

TERRORISM AT SEA AS A MANIFESTATION OF INTERNATIONAL TERRORISM AND PROSECUTORIAL MECHANISMS

TERRORISMO NO MAR ENQUANTO UMA MANIFESTAÇÃO DO TERRORISMO INTERNACIONAL E MECANISMOS DE INDICIAMENTO

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ABSTRACT

This article studies maritime terrorist acts as international terrorism and related prosecutorial mechanisms. It is first examined how the most serious manifestations of international (maritime) terrorism may be regarded as international crimes. Then, assessment of the international treaty framework on maritime terrorism and practice of the UN organs and agencies fleshes out the characteristics of international maritime terrorism. Attention is paid to legal definitions and procedures. Finally, universal jurisdiction and international criminal jurisdiction, including the International Criminal Court and potential new judicial fora, are discussed as mechanisms which may be suitable to prosecute and try international maritime terrorism offenders.

Keywords: International terrorism, terrorism at sea, maritime security and safety, international crimes, universal jurisdiction, international criminal jurisdiction.

RESUMO

Este artigo estuda os atos terroristas marítimos enquanto terrorismo internacional e os mecanismos de indiciamento relacionados a eles. Em primeiro lugar, analisa-se como as manifestações mais graves de terrorismo internacional (marítimo) podem ser consideradas como crimes internacionais. Em seguida, avalia-se o arcabouço de tratados internacionais sobre o terrorismo marítimo e a prática dos órgãos e agências da ONU ao apontar as características do terrorismo marítimo internacional. Atenção é dada às definições e procedimentos legais. Finalmente, aponta-se a jurisdição universal e jurisdição penal internacional, incluindo o Tribunal Penal Internacional e potenciais novos fóruns judiciais, que serão discutidos como mecanismos que podem ser adequados para indiciar e julgar ofensores do terrorismo marítimo internacional.

Palavras-chave: Terrorismo internacional, terrorismo marítimo, segurança marítima, crimes internacionais, jurisdição universal, jurisdição penal internacional.

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INTRODUCTION

International terrorism has been in the spotlight of international law in the last 15 years. Discussions have emphasized the intrinsic threat to international peace and security posed by international terrorism. This paper focuses on a specific manifestation of international terrorism, namely, terrorist acts committed at sea. Accordingly, after examining the nature of international terrorism, attention is drawn to the international treaty framework and efforts conducted within the United Nations (UN) to deal with maritime terrorism. Then, considerations on universal and international criminal jurisdiction over maritime terrorism are provided. International practice safely allows to qualify international terrorism as a serious threat to international peace and security. Besides traditional state practice, e.g., national legislation, attention is given to the UN practice, particularly, General Assembly (GA), Security Council (SC) Resolutions and International Maritime Organization (IMO) documents. As for them, their negotiation, adoption and the voting explanation actually constitute state practice.² Concerning UN GA Resolutions, they are intrinsically connected with the international treaty framework on terrorism. These treaties have thus been adopted by and/or preceded by some of those Resolutions. UN GA Resolutions-soft-law nature-have been transformed into binding international conventional law.

Despite politically-motivated adoption, the SC Resolutions still evidence international peace and security concerns held by the international community. When examining the importance of GA Resolutions as for the emergence of a rule or an *opinio juris*, the International Court of Justice (ICJ) concluded that attention should be drawn to their content, degree of acceptance and the consistency of state practice outside it.³ *Mutatis mutandis*, mechanisms and actions called by the SC to fight international terrorism have gone beyond the limited scope of the few States which originally adopted those Resolutions. Thus, these Resolutions arguably have at least indirectly impacted state practice as States have more promptly adopted or amended legislation, prosecuted terrorists and/or taken part in the negotiation, drafting, and ratification of/accession to counter-international terrorism treaties.

Most terrorist attacks have occurred on land or aboard aircrafts; however, some terrorist incidents have happened at sea. On 12 October 2000, two Yemeni suicide bombers rammed an explosives-laden dingy into an American destroyer, the US Cole, which followed a failed attack on the USS Sullivan in Yemen. 17 US service members were killed and 49 resulted injured.⁴ Al-Qaida claimed responsibility for this attack. A post-9/11 incident was the bombing of the French oil tanker Limburg, carried out by an explosive-laden boat (October 2002). Al-Qaida also claimed responsibility for

² HENCKAERTS, Jean-Marie and DOSWALD-BECK, Louise. **Customary International Humanitarian Law**, vol. I, Cambridge, Cambridge University Press, 2005, p. xxxv.

³ *Legality of the Use or Threat of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, 226, paras. 70-73.

⁴ See <http://mypetjawa.mu.nu/archives/189744.php> (last visit on 1 January 2016).

this incident which killed one crew member and sent more than 90,000 barrels of oil pouring into the Gulf of Aden.⁵ This followed the Moroccan government's arrests of Al-Qaida operatives suspected of plotting raids on US and British tankers passing through the Strait of Gibraltar in June 2002.⁶ On 24 April 2004, terrorist insurgents mounted three suicide boat attacks on an offshore oil terminal south of Basra, Iraq killing some US naval crew and injuring others.⁷ Furthermore, plans to conduct terrorist and piracy attacks on some regions of the world, e.g., the Malacca and Singapore Straits, were discovered in the post 9/11 era.⁸ In July 2015, Islamic State-affiliated militants in Sinai claimed to have launched a missile attack on an Egyptian naval vessel in the Mediterranean Sea, which followed incidents in that area, including a failed attack on a ship passing through the Suez canal (September 2013) and the successful attack on an Egyptian navy vessel in which at least five people got killed.⁹

Although there have been so far only a few maritime terrorist incidents, their number may increase depending on how Al-Qaida, the Islamic State and/or other international terrorist groups grow. If piracy considered almost extinct until some years ago has been recently back on the spotlight, an increase in maritime terrorism could be expected due to the importance of the sea for the whole humankind in diverse matters ranging from security to the environment. International law answers should hence be ready to face this potential challenge timely and appropriately.

I. INTERNATIONAL TERRORISM COMMITTED AT SEA AS A DISCRETE CORE INTERNATIONAL CRIME

A. International crimes and international terrorism committed at sea

As defined by Cassese: “[International crimes are] Violations of either international customary rules which are intended to protect values considered important by the whole international community and consequently bind all States and individuals, or of treaty rules that spell out, clarify, develop or elaborate upon general principles of customary rules, and are applicable in the case at issue”.¹⁰ Concerning international crimes categories, scholars generally rely on a tripartite,¹¹ or bipartite

⁵ See http://news.bbc.co.uk/2/hi/middle_east/2334865.stm (last visit on 1 January 2016).

⁶ See <http://www.bbc.com/news/world-middle-east-33557180> (last visit on 1 January 2016).

⁷ See <http://www.independent.co.uk/news/world/middle-east/suicide-bomber-boats-explode-in-attack-on-basra-oil-terminal-756454.html> (last visit on 1 January 2016).

⁸ NILUFER, Oral. The Regime of Straits: Safety, Security and Protection of the Marine Environment, in SCHIEBER, Harry and PAIK, Jin-Hyun (eds.), **Regions, Institutions and Law of the Sea**, Martinus Nijhoff, Leiden, 2013, pp. 181-182.

⁹ See <http://www.bbc.com/news/world-middle-east-33557180> (last visit on 1 January 2016).

¹⁰ CASSESE, Antonio. **International Law**, 2nd ed., Oxford, Oxford University Press, 2005, p. 436.

¹¹ BASSIOUNI, M. Cherif. The sources and content of International Criminal Law: A theoretical framework, in BASSIOUNI, M. Cherif (ed.), **International Criminal Law**, vol. I, 2nd. ed., Transnational Publishers, Ardsley, 1999, pp. 97-100.

classification. The latter is herein considered as most scholars,¹² and the International Law Commission (ILC) follow it. That classification considers the so-called core international crimes or *jus cogens* crimes, and the treaty crimes. The ILC in its 1994 Draft Statute for an International Criminal Court,¹³ building upon the Statutes of the International Military Tribunals of Nuremberg and for the Far East as well as of the International Criminal Tribunals for the former Yugoslavia (ICTY) and for Rwanda (ICTR), grouped genocide, war crimes, crimes against humanity and aggression under the core international crimes category and, concerning treaty crimes, provided for a treaty list: “crimes, established under or pursuant to the treaty provisions listed in the Annex, which, having regard to the conduct alleged, constitute exceptionally serious crimes of international concern”.¹⁴ The said Annex included *inter alia* offences under the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA Convention) and its 1988 Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf (1988 SUA Convention Protocol)¹⁵ Two criteria were used when selecting treaties: i) treaty crime definitions precise enough to be applied by an international criminal court without breaching the principle of legality, and ii) the treaty in question incorporates the principle *aut dedere aut judicare*.¹⁶ These two requirements are fulfilled by the treaties dealing with terrorist acts at sea as examined later.

Concerning the existence of an agreed international terrorism definition, endless discussions on the meaning of terrorism have characterized international law.¹⁷ The outcome of this lack of consensus is the absence of treaty rules providing for a comprehensive definition of international terrorism. Thus, the drafting of international treaties on specific manifestations of terrorism: “starts from the assumption that in the present political circumstances it is impossible to work out an instrument for combating terrorism which would be all-encompassing, generally acceptable and effective in reaching its objectives. The question of defining terrorism would be a stumbling block”.¹⁸ This absence of an accepted (treaty) definition of international terrorism, which was the case during the adoption of the SUA Convention and its 1988 Protocol, persisted during the *travaux préparatoires* of the International Criminal Court Statute (ICC) in 1998. The status of international terrorism and, particularly, maritime

¹² E.g., SCHABAS, William. **An Introduction to the International Criminal Court**, 2nd ed., Cambridge, Cambridge University Press, 2007, p. 8.

¹³ *Report of the International Law Commission on the work of its forty-sixth session (2 May-22 July 1994)*, *Draft Code of Crimes against the Peace and Security of Mankind*, Yearbook, 1994, vol. II, part two.

¹⁴ *Ibid.*, p. 18, article 20(e).

¹⁵ *Ibid.*, p. 70, Appendix II, numerals 12 and 13 respectively.

¹⁶ *Ibid.*, p. 41, para. 18.

¹⁷ CASSESE, Antonio. **International Criminal Law**, 2nd ed., Oxford, Oxford University Press, 2008, pp. 162-164.

¹⁸ TREVES, Tullio. The Rome Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, in RONZITTI, Natalino (ed.), **Maritime Terrorism and International Law**, Kluwer Academic Publishers, Dordrecht, 1990, p. 71.

terrorism as lesser offences in contrast with the traditional core international crimes listed above, prevailed in 1994 and the ICC Diplomatic Conference. Nevertheless, such situation is arguably different from the situation existent after the 9/11 as mainly exemplified in UN GA and SC Resolutions, state legislative practice and new treaties. Indeed, as examined later, the Special Tribunal for Lebanon (STL) based on extensive national and international practice for the first time at the international level concluded that international terrorism constitutes a discrete customary international law crime.¹⁹

B. International terrorism as a discrete core international crime: SC's practice

This section aims to show how international terrorism, acts committed at sea included, has steadily gained attention in the SC resolutions, including the SC's establishment of international criminal tribunals with the mandate to prosecute core international crimes. It is also sought to present how and to what extent the language condemning international terrorism has evolved and whether this process is enough to, at least under the SC's practice, label international terrorism as an international crime *sensu stricto*. Resolution 1267 (1999) has been considered and quoted by the SC in subsequent resolutions as one of a seminal nature in raising awareness of the threat to international peace and security posed by international terrorism. The SC pointed out that "the suppression of international terrorism is essential for the maintenance of international peace and security".²⁰ Similar wording may be pinpointed in later pre-9/11 Resolutions such as Resolutions 1269 (1999), 1333 (2000), and 1363 (2000), i.e., terrorism as a menace to international peace and security is taken as a premise to justify cooperation and enforcement mechanisms to fight it.

In the aftermath of the 9/11 attacks, the language condemning international terrorism maintained or even increased in intensity and the grounds justifying such approach were also provided in further detail. Thus, Resolutions 1368 (2001) and 1373 (2001) issued in the immediate turmoil of the 9/11 attacks qualified those actions as a "threat to international peace and security".²¹ By adopting Resolution 1377 (2001), the SC step forward in qualifying acts of international terrorism not only as a threat to international peace and security but also as "one of the most serious".²² This extra level of seriousness results relevant as until then only genocide, war crimes, crimes against humanity and the crime of aggression were referred to as the "most serious crimes". What may have initially been considered as an isolated qualification has indeed become part of a sustained practice as evidenced by an important number of SC Resolutions dealing with international terrorism. Resolutions 1456 (2003), 1535 (2004), 1566 (2004), 1617 (2005), 1735 (2006), and 1822 (2008), clearly went in that direction. Resolution

¹⁹ *Ayash et al.*, Interlocutory Decision on the Applicable Law, STL-11-01/PT/T26, 16 February 2011, paras. 83-85.

²⁰ S/RES/1267 (1999), 15 October 1999, preamble, para. 5.

²¹ S/RES/1368 (2001), 12 September 2001, para. 1; S/RES/1373 (2001), 28 September 2001, para. 3.

²² S/RES/1377 (2001), 12 November 2001, para. 2.

1904 (2009) reaffirmed that terrorism, in all forms, “constitutes one of the most serious threats to peace and security and that any acts of terrorism are criminal and unjustifiable regardless of their motivations, whenever and by whomsoever committed”.²³ Identical wording has been used to condemn the terrorist actions perpetrated by ISIS and Al-Nusra.²⁴ Other SC Resolutions on international terrorism adopted since 2001 have essentially maintained the language used in pre-9/11 resolutions and thus label terrorist acts as threats to international peace security without explicitly placing them among the most serious crimes.²⁵ However, all these resolutions share in common a broad material scope encapsulating any act of terrorism, which includes maritime terrorism, as “one of the most serious” or at least “a threat to international peace and security”.

C. Emerging case-law of the Special Tribunal for Lebanon

By Resolution 1757 (2007), the SC brought into force the agreement between the UN and Lebanon setting up the STL to try suspects in the assassination of ex Lebanese Prime Minister Rafiq Hariri and other dead/injured persons in relation to that attack.²⁶ The STL has jurisdiction over certain crimes under Lebanese law.²⁷ However, the STL Appeals Chamber came to important conclusions on definition and status of international terrorism as an international crime:

[...] a number of treaties, UN resolutions, and the legislative and judicial practice of States evince the formation of a general *opinio juris* in the international community, accompanied by a practice consistent with such *opinio*, to the effect that a customary rule of international law regarding the international crime of terrorism, at least in time of peace [...]. This customary rule requires [...]: (i) the perpetration of a criminal act [...] or threatening such an act; (ii) the intent to spread fear among the population (which would generally entail the creation of public danger) or directly or indirectly coerce a national or international authority to take some action, or to refrain from taking it; (iii) when the act involves a transnational element.²⁸

²³ S/RES/1904 (2009), 17 December 2009, preamble, para. 2.

²⁴ S/RES/2178 (2014), 24 September 2014, preamble, para. 1; S/RES/2199 (2015), 12 Feb. 2015, preamble, para. 2.

²⁵ See, *inter alia*, S/RES/1618 (2005), 4 August 2005, preamble, para. 4; S/RES/1530 (2004), 11 March 2004, para. 1; S/RES/1526 (2004), 30 January 2004, preamble, para. 3; S/RES/1516 (2003), 20 November 2003, preamble, paragraph 1; S/RES/1455 (2003), 17 January 2003, preamble, para. 3; S/RES/1450 (2002), 13 December 2002, para. 1; S/RES/1440 (2002), 24 October 2002, preamble, para. 2; S/RES/1438 (2002), 14 October 2002, preamble, para. 2.

²⁶ S/RES/1757 (2007), 30 May 2007, para. 1 (a).

²⁷ STL Statute, article 2.

²⁸ *Ayyash et al.*, Interlocutory Decision on the Applicable Law, STL-11-01/PT/T26, 16 Feb. 2011, paras. 83 and 85.

The STL Appeals Chamber looked into a wide array of legal sources, both national and international, to establish the common elements of terrorism in order to identify a customary rule. Among them, the STL referred to: i) the 1988 SUA Convention Protocol; ii) 1988 SUA Convention Protocol; iii) the Additional Protocol on Combating Terrorism to Agreement Among the Governments of the Black Sea Economic Cooperation Participating States on Cooperation in Combating Crime, in Particular in its Organized Form; and iv) the provisions of the United Nations Convention on the Law of the Sea of 1982, relating to piracy on the high seas.²⁹

Notwithstanding the importance of the STL Appeal Chamber's findings, as pointed out by Gillet and Shuster, there are mainly four problems with them.³⁰ First, the STL excluded the requirement of a political, religious, racial or ideological purpose; however, some national practice and the Draft Comprehensive Convention on Terrorism contradict the STL. Second, the use of an open-ended formulation of the underlying conduct that may be qualified as terrorism (use of "such as" "so on"), which may lead to potential problems with the principle of legality due to its vagueness. Third, the existence of a bifurcated intent standard which may be over-comprehensive. Fourth, concerning the reservations about application of the crime of terrorism during armed conflict, it may be counter-argued that the Convention on the Suppression of the Financing of Terrorism-to which 186 States are parties-applies in peace time and armed conflicts. Moreover, there are still reservations to consider that international terrorism already constitutes an independent category of international crimes as a consensual and universal definition of international terrorism has yet to be agreed on.³¹

All in all, it could be safely argued that international terrorism now falls in the core international crimes category provided that terrorist acts meet some gravity threshold conditions. These conditions may be summarized, as Cassese did: "[...] they [terrorist offences][...] *transcend national boundaries*...they are carried out with the support, the toleration, or acquiescence of the State where the terrorist organization is located or of a foreign State [and] [...] a phenomenon of concern for the whole international community and a threat to the peace".³² Following the STL's definition of international terrorism, two objective elements may be identified. First, an underlying conduct already criminalized in domestic law or international treaties against terrorism such as murder, kidnapping, hostage-taking, and hijacking.³³ The STL explicitly mentioned "attacks against or on board ships on the high seas".³⁴ The

²⁹ *Ibid.*, para. 66, footnote 92, and para. 89, footnotes 140 and 142.

³⁰ GILLET, Matthew and SCHUSTER, Matthias. Fast-track Justice. The Special Tribunal for Lebanon Defines Terrorism, *Journal of International Criminal Justice*, vol. 9, 2011, pp. 1008-1014.

³¹ See VENTURA, Manuel. Terrorism According to the STL's Interlocutory Decision on the Applicable Law A Defining Moment or a Moment of Defining?, *Journal of International Criminal Justice*, vol. 9, 2011, p. 1021.

³² CASSESE, Antonio. *International Criminal Law*, 1st ed., Oxford, Oxford University Press, 2003, p. 129.

³³ *Ibid.*, p. 130.

³⁴ *Ayyash et al.*, Interlocutory Decision on the Applicable Law, STL-11-01/PT/T26 (Appeals Chamber), 16

STL also examined the Lebanese Law of 11 January of 1958 which considers the partial or total destruction of a ship or other facilities as terrorist conduct.³⁵ Second, the presence of a transnational element, justified by the STL as follows: “To turn into an international crime, a domestic offence needs to be regarded by the world community as an attack on universal values [...] or on values held to be of a paramount importance in that community”.³⁶ Victims may be civilians or state officials, state enforcement agents included. As subjective elements (*mens rea*), general intent (*dolus*) to commit an underlying offence and a special intent (*dolus specialis*) which may consist in: i) compelling a public or a prominent private authority, international organization to do or refrain from doing something; or ii) spreading terror among civilians are required.³⁷

II. TREATY INTERNATIONAL LAW FRAMEWORK ON TERRORISM AT SEA

A. Rome Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (1988)

On 7 October 1985, the *Achille Lauro*, an Italian-flag cruise ship, was seized by members of the Palestine Liberation Front while sailing from Alexandria to Port Said. They held the ship’s crew and passengers hostages and threatened to kill them, demanding the Israeli government to release fifty Palestinian prisoners to spare the lives of those captured in the ship. They additionally threatened to blow up the ship if a rescue mission was attempted.³⁸ The seizure of the *Achille Lauro* and murder of one passenger raised interest in the drafting of a convention on maritime terrorism. Thus, at the invitation of the UN GA, the IMO was requested to study the issue of terrorism aboard or against ships in order to provide with some recommendations concerning appropriate measures.³⁹ It is pertinent to mention that, unlike terrorism perpetrated against civil aviation, terrorism concerning unlawful acts against ships had not received similar attention. Indeed, instruments such as the 1963 Tokyo Convention on Offences and Certain Other Acts Committed Onboard Aircraft, the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft and the 1971 Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation were already into force.

In November 1986, the IMO considered it convenient to examine this matter due to its urgent nature.⁴⁰ An *Ad Hoc* Preparatory Committee was accordingly established

February 2011, para. 141.

³⁵ *Ibid.*, para. 48.

³⁶ *Ibid.*, para. 91.

³⁷ See also CASSESE, Antonio. *Op. cit.*, *supra* footnote 16, p. 130.

³⁸ HALBERSTAM, Malvina. International Maritime Navigation and Installations on the High Seas, in BASSIOUNI, M. Cherif (ed.), *op. cit.*, pp. 819-820.

³⁹ GA Res. 4061 (XL), UN Doc A/RES/4061, 9 December 1985, para. 13.

⁴⁰ IMO Doc. 57/25, 1 October 1986.

holding the mandate to elaborate a Draft Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation.⁴¹ This Committee prepared a Draft Convention at a meeting in Rome in May 1987.⁴² Finally, the SUA Convention and its 1988 Protocol were adopted at a Rome-held Diplomatic conference on 10 March 1988 and both instruments came into force on 1 March 1992.

As Halberstam recalls,⁴³ this Convention is mainly oriented towards the apprehension, conviction and punishment of the offenders rather than the suppression of prohibited acts against the safety of maritime navigation as the Convention's title may suggest. This Convention has been accurately described,⁴⁴ as a genuine anti-terrorism instrument because faces: "the world-wide escalation of acts of terrorism in all its forms, the occurrence of which is considered a matter of grave concern to the international community". The Preamble also paraphrases the UN GA Resolution 40/61 in which all acts, methods, and practices of terrorism were strongly condemned. Additionally, by quoting another Resolution 40/61 paragraph, the Preamble emphasizes the need for all States to "contribute to the progressive elimination of causes underlying international terrorism". Nonetheless, no definition of international terrorism was included therein, which was praised as such inclusion would have hindered negotiations.⁴⁵

Article 3 lists the offences under the SUA Convention. Intentional and unlawful acts such as seizure or control over a ship; violent acts against a person if those acts are likely to endanger the safety of navigation; and destruction or damage to a ship or maritime navigational facilities were included. Although the *Achille Lauro* incident sparked the interest in the SUA Convention, the initial draft did not incorporate murder as an offense. The reason for this gap was that almost all previous counter-terrorism conventions had excluded murder from their lists of offences and the SUA Convention was modeled in those instruments. After intense diplomatic discussions,⁴⁶ murder was included as a separate offense under article 3.g. Deliberate killing of one or more persons aboard a ship seized by terrorists has thus been acknowledged as an autonomous offence and not only as an aggravating circumstance. One of the most important practical consequences thereof is that murder also falls under the obligation to extradite or to prosecute according to article 10 of the SUA Convention. Had murder merely been qualified as an aggravating circumstance, it would have fallen short of article 10 as this refers to extraditable offenses. This addition also debunks the argument under which killing a passenger after the seizure of a ship does not jeopardize

⁴¹ IMO Doc. C 57/WP.1, para. 25 (a)(2)

⁴² Draft Convention for the Suppression of Unlawful Acts Against the safety of Maritime Navigation, IMO Doc. PCUA 2/5, Ann. 1, at 2, 2 June 1987.

⁴³ HABERSTAM, Malvina. *Op. cit.*, p. 821.

⁴⁴ TUEK, Helmut. *Combating Terrorism at Sea: The Suppression of Unlawful Acts Against the Safety of Maritime Navigation*, in NORDQUIST, Myron et al. (ed.), **Legal Challenges in Maritime Security**, Martinus Nijhoff, Leiden, 2008, p. 52.

⁴⁵ *Ibid.*

⁴⁶ HALBERSTAM, Malvina. *Op. cit.*, p. 822.

the safety of navigation and, hence, should not be incorporated into a convention on safety of maritime navigation. Thus, it should be borne in mind that the ultimate reason for guaranteeing such safety is actually the protection of maritime navigation users.

Article 10, as previously mentioned, introduces the *aut dedere aut judicare* principle whereby the States Parties are bound to either extradite or prosecute. This principle is also enshrined in other counter-terrorism treaties. Consequently, there is no absolute obligation to extradite. Nor did the SUA put forward an absolute obligation to punish since the State in whose territory the offender is found is only required “to submit the case without delay to its competent authorities for the purpose of prosecution”. These authorities in turn “shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that State”. This wording has been criticized by some scholars as terrorists may avoid penal sanctions.⁴⁷ Regarding the effective implementation of the *aut dedere aut judicare* principle, States Parties shall exercise their jurisdiction over individual offences and criminalize them via appropriate penalties in accordance with their grave nature.⁴⁸

A controversial point is whether the application of the SUA Convention may be stretched out to cover nationals of States non-parties to it when found in the jurisdiction of a State Party. Terrorist acts offenders are usually nationals of States encouraging or, at least, turning a blind eye on terrorism. Thus, formalistic and limited application of counter-terrorist instruments to only nationals of State Parties would adversely impact on the effectiveness of those treaties. A broad understanding of the scope of application of the SUA Convention may be justified. In specific cases of acts committed by non-nationals of SUA Convention States in a SUA Convention State party’s territory—for ships, the State of the flag—the traditional exercise of criminal jurisdiction based upon a territorial link should be applicable. When both the offender is a national of a non-party State and the crime was perpetrated in a non-party State’s territory, applying universal jurisdiction in conformity with customary international law has gained momentum after the 9/11.

As for acts listed in the SUA Convention and committed on the high seas, some scholars consider that those crimes constitute piracy which has traditionally been regarded as an offense subject to universal jurisdiction under customary international law.⁴⁹ However, piracy and maritime terrorism constitute different offences. This differentiation mainly stems from both the place of commission and the existence of a special intent. Thus, according to the definition in the United Nations Convention on the Law of the Sea (UNCLOS), piracy can only be committed on the high seas, and no special *mens rea* is required for conviction.⁵⁰ In turn, the SUA Convention is not

⁴⁷ TUERK, Helmut. *Op. cit.*, p. 55; TREVES, Tullio. The Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, *Singaporean Journal of International Law and Comparative Law*, vol. 2, 1999, p. 552.

⁴⁸ SUA Convention, article 5.

⁴⁹ See HALBERSTAM, Malvina. *Op. cit.*, p. 828.

⁵⁰ See UNCLOS, article 101. Definition of Piracy.

restricted to offences committed on the high seas and special *mens rea* is required: “[...] the purpose of the act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act”.⁵¹ The scope of application of the SUA Convention includes ships navigating or scheduled to navigate into, through, or from waters beyond the outer limit of the territorial sea of a single State, or beyond the lateral limits of its territorial sea with adjacent States, or when the alleged offender is found in a State Party’s territory.⁵² This Convention, therefore, applies to ships on an international voyage operating or scheduled to operate seaward of any State’s territorial sea. Hence, ships engaged in cabotage occurring solely in the territorial sea of a coastal State-known as short-range cabotage-are excluded and, thus, any unlawful act perpetrated against them is exclusively sanctioned under national law.⁵³ The exception to the general scope of application is when the suspect is found in a State other than that of the ship’s registration.⁵⁴

B. Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Maritime Platforms Located on the Continental Shelf (1988)

The Diplomatic Conference convened by the IMO additionally adopted a Protocol which deals with fixed platforms placed on the continental shelf.⁵⁵ This instrument lays down in article 1.1 that articles 5, 7 and 10 of the SUA Convention addressing jurisdiction, extradition, punishment, rights of an offender while in custody, and mutual assistance in the prevention and prosecution of offences and with certain procedural matters, shall also apply *mutatis mutandi* to the crimes contained in article 2 of this Protocol provided that these are perpetrated on board or against fixed platforms located on the continental shelf. Article 1 also establishes, in similar terms than those of the referred Convention rule, that acts against fixed platforms shall be qualified as offences if committed unlawfully and intentionally. It should be added that the Protocol, like the SUA Convention, protects civilian and civilian property but not military property or personnel. Whereas the latter treaty excludes warships, police and customs vessels, the former treaty exclusively applies to platforms on the continental shelf used for economic purposes.⁵⁶

⁵¹ SUA Convention (as amended), article 3*bis*.

⁵² SUA Convention, article 4(1).

⁵³ See KISERMAN, Brad. Preventing and Defeating Terrorism at Sea: Practical Considerations for the Implementation of the Draft Protocol to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, in NORDQUIST, Myron et al. (ed.) **Recent Developments in the Law of the Sea and China**, Martinus Nijhoff, Leiden, 2006, p. 425; and BALKIN, Rosalie. The International Maritime Organization and Maritime Security, **Tulane Maritime Law Journal**, vol. 30, 2006, p. 5.

⁵⁴ SUA Convention, article 4.2.

⁵⁵ See article 1(3) of this Protocol.

⁵⁶ See respectively articles 1(3), 2(1)(a), and (b).

C. 2005 Protocol to the Rome Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, and Protocol to the 1988 Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf

Whilst the SUA Convention and its 1988 Protocol were drafted against the background of the *Achille Lauro* hijacking which took place in 1985, their 2005 Protocols came into existence as a response to international security concerns in the post 9/11 attacks scenario. Concerning legal aspects, what these Protocols seek is to broaden the definition of the offences of the SUA Convention and its 1988 Protocol. Article 3b *bis*, introduced by the 2005 Protocol to the SUA Convention, set down that the commission of an offense within the meaning of the Convention occurs if a person unlawfully and intentionally commits one of the acts listed and his purpose is to intimidate a population or to compel a government or an international organization to do or to abstain from some act. The wording of this intention corresponds to the special *mens rea* which distinguishes international terrorism from other international crimes, and which complements the set of individual acts or *actus reus*. These acts in turn mainly consist in transportation of biological, chemical or nuclear weapon or material. These acts read in the light of the chapeaux of the aforementioned special intention lead to the qualification of international terrorism perpetrated, in this case, at sea. However, if nuclear material is transported to or from the territory or transported under the control of a State party to the Treaty on the Non-Proliferation of Nuclear Weapons, such act falls short of the definition of the 2005 Protocol offences.⁵⁷

In addition to the acts explicitly mentioned in the 2005 Protocol to the SUA Convention, unlawful actions incorporated in other nine international counter-terrorism treaties and listed in the Annex to the Protocol also fall under the material scope of the Protocol. Unlawfully or intentionally killing in connection with the commission of the offenses in the SUA Convention is also criminalized. This link may likewise be established as to attempting to commit an offense, participating as an accomplice, organizing or directing others to commit an offense, or contributing to the commission of an offense.⁵⁸

With regard to States Parties' obligations, as Wolfrum remarks, these may be summarized as implementation of the *aut dedere aut judicare* principle.⁵⁹ Nevertheless, in agreement with Wolfrum, the 2005 Protocol only slightly improved the SUA Convention in this field.⁶⁰ Furthermore, none of the offences should be considered as

⁵⁷ 2005 Protocol to the SUA Convention, article 3bis, para. 2.

⁵⁸ *Ibid.*, article 3quarter.

⁵⁹ WOLFRUM, Rüdiger. Fighting Terrorism at Sea: Options and Limitations under International Law, in NORDQUIST, Myron et al. (ed.), **Legal Challenges in Maritime Security**, Martinus Nijhoff, Leiden, 2008, p. 17.

⁶⁰ *Ibid.*

political offences for extradition proceedings.⁶¹ Nor shall the obligation to extradite or afford mutual legal assistance apply in case of a presumption of an extradition request based upon political or similar grounds prosecution.⁶² Whilst the SUA Convention addresses inter-state criminal assistance,⁶³ its 2005 Protocol fleshes out the conditions of transference of a detained or convicted person from one to other State Party for purposes of identification, testimony or alike within the investigation or prosecution of offenses proceedings.⁶⁴

Another improvement introduced by the 2005 Protocol into the SUA Convention is cooperation and procedures to be followed in cases when a State Party desires to board a ship flying the flag of another State Party, outside the territorial water of any State and when the requesting Party has reasonable grounds to suspect that the ship or a person on board is, has been, or is about to participate in the commission of any of the offenses under the SUA Convention.⁶⁵ In contrast, the SUA Convention only included the responsibilities and roles of the master of the ship, flag State and receiving State in delivering to the authorities of any State Party any person believed to have committed an offense under the Convention, which includes the furnishing of evidence pertinent to the alleged offence. In order to proceed with the boarding, the authorization and cooperation of the flag State shall take place beforehand.⁶⁶ The State Party in question shall also include several safeguards when, *inter alia*, boarding. These safeguards include: not endangering the safety of life at sea; ensuring that all persons on board are treated in a manner which preserves human dignity and consistent with human rights law; taking due account of safety and security of the ship and its cargo; ensuring that measures taken are environmentally sound; and adopting reasonable efforts to avoid a ship being unduly detained or delayed.⁶⁷

With regard to the nature of international terrorism at sea as an international crime, Wolfrum notes that the SUA Convention considered that offences thereto would not qualify as truly international crimes inasmuch as it was merely drafted out of the interest that several States may hold in prosecuting offences under this treaty.⁶⁸ This may have been the original intention when discussing the SUA Convention text. It may however be argued that the 2005 Protocol, drafted and approved during the post 9/11 context, added an extra dimension to the original SUA Convention. Thus, concerns of the international community as a whole relating to values such as international peace and security were precisely reflected. This is particularly the case when terrorist acts genuinely threat and/ or strike the above-mentioned essential values provided that some conditions are met.

⁶¹ 2005 Protocol to the SUA Convention, article 11*bis*. See also SUA Convention, article 11.

⁶² 2005 Protocol to the SUA Convention, article 11*ter*.

⁶³ SUA Convention, article 12.

⁶⁴ 2005 Protocol to the SUA Convention, article 12*bis*.

⁶⁵ *Ibid.*, article 8*bis*(4)(b).

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*, article 8.

⁶⁸ WOLFRUM, Rüdiger. *Op. cit.*, p. 18.

Concerning the second 2005 Protocol, which modifies the 1988 SUA Convention Protocol, its new article 2 *bis* broadens the number of offences contained in the latter instrument. Accordingly, the *actus reus* is: i) to use against or on a fixed platform or discharges from a fixed platform any explosive, radioactive material or bacteriological/chemical or nuclear weapon in a manner that causes or is likely to cause death or serious injury or damage; ii) to discharge from a fixed platform, oil, liquefied natural gas, or other hazardous or noxious substance, in such quantity or concentration that it causes or is likely to cause death or serious injury or damage; or iii) to threaten, with or without a condition, as is provided for under national law, to commit an offence. In turn, the *means rea* requires a person to commit a crime unlawfully and intentionally and the purpose of the act, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act. In turn, the new article 2 *ter* incorporates the crimes of unlawfully and intentionally injuring or killing any person in connection with the commission of any of the offences, attempting to commit an offence, participating as an accomplice, and organizing or directing others to commit an offence.

D. Other relevant international treaties

Other three international instruments prove to be of special importance in dealing with terrorist crimes committed at sea even though these conventions have a general scope. The first of these treaties is the 1997 International Convention for the Suppression of Terrorist Bombings, which *inter alia* criminalizes delivering, placing, discharging or detonating an explosive or other lethal device into or against a public transportation system or an infrastructure facility.⁶⁹ In turn, the 1999 International Convention for the Suppression of the Financing of Terrorism, includes the SUA Convention and its 1988 Protocol to precise the offences whose financing is criminalized.⁷⁰ A third applicable treaty is the 2005 International Convention for the Suppression of Acts of Nuclear Terrorism, which criminalizes, among others, possessing, using radioactive material, or damaging a nuclear facility.⁷¹ Finally, nuclear facility, as defined in the Convention, comprehends nuclear reactors installed on vessels.⁷²

⁶⁹ International Convention for the Suppression of Terrorist Bombings, article 2(1).

⁷⁰ International Convention for the Suppression of the Financing of Terrorism, annex 8.

⁷¹ International Convention for the Suppression of Acts of Nuclear Terrorism, article 2.

⁷² *Ibid.*, article 1.3.

III. UNITED NATIONS EFFORTS DEALING WITH TERRORISM AT SEA

A. United Nations Security Council and General Assembly Resolutions

With regard to condemnation of concrete terrorist acts at sea, practice has been scarce. This stems not from a lack of interest in the matter but mainly from the fact that the immense majority of terrorist attacks have taken place either on land or in aircrafts. Notwithstanding this limitation, the references previously provided when discussing the SC qualification of international terrorism acts as a serious threat to international peace and security include maritime terrorism. SC and GA Resolutions tackling aspects relevant to terrorism at sea are examined.

Due to numerous incidents of piracy and armed robbery off Somalia's coast, the SC has issued several resolutions drawing the international community's attention towards this re-emerging crime.⁷³ It is necessary to remind again that piracy and terrorism at sea are different since the former can only be committed on the high seas or outside the jurisdiction of any State.⁷⁴ In turn, prosecuting the latter demands evidence of the *means rea* element, i.e., spreading terror or compelling to do or not to do something. However, what is clear is some overlap relating to the acts constitutive of the *actus reus* in both crimes. In a nutshell, violence perpetrated against persons, vessels and/or infrastructure located at sea broadly underlies piracy and maritime terrorism. Accordingly, e.g., Resolution 1816 (2008) condemned actions such as armed robbery, attack upon and hijackings of vessels,⁷⁵ which are-implicitly-embedded in the SUA Convention and its Protocols. Resolution 1918 (2010) also ordered all States to criminalize piracy under their national laws, highlighting concern out of the threat posed by piracy and armed robbery at sea against vessels not only within the Somali region but also relating to "[...] international navigation and the safety of commercial maritime routes [...]".⁷⁶ The SC has also stressed the need for prosecution of piracy and armed robbery perpetrated at sea in the Gulf of Guinea.⁷⁷

With regard to SC Resolutions addressing *sensu stricto* terrorist offences perpetrated at sea, the seriousness of the *Achille Lauro* incident, already detailed, was mirrored into Resolution 579 (1985). The taking of hostages and abduction unfolded during the *Achille Lauro* incident were described as "offences of grave concern to the international community".⁷⁸ This wording holds importance since it may be considered as an antecedent, in qualification and material scope, to the set of SC Resolutions issued over 10 years as counter-international terrorism measures.

⁷³ S/RES/1814 (2008); S/RES/1816 (2008); S/RES/1838 (2008); S/RES/1844 (2008); S/RES/1846 (2008); S/RES/1851 (2008); S/RES/1897 (2009); S/RES/1918 (2010); S/RES/2077 (2012); S/RES/2125 (2013).

⁷⁴ UNCLOS, article 101.

⁷⁵ S/RES/1816 (2008), 2 June 2008, preamble, paras. 3 and 8.

⁷⁶ S/RES/1918 (2010), 27 April 2010, preamble, para. 2.

⁷⁷ S/RES/2039 (2012), 29 February 2012, para. 5.

⁷⁸ S/RES/579 (1985), 18 December 1985, preamble, para. 2.

As a consequence of the *Achille Lauro* incident, the UN GA issued Resolution 40/61 (1985). In addition to calling for actions oriented towards prevention of international terrorism, the UN GA requested the IMO “[...] to study the problem of terrorism aboard or against ships with a view to making recommendations on appropriate measures [...]”.⁷⁹ Also, the UN GA actually called States, urging them to become parties to the SUA Convention and its 1988 Protocol, and to ensure their effective implementation. In the next section, the IMO’s contributions are examined.

B. International Maritime Organization’s actions

The activities conducted by the IMO concerning acts materially constitutive of terrorism at sea have included a wide spectrum of actions ranging from a pivotal participation in drafting of international instruments on maritime security to issuance of reports and guidelines. Thus, in the immediate aftermath of the 9/11 attacks, IMO’s steps were oriented to formulate enhanced security measures for the shipping community. Instructions were accordingly given by the IMO’s General Assembly via the Assembly Resolution A.924 (22) to the IMO’s Safety Committee.⁸⁰ Resolution A.924 (22) may be regarded as a call for reviewing mechanisms to prevent acts of terrorism which threaten the security of passengers and crews as well as the safety of ships and vessels. This Resolution, as acknowledged in its preamble, built up on other instruments from the IMO’s bodies, namely, Resolution A.584 (14) on “Measures to Prevent Unlawful Acts which Threaten the Safety of Ships and the Security of their Passengers”, and a IMO’s Circular titled “Measures to Prevent Unlawful Acts Against Passengers and Crews on Board Ships approved by the Maritime Safety Committee” in accordance with the requests of the IMO’s General Assembly as established in the above-mentioned resolution.⁸¹ Resolution A.584 (14) and this circular constituted the first steps after the *Achille Lauro* incident upon which the SUA Convention would later be drafted. The IMO’s General Assembly reached a number of additional decisions including the convening of a Maritime Security Conference in December 2002 to introduce amendments to the 1974 International Convention for the Safety of the Life at Sea (SOLAS).⁸²

The SOLAS is a treaty on international maritime safety and ensures that ships flagged by States Parties observe minimum safety standards in constructions, equipment and operation. In the aftermath of the 9/11 attacks, a new chapter, chapter XI-2 on Special measures to enhance maritime security and the International Ship and Port Facility (ISPS) was added. The background to the ISPS took place at the

⁷⁹ GA Res 40/61 (1985), 9 December 1985, para. 13.

⁸⁰ A 22/Res.924, 22 January 2002.

⁸¹ Resolution A.584 (14) and circular MSC/Circ. 443 were adopted in 1986.

⁸² Referred to by SALONIO, Lucio and SINHA, Rajeev. International, regional and national approaches towards maritime security issues of terrorism, in MUKHERJEE, Proshanto et al. (ed.), **Maritime violence and other security issues at sea**, WMU Publications, Malmö, 2002, p. 235.

75th Session of the Maritime Safety Committee (15-24 May 2002), when the ISPS Code was proposed. This Code, implemented via chapter XI-2 of the SOLAS, has two parts, one of compulsory nature and the other of recommendatory nature. The ISPS Code constitutes a comprehensive set of measures to strengthen the security of ships and port facilities. It was adopted to handle threats to ships and port facilities in the post 9/11 context. This Code hence aims to provide a standardized and coherent framework when evaluating risks and, thus, to enable States to offset changes in threat with changes in vulnerability for ships and port facilities via determination of security levels and corresponding security measures.⁸³ The Diplomatic Conference amending the SOLAS took place between 9 and 13 December 2002 not only incorporating amendments to enhance maritime security on board ships and at ship/port interface areas but also adopting an eleven resolution package in the field.⁸⁴ As the IMO highlighted those amendments stemmed out from the need to protect the international maritime transport sector from the threat of maritime terrorism.⁸⁵ Thus, the IMO's contribution to developing this new legal framework held pivotal importance. As part of its follow-up measures, the IMO issued the Circular "Implementation of SOLAS Chapter XI-2 and the ISPS" in 2014 in which invites SOLAS States Parties and other actors "to redouble their efforts to protect shipping against terrorism by taking action as soon as possible to ensure compliance with the requirements of SOLAS chapter XI-2 and the ISPS Code at as early a stage as possible".⁸⁶

With regard to the frequent acts of piracy and armed robbery off-Coast of Sudan and the Gulf of Aden, which have raised international attention to violent acts committed against vessels and persons when performing activities at sea, the IMO has issued some circulars. Even though these circulars were issued out of a concrete context, they are general in character and actually offer guidance and recommendations to both governments and crew members to better face similar incidents. Accordingly, the Circular "Guidance to Ship Owners and Ship Operators, Shipmasters and Crews on Preventing and Suppressing Acts of Piracy and Armed Robbery against Ships", hijacking of vessels or ships is addressed.⁸⁷ A subsequent circular moves forward as, unlike the previous one, explicitly touches upon terrorism. This document titled "Piracy and Armed Robbery against Ships" shed some light on how governments ought to prevent and suppress piracy and armed robbery against ships. In particular, one of the recommendations drew attention to communication and cooperation between inter-state agencies relating to the after-incident report to the coastal State, regarding the existence of "[...] mechanisms for dealing with other maritime security matters, e.g. [...] terrorism [...]" which should be "[...] incorporated into the incident command

⁸³ See <http://www.imo.org/> (last visit on 5 May 2015).

⁸⁴ See http://www.imo.org/conventions/contents.asp?topic_id=257&doc_id=647 (last visit on 5 May 2015).

⁸⁵ See <http://www.imo.org/OurWork/Security/Instruments/Pages/SecurityInstruments.aspx> (last visit on 5 May 2015).

⁸⁶ IMO, MSC/Circ.1104, 15 January 2014, para. 4.

⁸⁷ IMO, MSC.1/Circ.1334, 23 June 2009, Annex, paras. 4 and 79.

system in order to allow for efficient use of limited resources”.⁸⁸ In a much earlier circular titled “Measures to Enhance Maritime Security”, the IMO in providing for directives on acts of violence against ships for maritime rescue co-ordination centers (MRCCs), included “[...] provisions for the handling by MRCCs of alerts received from ships in response to *terrorist acts* and other security incidents [...]”.⁸⁹ Should the year (2003) when this circular was issued be borne in mind, it is no difficult to see its coherence with the international community’s efforts facing post 9/11 international terrorism challenges. Finally, a circular on Passenger Ferry Security pointed out that ships as a means of transport may be used as a conduit for the movement of arms consignments for terrorists.⁹⁰

IV. UNIVERSAL JURISDICTION OVER TERRORIST ACTS COMMITTED AT SEA

A. International treaties

From the examination of several international counter-terrorism treaties, both general framework instruments and those fleshing out specific aspects of terrorist acts at sea, it may preliminarily be concluded that, although such instruments do not obligate States Parties to exercise universal jurisdiction. Concerning the SUA Convention and its 1988 Protocol, in addition to the establishment of jurisdiction based upon territorial (State of flag included),⁹¹ active nationality,⁹² or passive nationality links,⁹³ both treaties introduced an open-ended clause which provides for that they do not “[...] exclude any criminal jurisdiction exercised in accordance with national law”.⁹⁴ The 2005 Protocol to the SUA Convention and the 2005 Protocol to the 1988 SUA Convention Protocol complemented this treaty with similar provisions applicable to the new offences added by the former.⁹⁵ Moreover, the above-mentioned instruments covered any loopholes relating to the exercise of jurisdiction in fulfillment of the *aut dedere aut judicare* principle. The SUA Convention more specifically laid down that:

Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences set forth in articles 3, 3*bis*, 3*ter* and 3*quater* in cases where the alleged offender is present in its

⁸⁸ IMO, MSC.1/Circ.1333, 26 June 2009, Annex, para. 15(2).

⁸⁹ IMO, MSC/Circ. 1073, 10 June 2003, para. 2 (emphasis added).

⁹⁰ IMO, MSC/Circ.754, 5 July 1996, 5.6.6.

⁹¹ SUA Convention, article 6(1)(a) and 6(1)(b) (as amended by the 2005 Protocol to the SUA Convention, article 6); 1988 Protocol to the SUA Convention, article 3(1)(a).

⁹² SUA Convention, article 6(1)(c); 1988 Protocol to the SUA Convention, article 3(2)(a).

⁹³ SUA Convention, article 6(2)(b); 1988 Protocol to the SUA Convention, article 3(2)(b).

⁹⁴ SUA Convention, article 6(5); 1988 Protocol to the SUA Convention, article 3(5).

⁹⁵ 2005 Protocol to the SUA Convention, article 6; 2005 Protocol to the 1988 SUA Convention Protocol, article 5.4.

territory and it does not extradite the alleged offender to any of the States Parties which have established their jurisdiction in accordance with paragraphs 1 and 2 of this article.⁹⁶

Later instruments on maritime terrorism have followed the same path. Thus, the International Convention for the Suppression of Terrorist Bombings, in principle, only provided for the traditional jurisdictional links, i.e., place of commission, active nationality, and passive nationality.⁹⁷ However, not only did this Convention ensure that each State Party shall exercise jurisdiction but it also considered the said links as not precluding “[...] any criminal jurisdiction established by a State Party in accordance with its domestic law”.⁹⁸ Likewise, although the International Convention for the Suppression of the Financing of Terrorism solely lays down the traditional criteria to exercise jurisdiction,⁹⁹ State Parties are not prevented from exercising “[...] any criminal jurisdiction established by a State Party in accordance with its domestic law”.¹⁰⁰

Attention should be drawn to the obligation imposed on States Parties to the referred treaties consisting in an effective incorporation of the offences defined at the international level into national criminal legislations. In doing so, one of the two prongs of the *aut dedere aut judicare* principle—the *aut judicare* alternative—is enforced and the State Party can prosecute/punish condemn maritime terrorism offenders regardless of jurisdictional links, i.e., universal jurisdiction. That is why the States must introduce the international counter-terrorism treaties definitions in their respective domestic criminal legislations so that the suspects be tried for maritime terrorism in compliance with the principle of legality.

Relating to universal jurisdiction, under the examined international maritime terrorist treaties, there are some legal effects such as: i) maritime terrorist offences shall not be considered political offences and, therefore, are extraditable; ii) the obligation to provide mutual legal assistance and judicial cooperation; iii) the obligation to criminalize the maritime terrorist offence defined in the treaty in national legislation; and iv) the obligation to sanction terrorist offences with sentences reflecting the seriousness of these crimes.¹⁰¹ E.g., States Parties to the SUA Convention shall “[...] make the offences set forth in articles 3, 3*bis*, 3*ter* and 3*quater* punishable by appropriate penalties which take into account the grave nature of those offences”.¹⁰²

⁹⁶ SUA Convention, article 6(4) (as amended by article 6(4) of the 2005 Protocol to the SUA Convention). See also article 3(4) of the 1988 Protocol to the SUA Convention.

⁹⁷ International Convention for the Suppression of Terrorist Bombings, article 6(1)(a)-(c) and 6(2)(a).

⁹⁸ *Ibid.*, article 7.

⁹⁹ *Ibid.*, article 7(1)(5).

¹⁰⁰ *Ibid.*, article 7(6).

¹⁰¹ See for further discussion: O’DONNELL, Daniel. International treaties against terrorism and the use of terrorism during armed conflict and by armed forces, **International Review of the Red Cross**, vol. 88, 2006, pp. 856-863.

¹⁰² SUA Convention, article 5 (as amended by the 2005 Protocol to the SUA Convention, article 5).

B. State practice: National legislations

Whether and to what extent the obligations embedded in international treaties have actually been implemented by States are assessed. 76 national criminal laws from diverse world regions were considered. Special attention was drawn to States which: i) have included offences constitutive of terrorist acts at sea and/or, at least, terrorism as a general offence; and ii) based upon general provisions of their Criminal Codes or Counter-Terrorism Acts empower their national criminal courts to exercise universal jurisdiction. Some findings are provided as follows.

First, there is no restriction of the jurisdiction of national courts to solely traditional jurisdictional links, i.e., place of commission of the crime which includes the flag State, perpetrator's nationality, and/or victim's nationality. The examined legislations broaden the jurisdiction of national courts regardless of a jurisdictional link. The justification for universal jurisdiction, however, differs depending upon which is the particular national law examined. Despite generalization risks, it is relatively clear the existence of three main types of legislative techniques relating to grounds for universal jurisdiction exercise. Thus, some national legislations vest their courts with universal jurisdiction as far as, *inter alia*, maritime terrorism is included in an international treaty or agreement binding on the State in question.¹⁰³ Sometimes there is an explicit reference to treaties, in particular, the SUA Convention and its 1988 Protocol,¹⁰⁴ or it is stated the use of international treaties when interpreting and giving content to the terminology used in national legislation.¹⁰⁵ A second group considers as sources for universal jurisdiction not only treaties binding on the respective State but also, in general, international law and/or customary international law.¹⁰⁶ The last category consists in legislations without explicit references to the grounds for universal jurisdiction.¹⁰⁷

Second, concerning legislations on international terrorism offences, maritime terrorism included, and over which universal jurisdiction may be exercised, were passed. In this regard, an important share of state legislative practice either as new acts, criminal codes or as amendments has been adopted in the last fifteen years which corresponds to the global terrorism context.¹⁰⁸

A third finding concerns which kind of offences has been implemented into national legislations. This aspect holds particular importance insofar as applicable substantive criminal law corresponds to the subject-matter over which national courts may exercise universal jurisdiction. Thus, three main categories were identified

¹⁰³ E.g., Brazil, Cyprus, Estonia, Georgia, Kazakhstan, and Russia.

¹⁰⁴ E.g., Denmark, England, and Finland.

¹⁰⁵ E.g., Cuba.

¹⁰⁶ E.g., Croatia, Ecuador, and Guinea.

¹⁰⁷ E.g., Azerbaijan, Gambia, Serbia.

¹⁰⁸ E.g., Austria, Colombia, Cuba, England, Ethiopia, France, Gambia, India, Romania, Serbia, and the USA.

and are presented herein in an increasing specificity scale. Some legislations only contain material acts (*actus reus*) constitutive of maritime terrorism such as abduction and unlawful detention and hijacking of vessels, imperilling human health and the environment, and hijacking of or destruction of vessels or platforms.¹⁰⁹ Other legislations criminalize terrorism as a general offence.¹¹⁰ Finally, the third and most numerous group is made up of legislations that additionally incorporate detailed provisions on terrorism at sea.¹¹¹ Thus, *inter alia*, the following offences have been included in domestic legislations¹¹²: i) hijacking of a ship; ii) destruction of or damage to a ship, its cargo or a platform, or committing a violent act in order to endanger, or be likely to endanger the safe navigation of the ship or safety of the platform; iii) destructing, damaging, or seriously interfering with the operation of marine navigation such as lighthouses; iv) violence against maritime navigation; v) violence against maritime fixed platforms; vi) placing devices or dangerous substances in territorial waters likely to destroy or damage ships or to interfere with maritime commerce; vii) violence against aids to maritime navigation; and viii) transportation of explosive, biological, chemical, or radioactive or nuclear materials.

Finally, it should be considered how inter-state cooperation in application of national legislations may work. Measures adopted for prosecution of piracy may be illustrative. Thus, concerning piracy committed off the Somali coast, the Contact Group on Piracy off the Coast of Somalia, created by the SC,¹¹³ established a special Working Group on legal issues in 2009. This Group in turn created the “Post Trial Transfer System”, a legal and political framework for prosecuting pirates in the region, which enables arresting States to transfer suspected pirates to a State in the region for prosecution and, if convicted, the pirates are sent to Somalia for serving their prison sentence. This system, which involves a high level of inter-state cooperation, may be considered for *mutatis mutandis* maritime terrorism. Its main advantage is arguably strong local or regional ownership of prosecution and trial when compared to an international court.¹¹⁴

¹⁰⁹ E.g., France and Sweden.

¹¹⁰ E.g., Ethiopia, India, and Romania.

¹¹¹ Azerbaijan, Croatia, Cuba, Denmark, England, Finland, Gambia, Kazakhstan, Serbia, and the USA.

¹¹² E.g., the USA.

¹¹³ S/RES/1851 (2008), 16 December 2008.

¹¹⁴ See LIISBERG, Jonas. The Legal Aspects of Counter-Piracy, in TARDY, Thierry (ed.), **Fighting piracy off the coast of Somalia. Lessons learned from the Contact Group**, Report No 20, EU Institute for Security Studies, Paris, 2014, p. 35.

V. FEASIBILITY OF TRYING INTERNATIONAL TERRORIST ACTS COMMITTED AT SEA BEFORE INTERNATIONAL/HYBRID CRIMINAL COURTS

A. The International Criminal Court

Concerning the inclusion of international terrorism and, particularly, maritime terrorism, as part of the ICC's jurisdiction, a preliminary but necessary source to be considered is the legislative history of this court's Statute. As the manner how the ILC dealt with this matter was already analysed, examination is herein focused on the immediate *travaux préparatoires* of the ICC Statute. Following a chronological order, attention should be drawn to the first Draft of the Preparatory Committee or "Zutphen Draft".¹¹⁵ In this draft, crimes of terrorism were considered as discrete offences, and a detailed list of offences under the heading of terrorism was also put forward.¹¹⁶ Precisely, offences under *inter alia* the SUA Convention, and its 1988 Protocol, fell under the proposed provision alongside the use of explosives and dangerous substances.¹¹⁷

During the Rome Diplomatic Conference, the Bureau's discussion paper included terrorism as an option on crimes within the jurisdiction of the ICC.¹¹⁸ The expression of "act of terrorism" was given an open-ended definition under this phrasing: "[...] shall also include any serious crime which is the subject matter of a multilateral convention for the elimination of international terrorism which obliges the parties thereto either to extradite or to prosecute an offender".¹¹⁹ As already discussed, this is the case of international treaties relating to terrorist acts committed at sea. Therefore, had this text been adopted, the treaty definitions of terrorist offences committed at sea would be now incorporated into the ICC's jurisdiction.

Even though the diplomatic delegations of, on the one hand, India, Sri Lanka, Turkey,¹²⁰ and, on the other one, Barbados, Dominica, India, Jamaica, Sri Lanka, Trinidad and Tobago and Turkey,¹²¹ carried on their determination to have international terrorism included as either a crime against humanity or as a discrete offence respectively, their proposal did not receive enough support, and consequently fell short of inclusion in the ICC Statute. Several reasons explain this negative outcome, namely: i) a lack of a generally accepted definition of terrorism; ii) time constraints made it impossible to reach consensus on such definition; iii) some of the terrorist acts qualified only as domestic offences and, hence, did not meet the threshold of a

¹¹⁵ *Report of the Inter-Sessional Meeting From 19 to 30 January 1998 in Zutphen, The Netherlands*, UN Doc. A/AC.249/1998/L.13, 4 February 1998.

¹¹⁶ A/AC.249/1997/L.5, p. 16.

¹¹⁷ *Ibid.*, 17.

¹¹⁸ Document A/CONF.183/C.1/L.53, 6 July 1998. Bureau: discussion paper regarding part 2.

¹¹⁹ Document A/CONF.183/C.1/L.44, 7 July of 1998. Recommendations of the Coordinator regarding article 5.

¹²⁰ Document A/CONF.183/C.1/L.27/REV.1.

¹²¹ Document A/CONF.183/C.1/L.71.

sufficiently serious crime to deserve being prosecuted by an international criminal tribunal; and iv) national criminal prosecution was thought to be the most convenient forum, especially considering the criteria of gravity laid down in the Statute.¹²²

Be that as it may be, it could be argued that international terrorist acts, maritime terrorism included, may be constitute of the most serious threats to international peace and security. As a result, the prosecution of these heinous acts by the ICC, the first permanent international criminal tribunal, would no longer be far-fetched. Nevertheless, from a plain reading of the ICC Statute, it is crystal clear that prosecution is not feasible, at least, based upon the current material scope of the ICC's jurisdiction. This corresponds to the fact that the crimes within the jurisdiction of the ICC are genocide, crimes against humanity, war crimes and aggression. International terrorism as such was not included. Additionally, in respect for the principle of legality, also included in the ICC Statute,¹²³ an individual can be neither prosecuted nor condemned for terrorist acts. Therefore, in order to vest the ICC with jurisdiction over the most serious manifestations of international (maritime) terrorism, it is necessary to amend the ICC Statute in conformity with article 121 ('Amendments') of the ICC Statute.

Having said so, the qualification given to the 9/11 attacks as crimes against humanity or even genocide, by several scholars merit a further precision.¹²⁴ It is argued herein that the ICC may prosecute and try acts materially constitutive of terrorism provided that the contextual or chapeau element characterizing genocide, crimes against humanity or war crimes is met. In other words, those material acts need to be: i) committed with the intention to destroy, in whole or in part, a national, ethnical, racial or religious group (genocide); ii) committed as part of a widespread or systematic attack against a civilian population (crimes against humanity); or iii) during and in connexion with an international or internal armed conflict (war crimes).¹²⁵

Among the numerous individual conducts constitutive of international crimes under the ICC Statute provisions, the following offences may be considered as the most relevant concerning maritime terrorism: i) murder; ii) taking of hostages; iii) intentionally directing attacks against the civilian population; iv) intentionally directing attacks against civilian objects; v) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; vi) intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.¹²⁶

¹²² See ROBINSON, Patrick. The Missing Crimes, in CASSESE Antonio et al. (ed.), **The Rome Statute of the International Criminal Court: A Commentary**, vol. I, Oxford University Press, Oxford, 2002, p. 517.

¹²³ ICC Statute, article 22.

¹²⁴ E.g., PELLET, Alain. *Le Monde*, 21 September 2001, p. 12; and ROBERTSON, Geoffrey. *The Times*, 18 September 2001, p. 18. Cited by SCHABAS, William. *Op. cit.*, p. 35.

¹²⁵ ICC Statute, articles 6-8 respectively.

¹²⁶ *Ibid.*, articles 7(1)(a); 8(2)(a)(viii) and 8(2)(c)(iii); 8(2)(b)(i) and 8(2)(e)(i); 8(2)(b)(ii); 8(2)(a)(iv); 8(2)

B. Feasibility of setting up an international or hybrid criminal tribunal for prosecuting international maritime terrorism

Should an amendment to the ICC Statute not come into place and should the international community as such consider it appropriate to prosecute international terrorist acts committed at sea, a special international or hybrid criminal tribunal with jurisdiction over those offences may be established. The question to be addressed is how feasible the setting up of such body results. The idea of creating an international tribunal for the prosecution of terrorism may actually be tracked down back to the League of Nations' times. Under the auspices of this organization, the 1937 Convention for the Creation of an International Criminal Court was adopted introducing the mechanism of an international criminal tribunal on terrorism prosecution for the very first time. This Convention was adopted the same day as the 1937 Convention for the Prevention and Punishment of Terrorism that provided the subject-matter jurisdiction of an envisioned international criminal court with jurisdiction on terrorism.¹²⁷ Although neither of these two Conventions entered into force, this court was *inter alia* thought as a permanent institution,¹²⁸ and subsidiary to national criminal jurisdictions.¹²⁹

Much more recent practice on the establishment of international and hybrid criminal courts and tribunals is examined as follows. As previously argued, what defines an international crime is primarily its nature, i.e., seriously affecting the values which are most important for the international community as a whole. Accordingly, should the phrasing included in the SC Resolutions on the post 9/11 international terrorism scenario be compared against the SC Resolutions creating the ICTY and the ICTR, these instruments may be found similar. Thus, while the former set of resolutions refer to the existence of very serious threats to international peace and security, the latter also speaks of a threat to international peace and security.¹³⁰ This wording stems from the peaceful measures which may be adopted by the SC under article 41 of the UN Charter in situations of threats to international peace and security. Therefore, if crimes against humanity, war crimes and genocide as threats to international peace and security justified the creation of the ICTY and the ICTR, there may be a case for an international or hybrid criminal court with jurisdiction over international terrorism, including international maritime terrorism. Indeed, although article 3 of the ICTY Statute does not expressly grant competence over terrorist acts, it includes an open-ended clause under the article on violations of the laws or customs of the war.

(b)(iv).

¹²⁷ Convention for the Prevention and Punishment of Terrorism, article 1. Reproduced in: HUDSON, M. (ed.), **International Legislation**, vol. VII, Washington, Carnegie Endowment for International Peace, 2000, pp. 862-878.

¹²⁸ Convention for the Creation of an International Criminal Court, article 3.

¹²⁹ *Ibid.*, article 2.

¹³⁰ S/RES/827 (1993), 25 May 1993, preambular para. 4; S/RES/955 (1994), 8 November 1994, preambular para. 4.

The ICTY has indeed applied it by considering terror as a crime under international humanitarian law.¹³¹ The ICTR Statute included acts of terrorism as a war crime.¹³²

The most recent example of setting up an international criminal tribunal via a SC Resolution,¹³³ in accordance with Chapter VII of the UN Charter, was the creation of the STL invested with *inter alia* jurisdiction to apply Lebanese criminal law on terrorism, over persons responsible for the assassination of the former Lebanese Prime Minister Rafiq Hariri.¹³⁴ Indeed, among the instruments of international and hybrid criminal courts, the STL Statute has been the first and so far only one to include terrorism as an independent crime, which corresponds to the context of assassination of Hariri. The SC via Resolution 1757 (2007), under Chapter VII of the UN Charter, brought into force the STL constitutive agreement, and is referred to in the Resolution as the annexed “document”.¹³⁵ Some authors have questioned the legality or constitutional property of bringing into force the STL constitutive agreement via a SC Resolution as the UN Charter does not authorize the UN to interfere in a State’s internal affair,¹³⁶ or to substitute a Chapter VII decision for a ratification of an international treaty.¹³⁷ However, the Lebanese Prime Minister was actually the one who, due to internal problems to ratify the agreement, requested the SC that “the Special Tribunal be put into effect [by] a binding decision regarding the Tribunal on the part of the Security Council”.¹³⁸ Indeed, there is no constraint on SC measures adopted under Chapter VII.¹³⁹ The SC considered the terrorist attack against Hariri and its implications as a threat to international peace and security.¹⁴⁰ As previously seen, the STL extensively analysed *inter alia* international maritime terrorism treaties, providing some clarification about the definitional elements of international terrorism as an independent international crime according to customary international law.

The feasibility of establishing international criminal tribunals with jurisdiction over serious offences committed at sea gained momentum at the SC as evidenced by Resolution 1918 (2010) under which all States were called to criminalize piracy under national laws. In particular, the option of an international or hybrid criminal tribunal to prosecute and try pirates was considered: “The Council requested to present within three months a report on possible option to further the aim of prosecuting and imprisoning

¹³¹ *Prosecutor vs. Galic*, Judgment, IT-98-29-T, 5 December 2003, paras. 133 et seq.

¹³² ICTR Statute, article 4.

¹³³ S/RES/1757 (2007), 30 May 2007.

¹³⁴ STL Statute, articles 1 and 2(a).

¹³⁵ S/RES/1757 (2007), 30 May 2007, para. 1.

¹³⁶ SHEHADI, Nadim and WILMSHURST, Elizabeth. The Special Tribunal for Lebanon: The UN on Trial?, in **Chatham House Middle East/International Law Briefing**, July 2007, p. 9.

¹³⁷ FASSBENDER, Bardo. Reflections on the International Legality of the Special Tribunal for Lebanon, **Journal of International Criminal Justice**, vol. 5, 2007, pp. 1097-1098.

¹³⁸ See *Letter dated 14 May 2007 from the Prime Minister of Lebanon to the Secretary-General*, S/2007/281 Annex (16 May 2007). See also S/RES/1757, Preamble, para. 8.

¹³⁹ UN Charter, article 2.7.

¹⁴⁰ S/RES/1636 (2005), 31 October 2005, Preamble.

pirates, including, in particular, options for the creation of special domestic chambers, possibly with international components, a regional tribunal, or an international tribunal to that end".¹⁴¹ As detailed in the Report of the Secretary-General answering this SC's request, setting up an internationalized special chamber, a regional, or an international criminal court presents both advantages and disadvantages.¹⁴² These pros and cons arguably should also *mutatis mutandis* weigh if and when the creation of a similar institution for international (maritime) terrorism prosecution is discussed. Thus, the more international the court is, the higher capacity building and state cooperation are. However, internationalization of justice normally leads to costly and prolonged proceedings, and remoteness from the country or region where the maritime terrorism acts took place.

Difficulties related to design a hybrid, regional, or international criminal court are also related to the presence of concurring potential jurisdictional links. Nevertheless, as the Lockerbie trial showed, it is possible to craft an internationalized criminal jurisdiction reflecting those links. In the Lockerbie incident, two Libyan officials were accused of blowing up the Pan Am Flight 103, killing all 259 passengers and crew, and eleven residents of the town of Lockerbie where the wreckage of the Boeing 747 crashed on 21 December 1988. After having been surrendered by Libya, those officials were tried in the Netherlands before a panel of Scottish judges at a former US military base known as Camp Zeist.¹⁴³

VI. CONCLUSIONS

Some of the most serious manifestations of international terrorism, in general, and of terrorist acts at sea, in particular, may be considered as a core international crime. This conclusion stems from the practice of the SC Resolutions in which international terrorism has been condemned in the strongest terms, national legislative practice, and some emerging case law at international and hybrid criminal courts, the STL in particular. This trend corresponds to the tremendous momentum gained by counter-terrorism measures in the post 9/11 context. This practice is actually in conformity with the serious nature of these offences which are considered as very serious threats to international peace and security. Accordingly, when international peace and security are seriously disturbed, as is the case of some of the most heinous forms of international (maritime) terrorism, the whole international community is severely affected.

The treaty framework of maritime terrorism should accordingly be read bearing in mind the new dimensions of international terrorism even though some of these instruments such as the SUA Convention and its 1988 Protocol were adopted before

¹⁴¹ SC Res. 1918, UN Doc. S/RES/1918 (2010), 27 April 2010, preambular paragraph 3.

¹⁴² S/2010/394, 26 July 2010.

¹⁴³ See SCHARF, Michael. The Lockerbie Trial Verdict, *Insights-American Society of Int. Law*, vol. 6, 2001.

the 9/11 context. Indeed, the negotiation and drafting of more recent instruments such as the 2005 Protocol to the SUA Convention, the 2005 Protocol to the 1988 SUA Convention Protocol as well as the Convention on Nuclear Terrorism endeavour to reflect those changes and new concerns. Be that as it may be, acts seriously affecting or jeopardizing life and bodily integrity, navigation safety, maritime infrastructure, among others, which seek to spread terror in a global scale underlie these instruments. In spite of the fact that the practice of the SC and GA Resolutions explicitly dealing with international maritime terrorism has been limited, initiatives taken by one or the other UN organ have led the way to the existent international framework on international maritime terrorist offences. These efforts have been complemented by the IMO mainly through participation in the drafting of international treaties and non-binding recommendations and circulars on international terrorism as part of the IMO's mandate to handle maritime safety and security issues.

The adoption and/or amendment of an important number of national legislations on terrorism, often including maritime terrorist offences or at least material acts constitutive of maritime terrorism and over which universal jurisdiction may be exercised, flows from the serious nature posed by these offences and is in fulfilment of international treaty obligations. Universal jurisdiction is increasingly considered an option to prosecute and try those offenders as evidenced in national practice. A highly integrated inter-state framework for prosecution of maritime terrorism may also be put into action.

Another mechanism that may be used for dealing with terrorist acts at sea is represented by international criminal courts. During the ICC *travaux préparatoires*, the inclusion of terrorist acts at sea in the ICC's jurisdiction was proposed but did not finally get its way in the ICC Statute due to *inter alia* a lack of consensus as to their seriousness. The state-of-the-art practice on terrorism as an international crime is, however, different from the prevalent situation at that time. Having said so, it will be necessary to amend the ICC Statute if the State Parties to it agree on expanding the ICC's jurisdiction to include the most serious manifestations of international (maritime) terrorism. Regardless of such amendment, the feasibility of setting up a special international or hybrid criminal tribunal should be considered inasmuch as some of the international criminal tribunals set up and/or backed via SC Resolutions have included other manifestations of terrorism. The STL Statute which for first time at the international level criminalizes terrorism and its emerging case law stand out as an example of this trend. Moreover, the SC itself considered international criminal mechanisms for prosecuting piracy, which *mutatis mutandis* may be illustrative as for international maritime terrorism in the future.

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