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## **New Developments in Maritime Security and Their Impact on International Shipping**

Research dissertation presented for the approval of Senate in fulfilment of part of the requirements for the LL.M in approved courses and a minor dissertation. The other part of the requirement for this qualification was the completion of a programme of courses.

I hereby declare that I have read and understood the regulations governing the submission of LL.M dissertations, including those relating to length and plagiarism, as those contained in the rules of this University, and that this dissertation conforms to those regulations.

Claude Pohlit

**To my Parents**

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## **A. Introduction**

Not a week goes by, it seems, without politicians or security experts raising fears about new threats of terrorism. Security has never been taken more seriously than in the wake of the September 11 disaster. The events have transformed most of the world's society more than anybody could have imagined. At the forefront of this transformation process is the maritime industry, which, perhaps, is experiencing more radical change than any other industry.<sup>1</sup> For good reason: most of the world's cargo is still transported by ship. Consequentially, shipping is a possible target for attacks aimed at the weakening of a functioning economic system. In this connection, the vulnerability of ports is often criticised, especially considering the trend to megaports<sup>2</sup> and megavessels<sup>3</sup>. Therefore, measures already adopted to combat violence and crime at sea needed to be reviewed internationally. On the other hand, not only the law regarding port and ship security had to be rethought, but also regulations addressing cargo security in order to illuminate the whole chain involved in the act of transport. That seems essential in the light of the risk presented by containerised shipping.<sup>4</sup> This paper examines the legal issues surrounding the prevention of maritime terrorism, looks at the new developments in the international legislation, considering especially IMO and American initiatives with their important impacts on international shipping and highlights the influence of these measures on both the relation between shipowners and charterers regarding certain clauses of charterparties, as well as the relation between the carrier and cargo in respect if the carriage of goods by sea and the possibility to limit liability.

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<sup>1</sup> Robert G. Clyne, *Terrorism and Port/Cargo Security: Developments and Implications for Marine Cargo Recoveries*. *Tulane Law Review* Vol.77, p. 1184.

<sup>2</sup> See John G. Fox, *Sea Change in Shipping*. *U.S. Naval Institute Proceedings*, May 2001, 65, defining megaports by their ability to efficiently handle large volumes of containers with minimum quay length of 330 meters, at least 15 meters deep, and special heavy lift cranes.

<sup>3</sup> There are plans for vessels carrying up to 15,000 containers. See Justin S.C. Mellor, *Missing the Boat: The Legal and Practical Problems of the Prevention of Maritime Terrorism*. *American University International Law Review* Vol.18, p. 351.

<sup>4</sup> Approximately two hundred million containers are moved between ports annually. See *ibid* p. 351, 352.

## **B. Security Problems in International Shipping**

Before dealing with the diverse regulations regarding security in shipping, we have to focus on the distinct, yet related, risk factors. These are on one hand the cargo and the vessels themselves, and on the other hand the people and companies associated with shipping.

### **I. Containerization**

Over the last decades, the economic necessity led to a vast improvement in the handling of maritime cargo. In the mid-1950s Malcolm McLean, owner of a North Carolina trucking firm, built up a small shipping line and implemented a system of “containerization”.<sup>5</sup> By moving the entire trailer instead of individual packages, the goods would only have to be handled twice and therefore much more effectively and safer. Using the old break bulk method, it often took days to load and unload ships. This process was simplified tremendously by the utilization of standardised boxes. As a result, port fees were reduced and the ships were able to make faster circuits. Today, most of the world’s non-bulk cargo is transported in marine shipping containers. A fleet of over 2700 modular container vessels are cruising at the world’s oceans. In 2002, the Bureau International of the Container (BIC) estimated that approximately 15.000.000 containers were in circulation – almost evenly shared between the self-owned and leased fleet.<sup>6</sup>

However, it is the efficiency of containerised systems, and the staggering volume of containers, that pose big challenges from a security perspective. A typical journey using a shipping container will involve the interaction of approximately 25 different actors, generate 30-40 different documents, use 2-3 different modes and be handled at as many as 12-15 physical locations.<sup>7</sup> The chain includes the transport by road/train, either directly to the port or to an intermediary’s premises, staging areas in the ports before the containers are moved next to the vessel at the quay, tranship-

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<sup>5</sup> Mark L. Chadwin et Al.: *Ocean Container Transportation*, 1990. p. 1-2. The idea for containers already came up in 1937. However, only in 1956, McLean converted a World War II tanker named *Ideal X* to carry freight by rigging containers on the ship’s deck. The new system proved successful and he subsequently changed the name of the company to Sea-Land Service Inc. The company developed into the world’s largest container shipping lines.

<sup>6</sup> OECD. Directorate for Science, Technology and Industry: *Security in Maritime Transport: Risk Factors and Economic Impact*. July 2003. p. 7.

<sup>7</sup> See *ibid* at p. 24.

ments in another port onto another vessel before arriving at its destination port, temporary storage areas and carriage by road/rail or inland waterway to the final destination. Such a logistic chain is not uniformly secure and the level of protection of the containers and their contents can vary immensely from node to node. However, the risk of security breaches at any of its links compromises the security of the whole chain. There are literally thousands of “entry points” along modern logistic chains that could be exploited by terrorist. Furthermore, perpetrators could take advantage of the anonymity of the whole system. Cargo can rarely be inspected and the only parties that know of the content are the shipper and the recipient. Consequently, there is no knowledge of what a ship brings into a country or what exactly is sitting on quays at major seaports for the purposes of import and export. In a worst case scenario<sup>8</sup>, a terrorist organization could pack a global positioning satellite-enabled weapon of mass destruction within a shipping container, introduce it into the international transport system using legitimate shippers, intermediaries and carriers, and remotely detonate the weapon upon its arrival in the heart of a major population or economic centre. All that would be required is a weapon, a few well-placed agents and a basic understanding of international trading practises.<sup>9</sup> The ease with which the container transport system can be subverted became apparent in the southern Italian port of Gioia Tauro when port authorities discovered a stowaway within a well-appointed shipping container complete with bed, heater toilet facilities, lap-top, satellite phone etc.. It could only be discovered because the stowaway attempted to widen the ventilation holes when port workers were nearby.<sup>10</sup>

Accordingly, the system is porous enough that it can relatively easy be subverted from legitimate commercial purposes. However, the vulnerability in the maritime sector is in many respects a product of the success of free trade and liberalized economic policies. It will be examined later on, if efforts to increase regulatory enforcements at ports and borders may result in a cure that is worse than the disease.<sup>11</sup>

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<sup>8</sup> It is not the aim of that paper to line out hypothetical terrorist scenarios. However, it seems to be indispensable to show at least some possibilities in order to discuss an effective preventive system.

<sup>9</sup> See OECD. Directorate for Science, Technology and Industry: Security in Maritime Transport: Risk Factors and Economic Impact. July 2003. p. 7-8.

<sup>10</sup> See *ibid* at p. 9.

<sup>11</sup> Stephen E. Flynn: Beyond Border Control. Foreign Affairs Nov./Dec. 2000. p. 58.

## **II. Vessels**

The most obvious risk is the lack of security onboard the vessels themselves. There is a potential for an entire vessel to be used as a weapon such as the attack of port facilities or population centres adjacent to the ports, or the blocking of the access to ports by sinking vessels.<sup>12</sup> On the other hand, previous incidents have tended to target the vessels rather than use them. The boarding of the cruise vessel *Achille Lauro*, the suicide attacks against the *U.S.S. Cole*, while docked in the port of Aden, and the oil tanker *Limberg*, and the discovery of an Al'Qaeda linked plot to attack vessels passing through the straits of Gibraltar, all point to the risk of attack faced by vessels.<sup>13</sup>

## **III. Seafarers**

There are approximately 1.227.000 officers and ratings manning the merchant fleet.<sup>14</sup> Not all of them operate on international trading vessels but a significant portion do. Seafarers have traditionally been granted relatively liberal travel rights by governments through non-immigrant crew list visas, or simply upon their presentation of their seafarer identity documents.<sup>15</sup> However, there is very little known about the men who operate the vessels. Any background checks prior to employment on board a ship is the legal responsibility of the flag state.<sup>16</sup> One of the great attractions of "Flags of Convenience" is that they allow vessels owners to crew the ship with foreign nationals as a means to control costs. The employment of a large number of foreign nationals makes the implementation of enhanced reliability checks nearly impossible.<sup>17</sup> This creates gaps that could be utilized by perpetrators in order to obtain em-

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<sup>12</sup> See OECD. Directorate for Science, Technology and Industry: Security in Maritime Transport: Risk Factors and Economic Impact. July 2003. p. 12.

<sup>13</sup> Ibid p. 12.

<sup>14</sup> Total seafarers in 2000 according to the BIMCO/ ISF Manpower Update Report.

<sup>15</sup> See OECD. Directorate for Science, Technology and Industry: Security in Maritime Transport: Risk Factors and Economic Impact. July 2003. p. 14.

<sup>16</sup> Art. 94(1) UNCLOS imposes the obligation that "[e]very State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag." That includes manning requirements and background checks for crew members.

<sup>17</sup> H. Edwin Anderson: The Nationality of Ships and Flags of Convenience: Economics, Politics and Alternatives. 21 Tulane Maritime Law Journal 1996. p. 163.

ployment with an overseas shipping company and thereby support their logistic operations.

#### **IV. Ownership and Control of Ships**

It is beneficial shipowners that decide how their vessel will be used, or at least remain responsible for the use to which their vessels are put. They are the ultimate beneficiaries of the revenue generated by the vessel they own. These ships can, as described above, be used to facilitate, fund or execute acts of terror. Of course, in numerous cases innocent shipowners could be unaware that their vessels could be used for such purposes. However, on many occasions terrorist related activities, especially those that may be complex or logistically difficult, could only be successfully handled with the knowledge and/or agreement of the owners.<sup>18</sup>

To these ends, there are numerous possibilities to cover their identities as beneficial owners for perpetrators that seek to get involved in shipping. Transparency in shipping does hardly exist. In fact, anonymity seems to be the rule rather than the exception. Owners may seek anonymity for a variety of reasons, legal or otherwise, that have nothing to do with security. However, regardless of the reason why the cloak of anonymity is made available, if it is provided it will also be used by those who may wish to remain hidden because they engage in illegal or criminal activities.<sup>19</sup>

It is the ship registration process that causes a lack of transparency. In order to operate internationally a vessel must be registered in a recognized ship register. In effect the state of registration will then become the ship's "flag State". The UN Law of the Sea Convention<sup>20</sup> regulates the flag State's obligations and responsibilities towards the ship carrying its flag in Art. 91-94. However, the Convention is, apart from noting that there "must exist a genuine link between the State and the ship" in Art. 91 UNCLOS, silent on ownership requirements. That concept was also used in the 1986 UN Convention on the Registration of Ships, which has never come into force, because it has failed to achieve the required number of accessions and ratifications.<sup>21</sup> Its objective was to strengthen the link between the nationality of a ship and the state

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<sup>18</sup> OECD. Directorate of Science, Technology and Industry: Ownership and Control of Ships. March 2003. p. 6.

<sup>19</sup> Ibid p. 7.

<sup>20</sup> United Nations Convention on the Law of the Sea (Montego Bay, December 10, 1982). Hereinafter UNCLOS.

<sup>21</sup> John Hare: Shipping Law & Admiralty Jurisdiction in South Africa, 1999. p. 134.

in which it is registered. Nonetheless, the linkage requirement has been widely accepted as being met by nothing more than a commercial, fee-for-service relationship between the owner and the flag State.<sup>22</sup> As a result, this loosened interpretation gave rise to the establishment of so-called “Open Registers”, where the nationality of the owners has no relevance. For example, the Anguillan ship register advertises with the note that two key features of the register are the non disclosure of beneficial owners and the availability of bearer shares, which greatly assist owners to ensure anonymity.<sup>23</sup> Nevertheless, some key information on ownership is required everywhere, of course, when application is made. However, numerous corporate instruments and structures that are freely available in many jurisdictions and accepted by the registers still enable reclusive owner to remain anonymous. The most common and effective mechanisms that can provide anonymity for beneficial owners include the already mentioned bearer shares, nominee shareholders, nominee Directors, the use of Intermediaries to act on owner’s behalf and the failure of jurisdictions to provide for effective reporting requirements.<sup>24</sup> Consequently, the loosened linkage in some Registers and the corporate mechanisms freely available internationally (though intended to facilitate international commerce) create an effective cloak to ensure the anonymity of beneficial owners and have been adopted by owners as a common way of organising shipping enterprises.

### **C. Responsibility to Prevent**

Having identified the security problems and their various origins, the question arises, whether there is a state responsibility for prevention in international law. It is in many respects beyond the capacity and capability of a single state to deal with maritime terrorism effectively. An efficient and provident system requires a comprehensive multilateral approach, bundling the collective efforts of states, international bodies and private sectors.<sup>25</sup> Omissions in this respect could even raise liability questions. The International Law Commission’s Draft Articles on Responsibility for In-

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<sup>22</sup> OECD. Directorate of Science, Technology and Industry: Ownership and Control of Ships. March 2003. p. 7.

<sup>23</sup> Ibid p. 7.

<sup>24</sup> Ibid p. 1, 8.

<sup>25</sup> Stephen E. Flynn: Beyond Border Control. Foreign Affairs Nov./Dec. 2000. p. 58.

ternational Wrongful Acts stipulate that an omission by a State attracts liability under international law by maintaining that “[t]here is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) Is attributable to the State under the international law; and (b) Constitutes a breach of an international obligation of the State.”<sup>26</sup>

Already in 1934, an international legal obligation was recognized by the League of Nations. In response of the assassination of King Alexander of Yugoslavia,<sup>27</sup> a resolution was passed that stated that it was “...the duty of every state neither to encourage nor tolerate on its own territory any terrorist activity...”<sup>28</sup> Furthermore “...every State must do all in its power to prevent and repress acts of this nature and must for this purpose lend its assistance to governments which request it.”<sup>29</sup>

As clearly and more recently, the U.N. General Assembly and the Security Council have consistently emphasized that there is a positive duty to prevent terrorism. For example, in Resolution 1373 affirmed that each state has a duty to “[c]ooperate, particularly through bilateral and multilateral arrangements and agreements, to prevent and suppress terrorist attacks, and take actions against perpetrators of such acts.”<sup>30</sup> General Assembly Resolutions have called on States “...to take appropriate practical measures to ensure that their respective territories are not used for terrorist installations or training camps, or for the preparation or organization of acts intended to be committed against other States or their citizens.”<sup>31</sup>

Furthermore, several cases point to the fact that states owe a duty to ensure the safety of foreign nationals and property. The *Corfu Channel case*<sup>32</sup> deals with a claim by the United Kingdom against Albania for damage done to a British warship by

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<sup>26</sup> See Report of the International Law Commission, U.N. GOAR, 56<sup>th</sup> session, Supp. No 10 at 43, U.N. Doc. A/56/10, 2001.

<sup>27</sup> October 9, 1934. The assassin was a Macedonian revolutionary with links to Croatian terrorists in Hungary. The assassination threatened war between Yugoslavia and Hungary. See John Flournoy Alexander: Hungary – The Unwilling Satellite, 1947.

<sup>28</sup> See 12 League of Nations Official Journal 1759, 1934.

<sup>29</sup> Ibid.

<sup>30</sup> U.N. Security Council Resolution 1373, 4385<sup>th</sup> Session, U.N. Doc. S/Res/1373 (2001).

<sup>31</sup> Measures to Eliminate International Terrorism, General Assembly Resolution 210, U.N. GAOR 51<sup>st</sup> Session, § I(3), U.N. Doc. A/Res/51/210, 1997.

<sup>32</sup> *Corfu Channel Case* (U.K. v. Albania), 1949 International Court of Justice 4.

mines within Albania's territorial sea. The International Court of Justice stated that the obligations to notify and warn approaching ships "...are based on certain general and well recognised principles namely, even more exacting in peace than in war; the principle of freedom of maritime communication; and every State's obligation not to allow its territory to be used for acts contrary to the rights of other states."<sup>33</sup> Taking up this reasoning, it could be suggested that states with major ports have in addition to the obligation to maintain security at the port facilities itself also to take reasonable steps to ensure the security of the contents of containers that are loaded onboard departing vessels.

An older case is the *Alabama Claims* arbitration with another significant ruling.<sup>34</sup> During the U.S. Civil War, British authorities made only perfunctory and ineffective attempts to arrest the *Alabama* and *Florida* (both Confederate ships supporting the southern Confederate movement during the American Civil War) although informed by the United States. The *Alabama* escaped and successfully sunk a significant number of Union ships, causing the United States to seek reparations through arbitration at the wars end.<sup>35</sup> The arbitrators found in favour of the United States and held that British Government had "...failed to use due diligence in the performance of its neutral obligations..." pursuant to international law. The arbitration stands for the proposition that "...once a government has notice, either from its own observations or from the complaints it receives from other states, that its territory is being used for the preparation of hostile acts, perfunctory efforts to stop these activities will not be sufficient to meet its duty under international law."<sup>36</sup>

However, such a duty can naturally only extend as far as a state's mean practically allow. That becomes clear in respect to the seemingly infinite number of containers carried around in international shipping. Furthermore, there cannot be an absolute duty. The *Alabama* case could serve as a starting point for state responsibility. The duty must be defined by the exercise of due diligence.<sup>37</sup> Therefore, limitations may be dictated by things such as the inability to prevent the attack because of an absence of manpower in areas of geographical remoteness or

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<sup>33</sup> Ibid p. 51.

<sup>34</sup> See Eric C. Bruggink, The "Alabama" Claims, 57 *Ala. Law.* 1996, p. 342.

<sup>35</sup> Ibid p. 343.

<sup>36</sup> Richard B. Lillich & John M. Paxman: State Responsibility for Injuries to Aliens Occasioned by Terrorist Activities, 26 *Am. U.L.Rev.* 1977. p. 256-257.

<sup>37</sup> Ibid p. 258.

absence of manpower in areas of geographical remoteness or by a lack of information.<sup>38</sup> Consequently, where inspections are extremely difficult and costly, these limitations on state responsibility seem to create a wide exemption. In this respect, an establishment of uniform international rules for maritime security would be a possible solution. However, attempts on international levels often lead to compromises and scattered provisions.

#### **D. Existing Law**

Over the centuries, many attempts have been made to improve security in shipping. The measures originate in different approaches regarding the ports, the vessels, the seafarers and the cargo. New developments have always required changes in the international regime. However, arriving at practical solutions that do not impede the flow of goods and restrict international economic growth was and still is extremely difficult. In addition to the practical problems, there are legal difficulties resulting from the inadequacy of existing international instruments. Over the years regional and international conventions were enacted that try to suppress or prevent security threats at sea. Nonetheless, these instruments are largely insufficient with respect to prevention of terrorism, because they have either attempted to fit terrorism within the scope of piracy or they have focused on the exertion of jurisdiction once an attack has occurred.

#### **I. 1958 Geneva Convention and UNCLOS**

Maritime terrorism as a newer security threat does not fall comfortably within the legal meaning of piracy in the 1958 Geneva Convention<sup>39</sup> and UNCLOS. Both conventions establish four basic criteria for an act to be considered as piracy. These include an illegal act of violence, detention or depredation committed by the crew or passengers for private ends committed on the High Seas against another vessel.<sup>40</sup>

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<sup>38</sup> See Justin S.C. Mellor, *Missing the Boat: The Legal and Practical Problems of the Prevention of Maritime Terrorism*. *American University International Law Review* Vol.18, p. 374.

<sup>39</sup> Convention on the High Seas (Geneva, April 29, 1958). Hereinafter 1958 Geneva Convention.

<sup>40</sup> See Art. 101 of UNCLOS which states the same as Art. 15 of the 1958 Geneva Convention:

Piracy consists of any of the following acts:

(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,

The requirements that an offence involve two vessels and that an act must be for private ends would exclude a large number of modern terrorist acts.

There is some argument about the “two ship requirement”. Samuel Menefee interprets Art. 101 UNCLOS and Art. 15 1958 Geneva Convention in the way that there is in fact no mention of another ship regarding sections (a)(ii)<sup>41</sup>. In his opinion, the High Seas would unarguably be “outside the jurisdiction of any State” as required in that sections<sup>42</sup>. However, this text was adopted by the definition of piracy from the report of the International Law Commission on the U.N. Assembly.<sup>43</sup> The Commission specifically excluded acts committed on board a vessel by the crew or passengers and directed against the vessel itself, or against persons or property on that vessel.<sup>44</sup> Though Menefee’s argument is based closely to the text we cannot ignore the intention of the legislation. Otherwise we would force the law to fit the changed reality.

The “private ends” issue is also a source of considerable debate. It would exclude acts committed out of some political motivation. Sometimes it seems not clear, whether an act has private ends. An act may also have both private and political ends. Additionally, though a perpetrator may deem an act to be political, it not necessarily is so.<sup>45</sup> Therefore, this requirement appears vague. As a consequence, a Palestinian terrorist seizure of the *Achille Lauro* was characterized as a form of piracy by the United States, although the motivation could easily have categorized as a political

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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;

(c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).

<sup>41</sup> See supra note 9.

<sup>42</sup> Samuel P. Menefee: Anti-Piracy law in the Year of the Ocean. ILSA J. Int'l & Comp. L. 1999, p. 309, 312.

<sup>43</sup> Report of the International Law Commission: Regime of the High Seas and the Territorial Sea. 2 Y.B. International Law Commission 1955, p. 20.

<sup>44</sup> Ibid at p. 65.

<sup>45</sup> Samuel P. Menefee: The New Jamaica Discipline: Problems with Piracy, Maritime Terrorism and the 1982 Convention on the Law of the Sea, 6 CONN. J. Int'l L. 1990, p. 141, 143.

one.<sup>46</sup> However, the International Law Commission once again took a narrow view of the definition of piracy, excluding every political connection.<sup>47</sup>

Finally, there is little in either Convention that would assist in preventing security threats. The 1958 Geneva Convention and UNCLOS state a “right of visit” for a foreign warship which encounter on the high seas a foreign ship, if there is reasonable ground for suspecting that the ship is engaged in piracy.<sup>48</sup> That means that countries are allowed to conduct searches of suspect vessels at sea before they enter the territorial waters. However, the requirement of “reasonable grounds” is not really able to establish a comprehensive maritime security regime and would especially rule out random inspections. Furthermore, Art. 110(3) UNCLOS and Art. 22 (3) 1958 Geneva Convention provide that if the suspicions prove to be unfounded, and provided that the ship boarded has not committed any act justifying them, the owner of the vessel shall be compensated for any loss or damage that may have been sustained. As a result, a wrongful inspection would be a very costly procedure and consequently an inappropriate measure of prevention.

The only reference that could indicate a multilateral approach is given in Art. 100 UNCLOS and Art. 14 1958 Geneva Convention. It obligates States to cooperate to the fullest possible extent in the repression of piracy on the high seas or any other place outside the jurisdiction of any State. However, it seems impossible - against the background of Art. 110 (3) UNCLOS with its compensation system - to facilitate any effective preventive measures. Furthermore, the provision does not account for the fact that an unlawful act may involve multiple perpetrators, both on the high seas and within various national jurisdictions.<sup>49</sup>

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<sup>46</sup> Documents Concerning the *Achille Lauro* Affair and Cooperation in Combating International Terrorism, 24 I.L.M. 1985, p. 1509, 1554. The U.S. Department obtained warrants for the arrest of the *Achille Lauro* terrorists for “piracy on the high seas”.

<sup>47</sup> Stating: “Although States at times have claimed the right to treat as pirates unrecognized insurgents against a foreign government who have pretended to exercise belligerent rights on the sea against neutral commerce, ... and although there is authority for subjecting some case of these types to the common jurisdiction of all States, it seems best, to confine the common jurisdiction to offenders acting for private ends only.” See Summary Records of the 290<sup>th</sup> Meeting. 1 Y.B. International Law Commission 1955, p. 37, 41.

<sup>48</sup> See Art. 110(1) UNCLOS and Art. 22(1) 1958 Geneva Convention.

<sup>49</sup> Justin S.C. Mellor, Missing the Boat: The Legal and Practical Problems of the Prevention of Maritime Terrorism. *American University International Law Review* Vol.18, p. 381.

Both the 1958 Geneva Convention and the UNCLOS are not able to deal with a modern definition of security in shipping. They approach the topic in a manner that evokes historical conception of piracy. This serves merely to obfuscate the present threat<sup>50</sup>, but cannot contribute to a comprehensive security system.

## **II. SUA Convention**

In response to the hijacking of the *Achille Lauro*<sup>51</sup> cruise ship and the lack of the existing international law in several key aspects, the governments of Egypt, Austria and Italy proposed the creation of a new convention on the subject of unlawful acts against safety of maritime navigation in November 1986.<sup>52</sup> As a result, in March 1988, a conference in Rome adopted the SUA Convention.<sup>53</sup> This new Convention represented an improvement over the existing rules in the sense that it moved away from the aforementioned problems associated with piracy, such as “private ends” and “two ship requirement”. The main purpose of the SUA Convention is to ensure that appropriate action is taken against persons committing unlawful acts against ships, which include the seizure of ships by force, acts of violence against persons on board ships, and the placing of devices on board a ship which are likely to destroy or damage it (Art. 3(1) SUA). Furthermore, the treaties oblige Contracting Governments either to extradite or prosecute alleged offenders (Art. 10 SUA). The Convention constituted a response to the shrinking universal jurisdiction brought about by UNCLOS.

However, its outcome is more reactive than preventive, in nature. There are only a few provisions aimed at prevention. Art. 13 SUA establishes a general duty of

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<sup>50</sup> Samuel P. Menefee: Anti-Piracy law in the Year of the Ocean. ILSA J. Int'l & Comp. L. 1999, p. 309, 315.

<sup>51</sup> On October 7, 1985, a group of Palestinians seized the *Achille Lauro*, an Italian registered cruise ship, in Egypt's territorial waters, and asked for the release of Palestinian prisoners from Israeli jails. In response to Israel's refusal, the terrorists murdered an elderly Jewish U.S. citizen. Egypt negotiated the release of the hostages and took the terrorists into custody, but did not actually arrest them. Subsequently, the hijackers boarded an Egypt flight to Tunisia. Under U.S. pressure, Tunisia did not allow the aircraft to land. The aircraft was forced down at a NATO airfield in Italy where a standoff occurred between U.S. and Italian authorities over which government had jurisdiction. The Italian Government denied the U.S. request for extradition and tried the hijackers in Italy.

<sup>52</sup> IMO: Enhancing maritime security, p. 2. See at [http://www.imo.org/Newsroom/mainframe.asp?topic\\_id=582](http://www.imo.org/Newsroom/mainframe.asp?topic_id=582).

<sup>53</sup> IMO Convention on the Suppression of Unlawful Acts against Safety of Maritime Navigation, 1988. (SUA)

states to prevent the use of their territories as bases for possible attacks and requires states to exchange information. Art. 14 SUA defines the information requirements and pose several problems. First, it restricts the flow of information to only those states that may exert jurisdiction in accordance with the SUA, although any act involving maritime shipping would likely have implications for a multitude of third party states. Furthermore, the passing of information must follow the national law of the state possessing the information. Most states have some form of official secret acts, criminalizing the passing of information to a foreign power, except where it is explicitly approved.<sup>54</sup> That would lead to impediments and information would not always be timely and forthcoming. Finally, a state is only required to transmit when it has “reason to believe that an offence set force in Art. 3 will be committed”.<sup>55</sup> Consequently, the transmission is not aimed at a regular course.

The Convention largely relegates the prevention issue to the preamble. It calls the IMO to develop measures “to prevent unlawful acts which threaten the safety of ships” and it affirms “the desirability of monitoring rules and standards relating to the prevention and control of unlawful acts against ships and persons on board ships, with the view to updating them as necessary.”<sup>56</sup> However, in the years after the enactment of that convention, the IMO did not take significant action relating to ship security, but focused more on its traditional role of preventing maritime pollution and promoting safety at sea.

Accordingly, there remain many gaps in an effective prevention mechanism. Though the Convention represents a commitment to the prevention of unlawful acts, it is ultimately up to the signatory states themselves to make the treaty work.<sup>57</sup> Since the Convention was concluded by the parties, states have accomplished very little in this area. However, they have suggested the need for a multilateral mechanism aimed squarely at prevention.<sup>58</sup>

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<sup>54</sup> Justin S.C. Mellor, *Missing the Boat: The Legal and Practical Problems of the Prevention of Maritime Terrorism*. *American University International Law Review* Vol.18, p. 386.

<sup>55</sup> Art. 14 SUA.

<sup>56</sup> Preamble SUA.

<sup>57</sup> Phillip E. Fried: *International Agreements – Convention and Protocol from the International Conference on the Suppression of Unlawful Acts against the Safety of Maritime Navigation*. *30 Harvard International Law Journal* 1989. p. 226, 227.

<sup>58</sup> Justin S.C. Mellor, *Missing the Boat: The Legal and Practical Problems of the Prevention of Maritime Terrorism*. *American University International Law Review* Vol.18, p. 386.

### **III. Conventions on Seafarers**

Another area that requires collective effort and close cooperation is the security documentation and verification of seafarers. For as long as mariners have gone to sea on merchant vessels, the shore leave has been a cherished right. The International Maritime Organization's Convention on Facilitation of International Maritime Traffic<sup>59</sup> contains a codification of that right.<sup>60</sup> For that reason, the International Labour Organisation (ILO) further specified in its Seafarers' Identity Documents Convention<sup>61</sup> that the only documentation that a seafarer needs is a valid seafarers' identity document<sup>62</sup>, which is to be issued by the states to their nationals or permanently resident seafarers. However, forms of background checks prior to being permitted to work internationally with such a certificate are barely carried out. As a consequence, United States is the only maritime nation that requires foreign merchant vessel crews to have a visa in order to apply for shore leave<sup>63</sup>, and they thus curtail a long existing customary right in maritime law. In that connection, it has to be considered that visas are difficult to arrange, if ships change destination. On the other hand, in a study carried out by the Seafarers International Research Centre covering 97 maritime administrations in 2001, a total of over 12.000 cases of fraudulent certificates of competency were detected.<sup>64</sup> This statistic serves to illustrate the unreliable state of the art for the present identification system.

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<sup>59</sup> Convention on Facilitation of International Maritime Traffic, April 9, 1965.

<sup>60</sup> Ibid § 3.19.1: "Foreign crew members shall be allowed ashore by the public authorities while the ship...is in the port, provided that the formalities on arrival of the ship have been fulfilled and the public authorities have no reason to refuse permission to come ashore for reasons of public health, public safety, or public order."

<sup>61</sup> Seafarers' Identity Documents Convention, 1958, (No 108).

<sup>62</sup> Ibid Art. 6.1.

<sup>63</sup> Douglas B. Stevenson: The Burden that 9/11 Imposed on Seafarers, 77 Tulane Law Review 2003, p. 1408.

<sup>64</sup> Arne Sagen: Practical Issues raised by the ISPS Code. Lloyd's List International. August, 2003.  
<http://www.lexis-nexis.com/professional/>.

#### **IV. ISM Code**

The ISM Code<sup>65</sup> aims to ensure safety at sea, prevention of human injury or loss of life and avoidance of damage to the environment in promoting new standards. Consequently, security issues are not directly dealt with. However, the ISM Code appears to be interesting in one aspect: It requires the operators to designate a person or persons ashore having direct access to the highest levels of management of the shipowning company. This provision addresses the responsibilities of the people who manage and operate the ships, and tries to achieve identifiability and accountability of the shipowner in lifting the veil of ship operating companies. That could prevent the possibility of beneficial shipowners to cover their identity. Certainly, the requirement of a designated person with access to the highest levels of management will make it more difficult for a perpetrator to hide behind the veil of anonymity. However, the *Prestige* accident<sup>66</sup> has shown that the chain of responsibility is not yet transparent enough. Month after the disaster the identity of the beneficial owner or operator, and consequently the party ultimately responsible for the ship, was still unclear. That could lead some to follow the "...convoluted chain of ownership and responsibility...what has been described as a 'morass of liability'."<sup>67</sup> Similarly, it could lead others to take advantage for criminal purposes. Consequently, the ISM Code apparently still reveals too many gaps for both safety and security issues.

#### **E. New Measures**

Not surprisingly, after the September 11<sup>th</sup> attacks in New York, several measures were discussed on both a national and an international basis to reduce inadequacies and to upgrade the security of shipping in existing international law. As it has become clear, the problem is complex and involves a wide range of parties such as

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<sup>65</sup> The International Safety Management Code for the Safe Operation of Ships and for Pollution Prevention. Adopted by the IMO by incorporation into Chapter IX of the SOLAS Convention. Assembly Resolution A.742(18).

<sup>66</sup> On Wednesday 13 November 2002, the *Prestige*, a Bahamas-registered, 26-year-old single-hull tanker owned by a Liberian company and carrying 77 000 tonnes of heavy fuel oil, sprang a leak off the coast of Galicia. It eventually broke apart on 19 November and sank 270 km off the Spanish coast.

<sup>67</sup> Jaworski: Development in Vessel-Based Pollution. *Prestige* oil catastrophe threatens West European Coastline. *CJIEL&P* 2002, 101.

port, flag, and coastal state along with shippers and manufacturers. The complexity of the problem dictates that any new approach would require international cooperation. However, there is a good chance that the attempt to develop a comprehensive system will finally lead to diverse regional and international approaches and regulations. Naturally, if various international, national, regional and local agencies are working on solutions, a myriad of initiatives will be enacted. These are based on different criteria and standards. That makes it even more difficult to establish a unified system.

The most important new approaches will be analysed in the following.

### **I. Port and Ship Security**

An international security regime pertaining to ports and vessels entered into force in July 2004. It was adopted by the International Maritime Organization (IMO) in December 2002. Historically, the IMO has principally focused on maritime safety and the prevention of maritime pollution by ships<sup>68</sup>, as opposed to security matters. In this respect, the IMO was alleged not to deal with the matter comprehensively. A new security regime may involve not just existing national maritime authorities, but also security and custom organizations. In this sense, a new regime would extend beyond simply focusing on the maritime aspects.<sup>69</sup> However, in the wake of the attacks on September 11, 2001, the IMO Assembly "...agreed to hold a Conference on Maritime Security...to adopt new regulations to enhance ship and port security and thus reduce the possibility of shipping becoming a target of international terrorism."<sup>70</sup> The Conference was attended by 108 Contracting Governments to the 1974 SOLAS<sup>71</sup> Convention.<sup>72</sup> It was stated during the opening:

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<sup>68</sup> See Art. 1(a) of the IMO Convention. International Maritime Organization: Introduction to IMO. See at [http://www.imo.org/About/mainframe.asp?topic\\_id=3](http://www.imo.org/About/mainframe.asp?topic_id=3).

<sup>69</sup> Justin S.C. Mellor, Missing the Boat: The Legal and Practical Problems of the Prevention of Maritime Terrorism. American University International Law Review Vol.18, p. 391.

<sup>70</sup> International Maritime Organization: IMO adopts comprehensive maritime security measures. Press Release, Dec 2002. [http://www.imo.org/Newsroom/mainframe.asp?topic\\_id=583&doc\\_id=2689](http://www.imo.org/Newsroom/mainframe.asp?topic_id=583&doc_id=2689).

<sup>71</sup> International Convention for the Safety of Life at Sea. 1914 with subsequent versions in 1929, 1948, 1960 and 1974. SOLAS has been accepted by 146 Parties representing 98.6% of world tonnage.

<sup>72</sup> International Maritime Organization: IMO adopts comprehensive maritime security measures. Press Release, Dec 2002. [http://www.imo.org/Newsroom/mainframe.asp?topic\\_id=583&doc\\_id=2689](http://www.imo.org/Newsroom/mainframe.asp?topic_id=583&doc_id=2689).

“The presence here today of so many distinguished Government representatives and international organization observers from all over the world demonstrates the crucial significance and importance of the Conference not only to the international maritime community but to the world community as a whole given the pivotal role shipping plays in the conduct of world trade.”<sup>73</sup>

The Conference adopted a number of amendments to the 1974 SOLAS Convention that present a new, comprehensive security regime for international shipping. The centrepiece and most far-reaching of which enshrines the ISPS Code.<sup>74</sup>

## **1. ISPS Code**

In essence, the ISPS Code takes the approach that ensuring the security of ships and port facilities is basically a risk management activity and that to determine what security measures are appropriate, an assessment of the risks must be made in each particular case. It is to provide a standardized, consistent framework for evaluating risk, enabling governments to offset changes in threat with changes in vulnerability for ships and port facilities.<sup>75</sup> The Code contains detailed security-related requirements for governments, port authorities and shipping companies in Part A, which is mandatory, in addition to a series of guidelines about how to meet these requirements in Part B, which is non-mandatory.<sup>76</sup>

### **a) Application**

The provisions of the Code apply to ships engaged on international voyages and consequently to port facilities serving such ships.<sup>77</sup> It does not, however, apply to the whole port area, but only serves the ship/port interface. Measures for the remaining area were left to a joint work between the IMO and the ILO. The Code applies to passenger ships, cargo ships of 500 gross tonnage and upwards and mobile offshore

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<sup>73</sup> International Maritime Organization: Historic Maritime Security Conference to Adopt Comprehensive New Security Measures for International Shipping. Press Release Dec 2002, see at [http://www.imo.org/Newsroom/mainframe.asp?topic\\_id=583&doc\\_id=2684](http://www.imo.org/Newsroom/mainframe.asp?topic_id=583&doc_id=2684).

<sup>74</sup> International Ship and Port Facility Security Code (ISPS), Chapter XI-2 of SOLAS.

<sup>75</sup> International Maritime Organization: Enhancing Maritime Security. Press Release. [http://www.imo.org/Newsroom/mainframe.asp?topic\\_id=582](http://www.imo.org/Newsroom/mainframe.asp?topic_id=582).

<sup>76</sup> Ibid.

<sup>77</sup> Sec 3.1.1/ 3.1.2 ISPS Code.

drillings.<sup>78</sup> The Governments can, however, decide the extent of application to such ports which are used primarily for national trade and only occasionally are involved in international shipping.<sup>79</sup> That gives on one hand a certain scope to states in order to maintain an undisturbed, seamless flow of goods within the country (noting that port regulation and security traditionally have been matters for state and local authorities), and on the other hand serves the international aim of these provisions. However, it could be used as a gap in the system if a state considers a port as not enough “international”. Other ports would in that case have to categorize ships arriving from such ports into higher risk levels.

#### b) Responsibility of Contracting Governments

To begin the whole security process, each contracting government will conduct port facility assessments. For such security assessments different factors have to be considered:

- the degree that the threat information is credible;
- the degree the information is corroborated;
- the degree that the threat information is specific or imminent; and
- the potential consequences of such a security incident.<sup>80</sup>

They must therefore identify and evaluate important assets and infrastructures that are critical to the port facility as well as those areas or structures that if damaged, could cause significant loss of life or damage to the port facility’s economy or environment. Furthermore, the actual threats must be identified in order to prioritise security measures. Finally, the assessment must address vulnerability of the port facility by identifying its weakness in physical security, structural integrity, protection systems, procedural policies, communication systems, transportation infrastructure, utilities, and other areas within a port that may be a likely target.<sup>81</sup> Once these assessments have been completed, contracting governments can accurately evaluate risk.

The next step is to set an appropriate security level in order to communicate the threat at a port facility or for a ship. Security levels 1, 2, and 3 correspond to nor-

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<sup>78</sup> Ibid.

<sup>79</sup> Sec 3.2 ISPS Code.

<sup>80</sup> Sec 4.1.1-4 ISPS Code.

<sup>81</sup> International Maritime Organization: IMO adopts comprehensive maritime security measures. Press Release, Dec 2002. [http://www.imo.org/Newsroom/mainframe.asp?topic\\_id=583&doc\\_id=2689](http://www.imo.org/Newsroom/mainframe.asp?topic_id=583&doc_id=2689).

mal, medium and high threat situation, respectively.<sup>82</sup> The security level creates the link between the ship and the port facility, since it triggers the implementation of appropriate security measures for both.

Moreover, the governments have various responsibilities according to the Code, including the approval to the Ship Security Plans<sup>83</sup> and relevant amendments to a previously approved plan, verification of the compliance of ships with the provisions of SOLAS chapter XI-2 and part A of the ISPS Code (sec 19.1.2 ISPS Code), issuing the International Ship Security Certificate (sec 19.2.2 ISPS Code), ensuring the completion and approval of the Port Facility Plans<sup>84</sup> and any subsequent amendments (sec 16.2 ISPS Code), and exercising control and compliance measures. They are also responsible for communicating information to the International Maritime Organization and to the shipping and port industries.<sup>85</sup> For all these purposes, governments can designate, or establish, Designated Authorities to undertake their security duties and allow Recognized Security Organizations to carry out certain work with respect to port facilities. That bears the risk of getting too much distance to official governmental work. However, the final decision on the acceptance and approval of this work should still be given by the government or authority.<sup>86</sup>

### c) Ship Security

Shipping companies will be required to designate a Company Security Officer for the company (sec 11.1 ISPS Code) and a Ship Security Officer for each of its ships (sec 12.1 ISPS Code). The Company Security Officer's<sup>87</sup> duties and responsibilities include that a special Ship Security Assessment is properly carried out, that subsequently appropriate Ship Security Plans are prepared and submitted for ap-

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<sup>82</sup> See definitions in sec 2.1.9-11 ISPS Code.

<sup>83</sup> See in E.I.1.c).

<sup>84</sup> See in E.I.1.d).

<sup>85</sup> See sec 9 of the Preamble ISPS Code.

<sup>86</sup> International Maritime Organization: IMO adopts comprehensive maritime security measures. Press Release, Dec 2002. [http://www.imo.org/Newsroom/mainframe.asp?topic\\_id=583&doc\\_id=2689](http://www.imo.org/Newsroom/mainframe.asp?topic_id=583&doc_id=2689).

<sup>87</sup> The Company Security Officer is roughly analogous to the 'designated' person under the abovementioned ISM Code, and many companies are combining these shore-based functions. See International Chamber of Shipping ICF: Delivering Maritime Security, Key Issues 2004. <http://www.marisec.org/ics-isfkeyissues2004/maritimesecuritytext.htm>.

proval by (or on behalf of) the administration, that security awareness and vigilance are enhanced, and that the personnel is adequately trained.<sup>88</sup>

The abovementioned assessment resembles the assessment for the port facilities. The diverse weak links concerning the ship's security including human factors have to be considered. It is the foundation of the following Ship Security Plan that indicates the operational and physical security measures the ship itself should take to ensure it always operates at security level 1. That means under the terms of the Code that access to the ship is controlled, deck areas and areas around the ship are monitored, the handling of cargo and ship's stores is supervised, and the communication is readily available.<sup>89</sup> Furthermore, the Plan should also show the additional, intensified security measures the ship itself can take to move to and operate at security level 2 and 3 when instructed to do so.

The Ship Security Officer is responsible for inspecting, maintaining, supervising and coordinating all security related aspects on board the ship.<sup>90</sup> The Code could be interpreted as if the master of the ship is prevented from being the designated Ship Security Officer defining his special responsibilities, training etc. next to the master.<sup>91</sup> However, that interpretation was not aimed<sup>92</sup> and cannot be in the sense of an effective system. It has to be viewed in conjunction with chapter XI-2/8 SOLAS on "Master's discretion for ship safety and security", which makes it clear that the master has ultimate responsibility for safety and security, and could naturally also perform his duty as a Ship Security Officer. It is, however, for the national administration to decide if they wish to impose particular restrictions on who may serve as that special person on ships flying their flag.

The ships will have to carry an International Ship Security Certificate indicating that they comply with the security requirements. It will be issued by the flag state and lasts for five years. It can, however, cease to be valid, if a company assumes the re-

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<sup>88</sup> Sec 11.2 ISPS Code.

<sup>89</sup> Sec 7.2 and sec 9.4 ISPS Code.

<sup>90</sup> Sec 12.2 ISPS Code.

<sup>91</sup> See especially sec 2.1.6 ISPS Code that defines him as "...the person on board the ship, accountable to the master..." or the enumeration in sec 6.2 ISPS Code "...the master and the ship security officer..."

<sup>92</sup> See International Maritime Organization: ISPS Code and Maritime Security.

[http://www.imo.org/Newsroom/mainframe.asp?topic\\_id=897](http://www.imo.org/Newsroom/mainframe.asp?topic_id=897).

sponsibility for the operation of a ship not previously operated by that company, and upon transfer of the ship to a flag of another state.<sup>93</sup>

When a ship is in a port or is proceeding to a port, the port's contracting government has the right, under the provisions of chapter XI-2/9 SOLAS to exercise various control and compliance measures with respect to that ship. Therefore, the ship can be subject to port State control inspections. However, such inspections will normally not extend to examination of the Ship Security Plan itself except in specific circumstances.<sup>94</sup> The ship may, also, be subject to additional control measures if a contracting government exercising the control and compliance measures has reason to believe that the security of the ship has, or the port facilities it has served have, been compromised.<sup>95</sup>

#### d) Port Facility

As it was explained, each contracting government has to ensure completion of a Port Facility Security Assessment for each port facility within its territory that serves ships engaged on international voyages pursuant to sec 15.2 ISPS Code. This assessment is fundamentally a risk analysis following the criteria of sec 15.5 ISPS Code of all aspects of a port facility operation in order to determine which parts of it are more susceptible, or more likely, to be the subject of an attack. The security risk is evaluated in respect of a mutual connection of the threats coupled with the vulnerability of the target and the consequences of an attack. On completion of the analysis, it will be possible to produce an overall assessment of the level of the risk. It will help to determine which port facilities are required to appoint a Port Facility Security Officer (sec 17.1 ISPS Code). Furthermore, the Port Facility Security Plan can be prepared out of this analysis. The plan should indicate – like a security plan on a ship – the measures the port facility should take to ensure that it always operates in the appropriate security levels. However, the Code was not intended to impede the international trade. Therefore sec 14.1 ISPS Code clearly emphasises that security measures and procedures shall be applied at the port facilities in such a manner as

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<sup>93</sup> Richards Butler: International Code for the Security of Ships and of Port Facilities – The ISPS Code, January 2004. See at [http://www.richardsbutler.com/pdf/the\\_isps\\_code.pdf](http://www.richardsbutler.com/pdf/the_isps_code.pdf).

<sup>94</sup> International Maritime Organization: IMO adopts comprehensive maritime security measures. Press Release, Dec 2002. [http://www.imo.org/Newsroom/mainframe.asp?topic\\_id=583&doc\\_id=2689](http://www.imo.org/Newsroom/mainframe.asp?topic_id=583&doc_id=2689).

<sup>95</sup> Ibid.

to cause minimum of interference with, or delay to, passengers, ships, ship's personnel and visitors, goods and services.

#### e) Enforcement

The system of the ISPS Code only works, if both ports and ships comply with the security procedures in order to adjust their security levels. If a ship does not comply with those requirements, it should not be issued with the International Ship Security Certificate. As a consequence, contracting governments should direct those ships flying their flag to immediately discontinue operations until they have been issued with the required certificate.<sup>96</sup> The ISPS Code does not provide a law enforcement provision for states. That will be left to domestic law. However, port state control will also drive compliance. Ships are subject to controls when in a port of other contracting governments. If a vessel does not have a valid certificate, that ship may be detained in port until it gets a certificate. Of course, the port State has various other options available at its disposal, if there is no certificate. Regulation 9 of the new SOLAS Chapter XI-2 (Chapter XI-2/9) provides port states with the power to impose a range of control measures on foreign ships should they fail to prove their compliance with the maritime security regime or choose not to provide information that may be requested. The authorities may curtail the operations of the ship, they may expel the ship from the port or they may refuse entry of the ship. Accordingly, the measures which are in place have been designed in such a way to ensure that those ships which do not have certificates find themselves out of the market in the shortest possible time. In addition, ships which call at port facilities that have failed to comply with the ISPS Code, although they may hold a valid Ship Security Certificate, may be faced with additional security requirements at subsequent ports of call, leading to delays and possible denial of port entry.<sup>97</sup> That could lead owners and charterers to the decision to instruct their ships not to proceed to port facilities which have not complied with the requirements of the ISPS Code, primarily, because of the problems such ships may encounter at subsequent ports of call.

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<sup>96</sup> See International Maritime Organization: ISPS Code and Maritime Security.  
[http://www.imo.org/Newsroom/mainframe.asp?topic\\_id=897](http://www.imo.org/Newsroom/mainframe.asp?topic_id=897).

<sup>97</sup> Richards Butler: International Code for the Security of Ships and of Port Facilities – The ISPS Code, January 2004. See at [http://www.richardsbutler.com/pdf/the\\_isps\\_code.pdf](http://www.richardsbutler.com/pdf/the_isps_code.pdf).

### f) Opposing International Law?

The described new security regime has to be reviewed under existing international law. The provided measures that include blacklists and bans of ships could raise important issues concerning flag discrimination and the legal right of states to close their ports to foreign vessels. There could be a right of entry into foreign ports in respect of international law.

The Convention on the International Regime of Maritime Ports of 1923<sup>98</sup> (and the Statute<sup>99</sup> annexed to it) stated a reciprocal freedom of access and equality of treatment of ships in the ports of the states' parties. However, as it is said in the preamble, the Convention intended to secure "...freedom of communications...by guaranteeing in the maritime ports under [the] sovereignty or authority [of the Parties] and the purposes of international trade equality of treatment between the ships of all the Contracting States, their cargo and passengers." The Convention accordingly did not regulate the *right* of entry, but rather its conditions. Furthermore, the convention has only received limited ratification.<sup>100</sup> Thus, it could not codify an existing right of entry or generate a right which later passed into customary law.

The *Aramco* arbitration of 1958<sup>101</sup>, in particular, presents an interesting view on this subject. It was herein stated that "[a]ccording to a great principle of public international law, the ports of every State must be open to foreign merchant vessels and can only be closed when the vital interests of a State so require."<sup>102</sup> However, in respect to the arbitration, it can certainly be argued that the "vital interests" of a State" would comprise the need to keep its territory free of the threat of terrorist attack.

The right to close one's ports to foreign vessels is a naturally corollary to the principle of state sovereignty. As one commentator has observed, "...limitations to sovereignty cannot be presumed and there is no evidence of any limitations in state practise in relation to sovereignty over ports."<sup>103</sup> The judgement of the International

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<sup>98</sup> Convention on the International Regime of Maritime Ports, Geneva, December 9, 1923.

<sup>99</sup> Statute on the International Regime of Maritime Ports, Geneva, December 9, 1923.

<sup>100</sup> A.V.Lowe: The Right of Entry into Maritime Ports in International Law. 14 San Diego Law Review 1977, p.602.

<sup>101</sup> *Saudi Arabia v Arabian American Oil Co.*, 27 International Law Report 117.

<sup>102</sup> Ibid at p.212.

<sup>103</sup> L. de La Fayette: Access to Ports in International Law. The International Journal of Marine and Coastal Law, 1996. p.1.

Court of Justice in 1986 in the *Nicaragua* case<sup>104</sup> confirms conclusion. “The basic legal concept of state sovereignty in customary international law...extends to the territorial waters and territorial sea of every state...It is also by virtue of its sovereignty that the coastal state may regulate access to its ports.”<sup>105</sup> Consequently, there is no right of free access for foreign ships in international (customary) law that the new security regime could contravene.

However, a significant impediment to the new security regime may appear in the General Agreement on Tariffs and Trade (GATT).<sup>106</sup> Article 5(2) provides for “Freedom of Transit” and states:

“There shall be freedom of transit through the territory of each contracting party, via the routes most convenient for international transit, for traffic in transit to or from the territory of other contracting parties. No distinction shall be made which is based on the flag of the vessel, the place of origin, departure, entry, exit or destination, or on any circumstances relating to the ownership of goods, of vessels or of other means of transport.”

There are security exceptions in GATT, but these appear somehow limited. Article 21 (c) allows any party to take action that violates the agreement if it is “...in pursuance of its obligation under the United Nation Charter for the maintenance of international peace and security.” This provision suggests that security concerns may in some cases be permitted to override other sections of the agreement. Nonetheless, a new security regime targeting certain vessels and cargo as a regular matter might constitute a violation of the agreement. If such regime has its foundation in other international agreements (like SOLAS), it could arguably be seen as an overriding amendment and concordant limitation of GATT. If, however, a state decides on its own to generally make ships carrying containers from suspicious countries subject to special scrutiny by government authorities, then this would result in some form of trade discrimination.

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<sup>104</sup> 1986 International Court of Justice Report 14, p.111. *Nicaragua v United States*.

<sup>105</sup> *Ibid*.

<sup>106</sup> General Agreement on Tariffs and Trade, October 30, 1947. GATT 1994 annexes article 5 provisions and the rest of the original 1947 GATT agreement.

### g) Implementation

Since the ISPS Code is a part of the 1974 SOLAS Convention, it has to be implemented by all 146 contracting governments into national law. The Code came into effect on July 1, 2004. However, even if a contracting government does not adopt the rules into its own national legislation, the IMO would not be allowed to impose penalties. Nevertheless it is to be anticipated that the market forces and economic factors will drive compliance.<sup>107</sup> In simple terms, if a state does not comply, ship operators will avoid its ports in order not to get refused or not to suffer from delays in destination ports because of security reservations. The other way around, shippers will avoid ships without a valid certification of its flag state for the same reasons.

That led to a significant number of implementations. According to the latest figures available to the IMO Secretariat from reports received by Governments, 89.5 percent of over 9000 declared port facilities now have their Port Facility Security Plans approved, a figure which shows considerable improvement from the 69 percent reported on the 1 July 2004 entry-into-force date of the new regulatory regime.<sup>108</sup> Equally, the information available from industry sources on International Ship Security Certificates issued for ships which have to comply with the new regulatory regime, indicates that the compliance rate is now well beyond the 90 percent mark, which compares favourably with the 86 percent of approved ship security plans reported on 1 July 2004.<sup>109</sup> Despite the overall optimism over implementation, progress has not been as rapid as might be hoped in all regions. The statistics suggest Africa is falling behind other continents in complying with the new regulations, with just over half of the 30 countries in Africa to which the Code applies reporting approved port security measures. Countries in the former Soviet Union and Eastern Europe have also been slow to implement the measures.<sup>110</sup>

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<sup>107</sup> International Maritime Organization IMO: ISPS Code and Maritime Security.

[http://www.imo.org/Newsroom/mainframe.asp?topic\\_id=897](http://www.imo.org/Newsroom/mainframe.asp?topic_id=897).

<sup>108</sup> International Maritime Organization IMO: Security compliance shows continued improvement. Latest Press Briefing on August 6, 2004. (last visited September 7, 2004)

[http://www.imo.org/Newsroom/mainframe.asp?topic\\_id=892&doc\\_id=3760](http://www.imo.org/Newsroom/mainframe.asp?topic_id=892&doc_id=3760).

<sup>109</sup> Ibid.

<sup>110</sup> Ibid.

South Africa, however, has already implemented the maritime security requirements through the Merchant Shipping (Maritime Security) Regulations, 2004.<sup>111</sup> They apply to South Africa's seven major ports, namely Saldanha Bay, Cape Town, Mossel Bay, Port Elizabeth, East London, Durban and Richards Bay. The South African Maritime Safety Authority (SAMSA) is responsible for approving ship security plans for South African ships, for verifying compliance with plans, and for issuing the International Ship Security Certificate.<sup>112</sup>

The European Parliament and the Council of the European Union adopted the obligating Regulation on Enhancing Ship and Port Facility Security<sup>113</sup> in order to ensure a harmonised implementation and equal conditions throughout the European Union. It goes beyond the mandatory provisions of the ISPS Code in making mandatory certain provisions of Part B. The regulation extends all of the provisions to include passenger ships engaged on certain domestic voyages, and the provisions regarding security assessments, security plans, company and ship security officers to include on other ships engaged in domestic travel. It details and strengthens the provisions for ports only occasionally serving international traffic and establishes the system of checks prior to the entry of ships of whatever origin into a Community port, as well as in the port. Finally it calls for a single national authority responsible for the security of ships and port facilities.<sup>114</sup> A survey made among ESPO members during the last week of June shows that all main European port facilities met the 1 July deadline set by the ISPS Code and the EU Regulation on Ship and Port Facility Security.<sup>115</sup>

In the United States the ISPS Code requirements and a whole set of other measures were adopted by the Maritime Transportation Security Act (MTSA).<sup>116</sup> The rules also apply to domestic traffic and make mandatory most of Part B of the Code. To ensure compliance with the ISPS Code, the Coast Guard is empowered, under its

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<sup>111</sup> Merchant Shipping (Maritime Security) Regulations, 2004. GNR 142 GG 25997 9/2/04.

<sup>112</sup> See in general Intertanko: Maritime Security. At <http://www.intertanko.com/isps/SouthAfrica.asp>.

<sup>113</sup> Regulation (EC) No 725/2004 of the European Parliament and of the Council of 31 March 2004 on Enhancing Ship and Port Facility Security.

<sup>114</sup> See for details Commission of the European Communities: Proposal for a Regulation of the European Parliament and of the Council on enhancing ship and port facility security. CELEX Database: Preparatory Acts. <http://www.lexis-nexis.com/professional/>.

<sup>115</sup> See European Sea Ports Organisation (ESPO): European Ports Meet ISPS Deadline. <http://www.espo.be/news/2004/PRESS%20RELEASE%20-%201%20JULY%202004%20.pdf>.

<sup>116</sup> Maritime Transportation Security Act of 2002.

port/state control authority, to board every foreign-flag vessel intending to enter a U.S. port in order to check its compliance.<sup>117</sup>

## **2. Other SOLAS Amendments**

The ISPS Code is only one of a series of amendments to the 1974 SOLAS Convention to further enhance maritime security.

The Conference renumbered existing SOLAS chapter XI, special measures to enhance maritime safety that have, however, also an impact on security. Regulation XI-1/3 states that ships require identification numbers to be permanently marked in a visible place either on the ship's hull or superstructure. Regulation XI-1/5 requires that ships be issued with a Continuous Synopsis Record, which is intended as an on-board record of the ship's history, including information such as the name of the ship and the State whose flag it is entitled to fly, the date when it was registered, the identification number, the port where the ship is registered, and the name of each registered owner and his or her registered address.

Other amendments in chapter XI-2 concern specifically maritime security. Regulation XI-2/3 requires administrations to set security levels for their ships. Prior to entering a port, or whilst within a port of a contracting government, a ship shall comply with the requirements for the security level set by the contracting government, if that level is higher than the one set by the administration for that ship. Regulation XI-2/5 requires ships to be provided with a ship security alert system, with most vessels being fitted by 2004 and the remainder by 2006. When activated the system shall initiate and transmit a ship-to-shore security alert to a competent authority, identifying the ship, its location and indicating that the security of the ship is under threat or it has been compromised. It recognizes the need of a different response than to distress or emergency situations on board.

## **3. Effects of the SOLAS Amendments**

The SOLAS Amendments and especially the ISPS Code have substantial implications in many respects. It affects commercial operations, long-term fixtures, insurance and relations with cargo. Therefore the different types of charterparties have to be adapted.

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<sup>117</sup> Constantine G. Papavizas and Lawrence I. Kiern: 2001-2002 U.S. Maritime Legislative Developments. 34 *Journal of Maritime Law and Commerce* 2003, p. 457.

Delays, costs and expenses may well be incurred in connection with security measures taken according to the ISPS Code. That could include extra security measures on board and ashore, extended loading and discharge, delays in getting contractors, surveyors and supercargo on board or additional port and flag state inspections and drills. Some of these costs are foreseeable, but many are not, like for example additional costs of moving from one security level into another. The burden must be borne by the owners or the charterers or shared between them. Therefore, the liability between the owners and the charterers for these delays, costs and expenses must be allocated. When fixing ships on charters the allocation of these costs should be provided for. There are discussed several ways this might be done:

- by allocating to owners those expenses which are directly related to the ship and to charterers those expenses which relate to the port and the cargo
- by providing the vessel on the basis of ISPS Security Level 1 with charterers responsible for the costs of higher security levels
- by 'regulation change clauses' to provide a mechanism for allocating any expense caused by changes of laws and regulations coming into effect after the fixture.<sup>118</sup>

#### a) Shipowner and Demise Charterer

However the relation will be arranged between the owners and the charterers, it is to the shipowners to provide a ship that is compliant to the ISPS Code and other laws and regulations relating to security. That would include that the owners shall procure that both the vessel and the company (as defined by the ISPS Code) shall comply with the requirements of the ISPS Code relating to the vessel and the company. Upon request the owners shall provide a copy of the relevant International Ship Security Certificate to the Charterers. The same obligation meets the demise charterer towards his sub-charterers, since he is in many respects deemed to be the owner, whereby possession and control of the ship are completely passed from the shipowner to the demise charterer.<sup>119</sup> This kind of compliance is the basis for the risks to be allocated in the charterparties.

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<sup>118</sup> See Eamon Moloney: Security - ISPS Code will put a break on Shipping. Lloyd's List March 2003. <http://www.lexis-nexis.com/professional/>.

<sup>119</sup> John Hare: Shipping Law & Admiralty Jurisdiction in South Africa, 1999, p. 583.

## b) Time Charterparties

In a time charterparty the charterer contracts with the owner - or the demise charterer as 'disponent owner' - for the exclusive use of the cargo carrying spaces on board a ship for a fixed period of time.<sup>120</sup> Thus a timecharterer does not hire the whole vessel itself. Nevertheless, the new security provisions pose some obligations to him, as well.

Under the ISPS Code, every ship must maintain a 'Continuous Synopsis Record' of the vessel's ownership and employment.<sup>121</sup> The required information regarding the charterers details is naturally not available to owners, and a lack would lead to non-compliance with the Code and possibly to delays. The charterers should therefore ensure that owners are aware of their full style contact details, and also of any sub-charterers, and they should further ensure, that any sub-charterparty includes terms to the same effect.<sup>122</sup>

Once these prerequisites are given and the vessel operates in compliance with the Code, the question arises how expenses and costs will be allocated. The BIMCO Clause<sup>123</sup> suggests that, firstly, all delays, costs or expenses arising out of security measures taken by the port facilities or other relevant authority in accordance with the ISPS Code will be for the charterers' account. This requirement is irrespective of the security level imposed in the particular port or area. Secondly, the Clause addresses the owners' liabilities and makes it clear that the owners are accountable for all measures taken to comply with the Ship Security Plan. For example, where the owners are required under their Ship Security Plan to place two guards at the gangway, even though the port security regulations require only one guard, such costs will be borne by the owners. The costs of preparing and implementing a Ship Security Plan for Levels 1, 2 and 3 are for the owners' account.<sup>124</sup> That provides a fair allocation of the responsibility of each party. After all, it is not the shipowner that decides in which waters and ports the vessel operates.

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<sup>120</sup> Ibid p. 588.

<sup>121</sup> See E.IV.

<sup>122</sup> See also Baltic and International Maritime Council (BIMCO) ISPS Clause for Time Charter Parties. <http://www.bimco.dk/Corporate%20Area/Documents/Clauses/ISPS%20Clause%20for%20Time%20Charter%20Parties.aspx>.

<sup>123</sup> Ibid.

<sup>124</sup> Baltic and International Maritime Council (BIMCO): BIMCO ISPS Clause. <http://www.bimco.dk>.

Another problem arises, where a ship is ordered by the charterers to a non-compliant port or port facility. One could argue that this constitutes a breach of the safe berth/safe port clause of the charter party, putting the liability on the charterer. Furthermore, the owner could claim damages; a charterer might incur liability under an implied indemnity in respect of employment between such ports. Also, where ship and port operate at different security levels, owners will have to consider whether they can refuse to comply with charterers' order, if they are ordered to a port with a higher security level than that operating on board the ship. A port will not be safe unless in the relevant period of time the particular ship can reach it, use it and return from it without, in the absence of some normal occurrence, being exposed to danger which cannot be avoided by good navigation and seamanship.<sup>125</sup> Certainly, a port is not principally exposed to danger only because it is in compliance with the ISPS Code. It should rather be determined on a case by case basis, whether it still would be reasonable to send a vessel to the particular port or not. For compliant ports, however, the ISPS Code defines in sec 2.1.11 security level 3 as a level where "...a security incident is probable or imminent..." Under such circumstances a port would indeed be exposed to danger and consequently unsafe. Even under security level 2 that requires at least a "...heightened risk of a security incident..."<sup>126</sup> it is arguable that a port is also deemed to be unsafe.<sup>127</sup> On the other hand, the Code and the different levels were introduced in order to face these exposed dangers and countervail them. That would lead to the conclusion that the danger should be somehow equalized by the measures following a higher security level, and thus the port cannot be considered as unsafe implicitly, but rather determined on a case by case basis, as well. However, it will be to the parties themselves to negotiate appropriate clauses that modify these problems and what the parties' obligations are in the different situations, for example the requirement to nominate an alternative port etc.<sup>128</sup>

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<sup>125</sup> John Hare: Shipping Law & Admiralty Jurisdiction in South Africa, 1999, p. 601.

<sup>126</sup> Sec 2.1.10 ISPS Code.

<sup>127</sup> See Eamon Moloney: Security - ISPS Code will put a break on Shipping. Lloyd's List March 2003.  
<http://www.lexis-nexis.com/professional/>.

<sup>128</sup> See for an example of an additional clause concerning safe ports  
[http://www.jseinc.org/tomac/bimco/isps\\_code.htm](http://www.jseinc.org/tomac/bimco/isps_code.htm).

### c) Voyage charterparties

The voyage charter is a contract of affreightment for the carriage of goods requiring space for one voyage or consecutive voyages. Voyage charterers are also involved in the implications of the new security regime. The abovementioned requirement that a vessel is only to be ordered to a safe port falls under the employment and indemnity clause of most voyage charterparties, as well.<sup>129</sup> The problem with ISPS compliant ports and security levels are corresponding. Additionally, there are various other concerns.

Voyage charters depend very much on scheduled ship movements. These properly elaborated plans could be disturbed by security measures in ports, making movements harder and slower or increasing the time required entering the port. Since owners or demise charterers do not have direct control of the loading and the discharging of the cargo, the charterparties provide a time frame (laytime) to be put on the charterer's operations. If this time frame is exceeded, the owner is entitled to claim demurrage as liquidated damages.<sup>130</sup> It is questionable, however, how the security regime fits into this system of laytime and demurrage. What effect can security operation causing delays have on charterers? The concept of laytime is based on the 'arrived ship'. A ship is arrived, if it is ready to load and if a valid notice of readiness (NOR) is given.<sup>131</sup> Both is possible under an often used WIBPON clause (whether in berth/port or not), as soon as the vessel is arrived at a customary waiting place, not necessarily within the harbour. If a port closes its waiting anchorage or in the event of access being denied to a contractual port there will be arguments as to if the ship is arrived. It is arguable, that these cases should be treated like the ones concerning congested ports. Ships with a WIBPON clause are considered to be arrived, although they are actually not able to discharge. On the other hand, that situation could reasonably be attributed to 'force majeure' or 'restraint of princes', in which case the loss, and thus the laytime, would lie where it falls<sup>132</sup>, consequently upon the shipowner, causing that the ship would not be considered to be arrived.

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<sup>129</sup> John Hare: Shipping Law & Admiralty Jurisdiction in South Africa, 1999, p. 600.

<sup>130</sup> Ibid p. 609.

<sup>131</sup> Ibid p. 610.

<sup>132</sup> Eamon Moloney: Security - ISPS Code will put a break on Shipping. Lloyd's List March 2003.

<http://www.lexis-nexis.com/professional/>.

Therefore, voyage charterparties need to be reconsidered in order to supplement them with various security clauses. The BIMCO ISPS clause for voyage charterparties<sup>133</sup> provide that the owner shall be entitled to tender Notice of Readiness even if not cleared due to applicable security regulations or measures imposed by a port facility or any relevant authority under the ISPS Code. Furthermore, any delay resulting from measures imposed by a port facility or by any relevant authority under the ISPS Code shall count as laytime or time on demurrage if the Vessel is on laytime or demurrage. If the delay occurs before laytime has started or after laytime or time on demurrage has ceased to count, it shall be compensated by the charterers at the demurrage rate. These clauses incorporate the possible effects of the new security measures into the existing system of laytime that tries to balance owners and charterers interests.

#### d) Insurance

It is highly likely that the ISPS Code will be a requirement for valid insurance. As the ISM Code falls under the warranty that the assured shall at all times comply with statutory requirements relating to the safe operation of the ship<sup>134</sup>, the ISPS Code could match the same condition. Since the security measures adopted by IMO are part of SOLAS, a shipowner who is in breach of these measures is not compliant with SOLAS. However, compliance with SOLAS is mostly a requirement of insurance and has an impact on seaworthiness.

But even if a ship is compliant this does not imply a full coverage of security risks. The insurance industry still tends to regard the risks associated with terrorist acts as coming under the heading of risks of war or armed conflict, where shipping is concerned. In fact, the terrorist risk would seem to be an every day risk and cannot be confined to specific geographical areas or to governmental action or military force, as may be possible in the case of war risk.<sup>135</sup> Consequently, the insurance industry should, analysing the risks covered, separate the different types of risks.

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<sup>133</sup> <http://www.bimco.dk/Corporate%20Area/Documents/Clauses/ISPS%20Clause%20for%20Voyage%20Charter%20Parties.aspx>.

<sup>134</sup> See John Hare: Shipping Law & Admiralty Jurisdiction in South Africa, 1999, p. 234.

<sup>135</sup> Graydon S. Staring: Insurance and Reinsurance in the New Age of Terrorism, 77 Tulane Law Review 2003, p. 1385.

## **II. Container Security**

While the described measures in the 1974 SOLAS Convention focus on port and vessel security primarily, a subject of at least equal concern is cargo and container security in particular. Therefore, while adopting the amendments to SOLAS, the Conference, being aware of the competencies of the World Customs Organization (WCO) since it is the only intergovernmental organization that has competence in customs matters, also adopted a resolution that invites the WCO to consider urgently measures to enhance security throughout international closed cargo transport units (CTUs) and request the Secretary-General of IMO to contribute expertise relating to maritime traffic to the discussions at the WCO. In this respect, the USA introduced unilateral protection measures, often anticipating the implementation of provisions being negotiated in international bodies like WCO and IMO. For this reason and in the background of the immense international trade to and from the U.S., the recent initiatives should be introduced.

### **1. The C-TPAT**

The Customs-Trade Partnership Against Terrorism (C-TPAT)<sup>136</sup> is a voluntary program or “partnership” between the trade industry and U.S. Customs to foster cooperative relationships that strengthen security by controlling and protecting the international supply chain of goods. This is one of several initiatives in an overall effort to “push back the borders” by encouraging those engaged in the carriage of goods to share information about the supply chain and to become involved in the effort to assess the security risks posed.<sup>137</sup> C-TPAT participation is open to brokers, manufacturers, warehouses, air carriers, sea carriers, land carriers, air freight consolidators, ocean transportation intermediaries, and non-vessel operating common carriers (NVOCCs),<sup>138</sup> and it accordingly tries to cover the whole supply chain. Participants agree to conduct a comprehensive self-assessment of supply chain security using the C-TPAT security guidelines jointly developed by Customs and the trade community, to ensure the integrity of their security practices and communicate their security

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<sup>136</sup> U.S. Customs, Customs-Trade Partnership Against Terrorism. See at [http://www.customs.gov/xp/cgov/import/commercial\\_enforcement/ctpat](http://www.customs.gov/xp/cgov/import/commercial_enforcement/ctpat).

<sup>137</sup> U.S. Customs, C-TPAT Fact Sheet and Frequently Asked Questions, see at [http://www.customs.gov/xp/cgov/import/commercial\\_enforcement/ctpat/fact\\_sheet.xml](http://www.customs.gov/xp/cgov/import/commercial_enforcement/ctpat/fact_sheet.xml).

<sup>138</sup> Ibid.

guidelines to their business partners within the chain. The emphasis is on prevention rather than detection as the best means of maintaining security. While it is a voluntary system and there is no monetary penalty for non-enrollment, various benefits of enrollment in the initiative include reduced exams, the assigning of an account manager, and expedited processing.<sup>139</sup> This in turn, should lead to fewer inspections, an attendant decrease in expense and delay in the C-TPAT member's commercial undertakings.

## **2. CSI and the "24 hour rule"**

The Container Security Initiative (CSI) is related with C-TPAT – though it is a separate program – and also involves the customs. Under the CSI, the United States forms partnership with foreign governments to place U.S. Customs in foreign sea-ports. Its main objective is to perform targeting and pre-screening operations at larger container ports in order to facilitate detection of security threats at the earliest possible moment and thus to push back the "zone of security" in the importation process.<sup>140</sup> This only is possible by means of a cooperative effort between the countries in whose jurisdiction the container ports are located. In general, the CSI program contains four core elements:

- establishing security criteria to identify high-risk containers
- pre-screening those containers identified as high-risk before they arrive in U.S. ports
- using technology to quickly pre-screen those containers
- developing and using smart and secure tamper-proof containers<sup>141</sup>

The system of container security is still a work in progress and is wholly dependent upon the cooperation of foreign states and, of course, their local port and terminal officials. U.S. Customs has, however, realized much progress in obtaining the participation of foreign container ports in the CSI program.<sup>142</sup> It also moved for-

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<sup>139</sup> Thomas J. Schoenbaum/ Jessica C. Langston: An All Hands Evolution: Port Security in the Wake of September 11<sup>th</sup>. 77 Tulane Law Review 2003, p. 1347.

<sup>140</sup> U.S. Customs, Container Security Initiative: Questions and Answers, see at [http://www.customs.ustreas.gov/xp/cgov/import/cargo\\_control/csi/q\\_and\\_a.xml](http://www.customs.ustreas.gov/xp/cgov/import/cargo_control/csi/q_and_a.xml).

<sup>141</sup> Ibid.

<sup>142</sup> Robert G. Clyne, Terrorism and Port/Cargo Security: Developments and Implications for Marine Cargo Recoveries. Tulane Law Review Vol.77, p. 1200.

ward efforts towards developing an international approach. However, there were and still are serious misgivings about some attendant issues.

Some of the EU member states with important sea ports were invited by the United States to join CSI. That included ports regarding certain criteria for trade volume and security level.<sup>143</sup> However, the EU pushed to amend the existing U.S. – EU customs cooperation clarifying that arrangements between the U.S. and individual EU countries be made on a community wide level instead. In this respect, in 2002 the European Commission initiated infringement proceedings against the EU member states which have agreed to participate in the program.<sup>144</sup> The EC argued that European ports that were not invited by the United States to join CSI, or did not meet criteria for trade volume and security levels, could suffer if cargo from those ports is subjected to more time consuming inspections or even denied entry to shipments because they did not come from a trusted CSI port. Thus, cargo in containers subject to a CSI port is not treated in the same way as cargo from other ports. That places some ports at a potential competitive disadvantage if shippers diverted cargo to ports that could guarantee clearance.<sup>145</sup> This would contravene the free movements of goods and the general principle of non-discrimination pursuant to Art. 7 of the Treaty Establishing the European Community.

However, the European Union and the United States signed an agreement (April 22, 2004) that paves the way for rapidly expanding to more European ports. Any country that meets the joint EU-US eligibility requirements is eligible to volunteer for CSI. Having regained central control of security policy vis-à-vis the United States, the EC has dropped legal proceedings against member states that had refused to renounce their CSI deals.<sup>146</sup>

CSI has been complemented by the so called “24 hour rule” issued by U.S. Customs which, amongst other things, requires cargo details of goods being trans-

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<sup>143</sup> Ports in Belgium, Britain, France, Germany, the Netherlands, Italy, Spain and Sweden have joined the program. See at European Commission, Taxation and Customs Union: Container Security. [http://europa.eu.int/comm/taxation\\_customs/customs/information\\_notes/containers\\_en.htm](http://europa.eu.int/comm/taxation_customs/customs/information_notes/containers_en.htm).

<sup>144</sup> Robert G. Clyne, *Terrorism and Port/Cargo Security: Developments and Implications for Marine Cargo Recoveries*. Tulane Law Review Vol.77, p. 1207.

<sup>145</sup> A&A Contract Customs Brokers: U.S.-EU Container Security Agreement. 2004. <http://www.aacb.com/news/article.asp?ArticleID=1108>.

<sup>146</sup> Ibid.

ported to the United States to be transmitted by the sea carriers to customs 24 hours before loading. Furthermore, a separate list of all foreign cargo that is not destined for the United States that will remain on the vessel has to be issued. Thereby, in a very short space of time, major changes to long standing cargo acceptance procedures were introduced. Generally, cargo manifests were required to be submitted no later than 48 hours prior to the vessel's arrival.<sup>147</sup> It could be prepared en route based on the cargo actually loaded aboard the vessel. Now, in accordance to the "24 hour rule", the shippers have to submit documentation several days prior to loading in order to facilitate the issuance of bills of lading and timely preparation of the manifest. That, in turn, necessitates earlier delivery, requires more storage capacity and costs, and inevitably increases the risk of loss or damage. Thus, the possibility of "onboard" bills of lading will be curtailed and the ability of an ocean carrier to accept last minute or just in time cargo could be severely limited. Furthermore, customs could require inspection or issue a hold about cargo already loaded aboard the vessel and after the bill of lading has been issued. These uncertainties could cause disruptions in documentation procedures, loading and stowage operations, and potentially have an impact on letter-of-credit financing.<sup>148</sup> Beside these reservations, the new requirements might create a logistical nightmare for both, carriers and regulators. As an example, four different manifest filings would be required for vessels loading at four different ports prior to commencement of a voyage to the United States, even for cargo remaining on board. Thus it is not surprising that a number of shipping interests are concerned that customs may not have sufficient resources to adequately assess and pre-screen the manifests in a timely fashion.<sup>149</sup> As a result, the rule might embody a costly procedure and enormous bureaucracy to provide information that cannot be evaluated. Moreover, there remains the question, whether the ship operators are the right person which this information should be obtained from, or if not the role of exporters and importers should be emphasized that are often in a better position to supply cargo information. On the other hand, since the full enforcement in February

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<sup>147</sup> International Chamber of Shipping ICF: Delivering Maritime Security, Key Issues 2004.

<http://www.marisec.org/ics-isfkeyissues2004/maritimeseuritytext.htm>.

<sup>148</sup> Thomas J. Schoenbaum/ Jessica C. Langston: An All Hands Evolution: Port Security in the Wake of September 11<sup>th</sup>. 77 Tulane Law Review 2003, p. 1349.

<sup>149</sup> World Shipping Council, Comments of the World of Shipping Council before the United States Customs Service in the Matter of Advanced Cargo Manifest Proposed Rulemaking. See at [http://www.worldshipping.org/customs\\_manifest\\_comments.pdf](http://www.worldshipping.org/customs_manifest_comments.pdf).

2003, the new procedures seem to have bedded in fairly well. Although there are problems in obtaining the data from the shippers in a timely manner, many container lines report benefits, the legal certainty provided by the rule reducing the scope for shippers to insist on placing last minute cargo and helping to eliminate inaccuracies in cargo documentation in this respect.<sup>150</sup> Furthermore, the industry has accepted that it is better to have a suspicious box identified before the ship is at sea than to have the entire ship and cargo denied port entry.<sup>151</sup>

### **3. International Measures**

As it was mentioned before, the initiatives in the United States were anticipating international procedures in respect of container security. The World Customs Organisation (WCO) adopted in response to the invitation of the IMO to the security process a resolution on Security and Facilitation of the International Trade Supply Chain. The resolution addresses a series of steps to protect the international trade supply chain from acts of terrorism and against being used for the illegal transport of goods for terrorist purposes.<sup>152</sup> It takes account of the fact that customs administration are the ideal authorities to deal with the problem, because they are already key-players in the supply chain, have the necessary risk management techniques to target high-risk consignments and the necessary equipment for control. The packages of measures include:

- guidelines for Advanced Cargo Information to enable the pre-arrival electronic transmission of customs data<sup>153</sup>;
- guidelines for cooperative arrangements between members and private industry to increase supply chain security and facilitate the flow of the international trade<sup>154</sup>;

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<sup>150</sup> International Chamber of Shipping ICS: Delivering Maritime Security, Key Issues 2004.

<http://www.marisec.org/jcs-isfkeyissues2004/maritimesecuritytext.htm>.

<sup>151</sup> Ibid.

<sup>152</sup> International Maritime Organization IMO: ISPS Code and Maritime Security.

[http://www.imo.org/Newsroom/mainframe.asp?topic\\_id=897](http://www.imo.org/Newsroom/mainframe.asp?topic_id=897).

<sup>153</sup> The counterpart to the U.S. "24 hour rule". However, the EU proposes that cargo information need to be received until 24 hours to arrival and not loading.

<sup>154</sup> The counterpart to C-TPAT.

- a new International Convention on Mutual Administrative Assistance in Custom Matters to assist members in developing a legal basis to enable the advanced electronic transmission of customs data
- an amendment of the WCO data model to include the main elements necessary to detect high risk consignments.<sup>155</sup>

WCO is currently working on further developments of supplementary instruments for the implementation of the abovementioned major instruments, with a view of finalizing them by the end of 2004. The measures aim to include all parties in the supply chain in order to create a comprehensive system.

#### **4. Effects of the Initiatives**

Effects from the security initiatives concerning containers are of the same problematic nature as the difficulties with the SOLAS amendments. Their implementation can affect the relation between the owner and the charterer in respect of delays and expenses. The following example reveals several problems: An ISPS compliant vessel loads containers at a compliant facility in a country which has signed the US CSI. All containers bound for ports in the US have been either inspected or otherwise cleared to the satisfaction of US Customs at the load port. On arrival in the US, the vessel is denied entry or delayed because a tip off has been received regarding a container bound for the vessel's next non-US port, which may not have been inspected by US Customs personnel at the load port. Assuming neither the owner nor the charterer has been culpable in this scenario, who, then, will bear the costs of such delay?<sup>156</sup> That would very much depend on the charterparty.

In time charterparties the employment of the vessel is solely the charterers' prerogative. Therefore, all costs and expenses arising out of security regulations or measures in connection with the cargo will be for the charterers' account. Consequently, there would also be no possibility for a charterer to put a vessel off hire in respect of such measures.

In voyage charterparties it is usually for the owners to comply with and pay for port related requirements and costs. However, the abovementioned security measures are cargo related and ought to be for the charterers' account. That would

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<sup>155</sup> World Customs Organisation. <http://www.wcoomd.org/ie/En/en.html>.

<sup>156</sup> See Vernon C. Miller: Maritime Security – Who is responsible for what?  
[http://www.maritimeadvocate.com/i26\\_mari.php](http://www.maritimeadvocate.com/i26_mari.php).

include time lost in obtaining entry and exit clearances, which is not attributable to the vessel, counting as laytime or time on demurrage and any expenses or additional fees relating to the cargo, even if levied against the vessel, being for the charterers' account. Charterers might take recourse against any other party or the authorities for wrongfully detaining the vessel in the first place. It is questionable, however, if such a claim would prevail against the government's sovereign immunity defence, particularly when concern about national security precipitated the action. Furthermore, there could come up argument about a valid notice of readiness if a vessel is refused entry into port. The scenario equals the situation where port entry is refused because of ISPS related measures.<sup>157</sup> To avoid confusion, a BIMCO clause proposes that notice of readiness may be tendered even when the vessel has not been cleared for entry by the authorities. This provision is designed to attempt to protect the owners against any arguments that the vessel is not legally ready although she is ready for all other purposes.<sup>158</sup>

Another problem occurs where a charterer has signed the C-TPAT Agreement, but the owner has not. Charterers would need the owners' information in order to comply with their obligation and not to get in breach of it. However, an owner is not legally bound to provide the required details. Therefore, charterparties should consider these obligations.

Finally, the effect of the '24 hour rule' has to be looked at. Failure to provide the required information within 24 hours prior to loading may result in the delay of a permit being issued to discharge the cargo in the U.S. and/or even the assessment of penalties or claims for liquidated damages levied on the carrier by the U.S. Customs.<sup>159</sup> However, the charterers are usually in a better position than the owners to obtain and assess the correctness of the information provided for the cargo. Nevertheless, there is no legal obligation for the charterers to present the information not later than 24 hours before lading. Thus, in order to protect carriers against the con-

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<sup>157</sup> See E.1.3.c).

<sup>158</sup> <http://www.bimco.dk/Corporate%20Area/Press%20releases/Documentary%20-%20US%20Security%20Clauses.aspx>.

<sup>159</sup> Summary of the United States Customs Service Requirement to Provide Manifest Data 24 Hours before Cargo is Laden aboard Vessel at Foreign Port for Transport to the USA.  
<http://www.medey.com/pdf/Advance%20manifest%20data%20requirement.pdf>.

sequences of these new security measures, special clauses have to be incorporated into voyage and time charter parties, respectively.

### **III. Security regarding Seafarers and Port Workers**

The IMO also adopted a resolution that invites the International Labour Organisation (ILO) to improve measures on a seafarers' identity document and on comprehensive port security requirements beyond the port/ship interface of the ISPS Code.<sup>160</sup> As a result, the ILO has approved the very rapid development of a new regulatory instrument which modifies the requirements of the existing ILO Seafarers' Identity Documents Convention.<sup>161</sup> The objective of the Convention is to ensure that a seafarer's identity can be verified positively and minimize Seafarer hardship as a result through enhanced security combined with the necessary freedom of movement in the normal conduct of their profession.<sup>162</sup> The formats of identity documents were to be more standardised, and the issuing procedures were to be tightened.<sup>163</sup> In March 2004, the ILO Governing Body decided on the biometric standard that will be incorporated in ILO Convention. That standard is given by a finger minutiae-based biometric profile for the document.<sup>164</sup> This program will be the first implementation of biometric technology (the ID card contains several physical data of the relevant person, such as photograph, fingerprints, and other personal information for a database verification of authenticity) on a global scale that will address biometric template interoperability. It is, however, still tested and not yet realised. Crucially, however, the Convention maintained the principle that port states must afford special treatment to seafarers for the purpose of facilitating shore leave or crew transits, and that seafarers holding the new document should not normally be required to apply for a visa. A

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<sup>160</sup> Resolution 8 of the Conference of Contracting Governments to the 1974 SOLAS Convention, 9-13 December 2002.

<sup>161</sup> See footnote 63, now ILO Convention No. 185.

<sup>162</sup> International Labour Organization ILO: Seafarers' Identification Documents, 2004. <http://www.ilo.org/public/english/dialogue/sector/papers/maritime/sid-test-ann.pdf>.

<sup>163</sup> The former identification system has not been accepted by the United States, which has led to the problem of frequent denial of shore leave. Some companies have also been required to pay for armed guards to prevent foreign crew members from absconding. See International Chamber of Shipping ICS: Delivering Maritime Security, Key Issues 2004. <http://www.marisec.org/ics-isfkeyissues2004/maritimesecuritytext.htm>.

<sup>164</sup> International Labour Organization ILO: Seafarers' Identification Documents, 2004. <http://www.ilo.org/public/english/dialogue/sector/papers/maritime/sid-test-ann.pdf>.

system of identification, based upon a “smart identity card”, is already working well for the airline staff within the aviation industry. Immigration authorities respect and trust the air crew, while there remains a contrasting situation for ship crews.<sup>165</sup> Hopefully that will change with the new regulations.

Furthermore, joint work between the International Labour Organization and the International Maritime Organization (IMO) led to an overall security code for the whole port area. The objective of this Code of Practice on security in ports<sup>166</sup> is to enable governments, employers, workers and other stakeholders to reduce the risk to ports from the threat posed by unlawful acts. The code provides a guidance framework to develop and implement a port security strategy appropriate to identified threats to security like the ISPS Code. However, it is not intended to replace the ISPS Code. It extends the consideration of port security beyond the area of the ship/port facility into the whole port. This code of practice is not a legally binding instrument and is not intended to replace national laws and regulations. It just functions as a guideline in order to harmonise the whole security system.

#### **IV. Ownership**

Another issue that had to be taken into account by a comprehensive security regime is the identification of ship operators with regard to the lack of transparency in shipping so far. In this respect the SOLAS provides some requirements that are aimed to lift the veil behind the control and management of vessels. SOLAS XI-1 Regulation 5 states that every ship must maintain a ‘Continuous Synopsis Record’ of the vessel’s history, ownership and employment. It requires the master to have continuous access to the following information:

- Who appoints the crew?
- Who are the parties to any charterparty?
- Who decides the employment of the ship?

There should be no difficulties to identify the person or the manning company who decides which seamen are signed on and off. However, practical problems arise for ferries, cruiseships and other vessels with a large ‘hotel’ function. Nevertheless,

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<sup>165</sup> Arne Sagen: Practical Issues raised by the ISPS Code. Lloyd’s List International. August, 2003.

<http://www.lexis-nexis.com/professional/>.

<sup>166</sup> Code of practice on security in ports. IMO, ILO 2003.

this should remain an administrative problem and shall not hinder from the aim of the regulation.

Equally, it will not be too difficult to identify the parties to any charterparty. It is, however, quite usual to provide the charterer with the liberty to sub-charter the vessel. In order to be able to comply with the SOLAS requirements the owner must ensure there is a sub-charter requirement in their charterparties for immediate notification of all sub-charterers.

The third requirement seems to be a bigger problem. The code is looking for a person who decides the employment of a ship. For a voyage charter this will probably be the charterer. However, problems arise, where a vessel is used by a time charterer, or as a tramping ship, or for cargo that is traded during a voyage. That makes an identification of employment much more difficult. Similarly, the required identification for an oil tanker fixed to carry one or more parcels which are traded during a voyage could change more than once. The range of this provision is not conclusively clear. However, charterparties will have to be amended to provide for this information to be available and updated throughout the fixture and should contain an indemnity for non-compliance.<sup>167</sup>

It has to be seen, how effective these provisions will work. If such a continuous record can be properly enforced, it would certainly not only benefit to security in shipping. It will also complement the ISM Code and thus contribute to the safety at sea by unravelling employment and ownership and consequently responsibilities in shipping. Furthermore, the disclosure of beneficial ownership would impede potential money laundering regimes in the world of shipping.

## **F. Cargo Loss or Damage in the Light of the New Security Regime**

Having outlined the major developments to date concerning maritime security and their direct impact on shipowners and charterers, the consequences for the carriage of goods by sea in respect of cargo loss and damage should be considered.

One of the primary duties of an ocean carrier including his agents and servants is to protect the vessel and the cargo. Yet security as a means to protect both is not an unfamiliar concept. Piracy, for example, has always been a threat to com-

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<sup>167</sup> **Butler, Richards:** International Code for the Security of Ships and of Port Facilities – The ISPS Code, January 2004. See at [http://www.richardsbutler.com/pdf/the\\_isps\\_code.pdf](http://www.richardsbutler.com/pdf/the_isps_code.pdf).

mercial shipping. Liability for failure to provide adequate security measures has been interposed in the contexts of theft, stowaways and unexplained loss. Accordingly, in a case where valuables were to be carried on board the ship, it was held that they should have been stowed in a manner 'reasonably fit to keep out a thief'.<sup>168</sup> That imposes a heightened standard of care to ocean carriers for foreseeable and preventable situations. The new security regime dictated by national and international initiatives might lead to the conclusion that it no longer may be assumed that acts imperilling the security of ship and cargo are unforeseeable or unpreventable by the carrier. Furthermore, the documentary procedures and activities on the part of the shipowners and charterers in the form of detailed vulnerability assessments and security plans, increased surveillance and monitoring, crew identity cards will be an increase in relevant information for discovery purposes.<sup>169</sup>

### **I. Principles of the Hague-Visby Rules**

The Hague-Visby Rules<sup>170</sup> (HVR) remain the dominant carriage regime<sup>171</sup> and they are components of many carriage contracts as well as of carriage regimes in domestic legislation<sup>172</sup>. Therefore, the impact of the security measures on these rules shall be analysed in the following.

Under the Hague-Visby Rules, an owner of cargo can establish a prima facie case of the carrier's liability regarding loss or damage by establishing that the cargo was delivered to the carrier in good order and condition and turned out damaged or short. Evidence can be provided by an appropriate bill of lading according to Art. III (4) HVR. Once shown, the carrier is held liable, unless he is able to prove that the cause of the loss was not caused by his negligence. In this respect, the rules provide two main obligations to the carrier.

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<sup>168</sup> Queensland National Bank v. P&O Steam Navigation Co (1898) 1 QB 567.

<sup>169</sup> However, it is questionable whether security related information will be subject to disclosure in civil litigation in respect of sensitive information.

<sup>170</sup> Hague Rules as amended by the Brussels Protocol 1968.

<sup>171</sup> Although the Hamburg Rules (UN Convention on the Carriage of Goods by Sea) came into effect on 1 November 1992, they have not a wide-spread ratification. They have been drawn mainly from the developing world. See John Hare: Shipping Law & Admiralty Jurisdiction in South Africa, 1999, p. 490.

<sup>172</sup> See for example the English Carriage of Goods by Sea Act, 1971; the American Carriage of Goods by Sea Act (46 USC § 1303) and the South African Carriage of Goods by Sea Act, 1986.

Under Art. III (1) HVR the carrier has inter alia to exercise due diligence to make the ship seaworthy and to properly man, equip and supply the ship at the inception of the voyage. This requirement is considered as the carrier's 'first base' obligation.<sup>173</sup> Unless the carrier is able to deny an allegation of a causative unseaworthiness due to the lack of due diligence on his behalf, an exception of his liability pursuant to the rules will generally not be available to him, and he will consequently lose his defences.<sup>174</sup> Seaworthiness is not only to be seen in the context of sailing from her port of departure to her port of destination, but must also include the suitability in respect of the cargo, what is often described as the cargoworthiness of a vessel. The undertaking is not an absolute one, but subject to due diligence of the carrier. This requirement comprises a standard of care regarding a certain degree of reasonable foreseeability and adequacy of specific measures.

The 'second base' obligation of the carrier is according to Art. III (2) HVR that he should "...properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried." This obligation is, however, subject to Art. IV HVR that provides for the carrier certain exclusions of his liability and his ability to limit. This article entails an obligation which may overlap the concept of seaworthiness and especially cargoworthiness, but also goes much beyond them.<sup>175</sup> It is therefore not always easy to determine, whether an exception can be invoked or not.

## **II. The Effect of the New Security Regime on the Rules**

There is nearly an infinite range of possibilities for acts of terrorism and security related threats involving the carriage of goods during every stage of the carriage from before loading until after discharge and delivery. However, it would be impossible to cover every potential scenario, since the slightest change in circumstances might well affect the rights and liabilities of the parties. In the following only a general analyse will be made in order to figure out the main problems as a starting point for specific cases.

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<sup>173</sup> John Hare: Shipping Law & Admiralty Jurisdiction in South Africa, 1999, p. 512.

<sup>174</sup> Ibid.

<sup>175</sup> Ibid p. 497.

## **1. 'First Base' Obligation**

The requirement of due diligence has changed, since the new security regime was introduced to shipping. On one hand, the awareness of security threats has increased tremendously. That has an effect on the standard of care and specific measures taken by the carrier. Increased awareness to all parties will make the task more difficult for the carrier to show that an event was unforeseeable and his due diligence regarding requisite security provisions followed the risk. The onus of proof will be to the carrier that the loss or damage was not caused by the want of due diligence.<sup>176</sup> Regarding an armed robbery a court held in *Tokio Marine Management v. M/V Zim Tokyo*<sup>177</sup> that the event was not unforeseeable even no such crimes had been experienced in the past. "...[I]f the risk is more than merely conceivable and the gravity of the potential harm is of sufficient magnitude, the law will still place upon defendants a duty to provide against the contingency."<sup>178</sup> Exactly how much caution defendants must exercise has to be determined on a case-to-case basis; the higher the security level, the higher the standard of care. And it will again be to the carrier to prove that he followed the measures indicated in his ship security plan.

As for what constitutes seaworthiness, it will have to be tested against minimum standards adopted in the ISPS Code.<sup>179</sup> Compliance will certainly be a prerequisite for a ship to be seaworthy. Furthermore, the ship security plan, even if licensed by the authority, must contain appropriate measures, and the ship security officer must be properly instructed and trained; if they prove not to be adequate, seaworthiness would fail and the due diligence question would arise again. The burdens of proof, however, are critical, especially where the actual cause of loss is in question.

## **2. 'Second Base' Obligation**

If the damage or loss was caused by a breach of the carrier's duty in accordance with Art. III (2) HVR and he is compliant with the 'first base' obligation, he could invoke exclusions of his liability provided in Art. IV HVR. The relevant exception clauses in respect of maritime security will be regarded in the following.

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<sup>176</sup> Ibid p. 622.

<sup>177</sup> *Tokio Marine Management v. M/V Zim Tokyo*, 1995 AMC 2279.

<sup>178</sup> Ibid.

<sup>179</sup> See equal standards in respect of the ISM Code, John Hare: Shipping Law & Admiralty Jurisdiction in South Africa, 1999, p. 512.

### a) Error in Management

According to Art. IV (2)(a) HVR the carrier could raise the potential defence of error in management. Prerequisite is, however, that the error is related to the management of the ship and not to the care and custody of the cargo. The latter would rather be an Art. III (2) failure than an excepted peril.<sup>180</sup> Thus cargo might argue that the crew's failure to detect or prevent the unlawful act that harmed the cargo constitutes a failure to care for the cargo. On the other hand, one could argue that any lapse to notice, prevent, or guard against an act of terrorism serves as an error associated with the protection of the vessel. When the actions of the crew affect both vessel and cargo, the 'primary purpose' test was applied to ascertain whether the operation was conducted in the interests of the vessel or the cargo.<sup>181</sup> That has to be determined for each case individually. However, there is a good assumption that a shipowner in the first instance is interested to protect the ship by taking security related measures. That would give the carrier the possibility to invoke the exception, but the line to draw is very fine and shaky. Moreover, the error in management exemption remains unpopular and is likely to fall away in future carriage regimes.<sup>182</sup> There is reasonable reluctance to excuse a carrier from the negligence of its own employees. Furthermore, the failure could also be interpreted as a failure by the carrier to exercise due diligence to make the vessel seaworthy in respect of the ship security plan or the training of the crew.<sup>183</sup> Thus, by raising the exception the carrier could cut off his own nose.

### b) Act of War/ Act of Public Enemies

The act of war and act of public enemy defences (Art. IV (2)(e),(f) HVR) could give the carrier another possibility to limit or avoid his liability. However, a strong argument exists that acts of war do not encompass types of terror. Acts of war require governmental action or military force, or something in nature of rebellion or revolution, both of which are domestic matters.<sup>184</sup> Terrorism does usually not have its origin

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<sup>180</sup> John Hare: Shipping Law & Admiralty Jurisdiction in South Africa, 1999, p. 631.

<sup>181</sup> *The Germanic* 196 US 589 (1905).

<sup>182</sup> John Hare: Shipping Law & Admiralty Jurisdiction in South Africa, 1999, p. 632.

<sup>183</sup> Robert G. Clyne: Terrorism and Port/Cargo Security: Developments and Implications for Marine Cargo Recoveries. *Tulane Law Review* 2003 Vol. 77, p. 1215.

<sup>184</sup> Graydon S. Staring: Insurance and Reinsurance in the New Age of Terrorism, *77 Tulane Law Review* 2003, p. 1385.

in governmental action or military force, and is mostly used as an international instrument. Hence this exception will not help the carrier in most of the cases.

The defence of acts of public enemies traditionally applies to an actual state of war between the government of a foreign nation and the carrier's government.<sup>185</sup> The requirement of another government involved would also exclude most of the cases of terrorism. Furthermore, the defence specifically refers to enemies of the shipowner's sovereign. Considering that the carrier would have the burden of proof, and the identity /nationality of terrorist may be unknown, and the ship may not be chosen just because of its flag, the defence would be in most instances difficult to prove and unsuccessful.

### c) Fire Defence

The fire defence of Art. IV (2)(b) HVR may be invoked if the fire is not caused by the actual fault or privity of the carrier. The onus of establishing actual fault or privity falls on the cargo claimant.<sup>186</sup> He has to prove that the owner either caused the fire or hindered its proper extinguishment in order to avoid the carrier's exemption. The security initiatives require the direct involvement of the owner in appointing company security officers and drafting and implementing security plans. These should also consider fire emergencies and thus could indicate negligence when security measures are deficient in respect to the detection or prevention of terrorism involving fire.<sup>187</sup>

### d) Any Other Cause

Finally, the carrier could raise the apparently very broad defence of Art. IV (2)(q) HVR in respect of "any other cause". This so-called 'catch-all' exemption depends upon the absence of actual fault or privity of the carrier, to be proved explicitly by the carrier. Thus it has to be shown that the carrier including the servants were completely without fault. There is a good chance that cargo could demonstrate that the carrier was negligent in designing or implementing security procedures to deter

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<sup>185</sup> Robert G. Clyne: Terrorism and Port/Cargo Security: Developments and Implications for Marine Cargo Recoveries. Tulane Law Review 2003 Vol. 77, p. 1216.

<sup>186</sup> William Tetley: Marine Cargo Claims, 4th edition (to be published in 2007), chapter 37 p.11. See at <http://tetley.law.mcgill.ca/maritime/ch37.pdf>.

<sup>187</sup> Robert G. Clyne: Terrorism and Port/Cargo Security: Developments and Implications for Marine Cargo Recoveries. Tulane Law Review 2003 Vol. 77, p. 1219.

terrorism. Thus the carrier is charged with the burden of establishing that he did all that in these circumstances a reasonable prudent owner would have done to protect cargo and ship from a terrorist act and that damage happened despite these efforts. This burden will be a heavy one in the light of the new awareness and the security requirements sweeping the maritime industry.

#### e) Restraint of Princes

The rules do not make any direct reference to delay. Nevertheless, courts to some degree recognize damages if they are consequences of the improper delay.<sup>188</sup> Hence a delay resulted from security related actions of the U.S. Customs or other governmental entities might cause a liability of the carrier. However, if not a liberty clause already releases the carrier from damages for delays, the 'restraint of princes' defence of Art. IV (2)(g) HVR will relieve the carrier from liability.

### **G. Conclusion**

Maritime security has been redefined in the 21<sup>st</sup> century with tremendous speed. Although the measures taken are widely spread in all corners of maritime law, a comprehensive system - that is, however, still in an early stage - has been developed in order to respond to the latest terrorist incidents. The mixture of international and domestic law with several agencies involved illustrate that the new security regime is and will continue to be "an all hands evolution".<sup>189</sup> The ultimate effect of the various initiatives upon world trade and maritime commerce remain uncertain. It is certain, however, that the new measures will have their price. According to estimates in an OECD report, an initial investment by ship operators of at least US\$ 1.3 billion will be required, and annual operating costs will increase by US\$ 730 million thereafter.<sup>190</sup> On the other hand, the report concludes that the potential costs of a major, well coordinated terror attack would likely be measured in the tens of billions of dollars. If such an attack would really occur is not sure, but it is not in the ambit of this work to

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<sup>188</sup> *United States v. Middleton* 1925 AMC 85.

<sup>189</sup> Thomas J. Schoenbaum/ Jessica C. Langston: An All Hands Evolution: Port Security in the Wake of September 11<sup>th</sup>. 77 Tulane Law Review 2003, p. 1333.

<sup>190</sup> See Organization for Economic Cooperation and Development (OECD). Directorate for Science, Technology and Industry (Maritime Transport Committee): Security in Maritime Transport: Risk Factors and Economic Impact, July 2003, p.3. See at <http://www.oecd.org>.

judge about assessments of potential disasters. It should be left to the industry and to politics whether shipping is able to bear this additional burden. However, beside the additional costs, it is also important to stress the advantages of the new regime. The measures will undoubtedly have beneficial effects in terms of the protection of port and marine professionals, and passengers as well, and also have indirect repercussions in terms of action to combat all forms of trafficking, and concerning taxation and the secure routing of freight transported.<sup>191</sup> Moreover, improved scanning, tracking of container seals, and an overall increase in security measures could well reduce the number of claims for shortage and theft/pilferage. Finally, the new level of transparency of operation will make it possible to organize them better and programme them over time for the benefit of all efficient and honest operators.

Naturally, the new regime will take its time to get completely implemented by all related parties, especially when it was adopted in such a short time. The implementation concerns state actions, but also the relation between the owner and the charterer as well as the relation between the shipper and the carrier. They will get aware of the new standards and adapt their contracts and behaviours in order to protect vessel and cargo from nowadays more foreseeable or at least more assessable risks. The main effect and benefit will eventually be that every party involved in the security system will become aware of security problems and thus will act more conscious in all respects.

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<sup>191</sup> European Commission: Preparatory Acts. Enhancing Maritime Transport Security, 2003. <http://www.lexis-nexis.com/professional/>, giving an example: While the installation of container scanners in the Port of Rotterdam cost € 15 million, in one year their use generated € 88 million in custom and tax revenue, even though only 2% of the containers are subject to such checks.