

Fighting Terrorism at Sea: Options and Limitations under International Law

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I. Introduction

Assessing existing international law rules concerning the suppression of piracy or terrorism¹ at sea, related support activities or activities having been recently assimilated to such activities, requires a clear distinction between different scenarios:

- Acts of piracy as covered by articles 101 et seq. of the Convention on the Law of the Sea and customary international law;²
- Acts of violence against a ship, its passengers or its crew similar to piracy but not meeting the narrow confines of the established definition of piracy;
- Acts using a ship as a weapon against navigational safety;
- Using the sea as a means of providing logistic support for terrorist activities;
- Using the sea as a platform to launch a strike against a state or to use a ship as a weapon against a state;
- Transport of weapons of mass destruction without a terrorist background.

International treaty law as well as customary international law has developed mechanisms to suppress acts of violence at sea, such as piracy or other acts directed against ships, airplanes or platforms. However, new developments seem to indicate that these mechanisms do not embrace modern threats. In particular these mechanisms did not explicitly provide for measures taken in response to ships being used as weapons. This situation has changed with the adoption of the 2005 Protocol to the Convention for the Suppression of Unlawful Acts (SUA) Against the Safety of Maritime Navigation (Rome Convention).³ Designing such measures had to strike a balance between the freedom of navigation and the security interests of individual states as well as the ones of the community of the states as a whole. Further, it has been

¹ The most general definition of the notion of terrorism is to be found in the Convention for the Suppression of the Financing of Terrorism, 1999 (ILM 39 (2000), 270: article 2, paragraph 1 b of that Convention reads: „Any ... act intended to cause death or serious bodily injury to a civilian, or any other person not taking part in hostilities in a situation of armed conflict, when the purpose of such 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.”

² G. Dahm/J. Delbrück/R. Wolfrum, *Völkerrecht*, Bd. I/2, 2002, 364 f.; R. Lagoni, *Piraterie und widerrechtliche Handlungen gegen die Schifffahrt*, in: *Festschrift Rauschnig*, 2001, 501 et seq., (511 et seq.) both with further references.

³ The amendment to the SUA or Rome Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 1988, ILM 27 (1988) 672; UNTS Vol. 1678 No. 29004, was adopted by the Diplomatic Conference on the Revision of the SUA Convention held from 10-14 October 2005. The amended Convention has not entered into force, yet.

felt that the increasing proliferation of weapons of mass destruction and the uncontrolled trade in the relevant hard and soft ware may cause an additional threat to international peace and security, in particular since such hard and soft ware may fall into the hands of terrorists. Mechanisms to restrict such trade are now interwoven into the mechanisms to suppress terrorism.

II. Traditional Mechanisms on the Elimination of Acts of Violence at Sea

1. General Remarks

Attempts to protect shipping from interference by acts of violence have a long history in international and national law and have resulted, amongst others, in the development of rules providing that piracy is to be considered an international crime. The international rules in question endow all states with the right to take enforcement measures for the suppression of piracy. This, in fact is to be seen as an infringement of the flag state principle which – to put it into a nutshell – means that ships on the high seas are under the jurisdiction of the flag state only.⁴

The international rules on piracy should not merely be considered relics of the past. Piracy still constitutes a threat to the safety of navigation and acts of piracy are on the increase.⁵ The existing rules for the suppression of piracy are inadequate. They do not even provide for an efficient regime against piracy narrowly defined. Nevertheless, attempts have been made to broaden the application of the rules concerning piracy so as to cover other forms of violence at sea or to suppress the transport by sea of armaments for terrorists. These attempts have failed.⁶

The failure to substantially broaden the existing regime against piracy is the reason why specific international agreements deal with the suppression of other forms of violence at sea; the most important of them being the Rome Convention.⁷ After 11 September 2001 several new

⁴ The flag state principle constitutes the well established mechanism through which public international law is being implemented and enforced in maritime areas outside the jurisdiction of states.

⁵ See on this topic under: <http://www.imo.org/Facilitation/mainframe.asp?topic_id=362>. According to this source acts of piracy are increasing (last visited 22 October 2007).

⁶ To try to make use of the regime against piracy to suppress other activities is not a new one. For example, the attempt has been made to consider submarine warfare as piracy (see, for example), the agreement of Nyon which attempt to criminalize submarine warfare as piracy.

⁷ These are, in particular, the Rome Convention (note 3) and the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, 1988, ILM 27 (1988), 685. Further international agreements of relevance are: the Convention on Offences and Certain Other Acts Committed on Board Aircraft, 1963; the Convention for the Suppression of Unlawful Seizure of Aircraft, 1970; the

international instruments have been adopted to meet the new challenges.⁸ Even an international treaty dealing with terrorist attacks against shipping of nuclear and radioactive material exists.⁹ The most important of them is the above mentioned 2005 Protocol to the SUA Convention. These instruments follow a different approach from the one governing the rules on piracy.

2. Piracy

One of the major deficiencies of the international rules concerning the suppression of piracy already codified in the Geneva Convention on the High Seas of 1958¹⁰ and repeated in the Convention on the Law of the Sea of 1982 (LOS Convention) is their narrow definition of piracy.¹¹

According to article 101 LOS Convention only those acts which have been committed illegally “for private ends” by the crew or the passengers of a private ship or a private aircraft on the high seas against another ship or aircraft or against persons or property on board such ship or aircraft are considered acts of piracy.

The restriction that only acts of violence committed for private ends constitute piracy limits the scope of application of those rules considerably.¹² This excludes acts of violence being treated as piracy if these acts are committed in order to destabilize a government or to cause unrest and terror with the view to blackmailing a government or for religious or ethnic grounds – typical attitudes of modern terrorism – being treated as piracy. The same is true for liberation movements, insurgents etc. who have seized a ship for political reasons.

Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, 1971; the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, 1973; the International Convention Against the Taking of Hostages, 1979; the Convention on the Physical Protection of Nuclear Material, 1980; the International Convention for the Suppression of Terrorist Bombing, 1998; and the International Convention for the Suppression of the Financing of Terrorism, 1999. Only the two latter instruments follow a modern approach whereas the others concentrate on the prosecution of offenders.

⁸ See for these instruments under: <<http://www.un.org/terrorism/instruments.html>>. With the view to fill existing security gaps Russia has initiated a Convention for the Suppression of Nuclear Terrorism.

⁹ Convention on the Physical Protection of Nuclear Material, INFCIRC 274/rev, May 1980; see S. Suarez, Post September 11 Security Challenges to the Legal Regime of the Maritime Carriage of Nuclear and Radioactive Materials, *International Journal of Maritime and Coastal Law*, vol.18 (2005), 423 (at 433 et seq.).

¹⁰ UNTS Vol. 450 No. 6465.

¹¹ Doc. A/CONF.62/122 and Corr.

¹² See Zou Keyuan, Seeking Effectiveness for the Crackdown of Piracy at Sea, *Journal of International Affairs*, 59 (2005), 117 at 118 et seq.; A. Rubin, Is Piracy Illegal?, *AJIL* 70 (1976), 95; José Luis Jesus, Protection of Foreign Ships against Piracy and Terrorism at Sea: Legal Aspects, *The Journal of Marine and Coastal Law*, vol. 18 (2003), 363-400 (at 375 et seq.).

The meaning of the word “illegal” in the definition of piracy in article 101 of LOS Convention is unclear; the legislative history is not enlightening. It is for the courts of the prosecuting states to decide whether the act of violence under consideration was illegal under international law or the national law of the prosecuting states.

Another limitation stems from the fact that only acts on the high seas and in the exclusive economic zones¹³ may be qualified as pirate acts but not those committed in the coastal waters of a state. The rationale of this limitation is that it is for the coastal state concerned to fight piracy. But what is the situation if the coastal state concerned is, for whatever reason, not able to control its coastal sea as is the case for failed states?

Actions against pirates may be taken in accordance with article 105 of LOS Convention. According to article 107 of LOS Convention a pirate ship may be seized only by a warship or a military aircraft or another ship in government service. The courts of the respective states will decide upon the adequate penalties and will also take a decision on the confiscation of the pirate ship and its cargo. What is important is that piracy belongs to the few crimes, including also the crime of genocide, to which the principle of universality applies. This means that the right to take enforcement measures against pirates is vested in all states and not only in states which have suffered the particular act of violence.

Taking the wording of the LOS Convention literally it seems that the possibilities for fighting piracy effectively are limited. Currently this is the prevailing view.¹⁴ There are good reasons for taking a different position, though. The LOS Convention offers quite some options in the fight against terrorist acts at sea.

It has to be acknowledged that the central provision, namely article 107 of LOS Convention, is worded as an option for states to take up rather than as an obligation incumbent upon them. However, states are under an obligation to cooperate in the repression of piracy according to article 100 of LOS Convention. Reading article 100 and 107 of LOS Convention together, it can be argued that states may not lightly decline to intervene against acts of piracy. This is

¹³ Article 101 of the LOS Convention refers to the high seas only. Nevertheless, article 101 of the Convention equally applies in exclusive economic zones since article 58, paragraph 2, of the Convention contains a corresponding cross-reference.

particularly important in respect of coastal states. Piracy relies for its logistical basis and for the sale of goods on cooperation with coastal states or at least the relevant local authorities. Such cooperation between a coastal state and pirates is in violation of article 100 LOS Convention. Similarly, a ship entitled to intervene in cases of piracy may not, without good justification, turn a blind eye to such acts.

As indicated earlier, under the rules for the suppression of piracy, a warship may not intervene against acts of violence by one ship against another private ship or against the persons or property on board such a ship carried out in the coastal waters of another state. However, other justifications for appropriate actions countering this act of violence do exist. A warship witnessing an attack against a merchant ship in the coastal waters of another state carried out by a private ship may intervene under its obligation to render assistance to persons in distress. Although article 98 of LOS Convention is intended to cover distress as the consequence of a natural disaster or of a collision at sea, it reflects the existence of a general obligation to safeguard human life at sea and in this respect it is applicable here. This possibility is a limited one, though. It does not embrace, in general, the mandate to suppress piracy in a particular area.

According to general international law, rescue actions may be taken by a warship to assist a ship under attack in the coastal waters of another state under the principle of humanitarian intervention. Although this approach is currently disputed,¹⁵ it has to be acknowledged that such interference in the sovereignty of the state concerned is less prevalent than in cases where the intervention takes place in the territory of the given state. Moreover, the fact also has to be taken into account that it is the obligation of the coastal state concerned to protect ships against attacks from pirates. If the warship of another state intervenes on behalf of a ship carrying the same flag it can at least presume that the coastal state would agree to such action. Nevertheless, the power to intervene in such cases, and in particular the jurisdiction to prosecute the offenders, rests primarily with the coastal state concerned. The right to intervene is, accordingly, a limited one.

¹⁴ Oppenheim's International Law, 9th ed., 1992, edited by Sir Robert Jennings/Sir Arthur Watts, vol. I, 746 et seq.; Jesus (note 12) at 380/381.

¹⁵ Sceptical as to the general principle, M. Bothe in: W. Graf Vitzthum (Hrsg.), *Völkerrecht*, 2001, 617/618; H.Fischer, in: K. Ipsen, *Völkerrecht*, 5th ed., 2004, § 59, marginal note 26.

The same applies in respect of the pursuit of a pirate ship if the act of piracy has been committed on the high seas and the pirate has sought shelter in foreign coastal waters. In general, the coastal state concerned has to give its consent to such pursuit. Such consent may be presumed, given the obligation of the coastal state concerned to cooperate in the suppression of piracy.

However, these possibilities allow foreign states to intervene on the spot only, whereas the suppression of piracy in general remains under the authority of the coastal state concerned. No other state may act on its behalf without its explicit consent.¹⁶ It is evident that the effectiveness of measures for the suppression of piracy relies on efficient cooperation with those states on whose coast pirates are operating. States may, however, resort to the possibilities under general international law to induce states to fully and effectively implement their obligations in this respect. Turning a blind eye to the activities of pirates is in itself an act of piracy, activities such as preparing to sell a ship and its cargo or such a sale itself is falling short of the requested cooperation in the suppression of piracy. States permitting such transactions do not live up to their international obligations, and counter measures may be taken against them. Theoretically, the Security Council may declare that these situations endanger world peace and may authorize states to take appropriate action against the state in question. Certainly, this is not the case originally envisaged by Article 39 of the Charter of the United Nations. However, the Security Council demonstrated in the Lockerbie Case, that it is willing to intervene for the protection of international communication.¹⁷

Similarly, coastal states which do not engage sufficiently in the suppression of piracy or whose authorities are even accomplices in such crimes can be held internationally liable for damage ships have suffered. We may ask why in the past no case was brought against states in whose territorial waters pirates are operating for their failure to cooperate in the suppression of piracy, and why no ship owner has, so far, approached its national government for diplomatic protection vis-à-vis these states.

Existing international law rules on the suppression of piracy cover a small segment of violence on the high seas only. Although the prosecution of piracy is founded on the principle of universality, states have, so far, not been induced to take forceful action against pirates. In

¹⁶ More positive Torsten Stein, *Völkerrechtliche und verfassungsrechtliche Fragen des Schutzes der Deutschen Handelsflotte durch die Bundesmarine*, in: *Festschrift Rauschning*, 2001, 487 et seq., (490).

¹⁷ S/RES/883 (1993) of 11 November 1993.

particular, the obligations of coastal states to suppress pirate activities are of a general nature only and hitherto have not been enforced by those states whose ships have suffered pirate attacks.

3. The Suppression of Other Forms of Violence at Sea

Specific international agreements attempt to fill the gap in the suppression of violence at sea left by the narrow definition of piracy in LOS Convention and its predecessor, the Geneva Convention on the High Seas (1958). The already mentioned Rome Convention for the Suppression of Unlawful Acts (SUA) Against the Safety of Maritime Navigation of 1988¹⁸ together with the associated Protocol of the same date for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf¹⁹ prohibits a broad range of acts of violence directed against ships or shipping.²⁰ The Rome Convention was, in fact, the result of a diplomatic initiative taken by the Governments of Austria, Egypt and Italy in response to the Achille Lauro incident, which had made it clear that the rules of international law existing then were not appropriate for dealing with maritime terrorism.²¹

The Rome Convention protects navigation as such as well as individual ships, the latter being the principal objective. Prohibited acts include the seizure or taking control of a ship by force or the threat thereof; the performance of acts of violence against a person on board a ship if that act is likely to endanger the safe navigation of that ship; the destruction or damaging of a ship or its cargo which is likely to endanger the safe navigation of that ship; the placement of devices on a ship which causes the destruction of or damage to the ship which is endangering the safety of navigation; the destruction or damaging of maritime navigational facilities likely to endanger safe navigation or the killing or injuring of persons in the context of any of the aforementioned offenses. Thus, the Convention covers not only acts of terrorism directed

¹⁸ See note 3.

¹⁹ Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, UNTS Vol. 1678 No. 29004. <<http://www.un.org/terrorism/instruments.html>>. The Protocol has also been amended in 2005, reflecting the amendments in the 2005 Protocol to the SUA Convention. The amended 2005 Protocol is also not in force yet.

²⁰ Although most East Asian countries acceded to the UN Convention on the Law of the Sea not all of them adhered to the Rome Convention. Southeast Asian States have adopted the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Southeast Sea <http://www.aseansec.org.14838.htm>.

²¹ See in this respect Matthias Münchau, *Terrorismus auf See aus völkerrechtlicher Sicht*, 1994; Thomas Mensah, "Suppression of Terrorism at Sea", in: *Liber Amicorum Tono Eitel: Verhandeln für den Frieden*, 2003, 627 et seq.; Jesus (note 12) at 388 et seq.; Carlo Tiribelli, *Time to Update the 1988 Rome Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation*, *Oregon Review of International Law* 8 (2006), 133-155.

against ships but all imaginable acts of violence at sea. Only to a limited extent the Convention deals with the use of ships as weapons.

According to article 3, para. 1(c), of the Rome Convention, it is an offense to unlawfully and intentionally destroy a ship or cause damage to a ship or its cargo in a way which is likely to endanger the safe navigation of that ship. Using a ship as a weapon against harbor facilities – similar to the airplanes used on 11 September 2001 against the Twin Towers in New York – which results in the destruction of that ship, accordingly, may be considered an offense under this provision of the Rome Convention. However, the offense would not cover the gravity of such crime adequately, since it neither reflects the damage done by the use of the ship nor the threat such use would pose to navigation in general or to other ships or persons. On that basis, it seems more appropriate to consider invoking article 3, para. 1(e), of the Rome Convention, according to which it is an offense to destroy or seriously damage maritime navigational facilities or to seriously interfere with their operation if such act is likely to endanger the safe navigation of a ship.

III. Mechanisms to Face New Challenges of Terrorisms and to Suppress the Transport of Weapons of Mass Destruction

1. The 2005 Protocol to the Rome Convention

The 2005 Protocol to the Rome Convention²² was developed in direct response to the 11 September 2001 attempts to define the offenses to be covered by the Rome Convention more broadly. The 2005 Protocol to the Rome Convention adds a new article, article 3bis, which states that a person commits an offense within the meaning of the Rome Convention if that person unlawfully and intentionally commits one of the acts listed, if it is the purpose of this act to intimidate a population, or to compel a Government or an international organization to do or to abstain from any act. It was necessary to describe the motivation in such detail since it was not possible to agree otherwise on the notion of terrorism.

The acts referred to are the following:

²² See note 3; on its legislative history see Tiribelli (note 21) at 146 et seq.

- using against or on a ship or discharging from a ship any explosive, radioactive material or biological, chemical or nuclear weapon in a manner that causes or is likely to cause death or serious injury or damage;
- discharging, from a ship, oil, liquefied natural gas, or other hazardous or noxious substance, in such quantity or concentration that causes or is likely to cause death or serious injury or damage;
- using a ship in a manner that causes death or serious injury or damage;
- transporting on board a ship any explosive or radioactive material, knowing that it is intended to be used to cause, or in a threat to cause, death or serious injury or damage for the purpose of intimidating a population, or compelling a Government or an international organization to do or to abstain from doing any act;
- transporting on board a ship any biological, chemical or nuclear weapon, knowing it to be such a weapon;
- transporting any source material, special fissionable material, or equipment or material especially designed or prepared for the processing, use or production of special fissionable material, knowing that it is intended to be used in a nuclear explosive activity or in any other nuclear activity not under safeguards pursuant to an IAEA comprehensive safeguards agreement;
- transporting on board a ship any equipment, materials or software or related technology that significantly contributes to the design, manufacture or delivery of a biological, chemical or nuclear weapon, with the intention that it will be used for such purpose.

The transportation of nuclear material is, subject to specific conditions, not considered an offense if it is transported to or from the territory of, or is otherwise transported under the control of, a State Party to the Treaty on the Non-Proliferation of Nuclear Weapons.²³

Under the new instrument, a person commits an offense within the meaning of the Convention if that person unlawfully and intentionally transports another person on board a ship knowing that the person has committed an act that constitutes an offense under the Rome Convention or an offense set forth in any treaty listed in the Annex.²⁴ The Annex lists nine such treaties.

²³ Article 3 bis, para. 2 of the 2005 Protocol.

²⁴ Article 3 ter of the 2005 Protocol.

The new instrument also makes it an offense to unlawfully and intentionally injure or kill any person in connection with the commission of any of the offenses in the Convention; to attempt to commit an offense; to participate as an accomplice; to organize or direct others to commit an offense; or to contribute to the commission of an offense.²⁵

The new crimes covered mean that it goes beyond fighting terrorism; it may also be used to enforce the Non-Proliferation Treaty. It is this aspect in particular which has been most controversially discussed.

The new instrument requires parties to take the necessary measures to enable a legal entity (a company or organization, for example) to be made liable and to face sanctions when a person responsible for the management or control of that legal entity has, in that capacity, committed an offense under the Convention.

2. Assessment

Although the Rome Convention is broad in respect of its territorial scope of application, and has been broadened as far as the offenses covered are concerned by the 2005 Protocol, the sanctions mechanism it provides for is limited.

The obligations of States Parties regarding the suppression of offenses under the Rome Convention may be summarized by referring to the old principle *aut dedere aut judicare* already mentioned by *Hugo Grotius*, whereby a state has an obligation to surrender an alleged offender to another state having criminal jurisdiction or, alternatively, may prosecute the offender itself.

Criminal prosecution is reserved for those states exercising criminal jurisdiction in accordance with the Rome Convention in respect of the offender or the offense. According to the respective provisions of the Rome Convention, the offender must have the nationality of the prosecuting state or the offense must have occurred in the coastal waters of the state claiming the right to prosecute or on board a ship flying the flag of that state. The Rome Convention provides for the possibility of states' being able to establish their criminal jurisdiction for other cases too. The most important aspect of it is that states may establish criminal jurisdiction in cases where one of their nationals has been injured or killed. Finally, states are under an obli-

²⁵ Article 3 quarter of the 2005 Protocol.

gation to prosecute offenses under the Rome Convention in cases where they do not surrender the alleged offender.

This general clause is meant to ensure that such offenders do not find a safe haven. The rules concerning the right to prosecute an offender under the Rome Convention ensure that states other than the ones referred to do not exercise criminal jurisdiction under the Rome Convention.

The 2005 Protocol provides for marginal improvements in that respect only. Article 11 of the Rome Convention covers extradition procedures. A new article, article 11bis, states that, for the purposes of extradition, none of the offenses should be considered a political offense. New article 11ter states that the obligation to extradite or afford mutual legal assistance need not apply if the request for extradition is believed to have been made for the purpose of prosecuting or punishing a person on account of that person's race, religion, nationality, ethnic origin, political opinion or gender, or that compliance with the request would cause prejudice to that person's position for any of these reasons. Article 12 of the Convention requires States Parties to afford one another assistance in connection with criminal proceedings brought in respect of the offenses. A new article, article 12bis, covers the conditions under which a person who is being detained or is serving a sentence in the territory of one State Party may be transferred to another State Party for purposes of identification, testimony or otherwise providing assistance in obtaining evidence for the investigation or prosecution of offenses.

The inadequacy of this particular aspect of the 2005 Protocol becomes particularly evident if compared with the respective rules on piracy. Prosecution on account of piracy is based upon a broader concept of criminal jurisdiction, namely the principle of universality. This marks the significant difference between those two regimes. Whereas piracy is considered a truly international crime, an offense under the Rome Convention is not. The Rome Convention acknowledges only that several states may have an interest in prosecuting offenses under this agreement. It is also worth reiterating that the deterrent effect the Rome Convention is meant to have is wasted on suicidal offenders. They do not fear prosecution as envisaged by the Rome Convention or other international agreements for the suppression of terrorist attacks which follow the same approach. Those who hijacked the airplanes on 11 September 2001 violated several of such international agreements; this – as well as the possibility of criminal prosecution – was of no concern to them.

There is one further highly relevant difference between the legal regime against piracy and the 2005 Protocol. The rules of international law concerning the suppression of piracy provide for the possibility of taking direct action to suppress an act of piracy whereas the Rome Convention concentrates on the prosecution of offenders only. This already severely limits the possibilities of taking response action let alone actions of a precautionary nature. The latter gap constituted the most significant deficiency in the Rome Convention. This was not a gap which had been left open unintentionally. On the contrary, article 9 of the Rome Convention clearly states that rules of international law pertaining to the competence of states to exercise investigation or enforcement jurisdiction on board ships not flying their flag are not affected. Accordingly, the Rome Convention can be used neither to take effective response actions against ships under the control of terrorists nor to take preventive actions.

It was not possible to close this gap by referring to the rules concerning the suppression of piracy as has already been indicated. These rules address piracy in the traditional meaning of the notion but they do not form an adequate basis for suppressing terrorist acts at sea or the use of the sea as an avenue for the transport of weapons or logistical support for terrorists. Even in cases where the ships concerned have been taken by an act of violence it would be difficult to maintain that these activities were undertaken for private ends. In all other cases where terrorists have contracted ships passage directly or indirectly there is no possibility of assimilating this with piracy and of taking action on that basis.

This lacuna is now remedied in part by the 2005 Protocol to the Rome Convention. Article 8 of the Rome Convention covers the responsibilities and roles of the master of the ship, flag state and receiving state in delivering to the authorities of any State Party any person believed to have committed an offense under the Convention, including the furnishing of evidence pertaining to the alleged offense. A new article, article 8bis, in the 2005 Protocol covers cooperation and procedures to be followed if a State Party desires to board a ship flying the flag of another State Party, outside the territorial water of any state, when the requesting Party has reasonable grounds to suspect that the ship or a person on board the ship is, has been, or is about to be, involved in the commission of an offense under the Convention.

The authorization and cooperation of the flag state is required before such boarding can take place.²⁶ Such authorization may be made in general or *ad hoc*. A State Party may notify the IMO Secretary-General that it will grant the authorization to board and search a ship flying its flag, its cargo and persons on board if there is no response within four hours. A State Party can also notify that it authorizes a requesting Party to board and search the ship, its cargo and persons on board, and to question the persons on board to determine whether an offense has been, or is about to be, committed. Finally, a State Party may grant the authorization to board a ship under its flag when requested.

Article 8bis of the 2005 Protocol includes several safeguards when a State Party takes measures against a ship, including boarding. The safeguards include: not endangering the safety of life at sea; ensuring that all persons on board are treated in a manner which preserves human dignity and in keeping with human rights law; taking due account of safety and security of the ship and its cargo; ensuring that measures taken are environmentally sound; and taking reasonable efforts to avoid a ship being unduly detained or delayed. The use of force is to be avoided except when necessary to ensure the safety of officials and persons on board, or where the officials are obstructed in the execution of authorized actions.

These rules on boarding are regarded as a major and innovative step in suppressing terrorism at sea. There may be some doubts as to whether this view is actually tenable. Compared, for example, with the rules on boarding and inspecting fishing vessels under the Straddling Fish Stocks Agreement²⁷ these new rules are rather disappointing. This Agreement provides for the boarding and inspection of fishing vessels on the high seas if there are sufficient grounds to believe that it has seriously violated the rules concerning fishing. No *ad hoc* admission by the flag state is required. Obviously the protection of living resources is more important than the protection of the security of states against terrorist attacks.

²⁶ Article 8 bis, para. 4 b of the 2005 Protocol.

²⁷ Agreement for the Implementation of the Provisions of the UN Convention on the Law of the Sea Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Species, Doc. A/CONF. 164/37 of 8 September 1995; critical on these rules on inspection D. Guilfoyle, *Interdicting Vessels to Enforce the Common Interest: Maritime Countermeasures and the Use of Force*, ICLQ vol.56 (2007), 69-82; a positive approach is taken by R. Rayfuse, *Countermeasures and High Seas Fisheries Enforcement*, Netherlands Law Review vol. 51 (2004), 41-76.

Finally, the Protocol lacks an appropriate dispute settlement clause in spite of the fact that flag states and inspecting states may disagree as to whether the investigation was justified in substance and in form.

3. Measures against Ships carrying Weapons of Mass Destruction or Relevant Hard or Soft Ware (PSI)

a) Introductory Remarks

It is the objective of the Proliferation Security Initiative (PSI), originally announced by the US President Bush in 2003 to interdict the “transfer or transport of weapons of mass destruction, their delivery systems, and related materials to and from states and non-state actors of proliferation concern”.²⁸ The PSI has evolved through a series of meetings and agreements. The underlying rationale of the initiative is to reduce the proliferation of weapons of mass destruction and, in particular, to ensure that such weapons or technology would not fall into the hands of terrorists. The eleven core participants developed a set of principles on September 4, 2003.²⁹ The Statement of Interdiction Principles – claiming that the Initiative is not violating international law – calls upon all PSI Participants, as well as other countries, not to engage in the trade of weapons of mass destruction and related technology with countries of proliferation concern and to permit their own vessels and aircraft to be searched if suspected of violating or endangering the principle of non-proliferation of weapons of mass destruction as provided for in the PSI. The Statement further establishes a procedure for the exchange of information on suspicious vessels. The initiative is open for accession by other states. Apart from that participating states are called upon to conclude ship-boarding agreements with other states. This is, particularly meant to provide for a legal basis to board ships under so-called flags of convenience.³⁰ The core commitments of interest here are:

- not transport or assist in the transport of weapons of mass destruction;

²⁸ See on this initiative Byers, *Policing the High Seas: The Proliferation Security Initiative*, AJIL 98 (2004), 526; Ch. Schaller, *Die Unterbindung des Seetransports von Massenvernichtungswaffen*, SWP-Studie, 2004; W. Heintschel von Heinegg, *The Proliferation Security Initiative – Security vs. Freedom of Navigation*, Israel Yearbook on Human Rights vol. 35 (2005), 181; Maximilian Malirsch/Florian Prill, *The Proliferation Security Initiative and the 2005 Protocol to the SUA Convention*, ZaöRV 67 (2007), 229-240; Jack I. Garvey, *The International Institutional Imperative for Countering the Spread of Weapons of Mass Destruction: Assessing the Proliferation Security Initiative*, Journal of Conflict & Security Law (2005), vol. 10, 125-147; Samuel E. Logan, *The Proliferation Security Initiative: Navigating the Legal Challenges*, Journal of Transnational Law & Policy, vol. 14 (2004-2005), 253-274.

²⁹ The Statement of Interdiction Principles is to be found on the Web Site of the State Department <http://www.state.gov/t/np/rls/fs/23764.htm> (last visited).

³⁰ Critical in this respect Garvey, note 24 at 132 et seq. Such agreements have been concluded so far by the United States with Panama, Liberia, the Marshall Islands and Cyprus.

- board their own vessels in their respective internal waters and territorial sea areas as well as on the high seas, if there is reasonable ground for suspicion that they are engaged in proliferation activities;
- consider to provide consent to boarding of their vessels by the authorities of other participating States;
- take measures against foreign vessels in the sea areas covered by their territorial sovereignty and in their respective contiguous zone.

The legal basis of the PSI – frequently characterized as an international partnership of states³¹ – has not been clarified fully. It is being claimed that the PSI conforms to the law of the sea and the various jurisdictional standards articulated in the LOS Convention.³² One may further argue that it – in general – reflects that attitude of the UN Security Council to stop the proliferation of weapons of mass destruction.³³ As far as its format is concerned it constitutes a collection of bilateral agreements constituting a collective partnership without amounting to an international organization.

Most problematic is subparagraph 4(d) of the Statement, which calls on PSI participants:

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

Intercepting ships, which are under the suspicion to carry weapons of mass destruction, without the consent of the flag state raises the question of the compatibility of such action with the law of the sea at least as a matter of principle. Under the Convention on the Law of the Sea the competences to intercept a vessel depends where such action is undertaken in the territorial waters of a state, in the exclusive economic zone or on the high seas.

b) Interception in territorial waters

³¹ See Garvey (note 24) at 129.

³² See Garvey (note 24) at 129; Heintschel von Heinegg (note 24) at 191 with further references.

³³ S/Res. 1540.

As long as the interception of a vessel under flag different from the intercepting state takes place in the internal waters by the coastal state concerned such act cannot be contested from the point of the law of the sea. No other state may take action against such a ship, including the flag state, unless the coastal state concerned has consented thereto.

The situation is more complicated in the territorial sea. The territorial sea forms part of the territory of the coastal state concerned but ships under the flag of other States enjoy the right of innocent passage.³⁴ According to article 25 LOS Convention coastal states may take action against a passage which is not innocent. However, innocent passage is, according to articles 18 and 19 LOS Convention, limited and may even be limited further if certain conditions are met by the national law of the coastal state concerned. These provisions are to be considered as customary international law.

According to article 19, para. 1, of LOS Convention passage is not innocent if it is “prejudicial to the peace, good order or security of the coastal state” or if the ship is engaged in one of the activities listed in article 19, para.2, of LOS Convention. Transporting weapons of mass destruction is not mentioned in para. 2 which most consider to constitute an exhaustive list of activities which renders passage not innocent.³⁵ For that reason recourse is necessary to article 19, para. 1 of LOS Convention. However, this does not solve the problem if the vessel is merely in transit since according to this paragraph only such passage is not innocent which is prejudicial to the peace, good order or security of that particular coastal state. Taken literally article 19 of the LOS Convention excludes that the coastal States limit the exercise of passage with the view to protect the interest of the community of states. It may act in its own interests only.

Although article 21 of the LOS Convention gives the coastal state the authority to adopt laws and regulations in accordance with international law this competence is limited. None of the issues which may be regulated on that basis would cover the mere transit of weapons of mass destruction. It should be noted in this context that the transport of nuclear substances is, according to article 23 of the LOS Convention, not in contradiction with the principle of innocent passage³⁶. Finally, article 27 of the LOS Convention cannot, at least not in itself, serve as

³⁴ Article 17 of LOS Convention.

³⁵ Garvey (note 24), at 131 with further references.

³⁶ It is astonishing that this article is rarely referred to nor is stated that this is an article insisted upon by the United States.

a basis for controlling ships in transit. Here again it is required that either the coastal state's action are been undertaken to defend its own interests (paragraph 1, lit. (a) and (b)), if such act is being undertaken upon request of the master of the ship or the flag state or for suppression of illicit traffic in narcotic drugs or psychotropic substances (paragraph 1, lit. (c) and (d)). However, it has been argued that coastal States may declare the transport of weapons of mass destruction and the relevant soft wave as a crime under their national criminal law and take enforcement action on the basis of article 27 LOS Convention.³⁷ They would have to argue that the crime has been committed on board the ship passing through the territorial sea and that this crime is of a kind to disturb the peace of the country³⁸ or the consequences of the crime extend to the coastal State³⁹. This interpretation constitutes a problematic circumvention of the inherent limits of article 27 LOS Convention. On the same basis the whole transport of nuclear waste of the transport of dangerous goods could be prohibited.

It has been argued that a passage can be considered to be not innocent if the conditions of S/Res. 1540 (2004) of 28 April 2004 are met.⁴⁰ It has further been argued that states may, on the basis of S/Res. 1540, enact national legislation declaring the transport of weapons of mass through their territorial seas a criminal offence which would allow the coastal state concerned to take actions as prescribed in article 27, para. 1 of the LOS Convention. Certainly S/RES 1540 provides that the proliferation of weapons of mass destruction constitutes a threat to international peace. Even if one accepts that the Security Council may exercise such quasi legislative power this does not render the transit of such material automatically non-innocent. The definition of innocent is quite narrow.⁴¹ It is required that such passage is prejudicial to the peace, good order or security of the coastal state. Apart from that the legislative history of the resolution reveals that it was not meant to cover indictments of vessels.⁴² The legal situation in respect of international straits is similar to the one discussed so far.⁴³

c) Interception on the high seas

³⁷ Heintschel von Heinegg (note 24) at 193; Logan (note 24) at 263.

³⁸ Article 27 para. 1 (b) LOS Convention.

³⁹ Article 27 para. 1 (c) LOS Convention.

⁴⁰ Heintschel von Heinegg (note 24), at 194.

⁴¹ See article 19 LOS Convention.

⁴² See below.

⁴³ See Logan (note 24) at 264.

It is being discussed controversially⁴⁴ whether ships carrying weapons of mass destruction without being targeted against a particular state may be interdicted on the high seas by warships of another state without the consent of the flag state concerned.

The exclusive jurisdictional relationship between a flag state and its vessel on the high seas is well rooted in customary international law. In the *Lotus case* the Permanent Court of International Justice held that “vessels on the high seas are subject to no authority except that of the State whose flag they fly”.⁴⁵ Article 92 LOS Convention codifies this principle. Several exceptions are provided for, a waiver by the flag state or the vessel is without a flag, or the vessel is engaged in piracy, slavery or unauthorized broadcasting. Accordingly there is a strict limit against boarding and inspecting a vessel under a flag different from the one of the investigating vessel.⁴⁶

It has been argued, however, that article 88 LOS Convention provides a basis for arresting vessel being under the suspicion to carry weapons of mass destruction.⁴⁷ According to article 88 LOS Convention the high sea shall be used for peaceful purposes.⁴⁸ This requires that the transport of weapons of mass destruction has been declared *erga omnes* as a threat to peace. Whether this is the case requires considering meaning and scope of UN Security Council Resolution 1540 (2004) or to consider the possibility of counter-measures under the rules of state responsibility. It is also necessary to establish whether the interception of foreign ships amounts to a violation of the prohibition of the use of force.

Security Council Resolution 1540 (2004) affirms as already stated that ‘proliferation of nuclear, chemical and biological weapons, as well as their means of delivery, constitutes a threat to international peace and security’ and requires *inter alia*, all states to ‘adopt and enforce appropriate effective laws which prohibit any non-state actor to ... transport, transfer or use nuclear, chemical or biological weapons and their means of delivery.’⁴⁹ This means in the context

⁴⁴ See Guilfoyle (note 23) at; Rayfuse (note 23), at; Heintschel von Heinegg, (note 24) at 194; S. Kaye, *The Proliferation Security Initiative in the Maritime Domain*, *Israel Yearbook on Human Rights*, vol. 35 (2005), 223.

⁴⁵ PCIJ ser. A 1927 No. 9 at 25.

⁴⁶ See article 110 LOS Convention.

⁴⁷ Logan (note 24) at 268.

⁴⁸ See also article 301 LOS Convention.

⁴⁹ Preamble and para. 2.

dealt with here that a State which either knowingly allows the transport of weapons of mass destruction or that does not intervene in case it is informed of a breach or which does not take appropriate legislative measures and provides for their effective implementation commits an international wrongful act.⁵⁰ The central question which remains is whether every state may take relevant countermeasures. According to the rules on state responsibility⁵¹ countermeasures are, as a matter of principle, available to an ‘injured’ state.⁵² A state may also be considered ‘injured’ where the obligation breached was owed to a group of states and the state taking countermeasures was specifically affected.⁵³ An alternative would be that the obligation was owed to a group of states and the breach has radically changed the position of all members of that group. This focusing on injured states does not mean that no action may be taken by individual states to protect so-called collective interests⁵⁴ without qualifying as injured states. However, in such circumstances states may only approach the state in breach of its obligations and, amongst others, request cessation of the breach but it may not take countermeasures. This point was discussed quite controversially in the International Law Commission. The Commission stated the state practice did not endorse that individual states may take countermeasures in defense of collective interests as long as the latter did not qualify as injured states.⁵⁵

It has been argued, though, that all activities of non-state actors resulting in a proliferation of weapons of mass destruction constituted a threat to international peace and security and that due to that the category of injured state cannot be limited to potentially targeted states. For that reason every state was to be considered as an injured state and thus could take countermeasures against the ships or aircraft in question.⁵⁶ Such approach is difficult to sustain. It would deprive the essential differentiation of the rules on state responsibility of most of its meaning. It also neglects that the enforcement of internationally legislated obligations either *vis-à-vis* individual states rests with the respective organ of the state community, that is in this case the Security Council, or by states or a particular state having been mandated by the community organ accordingly. States are only called upon to enforce the Security Council in-

⁵⁰ Heintschel von Heinegg (note 24), at p.200.

⁵¹ Reprinted in: James Crawford, *The International Law Commission’s Articles on State Responsibility*, 2002, at 61 et seq.

⁵² See article 42.

⁵³ See article 48.

⁵⁴ See article 48, para. 2.

⁵⁵ See the commentary of Crawford (note 47) at 276 et seq.

⁵⁶ Heintschel von Heinegg (note 24), at p. 200-201.

ternally. It is not possible to consider the rules on state responsibility in isolation from the primary obligation they are assisting to enforce. In this respect it has to be noted too that all references to interdiction were removed from the resolution upon the initiative of China.⁵⁷ This is a clear indication that the Security Council was not meant to be used as a basis to take action against foreign ships.⁵⁸ This cannot later be remedied by having recourse to the rules on state responsibility. It is only for the Security Council to mandate such actions to be undertaken.⁵⁹

Apart from that it has been discussed whether that interdicting a foreign vessel amounts to a breach of Article 2, para. 4, UN Charter or whether it constitutes a police action only.⁶⁰

IV. Approaches under General International Law to Suppress Terrorist Activities at Sea and the Transport of Weapons of Mass Destruction

1. Introductory Remarks

It has for a long time been neglected, that terrorism at sea or the transport of weapons of mass destruction may be fought on the basis of general international law. In that respect general international law supplements the rules so far described.

2. Self-Defense

States targeted by terrorists from the sea may resort to self-defense. In S/RES/1368 (2001) of 12 September 2001, the Security Council condemned the acts of terrorism carried out on 11 September 2001 and emphasized the necessity “... to combat by all means threats to international peace and security ...” caused by terrorist acts. In the same resolution the Security Council reconfirmed, invoking the wording of Article 51 of the UN Charter, “... the inherent right of individual or collective self-defense ...”. It repeated this approach in S/RES/1373 (2001) of 28 September 2001.⁶¹ The Council of the North Atlantic Treaty Organization like-

⁵⁷ S/PV. 4950.6; Guilfoyle (note 23), at 76.

⁵⁸ Logan (note 24) at 270.

⁵⁹ See article 48 UN Charter.

⁶⁰ Kaye (note 33) at 218.

⁶¹ In a declaration to the press the President of the Security Council stated on 8 October 2001: “... The members of the Security Council took note of the letters the representatives of the United States and of the United Kingdom sent yesterday to the President of the Security Council, in accordance with Article 51 of the UN Charter, in which they state that the action was taken in accordance with the inherent right of individual and collective self-defense following the terrorist attacks in the United States of 11 September 2001. The permanent representatives made it clear that the military action that commenced on 7 October was taken in self-

wise stated on 12 September 2001 that the terrorist attack of 11 September 2001 had triggered the right of self-defense in accordance with article 5 of the North Atlantic Treaty. The International Court of Justice seemed to be reluctant to follow such approach although its jurisprudence in this respect is not fully conclusive. Its statement in the Advisory Opinion *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* Opinion⁶² as well as in the case concerning *Oil Platforms (Islamic Republic of Iran v. United States of America)*⁶³ may have a procedural background only since neither Israel nor the USA had substantially invoked the right to self-defense. However, in the case concerning *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* this question was left open.⁶⁴

The reaction of the UN Security Council and of the Council of the North Atlantic Treaty Organization is based upon a modified understanding of the right to self-defense, according to which actions of self-defense are triggered by attacks which by their very nature and gravity are equivalent to military attacks whereas it is irrelevant whether such attacks were launched by, or can be directly attributed to, a sovereign state.

It is to be noted that the wording of Article 51 of the UN Charter does not limit self-defense to attacks undertaken by a state only. In that respect the drafters of the UN Charter were probably wiser than later commentators.⁶⁵ It should be further noted that according to Art. 2, para. 4, of the UN Charter use of force is prohibited in international relations which implies that such obligation applies to interstate relations only. However, it is of relevance⁶⁶ also that after the adoption of the UN Charter there was a predominant practice and respective *opinio iuris* that self-defense could be exercised against attack by states or at least controlled by them. The attacks of 11 September 2001 have changed this situation as demonstrated by the resolutions of the UN Security Council. What seems to be of essence now is the view the target state has

defense and directed against terrorists and those who harbored them. ... The members of the Council were appreciative of the presentation made by the United States and the United Kingdom. ...”

⁶² ICJ Reports 2004, 136

⁶³ ICJ Reports 2003, 161.

⁶⁴ Judgement of 15 December 2005 at p. 53. For all these reasons, the Court finds that the legal and factual circumstances for the exercise of a right of self-defence by Uganda against the DRC were not present. Accordingly, the Court has no need to respond to the contentions of the Parties as to whether and under what conditions contemporary international law provides for a right of self-defence against large-scale attacks by irregular forces.

⁶⁵ See J.A. Frowein,

⁶⁶ See article 31 of the Vienna Convention on the Law of Treaties.

adopted and could adopt under the circumstances when the attack took place. This interpretation of the right to self-defense reflects the fact that states have ceased to have the monopoly on waging war. Warlike activities having identical negative effects upon international peace and security may equally well be carried out by terrorists, especially if such terrorists are working within an international network. The mechanisms designed to restore international peace and security, whether they are of a multilateral, regional or unilateral nature, have to reflect this change in international relations.

However, this raises an additional problem, namely about the potential target of measures of self-defense. May such actions only be directed against the terrorist group or also against the state harboring such group? This is not the place to deal with this issue in detail. It may be sufficient to say that there are several avenues of justifying counter attacks against states harboring terrorists. Such states may by giving assistance to terrorists or by not suppressing their activities have violated their international obligations. The activities of terrorists may further be attributable to states under the rules of state responsibility.

It is well established that all actions of self-defense have to meet the test of proportionality. This is also true for actions of self-defense against ships under the control of terrorists and used as weapons. However, the array of possible effective measures against such ships is limited; their interception and destruction may be the only effective course of action.

3. Measures against Ships under the Control of Terrorists Taken by or on Behalf of the Flag State

On the high seas, ships are, in principle, under the sole jurisdiction of their flag state and it is up to the flag state to enforce international law with respect to ships flying its flag. The flag state principle is by no means anachronistic; it is one of the central elements guaranteeing freedom of navigation. Through this mechanism it is ensured that international law and the national law of a particular state applies to ships on the high seas. Otherwise ships on the high seas would operate in a legal vacuum. Similarly, the flag state principle concentrates enforcement powers which may be taken against a ship in one authority – that of the flag state. Otherwise a ship would be the target of various, possibly conflicting actions. But there is also a *quid pro quo*. Only if flag states exercise their jurisdiction effectively and thus ensure that ships do not violate the applicable international and national law will other states refrain from taking action against such ships.

If a ship has been brought under the control of terrorists with the aim of using it as a weapon, the flag state is under an international obligation to intervene, given the worldwide and unconditional condemnation of terrorism by the Security Council acting under Chapter VII of the UN Charter. The question is, though, whether the state in question will be in a position to do so or to do so before the threat posed by such a ship materializes. If this is impossible, the flag state concerned not only has the option but in fact is under an obligation to request assistance from other states.

A different line of argumentation may also be considered. Ships in the hands of terrorists constitute a mortal danger to the citizens of the targeted state and a duty to intervene can be based on the general principle of safeguarding human life. This is not only a principle governing the law of sea but can equally be based upon on the obligation to protect human life under the international regime for the protection of human rights.

This is of relevance also in those cases where the flag state is not able to react but ships of other states are. Interference in the sovereignty of the state whose flag the ship in question is flying can, at least, be justified by the fact that the flag state concerned is under an international obligation to intervene with the view of suppressing terrorism.

The flag state may consent to such intervention. As a result, the intervention would clearly conform to international law. In cases where military intervention against a ship under a foreign flag is the only means of protection against terrorists, the flag state is obliged to give its consent to such intervention. It may even be possible to consider going one step further and arguing that, in cases of a clearly identified terrorist threat to a ship, the consent to intervene, with the aim of ensuring that the terrorist threat does not materialize, may be presumed.

Finally, one further approach may be considered. Only ships flying the flag of a state are, on the high seas, under the exclusive jurisdiction of the flag state. Is that equally true for ships controlled by terrorists and targeted as weapons? It is worth considering whether, since the flag state has lost control of them; such ships should not be treated as ships without nationality. This would mean that any state would be entitled to arrest and seize such ships. However, it must be borne in mind that article 104 of the LOS Convention provides for the retention of nationality of pirate ships and it would be necessary to establish why and under which cir-

cumstances ships taken over by terrorists or equipped by terrorists to serve as weapons lose their nationality.

The main problem connected with any attempt to reduce the danger which ships in the hands of terrorists may pose to states, their citizens or navigation in general is that of obtaining reliable information early enough to intervene. This information has to pertain to the fact that a particular ship is posing such a threat and against which target. The possibility of states' considering – as is the practice with air traffic approaching the United States of America – requesting ships to communicate details about crew, passengers, cargo and destination to their ports of call well in advance cannot be ruled out. Although this may constitute an extra burden for shipping, it may be proportionate considering the threat such ships pose. Further, it is possible to imagine that some states may claim maritime zones for interception and intervention, as already claimed by the United States of America for the suppression of trade in narcotic drugs. This is not the place to deal with this practice. Undertaken unilaterally, some may argue that such an approach may result in the erosion of the freedom of navigation. It is a well-established fact that the freedom of navigation is not an absolute one. Account has to be taken of other established interests of the members of the community of states. The fight against terrorism may be one; however, means of suppressing it have at least to pass the test of proportionality, if they result in a limitation of established freedoms.

4. Precautionary Measures – Control of Cargo

S/RES/1368 (2001) and 1373 (2001) also indicate that terrorist attacks of such or similar scale may be considered to pose a threat to international peace and security and that the Security Council may take appropriate action on the basis of Article 39 of the UN Charter. This is of particular relevance for the suppression of terrorism by preventing the freedom of navigation from being misused in order to support terrorism.

Already the Preamble of the International Convention for the Suppression of the Financing of Terrorism of 1999⁶⁷ states that terrorism is a violation of the purposes and the principles of the UN Charter to maintain international peace and security. The UN General Assembly has in several resolutions condemned international terrorism and called upon states to take steps and counteract the financing of terrorism and terrorist organizations. In S/RES/1368 (2001) the international community is called upon to “... redouble their efforts to prevent and suppress ter-

⁶⁷ See under <<http://untreaty.un.org/English/Terrorism/Conv12.pdf>>.

terrorist acts including by increasing cooperation ...”.⁶⁸ S/RES/1373 (2001) is more specific. The Security Council decided – acting under Chapter VII of the UN Charter – that all states shall “... take the necessary steps to prevent the commission of terrorist acts, including by provision of early warning of other states by exchange of information ...”.⁶⁹ The Security Council in the same resolution stated “... afford one another the greatest measure of assistance in connection with criminal investigations or criminal proceedings relating to the financing or support of terrorist attacks ...”.⁷⁰ Finally, the Security Council in S/RES/1377 (2001) of 12 November 2001 underlined “... the obligation [of] states to deny financial and all other forms of support and safe haven to terrorists and those supporting terrorism.”⁷¹ These resolutions, in particular Security Council resolution 1373, form the necessary international law basis for the marine interception operations undertaken by various naval units, including a German naval unit, in the Indian Ocean and off the coast of Somalia. On this basis it is possible to approach and stop ships under foreign flags where there are indications that they may be supporting terrorism, and investigate their documents, cargo and crew. Owing to their obligation under the Security Council resolution, adopted under Chapter VII of the UN Charter, to suppress terrorism also by eliminating their financial and logistical support, the flag states may not object to an investigation of ships under their flags by warships of other states, as long as the measures taken are proportionate. In fact, the warships are acting on behalf of these flag states since it is for them to ensure that ships under their flags are at no times used in support of terrorist activities. No explicit consent of the flag state is necessary, as the denial of such consent would be contrary to the obligation under S/RES/1373.

This reasoning is substantiated if a comparison with the legal situation prevailing under the international law of maritime warfare is made. The naval forces of the belligerent parties may search ships of states not involved in the armed conflict to make sure that they are not supporting the activities of the other party. This is all the more applicable if it is considered that the Security Council has condemned terrorism and has made it mandatory to cooperate in its suppression.

Whether such activities in given maritime zones are acceptable and in particular whether such naval activities are effective is a different matter.

⁶⁸ S/RES/1368 (2001) of 12 September 2001, operative para. 4.

⁶⁹ S/RES/1373 (2001) of 28 September 2001, operative para. 2. lit. b.

⁷⁰ Ibid., operative para. 2 lit. f.

⁷¹ S/RES/1377 (2001) of 12 November 2001, Preamble.

Precautionary measures have been taken on the part of port authorities in an attempt to provide stricter control of ships' cargo in general. It may be too late to investigate the cargo at the ports of destination. Therefore a policy has been developed to check cargo at the port of departure. The container security initiative set up by the United States attempts to extend the zone of security outward by shifting security and screening activities to the border of the exporting country.⁷² On 19 September 2002, Singapore became the first country to sign an agreement with the United States of America allowing U.S. customs inspectors to ensure that cargo shipping containers bound for the United States are not being used for terrorist attacks. This system seems to mirror one which was already set up between the United States of America and Canada for the ports of Halifax, Montreal and Vancouver. Several other port authorities have agreed to join the U.S. container safety program and more have joined since the decision not to join has repercussions when United States ports are reached. In the first phase the top twenty ports that send the largest volume of container traffic to the United States have been included. In a second phase ports of political or strategic significance have been included. Currently more than 50 ports throughout the world participate in this initiative – most of them being European or Asian.⁷³

The main problem with this initiative is that it only protects the United States and that it discriminates all transport not coming from the ports cooperating in the Container Safety Initiative. Apart from that it has to be stated that – although terrorism is a universal phenomenon – the United States is just cooperating with not much more than 30 states in this respect. This approach however, makes any attempt to find a truly universal solution – including, for example, IMO – futile.⁷⁴

Another precautionary approach is reflected by the amendments to the International Convention for the Safety of Life at Sea (SOLAS Convention).⁷⁵ Under a new Chapter “Special

⁷² As to the details see Marjorie Florestal, *Terror on the High Seas*, *Brooklyn Law Review* 72 (2007), 385-447.

⁷³ See <http://www.cbp.gov/xp/cgov/border_security/international_activities/CSI/ports_in_CSI.xml> (last visited 22 October 2007).

⁷⁴ Florestal (note 71), 395; she (at 399 et seq.) also argues that this initiative is in violation with the most-favoured nation principle under Article I, para. 1 GATT.

⁷⁵ See under: <http://www.imo.org/Conventions/contents.asp?topic_id=257&doc_id=647>.

Measures to Enhance Maritime Security” Member States are required to establish an International Ship and Port Facility Security Code.

IV. Conclusions

A perusal of the existing international instruments to be used for the suppression of international terrorism at sea indicates that they are in a state of transition. This is due to different reasons. The most prominent of them are that the community of states has to deal with a new type of organized crime and a new type of offender. International terrorism works within an international network which makes it easy to switch the basis from which operations are launched. Modern forms of communication allow weapons and other necessary supplies to be transported to the targeted state. The criminals, in particular those carrying out such attacks, are not threatened by the fear of subsequently finding no shelter and being prosecuted. The latter, however, has hitherto been the principal mechanism for suppressing terrorist activities.

The Convention on the Law of the Sea and subsequent special international agreements has responded to this new challenge. They should be seen and assessed as a whole.

This legal development clearly indicates that international law as such and the procedures for amending it are flexible enough to react to new challenges. What is remarkable is the shift of emphasis to be witnessed in these new regimes namely the focus on precautionary measures.

However, it is impossible to end at a clearly positive note. Although piracy as well as terrorist activities at sea are clearly of an international nature only some of the legal responses are developed, so far. In particular the proliferation security initiative as well as the container security initiative does not reflect a multilateral approach but rather a unilateral one where individual states cooperate on the basis of bilateral agreements. This not only weakens its effectiveness – at least so far as its scope is concerned – but also jeopardizes the multilateral efforts undertaken against some forms of violence at sea.