

**Maritime Terrorism and the Law of the Sea:
Basic Principles and New Challenges**

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MARITIME TERRORISM AND THE LAW OF THE SEA: BASIC PRINCIPLES AND NEW CHALLENGES

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General principles governing a State's jurisdiction over maritime activities are well established under the United Nations Convention on the Law of the Sea (UNCLOS) and under principles of customary international law. First, only the coastal State has enforcement jurisdiction in maritime zones subject to its sovereignty and second, ships on the high seas are subject to the exclusive jurisdiction of the flag State, with limited exceptions. However, after the terrorist attacks on the United States on 11th September 2001, concerns were raised that traditional principles governing jurisdiction over maritime activities could potentially hamper efforts to combat acts of maritime terrorism. This is amply illustrated by the debates that surrounded the negotiation and adoption of certain instruments to combat maritime terrorism such as the 2005 Protocol to the 1988 SUA Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, the Security Council Resolutions on the Illicit Trafficking of Weapons of Mass Destruction (WMD) and the US led Proliferation Security Initiative (PSI), with some States fearing that these instruments would go beyond general principles governing jurisdiction over maritime activities.

To this end, this paper first discusses the general principles governing a State's jurisdiction over maritime activities. It then examines the various instruments adopted both before and after 11th September 2001 that can be used to combat maritime terrorism, and the extent to which these instruments are consistent with general principles governing jurisdiction over maritime activities. It then explores the extent to which States have participated in and effectively implemented these measures. Last, the paper concludes that the measures adopted to deal with maritime terrorism are consistent with general principles governing a State's jurisdiction over maritime activities and argues that focus should now shift to how to encourage participation in such measures and ensure effective implementation of such measures by States.

I. INTRODUCTION

After the terrorist attacks on the United States on 11th September 2001, States and international organizations were forced to rethink the threat of maritime terrorism. They recognized that if terrorist groups could use commercial aircraft in attacks, they could also use commercial shipping in the same manner.¹ While there is no internationally accepted definition of maritime terrorism,² maritime terrorism

¹ S.L. Hodgkinson, E. Cook, T. Fichter, C. Fleming, J. Shapiro, J. Mellis, B. Boutelle, S. Sarnoski and G. Noone, 'Challenges to Maritime Interception Operations in the War on Terror: Bridging the Gap', 22 *American University International Law Review* (2006-2007) 583 at 587.

² The Council for Security Cooperation in the Asia Pacific (CSCAP) has defined maritime terrorism as "the use of violence at sea or to a ship or fixed platform for political ends, including any use of violence for the purpose of putting the public or any section of the public in fear." See CSCAP Memorandum No. 5 on Cooperation for Law

can encompass a wide range of potential attack scenarios³ including ships being hijacked, ships being used as weapons against other ships or port facilities; terrorists entering countries posing as seafarers; and weapons of mass destruction being shipped on merchant ships to terrorist organizations.⁴

The legal regime governing a State's jurisdiction over maritime activities are set out in the 1982 *United Nations Convention on the Law of the Sea* (UNCLOS)⁵ as well as general principles of customary international law. To briefly summarize these principles, first, only the coastal State has enforcement jurisdiction in maritime zones subject to its sovereignty and second, ships on the high seas are subject to the exclusive jurisdiction of the flag State, with limited exceptions.

Maritime terrorism poses a particular challenge for the legal regime governing a State's jurisdiction over maritime activities. Prior to 11th September 2001, legal instruments that addressed maritime terrorism, such as the 1988 *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*,⁶ (1988 SUA Convention) focused on the prosecution and punishment of perpetrators of maritime terrorism after the attacks had occurred. As will be explained below, these instruments were consistent with principles governing jurisdiction over maritime activities.

After 11th September 2001, concerns were raised that the traditional principles governing jurisdiction over maritime activities could potentially hamper efforts to *prevent* acts of maritime terrorism. In maritime zones outside territorial sovereignty, only the flag State could board and arrest ships (or consent to such a boarding by another State) that were preparing to commit an act of maritime terrorism. To this end, this article examines the measures that have been taken, both before 2001 and after 2001, to prevent and suppress acts of maritime terrorism and discusses how these measures have presented challenges to the traditional principles governing jurisdiction over maritime activities.

Part II will examine the general principles of international law governing jurisdiction over maritime activities. Part III will examine how three of the UN counter-terrorism conventions adopted before 2001 can be utilized to combat maritime terrorism. Parts IV and V will examine the actions taken by the UN Security Council and the International Maritime Organization (IMO) in response to the terrorist attacks on the United States on 11th September 2001. Part VI will examine the actions taken by the UN Security Council in response to the threat of the proliferation of weapons of mass destruction from the Democratic People's Republic of Korea (DPRK). Part VII will examine the US-led Proliferation Security Initiative (PSI) and its provisions designed to counter the threat of the proliferation of weapons of mass destruction (WMD) and their delivery systems by sea. Part VIII will address the extent to which States have participated in and implemented the various measures adopted to combat maritime terrorism. In Part IX, this paper concludes that the measures adopted are consistent with principles governing jurisdiction over maritime activities, and that if States participate and effectively implement such measures, there will be a robust legal framework to address maritime terrorism.

and Order at Sea available online at

<<http://www.cscap.org/uploads/docs/Memorandums/CSCAP%20Memorandum%20No%205%20--%20Cooperation%20for%20Law%20and%20Order%20at%20Sea.pdf>>.

³ P. Parfomak and J. Frittelli, 'Maritime Security: Potential Terrorist Attacks and Protection Priorities', Congressional Research Report for Congress available at <<http://www.fas.org/sgp/crs/homesecc/RL33787.pdf>>.

⁴ R. Beckman 'International Responses to Combat Maritime Terrorism', in Ramraj, Hor, Roach (eds.), *Global Anti-Terrorism Law and Policy* (Cambridge University Press, 2005), pp 248 -269 at 248

⁵ *United Nations Convention on the Law of the Sea*, adopted 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994) (UNCLOS).

⁶ *Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation*, adopted 10 March 1988, 1678 UNTS 221 (entered into force 1 March 1992) (1988 SUA Convention).

II. PRINCIPLES GOVERNING JURISDICTION OVER MARITIME ACTIVITIES

Jurisdiction refers to the:

Power of a State under international law to govern persons and property by its municipal law. It includes both the power to prescribe rules (prescriptive jurisdiction) and the power to enforce them (enforcement jurisdiction). The latter includes both executive and judicial powers of enforcement.”⁷

“Prescriptive jurisdiction” generally refers to the authority of a State to *prescribe* laws and make them applicable to persons or circumstances.⁸ “Enforcement jurisdiction” describes the “authority of a State to take action to enforce those laws through, for example, arresting, detaining, prosecuting, convicting, sentencing and punishing persons for breaking those laws.”⁹

The principles governing jurisdiction over maritime activities, as set out in customary international law and UNCLOS, will depend on whether the act took place within maritime zones under the territorial sovereignty of a coastal State, or in maritime zones outside the territorial sovereignty of a coastal State.

In maritime zones under the territorial sovereignty of a coastal State, i.e. internal waters, archipelagic waters and territorial seas, coastal States have both prescriptive and enforcement jurisdiction.¹⁰ No State may exercise enforcement jurisdiction in an area under the territorial sovereignty of another State without its express consent.¹¹

In maritime zones outside the territorial sovereignty of a coastal State i.e. the exclusive economic zone (EEZ) and high seas, coastal States are permitted to exercise its prescriptive jurisdiction subject to any rules prohibiting such prescription.¹² However, only the flag State can exercise enforcement jurisdiction over vessels in the EEZ and on the high seas.¹³ Such ships may not be boarded without the express consent of the flag State or the master.

There are limited exceptions to the principle of exclusive enforcement jurisdiction of the flag State in the EEZ and on the high seas. First, warships or ships on government service of all States¹⁴ may board and arrest pirate ships in areas outside the territorial sovereignty of any State i.e. in the EEZ and on the

⁷ D. Harris, *Cases and Materials on International Law*, 7th Edition (London, Sweet and Maxwell, 2010), p. 227.

⁸ See International Bar Association, *Report of the Task Force on Extraterritorial Jurisdiction*, July 2008 available at <<http://tinyurl.com/taskforce-etj-pdf>> at pp. 7-8.

⁹ *Ibid.*

¹⁰ See Articles 2 and 49 of UNCLOS, *supra* note 5

¹¹ *SS Lotus (France v. Turkey)* 1927 PCIJ (ser A) No. 10 at 18 – 19.

¹² *SS Lotus (France v. Turkey)*, *ibid.* However, it should be noted that there is an alternative view that a State is not able to extend its prescriptive jurisdiction outside its territory unless permissive rules support such an exercise: See V. Lowe, ‘Jurisdiction’, in M. Evans, (ed.) *International Law*, 2nd edition, (Oxford, Oxford University Press, 2006), p. 335.

¹³ Article 89 of UNCLOS, *supra* note 5, provides that “(n)o State may validly purport to subject any part of the high seas to its sovereignty.” Article 94 sets out the duties of the flag State over vessels flying its flag on the high seas. Articles 88 to 115 on the high seas apply to the exclusive economic zone in so far as they are not incompatible with Part V on the exclusive economic zone (Article 58 (2), UNCLOS).

¹⁴ Article 107 of UNCLOS, *supra* note 5.

high seas.¹⁵ A ship is considered a pirate ship if it is intended by the persons in dominant control to be used for the purpose of committing any of the acts of piracy referred to in Article 101 of UNCLOS.¹⁶

Second, a warship may board another ship in the EEZ of another State or on the high seas if there are reasonable grounds for suspecting that the ship is engaged in piracy, the slave trade, or unauthorized broadcasting, the ship is without nationality or the ship is the same flag as the warship. This is known as the right of visit under UNCLOS.¹⁷

Third, UNCLOS also recognizes that additional reasons for exercising the right to board foreign flagged ships may be established by treaty.¹⁸

Fourth, it should also be mentioned that a State has enforcement jurisdiction under UNCLOS in relation to certain other matters. UNCLOS gives coastal States the power to enforce their fishing laws and regulations in their EEZs including the power to board, inspect and arrest ships violating its fisheries laws and regulations,¹⁹ as well as limited enforcement jurisdiction to enforce their laws governing marine scientific research and pollution of the marine environment.²⁰

These exceptions to the principle of exclusive flag State jurisdiction in areas outside the sovereignty of any State do not apply to warships and government ships owned and operated by States and used only on government non-commercial service. Such ships have complete immunity from the jurisdiction of any State other than the flag State.²¹

III. GLOBAL CONVENTIONS RELATING TO MARITIME TERRORISM PRIOR TO 2001

1. Overview of the UN Counter-Terrorism Conventions

Prior to 2001, the UN had not been able to agree on a general definition of terrorism. However, a series of global conventions were adopted to create a framework for cooperation among States Parties for specific offences. The first of these was the *Hague Convention for the Suppression of Unlawful Seizure of Aircraft*, 1970.²² These conventions are often referred to as the UN counter-terrorism conventions, even though the acts that are made offences in most of the conventions do not require a terrorist purpose or motive.²³

¹⁵ See Article 105 of UNCLOS, *supra* note 5, which allows all States to seize a pirate ship or a ship taken by piracy and under the control of pirates (piracy is defined in Article 101), and arrest the persons and seize the property on board. Article 105 applies in the EEZ by virtue of Article 58 (2) of UNCLOS.

¹⁶ See Article 103 of UNCLOS, *supra* note 5, for the definition of a “pirate ship.”

¹⁷ See Article 110 of UNCLOS, *supra* note 5, on the Right of Visit. This would apply in the EEZ by virtue of Article 58 (2).

¹⁸ Article 110 of UNCLOS, *supra* note 5, provides that “except where acts of interference derive from powers conferred by treaty.”

¹⁹ See Article 73 of UNCLOS, *supra* note 5.

²⁰ Article 56 (b) of UNCLOS, *supra* note 5, gives the coastal State jurisdiction over marine scientific research and the protection and preservation of the marine environment in the EEZ.

²¹ See Articles 95 and 96, UNCLOS, *supra* note 5.

²² *Hague Convention for the Suppression of Unlawful Seizure of Aircraft*, Adopted on 16 December 1970, 860 UNTS 105 (entered into force on 14 October 1971).

²³ However, Article 2 (1) (b) of the *International Convention for the Suppression of the Financing of Terrorism*, unlike the previous counter-terrorism conventions, contains what has been described as a mini-definition of terrorism: See *Implementation Kits for the International Counter-Terrorism Conventions*, 2002 available at <http://www.thecommonwealth.org/shared_asp_files/uploadedfiles/%7B8AE4DB15-88A5-46F2-8037-357DFF7D3EC1%7D_Implementation%20Kits%20for%20Counter-Terrorism.pdf>.

The UN counter-terrorism convention that was specifically designed to address maritime terrorism was the 1988 SUA Convention and the 1988 *Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf*²⁴ (1988 Platforms Protocol). The 1988 SUA Convention and 1988 Platforms Protocol were adopted in response to the 1985 hijacking of the Italian-flag cruise ship *Achille Lauro* by extremists in the Mediterranean Sea.

Two more of the UN counter-terrorism conventions can also be used against certain acts of maritime terrorism. The 1979 *Convention against the Taking of Hostages*²⁵ (1979 Hostages Convention) applies whenever the passengers or crew of a ship are taken hostage for ransom. The 1999 *International Convention for the Suppression of the Financing of Terrorism*²⁶ (1999 Terrorist Financing Convention) provides that it is an offence for a person to finance offences under the 1988 SUA Convention or the 1979 Hostages Convention. We will first examine the general framework for each of these Conventions, and then examine the specific offences under each of them.

2. *Framework for Cooperation in the UN Counter-Terrorism Conventions*

The framework for cooperation among States Parties is the same in all of the UN counter-terrorism conventions. In essence, they establish universal jurisdiction among States Parties for the specific offences defined in the Conventions, and obligate States Parties to either prosecute or extradite any alleged offenders present in their territory. All of the UN counter-terrorist conventions have the following features:

First, they define specific acts which all States Parties are obliged to make criminal offences under their domestic law punishable by serious penalties. States Parties are also obliged to provide that it is an offence to be an accomplice or to abet the commission of the offence.

Second, they place an obligation on States Parties to establish jurisdiction over offences that take place in their territory, as well as offences that take place outside their territory provided that there is some jurisdictional nexus between the State Party and the offence, for example, when the alleged offender is a national of the State Party or the offence takes place on board a ship or aircraft registered in that State Party. This is consistent with general principles of criminal jurisdiction recognized under international law.²⁷ More importantly, the conventions also oblige States Parties to establish jurisdiction over offences where the alleged offender is present in its territory and the State does not extradite him to any of the States Parties having jurisdiction over the offence. This is a form of universal jurisdiction based on the presence of the offender, sometimes described as “subsidiary universal jurisdiction.”²⁸

Third, they place an obligation on all States Parties to take alleged offenders into custody if they are present in their territory, and to either extradite them to another State Party or submit the case to its

²⁴ *Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf*, adopted 10 March 1988 1678 UNTS 304 (entered into force 1 March 1992) (1988 Platform Protocol).

²⁵ *Convention Against the Taking of Hostages*, adopted 17 December 1979, 1316 UNTS 205 (entered into force 3 June 1983) (1979 Hostages Convention).

²⁶ *International Convention for the Suppression of the Financing of Terrorism*, adopted 9 December 1999, 2178 UNTS 229 (entered into force 10 April 2002) (1999 Terrorism Financing Convention).

²⁷ Under international law, there are five general principles under which criminal jurisdiction can be claimed: the territorial principle, the nationality principle, the protective principle, the universality principle and the passive personality principle. For further discussion on these principles, see D. Harris, *Cases and Materials on International Law*, 7th Edition (London, Sweet and Maxwell, 2010), pp. 228 to 258.

²⁸ See Separate Opinion of President Guillaume in *The Arrest Warrant Case* ICJ Rep 2002

competent authorities for the purpose of prosecution. This is referred to as the obligation to “extradite or prosecute.”²⁹

Fourth, all the counter-terrorism conventions contain measures to facilitate extradition of offenders found in the territory of a State Party. First, a convention offence is deemed to be included as an extraditable offence in any existing extradition treaty between States Parties. States Parties also undertake to include the convention offence as an extraditable offence in every future extradition treaty to be concluded between them. Second, States Parties which make extradition conditional on the existence of an extradition treaty, may, at its option, consider the convention as the legal basis for extradition in respect of the convention offence. Third, where States Parties do not make extradition conditional on the existence of a treaty, they are required to recognize the convention offence as an extraditable offence as between themselves.

Fifth, States Parties are obliged to afford one another the greatest measure of co-operation in connection with criminal proceedings to prosecute the offenders.

Sixth, they do not apply when there is no transnational element. For example, the 1979 Hostages Convention has no application “where the offence is committed within a single State, the hostage and the alleged offender are nationals of that State and the alleged offender is found in the territory of that State.”³⁰

The net effect of these provisions is that if all the States in a region are parties to the counter-terrorism conventions and fulfil their obligations in good faith, any alleged offenders will have no place of refuge. If they enter the territory of any State Party to the Convention, they will be taken into custody, and they will either be extradited to another State Party or the case will be submitted to the competent authorities for prosecution.

3. *1988 SUA Convention and the 1988 Platforms Protocol*

The offences defined in the 1988 SUA Convention involve acts which endanger the safety of international maritime navigation,³¹ including:

- 1) The seizure of or exercise of control over a ship by any form of intimidation;
- 2) Violence against a person on board a ship;
- 3) Destruction of a ship or the causing of damage to a ship or to its cargo;
- 4) Placement on a ship of a device or substance which is likely to destroy or cause damage to that ship or its cargo; and
- 5) Destruction of, serious damaging of, or interference with maritime navigational facilities.

The 1988 Platforms Protocol has identical offences for fixed platforms³².

The 1988 SUA Convention applies to offences against ships committed in maritime zones under the territorial sovereignty of coastal States (territorial seas and archipelagic waters) provided that the ship was navigating or scheduled to navigate into, through or from waters beyond the territorial sea of a State³³ as well as in maritime zones outside the territorial sovereignty of coastal States (high seas or EEZ).

²⁹ Although it is described as an obligation to “extradite or prosecute,” it is not strictly an obligation to prosecute but to submit the case to competent authorities which could decide, for example, that there is insufficient evidence to prosecute.

³⁰ Article 13, 1979 Hostages Convention, *supra* note 25.

³¹ Article 3, 1988 SUA Convention, *supra* note 6.

³² Article 2, 1988 Platforms Protocol, *supra* note 24.

³³ Article 4, 1988 SUA Convention, *supra* note 6.

The 1988 SUA Convention and the 1988 Platforms Protocol do not contain any provisions giving powers to States Parties to board and arrest ships. Enforcement is dependent on States Parties arresting alleged offenders who enter their territory, including their territorial waters.

Under Article 8 (1) of the 1988 SUA Convention, the master of a ship of a State Party (“the flag State”) may deliver to the authorities of any other State Party (“the receiving Party”) any persons who he has reasonable grounds to believe has committed one of the offences set forth in Article 3, provided that the master whenever practicable and if possible gives notice of delivery of the suspect before entering the territorial sea of the receiving State³⁴ and the flag State furnishes the receiving State with any relevant evidence.³⁵ A receiving State is under a primary obligation to accept delivery of a suspect and can only refuse to accept delivery “*where it has grounds to consider that the Convention is not applicable to the acts giving rise to the delivery*” in which case it must give a statement of the reasons for the refusal.³⁶ Once a delivered suspect is received within its territory, the receiving State must exercise its option to either extradite or prosecute.³⁷

4. 1979 Hostages Convention

Although it is not designed specifically for maritime terrorism, the 1979 Hostages Convention would be applicable to acts of maritime terrorism when the passengers or crew of a ship are taken hostage. Article 1 states that:

Any person who seizes or detains and threatens to kill, to injure or to continue to detain another person (“the hostage”) in order to compel a third party, namely a State, an international governmental organization, a natural or juridical person, or group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage commits the offence of taking of hostages (“hostage-taking”) within the meaning of this Convention.

5. 1999 Terrorism Financing Convention

Article 2(a) of the 1999 Terrorism Financing Convention provides that:

Any person commits an offence within the meaning of this Convention if that person by any means, directly or indirectly, unlawfully and wilfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out:

(a) An act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex.

The treaties listed in the Annex are the UN counter-terrorism conventions,³⁸ including the 1979 Hostages Convention and the 1988 SUA Convention and the 1988 Platforms Protocol. Therefore, any

³⁴ Article 8 (2), 1988 SUA Convention, *supra* note 6.

³⁵ Article 8 (4), 1988 SUA Convention, *ibid.*

³⁶ Article 8 (3), 1988 SUA Convention, *ibid.*

³⁷ Article 7, 1988 SUA Convention, *ibid.*

³⁸ The Annex consists of the following conventions:

person who finances the hijacking of ships or other offences under the 1988 SUA Convention and 1988 Platforms Protocol has committed an offence under the 1999 Terrorist Financing Convention. Similarly, any person who finances the act of taking passengers or crew of a ship hostage for ransom has committed an offence under the 1999 Terrorist Financing Convention.

It should also be noted that the financing of offences under the 2005 SUA Convention or the 2005 SUA Protocol would also be offences under this convention (these Conventions will be dealt with in Part IV).

6. Consistency of these Conventions with international law

As mentioned above, in areas under territorial sovereignty, States are prohibited from exercising enforcement jurisdiction without the coastal State's consent. In areas outside of territorial sovereignty, States are allowed to exercise extra-territorial prescriptive jurisdiction, subject to any rules prohibiting such prescription. Further, only flag States are permitted to exercise enforcement jurisdiction in areas outside of territorial sovereignty with limited exceptions.

The three counter-terrorism conventions discussed above do not address enforcement jurisdiction against vessels i.e. the boarding or arrest of ships suspected of engaging in acts of maritime terrorism and only require States Parties to exercise prescriptive jurisdiction. States Parties are obliged to establish jurisdiction over defined offences (consistent with general principles on criminal jurisdiction under international law), to take alleged offenders present in their territory into custody and to either extradite them or submit the case to its competent authorities for prosecution. Accordingly, these conventions are consistent with principles governing jurisdiction over maritime activities.

IV. MEASURES BY THE UN ORGANIZATIONS AFTER 2001

1. 2001 Security Council Resolution on Terrorism

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1. Convention for the Suppression of Unlawful Seizure of Aircraft, done at The Hague on 16 December 1970.
 2. Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, done at Montreal on 23 September 1971.
 3. Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, adopted by the General Assembly of the United Nations on 14 December 1973.
 4. International Convention against the Taking of Hostages, adopted by the General Assembly of the United Nations on 17 December 1979.
 5. Convention on the Physical Protection of Nuclear Material, adopted at Vienna on 3 March 1980.
 6. Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, done at Montreal on 24 February 1988.
 7. Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, done at Rome on 10 March 1988.
 8. Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf, done at Rome on 10 March 1988.
 9. International Convention for the Suppression of Terrorist Bombings, adopted by the General Assembly of the United Nations on 15 December 1997.

The UN Security Council responded almost immediately to attacks on the United States on 11th September 2001. It declared in Resolution 1373 of 28 September 2001³⁹ that the attacks on the United States, “like any act of international terrorism, constitute a threat to international peace and security.” This enabled the Security Council to invoke its special powers under Chapter VII of the UN Charter to take collective action that is binding on all members of the UN. Resolution 1373 sets out a comprehensive set of measures that all member States of the UN must take in order to prevent and suppress the financing of terrorist acts. It establishes that States have a legal obligation to refrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts. Further, it calls on all States to enhance coordination of efforts on national, sub-regional, regional and international levels in order to strengthen the global response to the challenge of international terrorism.

Although the Security Council Resolutions do not specifically mention maritime terrorism or threats to international shipping, the events of 11th September 2001 focused the attention of the international community on the threats posed by international terrorists to maritime security. Since the taking of passengers as hostages on the *Achille Lauro* in 1985, there have been a few incidents of maritime terrorism, both before and after 11th September 2001. These include the deliberate ramming of the US naval ship, *USS Cole* in Aden Harbour, Yemen in 2000 by a small suicide boat loaded with explosives and operated by Al-Qaeda,⁴⁰ a similar attack on a French oil tanker, *Limburg*, in the Gulf of Aden in 2002,⁴¹ also allegedly by Al-Qaeda as well as the attack by the *Abu Sayyaf* terrorist group against the Philippine flagged ship, *SuperFerry 14* in 2004.⁴² It is said that while maritime terrorist attacks are more difficult to execute and as a result, less likely to occur than other types of attacks, they remain a significant possibility and States should continue to be vigilant.⁴³

2. 2002 IMO Measures on Maritime Security

As a result of the events of 11th September 2001, as mentioned above, States and international organizations were forced to completely rethink the threat of maritime terrorism. The United States initiated and led the drive at the IMO to adopt measures to strengthen maritime security on ships and in ports.⁴⁴

³⁹ UN Security Council Resolution 1373, 28 September 2001, S/RES/1373 (2001) available at < <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N01/557/43/PDF/N0155743.pdf?OpenElement>>.

⁴⁰ See Michael Isikoff, “10 years later, still no trial for accused USS Cole attack mastermind,” 10 December 2010, MSNBC available online at <http://www.msnbc.msn.com/id/39634317/ns/us_news-security/>.

⁴¹ See “US kills Al-Qaeda suspects in Yemen,” 5 November 2002, USA Today available online at <http://www.usatoday.com/news/world/2002-11-04-yemen-explosion_x.htm>.

⁴² J. Power, ‘Maritime Terrorism: A New Challenge for National and International Security’, 10 *Barry Law Review*, (2008), p.111 at 124.

⁴³ See P. Parfomak and J. Frittelli, *supra* note 3.

⁴⁴ On 15 January 2002, the United States submitted a proposal to the 75th Session of the IMO Maritime Security Committee on measures to improve maritime security (IMO Doc MSC 75/ISWG/5/7) (text provided to author). The proposal covered the following areas: Automatic Identification Systems, Ship and Offshore Facility Security Plans, Port Facility Security Plans, Ship Security Officers, Company Security Officers, Seafarer Identification Verification and Background Check, Port Vulnerability Assessments, Port of Origin, Container Examinations, Cooperation with the World Customs Organization, Information on the Ship and its Cargo and People, Means of Ship Alerting and Ship Security Equipment.

The IMO adopted Assembly Resolution A.924(22)⁴⁵ calling for a review of the existing measures and procedures to prevent acts of terrorism which threaten the security of passengers, crew members and the safety of ships. At the 22nd Assembly meeting in November 2001, it was agreed to hold a Conference on Maritime Security in December 2002 to adopt new regulations to enhance ship and port security.

The 2002 Conference adopted resolutions containing a series of measures to strengthen maritime security and prevent and suppress acts of terrorism against international shipping. Many of the measures were adopted through amendments to the major IMO Convention governing the safety of ships, the 1974 *International Convention on the Safety of Life at Sea*⁴⁶ (SOLAS Convention). The 2002 amendments to SOLAS 1974 entered into force on 1 July 2004.

3. *New Chapter XI-2 to SOLAS Convention*

One of the most important measures taken at the 2002 Conference was to add a new Chapter on maritime security to the SOLAS Convention. The new Chapter XI-2 is entitled “Special Measures to Enhance Maritime Security,” and is applicable to ships engaged on international voyages, to companies operating ships on international voyages, and to port facilities serving ships engaged on international voyages. The special measures include the following: First, flag States are required to set security levels for their ships, and port States are required to set security levels for their port facilities. Second, the master is required to have information on board the ship concerning persons or organizations responsible for the appointment and employment of crew members of the ship. Third, ships constructed after 1st July 2004 are required to be provided with a Ship Security Alert System. Fourth, the master of a ship is given the overriding authority and the responsibility to make decisions and measures with respect to the safety and security of the ship.

4. *ISPS Code*

Supplementary to the new Chapter XI-2 is the *International Ship and Port Facility Security Code* (ISPS Code) adopted on 1st July 2004. As the title suggests, the ISPS Code contains measures designed to enhance the security of ships and the security of port facilities. The ISPS Code has two parts, A and B. Part A is mandatory for the purpose of compliance with Chapter XI-2. Part B is to be used as a guide and treated as recommendatory.

The ISPS Code contains various measures designed to enhance the security of ship. First, a ship is required to carry on board a Ship Security Plan approved by the flag State on the basis of a Ship Security Assessment. Second, a company operating a ship must designate a Company Security Officer (CSO) for every ship, and every ship is required to have a designated Ship Security Officer (SSO), both of whom are required to undergo training in maritime security in accordance with the guidance given in Part B of the ISPS Code. Third, drills and exercises with respect to the Ship Security Plan are required to be carried out at appropriate intervals by all parties concerned. Fourth, ships verified to be in compliance are issued with an International Ship Security Certificate (ISS Certificate). Fifth, a ship is required to act upon the security levels set by the port State or the flag State by carrying out the activities prescribed in the ISPS

⁴⁵ Assembly Resolution A.924 (22), Review of Measures and Procedures to Prevent Acts of Terrorism which Threaten the Security of Passengers and Crews and the Safety of Ships, adopted on 20 November 2001.

⁴⁶ *International Convention on the Safety of Life at Sea*, adopted 1 November 1974, 1184 UNTS 2 (entered into force 25 May 1980).

Code with the aim of identifying and taking preventive measures against security incidents. A security incident is defined in Chapter XI-2 as “any suspicious act or circumstance threatening the security of the ship, including a mobile offshore drilling unit and a high speed craft, or of a port facility or of any ship/port interface or any ship to ship activity”.

The ISPS Code also contains measures to enhance the security of ports. Port Facilities to which Chapter XI-2 applies are required to develop and maintain a Port Facility Security Plan on the basis of a Port Facility Security Assessment. These facilities are required to designate Port Facility Security Officers who, together with appropriate port facility security personnel, are required to undergo training in maritime security in accordance with the guidance given in Part B of the ISPS Code. They are also required to conduct drills and exercises with respect to the Port Facility Security Plan.

Ships are subjected to Port State Control with respect to compliance with Chapter XI-2. The Port State Control inspection is limited to verifying that there is on board a valid International Ship Security Certificate (ISS Certificate) issued under the provisions of Part A of the ISPS Code. When a valid ISS Certificate cannot be produced or when there are clear grounds for believing that the ship is not in compliance with the requirements of Chapter XI-2 or Part A of the ISPS Code, certain control measures may be taken against the ship. Such control measures include inspection of the ship, delaying the ship, detention of the ship, restriction of operations including movement within the port, or expulsion of the ship from port. In addition, a port State may require that ships provide information to ensure compliance with Chapter XI-2 prior to entry into port, including information relating to the ISS Certificate, the security level of the ship, the security level at previous port calls, and security measures taken at previous port calls.

5. Other Measures on Maritime Security

The 2002 Amendments also included other measures to enhance maritime security. First, they brought forward the dates by which certain ships had to install an Automatic Identification System (AIS). The AIS system enables shore facilities to automatically identify ships and obtain basic information about them. Second, the regulations now require that a ship’s Identification Number must be permanently marked in two places on the ship, one of which must be clearly visible. Third, ships are required to carry on board a Continuous Synopsis Record, which is intended to provide an on-board record of the history of the ship with respect to the information recorded therein. This record will be issued by the Registry of Ships. The latter two measures will make it more difficult for hijackers or pirates to re-register and rename ships.

6. Consistency of measures with international law

The new maritime security measures described above did not pose any challenge to existing rules governing jurisdiction over maritime activities. They gave new obligations to both owners of ships as well as well as flag States but this is consistent with the principle that flag States have prescriptive jurisdiction over vessels which fly their flag. The new measures also gave new rights and responsibilities to port States, particularly the ISPS Code, but this is also consistent with customary international law and UNCLOS. Both customary international law and UNCLOS recognize that all States have jurisdiction

over acts and events in their territory, which includes ports and internal waters.⁴⁷ A corollary of this is the principle that States have a wide right to prescribe conditions for access to their ports.⁴⁸

The measures adopted by the IMO were very significant in two respects. First, they expanded the IMO's traditional responsibility for maritime safety to include maritime security. Second, they expanded the IMO's rule-making authority into port facilities, an area that had previously been considered a matter within the domestic jurisdiction of port States.

V. 2005 SUA Convention

1. Background to the 2005 SUA Convention

As another of its measures to enhance maritime security after 11th September 2001, the IMO urged its members to become parties to the 1988 SUA Convention. Consequently, the number of States Parties to the 1988 SUA Convention almost tripled within five years, from 52 States on 31st January 2001 to 152 States on 31st October 2006.

In addition, in October 2001, the Legal Committee of the IMO also decided to review the 1988 SUA Convention (and the 1988 SUA Protocol). The Legal Committee agreed to include the review of the 1988 SUA Convention as a priority item in its work program.⁴⁹ In April 2002, the Legal Committee agreed to establish a Correspondence Group led by United States with the short-term aim of developing a working paper on the scope of possible amendments for consideration at the 85th session of the Legal Committee in October 2003. The longer aim was to draft the amendments and make a recommendation to the IMO Assembly that it convene an international diplomatic conference to consider and adopt amendments to the 1988 SUA Convention.⁵⁰ All States and interested international organizations were invited to participate in the work of the Group.

The conclusion of the work of the Correspondence Group was that the offences in the existing conventions for maritime terrorism 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.”⁵¹ Further, it was found 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.”⁵²

The Legal Committee worked on a revised draft protocol prepared by the Correspondence Group over the next three years. The Correspondence Group received comments and suggestions from numerous States and organizations which participate in the work of the IMO. Most delegations expressed support for the revision. However, concerns were expressed that the draft boarding provisions should not intrude into the principles of freedom of navigation on the high seas and the exclusive jurisdiction of flag States

⁴⁷ R.R Churchill and A.V. Lowe, *The Law of the Sea* (United Kingdom, Manchester University Press, 1999) at 62

⁴⁸ Churchill and Lowe, *ibid.* UNCLOS itself presupposes that States may set conditions for entry to their ports (See Articles 25 (2), 211 (3) and 255 of UNCLOS, *supra* note 5).

⁴⁹ IMO Legal Committee, 83rd Session, 8-12 October 2001. A summary of the work of the Legal Committee is available on the IMO Home Page under Committees. See www.imo.org

⁵⁰ IMO Legal Committee, 84th Session, 22-26 April 2002, *ibid.*

⁵¹ H. Tuerk, ‘Combating Terrorism at Sea – The Suppression of Unlawful Acts Against the Safety of Maritime Navigation’, 15 *University of Miami International and Comparative Law Review* (2007 – 2008) p. 337 at 356.

⁵² *Ibid.*

over their ships on the high seas.⁵³ Delegations also stated that the SUA Protocol must not impinge on the operation of international commercial shipping. The two articles which were the subject of major debate and disagreement were Article 3*bis*, which sets out new offences to be added to the Convention, and Article 8*bis*, which establishes new provisions for the boarding and search of ships suspected of committing an offence under the 1988 SUA Convention and the draft 2005 SUA Protocol.

After three years of study and deliberation, the Legal Committee completed its work at its 90th session in April 2005.⁵⁴ An International Conference on the Revision of the SUA Treaties (2005 Conference) was held in October 2005 to adopt amendments to the 1988 SUA Convention (and to the 1988 SUA Platforms Protocol). The 2005 SUA Protocol⁵⁵ was formally adopted at the 2005 Conference on 14th October 2005.⁵⁶

2. *Entry into force of 2005 SUA Convention*

The 2005 SUA Protocol entered into force on 28th July 2010, ninety days after the date on which 12 States formally ratify or accept it by giving official notice to the IMO Secretary-General of their consent to be bound by its provisions.⁵⁷ To become a Party to the 2005 SUA Protocol, a State must first become a Party to the 1988 SUA Convention.⁵⁸

After the Protocol entered into force in July 2010, Articles 1-16 of the 1988 SUA Convention, as revised by the 2005 SUA Protocol, together with Articles 17 to 24 of the 2005 SUA Protocol and its Annex, are to constitute and be called the *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 2005* (2005 SUA Convention).⁵⁹

As of 31st October 2010, there are only 17 States Parties to the 2005 SUA Convention and 13 States Parties to the 2005 SUA Platforms Protocol.

3. *Offences under the 2005 SUA Convention*

One of the significant aspects of the 2005 SUA Convention is that it broadens the list of offences by adding three categories of new offences. The first category of new offences concerns acts of maritime terrorism such as using a ship as a weapon or as a means to carry out a terrorist attack.⁶⁰ These new offences require a specific knowledge and intent. They also require a “terrorist motive” -- the purpose of the act must be to intimidate a population or compel a government to do or abstain from doing an act.⁶¹ These new offences update the categories of acts that might endanger the safety of ships engaged in international maritime navigation.

The second category of new offences are non-proliferation offences that are intended to strengthen the international legal basis to impede and prosecute the trafficking by commercial ships on the high seas

⁵³ IMO Legal Committee, 88th Session, 19-23 April 2004, *supra* note 49.

⁵⁴ IMO Legal Committee, 90th Session, 18-29 April 2005, *ibid*.

⁵⁵ 2005 *Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*, adopted 14 October 2005, IMO Doc LEG/CONF. 15/21 (entered into force 28 July 2010) (2005 SUA Protocol).

⁵⁶ 2005 SUA Protocol, *ibid*.

⁵⁷ 2005 SUA Protocol, *ibid*.

⁵⁸ Article 17(4), 2005 SUA Protocol, *ibid*.

⁵⁹ Article 15(2), 2005 SUA Protocol, *ibid*.

⁶⁰ Article 3*bis* (1)(a), 2005 SUA Protocol, *ibid*.

⁶¹ *Ibid*.

of WMD, their delivery systems and related materials. The non-proliferation provisions require States Parties to criminalize transport on the high seas of WMD and certain related materials, as well as nuclear material and equipment.⁶² The offence for trafficking in WMD or related materials on the high seas requires certain “knowledge and intent”. However, no “terrorist motive” is required because the proliferation offences are intended to cover the proliferation of WMD by sea for profit as well as for terrorist purposes. This category of new offences establishes a new tool to combat the proliferation of WMD. The United States justified the inclusion of this category of offences by pointing out that it was a response to the measures called for in UN Security Council Resolution 1540 on the non-proliferation of WMD.⁶³

The third category of new offences in the 2005 SUA Convention makes it an offence to transport by sea any person who has committed an offence under the 2005 SUA Convention or its 2005 Protocol or any of the other UN counter-terrorism conventions when intending to assist that person to evade criminal prosecution. The counter-terrorism conventions concerned are listed in an Annex. This offence also requires specific “knowledge and intent” to ensure that innocent seafarers and masters are not made criminals.

4. *Boarding Provisions in the 2005 SUA Convention*

The most significant change in the 2005 SUA Convention is that it establishes a comprehensive set of procedures designed to facilitate the boarding of a vessel that is suspected of being involved in a SUA offence. Article 8*bis* of the 2005 SUA Convention allows States Parties to board the vessels of other States Parties outside the territorial sea of any State. If law enforcement or other authorized officials of a State Party (“the requesting Party”) has reasonable grounds to suspect that the ship or a person on board the ship is involved or is about to be involved in the commission of SUA offences, it must ask the flag State of the ship to confirm the nationality of the ship and then for authorization to board and to take appropriate measures to determine if a SUA offence has been committed.

The 2005 SUA Convention envisages three mechanisms to allow States Parties to consent to the boarding of a vessel.⁶⁴ States Parties can either (a) consent on an *ad hoc* basis to requests for boarding, (b) consent implicitly by notifying the Secretary-General of the IMO that prior authorization to board is given if no response is received from the flag State after four hours of a request or (c) consent implicitly by notifying the Secretary-General of the IMO that prior authorization to board is given (no time limit is imposed).⁶⁵ Such notifications of implicit consent given by notifying the Secretary-General of the IMO can be withdrawn at any time.

For ad hoc requests to board, the flag State can either (a) authorize the boarding subject to any conditions it may impose, (b) conduct the boarding with its own law enforcement or other officials, (c) conduct the boarding with the requested party subject to any conditions it may impose, or (d) decline to authorize a boarding.

⁶² Article 3*bis* (1)(b), 2005 SUA Protocol, *ibid*.

⁶³ See Security Council Resolution 1540 (2004), adopted by the Security Council at its 4956th Meeting on 28 April 2004, UN Doc No. S/Res/1540/2004 available at <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N04/328/43/PDF/N0432843.pdf?OpenElement>>.

⁶⁴ N. Klein, ‘The Right of Visit and the 2005 Protocol on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation’, 35 *Denver Journal of International Law and Policy* (2006 – 2007) p. 288 at 319.

⁶⁵ *Ibid* at 322.

Many States and organizations argued that the new boarding provisions must not unduly interfere with the economic interests of flag States and ship owners or with the rights of seafarers. As a result, the new boarding provisions contain the most comprehensive set of “safeguards” ever included in any such convention. Among the safeguards are the following:

- Use of force must be avoided except when necessary to ensure the safety of its officials and persons on board or where the officials are obstructed in the execution of authorized actions, and any use of force must not exceed the minimum necessary and reasonable in the circumstances;
- The boarding State must take into account the dangers and difficulties involved in boarding a ship at sea;
- The boarding State must take due account of the need not to endanger the safety of life at sea and of the safety and security of the ship and its cargo, and must take reasonable steps to avoid a ship being unduly detained or delayed;
- The boarding State must take due account of the need not to prejudice the commercial and legal interests of the flag State, and must advise the master of its intention to board and afford him the opportunity to contact the owner and the flag State;
- The boarding State is liable for damage, harm or loss attributable to it when the grounds for the boarding prove to be unfounded or when the measures taken are unlawful or exceed those reasonably required in the circumstances.

5. *Consistency of the 2005 SUA Convention with international law*

As mentioned in Part II, under UNCLOS, the flag State has exclusive jurisdiction on the high seas and other States have the right to board foreign flagged vessels in the limited circumstances set out in Article 110 (piracy, slavery, unlawful broadcasting and where suspicions as to the nationality of the vessel arise). Other States can also board foreign-flagged vessels if given express consent by the flag State. Article 110 also recognizes that additional reasons for exercising the right to board foreign flagged vessels may be established by treaty.⁶⁶ The 2005 SUA Convention creates a new treaty power to exercise the right to board foreign-flagged vessels. The boarding provisions were inevitably the subject of intense negotiations. As mentioned above, many States maintained that any new boarding provisions must be consistent with UNCLOS and must not interfere with the rights and jurisdiction of coastal States in their territorial sea, freedom of navigation or the principle that ships on the high seas are subject to the exclusive jurisdiction of the flag State.⁶⁷ The United States, on the other hand, insisted on the inclusion of a set of procedures to expedite the boarding of ships suspected of engaging in SUA offences.

The boarding provisions which were eventually agreed upon are consistent with UNCLOS. Boarding can only take place on ships under the flag of States Parties and only seaward of the outer limits of any State’s territorial sea (on the high seas or in an EEZ). Boarding can only occur with the express consent of the flag State. The implicit consent procedures established under the Protocol are optional and States Parties can choose whether or not to participate in the implicit consent regime. If the flag State does decide to give its consent to the boarding, it may impose conditions on the boarding State. Further, given the comprehensive safeguards, there is little likelihood that the boarding provisions will be open to abuse.

⁶⁶ Article 110 states “except where acts of interference derive from powers conferred by treaty.”

⁶⁷ N. Klein, *supra* note 64 at 319.

VI. SECURITY COUNCIL RESOLUTIONS ON ILLICIT TRAFFICKING IN WMD

1. UN Security Council Resolution 1540 of 28 April 2004

In September 2003, President Bush asked the UN Security Council to adopt a new anti-proliferation resolution that called upon all members of the UN to criminalize the proliferation of WMD, to enact strict controls consistent with international standards, and to secure any and all such materials within their own borders.⁶⁸ On 28th April 2004, the UN Security Council unanimously adopted Resolution 1540 on preventing proliferation of WMD. Invoking its enforcement powers under Chapter VII of the UN Charter, it affirmed that the proliferation of nuclear, chemical and biological weapons constitute a threat to international peace and security.⁶⁹

Under the Resolution, all members of the UN are legally bound to establish domestic controls including legislative measures to prevent the proliferation of WMD, in particular for terrorist purposes. With respect to the prevention of illicit trafficking by sea, no agreement could be reached on language concerning interdiction. The paragraph calling for cooperative action reads as follows:

8. Further to counter that threat, calls upon all States, in accordance with their national legal authorities and legislation and consistent with international law, to take cooperative action to prevent illicit trafficking in nuclear, chemical or biological weapons, their means of delivery, and related materials.⁷⁰

2. Security Council Resolutions on DPRK

When the DPRK conducted a test of a nuclear weapon on 9th October 2006, it posed a danger to peace and stability in the region and presented a challenge to international efforts aimed at strengthening the global regime of non-proliferation of nuclear weapons. In response, the UN Security Council adopted Security Council Resolution 1718 (SCR 1718) on 14th October 2006 imposing binding economic sanctions on DPRK.⁷¹

Despite the fear of the proliferation of WMD by sea, SCR 1718 does not contain any express language authorizing the interdiction of ships suspected of carrying WMD or other military equipment prohibited by the resolution. The operative paragraph reads as follows:

(f) In order to ensure compliance with the requirements of this paragraph, and thereby preventing illicit trafficking in nuclear, chemical or biological weapons, their means of delivery and related materials, all Member States are called upon to take, in accordance with their national authorities and legislation, and consistent with international law, cooperative action including through inspection of cargo to and from the DPRK, as necessary.

⁶⁸ Statement by President George W. Bush at the 58th General Assembly Plenary on 23 September 2009: See Press Release GA 10156 at <<http://www.un.org/News/Press/docs/2003/ga10156.doc.htm>>.

⁶⁹ See Security Council Resolution 1540 (2004), adopted by the Security Council at its 4956th Meeting on 28 April 2004, UN Doc No. S/Res/1540/2004 available at <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N04/328/43/PDF/N0432843.pdf?OpenElement>>.

⁷⁰ *Ibid.*

⁷¹ See Security Council Resolution 1718 (2006), adopted by the Security Council at its 5551st Meeting on 14 October 2006, UN Doc No. S/Res/1718/2006 available at <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N06/572/07/PDF/N0657207.pdf?OpenElement>>.

It was generally agreed that “through inspection of cargo” did not authorize the interdiction of ships exercising innocent passage rights in the territorial sea or the freedom of navigation beyond the limits of the territorial sea.

When DPRK conducted another nuclear test on 25th May 2009 in defiance of the UN and in violation of SCR 1718, the UN Security Council imposed additional economic sanctions in Security Council Resolution 1874 of 12th June 2009 (SCR 1874).⁷² This Resolution contained stronger language than SCR 1718, and made it very difficult for DPRK to ship any prohibited items from its ports. The operative paragraphs read as follows:

11. *Calls upon* all States to inspect, in accordance with their national authorities and legislation, and consistent with international law, all cargo to and from the DPRK, in their territory, including seaports and airports, if the State concerned has information that provides reasonable grounds to believe the cargo contains items the supply, sale, transfer, or export of which is prohibited by paragraph 8 (a), 8 (b), or 8 (c) of resolution 1718 or by paragraph 9 or 10 of this resolution, for the purpose of ensuring strict implementation of those provisions;

12. *Calls upon* all Member States to inspect vessels, with the consent of the flag State, on the high seas, if they have information that provides reasonable grounds to believe that the cargo of such vessels contains items the supply, sale, transfer, or export of which is prohibited by paragraph 8 (a), 8 (b), or 8 (c) of resolution 1718 (2006) or by paragraph 9 or 10 of this resolution, for the purpose of ensuring strict implementation of those provisions;

13. *Calls upon* all States to cooperate with inspections pursuant to paragraphs 11 and 12, and, if the flag State does not consent to inspection on the high seas, *decides* that the flag State shall direct the vessel to proceed to an appropriate and convenient port for the required inspection by the local authorities pursuant to paragraph 11;

3. *Consistency of Security Council Resolutions with international law*

SCR 1874 calls for inspections in a manner that is consistent with UNCLOS. Paragraph 11 calls upon States to inspect suspect cargo “in their territory, including their seaports and airports.” Paragraph 12 calls upon States to inspect ships on the high seas with the consent of the flag State. The key provision is paragraph 13, which provides that the Security Council “decides” that if the flag State does not consent to inspection on the high seas, the flag State shall direct the ship to proceed to an appropriate and convenient port for the required inspection by the local authorities. This reduces the possibility of a suspect ship flying the flag of the DPRK refusing to be inspected.

SCR 1874 is a very positive development because it in effect eliminates any legal loopholes but is at the same time completely consistent with UNCLOS. SCR 1874 places a clear obligation on the DPRK to either consent to inspection on the high seas or direct the vessel to proceed to a nearby port for the inspection.

⁷² See Security Council Resolution 1874 (2009), adopted by the Security Council at its 6141st Meeting on 12 June 2009, available at <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N09/368/49/PDF/N0936849.pdf?OpenElement>>.

VII. US PROLIFERATION SECURITY INITIATIVE

1. Background

The Proliferation Security Initiative (PSI) is an initiative of the United States to establish a coalition of willing partners to respond to the growing challenge posed by the proliferation of WMD. It is an attempt by the United States to create a framework for international cooperation to deal with the threat posed by WMD outside the international organizations and international treaties that regulate the proliferation of WMD.

The PSI was announced by United States President George Bush in Poland on 31st May 2003, just prior to the G8 Summit. President Bush stated:

When weapons of mass destruction or their components are in transit, we must have the means and authority to seize them. So today I announce a new effort to fight proliferation called the Proliferation Security Initiative. The United States and a number of our close allies, including Poland, have begun working on new agreements to search planes and ships carrying suspect cargo and to seize illegal weapons or missile technologies. Over time, we will extend this partnership as broadly as possible to keep the world's most destructive weapons away from our shores and out of the hands of our common enemies.⁷³

The statement by President Bush implied that new international agreements would be created that would allow the United States and its allies to search planes and ships carrying suspect cargo and seize illegal weapons or missile technologies. However, as the PSI developed, it has not been based upon the development of new international agreements, but on the development of cooperative arrangements among participating States regarding the interdiction of ships suspected of carrying WMD.

The United States began working with ten other countries in 2003 to develop a set of principles that would identify practical steps to interdict shipments of WMD flowing to or from “state or non-state actors of proliferation concern.” The ten countries were Australia, France, Germany, Italy, Japan, the Netherlands, Poland, Portugal, Spain and the United Kingdom. At a meeting in Brisbane in September 2003, the eleven participating countries agreed that North Korea and Iran were of particular proliferation concern and also agreed to a non-binding “Statement of Interdiction Principles”⁷⁴ (Interdiction Principles) There are presently ninety-eight (98) participating States as of October 2010.⁷⁵

2. Consistency of Interdiction Principles with international law

Questions have been raised as to whether some of the actions called for in the Interdiction Principles are consistent with existing rules of international law. Of particular concern was whether the provisions dealing with interdiction at sea were consistent with the provisions of UNCLOS.

The Interdiction Principles call upon participating States “to take specific action in support of interdiction...to the extent their national legal authorities permit and consistent with their obligations

⁷³ President George W. Bush, Remarks at Wawel Royal Castle in Krakow, Poland on 31 May 2003, available at <<http://www.whitehouse.gov/news/releases/2003/05/20030531-3.html>>.

⁷⁴ Interdiction Principles for the Proliferation Security Initiative, Adopted in Washington, 4 September 2003 available at <<http://www.state.gov/t/isn/c27726.htm>> (Interdiction Principles).

⁷⁵ See Proliferation Security Initiative, US Department of State online available at <<http://www.state.gov/t/isn/c27732.htm>>.

under international law.”⁷⁶ Generally speaking, some of the specific actions set out in the Interdiction Principles are consistent with international law as set out in UNCLOS. However, some of the specific actions required by the Interdiction Principles will be qualified by the provisions of UNCLOS.

The actions set out in the Interdiction Principles with respect to ships flying the flag of participating States are entirely consistent with the provisions in UNCLOS. States agree, on their own initiative, to board and search any suspect ships flying their flag in their internal waters or territorial seas or in areas beyond the territorial seas of any State.⁷⁷ This is consistent with the principles governing jurisdiction over maritime activities. States have a right to board and search ships flying their flag in their internal waters and territorial seas because the sovereignty of a State extends to these maritime zones and a State’s laws apply to ships flying their flag. In areas beyond the territorial sea of any State, the flag State has exclusive jurisdiction over ships flying its flag.

The Interdiction Principles also provide that a participating State should seriously consider giving other States consent to board and search ships flying its flag under appropriate circumstances.⁷⁸ Given that the flag State has exclusive jurisdiction over ships flying its flag outside the territorial sea of any State, it is consistent UNCLOS for flag States to give such consent. One of the goals of the United States under the PSI is to enter into bilateral agreements with major flag States which give the United States permission to board and search ships flying their flag when such ships are suspected of carrying WMD. The first such boarding agreement was signed by the United States and Liberia on 11th February 2004. The boarding agreement gives the United States authority, on a bilateral basis, to board ships flying the flag of Liberia if they are suspected of carrying illicit shipments of WMD. According to the United States, this boarding agreement was an important step in further operationalizing the PSI and strengthening the mechanisms that the United States has at its disposal to interdict suspect WMD-related cargoes. To date, the United States has signed eleven (11) of Ship-Boarding Agreements.⁷⁹

The Interdiction Principles also provide that participating States should:

*(T)ake appropriate actions to (1) stop and/or search in their **internal waters, territorial seas, or contiguous zones** (when declared) vessels that are reasonably suspected of carrying such cargoes to or from states or non-state actors of proliferation concern and to seize such cargoes that are identified; and (2) to enforce conditions on vessels entering or leaving **their ports, internal waters or territorial seas** that are reasonably suspected of carrying such cargoes, such as requiring that such vessels be subject to boarding, search, and seizure of such cargoes prior to entry.*⁸⁰

To the extent that these actions concern ships in a participating State’s ports and internal waters as well as ships entering or leaving their ports or internal waters, this is consistent with customary international law and UNCLOS. Participating States agree to stop and/or search ships in their ports or internal waters when such ships are reasonably suspected of carrying such cargoes to or from States or non-State actors of proliferation concern. Participating States also agree to enforce conditions on suspect ships entering or leaving their ports and internal waters. Such conditions might include a requirement that such ships be subject to boarding and search prior to entry. As mentioned in Part IV (6), ports and internal waters are

⁷⁶ Principle 4, Interdiction Principles, *supra* note 74.

⁷⁷ Principle 4 (b), Interdiction Principles, *ibid*.

⁷⁸ Principle 4 (c), Interdiction Principles, *ibid*.

⁷⁹ See Proliferation Security Initiative, US Department of State available at <<http://www.state.gov/t/isn/c27733.htm>>.

⁸⁰ Principle 4 (d), Interdiction Principles, *supra* note 74.

within the territorial sovereignty of a State, and States may impose conditions on ships in its ports and internal waters and on ships in its territorial sea that intend to enter its ports or internal waters.⁸¹

The most controversial actions set out in the Interdiction Principles concern actions of coastal States with regard to ships in their territorial sea or contiguous zone, and with regard to ships entering or leaving its territorial sea. These are controversial because under UNCLOS the ships of all States have a *right of innocent passage* through the territorial seas of all States.⁸² Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal state.⁸³ It is difficult to argue that the mere passage of a vessel containing WMD through the territorial sea of a coastal state is prejudicial to its peace, good order or security, given the fact that military vessels carrying nuclear weapons and foreign nuclear-powered ships and ships carrying nuclear substances⁸⁴ have a right of innocent passage through the territorial sea of a coastal State. Further, as acknowledged by many commentators, it is the intended use of the WMD at the point of destination that constitutes a threat to the coastal State and not the shipment of WMD itself.⁸⁵

Furthermore, special passage rules for the ships of all States apply in straits used for international navigation which fall within the territorial sea of the littoral states.⁸⁶ The ships of all states have the right of transit passage through straits used for international navigation, and such a right cannot be impeded or suspended by the littoral states.⁸⁷ The right of transit passage is an even broader right than the right of innocent passage.

Therefore, some States Parties to UNCLOS are unlikely to interfere with ships exercising the right of transit passage through a strait used for international navigation or the right of innocent passage through the territorial sea. Instead, they are likely to take the position that any action taken with respect to such ships must be *consistent with their obligations under international law* as set out in UNCLOS. However, it would be legal for the coastal State to board and search a suspect ship passing through its territorial sea if the flag State of the suspect ship expressly authorized or requested such action by the coastal State.

There is one other circumstance in which it may be legal for a coastal State to board and search a suspect ship in its contiguous zone or territorial sea. If a suspect ship was on a route in which there was evidence indicating that it was intending to bring WMD into the territory of the coastal State in violation of its customs laws and regulations, such a ship would not have a right of innocent passage. It could be boarded and searched by the authorities of the coastal State in its territorial sea. Similarly, it could be boarded and searched in the contiguous zone, which is a zone adjacent to the territorial sea in which the coastal state has special powers to enforce its customs and immigration laws.⁸⁸

3. *Relationship between PSI and 2005 SUA Convention*

⁸¹ See *supra* notes 47 and 48.

⁸² See Article 17, UNCLOS, *supra* note 5.

⁸³ See Article 19 (1), UNCLOS, *ibid.*

⁸⁴ See Article 23 of UNCLOS which assumes that foreign nuclear-powered ships and ships carrying nuclear or other inherently dangerous or noxious substances have the right of innocent passage.

⁸⁵ See, for example, J. Garvey, 'The International Institutional Imperative for Countering the Spread of Weapons of Mass Destruction: Assessing the Proliferation Security Initiative' 10 *Conflict and Security Law* (2005) p. 125 at 131.

⁸⁶ See Part III, UNCLOS, *supra* note 5.

⁸⁷ See Article 38 and 44, UNCLOS, *ibid.*

⁸⁸ See Article 33, UNCLOS, *ibid.*

The 2005 SUA Convention is consistent with the PSI and is complementary to it. The 2005 SUA Convention specifically provides that State Parties may conclude agreements or arrangements between them to facilitate law enforcement operations carried out under the boarding provisions.⁸⁹ The PSI would arguably be such an arrangement. In addition, the 2005 SUA Convention specifically provides that State Parties are encouraged to develop standard operating procedures (SOP) for joint operations and to consult with other States with a view to harmonizing SOP.⁹⁰

The link between the PSI and the boarding provisions in the 2005 SUA Convention could be a very significant development. The Interdiction Principles are very general. As mentioned above, the United States has negotiated bilateral ship boarding agreements with most of the major flag States, but the safeguards in Article 8bis are much more extensive than in the bilateral agreements. Therefore, if States cooperating in the PSI used the procedures for boarding that are set out in Article 8bis as their standard operating procedures, it would ensure that any interdictions and boardings under the PSI follow common procedures that contain extensive safeguards. This would alleviate some of the concerns in some States that interdictions and boardings under the PSI might be abused.

This link between the interdiction and boarding procedures in Article 8bis and the PSI could develop independent of the process of ratification or accession to the 2005 SUA Convention. If States participating in the PSI were to follow the procedures and safeguards in Article 8bis as standard operating procedures under PSI, the Article 8bis procedures could be incorporated into the PSI through practice. This would be very positive development.

VIII. PARTICIPATION IN AND IMPLEMENTATION OF MEASURES ON MARITIME TERRORISM

The success of the measures discussed above will depend on the extent to which States participate in such measures and where necessary, implement them within their national laws.

With respect to provisions to enhance maritime security that were adopted by the IMO in 2002, most States appear to have endorsed and implemented such provisions. The measures were adopted pursuant to the SOLAS Convention. Almost all States are parties to this Convention.⁹¹ In addition, many of the IMO measures to enhance maritime security were implemented through port State measures.⁹² Once major ports make compliance with the measures as a condition of entry into its port, the owners and operators of ships take the measures necessary to ensure that their ships meet the requirements necessary to obtain the certificates required for entry into ports. States were also diligent at meeting the requirements necessary to secure their port facilities, as they recognized that it was in their interests to do so for economic reasons. If they did not, ships carrying goods from their port would have difficulty entering major ports.

With regards to the UN counter-terrorism conventions such as the 1979 Hostages Convention, the 1988 SUA Convention, the 1999 Terrorism Financing Convention and the 2005 SUA Convention, the

⁸⁹ Article 8bis, paragraph 13, 2005 SUA Protocol, *supra* note 55.

⁹⁰ Article 8bis, paragraph 13, 2005 SUA Protocol, *supra* note 55.

⁹¹ See Status of IMO Conventions, IMO Website available at <<http://www.imo.org/About/Conventions/StatusOfConventions/Documents/Status%20of%20Conventions%202010.pdf>>.

⁹² See discussion in E. Lobsinger, 'Post-9/11 Security in a Post WWII World: The Question of Compatibility of Maritime Security Efforts with Trade Rules and International Law' 32 *Tulane Maritime Law Journal* (2007 -2008) p. 61 at 80 – 83.

UN General Assembly and regional bodies have all called upon States to ratify and implement these conventions. States have been slow to ratify some of these conventions, particularly the 2005 SUA Convention. As of 31 October 2010, only 17 States are parties to the 2005 SUA Convention, and the list of parties does not include any major maritime States or major powers.⁹³ This may be due to the controversy caused by the boarding provisions in the initial drafts of the 2005 SUA Convention and the consequent misapprehension by States that the provisions are still contrary to UNCLOS. This is unfortunate because if acts of maritime terrorism take place, the international community will not have a legal framework in place to address the issues, and perpetrators of such acts will remain unpunished, a situation that is presently seen with the piracy off the Horn of Africa.

There are also problems in the implementation of such conventions within national law. First, States Parties which consider international conventions as automatically part of their national law often do not have implementing legislation for these conventions.⁹⁴ However, all of these conventions require States Parties to establish penalties for the offences that take into consideration the grave nature of the offences. While a national court could conceivably rely on the convention (rather than domestic legislation) for the elements of the offence, there would be no corresponding penalty within their domestic legislation.

Second, States Parties which do have implementing legislation some times do not incorporate all elements of the offence as set out in the relevant convention which. This may pose difficulties when it is time to frame the charges against an alleged offender and there is a danger such implementing legislation will not be able to be used against the alleged offender.

Third, States Parties have often omitted to give their courts universal jurisdiction over convention offences based on the presence of the offender within their territory and usually require some form of jurisdictional nexus between the offence and the State. This may result in a State Party being unable to prosecute foreign offenders found in their territory for offences committed outside their territory where there is no jurisdictional nexus with the offence. This goes against the whole purpose and spirit of the counter-terrorism conventions, which is to ensure that there are no safe havens for offenders.

Some States are also reported to have had problems implementing binding decisions of the UN Security Council in their national legal systems. This issue was recently raised by the President of the International Court of Justice during an address in Singapore. One State which has taken specific steps to implement its obligations under Security Council Resolutions is Singapore. The Singapore Parliament passed the United Nations Act (Cap 339, Singapore Statutes) in 2001 to enable the Singapore government to effectively carry out binding decisions of the UN Security Council.⁹⁵

IX. CONCLUSION

It is evident that all of the measures taken to combat maritime terrorism, both before and after the terrorist attacks against the United States in 2001, are consistent with the principles governing jurisdiction over

⁹³ See Status of IMO Conventions, IMO Website available at <<http://www.imo.org/About/Conventions/StatusOfConventions/Documents/Status%20of%20Conventions%202010.pdf>>.

⁹⁴ This is often true of civil law countries whose systems of law are based on 'monism' whereby international conventions are considered self-executing.

⁹⁵ See United Nations Act 2001 (Cap 339), Singapore Statutes Online available at <http://statutes.agc.gov.sg/non_version/cgi-bin/cgi_getdata.pl?actno=2002-REVED-339&doctitle=UNITED%20NATIONS%20ACT%0a&date=latest&method=part&sl=1&segid=#1002272036-000004>

maritime activities. While some of the measures, such as the 2005 SUA Convention and the PSI, may have initially posed a challenge to such principles, they have ultimately been brought into conformity with international law or at the very least, be interpreted in a manner consistent with international law.

The importance of these measures being consistent with international law is undeniable. While the need to prevent and address maritime terrorism is imperative, the measures adopted must be defensible under international law to ensure their legitimacy and to ensure certainty in the international legal order. Further, the fact that they are consistent with international law will encourage States to participate in such measures.

The effectiveness of such measures depends on States participating in and implementing these measures. International and regional efforts should now focus on encouraging States to participate in such measures and on examining how States can effectively implement their obligations under the relevant conventions, the UN Security Council Resolutions and the PSI. This will help ensure that an effective legal framework is established to combat maritime terrorism.