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

Robert Beckman and Tara Davenport

Centre for International Law, National University of Singapore

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Robert Beckman and Tara Davenport
Centre for International Law, National University of Singapore

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 September 11, 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, 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 September 11th 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 whether the traditional principles governing jurisdiction over maritime activities limit the effectiveness of measures taken to combat maritime terrorism. Last, the paper concludes that the real problem lies not in the general principles governing a State's jurisdiction over maritime activities but in the effective implementation of these instruments by States.

I. INTRODUCTION

After the terrorist attacks on the United States on September 11, 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 it is agreed that maritime terrorism encompasses a wide range of potential attack scenarios3 including vessels being

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 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 >.
Maritime terrorism poses a particular challenge for the legal regime governing a State’s jurisdiction over maritime activities as set out in general principles of customary international law and the 1982 United Nations Convention on the Law of the Sea (UNCLOS). Prior to September 11, 2001, legal instruments that addressed maritime terrorism focused on establishing jurisdiction over the perpetrators of attacks and prosecution and punishment of them after the attacks had occurred. These instruments were consistent with principles governing jurisdiction over maritime activities. After September 11th, concerns were raised that the traditional principles governing jurisdiction over maritime activities could potentially hamper efforts to prevent acts of maritime terrorism. This is demonstrated by the sometimes contentious debates that surrounded the negotiation and adoption of instruments to combat maritime terrorism after September 11th. To this end, this article examines the measures that have been taken, both before September 11th and after September 11th, 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 the international law governing jurisdiction over maritime activities. Part III will then examine how three of the UN counter-terrorism conventions adopted before 2001 can be utilized to combat some cases of maritime terrorism. Parts IV and V will examine the actions taken by the UN Security Council and the International Maritime Organization (IMO) in reaction to the terrorist attacks on the United States on September 11, 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 North Korea. 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 outline the problems of effective implementation by States of the various international measures. In Part IX, this paper concludes that while most of the measures adopted are consistent with principles governing jurisdiction over maritime activities, and that this consistency is imperative, the real problem lies in the implementation by States of these measures.

II. PRINCIPLES GOVERNING JURISDICTION OVER MARITIME TERRORISM

There are two fundamental principles governing jurisdiction in ocean space against which maritime terrorism must be examined. As mentioned above, these principles are set out in UNCLOS and in general principles of international law. First, all States have jurisdiction over acts and events in their territory and in maritime zones subject to their sovereignty, including internal waters, archipelagic waters and territorial sea. No foreign State may exercise jurisdiction in an area under the sovereignty of another State without its express consent. Second, ships in areas outside the sovereignty of any State, namely the

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6 See Articles 2 and 49 of UNCLOS.
exclusive economic zone (EEZ) and high seas, are subject to the exclusive jurisdiction of the flag State, and may not be boarded without the express consent of the flag State or the master.

There are limited exceptions to this principle of flag State jurisdiction on the high seas. First, warships or ships on government service of all States may board and arrest pirate ships in areas outside the territorial sovereignty of any State i.e. in the EEZ and high seas. 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 (known as the right of visit under UNCLOS).

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

These exceptions to the principle of 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.

III. GLOBAL CONVENTIONS RELATING TO MARITIME TERRORISM PRIOR TO 2001

1. Overview of the UN Counter-Terrorism Conventions

Prior to 2001, the United Nations 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. 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.

The UN counter-terrorism convention that was specifically designed to govern maritime terrorism was the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Adopted on 16 December 1970, 860 UNTS 105 (entered into force on 14 October 1971).

Two more of the UN counter-terrorism conventions can also be used against certain acts of maritime terrorism. The \textit{Convention Against the Taking of Hostages, 1979}\textsuperscript{17} (1979 Hostages Convention) applies whenever the passengers or crew of a ship are taken hostage for ransom. The \textit{International Convention for the Suppression of the Financing of Terrorism, 1999}\textsuperscript{18} (1999 Terrorist Financing Convention) provided that it is an offence for a person to finance offences under the 1988 SUA Convention or the 1979 Hostages Convention.

2. \textit{Framework for Cooperation in the UN Counter-Terrorism Conventions}

The framework for the cooperation among States Parties is the same in all of the UN counterterrorism conventions. In essence, they establish universal jurisdiction (or universal jurisdiction based on the presence of the offender) 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 have an obligation to make criminal offences punishable by serious penalties under their domestic law. 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 the offences when they take place in their territory, when the alleged offender is their national, when the offence takes place in other places where they have criminal jurisdiction (e.g., on a ship or aircraft registered in their State), and when alleged offenders are present in their territory and they choose not to extradite them.

Third, 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.”\textsuperscript{19}

Fourth, 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 prosecute them in their courts. This is referred to as the obligation to “extradite or prosecute”.

Fifth, States are obligated to take measures to facilitate the extradition of offenders.

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

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\textsuperscript{17} \textit{Convention Against the Taking of Hostages}, Adopted 17 December 1979, 1316 UNTS 205 (entered into force 3 June 1983) (1979 Hostages Convention).


\textsuperscript{19} Article 13, 1979 Hostages Convention
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 extradited to another State Party or prosecuted in the State Party in whose territory they are present.


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

1) 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 platforms.

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

The 1988 SUA Convention and the 1988 Platforms Protocol does not contain any provisions giving powers to States to interdict and board ships. The enforcement of the Convention is dependent on coastal States arresting offenders within their territorial sea or archipelagic waters and States Parties arresting alleged offenders who enter their territory.

Under Article 8 (1) of the 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 State and the flag State furnishes the receiving State with any relevant evidence. 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. Once a delivered suspect is received within its territory, the receiving State must exercise its option to either extradite or prosecute.

20 Article 3, 1988 SUA Convention
21 Article 2, 1988 Platforms Protocol
22 Article 4, 1988 SUA Convention
23 Article 8 (2), 1988 SUA Convention.
26 Article 7, 1988 SUA Convention.
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 of the Hostages Convention 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 International Convention on the Suppression of the Financing of Terrorism**

Article 2(a) of the 1999 Terrorist 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, including the 1979 Hostages Convention and the 1988 SUA Convention and its 1988 Platforms Protocol. Therefore, any person who finances the hijacking of ships or other offences under the 1988 SUA Convention and 1988 Platforms Protocol has committed an offence under this 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**

These three counter-terrorism conventions do not address the arrest or interdiction of vessels suspected of engaging in acts of maritime terrorism. They only deal with jurisdiction over and prosecution of offenders present in the territory of a State Party after the commission of an act of maritime terrorism. Hence, they are consistent with the traditional principles governing jurisdiction over maritime activities set out in customary international law and UNCLOS.
IV. MEASURES BY THE UN ORGANIZATIONS AFTER 2001

1. 2001 Security Council Resolution on Terrorism

The UN Security Council responded almost immediately to attacks on the United States on September 11, 2001. It declared in Resolution 1373 of 28 September 2001 that the attacks on the United States, “like any act of international terrorism, constitute a threat to international peace and security”. This finding 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 United Nations. Resolution 1373 sets out a comprehensive set of measures that all member states of the United Nations 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 a 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 September 11 focused the attention of the international maritime community on the threats posed by international terrorists to maritime security.

2. 2002 IMO Measures on Maritime Security

As a result of the events of September 11th, 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. The IMO adopted Assembly Resolution A.924(22) calling for a review of the existing measures and procedures to prevent acts of terrorism which threaten the security of passengers and crews 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 (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. New Chapter XI-2 is entitled “Special Measures to Enhance Maritime Security”, and it 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 1 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 1 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 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 ships. 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 did not pose any challenge to existing rules of international law. They gave new obligations to both owners of vessels as well as flag States but this is consistent with the principle that flag States have 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 recognizes that all States have jurisdiction over acts and events in their territory, which includes ports and internal waters. A corollary of this is the principle that States have a wide right to prescribe conditions for access to their ports.

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 the port states because port facilities are within their territorial sovereignty.

V. 2005 SUA Convention

1. Background to the 2005 SUA Convention

32 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.
As another of its measures to enhance maritime security after the 9/11 attack, 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 31 January 2001 to 152 States on 31 October 2006. It was clear, however, that the existing counter-terrorism conventions would not be adequate to deal with the increased threat of maritime terrorism.

In October 2001, the Legal Committee of the IMO decided to review the 1988 SUA Convention (and the 1988 SUA Protocol) in the wake of the terrorist attack on the United States. The Legal Committee agreed to include the review of the SUA Convention as a priority item in its work program. 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. All States and interested international organizations were invited to participate in the work of the Group.

The Legal Committee continued to work 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 over their vessels on the high seas. 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 3bis, which sets out new offences to be added to the Convention, and article 8bis, which establishes new provisions for the boarding and search of suspect ships.

After three years of study and deliberation, the Legal Committee completed its work at its 90th session in April 2005. 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 Protocol was formally adopted at the 2005 Conference on 14 October 2005.

2. Entry into force of 2005 SUA Convention

The 2005 SUA Protocol entered into force on 28 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

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33 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
34 IMO Legal Committee, 84th Session, 22-26 April 2002, ibid.
35 IMO Legal Committee, 88th Session, 19-23 April 2004, ibid.
36 IMO Legal Committee, 90th Session, 18-29 April 2005.
38 2005 SUA Protocol.
bound by its provisions.³⁹ To become a Party to the 2005 SUA Protocol, a State must first become a Party to the 1988 SUA Convention.⁴⁰


As of 31 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 Protocol 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.⁴² These new offences require a specific knowledge and intent. They also require a “terrorist motive” -- the purpose of the acts must be to intimidate a population or compel a government to do or abstain from doing an act.⁴³ 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 offenses that are intended to strengthen the international legal basis to impede and prosecute the trafficking by commercial ships on the high seas 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.⁴⁴ 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 weapons of mass destruction.⁴⁵

The third category of new offences in the 2005 SUA Protocol makes it an offence to transport by sea any person who has committed an offence under the 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.

³⁹ 2005 SUA Protocol.
⁴⁰ Article 17(4), 2005 SUA Protocol.
⁴¹ Article 15(2), 2005 SUA Protocol
⁴² Article 3bis (1)(a), 2005 SUA Protocol.
⁴³ Ibid.
⁴⁴ Article 3bis (1)(b), 2005 SUA Protocol.
4. **Boarding Provisions in the 2005 SUA Convention**

The most significant change in the 2005 SUA Protocol 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 8bis 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 vessel to confirm the nationality of the vessel and then for authorization to board and to take appropriate measures to determine if a SUA offence has been committed.

The 2005 SUA Protocol envisages three mechanisms to allow States Parties to consent to the boarding of a vessel. 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). 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, (d) decline to authorize a boarding.

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 & 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 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 & 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

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47 *Ibid* at 322.
5. **Consistency of the 2005 SUA Protocol 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.\(^\text{48}\) As seen from the discussion on the boarding provisions above, the 2005 SUA Protocol creates a new treaty power to exercise the right to board foreign flagged vessels. The boarding provisions were inevitably the subject of intense negotiations. Many States maintained that any new boarding provisions must be consistent with UNCLOS and must not infringe either 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\(^\text{49}\). The United States 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 vessels 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 exclusive economic zone). Boarding can only occur with the express consent of the flag State. The implicit consent procedures established under the Protocol are optional. Also, 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 by the major powers.

**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 United Nations Security Council to adopt a new anti-proliferation resolution that called upon all members of the UN to criminalize the proliferation of weapons of mass destruction, to enact strict controls consistent with international standards, and to secure any and all such materials within their own borders.\(^\text{50}\) On 28 April 2004, the UN Security Council unanimously adopted Resolution 1540 on preventing proliferation of weapons of mass destruction. Invoking its enforcement powers under Chapter VII of the UN Charter, it affirmed that the proliferation of nuclear, chemical and biological weapons constitutes a threat to international peace and security.\(^\text{51}\)

Under the Resolution, all members of the United Nations 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:

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\(^{48}\) Article 110 states “except where acts of interference derive from powers conferred by treaty.”


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.

2. Security Council Resolutions on DPR Korea

When the Democratic People's Republic of Korea (DPRK) conducted a test of a nuclear weapon on 9 October 2006, it posed a danger to peace and stability in the region and presented a challenge to the Treaty on the Non-Proliferation of Nuclear Weapons and 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 14 October 2006 imposing binding economic sanctions on DPRK.52

Despite the fear of the proliferation of WMD by sea, SCR 1718 does not contain any express language authorizing the interdiction of ships suspected 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.

It was generally agreed that “through inspection of cargo” did not authorize the interdiction of ships exercising 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 25 May 2009 in defiance of the United Nations and in violation of SCR 1718, the UN Security Council imposed additional economic sanctions in Security Council Resolution 1874 of 12 June 2009 (SCR 1874).53 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 that 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

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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 vessels on the high seas with the consent of the flag State on the high seas. 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 States shall direct the vessel to proceed to an appropriate and convenient port for the required inspection by the local authorities. This reduces the possibility of the 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.

**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 weapons of mass destruction (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 US President George Bush in Poland on 31 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.54

The statement by President Bush suggests 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

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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 weapons of mass destruction 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.”55 There are presently ninety-eight (98) participating States as of October 2010.56

2. Interdiction Principles and UNCLOS

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

In the Statement of Interdiction Principles, participating states are called on “to take specific action in support of interdiction...to the extent their national legal authorities permit and consistent with their obligations under international law.” 57 Generally speaking, some of the specific actions set out in principles are consistent with international law as set out in UNCLOS. However, some of the specific actions set out in the principles will be qualified by the provisions of UNCLOS.

The actions set out in the interdiction principles with respect to vessels flying the flag of participating states are entirely consistent with the provisions in UNCLOS. In the Interdiction Principles, states agree, on their own initiative, to board and search any suspect vessels flying their flag in their internal waters or territorial seas or in areas beyond the territorial seas of any state.58 This is consistent with the principles governing the law of the sea. States have a right to board and search vessels in their internal waters and territorial sea which are flying their flag because the sovereignty of a state extends to its internal waters and to its territorial sea and a state’s laws apply on ships flying their flag. In addition, a flag state has exclusive jurisdiction over acts aboard ships in areas beyond the territorial seas of any state.

The interdiction principles also provide that a participating state should seriously consider giving other states consent to board and search vessels flying its flag under appropriate circumstances.59 Given that the flag state has exclusive jurisdiction over vessels flying its flag outside the territorial sea of any state, it is consistent with 1982 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 vessels flying their flag when such vessels are suspected of carrying WMD. The first such boarding agreement was signed by the United States and Liberia on 11 February 2004. The boarding agreement provides the United States authority on a bilateral basis to board vessels flying the flag of Liberia if they are suspected of carrying illicit shipments of weapons of mass destruction. According to the United States, this boarding agreement was an important step in further

57 Principle 4, Interdiction Principles, supra note 55.
58 Principle 4 (b), Interdiction Principles, supra note 55.
59 Principle 4 (c), Interdiction Principles, supra note 55.
operationalizing the PSI and strengthening the mechanisms that that the United States has at its disposal to interdict suspect weapons of mass destruction-related cargoes. To date, the United States has signed eleven (11) of Ship-Boarding Agreements.60

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.61

To the extent that these actions concern vessels in a participating State’s ports and internal waters as well as vessels 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 vessels in their ports or internal waters when such vessels 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 vessels entering or leaving their ports and internal waters. Such conditions might include a requirement that such vessels be subject to boarding and search prior to entry. As mentioned in Part IV (6), ports and internal waters are within its territorial sovereignty of a state, and states may impose conditions on vessels in its ports and internal waters and on vessels in its territorial sea that intend to enter its ports or internal waters.62

The most controversial actions set out in the interdiction principles concern actions of coastal states with regard to vessels in their territorial sea or contiguous zone, and with regard to vessels entering or leaving its territorial sea. These are controversial because under 1982 UNCLOS the vessels of all states have a right of innocent passage through the territorial sea of all states.63 Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal state.64 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 the military vessels carrying nuclear weapons and foreign nuclear-powered ships and ships carrying nuclear substances65 have a right of innocent passage through the territorial sea of the 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.66

Furthermore, special passage rules for the vessels of all states apply in straits used for international navigation which fall within the territorial sea of the littoral states.67 The vessels of all states have the right of transit passage through straits used for international navigation, and such right cannot be impeded

61 Principle 4 (d), Interdiction Principles, supra note 55.
62 See supra, notes 29 and 30.
63 See Article 17, UNCLOS.
64 See Article 19 (1), UNCLOS.
65 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.
67 See Part III, UNCLOS.
or suspended by the littoral states\textsuperscript{68}. The right of transit passage is an even broader right than the right of innocent passage.

Therefore, some States Parties to UNCLOS are not likely to interfere with the vessels 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 vessels 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 vessel passing through its territorial sea if the flag State of the suspect vessel 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 vessel in its contiguous zone or territorial sea. If a suspect vessel 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 vessel 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.

3. Relationship between PSI and 2005 SUA Convention

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\textsuperscript{69}. 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\textsuperscript{70}.

The link between the PSI and the boarding provisions in the 2005 SUA Convention could be a very significant development. The PSI Statement of Interdiction Principles is very general. As mentioned above, the United States has negotiated bilateral ship boarding agreements with most of the major flag States\textsuperscript{71}, but the safeguards in Article 8\textit{bis} 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 8\textit{bis} 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 the Article 8\textit{bis} and the PSI could develop independent of the process of ratification or accession to the 2005 SUA Protocol. If States participating in the PSI and States cooperating with the PSI were to follow the procedures and safeguards in Article 8\textit{bis} as standard operating procedures under PSI, the Article 8\textit{bis} procedures could be incorporated into the PSI through practice. This would be very positive development.

\textsuperscript{68} See Article 38 and 44, UNCLOS.
\textsuperscript{69} Article 8\textit{bis}, paragraph 13, 2005 SUA Protocol.
\textsuperscript{70} Article 8\textit{bis}, paragraph 13, 2005 SUA Protocol.
\textsuperscript{71} See \textit{supra} note 56.
VIII. NATIONAL IMPLEMENTATION OF MEASURES ON MARITIME TERRORISM

From the above discussion, it is clear that the measures adopted to counter maritime terrorism are consistent with international law including UNCLOS. 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. Indeed, the real problem in dealing with maritime terrorism is not the so-called constraints imposed by international law but rather that some States have had difficulty implementing the legal obligations set out in binding decisions of the UN Security Council or in global conventions to which they are a party.

The provisions to enhance maritime security that were adopted by the IMO in 2002 were adopted pursuant to the SOLAS Convention. Almost all States are parties to this Convention. In addition, many of the IMO measures to enhance maritime security were implemented through port State measures. Once major ports make compliance with the measures as 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 necessary 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.

The UN Security Council, the UN General Assembly and regional bodies have all called upon States to ratify and implement all of the UN counter-terrorism conventions. Nevertheless, some States appear to have been quite slow in ratifying and implementing the conventions. Questions have arisen on whether States whose constitutions provide that international treaties are part of their law must take measures to bring the conventions into force within their national legal systems. This is especially so with regard to the provisions in the UN counter-terrorism conventions which require the States Parties to establish penalties for the offences. Further study of these issues is required.

States have also been very slow to ratify 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. 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. 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

72 See Status of IMO Conventions, IMO Website available at <http://www.imo.org/About/Conventions/StatusOfConventions/Documents/Status%20of%20Conventions%202010.pdf>.
74 See Status of IMO Conventions, IMO Website available at <http://www.imo.org/About/Conventions/StatusOfConventions/Documents/Status%20of%20Conventions%202010.pdf>.
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.75

**IX. CONCLUSIONS**

There are two fundamental principles governing jurisdiction over maritime activities, including maritime terrorism. First, only the coastal State has enforcement jurisdiction in maritime zones subject to its sovereignty. Second, ships on the high seas are subject to the exclusive jurisdiction of the flag State, except as provided in UNCLOS and other international conventions. These principles provide the framework for dealing with any illegal activities at sea, including the threat of maritime terrorism.

We first examined the pre-2001 UN counter-terrorism conventions which relate to maritime terrorism. We then examined the various measures taken by the international community to combat maritime terrorism in response to the terrorist attacks on the United States in September, 2001. Some of these measures challenged the fundamental principles governing jurisdiction over maritime activities. However, in the end, all of the measures that were adopted have been consistent with the principles. As mentioned above, the importance of these measures being consistent with such principles of international cannot be underestimated. The fact that they are consistent with UNCLOS and international law will encourage States to participate in such measures.

The focus of the international community should now shift to ensure that States ratify and effectively implement their obligations under the relevant conventions and UN Security Council Resolutions and participate in non-binding principles such as the PSI.

The other major problem with respect to the legal regime governing maritime terrorism is that many States have not ratified or effectively implemented their obligations under the conventions and UN Security Council Resolutions. This problem should also be addressed.

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