Chapter 13
Maritime Security: Legal Framework in International Law

Introduction

Over the past few decades maritime security has emerged as an issue of serious concern and in recent years has been pushed forward into the forefront of IMO's agenda. The current activity in this field largely stems from the recent upsurge in piracy incidents in the Horn of Africa and the tragic events which took place in New York City on 11 September 2001. However, maritime insecurity as a real and significant threat in the current milieu was triggered as early as 1985 by the *Achille Lauro* incident occurring in the Mediterranean Sea. That unfortunate event led to the adoption in 1988 of the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA). Other incidents have occurred subsequently which may be termed acts of terrorism in line with the contemporary perception of that phenomenon. Some of these are mentioned later in this chapter. There has also been a significant increase in other types of violent criminal acts at sea, which are generally referred to as piracy, although the term does not always necessarily reflect an accurate description of the atrocity committed and is often a misnomer in terms of international law. Whatever rhetorical and other implications may result from the spurious use of the terms mentioned above, it is imperative that a realistic re-examination of the international regime of maritime security be carried out urgently, and that due heed be paid to the plight of those, including seafarers, who are directly involved in the movement of goods by sea.

As outlined above, there are essentially three facets to the problem of maritime security. These are high seas piracy, piracy-like acts committed within coastal zone waters and maritime terrorism. Piracy is the original seaborne criminal offence. It has for centuries been outlawed under international as well as national law. The present public international law governing piracy, which is largely a codification of the customary law in this field, is to be found in a number of provisions within the high seas regime of the United Nations Convention on the Law of the Sea (UNCLOS), 1982. Traditionally, under the admiralty jurisdiction a pirate could be tried in the courts of England regardless of where the act of piracy was

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committed so long as the perpetrator was apprehended and brought before the court. Arguably, there is no specific international regime in place as yet designed exclusively to deal with the menace of piracy-like acts committed in waters within the jurisdictions of coastal states, in this chapter referred to as "coastal zone piracy". However, the 2005 Protocol to the SUA Convention may to some extent be a useful device in this regard although it essentially has an anti-terrorism orientation. In the realm of maritime terrorism, following the so-called "9/11" disaster, the United States strengthened its regulatory maritime security regime through the Maritime Transportation Security Act (MTSA), 2002. Largely influenced by that development, the IMO embarked in parallel on a speedy amendment of the International Convention for the Safety of Life at Sea (SOLAS), 1974 through the tacit acceptance process and adopted the International Ship and Port Facility Security (ISPS) Code as an extension of an additional chapter in the Annex to the Convention. The Code became effective on 1 July 2004 and its implementation and enforcement is understandably high on the maritime agendas of states parties to SOLAS.

Maritime Security

It can be said that "maritime security" measures are those deployed by maritime administrations, shipowners, ship operators and managers, port facilities and offshore installation administrations, and other maritime organizations for *protection against unlawful acts such as piracy, armed robbery, terrorism, and maritime violence*. By contrast, "maritime safety" measures refer to those instituted by maritime administrations, shipowners, ship operators and managers, port facilities and offshore installation administrations, and other maritime organizations to *prevent or minimize the occurrence of accidents at sea that may be caused by substandard ships, unqualified crew, or operator error*. While "safety" and "security" can be used synonymously or interchangeably in several situations, the distinction as is apparent in the above descriptions is crucial in the context of shipping because each term connotes protection against different categories of threat to life and property at sea and is conspicuously so depicted in chapters IX and XI of the SOLAS Convention. One threat involves accidents caused by unsafe ships and unsafe ship operations while the other involves crimes perpetrated by humans against the ship's crew, passengers or cargo, or the ship itself. It is also to be noted that the distinction between these two types of threats is apparent in the respective themes of SOLAS and SUA. The former is primarily concerned with maritime safety, while the latter relates to maritime security.

It is important to appreciate the substantive distinction between safety and security which is not much of a problem when the terms are used in the English language as illustrated above. However, in certain languages the word "security" (spelt appropriately) bears the connotation of both security and safety causing apparent confusion in terminology. Examples are French and Spanish both of which are official languages of IMO. Prior to 2002, the same word, *seguridad*

maritima, stood interchangeably for both maritime safety and maritime security in IMO documents in the Spanish language. In French, the word used was *sécurité maritime*. The same linguistic situation arises in several non-official IMO languages. The ambiguity was resolved in 2002 when the ISPS Code was adopted. At the diplomatic negotiations Hispanophone delegations retained *seguridad maritima* to mean maritime safety and designated *protección marítima* to mean maritime security. The Francophones decided to employ the term *sécurité maritime* for maritime safety and *sûreté maritime* for maritime security.

The discussion on maritime security in this chapter focuses on threats that frequently lead to serious human injury or death. These are generally exemplified by acts of terrorism, high seas and coastal zone piracy, armed robbery against ships, and other acts of maritime violence. It is recognized, however, that there are equally repugnant sea crimes such as smuggling, narcotics trafficking, gunrunning, stowaways, and human smuggling which present serious maritime security threats.

Piracy

Piracy in all its facets is as old as seafaring and seafaring itself as a profession is arguably as old as human civilisation given that the use of floating logs as a means of waterborne transportation predates the invention of the cart and wheel. Piracy has been a maritime menace since time immemorial characterized by deliberate and unscrupulous violence as its hallmark. In recent times waterways such as the Straits of Malacca have been highly vulnerable to the despicable activities of marauders who have carved out natural habitats for themselves in these and other waters.

Most recently, seafarers and ships have been the target of vicious criminal activity particularly in the waters off Somalia and across the Indian Ocean—one of the key arteries of world trade—and also in West Africa (where the incidents are to date more akin to armed robbery—see following section). In recent years, several hundred seafarers have been held hostage onshore in Somalia in terrifying conditions, some for very long periods and most being released eventually following negotiations to achieve their freedom and the payment of ransoms. Sadly, at the time of writing, over 50 seafarers still remain in captivity—with all the pain and anguish that brings to them and their families.

The notion of piracy at international law suffers from confusion and ambiguity in the current maritime milieu because of its two characteristic dimensions, the nature of the act that attracts the appellation and the location of its commitment. Superimposed on this international perspective of piracy is the manner in which piracy is treated as a criminal offence under national law. Needless to say, there is little uniformity in the different ways domestic jurisdictions deal with piracy. In colonial times, insurgencies committed in some of the islands of the East Indies were considered as piratical acts.

The definition of piracy in international law as it appears in Article 101 of UNCLOS is conspicuously restrictive in terms of the constitutive elements of the act and the zonal location of its commission. With regard to the first dimension,

there is the limitation of the two-ship requirement. As well, the act must have been committed for private ends by crew or passengers of a private ship. The restrictions would preclude as piracy acts of terrorism such as hijacking that are politically motivated and ones where the perpetrator is on board the victim ship and there is no second ship involved, as was the case in the *Achille Lauro* incident. Notably, there is no definition of a private ship; but a reading of Article 102 would impliedly indicate by interpretation in reverse that a private ship is one that is not a warship or government ship. However, that in turn begs a definition for the term "government ship".

The other limitation is that the act will not be considered piracy in terms of international law unless it is committed on the high seas. The rationale, of course, is that piracy being a universal crime *jure gentium* any state should be able to take action against it. Regulation and enforcement of piracy should not be the exclusive province of the flag state of the pirate ship or the victim ship. The right of any state to take action against piracy is considered a peremptory norm of international law, but if the right extends to waters landward of the high seas or arguably the EEZ, it is an impingement on the sovereignty and jurisdiction of the coastal state. The status of piracy as a high seas crime would not perhaps have been so problematic had the outer limit of the territorial sea not been extended to 12 nautical miles and had there been no exclusive economic zone; in other words, the high seas would have started unequivocally seaward from the outer limit of the territorial sea. The present regimes are products of the redefinition of maritime zones by UNCLOS. The anomaly in the existing state of affairs, save for the current crisis off the coast of Somalia, is that many piratical acts, i.e., acts that would have qualified as piracy had they been committed on the high seas, occur today in waters where only the littoral state can exercise jurisdiction under international law.

Off the Somali coast, piracy takes a particular form—the hijacking of vessels and kidnapping of crew for ransom. In recent times, those waters have become exceptionally notorious and ships continue to be warned to keep as far away from the Somali coast as possible if they are to avoid being hijacked and victimised by one of the pirate groups in that region. Hijacked ships invariably stay in captivity for an average of 4–5 months and are released only after the payment of millions of US dollars in ransom.

Armed Robbery Against Ships

Since IMO is a specialized agency of the United Nations, it would be inappropriate for any IMO instrument to deviate from the definition of piracy as it appears in UNCLOS. Yet, consistent with its mandate in respect of international maritime safety and environmental protection, IMO does have responsibility for facilitating the development of regimes for combating criminal activities that would otherwise have qualified as piracy had the UNCLOS definition not been restrictive. The tentative solution was the articulation of the term "armed robbery against ships" defined by IMO as "any unlawful act of violence or detention or any act of

depredation, threat thereof, other than an act of 'piracy,' directed against a ship or against persons or property on board such ships, within a state's jurisdiction over such offences". It was adopted to accommodate those criminal acts that bear the characteristics of piracy *per se* but fall outside the scope of the restrictive definition of piracy under UNCLOS.

Thus, under the caption "armed robbery against ships" there is a broader spectrum of criminal acts. At one end of the spectrum there are attacks that are akin to muggings committed at sea. They are opportunistic in character often perpetrated by unemployed fishermen. These attacks are usually brief and swift and the goods targeted are the ship's safe, cash, personal valuables, coils of rope, cans of paint; mainly articles that can be easily carried away and sold conveniently. At the other end of the spectrum there are attacks that are pre-meditated, highly sophisticated, and extremely violent. These take weeks or months of planning by well-organized crime syndicates. They usually target the ship lock, stock and barrel, including cargo, stores, bunkers and personal possessions of the ship's inhabitants. The operation usually involves hijacking of the ship following which it is often renamed, re-crewed, and used for trading. Needless to say, the stolen cargo is sold to unscrupulous black market buyers and the ship may then continue trading in that market. Such activity is only possible where the perpetrators are well versed in the technical and commercial operations of ships. These are the typical "phantom ships" which assume fictitious identities and blend into the seascape of normal shipping operations often with success. A phantom ship continues a criminal existence that typically involves the perpetrator entering into carriage contracts with unsuspecting cargo owners and then stealing, diverting, and selling the cargoes. This cycle is repeated as many times as can be sustained without being apprehended by the law. As a result, enormous financial losses are suffered by ship owners, cargo owners, and marine insurers. Furthermore, the crew of a hijacked ship is frequently exposed to traumatic conditions, extreme physical discomfort, serious personal injury and even death in some instances.

Unlawful Acts

The *Achille Lauro* incident in 1986 was a rude awakening for the world maritime community. It suddenly drove home to governments and the shipping industry the woeful inadequacy of the international regime of piracy. Under the auspices of the IMO a new international instrument was adopted; the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 1988 otherwise referred to as the SUA Convention. In retrospect it can perhaps be said that it did not go much beyond the level of a cautious, preliminary attempt to deal with incidents exemplified by the *Achille Lauro* and acts of maritime violence committed in waters that are not necessarily high seas. While it imported the all-embracing term "unlawful acts" the convention also had its own limitations. The most significant drawback is that it is applicable only to unlawful acts that endanger the safety

of maritime navigation. However, it was the first IMO convention that created substantive maritime criminal offences but left it to state parties to prescribe sanctions. This, as may be expected, has resulted in a serious lack of uniformity in the overall international effectuation of the regime.

Following the disaster of 11 September 2001, the SUA Convention was brought back to the drawing board at IMO for major revision. A new Protocol was adopted in 2005 which introduced a number of far-reaching provisions in an attempt to make the regime more stringent and comprehensive. More criminal offences have been added focusing on maritime terrorism together with their associated or ancillary offences. There are cross-references to other terrorism-related treaties. The most significant additions are the new detailed provisions dealing with boarding of suspect ships by authorized officials of third party states.

A serious question that provokes curiosity is the lack of linkage between the criminal law regime of the SUA Convention and the regulatory package of SOLAS Chapter XI combined with the ISPS Code. While the adoption and entry into force of the ISPS Code moved at full speed ahead pushed unabashedly by a few major IMO member states, the revision of the SUA progressed at a relatively slower pace. There are no cross-references between the two instruments and no recognition of a common platform even though both supposedly deal with maritime security. The ISPS Code is simply a preventative tool, the productive utility of which remains to be seen. Some view it as nothing more than economic convenience inuring to the benefit of states that are relatively more vulnerable to terrorism at the expense of others whose exposures to such threats may be little or nil. As regards SUA 2005, as it is now called, there are several substantive problem areas which need careful reviewing. The regime, it is submitted, is still incomplete as it does not properly address the lingering problem of coastal zone piracy.

Terrorism

The maritime version of terrorism is distinguishable from piracy and armed robbery against ships in terms of their respective motives. Maritime terrorism like terrorism in general is politically motivated. The core object of the perpetrators is to establish political power and dominance through violence and intimidation. By contrast, the motivation behind acts of piracy and armed robbery is largely private financial gain, although in certain instances the monetary gains of the perpetrators are used for overtly or directly financing operations that perpetuate terrorism of sorts. It is sometimes said that the object of terrorism is to influence the political conduct of adversaries through threats and violent attacks on calculated targets. Acts of terrorism are characterised by symbolic rather than material significance, and their object and motivation are thus clearly different from those of piracy and armed robbery. The numerous cases of maritime terror, such as the 1970 explosion claimed by Al-Fatah and the Popular Front for the Liberation of Palestine (PFLP) that killed 19 and injured 36 in an Israeli port, the 1971 explosion of a bomb by a Mozambican terror group that killed 23 crew members on board a Portuguese cargo

ship, and the 1988 Abu Nidal attack against the Greek passenger ferry *City of Poros* that resulted in 9 persons being killed and 80 being injured are all different from cases of piracy and armed robbery against ships.

The literal meaning of "terror" from which the word "terrorism" is derived is fear. All the incidents referred to above were designed to elicit fear and horror. Piracy and armed robbery, in contradistinction, are motivated by private pecuniary benefit. The intention of these acts is to plunder (*animo furandi*) for the sake of gain (*lucri causa*). Acts of terrorism, on the other hand, are carried out to draw attention and publicity through exploitation of public sentiment fuelled by sensational media exposures.

The *Santa Maria* incident of 1961 is generally considered to be the first case of maritime terrorism in the modern era. In this case, one Captain Henrique Galvao together with 23 of his men took control of the Portuguese luxury liner *Santa Maria* in the Caribbean Sea. At the time the ship was carrying some 600 passengers and 350 crew members. Captain Galvao captured the ship in the name of General Humberto Delgado, who had been elected President of the Portuguese Republic. Notably, the incumbent Salazar government had declared the results of the election to be invalid. While the incident did not trigger the creation of any international treaty instrument, it generated some debate within the global maritime community regarding distinctions between acts of piracy, insurrection, rebellion and terrorism. Soon after news of the hijacking spread across the globe and was confirmed, the Salazar government, the ship owner, and several states labeled it as an act of piracy. Delgado's government exerted great effort to convince the international community that the act was not piracy, but an "appropriation of Portuguese transport by Portuguese for Portuguese political objectives." There was a possibility that had Galvao's actions been labeled piracy *jure gentium*, he would be branded *hostis humani generis* which would then give any state the jurisdiction to seize the *Santa Maria* on the high seas. Galvao's actions eventually became widely recognized as an act of protest against the Iberian dictatorship rather than as piracy. At the end of the 12-day dramatic event Galvao was offered political asylum in Brazil.

In relatively recent times, the *Achille Lauro* hijacking is a landmark incident which led to the adoption of the IMO instrument the Suppression of Unlawful Acts Convention of 1988 (SUA) referred to above. The atrocious brutality with which the act of terrorism was executed shocked the international community into taking concerted action. Briefly stated, the facts of the case are as follows:

On October 7, 1985, four Palestinian gunmen hijacked the Italian cruise ship *Achille Lauro* while the vessel was traversing the eastern part of the Mediterranean Sea with 400 people on board. While they were engaged in negotiations, the gunmen shot an elderly Jewish-American paraplegic passenger and then threw him overboard in his wheelchair. Similar to the *Santa Maria* case, debate and controversy followed the incident with regard to the motives of the perpetrators and whether the heinous act was piracy or terrorism. Notably, in this case, just like in the *Santa Maria* incident, there was no "pirate vessel". The perpetrators were in the guise of *bona fide* fare-paying passengers at the time they hijacked the vessel. Eventually, the *Achille Lauro* sailed to Egypt and the terrorists were put on board an

Egyptian aircraft which subsequently was forced to land in Italy as a result of intervention actuated by United States Air Force planes. The government of the United States demanded custody of the terrorists during the complex and protracted negotiations that ensued but it was denied by the Egyptian authorities. To make matters worse from the American perspective, the terrorists eventually escaped to Yugoslavia. As mentioned above, this tragic occurrence prompted the articulation and adoption of the SUA Convention, which incidentally, contains detailed extradition provisions.

Maritime terrorism has continued to cause death and destruction since the *Achille Lauro* incident. In 2000, the bomb explosion on the ro–ro ferry *Our Lady of Mediatrix* in Panguil Bay, Philippines resulted in some 50 people being injured and 40 others losing their lives. In that same year the United States warship *Cole* was bombed by terrorists, which caused the death of 19 people and wounded 37 others. One person, a member of the ship's crew, died when the oil tanker *Limburg* was bombed in the Gulf of Aden in October 2002. The attack also resulted in 90,000 barrels of oil being spilt. Of course, the oil spill itself was not of any major proportion, but it sparked fears of environmental terrorism and ships being used as instruments of terror with or without the environmental factor. Undoubtedly, a successful act of maritime terrorism cannot only cost human lives and result in personal injuries, but also dangerously affect the marine environment and impede trade and commerce in a serious way.

Maritime Violence

The use of the term "maritime violence" is relatively new. An elaborate definition of the term is provided in a so-called model national law devised by a Joint International Working Group on Uniformity of Law Concerning Acts of Piracy and Maritime Violence spearheaded by the Comite Maritime International (CMI). It has resulted from a perceived need to highlight certain commonalities among maritime criminal offences including piracy, armed robbery against ships, terrorism, *etc*. It appears for want of a more precise term and to deliberately cast the definitional net wider to encapsulate sundry violent maritime offences, the IMO, through the SUA Convention, coined another term, i.e., "unlawful acts" at sea.

The maritime community at large and the shipping industry in particular have been subjected to micro-surgical debate over whether a certain "unlawful act" constitutes piracy or terrorism, or armed robbery against ships. Legal technicalities, particularly where different jurisdictions have been involved because different segments of the same crime were committed in different locales, have helped pirates, armed robbers, and hijackers to escape prosecution. The reality is that the victim of a crime, whether he/she is a passenger, ship owner, cargo owner, crew, or bystander, is hardly concerned with legal niceties of zonal or jurisdictional consequence, or whether the crime was perpetrated for the sake of any pecuniary gain or a

political cause. Victims are concerned with loss of life, personal injury and loss of or damage to property.

As indicated above, the CMI has embarked on a useful exercise, namely, the drafting of a model national law on piracy. The object is to sensitise states to the fact that piratical acts or acts of maritime violence are, in the first instance, a national problem for individual states. By and large, the majority of these unlawful acts occur in waters within national jurisdictions and is therefore a matter for domestic law. The development of national legislation by use of a model law fosters uniformity and assists in the national law-making process. The CMI initiative can thus be instrumental in promoting systematic uniformity in the development of national legislation on the subject. In case there are any misconceptions about the so-called model law, it should be pointed out that it is not exactly drafted legislation, but is a framework of principles based on which domestic legislation can be articulated in a meaningful way. The model law identifies piracy and maritime violence as two separate criminal offences. It defines piracy in both treaty i.e. UNCLOS, as well as non-treaty terms. Through this initiative the intention of the CMI is to continue exploring the question of adequacy of the present international regime to deal with criminal acts committed on and against merchant ships, in particular, container ships, tankers and passenger vessels.

It is abundantly clear that separation of piracy and other maritime criminal offences in legal terms is of little or no benefit to ships which end up as victims of these heinous crimes. Violent attacks, whether they are called piracy (rightly or wrongly) are being carried out regularly and systematically in certain waterways of the world that have gained negative notoriety in this regard. Merchant ships are highly vulnerable to being hijacked and used for financial and material gains, or being used as vehicles for carrying out acts of terrorism. If a rational and meaningful solution is to be reached it must be approached through the articulation of a well-thought out integrated legal regime. With proper enforcement through interstate cooperation, it may well be possible to combat the maritime menace of crime at sea whether it is piracy, unlawful act or maritime violence or howsoever characterised otherwise.

International Legal Instruments and Current Developments

In temporal order, piracy has historically been the oldest threat to maritime security if one can characterize the statement in those terms. Of course, the distinction between high seas piracy and what is being referred to as coastal zone piracy, is one of relatively recent vintage. Be that as it may, the codification of the customary international regime of high seas piracy is reflected in UNCLOS. The provisions are contained in Articles 100–107 of that convention. Many are of the view that these provisions need to be revised in light of the current frequency of coastal zone piracy and the dislocation of the legal definition of piracy due to significant changes in the configurations of maritime zones under UNCLOS. Under UNCLOS, the high seas

have shrunk in area and, therefore, acts committed in certain waters that were previously part of the high seas are no longer high seas crimes because those waters now fall under the jurisdictions of coastal states. Given the geographical locations of most present day piratical acts the adequacy of the present regimes is seriously questionable.

While the problem is acknowledged by the international maritime community at large, it is also recognized that altering UNCLOS may not be the best solution. The rights of ships of all states to intervene in the event of high seas piracy must be retained. The problem of coastal zone piracy must be addressed without disturbing the UNCLOS regime. At any rate, any attempt to revise UNCLOS will be an inordinately long and arduous exercise simply in view of past experience with that convention. It took some 12 years for UNCLOS to be adopted and then another 12 for it to enter into force.

Another international legal instrument that features prominently in the domain of maritime security is the SUA Convention. The limitations of the piracy provisions under UNCLOS and the hijacking of the *Achille Lauro* stirred IMO into coining the concept of "unlawful acts against maritime navigation." This phraseology was intended not only to deal with the issue of geographical jurisdiction but also embrace criminal acts that did not fall within the UNCLOS definition of piracy. In the aftermath of the "9-11" disaster, the international community recognized that the 1988 version of the SUA Convention was inadequate to deal with all varieties of violent maritime acts that fell within contemplation. The revision of SUA was then put on the agenda of the IMO Legal Committee with the aim of making the convention more sound and effective in substantive terms and also wider in scope. In functional terms this objective was manifested mainly in the expansion of the Article 3 offences in the convention to accommodate a broader range of "unlawful acts". The coverage, it was envisaged, would extend to such atrocious and vile acts of crime as were exemplified by the 11 September event. The scope of application of the convention was enlarged to cover domestic and cabotage trade. As well, the provisions relating to jurisdiction and extradition were strengthened and made wider in scope. As an example, under the new draft the so-called political offence exception is no longer a valid ground for denying extradition under the convention.

The Model National Law initiated by the CMI has already been mentioned. Although the model is intended to be used to articulate and consolidate domestic legislation, the way it is designed, it serves to complement the piracy provisions of UNCLOS as well as the offences of the SUA Convention. One remarkable attribute of the Model National Law is that the definition of piracy in it accommodates the offence in virtually all its possible forms including those prevailing in international law as well as in the laws of various municipal jurisdictions. As well, the definition of maritime violence has been articulated in such a way that it is not as restrictive as in the SUA Convention; nor does it have the limitations of the definition of piracy in UNCLOS. Thus, the generalized definition of maritime violence in the Model National Law tempered by adaptations of relevant provisions from existing international instruments, allows the model law to accommodate a wider range of

offences. It is flexible enough to challenge individual states to modify and tailor the model to meet their special needs in terms of definitional and jurisdictional issues, at the same time taking cognizance of the fact that there is a global maritime menace that needs to be dealt with through concerted action.

Finally, there is the so-called ISPS package which is an integral part of the SOLAS scheme of maritime safety. Following the 9-11 disaster, the international maritime community adopted amendments to Chapters V and XI of the SOLAS Convention and created a new instrument known as the International Ship and Port Facility Security Code (ISPS Code). Chapter V which addresses the subject of safety of navigation has been amended to include requirements such as the automatic identification system (AIS) and the ship identification number (SIN). The old Chapter XI has been re-named Chapter XI-1 with the title "Special Measures to Enhance Maritime Safety" and a new Chapter XI-2 has been created bearing the title "Special Measures to Enhance Maritime Security" through which the ISPS Code has been adopted as an associated instrument. Part A of the ISPS Code is mandatory while Part B is recommendatory. The object and purpose of the Code is to assemble "an international framework involving co-operation between Contracting Governments, Government agencies, local administrations and the shipping and port industries to detect/assess security threats and take preventive measures against security incidents affecting ships or port facilities used in international trade". The Code aims to achieve this objective by establishing "the respective roles and responsibilities of all parties concerned, at the national and international level, for ensuring maritime security".

In the past, IMO instruments had not addressed any issues relating to ports. The ISPS Code marks a departure from that norm. It is to be noted, however, that the Code only purports to regulate security from seawards to the ship-port interface. Landward of that interface the jurisdiction and responsibility is that of the shore-based port authority and related enforcement authorities. One notable observation with regard to the ISPS Code is that unlike, for example, the ISM Code, it did not go through a period of gestation as an instrument *para droit*. From its inception it was intended to be an integral part of SOLAS and was made partly mandatory. The Code became fully effective internationally by July 2004. The ISPS Code has also re-demonstrated the recent trend of enhanced enforcement capability of IMO instruments. The Code has imposed direct responsibilities on companies, i.e., owners and operators of ships. In that respect, both the ISPS and ISM Codes of SOLAS are "self-executing" or "directly applicable" instruments in terms of international treaty law. The significance, of course, is that in states where the monistic system of treaty implementation is applicable under their constitutional laws, these Codes immediately become part of the law of the land upon their ratification or accession by the states in question.

Problem Areas

With regard to the international regime of maritime security and the global communities strive to gain uniformity there are still a number of problem areas that need to be revisited. While disturbing the piracy regime of UNCLOS is not being advocated, it must be observed that under Article 101 of that convention only if the following elements are present an act will qualify as piracy under international law. There must be: (1) an illegal act of violence; (2) motivated by private gain; (3) committed by persons on board a private ship; (4) directed against another vessel, or the persons and property on board; and (5) committed on the high seas or outside the jurisdiction of any State. But for the recent surge of piracy off the coast of Somalia, these requirements have proven to be anachronistic in a world of reduced ship manning and cheap high speed rubber boats, and where the high seas have shrunk and coastal maritime zones and related jurisdictions are now extended to 200 nautical miles from territorial sea baselines which themselves are further away from land than was the case in the past.

One of the most problematic elements of the UNCLOS definition of piracy is that the act in question must be committed on the high seas or outside the jurisdiction of any state. If piracy can only be a high seas crime under international law, then most acts that would otherwise be considered piratical would fall outside the scope of that definition and would only be subject to the national law of the coastal state in whose maritime zone the act was committed. Prior to the prevailing maritime zones under UNCLOS, such an act motivated by private gain committed by the crew of a private vessel against persons belonging to another private vessel would have constituted an act of piracy if the act occurred just beyond the three nautical mile limit from the territorial seas baseline. At the present time, however, the same act committed in the same geographical location as described above, or perhaps even as afar from shore as 200 nautical miles, would not be an act of piracy. Whether a violent unlawful act meeting the requirements of Article 101 qualifies as piracy if it occurs beyond the outer limit of the EEZ, or whether to so qualify it is sufficient for the act to be committed only beyond the territorial sea, is not entirely clear. Much depends on how Articles 58 and 101 are construed together. A great number of piracy-like incidents are reported to occur in either the EEZ or the territorial seas of states. Reports in fact indicate that numerous attacks take place against ships tied up alongside a pier or while at anchor.

The requirement in the Article 101 definition for an act to be motivated by private gain is also problematic because defining private ends is quite a Herculean task. A slew of questions arises immediately. Is “private” to be construed synonymously as “personal”; in other words, not “collective”? Is it “private” as distinguished from “public”, or “political”, or “religious”, or for that matter, is it any cause or end that, strictly speaking, is not “private”? The definition of the relevant end is not simply a matter of judicial construction to be undertaken by resorting to the rules of treaty interpretation. There are serious issues at stake for the individual victim, the state of his/her nationality, the flag state of the victim ship, commercial

interests suffering damage, perhaps a coastal state. The perspective of the perpetrator as well is important, as to whether his intention was or was not to achieve a private end. A review of the proceedings and *travaux préparatoires* of the Harvard Research Group of the early 1900s, and the deliberations of the International Law Commission drafting the 1958 Geneva Convention reveal that the "private end" requirement was deliberately inserted by the drafters of the relevant treaty provisions in their attempt to codify the international law of piracy. Apparently it was done to make a conscious distinction between "private ends" and "public" or "political" ends. The object and purpose of the exercise was to exclude from the definition, acts of insurgencies against foreign governments and ships acting under public authority, and thereby also excluding them from the application of universal jurisdiction. Some scholars have thus concluded that the acts committed against the *Achille Lauro* could be assimilated to piracy as defined in UNCLOS [see Samuel P. Menefee, "The Achille Lauro and Similar Incidents as Piracy: Two Arguments", in Eric Ellen (ed.), *Piracy at Sea*, 1989 at p. 179. See also, Malvina Halberstam, "Terrorism on the High Seas: The Achille Lauro, Piracy and the IMO Convention on Maritime Safety", 82 Am. J. Int'l. L. 269, 285 (1998)].

There are those who suggest that the SUA Convention can fill the *lacunae* inherent in UNCLOS Article 101 by subsuming piracy, high seas or otherwise, under it as an "unlawful act" without regard to the place of commission of the piratical act. The point is, of course, that SUA, which, as mentioned earlier, was adopted by IMO as a direct result of the *Achille Lauro* incident, is generally considered to be the convention designed to suppress maritime terrorism. But there is no convention definition of maritime terrorism or terrorism, for that matter; instead there is a list of offences designated as unlawful acts, albeit maritime acts connected to activities involving the sea. The Convention does attempt to overcome some of the hurdles of the Article 101 impediments of UNCLOS. For example, there is no two-ship requirement, no geographical restriction, and no motive specified in the Convention. Nevertheless, SUA is still relatively inadequate because not all criminal offences relating to maritime security are addressed. Theft and armed robbery are two glaring omissions.

Perhaps the most striking and conspicuous anomaly in SUA is that for an act to be "unlawful" under the Convention it must "endanger the safety of maritime navigation." In other words a criminal act that does not jeopardize navigational safety is not an unlawful act under the convention and therefore cannot be prosecuted. This is a major deficiency of the Convention. No reasonable "maritime" person will disagree that unlawful acts against ships regardless of whether or not safety of navigation is at risk should be covered by an international convention regime; not just instances where an attack exposes the ship to a risk of collision, grounding or the like. Furthermore, acts endangering port security should also be articulated as maritime criminal offences although this may just as well be addressed through land-based criminal law.

In the domestic legislation of the United Kingdom and some other British jurisdictions, hijacking is specified as an offence. Incidentally, in the United Kingdom, aviation security and maritime security are addressed together in one

piece of legislation known as the Aviation and Maritime Security Act (AMSA), 1990 which, *inter alia*, gives effect to the SUA Convention.

In the 2005 Protocol of SUA, Article 3 has been expanded to include seven new categories of offences. It is noteworthy that none of these offences are predicated on the unlawful act being a threat to the safety of maritime navigation. The SUA Convention bears the distinction of being the first instance of actually creating offences in the sphere of international maritime conventions. Unfortunately, it stops short of recommending sanctions. From the perspective of uniformity in international maritime law this is a perceived problem as different countries have different kinds of sanctions even though these offences are typically considered to be capital offences. Due cognizance must be taken of the fact that in some jurisdictions these offences could carry the death penalty, while in others, life imprisonment could be the maximum penalty that could be imposed.

As far as the ISPS Code is concerned, there are a number of issues that need further consideration. First, its lack of compatibility with SUA does not seem to have attracted any meaningful discussion. The ISPS Code is procedural and should therefore be related to its substantive counterpart which should be found in the SUA Convention. It is arguable that it is misplaced in SOLAS simply because it relates to security which is quite different from the notion of maritime safety as the latter concept has been envisaged since the inception of the Convention. While it is recognized that preservation of life is the common denominator, traditional maritime safety does not contemplate risk to safety of life at sea emanating from intentional human intervention, whereas maritime security does. That is not to categorically say that the ISPS Code could not belong to the SOLAS regime. In order to effectuate that, however, the object and purpose of the SOLAS would need to be restated and the link with the SUA would have to be established. In other words, the ISPS Code could derive its legitimacy as an international legal instrument from both those conventions.

Last, but not least, once the component elements of the international legal framework are adjusted and put in order, UNCLOS as the constitution of the world's oceans would need to be amended to accommodate it as a fundamental precept, perhaps even as a peremptory norm of international law otherwise referred to as *jus cogens*, the various unlawful acts and their technical and procedural elements.

Conclusion

With rapid changes taking place in the international regime for maritime security including several new initiatives, the legal framework both in terms of public international law as well as regulatory and criminal law warrants careful review and discussion. It is recognized that the international community particularly under the aegis of the IMO, is continuing its deliberations to adequately and effectively address the concerns of maritime security. As well, some initiatives in

non-governmental spheres are unfolding. It is also desirable that at the level of the United Nations, the constitution of the oceans, namely the Law of the Sea Convention, be revisited in order to provide a sound legal umbrella under which the specific regimes, both regulatory and those pertaining to criminal law, can operate in a satisfactory manner, having regard to the position of the seafarer in relation to his work environment on the ship. There is no doubt that maritime security is a crucial element of sound ocean governance and is an issue that is going to dominate the agendas of various maritime fora for some time to come.