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Commanding the commons: Constitutional enforcement and the law of the sea

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Abstract: What role does enforcement play in protecting the constitutional authority of international law? Can enforcement be understood as a specifically constitutional practice? I argue here that international law has a greater capacity for constitutional enforcement than sceptical accounts have tended to acknowledge. This argument is anchored in the institutional account of the authority of law offered by Hart and developed by MacCormick. This focuses on the official or administrative perceptions as the determinant of constitutional legitimacy, which offers a way to offset the scepticisms caused by gaps in the constitutional order. This establishes constitutional enforcement as a practice centred on and legitimated by the attribution of role responsibilities, rather than on the direct application or policing of the rules. I illustrate these arguments using the law of the sea, a domain where the functional difficulties of enforcement have always presented a challenge to international law's claim to authority.

Keywords: constitutional authority; enforcement; international institutions; law of the sea; responsibility

The UN Convention on the Law of the Sea (UNCLOS) has, since before its inception, been widely regarded as a 'constitution for the oceans'.[1] The obligations the treaty sets out are structured by the challenge of effecting genuine oversight over activities in the ocean domain, the challenge of governing the global commons. Most importantly, it implies a change to the 'free seas' principle which establishes a presumption in favour of open and unrestricted rights of access and limits on enforcement jurisdiction. But at the same time as heralding a potential revolution in the law of the

[1] SV Scott, 'The LOS Convention as a Constitutional Regime for the Oceans' in AG Oude Elferink (ed), *Stability and Change in the Law of the Sea: The Role of the LOS Convention* (Martinus Nijhoff Publishers, Leiden, 2005) 12; UNCLOS was the product of nine years of negotiation, concluded in 1982, with the treaty taking effect in November 1994 (once the required 60 ratifications were reached). It is worth noting that the US has not yet ratified it, but does recognize a majority of the obligations as part of customary international law.

sea, its claim to constitutional authority is far from settled. The practical difficulty of enforcing the rules in this geographically expansive domain gives one especially forceful reason for rejecting the claim that the oceans are now constitutionally governed. The weakness of enforcement becomes part of the argument for understanding the rules as, in practice, reliant on persuasion rather than coercion in order to claim authority.[2]

The target of this paper is the gloss this gives to the broader practice of international enforcement. The sceptical position is that international law's 'hard' ability to effect compliance as a key determinant of – and limitation on – its ability to claim 'constitutional authority' in international society. An international legal regime may set out the rules for what is expected of actors operating in a given issue area, but it tends to lack a sufficiently rigorous parallel regime for sanctioning those failing to live up to their responsibilities, and this lack of a law-enforcing capacity is enough to discredit – or at least introduce serious doubts about – the belief in international law's binding authority.[3] Debates about the constitutional nature of the law of the sea provide a useful touchstone for evaluating the broader issue of enforcement as a specific practice of global constitutionalism because of the strong presumption about the limits on enforcement embedded in the free seas principle.[4] This makes it possible to evaluate whether institutional advances in international law enforcement have the capacity to genuinely develop the existing customary principles in a way that advances international law's claim to constitutional authority. The argument advanced here is, ultimately, that the sceptical conception of enforcement fails because it does not engage with the special function of *constitutional* enforcement, which is to both reflect and determine an institutional capacity to delegate public responsibilities. Analysed in these terms, the law of the sea framework is able to exert a much greater – although by no means perfect – claim to 'command the commons', helping to structure the delegation of responsibilities by and to a wide range of actors.

The first section sets out the sceptical conception of enforcement, which uses the weakness of the current enforcement regime as a reason to doubt international law's capacity to claim constitutional-type authority. The second section challenges this perception, arguing that focusing on the weakness of the enforcement regime – especially the measures available to

[2] See especially J Vogler, 'Global Commons Revisited' (2012) 3 *Global Policy* 1, 69.

[3] See especially E Posner, *The Perils of Global Legalism* (University of Chicago Press, Chicago, 2009).

[4] These issues have also been explored in relation to a number of other legal regimes; see especially JL Dunoff and JP Trachtmann (eds), *Ruling the World? Constitutionalization, International Law and Global Governance* (Cambridge University Press, Cambridge, 2009).

effect compliance – is a mistake. This is because the practice of constitutional enforcement is not concerned with compliance as much as with the institutional capacity to delegate special responsibilities. The final sections apply this to the law of the sea. The operation of constitutional responsibilities in this domain has traditionally been tied to a presumption in favour of the free seas, which undermines international law's claims to constitutional authority. But as I argue, the law of the sea has increasingly been framed as an aspect of global commons law, and this principled shift has enabled and expanded the institutional ground for constitutional enforcement.

Anti-constitutional enforcement

There are a wider range of enforcement mechanisms available to international law than have traditionally been recognized by the international law 'sceptic'. But on the face of it, they do seem to have a point about the role these practices play in constructing or reflecting international law's constitutional authority. The sceptic's traditional argument for denying the constitutional authority of international law is that so many international legal obligations seem so patently unenforced and unenforceable.[5] The suspicion is that lacking a credible enforcement regime international law can only have a formal type of authority, certainly not the kind of overweening social authority typically associated with a constitutional legal order.[6] As Thomas Franck classically put it, 'the international system is organized in a voluntarist fashion, supported by so little coercive authority.'[7] Scepticism about the structural lack of coercive authority undergirds an assumption that the limited enforcement mechanisms available in the international order which do exist are of limited use in explaining international law's authority. This cashes out in the belief that the authority of international law can only be persuasive, certainly not anything like the binding commands typically associated with obligations in a domestic constitutional order.

[5] See E Posner (n 3); also MJ Glennon, *The Fog of Law: Pragmatism, Security and International Law* (Woodrow Wilson Centre Press, Washington, DC and Stanford University Press, Stanford, 2010); for a detailed overview of sceptical arguments, see ME O'Connell, *The Power and Purpose of International Law: Insights from the theory and practice of enforcement* (Oxford University Press, New York, 2008).

[6] J Jowell and D Oliver, *The Changing Constitution* (5th edn, Oxford University Press, Oxford, 2004).

[7] T Franck, 'Legitimacy in the International System' (1988) 82 *American Journal of International Law* 705; for a different starting point see J Goldsmith and D Levinson, 'Law for States: International Law, Constitutional Law, Public Law' (2009) 122 *Harvard Law Review* 1791.

This essentially persuasive character of international law becomes the source for a more general assertion that 'ownership' of the international legal order rests with political actors. These circumstances limit the constitutional effect enforcement practices can have on the authority of international law.[8] The basis of this claim is that enforcement powers do exist, but they are either not used, or are used in a way that undermines international law's claim to constitutional authority. For instance, universal jurisdiction provides states with the most sweeping of enforcement powers. But in one study looking at those clear cases of piracy over which states could have exercised universal jurisdiction to enforce the law shows that between 1998 and 2009 only 1.47% of cases were prosecuted.[9] A marginal figure by any measure. Other more highly institutionalized attempts at enforcement attract the same sort of concerns. The raft of institutional mechanisms now dedicated to enforcing international criminal law suggests the difficulty with attributing a constitutional effect to international enforcement practices. Critical voices point to the various ways in which, despite the degree of institutionalization, the actual process of enforcing international criminal law and successfully bringing individuals to justice remains contingent on the exercise of political power.[10] This contingency feeds doubts about whether the existence of an institutional mechanism for enforcement should be accepted as evidence of genuine advance in the structures of international enforcement, or simply old wine in new bottles. The sceptical claim, in other words, is that even highly institutionalized enforcement practices should not be taken as evidence of constitutional authority, merely as evidence of a context-limited political will for enforcement.

This grounds a much broader reason to be sceptical about the constitutional effect of international enforcement practices. One of the central challenges to claims that international law establishes a constitutional type of authority is that the enforcement practices seemingly justified by international law are so easily co-opted to serve subjective interests. As Anthony F Lang, Jr argues, enforcement practices are almost always validated by those undertaking them with reference to international legal rules.[11] On the surface this can create the perception that more enforcement

[8] On the link between international authority and the claims to 'ownership' of international law, see especially K Anderson, 'The Rise of International Criminal Law: Intended and Unintended Consequences' (2011) 20 *European Journal of International Law* 331–58.

[9] S Art and E Kontorovich, 'Agora: Piracy Prosecutions: An Empirical Examination of Universal Jurisdiction for Piracy' (July 2010) 104 *American Journal of International Law* 436.

[10] G Simpson, *Law, War and Crime: The Politics of War Crimes Tribunals* (Polity, London, 2007); K Ainley, 'The International Criminal Court on trial' (2011) 24 *Cambridge Review of International Affairs* 309–33.

[11] AF Lang, Jr, *Punishment, Justice and International Relations: Ethics and Order after the Cold War* (Routledge, London, 2008).

equates to a deeper constitutional order. The catch is that the international order lacks a body capable of establishing whether international legal rules are being legitimately enforced or whether the authority granted by international law is being used as a nefarious cloak for the advancement of subjective political interests. From this perspective, for a practice of enforcement to be justified it needs to be first located as part of a wider constitutional order able to regularize and legitimate a punitive regime. What state practice shows is the gaps in such an order, and as such international law's lack of an independent, institutional power to legitimately claim constitutional authority.

The sceptical worry goes even further than this, however. Because current punitive practices are of an *ad hoc* and *sui generis* character, and not the practice of a genuine constitutional order, international practices to enforce international law create a situation where, rather than enforcement practices building up a constitutional world order characterized by the rule of law, enforcement instead retrenches a world order defined by power and power politics. Whatever the formal authority claimed by the institution of international law, the fact that the architecture of international law cannot provide definitive guidance or oversight about the legitimate means, mechanisms or agents empowered to enforce its strictures attacks the idea that international law has the normative authority to order international society. This includes validating enforcement practices as constitutional practices because, for the sceptic, without clearly accepted constitutional rules there is no basis for constitutional enforcement.

This suggestion that we might be required to discount the constitutional effect of international law enforcement even where it looks *as if* international law is being effectively enforced – because this is in reality an expression of political power, or a function of a lack of genuine constitutionality – creates real problems for any attempt to use improvements in enforcement practices as evidence of international law's expanded constitutional authority. It does not seem to leave any room for an authoritative form of enforcement which does not collapse back into a flawed or facile constitutionalism. Scepticism about enforcement in this sense challenges the constitutional possibilities of international law, particularly the claim that disparate international law enforcement practices might be seen as part of a constitution building process.

Constitutional enforcement

In this section I set out an alternative to the sceptical conception of the link between enforcement and constitutional authority. HLA Hart provides the clearest support for conceptualizing enforcement as a process of delegating

the roles and responsibilities necessary for validating the institutional authority of a legal order. This includes, importantly, an understanding of enforcement as a practice that can be constitutional even in the absence of empirical certainty regarding the constitutionality of the underlying rules. This is not a great surprise given Hart's claim that the normative force of a legal order is something entirely distinct and prior to the question of whether or not the law is backed by a sanction or command. Sanctions, he argued, are necessarily the result of a normatively authoritative system of rules, not the basis for such a system. The crucial reason he gives for law's normativity being protected in practice even in the absence of a hard sanctioning mechanism is the presence of what he classically terms the 'secondary rules' of a legal order.[12] Primary and secondary rules provide a rubric to describe the formal validity of a legal order. Axiomatically, a legal order possessing both primary and secondary rules is able to protect the authority of legal obligations. Hart writes:

> Under rules of the one type, which may well be considered the basic or primary type, human beings are required to do or abstain from certain actions, whether they wish to or not. Rules of the other type are in a sense parasitic upon or secondary to the first; for they provide that human beings may by doing or saying certain things introduce new rules of the primary type, extinguish or modify old ones, or in various ways determine or control their operations. Rules of the first type impose duties; rules of the second type provide for operations which lead not merely to physical movement or change, but to the creation or variation of duties or obligations[13]

Secondary rules of recognition, change and adjudication function in this way as a *remedy* for the authority of the legal order, such that 'all three remedies together are enough to convert the regime of primary rules into what is indisputably a legal system'.[14] Importantly, however, secondary rules – including those enabling enforcement – are only a part of justifying the authority of the legal order. These rules are not *essential to* the legal order's claim to authority. This is why Hart regards the customary basis of international law as sufficient to establish valid legal order, but as lacking the 'full-blown' practical authority law tends to have in the domestic context.

The answer to the sceptical claims about the constitutional effect of enforcement comes from the manner in which Hart endows primary and secondary rules with the additional function of linking the formal, internal

[12] HLA Hart, *The Concept of Law* (2nd edn, Clarendon Press, Oxford, 1997).
[13] Ibid 81.
[14] Ibid 94.

validity of the legal order to the broader constitutional role of the legal order. The reason the union of primary and secondary rules provides evidence of the authority of the legal order is because they arise as part of a complex and deeply embedded socio-theoretical conversation about the appropriate relationship between the different normative standards available in a social order, namely the competing standards operating in law, politics and morality. As such, the division between primary and secondary rules is not only a prescriptive picture of what any valid legal system needs, but also a way of understanding how, in practice, a legal order fits into the wider constitutional order. This suggests the important constitutional role the secondary rules – or, better, *remedial responsibilities* – which confer, assign or entail rights and responsibilities of enforcement as enactors of a legal order. This is the meaning behind Hart's warning that: 'though the combination of primary and secondary rules merits, because it explains many aspects of the law, the central place assigned to it, this cannot by itself illuminate every problem. The union of primary and secondary rules is at the centre of a legal system; but it is not the whole, and as we move away from the centre we shall have to accommodate . . . elements of a different type'.[15]

The challenge of incorporating these penumbral elements into a coherent legal theory led Neil MacCormick to develop Hart's approach as part of a far-reaching account of the institutional grounding of legal authority (or, as Ronald Dworkin characterizes it, as an approach to thinking about law as 'a kind of social institution').[16] This in turn helps generate an account of the specific practice of constitutional enforcement. MacCormick argues that law's social function – and its claim to constitutional authority – is determined by the capacity to provide 'institutional normative order'.[17] Whether the legal order has this capacity to claim constitutional authority will be determined by the degree to which it is 'a genuinely observed source of the genuinely observed norms followed by those carrying out official public roles specified in or under it'.[18] At one level this could be taken to say simply that law needs to be able to 'inspire legality', as Fuller puts it.[19] But this seems to suggest that the authority of law can be discovered

[15] Ibid 99.

[16] R Dworkin, 'Hart and the concept of law' (2006) 119 *Harvard Law Review Forum* 98.

[17] N MacCormick, *Institutions of Law: An Essay in Legal Theory* (Oxford University Press, Oxford, 2007), especially 45–60.

[18] Ibid 46; see also HLA Hart (n 12) 113: 'The rules of recognition specifying the criteria of legal validity and its rules of change and adjudication must be effectively accepted as common public standards of official behaviour by its officials.'

[19] L Fuller, *The Morality of Law* (2nd edn, Yale University, New Haven, 1964) 39–41; see also J Brunnée and S Toope, *Legitimacy and Legality in International Law: An Interactional Account*, (Cambridge University Press, Cambridge, 2010).

through an empirical assessment of the ability of law to effect compliance, and with this to trigger the sceptical doubts regarding the evidence for the constitutional effect of enforcement.

Hart – and MacCormick – decisively reject this idea as part of a broader dismissal of the role played by sanctions in generating the normative force of law; looking for empirical measures of law's force, they argue, betrays a fundamental misunderstanding about the normativity of law.[20] Law precedes compliance – and sanctions – not the other way around. The important thing to note for purposes of understanding the institutional dimension of the practice of constitutional enforcement is that a legal order's constitutional authority is intimately tied to the presence of 'officialdom', actors with public roles and public responsibilities to enact the law. The actual capacity of these actors to effect compliance is beside the point. In order to establish a claim to authority law needs to be able to inspire legality – a sense of commitment – in law's officials. Crucially, this is not a general appeal to law's social acceptance, but a far more targeted appeal to those charged with enacting the law. Taking these actors as the target results in an institutional middle ground in which enforcement has a central role in determining constitutional authority, but at the same time has a limited role in determining the normative content of the legal order. This presents what is in effect a ratchet-like, one-directional concept of enforcement: enforcement can strengthen constitutional authority but it cannot weaken or undermine it, either in its absence or because of problems in its application. Constitutional law does not have to inspire obedience or compliance among its subjects; more important is that it inspires legality – as a culture of responsibility, rather than obedience – among those charged with enacting it.[21]

Analysing enforcement through the lens of remedial responsibilities helps answer the sceptic's concerns in three ways. First, the evidence for the constitutional (or anti-constitutional) quality of enforcement practices becomes a question to be answered with reference to institutional actors' perception of the authority of the constitutional principles or rules, rather than something that can be dismissed by reference to either a general scepticism about the possibility of constitutional authority or a structural claim about the incompleteness or illegitimacy of set of the existence mechanisms for enforcement. Second, focusing on remedial responsibilities

[20] See especially HLA Hart (n 12) 20–25; N MacCormick (n 17) 51–52; critiquing the scholarly preoccupation with compliance with international law, see R Howse and R Teitel, 'Beyond Compliance: Rethinking Why International Law Really Matters' (May 2010) 1 *Global Policy* 127–36.

[21] Hart talks about this in the context of the 'internal aspect' of legal conduct, (n 12) 56–7.

highlights the essential normativity of enforcement in the context of constitutional law. Contrary to the scepticism of, for example, Jack Goldsmith and Daryl Levinson, constitutional law is not divorced from sanctions.[22] It is simply prior to sanctions in setting who has the responsibility to enforce the law, in what circumstances, and within what limits. Third, this shifts the emphasis onto the descriptive task of capturing the available institutional mechanisms for delegating responsibility. Instead of remaining mired in the *general* inadequacy or illegitimacy of existing enforcement practices, the principal emphasis rests on the functionality of a far more targeted range of institutionally allocated special responsibilities.

In the context of international law this raises the question of agency. The traditional obstacle to extending this picture of constitutional enforcement to international law is that states are regarded as inhabiting the remedial roles available in the international legal order. The sceptic can plausibly argue that because of the prevailing sovereigntist structure of international law there is no pay-off from reconceptualizing enforcement as a remedial practice. If states are international society's best hope for responsible agents, there is not much cause for optimism: establishing that states hold remedial responsibilities will still result in the same lack of constitutional enforcement, so long as the impact of these responsibilities is defined through a sovereigntist lens. This is to see any remedial responsibilities as ultimately failing to give effect to the supremacy required of a constitutional order. It is too strong to say that states' agency in enforcement necessarily runs against an idea of the constitutional authority of international law. Some international and regional courts or tribunals are in fact recognized as exercising quite a thick standard of authority over states. But because this enforcement still tends to be channelled through – and limited by – both the domestic constitutional order and the pressures to advance subjective state interests, it is difficult to attribute pre-eminent or supreme type of authority to the international legal order, of the sort that marks out constitutional law.[23]

One way of broadening out this question of agency is simply to deny that the involvement of states in the enforcement of international law does of necessity undermine the authority of international law. Mary Ellen O'Connell suggests exactly this in showing how international law has developed an extensive capacity for enforcement.[24] These enforcement mechanisms are evidenced by the application of armed measures,

[22] See (n 7).

[23] See e.g. Anne Peters, 'Supremacy Lost: International Law meets domestic Constitutional Law' (2009) 3 *Vienna Online Journal on International Constitutional Law* 170–98.

[24] See ME O'Connell (n 5).

countermeasures and judicial measures in order to redress failures to comply with international law. These have both unilateral and collective roots in the international order but, crucially, are governed and ultimately legitimated by the strength and coherence of the underlying customary principles and an overarching commitment to the law's authority. O'Connell argues that this commitment lies in that 'we fundamentally accept the binding power of international law for the same reason we accept all law as binding. Our acceptance of law is part of a tradition of belief in higher things.'[25] This is not to suggest that these enforcement mechanisms are always used correctly, or are used as systematically as they could be, but it provides an answer to the sceptical claim that international law suffers from a structural lack of enforcement authority.

These are not isolated arguments. In a different conceptual key but to similar ends, Robert Scott and Paul Stephan point to how what they call a 'modern view' of enforcement opens up the field of those who could and should be considered responsible agents of international law enforcement, independent holders of remedial responsibilities.[26] They argue that enforcement in international law encompasses both formal and informal mechanisms, and that there is nothing to prevent this potentially disparate set of enforcement practices being regarded as a comprehensive enforcement regime for international law. As they put it, once the preconception of what an enforcement mechanism looks like is broadened out it 'allows private enforcement, employs independent tribunals and courts to do the enforcing, and empowers those tribunals and courts to wield the same array of tools that domestic courts traditionally use to compel compliance with their decisions'.[27] Writing to explain the specific nature of the enforcement of *erga omnes* obligations, Christian Tams similarly focuses attention away from the regime-specific mechanisms of enforcement, arguing that the informal, decentralized processes of enforcement are crucial to the protecting and development of the authority claimed by these rules.[28] At risk of labouring the point, Alan Boyle and Christine Chinkin also make similar claims, bundling the remedial practices of international law into the notion of 'soft law'.[29] The point is that a wide range of the literature on international law in recent years – see for

[25] Ibid 16.

[26] RE Scott and PB Stephan, *The Limits of Leviathan: Contract Theory and the Enforcement of International Law* (Cambridge University Press, Cambridge, 2006).

[27] Ibid 3.

[28] CJ Tams, *Enforcing Obligations Erga Omnes in International Law* (Cambridge University Press, Cambridge, 2005).

[29] A Boyle and C Chinkin, *The Making of International Law* (Oxford University Press, Oxford, 2007).

instance the various arguments for 'new international institutional law', 'soft law', and 'global administrative law' – understands there to be remedial processes or mechanisms supplementing the formal architecture of international law. It is no longer a justified presumption that international law's enforcement capacity revolves solely around a state's structurally privileged position in the international legal order.

Understanding enforcement as an institutional capacity to exercise remedial powers challenges the notion of international enforcement having an anti-constitutional effect. In contrast to the sceptical conception of enforcement, my suggestion in this section was that the currency of enforcement is the institutional capacity of the legal order to delegate responsibilities rather than to effect compliance with specific rules. It follows that the type of evidence to look for in assessing constitutional authority is not the practical mechanisms for policing compliance with international legal rules but the institutional mechanisms for allocating special responsibilities to enact international law. The crucial measure of enforcement is the institutional capacity to effectively delegate responsibilities, and by doing so to shape the normative order governing international society.

Constitutional enforcement in the free seas

The 'high seas' is a legal term describing an area covering roughly 50% of the planet.[30] The high seas are a transit to profit, carrying an estimated 90% of global commerce,[31] and a source of profit in their own right, with natural resources to be exploited on, in and under the sea. The term has historically been synonymous with the idea of the 'free seas', the designation of an open-access area immune from appropriation or legitimate command by any one state. This principle and accompanying customary international law establishes constitutional obligations but of limited scope, essentially protecting open access and freedom of movement; with remedial responsibilities limited to those of *self*-policing. As Hugo Grotius argued, any thicker rules of enforcement are not appropriate to this jurisdiction because no effective oversight could possibly be exercised. The high seas, he thought, are simply too big a domain for there to be any realistic hope of positive legal obligations being enforced. The only possibility left by the scale of the governance challenge is to embrace this as a domain of subjective right rather than objective duty. On this conception, freedom of the

[30] See Global Governance Monitor: Oceans, Council on Foreign Relations, 9 December 2010, available at <http://www.cfr.org/climate-change/global-governance-monitor/p18985#/Oceans/Issue%20Brief/> accessed 10 January 2012.

[31] See <www.marisec.org/shippingfacts/keyfacts> accessed 10 January 2012.

seas does not designate either a lack of constitutionality or a lack of enforcement, simply a self-policing governance regime characterized by negative responsibilities and freedoms – obligations not to act or to refrain from acting in a certain way – rather than positive responsibilities or freedoms – obligations to actively protect or promote the rules.[32] The constitutional rules are set here by reference to this presumption in favour of the free seas.

Although the concept of the free seas and the associated laissez-faire governance regime is now firmly entrenched in customary international law, it has not always been uncontested. In particular it needs to be remembered that the context for Grotius' argument that the seas were essentially free, a *mare liberum,* was to provide a legal justification for the hotly contested practice of Dutch privateerism, notably Jacob van Heemskerk's 1603 seizure of the Portuguese ship the *Santa Catarina*. In other words, Grotius wrote to provide a legal justification for fighting Spanish, Portuguese and, later, British claims to ownership – and by extension the rights of trade and access – of certain maritime domains by arguing that no-one could own the sea and, therefore, private actors were well within their rights to seize whatever they could. William Welwod and, later, John Selden opposed this, in support of British naval and colonial ambitions. As the title to Selden's work suggested, the nub of the argument was that the seas were subject to the same appropriation as land-based territory was, and that as a result the ocean space was a *mare clausum*, a closed sea which could be and historically had been effectively appropriated and occupied through naval power.

The scale of these issues has been resolved to some extent by slimming the legal area designated as 'high seas' and extending the reach of states' sovereign jurisdiction. Originally this was determined by the three-mile rule – the high seas began at the limits of cannon shot; certainly a visible manifestation of the how freedom of the seas began at the limits of states' enforcement ability. This became a 12-mile rule. And this in turn has been expanded through the UN Convention on the Law of the Sea (UNCLOS), which introduces an Exclusive Economic Zone (EEZ) which extends 200 nautical miles beyond a state's territorial sea and creates thicker rights and responsibilities than those within the high seas domain. Although states do not have legal 'ownership' of this area, they do have exclusive rights of

[32] In this regard, see R Keohane and J Nye, *Power and Interdependence: World Politics in Transition* (3rd edn, Longman, New York, 2001); [they argue that the essential freedoms on which law of the sea is built provide a close analogy to the anarchical structure of international society, in which the essential freedoms of sovereign statehood drive all other efforts at global governance].

access and use of this area – for example for fishing, or natural resource extraction. In the majority of cases these special rights create the conditions of de facto ownership. Correspondingly, it creates special responsibilities within this zone that narrow the (positive) enforcement gap in the law of the sea, although even here there are limits to how general this legal claim is.[33] The important point though is that this 200 nautical mile geographical expansion of state jurisdiction, as with the earlier iterations, only really tinkers with the enforcement regime suggested by the free seas framework. It's a regulatory drop in the governance ocean, you might say.

But the constitutional significance of this regime goes far beyond the establishment of the EEZ. UNCLOS potentially challenges the prevailing constitutional presumption in favour of the freedom of the seas. Replacing the narrow presumption that this domain is an area beyond effective juridical control is the attempt to establish the law of the sea as a comprehensive, unified framework which could effectively govern this domain. It would do this by bringing together the various overlapping regimes and treaties dealing with issues arising in this domain, aiming to systematize the relationship between the efforts to tackle specific regulatory challenges. The complexity of this field of governance is reflected in the issues covered, ranging from classical concerns with the delimitation of sovereign jurisdiction, piracy and high seas enforcement, to more modern concerns with the regulation of ships, environmental protection, and the right to national resources on, in and under the sea. It was in this light that Tommy Koh – who presided over the conference at which UNCLOS was adopted – hailed the framework as a 'constitution for the oceans'.[34] In this respect the 'constitutionality' of UNCLOS is contained in the claim to provide a comprehensive, general and authoritative framework with the capacity to detail the appropriate rules for action on the oceans.[35] All three of these aspects of constitutionality are contained in the claim that the

[33] Namely, these special rights do not grant a general legal claim to command and control of this zone. Where this difference becomes particularly pertinent is in determining the responsibilities operative within this zone. A state's claim to *economic* jurisdiction over the EEZ has no direct relevance to limiting the jurisdiction other states are able to exert in protecting maritime peace and security; for example, the rights and responsibilities states and other actors have to combat piracy on the high seas are also held within the EEZ; this has been important for establishing rights of third party interdiction within a state's EEZ, but its most far-reaching effect has been in establishing the scope of international environmental law.

[34] TTB Koh, 'A Constitution for the Oceans', Remarks by Tommy TB Koh, of Singapore, President of the Third United Nations Conference on the Law of the Sea (see <http://www.un.org/Depts/los/convention_agreements/texts/koh_english.pdf> accessed 25 January 2012), xxxvii.

[35] See BH Oxman, 'The Rule of Law and the United Nations Convention on the Law of the Sea' (1996) 7 *European Journal of International Law* 353–71.

rules systematized in UNCLOS reflect, for the most part, customary international law. The implication of this is that to the extent that UNCLOS embodies customary rules the enforcement regime it creates can claim the legitimate authority to direct the future development of law and governance in this area.[36]

The root scepticism is that this framework lacks the practical force necessary to generate a genuine claim to constitutional authority. Crucially, regardless of the customary basis of the core obligations, the regime lacks the important constitutional hallmark of supremacy.[37] Although this can be regarded as merely one black mark (albeit an important one) against an otherwise complete set of constitutional features, the lack of supremacy carries rather a lot of weight when it comes to assessing the constitutional character of a regime. As Dan Bodansky argues, this is because there is an important distinction between a governance regime possessing constitutional *features*, and the description of a set of rules as a constitutional *order*.[38] That UNCLOS systematizes customary international law in this domain only begs the additional question of the nature of customary international law's claim to authority. Establishing a legitimate claim to pre-eminent or supreme authority is key to whether a legal regime can be understood as establishing constitutional order, both within the specific domain governed by law and as a part of a wider global constitutionalism in which principles specific to this regime reflect and strengthen more general principles of global public order. If UNCLOS lacks a mechanism for establishing pre-emptive authority over states, however, any claim to constitutional authority is, to use Jeffrey Dunoff's term, a mere 'constitutional conceit'.[39]

The interesting feature of this as far international law's claim to constitutional authority goes is that evidence for the absence of constitutional authority hangs on scepticism about the viability of enforcement practices in the global ocean commons. Despite the regulatory advances, including the presence of international bodies empowered to settle disputes, the suggestion is that very little has changed in practice since the golden days of privateerism which formed the backdrop for the debate between Grotius and Selden. As William Langewische argues in *The Outlaw Sea: A World of Freedom, Chaos and Crime*, despite the rhetoric and regulation

[36] See e.g. A von Bogdandy, R Wolfrum, J von Bernstorff, P Dann and M Goldmann (eds), *The Exercise of Public Authority by International Institutions: Advancing International Institutional Law* (Springer, Heidelberg, 2010).

[37] See SV Scott (n 1).

[38] D Bodansky, 'Is there an international environmental constitution?' (Summer 2009) 16 *Indiana Journal of Global Legal Studies* 571.

[39] J Dunoff, 'Constitutional Conceits: The WTO's Constitution and the Discipline of International Law' (2006) 17 *European Journal of International Law* 647–75.

suggesting otherwise, the high seas are still 'free' in the most anarchic sense of the word; this is an area beyond authority, outside the effective reach of law.[40] Langewische highlights how efforts to bring high seas actors under state and international jurisdiction have been stymied by the continued reliance on regulation through *negative* responsibilities, by the presumption of free and open access, and by the fact that what regulation there is 'lacks teeth', particularly given the role of the flag state regime as the key enforcement mechanism. The structure is premised on the good-faith commitment of the various actors in this domain to refrain from violating the rules, rather than any threat of punishment or sanction for having violated the rules. Regulation aside, this is still an essentially lawless domain governed by private rather than public mechanisms enforcement.

The continuing operation of the flag-state regime[41] is a paradigm example of how the legacy of self-policing undermines the plausibility of UNCLOS representing an extant 'constitution for the oceans'. The flag state regime essentially extends sovereign territoriality into the high seas by granting states jurisdiction – hence enforcement powers – over ships flying their flag. On the surface this seems to delegate responsibilities in line with a practice of constitutional enforcement. The problem is that the standards of enforcement among the flag states vary widely, particularly in the 'genuine link' they require from a vessel in order to be registered as a flag ship, and the level of oversight they exercise once registration has occurred.[42] Because the flag state regime is a sizeable source of income for some states ship owners have been able to leverage their market position into loose regulations and few responsibilities; it is a buyer's market. In a reflection of why self-policing does not work, and how 'flags of convenience' have dominated the market, over 40% of vessels now fly the flags of either Panama, Liberia or the Marshall Islands.[43] This genuine link test looks rather stretched when you consider that taken together these countries represent roughly 0.1% of the world's population. But the income from this business is substantial, meaning that states tend to treat ships flagged under their registry as clients rather than subjects. The end result of this marketization has been to make re-flagging ships an easy, penalty-free way

[40] W Langewische, *The Outlaw Sea: A World of Freedom, Chaos and Crime* (Granta Books, London, 2004).

[41] See UNCLOS Article 94.

[42] AGO Elferink, 'The Genuine Link Concept: Time for a post-mortem?' in IF Dekker and HHG Post (eds), *On the Foundations and Sources of International Law* (TMC Asser Press, The Hague, 2003) 41.

[43] 'Structure and ownership of the world fleet', *Review of Maritime Transport 2009*, Report by the UNCTAD Secretariat (New York and Geneva, 2009) 36 available at <http://www.unctad.org/en/docs/rmt2009_en.pdf>.

to dodge regulatory oversight. Liberia provides one illustration of the weak interest some states will have in more proactively fulfilling their enforcement responsibilities under the flag-state mechanism. During the Liberian civil wars, where international sanctions restricted legitimate sources of state income, the Liberian Ship Registry accounted for some 70% of government income.[44] With other flag states there is an even more direct challenge to global enforcement practices. North Korean and Cambodian flagged vessels, for instance, are known to engage in illicit trafficking of drugs, people and weapons, with the presumption of flag state jurisdiction restricting efforts to interdict and enforce prohibitions on transnational crime.[45]

Port states and coastguards are in a position to pick up some of the slack this creates in the global enforcement regime. Port states can use their role as the gatekeepers to large and lucrative markets to demand repairs or issue fines for non-compliance with international standards. But port states are also in competition with each other, and there are few benefits from exercising anything but the most formal oversight; it is far easier simply to refuse entry rather than risk tying up dock space with a sick or unseaworthy ship.[46] Similarly, the coastguard has interdiction powers if a ship is suspected of illicit trafficking once a ship has entered territorial waters and regardless of the flag it flies. A network of bilateral treaties in which some states have ceded jurisdiction powers for the purposes of enforcement to other states – notably the US – who are regarded as better placed to exercise these enforcement powers extends enforcement authority beyond territorial waters. This is complemented by some multilateral enforcement regimes, both to prevent drug trafficking but also to police compliance with obligations relating to fishing stocks, weapons of mass destruction, and migration.[47] But the enforcement regime this creates is far from universal, reliant in the first place on the flag state's willingness to cede such interdiction powers, on the strength of the treaty regime, and on

[44] See <http://www.globalsecurity.org/military/world/liberia/registry.htm> accessed 12 January 2012.

[45] D Guilfoyle, *Shipping Interdiction and the Law of the Sea* (Cambridge University Press, Cambridge, 2009).

[46] Langewische (n 37) notes how port-state officials mirror national stereotypes in their strategies for avoiding the full extent of their oversight responsibilities. On a more serious note, he recounts a story of a ship's captain begging the port official to find his ship in violation of international safety standards, pointing out the many violations himself, in order to force the owner to pay for necessary repairs, all to no avail.

[47] For a good analysis of the range of problems here, see the discussion surrounding the Proliferation Security Initiative in Douglas Guilfoyle (n 45) and Michael Byers, 'Policing the High Seas: The Proliferation Security Initiative' (2004) 98 *American Journal of International Law* 526–41.

the strategic interests powerful states have in policing the oceans or commanding the commons.[48]

There are some exceptions to the limitations on enforcement imposed by the flag states regime. There is a universal right to inspect ships suspected of piracy, slavery, unauthorized broadcasting or lacking a nationality.[49] This is certainly not an extensive range of issues but, even so, the enforcement regime fails to create positive responsibilities of enforcement, promising much more enforcement capacity than it delivers in practice. The difficulty of responding to piracy in the Gulf of Aden is one example of how the general and non-specific nature of the interdiction regime has resolutely failed to translate into a practice of constitutional enforcement.[50] Reflecting this, those states engaged in counter-piracy operations off the coast of Somalia (and now within Somalia) have resolutely rejected suggestions that this is anything but a short-term operation. To this end, counter-piracy enforcement practices have been structured in such a way as to avoid any link to generalizable constitutional responsibilities of enforcement, either for the naval forces involved in policing the seas or as a judicial matter in terms of establishing a responsibility to try captured pirates.

Although piracy and trafficking have, for good reasons, generated the headlines in this area, in terms of international law's constitutional authority the greatest challenge is from ordinary, everyday practices of legal oversight. It is the everyday nature of the failings here that does most to feed the perception that this is an unconstitutional legal order defined by sovereign exceptionalism and private 'plunder'. In one memorable story used to illustrate the essential lawlessness of this domain, Langewische recounts how the family of one victim – Dianne Brimble – has faced an eight-year battle for justice, despite the presence of chilling photographic evidence showing her being raped while unconscious, by multiple men, the same men in whose cabin she was later found dead in.[51] Rather than questioning those involved when the ship docked, her body was removed, the men were allowed access to their cabin, the ship continued on its journey, and the criminal investigation that would normally have happened as a matter of course was never begun in earnest. Public pressure has now resulted in criminal proceedings against some of these men, but the point to take away here is that this is an extreme but not an exceptional case. Deaths on

[48] See D Guilfoyle (n 45); M Byers ibid; BR Posen, 'Command of the Commons: The Military Foundation of U.S. Hegemony' (2003) 28 *International Security* 5–46.

[49] See UNCLOS art 110.

[50] See especially S Art and E Kontorovich (n 9).

[51] For a detailed account see <http://www.themonthly.com.au/monthly-essays-malcolm-knox-cruising-life-and-death-high-seas-281> accessed 17 January 2012.

cruise ships often go down as accidents, suicides or disappearances; prosecutions for crime at sea are rare, partly as a result of investigative responsibilities falling on the cruise companies rather than on any public authority. The ordinary default mindset of states is that they are not positively responsible for law enforcement on the high seas. This is a domain where self-regulation is the norm.

This same fall-back tendency of states to think that their legal responsibilities do not extend to the high seas is part of a more pernicious practice of states using the perceived weakness of their enforcement responsibilities in this domain as a way to contract around international human rights obligations. This mindset is most evident in the detention of 'boat people' on Christmas Island, in which the ordinary human rights of migrants and refugees are seen as inoperative because these individuals are still in a technical legal sense 'at sea'. There are signs too of the Australian approach – the 'Pacific Island Solution'[52] – being considered elsewhere, for example in Canada where the arrival of 492 Tamil refugees on the *MV Sun Sea* was met by calls from some quarters to install a refugee holding ship outside of Canada's territorial waters; hence, to hold them on the high seas beyond the sphere of Canada's human rights and refugee obligations. These proposals highlight the perception that the high seas legal regime does not just lack an enforcement regime but actively neuters the positive responsibilities arising in overlapping areas of international law. And the principles endangered are not marginal; the specific challenge is to the peremptory principle of *non-refoulement*.[53] In an extension of this, positive responsibilities of rescue are increasingly contracted out to states with far less compunction about adhering to their international legal obligations, in much the same way that the judicial responsibilities accrued during counter-piracy action are passed on to institutionally weak states.[54] As Thomas Gammeltoft-Hansen and Tanja Aalberts persuasively argue, the tragedy of this domain is that 'the "drowning migrant" finds herself subject to an increasingly complex field of governance, in which participating states

[52] S Kneebone, 'The Pacific Plan: the promise of "effective protection"?' (2006) 18 *International Journal of Refugee Law* 696–721.

[53] See G Goodwin-Gill, 'The Right to Seek Asylum: Interception at Sea and the Principle of *Non-Refoulement*' (2011) 23 *International Journal of Refugee Law* 443–57; S Trevisanut, 'The Principle of Non-Refoulement at Sea and the Effectiveness of Asylum Protection' (2008) 12 *Max Planck Yearbook of United Nations Law* 205–46.

[54] See Amnesty International, 'Seeking safety, finding fear: Refugees, asylum-seekers and migrants in Libya and Malta', 14 December 2010, available at <http://www.amnesty.org/en/news-and-updates/report/libya-and-malta-failing-refugees-asylum-seekers-and-migrants-2010-12-14> accessed 15 December 2011; see also G Noll and M Giuffré, 'EU Immigration Control made by Gaddafi?', February 2011, available at <http://www.opendemocracy.net/gregor-noll-mariagiulia-giuffr%C3%A9/eu-migration-control-made-by-gaddafi> accessed 15 December 2011.

may successfully barter off and deconstruct responsibilities by reference to traditional norms of sovereignty and international law. Thus, rather than simply a space of non-sovereignty *per se*, the *Mare Liberum* becomes the venue for a range of competing claims and disclaims to sovereignty'.[55]

All of this points to how the perception of international law's limited institutional capacity for enforcement bolsters sceptical arguments regarding international law's constitutional authority. The various practices undertaken and sustained with reference to the law of the sea show how gaps in the enforcement regime create and sustain scepticism about the constitutional authority of the wider legal order. It may be a comprehensive regime on paper, in formal terms decisively shifting the governance framework away from a presumption in favour of the free seas, but there is little respect for the constitutionality of these rules in practice. The lack of 'hard' enforcement mechanisms and the reliance on a process of self-policing create a sense, at least among the subjects of this legal order, that this is, at best, a regulatory regime imposing few actionable enforcement responsibilities appealing instead to a weak, non-justiciable sense of responsibility. And where states do support enforcement measures – for example against 'boat people' – this is part of a strategy to declaim more onerous responsibilities, rather than to give constitutional effect to the law of the sea. There is, in other words, plenty of available evidence for the fact that international law in this domain lacks constitutional authority, at least as long as the appropriate measure of constitutional authority or supremacy is tied to a general capacity to get states to comply with their enforcement responsibilities.

Constitutional enforcement in the global commons

So far, so sceptical. In this last section, however, I want to point to ways that constitutional enforcement is being developed in this domain, specifically through the institutional delegation of enforcement responsibility. The point is to show how looking for institutional practices of responsibility delegation creates a much rounder picture of how enforcement is able to construct constitutional authority than is likely to emerge from the sceptic's analysis.

Support for seeing the law of the sea as an example of international law's constitutional authority comes from perception that the law of the sea is but one aspect of an emerging 'global commons law'. The global commons refers to those areas that are the 'common property of all

[55] T Gammeltoft-Hansen and T Aalberts, 'Sovereignty at Sea: The law and politics of saving lives in the Mare Liberum' (2010) *DIIS Working Paper 18*, 8.

mankind'.[56] In John Vogler's words, the global commons are 'areas or resources that do not or cannot by their very nature fall under sovereign jurisdiction'.[57] Susan J Buck similarly defines the commons as 'resource domains in which common pool resources are found', by extension seeing international or global commons as 'the very large resource domains that do not fall within the jurisdiction of any one country'.[58] This idea denotes the oceans and deep-sea bed, the atmosphere and global environment, outer space, areas of special ecological and cultural significance and, increasingly, cyberspace.[59] The governance challenge is set by the ever-present spectre of 'tragedy'; as Garrett Hardin famously argued, the 'tragedy of the commons' is that you have an area designated either by nature or social convention as open access, hence as beyond the effective control of any one actor or institution, designated unmanageable.[60] But at the same time, without some measure of control or cooperation to manage the (scarce) resource, the commons would over time degrade and become unusable. The tragedy here is that the open access model creates a structural lack of adequate incentives to regulatory cooperation. The promise of the global commons, providing common pool resources, also has the potential to function as a global sink, threatening independent resources.[61] Extending from Hardin's conception of the tragic is the inevitability that legal rules promising to govern the commons will fail to fulfil this function, at least as long as they protect a presumption in favour of free and open access. Here of course the 'free seas' become a paradigm example of the tragedy of the commons.

Since Hardin's pessimistic, rational-actor model, others have pointed to how common pool resources such as the high seas can be effectively governed if the 'communal' nature of the domain is taken seriously. Elinor Ostrom in particular has detailed how local, non-centralized governance models provide lessons for effective commons management which can be ramped up to manage national, regional or global commons. Where common pool resources have been managed effectively it is because the governance framework acknowledged that a centralized, top-down regulatory framework was inappropriate but, crucially, where there was also an

[56] SJ Buck, *The Global Commons: An Introduction* (Island Press, Washington, DC, 1998); AM Denmark, 'Managing the Global Commons' (2010) 33 *The Washington Quarterly* 165–82.

[57] J Vogler, *The Global Commons: Environmental and Technological Governance* (2nd edn, J Wiley & Sons, Chichester, 2000) 1.

[58] S Buck (n 56) 5–6.

[59] T Murphy, 'Security Challenges in the 21st Century Global Commons' (2010) 5 *Yale Journal of International Affairs* 28–43; J Vogler (n 2) 61–71.

[60] G Hardin, 'Extensions of "The Tragedy of the Commons"' (1998) 280 *Science* 682–83.

[61] Buck (n 56) 5.

exceptionally strong sense among those at the point of enforcement regarding the responsibilities owed as part of accessing this domain. Ostrom's point is that the tragedy of the commons gives us the terms of the governance challenge, rather than pointing to the impossibility of governance itself.[62] The institutionally driven reorientation of (some aspects of) the law of the sea as a framework for protecting either 'our common heritage' or 'our common threat' or 'our common responsibility' can be read as an effort to provide an institutional protection for this culture of responsibility, through the delegation of enforcement responsibilities.

The basis for this institutional shift is provided, in part, by the way that the structure of these obligations has spilled beyond – if it was ever truly contained within – the UNCLOS framework. The structure of the treaty obligations constrains the prospects for international enforcement by suggesting that it is the bilateral, or, in the case of a multilateral treaty, the bilateralizable relationships of responsibility that condition and protect the authority of international law. The reason is that this structure allocates enforcement responsibilities through the principle of reciprocity, where a harm against one state's interests creates a right of enforcement or redress. Where obligations are structured in this way it is difficult to understand the international legal order as a genuine reflection of a genuine community interest, or states as enforcing a community standard. All of the necessary remedial rules are contained in and limited by this bilateral structure of state responsibility. If the practice of enforcement is triggered by the harm done to an individual state, what triggers enforcement to redress the harm done to the international community? The sceptic's suggestion is that the constitutional value or principle needs to be, and potentially can be, pursued and enforced through the traditional bilateral structures of international law. There is not a need for international law to move beyond the horizontal model and establish more hierarchical enforcement mechanisms for delegating responsibilities, because these responsibilities are already sufficiently delegated, albeit through the negative responsibilities characterizing the free seas principle. There can be constitutional authority even in the absence of anything more than a power to persuade.

As the limitations of enforcement in the 'free seas' suggests, however, the bilateral structure of enforcement leaves a number of gaps through which states can wriggle out of their responsibilities. The overarching cause of the worry – and legal gap – is the fact that not all states are signed up to what has the potential to be 'a resounding success for the principles and purposes of the UN, including, crucially, progress towards the rule of

[62] See similarly S Strange, 'The Westfailure system' (1999) 25 *Review of International Studies* 345–54.

law in international affairs'.[63] UNCLOS lacks the supremacy it would get from a universal acceptance, and as a result lacks the power to unsettle the customary presumption of free and open access, at least in the coherent and comprehensive manner its proponents had initially hoped for.[64] But, on the surface, who or who has not signed up to UNCLOS should not matter for the authority of the obligations created because the majority are also obligations under customary international law. The real gap is not in the enforcement regime of UNCLOS, but the gaps this exposes in the wider practices of enforcing constitutional rules. As a matter of assigning remedial responsibilities it is not just the affected state whose enforcement responsibilities can be triggered, but all states as common members of the international community, as holders of a common interest. It is this interdependent, public responsibility that UNCLOS has needed to effect.

It is in this context that the emergence of the law of the sea as an aspect of global commons law has helped institutionalize a practice of constitutional enforcement. Particularly important here is the principle of 'common but differentiated responsibilities'.[65] Although this principle has emerged in the specific context of international environmental law, it has become the unifying thread to many recent efforts to manage the global commons more broadly, and to give constitutional bite to enforcement practices. In effect, the global commons concept functions to usher in the idea that an underlying obligation of trusteeship, or responsible stewardship, sets the scope of legitimate enforcement authority in this domain.[66] Responsibilities are allocated to the actor best placed to protect the global commons. The fact that these environmental responsibilities have been developed in relation to the basic idea that the agent best placed to act also has a responsibility to act forces positive responsibilities into existence. International institutions are empowered in this way to remedy international law's constitutional authority by specifying state responsibilities in this domain. Whether or not it replaces the previously benign protection regime, principally defined around the rights of access and duties of the flag state, it certainly challenges the degree to which practices of declamation can undermine the constitutional order. International institutions in this sense act to make sure the structural failure of states to comply with their responsibilities does not inevitably corrupt the possibility for constitutional authority, reflecting the institutional concept of constitutional enforcement.

[63] BH Oxman (n 35).

[64] Ibid especially at 360.

[65] See P Sands, *Principles of International Environmental Law* (2nd edn, Cambridge University Press, Cambridge, 2003) 285–90.

[66] PH Sand, 'Sovereignty Bounded: Public Trusteeship for Common Pool Resources?' (2004) 4 *Global Environmental Politics* 47–71.

UNCLOS establishes two particularly important institutional bodies whose officials increasingly take on this kind of enforcement role. The International Seabed Authority and the International Tribunal for the Law of the Sea (ITLOS) have both been actively engaged in pushing back against the actions of states and their proxy on the high seas and deep seabed. For example, the International Seabed Authority has recently requested an advisory opinion from ITLOS on the nature of states' obligations and responsibilities in sponsoring seabed mining and exploration; in its judgment the Tribunal leaves very little room for doubt about the extent of states' obligations and responsibilities, and about the oversight capabilities granted to the International Seabed Authority.[67] ITLOS in turn has also claimed jurisdiction over national port authorities, notably in the *Juno Trader* case, using its limited compulsory jurisdiction to full effect and in the process both solidifying and expanding the scope of its own authority.[68] The operation of UNCLOS is also actively orchestrated by the Division on Ocean Affairs and the Law of the Sea, a branch of the UN Office of Legal Counsel, which acts as the Secretariat for UNCLOS. They are responsible for drafting the UN Secretary-General's report on the law of the sea for the General Assembly, a role which they have explicitly interpreted as involving the progressive codification of the law of the sea. Indicative of this is the setting up of the 'Ad-Hoc Open-ended Informal Working Group to study issues relating to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction'.[69] This inauspiciously titled body has had a key role in developing the concept of a 'marine protected area', which has in turn been used to further elaborate the positive responsibilities of trusteeship held by states and other actors.[70]

There is a security dimension to the global commons too, which takes up Alfred Thayer Mahan's suggestion that to control this 'wide common,

[67] ITLOS Case 17, 'Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area (Request for Advisory Opinion submitted to the Seabed Disputes Chamber)', judgment issued 1 February 2011, available at <http://www.itlos.org/index.php?id=109> accessed 15 January 2012.

[68] S Cassese, B Carotti, L Casini and M Macchia (eds), *Global Administrative Law: Cases and Materials*, (University of Rome, Rome, 2006) available at <http://www.iilj.org/GAL/GALcasebook.asp>) 124–8; for a more expansive analysis of the *Juno Trader* case, see H Tuerk, 'Contribution of the International Tribunal for the Law of the Sea to International Law' (2007) 26 *Penn State International Law Review* 289–316.

[69] See <http://www.un.org/Depts/los/biodiversityworkinggroup/biodiversityworkinggroup.htm>, accessed 1 May 2012.

[70] L de La Fayette, 'The Marine Environmental Protection Committee: the Conjunction of the Law of the Sea and International Environmental Law' (2001) 16 *International Journal of Marine and Coastal Law* 155–238.

over which men may pass in all directions' is to hold the reigns of imperial domination.[71] Vogler argues that this perspective on the global commons is fundamentally different from that of environmental actors. Referencing Barry Posen's analysis, he points to how the injunction to command the commons is part of a hegemonic foreign policy practice.[72] By commanding the commons, the suggestion is that a powerful state can essentially free itself from all constraints – including, one assumes, those of international law. But this has changed too, as the threats from a failure to effectively police the global commons have grown. Security actors are increasingly accepting that given the limits of unilateral enforcement in the global commons there are significantly higher pay-offs from coordinating enforcement efforts. As Tara Murphy puts it, in the global commons 'the security of one is tightly linked to the security of all.'[73] As part of this general effort to preserve freedom of movement and trade, counter-piracy efforts begin to look like part of a general practice of constitutional enforcement rather than a narrow practice directed at Somali pirates. One of the mechanisms through which the UN Security Council has sought to address the growing threat of piracy (especially in UNSC resolutions 1816 and 1846) has been to strengthen the principles governing the use of force in counter-piracy operations. This has helped resolve some of the gaps in the UNCLOS enforcement regime on piracy, specifically the uncertainty about who was responsible for policing piracy, who could legitimately be employed to strengthen the enforcement regime (including private security companies), and the measures that could and should be taken (including intervention to attack pirate bases). It is precisely because the Security Council's role here was directed at giving 'maximum effect' to the international prohibition on piracy that it becomes a practice strengthening the constitutional order rather than undermining it. This highlights the way that a practice of constitutional enforcement can emerge despite the express efforts from states to prevent enforcement practices having this effect.

This says as much about how international institutional practices reflect the ongoing internationalization of 'officialdom' – of international forms of institutional authority – as it does about the shift from the free seas to the global commons as the principle governing the allocation of enforcement responsibilities. For example, the capacity to act on the 'common threat' of piracy can be linked to arguments for the functional importance of

[71] AT Mahan, *The Influence of Sea Power Upon History 1660–1783* (Courier Dover Publications, Mineola, 1987) 25.

[72] J Vogler (n 2) 65; see also BR Posen (n 48).

[73] T Murphy (n 59) 28.

international institutional authority.[74] These are not isolated practices but part of a raft of recent attempts to reconcile the role of international institutions as public, constitutional authorities, rather than mere venues for private forms of state cooperation. The point is not the importance of any single instance of enforcement but the institutionalization of a constitutional-type authority, in which public responsibilities are delegated by competent actors. The law of the sea regime is one example of how the international legal order has begun to establish this constitutional enforcement capacity – the capacity to delegate responsibilities – in which a number of institutional actors are empowered through the common purpose to promote what Tommy Koh called the 'common dream' of enacting the constitution for the oceans.[75]

Conclusion

I suggested at the beginning of this article that at the core of the sceptic's position was a belief that the constitutional order was too weak to support a conception of international law enforcement as a constitutional practice. For a start the mechanics of enforcement are underdeveloped: there is no global police force or comprehensive judicial system with the power to give effect to enforcement responsibilities. More fundamentally, because of ambiguity surrounding the constitutional rules, enforcement practices retrench state power, rather than strengthening the independent, constitutional-type authority of international law. The result of this institutional weakness is that where it looks like international law is being enforced, this is not 'constitutional enforcement' but simply the imposition of a contingent political reality. What I have presented here is evidence for an alternative perspective based on the institutional functions of the international legal order. The transition from the free seas to the global commons in the law of the sea highlights how the levers of effective and constitutionally legitimate enforcement are in place and are being used by institutional actors to remedy international law's constitutional authority. This clearly is not enough to address some of the gaps in the comprehensiveness of the regime, including the abuses continuing to take place in the global commons. But the possibility that the subjects of law might not comply

[74] This is captured in the UN report, 'A more secure world: our shared responsibility', Report of the High-level Panel on Threats, Challenges and Change (December 2004, A/59/565, see <http://www.un.org/secureworld/>); for the more general point, see A Orford, *International Authority and the Responsibility to Protect* (Cambridge University Press, Cambridge, 2011).

[75] See (n 34).

with their responsibilities is hardly the point, at least from this constitutionalist perspective. As long as institutional agents are themselves empowered to apportion responsibilities and enact international law in a way that protects the core constitutional principles there is a far more limited basis for scepticism about the constitutional effect of international enforcement. In this respect at least, international law does offers a viable model of constitutional enforcement, a capacity to command the global commons.