THE PREVENTION OF MARITIME TERRORISM

Is today’s maritime security sufficient?

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ABBREVIATIONS
1 Introduction

First I would like to explain my motivation for writing a master’s thesis about the prevention of maritime terrorism and then I would like to present the main issues, my sources and my approach.

1.1 Motivation

After having taken courses in Maritime Law and International Public Law at the University of Oslo in autumn 2007, I became especially interested in the area of overlap between these two subjects. In my opinion one of the most interesting aspects in this area is violence at sea. Violence at sea comprises both piracy and maritime terrorism. However, to narrow the topic of this thesis I decided to focus on maritime terrorism and its prevention for one particular reason: Since 9/11 the international community has been especially aware of a new type of terrorist, namely when the person committing the attack knows that he will die during the attack. When the main weapon is, for example, a suicide bomb, the traditional concepts of law enforcement are no longer effective. If the terrorist dies in the incident anyway, (criminal) proceedings after the incident will not prevent him from committing the attack. And catching those who are behind those carrying out the attack remains extremely difficult and often has little prospect for success. Therefore the aspect of the prevention of maritime terrorism is vitally important.

There is (as far as I have seen) no work that addresses the issue of the prevention of maritime terrorism in the way that I want to address it in this thesis – a fact which made this topic even more interesting for me to write about.

While I was doing research for my thesis I noticed that there is not much public awareness of maritime terrorism and that it is at the most considered a matter for thrillers and movies. It seems that everyone has the image of the collapsing Twin Towers in their head but that severe attacks at sea which have already happened are almost forgotten. So I asked myself
whether this lack of awareness of terrorist attacks at or from the sea is also reflected in the maritime security regulations and whether they are sufficient to prevent maritime terrorism.

1.2 Issues
In my opinion there are two means in particular of preventing maritime terrorism: The first is to have sufficient security regulations to reduce the vulnerability of the shipping industry as a whole, the second is the boarding of vessels to prevent them from being used as a means of supplying maritime terrorism or even as a means of committing an attack. In this thesis I would like to find out if there is already sufficient regulation to effectively prevent maritime terrorism or whether more has to be done to reduce the vulnerability of possible targets.

1.3 Sources
I will base my thesis most of all on international law. Even though maritime security creates an overlap between international and national security, I will only address the international aspect. The most important sources of international law concerning the prevention of maritime terrorism are: the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA), the International Convention for the Safety of Life at Sea (SOLAS) and the International Ship and Port Facility Security Code (ISPS), the United Nations Convention on the Law of the Sea (UNCLOS), the SAFE Framework (SAFE), the Convention on Facilitation of International Maritime Traffic (FAL) and the Seafarers’ Identity Documents Convention (Revised 2003). In addition to that I will mention some relevant UN SC resolutions as well as guidelines or codes of conduct. Unfortunately I cannot take into account how the international regulations have been implemented or enforced in the different countries. Issues of maritime security are very often not regulated by international conventions but by bilateral agreements. The United States in particular has often been a pioneer when it comes to issues of maritime security. Several US approaches have strong links to the prevention of maritime terrorism and have become what could be called “de facto

1 Lindfors, in: Maritime Security Conference, 35.
international” because so many countries have become parties to those initiatives. The US strategy for fighting terrorism consists of several interrelated initiatives: the 96-hour advance notification of arrival, the 24-hour advance manifest rule concerning cargo, the setting up of an automated targeting system, the Container Security Initiative (CSI) for sea cargo containers, the Customs-Trade Partnership Against Terrorism (C-TPAT) for supply chain security of cargo and the Proliferation Security Initiative (PSI) concerning weapons of mass destruction. For capacity restrictions I cannot discuss all the aforementioned US initiatives in this thesis. In my opinion the most interesting ones for the worldwide fight against maritime terrorism are the PSI and the CSI. I will therefore only discuss these two and not the other US initiatives.

However, there is not only growing concern about maritime terrorism in the United States, but also in Europe (as shown by several recent conferences2). The EMSA provides the European Commission and Member States with technical and scientific assistance in the proper development and implementation of EU legislation on maritime security.3 The European approach which, unfortunately, can not be discussed in this thesis is most of all based on Regulation (EC) No 725/2004, Regulation (EC) No 884/2005 and Directive 2005/65/EC.

1.4 Approach

Before analyzing how to prevent maritime terrorism a definition needs to be provided of what it is that is to be prevented, i.e. we need as exact a definition of maritime terrorism as possible. I would like to present, in brief, why and in what way the definition of “terrorism” (in general) is controversial, before trying to find the best possible definition for “terrorism” and finally specifying this definition concerning the maritime aspect of terrorism. I will only discuss non-state terrorism in this thesis. Another aspect which should be discussed is whether there is an overlap between maritime terrorism and piracy.

3 http://www.emsa.eu.int/.
Since several terrorist groups are likely to have developed a maritime attack capability, the topic of maritime terrorism is of great relevance today. So I would like to present the most important incidents of maritime terrorism that have happened in the past. Further I would like to explain the most feared scenarios.

Chapter 3 is the main chapter in the thesis. First of all I will present, in brief, how the main legal regime changed in the aftermath of 9/11. Then I will examine the prevention of maritime terrorism by dealing with the most relevant “risk factors” of maritime security, i.e. the vessels, the ports, the containers, the crews and the passengers. I would like to analyze whether the legal regime concerning the risk factors mentioned is sufficient to prevent maritime terrorist incidents or whether current regulations need to be improved. However, I will not examine the maritime security of drilling platforms or other offshore installations.

Concerning the risk factor “vessels” I will first present regulations on vessel security as such and then the legal situation concerning the boarding of vessels to prevent the supply of terrorism. However, I will not specifically discuss the threat of maritime terrorism to certain types of vessels such as bulk shipments (with LPG and LNG).

Furthermore, I would like to point out that I will be discussing the prevention of maritime terrorism in regard to the law in times of peace or peacebuilding but not in regard to jus in bello. I will not present the issue of naval forces or a “naval police” to prevent incidents of maritime terrorism.

Finally, I would like to mention that because of capacity restrictions and the complexity of the topic it was, unfortunately, not possible to discuss in depth all aspects mentioned in the above. I rather tried to give an overview of the current legal regime concerning maritime security in this thesis with the aim of pointing out its weaknesses. I would like to concentrate on the issues that I needed to leave out here in a doctoral thesis which I plan to write in the future.

\[^{4}\text{For the discussion of the legal status of the new security regime see: Bangert in: Conference Maritime Security, 164 seq.}\]
2 Conceptual framework and contextual background

I would like to define maritime terrorism and distinguish it from piracy, to present the relevance of maritime terrorism and its main scenarios.

2.1 Definitions and distinctions

First of all, as a basis for the thesis we need to define the term “maritime terrorism” as clearly as possible. The definition of “terrorism” has always been a controversial issue and the debate concerning the definition came up anew after 9/11. However, in addition to this definition problem, “maritime terrorism” also has to be differentiated and distinguished from “piracy”. Since both are elements of “violence at sea” there are several points of overlap, but different legal rules are applicable to terrorism and piracy.

2.1.1 Terrorism

Even though most people can clearly qualify an act as terrorism when they see it, experts have difficulties agreeing on a common definition of terrorism. A definition could first not be agreed on among the UN states because several Third World countries wanted the so-called freedom fighters, i.e. groups struggling for the realization of self-determination, to be excluded. “One man’s ‘freedom fighter’ is another’s ‘terrorist’” – this statement aptly sums up the problematic. The difficulty lay in agreeing under which circumstances the use of violence by terrorists could be qualified as legitimate. So UN Member States preferred to take a different approach by drawing up conventions which prohibit clearly-specified acts. This approach resulted in circumventing an agreement on a general definition of terrorism: Many international treaties regulate the specific aspects of terrorism (for example hijacking or hostage-taking), but none of them as yet contains a general definition of terrorism. The UN Member States still have no common definition of terrorism and this

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5 Ong, 63.
6 Schiller, in: Parritt, Violence, 88 mentioning the “Rainbow Warrior Affair” as an example.
7 Beck/Arend, 162; Garmon, 270
8 Cassese, 449 seq. with further references.
9 The UN Conventions on terrorism can be found here: http://untreaty.un.org/English/Terrorism.asp; see also Cisterna in: Conference Maritime Security, 58.
has been a major obstacle to the taking of international countermeasures against terrorism.\textsuperscript{10}

However, the League of Nations Convention for the Prevention and Punishment of Terrorism of 1937 (which never entered into force) already contained a general definition of terrorism in Article 1(2): “criminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons or a group of persons or the general public”. In my opinion this definition is not very appropriate because it defines “terrorism” by using the word “terror”, which is a circularity. Several of the more recent definitions retain this circularity.\textsuperscript{11}

However, we can also find recent definitions which avoid such a circular argument: For example, the standard definition used by the FBI in the United States describes terrorism as “the unlawful use of force and violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives.”\textsuperscript{12} In my opinion this definition is appropriate in that it both covers attacks against civilian and state targets. However, the term “unlawful” in the definition is problematical, because it excludes those terrorist acts which are justified. The question of justification should in my opinion not be part of the definition itself, but should rather be discussed on a later level, i.e. the level of justification.\textsuperscript{13}

My other criticism is that the terrorists’ objectives are limited to political and social ones, but that the ideological or religious ones are left out (which have gained special importance since the 9/11 incidents).

My own definition of terrorism is: “the use of force and violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political, social, ideological or religious objectives.”

\textsuperscript{10} UN, Definitions of terrorism.

\textsuperscript{11} See e.g. the UN GA Res. 49/60 (1994), § 3 of the annexed Declaration on Measures to Eliminate International Terrorism: “Criminal acts intended or calculated to provoke a state of terror […]” and SC Resolution 1566 (2004): “[…] with the purpose to provoke a state of terror […]”.

\textsuperscript{12} For the list of possible definitions (including the definition used by the FBI) see PA Comission.

\textsuperscript{13} German law (particularly criminal law and law of the torts) strictly differentiates between the elements of the offence (“Tatbestand”) and the affirmative defence (“Rechtfertigung”), so that an act which can be subsumed under the elements of the offence can still be justified on another level for certain reasons.
definition emphasizes the fact that the terrorist act goes beyond the immediate act of attacking a maritime target and that the objectives are other than financial. Since there is still no universally accepted definition of terrorism\textsuperscript{14}, I will use my own definition as the basis for my thesis.

2.1.2 Maritime terrorism

As terrorism, maritime terrorism (sometimes called “political piracy”\textsuperscript{15}) has no internationally accepted definition to date. However, scholars have sometimes chosen to employ Art. 3 of the SUA Convention to get approximate to a definition, because this provision describes in some detail certain offences against maritime navigation.\textsuperscript{16} By not using the word “terrorism” the drafters clearly avoided tackling the problem of the definition.\textsuperscript{17} In my opinion, this listing of punishable offences does not help us to find an appropriate definition, because we have already seen in the above that we need a certain motivation underlying the attack for the attack to qualify as terrorism. This motivation is not mentioned in Art. 3 SUA.

The Council for Security Cooperation in the Asia Pacific (CSCAP) Working Group has generated the following definition of maritime terrorism: “[…] the undertaking of terrorist acts and activities (1) within the maritime environment, (2) using or against vessels or fixed platforms at sea or in port, or against any one of their passengers or personnel, (3) against coastal facilities or settlements, including tourist resorts, port areas and port towns or cities.”\textsuperscript{18} This definition again reflects the circularity mentioned in the above, because it describes “maritime terrorism” as the “undertaking of terrorist acts”.

Sometimes “maritime terrorism” is defined as “the use of violence at sea, in territorial waters, or against maritime targets by supranational organizations or non-state actors for

\begin{flushright}
\textsuperscript{14} Alexander, 529.  \\
\textsuperscript{15} Valencia, 82.  \\
\textsuperscript{16} Ong, 61 f.  \\
\textsuperscript{17} Mensah, 633.  \\
\textsuperscript{18} Numbering added by the author; Maritime Terrorism, Definitions; Chalk, RAND 2008, 3 uses the same definition.  
\end{flushright}
ideological, religious, or political purposes.” As already mentioned in the above the purpose of the attack might also be other than political. Another criticism is that state-actors are not included in the definition. Due to space restrictions I will only discuss non-state maritime terrorism in this thesis, however.

Some extend the definition of maritime terrorism to also include the use of the maritime transportation system, for example to smuggle terrorists or terrorist material into the targeted country. However, in my opinion this is more an act of preparation of the terrorist attack, but not “maritime terrorism” itself. Using the sea as a transport route can constitute preparation for various kinds of crimes, not only maritime terrorism. I will not include it in the definition. However, hindering terrorists from using waterways for the purpose of transporting their material is part of the prevention of maritime terrorism; I will discuss this later on in the thesis.

Since there is as yet no internationally accepted definition, I will define “maritime terrorism” as: the threat or use of force within the maritime environment against a civilian or state target (be it a vessel, a port, off-shore installation, the crew or passengers or other target) for political, social, ideological or religious objectives, i.e. other than financial objectives.

2.1.3 Overlap between maritime terrorism and piracy

The Santa Maria attack (see below p. 11) gave rise to worldwide debate as to whether the act should be considered as piracy or terrorism. The problem came up anew after the Achille Lauro attack and after the Seaborne Spirit incidents (see below p. 11 and p. 13).

There was controversy as to whether terror and piracy could be treated as equal or how these acts were to be differentiated.

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19 Pelkofski.
20 Maritime Terrorism, Definitions.
21 Stehr, 94 with further references.
22 Mejia, 33 seq.
In the media a conflation of piracy and terrorism has become more common since the attacks of September 11, 2001.\textsuperscript{23} The IMB has warned of an overlap of piracy and terrorism, particularly in Indonesia.\textsuperscript{24} There might even be “partnerships” between pirates and terrorist groups.\textsuperscript{25} According to experts, many pirates in Indonesian waters (especially in the Malacca Strait) are acting under Al-Qaeda’s influence.\textsuperscript{26} Since that piracy is largely undertaken for commercial gain it is quite likely that pirates will not hesitate to carry out a terrorist act if someone pays enough money and if they have a reasonable chance of surviving. Terrorists may also carry out acts of piracy themselves as an alternative source of revenue for their main operations. There is certainly some overlap concerning tactics and methods used\textsuperscript{27}, but piracy and terrorism have different objectives. The main difference between maritime terrorism and piracy is the motivation for the criminal act: whereas the terrorist act goes beyond the immediate danger of attacking a maritime target and the maritime terrorist commits a crime for ideological or political reasons, the pirate commits a financial crime and focusses at the terrorist act itself.\textsuperscript{28} However, it is not always that simple to distinguish between the two; in many cases there is a nexus between maritime terrorism and piracy: The fact that the origins of maritime terrorism are connected to piracy is beyond dispute.\textsuperscript{29} However, some scholars even raise the question of whether extreme cases of piracy could be classified by international law and conventions as acts of maritime terrorism.\textsuperscript{30}

\textsuperscript{23} Thamm.
\textsuperscript{24} Valencia, 78 with further references.
\textsuperscript{25} Raymond, Threat.
\textsuperscript{26} Blanda.
\textsuperscript{27} Valencia, 84 seq.; Teo, 542.
\textsuperscript{28} Teo, 542.
\textsuperscript{29} Mednikarov/Kolev, 104.
\textsuperscript{30} Ong, 2, 15 seqq.
Many have claimed that: “Today’s pirate is tomorrow’s terrorist”. Several terrorist organizations seem to be working together with local pirates in order to get them to share their knowledge with them on, for example, how to enter ships. There are reports of terrorists boarding vessels in Southeast Asia as a training exercise to improve their navigation and sailing skills. They wanted to learn how to pilot vessels to commit an attack at sea in a similar manner to the 9/11 attacks. Training seems necessary from the terrorists’ point of view because most of them are not used to the sea: Nine months before the USS Cole incident (see below p. 12) Al-Qaeda tried to commit an attack against the USS The Sullivans in the harbour of Aden, Yemen, but underestimated the weight of the explosives, so that the suicide boat sank as it entered the water. However, this nexus between piracy and maritime terrorism is not uncontroversial: The latest research by the RAND Corporation states that to date there is no credible evidence to support the speculation about such a nexus. The objectives remain entirely different. For reasons of clarity I will use the term “maritime terrorism” in its original meaning in this thesis, that is without any overlap to piracy.

2.2 Relevance of maritime terrorism

I will present the most relevant maritime terrorism incidents that have already happened and will discuss why maritime terrorism is today more likely to occur than in the past.

2.2.1 Historical review

Maritime terrorism is not a new phenomenon. The history of maritime terrorism goes back to the 1930s when the “Organisation against fascism and in support of the USSR” (better

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31 See e.g. Blanda.
32 Raymond, Threat.
33 Chalk, RAND 2008, 32.
34 The Baltic Online; Chalk, RAND 2008, XIV.
35 Raymond, Threat; Pelkofski.
36 Chalk, RAND 2008, XIV.
known as “Wollweber league”) carried out more than 20 assassinations on merchant vessels of Fascist nations.\textsuperscript{37}

To exemplify maritime terrorism and to recall some past attacks, some of the most relevant incidents should be mentioned.\textsuperscript{38}

In 1961 a group of 70 people who opposed the Portuguese government hijacked the Portuguese passenger ship \textit{Santa Maria} off the coast of Venezuela which had more than 600 passengers on board. The group wanted to overthrow the Portuguese government. During the taking over of the vessel one person was killed.

In 1985 four terrorists got on board the cruise ship \textit{Achille Lauro} after one of them had previously taken a voyage on the ship to examine the security arrangements on board and to find out how it would be possible to kill as many people as possible. They were able to bring their weapons on board in their expensive looking hand luggage without any difficulties. On board they kept very much to themselves and the crew became suspicious, but did not mention their suspicions to the captain.\textsuperscript{39} The terrorists easily gained control over the ship and the hijackers demanded the release of 50 Palestinians from Israel. To add authority to their claim the hijackers killed one American passenger and jettisoned his dead body. The hijacking was actually not supposed to occur, instead the hijackers were part of a team which wanted to commit the attack in the next port of call, which was to be in Israel.\textsuperscript{40}

In July 1988 three terrorists belonging to a Palestinian terrorist group boarded the Greek ferry \textit{City of Poros} together with some 540 other passengers. They boarded the ship as legitimate passengers carrying hidden weapons and hand grenades. Earlier on that day a car bomb had exploded on the pier where the vessel was supposed to be berthed a few hours later. The intended target was almost certainly the ship, but the bombs exploded too early.

\begin{itemize}
\item \textsuperscript{37} Stehr, 89 with further references.
\item \textsuperscript{38} Unless otherwise noted, the information on the maritime terrorist attacks is taken from: Thamm; Stehr, 89 seq.; Chalk, RAND 2008, 48 seqq.; Elegant; Helmer; Nincic; Cisterna in: Conference Maritime Security, 48-50.
\item \textsuperscript{39} Parritt, Security, 13.
\item \textsuperscript{40} Wall, 72; Alexander, 540.
\end{itemize}
Just after the ship had left the port, the terrorists opened fire on the passengers. At least nine people died and more than 100 were injured.\textsuperscript{41} The most spectacular attack at sea so far was committed in October 2000 by the suicide-commando Yemeni-Islamic Jihad against the missile destroyer \textit{USS Cole}.$^{42}$ The vessel, measuring 150 meters, was in the harbour of Aden, when a small boat loaded with 300 kilograms of explosives moved slowly towards the \textit{USS Cole}, as if it wanted to sell something. This practice is not unusual in Third-World harbours, so the guards on the \textit{USS Cole} were not at all suspicious. A few seconds later the small boat exploded and the explosion tore a hole in the vessel’s port side. 17 people were killed and 17 injured in the incident.

In October 2002 – just one week before the second anniversary of the attack on the \textit{USS Cole} – a similar maritime terrorist attack was carried out off the Yemeni coast. The French double-hull supertanker \textit{VLCC Limbourg} (300,000 tons deadweight, at the time of the attack loaded with 55,000 tons of crude oil) was rammed by a speedboat packed with explosives which penetrated the double hull and exploded both inside and outside the hull. The attack was conducted while the tanker was awaiting a harbour pilot to guide the vessel to her mooring. At the time there was only one seaman on the bridge and when he saw a motorboat coming closer at very high speed it was already too late to prevent the attack. The \textit{VLCC Limbourg} was aflame within only a few seconds and several 10,000 tons of crude oil flowed into the Gulf of Aden. One seaman was killed.

The world’s deadliest terrorist attack at sea happened on February 27, 2004 when the ferry \textit{SuperFerry14} with about 900 passengers and crew was bombed in Manila Bay. As a result of the attack the ferry sank and more than 116 people were killed. A terrorist had gone on board as a passenger with a box containing a television set packed with 16 sticks of dynamite.\textsuperscript{43} He went to the cheapest passenger section of the ship, placed the box on his seat and slipped away just before the ferry cast off. According to Time magazine “the

\begin{flushleft}
\textsuperscript{41} Parritt, Security, 17; FAS. \\
\textsuperscript{42} Raymond, Threat. \\
\textsuperscript{43} Chalk, RAND 2008, 26. \\
\end{flushleft}
SuperFerry 14 bombing will go onto the rolls as the world’s fourth deadliest terrorist strike since Sept. 11, 2001, and Asia’s worst since the Bali bombings of October 2002.”

On April 24, 2004 the crew of the rigid-hulled inflatable vessel USS Firebolt attempted a boarding operation on an Arab sailing vessel that was approaching an oil terminal in Iraq. Just as they wanted to enter the vessel, it suddenly exploded in an apparent suicide bombing. The guardsman and two sailors were killed.

In October 2005 the passengers of the luxury cruise ship Seaborne Spirit were woken up by machinegun fire and rocket-propelled grenade launchers which hit the vessel 160 km off the coast of Somalia. One member of the crew was slightly injured, but none of the passengers was injured. To date it is still unclear whether this incident qualifies as terrorism or piracy.

After having mentioned various terrorist attacks, it might seem that maritime terrorism mainly exists outside of Europe. This is not true. Besides the City of Poros incident which I already mentioned I would like to give some more examples: In 1990 the IRA attacked and damaged the Royal Navy vessel Fort Victoria while it was being fitted in a shipyard. In 1994 Algerian terrorists killed the crew of the Italian merchant vessel Lucina. And in January 1996 Chechen terrorists gained control over the Turkish ferry Avrasya which had 220 passengers on board. The leader of this terrorist group demanded that some Chechens be set free otherwise, he would navigate the vessel towards the Bosporus and sink it there. The hijacking ended without loss of blood because the terrorists gave up.

In October 2001 customs authorities in the south Italian harbour of Gioia Tauro became suspicious about a container on the pier which was to be shipped from Port Said (Egypt) via Gioia Tauro and Rotterdam to Canada. They inspected the container and found inside a bed, heater, toilet, food, plans of the destination airport in Canada, passports, a laptop, a mobile phone with spare batteries and a transcript identifying the potential terrorist as an airline mechanic. The suspect, who is associated with Al-Qaeda, was set free on bail and disappeared without a trace.

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44 Elegant.
45 Doyle; Kouri.
In June 2002 the Basque ETA tried to smuggle a car bomb onto the ferry *Val De Loire* which was shuttling between England and Spain. Fortunately, the attack was foiled. In July 2002 ETA threatened to carry out attacks on the Norwegian cruise liner *Seabourn Legend* which was anchored near the Spanish-French border.

Last but not least it should be mentioned that probably many more maritime terrorist attacks might have occurred than we can find in official statements. Due to reasons of marine insurance it is likely that many of maritime terrorist incidents have been declared as acts of piracy.\(^{46}\)

### 2.2.2 Relevance of maritime terrorism today

The maritime area covers 139,768,200 square miles. This equates to ca. 2.4 times the planet’s terrestrial area.\(^{47}\) However, most of the marine area has the status of the high seas and therefore lies outside the jurisdiction of any other than the flag state, which often gives rise to serious problems concerning the enforcement of international law.

Shipping is the heart of global trade and 92% of the worldwide trade is carried out by sea.\(^{48}\) Every day more than 5 million containers are transported by sea and less than 5% of them are inspected in the ports.\(^{49}\) This makes commercial shipping an interesting target from a terrorist’s point of view. But passenger ships might also be targets: Both cruise ships and liner-ferries are used by more and more people every year.\(^{50}\) And cruise ships in particular might be seen as a symbol of Western luxury by terrorists.

Nevertheless, only 2% of international terrorist attacks in the last 30 years have addressed maritime targets.\(^{51}\) There are several factors that could explain this: First, it has always been more difficult to carry out terrorist attacks at sea than on land because land targets are easier to reach.\(^{52}\) And most terrorists have more experience on land than at sea.\(^{53}\)

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\(^{46}\) Thamm.  
\(^{47}\) Chalk, RAND 2008, 2.  
\(^{48}\) Thamm.  
\(^{49}\) Abrams.  
\(^{50}\) Thamm.  
\(^{51}\) Chalk, RAND 2008, 3, 19.  
\(^{52}\) Valencia, 84 seq.
Furthermore, maritime terrorists need special skills and knowledge in a number of areas: They have, for example, to include the tides, wind and weather conditions in their planning. For attacks at sea they also need equipment that is not ordinarily part of a land-locked terrorist's accoutrements. Terrorists want people to witness the attack, and the same is true of maritime terrorists. They want to spread pictures of their attack all over the world as propaganda for their deed. However, it was much more difficult in the past for the media to access and report from somewhere at sea than on the land. Being out of sight, the maritime targets were generally also out of mind. Today the whole situation has changed: The obstacles that existed to committing a terrorist attack at sea have ceased to exist. Terrorists have found ways to gain sufficient knowledge about maritime targets (e.g. co-operation with local pirates, see above). There are five more factors which make a shift of terrorism from land-based to maritime targets likely nowadays: First there are many gaps and weaknesses in maritime security because states have always devoted more resources to land-based security structures; second the growth of maritime sports enterprises makes it easy for terrorists to enrol in courses which provide them with the necessary knowledge on, for example diving; third sea-based attacks offer an additional means of causing economic destabilization, for example by committing an attack which leads to the blocking of a chokepoint at the same time; fourth maritime terrorism constitutes a potential for “mass coercive punishment” (especially concerning cruise ships or ferries), because the passengers are confined to a single space and cannot leave it easily; finally container shipping offers terrorists a means of transporting all their material and personnel.

Since September 11, 2001 there have been various indications that Al-Qaeda and affiliated groups are turning their attention to maritime terrorism and that they have developed a

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53 Valencia, 84 seq.; Chalk, RAND 2008, 19 seq.
55 Chalk, RAND 2008, 20; Tophoven, Weltonline.
57 Ibid., 21 seqq.
58 Ibid., 25.
maritime attack capability.\textsuperscript{59} Only a few weeks after September 11, 2001 plans for attacks against diverse targets in Singapore were discovered (inter alia against oil refineries in the harbour and the US warships).\textsuperscript{60} According to investigations, Al-Qaeda has 12-50 of its own commercial vessels, which can be used to transport weapons, explosives or personnel or as mother ships for flexible commandos.\textsuperscript{61} So the circumstances for committing a maritime terrorist attack have changed a lot in recent times, which makes such attacks more likely that it was the case in the past.

2.3 Main scenarios of maritime terrorism

Any classification implicates the danger of a generalization, because maritime terrorism is not static. There is not only one specific way for carrying out an attack. In fact, there are various possible scenarios for maritime terrorism and alternative scenarios could complement one another. However, there are some main scenarios of maritime terrorism which are of particular concern in the post-September 11 world. They can be divided into the four following groups: firstly, terrorists using the sea as a transport route (2.3.1), secondly, terrorists using ships as weapons against targets at sea or on land (2.3.2), thirdly, terrorist attacks on vessels and other objects at sea (2.3.3), and fourthly, the intensification of the aforementioned scenarios by using weapons of mass destruction or dangerous materials (2.3.4).\textsuperscript{62}

2.3.1 Scenario 1 (the sea as a transport route)

First of all terrorists could use the sea as a way to transport weapons, explosives or personnel. There is especially great concern regarding the transport of nuclear material by sea. This scenario could also occur in combination with the hijacking of a vessel for transport purposes thereafter. In this situation the question arises of whether it constitutes

\textsuperscript{59} Geise, 9, 18.
\textsuperscript{60} Ibid., 13.
\textsuperscript{61} Ibid., 18.
\textsuperscript{62} Stehr, 108 et seq; Valencia, 82 f.
the legal basis for ships to be stopped and boarded pre-emptively (which will be discussed later).

2.3.2 Scenario 2 (ships being used as weapons against targets at sea or on land)

A ship could be used as a weapon (in the manner of the World Trade Center and Pentagon attack) to attack another vessel, to attack port facilities or other coastal targets. This scenario of the “floating bomb” could for example be fulfilled by getting a container with hazardous material on the ship which explodes in a harbour. This scenario could also occur in combination with the boarding and hijacking of a vessel which is thereafter used as a weapon.

2.3.3 Scenario 3 (terrorist attacks against objects at sea)

Terrorists could attack a vessel directly at sea be it, for example, a cargo vessel, tanker, ferry or cruise ship. My distinction between scenario 2 (under 2.3.2) and 3 is the following: In scenario 2 the vessel is used to destroy another object and in scenario 3 the vessel itself is to be destroyed. Scenario 3 could involve ramming the vessel with another vessel (e.g. one loaded with explosives, see the USS Cole and the VLCC Limbourg incidents mentioned above on p. 12) – a scenario which is especially likely to occur in narrow waterways where there is not much room to avoid the attack. Another way of attacking a vessel is by getting an object with explosives on board the vessel. In this case the terrorist can decide where and when the object is going to explode and it is not even necessary that he is on board the vessel at the time of the explosion (see e.g. the SuperFerry 14 incident above on p. 12 seq.). The terrorist could also use a container to get the explosives on board. Furthermore, terrorists could commit attacks against other objects at sea than vessels (e.g. drilling or other offshore platforms); this situation will not be addressed in this thesis.

63 Christophersen in : Guan/Skogan, 155.
2.3.4 Scenario 4 (weapons of mass destruction or dangerous materials)

Maritime terrorists could commit their attack by using weapons of mass destruction or other dangerous materials or they could hijack a vessel carrying such materials. The use of weapons of mass destruction or dangerous materials can be combined with all the different possible scenarios of maritime terrorism.

3 Prevention of maritime terrorism

There are two starting points for the prevention of maritime terrorism: On the one hand the prevention of maritime terrorism is part of the general fight against terrorism; on the other hand maritime terrorism can be fought by improving maritime security. These two aspects can often not clearly be separated from each other. So to tackle the legal concept of preventing maritime terrorism I will also discuss both of them.

First I want to discuss the aspect of maritime security. To effectively prevent maritime terrorism we need various regulations in all the areas which might be especially exposed to the threat of maritime terrorism. The method I want to use is an evaluation of the present regulations with regard to five “risk-factors” which are in my opinion the most important factors of maritime security: the vessels, the ports, the containers, the crews and the passengers. The second issue that I will discuss is the boarding and searching of vessels which is a prevention of maritime terrorism but also a prevention of any other terrorist act (on land or in the air), because it cuts off the supply with weapons, other material or personnel.

3.1 Change in the legal regime following 9/11/2001

The legal regime on maritime security changed fundamentally in the aftermath of 9/11. Historically, international law on maritime terrorism has been reactive, rather than preventive in nature. Since the early 1990s the IMO has undertaken significant work on

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64 Romero, 597.
the prevention of piracy but not so much on terrorism and only one multilateral Convention aimed (inter alia) at protecting shipping against terrorism, namely the SUA Convention. This convention came as a reaction to the *Achille Lauro* attack (see above p. 11).

Following September 11, 2001 the international community’s awareness of the risk to maritime security increased fundamentally. If an attack could be launched using a plane, it might also be possible to launch similar attacks using a ship\(^{65}\) and this would pose a serious threat to the international transport system. However, striking the balance between on the one hand doing nothing and on the other hand overreacting was not that easy. It was necessary to find a balance between freedom of navigation and security interests\(^{66}\) and after the terrorist attacks of September 11 the willingness to delimit freedom of shipping with regard to security aspects remarkably increased. It was agreed that amendments to make international shipping more secure against terrorist attacks would be made to the SOLAS Convention\(^{67}\) and in December 2002 the IMO enshrined the ISPS Code in the SOLAS Convention.\(^{68}\) The fact that this convention was chosen for the amendments is interesting, because the SOLAS Convention nominally regulates the safety of life at sea and not security issues. In the past it was the UN and not the IMO that was responsible for maritime security.\(^{69}\)

After the 9/11 incidents the SUA was also amended (inter alia the list of offences was expanded\(^{70}\)). Besides SOLAS and SUA more of the legal framework on maritime terrorism was affected by the 9/11 incidents. The most important regulations will be discussed below in connection with the relevant risk factors.

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65 Wall, 73.
66 Wolfrum in: Verhandeln, 650.
67 Jenisch, 19; Peppinck.
68 Jenisch, 19.
69 Beckman in: Global Anti-Terrorism Law and Policy, 252.
70 Reddy.
3.2 Risk factor: vessels

There are two main legal aspects concerning the vessel as a risk factor of maritime terrorism: First in order to prevent the risk being realized there must be sufficient regulations governing maritime security and second we need sufficient regulations to board and inspect vessels to prevent terrorists from using the vessel as a supply base for their weapons, other material or personnel or even to commit the attack. I will discuss these two issues in the following.

3.2.1 Vessel security

Vessels can be qualified as “interesting” targets from a terrorist’s point of view for at least two reasons: first because the transport of goods by ships forms the heart of global trade and global trade is dependent on maritime transport. The UNCTAD estimated that 5.8 billion tonnes of goods were transported by sea in 2001, which is more than 80% of the global trade volume. Maritime trade is expanding steadily and reached 7 billion tons in 2005.\textsuperscript{71} The second reason is that, in addition to transporting of goods, vessels are also a means of transporting people (e.g. ferries or cruise ships).

3.2.1.1 SUA

The SUA Convention does not contain any provisions governing vessel security. According to Art. 13 and 14 the states are to co-operate to prevent offences. However, there are no concrete provisions governing powers and authorities concerning this prevention. In other words, the current version of the SUA Convention does not provide a clear basis concerning which preventive measures are allowed and which are not (this issue will be further discussed under 3.2.2).

3.2.1.2 SOLAS and ISPS

The main source concerning provisions on vessel security is SOLAS Chapter XI-2 and particularly the ISPS Code, which was enshrined in SOLAS in 2002. Part A of the ISPS Code contains mandatory requirements for the purpose of compliance with SOLAS

\textsuperscript{71} Christophersen in: Guan/Skogan, 155.
Chapter XI-2 and Part B a non-mandatory guidance. In the United States Part B is also mandatory.\textsuperscript{72} Other chapters of SOLAS also contain important provisions on maritime security.

The main elements concerning ship security are: the Automatic Identification System (AIS), the Ship Identification Number (SIN), the Ship Security Alert System (SSAS), Ship Security Assessment (SSA), the Ship Security Plan (SSP) and International Ship Security Certificate (ISSC), a Ship Security Officer (SSO) and a Company Security Officer (CSO). Furthermore, I would like to explain the control and non-compliance measures.

3.2.1.2.1 Ship Identification Number (SIN)

SOLAS Chapter XI-1 Regulation 3 requires vessels to prominently and permanently display their unique identification number. This was introduced by adapting Resolution A.600 (15) in 1987, which was made mandatory in 1994 for all passenger ships of 100 gross tonnage and upwards and for all cargo ships of 300 gross tonnage and upwards. The Ship Identification Number remains unchanged upon transfer of the ship to another flag and should be inserted in the ship’s certificates.

In May 2005, the IMO adopted a new regulation which is expected to enter into force on 1 January 2009 referring to the company and registered owner identification number (SOLAS XI-1 Regulation 3.1).\textsuperscript{73} The aim is to introduce more transparency regarding the true ownership of the vessel.

3.2.1.2.2 Automatic Identification System (AIS)

Certain technical equipment is also to be involved to guarantee ship security. All vessels of 300 gross tonnage and upwards engaged on international voyages and cargo ships of 500 gross tonnage and upwards not engaged in international voyages and passenger ships irrespective of size will have to be fitted with the AIS (Regulation 19.2.4. Chapter V SOLAS). This system helps ships to easily track, identify and exchange pertinent navigation information with other ships and with shore-based facilities. The AIS led to the

\textsuperscript{72} Lloyd’s Register.

\textsuperscript{73} http://www.imo.org/Facilitation/mainframe.asp?topic_id=388.
adoption of regulations for Long Range Identification and Tracking (LRIT) of ships by satellite in SOLAS Chapter V in May 2006 and entered into force 1 January 2008.\textsuperscript{74} These regulations are expected to be in operation from 31 December 2008.\textsuperscript{75} Another important technical feature in this context is the Global Maritime Distress Signal System (GMDSS) which was implemented in SOLAS Chapter IV back in 1999.\textsuperscript{76} Using the AIS ports and coastal states will be better able to cope with the threat of maritime terrorism, because they will be able to identify ships navigating through their waters.

3.2.1.2.3 Ship Security Alert System (SSAS)

This system will have to be installed at the latest from 2006 on every seagoing vessel. All ships constructed on or after 1 July 2004 will have to be provided with this system (Regulation 6.1.1. Chapter XI-2 SOLAS). There are special regulations concerning the timeframe for the adoption of the system on passenger ships, oil tankers and chemical tankers (Regulation 6.1.2 and 3).

The mode of operation of the SSAS is described in Regulation 6.2.: By pushing a button a constant alarm signal will be transmitted to the competent authority, which may also be a shipping company. It will neither be audible on board the vessel nor for other vessels. There have been some problems and concerns about what information is to be transmitted to the competent authorities to allow for the identification of the vessel. In May 2006 the IMO thus issued a guidance on what information is to be provided.\textsuperscript{77} In addition to that the Sub-Committee (of the Maritime Safety Committee) on Radio Communications and Search and Rescue (COMSAR) agreed that the IMO should establish a database containing the specific requirements regarding ship security alert systems.\textsuperscript{78}

\textsuperscript{74} http://www.imo.org/Newsroom/mainframe.asp?topic_id=1472&doc_id=8836.
\textsuperscript{75} Lindfors in: Conference Maritime Security, 37.
\textsuperscript{76} For the technical details see e.g.: http://www.gmdss.com.au/.
\textsuperscript{77} http://www.imo.org/includes/blastDataOnly.asp/data_id%3D14687/1190.pdf.
\textsuperscript{78} http://www.imo.org/Newsroom/mainframe.asp?topic_id=271&doc_id=3349.
3.2.1.2.4 Ship Security Assessment (SSA)

The SSA is regulated in Section 8 of the ISPS Code. It is designed to identify weaknesses in physical structures, personnel protection systems, processes or other areas that may lead to a security breach.\textsuperscript{79} The SSA is to be carried out before developing and updating the SSP. The (minimum) elements of the SSA are described in Section 8.4 ISPS Code.\textsuperscript{80}

3.2.1.2.5 Ship Security Plan (SSP) and International Ship Security Certificate (ISSC)

The SSP must be elaborated and carried on board the vessel (Regulation 9 SOLAS Chapter XI-2; Section 9 ISPS Code). The Plan must, inter alia, address: Measures to prevent weapons, dangerous substances and devices intended for use against people (9.4.1. ISPS Code), identification of restricted areas (9.4.2. ISPS Code) and measures for the prevention of unauthorized access to the ship (9.4.3. ISPS Code). The SSP should indicate the operational and physical security measures that the ship itself can take to always operate at security level 1. It should also indicate the additional measures which make it possible to move to security level 2 or 3.\textsuperscript{81} These measures might include controlling access to the vessel itself, denying access to certain parts of the vessel, screening passengers and personnel, screening baggage and the loading of stores. Furthermore, the SOLAS/ISPS ships will have to carry an International Ship Security Certificate (ISSC) indicating compliance with the requirements of SOLAS XI-2 and Part A of the ISPS Code (Section 19 ISPS Code).\textsuperscript{82}

\textsuperscript{79} MCGA, SSA.

\textsuperscript{80} For the individual steps undertaken in the SSA see e.g.: Veristar, SSA.

\textsuperscript{81} \url{http://www.imo.org/Newsroom/mainframe.asp?topic_id=583&doc_id=2689}.

\textsuperscript{82} Ibid.
3.2.1.2.6 Ship Security Officer (SSO)

An SSO will have to be designated for each ship (Section 12 ISPS Code) by the shipping company. The duties and responsibilities of the SSO are regulated in Section 12.2. ISPS Code: He will, inter alia, be responsible for security checks on board, the implementation of the SSP and the reporting of security incidents.

3.2.1.2.7 Company Security Officer (CSO)

The CSO will have to be designated by the shipping company. The CSO’s responsibilities include, inter alia, ensuring that an SSA is properly carried out, that SSPs are prepared and submitted for approval and thereafter placed on board the ship. The CSO will also make sure that the SSA is carried out by a person with the appropriate skills (Section 11 ISPS Code).

3.2.1.2.8 Control and compliance measures

Chapter XI-2 SOLAS and Part A of the ISPS Code contain several regulations governing control and compliance measures. The control and compliance regime is divided between the flag state, the port state and the contracting governments: The flag state needs to ensure that the vessel is in compliance with (national and) international regulations. The port state can make inspections with regard to the vessel irrespective of its flag when it is in port. However, such inspections will not normally extend to an examination of the SSP itself except in specific circumstances. Usually inspections of the ships in port are limited to controlling whether they are carrying a valid ISSC on board (Regulation 9.1.1.). However, if the officers duly authorized by a contracting government have clear grounds to believe that a vessel is not in compliance with Chapter XI-2 SOLAS or Part A of the ISPS Code, they will impose further control measures: inspection of the ship, delaying the ship, detention of the ship or restriction of operations, including movement within the port or exclusion of the ship from port (Regulation 9.1.2. and 1.3. SOLAS Chapter XI-2).

Contracting governments may for security purposes require that ships intending to enter its ports provide them with certain information, for example whether the ship possesses a valid

Certificate and at which security level the ship is currently operating (Regulation 9.2.). Denial of entry into port or expulsion from port will only be imposed when there are clear grounds to believe that the ship poses an immediate threat to the security or safety of persons or of ships or other property and there are no other means for removing the threat (Regulation 9.3.3).

3.2.1.2.9 Critique of the legal regime concerning vessel security

In my opinion some aspects of SOLAS Chapter XI-2 and the ISPS Code can be criticised. I would like to point out some of the main problems. First of all, Regulation 7.3 SOLAS Chapter XI-2 is problematical: According to this regulation the contracting government has to advise ships operating in its territorial sea or having communicated an intention to enter its territorial sea of the current security levels when a risk of attack has been identified. Furthermore, the government will have to be advised of the security measures that should have been put in place by the ships concerned to protect themselves and of the security measures that the coastal state has decided to put in place. However, it is for every flag state to decide which of these advised security measures it adopts or what assistance on security measures it accepts. Therefore, some scholars argue that it should also be up to the flag states to provide guidance on the security measures concerning ships flying their flags. However, in my opinion it is important that flag states receive advice from other states, because this means that it is at least more “uncomfortable” for flag of convenience states in particular not to apply the relevant security measures.

Another problem is that SOLAS Chapter XI-2 is only applicable to vessels on international voyages (Regulation 2 SOLAS XI-2) and, besides passenger ships, the chapter is only applicable to cargo ships of 500 gross tonnage and upwards. I welcome the fact that the chapter applies to any kind of passenger ship irrespective of size, but it should also be applicable to smaller cargo ships because they can also be targets of or means for maritime terrorism in the same way as the bigger cargo ships. The fact that SOLAS Chapter XI-2 is not applied to national voyages should be resolved by national law.

84 Wall, 79.
A general problem is that the IMO has no enforcement powers on its own and is dependent on the flag or port state to enforce the new regulations governing maritime security. Since many of the “flags of convenience” states have increased their power in the IMO, the IMO is trapped in a vicious circle concerning the enforcement of maritime security rules. I would therefore recommend the IMO itself having enforcement powers.

Another problem is that new technical features make it possible not only for security authorities, but also for terrorists to get information about various vessels: Everyone can buy an AIS and can find out where which vessel with which cargo on board is situated. The SIN makes is possible for terrorists to find out which cargo vessels have loaded. So in my opinion regulations and controls should be introduced to track who is able to purchase an AIS.

3.2.2 Boarding of vessels

The issue which I want to analyze in this section can be but in one question: Is it possible under the existing law to cut off terrorists’ logistical supply by sea? We need a basis for precautionary measures to control cargo, because otherwise the freedom of navigation might be misused to support terrorism. If we do not have a basis for such measures we will not be able to act before the threat materializes. One of the main problems concerning the prevention of maritime terrorism is the boarding and inspection of vessels. I want to give an overview of the existing legal regime and to present a new draft SUA provision on the boarding of vessels which has not entered into force yet.

3.2.2.1 UNCLOS

One must differentiate between several situations depending on where the vessel is situated at the moment of boarding and inspection: the internal waters (Art. 8.1. UNCLOS), the territorial sea (Art. 2 UCLOS), the contiguous zone (Art. 33 UNCLOS), the exclusive economic zone (Art. 55 UNCLOS) and finally the high seas (Art. 86 UNCLOS).

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85 Christophersen in: Guan/Skogan, 148.
86 Dietrich Dabels and Detlef Meenke (German Shipowners Association) in: Härpfer, 4 seq.
87 Wolfrum in: Verhandeln, 665.
3.2.2.1 Internal waters and territorial sea

In the internal waters and the territorial sea the coastal state has the authority to intervene because of its full territorial sovereignty. The coastal state’s jurisdiction is only limited by the right of innocent passage (Art. 17 UNCLOS). “Passage” is defined in Art. 18 UNCLOS. And “innocent” is defined in Art. 19 UNCLOS as being not prejudicial to the peace, good order, or security of the coastal state. The right of innocent passage may be further limited by the national law of the state concerned (Art. 21 UNCLOS). Art. 19.2 UNCLOS mentions some cases where passage is not innocent. However, the preparation of terrorist acts (e.g. by transporting weapons) is not mentioned and most consider the list in Art. 19.2. UNCLOS to be exhaustive.\(^88\) So recourse to the general provision in paragraph 1 is necessary: Passage is not innocent if it is prejudicial to the peace, good order or security of the coastal state. Is the transport of terrorist material prejudicial to the peace, good order or security of the coastal state? Some scholars argue that passage is not innocent when there is reasonable suspicion that the vessel is involved in proliferation. They base their argumentation on UN SC Resolution 1540.\(^89\) Other authors have serious doubts as to whether interdiction measures may be based upon the assumption of the non-innocent nature of the transport of WMD.\(^90\) I would like to stress that the text of Art. 19.1. defines passage as not being innocent when it is prejudicial to the peace, good order or security of the coastal state. This is not the case when the vessel is only in transit on its way to another country. So the definition of innocent is very narrow. Neither Art. 21, 23 or 27 UNCLOS can serve as a basis for controlling ships in transit.\(^91\)

3.2.2.1.2 Contiguous zone and continental shelf

In the contiguous zone and on the continental shelf the coastal state only has certain sovereign rights: The coastal state has the right to exercise control measures in the contiguous zone (Art. 33 UNCLOS). These measures concern only the prevention of an

\(^{88}\) Wolfrum, Lecture, Footnote 35 with further references.


\(^{90}\) Friedman, at 3.

\(^{91}\) Wolfrum, Lecture, Footnote 18 with further references.
infringement of its customs, fiscal, immigration or sanitary laws, but not the prevention of maritime terrorist attacks. So in this zone, the prevention of terrorist attacks is only incumbent upon the coastal state if terrorists smuggle weapons or want to infiltrate the territory of the coastal state and if that can be qualified as a violation of customs or immigration regulations. Since this thesis does not discuss maritime terrorist attacks against installations on the continental shelf, I will not further mention the coastal states’ rights to prevent maritime terrorism on the continental shelf.

3.2.2.1.3 Exclusive Economic Zone (EEZ)

The question of whether the current legal regime under UNCLOS is adequate for coping with maritime terrorism in the EEZ has not been discussed a great deal so far.\(^92\) Art. 73 UNCLOS regulates the boarding and inspection by the coastal state in the EEZ. However, this only concerns the exercise of the state’s sovereign rights with regard to the living resources in the EEZ. Where a maritime terrorist attack might lead to environmental damage to (endangered) species (e.g. oil spills), then a preventive boarding act might in my opinion be qualified as an act to conserve living marine resources in the EEZ within the meaning of Art. 73.1 UNCLOS. Since Art. 58 II UNCLOS states that the rules concerning the high seas (Art. 88-115) also apply to the EEZ, I would like to refer to the discussion under 3.2.2.1.4.

3.2.2.1.4 High seas

The issue of the boarding and inspection of vessels is most problematic on the high seas. Several times ships have been boarded and inspected on the high seas: In December 2001 the \textit{MV Nisha} was stopped by British ships in international waters. Security sources said that the vessel was carrying “terrorist material”. However, in a comprehensive inch-by-inch search spread over three days nothing was found.\(^93\) In December 2002 two Spanish naval

\(^{92}\) This is also mentioned in the Conference on Maritime Security, 166 seq.

\(^{93}\) BBC, 21.12.2001; Bansal, 4; The Argus; King, 240.
ships stopped and boarded a North Korean cargo vessel which flew no flag on the high seas. The boarding party found fifteen SCUD missiles hidden under sacks of cement.\textsuperscript{94} “High seas” is defined in Art. 86 UNCLOS and Art. 87 UNCLOS regulates the principle of the freedom of the high seas. Freedom of the high seas is guaranteed by the flag state principle, that means the extension of the sovereignty of the flag state to its vessels: Vessels are under the exclusive jurisdiction of the flag states when they are on the high seas (Art. 92 UNCLOS). This provision is a codification of the principle which was already mentioned in the so-called “Lotus Case” by the PCIJ in 1924.\textsuperscript{95} As regards our question of the boarding and inspection of vessels that means that basically no state other than the flag state has the right to control vessels on the high seas. There are exceptions when there are contractual agreements (there are several bilateral ship-boarding agreements which are consistent with UNCLOS\textsuperscript{96}) between states or when international public law allows for exceptions.

Does UNCLOS contain such an exception that allows for the boarding of a ship on the high seas? First of all Art. 110 might be relevant. In the exceptions mentioned in Art. 110 UNCLOS the naval ship may first verify the boarded vessel’s right to fly its flag or may check its documents and only further examine the ship if “suspicion remains.” However, maritime terrorism is not mentioned in this provision. Therefore, some scholars are in favour of the analogous application of Art. 110 1 (a) UNCLOS in cases of maritime terrorism.\textsuperscript{97} Since the phenomena of maritime terrorism and piracy are in my opinion per definitione not comparable (see above p. 8 seqq.), a legal analogy is not possible. So I do not want to follow that approach.

An interesting legal question is whether UN SC Resolutions 1373 and 1540 have a legal impact on UNCLOS Art. 110 by extending the exceptions to cover flag state consent.\textsuperscript{98} In my opinion there is neither room for an analogy nor for an extensive interpretation of

\textsuperscript{94} Kirgis.

\textsuperscript{95} PCIJ, 1927 Series A - No. 10.

\textsuperscript{96} See Beckman in: Global Anti-Terrorism Law and Policy, 260 seq.

\textsuperscript{97} For the detailed discussion of this approach see: Münchau, 89-119.

\textsuperscript{98} Cisterna in: Maritime Security Conference, 67.
Art. 110. 1 (a) UNCLOS. Other scholars argue that Art. 88 UNCLOS provides the basis for the boarding and inspection of vessels being that are suspected of supplying terrorism. Since the provision is rather general, I am not of the opinion that we can use it as a legal basis for the boarding of a vessel.

Art. 111 (right of hot pursuit) only deals with criminal repression and not the prevention of maritime terrorism. Therefore, it does not provide us with a solution for the legal problem either.

So in summary it can be said that UNCLOS does not provide the basis for the boarding of ships on the high seas without flag state consent to prevent an act of terrorism.

3.2.2.2 The SUA Convention

The SUA Convention does not contain any concrete provisions on authorizations concerning the prevention of maritime terrorism (only a rather general statement on prevention in Art. 13). The United States proposed an amendment of the SUA Convention to establish proceedings for boarding ships on the high seas in order to prevent terrorist acts. They wanted the SUA to allow the state to which the vessel is headed to intervene on the high seas in order to take preventive action. There was debate as to whether this boarding provision is consistent with international law, and several delegations expressed concern about the US proposals, because they might be subject to abuse. However, the 2005 Protocol to the SUA Convention adds a new Art. 8 bis to allow for the boarding of vessels on the high seas suspected of being involved in terrorist activities. This amended Protocol has not entered into force yet (as at 30 June 2008).

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99 See also Heintschel von Heinegg in: Conference Maritime Security, 115.
100 Wolfrum, Lecture, Footnote 47 with further references.
101 See also Stehr, 95.
102 Kimball, 66 seq.
103 Kimball, 67; Beckman in: Global Anti-Terrorism Law and Policy, 263, 265.
104 Mensah, 645 with further references;
The new Art. 8 \textit{bis} covers co-operation and procedures to be followed if a state party which is not the flag state desires to board a ship.\textsuperscript{106} The requesting party needs to have 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 offence under the SUA Convention. Authorization for boarding can be given by the flag state ad hoc or in general (by notification of the IMO secretary general or directly to the requesting state). To deal with the problem of the “flag of convenience” states the possibility of “tacit approval” was included: If the authorities of the flag state do not respond within four hours to such a request, the boarding is allowed. However, in my opinion the time frame of only four hours seems quite arbitrary. Vessels very often operate far away from the flag state and time differences must also be taken into account.

Art. 8 \textit{bis} of the 2005 Protocol includes several safeguards when measures such as boarding or inspections are taken against a vessel: not to endanger the safety at sea, to ensure that all persons on board are treated in a manner which preserves human dignity, human rights law must be observed, due account must be taken of safety and security of the ship and its cargo, only environmentally sound measures are to be taken, and reasonable efforts must be taken to ensure that a ship is not unduly detained or delayed. Finally, 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 in the execution of authorized actions.

In my opinion, the new Art. 8 \textit{bis} is a progressive provision on preventing terrorism at sea, not only because it offers the possibility of boarding by a non-flag state but also because it contains a certain degree of flexibility concerning the authorization by the flag state. I hope that Art. 8 \textit{bis} enters into force soon. The provision creates an appropriate and proportional balance between the freedom of navigation and security interests.

If we compare Art. 8 \textit{bis} with the boarding and inspection provisions of the United Nations Straddling Fish Stocks Agreement (Art. 20.6, 21.8, 22), we see that Art. 8 \textit{bis} is more innovative, because it allows for tacit approval. However, since Art. 8 \textit{bis} does not give us any basis for boarding on the high seas where the flag state refuses to give admission, I

would welcome a modification to this provision: the flag state should only be allowed to refuse admission in certain cases.

Art. 8 bis also poses some questions: How to get reliable information early enough to intervene? Art. 8 bis allows for boarding if there is reasonable suspicion that the vessel is involved in terrorist activities. The state in question can request the relevant information concerning details about crew, passengers, cargo and destination to their ports of call (this will be further discussed below). 107

Another question is: How much information is needed to determine that the grounds for boarding are “reasonable”. This is dependent on the interpretation of that term different states will hold different opinions. In German security and police law we use the following formula to balance protected legal interests in situations of perceived danger: Even little and vague evidence gives authorization to act if the protected interest/object is of high legal (i.e. non-financial) value (e.g. life and limb of persons). On the other hand, if the interest/object that might be subject to a terrorist attack is legally less valuable (like e.g. property), we need more evidence to get the authorization to act. I would like to transfer this rule to our situation, namely the boarding of vessels on the high seas: If we have any at least vague evidence or indications that the terrorist attack might be committed against the life and limb of persons we have “reasonable grounds” for the boarding and inspection of the vessel on the high seas. However, if we only have evidence or indications that the terrorist attack might be committed against property, only vague evidence is not sufficient for authorization.

3.2.2.3 Other approaches

Since UNCLOS does not allow for boarding on the high seas to prevent maritime terrorism and Art. 8 bis SUA has not entered into force yet, I would like to discuss whether we have another legal basis for boarding on the high seas.

There are several approaches to developing a basis for inspection by non-flag states on the high seas, which to some extent slightly overlap. Unfortunately, I cannot provide an in-depth discussion here, but I would like to give a short overview:

107 Wolfrum in: Verhandeln, 663.
3.2.2.3.1 Obligation erga omnes

If a violation of an obligation erga omnes is supposed to be committed with the help of the vessel, other states than the flag state might have the right to board and inspect it. The prevention of (maritime) terrorism is not such an obligation erga omnes, but the right to life (being a fundamental human right) is an obligation erga omnes. However, the transport of terrorist material or personnel on a vessel is a purely preparatory act and does not violate the right to life. So we cannot derive the right to board a vessel on the high seas from this institute.

3.2.2.3.2 With the consent of the flag state

Boarding of vessels is legal when it happens with the consent of the flag state (e.g. on the basis of a bilateral agreement). Since the prevention of (maritime) terrorism does not violate jus cogens, such consent is generally admissible. The only problem in this case is whether the flag state is free to give its consent or whether consent must be given to the requesting state in certain cases.

3.2.2.3.3 To protect own nationals

There might be a right or even an obligation of the non-flag states to board the ship to safeguard their own nationals on this ship even if the flag states has not given its authority to do so. A right to board to protect own nationals might especially be relevant when the flag state is unable or unwilling to react, because it either does not have the capacity or the will to act with due diligence with regard to its flag state control. Whereas some scholars qualify such boarding as a violation of the principle of non-intervention and therefore as a violation of the flag state principle, others make this decision more dependent on the actual circumstances of the situation. Boarding might be

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108 See e.g. Hoogh, 55.
109 See Ronzitti, 8.
110 Münchau, 123 seq.
111 Ronzitti, 9; Münchau, 122 seq.
112 Münchau, 123 seq.
113 Ronzitti, 9.
justified under the principle of necessity. According to other scholars, the right of a non-flag state to safeguard the people by boarding and inspecting the vessel derives from the general principle of safeguarding human life. The boarding is not justified if force within the meaning of Art. 2.4. UN Charter is used.

3.2.2.3.4 Vessels without nationality

Another approach might be considered: Can vessels under the control of terrorists be treated as ships without nationality since the flag state has lost control within the meaning of Art. 110. 1 (d) UNCLOS? This would mean that any state would be entitled to arrest and seize these ships. However, Art. 104 UNCLOS only provides for the retention or loss of nationality of a pirate ship not of a terrorist vessel. Since piracy and terrorism are completely different phenomena, the provision can not be applied analogously. We could also pose the following question: Can a vessel carrying WMD or terrorists be legally qualified as stateless, if the flag state refuses to grant consent to board? Since Art. 104 only explicitly mentions pirate ships and piracy and terrorism are not comparably, I do not want to follow this approach.

3.2.2.3.5 Pre-emptive self-defence

Boarding of a vessel by a non-flag state might be justified as a measure of pre-emptive self-defence according to Art. 51 UN Charter. The approach of individual or collective self-defence against terrorism is repeated in UN SC Resolutions 1368 (2001) and 1373 (2001), but has not yet become customary law.

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114 Wolfrum in: Verhandeln, 662.
116 Wolfrum in: Verhandeln, 664.
118 Münchau, 126-129.
119 Wolfrum in: Verhandeln, 664
120 Byers, 540 seqq.
There are several controversial issues connected with Art. 51 UN Charter. First of all, it is a matter of debate as to whether only state attacks are included or also attacks by private parties. The second controversial issue is whether Art. 51 can be applied preventively. I will not discuss these problems here, because they have already been discussed by others several times in great depth. In my opinion, activities by private parties should be allowed and a preventive application should be included. So the boarding of vessels could be qualified as pre-emptive self-defence.

Resolution 1373 in particular and its obligation to suppress terrorism by eliminating its financial and logistical support is regarded as providing the legal basis for approaching and boarding ships under foreign flags and investigating their documents, their cargo and crew where there are indications that they may be supporting terrorism. However, these measures must be appropriate to be justified.

3.2.2.3.6 UN SC Resolution 1540

In April 2004, following a request from the United States, the UN SC adopted a resolution on the non-proliferation of weapons of mass destruction (Resolution 1540). There were two concerns that led to this comprehensive resolution: terrorism and the proliferation of WMD. The resolution imposes several obligations on states with regard to the boarding of vessels and reinforces certain non-proliferation objectives of the NPT, and key NPT obligations. Most important is the obligation to adopt domestic measures to prevent the proliferation of WMD. This resolution might be (possibly in connection with the abovementioned Resolutions 1368 and 1373) regarded as a basis for the preventive boarding of vessels on the high seas.

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121 See e.g. Charney, 835 seqq.; Travalio/Altenburg, 97 seqq.; Travalio, 145 seqq. and see Rouillard’s discussion on the Caroline Case (p. 104 seqq.); see also, for example, the Nicaragua Case, the Oil Platforms Case, the Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons and the Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory.
122 Wolfrum in: Verhandeln, 666.
123 Oosthuizen/Wilmshurst, 1.
124 Semmel.
3.2.2.3.7 Holistic approach

Some scholars propose a more holistic approach. They say the worldwide fight against terrorism derives from UN SC Resolutions 1368 (2001) and 1373 (2001), SOLAS and the general rules of international public law. Since the UN is based on the principle of reciprocal security, states have the authority to control a vessel in the interest of a flag state when there are sufficient suspicious facts for (preparation of) terrorist activities. I do not like this approach, because being so undogmatic it lacks a true legal basis, in my opinion.

3.2.2.4 Proliferation Security Initiative (PSI)

The PSI is an initiative of the United States aimed at stopping shipments of WMD, their delivery systems and related materials worldwide. The core element of the PSI is the Statement of Interdiction Principles. The PSI was announced by the United States in May 2003 and started with ten countries. On the first anniversary meeting of the PSI, more than 60 states had already expressed their support for the PSI. The PSI creates a framework for international co-operation based on a set of activities rather than a formal treaty-based organization. It does not establish “formal obligations for participating states, but does represent a political commitment to establish best practices to stop proliferation-related shipments.” On the basis of this political framework, states enter into bilateral agreements with the United States that allow vessels flagged in those states to be boarded. Bilateral ship-boarding agreements usually include a provision stating that if the flag state has not responded to a boarding request within a number of hours it is deemed to have given consent to the boarding. Numbers 4 b-d of the Statement of Interdiction contain provisions governing the boarding and searching of vessels by the flag state when the vessels are in the internal waters, territorial sea or areas beyond the

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125 Stehr, 95 seqq.
126 USInfo, PSI; Globalsecurity, PSI.
128 Beckman in: Global anti-terrorism law and policy, 256.
129 The legal basis of the PSI has not been clarified fully. See: Wolfrum, Lecture, 16.
130 USInfo, PSI.
131 Chatham House, Ship-Boarding, first p.
territorial seas of any state. When the vessel is “reasonably suspected” of transporting cargoes of WMD, it might be boarded by the flag state on its own initiative or at the request of another state (this is similar to the draft of Art. 8 bis SUA, see above p. 30 seqq.). Questions have been raised as to whether the PSI principles are consistent with international law, in particular with the provisions of UNCLOS.132 When discussing this legal problem, a distinction must be made between boarding by the flag state when the vessel is in internal or territorial waters, boarding in international waters (EEZ and high seas) and boarding by the coastal state while the vessel is in the territorial sea or contiguous zone.

The principles regarding the boarding of vessels by the flag state in its internal waters or the territorial sea are consistent with UNCLOS133, but are the interdiction principles in international waters (EEZ and high seas) also consistent with UNCLOS? According to Art. 92 UNCLOS, vessels in these waters are under the exclusive jurisdiction of the flag state (except for circumstances provided for under UNCLOS or other international law). So the consent of the flag state is needed to board vessels on the high seas. Number 4 c of the PSI Interdiction Principles provides that the participating state (in our case the flag state) should seriously consider providing consent to such boarding under appropriate circumstances. Also the Frequently Asked Questions on the PSI make it clear that the interdiction of vessels in international waters is dependent on the consent of the flag state: “PSI actions will be taken consistent with existing national legal authority and international law and frameworks. This includes relevant international legal principles relating to boarding of vessels on the high seas. In the case of interdiction of vessels flying flags of convenience, the consent of the flag state would ordinarily provide a clear basis for a boarding on the high seas under international law.”134 So as regards boarding on the high seas, the PSI is consistent with UNCLOS.

The most controversial principles set out in the interdiction principles of the PSI concern the boarding and inspection of vessels by coastal states while they are in their territorial sea

132 Beckman in: Global anti-terrorism law and policy, 256 seqq.
133 Ibid., 257.
134 FAS.
or contiguous zone and vessels entering or leaving the territorial sea. Pursuant to UNCLOS these vessels have a right to innocent passage. As already discussed in the above (p. 27), the transport of WMD or material to construct WMD is to be qualified as being innocent when the vessel is only in transit, because such passage is not prejudicial to the peace, good order or security of the coastal state. So a vessel in the territorial sea or contiguous zone should not be boarded when the vessel is only in transit because such passage is “innocent” according to UNCLOS. Therefore, in my opinion the PSI is not consistent with UNCLOS in regard to this aspect.

The United States has often been criticized for its approach to the establishment of the PSI framework. It was said to be outside the existing international conventions and that the PSI was an example of the United States using its power and influence to achieve the coalitions it wants. In my opinion, such an undifferentiated critique is not appropriate. As seen in my discussion, most of the PSI interdiction principles are consistent with UNCLOS.

3.3 Risk factor: ports

Why are ports at risk of being exposed to maritime terrorism? Millions of people work in ports. There are not only those who work in port areas but also all the non-port workers who deliver goods and services to ports or have access to ports for other reasons linked to ship and port operations. The security of people working in ports and terminals, including service providers to ports and ships, is of primary importance in the prevention of maritime terrorism, because ports are the lynchpins of maritime security. Ports are widely accessible by land and sea and their infrastructures are often interlinked with those of the neighbouring countries. The interdependence of the world’s economy today and the “just-in-time” inventory system have created a situation in which a terrorist act in a port could trigger a chain reaction which has an impact on the whole global economy.

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135 Beckman in: Global anti-terrorism law and policy, 258.
136 Ibid, 260 with further references.
138 Lorenz, 9.
139 Murphy, 80.
In the following I would like to present the current regulations governing port security: The new SOLAS Chapter XI-2 and the ISPS-Code contain several security measures which port facilities must comply with. According to Regulation 10 Chapter XI-2 SOLAS, port facilities have to take into account the guidance given in Part B ISPS Code and governments have to ensure that the port security measures are carried out. There are three security levels and for each level certain security measures are to be implemented (Section 14 ISPS Code). The most important of these new ISPS port security measures are: Port Facility Security Assessment (PFSA), Port Facility Security Plan (PFSP) and Port Facility Security Officer (PFSO).

3.3.1 Port Facility Security Assessment (PFSA)

Section 15 ISPS Code regulates the PFSA. Each contracting government has to make sure that the PFSA is carried out for each port facility within its territory that serves ships engaged in international voyages. The PFSA is a risk analysis of all aspects of a port’s facility operation. The aim of this analysis is to determine which parts of the port facility are vulnerable and therefore likely to be subject to an attack.  

3.3.2 Port Facility Security Plan (PFSP)

The PFSP (Section 16 ISPS Code) is developed by the governments in whose territory the port facility is located (Reg. 3.2. SOLAS XI-2) on the basis of the PFSA. The main concern of the PFSP is to exclude unwarranted persons and undesirable objects from the port facility. The plan has to indicate the operational and physical security measures which the port facility needs to take to always operate at security level 1. The plan should also indicate additional security measures that need to be taken to operate at security level 2 or 3. If a vessel is operating, for example, at security level 1 and wants to enter a port operating at a higher security level it needs to have security measures that comply with the (higher) security level (Regulation 4.3. SOLAS XI-2).

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141 Ibid.
3.3.3 Port Facility Security Officer (PFSO)

According to Section 17 ISPS Code each port facility must designate a PFSO. The duties and responsibilities of the PFSO are mentioned in Section 17.2. ISPS Code. He will also receive training taking into account the guidance given in Part B of the ISPS Code (Section 18 ISPS Code).

3.4 Risk factor: containers

Approximately 12-15 million containers are used in global trade, and 232 million container movements are made through ports worldwide each year.\textsuperscript{142} Terrorists could use these containers to transport weapons, material or personnel (see the Gioia Tauro incident, above p. 13) or as a means to commit an attack. Most analysts agree that the scenario of terrorists committing an attack with the help of containers is most likely because the international trading system is deliberately designed to be as open and as accessible as possible. Less than 5% of the containers shipped worldwide are inspected at their port of arrival.\textsuperscript{143} Purely from a statistical point of view there is thus a high probability that a container that has been tampered with will not be found.\textsuperscript{144} It is like “finding the […] needle in the container haystack”.\textsuperscript{145} Every time the unit is re-loaded it should be checked that the seal is not broken.\textsuperscript{146} In addition, the locks used to seal the containers are often only of a rudimentary nature.\textsuperscript{147} And as soon as the container has reached the high seas, an inspection by a state other than the flag state is legally impossible or at least legally controversial (see above on p. 26 seqq.).

In addition, container shipping involves many different actors: the exporter, the importer, freight forwarder, customs broker, excise inspectors, truckers, railroad workers, dock

\textsuperscript{142} Christophersen in: Guan/Skogan, 155.
\textsuperscript{143} Abrams.
\textsuperscript{144} Chalk, RAND 2008, 27.
\textsuperscript{146} Mortensen in: Conference Maritime Security, 85 seq. gives an overview on the measures that should be applied to high-risk-containers.
\textsuperscript{147} Chalk, RAND 2008, 28.
workers, and the crews of the vessels themselves.\textsuperscript{148} The diversity of all procedures incorporating all these involved persons presents different windows of opportunity for terrorists to infiltrate containers.

There are several legal regulations governing container security. I will present the SAFE framework and the CSI in the following.

3.4.1 SAFE Framework

Since the SOLAS Convention is only concerned with the safety of life at sea, but most of the security-sensitive parts of cargo operation take place on land, other means of addressing the question of cargo and container security needed to be found. Therefore, the 2002 SOLAS Conference passed resolutions to enhance security in co-operation with the ILO and WCO.\textsuperscript{149} The WCO was regarded as being the appropriate platform for this because it has the membership and thus the participation of customs administrations representing 99% of global trade.\textsuperscript{150} The Resolution on Supply Chain Security and Trade Facilitation which addressed the protection of the international trade supply chain from acts of (maritime) terrorism was adopted. Since this resolution several measures have been established:\textsuperscript{151} a WCO list of 27 essential data elements for the identification of high-risk consignments, Customs Guidelines for Advance Cargo Information to enable the advance (pre-arrival) electronic transmission of customs data, WCO High Level Guidelines for Co-operative Arrangements between Members and Private Industry to Increase Supply Chain Security, a new International Convention on Mutual Administrative Assistance in Customs Matters to assist Members in developing a legal basis to enable the advance electronic transmission of customs data. In June 2005 the WCO adopted the Framework of Standards to Secure and Facilitate Global Trade (SAFE Framework) which is based on two pillars with international standards for both customs administrations and the business community. It was described

\begin{footnotes}
\footnote{148} Greenberg et al., RAND 2006, 113.
\footnote{149} \url{http://www.imo.org/includes/blastDataOnly.asp/data_id%3D17982/Containerised.pdf}.
\footnote{150} See the introduction of SAFE (p. 2) at: \url{http://www.un.org/sc/ctc/pdf/SAFE.pdf}.
\footnote{151} \url{http://www.imo.org/Newsroom/mainframe.asp?topic_id=897#wcocontainers}.
\end{footnotes}
as the “beginning of a new approach to working methods and partnerships for both customs and business”.  

3.4.2 CSI

The CSI is a precautionary multinational programme protecting containerized shipping from being exploited or disrupted by international terrorists. It was developed by US Customs, now the US Bureau of Customs and Border Protection (CBP), in the aftermath of the terrorist attacks of September 11, 2001. Since it may be too late and therefore of little value to inspect cargo at the port of destination this should be already done at the port of departure. The United States called this procedure an “extension of the borders”, because the physical borders are now the last line of defence and not the first. Singapore was the first country to sign this agreement with the United States. In October 2007 the CSI was operational in more than 50 ports in Europe, Asia, Africa, the Middle East and America. Most of the operating ports are in Europe and Asia.

The CSI is based on four core elements: firstly, identifying the high-risk containers, secondly, screening containers as early in the supply chain as possible (i.e. generally at the port of departure), thirdly, using technology that makes it possible to screen the containers so rapidly that screening does not slow down the movement of trade and, finally, using tamper-proof containers which will allow customs officers at the ports of arrival to identify manipulated containers.

The CSI is reciprocal and offers participating countries the opportunity to send their customs officers to major US ports to target ocean-going, containerized cargo to be exported to their countries. The US CBP is willing to assist foreign governments in reviewing existing laws and crafting new legislation to support implementation if they so

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152 Danet, Foreword.
153 Worldtraderef, CSI.
154 Romero, 3.
155 Bureau of International Information Programs, Global network.
156 Wolfram, Lecture, Footnote, 73.
157 Worldtraderef, CSI.
desire.\textsuperscript{158} Even though many countries are of the opinion that the container security approach is exaggerated, they have no other option than to co-operate with the United States if they do not want to lose the right to enter US ports.\textsuperscript{159} So in my opinion we could call the CSI a de facto international approach.

The CSI has often been subject to criticism: It was said that US unilateralism wants to protect the United States by pushing the risk to foreign ports and that it would have been better to regulate the issue of container security internationally.\textsuperscript{160} However, given the fact that most major seaports have joined the CSI, one must in my opinion say that the CSI has been a success.

3.5 Risk factor: crews

A large number of people are employed on vessels or work with cargo. International merchant fleets comprise 1,227,000 officers and seamen from many different countries.\textsuperscript{161} And every year thousands sail with falsified documents, which poses enormous security risks.\textsuperscript{162}

There are four main concerns about maritime security concerning the risk factor “crews” which I will present and discuss in the following: First the seafarers’ identity documents are often too easy to falsify, second there are insufficient background checks and the identity systems for seafarers in many developing countries are not secure. There are also concerns about screening of personnel, which is often not very stringent. The fourth major security concern is about the shore leave of the ships’ crew.

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\textsuperscript{158} Worldtraderef, CSI.
\textsuperscript{159} See e.g. the statement of Detlef Meenke (Verband Deutscher Reederei/Association of German Shipowners) in: Otten.
\textsuperscript{160} Beckman in: Global anti-terrorism law and policy, 255; Wolfrum Lecture, 27 with further references; Salamanca Aguado, 405 seqq.
\textsuperscript{161} Stehr, 126; Christophersen in: Guan/Skogan, 155; OECD 2003, 14 with further references.
\textsuperscript{162} Stehr, 126 with further references.
\end{flushright}
3.5.1 Identification

Main concerns have often been about the seafarers identity documents and background checks and it was necessary to seek compromises between the parties involved when drafting new regulations. Many concerns were resolved in 2002 by the adoption of a resolution (Conference resolution 8: Enhancement of security in co-operation with the International Labour Organization) requesting the IMO to co-operate with the ILO in the development of a seafarer’s document covering all the relevant data.\textsuperscript{163} In June 2003 The Seafarers Identity Documents Convention (2003, revised) was issued and became effective as from February 9, 2005. By 22 July, 2008 the Convention had been ratified by 13 countries.\textsuperscript{164} The revised Convention introduces a viable system for meeting contemporary security concerns while maintaining the necessary facilitation of shipping and recognition of the needs of seafarers at the same time.\textsuperscript{165} Each member state issues each of its seafaring nationals with an identity document embodying at least one security feature such as watermarks, ultraviolet features, holograms or laser engraving. This new identification system requires the maintenance of a national database but also international oversight.\textsuperscript{166} In March 2004 the ILO adopted a new “biometric” template for turning two seafarer’s fingerprints into an internationally standardized barcode. This will enable biometric identification of seafarers worldwide.\textsuperscript{167} Also the PFSP as described in the ISPS Code should contain procedures for the verification of identity documents.\textsuperscript{168}

3.5.2 Background checks

A major problem concerning background checks is how to get reliable information about the crew early enough to intervene before the vessel is in port. Ships approaching the United States are requested to communicate details about passengers, cargo, destination but

\textsuperscript{163} Mensah, 639; \url{http://www.imo.org/Newsroom/mainframe.asp?topic_id=583&doc_id=2689}

\textsuperscript{164} \url{http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?C185}.

\textsuperscript{165} \url{http://www.ilo.org/public/english/dialogue/sector/sectors/mariti/security.htm}.

\textsuperscript{166} Ibid.

\textsuperscript{167} Beckman in: Global Anti-terrorism Law and Policy, 253.

\textsuperscript{168} See the ILO and IMO code of practice: Security in ports, 8.1.9 (p. 11).
also about the crew in advance. Under the 96-hour rule of arrival, ships wishing to enter US ports have to provide 96 hours prior notice of arrival to the US Coast Guard and to provide it with certain information. This notice must include a list of all those on board (crew and passengers) with date of birth, nationality and passport number.\textsuperscript{169}

There are also several regulations in international law concerning providing the port of call with information: According to Regulation 5 Chapter XI-2 SOLAS the company (i.e. the ship owning company as defined in Chapter IX Regulation 1.1. SOLAS) must ensure that the master has available on board at all times information on who is responsible for appointing the members of the crew or persons currently employed or engaged on the ship. However, according to Regulation 9.2.1.6 Chapter XI-2 SOLAS ships intending to enter a port of another contracting government may be required by the ports which they want to call at to provide “other practical security related information”. 4.39.4 ISPS Code Part B (guidance) further describes what kind of information this is supposed to be. Such other practical information that may be required in the port is, for example, a crew list.\textsuperscript{170}

The FAL Convention also contains some provisions on requirements made of documents (such as a crew list) by public authorities on arrival or on departure (Annex Section 2 A.). According to this convention it is recommended practice that public authorities should not require the crew list to include more information than the name and nationality of the ship, the crew member’s family name, given names, nationality, rank or rating, date and place of birth, nature and number of identity document, port and date of arrival and where the crew member arrived from (section 2.6.1.).

3.5.3 Screening of personnel

The frequency of screening of personnel generally depends on which security level (according to the ISPS Code) is applicable. Whereas security level 1 includes only random screening of personnel, the frequency of screening in level 2 is increased and the access

\textsuperscript{169} Kimball, 68.

\textsuperscript{170} For example the port of Aarhus in Denmark requires all the vessels that want to call at its port to supply in advance a crew list and if necessary a list of crew changes (http://www.aarhushavn.dk/en/regulations_and_security/isps/).
and movement control measures more stringent. Level 3 measures may include 100 per cent screening as well as increased identification checks.\textsuperscript{171}

3.5.4 Shore leave

A very controversial issue on maritime security concerning the crew is shore leave. Shore leave is defined in Annex Section 2 A. of the FAL Convention as the permission for a crew member to be ashore during the ship’s stay in port within such geographical or time limits, if any, as may be decided by the public authorities.

Such a right to shore leave existed for merchant sailors in customary law long before it appeared in the earliest written maritime codes of the Middle Ages.\textsuperscript{172} However, the right to shore leave is not an absolute right. A very controversial matter is in what way the shore leave of the vessel’s crew is to be restricted nowadays. This is because of the conflicts between security and human rights which arise under that issue. There must be a proper balance between the needs of security, the protection of the human rights of the seafarers and working efficiency on the ship.\textsuperscript{173} The preamble to the ISPS Code (under No. 10) clearly states that ISPS is not to be interpreted in a way that is inconsistent with existing international law that protects the rights and freedoms of seafarers. If there is no reason (such as public health, public safety or public order) for refusing to grant a shore leave permission, foreign crew members shall be allowed to shore leave according to the FAL Convention (see the Preamble of the ISPS Code No 11). On World Maritime Day 2004, shore leave was spotlighted and it was pointed out that shore leave in foreign ports is important to ensure the seafarers’ wellbeing and welfare.\textsuperscript{174}

According to section 16.3.15 ISPS Code/Part A and 16.8.14 ISPS Code/Part B the PFSP too must address procedures for facilitating shore leave for ship’s personnel or personnel changes. However, certain governments, such as that of the United States, have placed

\textsuperscript{171} See the ILO and IMO Code of practice: Security in ports, 12.

\textsuperscript{172} See Stevenson, with further references.

\textsuperscript{173} MSC/Circ.1112;  http://www.imo.org/newsroom/mainframe.asp?topic_id=848&doc_id=3628; see also Hesse/Charalambous, 135 seq.

\textsuperscript{174} Cockroft/Horrocks.
tighter restrictions than those which are provided for under international law on the shore leave of seafarers: Not only has shore leave frequently been denied but some companies have also been required to hire armed guards to prevent foreign seafarers from leaving their ships. Despite the principle established under international law that seafarers should not be required to obtain visas in order to enjoy shore leave when they can present the new ID (according to the International Labour Organization Seafarers’ Identity Documents Convention, revised 2003), the United States requests individual visas for entry to US ports.175

The FAL Convention contains regulations governing shore leave. The last amendments which entered into force 1 November 2006 include a recommended practice for public authorities to develop the necessary procedures in order to use pre-arrival and pre-departure information to facilitate the processing of information and thus expedite and release clearance of cargo and persons. As a starting point crew members will not be required to have a special permit, for example, a shore leave pass, for the purpose of shore leave (Annex A 3.19.3.). Requiring a visa for shore leave is also specifically prohibited (3.45). It is recommended practice that public authorities should normally not require the presentation of individual identity documents or of information supplementing the seafarer’s identity document in respect of members of the crew other than that given on the crew list (3.10.3). 3.19 states that foreign crew members are to be allowed ashore by the public authorities while the ship on which they arrive is in port. Permission to come ashore can only be refused by the public authorities for reasons of public health, public safety or public order.

The International Labor Organization’s Seafarers’ Identity Documents Convention (Revised), 2003 (ILO-185), which has not yet come into force and has not yet been ratified by the United States, reaffirms the seafarers’ right to shore leave in its preamble: Since the seafarers work and live on the vessels, shore leave is a vital element for the seafarer’s wellbeing. According to Art. 6 seafarers are not to be required to hold a visa for the purpose of shore leave. Shore leave might be restricted by port authorities because of

public health, public safety, public order or national security (Article 6.5.). Similarly, the draft Consolidated Maritime Labour Convention (which is supposed to be a consolidation of all maritime labour standards when the consolidation process is finished) affirms the seafarers right to shore leave in Regulation 2.4.176

3.6 Risk factor: passengers

Several security measures prevent passengers from being harmed by a terrorist attack. However, passengers themselves could also constitute a threat. What legal regime do we have to prevent a terrorist attack being committed by someone who has entered a vessel as a legitimate passenger? Is there a difference with regard to passenger ferries and cruise ships? I would like to answer this question by first analyzing the risk factor “passengers” for cruise ships and ferries and then presenting the legal regime.

3.6.1 Cruise ships

Every year millions of people from countries all over the world go on a cruise. The Queen Mary 2, for instance, carries up to 3900 passengers and crew members.177 Cruise ships have been targets for terrorism in the past (see e.g. the Achille Lauro attack). It was reported that on June 15, 2008 the British Foreign Intelligence Service (MI6) uncovered a plot by Al-Qaeda to attack cruise ships in the Caribbean and jihadist websites state that Al-Qaeda plans to infiltrate terrorists with fake identities to work on cruise ships.178 Maritime terrorists are interested in cruise ships for several reasons, including the following: cruise ships carry a large number of people from different countries who are confined to a single space, they are of a highly iconic nature and reflect a type of Western materialism.179 Moreover, such an attack on a highly symbolic target could cause billions of dollars in economic damage and attract considerable media attention.180 Cruise ships sail according to precise schedules which are readily available on the internet or in brochures. These are

176 Stevenson.
177 Greenberg et al., RAND 2006, 73.
178 Maritime Terrorism, News.
179 Greenberg et al., RAND 2006, 75.
180 Ibid., 85.
extremely valuable sources of intelligence for maritime terrorists.\footnote{Greenberg et al., RAND 2006, 75.} Whereas some cruise ship companies require all boarding passengers to pass through a metal detector and x-ray all carry-on luggage, many companies do not do so.\footnote{Ibid., 76.}

3.6.2 Ferries

Ferries are certainly a target which is not as iconic or prestigious as cruise ships, nor do they constitute the same type of high economic value as is associated with container shipping. However, several traits inherent to passenger ferries make them extremely attractive to terrorists: they are easy to access, they have the potential to kill many people and are therefore likely to capture significant media attention. Ro-ro (roll on, roll off) ferries in particular allow for rapid loading of cars, tourist coaches, busses, mini vans and freight trucks.\footnote{Greenberg et al., RAND 2006, 93.}

Perhaps the best example of the positive cost-benefit ratio association in a terrorist’s view was the SuperFerry 14 which was bombed in 2004 (see above p. 12). Although costing only between $300 and $400, the attack killed 116 and injured more than 300 people.\footnote{Ibid., 95; Chalk, RAND 2008, 26.} Despite greater interest among analysts in the possibility of an attack on a cruise ship, many say that open-access ferries are probably the most likely targets for mass casualty attacks, possibly including hostage-taking at sea.\footnote{Murphy, 58.} Since these ferries are easily accessible, terrorists can enter the ferries as legitimate passengers and bring their material on board in luggage or even in vehicles (e.g. the SuperFerry 14 and City of Poros incidents, see above p. 11 seq.).

Security measures carried out at ferry passenger terminals vary greatly: Even in states like the Netherlands, Canada, the UK and the USA, these measures are not nearly as extensive
as those employed for cruise liners and much less extensive than those applied in commercial aviation.\(^\text{186}\)

### 3.6.3 Legal regime concerning the risk factor “passengers”

To prevent terrorists entering ships as legitimate passengers and bringing material on board to commit an attack, the following measures are most important: identity and background checks and screening of all persons and their luggage before they enter the ship. The most important legal sources regulating these measures are the ISPS Code and the FAL Convention.

The ISPS Code is applicable to all kinds of passenger vessels (Regulation 2.1.1.1.). The frequency of such security checks generally depends on which security level in the ISPS Code is applicable, and the quality and quantity of checks carried out will be dependent on the security level of the vessel and of the port facility. Whereas security level 1 includes only random screening of personnel, the frequency of screening is increased in level 2 and access and movement control measures are more stringent. Level 3 measures may include 100 per cent screening as well as increased identity checks.\(^\text{187}\)

According to Regulation 9.2.1.6 Chapter XI-2 SOLAS, ships intending to enter a port of another contracting government may be required by the ports at which they want to call to provide “other practical security related information” and regulation 4.39.6 ISPS Code Part B (guidance) mentions that this information can contain a passenger list.

However, the tools of the ISPS Code are not applied to all shipping in the same way. Alternative security agreements are allowed in the ferry sector for short voyages on fixed routes between port facilities in the territory of countries that are parties to the agreement (Annex B 4.26). These alternatives must be true alternatives, that is they must meet the same standard as the ISPS Code.\(^\text{188}\) Alternatives measures were allowed for because the regular ISPS rules are said to interfere too much with the loading and discharging process.

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\(^{186}\) Greenberg et al., RAND 2006, 95 seq.

\(^{187}\) See the ILO and IMO Code of practice: Security in ports, 12.

\(^{188}\) Nöll in: Conference Maritime Security, 92 seq.
The second reason for allowing alternative measures was that all measures have to be coordinated between the maritime administrations at both ends of the ferries itinerary. The FAL Convention (Annex Section 2 A and B) also provides for the possibility of public authorities requesting a passenger list on arrival or on departure to obtain the information referred to in Art. 2.7.3. However, it is recommended practice that public authorities should not require passenger lists on short routes between neighbouring countries (2.7.1). There are less stringent security regulations for passengers in transit who do not leave the vessel (3.36.-3.42).

The Convention also contains one chapter which is solely applicable to cruise ships and cruise passengers: For cruise ships the passenger list will be required only at the first port of arrival and final port of departure in a country provided that there has been no change in the circumstances of the voyage (3.21).

4 Conclusion

In my opinion, no general answer can be given to the question “Is today’s maritime security sufficient?” For a long time maritime security did not receive as much attention internationally as it should have. Now the days of little maritime security have passed.\(^\text{189}\) Much progress has been made – particularly after 9/11. However, today’s legal regime on maritime security has not only strengths, but also some flaws.

First of all I would appreciate if states found a definition of “maritime terrorism” they could agree on. Second I must say that I am not of the opinion that the premise “security is a matter of prioritizing and balancing risks”,\(^\text{190}\) and the resulting three security levels is an appropriate basis for regulating maritime security. Pursuant to the new SOLAS XI-2 and ISPS Code regime we have many new possibilities for creating a good standard of maritime security concerning particularly vessel and port security. However, the quality

\(^{189}\) Wall, 78.

\(^{190}\) Christophersen in: Guan/Skogan, 156.
and quantity of preventive security measures depends significantly on the currently applicable security level. This concept of security levels entails a grave problem. Of course we can never eliminate a risk completely. However, we can never be certain whether the evaluation of the applicable security has come to the right conclusion. Therefore, it might be the case that we operate on security level 1 on a certain vessel, but then a massive terrorist attack is carried out which could have been prevented with security measures from a higher security level. In other words: Why is every passenger checked for his identity, has to pass trough a metal detector and every single bag is screened at an airport before he is allowed to board the plane, whereas at a port or on a vessel the same quantity and quality of measures only takes place if a high security level applies? In conclusion, I must say that nowadays it seems easier to attack a ship or a coastal city than an aeroplane.\textsuperscript{191} I hope this will not result in an increasing number of maritime terrorist attacks.

One might say that it is not possible to always operate on a higher security level in the maritime sector because this would cost too much and all the security checks would take too much time, so that the whole flow of the trade system would be delayed.\textsuperscript{192} But one could also pose the question of why these strict security measures are nevertheless applied in air traffic where you could put forward the same line of argumentation (costs and delay).

Back in 1986 several regulations on maritime security measures were demanded which have not yet been drafted: for example always checking all the passengers’ luggage, checking all the vehicles which passengers are travelling on (after all their luggage has been removed from the vehicle) and checking that all passengers have returned from transit before sailing return.\textsuperscript{193} I hope that regulations on maritime security will be improved before a disaster of similar proportions to the 9/11 incidents occurs in the maritime world.

Concerning the risk factor “passengers” I am of the opinion that we need more stringent regulations. Since cruise liners and ferries must allow passengers to move freely, security

\textsuperscript{191} See also Ciotti Gallotti.

\textsuperscript{192} Mellor, 359 gives a practical example to show that screening of every container would produce unacceptable delays.

\textsuperscript{193} Stav in: Parritt, Violence, 134 seqq.
improvements should focus on developing more stringent and effective means for screening passengers, crew and luggage.

Concerning the risk factor “containers” every country would probably prefer to have an international treaty regulating this issue rather than bilateral agreements like the CSI. However, I must say that nowadays if we want to improve maritime security as soon and as effectively as possible, bilateral agreements might be the better way to resolve the problem. Most of the major seaports have joined the CSI. So one might conclude that the fear of losing the United States as a major trading partner if one does not sign the bilateral agreement might be more of an incentive than ratifying an international treaty. Since the introduction of the CSI more containers are being screened than ever before. So it can be seen as a success. However, I also would prefer it if every container were screened before being shipped. Of course, this will cost both time and money, but the improvement to maritime security should be worth it.

Concerning the issue of the boarding of vessels I would appreciate if there were a regulation that states clearly under which exact circumstances a vessel may be boarded and inspected. Determining which circumstances are sufficient to board a vessel should not be dependent on the flag state’s consent. The new draft of Art. 8 bis SUA is a step in the right direction, but is no more than that, because boarding remains dependent on the permission of the flag state. Several scholars have criticized the United States’ PSI approach as being inappropriate and said it should rather be regulated in an international treaty. In my opinion the PSI should not be criticised for that reason. The PSI is a step in the right direction, because it helps to improve maritime security effectively. And bilateral agreements might nowadays be a better alternative to regulating the issue in an international treaty.

Pertaining to the risk factor “crews” I really welcome the development of a uniform seafarer’s document containing all relevant data. It makes it possible to tighten maritime security without being a hindrance to trade. Shore leave should in my opinion be allowed without the need to obtain a visa, because there are other ways to safeguard potential terrorists from leaving a vessel to enter a country (e.g. identity and background checks when the crew lists are sent in advance or when the crew leaves the vessel).
Important steps have been taken, but there is still a long way to go before security measures in the shipping industry match security in other sectors. More steps should be taken down this road as soon as possible.
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[all webpages visited 02.09.2008]


Containerized cargo security – a case for “joined-up” government: [http://www.imo.org/includes/blastDataOnly.asp/data_id%3D17982/Containerised.pdf](http://www.imo.org/includes/blastDataOnly.asp/data_id%3D17982/Containerised.pdf)


Guidance on the provision of information for identifying ships when transmitting ship security alerts. MSC.1/Circ. 1190. 30.05.2006: [http://www.imo.org/includes/blastDataOnly.asp/data_id%3D14687/1190.pdf](http://www.imo.org/includes/blastDataOnly.asp/data_id%3D14687/1190.pdf)

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AIS – Automatic Identification System
Art. – Article
BFSP – British and Foreign State Papers
BITS – Berliner Informationszentrum für Transatlantische Sicherheit (Berlin Informationcenter for Transatlantic Security)
CBE – Commander of the Order of the British Empire
CBP – (US) Bureau of Customs and Border Protection
COMSAR – Committee on Radio Communications and Search and Rescue
CSCAP – Council for Security Cooperation in the Asia Pacific
CSI – Container Security Initiative
CSO – Company Security Officer
C-TPAT – Customs Trade Partnership Against Terrorism
EC – European Commission, European Community
EEZ – Exclusive Economic Zone
E.g. – For example
EMSA – European Maritime Safety Agency
ETA – Euskadi Ta Askatasuna (Basque for “Basque Homeland and Freedom”)
Et al. – And others
EU – European Union
FAL – Convention on Facilitation of International Maritime Traffic
FBI – Federal Bureau of Investigation
GMDSS – Global Maritime Distress Signal System
LRIT – Long Range Identification and Tracking
Ibid. - Ibidem
ICC – International Chamber of Commerce
PSI – Proliferation Security Initiative
Retd. – Retired
Ro-ro – Roll on, roll off (ferries)
SAFE – WCO SAFE Framework of Standards
SCUD – Septicemic Cutaneous Ulcerative Disease
Seq. – And the following page
Seqq. – And the following pages
SIN – Ship Identification Number
SOLAS – International Convention for the Safety of Life at Sea
SSO – Ship Security Officer
SUA – Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation
SS – Steamship
SSAS – Ship Security Alert System
SSP – Ship Security Plan
TNT – Trinitrotoluene (explosive material)
UK – United Kingdom of Great Britain and Northern Ireland
US – United States
USA – United States of America
USS – United States Ship
UN – United Nations
UNCTAD – United Nations Conference on Trade and Development
UN GA – United Nations General Assembly
UNON – United Nations Office Nairobi
UN SC – United Nations Security Council
USSR – Union of Soviet Socialist Republics
VLCC – Very Large Crude Carrier
Vs. – Versus
WCO – World Customs Organization
WMD – Weapons of Mass Destruction
WMU – World Maritime University