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Combating Terrorism At Sea -- The Suppression Of Unlawful Acts Against The Safety Of Maritime Navigation

Helmut Tuerk

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**COMBATING TERRORISM AT SEA—THE SUPPRESSION
OF UNLAWFUL ACTS AGAINST THE SAFETY OF
MARITIME NAVIGATION**

*Helmut Tuerk**

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SUMMARY

While piracy is an age-old phenomenon plaguing mankind, terrorism at sea has only manifested itself in recent times through the Achille Lauro hijacking in 1985 serving as a wake-up call. The international community has since been striving to adopt a series of legal as well as practical measures in order to prevent a recurrence of such a terrorist act because the rules of international law relating to piracy are not applicable mutatis mutandis to terrorism. The Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation was adopted in 1988. This Convention addressed terrorism at sea for the first time and represented an important extension of a cooperative law enforcement regime into a wholly new area containing a finely balanced aut dedere aut iudicare scheme.

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In the wake of the terrorist attacks of September 11, 2001, it became obvious that the 1988 Convention required revision and updating because the Convention focused on reactions to a terrorist act rather than its prevention. The amendments of 2005 significantly expand the scope of the Convention by providing an international treaty framework for combating and prosecuting individuals who use a ship as a weapon, as a means of committing a terrorist attack, or transport terrorists or cargo intended for use in connection with weapons of mass destruction programs. Furthermore, the Convention establishes a mechanism to facilitate—with the explicit authorization of the flag State—the boarding of vessels suspected of engaging in these activities in international waters.

A. INTRODUCTION

On October 7, 1985, the *Achille Lauro*, an Italian-flag cruise ship, was seized while sailing from Alexandria to Port Said.¹ It was unclear whether the initial seizure was on the high seas or within the territorial waters of Egypt, however, there was no doubt that the ship was on the high seas while being held by the hijackers.² The four Palestinian hijackers boarded the ship in Genoa, posing as tourists, and managed to smuggle on board automatic weapons, grenades and other explosives.³ The hijackers held the ship's crew and passengers hostage and threatened to kill passengers unless Israel released 50 Palestinian prisoners. In addition, the hijackers threatened to blow up the ship if a rescue mission was attempted, and when their demands were not met, one of the passengers was murdered.⁴ The passengers held hostage hailed from a number of different countries, including Italy, the United States and

¹ Malvina Halberstam, *Terrorism on the High Seas: The Achille Lauro, Piracy and the IMO Convention on Maritime Safety*, 82 AM. J. INT'L. L. 269 (1988).

² *See id.*

³ Brad J. Kieserman, *Preventing and Defeating Terrorism at Sea: Practical Considerations for the Implementation of the Draft Protocol to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA)*, in RECENT DEVELOPMENTS IN THE LAW OF THE SEA AND CHINA, 425, 425 (Myron H. Nordquist, John Norton Moore, & Kuen-chen Fu, eds. 2005).

⁴ *Id.*; Glen Plant, *The Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation*, 39 INT'L & COMP. L. Q. 27 (1990).

Austria. This hijacking constituted one of the first genuine acts of maritime terrorism recorded in modern history.⁵

The outrage that resulted from this terrorist act prompted a quick response by the international community. On November 20th, 1985, the Assembly of the International Maritime Organization (IMO) adopted Resolution A. 584(14) on “Measures to Prevent Unlawful Acts Which Threaten the Safety of Ships and the Security of Their Passengers and Crews”.⁶ This resolution called on all governments, port authorities and administrations, shipowners, ship operators, shipmasters, and crews to review and strengthen port and onboard security noting “the danger to passengers and crews resulting from the increasing number of incidents involving piracy, armed robbery and other unlawful acts against or on board ships”.⁷ Resolution A. 584(14) also directed the IMO Maritime Safety Committee, “to develop, on a priority basis, detailed and practical technical measures ... to ensure the security of passengers and crews on board ships.”⁸ The Committee was further invited to take note of the work of the International Civil Aviation Organization (ICAO) in the development of standards and recommended practices for airport and aircraft security.⁹

The actions taken by the IMO had the full support of the United Nations General Assembly. In Resolution 40/61, adopted by consensus on December 9th, 1985,¹⁰ the Assembly unequivocally condemned “as criminal, all acts, methods and practices of terrorism wherever and by whomever committed,” and requested that the IMO “study the problem of terrorism aboard or against ships with a view to making recommendations on appropriate measures.”¹¹ The insertion of this request in the resolution was proposed by Austria and Italy in order to reflect the concern of the international community at the seizure of the *Achille*

⁵ See Rosalie Balkin, *The International Maritime Organization and Maritime Security*, 30 TUL. MAR. L. J. 1, 5 (Winter/Summer, 2006).

⁶ International Maritime Organization (IMO), Measures to Prevent Unlawful Acts Which Threaten the Safety of Ships and the Security of Their Passengers and Crews, IMO Res. A.584(14) (Nov. 20, 1985).

⁷ *Id.*

⁸ *Id.*; see also Balkin, *supra* note 5, at 6.

⁹ *Id.*

¹⁰ G.A. Res. 40/61, ¶ 15, U.N. Doc. A/Res/40/61 (Dec. 9, 1985).

¹¹ *Id.*

Lauro and to endorse any steps taken in connection with the framework of the IMO.

On December 18, 1985, the Security Council also addressed the *Achille Lauro* incident in Resolution 579. This resolution recalls the statement by its President of October 9th, 1985, which resolutely condemns all acts of terrorism, including hostage taking, and urges the further development of international cooperation among States in devising and adopting effective measures to facilitate the prevention, prosecution and punishment of all acts of hostage taking and abduction as manifestations of international terrorism.¹²

In September 1986, in response to the directive of the IMO Assembly and the request by the UN General Assembly, the IMO Maritime Safety Committee adopted measures aimed at minimizing the risk of terrorist acts directed against ships and their crews on the basis of a proposal by the United States of America.¹³ These recommendations specifically applied to passenger ships engaged on international voyages of twenty-four hours or more, as well as the port facilities that serviced such ships.¹⁴ The measures adopted by the IMO Maritime Safety Committee anticipated the much more detailed International Ship and Port Facility Security (ISPS) Code adopted in 2002 by stressing the need for port facilities and individual ships to formulate security plans and appoint security officers.¹⁵

It was obvious that adopting practical measures to counter the threat of international terrorism against international shipping was itself sufficient because of the possibility that applying these measures, however stringent, might not by itself prevent a terrorist attack from succeeding. Thus, it became apparent that legal measures were necessary to prevent such acts and to ensure that the perpetrators of such acts were made duly accountable. Because these acts are committed on the high seas and the perpetrators as well as the victims hail from various countries that may not include that of the ship's flag, new international rules were necessary. More specifically, there was a need for rules relating to the arrest, prosecution, and subsequent detention of those responsible for

¹² S.C. Res. 579, ¶ 1, U.N. Doc. S/Res/579 (Dec.18, 1985).

¹³ IMO, Measures to Prevent Unlawful Acts Which Threaten the Safety of Ships and the Security of Their Passengers and Crews, IMO Doc. MSC 52/INF. 9 (Jan. 15, 1986).

¹⁴ Balkin, *supra* note 5, at 6.

¹⁵ *Id.*

acts of maritime terrorism.¹⁶ The existing legal framework seemed inadequate to deal with such situations.

B. THE LEGAL RESPONSE TO ACTS OF MARITIME TERRORISM

After the seizure of the *Achille Lauro*, many people contemplated the appropriate legal response to the terrorist act with a view towards preventing its recurrence in the future. The first question that needed to be answered was whether the seizure of that ship constituted an act of piracy. The act had been characterized as such by some, in particular the United States, which issued arrest warrants charging the hijackers with hostage taking, conspiracy and “piracy on the high seas.”¹⁷ However, there is no authoritative definition of piracy under customary international law and the municipal law of a number of countries is based on an extensive interpretation of a notion that has been defined as broadly as “any armed violence at sea which is not a lawful act of war.”¹⁸

Bear in mind that the notion of piracy, first codified in the 1958 Geneva Convention on the High Seas¹⁹ and later in the 1982 United Nations Convention on the Law of the Sea,²⁰ had been circumscribed by these legal instruments in a precise and definitely narrower sense.²¹ Article 15 of the 1958 Convention and Article 101 of the 1982 Convention define piracy as:

(1) Any illegal acts of violence, detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:

¹⁶ *Id.* at 7.

¹⁷ See Halberstam, *supra* note 1, at 270.

¹⁸ *Id.* at 273.

¹⁹ Convention on the High Seas, Apr. 29, 1958, 13 U.S.T. 2312, 450 U.N.T.S. 82.

²⁰ United Nations Convention on the Law of the Sea, Dec. 10, 1982, S. Treaty Doc. No. 103-39, 1833 U.N.T.S. 397.

²¹ See Rüdiger Wolfrum, *Fighting Terrorism at Sea: Options and Limitations under International Law*, in VERHANDELN FÜR DEN FRIEDEN—NEGOTIATION FOR PEACE LIBER AMICORUM TONO EITEL 649, 652 (Jochen Frowein, Klaus Scharioth, Ingo Winkelmann, & Rüdiger Wolfrum eds., 2003); Tullio Treves, *The Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation*, 2 SING. J. INT’L & COMP. L. 541, 542 (1998).

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

(b) Against a ship, aircraft, persons or property in a place outside the jurisdiction of any State.²²

The practice of piracy has been widespread over the centuries and continues to be a menace. As a result, every State not only has a right, but also a duty, to take action to curb piratical activities. Article 100 of the United Nations Convention on the Law of the Sea provides that “all States shall cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside of the jurisdiction of any State.”²³

Piracy is the oldest and one of the few crimes where universal jurisdiction has been recognized generally under customary international law,²⁴ whereas universal jurisdiction for other offenses depends upon specified conditions. The right to take enforcement measures against pirates is vested in all States; not only those which have suffered from an act of violence. States accepted universal jurisdiction over piracy because pirates indiscriminately attacked all States' ships and were a threat to everyone.²⁵ Universal jurisdiction was theoretically justified because pirates were considered *hostis humani generis*, enemies of all mankind.²⁶ Furthermore, pirates were not subject to the authority of any State. Therefore, no State could be held responsible under international law for acts of pirates.²⁷

Similar theories may be applied to terrorists as they are also a threat to all States. Secondly, no State is willing to assume responsibility for their actions. However, while piracy and terrorism at sea have many

²² Convention on the High Seas, *supra* note 19, at art. 15; United Nations Convention on the Law of the Sea, *supra* note 20, at art. 101.

²³ United Nations Convention on the Law of the Sea, *supra* note 20, at art. 100.

²⁴ Halberstam, *supra* note 1, at 272.

²⁵ *Id.* at 288.

²⁶ *Id.*; H.E. José Luis Jesus, *Protection of Foreign Ships against Piracy and Terrorism at Sea: Legal Aspects*, 18 INT'L J. MARINE & COASTAL L. 363, 384 (2003); Tina Garmon, *International Law of the Sea: Reconciling the Law of Piracy and Terrorism in the Wake of September 11th*, 27 TUL. MAR. L.J. 257, 259 (2002–2003).

²⁷ Halberstam, *supra* note 1, at 288.

similarities and both are forms of violent interference with shipping, there is a marked difference between the goals of pirates and terrorists: while pirates usually seek financial gain, terrorists wish to make a “political or ideological” point, most often coupled with the wanton destruction of human life.²⁸ Furthermore, pirates act with stealth, while terrorists seek publicity with their actions.²⁹ From the point of view of prosecuting the offenders, there is an advantage to qualifying acts of maritime terrorism as “piracy”—especially given the *Achille Lauro* incident.

In examining these issues, the Legal Advisors of the Foreign Ministries of Austria, the author, Italy and Egypt were not persuaded by the argument that the seizure of the *Achille Lauro* could be considered an act of piracy as defined in the aforementioned 1958 and 1982 Conventions because the hijackers did not act for “private ends,” and the seizure did not meet the two vessel requirement.³⁰ There was an obvious legal lacuna which would have to be filled by creating a specific convention relating to maritime terrorism because the development of international law regarding unlawful acts against ships had not yet reached the same stage as it had with respect to civil aviation. In aviation, the 1963 Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft, the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft and the 1971 Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation—elaborated within the framework of ICAO—were already in force.³¹ However, no

²⁸ See Leticia Diaz & Barry Hart Dubner, *On the Problem of Utilizing Unilateral Action to Prevent Acts of Sea Piracy and Terrorism: A Proactive Approach to the Evolution of International Law*, 32 SYRACUSE J. INT’L L. & COM. 1 (2004–2005); Tammy N. Sittnick, *State Responsibility and Maritime Terrorism in the Strait of Malacca: Persuading Indonesia and Malaysia to take Additional Steps to Secure the Strait*, 14 PAC. RIM L. & POL’Y J. 743, 751 (2005).

²⁹ See Sittnick, *supra* note 28.

³⁰ Jesus, *supra* note 26, at 388; see also Carlo Tiribelli, *Time to Update the 1988 Rome Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation*, 8 OR. REV. INT’L L. 133, 144 (2006).

³¹ See Convention on Offences and Certain Other Acts Committed on Board Aircraft, Dec. 22, 1969, 20 U.S.T. 2941, 704 U.N.T.S. 219; Convention for the Suppression of Unlawful Seizure of Aircraft, Mar. 8, 1973, 22 U.S.T. 1641, 860 U.N.T.S. 105; Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sep. 23, 1971, 24 U.S.T. 564, 974 U.N.T.S. 177; IMO,

convention existed that dealt with maritime terrorism. Terrorism at sea, in contrast to piracy, had never before been a serious international problem; thus, there was a lack of specific international rules on maritime terrorism.

The position of the three Legal Advisors was also supported by the International Transport Workers Federation, which called for an international convention on ship hijacking to mirror those conventions already in force in the case of civil aviation hijacking.³² Particular reference was made to the Hague Convention which commits the Contracting States to making such hijackings punishable by “severe penalties”.³³

As a consequence, Austria, Italy and Egypt proposed to elaborate a new international convention to deal specifically with the issue of maritime terrorism modelled on existing anti-terrorism conventions, particularly the Hague and Montreal Conventions, as well as the 1979 UN Convention Against the Taking of Hostages.³⁴

Such a convention would provide for a comprehensive suppression of unlawful acts committed against the safety of maritime navigation which endanger innocent human lives, jeopardize the safety of persons and property, seriously affect the operations of maritime services and thus are of grave concern to the international community as a whole.³⁵

Consideration of a Draft Convention for the Suppression of Maritime Navigation, at annex 2, C 57/25 (Oct. 1, 1986).

³² IMO, Assembly Resolution on Measures to Prevent Unlawful Acts Which Threaten the Safety of Ships and the Security of Their Passengers and Crews, at Press Release, 52/2/4 (Oct. 11, 1985).

³³ *Id.*

³⁴ International Convention Against the Taking of Hostages, Dec. 17, 1979, T.I.A.S. No. 11,081, 1316 U.N.T.S. 205.

³⁵ IMO, Assembly Resolution on Measures to Prevent Unlawful Acts Which Threaten the Safety of Ships and the Security of Their Passengers and Crews, *supra* note 32, at annex 3; Thomas A. Mensah, *Suppression of Terrorism at Sea: Developments in the Wake of the Events of 11 September 2001*, in VERHANDELN FÜR DEN FRIEDEN—NEGOTIATION FOR PEACE LIBER AMICORUM TONO EITEL 627, 629 (Jochen Frowein, Klaus Scharioth, Ingo Winkelmann, & Rüdiger Wolfrum eds., 2003).

Following the title of the Montreal Convention the three sponsoring countries called their draft "Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation".³⁶ In submitting this text, they pointed out that it was necessary to make a clear distinction between the cases covered by the proposed new convention and piracy, since the latter was governed by a different regime that is internationally codified, and the customary law of the sea. The same being true for hot pursuit, the new convention should be without prejudice to the legal rules regarding international piracy and hot pursuit.

In November 1986, the IMO Council unanimously agreed that the matter was appropriate for consideration by the IMO and that it required urgent attention. Following a suggestion made by the co-sponsors with a view to expediting the negotiation process, an Ad Hoc Preparatory Committee open to all States was established with "the mandate to prepare, on a priority basis, a Draft Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation," using as a basis the draft submitted by Austria, Egypt and Italy.³⁷ This Committee concluded its work within one year and the Convention was adopted by consensus on March 10th, 1988 by a Diplomatic Conference held in Rome.³⁸

At the Conference the Special Representative of the UN Secretary-General made it clear that the "two-vessel requirement" and the "private ends" criterion made rules on piracy inapplicable to maritime terrorism. On the other hand, it would seem that acts of piracy or armed robbery at sea could also qualify as unlawful acts under the Convention if they met the definition of the offences set forth therein.³⁹

³⁶ See generally IMO, Adoption of the Final Act and Any Instruments, Recommendations and Resolutions Resulting from the Work of the Conference: Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, I.L.M. 688, 1678 U.N.T.S. 221.

³⁷ See IMO, (Working Paper Doc. C 57/WP.1, ¶ 25(a)(2), 1986) quoted in Halberstam, *supra* note 1, at 292 n.99.

³⁸ IMO, Adoption of the Final Act and Any Instruments, Recommendations and Resolutions Resulting from the Work of the Conference: Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, I.L.M. 688, 1678 U.N.T.S. 221.

³⁹ See N.D. Korolyova, *International Legal Issues of Cooperation Between States in Suppressing Piracy and Terrorism: Some Aspects*, in MOSCOW SYMPOSIUM ON THE LAW OF THE SEA 174, 177 (Thomas A. Clingan, Jr. &

During deliberations on the Convention, the United States, supported by other coastal States having fixed platforms on their continental shelves, proposed that such installations be protected from terrorist acts.⁴⁰ However, the Ad Hoc Preparatory Committee decided to deal with this question outside of the Convention itself. Instead, the question was addressed in an optional protocol supplementary to the Convention.⁴¹ This resulted in the simultaneous adoption by the Diplomatic Conference of a "Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf."⁴²

The Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation entered into force on March 1, 1992.⁴³ Initially, until September 11, 2001, it had only been ratified by 67 States. Yet, it has since found overwhelming support by the international community.⁴⁴ At present, there are 146 Contracting States party to the Convention accounting for 87.74 percent of world tonnage and the Protocol has been ratified by 135 States accounting for 83.06 percent of world tonnage.⁴⁵ This development reflects the seriousness with which the international community has in recent years taken the threat of international terrorism, and its effects at sea.⁴⁶

Anatoly L. Kolodkin eds., *Law of the Sea Institute*, University of Hawaii, 1988); *See also* Treves, *supra* note 21, at 544.

⁴⁰ Philippe Kirsch, *The 1988 ICAO and IMO Conferences: An International Consensus Against Terrorism*, 12 *DALHOUSIE L.J.* 5, 13 (1989–1990).

⁴¹ IMO, Report of the Ad Hoc Preparatory Committee, Doc. C58/8/Add.1, at para. 4 (available upon request from the IMO).

⁴² IMO, Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, I.L.M. 688, 1678 U.N.T.S. 221, *available at* http://www.imo.org/Conventions/mainframe.asp?topic_id=259&doc_id=686.

⁴³ *Id.*

⁴⁴ Kieserman, *supra* note 3, at 434.

⁴⁵ *See* IMO, Summary of Conventions as at 31 December 2007, http://www.imo.org/Conventions/mainframe.asp?topic_id=247.

⁴⁶ Kieserman, *supra* note 3, at 434.

**C. THE CONVENTION FOR THE SUPPRESSION OF
UNLAWFUL ACTS AGAINST THE SAFETY OF
MARITIME NAVIGATION (SUA) AND PROTOCOL**⁴⁷

As already stated, the SUA Convention in substance is based on previously existing anti-terrorism conventions by adapting their provisions to the maritime field. However, it is also a “genuine” anti-terrorism convention because, in the Preamble, there is a deep concern about “the world-wide escalation of acts of terrorism in all its forms, the occurrence of which is considered a matter of grave concern to the international community as a whole.”⁴⁸ Furthermore, the preamble quotes from the aforementioned General Assembly Resolution 40/61 concerning the unequivocal condemnation as criminal of all acts, methods and practices of terrorism.⁴⁹ Such references were not made in the Hague, Tokyo and Montreal Conventions. In order to achieve the necessary political compromise and secure the adoption of the Convention by consensus, the preamble quotes another paragraph of Resolution 40/61 which refers to the need that “all States contribute to the progressive elimination of causes underlying international terrorism.”⁵⁰ There is, however, no authoritative definition of this term. Additionally, there was no attempt to create such a definition at the Diplomatic Conference. The failure to do so was a wise decision because defining such a term would certainly have led to insurmountable political difficulties.

The preamble further affirms that matters not regulated by the Convention “continue to be governed by the rules and principles of general international law.”⁵¹ Article 9 further spells out that “nothing in the Convention shall affect in any way the rules of international law pertaining to the competence of States to exercise investigative or enforcement jurisdiction on board ships not flying their flag.”⁵² In striving for consensus at the Diplomatic Conference the co-sponsors had purposely avoided tackling highly controversial issues, such as the

⁴⁷ See Plant, *supra* note 4, at 27–56 (a detailed analysis of the provisions of the SUA Convention).

⁴⁸ See *id.* at 32–34.

⁴⁹ See *id.* at 32; G.A. Res. 40/61, *supra* note 10.

⁵⁰ See Plant, *supra* note 4 at 32; G.A. Res. 40/61, *supra* note 10.

⁵¹ See Plant, *supra* note 4, at 33.

⁵² Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation art. 9, Mar. 1, 1992, 1678 U.N.T.S. 22; see Plant, *supra* note 4, at 45.

boarding of suspect vessels at sea by non-flag State authorities. The issues were not yet ripe for resolution.

A proposal by Kuwait to include a provision in the Convention that it would apply to a person who commits an offense acting on behalf of a government⁵³ did not find majority support at the Conference. The same was true of a proposal first made by Saudi Arabia, and then by Nicaragua, to include references to “crimes” committed by governments.⁵⁴ A similar suggestion had also been made by Iran in the course of the deliberations on the text of the Convention.⁵⁵

The SUA Convention applies to ships navigating or scheduled to navigate into, through, or from waters beyond the outer limit of the territorial sea of a single state, or beyond the lateral limits of its territorial sea with adjacent States, or when the alleged offender is found in the territory of a State Party.⁵⁶ Thus, the SUA Convention is applicable to ships on an international voyage operating or scheduled to operate seaward of any State’s territorial sea. The covered territory is a potentially vast geographic area into which many States would find it difficult to project an enforcement presence much beyond their respective littorals.⁵⁷ Ships engaged in cabotage that takes place exclusively within the territorial sea of a coastal state—so-called short range cabotage—are thus excluded and any unlawful act directed against them is governed solely by national law.⁵⁸ In conformity with general international law of sovereign immunities, warships or government vessels used for naval, customs or police purposes are excluded from the ambit of the Convention.⁵⁹

Although entitled “Convention for the *Suppression* of Unlawful Acts Against the Safety of Maritime Navigation,” the SUA’s operative

⁵³ See Halberstam, *supra* note 1, at 305–06.

⁵⁴ See Kirsch, *supra* note 13, at 27–28; Halberstam, *supra* note 1, at 306.

⁵⁵ See IMO, Doc. A/C.2/WP.1.

⁵⁶ See IMO, Adoption of the Final Act and Any Instruments, Recommendations and Resolutions Resulting From the Work of the Conference: Protocol of 2005 to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, IMO Doc. LEG/CONF.15/21 (Nov. 1, 2005) (available from the IMO upon request).

⁵⁷ Kieserman, *supra* note 3, at 427.

⁵⁸ Balkin, *supra* note 5, at 9.

⁵⁹ See David Freestone, *The 1988 International Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation*, 3 INT’L J. ESTUARINE & COASTAL L. 305, 308 (1988); Balkin, *supra* note 5, at 8.

provisions deal primarily with events after illegal acts have taken place; that is the apprehension, conviction and punishment of those who commit such acts, as opposed to the prevention or suppression of those acts.⁶⁰ Only one provision directly addresses the problem of prevention or suppression: Article 13 requires States Parties to cooperate in the prevention of offenses by taking all practical measures to prevent preparations in their respective territories for the commission of the offences within or outside their territories as well as to exchange information and to coordinate measures to prevent the commission of those offences.⁶¹ Furthermore, there is a duty for a States Parties that have a reason to believe that an offense set forth in the Convention will be committed to furnish as promptly as possible any relevant information to those States having established jurisdiction over such offenses.⁶²

Similar to most international anti-terrorism conventions, the core provision of the SUA Convention, enshrined in Article 10, is the requirement for States to “extradite or prosecute.”⁶³ This provision is substantially the same as the corresponding provision of the Convention Against the Taking of Hostages. Thus, there is no absolute obligation to extradite; the possibility of non-extradition for political offences as well as the right to grant asylum are maintained. “In the absence of specific extradition treaties in force between the requesting and requested States, the latter may at its option consider the Convention as a legal basis for extradition.”⁶⁴

Furthermore, there is no absolute duty to punish because the State in whose territory the offender is found is only required “to submit the case without delay to its competent authorities for the purpose of prosecution,” which “shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that State.”⁶⁵ This provision, although it corresponds to other anti-terrorism conventions, has been called a deficiency of the SUA Convention since it arguably allows terrorists to escape punishment.⁶⁶ People are left to trust

⁶⁰ Sittnick, *supra* note 28, at 760–61; Kieserman, *supra* note 3, at 427.

⁶¹ Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation art. 13, Mar. 10, 1988, 1678 U.N.T.S. 22.

⁶² *See id.*

⁶³ Kieserman, *supra* note 3, at 427.

⁶⁴ Tiribelli, *supra* note 30, at 149; *see also* Treves, *supra* note 21, at 552–53.

⁶⁵ Treves, *supra* note 21, at 552.

⁶⁶ *See id.*

the independence and efficiency of the judiciary systems called upon to deal with such offenders.

In support of the framework—*dedere aut iudicare*—States Parties are required to establish their jurisdiction over specified offenses and make these offenses punishable by appropriate penalties which take into account their grave nature. The idea behind such a provision is to ensure that terrorists will not find a safe haven in any territories of those States that are parties to the Convention.⁶⁷ There is, however, no binding obligation, but only a discretion, to extradite to the flag State rather than another State because only “due regard” is to be paid to the interests and responsibilities of the State Party whose flag the ship was flying at the time of the commission of the offence. A clear priority in favor of the flag State proved unacceptable to many States at the Diplomatic Conference in view of difficulties with domestic legislation.⁶⁸

The offenses covered by the Convention are listed in Article 3 and substantially reproduce *mutatis mutandis* those provided for in the aviation precedents.⁶⁹ At the initiative of the United States, a new offense was added for injuring or killing a person in connection with the commission, or attempted commission, of any of the other offenses.⁷⁰

The SUA Convention established extraditable offenses of direct involvement, or complicity, in the intentional and unlawful threatened, attempted or actual endangerment of the safe navigation of a ship by: the commission or attempt of seizure or exercise of control over a ship by any form of intimidation; violence against a person on board a ship; destruction of a ship; the causing of damage to a ship or to its cargo; placement on a ship of a device or substance which is likely to destroy or cause damage to that ship or its cargo; destruction of, serious damaging of, or interference with maritime navigational facilities; knowing communication of false information; and injury to or murder of any person in connection with any of the preceding acts.⁷¹ These offenses are also deemed to be includable as extraditable offenses in any extradition treaty existing between any of the States Parties.

⁶⁷ See *id.* at 553; see also Balkin, *supra* note 5, at 9.

⁶⁸ See Plant, *supra* note 4, at 50, 55.

⁶⁹ *Id.* at 40.

⁷⁰ See Kirsch, *supra* note 40, at 18.

⁷¹ Kieserman, *supra* note 3, at 427–28.

Article 6 established two types of jurisdiction; namely, obligatory and discretionary.⁷² A State Party is obliged to establish domestic law jurisdiction over those offenses committed against, or on board, a ship flying the flag of the State at the time the offense is committed, or in the territory of that State, including its territorial sea, or by a national of that State. Furthermore, a State Party may establish jurisdiction over any such offense, when: it is committed by a stateless person whose habitual residence is in that State; or during its commission a national of that State is seized, threatened, injured or killed; or it is committed in an attempt to compel that State to do or abstain from doing any act. The inclusion of discretionary jurisdiction represented a compromise between the States that supported obligatory jurisdiction, derived from the nationality of the victim or from coercion of a State, and those who opposed any sort of jurisdiction on these grounds.⁷³

Furthermore, Article 6 contains the important obligation for a State Party to establish its jurisdiction over the offenses in question in cases where the alleged offender is present in its territory and the State does not extradite him to any of the States Parties having established their jurisdiction in accordance with the aforementioned provisions.⁷⁴ This rule underlines the fact that the punishment of the offences covered by the SUA Convention is a common goal of the international community even though it does not contain a specific provision on universal jurisdiction.⁷⁵

In addition to the obligations to establish offenses, jurisdiction and punishment, and to prosecute or extradite, States Parties are obliged to take alleged offenders into custody, or secure their presence for trial, cooperate in preventative measures and exchange information and evidence needed in related criminal proceedings.⁷⁶

Article 8 permits the master of a ship to deliver to the authorities of any other State Party any person who he has reasonable grounds to believe has committed one of the offences set forth in Article 3 and all pertinent evidence in the master's possession.⁷⁷ Whenever practicable,

⁷² Plant, *supra* note 4, at 44.

⁷³ *Id.* at 46.

⁷⁴ *See id.* at 44.

⁷⁵ *See* Freestone, *supra* note 59, at 310.

⁷⁶ *See* Freestone, *supra* note 59, at 312 (describing the duties of the holding state).

⁷⁷ Kieserman, *supra* note 3, at 428; Plant, *supra* note 4, at 48.

the master is obliged to give the receiving State advance notification of his intention to deliver such person and the reasons therefore, possibly before entering that State's territorial sea. The receiving State must accept the delivery, except where it has grounds to consider that the Convention is not applicable to the acts giving rise to the delivery. It may then refuse to accept a delivery by presenting a statement of the reasons for refusal.⁷⁸ A receiving State that accepts the delivery of a person in this manner may in turn request that the flag State accept delivery of that person.⁷⁹

This provision was included in the SUA Convention in order to address those cases where the ship is navigating far from the flag State, flying a flag of convenience, or of a landlocked State, since few ships are equipped to keep alleged offenders on board for long periods of time.⁸⁰ This right of a master of a ship has been criticized as placing the potentially politically sensitive decision to choose the State of delivery in the hands of a private citizen.⁸¹ It seems, however, highly unlikely that the master of a vessel would take such a decision without previously consulting his competent authorities. In addition, the practical effect of that provision appears rather limited as it is difficult to imagine that the crew of a commercial vessel or a passenger ship would be in a position to overpower and detain terrorists.

The elaboration of the "Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf" was motivated by the possibility of a terrorist seizure of an oil or gas platform.⁸² The Protocol aims to provide a similar regime for fixed platforms located on the continental shelf. Similar to the Convention's treatment of vessels, most of the articles of the Convention are applied *mutatis mutandis*. A fixed platform is defined as "an artificial island, installation or structure permanently attached to the sea-bed for the purpose of exploration or exploitation of resources or for other economic

⁷⁸ See Plant, *supra* note 4, at 48.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*; see also Freestone, *supra* note 59, at 314–15.

⁸² See IMO, Adoption of the Final Act and Any Instruments, Recommendations and Resolutions Resulting From the Work of the Conference Protocol of 2005 to the Protocol for the Suppression of Unlawful Acts Against Safety of Fixed Platforms Located on the Continental Shelf, IMO Doc. LEG/CONF. 15/22 (Nov. 1, 2005) (available from the IMO upon request).

purposes.”⁸³ Military style or defense installations are thus *de facto* excluded.⁸⁴

The offenses listed in Article 2 of the Protocol correspond to those in Article 3 of the Convention when the offenses take place on board, or against a platform located on the continental shelf of a State Party, with the exception of the offenses relating to the endangerment of safe navigation.⁸⁵ In addition, Article 3 of the Protocol is identical *mutatis mutandis* to Article 6 of the Convention, except that the separate grounds for establishing obligatory jurisdiction based on registry of the ship and location within a State’s territory are replaced with a single ground for such jurisdiction based on the location of a platform on a State’s continental shelf.⁸⁶ Article 4 of the Protocol is similar to Article 9 of the SUA Convention and states that the rules of international law pertaining to fixed platforms on the continental shelf are not affected in any way by its provisions.⁸⁷

D. NEW FORMS OF TERRORISM AND THE UPDATING OF THE 1988 SUA CONVENTION AND *Protocol*⁸⁸

Since the SUA entered into effect in 1992, terrorism and the proliferation of weapons of mass destruction have increasingly plagued global security. In a number of resolutions, the United Nations General Assembly and the Security Council have emphasized the duty of States to prevent terrorism and deny all forms of support and safe haven to terrorists, as well as those supporting terrorism. They have also developed a link between terrorism and the proliferation of weapons of mass destruction.⁸⁹

⁸³ *Id.*

⁸⁴ See Freestone, *supra* note 59, at 315–16.

⁸⁵ Plant, *supra* note 4, at 52.

⁸⁶ *Id.*

⁸⁷ See Article 9 of the SUA Convention and Article 4 of the Protocol, *supra* notes 36 and 42.

⁸⁸ See generally Christopher Young, *Balancing Maritime Security and Freedom of Navigation on the High Seas: A Study of the Multilateral Negotiation Process in Action*, 24 U. Q.L.J. & R. 355 (2005) (containing a detailed description of the negotiating process).

⁸⁹ See Justin S.C. Mellor, *Missing the boat: The Legal and Practical Problems of the Prevention of Maritime Terrorism*, 18 AM. U. INT’L L. REV. 341, 367 (2002–2003); see also Wolfrum, *supra* note 21, at 664–65.

Transnational networks of terrorists have global reach and make common cause to pose a threat to all nations.⁹⁰ The traumatic events of September 11, 2001 have exposed the vulnerability of the global transport infrastructure both as a potential target for terrorist activity and a potential weapon of mass destruction.⁹¹ The shift towards containerization in the transportation of general cargo has reduced transparency in the shipping industry and greatly enhanced the potential risk of terrorist attack. The efficiency of containerized systems makes containers a potential security threat because the emphasis on speed means that cargo is rarely inspected.⁹² Actual and planned acts of terrorism against shipping have targeted vessels either in port or close to the shore.⁹³ Furthermore, the perils to commercial shipping have been heightened by an increased danger of possible coordinated efforts by terrorists and pirates, especially in important areas of international maritime transportation.⁹⁴ It is estimated that more than 90% of world trade is carried by sea. Thus, terrorist incidents, particularly when they occurred in vulnerable and strategic sea routes, had the potential for a severe disruption of international trade.⁹⁵

It was evident that the previous work of the IMO to combat terrorism at sea was insufficient to prevent this new kind of terrorist activity from posing a serious threat to the safety of international shipping.⁹⁶ The provisions of the SUA Convention and similar international agreements would not deter suicidal offenders to whom the possibility of criminal prosecution was probably of no concern.⁹⁷ In light of these considerations, in November 2001, the IMO Assembly adopted Resolution A.924(22) calling for “a review of the existing international legal and technical measures to prevent and suppress terrorist acts against

⁹⁰ The Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights for All*, ¶187 U.N. Doc. A/59/2005 (Mar. 21, 2005).

⁹¹ Balkin, *supra* note 5, at 16.

⁹² Mellor, *supra* note 89, at 348.

⁹³ Smarttraveler.gov, Shipping and Ports, http://www.smarttraveller.gov.au/zw-cgi/view/Advice/shippin_and_ports (last visited January 25, 2008).

⁹⁴ Sittnick, *supra* note 28, at 744; *see also* Erik Barrios, *Note: Casting a Wider Net: Addressing the Maritime Piracy Problem in Southeast Asia*, 28 B.C. INT'L & COMP. L. REV., Winter 2005, at 149, 151.

⁹⁵ Balkin, *supra* note 5, at 2.

⁹⁶ *Id.* at 16.

⁹⁷ *See* Wolfrum, *supra* note 21, at 660–61.

ships at sea and in port and to improve security aboard and ashore, in order to reduce any associated risk to passengers, crews and port personnel on board ships and in port areas and to the vessels and their cargoes".⁹⁸ The committees were given the task "to review, on a high priority basis, the instruments under their purview to determine whether they should be updated and whether there was a need to adopt other maritime security measures".⁹⁹

As a consequence, a Diplomatic Conference held in December 2002 adopted a series of wide-ranging new security measures.¹⁰⁰ Amendments were added to the 1974 Convention on the Safety of Life at Sea (SOLAS) addressing special measures to enhance maritime security. Additionally, the International Ship and Port Facility Security Code (ISPS) was adopted and made in part mandatory under the amended SOLAS Convention.¹⁰¹ This new comprehensive maritime security regime for international shipping entered into force on July 1, 2004.¹⁰²

The ISPS Code is a comprehensive set of measures designed to enhance the security of ships and port facilities. It contains detailed mandatory security requirements for governments, port authorities and the shipping companies as well as a series of non-mandatory guidelines regarding the implementation of these requirements. The Code covers both passenger ships and cargo ships, including tankers, weighing 500 gross tonnage or more as well as port facilities serving ships on international voyages and mobile offshore drilling units.¹⁰³

Whereas these instruments provide the technical framework for ensuring that ships and port facilities are rendered as safe as possible from terrorist attacks, they obviously do not guarantee that such attacks

⁹⁸ IMO, *Renewal of Measures and Procedures to Prevent Acts of Terrorism Which Threaten the Security of Passengers and Crews and the Safety of Ships*, IMO Res. A.924(22) (Nov. 20, 2001); see Balkin, *supra* note 5 at 16.

⁹⁹ *Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation*, Mar. 1, 1992, 1678 U.N.T.S. 222.

¹⁰⁰ Balkin, *supra* note 5, at 17.

¹⁰¹ The ISPS Code contains detailed security-related requirements for governments, port authorities and shipping companies in a mandatory section (Part A), together with a series of guidelines about how to meet these requirements in a second, non-mandatory section (Part B). Tiribelli, *supra* note 30, at 148 n.39; Phil DeCaro, *Safety Among Dragons: East Asia and Maritime Security*, 33 *TRANSP. L.J.* 227, 234 (2005–2006).

¹⁰² See Tiribelli, *supra* note 30, at 147.

¹⁰³ Balkin, *supra* note 5, at 17.

will not occur. In compliance with the aforementioned Resolution of the IMO Assembly, in October 2002, the Legal Committee began re-examining the provisions of the 1988 SUA Convention and Protocol on the basis of a draft text submitted by an open-ended "Correspondence Group" under the leadership of the United States.¹⁰⁴ The conclusion was that the categories of unlawful acts set forth in these legal instruments were too narrow and would require expansion in order to cope with modern day terrorist threats, including threats from biological, chemical and nuclear weapons or material.¹⁰⁵ It was further acknowledged that these instruments did not include provisions that would allow law enforcement officials to board foreign flag ships on the high seas, either to search for alleged terrorists or their weapons, or to render assistance to a vessel suspected of being under attack.¹⁰⁶ The drafting of such provisions became one of the main focuses of the revision exercise.¹⁰⁷ The drafting also sought to ensure that freedom of navigation, the right of innocent passage, and the basic principles of international law and the operation of international commercial shipping would not be jeopardized.¹⁰⁸

With respect to the question of whether the titles of the SUA Convention and Protocol should be amended to include the term "terrorist acts" it was considered that such an amendment would not be appropriate since the amending instruments were merely protocols to an existing Convention and Protocol. Although the treaties retained the term "unlawful acts," it was nevertheless understood that the object and purpose of these treaties was to deal with acts of terrorism and to provide a legal framework for the apprehension and prosecution of alleged terrorists.¹⁰⁹ Furthermore, in February 2005, the United Nations General Assembly adopted Resolution 59/24 inviting States "to participate in the review of those instruments by the IMO Legal Committee in order to

¹⁰⁴ See Balkin, *supra* note 5, at 25; see also Young, *supra* note 88, at 358; Mensah, *supra* note 35, at 640.

¹⁰⁵ Balkin, *supra* note 5, at 23.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ Tiribelli, *supra* note 30, at 147 n.36; see also Center for Nonproliferation Studies, *Convention for the Suppression of Unlawful Acts of Violence Against the Safety of Maritime Navigation (SUA Convention)*, <http://cns.miis.edu/pubs/inven/pdfs/maritime/pdf>.

¹⁰⁹ Balkin, *supra* note 5, at 24.

strengthen the means of combating such unlawful acts, including terrorist acts.”¹¹⁰ The General Assembly urged States “to take appropriate measures to ensure the effective implementation of the instruments in question, in particular through the adoption of legislation, where appropriate, aimed at ensuring that there is a proper framework for responses to incidents of armed robbery and terrorist acts at sea.”¹¹¹

The IMO Legal Committee completed its work amending the Protocols in April 2005. The amendments were adopted by consensus on October 14th, 2005¹¹² at the International Conference on the Revision of the SUA Treaties—one of the most politically charged conferences in the history of the Organization.¹¹³ By decision of the Conference, the original 1988 SUA Convention and Protocol, amended respectively by the two 2005 SUA Protocols, constitute single instruments now called the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 2005 (the 2005 SUA Convention) and of the Protocol for the Suppression of Unlawful Acts against the Safety of fixed Platforms located on the Continental Shelf, 2005 (2005 SUA Fixed Platforms Protocol).¹¹⁴

¹¹⁰ See G.A. Res. 59/24, ¶50, U.N. Doc. A/RES/59/24 (Nov. 17, 2004).

¹¹¹ *Id.*

¹¹² IMO, Adoption of the Final Act and Any Instruments, Recommendations and Resolutions Resulting From the Work of the Conference: Protocol of 2005 to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, IMO Doc. LEG/CONF.15/21 (Nov. 1, 2005) (available from the IMO upon request); IMO, Adoption of the Final Act and Any Instruments, Recommendations and Resolutions Resulting From the Work of the Conference: Protocol of 2005 to the Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, IMO Doc. LEG/CONF.15/22 (Nov. 1, 2005) (available from the IMO upon request). Three delegations—India, Pakistan, and Russia—however, made statements regarding provisions in the Protocol, such as concern over references to rights and responsibilities under the Non-Proliferation Treaties and their possible application to State Parties which are not also a party to these instruments in article 2bis and 3bis, and concern over the “dual use” provisions in article 3bis. See Young, *supra* note 88, at 384 n.145.

¹¹³ IMO, International Conference on the Revision of the SUA Treaties: Closing Statement by Secretary-General, As Delivered, (Oct. 14, 2005) (available from the IMO upon request).

¹¹⁴ Agustin Blanco-Bazán, *Suppressing Unlawful Acts: IMO Incursion in the Field of Criminal Law*, in LAW OF THE SEA, ENVIRONMENTAL LAW AND

In its resolution 61/222, adopted on March 14th, 2007,¹¹⁵ the General Assembly invited States to become parties to these instruments.¹¹⁶ The amended SUA Convention and its Protocol have thus far been signed by eighteen States. The amendments to the Convention will enter into force 90 days after twelve countries have become parties. The requirement for the entry into force of the amendments to the Protocol on Fixed Platforms is adherence by three countries.¹¹⁷ To date, the amendments to the Convention have been ratified by two States.¹¹⁸ The amended Protocol has not yet received any ratification. It will only become operational when the 2005 SUA Convention enters into force.¹¹⁹

E. THE PROTOCOLS OF 2005 TO THE 1988 SUA CONVENTION AND PROTOCOL

The core provisions of the 2005 Protocol to the 1988 SUA Convention are Article 3bis, which substantially enlarges the offenses covered by the Convention and Article 8bis, which relates to ship boarding and provides a mechanism through which the international community may enforce the provisions.¹²⁰ Because of the major changes brought about by the various amendments, it might have been more practical, from a legal standpoint, to draw up an entirely new Convention instead of inserting so many new substantive provisions into an existing text. However, adherence by States to these new legal rules will certainly be facilitated by their crafting onto an international instrument that has already been widely ratified.

In its preamble, the Protocol acknowledges that terrorist acts threaten international peace and security. There are references to the necessity of adopting provisions supplementary to those of the Convention in order to suppress additional terrorist acts of violence against the

SETTLEMENT OF DISPUTES 720 (Tafsir Malick Ndiaye & Rudiger Wolfrum eds., 2007).

¹¹⁵ G.A. Res. 61/222, ¶59, U.N. Doc. A/RES/61/221, (Mar. 16, 2007).

¹¹⁶ *Id.*

¹¹⁷ See Summary of Conventions, *supra* note 45.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ Caitlin A. Harrington, *Heightened Security: The need to Incorporate Articles 3bis(1)(A) and 8bis(5)(E) of the 2005 Draft SUA Protocol into Part VII of the United Nations Convention on the Law of the Sea*, 16 PAC. RIM L. & POL'Y J. 107, 122 (January, 2007).

safety and security of international maritime navigation.¹²¹ Once again, however, the Protocol does not contain a definition of terrorism, but instead a terrorist-purposes provision—article 3 bis (1)a - based on the definition found in the 1999 International Convention for the Suppression of the Financing of Terrorism.¹²² An act is thus criminalized under the Protocol when its purpose, by its nature or context, is to intimidate a population or to compel a Government or an international organization to do or to abstain from doing any act.¹²³

According to Article 3bis(1)a an offense within the meaning of the Convention is committed if a person for the purpose referred to unlawfully and intentionally:

(i) uses against or on a ship or discharging from a ship any explosive, radioactive material or BCN—biological, chemical, nuclear—weapon and other nuclear explosive devices—in a manner that causes or is likely to cause death or serious injury or damage;

(ii) discharges, from a ship, oil, liquefied natural gas, or other hazardous or noxious substance, in such quantity or concentration that causes or is likely to cause death or serious injury or damage;

(iii) uses a ship in a manner that causes death or serious injury or damage; or

(iv) threatens to commit any of these offences.¹²⁴

¹²¹ The International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, 2178 U.N.T.S. 38349, at Preamble, Dec. 9, 1999, 2178 U.N.T.S. 38349.

¹²² *Id.* at art. 2, para. 1(b). “Any...act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population or to compel a government or an international organization to do or to abstain from doing any act.” Wolfrum, *supra* note 21, at 650 n2.

¹²³ See The International Convention for the Suppression of the Financing of Terrorism, *supra* note 121, at art. 2, para. 1(b).

¹²⁴ IMO, Adoption of the Final Act and Any Instruments, Recommendations and Resolutions Resulting From the Work of the Conference: Protocol of 2005 to the Convention for the Suppression of Unlawful Acts Against the Safety of Mari-

Article 3bis(1)b focuses on the transportation of materials that could be used in a terrorist attack.¹²⁵ It prohibits the shipping of BCN weapons, source material not covered under the International Atomic Energy Agency's comprehensive safeguards agreement, other explosive or radioactive material to be used in a terrorist attack or such a threatened attack, and any equipment, materials or software or related technology that is intended to contribute to the design, manufacture or delivery of a BCN weapon.¹²⁶ The provision relating to dual-use goods may give rise to problems for determining whether such goods found on board a ship point to an offense under the Convention. In most situations, a seafarer would not have the requisite general knowledge and intent. Furthermore, a typical seafarer would not know what is in a container ordinarily sealed and loaded at port.¹²⁷

In addition, the transportation of nuclear material is not considered an offense if, subject to specific conditions, such item or material is transported to or from the territory of, or is otherwise transported under the control of, a State Party to the Treaty on the Non-Proliferation of Nuclear Weapons.¹²⁸ The fact that the Protocol further grants recognized nuclear weapon States a privileged position with respect to other States encountered opposition during the negotiations and may well prevent certain countries from adhering to the amended Convention in the future.¹²⁹

Under the new Protocol, a person also commits an offense within the meaning of the Convention if that person unlawfully and intentionally transports another person on board a ship knowing that the

time Navigation, 3bis (1)a IMO Doc. LEG/CONF.15/21 (Nov. 1, 2005) (available from the IMO upon request).

¹²⁵ Harrington, *supra* note 120, at 123.

¹²⁶ *Id.*

¹²⁷ Consideration of a Draft Protocol to the Convention For The Suppression of Unlawful Acts Against the Safety of Maritime Navigation; Comments on the Protections Afforded to the Shipping Industry, U.S.-ICFTU, Sept. 20, 2005, IMO Doc. LEG/CONF.15/14, No. 11.

¹²⁸ IMO, Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1998, IMO Doc., http://www.imo.org/Conventions/mainframe.asp?topic_id=259&doc_id=686; *see generally* Blanco-Bazán, *supra* note 114, at 719.

¹²⁹ *See* Balkin, *supra* note 5, at 23; International Convention for the Suppression of the Financing of Terrorism, *supra* note 122; *see generally* Harrington, *supra* note 120, at 123.

person has committed an act that constitutes an offense under the SUA Convention or an offense set forth in the nine anti-terrorism conventions listed in the Annex.¹³⁰ Thus, Article 3ter considerably broadens the scope of conduct relevant to the SUA Convention offenses.¹³¹ When adhering to the Protocol, if a State is not a party to a treaty listed in the Annex, it may declare that the treaty in question shall be deemed not to be included in that provision.

Article 3 quater makes it an offense to unlawfully and intentionally injure or kill any person in connection with the commission of any of the offenses in the Convention, to attempt to commit an offense, to participate as an accomplice, to organize or direct others to commit an offense, or to contribute to the commissioning of an offense.

An important innovation is the new article 8bis covering co-operation and procedures to be followed if a State Party desires to board a ship flying the flag of another State Party when the requesting State Party has reasonable grounds to suspect that the ship or a person on board the ship is, has been, or is about to be involved in, the commission of an offense under the Convention.¹³² However, before boarding, the express authorization and co-operation of the flag State is required. Such authorization may be given in general or ad hoc.¹³³ A flag State may further authorize the boarding State to exercise powers of, or in relation to arrest, detention, forfeiture and prosecution.¹³⁴

A State Party may notify the IMO Secretary-General that it would allow authorization to board and search a ship flying its flag, its cargo and persons on board if there is no response within four hours.¹³⁵ A State Party can also notify that it authorizes a State Party to board and

¹³⁰ See IMO, Background Information on the 2005 Protocols to the SUA Treaties, Oct. 10-14, 2005, IMO Doc., http://www.imo.org/Newsroom/mainframe.asp?topic_id=1018&doc_id=5334.

¹³¹ See International Convention for the Suppression of the Financing of Terrorism, *supra* note 122, at art. 2.

¹³² IMO, Revised Treaties to Address Unlawful Acts at Sea Adopted at International Conference, Diplomatic Conference on the Revision of the SUA Treaties, Oct. 10-14, 2005, http://www.imo.org/Newsroom/mainframe.asp?topic_id=1018&doc_id=5334.

¹³³ Wolfrum, Rüdiger, Fighting Terrorism at Sea: Options and Limitations under International Law (The 28th Doherty lecture), at 11, April 13, 2006, <http://www.itlos.org/news/statements/Wolfrum/Terrorism%20at%20Sea.28.04.06.pdf>.

¹³⁴ See *id.*

¹³⁵ *Id.*

search the ship, its cargo and persons on board, and to question the persons on board to determine if an offence has been, or is about to be, committed.¹³⁶ Finally, a State Party may grant the authorization to board a ship under its flag when requested.¹³⁷ During negotiations on the amendments no agreement could be reached that a flag State would automatically be deemed to have authorized a boarding when it fails to respond to a request by another State to board within a certain timeframe—as had been advocated by the United States.¹³⁸

In addition, Article 8bis includes important safeguards for innocent seafarers and carriers when a State Party takes measures against a ship, including boarding.¹³⁹ These safeguards include: not endangering the safety of life at sea; ensuring that all persons on board are treated in a manner which preserves human dignity and in keeping with human rights law; taking due account of safety and security of the ship and its cargo; ensuring that measures taken are environmentally sound; and taking reasonable efforts to avoid a ship being unduly detained or delayed.¹⁴⁰ When carrying out the authorized actions under this provision, the use of force is to be avoided except when necessary to ensure the safety of officials and persons on board, or where the officials are obstructed in the execution of these actions.¹⁴¹ Any use of force shall not exceed the minimum degree necessary and reasonable in the circumstances. These use of force provisions are consistent with current practice on the use of force in international law.¹⁴²

¹³⁶ IMO, Revised Treaties to Address Unlawful Acts at Sea Adopted at International Conference, *supra* note 132, at Boarding Provisions.

¹³⁷ *Id.*

¹³⁸ *See generally* The International Convention for the Suppression of the Financing of Terrorism, *supra* note 122.

¹³⁹ IMO, Revised Treaties to Address Unlawful Acts at Sea Adopted at International Conference, *supra* note 132, at Boarding Provisions.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *See* IMO, Consideration of: A Draft Protocol to the Convention for The Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 1988 and A Draft Protocol to the Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, 1988 Comments on Counter-Terrorism, Non-Proliferation and Boarding Provisions Submitted by the United States, IMO Doc. LEG/Conf.15/15, (Sept. 22, 2005), at ¶22.

States Parties shall also be liable for any damage, harm or loss attributable to them arising from measures taken pursuant to this article when the grounds for such measures prove to be unfounded, or unlawful, or exceed those reasonably required in light of available information.¹⁴³ This provision concerning liability of States for an illegal or unfounded boarding constitutes an important safeguard ensuring that vessels are not stopped and searched without reasonable grounds.¹⁴⁴

These boarding procedures do not change any rules of international law since¹⁴⁵ they are in conformity with the legal framework established by Articles 92 and 110 of the United Nations Convention on the Law of the Sea. Both articles allow flag States to enter international treaties granting a non-flag State the right to board their vessels on the high seas.¹⁴⁶ It has, however, been observed that these boarding provisions are more limited than those contained in the 1995 Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks.¹⁴⁷ That Agreement provides for the boarding and inspection of a fishing vessel on the high seas if there are sufficient grounds to believe that it has seriously violated the rules concerning fishing.¹⁴⁸ No ad hoc authorization by the flag State is required.¹⁴⁹ The protection of living resources is obviously regarded as more of a technical question, while the fight against terrorism is considered to have highly political overtones. Thus, flag States seem much more reluctant to agree to a limitation of sovereignty in that context.

The new Article 11bis states that, for the purposes of extradition, none of the offenses shall be regarded as a political offense or as an

¹⁴³ IMO, Adoption of the Final Act and Any Instruments, Recommendations and Resolutions Resulting From the Work of the Conference: Protocol of 2005 to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, IMO Doc. LEG/CONF.15/21 (Nov. 1, 2005) (available from the IMO upon request), at 8bis 10(b).

¹⁴⁴ Ambassador Dr. Georg Witschel, Lecture at the Virginia Maritime Security Conference, Max Planck Institute, *Mare Liberum* and Maritime Security: Contradiction or Complementarity? (May 25, 2007) (on file with author).

¹⁴⁵ See IMO, Consideration of: A Draft Protocol, *supra* note 142.

¹⁴⁶ Harrington, *supra* note 120, at 127; see also Comments on Counter-Terrorism, *supra* note 142.

¹⁴⁷ See Wolfrum, *supra* note 133, at 11–12.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

offense connected therewith or inspired by political motives.¹⁵⁰ This provision directly follows the model of the 1997 International Convention for the Suppression of Terrorist Bombings.¹⁵¹ According to the new Article 11ter, the obligation to extradite or afford mutual legal assistance need not apply if the requested State Party has substantial grounds for believing that the request for extradition has been made for the purpose of prosecuting or punishing a person on account of that person's race, religion, nationality, ethnic origin, political opinion or gender, or that compliance with the request would cause prejudice to that person's position for any of these reasons.¹⁵²

In line with the most recent United Nations anti-terrorism conventions, the Protocol also contains a savings clause—Article 2bis: nothing in the Convention shall affect other rights, obligations and responsibilities of States and individuals under international law, nor does it apply to the activities of armed forces during armed conflict or the activities undertaken by military forces of a State in the exercise of their official duties.¹⁵³

The amendments to the 1988 Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf reflect those in the 2005 Protocol to the SUA Convention.

A new Article 2bis broadens the range of offenses included in the Protocol. A person commits an offense if that person unlawfully and intentionally uses against or on a fixed platform any explosive, radioactive material or BCN weapon in a manner that causes or is likely to cause death or serious injury or damage; or discharges from a fixed platform, oil, liquefied natural gas, or other hazardous or noxious substance, in such quantity or concentration, that it causes or is likely to

¹⁵⁰ IMO, Revised Treaties to Address Unlawful Acts at Sea Adopted at International Conference, *supra* note 132, at Extradition.

¹⁵¹ See Balkin, *supra* note 5, at 30–31; International Convention for the Suppression of Terrorist Bombings, Dec. 15, 1997, 2149 U.N.T.S. 37517.

¹⁵² IMO, Revised Treaties to Address Unlawful Acts at Sea Adopted at International Conference, *supra* note 132, at Extradition.

¹⁵³ IMO, Adoption of the Final Act and Any Instruments, Recommendations and Resolutions Resulting From the Work of the Conference: Protocol of 2005 to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, IMO Doc. LEG/CONF.15/21 (Nov. 1, 2005) (available from the IMO upon request), at art. 2bis.

cause death or serious injury or damage; or threatens to commit any of these offenses when the purpose of the act, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act.¹⁵⁴ The new Article 2ter includes the offenses of unlawfully and intentionally injuring or killing any person in connection with the commission of any of the offenses, attempting to commit an offense, participating as an accomplice, organizing or directing others to commit an offense.¹⁵⁵

F. CONCLUSION

While piracy an is age-old phenomenon plaguing mankind, terrorism at sea has only manifested itself in recent times with the hijacking of the Italian cruise ship *Achille Lauro* in 1985 serving as a wake-up call. Because the rules of international law relating to piracy are not applicable *mutatis mutandis* to maritime terrorism, the international community has since been striving to adopt a series of legal as well as practical measures in order to prevent the recurrence of such a terrorist act in the future.

The 1988 SUA Convention and Protocol addressed the danger of terrorism at sea for the first time. The SUA constituted an important milestone in the development of an international anti-terrorist legislation. These instruments were a continuation of the “sectoral” approach of dealing with international terrorism. Additionally, these instruments represented an important extension of a cooperative law enforcement regime into a wholly new area¹⁵⁶ because they contained a finely balanced *aut dedere aut iudicare* scheme and gave preference to the specific enumeration of offenses over any attempt to define terrorism or terrorist acts.¹⁵⁷ They, however, faced the criticism that they were of a reactive rather than a preventative nature.¹⁵⁸

¹⁵⁴ IMO, Revised Treaties to Address Unlawful Acts at Sea Adopted at International Conference, *supra* note 132, at 2005 Protocol to the 1988 SUA Protocol.

¹⁵⁵ IMO, Revised Treaties to Address Unlawful Acts at Sea Adopted at International Conference, *supra* note 132, at 2005 Protocol to the 1988 SUA Protocol.

¹⁵⁶ See Freestone, *supra* note 59, at 316.

¹⁵⁷ Plant, *supra* note 4, at 56.

¹⁵⁸ See Mellor, *supra* note 89, at 384; Sittnick, *supra* note 28, at 760–61.

The terrorist attacks of September 11, 2001 were a gruesome demonstration that means of transport can be used as a weapon of mass destruction.¹⁵⁹ As a result, it became obvious that the 1988 SUA Convention and Protocol required revision and updating in order to be rendered more effective. The 2005 amendments to these instruments significantly expanded their scope by providing for an international treaty framework for combating and prosecuting individuals who use a ship as a weapon or means of committing a terrorist attack, or transport by ship terrorists or cargo intended for use in connection with weapons of mass destruction programs. Furthermore, there is a mechanism to facilitate the boarding in international waters of vessels suspected of engaging in these activities.¹⁶⁰ The freedom of navigation, therefore had to be restricted, but only with the explicit authorization of the flag State. Once these 2005 instruments are in force, it will no longer be possible for a State Party to refuse a request for extradition or for mutual legal assistance on the grounds that the offense may be characterized as politically inspired or motivated.¹⁶¹

The SUA Convention and its Protocol in their revised forms are complementary to the various practical measures put in place over the past years within the framework of the IMO. These new instruments are a major step in the right direction and a further reflection of a shift in mood of the international community and the perception that terrorism is an international crime that can only be tackled successfully by concerted international action.¹⁶²

As long as the 2005 SUA Convention and its Protocol have not entered into force, the Proliferation-Security-Initiative (PSI) announced by the United States in 2003,¹⁶³ which has since been endorsed by almost

¹⁵⁹ Nazery Khalid, *A Rush of Blood to the Head? Some Reflections on Post-9/11 Maritime Security Measures*, 21 *Ocean Yearbook* 505, 523.

¹⁶⁰ U.S. Dep't of State Fact Sheet, *Protocols to the United Nations Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA)* (Oct. 21, 2005), <http://www.state.gov/t/isn/rls/fs/58322.htm>.

¹⁶¹ Balkin, *supra* note 5, at 31.

¹⁶² *Id.*

¹⁶³ President George W. Bush, *Remarks to the People of Poland, Krakow, Poland* (May 31, 2003); *see also* Daniel H. Joyner, *The Proliferation Security Initiative: Nonproliferation, Counterproliferation, and International Law*, 30 *YALE J. INT'L L.* 507, 508 (2005).

90 nations,¹⁶⁴ will remain the most important tool to fight the proliferation of weapons of mass destruction using maritime transportation.¹⁶⁵ The PSI is a multilateral initiative intended to prevent the proliferation of weapons of mass destruction and the materials used to construct them. It explicitly contemplates boarding ships and, if necessary, using armed forces to seize weapons and the materials used to make them.¹⁶⁶ The PSI is a political alliance and not based on an international agreement.¹⁶⁷ The United States has further negotiated a number of bilateral PSI ship boarding agreements, particularly with countries having the largest ship registries¹⁶⁸ in the world, whose regulations contain more stringent restrictions of the flag State principle in connection with ship boarding than the revised SUA Convention.¹⁶⁹

Taking into account the changing nature of the terrorist threat, which has grown more urgent in recent years, international law is slowly adapting to become a more efficient means for fighting terrorism at sea. The interdependent nature of the world's economies also means that a successful terrorist attack on the international transport system might well trigger a chain reaction that could affect the entire world.¹⁷⁰ Nevertheless, whatever the legal and practical measures devised by the international community in order to combat maritime terrorism may be, no one can ever say with certainty that these will be sufficient or effective to deter a terrorist attack.¹⁷¹ These measures could only prove their true value in the face of a planned, imminent or actual attack. No one, however, would wish that we have to face that test.

¹⁶⁴ Hearing on the Law of the Sea Convention Before the S. Comm. On Foreign Relations, 110th Cong. (2007) (statement of Admiral Patrick M. Walsh, U.S. Navy Vice Chief of Naval Operations).

¹⁶⁵ Ambassador Dr. Georg Witschel, *supra* note 144, at 9.

¹⁶⁶ Mark R. Shulman, *The Proliferation Security Initiative and the Evolution of the Law on the Use of Force*, 28 HOUS. J. INT'L L. 774, 774–75 (2006).

¹⁶⁷ Ambassador Dr. Georg Witschel, *supra* note 144, at 9.

¹⁶⁸ Wade Boese, *Proliferation Security Initiative: A Piece of the Arms Control Puzzle*, 6 GEO. J. INT'L. AFF. 61, 64 (2005); Samuel E. Logan, *The Proliferation Security Initiative: Navigating the Legal Challenges*, 14 J. TRANSNAT'L L. & POL'Y 253, 273 (2004–2005); *see also* Chatham House, *Ship-Boarding: An Effective Measure Against Terrorism and WMD Proliferation?*, www.Chathamhouse.org.uk/publication/papers/download/-/id/318/file/3954_ilp241105.doc.

¹⁶⁹ *See* Shulman, *supra* note 166, at 813.

¹⁷⁰ *See* Balkin, *supra* note 5, at 34.

¹⁷¹ *See* Khalid, *supra* note 159.

