ARTICLES

MARITIME TERRORISM AND SECURITY CHALLENGES IN THE STRAITS OF MALACCA AND SINGAPORE*

Mary George**

1. INTRODUCTION

Since the events of 11 September 2001 (9/11),¹ terrorism, and as far as this paper is concerned maritime terrorism,² has been added to the list of crimes that fall within the prescriptive and criminal enforcement jurisdiction of states, collectively referred to as criminal jurisdiction in this paper. Maritime terrorism may be committed on coastal land; on the coastal shelter belt; in the interface between land and sea; on offshore islands, reefs, or upon low-tide elevations; on lighthouses; on offshore

* The original version of this article was presented as a paper entitled "Maritime Security Challenges in the Straits of Malacca and Singapore" at the International Law Association, British Branch Spring Conference, hosted by University College London and the School of Oriental and African Studies in central London, "Tower of Babel, International Law in the 21st Century: Coherent or Compartmentalised?", 3-4 March 2006.

** Associate Professor Datin Dr., Faculty of Law, University of Malaya.

¹ See Sterba, P. James (ed.), "For a brief history of terrorism", *Terrorism and International Justice* (New York: Oxford University Press, 2003) at 2, 1-27 where the author says, "The terrorism of 9/11 is something new and different". Sterba recognizes that states can commit terrorist acts as well, see Sterba, *ibid.* 206-228. On Brierly's critique of Vattel on the use of force and on freedom and human rights of the enemy, see Carty, Anthony, "Chapter 4: The terrors of freedom: the sovereignty of states and the freedom to fear" in Strawson, John (ed.), *Law after Ground Zero* (Portland, Oregon: The Glasshouse Press, 2002), at 44-56. See also Cook, L. Martin, "Ethical issues in counter-terrorism" in Okerstrom, Dennis (ed.), *Peace, War and Terrorism* (New York: Pearson/Longman, 2006), at 199-204, where the author discusses considerations of *jus ad bellum* and *jus in bello* and the moral status of an adversary. See also Charlesworth, Hilary, Valerie Epps and P. Michael Schraf, "International legal implication: Teach-in on terrorism*: September 20, 2001", 8 *New Eng Int'l & Comp L Ann* (2002), at 81, where these Professors held discussions on the 9/11 events within a week of the tragedies.

² See Raymond, Catherine Zara, "The threat of maritime terrorism in the Malacca Straits" in 4/3 (February 9, 2006) *Terrorism Monitor*, Global Terrorism Analysis, see <http://jamestown.org/terrorism/news/article.php?articleid=236986>, accessed on 14/9/2006; Rommel, C. Banloi, "Maritime terrorism in South-East Asia: the Abu Sayyaf threat" (58) 4, *Naval War College Review* (2005) (on line).

installations; on the sea-bed, slope, or rise of the continental edge or margin; in the common heritage of mankind; on gas pipelines or cables; under the seabed; on structures under the seabed or in the airspace above the sea, or even in outer space above the airspace above the sea. In simple terms, terrorism at sea may take place in any maritime zone from internal waters to the outer edge of the exclusive economic zones, or outer edge of the continental shelves or on the high seas. Maritime terrorism has many manifestations, for example, ships have been deliberately hijacked, run aground or blown up by explosives, and passengers and crew have been threatened and killed. If a Strait state is to examine and control criminal activities at sea, it needs to be conferred with express criminal jurisdiction under the 1982 LOSC. The International Maritime Organization (the IMO) has adopted three international conventions for the suppression of maritime terrorism. These Conventions cover neither issues of state responsibility nor international judicial intervention, but focus on domestic criminal enforcement. The maritime conventions and protocols that address maritime terrorism are as follows:

1. Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation 1988;
2. Protocol for the Suppression of Unlawful Activities Against the Safety of Fixed Platforms Located on the Continental Shelf 1988, and
3. 2005 Amendments to the Convention for the Suppression of Unlawful Acts (SUA) Against the Safety of Maritime Navigation, 1988 and its Related Protocol.

The author argues that in order to enforce the provisions of the 2005 SUA Protocols certain amendments have to be made to Part III on Straits Used for International Navigation of the 1982 LOSC as it does not confer sufficient criminal jurisdiction upon Strait states. This demonstrable lack of imperative criminal enforcement jurisdiction in Part III is unlike its correlative for coastal states in Article 27 of Part II on the Territorial Sea and Contiguous Zone, where Article 34 (2) of Part III states that “the sovereignty or jurisdiction of the States bordering the Straits is exercised subject to this Part and to other rules of international law”. The reference to “other rules of international law” is, *inter alia*, a reference to the general principles of criminal jurisdiction, the most powerful of which are the territorial and protective principles: the ‘effects’ doctrine. Article 34(2) as currently worded is unsupported by enforcement powers in the rest of the provisions of Part III and lacks an imperative direction from states; it has, rather, a precatory tone in meeting the challenges of maritime terrorism and the nuclear radiation of the oceans. The precatory nature derives from an expression of desire as manifested in Article 34, above. Under these circumstances, Strait states face an unduly heavy burden in defending the regime of transit passage. Given that criminal enforcement jurisdiction as currently stated in Part III of the 1982 LOSC is insufficient to meet the challenges ahead, this paper offers an alternate solution to the defending of the freedom of the oceans for all.

The only freedom which deserves the name is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs, or impede their efforts to obtain it.

- John Stuart Mill, *On Liberty*, 1859

The jurisprudential basis for attacking terrorism (the arguments of the utilitarian and the Kantian notwithstanding) is that terrorism is an exception to the general views on utilitarianism, freedom of speech and freedom of religion; it is a total violation of human rights and the dignity of persons. It deserves a special kind of treatment as it stems from a desire to use terror in the attempt, conspiracy or accomplishment of an act or omission which amounts to an offence. States need to study several areas, cited below, in the area of maritime terrorism and maritime security challenges. However, this paper does not aim to answer all of the following questions:

- (i) Is maritime terrorism any different from other crimes?
- (ii) What form of punishment should be meted out to these criminals?
- (iii) What sort of reform is envisaged for these criminals?
- (iv) Can the terrorist be separated from, say, the money-launderer?

In simple terms, where one individual or a group of individuals from one state or a group of states intends and knowingly plans and conspires to an attack using terror in any form on the citizens of the same state or a group of states in the furtherance of their unlawful objective, they have committed terrorism. It is direct abuse of the concept of liberty. A jurisprudence of the liberty of actions with no impediments is a veritable minefield. No one has the right to infringe the peaceful co-existence of a people or of a state. Liberty is that sphere of activity within which the law is content to leave one alone. This is lawful liberty. Liberty is good and some licence in a liberty for the regulation of civil society is acceptable when tempered by law, yet liberty without impediments when used by terrorists is tantamount to the instant genocide of the people and to the demolition of the state and its institutions. The peaceful co-existence of a people includes, among other factors, the recognition and enforcement of constitutionally guaranteed human rights that include the right to peaceful co-existence. When terrorists infringe this right of the peaceful co-existence of states and their populations, they commit an unlawful act. These unlawful acts are offences and have to be given a name, a definition, and a procedural content at international law in the form of a treaty for both legal and political action to be taken by the international community, a horizontally shared responsibility followed by a supporting element of national law. The right we have to live in peace and security is dependent upon the state's providing us with this blanket of security. Terrorists such as perpetrators of genocide have taken a liberty with no impediments to their terrorizing humankind, governments, and institutions alike for whatever reason. Their high degree of autonomy to determine and pursue their own ends has to be stopped where this infringes the right and liberty of the next citizen. Any form of state or official approval, connivance, indifference, impotence or acquiescence is wrong under the law of nature, anchored as it is in liberty.

With the dawn of the 2005 International Convention for the Suppression of Acts of Nuclear Terrorism, the regime of Straits used for international navigation needs

to be re-visited as the Convention considers it an offence to commit terrorism with nuclear materials.³ This Convention recognizes the traditional principles of territorial,

³ The United Nations GA Resolution and Conventions on terrorism are as follows: The UNGA A/RES/49/60 at its fiftieth session adopted a Declaration entitled "Declaration on Measures to Eliminate International Terrorism" which called for closer co-operation among states to combat terrorism and crimes closely connected with terrorism. The latter comprise drug trafficking, unlawful arms trade, money laundering, and the smuggling of nuclear and other potentially deadly materials. This Declaration condemns all acts, methods and practices of terrorism as criminal and unjustifiable including those which jeopardize the friendly relations among states and peoples and which threaten the territorial integrity and security of states. Paragraph 3 provides that:

Criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them;

UNGA A/RES/51/210 adds an Annex to the above Declaration, namely, Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism. It states, among others, that terrorists should be tried within the state, or extradited. In the case of those who seek asylum, their terrorist activity should not be considered a political issue whereby the asylum seeker is pardoned for his criminal terrorist activity. States are urged in paragraph 3 to deal with terrorists in conformity with national and international law, including international standards of human rights, before granting refugee status. This status should not be used as a ruse to perpetrate further terrorist activities. Even those awaiting asylum applications may not avoid prosecution for their terrorist activities. States with experience in dealing with these issues are reminded of the importance of sharing their information regarding the terrorists, their movements, support and weaponry, investigation procedures, and the prosecution of terrorist acts.

For UN Anti-terrorism Conventions, see UN Publication: UNITED NATIONS Office on Drugs and Crime, *Legislative Guide to the Universal Anti-Terrorism Conventions and Protocols* (New York: United Nations, 2004) and the United Nations, *International Instruments related to the Prevention and Suppression of International Terrorism* (New York: United Nations, 2004). Some recent conventions to control terrorism are the International Convention for the Suppression of Terrorist Bombings, adopted by the General Assembly of the United Nations on 15 December 1997 (UN Doc. A/RES/52/164, Annex), the International Convention for the Suppression of the Financing of Terrorism, adopted by the General Assembly of the United Nations on 9 December 1999 (UN Doc. A/RES/54/109, Annex), and the International Convention for the Suppression of Acts of Nuclear Terrorism, 2005.

Article 5 of the International Convention for the Suppression of Terrorist Bombings 1997 compels States Parties to adopt such measures as are necessary, including "domestic legislation, to ensure that criminal acts within the scope of this Convention, in particular where they are intended or calculated to provoke a state of terror in the general public or in a group of persons or particular persons, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature and are punished by penalties consistent with their grave nature". Article 1 of this Convention lays down definitions of "State or Government Facility", "Infrastructure facility", "Explosive or other lethal device", "Military forces of a state", "Place of public use" and "Public Transportation System". Article 3 stresses that the Convention does not apply where the offence is committed within a single state, the alleged offender and the victims are nationals of that state, the alleged offender is found in the territory of that state, and no other state has a basis under the Convention to exercise jurisdiction. Besides territorial jurisdiction, quasi-territorial jurisdiction on board ships and aircraft, nationality, and passive personality juris-

quasi-territorial, nationality and passive personality jurisdiction as it applies to ships and aircraft. The unlawful and intentional possession, making and using of damaging radioactive material are punishable under Article 2 (1). The criminal liability in Article 2 (1) extends to any person who unlawfully and intentionally possesses radioactive material or makes or possesses a device with the intention to cause death or serious bodily injury or substantial damage to property or to the environment; or intentionally uses radioactive material or damages a nuclear facility in a manner which releases or risks the release of radioactive material with the intention of causing death or serious bodily injury or substantial damage to property or to the environment; or compels a natural or legal person, an international organization or a state to do or refrain from doing an act. Similarly, threats and demands also constitute offences. Attempts and accomplices are punishable as acts furthering criminal activity. However, where the geographical scope of the offence coincides with the nationality jurisdiction of both the perpetrator and the victim and no other state can exercise jurisdiction, that constitutes a case of territorial jurisdiction, where the Convention does not apply. The Convention urges states to enact laws that counter nuclear terrorism both within and beyond their territories.⁴

diction, the Convention also recognizes jurisdiction based on domiciliary laws where the offence is committed by a stateless person who has his or her habitual residence in the territory of that State.

The 1999 International Convention For the Suppression of the Financing of Terrorism makes it an offence for a terrorist by any means, directly or indirectly, unlawfully and wilfully, to provide or collect funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, to carry out the acts within the scope of the Convention. Other offences include death, serious bodily injury to a civilian or the intimidation of a population, or the compulsion of a government or an international organization to do or abstain from doing an act.

⁴ Some other international conventions on terrorism:

The UN conventions on terrorism deal with terrorism in the airspace, on land and at sea are as follows:

The Tokyo Convention on Offences Committed on Board Aircraft, 1963, *see UNTS*, vol. 704, No. 10106; The Convention for the Suppression of Unlawful Seizure of Aircraft 1970, *see UNTS*, vol. 860, No. 12325; The Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation 1971, *see UNTS*, vol. 974, No. 14118; The Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents, adopted by the General Assembly of the United Nations 1973, *see UNTS*, vol. 1035, No. 15410 (not discussed here); The International Convention Against the Taking of Hostages, 1979, *see UNTS*, vol. 1316, No. 21931 (not discussed here); The Convention on the Physical Protection of Nuclear Material 1979, *see UNTS*, vol. 1456, No. 24631 (not discussed here); Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation 1971, *see ICAO Doc 9518*, supplementary to the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation 1988; and Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf 1988, *see UNTS*, vol. 1678, No. 29004.

Under these Conventions, criminal jurisdiction is based in traditional international law on the territorial principle; the quasi-territorial principle in so far as it relates to ships and aircraft registered in the particular state; the nationality principle; the passive personality principle, and the protective principle. Jurisdiction is linked to the location of crime. While states are given enforcement jurisdiction, they are encouraged to adopt prescriptive jurisdiction; through extra-territorial jurisdiction under their Penal Codes to conclude extradition treaties with states making terrorist offences

extraditable, granting asylum where necessary; determining refugee status and the application of human rights and humanitarian rights of such refugees. The duty to prosecute and punish the terrorist is paramount. To do this a state needs both prescriptive and enforcement jurisdiction. The state is a holder of both a right and a duty. First, a state can obtain the necessary enforcement criminal jurisdiction only if it is a Contracting Party to the Convention. Ratification plays a major role as in other treaties and the Conventions are again dependent on a minimum number of ratifications for entry into force. These Conventions are also subject to the “forces” of reservation and denunciation, which will determine the success or failure of a Convention. Second, it is important to remember that only actions that instil terror fall under the definition of terrorism. Thus, for instance, if a terrorist pollutes the atmosphere of an aircraft cabin and causes the death of 400 passengers on that plane, there is no element of terror involved and the offence does not fall under terrorism. It is a loop-hole under the present definition. The term “territory” has to be understood under general international law; for maritime purposes, it has to be understood under the provisions of the 1982 LOSC. The determination of the territory is critical for the exercise of jurisdiction. Thirdly and finally, the traditional immunity accorded to military, customs and police services, which has perhaps worked very well so far, may just prove to be the Achilles heel of the entire operations.

For instance, to give effect to the quasi-territorial jurisdiction of a state under the Tokyo Convention on Offences Committed on Board Aircraft 1963, the state has to be a Contracting Party to the Tokyo Convention and the aircraft to be one of a Contracting State. The recognized offence is provided in Articles 1 and 2 which deal with offences against penal law; acts which, whether or not they are offences, may or do jeopardize the safety of the aircraft or of persons or property therein or which jeopardize good order and discipline on board. The Convention applies in respect of offences committed or acts done by a person on board any aircraft registered in a Contracting State, while that aircraft is in flight or on the surface of the high seas or of any other area outside the territory of any state.

Article 2 provides that without prejudice to the provisions of Article 4 and except when the safety of the aircraft or of persons or property on board so requires, no provision of this Convention shall be interpreted as authorizing or requiring any action in respect of offences against penal laws of a political nature or those based on racial or religious discrimination.

It is only the state of registration of the aircraft that is competent to exercise jurisdiction. This includes criminal jurisdiction exercised in accordance with national law. There are some recognized exceptions encapsulated within Article 4 that permit a Contracting State which is not an aircraft registered state to exercise (1) protective jurisdiction where the offence has an effect on the territory of that state; (2) the nationality principle where the offence has been committed by or against a national or permanent resident of such state; (3) the principle of quasi-territorial jurisdiction where the offence consists of a breach of any rule or regulation relating to the flight or manoeuvre of aircraft in force in such state, and (4) subject-matter jurisdiction where the exercise of jurisdiction is necessary to ensure the observance of any obligation of such state under a multilateral international agreement. The aircraft commander is under pressure to determine whether, subjectively or objectively, he has reasonable grounds to believe that someone on his aircraft is about to commit an offence aboard. Twelve instruments of ratification are required to bring it into force.

Some of the weaknesses of the Tokyo Convention remain unchanged in The Hague Convention for the Suppression of Unlawful Seizure of Aircraft 1970 and the Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation 1971. To begin with, the Preamble of The Hague Convention in no uncertain terms provides that “for the purpose of deterring such acts, there is an urgent need to provide appropriate measures for punishment of offenders.” The Act recognizes that the act in question is an offence under Article 1 whereby any person who on board an aircraft in flight unlawfully, by force or threat thereof, or by any other form of intimidation, seizes, or exercises control of, that aircraft, or attempts to perform any such act, or is an accomplice

of a person who performs or attempts to perform any such act commits an offence.

The material scope of the Act extends to aircraft in flight as mentioned in Article 3. Every Contracting State undertakes to make the offence punishable by severe penalties (Article 2). When a person has been taken into custody, the concerned Contracting State has a duty to inform on the state of the registration of the aircraft, the state of the nationality of the detained person and any other State interested in the detention of such person of such custody (Article 4). States are bound to give the greatest measure of assistance in these criminal matters (Article 10). This Article also provides that the law of the state requested shall apply in all such cases. Extradition is recognized in these matters in Article 8 and the Council of the ICAO is to be informed of all such information (Article 11). The Convention requires a mere ten ratifications to enter into force.

The Montreal Convention of 1971 applies to offences against aircraft, too, and considered that there was an urgent need to provide appropriate measures for the punishment of offenders. It introduced the *mens rea* of intention into the definition of the offence against civil aviation. In Article 1 it states that any person commits an offence if he unlawfully and intentionally:

- a) performs an act of violence against a person on board an aircraft in flight if that act is likely to endanger the safety of that aircraft;
- b) destroys an aircraft in service or causes damage to such an aircraft which renders it incapable of flight or which is likely to endanger its safety in flight;
- c) places or causes to be placed on an aircraft in service, by any means whatsoever, a device or substance which is likely to destroy that aircraft, or to cause damage to it which renders it incapable of flight, or to cause damage to it which is likely to endanger its safety in flight;
- d) destroys or damages air navigation facilities or interferes with their operation, if any such act is likely to endanger the safety of aircraft in flight; or
- e) communicates information which he knows to be false, thereby endangering the safety of an aircraft in flight.

Attempts are punished as much as accomplices. The material scope of the Convention covers aircraft in flight and aircraft in service as stated in Article 2. The idea of imposing severe penalties is again retained in Article 3. Contracting States who are about to try the offender are required to take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that state (Article 7). The jurisdiction of a Contracting State is widened under this Convention for it extends to territorial jurisdiction, quasi-territorial jurisdiction, and domiciliary jurisdiction which covers both permanent residence and principal place of business requirements (Article 5). Articles 5 and 8 are inter-connected, as Article 8 states that for purposes of extradition between the Contracting States, each offence is to be treated as if the occurrence had been committed in all of the territories of the states required to establish jurisdiction under Article 5. This Convention is dependent on ten ratifications for it to enter into force.

The 1971 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation also considers in its Preamble that for the purpose of deterring such acts, the offenders must be punished. As this Protocol extends its coverage to the airport, the definition of the offence is given in Article II as stated below:

Article II:

Any person commits an offence if he unlawfully and intentionally, using any device, substance or weapon:

- a) performs an act of violence against a person at an airport serving international civil aviation which causes or is likely to cause serious injury or death; or
- b) destroys or seriously damages the facilities of an airport serving international civil aviation or aircraft not in service located thereon or disrupts the services of the airport, if such an act endangers or is likely to endanger safety at that airport.

States are required to regulate, de-regulate and re-regulate crimes occasionally within their states. Today crimes of maritime terrorism are added to this list. Terrorists are not punished under the laws of armed conflict, Geneva Conventions I to IV. Terrorism is a criminal offence for which states that once bore no responsibility for terrorists in their territories should now bear state responsibility, the rationale being that criminal acts undermine collective national security.

2. CONVENTIONS ON COUNTER-MARITIME TERRORISM

Piracy and armed robbery were the main human threats at sea for a long time.⁵ Pirates were not considered as terrorists but as stateless persons on the high seas who marauded certain passing ships for private gain and were subject to the rules of international law.⁶ Armed robbers were subject to municipal laws. A new offence was added to this list: the offence of maritime terrorism. The genesis of maritime terrorism in recent times can be traced to the nineteen-eighties, when there was a great deal of concern when ships were hijacked, run aground or blown up, passengers and crew killed or kidnapped and cargo lost. In November 1985, the Fourteenth Assembly of the IMO considered a proposal by the US that measures regulating the prevention of such unlawful conduct should be adopted. In this context, the IMO General Assembly in Resolution A. 584(14) noted:

[W]ith great concern the danger to passengers and crew resulting from the increasing number of incidents involving piracy, armed robbery and other unlawful acts against or on board ships, including small craft, both at anchor and underway.

Various provisions such as Article 1(4) (Tokyo), Article 3(2) (Hague), and Article 4(1) (Montreal), all state that the Conventions do not apply to aircraft used in military, customs or police services.

⁵ There is a great deal of literature on the subject of piracy, the *Achille Lauro* case, and maritime terrorism as follows: see Halberstam, Malvina, "Terrorism on the high seas: the *Achille Lauro*, piracy and the IMO Convention on Maritime Safety" 82 *AJIL* (1998), at 269–310; Barrios, Erik, "Casting a wider net: Addressing the maritime piracy problem in South-East Asia" 28 *Boston College International and Comparative Law Review* (2005), at 149–166 where he raises an interesting argument that there is another definition of piracy before UNCLOS that States in South-East Asia may apply and that maritime terrorism falls within the latter. At para. 157 of this work, this author writes: "Towards a more historically accurate piracy framework". Another author, Goodman, laments that no one is using international law to suppress piracy in Goodman, Timothy H., "Leaving the corsair's name to other times: How to enforce the law of the sea piracy in the 21st century through regional international agreements", 31 *Case W Res Int'l L* (1999), at 139–168; for gaps in the current law on piracy see Bornick, Brooke A., "Bounty hunters and pirates: Filling in the gaps of the 1982 UN Convention on the Law of the Sea", 17 *Fla J Int'l L* (2005), at 259 – 275.

⁶ See Dubner, Barry Hart, "Human rights and environmental disaster – two problems that defy the 'norms' of the international law of the sea piracy" 23 *Syracuse J Int'l L & Com* (1997), at 1 where Dubner argues that piracy and terrorist attacks have similarities, but their goals are different. For instance, a terrorist or pirate attack leading to oil or chemical spills could result in disastrous consequences moving up the entire food chain.

Thus the offences of piracy, armed robbery and maritime terrorism became intertwined to some extent with their criminal elements. The locus for maritime terrorism is very wide, while piracy is still an offence on the high seas and armed robbery a municipal crime. In December 1985, the UNGA called upon IMO “to study the problem of terrorism abroad or against ships with a view to making recommendations on appropriate measures”. The Maritime Safety Committee of the IMO issued a circular MSC/Circ. 443 on Measures to Prevent Unlawful Acts Against Passengers and Crews on Board Ships; it required governments, port authorities, administrators, ship-owners, ship masters and crews to take appropriate measures to prevent these unlawful acts.

By November 1986, taking the grave concerns of the international community into consideration, the Governments of Egypt, Austria and Italy proposed that the IMO prepare a convention on the topic of unlawful acts against the safety of maritime navigation to provide for a comprehensive suppression of unlawful acts committed against the safety of maritime navigation which endangers innocent human lives, jeopardizes the safety of persons and property, and seriously affects the operation of maritime services.

2.1. 1988 SUA and Protocol

About two years later, in March 1988, the Rome Conference adopted the 1988 Convention for the Suppression of Unlawful acts Against the Safety of Maritime Navigation (1988 SUA). The provisions of the 1988 SUA were then applied to the 1988 Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf. This Protocol was adopted on 10 March 1988 and it entered into force on 1 March 1992.⁷

The 1988 SUA and the Fixed Platforms Protocol were adopted in response to the 1985 hijacking of the Italian flag cruise ship, the *Achille Lauro*, and the murder of an American passenger. The main objective of the Convention was to ensure that appropriate action was taken against persons committing unlawful acts against ships. These included the seizure of ships by force, acts of violence against persons on board ships, and the placing of devices on board a ship which were likely to destroy or damage it. The terms of the Convention obliged Contracting Governments either to extradite or to prosecute the alleged offenders. It was a combination of several provisions developed in the past in dealing with aerial hijackings. The Convention required states to penalize the seizure of a ship; damage to a ship or its cargo likely to endanger its safe navigation; the introduction of a device or substance likely to endanger the ship, endanger its safe navigation by serious damage to its navigational facilities, or by communicating false information and injuring or killing any person in connection with the commission of the offences under the general conventions against terrorism. Attempts and participation are also punished. These conventions

⁷ See Witten, Samuel M., “The International Convention for the Suppression of Terrorist Bombings”, 92 *AJIL* (1998), at 774-781.

and protocols are applicable to non-Strait states and land-locked states under the subjective territorial principle, personality or passive personality or protective principles of general international law.

The 1988 SUA differs from the offence of piracy and armed robbery in that the rationale of the 1988 SUA Convention was to ensure the safety of navigation and to punish those responsible for abusing the safety of navigation. The Preamble expressed deep concern at the world-wide escalation of acts of terrorism in all of its forms which endangered or took innocent human lives, jeopardized fundamental freedoms and seriously impaired the dignity of human beings. The material scope of the Convention covered ships, a term defined in Article 1 as a “vessel of any type whatsoever not permanently attached to the sea-bed, including dynamically supported craft, submersibles, or any other floating craft”. This Convention did not apply to a warship, or to a ship owned or operated by a State when used as a naval auxiliary or for customs or police purposes. An abuse of navigation occurred where a ship, its passengers or cargo were endangered. Thus, where any person under Article 3 unlawfully and intentionally seized or controlled a ship by force, or threat, or intimidation; or performed an act of violence against a person on board a ship if that act was likely to *endanger the safe navigation* of that ship; or destroyed or damaged a ship or its cargo such that it was likely to endanger the safe navigation of that ship; or placed or caused to be placed on a ship a device or substance likely to destroy that ship, or caused damage to that ship or its cargo which endangered or was likely to endanger the safe navigation of that ship; or destroyed or seriously damaged maritime navigational facilities or seriously interfered with their operation, if any such act was likely to endanger the safe navigation of a ship; or communicated information which he knew to be false, thereby endangering the safe navigation of a ship; or injured or killed any person in connection with the commission or the attempted commission of any of the above offences: that person is said to have committed an offence.

Paragraph 2 of Article 3 punishes an attempt and an abetment of the above offence. Accomplices of persons who commit these offences are also punished. Any person who threatens, with or without a condition, aimed at compelling a physical or juridical person to do or refrain from doing any act also commits an offence if that threat is likely to endanger the safe navigation of the ship in question.

The geographical scope of the Convention, spelled out in Article 4 (1), covers ships navigating or scheduled to navigate in waters beyond the outer limit of the *territorial sea* of a single state or the lateral limits of its *territorial sea* with adjacent states. This shows that the Convention is not applicable to ships in the middle of the territorial sea of a state. “The lateral limits of its territorial sea” refers to the outer boundary of the territorial sea with the contiguous zone boundary. However, Paragraph 2 claims the territorial jurisdiction of a State Party when the offender or alleged offender is found in that State’s territory. This small problem of interpretation could be set aside as matters are further clarified in Article 6 where each State Party is mandated to legislate upon territorial jurisdiction in its territorial sea, extra-territorial or quasi-territorial jurisdiction for ships flying its flag, personal jurisdiction over its nationals and other stateless persons who habitually reside in that state, and passive personality jurisdiction where the national of that state is a victim of an offence.

Attempts are equally punishable. Acquisition and rescission of such jurisdiction must be notified to the Secretary General of the IMO. The Convention recognizes the municipal criminal jurisdiction of a State Party to the Convention.

States Parties have to ensure that their criminal procedure codes, the laws of evidence and extradition laws have suitable provisions in this regard. States Parties are under an obligation to prevent preparations in their respective territories. The Secretary General of the IMO has to be informed of all legal and extradition proceedings.

Neither the 1988 SUA and Protocol referred to Straits used for international navigation.

2.2. 2005 SUA Protocols

The 1988 SUA Convention and Protocol were amended during a Diplomatic Conference on the Revision of the SUA Treaties held from 10 to 14 October 2005. The 2005 Protocol to the SUA Convention was adopted on 11 October 2005. They are conveniently referred to as the 2005 SUA Protocols.⁸ The amended Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation will enter into force ninety days after the date on which twelve States have signed it without reservation as to ratification, acceptance or approval, or have deposited such an instrument with the Secretary General. The amended Convention will enter into force only after the 2005 Protocol has entered into force. These two treaties have significant non-proliferation, counter-terrorism and ship-boardings provisions. They are meant to plug the loopholes in the fight against terrorism as follows:

The SUA Protocol provides the first international treaty framework for combating and prosecuting individuals who use a ship as a weapon or means of committing a terrorist attack, or transport by ship terrorists or cargo intended for use in connection with weapons of mass destruction programs.

The SUA Protocol also establishes a mechanism to facilitate the boarding in international waters of vessels suspected of engaging in these activities.

- The new *non-proliferation offences* strengthen the international legal basis to impede and prosecute the trafficking of WMD, their delivery systems and related materials on the high seas in commercial ships by requiring states parties to

⁸ See UNTS, Vol. 1678, No. 29004. See "United States Supports New Protocols Directed Against Use of Ships in Terrorism and Proliferation of Weapons of Mass Destruction" in 100/1 *AJIL* (2006), at 224-227. See also "Contemporary practice of the United States relating to international law: international oceans, environment, health and aviation law" edited by John R. Crook, where he outlined President George W. Bush's New US Maritime Security Strategy intended to "prevent the maritime domain from being used by terrorists, criminals, and hostile states to commit acts of terrorism and criminal or other unlawful or hostile acts against the United States, its ... allies, and friends." *Ibid.* 222.

criminalize such transport. These transport offences are subject to specific knowledge and intent requirements that ensure the protection of legitimate trade and innocent seafarers. The non-proliferation offences are consistent with existing international non-proliferation treaties, and the SUA Protocol explicitly provides that the rights, obligations and responsibilities of states under international law – including the Nuclear Non-proliferation Treaty (NPT), the Chemical Weapons Convention (CWC), and the Biological Weapons Convention (BWC) – are not affected.

- The new *counter-terrorism offences* criminalize the use of a ship or a fixed platform to intimidate a population or compel a Government or international organization, including when: (1) explosive, radioactive material or a biological, chemical or nuclear weapon is used against, on or discharged from a ship or fixed platform; (2) certain hazardous or noxious substances are discharged from a ship or fixed platform; or (3) any other use is made of a ship in a manner that may lead to or causes death, serious injury or damage. The SUA Protocol also criminalizes the transport of fugitives who have committed an offence under the 12 UN (counter-) terrorism conventions and protocols.
- The *ship boarding provisions* establish a comprehensive set of procedures and protections designed to facilitate the boarding of a vessel suspected of being involved in a SUA offence. Consistent with existing international law and practice, SUA boardings can be conducted only with the express consent of the flag state. In addition to eliminating the need to create time-consuming *ad hoc* boarding arrangements when facing the immediacy of on-going criminal activity, the ship boarding provisions provide robust safeguards that ensure the protection of innocent seafarers.⁹

2.2.1. *Broader range of non-proliferation and counterterrorism offences to be included in national laws*

New Article 2 *bis* broadens the range of offences included in the Protocol. It is recognized that the likely targets are the populations of states, governments, and international organizations. Where a person unlawfully and intentionally intimidates a population, or compels a Government or an international organization to do or to abstain from doing any act, uses against or on a fixed platform or discharges from a fixed platform any explosive, radioactive material, or BCN weapon in a manner that it causes or is likely to cause death or serious injury or damage; or discharges from a fixed platform, oil, liquefied natural gas, or any 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 threatens, with or without a condition: this person commits an offence. (Irreparable loss to the marine environment has been excluded.)

New Article 2 *ter* covers the unlawful and intentional injuring or killing of any person in connection with the commission of any of the offences; in attempting to

⁹ See 100/1 *AJIL* (2006), at 225.

commit an offence; in participating as an accomplice, and in organizing or directing others to commit an offence.

The 2005 Protocol adds a new Article 3 *bis* to Article 3 of the 1988 SUA Convention. The latter referred to the seizure of ships by force, acts of violence against persons on board ships, and the placing of devices on board a ship likely to destroy or damage it.

The new Article 3 *bis* states that a person commits an offence within the meaning of the Convention if that person unlawfully and intentionally:

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

Transportation of nuclear material within the terms of the Treaty on Non-Proliferation of Nuclear Weapons is permissible.

Where a person unlawfully and intentionally transports a person who has breached the SUA Convention or any one of the nine treaties mentioned in the Annex on board a ship, this person commits an offence; this is also so where a person unlawfully and intentionally injures or kills any person in connection with the commission of any of the offences in the Convention. The phrase “in connection with” probably refers to the furtherance of the crime in question with the accompanying relevant states of mind such as common intention, common objective, unlawful conspiracy, and other bases for criminal liability. Other offences include attempts, abetments, participation as an accomplice, organization and directions to others to commit an offence, or to contribute to the commissioning of an offence. Corporate and other

legal entities are also made liable for the commission of an offence within the scope of the amendments.

2.2.2. *Use of force and boarding provisions*

A new Article 8 *bis* in the 2005 Protocol deals with the co-operation and procedures to be followed if a State Party desires to board a ship flying the flag of a State Party when the requesting Party has reasonable grounds to suspect that the ship or a person on board the ship is, has been, or is about to be involved in, the commission of an offence under the Convention. The use of force is prohibited except under the following circumstances: when required to protect the safety of officials and persons on board or where the officials are obstructed in the execution of authorised actions. Article 8 *bis* provides for certain safeguards such as not endangering the safety of life at sea, ensuring that human dignity is preserved and human rights law observed, taking due account of the safety and security of the ship and its cargo, ensuring that measures taken are environmentally sound, and taking reasonable steps to ensure that ships are neither unduly detained or delayed.

2.2.3. *Extradition, criminal procedure and evidence*

A new Article 11 *bis* states that none of the offences should be considered for the purposes of extradition as a political offence. New Article 11 *ter* recognizes certain exemptions to extradition and thus states that the obligation to extradite or afford mutual legal assistance need not apply if the request for extradition is believed to have been made for the purpose of prosecuting or punishing a person on account of that person's race, religion, nationality, ethnic origin, political opinion or gender, or that compliance with the request would cause prejudice to that person's position for any of these reasons.

A new Article 12 *bis* covers the conditions under which a person who is being detained or is serving a sentence in the territory of one State Party, may be transferred to another State Party for the purposes of identification, testimony or otherwise providing assistance in obtaining evidence for the investigation or prosecution of offences.

3. THE INADEQUACIES OF PART III OF THE 1982 LOSC

Part III of the 1982 LOSC has several inadequacies as regards combating maritime terrorism and for criminal enforcement jurisdiction in dealing with nuclear radiation and associated terrorist challenges of the oceans. The material, geographic and personal scope of the offence of maritime terrorism needs to be re-assessed in the context of the 1982 LOSC. For instance, there is a difference between the geographic scope of, respectively, maritime terrorist offences, and piracy. Terrorist conventions are adopted at the international level yet have no universal jurisdiction. Piracy differs in that it attracts universal jurisdiction where the offence is committed for a private

end. The personal content again is markedly different. For an offence such as piracy, the pirates are regarded as *hostis humanis generis*, are denied nationality and are subject to universal jurisdiction. Since terrorists are not denied nationality and are not regarded as *hostis humanis generis*, they could be regarded as being of a “higher rank” than pirates. This should not be the case; it is submitted that the laws of piracy, extrapolated from the 1982 LOSC, could be *mutatis mutandis* applied to the offence of maritime terrorism on the high seas. Terrorism on the high seas deserves a different definition while at least the same status as piracy on the high seas. If the criminality is bench-marked against the use of ‘terror’, then under such an approach, piracy and armed robbery would also be considered terrorist activities. Warships and aircraft should exercise over maritime terrorists such universal jurisdiction as that exercised over pirates under the 1982 LOSC. Armed robbery, which does not fall within the definition of the 1982 LOSC, would fall, too, under the definition of a terrorist activity and consequently would need to be regulated by national Penal Codes and extra-territorial offences legislation. All attempts, abetments and conspiracies directed against the subjects or objects of international law, that is, against States, ships and their cargoes and crew, are punishable. The resources of the seas and oceans within a national jurisdiction are State property and as such ought to be subject to the doctrine of public trust. Where resources are shared between States, then concurrent jurisdiction and joint surveillance over maritime terrorist activities should be adopted. In adopting a policy against maritime terrorism, it would be necessary to re-examine the legal validity of maritime and air-defence identification zones that extend right up to the high seas boundary, an otherwise prohibited activity under the rules of general international law and the law of the sea. Over the high seas, regional states may agree upon a treaty, a practice in which some states engage in the context of fisheries, the provisions of which could address the exercise of criminal enforcement jurisdiction by the concerned states. As a global constitution for the oceans, it is a failure on the part of the Convention that it does not deal with these issues.

The 2005 SUA Protocols require criminal enforcement jurisdiction on the part of Strait States as the range of offences have been broadened, the use of force recognized and extradition, criminal procedure and evidence introduced. To achieve these frightening goals under a sense of impending gloom, certain amendments need to be made to the 1982 LOSC.

3.1. Amendments to the 1982 LOSC

The 1982 LOSC needs to be amended in several respects to enable states to enforce the provisions of the 2005 SUA Protocols. These amendments are abbreviated as (A) in the following Articles of the 1982 LOSC. Besides the amendments, Strait states and flag states need to conclude a Compromissory Statement to Part III of the 1982 LOSC to confer express criminal enforcement jurisdiction on Strait states that would even in denial respect the transit rights of ships. There are nine amendments to be discussed, the first of which is addressed at Article 100 (A) which should read as “Duty to co-operate in the prevention, reduction, control and elimination of

terrorism – All States shall co-operate to the fullest extent possible in the prevention, reduction, control and elimination of terrorism on the high seas or in any place *within* or outside the jurisdiction of any State”. The second amendment is directed at Article 101 (A): definition of maritime terrorism – The definition of maritime terrorism is based on the 1988 SUA and its 2005 Protocol insofar as it is a comprehensive definition in comparison to the other international conventions on terrorism and at Article 101 (A2): definition of nuclear terrorism – The definition of nuclear terrorism is *per* the International Convention for the Suppression of Acts of Nuclear Terrorism. The third amendment is with regard to Article 102 (A): Terrorism by a warship, government ship or government aircraft – The acts of terror as defined in Article 101(A) committed by a warship, government ship or government aircraft are also acts of terrorism. The fourth amendment deals with Article 102 (A2): Terrorism by a warship, government ship or government aircraft whose crew has mutinied – The acts of terrorism, as defined in Article 101(A) committed by a warship, government ship or government aircraft whose crew has mutinied and taken control of the ship or aircraft are assimilated to acts of terrorism committed by a private ship or aircraft and with Article 103 (A): Definition of a terrorist ship or aircraft – This definition is also to be based on the international conventions on maritime and nuclear terrorism. The fifth amendment is related to Article 104 (A2): Retention or loss of the nationality of a terrorist ship or aircraft – A ship or aircraft *retains or loses* its nationality once it has become a terrorist ship or aircraft. The fifth amendment focuses on Article 105 (A): Seizure of a terrorist ship or aircraft, universal jurisdiction – On the high seas, or in any place outside the jurisdiction of any State, every State may seize a terrorist ship or aircraft, or a ship or aircraft taken by terrorism and under the control of terrorists, and arrest the persons on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft and persons, subject to the rights of third parties acting in good faith.

The sixth amendment is directed at Article 106(A): Liability for seizure without adequate grounds – Where the seizure of a ship or aircraft on suspicion of maritime terrorism has been effected without adequate grounds, the State making the seizure shall be liable to the State the nationality of which is possessed by the ship or aircraft for any loss or damage caused by the seizure. The seventh amendment relates to Article 107 (A): Ships and aircraft which are entitled to seize on account of maritime terrorism – A seizure on account of maritime terrorism may be carried out only by warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect. The eighth amendment deals with Article 108 (A2): Criminal Jurisdiction of States in the suppression of maritime terrorism – Where the offence of maritime terrorism has taken place under the 1988 SUA Convention and its 2005 Protocol, and in the case of nuclear terrorism under the 2005 International Convention for the Suppression of Acts of Nuclear Terrorism, the State with territorial, quasi-territorial, nationality, and passive personality criminal jurisdiction in the matter shall take the necessary action as stipulated under these conventions as ratified by the States Parties. Finally, Strait states would

need guidelines for the use of force besides the traditional argument of “no choice of means and no moment for deliberation.”

3.2. Compromissory Statement

Part III of the 1982 LOSC deals with the regime of transit passage in Straits used for international navigation. The drafting history of this Part as stated in UNCLOS III records that this was a regime fought for by developed states; it is a priceless regime. The nature of transit passage requires ships to pass through the Straits without impediments from Strait states. In the Straits, the flag state has four duties:

1. to proceed without delay through or over the Strait;
2. to refrain from any threat or use of force against the sovereignty, territorial integrity or political independence of Strait states;
3. to refrain from non-transit activities; and
4. to comply with other relevant provisions of Part III.

Of these four duties, the only topic that comes somewhat close to the topic of terrorism is the reference to the “use of force” by the flag state against the Strait state. There is a difference here between the 2005 Protocols on Terrorism and Part III of the 1982 LOSC. Under the 2005 Protocols the Strait state is empowered to use force against terrorists. Under the 1982 LOSC, the flag state is required to refrain from the use of force against the Strait state. The only provisions on the threat or use of force against the sovereignty, territorial integrity or political independence of a state are found in Articles 19(2)(a), 39(1)(b) and 301. Besides this reference to the “use of force” no further mention is made of it. Under the 1982 LOSC, Strait states do not have the necessary criminal enforcement jurisdiction over flag states. The 1982 LOSC was concluded before the international conventions on terrorism were drafted. The involvement, active or passive, of warships, aircraft, or government vessels of any non-commercial type, that engage in maritime terrorism lies beyond the scope of the SUA Convention or Protocol. The provisions of Articles 29 to 32 of the 1982 LOSC focus on warships.

The material scope of the unlawful acts under the 1988 and 2005 SUA Protocols are far beyond the scope of Part III of the 1982 LOSC. As the mainframe constitution of the oceans, Part III must endorse the criminal jurisdiction of the Strait state in matters of maritime terrorism. New Article 8 *bis* of 2005 emphasizes co-operation between states, yet does not provide for universal jurisdiction. Even some measure of the use of force is permissible under Article 8 *bis* for the safety of officials and persons on board. However, under Part III of the 1982 LOSC, such use of force by both the flag state and the Strait state will jeopardize transit passage.

Maritime criminal jurisdiction must be exercised subject to Part III of the 1982 LOSC and to general principles of public international law. There has to be a balancing act, an act of accommodation, an adjustment between the right of transit passage,

the duty of due diligence of Strait states, and the overriding need to control terrorist activities and to control the irradiation of the seas. An exercise of domestic maritime criminal jurisdiction could interfere with the right of transit passage of ships under Part III of the 1982 LOSC. Thus, “this Part” has to be reconciled with “other rules of international law”. Such a reconciliation has not been made in Part III of the 1982 LOSC, whereas it has in its counter-part in Part II as stated above. These arguments are centred on the fact that the exercise of maritime criminal jurisdiction by Strait states under Part III of the 1982 LOSC is not adequately provided for under the Convention; secondly, that maritime criminal jurisdiction referred to in Article 34(2) is not supported by the rest of Part III; and finally, Strait states and user states need to arrive at a “Compromissory Statement on the Exercise of Maritime Criminal Jurisdiction by Strait states and User States in the Regulation of Transit Passage in the Straits of Malacca and Singapore.”

When counter-maritime terrorism conventions are implemented by Strait states, the regime of transit passage will be suspended. To balance the right of transit passage and criminal enforcement jurisdiction, a set of seven other considerations need to be addressed, as follows:

- (1) the adoption of a Statement of Guarantee that will uphold the Freedom of Navigation, the Safety of Navigation, and the Duty of all user and Strait states to safeguard the marine environment of the Straits in this nuclear age;
- (2) the conduct of marine scientific research in the Straits given the range of new and deadly pollutants;
- (3) the examination of the exercise of pre-emptive criminal jurisdiction and criminal enforcement jurisdiction of Strait states, and the standard and basis of liability of the offence of terrorism;
- (4) the examination of the feasibility of adopting universal jurisdiction for cases of maritime terrorism on the high seas;
- (5) the re-examination of the role of warships and government ships in terrorism given their traditional immunity;
- (6) the adoption and establishment of Air Defence Identification Zones on the EEZ/high seas boundaries of Strait states; and finally
- (7) the security implications at the ASEAN level.

4. THE OBLIGATIONS OF STRAIT STATES UNDER THE 1982 LOSC

Given the exceptionally broad range of offences and extraordinary provision on the use of force among other new developments, the varied obligations of the Strait state to uphold safe navigation is unduly burdensome, as they relate to the due diligence duty to uphold and maintain a safe and orderly Straits without suspending or hampering the right of transit passage of ships. This is translated in Article 42(1) as a requirement to uphold the safety of navigation and the regulation of maritime traffic; to prevent, reduce and control marine pollution; to adopt regulations relating to fishing vessels; the prevention of fishing, including the stowage of fishing gear, and to legislate in matters of customs, fiscal, immigration or sanitary laws. Where

loss or damage is caused to a Strait state by a warship, or any vessel, ship or aircraft entitled to sovereign immunity, the flag state bears international responsibility for that loss or damage. This is stated in Article 42(5). This in effect means that the ship or aircraft can inflict an injury on the Strait state for which the flag state bears international responsibility. This provision makes little sense, standing alone, and in the context of maritime terrorism. However, since no amendments have been made, it remains an obligation of the Strait state to uphold navigation even in the face of such a threat.

4.1. *Mens rea and actus reus of terrorism*

It is a general principle of criminal law that the *actus reus* of an offence must coincide with the *mens rea*, expressed in the maxim *actus non facit reum nisi mens sit rea*. How should the *actus reus* and *mens rea* of terrorism be viewed and weighed? Acts of terrorism could be considered the equivalent of an offence against the state such as treason, and made an absolute liability offence, where even private thoughts can give rise to a criminal action. Mere *actus reus* of a slight degree of danger should be sufficient to attract punishment. Similarly, *mens rea* would also be punished. As the offence of maritime terrorism is unlawful in its very nature and condemned by the international community, the regime of strict liability cannot apply: strict liability usually applies in cases where the conduct sought to be regulated is either generally lawful and the offence is less serious, as in the case of a traffic offence; more serious, as in the case of operational or accidental oil pollution by vessels, or where the offence is less serious and consequently punishable, too.¹⁰ What would prove difficult for the Strait state would be the rehabilitation of the terrorist, that is, upon pain of punishment, what kind of person should the terrorist become? How should the terrorist handle future actions? What should the new influences be? Would the terrorist weary the state by his importunity? The terrorist in pursuit of his goal may commit various types of crimes such as crimes against the state, property crimes, crimes against morality, against the public order and other regulatory crimes. The Strait state would be obliged to rehabilitate the terrorist.

4.1.1. *Radioactive pollution and injunctions*

Radioactive pollution should also be considered a maritime crime as it will lead to the unsustainable development of the marine environment, and a violation of the rights and interests of state parties and stakeholders. Above all, such pollution is a direct infringement of the rights of the coastal populations that depend on the sea

¹⁰ This discussion has been influenced by the following works: Ratnapala, Suri and Moens GA, *Jurisprudence of Liberty* (Sydney: Butterworths, 1996), at 6-13; Simon, Thomas W., *Law and Philosophy* (Boston: McGraw Hill, 2001) for discussion on Berlin, Isaiah, "Two Concepts of Liberty" (1969), 219; Hospers, John, "What Libertarianism Is" (1974), 217; Bergmann, Frithjof, "On Being Free" (1977), 225.

for their livelihood. This sort of pollution requires a reconsideration of the powers of ITLOS to grant provisional measures that are more in the nature of a *quia timet* or mandatory injunction to prevent radioactive environmental degradation.

In the light of the above discussion, the exercise of maritime criminal jurisdiction has to be balanced by the respect by Strait states for several international rules, namely, firstly, to ensure that there is no safe haven for terrorists; secondly, that jurisdiction is based on the registration of aircraft or ships or on territoriality; thirdly, that jurisdiction is based upon the nationality of the alleged offender; fourthly, that jurisdiction is based upon the protection of other specified interests and, finally, that jurisdiction is required to be maintained for extradition or prosecution once an alleged offender is present. Strait states are under an obligation to conduct an inquiry, to report findings, and to advise of intent to exercise jurisdiction. Where Strait states do not prosecute the alleged offender, there is an obligation to submit for extradition. Similarly, the elements of knowledge and intent, and the bases of participation in crimes, need to be defined by states parties, for example, where Strait states intend to assist each other in criminal matters. Other matters that need to be looked into by Strait states that intend to establish jurisdiction under the extradition treaties are the nature and type of extraditable offences, extradition clauses, and exceptions to be made on grounds of political offence and discriminatory purposes. In a civilized society today the perpetrators of genocide are awarded their basic human rights; so too is the case with the terrorist. The first-generation human rights of the terrorist to communicate and to fair treatment cannot be ignored. Strait states also need to consider whether the offenders are worthy of being deemed refugees, where the status and a common understanding of the implications of such a move need to be underscored by the states. In one sense, such overly great care is taken in the name of human rights that it seems almost an abuse of a right.

Strait states have to incorporate and transform the international rules on counter-terrorism into municipal law enactments, such as merchant shipping regulations, penal codes, criminal procedure codes, laws of evidence, and extradition treaties where grounds of political asylum and grounds of refugee status are sharply defined. The Strait state may now have a duty to provide piloted armed riding crews on behalf of the state, exercise the rights of hot pursuit, and adopt an integrated approach to maritime governance where the state can introduce new Strait state maritime terrorist control and enforcement jurisdiction. In the exercise of maritime criminal jurisdiction, the state may also be required to ensure container tracking and apply advanced technology to ensure the safety of the cargo being transported. Such an activity may also fall under the civil jurisdiction of states.

Besides, regarding the drafting of municipal laws on counter-maritime terrorism, Strait states need to sort these by degree of civil and criminal wrongs and political issues: abuse of shipping and navigational standards, maritime terrorism, armed robbery and piracy, radioactive marine environmental pollution, and the economic and biological waste of living and non-living resources. Strait states also need to evaluate the destruction of living resources such as marine parks, aquaculture and animal husbandry at sea, and of non-living resources such as offshore oil and gas installations and the abuse of fishing rights. The loss of intellectual property rights

in marine scientific research needs to be quantified in socio-economic terms and assessed under the biodiversity list test. Strait states need to come to terms with the current law that a terrorist who abuses the human rights of other citizens of the world will if convicted be guaranteed his human rights in the conduct of a fair trial, with adequate legal representation, and in detention.

4.1.2. *Pre-emptive criminal jurisdiction*

There is no provision in Part III as a whole that confers pre-emptive criminal protective jurisdiction to the Strait state to prevent loss or damage. Even the provision on regional co-operation in Article 43, which has been criticized as being a hortatory call, fails to cover the duty to adopt protective criminal jurisdiction in terrorist situations when upholding a safe Strait. Does this mean that, should such terrorist acts occur in the Strait, the Strait states will be exempt from state liability or, on the contrary, be held liable to the international community for irresponsible conduct? The customary international law provision is found in the *Corfu Channel Case*,¹¹ which states that no State must knowingly allow injuries to be inflicted upon flag ships in its territorial sea. What is the alternative where the above-mentioned Compromissory Statement is not adopted, the 1982 LOSC not revised, and where the injunctive powers of the ICJ/ ITLOS are limited? The alternative, it is submitted, is that as the *Corfu Channel* standard is non-beneficial to Strait states, this could result in a breach of and thus endangerment of international peace and security.

5. IMPLICATIONS FOR STRAIT STATES

When the provisions of the SUA Convention and Protocol on maritime terrorism are extrapolated and applied to Part III of the 1982 LOSC, the following consequences, both positive and negative, arise. These prompt amendments to the 1982 LOSC.

5.1. Definition of a ship/warship

The definition of a ship proffered in the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation has to be adopted by the 1982 LOSC as there is, currently, no definition of a ship under the Convention, even though a warship has been defined in Article 29. The 1988 Convention's definition states that a ship is a "vessel of any type whatsoever not permanently attached to the sea-bed, including dynamically supported craft, submersibles, or any other floating craft".

¹¹ *ICJ Reports 1949*, at 4.

The weakness of the 1988 Convention is that it excludes warships. The 1982 LOSC recognizes the role played by a warship in the offence of piracy, yet the 1988 Convention applies neither to a warship, nor to a ship owned or operated by a State in a terrorist activity.

5.2. Due diligence measures

The due diligence measures that Strait states need to implement are found in Article 3 of the 1988 Convention. Due diligence means, *inter alia*, the ability to command sufficient means of acquiring knowledge of unlawfulness and of intention, seizure of ships, definitions relating to terms such as “control”, “force”, “threat”, “intimidation”, “violence”, endanger safe navigation”, “destruction”, “damage”, and “BCN weapon or device or substance”, to name but a few.

This Convention states that any person who unlawfully and intentionally seizes or exercises control over a ship by force or threat thereof or any other form of intimidation; or performs an act of violence against a person on board a ship, if that act is likely to endanger the safe navigation of that ship; or destroys a ship or causes damage to a ship or to its cargo which is likely to endanger the safe navigation of that ship; or places or causes to be placed on a ship, by any means whatsoever, a device or substance which is likely to destroy that ship, or causes damage to that ship or its cargo which endangers or is likely to endanger the safe navigation of that ship; or destroys or seriously damages maritime navigational facilities or seriously interferes with their operation, if any such act is likely to endanger the safe navigation of a ship; or communicates information which he knows to be false, thereby endangering the safe navigation of a ship; or injures or kills any person, in connection with the commission or the attempted commission of any of the offences mentioned above: that person is guilty of an offence under the Convention.

Attempts and abetments are also considered as offences. In the same vein, conditional or unconditional threats aimed at compelling a physical or juridical person to do or refrain from doing any act, where that threat is *likely to endanger the safe navigation of the ship in question*, amount to an offence. Accomplices, too, are considered as offenders.

5.3. Beyond scope

Part III of the 1982 LOSC does not address the issue of maritime terrorism or nuclear terrorism as provided for in the International Convention for the Suppression of Acts of Nuclear Terrorism. Ships navigating within and outside Straits used for international navigation are beyond the scope of the 1988 Convention. Article 4 (1) of the 1988 Convention covers ships navigating or scheduled to navigate in waters beyond the outer limit of the territorial sea of a single state or the lateral limits of its territorial sea with adjacent states. Paragraph 2 claims territorial jurisdiction of a State Party when the offender or alleged offender is found in that state’s territory.

Article 6 requires states to legislate upon territorial jurisdiction in its territorial sea, extra-territorial /quasi-territorial jurisdiction, personal jurisdiction over nationals and other stateless persons who habitually reside in that state, and passive personality jurisdiction where the national of that state is a victim of an offence. Offshore oil and gas installations in the northern end of the Straits of Malacca and Singapore may be beyond the scope of the 1988 Protocol for the Suppression of Unlawful Activities Against the Safety of Fixed Platforms Located on the Continental Shelf. As this Protocol is an extension of the 1988 SUA Convention to offshore oil and gas fixed platforms there is a possibility that it does not cover the oil and gas platforms in the northern end of the Straits of Malacca and Singapore, as Part III of the 1982 LOSC does not deal with this matter. Should the Strait states bordering the Straits of Malacca and Singapore ratify the 1988 SUA Convention and Protocol or should they instead ratify the 2005 SUA Protocols?

5.4. The 2005 SUA Protocols

Straits used for international navigation come under the regime of the 2005 Protocol to the SUA Convention. The 1982 LOSC may require a revision in the nature and meaning of transit passage, and the nature and types of actions that Strait states may undertake to ensure the safety and freedom of navigation from maritime terrorism and nuclear terrorism. This in turn would have implications for the temporary suspension of transit passage. For instance, new Article 2 *bis* broadens the range of offences included in the Protocol such as the intimidation of a population, or compelling a Government, or an international organization to do or to abstain from doing any act as unlawful. Similarly, the use of any explosive, any radioactive material or a BCN weapon against or on a fixed platform or discharged from a fixed platform that cause death or serious injury or damage also constitutes an offence. When an oil, gas or other chemical platform is attacked and death or serious injury or damage is caused, this too amounts to an offence.

New Article 3 *bis* of the 2005 Protocol does not limit its application to the area of the territorial sea. Therefore, it could apply to terrorist actions within the regime of Straits used for international navigation. A perpetrator or offender under the Protocol is a person who unlawfully and intentionally intimidates a population, or compels a government or an international organization to do or abstain from any act and uses against or on a ship or discharging from a ship any explosive, radioactive material or BCN weapon in a manner that causes or is likely to cause death or serious injury or damage. There are several other examples of *actus reus* mentioned in the Protocol, as discussed *supra*.

The transportation of any person who has breached the SUA Convention or any of the nine treaties mentioned in the Annex; the transportation of any explosive or radioactive material, or any BCN weapon, or any equipment, material or software or related technology that significantly contributes to the design, manufacture or delivery of a BCN weapon and transport by a ship for the above purposes, are all considered as offences.

Article 43 of the 1982 LOSC has to undergo a revision in this context and make a mandatory call for regional and sub-regional co-operation. Similarly, the position on use of force has to be endorsed in the 1982 LOSC. In this context, the 1982 LOSC also lacks provisions incorporating Article 8 *bis* of the 2005 Protocol which strives to uphold the freedom of navigation, respect for international human rights laws and the safety of life at sea, and marine environment law. It states that where a state, upon certain reasonable grounds of suspicion that an offender or potential offender is on board a ship, requests another State Party to board such a ship, then the flag state has to co-operate in this matter. If such co-operation is not forthcoming, then the State Party has to communicate such intent to the Secretary General of the IMO if the flag state does not respond within four hours. The use of force is permitted under very limited conditions.

The general basis of action to combat maritime and nuclear terrorism has to be endorsed in Part III, 1982 LOSC, and cognizance of this fact must be taken so that corresponding amendments may perhaps be introduced into the 1982 LOSC.

Finally, it is submitted that Strait states may need to study the gaps, inconsistencies and overlaps in their bilateral and multilateral treaties, and their current laws then to reconsider the following offences, their elements, and the relevant institutions as the offences may arise separately or concurrently, as enumerated below:

1. Piracy as traditionally understood under public international law, over which warships of states could exercise universal jurisdiction which today could also be termed as a form of piracy with terrorism;
2. Armed robbery which is subject to municipal law;
3. All attempts, abetment and conspiracies in the commission or omission of the above offences;
4. The *mens rea* of intention that could be difficult to prove in municipal courts;
5. The basis of liability which may be sole, joint or several;
6. The nature of extra-territorial enforcement jurisdiction of the relevant agencies involved in the suppression of terrorism, and
7. The attacks, attempts, abetments or conspiracies directed against subjects and objects of international law and under the 1982 LOSC and against all resources and properties of states in the seas.

6. CONCLUSION

This paper has examined maritime terrorism and maritime security challenges facing Strait states bordering the Straits of Malacca and of Singapore. The emphasis was on maritime conventions on counter-terrorism, namely, the 1988 and the 2005 SUA Conventions and Protocols. Under the 2005 Amended SUA Convention and Protocol, the term “terrorism” has been broadly defined as all acts that terrorize people or the State. Embedded in this definition lies the inducement of fear or terror that violates the territorial integrity or sovereignty, or sovereign rights, or jurisdiction, or political independence of the subjects and objects of international law. Equally embedded in this definition are all acts of commission or omission that are terrifying

in nature and/or content whether they be completed offences or attempts. Abetments and conspiracies are also to be punished. This means that terrorism at various stages, whether committed on land or at sea or in the interface between land and sea; or on offshore islands, or reefs or low tide elevations; or on light-houses or on offshore installations; or on the seabed; or on the continental slope may be punished. It also covers gas pipelines or cables placed on the continental shelf. Unfortunately, it does not include terrorism on the continental rise. It does not cover the seabed of the common heritage of mankind, or in the airspace above the high seas. As mentioned at the outset, terrorism at sea may take place in any maritime zone from internal waters to the outer edge of the exclusive economic zone, or the outer edge of the continental shelves or on the high seas. The point to be remembered is that no criminal enforcement jurisdiction has been vested in Strait states by the 1982 LOSC. Terrorism on the high seas deserves a different definition yet, *mutatis mutandis*, the same jurisdictional status as piracy on the high seas. To give effect to the concept of terrorism in these maritime zones, corresponding basic framework provisions need to be included in the 1982 LOSC, given that the Convention was concluded before the 1988 SUA was introduced. As a concept, the term “terrorism” should cover not only acts that induce fear or terror in the minds of a person or against the body of a person or which violate the integrity or stability of an international organization or other legal entity or which violate the territorial integrity or sovereignty or sovereign rights, or political independence of the subjects and objects of international law, but also cover acts that use terrorism to acquire property or gain or perpetuate an idea or philosophy.

6.1. Psyche

The motive, personal opinion or reason behind the terrorist attack should serve only towards achieving an understanding of the psyche of the terrorist. The basis of liability has to be established, for terror may be inflicted for a variety of reasons such as religious differences, political or ideological or institutional purposes or for reform of any body, charitable or non-charitable, or for public or private purposes or for private ends. The standard and basis of liability for terrorism has to be determined at municipal law. Purpose or motive, although irrelevant under the Conventions, will need to be proved when the *mens rea* of intention is proven before the local courts. At the municipal level, perhaps, and not at the international level, it matters whether terror was inflicted for religious, or political, or ideological or institutional purposes or for the reform of any body, charitable or non-charitable, or for public or private purposes or for political agenda or for private ends.

The offence of terrorism has the potential to be considered the equivalent of an offence against the state such as treason, and made an absolute liability offence. In such a case mere *mens rea* would be sufficient, where even private thoughts can give rise to a criminal action. Terrorism should not be based on strict liability because terrorism is an unlawful act. In a strict liability regime as in the 1969 CLC or 1992 CLC Conventions for vessel-sourced oil pollution, the regime of strict liability is

adopted as a *quid pro quo* measure between a victim of oil pollution who will find it hard to prove liability against an oil industry, on the one hand, and the liability of the industry, on the other, which would be capped where it would otherwise face unlimited damages.

With the dawn of nuclear terrorism, several old offences now receive fresh consideration. While the motives for the offences are different, the fact that terror is induced in the mind of the victim makes these old offences terrorist in nature, too. The proof of *mens rea* could be difficult unless the terrorist admits voluntarily to his state of mind, in a manner that may be adopted by the court. The basis of liability, sole or joint and several, is a detail that municipal law-makers have to manage. Similarly, they have to undertake revision of their respective Penal Codes, taking into account the extra-territorial nature of the offence, the provisions of the criminal procedure code and the laws of evidence. Issues concerning the punishment of offenders, the treatment of offenders and the trials of offenders; the international human rights of terrorists and pirates; their *habeas corpus* rights; legitimate expectation rights; the right to counsel, and other administrative law rights would all have to be reviewed at the municipal law level. It would also require Strait states to reconsider ratification of those treaties that have not yet been ratified.

As an exception to the general rule on the retrospective applicability of criminal laws, terrorist criminal law may be applied retrospectively for the reason that laws should be made to apply over activities that pierce the heart of collective security. The following definitions of “terrorism” and “terrorist” are submitted in this paper:

Terrorism means all acts of commission or omission against any person, natural, legal or juridical, that are terrifying in nature and/or content, whether they are actual, constructive, or imputable, committed in any space under sovereign domain or in *res communis* or in the common heritage of mankind or in the common province of mankind, whether successful or unsuccessful or complete or incomplete.

Anyone who participates in such an activity ought to be considered a terrorist. The motive, personal opinion or reason of the terrorist may serve as a guide to understanding the action or omission of the terrorist and, most importantly, the mind of the terrorist.

Given all of these developments, the 1982 LOSC has to state the broad framework of criminal enforcement jurisdiction of the Strait state in Straits used for international navigation. Similarly, the right of private security companies to provide armed riding crews for protection, the right of hot pursuit, and the adoption of an integrated approach to maritime governance are areas that need to be considered, and perhaps, necessary amendments may have to be made to the 1982 LOSC and then to municipal legislation. Other detailed considerations for Strait states would be the exercise of civil jurisdiction on board flag states that consist of container tracking, and the adoption of new technology for cargo safety. The exercise of criminal (and, for that matter, even civil jurisdiction) has to be expressly stated in the context of Straits used for international navigation. It may be timely that a new trust fund at the UN level for counter-terrorism expenses and counter-terrorism forces are set up to enable

Strait states to uphold the safety of the Straits and to guarantee the right of transit passage as they strive to bring the problem of maritime terrorism under their control.¹² As men, women and also minors may be involved in the offence of maritime terrorism, the use of the relevant pronoun should be borne in mind.

The universal condemnation of terrorism by the global community expressed in the UNGA resolutions and treaties and the adoption of the *lex specialis* maritime treaties for the suppression of terrorism may serve to prove that the terrorism has been condemned and outlawed; *a fortiori* condemnation of maritime terrorism has attained the status of *jus cogens* or at the very least represent the *opinio juris generalis juris* of states and thus amount to an obligation *erga omnes* at international law. It is true that a minimal number of ratifications are required to bring these into force; the diplomatic conference concluding the SUA Protocols were well attended by the member states of the IMO. If this argument is accepted, then it makes for a compelling case that a Compromissory Statement be adopted. Achieving the status of *jus cogens* or *opinio juris generalis juris* does not override the need for an alternative solution, as propounded in this paper.

At the sub-regional level, it would be necessary for Malaysia, Indonesia and Singapore to adopt, as a subset of the respective national oceans policy, the harmonization of laws and policies relating to maritime terrorism and maritime security challenges in the Straits of Malacca and Singapore.¹³ We need a Compromissory

¹² Bacon, Francis and Brian Vickers, *The Major Works including New Atlantis and the Essays, Oxford World Classics*, (Oxford: Oxford University Press, 2002), at 377 said: "A just fear of imminent danger, though there be no blow given, is a lawful cause of war". The security concerns within ASEAN range from international to municipal. The issues concerning security measures revolve around strategic alliances between developed and developing states, our position in non-aligned movement, military to military ties within ASEAN, and internal security and stability within States. There are many other issues that we in ASEAN need to explore such as enhanced diplomacy where peace is sometimes referred to as the period in between wars. We also need to examine and consolidate our positions on the ratification of UN Conventions and other maritime treaties by Malaysia, Singapore and Indonesia and other ASEAN members. These international treaties will have to be incorporated or transformed into municipal law and the regional stance on co-operation and data centres adopted and established. In addition, the role of the coastguard, marine police, warships, and the budget for defence needs reconsideration.

¹³ For summary of Indonesian legislation related to Anti-Terrorism, see United Nations Legislative Series, National Laws and Regulations on the Prevention and Suppression of International Terrorism, Part II (A-L), (New York: United Nations, 2005), at 292-293 and for the laws of Malaysia and Singapore on Anti-Terrorism see United Nations Legislative Series, National laws and Regulations on the Prevention and Suppression of International Terrorism, Part II (M-Z), (New York: United Nations, 2005), at 2-4 and 270- 272 respectively. See also Sittnick, Tammy M., "State responsibility and maritime terrorism in the Strait of Malacca: Persuading Indonesia and Malaysia to take additional steps to secure the Strait" 14 *Pac Rim L & Pol'y* (2005), at 743 where the author makes an argument that Malaysia and Indonesia have failed to take further steps to improve security and that Indonesia and Malaysia have breached their duty under international law to prevent terrorism as they are required to patrol and permit cross-border patrols. See also Dahlvang, Niclas, "Thieves, robbers and terrorists: piracy in the 21st century", 4 *Regent J Int'l L* (2006), at 17 where the author accuses

Statement that is adopted by Strait states and user states reconciling enforcement criminal jurisdiction and transit passage rights under the 1982 LOSC. The alternative to the Compromissory Statement could be globally unacceptable: the suspension of transit passage without permission. In order to carry out criminal enforcement jurisdiction for the control of terrorism, the time has come for stretching the financial resources of the nations to further protect the resources of the seas as states re-align themselves under the principle of protective jurisdiction in a nuclear age. As Aristotle once said: "A common danger unites even the bitterest of enemies" or if we may extrapolate from Benjamin Franklin, who said on the signing of the US Declaration of Independence: "We must all hang together, or assuredly, we shall all hang separately."¹⁴

Indonesia of demonstrating a lack of commitment to fighting terrorism even after the Bali Bombings of October 2002.

¹⁴ Aristotle, Greek Philosopher (384 BC – 322 BC) at <http://www.giga-usa.com/gigaweb1/quotes2/quautaristotlex001.htm>, visited site on 28 November 2006; Franklin, Benjamin, US statesman and writer, (1706–1790), Remark 4 July 1776 at the signing of the Declaration of Independence, quoted in Ben Franklin Laughing, Zall PM (1980), *The Columbia World of Quotations* (New York: Columbia University Press, 1996), Entry No. 23009, replying to John Hancock's remark that the revolutionaries should be unanimous in their actions. See also <http://www.bartleby.com/100/245.21.html>, visited site on 28 November 2006 for Bartlett, John, *Familiar Quotations*, 10th Ed, 1919, Entry no: 3949. For all aspects of ASEAN and National Security Strategy, see Paper by Tun Abdul Razak, Mohd Najib, Minister for Defence (as he then was), *Towards a Comprehensive National Security Strategy*, delivered on 26 September 2000, Hotel Nikko, Kuala Lumpur.