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 terrorism at sea and considering their supplementation requires a clear distinction to be made between the 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;
- 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.

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, it did not explicitly provide for measures taken in response to ships being used as weapons; this situation has changed with the adoption of a Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation in 2005. Designing such measures had to strike a balance between the freedom of navigation and security interests. In the following I will describe assess the relevant law of the sea rules and I will give an overview over the relevant rules of general international law.

II. The traditional mechanisms against acts of violence at sea

1. General Remarks

Attempts to protect shipping from interference have a long history and have resulted, amongst others, in the development of rules on the elimination of piracy which are undoubtedly part of customary international law. These rules provide that piracy is to be considered an international crime and endow all States with the right to take enforcement measures for the suppression of piracy, thus restricting the flag State principle. 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. The existing rules for the suppression of piracy are inadequate, as will be seen. Nevertheless, attempts have been made to broaden the application of the rules on piracy so as to cover other forms of violence at sea or to suppress the transport by sea of armaments for terrorists. But here again the various attempts have failed.

This 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. Even an international treaty dealing with terrorist attacks against shipping of nuclear and radioactive material exists. These instruments follow a different approach from the one governing the rules on piracy. With the view to fill existing security gaps Russia has initiated a Convention for the Suppression of Nuclear Terrorism. After 11 September 2001 several new international instruments have been adopted to meet the new challenges. The most important of them is the 2005 Protocol to the Rome Convention.

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 1958 and repeated in the Convention on the Law of the Sea of 1982 (Convention) is their narrow definition of piracy. 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 may constitute piracy limits the scope of application of those rules considerably. 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. The meaning of the word “illegal” in the definition of piracy in article 101 of the 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 zones 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?

Counter actions against pirates may be taken in accordance with article 105 of the Convention. According to article 107 of the 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 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 Convention on the Law of the Sea literally it seems that the possibilities for fighting piracy effectively are limited. Currently this is the prevailing view. There are good reasons for taking a different position, though. The Convention on the Law of the Sea 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 the 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 (article 100 of the Convention). Reading article 100 and 107 of the Convention together, it can be argued that States may not lightly decline to intervene against acts of piracy. This is 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 of the 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 counter-action 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 the respective provision of the Convention (article 98) 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 action 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, 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 attack 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.

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. 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. 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 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 the Convention on the Law of the Sea and its

predecessor, the Geneva Convention on the High Seas. The Rome Convention on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation of 1988 (Rome Convention) 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 Shelf prohibits a broad range of acts of violence directed against ships or shipping. 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.

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 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, paragraph 1(c), of the Rome Convention, it is an offense to unlawfully and intentionally destroy a ship or its cargo or to damage a ship 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, paragraph 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.

The 2005 Protocol to the Rome Convention developed in direct response to 11 September 2001 and which has not yet entered into force yet, 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:

- 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.

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. The Annex lists nine such treaties.

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.

The new crimes covered by the Rome Convention 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 controversial.

A new article 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.

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 Rome Convention will be dealt with first. 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 H. 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 obligation 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. 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. 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 (article 8bis, paragraph 4 (b)). 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 Agreement 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.

III. Approaches under general international law to suppress terrorist activities at sea

1. Introductory remarks

It is often been overlooked that terrorism at sea may be fought on the basis of general international law. They supplement the ones so far described.

2. Self-Defense

States targeted by terrorists from the sea may resort to self-defense. In resolution 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 resolution 1373 (2001) of 28 September 2001. The Council of the North Atlantic Treaty Organization likewise 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.

This 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. The latter issue remains of relevance when it is a matter of determining against whom actions of self-defense may be aimed. 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.

Actions of self-defense against ships under the control of terrorists and used as weapons must meet the test of proportionality. 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 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, as proven by the case of the Asya. However, it must be borne in mind that article 104 of the Convention provides for the retention of nationality of pirate ships and it would be necessary to establish why and under which circumstances 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

Security Council resolutions 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 being misused in order to support terrorism.

Already the Preamble of the Convention for the Suppression of the Financing of Terrorism 1999 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 Security Council resolution 1368 (2001) the international community is called upon to "... redouble their efforts to prevent and suppress terrorist acts including by increasing cooperation ...". Security Council resolution 1373 (2001) is more specific. The Security Council decided - acting under Chapter VII of the UN Charter – that all States shall "...2(b) [T]ake the necessary steps to prevent the commission of terrorist acts, including by provision of early warning of other States by exchange of information ...". The Security Council in the same resolution stated "...2(f) [A]fford one another the greatest measure of assistance in connection with criminal investigations or criminal proceedings relating to the financing or support of terrorist attacks ...". Finally, the Security Council in its resolution 1377 (2001) of 12 November 2001 underlined "... the obligation on States to deny financial and all other forms of support and safe haven to terrorists and those supporting terrorism." 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 Security Council resolution 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.

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. 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 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 will join since the decision not to join may have repercussions when United States ports are reached. The screening of containers seems to be an impossible task with some 5.7 million shipping containers reaching the United States, for example, every year.

It is evident that further thought should be given to this complex issue. Any measure taken should ensure that no undue burden is placed upon shipping and that there are not more restraints on the transport of goods by sea than necessary. It is, in particular, for the IMO to develop new rules which are adequate to counter the threat against security and take account of the needs of navigation.

Another precautionary approach is reflected by the amendments to the SOLAS Convention. Under a new Chapter “Special 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.