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The South China Sea as a Challenge to International Law and to International Legal Scholarship

Lorenz Langer*

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INTRODUCTION

Times Square in New York City is an unusual venue to expound complex international legal issues. The countless illuminated billboards of this tourist spot usually advertise Broadway productions, sugary soft drinks, or the latest must-have smartphone. Between July 23 and August 3, 2016, however, a three-minute clip by Xinhua, the Chinese State news agency, was shown 120 times a day on one of the giant screens of 2 Times Square.[1] Picturesque images of

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[1] Niu Yue, *South China Sea Plays in Times Square*, CHINA DAILY (July 27, 2016),

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fishing boats and islets were captioned with commentary describing the Chinese discovery of the South China Sea Islands over two millennia ago, and their subsequent exclusive exploration and exploitation.[2] Rather abruptly, however, the subject changed. The video denounced the vain attempts "of the Arbitral Tribunal … to deny China's territorial sovereignty and maritime rights and interests".[3] China, it stated, "did not participate in the illegal South China Sea arbitration, nor accepts the Award so as to defend the solemnity of international law."[4] Chinese officials and foreign politicians, diplomats, and observers then elaborated upon these statements, stressing that China was the "only true owner" of the South China Sea Islands, and advocating for a grown-up approach to dialogue by pressing for negotiations between the States directly concerned.[5]

If passing tourists noticed the display at all, the historical résumé presumably left most of them perplexed—Chinese assurances to the contrary notwithstanding.[6] Nor is it likely that the vague allusions to an unspecified arbitral award were readily grasped by visitors hunting for discounted musical tickets. Still, Chinese spectators in particular might have understood the reference to the final award in the South China Sea Arbitration between the Philippines and China before a tribunal established at the Permanent Court of Arbitration in The Hague (the Award). Two weeks previously, on July 12, 2016, this tribunal adopted the Award, ruling unanimously that the conduct of China in the South China Sea was incompatible with several provisions of the United Nations Convention on the Law of the Sea (UNCLOS, or, the Convention).[7] The arbitration proceedings were initiated in 2013 by the Philippines under the compulsory dispute settlement procedure provided for by the Convention.[8] The Philippines had submitted, *inter alia*, that the seabed and the maritime features of the South China Sea were governed by UNCLOS and that, as a consequence, Chinese claims based on "historic rights" within the area encompassed by the

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http://usa.chinadaily.com.cn/china/2016-07/27/content_26246467.htm.

[2] China Review Studio, *A Short Video on Times Square*, YOUTUBE (July 27, 2016), https://www.youtube.com/watch?v=XI2s-2vjr7o. The video is also available, *inter alia*, at http://www.cantab.net/users/langer/SCS.mp4.

[3] *Id*.

[4] *Id*.

[5] *South China Sea Video Draws Huge Response in Times Square*, CHINA DAILY (July 27, 2016), http://www.chinadaily.com.cn/world/2016-07/27/content_26239494.htm; *cf*. Stuart Leavenworth, *China's Times Square Propaganda Video Accused of Skewing Views of British MP*, THE GUARDIAN (July 31, 2016), https://www.theguardian.com/world/2016/jul/31/chinas-times-square-propaganda-video-accused-of-skewing-views-of-british-mp (reporting that Catherine West, the MP in question, had not been informed about the use of her statements in the film, and that she was in fact concerned about Chinese policies in the South China Sea; also, she had been identified incorrectly as "Shadow Secretary of State for Foreign Affairs of the British Labour Party"(*supra* note 3).

[6] *See South China Sea Video Draws Huge Response in Times Square*, *supra* note 5 (claiming that the video "has appealed to a massive number of people who stop by and watch").

[7] South China Sea Arbitration Award (Phil. v. China), 2013-19 (Perm. Ct. Arb. 2016) [hereinafter South China Sea Arbitration (Award)].

[8] U.N. Convention on the Law of the Sea, Dec. 10, 1982, arts. 286–287, Annex VII art. 1, 1833 U.N.T.S. 396 [hereinafter UNCLOS].

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so-called "nine-dash line" were invalid.[9] In addition, the Philippines had argued that certain maritime features in the South China Sea were mere rocks or low-tide elevations and therefore not entitled to an exclusive economic zone (EEZ) or to territorial waters respectively.[10] The Philippines also claimed that its own EEZ had been violated, and that Chinese reclamation and construction activities on some reefs violated UNCLOS provisions on artificial islands and on the protection and preservation of the marine environment.[11] China, which had neither recognized the Tribunal's jurisdiction nor participated in the proceedings, rejected the ruling as "null and void."[12]

The South China Sea Arbitration has set out the maritime legal questions in the South China Sea in great detail—combined, the Awards on jurisdiction and the merits run to over 650 pages.[13] The technicalities of these questions have also been extensively analyzed by legal scholars, both prior to the final Award and in its wake.[14] In this paper, however, the arbitration proceedings provide merely a starting point; rather than focusing on jurisdictional intricacies, maritime zones, or low-tide elevations, I intend to use the South China Sea as a paradigm for the challenges that face not only international law as a normative order, but also international legal scholarship.

While the arbitral Award itself will not be analyzed in this article, Part II illustrates that the Award's aftermath provides insights into the respective attitudes of the States involved with regard to dispute settlement. The conflict in

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[9] South China Sea Arbitration (Award), *supra* note 7, ¶¶ 112(B)(2) and 192. On the nine-dash line, *see infra*, note 22 and accompanying text.

[10] South China Sea Arbitration (Award), *supra* note 7, at ¶¶ 112(B)(3,4,6-7), 291–297 and 408–445; *cf*. UNCLOS arts. 121(3) and 13(2).

[11] For the final submissions, see South China Sea Arbitration (Award), *supra* note 7, ¶ 112.

[12] Ministry of Foreign Affairs, People's Republic of China, *Statement on the Award of 12 July 2016 of the Arbitral Tribunal in the South China Sea Arbitration Established at the Request of the Republic of the Philippines* (July 12, 2016), http://www.fmprc.gov.cn/nanhai/eng/snhwtlcwj_1/t1379492.htm.

[13] S. China Sea Arbitration (Phil. v. China) – Award on Jurisdiction and Admissibility, 2013-19 (Perm. Ct. Arb. 2015) [hereinafter South China Sea Arbitration (Jurisdiction)]; South China Sea Arbitration (Award), *supra* note 7.

[14] On jurisdiction, see 1/2013 AM. J. INT'L. L. and 2/2016 CHIN. J. INT'L. L. (*infra* notes 223 & 224); Robert Beckman, *UNCLOS Part XV and the South China Sea*, *in* THE SOUTH CHINA SEA DISPUTES AND LAW OF THE SEA 229–64 (Shunmugam Jayakumar, Tommy Koh & Robert Beckman eds., 2014); THE SOUTH CHINA SEA ARBITRATION: A CHINESE PERSPECTIVE (Stefan Talmon & Bing Bing Jia eds., 2014); Diane A. Desierto, *The Jurisdictional Rubicon: Scrutinizing China's Position Paper on the South China Sea Arbitration – Part I*, BLOG EUR. J. INT'L L.(Jan. 29, 2015), https://www.ejiltalk.org/the-jurisdictional-rubicon-scrutinizing-chinas-position-paper-on-the-south-china-sea-arbitration/; *The Jurisdictional Rubicon: Scrutinizing China's Position Paper on the South China Sea Arbitration – Part II*, BLOG EUR. J. INT'L L. (Jan. 30, 2015), https://www.ejiltalk.org/the-jurisdictional-rubicon-scrutinizing-chinas-position-paper-on-the-south-china-sea-arbitration-part-ii/; John E. Noyes, *In re Arbitration Between the Philippines and China*, 110 AM. J. INT'L L. 102–08 (2016); Anthony Carty, *The South China Sea Disputes Are Not Yet Justiciable*, *in* ARBITRATION CONCERNING THE SOUTH CHINA SEA: PHILIPPINES VERSUS CHINA, 23–54 (Shicun Wu & Keyuan Zou eds., 2016). On the merits, see Lucy Reed & Kenneth Wong, *Marine Entitlements in the South China Sea: The Arbitration between the Philippines and China*, 110 AM. J. INT'L L. 152–58 (2016); French Duncan, *In the Matter of the South China Sea Arbitration*, 19 ENVTL L. REV. 48–56 (2017).

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the South China Sea also has considerable implications for the law of the sea, positing demands for traditional freedom of navigation against more recent efforts to establish sovereign rights over ever larger maritime areas, as demonstrated in Part III.A. More importantly, and beyond the law of the sea, Part III.B sets out how the conflict in the South China Sea threatens the safeguarding of peace as one of the main tasks of international law. In Part IV, I argue that these developments should serve as a cautionary contrast to the prevailing narrative of international law as a progressively successful normative order. According to that narrative, international law is overcoming its traditional limitations and the primacy of State sovereignty. I will analyze two such claims of progress in some detail: in Part IV.A, the gradual process of deterritorialization will be addressed, while Part IV.B considers the advancing constitutionalization of international law. While such concepts have their merits, the South China Sea exposes the (considerable) limitations that they are still subject to. Finally, the conflict over shoals, rocks, and reefs also serves as a reminder of the important, yet rarely impugned role(s) that individual scholars of international law play—not only as proponents of legal theories or participants in abstract scholarly discourse, but also as active advocates of parochial national interests. In Part V, we will see that such advocacy is not restricted to the *forum*, but extends well into supposedly impartial scholarly output.

I.
THE ARBITRATION AWARD AND ITS AFTERMATH

The South China Sea encompasses an area of circa 3.5 million square kilometers, or 648,000 square nautical miles; it abuts on the coasts of China, Taiwan, Vietnam, Malaysia, Brunei, the Philippines, and Indonesia.[15] These waters are of eminent strategic and economic importance. Some of the busiest international sea lanes pass through the Sea, carrying approximately 5 trillion USD worth of shipping trade each year—more than half the world's annual merchant fleet tonnage.[16] Its grounds account for 10 percent of the global annual fishing catch and are thought to contain considerable oil and natural gas reserves.[17]

Competition for control of these assets has already resulted in armed clashes between some of the coastal States, mostly over control of the islands, islets, reefs, atolls, and sandbanks that are scattered throughout the South China

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[15] *See* John R. V. Prescott & Clive H. Schofield, *The Maritime Political Boundaries of the World* 429 (2d ed. 2005). An illustrative map is provided by the South China Sea Arbitration (Jurisdiction), *supra* note 13, at 3, Figure 1.

[16] *"You May Have Incidents": Singapore's Defence Minister Warns Non-military Vessels in South China Sea Create "Uncertainty"*, S. CHINA MORNING POST, (Oct. 3, 2016) http://www.scmp.com/news/asia/diplomacy/article/2024548/you-may-have-incidents-singapores-defence-minister-warns-non; C. J. Jenner & Tran Truong Thuy, *Introduction*, *in The South China Sea*, 1, 1 (C. J. Jenner & Tran Truong Thuy eds., 2016).

[17] INT'L CRISIS GROUP, *Stirring up the South China Sea (I)* (Apr. 23, 2012).

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Sea, and over the Spratly and Paracel Islands in particular.[18] Under the regime provided for by UNCLOS, the coastal States have submitted extensive claims to these riches as territorial or archipelagic waters, EEZs, as well as continental shelves.[19] Claims to a continental shelf beyond 200 nautical miles have to be submitted to the Commission on the Limits of the Continental Shelf established under UNCLOS, which will then issue recommendations; the limits of the shelf that are subsequently established by the coastal State on the basis of the Commission's recommendations are final and binding.[20] In response to Vietnamese and Malaysian claims submitted to the Commission, the People's Republic of China (PRC, or, China) invoked the so-called nine-dash line for the first time on the international level.[21] This line was conceived in 1936 and thus predates Communist rule in China.[22] The area enclosed encompasses approximately 2 million square kilometers, or the equivalent of 22 percent of China's land area; it includes the Spratly and Paracel Islands as well as Scarborough Shoal.[23] Originally, the various rocks, islets, and shoals comprised circa 15 square kilometers of dry land.[24] Starting in 2012, however, the PRC embarked on a large-scale reclamation project, which has almost doubled the land area in the South China Sea.[25]

As mentioned above, the Philippines contested the legality of both the extensive claims under the nine-dash line and the land reclamation before the arbitral tribunal.[26] China officially refused to participate in the arbitral proceedings, but nevertheless went to great lengths to make sure its position and its arguments were known. First, China used academic surrogates to advance its legal arguments indirectly.[27] Second, it published an official position paper on

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[18] Armed skirmishes between the PRC and Vietnam took place in 1974 in the Paracel Islands; in 1988 a naval battle in the Spratly Islands was sparked by the Chinese construction of a maritime station on Fiery Cross Reef. Tensions between the PRC and the Philippines persist over Scarborough Shoal and on Second Thomas Shoal. BILL HAYTON, THE SOUTH CHINA SEA: THE STRUGGLE FOR POWER IN ASIA 73–78, 81–84, 103–104, 160 (2014).

[19] *Cf.* UNCLOS arts. 3, 47, 55–75, 76–85

[20] UNCLOS art. 76(8), Annex II. Claims have to be submitted within ten years of the entry into force of the Convention for the respective State. UNCLOS art. 4, Annex II.

[21] Permanent Mission of the People's Republic of China, Note Verbale, U.N. Doc. CML/17/2009 (May 7, 2009); Permanent Mission of the People's Republic of China, Note Verbale, U.N. Doc. CML/18/2009 (May 7, 2009).

[22] Hayton, *supra* note 18, at 55. The number of dashes varies between nine and eleven. U.S. Dep't of State, Bureau of Oceans and Int'l Envtl & Sci. Affairs, China: Maritime Claims in the South China Sea 3 (Dec. 5, 2014) [hereinafter Bureau of Oceans].

[23] Bureau of Oceans, *supra* note 22, at 4.

[24] *Id*., at 4 (observing that all islands excluding Taiwan and Pratas Island encompass circa thirteen square kilometres). The Pratas Island encompasses circa two square kilometres. *See* Robert C. Beckman & Clive. H. Schofield, Defining EEZ Claims from Islands: A Potential South China Sea Change, INT'L J. MARINE & COASTAL L. 224 (2014).

[25] South China Sea Arbitration (Award), *supra* note 7, ¶ 854. A striking visualization of the reclamation work is available at https://amti.csis.org/island-tracker/.

[26] South China Sea Arbitration (Award), *supra* note 7.

[27] *Infra* Part V.

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the arbitration panel's jurisdiction in December 2014.[28] Third, through its ambassador to the Netherlands, the PRC also sent letters to the individual members of the arbitral tribunal.[29] Despite these missives, China questioned the legitimacy of the arbitral tribunal: the involvement of the Japanese President of the International Tribunal of the Law of the Sea (ITLOS) in the establishment of the tribunal allegedly affected its impartiality.[30] China also censured the arbitral tribunal for its composition[31] and its alleged lack of independence, since the arbitrators "were taking money from the Philippines" and possibly "from others."[32]

The stark response to the Award itself has been alluded to above.[33] The Chinese Foreign Ministry further claimed that Philippine actions in the South China Sea "grossly violated China's territorial sovereignty, the Charter of the United Nations and fundamental principles of international law"; in the course of the arbitral proceedings, the Philippines had "distorted facts, misinterpreted laws and concocted a pack of lies," and its claims were "a preposterous and deliberate distortion of international law."[34]

Yet the Chinese reaction was not limited to statements by State organs. As illustrated by the quixotic video-clip in Times Square, efforts were also made to sway international public opinion, although with rather mixed results.[35] With its

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[28] Government of the People's Republic of China, *Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines* (Dec. 7, 2014), reprinted in 15 CHIN. J. INT'L L., 431–55 (2016).

[29] South China Sea Arbitration (Award), *supra* note 7, ¶¶ 42, 51, 96, 97, 100, 102–104.

[30] Bethany Allen-Ebrahimian, *Beijing: Japanese Judge Means South China Sea Tribunal Is Biased*, FOREIGN POL'Y (June 21, 2016), http://foreignpolicy.com/2016/06/21/beijing-japanese-judge-means-south-china-sea-tribunal-is-biased-china-philippines-maritime-claims/. Under articles 3(c), (d) and (e) Annex VII of UNCLOS, the President of ITLOS is responsible for appointing the remaining panel members if the parties cannot reach an agreement.

[31] Although Thomas A. Mensah, a Ghanaian national, was the tribunal's president, China alleged that he is a long-term EU resident and criticised that the four remaining arbitrators were all European. Kor Kian Beng, *China Insists on Right to Declare Air Defence Zone*, STRAIT TIMES (July 13, 2016), http://www.straitstimes.com/asia/china-insists-on-right-to-declare-air-defence-zone (quoting Vice-Foreign Minister Liu Zhenmin); Sienho Yee, *The South China Sea Arbitration Decisions on Jurisdiction and Rule of Law Concerns*, 15 CHIN. J. INT'L L. 219, 222–23 (2016). Originally, a Sri Lankan president had been selected: South China Sea Arbitration (Jurisdiction), *supra* note 13, ¶ 30.

[32] Beng, *supra* note 31. The Philippine claim was frequently presented as a U.S. plot. *See, e.g.*, *Chinese Foreign Minister Says South China Sea Arbitration a Political Farce*, XINHUANET (July 12, 2016) http://news.xinhuanet.com/english/2016-07/13/c_135508275.htm. It should be noted, however, that Chinese non-participation in the arbitral proceedings was not a foregone conclusion: reportedly, several government lawyers argued for accepting the legal challenge. Wim Mueller, *China's Missed Opportunity in South China Sea Arbitration*, CHATHAM HOUSE (Mar. 19, 2015), https://www.chathamhouse.org/expert/comment/china-s-missed-opportunity-south-china-sea-arbitration.

[33] Ministry of Foreign Affairs, People's Republic of China, *supra* note 12.

[34] Ministry of Foreign Affairs, People's Republic of China, *China Adheres to the Position of Settling Through Negotiation the Relevant Disputes Between China and the Philippines in the South China Sea*, ¶¶ 114, 119 (July 13, 2016), http://www.fmprc.gov.cn/nanhai/eng/snhwtlcwj_1/t1380615.htm.

[35] International support for China's position actually decreased between the arbitral rulings on jurisdiction (31 States publicly opposing the tribunal) and on the merits (six States publicly opposing

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eclectic choice of individual statements, the clip itself already illustrates China's difficulties in finding immediate and weighty international support for its position.[36]

In addition, the Award elicited a plethora of patriotic outbursts on the home front. On social media, calls for a trade boycott or even war against the Philippines abounded;[37] celebrities who did not post the image of a map with the nine-dash line on Weibo–the Chinese social media platform–were severely chastised.[38] Presumably, public anger was also aimed at international institutions that were mistakenly assumed to be involved in the ruling: for several months after the ruling, a disclaimer on the International Court of Justice (ICJ) homepage pointed out that the ICJ "had no involvement" in the arbitration proceedings and was a "totally distinct institution" from the Permanent Court of Arbitration.[39]

Clearly, China is unwilling to accept compulsory dispute settlement, at least on matters that are perceived to touch on its (extensively construed) sovereignty.[40] Yet its absence before the arbitral tribunal does not necessarily

its ruling). *Who Is Taking Sides After the South China Sea Ruling?*, ASIA MARITIME TRANSPARENCY INITIATIVE (Aug. 15, 2016), https://amti.csis.org/sides-in-south-china-sea/.

[36] *Cf.* China Review Studio, *supra* note 3. Apart from Ms. West, the video featured a Chinese official, the Pakistani Ambassador to China, and a former London Economic and Business Policy Director (whose current position as a commentator for a Chinese government portal and Senior Fellow at Renmin University is not disclosed). *Cf.* John Ross, *Columnists*, CHINA.ORG (Mar. 20, 2018),

http://china.org.cn/opinion/johnross.htm. *See also South China Sea Tribunal Ruling "Politicized": Syrian Analysts*, XINHUANET (July 13, 2016), http://news.xinhuanet.com/english/2016-07/13/c_135508479.htm; *No Reason for China to Accept South China Sea Arbitration Award: Bangladeshi Experts*, XINHUANET (July 13, 2016), http://news.xinhuanet.com/english/2016-07/13/c_135508299.htm. On the role of domestic or mandated academics, *see* Part V, *infra*.

[37] Zheping Huang & Echo Huang, *China's Citizens Are Livid at the South China Sea Ruling Because They've Always Been Taught It Is Theirs*, QUARTZ (July 13, 2016), https://qz.com/730669/chinas-citizens-are-livid-at-the-south-china-sea-ruling-because-theyve-always-been-taught-it-is-theirs/.

[38] The map was accompanied by the slogan "China cannot lose even one bit of itself." Gene Lin, *Hong Kong Celebrities Defend China's Claims in South China Sea After Int'l Court Ruling*, HONG KONG FREE PRESS (July 14, 2016), https://www.hongkongfp.com/2016/07/14/hong-kong-celebrities-defend-chinas-claims-in-south-china-sea-after-intl-court-ruling/. For (semi-)official praise for "patriotic stars," see Wu Xinyuan (吳心遠), *Mingxing da Vmen zai "Nanhai Yulun Zhan" Zhong de Biaoxian* (明星大V們在"南海輿論戰"中的表現), RENMIN WANG (人民网) (July 15, 2016), http://yuqing.people.com.cn/BIG5/n1/2016/0715/c209043-28558600.html. For the repercussions for performers who have a Mainland following and who failed to post the map, see *Taiwan Yiren "Bu Zhichi" Nanhai, Zaoshou Fensi Kuang Hong Luan Zha!* (台灣藝人「不支持」南海，遭受粉絲狂轟亂炸!), MEI RI TOUTIAO (每日頭條) (July 13, 2016), https://kknews.cc/entertainment/pxeon2.html (discussing a Taiwanese celebrity posting her own photo instead of the 9-dash map and receiving over 100,000 complaints on her Weibo account). Weibo is the Chinese equivalent of Twitter.

[39] The disclaimer was first printed in Chinese, which is not an official language of the Court. INTERNATIONAL COURT OF JUSTICE, http://www.icj-cij.org/homepage/index.php (last visited July 20, 2016). A screenshot is available at http://www.cantab.net/users/langer/ICJ.jpg.

[40] Trade issues, on the other hand, are not considered "that sensitive." *International Law Programme Roundtable Meeting Summary: Exploring Public International Law and the Rights of*

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amount to a repudiation of the UNCLOS regime, and the option of denouncing the Convention seems to have been dismissed.[41] After the ruling, there were also some signs of *détente* between the parties, and in the region more generally.[42] It remains to be seen whether these overtures herald a less confrontational approach, or whether they are primarily tactical in nature and merely serve to gloss over what has been called China's "salami slicing" approach: the accumulation of small actions, such as island fortification, that do not provide a *casus belli* but over time add up to a major strategic shift.[43] References to the nine-dash line may have become less frequent.[44] Yet China has not made any material concessions; it still seeks to deal with other States in the South China Sea bilaterally, pushing for joint developments that would entail, at least, implicit recognition of its extensive claims.[45] On balance, it seems rather unlikely that China's attitude will change substantially.

Individuals with Chinese Scholars – Part 3, Mar. 5-6, 2016, CHATHAM HOUSE, at 5 (comment by a Chinese roundtable participant), https://www.chathamhouse.org/sites/files/chathamhouse/events/2016-03-05-exploring-public-international-law-rights-individuals-part-3-meeting-summary.pdf. On Chinese participation in the WTO, see Simon Chesterman, *Asia's Ambivalence about International Law and Institutions: Past, Present and Futures*, 27 EUR. J. INT'L L. 945, 959–60 (2016).

[41] This option was aired through semi-official channels after the Philippines had initiated proceedings. *See* Ellen Tordesillas, *Will China Withdraw From UNCLOS if UN Court Decides in Favor of PH?*, YAHOO! PHILIPPINES (Dec. 10, 2013), https://ph.news.yahoo.com/blogs/the-inbox/china-withdraw-unclos-un-court-decides-favor-ph-153936547.html. It was also discussed in the run-up to the Award. *See* Tara Davenport, *Why China Shouldn't Denounce UNCLOS*, DIPLOMAT (Mar. 24, 2016), http://thediplomat.com/2016/03/why-china-shouldnt-denounce-unclos/ (rejecting denunciation); Stefan Talmon, *Denouncing UNCLOS Remains Option for China After Tribunal Ruling*, GLOBAL TIMES (July 6, 2016), http://www.globaltimes.cn/content/971707.shtml (arguing that denunciation should depend on a "legal and political cost-benefit analysis"). An official statement after the Award does not elaborate the point, but emphasizes that China has so far faithfully implemented and upheld UNCLOS. Ministry of Foreign Affairs, People's Republic of China, *Foreign Ministry Spokesperson Lu Kang's Regular Press Conference on July 12, 2016*, (July 12, 2016), http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2511_665403/t1380374.shtml.

[42] Benjamin Kang Lim & Ben Blanchard, *China May Give Filipino Fishermen Access to Scarborough*, REUTERS (Oct. 18, 2016), http://www.reuters.com/article/us-china-philippines-exclusive/exclusive-china-may-give-filipino-fishermen-access-to-scarborough-sources-idUSKCN12I19I; Raul Dancel, *Deal on Framework of South China Sea Code*, THE STRAIT TIMES (Aug. 7, 2017), http://www.straitstimes.com/asia/se-asia/deal-on-framework-of-s-china-sea-code. Overall, this strategy has worked well so far. *See A Chinese Lake*, ECONOMIST, June 23, 2018, at 48.

[43] Robert Haddick, *Salami Slicing in the South China Sea*, FOREIGN POL'Y (Aug. 3, 2012), http://foreignpolicy.com/2012/08/03/salami-slicing-in-the-south-china-sea/. *See* SCOTT SNYDER, THE SOUTH CHINA SEA DISPUTE: PROSPECTS FOR PREVENTIVE DIPLOMACY 8 (U.S. Institute for Peace ed. Special Report No. 18, 1996) (referring to such actions as "salami tactics").

[44] Chesterman, *supra* note 40, at 973.

[45] *Cf*. Ministry of Foreign Affairs, People's Republic of China, *"Set Aside Dispute and Pursue Joint Development"*, http://www.fmprc.gov.cn/mfa_eng/ziliao_665539/3602_665543/3604_665547/t18023.shtml (last visited Sept. 22, 2017). The application to the South China Sea of the principle of "setting aside disputes," which dates back to Deng Xiaoping, is also advocated by Chinese scholars. *See, e.g.*, Zhang Xinjun, *"Setting Aside Disputes and Pursuing Joint Development" at Crossroads in South China Sea*, *in* TERRITORIAL DISPUTES IN THE SOUTH CHINA SEA: NAVIGATING ROUGH WATERS 39–

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Compared to the reaction of the PRC, the Philippines' response to its success before the arbitral tribunal has been much more measured. Shortly before the tribunal issued its Award, the term of the Philippine president who had initiated the proceedings, Benigno Aquino, ended. He was succeeded by Rodrigo Duterte. While campaigning, Duterte had promised to ride a Jet Ski to plant the Philippine flag on islands that it claims, and that he would willingly sacrifice his own life doing so.[46] After assuming office on June 30, 2016, the new president promised to accept the tribunal's verdict regardless of the outcome, but expressed optimism for a ruling favorable to the Philippines.[47] The immediate Philippine reaction to the Award was very cautious, with the foreign secretary appealing for "restraint and sobriety."[48] The new president at first stressed the relevance of the arbitral Award for the peaceful resolution of the disputes in the "West Philippine Sea, otherwise known as (the South) China Sea."[49] He also threatened retaliation for any territorial infringement and promised to work with other East Asian leaders towards the implementation of the arbitral Award.[50]

At the East Asia Summit in Laos in September 2016, however, the president eventually chose not to call publicly on China to respect the ruling, although a corresponding statement had already been prepared.[51] The omission was apparently prompted by irritation over U.S. criticism of human rights violations in the Philippines,[52] and it was followed by an abrupt policy change. Declaring that China now had military superiority in the region, the president of the Philippines announced a "separation" from its long-time ally and called for an end of U.S. military assistance.[53] He expressed doubts as to whether the United States would be willing to provide effective support should an armed

53 (Jing Huang & Andrew Billo eds., 2015). For a critical outlook, see Prashanth Parameswaran, *Beware the Illusion of China-ASEAN South China Sea Breakthroughs*, DIPLOMAT (Aug. 17, 2016), https://thediplomat.com/2016/08/beware-the-illusion-of-china-asean-south-china-sea-breakthroughs/.

[46] *Talk Duterte to Me*, ECONOMIST, July 9, 2016, at 43.

[47] Frances Mangosing, *Duterte Optimistic of Favorable Sea Ruling*, PHILIPPINES DAILY INQUIRER, July 5, 2016.

[48] Melba Maggay, *Taking on the Dragon*, PHILIPPINES DAILY INQUIRER (July 26, 2016), http://opinion.inquirer.net/95950/taking-on-the-dragon.

[49] *Philippines' Duterte Insists on Using Arbitral Ruling vs. China*, JAPAN ECON. NEWSWIRE, July 25, 2016.

[50] Bullit Marquez, *Duterte Toughens anti-China Rhetoric - There Will Be Blood if Philippine Territory Breached*, MACAU DAILY TIMES (Aug. 26, 2016), https://macaudailytimes.com.mo/duterte-toughens-anti-china-rhetoric-will-blood-philippine-territory-breached.html.

[51] Minoru Satake, *ASEAN Takes a Diffident Stance on the South China Sea*, NIKKEI ASIA REVIEW (Sept. 15, 2016), https://asia.nikkei.com/Politics/ASEAN-takes-a-diffident-stance-on-the-South-China-Sea.

[52] *Id*.

[53] Mark Landler, *Philippines 'Separation' From U.S. Jilts Clinton, Too*, N.Y. TIMES, Oct. 22, 2016, at 3.

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conflict break out over the contested islands;[54] in October, joint military maneuvers and patrols in the South China Sea were put on hold.[55]

While the change in government has made Philippine politics more unpredictable, it is far from certain that its traditional alliance with the United States or its erstwhile stance on the dispute in the South China Sea will change significantly.[56] First, cooperation between U.S. and Philippine armed forces is deeply entrenched; most senior officers of the Armed Forces of the Philippines have completed part of their training in the United States.[57] Also, the temporary realignment with China seems to have been triggered primarily by personal animosity between the newly elected president and his then-American counterpart. More importantly, no Philippine leader could risk making any concessions on sovereignty issues in the South China Sea. Accordingly, the president's statements on the dispute have become more bellicose again, and military cooperation with U.S. naval forces has continued.[58]

The United States has largely refrained from commenting on the recent shifting of Philippine policies, although it threatens an important element of the so-called "pivot" to Asia.[59] With regard to the arbitral Award, the United States did not—in line with its official practice —take a position on individual claims or the merits of the case, although the United States emphasized that the ruling invalidated China's nine-dash line claim, ruled out an EEZ for most of the contested maritime features, and found Chinese fishing and reclamation to be violations of Philippine rights.[60] More generally, the United States reiterated its strong support for the rule of law and for "efforts to resolve territorial and

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[54] Jane Perlez, *Philippines May 'Pivot' Away From the U.S. on China Visit This Week*, N.Y. TIMES, Oct. 18, 2016, at A4. The Mutual Defense Treaty Between the United States and the Republic of the Philippines, U.S.-Phil., Aug. 30, 1951, 177 U.N.T.S. 133, provides for mutual support in case of an armed attack on islands, yet it is unclear whether that provision also applies to contested territory. Catherine Wong, *Duterte's Tilt Towards China Set to 'Test US Pivot to Asia'*, S. CHINA MORNING POST, Oct. 22, 2016.

[55] Felipe Villamor, *Philippine President Raises Doubts About U.S. Military Ties*, N.Y. TIMES, Sept. 30, 2016, at 5. Under Duterte's predecessor, cooperation had just been deepened. *See* Agreement between the Government of the Republic of the Philippines and the Government of the United States of America on Enhanced Defense Cooperation, U.S.-Phil., Apr. 28, 2014, T.I.A.S. No. 14-0625.

[56] *Pivot or Pirouette?*, ECONOMIST, Feb. 25, 2017, at 46.

[57] Richard C. Paddock, *Rodrigo Duterte, Pushing Split With U.S., Counters Philippines' Deep Ties*, N.Y. TIMES (Oct. 26, 2016), https://www.nytimes.com/2016/10/27/world/asia/philippines-duterte-united-states-alliance.html. *See also* ALFRED W. MCCOY, CLOSER THAN BROTHERS: MANHOOD AT THE PHILIPPINE MILITARY ACADEMY 20 (1999).

[58] *Duterte Orders Military to Occupy South China Sea Areas*, PHILIPPINE STAR, Apr. 6, 2017; *US Guided-missile Destroyer now in Subic*, PHILIPPINE STAR, Apr. 2, 2017. President Duterte also invoked the arbitral award in bilateral meetings with the Chinese president. *Xi Threatened to Start War Over S China Sea: Duterte*, TAIPEI TIMES, May 21, 2017, at 1.

[59] *See* THOMAS LUM & BEN DOLVEN, CONG. RESEARCH SERV., R43498, THE REPUBLIC OF THE PHILIPPINES AND U.S. INTERESTS (May 2014). On the U.S. pivot to Asia, see MARK E. MANYIN ET AL., CONG. RESEARCH SERV., R42448, PIVOT TO THE PACIFIC? THE OBAMA ADMINISTRATION'S "REBALANCING" TOWARD ASIA, (March 2012).

[60] Dep't of State, Office of the Spokesperson, Background Briefing on South China Sea Arbitration, (July 12, 2016), https://2009-2017.state.gov/r/pa/prs/ps/2016/07/259976.htm.

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maritime disputes in the South China Sea peacefully, including through arbitration."[61] It stressed that the parties to UNCLOS had also agreed to the Convention's compulsory dispute settlement process to resolve disputes, and pointed out that the tribunal had unanimously found that the Philippines was acting within its rights under the Convention in initiating arbitration proceedings.[62] The tribunal's decision was "final and legally binding on both China and the Philippines," and the United States expressed "its hope and expectation that both parties will comply with their obligations," encouraging the claimants "to clarify their maritime claims in accordance with international law—as reflected in the Law of the Sea Convention."[63]

This response was a continuation of the U.S. government's general approach prior to the arbitral Award, which focused on the international rule of law.[64] It also emphasizes the global dimension of the dispute in the South China Sea.[65] In 2010 already, Secretary of State Clinton underlined that the United States had—"like every nation"—a "national interest in freedom of navigation, open access to Asia's maritime commons, and respect for international law in the South China Sea."[66] In international fora, President Obama subsequently reiterated on numerous occasions the importance of maintaining "a rules-based order in the maritime domain based on the principles of international law, in particular as reflected in the United Nations Convention on the Law of the Sea."[67] Before the UN General Assembly, he stressed the United States' "interest in upholding the basic principles of freedom of navigation and the free flow of commerce and in resolving disputes through international law, not the law of force." [68] In meetings with regional leaders prior to and after the arbitral Award, President Obama emphasized the "imperative of upholding the internationally-recognized freedoms of navigation and overflight";[69] at the same

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[61] U.S. Dep't of State, Bureau of Public Affairs, Decision in the Philippines-China Arbitration: Press Statement,(July 12, 2016), https://2009-2017.state.gov/r/pa/prs/ps/2016/07/259587.htm.

[62] *Id*.

[63] *Id*.

[64] *Cf., e.g*., Bureau of Oceans, *supra* note 22, at 8 (defining the international law of the sea as the applicable legal framework and as its basis of analysis).

[65] Geoffrey Till, *The Global Significance of the South China Sea Disputes*, *in* THE SOUTH CHINA SEA 13, 13-14 (C. J. Jenner & Tran Truong Thuy eds. 2016).

[66] Secretary of State, Remarks at Press Availability, Vietnam (July 23, 2010).

[67] Joint Statement: Group of Seven Leaders' Declaration, DAILY COMPILATION OF PRESIDENTIAL DOCUMENTS (DCPD) DCPD-201500422 (June 8, 2015); *see also* The President's News Conference in Kuala Lumpur, Malaysia, DCPD-201500836 (Nov. 22, 2015); Joint Statement of the United States-Association of Southeast Asian Nations Special Leaders Summit (Sunnylands Declaration), DCPD-201600082 (Feb. 12, 2016); Remarks Prior to a Meeting With Association of Southeast Asian Nations Leaders in Vientiane, Laos, DCPD-201600557 (Sept. 8, 2016); The President's News Conference in Vientiane, Laos, DCPD-201600570 (Sept. 8, 2016).

[68] Remarks to the United Nations General Assembly in New York City, DCPD-201500657 (Sept. 28, 2015); Remarks to the United Nations General Assembly in New York City, DCPD-201600612 (Sept. 20, 2016).

[69] United States-Vietnam Joint Vision Statement, DCPD-201500482 (July 7, 2015); *see also* Joint Statement by President Obama and President Joko "Jokowi" Widodo of Indonesia, DCPD-

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time, he asserted that U.S. interests were limited to protecting these principles, and to making sure that "the rules of the road" were upheld.[70]

Had she been elected, Hillary Clinton—a vocal advocate of the "pivot" to Asia—would presumably have continued this policy, albeit perhaps more aggressively.[71] However, the arbitral Award on the South China Sea (as well as the emphasis on international law) clearly enjoyed bipartisan support.[72] And while Donald Trump's position on the South China Sea remained vague during his campaign, he chided China for "totally disregarding" the United States by building "a military fortress the likes of which perhaps the world has not seen."[73] He also refused to rule out an armed response.[74] His campaign platform advocated "bolstering the U.S. military presence in the East and South China Seas to discourage Chinese adventurism."[75] But his campaign team also maintained the emphasis on freedom of navigation and overflight as "a key principle of the international rules-based order."[76]

After the election, there have been indications that the fundamentals of U.S. policy towards the South China Sea have not changed, and in fact may even have become more assertive. In his confirmation hearings, the new Secretary of State, Rex Tillerson, held that China's island-building in the South China Sea was "an illegal taking of disputed areas without regard for international

201500756 (October 26, 2015), Remarks Following a Tour of the Philippine Navy Frigate BRP Gregorio del Pilar in Manila, Philippines, DCPD-201500816 (Nov. 17, 2015), Remarks Following a Meeting With Communist Party General Secretary Nguyen Phi Trong of Vietnam (July 7, 2015), Joint Statement by President Obama and President Trna Dai Quang of Vietnam, DCPD-201600345 (May 23, 2016), Remarks in Vientiane, Laos, DCPD-201600563 (Sept. 6, 2016).

[70] The President's News Conference With President Xi Jinping of China, DCPD-201500646 (Sept. 25, 2015).

[71] In her platform, she promised to "press China to play by the rules" with regard to, *inter alia*, territorial disputes in Asia, "and hold [China] accountable if it does not": *Hillary for President: National Security* (2016), https://www.hillaryclinton.com/issues/national-security/. *See also Why China May Favor Donald Trump Over Hillary Clinton*, NEWSWEEK (July 7, 2016), http://www.newsweek.com/china-donald-trump-hillary-clinton-south-china-sea-beijing-xi-jinping-479536.

[72] *Cf*. Statement by Senators McCain and Sullivan on South China Sea Arbitration Award (July 12, 2016), https://www.mccain.senate.gov/public/index.cfm/2016/7/statement-by-senators-mccain-and-sullivan-on-south-china-sea-arbitration-award ("With today's award, China faces a choice. China can choose to be guided by international law, institutions, and norms. Or it can choose to reject them and pursue the path of intimidation and coercion.") *See also* South China Sea and East China Sea Sanctions Act, S. 695, 115th Cong. (2017).

[73] Maggie Haberman & David A. Sanger, *Transcript: Donald Trump Expounds on His Foreign Policy Views*, N.Y. TIMES (Mar. 27, 2016), https://www.nytimes.com/2016/03/27/us/politics/donald-trump-transcript.html?_r=2.

[74]*Id*. ("Would I go to war? Look, let me just tell you. There's a question I wouldn't want to answer. […] I don't want to say what I'd do because, again, we need unpredictability. […] I wouldn't want them to know what my real thinking is.").

[75] Trump Campaign, *US-China Trade Reform*, 2 (2016), https://assets.donaldjtrump.com/U.S.-China_Trade_Reform.pdf.

[76] David Brunnstrom & Jeff Mason, *U.S. Urges All Countries to Adhere to South China Sea Ruling*, REUTERS (July 12, 2016), https://www.reuters.com/article/us-southchinasea-ruling-usa-idUSKCN0ZS1HZ.

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norms,"[77] and he went as far as to suggest that Chinese access to the artificial islands should be prevented.[78] President Trump has also underscored "the importance of maintaining a maritime order based on international law, including freedom of navigation and overflight and other lawful uses of the sea," indirectly calling on China to "act in accordance with international law" in the South China Sea.[79]

II.
THE SOUTH CHINA SEA AND THE INTERNATIONAL LEGAL ORDER

A. Historical and Political Contingencies of the Law of the Sea

Both China and the United States insist on safeguarding the "fundamental principles of international law" in the South China Sea.[80] Yet they come to diametrically opposed conclusions as to what these principles are. While they both invoke the law of the sea, their claims illustrate that maritime law has served very different purposes in different contexts.

The United States' constant insistence on free navigation harkens back to the principle of the freedom of the open sea, or *mare liberum*, according to which no nation could appropriate the oceans or prevent other States' ships from crossing them.[81] That principle, however, did not always apply; it originated from specific historical circumstances.

The concept of *mare liberum* dates back to the eponymous pamphlet that Hugo Grotius published (anonymously) in 1609.[82] His polemic was aimed against Portugal and Spain: when extending their rule to Africa, Asia, and America, they had claimed ownership not only of the newly discovered lands, but also of the sea that they had crossed—a claim that was corroborated repeatedly by the Papacy.[83] Writing at the behest of the Dutch East India Company, Grotius' primary aim was to "demonstrate briefly and clearly that the

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[77] *Secretary of State Designate Senate Confirmation Hearing Before the S. Comm. on Foreign Rel.*, 115th Cong. (2017) (opening statement of nominee Rex Wayne Tillerson).

[78] *Secretary of State Confirmation Hearing Before the S. Comm. on Foreign Rel.*, 115th Cong. (2017) (statement of nominee Rex Wayne Tillerson), https://www.c-span.org/video/?421335-4/secretary-state-confirmation-hearing-part-3.

[79] Joint Statement by President Trump and Prime Minister Shinzo Abe of Japan, DCPD-201700112 (Feb. 10, 2017). *See also* Dep't of State, Office of the Spokesperson, *Secretary Pompeo's Meeting With Chinese Officials Including President Xi Jinping, Politburo Member Yang Jiechi, State Councilor and Foreign Minister Wang Yi* (June 14, 2018), https://www.state.gov/r/pa/prs/ps/2018/06/283236.htm.

[80] Government of the People's Republic of China, *supra* note 28; for the U.S. position see the statements and declarations *supra* note 69.

[81] ROBERT Y. JENNINGS & ARTHUR WATTS, OPPENHEIM'S INTERNATIONAL LAW VOLUME I: PEACE §§ 278–279 (9th ed. 1996).

[82] HUGO GROTIUS, MARE LIBERUM (Robert Feenstra ed., Brill 2009) (1609).

[83] WILHELM GREWE, THE EPOCHS OF INTERNATIONAL LAW 257–58 (Michael Byers ed., trans., 2000).

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Dutch . . . have the right to sail to the Indians as they are now doing and to engage in trade with them."[84] But relying on natural law considerations, he also made the more general claim that "occupation of the sea is impermissible both in the natural order and for reasons of public utility";[85] hence, "*no part* of the sea may be regarded as pertaining to the domain of any given nation,"[86] nor could historic claims based on prior exploration (*ante alios navigare*) preclude other seafarers:[87] by perpetual law, the sea was dedicated to common use.[88] Foreshadowing today's conflicts, Grotius also recalled that "in ancient times. . . it was held to be the greatest of all crimes" to oppose those "who were willing to submit to arbitration the settlement of their difficulties."[89]

But as indicated by its sponsors, although Grotius' pamphlet may have purported to further the "common benefit of mankind,"[90] it also served the very concrete trading interests of the *Staten-Generaal*, the States General of the Netherlands, as an emerging economic power.[91] The freedom of the seas as advocated by Grotius was an essential precondition for the subsequent economic and political dominance of Western States and their colonial and imperialistic expansion.[92]

Just as international legal norms in general do, the law of the sea reflects and underpins the power structure of the respective era. Western insistence on the freedom of the seas thus also aims to preserve an order that has served European powers and the United States particularly well. Numerous non-Western nations, on the other hand, experienced the vaunted *mare liberum* primarily as a means for the West to capitalize on its maritime superiority, both militarily and economically. Gunboat diplomacy or the display of naval superiority became an important means of coercion.[93]

Chinese preoccupation about controlling access to the South China Sea should be considered in this light as well: starting with the first Opium War,

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[84] GROTIUS, *supra* note 82, ch. i, p. 1 (the page numbers refer to the facsimile).

[85] *Id*. at ch. v, p. 28.

[86] *Id*. at ch. v, p. 26 (emphasis added).

[87] *Id*. at ch. v, p. 31.

[88] *Id*. at ch. vii p. 43 ("*Est autem lex illa perpetua ut Mare omnibus usu commune sit*" (But that law is perpetual that the use of the sea should be common to all)).

[89] *Id*. at Fol. 6 *recto*.

[90] *Id*. at ch. xiii, p. 66.

[91] *Cf*. Peter Borschberg, *Hugo Grotius' Theory of Trans-Oceanic Trade Regulation: Revisiting Mare Liberum (1609)*, 29 ITINERARIO 31, 36 (2005).

[92] *See* Martine Julia Van Ittersum, *Hugo Grotius in Context: Van Heemskerck's Capture of the Santa Catarina and its Justification in De Jure Praedae (1604-1606)*, 31 ASIAN J. SOC. SCI. 511, 535 (2003) and more generally EDWARD KEENE, BEYOND THE ANARCHICAL SOCIETY: GROTIUS, COLONIALISM AND ORDER IN WORLD POLITICS 60 (2002).

[93] The "black ships" of Commodore Perry provide perhaps the starkest example of the pivotal role that naval superiority played in furthering Western interests in the Far East, *cf*. MATTHEW CALBRAITH PERRY, NARRATIVE OF THE EXPEDITION OF AN AMERICAN SQUADRON TO THE CHINA SEAS AND JAPAN (Francis L. Hawks ed., 1856).

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naval superiority was instrumental in imposing a series of unequal treaties.[94] The cession of Hong Kong, for instance, provided the British with an additional trading post and a base for their fleet.[95] As a latecomer to the modern international legal order, China has first-hand experience of its vagaries, such as the imposition of consular jurisdiction in the nineteenth, or the fiction of the Republic of China's seat on the UN Security Council in the twentieth century. If life punishes latecomers, international law does so with a vengeance, and the freedom of the seas is an example of a universalized concept that was put forward by, and has long served the exclusive interests of, Western powers. This background might also contribute to Chinese distrust of arbitral proceedings and their alleged restriction of sovereignty.[96]

Yet as a mirror to the relative power of States, the law of the seas is also susceptible to changes in the fabric of the international community. In the days of British naval superiority, the territorial waters were defined as narrowly as possible, for the benefit of British control of the oceans.[97] The established sea powers successfully resisted any extension to their detriment at the Hague Conference (1930) and the Second United Nations Convention on the Law of the Sea in Geneva (1960).[98] But the extended discussion in The Hague and Geneva already heralded change. Several States—particularly newly independent ones—extended their territorial waters to twelve nautical miles.[99] Yet even for the established sea powers, the freedom of the seas was not a matter of principle, but of convenience. If it suited their interests, they did not hesitate to raise claims to exclusiveness, as evidenced by the Truman Proclamation of 1945.[100] The continental shelf that the Proclamation established was "tailored to the need of the United States," allowing for the exclusive exploitation of hydrocarbon resources in the Gulf of Mexico while preserving U.S. fisheries' interests off the shores of other States.[101] Numerous States

[94] For an overview, *see* IMMANUEL CHUNG-YUEH HSÜ, THE RISE OF MODERN CHINA 168–220 (6th ed. 2000).

[95] STEVE TSANG, A MODERN HISTORY OF HONG KONG 20–21 (2004).

[96] Beng, *supra* note 31; Yee *supra* note 31; *Chinese Foreign Minister Says South China Sea Arbitration a Political Farce*, *supra* note 32.

[97] *See* Andree Kirchner, *Law of the Sea, History of*, MAX PLANCK ENCYCLOPAEDIA OF PUBLIC INTERNATIONAL LAW [hereinafter MPEPIL] ¶¶ 16–19 (2007), www.mpepil.com.

[98] YOSHIFUMI TANAKA, THE INTERNATIONAL LAW OF THE SEA 21 (2d ed. 2015); D.W. Bowett, *The Second United Nations Conference on the Law of the Sea* 9 INT'L & COMP. L.Q. 415, 416 (1960). On the conferences, see also Shabtai Rosenne & Julia Gebhard, *Conferences on the Law of the Sea*, MPEPIL ¶¶ 9, 19–21 (2008).

[99] Sarah Wolf, *Territorial Sea*, MPEPIL, ¶ 6 (2011).

[100] Harry S. Truman, Policy of the United States With Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf, Proclamation 2667, Sept. 28 1945, 10 Federal Register 12303, 59 U.S. Stat. 884. For the expeditious codification of the new zone, see UN Convention on the Continental Shelf, Apr. 29, 1958, 499 U.N.T.S. 311.

[101] Tullio Treves, *Historical Development of the Law of the Sea*, *in* THE OXFORD HANDBOOK OF THE LAW OF THE SEA 1, 11 (Donald R. Rothwell et al. eds., 2015); TANAKA, *supra* note 98, at 137.

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emulated the United States and claimed exclusive rights to the "natural prolongation of [their] land territory into and under the sea."[102]

Subsequently, the selective approach reflecting the needs of the major seafaring nations came under increasing pressure, as evidenced by the prolonged discussions between developing and industrialized States, and the Third UN Conference on the Law of the Sea (1974-1982). The developing countries aimed to establish extensive exclusive economic zones to safeguard against technically advanced competition; the industrialized States insisted on freedom of navigation and free exploitation of the resources of the high seas and the deep seabed.[103] With the introduction in UNCLOS of an EEZ, the extension of the territorial sea to twelve nautical miles, and the designation of the deep sea as the "common heritage of mankind,"[104] the developing countries appeared to have carried the day on most contentious issues. As a result, the United States called for a vote on the Convention at the final session and voted against it. Several industrialized nations abstained.[105] Only after the revision of UNCLOS by a 1994 agreement did the Convention eventually enter into force.[106]

The United States was mainly concerned about the regime of seabed mining[107] (most other parts of the Convention were considered customary international law by the United States).[108] These concerns were instrumental in drafting the 1994 Agreement. Yet the United States still has not ratified the Convention. Consecutive U.S. administrations have subsequently pressed for ratification, and the detrimental effects of U.S. non-participation have been widely acknowledged,[109] specifically in the context of the South China Sea.[110] Yet Senate consent has remained elusive. Opposition has been primarily based

[102] North Sea Continental Shelf Cases (F.R.G. v. Neth.), 1969 I.C.J. Rep. 22 (Feb. 20). *See* TANAKA, *supra* note 98, at 137.

[103] For an overview, see Rosenne & Gebhard, *supra* note 98, ¶¶ 22–37.

[104] UNCLOS arts. 55, 3, 136.

[105] Third United Nations Conference on the Law of the Sea, 11th Sess.,182nd plen. mtg. ¶ 28, U.N. Doc. A/CONF.62/SR.182 (April 30, 1982).

[106] UNCLOS entered into force on Nov. 16, 1994. 1833 U.N.T.S. 396; *cf*. Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, G.A. Res. 48/236, Annex, U.N. Doc. A/Res/48/236/Annex (July 28, 1994). On the process, see Stefan Talmon, *Seerecht*, *in* LEXIKON DER VEREINTEN NATIONEN 455, 459–60 (Helmut Volger ed., 2000).

[107] *See* Doug Bandow, *UNCLOS III: A Flawed Treaty*, 19 SAN DIEGO L. REV. 475, 477 (1982).

[108] Third United Nations Conference on the Law of the Sea, 11th Sess.,192nd plen. mtg. ¶¶ 3, 8, U.N. Doc. A/CONF.62/SR.192 (Dec. 9, 1982).

[109] Elliot Richardson, *Treasure Beneath the Sea*, N. Y. TIMES, July 30, 1994, at 19; Vern Clark & Thomas R. Pickering, *A Treaty That Lifts All Boats*, N. Y. TIMES, July 14, 2007, at A11; *see generally Military Implications of the United Nations Convention on the Law of the Sea: Hearing Before the S. Comm. on Armed Services*, 108th Cong. (2004).

[110] *Calling upon the United States Senate to give its advice and consent to the ratification of the United Nations Convention on the Law of the Sea (Draft)*, H.R. Res. 631, 114th Cong. (2016) (". . . the House of Representatives . . . recommends the ratification of UNCLOS remain a top priority for the administration, . . . having most recently been underscored by the strategic challenges the United States faces in the Asia-Pacific region and more specifically in the South China Sea.").

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on vague concerns over the loss of (extensively construed) sovereignty.[111] Objections have been voiced against multilateral fora, where U.S. influence is not untrammeled,[112] when the benefits of UNCLOS could also be achieved "through bilateral and regional agreements."[113] In addition, security concerns persist;[114] so do concerns over "creeping jurisdiction" of international courts[115] which would "not have the heritage and the clarity of understanding of the jurisdiction question" relating to international disputes, leading to the risks of compulsory adjudication or arbitration.[116]

This attitude contrasts sharply with constant U.S. insistence on the paramount importance of UNCLOS and peaceful dispute settlement for the conflicts in the South China Sea. As set out above, the United States emphasizes that adherence to the rules laid down in UNCLOS and respect for its dispute settlement procedures are pivotal for the maintenance of "peace, security, and stability" in the region.[117] Yet the United States raises reservations that are not very different from Chinese objections to compulsory jurisdiction.

B. Implications for the Maintenance of International Peace & Security

One of the purposes of UNCLOS was to establish "a legal order for the seas and oceans which will facilitate international communication, and will promote the peaceful uses of the seas and oceans."[118] The conflict in the South China Sea is now testing that legal order, and hence the maintenance of international peace and security as envisaged in Article 1, Section 1 of the United Nations Charter. Tensions in the South China Sea could easily escalate. Armed conflicts have repeatedly flared up in the region.[119] Over the past years, some coastal States have embarked on significant naval armament, most notably China.[120] The stark imbalance between the armed forces of the PRC and its neighbor makes a military confrontation, at least in the South China Sea, less

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[111] *Cf.* Baker Spring, *All Conservatives Should Oppose UNCLOS*, 12 TEX. REV. L. & POL. 453–58 (2008).

[112] *Military Implications, supra* note 109, at 59–60 (Statement of Jeane J. Kirkpatrick).

[113] *Id.* at 57 (Statement of Jeane J. Kirkpatrick).

[114] *Id.* at 67 (Sen. Inhofe).

[115] *Id.* at 52 (Sen. Ensign).

[116] *Id.* at 53 (Sen. Sessions). Specific concerns were also voiced over the possibility of China instigating arbitral proceedings against the United States. *Id.* at 49 (Sen. Inhofe).

[117] United States-Vietnam Joint Vision Statement, *supra* note 69; Joint Statement of the United States-Association of Southeast Asian Nations Special Leaders Summit, *supra* note 67.

[118] UNCLOS pmbl. at 4.

[119] HAYTON, *supra* note 18.

[120] While these efforts may still primarily be aimed at *modernising* national navies, they also carry "potential arms race implications". Bernard F. W. Loo, Naval Modernisation in South-east Asia: Modernisation versus Arms Race, NAVAL MODERNISATION IN SOUTH-EAST ASIA 283, 283 (G. Till & J. Chan eds., 2014). The build-up of air forces is even more conspicuous, *see* Ryosuke Hanafusa, *China's Dismissal of Maritime Ruling Could Accelerate Asia's Arms Race*, NIKKEI ASIAN REVIEW (July 28, 2016), http://asia.nikkei.com/magazine/20160728-GENERATION-CHANGE/Politics-Economy/China-s-dismissal-of-maritime-ruling-could-accelerate-Asia-s-arms-race.

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likely—although nationalist *furore* (stoked, for instance, by the stationing of a Chinese oil rig in contested waters)[121] could still lead to unforeseen outcomes. Even such quixotic enterprises as the Philippine outpost on the Second Thomas Shoal in the Spratly Islands may well result in sudden clashes.[122]

By far greater—and more consequential—is the risk of a conflict between the United States and China over the South China Sea. The United States has projected naval power worldwide, starting with the voyage of the "Great White Fleet" in 1907–1909.[123] Since the late 1970s the United States has been systematically conducting freedom of navigation operations in an effort to counter allegedly excessive claims by coastal States and to bolster its understanding of the freedom of the seas as set out in the previous Part.[124] In the South China Sea such operations have led to immediate tensions with China. For example, the United States considered the transit of the destroyer U.S.S. Larsen within 12 nautical miles of an artificial structure on Subi Reef in October 2015 a routine freedom of navigation exercise; China, instead, called it a serious provocation and a threat to China's sovereignty and security interests, and warned that such "dangerous, provocative acts" could eventually spark a war.[125] Several similar operations have since been conducted, each time with a corresponding reaction from China[126] and U.S. insistence that such missions merely asserted "the principle of freedom of navigation in international waters … on behalf of states all around the world, including China."[127] More recently, China seized a U.S. underwater drone near Subic Bay on the Philippines,[128] and a U.S. carrier group started patrolling the South China Sea.[129] After some

[121] *Hot Oil on Troubled Water*, ECONOMIST, May 18, 2014; Mike Ives, *Vietnam Assails China in Sea Dispute*, N.Y. TIMES (Jan. 21, 2016), at A4.

[122] The Philippine landing ship BRP *Sierra Madre* (originally built in the United States during the Second World War) was run aground in 1999 on Second Thomas Shoal to maintain Philippine claims; for a graphic depiction of the situation aboard, see Jeff Himmelman, *A Game of Shark and Minnow*, N.Y. TIMES MAG. (Oct. 27, 2013), http://www.nytimes.com/newsgraphics/2013/10/27/south-china-sea/.

[123] *Cf.* JAMES R. RECKNER, TEDDY ROOSEVELT'S GREAT WHITE FLEET (1988) (recounting the circumnavigation of the world by sixteen battleships of the US Atlantic Fleet, dispatched by President Roosevelt to display the United States' new status as a naval power).

[124] Dale Stephens & Tristan Skousgaard, *Naval Demonstrations and Manoeuvres*, MPEPIL para. 14 (2009). The U.S. Department of Defence issues annual reports on such operations. *See* DoD Annual Freedom of Navigation (FON) Reports, http://policy.defense.gov/OUSDP-Offices/FON/.

[125] Kristina Daugirdas & Julian Davis Mortenson, *United States Conducts Naval Operation Within Twelve Nautical Miles of Spratly Islands in the South China Sea, Prompting Protests from China*, 110 AM. J. INT'L. L. 120, 122 (2016).

[126] Kristina Daugirdas & Julian Davis Mortenson, *United States Continues to Challenge Chinese Claims in South China Sea; Law of the Sea Tribunal Issues Award Against China in Philippines-China Arbitration*, 110 AM. J. INT'L. L. 795, 795—98 (2016).

[127] Office of the Press Secretary, *Press Briefing by Press Secretary Josh Earnest*, THE WHITE HOUSE (Oct. 21, 2016), https://obamawhitehouse.archives.gov/the-press-office/2016/10/21/press-briefing-press-secretary-josh-earnest-10212016.

[128] *China Seizes an Underwater Drone and Sends a Signal to Donald Trump*, ECONOMIST (Dec. 24, 2016).

[129] Xu Lushan, *US Resumes Its Provocative Actions in Sea*, CHINA DAILY (Feb. 22, 2017).

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hesitation, the new administration has also resumed freedom of navigation operations.[130]

Air incidents provide even more potential for uncontrollable consequences and may require momentous decisions within minutes.[131] Such incidents would multiply were China to declare, as threatened in the wake of the Hague ruling, an Air Defence and Identification Zone (ADIZ) over the South China Sea,[132] following the precedent it set when establishing and ADIZ over the East China Sea in 2013.[133] States have a right to establish such zones and to require entering airplanes to identify themselves—yet under international customary law, that right has been limited to civil airplanes intending to enter the respective national airspace.[134] However, in the East China Sea, China has tried to enforce a much more aggressive regime that is not limited to civilian airplanes on their way to Chinese airspace, and has threatened to use "defensive emergency measures" against non-cooperating planes.[135]

Such idiosyncrasy in interpretation not only applies to no-fly zones, but also to the Chinese understanding of free navigation. After some disagreements during the Cold War, the right of innocent passage has generally been construed broadly (and in line with U.S. exigencies). Under the currently prevailing view, that right presumably includes the passage of warships through the territorial sea.[136] China, on the other hand, has put forward a much more restricted interpretation that limits any military presence not only in territorial waters, but even in the EEZ.[137] Such a restricted view reflects the painful historical experiences mentioned above;[138]conversely, the U.S. position mirrors its need to

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[130] *US Navigation Game not Good for Better Relations*, CHINA DAILY (May 26, 2017) (regarding the U.S.S. Dewey bypassing Mischief Reef); *US Missile Destroyer Trespassing Territorial Waters 'Serious Provocation'*, CHINA DAILY (July 3, 2017) (regarding the U.S.S. Stethem bypassing Triton Island).

[131] *Cf.* Jane Perlez, *Chinese Fighters Flew Too Close, U.S. Says*, N.Y. TIMES, A6 (May 20, 2017).

[132] An Baije, *Air Defense Zone Called Option*, CHINA DAILY (July 14, 2016).

[133] J. Ashley Roach, *Air Defence Identification Zones*, MPEPIL para. 14 (2015).

[134] *Id.* at para. 6.

[135] *Id.* at para. 14. The U.S. has indicated that an ADIZ over the South China Sea would be ignored. *See* Missy Ryan, *U.S. Plans to Stick to its Script in the Pacific - Cautiously*, WASHINGTON POST, A12 (July 13, 2016).

[136] *Cf. Innocent Passage: U.S.-USSR Uniform Interpretation*, 84 AM. J. INT'L. L. 239-42 (1990). This view is opposed by some forty, mainly developing countries, including China. *See* Yoshifumi Tanaka, *Navigational Rights and Freedoms*, *in* THE OXFORD HANDBOOK OF THE LAW OF THE SEA 536, 546 (Donald R. Rothwell et al. eds., 2015).

[137] The PRC considers such a presence incompatible with the peaceful use of the sea prescribed by Art. 310 UNCLOS. *See* Till, *supra* note 65, at 23-24; *see also* Xinjun Zhang, *The Latest Developments of the US Freedom of Navigation Programs in the South China Sea: Deregulation or Re-balance*, 9 J. E. ASIA & INT'L. L. 167, 167-82 (2016).

[138] *See supra* note 94 and accompanying text. China had already opposed innocent passage for warships at the Third UN Conference on the Law of the Sea. *See* 2 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: A COMMENTARY 155, para. 19.1 (Satya N. Nandan & Shabtai Rosenne eds., 1993). Chinese attitudes may change, however, as a consequence of China's increasing naval power; the Chinese Navy has not only made significant contributions to counter-piracy efforts at the Horn of Africa, but also conducted surveillance operations in the EEZ of Hawaii and Guam. *See*

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secure navigation lanes for its carrier groups, to support its allies in the Pacific region, and to secure access to its military bases.

Since World War II, U.S. carrier groups have allowed the United States to provide the military support necessary for its domination of the global commons.[139] The first deployment of the first Chinese carrier, the Liaoning, to the South China Sea in 2013 was therefore highly symbolic, and it was symptomatic that a serious incident with a U.S. destroyer ensued.[140] An equally clear signal was sent by the drills that the Liaoning held in the South China Sea after the arbitral ruling.[141] The ultimate aims of such endeavors are clear: to restrict U.S. access to its regional allies, to supplant the United States as regional hegemon, and to establish an exclusive Chinese sphere of influence. And in this undertaking, China will not be deterred by the ruling of an arbitral tribunal or concerns over UNCLOS provisions.

Such behavior is not without precedent. The United States also refused, at first, to participate in most of the proceedings in the *Nicaragua* case and then to heed the judgement of the ICJ.[142] The Chinese aim to establish an exclusive sphere of influence also follows previous examples, most notably the Monroe Doctrine, which was granted precedence even under the League of Nations Covenant.[143] But there are more worrisome and more fundamental historical parallels. In the context of the South China Sea, where the prospect of conflict between the United States and China evokes the rivalry between Sparta and Athens, the so-called Thucydides trap serves as a warning.[144]

Andrew Poulin, *Going Blue: The Transformation of China's Navy*, THE DIPLOMAT (Aug. 16, 2016), http://thediplomat.com/2016/04/going-blue-the-transformation-of-chinas-navy/; Till, *supra* note 66, at 25.

[139] *Cf*. Andrew F. Hart & Bruce D. Jones, *How Do Rising Powers Rise?*, 52 SURVIVAL 63, 79 (2010).

[140] Mark J. Valencia, *The South China Sea and the "Thucydides Trap,"* THE SOUTH CHINA SEA 59, 67 (C. J. Jenner & Tran Truong Thuy eds., 2016).

[141] *Cf*. Ministry of Defence, People's Republic of China, China Aircraft Carrier Conducts Drill in S. China Sea (Jan. 3, 2017), http://eng.mod.gov.cn/TopNews/2017-01/03/content_4769023.htm.

[142] *Cf*. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27); Judgement of the International Court of Justice of 27 June 1986 Concerning Military and Paramilitary Activities in and Against Nicaragua, G.A. Res. 44/43, U.N. Doc. A/Res/44/43 (Dec. 7, 1989). It may be argued that by now the U.S. has substantially implemented the judgement, but it would have done so on its own terms and at its own convenience. The same holds true, *mutatis mutandis*, for Russia in the *Arctic Sunrise* case (in re Arctic Sunrise (Neth. v. Russ.) Case No. 2014-02 (Perm. Ct. Arb. 2015).

[143] *Cf*. Covenant of the League of Nations, 225 C.T.S. 195, Art. 21 (June 28, 1919). The U.S. already reserved the Monroe Doctrine for the 1899 Hague Conventions. Heinrich Pohl, *Der Monroe-Vorbehalt*, in FESTGABE FÜR PAUL KRÜGER 447, 447-72 (1911). This is presumably the case for the 1928 Briand-Kellog Pact as well. *See* CARL SCHMITT, VÖLKERRECHTLICHE GROSSRAUMORDNUNG MIT INTERVENTIONSVERBOT FÜR RAUMFREMDE MÄCHTE: EIN BEITRAG ZUM REICHSBEGRIFF IM VÖLKERRECHT 28 (1939). For Schmitt, the Monroe Doctrine provided the most eminent example for a "greater area with a mutual prohibition of intervention" (*Großraum mit gegenseitigem Interventionsverbot*). *See also infra*, IV.A.

[144] *Small Reefs, Big Problems*, ECONOMIST (July 25, 2015); Valencia, *supra* note 140; GRAHAM T. ALLISON, DESTINED FOR WAR: CAN AMERICA AND CHINA ESCAPE THUCYDIDES'S TRAP? (2017). The sense of inevitability of war that guided Athenian and Spartan decision-making processes is

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Another historical analogy, however, is more pertinent. We see an established naval power bent on defending the status quo and invoking international law as justification. And we see a rising power which, resurfacing after an extended period of weakness—even humiliation—questions this very status quo. Parallels to the developments preceding World War I are evident, when the German Empire challenged British hegemony, particularly through its naval build-up. The impact of these similarities is not limited to the geopolitical situation, or the importance of navies and waterways. More importantly, these similarities also extend to the role played by international law.

Since international law did not prevent the outbreak of World War I, it is often assumed to have been of marginal importance.[145] This assumption overlooks two important aspects. *First*, the period before World War I witnessed important progress in the codification of international law. While international humanitarian law was of particular prominence in this regard,[146] the institutionalization of the peaceful settlement of disputes also took great strides. The Permanent Court of Arbitration was established in 1899;[147] efforts to transform it into a truly permanent court with compulsory jurisdiction failed mainly due to German opposition. It is noteworthy that during negotiations, Germany had initially opposed *any* institutionalized arbitration as incompatible with State sovereignty, presaging Chinese refutation of any judicial proceedings.[148]

Second, and more importantly, the defense of the international legal order was also a primary reason for the Allied Powers Britain and France to enter the war in 1914. They considered themselves "engaged in the defence of international law and justice,"[149] affirming "the sanctities of treaties" against the "dangerous challenge to the fundamental principles of public law" posed by Germany, which argued that international law had to cede to military necessity and national self-preservation.[150]

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striking. *See* THUCYDIDES, HISTORY OF THE PELOPONNESIAN WAR, bk. I, 23, 33 and 44 (Loeb Classical Library No. 108, 1962). Evidence of such a sense is present today as well. *See, e.g.*, Benjamin Haas, *Steve Bannon: 'We're Going to War in the South China Sea ... no Doubt'*, THE GUARDIAN (Feb. 2, 2017), https://www.theguardian.com/us-news/2017/feb/02/steve-bannon-donald-trump-war-south-china-sea-no-doubt; Joshua Rovner, *Two Kinds of Catastrophe: Nuclear Escalation and Protracted War in Asia*, 40 J. STRATEGIC STUD. 696, 697 (2017).

[145] *See* ISABEL V. HULL, A SCRAP OF PAPER: BREAKING AND MAKING INTERNATIONAL LAW DURING THE GREAT WAR 3 (2014) (providing a revision of the traditional view); Oliver Diggelmann, *Beyond the Myth of a Non-relationship: International Law and World War*, 19 J. HIST. INT'L. L. 93, 93-95 (2017) (also questioning the traditional view).

[146] On the respective Hague Conventions of 1899 and1907, see Betsy Baker, *Hague Peace Conferences (1899 and 1907)*, MPEPIL (2009).

[147] Convention for the Pacific Settlement of International Disputes, 187 C.T.S. 410 (July 29, 1899).

[148] J.P.A. François, *La Cour permanente d'arbitrage: Son origine, sa jurisprudence, son avenir*, 87 RECUEIL DES COURS 461, 470 (1955).

[149] HULL, *supra* note 145, at 1 (citing Sir Graham Bower, a former British colonial official).

[150] *See id*. at notes 3&4 (reproducing the quotes); similarly, in 1917 President Wilson, in his message to Congress, stressed that German warfare violated the law of nations: Woodrow Wilson, Address delivered at Joint Session of the Two Houses of Congress, 65th Cong., 1st Sess. S. Doc. No. 5, at 3

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Nor are the similarities limited to the role of international law. They also extend to the parameters of decision-making processes. In *The Sleepwalkers*, Christopher Clark described the "mental maps" that underlay the actions of Serbian decision-makers in July 1914.[151] Such maps often deviate from geographical reality – on the Serbian mental map for instance, Bosnia-Montenegro was part and parcel of Serbia.[152] Similarly entrenched mental maps may be observed with regard to the South China Sea. Since 2012, Chinese passports have been embossed with the nine-dash line[153] – suggesting that Chinese citizenship is now inherently linked to the belief that the South China Sea is part of China. In the same vein, the exam question "What is the southernmost point of China?" is common in Chinese schools.[154] Students learn that this is James Shoal in the South China Sea: 107 km from the Malaysian coast, and 1500 km from Mainland China.[155] Yet James Shoal is indeed a shoal and lies 22 m *below* sea level—and its status as China's southern vertex is based on a translation error from the 1930s.[156]

III.
THE SOUTH CHINA SEA AND INTERNATIONAL LEGAL SCHOLARSHIP

In 1914, international law could not prevent the outbreak of the First World War. Is the international legal order of today more robust? Is the prohibition on the use of force sufficiently entrenched to prevent the outbreak of armed hostilities in the South China Sea on a large scale, the numerous parallels to the pre-World War I period notwithstanding? These should be questions of central importance to international legal scholarship—or so one would think. Yet the scholarly discourse rarely touches on such mundane matters. Instead, international law is often construed as a story of success and a narrative of continuous progress.[157] Two examples—both pertinent to the South China Sea—illustrate this propensity: the posit of the gradual *de-territorialization* and the concept of an increasing *constitutionalization* of international law. Neither of

(1917). *Cf. also* Treaty of Peace between the Allied and Associated Powers and Germany, 225 C.T.S. 188, art. 227 (June 28, 1919) (providing for the arraignment of Emperor Wilhelm II "for a supreme offence against international morality and the sanctity of treaties.").

[151] CHRISTOPHER CLARK, THE SLEEPWALKERS: HOW EUROPE WENT TO WAR IN 1914, 20 *et sqq*. (Penguin Books 2013) (2012). *See* David Ley, *Mental Maps / Cognitive Maps*, *in* THE DICTIONARY OF HUMAN GEOGRAPHY, 455, 455 (Derek Gregory ed., 5th ed., 2009) (providing a general overview of the concept).

[152] CLARK, *supra* note 151, 34-35.

[153] Mark McDonald, *A New Map in Chinese Passports Stirs Anger Across the Region*, N.Y, IMES, (Nov. 25, 2012), https://rendezvous.blogs.nytimes.com/2012/11/25/a-map-in-chinas-new-passports-stirs-anger/.

[154] Huang & Huang, *supra* note 37.

[155] Huang & Huang, *supra* note 37; HAYTON, *supra* note 18, at 116.

[156] HAYTON, *supra* note 18, at 56.

[157] For a thoughtful analysis, see Tilmann Altwicker & Oliver Diggelmann, *How is Progress Constructed in International Legal Scholarship*? 25 EUR. J. INT'L. L.425, 425-44 (2014).

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these theories will be comprehensively expounded and evaluated here; they merely juxtapose the sometimes far-reaching claims made under these headings with the dispute in the South China Sea.

A. De-territorialization

For several years now, scholars have considered traditional, State-centered international law along Westphalian lines to be increasingly obsolete, or at least increasingly inadequate.[158] In several areas, such developments may well apply to a certain degree. For instance, a "sense of de-territorialisation"[159] is discernible in certain technological and economic areas: the internet is not bound to the physical sphere in the way that traditional means of communication once were. Even international humanitarian law, which tended to be closely related to territorial matters, now has to deal with more ephemeral means of attack.[160] In commercial law, the liberalization of trade has also somewhat diminished the role of borders.[161] The process of European unification has been considered a prominent example of continuous de-territorialization as well.[162] Similar claims have been made in numerous other fields of international law, arguing that law is increasingly detached from territory.[163]

As a result, it is argued that contemporary international law must not return "to a territorial order serving the interests of a group of States and of their elites," but should instead "pursue a functional, global order, which, on the one hand, protects and promotes basic public goods and fundamental human values, on the other, accommodates constitutional pluralism and cultural diversity."[164] This is certainly a laudable goal. It is, however, questionable whether these developments amount to a decline "of the role of territory as a parameter in international law,"[165] or have resulted in a "crisis of the territory as a central

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[158] *See, e.g.*, Daniel Bethlehem, *The End of Geography: The Changing Nature of the International System and the Challenge to International Law*, 25 EUR. J. INT'L. L 9 (2014).

[159] Frédéric Mégret, *Globalisation*, MPEPIL para. 11 (2009).

[160] *See, e.g.*, Karl Zemanek, *War Crimes in Modern Warfare*, 24 SWISS REV. INT'L & EUR. L. 206, 225 (2014) (discussing computer network attacks).

[161] Jean-Philippe Robé, *Multinational Enterprises: The Constitution of a Pluralistic Legal Order*, *in* GLOBAL LAW WITHOUT A STATE 46 (Gunther Teubner ed.,1997).

[162] *See, e.g.*, Samantha Besson, *Deliberative Demoi-cracy in the European Union: Towards the Deterritorialization of Democracy*, *in* DELIBERATIVE DEMOCRACY AND ITS DISCONTENTS 181(Samantha Besson & José Luis Martí eds., 2006).

[163] A search for "de(-)territorialisation" and "de(-)territorialization" yields 459 contributions on HeinOnline. Incidentally, the term does not originate in a philosophical context in the 1970s. *Contra* Catherine Brölmann, *Deterritorialization in International Law: Moving Away from the Divide Between National and International Law*, NEW PERSPECTIVES ON THE DIVIDE BETWEEN NATIONAL AND INTERNATIONAL LAW 84, 90 n. 28 (Janne Nijman & André Nollkaemper eds., 2007)); its German equivalent (*Entterritorialisierung*) was already used by Carl Schmitt in a derogatory and strongly anti-Semitic context. *See* SCHMITT, *supra* note 143, at 12.

[164] Enrico Milano, *The Deterritorialization of International Law*, 2 ESIL REFLECTION (2013).

[165] Brölmann, *supra* note 163, at 84.

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concept in international law."[166] Even without applying a narrow realist perspective, the normative emergence of the prohibition of the use of force does not mean that international law no longer has to address the acquisition of territory by force.[167] And even if international institutional regimes are proliferating, their effectiveness often remains too limited to make territoriality less relevant.[168] "Drawing lines on the ground" may indeed not be the "ultimate response" to the challenges that an "ever-more interdependent humankind" is facing.[169] The South China Sea dispute, however, is a potent portent that reports of the demise of territoriality in international law have been somewhat exaggerated.[170]

Further, the law of the sea should have provided a powerful argument in favor of de-territorialization. The Third UN Conference on the Law of Sea was meant to collectivize and internationalize the sea, to establish a "common heritage of mankind" and to foster a sense of solidarity between developing and industrialized nations. The opposite has ensued. We observe an increasing "zonification," with the corresponding drawing of lines. At the expense of the high sea, States claim sovereignty or sovereign rights over ever more maritime areas,[171] and the result is a *mare clausum* rather than a *mare liberum*. The ten-year period provided for extended continental shelf claims has led to a race for (underwater) territory;[172] instead of an "end of geography," there is a relapse to an age when flags were once planted to mark territorial claims. This development is particularly stark in the Arctic, where the seabed is being territorialized as extensions of the respective coastal States,[173] and where a

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[166] Milano, *supra* note 164.

[167] *See id*. ("*Pace* Schmitt, territory is no more up for grabs in contemporary international law due to the emergence of peremptory norms, such as the prohibition to use force to acquire territory and the principle of self-determination.").

[168] *Cf*. Brölmann, *supra* note 163, at 92 (naming global health monitoring by the WHO as an example); *cf. also* Bethlehem, *supra* note 158, at 2. But the prescriptive power of the WHO is limited. *See* Lorenz Langer, *Impfung und Impfzwang zwischen persönlicher Freiheit und Schutz der öffentlichen Gesundheit*, 136 I ZEITSCHRIFT FÜR SCHWEIZERISCHES RECHT 87, 96 (2017). For a more cautious analysis of institutionalisation, see Andreas L. Paulus, *From Territoriality to Functonality? Towards a Legal Methodology of Globalization, in* GOVERNANCE AND INTERNATIONAL LEGAL THEORY 59, 75-88 (Ige F. Dekker & Wouther G. Werner eds., 2004).

[169] *See* Daniel-Erasmus Khan, *Territory and Boundaries*, *in* THE OXFORD HANDBOOK OF THE HISTORY OF INTERNATIONAL LAW 170, 247 (Bardo Fassbender & Anne Peters eds., 2012).

[170] It is rather ironic that China is now putting so much emphasis on clearly drawn lines. Clear-cut borderlines, just as insistence on territorial sovereignty, is a concept that China was forced to accept by imperial powers. *Cf. The Green Borderlands: Treaties and Maps that Defined the Qing's Southwest Boundaries* 23 (National Palace Museum ed., 2016), and on sovereignty Lorenz Langer, *Out of Joint? - Hong Kong's International Status from the Sino-British Joint Declaration to the Present*, 46 ARCHIV DES VÖLKERRECHTS 309, 313 n. 20 (2008).

[171] Talmon, *supra* note 106, at 465. National jurisdiction by coastal States now encompasses approximately 36% of the total seabed. *See* TANAKA, *supra* note 98, at 139.

[172] *See supra* note 20; Ted L. McDorman, *The Continental Shelf, in* THE OXFORD HANDBOOK OF THE LAW OF THE SEA 181, 197 *et seq*. (D. R. Rothwell et al. eds., 2015).

[173] The carving-up of the seabed is illustrated by the map prepared by the International Boundary Research Unit at Durham University, https://www.dur.ac.uk/resources/ibru/resources/Arcticmap04-

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Russian submarine planted a Russian flag on the ocean floor at the North Pole in 2009.[174] The Arctic should have been a prime example of the concept of a common heritage of mankind introduced by UNCLOS.[175] Instead, the seabed is being appropriated by coastal States, and political considerations determine as a matter of course the fate of geographical features.[176]

In the South China Sea, Chinese ships have repeatedly dropped "sovereignty steles" over James Shoal.[177] In this region, we may even witness a “re-territorialization”: with highly detrimental consequences to the environment, large areas of land are being reclaimed.[178] At the same time, territory also gains additional relevance through the apparent revival of exclusive spheres of interest. For the nine-dash line may also be understood as the proclamation of such a sphere—just as the United States did when adopting the Monroe Doctrine in 1823.[179] At that time, the United States refused to tolerate European interference with its hegemonic relations to Latin America; today, China insists on bilateral negotiations with its South-East Asian neighbors from a position of strength. As a consequence, we might face a return to a Schmittian world with entrenched spheres of interests, rather than the hoped-for and bright future of de-territorialized and universalist international law.[180]

B. Constitutionalization

The South China Sea gives rise to similar reservations with regard to the oft-invoked “constitutionalization” of international law.[181] Again, this concept

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[174] MICHAEL BYERS & JAMES BAKER, INTERNATIONAL LAW AND THE ARCTIC 92 (2013). Two years earlier, Canadian soldiers had planted a flag on Hans Island.

[175] Georg Witschel, *New Chances and New Responsibilities in the Arctic Region: An Introduction*, 69 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 529, 530 (2009).

[176] Thus, Russia considers the Lomonosov Ridge close to the North Pole an extension of the “Russian” landmass. *See* BYERS & BAKER, *supra* note 175, at 107. Yet the extension below surface of the State established above surface is of course a fiction; the State is construed as a *physical* reality, immanent in the ground.

[177] Zheng Wang, *The Nine-Dashed Line: 'Engraved in Our Hearts'*, THE DIPLOMAT (Aug. 25, 2014), http://thediplomat.com/2014/08/the-nine-dashed-line-engraved-in-our-hearts/; HAYTON, *supra* note 18, at 116. On the Shoal, see *supra* note 156.

[178] *Supra* note 25.

[179] *See* SCHMITT, *supra* note 143, at 23 *et seq*.

[180] Such a *caveat* is in order not only with regard to the South China Sea: even in the European Union, the refugee crisis of 2016 has led to national borders quickly re-emerging.

[181] *See, e.g.*, THE CONSTITUTIONALISATION OF INTERNATIONAL LAW (Jan Klabbers, Anne Peters & Geir Ulfstein eds., 2009); Thomas Kleinlein, *Konstitutionalisierung im Völkerrecht: Konstruktion und Elemente einer idealistischen Völkerrechtslehre* (Beiträge zum ausländischen öffentlichen Recht und Völkerrecht No. 231, 2012); SUPRASTAATLICHE KONSTITUTIONALISIERUNG: PERSPEKTIVEN AUF DIE LEGITIMITÄT, KOHÄRENZ UND EFFEKTIVITÄT DES VÖLKERRECHTS (Bardo Fassbender & Angelika Siehr eds., 2012). On the persisting lack of terminological accuracy in this context see Bardo Fassbender, *'We the Peoples of the United Nations': Constituent Power and Constitutional Form in International Law*, THE PARADOX OF CONSTITUTIONALISM: CONSTITUENT POWER AND CONSTITUTIONAL FORM 269, 276 (M. Loughlin ed., 2008)

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accurately reflects some important developments in international law. But has it become a dogma or credo, rather than a realistic description of actual developments? The transformative process of constitutionalization is supposed to result—or to have resulted—in an international order with constitutional characteristics, which include, *inter alia*, "rules on how laws ought to be made, how disputes ought to be settled, and which institutions shall exist, and [...] the sort of basic values [...] that no official action may encroach upon."[182] Institutionalization and judicialization are held to be central aspects of such a development, accompanied by a "fundamental shift" in dispute settlement from the traditional consensual paradigm to a new compulsory paradigm, where ratification of a treaty implies acceptance of certain adjudication procedures.[183] Indeed, examples for such a shift abound, ranging from dispute settlement at the World Trade Organization (WTO), to the International Tribunal of the Law of the Sea, and most prominently, to the International Criminal Court (ICC).

Another important facet of constitutionalization is the international protection of human rights and, as a corollary, a reassessment and, eventually, a restriction of traditional notions of sovereignty. This qualification of sovereignty is most obvious in the conceptualization of the Responsibility to Protect, which requires the international community to intervene in internal matters of States "when decisive action is required on human protection grounds."[184] Under such proposals, it would potentially be the Security Council's "duty" to take action under Chapter VII of the UN Charter to prevent genocide or massive crimes against humanity.[185]

Scholars also argue, however, that the protection of human rights is not only an *obligation* of the international community; it is a *precondition* to be part of that community. According to such views, gross and manifest human rights violation lead to the "suspension" of the respective State's sovereignty.[186] Sovereignty has "a legal value only to the extent that it respects human rights, interests, and needs,"[187] and only States able and willing to protect their own citizens qualify as "legitimate and respected members of international

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[182] Jan Klabbers, *Setting the Scene*, THE CONSTITUTIONALISATION OF INTERNATIONAL LAW 1, 9 (Jan Klabbers et al. eds., 2009).

[183] Cesare P. R. Romano, *The Shift from the Consensual to the Compulsory Paradigm in International Adjudication: Elements for a Theory of Consent*, 39 N.Y.U. J. INT'L. L. & POL'Y 791, 794-95 (2007); *see also* Geir Ulfstein, *Institutions and Competences*, *in* THE CONSTITUTIONALISATION OF INTERNATIONAL LAW 45-80 (Jan Klabbers et al. eds., 2009) (providing a discussion on institutionalisation).

[184] INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT para. 2.27 (International Development Research Centre ed., 2001).

[185] *See* Anne Peters, *Humanity as the A and Ω of Sovereignty*, 20 EUR. J. INT'L. L. 513, 539 (2009); *see also* Daniel Moeckli & Raffael N. Fasel, *A Duty to Give Reasons in the Security Council*, 14 INT'L. ORG. L. REV. 1, 44 (2017) (providing a more cautious account).

[186] INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT para. 5.26 (2001).

[187] Peters, *supra* note 185, at 513–14.

https://scholarship.law.berkeley.edu/bjil/vol36/iss3/2
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society."[188] Underpinned by notions such as *jus cogens*, a "constitution of the international community" is construed,189 with community interests that differ from the egoistic interests of States.[190] Eventually, and as an (ideal) vanishing point, under a Kantian perspective such a community would become a peoples' State (*Völkerstaat*) or a world republic.[191]

The conflict in the South China Sea offers a reality check, and a powerful antidote to overly optimistic claims. This is again illustrated by UNCLOS, the legal regime underlying the conflict. The Convention should have provided a persuasive example for the progressive constitutionalization of international law. At its adoption, the Convention was hailed as a "constitution for the oceans," as a "monumental achievement of the international community, second only to the Charter of the United Nations."[192] The number of signatures on the first day may have been "a new record in juridical history."[193] However, as set out above, the simmering disagreement between developing and industrialized nations resulted in the emergence of separate regimes and, after the 1994 Agreement, in the segmentation and appropriation of large swathes of the high sea.[194] With regard to *institutionalization*, UNCLOS established several new bodies: the Commission on the Limits of the Continental Shelf, the International Seabed Authority, and ITLOS, which was to play an important role in compulsory dispute settlement. Therefore, UNCLOS should also have entrenched important advances in the *judicialization* of the law of the sea. Part XV and Annexes VII and VIII of the Convention contain detailed rules for judicial and arbitral dispute settlement. In some cases, these mechanisms have indeed offered solutions to complex conflicts.[195] However, as the South China Sea arbitration illustrates, not every new convention or institution is tantamount to an increase in effective international governance.

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[188] Francis Mading Deng, *From 'Sovereignty as Responsibility' to the 'Responsibility to Protect'*, 2 GLOBAL RESPOSIBILITY TO PROTECT 353, 354 (2010).

[189] CHRISTIAN TOMUSCHAT, INTERNATIONAL LAW: ENSURING THE SURVIVAL OF MANKIND ON THE EVE OF A NEW CENTURY 87 (Recueil des Cours vol. 281, 1999).

[190] Bruno Simma & Andreas L. Paulus, *The 'International Community': Facing the Challenge of Globalization,* 9 EUR. J. INT'L. L. 266, 266–77 (1998).

[191] 8 IMMANUEL KANT*, Zum ewigen Frieden. Ein philosophischer Entwurf*, *in* KANT'S GESAMMELTE SCHRIFTEN, 341, 360 (Königlich Preussische Akademie der Wissenschaften ed., 1912) (1795). *Cf.* Jürgen Habermas, *Hat die Konstitutionalisierung des Völkerrechts noch eine Chance*, *in* DER GESPALTENE WESTEN 113–94 (2004).

[192] Third United Nations Conference on the Law of the Sea, Statement by the President, 11th Sess., 185th mtg., U.N. Doc. A/CONF.62/SR.185, ¶ 52 (Dec. 6, 1982), and Closing Statement by the President, 11th Sess., 185th mtg., U.N. Doc. A/CONF.62/SR.193 ¶ 46 (Dec. 10, 1982).; *see also* Tommy T.B. Koh, *A Constitution for the Oceans: Remarks by the President of the Third United Nations Conference on the Law of the Sea*, UNCLOS 1982, 11–17 (Myron H. Nordquist ed., 1984).

[193] Closing Statement by the President, *supra* note 192, at ¶ 44.

[194] *Supra* III.A and Talmon, *supra* note 106, at 459—60.

[195] *See, e.g.*, Bay of Bengal Maritime Boundary Arbitration (Bangl. v. India), Case no. 2010-16 (Perm. Ct. Arb. 2014).

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The aftermath of the arbitral Award, as set out above, should also caution against too far-reaching claims of an international community united by shared values. Instead of a relativization of sovereignty, we see its absolutization. After the adoption of the Award, China has declared sovereignty a red line, and reiterated that the South China Sea was a "core interest" of its sovereignty,[196] a sovereignty that is presumably not contingent on respect for human rights or other community values such as ecological responsibility.[197] China's refusal to participate in the proceedings weakens institutionalized dispute-settlement. Nor is it an isolated case. The ICC, which has been identified as a pivotal element of a "truly public international order,"[198] has also experienced several setbacks. Gambia may have rescinded its withdrawal from the Court, but Burundi has left the Rome Statute and South Africa is still intent on doing so.[199]

This indicates that international dispute settlement is still not by definition peaceful. Powerful States can afford to ignore the judgements of international tribunals with little consequence, indifferent to the damage that their international reputation allegedly suffers. In particular, the constitutionalization of international law reaches its factual limit as soon as a permanent member of the Security Council is involved, even in times when the Responsibility to Protect is touted as an established principle. What exactly does it mean, for instance, when the veto of a permanent Security Council member is considered "illegal" or an "*abus de droit*"?[200] Several vetoes in the context of the Syrian civil war might thus be considered illegal, yet they nevertheless precluded any action endorsed by the Security Council and hence in conformity with the UN Charter.[201] While it may well be that such inaction entails international responsibility either of the UN or a Security Council Member State, it is difficult to conceive of circumstances where such a responsibility could be successfully enforced.[202]

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[196] *State Councilor's Interview on the So-called Award by the Arbitral Tribunal for South China Sea Arbitration*, CHINA DAILY (July 16, 2016); *see also* Edward Wong, *Security Law Suggests Beijing Is Broadening Its Definition of 'Core Interests'*, N. Y. TIMES, A10 (July 4, 2015).

[197] *See supra* note 187 and accompanying text.

[198] Armin von Bogdandy & Sergio Dellavalle, *The Paradigms of Universalism and Particularism in the Age of Globalisation: Western Perspectives on the Premises and Finality of International Law*, 2 COLLECTED COURSES OF THE XIAMEN ACADEMY OF INT'L L. 45, 55 (2009).

[199] *ASP President Welcomes Gambia's Decision not to Withdraw from the Rome Statute (Press Release)*, ICC-ASP-20170217-PR1274 (Feb. 2, 2017); *Statement of the President of the Assembly of States Parties on the Process of Withdrawal from the Rome Statute by Burundi (Press Release)*, ICC-CPI-20161014-PR1244 (Oct. 18, 2016). South Africa's withdrawal was ruled unconstitutional by its High Court: Christopher Torchia, *South African Court Blocks Zuma's Bid to Leave Criminal Court at The Hague*, INDEPENDENT, 27 (Feb. 23, 2017).

[200] Peters, *supra* note 185, at 539.

[201] *Cf.* S/2017/315 (vetoed by Russia). Lacking Security Council support, the U.S. missile strike in retaliation for the use of chemical weapons was illegal. *See* Mika Hayashi, *The U.S. Airstrike After the Use of Chemical Weapons in Syria: National Interest, Humanitarian Intervention, or Enforcement Against War Crimes?* 21 ASIL INSIGHTS (2017).

[202] Karin Oellers-Frahm, *From Humanitarian Intervention to the Responsibility to Protect*, *in* RESPONSIBILITY TO PROTECT (R2P) 184, 196–203 (Peter Hilpold ed., 2015).

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As part of an idealistic discourse or an argument *de lege ferenda*, postulates of constitutionalization and communitarization do play an important role in international legal scholarship. For such scholarship should be more than mere positivism and must not be limited to an anodyne restatement of the *lex lata*—it should also point the way to a better future. But at the same time, it has to be more than a discursive exercise.[203] The prolific postulation of "emerging" rules or rights should not be mistaken for a description of the *lex lata*.[204] Auspicious yet adumbrated trends leading to a brighter tomorrow have to be clearly distinguished from the effectively enforced or protected rules and rights of today. Perhaps due to a lingering urge for self-justification, international legal scholars tend to oversell such trends as facts.[205] But if "almost anything is presented as 'progress'", it is indeed the "*system* of international law that will become the loser."[206]

Academic discourse is becoming increasingly detached from legal practice,[207] to the extent that the output of international legal scholarship is considered by practitioners "not terribly helpful."[208] Naturally, legal scholars are more than the handmaidens of practicing lawyers.[209] International legal scholarship should indeed be an "engaged constructor of social reality."[210] Nevertheless, it still needs to be grounded in a reality that is not experienced exclusively by a small circle of the initiated. Otherwise, our discipline will become an esoteric or even eschatological enterprise.

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[203] The Responsibility to Protect, for instance, seems to be primarily about a semantic change, as admitted by its proponents. INTERNATIONAL COMMISSION, *supra* note 184, at paras. 2.4, 2.5; it might therefore be criticised with some justification as a mere rebranding exercise. *Cf*. WILLIAM MICHAEL REISMAN, THE QUEST FOR WORLD ORDER AND HUMAN DIGNITY IN THE TWENTY-FIRST CENTURY: CONSTITUTIVE PROCESS AND INDIVIDUAL COMMITMENT 433 (Pocketbooks of the Hague Academy of Int'l L. No. 16, 2012).

[204] *See, e.g*., Thomas M. Franck, *The Emerging Right to Democratic Governance,* 86 AM. J. INT'L. L. 46, 46-91 (1992); Erika De Wet, *The Emergence of International and Regional Value Systems as a Manifestation of the Emerging International Constitutional Order,* 19 LEIDEN J. INT'L. L. 611, 611-32 (2006).

[205] Persistent self-doubts are evident in some of the themes of major international law conferences. *See, e.g*., "International Law: Do We Need It?" (2nd ESIL Biennal Conference, Paris, May 18-20, 2006); "International Law as Law" (103rd ASIL Annual Meeting, Washington D.C. Mar. 25-28, 2009); *see also* REISMAN, *supra* note 203, at 433: "International law is so often criticized, indeed even derided, that international lawyers feel an almost professional obligation not only to defend the entire enterprise, but also to see "major" advances in in tiny and often ambiguous 'baby steps' . . . ."

[206] REISMAN, *supra* note 203, at 433.

[207] Anne Peters, *Rollen von Rechtsdenkern und Praktikern – aus völkerrechtlicher Sicht*, 105, 145, PARADIGMEN IM INTERNATIONALEN RECHT 105, 145 (Deutsche Gesellschaft für Völkerrecht ed., 2012).

[208] *An Interview with John B. Bellinger III*, 52 HARV. INT'L. L.J. ONLINE 33 (2010), http://www.harvardilj.org/wp-content/uploads/2010/10/HILJ-Online_52_Profile_Bellinger1.pdf.

[209] Thus, merely providing "exhaustive surveys" of the *lex lata* would be a very anaemic form of scholarship indeed. *Contra id*. at 33.

[210] Altwicker & Diggelmann, *supra* note 157, at 427.

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IV.
LAST BUT NOT LEAST: THE ROLE OF LEGAL SCHOLARS – CALLING THE TUNE?

If developments in the South China Sea ought to dampen overly ambitious scholarly claims about the progress of international law, they should also serve as a reminder of the role that legal scholars play in such disputes. In the previous Part, I referred to the tension between international legal scholarship and international legal practice. In international law in particular, this tension exists not only in an interpersonal, but also in an intrapersonal way. In her study on the role of legal thinkers and practitioners, Anne Peters interviewed 17 eminent international law practitioners. Combined, these 17 individuals concurrently exercised 45 functions, such as legal adviser, counsel, arbitrators, judges and, predominantly, academic teachers.[211] Obviously, these different roles might influence each other: a counsel for a government is unlikely to publish an academic paper undermining his client's position. But to what extent may scholarship be instrumentalized to further the principal's cause?

One notable aspect of the academic fall-out of the Hague arbitral Award has been the clear partisanship of commentators. This is particularly evident with regard to the Chinese side. I have not found a single contribution by a Chinese scholar working in China that is critical of the PRC's position. Although the arbitral Award has evidently been scrutinized with great care,[212] for Chinese scholars, the motto apparently has to be: my country, right or wrong, my country.[213] It has been suggested that the boycott of the proceedings in The Hague might, in part, have been due to a lack of confidence in China's

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[211] Peters, *supra* note 207, at 108. Fourteen individuals were law professors.

[212] Mueller, *supra* note 32.

[213] With this justification, British Attorney-General Sir Hartley Shawcross eventually connived in withholding documentary evidence from the ICJ in the *Corfu Channel Case*. *See* REISMAN, *supra* note 203, at 458. The expression was originally coined by US Navy Commodore Stephan Decatur in 1816. *See* CONGRESSIONAL RESEARCH SERVICE, RESPECTFULLY QUOTED: A DICTIONARY OF QUOTATIONS 70 (2010). For the concerted positioning of Chinese scholars, *see e.g.* Jennifer Lo, *Chinese Legal Scholars Escalate Offensive on South China Sea Ruling*, NIKKEI ASIA REV. (2016), https://asia.nikkei.com/Politics-Economy/International-Relations/Chinese-legal-scholars-escalate-offensive-on-South-China-Sea-ruling. Most unusually for an international magistrate, even Xue Hanqin, the Chinese ICJ Judge since 2010, has criticized the Award. *South China Sea "Award" Pours Fuel on Flame in Dispute: ICJ Judge*, CHINA DAILY (July 17, 2016), http://www.chinadaily.com.cn/world/2016-07/17/content_26116756.htm. Already in November 2013, at the 4th Asian Soc. Int'l L. Biennial Conference in New Delhi, Judge Xue gave an extensive extemporaneous defence of the Chinese position on the arbitral proceedings. *See* Julian Ku,'*China's ICJ Judge Xue Hanqin Publicly Defends China's Non-Participation in UNCLOS Arbitration (Updated),* OPINIO JURIS (Nov. 20, 2013), http://opiniojuris.org/2013/11/20/chinas-icj-judge-xue-hanqin-publicly-defends-chinas-non-participation-unclos-arbitration/. Not sitting on the panel, she apparently justified her 20-mintues intervention with the fact that she was "the only Chinese present in the audience." She was responding to a paper that Harry Roque, a Philippine law professor, had presented at the Conference *See* Harry Roque, *A Judge from China Speaks Up on Our Arbitral Claim on the West Philippine Sea,* GMA NEWS ONLINE (Nov. 22, 2013), http://www.gmanetwork.com/news/opinion/content/336686/a-judge-from-china-speaks-up-on-our-arbitral-claim-on-the-west-philippine-sea/story/.

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autochthonous legal expertise.[214] Be that as it may, it is hardly a coincidence that the Chinese leadership in 2014 decided that the PRC should "vigorously participate in the formulation of international norms and strengthen our country's discourse power and influence in international legal affairs, and use legal methods to safeguard our country's sovereignty, security and development interests."[215] This refers to government strategy, but it also includes academic discourse: there has been a significant push to strengthen China's practical as well as its academic international law capacities.[216] One example for this two-pronged approach is provided by the Xiamen Academy of International Law, which aims for its summer programs "to be both practical and highly scholarly."[217] For the time being, such efforts rely to a considerable degree on extrinsic expertise.[218] However, the younger generation of Chinese international lawyers is increasingly expected "to develop distinctively Chinese theories of international law."[219]

Such ambitions are to be welcomed if they result in a broadening of legal discourse and the inclusion of new perspectives. However, given the multitude of roles of legal experts and given the prominent role that such experts play in international law,[220] it is also important that certain rules are observed so that

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[214] Sonya Sceats, *China's Fury Over South China Sea Belies Its Legal Insecurities*, CHATHAM HOUSE, (July 4, 2016), https://www.chathamhouse.org/expert/comment/chinas-fury-over-south-china-sea-belies-its-legal-insecurities.

[215] *Decision Concerning Some Major Questions in Comprehensively Moving Governing the Country According to the Law Forward*, CCP Central Committee, (Oct. 23, 2014), https://chinacopyrightandmedia.wordpress.com/2014/10/28/ccp-central-committee-decision-concerning-some-major-questions-in-comprehensively-moving-governing-the-country-according-to-the-law-forward/. While the party aims to "foster rule of law talents and reserve forces who are well acquainted with and persist in the Socialist rule of law system with Chinese characteristics," it also aims to "establish foreign-oriented rule of law talent teams who thoroughly understand international legal rules and are good at dealing with foreign-oriented legal affairs."

[216] Bill Hayton, Rod Wye & Wim Mueller, *China's Changing Approach to International Law* (Chatham House, Podcast, Mar. 30, 2017), https://www.chathamhouse.org/file/china-s-changing-approach-international-law.

[217] *See About Us: Introduction,* XIANACADEMY.ORG, http://www.xiamenacademy.org/aboutus.aspx ?BaseInfoCateId=75&CateID=75&CurrCateID=75&showCateID=75.

[218] While the Academy's Administrative Council consists exclusively of Chinese scholars, as of summer 2018, non-Chinese members constitute a majority on its Curatorium. *About Us: Curatorium,* XIANACADEMY.ORG, http://www.xiamenacademy.org/aboutus.aspx?BaseInfoCateId=76&CateID=76&CurrCateID=76&showCateID=76.

[219] This challenge was reportedly issued by the late Wang Tieya at the first meeting of the Chinese Society of International Law. *See Roundtable Meeting Summary: Exploring Public International Law and the Rights of Individuals with Chinese Scholars*, CHATHAM HOUSE, 3 (April 14-17, 2014), https://www.chathamhouse.org/sites/default/files/field/field_document/20140414PublicInternationalLawChina.pdf. In this context, it is worth noting that after reaching 50% in 2011, the percentage of Chinese professors teaching at the Xiamen Academy has significantly decreased in recent years (with no Chinese teaching in 2012 and 2016). Professors, Xianacademy.org, http://www.xiamenacademy.org/products.aspx.

220 See Oliver Diggelmann, Anmerkungen zu den Unschärfen des völkerrechtlichen Rechtsbegriffs, 26 SWISS REV. INT'L. & EUR. L. 381, 384 (2016).

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scholarship can provide added value beyond mere partisanship. Western scholars promote views that serve their clients as well, and it is also fairly common for scholarly publication to render such views. But if a forum is provided for partisan scholarship, transparency is of central importance, as is the principle *audiatur et altera pars*.[221] An example for such even-handedness is provided by the Agora on the South China Sea in the American Journal of International Law in 2013.[222] Issue 2/2016 of the Chinese Journal of International Law, on the other hand, dealt with the jurisdiction of the arbitral tribunal in The Hague, yet contained only contributions supporting China's position,[223] including, for good measure, the PRC Government position paper and a statement by the Chinese Society of International Law.[224] Other academic publications, though purportedly published only "to serve the administration of justice and to strengthen the rule of law,"[225] were of a similarly one-sided nature. Such publications apparently served as a surrogate, compensating for China's non-appearance in The Hague and aiming to disseminate the Chinese point of view.[226]

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[221] *Cf.* COMMITTEE ON PUBLICATION ETHICS, CODE OF CONDUCT AND BEST PRACTICE GUIDELINES FOR JOURNAL EDITORS Addendum 1 (2013) (2011), https://publicationethics.org/files/Code%20of%20Conduct_2.pdf (observing that the content of academic journals "should not be determined by the policies of governments.").

[222] *See* Lori Fisler Damrosch & Bernard H. Oxman, *Agora: The South China Sea: Editors' Introduction*, 107 AM. J. INT'L. L. 95, 95–97 (2013); Zhiguo Gao & Bing Bing Jia, *The Nine-Dash Line in the South China Sea: History, Status, and Implications*, 107 AM. J. INT'L. L. 98, 98–124 (2013); Florian Dupuy & Pierre-Marie Dupuy, *A Legal Analysis of China's Historic Rights Claim in the South China Sea*, 107 AM. J. INT'L. L. 124, 124–41 (2013).

[223] *See* Yee, *supra* note 31; Chris Whomersley, *The South China Sea: The Award of the Tribunal in the Case Brought by Philippines against China: A Critique,* 15 CHIN. J. INT'L. L. 219, 239–64 (2016); Sreenivasa Rao Pemmaraju, *The South China Sea Arbitration (The Philippines v. China): Assessment of the Award on Jurisdiction and Admissibility*, 15 CHIN. J. INT'L. L. 217, 265-307 (2016); Stefan Talmon, *The South China Sea Arbitration: Observations on the Award on Jurisdiction and Admissibility*, 15 CHIN. J. INT'L. L. 217, 309–91 (2016); Abraham D. Sofaer, *The Philippine Law of the Sea Action Against China: Relearning the Limits of International Adjudication*, 15 CHIN. J. INT'L. L. 217, 393–40 (2016); Natalie Klein, *Expansions and Restrictions in the UNCLOS Dispute Settlement Regime: Lessons from Recent Decisions*, 15 CHIN. J. INT'L. L. 217, 403-15 (2016); Michael Sheng-ti Gau, *The Agreements and Disputes Crystalized by the 2009-2011 Sino-Philippine Exchange of Notes Verbales and their Relevance to the Jurisdiction and Admissibility Phase of the South China Sea Arbitration*, 15 CHIN. J. INT'L. L. 217, 417–30 (2016). The special issue was addressed to "those who are interested in serious work and the rule of law in this area." *See Special Issue on Jurisdiction and Admissibility in the South China Sea Arbitration: Foreword*, 15 CHIN. J. INT'L. L. 217, 217 (2016).

[224] *Supra* note 28; Chinese Society of International Law, *The Tribunal's Award in the "South China Sea Arbitration" Initiated by the Philippines Is Null and Void*, 15 CHIN. J. INT'L. L. 217, 457–87 (2016).

[225] Stefan Talmon & Bing Bing Jia, *Preface* to THE SOUTH CHINA SEA ARBITRATION, *supra* note 14, at vi.

[226] *See id*. at i. ("The book [is] to serve as a kind of *amicus curiae* brief advancing possible legal arguments on behalf of the absent respondent."); *see also* Gao & Jia, *supra* note 222; Zhang Xinjun, *"Setting Aside Disputes and Pursuing Joint Development" at Crossroads in South China Sea,* TERRITORIAL DISPUTES IN THE SOUTH CHINA SEA: NAVIGATING ROUGH WATERS 39–53 (Seain J. Huang & A. Billo eds., 2015); Shicun Wu, *Competing Claims over the South China Sea Islands and*

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In international disputes, it is a time-honored task of international lawyers to represent the interest of one party. One of the foundational texts of the law of the sea, Hugo Grotius' *Mare liberum*, was written on behalf of the Dutch East India Company and exclusively served to push its agenda.[227] Partisanship, however, should be openly declared, particularly if based on a government mandate and professed by academics who teach and conduct research at public universities.[228] Otherwise, the academy risks being (ab)used, willingly or unwillingly, for government policy. As with numerous aspects of the South China Sea dispute, there is also a historical precedent for such developments: in the *post*-World War I period, German legal scholarship was systematically instrumentalized by the German Foreign Ministry, or *Auswärtiges Amt*, to criticize the Versailles Treaty regime.[229]

CONCLUSION

It is a long way from Times Square to the South China Sea. But the short propaganda clip displayed in Manhattan in 2016 illustrates that this regional conflict over some small islands has worldwide repercussions. It also shows that the international legal order is still struggling to assert itself when challenged by a major power. The Award in the South China Sea Arbitration was carefully worded and extensively argued. It prompted strong Chinese reactions, yet it is unlikely to be implemented any time soon.

If considered from a meta-perspective, however, the arbitration yields important insights on the state both of the law of the sea and of international law more generally. A short overview of Chinese and U.S. reactions shows that both powers invoke international law to bolster their mutually exclusive positions. These differences mirror the development of the law of the sea. Historically, the Western sea-faring nations have, since Grotius' *mare liberum*, pushed for a liberal regime of the sea, but just as that seminal text was meant to further Dutch trade interests, so did the concept of the freedom of the sea serve primarily its Western proponents. By contrast, the second half of the 20th century has seen a proliferation of sovereign rights over certain zones of the sea, and extensive State claims to these zones. The 2016 Award shows that there are limits to such rights and claims, but also that these limits may not be universally accepted. As a result, political and military tensions in the Asian-Pacific region are rising.

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the Way Forward: A Chinese Perspective on the Philippine-China Arbitration Case, ARBITRATION CONCERNING THE SOUTH CHINA SEA (PHILIPPINES VERSUS CHINA) 13–23 (S. Wu & K. Zou eds., 2016); *see supra* note 223 for additional examples.

[227] *See supra* note 82. The influence of the mandatary on the content of *mare liberum* becomes obvious when compared to Grotius' views on the sea in *De iure belli ac pacis*. *See, e.g.*, HUGO GROTIUS, DE IURE BELLI AC PACIS LIBRI TRES I, ch. 8, paras. 7 & 13 (The Classics of International Law, photo. reprint 1913) (1646).

[228] *See, e.g.*, *Interview: 'Die großen Fragen bleiben unberücksichtigt'*, DEUTSCHE WELLE (Aug. 18, 2015), http://www.dw.com/de/die-gro%C3%9Fen-fragen-bleiben-unber%C3%BCcksichtigt/a-18654977; *see also* Talmon, *supra* note 41.

[229] HULL, *supra* note 145, at 8.

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Historical parallels between the early 20th century and the rise of China and its challenge to the hegemonic position of the United States have been drawn before. However, these parallels are not limited to political or military aspects. The period before World War I saw significant progress in the codification of international law and in the institutionalization of dispute settlement. And yet, war broke out. When it did, the Allied Powers named the defense of international law as one of the main purposes of their fight. Today, the arbitral proceedings provided for by UNCLOS have not led to a peaceful settlement, and the United States similarly insists that its presence in the South China Sea aims to protect the freedom of the sea, and international law more broadly.

These developments should give the scholarly community pause. That community has construed the development of international law as steady progress towards an increasingly institutionalized and judicialized normative order with constitutional characteristics, in which once-omnipresent considerations of territoriality are slightly démodé. Such a grand narrative is an important element of international legal scholarship. Mere descriptive analysis of a somewhat somber present does not further a peaceful international community, which is the goal that international law is meant to serve. That goal, however, is not furthered by disregarding the considerable challenges posed by trouble spots such as the South China Sea, or by considering such challenges mere temporary distractions from a near-perfect world republic.

The so-called "Chinese curse" aims to condemn its victims "to live in interesting times."[230] Today's international lawyers live in interesting times indeed. Transnational legal regimes are spreading, and more and more aspects of our individual lives are affected by international law. At the same time, the fundamental tenets of international law—its binding nature, its ability to protect peace and enable the enjoyment of basic rights—keep being questioned. This tension should not be brushed over or covered up with well-intentioned utopias. It poses a challenge that should be acknowledged—and accepted.

[230] There is no Chinese equivalent for this "curse." Fittingly for our context, it seems to be a Western expression, apocryphally ascribed to the Chinese. *See* Fred R. Shapiro, THE YALE BOOK OF QUOTATIONS 669 (2006).

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