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

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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 fishing boats and islets were captioned with commentary describing the Chinese discovery of the South China Sea Islands over two millennia ago, and their

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subsequent exclusive exploration and exploitation. 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.” 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.”

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.

If passing tourists noticed the display at all, the historical résumé presumably left most of them perplexed—Chinese assurances to the contrary notwithstanding. 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). The arbitration proceedings were initiated in 2013 by the Philippines under the compulsory dispute settlement procedure provided for by the Convention. 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 so-called “nine-dash line” were invalid. In addition, the Philippines had argued

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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)].


9 South China Sea Arbitration (Award), supra note 7, ¶¶ 112(B)(2) and 192. On the nine-dash line,
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. 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. China, which had neither recognized the Tribunal’s jurisdiction nor participated in the proceedings, rejected the ruling as “null and void.”

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. The technicalities of these questions have also been extensively analyzed by legal scholars, both prior to the final Award and in its wake. 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 the South China Sea also has considerable implications for the law of the sea, 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.
posing 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. 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. Its grounds account for 10 percent of the global annual
fishing catch and are thought to contain considerable oil and natural gas
reserves.

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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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
http://www.scmp.com/news/asia/diplomacy/article/2024548/you-may-have-incidents-singapores-
defence-minister-warns-non; C. J. Jenner & Tran Truong Thu, Introduction, in The South China
Sea, 1, 1 (C. J. Jenner & Tran Truong Thu eds., 2016).
17 INT’L CRISIS GROUP, Stirring up the South China Sea (I) (Apr. 23, 2012).
Sea, and over the Spratly and Paracel Islands in particular. 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. 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. 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. This line was conceived in 1936 and thus predates Communist rule in China. 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. Originally, the various rocks, islets, and shoals comprised circa 15 square kilometers of dry land. 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.

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. 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


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.


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.
legal arguments indirectly.27 Second, it published an official position paper on 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 composition31 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

27 Infra Part V.


29 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.

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 Ministry of Foreign Affairs, People’s Republic of China, supra note 12.

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 in the arbitration: 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.

sway international public opinion, although with rather mixed results. With its eclectic choice of individual statements, the clip itself already illustrates China's difficulties in finding immediate and weighty international support for its position.

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; 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. 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.


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/.

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 Yimen 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 TOULTAO (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.

Clearly, China is unwilling to accept compulsory dispute settlement, at least on matters that are perceived to touch on its (extensively construed) sovereignty.\textsuperscript{40} Yet its absence before the arbitral tribunal does not necessarily amount to a repudiation of the UNCLOS regime, and the option of denouncing the Convention seems to have been dismissed.\textsuperscript{41} After the ruling, there were also some signs of détente between the parties, and in the region more generally.\textsuperscript{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 \textit{casus belli} but over time add up to a major strategic shift.\textsuperscript{43} References to the nine-dash line may have become less frequent.\textsuperscript{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,

\begin{itemize}
\item Chesterman, supra note 40, at 973.
\end{itemize}
implicit recognition of its extensive claims. On balance, it seems rather unlikely that China's attitude will change substantially.

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. 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. The immediate Philippine reaction to the Award was very cautious, with the foreign secretary appealing for “restraint and sobriety.” 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.” He also threatened retaliation for any territorial infringement and promised to work with other East Asian leaders towards the implementation of the arbitral Award.

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. 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 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

52 Id.
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.
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. More generally, the United States reiterated its strong support for the rule of law and for “efforts to resolve territorial and maritime disputes in the South China Sea peacefully, including through arbitration.” 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. 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.”

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. It also emphasizes the global dimension of the dispute in the South China Sea. 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.” 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.” 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 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

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-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).
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).
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.-
maintained the emphasis on freedom of navigation and overflight as “a key principle of the international rules-based order.”

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 norms,” and he went as far as to suggest that Chinese access to the artificial islands should be prevented. 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.

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. 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. 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. 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. Writing at the behest of the Dutch East India Company, Grotius’ primary aim was to “demonstrate briefly and clearly that the Dutch . . . have the right to sail to the Indians as they are now doing and to engage in trade with them.” 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,” hence, “no part of the sea may be regarded as pertaining to the domain of any given nation,” nor could historic claims based on prior exploration (*ante alios navigare*) preclude other seafarers: by perpetual law, the sea was dedicated to common use. 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.”

But as indicated by its sponsors, although Grotius’ pamphlet may have purported to further the “common benefit of mankind,” it also served the very concrete trading interests of the *Staten-Generaal*, the States General of the Netherlands, as an emerging economic power. 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.

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

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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. 26 (emphasis added).
86 Id. at ch. v, p. 31.
87 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)).
88 Id. at Fol. 6 recto.
89 Id. at ch. xiii, p. 66.
90 Cf. Peter Borschberg, Hugo Grotius’ Theory of Trans-Oceanic Trade Regulation: Revisiting Mare Liberum (1609), 29 ITINERARIO 31, 36 (2005).
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, 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

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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).


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


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
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
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
mining107 (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

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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

LAW OF THE SEA 1, 11 (Donald R. Rothwell et al. eds., 2015); TANAKA, supra note 98, at 137.

supra note 98, at 137.

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

104 UNCLOS arts. 55, 3, 136.


106 UNCLOS entered into force on Nov. 16, 1994. 1833 U.N.T.S. 396; cf. Agreement Relating to the
see Stefan Talmon, Seerecht, in LEXIKON DER VEREINTEN NATIONEN 455, 459–60 (Helmut Volger


ratification, and the detrimental effects of U.S. non-participation have been widely acknowledged.\textsuperscript{109} Specifically in the context of the South China Sea.\textsuperscript{110} Yet Senate consent has remained elusive. Opposition has been primarily based on vague concerns over the loss of (extensively construed) sovereignty.\textsuperscript{111} Objections have been voiced against multilateral fora, where U.S. influence is not untrammeled,\textsuperscript{112} when the benefits of UNCLOS could also be achieved “through bilateral and regional agreements.”\textsuperscript{113} In addition, security concerns persist;\textsuperscript{114} so do concerns over “creeping jurisdiction” of international courts\textsuperscript{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.\textsuperscript{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.\textsuperscript{117} Yet the United States raises reservations that are not very different from Chinese objections to compulsory jurisdiction.

\textbf{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.”\textsuperscript{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


\textsuperscript{110} \textit{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.”).


\textsuperscript{112} \textit{Military Implications, supra} note 109, at 59–60 (Statement of Jeane J. Kirkpatrick).

\textsuperscript{113} \textit{Id.} at 57 (Statement of Jeane J. Kirkpatrick).

\textsuperscript{114} \textit{Id.} at 67 (Sen. Inhofe).

\textsuperscript{115} \textit{Id.} at 52 (Sen. Ensign).

\textsuperscript{116} \textit{Id.} at 53 (Sen. Sessions). Specific concerns were also voiced over the possibility of China instigating arbitral proceedings against the United States. \textit{Id.} at 49 (Sen. Inhofe).

\textsuperscript{117} United States-Vietnam \textit{Joint Vision Statement, supra} note 69; \textit{Joint Statement of the United States-Association of Southeast Asian Nations Special Leaders Summit, supra} note 67.

\textsuperscript{118} UNCLOS pmbl. at 4.
United Nations Charter. Tensions in the South China Sea could easily escalate. Armed conflicts have repeatedly flared up in the region.\textsuperscript{119} Over the past years, some coastal States have embarked on significant naval armament, most notably China.\textsuperscript{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 likely—although nationalist \textit{furore} (stoked, for instance, by the stationing of a Chinese oil rig in contested waters)\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{125} Several similar operations have since been conducted, each time with a

\textsuperscript{119}HAYTON, \textit{supra} note 18.

\textsuperscript{120}While these efforts may still primarily be aimed at \textit{modernising} national navies, they also carry “potential arms race implications”. Bernard F. W. Loo, \textit{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, \textit{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.

\textsuperscript{121}Hot Oil on Troubled Water, \textit{ECONOMIST}, May 18, 2014; Mike Ives, \textit{Vietnam Assails China in Sea Dispute, N.Y. TIMES} (Jan. 21, 2016), at A4.

\textsuperscript{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, \textit{A Game of Shark and Minnow}, N.Y. TIMES MAG. (Oct. 27, 2013), http://www.nytimes.com/graphics/2013/10/27/south-china-sea/.

\textsuperscript{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).


\textsuperscript{125}Kristina Daugirdas & Julian Davis Mortenson, \textit{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).
corresponding reaction from China\textsuperscript{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."\textsuperscript{127} More recently, China seized a U.S. underwater drone near Subic Bay on the Philippines,\textsuperscript{128} and a U.S. carrier group started patrolling the South China Sea.\textsuperscript{129} After some hesitation, the new administration has also resumed freedom of navigation operations.\textsuperscript{130}

Air incidents provide even more potential for uncontrollable consequences and may require momentous decisions within minutes.\textsuperscript{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,\textsuperscript{132} following the precedent it set when establishing an ADIZ over the East China Sea in 2013.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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


\textsuperscript{128} China Seizes an Underwater Drone and Sends a Signal to Donald Trump, ECONOMIST (Dec. 24, 2016).

\textsuperscript{129} Xu Lushan, US Resumes Its Provocative Actions in Sea, CHINA DAILY (Feb. 22, 2017).


\textsuperscript{132} An Baije, Air Defense Zone Called Option, CHINA DAILY (July 14, 2016).


\textsuperscript{134} Id. at para. 6.

\textsuperscript{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).
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. Such a restricted view reflects the painful historical experiences mentioned above; conversely, the U.S. position mirrors its need to 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. 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. An equally clear signal was sent by the drills that the Liaoning held in the South China Sea after the arbitral ruling. 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. The Chinese aim to establish an exclusive

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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).
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
sphere of influence also follows previous examples, most notably the Monroe Doctrine, which was granted precedence even under the League of Nations Covenant. 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.

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. 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, the institutionalization of the peaceful settlement of disputes also took great strides. The Permanent Court of Arbitration was established in 1899; efforts to

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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.


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 and 1907, see Betsy Baker, Hague Peace Conferences (1899 and 1907), MPEPIL (2009).

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.\textsuperscript{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,"\textsuperscript{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.\textsuperscript{150}

Nor are the similarities limited to the role of international law. They also extend to the parameters of decision-making processes. In \textit{The Sleepwalkers}, Christopher Clark described the "mental maps" that underlay the actions of Serbian decision-makers in July 1914.\textsuperscript{151} Such maps often deviate from geographical reality – on the Serbian mental map for instance, Bosnia-Montenegro was part and parcel of Serbia.\textsuperscript{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\textsuperscript{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.\textsuperscript{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.\textsuperscript{155} Yet James Shoal is indeed a shoal


\textsuperscript{149} HULL, supra note 145, at 1 (citing Sir Graham Bower, a former British colonial official).

\textsuperscript{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 (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.”).


\textsuperscript{152} CLARK, supra note 151, 34-35.


\textsuperscript{154} Huang & Huang, supra note 37.

\textsuperscript{155} Huang & Huang, supra note 37; HAYTON, supra note 18, at 116.
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 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

156 Hayton, supra note 18, at 56.
159 Frédéric Mégret, Globalisation, MPEPIIL para. 11 (2009).
162 See, e.g., Samantha Besson, Deliberative Democ-racy in the European Union: Towards the
Similar claims have been made in numerous other fields of international law, arguing that law is increasingly detached from territory.\textsuperscript{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.”\textsuperscript{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,”\textsuperscript{165} or have resulted in a “crisis of the territory as a central concept in international law.”\textsuperscript{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.\textsuperscript{167} And even if international institutional regimes are proliferating, their effectiveness often remains too limited to make territoriality less relevant.\textsuperscript{168} "Drawing lines on the ground" may indeed not be the "ultimate response" to the challenges that an "ever-more interdependent humankind" is facing.\textsuperscript{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.\textsuperscript{170}

\begin{flushright}
\textit{Deterritorialization of Democracy, in Deliberative Democracy and Its Discontents} 181(Samantha Besson & José Luis Martí eds., 2006).
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\textsuperscript{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 (\textit{Entterritorialisierung}) was already used by Carl Schmitt in a derogatory and strongly anti-Semitic context. See \textsc{Schmitt, supra} note 143, at 12.

\textsuperscript{164} Enrico Milano, The Deterritorialization of International Law, 2 ESIL REFLECTION (2013).

\textsuperscript{165} Brölmann, supra note 163, at 84.

\textsuperscript{166} Milano, supra note 164.

\textsuperscript{167} See id. (“\textit{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.”).

\textsuperscript{168} Cf. Brölmann, supra note 163, at 92 (naming global health monitoring by the WHO as an example); \textit{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 Functionality? Towards a Legal Methodology of Globalization, in Governance and International Legal Theory 59, 75-88 (Ige F. Dekker & Wouther G. Werner eds., 2004).

\textsuperscript{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).

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

In the South China Sea, Chinese ships have repeatedly dropped "sovereignty steles" over James Shoal. In this region, we may even witness a “re-territorialization”: with highly detrimental consequences to the environment, large areas of land are being reclaimed. 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.

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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.


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/Arcticmap04-08-15.pdf.

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


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.


178 Supra note 25.
in 1823. 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.

B. Constitutionalization

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

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.
182 Jan Klabbers, Setting the Scene, THE CONSTITUTIONALISATION OF INTERNATIONAL LAW 1, 9 (Jan Klabbers et al. eds., 2009).
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 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."\textsuperscript{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 swaths of the high sea.\textsuperscript{194} With regard to \textit{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 \textit{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.\textsuperscript{195} However, as the South China Sea arbitration illustrates, not every new convention or institution is tantamount to an increase in effective international governance.

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,\textsuperscript{196} a sovereignty that is presumably not contingent on respect for human rights or other community values such as ecological responsibility.\textsuperscript{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,"\textsuperscript{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.\textsuperscript{199}

\textsuperscript{193} Closing Statement by the President, supra note 192, at ¶ 44.
\textsuperscript{194} \textit{Supra} III.A and Talmon, supra note 106, at 459—60.
\textsuperscript{195} See, e.g., Bay of Bengal Maritime Boundary Arbitration (Bangl. v. India), Case no. 2010-16 (Perm. Ct. Arb. 2014).
\textsuperscript{196} \textit{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, \textit{Security Law Suggests Beijing Is Broadening Its Definition of 'Core Interests'}, N. Y. TIMES, A10 (July 4, 2015).
\textsuperscript{197} See supra note 187 and accompanying text.
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

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

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200 Peters, supra note 185, at 539.
202 Karin Oellers-Frahm, From Humanitarian Intervention to the Responsibility to Protect, in RESPONSIBILITY TO PROTECT (R2P) 184, 196–203 (Peter Hilpold ed., 2015).
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).
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 Biennial Conference, Paris, May 18-20, 2006); "International Law as Law" (103rd ASIL Annual Meeting, Washington D.C. Mar. 25-28,
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.

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

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

212 Mueller, supra note 32.


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.”

which aims for its summer programs “to be both practical and highly scholarly.” For the time being, such efforts rely to a considerable degree on extrinsic expertise. However, the younger generation of Chinese international lawyers is increasingly expected “to develop distinctively Chinese theories of international law.”

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, it is also important that certain rules are observed so that 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. 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. 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, including, for good measure, the PRC Government position paper.


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?BaseInfoCatId=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.


and a statement by the Chinese Society of International Law. Other academic publications, though purportedly published only “to serve the administration of justice and to strengthen the rule of law,” 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.

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. 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. 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...

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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 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 GROTIIUS, *DE IURE BELLII AC PACIS LIBRI TRES* I, ch. 8, paras. 7 & 13 (The Classics of International Law, photo. reprint 1913) (1646).

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 20\(^{th}\) 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.

Historical parallels between the early 20\(^{th}\) 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

\(^{229}\) Hull, *supra* note 145, at 8.
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." 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).