Oceans cover approximately 70 percent of the surface of the Earth. For international lawyers, this has long been an area which lay beyond the control of States. Prior to the advent of jurisdiction based on the continental shelf and the exclusive economic zone (EEZ), almost all of this area was beyond national jurisdiction. Only a tiny belt of sea of usually 3 to 4 nautical miles was subject to the direct control of a coastal State. Even today under the 1982 United Nations Convention on the Law of the Sea (1982 LOS Convention), where coastal States can extend their jurisdiction to the seabed and waters around their littoral out to 200 nautical miles, and the seabed in limited circumstances to as much as 350 nautical miles, two-thirds of the world’s oceans are beyond any national jurisdiction.

This article considers the challenges facing coastal States attempting to combat threats to their security that pass through this vast area of high seas, in areas where the coastal State has no jurisdiction. It will consider the nature of the threats posed in these areas, and what tools international law provides States in order to respond to these threats. It will conclude by positing areas where further development may assist in improving the coastal State’s ability to react in a timely and effective fashion to a threat in the global commons. However, before doing so, it is necessary to consider the limits of the global commons for the purposes of the paper.

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**Threats from the Global Commons: Problems of Jurisdiction and Enforcement**

**The Global Commons**

There are a number of different definitions possible for 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 the 1982 LOS Convention as the Area, consisting of all of the seabed outside the continental shelf of any State, and the waters beyond the EEZ of any State. These are commons as jurisdiction is vested, in the case of the Area, in the International Seabed Authority as part of the common heritage of mankind, and in the case of the high seas, jurisdiction by States is limited to vessels flying their flag, except in very specific and limited circumstances.

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 the EEZ. The EEZ only gives a coastal State jurisdiction over economic activity, marine scientific research and environmental matters. It does not give a coastal State jurisdiction to interfere with freedom of navigation, the laying of submarine cables or pipelines, or to stop and board vessels unless they infringe coastal State laws concerned with the EEZ. This means that even if a foreign vessel had individuals onboard who had committed serious crimes against the coastal State, it would not be open for the coastal State to apply its law to that vessel. In some respects then, the EEZ remains an area of commons, even though the coastal State may still be able to regulate economic activities such as fishing and seabed mining. A similar situation is reflected for aerial navigation, as the airspace over the EEZ and high seas is international airspace, where there is a right of freedom of aerial navigation.

In the context of this article, the global commons will be treated as areas where the activities of vessels not subject to effective 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.

**Threats from the Global Commons**

There are two distinct types of threats that come from the high seas. The first encompasses threats against the ports and territory of a coastal State that originate from the sea. Such threats might be through 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, this could be from a
nal vessel, or could be accomplished using a commercial vessel which has been chartered, commandeered or hijacked and which is destroyed in the port of a State to cause damage to facilities or human life.

The first type of attack has yet to occur in the West, although it has occurred in the Middle East against Western interests.\(^9\) Even so, threats from shipping have been the focus of a tremendous amount of planning and cooperative effort internationally. The Proliferation Security Initiative\(^10\) and the International Ship and Port Facility Security Code (ISPS Code)\(^11\) at an international level, or the United States’ Container Security Initiative\(^12\) internally, are excellent examples of responses to this direct threat from the sea. States have moved cooperatively to put in place legal measures designed to protect shipping and maritime infrastructure from terrorist threats, and to better cooperate in sharing data and intelligence.\(^13\) 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 and that they were adopted and functioning well within five years of the 9/11 attacks.\(^14\)

The first type of threat in some ways is relatively easily dealt with from a legal point of view. Once a vessel enters the port of a State, unless it is sovereign immune, it becomes subject to the regulation of the port State, whose criminal laws can be applied to activities taking place onboard.\(^15\) An attempt to ship WMD into a port would attract the jurisdiction of the port State, and enforcement action against the ship could be taken inside the port 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 in an expeditious fashion. Additionally, the actions of the offending vessel 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.\(^16\)

Port States can also close the port to international traffic or refuse vessels entry for failure to comply with entry requirements. For example, the Australian Maritime Identification System requires vessels to provide data to Australian authorities of the vessel’s crew, cargo, route and previously visited ports. This data is sought when the vessel is within 1,000 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 result in the vessel being refused entry to the port and subsequent arrest if it enters the territorial sea with an intention to proceed to its intended port. The right of entry becomes tied to additional conditions, which can be used to improve security and give operators a clearer picture of the maritime security environment in adjacent waters.\(^17\)

The second type of threat is one directed at activities in the global commons. Activities in the commons include transportation, fishing, oil and gas exploitation, and communications via submarine cable. Each of these activities is vulnerable to
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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.18 The 1982 LOS Convention, codifying existing customary international law, provides for universal jurisdiction over vessels engaged in piracy, provided that enforcement action is undertaken by marked government vessels in areas outside the territorial sea of third States.19 This potentially gives great freedom of action to flag States to use their armed forces to protect their shipping from pirate activity.

In practice, the availability of universal jurisdiction to deal with piracy has been limited by two key factors. Firstly, universal jurisdiction over piracy is limited to incidents taking place outside the territorial sea. The 1982 LOS Convention retains the paramountcy of the coastal State's sovereignty within the territorial sea, and consistent with the regime of innocent passage, non-coastal State vessels lack the power to effect an arrest of a pirate vessel in these waters.

The second factor is of greater relevance to recent concerns over security. The traditional definition of piracy is the attacking of a vessel in pursuit of personal profit.20 This motivation for profit distinguishes piratical acts from activities with a purely political motivation. Since terrorists are generally not motivated in their attacks by the possibility of personal profit, but rather the advancement of a political cause or the desire to frighten and disrupt lawful activities, it has been accepted that terrorist acts at sea do not fall under the umbrella of piracy.

While attacks on shipping present a threat from the global commons, there are other and different threats posed to other activities taking place in the world's oceans. Oil and gas exploitation of offshore fields means that there are large and expensive facilities permanently moored in areas remote from coastal areas. These platforms, loading facilities and pipelines are extremely vulnerable to hostile action. They are exploiting and storing quantities of flammable gases or liquids, which could be set alight by terrorist action, or alternatively could be the source of significant environmental harm.

Terrorist attacks against oil and gas platforms have not taken place, although the occupation of Brent Spar by Greenpeace in 199521 demonstrated the relative ease with which terrorists could occupy an offshore platform and the difficulties inherent in their removal. Attacks against oil and gas facilities have taken place in the context of armed conflicts, and the facilities are particularly vulnerable. The lack of a terrorist attack has not prevented international concern over the potential threat, and has led to international law providing coastal States and others greater powers to protect such facilities.
Submarine cables and pipelines are also an 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. 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 such cables or pipelines might take. 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. Terrestrial attacks against pipelines in Iraq and Nigeria have caused rises, albeit temporary, in world oil prices. Attacks against submarine pipelines would have the added difficulties of causing widespread environmental harm, possibly to the EEZ of another State, and be far more expensive and difficult to repair. Submarine cables, especially fiber optic cables, still 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.

In both cases, 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 because both pipelines and submarine cables are vulnerable to accidental damage by mariners engaged in lawful activities. Notice of their location reduces the risk of harm. The practical upshot of this legitimate and sensible precaution is to make the targeting of such facilities much easier for those engaged in potential terrorist activities against them.

Responses

International law has for many years permitted ships and flag States to protect themselves from attack. The fact that piracy attracts universal jurisdiction in areas beyond the territorial sea emphasizes this fact. Any ship that is subjected to an attack by pirates outside the territorial sea can receive assistance, and the pirates taken into custody by the warships of any State.

In the context of responding to attacks on its nationals or ships flying its flag, a flag State has a right of self-defense and can take steps to protect individuals and ships. This would permit naval escort of ships by the flag State and a right to take action to protect those ships from attack. Difficulties may arise where a State’s nationals are onboard vessels that are flagged to another State. This makes efforts at protection problematic, and would require the flag State to consent to warships of another State providing protection. However, the provision of protection to other flagged vessels is by no means impossible with such consent and there is ample precedent for it during times of armed conflict. Such difficulties were avoided during the Iran-Iraq war when, after tankers entering the Persian Gulf had come under
fire from Iran, the United States Navy (and navies of other neutral nations) formed convoys of neutral-flag merchant vessels, or escorted or accompanied neutral-flag merchant vessels carrying cargoes to and from neutral States.25

In the context of protecting shipping from terrorist attack, 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) was negotiated as a direct result of the 1985 hijacking of the Italian liner Achille Lauro.27 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 was because of the requirement that piracy be for "private" ends, and the fact the group that attacked the vessel, the Palestinian Liberation Front, staged the attack for political purposes. Other States, including the United States, considered that the attack amounted to piracy, and were concerned that responses to an incident of this type might be undermined if it were not considered a piratical act.28 Obviously, with this difference of view it was necessary to create an international instrument to clarify the response to what was still manifestly an illegal act.

The response adopted was the 1988 SUA Convention. It dealt 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, endangerment of the safety of a ship by interfering with maritime navigational facilities or sending a false signal.29 The purpose motivating the acts is not relevant, and therefore there would be some overlap with piracy, although the scope of the SUA Convention is necessarily much wider. The SUA Convention applies to ships that have journeyed outside the territorial sea of a single State, or are scheduled to pass outside the territorial sea.30 Parties to the SUA Convention have jurisdiction to deal with such offenses, based on the ship’s presence in their territorial sea, possession of their flag or other means.31 However, the SUA Convention did not deal directly with the boarding of vessels where jurisdiction might be asserted by another State. The Preamble of the SUA Convention provides “matters not regulated by this Convention continue to be governed by the rules and principles of general international law,” which would limit non-flag State intervention to acts covered under Article 110 of the 1982 LOS Convention, in this context acts of piracy.32 There are also provisions to allow for either prosecution or extradition of individuals believed to have committed offenses.33

In 2005 the SUA Convention was amended by a new protocol pertaining to maritime terrorism against shipping.34 The focus of the 2005 amendments is weapons of mass destruction (WMD) and their non-proliferation.35 New offenses were created, including using a ship as a platform for terrorist activities,36 and the
transportation of a person who has committed offenses under the SUA Convention, or any of another nine listed anti-terrorism conventions. The 2005 amendments also widen the scope for third party boarding of ships, although flag-State authorization is still required for such a boarding.

States also were of the view that maritime terrorism need not be limited to ships, but could also be directed at offshore oil and gas installations. This led to the adoption of a protocol to the SUA Convention (1988 Protocol) that dealt with similar acts committed against offshore petroleum installations at the same time as the SUA Convention.

The 1988 Protocol applies to "fixed platforms," which is liberally defined to include all petroleum producing structures. It also limits application to facilities on the continental shelf. This excludes the application of the protocol to installations in the territorial sea of a coastal State, in the ordinary course of events. The offenses under the 1988 Protocol 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 or destroy or endanger the safety of a platform, or threats, intimidation, or acts of violence against persons onboard a platform.

States under the 1988 Protocol have a similar jurisdictional envelope as under the SUA Convention. The 1982 LOS Convention makes it clear that States have jurisdiction over offenses taking place on fixed platforms on their continental shelf, and this is confirmed in the 1988 Protocol. In addition, under the Protocol, States also have jurisdiction if either the offender or the victim is a national of the State, if the offender is stateless and a habitual resident of the State, or if the offense is intended to coerce the State concerned.

The 1988 Protocol does not deal with the issue of boarding of fixed platforms, and as with the SUA Convention, the preamble reiterates "that matters not regulated by this Protocol continue to be governed by the rules and principles of general international law," apparently limiting direct unilateral intervention against acts against platforms to the coastal State. This was to ensure that a coastal State would retain sole jurisdiction over activities on its platforms, and another State could not assert it had a right to board a platform, based on having jurisdiction over an offense. The absence of a boarding provision would not prevent a coastal State from giving a third State an ad hoc authorization to board its installation.

The 1988 Protocol was also amended by protocol in 2005, with amendments similar in nature to the 2005 SUA Convention amendments. New offenses, including using explosives or radioactive material or a biological, chemical, nuclear (BCN) weapon to cause death, serious injury or damage to an installation; releasing oil or gas from an installation in a manner calculated to cause death, serious
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injury or damage, or the threat to commit such offenses, were created. A State party must take the measures necessary to apply its jurisdiction to its nationals and fixed platforms on its continental shelf in respect to these offenses. Much of the rest of the SUA Convention and the 2005 amendments, in relation to extradition, cooperation concerning data and evidence, and domestic implementation, are applied by the 2005 Protocol mutatis mutandis.

The 2005 SUA Convention amendments and 1988 Protocol amendments will enter into force after the twelfth ratification without reservation for the SUA Convention amendments and ninety days after the third ratification without reservation for the Protocol amendments. Given the current wide participation in the SUA Convention and 1988 Protocol, both the Convention amendments and Protocol amendments are likely to enter into force relatively quickly.

Responses in relation to the protection of submarine cables and pipelines have been less forthcoming. The 1982 LOS Convention does provide that a coastal State must be consulted over the route a cable or pipeline on its continental shelf may take, but not that the coastal State has jurisdiction over the cable or pipeline. If a cable or pipeline owned by a coastal State or its nationals were damaged, the LOS Convention provides that the flag State of the vessel, or of the nationality of the offender responsible, has jurisdiction to deal with the harm caused. A coastal State asserting jurisdiction over an attack on a pipeline presents more options than the situation for submarine cables. An attack on an oil pipeline would probably cause environmental damage, and therefore provide a basis for a coastal State to assert its jurisdiction. Article 79(4) of the 1982 LOS Convention creates an implication that a coastal State can make laws dealing with leaks from pipelines. A coastal State might also respond to an attack on a cable or pipeline on the basis of self-defense. To do so it would need to demonstrate the importance of the threatened infrastructure to itself, and that a use of force is proportionate in the circumstances. This will always be a question of fact, and would be dependent upon the cable being vital telecommunications infrastructure, or a pipeline carrying essential oil or gas for the national economy. Even in those 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 Article 3bis(1)(a)(iiii) of the 2005 SUA Convention amendments. This provision creates an offense where an individual "uses a ship" to cause damage. If the employment of a ship to aid
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terrorists in attacking a cable or a pipeline could be described as a “use” of a ship in the context of Article 3bis, then there could be jurisdiction. It is submitted that such a wide definition is almost certainly beyond the anticipated scope of the offense. If the definition could sustain such stretching, the consent of the flag State would still be required to effect a boarding, and the flag State be a party to the 2005 Protocol amending the SUA Convention.

Placing jurisdiction over pipelines and submarine cables outside the territorial sea in the control of the flag State of the offending vessel is, under the 1982 LOS Convention, problematic. If terrorists attacked a pipeline or cable with a chartered vessel, perhaps 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, have no capacity to deal with attacks even close to their coasts.

Reliance on flag-State jurisdiction in the context of cables and pipelines serves to highlight a broader problem, that is, 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 the connection to flag States can be so diffuse as to be meaningless. In that circumstance, it is difficult to conceive that effective enforcement at sea can take place. Flag-of-convenience States have no capacity to enforce their laws on ships flying their flag around the world, and may have little incentive to cooperate with other States to remedy the deficiency. The United States has sought to tackle the problem in the context of the Proliferation Security Initiative with boarding agreements with a number of States with open registries, including Liberia and Panama; they fall short of permitting boarding in a wider range of circumstances.

Conclusion

The international community has shown great energy in tackling threats in the global commons. The SUA Convention and Protocol in their 2005 iterations represent a substantial and positive step forward in the legal protection of ships and platforms in the global commons beyond the territorial sea. 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 does it appear there are international efforts in progress to remedy the
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situation. It can only be hoped that it is not the reality of an attack that acts as the catalyst to produce positive change in these areas.

Notes

1. The United States, the British Empire and France all maintained 3 nautical mile territorial seas until after World War II. The Scandinavian nations asserted 4 nautical mile territorial seas from the late eighteenth century until after the war. See D.P. O'Connell, 1 The International Law of the Sea 131–138 (I.A. Shearer ed., 1982).


3. Article 76 of the Law of the Sea Convention deals with the limits of the continental shelf.

4. Id., art. 1(1).

5. Id., art. 136.

6. Id., art. 56.

7. Id., art. 58(1).

8. Id.

9. For example, the separate attacks in Aden harbor against the French flagged tanker MV Limburg and the US destroyer USS Cole (DDG 67) would fall into this category. See Jessica Romero, Prevention of Maritime Terrorism: The Container Security Initiative, 4 Chicago Journal of International Law 597, 598 (2003).


15. See Wildenhus’s Case, 120 U.S. 1, 12 (1887).

16. 1982 LOS Convention, supra note 2, art. 31.


19. 1982 LOS Convention, supra note 2, arts. 107 and 110.
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20. Id., art. 101.
23. For example, the value of submarine cables to Australia alone has been estimated at over US $5 billion per year to the national economy. See Australian Communications and Media Authority, Information Sheet, Proposed Protection Zones Off Sydney, New South Wales, http://www.acma.gov.au/acmainews/.../sheet.pdf (last visited Feb. 27, 2007).
24. 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.
29. SUA Convention, supra note 26, art. 3.
30. Id., art. 4.
31. The SUA Convention also contemplates jurisdiction based on passive personality, or attempted coercion of the State concerned. See id., art. 6.
32. The deficiency was to some extent addressed by Article 8 of 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. See id., art. 8.
33. Id., art. 10.
35. Id., art. 3bis.
36. Id., art 3bis(1)(a)(3).
37. Id., art 3ter.
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42. 1988 SUA Protocol, supra note 40, art. 1. This definition includes artificial islands, installations and structures engaged in exploration or exploitation of the seabed or some other economic purpose.

43. Id., art. 1(2).

44. Id., art. 2(1). The offenses include attempting, abetting and threatening to commit an offense. Id., art. 2(2).

45. Given that Article 60 of the Law of the Sea Convention gives a coastal State exclusive jurisdiction to regulate the operation and use of an installation, and the Protocol does not displace general international law upon matters to which it does not address itself. Id., Preamble.

46. Id., art. 3.


48. Id., art. 2bis(a).

49. Id., art. 2bis(b).

50. Id., art. 2bis(c).

51. Id., art. 2ter.

52. Id., art. 3(1).

53. Id., art 1.


55. Only State parties to the SUA Convention who have made no reservations to the application of that Protocol can become parties to the 2005 SUA Convention amendments. See id., art. 17.


57. Only State parties to the SUA Protocol who have made no reservations to the application of that Protocol can become parties to the 2005 SUA Fixed Platforms Protocol. See id., art. 8.

58. 1982 LOS Convention, supra note 2, art. 79.

59. Id., art. 113.

60. Id., art. 79(4).


62. For example, see W. Michael Reisman, International Legal Responses to Terrorism 22 HOUSTON JOURNAL OF INTERNATIONAL LAW 3, 55–8 (1999); Davis Brown, Use of Force Against Terrorism After September 11th: State Responsibility, Self-Defense and Other Responses 11 CARDOZO JOURNAL OF INTERNATIONAL & COMPARATIVE LAW 1, 40–1 (2003).

63. 2005 SUA Safety of Maritime Navigation Protocol, supra note 34, art. 3bis(1).

64. Id., art. 8bis(5)(b).


66. 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
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