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The regime of boarding ships in international maritime law

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WORLD MARITIME UNIVERSITY

Malmö, Sweden

**THE REGIME OF BOARDING SHIPS IN
INTERNATIONAL MARITIME LAW**

By

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Iraq

A dissertation submitted to the World Maritime University in partial
fulfilment of the requirement of the degree

MASTER OF SCIENCE

In

MARITIME AFFAIRS

(MARITIME SAFETY AND ENVIRONMENTAL PROTECTION)

2006

DECLARATION

I certify that the material in this dissertation that is not my own work has been identified, and that no material is included for which a degree has previously been conferred on me.

The contents of this dissertation reflect my own personal views, and are not necessarily endorsed by the University.

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ABSTRACT

Title of Dissertation: **The Regime of Boarding Ships in International Law**

Degree: **Master of Science**

This dissertation is a study into the regime of boarding ships in international maritime law. The subject deals with the legal justification and some of the operational issues of the different boardings of ships and how they ultimately serve in shaping the provisions of boarding under the new mandate of the SUA Convention, the 2005 amendments.

The study starts by looking at the freedom of navigation and sovereignty of ships in history and its codification in UNCLOS82, as it is the most comprehensive body of international maritime law. Its principles are the main criteria, which govern the legality of ship boarding. The different regimes of interdiction are looked at carefully with analysis to their legal justifications. Other authorized interdictions under the United Nations Charter and UNSC decisions are examined.

Although most of shipboardings are covered by conventional law, they require certain legal and practical arrangements to preserve sovereignty and integrity of ships and the interests of the different players. Bilateral and multilateral agreements, which serve this objective, are elaborated on in a separate chapter.

The most recent ship boarding regime is facilitated by the 2005 amendment to the SUA Convention 1988. Its far-reaching implications are discussed and evaluated in terms of the other provisions of the convention and in the light of the other regimes discussed in other chapters.

The final chapter presents the writer's analysis of shipboarding in general as well as his opinions of the boarding regime under SUA Convention. The dissertation

ends with recommendations on how to pave the way for future amendments to make the regime more effective.

Key words: Maritime security, Interdiction, Shipboarding, SUA Convention

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LIST OF ABBREVIATIONS

BC	Biological Convention
CWC	Chemical Weapon Convention
EEZ	Exclusive Economic Zone
FOC	Flag Of Convenience
G-8	Group of Eight
IAEA	International Atomic Energy Agency
ICFTU	International Confederation of Free Trade Unions
ICJ	International Court of Justice
ICS	International Chamber of Shipping
ILC	International law commission
IMO	International maritime organization
ISF	International shipping Federation
ISPS Code	International Ship and Port Facility Security Code
ITLOS	International Tribunal of the Law of the Sea
LEDETS	Law Enforcement Detachment
NATO	North Atlantic Treaty Organization
NBC	Nuclear, Biological and Chemical
NPT	Nuclear Proliferation Treaty
PSI	Proliferation Security Initiative
SOLAS	Safety of Life at Sea
SUA	Convention for the Suppression of Unlawful Acts against the Safety of navigation, 1988
TEUs	Twenty Feet Equivalent Units
UK	United Kingdom
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea, 1982
UNSC	United Nations Security Council
UNSCR	United Nations Security Council Resolution
US	United States of America

USA	United States of America
VCLT	Vienna Convention on the Law of Treaties, 1969
Wassenaar	Agreement on Export Controls for Conventional Arms and Dual-Use Goods and technologies
WMD	Weapons of Mass Destruction

CHAPTER ONE

1.1. Introduction

The interception of ships in order to board, search and carry out law enforcement functions is not a new legal concept; it has been inherited from state practice and customary law as a way of dealing with different matters perceived as threats and infringement to State's laws and the public order of the seas. Ship interdiction and boarding reflect the notion of deterrence, first line of defense and ultimately law preservation and ensuring maritime security. It has been legally justified for different situations and has met wide acceptance by the international community, thus it has been codified and become part of the international law in general and maritime law in particular.

The international community has perceived most recently a new threat. The 11 September 2001 attacks have suggested that ships could be used to facilitate terrorist attacks. This could take, inter alia, the direct use of a ship, the financing through legal and illegal shipping activities, the transfer of Weapons of Mass Destruction (WMD) or materials related to them. The last two are seen as posing a grave danger as they assist in the proliferation of WMD and future use by rogue States and terrorist organizations. A practical mechanism should, then, be followed to suppress such an activity and deter its danger. The obvious way is to try taking preemptive measures by intercepting such danger-contributing materials before

reaching their destination where they can be used directly or further manufactured to be used later on in causing fatalities or intimidating nations.

The international community felt the need to fill the legal gap left by the many conventions in place dealing with WMD that bans their transport as means, among many other efforts, to stop proliferation. This objective has been realized to be achieved by boarding ships to search them for such weapons.

The Legal Committee of the IMO was tasked to tackle the amendment of the SUA 1988 Convention and its protocol to facilitate the new threats. It came up with new amendments involving the provision of shipboarding under Article 8. The new amendments shall be called in this dissertation as SUA Convention 2005, or SUA 2005.

1.2. Objectives

The objective of this dissertation is to explore the shipboarding regime under Maritime Law in general and then to look at the specific example of shipboarding under the SUA Convention 2005. It will cover the following aspects:

- a. Examine the legal precedents of ship interdiction regimes under customary, international and conventional laws and its relationship with the freedom of navigation. This will be elaborated on by looking at the Law of the Sea Convention 1958 convened in Geneva, the United Nations Convention on the Law of the Sea, UNCLOS 1982, other rights and obligations through the United Nations Charter and UNSC resolutions and the different doctrines and rights, namely, the necessity and the hot pursuit doctrines and belligerent rights. Leading cases will be used to illustrate the justification or violation of boarding rights under the different regimes.
- b. Look at the different arrangements and agreements concluded among states to intercept, board, and search suspected ships of carrying illicit

activities. Both bilateral and multilateral agreements will be looked at, giving examples of such agreements where appropriate.

- c. Analyse critically the main provisions in the SUA Convention 2005 and identify some of the strengths and weaknesses of the convention. The emphases will be on the new transfer offences introduced and the biased implications, the dual-use materials and ambiguity, the boarding regime and controversy, criminal jurisdiction bases and seafarers protection.
- d. Discuss the different findings about the boarding provisions under SUA Convention 2005 in the light of the different ship interdiction regimes and the arrangements and agreements that have been in practice for years.
- e. Determine, based on the critical analysis, the identity and nature of any amendments and changes that may be necessary to the boarding regime under SUA 2005 by giving recommendations.

CHAPTER TWO

Ship Interdiction

2.1. Introduction

This chapter explores the relationship between ship interdiction and the freedom of navigation. It also examines the origin of the doctrine of freedom of navigation in international law and why it is essential to preserve to it. It also looks at what makes nations reluctant to modify it to fit new ideas and approaches and whether the doctrine acts as an impediment to the struggle against terrorism. Furthermore, the prevailing legal conditions for ship interdiction in international law will be examined with examples of precedent cases to see how those cases were justified and where violations took place.

2.2. Maritime interdiction and the freedom of navigation

Freedom of navigation on the high seas was curtailed by the maritime powers for a long period of time when they claimed complete sovereignty over the seas. This claim reached its climax in 1493 when Pope Alexandre VI (Borgia) divided the non-European world which could be reached by sea between Spain and

Portugal, with the proviso: 'the souls for God, the land for king'¹. This treaty was challenged markedly during the 17th century by the Dutch when they captured the Portuguese ship called *Santa Catarina*, and declared it a good prize². Their jurist Hugo Grotius based his defence on justifying what the Dutch did on the Roman legal principle of *De Mare liberum*, and natural law by asking a number of questions and giving persuasive answers to jurists in his *De mare Liberum* 1604-1605. He said that the Spanish and Portuguese have no right to claim what they have never owned. The rights at sea had been under either the property of no one "*res nullius*" or a common possession "*res communis*" or public property "*res publica*". Grotius drew two conclusions. First "that which can not be occupied, or which never has been occupied, cannot be the property of any one, because all property has arisen from occupation." Second, " all that which has been so constituted by nature that although serving some one person is still suffices for the common use of all persons, is today and ought in perpetuity to remain in the same condition as when it was first created by nature".³ That was the basis for the formulation of the legal regime touching upon the essentials of freedom of the seas, and among others, the freedom of navigation and the exclusive jurisdiction of flag state on their ships. These ideas were then codified and enlarged upon by the two main conventions, the Geneva Convention on the High Seas 1958⁴ followed by the United Nations Convention on the Law of the Sea 1982 (UNCLOS). This Convention makes substantial changes, especially to the spatial elements of the high seas.

The law of the sea made freedom of navigation, among others, clear in its article 87 and stated that "these freedoms shall be exercised by all states with due regard for the interests of other states in their exercise of the freedom of the high seas". Furthermore, article 89 emphasises the doctrine of freedom of the high seas from another perspective, sovereignty. It states "no State may validly purport to

1 Zemank K.: Was Hugo really in favour of the freedom of the seas? *Journal of the history of the law* 1, 48-60. Netherlands: Kluwer law international, 1990.

2 Thornton H. :Hugo Grotius and the freedom of the seas. *International journal of maritime history*, vol. XVI (2), p.18, (2004)

3 Sohn L.B. and Noyes J.E.: *Cases and materials on the Law of the sea*,p46,Transnational publishers,Inc,Ardlsley,2004.

For the whole defence read the freedom of the seas by Hugo Grotius which was translated with revision of the latine text of 1663 by Magoffin, associate professor of Greek and Roman history, the Johns Hopkins University. New York, Oxford press (1916). On line:<http://socserv.mcmaster.ca/econ/ugcm/3ll3/grotius/Seas.pdf>

4 The preamble of the convention says that its provisions are "generally declaratory of established principles of international law"

subject any part of the high seas to its sovereignty.” When it comes to ships, article 92 strongly establishes that the flag State only has jurisdiction over their ships, “ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this convention, shall be subjected to its exclusive jurisdiction on the high seas”.

Churchill and Lowe define other freedoms of the high seas by saying that “there are high-seas activities alleged by some States to constitute freedoms, but denied this status by other States. The principle on which such disputes should be resolved is that any use compatible with the status of the high seas- that is, a use which involves no claim to appropriation of parts of the seas-should be admitted as a freedom unless it is excluded by some specific rule of law”⁵.

It should be mentioned here that if, arguably, the law of the sea does not bind states as they are not party to it, “the international law of the sea has developed into customary international law that binds even non-parties to the convention. It is one of the most comprehensive and well- established conglomerations of international regulatory norms in existence, which is also buttressed by long standing formal legal agreements”⁶.

The law of the sea preserves the rights of all states without discrimination. It was not an easy task to reach such a wide agreement among nations; taking about 20 years to arrive in its final form known as UNCLOS⁸². This makes states reluctant to introduce any changes to its provisions. Furthermore, rights and obligations, once compromised by an amendment, are not easily gained back. In fact, even world or regional powers that seek more privileges to practise interdiction and jurisdiction over other states’ ships abstain from proposing changes to UNCLOS for the same reasons mentioned above, and try to find more convenient but persuasive ways to go round it. Such ways are enacting new conventions or bilateral agreements. Failure to do so sometimes leads nations to initiate unilateral actions, especially

5 Churchill R.R. and Lowe A.V.: *The law of the sea*, 3ed.P.206, Juris publishing, Manchester University press, 1999.

6 see Young S. S. (2003). Legal bases for state interception of shipments on high seas: Legality of the interdiction under the “proliferation security Initiative”. Retrieved April 5 2006 from the World Wide Web:

those that have influential political and economical powers and see from their points of view that they are threatened. Even though, it has been argued that events lead to the change of laws and conventions in general, and circumstances are now so granted to come up with new changes when it comes to interdiction and UNCLOS. This argument is true if we look at UNCLOS itself. Though the regime of the high seas is based on the principle of the freedom of the seas, this same principle has been modified or replaced to meet the requirements of the other functional maritime regimes established in modern international law as reflected in the 1982 convention⁷.

Have ever the freedom of navigation and exclusive jurisdiction been violated by other states other than those cases excluded by international law? How have they been justified and what was the range of acceptance by nations? Are we expecting violation all the time for purely unjustified reasons and merely for a hidden agenda?

The capture of the *Virginus*⁸ witnesses such a violation. The action was justified as “self-preservation took precedence over the right of free navigation”⁹. Such precedence was controversial as the British accepted the capture of the ship but not the execution whereas the Americans denied the action as the vessel was flying the American flag on the high seas in a time of peace. The Jurists, on the other hand, had their say. Westlake saw self-defence as constituting an exception to the exclusive jurisdiction of the flag states over their ships on the high seas. He stated that “the other case in which on the high seas the flag clearly does not exclude the forcible exercise of authority on board by another state is that of self-defence, which arises when under the cover of the flag a hostile enterprise is attempted against the state which intervenes.”¹⁰ Whereas Gidel has denied the right to board foreign vessels on the grounds of self-defence is recognised in

http://www.lcnp.org/disarmament/MEMO_NK_interdiction.PDF

7 Nandan S., Rosenne S. & Grandy N. R.: United Nations Convention on the Law of the Sea 1982: A commentary, volition, articles 86 to 132,p27: Boston: Martinus Nijhoff publishers, 1995.

8 It was a ship flying the American flag captured on the high seas on 31 October 1873 by the Spanish warship *Tornado* while running men and arms from Jamaica to insurgents in Cuba. Fifty-three of the persons on board were court-martialled and shot dead.

9 Nelson D.:Key note address, The *Virginus* revisited. In Mukherjee, Mejia, Gauci (Eds.), *Maritime violence and other security issues at sea* (pp.1-8). WMU ,Malmö, August2002.

10 Westlake, *International law, part1, Peace* (1904) p.167.

international law. The international court of justice recognises such an action, nevertheless it has its reservation as to whether the state 'essential interests' are threatened by a 'grave and imminent peril' and the action is the 'only means of safeguarding that interest'.¹¹

It is clear that such conditions are not conceivable, at least on the high seas, especially when ships are underway from states claiming that they are under threat. Such subjective interpretations are of an imminent danger to international law, the freedom of navigation, and lessons have to be drawn from them to avoid repeating them.

Other cases of ship interdiction, in recent history, have taken place within different maritime zones. Some of them were easily justified as they took place in waters covered by the national laws of that states and the assumption that law prohibits carrying WMD. Examples of such interdiction are the *Ku Wol San* incident¹² in the internal waters of India and the *Baltic Sky*¹³ in the territorial waters of Greece. Other incidents were of controversial status as they took place in international waters and had no legal background or precedence in international law at that time to prohibit the transfer of WMD, such as the incident of the North Korean ship *So San*. On the 9 December 2002, the ship was bound for Yemen when was intercepted in the Arabian Gulf by combined Spanish and American naval forces. Although the vessel was suspected of carrying missiles, it was boarded for failing to fly a flag. The missiles were confirmed to be on board but nothing happened as the USA was neither at war with Yemen nor was there any provision under international law to prohibit Yemen from accepting delivery of missiles from North Korea. Furthermore, no provision in international law prohibits nations from dealing with conventional weapons.

¹¹ Supra 9,

¹² On 25 June 1999 the 9,600 ton steamer *Ku Wol San* owned by the Phuong detonators Trading Company of North Korea, docked at an Indian port on the west coast and began unloading sugar taken aboard in Bangkok, Thailand. It later turned out that the cargo manifesto was fabricated. After searching the vessel equipment found including missile blueprints, drawings, and instruction manuals, in addition to a sizeable shipment of missile components and production materials.

¹³ A Comoros flagged ship boarded by Greek authority .They found about 680 tons of explosives and some amount of 8000 detonators on board. The captain and crew were convicted of carrying dangerous cargo without informing the Greek authorities.

It is clear from the two first incidents that the failure of the crew to comply with mainly national regulations led to the boarding of their ship, whereas in the third case, the ship was not flying a flag therefore considered a ship without a flag which is prohibited under UNCLOS 82 and can lead to interception.

2.3. Exceptions of freedom of navigation

There are very precise illegal acts that justify the right to resort to threat or use of force to board, search and, if justifiable, seizure of a ship under international law. These acts are regarded as exceptions of the exclusive jurisdiction of flag States and require no authorization from the flag State. Apart from the right of hot pursuit, UNCLOS 82, article 110 gives a warship which encounters on the high seas a foreign ship, other than a ship entitled to complete immunity in accordance with articles 95 and 96, the right to board if there is reasonable ground for suspecting that the ship is engaged in piracy, the slave trade, unauthorised broadcasting, without nationality, or is flying a false flag. However, it was realized by governments in the last century that the right to visit could be abused and that there must be reasonable grounds for suspicion, for example a refusal by a ship to hoist its flag¹⁴. Otherwise, in its comment the International Law Commission stated that the severe penalty 'seems to be justified in order to prevent the right of visit being abused'¹⁵. This statement reflects how the doctrine of freedom of navigation is precious and States should be vigilant to it before taking any action.

The essential question here is what is common among such illegal acts that give a wide agreement among states to accept the boarding of ships by other states' warships?

The illegal acts excluded from exclusive jurisdiction of flag states in UNCLOS article 110, are known as *delicta juris gentium*, crimes under international law. Bassiouni describes them as "offences which endanger the fundamental values of

14 Brownlie I. *Principles of public international law 1999 (5ed)*, p.240, New York :Oxford University press.

15 Yearbook, *International Law Commission (1956)*, Vol.2, p.284.

the international community as a whole” and hence “has given rise to universality principle, where every state which is a member of that community has the power to retaliate against such offences wherever they may have been committed”¹⁶. Piracy for example, inflicts huge damage on international trade and general safety therefore it is treated as a universal crime whose perpetrators is *hoste humani generis* or enemies of the human race and should be punished by any state catching them.

One of the characteristics of such offences is *ratione personae* i.e. the personal status of the offender cannot affect the incidence of the municipal criminal law by virtue of that principle. This is enough reason for flag states accepting that their ships could be boarded by the warships of others.

It is evident that the provisions of UNCLOS article 110 are of a non-discriminatory nature. No matter which ship is suspected of carrying out any of the illegal acts it would be subjected to a visit by warships in the vicinity and the municipal laws of that ship would be applied.

2.4. General right of self-defence and interdiction

It is well established in the United Nations charter that nations have the right of self-defence against armed attacks. Article 51 of the charter reads:

Nothing in the present charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by members in the exercise of this right of self-defence shall be immediately reported to the security council and shall not in any way affect the authority and

¹⁶ Bassiouni M. C.: *International law 1999(2nd ed)*., Crimes, p.49, Transnational publishers, Inc, Ardsley, New York, 1999.

responsibility of the security council under the present charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

It is clear from the wording that the charter only permits an action of self-defence when certain conditions are satisfied. One of the conditions is that an armed attack has occurred. In addition, article 51 of the charter only allows self-defence action during an interim period until the Security Council can take the necessary measures¹⁷. Hence, there is no direct legal authority to board ships under the doctrine of self-defence. Evidence should be presented to the Security Council, which can then decide whether or not to authorize action.

Furthermore, Article 51 should be read together with article 2(4) of the charter which reads: "All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purpose of the United Nations". As the ship is, metaphorically, an extension of that territorial integrity as asserted by the permanent court of international justice in the *Lotus case* "All that can be said is that by virtue of the principle of the freedom of the seas, a ship is placed in the same position as national territory"¹⁸.

Brownlie comments on the use of force by the United Kingdom to detain vessels on the grounds of security or self-defence by saying "It may be said here that the legal basis of such a right, in the absence of an attack on other shipping by the vessel sought to be detained, is lacking"¹⁹. Furthermore, the commission in charge of the High Seas Convention 1958 commented on the draft article which later appeared as Article 22 of the convention by stating "The question arose whether the right to board a vessel should be recognized also in the event of a ship being suspected of committing acts hostile to the State to which the warship belongs,

¹⁷Supra 6.

¹⁸ For the details of the case see Mukherjee P. K. (2005). nationality of ships .Unpublished lecture handout, World Maritime University, Malmö, Sweden. See also on line: http://www.worldcourts.com/pcij/eng/decisions/1927_09.07lotus/

at a time of imminent danger to the security of that state. The commission did not deem advisable to include such a provision, mainly because of the vagueness of terms like 'imminent danger' and 'hostile acts', which leaves them open to abuse"²⁰.

2.5. Interdiction and the doctrine of necessity

The doctrine of necessity is claimed under international law as an excuse to justify a state's violation of its obligations under international law. Hugo Grotius outlined this doctrine in his writings in *Mare Liberum*.

The International Court of Justice recognised this right as long as it fulfils certain principles as set by the International Law Commission. Such principles include that the act under necessity is "the only means of safeguarding an essential interest of the state against a grave and imminent peril" and state of necessity may not be invoked by a State as a ground for precluding wrongfulness "if the international obligation with which the act of the State is not in conformity arises out of peremptory norm of general international law"²¹. Furthermore, "To systematically lean on this doctrine to justify the high seas interdiction would not be in accordance with international law since international law rests on the presupposition that all states carry their obligations 'in good faith' "²² and this doctrine would be a 'last resort' choice.

2.6. The UN Security Council and interdiction

The UN Security Council resolutions relating to the maintenance of international peace and security are binding on all member states. This authority is entrusted with the Council as all the members of UN agreed to accept its authority

¹⁹Supra 14

²⁰ Supra 15.

²¹ Rephrased from International law commission, Draft articles on state responsibility, article 33. On line: http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf

under article 25 of the charter²³. The Council, as its name suggests looks at threats to peace, breaches of peace and acts of aggressions as defined by the UN Charter.

The Council has taken, among others, decisions related to maritime interdiction where responsibility is entrusted with UN agencies and through the cooperation with all states as there is no force under its command already formed for taking action. Two outstanding cases in recent history relate to maritime interdiction; one was the Security Council resolution 787, November 16, 1992 to interdict ships bound for Bosnia-Herzegovina, a region within the old Yugoslavia, followed by another resolution 820 (1990) to authorise interdiction of vessels in the territorial sea²⁴. The other one was the maritime interdiction against Iraq after the invasion of Kuwait. The Security Council resolution 665 of August 25, 1990 called for measures "to halt all inward and outward maritime shipping in order to inspect and verify their cargoes and destinations and to ensure strict implementation of the provisions related to such shipping laid down in resolution 661(1990)".²⁵

Another example of the UN Security Council forcing maritime interdiction is during peacetime. The current example is the UNSCR 1483 and 1564; at the request of the Iraqi government, a multinational maritime security force is authorised to board and inspect vessels bound for Iraqi ports. Inspections are conducted to verify compliance with the relevant UNSCRs and to contribute to the maintenance of security and stability in Iraq²⁶.

It is evident that the Security Council yields considerable power in taking actions to preserve peace and order when required as long as there is a majority

22 Andréa's p., Ian D.: Sailing into unchartered waters ?The proliferation security initiative and the law of the sea, British American security information council, June 2004. on line: <http://www.basicint.org/pubs/Research/04PSI.htm>

23 Decisions are binding only when nine members of the council agree on the decisions under consideration and provided that decisions are not vetoed by any of its permanent member states (China, Russia, France, UK and USA). See United nations Charter, Chapter V, Article 27. On line: <http://www.un.org/aboutun/charter/chapter5.htm>.

24 Supra 3, 216-218 .

25 United Nations Security Council: Resolution 665 in August 25, 1990 to implement resolution 661 (1990) which provides for economic sanctions against Iraq. On line:

<http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/575/15/IMG/NR057515.pdf?OpenElement>

26 Press release: Iraq- security procedures for in/outbound shipping, UK Military Royal navy liaison office, Dubai, 6 Feb.2005.Online: http://www.rncom.mod.uk/maritime/UKMTO/docs/0015_06Feb05.pdf

consensus among its members. It can be ascertained here, that it has never been easy to have a collective biased decision taken by members to satisfy the desire of a particular state and most of the decisions reflect the desire of UN members. That is why it is not easy to lean on the UNSC to take vessel interdiction decision; otherwise many states would like to take such a decision against North Korea and Iran.

2.7. Hot pursuit

Hot pursuit is defined by O'Connell as "the legitimate chase of a foreign vessel on the high seas following a violation of the law of the pursuing state committed by the vessel within the pursuing state's jurisdiction, provided that the chase commences immediately and the vessel evades visit and search within the jurisdiction, and provided that the chase is carried on without interruption on to the high seas".²⁷

The rationale behind hot pursuit is perceived by Hall in his comment "when a vessel, or some one on board her, while within foreign territory commits an infraction of its laws she may be pursued into the open seas, and there arrested....the reason for the permission seems to be that pursuit under these circumstances is a continuation of an act of jurisdiction which has been begun, or which but for the accident of immediate escape would have been begun, within the territory itself, and that it is necessary to permit it in order to enable the territorial jurisdiction to be efficiently exercised"²⁸.

However the doctrine of hot pursuit is tangibly related to the principle of the freedom of navigation of the high seas, as it constitutes certain limitations on such freedom. It is obviously one of the exceptions to exclusive flag state jurisdiction when all the conditions are satisfied.

²⁷ O'Connell D. P.: *The international law of the sea 1984* (vol.2),pp.1075-1076.Clarendon press. Oxford, 1984.

²⁸ Supra 14, p.309

State practice shows that hot pursuit has long been accepted under customary law; such an example is the case of *I'm Alone* in 1935²⁹. The right of hot pursuit is articulated clearly in article 23 of the Law of the Sea, 1958, followed by article 111 In UNCLOS82. A number of qualifications are mentioned in these articles rather than relying on the individual states practice. The first is that the competent authorities of the coastal State have good reason to believe that the ship has violated the laws and regulations of that State. Secondly, the pursuing ship is convinced that the other ship is within the territorial sea or the contiguous zone; thirdly, it is not necessary that the order to stop the pursued ship is giving by a ship in the same zone; fourthly, the pursuit may only be commenced after a visual or auditory signal to stop has been given at a distance which enables it to be seen or heard by the foreign ship; fifthly, hot pursuit may be exercised only by warships or military aircraft, or other ships or aircraft on government service specially authorized to that effect; sixthly the right of hot pursuit ceases as soon as the ship pursued enters the territorial sea of its own country or of a third State. Even though, there are states who object to hot pursuit in their EEZs like Brazil. In the context of the 1988 UN convention against Illicit Traffic in Narcotic Drugs, Brazil has taken the view that the arrest of a ship within an EEZ needs the consent of the coastal state. Churchill comments on this by saying there is no reason why the right of hot pursuit should cease when the vessel pursued enters the EEZ of its own or a third state³⁰.

2.7.1 The case of *I'm Alone*

The case of *I'm Alone* explains the necessity of adherence to the qualification needed for hot pursuit and how it is restricted to start from the territorial sea. The *I'm Alone* was a vessel registered in Canada, which was intercepted off the Louisiana coast (according to Canada at a distance of 14.5 miles and according to the United States 8.2 miles) and upon being signalled, refused to stop for examination. Later the commander of the intercepting vessel, the U.S. cutter *Wolcott*, was permitted to board the vessel, but not to examine the ship's papers or to search

29 Supra 5, p.214.

30 Supra 5, p.215.

the vessel. The *Wolcott* then began pursuit of the vessel and on the morning of the third day was joined by the *Dexter* which, after warning the *I'm Alone* to stop, fired upon it and sank it³¹.

The United States justified the arrest on interpretation of the Liquor Treaty but Canada disputed it on the ground that the pursuit must commence in the territorial sea. Compensation was accordingly awarded to Canada³².

McDougal and Burke expressed their view for cases on the high seas by saying "The interference with foreign vessels on the high seas by arrest and seizure is justifiably regarded as a serious matter and placing the risk of action on the interfering vessel seems reasonably commensurate with the gravity of the situation. Accordingly, it seems desirable to require payment of compensation for harm caused by pursuit of a vessel on inadequate ground"³³.

2.8. Belligerents rights

One of the principles of international law is the right of warships of belligerents to visit and search merchant and private vessels. In peacetime, this right is ordinarily exercised only within the territorial waters of a state and merely as the practice of the power to police such waters. In wartime, however, a belligerent may search neutral vessels on the high seas in order to capture the property of enemy nationals or to remove contraband bound for enemy ports³⁴. Laws regulating such conduct presuppose the existence of a legal state of war and forcible resistance to search allowing the warship to attack or destroy the vessel or its cargo or to declare it as a prize.

31 McDougal M.S. and Burke W. : *The public order of the Oceans, a contemporary international law of the sea*, p.900, New haven press, New Haven 1987.

32 Supra 27, p.1084.

33 Supra 31, p.898..

34 There is a well defined body of laws of war at sea deriving in part from conventions, notably those drafted by The Hague Peace Conference of 1907, and in part from customary law.

The issue of presupposed legal state of war is still controversial as to where such legality is drawn from. Churchill and Lowe see this issue from two viewpoints, one view, probably the most widely held, is that force may be lawfully used only with the authorization of the United Nations Security Council (or the General Assembly, acting under the 'Uniting for peace' resolution) or alternatively in exercise of the inherent right of self-defence preserved by article 51 of the United Nations Charter. The other view is that, regardless of the legality of the use of force in international relations, when force is used on a large scale it is regulated by the Laws of War and the law of neutrality³⁵. The first view can be found in the practice followed by the United Kingdom in the Falklands war and the other view was adopted by the USA in the Iran/ Iraq conflict of 1980-8.

2.9. States practice and Customary Law

Article 38 of the statute of the International Court of Justice stipulates that "international custom" is one source of international law. However, the Orthodox legal theory requires two conditions for such a custom to establish customary law. The first is a general and consistent practice adopted by states and the second is the so-called "*opinio juris*" the conviction that the practice is one which is either required or allowed by customary international law, or more generally that the practice concerns a matter which is the subject of legal regulation and is consistent with international law³⁶.

On the other hand, it is possible that a treaty law limited to a number of States can be developed to form international customary law. This has been confirmed in Article 38 of the final draft of the 1969 Vienna Convention on the Law of Treaties (VCLT), where it is stated that "Nothing in Articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognized as such"³⁷.

³⁵ Supra 5, p.422.

³⁶ Ibid, p.7 .

2.9.1. Multilateral hot pursuit under State practice: The case of *Viarsa 1*

Apprehension could be made possible due to multilateral hot pursuit. Such an event of hot pursuit seems to be accepted from the point of view of international law and state practice as in the case of *Viarsa 1*, a Uruguayan-flagged fishing vessel which was apprehended on 28 August 2003 after a record-breaking 21-day hot pursuit by the Australian-flagged *Southern Supporter*. The 3,900 nm chase commenced on 7 August 2003 after the sighting of *Viarsa 1*, allegedly engaged in illegal fishing in Division 58.5.2 in the Australian EEZ around Herald Island and McDonald Island in the South Ocean. The pursuit ended 2,000 nm southwest of Cape Town, South Africa, in the Atlantic Ocean. The multilateral dimension ensued from the fact that while the pursuit was commenced by an Australian vessel, boarding and arrest was clearly enabled by the involvement of vessels from South Africa and the United Kingdom. To confirm that more than one vessel from different flags can use in hot pursuit; the ILC agreed on inserting a paragraph in the Commentary to the draft provision of what would become Article 23. It reads “The ship finally arresting the ship pursued need not necessarily be the same as the one which began the pursuit, provided that it has joined in the pursuit and has not merely effected an interception”³⁸.

The legality and justification of multilateral hot pursuit, seen by one member of the ILC, was that “the important point was the fundamental right to give the order to stop and to undertake hot pursuit, not the specific means by which that right was exercised.”³⁹

It is clear that ship interdiction is subjected to conditions agreed upon by the international community and codified as laws. Such laws are derived from a general consensus of nations and state practice, but not necessarily reflect all the individual States' views. Hence, the interpretation of the conditions is sometimes different from one situation to another leading to, at least, political conflicts. The most appropriate

37 For the details of the articles 34 to 37 see *Vienna Convention on the Law of treaties*, 23 May 1969.

38 Molenaar E. J.: Multilateral hot pursuit and illegal fishing in the Southern Ocean: the pursuit of *Viarsa 1* and the *South Tomi*. *International journal of marine and coastal law*, 19,p30,2004

and reliable way to tackle the problem is by having arrangements to regulate the activity of interdiction. The following chapter explains some of the arrangements by exploring the different bilateral and multilateral agreements in place and how they serve in paving the way for shipboarding.

³⁹ Ibid., p32

CHAPTER THREE

Ship Boarding Agreements

3.1. Introduction

The majority of shipboarding, apart from that granted by international law, is based on agreements and mutual assistance arrangements; otherwise it is regarded as a violation of international law and the freedom of navigation. Such agreements can be bilateral or multilateral in scope depending on the reasons behind them and the scope of political will.

Agreements normally range from full authorisation in advance to authorisation pending further information and conditions to be satisfied. Political atmosphere and economic factors usually play a role in deciding how such agreements are concluded and what conditions are involved. In other words political will and assurances of sovereignty preservation and the availability of resources to facilitate the agreements are the dominant factors and govern the direction and the extent of agreements. This is reflected in the report of the high level panel on threats, challenges and change prepared by the UN "While the duty of states to protect and provide for the welfare of its own people is recognized, historical evidence

demonstrating that the state can also be unable or unwilling to perform this role is taken into account⁴⁰.

In this chapter examples of the different bilateral and multilateral agreements will be explored to reveal the different terms and arrangements involved. The main emphasis is to show how sovereignty is preserved, what safeguards are taken into consideration and how practical the arrangements are.

3.2. Bilateral shipboarding agreements

Bilateral shipboarding agreements are concluded between states for different motives. There are, for example, a fair number of them between the United States and the Caribbean concerning maritime counter-drug operations. These are based on the 1988 United Nations Convention against Illicit Traffic in Narcotic and Psychotropic Substances. Others such current agreements are those between the USA and Bahamas, Panama, Honduras and Barbados. Most recently the USA has concluded a number of bilateral agreements with major flag states to suppress the illicit traffic in WMD as a practical measure under the Proliferation Security Initiative. Examples are already mentioned as those with FOC. Other agreements may take the form of exchange of notice like the one concluded between the USA and the UK, the 1981 Exchange of Notes concerning Co-operation in the Suppression of the Unlawful Importation of Narcotic Drugs into the United States and the Liquor Agreement, 23 January 1924.

3.2.1. Bilateral ship boarding agreements under PSI

The proliferation security initiative statement was proposed by President George Bush of the USA before the Group of Eight (G-8) Summit in Krakow during their meeting in Poland on May 31, 2003⁴¹. It is regarded, in essence, as “a multilateral intelligence sharing project incorporating cooperative actions and

40 UN: A more secure world: Our shared responsibility, Report of the high level panel on threats, challenges and change, 2004.
http://iis-db.stanford.edu/pubs/20806/A_More_Secure_World_.pdf

41 For the text of the statement see the White house: fact sheet on <http://www.whitehouse.gov/news/releases/2003/09/20030904-11.html>

coordinated training exercises to improve the odds of interdicting the transfer of weapons of mass destruction to and from 'states and non-state actors of proliferation concern' ”⁴².

The interdiction principles agreed upon “recommend that states take specific actions permitted under the law, including stopping and searching ships and denying air transit rights, to prevent WMD transfers by air, sea or land”.⁴³

The PSI, partly, uses national regulations to enforce the boarding and inspection of suspected vessels and shipments in the major ports and hubs. By doing so it is trying to avoid conflict with international law and make inspection acceptable as routinely carried out as by port state control officers.

The fact that was realised from the beginning is there are shipments which never pass through major ports and hubs. Therefore, it was found that interdiction has to be extended to ships inside the other maritime zones, especially the high seas. This is where the initiative runs into problems and conflict with international law. Such problems are the “innocent passage” in the territorial waters of coastal states, the right to transit through straits, the freedom of navigation at the high seas and sovereign integrity of ships. This is why the USA, as one of the core members and a major player behind the initiative, tries to avoid such complications and to make the initiative more effective, and has worked hardly on concluding bilateral agreements for shipboarding with major flag states. The main emphasis has been on Flag States with open registries such as Liberia, Panama, the Bahamas, Malta, Cyprus, and the Marshal Islands. These States are collectively sometimes known as Flags of Convenience (FOC) States. They “feature the bare-bones registration procedures, inexpensive fees, and nonexistent oversight for ships listed under their flags. Accordingly, many ships involve in illicit trade, including narcotics,

42 Joseph J.: The proliferation security initiative: can interdiction stop proliferation? Arms control association, June 2004.
http://www.armscontrol.org/act/2004_06/Joseph.asp

43 White house fact sheet :Proliferation security initiative: statement of interdiction principles,. On line:
<http://www.whitehouse.gov/news/releases/2003/09/20030904-11.html>

counterfeiting, and weapons shipments, register with FOC states to evade intrusive questioning and seizure of assets”⁴⁴.

All agreements are consistent with the principles of sovereign equality and the territorial integrity of States and that non-intervention in the domestic affairs of other States. As an example the agreements between the USA and Belize, Marshal Island and Cyprus are drawn up on the same lines with almost identical provisions. This is an essential feature, especially when they provide for third party rights of jurisdiction. This makes implementation easy as long as they have the same agreements in place with familiar terms. Another example is the agreement between the USA and Panama, which has been subjected to a series of amendments to take into account the new developments and measures agreed upon regionally and internationally. This agreement will be discussed in detail as it provides a comprehensive and legally sound bilateral agreement with no violation to international law.

3.2.2. Bilateral agreement between the USA and Panama

A bilateral arrangement between the government of the United States of America and the government of Panama for supporting and assisting the United States coastguard for the national maritime services of the Ministry of Government and Justice has been in place since March 18, 1991. This was then followed by a supplementary arrangement between the same parties on February 5, 2002 to establish a program for conducting bilateral maritime law enforcement operations to stop illegal activities such as the international trafficking of drugs, based on the 1988 convention, illegal fishing and transportation of contraband. Finally, the supplementary arrangement was amended in order to facilitate cooperation between the United States and Panama to prevent shipments by sea of weapons of mass destruction, their delivery systems, or related materials by establishing procedures to board and search vessels suspected of carrying such items that are located in international waters.

⁴⁴ Supra 42.

How relevant the agreement is for both parties, and how it is reflected on the customary international law of the sea, as drawn up in the 1982 UNCLOS and other legal matters can be understood only by looking at the details of the agreement and the supplementary arrangement in place, Annexes A and B respectively, supported with the analysis below.

Looking at the preamble of the agreement, it refers to all the international conventions and protocols related to the subject matter to remind the parties that this agreement is not working in isolation of the other arrangements. The fact is that it is built on them, integrating them and forming the bases for jurisdictions established by the parties. The agreement recalls i.a., the UNSC resolution 1373 of September 28, 2001 and its main concern is terrorism and the illegal movement of NBC and other potentially deadly materials, the CWC done in Paris, January 13 1993, the NPT done in Washington, London, and Moscow, July 1, 1968, the BC done in Washington, London, and Moscow, April 10, 1972 and the PSI of September 4, 2003. Finally, it mentions the UNCLOS 1982 as it is the most comprehensive maritime convention and all conducts and obligations should stem from it and should not deviate from it.

Article I:

states the purpose and the scope of the agreement so that every individual and entity knows their job and to what extent they are allowed and obliged.

Article II:

gives clear definitions for all terms used to clear confusion and misinterpretation by legal entities as well as law enforcement officials. It indicates how important saving the right of ship owners and seafarers is by having a unified interpretation and hence avoiding subjective interpretation where possible.

Article III:

defines the designated auxiliary personnel, as it is important for law enforcement to know who it is to seek assistance from. This is crucial in emergencies when the range and extent of operations are beyond the capability of the permanent

force. A step like this gives the agreement momentum and makes it effective in all circumstances.

Article IV:

The parties have established a joint law enforcement shiprider program between the two law enforcement authorities. The program reflects the highest possible extent of cooperation and reflects the political will of the parties to suppress illegal traffic. In fact, it shows the spirit of one team rather than being two as the shiprider from one party has the authority to command the other party's personnel and vessels. Such an activity would eliminate biased decision making, exploit resources effectively and enhance the experience of both parties.

Article V:

is a complementary provision to article IV and stresses the overriding authority of the shiprider.

Article VI:

stresses the cooperation between parties in terms of operational support and technical assistance. It is necessary to exchange operational information on the detection and location of a suspected vessel and notify the other party as it provides full coverage for the area and avoids surprise by the suspected vessel. They work as if they are one unit reflecting the sense of responsibility.

In a step to deny a suspected vessel going away with their illegal activities, this article gives the other party the right to chase it into the territorial waters of the other party, stop it and wait there until the host law enforcement authority arrives. The remainder of the operation will be then in the hands of the host party who will have full jurisdiction over the vessel. However, the host party could entrust the whole operation to the chasing party, which can establish jurisdiction over the vessel. This reflects how practical the agreement is and how resources can be saved. The essence is to support each other to stop illicit traffic and not to make other gains such as confiscating vessels.

Extra measures are provided by the agreement in the case when a suspected vessel is spotted in the other party's territorial sea. The second party, can request authorization in order to enter the others waters and investigate until the arrival of the other party's law enforcement forces or perhaps ask them to continue with the operation. This kind of cooperation facilitates integration and definitely gives the enemy the right signal on how secure the area is. It might also act as deterrence against illegal traffic.

Articles VII and VIII:

As far as monitoring activities in waters and collecting information are concerned, articles VII and VIII still provide for an alternative option to collect information by using flights. This helps to speeding up operations and ensures a wider coverage of area. To avoid the sensitivity of the situation of having flights over their space, it is up to the shiprider of that state to judge the need to carry out over flights in an effort to collect information.

Article X:

clearly explains, in extensive detail, the obligation of both parties in international waters, the maritime zone where all disputes would arise.

It is clear from the wording of paragraph (1) (b) (i) and (ii) that there should be no boarding without authorization. However, paragraph (3) gives the requested party, after verifying the nationality of the vessel, the freedom to choose from many alternatives to board and search the suspected ship. It states that it may:

- a. decide to conduct the boarding and with its own law enforcement officials;
- b. authorize the boarding and search by the law enforcement officials of the requesting party.
- c. decide to conduct the boarding and search together with the requesting party; or
- d. deny permission to board and search.

There are cases when the requested party cannot verify registration for one reason or another within the two hours agreed upon under article X paragraph (4). In such circumstances, and to avoid the possibility of the suspected vessel escaping, the requested party may authorise boarding if the nationality is being confirmed, based on vessels claim. Otherwise, it can refute the claim of nationality in which case boarding will take place with the initiative of the requesting party leaving no gap whatsoever for escape boarding.

If this happens and no reply is received by the requesting party within the two hours agreed upon, the requesting party will be deemed to have been authorized to board and search. In a world of fast and reliable communications, the two-hour span is reasonable to process the information through the database to verify nationality and give a prompt response. On the other hand, assuming a ship speed of high tonnage is about 15 knots, the distance travelled will not be more than 30 nautical miles. This presents no threat at all, especially on the high seas, as being away from the territorial seas of others. It might be argued that too much time gives perpetrators the opportunity to get rid of illicit materials by disposing them into sea. There is no doubt about that but it could happen within the two hours as well, especially when talking about a few hundred grams of enriched Uranium. This argument might service states in favour of extending the response time as it gives them enough space to collect and process information when the ship under consideration has no previous record of suspicion. It needs to be born in mind that the flag state has an obligation to protect the interests of its ship owners and satisfy its people by acting as a true sovereign state.

Article XI:

provides that states have full jurisdiction within the territorial sea and the contiguous zone to board and search suspected vessels. However, there are cases in the contiguous zone where the suspected vessel is not flying the host party flag or fleeing from its territorial sea and the two parties have authority to exercise jurisdiction to prosecute, then whichever party conducts the boarding and search shall have the right to exercise jurisdiction.

Paragraphs 4 to 7 of the same article detail the rights and conditions to waive jurisdiction for other member States. Exercising jurisdiction will be under the rules of international law. Nevertheless, failure to waive jurisdiction after request, cannot in any way be interpreted as authorization.

Article XII:

A provision set in this article is to identify liaison officials and the liaison office to deal with all matters related to the execution of the agreement. Such matters are, including but not limited to, verifying registration, authorisation, and boarding. This office is essential as it represents the competent authority authorised by the law to deal with the agreement. It is important as it makes it easy to provide services around the clock to avoid the undue delay of ships and save time for the law enforcement activities of both parties.

Article XIII:

makes it clear for personnel involved that all efforts are directed towards targeting the suspected vessels of illicit traffic only. It works on a similar basis to those adopted in MOUs related to port state control but is carried out at sea and directed against illicit traffic rather than technical deficiencies.

Article XIV:

reminds the parties that it is their duty to communicate promptly all information related to the results of boarding and searching. Furthermore, the status of investigations, prosecution and judicial proceedings has to be reported in a timely manner. It is very important to exchange such information for future reference and probably wiser to have a common database that can be accessed by both officials with a policy of secrecy.

Article XV:

emphasises the safeguards that have to be followed by the law enforcement officials. The safety of personnel, the ship, and cargo should be of major concern as not every ship suspected of illicit traffic is proven to be guilty. Such cautious and prudent conduct would serve the State, as it will avoid it running into damages

claimed by a ship owner or his/her crew. Furthermore, it shows the State's respect towards international law.

Article XVI:

Technical support has to be asked in advance after evaluating the situation reported by the boarding party.

Article XVII:

The use of force when required is authorised under this article. Nonetheless, the rules of engagement are not mentioned in detail and left for the officials involved to base their own subjective judgment upon. This might not be a problem especially when the persons involved are professionals and bearing in mind that there are provisions providing for damage claims.

XVIII:

It is important to exchange the information of the respective applicable laws and policies, especially those pertaining to the use of force. This makes both parties familiar with their respective party, which helps, at least, the responsible and reasonable officials to make judgments on the illegal and biased behaviours of the other party.

Article XIX:

Although the essence of the agreement is to make money, disposition of assets is important as there are expenditures and financial obligations involved. This article gives the right for the boarding party to follow the disposition under their law, but bearing in mind the extent of the contribution by the other party.

Article XX:

One of the reasons that states tend to make agreements is to get technical assistance when required. This is why this article stipulates that.

Article XXI:

It is common practice that agreements have to be evaluated to find out their strengths and to support them and the weaknesses to avoid them.

Article XXII:

Consultation between parties to solve questions related to implementation helps with coming up with a unified interpretation. This ensures no conflict will arise between law enforcement officials.

Article XXIII:

As article XV provided for safeguards, this article provides for damages claimed by any claimant involved in the process. Disputes of claims will be solved in accordance with the boarding party's domestic law in a manner consistent with international law, including paragraph 3 of article 110 of UNCLOS.

XXIV

provides for other provisions to make the agreement more flexible.

3.2.3. Agreement between the USA and Jamaica

The two parties, the government of the USA and the government of Jamaica, agreed to co-operate on the suppression of illicit maritime drug trafficking and hence signed the original agreement in May 6, 1997⁴⁵. The parties then found out that such agreement is limited and did not reach the standard of the challenge posed by traffickers. In a workshop conducted in Curacao, Netherlands Antilles for the period 10-12 December 2003, the secretariat said:

The most frequently encountered method of trafficking drugs in the Caribbean is by go-fast vessels. The proximity of some states in the region allows go-fast to

transport drugs from one jurisdiction to another in a matter of minutes. Even when specific intelligence exists to pinpoint the time and place of departure, the speed and manoeuvrability of such a boat and the flexibility of its crew to jettison drugs and/or divert to a different landing site can easily frustrate the most well-planned and coordinated unilateral counter-drug operation. Such operations require multilateral, well-developed, pre-arranged, and expeditious information sharing and operational protocols in order for the nations concerned to cooperate more effectively and efficiently than the drug smugglers.⁴⁶

The agreement then was amended to include the use of other states' vessels as platforms for the use by law enforcement of both sides. Article 14 *bis* of the amended agreement which provides that: Law enforcement officials of the parties may also operate pursuant to this agreement from vessels and aircrafts of other states, including any boat or aircraft embarked on vessels, that are clearly marked and identifiable as being on government non-commercial service and authorized to that effect, as may be agreed to in writing by the parties, in accordance with arrangements completed by either party with those other states. This arrangement is reflected in the United States of America Embassy's note 3587703/202 to Jamaica, February 6, 2004 "The ministry notes the information supplied by Embassy of the United States concerning U.S. Coast Guard law enforcement detachments (LEDETS) embarked on Government ships of the Kingdom of Belgium, of the Kingdom of the Netherlands, and of the United Kingdom of Great Britain and Northern Ireland pursuant to standing arrangements with those Governments"⁴⁷.

45 The details of the agreement can be found on

http://www.caricom.org/jsp/secretariat/legal_instruments/agreement_jamaica_us_drugtraffic.jsp?menu=secretariat

46 The report of the secretariat of the workshop on regional maritime agreement, beyond mere ad hoc interdiction: Implementing the Caribbean Regional Agreement, p1. Curacao, Netherlands Antilles for the period 10- 12 December, 2003. The text on file with the Author.

47 Text on file with the author

Shipboarding by the other party is carried out only seaward of the territorial sea and the terms, which are always used are: *request* and *authorization*. When there are reasonable grounds to suspect a vessel if engaged in illicit traffic, the boarding party may request the other party to verify registration, to authorise the boarding and search of the suspected vessel, cargo and persons found on board by the law enforcement officials of the first party.

When permission to board and search a vessel is granted and evidence is found of illicit traffic, the requesting party has an obligation under article 3 to communicate information to the flag state “the flag state shall be promptly informed of the result of the search, including the names and claimed nationalities, if any, of the persons on board” and further, the flag state is “ requested to give directions as to the disposition of the vessel, cargo and persons on board, pending receipt of such instructions, the vessel, cargo and persons on board may be detained”.

Precautions have to be taken not to endanger the safety of life at sea, the security of the suspected vessel and its cargo, or prejudice the commercial and legal interests of the flag state or any other interested states.

To facilitate quick action and preserve sovereignty, article 7 gives the government of Jamaica the option to designate law enforcement officials who, subjected to Jamaican law, may for the conduct of law enforcement operations for prevention, detection and suppression of illicit traffic by vessels in Jamaican waters, embark on United States law enforcement vessels. While so embarked and for the aforesaid purposes, such Jamaican law enforcement officials may:

- a. enforce the laws of Jamaica in Jamaican waters and seaward there from, in the exercise of the right of hot pursuit or otherwise in accordance with international law; and
- b. authorize the entry of the vessel into and its navigation within Jamaican waters.

All activities, including boardings, searches, seizures, detentions and enforcement of Jamaican law under this article relating to suspect vessels shall be the responsibility of the Jamaican law enforcement officials and carried out by them. The same can happen on Jamaican vessels in United States waters as provided for in article 8.

It should be mentioned here that, although all the agreements, bilateral or multilateral, are mutual in nature they are made in the Caribbean for mainly the interest of the USA as it is targeted by drug dealers basically because it is a good consuming market. However, the agreements may have future impact on the production of drugs when the market diminishes. Furthermore, enough safeguards are included to protect the interests of the other parties.

3.2.4. UK-USA Cooperation

It might be argued that most of the boarding agreements are concluded between the government of the USA and other states of no power to object such agreements. The fact is that there are boarding agreements between the powers. The motive and geography play a role in concluding such agreements. The most appropriate example is the 1981 Exchange of Notice between the governments of the USA and the government of the UK to cooperate in the suppression of the unlawful importation of drugs into the United States. Such cooperation is required as there are many ships home ported in UK Caribbean Dependency States which are registered in Britain. The UK has no interest other than expressing the sense of responsibility and the willingness to cooperate in friendship. The agreement "is to obviate the necessity of requesting individual authorizations from the United Kingdom for U.S enforcement authorities to board ships under the British flag outside the limits of the territorial sea and contiguous zone of the United States and within specific areas in any case in which the U.S. authorities reasonably believe

that the vessel has on board a cargo of drugs for importation into the United States in violation of U.S. laws⁴⁸.

This agreement is interpreted by the United Kingdom as 'non-reciprocal' in nature and drafted on the same lines as the regulation of Liquor Traffic of 23 January 1924. Therefore its provisions are designed solely to facilitate the effective enforcement of US law subject to a number of safeguards for the UK⁴⁹.

The safeguards, which were provided to avoid abuse by the US law enforcement, can be derived from the agreement as⁵⁰:

- a. On boarding the vessel and evidence from enquiry and other measures suggest that an offence of importation of drugs is committed, the UK then agrees not to object the search of the vessel by U.S. authorities,
- b. If the offence is being committed, the United Kingdom agrees not to object to seizure of the vessel (and the arrest of crew)
- c. Within 14 days of the vessel's entry into port the United kingdom may object to the continued exercise of U.S. jurisdiction for the purpose of U.S. laws related to the importation of narcotics, whereupon the U.S. Government is required to release the vessel without charge. The United States may not institute forfeiture proceedings before the end of the 14-days period
- d. The United Kingdom may object within 30 days of the vessels entry into port to prosecute any UK national found on board, whereupon the U.S. government must release the person.
- e. Either Government on one month's notice may terminate the agreement.

48 Leigh M. N.: Contemporary practice of the United States related to International law, *The American Journal of International law*, vol.76, No.2, (April, 1982), pp.377-379.

49 William C. Gilmore: Narcotic interdiction at sea, UK-US cooperation, *Marine Policy*, 13., 218-230, July 1989.

50 Supra 48.

3.3. Multilateral agreements

Multilateral agreements which involve shipboarding is best represented by the widely accepted conventions, the 1988 United Nations convention for the suppression of illicit drug trafficking and the 2000 Palermo Protocol against illegal immigration. Nevertheless, the boarding of suspected ships requires the authorization of the flag State. Article 17 (3) of the 1988 Convention states that: “a party which has reasonable grounds to suspect that a vessel exercising freedom of navigation in accordance with international law and flying the flag or displaying marks of registry of another party is engaged in illicit traffic may so notify the flag State, request confirmation of registry and, if confirmed, request authorization from the flag State to take appropriate measures in regard to that vessel”. However, they have organized in a concrete way the cooperation between States, should ships on the high seas be discovered and suspected of such illegal activities.

The United Nations Charter under article 21 approves such agreements. An example of a standing agreement is the treaty establishing the regional security system (1996) amongst a number of Caribbean States, Antigua and Barbuda, Barbados, the Commonwealth of Dominica, Grenada, Saint Christopher and Nevis, Saint Lucia and Saint Vincent and the Grenadines.⁵¹ It is based on the mutual co-operation and the sharing of resources. Some of its important provisions will be discussed later on.

Churchill and Lowe describe regional multilateral institutions legality by saying: “they have been established by the agreement of the neighbouring States, and do not purport to impose legal duties or liabilities upon non-States”⁵². This view was reflected again during the war of Federal Republic of Yugoslavia against Kosovo when in 1999 NATO proposed, in response to the bombing of Kosovo by the Federal Republic of Yugoslavia, to intercept ships-including ships not flying the

⁵¹ For the details of the treaty see The treaty establishing the regional security system (1996), U.S. Department of State on line: <http://www.state.gov/t/ac/csbn/rd/4367.htm>

⁵² Supra 5, p. 220.

flag of NATO partners that were suspected of carrying oil to the federal Republic. The proposal was criticized as illegal because of the lack of Security Council authorization⁵³. Furthermore, NATO agreement (pact) is binding on member states only.

However, multilateral agreements can not succeed by themselves only; they require collaboration with national and other actors. Molenaar says “Multilateral institutions normally operate alongside national, regional, and sometimes civil society actors, and are most effective when these efforts are aligned to common goals. This is as true of and non-proliferation measures”⁵⁴.

A wider multilateral agreement following the same theme, but looked at as a more comprehensive agreement is the one called the Caribbean Area Agreement or “the 2003 San Jose Convention”. It was opened for signature in Costa Rica on April 10, 2003. As of December 2003, ten states have signed the agreement: Costa Rica, Dominican Republic, France, Guatemala, Haiti, Honduras, Jamaica, Netherlands, Nicaragua, and the United states.⁵⁵It is intended to suppress illicit drug activities but in a wider range including other states besides the Caribbean.

Finally, the United Nations conference on straddling fish stocks and highly migratory fish stocks in its sixth session, New York, 24 July-4 August 1995, provides the authorization to board and inspect vessels on the high seas that are in possible violation of the regional or sub-regional regulatory schemes created pursuant to the agreement. Article 22, gives a clear indication that the suspected vessel can be boarded and searched before the flag state is contacted as long as the vessel in the region has agreed upon this. Investigations then will be left for the flag state to decide who will carry them out to make sure adherence to the agreement is achieved. It might be left to the same boarding state. Based on this agreement, sub

53 Supra 3,p.221.

54 Supra 40, pp.17-18.

55 The report of the secretariat of the workshop on regional maritime agreement held in Curacao, Netherlands Antilles for the period 10- 12 December, 2003 (The text of report with the author).

regional and regional agreements are concluded all over the world for the conservation and regulation of fishing on the high seas adjacent to them. Another example in the fisheries field is the South-East Atlantic Ocean convention on the conservation and management of fishery whereby enforcement measures are taken.

3.3.1 Treaty establishing the regional security system in the Caribbean (1996)

Although, there are many bilateral and ad hoc agreements in place within the Caribbean area, “the threat to the region is significantly increased by the lack of a cohesive operational framework”⁵⁶.

This lack of cooperation and coordination, exacerbated by sensitivities over national sovereignty, corruption, and absence of trust, and inability or unwillingness to share information with one another, unharmonized legislation, and ineffective mechanisms, is thoroughly exploited by the drug traffickers to their benefit.⁵⁷

Realizing the reasons mentioned above, and many others, the situation urged the whole area to think the matter over again and stand for the threat by putting their efforts together in one solid agreement, The Treaty Establishing the Regional Security System (1996).

The following is an insight into the main articles, in particular the purpose and function of the system (article 4), and the jurisdiction (article 11). These articles are mentioned for the sake of comparison as they are included in all agreements but in different wording.

Article 4

This article states the purpose and the function of the treaty, which is to promote cooperation among member states in, among other things, the prevention and interdiction of traffic in illegal narcotic drugs, immigration control, fisheries protection, and the prevention of smuggling. These activities require the boarding of

⁵⁶ Maritime Counter-drug Cooperation in the Caribbean, beyond Mere ad hoc interdiction, Paragon, May15, 1997, Barbados, West Indies, p.2-3.

ships and search them by the joint law enforcement team. Furthermore, the member states shall have the right of “hot pursuit” within each other’s territorial sea and EEZ.

This reflects the satisfaction of member states, as they perceive no infringement to their sovereignty as long as boarding is carried out jointly.

Article 11

It is a common practice to clarify, under articles establishing jurisdiction, the rights and obligations of parties in the different maritime zones. However, in this agreement no mention whatsoever of this matter is made under this article because such rights make no difference as activities of shipboarding are taken care of by the joint team of boarding. Hence it is assumed that activities are to be carried out by the law enforcement of the same State.

This article is reserved to clarify the jurisdiction over personnel involved in the operations where it is stated that “the Service Authorities of one member state have, within another member state or on board any vessel or aircraft of the other state, the right to exercise all such criminal and disciplinary jurisdiction over the service personnel of the first-mentioned member state, as are conferred on the service authorities of that state by the laws of that state, including the right to repatriate personnel to their own state for trial and sentencing”.

It has been proved in this chapter that the most effective way to regulate shipboarding is to have agreements in place. Nevertheless, most of these agreements are limited to mainly bilateral agreements or arrangements with a limited purpose, and the multilateral ones are more or less limited to regional membership and serve one purpose. The next chapter will focus on the new arrangement of shipboarding under the SUA Convention 2005, where it is open in membership to all IMO Member States and covers many offences.

57 The Caribbean and the Drugs problem, *report EU Experts Group*, April 1996, p.51.

CHAPTER FOUR

SUA Convention

4.1. Background

Terrorist activities at sea are a relatively new phenomena compared to the long-standing acts of piracy. It was not until the hijacking of the Italian passenger ship, *Achille Lauro*, in 1985, that the international community considered developing measures to combat such activities. Due to the legal gap in international law, this incident was branded as an act of piracy by a number of states, including the USA. However, the debate was not long-lived, as the incident did not qualify under the definition of piracy in UNCLOS, especially the private ends and the two ship criteria. Mejia clarified this issue by stating, “while the concept of the private ends may prove to be too ambiguous a benchmark, one could still differentiate terrorism from piracy and armed robbery by claiming that the two differ in motive, the former being politically motivated and the latter financially motivated”⁵⁸. The government of Italy “soon after the conclusion of the *Achille Lauro* affairs, called for the international community’s attention to the requirement for a convention on maritime terrorism, in order to fill a lacuna in the legal frame work of the fight against terrorism”⁵⁹. The

58 Mejia M.: Defining maritime violence and maritime security. In Mukherjee, Mejia, Gauci (Eds.), *Maritime violence and other security issues at sea* (pp.27-38). Malmö: WMU.

59 Jesus L. J. :(2003).Protection of foreign ships against piracy and terrorism at sea: Legal aspects. *International journal for marine and coastal law* , 18,363-400.2003

international community responded to this call and adopted the SUA Convention in March 10, 1988 in Rome, Italy. The convention entered into force in March 1, 1992.

The attacks against the United States marked the beginning of an era of stringent security measures unparalleled in the history of transportation. The use of civilian aircraft as weapons to destroy symbolic targets and cause the death of thousands of innocent lives led the shipping community to consider unimaginable threats and risks to ships and port facilities. "The World Bank estimates that the attacks of 11 September 2001 alone increased the number of people living in poverty by 10 million; the total number cost to the world economy probably exceeded 80 billion dollars"⁶⁰. This resulted in a several serious initiatives by IMO. These initiatives concentrated on the technical aspects, which include, among others, the following measures:

- a. The partitioning of Chapter XI of the SOLAS Convention into two parts. The new Chapter XI-2 dealing with special measures to enhance maritime security.
- b. The International Ship and Port Security (ISPS) Code, which entered into force in July 2004.

This approach was realised not to be enough to deal with maritime terrorism and today's security issues from a judicial point of view, hence tighter international regulations needed to be in place to face vulnerabilities and secure the punishment of offenders when acts are about to be, or are committed. Admiral Mitropoulos described the misjudgement of the vulnerability of the maritime sector by saying "The maritime domain has been described as being of unparalleled importance, but at the same time, it is clear that the global maritime transportation system provides a vulnerable and valuable target for terrorists"⁶¹. The international community, in particular the shipping sector, was puzzled as there was no legal framework to facilitate the stopping and searching of ships on the high seas suspected of being

⁶⁰ Supra 40, p.14.

⁶¹ "IMO pursues global security consciousness", *Bimco*, 11October 2005 On line:

<http://www.bimco.dk/Members%20Area/News/Security/2005/1011-IMO%20pursues%20global%20security%20consciousness.aspx>

involved in unlawful activities, other than those illegal acts stated in UNCLOS⁶² such as piracy and the slave trade. “In the absence of an internationally accepted framework, it is legally incorrect to order a ship flying another nation’s flag to stop and be searched in international waters without running the risk of a major diplomatic incident as was the case of *So San*. This will definitely lead to a diplomatic and legal confrontation as was the case of *So San*, a North Korean freighter, intercepted by Spanish frigate, carrying a legitimate cargo of missiles for Yemen”⁶².

One of the measures thought to be effective in highlighting and tightening security in the maritime sector was to review the international treaties available and to broaden the expected criminal offences related to the use of ships in carrying out unlawful acts. The best and fastest way to do so was to have a new protocol to the SUA convention 1988, which was limited to a few unlawful acts. These acts were mainly:⁶³

- a. The seizure of ships by force;
- b. Acts of violence against persons on board ships; and
- c. The placing of devices on board a ship which are likely to destroy or damage it.

The convention obliges Contracting Governments either to extradite or prosecute alleged offenders. There was no mention of a terrorist’s activities in relation to WMD and their transport.

The revision was emanated from the IMO Assembly Resolution A. 924(22) in November 2001 on “Review of measures and procedures to prevent acts of terrorisms which threaten the security of passengers and crews and the safety of ships”. This resolution reflected the will of the United Nations Security Council in its

62 Sakhuja V: Reinforcing SUA Convention: Towards A Safer Maritime Navigation,2005 .(on line, Retrieved April 10 2006)
http://www.sspconline.org/article_details.asp?artid=art64

63 IMO: Review of the SUA Convention and Protocol. *Legal Committee (LEG), 88th session*.London:IMO, (19-23 April 2004)
(on line, April 17 2006): http://www.imo.org/About/mainframe.asp?topic_id=280&doc_id=3352

resolutions, not to mention, 1368(2001)⁶⁴ and 1373(2001)⁶⁵ to combat terrorism in all its forms and manifestations and urge all member states not only to become parties to the existing conventions but also to participate in the review of those conventions.

Over the period of deliberations to review the SUA convention and its protocol many maritime incidents involving different unlawful activities related to states or terrorist organisations took place. This assisted in giving the deliberations more heat and real understanding of the problem. In October 2002, a French-registered oil tanker, *Limburg*, was attacked by using an explosive-laden small boat. 90,000 barrels of oil spilled into the Gulf of Aden⁶⁶. On April 24, 2004; a similar attack against offshore Iraqi fixed platforms for oil loading was intercepted. The attackers used a dhow⁶⁷.

4.2. SUA Convention 2005

Pursuant to IMO resolution A. 924(22), the Legal Committee started providing the legal basis for actions to be taken against persons committing unlawful acts against ships and fixed platforms.

The IMO created an environment of enthusiasm and responsibility among member states to review the convention and bring about changes to take into account new security concerns especially in view of the expanding threat of maritime terrorism at sea. The main aim of the changes was to have an appropriate legal framework in place against persons committing unlawful acts against shipping. IMO Secretary-General Mr. William A. O Neil, speaking at the opening of the Legal

64 Security Council 4370th Meeting (PM) unanimously adopting resolution 1368 (2001), calling on all states to bring perpetrators to justice. The Security Council condemns, 'In Strongest Terms', Terrorist Attacks on USA. On line:http://www.bits.de/public/documents/US_Terrorist_Attacks/Security_Council.htm

65 UN Security Council notes with concern the close connection between international terrorism and Transnational organized crime, illicit drugs, money-laundering, illegal arms-trafficking, and illegal movement of nuclear, chemical, biological and other potentially deadly materials, and in this regard emphasizes the need to enhance coordination of efforts on national, sub regional, regional and international levels in order to strengthen a global response to this serious challenge and threat to international security;

66 Richardson M. : *A time bomb for global trade*,(p.18). Singapore: ISEAS publications, (2004).

Committee 83rd session from 8 to 12 October 2001, told the Committee that the shocking events of 11 September 2001 could not be ignored by an international Organization such as IMO, which has as an integral part of its mandate the duty to make travel and transport by sea as safe as possible. He added, "Apart from any possible revision of practical preventative measures advocated by IMO, it is also important to ensure that criminals who have perpetrated acts of violence at sea be properly brought to trial and punished". This is directly related to two important IMO legal treaties on prosecution and extradition adopted in 1988, namely, the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (the SUA Convention) and its Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf (the SUA Protocol).

All delegates expressed strong support for the SUA revision in order to combat terrorist acts. They expressed their concerns as many of them have suffered the brutality of terrorists in one way or another. The unlawful acts covered by the new convention were broadened to include an extensive list of unprecedented elements. The revisions also included novel provisions to facilitate the boarding of ships where offences may already be in the process of being committed, with the intention of preventing or neutralising their potentially damaging consequences.

Deliberations by member states around the different provision were complex due to political sensitivities among delegates especially when issues derived from other conventions such as the nuclear non- proliferation were debated. Although there was no disagreement on the necessity to combat the menace of terrorism, there was a need to consider the different views on best practices of international law.

In his speech Admiral Mitropoulos called for delegations to co-operate in good faith when debating the SUA treaties, saying that he understand and respect "the sensitivity of any state over sovereign issues and its right of non-interference in its internal affairs" but at the same time, he added "states have responsibilities

67 Levin R.: *Maritime terrorism-A survey and bibliography*, (p.11), Haifa: University of Haifa, 2005.

towards their own people, the international community and their international engagements”⁶⁸.

The unfortunate thing about the convention is it gave more emphasis to certain member states views rather than the ultimate quality of the legal framework based on consensus. In doing so, the convention ignored many valid concerns by a number of member states. This, of course, put many of them at a disadvantageous position, hence making them reluctant to comply with the conventions and expressing that in advance. This was reflected, as an example, in the statement made by the delegate of India conveying his government’s “disappointment about the review process and stated that the process did not address its concerns and did not conform to the principle of consensus. India stated that it could not join the consensus”⁶⁹. The rest of the chapter will focus on the essential points of SUA Convention 2005, mainly the extended offences, transport offences and the boarding provisions.

4.2.1. Transport offences and biased implications

The transport of certain types of materials and equipment on board ships are regarded by the protocol as criminal offences. The materials include:

- a. any explosive or radioactive material,
- b. BNC weapon,
- c. any source material, special fissionable material, or equipment or material especially designed or prepared to the processing, use or production of special fissionable material,
- d. Any equipment, materials or software or related technology that significantly contributes to the design, manufacture or delivery of a BNC weapon.

⁶⁸ Sandra Spears.: Mitropoulos appeals for good faith in talks on maritime anti-terror convention, *Lloyd list*, October 11,2005.

A careful examination of article 3bis1 (b) (iii), reveals some bias as to whom this provision applies. It certainly denies some of the nuclear powers such as India, Pakistan and Israel the right to transport any nuclear-related material putting them at an arguably disadvantageous position. The delegate of India expressed openly the views of his government saying “India cannot accept the text of article 3bis 1(iii), since it seeks to extend the requirement of the comprehensive safeguards to India. As a state not party to the NPT, India is not under any obligation to have comprehensive safeguards”⁷⁰. The delegate from Pakistan expressed the same views. Furthermore, article 3bis 1(iv) gives the interdicting party the right to judge whether the equipment, materials or software are related to BNC weapons or not. The provision is of questionable logic as there are materials of dual-use, which may be prohibited under the national legislation of one country, but not so under the legislation of another.

What makes the situation even more biased in article 3bis 1(iv) is that it gives states parties to NPT a sound advantage as they are the only ones afforded the right to transfer materials covered by article3bis 1(iii),(iv). This again can be seen as a curtailment of the rights of states not party to NPT to pursue peaceful uses of nuclear energy and to transport, including on its own civil/commercial vessels, nuclear or nuclear related materials for peaceful purposes. The inclusion of such a safeguard constitutes clear discrimination and could lead to resentment and political unwillingness to cooperate.

The Convention, though it was referring to NPT as an important treaty for states to fall back on in many cases, raises serious concerns. It jeopardises articles I, II and III of the NPT related to non- proliferation of nuclear weapons. The convention permits nuclear powers to transfer nuclear materials and technology to other states under their control as it is provided in article 3bis(2) “it shall not be an offence within the meaning of this convention to transport an item or material covered by paragraph 1(b) (iii) or, insofar as it relates to a nuclear weapon or other explosive device, paragraph 1(b) (iv), if such item or material is transported to or from the

69 IMO:Record of decisions of the second plenary meetings: Statement by India. *Leg./conf. 15/rd/2, Annex1*, 14 Nov., 2005.

territory of, or is otherwise transported under the control of, a state party to the treaty on the Non- proliferation of Nuclear weapons". This is not just an infringement of the NPT but it is in contradiction with the fair uniform implementation of the convention. In fact, it collides with many national legislations as evidence can be derived from the South African statement in the last meeting of NPT held in New York "The amended provisions are in direct conflict with South Africa's policy on nuclear Non-proliferation and disarmament, as well as legislation that outlaws the transfer of such items for any weapon purposes, consistent with our obligations under article II and III of the NPT. If the SUA provisions are not brought into line with the NPT, South Africa will not be able to become party to this instrument-unless we reserve our policy and legislation that have made South Africa's process of nuclear disarmament and nuclear non-proliferation an irreversible one"⁷¹ .

It should be envisaged that the transport provision is not a real impediment to transfer WMD-related materials. "Even if universal participation were possible, the most likely proliferators, such as North Korea, could always elect to transport WMD shipments under their own flag, thereby guaranteeing that consent would be forthcoming"⁷². Any terrorist group can take the same approach by switching over from one flag non-party to another, leaving the provisions of the convention paralysed with limited authority.

Some terrorist groups have used shipping as a means of conveyance for positioning their agents, logistic support, and generating revenue⁷³. This is probably the reason behind another controversial provision as in *3ter*. Although it might be theoretically sound to criminalise a person who transports any person involved in committing an act regarded as an offence under other conventions as listed in article 7(the annex), it is absolutely impossible in practice to know such a person. How is it possible for a seafarer, say the captains, to know the persons who have committed

70 *ibid* 70.

71 Statement of South Africa delegate(main committee I), New York, 2-27 May 2005.(on line: <http://www.dfa.gov.za/docs/speeches/2005/mint08222g.htm>

72 Smith D.:Establishing a global quarantine against weapons of mass destruction. (2005), (On line, April 4 2006 www.citba.org/Docs/2nd%20place%2005%20Vance%20paper.doc).

crimes under other conventions unless such information is being communicated to them with their personal details including a recent photo? In addition, it is assumed that they have not changed their appearance and obtained forged identity documents.

Last but not least, we should remind ourselves “the issue of nuclear weapons proliferation and disarmament are related. It is unreasonable to expect other nations not to acquire a weapon that the nuclear weapon states find essential for their own security. On the contrary, emerging and worrying concept of ‘pre-emptive war’ ‘and first strike’ may prompt countries to acquire nuclear deterrence in order to defend the country against what they perceive as Western aggression”.⁷⁴

In conclusion, the omission of the phrase ‘for terrorist motive’ from the definition of transport gives an indication that the convention is directed towards states rather than terrorists. The provision relating to transport is written on discriminatory basis as it extends to international instruments, which are not applicable to certain States and not easily digested by seafarers. Furthermore, the introducing of safeguards gives rise to putting some of the States in an advantageous situation while subjecting others to abuse. The obligations on seafarers are beyond human capabilities unless supported with a huge, updated database and with comprehensive cooperation and information sharing. This is not feasible at this time as mistrust is the dominant factor.

4.2.2. The dual-use ambiguity

The Convention tries to distinguish, through an extensive definition in article 2 between materials for general civil use and those intended to be used for the manufacture of weapons of mass destruction. The distinction is made in spite of the fact that people with a seafaring education and background cannot in any way judge

73 United States department of State: International outreach and coordination strategy for the national strategy for maritime security. Appendix A (p2), Nov. 2005.

74 Supra 22.

the type of material being shipped. According to Professor Chai, “Seafarers are in that respect ordinary people and they are not specially trained to deal with those products.” He adds that “the matter is made further complicated by the fact that the protocols refer to many other conventions and international regimes, sometimes for the purpose of designating certain materials forbidden to carry and sometimes with the aim to note certain occasions permitted to transport”⁷⁵.

Michael Beck, executive director of the centre for international trade and security, writes “no countries are known to be exporting ready-made WMD. The problem is the export of components, technologies, and production materials associated with WMD-items which are far more elusive because they are civilian as well as military end-uses and their trade is not illegal...95 percent of the ingredients for WMD are dual-use in nature, having both civilian and WMD applications.”⁷⁶

It is impossible for seafarers or owners to determine the future of every individual consignment of dual-use components as destined for the production of WMD. Timlen comments on such obligations by saying “here the industry for the most part is reliant on government agencies to combine analysis of cargo information received in advance with input from intelligence services, to identify consignments that may be destined for WMD production”⁷⁷ in which case boarding might be justified.

The Wassenaar arrangement mentioned previously would have been adopted by shipping companies at least to recognise dual-use materials from those prohibited before the captain signs the bill of lading. This of course requires an expert’s judgement, which is not always available especially when talking about tramps that collect their cargo from different places at different times. There is no direct support from the management and the captain’s judgment is the only option available. Moreover, the dual-use offence definition “is excessively wide and may

75Chai L. S.: *The revision of the SUA Convention*, a paper submitted in the maritime security symposium held in the world maritime University, 2006.

76 The promise and limits of the PSI. *The monitor* 10:1 (spring 2004), centre for international trade and security, pp.16-17, at: http://www.uga.edu/cits/documents/pdf/monitor/monitor_sp_2004.pdf.

77 Thomas Timlen: The broadening scope of maritime security. *Bimco Review* 2005, 182-183.

open possibilities for subjective interpretation”⁷⁸. For example “to be a biological weapon, the biological substance must be ‘of types and in quantities that have no justification for’ peaceful purpose”⁷⁹. This creates difficulties not just for the seafarers but for the law enforcement authorities as it is subjected to subjective judgment as well and would be liable to abuse since they are the final arbiter in deciding its scope. In this respect the safeguards phrase “intentionally and unlawfully” that qualifies an act as an offence is not enough to dispel responsibility. Furthermore, “it is not clear whether the unlawfulness will be determined according to international or national law”⁸⁰.

The problem of dual-use materials cannot be solved by merely tightening its transport, but to “some observers recommend strengthening export controls to keep sensitive technologies off the international market, thereby restraining the ability of states to develop WMD”⁸¹.

This author is of the opinion that proliferation is fuelled by dual-use items, especially when it comes to chemical weapons. Even if it is assumed that seafarers can be taught to make the right judgement about the materials shipped, the problem of dual-use materials will be persistent as it is not possible to ban their transport based on speculations on their future use and a State’s intentions.

4.2.3. The boarding regime and controversy

The committee recognized that the inclusion of boarding provisions implied a substantial inroad into the fundamental principles of freedom of navigation on the high seas and the exclusive jurisdiction of the flag states over their vessels. (IMO legal committee, 2004)

78 IMO: Record of decisions of the second plenary meetings: Statement by the Russian Federation. *Leg/conf. 15/rd/2, Annex 3*, 14 Nov., 2005.

79 *Supra* 76.

80 Z Oya Özçayir: Convention for the Suppression of Unlawful Acts of Violence against the Safety of Maritime Navigation, *The International Journal of Maritime Law*, 11, 432-439.at 439.2005.

It has been long recognised that the right to board a ship is limited to flag and coastal states besides the clear-cut cases provided for in international law, which are regarded as exceptions of the flag state jurisdiction. The establishment of jurisdiction over boarding is clearly elaborated on in international law and the conventions. Where a flag state has exclusive jurisdiction over its ships, the Coastal state is restrained by provisions promoting the non-interference principle in favour of navigational rights and non-discrimination.

The request to stop and board ships at sea, and then search them, their cargo and persons on board including questioning persons is so granted under the new SUA Convention, subject to certain conditions. Such a measure against suspected ships would be generally based on solid information gathered by member states, called the requesting party, followed by the consent of the flag state; otherwise boarding without consent would subject the requesting party to legal sanctions.

As it is impossible to search every ship, especially containers and their cargo, “accurate and timely intelligence of any terrorist threat will remain the key to success”⁸². Intelligence helps in managing the operational aspects and creates the legal justifications of interdiction. The most profound example is the *So San* case mentioned in chapter two. The ship was intercepted not because it was suspected of carrying WMD, but the legal justification was that the ship assimilated without flag and interception was facilitated by article 110 of UNCLOS 82. Without the help of good intelligence that justification would not be possible⁸³.

81 Supra 73.

82 Richardson M.: The proliferation security initiative (PSI) An assessment of its strengths and weaknesses, with some proposals for shaping its future, a paper submitted to the maritime security symposium held in the World maritime University, 2006.

83 U.S. intelligence had evidence that a North Korean ship, the *So San*, was carrying Scud missiles to Yemen. Three Spanish naval units pursued the vessel in international waters of the Indian Ocean. Surveillance revealed the facts which provided legal justification for boarding. No vessel named *So San* was registered under the North Korean flag. The crew kept raising and lowering its flag and “*So San*” was freshly painted on the stern, the customary location for a ship’s name. Under international law, all of these facts permitted Spanish warships to invoke a peacetime right to approach and visit “stateless” vessels.

Unfortunately, the SUA Convention does not provide mechanisms for information exchange, especially when there are states, which lag behind when it comes to intelligence. Nevertheless, “there will have to be a careful trade-off between providing sufficient intelligence to show cause and protecting intelligence methods and sources”⁸⁴. The general problem, especially with those states leading in intelligence capabilities, are the “loath to pool, collate and share such data and intelligence (and their analysis); public information on, for example, the movement of ships may be useful not only to states, but also to terrorists”⁸⁵. Moreover, the collection and exchange of information and its reliability has been proven to be shaken, where the experience from the 1993 detention of the Chinese vessel *Yinhe*, which was suspected of carrying chemical warfare precursors to Iran, is a specific example of faulty intelligence resulting in an unjustifiable interdiction⁸⁶. This was then followed by even more misleading intelligence concerning Iraq having WMD, which led the USA and its coalition partners to go to yet another unjustified war against the country. Such examples will definitely make states hesitant to accept information from others that might run them into legal problems and the presumable liability for any cost or damage incurred by the boarding state. The whole regime will then be exploited by the super power states only and a new order, at least on the high seas will prevail as long as there are nations whose political wills are undermined for one reason or another. Professor Chai in this respect stated “one could easily envisage the situation where a superpower makes use of the new regime as a ground to police the sea carriage on the high seas”⁸⁷. This is a fact because there is “only a handful of navies in the world maintain a presence outside their immediate regions, and only the United States maintains a global presence”⁸⁸. This can be illustrated by looking at the agreements concluded among PSI member states where only the USA has bilateral ship boarding arrangements with the other member states and is the only member with a global navy. Nevertheless, submitting

84 Valencia M.J.: *The proliferation security initiative: Making waves in Asia*, P.41, New York: Routledge, 2005.

85 Chatham House: Ship-boarding: An effective measure against terrorism and WMD proliferation?, A summary of the discussion of the international law discussion group at chatham house, held on 24 Nov. 2005.

86 Supra 83, p. 39.

87 Supra 76.

88 Supra 42.

to this reality, one way around it could be to have enough safeguards to protect other parties.

The Convention should have envisaged that there would be states at a point of time who will not give authorisation for others to board their ships when the evidence is not clear enough or they have something to hide. The problem is more serious when it comes to states of concern, which are at the same time not parties to the convention, and there is no legal ground to board their ships.

In spite of paragraph 3 in Article *8bis* where it provides that parties could postpone measures to be taken at the next port of call or elsewhere, the Convention is giving too much weight for shipboarding on the high seas contrary to the fact that boarding for the sake of searching for WMD related materials is impossible to be carried out there. This requires complicated technologies, experts for each special type of material or ready weapons and definitely human resources, especially when talking about containers and general cargo ships. The job is like searching for a needle in haystack.

Other than that, the mechanism stipulated for authorization is practical and follows a logical order as long as the parties are well prepared and have already nominated the competent authorities to deal with requesting matters. Article *8bis* Paragraph 5(c), (d) and (e) are worded in a way to preserve sovereignty and make the requested state run the scene. In fact even State proliferators, under international pressure or for political gains, might be encouraged in a certain stage of time to make accession to the Convention as they can always deny authorization to board and search their ships.

4.2.4. Criminal Jurisdictional bases

The establishing of criminal jurisdiction, as can be interpreted from the convention, covers all the maritime zones, including the territorial waters. This would give the convention extra strength and reliability to chase proliferators and leave no legal gap which can be exploited by the different users. Besides, it is a great help for

large flag states and open registry flags, who cannot practically bear such responsibility throughout the world where their ships trade. Hence, the jurisdictional basis approved by the convention can be derived from Article 6 as follows:

- a. Nationality-based jurisdiction. This is based on the offender's citizenship or the flag state of the ship against or on board of which the offence is committed
- b. Territoriality-based jurisdiction, based upon the territory where the offence was committed, including the territorial sea.
- c. Representational jurisdiction. This is where the alleged offender is present in its territory (onboard one of its ships) and does not extradite him to any States parties which have established their jurisdiction in accordance with the offences set by the Convention.
- d. Habitual residence jurisdiction, as when the offence is committed by a stateless person but living in that state.
- e. Passive nationality jurisdiction based on the citizenship of the victim. It is established is seized, threatened, injured or killed.
- f. Target state jurisdiction in cases where the offence is committed in an attempt to compel that state to do or abstain from doing any act.
- g. Police enforcement jurisdiction. Member States are encouraged to establish among themselves agreements to board suspected ships on mutual bases. It is derived from Article *8bis* (13). It gives the impression States are establishing universal jurisdiction but in this case no absolute universality as the Convention is not yet a universal one. It is limited to member States involved in mutual agreements.

Nevertheless, establishing any of the jurisdictions mentioned above is not enough by just referring to the Convention. The flag State should implement the Convention in its legislation which depends on what legal system is adopted by that State⁸⁹.

⁸⁹ There are two methods to implement international conventions. Firstly, monistic method where it is so provided for by the constitutional law, an international convention can become part of the domestic law simply as a consequence of its ratification or accession by the State. Secondly, dualistic system in which some of legislative action is required for the implementation of an international convention, following its ratification or accession. For more details see Mukherjee P.K. (2002). *Maritime legislation*, pp.126-139. Malmo: World Maritime University publications.

Furthermore, such jurisdictions are not always reflected in all domestic legislations, in which case authorization to board to exercise powers of, in relation to arrest, detention, for forfeit and prosecution are not granted as the requesting State is not having jurisdiction under Article 6 of the convention covering the jurisdictions above⁹⁰. There are domestic laws prohibit, for example, the extradition of perpetrator even if the crime took place in that State. As an example, the case of Malaysia which might explains why this country is not yet a party to SUA Convention 1988 in spite of being situated in an area threatened by intensive and persistent piracy.

Another aspect under jurisdictional bases which might be assumed as one of the strengths of the convention over many others is that it covers all the modalities of international cooperation in penal matters namely: “extraditions, mutual assistance, transfer of criminal proceedings, transfer of prisoners, seizure and forfeiture of assets and recognition of foreign penal jurisdictions”⁹¹. Such cooperation is essential, but in practice it will be reflected in mutual agreements, political will and states interests.

4.2.5. Safeguards and interests protection

The organisations and agencies representing the rights of ship owners and seafarers such as ICS, ISF and the ICFTU have tried to formulate suggestions and recommendations to protect the legitimate commercial interests of ship owners and the human rights of seafarers. This stems from the fact that, as put by the representative above, “the proposed measures deal with criminal law and have potentially far-reaching consequences for shipping industry personnel and commercial activity, they should be confined to what is necessary and have clearly defined parameters”⁹². The organisations mentioned above admitted that they could not get full approval for their proposals “While not all of the industry’s proposals were

90 supra 81,p. 439.

91 Supra 16, P. 770.

92 IMO: Comments on the draft preamble, article 1, article 3bis and 3ter submitted by the International Chamber of Shipping (ICS), the International Shipping Federation (ISF) and the International Confederation of Trade Unions (ICFTU). Leg 89/4/8, 24 September 2004.

adopted, the final text is much improved by the inclusion of provisions which address some of the industry's concerns"⁹³. This definitely reflects that there was a compromise made at the expense of the seafarers' rights⁹⁴.

Although the boarding provisions article 8*bis* (10) provide safeguards for the liability of unfounded boarding, one maritime law consultant Özcayir, a member of the IMO roster of experts, comments on the safeguard for ship owners by saying "Although such liability is provided under article 8*bis* which require state parties to take reasonable efforts to avoid a ship being unduly detained or delayed, it is not clear how this liability will be established and whether it will be used in practice"⁹⁵. She gave an example of such a provision in port state control and how claims being denied by port authorities leave the burden for the ship owner to deal with.

It is not clear what would happen if the crew of a vessel are all nationals of the flag state and were intimidated to take part in illegal transport for its benefit. The safeguards provided by the convention are not enough to give immunity to such persons and definitely just confiscating the cargo would not be a valid solution either. It is left unclear whether they will be criminalised as stipulated in article 3*bis* (1) b or not and hence, subjective interpretation will prevail, unless unified interpretation is agreed on.

In this chapter the main characteristics of the SUA Convention 2005 has been discussed and the merits of the shipboarding regime were explored. The regime will be further analysed in the light of the other chapters in order to come up with a more reliable and more comprehensive arrangement with wider acceptance.

93 Hewlett L. : 2005 Protocols to the 1988 SUA convention and its protocol relating to fixed platforms .Norwegian ship owner's association, 2005.(on line April 17 2006 :<http://www.rederi.no/Article.asp?ArticleID=6150>).

94 For the full text of safeguards see Article 8*bis*, paragraph 10 of the Convention.

95 *supra* 81, p.439.

CHAPTER FIVE

General Discussion

5.1. SUA 2005 in light of other ship interdiction provisions

There might be claims that Shipboarding under other legal justifications can be exploited for offences covered by the SUA Convention particularly against ships whose flag states are non-party to the Convention.

An important issue which might be raised here is whether offences excluded from flag state jurisdiction under UNCLOS82 are different from those which justify shipboarding under the SUA Convention or not. Looking at some of the offences covered by the SUA convention 2005, they are not all qualified to become of universal nature. The writer is of the opinion of Liljedahl who “believes that a genuine international crime could be well described as a crime on which it is the general international understanding that all States have legislative, executive and judicial competence”⁹⁶. SUA Convention is not qualified yet for this universality.

Transporting WMD-related materials, which is the culprit of the convention, is not necessarily seen by all states as a threat to humanity and require the competence referred to above, otherwise why do many states still have such

⁹⁶ Liljedahl J.(2002).Transnational and international crimes: jurisdictional issues, in Mukherjee, Max &Gauci (Eds.), *Maritime violence and other security issues at sea*, pp.115-131, Malmö: WMU.

weapons and still transport their constituent materials among themselves and move them around the world in their warships? Why do they keep such weapons as deterrence and at the same time deny other legitimate parties the same right is a subject of debate? It *de facto* makes a few states exclusive world trustees of peace. On the other hand, it is evident that the provisions of article 110, UNCLOS are of a non-discriminatory nature. Any ship suspected of carrying out any illegal act would be subjected to a visit by warships in the vicinity and the municipal laws of that ship would be applied whereas this is not the case with SUA 2005. Many of its provisions were written in a discriminatory way leading to the uneven application and advantages of some nations at the expense of others. This, of course, might be one of the reasons that mean the convention is not well received by all the member states. Nevertheless, time is needed, as is the case with other previous conventions, to put SUA 2005 in practice for a while to see how it performs and the international community will then judge its effectiveness.

Realistically, even if a wide acceptance was achieved, state-proliferators could always elect to transport WMD shipments under their flag, thereby guaranteeing that consent, as required by the boarding clauses, would not be forthcoming. Furthermore, at times WMD are seen as deterrence by many states, while the same states deny others this right. This double standard is more evident in article 3*bis* of the SUA Convention and is practically seen in the practice of States with WMD such as the United States of America, the United Kingdom, and France which have continuously worked to ensure that the ability to transit nuclear weapons is not hindered by any agreement, even under UN efforts.

Shipboarding under belligerent rights is not justified here to deal with offences covered by the SUA Convention as the convention deals with criminal matters whereas belligerent rights pertains to situations when a state of war is declared. The logical question that might arise is, are we at war? This has been declared repeatedly by politicians that we are at war against terror. Nevertheless, although, this declaration metaphorically seems to be correct it lacks legality. Under customary international law, when a state enters into war in the form of armed conflict against another and imposes a blockade, there must be a declaration of

blockade to allow ships to leave the area⁹⁷. This means the blockade is limited to certain geographical areas and hence, it is not possible to use such a right to stop ships on all routes of the high seas and search them. Furthermore, it should be recalled that the SUA Convention deals with crimes and there is no provision indicating the declaration of war. The conclusion is that, it is legally unsound for the SUA Convention to exploit belligerent rights to board ships for the sake of fighting the proliferation of WMD.

Clearly transporting WMD-related materials on the high seas is not equivalent to making an armed attack as provided by Article 51 of the United Nations Charter. Furthermore, to use force there must be a number of criteria to be fulfilled as the seriousness of the threat, proper purpose, last resort, proportional means and balance of consequences⁹⁸. Hence, interdiction of ships for merely carrying materials related to WMD is not justified as self-defence. It should be recalled, the essence of the SUA Convention is to cater for terrorist related activities rather than open conflicts and hence there is no automatic transition to justify boarding for this effect.

In the light of the two principles of state of necessity as interdiction is the only means of safeguarding an essential interest of the state against a grave and imminent peril and the act arises out of peremptory norm of general international law, interdiction of ships may not be justifying the doctrine as grave and imminent peril is not foreseen on the high seas. There is always enough time to take other measures such as the coordination with the flag state to take the appropriate action or perhaps seeking United Nations approval beforehand. The other principle is not satisfied, as the interdiction of WMD has never been a peremptory norm recognised by international law. This a newly developed concept after the September 11, 2001 attacks on the twin towers of the World Trade Centre in the USA.

⁹⁷The law of the sea and naval operations.: The law of naval warfare. June 22, 2006, on line:<http://www.navy.gov.au/spc/ncamo/chap2.html>

⁹⁸ Supra 40. p. 67.

When it comes to state practice and the development of customary law, by inspecting the two conditions required to accept a custom as forming a customary law with respect to shipboarding related to WMD, it is clear that no international custom has yet been developed that gives the international community the right to intercept ships of other states to search for WMD-related materials on the high seas. Nevertheless, in the writer's opinion, the conviction is there as the majority of the international community would like to see it, through SUA 2005, so that WMD are suppressed but by non-discriminatory measures and without jeopardizing the sovereignty of states. Any unilateral or limited multilateral practice of ships intercepting WMD, in conflict with UNCLOS, will never yield consensus and the full participation of nations. Smith sees that "Customary international law does not come into existence by one superpower declaring its standards or principles. No one state can unilaterally legislate international law"⁹⁹. Looking at Article 38 of VCLT where the treaty is becoming binding upon third States as customary law, does not promise too much, especially when such a custom is consistently rejected. This might be the case with the SUA Convention. Nevertheless, the acceptance of the Convention by the overwhelming majority of States is possible in the future but when the treaty becomes redundant and new developments will supersede it.

Probably the reliance on the UNSC to deal with shipboarding was proven to be an effective way as seen in the Yugoslavia and Iraq embargoes. However, "the principle enshrined in the UN charter of states waiting for the Security Council before taking action does not mesh well with the special characteristics of interdiction, rooted in speed and secrecy"¹⁰⁰ is to deal with the daily cases of interdiction. Then what is the purpose of the convention if its clear intention, the restraining of rogue states¹⁰¹ and proliferators in general, is not fulfilled at the right

⁹⁹ Supra73.

¹⁰⁰ Ibid.

¹⁰¹ The current US Administration defines rogue states as those that: brutalise their own people and squander their national resources for the personal gain of the rulers; display no regard to international law; threaten their neighbours, and callously violate international treaties to which they are party; are determined to acquire weapons of mass destruction, along with other advanced military technology, to be used as threat or offensively to achieve the aggressive designs of these regimes; sponsor terrorism around the globe; and reject basic human values and hate the USA and everything for which it stands.(Goodby,2005).

time? Such long formalities and legal processes render the whole operation of boarding impracticable.

5.2. Shipboarding provisions under SUA Convention versus other ship boarding agreements

Boarding provisions are not a new aspect in international treaties whether they are universal or limited in scope and extent. They are inherited from state practice to become, later on, a feature of customary law. They are then codified in such away to give permission to board ships without the expressed consent of states. UNCLOS for example gives such a right, as described by article 110, for a number of cases, including the suppression of the slave trade, piracy, unauthorized broadcasting, and ships without flag. Other provisions allow hot pursuit whenever the law of a state is violated by ships and does not stop for calls by the coastal state. It gives the right to chase them and board them. These cases require no request for authorization as they are stated in UNCLOS 1982.

On the other hand, in boarding of ships under the 1988 Drug Convention, the boarding of suspected vessels to search for illicit drugs requires the request of authorization and the express consent of the requested state.

Nowadays, the danger of proliferation of WMD is of a legitimate concern due to the recent threats by terrorists in conjunction with the use of WMD. Unfortunately, all the conventions invoked with respect to WMD are limited to states party to them. Furthermore, they do not include direct indications to prohibit their transfer, hence creating a legal gap in international law.

The new legal frame work of the SUA Convention 2005 introduces new offences under article 3*bis* (1) (b) to take care of what was missing in the previous treaties and to fill the gaps in the legal system. To give such a provision practical effect, article 8 of the same convention makes it possible to board ships and search them for carrying WMD-related materials, subjected to certain conditions which are stipulated in the same article.

To facilitate the boarding, arrangements and agreements may be concluded among member states as suggested by Paragraph 13 of article 8 *bis*. The essence of the boarding is the trust and the political will between the requesting and the requested parties since there will be no boarding without authorization. This situation arises in particular when there are political sensitivities between the two states.

The main differences between the arrangements of the boarding regime under SUA and the other types of agreements mentioned in chapter three are discussed here to give an idea about how well and fair the provisions have been made.

It should be remembered that the drafting of the SUA Convention was entrusted with the USA and such a thing would give an indication that the provisions of the boarding are mainly drawn up on the same lines as those already concluded between the USA and other states. Nevertheless, as the subject matter was under discussion in the plenary meetings in IMO, a number of contributions and objections by other member states have been taken into consideration and consequently changes have been made. The following are the points that are worth observing in comparison with other agreements:

- a. The master of the ship may deliver to the authorities of any other state party (the receiving state) any person who the master has reasonable grounds to believe has committed an offence set forth in article 3, *3bis*, *3ter*, or *3quater*. This is a new obligation on the master as he has responsibility over his ship in the absence of the owner. At the same time the receiving party should take the responsibility of assisting the master. Such a provision has a legal implication as it is not clear what constitutes reasonable grounds for the master. Mejjia and Mukherjee point out that, firstly, whether or not an act constitutes an offence is a conclusion of law which only a court can determine and secondly, the burden of providing

that the accused possessed the knowledge of an act to constitute an offence under Article 3, 3bis or 3 quarter is virtually insurmountable¹⁰².

- b. When dangers and difficulties are envisaged in boarding a ship at sea and searching its cargo, the measures could be taken in the next port of call or elsewhere. This is obvious when, for example, a container ship of thousands of TEUs is suspected of carrying materials related to WMD. The manpower and/or technology required might lead to postpone the operation after taking the appropriate precautions and the necessary arrangements in cooperation with the port. This seems to be a very reasonable measure in spite of the possibility that suspected materials could be discharged to sea on the way to the port, and maybe, in extreme cases, the ship will be used to cause damage to the port and other ships in the vicinity. It is a dilemma but with good risk assessment by experienced people and probably through cross examination of the captain of the ship and his crew a proper decision could be made.

- c. A provision as a matter of choice is included. Paragraph (5)(e), grants authorization to any requesting party without the need to ask for authorization as long as the requesting party is convinced that the conditions so warrant to board and search the ship. This is left to the discretion of the member states to decide in advance and give such authorization to states which feel they are reasonable, unbiased in their judgment and have excellent intelligence to rely on their information. Certain States, especially with limited resources, might go for this choice to make life easy for the administration and to avoid the financial burden incurred or required for facilitating boarding. It is clear that all open registries, as they have concluded bilateral agreements with the USA, will do the same under the SUA Convention. It is still not bad as they have nothing to hide and the safeguards provided are enough to preserve their legal interests and their shipowners' interests in cases of

102 Meija M.& Mukherjee P.K.(2006). The SUA Convention 2005: a critical evaluation of its effectiveness in suppressing maritime criminal acts, *Journal of International Maritime Law*, 12(3), 170-191.

violations by the requesting state. A common practice in most of the bilateral agreements is to have an agreed time for response to verify the nationality of the suspected ship; otherwise authorization is deemed granted to be board and search the ship. Again it is a reasonable practice as long as the requested party cannot verify the nationality, and then the ship is treated to be without nationality.

- d. It is normal in agreements that the assets seized are disposed of according to the laws of the party exercising jurisdiction. Nevertheless, under the SUA authorization this may be pending on receipt of the disposition instructions from the flag state. This could be assumed as a safeguard for the economic interests of the flag state of the ship. By having certain arrangements with the requesting party, the financial obligations of the ship towards the flag state may be fulfilled.
- e. Most of the boardings under other agreements deal with one particular offence whereas the SUA Convention deals with many offences some of which are vague and require certain professional knowledge and intensive intelligence information. This is clear when talking about dual-use materials. Therefore it is not an ordinary mission as the perpetrators are not the normal persons as in drug trafficking or fishing rules violations. It sometimes involves States as perpetrators. Hence, due to such complications and the possibility of political and legal consequences, huge investment is required to achieve successful boarding.
- f. Under other agreements criminal offences are almost clear and defined as they are limited whereas under the SUA Convention, boarding covers offences beyond those expressed by the Convention. It also covers other offences under other Conventions as stipulated in Article 7; it is a far-reaching task requiring a huge database run by professionals.
- g. Safeguards can be found in all agreements and usually disputes and damage claims are based on the national legislations of law enforcement

which might be accepted to a certain extent as far as individuals are involved. The problem with the SUA Convention is that sometimes States are involved in a dispute over boarding which makes it illogical to rely on domestic laws.

CHAPTER SIX

6.1. Conclusions

Shipboarding is a measure among many others to deter the offences covered by SUA Convention. Nevertheless, its effectiveness is measurable by the way its provisions are made.

Legally accepted forms of shipboarding, as discussed in chapter two, do not always substantiate boarding for the offences covered by the SUA Convention, as the circumstances and conditions are different. The doctrine of self-defence, which is sometimes claimed by States, is still not widely accepted, especially when the wording of article 51 of the United Nations' Charter is read carefully in connection with article 2 (4) of the same charter.

Suggestions to change UNCLOS 82 and make provisions to criminalise the transfer of WMD and exclude them from flag state jurisdiction could be possible if the majority of states were to approve that. Nevertheless, it has proven to be a tedious job that might take years before it is accepted by the majority. It should be remembered that only recently have many States accepted UNCLOS 82, having taken more than 20 years since the Convention entered into force in 1982 for them to realise the Convention is a useful tool in regulating maritime affairs. It is likely to take even more time before any new changes are accepted. Then, what is the point of exhausting the international community with suggestions of change, when

offences perceived to be of current grave danger require quick action. Amendments to the SUA Convention are clearly the solution.

The boarding provisions under SUA cannot be looked at in isolation from the rest of the Convention, such as the transport offences, dual-use materials and criminal jurisdictions, where many biased provisions are included. This puts many States in a disadvantageous position; especially States with nuclear abilities but not party to IAEA and those with the ambition to get WMD as a deterrent following the steps taken by the superpowers, and this perhaps gives rise to reluctance to cooperate. This leads to the dark end of the tunnel, and not much would be expected from SUA to fulfil its main objective.

Even if the convention entered into force, its effectiveness relies mainly on getting authorization to board suspicious ships to search for WMD. This is a far reaching matter, especially when getting authorization from states involved directly in the business of proliferation as they can use their own fleets and reject the request of authorization, whereas non-state proliferators can switch from one flag to another. Furthermore, the Convention obliges only member states.

One way of making partial success among member states is to conclude bilateral and multilateral boarding arrangements. These have been proven to be successful for decades in dealing with illicit drug trafficking and fish stock monitoring. Other arrangements, such as the bilateral boarding agreements made between the United States and Panama under PSI, could be taken as a model with more safeguards. However, it is wiser to involve as many member states as possible in each multilateral agreement and to form joint law enforcement to make best of the available resources in a collective way and to melt down sensitivities towards sovereignty issues. Such joint law enforcement can even chase suspected ships into the territorial waters of member states to that agreement without running into legal problems, as long as they agree to that beforehand.

Finally, unless the superpowers show the desire to take positive steps towards global disarmament without discrimination through the development of the

existing WMD treaties, the problem of WMD proliferation will likely persist for a long time.

6.2. Recommendations

Other measures that can be taken to help make the Convention more reliable are stated below as recommendations.

- a. The harmonization and intensification interdiction in internal waters and territorial seas. As there are many states reluctant to have their ships boarded by other states, even those who are parties to the 2005 SUA Convention, then, to make the Convention more effective, it is wise to take measures within the territorial seas as they are subjected to national laws. This can be achieved by enacting national legislation by the individual States to criminalize the transfer of WMD within their internal waters and territorial seas as long as such transfer is perceived by the coastal state endangering the safety of navigation and the preservation of the environment pertinent to article 21(a) and(f) of UNCLOS82. The coastal State shall give due publicity to all such laws and regulations as required by the same Article in paragraph (3).
- b. Make a flexible list of dual-use materials and equipment so that crews can use it as a guideline to pass information, whenever suspicion arises, to the owner or flag state to enable them to track the shipper and his/her activities. In case there are reasonable grounds to believe that his/her involvement is in illicit activities, the ship can be intercepted for boarding and searching. Such a list would also help States to make the right decision whether to board a ship or not.
- c. The creation of a database to share information among member states. Data base access shall be restricted to the competent authorities in charge of giving authorizations to requests of boarding activities. This would enable States to make quick and responsible responses to requests. Information sharing is a reflection of the will of cooperation and

shows transparency. If it is not possible to communicate highly classified information, then at least a format of reporting should be arranged to sustain the shared database without running into the risk of disclosing secret information that might be used by proliferators.

- d. Information on which suspicion is based should be passed in advance to the flag state to give it enough time to process the information and reach a reasonable decision about giving authorization to others board its ship or do the boarding by the flag State itself.
- e. The creation of a committee working under the UNSC to look at cases of WMD related to non-member states and posing imminent danger. The committee should be empowered to authorize the boarding of suspicious ships wherever and whenever required as expeditiously as possible. This is to give shipboarding legality rather than misinterpreting international law and acting unilaterally against suspected ships.
- f. The disposition of confiscated materials should be explicitly entrusted with the flag state since it is part of the flag State's duty to effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag as stated by UNCLOS 82, article 94. This is to emphasise that the intention behind interception is to deter danger and not to make a financial profit by the boarding state. Besides, this measure acts as a safeguard to avoid boarding unless it is extremely well founded since boarding requires resources.
- g. More clear safeguards should be included for shipowners and seafarers based on recommendations by the ISF, ICF and ICFTU as they are the main organizations guarding shipowners and seafarers rights.
- h. There are times when political pressure is put on justice, or claimants are subjected to abuse, therefore there should be an alternative court for claiming damages other than national courts of the boarding states.

Disputed cases should be referred to the International Court of Justice (ICJ) or to the International Tribunal of the Law of the Sea (ITLOS) through flag States. Such a provision must be included in the Convention because States are only obliged to comply with the international instruments after expressing consent to be bound.

- i. As it is not always possible for all flag States to have expertise in the different types of WMD, special arrangements have to be made with IAEA and a team of experts to assist states in checking and dismantling such weapons whenever required.
- j. The Superpowers have to take initiatives towards global disarmament by cutting down budgets dedicated to WMD and start destroying such weapons to show the international community that what is bad for one is bad for others.
- k. There should be a clear definition of '*unlawful and unreasonable*' measures by boarding parties, which are qualified for granting damages. This could be the extent of time of delay, the assault of persons on board, or perhaps the level of damage to cargo; otherwise each state has different interpretations and hence different measures.

For comprehensive, effective and reliable boarding against unlawful activities under the SUA Convention, the Convention has to be revisited by the international community represented by IMO. All views expressed by the member States and other entities have to be considered carefully without authoritarian attitudes to come up with not just a consensus, but ultimately a quality legal product.

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Annex A

Proliferation Security Initiative Ship Boarding Agreement with Panama

Bureau of Nonproliferation
Washington, DC

Amendment to the Supplementary Arrangement Between the Government of the United States of America and the Government of the Republic of Panama to the Arrangement Between the Government of the United States of America and the Government of Panama for Support and Assistance from the United States Coast Guard for the National Maritime Service of the Ministry of Government and Justice

Signed May 12, 2004; provisionally applied from May 12, 2004; entered into force December 1, 2004.

[Text of February 2002 U.S.-Panama Supplementary Arrangement on U.S. Coast Guard Assistance.]

The Government of the United States of America and the Government of the Republic of Panama (hereinafter “the Parties”):

Bearing in mind that the Arrangement between the Government of the United States of America and the Government of Panama for Support and Assistance from the United States Coast Guard for the National Maritime Service of the Ministry of Government and Justice, signed at Panama, March 18, 1991 (hereinafter “the Arrangement”), and the Supplementary Arrangement between the Government of the United States of America and the Government of the Republic of Panama to the Arrangement between the Government of the United States of America and the Government of Panama for Support and Assistance from the United States Coast Guard for the National Maritime Service of the Ministry of Government and Justice, signed at Panama, February 5, 2002 (hereinafter “the Supplementary Arrangement”), establish a program for conducting bilateral maritime law enforcement operations to stop illegal activities, such as the international trafficking of drugs, illegal fishing and transportation of contraband;

Deeply concerned about the proliferation of weapons of mass destruction (WMD), their delivery systems, and related materials, particularly by sea, as well as the risk that these may fall into the hands of terrorists;

Recalling the January 31, 1992, United Nations Security Council Presidential Statement that proliferation of all WMD constitutes a threat to international peace and security, and underlines the need for Member States of the United Nations to prevent proliferation;

Recalling also United Nations Security Council Resolution 1373 of September 28, 2001, which, *inter alia*, noted with concern the close connection between international terrorism and illegal movement of nuclear, chemical, biological and

other potentially deadly materials, and in this regard emphasized the need to enhance coordination of efforts on national, subregional, regional and international levels in order to strengthen a global response to this serious challenge and threat to international security, and called upon States to find ways of intensifying and accelerating the exchange of operational information, especially regarding the threat posed by the possession of weapons of mass destruction by terrorist groups;

Recalling further the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, done at Paris, January 13, 1993; the Treaty on Non-Proliferation of Nuclear Weapons, done at Washington, London and Moscow, July 1, 1968; and the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, done at Washington, London and Moscow, April 10, 1972;

Acknowledging the widespread consensus that proliferation and terrorism seriously threaten international peace and security;

Convinced that trafficking in WMD, their delivery systems, and related materials by States and non-state actors of proliferation concern must be stopped;

Inspired by the Statement of Interdiction Principles for the Proliferation Security Initiative, Paris, and September 4, 2003;

Reaffirming the importance of the customary international law of the sea, as reflected in the 1982 United Nations Convention on the Law of the Sea; and

Desiring to amend the Supplementary Arrangement in order to enhance cooperation between the Parties to prevent illicit traffic involving proliferation by sea of WMD, their delivery systems, and related materials to or from States and non-state actors of proliferation concern;

Have agreed to amend the Supplementary Arrangement as follows:

Article I

1. Paragraph (b) of Article II of the Supplementary Arrangement, Definitions, is amended to read:

“(b) “illicit traffic” also includes proliferation by sea and other illegal activities prohibited by international law, including other international conventions to which both States are party, but only to the extent enforcement pursuant to this Supplementary Arrangement is authorized by the laws of both Parties.”

2. The following paragraphs (u) through (y) are added to Article II of the Supplementary Arrangement, Definitions, as follows:

“(u) “Proliferation by sea” means the transportation by ship of weapons of mass destruction, their delivery systems, and related materials to or from States and non-state actors of proliferation concern.

(v) "Weapons of mass destruction (WMD)" means nuclear, chemical, biological and radiological weapons.

(w) "Related materials" means materials, equipment and technology, of whatever nature or type that are related to and destined for use in the development, production, utilization or delivery of WMD.

(x) "Items of proliferation concern" means WMD, their delivery systems, and related materials.

(y) "States and non-state actors of proliferation concern" means those countries or entities that should be subject to interdiction activities because they are or are believed to be engaged in: (1) efforts to develop or acquire WMD or their delivery systems; or (2) transfers (selling, receiving, or facilitating) of items of proliferation concern."

3. Paragraph 3 of Article III of the Supplementary Arrangement, Designated Auxiliary Personnel, is amended to read:

"3. Except as provided in paragraph 3 of Article XV, the designated auxiliary personnel shall not have the powers conferred by this Supplementary Arrangement on law enforcement officials, and their actions shall be limited to providing the technical support described in the notice of their functions given to the other Party."

4. Paragraph 3 of Article XV of the Supplementary Arrangement, Conduct of Law Enforcement Officials, is amended to read:

"3. Boardings and searches pursuant to this Supplementary Arrangement shall be carried out by law enforcement officials from law enforcement ships or aircraft, or from technical support vessels of a Party or of third States, and, in emergencies and under exceptional circumstances, may be assisted by designated auxiliary personnel from technical support vessels or aircraft of a Party or of third States. However, when law enforcement officials are not readily available, boardings and searches undertaken pursuant to Article X of this Supplementary Arrangement to suppress proliferation by sea may, upon advance notice to the other Party, also be carried out by designated auxiliary personnel. These personnel shall in such cases be subject to the provisions in this Supplementary Arrangement governing the conduct and operations of law enforcement officials."

Article II

1. The Parties agree that the Government of the Republic of Panama may extend, *mutatis mutandis*, all rights under the Supplementary Arrangement as amended by the present Amendment concerning vessels suspected of proliferation by sea, claiming its nationality and located seaward of any State's territorial sea, to such third States as it may deem appropriate, on the understanding that such third States shall likewise comply with all conditions set forth in the present Amendment and with those provisions of the Supplementary Arrangement agreed between the Government of the Republic of Panama and the third States for the exercise of such rights. Further, the Government of the Republic of Panama and such third States shall identify Liaison Offices and liaison officials in accordance with Article XII of the Supplementary Arrangement.

2. Such third States shall enjoy rights and be subject to all conditions governing their exercise as set forth in paragraph 1 of this Article, effective on the date of notification by the third State to the Government of the Republic of Panama that it will comply with the conditions for the exercise of those rights.

3. Such rights may be modified by written agreement between the Government of the Republic of Panama and the third State and shall be effective on the date agreed by the Government of the Republic of Panama and the third State.

4. Such rights shall be revocable by the Government of the Republic of Panama or the third State by written notification. Such rights shall be revoked, and the conditions governing their exercise shall cease to apply, effective on the date of such notification.

Article III

1. The Parties shall apply this Amendment provisionally from the date of its signature. This Amendment shall enter into force on the date that the Government of the United States of America notifies the Government of the Republic of Panama that its necessary internal procedures have been completed, and shall remain in force concurrent with the Supplementary Arrangement.

2. Either Party may discontinue provisional application at any time. Each Party shall notify the other Party immediately of any constraints or limitations on provisional application, of any changes to such constraints or limitations, and upon discontinuance of provisional application.

IN WITNESS WHEREOF, the undersigned, being duly authorized by their respective Governments, has signed this Amendment.

DONE AT Washington, 12th day of May, 2004, in duplicate, in the English and Spanish languages, both texts being equally authentic.

**FOR THE GOVERNMENT OF THE
UNITED STATES OF AMERICA:**

/s/ John R. Bolton

[JOHN R. BOLTON
Under Secretary of State for
Arms Control and International
Security Affairs]

**FOR THE
GOVERNMENT OF
THE REPUBLIC OF
PANAMA:**

/s/ Arnulfo Escalona

[ARNULFO
ESCALONA
Minister of
Government and
Justice]

Annex B

U.S.-Panama Supplementary Arrangement on U.S. Coast Guard Assistance

Bureau of Nonproliferation
Washington, DC

Supplementary Arrangement Between the Government of the United States of America and the Government of the Republic of Panama to the Arrangement Between the Government of the United States of America and the Government of Panama for Support and Assistance from the United States Coast Guard for the National Maritime Service of the Ministry of Government and Justice

Signed at Panama City, Panama February 5, 2002. Entered into force February 5, 2002.

[*This arrangement was [amended](#) on May 12, 2004, to address proliferation of weapons of mass destruction (WMD), their delivery systems, and related materials.*] The Government of the United States of America and the Government of the Republic Panama (hereinafter, “the Parties”);

Bearing in mind that the Arrangement between the Government of the United States of America and the Government of Panama for support and assistance from the United States Coast Guard for the National Maritime Service of the Ministry of Government and Justice, signed at Panama, March 18, 1991 (hereinafter, “the Arrangement”), establishes a program for conducting bilateral maritime police operations within the territorial waters of Panama to stop illegal activities, such as the international trafficking of drugs, illegal fishing and transportation of contraband;

Whereas the transnational character of illicit traffic by sea and by air in narcotics and related offenses gives rise to the need for major international cooperation in the suppression thereof, which is recognized in the 1961 Single Convention on Narcotic Drugs and its 1972 Protocol, in the 1971 Convention on Psychotropic Substances, in the 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (hereinafter, “the 1988 Convention”), and in the 1982 United Nations Convention on the Law of the Sea (hereinafter, “the Law of the Sea Convention”);

Recalling that Article 17 of the 1988 Convention provides, *inter alia*, that the Parties shall consider entering into bilateral and regional agreements to carry out, or to enhance the effectiveness of, the provisions of Article 17;

Desiring to promote greater and resolute cooperation between the Parties to combat illicit traffic by sea and by air in narcotics and related offenses;

Recalling the Treaty between the Parties on Mutual Assistance in Criminal Matters, with annexes and appendices, signed at Panama, April 11, 1991, that enables more

effective cooperation between the Parties in the investigation, prosecution and suppression of serious crimes, such as narcotic trafficking;

Recalling further the Inter-American Convention against the illicit manufacturing of and trafficking in firearms, ammunition, explosives and other related materials, signed by Panama and the United States, on November 14, 1997; and

Recalling the annual programs of counter-narcotics assistance provided by the Government of the United States of America to the Government of Panama;

Have agreed as follows:

Article I
Purpose and Scope

The Parties shall continue to cooperate in combating illicit traffic by sea and air in narcotics and related offenses to the fullest extent possible, consistent with available law enforcement resources and priorities related thereto.

Article II
Definitions

For the purposes of this Supplementary Arrangement, unless the context otherwise requires:

(a) "illicit traffic" has the same meaning as in Article 1(m) of the 1988 Convention and includes illicit traffic by air.

(b) "illicit traffic" also includes other illegal activities prohibited by international law, including other international conventions to which both States are party, but only to the extent enforcement pursuant to this Supplementary Arrangement is authorized by the laws of both Parties.

(c) "territory, waters and airspace of a Party" means:

(i) For the Republic of Panama: the territory under the sovereignty of Panama, those waters within 12 nautical miles of Panamanian territory, and the airspace over Panamanian territory and waters.

(ii) For the Government of the United States of America: the Commonwealth of Puerto Rico, the United States Virgin Islands, Navassa Island and other territories and possessions in the Caribbean Sea over which the United States exercises sovereignty, those waters within 12 nautical miles of United States territory, and the airspace over such United States territory and waters.

(d) "continental territory" means the mainland territory of Panama situated within Panama's boundaries with bordering States and between its maritime coasts.

(e) "contiguous zone" has the same meaning as in Article 33 of the Law of the Sea Convention.

(f) "international waters" means all parts of the sea not included in the territorial sea and internal waters of a State.

(g) “international airspace” means the airspace situated over international waters.

(h) “law enforcement authority” means, for the Government of Panama, the National Maritime Service (hereinafter, “SMN”) and National Air Service, (hereinafter, “SAN”), agencies of the Ministry of Government and Justice of Panama, and for the Government of the United States of America, the United States Coast Guard, an agency of the U.S. Department of Transportation.

(i) “law enforcement vessels” means armed and unarmed vessels belonging to the SMN and vessels of the United States Coast Guard, aboard which law enforcement officials are embarked, clearly marked and identifiable as being on government non-commercial service and authorized to that effect, including any boat or aircraft embarked on such vessels.

(j) “law enforcement aircraft” means aircraft belonging to the SAN and SMN, and aircraft of the United States Coast Guard, clearly marked and identifiable as being on government non-commercial service and authorized to that effect.

k) “technical support vessels and aircraft” means vessels and aircraft of a Party, clearly marked and identifiable as being on government non-commercial service and authorized to that effect, which, though not belonging to its law enforcement authority, may be temporarily under its authority and control for the achievement of the purposes of this Supplementary Arrangement or which, though not under its temporary authority and control, support law enforcement officials, vessels and aircraft in the performance of their functions and responsibilities under this Supplementary Arrangement.

(l) “technical support vessels and aircraft of third States” means vessels and aircraft of States other than the Parties, clearly marked and identifiable as being on government non-commercial service and authorized to that effect, with which the Republic of Panama or the United States of America has agreements or arrangements for combating illicit traffic, and which, when they are under the temporary authority and control of a law enforcement official of one of the Parties, may be authorized by agreement of the Parties, to be afforded the status of “technical support vessels” or “technical support aircraft” of the Party to which the law enforcement officials belong, and therefore be authorized to engage in operations under the terms and conditions of this Supplementary Arrangement.

(m) “law enforcement officials” means, for the Government of Panama, uniformed members of the SMN and SAN, and for the Government of the United States of America, uniformed members of the United States Coast Guard.

(n) “designated auxiliary personnel” means personnel of a Party who, while not law enforcement officials, support the law enforcement officials of that Party in the operations under this Supplementary Arrangement.

(o) “Shiprider Program” means the program of activities agreed upon for the performance of shipboarding pursuant to this Supplementary Arrangement.

(p) “shiprider” means a law enforcement official of one Party authorized to embark on a law enforcement vessel or aircraft of the other Party and to exercise the

authority and control and perform the functions set out in this Supplementary Arrangement.

(q) "Shiprider Program Coordinator" means the law enforcement official of a Party designated to organize its program activities with the other Party.

(r) "Liaison Office" means the point of contact designated by the Parties as responsible for guaranteeing communication between the law enforcement authorities of the Parties.

(s) "liaison official" means a law enforcement official of a Party, who may or may not be embarked on a vessel or aircraft of that Party, who has been designated to perform the functions of the Liaison Office of that Party.

(t) "suspect vessel or aircraft" means a vessel or aircraft used for commercial or private purposes in respect of which there are reasonable grounds to suspect it is engaged in illicit traffic.

Article III Designated Auxiliary Personnel

1. The Parties, by mutual agreement, shall define the number and functions of auxiliary personnel designated to lend technical support to the law enforcement officials and to the vessels and aircraft participating in the maritime and/or air operations, depending on their needs.

2. When the functions these personnel routinely perform are unrelated to the operation of such vessels and aircraft, the other Party shall be given advance notice of the nature of the technical support functions such personnel are to carry out.

3. The designated auxiliary personnel shall not have the powers conferred by this Supplementary Arrangement on law enforcement officials, and their actions shall be limited to providing the technical support described in the notice of their functions given to the other Party.

4. Nevertheless, in emergencies and under exceptional circumstances, the designated auxiliary personnel of one Party may be requested by a shiprider of the other Party to support the law enforcement officials in enforcing the law.

5. In any case, these designated auxiliary personnel shall be subject to the same requirements the Parties have defined for the other participants in the Shiprider Program.

Article IV Shiprider Program

1. The Parties shall establish joint law enforcement Shiprider Program between their respective law enforcement authorities. Each Party shall designate a Coordinator to organize its program activities and to identify the types of vessels and officials involved in the Program to the other Party.

2. Each Party shall designate shipriders who, subject to its laws and policies and to the provisions this Supplemental Arrangement, shall embark on law enforcement vessels and aircraft of the other Party and exercise authority and control, in appropriate circumstances, to:

(a) search suspect vessels, seize property, detain persons, and authorize the use of force, including the use of weapons in accordance with the terms of Article XVII of this Supplementary Arrangement;

(b) authorize vessels or aircraft of the other Party aboard which they are embarked to pursue suspect vessels or aircraft in the waters and airspace of the Party they represent;

(c) authorize law enforcement vessels of the other Party aboard which they are embarked to patrol the waters of the Party they represent, for purposes of this Supplementary Arrangement;

(d) authorize the law enforcement aircraft of the other Party aboard which they are embarked to overfly, for purposes of this Supplementary Arrangement, the airspace of the Party they represent;

(e) enforce the laws of their respective countries in the waters and in the airspace over the waters of the Party they represent or seaward the reform in exercise of the right of hot pursuit in accordance with international law of the sea; and

(f) request and authorize the law enforcement officials of the other Party to assist in the enforcement of the laws of the Party they represent.

3. The implementation of this Program shall not result in additional operating costs to the Party providing a shiprider to the other Party. Each Party shall assume the normal costs associated with the payment of its officials assigned to this Program.

4. Each Party shall endeavor to designate shipriders and liaison officials fluent in the language of the other Party.

Article V Assistance in Law Enforcement

1. When a shiprider is embarked on the other Party's law enforcement vessel, and the enforcement action being carried out is pursuant to paragraph 2 of Article IV, any law enforcement measure, including any boarding, search or seizure of property, any detention of a person, and any use of force pursuant to this Supplementary Arrangement, whether or not involving weapons, shall be carried out by the shiprider in accordance with the laws and regulations of the shiprider's Government.

2. Law enforcement officials of the other Party's law enforcement vessel and, in emergencies and under exceptional circumstances, designated auxiliary personnel of the other Party, may assist in any such action if expressly requested to do so by the shiprider and only within the limits of such request and in the manner requested. Such request may only be made, agreed to, and acted upon in accordance with the applicable laws and policies of both Parties.

3. Such law enforcement officials and designated auxiliary personnel may use force in self-defense, in accordance with the terms of Article XVII of this Supplementary Arrangement.

4. The assistance requested may not be contrary to the laws or policies of the Party of which this assistance is requested.

Article VI

Law Enforcement in the Waters of a Party and in the Airspace Over Such Waters

1. The law enforcement authority of each Party is authorized to provide the other Party operational support and technical assistance in the suppression of illicit traffic in the waters of a Party and the airspace over such waters, by means of sea and air police operations involving law enforcement vessels or aircraft with embarked shipriders designated in accordance with this Supplementary Arrangement.

2. The law enforcement authorities of both Parties shall endeavor to exchange operational information on the detection and location of suspect vessels or aircraft and to make best efforts to communicate with each other.

3. If a law enforcement vessel or aircraft of a Party ("the first Party") detects a suspect vessel or aircraft located in or entering the waters or airspace of the other Party, or the airspace over such waters, the first Party shall promptly notify the other Party.

4. In the event that the suspect vessel or aircraft is entering the waters or airspace of the other Party, and the law enforcement vessel or aircraft of the first Party does not have on board a shiprider of the other Party, the vessel or aircraft of the first Party may proceed as follows:

(a) It may pursue the suspect vessel into the waters of the other Party, in order to stop and secure the suspect vessel while awaiting the arrival of the law enforcement officials of the other Party, who shall conduct the search and assume jurisdiction of the suspect vessel, its cargo and persons on board;

(b) At the request of the law enforcement authority of the other Party, law enforcement officials of the first Party may search the suspect vessel, its cargo and persons on board, and if evidence of illicit traffic is found, detain the vessel pending instructions from the law enforcement authority of the other Party; and

(c) It may engage in pursuit of the suspect aircraft in the airspace of the other Party, in order to maintain contact and relay to the suspect aircraft the instructions of the aviation authority of the other Party.

5. In the event that the suspect vessel or aircraft is located in the waters or airspace of the other Party, and the law enforcement vessel or aircraft of the first Party does not have on board a shiprider of the other Party, the vessel or aircraft of the first Party may proceed as follows:

(a) upon receipt of authorization from the law enforcement authority of the other Party, it may enter the waters of the other Party, in order to investigate, stop and secure the suspect vessel and persons on board while awaiting the arrival of the law

enforcement officials of the other Party, who shall conduct the search and assume jurisdiction of the suspect vessel, its cargo and persons onboard;

(b) at the request of the law enforcement authority of the other Party, law enforcement officials of the first Party may search the suspect vessel, and if evidence of illicit traffic is found, detain the vessel pending instructions from the law enforcement authority of the other Party; and

(c) upon receipt of authorization from the law enforcement authority of the other Party, it may pursue of the suspect aircraft in the airspace of the other Party, in order to maintain contact and relay to the suspect aircraft the instructions of the aviation authority of the other Party.

6. Each Party may permit, after notification to and coordination with appropriate officials, on the occasions and for the time necessary for the proper performance of the operations required under this Supplementary Arrangement:

(a) the temporary mooring of law enforcement vessels of the other Party at national ports in accordance with international norms for the purpose of resupplying fuel and provisions, medical assistance, minor repairs, weather and other logistics and related purposes;

(b) entry of additional law enforcement officials of the other Party; and

(c) entry of suspect vessels not flying the flag of either Party escorted from waters seaward of either Party=s territorial sea by law enforcement officials of the other Party.

7. The Government of Panama may permit, after notification to and coordination with appropriate officials, on the occasions and for the time necessary for the proper performance of the operations required under this Supplementary Arrangement, the escort of persons, other than Panamanian nationals, from suspect vessels escorted by United States law enforcement officials through and exiting out of Panamanian territory.

Article VII

Overflight Operations for Suppression of Illicit Traffic

1. Each Party ("the first Party") authorizes the law enforcement aircraft and the technical support aircraft of the other Party, in accordance with Articles IV, V, and VI(1) of this Supplementary Arrangement, to overfly its waters, observing the laws, policies, and instructions of the civil aviation authority of the first Party.

2. For overflight of continental territory by technical support aircraft pursuant to Article VIII, the Parties shall agree upon an embarkation and disembarkation program for shipriders of the other Party at the air facilities from which these operations are to be conducted.

3. The civil aviation authority of the first Party may deny, in specific instances, the overflight of the first Party's waters or territory, even in cases of pursuit of suspect aircraft, if it deems that such overflight endangers the safety of air navigation or the life or safety of third parties.

4. In the interest of flight safety, the law enforcement officials aboard these aircraft shall observe the following procedures:

(a) identify the aircraft and provide notification of its entry into and departure from the air traffic control zone assigned to the appropriate civil aviation authority;

(b) maintain open and ongoing communication with the civil aviation authority of the other Party;

(c) observe the air navigation regulations and practices stipulated by the ICAO and international law; and

(d) follow the flight safety instructions of the civil aviation authority of the other Party.

5. Subject to the laws of each Party, the aircraft may relay the orders of the competent authorities to suspect aircraft to land in the territory of the other Party.

6. Each Party may permit, after notification to and coordination with appropriate officials, on the occasions and for the time necessary for the proper performance of the operations required under this Supplementary Arrangement, law enforcement aircraft operated by the other Party to:

(a) land and temporarily remain at international airports in accordance with international norms for the purposes of resupplying fuel and provisions, medical assistance, minor repairs, weather, and other logistics and related purposes; and

(b) disembark and embark law enforcement officials of the other Party, including additional law enforcement officials.

7. The Government of Panama may permit, after notification to and coordination with appropriate officials, on the occasions and for the time necessary for the proper performance of the operations required under this Supplementary Arrangement, United States law enforcement aircraft to disembark, embark and depart out of Panamanian territory with persons referred to in Article VI(7).

Article VIII

Law Enforcement Information from Technical Support Flights

The Parties agree that:

(a) the collection of law enforcement information from technical support flights over the continental territory of a Party provided for under this Supplementary Arrangement may take place only in the presence of and with authorization from the shiprider of the Party over whose territory the flights take place;

(b) both parties shall have total and unrestricted access to this material at all times;

(c) the law enforcement information obtained in these operations shall be classified in accordance with the laws and policy of the Party collecting the information, shall be supplied to the other Party under the appropriate laws and policies, and shall be used only for the purposes provided for in this Supplementary Arrangement; and

(d) the law enforcement information collected under this Supplementary Arrangement may not be communicated to third parties without the prior express consent of the Party in whose jurisdiction they were collected.

Article IX
Air Pursuit

This Supplementary Arrangement authorizes the pursuit for the purposes of and in accordance with its provisions, by law enforcement aircraft and technical support aircraft of one Party of suspect aircraft in or into the airspace over waters of the other Party and in or into the airspace over the continental territory of the other Party.

Article X
Operations in International Waters

1. Whenever the law enforcement officials of one Party ("the requesting Party") encounter a suspect vessel flying the flag of or claiming to be registered in the other Party ("the requested Party") located seaward of any State's territorial sea, the requesting Party may request that the Liaison Office designated by the requested Party:

(a) confirm the claim of registry in or the right to fly the flag of the requested Party; and

(b) if such claim is confirmed:

(i) authorize the boarding and search of the suspect vessel, cargo and the persons found on board by law enforcement officials of the requesting Party; and

(ii) if evidence of illicit traffic is found, authorize the law enforcement officials of the requesting Party to detain the vessel, cargo and persons on board pending instructions from the law enforcement authorities of the requested Party as to the exercise of jurisdiction in accordance with Article XI of this Supplementary Arrangement.

2. Each request should contain the name of the suspect vessel, the basis for the suspicion, the registration number, home port, the port of origin and destination, and any other identifying information. If a request is conveyed orally, the requesting Party shall confirm the request in writing as soon as possible.

3. If the registration or the right to fly its flag is verified, the requested Party may:

(a) decide to conduct the boarding and search with its own law enforcement officials;

(b) authorize the boarding and search by the law enforcement officials of the requesting Party;

(c) decide to conduct the boarding and search together with the requesting Party; or

(d) deny permission to board and search.

4. The requested Party shall answer requests made for the verification of registry or right to fly its flag within two (2) hours of the receipt of such requests.

5. If the registration or the right to fly its flag is not verified within the two (2) hours, the requested Party may:

(a) nevertheless authorize the boarding and search by the law enforcement officials of the requesting Party; or

(b) refute the claim of the suspect vessel to registration or the right to fly its flag under its laws.

6. If there is no response from the requested Party within two (2) hours of its receipt of the request, the requesting Party will be deemed to have been authorized to board the suspect vessel for the purpose of inspecting the vessel's documents, questioning the persons on board, and searching the vessel to determine if it is engaged in illicit traffic.

7. Notwithstanding the foregoing paragraphs of this Article, this Supplementary Arrangement authorizes the law enforcement officials of one Party ("the first Party") to board suspect vessels claiming to be registered in the other Party that are not flying the flag of the other Party, not displaying any marks of its registration, and claiming to have no documentation on board the vessel, for the purpose of locating and examining the vessel's documentation. If documentation is located, the foregoing paragraphs of this Article apply. If no evidence of registration or nationality is found, the first Party may assimilate the vessel to a ship without nationality in accordance with international law.

8. The authorization to board, search and detain includes the authority to use force in accordance with Article XVII of this Supplementary Arrangement.

9. Except as expressly provided herein, this Supplementary Arrangement does not apply to or limit boardings of vessels, conducted by either Party in accordance with international law, seaward of any State's territorial sea, whether based, *inter alia*, on the right of visit, the rendering of assistance to persons, vessels, and property in distress or peril, the consent of the vessel master, or an authorization from the flag State to take law enforcement action.

Article XI

Jurisdiction over Vessels or Aircraft Detained

1. As provided in Article 2(3) of the 1988 Convention, neither Party shall undertake in the territory of the other Party the exercise of jurisdiction and performance of functions that are exclusively reserved to the authorities of that other Party by its domestic law.

2. In all cases arising in a Party's waters, or concerning vessels registered in or flying the flag of a Party seaward of any State's territorial sea, that Party ("the first Party") shall have the right to exercise jurisdiction over a detained vessel, cargo and/or persons on board (including seizure, forfeiture, arrest, and prosecution), provided, however, the first Party may, subject to its Constitution and laws, waive its right to exercise jurisdiction and authorize the enforcement of the other Party's law against the vessel, cargo and/or persons on board. The first Party has the right to exercise jurisdiction over aircraft that have landed in its territory and aboard which evidence of illicit traffic has been found.

3. In cases arising in the contiguous zone of a Party, not involving suspect vessels fleeing from the waters of that Party or suspect vessels flying the flag of or registered in that Party, in which both Parties have the authority to exercise jurisdiction to prosecute, the Party which conducts the boarding and search shall have the right to exercise jurisdiction.

4. If the evidence so warrants, the other Party may request that the first Party waive jurisdiction. Instructions as to the exercise of jurisdiction pursuant to this Supplementary Arrangement shall be given without delay.

5. A waiver of jurisdiction may be granted verbally, but as soon as possible, it shall be recorded in a written note from the competent authority and be processed through the diplomatic authorities, without prejudice to the immediate exercise of jurisdiction over the suspect vessel by the other Party.

6. Failure by the first Party to waive jurisdiction shall not be interpreted as authorization for the other Party to assume jurisdiction.

7. In no case shall such authorizations be understood to cover the boarding or inspection of vessels of a flag other than that of the first Party; in such case, the other Party shall proceed in accordance with the rules of international law.

Article XII Liaison Office

Each Party shall identify to the other Party the Liaison Office and liaison officials responsible for communicating with its national authorities competent to receive and act on notifications under Articles III, IV, VI, VII, XIV and XVI, for processing requests under Article X for verification of registration and the right to fly its flag and authority to board, search and detain suspect vessels, and for instructions as to the exercise of jurisdiction under Article XI, in addition to any other communication necessary for the implementation of this Supplementary Arrangement.

Article XIII Suspect Vessels and Aircraft

Operations to suppress illicit traffic pursuant to this Supplementary Arrangement shall be carried out only against suspect vessels and aircraft, including vessels and aircraft without nationality.

Article XIV Notification of Results of Shipboardings and Actions Taken

1. Each Party shall promptly notify the other Party of the results of any boarding and search of the vessels of the other Party conducted pursuant to this Supplementary Arrangement.

2. Each Party, consistent with its laws, shall report in a timely manner to the other Party on the status of all investigations, prosecutions and judicial proceedings resulting from enforcement action taken pursuant to this Supplementary Arrangement where evidence of illicit traffic was found.

Article XV Conduct of Law Enforcement Officials

1. Each Party shall ensure that its law enforcement officials, when conducting boardings, searches and air intercept activities pursuant to this Supplementary

Arrangement, act in accordance with its applicable national laws and policies and with international law and accepted international practices.

2. In particular, while carrying out boarding and search activities pursuant to this Supplementary Arrangement, the Parties shall take due account of the need not to endanger the safety of life at sea, the security of the suspect vessel and its cargo, or to prejudice the commercial and legal interests of the flag State or any other interested State; and shall observe the norms of courtesy, respect and consideration for the persons on board the suspect vessel. While conducting air intercept activities pursuant to this Supplementary Arrangement, the Parties shall not endanger the lives of persons on board and the safety of civil aircraft.

3. Boardings and searches pursuant to this Supplementary Arrangement shall be carried out by law enforcement officials from law enforcement ships or aircraft, or from technical support vessels of a Party or of third States, and, in emergencies and under exceptional circumstances, may be assisted by designated auxiliary personnel from technical support vessels or aircraft of a Party or of third States.

4. When conducting boardings and searches law enforcement officials may carry regulation weapons.

5. Law enforcement vessels of a Party operating with the authorization of the other Party pursuant to this Supplementary Arrangement shall, during such operations, also fly, in the case of the United States of America, the Panamanian flag, and in the case of Panama, the United States Coast Guard ensign.

Article XVI

Identification of Technical Support Vessels and Aircraft

Prior to entry into the territory, waters or airspace of a Party, the law enforcement authority of the other Party shall furnish information on the technical support vessels and aircraft it will need for the conduct of the operations provided for in this Supplementary Arrangement, the type of service and support they will provide, their technical features, and the approximate period of time they will remain within the territory, waters or airspace of the other Party.

Article XVII

Use of Force

1. All uses of force by a Party pursuant to this Supplementary Arrangement shall be in strict accordance with applicable laws and policies of that Party and shall in all cases be the minimum reasonably necessary under the circumstances, except that neither Party shall use force against civil aircraft in flight.

2. Nothing in this Supplementary Arrangement shall impair the exercise of the inherent right of self-defense by law enforcement or other officials of the Parties.

Article XVIII

Exchange and Knowledge of Laws and Policies of the Parties

1. To facilitate implementation of this Supplementary Arrangement, each Party shall ensure that the other Party is fully informed of its respective applicable laws and policies, particularly those pertaining to the use of force.

2. Each Party shall ensure that all of its law enforcement officials acting pursuant to this Supplementary Arrangement are knowledgeable of the applicable laws and policies of both Parties.

Article XIX

Disposition of Seized Property

1. Assets seized in consequence of any operation undertaken pursuant to this Supplementary Arrangement shall be disposed of in accordance with the laws of the Party exercising jurisdiction in accordance with Article XI of this Supplementary Arrangement.

2. To the extent permitted by its laws and upon such terms as it deems appropriate, the seizing Party may, in any case, transfer forfeited assets or proceeds of their sale to the other Party. Each transfer generally will reflect the contribution of the other Party to facilitating or affecting the forfeiture of such assets or proceeds.

Article XX

Technical Assistance

The law enforcement authority of one Party (the "first Party") may request, and the law enforcement authority of the other Party may authorize, law enforcement officials of the other Party to provide technical assistance, such as specialized assistance in the conduct of search of suspect vessels, to law enforcement officials of the first Party for the boarding and search of suspect vessels located in the territory or waters of the first Party.

Article XXI

Follow-up and Evaluation

1. The Parties shall hold an annual meeting for the purpose of evaluating and following up on the implementation of this Supplementary Arrangement.

2. For the same purpose, either Party may invite, with sufficient advance notice, the other Party to special meetings.

Article XXII

Consultations and Dispute Settlement

1. In case a question arises in connection with implementation of this Supplementary Arrangement, either Party may request consultations with the other Party to resolve the matter.

2. The Parties undertake to settle by consultation any disputes that arise from the implementation of this Supplemental Arrangement.

Article XXIII
Claims

1. Any claim for damages, injury or loss resulting from an operation carried out under this Supplemental Arrangement shall be examined by the Party whose authorities conducted the operation.
2. If responsibility is established, the claim shall be resolved in favor of the claimant by that Party, in accordance with the domestic law of that Party, and in a manner consistent with international law, including paragraph 3 of Article 110 of the Law of the Sea Convention.
3. Neither Party thereby waives any rights it may have under international law to raise a claim with the other Party through diplomatic channels.

Article XXIV
Miscellaneous Provisions

Nothing in this Supplementary Arrangement:

- (a) precludes the Parties from otherwise agreeing on operations or other forms of cooperation to suppress illicit traffic;
- (b) supersedes any bilateral or multilateral agreement or other cooperative mechanism concluded by the Parties for the suppression of illicit traffic;
- (c) is intended to alter the rights and privileges due any individual in any legal proceeding; and
- (d) prejudices in any manner the positions of either Party regarding the international law of the sea or legal status of the Gulf of Panama.

Article XXV
Entry into Force

This Supplementary Arrangement shall enter into force upon signature.

Article XXVI
Termination

1. This Supplementary Arrangement may be terminated at any time by either Party upon written notification to the other Party through the diplomatic channel.
2. Such termination shall take effect six months from the date of notification.

Article XXVII
Continuation of Actions Taken

This Supplementary Arrangement shall continue to apply after termination with respect to any administrative or judicial proceedings arising out of actions taken pursuant to this Arrangement.

IN WITNESS WHEREOF, the undersigned, being duly authorized by their respective Governments, has signed this Supplementary Arrangement.

DONE AT Panama City, Republic of Panama, this fifth day of February, 2002, in the English and Spanish languages, each text being duly authentic.

FOR THE GOVERNMENT OF
THE UNITED STATES OF
AMERICA:

/s/ Frederick A. Becker

Frederick A. Becker
Chargé d'Affairs a.i.

FOR THE GOVERNMENT OF
THE REPUBLIC OF PANAMA:

/s/ A. Salas

Anibal Salas
Minister of Government and
Justice