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**THREATS OF TERRORISM AND THREATS TO
INTERNATIONAL LEGAL STRUCTURES:
A LAW OF THE SEA PERSPECTIVE**

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The events of 11 September 2001 have been the catalyst for an array of state action in response to new security threats. The reactions have been wide-ranging, affecting political, economic and social policies, as well as legal regimes. In international law, the 11 September terrorist attacks, along with subsequent attacks in Bali, Madrid and London, have already brought pressure to bear on the international rules concerning the use of force, international humanitarian law, and human rights law. The strains on these legal principles can be briefly outlined as follows:

- Under the laws governing the use of force, states are prohibited from the threat or use of force,¹ unless that force is authorised by the Security Council,² or is consistent with the right of self-defence.³ The right of self-defence is available to a state if it has been the victim of an armed attack.⁴ In September 2002, US President Bush articulated the doctrine of pre-emption, whereby the United States will take anticipatory action in self-defence even if an attack is not known to be imminent.⁵ This approach has been criticised as inconsistent with the requirements of Article 51,⁶ and has opened the possibility of modifying these fundamental rules of the international legal order.

¹ *Charter of the United Nations* art 2(4).

² Acting under Chapter VII of the UN Charter, the Security Council may authorise 'such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security'. *Charter of the United Nations* art 42.

³ *Charter of the United Nations* art 51.

⁴ Article 51 reads: 'Nothing in the present Charter shall impair the inherent right of individual or collective self-defence *if an armed attack* occurs against a Member of the United Nations...' (emphasis added). There has been considerable debate as to whether Article 51 should be given a restrictive or permissive reading so as to allow for the possibility of an act of anticipatory self-defence. See, eg, Martin Dixon, *Textbook on International Law* (5th ed, 2005) 292-3.

⁵ The doctrine of pre-emption was articulated by United States President Bush as follows: The United States has long maintained the option of pre-emptive actions to counter a sufficient threat to our national security. The greater the threat, the greater is the risk of inaction – and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack. To forestall or prevent such hostile acts by our adversaries the United States will, if necessary, act pre-emptively; *US National Security Strategy* (2002) 41 ILM 1478.

⁶ In the UN High Level Panel report, a distinction was drawn between anticipatory self-defence and preventive action. According to the former, '[a] threatened state, according to long established international law, can take military action as long as the threatened attack is imminent, no other means would deflect it and the action is proportionate'. Preventive action would be taken when the threat is non-imminent or non-proximate. In the report, the latter course of action was considered acceptable only if authorised by the Security Council and that no re-writing or reinterpretation of art 51 was otherwise required. Report of the High-level Panel on Threats, Challenges and Change, *A more secure world: Our shared responsibility* (2004) 63.

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- Although the conduct of armed conflict is to be guided by ‘the laws of humanity and the requirements of the public conscience’,⁷ this basic premise has been challenged by the recent actions of the United States in its so-called ‘war on terror’. The United States has characterised detainees held in Guantanamo Bay as ‘enemy combatants’, a little known category of persons in the law of armed conflict prior to 11 September 2001, and consequently stripped those detainees of a range of protections to which they would otherwise be entitled as prisoners of war.⁸
- As states introduce new national legislation to improve their counter-terrorism capabilities,⁹ concerns about restrictions on the freedom of speech, the freedom of association, and due process rights have mounted.¹⁰ In addition, the prohibition against torture, which is a non-derogable right with *jus cogens* status, has been undermined by United States’ interpretations and practice.¹¹

In these examples, it is apparent that state reactions to the 11 September attacks, as well as subsequent terrorist attacks in Bali, Madrid and London, have threatened the existing legal order in ways that are antithetical to community interests in maintaining certain core values – such as minimising the resort to force, and upholding fundamental human rights.

⁷ This statement is part of what is known as the *Martens* clause, which is in the preamble to the 1899 Hague Convention (II). *Convention with Respect to the Laws and Customs of War on Land*, opened for signature 29 July 1899, 32 Stat. 1803, Treaty Series 403, Preamble (entered into force 4 September 1900).

⁸ See generally Diane Marie Amann, ‘Guantanamo’ (2004) 42 *Columbia Journal of Transnational Law* 263; Anne E. Joynt, ‘Note: The Semantics of the Guantanamo Bay Inmates: Enemy Combatants or Prisoners of the War on Terror?’ (2004) 10 *Buffalo Human Rights Law Review* 427.

⁹ See, eg, amendments to the *Criminal Code Act 1995* (Cth) and *Australian Security Intelligence Organisation Act 1979* (Cth); *The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001*, Pub L No 107-56, 115 Stat 272 (also known as the USA PATRIOT Act).

¹⁰ See, eg, Sarah Joseph, ‘Australian Counter-Terrorism Legislation and the International Human Rights Framework’ (2004) 27 *UNSW Law Journal* 428; Jennifer C Evans, ‘Hijacking Civil Liberties: The USA PATRIOT Act of 2001’ (2001-2002) 33 *Loyola University of Chicago Law Journal* 933.

¹¹ See generally Louis-Philippe F. Rouillard, ‘Misinterpreting the Prohibition of Torture Under International Law: The Office of Legal Counsel Memorandum’ (2005) 21 *American University International Law Review* 9; Sean D. Murphy, ‘Executive Branch Memoranda on Status and Permissible Treatment of Detainees’ (2004) 98 *American Journal of International Law* 820.

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The 11 September attacks have also initiated change in another well-established area of international law, notably the law of the sea. Following the deadly use of aircraft on 11 September and attacks on the underground railway in London, attention has inevitably been drawn to the ways that other modes of transport may be used for terrorist purposes. There are concerns that weapons, supplies, and the terrorists themselves may be transported via the oceans, as happens with the majority of the world's cargo. Further scenarios envisaged include the use of small vessels packed with explosives being rammed into oil tankers or vessels carrying liquid natural gas, particularly when those vessels are transiting a narrow strait that is one of the major shipping routes or when the vessel is one of the vital hub ports for international shipping.

States have encountered difficulties in devising ways to enhance their maritime security because of the fundamental principle of *mare liberum*, whereby all states are entitled to exercise a right of navigation across the high seas and normally no state may exercise jurisdiction over a vessel on the high seas that does not bear its flag. The traditional preference has been to view ocean space as available to all users with minimal interference from other users. Control over high seas areas has been limited to the vessels plying these waters, rather than according rights over the maritime space itself.

Against this construct, three particular avenues that states have pursued in order to reduce the likelihood of a terrorist attack against international shipping, or otherwise to thwart terrorist activity, are: (1) the unilateral initiative of Australia in instituting an 1000 mile Maritime Identification System (AMIS); (2) the Proliferation Security Initiative (PSI), an informal arrangement instigated by the United States; and, (3) the adoption of a new multilateral treaty, the 2005 Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation. It is the purpose of this paper to outline what challenges are being posed by these recent developments to the traditional construct of the law of the sea, and how the fundamental principles of the law of the sea have thus far prevailed. A consequence is that efforts to improve maritime security have been significantly hindered. It is

argued that some small changes could be made to the traditional principles of the law of the sea without jeopardising its core values. Not all security-driven challenges to legal regimes are necessarily detrimental to the rule of law.

I THE AUSTRALIAN MARITIME IDENTIFICATION SYSTEM (AMIS)

Australia announced at the end of 2004 that it would institute a 1 000 nautical mile 'Maritime Identification Zone' as part of Australia's efforts to strengthen its offshore maritime security.¹² This endeavour was to enable a Joint Command of the Australian Defence Force and the Australian Customs Service to identify vessels intending to enter Australian ports, as well as all vessels entering Australia's Exclusive Economic Zone.¹³ That is, for any vessel entering an Australian port, that vessel would be required to provide identification information to Australian officials when it was still 1 000 nautical miles from the coast; vessels not entering Australian ports, but only in transit, would still be required to provide this information as soon as they were within 200 nautical miles of the Australian coast. These vessels are 'to provide comprehensive information such as ship, identity, crew, cargo, location, course, speed and intended port of arrival'.¹⁴ Such a proposal was quite novel in the law of the sea. It was justified, as far as Australia was concerned, because the Australian Government took the position that the provision of this information was intended to improve the effectiveness of civil and military maritime surveillance, as well as potentially protecting offshore oil and gas facilities from terrorism.¹⁵

In extending 1 000 nautical miles from Australia's coast, this 'zone' encompassed ocean areas that would have otherwise been high seas and over which no state may

¹² Prime Minister of Australia, John Howard, *Strengthening Offshore Maritime Security*, (Media Release, 14 December 2004) <www.pm.gov.au/news/media_releases/media_Release1173.html> at 12 February 2007 [hereinafter PM Media Release].

¹³ Ibid 2.

¹⁴ Ibid.

¹⁵ Ibid 1-2.

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exercise sovereignty.¹⁶ As such, it was not surprising that concern was expressed by some of Australia's neighbours at Australia's purported assertion of authority over such a broad expanse of ocean space. For example, New Zealand voiced concerns that the new 'zone' would stretch into the territorial waters of New Zealand's South Island.¹⁷ In Indonesia, a spokesman for the Foreign Minister stated more bluntly that the 'zone' would be a violation of Indonesian sovereignty and was in contravention of international law.¹⁸ Even states in the region that were outside the 1 000 mile reach questioned Australia's authority in this regard.¹⁹ Clearly the precedential effect of Australia's unilateral assertion was a global concern.²⁰

Australia has started referring to a 'system' rather than a 'zone',²¹ which would appear to be an effort to assuage concern that Australia was seeking to claim rights over the high seas. To mark its deference to existing law of the sea principles, Australia has also said that the 'system' will now only operate on a voluntary basis. The 1 000 nautical mile reach has not been changed, however. As such, questions still arise as to whether Australia is lawfully entitled to seek such information from vessels and what steps Australia may be able to take against vessels that refuse to provide the identification information.

¹⁶ *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, UN Doc A/CONF.62/122 (1982), reprinted in *Official Text of the United Nations Convention on the Law of the Sea*, UN Sales No E.83.V.5 (1983) and 21 ILM 1261 (1982), art 89 (entered into force 16 November 1994) [hereinafter UNCLOS].

¹⁷ Lloyds List, *Australia Security Plan Alarms Wellington*, Australian Maritime Pilots Association, <<http://www.ampa.asn.au/Members/GetFile.aspx?File=members/news/article2789.html>> at 12 February 2007.

¹⁸ *Indonesia Rejects Australian Maritime Zone* <<http://www.abc.net.au/news/newsitems/200412/s1267205.htm>> at 12 February 2007; See also Matthew Moore, 'Indonesia Rejects Plan for Security Zone as Breach of Maritime Boundaries' *Sydney Morning Herald* (Sydney), 18 December 2004 (referring to comments of Australia's Defence Minister, Senator Robert Hill).

¹⁹ Cynthia Banham and Agencies, 'Back off with the Bulldozer, Malaysia tells PM', *Sydney Morning Herald* (Sydney), 19 December 2004 (reporting on comments of the Malaysian Deputy Defense Minister).

²⁰ When the United States proclaimed rights over its continental shelf shortly after the Second World War, this proclamation triggered comparable or more excessive claims, by other states around the world.

²¹ No official announcement of the change appears to have been made, but government officials began referring to a 'system' rather than a 'zone'. See Michelle Wiese Bockmann, 'Maritime zone plans scrapped' *The Australian* (Sydney), 11 July 2005.

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Australia's right to request information from vessels seeking to enter its ports does not run contrary to the freedom of navigation, which has been long-enshrined in the law of the sea. Requesting information can be seen as consistent with Australia's rights under recent changes to the Safety of Life at Sea Convention,²² and the adoption of the International Ship and Port Facility Security Code.²³ Moreover, Australia would be entitled to seek this identification information from vessels entering its ports under the UN Convention on the Law of the Sea, or customary international law, as merely requesting information would not constitute an unreasonable infringement on the freedom of navigation.²⁴

Beyond simply requesting information, the Prime Minister announced that within the 'zone' the Australian Defence Force would 'take responsibility for offshore counter-terrorism prevention, interdiction and response capabilities and activities'.²⁵ However, any efforts at interdiction to enforce the information requirement on the high seas would be unlawful.²⁶ There is no exception to flag state authority on the high seas under the law of the sea that would permit Australian officials to enforce a coastal state requirement to provide information in pursuit of that state's maritime security policies.²⁷ Even in Australia's Exclusive Economic Zone, Australia does not have any special entitlement by virtue of its position as a coastal state to require

²² *International Convention for the Safety of Life at Sea*, opened for signature November 1 1974, 14 ILM 959 (entered into force 25 May 1980) [hereinafter SOLAS].

²³ See International Maritime Organisation (IMO) adopts comprehensive maritime security measures, (Conference of Contracting Governments to the International Convention for the Safety of Life at Sea 1974) 9-13 December 2002)

<http://www.imo.org/Newsroom/mainframe.asp?topic_id=583&doc_id=2689> at 12 February 2007. The ISPS Code is mandatory for all states parties to SOLAS. Australia has implemented the ISPS Code through the *Maritime Transport and Offshore Facilities Security Act 2003* (Cth).

²⁴ Natalie Klein, 'Legal Implications of Australia's Maritime Identification System' (2006) 55 *International and Comparative Law Quarterly* 337, 343-345.

²⁵ PM Media Release, above n 12, 1.

²⁶ See Klein, above n 24, 345-50.

²⁷ Article 110 of UNCLOS enshrines the right of visit on the high seas, but only in certain specified, limited circumstances.

vessels to provide security-related information or to enforce such a requirement.²⁸ Rather, coastal-state rights in that maritime area are for the promotion and protection of exclusive economic interests, rather than security interests. In this context, it is apparent that Australia may not undertake the security measures desired without breaching established legal rules relating to the high seas. Australia has instead had to revise its efforts to enhance Australian maritime security by changing it into a voluntary regime in order to act consistently with existing legal mandates.

II PROLIFERATION SECURITY INITIATIVE

The PSI was initially conceived as a ‘collection of interdiction partnerships’,²⁹ among fifteen core members (including Australia), as well as receiving the support of another sixty states.³⁰ As such, the PSI is not a formal organisation of these states. In agreeing on a non-binding Statement of Interdiction Principles, the participants politically commit themselves to establishing:

a more coordinated and effective basis through which to impede and stop shipments of [weapons of mass destruction], delivery systems, and related materials flowing to and from states and non-state actors of proliferation concern, consistent with national

²⁸ As a coastal state, Australia has sovereign rights ‘for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the sea-bed and of the sea-bed and its subsoil’, as well as ‘with regard to other activities for the economic exploitation and exploration of the zone’; UNCLOS, above n 16, art 56(1)(a). Jurisdiction is then accorded to Australia for the establishment and use of artificial islands, installations and structures, marine scientific research, and the protection and preservation of the marine environment. Ibid art 56(1)(b).

²⁹ Jack I Garvey, ‘The International Institutional Imperative for Countering the Spread of Weapons of Mass Destruction: Assessing the PSI’ (2005) 10 *Journal of Conflict & Security Law* 125, 129. See also Samuel E Logan, ‘The Proliferation Security Initiative: Navigating the Legal Challenges’ (2005) 14 *Journal of Transnational Law and Policy* 253, 255 (referring to the PSI as a ‘loose alliance’).

³⁰ The core participants are: Australia, Canada, France, Germany, Italy, Japan, the Netherlands, Norway, Poland, Portugal, Russia, Singapore, Spain, the United Kingdom and the United States. In August 2005, the core group was dismantled, as it was not apparently needed once the basic principles of interdiction have been established. Mark J Valencia, *The Proliferation Security Initiative: Making Waves in Asia* (2005) 29.

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legal authorities and relevant international law and frameworks, including the UN Security Council.³¹

As the Statement of Interdiction Principles intends participants to take action 'to the extent their national legal authorities permit and consistent with their obligations under international law and frameworks',³² the PSI is immediately constrained by the traditional requirements of exclusive flag state control and the freedom of the high seas. In recognition of the greater authority that states have over their ports, internal waters and territorial seas, the participant states are committed to taking appropriate action in respect of vessels that are reasonably suspected of carrying cargos of proliferation concern in these areas.³³ These actions may involve stopping and / or searching vessels, or enforcing conditions on vessels that enter or leave ports, internal waters or territorial seas that require the boarding, searching and seizure of cargos of proliferation concern.³⁴ Doubts have been raised, though, as to whether the mere passage of weapons of mass destruction through the territorial seas is a violation of the right of innocent passage accorded to all states in these waters.³⁵

Participant states are further committed to taking action to board and search any vessel flying their own flag when those vessels are either in their territorial seas or internal waters, or when those vessels are outside the territorial waters of another state.³⁶ Moreover, where vessels are flagged to the participant states, these states commit to giving serious consideration as to whether other states should be permitted

³¹ Proliferation Security Initiative: Statement of Interdiction Principles, Fact Sheet, The White House, Office of the Press Secretary, Washington, 4 September 2003 [hereinafter Statement of Interdiction Principles].

³² Ibid Principle 4.

³³ Ibid Principle 4(d).

³⁴ Ibid Principle 4(d).

³⁵ See, eg, Logan, above n 29, 259 ('it is not the mere transport of WMD that threatens a state's sovereignty, but the use of these weapons against it'); Daniel H Joyner, 'The Proliferation Security Initiative: Nonproliferation, Counterproliferation, and International Law' (2005) 30 *Yale Journal of International Law* 507, 542 ('with few exceptions there is very little hard or formal international law not only on the question of transfers of nuclear, chemical, and biological materials, agents, and compounds and the associated myriad dual-use items and technologies that could be used to turn those materials into weaponized devices, but even more fundamentally on the question of the possession of such technologies').

³⁶ Statement of Interdiction Principles, above n 31, Principle 4(b).

to board and search those vessels in pursuit of the PSI objectives.³⁷ The ongoing deference to the flag state's authority affirms that the PSI is not intended to alter the existing adherence to flag state control on the high seas. It is this very deference to the flag state that tends to undermine the effectiveness of the PSI, as states most likely to be involved in the shipment of weapons of mass destruction, such as North Korea, are unlikely to provide the necessary consent to PSI participants.

Lerhman has correctly noted that 'principles of international maritime law may frustrate the implementation of the PSI in particular contexts and situations'.³⁸ For example, an Iranian vessel on the high seas could not be intercepted and stopped by a United States military vessel for inspection under the articulated principles of the PSI. Instead, the United States would have to wait for the Iranian vessel to enter the territorial sea of a state that supports the PSI and then request that state to stop and inspect the vessel. The Iranian vessel may completely avoid the waters of a PSI supporter. Even if the Iranian vessel did enter the territorial sea of a PSI participant, the right of innocent passage, as it stands under existing law of the sea principles, would not necessarily permit that coastal state to stop the Iranian vessel either. As a result, if the Iranian vessel chooses its path carefully, the PSI will serve no purpose in preventing the possible delivery of weapons of mass destruction, or related material for the construction of such weapons. As with the AMIS, the existing law of the sea regime tends to hinder, rather than advance, efforts to improve maritime security.

III 2005 PROTOCOL TO THE CONVENTION FOR THE SUPPRESSION OF UNLAWFUL ACTS AGAINST THE SAFETY OF MARITIME NAVIGATION

As opposed to unilateral efforts, or multilateral initiatives that are intended to be political commitments rather than legal regimes, states acting under the auspices of the International Maritime Organisation moved to adopt a protocol to the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime

³⁷ Ibid Principle 4(c).

³⁸ Thomas D Lerhman, 'Enhancing the Proliferation Security Initiative: The Case for a Decentralized Nonproliferation Architecture' (2004) 45 *Virginia Journal of International Law* 223, 228.

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Navigation.³⁹ It was decided that the range of offences set forth in the 1988 treaty over which states could establish jurisdiction needed to be expanded, and it was further decided that beyond establishing jurisdiction over the offences, a means would be created to exercise that jurisdiction over vessels and the persons on those vessels. As such, the 2005 Protocol sets out procedures by which states parties may request that flag states of suspect vessels consent to the boarding of their vessels outside the territorial sea of any state.⁴⁰ For boarding to be authorised under the 2005 Protocol, a requesting state must have ‘reasonable grounds to suspect that the ship or a person on board the ship has been, is or is about to be involved in the commission of’ one of the offences set out in the original treaty or the 2005 Protocol.⁴¹

In authorising a ship boarding for the purposes of the 2005 Protocol, states parties may either consent on an *ad hoc* basis, provide prior consent if such notification is given to the Secretary General, or consent implicitly if prior authorisation is notified to the Secretary-General and no response to a request is forthcoming after four hours.⁴² This structure confirms the importance of obtaining express flag state authorisation. Tacit and advance authorisations to board are simply optional and are at the discretion of the flag state. The only constraint placed on flag state authority in this regard is the general obligation that states parties must respond to requests pursuant to this article as expeditiously as possible.⁴³

³⁹ *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*, opened for signature 10 March 1988, 27 ILM 668 (entry into force 1 March 1992); 2005 Protocol to the *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*, opened for signature 14 February 2006, IMO Doc, LEG/CONF.15/21, Nov 1, 2005 (not yet entered into force) [hereinafter 2005 Protocol].

⁴⁰ This instrument is therefore concerned with maritime areas in which all states have the right to exercise the freedom of navigation, namely the EEZ and on the high seas. In recognition of a coastal state’s rights in the EEZ, a state party conducting a boarding must take due account of the need not to interfere with or affect ‘the rights and obligations and the exercise of jurisdiction of coastal States in accordance with the international law of the sea’; 2005 Protocol, above n 39, art 8*bis* [10(c)(i)].

⁴¹ *Ibid* art 8*bis* [5].

⁴² In its first articulation, the United States proposed two methods by which a flag state could authorise the boarding of one of its vessels outside of territorial waters: ‘either advance authorization when the enumerated conditions are met, or a procedure for granting authorization on an as-requested basis, including authorization when no reply is given within four hours’. IMO Doc LEG 85/4, Submitted by the United States, 17 August 2002 [12].

⁴³ 2005 Protocol, above n 39, art 8*bis* [1].

Any boarding request 'should, if possible, contain the name of the suspect ship, the IMO ship identification number, the port of registry, the ports of origin and destination, and any other relevant information'.⁴⁴ The requesting state is not expressly required under the terms of the 2005 Protocol to provide information explaining why it has reasonable grounds to suspect that a ship or person on board a ship is involved in a proscribed act.⁴⁵ However, the general reference to 'other relevant information' may provide a means by which information related to the suspected offences must be disclosed if desired by the flag state. Indeed, the flag state may potentially condition its consent on the provision of such information. The 2005 Protocol does not explicitly stipulate intelligence-sharing requirements in relation to the boarding of vessels and so this important factor will have to be addressed on an *ad hoc* basis and will inevitably depend on the existing relationship between the flag state and the requesting state.

The flag state has four options under the 2005 Protocol in deciding on how any boarding should proceed. It may authorise the boarding by the requesting state either on its own or with officials of the flag state and in either instance subject the boarding to any conditions relating to responsibility for and the extent of measures to be taken.⁴⁶ Alternatively, the flag state may conduct the boarding and search the suspect vessel itself, or just decline to authorise a boarding and search.⁴⁷ What appears to be lacking is an obligation on the flag state to take measures against one of its vessels when there are reasonable grounds to suspect the involvement of that vessel in the commission of an offence. It would seem that such a gap in the enforcement regime created in the 2005 Protocol further underscores the pre-eminence of flag state authority over its vessels on the high seas.

⁴⁴ *Ibid* art 8*bis* [2].

⁴⁵ France had made a proposal to this effect but it was not incorporated into the text. See IMO Doc LEG/SUA/WG.1/2/1, Submitted by France, 30 June 2004, Art 8*bis*, para 2. See also IMO Doc LEG/SUA/WG.1/2/6, Submitted by the United States, 12 July 2004, n. 44 (a proposal that would have required the requesting party to hand over any evidence to the flag state); IMO Doc LEG/90/15, Report of the Legal Committee on the Work of its Ninetieth Session, 9 May 2005 [66] (referring to a comparable proposal from India but was rejected, with some delegations stating it was already covered by the text of para 5).

⁴⁶ 2005 Protocol, above n 39, art 8*bis* [5(c)] [7].

⁴⁷ *Ibid* art 8*bis* [5(c)].

While the 2005 Protocol is an advance over the AMIS and the PSI inasmuch as it is a legally-binding instrument to which states may become parties and may take lawful action to promote maritime security, the terms of the instrument are marked by the ongoing deference to the freedoms of the high seas and flag state authority over vessels on the high seas. The need for express consent to board, the possibility of conditions being attached to the boarding, and the possibility that the flag state will take no action in response to information about a suspect vessel all tend to indicate that the 2005 Protocol is consistent with the traditional construct of the law of the sea.

In each of the efforts described to improve maritime security since 11 September, it is evident that the states involved have ultimately conformed to the rule of law as far as the law of the sea is concerned. However, it should rightly be questioned as to whether security interests have truly been advanced through deference to this construct in the AMIS, the PSI and the 2005 Protocol?

IV A PARADIGM SHIFT TO ENHANCE MARITIME SECURITY, AND THE RULE OF LAW

The difficulty that states have faced in each endeavour to improve their maritime security is that the traditional construct of the law of the sea emphasises the freedom of navigation and the exclusive authority of a state over vessels flying its flag. It is argued here that a small paradigm shift is necessary to enhance maritime security, and is viable without disrupting or nullifying the existing legal order. Unlike the changes to legal regimes related to the use of force, international humanitarian law and international human rights law that have been initiated in response to terrorist threats, core values in the law of the sea do not need to be overturned for the sake of security.

The premise of *mare liberum* is that it is in the common interest that the oceans be available for all users,⁴⁸ particularly given that the very nature of the oceans makes it

⁴⁸ See generally Hugo Grotius, *The Freedom of the Seas or the Right which Belongs to the Dutch to Take Part in the East Indian Trade* (1608, R. Magoffin trans, 1916 ed) [trans of: *Mare Libervm sive de Ivre Qvod Batavis Competit Ad Indicana Commercialia*].

extremely difficult for states to assert control over the waters in a comparable way to control over land territory.⁴⁹ All states have a shared interest in allowing their commercial and military vessels to traverse the oceans as a vital means of communication, transporting goods and persons as necessary as well as pursuing foreign policy objectives. For these reasons, states have resisted any restriction of this freedom or any reduction of the areas over which the freedom is exercised.⁵⁰ Stated otherwise, it could be argued that inclusive interests have outweighed exclusive interests.⁵¹

Maritime security may be better protected if it is generally recognised that there is a common interest in ensuring that shipping is not subjected to a terrorist attack. If limited security interests are perceived as inclusive then the legal developments intended to promote maritime security should be interpreted and applied consistently with this perspective in mind. A small expansion in what is considered as part of the common interest does not involve promoting exclusive interests, which are generally anathema to *mare liberum*. Hence, the overall freedom of navigation is not threatened and one of our core values in the law of the sea is maintained. Our paradigm shift comes in acknowledging that inclusive interests require that there be an increase in regulation of flag state control. It is not proposed that flag state authority should be completely ignored or otherwise rendered meaningless. Instead, the weight accorded to the exclusive claims of the flag state needs to be slightly reduced in seeking to balance inclusivity and exclusivity in our common interest equation.

To apply this approach, by way of example, to the 2005 Protocol, it could be argued that if less deference had been accorded to flag state control, states may have been willing to create a basis of consent for ship-boarding by virtue of the treaty, instead of

⁴⁹ See Lea Brilmayer and Natalie Klein, 'Land and Sea: Two Sovereignty Regimes in Search of a Common Denominator' (2001) 33 *NYU Journal of International Law and Politics* 703, 707-8.

⁵⁰ See, eg, Robin R Churchill and A Vaughan Lowe, *The Law of the Sea* (3rd ed, 1999) 161, 144, and 77-9 (describing the compromise proposal of the EEZ to prevent the institution of a 200-mile territorial sea; the debated status of the continental shelf; and setting out the controversy relating to the breadth of the territorial sea, respectively).

⁵¹ This distinction between inclusivity and exclusivity was explored in detail by McDougal and Burke. See generally Myres S McDougal and William T Burke, *The Public Order of the Oceans: A Contemporary International Law of the Sea* (1962).

insisting on a separate consent procedure. Less weight on exclusive flag state control may have further resulted in the removal of a clause permitting the flag state to impose conditions on the boarding, additional to the safeguards already included in the instrument. There is even scope to take this approach in justifying the application of the AMIS in the Exclusive Economic Zone by reference to Article 59 of the UN Convention of the Law of the Sea.⁵² Therefore, modifications to the law of the sea are possible without eroding the core values of this body of law.

V CONCLUSION

This paper has examined the efforts that some states have pursued post-11 September in order to enhance maritime security. The potential economic repercussions on a global scale have warranted such attention. The particular initiatives include Australia's attempt to improve its intelligence capability in seeking more information about the vessels approaching Australian shores, or traversing Australian waters; the United States has led a coalition intent on reducing the proliferation of weapons of mass destruction and related material by sea; and, finally, a multilateral endeavour has resulted in the creation of a new treaty to provide avenues to enforce laws proscribing certain terrorist activity. It has been shown that with each of these undertakings, the traditional rules of the law of the sea have hampered the development and operation of these initiatives.

This unsatisfactory result does provide impetus for change within the law of the sea. It has been proposed here that a small shift in emphasis away from the absolute authority of the flag state over its vessels on the high seas would be an acceptable

⁵² Australia could argue that the identification information falls into a category of unattributed rights in the EEZ, as anticipated in art 59 of the Convention. Article 59 reads: 'In cases where this Convention does not attribute rights or jurisdiction to the coastal State or to other States within the exclusive economic zone, and a conflict arises between the interests of the coastal State and any other State or States, the conflict should be resolved on the basis of equity and in the light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as the international community as a whole'. In this situation, when regard may be had to all relevant circumstances and community interests in ensuring maritime security, Australia could well be justified in instituting the AMIS in respect of all vessels in its EEZ. See Klein, above n 24, 359-60.

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change, particularly because it does not threaten the ongoing importance of the freedom of navigation as a shared interest among all users of the high seas. Further, the very promotion of maritime security is a shared, or inclusive, interest for all states in view of the far-reaching impact of a terrorist attack against a major port or in a vital shipping lane, or the delivery of weapons of mass destruction to terrorists.

It has been argued that developments or modifications in international law to address present security imperatives do not have to entail violence to the existing legal order. Instead, a moderate approach that is responsive to concerns about terrorism threats while still appropriately cognisant of long-standing legal principles is possible. Perhaps the law of the sea may provide an exemplar for other threatened international legal regimes in this regard.