

NAVIGATING BETWEEN SCYLLA AND CHARYBDIS: INTERNATIONAL LAW, MARITIME SECURITY AND FREEDOM OF NAVIGATION

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There has been longstanding friction between international law and international security, with the Law of the Sea being no exception. Where once, states had wide latitude to utilise freedom of the seas to engage in commerce and colonialism, such freedom is now more restricted. While freedom of navigation is imperative for global commerce, the question arises as to how such freedom can be best protected from insecurity.

The research question determines whether the tension between maritime security and freedom of navigation can be reconciled. To answer this question, this paper will analyse the legal and security framework of maritime security and freedom of navigation. Through this analysis, the author will suggest a mechanism whereby maritime security can be improved to protect the freedom of navigation of seafaring states without compromising the sovereignty of coastal states.

The Law of the Sea's interaction with maritime security is vital in this area, particularly in relation to maritime terrorism. Relevant aspects of international law such as the UN Convention on the Law of the Sea, Convention on the Suppression of Unlawful Acts against the Safety of Maritime Navigation and the International Ship and Port Facility Security Code are reviewed.

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The conclusion is that absolute freedom of the seas is impractical, and regulation and enforcement are vital to ensure the safe enjoyment of freedom of navigation. Notably, supporting state maritime patrols is a key method of protecting freedom of navigation from maritime insecurity while preventing the erosion of state sovereignty.

Keywords: International Law, Maritime Security, Freedom of Navigation, Law of the Sea, International Security, Law and Security, Maritime Terrorism, Piracy.

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I. INTRODUCTION

The rule of law—often so solid on land, bolstered and clarified by centuries of careful wordsmithing, hard fought jurisdictional lines, and robust enforcement regimes—is fluid at sea, if it’s to be found at all.¹

Seafaring is a major industry, comprising for over 90% of global trade.² Such trade has expanded over previous years, even as it reduced somewhat recently due to the effects of Covid19.³ Freedom of navigation is key in making this global trade possible.⁴ Being the lifeblood of the maritime industry, freedom of navigation is a common good, in the interest of all nations to maintain.⁵ However, in a globalised world, where maritime security⁶ must be balanced against the importance of commerce, the tensions between security and freedom are more pressing than ever. There is a surprising lack of attention given to the intersection of the two, especially in relation to international law.

To remedy this lacunae, this article aims to determine whether the tension between maritime security and freedom of navigation can be reconciled. It does so by analysing the framework within which security and freedom conflict and suggests a mechanism whereby maritime security can be improved to protect the freedom of navigation of seafaring states without compromising coastal state sovereignty.

¹ Ian Urbina, *The Outlaw Ocean: Crime and Survival in the Last Untamed Frontier* (Vintage 2020), Xiii.

² Marko Golnar and Bojan Beškovnik, ‘Green Maritime Transport as a Part of Global Green Intermodal Chains’ (2020) 3 *Journal of Maritime & Transportation Science*, 21.

³ United Nations Conference on Trade and Development, ‘*Review of Maritime Transport 2020*’ (2020), Xi.

⁴ The concept whereby ships can safely travel through the territorial seas, contiguous zones or Exclusive Economic Zones of a coastal state or the high seas. See: Tommy Koh, ‘Setting the Context: A Globalized World’ in Myron H Nordquist and others (eds), *Freedom of Navigation and Globalization* (Brill 2014), 5.

⁵ *ibid*, 4.

⁶ In essence, a set of policies taken with the aim of securing the maritime domain. See: Basil Germond, ‘The Geopolitical Dimension of Maritime security’ (2015) 54 *Marine Policy*, 137.

This article first provides a brief overview of the tension between freedom of navigation and security. Then a review is made of the different types of freedom of navigation under international law (by treaty, case law and custom). This is followed by an analysis of maritime terrorism and piracy, and how these are distinct concepts under international law, before turning to the different legal instruments that attempt to resolve them. The next section analyses the tension between freedom of navigation and maritime security before offering tentative suggestions as to how these might be reconciled. Finally, the article concludes that there is a way to balance freedom of navigation with maritime security by strengthening coastal state support. Such a solution requires a compromise between both principles.

Such a balancing act is inherent in the very nature of seafaring. This might be illustrated with the legend of Odysseus, who was forced to navigate his ship through a narrow strait with the six-headed monster of Scylla on one side and the whirlpool monster Charybdis on the other. So too must international law navigate between the twin threats of unfettered free navigation and excessive maritime securitisation. I was especially struck by this when onboard a civilian ship near Indonesia in an area where there was a heightened risk of piracy. Due to this threat, the crew placed uniformed dummies in visible locations on the deck to give the impression of additional sentries and rigged hoses around the ship to respond to attacks with high-pressure jets of water. Indonesia lacks the capacity to conduct effective naval patrols, especially over its disputed territorial waters and resists letting other countries patrol its waters despite the high volume of shipping.⁷ Despite the sense of security provided by the ship's proximity to land, the threat of maritime violence was therefore high, with the closeness to land paradoxically putting the crew in greater danger from shore based actors. This encapsulates a key issue: addressing the Scylla of freedom of navigation with the Charybdis of the enforcement of maritime security by states, especially when a state is unable or unwilling to conduct enforcement within their own sovereign waters. Critical in this is that piracy and maritime

⁷ Sebastian Axbar, 'Income Opportunities and Sea Piracy in Indonesia: Evidence from Satellite Data' (2016) 8 *American Economic Journal: Applied Economics* 154, 158-159.

terrorism are distinctly different concepts whose designation matters when approaching maritime security.

II. BACKGROUND

The tension over freedom of navigation versus maritime security is not a new one. Scholars from two of Europe's major seafaring nations are central in this debate. Hugo Grotius of the Netherlands famously advocated for freedom of navigation in *Mare Liberum*,⁸ while John Selden of England endorsed *Mare Clausum*, arguing that the sea required regulation for the exercise of ownership rights.⁹ This was tied to contemporary English maritime interests, including laying claim to adjacent seas for jurisdiction.¹⁰ Grotius' arguments prevailed, as the ideal of freedom of navigation was useful for other European powers, who needed freedom of the seas to explore and conduct commerce in the East.¹¹ Furthermore, European colonialism has meant that European concepts of international law became universalised by the end of the nineteenth century,¹² further promoting freedom of navigation.

The importance of freedom of navigation for global trade is evidenced by the *Ever Given's* grounding in the Suez Canal in March 2021, which cost an estimated \$9.6bn a day,¹³ with every further week of closure

⁸ Hugo Grotius, *Mare Liberum* (The Free Sea) (Liberty Fund 2004), 37. See: Efthymios Papastavridis, 'The Right of Visit on the High Seas in a Theoretical Perspective: Mare Liberum Versus Mare Clausum Revisited' (2011) 24 *Leiden Journal of International Law*, 50.

⁹ See also: Richard Tuck, *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant* (Oxford University Press 1999), 116-118.

¹⁰ Mark Somos, 'Selden's Mare Clausum. the Secularisation of International Law and the Rise of Soft Imperialism' (2012) 14 *Journal of the History of International Law*, 292-293.

¹¹ Malcolm N Shaw, *International Law* (Cambridge University Press 2017), 410.

¹² Antony Anghie, 'The Evolution of International Law: Colonial and Postcolonial Realities' (2006) 27 *Third World Quarterly*, 746.

¹³ Economist Intelligence Unit, 'Suez Canal Blockage Disrupts Global Trade Supplies.' (*Economist Intelligence Unit*, 2021) <<https://go-gale-com.jproxy.nuim.ie/ps/i.do?p=ITOF&u=nuim&id=GALE%7CA656991320&v=2.1&it=r&sid=summon>> accessed 9 November 2021.

reducing annual global trade growth by 0.2–0.4%.¹⁴ While not a terrorist incident, the prevention of navigation by a single ship and its impact on the global economy shows the fragility of contemporary maritime trade and security, as well as the risks posed by terrorism. This was apparent to Singapore, who warned in 2005 that Al Qaeda was developing its maritime terrorism capabilities and even a single explosives laden vessel being driven into a port could halt global trade and cause severe economic damage.¹⁵ Likewise, so called “maritime choke points” such as the Turkish or Malacca straits are highly vulnerable to disruption. Such choke points are notable for high levels of shipping amidst natural constraints to navigation, making them vulnerable to attacks with devastating economic consequences.¹⁶ With this in mind, we must turn to freedom of navigation under international law.

III. FREEDOM OF NAVIGATION

When discussing freedom of navigation, one must first specify the types of freedom of navigation that exist under international law. Critical in this is the United Nations Convention on the Law of the Sea (UNCLOS), which was heavily influenced by Grotian *Mare Liberum*.¹⁷ UNCLOS is the result of the longest-running negotiation in UN history,¹⁸ and is widely regarded as the

¹⁴ Allianz Research, *The Suez Canal Is Not the Only Thing Clogging Global Trade* (Allianz SE 2021), 1.

¹⁵ Nong Hong and Adolf KY Ng, ‘The International Legal Instruments in Addressing Piracy and Maritime terrorism: A Critical Review’ (2010) 27 *Research in Transportation Economics*, 53.

¹⁶ See David L Alderson, Daniel Funk and Raluca Gera, ‘Analysis of the Global Maritime Transportation System as a Layered Network’ (2020) 13 *Journal of Transportation Studies*, 296 and Mohd Hazmi Mohd Rusli, ‘Navigational Hazards in International Maritime Chokepoints: A Study of the Straits of Malacca and Singapore’ (2012) 8 *Journal of International Studies*, 66–67.

¹⁷ David Garfield Wilson, ‘Interdiction on the High Seas: The Role and Authority of a Master in the Boarding and Searching of His Ship by Foreign Warships’ (2008) 55 *Naval Law Review*, 163.

¹⁸ David Freestone, ‘The Law of the Sea Convention at 30: Successes, Challenges and New Agendas’, *The 1982 Law of the Sea Convention at 30: Successes, Challenges and New Agendas* (Brill 2013), 1.

“authoritative maritime safety and security instrument of our time”.¹⁹ It provides a comprehensive legal foundation, balancing the rights and duties of coastal states in exploiting the maritime resources off their coasts as well as the interest of the international community generally, particularly in maintaining freedom of navigation.²⁰

Freedom of navigation relating to innocent passage through the territorial sea of coastal states is a longstanding principle of customary international law²¹ and was codified in UNCLOS.²² The right of innocent passage is qualified for vessels (including warships) in Article 19 of UNCLOS, which defines passage as innocent when it is not prejudicial to the peace, good order or security of the coastal state.²³ The principal was tested in the *Corfu Channel* case where the ICJ ruled that the mining of the North Corfu Channel “was a violation of the right of innocent passage which exists in favour of foreign vessels (whether warships or merchant ships) through such an international highway”.²⁴ The coastal state has the right to protect against passage that is not innocent,²⁵ and can require warships not complying with laws within its territorial seas to leave immediately.²⁶

¹⁹ RL Castaneda, C Condit and B Wilson, ‘Legal Authorities for Maritime Law Enforcement, Safety, and Environmental Protection’ in Michael McNicholas (ed), *Maritime Security* (Elsevier 2016), 436.

²⁰ James Kraska and Raul Pedrozo, *International Maritime Security Law* (Brill 2013), 215.

²¹ Susan Breau, *International Law* (Oxford University Press 2009), 99.

²² *Convention on the Law of the Sea (10 December 1982)* 1833 U.N.T.S. 397. Art. 17.

²³ The Convention also defines a number of examples. See: *ibid*, Art. 19.

²⁴ International Court of Justice, *The Corfu Channel Case (United Kingdom v Albania)*. *ICJ Report 4* (Judgement of 09 April 1949), 10. It must be noted that the ruling specifically related to straits and warships though its ruling is important for what constitutes innocent passage. See Donald Rothwell and Tim Stephens, *The International Law of the Sea* (Hart 2016), 224–225.

²⁵ *Convention on the Law of the Sea (10 December 1982)* 1833 U.N.T.S. 397. (n 23). Art. 25

²⁶ *ibid*. Art. 30.

During the twentieth century, coastal states' areas of maritime jurisdiction were extended significantly, which also increased their enforcement obligations.²⁷ Among these obligations, coastal states must ensure that foreign vessels can safely enjoy freedom of navigation within their waters. Failure to suppress maritime terrorism would thus constitute a breach of the coastal state's international obligations.²⁸ Coastal states also have an interest in protecting their waters, as their economies would be adversely affected by instability due to maritime terrorism.²⁹

Freedom of navigation is thus an important aspect of the international law of the sea, with UNCLOS explicitly highlighting that freedom of navigation on the high seas is open to all states, whether coastal or landlocked.³⁰ Vessels are subject to the jurisdiction of the state under whose flag they sail.³¹ Essentially, flag states are responsible for order in the high seas and regardless of the ship's location, the flag state maintains jurisdiction. This includes prescriptive jurisdiction in other states' territorial and internal waters.³² A flag state may authorise another state to exercise jurisdiction on its behalf, or even enforce flag state law, although this is rare.³³ A key reason for exercising such sovereignty is countering maritime terrorism.

IV. MARITIME TERRORISM

Despite the threat that international terrorism poses to freedom of navigation, the international community has been slow on maritime terrorism prevention, preferring to focus on jurisdiction once a terrorist

²⁷ Stuart Kaye, 'Maritime Jurisdiction and the Right to Board' (2020) 26 *James Cook University Law Review*, 17.

²⁸ Md Saiful Karim, *Maritime terrorism and the Role of Judicial Institutions in the International Legal Order* (Brill 2017), 98.

²⁹ Hong and Ng (n 16), 51.

³⁰ *Convention on the Law of the Sea (10 December 1982)* 1833 U.N.T.S. 397. (n 23). Art 87 (1).

³¹ Shaw (n 12), 455.

³² Kaye (n 28), 17-18.

³³ *ibid.*

incident has already occurred.³⁴ Both piracy and terrorism pose a threat to freedom of navigation and are frequently conflated. Distinguishing between the two is, however, important. International opposition to piracy is longstanding, with pirates being seen as *hostis humani generis*; enemies of all humankind and prosecutable by any nation upon the high seas.³⁵ Furthermore, piracy has an explicit definition under UNCLOS,³⁶ whereas there is no internationally agreed definition of terrorism.³⁷ As is often reiterated, political violence's classification as either freedom fighting or terrorism can be a matter of opinion.³⁸ Given that piracy and maritime terrorism are distinct, it is important to differentiate between an act of maritime violence as terrorism or piracy. Acts of piracy can enable a state to avoid its obligations under UNCLOS.

³⁴ Justin SC Mellor, 'Missing the Boat: The Legal and Practical Problems of the Prevention of Maritime terrorism' (2002) 18 *American University International Law Review*, 343.

³⁵ Robert C McCabe, *Modern Maritime Piracy: Genesis, Evolution and Responses* (Routledge 2018), 22.

³⁶ Namely, piracy is defined under UNCLOS as: "(a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:

(i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;

(ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;

(b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;

(c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b)."

Convention on the Law of the Sea (10 December 1982) 1833 U.N.T.S. 397. (n 23). Art. 101.

³⁷ Rumyana Grozdanova, "'Terrorism' - Too Elusive a Term for an International Legal Definition?" (2014) 61 *Netherlands International Law Review*. 306-307.

³⁸ Gus Martin, *Understanding Terrorism: Challenges, Perspectives, and Issues* (SAGE Publications 2006), 3.

There have been various attempts to assimilate piracy and terrorism as crimes,³⁹ but the conventional view remains that the definition of piracy excludes terrorism, as terrorism is politically motivated.⁴⁰ Pirates and maritime terrorists do however share several attributes; notably, both need money to sustain their operations and operate in areas of weak governance.⁴¹ The distinction between pirates and terrorists can also be blurred, with terrorists adopting pirates' tactics and pirates adopting terrorists' ideology.⁴² However, pirates and maritime terrorists have a key difference, in that pirates are motivated by profit while terrorists have ideological goals.⁴³ Furthermore, while terrorists court the media, pirates usually seek to avoid attention.⁴⁴ This was notable in the hijacking of the Italian cruise liner, *Achille Lauro* by the Palestine Liberation Front in 1985.⁴⁵ Likewise, after the 9/11 terrorist attacks in 2001, states saw the need to cooperate against terrorism, including maritime terrorism⁴⁶ and the International Maritime Organisation⁴⁷ (IMO) began to focus on maritime security.⁴⁸ Such security concerns became increasingly problematic in the twenty-first century as

³⁹ Douglas Guilfoyle, 'Piracy and Terrorism' in Panos Koutrakos and Achilles Skordas (eds), *The Law and Practice of Piracy at Sea* (Hart 2015), 35.

⁴⁰ *ibid*, 46-47.

⁴¹ Joshua Regan, 'The Piracy Terrorism Paradigm: An Interlinking Relationship' (2019) 11 *Behavioral Sciences of Terrorism and Political Aggression*, 150. For further analysis of the link between weak governance and maritime violence, see Christian Bueger, 'Learning from Piracy: Future Challenges of Maritime security Governance' (2015) 1 *Global Affairs*, 34-35.

⁴² Hong and Ng (n 16), 51.

⁴³ Regan (n 42), 150.

⁴⁴ *ibid*, 150.

⁴⁵ Erica Pearson, 'Achille Lauro Hijacking' in Gus Martin (ed), *The SAGE Encyclopedia of Terrorism* (Sage Publications 2012), 8.

⁴⁶ Natalie Klein, *Maritime Security and the Law of the Sea* (Oxford University Press 2011), 147.

⁴⁷ The IMO is the UN agency that seeks to promote the safety and security of international shipping.

⁴⁸ R William Johnstone, *Protecting Transportation: Implementing Security Policies and Programs* (Elsevier 2015), 108.

some terrorist groups became more sophisticated and utilised maritime violence in their tactics.⁴⁹

In an attempt to address the conflict between freedom of navigation and maritime security, the IMO passed the Convention on the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA) in 1988,⁵⁰ which remains the primary legal mechanism against maritime terrorism.⁵¹ In summary, it requires states to criminalise and prosecute actions such as hijacking, attacking ships or committing other types of violence that endanger navigation.⁵² Similar to other international counter-terrorism treaties, the SUA focuses on apprehension and conviction rather than prevention.⁵³ The SUA makes no distinction between piracy and maritime terrorism.⁵⁴ While most UN member states have signed the SUA (accounting for nearly 95% of world shipping), several important states such as Indonesia, Malaysia and Somalia are not signatories.⁵⁵ Such states experience a high level of maritime violence within their waters⁵⁶ but fear that the SUA will undermine their sovereignty.⁵⁷

While the SUA was welcomed, after 9/11, seafarers soon found themselves facing new threats, particularly the increased threat of maritime terrorism. A

⁴⁹ Victor Asal, Justin V. Hastings and Karl Rethemeyer, 'Maritime Insurgency' (2020) 34 *Terrorism and Political Violence*, 9.

⁵⁰ *Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (10 March 1988) 1678 U.N.T.S I-29004*.

⁵¹ Karim (n 29), 63.

⁵² *Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (10 March 1988) 1678 U.N.T.S I-29004* (n 51). Articles 3-5.

⁵³ Ted L McDorman, 'Maritime terrorism and the International Law of Boarding of Vessels at Sea: Assessment of the New Developments', *The Oceans in the Nuclear Age: Legacies and Risks: Expanded Edition* (Brill 2014), 241.

⁵⁴ Guilfoyle (n 40), 46.

⁵⁵ International Maritime Organisation, 'Status of Treaties' (2021) <<https://wwwcdn.imo.org/localresources/en/About/Conventions/StatusOfConventions/StatusOfTreaties.pdf>> accessed 19 November 2021.

⁵⁶ Hong and Ng (n 16), 56.

⁵⁷ Adam J Young and Mark J Valencia, 'Conflation of Piracy and Terrorism in Southeast Asia: Rectitude and Utility' (2003) 25 *Contemporary Southeast Asia*, 277.

prominent fear was that Weapons of Mass Destruction (WMDs) could fall into the hands of terrorists, leading to the 2005 protocol to the 1988 SUA.⁵⁸ The Protocol revised the SUA to cover areas such as the carriage of WMDs and terrorist actions,⁵⁹ but the focus is on flag state consent to conduct boardings, which reduces its effectiveness.⁶⁰ While a welcome development, the SUA reaffirms the exclusivity of flag state jurisdiction⁶¹ and offers no constabulary role for states to board, search, or arrest persons or ships engaged in terrorism.⁶² Furthermore, its applicability relies on ambiguous language, which undermines its utility in counterterrorism.⁶³ Another development was the International Ship and Port Facility Security (ISPS) Code, which was a global effort led by the US Coast Guard.⁶⁴ ISPS's execution relies on cooperation between state and non-state actors to improve security among vessels subject to SOLAS.⁶⁵ However, the ISPS does not apply to cargo ships of less than 500 gross tonnage,⁶⁶ and so fails to address the danger posed by smaller crafts that are often used in maritime terrorism.⁶⁷ Another important instrument is the Proliferation Security Initiative (PSI) was adopted in 2003 to address the trafficking of WMDs.⁶⁸ The PSI has been signed by over one hundred states but does not create new

⁵⁸ Aleeza Moseley, 'The Implementation of International Maritime security Instruments in CARICOM States' (United Nations-Nippon Foundation 2009), 22.

⁵⁹ *Protocol of 2005 to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (01 November 2005) 1823 U.N.T.S A-29004* (2005), Art 3.

⁶⁰ Hong and Ng (n 16), 57.

⁶¹ *Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (10 March 1988) 1678 U.N.T.S I-29004* (n 51), Art.9.

⁶² José Luis Jesus, 'Protection of Foreign Ships against Piracy and Terrorism at Sea: Legal Aspects' (2003) 18 *International Journal of Marine and Coastal Law*, 391.

⁶³ Guilfoyle (n 40), 47-48.

⁶⁴ Bruce Stubbs and Scott Truver, 'Towards a New Understanding of Maritime Power' in Andrew TH Tan (ed), *The Politics of Maritime Power: A Survey* (Routledge), 11.

⁶⁵ International Maritime Organisation, *International Ship and Port Facility Security Code and Solas Amendments 2002* (IMO 2003), 4.

⁶⁶ *ibid*, Art. 3.1.

⁶⁷ Klein (n 47), 306.

⁶⁸ U.S. Department of State, 'Proliferation Security Initiative' (2016) <<https://2009-2017.state.gov/t/isn/c10390.htm>> accessed 19 November 2021.

laws.⁶⁹ Rather it relies on existing laws and while it does not create legally binding obligations on states, the PSI is a useful tool in combating maritime terrorism,⁷⁰ given its multinational dimension. Together these instruments recognise maritime terrorism as a global problem that can only be addressed through international cooperation.⁷¹ Nonetheless, these various legal instruments remain inadequate.

Apprehending terrorists on the high seas is both difficult and legally complex, given that unlike acts of piracy, there is no universal jurisdiction conferred on acts of terrorism.⁷² Furthermore, the SUA does not authorise the seizure of terrorist vessels unlike pirate vessels, limiting its effectiveness.⁷³ This is likely due to the lack of a universal definition on what a terrorist is,⁷⁴ complicated by the increasing convergence between piracy and maritime terrorist activity.⁷⁵ The lacuna within which maritime counterterrorism exists is compounded because authority to intercept a vessel does not automatically involve the authority to detain the vessel, its crew or its cargo.⁷⁶ As most maritime violence takes place within territorial waters, the arrest and prosecution of perpetrators is the responsibility of the coastal state.⁷⁷ As such, the coastal state could even be held responsible for failing to take action against maritime terrorism within its waters.⁷⁸ However, without coastal state consent, foreign warships lack jurisdiction over maritime

⁶⁹ Arms Control Association, 'The Proliferation Security Initiative (PSI) At a Glance' (2020) <<https://www.armscontrol.org/factsheets/PSI>> accessed 19 November 2021.

⁷⁰ McDorman (n 54), 242-243.

⁷¹ Pat Burke, 'Global Maritime security – Maintaining Public Order of the Oceans' [2015] *Defence Forces Review*, 66.

⁷² Klein (n 47), 147.

⁷³ *Convention on the Law of the Sea (10 December 1982)* 1833 U.N.T.S. 397. (n 23), Art. 105.

⁷⁴ Guilfoyle (n 40), 44.

⁷⁵ Hong and Ng (n 16), 54.

⁷⁶ Winston McMillan, 'Something More Than a Three-Hour Tour: Rules for Detention and Treatment of Persons at Sea on U.S. Naval Warships' [2011] *The Army Lawyer*, 39.

⁷⁷ Young and Valencia (n 58), 270.

⁷⁸ Karim (n 29), 98.

violence, including maritime terrorists,⁷⁹ occurring within territorial waters (even if the same violence would be seen as piracy if it occurred on the high seas).⁸⁰ States jealously guard their sovereignty, and will usually be unwilling to cede jurisdiction, even to combat maritime terrorism.⁸¹ Furthermore, maritime violence most often takes place in areas of weak governance.⁸² Another complicating factor is that fragile states are overwhelmingly located in the Global South.⁸³ Due to colonialism, these states have had recent experience of foreign domination and fear erosion of their sovereignty under the guise of supranational cooperation.⁸⁴ This is an issue in South-East Asia where several terrorist groups with substantial maritime capabilities operate and where maritime attacks usually occur within territorial or archipelagic waters.⁸⁵ This poses a threat to seafarers being able to exercise their freedom of navigation and demonstrates the need to address maritime terrorism to ensure maritime security.

V ADDRESSING MARITIME-INSECURITY AND FREEDOM OF NAVIGATION

Maritime-insecurity poses a grave threat to seafarers and their freedom of navigation but addressing it is mired in controversy. Without coastal state consent, the main way for a state to address maritime violence in the territorial waters of another state would be via a UN Security Council (UNSC) Resolution. Chapter VII of the UN Charter empowers the UNSC to authorise military action.⁸⁶ This could be used to respond to maritime

⁷⁹ Article 100 of UNCLOS requires states to cooperate against piracy on the high seas, while Article 101's definitions are limited to the high seas. See *Convention on the Law of the Sea (10 December 1982)* 1833 U.N.T.S. 397. (n 23), Arts.100-101.

⁸⁰ Such violence within territorial waters is not deemed "piracy" but rather, "sea-robbery". See Urbina (n 1), 325-326.

⁸¹ Klein (n 47), 304.

⁸² See (n 42).

⁸³ Fund for Peace, *Fragile States Index Annual Report 2021* (2021), 7-8.

⁸⁴ Thomas G Weiss, *What's Wrong with the United Nations and How to Fix It* (Polity Press 2016), 22.

⁸⁵ Hong and Ng (n 16), 53-55.

⁸⁶ *Charter of the United Nations (1 U.N.T.S. XVI, 1945)*. Article 41.

violence in the territorial waters of a state unable or unwilling to respond. Likewise, the UNSC remains an area that could have a key role to play in countering maritime violence, by enabling international action without flag states ceding their exclusive jurisdiction.⁸⁷ However, UNSC requires unanimity among its five permanent members (P5) who have their own agendas. This means the UNSC's response to crises remains ad-hoc and subject to the P5's self-interest.⁸⁸ Nonetheless, the UNSC remains a keystone in international security, and is unique in enjoying legitimacy for authorising the use of force without the host state's consent. A prime example is Operation Atalanta, whereby the EU deploys an anti-piracy naval operation off the coast of Somalia under UNSC authorisation.⁸⁹ However, while Operation Atalanta initially authorised Member States to enter Somali territorial waters to suppress piracy,⁹⁰ in March 2022, this was not renewed.⁹¹ Likewise, Operation Atalanta is enacted to counter piracy and is therefore of limited utility as a framework for tackling the more contentious issue of terrorism.

One possibility is extending universal jurisdiction over piracy to include maritime terrorism.⁹² Given the increasing conflation between terrorism and maritime piracy, this is a potential option.⁹³ Permitting states' exclusive

⁸⁷ Klein (n 47), 325.

⁸⁸ Aidan Hehir, 'The Permanence of Inconsistency: Libya, the Security Council, and the Responsibility to Protect' (2013) 38 *International Security*, 137-138.

⁸⁹ Security Council Report, 'Somalia: Anti-Piracy Resolution' (*Security Council Report*, 2021) <<https://www.securitycouncilreport.org/whatsinblue/2021/12/somalia-anti-piracy-resolution-3.php>> accessed 2 April 2022.

⁹⁰ Efthymios Papastavridis, 'EUNAVFOR Operation Atalanta off Somalia: The EU in Unchartered Legal Waters?' (2015) 64 *The International and Comparative Law Quarterly*, 542.

⁹¹ EU NAVFOR, 'EU NAVFOR Atalanta Statement on the UNSC Resolution on Fighting Piracy Off the Coast of Somalia Non-Extension Announcement' (*EU NAVFOR*, 2022) <<https://eunavfor.eu/news/eu-navfor-atalanta-statement-uns-resolution-fighting-piracy-coast-somalia-non-extension-announcement>> accessed 2 April 2022.

⁹² Jesus (n 63), 399.

⁹³ Guilfoyle (n 40), 52.

jurisdictional interests to exist alongside the promotion of maritime security via collective rules is feasible.⁹⁴ This could assist weak states in state and capacity building through addressing the importance of state governance in maritime-insecurity.⁹⁵ However, opening the capacity of states to prosecute terrorism in the name of maintaining freedom of navigation risks opening a Pandora's Box of legal problems. For example, in 2017 Japan passed anti-terrorism legislation that deems protesting near Japanese whaling ships as terrorism.⁹⁶ Consequently, marine conservation protesters risk arrest and imprisonment as terrorists by Japan, even for protests conducted in international waters.⁹⁷ Mandating states to detain or prosecute terrorists enters dubious legal territory given the lack of international agreement on what exactly a terrorist is. This is compounded by the fact most states are unlikely to want to pursue questionably named "terrorists" like marine conservation protesters in the interests of states like Japan.

A further issue with extending state jurisdiction on the high seas is that some states see the lawlessness of the high seas as useful in counter-terrorism. A prime example is the US, which sequesters terrorist suspects on board American warships on the high seas, enabling the US to detain and interrogate them while evading humanitarian⁹⁸ and domestic law.⁹⁹ Using the length of sea passages as a way to prolong interrogations would appear to go against American federal law, which deems delay for the purpose of interrogation as the "epitome of delay".¹⁰⁰ However, terrorist suspects'

⁹⁴ Klein (n 47), 327.

⁹⁵ Young and Valencia (n 58), 280-281.

⁹⁶ Ben Doherty, 'Sea Shepherd Says It Will Abandon Pursuit of Japanese Whalers' (*The Guardian* 29 August 2017). <<https://theguardian.com/environment/2017/aug/29/sea-shepherd-says-it-will-abandon-pursuit-of-japanese-whalers>> accessed 2 April 2022.

⁹⁷ Urbina (n 1), 404.

⁹⁸ See McMillan (n 77), 35-36.

⁹⁹ Meghan Claire Hammond, 'Without Unnecessary Delay: Using Army Regulation 190-8 to Curtail Extended Detention at Sea' (2016) 110 *Northwestern University Law Review*, 1305-1306.

¹⁰⁰ *Corley v United States*, 556 US 303 (2009).

attempts to get their statements made during detention at sea deemed inadmissible have thus far been rejected in American federal courts.¹⁰¹ The fact that some states benefit from the high seas' relative lawlessness remains a further obstacle to countering maritime terrorism, because they have a stake in retaining the current legal system's ineffectiveness on the high seas.

One potential response to ensuring freedom of navigation and combatting maritime-insecurity without eroding state sovereignty is political rather than legal. As highlighted above, maritime violence off the coast of Indonesia is compounded by a lack of funding to conduct naval patrols, especially given that Indonesia comprises over 18,000 islands.¹⁰² In such cases, aid could be provided to acquiescing states in the form of funding and providing them with the naval vessels and maritime training enabling them to conduct their own naval patrols. This would be of enormous utility, protecting freedom of navigation by aiding coastal states to tackle maritime violence without impeding their sovereignty. This model has been used before: after Ireland acceded to the European Economic Community (EEC) in 1973, its navy consisted of a single offshore patrol vessel and three aged minesweepers, which had extremely limited range.¹⁰³ When the EEC adopted a Community-wide 200 mile Exclusive Economic Zone in 1976,¹⁰⁴ Ireland's existing navy was entirely inadequate for patrolling Ireland's waters and were unable to tackle maritime smuggling of weapons and explosives to paramilitaries in Northern Ireland.¹⁰⁵ Consequently, EEC funding was granted to enable Ireland to expand and modernise its fleet to permit

¹⁰¹ *United States v Ahmed Salim Faraj Abu Khatallah*, 314 F Supp 3d 179 (DDC 2018).

¹⁰² Axbard (n 7), 158-159.

¹⁰³ Tom MacGinty, *The Irish Navy: A Story of Courage and Tenacity* (The Kerryman Ltd 1995), 168-169.

¹⁰⁴ The EEC adopted a 200 mile Exclusive Economic Zone across its waters in 1976, before UNCLOS and its EEZ limits came into being. See: Council of the European Communities, *Council Resolution of 3 November 1976 on Certain External Aspects of the Creation of a 200-Mile Fishing Zone in the Community with Effect from 1 January 1977* [1976] OJ C105/1.

¹⁰⁵ Aidan McIvor, *A History of the Irish Naval Service* (Irish Academic Press 1994), 145.

operational effectiveness.¹⁰⁶ Financial assistance for states' self-help has a precedent for addressing maritime security and freedom of navigation while supporting state sovereignty. However, while such a system is legally useful in that it enables states to improve their own maritime security without risking the erosion of their sovereignty via foreign interference, the political and economic aspects of such a system is another matter. Such a system of financial aid would likely require significant oversight by an external body to prevent corruption, which creates its own difficulties in terms of foreign involvement in a state's internal affairs. Key in the Irish example is the EEC's existing model for financial assistance that is unavailable for many developing states. Regional organisations such as the African Union or Association of Southeast Asian Nations could be explored as possible vehicles to provide financial assistance to promote their members' maritime security.

VI CONCLUSION

An unfettered approach to freedom on the high seas is problematic in an era of international terrorism and globalised commerce. Such tension between freedom and security on the seas is not a unique development, with twentieth-century states already having realised that “absolute *Mare Liberum*” was untenable and maritime freedom required regulation in order to safeguard its enjoyment by all.¹⁰⁷ However, further action on this is difficult, because it is unlikely there will be any ceding of coastal or flag state sovereignty in the near future, and states will continue to guard their jurisdictional rights over their citizens and flagged vessels.¹⁰⁸ Such divergent interests on the exercise of jurisdiction is a key issue for maritime security on the high seas

¹⁰⁶ *ibid.*

¹⁰⁷ Michael A Becker, ‘The Shifting Public Order of the Oceans: Freedom of Navigation and the Interdiction of Ships at Sea’ (2005) 46 *Harvard International Law Journal*, 170.

¹⁰⁸ Burke (n 72), 71.

Simply expanding states' sovereignty over adjacent waters would be a poor attempt to safeguard freedom of navigation since many states lack effective enforcement mechanisms for the waters already under their jurisdiction.¹⁰⁹ Furthermore, maritime security traditionally relied on state enforcement within defined waters, which is now problematic given the ongoing disputes over maritime boundaries in South-East Asia, complicating the issue of legal jurisdiction.¹¹⁰ Maritime security has traditionally relied on state enforcement within defined waters but this has proved problematic in South East Asia, notably in the South China Sea.¹¹¹ Nonetheless, perhaps the best method to address this is by providing financial and technical assistance to sovereign states. This would strengthen their ability to conduct maritime patrols and combat maritime terrorism without the political controversy of encroaching on states' sovereignty under international law, especially in Global South nations.

Just as states once compromised on freedom of navigation in the high seas in order to address the threat of piracy, they must now accommodate the need to combat maritime terrorism.¹¹² This balancing act will remain an area of controversy for the near future.

¹⁰⁹ Hong and Ng (n 16), 55.

¹¹⁰ Young and Valencia (n 58), 270.

¹¹¹ Benjamin K Wagner, 'Lessons from Lassen: Plotting a Proper Course for Freedom of Navigation Operations in the South China Sea' (2016) 9 *Journal of East Asia and International Law*.

¹¹² Jesus (n 63), 400.