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**INTERNATIONAL TERRORISM AT SEA**  
**BETWEEN MARITIME SAFETY AND**  
**NATIONAL SECURITY. FROM THE 1988 SUA**  
**CONVENTION TO THE 2005 SUA PROTOCOL**

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6.1  
**INTRODUCTION**

Violence at sea consists of not only piracy but also acts of terrorism, which could affect both maritime security and the security of the targeted state(s). Terrorist strikes at sea can be actions of violence against the ship, the passengers or the crew. These actions are similar to those committed by pirates. But terrorism at sea can also be conducted through ships utilized as a sort of weapon to strike other ships or the port or some port facilities. But terrorists can also utilize ships as a logistic base for their attacks or as a means of transporting weapons – including weapons of mass destruction – for their attacks.

Currently, the attention of the international community is focused on piracy and less on terrorism at sea because of the escalation of piracy not only off the Somali coasts but also off the Nigerian coasts and its devastating effects on maritime navigation and also peace and international security. As far as terrorism is concerned, statistics show that only 2% of maritime accidents have been caused by terrorist acts in the last three decades.

Mainly terrorism at sea seems to be latent and to arise in specific, localized and infrequent episodes. Nevertheless, even though terrorism at sea has not increased over the years, the fear of terrorist attacks at sea is still felt owing to the peculiar characteristics of maritime navigation that have influenced the increase of piracy, the physical characteristics of vessels and the peculiarity of modern shipping in the economic globalization era.¹ An increase in terrorism at sea could derive also from the development of its links with piracy. In other words, terrorist groups could act together with pirates in order to optimize their actions or could assign terrorist strikes to pirates. Even the risk of capital flow from piracy to terrorism must be taken into account to this end.

The reaction in legal terms against terrorism at sea by the international community has been triggered occasionally by terrorist attacks: first of all, the hijacking of the Italian flag

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cruise ship *Achille Lauro* in 1988 and then, more than ten years later, by some attacks perpetrated by terrorists groups affiliated to Al Qaeda.² Pressurized by the murder of a US citizen during the hijacking of the *Achille Lauro*, the UN Convention on the Suppression of Unlawful Acts Against Maritime Navigation was adopted on 10 March 1988 in Rome (1988 SUA Convention), while the Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation was adopted on 15 October 2005 in London (2005 Protocol).³

The revision of the 1988 SUA Convention had two major purposes. The first one was to update its provisions taking into account the new treaties against terrorism, such as the 1997 International Convention for the Suppression of Terrorist Bombing,⁴ the 1999 International Convention for the Suppression of the Financing of Terrorism⁵ and the 2005 International Convention for the Suppression of Acts of Nuclear Terrorism.⁶ The second one was to include those additions and amendments necessary to counter new forms of terrorism at sea and the new threat caused by Al Qaeda terrorism.

To that end, the activities of armed forces during an armed conflict and activities undertaken by military forces of a state in the exercise of their military duties have been excluded from the scope of application (Art. 2bis). The reference to terrorism and its definition – although generic – have been inserted in the text (Art. 3bis) and the offences broadened (Arts. 3bis, 3ter and 3quater). The so-called political offence exception has been included (Art. 11ter); and lastly, the right to visit foreign vessels on the high seas has been regulated (Art. 8bis).⁷

The 1988 SUA Convention has been ratified by 160 states, constituting the large majority of the world merchant fleet (94.66%), whereas the Protocol has been ratified by just 23 states, representing only around 30.27% of the world merchant fleet.⁸ The low number of states parties to the 2005 SUA Protocol can be explained by the fact that terrorism at sea is considered a minor risk compared with piracy, which is nowadays the focus of the whole international community. Some difficulties in ratifying or adopting the Protocol arise from the fact that it contains rather detailed provisions defining acts of terrorism at sea and increases the possibilities for intervention on the high seas by non-flag states to combat terrorism effectively.

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² In January 2000 an attack was made by a group affiliated to Al Qaeda against the destroyer USS *The Sullivans* in the port of Aden, and some months later a suicide attack was conducted by another group affiliated to Al Qaeda against the destroyer USS *Cole* in the port of Aden. In October 2002 a terroristic attack was perpetrated against the French supertanker *Linburg* off the Yemeni coast. For more information on terroristic attacks at sea, see N. Klein, *Maritime Security and the Law of the Sea*, Oxford University Press, Oxford, 2011, pp. 148 et seq.


⁴ 2149 UNTS 284.


⁷ Klein 2011, p. 171.

⁸ Status of ratifications at November 2012.
Today counterterrorism at sea has its legal basis in some international law rules: (1) the 1982 UN Convention on the Law of the Sea (UNCLOS 1982) as far as the principles on rights and duties of states on the high seas are concerned and (2) the 1988 SUA Convention and the 2005 SUA Protocol establishing the detailed rules in consideration of how terrorism has evolved. Moreover, some rules of the 1974 International Convention for the Safety of Life at Sea (1974 SOLAS Convention), as amended, are also relevant because in dealing with the security of navigation, they lay down rules that are helpful in the fight against terrorism at sea. The legal framework indicated just now is completed by the principle on the inherent right of self-defence and Chapter VII of the UN Charter on the collective security system. These rules can be applied once the UN Security Council determines that terrorism at sea is a threat to international peace and security. Additionally, some non-binding or rather merely political instruments for enhancing interstate cooperation – such as the Proliferation Security Initiative (PSI) – also contributed to better controls on the high seas.9 This chapter intends to address the aspects of the rules concerning counterterrorism at sea raised by the revision of the 1988 SUA Convention by the 2005 SUA Protocol, and especially those aspects that exemplify the passage from a concept of terrorism at sea as solely endangering the freedom and the security of navigation to a – more correct – concept of terrorism at sea menacing the security of not only single states but also the international community on the whole. The analysis will underline some ambiguities in the body of rules and connections with other international law provisions as well as some inevitable compromises. Both stem from the fact that the relevant rules have been developed not following a systematic approach but under pressure from specific acts of terrorism exhibiting new features compared with previous ones. The risk that terrorists could utilize weapons of mass destruction influences the choices, enlarging the scope of the rules. Furthermore, the attitude of the UN Security Council towards terrorism as a threat to international peace and security has given new legal relevance to terrorism at sea too.


Neither the 1988 SUA Convention nor the 2005 SUA Protocol contains any definition of terrorism at sea. Well aware of the difficulties in defining terrorism at the international level, the negotiators of both these treaties preferred to avoid any risk and to adopt

a pragmatic approach focused only on determining which acts constitute typical acts of terrorism or play a role in terrorist strikes and on enumerating them in the conventional rules without any further qualification. In this way the ideological and political aspects of terrorism, which, up to now, have impeded efforts towards a global convention on terrorism, remain in the background.\textsuperscript{10}

While the 1988 SUA Convention limits to the maximum references to terrorism, the 2005 SUA Protocol is less cautious. The first treaty uses the word 'terrorism' only in the preamble, which – as it is well known – does not contain substantive provisions but merely ones that serve to explain the rationale and the scope of the conventional rules. The preamble also refers to UN General Assembly Resolution 40/61 of 9 December 1985 containing a clear and unequivocal condemnation of terrorism and requesting the International Maritime Organization (IMO) to study the problem of terrorism on board ships or against ships in order to recommend the appropriate measure to react.

Moreover, the offences indicated in Article 3 do not present any link to terrorism. They consist of particularly serious acts of violence committed on board a ship and “likely to endanger the safe navigation of that ship.” This latter requisite is fundamental, and it does not relate to the mental element of the offence but to the material one: the prevalent or main goal of the conduct must be to endanger the safety of navigation. Pursuant to Article 3.1, intention by the offender is required since the provision states that “[a]ny person commits an offence if that person unlawfully and intentionally […].”

Therefore, the 1988 SUA Convention can be defined as a treaty on the safety of navigation on the basis of its textual interpretation and a treaty on terrorism at sea on the basis of the rationale – emerging elsewhere as has been seen – and the circumstances of its conclusion: to combat acts of terrorism at sea analogous to those that occurred on board the cruise ship \emph{Achille Lauro}.\textsuperscript{11}

The solution of not referring expressly to terrorism is abandoned by the 2005 SUA Protocol.\textsuperscript{12} Article 3 \textit{bis} contemplates several offences whose purpose is terroristic since it, “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 any act.”

This purpose entails the following conduct: (a) the use (or the threat of using) against or on a ship or the discharging from a ship of any explosive, radioactive material or BCN weapon in a manner that causes or is likely to cause death or serious injury or damage; (b) the discharging (or the threat of discharging) of oil, liquefied natural gas or other


\textsuperscript{11} For a deep analysis of this Convention, \textit{see} N. Ronzitti (Ed.), \textit{Maritime Terrorism and International Law}, Kluwer, Leiden, 1990.

hazardous or noxious substance from a ship in such quantity or concentration that causes (or is likely to cause) death or serious injury or damage and (c) the use (or the threat of using) of a ship in a manner that causes death or serious injury or damage. The *mens rea* of intent is a special feature of the offences listed in Article 3bis.1(a), compared with other analogous acts and conduct. Specifically, the mental state required is the specific intention of the offender to use violence to spread terror among a population or to obtain certain conduct or abstention from a government or an international organization. As for the transport of any explosive or radioactive material on board a ship, the offender is required to know that “it is intended to be used to cause, or in a threat to cause, with or without a condition, as is provided for under national law, 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.” The formula in Article 3bis to describe the specific terrorist purpose is not new to international law and can be found in identical terms in Article 2 of the 1999 United Nations International Convention for the Suppression of the Financing of Terrorism,13 and in rather similar terms in UN Security Council Resolution 1566 (2004)14 as well as in EU Council Framework Decision 2002/475/JHA of 13 June 2002 on Combating Terrorism.15 In any event, the terroristic purpose changes the object of the conventional rules: not only the safety of navigation but, above all, national security, being the final target of terrorism

13 Art. 2 defines the crime of terrorist financing as the offence committed by any person who “[…] by any means, directly or indirectly, unlawfully and wilfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out […]” an act “[…] intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the 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. […]”

14 The UN Security Council defines terrorism acts as: “[…] criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature, […]”. See also the definition of terrorism given by the High Level Panel on Threats, Challenges, and Change convened by the UN Secretary General; according to it the act of terrorism consists in: “any action, in addition to actions already specified by the existing conventions on aspects of terrorism, the Geneva Conventions and Security Council Resolution 1566 (2004), that is intended to cause death or serious bodily harm to civilians or non-combatants, when the purpose of such an 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.”

15 OJ 2002 L 164/3. According to this Decision, terrorist offences: “[…] given their nature or context, may seriously damage a country or an international organization where committed with the aim of: seriously intimidating a population; or unduly compelling a Government or international organization to perform or abstain from performing any act; or seriously destabilizing or destroying the fundamental political, constitutional, economic or social structures of a country or an international organization.”
at sea. This conclusion is supported by the fact that Article 3bis adds to some offences the reference “to cause death or serious injury or damage”.

6.3 The Enlargement of Offences by the 2005 SUA Protocol between Counterrorism and Counterrorproliferation of Weapons of Mass Destruction

Article 3bis also includes offences involving biological, chemical and nuclear weapons (so-called BCN weapons) and other explosive radioactive material. Therein the Protocol also seems to go beyond the mere scope of protecting the security of navigation against terrorism and to be rather focused on the non-proliferation of weapons of mass destruction.16 In particular, this article criminalizes the transport, on board a ship, of “any BCN weapon knowing it to be a BCN weapon, [...] any source material, special fissionable material or equipment or material especially designed or prepared for the processing, use or production of special fissionable material” or “any equipment, materials or software or related technology that significantly contributes to the design, manufacture or delivery of a BCN weapon.”

The use against or on a ship or discharges from a ship of any explosive, radioactive material or BCN weapon is criminalized only in the presence of a specific mental element of the offender.

The phrasing here is not particularly clear as to the form of mens rea of the offender. Obviously the transportation must be intentional. But this condition is not sufficient. As far as BCN weapons are concerned, the offender is required to know their nature of mass destruction weapons while, with reference to source or fissile material, he is required to be aware not only that its final destination is in nuclear activities but also if it is in conformity with the relevant IAEA safeguards agreement.17 In other words, the offender has to know the practical utilization of the fissile materials and the international rules governing this utilization.

Lastly, in the case of transportation of any equipment, materials or software or related technology connected with the design, manufacture or delivery of a BCN weapon, the intention must be specifically focused on the fact of using them for these purposes. The intent is to some extent a qualified one.18

16 Klein 2011, pp. 172 et seq.
17 Through the safeguards activities IAEA can verify that a state is living up to its international commitments not to use nuclear programmes for nuclear-weapons purposes. Today, IAEA safeguards nuclear material and activities under agreements with more than 140 states.
18 The provision in question reconfirms the double regime under NPT: that applicable to the states already having nuclear weapons at the date of entry into force of this agreement, and that applicable to all the other states.
Article 3ter extends criminalization to the transportation of a person on board a ship knowing that the person has committed an act that constitutes an offence set forth in Articles 3, 3bis or 3quater or an offence set forth in one of the nine counterterrorism treaties included in a new Annex added to the 1988 SUA Convention by the Protocol, and intending to assist that person to evade criminal prosecution. Lastly, Article 3quater criminalizes conduct consisting of attempting, participating, organizing or directing others, or contributing to various principal offences under the Convention and the Protocol.

In conclusion, a qualitative leap between Article 3 of the 1988 SUA Convention and Article 3bis of the 2005 SUA Protocol emerges. Article 3 sets out offences unequivocally against the safety of navigation, whose effects are mainly and directly limited to the vessel, the crew, the passengers or the cargo. On the contrary, offences under Article 3bis of the SUA Protocol 2005 are against state security since their end purpose is to spread terror to a population or a government. They threaten navigation too, but as a way to attack the security of a state and a population.

Another qualitative difference stems from the fact that Article 3bis refers to the conventions on disarmament with regard to weapons of mass destruction and to the 1968 Treaty of Non-proliferation of Nuclear Weapons (NPT) with regard to nuclear weapons. The 2005 SUA Protocol shares the main goal of contemporary international law: the maintenance of international peace and security. Therefore, 2005 SUA Protocol incisively amends the 1988 SUA Convention: it transforms a treaty focused on the security of navigation – or at least, combating terrorism against navigation – into a treaty combating terrorism on a larger scale if caused by, from or through a vessel.

6.4 The Reaction against Terrorism at Sea: The Multiplication of the Grounds for Jurisdiction

The duty imposed on a state to combat unlawful acts against the safety of maritime navigation by the 1988 Convention consists of making the offences set forth in the Convention punishable (Art. 5), in taking the necessary measures to establish its jurisdiction over the same offences if certain conditions occur (Art. 6), in taking the offender into custody if he is present in its territory or taking other analogous measures (Art. 7), in extraditing him or submitting the case to its competent authorities (Art. 10), in cooperating in the field of assistance in connection with criminal proceedings (Art. 12), and in cooperating in the prevention of the relevant offences (Art. 13).

19 Art. 4quater is complementary since it criminalizes the participation, organization, contribution, etc. to the conduct indicated in Arts. 3bis and 3ter.
The rules on the exercise of jurisdiction to adjudicate are contained in full in the 1988 SUA Convention. On this point, the 2005 Protocol does not amend the 1988 SUA Convention as it just provides for specification: none of the offences indicated are to be regarded as a political offence or as an offence inspired by political motives for the purposes of extradition or mutual legal assistance (Art. 11bis). This provision could play a fundamental role in removing a major obstacle to the well and efficient functioning of interstate cooperation in the field of counterterrorism because many extradition treaties and many national laws exclude from extradition political offences the so-called 'political offence exception' and terrorism could be easily classified as a political offence.

Article 6 of the 1988 SUA Convention dealing with state jurisdiction is the result of a compromise. It maintains as central the principle of flag state jurisdiction, while giving a role to the coastal state and to the state of the offender (active personality principle). States parties are obliged to establish such grounds for jurisdiction within their respective national legal systems (so-called mandatory grounds for jurisdiction). These jurisdictions are not fully and always in concurrence.

Flag state jurisdiction is an alternative to the coastal state one once the offence occurs in its territorial sea. In this case the criteria to be followed to permit coastal state jurisdiction to prevail are set out by Article 27 UNCLOS: if the consequences of the crime extend to the coastal state, if the crime is of a kind to disturb the peace of the country or the good order of the territorial sea, if the assistance of the local authorities has been requested by the master of the ship or by a diplomatic agent or consular officer of the flag state, or if such measures are necessary for the suppression of illicit traffic in narcotic drugs or psychotropic substances.

The jurisdiction of the state of the offender is an alternative to that of the flag state if the offence occurs on the high seas, and to that of the coastal state if the offence occurs in its territorial sea or in its territory. No indication is contained in the 1988 SUA Convention on the rules to apply to determine the prevailing jurisdiction.

But states parties can establish other grounds for jurisdiction (to be notified to the secretary general of the IMO), the so-called optional grounds for jurisdiction: the jurisdiction of the state where the offender, if stateless, has his permanent residence; the jurisdiction of the state of the victim (the passive personality principle) and the jurisdiction of the state compelled to do or abstain from doing any act.

It can be argued that the mandatory grounds for jurisdiction prevail over the compulsory ones for simple reasons of juridical logic. It can also be argued that the strongest ground for jurisdiction is that of the flag state if Article 6 is interpreted in light of Article 11.5.
latter provides that the state, having received two or more requests for extradition and not intending to prosecute the offender, must select another state to extradite, having “due regard to the interests and responsibilities” of the flag state.

The obligation to extradite, following the principle *aut dedere aut judicare*, completes the set of rules on the exercise of jurisdiction. This obligation is strongly secured. Not only must the offences listed in the Convention (and in the 2005 SUA Protocol) be deemed included in any extradition treaty existing between states parties, but states parties are also called upon to insert the same offences in every new extradition treaty to be concluded by them. Moreover, the obligation to extradite does not necessarily depend on the existence of an extradition treaty since the requested state – in the absence of an extradition treaty – may consider the 1988 SUA Convention as a legal basis for extradition. Lastly, extradition is facilitated by the provision doubling the *locus in quo* to the purpose of extradition; to this end, the relevant offence is considered committed either in the place where it occurred or within the jurisdiction of the state requesting extradition.

In conclusion, the outcome of the multiplication of the grounds for jurisdiction along with the obligation to extradite is to avoid any risk of impunity for terrorists at sea. Some doubts arise on the practical application of these rules because of the difficulty in interpreting ambiguous provisions since they are designed to satisfy opposing states’ interests and claims. The state that apprehends the offender will be in a position to impose its ground for jurisdiction over the others provided for by the 1988 SUA Convention unless it agrees to extradite the offender.

6.5 Prevention and Suppression of Terrorism at Sea: The Limited Cooperation Between States

Only Article 14 of the 1988 SUA Convention is dedicated to interstate cooperation in preventing the commission of the offences listed in the Convention itself. The provision establishes that the state having reason to believe that an offence under the Convention will be committed has to furnish, in accordance with its national law, as promptly as possible any relevant information in its possession to those states that it believes would be the states having established jurisdiction. This provision is rather vague and is limited by the reference to existing national law on the exchange of information. States parties are not obliged to adopt national measures to make the transfer of information on terrorism possible and, therefore, the absence of such legislation could avoid or limit the functioning of Article 14.

The 2005 SUA Protocol does not alter the layout of the 1988 SUA Convention. It only provides for a mechanism to allow enforcement measures by third states on the high seas. But this is the only *lacuna* of the 1988 SUA Convention dealt with by the Protocol as far as cooperation in preventing and suppressing terrorism at sea is concerned. Under both treaties, counterterrorism at sea is achieved mainly through the criminalization of certain
conduct and the provision of different grounds for jurisdiction.\textsuperscript{22} The interstate cooperation in enforcement measures to prevent or suppress terrorism at sea is in the background, with the right to visit excepted.

Detailed measures focused on prevention have to be looked for elsewhere. Nowadays these measures are provided for by the International Ship and Port Facility Security Code (the so-called ISPS Code) and through amendments to the 1974 SOLAS Convention, contained in its new Chapter XI-2 implementing the ISPS Code, both adopted by the IMO Diplomatic Conference held in 2002. The 1974 SOLAS Convention and the ISPS Code outline and clarify the global regime of prevention for the security of navigation that has been in force since 1 July 2004.

The ISPS Code establishes in a detailed manner the security conditions to be followed by governments, port authorities and shipping companies in a section containing binding rules (Part A) along with some recommended guidelines concerning the ways to implement these conditions (Part B). The ISPS Code provides for a series of preventive measures against security incidents intended as those suspicious acts or circumstances threatening the security of a ship. It does not apply to all vessels but only to ships on international voyages, which include passenger ships and cargo ships of 500 gross tonnages and above. Warships or other government ships not used for commercial services are excluded from the ISPS Code’s field of application, as are fishing vessels.\textsuperscript{23}

The main aims of the ISPS Code are to establish an international framework involving cooperation between states parties, government agencies, local administrations and the shipping and port industries to detect and assess security threats and take preventive measures against security incidents affecting ships or port facilities; to establish the effective roles and responsibilities of all these parties concerned, at the national and international level, for ensuring maritime security; to guarantee the early and efficient collation and exchange of security-related information\textsuperscript{24}; to provide for a methodology for security assessments so as to have in place plans and procedures to react to changing security levels; and to ensure confidence that adequate and proportionate maritime security measures are in place.

\textsuperscript{22} The 2005 SUA Protocol also tries to facilitate the exercise of jurisdiction through standard measures such as transfer of the detained or the person serving a sentence in the territory of one state party for purposes of identification, testimony or otherwise providing assistance in obtaining evidence for the investigation or prosecution of offences in another state party (Art. 12bis).

\textsuperscript{23} Klein 2011, pp. 156 et seq.

\textsuperscript{24} In particular, the ISPS Code envisages that a ship wishing to enter a port must provide security information prior to its entry. A refusal to provide such information may lead the port state to deny entry into the port. The port state is also allowed to inspect the ship within the territorial waters in case of its non-compliance with the requirements of the 1974 SOLAS Convention (Chapter XI-2) and ISPS Code (Part 2). The port state may also verify if the ship holds an International Ship Security Certificate proving its compliance with the 1974 SOLAS Convention (Chapter XI-2) and ISPS Code (Part 2).
These objectives are achieved by the designation of appropriate officers and people on each ship, in each port facility and in each shipping company to prepare and to put into effect the security plans that are approved for each ship and port facility.\[25\]

### 6.6 The Right to Visit for Counterterrorism in the 2005 SUA Protocol

The 1988 SUA Convention does not establish any means to exercise enforcement jurisdiction at sea in order to obtain control of the vessel and the offenders. Article 9 clearly establishes that “[n]othing in this Convention shall affect in any way the rules of international law pertaining to the competence of States to exercise investigative or enforcement jurisdiction on board ships not flying their flag.”\[26\] On this point the Convention refers to the relevant provisions contained in UNCLOS. The coastal state can exercise its enforcement jurisdiction on foreign vessels navigating in its internal waters, territorial sea and contiguous zone, but the principle of the exclusive jurisdiction of the flag state jurisdiction is applicable on the high seas (Art. 92.1): the ship under the flag of a state is subject to the exclusive jurisdiction of that state, save in exceptional cases expressly provided for in international treaties or in UNCLOS itself.

The 1988 SUA Convention could have implemented Article 92, providing for a specific regime for the right to visit foreign ships on the high seas, as did other subsequent treaties concerning other sectors: the 1988 United Nations Convention Against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances,\[27\] the 1995 Council of Europe Agreement on Illicit Traffic by Sea Implementing Article 17 of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances,\[28\] the 1995 United Nations Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks,\[29\] and the 2000 Protocol against the Smuggling of Migrants by Land, Sea and Air Supplementing the UN Convention against Transnational Organized Crime.\[30\] On the contrary, the 1988 SUA Convention fully supports the principle of the exclusive jurisdiction of the flag state. In other words, the 1988 SUA Convention does not limit the enforcement jurisdiction of the flag state on the high seas but only affects its jurisdiction to adjudicate, providing for new grounds for jurisdiction besides that of the flag state. This lacuna is filled by the 2005 SUA Protocol.

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25 Coastal states are responsible for establishing and developing Port Facility Security Plans and training Port Facility Security Officers, while flag states are responsible for adopting and implementing Ship Security Plans.


The proposition to insert the possibility of exercising the right to visit foreign ships on the high seas was advanced later during the negotiations of the 2005 SUA Protocol and came from the United States, which wanted to seize on the developments reached in the above-mentioned treaties and reinforce the political – not legally binding – instrument of the PSI.

The mechanism concerning the right to visit by the non-flag states envisaged by the 2005 SUA Protocol is the most advanced one in comparison with the others listed above. It does not contemplate exceptions to the flag principle, but it envisages the possibility for other states to be allowed by the flag state to visit and take some measures on board the ship flying its flag on the high seas. In this way the 2005 SUA Protocol mediates between the interest to protect national security – and even international peace and security – against terrorism and the interest of guaranteeing the principle of freedom of navigation and the connected principle of the exclusive jurisdiction of the flag state.

On the basis of the principle of the exclusive jurisdiction of the flag state, the procedure the other state must follow to request the necessary authorization by the flag state to board its ship on the high seas is set out in Article 8bis. The use of the expression “authorisation” in this article clearly underlines the full jurisdiction of the flag state and excludes any intention to recognize any right to intervene on the requesting state if the flag state does not so consent.

The procedure can be activated only if the ship is located “seaward of any state’s territorial sea” (Art. 8bis.5). This means that the boarding of foreign vessels is under the sovereign power of the coastal state within its territorial sea since a vessel engaged in terrorist activities does not enjoy the right of innocent passage anymore. In the contiguous zone, the coastal state can exercise enforcement jurisdiction only within the legal framework given by Article 33 UNCLOS, namely to prevent infringement of its customs, fiscal, immigration or health laws and regulations within its territory or territorial sea; and/or punish infringement of the above laws and regulations committed within its territory or territorial sea. The infringement of its criminal law is not contemplated by the above provision as well as the need to prevent or protect its national security. Therefore, it seems difficult to conceive the boarding of a foreign ship by the coastal state owing to counterterrorism at sea in its contiguous zone.

Furthermore, no role at all can be recognized for the coastal state in counterterrorism in its exclusive economic zone. The sovereign rights and jurisdictions attributed to the coastal states in the exclusive economic zone by UNCLOS (Art. 56) do not include the exercise of powers of enforcement towards and on board ships engaged in terrorism at sea. The freedom of navigation still exists in the exclusive economic zone and so does the principle of exclusive jurisdiction of the flag state (Art. 58). The flag state or the requesting

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31 Klein 2011, pp. 175 et seq.
state – duly authorized to visit the vessel in order to combat terrorism at sea – must have
due regard to the rights and duties of the coastal state within its exclusive economic zone
when intervening on board the vessel.33

The existence of “reasonable grounds to suspect” that the ship or a person on board the
ship has been or is about to be involved in the commission of an offence set forth in the
1988 SUA Convention and the 2005 SUA Protocol is at the basis of the request for au-
thorization by the requesting state. On this point the provision is in line with the above-
mentioned treaties in relation to intervention on the high seas. Information, evidence or
proof giving rise to the “reasonable grounds to suspect” must not necessarily be made
known to the flag state under Article 8bis. Actually, this provision does not indicate the
content of the request, but it is quite obvious that in practice the requesting states will do
their best to be persuasive with regard to the flag state.

The flag state may authorize the visit to a ship flying its flag on the high seas following one
of the three authorization procedures envisaged by Article 8bis of the 2005 SUA Protocol.

6.6.1 Case-by-Case Authorization

The flag state may issue the authorisation case by case. This option simply implements the
classic customary principle of the exclusive jurisdiction of the flag state on the high seas in
the field of counterterrorism at sea. The latter state maintains full control over its vessels
on the high seas, since it only assumes the obligation to give an answer, positive or nega-
tive, to the requesting state, as expeditiously as possible.

Pursuant to Article 8bis.5(c) the flag state may expressly authorize the requesting state
to board and to take appropriate measures.34 Because of the principle of the exclusive
jurisdiction of the flag state, the measures that could be taken are already outlined by
Article 8bis.5(b). The list therein contained is not exhaustive, but it clearly limits the dis-
cretion of the requesting state. Moreover, the flag state may subject the authorization to
any condition. On the contrary, the reference to the conditions provided for in the sub-
sequent paragraph 7 does not reduce the discretion of the flag state since this provision is
rather vague in its content.

But the flag state may also combine an authorization with the decision to conduct the
boarding and search together with the requesting state, so significantly limiting the inter-
vention by the requesting state.

The flag state may also decline to authorize a boarding and search either expressly or by
silence once a certain period of time has passed. In other words, the silence consists in
denyng the authorization. In order to avoid any doubt on the attitude of the flag state,
it would have been better to fix a precise but flexible deadline to express the necessary

33 Klein 2011, p. 175.
34 The request for authorization must follow the confirmation of the nationality of the vessel.
authorization. This solution is adopted by the 1995 Council of Europe Agreement on Illicit Traffic by Sea Implementing Article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. Article 7 sets a time limit of four hours “wherever practicable” for the flag state to give an answer on the boarding and inspection, and once the time has elapsed, the consent is considered as refused. Lastly, Article 8 bis.5(b) recognizes that “the flag State shall [...] conduct the boarding and search with its own law enforcement or other officials.” This provision seems superfluous: obviously, the flag state can board and visit the vessels flying its flag: the competence stems from the flag state principle. Therefore, the question is whether it is possible to interpret the rule as imposing on the flag state the obligation to board and search when it declines to authorize the requesting state to do that. Only such an interpretation could give meaning to this rule.

6.6.2 Implicit Prior Authorization after Four-Hour Wait

Pursuant to Article 8 bis.5(d), a state party, upon or after depositing its instrument of ratification or analogous instrument, may notify the Secretary General of the IMO that it grants authorization to board and search the ship flying its flag if there is no response from it within four hours of acknowledgement of receipt of a request to confirm nationality. This provision does not alter at all the right of the flag state to exercise exclusive jurisdiction by configuring an exception, albeit very strict, to this right. It only envisages the possibility that the flag state can permit other states parties to board its vessel under a certain time condition. The exercise of this possibility is relied on the flag state only. Article 8bis.5(d) contains an opt-in clause that the flag state is free to utilize or not.35 The flag state can also withdraw its opting-in. Moreover, once it has decided to opt in, the implicit prior authorization will not function automatically: the flag state has four hours to manifest its different attitude to the requesting state. The four-hour limit has been considered as a very short time for the requested state to make all necessary checks and for the masters of vessel to be informed about the boarding by a foreign vessel.36 But presumably if the respect of the four-hour time limit was impracticable by the flag state, it could simply deny, without any further delay, its authorization.

6.6.3 Implicit Prior Authorization without any Time Limit

Again, upon or after depositing its instrument of ratification or other analogous instrument, a state party may notify the Secretary General of IMO that it authorizes the requesting party to board ships flying its flag (Art. 8bis.5(e)). This is another opt-in clause affecting more strongly the flag state’s exclusive jurisdiction. In other terms, by utilizing such a clause, the flag state gives its consent, once and for all,

35 During negotiations, a proposal of opting out clause was presented. Under this proposal, the implicit authorization rule could have been avoided by a state party by notifying its exclusion to the IMO Secretary General.
to the boarding of vessel flying its flag for reasons of counterterrorism. In any event, the limitation of the flag state’s exclusive jurisdiction derives only from its free consent. The 2005 SUA Protocol just provides for a possibility and does not impose any manifestation of consent. And the consent can be withdrawn at any time. The withdrawal is to have effect immediately unless the withdrawing state decides for it to be effective after a certain period of time.

This regime of prior authorization is rather innovative compared with those established by other treaties. For example, the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the UN Convention against Transnational Organized Crime of 2000 envisages only consent case by case by the flag state concerning the right of visit on the high seas (Art. 8).\(^{37}\)

On the contrary, the UN Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks of 1995 establishes the boarding and inspection of fishing vessels on the high seas on the basis of sufficient grounds of violation of the rules on fishing and without any specific consent by the flag state of the fishing vessel (Art. 21).\(^{38}\)

The few states that have ratified the 2005 SUA Protocol have been very cautious towards implicit authorization, even with all the above-mentioned limitations. None of these states accepted one or the other opt-in clause. Moreover, further to Article 8bis.15, only one state (Latvia) has designated the authority or the authorities competent to receive and respond to requests for assistance, for confirmation of nationality, and for authorization to take appropriate measures. Even if this designation does not mean anything with respect to both opt-in clauses, states preferred to abstain from any declaration that could, even remotely, imply implicit authorization to board a vessel flying their flags.

Therefore, state practice underlines how thorny and delicate it can be to touch on the principle of the freedom of navigation and the principle of exclusive flag state jurisdiction even to prevent and suppress a threat to international peace and security such as terrorism. The fact that terrorism at sea and the shipping of weapons of mass destruction are not confined to specific vessels but can concern almost all commercial vessels makes it more difficult for the states to accept any regime of global ship-boarding based on an automatic mechanism of consent to visit foreign vessels.\(^{39}\)

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37 Most recently, a draft agreement adopted on 2002 within the European Union on the cooperation between EU member states customs administrations against the illicit traffic of drugs on the high seas provides for the express renunciation by the flag state to its exclusive jurisdiction. If the flag state does not renounce, the intervening state must release the vessel to the flag state authorities.
39 McDorman 2010, pp. 254 et seq.
6.6.4 Ship-Boarding Procedures and Follow-Up

The ship boarding, once authorized, must be conducted following certain standards and safeguards indicated in Article 8bis.9, to ensure its consistency with the principles of international law. In particular, the intervening state must protect the persons on board, the safety and the security of the ship, the interests, commercial or legal ones, of the flag state. But, above all, the use of force is to be limited when necessary to ensure the safety of officials and persons on board, or where the officials are obstructed in the execution of the authorized actions. In any event, the intervening state must reduce to the minimum the degree of force according to what is necessary and reasonable, taking into account the particular circumstances of the intervention. This provision is rather vague and could probably give rise to some interpretative contrasts.

If the visit leads to a detection of one of the offences listed in the 1988 SUA Convention or the 2005 SUA Protocol, the intervening state must promptly inform the flag state. The latter may authorize the detention of the ship, cargo and people on board, but in any event, it retains the right to exercise jurisdiction pursuant to Article 8bis.6. It may consent to the exercise of jurisdiction by another state, provided that this has legal ground for jurisdiction under Article 6 of the 1988 SUA Convention. The consent of the flag state cannot at all modify or introduce new grounds for jurisdiction, derogating from Article 6.

On the contrary, if the visit does not confirm any of the suspected offences, the intervening state must pay compensation for any damage, harm or loss attributable to it arising from measures pursuant to Article 8bis.

6.7 The Right to Visit for Counterterrorism beyond the 2005 SUA Protocol

For these grounds scholars try to find a legal basis for the boarding of a foreign vessel on the high seas. It has been argued that if the vessel is completely under the control of terrorists intending to utilize it as a weapon, it can be considered without nationality, and therefore Article 110 UNCLOS authorizing the right to visit by any warship on the high seas would apply.40

It has also been considered that under Article 88 UNCLOS the high seas are reserved for peaceful purposes. Since this is an erga omnes provision, its violation would allow the intervention – the right to visit – by any state party on the vessel utilized for terrorism.41

These suggestions are very interesting, but they are open to criticism. The only certain basis for any right to visit foreign vessels on the high seas can be founded on a specific

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40 Wolfrum 2008, p. 35.
agreement between the two states concerned: the requesting state and the flag state. As far as Article 8bis.15 is concerned, it specifically envisages the conclusion by states parties of agreements or arrangements between them to facilitate law enforcement operations carried on in accordance with the provisions of the 2005 SUA Protocol. Obviously any broadening of the right to visit or cooperation on the right to visit can be more easily established and regulated on a bilateral basis than at a multilateral level.

Numerous bilateral agreements on ship boarding, establishing mechanisms for implied authorization to board foreign vessels, have been concluded by the United States. Most of these agreements are with so-called ‘open register’ States giving the United States – on mutual terms – the opportunity to board and inspect a large number of vessels suspected of transporting weapons of mass destruction.

The main characteristic of these agreements consists in allowing the right to visit foreign vessels through a rather standardized ship-boarding procedure. Once the nationality of the suspected ship has been confirmed, the authorization can be accorded expressly by the flag state for the boarding and search of the ship, the cargo and people on board or denied. The response to the request for authority to board must be given in a very short time: four hours according to certain agreements, or two hours according to other agreements, even if some additional time to respond can be demanded.

But the singularity of the procedure resides in the mechanism of implicit consent to the right of visit when the time has elapsed without any response by the requested state. Clearly, very often the consent for authorization would be given implicitly since the time to respond is very short. Therefore, it is as if the state requested has already consented, once and for all, to the boarding of the vessels flying its flag on the basis of the bilateral agreement, unless it does not deny it expressly within the indicated time limit.

No exceptions to the principle of the exclusive flag state jurisdiction and the principle of the freedom of navigation can be found elsewhere. Both principles are also safeguarded by the Proliferation Security Initiative, initiated by the United States in 2003, to prevent the shipment of weapons of mass destruction and related materials at sea. As it is well known, PSI, even if it is only of a political nature and is not binding on the participant states, seeks to be consistent with international law principles, as it is clear in the Statement of Interdiction Principles at its basis. This consistency concerns also the principle of the exclusive jurisdiction of the flag state. Therefore, the visit to foreign-flagged vessels can take place only if the consent of the flag state has been previously obtained. Anyway, one of

43 Klein 2011, p. 183.
44 Around 102 states are participating in PSI.
45 V. Eboli, ‘The Proliferation Security Initiative (PSI) and the Fight Against Terrorism on the High Seas’, in K. Chainaglou et al. (Eds.), International Terrorism and Changes in International Law, Aranzadi, Cizur Menor, Spain, 2007, pp. 164 et seq.
the commitments of the participating states is to enforce controls on vessels flying their flag on the high seas.

Both principles are respected by North Atlantic Treaty Organization (NATO) in the *Active Endeavour* operation started in 2001. Under this Operation NATO ships are patrolling the Mediterranean and monitoring shipping to help detect, deter and protect against terrorist activity. Since 2003, NATO has been systematically boarding suspect ships and these boardings take place with the consent of the flag states.

In conclusion, apart from treaty rules, the only exceptions to the principle of the exclusive jurisdiction of the flag state in the field of counterterrorism at sea can derive from the exercise of the right of self-defence under Article 51 of the UN Charter and when the UN Security Council, acting under Chapter VII, requests states to patrol the high seas and check every ship on the high seas independently of the flags they fly to maintain peace and international security.