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## Towards a European maritime security policy

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# Strategic Insights

## Global Maritime Security Analysis

No 10 - 2008



USCGC Bertholf during sea trials 8 February 2008 (USCG)

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## Introduction

Karsten von Hoesslin, Senior Analyst & Editor, Risk Intelligence

Nowhere is the subject of Maritime Security a more prevalent issue than in the United States. In his editorial, Dr. Robbin Laird examines the future of American thinking with respect to Homeland Security in light of the upcoming election where a series of scenarios reveal the interconnectedness of America's approach to security over all.

2006 & 2007 were unique years for the European Union in that it began to debate maritime security seriously and attempt to create a more cohesive stance for its Member States. The release of the Green Paper and creation of FRONTEX are two examples of Europe's desire to implement Europe-wide measures and participate in international proposals. Researcher Mattias Wengelin from the University of Lund addresses these issues in the feature article.

Dr. Peter Chalk from the Rand Corporation examines in detail the ongoing civil war in Sri Lanka and what role the Liberation Tigers of Tamil Eelam (LTTE)'s Sea Wing plays in the conflict. Despite recent defeats, the LTTE continue to prove that their mastery of the sea as both battleground and sea lane for logistics and re-supply should not be underestimated.

Finally, World Maritime University Associate Dean Patrick Donner sheds light on the complicated subject of Marine Insurance and more specifically War Risk Insurance. The article examines the act of piracy and its recent relationship with War Risk Insurance weighing both the pros and cons of its inclusion sighting contemporary examples.

## US Maritime Security Policy Revisited

Robbin Laird, Partner, Risk Intelligence

As the Bush Administration winds down with the certainty of a new administration coming to office in mid 2009, it is an ideal time to evaluate the immediate past and the way ahead for U.S. maritime security policy. The Bush Administration set in motion the first maritime security strategy for the United States. The Administration laid out a comprehensive and ambitious effort to address a core issue affecting the global economy, namely, to more effectively care for supply chain security, protection of maritime sea lanes, and to more comprehensively partner with the private sector and global partners.

Although a positive start, the policy is not being put in place rapidly or extensively enough. The U.S. maritime security effort is at a critical inflection point. A brief examination of the dynamics impeding the implementation of the new policy is warranted, especially in light of a new administration coming to power. Will the policy receive a new impulse and move forward or will new policy agendas come to supersede the effort already begun? The sources of failure to move out rapidly on a new maritime security policy are five-fold. Together these challenges suggest that a new start will have to be made when a new Administration arrives and shapes its own maritime and homeland security policies.

The first challenge has been simply the cost and distraction of the Iraq War. The entire cost of a year's funding effort for maritime security would constitute something between a week to a month's worth of Iraq War funding. Beyond the monetary cost, there is the bureaucratic cost of an almost total focus on the Middle East and Iraq. As a result, it is increasingly difficult to get official Washington, whether Republican or Democratic, to focus on "marginal" issues such as maritime security.

The second challenge has been the implosion of the US Coast Guard (USCG) and its re-capitalization efforts. The Deepwater acquisition effort was designed to put in place a "system-of-systems" approach to USCG capability. After 9/11, the Deepwater effort was re-focused on connecting the "system-of-systems" approach to crafting the lead agency role for the USCG in the US maritime security strategy and effort. With the crisis in Deepwater acquisition, the USCG has reverted to a platform or single asset acquisition strategy. Not only does this change completely a

systems approach, the need to compete asset by asset will slow down dramatically and already delayed acquisition strategy. The danger is that the USCG modernization strategy will become a Potemkin PowerPoint fleet. And with the shift away from systems towards platform by platform acquisition, the USCG is reemphasizing the traditional missions, such as search and rescue, at the expense of focusing on reaching out to sea to provide maritime security defence of the nation.



USCGC Bertholf

(Photo: USCG)

For the USCG to play a lead role in maritime security, the service needs to evolve its effective deepwater capability, ranging from inland waterways to the sea approaches to the United States. To provide for the command and control as well as the digital data to operate such an enterprise requires integration of the USCG with commercial, law enforcement and military authorities of the United States and its partners. The Deepwater crisis as currently being played out, threatens to overwhelm the American ability to integrate assets to provide for maritime security capability.

The third challenge is the collapsing US Navy shipbuilding program. The USN and the USCG envisaged building a national fleet to provide for collaborative maritime security missions. With the crisis in naval shipbuilding associated with the USN littoral combat ships and with the USCG patrol and cutter deepwater ships, the national fleet (of combined USCG and US Navy assets) is devolving into a notional fleet. Rather than a fully funded littoral combat system fleet (envisaged original at 1/5 of the entire USN surface fleet or a fully deployed patrol and cutter fleet, both the USN and the USCG are unable to build ships

adequately or on time. Significant shortfalls in global fleet presence are the inevitable result.

The fourth challenge is the inability of the US government to embrace more effectively the commercial aspect of the maritime security enterprise. For maritime security to become optimized, a core partnership between the private and public sectors is essential. Because the US has so little commercial shipping interests, this means the US must collaborate globally to achieve even a national result. The US by default must demonstrate an ability to work with the global partnerships with the global shipping companies and flag states in order to have any success at all in maritime security. The US has narrowed this effort to a militarized notion of maritime domain awareness. The US government is confusing military intelligence with the information necessary to provide for the basic information which shippers and stakeholders need in order to implement a global maritime security regime. Commercial data as well as sharable information among partners is more important than hermetically sealed classified information.



USCG dog team

(Photo: USCG)

The fifth challenge is the lingering inability to work with global partners. This problem can be divided into the allied and competitor working agenda issues. With the allies, the challenge is to more effectively reinforce the core international organizations and institutions as well as to reinforce bilateral engagements that expand the law enforcement effort grounded in sound international standards and norms. With regard to competitors such as China, the challenge is to provide a more nuanced ability to both compete and cooperate with key maritime partners. The Chinese are pursuing *co-opetition* with the United States, whereby commercial interests are commingled with the rise of Chinese global power. The PRC is both a core partner and competitor for the United States. Managing simultaneous global

*cooperation and competition* is a core requirement of a successful maritime security regime. The next Administration can reinvigorate the Bush Administration's approach, craft a new alternative, or reduce the salience of the entire effort.

### **Scenario 1: Reinvigorating the Effort**

Here a projected wind down of the US engagement in the Iraq War will provide an opportunity to rebalance resources from global deployments to global engagement in the security domain. Money shall have to be put into the effort to source the USN and the USCG as well as for the two services to reorient themselves to shift from a notional to a national fleet. Moving beyond the military dimension more effectively to embrace the commercial domain is a requisite for success with the law enforcement dimension equally reinvigorated.

### **Scenario 2: Crafting a New Alternative**

The USCG may simply be marketing itself out of an extended maritime security enterprise. The crisis in US shipbuilding can be resolved by embracing the global ship, modular frigates, and the USN given the core maritime security mission beyond the ports. The USCG would return to the Department of Transportation and the Department of Homeland Security redesigned along with the Department of Defense. The 1947 national security act would be revisited and new joint capabilities would be generated, including those in the maritime security domain.

### **Scenario 3: Reducing the Salience of the Effort**

The next Administration could simply denounce the "militarism" of the Bush Administration and wish to return to a less confrontational relationship with the world. Contentious efforts to extend US sovereignty with the global maritime commons would be ended in favour of international regulation, rules and means. The inability of these regimes to be enforced effectively with existing capabilities would be overlooked in a desire to normalize relations with the world.

Although there is certainly uncertainty with regard to the next administration, two key points can be underscored: First, the close linkage between the Deepwater program generated in the late 1990s by the USCG and the enhanced role of the USCG as the lead agency in an expanded maritime security effort is broken. This means that the USCG is focusing upon platform modernization without reference to its broader maritime security mission. As a result, the USCG is clearly at risk as a new administration comes to power. The current Commandant's term of office ends in early

2010 and the new administration will shape a new mandate for the next Commandant.

Second, if the next administration is Democratic as is widely expected, the new administration would seek sharp discontinuity with the Bush Administration. The most recent historical analogy to this transition is that from Carter to Regan. When Reagan became President all of the political appointees of the Carter Administration were asked to vacate their offices prior to a new staff being appointed. It was considered better to have no continuity than to have the remnants of the Carter Administration at hand. This would mean that the maritime security approach put in place faces distinct prospects of discontinuity as well.

Here there are three likely trend lines: First, the Department of Homeland Security could be stripped of its extended security efforts, with those elements placed in the Department of Defense. The focus would be upon crafting a law enforcement agency with an immigration, customs, border and ports emphasis. Processing data and promoting interoperability in the data for homeland law enforcement would be prioritized at the expense of a global security effort. Second, the Department of the Navy is likely to be in the midst of continuing shipbuilding crisis. Unable to deliver the overly complex new warships which it

currently has ordered will provide the temptation for the new Secretary of the Navy to take over the national security cutters and other elements of the USCG which are designed for extended maritime security. The USN would subsume littoral and maritime security missions under a single effort to provide for close-in security operations. Third, the USCG could be moved into the Department of Transportation and become part of a national infrastructure defence effort. Here the USCG's emphasis on search and rescue missions, inland waterways and port security would be prioritized within a domestic regime with reduced international outreach.

In short, the maritime security effort crafted under the Bush Administration had barely begun before it may be forgotten. But the global threats and dynamics remain which generate the need for an effective maritime security regime. It may therefore lie with Europe and Asia to lead the effort. Because both Europe and Asia are building commercial and military ships and remain as the location of the key global maritime shipping lines, the two regions are thus central to any effective maritime security effort. But what is required is for key Asian nations to shape a leadership role within which European nations and the community can participate as effective partners.

**Dr Robbin Laird**

Dr Robbin Laird is Partner at Risk Intelligence and President and owner of ICSA and works with national security strategic issues with the U.S and European governments and with key aerospace and defence firms. He has a PhD from Columbia University.

# Towards a European Maritime Security Policy?

Mattias Wengelin, Maritime Safety & Security Researcher, Lund University

## Introduction

In the summer of 2006 the Commission of the European Communities presented their Green Paper "Towards a future Maritime Policy for the Union: A European vision for the oceans and seas". In October 2007, after a period of consultation, the Commission presented a proposal to the Council and Parliament suggesting a way forward. During this consultation process a new specific programme was launched to increase the efforts in protecting people and critical infrastructure against terrorist attacks and other security related incidents, the 2005/65/EC Directive on enhancing port security has been added to the already implemented ISPS code and the 7<sup>th</sup> Framework Programme has published its first joint Call between ICT and Security Themes on Critical Infrastructure Protection. The border protection agency FRONTEX has entered the scene with several successful operations by decreasing the flow of illegal entries into the Union and tightening the border control in some areas in the Mediterranean Sea and the Atlantic. Even if the FRONTEX core objective is to cover a field wider than that of the maritime domain, most of its initial work has been focused on sea borders.

In many areas related to maritime security there is a significant amount of planning in progress. However, the heterogeneity of actions and actors suggest that there is no structured thought behind the Union's initiatives and therefore, are not driven by a clear strategy. The first step towards a policy are being taken through different channels initiated by the Commission but without being clearly targeted and monitored, which is mainly due to the lack of a specialized agency handling maritime security issues including policy making. This article, however, argues that there may be possible solutions to this dilemma.

This article shall take a short tour through the history of the maritime security domain from a European perspective, highlight some of the efforts to create a maritime security policy and examine its rationale. It will further elaborate on the potential actors in and around the maritime security field.

## Maritime security

1985 was in many respects a turbulent year. Several airplane accidents were accounted for in addition to the hijacking of TWA Flight 847 by

members of Hezbollah. On 7 October, an important event occurred which set the scene for the need for a maritime security framework. The Achille Lauro was an Italian cruise ship en route from Alexandria to Port Said when members of the Palestine Liberation Front took control of the ship and its passengers, demanding the release of 50 Palestinians in Israeli prisons. Being one of the first maritime related politically driven incidents, the perception of terrorist threats towards the maritime trade was significantly altered. Following the blueprint of airplane hijackings, using passengers for political purposes, the hijackers from the Palestine Liberation Front planted the seed for decades to come. This act was further enunciated by the killing of one of the passengers on the Achille Lauro, an American citizen.



M.S. Achille Lauro

Slightly more than one month later an IMO Maritime Security Committee Assembly meeting took place, and with the Achille Lauro affair fresh on the IMO agenda, the Resolution A.584(14) was adopted. The resolution in itself is a one page statement with four important points:

*"The assembly,*

- 1. CALLS UPON all Government, port authorities and administrations, shipowners, ship operators, shipmasters and crews to take, as soon as possible, steps to review and, as necessary, strengthen port and on-board security;*
- 2. DIRECTS the Maritime Safety Committee, in co-operation with other committees, as required, to develop, on a priority basis, detailed and practical technical measures, including both shoreside and shipboard measures, which may be employed by Governments, port authorities and*

*administrations, shipowners, ship operators, shipmasters and crews to ensure the security of passengers and crews on board ships;*

3. *INVITES the Maritime Safety Committee to take note of the work of the International Civil Aviation Organization in the development of standards and recommended practices for airport and aircraft security;*
4. *AUTHORIZES the Maritime Safety Committee to request the Secretary General to Issue a circular containing information on the measures developed by the Committee to Governments, organizations concerned and interested parties for their consideration and adoption.”*

In light of the issue of piracy and armed robbery against ships coming to the forefront, a new dimension was added to the maritime security domain – to ensure the security of passengers and crews on board. This appeared to be a direct answer to the Achille Lauro incident. The assembly hereby addressed the Maritime Safety Committee (MSC), directing them to develop detailed and practical technical measures involving both ships as well as shore-side facilities. These measures were developed and approved by the MSC at its fifty-third session and subsequently circulated in MSC/Circ.443.

Having since become a forgotten problem, focus turned back to the maritime security arena after the September 11 Terrorist Attacks (9/11) when the international community started the quest of enhancing maritime security to combat possible terrorist attacks on the maritime supply chain. Circular 443 once again came into view at the start of the International Ship & Port Facility Security Code (ISPS) development. The circular contains three major sections: General Provisions; Port Facility Security Plan; and Ship Security Plan. The content is not mandatory but “should be taken into consideration and adoption” by governments, organisations concerned and interested parties.

When analyzing the different components in the circular they can almost all be found in the ISPS code- many to the letter. For the Port facility plan 13 out of 15 paragraphs in the circular have found their way straight into the ISPS code, for the Ship security plan, it is identical with 18 out of 18 points matching. This conforms well to the proposals in a US document presented at the start of the development of the ISPS code (MSC75/ISWG/5/7) regarding the ship and port security plans, including the responsibilities for Port facility and Ship security officers. The

obvious weakness, not being mandatory, is approached in the US proposal that suggests that the circular is rewritten and made compulsory.

Having identified the origin of the main body of the ISPS code through historic documents it is time to take a closer look at the actual development process, or “the chaotic 13 months” as Mr Johan Franson from the Swedish Maritime Administration (SMA) defined it during an interview.



Port of Hamburg

When analyzing this process some issues must be kept in mind: First of all in light of the doctrine being conceived so close to 9-11, there was a high degree of sympathy towards the United States on behalf of the international community; Second, the extremely tight timeframe between the start of the development process up to the diplomatic conference where the final code was to be presented; and finally, the parallel development of the US Maritime Transportation Security Act (MTSA) as well as a high degree of political pressure from individual countries, especially the United States. The delegate appointed to lead the performance of this delicate balancing act was Mr Frank Wall from the United Kingdom.

Over all, the backbone of the process was built on 6 different meetings.

1. 22<sup>nd</sup> Assembly meeting, 19-30 November 2001
2. MSC 75/ISWG, 11-15 February 2002
3. MSC 75, 15-24 May 2002
4. MSC 76/ISWG, 9-13 September 2002
5. MSC 76, 2-13 December 2002
6. Diplomatic Conference on Maritime Security, 9-13 December 2002



The 22<sup>nd</sup> Assembly meeting merely constituted the process by defining the problem and deciding on and setting the date for the February Inter-Sessional Working Group meeting (ISWG). The new code was to be integrated as a new chapter in SOLAS. However, with a strong emphasis on Port Security this was heavily challenged. Having SOLAS moving ashore was an oddity questioned by many. By moving back to the Circ. 443, adopting and adapting the definition "Port Facility" and adding the "Ship-Port Interface" dimension (supported by the fact that SOLAS *do* have some regulations on land based facilities already), the dispute was neutralized. By decreasing the level of details in what could be seen as sensitive areas, "unnecessary" arguments were avoided and thereby the momentum could be maintained. Another strategy was to use existing material as much as possible (such as in Circ. 443) due to the fact that they already were official documents and previously acknowledged by the MSC. The very pragmatic view of Mr Frank Wall is best described by his own statement; "Better to have an imperfect code than no code at all...".

As previously mentioned the political pressure was substantial. The drafting of the code became a tug of war between differing interests, mainly between the European delegates and the delegates from the US. An example was the discussions on compliance control of ships where the difference in organization and culture created tensions between the two camps. The working-group handling this question was initially dominated by the US but more EU members were called to create a balance. Another strategy to avoid a collision of interests with the US was to follow the parallel development of the US Maritime Transport Security Act (MTSA). This process had a head start and the ISPS development followed in its wake, enabling the ISPS authors to avoid obvious clashes of interest in definitions. The only remaining difference between the ISPS and MTSA can be found in the definitions of Port and Port Facility where the ISPS code defines the Port Facility as the ship-shore interface but where the MTSA Port Facility has a wider meaning and can consist of several ship-shore interface points.

### **Enhancing port security and building a policy**

After having been dragged through the ISPS process by US interests and after having seen the Suppression of Unlawful Acts (SUA) Convention being revised through what has been described as a US "hostile takeover" of the IMO Legal Committee and the European Commission decided to act pre-emptively by initializing and

concluding its own Directive on enhanced port security. This task was already underway by the IMO and the ILO but the European Commission characterized it as slow and inefficient and wanted to take the initiative. Based on the philosophy of the ISPS code, the new directive expanded the port definition beyond the port-ship interface (port facility). The same actions had to be taken for the expanded port and for the port facility with respect to a designated authority, security assessments and security plans. For ports where the port facility and the new port definition coincide, the ISPS code overrules the new directive.

Having been constantly behind in the development of maritime security initiatives and regulations, the European Commission also launched a process to create an integrated maritime policy, "Green Paper - Towards a future Maritime Policy for the Union: A European vision for the oceans and seas" (COM(2006) 275). The result of this work was presented in mid October 2007 in "An Integrated Maritime Policy for the European Union - "The Blue Book"" (COM(2007) 575 Final). The integrated approach leaned heavily on promoting growth and environmental sustainability in the maritime sector where the security related parts of the document were surprisingly downplayed, even though it was supported by a thorough background paper on maritime safety and security. A reason for this may be that maritime security is a responsibility for the European Commission and as such just one component in a wider perspective of security issues.

The Commission simultaneously seems to be ready to dismantle much of the internal maritime security within the Union by moving to reduce controls on sea-going cargo within the internal market. The reason for this is to put the level of control in balance with that of road carriers and thus creating a "real internal market for maritime transports". This is mainly a question of customs administration and control but would have an impact only if other types of control also treated intra European traffic as "national". One measure to increase the overall control of the quality of customs handling has been to introduce a new methodology by certifying "Authorised Economic Operators (AEO)". Resembling the US initiative C-TPAT, this has been made as a part of the European Security Programme. AEO status can be applied for by an operator that meets the common criteria relating to the operators' control systems, financial solvency and compliance record. Some emphasis is put onto traceability and security assessments of the operator and its

place in the flow of goods. When meeting the criteria (and having been granted the AEO status) the operator will get easier handling and less paperwork in return. For shipping companies this can be problematic as it is not always known whether all customers are certified and this problem has rendered the Commission to take specific action to provide information about AEO certified organisations. The result of this measure, aiming at increasing security in the European flow of goods as well as decreasing the administrative burden of both operators and customs authorities, could however, be a measure that increases the difference between sea and land going goods.

How this relates to the international regulative body remains a key issue as the details of these ideas are currently being worked on by the Maritime Affairs commissioner Joe Borg.

After the Erika disaster the European Maritime Safety Agency (EMSA) was established to focus on sea safety, maritime accidents and maritime pollution. As an effect of the new regulations regarding maritime security, EMSA has a limited responsibility in delivering technical assistance to the Commission and to partake in, on request, security related inspections performed by the Commission. However, this fragmentation of competence and responsibility is not providing the Union with a consistent framework for policy making. Despite the Commission's shortcomings, maritime security has become an issue within the commercial realm and is now driven by the market force.

### **European Research Programmes or Converting European Military Industry**

Particularly in the post 9-11 era, terrorist attacks have been high on the European agenda. After a period of number-crunching on behalf of the EU bureaucracy, the following strategies were presented in 2004: The revised European Union Plan of Action on Combating Terrorism was adopted in the summer of 2004 with a focus on prevention and consequence management of terrorism attacks and the protection of critical infrastructure. Later in the same year the European Council adopted the revised European Union Solidarity Programme on the Consequences of Terrorist Threats and Attacks. During 2005 a European Programme for Critical Infrastructure protection was launched hand in hand with a new Counter Terrorism Strategy.

In 2007, covering the period 2007 – 2013, the Specific Programme 'Prevention, Preparedness

and Consequence Management of Terrorism and other Security related risks' was established by the Council with the overall objective to reduce risks linked with terrorism. The programme is particularly aimed at:

- a) Stimulating, promoting, and supporting risk assessments on critical infrastructure, in order to upgrade security;
- b) Stimulating, promoting, and supporting the development of methodologies for the protection of critical infrastructure, in particular risk assessment methodologies;
- c) Promoting and supporting shared operational measures to improve security in cross-border supply chains, provided that the rules of competition within the internal market are not distorted;
- d) Promoting and supporting the development of security standards, and an exchange of know-how and experience on protection of people and critical infrastructure;
- e) Promoting and supporting Community wide coordination and cooperation on protection of critical infrastructure.

With a significant focus on critical infrastructure and a particular focus on cross-border supply chains, it is logical to envisage a focus on air and sea ports. Furthermore this programme seeks to synergize consistency and complementarities with other Union and Commission instruments, such as the Seventh Framework Programme for Research, Technological Development and Demonstration Activities (FP7). Further examination into the FP7 reveals a request for the military/security industry to join in the fight against terrorism. With a decreasing conventional military market, especially for regional European actors, this could be a new market niche to explore and many industrial clusters are applying for research funds. In Sweden at least two applications related to port security, sensors and systems has been developed and submitted.

The objectives of the Security theme in the FP7 are:

- to develop technologies and knowledge needed to ensure the security of citizens from threats such as terrorism and (organised) crime, natural disasters and industrial

accidents while respecting fundamental human rights;

- to ensure optimal and concerted use of available and evolving technologies to the benefit of civil European security;

- to stimulate the cooperation of providers and users for civil security solutions; improving the competitiveness of the European security industry and delivering mission-oriented results to reduce security gaps

Emphasis will be given to the following activities:

- **Increasing the security of citizens** - technology solutions for civil protection, bio-security, protection against crime and terrorism;
- **Increasing the security of infrastructures and utilities** - examining and securing infrastructures in areas such as ICT, transport, energy and services in the financial and administrative domain;
- **Intelligent surveillance and border security** - technologies, equipment, tools and methods for protecting Europe's border controls such as land and coastal borders;
- **Restoring security and safety in case of crisis** - technologies and communication, coordination in support of civil, humanitarian and rescue tasks;
- **Improving security systems integration, interconnectivity and interoperability** - information gathering for civil security, protection of confidentiality and traceability of transactions;
- **Security and society** - socio-economic, political and cultural aspects of security, ethics and values, acceptance of security solutions, social environment and perceptions of security;
- **Security research coordination and structuring** - coordination between European and international security research efforts in the areas of civil, security and defence research.

These initiatives regarding specific programs and research could reinvigorate the maritime security debate in Europe. However, this time it will be led by the industry, providing new technological systems to assist the maritime security actors in achieving a higher level of security, rather than by government authorities. One problem the industry will face is combining the technical innovations and systems with a sound business case that is attractive enough to create a market that is commercially viable. This problem was clearly defined in the conclusions reached at the European Conference on Security Research in Vienna February 2006:

22) However, it was felt that the supply side, already aware of its benefits from a closer and more balanced co-operation, is pushing more strongly towards its opportunities of establishing new markets than the demand side. But only if the output of the supply side – knowledge or technology – is eventually applied by the relevant end users and transformed into available capabilities, can the two objectives be met.

(23) To ensure that end users “get what they want”, they need to be involved in the strategy definition phase of research programmes and in research projects. To ensure the take-up of research results, a wide range of persons from

operative end users to financial administrators and political players have to be addressed. They eventually decide about factual investments in security solutions. Financing increased security enhancing capabilities is expensive and often difficult to justify in public, and it competes with investments in other areas.

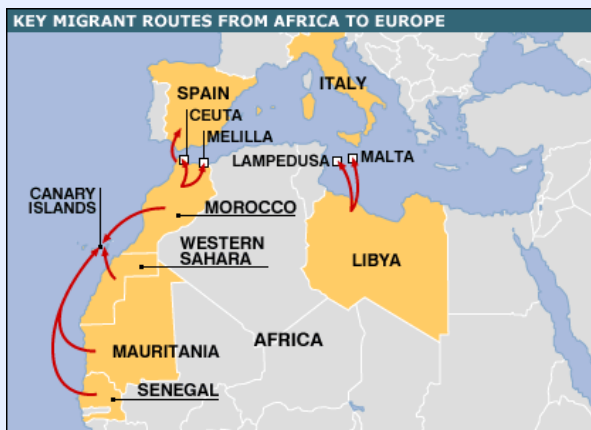
24) Thus, it was one of the lessons learned that security research should not be dealt with as an isolated subject but that the development of full business models involving all relevant stakeholders was one of the critical issues. Many of the markets for security solutions are in the public domain or take the shape of large infrastructures which are often private/privatized. Public procurement decision making and financing mechanisms and the awareness building and training of the public user side needs to be taken into account as well. More user dialogue and market development dialogue will have to follow.

Pointing out the importance of the participation of all relevant stakeholders the conference conclusions touch upon a string of highly relevant questions: In the maritime security sector, who are “the operative end users, the financial administrators and the political players”? Who are the policy makers?

## FRONTEX – a Cat among Pigeons

Established in early 2005 through COUNCIL REGULATION (EC) No 2007/2004 FRONTEX was the European Union's answer in increased awareness of terrorism and the increasing problem with illegal movements over borders, especially the eastern and southern maritime sectors. When defining its tasks it covered the following topics:

- Carrying out risk analysis,
- Coordination of operational cooperation between Member States in the field of management of external borders,
- Assistance to Member States in the training of national border guards, including the establishment of common training standards,
- Following up the development of research relevant for the control and surveillance of external borders,
- Assistance to Member States in circumstances requiring increased technical and operational assistance at external borders,
- Providing Member States with the necessary support in organizing joint return operations



Key Migrant routes from Africa to Europe (BBC)

Although FRONTEX was envisaged as an administrative, assisting, coordinating and supporting agency, it has gradually become an operative unit. Early in the regulation the EU clearly states that border control and surveillance is a national responsibility:

“4) The responsibility for the control and surveillance of external borders lies with the Member states. The Agency should facilitate the application of existing and future Community measures relating to the management of external borders by ensuring the coordination of Member States' actions in the implementation of those measures.”

However, FRONTEX is given the possibility to act operationally and to launch initiatives in cooperation with member states. Chapter 2, article 3 says:

“The Agency may itself, and in agreement with the Member State(s) concerned, launch initiatives for joint operations and pilot projects in cooperation with Member States. It may also decide to put its technical equipment at the disposal of Member States participating in the joint operations or pilot projects.”

Being such a young agency within the EU it is interesting to note that the track record of FRONTEX is already impressive. Having conducted a number of joint operations, especially in the Mediterranean Sea and the Atlantic, it has achieved a positive reputation. These operations are described as FRONTEX operations, and requests have been put forward by individual member states, such as Malta, for FRONTEX to continue this work on securing sea borders.

Remembering that FRONTEX initially was established as a management and coordination agency without any fixed assets of its own, it is surprising that the European Commission requested permanent assets for the agency so quickly. 19 of the 29 countries approached initially responded and in total FRONTEX has been promised access to 21 surveillance planes, 27 helicopters and 116 patrol boats. The Commission decided not to name the countries adding to FRONTEX assets but acknowledged Finland, Germany, Spain and Italy as the most dedicated. These resources have become the backbone of what is called the “FRONTEX toolbox”.

Having the management and coordinative competence and now a toolbox of its own, the next step was to request the set up of its own “Rapid Border Intervention Teams” (RABITS). With limited notice, RABITS would be able to assist member states during the calm season where the seas would host elevated illegal migration movements. The RABITS are intended to support the member state according to the proposal in COM(2006) 401:

“As regards checks of persons at the external borders:

- a) to check the travel documents of any person crossing the border, in order to ascertain the validity and authenticity of such documents and establish the identity of the persons;

- b) to use technical devices to check the travel documents in accordance with point (a);
- c) to interview any person crossing the border in order to verify the purpose and conditions of the journey, as well as that he/she possesses sufficient means of subsistence and the required documents;
- d) to check that the person is not the object of an alert for refusal of entry in the Schengen information system (SIS);
- e) to stamp travel documents, in accordance with Article 10 of the Community Code, both at entry and exit;
- f) to search means of transport and objects in the possession of the persons crossing the border, in accordance with the national law of the host Member State.”

With respect to surveillance of the external borders:

- a) to make use of technical means for monitoring the external border area;
- b) to participate in patrols on foot and in means of transport in the external border area of the host Member State;
- c) to prevent persons from crossing illegally the external border of the host member State in accordance with the national law of that Member State;”

The cost of operation, both regarding the “toolbox” and the RABITS are to be handled by FRONTEX and therefore the budget of the Agency is nearly doubling from 2007 to 2008, from €35 Million to €65 Million. More and more assistance requests are being submitted and short term operations are asked to have their deadlines prolonged. With respect to illegal immigration and sea safety, FRONTEX adds another dimension to the challenges of sea border patrol.

FRONTEX Managing Director Ilkka Laitinen recently posted a press release to clarify the duties of FRONTEX desperately trying to put its current capabilities into perspective. One example was clearly stating that search and rescue (SAR) is not within the mandate of the agency and that its “Legal advisors could have some problems in explaining why a Community agency should take action in an area that is out of the mandate not

only of the agency but also the European Union”. Hence, FRONTEX goes to great lengths to avoid any SAR operations, something that contravenes the UNCLOS, SOLAS and the SAR Conventions that any seagoing operational force is required to adopt.



Patrol vessel Operation Nautilus 2006 (EU)

FRONTEX is clearly an agency in the developing stages, but also an agency growing faster than its capabilities. There are two different scenarios for FRONTEX: a continuous rapid growth to become somewhat of a European version of the Department for Homeland Security/Customs and Border Protection or a crash stop at its current position and a withdrawal from the more extreme hands on operations. A middle ground thus far cannot be envisaged. The agency also has the potential power to be an important part of the establishment of a European Maritime Security Policy, mainly through its technological research and development efforts. The mandate given in this field is to follow up on research conducted and keep the Commission up to date with any developments on the front lines.

### Conclusion

This article has shown that the European Union has, since the Achille Lauro hijacking, struggled to keep up the pace with the US when it comes to establishing not only an international maritime security standard but also in defining a maritime security policy of its own. Sadly, maritime security has become just another part of the overall fight against terrorism and is looped in with other activities but not addressed on its own. Maritime security is not treated as one specific field by the European Union, and therefore it becomes hard to speak about a European Maritime Security Policy. An embryo of policy is being created through different channels initiated by the Commission but without being clearly targeted and monitored, mainly due to the lack of a specialized agency

handling maritime security issues - including policy making.

Depending how the maritime security domain is defined, different answers exist as to what a maritime security policy should contain. By adopting a traditional IMO/SOLAS definition for the maritime field you will exclude the ports and thereby limit your ability to address maritime security through a holistic lens. By including the supporting infrastructure, such as ports, there is a need for a more comprehensive approach. However, such a strategy will move away from the maritime core and at one point lose the specifics for a more general security policy.

Does the European Union need a specific Maritime Security Policy? This analysis suggests that the European Commission does not think so. Where safety at sea is a general problem with emphasis on safety of lives at sea, environmental protection and prevention of pollution (and therefore worth having its own agency - EMSA), security is a specific area which has to do with terrorism and border protection. Safety at sea is a problem that is easily defined and related to ships, the practices onboard ships, by seamen, at sea. Security comes in a wider shape and is not as easy to encapsulate. Terrorism is a phenomenon that might need a more heterogenic approach;

however, there must be an entity that can summarize how a certain domain is affected by all the initiatives taken in various places. This entity must be part of the orchestration of efforts, and one that can move into the specifics of the domain where the general activities end.

Possible solutions could be an outspoken maritime branch of FRONTEX, specializing in maritime border protection, security and policy; or an extension of EMSA into the security realm. There are pros and cons with both alternatives. With the FRONTEX solution the maritime security field would be tightly interlinked with other security related issues but possibly with a need to add maritime competence and links; with the EMSA extension having strong ties to the international maritime community but being further away from general security issues. The establishment and maintenance of a European Maritime Security Policy will help all the actors in the maritime field and be able to keep current with what is happening and also help the Commission evaluate how such efforts can work in this specific field. Hopefully the Union will avoid being trapped in a deadlock where the lack of a responsible entity hinders the development of a maritime security policy, and a lack of a maritime security policy hinders the development of a responsible entity.

#### **Mattias Wengelin**

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# The Maritime Operations of the Liberation Tigers of Tamil Eelam (LTTE): The Sea Tigers and Sea Pigeons

Dr Peter Chalk, Policy Analyst, RAND

The Liberation Tigers of Tamil Eelam (LTTE) emerged in the mid-1970s under the uncompromising leadership of Velupillai Prabhakaran to secure an independent Tamil state across northeastern Sri Lanka through armed struggle. Now in its 26<sup>th</sup> year of existence and 15<sup>th</sup> year of concerted conflict, the movement has since proven itself to be a remarkably effective and resilient organization. Current estimates of the Tigers' on-ground strength in Sri Lanka vary between a low of 12,000 to highs in excess of 20,000. These cadres have built up a reputation of both combat efficiency and professionalism, demonstrating a proven ability to operate along a full combat spectrum ranging from selective assassinations through acts of urban sabotage, civilian-directed bombings and hit and run attacks to full-scale conventional land and sea assaults. More importantly, the Tigers have been able to take and hold large tracts of territory as well as resist and then decisively respond to concerted offensives instituted by the Sri Lankan Armed Forces (SLAF). It was a combination of this proven effectiveness that essentially drove Colombo to accept the terms for a so-called Ceasefire Agreement (CFA) in 2002. Brokered by Norway on 22 February, the accord opened the way for several rounds of talks between the government and the LTTE during which the latter were given de-facto control of an autonomous area in the northeast of the country, complete with its own tax structure, judiciary, police and health and educational structure.

While the 2002 truce ceasefire continues to exist on paper, the prospect for a lasting settlement in Sri Lanka remains a distant hope. At the time of writing, large-scale hostilities had resumed between the LTTE and Colombo in the north and east of the country, which as of October 2006, had displaced in excess of 200,000 people from their homes and left more than 2,000 troops, rebels and civilians dead. Just as significantly, the LTTE's combat capacity appeared to be as strong as ever – in October 2006, for instance, the group repelled a major 12-hour government offensive during which 129 troops lost their lives - while talk of a federated solution to the Tamil/Sinhala ethno-national conflict, the basis of the 2002 CFA, had all but disappeared from the group's diplomatic rhetoric.

To be sure, adroit employment of guerrilla tactics and Colombo's own military incompetence have been important factors in accounting for the Tigers' battlefield resilience. However, a critical element that has fed into the group's on-going fighting capacity has been a highly professional and developed maritime wing that has been effectively used for both offensive and logistical purposes. This article provides a brief overview of the scope and dimensions of the LTTE's sea-based operations, focusing on the actions of the Sea Tigers (the group's main operational maritime unit) and the Sea Pigeons (the group's main logistical wing).



Sea Tigers parade (LTTE)

## The Sea Tigers

The Sea Tigers (STs) constitute the LTTE's main amphibious strike force. Known as the *Kadul Puli*, the brigade (or *papaipirivu*) is led by Soosai and is currently thought to number around 1,500 to 2,000 cadres. The unit's main marine bases are strung along the northeastern coast from Chundikulam in the north to regions near and south of the government-held port of Trincomalee. These facilities house several specialist divisions that are reminiscent of the functional areas found in many professional navies around the world, including engineering, maintenance, communications,

underwater demolition, naval training and suicide attacks.

*The Sea Tiger Inventory:*

The STs have access to a formidable armoury of attack and operational craft. Assault vessels, which number between 12 and 15 and can accommodate up to 14 crew members, are powered by five 250 horsepower outboard engines that can achieve a maximum speed of around 40 knots. Each boat is equipped with radar and either very high frequency (VHF) or high frequency communication systems and all are armed with a 23mm twin-barrel cannon that is then backed up by four 12.7mm machine guns and various combinations of anti-ship missiles and rocket propelled grenades (RPGs). Supplementing these assets are coastal transit boats, which are used to ferry logistical supplies from LTTE ocean-going carriers to drop-off points on the Sri Lankan north-eastern shore. Driven by four 225 horsepower engines, these vessels can attain speeds up to 35 knots and when fully laden have a very low profile making them extremely difficult to detect. They are generally armed with 12.7mm light machine guns and RPGs, though mostly rely on Tiger attack craft for protection.



Sea Tiger attack boats

A highly important (and feared) sub-component of the ST's attack inventory is made up of boats that have been developed specifically for suicide strikes. These craft, which lie low to the water and are generally manned by two cadres, are manufactured with lightweight fiberglass angled metallic superstructures to maximize their surface speed as well as reduce radar cross-section. They are typically rigged with between 10 and 14 claymore mines that are connected in a circuit to three booster charges, weighing up to 21 kilograms each. A number of vessels also have sharpened "horns" attached to their bows, which are either placed on tracks so they can be driven back into explosive packs to acts as a self-detonation device or rigidly affixed to puncture the

hardened hulls of targeted ships on impact; the latter use has been especially effective in amplifying the destructive force of resulting blast shock waves, ensuring that even large-scale, reinforced combat ships can be sunk in a suicide attack.

Apart from attack and suicide ships, the STs have procured/manufactured a variety of water-borne explosive devices as well as moved to develop at least a nascent semi-submersible capability. As Martin Murphy observes in *"Maritime Threat: Tactics and Technology of the Sea Tigers,"* considerable time and resources has been devoted to marine mine warfare:

In the 1990s, [the LTTE] used mines remotely detonated from the shore at the southern end of the Jaffna peninsula around Kilali. They have [since] developed improvised mines from a range of household objects, including rice cookers. They have also made regular use of free-floating mines, on some occasions inside Trincomalee harbour. In most cases, these have six horns designed to ensure that they cannot be detonated accidentally by [surface] debris. Mines have also been used in arrays to attack specific locations and to disrupt naval operations. (P.9-10)

For underwater assaults, the STs have a dedicated combat diving cadre at its disposal – reputedly trained by ex-members of the Norwegian military – who are deployed for both conventional and non-conventional/suicide missions. Tiger frogmen are equipped with rebreather kits, which eliminate tell-tale oxygen bubbles rising to the surface and which have enabled stealth attacks to be undertaken against docked warships and other high-value maritime assets. Ordinance used in these strikes have included RDX explosive slabs that can be attached to a ship's hull and free-hanging cylindrical bombs that are suspended from a vessel's rudder shaft. The LTTE is also thought to have developed rudimentary swimmer delivery vehicles (SDVs) to extend a diver's range and carrying capacity. Revelations that the group were moving in this direction first broke in 2000 when a partially completed SDV prototype was discovered at a Tamil-owned shipyard in Phuket, Thailand. According to informed sources, the five-meter vessel, while low-tech, was capable of remaining submerged for up to six hours (at speeds of about five knots) and could very well have served as the blueprint for more advanced versions that the STs are now alleged to possess.



*ST Attack Profile:*

STs usually operate in squadrons of three boats each with attack groups mostly striking at night to avoid counter-offensives by Mi-24 Hind helicopters deployed by the Sri Lankan air force. Typically assaults employ Tiger “wolf packs” that single out and surround a surface combat ship; the target is then either fired upon or rammed by a suicide craft (see below). The principal aim of these strikes is to reduce the mobility of the SLN around the north-eastern coast, which represents both the principal conduit for the importation of LTTE weapons and Colombo’s main supply route to army contingents on the Jaffna peninsula. The navy’s tendency to patrol the same routes along the eastern seaboard has greatly facilitated these operations, informing the timing and location of ST missions to such a degree that the wing has been repeatedly able to convince Sri Lankan surface frigates and interdiction craft that it is everywhere except where it is. Reflecting this is not only the ease by which vessels are lured into ambushes and traps, but also the volume of armaments have managed to ship to coastal drop-off points under their control. Between February 2002 and October 2006, for instance, the LTTE was implicated in no less than 34 major arms movements to bases along the eastern seaboard – including consignments of heavy artillery such as 120mm, 122mm and 150mm mortars – all of which are clear infringements of the Memorandum of Understanding that underscores the CFA. Overall there were in excess of 4,000 violations of the MOU during this period, over 90 percent of which were “credited” to the Tigers.

On an unconventional level, the STs have made extensive use of suicide strikes. The bulk of these attacks are perpetrated by wounded militants who volunteer to undertake such missions as a last “hurrah” to the group. As noted above, the typical format of these assaults is for a ship to be first surrounded by a hunter “wolf pack” consisting of between five and attack craft; once any opportunity for escape has been eliminated, the encircling perimeter is opened to two fast suicide craft, which then approach and ram the targeted vessel (usually from opposite sides). The STs have carried out over 40 attacks of this type since 1990, roughly 80 percent of which are thought to have been instrumental in achieving their primary aim. According to one senior retired naval officer, fear of being caught in a martyr strike was one of the main factors contributing to decreases in SLN recruitment, which really only began to recover following the 2002 CFA.

The effectiveness of LTTE sea-borne strikes (conventional and non-conventional) has necessarily forced Colombo to take steps to harden its maritime assets. Frigates, for instance, are now equipped with the latest radar-technology to detect in-coming assault craft and many are also constructed with reinforced superstructures and/or false outer-skeletons to mitigate the effects of deliberate ramming. Although welcome, these measures have merely prompted “counter-innovation” on part of the Tigers. As noted, rigid horns are now routinely attached to the bows of suicide boats to defeat hardened hulls of surface destroyers while attack teams typically sail in tight configurations, closely hugging the coastline, to mask the signature of individual vessels. This latter technique is designed to give the impression that only one large object is present and is based on the same procedure that combat air wings use to avoid aerial surveillance.

*Piracy:*

Besides attacks on “legitimate” Sri Lankan navy assets, the STs have, on occasion, been prepared to hijack domestic and foreign-owned commercial carriers, with some boardings taking place up to 80 kilometers from the coast. While some of these missions have been purely opportunist in nature, most have, in some manner, been executed to support the group’s on-ground war effort. Container vessels shipping agricultural equipment, cement, timber and car parts, for instance, have often been raided to provide the raw materials for buildings, transport vehicles and indigenously developed tractor-mounted rocket launchers. In relation to more concerted maritime combat, however, piracy has not featured prominently in the LTTE’s operational activities and should be considered an adjunct rather than an integral feature of its overall tactical agenda.



MV City of Liverpool highjacked by LTTE 21 January 2007

### The Sea Pigeons

The Sea Pigeons (SPs) constitute the LTTE's main maritime logistical wing. Consisting of 15 large-scale freighters with an average tonnage of 1,200, the mechanics of the SPs falls under the auspices of the so-called "KP Department" (named after Kumaran Pathmanan, one of Prabhakaran's most trusted lieutenants), which is responsible for all LTTE arms procurement. Although the origins of the division go back to the early 1980s, most development occurred in the 1990s in an explicit attempt to extend the Tigers' off-shore reach and capabilities (which hitherto had been limited to shuttle runs between India and Sri Lanka) as well as reduce reliance on traceable charters. Integral to developing the SPs has been the example of syndicated ocean fraud as manifested in the so-called "phantom ship phenomenon." Existing at the high-end of modern-day piracy, these attacks involve the hijacking and theft of container vessels and their subsequent re-registration under flags of convenience (FOCs) to avail illicit maritime trade. The LTTE has used this model to build up the Sea Pigeons fleet, most of which sail under Panamanian, Honduran, Liberian, Bermudan, Maltese or Cypriot flags. These states lie at the root of phantom ship practices largely due to the cheap, anonymous and extremely lax recording requirements that characterize their respective shipping bureaus. The LTTE, in common with organized maritime criminal syndicates, have exploited this "facet" to repeatedly confound international monitoring and tracking attempts by repeatedly changing the names, manifest details and duty statements of the various vessels used.

Ninety five percent of the time, the SPs are involved in the legitimate transport of commercial goods such as tea, paddy, rice and fertilizer. For the remaining five percent, however, they play a pivotal role in supplying explosives, arms, ammunition and other war-related materiel to the LTTE theatre of conflict. In most cases, SP freighters deliver munitions direct to Tiger maritime facilities located on the Thai and Burmese seaboards in the Andaman Sea. Weapons are then loaded onto smaller coastal transit boats for the final 1,900 kilometer trip to drop-off points along the north-eastern Sri Lankan coast between Mullaitivu, Batticaloa and Trincomalee. One chance interception of a shipment made in early 2004 reflects the extensive range of arms transported via this route. Seized off the Burmese coast, the consignment included TK56 and M-16 assault rifles; M-60 general purpose machine guns; grenade launchers; state-of-the-art sniper guns; and dual-

use items such as field communication sets, infrared cameras, laptop computers, car batteries and new vehicle engines. The munitions had been purchased from China's North Industries Corporation (Norinco) as part of a larger order certified with North Korean user-end certificates - presumably obtained through bribery - which had been loaded in Tianjin in September 2003.



The Seishin LTTE cargo vessel destroyed 2007

The overall sophistication and global reach of the SPs and its various arms procurement activities can be measured by one "sting" operation that took place in 1997. The incident in question originated with a US\$3 million deal that Colombo had concluded with Zimbabwe Defense Industries (ZDI) for the purchase of 32,000 mortar bombs to facilitate the army's then on-going offensive to gain control of the strategically important A9 highway (*Operation Jayasekuru*) - the main arterial trunk road linking the capital with the Jaffna peninsula. On May 23 1997, the government was informed that the munitions had left the Mozambique port of Beira as scheduled and were en-route to South Asia. The weapons, however, never arrived and on 11 July the LTTE sent a fax to the US embassy in Colombo stating that the group had "apprehended" a ship dispatched from southern Africa and that its cargo of ZDI-supplied mortars had been "confiscated."

Subsequent investigations uncovered a far more complex and convoluted story. Apparently the LTTE had known of the transaction from the outset, having successfully infiltrated the Sri Lankan National Intelligence Bureau (NIB) to the very highest levels (see below). Armed with this information, the Tigers had then bribed Ben Tsoi, the Israeli sub-contractor who had arranged the original deal, to let one of the group's own freighters, the *Stillus Limassul*, pick up the consignment directly. According to western intelligence agencies, Tsoi's company, L.B.J.

Military Supplies, had persuaded ZDI to acquiesce in the sting by providing false information to Colombo confirming that the shipment had been loaded at Beira and were en-route via Walvis Bay and Madagascar. By the time the Sri Lankan government learned the full extent of what had transpired, the mortars had been off-loaded at LTTE bases along the Mullaitivu coast and were being used with devastating effect against the SLAF for control of the A9 highway.

### **The LTTE as a model for Maritime Insurgency and Terrorism?**

The LTTE has demonstrated a proven ability to undertake a range of highly effective maritime operations that have spanned the spectrum of conventional combat attacks, through logistical re-supply to deadly suicide strikes.



Sea Tiger attack on Sri Lanka Navy vessel (LTTE)

The damage wrought by the STs has been considerable – overall, it has been estimated that between a third and half of the SLN fleet has been damaged or destroyed as a result of ST engagements – while the SPs have been a critical factor in helping to sustain the group's on-ground

war effort. Although the LTTE has so far constrained its sea-based activities to the conflict in Sri Lanka, there is always the risk that other groups will learn from this experience and adapt the techniques and technologies of the Tigers to meet their own requirements. As Martin Murphy observes in *"Maritime Threats: Tactics and Technology of the Sea Tigers"*:

A look at the lightweight fibreglass craft developed by the Sea Tigers demonstrates that marine insurgents can buy much of what they need on the open market, but when this proves impossible, they can develop indigenous alternatives. [Equally], as the SLN's clashes with the Sea Tigers make clear, modern technology does not render the sea transparent. By using craft that lie low in the water, made from materials that are hard to detect electronically, and by employing a combination of speed (or seemingly innocent slowness), deception, camouflage, surprise and legal cover, insurgents can operate with lethal effect. (p.10)

With this context in mind, it is salient to note that the LTTE executed two *USS-Cole* style attacks as far back as 1990. This not only suggests that the STs are some ten years ahead of *al-Qaeda* in terms of seaborne capabilities – significant given that Bin Laden's movement is often singled out as being one of the most adept organizations to have operated from a non-territorial environment. More intrinsically (and worryingly), it may very well reflect that the Tigers are already serving as a critical benchmark for developments in the wider arena of maritime terrorism, martyrdom and insurgency.

### **Dr. Peter Chalk**

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## Marine Insurance for Piracy or Terrorism – Drawing a line in Water

Patrick Donner, Associate Dean, World Maritime University

According to the definition in Section 3 of the Marine Insurance Act 1906, “maritime peril” is a wide concept encompassing risks “consequent on, or incidental to a maritime adventure” and the list of perils specifically mentions “war perils, pirates, rovers, thieves, captures, seizures, restraints, and detentions of princes and peoples...and any other perils, either of the like kind or which may be designated by the policy.” As a concept, therefore, marine insurance includes ordinary marine perils as well as war risks in the broad sense of the word, including acts of violence directed at a ship. However, in marine insurance practice the definitions of “war”, “strikes”, “piracy” and “terrorism” become quite important as the different perils tend to be covered under different insurance policies.

### Historical development of war risks cover

Originally, the London insurance market under the Lloyd’s SG Form of marine policy did not make a distinction between ordinary marine risks and war risks, but already in the 17<sup>th</sup> century underwriters would on occasion exclude war risks from being covered by the policy. Depending on the political situation and the risks that ships and shipping were exposed to other exclusions from cover were made, and became more or less routine, such as “capture and seizure”, “warlike operations” and “riots and civil commotions”, but it was not until the end of the 19<sup>th</sup> century, in 1898, that the Lloyd’s market decided that marine risks and war risks would be covered under separate policies with separate ratings. The “free of capture and seizure” (FC&S) clause had thus evolved over a period of a century and a half and the 1898 version of the FC&S clause had the following wording:

Warranted nevertheless free of capture, seizure and detention, and of the consequences thereof, or any attempt thereat, piracy excepted, and also from all consequence of hostilities or warlike operations, whether before or after the declaration of war.

The overall effect of this was that war risks were, in principle, covered by the marine perils policy but specifically excluded from that cover by the FC&S clause, and then the excepted perils were covered by a separate policy or with a mutual insurance association.

It is fair to say that nowadays war risk perils are dealt with separately from ordinary marine risks, in fact, one might say that war risks are always specifically excluded under all ordinary marine risks policies. This is true regarding hull and machinery insurance, loss of hire insurance, cargo insurance, standard protection and indemnity cover, as well as builders’ risk and ship repairers’ liability cover. The wording of the War and Strikes Clauses “dovetails” with the wording of the war and strikes exclusions under the standard hull cover, so that where the risks are excluded from the hull cover they are insured perils under the war and strikes risk cover. Since it is safe to assume that any prudent shipowner will have taken out cover for both marine risks and war risks it may be seen as a point of primarily academic interest whether a risk falls under one policy or the other, but there is a very practical aspect and reason for the distinction between insurance for ordinary marine perils and war risks and that is the fact that different insurers normally underwrite them. This means that it is important for the assured to know what actual risks are covered under the hull and war risks policies, respectively, in order to know under which policy to claim.



Cypriot tanker during the “Tanker War”

### Piracy

At the end of the 19<sup>th</sup> century piracy was still covered as a marine peril, as it was clearly excluded from the exception, but by 1937 piracy had been included in the exceptions from ordinary cover for marine perils and remained so until the Lloyd’s SG Form was replaced by the new Lloyd’s Marine Policy (MAR) Form in 1982. At that time new standard clauses were also elaborated and the Institute Time Clauses (Hulls) (01/10/83) specifically lists “piracy” as an insured peril in clause 6.1.5. Furthermore, barratry and piracy are specifically excluded from the war risks exclusion

in clause 23.2 of the standard hull cover and, logically, also excluded from war risks cover under clause 4.1.7 of the Institute War and Strikes Clauses (Hulls – Time). Likewise, piracy, although not specifically mentioned, is included under the “all risks” cover provided by the Institute Cargo Clauses (A) 01/01/82 (and excluded from the war risks exclusion in clause 6.2) and the same applies to cargo (A) clauses for special cargoes such as in the Commodity Trade Clauses, Frozen Food Clauses and Timber Trade Federation Clauses.



Indonesian pirates 2006 (Green Ray Films)

Although piracy is currently included in the ordinary marine risks under the standard hull insurance conditions in the London market, this is not cast in stone and recently the London market has again considered the possibility of shifting the risk of piracy from the ordinary marine cover to the war risks cover, and the London Market’s Joint Hull and Joint War Committees have drawn up a new set of clauses which remove piracy from the hull cover and place it under war risks. However, these new clauses are at this time offered as an alternative solution to alter the scope of cover of the standard hull clauses. Opinions may differ as to the desirability of such a shift, but one advantage of uniformity between the different standard conditions is that the risk of gaps in the insurance cover or of having double insurance would be reduced. It is also worth noting that where war risks are insured in the Mutual War Risk Associations “piracy and violent theft by persons from outside the ship” is already included in the cover provided by these Associations. Similarly, in the Norwegian market the Norwegian Marine Insurance Plan of 1996 (2007 version) places piracy risks under war risks.

### **Terrorism**

Insurance cover for losses caused by acts of terrorists very clearly falls under war risks as clause 1.5 of the Institute War and Strikes

Clauses Hulls covers loss of or damage to the vessel caused by “any terrorist or any person acting maliciously or from a political motive” all of which are excluded from the standard hull cover using identical or very similar wording. What is not immediately obvious is why terrorist acts are categorized as “strike” risks in the Institute Time Clauses (Hulls) (the relevant clause is called “Strikes Exclusion”). The various excluded perils listed in the clauses named “War Exclusions”, “Strikes Exclusion” and “Malicious Acts Exclusion” start with “war civil war revolution...” and continue via “any terrorist or any person acting from a political motive” to “...caused by any person acting maliciously or from a political motive” and as such there may be some logic in the sense that the listed occurrences seem to involve a diminishing number of people and terrorist acts are usually done by individuals or relatively small groups of people. The International Hull Clauses (01/11/03) seems to have solved the issue by regrouping and renaming the exceptions into two clauses: clause 29 named “War and Strikes Exclusion” and clause 30 named “Terrorist, Political Motive and Malicious Acts Exclusion”. This may, again, appear to be of academic interest only, since the risks excluded from the hull cover are covered by the Institute War and Strikes Risks Clauses (Hulls). However, it is of some real importance in the context of cargo insurance, because war and strikes risks are covered by separate standard clauses, i.e. the Institute War Clauses (Cargo) and Institute Strikes Clauses (Cargo) and in these clauses, terrorists are only covered under the Strikes Clauses. It is, therefore, important for buyers of cargo cover to include both sets of clauses in their cargo policies, provided of course, that they wish to have full cover.

There appears to be relatively little legal precedence defining the particular terms relating to terrorism and even if there were, older case law might not be particularly relevant, because English courts tend to interpret terms in commercial contracts according to the ordinary everyday meaning of the words. Terrorism has become such a topical issue that what people call terrorism or perceive as terrorism may change very quickly and so may the available insurance cover. After the September 11, 2001 attacks in New York and Washington and the subsequent development of the International Ship and Port Facility Security (ISPS) Code there have even been calls for the exclusion of terrorism from the war risks cover. Such a move would make the risk of terrorism subject to separate insurance, which would eliminate the previously mentioned

advantage of having piracy and terrorism covered under the same policy, but there is also the very real possibility that consequences of terrorism would not be insurable at all.

The term “maliciously” was defined by Lord Denning MR in *Nishina Trading Co Ltd v Chiyoda Fire and Marine Insurance Co Ltd (The Mandarin Star)* as meaning “spite, or ill-will, or the like”. This definition does not cause problems. The term “political motives” has not been the subject of definition by the courts. One basic principle defining terrorism is that terrorist acts are always for a public cause. A person who kills or destroys property for his own personal gains is simply a criminal but not a terrorist. The difficulty with this principle is that it is sometimes almost impossible to determine the motives of the perpetrators. One case in point was the passenger vessel *City of Paros*. A group of people had smuggled weapons onboard in 1988 and, throwing hand grenades and firing automatic rifles, killed and injured many of the passengers also causing serious damage to the ship. After the attack the perpetrators fled the scene in speedboats. It was evident that the attack was carefully planned, but the attackers remained unknown and their motives were not clear, although Abu Nidal, a splinter group of PLO (the Palestine Liberation Organisation), was suspected to be responsible. Whatever Abu Nidal's aims are, they are political, but it has not been proven that Abu Nidal was, in fact, responsible. In this case, the concerned Mutual War Risk Association accepted the claim.

### **Piracy – a marine or war risk?**

At this point it may be helpful to briefly remind ourselves of the definitions of piracy and terrorism. In the ordinary sense of the word a terrorist is always seen to act from a political motive while Pickford J in the case *Republic of Bolivia v Indemnity Mutual Marine Insurance Company Ltd*. defined a pirate as:

“ a man who is plundering indiscriminately for his own ends, and not a man who is simply operating against the property of a particular State for a public end . . . “

Although the definitions appear clear, they turn on the motives of the person, sometimes those motives cannot be ascertained. If a ship has been attacked and boarded by an armed gang who want to take over the whole ship and/or its cargo, it is not very likely that the master, while staring down the wrong end of a Kalashnikov, would interrogate the gang leader as to his motives and

whether they are political or simply for personal gains. In principle, that is exactly what he should do as the answer is relevant for determining the correct heads of claim and under which insurance policy the claim should be made. Piracy has changed as well, and pirate attacks have become more violent and hijacking of vessels has become more common. In the past few years, there have also been suggestions that the reason for hijacking vessels has been to supply terrorists with marine hardware or freight earnings to finance terrorist activities or just to provide them with training opportunities so that they can use vessels in future terrorist attacks. Although such connections between piracy and terrorism have not actually been proven, it appears clear enough that the hijacking of vessels off the coast of Somalia and holding their crews for ransom has become an enterprise and possibly also a method to finance the activities of groups fighting against the government. The point is that it has become even more difficult than before to distinguish between piracy and terrorism.

There is at least one important difference depending on whether piracy falls under war risk cover rather than hull cover and that relates to termination of the policy. Generally, a time policy ends when the insured period within the policy runs out, and normally continues even after that, if the vessel is at sea at the relevant time. The same principles apply to a time policy covering war risks as well, but the Institute War and Strikes Clauses have an additional termination clause. Clause 5 of the Institute War and Strikes Clauses (01/10/1983) read as follows:

#### **Termination**

5.1 This insurance may be cancelled by either the Underwriters or the Assured giving seven days notice (such cancellation becoming effective on the expiry of seven days from midnight of the day on which notice of cancellation is issued by or to the Underwriters). The Underwriters agree however to reinstate this insurance subject to agreement between the Underwriters and the Assured prior to the expiry of such notice of cancellation as to the new rate of premium and/or conditions and/or warranties.

At first glance it may appear harsh that the insurance cover may be withdrawn during the agreed period of the policy, but the explanation lies in the fact that the war and strikes risks cover ordinarily offered is for the risks that occur during

peacetime and this cover can be provided at a relatively moderate cost of premium for the assureds. When a vessel operates in an actual active war zone the risks are dramatically increased and require a considerably higher premium. For this purpose, the Joint War Committee (JWC) in the London insurance market maintains a list of areas, which are excluded from the ordinary war risks cover and when a vessel enters one of the excluded areas (now called “areas of perceived enhanced risk”) it is deemed to breach the “War Risk Trading Warranties” unless the owners agree to pay an additional premium, which is based on the degree of perceived risk in that particular area. The “hot spots” in the world change from time to time and clause 5.1 of the Institute War and Strikes Clauses provides the mechanism whereby the war risks insurance can be terminated on short notice when there is an increased risk of war or warlike activities in a new area so that this new area can be included in the “areas of perceived enhanced risk”, i.e. the trading limits can be altered. This issue came to a head in 2005 when the Joint War Committee (JWC) in the London insurance market included the Malacca Strait in the “Listed Areas”, which meant that higher war risk premium was payable by transiting vessels. The JWC claimed there was a heightened risk of terrorism in the area while shipowners’ organisation contended that the JWC had confused “risk” and “vulnerability” and that the risk in the area was primarily one of piracy. After a year of intense argument, particularly on the part of the littoral states, the JWC removed the Malacca Strait from the “Listed Areas” in August 2006.



Vessels in the Malacca Straits

The justification for allowing the market to cancel cover on short notice to adjust the trading limits may be said to lie in the fact that without this facility the premium that the shipowner would have to pay for his ordinary war risk cover would

have to include the possibility of the risk for warlike activities increasing somewhere in the world sometime during the policy year, a risk that may not materialise at all and, even if it did, the shipowner could avoid by choosing not to trade his vessel in that area. It can, therefore, be said that this cancellation clause allows the market to assess the premium realistically in accordance with the actual risk. It is, of course, true that the areas where piracy attacks are most frequent are identifiable as clearly as are areas of war or warlike hostilities, but in most cases they occur in different places. Consequently, in order to achieve a fair rating for setting premiums it would be necessary to identify “areas of perceived enhanced **war** risk” and “areas of perceived enhanced **piracy** risk” separately. Although technically feasible, one clear drawback of such a system is the lack of certainty for the shipowners – if premiums could vary during the year and in different areas on short notice, the owners would not even be able to make an accurate voyage calculation, let alone annual budget for operating costs. True, the war risk premium can already be adjusted on a week’s notice, but there is a fundamental difference: the ship operator can always choose not to enter an area with increased risk of war as there is in every contract of carriage an implied undertaking that the charterer must nominate only safe ports. A port situated in an area identified as being subject to increased risk of war would not be deemed safe, but it is doubtful whether passing through an area of increased risk for pirate attacks would give the shipowner the right to refuse. The likely solution to this dilemma would be to shift the risk and burden onto the charterer by making them responsible for the increased insurance premium. In fact, this is a method which is already commonly applied to increased war risks premium and the wordings of existing standard charterparty clauses governing increased war risk premiums might already protect the shipowners, but at the very least, all such clauses would need to be closely analysed.

### Conclusion

In theory, it should not make much difference from a rating point of view whether piracy falls under the normal hull cover or war and strikes risks cover – the main issue is that it is covered and that the underwriter of the risk rates it properly. In practice, however, a cynical shipowner would probably say that if a risk is shifted from one policy to another, the decrease in premium on the first policy is likely to be smaller, or significantly smaller, than the increase in premium on the other.

There is, however, another aspect, which is much more important to take into account when considering whether a shipowner will be indemnified for a loss and that is whether cover is offered for "all risks" or based on named perils. In the United Kingdom and the United States cover is, in most cases, based on named perils (with specific additional exclusions), but in other insurance markets ships are often insured on an "all risks" basis, although also with specific exclusions. Although this appears to be a fundamental difference, the actual difference in risks covered is not all that significant. On the one hand, the list of named perils in the standard Institute Clauses (or equivalent conditions) is quite comprehensive and, on the other hand, the exceptions from the "all risks" reduce the cover to an extent, which, by and large, corresponds with that offered in the London market. However, the difference is still there, as any "new" perils, which have not been previously specifically identified may form a "grey zone" and in these cases the "all risks" cover is perhaps more likely to provide cover than a policy based on "named perils". The most fundamental difference, however, stems

from the burden of proof. The general rule is that the claimant "must prove such facts as bring him *prima facie* within the terms of the promise", i.e. the assured has the burden of proving that the loss falls within the named perils. On the contrary, under an "all risks" cover the assured still has to prove they have an insurable interest, that this interest has sustained a loss as a result of a peril covered by the insurance (all risks), and to establish the extent of the loss, but if the insurer wishes to contest the claim, the insurer has to prove that the loss was caused by a peril that is NOT covered by the insurance.

We have seen above that when a loss has been caused by a violent attack against a ship, the problem that the assured shipowner may face is whether to claim against his hull underwriter or the insurer of war risks and the risk of having to resort to litigation, and the inherent litigation risk that follows, must be considerably smaller if the assured is covered under an "all risks" policy. In the final analysis, this may be the difference between being indemnified or not.

#### **Patrick Donner**

Professor Donner qualified for the bar in Finland (vicehäradshövding) in 1977 and served on the bench as deputy judge and acting chief judge of the City Court of Mariehamn for several years in the late 1970's. Professor Donner served the Sally Shipping group for 12 years, advancing from chief legal counsel and company secretary to deputy managing director with responsibility for the legal affairs of the group, which had ferry operations in Scandinavia and the United Kingdom and cruise operations in the Caribbean. After the Sally Group he was managing director for Delfin Cruises Ltd. in Finland, operating cruises in the Baltic, after which he ran his own law and management consultancy firm for a few years. During all this time he taught maritime law (part-time) at the Maritime Academy of Åland and also held numerous non-executive positions on boards of directors of shipping and insurance companies as well as elected public office at local level.

Since January 1995 professor Donner has been at the World Maritime University in Malmö, Sweden, first as Associate Professor in Shipping Management and currently as Associate Academic Dean, teaching international post-graduate students in all commercial aspects of shipping with an emphasis on maritime and commercial law.



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