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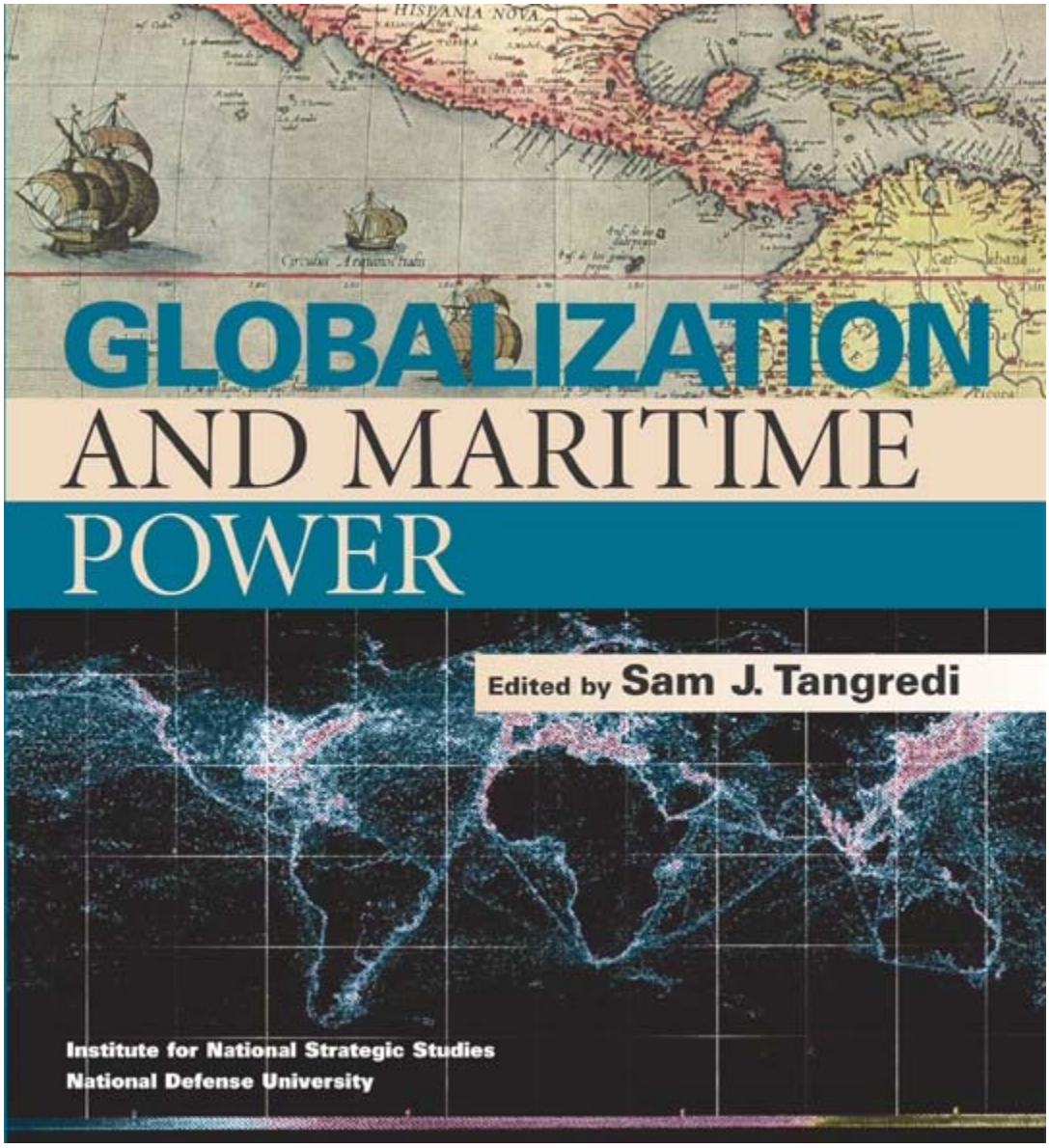

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Chapter 12

The International Law of the Sea in a Globalized World

Daniel Moran

Sensible people have long recognized the incongruity of the claim that Christopher Columbus discovered America, already home to perhaps a million souls at the time of his arrival. It is less widely recalled that Columbus did not mean to discover anything. He thought he knew where he was going and, famously, did not quite realize he had not gotten there. His motives, and those of his royal patrons, were more commercial than scientific. Columbus set out not to uncover new lands but to demonstrate the feasibility of transoceanic travel. It was this achievement, and not his accidental encounter with an unsuspected continent, that proved transformative. Three centuries later, Adam Smith, the evangelist of modern capitalism, would declare the voyages of Columbus and his successors to be the greatest events in the history of the world, a sentiment that has resonated among recent students of what is now called *globalization*.[1] Although it is not a point of view to be accepted uncritically, the fact remains that the inhabitants of the Americas were descended from Asian migrants who arrived on foot via a since-vanished land bridge across the Bering Strait. When Columbus sailed, neither they nor any other major human population had reached its present position on the globe by transiting the high seas.[2] Afterward, this would begin to change.

The Age of Discovery and Maritime Order

Columbus's success presented his contemporaries with two sets of problems, the first scientific, technical, and organizational; the second legal and political. The conversion of the world's oceans from an impassable barrier into what Alfred Thayer Mahan would call a "great common" required centuries of effort in the development of ships capable of withstanding the rigors of ocean voyages, new means of accurate navigation on the open seas (a puzzle that had only just been solved when Smith wrote), and a shore-based infrastructure capable of sustaining the new merchant fleets and the navies that protected them. Most histories of sea power take these achievements as their central theme.

Our interest, however, lies with the second set of problems, those having to do with the development of legal and political norms governing the use of sea and with their role in shaping *globalization*, an expression that requires some preliminary comment, since its meaning is dependent upon context. A recent collection of essays on the subject distinguished between economic, social, cultural, environmental, and military globalization, while noting that additional categories—political, scientific, linguistic, and so on—were possible.[3] Among economists, the group that has subjected the concept to the most rigorous scrutiny, the term refers to the tendency of prices and other measures of economic activity to converge around global norms.[4] Others employ it more generally to refer to the increasing speed and efficiency with which information, material goods, and

money move about the planet, a process driven mainly by new technologies.[5]

For our purposes, however, the essential thing is to note that, as presently understood, globalization in all its forms refers to processes that increasingly operate independently not just of physical distance but also of nationality and the power of the state. It is this aspect that defines its relationship to international law and to our particular concern, which is the law of the sea.

That relationship is less harmonious than might be imagined, though there is a case to be made for what might be called mutual enablement—that is, that international legal rules are conducive to the globalization of trade and social intercourse, and vice versa. As abstract propositions, both international law (a body of theory and doctrine) and globalization (a social and technological practice) share a common impulse toward moderating, if not suborning, the authority of state governments. International law introduces order and due process into the metaphoric space that separates sovereign polities, a space that would seem to be a natural zone of expansion for globalizing economic, social, and cultural forces. Conversely, much of the political resistance to globalization is tinged with concern about its legal consequences: that it will create too much new international law, thus undermining the sovereignty of national governments; or that it will not create enough, and so expose the citizen to the unchecked influence of supranational institutions like the World Bank, the World Trade Organization, or the International Monetary Fund.

Without commenting on the merits of these concerns, it must be emphasized that they rest to some extent upon a misapprehension of what international law is. It is not global law, which is to say it is not the legal expression, even in theory, of the interests of a global civil society.[6] Should such a law become necessary in the future as a consequence of the changes globalization brings, it would require a wholesale reconstitution of the international legal system, which is an expression and creature of the sovereign states that are its subjects. International law, whether operating within the quasi-anarchical states system that prevailed before World War I or within confederated structures like the League of Nations or the United Nations (UN), exists to legitimize certain forms of state power—above all those concerned with self-defense—and to define and coordinate reciprocal relationships among sovereignties, whose autonomy, authority, and equality are taken for granted.

One consequence of the early voyages of discovery was that they provided a sharp impetus for reflection upon these matters. The commercial possibilities of trans-oceanic trade were apparent even before Columbus made his voyage. To realize those possibilities, however, it was equally obvious that the high seas, once their navigability had been proven, could not simply be left as a zone of lawlessness, where each could prey without scruple upon all. At first, the effort to impose a maritime order took the form of schemes to extend the sovereign jurisdictions of the main maritime powers, a natural impulse given the decentralized and competitive nature of the European states' system, but by no means a universal one. The Chinese, who had sent fleets of treasure junks as far as the east coast of Africa before Columbus was born, made no attempt to devise a legal regime for the waters they traversed or the new lands they saw and ultimately abandoned their voyages of exploration on the grounds that the novelties they disclosed were of little practical use.

Among Europeans, however, the proposition that a coastal community had the right to control the water adjacent to it had been proverbial since ancient times and was now extended literally to the ends of the earth. In 1494, Spain and Portugal, with the encouragement of the Pope, divided the world's oceans between them along a line in the mid-Atlantic. Other maritime powers followed suit. For most of the 17th century, what would today be called the territorial sea of the British Isles was held by the English crown to extend to the shores of Scandinavia, thus fully encompassing the putative national waters of the Danes. Genoa, Tuscany, the Ottoman Empire, the Venetian Republic, and the Papacy itself all advanced similarly extensive claims. Even on the most optimistic interpretation, there was reason to believe that when the principle of sovereignty was extended to the high seas, it ceased to be an antidote to anarchy and became an expression of it.

This was so because the pretensions of European princes to rule the oceans were entirely fanciful. On the high seas, the space between sovereignties, which international law seeks to organize, is not metaphorical. It is real. It is also vast and inhospitable to extended human habitation. When, in 1702, a Dutch jurist proposed that the "maritime marches" of a state be limited to waters within the range of cannon fired from the shore—a distance subsequently reckoned to be 3 miles—he was merely affirming the common-sense limits of the possible at the time; though, it would take another century or so before the practice of confining territorial claims to a narrow coastal belt became widely accepted.[7]

Credit for developing the theoretical framework for a maritime regime based upon freedom rather than extended sovereignty belongs to another Dutchman, Hugo Grotius, the preeminent figure in the history of early modern international law. In 1604, the Dutch East India Company asked Grotius to prepare a brief defending the actions of a Dutch admiral who had seized a Portuguese merchantman in the Strait of Malacca. Although Portugal and the Netherlands were at peace when the seizure occurred, Grotius argued in a work entitled *De Jure Praedae* ("On the Law of Prize and Booty") that the Dutch admiral was justified because of the impropriety of Portuguese claims to exclusive trading rights in the East Indies. Five years later, one section of this brief was published as book under the title *Mare Liberum* ("The Freedom of the Seas"), in which it was argued that the seas must be open to all.

Grotius' originality as a legal theorist lay in his claim that states, like individuals, were bound by natural law—that is, rules and principles independent of historical practice and divine revelation (although compatible with the latter) but rooted in the inherent logic of facts. As far as the ocean was concerned, the essential facts were its ubiquity, immensity, and fecundity. In contrast to the land, from which benefit could be derived only by possession, the sea represented an inconsumable, self-renewing resource, whose political subdivision was contrary to nature. From this, two principles and a stipulation followed: that the high seas could not be appropriated by individuals or states; that any use of the sea by one state must leave it available for use by others; and that both provisions must apply during peace and war, except for belligerents, whose goods were lawful prize for each other.[8]

Law of the Sea and the Law of War

Although Grotius' work acquired great prestige among scholars and political theorists,[9] its impact on the maritime law of preindustrial Europe had more to do with his analysis of belligerent rights than with his broader doctrine of freedom of the seas. Claims to sovereignty over the high seas faded during the 18th century less because of the power of ideas than because most of the countries that advanced them—Portugal, Spain, and the states of the Mediterranean littoral—lost out in the military and economic competition of the day; while Britain, one of the winners and an early advocate of closed seas, changed its mind after 1688, when the House of Orange replaced the Stuarts on the English throne, thus tempering Britain's longstanding trade rivalry with the Netherlands.[10] The retreat of sovereignty did not, however, entail any alteration in the prevailing economic attitude known as *mercantilism*, which regarded commerce, piracy, and warfare as, if not synonymous, then as points on a single continuum of international rivalry; and which measured economic success in terms of the accumulation of assets by the state, rather than by growth in trade volume, productivity, and so on.

In such circumstances, maritime law could amount to little more than a codicil of the law of war, by which the taking of prize and booty was organized to general advantage. This is not to suggest that the law of the sea was of no account in the Age of Sail. On the contrary: Clausewitz's peremptory dismissal of international law as a restraint upon the conduct of war,[11] which must have struck the soldiers of his day as mere common sense, would have seemed absurd to the sailors, whose professional lives proceeded among a dense web of prize courts, Orders in Council, Navigation Acts, letters of marque, and a host of treaties and licenses by which the rights to trade and plunder were parceled out.

Grotius and his successors contributed to the construction and management of this web by injecting it with theoretical integrity, in the form of what became known as the Old Rule of prizes. It held, in the words of one authoritative statement, that:

- the Goods of an Enemy, on Board the Ship of a Friend, may be taken
- that the lawful Goods of a Friend, on board the Ship of an Enemy, ought to be restored
- that Contraband Goods, going to the Enemy, tho' the Property of a Friend, may be taken as Prize; because supplying the enemy, with what enables him better to carry on the War, is a departure from Neutrality.[12]

The Old Rule afforded belligerent warships the right to stop, search, and demand explanations from any merchant vessel they encountered—a hard system for those in the carrying trade, who could be hauled before a prize court upon any pretext of irregularity in their papers or cargo. Yet given the alternative, which was piratical mayhem, this rough-and-ready practice afforded essential, if modest, protection to trans-oceanic commerce.

Toward a World Economy

The result was a steady expansion of world trade, which grew by just over 1 percent per annum during the 3 centuries following Columbus' voyage—in aggregate a 20-fold expansion, despite the fact that, for most of this period, warfare was endemic among the major maritime states.[13] A similarly dramatic transformation is apparent in the cultural outlook of European elites. Those who had access to the goods and knowledge that global commerce brought to Europe

learned to think of themselves not as members of a world community by any means, but at least as the preeminent inhabitants of a planet whose farthest reaches offered scope for their ambitions. Grotius himself regarded the ubiquity of the oceans as proof that God intended all the nations of the world to be in contact with each other, so that each might profit from the special talents and resources of the others.[14]

Nevertheless, the enthusiasm that some scholars have shown for the proposition that globalization, as presently experienced, antedates the industrial era is not supported by a close analysis of how long-distance maritime trade actually worked. It was, first of all, almost entirely the business of state-chartered monopolies—the Dutch East India Company is an example—that operated in cooperation with their respective national navies. The resulting trading patterns did not resemble a network but were confined to noncompetitive goods of high value relative to their bulk. Europeans imported spices, tea, coffee, silk, gold, and sugar, which were rare or nonexistent on the continent, and exported silver, wool, and linen to Asia. Only goods for which there was no local competition could command prices high enough to cover the costs of transoceanic transportation. This in turn meant that while the interruption of overseas trade in wartime might adversely affect the finances of a state that depended upon it for cash, it had no impact upon the broader society, which neither produced nor consumed the categories of goods involved.

True economic globalization, as measured by a combination of trade expansion, price convergence, and competition between imported and domestic goods, dates from the dismantling of mercantilism in the decades following the Napoleonic wars. Two general sets of factors contributed to the demolition. First, and most important, were improvements in transportation technology. The advent of railroads lowered the cost of overland transportation—historically an order of magnitude more expensive than moving the same goods over water—which expanded the market for products arriving from overseas and also increased the feasibility of producing low-margin primary commodities for export. The cost advantages of railroads were compounded by those of oceangoing steamships. The cost per ton of transoceanic trade did no better than hold its own (and probably rose) over the 17th and 18th centuries, for reasons that included an increasing need for insurance and other precautions against capture as prize.[15] In the 19th century, they decline dramatically. No one knows what it would have cost to ship a bushel of grain from New York to Liverpool in 1800, since it would not have occurred to anyone to try it. In 1874, however, it cost 20 cents on a piston-engine steamer. In 1881, thanks to the introduction of the Parsons turbine, it cost 2 cents.[16]

The market efficiencies embodied in new technologies were realized in large part because of the advance of political liberalism, which shifted state attitudes in the direction of free enterprise, and because of the prevalence of peace among the Great Powers following the defeat of Napoleon in 1815.[17] Although it would be wrong to suggest that Europeans had lost their taste for “prize and booty” as a consequence of the wars engendered by the French Revolution, there is no question that the Concert of Europe was less prone to adopt war as an all-purpose instrument of policy than the Old Regime had been. As one recent study of the period has noted, no European state threatened with war in the decades before 1789 ever succeeded in avoiding it, even if it tried hard to do so.[18] This was

certainly not the case after 1815.

The defeat of France allowed high wartime tariffs to be dispensed with, an adjustment that marked the beginning of a secular trend toward trade liberalization. Internal customs duties disappeared in Germany and much of the Habsburg Empire; the paramilitary royal companies that had dominated global trade under the Old Regime were disbanded; and Britain, now uncontested master of the high seas, shifted its weight decisively in favor of free trade by abolishing its tariffs on imported grain. In the second half of the 19th century, global terms of trade shifted permanently in favor of finished goods and against primary commodities, whose prices fall regardless of where they are produced. The rate of trade expansion between 1820 and 1914 more than tripled compared to that of the previous 3 centuries, to 3.5 per cent per annum, a rate that has persisted to this day.[19] Labor and capital followed the flow of goods. The plummeting cost of transoceanic transportation allowed tens of millions of Europeans to migrate to the Americas. In 1910, 17 percent of the population of the United States and 24 percent of its work force consisted of immigrants. By 1913, overseas investment (as a percentage of total investment) had reached a level comparable to that of today, and possibly exceeded it.[20]

Free Trade and Belligerent Rights

The rise of free trade demanded a new approach to the international law of the sea, in which the theoretical structure developed during the Enlightenment would be adapted to an environment in which private interests and the rights of neutrals counted for far more than they had in the past. And here one could do worse than to recall Clausewitz's "paradoxical Trinity," by which war was imagined to be a phenomenon suspended among three magnets: violence, chance, and reason.[21] In considering the evolution of the law of the sea, one might think of the magnets as three sets of interests, each in need of legal protection. The first are the interests of warfare; the second, those of trade, which requires unfettered use of the high seas and uninterrupted access to the ports of trading partners; the third, those of direct economic exploitation, which seeks to harvest resources for use and to bar competitors from doing the same.

The customary prize law of the Old Regime was transformed into the modern, treaty-based law of the sea because of the increasing strength of the second magnet during the 19th century. The elemental tug of commerce was strengthened by the emergence, for the first time, of a major trading state indifferent to the rivalries of the European powers and without a strong navy of its own. This was, of course, the United States, whose economic might was arrayed behind a policy that sought to extend the protection of international law to all private property on the high seas.

Like most strongly held principles, this one was capable of forcing some unattractive tradeoffs. Thus the United States, having outlawed the slave trade in 1808 (a year after the British did so), nevertheless refused to cooperate in its suppression on the high seas, on the grounds that the only thing worse than slavery, in the words of Secretary of State John Quincy Adams, would be "admitting the right of search...for that would be making slaves of ourselves."[22] America's adamant stance weighed heavily with its biggest trading partner, Great Britain.

Britain had gotten itself into war with its former colonies in 1812 because of the Royal Navy's too-forcible assertion of belligerent rights. When the Crimean War began in 1854, it sought to avoid any repetition by announcing that it would forego its right to search neutral vessels engaged in trade with the enemy. This concession, initially conceived as a wartime expedient, became impossible to withdraw once granted and was incorporated in a declaration accompanying the Treaty of Paris in 1856. Under its terms, the Old Rule was supplanted by the New, whose provisions were that privateering—the licensing of private ships as commerce raiders—was abolished; that enemy goods (save contraband) could move freely on neutral ships; that neutral goods (again save contraband) could move freely on enemy ships; and that a blockade had to be "effective" to convey belligerent rights—meaning it had to be maintained by large naval forces and not simply proclaimed as a pro forma means to legalize prize-taking.[23]

Only seven countries signed the Declaration of Paris, but all the major maritime powers adhered to it, including the United States, which declined to sign because the declaration's provisions fell short of complete immunity for all private vessels, including those of belligerents. The declaration codified a fundamental change in the balance of interests between warfare and trade on the high seas, in effect shifting the benefit of the doubt from the one to the other. It did so, however, at a time when the globalization of world commerce was altering the strategic landscape in ways whose implications were decidedly puzzling, at least for those who favored the advance of liberty in politics.

It was not simply that the cause of freedom on the oceans might confound the same cause elsewhere, as Adams's painful remark about slavery makes plain enough. It was that it was not easy to agree on what kind of legal regime would be most conducive to the cause of peace, upon which the progress of global trade depended. The triumph of the New Rule reflected the rise of commercial interests and a specific interpretation of how those interests would play out militarily. Advocates of immunity believed they were creating "a partial commercial peace in the midst of...political war."[24] If war persisted, then at least it would be reduced to "a duel between Governments and their professional fighters."[25]Precisely for that reason, however, others were convinced that the restraining effects of globalization on the bellicosity of governments would be lost if commercial interests were not at risk. In their eyes, the true hope of peace, and the only true security for commerce in wartime, lay in the continued assertion of belligerent rights by peaceloving commercial democracies.[26]

Diplomatically, immunity was a legal position endorsed by states without strong navies, a fact that advocates sought to finesse by arguing that, like other advances of free trade, its benefits would accrue to maritime nations—quoting Adams again—"in proportion to their interests...upon the Ocean." Strong maritime states need not fear the loss of belligerent rights, since they were gaining "entire security" for their own commerce, the true source of national strength in modern times.[27] As the naval strength of the United States grew, however, its experts came to doubt the wisdom of its traditional policy. Thus Alfred Thayer Mahan wrote to President Theodore Roosevelt in 1904, warning that America's insistence upon "free ships, free goods" had "lost the fitness it possibly once had to national conditions." Roosevelt saw the point, while noting that the advance of civilization had brought with it "a strong tendency to protect private property and private life

on sea and land."[28] In the event, it proved difficult to abandon an ideological commitment of such long standing. The United States voted with Germany and a host of small neutrals at The Hague in 1907, in an unsuccessful attempt to abolish the right of search and capture on the high seas. It was still hectoring Great Britain about freedom of the seas until a few weeks before it entered the war against Germany in 1917.

Globalization in Retreat

By then, however, the real strategic significance of globalization was becoming apparent, particularly for the inhabitants of continental states cut off by the competing blockades mounted by Germany and Great Britain. Not only had the expanding web of commercial relationships created during the 19th century failed to avert war among trading partners, it also had created new forms of strategic vulnerability. One reason the British had gone as far as they had in accepting the New Rule was that they had come to regard war against commerce as an unprofitable diversion of naval forces—a point of view shared by American navalists like Mahan. The revolution in the terms of trade that globalization had brought about falsified this tactical assumption no less thoroughly that it had dashed liberal hopes for perpetual peace.

All major belligerents in World War I (except the United States) were dependent upon primary commodities imported from overseas—most critically food, for which demand is constant and substitution difficult. In 1917, Germans were consuming 40 percent fewer calories per day than they had been 3 years before, thanks to the British blockade. The unlimited submarine campaign they unleashed by way of reprisal brought Britain to the brink of defeat in its turn, an outcome narrowly avoided only when major naval assets were grudgingly diverted from fleet operations to commerce protection.

Such effects were unknown to maritime warfare in the past. Under the Old Regime, the major impact of a naval blockade was financial. In a globally interdependent world, it struck directly at society as a whole. Prolonged deprivation of a kind never before experienced by an industrial population eroded German civilian and military morale and confronted the government in Berlin with almost insoluble problems of manpower allocation, as the army and war industries relentlessly absorbed the labor needed to increase domestic food production. Nor were the effects purely psychological. Upward of 700,000 German civilians died in World War I, a toll directly attributable to their being cut off from the vast, unseen network of overseas farmers and grain merchants on which they had become dependent. In searching for the roots of Germany's defeat in 1918, the advent of free trade in grain 80 years before is not a bad place to start.[29]

World War I brought an end the world's first great era of globalization. The subsequent retreat into autarky, which persisted until after 1945, was due partly to the economic dislocation the war caused and partly to new apprehensions about excessive dependence on overseas trade.[30] Although the creation of the League of Nations in 1919 promised to inject new vitality into international law, the impact of collective security on the law of the sea was limited. The general drift of legal development before 1914, as reflected in the Declaration of Paris, The Hague and Geneva conventions, and countless other agreements, had been to protect the

rights of private persons and property, soldiers (as individuals), and neutrals from the consequences of military action. In the era of collective security, the aim was raised to incorporate a ban upon international violence per se, a goal for which legal remedies would prove inadequate in the face of determined aggression by strong states.

Economic globalization resumed in the 1950s, stimulated by a combination of proactive measures to hasten postwar reconstruction—the Marshall Plan and the founding of the World Bank and the International Monetary Fund most prominently—and the final breakdown of European empires, which left successor states more exposed to the risks and rewards of international markets than ever before. At the same time, certain basic premises of international life had been permanently altered by protracted global conflict and the advent of collective security. Even at the turn of the 20th century, the right of developed states to use force to manage their relations with the less developed world was scarcely questioned. In the aftermath of the world wars, this would no longer be true.

The United Nations and Law of the Sea

These developments coincided with a renewed concern with the law of the sea, pulled along now by economic exploitation, the third of the magnets described earlier. In Grotius' day, or for that matter in Mahan's, the direct appropriation of ocean resources was chiefly the business of fishermen and whalers, whose disputes, while perennially contentious, are ultimately parochial. As the industrialized world shifted from coal to oil as its principal source of energy, however, the attractions of the seabed for the world's oil industry became intense, and the stakes involved in regulating economic use of the ocean grew large. American companies began drilling a few thousand yards offshore in the Gulf of Mexico in the 1930s, and as technology improved, the question of how to manage expansion into deeper, international waters arose. In September 1945, the United States formally asserted its "jurisdiction and control" over its continental shelf out to a depth of 200 meters, a zone extending far beyond its 3-mile territorial sea. Because the claim was specifically to seabed resources, however, the waters above remained "high seas," through which free passage was guaranteed.[31]

Over the next few years, dozens of states followed the American example, albeit with significant variation in legal form, and in some cases with express reservations about the international status of the superjacent sea. In 1958, the first United Nations Conference on the Law of the Sea (UNCLOS) sought to get the cat back in the bag by, in effect, codifying what must have seemed to the Truman administration a simple enough distinction: national sovereignty (roughly) for the seabed, but not for the water above it.[32] By then, however, the process of subdividing and refining jurisdictional claims beyond the territorial sea, for purposes of regulating mining, drilling, fishing, environmental pollution, and so on, had acquired a highly contentious life of its own. In the process, the longstanding but uncodified convention limiting the territorial sea to 3 miles collapsed, under pressure from post-colonial regimes with scant means of exploiting or defending maritime rights, and fearful of encroachment by more capable outsiders. Among the 101 states that joined the UN between 1946 and 1980, only 8 settled for a 3-mile territorial sea—most claimed 12 miles, a few as many as 200—a tide the UN was unable to stem at a second conference (UNCLOS II) in 1960.

For the developed world, the expansion of the territorial sea posed a threat to navigation and overflight, above all as applied to international straits. Special rules of access to a few critical straits have been a feature of black-letter international law since 1841, when the British forced the abrogation of an earlier treaty between the Russians and the Ottoman Empire, restricting the right to transit the Dardanelles (which are less than a mile wide at their narrowest point). For most such vital waterways, however, the 3-mile limit provided de facto assurance of a middle channel through international water. If 3 miles were stretched to 12, however, over 100 international straits would become subject to the sovereign claims of the nations that bordered them. To this concrete concern must be added nebulous unease about the fact of disorder as such. As Adams pointed out to the British in the 1820s, powerful maritime states will profit from an orderly oceans regime in proportion to their interests on the water, even if achieving order means giving up familiar advantages. The United States would now find itself on the receiving end of this very argument.

The political leverage by which the major maritime powers would arrest the creep of sovereignty onto the high seas arose because the prospect of anarchy began to trouble the developing world as well. In particular, it was feared that new technologies would allow the mining of polymetallic nodules on and beneath the ocean floor, an activity in which Third World nations could not compete for lack of technology and expertise, and which if successful might ruin land-based producers of the same metals, many of which are found in poor countries. Extravagant territorial claims projecting outward from the shoreline could not protect against this threat. In the late 1960s, something between a gold rush and an arms race seemed to impend, as envisioned most candidly by Malta's ambassador to the UN, Arvid Pardo. In an August 1967 speech delivered before the UN Ad Hoc Committee to Study the Peaceful Uses of the Seabed and the Ocean Floor beyond the Limits of National Jurisdiction, Pardo prophesized that as the seabed became "progressively and competitively subject to national appropriation and use," rapid militarization and resource depletion would follow, through which "the common heritage of mankind" would be siphoned off "for the national advantage of technologically developed countries."[33]

Pardo's phrase, "the common heritage of mankind," would become the watchword of contemporary ocean law 15 years later, with the promulgation of UNCLOS. The convention, the fruit of 9 years of negotiation involving 149 countries and nongovernmental organizations, is in textual terms the longest international agreement ever recorded. Much of its contents are devoted to technical questions—the precise methods for drawing the baselines from which territorial and archipelagic seas are measured, for instance—whose resolutions are mainly of administrative and juridical significance.[34] At the treaty's heart, however, lay a pathbreaking political compromise, by which the developed world's concern with commercial access and navigation was assuaged in return for concessions designed to assure poor countries a share in any future development of ocean resources. And here the treaty's framers failed to allay the qualms of key constituents, notably the United States, which balked at the convention's provisions regarding seabed mining. Ratification was delayed an additional 12 years while a separate agreement amending the relevant articles was hammered out. The resulting treaty, plus the associated agreement, finally entered into force on November 16, 1994,

and is now regarded by most nations, including the United States, as "an authoritative expression of existing international law"[35] (though it still awaits ratification by the U.S. Senate).

From the point of view of the continued expansion and integration of the world economy, the most important achievement of UNCLOS III is undoubtedly its statutory definition of the territorial sea, which is now limited to 12 miles and linked to two other legally defined zones, across which a coastal state's authority gradually diminishes. Thus an additional 12 miles may be claimed as a contiguous zone, where a state may enforce its own regulations respecting customs, immigration, fiscal, and sanitary matters; and beyond that an additional exclusive economic zone (EEZ), extending out to 200 miles, over which it may claim exclusive rights with respect to all living and nonliving resources of the water, seabed, and subsoil. Travel through international straits and archipelagic sea lanes falling within territorial seas are governed by special rules of transit passage, which must remained unobstructed at all times for civilian and military vessels alike, including submerged submarines.

All these provisions have attracted comment and concern. It is by no means unreasonable to worry, for instance, about states adopting onerous conditions respecting the treaty's provision for innocent passage for all ships (including warships) through territorial seas (as has already happened in a number of instances [36]—though it must be admitted that a propensity for onerous behavior does not depend on the depth of the water in which it occurs). The enormous size of the EEZ is sufficient in itself to give pause. Together with the territorial sea and contiguous zone, it comprises about one-third of the world's oceans, and 99 percent of the world catch of fish is taken there.[37] Its extent ensures that the zones of neighboring states often overlap, and drawing the lines necessary to separate them is by no means a purely mechanical process.[38] At the same time, because the EEZ is defined from a baseline drawn along the shore, it does not always encompass the resource-rich continental shelf, for which many additional rules and exceptions are provided—rules that have no bearing on the status of the superjacent waters. From such intricacies, friction will surely come, as well as from numerous points at which UNCLOS III provisions transgress expectations based upon earlier treaty law.[39]

The central issue, however, is whether the hierarchy of zones established by UNCLOS III checks the drift toward extended sovereignty that began with the Truman Declaration in 1945 or simply applies an additional layer of grease to an already slippery slope. History, it has been proposed, shows that "claims to jurisdiction have always tended to harden into claims to sovereignty,"[40] a proposition that should not be taken at face value. If history shows anything in the matter, it is that, in international law, practice trumps theory. The question, for instance, whether the EEZ is high seas, over which coastal states exercise a few special rights, or alternatively an extension of the territorial sea, in which outsiders are accorded a few special privileges, is left unsettled by UNCLOS III, and remains fair game for contestation. Yet it is equally reasonable to view UNCLOS III as having injected an element of elasticity into a process in which rigidity is usually a portent of rupture. As long as the major maritime states persist in treating the EEZ as high seas for purposes of war and trade, that is what it will be. In this regard, the fact that the largest zones are claimed by states with a profound interest in freedom

of navigation—the largest EEZ of all is that of the United States—is an additional source of reassurance.

UNCLOS III initially failed ratification not because of doubts about its regime of zones, but because of the way it handled what was left over once all the lines were drawn—specifically the international seabed beneath the high seas, known in the treaty as "the Area." It is in the Area that the "common heritage of mankind" is found, and it was to get a share of it that the developing world was prepared to curtail its exfoliating claims to sovereignty. UNCLOS III placed the Area under the jurisdiction of a new agency, the International Seabed Authority (ISA), which was responsible for regulating exploration and exploitation and for equitable sharing of benefits. To achieve the latter, it was envisioned that commercial development would proceed along parallel tracks. Applicants who wished to mine the seabed would be required to submit plans identifying two sites of equal estimated value, one of which would be reserved for development by the ISA commercial organ, called the "Enterprise," which would distribute proceeds to the treaty's poor signatories. Private-sector and national companies that wished to mine in the Area would be required to sell their technology to the Enterprise and to pay annual fees for working their designated sites. They would also be subject to ISA-administered environmental rules and to production limits intended to protect land-based producers of the same minerals.

These provisions proved troubling to a number of developed countries and wholly unacceptable to the United States, which became one of only four conference participants to refuse signature of the treaty in 1982. Much has been written about the nature of America's objections and about the cynicism with which they were advanced, for it was clear to all that the provisions about which the United States cared most—the new rules defining the territorial sea, the contiguous zone, and the EEZ—were certain to become customary law, regardless of whether the United States signed or not. Subsequent negotiations amended the deep seabed regime in fundamental ways by eliminating access fees, mandatory technology transfers, and production limits; and by changing the ISA composition to ensure that the interests of developed states were represented in proportion to their economic weight, rather than their numbers among the UN membership. It was with these emendations that the treaty finally entered into force.

Beyond UNCLOS

It is difficult today to recapture the intensity of feeling that once attached to UNCLOS III seabed mining provisions. The celebrated polymetallic nodules have proven to be among nature's more elusive creations, whose successful recovery is now conceded to be many years away.[41] In the meantime, the industrialized world's anxiety about "strategic metals" has faded with the ending of the Cold War, while many of the Third World states that hoped to gain from a centralized scheme for redistributing wealth now prefer market solutions instead. It was, indeed, precisely because of these exogenous changes in the political and economic environment that a seabed treaty acceptable to all was finally achieved.

Which, in the present context, is very much the point. During the years in which UNCLOS III was aborning—roughly the late 1960s to the early 1990s—the world economy more than doubled in size and developed wholly unanticipated new

forms of dynamism, integration, and growth—forms in which activities like mining, however esoteric, play a far less prominent role than anyone imagined a generation ago. When UNCLOS III was first negotiated, its proponents imagined that it was a harbinger of the future, "a new platform from which to launch a new international order."

The concept [is] of a public international institution that is operational, capable of generating revenue, imposing international taxation, bringing multinational companies into a structured relationship; responsible for resource planning on a global scale, as well as for the protection and conservation of the marine environment and scientific research. An institution linking politics, economics and science in new ways—a model, potentially, for international organizations in the twenty-first century.[42]

That the past should have been wrong about what the future would hold is unsurprising. We are undoubtedly equally mistaken in our expectations. The question UNCLOS III raises is not about failed prophecy but about responsiveness to the modern pace of social and economic change. And here we must recall a point made at the start: that international law is made by and for states, which are not the lead actors in the drama of globalization and may be among the less quick of the supporting players. UNCLOS III was and is distinguished by a desire to elevate global interests above those of state governments; quite apart from its creation of a wholly new international regime for the ocean floor, its signatories are bound to settle treaty-related disputes either in international courts or through binding arbitration. Yet the convention's effort to visualize how those interests should be embodied in institutions already looked outdated on the day it came into force.

Law of the Sea versus Global Terrorism: Wrong Place to Look

The terrorist attacks directed against the United States in September 2001 seem certain to challenge the law's capacity to adapt to strategic change as well. The modern law of war aims to discriminate between the civil and the military, between belligerents and bystanders, between the use of lethal force and the larger interests of humanity. Its capacity to interpret events and render justice will be sorely tested by new forms of massive social violence designed precisely to blur all such distinctions. How far the global war on terrorism will impact the distinctive interests of the law of the sea is difficult to judge, though it is easy to imagine scenarios by which that impact could be profound. Had the attacks of September 11 been delivered not by hijacked airliners but by liquefied natural gas tankers detonated in New York Harbor and the Delaware Bay, the subsequent actions of the U.S. Navy probably would not have been much constrained by concern for a 12-mile territorial sea. Yet it is generally true that international legal structures fall short when confronted with worst-case scenarios, and in their absence it is perhaps equally likely that the habits of compromise and conciliation that UNCLOS III embodied will prove their worth in strategic terms as well.

Still, the international law of the sea has evolved to support global trade and enterprise. Its value in the eradication of a global scourge is as yet untested. The best historical precedent, the suppression of the slave trade, is not reassuring. Rather like terrorism, slavery in the 19th century was a practice that found few

open defenders beyond the narrow ranks of those directly involved in it. It was declared anathema by the Treaty of Paris in 1815 and outlawed everywhere in Europe, even by states that tacitly supported the overseas trade between Africa and the Americas. Yet the British, who were determined to end the trade, were unable to construct an international legal consensus, because action against slavery was thought to jeopardize other important interests—free trade in the case of the United States, and national pride and autonomy in the case of small countries such as Portugal and Belgium, which profited surreptitiously from the trade. In the end, the British proceeded instead on the basis of bilateral treaties and by asserting what was in fact a belligerent right—the right of search—in peacetime, a borderline illegal practice that heightened Britain's reputation for arrogant unilateralism.[43] Slavery and the trade in slaves were proscribed by international law only in 1926, long after the issue had been substantially settled by more forcible means.

It therefore bears repeating: in matters of international law, practice trumps theory. Or, more precisely, it precedes it, both logically and for the most part historically, as the developments surveyed in this essay illustrate clearly enough. This deferýnce of theory to practice is not a defect of international law. On the contrary, it is testimony to its underlying realism and utility. Yet it does suggest that international law is probably not the place to look for leadership in solving the problems of the emergent global economy or in addressing the strategic challenges that have followed in its wake.

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Notes

[1] Adam Smith, *The Wealth of Nations*, vol. 2 (London, 1776; reprinted 1791), 139. Among scholars who accept the Columbian era as a watershed dividing a globalizing modernity from a parochial past, see Andre Gunder Frank, *ReOrient: Global Economy in the Asian Age* (Berkeley: University of California Press, 1998), 52; Jerry H. Bentley, "Cross-Cultural Interaction and Periodization in World History," *American Historical Review* 101, no. 3 (June 1996), 749–770; Immanuel Wallerstein, *The Modern World System, vol. 1: Capitalist Agriculture and the Origins of the European World-Economy in the Sixteenth Century* (New York: Academic Press, 1974), 67; William H. McNeill, *A World History*, 4th ed., rev. (New York: Oxford University Press, 1999). BACK

[2] Pacific islanders did transit the open ocean to spread out across the Pacific, but not in the numbers of the prehistoric Asian or post-Columbian migrations. BACK

[3] Robert O. Keohane and Joseph S. Nye, Jr., "Introduction," in *Governance in a Globalizing World*, ed. Joseph S. Nye and John D. Donahue (Washington, DC: The Brookings Institution Press, 2000), 1–6; see also Alan W. Heston and Neil A. Weiner, eds., "Dimensions of Globalization," in *The*

Annals of the American Academy of Political and Social Science 570 (London: Sage Publications, 2000), which adopts a similar scheme with different results. For Keohane and Nye, globalization dates from the campaigns of Alexander the Great (4); for Heston and Weiner, it is a phenomenon of the last 20 years (8–17). BACK

[4] Kevin H. O'Rourke and Jeffrey G. Williamson, *Globalization and History* (Cambridge, MA: MIT Press, 1999); Jeffrey G. Williamson, "Globalization, Convergence, and History," *Journal of Economic History* 56, no. 2 (June 1996), 1–30. BACK

[5]Richard Langhorne, *The Coming of Globalization* (New York: Palgrave, 2001); see also Pippa Norris, "Global Governance and Cosmopolitan Citizens," in Nye and Donahue, 155–177. BACK

[6] Whether international law is an expression of international society—that is, the society created by states among themselves—is another question, on which see Kai Alderson and Andrew Hurrell, *Hedley Bull on International Society* (New York: Palgrave, 2000). BACK

[7] Cornelius van Bynkershoek, *De dominio maris* (Leyden, 1702), chap. 2. The principle of a maritime belt began to command general acceptance after it was taken up by Emer de Vattel in his influential *Le Droit des Gens* (1758). It was subsequently incorporated into the customs and fishery regulations of a number of states. See Ian Brownlie, *Principles of Public International Law,* 5th ed., rev. (New York: Oxford, 1998), 179. The formalization of the "cannon-shot rule" into the now-defunct 3-mile limit for territorial waters was the work of British and American prize courts during the Napoleonic wars. BACK

[8] Grotius, *Mare Liberum*, chap. 5. Grotius' work does not include the idea of a maritime belt as sovereign territory. For him, the high seas extended from shore to shore. BACK

[9] The most serious objections to Grotius' arguments involved his assumption that the resources of the sea were unlimited, a claim that even 17th-century fisherman knew to be false. See William Welwood, *An Abridgment of All Sea Lawes* (London, 1613), and John Selden, *Mare Clausum* (London, 1635), book 1. BACK

[10]The outcome of the struggle for precedence in early modern Europe testifies to the limited weight of preindustrial globalization. Except for Spain in the 16th century, none of the countries that rise to the top during this period do so on the strength of gains from overseas trade and empire. See David Eltis and Stanley L. Engerman, "The Importance of Slavery and the Slave Trade to Industrializing Britain," *Journal of Economic History* 60, no. 1 (March 2000), 123–144. BACK

[11] Carl von Clausewitz, *On War* (1832), ed. and trans. by Michael Howard and Peter Paret (Princeton: Princeton University Press, 1976), 75. BACK

[12] The Duke of Newcastle's *Letter by His Majesty's Order*, to Monsieur Michell, the King of Prussia's Secretary of the Embassy (London, 1753), 10. Newcastle, citing Grotius as his authority, wrote to defend Britain's wartime seizure of French goods on a neutral Prussian merchantman. The original text is not in the form of a bullet list; it appears here in that form for clarification. BACK

[13] Kevin H. O'Rourke and Jeffrey G. Williamson, *After Columbus: Explaining the Global Trade Boom, 1500–1800*, National Bureau of Economic Research Working Paper 8186 (Cambridge, MA: MIT Press, 2001), 3. During the century and a half studied by Mahan in his *Influence of Seapower* series (1660–1815), there were no more than a score of years in which at least one of the major maritime states (France, Britain, Spain, and the Netherlands) was not at war. BACK

[14] *Mare Liberum*, chap. 1. BACK

[15] Ralph Davis, *The Rise of the English Shipping Industry in the Seventeenth and Eighteenth Centuries* (London: David and Charles, 1962), 262–264; Russell Menard, "Transport Costs and Long-Range Trade, 1300–1800: Was There a European 'Transport Revolution' in the Early Modern Era?" in *The Political Economy of Merchant Empires*, ed. James D. Tracy (Cambridge, Cambridge University Press, 1991), 228–275. BACK

[16] Norman Stone, *Europe Transformed, 1878–1919* (Cambridge, MA: Harvard University Press, 1983), 25. BACK

[17] Kevin H. O'Rourke and Jeffrey G. Williamson, *When Did Globalization Begin?* National Bureau of Economic Research Working Paper 7632 (Cambridge, MA: MIT Press, 2001), argues that about 75 percent of price convergence in the 19th century is due to declining transportation costs, with the remainder attributable to the liberal policy shift. BACK

[18] Paul Schroeder, *The Transformation of European Politics, 1763–1848* (New York: Oxford University Press, 1994), 52. BACK

[19] O'Rourke and Williamson, *After Columbus*, 3. BACK

[20] Peter H. Lindert and Jeffrey G. Williamson, *Does Globalization Make the World More Unequal?* National Bureau of Economic Research Working Paper 8228 (Cambridge, MA: MIT Press, 2001), 13–14 and table 2. BACK

[21] Clausewitz, 89. BACK

[22] Adams was of course an ardent abolitionist himself. The quoted statement, made to the British Ambassador, is in H.G. Soulsby, *The Right of Search and the Slave Trade in Anglo-American Relations, 1814–1862* (Baltimore: Johns Hopkins University Press, 1933), 18. On Anglo-American maritime relations generally, see Bernard Semmel, *Liberalism and Naval Strategy: Ideology, Interest, and Sea Power during the Pax Britannica* (Boston: Allen and Unwin, 1986), especially 31–67, 152–171. BACK

[23] "Paris Declaration Respecting Maritime Law," April 16, 1856, in *Documents on the Laws of War*, ed. Robert Adams and Richard Guelff, 3rd ed., rev. (New York: Oxford University Press, 2000), 47–49. BACK

[24] [Henry Reeve], "The Orders in Council on Trade During War," *Edinburgh Review*, July 1854, 221–222. BACK

[25] Richard Cobden to W. S. Lindsay, August 29, 1856, in Semmel, 71. BACK

[26] John Stuart Mill, speech of August 5, 1867, in *Parliamentary Debates: House of Commons*, 3d series (London: HMS Stationary Office, 1869), 880. BACK

[27] Adams to [British] Minister Rush, July 28, 1823, in *Policy of the United States Toward Maritime Commerce in War* vol. 1, ed. Carlton Savage (Washington, DC: Government Printing Office,1934), 306–307. BACK

[28] -or this exchange of letters see Semmel, 155. BACK

[29] On the consequence of food shortage for the German war effort, see Avner Offer, *The First World War: An Agrarian Interpretation* (New York: Oxford University Press, 1989). The severe German death toll was the result not of starvation but of declining resistance to disease, increased infant mortality, and so on. For the original statistics, see the League of Nations study compiled by Frank W. Notestein et al., *The Future Population of Europe and the Soviet Union: Population Projections, 1940–1970* (Geneva: League of Nations, 1944). BACK

[30] A third cause, less immediately germane to our theme, was the increasing economic inequality that accompanied globalization in Europe. Socialist, national-socialist, fascist, and communist parties all sought to limit the impact of international capitalism on the mass of the population, and liberal regimes that feared radical opposition forces were disposed to do likewise by way of self-defense. Scholars are uncertain whether a similar link between globalization and inequality exits today. See Adrian Wood, *North-South Trade, Employment, and Inequality: Changing Fortunes in a Skill-Driven World* (New York: Oxford, 1994); and Kevin H. O'Rourke, *Globalization and Inequality: Historical Trends*, National Bureau of Economic Research Working Paper 8339 (Cambridge, MA:

MIT Press, 2001). BACK

[31]The text of the U.S. declaration is in Marjorie M. Whiteman, *Digest of International Law* 4 (Washington, DC: U.S. Department of State, 1963–1973), 756. BACK

[32] UN Convention on the Continental Shelf, excerpted in Brownlie, 213. BACK

[33] Excerpted in George V. Galdorisi and Kevin R. Vienna, *Beyond the Law of the Sea: New Directions of U.S. Oceans Policy* (Westport, CT: Praeger, 1997), 25. BACK

[34] For an authoritative analysis of the convention's legal meaning, see *United Nations Convention on the Law of the Sea: A Commentary*, 5 vols., ed. Myron H. Nordquist (Boston: Martinus Nijhoff, 1985). The first volume includes the text of the treaty itself (206–403). The best non-technical account, with emphasis upon American policy, is Galdorisi and Vienna. The older work by Ken Booth, *Law, Force, and Diplomacy at Sea* (Boston: Allen and Unwin, 1985), now somewhat overtaken by events, remains useful for its insights into the convention's political and strategic context. BACK

[35] Lung-Chu Chen, *An Introduction to Contemporary International Law: A Policy-Oriented Perspective*, 2d ed. (New Haven, Yale University Press, 2000), 133. BACK

[36] Galdorisi and Vienna, 145–147. BACK

[37] Chen, 137. BACK

[38] There is a useful map illustrating the zone's extent and the complexity of its definition where neighboring zones collide in Booth, following page 220. BACK

[39] See H. Caminos and M.R. Molitor, "Progressive Development of International Law and the Package Deal," *American Journal of International Law* 79, no. 4 (October 1985); and Malcolm N. Shaw, *International Law*, 4th ed. (Cambridge: Cambridge University Press, 1997), 443. BACK

[40] Brownlie, 180. BACK

[41] Chen, 141. BACK

[42] Elisabeth Mann Borgese, "Law of the Sea: The Next Phase," *Third World Quarterly* (October 1982), 708; see also discussion in Booth, 28. BACK

[43] See Chaim D. Kaufmann and Robert A. Pape, "Explaining Costly International Moral Action: Britain's Sixty-Year Campaign Against the Atlantic Slave Trade," *International Organization* (Autumn 1999), 631–668. BACK

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Chapter 13

Beyond Integration: Globalization and Maritime Power from a European Perspective

James H. Bergeron

It is common in discussions of U.S.–European Union (EU) relations to point out a supposed difference in strategic viewpoint between the two. The United States is often depicted (especially in Europe) as being overly committed to a neorealist vision of international relations—a world of friends and foes, deterrence, power, and conflict. In turn, European political culture is often described (especially in the United States) as immature, insular, naïve in its reliance on supposed international norms, and overly focused on diplomacy, development aid, and crisis management solutions to international problems. At the heart of these differences (and there *are* differences, although they often are distorted out of proportion) lies competing visions of globalization, based on different (but intertwined) historical experiences. This chapter explores the European concepts of globalization and examines how they have changed over time, particularly since September 11, 2001. It will then consider the implication of the European global perspectives for EU maritime doctrine and the future of its force structure.

Europe is at a crossroads in its global vision, a situation that has been developing since the end of the Cold War but has become an imperative issue since September 11 and the potential changes in U.S.–EU relations that may come in its wake. European states do not view the world similarly, but it has been the case the most European states have, since 1945, focused their vision on the European integration project to the exclusion of wider geostrategic concerns. This was partly and understandably due to the roles played by the United States and the North Atlantic Treaty Organization (NATO) during those years as the guarantors of Western defense. In contrast, the 1990s witnessed a slow development of European strategic consciousness at the level of EU institutions, culminating in the European Security and Defense Policy (ESDP) and the development (at least on paper) of a European Rapid Reaction Force. All of this has been accelerated since September 11. The post-September 11 world creates both challenges and opportunities for Europe different from anything they have had to address for over 30 years, and for many EU member states, the revival of an old conundrum: the need for Europe to act as a global, rather than a regional, power.

European Integration as a Surrogate for Globalization

A linkage has always existed between the parallel European projects of integration and defense. Thus it was at the beginning. It is now mostly forgotten (especially in Washington) that the United States was among the main promoters of the failed European Defense Community initiative in the early 1950s. Instead of a separate European defense alliance, what developed was a selective European Economic

Community (EEC)—guided by France and West Germany—with security provided by NATO, whose membership extended beyond the EEC.[1] By the 1960s, Europe was an economic, political, and security part of a grander transatlantic whole, of variable geometry, and with high tensions. It was the era of the Berlin airlift, the Cuban missile crisis, and the John F. Kennedy assassination. The Cold War was truly cold and threatened to become hot.

The period between the failure of the first EEC applications of the United Kingdom and Ireland in 1962, and the final accession of the United Kingdom, Ireland, and Denmark to the community in 1973 witnessed a substantial transformation in the global context of European integration. U.S.-Soviet relations stabilized. President Richard Nixon initiated a policy of détente with the Soviet Union and opened a diplomatic door to China. U.S. defense spending fell, the Navy shrank. The threat, such as it was, existed more in Southeast Asia than in Europe. Although at the epicenter of nuclear confrontation, the very enormity of such a confrontation reduced the likelihood, in the eyes of many Europeans, of a nuclear war ever occurring in Europe. Détente and the advent of arms control agreements reduced the nuclear specter still further. In Europe, the world of détente had become a more peaceable one, and it made possible the emergence of a different kind of EEC.

For just at that time, in the late 1960s, began the construction of a more autonomous, civilianized European Community (EC) that represented an inward shift in the global paradigm for many European states. Although the De Gaulle plan for a European Political and Defense Union had come to naught, his historic *rapproachment* with Konrad Adenauer in 1962 had created Franco-Germany as the center of gravity of a European project that would have a more commercial and social focus. The expansion of EEC economic and social law, including especially the free movement of persons, and the expanding constitutional law of the EEC Treaty emerging from the European Court of Justice in Luxembourg provided a foundation for a view of Europe as a quasi-federal entity, a constitutional legal order based on treaty.

This new Europe was one of trade and travel, of increasing labor and capital mobility, competition law and economic regulation, a bright Europe whose new optimism (at least within the EC institutions) was unblemished by the defense and security concerns that were the responsibility of the United States or the member states acting through NATO. Or perhaps, from an institutional perspective, the new Europe was a project of national foreign ministries, trade ministries, other ministries such as labor, environment, and finance, judges, lawyers, corporations, business and interest groups. Ministries of defense and the military had almost no role within the scope of the community and so naturally took their lead, and their focus, from NATO.

In effect, the common market had created a space for positive European cooperation, outside of the sphere of superpower confrontation (although supported by the United States for political and economic reasons). It also played an important psychological function, in making the EC member states masters of their own destiny, albeit within a narrow confine of interests, in an era of decolonization, the economic domination of the United States and growing economic rivalry of Japan, and the arrival from the late 1950s of new immigrant populations from the former colonies.[2] European integration itself thus represented

a form of globalization, based on the rule of international law, supranational institutions, harmonization of laws and policies, and the free flow of goods, persons, capital, culture and ideas. It was a *rational* or planned globalization, brought about as an act of the sovereign wills of EC member states pooling their sovereignty. It was a very "European" globalization based on the assumption of managing technological forces through cooperation and legal regulation.[3]

The presence of the United States, in Europe and globally, was of course an essential precondition for this Brussels worldview. Defense could be ignored within the corridors of the European institutions precisely because it had been the first European market to have been integrated, through NATO.[4] With defense sovereignty pooled in NATO under the leadership of the United States—and thus depoliticized from an internal European perspective—the EEC could develop a remarkable power-sharing model that gave influence to smaller states and the European Commission. In particular, the "big four" powers—France, West Germany, Italy, and the United Kingdom—did not exercise the kind four-power *directoire* over Europe that might have been the case were political and security policy issues in play in the Council.

Ironically, the more stable world of détente allowed for the creation of a greater space for European foreign policy, at least in the sense of formal political declarations. The early 1970s witnessed the emergence of an informal European Political Cooperation in the Council of Ministers, European support for the Conference on Security and Cooperation in Europe (against U.S. policy wishes), and the rebuff of Secretary of State Henry Kissinger's "Year of Europe" attempt to reexert a more robust U.S. foreign policy hegemony. The new emphasis from the 1970s to the 1990s was on the internal market, employment policy, competition, regulation, state aids, cohesion and development funds, free movement, economic and monetary union, subsidiarity, European citizenship. External relations were primarily concerned with economic relations, in particular the General Agreement on Trade and Tariffs, but also trade association agreements, and preferential agreements for former colonies and developing countries.

Yet it was in these years of European development, the heyday of the EC in the view of many, that Europe as a set of institutions withdrew further from security and defense concerns. It is noteworthy that during the Second Cold War following the Soviet invasion of Afghanistan in 1979 and through the Intermediate-Range Nuclear Forces crisis, the Community developed no significant autonomous security policy or institutions. NATO, led by the United States, remained firmly at the helm of European defense policy. This was also the era of declining European defense expenditures and of a growing gap between European and U.S. military capabilities, as the United States turned to computer and information technologies to reinvent the art of post-Vietnam warfare.

The Cold War Ends: First Crack in the Assumed Security Paradigm of Europe

In 1986, the great European initiative was the completion of the internal market—the creation of a Europe without frontiers. Three hundred directives were to be implemented by the member states in areas such as banking and financial services harmonization, mutual recognition of professional qualifications, technical