

# THREATS FROM THE GLOBAL COMMONS: PROBLEMS OF JURISDICTION AND ENFORCEMENT

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*[This commentary considers a number of potential threats to security originating from the global commons. While direct attacks on a state from vessels and aircraft passing through the global commons constitute such threats, this paper focuses upon challenges posed by possible action against maritime activity occurring outside the territorial sea and national airspace. In this context, there are vulnerabilities surrounding a variety of activities in the global commons. These include threats to international maritime trade and fisheries, possible attacks on offshore oil and gas installations, and interference with pipelines and submarine cables. There are significant limitations on the ability of a coastal state to respond within international law. This commentary considers the nature of jurisdiction beyond the territorial sea, and investigates what protective and responsive actions are available to states. It concludes by considering current international developments which provide for cooperation in intelligence, surveillance and interdiction, and greater use of port state control to circumvent these jurisdictional limitations.]*

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## I INTRODUCTION

Oceans cover approximately 70 per cent of the earth's surface. For international lawyers, this has long been an area which lay beyond the direct control of coastal states. Prior to the advent of jurisdiction based on the continental shelf and a state's exclusive economic zone ('EEZ'), almost all of this area was beyond national jurisdiction. Only a tiny belt of sea of usually three to four nautical miles was subject to the direct control of a coastal state.<sup>1</sup> The *United Nations Convention on the Law of the Sea* ('UNCLOS')<sup>2</sup> currently permits coastal states to extend their jurisdiction to the seabed and waters up to 200 nautical miles around their littoral, and in limited circumstances, to extend their jurisdiction in relation to the seabed to 350 nautical miles around their

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<sup>1</sup> The British Empire and France all maintained three nautical mile territorial seas until after World War II. The Scandinavian countries asserted four nautical mile territorial seas from the late 18<sup>th</sup> century until after World War II: see Daniel O'Connell, *The International Law of the Sea* (Ivan Shearer, revised ed, 1982) vol 1, 131–8.

<sup>2</sup> Opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994).

littoral.<sup>3</sup> In spite of this, two thirds of the world's oceans are still beyond any national jurisdiction.<sup>4</sup> Even with this jurisdiction over the EEZ and continental shelf, *UNCLOS* explicitly preserved most high seas rights, and limited the jurisdiction which a coastal state could exercise.

This commentary considers the challenges that coastal states face when attempting to combat security threats which pass through this vast area of high seas, the EEZ and areas in which the high seas rights of other states can still be asserted. It will briefly consider the jurisdictional and enforcement questions posed by ships as a source or target of an attack, as well as the risk of attacks on oil and gas installations, and on undersea pipelines and submarine cables. It will consider the nature of the threats posed in these areas, and what tools international law provides states to allow them to respond to such threats. It will conclude by positing areas where further development may assist in improving the ability of coastal states to react in a timely and effective fashion to a threat in the global commons. However, it is first necessary to consider the limits of the global commons for the purposes of this commentary.

## II THE GLOBAL COMMONS

There are several ways to define the extent of the oceanic global commons. One would be to limit the commons to areas entirely beyond national jurisdiction and control. This would include the deep seabed, referred to in *UNCLOS* as the 'Area', which consists of the entire seabed outside the continental shelf of any state, and the waters beyond the EEZ of any state.<sup>5</sup> These areas are commons because, in the case of the Area, jurisdiction is vested in the International Seabed Authority as part of the common heritage of mankind;<sup>6</sup> in the case of the high seas, jurisdiction by states is limited to vessels flying their flag, except in very specific and limited circumstances.<sup>7</sup>

Yet, in a number of ways, restricting the global commons to these areas does not adequately indicate the freedom from state jurisdiction that is available even in the waters of a state's EEZ. The EEZ only gives a coastal state jurisdiction and sovereign rights over economic activity, marine scientific research and environmental matters.<sup>8</sup> It does not give a coastal state jurisdiction to interfere with freedom of navigation,<sup>9</sup> the laying of submarine cables or pipelines,<sup>10</sup> or to stop and board vessels unless they infringe the coastal state's laws concerning the EEZ.<sup>11</sup> In such contexts, laws of a coastal state would thus be inapplicable to a foreign vessel even if individuals on board had committed serious crimes against the coastal state. In some respects then, the EEZ remains an area of

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<sup>3</sup> Ibid art 76, which defines the limits of the continental shelf.

<sup>4</sup> See, eg, Martin Tsamenyi and Transform Aqorau, 'Fishing Rights and Responsibilities at Sea: Analysis of the Relevant Provisions of the *United Nations Convention on the Law of the Sea*' in Martin Tsamenyi and Max Herriman (eds), *Rights and Responsibilities in the Marine Environment: National and International Dilemmas* (1996) 67.

<sup>5</sup> *UNCLOS*, above n 2, art 1(1).

<sup>6</sup> Ibid art 136.

<sup>7</sup> Ibid art 110.

<sup>8</sup> Ibid art 56.

<sup>9</sup> Ibid arts 58(1), 87.

<sup>10</sup> Ibid arts 58(1), 79. Article 58(1) indicates that other states have a right to lay cables and pipelines, in accordance with other provisions of *UNCLOS*. While art 79(3) also stipulates that the 'delineation of the course of laying a pipeline is subject to the consent of the coastal state', this would not seem to amount to a veto over construction.

<sup>11</sup> Ibid art 58(3).

commons, even though the coastal state may still be able to regulate economic activities such as mining and fishing.<sup>12</sup> A similar situation occurs in respect to aerial navigation. The airspace over the EEZ and high seas is international airspace, where there is a right to freedom of aerial navigation.<sup>13</sup>

In the context of this commentary, the global commons will be treated as areas in which the activities of vessels not subject to flag state control cannot, for the most part, be regulated. This will certainly include the high seas, but would also encompass the EEZ, where although the coastal state would possess the right to protect economic activities, it would lack the jurisdiction to regulate most other actors and activities, from whence a threat may come.

It must also be noted that this consideration of the global commons should not be regarded as understating the threats to shipping resulting from piracy and other criminal activity in the territorial seas and internal waters of coastal states.<sup>14</sup> Instead, this commentary seeks to consider threats to shipping in areas where the territorial jurisdiction of a coastal state is not available to provide a response, which, while a lesser threat, raise more difficult jurisdictional issues.

### III THREATS

#### A *Threats from the Commons*

There are two distinct areas of threats emerging from the high seas. First are threats against the ports and territory of a coastal state that originate from the global commons. Such threats might include the shipment of weapons of mass destruction ('WMD') or related delivery systems to a port for use against a state or its allies, or the use of a vessel in a direct attack. In the latter case, direct attacks could originate from a naval vessel or a commercial vessel which has been chartered, commandeered or hijacked, and destroyed in the port of a state causing damage to facilities or human life.

This type of attack has yet to occur in the West, but has been carried out in the Middle East against Western interests.<sup>15</sup> Even so, threats derived from commercial shipping have been the focus of a tremendous amount of planning and cooperative effort internationally. Multinational efforts — such as the Proliferation Security Initiative ('PSI')<sup>16</sup> and the International Ship and Port

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<sup>12</sup> Ibid art 33. There is some additional scope for state jurisdiction in the contiguous zone over fiscal, immigration, sanitary and customs matters.

<sup>13</sup> Ibid art 58(1).

<sup>14</sup> In this regard, it should be noted that most cases of piracy take place in territorial seas, particularly off parts of Africa and South East Asia: see, eg, International Chamber of Commerce International Maritime Bureau, International Chamber of Commerce Commercial Crime Services, *Live Piracy Map 2006* (2006) <<http://www.icccs.org/extra/display.php>> at 18 May 2007 (charting the location of pirate attacks in 2006).

<sup>15</sup> For example, the separate attacks against the French-flagged tanker *Limburg* in the Aden harbour and the destroyer *USS Cole* off the coast of Yemen would fall into this category: see Jessica Romero, 'Prevention of Maritime Terrorism: The Container Security Initiative' (2003) 4 *Chicago Journal of International Law* 597, 598. See also Yonah Alexander and Tyler Richardson, 'Maritime Terrorism Phase Next?', *The Washington Times* (Washington DC, US) 20 October 2002, B3.

<sup>16</sup> See generally Stuart Kaye, 'The Proliferation Security Initiative in the Maritime Domain' (2005) 35 *Israel Yearbook on Human Rights* 205.

Facilities Security Code ('ISPS Code')<sup>17</sup> — and the United States' Container Security Initiative,<sup>18</sup> are excellent examples of responses to this direct threat from the sea. States have moved cooperatively to design and implement legal measures to protect shipping and maritime infrastructure from terrorist threats, and to foster improved data and intelligence sharing.<sup>19</sup> Significant progress in these areas has been made in a relatively short space of time, especially considering the scale and reach of the measures within the ISPS Code, which was adopted and functioning effectively within five years from the attacks of September 11, 2001.<sup>20</sup>

From a legal point of view, this type of threat is, in some ways, relatively easy to deal with. Once a vessel which is not sovereign immune enters the port of a state, it becomes subject to the regulation of the port state, whose criminal laws can be applied to activities taking place on board.<sup>21</sup> An attempt to ship WMD into a port would thus attract the jurisdiction of the port state, and enforcement action against the ship could be taken by local authorities. Even if the offending vessel is sovereign immune, it can be asked to vacate the port and the territorial waters of the port state, and must comply with these directions in an expeditious fashion. These actions may give rise to a valid claim for damages against the flag state for any breaches of the law of the port state committed by the vessel.<sup>22</sup>

Port states can also close the port to international traffic, or refuse entry to vessels which fail to comply with entry requirements. For example, the Australian Maritime Identification System ('AMIS') requires vessels to provide the Australian authorities with data detailing the vessel's crew, cargo, route and

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<sup>17</sup> *Amendments to the Annex to the International Convention for the Safety of Life at Sea*, opened for signature 12 December 2002, [2003] ATNIF 11, Annex (International Code for the Security of Ships and of Port Facilities) (entered into force 1 July 2004). The ISPS Code was passed as an amendment to the *International Convention for the Safety of Life at Sea*, opened for signature 1 November 1974, 1184 UNTS 2 (entered into force 25 May 1980), which adopted a new chapter XI-2, entitled 'Special Measures to Enhance Maritime Security', requiring states to comply with the ISPS Code. See also Rachael Bralliar, 'Protecting US Ports with Layered Security Measures for Container Ships' (2005) 185 *Military Law Review* 1, 23–35.

<sup>18</sup> US Customs and Border Protection, *Container Security Initiative: 2006–2011 Strategic Plan* (2006), available from <<http://www.cbp.gov>> at 18 May 2007. See generally Romero, above n 15; Math Noortmann, 'The US Container Security Initiative: A Maritime Transport Security Measure or an (inter)National Public Security Measure?' (2004) 10 *Ius Gentium* 139.

<sup>19</sup> See generally Michael Becker, 'The Shifting Public Order of the Oceans: Freedom of Navigation and the Interdiction of Ships at Sea' (2005) 46 *Harvard International Law Journal* 131; Justin Mellor, 'Missing the Boat: The Legal and Practical Problems of the Prevention of Maritime Terrorism' (2002) 18 *American University International Law Review* 341.

<sup>20</sup> See generally Rosalie Balkin, 'The International Maritime Organization and Maritime Security' (2006) 30 *Tulane Maritime Law Journal* 1; Thomas J Schoenbaum and Jessica C Langston, 'An All Hands Evolution: Port Security in the Wake of September 11th' (2003) 77 *Tulane Law Review* 1333.

<sup>21</sup> See *Wildenhuis's Case*, 120 US 1, 11–12 (1887).

<sup>22</sup> *UNCLOS*, above n 2, art 31.

previously visited ports.<sup>23</sup> This data is sought when the vessel is within 1000 nautical miles of the Australian continent. Although there is no territorial jurisdiction to enforce such a measure, it has been effective because failure to provide the data may see the vessel refused entry to the port, and subject to subsequent arrest if it enters Australia's territorial sea with an intention to proceed to its intended port. The right of entry thus becomes tied to additional conditions, which can be used to improve security, giving operators a clearer picture of the maritime security environment in adjacent waters.<sup>24</sup>

For vessels which pose a threat but have yet to reach port, issues of response become more difficult. Interdicting such vessels raises questions regarding the basis on which a coastal state may assert its jurisdiction. Certainly, even the PSI does not purport to authorise the interception of vessels outside of territorial waters, unless they are flagged in a PSI state, or if consent has been obtained from the flag state.<sup>25</sup> Other regimes that might provide a basis for intervention in the global commons will be considered in the next section.

### B *Threats to Activities in the Commons*

The second type of threat is directed at activities occurring within the global commons. Activities which take place in the commons include transportation, oil and gas exploitation, and communications via submarine cable. Each of these activities is vulnerable to attack from ships and aircraft on a range of levels, and it is appropriate to consider each in turn.

Attacks on ships at sea have been a feature of maritime transportation since ancient times. The legal concept of piracy is of great antiquity, and the ability of states to deal with piratical acts against their shipping is quite extensive.<sup>26</sup> *UNCLOS* codifies existing customary international law and provides for universal jurisdiction over vessels engaged in piracy, as long as enforcement action is undertaken by marked government vessels in the high seas.<sup>27</sup> This potentially gives great freedom of action to flag states to use their armed forces to protect their shipping from pirate activity.

In practice, however, the availability of universal jurisdiction to deal with piracy has been limited by two key factors. First, universal jurisdiction over piracy is limited to incidents taking place outside the territorial sea. *UNCLOS* preserves the paramountcy of coastal state sovereignty within the territorial sea, and consistent with the regime of innocent passage,<sup>28</sup> third state vessels lack the

<sup>23</sup> Natalie Klein, 'Legal Implications of Australia's Maritime Identification System' (2006) 55 *International and Comparative Law Quarterly* 337; Cameron Moore, 'Turning King Canute into Lord Neptune: Australia's New Offshore Protection Measures' (2006) 3 *University of New England Law Review* 1. In its original formulation, the AMIS was described by the Australian Prime Minister as a 'Maritime Identification Zone': John Howard, Prime Minister of Australia, 'Strengthening Offshore Maritime Security' (Press Release, 15 December 2004). However, following concerns voiced by Australia's neighbours over a perceived unilateral assertion of authority, Australian officials began referring to the 'zone' as the AMIS. For the current interpretation regarding the operation of the AMIS, see Australian Customs Service, *Australian Maritime Identification System* (2006) <<http://www.customs.gov.au/site/page.cfm?u=5644>> at 18 May 2007.

<sup>24</sup> See Natalie Klein, 'Legal Limitations on Ensuring Australia's Maritime Security' (2006) 7 *Melbourne Journal of International Law* 306.

<sup>25</sup> See below Part IV(A).

<sup>26</sup> Ivan Shearer, *Starke's International Law* (11<sup>th</sup> ed, 1994) 247-50; Lassa Oppenheim, *International Law: A Treatise* (Hersch Lauterpacht, 6<sup>th</sup> revised ed, 1947) vol 1, 557-67.

<sup>27</sup> *UNCLOS*, above n 2, arts 107, 110.

<sup>28</sup> *Ibid* Part II, s 3.

power to effect an arrest of a pirate vessel in these waters. As noted above, the bulk of pirate attacks in recent times have taken place in the territorial seas, limiting the ability of states other than the coastal state to respond to such attacks.<sup>29</sup>

The second factor is of greater relevance to recent concerns regarding coastal state security. The traditional definition of piracy is the attacking of a vessel for 'private ends'.<sup>30</sup> This motivation of obtaining profit distinguishes piratical acts from activities with a purely political motivation. Since terrorist attacks are generally not motivated by the possibility of personal profit, but are instead designed to advance a political cause, or to frighten and disrupt lawful activities, it is likely that many terrorist acts at sea will not fall under the umbrella of piracy.

While attacks on shipping represent one example of a threat from the global commons, the multitude of activities taking place in the world's oceans face numerous other threats. Oil and gas exploitation of offshore fields means that there are large and expensive facilities permanently moored in locations remote from coastal areas. As a consequence, these platforms, loading facilities and pipelines are extremely vulnerable to hostile action. This vulnerability is due to the fact that they are exploiting and storing quantities of flammable gases or liquids, which could be ignited by terrorist action, or released to cause significant environmental harm.

Although terrorist attacks against oil and gas platforms have not taken place, the occupation of Brent Spar by Greenpeace in 1995 demonstrated the relative ease with which terrorists could occupy an offshore platform and the inherent difficulties in removing them.<sup>31</sup> The particular vulnerability of such facilities is further highlighted by the fact that attacks against oil and gas facilities have also taken place in the context of armed conflicts.<sup>32</sup> The absence of a terrorist attack has not prevented international concern over this potential threat, and has led to international law providing coastal states and other relevant parties with greater powers to provide stronger protection to such facilities.<sup>33</sup>

Submarine cables and pipelines are another example of vulnerable assets in the global commons. All states have the right to lay cables and pipelines along the sea floor outside the territorial sea.<sup>34</sup> These cables and pipelines cannot be restricted by the coastal state, although there is a right for coastal states to be consulted with respect to the route of a proposed pipeline.<sup>35</sup> As with oil and gas platforms, a concrete terrorist threat against these facilities has yet to occur, but the possibility of damage and disruption is not insignificant. In this regard, terrestrial attacks against pipelines in Iraq and Nigeria have caused rises, albeit

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<sup>29</sup> See above n 14.

<sup>30</sup> *UNCLOS*, above n 2, art 101.

<sup>31</sup> See Greenpeace International, *The Brent Spar* <<http://www.greenpeace.org/international/about/history/the-brent-spar>> at 18 May 2007.

<sup>32</sup> See, eg, *Oil Platforms (Iran v US) (Merits)* [2003] ICJ Rep 161. This case involved attacks carried out by the US navy on Iranian oil platforms in response to attacks by Iran on US-flagged vessels.

<sup>33</sup> See *Protocol of 2005 to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*, opened for signature 14 October 2005, IMO Doc LEG/CONF.15/21 (not yet in force) ('*SUA Protocol 2005*').

<sup>34</sup> *UNCLOS*, above n 2, art 112(1).

<sup>35</sup> *Ibid* art 79(3).

temporary, in world oil prices.<sup>36</sup> Attacks against submarine pipelines would have the added difficulties of causing widespread environmental harm, possibly to the EEZ of another state, and would be far more expensive and difficult to repair. Moreover, submarine cables, especially fibre optic cables, carry the bulk of the world's telephonic and electronic data, and their disruption could harm world communication in some areas for an extended period.<sup>37</sup>

In relation to these scenarios, the risk of harm from attack is not insubstantial. The locations of pipelines and cables are marked on commercially available charts, and the coordinates of cables can be downloaded from the internet without cost. This is because both pipelines and submarine cables are vulnerable to accidental damage, and there is a concern that mariners should avoid causing accidental harm. In practical terms, however, the implication of this legitimate and sensible precaution is to make the targeting of such facilities much easier for those engaged in organising potential terrorist activities against them.

#### IV RESPONSES

In considering the responses to threats from the global commons, it is appropriate to consider the individual types of threat faced, as the responses to each type of threat, while often related, are certainly distinct.

##### A *Shipping*

International law has for many years permitted ships and flag states to protect themselves from attack. This is exemplified by the fact that piracy attracts universal jurisdiction in areas beyond the territorial sea. Any ship that is subjected to an attack by pirates outside the territorial sea can receive assistance, and the pirates may be taken into custody by the warships of any state.<sup>38</sup>

In the context of responding to attacks on its nationals or ships flying its flag, a flag state has a right of self-defence, and can take any necessary steps to protect individuals and ships. This permits the naval escort of ships by the flag state and provides the flag state with a right to take action to protect the ship from attack.<sup>39</sup> Difficulties may arise where a state's nationals are aboard vessels that are flagged to another state. This makes efforts of protection problematic and would require the flag state to consent to the provision of protection by warships of another state. However, the provision of protection to other flagged vessels is by no means impossible without such consent, and there is ample precedent for such occurrences during times of armed conflict.<sup>40</sup> Such difficulties were avoided

<sup>36</sup> See, eg. Jamie Wilson, 'Iraq Hit by Fresh Attack on Oil Pipeline', *Guardian* (London, UK) 18 August 2003, 1; Edward Harris, 'Nigerian Militants Attack Oil Pipeline', *Associated Press Newsfeed*, 21 February 2006.

<sup>37</sup> For example, the value of submarine cables to Australia alone has been estimated at just under A\$5 billion per year to the national economy: Australian Communications and Media Authority, *Proposed Protection Zones for Submarine Cables off Sydney, New South Wales*, available from <<http://www.acma.gov.au>> at 18 May 2007.

<sup>38</sup> *UNCLOS*, above n 2, art 105.

<sup>39</sup> In times of armed conflict, merchant vessels receiving this form of protection in a convoy lose their protected status, and may be the subject of legitimate attack. Merchant vessels travelling unescorted may be taken as prizes during an armed conflict, but are not to be attacked without warning: see generally Louise Doswald-Beck (ed), *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (1995).

<sup>40</sup> For example, Allied convoys during both World War I and World War II were escorted by a range of Allied warships and contained a variety of Allied merchant shipping: see generally Richard Hough, *The Longest Battle: The War at Sea 1939-45* (1986).

during the Iran–Iraq war when, after tankers entering the Persian Gulf had come under fire from Iran, the US Navy provided escort protection to Kuwaiti-flagged vessels.<sup>41</sup>

In the context of protecting shipping from terrorist attacks, a separate instrument was negotiated under the auspices of the International Maritime Organization (‘IMO’) to facilitate a response. The *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation* (‘*SUA Convention*’)<sup>42</sup> was negotiated as a direct result of the 1985 hijacking of the Italian liner *Achille Lauro*.<sup>43</sup> The necessity for an international response was manifested in part because of differences within the international community as to whether the attack constituted piracy. This difference in opinion arose from the requirement that piracy be for ‘private ends’,<sup>44</sup> and the fact that the group who attacked the vessel, the Palestinian Liberation Front, staged the attack for political purposes. Some states, including the US, considered the attack to be an act of piracy, and were concerned that responses to an incident of this type might be undermined if it were not considered a piratical act.<sup>45</sup> Given this difference in opinion, it was necessary to create an international instrument to clarify the response to what was widely considered to be an illegal act.

Consequently, the *SUA Convention* was adopted in 1988. It deals with certain acts against shipping, including: seizing a ship; acts of violence against individuals on a ship; damage to a ship or its cargo so as to endanger its safe navigation; and endangerment of the safety of a ship by interfering with maritime navigational facilities or sending a false signal.<sup>46</sup> As the purpose motivating the acts is not relevant, an offence under the *SUA Convention* overlaps somewhat with piracy, although the scope of the *SUA Convention* is necessarily much wider. The *SUA Convention* applies to ships that have journeyed outside, or are scheduled to pass outside, the territorial sea of a single state.<sup>47</sup> Parties to the *SUA Convention* have jurisdiction to deal with such offences, based on the ship’s presence in their territorial sea, possession of their flag, or other means.<sup>48</sup> While the *SUA Convention* does not deal directly with the boarding of vessels where jurisdiction might be asserted by another state, the preamble to the *SUA Convention* provides that ‘matters not regulated by this Convention continue to be governed by the rules and principles of general international law’. This would limit non-flag state intervention to acts covered under art 110 of *UNCLOS*,

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<sup>41</sup> See, eg, *Operation Earnest Will* (2005) <[http://www.globalsecurity.org/military/ops/earnest\\_will.htm](http://www.globalsecurity.org/military/ops/earnest_will.htm)> at 18 May 2007.

<sup>42</sup> Opened for signature 10 March 1988, 1678 UNTS 221 (entered into force 1 March 1992).

<sup>43</sup> *Measures to Prevent Unlawful Acts Which Threaten the Safety of Ships and the Security of Their Passengers and Crews*, IMO Res A 584/14, Assembly, 14<sup>th</sup> sess (20 November 1985). The resolution was adopted by the IMO to encourage states to take measures to combat terrorist activity against ships. See also Malvina Halberstam, ‘Terrorism on the High Seas: The *Achille Lauro*, Piracy and the IMO Convention on Maritime Safety’ (1988) 82 *American Journal of International Law* 269, 270.

<sup>44</sup> *UNCLOS*, above n 2, art 101.

<sup>45</sup> Samuel Pyeatt Menefee, ‘Anti-Piracy Law in the Year of the Ocean: Problems and Opportunity’ (1999) 5 *International Law Students Association Journal of International and Comparative Law* 309, 310–13; Halberstam, above n 43, 270–91.

<sup>46</sup> *SUA Convention*, above n 42, art 3.

<sup>47</sup> *Ibid* art 4.

<sup>48</sup> The *SUA Convention* also contemplates jurisdiction based on passive personality, or attempted coercion of the state concerned: *ibid* art 6.

which would include, in this context, acts of piracy.<sup>49</sup> The *SUA Convention* also contains provisions which allow for the prosecution and extradition of individuals believed to have committed offences.<sup>50</sup>

In 2005, the *SUA Convention* was amended by a new protocol pertaining to maritime terrorism against shipping — *SUA Protocol 2005*. The focus of the *SUA Protocol 2005* is WMD and their non-proliferation.<sup>51</sup> New offences were created, including the use of shipping for terrorist activities,<sup>52</sup> and the transportation of a person who has committed offences under the *SUA Convention*<sup>53</sup> or any of the nine listed anti-terrorism conventions.<sup>54</sup> The *SUA Protocol 2005* also widens the scope for third parties to board ships, although flag state authorisation is still required to do so.<sup>55</sup>

An additional basis for inspection of vessels on the high seas is derived from the PSI. Although the PSI is expressed in terms of action based on flag state cooperation or territorial connection, it has led to the conclusion of flag state cooperative mechanisms with non-PSI state parties. The US has concluded a number of ship-boarding agreements, initially with Liberia<sup>56</sup> and Panama,<sup>57</sup> and subsequently with Belize,<sup>58</sup> Cyprus,<sup>59</sup> Croatia,<sup>60</sup> and the Marshall Islands,<sup>61</sup> with

<sup>49</sup> The deficiency was to some extent addressed by the *SUA Convention*, which provided a mechanism for the master of a vessel to hand individuals over to a 'receiving State', other than the flag state: *ibid* art 8.

<sup>50</sup> *Ibid* art 10.

<sup>51</sup> *SUA Protocol 2005*, above n 33, art 4(5) (providing for the addition of art 3*bis* to the *SUA Convention*).

<sup>52</sup> *Ibid* art 4(5), (providing for the addition of art 3*bis*(1)(a)(3) to the *SUA Convention*).

<sup>53</sup> *Ibid* art 4(6), (providing for the addition of art 3*ter* to the *SUA Convention*).

<sup>54</sup> *Ibid* arts 4(6), 7 (providing for the addition of art 3*ter* and the Annex to the *SUA Convention* respectively).

<sup>55</sup> *Ibid* art 8(2) (providing for the addition of art 8*bis* to the *SUA Convention*).

<sup>56</sup> *Agreement between the Government of the United States of America and the Government of the Republic of Liberia concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, Their Delivery Systems, and Related Materials by Sea*, opened for signature 11 February 2004, KAV 7065 (entered into force 9 December 2004) ('*PSI Ship Boarding Agreement with Liberia*').

<sup>57</sup> *Amendment to the Supplementary Arrangement between the Government of the United States of America and the Government of the Republic of Panama to the Arrangement between the Government of the United States of America and the Government of Panama for Support and Assistance from the United States Coast Guard for the National Maritime Service of the Ministry of Government and Justice*, opened for signature 12 May 2004 (entered into force 1 December 2004) ('*PSI Ship Boarding Agreement with Panama*').

<sup>58</sup> *Agreement between the Government of the United States of America and the Government of Belize concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, Their Delivery Systems, and Related Materials by Sea*, opened for signature 4 August 2005 (entered into force 19 October 2005) <<http://www.state.gov/t/isn/trty/50809.htm>> at 18 May 2007.

<sup>59</sup> *Agreement between the Government of the United States of America and the Government of the Republic of Cyprus concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, Their Delivery Systems, and Related Materials by Sea*, opened for signature 25 July 2005, KAV 7228 (entered into force 12 January 2006).

<sup>60</sup> *Agreement between the Government of the United States of America and the Government of the Republic of Croatia concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, Their Delivery Systems, and Related Materials*, opened for signature 1 June 2005 (entered into force 5 March 2007) <<http://www.state.gov/t/isn/trty/47086.htm>> at 18 May 2007.

<sup>61</sup> *Agreement with the Marshall Islands: Agreement between the Government of the United States of America and the Government of the Republic of the Marshall Islands concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, Their Delivery Systems, and Related Materials by Sea*, opened for signature 13 August 2004, KAV 7064 (entered into force 24 November 2004).

a view to permitting US vessels to stop and search suspect vessels flagged in these countries. As such, Liberia and Panama will, in certain circumstances connected to the shipment of WMD and related material, allow the US to inspect their flag vessels even though they do not function as PSI states.<sup>62</sup> The vast size of the Liberian and Panamanian registries means that these agreements have perhaps the greatest impact of all of the measures directed at shipping.

### B Oil and Gas Platforms

States have also considered the possibility of maritime terrorism being directed at targets other than ships — in particular, offshore oil and gas installations. This led to the adoption of the *Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf* ('*SUA Fixed Platforms Protocol 1988*')<sup>63</sup> which, along with the *SUA Convention*, deals with terrorist acts against offshore petroleum installations.<sup>64</sup>

The *SUA Fixed Platforms Protocol 1988* applies to 'fixed platforms', which is liberally defined to include all petroleum producing structures.<sup>65</sup> It also limits application to facilities on the continental shelf, excluding the application of the *SUA Fixed Platforms Protocol 1988* to installations in the territorial sea of a coastal state.<sup>66</sup> The offences under the *SUA Fixed Platforms Protocol 1988* are analogous to those under the *SUA Convention*. These include seizing a platform by force, destruction or damage threatening the safety of a platform, the placing of a device designed to damage, destroy or endanger the safety of a platform, and threats, intimidation, or acts of violence against persons aboard a platform.<sup>67</sup>

States under the *SUA Fixed Platforms Protocol 1988* have a similar jurisdictional envelope as under the *SUA Convention*. *UNCLOS* makes it clear that states have jurisdiction over offences taking place on fixed platforms on their continental shelf. This is confirmed in both the *SUA Fixed Platforms Protocol 1988* and the *SUA Convention*.<sup>68</sup> However, under the *SUA Fixed Platforms Protocol 1988*, states also have jurisdiction based on the nationality of the offender or the victim, or if the offender is a stateless individual habitually resident in that state, or if the offence is intended to coerce the state concerned.<sup>69</sup>

The *SUA Fixed Platforms Protocol 1988* does not deal with the issue of boarding fixed platforms. However, its preamble follows the *SUA Convention* in reiterating that 'matters not regulated by this Protocol continue to be governed by the rules and principles of general international law'. This appears to limit direct

<sup>62</sup> Liberia will also have the right to inspect US-flagged vessels: *PSI Ship Boarding Agreement with Liberia*, above n 56, arts 4, 15. However, it seems unlikely that this right will be exercised.

<sup>63</sup> Opened for signature 10 March 1988, 1678 UNTS 304 (entered into force 1 March 1992).

<sup>64</sup> Hossein Esmaeili, *The Legal Regime of Offshore Oil Rigs in International Law* (2001) 132.

<sup>65</sup> The definition includes artificial islands, installations and structures engaged in exploration or exploitation of the seabed or some other economic purpose: *SUA Fixed Platforms Protocol 1988*, above n 63, art 1(3).

<sup>66</sup> *Ibid* art 1(2).

<sup>67</sup> *Ibid* art 2(1). Other offences include attempting, abetting and threatening to commit an offence set out in art 2(1): at art 2(2).

<sup>68</sup> Neither the *SUA Fixed Platforms Protocol 1988* nor the *SUA Convention* displace general international law upon matters to which they do not address themselves: *SUA Fixed Platforms Protocol 1988*, above n 63, preamble; *SUA Convention*, above n 42, preamble. Therefore, the exclusive jurisdiction to regulate the operation and use of an installation remains with coastal states: *UNCLOS*, above n 2, art 60.

<sup>69</sup> *SUA Fixed Platforms Protocol 1988*, above n 63, art 3.

unilateral intervention against acts against platforms of a coastal state. The purpose of this provision was to ensure that coastal states would retain sole jurisdiction over activities on their platforms, such that another state could not assert a right to board a platform based on having jurisdiction over an offence. However, the absence of such a provision in the *SUA Fixed Platforms Protocol 1988* would not prevent a coastal state giving a third state ad hoc authorisation to board its installation.

The *SUA Fixed Platforms Protocol 1988* was also amended by protocol in 2005,<sup>70</sup> with amendments similar in nature to the *SUA Protocol 2005*. New offences have been created,<sup>71</sup> including: the use of explosives, radioactive materials, or WMD to cause death, serious injury or damage to an installation;<sup>72</sup> releasing oil or gas from an installation in a manner calculated to cause death, serious injury or damage;<sup>73</sup> or the threat to commit such offences.<sup>74</sup> State parties must apply their jurisdiction to their nationals and fixed platforms on their continental shelf in respect of these offences.<sup>75</sup> Much of the rest of the *SUA Convention* and *SUA Protocol 2005* amendments in relation to extradition, cooperation concerning data and evidence and domestic implementation are applied by the *SUA Fixed Platforms Protocol 2005 mutatis mutandis*.<sup>76</sup>

The *SUA Protocol 2005* and *SUA Fixed Platforms Protocol 2005* will enter into force 90 days after the 12<sup>th</sup> ratification without reservation in relation to the *SUA Convention* amendments,<sup>77</sup> and 90 days after the third ratification without reservation for the *SUA Fixed Platforms Protocol 1988* amendments.<sup>78</sup> Given the current wide participation in the *SUA Convention* and *SUA Fixed Platforms Protocol 1988*, both amendments are likely to enter into force relatively quickly.

### C Submarine Cables and Pipelines

In comparison to the measures taken to protect oil and gas platforms, responses in relation to the protection of submarine cables and pipelines have been less forthcoming. *UNCLOS* does provide that a coastal state must be consulted over the route a cable or pipeline on its continental shelf may take, but does not grant the coastal state jurisdiction over the cable or pipeline.<sup>79</sup> If a

<sup>70</sup> *Protocol of 2005 to the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf*, opened for signature 14 February 2006, IMO Doc LEG/CONF.15/21 (not yet in force) ('*SUA Fixed Platforms Protocol 2005*').

<sup>71</sup> *Ibid* art 4(2) (providing for the addition of art 2ter to the *SUA Fixed Platforms Protocol 1988*).

<sup>72</sup> *Ibid* art 4(1) (providing for the addition of art 2bis(a) to the *SUA Fixed Platforms Protocol 1988*).

<sup>73</sup> *Ibid* art 4(1) (providing for the addition of art 2bis(b) to the *SUA Fixed Platforms Protocol 1988*).

<sup>74</sup> *Ibid* art 4(1) (providing for the addition of art 2bis(c) to the *SUA Fixed Platforms Protocol 1988*).

<sup>75</sup> *Ibid* art 5(1) (providing for the replacement of art 3(1) in the *SUA Fixed Platforms Protocol 1988*).

<sup>76</sup> *Ibid* art 2(provides for the amendment of art 1 in the in the *SUA Fixed Platforms Protocol 1988*).

<sup>77</sup> *SUA Protocol 2005*, above n 33, art 18. Only state parties to the *SUA Convention* who have made no reservations to the application of that Protocol can become parties to the *SUA Protocol 2005*: at art 17.

<sup>78</sup> *SUA Fixed Platforms Protocol 2005*, above n 70, art 9. Only state parties to the *SUA Fixed Platforms Protocol 1988* who have made no reservations to the application of that Protocol can become parties to the *SUA Fixed Platforms Protocol 2005*: at art 8.

<sup>79</sup> *UNCLOS*, above n 2, art 79(1)–(3).

coastal state's cable or pipeline were damaged or its nationals injured, *UNCLOS* vests jurisdiction with the flag state of the offending vessel or the nationality of the offender.<sup>80</sup> A coastal state may only assert jurisdiction in certain limited circumstances. For example, jurisdiction may arise on the basis of the coastal state's EEZ jurisdiction where the damage to the cable or pipeline has caused harm to the environment.<sup>81</sup> Alternatively, the coastal state may assert jurisdiction if the cable or pipeline is on the coastal state's own continental shelf and used in connection with the exploration or exploitation of the shelf.<sup>82</sup>

Jurisdiction arising as a result of an attack on a pipeline presents the coastal state with more options for response than the situation for submarine cables. Even if the attack targets pipelines unconnected to a coastal state's exploitation activities, attacks on oil pipelines are likely to cause environmental damage. This would provide the coastal state with a basis for asserting its jurisdiction under art 79(4) of *UNCLOS*, which implies that a coastal state can make laws dealing with leaks from pipelines.<sup>83</sup>

A coastal state might also respond to an attack on a cable or pipeline on the basis of self-defence. Such actions would require states to demonstrate the importance of the threatened infrastructure, and the proportionality of the use of force in the circumstances.<sup>84</sup> Determining this question of fact will depend on the cable being vital telecommunications infrastructure, or an oil or gas carrying pipeline essential to the national economy.<sup>85</sup> Even in such circumstances, an isolated attack not immediately detected by the coastal state, or indeed other states using the cable or pipeline, might make it difficult to justify a response involving the use of force.

One way to increase the ability of states to respond to attacks on pipelines and submarine cables might be to base an argument upon art 3*bis* (1)(a)(iii) of the *SUA Protocol 2005*. This provision creates an offence where an individual 'uses a ship' to cause damage.<sup>86</sup> If the employment of a ship to aid terrorists in attacking a cable or a pipeline could be described as a 'use' of a ship in the context of art 3*bis*, then there could be jurisdiction. It is submitted, however, that such a wide definition is almost certainly beyond the anticipated scope of the offence. Moreover, even if the definition could sustain such interpretation, other conditions would need to be satisfied — for example, the consent of the flag state would still be required to effect a boarding,<sup>87</sup> and the flag state would also need to be a party to the *SUA Protocol 2005*.

In relation to jurisdiction over pipelines and submarine cables outside the territorial sea, vesting such jurisdiction, on the basis of *UNCLOS*, with the flag

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<sup>80</sup> *Ibid* art 113.

<sup>81</sup> *Ibid* art 56.

<sup>82</sup> *Ibid* art 79(4).

<sup>83</sup> See Myron H Nordquist (ed), *United Nations Convention on the Law of the Sea 1982: A Commentary* (1993) vol 2, 909–17.

<sup>84</sup> See, eg, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US) (Merits)* [1986] ICJ Rep 14, 94; *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226, 245.

<sup>85</sup> See, eg, W Michael Reisman, 'International Legal Responses to Terrorism' (1999) 22 *Houston Journal of International Law* 3, 55–8; Davis Brown, 'Use of Force against Terrorism after September 11<sup>th</sup>: State Responsibility, Self-Defense and Other Responses' (2003) 11 *Cardozo Journal of International and Comparative Law* 1, 40–1.

<sup>86</sup> *SUA Protocol 2005*, above n 33, art 4(5) (providing for the addition of art 3*bis*(1) to the *SUA Convention*).

<sup>87</sup> *Ibid* art 8(2) (providing for the addition of art 8*bis*(5)(b) to the *SUA Convention*).

state of the offending vessel is problematic. If terrorists attacked a pipeline or cable using a chartered vessel, such as a fishing trawler, the vessel may well be flagged in a state with an open registry. This would substantially undermine the prospects of enforcement action, as it is clear that a number of states with open registries that have attracted fishing vessels, such as Georgia, Togo or Equatorial Guinea,<sup>88</sup> have no capacity to deal with attacks even if those attacks occur close to their coasts.

Reliance on flag state jurisdiction in the context of cables and pipelines serves to highlight a broader problem resulting from the limitations of flag state jurisdiction over vessels. While the jurisdiction of a flag state remains the paramount mechanism to determine the applicable law aboard a vessel, in the case of states with open registries, a vessel's connection to its flag state may be so diffuse as to be meaningless. It is difficult to see how effective enforcement at sea can be undertaken by many of the states with substantial registries. Flag of convenience states have no capacity to enforce their laws on ships flying their flag, and may have little incentive to cooperate with other states to remedy the deficiency. The US has sought to tackle the problem in the context of the PSI by concluding boarding agreements with a number of states with open registries, including Liberia<sup>89</sup> and Panama.<sup>90</sup> However, these agreements fall short of permitting boarding in a wide range of circumstances, and there is every reason to think that further steps by flag states to improve cooperation in this manner would simply see a flight of vessels to other open registries.

## V CONCLUSION

The international community has shown great energy in tackling threats in the global commons. The *SUA Convention* and *SUA Fixed Platforms Protocol 1988* in their 2005 iterations represent a substantial and positive step forward in the legal protection of ships and platforms operating in the global commons. The conclusion of ship boarding agreements by the US to strengthen the efficacy and range of the PSI substantially broadens the reach of those arrangements into the global commons without undermining the fabric of international law. However, it is apparent that states have yet to create protection for the totality of activities that take place beyond the territorial sea. Adequate jurisdictional mechanisms to ensure an effective response to attacks on submarine cables and undersea pipelines do not exist, nor have international efforts been initiated to remedy the situation. It can only be hoped that positive change in these areas will not require the reality of an attack as a catalyst. Certainly, the piecemeal and inadequate nature of the current measures highlights the limitations of the jurisdictional basis for protecting assets in the global commons. Unless and until there are changes to the flag state jurisdiction regime, further development of the law in this area will continue in a sectional and reactive fashion.

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<sup>88</sup> These states were identified by the Commission for the Conservation of Antarctic Marine Living Resources in 2005 as 'flags of non-compliance': Commission for the Conservation of Antarctic Marine Living Resources, *Report of the Twenty-Fourth Meeting of the Commission, Annex 5: Report of the Standing Committee on Implementation and Compliance* (2005) <[http://www.ccamlr.org/pu/e/e\\_pubs/cr/05/a5.pdf](http://www.ccamlr.org/pu/e/e_pubs/cr/05/a5.pdf)> at 18 May 2007.

<sup>89</sup> *PSI Ship Boarding Agreement with Liberia*, above n 56.

<sup>90</sup> *PSI Ship Boarding Agreement with Panama*, above n 57.