

Violence at Sea

The Legal Framework to Combat Maritime Terrorism

Master Thesis in Law of the Sea, September 2016

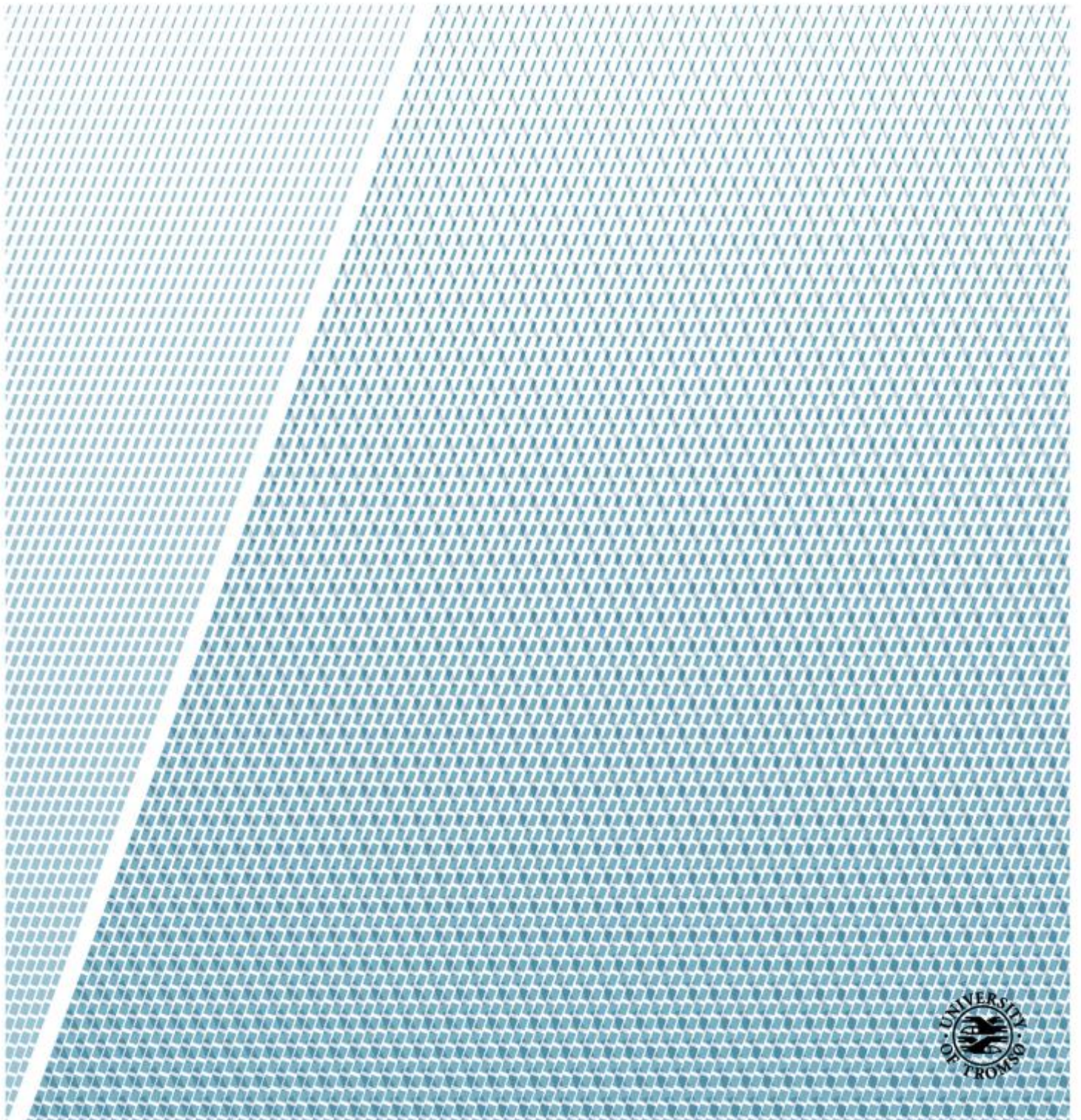


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1 Introduction

Certainly, maritime security is a significant pillar of international peace and security but the term is interpreted in different ways. As Ban Ki-Moon stated it: "There is no universally accepted definition of the term 'maritime security'. Much like the concept of 'national security', it may differ in meaning, depending on the context and the users."¹ Some authors adjudge "[S]ecurity, however, is the work to protect against people who want to harm us deliberately"² while others more precisely describe it as "the protection of a state's land and maritime territory, infrastructure, economy, environment, and society from certain harmful acts occurring at sea."³

Independent from the understanding of the term, the threats facing maritime security are generally recognized.⁴ Maritime terrorism is among those and, in fact, it is *one of the most serious threats to international peace and security*, as acknowledged in recent resolutions of the United Nations Security Council. It endangers not only the objective of the United Nations Charter,⁵ which is maintenance of peace and security, but also the world's economy, the freedom of seas, an intact marine environment, and human lives.

The tremendous terrorist attacks on September 11 and the following world-wide escalation of terrorism acted as a turning point in the international perception of the threat posed by terrorist organizations. Terrorist groups operating at sea have long been disregarded as a realistic threat but is now seen as a definite concern.⁶ The noticeable impacts of violent acts cause not only local, national and regional, but also have international consequences. Common remedies are crucial, since "no single state has the sovereignty, capacity, and control over the assets, resources, or venues from transnational threats endanger global

¹ Secretary-General, Report *Oceans and the Law of the Sea*, A/63/63 (10th March 2008), 39.

² Kaare André Kopperud and Moritz Askildt, *Security at Sea: The International Ship and Port Facility Code* (Nesttum Norwegian Shipping Security, 2003), 6.

³ Natalie Klein, *Maritime Security and the Law of the Sea* (New York: Oxford University Press, 2011), 11.

⁴ Report of the Secretary-General, A/63/63, 55 et seqq.

⁵ Charter of the United Nations, San Francisco, 26th June 1945.

⁶ Kaare Kopperud and Moritz Askildt, *The International Ship and Port Facility Code*, 6.

security."⁷ Thus, states need to work together to enable effective international counter-terrorism law and those global legal efforts to combat terrorism at sea are the focal point of this study.

⁷ Jon Peppetti, "Building the Global Maritime Security Network," *Naval Law Review* 55 (2008), 86.

2 The Legal Sources and Method

This master thesis will address the following research questions: does international law regulate the combat against maritime terrorism? If so, which treaties and other rules are applicable? It further seeks to answer whether the relevant rules provide a solid basis for an effective fight against international maritime terrorism.

In order to assess the existing regulations, all relevant sources of international law as identified in article 38 of the Statute of the International Court of Justice⁸ will be analysed, with particular emphasis placed on multilateral treaties. Customary international law and case law will also be addressed where appropriate. The study is based on a wide range of sources in the doctrine of international law, including books and peer-review articles. It will also rely to some extent on secondary sources of information such as newspaper articles and websites. Lastly, the Global Terrorism Database (GTD) and the RAND MIPT Terrorism Database will be consulted in order to gather statistical data.

Chapter three will introduce the concept of maritime terrorism. It will explain the distinction of maritime terrorism from other forms of violence at sea and the essential definitions that are used in this study. In chapter four the role of the relevant international intergovernmental organizations in the field of maritime security will be examined, followed by an analysis of the applicable laws against terrorism at sea in chapter five. Chapter six will provide an overall assessment of the current legal framework and its effectiveness in combating maritime terrorism at a global level. Finally, chapter seven will complete with some succinct conclusive remarks.

The study takes a theoretical and analytical approach when addressing the formulated research question. The perspective adopted is purely global without any regional focus.

⁸ Statute for the International Court of Justice (ICJ), San Francisco, 26th June 1945.

3 The Threats to Maritime Security

At present there are numerous threats to maritime security: organized crime, piracy, maritime terrorism, drug and human trafficking, human smuggling, and the proliferation of weapons of mass destruction (WMD) are a small selection of menaces that demand international attention and resources. In the following chapters, the scope is limited to aspects of maritime terrorism. However, some attention is also paid to piracy so that the two concepts can be differentiated.

3.1 Piracy and Armed Robbery at Sea

Piracy has been in existence for centuries, although it was thought to have become negligible before a new wave of pirate attacks occurred in the 1980/90s that still lingers to this day.⁹ Benefitting from globalization and modernization, piracy developed into brutal strikes with highly effective and modern weapons and, due to innumerable highly profitable targets, a criminal act converted into a business model which had a perceptible negative impact on global trade and national economies.¹⁰

Within areas of national jurisdiction, it is the coastal state that has the authority to deal with pirates under the provisions of United Nations Convention on the Law of the Sea.¹¹ However, all states are entitled to police measures against pirate ships on the high seas under articles 105 and 110 UNCLOS which include boarding, inspecting, detaining the vessel and

⁹ José Jesus, "Protection of Foreign Ships against Piracy and Terrorism at Sea: Legal Aspects," *Int. J. Mar. & Coast. L.* 18 (2003), 365-366; Douglas Guilfoyle, *Shipping Interdiction and the Law of the Sea* (Cambridge: Cambridge University Press, 2009), 45,46.

¹⁰ Nong Hong and Adolf Ng, "The International Legal Instruments in Addressing Piracy and Maritime Terrorism: A Critical Review," *Research in Transportation Economics* 27 (2010), 53.

¹¹See Articles 2 (3), 17, 19, 25 (1) United Nations Convention on the Law of the Sea, Montego Bay, 10th December 1982. Hereunder UNCLOS.

arresting its crew,¹² as pirates are generally considered as *hostis humani generis*.¹³ To avoid abuse of extensive universal jurisdiction, it is necessary to define *piracy* in a unified manner.¹⁴

The notion of piracy was often used broadly but nowadays the definitions found in article 101 (a) UNCLOS and in the monotonous article 15 of the High Seas Convention¹⁵ are accepted as the authoritative definition which are also reflected in customary international law.¹⁶ In comparison to earlier proposed definitions, article 101 (a) UNCLOS is notably narrow. First, the term is geographically limited to the high seas which, according of article 58 (2) UNCLOS, also includes the exclusive economic zone (EEZ). Secondly, the violent acts must be committed by the crew or the passengers of another ship (the two-ship requirement); attacks committed by crew members or passengers on board the attacked vessel are not covered. Thirdly, an attack has to be committed for private ends; however, as the UNCLOS does not provide any clarification on the meaning of *private ends*, the content is controversial.¹⁷

Piracy can also be distinguished from armed robbery at sea, with the decisive factor being the geographical location. A violent attack involving more than one ship and committed for private ends but conducted within the territorial sea or internal waters of a coastal State is described as armed robbery at sea.¹⁸ Those perpetrators are not considered pirates under international law.¹⁹

¹² Helmut Tuerk, "The Resurgence of Piracy: A Phenomenon of Modern Times," *U. Miami Int'l & Comp. L* 17 (2009), 15; José Jesus, "Protection of Foreign Ships," 380; Nong Hong and Adolf Ng, "Addressing Piracy and Maritime Terrorism," 52.

¹³ Helmut Tuerk, "Combating Terrorism at Sea - The Suppression of Unlawful Acts Against the Safety of Maritime Navigation," *U. Miami Int'l & Comp. L. Rev.* 15 (2011), 342.

¹⁴ Malvina Halberstam, "Terrorism on the High Seas: The Archille Lauro, Piracy and the IMO Convention on Maritime Safety," *AJIL* 82 (1988), 269, 288; Douglas Guilfoyle, "Counter-Piracy Law Enforcement and Human Rights," *Int'l & Comp. L Quarterly* 59 (2010), 144.

¹⁵ United Nations Convention on the High Seas, Geneva, 29th April 1958. Hereinafter HSC.

¹⁶ Ivan Shearer, "Piracy," in *Max Planck Encyclopedia of Public International Law* (New York: Oxford University Press, 2015), 2-3; Douglas Guilfoyle, "Counter-Piracy," 143; Robert Geiß and Anna Petrig, "Piracy and Armed Robbery at Sea," 41; Nong Hong and Adolf Ng, "Addressing Piracy and Maritime Terrorism," 52.

¹⁷ Eric Nelson, "Maritime Terrorism and Piracy: Existing and Potential Threats," *Global Security Studies* 3 (2012), 16; Douglas Guilfoyle, "Counter-Piracy," 143.

¹⁸ Antonio Monno, "Piracy and Terrorism, Threats to Maritime Security: A Brief Analysis," in *Piracy and Maritime Terrorism: Logistics, Strategies, Scenarios*, ed. S. Ciotti Galletti (Amsterdam: IOS Press, 2012), 59.

¹⁹ Article 2 Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery Against Ships, 22nd January 2002; Douglas Guilfoyle, *Shipping Interdiction*, 144; Nong Hong and Adolf Ng, "Addressing Piracy and Maritime Terrorism," 52.

3.2 Terrorism

Terrorism, similar to piracy, is not a new phenomenon but has received greater attention after the events of September 11.²⁰ Global imminence is generated by the structure of the terrorist groups and the nature of their activities. Their loose network structure makes the organization susceptible to rapid change which means it adapts quickly and it is therefore unpredictable to outsiders.²¹ They employ an offensive and destructive strategy while simultaneously rejecting any moral values of the society.²² Modern terrorism is characterized by the high number of dead; mass casualties due to the emerging usage of weapons of mass destruction (WMD) cause great insecurity within the society.

3.2.1 Defining Terrorism

The discussion surrounding terrorism automatically gives rise to the question: what does terrorism mean exactly? For the purpose of legal analysis and discussion, the subject matter indispensably requires an adequate description of the term. However, in reality a generic definition of terrorism exists neither in treaty law nor in customary international law.²³ The United Nations (UN) have adopted several counter-terrorism treaties but these conventions are characterized by adopting diverging definitions of the term depending on the subject matter of each treaty.

When attempting to approach the terminological ambivalence through interpretation, one can draw upon the general rules of interpretation laid down in article 31 of the Vienna Convention on the Law of Treaties,²⁴ which speaks of the “ordinary meaning... in the light of its object and purpose” of the term. However, the term is used in a broad and inconsistent manner in everyday language;²⁵ legal definitions in the counter-terrorism conventions differ

²⁰ It exists at least since the Jacobin's reign of terror during the French Revolution, 1793; Clive Walker, *Terrorism and the Law* (New York: Oxford University Press, 2011), 1.02.

²¹ Kalin Kalinov, “The Asymmetric Nature of Terrorist Organizations and Its Impact on Maritime Security System Structure,” in *Piracy and Maritime Terrorism: Logistics, Strategies, Scenarios*, ed. S. Ciotti Galletti (Amsterdam: IOS Press, 2012), 95; Igor Primoratz, “What Is Terrorism?” in *Terrorism*, ed. Conor Gearty (Dartmouth: Aldershot, 1996), 20.

²² Kalin Kalinov, “The Asymmetric Nature of Terrorist Organizations,” 94; Ercan Citlioglu, “Understanding the Roots of Terrorism: An Evaluation of Its Origins and Future.” In *Transportation Security Against Terrorism*, ed. M. Tahmisolglu and C. Özen (Amsterdam: IOS Press, 2009), 11.

²³ Clive Walker, *Terrorism and the Law*, 1.132.

²⁴ Vienna Convention on the Law of Treaties, Vienna, 23rd May 1969.

²⁵ Jenny Teichman, “How to Define Terrorism,” In *Terrorism*, ed. Conor Gearty (Dartmouth: Aldershot, 1996), 3.

remarkably.²⁶ Hence no universal ordinary meaning can be abstracted and the application of article 31 for the purpose of interpretation fails.

Creating a universal definition that encompass all possible forms of terrorism of today is a markedly demanding task; but to develop a definition that includes all possible future emergences of terrorist actions may be impossible. Different perspectives and diverging political goals and the attitude towards the use of violence of states causes “moral confusion over what constitutes terrorism”.²⁷ This dilemma is commonly and aptly phrased as: One man's terrorist is another man's freedom fighter. Furthermore, a single definition is likely to exclude some violent attacks committed by terrorists. States will have to agree to a flexible and thus inclusive definition.

Despite these general issues, an abstract determination of the notion is needed for the purpose of the present study. In order to delimitate the subject matter, several definitions provided by jurists, sociologists, international entities and in international legal documents will be compared in order to find a common denominator. This will attempt to highlight the key elements that characterize terrorism and distinguish terrorism from other forms of violence; this will sufficient for the purpose of presenting this paper's research question.

Hence, hereafter the term terrorism is understood as *the use and threat of use of violence as a method to cause fear and terror among a population or a group²⁸ in order to reach a political, social, religious, or ideological goal²⁹ by coercing someone to do something he/she would otherwise not do or abstain from doing something he/she would otherwise do.*³⁰

²⁶ Tina Garmon, “International Law of the Sea: Reconciling the Law of Piracy and Terrorism in the Wake of September 11th,” *Tul. Mar. L. J.* 27 (2002-2003), 271.

²⁷ Yonah Alexander, “Terrorism: A Definitional Focus” in *Terrorism and the Law*, ed. Yonah Alexander and Edgar H. Brenner (Ardsey: Transnational Publishers, Inc., 2001), 3.

²⁸ Article. 1 (b) of the International Convention for the Suppression of the Financing of Terrorism, New York, 9th December 1999; Tina Garmon, “International Law of the Sea,” 270; Helmut Tuerk, “The Resurgence of Piracy,” 27; Jason Power, “Maritime Terrorism: A New Challenge for National and International Security”, *Barry L .Rev.*10 (2008): 114; Robert Beck and Anthony Arend, ” 'Don't treat on us': International Law and Forcible State Responses to Terrorism,” *Wisconsin Int'L Journal* 12 (1993-1994): 162; Clive Walker, *Terrorism and the Law*, 1.111; Yonah Alexander, “Terrorism: A Definitional Focus,” 7; Igor Primoratz, “What Is Terrorism?” 18; Grand Wardlaw, *Political Terrorism: Theories, Tactics and Counter-measures*, 2nd edn. (Cambridge: Cambridge University Press, 1989), 16.

²⁹ Para. 3 of Declaration on Measure to Eliminate International Terrorism, A/Res/49/60 (1994); Helmut Tuerk, “The Resurgence of Piracy,” 27; Jason Power, “Maritime Terrorism,” 114; Victor Asal and Justin V. Hastings, “When Terrorism Goes to Sea: Terrorist Organizations and the Move to Maritime Targets,” *Terrorism and Political Violence* 27 (2015), 728; Robert Beck and Anthony Arend, ”Forcible State Responses to Terrorism,” 162; Clive Walker, *Terrorism and the Law*, 1.109; Yonah Alexander, “Terrorism: A Definitional Focus,” 7; Grand Wardlaw, *Political Terrorism*, 16; Igor Primoratz, “What Is Terrorism?” 22; Martin Murphy, *Small Boats, Weak States and Dirty Money* (New York: Columbia University Press, 2010), 184; Natalie Klein, *Maritime Security*, 147.

³⁰ Article. 1 (b) of the International Convention for the Suppression of the Financing of Terrorism; Helmut Tuerk, “The Resurgence of Piracy,” 27; Jason Power, “Maritime Terrorism,” 115; Robert Beck and Anthony Arend, ”Forcible State Responses to Terrorism,” 162; Tina Garmon, “International Law of the

3.2.2 Maritime Terrorism – A Real Threat

"Maritime terrorism is terrorism that takes place at sea."³¹ Traditionally, terrorism is associated with urban centres and areas of conflict, though, the hazards exposed to ports and vessels cannot be disregarded.

Currently, terrorist attacks occurring at sea present only 0,2-2% of all violent acts committed by terrorists (within the last 30 years).³² According to the Global Terrorism Database, 314 incidents of maritime terrorism (in accordance with the working definition applied in this study) occurred between 1970 and 2014.³³ But when analysing these data, one needs to bear in mind that incidents of terrorism are often not reported because they are either not newsworthy or successful, but would still cause higher costs for the operator due to delays or raising insurance rates.³⁴

One reason that terrorists predominantly attack terrestrial targets is that most terrorist organizations are not based in coastal areas viz. maritime targets are generally out of reach. Furthermore, many groups do not possess the required mariner skills and knowledge to approach mobile targets,³⁵ with boats, fuel, and navigational equipment being costly. In addition, the media attention, which is essential for the success of strike, is marginal for violence at seas compared with strikes on shore where news cameras are omnipresent³⁶- however, this aspect may not be relevant for ports, cruise ships and areas close to shore.³⁷

Sea," 270; Igor Primoratz, "What Is Terrorism?" 18, 19; Clive Walker, *Terrorism and the Law*, 1.110; Grand Wardlaw, *Political Terrorism*, 16.

³¹ Martin Murphy, *Small Boats*, 185.

³² Martin Murphy, *Contemporary Piracy*, 45; Victor Asal and Justin Hastings, "When Terrorism Goes to Sea," 722.

³³ Global Terrorism Database at

https://www.start.umd.edu/gtd/search/Results.aspx?start_yearonly=1970&end_yearonly=2014&start_year=&start_month=&start_day=&end_year=&end_month=&end_day=&asmSelect0=&asmSelect1=&target=11&criteria1=yes&criteria2=yes&criteria3=yes&dtp2=all&success=yes&casualties_type=b&casualties_max (last visited 9th August 2016).

³⁴ Jason Power, "Maritime Terrorism," 119.

³⁵ U.S. Coast Guard Intelligence Coordination Center. *Threats and Challenges to Maritime Security 2020* (1999), Chapter II 3 b. (2) (b); Peter Chalk, *Maritime Dimensions of International Security: Terrorism, Piracy, and Challenges for the United States 2008* (Santa Monica: The RAND Corporation, 2008), 19; Eric Nelson, "Maritime Terrorism and Piracy," 23.

³⁶ Victor Asal and Justin Hastings, "When Terrorism Goes to Sea," 724; Antonio Monno, "Piracy and Terrorism," 71.

³⁷ U.S. Coast Guard Intelligence Coordination Center, Chapter II 3 b (2) (b); Martin Murphy, *Contemporary Piracy*, 45.

Lastly, terrorists appear to be conservative in the use of methods, meaning that they use tactics that have been employed in the past and so it becomes clear that there are no convincing reasons to go to sea.³⁸

Nonetheless they do operate at sea and the list of past maritime attacks is surprisingly long.³⁹ The question then being why terrorists accept the named disadvantages. The fact that terrorist organizations in modern society dispose of greater funds makes seafarer training and also appropriate equipment available to them. Also they take increasing advantages of commercial facilities such as diving schools. Eventually, some terrorist organizations pursue a maritime strategy while some others undergo a shift of priorities from a high body count to fiscal effects and trade disruption which generates new motivation for terrorists to change their operational fields.⁴⁰

Within recent decades, The Liberation Tigers of Tamil Eelan,⁴¹ Al-Qaeda, Abu Sayyaf Group, The Movement of the Emancipation of the Niger Delta, and Free Aceh Movement have been particularly present terrorist organizations in the maritime field.⁴² It is suspected that Al-Qaeda possess a fleet of more than a dozen freighters which are used for weapon smuggling and could, potentially, being used as floating bombs.⁴³

3.3 Delimitating Piracy and Armed Robbery at Sea from Maritime Terrorism

As previously demonstrated, definitions of piracy and maritime terrorism differ substantially. Nonetheless the two phenomena have occasionally been considered one and the same or have been mistaken for each other.⁴⁴ The fact that there is some similarity between them is not surprising; most notably both piracy and maritime terrorism constitute

³⁸ Peter Chalk, *Maritime Dimensions of International Security*, 19; Peter Lehr, "Maritime Terrorism: Locations, Actors and Capabilities," in *Lloyd's MIU Handbook of Maritime Security*, ed. Rupert Herbert-Bruns et al. (Boca Raton: CRC Press, 2010), 57; Martin Murphy, *Small Boats*, 185.

³⁹ Antonio Monno, "Piracy and Terrorism," 71; see also the Global Terrorism Database at <https://www.start.umd.edu/gtd/> (last visited 9th August 2016).

⁴⁰ Victor Asal and Justin Hastings, "When Terrorism Goes to Sea," 724; Antonio Monno, "Piracy and Terrorism," 72; Jason Power, "Maritime Terrorism," 120.

⁴¹ Also known as LTTE or The Sea Tigers of the naval wring.

⁴² Martin Murphy, *Contemporary Piracy*, 65; Jason Power, "Maritime Terrorism," 117-119, 123; Victor Asal and Justin Hastings, "When Terrorism Goes to Sea," 731.

⁴³ Natalie Klein, *Maritime Security*, 148; Ashley Roach, "Initiatives to Enhance Maritime Security at Sea," *Marine Policy* 28 (2004), 41; Nong Hong and Adolf Ng, "Addressing Piracy and Maritime Terrorism," 53; Antonio Monno "Piracy and Terrorism," 75.

⁴⁴ Nong Hong and Adolf Ng, "Addressing Piracy and Maritime Terrorism," 51; Jason Power, "Maritime Terrorism," 119.

a considerable threat to maritime security as they are marked by violence and the factors that facilitate them are alike.

From a legal perspective, the two main decisive criteria area found in articles 101 UNCLOS and 15 HSC: acts of piracy need to (1) involve more than one vessel and (2) be committed for *private ends*. The exact meaning of *private ends* cannot be derived from the provisions itself. When considering the drafting history and the intentions of the Harvard Draft Convention on Piracy (1932), the origin of article 101 UNCLOS and article 15 HSC, it becomes clear that the term private ends was intended to exclude civil war insurgents from the meaning. However, following this, a narrow interpretation does not appear compulsory.⁴⁵ Some scholars advocate an extensive interpretation of *private* that includes “all acts of violence that lack state sanction” reasoning that this position is demanded to safeguard safety of navigation.⁴⁶ The opposite view propagates a narrow interpretation concluding private ends are a complement to political ends.⁴⁷ According to the latter, *private ends* include personal motives such as hatred and vengeance, theft and the desire for financial gain but it excludes situations in which the actor is driven by political and ideological motives.⁴⁸ This distinction between private and political motives is further mirrored in the methods applied. Pirates usually target the most vulnerable and promising vessel and board it in order to steal objects of value⁴⁹ but try to avoid attraction of public attention because this curtails the business and creates the risk of being convicted.⁵⁰ This is opposed to terrorists who choose their targets strategically with the intention of destructing a specific target or disrupting the global maritime network for gaining as much international attention as possible in order to spread their political agenda.⁵¹

The second distinguishing feature is the two-vessel requirement which makes the rules of piracy inapplicable to maritime terrorism.⁵² To constitute an act of piracy one ship needs to

⁴⁵ Douglas Guilfoyle, *Shipping Interdiction*, 32, 36.

⁴⁶ *Ibid.*, 3, 37, 38; similar Jason Power, “Maritime Terrorism,” 121; James Crawford, *Brownlie's Principles of Public International Law*, 8th edn. (New York: Oxford University Press, 2008), 305.

⁴⁷ Malcolm N. Shaw, *International Law*, 5th edn. (Cambridge: Cambridge University Press, 2013): 549; Eric Nelson, “Maritime Terrorism and Piracy,” 18; Ivan Shearer, “Piracy,” 16; Natalie Klein, *Maritime Security*, 119; Felicity Attard, “IMO's Contribution to International Law Regulating Maritime Security,” *J. Mar. L. Com.* 45 (2014): 501.

⁴⁸ José Jesus, “Protection of Foreign Ships,” 377, 378; Helmut Tuerk, “The Resurgence of Piracy,” 26; Nong Hong and Adolf Ng, “Addressing Piracy and Maritime Terrorism,” 52.

⁴⁹ Eric Nelson, “Maritime Terrorism and Piracy,” 17.

⁵⁰ *Ibid.*, 24.

⁵¹ *Ibid.*, 18; Peter Chalk, *Maritime Dimensions of International Security*, 31, 32; Helmut Tuerk, “The Resurgence of Piracy,” 27.

⁵² Helmut Tuerk, “Combating Terrorism at Sea,” 345.

approach another while a terrorist attack can be carried out by a passenger, crew member or stowaway as an act of internal seizure.⁵³

In legal terms an analogy of the piracy rules to terrorism or an unduly stretch of the wording of article 101 UNCLOS to include terrorism is barred. That conclusion can withstand the occasionally argued emerging nexus between piracy and terrorism, which is a possibility, albeit an unlikely one, but has not yet materialized.⁵⁴ The line between the two types of maritime violence is thin in practical terms.⁵⁵

⁵³ Ivan Shearer, "Piracy," 15.

⁵⁴ Victor Asal and Justin Hastings, "When Terrorism Goes to Sea," 724. Eric Nelson, "Maritime Terrorism and Piracy," 23, 24; Peter Chalk, *Maritime Dimensions of International Security*, 31.

⁵⁵ Nong Hong and Adolf Ng, "Addressing Piracy and Maritime Terrorism," 52; José Jesus, "Protection of Foreign Ships," 379.

4 The Role of International Organizations

4.1 The United Nations Security Council

Since the 1970s the concern of terrorism has been present on the UN's agenda and still continues to be.⁵⁶ Several Security Council resolutions have, since 2001, determined terrorism as *one of the most serious threats to international peace and security*, and according to article 24 of the UN Charter, it is the Security Council that has the mandate to deal with threats to international peace and security. After this was established, the Council adopted numerous respective resolutions, some of them under Chapter VII of the UN Charter.⁵⁷ A couple of these resolutions are of particular importance and should be specifically addressed here.

Resolution 1373,⁵⁸ adopted after September 11, presents a new quality of resolutions under Chapter VII: resolutions that establish legally-binding obligations. The resolution in actual fact transforms the 1999 Convention for the Suppression of the Financing of Terrorism into a Security Council resolution, making it legally binding for all states under article 25 UN Charter.⁵⁹ Resolution 1373 in particular obliges states to criminalize terrorism under national legislation, to deny shelter, to suppresses funding, and to prevent movement of terrorists.⁶⁰ It implies that states may not allow the shipping of terrorists and their supplies.⁶¹ But it does neither explicitly nor implicitly regulate how to deal with violations of these obligations. It has been argued that the resolution itself can be used as a legal basis for interdiction of

⁵⁶ See UN Security Council Counter Terrorism Committee: <http://www.un.org/en/sc/ctc/laws.html> (last visited 9th August 2016)

⁵⁷ Christian Walter, "Terrorism," in *Max Planck Encyclopedia of Public International Law* (New York: Oxford University Press, 2015), 66.

⁵⁸ S/Res/1373 (2001).

⁵⁹ Christian Walter, "Terrorism," 65.

⁶⁰ Article 1 and 2 of S/Res/1373; Ann Robertson and Laura Lambert, "United Nations," in *The SAGE Encyclopedia of Terrorism*, ed. Gus Martin (Thousand Oaks: SAGE Publications, 2011), 3; Christian Walter, "Terrorism," 69.

⁶¹ Natalie Klein, *Maritime Security*, 283.

foreign ships if it is suspected of being involved in terrorist activities, either with flag state consent or on its' behalf without prior authorization.⁶² It was reasoned that the flag state is obliged to intervene when its vessels are under terrorist control; if not capable or willing to do so itself, other states may act on its behalf. In those instances, the flag state cannot deny its consent to interdiction as it is obliged under Resolution 1373 to take remedies.⁶³ Whether the resolution actually is a legal basis for high seas interdiction is doubtful as it undermines long standing principles of the law of the sea. Nonetheless obtained the Resolution considerable importance in practice as justification for high seas enforcement measures.

Resolution 1540 targets the use of biological, chemical or nuclear weapons by non-state actors.⁶⁴ Just as Resolution 1373, it imposes rigorous obligations on states. It requires them to refrain from any support of non-state actors in respect of WMD and also to legislate corresponding laws.⁶⁵ Although this resolution does not exclusively address terrorist groups, it provides an important contribution to the efforts for suppressing maritime terrorism.

Resolutions 2199, 2249, 2253, and 2255, adopted in 2015,⁶⁶ are the most recent concerning terrorism. They address specific groups, such as al-Qaeda, the Islamic State in Iraq and the Levant and the Al-Nusrah Front, and call for national, sub-regional, regional, and international collaboration of member states to suppress the threat. They emphasise the need to prevent any kind of financing as well as weapon supply and stress the important role of the UN in combating terrorism.

Security Council resolutions are an effective way to address threats to maritime security that are not comprehensively regulated by treaties and hence, help to improve maritime security through proactive measures.⁶⁷ Notably, none of these resolutions address the specifics of maritime terrorism or, albeit using the term, elaborate the definition of terrorism, leaving the interpretation to the individual state.

⁶² Rüdiger Wolfrum, *Fighting Terrorism at Sea: Options and Limitations under International Law* (Lecture delivered at University of Virginia School of Law, Washington D.C., 13th April 2006), 24.

⁶³ Ibid.

⁶⁴ S/Res/1540 (2004).

⁶⁵ Ulrik Ahnfeldt-Møllerup, "The Universal Legal Regime Against Terrorism - The Role of the United Nations" in *Transportation Security Against Terrorism*, ed. M. Tahmisoglu and C. Özen (Amsterdam: IOS Press, 2009), 92.

⁶⁶ S/Res/2199 (2015), S/Res/2249 (2015), S/Res/2255 (2015).

⁶⁷ Stefan Talmon, "The Security Council as World Legislator," in *AJIL* 99 (2005), 192; Natalie Klein, *Maritime Security*, 284; Michael Byers, "Proliferation Security Initiative (PSI)," in *Max Planck Encyclopedia of Public International Law* (New York: Oxford University Press, 2015), 14.

4.2 The International Maritime Organization

The International Maritime Organization (IMO) is an integrated part of the UN framework. It is a specialized agency created under article 59 UN Charter, *viz.* the IMO and UN share the same objectives but are separate legal personalities.⁶⁸ The Organization was established as a forum for consultation, discussion, and standard setting for the improvement of safety of maritime navigation and prevention of vessel-source pollution (see articles 1 and 2 Convention on the International Maritime Organization).⁶⁹

Although maritime security is not mentioned here, it has been a focus point in the work of the Organization that is commonly interpreting *safety* of shipping extensively.⁷⁰ In accordance with its' Mission Paper, "[To] promote safe, secure, environmentally sound, efficient and sustainable shipping through cooperation," is one of the Organization's main concerns and maritime security as one of its intricate responsibilities.⁷¹ Considering that ninety percent of the worlds trade is transported by sea and that this transportation system is seriously threatened by piracy and terrorism, it is difficult to deny that safety and security in the maritime area require a holistic treatment since they are tightly intertwined. After 2001 when the international community realized the insufficiency of the maritime security regime in meeting current threats, and the imminence of terrorist act rose, there appeared to be a tacit agreement among the 160 member states to accept the exceedance to the formal mandate.⁷² Also, the repeated endorsement of the work of the IMO by the UN General Assembly prompts considerations of the extension of the mandate to be accepted under customary international law. Bearing in mind the specialized nature of IMO, having the expertise to deal with security issues and the similar objectives to those of the UN, this solution seems logical.

⁶⁸ Felicity Attard, "IMO's Contribution," 481; Glen Plant, "Legal Aspects of Terrorism at Sea", in *Terrorism and International Law*, ed. Maurice Flory and Rosalie Higgings (London: Routledge, 2002), 73.

⁶⁹ Convention on the International Maritime Organization, Geneva, 6th March 1948. Hereinafter IMO Convention.

⁷⁰ IMO Res. A.1011(26); Rosalie Balkin, "The International Maritime Organization and Maritime Security," *Tul. Mar. L. J.* 30 (2006), 3.

⁷¹ IMO, *Strategic Plan for the Organization (for the Six-Year Period 2004 to 2010)*, Res. A.944(23); Rosalie Balkin, "The International Maritime Organization," 2; Felicity Attard, "IMO's Contribution," 493.

⁷² Felicity Attard, "IMO's Contribution," 489; Rosalie Balkin, "The International Maritime Organization," 2, 16; Thomas A. Mensah, "International Maritime Organization (IMO)," in *Max Planck Encyclopedia of Public International Law* (New York: Oxford University Press, 2015), 22.

The IMO also provides assistance and a platform for cooperation and also exchange of data as it publishes frequent statistic data on the pertinent matters.⁷³ Even though the function of the IMO is essentially non-regulatory and directed upon standard setting through the adoption of recommendations, guidelines, practical measures and codes of practice, a considerable part of its work is dedicated to consultations, negotiations and drafting of binding legal instruments.⁷⁴ The 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation⁷⁵ and its 2005 Protocol⁷⁶ are only two out of many legal instruments negotiated under IMO auspices. Within the UN system as a whole, there is no other intergovernmental organization as engaged in security issues and the law of the sea as the IMO. Respective maritime security, the IMO is the primary body to take essential steps in the fight against terrorism.⁷⁷

⁷³ IMO Monthly Reports on Piracy and Armed Robbery:

<http://www.imo.org/en/OurWork/Security/SecDocs/Pages/Maritime-Security.aspx> (last visited 9th August 2016).

⁷⁴ Article 2 IMO Convention.

⁷⁵ Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, Rome, 3rd October 1988. Hereunder SUA Convention.

⁷⁶ Protocol of 2005 to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, London, 14th October 2005. Hereinafter the Protocol or 2005 SUA Convention.

⁷⁷ Felicity Attard, "IMO's Contribution," 479.

5 The Current Legal Framework to Combat Maritime Terrorism

States, as the primary actors in public international law, have rights and obligations. Such rights and obligations may derive from customary international law, treaties, and/or case law. In accordance with the subject matter of this study the principle purpose of the following elaborations is to ascertain whether maritime terrorism is regulated in international law and which instruments are pertinent. The regulations applying to maritime terrorism are, to a large extent, identical to those regulating terrorism ashore; partial modifications are required due to the special character of the high seas in international law.

When analysing terrorism from the perspective of law, the theoretical point of departure is the condemnation of terrorism and the general prohibition of states to support terrorism either directly or indirectly under customary international law.⁷⁸

5.1 The United Nations Charter and the Use of Force

Due to the lack of any specific rules on terrorism and in particular maritime terrorism in the UN Charter, the general provisions are considered below.

5.1.1 The Prohibition of the Threat and Use of Force

Article 2 (4) UN Charter, in a nutshell: “There shall be no violence.”,⁷⁹ is the linchpin in maintaining international peace and security, the primary purposes of the UN.⁸⁰ As *ius cogens*, article 2 (4) bans unilateral use of force in international relations save only in a number of cases listed in the Charter itself.⁸¹

⁷⁸ UK v. Albania in ICJ Reports 1949, 22; DRC v. Uganda in ICJ Reports 2005, 162; see exemplary S/Res/1373 (2001), S/Res/2199 (2015) and S/Res/2249 (2015).

⁷⁹ Hersch Lauterpacht, *The Function of Law in the International Community* (Oxford: Clarendon, 1933), 64.

⁸⁰ Article 1 UN Charter.

⁸¹ Katie Peters, “International Law and the Use of Force,” *QUTLaw JJI* 14 (2004), 1.

Dealing with the maritime area renders article 301 UNCLOS pertinent which unambiguously states that the prohibition of threat or use of force is applicable to the entire maritime domain.⁸² But neither article 2 (4) UN Charter nor article 301 UNCLOS are pertinent if the measures adopted are merely police enforcement measures (so called small scale measures of self-defence)⁸³, or if the flag state consented to third-state interdiction of its vessel.

5.1.2 The United Nations Security Council Measures under Chapter VII

In accordance with its mandate and article 39 of the UN Charter, the monopoly to authorize use of force rests with the UN Security Council.⁸⁴ Before taking enforcement actions pursuant to Chapter VII, the Security Council needs to determine a *threat to the peace, breach of the peace, or an act of aggression*. Admittedly, the determination has to overcome uncertainties resulting from the lack of any further explanations of the terms.

The question of whether or not the term of *a threat or breach of peace* entails an inter-state element or can include terrorist attacks is highly debated. One could suppose that the threat needs to spring from a state, since the Charter was intended to regulate security threats posed by states, simply because at the time of conclusion, only states were assumed to have the ability to impose threats to international security.⁸⁵ *International relations*, as framed in article 2 (4) indicates the corresponding intention of the drafters.⁸⁶

State practice has been changing towards an inclusion of non-state actors in article 39 in the aftermath of September 11, and so has *opinio iuris*.⁸⁷ This shift is reflected in the position of the Security Council: "a threat to the peace can be elicited by states as well as by non-state actors".⁸⁸ The Security Council implemented its position into resolutions *inter alia* in S/Res/1368 and S/Res/1373 adopted in 2001, and more recently in S/Res/2199, 2249, and 2253 adopted in 2015. One can therefore observe that under current resolution practice, non-

⁸² Douglas Guilfoyle, *Shipping Interdiction*, 272; Thomas Bruha, "Gewaltverbot und humanitäres Völkerrecht nach dem 11. September," *Archiv des Völkerrechts* 40 (2002), 399.

⁸³ Thomas Bruha, "Gewaltverbot," 398.

⁸⁴ Article 24 (1) UN Charter; Preamble of S/Res/2250 (2015); Natalie Klein, *Maritime Security*, 284.

⁸⁵ Karl Zemanek, "Armed Attack," in *Max Planck Encyclopedia of Public International Law* (New York: Oxford University Press, 2013), 5.

⁸⁶ Rüdiger Wolfrum, "Fighting Terrorism at Sea," 22.

⁸⁷ *Ibid.*

⁸⁸ See exemplary S/Res/1540 (2004); Hans-Georg Dederer, "Krieg gegen Terror," *JuristenZeitung* 59 (2004), 422, 423; Thomas Bruha, "Gewaltverbot," 391, 395.

state actors, in particular terrorists, may trigger measures under Chapter VII; that of course is true of terrorists operating at sea, too.⁸⁹

5.1.3 The Right of Self-defence

Self-defence under article 51 of the UN Charter is subsidiary to the aforementioned article 39 UN Charter. The inherent defensive right is released *if an armed attack occurs*. This formulation, again, may generate diverging interpretations since the Charter does not provide a definition.⁹⁰ Two aspects are currently under scrutiny: first, who is a proper attacker and secondly, whether an imminent attack instead of an actual attack is sufficient.

The first and exigent matter of controversy is whether or not non-state actors can trigger the defensive right. Commensurately clear are cases of "sending of or on behalf of a state of armed bands, groups or mercenaries" where the sending state is responsible for the activities of the sent non-state actors.⁹¹ In order to distinguish whether an attack has been committed "of or on behalf of a state", the International Court of Justice (ICJ) introduced the effective control test.⁹² If the test is positive, the affected state may respond with force.

However, where no state can be held accountable for an attack, self-defence is highly controversial. Again, the UN Charter was designed to regulate relations between states and private groups. It is difficult to reason why a sovereign state not being responsible for a violent attack committed by terrorists should suffer military strikes against its territory and nationals. This would be incompatible with the spirit of the Charter as well as the principle of state sovereignty, which generally prevails over the right of self-defence. The ICJ took a similar position in the case concerning *Oil Platforms*⁹³ and in the *Israeli Wall Advisory Opinion*, where it stated that the defensive right is provoked "in the case of armed attack by one state against another state."⁹⁴ It is noticeable that the situation in Israel, subject of the Advisory Opinion, was characterized by violence from within the country. Whether this internal situation is comparable to threats originating from a terrorist organization reside abroad is doubtful. Nevertheless, the ICJ is clear in its message that an *armed attack* requires

⁸⁹ Natalie Klein, *Maritime Security*, 262.

⁹⁰ Karl Zemanek, "Armed Attack," 2.

⁹¹ Nicaragua v. United States of America in ICJ Reports 1986, 195.

⁹² Ibid., 109, 115.

⁹³ Islamic Republic of Iran v. United States of America in ICJ Reports 2003, 136.

⁹⁴ Israeli Wall Advisory Opinion in ICJ Reports 2004, 139.

violence committed by one state against another state.⁹⁵ This opinion was reiterated in 2005 in case concerning *Armed Activities*.⁹⁶

In contrast thereto, it has been argued that the position of the Court is a "conceptual construction of international law as law between states", as no supporting evidence can be detected in the law itself.⁹⁷ As a consequence, a broad interpretation of effective control is preferable. As early as 1841, following the *Caroline* affair, armed attacks by non-state actors were accepted in state practice.⁹⁸ This is endorsed by designation of self-defence as an *inherent right*, which emphasises its associated value and importance. It would be contrary to the concept, to exclude specific forms of violence *inter se* from the scope of the norm.⁹⁹ The factual shift of *opinio iuris* after 2001 and the corresponding S/Res/1368 and 1373 (2001) stipulate, albeit only in their preamble, the right of self-defence against terrorist attacks. The same follows when taking the perspective of actual necessity; it may appear essential to react to the threat of terrorism by use of force as police enforcement measures are commonly insufficient to fight global networks of destructive violence. Moreover, general exclusion of non-state actors would result in inconsistency with objective of the UN Charter. This is especially true where an armed attack committed by terrorists manifests a corrosive effect comparable with military force. It is therefore appropriate to consider the scope and effect of the attack as crucial factors in deciding whether or not a military reaction is necessary to sustain or reconstruct peace and security.¹⁰⁰ An attack with warlike destructive effects should be treated as such.¹⁰¹

If terrorist attacks continue to remain outside the scope of article 51, states will possess no effective means to combat terrorism, which they are legally obliged to. This finding is endorsed by relevant law since customary international law determines that states may not provide support to terrorists either directly or indirectly. Case law states that it is "every state's obligation not to knowingly allow its territory to be used for acts contrary to the rights of other states".¹⁰² Therefore if a state still provides shelter for terrorist groups, it must expect self-defence reactions against the own territory,¹⁰³ yet, the principle of sovereignty must be

⁹⁵ ICJ Reports 2004, 139.

⁹⁶ ICJ Reports 2005, 146.

⁹⁷ Karl Zemanek, "Armed Attack," 16.

⁹⁸ Christopher Greenwood, "The Caroline," 10.

⁹⁹ Thomas Bruha, "Gewaltverbot," 397, 398; Karl Zemanek, "Armed Attack," 2.

¹⁰⁰ ICJ Reports 1986, 195.

¹⁰¹ Thomas Bruha, "Gewaltverbot," 394; Rüdiger Wolfrum, "Fighting Terrorism at Sea," 23.

¹⁰² ICJ Reports 1949, 22 and ICJ Reports 2005, 162.

¹⁰³ Natalie Klein, *Maritime Security*, 272 (with further reference).

upheld when a state actively tries to extinguish terrorism in its territory and prosecute perpetrators. Finally, taking into account that the inclusive interpretation, is not incompatible with the wording and the general rules on interpretation of treaties as stipulated in the Vienna Convention, one needs to admit that a wide interpretation that integrates terrorists is as feasible as desirable. The contrary position, upheld by the ICJ, however, constitutes an obstacle to an authoritative broader understanding of *armed attack*.

Second, interpretation is required respective whether the article 51 UN Charter covers anticipatory measures. The wording *if an armed attack occurs* should be treated seriously as it is the outer limit of all possible interpretation. Using the present tense is a means to clarify that only attacks that have just taken place or are presently taking place are intended to be covered. The same conclusion follows from the purpose of the Charter.¹⁰⁴ But the contrary is advocated by the UN High Level Panel on Threats, Challenges, and Change which states: “[A] threatened state ... can take military actions as long as the threatened attack is imminent, no other means would deflect it and the action is appropriate.”¹⁰⁵ Already in the *Caroline* affaire the parties accepted actions necessary and proportionate in anticipation of a hostile threat.¹⁰⁶ New emerging state practices support this position.¹⁰⁷ Proponents for anticipatory self-defence further argue that international law is flexible and dynamic in its very nature and needs occasional adjustments in interpretation to meet the factual situation. Arguably, such a particular situation arose on September 11. Case law, however, in this respect is still unsettled and cannot be employed to support this position. In the *Nicaragua Case* it is worth noting that the ICJ did not deal with this matter, while in *Armed Activities* the ICJ implicitly excluded anticipatory force from the scope of article 51 UN Charter.¹⁰⁸

But, finally, when taking into account that the use of force will have an irreversible and irreparable impact and cause civilian casualties, a restrictive interpretation, opposing to the position of the majority of scholars and statesmen, is preferable. Regardless of whether or not terrorist are considered armed attackers and anticipatory actions are accepted, the natural

¹⁰⁴ Article 1 (1) UN Charter; James Crawford, *Brownlie's*, 750.

¹⁰⁵ Report of the Secretary General's High Level Panel on Threats, Challenges and Change (2nd December 2004).

¹⁰⁶ Jackson N. Maogoto, *Battling Terrorism* (Hampshire: Ashgate, 2005), 34.

¹⁰⁷ Daniel Bethlehem “Principles Relevant to the Scope of a State's Right of Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors,” *AJIL* 106 (2012), 3, 4; House of Commons, Foreign Affairs Committee, *Foreign Policy Aspects of the War Against Terrorism (2003-2004)*, H.C., 441-I, para. 429.

¹⁰⁸ „Article 51 of the Charter may justify the use of force in self-defence only within the strict confines there laid down.“ ICJ Report 2005, 148.

limit of force in self-defence will always be the necessity, as well as the proportionality in size, duration, and target.¹⁰⁹ Regarding the scale and effect, only the "most grave forms" of force can be considered as *armed attacks*.¹¹⁰ The high threshold is justified as self-defence can only be applied when a state actually faces a serious threat to its safety.¹¹¹

As article 88 UNCLOS shows, the maritime domain is reserved for peaceful purposes.¹¹² Hence, interpretation disagreements on lawful force under the UN Charter do not lose any pertinence when applied to the sea. In the territorial seas (and internal waters) the coastal state enjoys, according to article 2 (1) UNCLOS, full sovereignty. Hence the earlier discussions apply without modification to waters within national jurisdiction. The situation changes, however, in areas beyond national jurisdiction. On the high seas and in the EEZ, the freedom of the high seas and the flag state principle¹¹³ rather than state sovereignty are at stake. Interdictions of foreign flagged vessels on the high seas based on the right of self-defence, violate the flag states' interests and jurisdiction.

Indeed, the position of the ICJ prevent several legal problems by denying a right of self-defence in response to terrorist attacks. But taking the contrary position of non-state actors as possible attackers, and, then applying this to the high seas and EEZ, gives rise to numerous legal questions. These include, *inter alia* how to defend a state against a terrorist attack that is characterized by a "hit and run" or suicide tactic when a further attack is highly unlikely or impossible? If small stateless rubber boats are employed in a terrorist attack, who is the receiver of the military response? What impact does it have on the scope of force and the attack occurs in a neutral states' EEZ and how are the interests of the neutral coastal state to protect? Of course human rights need to be safeguarded under any circumstances, in particular in cases of anticipatory self-defence but is the analogous application of safeguards in article 110 and 111 UNCLOS appropriate? Lastly, the question on how to appreciate the fact that the fight against terrorism is a truly international matter, just as indicated in paragraph 7 of the preamble of the Charter, remains.

¹⁰⁹ ICJ Reports 1986, 224; ICJ Reports 2003, 51; ITLOS Judgment: MV Saiga (No 2), 1999, 155; Christopher Greenwood, "The Caroline," in *Max Planck Encyclopedia of Public International Law* (New York: Oxford University Press, 2015), 5.

¹¹⁰ ICJ Reports 2003, 51; ICJ Reports 1986, 191; James Crawford, *Brownlie's*, 749; Natalie Klein, *Maritime Security*, 270

¹¹¹ Karl Zemanek, "Armed Attack," 7.

¹¹² See also articles 141, 143, 147 (2) (d), 240 (a) UNCLOS.

¹¹³ Article 92 UNCLOS; S.S. Lotus Case (Judgement from 7th September 1927), PCIJ Series A no 10, 59.

The threshold applicable for strikes ashore needs to be copied to the maritime area to avoid unduly curtailing of the traditional freedoms of the high seas.¹¹⁴ Thus far, none of the past terrorist strikes at sea have been comparable in scope and effect to military forces as necessary to trigger the right to self-defence.¹¹⁵

5.1.4 Appraisal

International violence committed by non-state actors has become increasingly common, while the number of traditional inter-state conflicts has decreased.¹¹⁶ The legal situation has adapted to these changes. A broad interpretation of articles 39 and 51 UN Charter is clearly beneficial for the suppression of maritime terrorism as military strikes against non-state actors as terrorists could then be considered lawful. Foreign forces might especially be useful where the coastal state reached the limits of its capacity or where police measures failed. Anticipatory self-defence is crucial where ships are suspected of transporting terrorists or weapons of mass destruction to be used in terrorist acts.

On the other hand, an inclusive interpretation likely to open the door for abuse of force against terrorists as well as uninvolved civilians. Hence, caution needs to prevail when we allow new inclusive interpretations to ensure that barriers will not be broken down and extensive unilateral military operations against terrorists will not be permissible at the high seas. Otherwise, the fact that terrorists are operating in loose networks and cannot be targeted by a single military operation in one country, could be used as justification for the exponential increase of force on the world oceans, even though, most vessels on the high seas suspected of being involved in the proliferation of WMD, will not pose an *armed attack* that allows for force under article 51 UN Charter.¹¹⁷ However, it cannot be ignored that a narrow interpretation of the use of force, would prevent essential suppression endeavours necessary to combat terrorism.

For the benefit of the objective of the UN Charter, a qualified threshold need to be upheld at any time, although, the progressive development of the understanding of norms cannot be denied. Customary international law is dynamic, *viz.* steadily developing, and without this flexibility, international law would not be able to respond appropriately to social, political,

¹¹⁴ Natalie Klein, *Maritime Security*, 272.

¹¹⁵ *Ibid.*, 269.

¹¹⁶ Thomas Bruha, "Gewaltverbot," 383.

¹¹⁷ Michael Byers, "Proliferation Security Initiative," 22.

and factual changes. A restrictive interpretation of the use of force is thus beneficial to a state's own security. Keeping in mind that the value and success of force in the fight against terrorism is not evident yet, it is indispensable to consider the use of force as a last resort.¹¹⁸ To this day, no acts of maritime terrorism had demonstrated an intensity comparable to military strikes, so the discussion on self-defence and maritime terrorism still remains purely theoretical, yet.

5.2 The United Nations Conventions against Terrorism

Thus far, 16 anti-terrorism conventions have been produced by the UN and its specialized agencies, including four addressing the maritime area specifically.¹¹⁹ Among these conventions, there is no single comprehensive anti-terrorism convention. In 1996, the UN General Assembly established an Ad Hoc Committee to develop a draft of a comprehensive convention that would complement the existing legal framework.¹²⁰ But the process has stagnated when attempting to clarify the subject matter as no consent on an abstract definition was achieved.¹²¹

The treaties in place employ different definitions and focus on a specific tool applied or target aimed at, rather than on the phenomenon itself. The tool-specific method (e.g. bombing, hostage taking, nuclear material) or target-specific method (e.g. aircrafts, airports, off shore installations, vessels) lead to a piecemeal approach.¹²² Consequently, the current regime cannot provide for universal coverage.¹²³ However, there are three elements that they have in common: first, the treaties require the establishment of jurisdiction and the criminalization of attacks; secondly, several conventions apply the *aut dedere aut iudicare* principle;¹²⁴ finally, multilateral cooperation is promoted. The main goal of these suppression conventions is to ensure that terrorists will not find a safe haven. This could only be achieved through universal ratification and strict national implementation.¹²⁵

¹¹⁸ Isabelle Duyvesteyn, "Great Expectations: The Use of Armed Force to Combat Terrorism," *Small Wars & Insurgencies* 19 (2008), 329, 340.

¹¹⁹ See the list of all conventions at: <http://www.un.org/en/counterterrorism/legal-instruments.shtml> (last visited 9th August 2016).

¹²⁰ Ulrik Ahnfeldt-Mollerup, "The Universal Legal Regime Against Terrorism," 95; <http://legal.un.org/committees/terrorism> (last visited 9th August 2016).

¹²¹ Yonah Alexander, "Terrorism: A Definitional Focus," 4.

¹²² Ann Robertson and Laura Lambert, "United Nations," 1.

¹²³ Genevieve Lennon and Clive Walker, "Law and Terrorism," in *The SAGE Encyclopedia of Terrorism*, ed. Gus Martin (Thousand Oaks: SAGE Publications, 2011), 11.

¹²⁴ Means to extradite or prosecute a perpetrator. First proposed by Hugo Grotius in 1625.

¹²⁵ Ulrik Ahnfeldt-Mollerup, "The Universal Legal Regime Against Terrorism," 98.

5.3 The 1982 United Nations Convention on the Law of the Sea

The UNCLOS as a widely ratified convention is the fundamental instrument regulating maritime matters. It lays down the basic principles applicable at sea, just as the principle of freedom of the seas, peaceful uses of the oceans, freedom of the seas and exclusive flag state jurisdiction on the high seas.

Coastal states and flag states share the common interest of eliminating maritime terrorism which is a threat to safety of navigation routes, safety of human life at sea, and major economic interests.¹²⁶ When the UNCLOS was negotiated, maritime terrorism was not as visible and urgent as it is today. Only the hijacking of the Italian flagged cruise ship *Archille Lauro* in 1985, three years after the conclusion of UNCLOS, functioned as a wakeup call. Explicit regulations on terrorism are hence lacking, and it is to resort to general provisions. Of particular importance in this context is the principle that jurisdiction is based on registrations.¹²⁷ Exclusive flag state jurisdiction, which in a nutshell stipulates that on the high seas no state other than the flag state is permitted to prescribe or enforce law on a vessel, is the consequence. Nonetheless, as a principle it is not absolute and encroachments are permissive as long as justified by law.

5.3.1 Areas within National Jurisdiction

Internal waters, including ports and bays are areas under full sovereignty where the coastal state exercises prescriptive, enforcement and adjudicative jurisdiction.¹²⁸ In the case of a terrorist attack within these waters, coastal states may take enforcement actions such as boarding, inspecting, seizure of the boat and its crew, as well as instituting criminal proceedings under national law.

The territorial sea, as well as archipelagic waters are also under states sovereignty but subject to the right of innocent passage as provided for by the provisions of UNCLOS and other rules of international law.¹²⁹ According to articles 19 to 25 UNCLOS, the coastal state can prevent passage of foreign vessels only if the passage is *not innocent*. The law is not clear on how to resolve situations where the coastal state cannot provide evidences on the non-

¹²⁶ Natalie Klein, *Maritime Security*, 11, 17.

¹²⁷ Article 91 and 92 (1) UNCLOS.

¹²⁸ Article 2 (1), 8, 10, 11 UNCLOS; Stuart Kaye, "Interdiction and Boarding of Vessels at Sea: New Developments and Old Problems" in *Lloyd's MIU Handbook of Maritime Security*, ed. Herbert-Bruns et al., (London: CRC Press, 2009), 202.

¹²⁹ Article 2 (3) UNCLOS.

innocent character of the passage but has reasonable grounds to assume so. Reasonableness and proportionality should be the guiding principles in such cases.¹³⁰

The coastal state has limited criminal jurisdiction in its territorial sea. According to article 27 UNCLOS the criminal jurisdiction should not be exercised save in a few well-defined cases. The language (*should not*) is not mandatory, but rather an imperative recommendation followed by state practice.¹³¹ If a terrorist act is about to happen in the territorial sea, the coastal state, according to articles 19 and 25 UNCLOS, could intervene (stop, board and inspect the vessel) if it is fairly confident that the passage is non-innocent. If the measures taken prove unreasonable or not proportionate the state is liable for any damage caused. The risk of being made liable poses an inhibitory threshold to the state.

When a terrorist attack occurs in the territorial sea, criminal jurisdiction can only be exercised by the coastal state *if the crime is of a kind to disturb the peace of the country or the good order of the territorial sea* or otherwise justified under article 27 (1) UNCLOS. On the other side, the transport of WMD through the territorial sea but not directed to that state, cannot be easily prevented by the coastal state as the vessel is according to article 19 UNCLOS still in innocent passage.

The coastal state has wide powers to suppress maritime terrorism and prosecute criminals but has no legal obligations to do so within its maritime zones up to 12 nm from the baselines under UNCLOS.

5.3.2 Areas beyond National Jurisdiction

When dealing with areas beyond national jurisdiction, i.e. EEZ and the high seas,¹³² the EEZ is not specifically addressed here. Navigation in maritime zones beyond national jurisdiction is characterized by the freedom of navigation and the corresponding exclusive jurisdiction of the flag state.¹³³ Articles 110 and 111 UNCLOS allow for exceptional third-state enforcement powers on the high seas.¹³⁴

The right to visit in article 110 includes the right to stop, board and inspect the vessel but not to arrest the crew or detain the vessel. Article 110 (1) (a) applies to piracy, but an analogy

¹³⁰ José Jesus, "Protection of Foreign Ships," 398.

¹³¹ Douglas Guilfoyle, *Shipping Interdiction*, 11, 12.

¹³² Articles 56 and 73 UNCLOS.

¹³³ Article 92 UNCLOS.

¹³⁴ The norms are applicable in the EEZ through Article 58 (2) UNCLOS.

to piracy and also an application for norms *mutatis mutandis* should be refused¹³⁵. However, article 110 (1) (d) UNCLOS may be applicable to maritime terrorism if terrorists approach their target in small, highly manoeuvrable speedboats. These are exempted from the requirement to fly the flag of any state and so they are considered as stateless vessels subject to the universal right to visit.¹³⁶ In limited emergencies of maritime terrorism, article 111 UNCLOS may grant third-states jurisdiction. If an attack has been committed within areas of national jurisdiction and the offender flees towards the high seas, the coastal state authorities may pursue the boat in an act of hot pursuit in order to stop the boat and take enforcement measures. The threshold here is considerably high. Several safeguards in article 110 and 111 raise the burden further to protect the rights of the vessel, crew, and the flag state.

Uncertainty is still prevalent as to whether or not police authorities may use force to assert their rights under articles 110 and 111. The UNCLOS is silent but international jurisprudence provides guidance. In the *M/V Saiga (No.2)*, the International Tribunal for the Law of the Sea (ITLOS) stated: “Although the Convention does not contain express provisions on the use of force in the arrest of ships, international law, which is applicable by virtue of article 293 of the Convention, requires that the use of force must be avoided as far as possible and, where force is unavoidable, it must not go beyond what is reasonable and necessary in the circumstances.”¹³⁷

Substantial obligations to suppress maritime terrorism are not provided in the Convention. Only the general obligations for flag states to *effectively exercise its jurisdiction and control in administrative, technical and social matters* in article 94 (1) gives a vague idea on the obligations of the flag states, but is of subordinated importance in respect to terrorism. Nonetheless, it has been argued that ships under terrorist control may generally be considered stateless, as the flag state has lost *effective control* and the *genuine link* between the flag state and the vessel expired.¹³⁸ This position does not warrant support. Otherwise those ships would be subject to universal jurisdiction which would be contrary to article 104 UNCLOS; if a ship remains its nationality although it has become a pirate ship, that is all the more true for ships under terrorist control.¹³⁹

¹³⁵ See Chapter 3.3; Helmut Tuerk, “Combating Terrorism at Sea,” 365.

¹³⁶ Article 94 (2) (a) UNCLOS.

¹³⁷ ITLOS Judgment: *M/V Saiga (No.2)*, 1999, 155.

¹³⁸ Article 91 UNCLOS.

¹³⁹ Rüdiger Wolfrum, “Fighting Terrorism at Sea,” 24, 25.

5.3.3 Appraisal

It is a considerable shortcoming of UNCLOS that maritime terrorism is not explicitly regulated. The general provisions and principles are insufficient to tackle the specific phenomenon of terrorism at sea.

Hot pursuit is an important power of the coastal state to fight terrorism if perpetrators flee towards the high seas but applicable only in limited instances. However, the pursuit must be terminated when the pursued vessel reaches the territorial sea of another state.¹⁴⁰ This causes a particular problem when pursuing terrorists,¹⁴¹ as maritime boarders do not constitute an obstacle for the terrorists since they are usually invisible and unprotected. Though, they constitute a legal hindrance for the chasing warship. Safety is a universal concern and requires collective remedies. This is why some scholars advocate the establishment of universal jurisdiction for maritime terrorism following the model of piracy.¹⁴² They argue that the longstanding experience with universal jurisdiction for piracy has shown that it has been to the benefit of all as weak states obtain the assistance they need. At the same time, such universal jurisdiction does not seriously infringe the rights of flag states as respective safeguards could be adopted.¹⁴³ That being said, it is not evident that universal jurisdiction would be the only solution. Universal jurisdiction allows interdiction, including the right to arrest and prosecute the offenders under national law, but as long as terrorism is not consistently defined and not considered a crime under the Rome Statute,¹⁴⁴ such jurisdiction will undeniably lead to the question of who can be regarded as a terrorist and what punishments are appropriated. The different perspectives of the states involved would coactively leave some states unsatisfied.

The absence of express duties to cooperate, provide assistance, and exchange data, indispensable for a preventive approach at sea, renders the efforts of individual states and regional co-operation organizations ineffective as terrorists are not prevented from escaping to another state and seeking safe haven.

¹⁴⁰ Article 111 (3) UNCLOS.

¹⁴¹ Nong Hong and Adolf Ng, "Addressing Piracy and Maritime Terrorism," 55.

¹⁴² Exemplary: José Jesus, "Protection of Foreign Ships," 395; Helmut Tuerk, "Combating Terrorism at Sea," 337, 365.

¹⁴³ José Jesus, "Protection of Foreign Ships," 395.

¹⁴⁴ Rome Statute of the International Criminal Court (ICC), Rome, 17th July 1998.

Lastly, the UNCLOS is a sensitive balance of state's interests and amendments to the allocation of jurisdiction would likely disrupt this balance. At present, it appears unlikely that states would easily agree common definition and incorporate it into the tenuous structure of compromises in the UNCLOS. However, this does not mean that such a result would be impossible or undesirable. For the time being, states need to focus on enhancing international cooperation and assistance rather than using resources in the renegotiations of the Convention.

5.4 The 1988 Convention on the Suppression of Unlawful Acts against the Safety of Maritime Navigation

The SUA Convention was adopted to address the shortcomings of UNCLOS regarding maritime terrorism. The perception of deficiencies of UNCLOS was triggered by the hijacking of the *Archille Lauro* by four armed fighters of the Palestine Liberation Front. After understanding that the piracy provisions in UNCLOS are not applicable in the case, the need to fill the legal gap become apparent. A resolution of the Assembly of the IMO, formally recognizing the need for appropriate international solutions,¹⁴⁵ was fully endorsed by the UN General Assembly, calling for "the speedy and final elimination of the problem of international terrorism."¹⁴⁶

Many possible options to achieve this goal were discussed but adoption of a global convention gained the most support¹⁴⁷ and a genuine anti-terrorism convention, was negotiated under the auspices of the IMO.

5.4.1 The Applicability

Ratione personae and *ratione loci* of the 1988 SUA Convention are remarkably wide. In order to ensure the safe maritime navigation of ships, article 1 adopts a broad definition of *ship*;¹⁴⁸ with only platforms permanently attached to the sea floor¹⁴⁹ and vessels listed in article 2 being excluded. Articles 1 and 2 read together accurately reflect the mandate and the limits of the IMO, which is confined to commercial shipping.¹⁵⁰

¹⁴⁵ IMO Resolution A.584 (14) (1985).

¹⁴⁶ A/Res/40/61 (1985).

¹⁴⁷ Felicity Attard, "IMO's Contribution," 505.

¹⁴⁸ Glen Plant, "Legal Aspects of Terrorism at Sea," 76.

¹⁴⁹ Regulated in the 1988 Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf; Rome, 10th March 1988; The 1988 Protocol will not be considered in any detail since the rules are largely similar to those applicable to ships.

¹⁵⁰ See chapter 4.2; Rosalie Balkin, "The International Maritime Organization," 8.

"All vessels engaged in an international voyage operating or scheduled to operate seawards of any state's territorial sea"¹⁵¹ are covered by the 1988 SUA Convention, to summarize the geographical scope of article 4 briefly.

Potential offender can be *any person*, as established in article 3 (1), regardless of whether he/she works on behalf of a government or privately. Furthermore, the *direct involvement or complicity, in the intentional and unlawful threatened, attempted or actual endangerment of the safe navigation of a ship* is covered by articles 3 (1) and 3 (2),¹⁵² indicating that interference with safe navigation of a ship is the common aspect of all offences.¹⁵³

The SUA Convention lacks an express limitation to, and definition of, terrorism and does not distinguish between crimes committed for political and private reasons. During the negotiations it became apparent that any attempt to include an abstract definition of terrorism would be in vain. That is why an exhaustive list naming the offences that are covered by the treaty in a sectoral approach was included instead.¹⁵⁴

5.4.2 The Jurisdictional Scope and Content

The SUA Convention is shaped by two core obligations: the obligation to establish jurisdiction over the offences listed in article 3;¹⁵⁵ and to extradite or prosecute (alleged) offenders once jurisdiction has been established.¹⁵⁶

According to article 6 (1) state parties *shall* criminalize the crimes listed, if one of the following conditions are fulfilled: a vessel flying the flag of the state is affected; the offence takes place in the state's territory or territorial sea; or the offender is a national of the state. Article 6 (2) grants the option to establish further discretionary jurisdiction (*may also establish jurisdiction*) where the crime is committed by a stateless person whose habitual residence is in that state (a); the victim of the offence is a national of the state (b); or the offence is an attempt to compel the state (c). Furthermore, article 6 (4) obliges states to adopt jurisdiction if the offender is present in their territory. It is apparent that in every instance a link that binds the state to the offence/offender is required.¹⁵⁷ The latitude to assume a linkage is extremely broad in order to ensure that, at any time, any state will possess adequate laws permitting prosecution.

¹⁵¹ Helmut Tuerk, "Combating Terrorism at Sea," 348.

¹⁵² *Ibid.*, 350.

¹⁵³ Rosalie Balkin, "The International Maritime Organization," 8.

¹⁵⁴ Article 3 SUA Convention.

¹⁵⁵ Article 6 SUA Convention.

¹⁵⁶ Article 10 SUA Convention.

¹⁵⁷ Felicity Attard, "IMO's Contribution," 508.

The *aut dedere aut judicare* principle was introduced to impose a legally binding obligation upon states to either arrest and prosecute or extradite the offender.¹⁵⁸ Once the (alleged) criminal enters the territory of a state party, that state must initiate investigations into the suspected crime.¹⁵⁹ It is the exclusive responsibility of the requested state to decide whether to prosecute suspects under national law or to extradite them, with the Convention itself not giving an absolute obligation to extradite. When receiving requests from more than one state for extradition, there is no priority of any state. It is in the discretion of the requested state to decide, but also to *pay due regard to the interests and responsibilities of the States Party whose flag the ship was flying at the time of the commission of the offence*.¹⁶⁰

The extradition is commonly based upon special bilateral agreements although if none is concluded, the Convention itself may serve as a legitimating instrument.¹⁶¹ When denying extradition, the state is obliged under article 10 (1) 1988 SUA Convention *to submit the case without delay to its competent authorities for the purpose of prosecution*. But due to the weak language, the state is not obliged to punish the criminal but rather only to submit the case to the authorities.

5.4.3 Appraisal

The SUA Convention is the first international treaty designed to meet the particularities of maritime terrorism. As such it is important and signifies a considerable step forwards in the fight against terrorism at sea.

Article 3 represents a great range of unlawful acts which are considered to be acts of terrorism, whether authorized by a state or not.¹⁶² The list itself is not all-encompassing and does not address all possible forms of maritime terrorism - loopholes remain.¹⁶³ Due to the sectoral approach towards the offences, no expansion of the list will ever lead to absolute coverage of all terrorist attacks as it is based on experience from the past; precaution is effectively prevented. This unsatisfactory result will maintain until an abstract definition is

¹⁵⁸ Glen Plant, "Legal aspects of Terrorism at Sea," 82, 86.

¹⁵⁹ Douglas Guilfoyle, "Counter-Piracy," 149; Douglas Guilfoyle, "The Legal Challenges in Fighting Piracy," in *The International Response to Somali Piracy: Challenges and Opportunities*, ed. Bibi van Ginkel and Frans-Paul van der Putten (Leiden: Nijhoff, 2010), 133.

¹⁶⁰ Article 11 (5) SUA Convention.

¹⁶¹ Article 11 (2) SUA Convention.

¹⁶² Article 3 (1) and preamble paragraph 8 SUA Convention.

¹⁶³ José Jesus, "Protection of Foreign Ships," 391.

developed. Nonetheless, the wide geographical scope is highly appreciated as it corresponds to the need for global and unified efforts in all maritime areas.¹⁶⁴

As the parties agreed to multiple basis' for establishing criminal jurisdiction, many states have competing jurisdiction. Presupposing that all 166 parties¹⁶⁵ establish jurisdiction under article 6 (1), and many of them under 6 (2) as well, a fine-mesh net would be spun and allow several states to punish the perpetrator. The net is occasionally considered to be quasi-universal.¹⁶⁶ Explicit universal jurisdiction would hence be largely redundant. However, the impact of the SUA Convention depends upon the precise implementation of article 3 and 6 in national legislation. But so far the process of establishing jurisdiction is slow and rarely any states have been issued pertinent national law.¹⁶⁷ The desired outcome has not yet arisen.

Parties receive additional prescriptive jurisdiction to criminalize several offences through the Convention. One may draw the cautious conclusion that the Convention itself does not bestow enforcement powers to the parties,¹⁶⁸ but it rather reaffirms in article 9 and the preambular paragraph 13 the principle of exclusive flag state jurisdiction. Any third-state enforcement jurisdiction still needs to be derived from UNCLOS or customary international law.

The relationship with UNCLOS is noteworthy. It appears clear from the preamble and article 9 of the SUA Convention that it is meant to supplement UNCLOS and not contradict or replace UNCLOS provisions by virtue *lex posterior*. Yet, article 11 (5) does not harmonize with article 92 UNCLOS. A mandatory precedence of the flag state's request over other states' requests would fit better into the concept, although, again, principles are not absolute and in the present context a derogation is lawful and preferable as a considerable number of the global fleet fly a flag of convenience. Flag states of convenience may choose not to extradite offenders, but (fair) trails and prosecutions cannot be realistically expected. This is

¹⁶⁴ José Jesus, "Protection of Foreign Ships," 393.

¹⁶⁵ Status in August 2015; these 166 States represent 94,45% of world's tonnage:

<http://www.imo.org/en/About/Conventions/StatusOfConventions/Documents/Status%20-%202016.pdf> at 420 (last visited 9th August 2016).

¹⁶⁶ Douglas Guilfoyle, "The Legal Challenges in Fighting Piracy," 133.

¹⁶⁷ Rosalie Balkin, "The International Maritime Organization," 25; Brad J. Kieserman, "Preventing and Defeating Terrorism at Sea: Practical Considerations for Implementation of the Draft Protocol to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation," in *Recent Developments in the Law of the Sea and China*, ed. Myron H. Nordquist et al. (Leiden/Boston: Martinus Nijhoff Publishers, 2006), 437.

¹⁶⁸ José Jesus, "Protection of Foreign Ships," 391.

likely to undermine the efforts undertaken under SUA Convention. However, *due regard* shall be paid to the flag state's interests, as it enjoys an outstanding role in the law of the sea which need to be given credit to.

Cooperation and assistance as the fundamental basis to combat terrorism is provided in article 12 and 13 SUA Convention. The strong language of these provisions is highly appreciable. Even though the preventive approach is of utmost importance for the suppression of terrorism, article 13 is the only preventive element of the Convention.

The 1988 SUA Convention is a criminal law instrument making terrorists criminals, but does not contribute to the suppression of attacks as indicated by the title.¹⁶⁹ Criminalization is seen as beneficial since it renders it difficult for terrorist to find safe haven as states may not provide shelter to suspects. Though the goal is, as some scholars say, hampered by the lack of obligatory extradition or prosecution. Whether to *aut dedere aut iudicare* is within the apprehending states discretion. If it resolves not to hand over an offender the state will submit the perpetrator to the competent authorities. Whether this will lead to a fair and meaningful trial, or no trial at all is beyond the power of the state requesting extradition. Still, it is important to remember that international law is constructed upon the principle of state sovereignty, which would be seriously violated by foreign intervention through national criminal proceedings.

5.5 The 2005 Protocol to the Convention on the Suppression of Unlawful Acts against the Safety of Maritime Navigation

The cruel terrorist attacks of September 11 furnished evidence of the incomplete legal regime concerning terrorism at that time, as neither IMO instruments nor UNCLOS covered terrorist attacks where a ship is used as a weapon.¹⁷⁰ New security concerns accrued when vulnerability of international transport systems become indisputable;¹⁷¹ when global terrorism began to interweave with WMD.

By adopting resolution A.924 (22) in 2001, the IMO Assembly reacted to those apprehensions and delegated the task of reviewing existing IMO instruments in view of their

¹⁶⁹ Rosalie Balkin, "The International Maritime Organization," 23; J. Ashley Roach, "Enhance Maritime Security," 59.

¹⁷⁰ Helmut Tuerk, "Combating Terrorism at Sea," 354.

¹⁷¹ *Ibid.*; Felicity Attard, "IMO's Contribution," 510.

updating to the Legal Committee.¹⁷² The subsequent review process revealed three major deficiencies of the 1988 SUA Convention.¹⁷³ First, the offences established under article 3 are too narrow to embrace new security threats linked to WMD and the usage of ships as weapons.¹⁷⁴ Second, the complete lack of boarding provisions leads to a situation in which third-states cannot render assistance to a vessel suspected to be under terrorist attack,¹⁷⁵ or apprehend attacks. The right to board a vessel is left to customary international law as reflected in UNCLOS.¹⁷⁶ This finding is closely related to the third discovered shortage: the merely reactive rather than preventative approach of the instrument renders the treaty important for prosecutors but not for sea-going police officers.¹⁷⁷ All these factors led to the Convention being updated to widen its scope and align it with recently concluded anti-terrorism conventions.¹⁷⁸ The balance of traditional principles with new needs was the challenge faced by the Legal Committee. The outcome was the Protocol of 2005 to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation. The 1988 SUA Convention, and its Protocol, now constitute one single instrument: the 2005 SUA Convention.

5.5.1 The Amendments to 1988 SUA Convention

The 2005 SUA Convention introduces the expansion of listed offenses and the insertion of third-state boarding provisions. The new article 3bis (1) (a) details a description of the terrorism motive (*When the purpose of the act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act*) in order to ensure that article 3bis only covers terrorists but not innocent seafarers.¹⁷⁹ But no objective criteria are given for the terrorism motive.

Also the 2005 SUA Convention includes three new forms of crimes,¹⁸⁰ of which article 3bis (1) (a) comprises offences where ships are used to commit a terrorist attack. Article 3bis (1) (b) introduces non-proliferation crimes and under article 3ter, the sea transport of offenders

¹⁷² Felicity Attard, "IMO's Contribution," 511, 513.

¹⁷³ *Ibid.*, 513.

¹⁷⁴ Helmut Tuerk, "Combating Terrorism at Sea," 353.

¹⁷⁵ Rosalie Balkin, "The International Maritime Organization," 23.

¹⁷⁶ Kieserman, "Preventing and Defeating Terrorism at Sea," 433, 434.

¹⁷⁷ *Ibid.*, 432.

¹⁷⁸ Natalie Klein, *Maritime Security*, 171; Stuart Kaye, "Interdiction and Boarding of Vessels at Sea," 207.

¹⁷⁹ Based on definition found in the International Convention for the Suppression of the Financing of Terrorism; Rüdiger Wolfrum, "Fighting Terrorism at Sea," 9; Natalie Klein, *Maritime Security*, 171; Helmut Tuerk, "Combating Terrorism at Sea," 359.

¹⁸⁰ Kieserman, "Preventing and Defeating Terrorism at Sea," 436.

under articles 3, *3bis*, or *3quarter* is a crime. According to article *11bis* none of the offences shall be regarded as *political offences*.

The second remarkable achievement is article *8bis* regulating cooperation and third-state boarding. According to article *8bis* (5) (c), any boarding and enforcement measures require the express authorization of the flag state. Any state that has *reasonable grounds 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* may request boarding authorization without a duty to elaborate as to why it has reasonable grounds to suspect a vessel being involved in an offence.¹⁸¹ How to deal with such requests is a matter of national law. They can either deal with requests ad hoc or grant permission generally (or only when the state did not respond within four hours) based on a declaration deposited at the Secretary-General of the IMO.¹⁸² These so called opt-in clause make it optional for the flag state to allow tacit authorization or not. When authorization is declined, the flag state can take appropriate action itself but is not expressly obliged to do so.¹⁸³ Through the requirement for express consent for boarding, the precedence of flag state jurisdiction and freedom of navigation is ensured.¹⁸⁴ On the other hand, the flag state is committed to respond to boarding requests as expeditiously as possible.¹⁸⁵ To include a confined time frame was not acceptable for numerous flag states.¹⁸⁶ To avoid any abuse of article *8bis* (5) to the disadvantage of innocent seafarers and national commercial interests, the states agreed upon extensive safeguards in article *8bis* (10).

5.5.2 Appraisal

The 2005 Protocol expands the scope of the SUA Convention considerably. Innovative is, for instance, the coverage of proliferation of WMD in article *3bis* which reflects raising threats originating from a link between terrorism and WMD. The Protocol is the first international instrument criminalizing the transport of WMD at sea.¹⁸⁷

But even though the provisions present a great step forwards in the address of modern threats in international law, they show deficiencies concerning vague terms, lack of definitions and

¹⁸¹ Natalie Klein, *Maritime Security*, 176.

¹⁸² Article *8bis* (5) (d) and (e) 2005 SUA Convention.

¹⁸³ Natalie Klein, *Maritime Security*, 179, 180; Article *8bis* (5) (c) (iv) SUA 2005.

¹⁸⁴ Felicity Attard, "IMO's Contribution," 514.

¹⁸⁵ Article *8bis* (5) (1) 2005 SUA Convention.

¹⁸⁶ Natalie Klein, *Maritime Security*, 179.

¹⁸⁷ Hiroyuki Banzai, "The Proliferation Security Initiative and International Law of the Sea: A Japanese Lawyer's Perspective," in *JEAIL* 3 (2010), 27.

discriminatory treatment of states. The latter matter is manifest in article *2bis* (the saving clause), according to which the Protocol's provisions shall not affect the rights and obligations under the Treaty on the Non-Proliferation of Nuclear Weapons.¹⁸⁸ States not party to the treaty, will therefore have diverging rights and obligations under article *3bis* (2).

The new offences under articles *3bis* and *3ter* are marked by innovative subjective requirements, such as a terrorism motive, knowledge or intention.¹⁸⁹ These subjective elements of an offence help to distinguish terrorism targeted by the SUA Convention from other unlawful acts at sea, and hence finally transfer it into a more specific instrument designed for a very particular type of crime as it was initially intended. Interestingly, crimes under article *3bis* (1) (a) do not necessarily need to be linked to the safety of navigation by the virtue of the wording, which indicates an understanding for the close connection of maritime security and security on land.¹⁹⁰ Article *11bis* eventually excludes from the practice of denying extradition the cases of *political offences*. The general exception of extradition for political offences which is based on customary international law, is hence not applicable to crimes of article 3 anymore. This is of particular importance as terrorist attacks commonly follow a political, religious or similar motivation, which would otherwise allow for excessive abuse of the *political offences* exception and could render the entire *aut dedere aut judicare* system *ad absurdum*.

Despite such felicitous provisions, cooperation, essential to suppress a globally operating enemy, and harmonization of boarding procedures and standards will contribute to a more effective approach. States need to prepare their joint operations so that they are able to cooperate at short notice.¹⁹¹ Time is a crucial factor when it comes to international terrorism, and the timely exchange of information and efficient assistance are decisive for the success of police measures.¹⁹² Many actors, such as states, international organizations, intelligence agencies and private actors of the maritime sector will be involved, and so it is necessary to coordinate the tasks and responsibilities before an actual attack occurs.

¹⁸⁸ Treaty on the Non-Proliferation of Nuclear Weapons; New York, 1st July 1968.

¹⁸⁹ Robert R. Beckman, "The 1988 SUA Convention and the 2005 SUA Protocol: Tools to Combat Piracy, Armed Robbery, and Maritime Terrorism," in *Lloyd's MIU Handbook of Maritime Security*, ed. Rupert Herbert-Bruns et al. (Boca Raton: CRC Press, 2010), 197.

¹⁹⁰ Natalie Klein, *Maritime Security*, 171, 172.

¹⁹¹ Article *8bis* (12) 2005 SUA Convention; Ashley Roach, "Enhance Maritime Security," 63.

¹⁹² Kieserman, "Preventing and Defeating Terrorism at Sea," 439.

Article 8bis is the core of the Protocol; it gives "teeth" to the Convention as some writers put it.¹⁹³ Boarding in cases where a ship *has been, is or is about to be involved* reflects a more preventive approach than in previous treaties, which became only possible to include after a shift of mood within the international community recognizing the need to legalize preventive actions in order to minimize the possibility of the criminal act and render assistance when it is actually needed and not only in the aftermath.¹⁹⁴ Nonetheless, the reluctance of states to accept any interference with sovereign rights or a transfer of rights is unchanged. Achieving a compromise that does justice to the necessities and at the same time preserves traditional principles of international law of the sea is a challenging undertaking, which is unlikely to result in any ground-breaking solutions. Hence, article 8bis takes a conservative approach and presents the smallest common denominator so that states were willing to agree. Boarding of a foreign flagged vessel on the high seas by a third-state is still only possible with express authorization of the flag state.¹⁹⁵ Nonetheless, several authors, as well as states, consider this provision to be a representative of new international law that provides for the exercise of enforcement jurisdiction.¹⁹⁶ According to them it is innovative, important and the "most well-developed" provision for boarding in international conventions of a similar kind.¹⁹⁷

The position that the boarding provisions present new international law is not convincing. Considering state sovereignty as a starting point and fundamental principle of international law, a states can always allow another state to exercise jurisdiction upon request or request itself assistance by exercising enforcement jurisdiction. Based on state consent all such measures would be in harmony with the principle of sovereignty and a states' freedom to transfer their rights to other states at their will. Long standing and increasingly common state practice support this finding.¹⁹⁸ Hence, the value of the boarding provisions as the codification of customary international law in a treaty is limited. On the other hand, it renders it more difficult for the state parties to deny a request and so some writers regard the Protocol as a mitigation of the principle of flag state.¹⁹⁹ Whether the boarding provisions will have

¹⁹³ Rosalie Balkin, "The International Maritime Organization," 31.

¹⁹⁴ Helmut Tuerk, "Combating Terrorism at Sea," 366.

¹⁹⁵ Article 8bis (5) (c) SUA 2005 Convention.

¹⁹⁶ Natalie Klein, *Maritime Security*, 174.

¹⁹⁷ "Consideration of: A draft protocol on the Convention for the suppression of unlawful acts against the safety of maritime navigation, 1988 and a draft protocol to the protocol for the suppression of unlawful acts against the safety of fixed platforms located on the continental shelf, 1988: Comments on counter-terrorism, non-proliferation and boarding provisions, Submitted by the United States" 22nd September 2005, IMO Doc LEG/CONF. 15/15, para.3.

¹⁹⁸ Ashley Roach, "Enhance Maritime Security," 48; Michael Byers, "Proliferation Security Initiative," 3.

¹⁹⁹ Hiroyuki Banzai, "Japan and PSI," 26.

any impact on the practice of flags states of convenience, which are commonly not willing to consent to boarding and inspections of their vessels, is doubtful.

No indication of universal jurisdiction can be discerned in the Protocol. The deficiencies of the SUA Convention with respect to its non-preventive approach is remedied by the Protocol only to a very limited extent. The SUA Convention, as well as its Protocol, primarily recognize the interests of states in prosecution but not in prevention.²⁰⁰ Universal jurisdiction, on the other hand, would allow suppression as well as preventive measures.²⁰¹

Furthermore, states have to reply to a request for authorization *as expeditious as possible* but are not bound to any specific time limit.²⁰² During the negotiations, a time limit of four hours was proposed but states were reluctant to accept as the expiration of the granted time would lead to a tacit authorization to board a vessel and hence interfere with the flag state principle which states are, under no circumstances, willing to degrade. A timely reaction is needed and the denial of a request or the lack of any response would allow suspected terrorists to continue their journey unhindered with no apprehension being possible. Taking into account failed states and the number of flags of convenience, as well as the considerable size of their fleet, it is worrisome to be dependent upon their timely response or in case of denial, their effective enforcement measures against the suspects. Whether states are willing and capable to react appropriately in a particular case is unpredictable. Moreover, given that no comprehensive definition of the notion of terrorism is found, it will remain the state's duty to judge whether or not a suspect is a terrorist and interdiction should therefore be desirable. To complicate things further, the terrorism purpose as described in article 3*bis*, lacks any objective criterion. It hence requires states to assess the suspect's intention from a distance and trust in the requesting state's evaluation. How this would be done in a global and responsible manner is questionable as trust is a weak basis in international law.

To bind boarding to flag state consent perpetuates the *status quo* and can only partially compensate the earlier shortcomings. The omnipresent balance between the need for security and action on the one hand, and the flag states interests on the other, has led to a standstill. Strict implementation of the Protocol and the least possible interference with state's interests

²⁰⁰ Rüdiger Wolfrum, "Fighting Terrorism at Sea," 12.

²⁰¹ *Ibid.*, 13.

²⁰² Article 8*bis* (1) SUA 2005 Convention.

can hardly be achieved at the same time.²⁰³ Cases where a provision of the instrument would need interpretation will always require a balance of these two positions.²⁰⁴ It is not possible to predict to what extent the Protocol will be successful as its success depends greatly upon its effective implementation at national level through adoption of its catalogue of offences and provisions for criminal jurisdiction; a process that is slow and will certainly take more time.²⁰⁵ Implementation always faces legal, political and operational difficulties.²⁰⁶ Nonetheless, general acceptance of the instrument is essential for it to operate successfully. It is of special importance that all states in the same region become parties to ensure close cooperation and prevention of safe havens for terrorism.²⁰⁷ So far merely 40 states, representing 39,06 % gross tonnage of the world's merchant fleet, have ratified the amendments.²⁰⁸

5.6 The Proliferation Security Initiative

After the *So San intermezzo* in December 2002,²⁰⁹ the international community became more aware of the risk of proliferation of WMD, their delivery systems and related material. This led to a widespread acceptance that common efforts to prevent maritime transport of WMD intended for terrorist attacks, enabled through the abusive usage of the flag state principle by flags of convenience, were needed.²¹⁰ The consequence was the establishment of the Proliferation Security Initiative (PSI), launched in 2003 in Krakow.²¹¹ The PSI, as an informal international mechanism aims to further inter-state cooperation and strengthen "the political commitment, practical capabilities, and legal authorities necessary to stop, search, and, if necessary, seize vessels and aircraft believed to be transporting WMD",²¹² to suppress proliferation of WMD from and to states and non-state actors as well as to detect vessels and aircraft engaged in illicit proliferation.²¹³ This receives broad international support and to

²⁰³ Rosalie Balkin, "The International Maritime Organization," 32.

²⁰⁴ Natalie Klein, *Maritime Security*, 182.

²⁰⁵ Rosalie Balkin, "The International Maritime Organization," 25; Kieserman, "Preventing and Defeating Terrorism at Sea," 437.

²⁰⁶ Kieserman, "Preventing and Defeating Terrorism at Sea," 450.

²⁰⁷ Robert Beckman, "The 1988 SUA Convention," 197, 198.

²⁰⁸ <http://www.imo.org/en/About/Conventions/StatusOfConventions/Documents/Status%20-%202016.pdf> at 431 (last visited 9th August 2016)

²⁰⁹ http://www.nytimes.com/2002/12/12/news/12iht-scuds_ed3_.html (last visited 9th August 2016).

²¹⁰ Hiroyuki Banzai, "Japan and PSI," 10, 12.

²¹¹ U.S. President George W. Bush, 31st May 2003.

²¹² Michael Byers, "Proliferation Security Initiative," 5.

²¹³ Hiroyuki Banzai, "Japan and PSI," 9.

date 105 states endorsing the Initiative.²¹⁴ As terrorists are increasingly interlinked with WMD, the PSI is highly relevant for the suppression of maritime terrorism.

5.6.1 Regulatory Content

The substantial body of the PSI framework can be divided into two parts: the Statement of Interdiction Principles²¹⁵ and several mutual bilateral boarding agreements between the U.S. and other states, commonly considered as flags states of convenience.

The Statement provides for the adoption of measures both nationally and internationally to suppress proliferation.²¹⁶ Due to the non-legally binding character of the Statement, endorsement to the provisions is sufficient to become a participant in the Initiative.²¹⁷ Participants should adopt procedures to ensure the timely exchange of data according to article 2 of the Statement. Article 4 calls upon states to take actions to inhibit WMD trafficking, based on either territorial jurisdiction (articles 4 (a), (d), (e), and (f)) or on flag state jurisdiction (articles 4 (a), (b), and (c)). All such measures must be consistent with international law, but regarding their compatibility with general law of the sea, article 4 (d) is of concern.²¹⁸ Whether measures based on article 4 can be enforced against non-participating flag states is doubtful when the suspected vessel is exercising its right of innocent passage. States can solely prevent passage through their territorial sea if it is non-innocent.²¹⁹ Whether a passage is innocent can be derived solely from article 19 UNCLOS. This article does not expressly refer to the passage of vessels transporting WMD through the territorial sea. It has been brought forward that the coastal state may declare WMD trafficking a crime and hence may enforce jurisdiction within the restrictive borders set by article 27 UNCLOS.²²⁰ But this law in turn might be inconsistent with article 23 UNCLOS.

In areas beyond national jurisdiction, it is only the flag state that can take measures in accordance with article 4 (a), (b), and (c) of the Statement. However, the Statement is not legally binding and cannot serve itself as a legal basis for interdiction.²²¹ Article 110

²¹⁴ <http://www.state.gov/t/isn/c10390.htm> (last visited 9th August 2016).

²¹⁵ Statement of Interdiction Principle, The White House, Washington D.C., 4th September 2003. Hereunder the Statement.

²¹⁶ Hiroyuki Banzai, "Japan and PSI," 10.

²¹⁷ <http://www.psi-online.info/Vertretung/psi/en/01-about-psi/0-about-us.html> (last visited 9th August 2016).

²¹⁸ Hiroyuki Banzai, "Japan and PSI," 14, 15; Nong Hong and Adolf Ng, "Addressing Piracy and Maritime Terrorism," 57; Rüdiger Wolfrum, "Fighting Terrorism at Sea," 17.

²¹⁹ Article 25 UNCLOS, see Chapter 5.3.1.

²²⁰ Rüdiger Wolfrum, "Fighting Terrorism at Sea," 17.

²²¹ Nong Hong and Adolf Ng, "Addressing Piracy and Maritime Terrorism," 57.

UNCLOS does not allow boarding of vessels that are suspected of smuggling WMD on the high seas. The flag states jurisdiction prevails. Moreover, article 88 UNCLOS is not a legal basis for interdiction either because that would first require the declaration of illicit WMD transport a crime *erga omnes*.²²² In conclusion, the Statement does not grant any additional powers and rather refers to existing rules of international and national law.²²³

Contrary to most participants to PSI, some have concluded mutual ship-boarding agreements. According to the agreements the boarding state has to request that the flag state confirms nationality of the vessel and authorizes boarding. Most agreements provide a default provision which presumes default authorization if no response has been received within two to four hours.²²⁴

5.6.2 Relationship to the 2005 Protocol to the SUA Convention

The 2005 SUA Convention was the first international instrument addressing proliferation of WMD at sea.²²⁵ It permits third-state boarding only with flag state consent but the discretion to deny authorization is limited by the Convention which lays down detailed provisions on inter-state cooperation in article 8*bis*.²²⁶ Article 8*bis* (13) permits states to conclude mutual agreements *to facilitate law enforcement operations carried out in accordance with this article*. The mutual ship-boarding agreements under the framework of the PSI present direct implementation of that paragraph²²⁷ and thereby create an important correlation between the two instruments. But the vague nature of the PSI agreements does not provide comparable level of protection in the same way as article 8*bis* 2005 SUA Convention does.²²⁸ Therefore, states need to refer back to article 8*bis* and its extensive safeguards in paragraph 10 to be not only complementary, but also consistent.²²⁹

²²² Rüdiger Wolfrum, "Fighting Terrorism at Sea," 20.

²²³ See article 4 Statement of Interdiction Principles.

²²⁴ *Inter alia* article 4 (3) (d) of the Agreement Between the Government of the United States of America and the Government of the Republic of Liberia Concerning Cooperation To Suppress the Proliferation of Weapons of Mass Destruction, Their Delivery Systems, and Related Materials By Sea, Washington, 11th February 2004; without a default provision: 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, Nassau, 11th August 2008.

²²⁵ See in particular article 3*bis* (1) (b) (ii) 2005 SUA Convention; chapter 5.5.1.

²²⁶ Hiroyuki Banzai, "Japan and PSI," 26.

²²⁷ *Ibid.*

²²⁸ Robert Beckman, "The 1988 SUA Convention," 196.

²²⁹ *Ibid.*

5.6.3 Appraisal

The PSI was intended to serve as justification of numerous military actions at sea and in ports.²³⁰ The inspirational basis of the Initiative might be S/Res/1540. But the legal basis for concrete implementation gives rise to important legal questions. The Statement does not reiterate any provisions of article 8*bis*, with the safeguards notably omitted and as the Statement is not consistent with article 8*bis* (13), it cannot be a source of justification. Hence, the matter remains unresolved and requires urgently increasing international attention.

Besides the basis of the PSI, its compatibility with general law of the sea and the UNCLOS in particular, is doubtful. This is particularly obvious respective the regime of innocent passage applying in the territorial sea and the flag state principle pertinent on the high seas, which appear to be impaired by interdiction operations as stipulated in the Statement.²³¹ To avoid conflicts the PSI can only be implemented within the defined borders of the UNCLOS.²³²

The number of states endorsing the PSI is impressive. However, since the threshold for becoming a participant is considerably low,²³³ the value of such a high number of participants is nebulous. The numerous reservations to the Statement made by participants amplify this impression. When it comes to the implementation, the reluctance of states to fulfil their commitments for the benefit of global security is significant. Thus far, only twelve states have accepted the exercise of third-state enforcement jurisdiction over their ships through separate agreements.²³⁴ Most of them are considered as flags of convenience, whose role was eyeballed with scepticism in the context of the SUA Protocol, but their readiness to invest in global security is exemplary. Nonetheless, those few states are not capable of suppressing a global security in a holistic manner. Thus, agreements with more influential states (and organizations such as the European Union) which dispose over a great fleet, as well as states of proliferation concern are indispensable. The attitude of flag states towards their exclusive jurisdiction might otherwise entrap abuse and uncontrolled proliferation with unpredictable consequences.

²³⁰ Rüdiger Wolfrum, "Fighting Terrorism at Sea," 16.

²³¹ See chapter 5.6.1.

²³² Hiroyuki Banzai, "Japan and PSI," 28.

²³³ *Ibid.*, 13.

²³⁴ Nong Hong and Adolf Ng, "Addressing Piracy and Maritime Terrorism," 57.

Both, the Statement and the bilateral agreements, rely on voluntary actions by states and provide a proactive approach that seeks to take pre-emptive actions against suspects.²³⁵ States supporting WMD and its proliferation are unlikely to grant enforcement power to other states though these are the states that need to join the initiative actively to guarantee its success.²³⁶ In order to get those states on board, it might help to focus on port inspections instead of at-sea enforcement measures, as currently discussed. States might be more inclined to support the efforts of the PSI knowing that they cannot prevent most of the controls as they happen in ports and interdictions on the high seas are a mere exception.

So far, a small number of countries have concluded bilateral agreements, but all other participating states are not legally bound by anything. Those states use the PSI and its meetings as a "platform for networking"²³⁷ and means to develop partnerships with cooperations.²³⁸ Even though proliferation of WMD is generally accepted as a threat to international peace and security,²³⁹ states rely on informal cooperation rather than on substantial legal agreements including enforcement measures. The pre-emptive approach of the PSI can unfold its potential only through additional boarding agreements. This is what is needed to efficaciously contribute to a sophisticated terrorism suppression regime.

²³⁵ U.S. Department of State at <http://www.state.gov/t/isn/c10390.htm> (last visited 9th August 2016).

²³⁶ Nong Hong and Adolf Ng, "Addressing Piracy and Maritime Terrorism," 57.

²³⁷ <http://www.psi-online.info/Vertretung/psi/en/01-about-psi/0-about-us.html> (last visited 9th August 2016).

²³⁸ <http://www.nti.org/learn/treaties-and-regimes/proliferation-security-initiative-psi/> (last visited 9th August 2016).

²³⁹ Hiroyuki Banzai, "Japan and PSI," 28.

6 Overall Assessment of the Legal Regime to Combat Maritime Terrorism

The applicable rules as described and analysed previously shall now be assessed for its effectiveness in combatting maritime terrorism.

6.1 Rules Applicable in Areas Within National Jurisdiction

In internal waters and the territorial sea, the coastal state jurisdiction is the prevailing principle. Here the coastal state has discretion to enact and enforce laws addressing maritime terrorism with due regard to the other states' right of innocent passage. The prohibition of the use of force as stipulated in the UN Charter is applicable, including all its legal uncertainties, just as it would be on land territory. If a voyage is not exclusively within the waters of a single state, the 1988 SUA Convention applies and grants the coastal state additional criminal jurisdiction. Furthermore, it introduces the obligation to prosecute or extradite alleged perpetrators. This obligation is upheld and expanded by the 2005 Protocol, as are the crimes that are covered by the treaties. The PSI is of subordinated importance in areas within national jurisdiction save in situations where vessels flying the flags of state parties to bilateral boarding agreements, are involved.

The coastal state jurisdiction is broad but substantially limited through the right of innocent passage safeguarded through provisions in UNCLOS. The coastal state can only interfere with vessels in passage in limited cases. The shipment of WMD through the territorial sea is not considered to be such case if the weapons are not directed to the coastal state. At present, this might be a minor security concern as it will occur rarely, but bearing in mind the rapid changes in the methods of terrorists and their raising funds, that is likely to create considerable issues in the mid-term future. Solving the matter by reallocating jurisdictional powers in UNCLOS does not appear likely in the foreseeable future. Nonetheless, the issue requires attention and might be approached through increasing cooperation among coastal

states, in particular among law enforcement authorities, standard setting, and adoption of common practical measures. Furthermore, improvement of coastal state capabilities, and the strengthening of authorities, should be a focal point of action in order to ensure sound implementation and enforcement of the existing norms. Whether the law will have an actual impact depends greatly on precise implementation.

6.2 Rules Applicable in Areas Beyond National Jurisdiction

The traditional freedoms of the seas and exclusive flag state jurisdiction as codified in UNCLOS apply in areas beyond national jurisdiction. The ban of the unilateral use of force is, according to the UNCLOS and UN Charter, pertinent on the high seas and in the EEZ just as it is elsewhere. However, the right of self-defence in areas beyond national jurisdiction is surrounded by legal uncertainty. The 1988 SUA Convention enables criminal law enforcement but also impose an obligation to prosecute or extradite. The role of cooperation in terrorism suppression has received special emphasis. The 2005 Protocol reiterates these features and includes additional boarding provisions that allow for third-state enforcement measures, presupposing the flag states consent. Flag states' rights are secured through extensive safeguards. Bilateral boarding agreements in the PSI framework allow for the further enforcement of rights in particular cases; the Statement of Interdiction Principles is in contrast thereto rather political than legal in nature. The Resolutions 1373 and 1540 adopted under Chapter VII are legally binding to states and, in fact have gained substantial practical relevance as a justification of at-sea enforcement operations by non-flag states.

The emerged norms preserve the fundamental principles on which the law of the sea is based, acknowledge their values, and in this way, uphold the stable foundation of the law. The 1988 SUA Convention is marked by its powerful language and many state parties, both acknowledged as indicators for a strong treaty. However, no ground breaking accomplishments has been produced as it has proved intractable to accommodate conflicting interests in favour of international maritime security. The outcome presents a rather feeble compromise in the struggle for balancing the freedom of the seas and international security concerns. The Protocol copies the vigorous language and partially remedies some of the shortcoming of the 1988 SUA Convention since states have been willing to make concessions and to accept limitations to their traditional rights. The boarding provisions function as a demonstration of that process. The requirement for flag state authorization may lead to a weak appearance of the Protocol at first glance, however, the possibility of states

to request permission puts substantial pressure on the flag states to exercise its' jurisdiction under 2005 SUA and UNCLOS effectively. Here, legal regulations and political pressure are intertwined. Nonetheless, an allowance for boarding, independent from flag state discretion, would be meaningful in terrorism suppression. As flag states of convenience and failed states could otherwise undermine global suppression efforts. The negotiations to 2005 SUA Convention provided an opportunity for states to demonstrate their serious concerns, confronting the good order of the seas and borrowing from the strong law enforcement regime applicable to marine living resources in the UN Fish Stock Agreement concluded a decade earlier.²⁴⁰ The outcome was rather disappointing. Just as in the 1988 SUA Convention, its Protocol focuses on prosecution of perpetrators rather than on prevention of violent terrorist acts. Although, it strengthens the endeavours to criminalize maritime terrorism remarkably. The efforts are embossed by the establishment of jurisdiction in national law systems, which in turn provides the fundamental basis for a successful extradition or prosecution procedure. The impact of the 2005 SUA Convention on state practice is not predictable.

Taking the increasingly common method of suicidal attacks into consideration, prosecution does not show the desired deterrent ramification. A genuine preventative approach seems the only solution but is yet to be adopted in any instrument. One attempt to compensate for this shortcomings is seen in Resolution 1373 which was concluded to fill the gaps in law. Resolutions proved to be an effective way to circumvent existing principles of the law of the sea, even though its lawfulness has not yet been conclusively established.²⁴¹ The contribution of the Statement of Interdiction Principles is relatively insignificant in this respect. However, it may help to change the attitude of participating states and increasing third-state interdiction operations.

Lastly, the missing central plank - an accepted definition of terrorism - is omnipresent. Although the term is employed in resolutions and the PSI, it not understood consistently. Diverging interpretations and implementations of the rules could be the consequence. The fact that the 2005 SUA Convention requires a terrorist motive as an element of crime is highly appreciated as it can be considered as a general acknowledgement of the unique status

²⁴⁰ Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, New York, 4th August 1995.

²⁴¹ Natalie Klein, *Maritime Security*, 325.

and treatment of terrorists under international law and a gentle attempt to confine the scope of the Convention to terrorism without necessarily defining it. It is a first step, but can certainly not substitute an abstract definition.

Until very recently, maritime terrorism did not pose a serious threat and states and legislators did not recognize the necessity to regulate these matter. Now, the matter of maritime terrorism is only partial regulated. To make the instruments in place work effectively, a larger number of ratifications, effective enforcement, and strict national implementation are absolutely necessary. Assistance and cooperation in law enforcement are the key for success. Furthermore, joint maritime police officer training, information sharing, and capacity building for coastal state authorities could support sound enforcement operations. A successful third-state enforcement would help building trust and may finally lead to allocated enforcement powers. Practical and appropriate measures could be used to overcome the present shortcomings until new, more preventive, instruments are available.

7 Conclusion

It is important to remember that terrorism has always been a highly political topic that makes treaty making a challenge to undertake. The changing and adaptive nature of terrorism renders it nearly impossible to encompass it in a comprehensive legal manner. The *status quo* is a defected and inefficient regulated regime and what we have is a collection of some general provisions and few specific rules, with Security Council resolutions trumping general principles of the law of the sea.²⁴² The existing norms may be insufficient to address the problem but it is not the law itself which makes it inappropriate, but rather the practical circumstances. Even well thought out and carefully drafted treaties cannot be successful if they do not meet the factual situation they are intended to regulate.

The law on terrorism is still developing and requires constant amendments as terrorism, according to Kofi Annan, is a threat "to all that the United Nations stand for: respect for human rights, the rule of law, the protection of civilian, tolerance among peoples and nations, and the peaceful resolution of conflict."²⁴³

²⁴² Natalie Klein, *Maritime Security*, 325.

²⁴³ Security-General, Report *In Larger Freedom: Towards Development, Security and Human Rights for All*, A/59/2005 (21st March 2005), 87.

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