KEYNOTE ADDRESS

*Mare Liberum* and Maritime Security: Contradiction or Complement?

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Many states have both an interest in the freedom of the high seas and promoting their (coastal) security interests. The tension between the two objectives is not new and persists despite the substantive extension of functional jurisdiction of coastal States beyond their territorial sea in the 1982 United Nations Convention on the Law of the Sea (UNCLOS). However, the challenges of both modern terrorism and proliferation of weapons of mass destruction (WMD) brought a number of deficits of the UNCLOS-based “old system” to the surface. Among them was the lack of effective measures 1) to prevent ships from being used as means for terrorist attacks or as support vessels for terrorist activities, 2) to ensure bringing suspected terrorists to justice, and 3) to halt the proliferation of WMD.

Attempts of some states to unilaterally extend their jurisdiction on the high seas seem to be contrary to the UNCLOS regime and customary law. On the other hand treaty based approaches (IMO, SOLAS) or states requesting vessels to voluntarily report their identity, course and speed are in accordance with international law.

With the protocols of 2005 amending provisions of the 1988 Convention on the Suppression of Unlawful Acts at Sea, a number of preventive and law enforcement measures were adopted. Transportation and delivery of WMD were criminalised and under certain circumstances law enforcement officials of a state party were allowed to board a ship flying the flag of another state party outside the territorial sea. This protocol has an impact on the freedom of navigation and the flag State

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principle, but boarding still requires the consent of the flag State (exemption possible by an opt-in clause). With the proliferation security (PSI) initiative a political alliance was established to combat the proliferation of WMD, which builds on the revised SUA Convention as a central legal tool. PSI has been a political basis for the conclusion of bilateral ship boarding agreements between the United States and a number of important flag States.

Security Council resolutions may help to overcome the shortcomings of the present legal regime security aspects only under certain circumstances. Neither SC Resolutions 1368 and 1373 (terrorism) nor SC Resolution 1540 (non-proliferation) provide a legal basis for non-compliant boarding. Furthermore the UN Charter does not empower the SC to modify and amend international treaties or customary law by way of abstract general resolutions. Consequently the Security Council can allow for the non-compliant boarding of the ships in international waters only if a Chapter VII Resolution has been adopted in the context of a specific time and situation, responding to a specific threat to international peace and security.

The right of self-defense, recognised inter alia by SCR 1368 does not imply a right to non-compliant boarding of ships flying the flag of a state which has not been involved in the attack triggering the right to self-defense. It remains to be seen whether customary law will emerge allowing non-compliant boarding of ships registered e.g. in failing states or in states which are unwilling or unable to prevent the use of these ships for terrorist or proliferation purposes.

The most appropriate approach for achieving more security while fully respecting the freedom of the high seas lies in treaty instruments.

I. Introduction

- *Mare liberum*, freedom of the high seas—one of the basic and most important principles of the law of the sea—is closely connected with the flag State principle.

- 90 percent of world trade is transported on the oceans.