

## Terrorism at Sea: Role of International Legal Instruments and Challenges Ahead

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### Abstract:

*From time immemorial, global waters play an influential role as global lifeline for international trade and commerce as well as maintaining status quo relations between states. Recent technological development and connectivity open up new horizons for international trade through the transport and transshipment of energy, goods and products around the world where security concerns remain a major hindrance to take full fledge leverage from this avenue. Cross-border criminal activities like piracy and global terrorism poses the primary threat for maritime domain. Therefore, this paper intended to illustrate the very concept of terrorism and draw a line between terrorism and piracy, and to examine the role of international legal instruments including its shortcomings and challenges.*

**Key words:** terrorism, piracy, international legal instruments

### INTRODUCTION:

Following the terrorist attack on 9/11 the world has changed dramatically in terms of security perception, where conventional security paradigm has shifted to unconventional security threat -still dominates the main aspect of security

apparatus. After a sporadic act of depredation lead by global terrorist network, it has been identified that it must adapt and transform the existing security architecture with a more sophisticated and robust system to address the threat. Global water body covering 70% of earth surface is not out of this scenario where several attack were observed including US Cole in 2000 and French registered oil tanker Limburg in 2002, highlighted the sensitivity of the maritime domain as their operating theater. Whenever we think about terrorism above all they cover the terrestrial one with our imagination, but the most vulnerable and devastating spot for terrorist attack are the waters in which nearly 90% of seaborne trade and commerce takes place offer a higher potential for terrorist to inflict damage. In this context serving as a lifeline for energy supply and supply of goods and products around the world, sea line of communication is highly associated with the global economic activity and to global peace and stability. However, some statistics indicate that terrorism at sea has been less severe; as yet, very few cases have been observed over the past 30 years. This is apparently right that there are fewer cases compared to onshore terrorism but this doesn't imply that there is no such proximity or serious worryment about the terrorist activity in maritime domain. As an unregulated and a volatile space ocean offer a huge opportunity and vulnerability thus, the sensitivity of international commerce system to disruption can have a serious consequence for the world economy. Whenever we estimate the maritime risk management capabilities the threat of terrorist depredation comes first to our mind to adjust our security loopholes. The continued marginalization of the global terrorist network in land has forced them to look forward to the maritime domain to continue and run their activities. Bringing with it a huge strategic implication the recent anti terrorist front has progressed a lot in Iraq and Syria against ISIS where their placing eye in Philippine is an evidence to choose sea as their strategic footprint. At this juncture, this

paper aims to illustrate some basic ideas about terrorism focusing on maritime terrorism and to explore the role of legal instruments and mechanism offered by the international regulatory body.

### **Illustrating terrorism:**

The idea of terrorism is one of the vexed and perplexed terms to illustrate, a plethora of definitions and explanations have been found both in theory and practice, object to build a holistic approach to deal with. Undoubtedly, the lacuna in interpretation and lack of defining consensus are of great implication, so the trend of indiscriminate and interchangeable use of terrorism has made terrorism a tool to get considerable leverage under special circumstances. The serious worryment of this misinterpretation lies on the generalization of the idea. Since a clear cut distinction was made, this deliberate and inappropriate Generalization has been regarded as a general compulsion to take far reaching counter-strategic measures to combat terrorism.

To get better apprehension about terrorism we need to explore the distinctive nature of terrorism and insurgency. Distinction between terrorism and insurgency can simply be illustrated by observing their strategic choices and organizational structures. Whether both terrorism and insurgency are politically motivated violence the point of difference is, Firstly Insurgents are always fighting against the government force, and their target is to dismantle government capacity by attacking state law enforcement force to disrupt the law and order, to prove government's inability to continue their rule. During this phase they try to attack the attention of civilian to support them as well as to seek legitimacy and sympathy from outer world. On the other hand terrorist always target the civilian non combatant people to give a shock and spread fear among people not engaging direct confrontation with security forces or combatant. In this regard the motive for

the use of violence in terrorism is exposed in nature where instrumental in insurgency. Secondly, terrorism is a method to pursuing a political goal while insurgency is a movement to attain political goal. If we think insurgency as a whole package then terrorism is a element of that package. In most cases the ultimate aim of a insurgent group to overthrow the regime where terrorism is go far beyond to change the total system of governance replace with more restrictive and repulsive one. Thirdly, a difference between terrorist and insurgents is territorial control. If not a full control, insurgent have a control or dominance over certain territories where government security architecture is vulnerable. Fourthly, terrorism has global security ramifications but insurgency has security risk for a particular state in role. Since we have drawn a line between terrorism and insurgency the current case of terrorism has some special features that we simply cannot comprehend or fall under the criterion of terrorism or insurgency. Current terrorist demonstration by Islamic State in Iraq and Syria has change some of our previous understanding in which ISIS has been appeared as an insurgent cum terrorist combatant group established control over a certain area has regular army armed with sophisticated armaments, fighting against combatants and civilian. This interplay of terrorism, insurgency and civil war offer a different type of definition which can't be understood simply drawing a line between terrorism and insurgency; need to cover a wide range of issues to establish a proper conceptual remark. To take this matter into consideration this paper would like to focus terrorism and insurgency interchangeably as almost all international legal instruments regarding terrorism has not expressly spell out terrorism rather addressed by unlawful acts.

### **Terrorism at sea**

The unique features of maritime sector offer an attractive spot to carry out terrorist activities. The extraterritoriality in high

seas and the freedom of navigations on most of the seas offer a favorable ground to demonstrate terrorist depredation. Equally, lack of integrity, poor and inconsistent security measures taken by the coastal state are also the cause of selecting sea as their operating theatre. One of the big differences between maritime terrorism and terrestrial terrorism can be observed by assessing the magnitude of risks and vulnerabilities it poses. Compare to land-based terrorism the magnitude of risk in maritime terrorism is much more destructive and horrible. Therefore, by a single act terrorist attack on a port or a strait used for international navigation can disrupt the global supply chain creates a stagnant situation on global trade and commerce. The scenarios would be more horrifying if containers may use as target for an attack involving weapons of mass destruction (WMD). A report published by Department of Transportation Volpe Center estimated that the detonation of a 10-20 kiloton weapon in a container would cause a disruption of trade valued at \$ 100-300 billion, property damage \$ 50-500 billion and the loss of 50,000-1,000,000 lives. Beyond this, this sort of terrorist attack has huge implication for environment where by ambushing an vessel carrying oil or liquefied gas, hazardous and noxious substances would affect the hole ecosystem inflict serious harm of environment on a particular area affected. Second Common Avenue for maritime terrorism is that, it is not clearly addressed as terrorism by any of international legal instrument rather addressed as unlawful act of depredation or act of violence. Thus the conceptual ambiguity persists and maritime terrorism has frequently been overlapped with piracy- an economic objective based violent criminal offense affect the security of maritime domain adversely. Since the motive, Methods and targets are different a clear distinction should be laid between terrorism and piracy to develop sound policy requirements.

## **Terrorism and piracy**

The main obstacle to differentiate terrorism from piracy is the nonexistent of a clear definition of maritime terrorism by United Nation Convention on the Law of the Sea (UNCLOS) and none of legal instrument illustrates it directly. Most of the legal instruments regulate the issues related to maritime terrorism and piracy is defined through the lens of violence and suppression on seas. To have better understanding on the point of discrepancy we may look at the definition of piracy and terrorism. Both the International Maritime Organization(IMO) and the International Maritime Bureau currently use the definition of piracy ascribed by The United Nation Convention of Law of the Sea (UNCLOS). According to the definition of UNCLOS, piracy is

- (a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
  - (i) On the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
  - (ii) Against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
- (b) Any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft; and
- (c) Any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).

Maritime terrorism has not yet been delineated internationally. Legal scholars have agreed on an operational definition for maritime terrorism based on article 3 and 4 of the 1988 Convention for the Suppression of the unlawful acts against the Safety of maritime Navigation (SUA), even though the SUA convention does not refer it specifically. SUA convention

defined maritime terrorism as: (a) any attempt or threat to seize control of a ship by force (b) to damage or destroy a ship or its cargo (c) to injure or kill a person on board a ship; or (d) to endanger in anyway the safe navigation of a ship that moves from the territorial waters of one state into those of another state or into international waters.

However, there are two organizations, the International Maritime Bureau (IMB) and the Asia- Pacific Security Cooperation Council (CSCAP), which offer notable definitions of piracy and maritime terrorism. The IMB defines piracy as “an act of embarkation or attempt to embark a ship with the obvious intention of committing theft or other crime and with the obvious intention or ability to support that act” (Chalk-2008). While CSCAP considers maritime terrorism as “... the undertaking of terrorist acts and activities within the maritime environment, using or against vessels or fixed platforms at sea or in port, or against anyone of their passengers or personnel, against coastal facilities and settlement, including tourist resorts, port areas port towns or cities.” This definition however, doesn’t define what terrorism is and whether it would only include maritime attacks against civilian (merchant) vessels or also attacks against military crafts.

Although the definitional ambiguity persist, the motive, aim, target, tactics and methods has clearly been delineated the line between terrorism and piracy. The motive of terrorism is purely political where their act of violence and intimidation is fully exposed in nature. According to Lous Richardson the objective of terrorism is three folded, first of all terrorist want to take revenge on a factor that has affected their interest. Second, through revenge they attempt to earn renown and third they seek to attract public attention in large scale trough the response of their activities. For example in order to take revenge terrorist are always and in most cases targeting the US or its European alliances, which are fighting and financing against global terrorism or jihadist network. And successfully

carry out an attack on such a target there will be considerable fame, renown and reaction that it seeks. In choosing target, tactics or methods terrorist always vary from the pirates. Terrorist target is basically under four categories (1) ships as iconic target (2) ship as economic target (3) ships as mess casualty targets (4) ships as weapons (Murphy-2008) which has a close correlation with the short term objective revenge, renown and reaction. As iconic target terrorist always try to harm or damage on a ship with a special preference for revenge. Ships that serve as economic targets are those that when attacked may disrupt the economic activities of adversarial state such as oil tankers, oil platforms, ports or any busy chokepoints which would serve the objective of renown of the terrorist. Ships carrying large number of passengers such as cruise ships and ferries are potential mass casualty target to the terrorist to create fear and reaction among people around the world. In addition a ship can use by terrorist as weapons driving them into another ship and direct that into a port or a busy passageway which inflicts a huge damage would ultimately get huge attention and reaction as well. In contrast pirates' motive is driven by economic gain whose prime concern is to theft the container or makes the captain, crew hostage to get ransom money from the shipping company or the flag state. In case of choosing target pirates always prefers comparatively small ship or vessel with lack of surveillance mechanism, small number of crews which is easy to board. Whether performing as much violence as possible is one of the prime ambitions of terrorist, pirates are sensitive to use of violence in fear of congregated cleansing operation against them. Another distinguishing factor is the operational length or wave where terrorist operation or act of violence has driven by a global agenda and their maritime exertion is an extensive front of onshore activities, pirates are solely active in maritime domain. Thus, piracy is limited to a certain geographic area active in regional level while terrorist has global ramifications in terms



of objective. So piracy and terrorism is different in many way in fact, because of their motive and objective is different.

### **The point of similarities and possible nexus between terrorism and piracy**

As a common operating room, pirates and terrorist share some considerable similarities which sometimes blur the two separate concepts. The basic point of similarities can be traced back to the way that both terrorism and piracy is unlawful act of violence or threat of violence, while lack of legal order and jurisdictional shortcomings, geographic advantage, lack of coherent and expeditious patrolling due to corrupt and instable political weather offer a favorable ground to carry out their mission (Murphy-2007). Southeast Asian water can be considered as an example in this regard where the overlapping jurisdictional claim, weak and corrupt government, lack of law enforcement force has been make a favorable spot for terrorist and the pirates. Another point of agreement is both piracy and terrorism is regarded as *mutis mutandis*; poses common threat for all country implies Universal jurisdiction to cope with. This extraterritoriality nature of these two special maritime threats needs to address by encompassing international legal and practical agreement and cooperation. Beside these, the tactics and method of inflict attack almost same where they often choose fast and small boats for their maneuver capability, speed and effectiveness to hide them by evading radar detection technology, which also less expensive and comparatively easy to drive (Murphy-2007).

Beside this type of similarities the evolving nexus between piracy and terrorism has been a factor of discussion and great concern for maritime security. Certain conditions favor the claim that, although the motive of terrorism is political, in the case of MEND in Niger delta, Nigeria where kidnappings of oil workers had both financial and political motive. This scenario of interplay of financial and political

motive is more proximate in maritime domain where terrorists are steadily involving with hijacking ships or vessels. One of the reasons of such hijacking is to use the vessels to smuggle illegal weapons including weapons of mass destruction and explosives and secondly the crew could be used as hostages to get huge ransom money or to exchange terrorist members by releasing them. This is particularly relevant for the Somalia case where Al Shabab terrorist group is known to have links to Al Qaeda is active in the Somali maritime shore. In 2011 with the release of the MV Ashphalt Venture multi-million dollars were paid but they ultimately refused to release the seven original crew. They demanded the release of 100 pirates that the Indian navy captured before (Lydelle Joubert-2013). The opposite view also persists where several scholars stipulate that there is no such nexus and in fact pirates have no benefit in keeping cooperation with terrorists. Since the presence of a nexus between terrorists and pirates is in debate and absence of strong evidence to support such an argument is a cause of skepticism to many of the scholars; it doesn't imply that there is no proximity of such collusion with one another or we can't deny all out possibilities of such a nexus.

### **1988 SUA Convention- first international legal instrument to address terrorism at sea**

Serving as a constitution of the global water body UNCLOS doesn't cover terrorism specifically rather the concept was understood within the context of piracy. The formal definition of piracy under international law is limited to acts of violence perpetrated for financial purposes, this definition is limited where still there are acts of violence in sea for political or other public reasons. This definitional lacuna was addressed by the 1988 Suppression of Unlawful Acts (SUA) against the Safety of Maritime Navigation Convention. The abduction of the Italian vessel Achille Lauro and the assassination of a US national by Palestine liberation forces in 1985 was a breakthrough in which

the advisors of foreign ministry of Australia, Egypt and Italy were not persuaded by the argument that the kidnapping could be considered as piracy under 1958 convention and 1982 UNCLOS because the hijacking motive was not reinforced by private ends. Thus for the first time this incident was not labeled as piracy rather the factual evidence was marked as terrorism. Since the piracy laws appeared to be obscene, after this special case of maritime degradation International community feel the necessity to construct international legal instruments in order to deal effectively with future cases of maritime terrorism to enforce jurisdiction over these acts of violence within the territorial sea and beyond. Therefore 1988 SUA convention was established with the consideration of the principle of *aut dedere aut judicare*(either extradite or punish) consistent with previous anti terrorism treaties. This principle stipulates that the role and the obligation to extradite or prosecute plays in supporting international cooperation to fight impunity has been recognized at least since the time of Hugo Grotius, who postulated the principle of *aut dedere aut punire* (either extradite or punish): “When appealed to, a State should either punish the guilty person as he deserves, or it should entrust him to the discretion of the party making the appeal.” The modern terminology replaces “punishment” with “prosecution” as the alternative to extradition in order to reflect better the possibility that an alleged offender may be found not guilty (final report of international law commission 2014).

Article 10 of SUA Convention includes this provision, which imposes an international obligation on all contracting states in which offender may be prosecuted before the national courts whether the offense was committed in their territory or the offenders are extradited one of those states that had jurisdiction under the SUA 1988 (McDorman, 2005). The offenses for extradite or punish was established in article 3 of SUA Convention which includes direct involvement or complicity to seizure or taking control of a ship or threatening

control of a ship, the conduct of act of violence against a person board a ship if the act endangers the safe navigation of that ship; the destruction or damage to a ship or its cargo that could jeopardize the safe navigation of that ship; placing equipment on a ship that destroys or damages the vessel, compromising navigation safety; the destruction and damage to navigation installations which could endanger safe navigation or killing or injuring the persons in connection with the commission or attempted commission of any of the abovementioned offenses. These offenses are also deemed to be included in the occasion of bilateral extradition treaty.

1988 SUA convention thus vary from 1982 UNCLOS in describing unlawful act or act of violence at sea where the range and length of territorial jurisdiction is much bigger than previous legal architecture. Under UNCLOS the jurisdiction was only limited to high seas and EEZ but in SUA it has lengthened to waters within national jurisdiction. Second, UNCLOS recognizes a very narrow line of motivational factors of private ends that ignores the acts of violence on the ground of political and other public reasons- has recovered well through SUA Convention. Third, two vessel criteria is a common component of UNCLOS convention addressing any unlawful act of violence in sea which ignores the possibility of performing such misdeed by the passenger or crew of a particular ship. This two ships criterion has been rejected by the SUA convention in which a single person can be charged in case of any offense committed in maritime domain.

Since the SUA convention was established on some strong ground consistent with other legal counter-terrorism mechanism, the evolve of new phase of terrorism after September 2001 has been raised some serious concern, and many loopholes were discovered by the legal expert, including the proliferation or acquisition of Weapons of Mass Destruction by terrorist or use a vessel laden with explosives or dirty bomb as weapon to attack in a mega port or busy passageway. The

higher altitude of risk and tremendous consequence of this kind of attack have lead all states to rethink the security options by exploring legal loopholes highlighted by 1988 SUA Convention. When the terrorist successfully reached the target with a plane as a weapon in 9/11 Thus, one of the main limitation of the 1988 SUA convention was seen as focusing on the possibility that this type of occurrence could be transferred to the maritime domain. Therefore, the use of vessel or ship as weapon later in 2005 was addressed by SUA protocol as an offense of extradition or punishment. Another limitation of 1988 SUA Convention was that it failed to grant any rights to exercise enforcement jurisdiction such as right to visit in the prevention or suppression of the offenses set forth in the treaty (Natalie Klein-2011). Article 9 stipulated this as “Nothing in this Convention shall affect in way the rules of international law pertaining to the competence of states to exercise investigative or enforcement jurisdiction on board ships not flying their flag”. Subsequently it was argued by Natalie Klein(2011) that the provisions related to the prevention and suppression of the prescribed offences are limited to requirements to cooperate in prevention of potential offences and the exchange of information. Thus, article 14 of the 1988 SUA Convention simply calls on states to use ‘all practicable measures’ to prevent preparation for or commission of offences without providing any clarity (beyond exchanging information) as to what these measures should be. By examing these factors 1988 SUA Convention is found to be reactive not preventive in nature. Taking these shortcomings into consideration the scope of 1988 SUA Convention was expanded by SUA protocols adopted in October 2005.

### **2005 SUA protocol and maritime terrorism**

On 14<sup>th</sup> October 2005 the SUA Protocol was adopted by the diplomatic conference held in the headquarters of International Maritime Organization (IMO), which come into force on 28 July

2010. The 2005 SUA protocol was the first attempt made immediate after the terrorist attack in the United States on September 11, 2001, to amend the previous 1988 Convention for the Suppression of Unlawful Acts against the safety of maritime terrorism. As 1988 SUA Convention was constrained by the limited enforcement rights and several new types of offence must be brought into focus to fill the gap of the 21<sup>st</sup> century timeframe, thus 2005 SUA has open a new horizon to enforce jurisdiction by establishing a ship- boarding procedure and including new offence over which a state party can establish jurisdiction. One of the fundamental principle of law of the sea is Mare Liberum, freedom of high seas; this provision was established by Hugo Grotious more than four hundred years ago, prohibits state's jurisdiction or sovereignty over high seas need to be open and unrestricted for all users to enjoy all rights and freedoms of navigation. The striking balance between coastal state jurisdiction over territorial sea and user states jurisdiction over high seas regarded as the basic regulatory rule in international law governing international waters. With due respect to this ground principle 2005 SUA protocol was initiated tighter balance between freedom of navigation and flag state responsibility to respond on new threats and challenges affects safe navigation. SUA protocol thus encompasses a wide range of offences than 1988 SUA including concern related to proliferation of WMD. Article 3 bis (1) (a) of the 2005 SUA Protocol thus affixes offences when the purpose of the act, by its nature or context, to intimidate a population, or to compel a government or an international organization to do or abstain from doing any act and an offender:

- (i) uses against or on a ship or discharges from a ship any explosive, radioactive material or BCN weapon (article 2 of the SUA Protocol defines BCN weapons as biological, chemical, and nuclear weapons and other nuclear explosives devices) in a manner that

- causes or is likely to cause death or serious injury or damage or
- (ii) discharges, from a ship, oil, liquefied natural gas or other hazardous or noxious substances (not covered in (i)), in such quantity or concentration that causes or is likely to cause death or serious injury or damage or
  - (iii) uses a ship in a manner that causes death or serious injury or damage or
  - (iv) Threatens, with or without condition as is provided under national law to commit an offence set forth in (i),( ii) or (iii).

According to Article 3 bis (1) (b) another offence relating to the transport of any explosive or radioactive material on board a ship is established if it is known to be used in a terrorist attack and the transport of biological, chemical and nuclear weapons, and related materials. This article related to transportation of WMD and related materials face a huge objection by some states who argued that this provision has no direct link with terrorism and this would in fact implement the effort of enhance non- proliferation generally. Article 3 ter then establishes another notable offence for the transport of an offender with the intention to assist that person to evading persecution. Article 3 ter of the convention stated that a person to unlawfully or intentionally transport another person on board a ship with the intent to assist that person in evading criminal persecution and knowing that the person has committed an act that constitutes an offence set forth in Articles 3, 3bis, or 3 quarter of the amended SUA Convention or an offence set forth one of the treaties listed in the annex to the Convention. The scope of this provision is even more remarkable as it takes into account the link between maritime security with security on land. The offence under the 2005 convention was also passed on to those who seek to participate,

organize or direct others or contribute to several of the principle offences set forth 1988 SUA Convention or the 2005 SUA Protocol.

1988 SUA Convention was criticized mostly because of its lack of law enforcement jurisdiction, which requires ship boarding procedures to intercept, board, and search or arrest foreign flagged ships. The 2005 SUA Protocol was established this. In establishing a well regulated ship boarding provision 2005 SUA Protocol has get essential guidance from UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988 Vienna Convention) and 2000 migrant smuggling Protocol. However, The 2005 SUA Protocol sets out in Article 8 (1) that for boarding to be authorized a requesting state must have 'reasonable ground to suspect' that the ship or the person on board is involved in the commission of an offence set out in Article 3, 3 bis, 3 ter of 1988 SUA Convention or 2005 SUA Protocol. In asking request to board a foreign flagged ship state party should contain the name of the suspect ship, the IMO ship identification number, the port of registry, the ports of origin and destination any other relevant information. A request may be issued orally but must be confirmed in writing as soon as possible (Article 8 bis(2)). If there is a reasonable ground persists then the state party need to request the flag state to authenticate the nationality of that ship. After the confirmation of the nationality the requesting party seeks for the authorization from the flag ship to stop, search or detain a ship suspected under the offences described in Article 3, 3 bis, 3 ter. In this context the flag state need to response as expeditiously as possible either authorize the requesting party or to boarding by its own enforcement force or officials. If there is no response within four hours to confirm nationality of a ship the requesting party may notify the IMO Secretary General in order to allow for boarding or searching. Thus, there are three possible way by which a boarding may occur. The first steps involves approval on an ad hoc basis,



second, consent is implicitly granted if the IMO Secretary General notified before and no response to a request is forthcoming from the flag state after four hours. Finally if the prior authorization is communicated to the Secretary General, the consent is again considered implicit then it is not necessary to wait four hours for permission to visit the suspect vessel.

In addition Article 8 bis provides number of safeguards as to how a state can go on board a foreign vessel. In this regard paragraph 10 sets out the obligations imposed on the requesting states such as the protection of the person on board, the safety and security of the ship and its cargo and not jeopardizing the commercial or legal interests of flag states. Equally, boarding must also comply with the requirements of international law regarding the use of force. Article 8 bis thus, stipulated that the use of force is to be avoided 'except when necessary to ensure of its officials and person on board, or where the officials are obstructed in the execution of the authorized actions'. The states are also required to use only the minimum degree of force that would be necessary and reasonable in the circumstances.

The 2005 SUA Protocol also provides for a provision under Article 8 bis in which the state party is responsible for any damage, harm or loss if the grounds for such measures are unlawful or prove unfounded then the requesting state is responsible to compensate for the damage. The possible imputation of liability under these circumstances would suggest that any decision to apply for authorization to board must in fact exceed the mere existence of a reasonable ground to suspect.

### **Challenges faces by the 2005 SUA Protocol**

As a revised form of legal framework 2005 SUA Protocol mark as a significant effort to counter terrorism and proliferation of WMD and related materials face some serious shortcomings and challenges. The question of effectiveness of 2005 SUA

Protocol is raised in respect of the participation of states. Until now very few states (Until February 2016 40 states) have ratified it, in which the major maritime powers are far beyond from ratification. This marks first challenge for the effectiveness of 2005 SUA. The reason of this non ratification of the major states has been assessed on the ground of intrusive ship boarding procedure. Although ship boarding provision on high sea is nothing new and a several legal instruments share this provision, as the fish stocks agreement contains boarding provision that significantly exceed 2005 Protocol. And the extraordinary authority to board, although limited to certain geographic areas, is more intrusive than the 2005 SUA Protocol, yet fish stocks agreement has seventy eight parties nearly four times that of 2005 SUA Protocol where MacDonald (2013) argues that this is likely a result of the fact that protecting fish stocks is viewed as a technical matter, while terrorism is far more politicized. As some states view terrorism as an instrument to accomplish the need of maritime power to demonstrate their hegemonic role as well as serve their national interest, states are skeptical about this intrusive treaty obligation that could provide an opportunity to interfere states domestic affairs or to hinder freedom of navigation. For example Indonesia and Malaysia in Southeast Asia are not parties to the 2005 SUA Protocol which maritime area is most affected by piracy and terrorism. The reason for non participation is argued by the states that the ratification and more increased participation in the counter-terrorism mechanism would result in terrorists choosing this area as an operating theater. The experience of colonization also gave this nuance to the states that are fearful about this possibility.

Since the right of exclusive jurisdiction of flag state over high sea can be compromise for the well-being of all states, most states have reservations about certain provisions which keep them away from ratifying the protocol. Such as China considered that the 'generic requirement' to a request to a

request as expeditiously as possible provided in Article 8 bis (1) is sufficient and avoided unreasonable and impractical difficulties in specifying time limit. In line with china's views, a majority of states considered that, to setting a time limit would increase the complexity of boarding, as different states belongs to various time zone and public holidays are also different from state to state. Another factor that incorporates the less participation of the countries is the very components of nuclear, chemical, biological and other related materials is dual-use in nature and can be used instead of weapons for peaceful purposes. In this respect some states perceives that, transportation of such materials for civilian purposes would be faced with huge speculation by other state parties. Furthermore allegations also found that the 2005 SUA Protocol is a non-proliferation treaty which deals more with non-proliferation of WMD than with terrorism. In support of this argument, they considered that the transportation of component parts of WMD does not directly affect the safety of the ship or the safety of maritime navigation. Apart from these reasons some states prefer their own interest which are well served by fishing or conservation of living and non living resources and exploration of natural resources, nonetheless interested about terrorism which they pretend doesn't bear any implication for them rather implied extra risk upon them. On the other hand some states reject 2005 SUA Protocol questioning about its effectiveness as a legal instrument to combat terrorism and proliferation of WMD at sea where Natalie Klein (2011) claim that the limitation of the SUA Protocol, in particular with regard to maintaining the emphasis on expressive a flag state approval for boarding may undermine its utility.

Second challenge poses by 2005 SUA Convention is that its scope is too board and there is no express definition of terrorism although its preamble speak lot about terrorism. As terrorism, piracy and insurgency are three different matters it is necessary to differentiate them to undertake effective counter

measures. If all these separate ideas congregate within a same framework thus, sometimes create confusion to hit the actual point to get redress.

### **PSI interdiction principles and ISPS code**

In November 2002 a Cambodian vessel called So San which carried containers from North Korea to Yemen was boarded by The Spanish Navy for its doubt about the nationality of the vessel. After boarding to verify its registration the boarding team observed sealed containers not listed on the cargo manifest, and opened them to find the Scud missiles and related materials. The frustrating experience surrounding this case of shipment of WMD and associated materials under the guise of peaceful and legitimate activities has raised serious worryment and point to a gap that leads US to declare the Proliferation Security Initiatives (PSI) in May 2003.

Proliferation Security Initiatives is neither a legal framework nor an organization, but a political agreement between states with the aim of strengthening all forms of cooperation respecting existing legal framework to prevent the movement of WMD and related materials between state and non state actors of proliferation concern. From the policy perspective, The PSI has been described as ‘a multilateral intelligence-sharing project incorporating cooperative actions and coordinated training exercise to improving the odds of interdicting the transfer of weapons of mass destruction (Natalie Klein- 2011). PSI interdiction principles were released in September 2003 stating that they target state and non-state actor engaged in proliferation through (i) efforts to develop or acquire chemical, biological or nuclear weapons and associated materials and delivery system, (ii) transfers selling, receiving, or facilitating of WMD, their delivery systems and related materials.

Therefore, PSI provides a list of four interdictions that defines each member’s role and the mission they need to

accomplish. First, interdiction provides the country acting alone or in cooperation, takes efficient measures against the transport of WMD and related items to or from. The second interdictions require states to have an efficient procedure for communicating relevant information about suspicious activity. In this respect they should also take care of the confidentiality of such information and take as many initiatives as possible to improve cooperation in this area. Third, states need to update and strengthen their competent authorities by revising their structures, roles and competences. Following the same idea states are also called upon to adopt new national rules in order to give the problem a better framework at local level. And finally fourth interdiction provides that the state should take specific action regarding some threat. These actions are: not contributing to transport of such items to state or non-state actors nor allow a citizen from such country to do so; to board and search vessel in the territorial sea or internal waters, if they are suspected to being involved in proliferations related activities; to agree on boarding a ship flying its flag by another state and seize the prohibited items if present; to undertake appropriate measures to board and search suspicious vessel flying flag of convenience located their inland waters, territorial waters or adjacent waters, and to reinforce the conditions for entry and exit from a port or territorial sea for suspicious vessels which may be subject to specific requests for investigation; to require the landing of a suspected airplane while transiting the airspace of the states.

Since ports are interfaces for international shipping and global trade and supply of goods, port security is essential to prevent any unlawful act of depredation or transporting WMD and related materials by the terrorist. The most vulnerable aspect of maritime security has been determined by the sensitivity of port, since from the practical point of view it is easier to damage vessels in the port than those vessels are at sea. To take this sensitive aspect into consideration IMO has

adopted ISPS Code to improve security of vessels both at port and sea. The ISPS Code is an amendment to the 1974 Safety of Life at Sea Convention (SOLS Convention) which came into force in July, 2004. The ISPS Code therefore, intended to identify and enable preventative measures against security threats constituted by 'any suspicious act or circumstances threatening the security of the ship'. The purpose of ISPS Code is to provide standardized and consistent framework for evaluating risk and enabling governments to strengthen risk management capabilities, and the main idea behind this is to obtain, gather and share information as early as possible to response the threat. ISPS Code applies to passenger ships, and cargo ships of 500 gross tonnage or more and it doesn't apply to warships or other ships used for non commercial purposes, nor to fishing vessels of any size. The ISPS Code is composed of two major components, part A and part B. Part A provides some level of mandatory obligation to the port states and the vessels represented by the respective firms. Part B provides more board but not mandatory guidelines where parties are free to use other means to comply with it in the implementation of security assessment and plans. The divisions of the two parts are equivalent with part A outlining the principles maritime actors must follow and part B discusses how to implement such principles. In reinforcing maritime security by preventing terrorism and proliferation of WMD, the flow of information considered as an important tool in case of suspicion of a ship. The ISPS Code is a mechanism that no longer provides new enforcement powers but provides a cooperative framework in which, if there is any suspicion, the existing legal framework is sufficient to respond against the threats involved.

### **Challenges face by PSI and ISPS Code**

Like 2005 SUA Protocol PSI has considerable gap in participation. Until now PSI has 105 parties where state of significance China, India and most of the Southeast Asian

countries are out of this obligation. China as a second largest economy and third largest merchant fleet has been opposed PSI on the ground that this mechanism has no consistency with International law will operate in violation of international law. Consequently, very few countries of convenience adopted PSI and thus several countries using flag of convenience would be out of the application of it. This non-participatory character of PSI raises a question of effectiveness of this effort. However, The debate over whether PSI is consistent with international law some scholars believe that this type of mechanism target some particular state like north Korea, Iran or Syria, is the violation of the principle of equality where Valencia stated that PSI has proven controversial, particularly among Asian countries as it violates the fundamentals of existing international law. Second, since United States introduced this security architecture, some countries are more skeptical about their purpose saying that the current anti-terrorism mechanism is being fueled as a part of US homeland security initiatives without paying attention to global issues.

Unlike PSI ISPS Code faces considerable challenges to implement effective counter measures against terrorism and proliferation of WMD. First of all the factor incorporates state not ratifying the code involves its huge cost of maintaining the whole process, which at times puts additional burden on states and some states has lack of capability to continue this system of speculation. For example Indonesia a archipelago with lack of capability in economic factors and enforcement power has kept itself out of this robust system of speculation. Second, there are some gaps in the code, that ISPS Code exclude non commercial and fishing vessel from its jurisdiction which provides the terrorist greater latitude to exploit this gap. Many examples can be found in relation to this gap where the ships used for attack on the USS Cole and Iraqi platforms or in Indian residential hotel were fishing vessels. Another considerable gap was pointed out by Natalie Klein, (2011) the obvious difficulty

is that if a security threat is detected as a result of this information –seeking process, the port state can only take action to eliminate or reduce this threat once the vessel is in port or within 12 miles of its coast. This proximity to a port state's maritime assets may be quite undesirable. Consequently, the preamble states that the provisions in this Code should not extend to the actual response to attacks or to any necessary cleanup activities after such an attack (IMO-2012). This aspect is another limitation of ISPA Code, where its preventive measures just illustrate how an attack may deter, but the procedure of its consequence is not mentioned.

## **CONCLUSION**

The Traditional principle freedom of high seas has been limited in many ways as security and safety concerns in cross-border criminal activity and terrorism have plunged the interests of the entire community of the world. In order to minimize losses and improve risk management capabilities, all countries have duty to shoulder responsibility to safeguard international peace and stability and to take collective measures for the prevention and removal of threat to peace. In doing so states have concluded bilateral, regional and multilateral agreements and arrangements to recognize procedure that can be applied against their vessels when any reasonable suspicions of certain activities that endanger maritime security is found.

The global architecture for preventing unlawful act of violence has changed over time and reassessed to meet the need for time. The terrorist attack in 9/11 has changed some of the core ideas about terrorism and some new loopholes have been identified and reassessed by new legal instruments. The question of participation in these newly emerged instruments has considerable backdrop which requires further renovations. As all of existing legal instrument regarding the suppression of unlawful acts of violence at sea covers terrorism and



proliferation of WMD within same framework, the scope of these instruments is much wider, which making them complicated and questionable to many states. Therefore two different instrument addressing terrorism and proliferation of WMD would demonstrate the feasibility of countering terrorism and the proliferation risk. And further difficulty is noted by the principle of sovereign immunity, where Natalie Klein has addressed that “the possible use of vessels entitled to sovereign immunity to ship WMD and related materials to non-state actors or other states remains unchallenged in any of the legal frameworks developed in response to concern regarding maritime terrorism and proliferation at sea”. There is no sign to change or challenge this principle in any way to strengthen maritime security. Although this principle gives states unquestionable powers, this gap can be closed by the rights of self-defense enshrined in the United Nations Charter where state can take actions based on a serious threat of terrorism and proliferation of WMD.

The essence of international law is to strike a balance between the interest of the entire community of the world and the individual state, and this mechanism of sacrificing certain sovereign authority in favor of all is the basic idea behind the law of the sea and maritime security initiatives. As far as the security is concerned, terrorism has no universally agreed definition, and this omission implies that universal jurisdiction is unlikely to be found at sea for terrorist. In this respect 2005 SUA Protocol with other instruments could provide the best way for states to take effective measures against terrorist and proliferation of WMD and related materials.

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