

London Shipping Law Centre

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**Shipping and the fight against terrorism**

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# Shipping and the fight against terrorism – The Cadwallader Memorial Lecture

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## Lecture I John D Kimball

### Introduction

9/11 was a galvanising event without parallel in modern times for America and countries around the globe. It was plain for all to see that our country was caught with its guard down with tragic consequences. The lesson to be learned was instantly clear. If our guard was down on 9/11, we can never let it happen again. Putting that awareness into tangible action, however, presents huge difficulties. Our governments are racing against time to put themselves in a position of catch-up to prevent other and perhaps even more horrific events from occurring. This process will continue indefinitely, but life as we knew it before 9/11 will never be the same.

This paper looks in fairly broad terms at a range of actions which are being taken by the US Government to protect the shipping industry from being the victim of terrorist acts and from being used to carry out such attacks. Some of the initiatives are essential. Others are questionable. Well-intentioned mistakes will be made. What is abundantly clear is that no matter how annoying and vexing the problems may seem, they must be dealt with now. One of the key problems our governments face in dealing with the daily threat of terrorism concerns basic human rights. Basic human freedoms which we value above all else must be protected. But we must prevent those freedoms from being used to allow terrorists to live and work among us like ordinary citizens in order to plan and carry out their attacks. The videotape of Mohammed Atta standing in line on 9/11 to board an airplane like any other passenger is an unforgettable image.

The clear goal of the United States is to prevent terrorists from having the opportunity to cause destruction and the fear it is intended to create. To achieve that goal, we have adopted a policy of pre-emptive action. When the main weapon of choice is suicide bombing, traditional concepts of law enforcement are turned on their head. Trying to catch the bad guys who organised or assisted in carrying out an attack obviously remains a high priority. Stopping them from killing people or disrupting trade is a higher one. It is also more difficult.

In the future, business as usual must be carried out in a different way, fully alert and conscious of the threat that terrorist acts might be carried out at any time or any place. While the government will work with business, the underlying points are that (1) security cannot be left to the marketplace, and (2) security comes first when it conflicts with the way business has been carried out in the past.

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\* [www.london-shipping-law.com](http://www.london-shipping-law.com)

If we examine shipping in this context, it bears emphasis that in the eyes of Al Qaeda and its offshoots, the entire global trading system is an enemy. With the entire global trade network as a target, there are a huge number of vulnerable points in the chain. It can be seen that ships represent several things: a ship can be a weapon; a ship can be used as a simple mode of transport for people intent on carrying out attacks or weapons shipped as cargo; a ship and its crew and passengers can be hostages; and a ship itself can be the target of a terrorist attack, as we saw with the *Limburg*. Last but not least, a ship can be used as a revenue source or a vehicle for money laundering that funds terrorist activities. Ports also provide major targets since there is always a great deal of movement and a successful attack on a port could disrupt the economy.

A key dynamic in shipping is the number of different national interests involved in any given voyage. We begin with the Flag State of the vessel, which may or may not be the same as the state of the owning company. A charterer or cargo interests may be of a different nationality from the owner. Insurers based in London or elsewhere also have a key stake. Then we have the Port States in which loading and unloading takes place. And then there is the crew, which may be comprised of persons of many different nationalities. In the case of passenger vessels, of course, we have the added element of the nationalities of the passengers. There seems to be no other industry that has persons of so many different nationalities with an interest in a single venture.

The United States, of course, has a vital stake in maritime security. The United States is the largest trading nation in the world for both imports and exports, accounting for about 20 per cent of the world trade in goods.<sup>1</sup> The consequences of a shutdown of a major US port because of a terrorist attack could be huge and could run into the billions of dollars in just a few days, with worldwide impact.

### IMO Initiatives

The US Government has focused much of its response to 9/11 on working with the United Nations. Because of the global nature of shipping, we have worked extensively with IMO on the initiatives Frank Wall will discuss. Prior to 9/11, no less than 12 major multilateral Conventions and protocols had been adopted to combat terrorism.<sup>2</sup> These include one major treaty aimed at shipping, which came about following the *Achille Lauro* atrocity, and is called the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation ('SUA').<sup>3</sup>

### SUA amendments

The main purpose of SUA is to ensure that terrorists are prosecuted for crimes they commit. The Convention obliges contracting governments either to extradite or prosecute alleged offenders. The United States has proposed amendments to SUA which would do several things.<sup>4</sup> First, we would expand the offences listed in SUA to ensure that it sufficiently covers a wide range of terrorist acts. The new list of offences is designed to catch terrorist acts involving the possible use of biological, chemical or radioactive weapons. The proposed amendments also would establish accomplice

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<sup>1</sup> US Accounting Office, Rep. no. GAO-02-1033, Federal Financing and a Framework of Infrastructure Investment, 9 September 2002, at 3, available at <http://www.gao.gov>.

<sup>2</sup> These include the International Convention for the Suppression of the Financing of Terrorism, G.A. Res. 109, U.N. GAOR 6th Comm., 54 Sess., 76th mtg., Agenda Item 160, U.N. Doc. A/54/109, 39 I.L.M. 270 (9 December 1999), available at <http://un.org/law/cod/finterr/htm>; International Convention Against the Taking of Hostages, 17 December 1979, TIAS No. 11,081, 1316 U.N.T.S. 205, available at <http://undep.org/odccp/terrorism-convention-hostages.html>; Convention to Prevent and Punish the Acts of Terrorism Taking the Forms of Crimes Against Persons and Related Extortion that are of International Significance, 2 February 1971, 27 U.S.T. 3949, TIAS No. 8413, available at <http://untreaty.un.org/english/terrorism/conv16.pdf>.

<sup>3</sup> Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, March 10, 1988, 27 I.L.M. 668 (1988), available at <http://imo.org> (entered into force generally on 1 March 1992 and for the United States on 6 March 1995).

<sup>4</sup> Draft Amendments to the SUA Convention and SUA Protocol, Submitted by the United States to the IMO Legal Committee, 85th Session, Agenda Item 4, LEG 85/4, 17 August 2002, available at <http://afls16.jag.af.mil/dscgi/ds/py/view/collection-4966>.

liability to cover persons who organise or direct actions that constitute offences. They would fill a significant gap which currently exists in SUA by establishing procedures for boarding ships on the high seas in order to prevent or respond to a terrorist act.

An example may be helpful. Let us suppose that a nuclear weapon or component parts are smuggled aboard a Liberian-registered containership bound for New York. New York is taken as an example, but in reality it could be Rotterdam, Hong Kong, Felixstowe or anywhere container ships are docked. Suppose further that while the vessel is in the Atlantic Ocean in international waters, the US Coast Guard receives what is considered to be a reliable tip that the vessel has such a weapon or the component parts of such a weapon aboard, along with a few crew members who are part of an Al Qaeda cell. What can the US Government do?

Under SUA as now written, the United States may not be authorised to do anything until the ship enters the US territorial sea. Whether the Flag State itself could take effective measures is questionable. It is clear that we do not want a ship carrying weapons of mass destruction to enter US waters. Thus, to deal with this sort of nightmare scenario, the United States has proposed that IMO expand the scope of SUA to allow the state to which the vessel is headed to intervene on the high seas in order to take preventive action.

In my view, there can be no question that the proposed boarding provision is consistent with international law. First, Flag State consent is to be requested before the boarding takes place. Secondly, there is substantial precedent for the proposed amendment in existing conventions which allow states to take action on the high seas against foreign flag vessels. Several UN Conventions deal with criminal acts such as drug smuggling and have nearly identical provisions to the proposed SUA amendment.<sup>5</sup> There also is the Convention for Intervention on the High Seas for ships threatening to create an oil spill.<sup>6</sup>

With these points in mind, hopefully the proposed SUA amendments will not be considered controversial when they are considered by the IMO Legal Committee in April 2003.

### **SOLAS amendments**

Another major area of IMO activity concerns amendments to SOLAS.<sup>7</sup> Frank Wall will cover the coming SOLAS<sup>8</sup> amendments which are to be adopted when IMO meets in December 2002. The only point for discussion here concerns Regulation 9, which deals with the subject of Port State Control of Ships. Regulation 9 is a key part of the amendments because it creates a Port State Control mechanism. The draft regulation makes it clear that ships can be denied access to a port if they are not in compliance. The latest draft of Regulation 9 covers the obligations of ships in order to gain access to ports to load or unload cargo or for any other operations. It also regulates the requirements governments may impose. In this regard, governments will be permitted to require proof that a ship possesses a valid International Ship Security Certificate and that the vessel is operating at adequate security levels.

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<sup>5</sup> See, for example, Article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988; Articles 7 to 9 of the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime. See also IMO Legal Committee Document LEG 85/4 dated 17 August 2002, Statement submitted by the United States concerning Draft Amendments to the SUA convention and SUA protocol.

<sup>6</sup> International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, 29 November 1969, Article 8, 26, U.S.T. 765, 97 U.N.T.S. 211, 9 I.L.M. 25, available at <http://www.imo.org> (adopted as a result of the Torrey Canyon Disaster of 1967).

<sup>7</sup> International Convention for the Safety of Life at Sea, 1 November 1974, 32 U.S.T. 47, U.N.T.S. 113, TIAS No. 9700, available at <http://imo.org>.

<sup>8</sup> See IMO Doc. MSC 76/4/1 dated 25 September 2002.



## United States Maritime Homeland Security Strategy

Let me now turn to what has been happening on a domestic level in the United States. Our concerns about maritime security are part of a larger picture which falls within the general ambit of what has been labelled 'Homeland Security'. Deciding to make the war against terrorism a national priority is easy to say, but organising the response is not. We have a very large government, with many departments responsible in some degree for dealing with terrorism. Deciding what agencies will co-ordinate the effort is by itself a major task.

Shortly after 11 September, President Bush created the Office of Homeland Security. One of the initiatives of the Administration has been passage of legislation to reorganise completely the federal government to make homeland security a top priority. After months of debate, legislation was passed by Congress on 22 November 2002, to establish the Department of Homeland Security. The *New York Times* described passage of the bill as 'Washington's biggest transformation in 50 years'.<sup>9</sup> This new department will become the umbrella for key agencies which deal with terrorist issues, including the Coast Guard and parts of US Customs.

### *The Maritime Transportation Security Act of 2002*

The Maritime Transportation Security Act of 2002 (S. 1214) was passed by Congress in late November 2002. The new law is broad in scope and intended to protect the security of United States ports. Among other things, the Act:

1. mandates that vessels have security plans and incident response plans in place which are to be approved by the Coast Guard;
2. compels commercial vessels to be equipped with and operate an automatic identification system (AIS) when navigating on the waters of the United States;
3. authorises the Coast Guard to board ships entering US ports in order to deter hijackings or other terrorist threats and to develop maritime safety and security teams.

### *Ninety-six-Hour Notice of Arrival*

Let us now look at some of the key initiatives which have emerged from the US Coast Guard.

One of the Coast Guard's initiatives concerns requirements for notice of arrival at a US port. Prior to 9/11, ships had to notify the Coast Guard at least 24 hours before arrival, and provide certain information.<sup>10</sup> As a result of the attacks, on 4 October 2001, the Coast Guard implemented a temporary rule extending the notification requirement to 96 hours in advance and requiring additional information.<sup>11</sup> This rule has become permanent, albeit with some changes. Under the rule, ships wishing to enter U.S. ports have to provide 96 hours' prior notice of arrival to the US Coast Guard, along with crew, passenger and cargo information.

Additional information must be included in the Advance Notice of Arrival. For example, the name of the charterer must be indicated.<sup>12</sup> The Notice must include for each port of arrival the name of the receiving facility, the port or place of destination, and a listing of all persons on board (crew and passengers), with date of birth, nationality, and passport number.<sup>13</sup> The Notice must include the vessel name, country of registry, call sign, official number, registered owner of the vessel, operator,

<sup>9</sup> *New York Times*, 20 November 2002, at 1. The Department will have 170,000 employees and the Secretary of the Department will be a cabinet-level position.

<sup>10</sup> 33 C.F.R. section 160.207 (2000).

<sup>11</sup> 33 C.F.R. section 160.T208 (2002). An amendment to the rule dated 19 August 2002, requires the owner, master, operator, agent, or person in charge of the vessel to identify the charterer of their vessel. Notification of Arrivals, Departures, Hazardous Conditions, and Certain Dangerous Cargoes, 67 Fed. Reg. 53,735 (2002). All federal register documents since 1994 are available at [http://www.access.gpo.gov/su\\_docs/aces/aces140.html](http://www.access.gpo.gov/su_docs/aces/aces140.html).

<sup>12</sup> Notification of Arrivals, Departures, Hazardous Conditions, and Certain Dangerous Cargoes, 67 Fed. Reg. 53,735 (2002) (to be codified at 33 C.F.R. 160.T208).

<sup>13</sup> 33 C.F.R. section 160.T208 (2002).

classification society, a description of the cargo, and date of departure from last port and that port's name.<sup>14</sup> A key requirement is that the name and telephone number of a 24-hour point of contact for each US port included in the Notice must be provided.<sup>15</sup> Additional information concerning the vessel's ISM certification also is required.<sup>16</sup> For vessels carrying certain dangerous cargoes, the Notice must also include the name, amount and stowage location of each dangerous cargo carried. The definition of 'dangerous cargo' has been expanded.<sup>17</sup>

### **Port Security and Port Security Plans**

Immediately after 9/11, the Coast Guard established security zones in all US ports. Basically, the purpose of the security zones is to restrict access until a vessel has been approved by the Coast Guard. In addition, vessels which are perceived to present a security threat or to be at risk can be placed in isolated security zones. This happened recently with the *Palermo Senator* in New York.<sup>18</sup> The security zone rules for each port are published and available on the internet. Vessels carrying dangerous cargoes are subject to special restrictions. Vessels passing by sensitive areas, such as power plants or oil storage tanks, are subject to special restrictions.

The Coast Guard very recently published a circular which is meant to be a full-scale mobilisation plan to create a permanent infrastructure to prevent or deal with terrorist acts.<sup>19</sup> The circular provides for the creation of Port Security Committees and Port Security Plans. The Port Security Committees will be interagency bodies, including the Coast Guard, Department of Defense and other federal, state and local agencies. The goal of the Committee would be to establish joint security plans to detect vessels that may present a high risk of terrorist activity. In addition, the plans will deal with all of the detailed contingency planning for responsive actions that would be triggered in the event of a terrorist incident in a US port. The responses could involve ship boarding teams. These plans are consistent with the Maritime Transportation Security Act mentioned earlier.

In this area, the United States is working within IMO towards the adoption of uniform requirements. It is anticipated that the ISPS Code to be adopted by IMO will, in turn, be used by the Coast Guard for US port security plans.

### **Enhanced Border Security and Visa Entry Reform Act**

President Bush recently signed into law the Enhanced Border Security and Visa Entry Reform Act.<sup>20</sup> The law has a range of important provisions concerning ships entering or leaving the United States. The law detailed requirements for information which must be provided on a manifest for each crew member or passenger. Of particular import to the maritime industry, the new law directs the Attorney General to develop machine-readable, tamper-resistant visas and other travel documents that use biometric identifiers for seamen and port workers.

### **Detainment of Crew**

Probably the most contentious measure taken by our government involves restrictions on shore leave for foreign crew members who come to US ports.<sup>21</sup> In a number of cases, shipowners have been

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<sup>14</sup> *Ibid.*

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*

<sup>18</sup> 'FBI leads probe over Palermo Senator', *Lloyd's List*, 13 September 2002 at 18, available at <http://www.lexis.com>.

<sup>19</sup> See Navigation and Vessel Inspection Circular No. 9 02, United States Coast Guard, issued 30 September 2002.

<sup>20</sup> Pub. L. No. 107-173, 116 Stat. 543 (2002).

<sup>21</sup> See, for example, Douglas B. Stevenson, 'Allies, Not Enemies', *J. Comm.*, 23 September 2002, at 38; Bill Hensel Jr and Kevin Moran, 'Seafarers Held as Virtual Prisoners; Tighter Security Measures Cut Into Shore Leave', *Houston Chronicle*, 6 September 2002, at 1; Chris Dupin, 'Guarding the Gangplank; New Policies for Ship Security in Ports Attract Criticism from Shipowners and Seafarer Advocates', *J. Comm.*, 2 September 2002, at 23.

required to hire security guards to enforce these shore restrictions and limit access to the vessels. I think it is fair to say that the policy of the Immigration and Naturalization Service is still evolving. It is also fair to note that the evolution has been and will continue to be pretty bumpy.

The INS has instituted a selective 'detain on board' policy, which has already started in some ports and is expected to be implemented in other US ports. INS is requiring that ships calling at some ports have a crew member security plan in place. Under its policy, INS compares crew names listed on the manifests that owners must file before arrival against a database of persons who are considered to be national security risks. Crew members whose names match those in the database cannot go ashore, even if they hold an otherwise valid visa. Sometimes shore leave is denied in a blanket fashion and the reasons for the grant or denial of entry are often unclear.

A wide range of interests in the shipping industry has criticised the measures denying shore leave. The outcry on this issue has reached very high decibel levels with even *Lloyd's List* running tabloid headlines.<sup>22</sup> A key point to bear in mind, however, is that crew detainment is an immigration issue. It is not a human rights issue. For many years, going back to the 1950s, the US Immigration Service has exercised the authority to detain crew on board a vessel. The INS and Coast Guard recently have been working on the adoption of Standard Operating Procedures for dealing with seafarers whom INS determines should not be allowed to come ashore. The criteria used by INS for making these decisions are classified and therefore cannot be revealed here.

The purpose of the programme, however, is to prevent persons from coming ashore who present a security risk to the United States. Clearly, the vast majority of seamen present no security risk to the United States or any other place. One can only urge INS to be prudent in making its decisions. There is no doubt that mistakes will be made, probably many more than there should be. The shipping industry has to recognise, however, that its own record in vetting crew members is spotty. The message to the industry from INS is plain: If there is a basis for believing that a crew member may present a security risk, the US immigration service is going to err on the side of being careful.

### The US Customs Service

The US Customs Service has jurisdiction over the importation of goods into the United States. As a result, it has become a key agency in a number of initiatives to prevent terrorist acts. The primary focus of its efforts is the Container Security Initiative.

#### *Container security initiative ('CSI')*<sup>23</sup>

CSI was first proposed in January 2002, and has already gained strong global support. CSI is based on the premise that the global trading system will be more secure if cargo containers which present a high risk of being used for terrorism are targeted and screened before they are loaded. The goal of CSI is to improve security without slowing down the movement of legitimate trade.

To implement CSI, US Customs is partnering with foreign governments. US Customs officers assist Customs agencies at foreign ports. They target and screen high-risk containers for security inspections using technology, including radiation detectors and large-scale x-ray and gamma ray machines, before the cargo is shipped to US ports. The goal is wherever possible to have the screenings done during periods of down time, when containers sit on the docks waiting to be loaded on a vessel. Once the screening is done, it will not, except in rare cases, need to be done again in the United States. Nearly all CSI-screened cargo clears customs on arrival in the United States without further inspection. The United States started implementing CSI with Canada last spring. In Europe, the United States has signed agreements with the Netherlands, Belgium, France and Germany.

<sup>22</sup> 'New U.S. Rules "An Incentive to Murder Stowaways"', *Lloyd's List*, 14 October 2002, at 3, available at <http://www.lexis.com>.

<sup>23</sup> For a comprehensive treatment of CSI details, see <http://www.customs.gov>.

According to a recent *Lloyd's List* article, the United Kingdom is likely to sign on before the end of 2002.<sup>24</sup> In the Far East, Singapore, Hong Kong and Japan, all have agreed to participate in CSI.<sup>25</sup>

### **The 24-hour rule**

On 31 October 2002, the US Customs Service issued final regulations for what is called the '24-hour rule'.<sup>26</sup> The '24-hour' rule concerns the presentation of vessel cargo declarations to Customs before cargo is loaded aboard vessels at foreign ports for transport to the United States. The regulations require ocean carriers to transmit cargo manifests for cargo being shipped to the United States 24 hours in advance of loading at foreign ports. The regulations apply to container vessels and, on a case-by-case basis, may apply to shipments of break-bulk cargo. Bulk carriers are exempt from the regulations. The 24-hour rule will have a major impact on vessel owners, charterers and shippers and has generated a strong response.<sup>27</sup>

Current US Customs laws and regulations impose well-understood requirements for vessels which arrive in the United States to discharge their cargo. Every vessel must have a manifest that meets the requirements of published regulations. Essentially, to get cargo off a ship, a manifest has to be available on arrival at the US port. The usual practice is that the manifest is prepared after all the cargo has been loaded. Current regulations require users of the Automated Manifest System to file the manifest 48 hours before arrival.<sup>28</sup>

The new 24-hour rule adopted by Customs changes the procedure dramatically. The regulations require that Customs must receive the manifest from the carrier 24 hours before the cargo is loaded aboard the vessel at a foreign port. In addition, Customs requires that the cargo declaration separately list cargo not destined for the United States that is to remain on board, as well as empty containers that are on the vessel. One of the requirements in the new regulations is that there be a precise description of the cargo. In the case of sealed containers, generic descriptions such as 'STC' ('said to contain') are no longer acceptable.

US Customs' argument in support of the 24-hour rule is that it is essential to know before cargo is loaded what is going to be on board. Customs claims that having the information in advance is necessary to assess the risks presented by shipments while providing for expedited treatment of the cargo on arrival.

Customs is faced with the challenge of dealing with about six million containers heading to US ports each year.<sup>29</sup> The liner industry has built a logistics system that is designed to make delivery of containers fast and efficient. But this system was not designed for national security. In fact, the whole concept of presenting sealed containers at the loadport which are not to be opened until delivery creates a very fertile environment for terrorists. The nightmare scenario of containers being used to conceal a weapon of mass destruction is unfortunately a real possibility. It can be discounted, but no one can say the possibility is not a real one.

### **Customs-Trade Partnership Against Terrorism (C-TPAT)<sup>30</sup>**

Another US Customs initiative is the Customs Trade Partnership Against Terrorism (C-TPAT). This is a

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<sup>24</sup> *Ibid.*

<sup>25</sup> For comprehensive treatment of CSI details, see <http://www.customs.gov>.

<sup>26</sup> 67 Fed. Reg. 66318 (31 October 2002).

<sup>27</sup> For example, Gregory Crouch, 'U.S. Port Security Plan Irks Europeans', *New York Times*, 6 November 2002, at W1; Matthew Flynn, 'South Korea Protest Over CSI', *Lloyd's List*, 2 September 2002, at 3; Peter Tischwell, 'The 24-Hour Controversy', *J. Comm.*, 30 September 2002, at 4.

<sup>28</sup> Presentation of Vessel Cargo Declaration to Customs Before Cargo Is Laden Aboard Vessel at Foreign Port for Transport to the United States, 67 Fed. Reg. 66,318 (31 October 2002) (to be codified at 19 C.F.R. pts 4, 113 and 178).

<sup>29</sup> For comprehensive treatment of CSI details, see <http://www.customs.gov>.

<sup>30</sup> For comprehensive treatment of C-TPAT, see <http://www.customs.gov>.



joint government-business initiative to build co-operative relationships that strengthen the overall supply chain and border security. Through this initiative, Customs is asking businesses to ensure the integrity of their security practices and communicate their security guidelines to their business partners within the supply chain. What customs offers in return is expedited clearance of cargo at the US border. The process was opened on 15 July 2002, with very strong support from virtually all of the major companies in the liner shipping industry. At the last count, over 500 companies had signed on.

## Lecture 2 Frank Wall

### Introduction

I shall be looking particularly at the work that is being undertaken in IMO in preparation for the Diplomatic Conference on Maritime Security (held in London 9–13 December 2002, see the *Epilogue*, p. 78, which outlines the results of the Conference), and will also touch on some matters that came to IMO but have now been spun off into other international organisations.

One of the main aims of this work is the development of an international system of universal acceptance and application that avoids the need for unilateral action by any state, including the United States. For the purposes of this lecture, I personally take terrorism to be an unlawful act committed for a political purpose.

What examples have there been of terrorist acts involving ships? Let us go back to the James River in December 1773. This incident involved the British-flagged vessel *Dartmouth* and two other ships, also British-flagged. In an act described either as high political theatre or as terrorism, a group initially believed to be Mohawk braves attacked the ships, terrifying the crews and destroying the cargo of tea. As a consequence of this attack and other issues, Great Britain took legislative action the following year, followed by military action, and eventually lost the colonies.

There may be some lessons still to be learned from that particular incident. More seriously, in recent years there have been some, and it is 'some', ships that have been the target of terrorism, notably the Portuguese *Santa Maria*, hijacked in early 1961 as a protest against dictatorships in the Iberian peninsula. There was the bomb scare involving the *QE II* in the mid-Atlantic in 1972, when an explosives officer was trained how to jump out of a Hercules by parachute on the way to the vessel; and then of course, tragically, the *Achille Lauro* in 1985, where one person was killed, again with the ship hijacked – though some argue that the intention of the terrorists was to launch an attack on the ship in its next port of call, which was to be in Israel. And in 1988 eight people, the largest single number to be killed in such an incident, were attacked, were killed in a grenade attack on the *City of Poros* in Piraeus.

As already mentioned in Lecture 1, the *Achille Lauro* was followed by IMO's Suppression of Unlawful Acts Convention. In the United Kingdom we have since 1968 had terrorist violence associated with Northern Ireland. There has only been one reported attack on a ship and that was in the early 1970s and involved a small collier in Lough Foyle. But we have considerable experience of the use of ships to import arms, including the high-profile seizures at sea where the French and Irish authorities intercepted vessels carrying arms from Libya and the United States. We also have a continuing low-profile programme of searches of ships using Northern Ireland ports – including, sadly, the loss of the lives of two members of an army search party on the bulk carrier *Diamond Bulker*, again in Lough Foyle, as recently as 2000.

In the United Kingdom we have terrorism-related legislation, notably the Aviation and Maritime Security Act of 1990 ('AMSA') and the Prevention of Terrorism Acts. On the maritime side the former is primarily directed at passengers departing from cruise and ferry terminals in the United Kingdom and this is the responsibility of my Department. When the AMSA was drafted the terrorist risk to cargo ships was considered negligible. The Prevention of Terrorism Acts deal with incoming

passengers, vehicles, and so on, and is the responsibility of the police forces. It includes traffic between Northern Ireland and the mainland, not simply international traffic.

A continuing concern for the United Kingdom has been the fact that the security measures we have in place at several of our ports are not mirrored at ports on the Continent that are used to import arms and equipment to terrorist organisations operating within the United Kingdom.

Since the early 1990s the IMO has undertaken a significant amount of work on armed robbery and piracy, but not terrorism. September 11 (2001) changed everything. It demonstrated the scale of attack that could take place, reinforcing the long-standing concern about the ship as a possible target, and adding the possibility of the ship itself being used as the weapon or being used to carry a weapon with the further possibility of a port in a heavily populated area being the target. There was also concern that ships could be used in apparently legitimate ways to finance terrorism.

In November 2001 the IMO Assembly decided on a fast-track approach to the adoption of additional anti-terrorism measures, including revision of the Suppression of Unlawful Acts Convention ('SUA'). There will also be a diplomatic conference on maritime security in December 2002 to consider proposals for change, other than those regarding SUA which have been referred to the legal committee. The initial proposals for consideration by December's diplomatic conference were presented to a Maritime Safety Committee (MSC) inter-session working group meeting in February 2002.

Before I detail the work in IMO I need to complete the picture of actual incidents by mentioning the interception of the *Nisha* in the English Channel in December 2001 and more recently the actual attack on the *Limburg* off the Yemen.

I will now briefly deal with the history of the three working sessions we have had to discuss the terrorism measures and then detail the proposals that are actually going to the Diplomatic Conference in December.

### February 2002 (First) Intersessional Working Group

The proposals submitted in February 2002 included early implementation of Automatic Identification Systems. This was originally to have been phased in over several years. It is now proposed that AIS should be in place on all SOLAS vessels as early as 2004. It is also suggested that work should start on long-range AIS, in other words the capability of tracking ships beyond the present range of AIS, which of course is VHF line-of-sight based. It is further proposed that there should be a specific 'Attack Alarm' related to terrorist attacks, distinct from the piracy and armed robbery alarm in that it is intended to alert shore authorities without alerting the terrorist that an alarm signal had actually been sent.

In addition, there was a proposal for a Seafarers Identification Document which, as well as biometric details, was also to include a security check on the individual carrying the document. There were proposals that IMO should take up the issue of container security including sealing and tracking.

However the proposals that have come to dominate our discussions relate to the setting of security levels, the appointment of Ship and Company Security Officers and the preparation and approval of a Ship Security Plan for every ship covered by SOLAS. For ports the proposals included the undertaking of a Port Security Assessment followed, in designated ports, by the appointment of a Port Security Officer and the preparation and approval of a Port Security Plan.

There were to be similar assessments and plans for fixed and floating platforms; and the US proposals looked beyond the deter-and-detect element and suggested that consideration should also be given to incident response and to restoration following an incident.

The outcomes of our discussions in February can be summarised as agreement in principle that the introduction of AIS should be accelerated, but no agreement on the date, a range of dates being offered between 2004 and 2007. There was agreement that long-range AIS should be developed in the

longer term, though some states still argue that it should be developed using INMARSAT on a shorter timescale, and agreement that there was need to develop technical standards for attack alarms.

The question of a Seafarers Identification Document was referred to ILO. There was strong opposition on the inclusion of a security check; the only State that supported the United States was the People's Republic of China and we have heard no more of that proposal. The intention behind the proposed Seafarers Identification Document is a document which will be a welfare document (which was always the intention behind the Seafarers Identification Document) and which some states will accept as equivalent to a visa, a document which provide verifiable identification for security purposes and also confirms that the bearer possesses the necessary certificates to serve on board ship.

In the event, the issue of supply-chain security, including containers, was referred to the World Customs Organisation and there is lingering concern that until the World Customs Organisation produces its solutions, the only international requirements relating to checking containers will be found, for the time being at least, in December 2002's SOLAS amendments. It is anticipated that the measures to be adopted in December (see Epilogue) may have to be amended, or augmented, once the World Customs Organisation has completed its work.

There was discussion within the Working Group as to whether it was appropriate to include the proposed security provisions regarding ships in SOLAS or whether they should alternatively be included in the ISM Code, a revision of STCW, as a protocol to the FAL Convention, or, possibly, in a free-standing Convention.

However, the clear consensus was that there should be new regulations in a new SOLAS Chapter XI, Part 2 which would meet the essential imperative of early entry into force; that there should be text on further mandatory provisions in a new International Ship and Port Security Code (ISPS) with guidance provided in a non-mandatory Part B of ISPS. There was full recognition of the need to ensure that appropriate links were established with both ISM and STCW and that the provisions regarding ships would, in time, form part of the IMO's harmonised certification procedures.

Concern was expressed as to whether it was appropriate that SOLAS should be extended to also cover ports. Responding to these concerns the Working Group considered that it was appropriate for SOLAS to cover the ship-port interface but that wider issues of port security should be taken forward through a joint IMO/ILO Working group. It is fair to say that there are continuing concerns about the full application of the SOLAS provisions to small ports involved in direct short distance international voyages.

Issues relating to ownership and control, including the possible lifting of the corporate veil, were rapidly referred to the Legal Committee. Fixed and floating platforms were summarily excluded due to the clear, and sole, primacy given to Coastal States in UNCLOS over standards to be applied to such platforms. It was also readily agreed that it was inappropriate for an IMO instrument to extend to incident response or post-incident restoration.

The Working Group took forward the proposals relating to the setting of security levels, the appointment of Company and Ship Security Officers, the need for Ship Security Plans, Port Facility Security Assessments, the appointment of Port Facility Security Officers and the preparation of Port Facility Security Plans. A limited amount of work was also undertaken on the preparation of non-mandatory guidance.

### MSC Working Group, May 2002

Our next one-week meeting (in fact it was slightly longer than a week) was in May as part of the Maritime Safety Committee's meeting. A number of new proposals were submitted including provisions relating to control measures.

These new proposals included implementation of requirements regarding the display of the ship's IMO number, the carriage of a Continuous Synoptic Record, providing a complete history of the vessel to be kept on board the vessel and subject to inspection, and a provision relating to a Declaration of Security prepared by the port and the ship indicating the security measures to be applied during the ship's visit.

We also considered the response from the Legal Committee on ownership, where effectively we left much of the corporate veil in place, but did suggest that it was essential that the ship should carry on board information on the registered owner, who fixed the charter on behalf of the owner, and who fixed the appointment of the crew on behalf of the owner.

We agreed in May on a new SOLAS regulation on the Continuous Synoptic Record, and agreed to put it in Part 1 of Chapter II, primarily as a safety measure rather than Part II. We also agreed the proposal regarding ship numbering, including external numbering, and on the Legal Committee's approach on information relating to ownership and control. There was a cautious acceptance of the concept of the Declaration of Security, and many of us still have doubts as to precisely what this is intended to do.

Because of the concern over the use of the term 'port' and concern over SOLAS extending ashore we had adopted the concept of the ship-port interface. In May we developed the concept further and have since used the term 'port facility', which is something less than the port and is intended to include the actual ship-port interface.

We refined further the mandatory provisions relating to ship and port facility plans and we produced the initial text on conference resolutions. Our debate in May showed considerable concern about the approach being proposed to control measures with its two components: traditional Port State Control, and additional measures when it was believed that the ship's security, or the security of the port facilities it had visited, had been compromised. It was clear that there would have to be further development and discussion of these concepts.

No work was done at the actual session on the non-mandatory guidance but the Chairman was entrusted with producing a text for further discussion. At the end of its session MSC recommended that the Diplomatic Conference should take place in December 2002, but that there should be a further intersessional meeting in September.

### **Intersessional meeting, September 2002**

In September, the significant new, or revised, proposals related to the control measures and the Chairman's draft of the non-mandatory guidance, Part B of the ISPS Code draft text was presented on Part B of the text of the Guidance. Our previous decisions regards ship and port facility plans were confirmed with some refinements. We managed to get through, by three night sittings, a complete first read of the Part B Guidance. There was continuing discussion of the control measures in a single regulation now known as Regulation 9, and though the basic approach was agreed concern remained over the detailed drafting of the provision.

Some issues remained following September, including the appropriate role of recognised security organisations. There was discussion about the status of the Part B Guidance. Initially, there was concern about the amount of detail contained in the draft guidance but it was generally accepted, although there was continuing concern about the Code's application to short sea voyages and port facilities solely used by ships operating such services. The Chairman was, again, entrusted with producing a further draft of Part B of the Code.

### **The key elements of the New Security Provisions**

Let me now go through the proposals that we will consider during diplomatic conference in December 2002. The indications are that there is a broad level of agreement already on many of these, although obviously there is some further refinement to be done. The proposals will allow

governments to appoint designated authorities within government to undertake many of their security responsibilities. In addition to the Administration there may also be a Designated Authority to undertake certain security functions, particularly those relating to port facilities. Recognised security organisations, that is, commercial organisations with knowledge of ships, ports and security issues, can be appointed to undertake certain activities but they will not be allowed to set the applicable security level, approve a Port Security Facility Assessment, designate the ports that require a Port Facility Security Officer or a Port Facility Security Plan, approve a Port Facility Security Plan, exercise control measures, or issue a requirement for a Declaration of Security or approve their own work.

### *Setting the security level*

The responsibility for setting the security level, which will be intelligence-based, will rest with the government; and it is proposed that there should be three security levels.

Security level one is normal, the security level to apply at all times to ships and port facilities. This is a key new development. All ships (that is, all SOLAS ships) will be expected at all times to operate at security level one. The simple message is, the days of no security and being able to walk on board a ship, or enter a port facility, without challenge should be over. Guidance will be offered on the appropriate physical and operational security measures to apply at security level one.

Security level two is a heightened level of security applying as long as there is a heightened risk of a security incident. Both the ship and port facility will be expected to be able to move to security level two without necessarily relying on external assistance. Again, guidance will be offered on the appropriate physical and operational security measures to apply at security level two, in many ways an intensification of the types of measures applied at security level one.

Security level three will be exceptional, the security level applying for the period of time when there is the probable or imminent risk of a security incident. Effectively the ship or port facility must respond to instructions issued by the authorities responding to the incident or threat. Guidance will be offered on the steps a ship or port facility could take to respond to such instruction issued by the responding authorities.

### *The ship*

For the company and the ship, each company will have to appoint a Company Security Officer for the company and its fleet, and a Ship Security Officer for each SOLAS ship. The company officer obviously covers the whole. The responsibilities of these officers, their training and drills are prescribed in mandatory provisions in Part A of the Code.

The Company Security Officer will be responsible for the preparation of a ship security assessment on each ship and the preparation of a Ship Security Plan for each ship. The Ship Security Plan should indicate the operational and physical measures the ship will take to ensure it always is capable of operating at security level one. It should then show how the ship will move to security level two and the action the ship could take in a security level three situation. The Ship Security Plan must be approved by or on behalf of the Administration. The Company and Ship Security Officers are responsible for monitoring its continuous effectiveness and the Administration may test the effectiveness of the plan.

Every ship will have to carry an International Ship Security Certificate and the Code will include provisions relating to the verification and certification of the ship's compliance with the requirements of SOLAS and of the Code. Verification will be on an initial, renewal and intermediate basis, based in part on the approach that is found in the ISM Code.

### *Control measures*

Control measures will apply to ships. The International Ship Security Certificate will be subject to Port State Control inspection in the traditional manner. The ship may be subjected to additional

control measures in or when approaching port, if there is reason to believe that the security of the ship has or the port facilities it has served have been compromised. The ship may be required to provide advance information on its cargo, its passengers, its personnel, and its previous ports of call. It is the responsibility of the company to ensure that that information is available. The United States already requires such information to be provided well in advance of arrival at a US port.

Control measures may include denial of entry into port and provision is proposed to allow compensation to be claimed for unreasonable action by a Port State. You will remember that in the traditional Port State Control regime that has always been an allowance for unreasonable action by a Port State. There is little doubt that the Diplomatic Conference will adopt such control measures though there will be continuing discussion both of the extent of Port State jurisdiction and on the appropriate clear grounds which will allow a Port State to take action in respect of approaching ships, or ships already in port.

### *The Port Facility*

Each SOLAS contracting government has to oversee and approve a Port Facility Security Assessment of its port facilities. In the United Kingdom alone, there are over 1,000 locations which are considered to be ports, landing stages, marinas or where ships may or may not anchor. If you regard those that deal with large ships, we come down to some 400. If we look at ships that are involved in international trade, we come down to between 200 and 250. This is a significant task.

The Port Facility Security Assessment will determine which port facilities will have to appoint a Port Security Officer and prepare a Port Security Plan. Guidance will be offered on the action needed to be taken when a ship uses a port facility that does not in fact have a Port Facility Security Plan, and the Company and Ship Security Officer must always be able to discuss and agree appropriate security measures with a competent person, or authority, ashore when using such port facilities.

The responsibilities of the Port Security Facility Officer are defined, as are the requirements for drills and training. The Port Facility Security Officer is of course responsible for preparing the Port Security Facility Plan; and the Port Facility Security Plan looks at the same three security levels that apply on the ship and provides for movement from level one to level two and the action appropriate in the case of security level three. As with ships, guidance is offered on the appropriate physical and operational security measures to apply at levels one and two and the steps that could be taken relating to level three. The Port Facility Security Plan has to be approved by the contracting government and major amendments also have to be approved. Again, the Port Facility Security Officer is responsible for monitoring its continuing effectiveness and the contracting government, or Designated Authority, may test the effectiveness of the approved plan. The Port Facility Security Plan may also set down the circumstances when completion of a Declaration of Security is required. The Port Facility Security Assessments will have to be reviewed at the appropriate intervals and of course the resulting plans will also have to be reviewed.

### *Additional provisions*

From a number of submissions that have already been received the December 2002 meetings will also have to consider provisions regarding alternative security measures applying to port facilities that solely handle direct short sea voyages between adjacent states. Proposals are also being submitted following the recent attack on the French tanker *Limburg*.

### *Entry into force*

Entry into force is crucial. If adopted in December, the key provisions of Chapter XI, Part 2 and the Code will come into force internationally in July 2004. In other words, if one was being cynical, if we were to get all this in place, we should have started three years ago. There will be a very rapid process of learning and application.



The timing of the entry into force of other SOLAS provisions on Automatic Identification Systems, ships' security alert systems and numbering will depend on the decisions that are taken at the Diplomatic Conference in December, though most are also likely to come into effect on or very near 2004 (see below).

### **Guidance**

A further draft of the Guidance has been prepared for consideration in December. It provides advice on all the duties, assessments and plans already mentioned, together with advice on the associated drills and training. There will also need to be amendments to the current text of the Guidance to cover some aspects of the position of seamen and particularly the searching of seamen and their personal effects by their crew-mates.

### **Conclusion**

The measures outlined above will represent a step change in the approach taken to maritime security. The days of little or no security on board ships have passed. Those of us who have dealt with piracy and armed robbery have been continuously worried about how insecure ships can be, even when they are in waters where piracy and armed robbery can take place. The truth probably is that ship and port security has not received that much attention internationally. It will surprise many outside the industry that that has been the case for so long.

These IMO provisions are to be seen together with the measures on supply-chain issues which WCO are developing. Clearly the effectiveness and appropriateness of these measures will have to be assessed over time and it is almost certain that they will be amended in the light of experience. How early those amendments are submitted is a matter of some debate. The fact that action is being taken now is appropriate. At least for once we are seeking to put measures in place before a major incident tragically demonstrates the weaknesses that are there at present. Sensible implementation of these provisions will, I believe, make a real difference.

### **Epilogue – the IMO's Diplomatic Conference on Maritime Security – 9–13 December 2002**

On 13 December 103 of the states party to the SOLAS Convention signed the Final Act of the IMO's Diplomatic Conference on Maritime Security. This marked the successful culmination of the IMO's work on maritime security and the adoption both of the security related amendments to the SOLAS Convention and of the new International Ship and Port Facility Security (ISPS) Code. Signing of the Diplomatic Conference's Final Act followed a further two weeks' work on the amendments and the draft ISPS Code.

The measures adopted by the Diplomatic Conference correspond broadly to those outlined in my Cadwallader lecture though with some refinements, reordering and additions. In summary, the need to set security levels and the need for Company, Ship and Port Facility Security Officers were confirmed, as were the requirements for Ship Security Assessments, Ship Security Plans, Port Facility Security Assessments and Port Facility Security Plans.

The ISPS Code comes into force internationally on 1 July 2004 and the implementation date for mandatory carriage of Automatic Identification Systems (AIS) is to be by the end of 2004. Ship identification numbering has to be in place by 1 July 2004. Security alarm systems for all new ships and for existing passenger ships, oil and chemical tankers, gas carriers, bulkers and cargo high speed craft have to be in place no later than the first survey of the radio installation after 1 July 2004 and for existing cargo ships no later than the first radio installation survey after 1 July 2006.

The major refinements and additions made in December relate to:

- (a) recognised security organisations
- (b) threats to ships and other incidents at sea
- (c) alternative security arrangements

- (d) control measures
- (e) Declarations of Security
- (f) interim certificates.

### *Recognized security organisations*

The roles and responsibilities of recognised security organisations and their competencies, are defined. Their roles are set out in terms both of what they can, and what they cannot, do. In the latter respect, most notably, they cannot approve their own work, nor adopt or approve port facility security assessments or port facility security plans. Linked to the conclusions drawn up concerning recognised security organisations was a decision that the term 'Designated Authority' would be used to describe the agency within government responsible for port facility security, and the term 'Administration' would continue to be used for the agency within government responsible for ship security.

### *Threats to ships and other incidents at sea*

Post *Limburg*, Coastal States shall provide advice on the applicable security level to ships operating in their territorial sea or which have communicated their intention to do so. As well as communicating the applicable security level the Coastal State may offer advice as to the security measures such ships should take, and may indicate what security assistance the Coastal State itself may offer. However, it will be for each foreign flag ship to decide what security measures it adopts or what assistance it accepts. Flag States should also provide general guidance on the security measures considered appropriate to reduce the risk to their own ships when at sea.

### *Alternative security arrangements*

After some debate the adopted text allows contracting governments to conclude alternative security arrangements in respect of ships and port facilities engaged in, or handling, short international voyages on fixed routes. Such agreements must clearly fall under SOLAS and must not compromise the security of other ships or port facilities and will have to be reviewed at least every five years. Provisions are included regarding third flag vessels operating such international voyages. Provisions are included allowing equivalencies for both ships and port facilities.

### *Control measures*

Though the text has been refined and reordered the control measures remain substantially those that emerged from the September intersessional meeting. Ships may be required to provide information in advance of entry into port. Ships are required to retain information on their last ten port calls.

They may be inspected when in port or prior to entry into port. Inspections prior to entry into port can only be by consent and undertaken within the Coastal State's territorial waters. Failure to provide information or to consent to an inspection prior to entry into port may lead to denial of entry. These provisions relate solely to control measures exercised under Chapter XI-Part 2 and the ISPS Code; they do not affect other rights of Coastal States under international law.

### *Declaration of Security*

Understanding was reached on the role of the Declaration of Security and the circumstances in which such a Declaration of Security could be requested by a port facility or a ship. Despite the earlier uncertainty about Declarations of Security it had always been envisaged that a port facility could, in defined circumstances, request completion of a Declaration of Security.

The major change is a list of circumstances in which a ship can request completion of a Declaration following realisation of the potential role the Declaration of Security could play in respect of the information needed under the control measures.

Ships can now request completion of a Declaration of Security:

- when the ship is operating at a higher security level than the port facility,
- following a security incident,
- under an intergovernmental agreement,
- when a ship visits a port, or undertakes a ship to ship interface, and the port or other ship is not required to have an approved ship or port facility security plan.

### *Interim certification*

Since the February intersessional meeting the mandatory text had included verification and certification for ships. It had survived with minimal change until the last two weeks when the need for provisions in relation to interim certification was emphasised. It was claimed that without provision for interim certification it would be difficult to operate a vessel for a significant period following change of ownership or flag. The counter argument was that the potential abuse of an interim certification system could be used to circumvent the new security requirements. The text eventually adopted seeks to strike an appropriate balance between these competing concerns and allows for an interim certificate to be issued in carefully prescribed circumstances.

### *The end of the beginning*

In the end the texts of the Convention, the ISPS Code and the Conference Resolutions were adopted without division. Only one State expressed open concern about the feasibility of the entry into force provisions. Following some eleven months' effort the IMO has adopted a comprehensive set of international maritime security requirements. These are, effectively, to be in place by 1 July 2004. The focus must now shift to national implementation. This will be a challenging and demanding process and there is little doubt that significant difficulties will be encountered along the way. At one point in our discussion I reminded my colleagues of a Chinese proverb:

'That a journey of a thousand miles starts with a single step'.

We have, however, now taken that first, single step.

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