

THE OXFORD HANDBOOK OF

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Edited by

DONALD R ROTHWELL

Professor of International Law, Australian National University

ALEX G OUDE ELFERINK

Professor of International Law of the Sea, University of Tromsø and Utrecht University

KAREN N SCOTT

Professor of Law, University of Canterbury

TIM STEPHENS

Professor of International Law, University of Sydney

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MARITIME SECURITY

NATALIE KLEIN

1 INTRODUCTION

SECURITY has always been an influential dimension in the law of the sea. The earliest articulations of maritime law included the view that a State's territory extended into the sea as far as its terrestrial-based military force could reach.¹ The long-ago voyages of navies as part of military campaigns and the conquest of new territory further reflected the realization of State policies designed to promote the power and influence of that State. Throughout the nineteenth and twentieth centuries, the movement of warships remained of critical importance for a State in promoting and securing its national interests. In the twenty-first century, the concept of maritime security continues to embrace the military interests of States, as well as extending to a range of maritime crimes that may threaten a State's economic, political, social, and cultural values.

Maritime security is best understood as encompassing two key dimensions: (1) traditional security concerns and (2) responses to perceived maritime security threats. By traditional security concerns, this dimension primarily refers to border protection, to prevent incursions into areas considered as the sovereign domain of a State, as well as power projections, which entail a State exercising military power in its

¹ This is commonly known as the 'cannon-shot' rule. The jurist Bynkershoek, who is credited with the theory, claimed that 'territorial sovereign ends where the power of arms ends.' See AH Dean, 'The Second Geneva Conference on the Law of the Sea: The Fight for the Freedom of the Sea' (1960) 54 *American Journal of International Law* 751, 759-60.

relationship with other States in respect of particular maritime areas. Responses to perceived maritime security threats then reflect the steps taken by States to reduce the risk of certain crimes or activities that would prejudice or injure their interests and society. This chapter addresses both dimensions of maritime security, particularly as the latter dimension has come to influence increasingly the law of the sea.

For the purposes of this chapter, the term 'maritime security' will be understood as 'the protection of a state's land and maritime territory, infrastructure, economy, environment, and society from certain harmful acts occurring at sea.'² The threats to maritime security encompass piracy and armed robbery; terrorist acts; illicit trafficking in arms and weapons of mass destruction; drug trafficking; people smuggling and human trafficking; illegal, unreported, and unregulated fishing.³ In casting the definition of maritime security broadly, the intention is to encompass both traditional and more recent security concerns.

The law related to maritime security is largely addressed within the existing law of the sea framework, but it has gathered force as a justification for elaborating new legal arrangements. These are addressed in the first part of the chapter. Second, there is discussion of the critical issues in contemporary maritime security, highlighting ongoing boundary disputes, transnational crime, and intelligence gathering. Third, in light of the legal framework and the current efforts to improve maritime security, the question then considered is what the future may hold for maritime security. It will be seen that maritime security will likely remain of fundamental concern and continue to influence legal developments, but perhaps only to the extent that national interests can be asserted and accepted as shared interests.

2 MARITIME SECURITY AND THE LAW OF THE SEA

Many facets of the law of the sea reflect maritime security interests, even if in conjunction with other concerns, such as economic interests or environmental

² N Klein, J Mossop, and DR Rothwell, 'Australia, New Zealand and Maritime Security' in N Klein, J Mossop, and DR Rothwell (eds), *Maritime Security: International Law and Policy Perspectives from Australia and New Zealand* (Routledge Oxford 2010). For further definitional discussions, see KG Hawkes, *Maritime Security* (Cornell Maritime Press Centreville 1989); MQ Mejia Jr, 'Maritime Gerrymandering: Dilemmas in Defining Piracy, Terrorism and Other Acts of Maritime Violence' (2003) 2 *Journal of International Criminal Law* 153, 155.

³ UN Secretary General, *Oceans and the Law of the Sea: Report of the Secretary-General to the General Assembly*, UN Doc A/63/63 (10 March 2008) [39].

protection. The increasing claims of coastal States over maritime areas closest to land territory reflect defensive interests in keeping foreign warships at a safe distance.⁴ These claims to exclusive use were countered by other States seeking to ensure the ongoing freedom of movement of warships and other military vessels across as broad an expanse of ocean space as possible.⁵ In asserting rights over a growing range of maritime zones, States have taken steps to reduce criminal activity that could threaten the security of the State and have increasingly elaborated on the rights and duties exercised in the different maritime zones to prevent crime and improve the security of shipping. These different ways that maritime security features in the law of the sea are discussed in this part.

2.1 Traditional maritime security concerns

Protection from attack or invasion by another State is a key security interest for any government. Certainty of borders and the protection of those borders and the areas within are fundamental to the defence of a State. The oceans have served as theatres of war and specific rules were developed governing the use of force at sea, particularly in protecting the neutrality of vessels from States not engaged in hostilities.⁶ The most recent iteration of these rules takes account of the current maritime zones under the 1982 United Nations Convention on the Law of the Sea (LOS), including the ongoing freedoms of navigation that are maintained by vessels flagged to neutral States.⁷

In times of peace, the movement of naval vessels remains of critical importance. States are keen to ensure that their naval vessels are able to reach without restriction any part of the globe that is of importance in the State's international relations.

⁴ For example, the claims of extending the territorial sea to 12 nm were sometimes premised on the idea that States would be safer if warships were not allowed to come too close to a State. See eg *Official Records of the Second UN Conference on the Law of the Sea, Summary Records of Plenary Meetings and of Meetings of the Committee of the Whole, Annexes and Final Act*, 101, [14] (Albania). The reality, even at the time these arguments were made, was that modern weaponry could still reach a State even across the distances being claimed as under the sovereignty of the State. See eg (1958) III *Official Records of the UN Conference on the Law of the Sea* 167, [3] (Mr Drew, Canada), available at <http://legal.un.org/diplomaticconferences/lawofthesea-1958/docs/english/vol_III/16_51ST_TO_55TH_MEETINGS_1st_Cttee_vol_III_e.pdf>.

⁵ This debate being seen most clearly in the establishment of the EEZ under the 1982 United Nations Convention on the Law of the Sea (hereinafter LOS) and the balance of interests established in Arts 56 and 58 of that Convention.

⁶ A series of conventions were adopted in The Hague in 1907. N Ronzitti (ed), *The Law of Naval Warfare: A Collection of Agreements and Documents with Commentaries* (Martinus Nijhoff Dordrecht 1988).

⁷ See L Doswald-Beck (ed), *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (Cambridge University Press Cambridge 1995) [20], [23], [26], [27], [31], and [32].

The International Court of Justice (ICJ) in the *Corfu Channel* case recognized the central interest of navies in accessing straits. There, the Court stated:

It is, in the opinion of the Court, generally recognized and in accordance with international custom that States in time of peace have a right to send their warships through straits used for international navigation between two parts of the high seas without the previous authorization of a coastal State, provided that the passage is *innocent*. Unless otherwise prescribed in an international convention, there is no right for a coastal State to prohibit such passage through straits in time of peace.⁸

This key security interest in the movement of naval vessels is reflected in the protection afforded to navigation under the modern law of the sea, even when there are no explicit references to military activities or the specific rights of naval vessels.⁹ Thus, the creation of transit passage under the LOSC ensured protection of the rights of warships and other naval vessels to traverse straits in ‘their normal modes’ that would otherwise be territorial sea and require restricted operations.¹⁰ The freedom of navigation ‘and other internationally lawful uses of the sea related to’ this freedom have also been protected in the large swathes of ocean space now designated as exclusive economic zones (EEZ).¹¹ Whether and what military activities are permissible in the EEZ of another State continue to be controversial questions in the practice of States.¹²

Protecting access to resources has also been an important security concern that has traditionally been protected under the law of the sea. One of the rationales for expanding the breadth of the territorial sea was to safeguard the supply of marine living resources for the nourishment of the local population, as well as fostering profitable export markets.¹³ Maintaining exclusive control over these resources was an impetus to the subsequent establishment of the EEZ. The legal recognition of the continental shelf provided States with economic certainty for their rights over the

⁸ *Corfu Channel (United Kingdom v Albania)* (Judgment) [1949] ICJ Rep 4, 28.

⁹ See further discussion in Chapter 24 in this volume.

¹⁰ LOSC, n 5, Art 39(1). For discussion of this view, see WM Reisman, ‘The Regime of Straits and National Security: An Appraisal of International Lawmaking’ (1980) 74 *American Journal of International Law* 48; BH Oxman, ‘The Regime of Warships under the United Nations Convention on the Law of the Sea’ (1984) 24 *Virginia Journal of International Law* 809.

¹¹ LOSC, n 5, Art 58(1).

¹² For discussion, see R Pedrozo, ‘Military Activities in and Over the Exclusive Economic Zone’ in MH Nordquist et al (eds), *Freedom of Seas, Passage Rights and the 1982 Law of the Sea Convention* (Martinus Nijhoff Leiden/Boston 2009) 235; R Ziafeng and CX Cheng, ‘A Chinese Perspective’ (2005) 29 *Marine Policy* 139. See further Chapter 38 in this volume.

¹³ As noted in International Law Commission debates—see (1955) 1 *Yearbook of the International Law Commission*, UN Doc A/CN.4/SR.295, 72, [51]—as well as at the First United Nations Conference on the Law of the Sea (UNCLOS I). See eg (1958) III *Official Records of the UN Conference on the Law of the Sea*, First Committee (Territorial Sea and Contiguous Zone), UN Doc A/CONF.13/C.1/SR.1–5 (1958) 7, [11] (Peru).

seabed resources.¹⁴ Ensuring that States' economic interests are protected is clearly part of the security of a State because it reduces the likelihood of dependence on other States for these important resources.

In the current governance framework for the oceans, the LOSC sought to give greater certainty to entitlement to resources through the definition of the different maritime zones. While there is no strict formula to be applied for the delimitation of overlapping maritime zones, the LOSC does provide general parameters, as well as a mechanism for provisional arrangements.¹⁵ In addition, States may resort to compulsory dispute settlement procedures entailing binding decisions for the resolution of maritime boundary disputes.¹⁶ However, as will be discussed further below, many maritime boundaries remain to be delimited and are highly contested precisely because access to resources remains an important security issue for coastal States.

2.2 Responding to maritime security threats

Within each maritime zone, States are accorded rights and duties permitting responses to a range of maritime crimes or other unlawful acts. Beginning closest to the coast, a State's national criminal law would normally apply to the territorial sea and internal waters in accordance with the sovereignty that the coastal State exercises over these waters. This sovereignty permits the coastal State to take action against vessels engaged in terrorism, transnational crimes (such as drug trafficking and people smuggling), intentional pollution, illegal fishing, and intelligence gathering. Criminal activity would fall within Article 27 of the LOSC and the actions in question would otherwise be in violation of the right of innocent passage accorded to foreign-flagged vessels in the territorial sea.¹⁷ The coastal State is only limited in taking action against warships and other government vessels operating on non-commercial service as these vessels are subject to sovereign immunity.¹⁸

In the contiguous zone, the coastal State may act under particular circumstances to prevent and punish offences related to fiscal, immigration, sanitary, and customs matters.¹⁹ These powers allow a coastal State to respond to some maritime security threats, such as drug or arms trafficking as violations of customs law and to people smuggling as a violation of immigration laws. Coastal State action against

¹⁴ Especially as these rights were recognized as belonging *ipso facto* and *ab initio* to the coastal State. *North Sea Continental Shelf (Federal Republic of Germany v Denmark; Federal Republic of Germany v The Netherlands)* [1969] ICJ Rep 3, [18]–[20].

¹⁵ LOSC, n 5, Arts 74(3) and 83(3).

¹⁶ *Ibid*, Part XV. States do, however, have the option of excluding maritime boundary disputes from these mandatory proceedings. See *ibid*, Art 298(1)(a).

¹⁷ N Klein, *Maritime Security and the Law of the Sea* (Oxford University Press Oxford 2011) 75–7.

¹⁸ LOSC, n 5, Art 32. ¹⁹ *Ibid*, Art 33.

other maritime security threats in the contiguous zone would otherwise be governed according to the rights and duties adhering to States within the EEZ and the high seas.

The enforcement powers of the coastal State significantly diminish in the EEZ, as authority is explicitly granted to the coastal State to enforce its laws in relation to fishing and pollution.²⁰ On the high seas, States may normally only interfere with vessels bearing their flag,²¹ which limits the actions States may take to protect against maritime security threats. Piracy has been one of the few crimes whereby any State is granted authority to arrest and prosecute pirates whenever caught outside the territorial sea of a State.²²

An increasing number of treaties have instead been adopted that create processes and mechanisms that allow warships to visit foreign-flagged vessels and potentially take action against suspected offenders as a matter of international law.²³ These treaties cover drug trafficking,²⁴ people smuggling,²⁵ illegal fishing,²⁶ terrorist activity,²⁷ and unlawful transportation of weapons of mass destruction.²⁸ In this regard, it may be seen that States have sought modifications to the existing law of the sea in response to common concerns in preventing and responding to particular maritime crimes that are considered as a threat to the security of the State.²⁹

States have also taken action to improve ship security. Given that over 90 per cent of the world's international trade is carried by sea, ensuring the free and safe movement of this cargo is vital for the economic interests of States. Significant economic harm through the shut down of international shipping reflects a key security

²⁰ Ibid, Arts 73 and 220. It is also argued that there is implicit authorization to exercise enforcement jurisdiction in relation to artificial islands and the exploitation of non-living resources. See eg Y Tanaka, *The International Law of the Sea* (Cambridge University Press Cambridge 2012) 129, 143.

²¹ The two main exceptions relate to the right of visit and the right of hot pursuit. LOSC, Arts 110 and 111, respectively.

²² LOSC, Art 105. See further Chapter 37 in this volume on piracy.

²³ In implementing these treaties, States need to consider whether their warships have powers to exercise criminal enforcement jurisdiction.

²⁴ 1990 UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (hereinafter Drugs Convention).

²⁵ 2000 Protocol against the Smuggling of Migrants by Land, Sea and Air Supplementing the Convention against Transnational Organized Crime (hereinafter Migrant Smuggling Protocol).

²⁶ 1995 UN Agreement for the Implementation of the Provisions of the UN Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (hereinafter FSA). This agreement allows for visits and inspections.

²⁷ 2005 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (encompassing the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, amended by the Protocol of 2005 to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation) (hereinafter SUA Convention).

²⁸ Ibid. The United States has also entered into a series of bilateral agreements to this effect. See discussion in D Guilfoyle, *Maritime Interdiction and the Law of the Sea* (Cambridge University Press Cambridge 2009) 246–54.

²⁹ Such modifications are envisaged under LOSC, n 5, Art 311(3).

interest. To avoid this situation, States have sought to identify and minimize risks that may be posed to international shipping through collective action, primarily under the auspices of the International Maritime Organization (IMO), and in some instances, on a unilateral basis.³⁰

Following the September 11 attacks on the United States, in 2004 the IMO took steps to amend the 1974 International Convention on the Safety of Life at Sea (SOLAS) with the introduction of an International Ship and Port Facility Security Code (ISPS Code), which was included as part of a new chapter to that treaty.³¹ The ISPS Code sets out both mandatory steps as well as recommendations to identify potential threats to ships and to ports, provides for specific roles and procedures to be performed on ships and at port, and sets out what steps are to be taken in the event a risk is identified.³²

The IMO also adopted regulations under the SOLAS Convention to enable the long-range identification and tracking (LRIT) of ships so that States will have better information as to what ships are navigating where, and particularly what ships are voyaging towards that State's territory.³³ The LRIT Regulations are part of broader efforts to improve information gathering and monitoring of maritime areas to detect threats to maritime security.³⁴

The responses to maritime security threats reflect steps taken by States to address particular activities that may prove detrimental to the State individually. In addition, there has been a shared interest in recognizing the rights and duties of States under the law of the sea to reduce the impact that any one act may have on the community of States. So, for example, an oil tanker being rammed by a small vessel and exploding in a mega-port not only affects the flag State of the vessel concerned, and those States interested in the oil being carried, but all other States that have cargo delayed because of the damage to or closure of the port in question. The current analysis indicates that security concerns are most commonly protected under the law of the sea when States have recognized that there is a shared interest at stake.

³⁰ Such unilateral action has particularly been taken by the United States to improve information and security regarding what cargo is moving into the United States. See GW Bowman, 'Thinking Outside the Border: Homeland Security and the Forward Deployment of the US Border' (2007) 44 *Houston Law Review* 189.

³¹ 1974 International Convention for the Safety of Life at Sea (SOLAS), 1983 Amendments to the Annex, contained in Resolutions 1, 2, 6, and 7 of the 2004 Conference of Contracting Governments and including the International Ship and Port Facility Security (ISPS) Code.

³² For further discussion, see Klein, n 17, 158–62; HG Hesse, 'Maritime Security in a Multilateral Context: IMO Activities to Enhance Maritime Security' (2003) 18 *International Journal of Maritime and Coastal Law* 327, 331.

³³ For further discussion on the LRIT Regulations, see Klein, n 17, 229–34.

³⁴ This initiative is part of broader policies of maritime domain awareness. See C Rahman, 'Maritime Domain Awareness in Australia and New Zealand' in Klein et al (eds), n 2, 202, 202–7.

3 CRITICAL ISSUES IN CONTEMPORARY MARITIME SECURITY

The discussion thus far has indicated how the varied maritime security interests of States have been accommodated within the law of the sea, either in the LOSC or in the adoption of additional agreements or regulations as the need has arisen. As previously indicated, the evolution of the law has been possible in situations where a shared common interest in articulating the necessary rights and duties existed. However, where the exclusive interests of States clash with those of another State, or with the inclusive interests of all States, there remain difficult issues to determine as to how the law is to be interpreted and applied. Questions also arise as to whether gaps or ambiguities in existing law need to be resolved. This part considers some of the main sources of current concern for maritime security: boundary disputes, transnational crime, and intelligence gathering.

3.1 Ongoing boundary disputes

Protection of borders and the assertion of authority over maritime space remain critical maritime security concerns. The most controversial maritime boundary disputes most typically concern areas where there are significant seabed resources to be exploited so the neighbouring States have an interest in gaining access to these resources and the financial benefits accruing from their exploitation. In the absence of certainty of title, the oil or gas companies that would undertake the necessary exploration and extraction usually refrain from entering into agreements with States.³⁵

Two of the most significant flashpoints in this regard are the South China Sea and the East China Sea. In the South China Sea, there are contested maritime boundaries and sovereignty disputes between seven States.³⁶ Japan and China are in dispute over their maritime boundaries and certain insular features in the East China Sea. These States have great interest in these areas as they seek to benefit from not only the natural resources but also the strategic importance of shipping lanes through the region.

Boundary disputes also arise in relation to the drawing of baselines from which maritime zones are then measured. There has been considerable controversy in the

³⁵ L Brilmayer and N Klein, 'Land and Sea: Two Sovereignty Regimes in Search of a Common Denominator' (2001) 33 *New York University Journal of International Law and Politics* 703, 732–6.

³⁶ Brunei, China, Indonesia, Malaysia, the Philippines, Taiwan (albeit not a State in the view of China and some other States), and Viet Nam.

past about how States have interpreted Article 7 of the LOSC, which sets out the criteria for the drawing of straight baselines. States will protest against the questionable drawing of straight baselines, or closing lines across bays, that have the effect of reducing areas subject to the freedom of navigation. The United States has undertaken military action in this regard, with a notable example being the Freedom of Navigation Program applied, *inter alia*, against Libya's closure of the Gulf of Sirte. Tensions are also currently arising in relation to the North West Passages and the increasing movement of vessels through Arctic waters. These ongoing disputes underline a core interest in maritime security in terms of ensuring free movement of naval vessels.

3.2 Transnational crime

Piracy and the illegal trafficking of people, weapons, and drugs remain critical policing concerns for coastal States. Piracy, which is examined in detail in Chapter 37, has posed a significant threat to international shipping, jeopardizing international trade, and has exacted a human toll with hostage taking and violence against masters, crews, and passengers on diverse vessels. States have clear authority under the LOSC to stop and exercise jurisdiction over pirates,³⁷ and these powers have been augmented by the Security Council in relation to piracy off the coast of Somalia.³⁸ Ongoing difficulties in responding to piracy include whether the naval vessels involved in piracy operations have authority to exercise criminal jurisdiction over an individual in arresting them at sea, and whether obligations exist in prosecuting a pirate once arrested.³⁹ Practical difficulties in prosecuting pirates include the sufficient collection of evidence, and the timely transport of a pirate to the arresting vessel's home country.⁴⁰ The domestic laws of the prosecuting State must also allow for jurisdiction to be asserted over a foreign national charged with piracy and have appropriate penalties in place.⁴¹

People smuggling has prompted strong policy responses from destination States seeking to deter the arrival of illegal migrants and asylum seekers. The United States, the European Union and Australia have all undertaken operations intended to prevent the passage of vessels carrying illegal migrants and thereby stop arrival

³⁷ See LOSC, n 5, Arts 105 and 110.

³⁸ See United Nations Security Council (UNSC) Res 1816 (2 June 2008); UNSC Res 1851 (16 December 2008). These resolutions were subsequently renewed for longer time periods.

³⁹ MS Karim, 'Is there an International Obligation to Prosecute Pirates?' (2011) 58 *Netherlands International Law Review* 387.

⁴⁰ See eg H Fouche and J Meyer, 'Investigating Sea Piracy: Crime Scene Challenges' (2012) 11 *World Maritime University Journal of Maritime Affairs* 33.

⁴¹ See eg Ashley Roach, 'Agora: Piracy Prosecutions Countering Piracy off Somalia: International Law and International Institutions' (2010) 104 *American Journal of International Law* 397.

into their territory.⁴² Under the 2000 Protocol Against the Smuggling of Migrants by Land, Sea and Air Supplementing the United Nations Convention against Transnational Organized Crime (Migrant Smuggling Protocol), a procedure has been laid out whereby States may exercise the right of visit and arrest those suspected of engaging in people smuggling or human trafficking enterprises.⁴³ There are a number of conditions imposed on the exercise of the right of visit against a foreign flagged vessel in these circumstances.⁴⁴

The actions of destination States in responding to threats to their border security highlight a critical aspect of law enforcement: the alignment of domestic law with international law. In relation to deterring the arrival of illegal migrants, concerns may rightly be raised that the policies and laws put in place at the national level do not properly account for the international law obligations of States.⁴⁵ For piracy and other crimes at sea, the concern may be that national laws have not been implemented to reflect the international obligations imposed under treaties to which a State becomes party addressing transnational crimes and terrorist offences. An example of the latter may be the failure of States to assert jurisdiction over alleged offenders as required under the 2005 SUA Convention.⁴⁶ Maritime security will only be improved when there is proper alignment between national and international laws addressing those threats.

3.3 Intelligence gathering

As discussed previously, coastal States have a keen interest in being aware of what activities are occurring in their maritime zones. At the same time, other States may seek to learn more about the maritime domain of a particular coastal State, as well as gaining information and data about the coastal defences of a State.⁴⁷ The conduct of foreign-flagged military activities in the EEZ of a coastal State remains a

⁴² See discussion in E Papastavridis, 'Interception of Human Beings on the High Seas: A Contemporary Analysis under International Law' (2009) 36 *Syracuse Journal of International Law and Commerce* 145; Guilfoyle, n 28, 187–221.

⁴³ Migrant Smuggling Protocol, n 25, Arts 8 and 9.

⁴⁴ Some of these conditions include ensuring the safety and humane treatment of people on board and not prejudicing the legal interests of the flag State: *ibid*, Art 9.

⁴⁵ Particularly in relation to the protection of asylum seekers, as established in the Refugee Convention: 1951 United Nations Convention Relating to the Status of Refugees and 1967 Protocol Relating to the Status of Refugees. The importance of these and human rights obligations in maritime interceptions were highlighted in *Hirsi Jamaa and Others v Italy*, Judgment of the European Court of Human Rights, App No 27765/09 (23 February 2012).

⁴⁶ SUA Convention, n 27, Art 6.

⁴⁷ See discussion in D Ball, 'Intelligence Collection Operations and EEZs: the Implications of New Technology,' (2008) 28 *Marine Policy* 67.

source of controversy, particularly because of differing interpretations of the LOSC on this issue.

Coastal States will protest the presence of foreign naval vessels in their maritime zones when those vessels are suspected of spying. For example, Japan has protested against Chinese research vessels believed to be gathering intelligence and also attacked and sunk a North Korean vessel in 2001.⁴⁸ China has actively sought to restrain the presence of US surveillance vessels in as well as US aircraft over its EEZ.⁴⁹ Such events not only jeopardize the lives of those on board the vessels, but also escalate tensions between States and within regions.

The United States and commentators closely involved in negotiating the LOSC have maintained that the protection of the freedom of navigation and other related uses anticipated that States would be able to conduct military activities in the EEZ of another State, subject only to due regard requirements.⁵⁰ China, among other States, has instead declared that such conduct is not permissible in the EEZ.⁵¹ Indeed, several States expressly declared at the time they became parties to the LOSC that military activities by other States were not considered permissible in their EEZ.⁵² A set of guidelines negotiated by senior officials and analysts in the Asia-Pacific region with the intention to reach agreement on this controversy support the view that military activities in the EEZ of another State are part of the freedom of navigation,⁵³ but have not yet garnered widespread agreement among States.

Overall, it may be argued that these current controversies have arisen because States are constantly seeking to promote their own national security interests, and these may not be shared with other States but instead may well come at the expense of other common interests that may exist. James Kraska has argued forcefully that the increasing number of claims against the freedom of navigation will ultimately prove detrimental to maritime security.⁵⁴ Each of the critical issues discussed in this

⁴⁸ See MJ Valencia, *The Proliferation Security Initiative: Making Waves in Asia* (Routledge Oxford 2005) 20–2.

⁴⁹ Klein, above n 17, 218–19.

⁵⁰ JM Van Dyke, 'Military Ships and Planes Operating in the Exclusive Economic Zone of Another Country' (2004) 28 *Marine Policy* 29, 31 (citing statement of Ambassador Tommy Koh from the negotiations of the LOSC). See also R Pedrozo, 'Preserving Navigational Rights and Freedoms: The Right to Conduct Military Activities in China's Exclusive Economic Zone' (2010) 9 *Chinese Journal of International Law* 9.

⁵¹ See eg S Yee, 'Sketching the Debate on Military Activities in the EEZ: An Editorial Comment' (2010) 9 *Chinese Journal of International Law* 1; Ziafeng and Cheng, above n 12.

⁵² Eg Brazil, India, Iran, and Malaysia. See discussion in GA Galdorisi and AV Kaufman, 'Military Activities in the Exclusive Economic Zone: Preventing Uncertainty and Defusing Conflict' (2002) 32 *California Western International Law Journal* 253.

⁵³ S Bateman, 'Prospective Guidelines for Navigation and Overflight in the Exclusive Economic Zone' (2005) 144 *Maritime Studies* 17, 23.

⁵⁴ See J Kraska, *Maritime Power and the Law of the Sea: Expeditionary Operations in World Politics* (Oxford University Press Oxford 2011) 221–90.

section reflect situations where States are seeking to gain greater exclusive control at the expense of inclusive interests in maintaining high seas freedoms.

4 FUTURE CHALLENGES IN MARITIME SECURITY

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What will be perceived as maritime security threats in the years ahead will obviously change over time. In this regard, it may be worth recalling Edwin D Dickinson authored an article entitled 'Is the Crime of Piracy Obsolete' in 1925.⁵⁵ Nonetheless, piracy remains an ongoing issue for international shipping and it could be predicted that as pirates access improved technology, their threat may become greater than it is at present. While accurate predictions may be elusive, there are some indications of issues that may emerge as greater maritime security concerns in the years ahead. This part discusses the evolving threats that may arise as a result of technological development, new uses of the oceans, and changes in the environment. The examination then shifts to the under-analysed aspect of human dimensions and the many jurisdictional issues that arise and are yet to be fully resolved.

4.1 Evolving maritime security threats

Technological advances will inevitably impact on how States conceive of their maritime security. One dimension is that States may take the view that their defences are weakened by the use of technology deployed from the sea to gain greater information about their coastal border security operations, forces, and equipment. Greater efforts are also being undertaken to gather communications and signal intelligence, which may potentially be used for electronic or information warfare.⁵⁶ Rules relating to the freedom of overflight may be reassessed with the use of unmanned aerial vehicles (drones) for military surveillance activities.

A second dimension is that States will be able to benefit from technological developments to improve their policing of maritime areas and be in a better position to detect and respond to crimes and other illegal activities within their waters. The Pacific Island nation of Palau, for example, has been the subject of a pilot project involving the use of unmanned aerial vehicles as a potential means to improve

⁵⁵ ED Dickinson, 'Is the Crime of Piracy Obsolete?' (1925) 38 *Harvard Law Review* 334.

⁵⁶ See Ball, n 47.

surveillance in monitoring its vast EEZ against illegal fishing.⁵⁷ Laws relating to hot pursuit, the right of visit, and the exercise of enforcement jurisdiction may need to be reviewed to align with information obtained and shared through advancing technology.

A further impact on maritime security by technology could be the increased sophistication of criminal activities as perpetrators are able to access new means and methods to conduct their activities and avoid detection. In the development of tracking devices, such as those envisaged for the LRIT Regulations as well as the Automatic Identification System, security measures are necessary to ensure that only State authorities are able to access information and not criminal organizations.⁵⁸

Transnational criminal organizations are also turning to new forms of transportation for trafficking at sea, as submarines have now been detected for drug trafficking operations in Central America and the Caribbean.⁵⁹ Submarines have more typically been used by State authorities as part of their naval forces and rules regulating the passage of submarines, especially in maritime areas close to the coast, have been predicated on the understanding that submarines are not privately owned and operated. While submarines must navigate on the surface for the purposes of innocent passage in the territorial sea,⁶⁰ it is generally understood that no such requirement exists in relation to transit passage.⁶¹ Will this need to be reconsidered in the context of submarines that are not subject to sovereign immunity?

What constitutes maritime security threats may further expand as States perceive of situations or other circumstances that jeopardize the safety and well-being of their communities. At present, wilful and intentional damage to the environment is considered a maritime security threat,⁶² but it could be the case that other environmental harm will similarly be viewed within the context of maritime security. Anthropogenic harm to the marine environment may become increasingly problematic and have an increased impact on the security of the State. The changes to the marine environment resulting from climate change may further prompt action by States to protect their maritime and terrestrial interests.⁶³

Ultimately, while technological and environmental changes influence the uses of the oceans, these challenges will continue to be met within the existing framework of

⁵⁷ 'Pacific's Palau Mulls Drone Patrols to Monitor Waters', *Global Post* (4 October 2013), available at <<http://www.globalpost.com/dispatch/news/afp/131004/pacifics-palau-mulls-drone-patrols-monitor-waters>>.

⁵⁸ See IMO Doc MSC80/5/5 (2 March 2005) 3–4 (submitted by the International Mobile Satellite Organization (IMSO)).

⁵⁹ MS Schmit and T Shanker, 'To Smuggle More Drugs, Traffickers Go Under the Sea', *New York Times* (9 September 2012), available at <<http://www.nytimes.com/2012/09/10/world/americas/drug-smugglers-pose-underwater-challenge-in-caribbean.html>>.

⁶⁰ LOSC, n 5, Art 20. ⁶¹ See further discussion in Chapter 24 in this volume.

⁶² See UN Secretary General, n 3, [39].

⁶³ See eg A McIlgorm et al, 'How will Climate Change Alter Fishery Governance? Insights from Seven International Case Studies' (2010) 34 *Marine Policy* 170.

rights and duties for each maritime zone as established under the LOSC. Where certain activities were not contemplated in this treaty, there may be need for additional rules or guidelines. Depending on the urgency of the threat, the Security Council may step in to determine State action on a more immediate basis. Otherwise, treaties or non-binding agreements may be needed to expand on the existing framework in response to widely recognized threats and challenges that arise.

4.2 Human dimension

In looking ahead, maritime security will need to address ways to improve control over non-State actors (such as pirates, illegal fishers, people smugglers, terrorists, crews on vessels) in an area that is not readily controlled. There are a range of laws that address the particular activities and interests of humans at sea. These include rights and duties for seafarers, for those rescued at sea, stowaways, as well as alleged criminal offenders. While a framework of laws and guidelines therefore exists, there is scope for further study as to the regulation of these individuals.

There are considerable jurisdictional complexities when dealing with the perpetrators of maritime crimes and other acts that threaten maritime security. The location of any act determines if a coastal State has authority and what authority it may have depending on what has occurred. As a vessel will typically be involved, the flag State of that vessel may have a jurisdictional interest. The nationality of the perpetrators and potentially of any victims may further be relevant. On one vessel, the master and crew members may be of different nationalities. While international law focuses on the nationality of the vessel (or its State of registration), the legal and beneficial owners, as well as the insurers, may be from different States. The financial interests at stake may prompt these actors to influence events, including through their own State of nationality. The interests of these many different States may all be put in play depending on any given factual scenario.

The *Achille Lauro* reflects a classic example of these jurisdictional clashes. The *Achille Lauro* was a cruise ship flagged to Italy and was 30 miles off the coast of Egypt when members of the Palestinian Liberation Front took control of the vessel. Holding all crew and passengers as hostages, a demand was made to Israel to release certain prisoners. When the demand was not met, a US national was pushed overboard and killed. An agreement was subsequently reached where passage to Tunisia was to be granted to the hostage-takers for the release of the *Achille Lauro*. The United States then forced the aircraft to land in Italy, where Italian authorities arrested the hostage-takers. A number of States could have potentially prosecuted the hostage-takers in light of the varied bases of jurisdiction available as a matter of international law.⁶⁴ The 1988 SUA Convention ultimately sought to resolve some of

⁶⁴ For discussion, see CC Joyner, 'Suppression of Terrorism on the High Seas: the 1988 IMO Convention on the Safety of Maritime Navigation' (1989) 19 *Israel Yearbook on Human Rights* 341;

these jurisdictional difficulties,⁶⁵ although there is still no priority accorded to any particular basis of jurisdiction.

Other jurisdictional controversies may arise in search and rescue scenarios, where a vessel performing obligations in its Search and Rescue Region retrieves illegal migrants. The Search and Rescue Region does not necessarily overlap with a State's maritime zones and a vessel of another nationality may be requested to assist. Questions may arise as to where the vessel that has taken illegal migrants on board may deliver them and what obligations arise in prosecuting those responsible for the people smuggling activity.⁶⁶ In this situation, it is not only the law of the sea that is at play but also obligations in relation to the treatment of asylum seekers. There is undoubtedly more analysis needed on how these legal regimes should interact and how gaps and ambiguities within existing legal regimes should be resolved.

5 THE INFLUENCE OF MARITIME SECURITY ON THE DEVELOPMENT OF THE LAW OF THE SEA

Maritime security is largely not a distinct body of law in its own right, as may be the case with maritime boundary delimitations or fisheries regulations. Instead, the concept of maritime security encompasses the regulation of armed force and peacetime military activities as well as law enforcement operations and shipping safety regimes. Maritime security further sits within the general body of the law of the sea when assessing the rights and duties of States within different maritime zones. Hence, in considering the influence of maritime security on the development of the law of the sea, it is more a matter of how security concerns have influenced the articulation, interpretation, and application of the law in this area. Moreover, regard may be had to the growing network of treaties, guidelines, and other agreements that are intended to respond to and prevent particular maritime security threats. These two dimensions are examined in the discussion below.

M 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.

⁶⁵ See SUA Convention, n 27, Art 6.

⁶⁶ These questions were starkly demonstrated in relation to the Norwegian vessel, the *MV Tampa*, and its rescue of asylum seekers who had left Indonesia and were bound for Australia. For discussion, see DR Rothwell, 'The Law of the Sea and the *MV Tampa* Incident: Reconciling Maritime Principles with Coastal State Sovereignty' (2002) 13 *Public Law Review* 118.

5.1 Maintain the ambiguities?

A hallmark of the law of the sea has been the preference to treat security concerns implicitly rather than explicitly. There are many examples in this regard within the LOSC. As mentioned earlier, the regime of transit passage allows for passage 'in normal mode'.⁶⁷ This term has then typically been interpreted as allowing launching and recovery of aircraft and helicopters, as well as putting up air patrols and formation steaming.⁶⁸ Although this interpretation of the clause has not been without debate,⁶⁹ it did resolve an issue of significant controversy within the law of the sea (namely, the breadth of the territorial sea) and reflected a compromise between the competing interests of littoral States and the superpowers of the time.

Similarly, deliberate ambiguity was employed in relation to the rights accruing to States in foreign EEZs, as these include the freedom of navigation and 'other internationally lawful uses of the sea related to these freedoms'.⁷⁰ As discussed, States have adopted differing interpretations as to whether this term is broad enough to allow military activities in a foreign EEZ. The ambiguity within the express terms of the LOSC allows for States to argue their position either way and while a clearer prescription may be optimal, the existing phrase allowed for States to reach agreement on the treaty text and has largely maintained minimal order on this issue.

The LOSC only explicitly references security in a few specific instances. What constitutes the 'peace, good order or security' of a State is an essential element in determining whether passage through the territorial sea of a State is innocent or not.⁷¹ A series of activities that render passage non-innocent provides some indication of what conduct threatens the security of the coastal State.⁷² The LOSC also references security in the context of permitting States to withhold evidence the disclosure of which is 'contrary to the essential interests of its security'.⁷³ Such an exclusion holds particular importance when it is recalled that the LOSC entails a compulsory dispute settlement system,⁷⁴ whereby States may be subjected to arbitration or adjudication once becoming parties to the LOSC.⁷⁵ These compulsory procedures prompted further explicit protection of security in the LOSC, as States may opt to exclude disputes concerning military activities or those concerning the

⁶⁷ LOSC, n 5, Art 39(1).

⁶⁸ See WF Doran, 'An Operational Commander's Perspective on the 1982 LOS Convention' (1995) 10 *International Journal of Marine and Coastal Law* 335, 340.

⁶⁹ See eg V Lowe, 'The Commander's Handbook on the Law of Naval Operations and the Contemporary Law of the Sea' (1991) 64 *International Law Studies: The Law of Naval Operations* 109, 111 and 122.

⁷⁰ LOSC, n 5, Art 58.

⁷¹ *Ibid*, Art 19.

⁷² S Kaye, 'Freedom of Navigation in a Post 9/11 World: Security and Creeping Jurisdiction' in D Freestone, R Barnes, and DM Ong (eds), *The Law of the Sea: Progress and Prospects* (Oxford University Press Oxford 2006) 347, 348–9.

⁷³ LOSC, n 5, Art 302.

⁷⁴ See further Chapter 18 in this volume.

⁷⁵ LOSC, n 5, Part XV.

functions of the UN Security Council from the scope of mandatory arbitration or adjudication.⁷⁶

In light of the existing ambiguities in the LOSC, States have otherwise been left to negotiate separate agreements, which are discussed in the next section, or the expectation is that other avenues will be pursued,⁷⁷ including the development of customary international law, to govern maritime security matters. The Proliferation Security Initiative (PSI) is an example of States seeking to test the bounds of the LOSC language and potentially develop customary international law for the purposes of detecting the shipment of weapons of mass destruction and related material to non-State actors. The PSI was spearheaded by the United States and attracted support from approximately 60 States.⁷⁸ The Statement of Interdiction Principles adopted by the participants intended them to take action 'to the extent their national legal authorities permit[ted] and consistent with their obligations under international law and frameworks'.⁷⁹ There has been considerable debate as to whether the PSI was intended or has had the effect of shaping customary international law,⁸⁰ and it could not be said that there is yet a definitive answer to this question.

To the extent that customary international law may influence the interpretation and application of the LOSC, there is a concern that such development will upset the delicate compromise achieved in the LOSC at the time of its drafting and should be avoided.⁸¹ With technological advances and shifting perceptions of what constitutes threats to maritime security, it would seem that this position will become increasingly difficult to maintain.

5.2 An increasing labyrinth

Beyond the general rights and obligations accruing to States in the different maritime zones that implicate responses to maritime security threats, States have also sought to conclude agreements to deal with specific concerns. In this regard, there are an increasing number of agreements, concluded on bilateral, regional, and multilateral bases, to address diverse aspects of maritime security.⁸² An exceptional

⁷⁶ See *ibid.*, Art 298(1)(c).

⁷⁷ The other means and fora available to develop the law of the sea, or potentially amend the LOSC, include through the meetings of States Parties (known as SPLOS) or under the auspices of the UN General Assembly. See discussion in Tanaka, above n 20, 32–7.

⁷⁸ Klein, above n 17, 195–6.

⁷⁹ US Department of State, *Proliferation Security Initiative: Statement of Interdiction Principles: Fact Sheet* (2003) Principle 4, available at <<http://www.state.gov/t/isn/c27726.htm>>.

⁸⁰ See eg Valenica, above n 48, 47–8; TC Perry, 'Blurring the Ocean Zones: The Effect of the Proliferation Security Initiative on the Customary International Law of the Sea' (2006) 37 *Ocean Development and International Law* 33.

⁸¹ See Kraska, above n 54, 224.

⁸² These have been surveyed in J Kraska and R Pedrozo, *International Maritime Security Law* (Brill Leiden 2013).

example of a broad maritime security agreement was adopted by States members of the Caribbean Community.⁸³ It is readily seen that there has been considerable law-making activity at different levels of governance.

Within the IMO, the primary work has been in relation to maritime safety and other standards for international shipping. The IMO first became engaged in matters of maritime security when the UN General Assembly requested the IMO to draft what became the 1988 SUA Convention.⁸⁴ Following the September 11 attacks on the United States, the IMO has become increasingly engaged in issues of maritime security. In its global governance role, the IMO has overseen the adoption of the ISPS Code,⁸⁵ the LRIT Regulations,⁸⁶ guidelines for rescues at sea,⁸⁷ seafarers identification agreement,⁸⁸ and ship routing measures along with spatial planning.⁸⁹ Against this expanding body of law, it must be recalled that the IMO does not typically deal with enforcement powers in relation to its agreements. At most, there are reporting mechanisms to the institution, but the more common situation is to anticipate enforcement consistently with existing rules relating to enforcement under the law of the sea.

For the augmentation of enforcement powers, States have instead devised regimes addressing particular maritime security threats and set out jurisdictional bases for the prevention and suppression of the relevant activities. Additional powers for exercising the right of visit have been granted under multilateral treaties such as the 1988 Drugs Convention,⁹⁰ the 1995 Fish Stocks Agreement,⁹¹ the 2000 Migrant Smuggling Protocol,⁹² and the 2005 SUA Convention.⁹³ These treaties have all attracted wide participation across all regions of the world.⁹⁴

Regional agreements have also been pursued to address specific threats, such as the Council of Europe agreement on drug-trafficking,⁹⁵ the 2004 Regional Cooperation Agreement on Combating Piracy and Armed Robbery Against Ships in Asia (ReCAAP),⁹⁶ and in the broader context, the 2008 CARICOM Maritime

⁸³ 2008 CARICOM Maritime and Airspace Security Co-operation Agreement.

⁸⁴ UNGA Resolution 40/61, UN Doc A/RES/40/61 (9 December 1985).

⁸⁵ See SOLAS, 1983 Amendments to the Annex, n 31. ⁸⁶ See n 33 and accompanying text.

⁸⁷ IMO, Guidelines on the Treatment of Persons Rescued at Sea, IMO Res MSC.167(78), IMO Doc 78/26/Add.2 (10 May 2004) Annex 34.

⁸⁸ 1958 ILO Convention (No 108) Concerning Seafarers' Identity Documents (revised 2003).

⁸⁹ Safety zones and security zones may be established to protect, for example, submarine cables, offshore installations, offshore platforms.

⁹⁰ Drugs Convention, n 24. ⁹¹ FSA, n 26. ⁹² Migrant Smuggling Protocol, n 25.

⁹³ 2005 Protocol to Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (hereinafter 2005 SUA Protocol).

⁹⁴ The 1998 Drugs Convention, n 24, has 188 States Parties, the 1995 FSA, n 26, has 81, the 2000 Migrant Smuggling Protocol, n 25, has 138. The 1988 SUA Convention, n 27, has 164 whereas its 2005 Protocol, n 93, has attracted 29 States parties thus far.

⁹⁵ 1995 Agreement on Illicit Traffic by Sea, Implementing Article 17 of the Drugs Convention, n 24.

⁹⁶ 2004 Regional Cooperation Agreement on Combating Piracy and Armed Robbery Against Ships in Asia.

and Airspace Security Co-operation Agreement. Regional fisheries management organizations are also active in taking steps to reduce illegal, unregulated, and unreported fishing activities.⁹⁷ These sorts of regional responses have been preferred where there is a shared concern to address a specific geographic area, or where neighbouring States have a common interest in responding to specific maritime security threats. In some instances, the regional response is intended to implement a multilateral commitment, as was the case with the European drug-trafficking convention as an implementation of Article 17 of the 1988 UN convention on drug trafficking.

The United States has also been very active in concluding bilateral treaties with neighbouring States to respond to the illicit trade in narcotics,⁹⁸ and also to prevent the transport of weapons of mass destruction in violation of international law.⁹⁹ Bilateral treaties have also been pursued between European and North-African States in response to people smuggling concerns.¹⁰⁰ At the bilateral level, States have been able to improve their law enforcement capabilities by cooperative arrangements, such as allowing for officials from one State to accompany officials of another State on the latter's vessels for the purposes of granting authority to act in the first State's maritime zones or against its vessels.¹⁰¹ The possibility of multilateral hot pursuit has been set out in a bilateral agreement between Australia and France to improve responses to illegal fishing in remote Antarctic waters.¹⁰²

Formal agreements may be supplemented with non-binding guidelines, or codes of conduct or memoranda of understanding. The PSI and its Statement of Interdiction Principles may be seen as a broad political agreement that has provided a basis for cooperation among participants, and has extended to facilitating joint exercises and training. While it has been reported that the

⁹⁷ For further discussion, see Chapter 20 in this volume.

⁹⁸ See discussion in MJ Williams, 'Bilateral Maritime Agreements Enhancing International Cooperation in the Suppression of Illicit Maritime Narcotics Trafficking' in MH Nordquist and JN Moore (eds), *Oceans Policy: New Institutions, Challenges and Opportunities* (Martinus Nijhoff Leiden 1999) 179; see also J Gonzalez-Pinto, 'Interdiction of Narcotics in International Waters' (2008) 15 *University of Miami International and Comparative Law Review* 443.

⁹⁹ AJ Roach, 'Proliferation Security Initiative (PSI): Countering Proliferation by Sea' in MH Nordquist, JN Moore, and K Fu (eds), *Recent Developments in the Law of the Sea and China* (Martinus Nijhoff Leiden 2006) 351.

¹⁰⁰ See V Moreno-Lax, 'Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States' Obligations Accruing at Sea' (2011) 23 *International Journal of Refugee Law* 174, 178–85.

¹⁰¹ These are commonly referred to as ship rider agreements.

¹⁰² See W Gullett and C Schofield, 'Pushing the Limits of the Law of the Sea Convention: Australian and French Cooperative Surveillance and Enforcement in the Southern Ocean' (2007) 22 *International Journal of Marine and Coastal Law* 545. See further EJ Molenaar, 'Multilateral Hot Pursuit and Illegal Fishing in the Southern Ocean: The Pursuits of the *Viarsa I* and the *South Tomi*' (2004) 19 *International Journal of Marine and Coastal Law* 19.

PSI has provided the basis for several interdictions, full details have not been made public.¹⁰³ Other non-binding agreements designed to enhance cooperation within the existing confines of international law include the Bali Process on people smuggling,¹⁰⁴ and the Djibouti Code of Conduct to address piracy among eastern African States.¹⁰⁵

The Security Council could potentially influence the development of the law relating to maritime security through its mandatory resolutions adopted under Chapter VII. The weight of these resolutions may rightly be questioned as a source of law, given that they commonly target particular States or specific situations. Hence resolutions that permit States to conduct a right of visit for the purposes of enforcing sanctions imposed under Article 41 of the UN Charter do not grant authority more broadly and otherwise upset the exclusive jurisdiction of the flag State.¹⁰⁶ More typically, Security Council resolutions will reflect the existing law of the sea. For example, the resolutions relating to enforcement of sanctions against North Korea still deferred to the authority of flag States in consenting to actions against their vessels.¹⁰⁷ Equally, the resolutions addressing piracy off the coast of Somalia were intended to sit within existing law rather than potentially influence the law of piracy or allow for the possibility that other situations of piracy could constitute a threat to peace and security warranting action under Chapter VII of the UN Charter.¹⁰⁸ The potential of the Security Council to influence the development of the law relating to maritime security will only be realized if the Council opts to exercise its powers under Chapter VII. The engagement of the Security Council in this regard may provide a considerable scope of authority for legal developments if it decides that certain maritime security threats are threats to international peace and security and then authorizes a wide range of actions in response to that threat.¹⁰⁹

¹⁰³ A Prosser and H Scoville Jr, *The Proliferation Security Initiative in Perspective* (2004), available at <<http://www.docstoc.com/docs/22652143/The-Proliferation-Security-Initiative-in-Perspective>>.

¹⁰⁴ The Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime, available at <<http://www.baliprocess.net/>>.

¹⁰⁵ Code of Conduct Concerning the Repression of Piracy and Armed Robbery Against Ships in the Western Indian Ocean and the Gulf of Aden (29 January 2009), IMO Doc C 120/14 (3 April 2009).

¹⁰⁶ For discussion, see R McLaughlin, 'United Nations Mandated Naval Interdiction Operations in the Territorial Sea' (2002) 51 *International and Comparative Law Quarterly* 249.

¹⁰⁷ See UNSC Res 1872 (12 June 2009) [11], [12].

¹⁰⁸ See interventions by Indonesia and South Africa: UN Doc S/PV.5902 (2 June 2008).

¹⁰⁹ The 'legislative' activity of the Security Council has been seen in response to terrorism more generally. See discussion in E Rosand, 'Security Council Resolution 1373, the Counterterrorism Committee, and the Fight Against Terrorism' (2003) 97 *American Journal of International Law* 333.

6 CONCLUSION

Maritime security is a very dynamic area of the law of the sea. As discussed in this chapter, it encompasses traditional security concerns, which may engage the law of armed conflict, as well as law enforcement and shipping safety issues. Critical problems presently confronting States include unresolved boundary disputes, increasingly sophisticated and menacing criminal enterprises, and the collection of data and information at sea that threatens the interests of a State. Looking ahead, States will need to consider the positive and negative impacts of advancing technology in their regulation of maritime activities. Laws will need to develop apace to the extent possible, and will not only need to consider what is happening but also who is engaged in those activities and how authority may be asserted over them. Responding to these challenges will no doubt influence the development of laws relating to maritime security in the future.

Maritime security has already clearly influenced the development of the law of the sea, as evidenced by the increasing number of agreements and arrangements concluded by States. While the international law framework is becoming increasingly complex and comprehensive, there are gaps remaining. Most notably, the gaps arise because not all States are participating in the myriad of agreements. Obviously not every State will share the same level of concern and interest in responding to maritime security threats as may be the case for other States. Some regimes may work effectively without universal participation, provided the States most interested and most affected are part of the relevant regime.

Moreover, those States that do become parties to the different international treaties or engage in other arrangements do not necessarily take all of the required steps to implement their international obligations. Implementation may be a particularly difficult question for countries that do not bestow policing powers on naval forces and in federal States where criminal prosecution happens on the state or provincial level rather than on the national level. In the former situations, States will need to give careful consideration to the deployment of their vessels in international policing operations. In the latter, States will potentially need to undertake legislative reform or make other internal arrangements to ensure international obligations can be fulfilled.

It may further be the case that States lack the resources to operationalize fully the requirements for improving maritime security or for enforcing prescribed standards to reduce risks. Such concerns were already manifested in the implementation of the ISPS Code and in changes to seafarer identification requirements.¹¹⁰ In

¹¹⁰ See Klein, n 17, 162, 237–9.

each instance, developed States undertook regional and bilateral initiatives to assist developing States. However, not all coastal States will be agreeable to the intervention of third States in improving maritime security regimes within their waters. So much was evident in the responses of Indonesia and Malaysia to US proposals to undertake greater surveillance and other security measures within the Malacca Straits.¹¹¹ Nonetheless, greater cooperation and capacity building will be necessary tools to strengthen the overall international law framework for maritime security.

¹¹¹ TM Sittnick, 'State Responsibility and Maritime Terrorism in the Strait of Malacca: Persuading Indonesia and Malaysia to take Additional Steps to Secure the Strait' (2005) 14 *Pacific Rim Law and Policy Journal* 743, 755.