ENSURING THE FREEDOM OF NAVIGATION THROUGH THE LENS OF THE INCREASING DANGER OF TERRORISM

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ABSTRACT

The present article analyses the topic of ensuring the freedom of navigation through the lens of the increasing danger of terrorism. It thereby discusses the legal mechanisms used against maritime terrorism and the gaps in international law that hamper timely identification and elimination of the danger of maritime terrorism. If adequate legal measures are elaborated and fully implemented, it would, in the view of the author, be possible to strike a balance between preventing acts of terrorism and ensuring the freedom of navigation.

INTRODUCTION

Nowadays, more than ever before, the prevention of acts of terrorism be it on land or at sea, is a global challenge. It is impossible to ensure global security unless this problem is solved. The tragic events of 11 September 2001 have made it clear that an act of terrorism may turn any transport facility into a weapon of mass destruction. The increase in the transportation of goods in containers, and thus decreasing transparency, has considerably heightened the risk of terrorist attacks in maritime navigation. Due to the fact that 90% of the global movement of goods is carried out by sea, terrorist acts which are directed against strategically important maritime routes are detrimental to international trade;[1] the elaboration of legal mechanisms and adoption of measures to counteract such acts of terrorism, however, could eventually also have an impact on the freedom of navigation.

Freedom of navigation is protected under the 1958 Geneva Convention on the High Seas (hereinafter – 1958 Geneva Convention)[2], as well as under the 1982 United Nations Convention on the Law of the Sea (hereinafter – UNCLOS)[3]. Neither one of them covers the issue of freedom of navigation in terms of preventing terrorism and prosecuting terrorists. This is understandable, since the need of elaborating new mechanism and employing adequate measures for the prevention of terrorist acts has only been focused upon after the incident, in 1985, regarding the cruise ship "Archille Lauro".[4] The highjacking of that Italian cruise liner is deemed to be

1 Rosalie Balkin, "The International Maritime Organization and Maritime Security", Tulane Maritime Law Journal, 30, 1 (2006): 16.

2 1958 Geneva Convention on the High Seas https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXI-2&chapter=21&clang=_en

3 1982 United Nations Convention on the Law of the Sea (UNCLOS) https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en.

4 Andrew L. Liput, "An Analysis of the Achille Lauro Affair: Towards an Effective and Legal Method of Bringing International Terrorists to Justice", Fordham International Law Journal, 9 (1985): 328-372, accessed: 15 November, 2019, http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1123&context=ilj

the first maritime terrorist act in the modern history of terrorism.[5] In response to this act, on 10 March 1988 the UN Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (hereinafter referred to as 1988 SUA Convention) and the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf (hereinafter called the 1988 SUA Protocol) were adopted.[6] This is the first Convention concerning maritime terrorism because prior to the tragic incident of the "Archille Lauro" maritime terrorism, in comparison to piracy, had never been a serious international problem. Thus, no relevant regulating mechanism had been adopted until then.[7]

Unfortunately, the 1988 SUA Convention included more norms on criminal liability and fewer provisions on preventive mechanisms.[8] Preventive mechanisms became especially important after 11 September 2001, and the prosecution of terrorists less topical because they frequently and intentionally committed suicide during an attack. Additionally, means of transportation became by themselves weapons of mass destruction. Such activities were not regulated under the 1988 SUA Convention. Consequently, in 2005, the 1988 SUA Convention and the 1988 SUA Protocol were amended, to make them responsive to modern time challenges.[9]

This article aims at defining the legal mechanisms that address the prevention of maritime terrorism. Attention will be paid thereby to the legal gaps that prevent states from identifying maritime terrorism in a timely manner. The main purpose, however, will be to find a balance between two concepts and compliance: on the one hand, to establish effective control mechanisms for vessels by States to prevent terrorist acts; and on the other hand, not to unduly limit freedom of navigation.

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[5] Sea: Balkin, The International Maritime Organization and Maritime Security, 1. In spite of the fact that in the modern maritime history the 1961 incident of "Santa Maria" may be deemed as the first terrorism act, the 1985 incident of "Archille Lauro" has become publicly known and has had international resonance. See: Lydelle Joubert, "The Extent of Maritime Terrorism and Piracy: A Comparative Analysis", 41 South African Journal of Military Studies, (2013): 111-137, accessed 15 November, 2019, http://commons.wmu.se/cgi/viewcontent.cgi?article=1000&context=lib_articles .

[6] 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (1988 SUA Convention), 1988 Protocol for the Suppression of unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf (1988 SUA Protocol). https://treaties.un.org/pages/showdetails.aspx?objid=08000002800b9bd7.

[7] Helmut Tuerk, "Combating Terrorism at Sea-The Suppression of Unlawful Acts Against the Safety of Maritime Navigation", 15, University of Miami International & Comparative Law Review, (2008): 337, 343-344, accessed 15 November, 2019, https://www.unodc.org/tldb/bibliography/Helmut%20Tuerk.pdf .

[8] *Ibid.*, 349.

[9] Protocol of 2005 to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (The 2005 Protocol), Protocol of 2005 for the Suppression of unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf. http://oceansbeyondpiracy.org/sites/default/files/SUA_Convention_and_Protocol.pdf.

1. FREEDOM OF NAVIGATION ACCORDING TO THE 1958 GENEVA AND 1982 UN CONVENTIONS

The freedom of navigation is protected under the 1958 Geneva Convention and the 1982 UNCLOS. Article 87 of the UNCLOS defines freedom of the high seas which comprises the right of states to exercise the freedom of navigation, freedom of fishing, of overflight, scientific research, etc.[10] The UNCLOS also states that when exercising the aforementioned freedoms, states shall act with due regard for the rights and interests of other states protected under the Convention.[11]

The basis for the legal regime relating to the freedom of navigation in high seas is governed by one of the general principles of modern international law, namely the exclusive jurisdiction of the flag state on any of its vessels in the high seas.[12] Limiting this jurisdiction is only permitted under the circumstances set forth in the UNCLOS - namely, in accordance with an international agreement; if the vessel is engaged in piracy or trade in slaves; if the vessel flies a flag of a foreign state or refuses to show a flag but has the same nationality as a warship; in case of unauthorized emissions or when the ship has no nationality.[13]

It thus appears that freedom of navigation under the UNCLOS may be restricted for the purpose of ensuring security and preventing illegal acts. In this regard, two fundamental principles confront each other: "inclusive" and "exclusive" claims over the sea and its utilization. The former entails the interests of all states to use the maritime space and is in accordance with the principle of freedom of the high seas, while the other one protects the individual interests of states, without considering the interests of other states.[14]

Freedom of the high seas has considerable economic significance. To be precise, the possibility of transferring people and goods across the world without the control of a state promotes the development of international trade.[15] This global benefit is threatened by terrorism. But maritime security must also be viewed as an "inclusive" issue because it is in the primary interest of all states.[16] International law, therefore, faces a challenge since it has to strike a balance between freedom of navigation and mechanisms of combating terrorism that limit this freedom.

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10 *Supra*, n. 3. The 1982 UNCLOS, Article 87 (1).

11 *Ibid.*, Article 87 (2).

12 Василий Гуцуляк, Международное Морское Право: публичное и частное (учебное пособие), 2006, 85.

13 *Ibid.*, 85-86.

14 Natalie Klein, Maritime Security and the Law of the Sea, 2003, 2-3.

15 See, Hugo Grotius, The Freedom of the Seas: or The Right which Belongs to the Dutch to Take Part in the East Indian Trade: a dissertation, (Magoffin, R. trans.) 1916, chapter 5.

16 Klein, Maritime Security and the Law of the Sea, 2-20.

2. MEANS OF COMBATING MARITIME TERRORISM

2.1. THE 1988 SUA CONVENTION AND ITS 2005 PROTOCOL

The main purpose of the 1988 SUA Convention was to ensure punitive measures against those persons who commit certain offences against ships.[17] Those offences were defined as the following:

a) to seize or to exercise control over a ship by force or any other form of intimidation; or
b) to perform an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of that ship; or
c) to destroy a ship or cause damage to a ship or to its cargo which is likely to endanger the safe navigation of that ship;
d) to communicate information which the person knows to be false, thereby endangering the safe navigation of a ship; or
e) to place or to cause to be placed on a ship, by any means whatsoever, a device or substance which is likely to destroy that ship, or cause damage to that ship or its cargo which endangers or is likely to endanger the safe navigation of that ship; or
f) to injure or to kill any person, in connection with the commission or the attempted commission of any of the abovementioned offences.[18]

While the 1988 SUA Convention contained a long list of acts that might have been qualified as terrorist acts, it did not regulate all acts that should have been qualified as such under international law.[19]

To remedy these shortcomings, a Diplomatic Conference, held from 10 to 14 October 2005, amended the 1988 SUA Convention and the SUA Protocol.[20] The United States (US) had strongly lobbied for this initiative.[21]

The 2005 Protocol entered into force on 28 July 2010, adding Article 3*bis* to the Convention.[22] Under this provision, new offences under the Convention include any unlawful and intentional act, the purpose of which it is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any such act. It is important to review those additions in detail, which made it possible for the international community to agree on the content of terrorism.[23]

[17] *Supra*, n.6. The 1988 SUA Convention, Preamble.

[18] *Ibid.*, Article 3.

[19] H.E. Jose Luis Jesus, Protection of Foreign Ships against Piracy and Terrorism at Sea: Legal Aspects, 18, International Journal of Marine and Coastal Law, (2003): 363, 391.

[20] *Supra*, n. 9.

[21] Sohn L. B., et al , Cases and Materials on the Law of the Sea, (2nd ed), (2014) 719.

[22] *Supra*, n. 9. The 2005 Protocol to the 1988 SUA Convention, Article 4(5), adding to the Convention Article 3*bis*.

[23] Definition of terrorism as such is not set forth in the Convention. See: Rüdiger Wolfrum, Fighting Terrorism at Sea: Options and Limitations under international Law, (2006) 7, accessed: 18 December, 2019, https://www.itlos.org/fileadmin/itlos/documents/statements_of_president/

The acts in question are the following:

> a) to use against or on a ship or to discharge from a ship any explosive, radioactive material or biological, chemical or nuclear weapons in a manner that causes or is likely to cause death or serious injury or damage;
> b) to discharge, from a ship, oil, liquefied natural gas, or other hazardous or noxious substance in such quantity or concentration that causes or is likely to cause death or serious injury or damage;
> c) to use a ship in a manner which causes death or serious injury or damage;
> d) to threaten, with or without a condition, as is provided for under national law, to commit an offense set forth above in (a), (b), or (c);
> e) to intentionally transport on board a ship any explosive or radioactive material, knowing that it is intended to be used to cause, or in a threat to cause, death or serious injury or damage;
> f) to intentionally transport on board a ship any biological, chemical or nuclear weapon, knowing it to be a such;
> g) to intentionally transport on board a ship any source material, special fissionable material, or equipment or material especially designed or prepared for the processing, use or production of special fissionable material, knowing that it is intended to be used in a nuclear explosive activity or in any other nuclear activity not under safeguards pursuant to an International Atomic Energy Agency (IAEA) comprehensive safeguards agreement; or
> h) to intentionally transport on board a ship any equipment, materials or software or related technology that significantly contributes to the design, manufacture or delivery of a biological, chemical or nuclear weapon, with the intention that it will be used for such purpose.[24]

Under the Protocol, it also constitutes an offence to unlawfully and intentionally transport another person on board a ship, with the intent of assisting that person in evading criminal prosecution and knowing that the person has committed an act that constitutes an offense set forth in one of the treaties listed in the Annex to the 1988 SUA Convention.[25]

It should be mentioned that transporting nuclear material is permissible if it is transported from or on the territory or under the control of a member state to the Treaty on Non-Proliferation of Nuclear Weapons (NPT).[26]

The new regulations make it an offence for a person to unlawfully and intentionally

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24 *Supra* n. 9. The 2005 Protocol to the 1988 SUA Convention, Article 4(5), adding to the Convention Article 3*bis*.

25 *ibid.*, Appendix to the 1988 SUA Convention lists nine such conventions.

26 *Supra* n.9. The 2005 Protocol to the 1988 SUA Convention, Article 4(5), adding to the Convention Article 3*bis* (2).

injure or kill any person in connection with the commission of any of the offences set forth in the Convention; also, the attempt, participation, organization or contribution to the commission of these offences.[27]

The provisions of the Convention apply if the ship is navigating or is scheduled to navigate into, through or from waters beyond the outer limit of the territorial sea of a single State, or the lateral limits of its territorial sea with adjacent states.[28]

2.1.1. THE SHIP-BOARDING REGIME

Article 8*bis*, which was also added to the Convention through the 2005 Protocol, deals with the regime of boarding a ship flying the flag of another state party to the Convention seaward of any state's territorial sea, when there is reasonable ground to suspect that the ship or a person on board the ship has been, is or is about to be involved in the commission of an offence set forth in the Convention. The particularity of this regime is that the right to board a ship flying another state's flag is dependent upon the latter's (flag state's) authorization. Authorization may be accorded *ad hoc* or in advance, when a state authorizes another state to board a ship flying its flag in the circumstances set out in the Convention. The authorization shall be submitted to the Secretary-General of the International Maritime Organization (IMO), pursuant to paragraphs 5(d) and 5(e) of Article 8*bis*. The notification made according to these paragraphs can be withdrawn at any time.[29]

Pursuant to the new regulations, the flag state is permitted to: 1) authorize the requesting party to board; 2) conduct the boarding itself; 3) conduct the boarding together with the requesting party; or 4) decline to authorize a boarding by the requesting state. Unfortunately, the Convention does not impose an obligation on the state to conduct the boarding or to authorize another member state despite reasonable grounds for suspicion, which may be deemed as a gap in the 2005 Protocol.[30]

It should also be mentioned that the 2005 Protocol does not require the requesting state to provide reasoning for the suspicion or to present such information to the flag state.[31]

The 2005 Protocol also does not cover the boarding of a ship in the territorial sea of the coastal state.[32] Additionally, there is no direct reference to the difference between ship-boarding procedures in different maritime zones such as exclusive

[27] *Ibid.*, Article 4(7), adding to the Convention Article *3 quarter*.

[28] *Supra* n.6. The 1988 SUA Convention, Article 4.

[29] *Supra* n.9. The 2005 Protocol to the 1988 SUA Convention Article 8(2), adding to the Convention Articles 8*bis* (5)(d) and 8*bis* (5)(e).

[30] Klein, Maritime Security and the Law of the Sea, 177-179.

[31] *Ibid.*, 177.

[32] *Ibid.*, 175.

economic zones and the high seas. Only when analyzing the security measures does the Protocol mention these differences and the obligation of a state not to interfere with the jurisdiction of the coastal state, according to international maritime law.[33] Therefore, when boarding a ship, the sovereign rights and the jurisdiction of the coastal state in the exclusive economic zone shall be taken into account, in order not to violate them.[34]

It should be mentioned, that under the 1988 Convention the state boarding a ship is required to ensure the safety of the vessel, the crew and the cargo, together with its commercial and legal interests.[35] Similar protective mechanisms are also considered by other agreements that grant the authority of interdiction.[36] However, what matters is how these protective mechanisms are implemented in concrete circumstances.[37]

The requirements established for the use of force are important. Namely, article 8*bis* of the SUA Convention, added by the 2005 Protocol, states that the use of force shall 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 the authorized actions. The use of force by states shall not exceed the minimum degree of force which is necessary and reasonable in the circumstances.[38] However, in this regard a controversy exists as to what is necessary and reasonable in concrete circumstances.[39] Finally, any ambiguity shall be interpreted according to which interest prevails – the interest of the flag state or of the state boarding the ship.[40] Due to the fact that the Convention was elaborated, on the one hand, to lay down measures against terrorism and, on the other hand, emphasizes the exclusive jurisdiction of the flag state, makes it difficult to find a balance.[41]

2.1.2. LEGAL CONSEQUENCES OF SHIP-BOARDING

When granting authorization to another state party to the Convention to board the ship, according to the 2005 Protocol and paragraphs 6-9 of Article 8*bis* of the Convention, the jurisdiction of the flag state prevails over the jurisdiction of the

33 *Supra* n.9. The 2005 Protocol to the 1988 SUA Convention, Article 8(2), adding to the Convention Article 8*bis*(10)(c)(i).

34 Klein, Maritime Security and the Law of the Sea 175.

35 *Supra* n.9. The 2005 Protocol to the 1988 SUA Convention, Article 8(2), adding to the Convention Article 8*bis* (10); See also: Tuerk, Combating Terrorism at Sea-The Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 362-363.

36 Douglas Guilfoyle, *Shipping Interdiction and the Law of the Sea*, (Cambridge University Press) 2009, 266-267.

37 Klein, Maritime Security and the Law of the Sea, 182.

38 *Supra* n.9. The 2005 Protocol to the 1988 SUA Convention, Article 8(2), adding to the Convention Article 8*bis*(9).

39 Klein, Maritime Security and the Law of the Sea, 183.

40 *ibid.*

41 *Ibid*, 184.

state boarding the ship.[42] For instance, the state boarding the ship is obliged to notify the flag state regarding the results of the boarding and it cannot detain the ship or employ other measures without the authorization of the flag state. Consequently, if the state boarding the ship establishes that offences proscribed under the 1988 SUA Convention and the 2005 Protocol have been committed, it cannot raise the issue of the criminal liability of the offender, unless it has the authorization to exercise jurisdiction according to the Convention and the 2005 Protocol.[43]

It should also be taken into account that if it is established that the ground for the ship-boarding has been illegal or the boarding has been unreasonable, the state carrying out the boarding is obliged to pay damages for the damage, injury or loss suffered due to the measures employed under Article 8*bis*.[44]

The 1988 SUA Convention sets forth the obligation of state parties to prosecute the offenders or to extradite them.[45] Therefore, the Convention is based upon the principle of international law - *aut dedere aut judicare* - which sets forth the obligation of a state to prosecute the offender if the other state having jurisdiction does not request extradition of that person.[46]

According to the 1988 SUA Convention, the state party to the Convention can exercise criminal jurisdiction over the offender or the alleged offender if that person is its national, or the offence has been committed in its territorial sea or on board the ship flying its flag.[47] The Convention also establishes the jurisdiction over the offender if a national of that state has been killed or injured during the offence.[48] Besides that, the State Party shall prosecute the offenders who have not been extradited.[49] It should be mentioned that the 2005 Protocol has amended this rule - namely, that according to Article 11*bis*, none of the offences shall, for the purpose of extradition, be regarded as a political offence.[50] Article 11*ter* states

[42] *Supra* n.9. The 2005 Protocol to the 1988 SUA Convention, Article 8(2), adding to the Convention Article *8bis* (6-9).

[43] Klein, Maritime Security and the Law of the Sea, 183; See also: Tuerk, Combating Terrorism at Sea-The Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 351-352; See also: *Supra* n.9. The 2005 Protocol to the 1988 SUA Convention, Article 6 and *Supra* n.6. The 1988 SUA Convention, Article 6.

[44] *Ibid*, 184.

[45] *Supra* n.9. The 2005 Protocol to the 1988 SUA Convention, Article 6 (3).

[46] International Law Commission (ILC), 'Final Report of the International Law Commission on the obligation to extradite or prosecute (*aut dedere aut judicare*) (2014) UN Doc A/69/10, accessed 26 December, 2019 http://legal.un.org/ilc/texts/instruments/english/reports/7_6_2014.pdf .

[47] *Supra* n.6. The 1988 SUA Convention, Article 6.

[48] *Ibid*, Article 6.

[49] *Ibid*, Article 10.

[50] *Supra* n.9. The 2005 Protocol to the 1988 SUA Convention, Article 10(2), adding to the Convention Article 11*bis*.

that the obligation to extradite or to afford mutual legal assistance does not exist if the requested state party has substantial grounds to believe that the request for extradition has been made for the purpose of prosecuting or punishing a person on account of that person's race, religion, nationality, ethnic origin, political opinion or gender, or that compliance with the request would cause prejudice to that person's position for any of these reasons.[51]

It is important to note that pursuant to the 1988 SUA Convention the principle of "exclusive" jurisdiction prevails over the principle of universal jurisdiction, the latter being prioritized by the UNCLOS regarding piracy.[52] According to Article 9 of the 1988 Convention, "*Nothing in this Convention shall affect in any way the rules of international law pertaining to the competence of States to exercise investigative or enforcement jurisdiction on board ships not flying their flag*".[53] Consequently, the 1988 SUA Convention limits the effectiveness of measures to prevent terrorism or to respond to acts already carried out.[54]

Article 8 of the 1988 SUA Convention is also relevant as it sets forth the right of the Master of the ship to deliver to the authorities of any other state party any person who the Master has reasonable grounds to believe has committed an offence set forth in articles 3, 3*bis*, 3*ter*, or 3*quater*.[55] However, the effectiveness of this provision is not convincing, since the Master of a commercial vessel or an ocean liner may not be able to disarm and detain terrorists.[56]

2.2 BILATERAL SHIP-BOARDING AGREEMENTS

Bilateral ship-boarding agreements that provide for the authority of the Contracting States to board suspect vessels beyond the territorial sea are important. The USA has overtime concluded many bilateral ship-boarding agreements.[57] Generally, these

51 *Ibid*, Article 10(2), adding to the Convention Articles 11*bis* and 11*ter*. Article 12 of the 1988 SUA Convention obliges state parties to afford mutual legal assistance. See: *Supra* n.6. The 1988 SUA Convention, Article 12.

52 *Supra* n.3. The 1982 UNCLOS Article 110, Article 107.

53 The 1988 SUA Convention, Article 9 https://matsne.gov.ge/ka/document/view/1202848

54 Wolfrum, Fighting Terrorism at Sea: Options and Limitations under international Law, 10.

55 *Supra* n.9. The 2005 Protocol to the 1988 SUA Convention, Article 8 (1).

56 *Supra* n.7. 352.

57 For the USA Agreements with the Bahamas, Croatia, Cyprus, Panama, Mongolia, Malta, etc. *see* Agreement between the Government of the Commonwealth of the Bahamas and the Government of the United States of America concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, Their Delivery Systems, and Related Materials by Sea (US–Bahamas) (2008) http://www.state.gov/t/isn/trty/108223.htm accessed 15 December 2015;Agreement between the Government of the United States of America and the Government of the Republic of Croatia concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, Their Delivery Systems, and Related Materials by Sea (US–Croatia) (2005), accessed 28 December 2015, http://www.state.gov/t/isn/trty/47086.htm; Agreement between the Government of the United States of America and the Government of the Republic of Cyprus concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, Their Delivery Systems, and Related

agreements require the consent of the flag State to board the vessels; however, if the consent cannot be contained within 2 hours, the notion of implied consent applies, which can be considered to be an advantage of such agreements.[58] Furthermore, the bilateral agreements provide for the opportunity for third State inclusion in the boarding process – an issue not covered under the 1988 Convention.[59] Most importantly, the decision to conclude bilateral ship-boarding agreements signals the will of the Contracting States to adopt all necessary measures to maintain maritime security and, under those circumstances, bilateral agreements can be more effective tools than the 1988 Convention.[60]

2.3 ADVANCEMENTS IN THE CONTROL OF THE PORT STATE

2.3.1 THE INTERNATIONAL SHIP AND PORT FACILITY SECURITY (ISPS) CODE

Even before "11 September 2001", in 1986, the International Maritime Organisation (IMO) decided to strengthen vessels' security in ports and at the sea; to that end, the IMO approved the Circular entitled "Measures to Prevent Unlawful Acts against Passengers and Crews on Board Ships".[61] Having the character of a recommendation, the document was not adhered to by all States. In 2002, the IMO adopted the International Ship and Port Facility Security (ISPS) Code[62] – an amendment to the 1974 Safety of Life at Sea Convention (SOLAS). The ISPS entered into force in 2004. The first part of the Code contains the obligations of Governments, Port authorities, administrations and ship owners. The second part includes recommendations on the implementations of the above-mentioned obligations. The amendments also include identification and monitoring systems with a view to creating a uniform system of global identification and monitoring of vessels,[63] to implement a system of vessel-

Materials by Sea (US–Cyprus) (2005) accessed 28 December 2015, http://www.state.gov/t/isn/trty/50274.htm; Agreement between the Government of the United States of America and the Government of Malta concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, Their Delivery Systems, and Related Materials by Sea (US–Malta) (2007) http://www.state.gov/t/isn/trty/81883.htm accessed 25 December 2015; Agreement between the Government of the United States of America and the Government of Mongolia concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, Their Delivery Systems, and Related Materials by Sea (US–Mongolia) (2007) accessed 27 December 2019, http://www.state.gov/t/isn/trty/94626.htm.

[58] Klein, Maritime Security and the Law of the Sea, 188-190.

[59] *Ibid*, 189.

[60] *Ibid*, 189-192.

[61] IMO Maritime Safety Committee, 'Measures to Prevent Unlawful Acts Against Passengers and Crews on Board Ships' (26 September 1986) IMO Doc MSC/Circ.443, accessed 27 December 2019, https://www.classnk.or.jp/hp/pdf/activities/statutory/isps/IMO/MSC.Circ.443.pdf.

[62] Amendments to the Annex to the International Convention for the Safety of Life at Sea (SOLAS), 1974 ([1983] ATS 22) contained in Resolutions 1, 2, 6 and 7 of the Conference of Contracting Governments and including the International Ship And Port Facility Security (ISPS) Code [2004] ATS 29 ['ISPS Code'], accessed 27 December 2019, http://www.mpa.gov.sg/sites/port_and_shipping/port/port_security/isps_code.page

[63] Long-range Identification and Tracking System (LRIT) http://www.imo.org/en/OurWork/Safety/Navigation/Pages/LRIT.*aspx* See Sohn, et al, Cases and Materials on the Law of the Sea,

coast security signal transmissions.[64] In accordance with an IMO decision of 2006, ships on international voyages should obtain a certificate of compliance with the Code.[65]

Unfortunately, the ISPS does not provide for sanctions in the case of non-compliance. The Port State has the right to board a ship only within the boundaries of national ports. The port State is also able to impose control measures if it is concerned that the ship is not in compliance with ISPS requirements.[66] Measures include the check of security documentation, boarding in the territorial sea, arrest or detention of a ship, restrictions to the freedom of movement in the ports and restrictions to enter the port if the ship poses an imminent threat. The Port Administration should adopt every measure to avoid unreasonable arrests or detentions of ships.[67] Otherwise, the Port Administration will be responsible /incur civil liability for the damage caused.[68]

The ISPS is an important step forward in the area of maritime security – the Code guarantees the sovereign right to exercise control in the ports, territorial sea and internal waters; on the other hand, the captain has the option to avoid entering the ports, where the security measures might be taken.[69] The ISPS creates a delicate balance between freedom of navigation and control mechanisms. Further, the ISPS is an example of State cooperation which serves the common interest in the suppression of terrorism.[70]

Even though the ISPS provides for a right to inspect a ship entering a Port by the port State it does not guarantee the right to inspection by a third State. Another weakness of the ISPS lies in the fact that the Code applies to cargo ships of 500 gross tons and larger; thus, the risks posed by smaller ships are not[71]being addressed.

727-729.

64 Sohn, et al,Cases and Materials on the Law of the Sea, 727-729.

65 IMO Maritime Safety Comm. Res. 211(81), IMO Doc. MSC 81/25/Add.1, Annex 14 (2006), accessed 8 December 2019, http://www.navcen.uscg.gov/pdf/lrit/ref_docs/MSC%2081-25.pdf; See also: Sohn L. B., *et al,Cases and Materials on the Law of the Sea*, 727-729.

66 Beckman, R.C. (2005) "*International Responses to Combat Maritime Terrorism*" in Ramraj, V.V, Hor, M. and Roach, K. (eds), Global Anti-Terrorism Law and Policy, 248, 255.

67 *ibid.*

68 *See* Klein, Maritime Security and the Law of the Sea; see also: Sohn, et al, Cases and Materials on the Law of the Sea, 727-728.

69 Noortmann, M. (2004), The US Container Security Initiative: A Maritime Transport Security Measure of an (inter)National Public Security Measure, 10, International Legal Theory, 123, 129.

70 *See* Klein, Maritime Security and the Law of the Sea, 162.

71 *Ibid* 307.

2.3.2 CONTAINER SECURITY INITIATIVE

With a view to strengthening Port security, in 2002, as a result of a USA initiative, the Container Security Initiative (CSI)[72] was adopted. The rationale of the CSI is to exchange information on the pre-screening and post-screening of cargo to minimise the risks posed by the global terrorist chain.[73]

Many actors are involved in international maritime cargo transportation: operators, importers, exporters, customs and port administrations, service personnel, etc. Therefore, transportation is a multi-stage process, starting from the drafting of communications and ending with loading-unloading. To assess the risks associated with terrorism, a land-based check is more efficient. To that end, the USA decided to check the cargo before the ship enters its ports – thus, in the ports of another States, before the containers are being transported.[74]

The CSI was codified in the "Security and Accountability for Every Port Act" (SAFE Port Act).[75] To further strengthen the CSI, the USA adopted additional measures such as the "Integrated Cargo Security Strategy" .[76]

Within the scope of CSI, the USA has concluded bilateral agreements with other States to identify potentially dangerous cargo. The agreements are implemented through the exchange of cargo information and available intelligence between the USA Customs Service and CSI partner States.[77]

The bilateral nature of such arrangements has proven problematic in some instances.[78] The United States entered into bilateral agreements with eight European states, provoking a dispute within the European Union to the effect that the bilateral agreements were in violation of European law since they potentially gave those states an unfair competitive advantage over European Union member states with ports not involved in the CSI.[79] Additionally, the United States has ostensibly

[72] US Customs and Border Protection, 'Container Security Initiative: 2006–2011 Strategic Plan' (August 2006) ['Container Security Initiative: 2006–2011 Strategic Plan'] accessed 15 December 2019, http://www.cbp.gov/linkhandler/cgov/trade/cargo_security/csi/csi_strategic_plan.ctt/csi_strategic_plan.pdf

[73] *ibid.*

[74] Klein, Maritime Security and the Law of the Sea, 165.

[75] Security and Accountability for Every Port Act (SAFE Port Act) 120 STAT. 1884 (2006) Public Law 109–34, accessed 16 January 2019, https://www.congress.gov/bill/109th-congress/house-bill/4954. See also: Bowman, G.W. (2007) Thinking Outside the Border: Homeland Security and the Forward Deployment of the U.S. Border, 44, Houston Law Review, 204, accessed 25 November 2019, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=921121

[76] Klein, Maritime Security and the Law of the Sea, 163-166.

[77] *Ibid*, 164-165.

[78] Lee, S.Y. (2003), The Container Security Initiative: Balancing US Security Interests with the European Union's Legal and Economic Concerns, 13, Minnesota Journal of Global Trade, 123, 139-141.

[79] Bowman, G.W. Thinking Outside the Border: Homeland Security and the Forward Deployment

granted reciprocal rights to its treaty partners as regards security checks in the United States. It is widely recognized, in general terms, that the implementation of the CSI is biased in favour of the United States.[80] Finally, civil penalties may be imposed on shippers if there is a failure to comply with the new regulations, and in such cases, permission to load or unload cargo to or from the vessel may be denied.[81] In pursuing the CSI, the United States has endeavoured to highlight the advantages of international trade in minimising security risks.[82] Namely, that economic benefits from the CSI arise in that cargo bound for the US is processed on an expedited basis upon arrival as it has already been inspected at a foreign port, and that any port covered by the CSI would be less vulnerable to a terrorist attack. A further purported benefit is that improved security would allow for a decrease in insurance costs. However, there may be costs for states involved in the CSI because of the need to obtain new inspection equipment.[83]

The arguments that international trade is facilitated by the CSI need to be stronger since inspection at a foreign port results in the increase of costs for States involved.[84] The CSI has also raised concerns about the infringement on state sovereignty.[85]

2.3.3 WORLD CUSTOMS ORGANIZATION: "A FRAMEWORK OF STANDARDS TO SECURE AND FACILITATE GLOBAL TRADE"

In June 2002, the World Customs Organization (WCO) adopted a resolution to enable ports in its member states to begin developing CSI-similar programs that would include the "collection of data concerning both outbound shipments in electronic form, use of risk management to identify and target high-risk shipments, and use of radiation detection and large-scale technology to identify containers that pose a security threat."[86] This resolution paved the way for the adoption, in June 2005, of the "Framework of Standards to Secure and Facilitate Global Trade" (WCO SAFE Framework).[87]

The "WCO SAFE Framework of Standards" seeks to facilitate the transit of legitimate

of the U.S. Border, 205. Currently, the CSI applies to the ports located in the North America, Europe, Asia, Africa, Latin and Central America, and Central East. http://www.cbp.gov/border-security/ports-entry/cargo-security/csi/csi-brief

80 Klein, Maritime Security and the Law of the Sea, 166.

81 Bowman, G.W. Thinking Outside the Border: Homeland Security and the Forward Deployment of the U.S. Border, 231.

82 *Supra* n. 74. Container Security Initiative: 2006–2011 Strategic Plan, 9-10.

83 Bowman, Thinking Outside the Border: Homeland Security and the Forward Deployment of the U.S. Border, 231.

84 Walters, K.L. III (2006), "Industry on Alert: Legal and Economic Ramifications of the Homeland Security Act on Maritime Commerce", 30 Tulane Maritime Law Journal, 311, 332; see also: Klein, Maritime Security and the Law of the Sea, 166-167.

85 *Supra* n.71, 129.

86 Klein, Maritime Security and the Law of the Sea, 167.

87 WCO, 'Framework of Standards to Secure and Facilitate Global Trade' (June 2005) [WCO Framework], accessed: 15 February 2019, http://www.wcoomd.org/en/topics/facilitation/instrument-and-tools/frameworks-of-standards/safe_package.aspx

trade via electronic documentation.[88] The preference is for high-risk cargo to be inspected through non-intrusive means, such as large-scale X-rays. Accordingly, the processes proposed within the "WCO SAFE Framework" are the most realistic ones, given the effort to strike a balance between maritime security measures and objectives to facilitate international trade.[89] Moreover, the WCO SAFE Framework reflects an internationalization of US cargo security policy – 169 States have thus far accepted to implement the WCO SAFE Framework to facilitate international trade.[90]

This Framework is updated every three years to reflect evolving needs of the international supply chain. For instance, in 2015, the partnership program between the customs, governmental and non-governmental institutions has been significantly improved.[91] The latest updates of 2018 offer new opportunities for customs, relevant government agencies and economic operators to work towards the common goal of enhancing supply chain security and efficiency, based on mutual trust and transparency.[92] To further facilitate implementation, the WCO SAFE Working Group and other WCO bodies have developed a number of guidelines. In order to compile this important body of rules in one volume, the WCO compiled a "SAFE Package".[93]

Both the CSI and the ISPS Codes are examples of efforts to improve the security of international shipping without overly restricting international trade.[94] Each step took into consideration the economic costs of reducing efficiency in trade through potentially burdensome reporting and inspection requirements.[95] The "WCO SAFE Framework" goes some way to provide multilateral support to the CSI on a global level; but resistance to interference in sovereign matters of states has continued to limit preventive efforts to combat terrorism.[96]

2.4. UN RESOLUTIONS AND THE IDENTIFICATION OF SEAFARERS

United Nations Security Council (UNSC) Resolution No. 1372 is noteworthy insofar as it obliges States to suppress the financing of terrorism.[97] Moreover, in 2004, as provided for in that UNSC Resolution, proliferation and the means of delivery of nuclear, chemical and biological weapons, were declared to constitute threats

[88] Klein, Maritime Security and the Law of the Sea, 168.

[89] *Ibid*, 168-169.

[90] *Supra* n.89.WCO Framework.

[91] *ibid.*

[92] *Ibid.*

[93] *ibid.*

[94] Klein, Maritime Security and the Law of the Sea, 170.

[95] *ibid.*

[96] *ibid.*

[97] UNSC Res 1373 (28 September 2001) UN Doc S/RES/1373, accessed: 15 January 2019, http://www.un.org/en/sc/ctc/specialmeetings/2012/docs/United%20Nations%20Security%20Council%20Resolution%201373%20(2001).pdf.

to international peace and security. The Resolution further urged States to adopt and enforce effective laws prohibiting any non-State actor to manufacture, acquire, possess, develop, transport, transfer or use nuclear, chemical or biological weapons and their means of delivery, in particular for terrorist purposes.[98] The UNSC adopted another Resolution in response to the 2009 disclosure of the Democratic People's Republic of Korea's (DPRK) production of nuclear, chemical and biological weapons, as well as to the DPRK's nuclear tests in 2013. The Resolution laid down the right for all States to inspect all cargo within or transiting through their territory that originated in the DPRK, or that is destined for the DPRK, or has been brokered or facilitated by the DPRK or its nationals, or by individuals or entities acting on their behalf, if the State concerned had credible information that the cargo contained prohibited items.[99] The Resolution obliged States to deny a vessel entry to their ports if the vessel has refused to allow an inspection.[100]

The "Revised Seafarers' Identity Documents' Convention" is also important for the purposes of terrorism prevention.[101] The instrument introduces the possibility of a unified access to seafarers' information. Consequently, the seafarers enjoy a simplified procedure for entering other States' ports. This could, however, also increase the threat of terrorism.[102]

CONCLUSIONS

The 1988 Convention on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation and its 2005 Protocol provide us with important mechanisms in the fight against terrorism; many bilateral agreements also contribute to that objective. Legal instruments aimed at facilitating international trade through the strengthening of "Port State control" should also be noted in this regard.

Despite the existence of those instruments and mechanisms, the current legal framework does not constitute an effective response to terrorist acts, nor is it adequate for purposes of prevention. Contemporary terrorism has evolved in new shapes and forms. The measures provided for in the 1988 Convention and the 2005 Protocol are therefore not adequate to counter those developments and to satisfy

98 UNSC Res 1540 (28 April 2004) UN Doc S/RES/1540 (2004), accessed: 16 January 2019, http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N04/328/43/PDF/N0432843.pdf?OpenElement.

99 UNSC Res 2094 (7 March 2013) UN Doc S/RES/2094 (2013), accessed 26 December 2019, http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N13/253/06/PDF/N1325306.pdf?OpenElement. See also: UNSC Res 1874 (12 June 2009) UN Doc S/RES/1874 (2009), accessed: 28 December 2019, http://www.un.org/en/sc/ctc/specialmeetings/2012/docs/United%20Nations%20Security%20Council%20Resolution%201373%20(2001).pdf. See also Sohn, et al, Cases and Materials on the Law of the Sea, 730.

100 *ibid.*

101 Revised Seafarers' Documents Convention (adopted 1958, revised 19 June 2003, entered into force 9 February 2005) 185 ILO, accessed: 29 December 2015http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C185.

102 Sohn, et al, Cases and Materials on the Law of the Sea, 730; see also Klein, Maritime Security and the Law of the Sea, 235-239.

the need for their prevention. Earlier introduced measures were aligned to the punishment of terrorist crimes; however, the current forms of terrorism, i.e. suicide bombings, pose increased demands on prevention. In addition, the use of transport facilities as means of mass destruction results not only in the loss of human lives but also in damaging the global economy in the interconnected world in which we are living today.[103]

In view of the above, current international anti-terrorist maritime legislation needs to reorient itself to face the new challenges of terrorism: first, it is necessary to acknowledge the continued threat of terrorist acts and the consequent widespread economic, social and political damages. Accordingly, States should review their national interests and improve international maritime security – they should adopt all necessary measures providing for any State to inspect vessels that demonstrate suspect behaviour, without prior consent of the flag State. Moreover, the right to inspection should also include the territorial waters of States, as often States are not capable of preventing terrorist acts in acting alone. Bilateral agreements should be efficiently utilised only if and when in the interest of both States. The same is applicable in regard of "container" inspection in ports. State cooperation in that regard is of prime importance if anti-terrorist measures are to be effectively implemented in ports. As for the impediments to the freedom of navigation, it should be noted that both freedom of navigation and of maritime security are "inclusive" notions,that is of prime importance to all nations.[104] Therefore, adequate security measures must include the possibility of striking a balance with the notions of freedom of navigation, avoidance of damages to international trade and global economic goods.

[103] Statement by Wolfrum, Freedom of Navigation: New Challenges' Int'l Tribunal for the Law oft the Sea. accessed: 16 December 2019, https://www.itlos.org/fileadmin/itlos/documents/statements_of_president/wolfrum/freedom_navigation_080108_eng.pdf .

[104] See Klein, Maritime Security and the Law of the Sea, 2-18.