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## Maritime Security and Threat of a Terrorist Attack

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# MARITIME SECURITY AND THREAT OF A TERRORIST ATTACK

**Aniruddha Rajput\***

## **ABSTRACT**

The incidents of terrorism have multiplied and so have the routes through which the terrorists reach their targets. There is a threat of a terrorist attack from the sea route aimed at targets on the land. Until now the academic scholarship as well as treaty practice has focused on challenges of terrorism to the safety of navigation rather than terrorist threats originating from the sea. Efforts at treaty making in this direction in the past are inadequate to address the problem. This article analyses the legal framework within which response may be undertaken to neutralize a terrorist threat through preventive action or after the terrorist act has been committed. It is argued that it is possible for a coastal state to stay within the purview of the United Nations Convention on the Law of the Sea (UNCLOS) and take necessary actions against a terrorist vessel. All states are under an international obligation to suppress terrorism. Moreover, the UNCLOS mandates that the seas and oceans have to be used for peaceful purposes. There may not be an explicit reference to taking action against a terrorist vessel, yet there is adequate support for such an action as per the interpretation of various provisions of the UNCLOS. Although the extent of control exerted by the coastal state in the territorial sea, contiguous zone, continental shelf, Exclusive Economic Zone and the high seas varies yet in all these maritime zones coastal states can undertake necessary actions.

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## I. INTRODUCTION

Threats posed by international terrorism are rising and so are the patterns in which the “targets” of terrorist attacks are chosen and “routes” which are used to execute these attacks. Targets of terrorist attacks could be located on the land, air, or sea. Likewise, the routes chosen to execute these attacks could be through land, air, or sea or through use of one or more of these routes. Traditionally, international terrorism or cross border terrorist attacks have targeted land territory.<sup>1</sup> In some cases even air and sea have been targeted, albeit few in number.<sup>2</sup> The 9/11 terrorist attacks exposed the possibility of use of air route for committing terrorist attacks to target land. This article is concerned with the use of sea route for committing terrorist attack on land. The legal regime regulating the steps that could be taken for prevention of an attack or in response to an attack on the land originating from the sea route are unexplored under international law. In the 2008 report of the Oceans and the Law of the Sea, the Secretary General of the United Nations identified seven threats to maritime security.<sup>3</sup> One of those threats is international terrorism. The Report noted that terrorist attacks are capable of causing significant economic loss.<sup>4</sup> The threat of international terrorism has been a continuous challenge and reports thereafter have continued to highlight its threat to the activity on the sea.<sup>5</sup> These Reports represent the limited approach to maritime terrorism because they are limited to protection of the activity on the sea. The 2008 Report specifies that it relates to “terrorist acts against ships, offshore platforms and other maritime interests.”<sup>6</sup> The Report ignores the possibility of the use of the sea as a route for committing terrorist attacks and not merely as a target. Even if sea is not a target, the use of the sea as a route for committing

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<sup>1</sup> James Stavridis, *Terrorists Have Been All Too Effective by Air and Land. What If They Hit by Sea?*, TIME (June 29, 2017), <https://time.com/4838706/what-if-terrorists-hit-by-sea/>.

<sup>2</sup> Richard Farrell, *Maritime Terrorism: Focusing on the Probable*, 60 NAVAL WAR COLLEGE REV. 46, 47 (2007).

<sup>3</sup> U.N. Secretary-General, *Oceans and the law of the sea*, ¶ 54–107, U.N. Doc. A/63/63 (Mar. 10, 2008) [hereinafter Oceans 2008].

<sup>4</sup> See *id.* ¶ 40 (explaining the impact of terrorism beyond force).

<sup>5</sup> U.N. Secretary-General, *Oceans and the law of the sea*, ¶ 43, U.N. Doc. A/70/74/Add.1 (Sept. 1, 2015).

<sup>6</sup> *Id.*

terrorist attacks ought to be covered under the threat to maritime security. The last phrase: “other maritime interests” has not been elaborated in the Report. But arguably, it is broad enough to encompass terrorist threats to all activities relating to the sea and maritime security.

The challenge of a seaward terrorist attack for maritime security is daunting. The notion of maritime security is broad and it encompasses various aspects.<sup>7</sup> One of the elementary features of maritime security is ensuring that the area immediately adjacent to the coast of a state is not used in a way that the territorial integrity or political independence of the state is not jeopardized.<sup>8</sup> A terrorist attack committed or attempted through the sea route commits precisely this by using the sea to pose a threat to the coast.<sup>9</sup> Therefore, prevention of the use of sea routes for committing a terrorist attack on the land relates to the larger question of maritime security. Threats from seaward terrorist attacks are often ignored because a majority of a state’s energy and resources are spent on securing land borders.<sup>10</sup> Additionally, surveillance of coastline is a complex exercise. Land boundaries can be secured through fencing or other advanced technology. But there are significant challenges in controlling ingress and egress from the sea.<sup>11</sup> Unlike land boundaries, it is impossible for the coastal state to seal sea boundaries due to various obligations under the United Nations Convention on the Law of the Sea (“UNCLOS”).<sup>12</sup> Access to the

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<sup>7</sup> NATALIE KLEIN, *MARITIME SECURITY AND THE LAW OF THE SEA* 4 (Oxford Univ. Press 2012).

<sup>8</sup> See *Oceans 2008*, *supra* note 3, ¶ 60 (encouraging states to be vigilant over international waters near the coast).

<sup>9</sup> Natalya A. Knyazeva & Alexander I. Korobeev, *Maritime Terrorism and Piracy: The Threat to Maritime Security*, 6 *MEDITERRANEAN J. SOC. SCIENCES* 226, 226 (2015).

<sup>10</sup> See generally *The Rise and Countering of Maritime Terrorism by the United States*, RISE TO PEACE: BLOG (Apr. 20, 2021), <https://www.risetopeace.org/2021/04/20/the-rise-and-countering-of-maritime-terrorism-by-the-united-states/risetopeace/> (explaining the importance of shifting the focus from securing land borders to coastlines).

<sup>11</sup> See V.M. Syam Kumar, *Piracy, Private Maritime Security Companies and Coastal Security in India: Lessons from the Enrica Lexie and Seaman Guard Ohio Cases*, in *NATIONAL SECURITY MANAGEMENT IN FEDERAL STRUCTURES: PERSPECTIVES FROM INDIA AND THE UNITED STATES*, at 57–59 (2014) (ebook) (using India as an example of these difficulties).

<sup>12</sup> Alex Marsh, *More to Maritime Boundaries: The Extended Continental Shelf*, *SOVEREIGN LIMITS* (Feb. 4, 2022), <https://sovereignlimits.com/blog/more->

sea and the freedom of navigation of other states cannot be unduly interfered with. The gravity of the challenge depends on the geographical location and topography of the coast.<sup>13</sup> The problem gets compounded if there are conflicting maritime claims and heavy traffic or other offshore installations.<sup>14</sup> The length of the coastline also creates problems. If the coastline is vast, surveillance is unmanageable.<sup>15</sup>

A terrorist attack could take any one of the various forms:

- A. Hijacking of a commercial or navy vessel. *Achille Lauro* is the most well-known case where a Palestinian guerilla group seized an Italian flagged cruise ship on the high seas.<sup>16</sup> They demanded release of fifty Palestinian prisoners and when their demands were not met, they killed an American prisoner.<sup>17</sup>
- B. Attack on a commercial or navy vessel. In such an attack the terrorists may board the ship and commit terrorist actions or ram a small ship loaded with explosives on the targeted vessel. For example, in the *USS Cole* incident, a small Al Qaeda boat inflicted major damage to a large military vessel.<sup>18</sup>
- C. Terrorist attack on an offshore installation.
- D. Smuggling of Weapons of Mass Destruction (WMD) for terrorist actions.
- E. Using a vessel to transport terrorists and/or material to be used for committing terrorist actions into a state or after committing or attempting to commit a

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to-maritime-boundaries-the-extended-continental-shelf.

<sup>13</sup> See Marsh, *supra* note 12.

<sup>14</sup> See PUSHPITA DAS, COASTAL SECURITY: THE INDIAN EXPERIENCE 8 (2013), <http://www.idsa.in/system/files/Monograph22.pdf> (showing how, in India, compounding factors pose a challenge).

<sup>15</sup> Joe DiRenzo III & Chris Doane, *America's Maritime Homeland Security Challenge: Ports, Waterways, and Coastal Borders*, in 1 HOMELAND SECURITY: BORDERS AND POINTS OF ENTRY 224 (James J. F. Forest ed., 2006).

<sup>16</sup> Richard Pallardy, *Achille Lauro hijacking*, BRITANNICA, <https://www.britannica.com/event/Achille-Lauro-hijacking> (last visited Mar. 22, 2022).

<sup>17</sup> *Id.*

<sup>18</sup> NORTH ATLANTIC TREATY ORGANIZATION (NATO), BRIEFING: COMBATING TERRORISM AT SEA, at 3 (2008), [http://www.nato.int/nato\\_static/assets/pdf/pdf\\_2006\\_09/2010\\_03\\_D011B221E26B40D891C22D0CA8A7D9AC\\_active\\_endeavour2008-e.pdf](http://www.nato.int/nato_static/assets/pdf/pdf_2006_09/2010_03_D011B221E26B40D891C22D0CA8A7D9AC_active_endeavour2008-e.pdf).

terrorist act, the terrorists may use a vessel to escape.

- F. In situation (e), the terrorists may enter the coastal state to commit terrorist actions in the coastal state or pass through the coastal state to enter another state to commit terrorist acts. Or, after committing or attempting to commit a terrorist attack, the terrorists may cross land borders to enter into the coastal state to escape through the coast of that coastal state.

In situations (a) to (d) the target is the activity on the sea whereas in situations (e) and (f) sea route is used to target land. Situations (a) to (d) related to maritime navigation or security on the sea.<sup>19</sup> Occurrence of these situations creates fear of insecurity and impacts maritime trade.<sup>20</sup> Maritime trade has an important share in the overall international trade.<sup>21</sup> Such attacks have taken place in the past and therefore attracted academic attention.<sup>22</sup> Situation (e) and (f) pose challenges to security of a coastal state or other states connected to the coastal state through a land boundary.<sup>23</sup> The peculiarity of situations (e) and (f) is that they are not primarily related to security on the sea but security on the land. In these situations, there is an inchoate link with the activity on the sea, and therefore maritime security is involved.<sup>24</sup> The subject of the threat of a terrorist attack to a coastal state and to states adjoining the coastal state by land boundary is important due to the practical significance and severe consequences if such an attack materializes.<sup>25</sup> It is important to look at the legality of the responses that a state can undertake. This area has not received

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<sup>19</sup> Gal Luft & Anne Korin, *Terrorism Goes to Sea*, 83 FOREIGN AFFAIRS 61, 64 (2004).

<sup>20</sup> *Id.* at 62.

<sup>21</sup> *Id.*

<sup>22</sup> See, e.g., KLEIN, *supra* note 7, at 8; Wolff von Heinegg, *The Proliferation Security Initiative: Security v. Freedom of Navigation?*, in 81 INTERNATIONAL LAW CHALLENGES: HOMELAND SECURITY AND COMBATING TERRORISM 55, 66 (Thomas Mck. Sparks & Glenn M. Sulmasy eds., 2005); Assaf Harel, *Preventing Terrorist Attacks on Offshore Platforms: Do States Have Sufficient Legal Tools?*, 4 HARV. NAT'L SEC. J. 131, 134–35 (2012); Luft & Korin, *supra* note 19, at 61–62.

<sup>23</sup> DAS, *supra* note 14, at 21–22.

<sup>24</sup> *Id.* at 22.

<sup>25</sup> DAS, *supra* note 14, at 23–24.

adequate attention in academic literature. Therefore, this article is limited to situations (e) and (f) and explores whether the present system of international law is adequately equipped to address these situations.

There are three instances where such a terrorist attack took place and all the three relate to India. On March 12, 1993, thirteen coordinated bomb explosions killed more than 200 people and injured 800.<sup>26</sup> The explosives used for the bomb explosion were brought into India through the sea route<sup>27</sup> and the perpetrators of the bomb explosion escaped through the sea route.<sup>28</sup>

On November 26, 2008, ten terrorists landed on the coast of Mumbai, India armed with weapons and entered the city.<sup>29</sup> After completing the initial journey in a small ship, around four nautical miles away from the coast of Mumbai they got onto a small speed-boat, an inflatable rubber dinghy.<sup>30</sup> Therefore, neither their journey nor disembarking was under suspicion.<sup>31</sup> The place they landed is surrounded by fishermen's colonies and the sea water is calm in this area.<sup>32</sup> This obliterated the possibility of suspicion.<sup>33</sup> They conducted twelve coordinated shootings and bombing incidents that killed 164 people, including foreigners.<sup>34</sup>

In January 2015, approximately 365 kilometers off the coast

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<sup>26</sup> 1993: *Bombay hit by devastating blasts*, BBC NEWS (Mar. 12, 1993), [http://news.bbc.co.uk/onthisday/hi/dates/stories/march/12/newsid\\_4272000/4272943.stm](http://news.bbc.co.uk/onthisday/hi/dates/stories/march/12/newsid_4272000/4272943.stm).

<sup>27</sup> *Five people get 3 years in jail for smuggling in RDX*, ECON. TIMES (May 19, 2007, 3:13 AM), <https://economictimes.indiatimes.com/news/politics-and-nation/five-people-get-3-years-in-jail-for-smuggling-in-rdx/articleshow/2060944.cms?from=mdr>.

<sup>28</sup> Rajesh Kunayil, *Coastal Security in India: Challenges and Policy Concerns after 26/11 Mumbai Terror Attacks*, in *MARITIME SECURITY OF INDIA: THE COASTAL SECURITY CHALLENGES AND POLICY OPTIONS* 70, 75 (Vij Books ed., 2014).

<sup>29</sup> Soutik Biswas, *Mumbai 26/11 attacks: Six corpses, a mobile phone call and one survivor*, BBC NEWS (Nov. 26, 2018), <https://www.bbc.com/news/world-asia-india-46314555>.

<sup>30</sup> Mohammed Ajmal Mohammad Amir Kasab Alias Abu Mujahid v. State of Maharashtra, (2012) 8 S.C.R. 295, 378 (India).

<sup>31</sup> *Id.* at 384.

<sup>32</sup> *Id.*

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

<sup>34</sup> *Mumbai Terror Attacks Fast Facts*, CNN, <http://edition.cnn.com/2013/09/18/world/asia/mumbai-terror-attacks/> (Dec. 3, 2021).

of India the Indian coast guard intercepted a suspicious fishing vessel.<sup>35</sup> The vessel contained explosives and those on board detonated the explosives immediately.<sup>36</sup>

These incidents took place in India and parallels of such incidents are not found in other places.<sup>37</sup> However, this does not mean that the terrorists would not resort to this route in other places. These attacks have sparked debate about the nature and extent of security measures that need to be employed to tackle threats from the sea.<sup>38</sup> However, whether the current legal regime is adequate to tackle the threat of a terrorist attack from the sea in international law is not yet addressed.

In the three incidents discussed above and generally in situations (e) and (f), terrorists prefer to use small vessels.<sup>39</sup> Using large vessels for terrorist attacks is difficult,<sup>40</sup> especially considering the chances of their detection. Smaller vessels are always convenient – they are simple and more frequently used by terrorists for attack via explosives.<sup>41</sup> This article focuses on the legal regime regulating the use of small vessels to commit terrorist attack and how coastal states can take action against them while the vessel is at the sea. Once the terrorist is on the land territory, the terrorist would be covered under the domestic jurisdiction of that state.<sup>42</sup> There is no legal definition of a terrorist vessel.<sup>43</sup> The word “terrorist vessel” has been used in

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<sup>35</sup> Rajat Pandit, *Coast Guard foils 26/11-type attack, intruder boat blows itself up*, TIMES INDIA (Jan. 3, 2015), <https://timesofindia.indiatimes.com/india/Coast-Guard-foils-26/11-type-attack-intruder-boat-blows-itself-up/articleshow/45737506.cms>.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> John F. Bradford, *The Maritime Strategy of the United States: Implications for Indo-Pacific Sea Lanes*, 33 CONTEMP. SE. ASIA 183, 191 (2011); ROUTLEDGE, *INDIA'S NAVAL STRATEGY AND ASIAN SECURITY* 29 (Anit Mukherjee & C. Raja Mohan eds., 1st ed. 2016); INST. DEFENCE STUD. & ANALYSES, *NAVAL BORDER MANAGEMENT: SELECT DOCUMENTS* 15 (Pushpita Das ed., 2010).

<sup>39</sup> See, e.g., U.S. DEP'T OF HOMELAND SEC., *SMALL VESSEL SECURITY STRATEGY* i (2004) (discussing common situations in which terrorists may use small vessels).

<sup>40</sup> PAUL W. PARFOMAK & JOHN FRITELLI, CONG. RSCH. SERV., RL33787, *MARITIME SECURITY: POTENTIAL TERRORIST ATTACKS AND PROTECTION PRIORITIES* 9 (2007).

<sup>41</sup> *Id.*

<sup>42</sup> See, e.g., 18 U.S.C. § 2332(b)(2) (2018) (stating that the United States has jurisdiction over terrorism activity occurring within the United States' territory, suggesting other countries have similar methods of jurisdiction).

<sup>43</sup> See, e.g., § 18 U.S.C. 2332i(e)(13) (2018) (providing definition of the word

this article to refer to a small vessel used by terrorists to perpetrate terrorist attack against the coastal state. The terrorist vessel may be used to transport terrorists, ammunition and explosives, or other preparations necessary for the commission of a terrorist act.<sup>44</sup> The vessel may have already been taken over by terrorists from the original owner through use of force or deceit.

The steps that a coastal state can take under international law, and particularly under UNCLOS, are discussed in detail in this article. This article is divided into five sections. Section I is the introduction. Section II sets out the international obligations of states to suppress terrorist activities and by indulging in a terrorist act, a terrorist vessel is acting contrary to international peace and security. Therefore, coastal states are not only permitted but also obligated to suppress terrorist activities. Section III focuses on the extent of power exercisable by a coastal state over terrorist vessels in different maritime zones such as the territorial sea, contiguous zone, continental shelf, Exclusive Economic Zone, and the high seas. In addition to UNCLOS, different international instruments have emerged that provide the scope of control and authority exercisable by the coastal states. And finally, Section IV discusses responses that can be taken within the sphere of international law to prevent a terrorist vessel from committing a terrorist act or how to handle a terrorist attack after it has been committed.

## II. RESPONSIBILITY OF STATES FOR SUPPRESSING TERRORIST ACTIVITIES

Suppression of terrorism has been on the agenda of the international community since the time of the League of Nations.<sup>45</sup> Terrorism in all forms and in all places has been condemned by the international community. The General Assembly and Security Council have passed resolutions to this effect from time to time, including binding resolutions under Chapter VII by the Security Council.<sup>46</sup> Some common themes

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"vessel," with no definition for "terrorist vessel").

<sup>44</sup> PARFOMAK & FRITELLI, *supra* note 40.

<sup>45</sup> Ben Saul, *The Legal Response of the League of Nations to Terrorism*, 73 J. INT'L CRIM. JUST. 78, 78 (2006).

<sup>46</sup> U.N. Charter art. 39–51; *see, e.g.*, S.C. Res. 1377 (Nov. 12, 2001) (calling on all states to take urgent actions to combat terrorism); *see, e.g.*, S.C. Res.

emerge from these resolutions. Fundamentally, the international community is deeply concerned with the menace of terrorism.<sup>47</sup> Resolutions by the General Assembly and the Security Council have “[u]nequivocally [condemned] all acts, methods and practices of terrorism as criminal and unjustifiable, regardless of their motivation, in all their forms and manifestations, wherever and by whomever committed, in particular those which could threaten international peace and security.”<sup>48</sup> The condemnation of terrorism in these resolutions is not an aspirational statement, but they are requirements for concrete actions from the states.<sup>49</sup> Moreover, these resolutions condemn terrorist actions in such a way because of their impact on humanity and their threat to international peace and security.<sup>50</sup> The General Assembly in Resolution 49/60 declared that:

Acts, methods and practices of terrorism constitute a grave violation of the purposes and principles of the United Nations, which may pose a threat to international peace and security, jeopardize friendly relations among States, hinder international cooperation and aim at the destruction of human rights, fundamental freedoms and the democratic bases of society.<sup>51</sup>

Maintenance of international peace and security is one of the fundamental purposes of the UN Charter.<sup>52</sup> It has been stated more than once that international terrorism constitutes one of the most serious threats to international peace and

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1456 (Jan. 20, 2003) (calling on all states to take further action to prevent and suppress all active and passive support to terrorism and comply with S.C. Res. 1377); *see, e.g.*, S.C. Res. 2249 (Nov. 20, 2015) (reaffirming prior resolutions calling states to combat terrorism).

<sup>47</sup> *See* United Nations Security Council Counter-Terrorism Committee (CTED), *About Us*, U.N. (Dec. 2021), [https://www.un.org/securitycouncil/ctc/sites/www.un.org/securitycouncil.ctc/files/cted\\_factsheets\\_dec\\_2021.pdf](https://www.un.org/securitycouncil/ctc/sites/www.un.org/securitycouncil.ctc/files/cted_factsheets_dec_2021.pdf) (describing that countering terrorism has been on the agenda of the United Nations for decades).

<sup>48</sup> *See* S.C. Res. 1269, ¶ 1 (Oct. 19, 1999) (highlighting that the Security Council reaffirmed the General Assembly resolution 49/60 which used identical language to condemn terrorism); *see, e.g.*, G.A. Res. 49/60, annex, Declaration on Measures to Eliminate International Terrorism, ¶ 1 (Feb. 17, 1995) (providing the basis for the current language).

<sup>49</sup> *See* S.C. Res. 1269, *supra* note 48, ¶ 2 (reiterating the state’s commitment to combatting terrorism).

<sup>50</sup> G.A. Res. 49/60, *supra* note 48, ¶ 2.

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

<sup>52</sup> U.N. Charter art. 1, ¶ 1.

security and is contrary to the purposes and principles of the United Nations.<sup>53</sup> Presently, there is no agreed definition of terrorism. However, certain actions undoubtedly constitute terrorist acts. Some of which have been specified in Resolution 49/60:

Criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them.<sup>54</sup>

The phrase maritime terrorism is used to encompass terrorist attacks emanating from the challenges of maritime security. Samuel Pyeatt Menefee defines maritime terrorism as “any illegal act directed against ships, their passengers, cargo or crew, or against seaports with the intent of directly or indirectly influencing a government [or] group of individuals.”<sup>55</sup> The focus of this definition is on protection of navigation rather than protection of a coastal state from a seaward terrorist attack. Christopher C. Joyner has used somewhat of a different definition that would include threats from a terrorist vessel.<sup>56</sup> Joyner describes maritime terrorism as “the systematic use or threat to use acts of violence against international shipping and

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<sup>53</sup> See, e.g., S.C. Res. 1377, *supra* note 46, pmb. (stating that terrorism in all forms is the most serious threat to the peace and security of UN members); S.C. Res. 1456, *supra* note 46, pmb.; S.C. Res. 1535, pmb. (Mar. 26, 2004); S.C. Res. 1566, pmb. (Oct. 8, 2004); S.C. Res. 1787, pmb. (Dec. 10, 2007); S.C. Res. 1805, pmb. (Mar. 20, 2008); S.C. Res. 1963, pmb. (Dec. 20, 2010); S.C. Res. 2195, pmb. (Dec. 19, 2014); S.C. Res. 2178, pmb. (Sept. 24, 2014); S.C. Res. 1373, ¶ 5 (Sept. 28, 2001); S.C. Res. 1624, pmb. (Sept. 14, 2005); S.C. Res. 2133, pmb. (Jan. 27, 2014); S.C. Res. 2199, pmb. (Feb. 12, 2015); S.C. Res. 2253, pmb. (Dec. 17, 2015).

<sup>54</sup> G.A. Res. 49/60, *supra* note 48, ¶ 3; see also G.A. Res. 54/109, pmb. (Feb. 25, 2000) (adopted by the General Assembly of the United Nations in resolution 54/109 of December 9, 1999, which also describes terrorism in a similar fashion in its preamble).

<sup>55</sup> Md Saiful Karim, *The International Law of Maritime Terrorism*, in MARITIME TERRORISM AND THE ROLE OF JUDICIAL INSTITUTIONS IN THE INTERNATIONAL LEGAL ORDER 39, 40–41 (Robin Churchill & Alex Oude Elferink eds., Brill Nijhoff 2017); Donna Nincic, *The challenge of maritime terrorism: Threat identification, WMD and regime response*, 28 J. STRATEGIC STUD. 619, 620 (2005).

<sup>56</sup> Christopher C. Joyner, *Suppression of Terrorism on the High Seas: The 1988 IMO Convention on the Safety of Maritime Navigation*, 19 ISR. Y.B. HUM. RTS. 343, 348 (1989).

maritime services by an individual or group to induce fear and intimidation in a civilian population in order to achieve political ambitions or objectives.”<sup>57</sup> This definition expands what the idea of maritime terrorism by including the intimidation of civilian populations that could be achieved through the use of the sea.

Needless to say that in situations (e) and (f) mass killing of innocent civilians is involved. Although the killing technically does not happen on the sea and takes place on the land, the source of the threat and the resultant terrorist action is from the sea. Once the terrorists are on land, then the domestic law would cover the situation completely. But challenges arise while the terrorists are at sea either before or after the commission of a terrorist act. The ultimate act that they intend to commit or have committed is a criminal act intended or calculated to provoke a state of terror in the minds of the general public. In sum, the actions committed through terrorist vessels are terrorist activities under international law. The international community has urged states to suppress all acts of terrorism, and situations (e) and (f) are included in them.

States are expected to cooperate in every way possible to fight against terrorism.<sup>58</sup> The Security Council called upon all states to cooperate and coordinate in taking appropriate steps to

[P]revent and suppress terrorist acts, protect their nations and other persons against terrorist acts and bring to justice the perpetrators of such acts; prevent and suppress in their territories through all lawful means the preparation and financing of any acts of terrorism; [and] deny those who plan, finance or commit terrorist acts safe havens by ensuring their apprehension and prosecution or extradition.<sup>59</sup>

It is necessary that states cooperate with each other in the fight against terrorism and ensure, in particular, that the sea is not used for a terrorist activity. Therefore, a state would have to take various measures, discussed in the following sections, to stop the activities of a terrorist vessel whether it is intended to commit a terrorist act on the coastal state, under situation (e), or on another state by crossing through the coastal state, under situation (f).

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<sup>57</sup> *Id.* at 348.

<sup>58</sup> S.C. Res. 1377, *supra* note 46, ¶ 3.

<sup>59</sup> S.C. Res. 1269, *supra* note 48, ¶ 4.

The responsibility to cooperate for the fight against terrorism is an obligation emanating from the UN Charter and international law. The General Assembly Resolution 49/60 states that:

States must also fulfil their obligations under the *Charter of the United Nations* and other provisions of international law with respect to combating international terrorism and are urged to take effective and resolute measures in accordance with the relevant provisions of international law and international standards of human rights for the speedy and final elimination of international terrorism.<sup>60</sup>

In the concluding paragraph, the Resolution urged the states to “promote and implement in good faith and effectively” the provisions of the Declaration.<sup>61</sup> After the 9/11 terrorist attacks, the international community has become more concerned about these threats, and the Security Council has called upon the “international community to redouble their efforts to prevent and suppress terrorist acts including by increased cooperation and full implementation of the relevant international anti-terrorist conventions and Security Council resolutions.”<sup>62</sup> The Security Council has directed that the states should punish the perpetrators of terrorist activities as well as those who abet commission of such actions. The Security Council has directed that “States must bring to justice those who finance, plan, support or commit terrorist acts or provide safe havens, in accordance with international law, in particular on the basis of the principle to extradite or prosecute.”<sup>63</sup>

Resolution 1373 of the Security Council is the most crucial resolution for the fight against terrorism.<sup>64</sup> It was passed under Chapter VII of the UN Charter with mandatory language.<sup>65</sup> It is binding on all UN Member states.<sup>66</sup> Resolution 1373 requires states to “[t]ake the necessary steps to prevent the commission of terrorist acts, including by provision of early warning to other

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<sup>60</sup> G.A. Res. 49/60, *supra* note 48, ¶ 5.

<sup>61</sup> *Id.* ¶ 11.

<sup>62</sup> S.C. Res. 1368, ¶ 4 (Sept. 12, 2001).

<sup>63</sup> S.C. Res. 1456, *supra* note 46, ¶ 3.

<sup>64</sup> S.C. Res. 1373, *supra* note 53, ¶ 1.

<sup>65</sup> *Id.*

<sup>66</sup> U.N. Charter art. 25.

States by exchange of information.”<sup>67</sup> It further directs states to “[f]ind ways of intensifying and accelerating the exchange of operational information.”<sup>68</sup> While cooperating, states have to ensure that

[A]ny person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offenses in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts.<sup>69</sup>

States have to “[a]fford one another the greatest measure of assistance in connection with criminal investigations or criminal proceedings relating to the financing or support of terrorist acts, including assistance in obtaining evidence in their possession necessary for the proceedings.”<sup>70</sup>

Resolution 1373 makes it obligatory on all states to prevent their nationals or their territories from being used for terrorist activities.<sup>71</sup> The implication of this clause is that states cannot allow their nationals or vessels to transport terrorists or goods that are intended for acts of terrorism.<sup>72</sup> Therefore, by allowing a terrorist vessel to be registered in a state and allowing it to commit terrorist acts, the state of registration would be failing to prevent commission of terrorist acts. States should “[r]efrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts.”<sup>73</sup> The Resolution restrains states from providing “active” as well as “passive” support, which has been reaffirmed in Resolution 1456 of the Security Council at the meeting at the Ministerial Level<sup>74</sup> and thereafter.<sup>75</sup> States cannot allow their nationals or ships and aircrafts to transport international terrorists and goods aimed at committing terrorist

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<sup>67</sup> S.C. Res. 1373, *supra* note 53, ¶ 2(b).

<sup>68</sup> *Id.* ¶ 3(a).

<sup>69</sup> S.C. Res. 1373, *supra* note 53, ¶ 2(e).

<sup>70</sup> *Id.* ¶ 2(f).

<sup>71</sup> *Id.* ¶¶ 1–2.

<sup>72</sup> Wolff von Heinegg, *The Legality of Maritime Interception/Interdiction Operations Within the Framework of Operation ENDURING FREEDOM*, 79 INT'L L. STUD. 255, 261–62 (2003).

<sup>73</sup> S.C. Res. 1373, *supra* note 53, ¶ 2(a).

<sup>74</sup> S.C. Res. 1456, *supra* note 53, ¶ 1.

<sup>75</sup> S.C. Res. 2199, *supra* note 53, pmb.; S.C. Res. 2253, *supra* note 53, pmb.

acts. If states willingly abstain from these responsibilities, then they would be in breach of the obligations under the UN Charter.<sup>76</sup> The state of registration should denounce registration of a terrorist vessel once it is noticed that the vessel has indulged into terrorist activities. Once the registration is denounced, the vessel would become a stateless vessel and will be amenable to the jurisdiction of the coastal state seeking to take appropriate action to prevent the commission of or take actions after the commission of a terrorist act.<sup>77</sup> By registering terrorist vessels in its state, a state is providing passive support to terrorist activities.<sup>78</sup> If a state fails to de-recognize a vessel by de-registering a terrorist vessel, the state would be providing passive support to terrorist activity.<sup>79</sup> If a state continues to extend protection on the ground that it is the flag state of a terrorist vessel, then that state would be providing passive support to a terrorist act and thus violating Resolution 1373.<sup>80</sup>

Resolution 1373 also addresses the situation where terrorists enter the coastal state not to commit the offense on the territory of that state, but to use it as a transition state and enter another state to commit the terrorist act.<sup>81</sup> Even in such a situation, the coastal state would have to take actions for suppression of the terrorist act.<sup>82</sup> Resolution 1373 directs states to take following steps: “[p]revent the movement of terrorists or terrorist groups by effective border controls and controls on issuance of identity papers and travel documents, and through measures for preventing counterfeiting, forgery or fraudulent use of identity papers and travel documents.”<sup>83</sup>

In order to prevent the movement of terrorist groups a coastal state would have to undertake measures for interdiction.

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<sup>76</sup> Heinegg, *supra* note 72, at 261–62.

<sup>77</sup> See Anne Bardin, *Coastal State's Jurisdiction over Foreign Vessels*, 14 PACE INT'L L. REV. 27, 24–26 (2002) (describing coastal state's jurisdiction over un-registered or "stateless" vessels).

<sup>78</sup> See generally Md Saiful Karim, *Flag State Responsibility for Maritime Terrorism*, 33 SAIS REV. INT'L AFFAIRS 127, 130–32 (2013) (discussing the challenges of curtailing maritime terrorism activities due to vessel registration loopholes).

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 132.

<sup>81</sup> See S.C. Res. 1373, *supra* note 53, ¶ 2(g) (prohibiting terrorists from moving between countries through border control measures).

<sup>82</sup> *Id.*

<sup>83</sup> S.C. Res. 1373, *supra* note 53, ¶ 2(g).

According to Wolff von Heinegg, Resolution 1373 gives ample power to the coastal state to take all necessary measures against a vessel that does not disclose necessary information on its identity and continues the journey.<sup>84</sup> In sum, a coastal state is under an obligation to prevent maritime terrorism and ensure that vessels registered in its jurisdiction are not used for terrorist activities, otherwise it would amount to passive support for terrorist activities.

As is evident above, participating in terrorist activity is a violation of the UN Charter and international law.<sup>85</sup> The obligation of states to interdict and take action against a terrorist vessel precedes the terrorist action and extends even after a terrorist action has been already committed.<sup>86</sup> States are to cooperate to ensure that they take adequate steps to stop such a terrorist vessel, whether the terrorist vessel is meant to create havoc within its territory or within that of another state.<sup>87</sup> The power a coastal state could exercise on a terrorist vessel depends on the jurisdiction, and these issues are discussed in the following section.

### III. LEGAL REGIME UNDER THE UNCLOS AND OTHER INTERNATIONAL INSTRUMENTS

This section analyses and compares the legal regime of control that a coastal state can exercise over a terrorist vessel in various maritime zones under UNCLOS as well as under other international instruments.

#### A. *Regime under the UNCLOS*

UNCLOS is a foundational multilateral treaty dealing comprehensively with the activities on the sea.<sup>88</sup> UNCLOS exemplifies progressive development in the law of the sea and is an important step towards codification. An important driving factor to codify and progressively develop the law of the sea is

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<sup>84</sup> Heinegg, *supra* note 72, at 261–62.

<sup>85</sup> S.C. Res. 1373, *supra* note 53, ¶ 5.

<sup>86</sup> Heinegg, *supra* note 72, at 261–62 (describing state obligations and elements needed for states to act under UN Resolution 1373).

<sup>87</sup> *Id.*

<sup>88</sup> See United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

the need to ensure peace, security, and friendly relations between states. This objective is expressed in the preamble of UNCLOS which states:

Believing that the codification and progressive development of the law of the sea achieved in this Convention will contribute to the strengthening of peace, security, cooperation and friendly relations among all nations in conformity with the principles of justice and equal rights and will promote the economic and social advancement of all peoples of the world, in accordance with the Purposes and Principles of the United Nations as set forth in the Charter.<sup>89</sup>

A preamble is an influential component of any treaty interpretation and is particularly important here since it contributes to the context of the treaty.<sup>90</sup> It influences the scope of treaty provisions by suggesting whether they are to be interpreted broadly or narrowly.<sup>91</sup> Particularly for a multilateral treaty, the role of the preamble is very important. The character of a treaty influences the role of elements of treaty interpretation.<sup>92</sup> A multilateral treaty establishing institutions with participation of many countries has an element of stabilization of international relations. Such treaties are to be read in their entirety and the preamble is one of the crucial factors.<sup>93</sup> Such treaties are treated as law-making treaties rather than mere contractual instruments. These treaties are also referred to as constitutional or constitutive treaties.<sup>94</sup> While interpreting such treaties, the principles that need to be kept in mind, according to the ICJ are:

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<sup>89</sup> UNCLOS, *supra* note 88, pmb1.

<sup>90</sup> Vienna Convention on the Law of Treaties, art. 31(2), May 23, 1969, 1151 U.N.T.S. 331.

<sup>91</sup> See RICHARD K. GARDINER, TREATY INTERPRETATION 186–87 (2d ed., 2015) (explaining how dictionaries and other sources of definitions influence treaty interpretation).

<sup>92</sup> *Report of the International Law Commission to the General Assembly*, 21 U.N. GAOR Supp. 16, U.N. Doc. A/6516 (1966), reprinted in [1966] 2 Y.B. Int'l L. Comm'n 219, U.N. Doc. A/CN.4/SER.A/1966/Add.1. (explaining that “the character of a treaty may affect the question whether the application of a particular principle, maxim or method of interpretation is suitable in a particular case.”).

<sup>93</sup> Isabelle Van Damme, *Treaty Interpretation by the WTO Appellate Body*, 21 EUR. J. INT'L L. 605, 629–30 (2010).

<sup>94</sup> EIRIK BJORGE, THE EVOLUTIONARY INTERPRETATION OF TREATIES 106, 129 (2014).

[T]he constituent instruments [...] are also treaties of a particular type; their object is to create new subjects of law endowed with a certain autonomy, to which the parties entrust the task of realizing common goals. Such treaties can raise specific problems of interpretation owing, *inter alia*, to their character which is conventional and at the same time institutional; the very nature of the organization created, the objectives which have been assigned to it by its founders, the imperatives associated with the effective performance of its functions, as well as its own practice, are all elements which may deserve special attention when the time comes to interpret these constituent treaties.<sup>95</sup>

It would be appropriate to look at the preamble of UNCLOS to determine the objectives of the treaty. UNCLOS aims to comprehensively deal with the subject of the law of the sea because it aims at settling “all issues relating to the law of the sea.”<sup>96</sup> Moreover, UNCLOS is seen as an instrument to achieve international peace and security.<sup>97</sup> Therefore, the target of UNCLOS as per the preamble is to make “an important contribution to the maintenance of peace, justice and progress for all peoples of the world.”<sup>98</sup> The fundamental objective of UNCLOS according to the preamble is to maintain the legal order of the seas.<sup>99</sup> The preamble of UNCLOS declares this intention by

*Recognizing* the desirability of establishing through this Convention, with due regard for the sovereignty of all States, a legal order for the seas and oceans which will facilitate international communication, and will promote the peaceful uses of the seas and oceans.<sup>100</sup>

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<sup>95</sup> Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, 1996 I.C.J. 66, ¶ 19 (July 8).

<sup>96</sup> UNCLOS, *supra* note 88, pmbl.

<sup>97</sup> *UNCLOS has proven itself as valuable global framework for resolving maritime conflicts*, UNCLOSDEBATE, <https://www.unclosdebate.org/evidence/771/unclos-has-proven-itself-valuable-global-framework-resolving-maritime-conflicts> (last visited Apr. 6, 2022).

<sup>98</sup> UNCLOS, *supra* note 88, pmbl. (“*Prompted* by the desire to settle, in a spirit of mutual understanding and cooperation, all issues relating to the law of the sea and aware of the historical significance of this Convention as an important contribution to the maintenance of peace, justice and progress for all peoples of the world.”).

<sup>99</sup> UNCLOS, *supra* note 88, pmbl.

<sup>100</sup> *Id.*

Moreover, a terrorist vessel commits violent acts when it uses the sea for terrorist activities such as criminal actions aimed at creating a sense of fear in the minds of general public. Therefore, the presence of a terrorist vessel and the use of the sea and oceans by a terrorist vessel is an anathema to the objective of promoting peaceful use of the sea. And, to promote peaceful use of the sea, suppression of the use of sea for terrorist activities is necessary. Any activity by states must be within the sphere of these objectives. Using the sea for terrorist activities is against the objectives of UNLCOS and a coastal state would be well within its rights to stop any such use.

UNCLOS must also be interpreted in the background of general international law and binding obligations of states emanating thereunder. Particularly, UNCLOS has to operate within the framework of general international law and the UN Charter. Maintenance of international peace and security is the foundational principle of the UN Charter.<sup>101</sup> A multilateral treaty, like UNCLOS, also has to be interpreted in an evolutionary manner, taking into consideration the developments in the field and keeping in mind the challenges of changing times that the treaty ought to resolve.<sup>102</sup> Evolutionary interpretation is embedded in Article 31 of the Vienna Convention on the Law of Treaties because it understands that relevant rules of international law must be taken into consideration while interpreting a treaty.<sup>103</sup> Explaining the role of evolutionary interpretation, the ICJ in the *Namibia* Advisory Opinion, stated that “an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation.”<sup>104</sup> In the *Navigation Rights Case*, the ICJ gave the following reasons for

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<sup>101</sup> U.N. Charter art. 2, ¶ 6.

<sup>102</sup> See generally Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶¶ 27–28 (July 9) (discussing the evolutionary nature of the General Assembly procedures in seeking an advisory opinion); Stefan Kadelbach, *Interpretation of the Charter*, in THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 71, 74 (Oxford Univ. Press ed., 3rd ed. 2012).

<sup>103</sup> David McKeever, *Evolving Interpretation of Multilateral Treaties: ‘Acts Contrary to the Purposes and Principles of the United Nations’ in the Refugee Convention*, 64 INT’L & COMPAR. L.Q. 405, 407 (2015).

<sup>104</sup> Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16, ¶ 53 (June 21).

the adoption of an evolutionary approach:

On the other hand, there are situations in which the parties' intent upon conclusion of the treaty was, or may be presumed to have been, to give the terms used — or some of them — a meaning or content capable of evolving, not one fixed once and for all, so as to make allowance for, among other things, developments in international law. In such instances it is indeed in order to respect the parties' common intention at the time the treaty was concluded, not to depart from it, that account should be taken of the meaning acquired by the terms in question upon each occasion on which the treaty is to be applied.<sup>105</sup>

Rules on suppression of terrorism adopted by binding Security Council Resolutions have changed general international law and are therefore a relevant consideration for interpretation. Evolutionary interpretation would not warrant inclusion of new provisions or addressing situations that do not exist in the treaty. However, if there is adequate support for covering situations based on the general philosophy reflected in the preamble and coverage under provisions of the treaty, then a constitutional treaty should be interpreted in an evolutionary manner. Like any other branch of law, international law of the sea is not static. It embodies and attempts to interpret and reflect the legal order of the oceans, which change and evolve in response to the challenges required by the need to secure and maintain an orderly use of the oceans. There need not be direct reference to suppression of terrorist actions arising from the sea, as long as the scope of the provisions in UNCLOS is extensive enough to accommodate undertaking necessary actions for the suppression of terrorist threats emanating from the sea. For example, a coastal state can undertake various regulations based on provisions in UNCLOS.<sup>106</sup> José Luis Jesus has remarked that:

For any system of law to be able to respond to the needs of society, it has to be able to change and adapt to the changing circumstances affecting the relations or the reality it purports to discipline and regulate. It should reflect the mood of new times and situations, absorb new requirements and dominant trends and adopt measures to prevent or repress negative developments that

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<sup>105</sup> Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicar.), Judgment, 2009 I.C.J. 213, ¶ 64 (July 13).

<sup>106</sup> UNCLOS, *supra* note 88, art. 21.

pose a serious threat.<sup>107</sup>

The provisions of UNCLOS must be interpreted in a way that keeps in mind the underlying philosophy of maintaining the legal order of the sea. Therefore, there it is appropriate for the coastal states to take measures to tackle the threat of a terrorist attack in situations (e) and (f) even though UNCLOS does not have any specific provision dealing with such a terrorist threat. Since maintenance of international peace and security is one of the fundamental objectives of UNCLOS,<sup>108</sup> the developments in the field of countering terrorism, and maritime terrorism in particular, are necessarily part of that objective. UNCLOS creates maritime zones on which different degrees of control and influence can be exercised by a coastal state. Depending on the maritime zone under consideration, the manner in which the threat of a terrorist attack from a terrorist vessel can be addressed is determined. In all these zones a coastal state can exercise powers to neutralize a terrorist vessel. Specific regimes in different maritime zones are discussed hereunder.

### *B. Territorial Sea*

Territorial sea is an area “not exceeding 12 nautical miles, measured from baselines,” which are determined in accordance with UNCLOS.<sup>109</sup> Sovereignty of a coastal state extends to these territorial waters.<sup>110</sup> Sovereignty over the territorial sea is extensive and comparable to the degree of control exercised on land territory, subject to limitations under UNCLOS and other rules of international law.<sup>111</sup> The coastal state is free to regulate the activity of the territorial sea in a manner it deems appropriate,<sup>112</sup> and has the power to suppress all criminal activities including terrorist activities on the territorial sea. The powers exercised by the coastal state on the territorial seas are akin to those exercised on the land territory, as long as they do not contradict the right of innocent passage conferred on other

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<sup>107</sup> José Luis Jesus, *Protection of Foreign Ships against Piracy and Terrorism at Sea: Legal Aspects*, 18 INT’L J. MARINE & COASTAL L. 363, 381–82 (2003).

<sup>108</sup> See UNCLOS, *supra* note 88, art. 138.

<sup>109</sup> UNCLOS, *supra* note 88, art. 3.

<sup>110</sup> *Id.* art. 2(1).

<sup>111</sup> *Id.* art. 3.

<sup>112</sup> *Id.* art. 2.

states under UNCLOS.<sup>113</sup> A coastal state can take action against a terrorist vessel based on the provisions governing the activities on the territorial sea.<sup>114</sup>

The limitation on the exercise of absolute sovereignty of the coastal state in the territorial sea is in the form of the right of “innocent passage” of vessels belonging to other states.<sup>115</sup> To exercise this right, the conditions of innocent passage have to be satisfied by vessels belonging to other states. If any vessel – including a terrorist vessel – does not satisfy the conditions of innocent passage, then a coastal state would be within its powers to stop passage of that vessel and undertake necessary measures. Prior to the codification of UNCLOS, the 1958 Territorial Sea Convention covered this field.<sup>116</sup> That convention referred to innocent passage but did not specify the elements of innocent passage. One of the areas of achievement where UNCLOS has made impressive progress in codification over the 1958 Territorial Sea Convention is setting out the ingredients of innocent passage in detail.<sup>117</sup> Although rather intuitive, the two necessary elements of “innocent passage” are that (1) the passing of the vessel should satisfy the conditions of “passage” and (2) that “passage” shall be innocent. UNCLOS defines both these elements.

Article 18 of UNCLOS defines “passage” as navigation through territorial sea for traversing the sea with or without entering territorial waters or calling at a roadstead or port facility by entering territorial waters or simply from outside.<sup>118</sup> If the terrorist vessel does not pass through the territorial sea, then legal provisions regulating other maritime zones discussed in the following sections would control. If the terrorist vessel enters territorial sea – which it is bound to – it will be outside the scope of “passage.”<sup>119</sup> If the destination of the terrorist vessel is the coastal state, it is not simply traversing. And the

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<sup>113</sup> R.R. CHURCHILL & A.V. LOWE, *THE LAW OF THE SEA* 75 (3rd. ed. 1999).

<sup>114</sup> *Id.*

<sup>115</sup> UNCLOS, *supra* note 88, art. 17.

<sup>116</sup> *Convention on the Territorial Sea and Contiguous Zone*, BRITANNICA, <https://www.britannica.com/topic/Convention-on-the-Territorial-Sea-and-Contiguous-Zone> (last visited Mar. 29, 2022).

<sup>117</sup> *Convention on the Territorial Sea and the Contiguous Zone*, art. 14 (3)–(4), Apr. 9, 1958, 516 U.N.T.S. 205 [hereinafter UNCTSCZ].

<sup>118</sup> UNCLOS, *supra* note 88, art. 18.

<sup>119</sup> *Id.* art. 19.

“[p]assage shall be continuous and expeditious,”<sup>120</sup> so ships are not allowed to hover or cruise around in territorial waters.<sup>121</sup> The freedom of passage is available only for ships that are passing through and not for those who intend to dock on the port or otherwise for whatever reasons.<sup>122</sup> A vessel may stop and anchor only to the extent that it is incidental to ordinary navigation, or necessary due to *force majeure* or distress or rendering assistance to persons or ships or aircraft in danger or distress.<sup>123</sup> It seems clear that a terrorist vessel would not stop in the territorial sea for any of these reasons, but even if it did stop, it would only be temporary and in furtherance of its aim at reaching the land territory of the coastal state. It is not passing or transiting from the territorial sea for its onward voyage. It is traversing the territorial sea to enter the coastal state.

Satisfaction of the “passage” conditions is also required for satisfaction of “innocent passage.”<sup>124</sup> So long as a vessel’s passage is not “prejudicial to the peace, good order or security of the coastal State,” then they have satisfied “innocent passage.”<sup>125</sup> This provision is described as a “catch-all clause”<sup>126</sup> since it expands the scope of jurisdiction of the coastal state to take actions that do not relate to passage. The nature of this clause is such that even if the passage is lawful, it would become non-innocent.<sup>127</sup> A terrorist vessel, in its very nature, does not satisfy the requirements of “passage” or “innocent passage.” Since a terrorist act involves violence, it is contrary to peace.

Throughout the various stages prior to the creation of UNCLOS, security of the coastal state has been a fundamental criterion for satisfying the test of innocent passage.<sup>128</sup> At the first Law of the Sea Conference, it was proposed that “the sole test of innocence of a passage was whether or not it was

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<sup>120</sup> *Id.* art. 18(2).

<sup>121</sup> CHURCHILL & LOWE, *supra* note 113, at 82.

<sup>122</sup> UNCLOS, *supra* note 88, art. 18(2).

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

<sup>124</sup> UNCLOS, *supra* note 88, art. 19(1)–(2).

<sup>125</sup> *Id.* art. 19(1).

<sup>126</sup> Sarah Wolf, *Territorial Sea*, in MAX PLANCK ENCYCLOPEDIAS OF INTERNATIONAL LAW ¶ 25 (Oxford Univ. Press ed., 2013).

<sup>127</sup> OPPENHEIM’S INTERNATIONAL LAW 616 (Robert Jennings & Arthur Watts eds., 9th ed. 1992).

<sup>128</sup> See U.N. CLOS, 8th Sess., 26th mtg. at 82, U.N. Doc A/CONF.13/C.1/SR.26-30 (Mar. 27, 1958).

prejudicial to the security of the coastal State.”<sup>129</sup> There was disagreement about the precise extent of protection contemplated under the word “security” and the kinds of protection included.<sup>130</sup> But there was agreement that national defense was included in the meaning of the word “security.”<sup>131</sup> Again, the 1958 Territorial Seas Convention stipulated that for a passage to be innocent, it must not be prejudicial to the peace, good order or security of the coastal state.<sup>132</sup> And the same sentiment is contained in Article 19 of UNCLOS.<sup>133</sup> The word “security” in Article 19 is broad and cannot be limited to any particular kind of security interest. It is not limited to military security and covers a wide range of issues.<sup>134</sup> Maritime security is inevitably included and therefore maritime terrorism is contrary to the understanding of “security” under this provision.

UNCLOS provides for certain activities that are “prejudicial to the peace, good order or security of the coastal State.”<sup>135</sup> Specifically, a vessel cannot indulge in an activity causing “any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations.”<sup>136</sup>

The language of this clause suggests that a vessel is restrained from not only the actual use of force but also the threat of use of force. The language used in this provision of UNCLOS is the same as Article 2(4) of the UN Charter.<sup>137</sup> Therefore, a conclusion between these two provisions can be drawn. For there to be a “threat” there is no need for an armed attack or a serious form of use of force or limited confrontation

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

<sup>130</sup> *Id.* at 83.

<sup>131</sup> *See id.* (stating that security implies that there should be no military or other threats to the sovereignty of the coastal state).

<sup>132</sup> UNCTSCZ, *supra* note 117, art. 14(4); Gerald Fitzmaurice, *Some Results of the Geneva Conference on the Law of the Sea: Part 1 – the Territorial Sea and Contiguous Zone and Related Topics*, 8 INT’L & COMPAR. L.Q. 78, 95 (1959).

<sup>133</sup> UNCLOS, *supra* note 88, art. 19(1); Fitzmaurice, *supra* note 132.

<sup>134</sup> Stuart Kaye, *Freedom of Navigation in a Post 9/11 World: Security and Creeping Jurisdiction*, in THE LAW OF THE SEA: PROGRESS AND PROSPECTS 349 (David Freestone, et al. eds., 2010).

<sup>135</sup> UNCLOS, *supra* note 88, art. 19(1).

<sup>136</sup> *Id.* 19(2).

<sup>137</sup> U.N. Charter art. 2(4).

between armies, it virtually includes any military operations.<sup>138</sup> In the case of a terrorist attack, such a confrontation would not be involved. In the Draft Code of Crimes Against the Peace and Security of Mankind, the International Law Commission stated that “the word “threat” denotes acts undertaken with a view to making a State believe that force will be used against it if certain demands are not met by that State.”<sup>139</sup>

Threat of force according to the ICJ is “the stated readiness to use it.”<sup>140</sup> There should be good reason to believe that an attack is contemplated.<sup>141</sup> Romana Sadurska has defined a threat as “an act that is designed to create a psychological condition in the target of apprehension, anxiety and eventually fear, which will erode the target’s resistance to change or will pressure it toward preserving the status quo.”<sup>142</sup> And Marco Roscini has defined use of force as “an explicit or implicit promise of a future and unlawful use of armed force against one or more states, the realization of which depends on the threatener’s will.”<sup>143</sup> The seriousness of the action and whether it would amount to threat of force would depend on the “context” in which it occurred.<sup>144</sup> In the case of UNCLOS, there is a general reference to “threat” to the coastal state. Therefore, it would be cumbersome on the language of the treaty to interpret that the threat has to emanate from a non-state actor. A coastal state could take action against a threat even by state actors. A terrorist vessel threatens to use force because it is in the process of using force against the coastal state.

A passage is not innocent if the vessel commits “any act aimed at collecting information to the prejudice of the defence or security of the coastal State.”<sup>145</sup> The primary aim, however, of a

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<sup>138</sup> OLIVIER CORTEN, *THE LAW AGAINST WAR: THE PROHIBITION OF THE USE OF FORCE IN CONTEMPORARY INTERNATIONAL LAW* 52 (Hart Pub. ed., 2010).

<sup>139</sup> *Draft Code of Crimes Against the Peace and Security of Mankind*, [1989] 2 Y.B. Int’l Comm’n 68, U.N. Doc. A/CN.4/SER.A/1989/Add.1.

<sup>140</sup> *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 95, ¶ 47 (July 8).

<sup>141</sup> *Draft Code of Offenses Against the Peace and Security of Mankind*, [1950] 2 Y.B. Int’l L. Comm’n 277–78, U.N. Doc. A/CN.4/25.

<sup>142</sup> Romana Sadurska, *Threat of Use of Force*, 82 AM. J. INT’L L. 239, 241 (1988).

<sup>143</sup> Marco Roscini, *Threats of Armed Force and Contemporary International Law*, 54 NETH. INT’L L. REV. 229, 235 (2007).

<sup>144</sup> CORTEN, *supra* note 138, at 73.

<sup>145</sup> UNCLOS, *supra* note 88, art. 19(2)(c).

terrorist vessel covered under situations (e) and (f) would not be at collecting information. Instead, in these situations where a terrorist vessel is on such an expedition, the information collection will still pose a threat to the peace, good order, and security because the terrorist attack is still in motion but only in a planning stage.

A vessel would be acting prejudicial to the peace, good order, or security of the coastal state if it indulges into “any act of propaganda aimed at affecting the defence or security of the coastal State.”<sup>146</sup> Again, the primary purpose of a terrorist vessel may not be to indulge into such an activity. But the possibility of propagation of use of terrorist activities or use of force against the coastal state cannot be ruled out.

Most often, a terrorist vessel enters a coastal state in a clandestine manner without any authorization. Even if it seeks authorization, it obtains that authorization by deceit thereby discrediting its legal validity. They also manifestly violate immigration laws. And terrorists typically carry ammunition which violates the customs regulations of the coastal state. Often terrorists carry fake currencies<sup>147</sup> and violate fiscal laws.<sup>148</sup> All these actions are contrary to the peace, good order, or security of the coastal state as seen through UNCLOS that lists “the loading or unloading of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal State” as prohibited conduct.<sup>149</sup>

If a vessel commits “any act aimed at interfering with any systems of communication or any other facilities or installations of the coastal State” then the action is contrary to the peace, good

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<sup>146</sup> *Id.* art. 19(2)(d).

<sup>147</sup> FINANCIAL ACTION TASK FORCE, FAFT REPORT: MONEY LAUNDERING AND TERRORIST FINANCING RELATED TO COUNTERFEITING OF CURRENCY 30 (2013), <https://www.fatf-gafi.org/media/fatf/documents/reports/money-laundering-terrorist-financing-related-to-counterfeit-currency.pdf>; U.S. DEP'T OF STATE, BUREAU OF INT'L NARCOTICS & L. ENF'T AFFAIRS, INTERNATIONAL NARCOTICS CONTROL STRATEGY REPORT: MONEY LAUNDERING AND FINANCIAL CRIMES 109 (2021), [https://www.state.gov/wp-content/uploads/2021/02/21-00620-INLSR-Vol2\\_Report-FINAL.pdf](https://www.state.gov/wp-content/uploads/2021/02/21-00620-INLSR-Vol2_Report-FINAL.pdf).

<sup>148</sup> KRISTEN E. BOON ET AL., TERRORISM: COMMENTARY ON SECURITY DOCUMENTS: TERRORIST FINANCING AND MONEY-LAUNDERING 379–80 (Oxford Uni. Press ed., vol. 106, 2010).

<sup>149</sup> UNCLOS, *supra* note 88, art. 19(2)(g).

order, and security of the coastal state.<sup>150</sup> In some situations, to escape identification by coast guards, terrorist vessels may use devices that interfere with the communication systems or other facilities of the coastal state. In which case, again, the passage of a terrorist vessel would not be innocent.

According to the ICJ in the *Corfu Channel Case*, the decision of whether the passage is innocent would depend on the “manner” in which the ship passes through the territorial sea.<sup>151</sup> For example, the manner in which a terrorist vessel travels through territorial waters before or after committing a terrorist attack would be prejudicial to the peace and security.<sup>152</sup>

Although the elements of innocent passage are set out in Articles 18 and 19 of UNCLOS,<sup>153</sup> some additional practices have developed in the application of these provisions.<sup>154</sup> Many states have imposed conditions on passage through territorial waters.<sup>155</sup> They insist on prior notification by warships.<sup>156</sup> These provisions, however, do not apply to commercial vessels.<sup>157</sup> It is unclear how a terrorist vessel would characterize itself.<sup>158</sup> Normally a terrorist vessel would be traversing in a clandestine manner and evading disclosures to the coastal authorities.<sup>159</sup> Thus, it would not be complying with the requirement of intimation and even if it does intimate, the information provided would be false.

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<sup>150</sup> *Id.* art. 19(2)(k).

<sup>151</sup> *Corfu Channel (U.K. v. Alb.)*, Judgment, 1949 I.C.J. 4, 30–31 (Apr. 9).

<sup>152</sup> UNCLOS, *supra* note 88, art. 19(1).

<sup>153</sup> UNCLOS, *supra* note 88, arts. 18–19.

<sup>154</sup> FLETCHER SCHOOL OF LAW & DIPLOMACY, *LAW OF THE SEA: A POLICY PRIMER* 22 (John Burgess et al., eds., 2017) [hereinafter *LAW OF THE SEA: A POLICY PRIMER*].

<sup>155</sup> UNCLOS, *supra* note 88, art. 21(1) (providing an exhaustive list on how coastal states can limit passage through territorial waters).

<sup>156</sup> *LAW OF THE SEA: A POLICY PRIMER*, *supra* note 154.

<sup>157</sup> Simon O. Williams, *Maritime Security: The Concept of Innocent Passage*, MARITIME EXEC. (Dec. 17, 2014, 3:38 PM), <https://www.maritime-executive.com/features/Maritime-Security-Private-The-Concept-of-Innocent-Passage>.

<sup>158</sup> *See, e.g.*, George W. Bush, *The National Strategy for Maritime Security*, WHITE HOUSE (Dec. 17, 2014), <https://georgewbush-whitehouse.archives.gov/homeland/maritime-security.html#section2> (listing the various types of vessels used to carry out terroristic threats).

<sup>159</sup> *See, e.g.*, U.S. DEPT. OF TREASURY, NATIONAL STRATEGY FOR COMBATING TERRORIST AND OTHER ILLICIT FINANCING 10, 18, 23–24 (2020) (illustrating the different ways that terrorists and other criminals evade the authorities).

While imposing regulations on the passage of vessels, all that UNCLOS expects is that innocent passage would not be hampered contrary to the objectives of UNCLOS.<sup>160</sup> Restrictions cannot be imposed that would have the practical effect of impairing innocent passage.<sup>161</sup> The crucial limitation on the power of the coastal state is that it shall not “discriminate in form or in fact” against ships of any state or ships carrying cargo.<sup>162</sup> The regulations that a coastal state imposes and the actions that it would take have to be non-discriminatory.<sup>163</sup> Exercise of jurisdiction by the coastal state serves not only national interest of the coastal state but also performs policing function in combating international terrorism.<sup>164</sup> Since port state jurisdiction complements the flag state jurisdiction, the port state can contribute towards ensuring compliance with international regulatory efforts.<sup>165</sup>

Ordinarily, a ship passing through the territorial sea would be required to comply with laws and regulations relating to navigation and transport.<sup>166</sup> It is universally recognized that a coastal state has exclusive jurisdiction within the territorial sea over matters of police and control.<sup>167</sup> If there is no passage or not an innocent passage then the ship would be subject to all coastal state laws.<sup>168</sup> Except for the situations mentioned under Article 27 of UNCLOS, the jurisdiction of the coastal state would be absolute.<sup>169</sup> Article 27 stipulates conditions for exercise of criminal jurisdiction of a coastal state on a foreign ship passing through territorial waters.<sup>170</sup> As a general rule, criminal

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<sup>160</sup> UNCLOS, *supra* note 88, art. 24.

<sup>161</sup> *Id.* art. 24(1)(a).

<sup>162</sup> *Id.* art. 25(3).

<sup>163</sup> *Id.* art. 227.

<sup>164</sup> *See, e.g.*, U.N. OFF. ON DRUGS & CRIME, MARITIME CRIME: A MANUAL FOR CRIMINAL JUSTICE PRACTITIONERS 10 (2019) (illustrating how maritime law enforcement agencies are simultaneously concerned with obligations under international law).

<sup>165</sup> Simon O. Williams, *Maritime Security: State Jurisdiction Over PCASP*, MARITIME EXEC. (Dec. 9, 2014, 9:13 AM), <https://www.maritime-executive.com/article/Maritime-Security-State-Jurisdiction-Over-PCASP-2014-12-09>.

<sup>166</sup> OPPENHEIM'S INTERNATIONAL LAW, *supra* note 127, at 617.

<sup>167</sup> *Id.* at 620.

<sup>168</sup> CHURCHILL & LOWE, *supra* note 113, at 95.

<sup>169</sup> *Id.*

<sup>170</sup> UNCLOS, *supra* note 88, art. 27(1).

jurisdiction of a coastal state would not extend over a ship passing through the territorial sea.<sup>171</sup> A coastal state could exercise criminal jurisdiction “if the consequences of the crime extend to the coastal State”<sup>172</sup> or “if the crime is of a kind to disturb the peace of the country or the good order of the territorial sea.”<sup>173</sup> The criminal jurisdiction of the coastal state would extend to a foreign vessel except for matters solely involving internal discipline of the vessel.<sup>174</sup> The terrorist vessel would be committing crimes in the territory of the coastal state and the principal aim of a terrorist vessel is of disturbing the peace and good order.<sup>175</sup> In a situation where the terrorist vessel intends to enter the coastal state to commit a terrorist act or is returning after having committed such an act, the situation would be covered and the coastal state would have criminal jurisdiction.<sup>176</sup> The challenge is when the terrorists disembark on the shore of the coastal state and then cross over to another state through land to commit a terrorist attack or are returning after having committed a terrorist act.<sup>177</sup> In this situation the terrorist vessel is not indulging into a terrorist activity against the coastal state or in the territorial waters of the coastal state.<sup>178</sup> This situation does not fall within either of the two situations under which criminal jurisdiction could be exercised by the coastal state.<sup>179</sup> However, in view of the general obligation on all states to take action against perpetrators of terrorist acts under resolutions of the Security Council and General Assembly, the coastal state could exercise criminal jurisdiction.<sup>180</sup> And by failing to exercise that jurisdiction, the coastal state would be

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<sup>171</sup> *Id.* art. 27(5).

<sup>172</sup> *Id.* art. 27(1)(a).

<sup>173</sup> *Id.* art. 27(1)(b).

<sup>174</sup> YOSHIFUMI TANAKA, *THE INTERNATIONAL LAW OF THE SEA* 79 (Cambridge Univ. Press ed., 2012).

<sup>175</sup> BJORN MOLLER, *PIRACY, MARITIME TERRORISM AND NAVAL STRATEGY* 23 (Danish Inst. for Int'l Stud., ed., 2d ed. 2009).

<sup>176</sup> MOLLER, *supra* note 175, at 15.

<sup>177</sup> *See, e.g.,* Kunayil, *supra* note 28, at 75 (highlighting the Mumbai terrorist attack which began on the sea and transitioned to land when the terrorists disembarked).

<sup>178</sup> UNCLOS, *supra* note 88, art. 27(5).

<sup>179</sup> *Id.* art. 27(1).

<sup>180</sup> *See, e.g.,* G.A. Res. 49/60, *supra* note 48 (calling on all states to combat terrorism); *see, e.g.,* S.C. Res. 2249, *supra* note 46 (reaffirming state's commitment to combatting all forms of terrorism).

violating mandatory Security Council Resolutions.<sup>181</sup>

The range of measures that a coastal state can adopt to control the movements of a terrorist vessel in the territorial waters are far-reaching. UNCLOS allows the coastal state to take all necessary steps to prevent passage which is not innocent.<sup>182</sup> The traversing of territorial sea by a terrorist vessel is prejudicial to the peace, good order, and security of the coastal state, and therefore it could be intercepted, and appropriate actions may be taken against it.<sup>183</sup> And the coastal states are further supported by their own criminal jurisdiction which applies to a terrorist vessel.<sup>184</sup>

The manner of terrorist attacks in India, for example, has shown that a terrorist vessel would normally not land on a port.<sup>185</sup> They prefer to land unnoticed and that is possible through the use of smaller boats, but as time has passed, even those smaller vessels have been noticed and are normally used to ferry terrorists or ammunition.<sup>186</sup> If terrorists do approach a port, it is much easier for the coastal state to take action against such a vessel.<sup>187</sup> In fact, complete sovereignty extends over ports.<sup>188</sup> Because a port is defined as the outermost permanent harbor, “works which form an integral part of the harbor system are regarded as forming part of the coast.”<sup>189</sup> The consequence of the sovereign right of a coastal state on the port is that it can

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<sup>181</sup> See S.C. Res. 2249, *supra* note 46 (describing the commitment that all states take in combatting terrorism).

<sup>182</sup> See UNCLOS, *supra* note 88, art. 25(1) (providing that “[t]he coastal State may take the necessary steps in its territorial sea to prevent passage which is not innocent.”).

<sup>183</sup> *Id.* arts. 19(1)–(2).

<sup>184</sup> UNCLOS, *supra* note 88, art. 27(1)(b) (stating that the criminal jurisdiction of a coastal state would apply if a crime that disturbs the peace of the country is committed).

<sup>185</sup> See Vaibhav Tiwari, *Terror Alert For South India Based On Boats Found In Gujarat's Sir Creek*, NDTV (Sept. 10, 2019, 4:57 AM), <https://www.ndtv.com/india-news/army-warns-of-terror-attack-in-southern-india-after-boats-found-abandoned-2098087> (describing recent terrorists in India abandoned their boats outside of the ports).

<sup>186</sup> ABHIJIT SINGH, MARITIME TERRORISM IN ASIA: AN ASSESSMENT 7 (Observer Rsch. Found. ed., 2019).

<sup>187</sup> UNCLOS, *supra* note 88, art. 11 (describing the control that coastal states have over their ports).

<sup>188</sup> *Id.* art. 2.

<sup>189</sup> *Id.* art. 11.

control which vessels enter and under what conditions.<sup>190</sup> States can regulate activities on the port to protect various interests of the state and maritime security is one of them.<sup>191</sup> States can always exercise jurisdiction over ships that voluntarily enter the port.<sup>192</sup> States enjoy extensive sovereign powers over the port including the right to close a port for foreign shipping.<sup>193</sup> A ship that enters the port is subject to civil and criminal jurisdiction of the port state.<sup>194</sup> A coastal state would be perfectly within its right to deny access to a terrorist vehicle to its port whether the terrorist vehicle intends to commit a terrorist act in that state or any other state.

### C. *Contiguous Zone*

The maritime zone adjacent to the territorial sea is the contiguous zone.<sup>195</sup> It is adjacent to the territorial sea and “may not extend beyond [twenty-four] nautical miles from the baselines from which the breadth of the territorial sea is measured.”<sup>196</sup> The concept of a contiguous zone was developed to address the menace of smuggling ships that hovered beyond the territorial sea.<sup>197</sup> Since the smuggling ships were beyond the territorial sea, they were outside the national jurisdiction of the coastal state. An additional adjacent area was claimed by states to exercise preventive and punitive jurisdiction over activities in adjacent waters but beyond the territorial sea.<sup>198</sup> The scope of authority exercised by a coastal state in the contiguous zone is lesser as compared to that exercised in the territorial sea.<sup>199</sup> In

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<sup>190</sup> See *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v U.S.)*, Judgment, 1986 I.C.J. 111, ¶ 213 (June 27) (stating that “It is also by virtue of its sovereignty that the coastal State may regulate access to its ports”).

<sup>191</sup> John T. Oliver, *Legal and Policy Factors Governing the Imposition of Conditions on Access to and Jurisdiction Over Foreign-Flag Vessels in US Ports*, 5 S.C. J. INT’L L. & BUS. 209, 246–47 (2009).

<sup>192</sup> Tullio Treves, *High Seas*, in MAX PLANCK ENCYCLOPEDIAS OF PUBLIC INTERNATIONAL LAW ¶ 29 (Oxford Univ. Press ed., 2008).

<sup>193</sup> KLEIN, *supra* note 7, at 67.

<sup>194</sup> UNCLOS, *supra* note 88, arts. 27(2), 33(1).

<sup>195</sup> *Id.* art. 33(1).

<sup>196</sup> *Id.* art. 33(2).

<sup>197</sup> *Id.* art. 33(1).

<sup>198</sup> CHURCHILL & LOWE, *supra* note 113, at 132.

<sup>199</sup> Compare UNCLOS, *supra* note 88, art. 27(2) (stating that coastal States have the right to take any steps authorized by its laws to pursue an arrest on

the contiguous zone, the coastal state can exercise control to prevent and punish infringement of customs, fiscal, immigration, or sanitary laws and regulations within its territory or territorial sea.<sup>200</sup> Coastal states enjoy enforcement jurisdiction over the contiguous zone on limited subjects.<sup>201</sup> As in Article 19(2)(g), impeding the peace, good order, and security of a coastal state are the circumstances under which a coastal state can interfere with a vessel in the contiguous zone.<sup>202</sup> And as seen above, under this clause a terrorist vessel violates customs, fiscal, and immigration laws. Therefore, a coastal state can take action against a terrorist vessel in the contiguous zone as well.

The Exclusive Economic Zone (“EEZ”) subsumes the area of the contiguous zone.<sup>203</sup> EEZ is defined as an area beyond and adjacent to the territorial sea.<sup>204</sup> It extends up to 200 nautical miles from the baseline.<sup>205</sup> Therefore, the powers exercised by the coastal state on the EEZ also apply to contiguous zones, as discussed below.

#### D. Continental Shelf

The continental shelf of a coastal state contains the seabed and subsoil of the submarine area.<sup>206</sup> It extends beyond the territorial sea as a natural prolongation of its land territory to the outer edge of the continental margin or up to a distance of 200 nautical miles from the baseline from where the breadth of the territorial sea is measured.<sup>207</sup> The coastal state has sovereign rights for the purpose of exploring and exploiting

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a foreign ship passing through territorial waters after leaving internal waters), with UNCLOS, *supra* note 88, art. 33(1) (explaining that a coastal state is limited to preventing violations of customs, fiscal, immigration, or sanitary laws in its contiguous zone).

<sup>200</sup> UNCLOS, *supra* note 88, art. 33(1).

<sup>201</sup> TANAKA, *supra* note 174, at 122–23.

<sup>202</sup> See UNCLOS, *supra* note 88, arts. 19, 33 (acknowledging that the state may prevent infringement of territorial laws).

<sup>203</sup> UNCLOS, *supra* note 88, art. 48; see also *Maritime Zones and Boundaries*, NAT'L OCEANIC & ATMOSPHERIC ADMIN. OFF. GEN. COUNCIL (Sept. 3, 2021), [https://www.gc.noaa.gov/gcil\\_maritime.html#contiguous](https://www.gc.noaa.gov/gcil_maritime.html#contiguous) (explaining how each coastal state can claim an EEZ).

<sup>204</sup> UNCLOS, *supra* note 88, art. 55.

<sup>205</sup> *Id.* art. 57.

<sup>206</sup> *Id.* art. 76(1).

<sup>207</sup> *Id.*

natural resources in this area.<sup>208</sup> The rights of the coastal state are limited to these rights and do not affect the other rights enjoyed by other states over the super adjacent waters and the air space above them.<sup>209</sup> The continental shelf is a reference to rights over the subsoil and seabed rather than the activities undertaken on the surface of the water.<sup>210</sup> The activities on the water would be operated by the rules regulating territorial sea, up to twelve nautical miles from the baseline, and EEZ, up to 200 nautical miles.<sup>211</sup> It would be appropriate to refer to the permissible scope for taking action against a terrorist vessel in these areas.

#### *E. Exclusive Economic Zones*

The EEZ is an area beyond and adjacent to the territorial waters.<sup>212</sup> It does not extend beyond 200 nautical miles from the baseline from which the breadth of the territorial sea is measured.<sup>213</sup> Coastal states enjoy sovereign rights over these areas for exploration and exploitation, conservation and management of natural resources, creation of artificial islands, installations and structures, marine scientific research, protection of marine environment and other rights and duties under UNCLOS.<sup>214</sup> Coastal states have to ensure that they use the exclusive economic zone with “due regard” to the rights of other states.<sup>215</sup> The rights of coastal states do not affect the rights of other states’ freedom of navigation, overflight by aircraft, laying of cables and pipelines, and other internationally useful uses of the sea.<sup>216</sup> These rights are subject to the “due regard” rule.<sup>217</sup> “Due regard” applies both to coastal states and other states. The coastal state has to ensure that it uses the exclusive economic zone with due regard to the rights of other states and at the same time other states have to use that area

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<sup>208</sup> *Id.* art. 77(1).

<sup>209</sup> *Id.* art. 78(1).

<sup>210</sup> *Id.* art. 76(1).

<sup>211</sup> *Id.*

<sup>212</sup> UNCLOS, *supra* note 88, art. 55.

<sup>213</sup> *Id.* art. 57.

<sup>214</sup> *Id.* art. 56(1).

<sup>215</sup> *Id.* art. 56(2).

<sup>216</sup> *Id.* art. 58(1).

<sup>217</sup> *Id.* art. 58(3).

with “due regard” to the rights of the coastal state. The details of the due regard rule are discussed in the next section.

The extent of rights enjoyed by coastal states in the exclusive economic zone are not as frugal as in the high seas or as extensive as in the territorial sea. The scope of authority exercised by coastal states' EEZ lies between that exercised in the high seas and territorial sea.<sup>218</sup> During the drafting of UNCLOS, some states argued that the EEZ should have a residual high seas character, i.e. any activity not falling within the clearly defined rights of coastal states under the part relating to the EEZ would be subject to the regime of high seas.<sup>219</sup> The suggestion was not accepted and Articles 55 and 86 of UNCLOS make it clear that the EEZ does not have a residual high seas character.<sup>220</sup> Similarly, coastal states do not enjoy residual territorial rights in the EEZ except for the rights mentioned in the section relating to the EEZ.<sup>221</sup> Coastal states cannot claim the same rights in the territorial sea as in the EEZ.<sup>222</sup> The EEZ is a separate functional zone with *sui generis* character.<sup>223</sup> Coastal states do not have territorial sovereignty over the EEZ, but they enjoy sovereign rights including exclusive legislative and enforcement jurisdiction over the EEZ.<sup>224</sup> Therefore, coastal states can, for example, enforce domestic legislations on suppression of terrorism in the EEZ and take action against a terrorist vessel.

In situations where UNCLOS does not attribute rights or jurisdiction to the coastal State or to other States within the exclusive economic zone, and a conflict arises between the interests of the coastal State and any other State or States, the conflict should be resolved on the basis of equity and in the light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as

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<sup>218</sup> UNCLOS, *supra* note 88, arts. 2–8, 24–28, 33, 55–63, 86–90 (outlining states' authority in these distinct maritime zones).

<sup>219</sup> Robert Beckman & Tara Davenport, *The EEZ Regime: Reflections after 30 Years* 6 (U.C. Berkeley Law of Sea Inst., Conference Paper, 2012).

<sup>220</sup> UNCLOS, *supra* note 88, arts. 55, 86; *see* CHURCHILL & LOWE, *supra* note 113, at 165.

<sup>221</sup> UNCLOS, *supra* note 88, arts. 55–63.

<sup>222</sup> LAW OF THE SEA: A POLICY PRIMER, *supra* note 154, at 12.

<sup>223</sup> *See* CHURCHILL & LOWE, *supra* note 113, at 165–66.

<sup>224</sup> TANAKA, *supra* note 174, at 128.

well as to the international community as a whole.<sup>225</sup>

This provision grants residual rights to the coastal state in the EEZ.<sup>226</sup>

It cannot be argued by a state that steps taken for suppression of terrorist actions by a coastal state amount to interference with its interests. Steps taken by a coastal state would be in the interest of the entire international community and hence justified. Other states could argue that steps taken for suppression of terrorist actions amount to undue interference with the right of navigation of those states, but that also would not be an issue in cases of a terrorist attack, as discussed in this article, because the vessels used are small. The coastal state would be interjecting or taking action against these small vessels rather than large containers that would suffer severe financial loss if detained for any period of time.

Therefore, in effect, rights of the coastal state to restrict the entry of a terrorist vessel and the right to take action under other provisions of UNCLOS would continue to operate.

#### *F. High Seas*

The legal regime of the high seas has been prominently characterized by the principles of freedom of usage and exclusive jurisdiction of the flag state.<sup>227</sup> The high seas are a common heritage of mankind, and the freedom of navigation for all states on the high seas is one of the oldest rules of international law, coined and cemented by Hugo Grotius through his treaties advocating the freedom of all states to use the high seas freely – *mare liberum*.<sup>228</sup> Therefore, the rights of coastal states over the high seas are limited. Coastal states cannot prevent ships from other states from using the high seas for peaceful purposes.<sup>229</sup> The high seas under UNCLOS comprises “all parts of the sea that are not included in the exclusive economic zone, in the

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<sup>225</sup> UNCLOS, *supra* note 64, art. 59.

<sup>226</sup> TANAKA, *supra* note 174, at 131–32.

<sup>227</sup> CHURCHILL & LOWE, *supra* note 113, at 203.

<sup>228</sup> HUGO GROTIUS, *THE FREE SEA* xviii (David Armitage ed., Richard Hakluyt trans., 2004).

<sup>229</sup> CHURCHILL & LOWE, *supra* note 113, at 205 (explaining that “[s]tates cannot in principle control the activities of other [s]tates on the high seas... [because] the freedoms of the high seas cannot be exhaustively listed”).

territorial sea or in the internal waters of a State.”<sup>230</sup> Sovereignty of the coastal state does not extend to the high seas and very limited powers could be exercised by the coastal state. The challenge then is how far can a coastal state take actions against a terrorist vessel. It is also whether UNCLOS allows undertaking of actions on the high seas against a terrorist vessel and whether actions of the coastal state amount to interference with freedom of navigation of other states.

All states, whether coastal or land-locked, enjoy certain freedoms on the high seas. Freedom on the high seas consists of freedom from national jurisdiction.<sup>231</sup> These freedoms include freedom of navigation, over light, fishing, laying of submarine cables and pipelines, construction of artificial islands and other installations and the freedom of conducting scientific research.<sup>232</sup> The important freedom relevant to the present discussion is the freedom of navigation. Freedom of navigation means all states, whether coastal or land-locked, have the right to sail ships flying their flag on the high seas.<sup>233</sup> Freedom of the high seas, including the freedom of navigation, is neither absolute nor unrestrained.<sup>234</sup> All freedoms have to be exercised “with due regard for the interests of other States.”<sup>235</sup> The “due regard” or “reasonable regard” obligation, as it is now termed, requires analysis on a case-by-case weighing of actual interests involved to decide which use is reasonable.<sup>236</sup> It is necessary that the competing rights of states are balanced, taking into account the essential principle of safeguarding life at sea.<sup>237</sup> No one would dispute that use of the high seas for violent purposes would be a violation of the “due regard” obligation.<sup>238</sup> It would

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<sup>230</sup> UNCLOS, *supra* note 88, art. 86.

<sup>231</sup> TANAKA, *supra* note 174, at 151.

<sup>232</sup> UNCLOS, *supra* note 88, art. 87(1).

<sup>233</sup> UNCLOS, *supra* note 88, art. 90.

<sup>234</sup> *See Id.* art. 87(2) (explaining that the freedom to navigate the sea must be exercised with due regard for other states' interests and rights under the convention).

<sup>235</sup> *Id.* art. 87(2).

<sup>236</sup> CHURCHILL & LOWE, *supra* note 113, at 206.

<sup>237</sup> Jan Jakub Solski, *The 'Due Regard' of Article 234 of UNCLOS: Lessons From Regulating Innocent Passage in the Territorial Sea*, 52 OCEAN DEV. & INT'L L. 398, 401 (2021).

<sup>238</sup> KLEIN, *supra* note 7, at 53 (“[C]onflict should be resolved on the basis of equity and in the light of all the relevant circumstances, taking into account the respective importance of the interest involved to the parties as well as to

be equitable for the coastal state to take steps that would limit freedom of navigation of other states if the steps are taken to prevent maritime terrorism.<sup>239</sup> A coastal state would be within its powers to stop and take counter action against a terrorist vessel on the high seas because using the high seas for terrorist activities is violation of the “due regard” principle.

Due regard has to be understood in the context of the aims and objectives of the UNCLOS and compliance with its other provisions. There are two additional provisions in UNCLOS in relation to the high seas which do not accept use of the high seas for terrorist activities. Article 88 reserves the high seas for peaceful purposes in the following words: “The high seas shall be reserved for peaceful purposes.”<sup>240</sup>

The use of the high seas cannot happen in deviation of this elementary principle. Anybody using the high seas for any violent activity, thereby committing piracy, loses their freedoms on the high seas including the freedom of navigation.<sup>241</sup> UNCLOS imposes a general obligation on all states to use the seas for peaceful purposes.<sup>242</sup> Article 301 states that the states should not use the seas in any “manner inconsistent with the principles of international law embodied in the Charter of the United Nations.”<sup>243</sup> This is a general provision applicable on all maritime zones. While the coastal states are themselves under an obligation not to use the high seas for peaceful purposes, they can undertake steps to ensure that the seas are not used contrary to the principles of the UN Charter. Therefore, coercive measures undertaken by a coastal state for implementation of police measures on the seas do not amount to use of force in international law.<sup>244</sup>

Another aspect of the freedom of navigation of all states on the high seas is the exclusive jurisdiction of the flag state. Ships have the nationality of the state whose flag they are entitled to fly, and that state is the flag state.<sup>245</sup> Ships are subject to

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the international community as a whole.”).

<sup>239</sup> *Id.*

<sup>240</sup> UNCLOS, *supra* note 88, art. 88.

<sup>241</sup> UNCLOS, *supra* note 88, art. 101.

<sup>242</sup> *Id.* art. 88.

<sup>243</sup> *Id.* art. 301.

<sup>244</sup> CORTEN, *supra* note 138, at 56.

<sup>245</sup> UNCLOS, *supra* note 88, art. 91(1).

exclusive jurisdiction of the flag state.<sup>246</sup> Thus, the coastal state or any other state is not authorized to interfere or exercise jurisdiction over a ship on the high seas except the state where the ship is registered. However, the exclusiveness of the flag state is not absolute<sup>247</sup> and UNCLOS recognizes certain exceptions to this rule.<sup>248</sup> UNCLOS allows a warship of a state to board a vessel if there is a reasonable ground to suspect that the ship is engaged in piracy, slave trade, unauthorized broadcasting, lack of nationality, or the ship is flying a foreign flag or refusing to show the flag although the ship is of the same nationality as the warship.<sup>249</sup> Two situations would be relevant for interception of a terrorist vessel: piracy and ship without nationality, a stateless vessel.

Piracy is one of the oldest crimes under customary international law,<sup>250</sup> which is now codified under UNCLOS. Piracy includes any illegal act of violence, detention, or depredation committed for private ends by the crew or passengers of a private ship, or aircraft, against another ship, or aircraft, or persons or property on board or on the high seas.<sup>251</sup> It remains to be seen whether a terrorist act would be covered under the crime of piracy since the definition is limited to the requirement of “private ends.” Terrorist activities include those aimed at destabilizing governments, causing unrest and threats to blackmail governments, or for purported religious and ethnic reasons, which include actions undertaken during liberation movements or insurgents seizing ships for political reasons. These activities, however, do not involve the essential element of private ends.<sup>252</sup> Pirates usually seek financial gain whereas terrorists wish to make a political or ideological point.<sup>253</sup>

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<sup>246</sup> *Id.* art. 92(1).

<sup>247</sup> See H.W. HALLECK, INTERNATIONAL LAW: OR, RULES REGULATING THE INTERCOURSE OF STATES IN PEACE AND WAR 593 (H.H. Bancroft & Co. ed., 1861) (showing that exceptions to the absolute right of the flag state have been recognized since the 19th century).

<sup>248</sup> CHURCHILL & LOWE, *supra* note 113, at 209.

<sup>249</sup> UNCLOS, *supra* note 88, art. 110.

<sup>250</sup> Michael Scharf & Mistale Taylor, *A Contemporary Approach to the Oldest International Crime*, 33 UTRECHT J. INT'L & EUR. L. 77, 77 (2017).

<sup>251</sup> UNCLOS, *supra* note 88, art. 101.

<sup>252</sup> Rüdiger Wolfrum, *Fighting Terrorism at Sea: Options and Limitations under International Law*, in LEGAL CHALLENGES IN MARITIME SECURITY 2–3 (Brill ed., 2008).

<sup>253</sup> See Helmut Tuerk, *Combating Terrorism at Sea – The Suppression of*

Therefore, actions such as hijacking of a vessel for political ends cannot qualify as an act of piracy.<sup>254</sup>

Despite the absence of strict private gains in terrorist activities, some have argued that terrorist actions could be covered under piracy. There is a link between piracy and terrorism in some cases.<sup>255</sup> The definition of piracy under customary law, prior to its codification under the UNCLOS, is broad. In Oppenheim's International Law, piracy is defined as "every unauthorized act of violence against persons or goods committed on the open sea either by a private vessel against another vessel or by the mutinous crew or passengers against their own vessel."<sup>256</sup> According to the treatise, an act would amount to piracy if a vessel is stopped to kill a passenger because piracy involves any act of violence. There is no need for *animus furandi* as piracy "may be prompted by hatred or revenge."<sup>257</sup> There is no need to actually commit piracy. A mere attempt is adequate.<sup>258</sup>

An analogy could be drawn between piracy and terrorism on the basis that both actions have been condemned by the international community and each state is under an obligation to ensure that they do not support commission of such actions in their territory. Each state has to ensure that obligations to suppress terrorism, which is a form of piracy, are effectively implemented and turning a blind eye towards these obligations is failure to suppress piracy.<sup>259</sup> Likewise, under various binding Security Council resolutions each state is under an obligation to suppress terrorism, failure to do so would be a violation of the UN Charter.

Scholars such as Malvina Halberstam insist that the acts of terrorism are covered by piracy and ought to be treated so under

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*Unlawful Acts Against the Safety of Maritime Navigation*, 15 U. MIA. INT'L & COMP. L. REV. 337, 342–43 (2008) (discussing the different goals of pirates and terrorists).

<sup>254</sup> *Id.* at 345 (stipulating that hijacking a vessel at sea for political reasons cannot be considered an act of piracy).

<sup>255</sup> UNRESOLVED ISSUES AND NEW CHALLENGES TO THE LAW OF THE SEA: TIME BEFORE AND TIME AFTER 175 (Anastasia Strati et al., eds., 2006).

<sup>256</sup> INTERNATIONAL LAW: A TREATISE 608–09 (Herst Lauterpracht ed., 8th ed. 1955).

<sup>257</sup> OPPENHEIM'S INTERNATIONAL LAW, *supra* note 127, at 752.

<sup>258</sup> *Id.* at 752–53.

<sup>259</sup> See Wolfrum, *supra* note 252, at 2, 3 (raising similar arguments in relation to piracy and could be extended to terrorism).

UNCLOS.<sup>260</sup> She argues that the use of “private ends” was not intended to limit acts of piracy to acts done with the intention of robbing (*animus furandi*).<sup>261</sup> After referring extensively to the drafting history, she convincingly argues that “for private ends” was never intended to exclude terrorist acts.<sup>262</sup> Exclusion of “private ends” was added to exclude acts that were illegal because the revolutionary organizations resorting to violence had not been recognized as belligerent, otherwise they would have been legal if they were so recognized.<sup>263</sup>

UNCLOS permits interdiction and boarding of a ship if there is reasonable suspicion that the ship is without nationality.<sup>264</sup> According to international law and admiralty laws of most host states, all vessels are to be registered with some state and are subject to regulatory control of that state.<sup>265</sup> In international law, all vessels must have nationality.<sup>266</sup> Therefore, registration of a vessel with the flag state is mandatory. A ship without nationality or a stateless vessel is a ship that is not registered with any state. If such a vessel sets sail, then there is no assurance under the law of the sea that it would not be interdicted. Such vessels do not have a right to fare freely on the high seas.<sup>267</sup> Stateless vehicles do not enjoy any protection under international law.<sup>268</sup> Identification of vessels with nationality is indispensable for maintaining order at the

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<sup>260</sup> See Malvina Halberstam, *Terrorism on the High Seas: The Achille Lauro, Piracy and the IMO Convention on Maritime Safety*, 82 AM. J. INT'L L. 269, 276 (1988) (discussing how terrorist attacks may also be characterized as piracy).

<sup>261</sup> *Id.* at 277.

<sup>262</sup> See *id.* at 276–81 (explaining that the “for private ends” UNCLOS definition was informed by the reasoning and scholarly debate surrounding similar terms and definitions in the Geneva Convention, UN Convention on the Law of the Sea, and the Harvard Draft Convention on Piracy).

<sup>263</sup> *Id.* at 279–80.

<sup>264</sup> UNCLOS, *supra* note 88, art. 110(1)(d).

<sup>265</sup> See RESTATEMENT (THIRD) OF FOREIGN RELATIONS L. OF THE U.S. § 501 (Am. L. Inst. 1987) (connecting also to Comment (b) discussing the relationship between a vessel and the registering state).

<sup>266</sup> INTERNATIONAL LAW, 9 WHITEMAN DIGEST, ch. 25, § 1, at 21 (“The registration of ships and the need to fly the flag of the country where the ship is registered are considered essential for the maintenance of order on the open sea.”).

<sup>267</sup> *United States v. Marino-Garcia*, 679 F.2d 1373, 1382 (11th Cir. 1982).

<sup>268</sup> H. Edwin Anderson, III, *The Nationality of Ships and Flags of Convenience: Economics, Politics and Alternatives*, 21 TUL. MAR. L.J. 139, 142 (1996).

sea.<sup>269</sup> According to Oppenheim's International Law "[i]n the interest of order on the open sea, a vessel not sailing under the maritime flag of a State enjoys no protection whatever, for the freedom of navigation on the open sea is freedom for such vessels only as sail under the flag of a State."<sup>270</sup> As such, stateless vessels are not entitled to any protection under international law.<sup>271</sup> All states are required, under international law, to make every private vessel sailing under their flag to carry papers on board that would assist in identification.<sup>272</sup> Stateless vessel is an anathema to international law and if there is such a vessel, then any State can exercise jurisdiction over such a vessel.<sup>273</sup>

States generally have two kinds of registrations: closed registries and open registries. Most of the states have closed registries, whereby only nationals or an entity predominantly composed of nationals of that state can obtain registration.<sup>274</sup> Open registries are those where the state of registration places minimal or no restrictions on vessels that can fly their flag. Any vessel can obtain a registration with such states. The flags that they fly are of convenience.<sup>275</sup> The issue becomes complex if a terrorist vessel is registered with an open registry.<sup>276</sup> In any case, there is a need of 'genuine link' between the vessel and its state of registration.<sup>277</sup> Article 5 of the Convention on High Seas recognized this requirement. This requirement was continued under Article 91 of UNCLOS.

According to ITLOS, "the need for a genuine link between a ship and its flag State is to secure more effective implementation

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<sup>269</sup> MYRES S. McDOUGAL & WILLIAM T. BURKE, *THE PUBLIC ORDER OF THE OCEANS: A CONTEMPORARY INTERNATIONAL LAW OF THE SEA* 1084 (Yale Univ. Press ed., 1962).

<sup>270</sup> INTERNATIONAL LAW: A TREATISE 422 (Ronald F. Roxburgh ed., 3rd ed., 1920).

<sup>271</sup> Anderson, *supra* note 209.

<sup>272</sup> OPPENHEIM'S INTERNATIONAL LAW, *supra* note 127, at 734.

<sup>273</sup> David F. Matlin, *Re-evaluating the Status of Flags of Convenience Under International Law*, 23 VAND. J. TRANSNAT'L L. 1017, 1025–26 (1991).

<sup>274</sup> Matlin, *supra* note 273, at 1039–42.

<sup>275</sup> *Id.* at 1019–20.

<sup>276</sup> For the practice of open registries and problems associated therewith, see Anderson, *supra* note 209, at 158–68; Matlin, *supra* note 214, at 1042–43.

<sup>277</sup> *Regime of the High Seas*, [1956] 1 Y.B. Int'l L. Comm'n 71, U.N. Doc. A/CN.4/SER.A/1956; see also D. P. O'Connell, *The History of the Law of the Sea*, in *THE INTERNATIONAL LAW OF THE SEA* 761 (1st ed. 1982) (during negotiations of UNCLOS, genuine link was understood to precede eligibility for registration).

of the duties of the flag State.”<sup>278</sup> These provisions ensure that all vessels have a link with the state of registration. If they do not, then the vessel would be treated as a stateless vessel. Thus, a terrorist vehicle without genuine link to the flag state would be violating international law and could be interjected by any state, including the coastal state.

In case of a closed registry, the vessel would be under the jurisdiction of the state of registration. Assuming that such a vessel is registered with some state, the moment it indulges into a terrorist activity it would lose its nationality.<sup>279</sup> Also, since the Security Council through resolution 1373 has urged states not to provide active or passive support to terrorism, a coastal state would not be justified in continuing registration of such a terrorist vessel. All states are under an obligation to suppress terrorism. A terrorist vessel would lose its registration by operation of law because it has acted contrary to the aims and objectives and provisions of UNCLOS such as Articles 88 and 301. Registration allows freedom of navigation subject to peaceful use of oceans. Once a vessel indulges into activities contrary to the peaceful use, it would have gone beyond the contours of registration and deemed to be deregistered. Deregistration of a vessel indulging into a terrorist activity would happen in case of vessels registered with a state having closed registries or in case of open registries where the link between the vessel and the state of registration is not genuine. The manner in which terrorist vessels have been used for committing terrorist attacks shows that ‘small vessels’ are used to commit these acts. But a small vessel is exempted from registration with a flag state under UNCLOS.<sup>280</sup>

UNCLOS exempts small vessels from registration but does not define small vessels or stipulate criteria for its identification.<sup>281</sup> Different criteria are applied under international instruments and domestic law: based on size or weight of the vessel. If the definition is based on the length, then normally it is defined as a vessel smaller than twenty-four

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<sup>278</sup> *M/V Saiga (No. 2) (St. Vincent v. Guinea)*, Case No. 2, Judgment of July 1, 1999, ITLOS Rep. ¶ 83.

<sup>279</sup> Wolfrum, *supra* note 252, at 15–16.

<sup>280</sup> UNCLOS, *supra* note 88, art. 94.

<sup>281</sup> *See id.*

meters.<sup>282</sup> In the U.S., a small vessel is defined as a vessel that is smaller than 300 gross tons.<sup>283</sup> And there are concerns being raised about the possible misuse of this provision with respect to small vessels committing terrorist acts.<sup>284</sup> The experience of past discussed in the introduction amply demonstrates that terrorists prefer small vessels due to their strategic and practical benefit. Terrorists can also escape prior detection by not registering the vessels and claiming them to be exempt from registration. Especially since small vessels are a convenient mode for transport even for long distances in the sea.

Based on this, UNCLOS has to be interpreted in a balanced manner. The freedom of navigation does not authorize use of high seas for terrorist activities. All freedoms associated with the high seas are regulated. The 1955 Report of the International Law Commission prepared for the First UN Convention on the Law of the Sea stated that:

Any freedom that is to be exercised in the interests of all entitled to enjoy it, must be regulated. Hence, the law of the seas contains certain rules, most of them already recognized in positive international law, which are designed not to limit or restrict the freedom of the high seas, but to safeguard its exercise in the interests of the international community.<sup>285</sup>

Using the high seas for terrorist acts is contrary to the ethos and principles of UNCLOS.

### *G. Regime under other international instruments*

Different aspects of maritime security are covered under various binding and non-binding international instruments. The Convention for Suppression of Unlawful Acts Against Safety

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<sup>282</sup> Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas art. II, 1993, (S. Treaty Doc. No. 103-24); Merchant Shipping Act 1995, c. 21, §1(2) (UK); *Shipping Registration Act 1981* (Cth) 13 (Austl.).

<sup>283</sup> DEPARTMENT OF HOMELAND SECURITY (DHS), REPORT OF THE DHS NATIONAL SMALL VESSEL SECURITY SUMMIT 11 (Homeland Security Institute ed., 2007); FEDERAL LAW ON NAVIGATION UNDER THE SWISS FLAG [NAVIGATION ACT] art. 30 (Switz.).

<sup>284</sup> See FAO FISHERIES, REPORT OF THE EXPERT CONSULTATION ON THE DEVELOPMENT OF A COMPREHENSIVE GLOBAL RECORD OF FISHING VESSELS 52 (FAO Publications ed., 2008).

<sup>285</sup> *Freedom of the High Seas*, [1956] 2 Y.B. Int'l L. Comm'n 278, U.N. Doc. A/3159 (1956).

of Maritime Navigation 1988 (“SUA Convention”) and the 2005 Protocol of the SUA Convention are two important binding treaties that relate to maritime security and peaceful use of the sea.<sup>286</sup> The SUA Convention is primarily concerned with the safety of maritime navigation.<sup>287</sup> The scope of the SUA Convention is limited to protection of a ship from hijacking or violence on board or threat to the ship.<sup>288</sup> The SUA Convention

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<sup>286</sup> See *SUA Convention and the Protocol*, CAPT. S.S. CHAUDHARI, <https://captsschaudhari.com/2021/09/09/sua-convention-and-the-protocol/> (last visited Apr. 4, 2022).

<sup>287</sup> Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation pmb., Mar. 10, 1988, 1678 U.N.T.S. 222 [hereinafter SUA Convention].

This fact is established from the title of the Convention. This position is confirmed from the relevant portions of the preamble of the Convention. The relevant portion reads:

“Considering that unlawful acts against the safety of maritime navigation jeopardize the safety of persons and property, seriously affect the operation of maritime services, and undermine the confidence of the peoples of the world in the safety of maritime navigation [...] Being convinced of the urgent need to develop international co-operation between States in devising and adopting effective and practical measures for the prevention of all unlawful acts against the safety of maritime navigation, and the prosecution and punishment of their perpetrators [...] Affirming the desirability of monitoring rules and standards relating to the prevention and control of unlawful acts against ships and persons on board ships, with a view to updating them as necessary.”

<sup>288</sup> SUA Convention, *supra* note 287, art. 3.

Article 3 of the Convention limits the application of the Convention to certain instances. It states:

“1. Any person commits an offence if that person unlawfully and intentionally:

- (a) seizes or exercises control over a ship by force or threat thereof or any other form of intimidation; or
- (b) performs an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of that ship; or
- (c) destroys a ship or causes damage to a ship or to its cargo which is likely to endanger the safe navigation of that ship; or
- (d) places or causes to be placed on a ship, by any means whatsoever, a device or substance which is likely to destroy that ship, or cause damage to that ship or its cargo which endangers or is likely to endanger the safe navigation of that ship; or
- (e) destroys or seriously damages maritime navigational facilities or seriously interferes with their operation, if any such act is likely to endanger the safe navigation of a ship; or
- (f) communicates information which he knows to be false, thereby endangering the safe navigation of a ship; or
- (g) injures or kills any person, in connection with the commission or the attempted commission of any of the offences set forth in subparagraphs (a) to (f).

only covers commercial vessels and does not cover naval vessels.<sup>289</sup> The conspicuous drawback of the SUA Convention is that it is flag state centric.<sup>290</sup> Only the flag state can exercise jurisdiction and the coastal state is excluded from exercising jurisdiction.<sup>291</sup> The SUA Convention also does not discuss situations where ships are used to perpetrate terrorist attacks.<sup>292</sup> The SUA Convention does not cover situations of equipping terrorists and using ships as instruments of a terrorist weapon against a state, undertaken in any part of the ocean except internal waters or smuggling of potential offenders, equipment and material in the territory of a state to perpetrate acts of terrorism.<sup>293</sup> José Luis Jesus views that in order to cure this gap, coastal states should have policing powers and exercise assertive jurisdiction over their territorial sea.<sup>294</sup>

After the 9/11 terrorist attacks, measures were needed for protection from a seaward terrorist attack, so the 2005 Protocol updated the SUA Convention.<sup>295</sup> The objective of the 2005 Protocol is

[R]evision of existing international legal and technical measures and the consideration of new measures in order to prevent and suppress terrorism against ships and to improve security aboard and ashore, and thereby to reduce the risk to passengers, crews and port personnel on board ships and in port areas and to vessels

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2. Any person also commits an offence if that person:
    - (a) attempts to commit any of the offences set forth in paragraph 1; or
    - (b) abets the commission of any of the offences set forth in paragraph 1 perpetrated by any person or is otherwise an accomplice of a person who commits such an offence; or
    - (c) threatens, with or without a condition, as is provided for under national law, aimed at compelling a physical or juridical person to do or refrain from doing any act, to commit any of the offences set forth in paragraph 1, subparagraphs (b), (c) and (e), if that threat is likely to endanger the safe navigation of the ship in question.”

<sup>289</sup> *Id.* art. 2.

<sup>290</sup> *Id.* art. 8.

<sup>291</sup> S. EXEC. DOC. NO. 110–25, at 2 (2005).

<sup>292</sup> Jesus, *supra* note 83, at 393–94.

<sup>293</sup> Jesus, *supra* note 83, at 394.

<sup>294</sup> *Id.* at 394–95.

<sup>295</sup> See generally Int’l Maritime Org. [IMO], *Protocol to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation*, LEG/CONF. 15/21 (Nov. 1, 2005), <https://www.refworld.org/docid/49f58c8a2.html> (updating the SUA Convention) [hereinafter 2005 SUA Protocol].

and their cargoes [and] the urgent need for all States to take additional effective measures to prevent the proliferation of nuclear, chemical or biological weapons and their means of delivery.<sup>296</sup>

The 2005 SUA Protocol has made substantial advancements over the SUA Convention by covering a wide range of activities, including the situations (a) to (f) discussed in this article.<sup>297</sup>

The SUA Convention was already broad in terms of its territorial application.<sup>298</sup> Its subject matter coverage has been broadened by the 2005 Protocol, yet the sanctioning mechanism under the 2005 Protocol is limited.<sup>299</sup> Despite covering the situations (a) to (f) in which terrorist attacks could take place and achieving greater coordination and cooperation of states, the 2005 Protocol has important weaknesses in comparison to the regime under UNCLOS. The 2005 SUA Protocol confirms the exclusive right of flag state of boarding and taking action and provides steps for facilitation of such authorization.<sup>300</sup> Therefore, the shortcomings of the original SUA Convention remain. It directs the transfer of accused persons and provides evidence for prosecution.<sup>301</sup> The 2005 Protocol simply imposes an obligation on state Parties to “co-operate to the fullest extent possible,” thereby leaving discretion to states.<sup>302</sup> Before taking any action, an elaborate procedure has to be followed, such as prior information about the suspect ship along with its identification number - there is no time to comply with elaborate procedures in situations covered under this article.<sup>303</sup>

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<sup>296</sup> *Id.* pmbl.

<sup>297</sup> See 2005 SUA Protocol, *supra* note 295, at 2–21 (listing the advancements made by the 2005 SUA Protocol).

<sup>298</sup> See Wolfrum, *supra* note 252, at 8 (explaining how the Rome Convention was broad in the scope of defining terrorism).

<sup>299</sup> SUA Protocol, *supra* note 295, at pmbl.

<sup>300</sup> Treves, *supra* note 192, at ¶ 24.

<sup>301</sup> 2005 SUA Protocol, *supra* note 234, art. 12.

<sup>302</sup> *Id.* art. 8.

<sup>303</sup> *Id.*

The relevant clauses of Article 8 provide the procedure:

“2. Each request pursuant to this article should, if possible, contain 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. The requested Party shall acknowledge its receipt of any written or oral request immediately.

3. States Parties shall take into account the dangers and difficulties

Additionally, the profound drawback of the 2005 Protocol is the absence of the kinds of responses a coastal state could undertake in addition to prosecution. The remedy of prosecution is futile in situations where the terrorist vessel is on a suicide mission, a fact established from experiences in past.<sup>304</sup> The terrorist vessels are an imminent and immediate threat to the security of the coastal state.<sup>305</sup> Delay in taking actions would result in catastrophic consequences, and the response time for the

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involved in boarding a ship at sea and searching its cargo, and give consideration to whether other appropriate measures agreed between the States concerned could be more safely taken in the next port of call or elsewhere.

4. A State Party that has reasonable grounds to suspect that an offence set forth in article 3, 3bis, 3ter or 3quater has been, is being or is about to be committed involving a ship flying its flag, may request the assistance of other States Parties in preventing or suppressing that offence. The States Parties so requested shall use their best endeavours to render such assistance within the means available to them.

5. Whenever law enforcement or other authorized officials of a State Party (“the requesting Party”) encounter a ship flying the flag or displaying marks of registry of another State Party (“the first Party”) located seaward of any State’s territorial sea, and the requesting Party has reasonable grounds to suspect that the ship or a person on board the ship has been, is or is about to be involved in the commission of an offence set forth in article 3, 3bis, 3ter or 3quater, and the requesting Party desires to board,

(a) it shall request, in accordance with paragraphs 1 and 2 that the first Party confirm the claim of nationality, and

(b) if nationality is confirmed, the requesting Party shall ask the first Party (hereinafter referred to as “the flag State”) for authorization to board and to take appropriate measures with regard to that 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, 3bis, 3ter or 3quater has been, is being or is about to be committed, and

(c) the flag State shall either:

(i) authorize the requesting Party to board and to take appropriate measures set out in subparagraph (b), subject to any conditions it may impose in accordance with paragraph 7; or

(ii) conduct the boarding and search with its own law enforcement or other officials; or

(iii) conduct the boarding and search together with the requesting Party, subject to any conditions it may impose in accordance with paragraph 7; or

(iv) decline to authorize a boarding and search.

The requesting Party shall not board the ship or take measures set out in subparagraph (b) without the express authorization of the flag State.”

<sup>304</sup> Wolfrum, *supra* note 252, at 10.

<sup>305</sup> *See id.* (assessing the dire issue of terrorism at sea in regards to international law).

authorities of the coastal state is very little.<sup>306</sup> There are various responses that would have to be undertaken to respond to terrorist actions beyond this instrument and are discussed below.<sup>307</sup> These actions are possible by staying within UNCLOS. While acting under the SUA Convention and the 2005 Protocol, the rights of the coastal state to use police powers are severely constrained.<sup>308</sup> Furthermore, these rules would be adept and guiding in relating to large vessels and to tackle situations (a) to (d).<sup>309</sup> As discussed above, for committing terrorist actions in situations (e) and (f), a small vessel would be used which is exempted from registration under Article 94 of UNCLOS.<sup>310</sup> Even if they are flying a flag, it would not be registered with the state, whose flag it is flying.<sup>311</sup> The 2005 SUA Protocol excludes the rules of international law on competence of states to exercise investigation or enforcement jurisdiction on board ships that do not fly their flag, reversing Article 9 of the SUA Convention.<sup>312</sup> Thus, stateless vessels are excluded from the operation of the 2005 SUA Protocol.<sup>313</sup> Arguably a terrorist vessel would fall outside the purview of the 2005 SUA Protocol, but then there is lack of clarity about under which legal regime actions could be taken against such a vessel.<sup>314</sup> In these situations the powers of coastal states under UNCLOS would continue to operate.<sup>315</sup>

The limitation on taking action under the SUA Convention and the 2005 Protocol due to its flag state bias is evident even in

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<sup>306</sup> See Christopher C. Joyner, *Offshore Maritime Terrorism: International Implications and the Legal Response*, 36 NAVAL WAR COLL. REV. 16, 26–27 (1983) (defining the factors behind an effective response and why those responses may be constrained).

<sup>307</sup> Joyner, *supra* note 306, at 26–27.

<sup>308</sup> Wolfrum, *supra* note 252, at 8.

<sup>309</sup> SUA Convention, *supra* note 287, art. 3.

<sup>310</sup> UNCLOS, *supra* note 88, art. 94.

<sup>311</sup> Karim, *supra* note 78, at 127.

<sup>312</sup> Natalie Klein, *The Right of Visit and the 2005 Protocol on the Suppression of Unlawful Acts against the Safety of Maritime Navigation*, 35 DENV. J. INT'L L. & POL'Y 287, 318 (2007).

<sup>313</sup> *Id.*

<sup>314</sup> See Allyson Bennett, *That Sinking Feeling: Stateless Ships, Universal Jurisdiction, and the Drug Trafficking Vessel Interdiction Act*, 37 YALE J. INT'L L. 433, 439 (2012) (detailing that stateless vessels undermine the law-of-the-flag regime and that no state can exercise jurisdiction over them).

<sup>315</sup> See, e.g., UNCLOS, *supra* note 88, art. 110(1)(e) (stating that if a vessel "refus[es] to show its flag, the ship is, in reality, of the same nationality as the warship" which is reasonable grounds for boarding).

cases of piracy, another international crime.<sup>316</sup> Under the UNCLOS provisions on piracy, states can take actions directly, but under the 2005 SAU Protocol there is a need to obtain prior permission of the flag state before any action could be taken against a vessel.<sup>317</sup> The SUA Convention and the 2005 Protocol do not provide mechanisms for taking preventive actions. Instead, it is focused on prosecution of offenders only.<sup>318</sup> The SUA Convention is not an effective tool for taking effective action against a vessel under the control of terrorists, or even preventive action.<sup>319</sup> The regime under UNCLOS, in comparison, is flexible and effective in terms of exercising control over the terrorist vessel and taking effective steps for that purpose.

Situation (c) is covered by the Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf.<sup>320</sup> Under such protocol, the coastal state has jurisdiction to punish the offender.<sup>321</sup> The situation is also covered by the International Ship and Port Facility Security Code (“ISPS Code”), which is a comprehensive set of measures designed to enhance the security of ships and port facilities.<sup>322</sup> The focus is on the protection of passenger ships and cargo ships of more than 500 gross tonnage and port facilities serving ships engaged on international voyages.<sup>323</sup> The ISPS Code does not deal with protection of ships of a smaller size, as it is not mandatory for small vessels.<sup>324</sup> The focus of these instruments is on protection of navigation, therefore they do not address

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<sup>316</sup> See *id.* arts. 100–07 (describing piracy as an international crime).

<sup>317</sup> Klein, *supra* note 312.

<sup>318</sup> *Id.* at 320.

<sup>319</sup> *Id.* at 324.

<sup>320</sup> *Id.* at 323–24.

<sup>321</sup> Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf art. 3(1), Mar. 10, 1988, 1678 U.N.T.S. 304.

<sup>322</sup> Tuerk, *supra* note 253, at 355; see Int’l Maritime Org. [IMO], *International Ship & Port Facility Security Code and SOLAS Amendments 2002*, art. 3.1, IMO Doc. I:\CONF\SOLAS\5\34. (2002) [hereinafter *ISPS Code*].

<sup>323</sup> *ISPS Code*, *supra* note 250.

<sup>324</sup> *Non ISPS Code Requirements*, MPA SING., <https://www.mpa.gov.sg/web/portal/home/port-of-singapore/security/port-security/non-isps-code-requirements> (last updated Sept. 11, 2019).

threats to a land territory originating in the sea.<sup>325</sup> Therefore, a coastal state can undertake measures on the sea to tackle this threat, but this threat does not necessarily extend to land.<sup>326</sup>

Efforts have been made to address the threat in situation (d) through a multilateral framework.<sup>327</sup> As a response to the threat of use of weapons of mass destruction (“WMD”) at sea, President George W. Bush declared the Proliferation Security Initiative (“PSI”).<sup>328</sup> PSI is described as “a multinational response to the challenge posed by the threat of the proliferation of weapons of mass destruction (WMD).”<sup>329</sup> PSI is “a multilateral intelligence-sharing project incorporating cooperative actions and coordinated training exercises to improve the odds of interdicting the transfer of weapons of mass destruction.”<sup>330</sup> It contemplates interception of illicit and dangerous cargo, and participating states have pledged to contribute intelligence and physical resources to interdict vessels at sea that could be a threat to the world community.<sup>331</sup> In substance, PSI is a framework for interdiction of vessels on the high seas based on the suspicion that the vessel is transporting WMD.<sup>332</sup> And its aim is to check vessels carrying WMD, which need not necessarily be used for terrorist activity,<sup>333</sup> such as when the cargo is lawfully owned by a state and intended to be used for defense purposes.<sup>334</sup>

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<sup>325</sup> See generally Tuerk, *supra* note 253, at 366–67 (explaining that the focus of the SUA Convention and the ISPS Code is navigation, and as the mode of terrorism changes, a more efficient method for combating it might develop).

<sup>326</sup> See UNCLOS, *supra* note 88, art. 2.

<sup>327</sup> See S.C. Res. 1540, ¶ 8 (Apr. 28, 2004).

<sup>328</sup> *Proliferation Security Initiative (PSI)*, NUCLEAR THREAT INITIATIVE, <https://www.nti.org/education-center/treaties-and-regimes/proliferation-security-initiative-psi/> (last updated May 31, 2020).

<sup>329</sup> *The Proliferation Security Initiative*, PSI, <https://www.psi-online.info/psi-info-en/-/2075520> (last visited Apr. 4, 2022).

<sup>330</sup> Jofi Joseph, *The Proliferation Security Initiative: Can Interdiction Stop Proliferation?*, 34 ARMS CONTROL TODAY 6 (2004).

<sup>331</sup> Michael Becker, *The Shifting Public Order of the Oceans: Freedom of Navigation and the Interdiction of Ships at the Sea*, 46 HARV. INT'L L.J. 131, 134 (2005).

<sup>332</sup> *Id.*

<sup>333</sup> See *id.* at 161–62 (explaining that there need only be “good cause” to search).

<sup>334</sup> *Id.* at 153, 161–62 (“The United States acknowledged the lack of ‘clear authority’ for seizing the missiles since the sale between North Korea and Yemen was not prohibited under any international agreement.”).

The focus of this article is on situations (e) and (f) which are covered under the 2005 SUA Protocol. The shortcomings in that instrument, however, make the provisions under the UNCLOS more appealing for preventing a terrorist attack.

#### IV. RESPONSES AGAINST A TERRORIST VESSEL

The extent of measures that a coastal state can undertake against a terrorist vessel would depend on the extent of jurisdiction that a coastal state can exercise over that terrorist vessel.<sup>335</sup> State jurisdiction is essentially concerned with the extent of its right to regulate conduct or the consequences of events.<sup>336</sup> The conduct may be regulated by legislation, courts, of civil or criminal nature, or by executive or administrative actions to enforce its laws.<sup>337</sup> There is a distinction between the power to make laws or rules, the prescriptive or legislative jurisdiction, and the power to take executive action, the enforcement or prerogative jurisdiction, pursuant to enforcement of those actions.<sup>338</sup> The actions taken against a terrorist vessel relate to the “enforcement jurisdiction” of the state and deal primarily with its police powers. Traditionally, this jurisdiction was territorial, but with the increasing complexity of international law, jurisdiction can be exercised in various other ways.<sup>339</sup>

There are two elements of territorial jurisdiction: subjective and objective. According to the subjective jurisdiction, jurisdiction of a state is created if a crime commences in the jurisdiction of that state.<sup>340</sup> For objective territorial jurisdiction, principle jurisdiction is founded on the ground that the essential constituent elements of a crime are consummated on the territory of a state.<sup>341</sup> The objective territorial jurisdiction in international law also allows jurisdiction over offenses culminating in the state even if they had not begun there.<sup>342</sup> The

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<sup>335</sup> Becker, *supra* note 331, at 196.

<sup>336</sup> OPPENHEIM'S INTERNATIONAL LAW, *supra* note 127, at 456.

<sup>337</sup> *Id.*

<sup>338</sup> IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 299 (7th ed. 2008).

<sup>339</sup> BROWNLIE, *supra* note 338.

<sup>340</sup> *Id.* at 301.

<sup>341</sup> *Id.*

<sup>342</sup> *objective territoriality*, U.N. TERMINOLOGY DATABASE,

classic example is firing a gun across borders and killing a person.<sup>343</sup> Therefore, the state in which the person was killed would have objective territorial jurisdiction.<sup>344</sup> Terrorist actions in situations (e) and (f) fall in the same category. The terrorist acts start somewhere else but culminate in the coastal state or an adjoining state. Some offenses are of such grave and international character that the jurisdiction of states is not tied by territoriality principle. Piracy is a good example.<sup>345</sup> Some states have asserted universal jurisdiction in cases of terrorism<sup>346</sup> and according to Antonio Cassese, terrorism may not be an offense over which universal jurisdiction is exercisable, yet it is an international offense over which many states are willing to assert jurisdiction.<sup>347</sup>

As per the territoriality principle, a state can exercise jurisdiction only over its territories but in some situations, there are exceptions to the rule. If the security of the state is under threat, then universal jurisdiction can be exercised.<sup>348</sup> According to the passive personality rule, states have exercised extraterritorial jurisdiction over terrorist acts of foreigners against their nationals.<sup>349</sup> According to Ian Brownlie, “[n]early all states assume jurisdiction over aliens for acts done abroad which affect the security of the state, a concept which takes in a variety of political offences, but is not necessarily confined to political acts.”<sup>350</sup> States frequently punish for currency, immigration, and economic offenses.<sup>351</sup> Extraterritorial application of jurisdiction has been exercised under domestic law by states. And jurisdiction exercised over vessels by coastal

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[https://untermportal.un.org/unterm/Display/record/UNHQ/\\_objective\\_territoriality/58D3C8D4639FDAA385257241006F3F04](https://untermportal.un.org/unterm/Display/record/UNHQ/_objective_territoriality/58D3C8D4639FDAA385257241006F3F04) (last visited Apr. 5, 2022).

<sup>343</sup> OPPENHEIM'S INTERNATIONAL LAW, *supra* note 127, at 459.

<sup>344</sup> OPPENHEIM'S INTERNATIONAL LAW, *supra* note 127, at 459–60.

<sup>345</sup> *Id.* at 469.

<sup>346</sup> Criminal Jurisdiction Act (Northern Ireland) 1975, c. 59, §§ 1, 2; Criminal Law (Jurisdiction) Act 1976 (Act No. 14/1976) (Ir.), <https://www.irishstatutebook.ie/eli/1976/act/14/enacted/en/print.html>; Patriot Act of 2001, Pub. L. No. 107–56, 115 Stat. 272; Criminal Code, R.S.C. 1985, c C-34, (Can.); Law on the Judiciary art. 23 (B.O.E. 1985, 157) (Spain).

<sup>347</sup> Antonio Cassese, *The International Community's "Legal" Response to Terrorism*, 38 INT'L & COMPAR. L. Q. 589, 593, 602–03, 606 (1989).

<sup>348</sup> OPPENHEIM'S INTERNATIONAL LAW, *supra* note 127, at 470–71.

<sup>349</sup> *Flatow v. Islamic Republic of Iran*, 999 F.Supp. 1, 15 n.7 (D.D.C. 1998).

<sup>350</sup> BROWNLIE, *supra* note 338, at 304.

<sup>351</sup> *Id.*

states is extensive. William Burke has summarized the purview of enforcement jurisdiction in the following words: “[e]nforcement is the process of invoking and applying authoritative prescriptions. The range of operations includes surveillance, stopping and boarding vessels, search or inspection, reporting, arrest or seizure of persons and vessels, detention, and formal application of law by judicial or other process, including imposition of sanctions.”<sup>352</sup>

The jurisdiction exercisable in the territorial sea is the broadest and it consequently reduces as one proceeds further into the EEZ and then to the high seas. As such, the coastal state can exercise enforcement jurisdiction on the territorial sea and the EEZ.<sup>353</sup> Whereas on the high seas, the right of the coastal state extends only to the right of visit and use of force.

#### A. *Interdiction*

The right of interdiction exists in the interest of all maritime nations in the maintenance of order on the high seas.<sup>354</sup> There are no limitations imposed in UNCLOS on the coastal state from interdicting a vessel while in the territorial waters, the EEZ, or the continental shelf. The complexity arises only in the case of high seas. Ordinarily a coastal state can exercise jurisdiction over a foreign vessel with the consent of the flag state. And there is no prohibition on states from exercising extraterritorial jurisdiction on stateless vessels in the high seas.<sup>355</sup> In light of Security Council Resolution 1373, each state is under a responsibility to ensure that its ships registered in its jurisdiction do not indulge into acts of international terrorism.<sup>356</sup> If they fail to take action, then it would be acting contrary to Resolution 1373 and would be violating international law.<sup>357</sup> It would be incompatible with Resolution 1373 to allow the flag state to object on the basis of sovereign right or lack of explicit

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<sup>352</sup> WILLIAM BURKE, *THE NEW INTERNATIONAL LAW OF FISHERIES: UNCLOS 1982 AND BEYOND* 303 (Clarendon Press ed., 1994).

<sup>353</sup> *Id.* at 312.

<sup>354</sup> OPPENHEIM'S INTERNATIONAL LAW, *supra* note 127, at 736.

<sup>355</sup> DOUGLAS GUILFOYLE, *SHIPPING INTERDICTION AND THE LAW OF THE SEA* 296 (Cambridge Univ. Press ed., 2009).

<sup>356</sup> Heinegg, *supra* note 72, at 273.

<sup>357</sup> *Id.*

consent.<sup>358</sup> It is therefore possible to take steps against the vessel without intimating the flag state because any advance notice requirement would jeopardize the “effectiveness of the international efforts against international terrorism.”<sup>359</sup>

The right of interdiction is covered under the right to visit, as discussed above. If it is found that a suspected vessel is not a terrorist vessel, then the coastal state need not proceed further to take action against the vessel.<sup>360</sup> If the suspicion that a vessel is a terrorist vessel is confirmed, then the natural consequence is arrest and detention of the ship and punishment to the persons on the ship under domestic criminal or anti-terrorism law of the coastal state.<sup>361</sup> If the vessel does not cooperate or resorts to force, then the authorities from the coastal state would have to use force to overpower the terrorist vessel.<sup>362</sup> If the vessel is captured then the terrorists on board could be prosecuted by the coastal state or sent to the state where they have committed terrorist attack.<sup>363</sup> The material aboard the vessel, including the weapons, ammunition, and other military equipment, could be captured and seized.<sup>364</sup> It may even result in the sinking of the terrorist vessel.<sup>365</sup>

A proper procedure has to be followed prior to interdiction. Four stages are involved in the process of arresting a terrorist vessel.<sup>366</sup> First, the intention to visit may be communicated by hailing or through the “informing gun” – i.e., firing either one or two blank cartridges.<sup>367</sup> If the vessel does not take notice then a shot may be fired across its bows as a signal.<sup>368</sup> If there is a

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<sup>358</sup> *Id.* at 261–62.

<sup>359</sup> *Id.* at 262.

<sup>360</sup> Magne Frostad, *United Nations Authorized Emargos and Maritime Interdiction: A Special Focus on Somalia*, in *THE FUTURE OF THE LAW OF THE SEA* 213, 221 (Gemma Andreone ed., 2017) (ebook).

<sup>361</sup> UNODC, *MARITIME CRIME: A MANUAL FOR CRIMINAL JUSTICE PRACTITIONERS* 127 (June 2019), [https://www.unodc.org/documents/Maritime\\_crime/19-02087\\_Maritime\\_Crime\\_Manual\\_Second\\_Edition\\_ebook.pdf](https://www.unodc.org/documents/Maritime_crime/19-02087_Maritime_Crime_Manual_Second_Edition_ebook.pdf).

<sup>362</sup> Heinegg, *supra* note 72, at 268.

<sup>363</sup> UNODC, *supra* note 361, at 127.

<sup>364</sup> Heinegg, *supra* note 72, at 272.

<sup>365</sup> UNODC, *supra* note 361, at 94.

<sup>366</sup> OPPENHEIM'S INTERNATIONAL LAW, *supra* note 127, at 738–39.

<sup>367</sup> *Id.* at 738.

<sup>368</sup> *Id.* at 738.

failure to comply then force may be used.<sup>369</sup> In *M/V Saiga (No.2)*, ITLOS summarized this procedure in the following words:

The normal practice used to stop a ship at sea is first to give an auditory or visual signal to stop, using internationally recognized signals. Where this does not succeed, a variety of actions may be taken, including the firing of shots across the bows of the ship. It is only after the appropriate actions fail that the pursuing vessel may, as a last resort, use force.<sup>370</sup>

Second, the warships send a boat under the command of an officer to check the documents of the suspect ship, or the master of the ship may be ordered to bring the papers for inspection;<sup>371</sup> this is also known as the right of investigation of the flag (*droit d'enquête ou verification du pavillon*). If the papers are found to be in order, then an entry is made in the log book and the vessel is allowed to proceed for its onward journey.<sup>372</sup> Third is the right of search (*droit de visite et inspection*).<sup>373</sup> Search is naturally preceded by visit.<sup>374</sup> If the visit is not satisfactory, then a search is conducted.<sup>375</sup> The search must be conducted in an orderly fashion without causing any damage to the cargo.<sup>376</sup> If everything is found in order then an entry is made in the log book and the vessel is allowed to continue its journey.<sup>377</sup> Fourth, and finally, is arrest (*droit de saisir et immobilization*).<sup>378</sup> Arrest takes place after visit and search have proved to be unsatisfactory.<sup>379</sup> Arrest is effected through the commander of the arresting warship who would appoint one of the officers to take charge of the arrested vessel.<sup>380</sup> The arrested vessel is then to be brought to the harbor.<sup>381</sup>

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<sup>369</sup> Convention on the High Seas art. 22, ¶¶ 2–3, Apr. 29, 1958, 450 U.N.T.S. 11.

<sup>370</sup> *M/V Saiga (No. 2) (St. Vincent v. Guinea)*, Case No. 2, Judgment, Jul. 1, 1997, ITLOS Rep. ¶ 156.

<sup>371</sup> OPPENHEIM'S INTERNATIONAL LAW, *supra* note 127, at 738.

<sup>372</sup> *Id.*

<sup>373</sup> *Id.* at 738.

<sup>374</sup> *Id.*

<sup>375</sup> *Id.*

<sup>376</sup> *Id.*

<sup>377</sup> OPPENHEIM'S INTERNATIONAL LAW, *supra* note 127, at 738–39.

<sup>378</sup> OPPENHEIM'S INTERNATIONAL LAW, *supra* note 127.

<sup>379</sup> *Id.* at 738–39.

<sup>380</sup> *Id.*

<sup>381</sup> *Id.*

The right of interdiction cannot be abused, and the coastal state must be careful when conducting interdiction. If a commercial vessel of another state is stopped without sufficient grounds for suspicion, then the coastal state would have to pay compensation.<sup>382</sup>

### B. Use of Force

Case law and state practice represents that there are two aspects of use of force. One under enforcement of police powers, exercised under treaty provisions or customary international law, and the other under Article 51 of the UN Charter for self-defense.<sup>383</sup> A coastal state can use force in either form. The use of force relevant to neutralize a terrorist vessel is covered under the first category: enforcement of police powers. The use of “force” for the implementation of provisions under UNCLOS covers a different domain than Article 2(4) of the UN Charter.<sup>384</sup> Steps taken towards implementation of a right of pursuit, police measures, or coercive measures do not amount to use of force.<sup>385</sup> The actions undertaken thereunder are police measures applied by a state against individuals and not force used by one state against another.<sup>386</sup> Even if the police measures are implemented through military means, they do not amount to use of force under the UN Charter.<sup>387</sup> The use of force during the exercise of police powers is a coercive act which does not reflect the intention of one state to act against another state.<sup>388</sup> In determining whether an act is a use of force, intention plays a crucial role. As seen in the *Corfu Channel Case*, the acts of the United Kingdom were not treated as a use of force, in violation of Article 2(4), because there was not that intention.<sup>389</sup>

According to some commentators, coastal states may invoke self-defense in response to a terrorist attack.<sup>390</sup> However, there

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<sup>382</sup> *Id.* at 738.

<sup>383</sup> CORTEN, *supra* note 138, at 59.

<sup>384</sup> *Id.* at 56.

<sup>385</sup> *Id.*

<sup>386</sup> *Id.* at 55–56.

<sup>387</sup> *Id.* at 57.

<sup>388</sup> CORTEN, *supra* note 138, at 77.

<sup>389</sup> *Id.*

<sup>390</sup> Heinegg, *supra* note 72, at 261–62, 268; Wolfrum, *supra* note 252, at 13; Patricia Jimenez Kwast, *Maritime Law Enforcement and the Use of Force*:

is a much stronger case for use of force in enforcing police powers on the seas. The I.C.J. has given wide interpretation to the use of force as a part of enforcement jurisdiction of domestic law. In the *Fisheries Jurisdiction Case* between Spain and Canada, Canadians intercepted, boarded, and seized a Spanish shipping vessel on the high seas.<sup>391</sup> Spain's contention was that it was a violation of international law since Spain was the flag state.<sup>392</sup> Canada defended the measure on the grounds that the measure was aimed at conservation of resources and was undertaken to enforce domestic law.<sup>393</sup> The Court accepted that Canada had the right to intercept, board, and seize the vessel for enforcement of its domestic law. The Court held that:

For all of these reasons the Court finds that the use of force authorized by the Canadian legislation and regulations falls within the ambit of what is commonly understood as enforcement of conservation and management measures and thus falls under the provisions of paragraph 2 (d) of Canada's declaration. This is so notwithstanding that the reservation does not in terms mention the use of force. Boarding, inspection, arrest and minimum use of force for those purposes are all contained within the concept of enforcement of conservation and management measures according to a "natural and reasonable" interpretation of this concept.<sup>394</sup>

The condition of using the sea for peaceful purposes does not override the right of the coastal state to take enforcement measures for violations of its laws in the EEZ.<sup>395</sup> Coastal states can exercise police powers in territorial waters and EEZ, and this force is distinguishable from prohibition on the use of force under Article 2(4). According to Francesco Francioni:

With respect to the territorial sea, internal waters, and the EEZ, one must distinguish between use of force in the pursuit of 'police powers' and the 'transborder' use of force under article 2(4) of the Charter. Many of the precedents reviewed indicate that coastal

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*Reflections on the Categorisation of Forcible Action at Sea in the Light of the Guyana/Surinam Award*, 13 J. CONFLICT & SEC. L. 49, 68 (2008); Natalino Ronzitti, *The Right of Self-Defense and the Law of Naval Warfare*, 14 SYRACUSE J. INT'L L. & COM. 571 (1987-1988).

<sup>391</sup> *Fisheries Jurisdiction (Spain v. Can.)*, Judgment, 1998 I.C.J. 432, ¶ 1 (Dec. 4) [hereinafter *Fisheries Jurisdiction*].

<sup>392</sup> *Id.* at ¶ 70.

<sup>393</sup> *Id.* at ¶ 15.

<sup>394</sup> *Fisheries Jurisdiction*, *supra* note 391, ¶ 84.

<sup>395</sup> B. Martin Tsamenyl, *The Exercise of Coastal State Jurisdiction Over EEZ Fisheries Resources: The South Pacific Practice*, 17 *AMBIO* 255, 256 (1988).

States' action in repelling or arresting foreign intruders represents an exercise of police power which does not constitute *prima facie* violation of article 2(4) of the Charter. At the same time, the legality of such must be judged in light of the general principles of necessity and proportionality.<sup>396</sup>

In the *Torrey Canyon Case*, UK authorities bombed the wreck of a Liberian vessel to contain the spread of oil spillage on the high seas off the coast of UK.<sup>397</sup> Despite the scale of the military means used, no state treated it as a use of force under international law and the debate took place within the context of lawful use of police powers.<sup>398</sup>

On the high seas, interdiction and boarding of a vessel is not possible without the consent of the flag state. There must be some permissive act to interdict or board a vessel.<sup>399</sup> Use of police powers under Article 110 is possible because it represents prior consent of the flag state for use of force in the nature of police powers.<sup>400</sup> The use of force in the nature of police powers is permitted through the treaty, and thus is not contrary to general prohibition.<sup>401</sup> Similarly, protecting against a terrorist action through the use of force is justified on the ground of protection of human rights. This, however, is not covered under Article 2(4) of the UN Charter either.<sup>402</sup> While interdicting a vessel, force may be required on a ship which does not cooperate on the high seas. Therefore, it is permissible to "use necessary and reasonable force for the purpose of effecting the objects of boarding, searching, seizing and bringing into port the suspected

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<sup>396</sup> Francesco Francioni, *Peacetime use of Force, Military Activities, and the New Law of the Sea*, 18 CORNELL INT'L L.J. 203, 226 (1985).

<sup>397</sup> CORTEN, *supra* note 138, at 58–59.

<sup>398</sup> *Id.* at 59.

<sup>399</sup> Douglas Guilfoyle, *Interdicting Vessels to Enforce the Common Interest: Maritime Countermeasures and the Use of Force*, 56 INT'L & COMPAR. L.Q. 69, 80–81 (2007).

<sup>400</sup> Guilfoyle, *supra* note 399, at 81.

<sup>401</sup> *Id.*

<sup>402</sup> See CORTEN, *supra* note 138, at 132–35; U.N. Secretary-General, *Report of the Secretary-General Prepared Pursuant to Resolutions 1160 (1998) and 1999 (1998) of the Security Council*, ¶ 29, U.N. Doc. S/1998/912 (October 3, 1998) (commenting on the civil war, referring to the actions of the Yugoslav army to repress Kosovo Liberation Army, Secretary General observed that: "[t]he authorities of the Federal Republic of Yugoslavia have the inherent right, as well as the duty, to maintain public order and security and to respond to violent acts of provocation. However, this can in no way justify the systematic terror inflicted on civilians.").

vessel; and if sinking should occur incidentally, as a result of the exercise of reasonable and necessary force for such purpose, the pursuing vessel might be entirely blameless.”<sup>403</sup>

In all respects, if an action is taken under self-defense against a terrorist attack it must meet the test of proportionality.<sup>404</sup> Likewise, even if the use of force is a part of enforcement of domestic law, it still must meet the test of proportionality. This test, along with the other limitations, suggest that even though there are exceptions to the general prohibition of the use of force, like most things, the power of the state is not unlimited.

## V. CONCLUSIONS

Some states have claimed new maritime zones to claim greater protection over the ocean space and uses from the security perspective, which has met with criticism from other states.<sup>405</sup> The so-called security maritime zones may be intended for conducting broader surveillance and inspection of vessels which is bound to meet with resistance from other states seeking to protect their freedom of navigation on the high seas. They are prone to abuse because the rights claimed over these zones are unclear.<sup>406</sup> There are chances that these zones could be used to stifle and defeat the freedom of navigation. For taking action against a terrorist vessel, declaration of such a zone would not be necessary. As long as it is a terrorist vessel, the rights of the coastal state would be wide enough to tackle the threat. In practice, there is no possibility of an entire container, or a large ship being used for a terrorist act because it will be detectable. Considering the magnitude of the threat of the vessel and the consequential threat, the coastal state could invoke its right of self-defense in such a situation and take military action in any case. The question of extent of power exercisable by the coastal state arises in case of a small vessel that is being used for a covert terrorist acts.

While security of states and protection from a potential

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<sup>403</sup> S.S. “I’m Alone” (Can. v. U.S.), 3 R.I.A.A. 1609, 1617 (Perm. Ct. Arb. 1935).

<sup>404</sup> Wolfrum, *supra* note 252, at 13.

<sup>405</sup> KLEIN, *supra* note 7, at 7.

<sup>406</sup> *Id.* at 58–60.

terrorist attack is important, it is necessary to ensure that the freedom at high seas is not excessively hindered. But the freedom of navigation itself is already regulated and restricted. In the commentary to the draft articles for the 1958 High Seas Convention, it was stated that:

Any freedom that is to be exercised in the interests of all entitled to enjoy it, must be regulated. Hence, the law of the high seas contains certain rules, most of them already recognized in positive international law, which are designed, not to limit or restrict the freedom of the high seas, but to safeguard its exercises in the interest of the entire international community.<sup>407</sup>

The sovereign jurisdiction of the coastal state would extend to the territorial sea. The coastal state would have power to interdict and inspect vessels suspected of terrorist activity. Some sovereign powers, although not all, continue to extend on areas beyond the territorial sea. States enjoy various rights over these areas and UNCLOS protects various freedoms at the high seas. The list is not exhaustive and the states may undertake additional regulations. The regulations are to be aimed at safeguarding the freedoms of the states in the interest of the whole international community.<sup>408</sup> Therefore, regulations for checking terrorist activities – within the framework of UNCLOS - would be valid.

The freedom of high seas is limited to a reasonable use of the high seas. Explaining this, D.P. O'Connell wrote:

One common thread running through the formulation of the various jurisdictional zones in the contemporary law of the sea is the idea of accommodation of interests, or as a balancing of rights and duties, which can be summed up in the concept of "reasonable use." The result is that there is little absolutism in the rights of States with respect to the sea.<sup>409</sup>

The exercise of these powers is with the state with competent jurisdiction. It would be either by the port state if the vessel is in the territorial waters or the flag state if the vessel is

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<sup>407</sup> *Documents of the Eight Session, Including the Report of the Commission to the General Assembly*, [1956] 2 Y.B Int'l L. Comm'n 278, U.N. Doc. A/CN.4/SER.A/1956/Add.1.

<sup>408</sup> U.N. CLOS, 8th Sess., 9th mtg. at 15 ¶ 11, U.N. Doc. A/CONF.13/40 (Mar. 13, 1958).

<sup>409</sup> O'CONNELL, *supra* note 277, at 57.

in the high seas.<sup>410</sup> However, since a terrorist vessel is a stateless vessel, any state can exercise prescriptive jurisdiction over a terrorist vessel. José Luis José Luis Jesus has observed that:

The possible acceptance of jurisdiction of any state party to police ships suspected of being involved with terrorist acts on the high seas areas of the ocean would be another encroachment on the state's sovereignty or exclusive jurisdiction over ships flying their flags. However, it would be a legitimate encroachment to the extent that it would be done for a good purpose, benefitting all states.<sup>411</sup>

There is another reason for having a robust security mechanism on the sea. The battle against terrorism has a strong element of psychological warfare. The impact is on the psyche of the citizens. Areas prone to terrorist attack tend to suffer in more than one way, whether or not they are actually attacked. Investors are unwilling to invest in areas that are prone to terrorist attack from the sea. The threat of an attack would affect businesses associated with seafaring but also other activities on the land which may not be directly related to the business activities relating to the use of the sea. An effective and alert mechanism for security would ensure that states remain safe. It is therefore necessary that there are steps taken by the coastal state to ensure protection from a seaward terrorist attack.

While exercising control over suspected terrorist vessels, the coastal state shall apply its domestic regulations and take actions without discrimination. Any action shall be preceded by reasonable suspicion otherwise the state would be responsible to pay compensation to the flag state for damage caused to the vessel. All restrictions on innocent passage are subject to a non-discrimination standard.<sup>412</sup> The discussion here would not adversely impact freedom of navigation and maritime trade because the terrorist vessel in question is a small vessel. Other treaties and multilateral frameworks for cooperation do not cover these small vessels.

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<sup>410</sup> See Karim, *supra* note 78, at 127 (discussing flag state's authority over its vessels); see also Fitzmaurice, *supra* note 132, at 112 (discussing a state's authority in its territorial waters).

<sup>411</sup> Jesus, *supra* note 83, at 395.

<sup>412</sup> UNCLOS, *supra* note 88, art. 24(1)(b).

Despite differences in the extent of control a coastal state can exercise over different maritime zones under UNCLOS, the coastal state has wide powers to interject and neutralize a terrorist vessel.