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The Influence of Law on Sea Power Doctrines: The New Maritime Strategy and the Future of the Global Legal Order

Craig H. Allen*

For much of the 2006–07 academic year, elements of the US Naval War College facilitated an elaborate process designed to provide the intellectual foundations for the Chief of Naval Operations (CNO) and his staff to draw upon in drafting a new maritime strategy.¹ The process brought together experts from throughout the world to take part in workshops, strategic foundation “war” games, conferences and listening sessions.² It was my privilege as the Charles H. Stockton Chair of International Law to serve as legal advisor throughout the process. This article summarizes the contributions of the Naval War College International Law Department (ILD) in the process to develop and define the relationship between maritime strategy and law, particularly international law, and provides the author’s thoughts on what course that strategy should take.

Three decades have now elapsed since Daniel Patrick O’Connell challenged our thinking with his book *The Influence of Law on Sea Power.*³ In it, the New Zealand law of the sea expert and Chichele Professor of Public International Law argued, shortly before his death in 1979, that because the law of the sea “has become the stimulus to sea power, not its restraint,”⁴ future naval operations planning staffs

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must acquire a thorough appreciation of the law. In contrast to Admiral Alfred Thayer Mahan and the more recent naval historians who, while providing illuminating analyses of the influence of sea power on history, mostly disregard the influence of international law on sea power, Professor O'Connell forcefully argued that sea power doctrines can no longer be considered in isolation from the relevant law. More importantly, O'Connell recognized that international law can be a powerful strategic enabler. The question I asked myself as I launched into my new task last fall was, "Has the naval strategy community heeded Professor O'Connell's admonition?" Let me attempt to answer that question by taking the reader on a brief tour of our maritime strategy development process and the role of law and legal advisors in that process.

The Maritime Strategy Project

At the June 2006 Current Strategy Forum, Admiral Mike Mullen, one year into his tenure as CNO (and one year before his nomination as Chairman of the Joint Chiefs of Staff), called for the development of a new maritime strategy to guide the maritime services in the coming years. It is to be a strategy of this age and for this age. The new strategy document, A Cooperative Strategy for 21st Century Sea Power, developed under the overall leadership of Vice Admiral John Morgan, Deputy Chief of Naval Operations for Plans and Strategy (N3/N5), joins several other naval capstone planning documents, including Sea Power 21, which, together with Marine Corps Strategy 21, provides the vision that establishes the strategic ends; the Navy Strategic Plan, which lays out the ways and means to achieve the vision; the CNO-CMC Naval Operations Concept, which addresses the operational principles that will be used by the services; and the US Coast Guard Strategy for Maritime Safety, Security, and Stewardship. At the June 12–13, 2007 Current Strategy Forum, the Commandants of the Marine Corps and the Coast Guard announced their readiness to join the CNO in signing the new maritime strategy when it is completed, making it a true strategy of all three sea services. In the summer of 2006, the CNO tasked the Naval War College to act as broker for an ordered competition of maritime strategy ideas—ideas that would inform and guide the carefully selected team charged with drafting the new strategy. It was made clear from the start that there were no preconceived ideas and that no suggestions were to be off limits. The War College was also asked to facilitate a conversation with the country—indeed with the world—to describe our process and solicit feedback.
Security Strategies in the United States

We were not asked to compose the new strategy on a blank canvas. Indeed, we worked on one that was already suffused with an elaborate landscape. The new maritime strategy will be nested in what has become a multifaceted web of security strategies for the nation, all of which emanate from the National Security Strategy of the United States.\textsuperscript{16} The National Security Act of 1947, as amended by the Goldwater-Nichols Act of 1986, requires the President annually to submit to the Congress a National Security Strategy (NSS) report.\textsuperscript{17} The President's NSS vision is in turn implemented by the National Defense Strategy promulgated by the Secretary of Defense and the National Military Strategy issued by the Chairman of the Joint Chiefs of Staff.\textsuperscript{18} Closely related to those are the National Strategy for Maritime Security, the National Strategy for Homeland Security, the Maritime Strategy for Homeland Security, the National Strategy for Combating Terrorism and the National Strategy to Combat Weapons of Mass Destruction. Not surprisingly, many of the strategy documents have classified versions.

I should add that this was not the first time the US Navy has launched a grand strategy development project. Indeed, research by the Center for Naval Analyses in the fall of 2007 identified at least seventeen Navy capstone planning documents since the 1970s.\textsuperscript{19} It is noteworthy for this observer that none of the earlier Navy capstone strategies, or Naval Doctrine Publication 1 on Naval Warfare\textsuperscript{20}—which “introduces who we are, what we do, how we fight, and where we must go in the future”—expressly discusses the role of law and legal institutions in naval operations, other than to make a passing reference to the fact that naval mobility would be better assured if the United States acceded to the 1982 United Nations Convention on the Law of the Sea (1982 LOS Convention).\textsuperscript{21}

Strategy as a Critical Component of the Geo-strategic Environment

Strategy is said to be “a prudent idea or set of ideas for employing the instruments of national power in a synchronized and integrated fashion to achieve theater, national, and/or multinational objectives.”\textsuperscript{22} In setting out to achieve those national objectives, strategy must be adapted to the strategic environment in which it will operate.\textsuperscript{23} Accordingly, to provide the development team with the foundation they needed to prepare maritime strategy options for the CNO, the Naval War College began by convening a Geo-strategic Environment Workshop. The workshop participants drew heavily on the National Intelligence Council assessment “Mapping the Global Future.”\textsuperscript{24} Later, a British perspective was provided by the UK Ministry
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of Defence Development and Concepts Doctrine Centre’s “Strategic Trends 2007–2036.”25 The experts’ conclusions were sobering.26

The reader is likely familiar with much of the strategic environmental picture, so I will only summarize the most salient features. Geopolitical entropy, disorder and uncertainty are on the rise.27 The world is said to be suffering from a global security deficit.28 Unsustainable population growth rates, the “youth bulge” and chronic unemployment are most pronounced in those regions lying in the so-called arc of instability. State sovereignty and territorial integrity are on the decline.29 State powers are increasingly diffused and devolved. Many States, even some of the most developed States, are besieged by an unrelenting flow of illicit weapons, drugs, money and migrants across their borders. At the same time, through what some have described as the democratization of violence and of technology,30 States have lost their historical monopoly on the large-scale use of force and on access to weapons of mass destruction (WMD) technologies.31 Indeed, the global picture looks much the same as it did in 1921, when William Butler Yeats penned his apocalyptic poem The Second Coming:

Things fall apart; the centre cannot hold;
Mere anarchy is loosed upon the world,
The blood-dimmed tide is loosed, and everywhere
The ceremony of innocence is drowned;
The best lack all conviction, while the worst
Are full of passionate intensity.

Grim verses, indeed, whose dark and disturbing images still ring true.

Economic security is widely recognized as a vital interest of the State.32 Yet, present efforts are not sufficient to meet basic security needs even within the borders of many States, let alone provide the kind of stability needed by the globalized, inter-dependent and tightly connected economy of the twenty-first century. Contemporary security strategies must be designed to manage threats to the public order. Those threats come from States and non-State actors. We are painfully aware that the threats know no geographical boundaries, particularly as globalization increases the porosity of borders. Accordingly, the threats must be detected and managed in the commons, at boundaries between the commons and States, and along the borders of adjacent States.

In an age when the international supply chains that sustain the global economy and the seas over which those chains are carried are the common concern of all States, global order—including order on the sea—is the new raison d’état and must be the goal of every maritime security policy and strategy. Irresponsible and
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incompetent flag States; failing and failed States; transnational terrorist organizations; criminal syndicates engaged in trafficking in weapons, drugs and humans; and illegal, unreported and unregulated fishing all undermine order in the commons. Here in the global commons, where the pinch from flag States falling short in their responsibility to “effectively” exercise jurisdiction and control over their vessels is felt most acutely, the security deficit is most urgent.

The Strategic Foundations Games

Following the August 2006 Geo-strategic Environment Workshop, a series of executive group meetings and war games were conducted in September and October of 2006 to develop strategic foundations for use in the Maritime Strategy Options Development Workshop in December. Those options were later vetted through the Options Refinement Decision Support Event in February of 2007. The International Law Department provided legal advice to all of the war game teams and to two of the executive groups. Early on in the process, it also provided a brief to the Red Team Executive Group suggesting possible “lawfare” strategies and tactics that might be used against the Blue Team. During this same period, the Naval War College hosted a conference on the maritime implications of China’s energy strategy, an Intercessional Conference on Maritime Strategy and a workshop entitled Economics and Maritime Strategy: Implications for the 21st Century. ILD attended each of the events and an ILD member (the author) participated in the Economics and Maritime Strategy Workshop, submitted a paper on legal interoperability challenges and made a presentation on international cooperation in securing the maritime commons.

The Future Global Legal Orders Workshop

Let me now turn to something of greater interest to readers of this volume, all of whom will likely appreciate that law—that is, rule sets, legal processes and international institutions—is as much a part of the geo-strategic environment, and therefore the planning “context,” as geography, energy, demographics, organizational culture and technology. The international system consists principally of sovereign States, who collectively comprise a horizontal, non-hierarchical global order that has historically been described as one of moderated anarchy, at least by the realists. Conventional wisdom posits that within that system, international institutions and organizations ameliorate the anarchy, but with few exceptions they do so without altering its horizontal structure.
The experts who participated in the Geo-strategic Environment Workshop exhibited little faith in existing international organizations and in international law. Three sample findings demonstrate the depth of their skepticism. First, they concluded that "some international organizations are looking long in the tooth and incapable of coping with emerging challenges." Next they concluded that "some of the institutions that are charged with managing global problems may be overwhelmed by them" and "the number of bilateral agreements will rise as international organizations continue to fall short in their objectives." Given the experts' harsh judgment of international organizations and regimes, their prescription, "International Organizations: out with the old, in with the new," should not surprise you.

The Workshop experts' conclusions added credence to the view that international law is merely "epiphenomenal." What really affects State behavior is State interests—that is, the underlying economic and political factors. Legal academics have expressed related doubts about international law. International lawyers no doubt recall John Austin’s nineteenth-century conclusion that international law was not positive law at all, but rather a body that partakes more of a moral obligation, violation of which may provoke the hostility of other nations but not the kind of sanctions that attend violation of laws promulgated by a sovereign. And H.L.A. Hart famously observed that because international law lacks the formal structure of legislative courts with compulsory jurisdiction and official sanctions it is far more primitive than the municipal law enacted by a sovereign.

The Workshop report left some of us wondering whether their views were shared by international law experts. Mindful that the state of the future global legal order is a vital component in the geo-strategic environment, the President of the Naval War College convened a two-day workshop that brought forty-two legal experts together to examine the global legal order in 2020. Those experts were asked to provide the legal component that is too often neglected in strategy documents.

With few exceptions, military strategists have a long history of giving short shrift to international law in their writings. The origin of the problem can be traced back to Carl von Clausewitz, who dismissively referred to those "certain self-imposed, imperceptible limitations hardly worth mentioning, known as international law and custom." George F. Kennan, the leading architect of America’s Cold War containment security strategy, is also remembered for his attack on what he saw as an excess of "legalism and moralism" in American foreign policy during the Wilson presidency years. Regrettably, international lawyers have not always done their part to engage with strategy planners, to help them forge plans that can achieve strategic goals while respecting and even advancing the rule of law. The experts who came to Newport were ready to do just that, in the hope that the strategists were ready to listen.
And what a distinguished group they were. They came to Newport from Argentina and Australia, from Canada and Chile, and from India, Indonesia and Italy. In all, they represented eleven countries. They were law professors; international law specialists from the US Departments of State, Justice and Homeland Security and the Center for Naval Analyses; a Chinese law of the sea scholar; senior legal advisors to the Indian Coast Guard and the Italian Navy General Staff; the legal counsel to the US Chairman of the Joint Chiefs of Staff; senior judge advocates for the US Marine Corps, Coast Guard, and several combatant and fleet commands; and the Director of the UN Division for Ocean Affairs and the Law of the Sea. They brought backgrounds in international security law, law of the sea, arms control and proliferation, the law of armed conflict, international transportation law, international criminal law and international organizations.

The Workshop began with a brief discussion of some assumptions proposed by the conference chair concerning the role and reach of law. The first was the pragmatic observation that the new maritime strategy must be adapted to the global legal order in which it will function. The second was that a robust and respected legal order has the potential to save lives, by providing predictability and preventing conflicts, and by providing effective and peaceful means to resolve conflicts that do arise. The third assumption was that, while the future state of the legal order is uncertain, it can, to some degree, be mapped and shaped, and—as Thomas Friedman reminds us—“the future belongs to the shapers and adapters.”

To avoid what the influential British strategist Colin Gray labels the “sin of presentism,” the legal experts attempted to widen their temporal lens by exploring several “alternative futures,” using the scenario-planning method championed by futurists like Peter Schwartz and Philip Bobbitt. They initially discussed six strawman scenarios that would collectively map the future global legal order, before adopting an approach that focused on twelve areas of potentially significant changes in the legal order. For each of the twelve areas, the experts examined the possible trends in the rule sets, legal processes and institutions, and in compliance levels. Next, they were asked to consider the consequences of those changes to the maritime strategy mission inventory and for the means and methods for carrying out those missions. Finally, they were asked what the new maritime strategy should say—and not say—about international law.

One would expect that forty-two lawyers from eleven different nations would find little on which to agree. To some extent, that was the case with this group. There was, however, one question on which every expert agreed: the new maritime strategy should include an express reference to international law. As one expert put it, international law “is the foundation on which we operate; it is why we are there.”
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The Role of Law in the New Maritime Strategy

As the legal experts concluded, there are a number of compelling reasons to embrace the rule of law in the new maritime strategy and no sufficient reason for failing to do so. The new strategy must be consistent with higher-level security strategies. The 2006 National Security Strategy of the United States expressly cites the importance of enforcing the rule of law.\textsuperscript{52} Similarly, the presidential directive on national maritime security made it clear that in developing the National Strategy for Maritime Security (NSMS) the United States will act consistently with international and US law.\textsuperscript{53} The NSMS opens its chapter on "strategic objectives" by quoting the presidential directive to "take all necessary and appropriate actions, consistent with U.S. law, treaties, and other international agreements to which the United States is party . . . ."\textsuperscript{54}

But even if the higher-level strategy documents were silent on the role of law, a maritime strategy that acknowledges the importance of law as an ordering force and a unifying theme for the crucible of international relations—in short, the "centre" Yeats longed for—will be far more compelling and durable. Such a document would also be a source of pride and inspiration for the members of our armed forces, a confidence-building measure for our friends and allies, and a key enabler in our ability to shape the future global order.

Law as an Ordering Force

The United States has a long tradition of calling upon international law when it serves the national interest.\textsuperscript{55} In the late eighteenth and early nineteenth centuries, the infant republic raised international law objections to Great Britain's boarding of US vessels on the high seas and impressment of US sailors into the Royal Navy, and against the Barbary States for piratical attacks on US merchantmen in the Mediterranean Sea and its approaches. Two other disputes between the United States and Great Britain—leading respectively to the Caroline exchange of notes and the Alabama arbitration award—produced enduring international principles well known to the readers of this volume.\textsuperscript{56} More recently, the nation invoked international law against Iran for breaching the inviolability of the US embassy in Tehran and holding US diplomatic personnel and other citizens hostage, and against the People's Republic of China for its conduct when a US Navy EP-3 was forced to land on Hainan Island following a midair collision with a Chinese fighter.

Although national interest is surely the midwife of security policy and strategy,\textsuperscript{57} at the same time States have repeatedly demonstrated their willingness to cooperate with other States to achieve shared goals or resolve common problems.
Globalization and its just-in-time and just-enough logistics imperatives have fundamentally altered the strategic calculus, virtually mandating a cooperative approach to maritime security. Accordingly, the new maritime strategy must be mindful of national interests while remaining ever alert to shared interests. A strategy that narrowly focuses on national interests will surely reinforce existing perceptions of the United States and drive away potential partners. By contrast, it takes but little imagination to see that a new maritime strategy that defines and articulates in compelling terms a framework for achieving shared goals and joint solutions to common problems is much more likely to make other States want to flock to the nascent 1,000-ship multinational navy.58

Finding common ground among national interests should not be difficult. For some, the need to promote and protect the international trade and transportation system on which the globalized and energy-hungry world depends is a vital national interest.59 It is also a shared interest. In the words of some, “commerce craves security.” For other States, particularly those in West Africa, South America and Southeast Asia, protecting offshore fisheries from poachers is not merely a pursuit of profit; it is a survival imperative. Still other States consider threats to the environment as national “security” issues. Consider, for example, small-island developing States, for whom global warming and its attendant rise in the sea level present an existential threat. A strategy that promotes sustainable and equitable access to marine living resources and protection of the marine environment is sure to have broad appeal. At the same time, however, none of these interests can be obtained if the larger system is fraught with disorder and violence. In Abraham Maslow’s hierarchy of human needs, the need for security is exceeded only by basic needs, e.g., food.60

Professor Colin Gray asserts that “order is the prime virtue; it is the essential prerequisite for security, peace, and possibly justice. Disorder is the worst condition.”61 There is, in the minds of many, no longer a “war” to be won, only security to be secured, extended and maintained, so that war can be prevented. The spread of terrorism and weapons of mass destruction threatens chaos, as effective power shifts away from States to non-State actors and super-empowered individuals. To the extent that civilization rests in part on the control of violence, and the growing capacity of non-State actors to inflict such violence now casts a menacing shadow over the planet, the role of law as the deep stratum undergirding international security becomes more apparent and more urgent. Law has the potential to serve as the indispensable binding force to check and perhaps reverse our social and institutional entropy. If the States’ grip on law lessens, and States become increasingly prone to use military force, the binding force so vital to civilization may be fatally weakened.
In a geo-strategic environment everywhere characterized by growing uncertainty, rapid change and instability, rule sets can promote greater predictability and stability. At the same time, rule sets are not legal pixie dust that miraculously brings order where there was once chaos. They must be given the level of respect and enforcement necessary for credibility or no State will be willing to rely on them. Rule sets like the UN Charter, the 1982 LOS Convention, anti-terrorism treaties and the non-proliferation regime can increase order, but only if they are complied with.

We recognize that not all States and non-State actors will voluntarily comply with the rule sets, whether the rules under consideration are those relating to non-aggression and non-proliferation or to trafficking for profit. If voluntary compliance falls short, we must of course redouble our efforts to rebuild it to the level necessary for public order. That may come through education, inducement, deterrence, or capacity building of States, or of global or regional international organizations. But make no mistake, while each of these approaches will be vital to long-term success, they will likely never be sufficient unto themselves to provide the needed level of security in the coming years. For that, we must add enforcement.

Because law is not self-executing, no security strategy should be founded on unrealistic expectations regarding the influence of law on States (let alone on non-State actors) in the conduct of their foreign and military affairs—particularly when survival or vital State interests, or “fundamental” religious beliefs, are at stake. Nor should we delude ourselves about the effectiveness of international organizations in preserving or restoring peace and security. Yet, even if, as Thomas Hobbes warned, “covenants, without the sword, are but words and of no strength to secure a man at all,” even the most committed contrarian would not counsel us to turn our backs on covenants. International law and international organizations like the United Nations will never be more effective or influential than the leading States allow them to be. If the new US maritime strategy ignores the role of either, we diminish the importance of both and undermine their effectiveness. The result will be a less ordered and less secure world. For that reason, it is vital that the maritime strategy provide a rule-based approach for enforcing the global legal order.

In considering enforcement approaches I suggest that effective enforcement of global rule sets will require a new way of thinking that transcends the so-called “DIME” construct. The DIME approach, which looks to the State’s diplomatic, information, military and economic “instruments of national power,” is too narrow for a global environment in which non-State actors pose significant, even cataclysmic, risks to States. This Cold War artifact, which is currently taught at US war colleges, assumes that only a narrow set of instruments is available and that they
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will be used against States. In the post-Cold War, post-9/11, post-Bali, Madrid, London subway and Lebanon 2006–2007 world, it is clear that instruments of national power will increasingly be used against non-State actors, like Al Qaeda, Hezbollah and transnational criminal syndicates, and that the DIME approach is not always well suited to them. The United States already reaches well beyond the DIME framework, using a variety of leadership, managerial, institutional, cultural, technological, law enforcement, judicial and financial measures, such as freezing assets. Some of the rule violations that threaten public order are and will remain “M” (military) issues. But many are “enhanced L” (law enforcement) issues, calling for enhanced law enforcement measures. This broader, “DIME-plus” framework will be vital to any maritime strategy—certainly for the Coast Guard and other interagency players with maritime safety and security missions. The new strategy must also acknowledge that without the Coast Guard, US maritime forces will not have a seamless approach to maritime security, for without it the strategy will lack the only alternative “end game” to killing your adversaries or detaining them on remote islands: arresting and prosecuting them. The Coast Guard puts the “L” factor in what is otherwise a limited DIME tool kit for addressing many of our maritime security problems. The next strategy must adapt itself accordingly.

Law as a Unifying Theme

Several of the outside experts engaged in the maritime strategy development process hosted by the Naval War College highlighted the need for the new document to include a “compelling narrative” that will ensure it is read, studied and implemented. How do you select a theme that will counter the scores of centrifugal forces, unify the elements of the strategy, and serve as the leadership spark and catalyst to bring together the three maritime services with overlapping yet unique identities, the other interagency players so essential to the mission, and international friends and allies, while at the same time winning over or at least muting intergovernmental and non-governmental organizations? I suggest that law and its proven, albeit imperfect, capability to promote order, security and prosperity can be a powerful unifying theme and force in the new maritime strategy in the globalized, media-sensitive world in which we find ourselves. In fact, the new strategy has the potential to go a long way toward rehabilitating the reputation of the United States as an overweening hegemon that has become tone deaf to the concerns of its allies.

Global security requires global cooperation and, for many, law provides the logic and language of cooperation. Adherence to shared rule sets can be an effective unifying force. Some would go so far as to say it is now embedded in the cosmopolitan DNA. For that reason, an explicit embrace of the rule of law could prove to be
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one of the most attractive features of the new maritime strategy for the Navy's interagency and international partners. Promotion and implementation of rule sets would give the strategy internal coherence and broad external appeal. Any strategy that downplays, or still worse denigrates, international law and international organizations, as does the current National Defense Strategy of the United States, ill serves the nation's long-term interest. Much of the world still considers the United Nations the primary if not sole source of legitimacy for the use of force. A strategy that suggests that military force will be deployed in a manner that some will conclude violates the UN Charter, which prohibits the use of force or even the threat to use force against the political independence or territorial integrity of a State, will further isolate the nation.

The importance of common rule sets, based on international law as a unifying force in combined operations, will not be lost on those who observed the evolution of the Proliferation Security Initiative (PSI) and the recent UN Security Council resolutions on proliferation threats to international peace and security. Both make clear that most of the world will insist on an approach that respects international law.

Early positions taken by then–Under Secretary of State John Bolton at the July 2003 PSI-participating States' meeting in Brisbane suggested that with respect to legal justifications for PSI boardings, the United States was "taking nothing off the table," including the Article 51 right of self-defense. That was understood by some as advocating a position on boarding foreign flag vessels believed to be transporting weapons of mass destruction that might go beyond what current international law permits. At their meeting in Paris three months later, several of the PSI-participating States responded to the US opening position with a call for all participating States to subscribe to a common Statement of Interdiction Principles. The two-page statement eventually adopted at that meeting, and still in force, twice expresses the participating States' commitment that PSI activities will be carried out in a manner consistent with international law. Similarly, Security Council Resolutions 1540, condemning proliferation of weapons of mass destruction to or by non-State actors, and 1718, applying similar prohibitions to North Korea, both tie any enforcement measures to the applicable rules of international law.

Law and the Expectations of Our Partners

Admiral Harry Ulrich, Commander, US Naval Forces Europe, espouses a relatively simple formula for the global war on terrorism: have more partners than your adversaries have. The reasons are elementary. The struggle against disorder knows no flag. Waging that struggle has become a team sport. Vice Admiral Morgan has been
the leading voice for the 1,000-ship multinational navy/Global Maritime Partnership, a concept designed to attract the kind of partners Admiral Ulrich seeks. Does the Global Maritime Partnership (and the Global Fleet Station initiative) need a unifying global maritime strategy that promises to respect the rules of international law? Many of the potential 1,000-ship-navy partners think so.

In their response to the November 2005 “1,000 Ship Navy” article by Admirals Morgan and Martoglio, the naval commanders of France, Ghana, India, Portugal and Spain all referred to the rule of law or legal considerations. The French commander, for example, observed that any 1,000-ship-navy operations must be “in full compliance with the UN Convention on the Law of the Sea . . . .” Portugal expressly referred to the “rule of law,” and India asked whether the 1,000-ship concept should be established under the aegis of the United Nations. Admiral Soto of the Spanish Navy observed that “[t]ogether we must find a legal solution to preserving the natural flow of friendly maritime trade while denying freedom of action to those criminals who attempt to use the maritime space for illegal activities.” It seems clear that respect for international law has the potential to unite or fracture the embryonic 1,000-ship navy.

One year later, many of those same foreign CNOs were asked to respond to Admiral Mullen’s plan for a new US maritime strategy. Once again, international law figured prominently in several of the responses. The Commandant of the Brazilian Navy urged that the new strategy “be guided by principles sanctioned by international law,” a view shared by the Secretary General of the Peruvian Navy and the Portuguese Navy Chief of Staff. Their counterpart in Colombia emphasized the need for an “international legal mechanism of cooperation.” Uruguay’s reply was also directly on point: “Multilateral cooperation among navies is legitimate activity when it is based on the law.” The Commander of the Lebanese Navy cited the 1982 LOS Convention and cautioned against the United States acting alone, while the new Chief of Staff for the Spanish Navy highlighted the need for the US Navy “to operate alongside its allies in accordance with international law.” The Australian Maritime Doctrine elegantly and forcefully captures the central importance of law and legitimacy for one of America’s most respected partners:

Australia’s use of armed force must be subject to the test of legitimacy, in that the Government must have the capacity to demonstrate to the Parliament and the electorate that there is adequate moral and legal justification for its actions . . . . [T]his adherence to legitimacy and the democratic nature of the Australian nation state is a particular strength. It is a historical fact that liberal democracies have been more successful in the development and operation of maritime forces than other forms of government, principally because the intensity and complexity of the sustained effort.
required for these capabilities places heavy demands upon a nation’s systems of state credit, its technological and industrial infrastructure, and its educated population. Sophisticated combat forces, in other words, depend directly upon the support of the people for their continued existence.75

Finally, a bit closer to home, in the 2007 US Coast Guard *Strategy for Maritime Safety, Security, and Stewardship*, the Commandant of the Coast Guard, who you will recall will be asked to join in the coming maritime strategy, has clearly identified the need to update and strengthen maritime regimes to address emergent threats and challenges and to support US ocean policy. More specifically, the Commandant has concluded that the “nation needs a set of coordinated and interlocking domestic and international regimes that . . . balance competing uses within the maritime domain” and that “[s]trengthened rules, authorities, and agreements . . . enable consistent, coordinated action on threats and provide an acceptable framework of standards that facilitate commerce and maritime use.”76 The lessons seem plain: a Navy-led maritime strategy that similarly acknowledges the important contributions of rule sets to promoting public order is far more likely to attract the support of international and interagency partners.77

**Law and Our Opportunity to Shape and Influence**

Serious students of international law and relations understand that the law is not complete, nor is it perfect. We also know that it can and will be influenced, adapted, developed, clarified and explained—in other words, shaped—in the coming years. Who will be most influential in the law development enterprise? Those who embrace the rule of law, while working to remedy its shortfalls, or those who sullenly turn their backs on the enterprise?78

In his 2006 Current Strategy Forum remarks, Admiral Mullen cited as two of the nation’s three enduring naval strengths the capacity to “influence” and “to build friends and partners.” The legal experts had something to say about both. There seemed to be widespread agreement among the experts that it is not enough to simply know and follow the rules of international law; there is also an urgent need to shape those rules.79 For example, leadership on freedom of navigation and overflight—for warships and military aircraft and the commercial vessels and aircraft on which the global economy depends—will be crucial in the coming years. Some experts’ assessments reveal the magnitude of the coming challenge to shape international maritime law on navigation issues:

- 38 percent of the experts believe that the regime for innocent passage in the 12-mile territorial sea will not remain stable between now and 2020. When they
were asked the same question about transit passage through international straits and archipelagic sea lanes passage, the numbers went up to 41 percent and 51 percent respectively.\(^8\)

- 95 percent of the experts believe that in the coming years more States will claim the right to exercise jurisdiction and control over military activities in their 200-mile exclusive economic zones.\(^8\)

To lead on freedom of navigation and overflight, or any other law of the sea issue, it is crucial that the United States become a party to the 1982 LOS Convention and participate in the United Nations' annual law of the sea processes. Moreover, to encourage others to respect those parts of the rule set about which we are most concerned—the navigation rights of warships and military aircraft and the non-proliferation regime, for example—we must be clear that we respect the entire rule set,\(^8\) as consented to by each State, including the provisions that might seem less important or even "quaint" to us. We cannot hope to "shape" the global or regional legal order unless we are a good-faith participant in the system. After all, why would any State acquiesce in letting us help define a rule set if they know that we intend to later exempt ourselves from it?

At the same time, there is growing concern that law is increasingly used by less powerful States and by non-State actors as an asymmetric instrument to discredit or otherwise balance against more powerful States, even proclaiming that less powerful States are not bound by the same rules.\(^8\) It has been observed that less powerful States respond to sea control strategies by more powerful adversaries by employing sea denial strategies and tactics. Naval mines commonly come to mind,\(^8\) but lately "lawfare" strategies seek to restrict the navigation rights and freedom of action of powerful States by exerting pressure on them to bind themselves to new legal regimes,\(^8\) or by employing existing legal regimes to discredit the more powerful State. As Professor Davida Kellogg at the University of Maine has argued forcefully, the response to such tactics must not be a reflexive denigration of law, but rather a decisive and well-reasoned rejoinder that unmasks this abuse of the law.\(^8\)

The new maritime strategy will almost certainly have an effect on the law by what it says—or does not say—about the role of law in modern maritime security operations.\(^8\) In a system where international law is made in part by State practice, navies make international law every day by what they say and what they do. At the same time, and for the same reason, the strategy’s treatment of law will affect the ability of the United States to influence the future direction of international regimes and organizations. The Navy can create or ease friction by what it says or does not say about the law in the new strategy and enhance or erode its credibility and therefore its effectiveness as a shaping influence.\(^8\)
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Law's Role in Preserving and Enhancing the Service Ethos

At an early Naval War College session involving veterans of prior Navy maritime strategy drafting teams, Professor Roger Barnett spoke of the importance of understanding the Navy's culture in crafting any capstone strategy document. That culture, it seems to me, plainly includes a deep appreciation for international law. In describing the most desirable qualifications for a naval officer, Captain John Paul Jones wrote more than two hundred years ago that the "naval officer should be familiar with the principles of International Law... because such knowledge may often, when cruising at a distance from home, be necessary to protect his flag from insult or his crew from imposition or injury in foreign ports." US Navy Regulations have long codified the requirement for its members to comply with international law. Compliance is facilitated by a proactive training and education program.

International law was among the first subjects taught in the opening days of the Naval War College in 1884 and the Naval War College is still the only war college in the United States to have a dedicated International Law Department. The first civilian to join the Naval War College faculty was James R. Soley, appointed in the foundation year of the College to teach international law. In 1901, the well-known publicist John Bassett Moore joined the faculty as a professor of international law and later initiated the College's International Law Studies ("Blue Book") series. The first academic chair at the Naval War College was the Chair in International Law, established on July 11, 1951, and filled by Harvard's Bemis Professor of International Law and Permanent Court of International Justice Judge Manley O. Hudson. In 1967 the chair was named in honor of Rear Admiral Charles H. Stockton, an international law scholar and former president of the Naval War College.

Our personnel have a right to expect that their capstone strategy will honor the rule of law. We have a new generation of men and women who are drawn to the all-volunteer forces by a combination of pride, patriotism and the need for self-affirmation. They are at their best when they believe in themselves, their service and their nation. Our accession programs and ceremonies emphasize respect for law and principle. The oath of office for military officers includes a pledge to support and defend the Constitution of the United States—not a monarch, but rather a body of law. Our oldest warship in commission is named not after a president or a famous battle, but rather that same hallowed legal text. The core principles of the Navy, Marine Corps and Coast Guard all highlight the importance of honor, which for Marines expressly includes the obligation to respect human dignity. Those creeds also recognize the importance of courage, one version of which expressly includes "moral courage," describing it as the inner strength to do what is right and to adhere to a higher
standard of conduct. The service members who take these oaths and are moved by these creeds represent our nation’s finest, and they deserve to know more than merely how and where they will fight; they deserve to know why they fight—that is, the principles they are being asked to support and defend. The Navy lieutenant junior grade leading her boarding team onto a freighter in the Arabian Gulf to conduct a Proliferation Security Initiative boarding and the battalion landing team sergeant major ordering his Marines into the LCACs and CH-46s to execute a non-combatant evacuation operation should both be able to see their core values reflected in the maritime strategy that sent them on their missions.

Conclusion

The decision by the Naval War College to integrate faculty from the College’s International Law Department and outside legal experts into the strategy development process wisely ensured that the core strategy development team had access to a thoughtful and informed assessment of the future global legal order. Legal participation in the process by no means assures that the law will play a role in the new strategy, but there’s every reason to believe that it will.

Respect for the rule of law is a signal strength for those who practice it and a vexatious, corrosive and embarrassing source of friction for those who fail to do so. By clearly embracing a position that promises respect for the rule of law in the new maritime strategy, the Navy can seize the opportunity to enhance its legitimacy and its ability to attract coalition partners, instill pride in its members and position itself more effectively to shape the global order. The Coast Guard has shown the way forward with its new Strategy for Maritime Safety, Security, and Stewardship. But let there be no mistake: “respect” for the rule of law entails more than a one-sided obligation for the United States to obey the relevant laws advocated by asymmetricians. It also means that we will expect others to comply with the law, including those provisions that, in the words of John Paul Jones more than two centuries ago, “protect” the nation, its vessels and aircraft, and their navigational rights and freedoms.

With all the buildup it has been given, the new strategy must not fall short in providing a fresh and proactive approach to a demonstrably new threat environment that has shaken a lot of people’s confidence in the US national security system. It should be a strategy of hope and action, rather than one born of despair and cynicism. Whether you are an idealist aspiring to establish a shining city on the hill that reveres the rule of law for its own sake, or a calculating utilitarian methodically calibrating means to ends, there is much to value in a more robust rule of law, forcefully advocated by the three maritime service chiefs. For the utilitarians, ask
the Marines and soldiers in Fallujah, Ramadi and Kandahar whether the threat environment was better or worse after images of the disgraceful and lawless acts at the Abu Ghraib prison flashed across the Internet and Al Jazeera. While you're at it, ask them how it affected their pride as American service members. We cannot always control the behavior of our members, but our service chiefs can be firm and unequivocal about the fundamental principles for which we stand.

It must seem to many that the world has not changed much since the interwar years that drove Yeats to lament the loss of conviction by the best, the rise of passionate intensity by the worst, and the collapse of the "centre." What he left unnamed is the source and nature of that center and how we might fortify it. For many in Yeats' age, the ordering force to provide that center was to be found in the hopeful vision of a new League of Nations. Their modern counterparts look to the rule of law developed and implemented by forward-thinking States coming together in respected and competent international organizations.

I will close with a report on the informal surveys I conduct each year at my law school. In the first week of classes back in Seattle I ask my students for their views on the "rule of law." They have so far been unanimous in their approval of the principle, though some are skeptical of its empirical record. But when I then ask them to define the rule of law, their brows furrow and they grow silently pensive. We shouldn't be too hard on them. Few law school casebooks attempt to describe the rule of law or postulate its force or trajectory. And you will not be too surprised to learn that the Department of Defense dictionary does not define it. We must work to remedy that oversight. The legal profession has a well-earned reputation for persuasive communication. And I believe, as did Alexis de Tocqueville, that we in the legal profession have a special province and duty. If law is the logic and language of global cooperation, we are its most proficient expositors. As such, it is, I believe, incumbent upon us all to embrace the rule of law as our lodestar, as the "center" for this tumultuous new century. In short, it is time for us to take up the baton from Professor O'Connell and advance it steadily forward toward that elusive finish line.

**Postscript on US Accession to the 1982 LOS Convention**

The legal experts widely agreed that the first challenge that must be met is to obtain the necessary Senate and presidential action for the United States to accede to the 1982 LOS Convention. Nothing less than an all-agency full-court press will be sufficient. If the three maritime services and their allied agencies fail to persuade the Senate to approve the LOS Convention during the One Hundred Tenth Congress, a maritime strategy that purports to affirm the importance of law to global security
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will have no credibility. Words without consistent action will soon be ignored and forgotten.

The call for Senate action was renewed when, during his January 30, 2007 confirmation hearing before the Foreign Relations Committee to serve as Deputy Secretary of State, former Director of National Intelligence John D. Negroponte affirmed the administration’s strong support for the Convention. One week later, the Department of Defense once again included the LOS Convention on its treaty priority list. The next day, the President’s National Security Advisor, Stephen Hadley, wrote to Senator Joseph Biden, the new Chairman of the Senate Foreign Relations Committee, citing the “historic bipartisan support for the Law of the Sea Convention” and requesting Senate action “as early as possible during the 110th Congress.”

On May 15, 2007, President Bush formally announced that he was urging the Senate to give its advice and consent to accession to the Convention during the current session of the Congress. On June 13, 2007, Deputy Secretary of State Negroponte and Deputy Secretary of Defense Gordon England joined in an op-ed supporting accession. The Navy and Coast Guard have long worked to gain Senate approval for the Convention. A recommendation that the United States accede to the Convention was the first resolution to come out of the US Commission on Ocean Policy chaired by former CNO Admiral James Watkins. In testimony before the Congress on March 1, 2007, Secretary of the Navy Donald Winter, Chief of Naval Operations Admiral Mike Mullen and Commandant of the Marine Corps James Conway unequivocally affirmed the Navy Department’s support for US accession. Admiral Thad Allen, Commandant of the Coast Guard, similarly reaffirmed his service’s support for accession on May 17, 2007.

Thus, there is every reason to be optimistic about the fate of the 1982 LOS Convention within the Senate this time. Painfully, however, we have been this close once before. It seemed like success was at hand in 2004, when Senator Lugar provided the needed leadership on the Foreign Relations Committee to achieve a unanimous recommendation out of that Committee that the US Senate should provide its assent. Somehow, however, a small but vocal opposition was able to persuade the Senate leadership not to bring the treaty to a floor vote. If the Senate cannot now be persuaded to approve the LOS Convention, other parties to the Convention will continue to shape developments in the Commission on Continental Shelf Limits, International Seabed Authority and International Tribunal for the Law of the Sea and, perhaps, add a gloss to the Convention’s text through the recognized process of agreed-upon interpretations.
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Notes

1. There is apparently no statutory mandate for such a plan; however, 10 US Code sec. 5062(a) (2006) provides that

[t]he Navy shall be organized, trained, and equipped primarily for prompt and sustained combat incident to operations at sea. It is responsible for the preparation of naval forces necessary for the effective prosecution of war except as otherwise assigned and, in accordance with integrated joint mobilization plans, for the expansion of the peacetime components of the Navy to meet the needs of war.

2. A timeline of the process is available at http://www.nwc.navy.mil/cnws/marstrat/overview.aspx (last visited Feb. 8, 2008). Efforts at the Naval War College were led by Robert Rubel, Dean of the Center for Naval Warfare Studies.


5. O'Connell also notes that "there is no public servant with such means of involving his government in international complications as the naval officer." Id. at 179.

6. See, e.g., Alfred Thayer Mahan, The Influence of Sea Power upon History 1660–1783 (5th ed. 1894); Peter Padfield, Maritime Supremacy and the Opening of the Western Mind: Naval Campaigns that Shaped the Modern World, 1588–1782 (1999); Peter Padfield, Maritime Power and the Struggle for Freedom: Naval Campaigns that Shaped the Modern World, 1788–1851 (2003); Michael A. Palmer, Command at Sea: Naval Command and Control since the Sixteenth Century (2005); Norman Friedman, Seapower as Strategy: Navies and National Interests (2001); Arthur Herman, To Rule the Waves: How the British Navy Shaped the Modern World (2005). Although Herman's account does document the Royal Navy's contributions to eradicating piracy and slavery, his focus there is best characterized as the influence of the use of sea power on law, not the other way around.


15. Other institutions in the strategy development process included the US Naval Academy, Naval Postgraduate School, Center for Naval Analyses, US Army War College, National War College and the Applied Physics Laboratory at Johns Hopkins University.


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29. US Special Operation Command’s “sovereign challenge” initiative is designed to help other states appreciate the effect of global terrorism on state sovereignty. Among other things, it has persuaded US Southern Command to avoid phrases such as “coalition partners” and “partner nations,” and instead use “sovereign nations” to reinforce the importance of the state. See Sovereign Challenge: The Network for Sovereign Nation Collaboration toward a Global Anti-terrorist Environment, available at http://www.sovereignchallenge.org (unclassified, but restricted access).


32. Some would include environmental security as well. See generally THOMAS HOMER-DIXON, ENVIRONMENT, SCARCITY, AND VIOLENCE (1999).

33. 1982 LOS Convention, supra note 21, art. 94.


37. Craig H. Allen, Legal Interoperability Issues in International Cooperation Measures to Secure the Maritime Commons, in id. at 113.

38. As used herein, “international institutions” refers to a set of rules that stipulate the ways in which states should cooperate and compete with each other. They call for decentralized cooperation of individual sovereign states, without any effective mechanism of command. They are sometimes formalized into international agreements and embodied in international organizations with their own personnel and budgets. See John J. Mearsheimer, The False Promise of International Institutions, 19 INTERNATIONAL SECURITY, Winter 1994/95, at 5. The Proliferation Security Initiative is an example of an international institution that is not based on a formal agreement or organization. See US Department of State, Bureau of Public Affairs, Fact Sheet, Proliferation Security Initiative (Feb. 9, 2006), http://www.state.gov/t/isn/60896.htm. See also Sean D. Murphy, Contemporary Practice of the United States Relating to International Law, International Criminal Law: “Proliferation Security Initiative” for Searching Potential WMD Vessels, 98 AMERICAN JOURNAL OF INTERNATIONAL LAW 355 (2004). By contrast, the International Atomic Energy Agency (IAEA) is an international organization that facilitates an international regime. For a description of the IAEA’s mission, see IAEA.org. The “Atoms for Peace” Agency, http://www.iaea.org/About/index.html (last visited Feb. 8, 2008).
39. Realism is one of several positive theories of international relations that seek to (1) describe the world of international affairs, (2) predict how it might change in the coming years and (3) prescribe a response to that world. Such positive analysis must be distinguished from the normative approaches in political philosophy.


41. Id. at 189. In reviewing Anthony Arend's book Legal Rules and International Society, David Bederman surveys views on international law held by the various schools of international relations:

But if [international relations (IR)] theory could not divine a categorical conclusion as to the ultimate nature of the international order, both realists and institutionalists could agree on some things. One of them was that international law was irrelevant. The classical realist position, championed by such epic figures as Hans Morgenthau and George Kennan, is that international law is "epiphenomenal" ([that is,] stupid). The classical realists' intellectual successors, the structural realists (or neorealists), are no less hostile to international law. Such writers as Kenneth Waltz, John Mearsheimer, and Joseph Grieco were emphatic in their dismissal of international legal rules as an independent force influencing the behavior of nations. All that matters, according to the realists (whether classical or structural), is power. In their view, legalities can never constrain power. And if this seems dreary in a Hobbesian way, the rational institutionalists of IR theory are really no better. As Professor Arend notes at the outset of his book, institutionalists were quick to "sell-out" international law in their rush to defend themselves against the onslaught of realist attack. Much of rational institutionalist scholarship does not mention international law by name, preferring, instead, to resort to a bewildering array of jargon for such phenomena as regimes, norms, and values. International law, in the minds of such writers as Robert Keohane, Stephen Krasner, and Oran Young, is just, well, too legal. And even though the rational institutionalists espouse the view that institutions and regimes reduce transaction costs, stabilize expectations, allow "repeat-playing" and cooperation in international affairs, and permit decentralized enforcement of norms, none of these virtues necessarily translates into the recognition of definitively legal rules. According to the institutionalists, international law might impact "low-politics"—that realm of policy that is not at the core of central state interests. For the rational institutionalists, where rules really matter, there really is no law. This is what makes the institutionalists rational, at least in the view of their archenemies, the realists.

See David J. Bederman, Constructivism, Positivism, and Empiricism in International Law, Review of Anthony Clark Arend, Legal Rules and International Society (1999), 89 GEORGETOWN LAW JOURNAL 469 (2001) (footnotes omitted). Others respond that whatever its status as positive law, mere epiphenomenal character, or its comparatively primitive state of development, there is no denying that international law exerts a normative force on State behavior.

42. JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 208 (1832). Lord Austin is said to have once likened the effect of international law to that of a hedgerow: while not blocking one's path, it certainly redirects one's trajectory.

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45. See, e.g., COLIN S. GRAY, THE SHERIFF: AMERICA’S DEFENSE OF THE NEW WORLD ORDER 3 (2004) (in referring to the NATO intervention in Kosovo, without UN Security Council authorization, he argues that “[b]ecause world politics comprises a distinctly immature political system, we have to be somewhat relaxed about some of the legal niceties”).

46. CARL VON Clausewitz, ON WAR 75 (Michael Howard & Peter Paret eds. and trans., 1976) (1832).


55. National interests include survival, defense of the homeland, economic well-being, favorable world order and promotion of values. States are more willing to place their trust in international law and organizations for the protection and promotion of the latter three interests, less likely to do so with defense of the homeland, and would almost never do so when the State’s survival is at stake.


57. I avoid arguments based on altruism, noting Colin Gray’s observation that “altruism has a thin record in strategic history and, we must assume, an unpromising future.” THE SHERIFF, supra note 45, at 8. See also JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW 211–15 (2005).

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59. Smaller, regional navies often embrace Professor Till’s concept of good order at sea. Some remark that there are no longer any wars to be won, only order to be secured. See GEOFFREY TILL, SEAPOWER: A GUIDE FOR THE TWENTY-FIRST CENTURY (2004). See also RICHARD HILL, MARITIME STRATEGY FOR MEDIUM POWERS (1986).


61. The Sheriff, supra note 45, at 3.

62. But we should not fall prey to what some call the “perfect” regime paradigm, by which we assume that the present regime is complete and perfect and that new threats, challenges and opportunities can all be addressed by merely reinterpreting the existing regime. See Harry P. Monaghan, Our Perfect Constitution, 56 NEW YORK UNIVERSITY LAW REVIEW 353 (1981). To do so stifles rulemaking, substituting judges and academics for legislators. We would do well to consider the merits of one critic who suggested that the UN Charter system is only clear in its application where no State does anything. Perhaps it is asking too much to expect clarity from resolutions vetted through fifteen members of the Security Council. But the lack of clarity gives rise to the temptation for clever interpretations of UN Security Council resolutions or of Article 51 of the Charter.


64. Future US security strategies will almost surely say a good deal more than the past ones about the tension between State sovereignty and international law and organizations. Many see the relationship between the two as a zero-sum game: every gain in international law or in an international organization’s power necessarily means there must be an offsetting loss of State sovereignty. See, e.g., JEREMY A. RABKIN, LAW WITHOUT NATIONS? WHY CONSTITUTIONAL GOVERNMENT REQUIRES SOVEREIGN STATES (2005). Others see synergistic possibilities. See, e.g., STEPHEN D. KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY (1999). A bold maritime strategy might start this conversation now in the expectation that it will bear fruit in 2009 with the new administration, perhaps even leading the way.

65. The diplomatic-ideological-military-economic force formulation by Professors McDougal and Feliciano in 1961 was plainly focused on State actors. See MYRES S. MCDOUGAL & FLORENTINO P. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER 28–33 (1961).


67. The President’s recent executive order on “national security professional development” is likely to stimulate and expand those efforts. See Exec. Order No. 13,434, 72 Fed. Reg. 28583 (May 17, 2007).

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available at http://www.austlii.edu.au/cgi-bin/disp.pl/au/other/dfat/treaties/notinforce/2005/30.htm?query=suppression%20of%20unlawful%20acts (which now extends to additional acts of maritime terrorism and transport of WMD)? The author has been informed that the Navy rejected the idea.


70. As Admiral Mullen described the Global Fleet Station concept, "The idea is to forward deploy, where invited, ... a fleet of shallow-draft ships and support vessels ... in green and brown water." Mullen, supra note 7 (emphasis added).


73. The Commanders Respond, supra note 71, at 34.


76. Supra note 13, at 6.

77. The new Joint Publication on Multinational Operations recognizes that "[c]ommanders must ensure that MNTF forces comply with applicable national and international laws during the conduct of all military operations." Chairman of the Joint Chiefs of Staff, Joint Publication 3-16, Multinational Operations, at III-6 (2007). Joint Publication 3-16 lists law not as an "operational" consideration in planning and execution, but rather as one of several "general considerations," which include, inter alia, rules of engagement, language, culture and sovereignty.

78. In 2006, the United States lost its seat on the International Law Commission (ILC), arguably the world's most important international law codification and progressive development forum, when its candidate was, for the first time since the ILC's founding, not voted a seat on the Commission. Those who observed the international and non-governmental organization politics behind the United States being voted off the UN Human Rights Commission on May 3, 2001 should not have been surprised.


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
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essay illustrate clearly enough. This deference 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.

80. For example, the 2006 Green Paper on Maritime Strategy for the European Union concludes that

[t]he legal system relating to oceans and seas based on UNCLOS needs to be developed to face new challenges. The UNCLOS regime for EEZ and international straits makes it harder for coastal states to exercise jurisdiction over transiting ships, despite the fact that any pollution incident in these zones presents an imminent risk for them. This makes it difficult to comply with the general obligations (themselves set up by UNCLOS) of coastal states, to protect their marine environment against pollution.


82. My use of the term “rule set” begs the important and controversial question “which rule set?” It is important to keep in mind that, as the Department of State’s Legal Advisor John Bellinger highlighted in his address to the 2006 Naval War College International Law Department Conference, a number of States and non-governmental organizations criticize the United States for its disregard for “international law” when often the “laws” they are referring to are not binding on the United States (e.g., the Rome Statute establishing the International Criminal Court, the Kyoto Protocol, the Ottawa Anti-personnel Landmines Convention and the Additional Protocols to the 1949 Geneva Conventions). The critics rhetorically conflate a policy choice by the United States not to become party to a treaty with violations of a treaty to which the United States is a party. This can present a problem for the strategy drafter who might need to choose his/her words carefully, to make it clear that the United States will adhere to international law to which it has consented to be bound. See John B. Bellinger III, International Legal Public Diplomacy, in GLOBAL LEGAL CHALLENGES: COMMAND OF THE COMMONS, STRATEGIC COMMUNICATIONS AND NATURAL DISASTERS 205 (Michael D. Carsten ed., 2007) (Vol. 83, US Naval War College International Law Studies). See also Policy Coordinating Committee, US National Strategy for Public Diplomacy and Strategic Communication (2007), available at http://www.state.gov/documents/organization/87427.pdf.

83. See, e.g., John Pompret, China Ponders New Rules of Unrestricted Warfare, WASHINGTON POST, Aug. 9, 1999, at 1, quoting Colonel Wang Xiangsui, of the Chinese Air Force: “War has rules, but those rules were made by the West. . . . [I]f you follow those rules, then weak countries have no chance. . . . We are a weak country, so do we need to fight according to your rules? No.”
84. The classical approach was the "fleet in being." See Julian Corbett, SOME PRINCIPLES OF MARITIME STRATEGY pt. III, ch. III (1911).

85. See generally Craig H. Allen, Command of the Commons Boasts: An Invitation to Lawfare?, in GLOBAL LEGAL CHALLENGES, supra note 82, at 21. Examples might include the Rome Statute establishing the International Criminal Court, Additional Protocol I to the 1949 Geneva Conventions and the Convention on Anti-personnel Landmines. In the words of Vattel, in international law "strength or weakness . . . counts for nothing. A dwarf is as much a man as a giant is; a small Republic is no less a sovereign state than the most powerful Kingdom." EMERICH DE VATTÉL, DROIT DES GENS (1758), quoted in ADAM WATSON, THE EVOLUTION OF INTERNATIONAL SOCIETY 203 (1992).

86. Kellogg, supra note 34, at 50.

87. The "New Haven School" policy-oriented jurisprudence developed by Yale Professors Myres McDougal and Harold Lasswell depicts international law as a process, in which "uses" produce "effects," some of which are undesired, resulting in "responses," which may include new rules. MYRES S. MCDOUGAL & HAROLD D. LASSWELL, JURISPRUDENCE FOR A FREE SOCIETY: STUDIES IN LAW, SCIENCE AND POLICY (1992).

88. Some have argued that only the United States has an independent global security strategy. See, e.g., ROBERT COOPER, THE BREAKING OF NATIONS: ORDER AND CHAOS IN THE TWENTY-FIRST CENTURY 45 (2004); LEHMAN, supra note 16, at 135–36 (noting that any US maritime strategy must be global in concept).

89. John Paul Jones, quoted in BURDICK H. BRITTIN, INTERNATIONAL LAW FOR SEAGOING OFFICERS 7–8 (5th ed. 1986). The relevant law was collected, reported, analyzed and, in my opinion, shaped by the pioneer Charles H. Stockton in his early books on international law; by Captain Burdick Brittin in the five editions of his Naval Institute Press books published between 1956 and 1986; and by the 1987 Commander's Handbook on the Law of Naval Operation and the later Annotated Supplement, which many believe sprang fully footnoted from the cranium of one Captain Jack Grunawalt (US Navy, retired). The current iteration of the Commander's Handbook is cited in note 66.

90. See Department of the Navy, US Navy Regulations art. 0705 (1990). Arguably, the Army's commitment to a robust operational law program, begun in the 1980s under the leadership of visionaries like Colonel David Graham, went one step further by putting the requirement to conform to the law into practice through training and wider use of the service's judge advocates. Some now urge that operational law should be included in the Joint Professional Military Education requirements.

91. For the sake of argument, I will concede that protecting human rights abroad is not widely viewed as a "vital interest" of the United States; however, we must not overlook how entrenched this issue is in our national identity. Strategy must serve the national interests; but it must also be consistent with the national identity. See William C. Adams, Opinion and Foreign Policy, FOREIGN SERVICES JOURNAL (May 1984), available at http://www.gwu.edu/~pad/202/readings/foreign.html. For the United States, that identity begins with a reminder that we are the world's oldest constitutional democracy.

92. Supra note 13.


Professor Kennedy opens his book with Alfred Lord Tennyson’s 1837 poem *Locksley Hall*, which accurately reflects the modern/postmodern view.

96. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA (1835).

97. The author is indebted to the late Judge William L. Dwyer (US District Court for the Western District of Washington) for the allusion to Yeats and the suggestion that the law can serve as our “centre.”


