

Assessing the Viability of the 2005 Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation

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Abstract: The terrorist attack on the *Achille Lauro* prompted the international community to adopt the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA) 1988, which established a legal basis for prosecuting maritime violence that did not fall within the piracy framework of the United Nations Convention on the Law of the Sea 1982. To extend the range of offences covered by the Convention, it was amended by the 2005 Protocol. The Protocol, however, has been the subject of much criticism. One of the most serious criticisms of the Protocol is directed at its Article 8*bis*, which authorizes a state party to visit a ship flying the flag of another state party without prior authorization from the flag state on the ground of failure to respond within four hours. In fact, this provision is in conflict with the exclusive jurisdiction of a flag state over a ship flying its flag on the high seas. This is the reason why although the 2005 Protocol entered into force on 28 July 2010, until present, there are only 22 States parties, most of which are not major maritime countries. The main objective of this paper therefore is to identify shortcomings of the 2005 Protocol and assess its viability. It is suggested that the 2005 Protocol needs to be revised to cure its deficiencies in order to attract more states to become parties to it.

Key words: Maritime terrorism; SUA Convention; 2005 Protocol; piracy; safety of maritime navigation.

INTRODUCTION

Safety of maritime navigation has been one of the major issues in various debates, workshops and on discussion tables for decades all over the world (Manyin, M et al., 2004). Notably, piracy and maritime terrorism are most common crimes, which threaten the safety of international maritime navigation. Maritime terrorism, a product of the 21st century, could be confused with the traditional crime of piracy. In the past, piracy was one of the most common tragedies in the seas apart from natural disasters and acts of God. It recurs and seriously threatens the safety of international maritime navigation in the present day too. It threatens crews, passengers, property and ships, imperils critical sea lanes and the free flow of international trade, and erodes regional stability. Piratical attacks against oil tankers and other ships in the Gulf of Eden off the Coast of Somalia and the Straits of Malacca demonstrate the seriousness of the danger of modern-day piracy (Ong-Webb G.G., 2006.). The real headache for international lawyers is that the definition of piracy in the United Nations Convention on the Law of the Sea (UNCLOS) 1982 is too narrow to be effective in suppressing the modern-day piracy. What makes the matter worst is that in modern times piratical acts may be associated with terrorist motives which is based on 'political ends' rather than 'private ends' as required by the definition of piracy under the UNCLOS. The rise of the new threat of maritime terrorism was not contemplated by the drafters of the UNCLOS.

As a result, the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA) 1988 was adopted by the International Maritime Organization with a view to addressing the increasing threat of maritime terrorism. It focuses on more serious attacks that can occur at seas and the offence is defined far more broadly in terms of geographical scope than the UNCLOS definition. Although the Convention attracts quite a number of States to be parties, it cannot effectively combat modern-day piracy or deter maritime terrorism. Under this Convention, contracting parties have option either to extradite or to prosecute alleged offenders. Difficulties may arise when a State refuses to extradite and rather tolerates or even assists perpetrators.

For these reasons, the IMO adopted the 2005 Protocol with major amendments to the SUA Convention. The 2005 Protocol is an ambitious attempt to address the issue of maritime terrorism. It goes even further and deals also with the issue of non-proliferation. Nevertheless, the 2005 Protocol took five long years to enter in force, which indicates that the international community is not much in favour of it.

The main objective of this study, therefore, is to assess the viability of the 2005 Protocol in combating maritime terrorism. The following questions need to be addressed: Why majority of States are reluctant to ratify the 2005 Protocol? Is the boarding provision in Article 8 *bis* contrary to the exclusive jurisdiction of the flag State? What are the shortcomings of the 2005 Protocol and how to solve them?

Methods:

The qualitative approach is the main methodology, which is supplemented by an analysis of the key provisions of the Protocol. The analytical method is used to identify shortcomings of the Protocol and how to amend them to be a legal document which is acceptable to the overwhelming majority of the international community.

Research Findings:

Narrow definition of Piracy under International Law:

The Convention on the High Seas 1958 is the first international legal regime which contains provisions for the crime of piracy. The UNCLOS 1982 follows the definition of piracy in the Convention on the High Seas 1958, which reflects customary international law. Article 101 (a) of the UNCLOS defines piracy as “any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed: (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft; (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State.” This definition is too narrow to encounter modern-day piracy. Basically, there are three main deficiencies, namely: (i) the piratical attack must occur on the high seas and not within the jurisdiction of any state; (ii) two ships must be involved to constitute piracy, i.e. the pirate must and the victim ship; and (iii) the attack must be for “private ends” (Menefee, S.P., 1999).

Soon after the adoption of the UNCLOS, it became clear that its conception of piracy did not cover many of the violent crimes committed on the seas. Inadequacy of the definition of piracy under the UNCLOS was evident when the *Achille Lauro* incident occurred. On 7th October 1985, four armed stowaways onboard the Italian cruise liner *Achille Lauro*, hijacked the ship and killed one American passenger (Natalino, R., 1990). The apparent political motivations for the attack, the location of the attack in Egyptian waters, and the attack originated from the target ship rather than from a separate ship, placed the attack outside the ambit of the definition of piracy under the UNCLOS and, presumably, beyond the purview of universal jurisdiction. The United States, and other states that may have had an interest in prosecuting the perpetrators, were left without the authority under international law to prosecute. After the *Achille Lauro* attack, the international community, through the United Nations and the IMO, formulated the SUA Convention which establishes a legal basis for prosecuting maritime violence that did not fall within the UNCLOS piracy regime (Halberstam, M., 1988).

Unlawful Acts under the SUA Convention:

It could be observed that there was no legal framework at both the international and regional level for the enforcement of maritime terrorism until the *Achille Lauro* incident took place (Abhyankar, J., 2006). At that time, it was a hotly-debated issue for the international community (Natalino, R., 1990). On 10th March 1988, as a result of the diplomatic initiative taken by Austria, Egypt and Italy in respond to the *Achille Lauro* attack, the IMO adopted the SUA Convention in order to create regulations for unlawful acts against the safety of maritime navigation. The Convention does not employ terminologies such as piracy and maritime terrorism due to difficulties in defining them (Ansari, A. H., 2002). It uses the simple term “unlawful acts” in which both the crime of piracy and maritime terrorism can be covered. The SUA Convention criminalizes offences which do not fall within the definition of piracy under the UNCLOS.

Under Article 3 (1) of the SUA Convention, it is unlawful to seize or take control of a ship by force or threat of force, to perform an act of violence against a person on board a ship if it is likely to endanger safe navigation of that ship, to destroy or damage a ship or its cargo if it is likely to endanger safe navigation, to place devices or substances on a ship that are likely to destroy that ship, to knowingly communicate false information to a ship that would endanger safe navigation, and to injure or kill any person in connection with any of the above acts.

If we look at the applicability under Article 4 of the Convention, it applies “if the ship is navigating or is scheduled to navigate into, through or from waters beyond the outer limit of the territorial sea of a single State, or the lateral limits of its territorial sea with adjacent States.” Accordingly, the Convention is not applicable if the ship is navigating within the territorial sea of a single state. However, it still applies when the offender or the alleged offender is found in the territory of a State Party. Therefore, this Convention is applicable to offences committed not only on the high seas but also in the territorial sea and even in the internal waters of a State (Treves, Tullio., 1998).

The SUA Convention authorizes and, under certain circumstances, requires states parties to establish jurisdiction over the perpetrators, either extraditing the perpetrators to another interested signatory state or

prosecuting the alleged offenders themselves. According to Articles 5 and 6 of the SUA Convention, a State Party is required to take necessary measures for penalizing offenders and establish jurisdiction over the offence committed against or on board a ship flying the flag of the State at the time the offence is committed; or in the territory of that State, including its territorial sea; or by a national of that State. Furthermore, a State Party may also establish its jurisdiction over any offence when it is committed by a stateless person whose habitual residence is in that State; or during its commission a national of that State is seized, threatened, injured or killed; or it is committed in an attempt to compel that State to do or abstain from doing any act. Under Article 7 (1) of the SUA Convention, a State Party in the territory of which the offender or the alleged offender is present shall take him into custody or take other measures to enable any criminal or extradition proceedings to be instituted. According to Article 10 of the SUA Convention, if the custodial state does not extradite the offender, then that party is obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case without delay to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State.

The SUA Convention, in any case, facilitates rules and principles in order to control and minimize unlawful acts against the safety of maritime navigation even though it will not be able to bring to an end of maritime terrorism by itself. Although the Convention attracts 160 States to be parties (IMO, 2012), it still suffers deficiencies especially pertaining to enforcement measures such as jurisdiction, extradition and prosecution. Article 11 of the SUA Convention states that offences set forth in this Convention are considered as extraditable crimes in existing and upcoming extradition treaty between States Parties. Nonetheless, if there is no extradition treaty between States Parties, the requested State Party may, at its option, consider this Convention as a legal basis for extradition. Moreover, extradition shall also be subject to the other conditions provided by the law of the requested State Party.

Since parties have the option either to extradite or to prosecute alleged offenders, difficulties may arise when a State Party refuses to extradite but rather tolerates or assists the perpetrators (Tiribelli, C., 2006); or if neither state - both the coastal state and the potential state for prosecution - is a party to the SUA Convention. It can even be said that the enforcement measures under this Convention is discretionary in nature. Furthermore, it does not create any provision for acts of terrorism that might be committed by Governments or their agents, the so called state-sponsored terrorism. Hence, it is still needed to be amended for the purpose of creating effective enforcement mechanisms among state parties pertaining to establishing jurisdiction, prosecution and extradition to combat all forms of unlawful acts against maritime navigation. In this respect, a diplomatic conference was held again to make necessary amendments to the SUA Convention with a view to adopt provisions supplementary to those of the Convention, to suppress additional terrorist acts of violence against the safety and security of maritime navigation and to improve its effectiveness.

The 2005 Protocol and Lukewarm Response By The International Community:

The IMO held a Diplomatic Conference on the Revision of the SUA Convention at its headquarters and, on 14th October 2005, the 2005 Protocol to the SUA Convention was successfully adopted to encounter the growing threat of maritime terrorism. The Protocol entered into force on 28 July 2010 and up until now it has only 22 States Parties. Despite the fact that the 2005 Protocol can be a potential solution to encounter all forms of unlawful acts against the safety of international maritime navigation, there are only 22 States parties, namely, Algeria, Austria, Bulgaria, Cook Islands, Côte d'Ivoire, Dominican Republic, Estonia, Fiji, Latvia, Liechtenstein, Marshall Islands, Nauru, Netherlands, Palau, Panama, Saint Kitts and Nevis, Saint Vincent and the Grenadines, Serbia, Spain, Switzerland, Turkey and Vanuatu. This number of States is less significant in preventing and suppressing maritime terrorism worldwide and it is exceptionally low compare to 160 States parties to the SUA Convention (IMO, 2012). Again, it is clear that most of the major maritime countries are not in favour of this Protocol.

New Offences under the 2005 Protocol:

The 2005 Protocol mainly widens the scope of maritime offences and it covers not only piratical or terrorist attacks but also the marine transportation of Weapons of Mass Destruction (WMD), especially Biological, Chemical, Nuclear weapons and other nuclear explosive devices (BCN) for the purpose of utilizing them in terrorist activity, and the transportation of people who have involved directly or indirectly in committing terrorist attack. Maritime violence offenses enumerated in Article 3 of the SUA Convention are expanded by Article 4 of the 2005 Protocol. Provisions set out in Articles *3bis*, *3ter*, and *3quater* greatly supplement additional maritime offenses to Article 3 of the SUA Convention.

Article *3bis* of the 2005 Protocol deals terrorist activities which involve ships. It does not matter whether a ship is used as a tool to commit the violence attack or a ship as a mode of transportation to carry materials, or substances for the purpose of utilizing in committing terrorist activities, or persons who have committed any offence set forth under this Convention (Harrington, C.A., 2007). According to Article *3bis* (1) (a), a person is guilty of an offence if he unlawfully and intentionally intimidates a population, or compels a government or an

international organization to do or to abstain from doing any act. Under the same Article, it is also prohibited to use against a ship or on a ship or discharge from a ship any explosive, radioactive material or BCN weapon in a manner that causes or is likely to cause death or serious injury or damage; or discharge from a ship oil, liquefied natural gas, or other hazardous or noxious substance in such quantity or concentration that causes or is likely to cause death or serious injury or damage; or use a ship in a manner that causes death or serious injury or damage; or threaten, with or without a condition, as is provided for under national law to commit one of the aforesaid offences.

Article 3*bis* (1) (b) of the 2005 Protocol makes illegal to transport on board a ship any explosive or radioactive material, knowing that it is intended to be used to cause, or in a threat to cause, with or without a condition, as is provided for under national law, death or serious injury or damage for the purpose of intimidating a population, or compelling a government or an international organization to do or to abstain from doing any act; or any BCN weapon, knowing it to be a BCN weapon; or any source material, special fissionable material, or equipment or material especially designed or prepared for the processing, use or production of special fissionable material, knowing that it is intended to be used in a nuclear explosive activity or in any other nuclear activity not under safeguards pursuant to an IAEA comprehensive safeguards agreement; or any equipment, materials or software or related technology that significantly contributes to the design, manufacture or delivery of a BCN weapon, with the intention that it will be used for such purpose. However, Article 3*bis* (2) provides some safeguards to the transportation of abovementioned items or materials if such items or materials are transported under the control of a State Party to the Treaty on the Non-Proliferation of Nuclear Weapons where the resulting transfer or receipt of the item or material is not contrary to such State Party's obligations under the Treaty on the Non-Proliferation of Nuclear Weapons; and, if such items or materials are intended for the delivery system of a nuclear weapon or other nuclear explosive device of a State Party to the Treaty on the Non-Proliferation of Nuclear Weapons.

Interestingly, under Article 3*ter* of the 2005 Protocol, a person is also considered as an offender if that person unlawfully and intentionally transports another person on board a ship knowing that the person has committed an act that constitutes an offence set forth in Article 3, 3*bis* or 3*quater* or an offence set forth in any treaty listed in the Annex, and intending to assist that person to evade criminal prosecution. Nevertheless, if the person so transports does not have knowledge about the offender or the alleged offender, then the transporter will not be liable under this Convention. Again, under Article 3*quater* a person also commits an offence if that person unlawfully and intentionally injures or kills any person or attempts to commit an offence; or participates as an accomplice in an offence; or organizes or directs others to commit an offence; or contributes to the commission of one or more offences set forth in Article 3 (1), Article 3*bis*, or Article 3*ter*.

It is noticeable that Article 3*bis* (1) (a) only concerns with the offences where a ship is used as a weapon to commit terrorist attacks whereas Article 3*bis* (1) (b) emphasizes on the offences where a ship is used as a mean to transport materials or substances with the intention to apply in committing terrorist activities. Another fresh approach could also be found in Article 3*ter* where a person is regarded as an offender for knowingly transports another person has committed an offence set forth in the Convention and assisting that person to evade criminal prosecution. Therefore, this is the first international legal regime that includes provisions against a person who uses a ship as a weapon or as a means to carry cargoes intended to utilize in terrorist attacks or weapons of mass destruction (WMD), or who transports terrorists (IMO, October 2005).

Right of Visit and Boarding Procedures:

Article 8 (1) of the 2005 Protocol encompasses responsibilities of the master of the ship, flag State and receiving State in delivering the offender or the alleged offender who has reasonable grounds to believe in committing an offence set forth in article 3, 3*bis*, 3*ter*, or 3*quater* to the authorities of any State Party. Article 8*bis* (1) imposes duties to States Parties to co-operate to the fullest extent possible to prevent and suppress unlawful acts covered under this Convention and to respond to requests pursuant to this article as expeditiously as possible in accordance with international law. Article 8*bis* (2) even go further details as to how a request should be responded. The respond generally contains the name of the suspect ship, the IMO ship identification number, the port of registry, the ports of origin and destination, and any other relevant information. If a request is conveyed orally, the requesting Party shall confirm the request in writing as soon as possible. On the other hand, the requested Party is also obliged to acknowledge its receipt of any written or oral request immediately.

The 2005 Protocol also deals with the boarding procedures on the high seas by a State Party to a ship which flies the flag of any State Party or non-flag ship. Article 8*bis* - which provides the right of visit and boarding procedures is the most critical provision among others in the 2005 Protocol. Right of visit and boarding procedures, in fact, are major burning issues that make the 2005 Protocol infamous in the international community. Therefore, Article 8*bis* will be analyzed critically below in order to examine whether the 2005 Protocol is feasible in the international community.

The 2005 Protocol imposes States Parties to take into account the dangers and difficulties involved in boarding a ship at sea and searching its cargo. Article 8*bis* (3) provides to give due consideration as to whether

other appropriate measures agreed between the States concerned could be more safely taken in the next port of call or elsewhere. Under Article 8*bis* (4), the foremost requirement for a State Party to visit a ship flying the flag of another party is that reasonable grounds to suspect that an offence set forth in article 3, 3*bis*, 3*ter* or 3*quater* has been, or is being, or is about to be committed involving a ship flying its flag. Then, that Party may seek the assistance from other States Parties in preventing or suppressing that offence. The States Parties so requested are necessary to exercise their best efforts to provide such assistance within the means available to them.

According to Article 8*bis* (5), a State Party may board on a ship flying the flag of another Party when it has aforesaid reasonable grounds. It is, however, subject to several requirements. At the initial stage, the State Party which has reasonable grounds must request to the flag State to authenticate the nationality of that ship. The requested Party also duly obliged to confirm the nationality of the ship. After the confirmation of the nationality of that ship, the requesting Party will seek for the authorization from the flag State in order to board and to take appropriate measures with regard to the ship which may include stopping, boarding and searching the ship, its cargo and persons on board, and questioning the persons on board in order to determine if an offence set forth in Article 3, 3*bis*, 3*ter* or 3*quater* has been, or is being, or is about to be committed.

At this juncture, the flag State shall either authorize the requesting Party to board and to take appropriate measures subject to any conditions it may impose; or conduct the boarding and searching with its own law enforcement or other officials; or conduct the boarding and searching jointly with the requesting Party, subject to any conditions it may impose; or decline to authorize the boarding and searching. Therefore, it is apparent that the requesting Party does not have the right to board the ship or take measures without the express authorization of the flag State.

Nonetheless, if there is no response from the requested Party within four hours to confirm nationality of the ship, the requesting Party may also notify the IMO Secretary-General in order to allow for boarding and searching the ship, its cargo and persons on board, and questioning the persons on board to locate and examine documentation of its nationality and determine if an offence set forth in Article 3, 3*bis*, 3*ter* or 3*quater* has been, or is being, or is about to be committed. In this situation, the IMO Secretary-General would grant the authorization to the requesting to board and search the ship, its cargo and persons on board. A State Party may also notify to the IMO Secretary-General when it authorizes a requesting Party to board and search the ship, its cargo and persons on board, and to question the persons on board in order to determine if an offence under article 3, 3*bis*, 3*ter* or 3*quater* has been, is being or is about to be committed. Such notifications can be withdrawn at any time. It could be analyzed that a State Party will only has the right to exercise its boarding and searching to take appropriate measures towards a ship flying the flag of another Party when the flag State does not reply the request within four hours by notifying to the IMO Secretary-General on the basis of reasonable grounds to suspect that the ship or a person on board the ship has been, or is being, or is about to be involved in the commission of an offence set forth in Article 3, 3*bis*, 3*ter* or 3*quater*.

Under Articles 8*bis* (6) and (7), the flag State may authorize the requesting Party to detain the ship, cargo and persons on board when evidence of conduct described in Article 3, 3*bis*, 3*ter* or 3*quater* is found. The boarding Party, however, may not take any additional measures without the express authorization of the flag State, except when it is necessary to relieve imminent danger to the lives of persons or where those measures derive from relevant bilateral or multilateral agreements between them. The boarding Party is required to inform immediately to the flag state the results of a boarding, searching, and detention conducted and the discovery of evidence of illegal conduct that is not subject to this Convention.

With respect to the jurisdiction, Article 8*bis* (8) gives the right to the flag State to exercise its jurisdiction over a detained ship, cargo or other items and persons on board, including seizure, forfeiture, arrest and prosecution. Under Article 8*bis* (9), however, the flag State may consent to the exercise of jurisdiction by another state which is also having jurisdiction under Article 6. As a general rule, use of force is prohibited during the course of boarding and searching on board a ship. Nevertheless, it is allowed to do so when there is necessity to ensure the safety of its officials and persons on board, or where the officials are obstructed in the execution of the authorized actions unless it exceeds the minimum degree of force which is necessary and reasonable in the circumstances.

Article 8*bis* (10) provides some vital safeguards for a State Party in taking measures against a ship too. A State Party has to take appropriate consideration not to cause danger to the safety of life at sea. It must ensure that all persons on board are treated in a manner which preserves their basic human dignity in accordance with relevant international laws including international law of human rights and exercise of boarding and searching in accordance with applicable international law. It will need to take due account of the safety and security of the ship and its cargo; and need not to prejudice the commercial or legal interests of the flag State. It shall also ensure that any measure taken with regard to the ship or its cargo is environmentally sound; and persons on board against whom proceedings may be commenced in connection with any of the offences set forth in Article 3, 3*bis*, 3*ter* or 3*quater* are in line with the protections available under Article 10 (2) of the SUA Convention. In addition, it has to give the opportunity to the master of a ship to contact the ship's owner and the flag State; and take reasonable efforts to avoid a ship being unduly detained or delayed.

Moreover, a State Party will be responsible for any damage, harm or loss attributable to them arising from measures taken if the grounds to take such measures are not proven when the ship has not committed any act justifying the measures taken; or such measures are unlawful or exceed reasonable requirements. In this situation, States Parties shall provide effective recourse in respect of such damage, harm or loss. Again, a State Party which takes measure against a ship cannot interfere the rights as well as obligations and the exercise of jurisdiction by coastal States in accordance with the international law of the sea; or the authority of the flag State to exercise jurisdiction and control in administrative, technical and social matters involving the ship. The boarding and searching measures will only be taken by law enforcement or other authorized officials from warships or military aircraft, or from other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect.

A Critical Assessment of the 2005 Protocol:

Although the 2005 Protocol can be a potential solution to encounter all forms of unlawful acts against international maritime navigation, there are only 22 States parties. Why the overwhelming majority of States are reluctant to ratify the 2005 Protocol? In considering the whole scenario of the 2005 Protocol, it is evident that most of the States are not in favour of it due to the right of visit and boarding procedures set out in Article 8*bis*. Majority consider that this provision is against the principle of the freedom of navigation on the high seas and the exclusive jurisdiction of the flag state over ships flying its flag on the high seas.

Freedom of navigation on the high seas has been a well established principle of international law since time immemorial. It has also been reaffirmed again and again in various international legal instruments and case law. It is codified in Article 2 of the Convention on the High Seas 1958 and Article 87 (1) of the UNCLOS 1982. According to this principle, no state can exercise jurisdiction on the high seas. However, a state is entitled to exercise exclusive jurisdiction over ships flying its flag on the high seas. In the case of *S.S Lotus Case* (France v. Turkey) [1927] PCIJ Series A, No 10, at 25, the Permanent Court International Justice (PCIJ) recognized the freedom of the high seas by affirming that “vessels on the high seas are subject to no authority except that of the State whose flag they fly. In virtue of the principle of freedom of the seas, that is to say, the absence of any territorial sovereignty upon the high seas, no state may exercise any kind of jurisdiction over foreign vessels upon them.” This principle of the exclusive jurisdiction of flag states over vessels on the high seas flying their flags has also been codified in Article 6 (1) of the Convention on the High Seas 1958 and Article 94 (1) the UNCLOS 1982. The combination of the two principles of the freedom of navigation on the high seas and the exclusive jurisdiction of flag states makes it unable for a state to exercise its jurisdiction over a foreign ship on the high seas apart from a few exceptions.

Without a doubt, the right of visit by a warship to a foreign vessel based on the suspicious ground of committing piracy and maritime terrorism is not something strange in the field of international law of the sea. Logically, there would not be any hesitation for international community to be part of the 2005 Protocol which also stipulates a non-flag state party to visit on board a ship with the authorization from the flag state on the basis of reasonable grounds to suspect that the ship or a person on board the ship has been, or is being, or is about to be involved in the commission of an offence set forth in article 3, 3*bis*, 3*ter* or 3*quater*. It is still acceptable for a sovereign state to allow the foreign authority with its prior permission to exercise enforcement jurisdiction over a ship flying its flag on the high seas.

What makes the international community undesirable to ratify the 2005 Protocol is that of the time limitation sets out in Article 8*bis* (d). Under this Article, if the flag state fails to respond within four hours to a request, then the requesting Party may still exercise boarding and searching the ship, its cargo and persons on board, and questioning the persons on board to locate and examine documentation of its nationality and determine if an offence set forth in article 3, 3*bis*, 3*ter* or 3*quater* has been, or is being, or is about to be committed by simply notifying to the IMO Secretary-General which would grant authorization to do so.

In this regard, China, during the course of negotiations, contended that the requirement to respond a request as expeditiously as possible as sets out in Article 8*bis* (1) is sufficient and, therefore, to specify an impractical time limit would create more complexity in boarding procedures. It is not a pragmatic approach as well since various states are subjected to different time zone and public holidays are also different from state to state. Though these were the imperative factors to bear in mind while drafting the 2005 Protocol, unfortunately, they were overlooked (IMO, May 2004). Furthermore, it seems to be a word of warning from the requesting state to a flag state to respond its request within four hours and unless it will visit without any authorization taken from the flag state (IMO, November 2004). Again, it does mean that there is tacit approval from the flag state to board on a ship due to its delay in responding to a request made by the requesting state. This state of affairs is totally unacceptable for any sovereign state. In view of that, majority of representatives at the Rome conference considered that to slot in a time limitation is unnecessary. Alternatively, it was too constraining, impracticable (especially if different time zones were involved) and served no real purpose. It is very rigid and, therefore, not viable to practice (IMO, May 2005).

Suggested Solutions To The Weaknesses Of The 2005 Protocol:

Is the 2005 Protocol need to be revised? The answer is in the affirmative and the Protocol needs amendments in order to meet the expectations of the international community. It could be observed that boarding procedures includes in the 2005 Protocol constitutes a significant departure from the fundamental principles of international law such as the freedom of navigation on the high seas and exclusive jurisdiction of flag states over the ships flying their flags on the high seas. Nevertheless, it is essential that any kind of exception must be precise, unambiguous and internationally accepted.

What would be the solution for the 2005 Protocol? Some necessary adjustments need to be made to the 2005 Protocol in order to convince more states to become parties. Otherwise, most of the states will reject it. International maritime navigation will not also be free from the threat of maritime terrorism unless the 2005 Protocol can attract substantial numbers of states. The suggestion predominantly relates to the right of visit and boarding procedures under Article 8*bis*. A State Party should be allowed to, if it has grounds to suspect that an offence has been committed, exercise the right of visit to vessels on the high seas strictly with the prior authorization from the flag state (IMO, May 2005). Boarding without prior permission from the flag state on the ground of failure to respond a request should be deleted from the 2005 Protocol. Then, state parties will feel secured for vessels flying their flags which are under their exclusive jurisdiction because such vessels will only be boarded by a foreign warship only when they consent to do so. Again, the limitation to respond a request within four hours from the flag state should also be abolished. State parties are already obliged to respond a request made by a State Party as expeditiously as possible. Thus, setting up a time limitation would create unnecessary complexity and kind of threat to the flag state.

However, it does not mean that there cannot be any such detailed rules as in Article 8*bis* for apprehending perpetrators. It could be done between States Parties by concluding bilateral or multilateral agreements based on the basic principles set out in the Convention. Besides, Articles 8*bis* (12) and (13) of the 2005 Protocol encourage states parties to conclude agreements or make necessary arrangements among them to facilitate law enforcement operations. Thus, ample of chances are there for the State Parties to develop standard operating procedures for joint operations pursuant to this Convention and consult, as appropriate, with other States Parties with a view to harmonizing such standard operating procedures for the conduct of operations. It is recommended that the 2005 Protocol first should meet the general requirements of the international community as a whole and ought not to be too inflexible for the states to practice it. Only in this way, it will be acceptable for significant number of states to be parties to it.

Conclusion:

In fact, threat of maritime terrorists and piratical attacks are still on the rise around the world (IMB, 2004). Unlawful acts against safety of maritime navigation such as maritime terrorism and piracy will continue unless and until effective enforcement mechanisms are set up to prevent and suppress such crimes (Frécon, E., 2006). Thus, without any exception, all sorts of unlawful acts against safety of maritime navigation should be strictly prohibited due to its contrary to fundamental human rights such as right to life, right to liberty and right to security. All states are responsible to ensure maritime security as it is a common interest for the international community as a whole (Abdul Ghafur Hamid, 2006).

Despite the shortcomings of both the SUA Convention and the 2005 Protocol, they can still contribute a lot to ensure maritime security at seas. If the 2005 Protocol can attract significant number of states to be parties, it would be the most up-to-date international legal regime to encounter all forms of unlawful acts against the safety of maritime navigation. Nonetheless, as it is suggested above, the 2005 Protocol still need to be revised with a view to meet the expectation of the international community. In this way, the 2005 Protocol will contribute greatly not only to prevent and suppress all forms of unlawful acts against safety of the international maritime navigation but also to maintain international peace and security at seas.

REFERENCES

Abdul Ghafur Hamid., 2006. Maritime Terrorism, the Straits of Malacca, and the Issue of State Responsibility. *Tulane Journal of International and Comparative Law*, 15: 155.

Ansari, A.H., 2002. Terrorism, National Integrity and Human Rights: A Critical Appraisal. *Malayan Law Journal*, 2: i-xxxvii.

Abhyankar, J., 2006. Piracy, Armed Robbery and Terrorism at Sea: A Global and Regional Outlook. In Graham Gerard Ong-Webb (ed.). 2006. Piracy, Maritime Terrorism and Securing the Malacca Straits. Singapore: the International Institute for Asian Studies, the Netherlands [IIAS] and the Institute of Southeast Asian Studies (ISEAS), 1: 1-22.

Frécon, E., 2006. Piracy and Armed Robbery at Sea along the Malacca Straits: Initial Impressions from Fieldwork in the Riau Islands. In Graham Gerard Ong-Webb (ed.) 2006. Piracy, Maritime Terrorism and

Securing the Malacca Straits. Singapore: the International Institute for Asian Studies, the Netherlands [IIAS] and the Institute of Southeast Asian Studies (ISEAS), 5: 68-83.

Halberstam, M., 1988. Terrorism on the High Seas: the *Achille Lauro*, Piracy and the IMO Convention on the Maritime Safety. *American Journal of International Law*, 82: 269-310.

Harrington, C.A., 2007. The need to Incorporate Article 3bis(1)(a) and 8bis of the 2005 Draft SUA Protocol into Part VII of the United Nations Convention on the Law of the Sea. *Pacific Rim Law & Policy Journal*, 16: 107.

International Maritime Bureau IMB., January 1 - December 31, 2004. Piracy and Armed Robbery: Attacks in SE Asia, Indian Sub. Cont., and Far East. Available at <http://www.iccwbo.org/home/news_archives/2005/Images/Piracy_maps/Piracy_maps_2004.asp>

International Maritime Organization IMO., October 2012. Status of Multilateral Conventions and instruments in Respect of which the International Maritime Organization or Its Secretary-General Performs Depository or other Functions.

International Maritime Organization IMO., May 2004. IMO Legal Committee (88th Session). Agenda item 13, Report of the Legal Committee on the Work of its Eighty-Eighth Session. IMO Doc. LEG 88/13.

International Maritime Organization IMO., November 2004. IMO Legal Committee (89th Session). Agenda item 16, Report of the Legal Committee on the Work of its Eighty-Ninth Session. IMO Doc. LEG 89/16.

International Maritime Organization IMO., May 2005. IMO Legal Committee (90th Session). Agenda item 15, Report of the Legal Committee on the Work of its Ninetieth Session. IMO Doc. LEG 90/15.

International Maritime Organization IMO., October 2005. Revised treaties to address unlawful acts at sea adopted at international conference, Briefing 42. Disarmament Documentation. Available at <<http://www.acronym.org.uk/docs/0510/doc06.htm>>

Manyin, M et al., 2004. Congressional Research Service, Terrorism in Southeast Asia, 2: 4. Available at <<http://fpc.state.gov/documents/organization/35795.pdf>>

Menefee, S.P., 1999. Anti-Piracy Law in the Year of the Ocean: Problem and Opportunity. *ILSA Journal of International and Comparative Law*, 5: 309.

Natalino, R., 1990. *Maritime Terrorism and International Law*. Dordrecht Neth., Boston Mass. USA: Martinus Nijhoff Publishers in International studies on Terrorism, 6: 43-90.

Ong-Webb G.G (ed.), 2006. Piracy, Maritime Terrorism and Securing the Malacca Straits. Singapore: the International Institute for Asian Studies, the Netherlands [IIAS] and the Institute of Southeast Asian Studies (ISEAS), xxxv-xxxvi.

Tiribelli, C., 2006. Time to Update the 1988 Rome Convention for the Suppression of Unlawful Acts Against The Safety of Maritime Navigation. *Oregon Review of International Law*, 8: 133.

Treves, Tullio., 1998. The Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation. *Singapore Journal of International & Comparative Law*, 2: 541-556.