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# HEIGHTENED SECURITY: THE NEED TO INCORPORATE ARTICLES 3BIS(1)(A) AND 8BIS(5)(E) OF THE 2005 DRAFT SUA PROTOCOL INTO PART VII OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

Caitlin A. Harrington<sup>†</sup>

*Abstract:* Maritime terrorism on the Pacific Ocean is a growing threat. Terrorists can take advantage of widening gaps in the world's maritime security regime. The current incarnation of the legal framework surrounding the nonflag-state right of visit has exacerbated emerging weaknesses. The world must be willing to allow nonflag states greater power to board vessels on the high seas that are suspected of participating in maritime terrorism.

The ship-boarding procedures within the 2005 Draft Protocol to the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation are a step in the right direction. They do not go far enough, however, toward increasing maritime security.

To effectively combat maritime terrorism, the international community should amend the United Nations Convention on the Law of the Sea, incorporating Article 3bis(1)(a) and Article 8bis(5)(e) of the 2005 Draft Protocol into Part VII of the Convention. This would create an additional exception to the principle of exclusive flag-state jurisdiction and control on the high seas, allowing for a nonflag-state right of visit given reasonable grounds to suspect that a ship has committed, is committing, or is about to commit an act of maritime terrorism as defined by Article 3bis(1)(a).

## I. INTRODUCTION

Widening gaps in maritime security have resulted in weaknesses ripe for exploitation by terrorist organizations targeting the waters of the Pacific Ocean. The danger of maritime terrorism has become increasingly clear. A member of the Jemaah Islamiyah terrorist organization, a group with ties to Al Qa'ida, has admitted to the Indonesia National Intelligence Agency that the waters of Southeast Asia have emerged as a potential target.<sup>1</sup> In a separate incident, Barbar Ahmad, another terrorist linked to Al Qa'ida, was discovered with a set of plans outlining the vulnerabilities of American naval fleets, raising fears of a maritime terrorist attack.<sup>2</sup>

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<sup>1</sup> Joshua Ho, *The Security of Sea Lanes in Southeast Asia*, MIL. TECH., May 1, 2005, at 14, 15.

<sup>2</sup> *Id.*

International terrorist organizations have strengthened their maritime presence. Recent estimates are that Osama bin Laden and those associated with him control a dozen to fifty freighters.<sup>3</sup> Al-Qa'ida, the Moro Islamic Liberation Front, the Abu Sayyaff Group, Jemaah Islamiyah, the Kumpulan Militan Malaysia, the Gerakan Aceh Merdeka, and Laskar Jihad are all suspected of planning or undertaking maritime attacks in the Asia Pacific region.<sup>4</sup> Reports also indicate a growing interest on the part of Al-Qa'ida, Jemaah Islamiyah and the Kumpulan Militan Malaysia to launch terrorist attacks targeting global trade and the U.S. Navy.<sup>5</sup>

Although many of the potential targets of maritime terrorism lie in the coastal waters and ports of nation states, effective control over the high seas remains a vital element in the prevention of attacks. Pursuant to the United Nations Convention on the Law of the Sea ("UNCLOS"), the vast majority of the world's oceans are classified as the high seas. Therefore, it is likely that terrorist vessels, even those whose eventual targets lie closer to the shoreline, will travel through the high seas.

Terrorists, taking advantage of weak international enforcement, can also directly target ships traveling on the high seas. In the words of U.S. Admiral Walter F. Doran, "terrorism, like water, flows through the paths of least resistance."<sup>6</sup> This comment argues that, under the current international legal framework, the international community has very little power to resist a terror attack on the high seas.

Weak flag-state<sup>7</sup> control over vessels traveling on the high seas creates gaps in maritime security, exacerbating the threat of maritime terrorism. UNCLOS codifies the exclusive right of flag states to exercise jurisdiction and control over their vessels traveling on the high seas. While UNCLOS provides a limited number of exceptions allowing for a nonflag-state right of visit given specific circumstances, none of the exceptions focuses on the prevention of a maritime terrorist attack.

Under current international law of the sea, nonflag states must gain flag-state permission to board a suspect vessel on the high seas or rely upon the flag state to ensure that the vessel is not involved in terrorist activity. Flag states exert varying levels of regulation and enforcement over their

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<sup>3</sup> Michael A. Becker, *The Shifting Public Order of the Oceans: Freedom of Navigation and the Interdiction of Ships at Sea*, 46 HARV. INT'L L. J. 131, 145 (2005).

<sup>4</sup> *U.S. Urges Nations to Sign Treaty Prohibiting Nuclear Terrorism*, U.S. FED. NEWS, Sept. 12, 2005.

<sup>5</sup> *Id.*

<sup>6</sup> Admiral Walter F. Doran, 18th Asialink Lecture Address, Sept. 9, 2003, available at <http://www.cpf.navy.mil/speeches/030909.htm>.

<sup>7</sup> For a description of flag states, see *infra* comment II(B)(1).

ships. So-called “flags of convenience” are those of flag states that fail to strictly monitor and enforce international law on their vessels. To prevent a maritime terrorist attack, the international community clearly must rectify the weaknesses in maritime security created by inadequate flag-state enforcement.

The 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (“SUA Convention”) and the 2005 Draft Protocol to the SUA Convention (“2005 Draft Protocol”) are both attempts to strengthen international maritime security. The director for operations policy of the United States Coast Guard, Rear Admiral Wayne Justice, describes the 2005 Draft Protocol as providing “unprecedented tools” that will counteract the threat of maritime terrorism if and when it enters into force.<sup>8</sup>

This comment focuses on Article 3bis(1)(a) and Article 8bis(5)(e) of the 2005 Draft Protocol (“Article 3bis(1)(a)” and “Article 8bis(5)(e)”). It argues that while the ship-boarding provisions of the 2005 Draft Protocol increase international maritime security, they do not create a strong-enough defense against maritime terrorism. The international community should amend UNCLOS Part VII, incorporating the definition of maritime terrorism contained within Article 3bis(1)(a) and the ship-boarding procedure of Article 8bis(5)(e) into the Convention. This would create a nonflag-state right of visit on the high seas given reasonable suspicion of a ship’s involvement in terrorist activity.

Part II of this comment outlines the increasing danger posed by maritime terrorism on the Pacific Ocean and the failure of the ship-boarding procedures codified in UNCLOS to adequately respond to this threat. Part III discusses how the 2005 Draft Protocol, through Article 3bis and Article 8bis, attempts to prevent maritime terrorism. Part IV analyzes Article 3bis(1)(a) and Article 8bis(5)(e), finding that they endeavor to strengthen maritime security while working within established international law, including the current UNCLOS framework. Part V argues that the international community should amend Part VII of UNCLOS, incorporating Article 3bis(1)(a) and Article 8bis(5)(e) into the convention. This would create a nonflag-state right of visit on the high seas given reasonable grounds to suspect that a vessel has committed, is committing, or is about to commit an act of maritime terrorism as defined by Article 3bis(1)(a).

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<sup>8</sup> U.S. Representative Christopher Shays (R-CT) Holds A Joint Subcommittee Hearing On International Maritime Security, CAP. TRANSCRIPTS, Dec. 13, 2005.

## II. INTERNATIONAL LAW GUIDELINES ON THE NONFLAG STATE RIGHT OF VISIT ON THE HIGH SEAS ARE TOO LIMITED TO ADEQUATELY PROTECT AGAINST THE GROWING FORCE OF MARITIME TERRORISM

The threat of maritime terrorism is a grave concern. Weaknesses in international security created by limitations on high-seas ship boarding have exacerbated the problem. The international community should incorporate Article 8bis(5)(e) and Article 3bis(1)(a) into UNCLOS Part VII, creating a nonflag-state right of visit on the high seas given reasonable grounds to suspect a ship's involvement in terrorism.

This comment recognizes that it is likely that future terrorist attacks will occur within the ports and the territorial waters of states. It focuses, however, on the ability of the international community to board vessels on the high seas before they reach their targets.

### A. *Maritime Terrorism on the Pacific Ocean Is an Increasing Threat to International Peace and Security*

The international community has become increasingly concerned with maritime terrorism in the wake of the September 11, 2001, terrorist attacks against the United States.<sup>9</sup> International specialists fear that terrorists will “exploit[]” the ocean to “simultaneously facilitate terrorist logistical and operational designs.”<sup>10</sup>

The importance of effective security on the world's oceans has become especially imperative “for the United States and Canada, member states of the European Union, Australia and New Zealand, and for China, Japan, South Korea, Taiwan, Thailand, Malaysia, and other economies in East Asia that have extensive direct seaborne trade with the U.S., Europe, and other industrialized nations.”<sup>11</sup>

In contrast to current concerns, maritime terrorism has not posed a large historical threat to international security. The RAND Terrorism Chronology Database and the RAND-MIPT Terrorism Incident state that “seaborne strikes . . . constituted only 2 percent of all international incidents

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<sup>9</sup> Michael Richardson, *Drugs and Terrorism Roams [sic] the High Seas Under Tuvaluan Flag*, THE STRAIGHT TIMES, May 22, 2003, available at <http://www.tuvaluilands.com/news/archived/2003/2003-05-21.htm>.

<sup>10</sup> Peter Chalk, *Maritime Terrorism in the Contemporary Era: Threat and Potential Future Contingencies*, in THE MIPT TERRORISM ANNUAL 2006, 19, 20 (2006) available at <http://www.tkb.org/documents/Downloads/2006-MIPT-Terrorism-Annual.pdf>.

<sup>11</sup> Michael Richardson, *A Time Bomb for Global Trade: Maritime-related Terrorism in an Age of Weapons of Mass Destruction*, Institute of South East Asian Studies Viewpoints, 2 (Feb. 25, 2004) available at <http://www.iseas.edu.sg/viewpoint/mricsumfeb04.pdf>.

of the last thirty years.”<sup>12</sup> The past lack of maritime terrorism may be explained by a simple cost-benefit analysis: “in a world of finite human and material assets, the costs and unpredictability associated with expanding to the maritime realm have typically trumped any potential benefits.”<sup>13</sup>

Unfortunately, the appeal of maritime terrorism has increased for several reasons. First, due the increased strength of international media, “it is now far more probable that attacks at sea will elicit the necessary exposure and publicity that terrorists crave.”<sup>14</sup> Second, it has become easier for potential terrorists to “gain basic skills and equipment for seaborne attacks.”<sup>15</sup> Third, even if terrorists are unable to obtain the skills themselves, they may “be able to overcome existing shortcomings in seaborne attack capabilities by contracting out to pirate syndicates.”<sup>16</sup> Finally, it has become increasingly clear that global shipping is vulnerable “as a result of the largely unpoliced nature of the high seas,” the lack of enough “serious programs of coastal surveillance, and the sheer esoteric character that typifies much of the oceanic environment.”<sup>17</sup>

The list of terrorist organizations that have “moved to conspicuously integrate waterborne modalities into their overall logistical and attack mandates” is extensive.<sup>18</sup> It includes the Palestinian Islamic Jihad, the Lebanese Hezbollah, Abu Sayyaf Group, Gerakan Aceh Merdeka, the Liberation Tigers of Tamil Eelam, Jamaat al-Tawhid wa’l-Jihad, and Al Qa’ida.<sup>19</sup> Intelligence agencies of the United States and Norway have identified numerous freighters flagged under the registries of “Yemen, Somalia, and the Pacific Island of Tonga” that they believe to be “owned or controlled by the Al [Qa’ida] network.”<sup>20</sup>

A maritime terrorist attack in the Pacific Ocean could take on a number of manifestations in addition to a traditional attack against a ship traveling through the region’s waters. As ports have become “critical nodes of global seaborne trade,” they have emerged as tempting terrorist targets.<sup>21</sup> For example, terrorists could work with the region’s pirates, hijacking

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<sup>12</sup> Chalk, *supra* note 10 at 21.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*, at 23.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*, at 22.

<sup>18</sup> *Id.*, at 29-30.

<sup>19</sup> *Id.*

<sup>20</sup> *Maritime Terrorism: A New Challenge for NATO*, ENERGY SECURITY (prepared by the Institute for the Analysis of Global Security), Jan. 24, 2005, available at <http://www.iags.org/n0124051.htm> [hereinafter ENERGY SECURITY].

<sup>21</sup> Ho, *supra* note 1, at 15.

liquefied natural gas carriers and transforming them into “floating bombs to disable ports.”<sup>22</sup> Terrorists also could attack vital ports with “dirty bombs” smuggled in shipping containers.<sup>23</sup>

In addition to transiting through the high seas on their way to or from launching an attack closer to shore, a terrorist organization could target a vessel traveling on the high seas. International fear of such an attack increased in October 2002 with the detainment of Abd al Rahman al Nashiri, the man who many “believe[] to have been responsible for the attack on the USS Cole.”<sup>24</sup> Along with learning that Al Qaeda had begun “preparations to attack ships in the Mediterranean,” the international community also uncovered “a dossier captured with Nashiri” naming “cruise liners sailing from Western ports [as] ‘targets of opportunity.’”<sup>25</sup>

Recent attacks in Southeast Asia illustrate the danger inherent in the failure to prevent a maritime terrorist attack. Since 2000, a number of maritime terrorist attacks have shocked the region. In February 2000, forty people were killed and fifty wounded when the Moro Islamic Liberation Front bombed the *Our Lady Mediatrix*, a Philippine ferry.<sup>26</sup> Less than two years later, in December 2001, an Indonesian ferry, the *Kalifornia*, was bombed while sailing through the country’s Maluku Archipelago, killing ten individuals and injuring forty-six more.<sup>27</sup> The attack on the *Kalifornia* was not a solitary act of violence but rather the beginning of “a cycle of violence” resulting in attacks on several other vessels.<sup>28</sup> Unrelated to the *Kalifornia* tragedy, another one hundred and sixteen people died in the February 2004 sinking of the *Super Ferry* close to Manila, an attack for which the terrorist organization Abu Sayyaff has taken responsibility.<sup>29</sup> Finally, although not an act of maritime terrorism, the triple nightclub bombing that shook Bali on October 12, 2002, is symbolic of the strength of terrorist organizations in Southeast Asia.<sup>30</sup>

Terrorists target vessels not only for attack. The *So San* incident awoke the world to the ease with which vessels could be used to transport weapons of mass destruction and other terrorist materials. This comment does not address the transportation of weapons of mass destruction. The *So*

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<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> ENERGY SECURITY, *supra* note 20.

<sup>25</sup> *Id.*

<sup>26</sup> John F. Bradford, The Growing Prospects For Maritime Security Cooperation In Southeast Asia, 58 NAVAL WAR C. REV. 63, 67 (2005).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*, at 71.

<sup>30</sup> *Id.*, at 67.

*San* incident, however, demonstrates that weapons used to carry out maritime terrorist attacks can be hidden within seemingly legitimate cargo.

In December 2002, the Spanish Navy, acting on information provided by the United States, boarded the *So San*.<sup>31</sup> Though the vessel was registered in Cambodia, the nonflag-state boarding was allowed under UNCLOS Article 110 because the ship flew no flag and had concealed its name with paint.<sup>32</sup> The *So San* had originated in North Korea<sup>33</sup> and at the time it was interdicted was on the high seas six hundred miles off the Yemeni coast.<sup>34</sup> The Spanish Navy uncovered fifteen SCUD missiles buried beneath the *So San*'s declared cargo of cement.<sup>35</sup> Although the *So San* was eventually allowed to continue onto its destination, following a declaration by Yemen that it had bought the weapons from North Korea, it illustrated the ease with which terrorists could move weapons of mass destruction through the high seas.<sup>36</sup>

*B. Existing International Ocean Law Has Not Adequately Responded to Threats Posed by Maritime Terrorism*

International law, specifically the UNCLOS codification of the flag-state right of jurisdiction and control on the high seas, has proven inadequate to meet the threat of terrorism. There is no uniformity in the level and quality of regulations imposed by different flag states. Flag states with poor enforcement mechanisms create weaknesses in international security that may be exploited by maritime terrorists. UNCLOS provides a very limited number of circumstances under which a nonflag state may board a vessel traveling on the high seas, none of which apply to the prevention of maritime terrorism.

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<sup>31</sup> Thomas D. Lehrman, *Enhancing the Proliferation Security Initiative: The Case for a Decentralized Nonproliferation Architecture*, 45 VA. J. INT'L L. 223, 224 (2004).

<sup>32</sup> Becker, *supra* note 3 at 152-53.

<sup>33</sup> *Id.*

<sup>34</sup> Lehrman, *supra* note 31 at 224.

<sup>35</sup> Becker, *supra* note 3 at 153.

<sup>36</sup> Lehrman, *supra* note 31 at 224.



1. *The UNCLOS Codification of Flag-State Power Leaves Too Much Discretion and Authority to Flag States to Register Ships and to Enforce International Law on those Vessels*

Every nation has the inherent right “to sail ships flying its flag on the high seas.”<sup>37</sup> Ships experience varying levels of enforcement of international law depending on the state whose flag they fly. Notwithstanding exceptional circumstances, a vessel may fly the flag of only one state throughout the course of its journey.<sup>38</sup>

Nations develop their own criteria for flagging ships. Pursuant to UNCLOS Article 91, every flag state has the responsibility to “fix the conditions for the grant of its nationality.”<sup>39</sup> UNCLOS Article 91 places a single requirement on the flagging of vessels, stating that “[t]here must be a genuine link between the State and the ship.”<sup>40</sup> UNCLOS never precisely defines the concept of a “genuine link,” a definition that differs widely among nations. Historically, traditional flag states, applying strict rules, registered only those vessels owned by their own nationals.<sup>41</sup>

Today, flag-state ship registries range from open registries to closed registries. These two types of registration systems roughly define the spectrum of ways in which the concept of a “genuine link” has been interpreted. Closed-registry nations register vessels based upon a set of “strict criteria.”<sup>42</sup> Open registry states are remarkably different. They often impose lax restrictions and regulations, prompting criticism that effectively they “rent out their flags” to ship owners willing to pay to register their vessels.<sup>43</sup> Open registries also may offer discounts on volume, an absence of manning requirements, fewer strict shipping regulations, and decreased taxes.<sup>44</sup>

While there are economic benefits for ship owners who register with an open registry, the flag state also gains income through the operation of such a registry.<sup>45</sup> A 2003 report by the Organization for Economic Cooperation and Development describes the impact that open registries have had upon the definition of a “genuine link,” stating, “the linkage requirement

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<sup>37</sup> United Nations Convention on the Law of the Sea, art. 90, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

<sup>38</sup> *Id.*, art. 92.

<sup>39</sup> *Id.*, art. 91.

<sup>40</sup> *Id.*

<sup>41</sup> INTERNATIONAL TRANSPORT WORKERS’ FEDERATION, STEERING THE RIGHT COURSE 11 (2003).

<sup>42</sup> Becker, *supra* note 3 at 142.

<sup>43</sup> INTERNATIONAL TRANSPORT WORKERS’ FEDERATION, *supra* note 41 at 11.

<sup>44</sup> Julie A. Perkins, *Ship Registers: An International Update*, 22 TUL. MAR. L.J. 197, 197 (1997).

<sup>45</sup> *Id.*

has been widely accepted as being met by nothing more than a commercial, fee-for-service relationship between the owner and the Flag State.”<sup>46</sup> The term “flags of convenience” is used within the context of open registries; a flag of convenience implies “registration for primarily economic reasons in a country with an open registry.”<sup>47</sup>

The identity of a vessel’s flag state directly affects the level of regulation and enforcement that it will encounter while on the high seas. Flag states, those with both open registries and closed registries, generally exercise “exclusive” jurisdiction over their vessels sailing on the high seas.<sup>48</sup> They relinquish this control only in rare occasions, such as involving the right of visit and hot pursuit, expressly stated in UNCLOS or in international treaties.<sup>49</sup>

While a flag state may utilize its own interpretation of a “genuine link,” it must also comply with a set of duties imposed by UNCLOS. The responsibilities of a flag state require it to exercise its jurisdiction in an effective manner, controlling all “administrative, technical and social matters over ships flying its flag.”<sup>50</sup> Additionally, UNCLOS Article 94 codifies the requirement that a flag state act in conformity with “generally accepted international regulations, procedures and practices,” taking all necessary steps “to secure their observance.”<sup>51</sup>

It is well established that terrorism endangers international peace and security<sup>52</sup> and is counter to established international law. Therefore, a flag state may not allow its ships to engage in terrorist violence in a manner that would violate international regulations, procedures, and practices. While a state will, theoretically, bear international responsibility if it breaches this duty, there are no external enforcement mechanism to ensure flag-state compliance.

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<sup>46</sup> INTERNATIONAL TRANSPORT WORKERS’ FEDERATION, *supra* note 41, at 16 (quoting Organization of Economic Co-Operation and Development, *The Ownership and Control of Ships* (March 2003)).

<sup>47</sup> H. Edwin Anderson, III, *The Nationality of Ships and Flags of Convenience: Economics, Politics, and Alternatives*, 21 TUL. MAR. L.J. 139, 157 (1996).

<sup>48</sup> UNCLOS, *supra* note 37, art. 92.

<sup>49</sup> *Id.*, art. 110; *id.*, art. 111.

<sup>50</sup> *Id.*, art. 94.

<sup>51</sup> *Id.*

<sup>52</sup> S.C. Res. 1373, U.N. SCOR, 4385th Meeting, Supp., at 1, S/RESS/1373 (2001) [hereinafter S.C. Res. 1373].

2. *UNCLOS Does Not Grant Nonflag States a Right of Visit on the High Seas When a Vessel Is Suspected of Terrorist Activity*

As a general rule, flag states have exclusive jurisdiction over their vessels sailing on the high seas. There are limited circumstances under which a nonflag state may exercise a right of visit. UNCLOS Article 110 codifies these limitations: a nonflag state may board a vessel traveling on the high seas given reasonable grounds to suspect that the vessel is involved in piracy, engaged in the slave trade, broadcasting without authority, or sailing without a flag.<sup>53</sup>

UNCLOS Article 110 is as significant for what it leaves out as for what it includes. It does not allow a nonflag state to board a vessel on the high seas based upon a reasonable suspicion that it has engaged in, is engaging in, or is about to engage in terrorist activity.

UNCLOS Article 110 does include a broad exception analogous to that contained within UNCLOS Article 92. It allows nonflag states to board a vessel in instances “where acts of interference derive from powers conferred by treaty.”<sup>54</sup> Because neither UNCLOS Article 92 nor UNCLOS Article 110 allow for a nonflag state to board a vessel based upon a reasonable suspicion of its participation in maritime terrorism, states must, currently, create separate treaties that allow for boarding under such a circumstance.

C. *The Proliferation of Flags of Convenience Combined with the Extreme Limitations on the Nonflag-State Right of Visit on the High Seas Has Created a Situation Ripe for Maritime Terrorism*

The existence of flags of convenience assumes a more ominous tone when considered in conjunction with rising levels of maritime terrorism. Though open registries may once have been perceived as a way to allow ship owners to avoid burdensome regulations, they have “now taken on a frightening new persona.”<sup>55</sup> As was recognized in a 1981 United Nations Conference on Trade and Development report, strict enforcement is not compatible with the goals of registries whose sole purpose is to make a profit.<sup>56</sup>

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<sup>53</sup> UNCLOS, *supra* note 37, art. 110.

<sup>54</sup> *Id.*

<sup>55</sup> Maria J. Wing, *Rethinking the Easy Way Out: Flags of Convenience in the Post-September 11th Era*, 28 TUL. MAR. L.J. 173, 173 (2003).

<sup>56</sup> Anderson, *supra* note 47 at 165.

Options under UNCLOS to exercise a nonflag-state high-seas right of visit based upon a reasonable suspicion of a ship's participation in maritime terrorism range from limited to nonexistent. This creates a widening gap in maritime security. Terrorist organizations may register their ships with a flag state that has a history of weak enforcement. If the established enforcement pattern continues, and the flag state once again fails to inspect ships or to ensure compliance with international law, the terrorists are subject to no enforcement of international law.

In a March 2004 resolution, the United Nations General Assembly recognized the danger posed by weak flag-state enforcement.<sup>57</sup> The resolution focused on states that lack the necessary maritime administration and legal framework to ensure international compliance with the enforcement responsibilities designated to them by international law.<sup>58</sup> The General Assembly urged such states, until they strengthen their enforcement mechanisms, "to consider declining the granting of the right to fly their flag to new vessels, suspending their registry or not opening a registry."<sup>59</sup> In addition, the General Assembly has invited the International Maritime Organization to examine the relationship between the requirement for a "genuine link" and the responsibility of flag states to control the vessels flying their flags.<sup>60</sup>

### III. THE 2005 DRAFT PROTOCOL IS AN ATTEMPT TO MEET EVOLVING MARITIME SECURITY CONCERNS

The international community created the 2005 Draft Protocol to address weaknesses in maritime security resulting from poor flag-state enforcement and from limitations on the nonflag-state right of visit on the high seas. Article 3*bis* and Article 8*bis* of the 2005 Draft Protocol attempt to strengthen maritime security while working within the existing UNCLOS framework. To adequately protect against maritime terrorism, however, the international community must be willing to amend UNCLOS to allow for a nonflag-state right of visit on the high seas given reasonable grounds to suspect that a vessel has committed, is committing, or is about to commit an act of maritime terrorism.

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<sup>57</sup> G.A. Res. 240, U.N. GAOR, 58th Sess., para. 27, U.N. Doc. A/RES/58/240 (2004) [hereinafter G.A. Res. 58/240].

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> United Nations, *Advance, Unedited Reporting Material on Oceans and the Law of the Sea*, 27 (Feb. 27, 2004) available at <http://www.iucn.org/places/medoffice/CDGovernance/conten/2-tallerexpertos/conten/d/UNSGtoUNGAmarch04.pdf>; G.A. Res. 58/240, *supra* note 57 at para. 28.

A. *The International Community Created the 2005 Draft Protocol in an Effort to Confront the Increasing Danger Posed by Maritime Terrorism*

The 2005 Draft Protocol amends the 1988 SUA Convention. The Draft Protocol attempts to strengthen the international community's ability to prevent maritime terrorism. Catalyzed by the attacks against the United States on September 11, 2001, the 2005 Draft Protocol emerged when the world realized the growing threat that maritime terrorism posed to the safety of navigation.

1. *The SUA Convention, Precursor to the 2005 Draft Protocol, Was Written to Ensure that the Perpetrators of Maritime Terrorism Would Be Brought to Justice*

Adopted on March 10, 1988,<sup>61</sup> the SUA Convention was created in response to the fear that ships traveling on the high seas were tempting targets for international terrorists. International Maritime Organization ("IMO") members were responsible for creating the SUA Convention. The 166-member IMO is a specialized U.N. agency that focuses on international shipping.<sup>62</sup>

The October 1985<sup>63</sup> terrorist hijacking of the cruise ship *Achille Lauro*, during which an elderly, disabled passenger was murdered, catalyzed the SUA Convention's development.<sup>64</sup> In November 1986, Austria, Egypt, and Italy issued a proposal asking the IMO to call an international conference to draft a convention focused on stopping illegal actions against maritime navigation.<sup>65</sup> Accordingly, the convention's purpose is "to ensure that appropriate judicial action is taken against persons committing unlawful acts against ships."<sup>66</sup> It was written to guarantee that, through prosecution

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<sup>61</sup> *Summary of International Maritime Organization Conventions*, available at <http://www.uscg.mil/international/affairs/Publications/MMSCode/english/AppendC.htm> [hereinafter Summary of IMO Conventions].

<sup>62</sup> Wade Boese, Arms Control Association, *Treaty Amended to Outlaw WMD at Sea*, 35 ARMS CONTROL TODAY 36, 36 (2005) available at [http://www.armscontrol.org/act/2005\\_12/Dec-WMDsea.asp](http://www.armscontrol.org/act/2005_12/Dec-WMDsea.asp).

<sup>63</sup> Christ Trelawney, *Enhancing Port and Ship Security*, in Proceedings of the Pakistan Trade and Transport Facilitation 2003 Conference (Dec. 6, 2003) available at <http://www.nttfc.org/proceed03/proc03-trelawney.htm>.

<sup>64</sup> *Recognising a Dangerous World*, LLOYD'S LIST INT'L, Oct. 5, 2005.

<sup>65</sup> Trelawney, *supra* note 63.

<sup>66</sup> Frank Kennedy, *Sea Views: Iacs Warns Over Inconsistent PSC Information*, GULFNEWS.COM, Oct. 28, 2001, available at <http://archive.gulfnews.com/articles/01/10/28/30643.html>.

and extradition, there would be no shelter for individuals who commit illegal acts contrary to “the safety of navigation.”<sup>67</sup>

Unlawful acts are defined to encompass a broad range of activities including forceful seizure, violent acts against individuals on ships, and the placing of destructive devices aboard a ship.<sup>68</sup> The SUA Convention targets actions that may negatively impact the navigation of vessels and requires the domestic criminalization of such acts in the national laws of its parties as well as their cooperation in the prosecution of violators.<sup>69</sup>

As of 2004, the SUA Convention had been ratified by 104 states that together represented 81.52 percent of the world’s tonnage.<sup>70</sup> In August 2005, the number of state parties had increased to 126.<sup>71</sup>

## 2. *The 2005 Draft Protocol Developed in Response to the Growing Threat of International Maritime Terrorism*

Negotiations for the development of the 2005 SUA Protocol arose in the aftermath of the September 11, 2001, terrorist attacks against the United States. In Resolution A.924(22), issued November 2001, the IMO General Assembly recognized the need to review the measures and procedures intended to prevent maritime terrorism.<sup>72</sup> IMO Secretary General William O’Neal stated that “the shocking events of September 11th could not be ignored by an international organisation, such as the IMO which has, as an integral part of its mandate, the duty to make travel and transport by sea as safe as possible.”<sup>73</sup>

The IMO Legal Committee sought to strengthen the SUA Convention through amendments that would respond to the dangers posed by international terrorism to maritime navigation.<sup>74</sup> During the Eighty-fifth Session of the IMO, the IMO Legal Committee conducted an exchange of viewpoints on proposed amendments to the SUA Convention.<sup>75</sup> The work of

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<sup>67</sup> *International Conference Adopts Revised Treaties to Address Unlawful Acts at Sea*, 28 OIL SPILL INTELLIGENCE REPORT 1, 1 (Oct. 20, 2005) [hereinafter Oil Spill Intelligence Report].

<sup>68</sup> Kennedy, *supra* note 66.

<sup>69</sup> J. Ashley Roach, *Enhancing Maritime Security in the Straits of Malacca and Singapore*, 59 J. INT’L AFF. 97, 105 (2005).

<sup>70</sup> *IMO Wins the Day on Stop and Search Update*, LLOYDS LIST INT’L, Apr. 26, 2004.

<sup>71</sup> Roach, *supra* note 69 at 105.

<sup>72</sup> Center for Nonproliferation Studies, *Convention for the Suppression of Unlawful Acts of Violence Against the Safety of Maritime Navigation (SUA Convention)*, SUA-2 available at <http://cns.miis.edu/pubs/inven/pdfs/maritime.pdf>.

<sup>73</sup> Kennedy, *supra* note 66.

<sup>74</sup> United States and the International Confederation of Free Trade Unions, *Consideration of a Draft Protocol to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation*, 1988, Sept. 20, 2005 [hereinafter U.S. Consideration of a Draft Protocol].

<sup>75</sup> Center for Nonproliferation Studies, *supra* note 72 at SUA-2.

the IMO Legal Committee continued throughout the Eighty-sixth and Eighty-seventh IMO sessions.<sup>76</sup> During the Eighty-eighth Session of the IMO, held in April 2004, most of the participating nations stated their support for the development of the 2005 Protocol.<sup>77</sup> However, several delegations raised the possibility of a conflict with established ocean law when they stressed the importance of ensuring that the SUA Protocol would not threaten the right of innocent passage or the freedom of navigation.<sup>78</sup>

The United States strongly pushed for the development of the 2005 Draft Protocol. During the IMO Legal Committee's meeting in April of 2005, the United States, as the lead delegation, proposed adding a number of clauses that focused on broadening the range of potential offenses.<sup>79</sup> The efforts of the United States were successful; Article 3*bis* of the 2005 Draft Protocol expands the offenses covered by the SUA Convention.<sup>80</sup> They now include violent attacks against vessels as well as ocean transport of explosive and nuclear material given the intent that they be used in terrorist activity.<sup>81</sup>

The support of the United States continued in September 2005 when it issued a Joint Comment with the International Confederation of Free Trade Unions focused on the proposed 2005 Draft Protocol.<sup>82</sup> The Joint Comment tied the 2005 Draft Protocol to a growth in international treaty law, stating that it would be "an additional tool to combat the proliferation of weapons of mass destruction."<sup>83</sup> The Joint Comment also asserted that the 2005 Draft Protocol conformed to international law, citing sources of specific interest to the IMO.<sup>84</sup> These included the IMO mandate as well as various IMO assembly resolutions.<sup>85</sup>

Perhaps most importantly, the Joint Comment stated that the proposed 2005 Draft Protocol aligned with the decision made in the Eighty-ninth session of the IMO "when developing new instruments or amendments to existing ones, to ensure that these are compatible and not in conflict with

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<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Terrorism and Wrecks Dominate Talks*, LLOYDS LIST, May 18, 2005.

<sup>80</sup> See description of the ways in which Article 3*bis* expands the offenses covered in the SUA Convention *infra* Part III.B.

<sup>81</sup> International Maritime Organization, *Considerations of a Draft Protocol of 2005 to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation*, Oct. 14, 2005, art. 3*bis* [hereinafter 2005 Draft Protocol to the SUA Convention].

<sup>82</sup> U.S. Consideration of a Draft Protocol, *supra* note 74.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

other instruments of international law and that they cannot be interpreted or used in a way that conflicts with such instruments.”<sup>86</sup>

The Diplomatic Conference on the Revision of the SUA Treaties met October 10-14, 2005.<sup>87</sup> In accordance with IMO standard procedure, it was open to both IMO member states and to members of the U.N. and its specialized agencies.<sup>88</sup> After more than three years of negotiations, the 2005 Draft Protocol was opened for signature on February 14, 2006.<sup>89</sup> The United States signed the Draft 2005 Protocol on February 17, 2006.<sup>90</sup> It will enter into force ninety days following the date of signature of the twelfth country who “signs it without reservation as to ratification, acceptance or approval (or deposits an instrument to that effect).”<sup>91</sup>

*B. The 2005 Draft Protocol Expands the Scope of the SUA Convention, Increasing the Types of Forbidden Acts and Establishing a Set of Nonflag-State Ship-Boarding Procedures*

The 2005 Draft Protocol amends the SUA Convention. Therefore, all state parties to the 2005 Draft Protocol must also, as a prerequisite, be parties to the SUA Convention.<sup>92</sup> According to the United States, it creates one of the first international frameworks whose purpose is to “combat[] and prosecute[] anyone who uses a ship . . . as a means to carry out a terrorist attack, or who transports terrorists . . . by ship.”<sup>93</sup> The two provisions of the 2005 Draft Protocol most pertinent to this comment are Article 3*bis* and Article 8*bis*.

Article 3*bis* of the 2005 Draft Protocol, along with Articles 3*ter* and 3*quater*, expands the list of offenses covered by the Article 3 of the SUA Convention, widening its prescriptive scope.<sup>94</sup> Terrorist actions prohibited by Article 3*bis* span a wide range of activities—from the use of a ship as a weapon to the use of a ship as a mode of transport of terrorist material to the targeting of a ship in a terrorist attack.<sup>95</sup>

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<sup>86</sup> *Id.*

<sup>87</sup> Oil Spill Intelligence Report, *supra* note 67 at 1.

<sup>88</sup> Summary of IMO Conventions, *supra* note 61.

<sup>89</sup> News from the Washington File International Conference Amends Maritime Treaties on Unlawful Act, STATE DEP’T DOCUMENTS, Oct. 27, 2005 [hereinafter News from the Washington File].

<sup>90</sup> U.S. Signs the Protocols to the United Nations Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA), U.S. DEP’T OF STATE, Feb. 17, 2006, *available at* <http://www.state.gov/r/pa/prs/ps/2006/61506.htm>.

<sup>91</sup> *Id.*

<sup>92</sup> 2005 Draft Protocol to the SUA Convention, *supra* note 81, preamble.

<sup>93</sup> News from the Washington File, *supra* note 89.

<sup>94</sup> 2005 Draft Protocol to the SUA Convention, *supra* note 81, art. 3*bis*.

<sup>95</sup> *Id.*



Although it increases the scope of possible offenses, Article 3*bis* also includes important safeguards meant to protect innocent seafarers from prosecution.<sup>96</sup> The 2005 Draft Protocol does not allow the criminal prosecution of seafarers who do not know about illegal conduct on their vessels and who have not intentionally participated in such illegal conduct.<sup>97</sup>

Article 8*bis* of the 2005 Draft Protocol provides a mechanism through which the international community may enforce Article 3*bis*. It outlines a set of nonflag-state boarding procedures applicable to any vessel traveling “seaward of any State’s territorial sea” given reasonable grounds to suspect the vessel’s involvement in violations of Article 3, 3*bis*, 3*ter*, or 3*quater*.<sup>98</sup>

C. *Article 3bis, Article 3ter, and Article 3quater of the 2005 Draft Protocol Expand the Activities Prohibited by Article 3 of the SUA Convention*

Articles 3*bis*, 3*ter*, and 3*quater* supplement Article 3 of the SUA Convention. They create additional offenses that will be applicable to all nations that sign the 2005 Draft Protocol.

Article 3*bis* may be split into three sections: Article 3*bis*(1)(a), Article 3*bis*(1)(b), and Article 3*bis*(2).<sup>99</sup> Article 3*bis*(1)(a) prohibits four types of activities when they are committed “to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act.”<sup>100</sup> First, an individual may not “use[] against 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.”<sup>101</sup> Article 1(1)(d) of the 2005 Draft Protocol defines BCN weapons as biological weapons, chemical weapons, nuclear weapons, and “other nuclear explosive devices.”<sup>102</sup>

Second, an individual may not discharge “oil, liquefied natural gas, or other hazardous or noxious substance[s]” from a ship when the discharge is “likely to cause death or serious injury or damage.”<sup>103</sup> Third, an individual may not “use[] a ship in a manner that causes death or serious injury or damage.”<sup>104</sup> Finally, an individual may not threaten, conditionally or non-

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<sup>96</sup> U.S. Consideration of a Draft Protocol, *supra* note 74 at para. 7.

<sup>97</sup> *Id.* at para. 7, 9.

<sup>98</sup> 2005 Draft Protocol to the SUA Convention, *supra* note 81, art. 8*bis*.

<sup>99</sup> *Id.*, art. 3*bis*.

<sup>100</sup> *Id.*, art. 3*bis*(1)(a).

<sup>101</sup> *Id.*, art. 3*bis*(1)(a)(i).

<sup>102</sup> *Id.*, art. 1(1)(d).

<sup>103</sup> *Id.*, art. 3*bis*(1)(a)(ii).

<sup>104</sup> *Id.*, art. 3*bis*(1)(a)(iii).

conditionally, to commit any of the three actions previously mentioned in Article 3bis(1)(a).<sup>105</sup> Both Article 3bis(1)(a) and Article 3bis(1)(b) include the requirement of intentionality; the offending individual must act “unlawfully and intentionally.”<sup>106</sup>

While Article 3bis(1)(a) deals with a ship’s direct involvement, as an aggressor or as a target, in maritime terrorism, Article 3bis(1)(b) focuses on the transportation of materials that could be used in a terrorist attack. It prohibits the shipping of BCN weapons, source material not covered under the International Atomic Energy Agency’s comprehensive safeguards agreement, other “explosive or radioactive material” to be used in a terrorist attack or a threatened terrorist attack, and “any equipment, materials or software or related technology” that is intended to contribute to “the design, manufacture or delivery of a BCN weapon.”<sup>107</sup>

Article 3bis(2) relates back to Article 3bis(1)(b). It creates safeguards, defining situations when the 2005 Draft Protocol does not prohibit the shipping of nuclear materials normally covered under Article 3bis(1)(b).<sup>108</sup>

Article 3ter prohibits the intentional maritime transport of any person who has violated “[A]rticles 3, 3bis or 3quater or any offence set forth in any treaty listed in the Annex” of the 2005 Draft Protocol.<sup>109</sup> Liability under Article 3ter rests upon the transporting parties’ knowledge of the individual’s violation and their intent to help the violator “evade criminal prosecution.”<sup>110</sup>

Article 3quater supplements Articles 3, 3bis, and 3ter. It makes it an offense to “intentionally injure[] or kill[] any person” in conjunction with a violation of “[A]rticle 3, paragraph 1, [A]rticle 3bis, or [A]rticle 3ter.”<sup>111</sup> In addition, it prohibits attempts to violate “[A]rticle 3, paragraph 1, [A]rticle 3bis, subparagraphs 1(a)(i), (ii) or (iii), or subparagraph (a)” of Article 3quater.<sup>112</sup> Finally, it states that individuals may not participate, organize, direct, or contribute to a violation of “[A]rticle 3, [A]rticle 3bis, [A]rticle 3ter or subparagraph (a) or (b) of” Article 3quater.<sup>113</sup>

This comment advocates for the incorporation of Article 3bis(1)(a), in conjunction with Article 8bis(5)(e), into UNCLOS Part VII. It argues for the

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<sup>105</sup> *Id.*, art. 3bis(1)(a)(iv).

<sup>106</sup> *Id.*, art. 3bis(1).

<sup>107</sup> *Id.*, art. 3bis(1)(b).

<sup>108</sup> *Id.*, art. 3bis(2).

<sup>109</sup> *Id.*, art. 3ter.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*, art. 3quater(a).

<sup>112</sup> *Id.*, art. 3quater(b).

<sup>113</sup> *Id.*, arts. 3quater(c), (d), and (e).

creation of a nonflag-state right of visit given reasonable grounds to suspect a ship's involvement in an act of maritime terrorism, whether the ship is attacking another ship or being used as a weapon. It does not propose incorporation of Articles *3bis*(1)(b), *3bis*(2), *3ter*, or *3quater* into UNCLOS Part VII because they would excessively widen the number of situations during which a nonflag-state right of visit on the high seas would exist. As discussed above, Articles *3bis*(1)(b), *3bis*(2), *3ter*, and *3quater* focus on issues of transportation and other activities that, though related, are also peripheral to maritime terrorism. In recognition of the international rights of flag states, a nonflag-state right of visit on the high seas should only exist given reasonable suspicion of a limited set of actions directly connected to maritime terrorism and codified in Article *3bis*(1)(a).

*D. Article 8bis(5)(d) and Article 8bis(5)(e) of the 2005 Draft Protocol Establish Two Alternate Nonflag-State Ship-Boarding Procedures that Enforce Article 3, Article 3bis, Article 3ter, and Article 3quater*

Article *8bis* outlines the procedure that a nonflag state must follow when boarding a vessel "located seaward of any State's territorial sea."<sup>114</sup> It focuses on the boarding of vessels that have violated, are violating, or are about to violate one of the offenses established by Article 3, Article *3bis*, Article *3ter*, or Article *3quater*.<sup>115</sup> Thus, Article *8bis* deals with offenses that were committed in the past, that are being committed currently, and that may be committed in the future.

This comment focuses on two of the different ship boarding procedures outlined in Article *8bis*—Article *8bis*(5)(d) and Article *8bis*(5)(e). It examines both provisions within the context of Article *8bis*(6), Article *8bis* (7), and Article *8bis*(8).

*1. Article 8bis(5)(d) and Article 8bis(5)(e) Do Not Require Flag-State Approval on a Case-by-Case Basis*

When a party to the 2005 Draft Protocol deposits its instrument of ratification, acceptance, approval, or accession with the IMO, it has the option of issuing different kinds of approval that grant permission for nonflag-state boarding. This comment focuses on Article *8bis*(5)(d) and Article *8bis*(5)(e), both of which allow nonflag states to board vessels given a specific set of circumstances.<sup>116</sup> Because flag-state approval under Article

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<sup>114</sup> *Id.*, art. *8bis*.

<sup>115</sup> *Id.*

<sup>116</sup> 2005 Draft Protocol to the SUA Convention, *supra* note 81, art. *8bis*(5)(e).

8bis(5)(d) and Article 8bis(5)(e) is not needed on a case-by-case basis, neither article requires the permission of the flag state to be given<sup>117</sup> each time a nonflag state conducts a high-seas boarding.

Under Article 8bis(5)(d), flag states may grant nonflag states authorization to board and search their vessels if they have not responded to the requesting state “within four hours of acknowledgement of receipt of a request to confirm nationality.”

Alternatively, Article 8bis(5)(e) creates a much broader approval. Voluntarily given by flag states, Article 8bis(5)(e) approval allows for nonflag-state boarding anytime the requesting state has reasonable grounds to suspect that a ship has violated, is violating, or is about to violate Article 3, Article 3bis, Article 3ter, or Article 3quater. Once a flag state has issued the second type of approval, the party may choose to withdraw it at any point.<sup>118</sup> Upon boarding, the nonflag state may “search a ship, its cargo and persons on board” and “question the persons on board in order to determine if an offence under article 3, 3bis, 3ter or 3quater has been, is being or is about to be committed.”<sup>119</sup>

This comment advocates for the incorporation of Article 8bis(5)(e) into UNCLOS Part VII because it is broader than the Article 8bis(5)(d) ship boarding procedure. Article 8bis(5)(d) gives requesting nonflag states the right of visit only if they have requested permission to board and have not received an answer from the flag state within four hours. Article 8bis(5)(e), however, creates a nonflag-state right of visit anytime there is a reasonable suspicion of a vessel’s participation in terrorist activity. Because the need to prevent maritime terrorism is too great to be limited by predetermined wait periods, the international community should incorporate Article 8bis(5)(e) rather than Article 8bis(5)(d) into UNCLOS Part VII.

## 2. *Articles 8bis(6), 8bis(7), and 8bis(8) Provide the Context Within Which Article 8bis(5)(e) Should Be Interpreted*

Article 8bis(5)(e) provides a limited degree of power to nonflag states, allowing only for the boarding and searching of a vessel and the questioning of all individuals on board. In instances where the boarding state discovers violations of Article 3, Article 3bis, Article 3ter, or Article 3quater, Article

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<sup>117</sup> Article 8bis(5)(e) is different from Article 8bis(5)(b), which requires the requesting party to ask the flag state “for authorization to board and to take appropriate measures.”

<sup>118</sup> 2005 Draft Protocol to the SUA Convention, *supra* note 81, art. 8bis(5)(e).

<sup>119</sup> *Id.*

8bis(5)(e) does not address the jurisdictional issues involved in the resulting arrests and prosecutions.

Article 8bis(6) fills the jurisdictional gap unaddressed by Article 8bis(5)(e). Once a requesting state has discovered evidence of violations of Article 3, Article 3bis, Article 3ter, or Article 3quater, “the flag [s]tate may authorize the requesting Party to detain the ship, cargo and persons on board pending receipt of disposition instructions from the flag [s]tate.”<sup>120</sup> A boarding state that has received flag-state permission and has detained the ship, cargo or person on board must inform the flag state “of the results of a boarding, search and detention” as well as “of the discovery of evidence of illegal conduct” unrelated to the SUA Convention.<sup>121</sup>

Article 8bis(8) preserves the right of a flag state “to exercise jurisdiction over a detained ship, cargo or other items on board, including seizure, forfeiture, arrest and prosecution.”<sup>122</sup> Therefore, even if a nonflag state is allowed to board and detain a vessel, the flag state retains jurisdiction over arrest and prosecution. A flag state may choose to consent to the exercise of jurisdiction by another state “having jurisdiction under article 6” of the SUA Convention as long as such consent is allowable under “its constitution and laws.”<sup>123</sup>

According to Article 8bis(7), flag states have the power to impose conditions upon the actions of nonflag states as related to steps taken in conformity with Article 8bis(5) or Article 8bis(6).<sup>124</sup> Possible conditions include requiring additional information from the requesting party and “conditions relating to responsibility for and the extent of measure to be taken.”<sup>125</sup> Requesting states may bypass the flag state’s conditions under only two circumstances: “when necessary to relieve imminent danger to the lives of persons or where those measures derive from relevant bilateral or multilateral agreements.”<sup>126</sup> The flag state must still give permission for arrests and prosecutions on a case-by-case basis.

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<sup>120</sup> *Id.*, art. 8bis(6).

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*, art. 8bis(8).

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*, art. 8bis(7).

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

IV. ARTICLE 3BIS(1)(A) AND ARTICLE 8BIS(5)(E) ARE IN CONFORMITY WITH INTERNATIONAL LAW

An attempt to codify an international rule against maritime terrorism, Article 3bis(1)(a) is clearly in conformity with international law. Article 8bis(5)(e) also conforms with international law, including the legal framework established by UNCLOS Articles 92 and 110.

A. *The Article 8bis(5)(e) Ship-Boarding Procedure Complies with UNCLOS Article 92 and UNCLOS Article 110*

Article 8bis(5)(e) conforms to the international legal framework established by UNCLOS Articles 92 and 110. Both articles allow flag states to enter into international treaties, granting a nonflag state the right to board their vessels on the high seas. Article 8bis(5)(e) is clearly part of such an international agreement. It follows, therefore, that it is in compliance with UNCLOS.

B. *Article 3bis(1)(a) and Article 8bis(5)(e) Attempt to Preserve International Peace and Security and Conform with International Law*

Article 3bis(1)(a) and Article 8bis(5)(e) should be interpreted within the context of the 2005 Draft Protocol. According to Article 31 of the Vienna Convention on the Law of Treaties “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context.”<sup>127</sup>

The preamble to the 2005 Draft Protocol includes a number of references that both individually and taken as a whole suggest the Diplomatic Conference’s desire to conform to established international law. To begin with, it acknowledges “that terrorist acts threaten international peace and security.”<sup>128</sup> In addition, it specifically recalls United Nations Security Council Resolution 1373 (“Resolution 1373”).<sup>129</sup> Adopted on September 28, 2001, Resolution 1373 begins by stating that “any act of international terrorism, constitute[s] a threat to international peace and security.”<sup>130</sup>

The continued references to threats to “international peace and security” are noteworthy in two respects. First, UNCLOS Article 88

<sup>127</sup> Vienna Convention on the Law of Treaties art. 31(1), May 23, 1969, U.N. Doc. A/CONF. 39/27.

<sup>128</sup> 2005 Draft Protocol to the SUA Convention, *supra* note 81, at preamble.

<sup>129</sup> *Id.*

<sup>130</sup> S.C. Res. 1373, *supra* note 52.

explicitly reserves the high seas “for peaceful purposes.”<sup>131</sup> Activities that threaten international peace and security are clearly in violation of the requirement that the high seas be used only for peaceful purposes. Second, Article One of the Charter of the United Nations states that one of the purposes of the United Nations is “[t]o maintain international peace and security.”<sup>132</sup> It is inferable from the references to international peace and security in the preamble of the 2005 Protocol that the purpose behind Article 8*bis* is consistent with UNCLOS and with the Charter of the United Nations.

Resolution 1373 provides additional support for the international legitimacy of Article 3*bis*(1)(a) and Article 8*bis*(5)(e). Paragraph 3(c) of Resolution 1373 calls for international cooperation “particularly through bilateral and multilateral arrangements and agreements, to prevent and suppress terrorist attacks and [to] take action against perpetrators of such acts.”<sup>133</sup> While Article 3*bis*(1)(a) outlines the maritime terrorist activity forbidden by the 2005 Draft Protocol, Article 8*bis*(5)(e) enforces the rules prescribed by Article 3*bis*(1)(a). Assuming that Article 3*bis*(1)(a) and Article 8*bis*(5)(e) are consistent with international law, it follows that they are the type of cooperative action sanctioned by Resolution 1373.

V. THE INTERNATIONAL COMMUNITY SHOULD INCORPORATE ARTICLE 3*BIS*(1)(A) AND ARTICLE 8*BIS*(5)(E) INTO UNCLOS PART VII, ALLOWING FOR A NONFLAG-STATE RIGHT OF VISIT ON THE HIGH SEAS GIVEN REASONABLE GROUNDS TO SUSPECT A VESSEL IS INVOLVED IN TERRORIST ACTIVITY

The international community should amend UNCLOS Part VII, incorporating Article 3*bis*(1)(a) as a prescriptive rule and Article 8*bis*(5)(e) as the mechanism through which to enforce that rule. This would create an additional exception to the general principle of flag-state control on the high seas. Maritime terrorism has become an increasingly dangerous threat. To ensure adequate protection against such violence, a state must be allowed to board a vessel on the high seas, even if the vessel is flying a flag other than its own, given reasonable grounds to suspect the ship’s participation in maritime terrorism.

Protection against maritime terrorism is too important a task to be subject to existing inconsistencies in enforcement. Unfortunately, flag states exert varying levels of regulation and control over their ships on the high

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<sup>131</sup> UNCLOS, *supra* note 37, art. 88.

<sup>132</sup> U.N. Charter art. 1, para. .1

<sup>133</sup> S.C. Res. 1373, *supra* note 52, at para. 3(c).

seas. To combat the resulting weakness in maritime security, the international community should ensure that it has a uniform ability to board ships suspected of involvement in maritime terrorism.

The ability of nonflag states to board vessels on the high seas suspected of participation in terrorism would help to protect against maritime terrorism in two ways. It would increase the ability of the international community to respond to potential threats, and it would offer further deterrence against potential maritime terrorists. The best way to accomplish this goal is to incorporate Article 3bis(1)(a) and Article 8bis(5)(e) into UNCLOS Part VII.

The incorporation of Article 3bis(1)(a) and Article 8bis(5)(e) into Part VII of UNCLOS would apply only to ships sailing on the high seas. Part VII of UNCLOS focuses exclusively on the high seas; vessels traveling in other portions of the ocean would be unaffected. While many of the potential targets of maritime terrorism are not located on the high seas, increased international scrutiny on the high seas remains an important tool in the prevention of such attacks. The world needs to stop maritime terrorists before they enter into the territorial waters and the ports of coastal states.

The 2005 Draft Protocol is a step in the right direction. Its approach to improving maritime security, however, is too timid. In the 2005 Draft Protocol, the Article 8bis(5)(e) ship-boarding provision is optional, one of several procedures from which flag states may choose. In addition, there is no guarantee that the 2005 Draft Protocol will impact enough nations to be truly effective.

The United Nations “has adopted a pro-active approach” in its struggle against terrorism.<sup>134</sup> The international community should extend this same approach to the challenge posed by maritime terrorism and incorporate Article 3bis(1)(a) and Article 8bis(5)(e) into UNCLOS Part VII. This would result in a specific definition of maritime terrorism and in an appropriate response, one that is necessary to prevent terrorist attacks.

A. *The International Community Should Incorporate Article 3bis(1)(a) and Article 8bis(5)(e) into UNCLOS Part VII Through the Amendment Procedures of UNCLOS Article 312 or UNCLOS Article 313*

The international community should incorporate Article 3bis(1)(a) and Article 8bis(5)(e) into UNCLOS Part VII pursuant to UNCLOS Article 312 or UNCLOS Article 313. At its creation, UNCLOS was intended to be

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<sup>134</sup> Anton Du Plessis, *Global and Regional Initiative to Combat Terror*, 42 INSTIT. STRATEGIC STUD. 68, 72 (2005).



“comprehensive in scope and universal in participation.”<sup>135</sup> To ensure that the convention would remain “capable of further evolution,” the international community included articles allowing for amendment and incorporation of international agreements and standards.<sup>136</sup> The nations involved in the development of UNCLOS stressed that the amendment procedures represented a balance between the “overriding principle of [the] preservation” of UNCLOS as a “package deal” and a “right of amendment” implied by a nation’s acceptance of the convention.<sup>137</sup> UNCLOS may be amended through Article 312 or through a simplified procedure codified in Article 313.

UNCLOS Article 312 allows party states to propose amendments “[a]fter the expiry of a period of 10 years from the date” that UNCLOS entered into force.<sup>138</sup> The ten-year waiting period may have been an attempt to “prevent immediate challenges to the package deal regime” of the convention.<sup>139</sup> To propose an amendment, a state party must first give the secretary general of the United Nations a written copy of the proposed amendment and request that he convene a “conference to consider such proposed amendment[.]”<sup>140</sup> The proposed amendment is then circulated among all state parties.<sup>141</sup> The secretary general convenes a conference to consider the proposed amendment if, within a year, “not less than one half of the State Parties reply favorably to the request.”<sup>142</sup>

A conference to consider a proposed amendment to UNCLOS, will, unless participants decide otherwise, apply the same “decision-making procedure” as was utilized at the Third United Nations Conference on the Law of the Sea.<sup>143</sup> In addition, conference participants must “make every effort to reach agreement on any amendments by way of consensus.”<sup>144</sup> The creation of consensus is important, as UNCLOS Article 316 requires the proposed amendment’s ratification or accession “by two thirds of the State

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<sup>135</sup> Alan Boyle, *Further Development of the Law of the Sea Convention: Mechanisms for Change*, 54 INT’L & COMP. L. Q. 563, 563 (2005).

<sup>136</sup> *Id.*, at 563-64.

<sup>137</sup> David Freestone & Alex G. Oude Elferink, *Flexibility and Innovation in the Law of the Sea – Will the LOS Convention Amendment Procedures Ever Be Used?*, in STABILITY AND CHANGE IN THE LAW OF THE SEA: THE ROLE OF THE LOS CONVENTION 174 (Alex G. Oude Elferink ed., 2005).

<sup>138</sup> UNCLOS, *supra* note 37, art. 312(1).

<sup>139</sup> Freestone and Elferink, *supra* note 137, at 176.

<sup>140</sup> UNCLOS, *supra* note 37, art. 312(1).

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*, art. 312(2).

<sup>144</sup> *Id.*

Parties or by 60 State Parties, whichever is greater,” before it can enter into force.<sup>145</sup>

A state party may also propose an amendment through the simplified procedures of UNCLOS Article 313. Pursuant to UNCLOS Article 313, the secretary general will circulate the party’s proposed amendment to all state parties.<sup>146</sup> If, within a year of its initial circulation, no state party objects to the proposed amendment, it “shall be considered [to be] adopted.”<sup>147</sup> The simplicity of UNCLOS Article 313 may “have been intended to allow amendments necessary to keep the convention up to date to be made at any point.”<sup>148</sup>

Proposed amendments, emerging according to both Article 312 and Article 313, are “open for signature by State Parties for 12 months from the date of adoption.”<sup>149</sup> Pursuant to UNCLOS Article 316(1), they enter into force “on the thirtieth day following the deposit of instruments of ratification or accession by two thirds of the State Parties or by 60 State Parties, whichever is greater.”<sup>150</sup> After an amendment has entered into force, any state that then becomes a party to UNCLOS will, unless it has expressed otherwise, also be a member to the amendment.<sup>151</sup>

As of spring 2006, no state had attempted to amend UNCLOS using the procedures set forth within UNCLOS Article 312 or UNCLOS Article 313.<sup>152</sup> This may be because of the high bar set by UNCLOS Article 316, specifically its requirement of ratification or accession “by two thirds of the State Parties or by 60 State Parties, whichever is greater” before an amendment may enter into force. The amendment proposed by this comment, incorporation of Article 3bis(1)(a) and Article 8bis(5)(e) into UNCLOS Part VII, would be the first attempt to amend UNCLOS pursuant to UNCLOS Article 312 or UNCLOS Article 313.

Worldwide consensus is needed in the fight against maritime terrorism. The success of Article 3bis(1)(a) and Article 8bis(5)(e) depends upon the number of countries that embrace them. David H. Anderson, a former judge at the International Tribunal for the Law of the Sea, argues that international usage of the UNCLOS amendment procedures is “a question of

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<sup>145</sup> *Id.*, art. 316.

<sup>146</sup> *Id.*, art. 313.

<sup>147</sup> *Id.* art. 313(3).

<sup>148</sup> Freestone and Elferink, *supra* note 137 at 177.

<sup>149</sup> UNCLOS, *supra* note 37, art. 315.

<sup>150</sup> *Id.*, art. 316(1).

<sup>151</sup> *Id.*, art. 316(4).

<sup>152</sup> Boyle, *supra* note 135, at 564.

politics and diplomacy.”<sup>153</sup> The UNCLOS Article 316 amendment requirements would encourage the international community to employ the power of politics and diplomacy to increase the ratification and accession of Article 3bis(1)(a) and Article 8bis(5)(e).

The incorporation of Article 3bis(1)(a) and Article 8bis(5)(e) into UNCLOS Part VII, as the convention’s first proposed amendment, would also be symbolic of the international community’s commitment to stop maritime terrorism. When it created UNCLOS Articles 312 and 313, the international community stressed that UNCLOS should be able to adapt to “technological advances” and “economic, political and juridical” changes.<sup>154</sup> The increasing need to respond to the threat posed by maritime terrorism is the type of adaptation envisioned by the UNCLOS creators.

*B. Incorporation of Article 3bis(1)(a) and Article 8bis(5)(e) into UNCLOS Part VII Would Ensure Conformity with International Law, Uniformity, and Wide-Scale Observance*

Incorporation of Article 3bis(1)(a) and Article 8bis(5)(e) into UNCLOS Part VII would solve three problems inherent in the 2005 Draft Protocol’s maritime terrorism ship-boarding provisions. First, it would create a general nonflag-state right of visit given reasonable suspicion of a vessel’s participation in maritime terrorist activity. Second, it would decrease the potential for overlaps and possible inconsistencies inherent in a system that now relies on multiple bilateral and multilateral treaties. Finally, it would separate the issue of maritime terrorism, as defined by Article 3bis(1)(a), from more contentious portions of the 2005 Draft Protocol. This would increase the probability international consensus supporting a nonflag-state right of visit on the high seas given reasonable suspicion of a vessel’s involvement in maritime terrorism.

*1. Incorporation of Article 3bis(1)(a) and Article 8bis(5)(e) into UNCLOS Part VII Would Create a Nonflag-State Right of Visit Given Reasonable Suspicion of a Vessel’s Involvement in Maritime Terrorism*

The inclusion of Article 3bis(1)(a) and Article 8bis(5)(e) in UNCLOS Part VII would create a right of visit given reasonable suspicion of a vessel’s involvement in maritime terrorist activity. This would dramatically improve the legal procedure codified in the 2005 Draft Protocol. The 2005 Draft

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<sup>153</sup> David H. Anderson, *Commentary, in STABILITY AND CHANGE IN THE LAW OF THE SEA: THE ROLE OF THE LOS CONVENTION* 226 (Alex G. Oude Elferink ed., 2005).

<sup>154</sup> Freestone and Elferink, *supra* note 137, at 174.

Protocol does not require state parties to grant nonflag states a right of visit given reasonable suspicion of a vessel's involvement in maritime terrorism. Rather, it explicitly allows flag states to refuse to grant such permission. In addition, it permits flag states that choose to grant nonflag states permission to board one of their vessels to do so in one of two ways—on a general basis or on an ad-hoc basis.

As written, the 2005 Draft Protocol allows a state party to choose to grant a nonflag-state right of visit only if the nonflag state has requested permission and has failed to receive a response “within four hours of acknowledgement of receipt of [its] request.”<sup>155</sup> Under this option, not only must the nonflag state wait for four hours before exercising the right of visit, but the flag state retains the right to deny its request. Both of these requirements are impediments to international security in the case of a vessel reasonably suspected of participation in terrorist activities. Given suspicion of a vessel's involvement in maritime terrorism, a nonflag state should have the right of visit immediately, just as it would in cases of piracy, slavery, or illegal broadcasting.

2. *Incorporating Articles 3bis(1)(a) and 8bis(5)(e) into UNCLOS Part VII Would Create a Uniform Legal Rule Focused on Maritime Terrorism*

To be successful, the world's counterterrorism strategy must have an intelligible prescriptive foundation and utilize one coherent high-seas ship-boarding procedure to be followed when a vessel on the high seas is suspected of participating in maritime terrorist activity. Boarding states must be able to rely on a uniform protocol, a protocol whose existence would also serve as a deterrent against maritime terrorism.

There is no uniform antiterrorism ship-boarding procedure under the current legal framework. Instead, a series of bilateral and multilateral treaties attempt to work within the structure established by UNCLOS Articles 92 and 110. The 2005 Draft Protocol symbolizes a larger movement to broaden the scope of allowable nonflag-state ship boarding on the high seas in order to confront evolving maritime security threats.

For example, the Proliferation Security Initiative (“PSI”) is an international effort “to enhance and expand . . . efforts to prevent the flow of WMD, their delivery systems, and related materials on the ground, in the air, and at sea, to and from states and non-state actors of proliferation

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<sup>155</sup> 2005 Draft Protocol to the SUA Convention, *supra* note 81, art. 8bis(5)(d).

concern.”<sup>156</sup> By June 2005, more than sixty nations were in support of the PSI.<sup>157</sup> Like the SUA Convention and the 2005 Draft Protocol, participation in the PSI is voluntary.<sup>158</sup> Although it has spawned the creation of six bilateral ship-boarding agreements,<sup>159</sup> the PSI provides no legal authority supporting high-seas interdictions that have not been authorized by the flag state.<sup>160</sup>

Amending UNCLOS Part VII to incorporate Article 3bis(1)(a) and Article 8bis(5)(e) would create a uniform nonflag-state right of visit given reasonable suspicion of a vessel’s participation in maritime terrorism. As this comment previously discussed, pursuant to UNCLOS Article 316, an amendment requires the ratification of two-thirds of UNCLOS states parties. Therefore, if the international community were to incorporate Article 3bis(1)(a) and Article 8bis(5)(e) into UNCLOS Part VII through amendment, it would effectively be crafting an international consensus, creating a uniform procedure to be followed in instances of suspected participation in maritime terrorism.

### 3. *Incorporation into UNCLOS Part VII Would Increase the Influence of Articles 3bis(1)(a) and 8bis(5)(e)*

Incorporation into UNCLOS Part VII would increase the influence of Article 3bis(1)(a) and Article 8bis(5)(e) by creating a uniform nonflag-state right of visit on the high seas given a reasonable suspicion that a ship is involved in terrorist activity. It would also broaden the number of states that are likely to embrace Article 3bis(1)(a) and Article 8bis(5)(e).

Despite the urgency of the situation, the scope of the 2005 Draft Protocol is extremely narrow. It does not add an additional UNCLOS Article 110 right of visit for situations in which a vessel is suspected of participation in maritime terrorism. Instead, it simply creates “a voluntary expedited interdiction procedure.”<sup>161</sup> Amending UNCLOS to incorporate Article 3bis(1)(a) and Article 8bis(5)(e) into UNCLOS Part VII would prevent states that are party to the amendment from refusing to allow a

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<sup>156</sup> *Proliferation Security Initiative Frequently Asked Questions*, U.S. DEP’T OF STATE, May 26, 2005, available at <http://www.state.gov/t/isn/rls/fs/46839.htm>.

<sup>157</sup> Stephen G. Rademaker, *The Proliferation Security Initiative (PSI): A Record of Success*, U.S. DEP’T OF STATE, June 9, 2005, available at <http://www.state.gov/t/ac/rls/rm/47715.htm>.

<sup>158</sup> Boese, *supra* note 62, at 36.

<sup>159</sup> *Ship Boarding Agreements*, U.S. DEP’T OF STATE, available at <http://www.state.gov/t/isn/c12386.htm>.

<sup>160</sup> Boese, *supra* note 62 at 36.

<sup>161</sup> *Id.*

nonflag state a right of visit given reasonable suspicion of a vessel's involvement in maritime terrorism.

In addition, the 2005 Draft Protocol, when it enters into force, will have the power to bind only those states that have agreed to become party to it.<sup>162</sup> There is a risk that "states not party to treaties like the 1968 Treaty on the Non-Proliferation of Nuclear Weapons (NPT)" will refuse to sign the 2005 Draft Protocol.<sup>163</sup> Pakistan, India, and Israel have all "made clear their opposition to aspects of the Protocol . . . which in effect give[] recognized nuclear-weapon states a privileged status vis-à-vis other states."<sup>164</sup>

The incorporation of Article 3bis(1)(a) and Article 8bis(5)(e) into UNCLOS Part VII would divorce the issue of a nonflag-state right of visit on the high seas given reasonable suspicion of a vessel's involvement in maritime terrorism from the more controversial sections of the 2005 Draft Protocol.

## VI. CONCLUSION

The rising threat of maritime terrorism is a danger that the world cannot ignore. The secretary general of the International Maritime Organization, Efthimios E. Mitropoulos, recognized the danger that terrorism poses to maritime security at the close of the October conference adopting the 2005 Protocol.<sup>165</sup> He stated that with regard to the 2005 Draft Protocol, "[t]he usual request for States to become Parties" is transformed into "an urgent plea."<sup>166</sup> He warned that the international community is "running a race against time" as it attempts to ensure maritime safety.<sup>167</sup>

Though the 2005 Draft Protocol was created to address the challenges of maritime terrorism, it is too timid in its approach to nonflag-state ship boarding on the high seas given reasonable suspicion of a vessel's participating in maritime terrorism. It attempts to increase maritime security while remaining within the current UNCLOS framework. The international community must be willing to amend UNCLOS, incorporating Article 3bis(1)(a) and Article 8bis(5)(e) into UNCLOS Part VII.

To confront the danger posed by maritime terrorism, the world should provide nonflag states a high-seas right to visit given reasonable grounds to

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<sup>162</sup> *Ship-Boarding: An Effective Measure Against Terrorism and WMD Proliferation?*, Chatham House, available at <http://www.chathamhouse.org.uk/pdf/research/il/ILP241105.doc>.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> Oil Spill Intelligence Report, *supra* note 67, at 1.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

suspect that a vessel has engaged in, is engaging in, or is about to engage in maritime terrorism as defined by Article 3*bis*(1)(a). The current reliance on flag-state enforcement has created weaknesses in the world's maritime security regime. Flag states, particularly flags of convenience, have little incentive to ensure compliance with international norms. The international community must ensure maritime security by filling the gaps that have opened as a result of poor flag-state enforcement.

If a nonflag state has reasonable grounds to suspect a vessel's participation in terrorist activity, it must have the power to board it before it reaches its intended target. If the world fails to take this step, a nation may be faced with two dangerous options—to let a ship go, risking possible violence, or to violate international law. No nation should be forced to make this choice, a quandary that may be prevented by the incorporation of Article 3*bis*(1)(a) and Article 8*bis*(5)(e) into UNCLOS Part VII.