

**THE IMPLEMENTATION OF INTERNATIONAL MARITIME SECURITY  
INSTRUMENTS IN CARICOM STATES**

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## **ABSTRACT**

This thesis is divided into two main parts. Part I will feature the international aspects of maritime security instrument including the nature of the current major maritime security threats and the response of the international community in tackling them, while giving consideration to national implication that necessarily arise from implementing international maritime security instruments. Part II considers the special implications for Small Island Developing States, in particular, the States of the Caribbean Community (CARICOM) and explores the regional machinery as a facilitator for full and effective implementation of international maritime security instruments.

The transboundary nature of these threats to maritime security posed a number of legal challenges for States particularly in the context of asserting and exercising jurisdiction. Combating maritime threats and overcoming challenges therefore necessitated cooperation within the international community to depart from traditional grounds for exercising jurisdiction over criminal activity, which the international community has sought to do through a number of international conventions and instruments. Implementation of these instrument has however been slow namely in CARICOM States, which as SIDS experience certain vulnerabilities and, hence, certain challenges to implementation. Burdened with limitations relating to capacity and an insufficient resource base, implementation for these States is necessarily a matter of technical and financial assistance in capacity building and mitigating resource shortages. At the same time, the issue of security is also a collective regional concern and regional organisations can play an important role in helping SIDS implement international maritime security provisions and in achieving the objects and purposes of these security instruments. In the Latin American and Caribbean Region a number of regional arrangements are in gear, at least three of which are accessible by CARICOM States. Finally this thesis will conclude with some observations and suggestions regarding the implementation of international maritime instruments by CARIICOM States.

## **DISCLAIMER**

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## **I. THE MARITIME SECURITY FRAMEWORK**

There are a number of clearly identifiable criminal acts that threaten maritime peace and security. These acts, namely trafficking in narcotics, arms and persons, terrorism at sea, piracy and armed robbery at sea, collectively pose threats to the safety of navigation, human life and safety both at sea and on land, maritime trade, as well as to the social and economic fabrics of both coastal and land-locked States. These threats may also be compounded by indirect or aggravating factors such as weapons of mass destruction which could drastically increase the devastation caused by a terrorist attack, or legal lacunae in national systems that may enable organised crime syndicates to present a legal veneer to their operations. Furthermore, law enforcement action against and prosecution of perpetrators is complicated by the fact that these crimes occur at sea which, legally and jurisdictionally, is carved into zones that dictate and very often limit the extent to which any one State may act against a ship. Therefore, the transboundary and mobile nature of maritime crimes, including the opportunity for perpetrators to cross jurisdictional lines after the commission of an offence, makes their interdiction and punishment difficult and subject to surrounding circumstances.

As such, maritime offences cannot be dealt with effectively by any one State and the international character of these crimes has consequently warranted a concerted reaction by the international community to curb them. The international approach to this colossal task has therefore been to ensure that no safe havens exist for perpetrators and that every State has the jurisdiction to act as necessary against ships suspected or accused of engaging in the commission of maritime crimes. The international community has sought to achieve this through conventions and instruments requiring States Parties to implement domestic measures enabling them to take the prescribed law enforcement action, and through designated or established international institutions mandated to oversee the successful realisation of the objects and purposes of the relevant instruments, including their implementation at the domestic level. In furtherance of its goal to eliminate avenues of escape, the international community has also sought to achieve universal ratification of maritime security instruments. If this were accomplished all States would be poised to exert law enforcement and prosecutorial action against perpetrators of certain crimes with international and transboundary ramifications. In this regard, the ultimate goal of the international response to maritime crimes will have been achieved.

However, as international conventions and instruments are merely a foundation for measures to be taken at the domestic level, and as effective State action pursuant to these instruments are dependent upon State implementation of prescribed measures, such a goal is not readily accomplished. States are required to make legislative and sometimes institutional modifications that may have implications within the national legal system and for the infrastructural composition of the State. Depending on the resources available to States the pace of domestic implementation will vary significantly and consequently it will likely be several years before all States are able to exercise jurisdiction over certain maritime crimes committed outside their respective jurisdictions. In the meantime, international organisations charged with overseeing the attainment of the objects and purposes of relevant international instruments play a significant role in verifying State compliance with instruments including implementation requirements. These institutions may also issue rules and guidelines in furtherance of the objects and purposes of the relevant instruments. However, the extent to which they may do this depends upon their particular mandates which, it would seem, may be broadly interpreted and consequently evolve to encompass responsibilities beyond the originally envisioned scope.

Accordingly, the international community has reacted to maritime security threats to develop a legal and procedural framework within which States must work to combat maritime threats and to remove pre-existing impediments to the prevention of maritime threats and to maritime security enforcement.

This thesis will examine in its first part, the international aspects of the maritime security framework, including the nature of international threats, the response of the international community to these threats and the implications that arise for national systems in implementing the international framework. The second part will examine regional cooperation as a tool for accomplishing effective implementation in CARICOM States taking account of the special vulnerabilities of CARICOM States as Small Island Developing States (SIDS). This paper will then conclude with suggestions for expediting the implementation process through the regional machinery.

## A. MARITIME SECURITY THREATS AND THE INTERNATIONAL RESPONSE

The major maritime security threats that occupy the focus of the international community are very serious crimes that gravely undermine the global economy and threaten social stability in all regions of the world. These maritime threats are also such that they make it difficult for any one State to take punitive action against perpetrators within the context of traditional rules of international law and the provisions of the United Nations Convention on the Law of the Sea<sup>1</sup> (hereafter referred to as 'UNCLOS'). Nevertheless, these threats may be examined from two perspectives: direct threats and aggravating factors. This classification stems from the fact that the threats manifest either as crimes committed at sea or as vectors for facilitating the crimes or dramatically increasing the potency of their effects. It is necessary to first understand their nature not only to present a clear picture of the maritime security framework but also to fully appreciate the structure of the framework as a result of the international response to the relevant threats. Accordingly, the following highlights the nature of the threats to maritime peace and security and reflects upon the response of the international community to counteract them.

### 1. Nature of the Threats

There are currently a number of threats that directly affect international maritime security. It may be said that the most major of these are (a) transnational organised crime including the illicit traffic in narcotics, arms and weapons, and persons; (b) terrorism; and (c) piracy and armed robbery at sea. Likewise, the major indirect or aggravating factors may be identified as (a) biological, chemical and nuclear weapons (hereafter referred to as 'BCN') and their precursors, and (b) municipal laws and procedures in relation to company incorporation and ship registration.

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<sup>1</sup> The United Nations Convention on the Law of the Sea adopted in Montego Bay, Jamaica, 1982

(i) *Direct Maritime Threats*

a) Transnational Organised Crime and Illicit Trafficking

*Transnational Organised Crime*

Transnational organised crime is a very old phenomenon that has evolved and intensified over the years. It has captured the world's attention in the past thirty or forty years particularly in connection with the illicit drug trade and the narcotic black market that emerged as a result of law enforcement efforts to suppress trafficking. A huge aspect of organised crime today is a network of violence and corruption perpetuated by drug cartels in order to protect their financial interests in trafficking illegal narcotics.<sup>2</sup> Organised crime typically engenders activities such as illicit trafficking in drugs, small arms and light weapons, corruption, money-laundering, prostitution, human trafficking all of which are linked to increased incidences of violent crime within national borders.<sup>3</sup> Moreover, as its name suggests, this network of violence and crime is highly organised and spans a broad global spectrum among powerful cartels and crime syndicates. The reach of power of these crime organisations has so grown over time that they are believed to have financial and other stakes in virtually all of the security threats discussed herein, including terrorism.<sup>4</sup>

Increased law enforcement action against the drug trade created a need on the part of traffickers to protect their interests in the extremely lucrative trade and to manoeuvre around legal systems. As a consequence, traffickers became more organised and savvy in terms of their operations and a clear hierarchy of power or chain of command developed within criminal organisations.<sup>5</sup> This level of organisation and development was also aided by the vast resources acquired on account

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<sup>2</sup> See *Organized Crime and its Threat to Security Tackling a Disturbing Consequence of Drug Control*, Report by the Executive Director of the United Nations Office Drugs and Crime, Documents E/CN.7/2009/CRP.4–E/CN.15/2009/CRP.4, 1 March 2009 – Commission on Narcotic Drugs, Fifty-second Session and Commission on Crime Prevention and Criminal Justice, Eighteenth Session, page 3

<sup>3</sup> *Ibid*

<sup>4</sup> For a discussion on the background and nature of organised crime, see Carrie Lyn Donigan Guymon, 'International Legal Mechanisms for Combating Transnational Organized Crime: The Need for a Multilateral Convention', (2000) 18 Berkeley J. Int'l L. 53, pages 55-69

<sup>5</sup> *Op. cit.* n 2

of the drug trade which has also cultivated a contiguous culture of violence and intimidation mainly through the use of firearms and other weapons to resist interference from law enforcement authorities as well as rival drug traffickers. In order to fully profit from the proceeds of crime, criminal organisations required a way to “legitimise” their funds, hence the money-laundering aspect of organised crime.<sup>6</sup> Corruption and bribery of public officials also became a tool for thwarting law enforcement efforts against organised criminal activity and for increasing the power base of cartels. With increased power bases and huge financial resources criminal organisations were able to diversify their portfolios. Human trafficking, prostitution, and migrant smuggling which are all very lucrative illegal trades and some of which have a parallel connection with the drug trade, are also associated with organised criminal operations. As demand and markets for illicit trades grew globally, so did the global network of crime syndicates. This level of criminal organisation evolved to create inter-organisational cooperation among cartels in different regions of the world, hence further developing the transnational aspect of organised crime.<sup>7</sup>

Criminal organisations more easily conduct these operations in regions where poverty is relatively high, social stability is relatively low and/ or where borders are long and porous with lax or few controls attending them, as these conditions are conducive to corruptible public officials, disaffected youth that may be attracted to the financial gains of organised criminal activity, as well as easy access to territories from the air and particularly from the sea. Organised crime syndicates also act to create or exacerbate these conditions where possible. They are known to fund internal conflicts in vulnerable regions of the world maintaining, or in some cases, increasing the demand for drugs and weapons.<sup>8</sup> In other cases, social destabilisation occurs as a natural consequence of the violence and crime that accompanies organised criminal activity, discouraging valuable revenue derived from tourism and foreign investment. In a nutshell, organised criminal activity weakens rich countries and devastates poor ones.

The United Nations Convention Against Transnational Organised Crime<sup>9</sup> (hereafter referred to as ‘CTOC’) is the main international convention addressing this problem. It aims to combat

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<sup>6</sup> *Ibid*

<sup>7</sup> *Ibid*

<sup>8</sup> *Op. cit.* n2

<sup>9</sup> *Ibid*

organised crime through, *inter alia*, global cooperation in matters relating to confiscation of property, extradition, mutual legal assistance, and technical assistance and training. It also requires States Parties to implement domestic measures to achieve, *inter alia*, criminalisation of the various aspects of organised crime, including illicit trafficking in arms, drugs and persons; international law enforcement cooperation; the adoption of new frameworks for mutual legal assistance; extradition; and provision for technical assistance and training. Its three Protocols<sup>10</sup> make similar provision in respect of human trafficking,<sup>11</sup> smuggling of migrants at sea,<sup>12</sup> and the illicit manufacture and traffic of firearms.<sup>13</sup> The United Nations Office on Drugs and Crime (hereafter referred to as the ‘UNODC’) is the United Nations agency that works with Governments, regional organisations and civil society to achieve full and effective national implementation of CTOC and its Protocols.<sup>14</sup>

### *Drug Trafficking*

The abuse of narcotic drugs is a very old problem in human history but the issue of narcotic drug trafficking has only occupied the attention of the collective international community for about a century during which time the illicit activity has evolved at a staggering pace, forcing law enforcement techniques and mechanisms to evolve just as rapidly.<sup>15</sup>

The huge global demand for illegal drugs is the fundamental driving force behind the illicit trade.<sup>16</sup> The source of illegal drugs is typically poor farmers in developing countries for whom

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<sup>10</sup> The three Protocols are: (1) Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime; (2) Protocol against the Smuggling of Migrants by Land, Air and Sea, supplementing the United Nations Convention against Transnational Organized Crime; and (3) Protocol against the Illicit Manufacturing and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime

<sup>11</sup> *Ibid*

<sup>12</sup> *Ibid*

<sup>13</sup> *Ibid*

<sup>14</sup> *Ibid*

<sup>15</sup> See the United Nations Office on Drugs and Crime, *World Drug Report 2009* at page 5 (copy is available at [www.unodc.org](http://www.unodc.org))

<sup>16</sup> See CICAD document *Anti-drug Strategy in the Hemisphere*, paragraph 12 a copy of which is available at <http://www.cicad.oas.org/EN/basicdocuments/Strategy.asp>

the cultivation of their traditional or new food crops is far less profitable than cultivation of illicit drugs.<sup>17</sup> Globalisation has, in this respect, been said to have contributed to the nurture of the drug trade, for as displaced farmers seek alternative ways to eke their living the cultivation of narcotics for illicit sale and distribution becomes a tempting solution despite the incumbent risks and dangers.<sup>18</sup> The organised criminal organisations that employ these farmers, at one time, also ensured that the supply reached the demand, thereby exerting control on drug operations from beginning to end but this absolute control has waned in recent years due to law enforcement efforts. The global drug trade has been valued by the UNODC at \$320 billion per year, comparable to the gross national product (GNP) of a State such as Sweden at \$358 billion.<sup>19</sup> Accordingly, it is greater than the world market for tobacco, wine beer, chocolate, coffee and tea combined. The cocaine whole-sale market covers more than one quarter the value of the entire illicit drug trade while the heroin market alone has been valued at \$57 billion.<sup>20</sup> Two billion dollars of this go to farmers while most of the remainder ends up with professional criminals, insurgents, terrorists and street retailers.

These sums of money allow drug syndicates to buy the weapons, access and influence required to get illicit drugs to the market, thereby providing them with a dangerous economic, political and paramilitary leverage. All this has devastating consequences for human security and social stability.<sup>21</sup> In some cases destabilisation is deliberate with drug traffickers funding insurgencies and internal strife while in others the violent consequences of the trade ward off tourists and foreign investors which are crucial to economic development in poorer countries.<sup>22</sup> As such, the global drug problem is viewed as a serious threat to public health and safety, to the well-being of humanity, and to the national security and sovereignty of States, consequently undermining socio-economic and political stability as well as sustainable development.<sup>23</sup>

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<sup>17</sup> [http://www.cicad.oas.org/Desarrollo\\_Alternativo/ENG/Projects\\_By\\_Country/Colombia/Colombia\\_History.asp](http://www.cicad.oas.org/Desarrollo_Alternativo/ENG/Projects_By_Country/Colombia/Colombia_History.asp) - see for alternative development project information in relation to Colombia

<sup>18</sup> See Anthony T. Bryan, *Clinton Administration and the Caribbean: Trade, Security and Regional Politics*, Journal of Interamerican Studies and World Affairs, Spring 1997

<sup>19</sup> *Op. cit.* n2 pages 3-4

<sup>20</sup> *Ibid*

<sup>21</sup> *Ibid*

<sup>22</sup> *Ibid*

<sup>23</sup> See document A/RES/63/197, preambular paragraph 5

The international community has sought to address this problem through the 1961 Single Convention on Narcotic Drugs<sup>24</sup> as amended by the ‘1972 Protocol Amending the Single Convention on Narcotic Drugs’ and the 1988 United Nations Convention against Illicit Trafficking in Narcotic Drugs and Psychotropic Substances (hereafter referred to as the ‘Narcotic Trafficking Convention’). The former essentially prescribes minimum controls and standards for States to apply at the national level in relation to legitimate narcotic handling, that is to say, for medical and scientific purposes, while requiring the implementation of national measures to prevent illicit narcotic activity including trafficking. The 1988 Convention on the other hand deals directly with State legislative and maritime law enforcement cooperation to combat illicit drug trafficking. In both cases, international cooperation is the key component.

### *The Illicit Trade in Small Arms and Light Weapons*

As indicated, the illicit trade in small arms and light weapons (SALW) is heavily linked to the illicit drug trade.<sup>25</sup> As such its impact is as hard-hitting and far-reaching as the illicit drug problem. There is a distinction to be made however between the illicit trade in weapons and the secret trade thereof. Governments supplying arms secretly to groups in foreign countries are not necessarily acting illicitly, although, if the proper procedures of the receiving state have not been followed that state may well regard the action as illicit in the context of interference in its domestic affairs. The illicit traffic in weapons as it is referenced herein is generally understood to cover “that international trade in conventional weapons which is contrary to the laws of states and/ or international law”.

The demand for illicit arms and weapons is due to a number of factors but is in many cases directly proportional to the demand for illegal narcotics. In others it is fuelled by internal conflict and civil war. Traffickers in this respect tend to be exiled groups and private arms dealers whose motives are politically driven, or drug traffickers and organised criminal elements whose motives are for profit. Excessive accumulations of small arms and light weapons are generally the source

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<sup>24</sup> The 1961 Convention codified in one document all previous multilateral agreements on drug control and regulation. It was also adopted at a time when the international community focussed on the control of drug production (mainly opiates).

<sup>25</sup> *Supra*. Section A.1(i)(a)

of weapons peddled on the illicit market. Some of these are surplus from newly manufactured weapons while others are surplus from the cold war and therefore much older. The illicit trade therefore largely consists in practical terms of excessive accumulations of legally produced weapons circulated throughout the target market with destabilising effects on the countries and regions that receive them.

The illicit traffic in weapons plays a major role in the current increases in violence in many countries and regions, whether as a result of internal armed conflict or increases in violent crime, and consequently the destabilisation of societies and governments. The illicit traffic or circulation of arms has also been linked to the fostering of terrorism, mercenary acts and the violation of human rights. These effects are further exacerbated by the lack of national controls on arms production, exports and imports in a number of countries that receive illicit weapons as well as poorly trained or corrupt border personnel. Differences in legislation and enforcement mechanisms of states for the import and export of weapons has been identified as a facilitating factor in the circulation and illicit transfer of SALW, along with the lack of state cooperation in this area. This lack of cooperation and coordination has also been identified as facilitating the excess accumulation of SALW.

In this regard, international efforts to conclude a binding legal document in respect of SALW have failed to date. While States all agree that the scourge of illicit traffic in SALW must be urgently curbed, differences in approach and national interests among blocs of States have prevented consensus on a legally binding text. Therefore, with the specific exception of firearms, their parts, components, and ammunition,<sup>26</sup> legally binding instruments on the issue so far only exist at the sub-regional level.<sup>27</sup> However, at the international level, the most influential document on this issue is the *Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects* (PoA).<sup>28</sup> This non-binding instrument

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<sup>26</sup> See Protocol against the Illicit Manufacturing and Trafficking in Firearms, *Op. cit* n10

<sup>27</sup> The Economic Community of West African States (ECOWAS) adopted its '*Convention on Small Arms and Light Weapons, their Ammunition and other Related Materials*' on June 14, 2006. The Convention is a legally binding follow-up to the ECOWAS Moratorium on Small Arms and Light Weapons but has not yet entered into force. Information is available at <http://www.ecosap.ecowas.int/stand.php?id=arms2&lang=pt>

<sup>28</sup> See UN document A/CONF.192/15, Report of the United Nations Conference on the Illicit Trade in Small Arms and Light Weapons in All Its Aspects, 9 – 20 July 2001, paragraph 24. A copy of the report including the PoA is

adopted in July 2001 sets out measures to be taken at the national, regional and international levels in respect of, *inter alia*, legislation; confiscated, seized or collected weapons; and technical and financial assistance to States which are otherwise unable to adequately identify and trace illicit arms and light weapons. Since 2001 there have been a number of Regional follow-up conferences regarding implementation of the PoA. In 2006, the United Nations Conference to Review the Implementation of the Programme of Action on the Illicit Trade in Small Arms and Light Weapons was held but failed to produce an outcome document due to States being unable to agree on details of the follow-up strategy. However, the PoA remains the main framework document with which many States and regions work in relation to implementing measures to address the problems of SALW.

### *Human Trafficking*

Human trafficking, or trafficking in persons, is internationally regarded as “the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.”<sup>29</sup>

The general pattern that human trafficking has been found to follow is that victims are recruited or taken in the country of origin, transported through transit territories, and exploited in the country of destination. Based on reported cases of human trafficking, typical areas of origin, transit and destination have been identified. The major regions of origin have been identified as Western Africa, Asia, particularly South East Asia, Latin America and the Caribbean, and Central and South East Europe. Major destination regions have been identified as Western

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available at [http://disarmament.un.org/CAB/smallarms/files/aconf192\\_15.pdf](http://disarmament.un.org/CAB/smallarms/files/aconf192_15.pdf) and a copy of the PoA on its own is available at <http://disarmament.un.org/CAB/poa.html>

<sup>29</sup> See article 3(a) of Protocol to Prevent, Suppress and Punish Trafficking in Persons, *Op. cit.* n 10. ‘Exploitation’ includes, at minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.

Europe and North America. In the case of intra-regional trafficking Western Africa has been identified as the main destination sub-region for victims trafficked from Africa. Within Europe, Central and South East Europe are the major origin sub-regions with Western Europe being the main point of destination. In Asia certain countries rate highly as countries of origin while others are largely destination countries.

The Commonwealth of Independent States is identified as a region of origin with victims from this sector mainly being trafficked to Western Europe, North America, and, to a lesser extent, Central and South Eastern Europe, and the sub-region of Western Asia and Turkey. Likewise, victims from Africa are mainly trafficked to Western Africa and Western Europe whereas in the Americas, most of the victims trafficked from Latin America and the Caribbean are reportedly trafficked to Western Europe and to North America. To a lesser degree Latin America and the Caribbean is reported as being a destination and a transit region. On the other hand, Central and South Eastern Europe is reportedly a main transit sub-region.

As this data is based on reported information, the picture it paints is probably not entirely representative of the trafficking situation worldwide but does give a general idea of the demand and supply trends throughout the market for trafficked persons. Women and children are most frequently and most acutely affected but men are also trafficked, more often for forced labour purposes than for the purposes of sexual exploitation which tends to most affect women and young girls. Besides being physically, psychologically and emotionally destructive to its many victims and an affront to human rights as a whole, human trafficking affects societies in a variety of ways. As a result of its links to organised crime, human trafficking tends to be accompanied by drugs, arms and increased criminal activity, namely at the transit phase and the destination phase in cases where victims are trafficked for the purpose of sexual exploitation. In this respect, its prevalence can lead to social degradation which has economic consequences from the perspective that legitimate local and foreign investment may suffer and decline.

On the international plane, the authoritative instrument for combating human trafficking is the Convention Against Transnational Organised Crime and its Protocol to Prevent, Suppress and

Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime.<sup>30</sup>

#### b) Terrorism

There is no standard, internationally agreed definition of terrorism. However, it would seem that it is universally viewed as involving a violent or destructive act underpinned by political motivations. There is, nonetheless, disagreement as to the context in which acts involving these elements may be accurately labelled as terrorism and when they qualify as freedom fighting or resistance against oppressive political regimes. In any event, incidents recognised as terrorist acts by all or a majority of the international community have been a problem for decades.<sup>31</sup> Terrorist attacks tend to affect large numbers of people at once and cause widespread destruction usually to make a political point or to force the hand of some political entity. The typical randomness, unpredictability, and destructiveness of such acts tend to place populations and Governments in the grips of fear while going about their daily lives. An attack may also occur in any magnitude or form and it is feared that should BCN fall into the wrong hands the world would be at risk of seeing a terrorist attack of hugely devastating proportions. Since the attacks of September 11, 2001 this fear has been stronger than ever and also since the September 11 attacks the international community has launched even more aggressive strategies to combat terrorism.

A terrorist attack can cripple a society. The destruction it can cause can shut down the social and economic life of a city or town, set it back economically in terms of repairing damage, cause serious injury and widespread death, and create a climate of fear that would exacerbate the physical social and economic damage directly caused. All this would be compounded in a developing country or SIDS lacking the resources to recover quickly from such an incident.

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<sup>30</sup> Supra Section A.1 (i) (a) – *ILLICIT TRAFFICKING: Drug Trafficking; Op. Cit.* n10

<sup>31</sup> Since 1937, terrorism has been of concern to the international community when the League of Nations elaborated the Convention for the Prevention and Punishment of Terrorism. Since 1963 the international community concluded the universal legal instruments on terrorism. The *Achille Lauro* incident in 1988 and the September 11, 2001 attacks in New York City were also pivotal events in the international response to terrorism. See <http://www.unodc.org/unodc/en/terrorism/global-action-against-terrorism.html?ref=menuaside>

### c) Piracy and Armed Robbery at Sea

The universal crime of piracy is a very old one. Historically, areas such as the Caribbean and the Mediterranean were rife with pirate attacks on merchant ships. Such a scourge it was then that it was regarded as a *jus cogens* crime, subject to the penal jurisdiction of all States. This classification remains today but the problem has much reduced. Still, there are areas that have been identified as hotspots. The main areas are the South China Sea, the Strait of Malacca, West Africa and Somalia. Currently the greatest number of incidents of piracy and robbery at sea, and certainly the most disruptive is shown to occur off the coast of Somalia.<sup>32</sup> These crimes occurring off the coast of Somalia have occupied a great deal of media attention in recent times due to the frequency of attacks, their impact on the international shipping industry and international trade. In 2008 there were reports of 111 incidents of pirate attacks while in 2009 there were at least 130 reported. The attacks have also reportedly extended to the EEZ of the Seychelles. Many of the attacks have taken place in the Somali EEZ as it was last declared, which has complicated enforcement options of the international community given that Somalia is effectively a failed State with no central Government or overarching rule of law. As such, the nature of the piracy problem in the Gulf of Aden is one with particular surrounding circumstances thus requiring a certain approach.

Armed robbery at sea, on the other hand, must be distinguished from piracy as the definition of piracy is very narrow. The commission of an act of piracy necessarily involves the attack being launched from another ship on the High Seas and the attack must be launched for private ends. Armed robbery, however, is defined as “any unlawful act of violence or detention or any act of depredation, or threat thereof, other than an act of “piracy”, directed against a ship or against persons or property on board such ship, within a State’s jurisdiction over such offences.” Accordingly, there is no requirement for the involvement of at least two ships or any limitations in respect of the motivation behind armed attacks.

The number of incidences of piracy and armed robbery at sea reported to the IMO to have taken place in April 2009 in (a) international waters was 21; (b) territorial waters was 6; (c) port area

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<sup>32</sup> See Statistics at <http://www.icc-ccs.org/>; See also IMO CircularMSC.4/Circ.136, 5 May 2009, Ref. T2-MSS/2.11.4.1, *Reports on Acts of Piracy and Robbery Against Ships*, Annex1: *Acts of piracy and armed robbery against ships reported by Member States or international organisations in consultative status*

was 3. There were also 27 attempts to commit piracy or armed robbery at sea reported in relation to international waters. The vast majority of these incidents took place in or off the East African coast followed by the South China Sea. Despite the concentration of this problem in select parts of the world, its impact on the global economy is significant.

(ii) *Indirect Maritime Threats/ Aggravating Factors*

Indirect threats to maritime security may or may not be inherently dangerous or illicit but in relation to maritime security they would aggravate or facilitate direct threats. Two significant indirect threats of concern are the existence of weapons of mass destruction namely biological, chemical and nuclear weapons (BCN), and corporate practices that enable the conduct of illicit activity without detection. The former is an aggravating factor in the context of the potential devastation and destruction they could cause in the commission of a terrorist act. The latter threat is more of a facilitator of illicit activity in that it may shield the identities of the true beneficial owners of ships being used for illicit purposes, making it almost impossible for authorities to trace them or the proceeds of their crimes. Corporate devices may also be used to present a legitimate cover for illicit activities thereby allowing these activities to continue without immediate detection by law enforcement authorities.

(a) Biological, Chemical and Nuclear Weapons (BCN)

In contrast to fears of the cold war era, today it is feared that BCN may fall into the hands of non-State actors, particularly, terrorists and organised crime syndicates. The use of a ship to carry out a terrorist act using these weapons would be several times more devastating, physically, socially and economically than a terrorist act committed with conventional weapons. Ships may facilitate such acts of terrorism by directly providing a medium for detonating BCN or by transporting BCN across the oceans from one non-State actor to another for the purpose of ultimately carrying out a terrorist attack.

The possibility of terrorist attacks being committed in this manner is anticipated by the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation,

(herein after ‘the 1988 SUA’) as amended by the 2005 Protocol to the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (hereafter ‘the 2005 Protocol’), where the use of a ship to transport BCN or even as a BCN itself is included as an unlawful act within the meaning of the Convention.<sup>33</sup> Other conventions such as the Chemical Weapons Convention, the Biological Weapons Convention and the Non-Proliferation Treaty which collectively address the issue of proliferation of BCN do not necessarily address the problem in the specific context of maritime security but their provisions, nevertheless, have bearing on the enhancement of maritime security in this respect. For example, the Chemical Weapons Convention focuses on accounting for and bringing about the destruction of chemical weapons in the possession of Member States;<sup>34</sup> on the monitoring of chemical weapon precursors including with regard to their import, export and re-exportation;<sup>35</sup> and State prohibition, through legislation and other domestic measures, of natural and legal persons subject to its jurisdiction engaging in activities prohibited by the Convention.<sup>36</sup> The Convention also provides for, *inter alia*, consultation and cooperation among States Parties,<sup>37</sup> the provision of technical, scientific and financial assistance,<sup>38</sup> opportunities for training in the peaceful applications of chemistry,<sup>39</sup> and assistance in the event of an attack.<sup>40</sup> Its main focus is not specifically the use or transport of chemical weapons at sea, but if chemical weapon stockpiles are successfully destroyed and shipments of their precursors successfully monitored, this would lead to the enhancement of

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<sup>33</sup> For example, article 3 bis of the 2005 Protocol lists a number of acts at sea as unlawful including the following acts involving BCN: (a) the use against or on a ship of any explosive, radioactive material or BCN weapon in a manner likely to cause death damage or serious injury for the purpose of intimidating a population or compelling a government or international organisation to do or abstain from doing any act; (b) the intentional discharge from a ship of oil, liquefied natural gas or other hazardous or noxious substance in such quantity as to cause death, damage or serious injury for the purpose of intimidating a population or compelling a government or international organisation to do or abstain from doing any act; (c) the transport on board a ship of explosive or radioactive material with knowledge that it is intended to cause death, damage or serious injury for the purpose of intimidating a population or compelling a government or international organisation to do or abstain from doing any act; and (d) the transport of any BCN weapon within the meaning provided in the Protocol(s) with knowledge that it is a BCN weapon.

<sup>34</sup> See Chemical Weapons Convention, articles I, III and IV

<sup>35</sup> *Ibid.* article VI

<sup>36</sup> *Ibid.* article VII

<sup>37</sup> Provision for various forms of consultation and cooperation among Member States may be found in preambular paragraph 9 and articles

<sup>38</sup> *Ibid.* article X

<sup>39</sup> *Ibid.* article XI; also see [www.opcw.org](http://www.opcw.org) for opportunities and programmes offered through the Technical Secretariat of the Organisation for the Prohibition of Chemical Weapons

<sup>40</sup> *Op. cit.* n 38

maritime security. From this perspective, BCN conventions, which focus on the destruction and monitoring of BCN as well as the peaceful usage of their precursors, have a tangible bearing on maritime security.

#### (b) Corporate Devices

The fight against maritime security threats would be greatly aided by access to information regarding the identity of beneficial owners of vessels, mainly, in two ways: firstly, knowledge of vessel ownership by known or suspected criminals would immediately draw the attention of law enforcement bodies to their maritime activities and facilitate swifter detection of maritime security threats, and secondly, the ability to easily trace illicit or suspicious maritime activities to the beneficial owners of the vessel would accelerate the conduct and conclusion of investigations and lead to more prosecutions. However, the permitted ownership of vessels by companies and other corporate entities provides a vehicle for perpetrators of illicit maritime activities to establish beneficial ownership of ships and keep their identities hidden from the public domain.

The term ‘corporate veil’ refers to the proverbial veil, created in common law jurisdictions by the ‘separate legal personality’ principle, which shields shareholders from liability in respect of the company and its assets on the basis that the company and the persons running the company possess separate legal personalities. The term ‘piercing the corporate veil’ refers to the exceptional circumstances in which shareholders may be exposed to liability. In the case of ship ownership the veil allows companies by virtue of their own legal personality to be registered as owners of ships. However, the identity of the shareholders of such companies or of their parent companies may be obscured through the use of various corporate mechanisms. These mechanisms include, *inter alia*, the issue of bearer shares to shareholders, the appointment of nominee shareholders and directors, and the use of intermediaries. Other means of thwarting identification are more institutional in nature and include ownership through private limited companies or public ones, the shares of which are not traded on the stock exchange; ownership through international business corporations (IBCs) or exempt companies; ownership by virtue of trusts; ownership via foundations; and ownership through partnerships. IBCs are primarily used to facilitate legitimate international business transactions as they are extremely easy to establish and are available in many countries specialising in off-shore services. IBCs are rarely supervised

and in most cases can be used along with all the above-mentioned mechanisms to conceal the identity of a beneficiary of illicit activities. By and large, these institutional devices and corporate mechanisms are used in tandem across a number of jurisdictions making it exceedingly difficult to trace the proceeds of crime and in particular their beneficiaries. In the context of maritime security, ownership of vessels is very often established by companies which open the door for the use of these corporate devices to shield not only criminal activities conducted by ships but also the true identities of the beneficial owners of such vessels.

A separate issue that compounds this problem is the lack of standardisation of ship registry regulatory procedures. The fact that not every flag State requires the existence of a 'genuine link' between the shipowner and the flag State contributes to the problem in that any company may own or incorporate a subsidiary within the flag State and register it as the owner of a vessel, very often without submitting detailed information on the beneficiary owner. Furthermore, the 'open registry' phenomenon in generating competition to attract shipping companies often results in the softening of regulatory standards in respect of the flag State's registry requirements as well as its corporate rules and procedures. The nationality of ships then becomes a matter of commercial bidding rather than one of genuine ties to the flag State subject to specific standards and procedures. The 1986 United Nations Convention on Conditions for Registration of Ships attempted to address this and other related problems by setting higher uniform standards for the registration of ships. However, no state has ratified it and it is regarded for all intents and purposes as a failed convention. Given the unwillingness of States to relinquish the lucrative open registry system the problem may best be tackled from the perspective of changing procedures and practices within the system rather than disposing of it entirely.

Modern maritime security threats are not recently occurring phenomena but they have escalated to a scale today that greatly profits organised criminal groups, terrorist organisations and individuals engaged in criminal activity while costing and, in some cases, devastating the economic and social fabrics of States, particularly developing States. The potentially devastating consequences of the continued proliferation of organised crime, terrorism, piracy and armed robbery at sea in the face of aggravating factors such as BCN and 'the corporate veil' have prompted collective action on the part of States. This collective approach to maritime security threats is not only due to the fact that virtually every State is affected in some way by these

threats but also by the fact that their transboundary nature makes it difficult for any one State to apprehend and punish perpetrators without the cooperation of all other States.

## 2. The International Response

As the major maritime security threats became more widespread and difficult to control the international community sought to address the obstacles to effective control and regulation. These were recognised as a number of significant legal loopholes that effectively ‘tied the hands’ of States with regard to the adoption of prevention, enforcement and prosecution measures. The major legal lacuna was jurisdictional in nature since prevailing fundamental principles such as State sovereignty and the exclusive jurisdiction of flag States as well as traditional principles under which States could assert jurisdiction created barriers to State action against suspected ships and perpetrators which traverse all the maritime zones and jurisdictional boundaries with relative freedom. There was also inadequate coverage of certain acts at sea, including the illicit use or transport of BCN and acts that typically constituted or were characteristic of terrorism. In addition, frontiers controlled by national governments and which were porous and subject to weak controls, if any at all, also served to thwart international efforts to curb maritime threats to security. The international community, therefore, sought to close these jurisdictional and systemic gaps by additional international agreement. Accordingly, the relevant body of agreements in this context necessitate that States take a number of domestic measures to ensure the closure of these lacunae which would have direct legal consequences at the international level. International institutions charged with managing and facilitating the implementation of such international instruments also help to ensure the ultimate closure of legal lacunae.

### (i) *Sealing Jurisdictional and Systemic Gaps*

The relevant legal instruments seek to close jurisdictional gaps in two main ways. These are (a) to allow State jurisdiction to have universal reach in respect of these crimes, and (b) by creating universal jurisdiction to address these crimes. In order to facilitate the universal reach of State jurisdiction further exceptions or modifications to traditional principles of jurisdiction have been created in relation to some if not all of these crimes, whereas universal jurisdiction is achieved as

a matter of fact, when all States possess the right to exercise jurisdiction over international maritime crimes. Systemically, international instruments seek to reduce the porosity of national borders that provide escape routes for criminals and avenues for the perpetuation of their illicit activities.

a) The Existence of Maritime Jurisdictional and Systemic Lacunae

At different points in time lacunae were recognised as existing in all the relevant areas of security, namely, terrorism, arms and drug trafficking, human trafficking, and piracy. Generally, this recognition would be precipitated by an event or disaster that was not adequately addressed by the relevant existing law and which required legal action by the international community to properly address the problem at hand and similar incidents that might occur in the future.

There existed at one time or another, inadequate legal frameworks to properly address and prosecute certain crimes namely terrorism at sea and human trafficking. In the cases of terrorism and human trafficking there were no clear definitions of these crimes in international law and consequently no express provision criminalising them and subjecting them to prescribed penal measures.

There was also insufficient legal provision for inter-State cooperation to circumvent the limitations posed by the rule of exclusive flag State jurisdiction when seeking to interdict suspected ships flying the flag of another State or to exercise other jurisdiction in the case of a ship on board which a maritime crime was committed. This was particularly problematic in the case of drug, arms and human trafficking, armed robbery at sea<sup>41</sup> and terrorism since interdiction at sea can play a vital role in terms of preventing harmful materials or illicit cargo from successfully reaching their final destinations, or the dispersal of evidence of the commission of the crime. In the case of drug trafficking there are a number of bilateral ship-rider agreements largely between the United States and a number of other countries in the Latin American and Caribbean region but these were insufficient to tackle the global problem of drug trafficking as they applied to a select number of countries in a concentrated area of the globe.

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<sup>41</sup> Theoretically this is not a problem in relation to piracy since as a *jus cogens* crime and since under article 105 of UNCLOS any State may exercise jurisdiction over this maritime offence on the High Seas or any other place outside the jurisdiction of any State.

States were also precluded from exercising penal jurisdiction over particular crimes due to insufficient nexus between the State and the crime that would invoke the exercise of its jurisdiction in accordance with traditional principles on the exercise of criminal jurisdiction. The territoriality principle<sup>42</sup> which is the most widely accepted basis for the exercise of criminal jurisdiction, and the nationality principles still left avenues of escape for perpetrators that fled to territories where no such nexus existed between them.

An inadequate legal framework to regulate the manufacture, use and transport BCN also posed a potential threat. This concern was somewhat moot in the cold war era when the source of fears of the launch of a BCN attack was Government and State actors. Today, with the continued existence of BCN, this fear still looms but greater alarm is paid to the possibility that such attacks may be launched by non-State actors who, being unknown and invisible to their targets, could cause untold destruction if BCN were to fall into their hands. There was at various points in time, nonetheless, little effective regulation of BCN or their precursors in terms of their manufacture, use, transport, sale distribution, proliferation and the ultimate elimination of BCN themselves. The aim of eliminating these or, failing that, tracking and controlling their use and movement internationally and nationally would be to circumscribe their use and therefore their devastating effects. Regulation of BCN in this manner therefore equates, in this context, to the circumscription of BCN falling into terrorist hands and being used to compromise maritime security and safety.

From a more practical perspective, the standards of customs and border control policies and procedures were not uniform and porous borders with insufficiently strict customs controls would be frequently and deliberately targeted to get contraband across maritime and other borders. There was no international regulation of standards for customs control or guidelines as to what sort of measures should be in place to circumvent the occurrence of any of the major maritime security threats.

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<sup>42</sup> Under the territoriality principle a State has jurisdiction to prosecute offences that occur within its territory. The exercise of jurisdiction in this regard is tied to the sovereign rights of a state over its territory and it is the most practical exercise of jurisdiction in that the perpetrator, evidence and witnesses are usually all within the reach of the judicial and law enforcement arms of the State. For more on the territoriality principle see R. R. Churchill and A. V. Lowe, *The Law of the Sea*, 1999 3<sup>rd</sup> Ed.; also see See Malcolm N. Shaw, *International Law* 2003, 5<sup>th</sup> Edition at pg 579

There were also no international regulations regarding ship registry and or corporate practices as they relate to the registration and manning of ships.<sup>43</sup>

Therefore, the main obstacles faced by States in combating maritime threats were limitations on the application of prescriptive, enforcement and penal jurisdiction as well as gaps in certain systemic and policy standards. These limitations and gaps in the international legal framework effectively provided safe havens for perpetrators of serious maritime offences. As such the international community set about removing these limitations on the jurisdictional reach of States in an effort to seal all avenues of escape.

#### b) Universal Jurisdictional Reach

Through conventions and other international instruments, the international community sought to seal jurisdictional and systemic gaps that hindered the maintenance of maritime security and in particular to increase the jurisdictional reach of individual States in relation to major maritime offences.

To this end, these instruments possess a number of common features. One such feature is the requirement that States Parties criminalise relevant unlawful acts and prescribe enforcement and penal measures to be applied.<sup>44</sup> In the case of the SUA Convention and Protocol counteractive measures were prescribed for a long list of unlawful acts, owing to the fact that there is no agreed definition of terrorism in international law.<sup>45</sup> These unlawful acts include intentional threat of or

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<sup>43</sup> *Supra* Section A.1 (ii) (b) – *Corporate Devices*

<sup>44</sup> See the Convention on Transnational Organised Crime, articles 5-9, 11 and 12; its Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, article 5; its Protocol against the Illicit Manufacturing and Trafficking in Firearms, Their Parts and Components and Ammunition (*Op. cit* n 10), article 5; the 1988 Convention on the Illicit Traffic in Narcotics and Psychotropic Substances, article 3; the Chemical Weapons Convention, article VII; and the Biological Weapons Convention, article IV

<sup>45</sup> This is due to the fact that Members of the international community are unable to agree on an overarching definition of terrorism. Some States fear that the definitions offered do not adequately distinguish between terrorist activities and nationalist struggles for independence and may therefore be used inappropriately for political reasons. Nevertheless, there are at least 115 definitions of terrorism in national enactments and international treaties. For examples of these see the United Kingdom Terrorism Act 2000, article 1; United States Code Title 18 – Crimes and Criminal Procedure, Chapter 113 B – Terrorism Section 2331- ‘Definitions’; the Barbados Anti-Terrorism Act, Chapter (Cap) 158, which is also Barbados’ enabling legislation in respect of the

actual seizure or forcible exercise of control over a ship or fixed platform; performance of a violent act against a person on a ship or fixed platform likely to result in the endangerment of the ship's navigation or the safety of the platform;<sup>46</sup> the transport on board a ship of explosive or radioactive material with knowledge that it is intended to cause death, damage or serious injury for the purpose of intimidating a population or compelling a government or international organisation to do or abstain from doing any act;<sup>47</sup> and the transport of any BCN weapon within the meaning provided in the Protocol(s) with knowledge that it is a BCN weapon.<sup>48</sup> In the case of the BCN conventions,<sup>49</sup> governments also pledge to refrain from engaging in activities involving the relevant BCN material and systems are established for the purpose of verifying government compliance. Among the responsibilities placed on governments is that of taking measures to ensure that none of the relevant prohibited activities take place on their territories or anywhere within their jurisdiction, starting with the prohibition of legal and natural persons<sup>50</sup> from engaging in any of the activities prohibited by the applicable BCN convention. With regard to the illicit traffic in small arms and light weapons where there is no binding international instrument<sup>51</sup> the PoA to Prevent, Combat and Eradicate the Illicit Trade in SALW in all its Aspects includes an undertaking by participating States for prohibitive measures to be taken at the national level including the assumption of prescriptive jurisdiction.<sup>52</sup>

On the other hand, a collaborative approach was required on the part of States in order to circumvent difficulties in the exercise of enforcement jurisdiction at sea, arising from the rule of exclusive flag-State jurisdiction. In order to reduce the lacuna presented by this principle, ship-

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*International Convention for the Suppression of the Financing of Terrorism*, creates an "offence of terrorism" at section 3.

<sup>46</sup> See the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA) 1988, article 3, and the Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf (SUA Protocol) 1988, article 2

<sup>47</sup> See the Protocol of 2005 to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (2005 SUA Protocol), article 3*bis*. Note that the 2005 SUA Protocol has not entered into force and therefore its provisions currently lack legal authority.

<sup>48</sup> *Ibid.*

<sup>49</sup> For these purposes "BCN Conventions" refers to the Biological Weapons Convention (BWC), the Chemical Weapons Convention (CWC) and the Nuclear Non-Proliferation Treaty (NPT)

<sup>50</sup> See Art. VII of the Chemical Weapons Convention

<sup>51</sup> See section A.1. (i) (a) 'Illicit Trade in Small Arms and Light Weapons', Pgs 17-18, *Supra*

<sup>52</sup> See the *Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All its Aspects*, Part II, paras. 2 and 3, Report of the United Nations Conference on the Illicit Trade in Small Arms and Light Weapons in All its Aspects, New York, 9-20 July 2001

boarding provisions were introduced in relation to drug interdiction and terrorism.<sup>53</sup> These ship-boarding provisions permit warships or State owned vessels to board private craft flying the flag of another State party, on the basis of reasonable suspicion that the private craft is engaged in an activity prohibited by the applicable convention.<sup>54</sup> However, consent of the flag-State is still required before taking action<sup>55</sup> although States Parties may elect to provide that consent with or without conditions upon ratification of the convention or any time thereafter.<sup>56</sup> States parties in these cases have therefore agreed to depart from the prohibitive effects of the flag-State jurisdictional rule but not from the rule entirely.

In order to close the gap presented by traditional principles relating to the exercise of criminal jurisdiction,<sup>57</sup> a number of conventions relating to maritime security expressly provide for the presence of an alleged offender in the territory of a State Party as a basis for exercising enforcement and penal jurisdiction over the individual<sup>58</sup> in addition to the territoriality<sup>59</sup> and nationality principles.<sup>60</sup> Moreover, in order to avoid offenders escaping justice as a result of being in the custody of States either unable or unwilling to exercise penal jurisdiction, a duty to prosecute or extradite is imposed by some conventions. Therefore, if a State Party does not elect or finds it is unable to prosecute alleged offenders present in its territory it must extradite them to another State Party which is able and willing.<sup>61</sup>

From a systemic perspective, territorial borders which are under the control of States require a certain degree of vigilance in order to interrupt the easy passage of contraband from one place to another. In this context, jurisdiction is not so much an issue as such frontiers fall squarely within

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<sup>53</sup> *Op. cit.* n 47, art. 8 *bis*; United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988 (UN Narcotic Trafficking Convention), art. 17. See also section I.A.2 (i) (a) *Supra*

<sup>54</sup> UN Narcotic Trafficking Convention, art. 17(4); 2005 SUA Protocol, art. 8*bis*(5)

<sup>55</sup> UN Narcotic Trafficking Convention, art. 17(3); 2005 SUA Protocol, art. 8*bis*(5)(b) and (c)

<sup>56</sup> 2005 SUA Protocol, art. 8*bis*(5)(d) and (e)

<sup>57</sup> See section I.A.2(i)(a) at pg 27 *Supra*

<sup>58</sup> UN Narcotic Trafficking Convention, art. 4(2); SUA 1988, art. 6(4); CTOC, art. 15(3) and (4). It should be noted that the SUA 1988 makes the implementation of this provision mandatory whereas the UN Narcotic Trafficking Convention and CTOC make it subject to the discretion of States Parties (see arts. 4(2)(b) and 15(4) respectively). However, these two Conventions make this measure mandatory where nationality and/ or territoriality nexuses also exist between the State and the alleged perpetrator or the offence (see arts. 4(2)(a) and 15(3) respectively)

<sup>59</sup> See Malcolm N. Shaw, *International Law* 2003, 5<sup>th</sup> Edition at pg 579, *Op. cit.* n 42

<sup>60</sup> *Ibid* at pg 588. Also see UN Narcotic Trafficking Convention, art. 4(1); SUA 1988, art. 6(1); CTOC, art. 15(1). It should also be noted that establishment of jurisdiction on this basis is mandatory in the SUA 1988 but discretionary in the UN Narcotic Trafficking Convention and CTOC

<sup>61</sup> UN Narcotic Trafficking Convention, art. 6(9); SUA 1988, art. 10(1); CTOC, art. 16(10)

the purview of States. The difficulty is that customs policies and systems in place to prevent smuggling of prohibited materials are not internationally standardised and, due to various factors including the resource bases of States and the prevalence of corruption, the borders of some States are significantly more porous than others. Countries with porous borders tend to be attractive to traffickers and smugglers as destination and transit points, and also permit fugitives to enter undetected and slip into obscurity in their territories. In this regard, the strength of border control policies and systems is important to the coastal State as well as to its neighbouring States.

In order to close the gaps in global border control standards and to raise them in general, action was taken at the international level.<sup>62</sup> United Nations Security Council Resolution 1540 (hereafter “UNSCR 1540”) was issued by the Security Council requiring that States take prescribed border control measures within the context of their national systems to prevent the smuggling of BCN by non-State actors and to prevent BCN from reaching the hands of non-States actors.<sup>63</sup> Despite some controversy surrounding this action taken by the Security Council<sup>64</sup> the resolution was passed pursuant to Chapter VII of the UN Charter<sup>65</sup> and is therefore not only binding on all parties to the United Nations but can technically expose non-compliant States to sanctions under Chapter VII.<sup>66</sup> In addition, the International Ship and Port Facility Security (ISPS) Code which is elaborated under SOLAS and the IMO provides a guide for States Parties to the SOLAS to follow in order to meet port facility and shipping standards that would equip and prepare States to detect contraband and explosive material at ports of entry and to handle or defuse possible situations that might ensue.<sup>67</sup> Provision for border control measures is also included in a number of other maritime security related conventions.<sup>68</sup>

Despite the international response to remove loopholes from the maritime security legal framework some gaps still remain since not every area of security has been covered or adequately addressed. The areas of SALW and ship registration procedures, for example, remain

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<sup>62</sup> United Nations Security Council Resolution (UNSCR) 1540, operative paragraph (OP) 3 (c) and (d); International Convention for the Safety of Life at Sea (SOLAS), Chapter XI-2/2: International Ship and Port Facility Security (ISPS) Code; UN Narcotic Trafficking Convention, art. 18.

<sup>63</sup> UNSCR 1540, OPs 1 – 3

<sup>64</sup> See *Enforcing International Law Norms Against Terrorism*, Andrea Bianchi and Yasmin Naqvi, 2004

<sup>65</sup> *Action with Respect to Threats to the Peace, Breaches of the Peace and Acts of Aggression*

<sup>66</sup> UN Charter, Chap. VII, arts. 41 and 42

<sup>67</sup> SOLAS, Chap. XI-2/2

<sup>68</sup> UNSCR 1540; UN Narcotic Trafficking Convention, *op. cit.* n 62;

outstanding. Attempts to agree on a binding legal document in respect of SALW have failed to date for while States all agree that the illicit traffic in SALW must be urgently curbed, differences in national interests and approaches among blocs of States have prevented consensus on a legally binding text. The PoA is therefore the most influential document on SALW setting out measures to be taken at the national, regional and international levels in respect of, *inter alia*, legislation; confiscated, seized or collected weapons; and technical and financial assistance to States which are otherwise unable to adequately identify and trace illicit arms and light weapons.<sup>69</sup> An Arms Trade Treaty (ATT) is also currently being negotiated.<sup>70</sup> Accordingly, with the exception of firearms, the illicit trade in small arms and light weapons is not subject to any binding legal instrument in international law. In the case of ship registration, on the other hand, the 1986 convention on ship registration was adopted but never ratified by States and is regarded as a failed convention.<sup>71</sup> Although UNCLOS makes some provision for the registration of ships, it does so from the perspective of the duties of flag States and in very basic and general terms.<sup>72</sup> UNCLOS article 94 obliges flag States to exercise administrative, technical and social jurisdiction over ships flying their respective flags but does not elaborate the particulars of the exercise of its jurisdiction beyond a duty to maintain a ship register containing the names and particulars of vessels and domestic assumption of jurisdiction over shipmasters, officers and crew.<sup>73</sup> The failure of the 1986 Convention and the inadequacy of the UNCLOS provisions has meant that no standard regulation or requirements for the registration of ships exist in international law and as a consequence individuals engaged in illicit activities have no difficulty

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<sup>69</sup> Since 2001 there have been a number of regional follow-up conferences regarding implementation of the PoA. In 2006, the United Nations Conference to Review the Implementation of the Programme of Action on the Illicit Trade in Small Arms and Light Weapons was held but failed to produce an outcome document due to States being unable to agree on details of the follow-up strategy. However, the PoA remains the main framework document with which many States and regions work in relation to implementing measures to address the problems of SALW.

<sup>70</sup> In addition, the international community is working towards an Arms Trade Treaty (ATT) to establish common international standards for the import, export and transfer of conventional arms, including SALW. This has been under discussion for some time. In 2006, the United Nations General Assembly by resolution 61/89 requested the Secretary General to establish a group of governmental experts (GGE), on the basis of equitable geographical distribution, to examine the feasibility, scope and parameters for such a Treaty. Pursuant to the conclusions and recommendations contained in the report of the GGE<sup>70</sup> submitted during the 63<sup>rd</sup> Session of the General Assembly in 2008, the matter remains an on-going process within the United Nations.

<sup>71</sup> See A.1. (ii) (b) *Supra*

<sup>72</sup> UNCLOS, art. 94, *Duties of the Flag State*

<sup>73</sup> *Ibid*, para. 2

in finding registries that can be manipulated to obscure their identities or place a legitimate face on their criminal activities.

By the same token, areas that have been addressed by binding or potentially binding instruments are not necessarily lacunae free. For instance, the requirement of prior informed consent from flag state authorities in order for foreign government vessels to board ships flying their flags<sup>74</sup> has been criticised as fettering attempts to dissolve the enforcement problems posed by exclusive flag State jurisdiction.<sup>75</sup> The requirement that interdicting vessels must contact flag State authorities to verify the nationality of suspect vessels<sup>76</sup> and that flag State authorities must respond within 4 hours has been criticised as impractical and counter-productive<sup>77</sup> as a four-hour window is too small for the appropriate verifying searches to be conducted but wide enough for vessels to discreetly dispose of incriminating evidence while warships await the appropriate authorisation. Furthermore, the requirement of prior informed consent for both the searching phase of interdiction as well as the enforcement phase has been criticised as a reflection of States' continued adherence to flag State jurisdiction.<sup>78</sup> Klein<sup>79</sup> maintains that the option in the 2005 SUA Convention for States to provide consent upon ratification remains a reflection of the supremacy of flag State jurisdiction because States were given the choice to 'opt-in' rather than to 'opt-out' of such a provision. States may therefore ratify the convention without this provision having automatic application and deliberate effort is necessarily spent to induce its application rather than to remove it. As the 2005 Protocol to the SUA Convention is not yet in force it remains to be seen whether these potential difficulties will prove to be lacunae in their own right in the international maritime security framework.

The issue of State ratification and implementation also perpetuates gaps in the security framework. The international response to maritime threats has no application to States that do not consent to be bound by security conventions and it has no effect if the required measures are

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<sup>74</sup> *Op. cit.* n 53

<sup>75</sup> *Supra* A.2.(i)(a); See also Natalie Klein, *The Right of Visit and the 2005 Protocol on the Suppression of Unlawful Acts against the Safety of Maritime Navigation*, *Denver Journal of International Law and Policy* (Spring, 2007), 35 *Denv. J. Int'l L. & Pol'y* 287, pgs 323 – 325;

<sup>76</sup> 2005 SUA Protocol art. 8bis(5)(a)

<sup>77</sup> Klein, *op. cit.* n75, pg 329

<sup>78</sup> *Ibid.*

<sup>79</sup> *Op. cit.* n77, pgs 323 – 329

not taken. The 2005 Protocol to the 1988 SUA has not entered into force and many countries that are bound by security instruments, particularly developing countries with long, porous borders, have failed to implement many of the measures elaborated by, *inter alia*, UNSCR 1540, the ISPS Code, the 1988 SUA and Protocol and the BCN conventions. Ideally, for the security framework to achieve its objectives and for legal and systemic lacunae to be securely closed all States would become party to the relevant instruments and implement their provisions. This would create a *de facto* universal jurisdiction<sup>80</sup> whereby every State would have the competence to try or extradite alleged offenders present in their territories and the power to investigate and take enforcement action on board ships of any nationality within the specified parameters. While universal jurisdiction provides the ideal environment for eliminating lacunae and consequent safe havens for transnational criminals, it is far from being accomplished.<sup>81</sup>

### c) Universal Jurisdiction

Universal jurisdiction may manifest in a number of ways. It exists in customary law for some international crimes namely piracy and can be created by treaty.<sup>82</sup> At least five meanings have been ascribed to the concept of universal jurisdiction<sup>83</sup> but *stricto sensu* universal jurisdiction refers to the power or competence of any and every State to exercise jurisdiction over a particular crime by virtue of the very nature of that crime.<sup>84</sup> In customary law it appears that universal jurisdiction applies with unanimous certainty to piracy and this is codified in UNCLOS.<sup>85</sup> There is some difference of opinion, however, as to whether universal jurisdiction applies to any other crimes in international law. Some jurists opine that universal jurisdiction also applies to slavery and slave-related practices, war crimes, crimes against humanity, genocide, and by convention,

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<sup>80</sup> *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, M. Cherif Bassiouni, 2001 Virginia Journal of International Law Association (Fall, 2001), 42 Va. J. Int'l L. 81, pgs. 152 – 153

<sup>81</sup> *Ibid.*

<sup>82</sup> *Ibid.* pg 156

<sup>83</sup> *Ibid.* at pg 152: "(1) universality of condemnation for certain crimes; (2) universal reach of national jurisdiction, which could be for the international crime for which there is universal condemnation, as well as others; (3) extraterritorial reach of national jurisdiction (which may also merge with universal reach of national legislation); (4) universal reach of international adjudicative bodies that may or may not rely on the theory of universal jurisdiction; and (5) universal jurisdiction of national legal systems without any connection to the enforcing state other than the presence of the accused."

<sup>84</sup> Generally, a crime deemed *hostis humani generis*, i.e. an enemy of mankind

<sup>85</sup> Arts 100 – 107

torture and some international terrorism crimes.<sup>86</sup> In the context of maritime security universal participation and implementation of any of the relevant security conventions could bring about a *de facto* universal jurisdiction in respect of the relevant crimes. However, without universal participation and the necessary domestic action to actually invoke the power to exercise jurisdiction it is not likely that such jurisdiction would be achieved by means of international convention. Nonetheless, the achievement of universal jurisdiction is generally the expressed or tacit goal behind maritime security instruments and, accordingly, international institutions, generally responsible for ensuring that the objects and purposes of international instruments are achieved, have a significant role to play in the realisation of this goal.

(ii) *The Role of International Institutions*

The main role of international institutions established under or designated in respect of specialised conventions such as maritime security instruments is to ensure the achievement of the objects and purposes of the convention, including state implementation of prescribed measures. Some institutions mandated to deal with a particular area of security or international crime may assume this role in relation to international conventions on the relevant subject matter. Whatever the type of institution, whether it is, *inter alia*, an intergovernmental organisation (IO), a commission, an office of an IO, or decision making body, its powers and organisation depend upon its particular mandate, which sets out the parameters of its operations and competence. However, a broad interpretation may be applied to the mandate of an international institution enabling it to assume responsibilities not originally contemplated. This tends to result in the evolution of its responsibilities and, by extension, its role in maritime security affairs.

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<sup>86</sup> See *International Crimes: "Jus Cogens" and "Obligatio Erga Omnes"*, M. Cherif Bassiouni, *Law and Contemporary Problems*, Vol. 59, No. 4, (Autumn, 1996), pp. 63-74 at p 68. Bassiouni actually speaks of these and other crimes in terms of *jus cogens* as opposed to universal jurisdiction. A relevant question is whether the status of *jus cogens* automatically invokes universal jurisdiction in relation to the particular offence. Klein, *op. cit.* n 75 at pg 299, cites the 1817 British case of *Le Louis* where it was held that British warships had no right to visit and search vessels of other States for the purposes of suppressing the slave trade, and contrasts it with the situation of piracy where any State could arrest a ship of another state and prosecute its occupants. Furthermore, art. 99 of UNCLOS only authorises flag States to take preventive and enforcement measures in respect of the slave trade and, according to Klein, "Even though prohibitions on the slave trade have long been entrenched in international law, the enforcement of the prohibition, consistent with the traditional paradigm, is conferred solely on the flag state." Therefore, can it truly be said that universal jurisdiction applies to slavery and slave-related practices? See the dissenting opinion of Judge Guillaume in the *Arrest Warrant Case*. See also Bassiouni, *op. cit.* n 80.

Some international institutions may be established under a convention as the body charged with promoting or ensuring the implementation of the convention by States Parties; or with monitoring and evaluating State compliance; or overseeing and carrying out verification and statistical requirements; or with performing various combinations of the foregoing. The Organisation for the Prohibition of Chemical Weapons (OPCW) and the International Narcotic Control Board are prime examples as their corresponding conventions<sup>87</sup> not only prescribe certain domestic measures to be taken but they also elaborate monitoring and evaluation systems that these institutions are charged with overseeing<sup>88</sup> in addition to promoting State compliance with and implementation of the conventions.<sup>89</sup>

In other cases, an international institution or organisation may be created by a constitutive instrument in order to deal with a particular area of major concern in accordance with its prescribed purposes and functions. In view of its overarching responsibilities in the given area conventions may be concluded at the institution's behest<sup>90</sup> or conventions concluded in the area may designate the institution to promote compliance, implementation and to generally oversee the achievement of treaty objectives.<sup>91</sup> Such international institutions may therefore perform functions pursuant to the provisions of more than one convention or legal instrument and work, from time to time, with other institutions possessing overlapping responsibilities.<sup>92</sup> The UNODC,<sup>93</sup> the IMO<sup>94</sup> and the IAEA<sup>95</sup> provide apt examples of international institutions

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<sup>87</sup> Chemical Weapons Convention (CWC) and the 1961 Single Convention on Narcotic Drugs as amended by the 1972 Protocol Amending the Single Convention on Narcotic Drugs respectively

<sup>88</sup> See CWC, Annex on Implementation and Verification ("Verification Annex"); Also see the Comprehensive Nuclear-Test-Ban Treaty (CTBT), art. IV and the Protocol to the CTBT

<sup>89</sup> *Ibid.*

<sup>90</sup> Eg. The international Maritime Organisation (IMO) and its conventions; see [www.imo.org](http://www.imo.org); for a discussion on the background and evolution of the IMO see Thomas A. Mensah, *Prevention of Marine Pollution: The Contribution of IMO*, Hamburg Studies on Maritime Affairs 10, Pollution of the Sea – Prevention and Compensation, pgs 41 – 61; the SUA Conventions and protocols are also examples as UN conventions spearheaded and overseen by the IMO;

<sup>91</sup> Eg. The IAEA which was created in 1957 in response to fears ensuing the discovery of nuclear energy came to play a central role in achieving the objects and purposes of the 1968 Treaty on Non-proliferation of Nuclear Weapons ("Non-Proliferation Treaty" or "NPT") as well as those of the Treaty of Tlatelolco; also the UNODC in relation to CTOC and the IMO in relation to SUA Conventions and Protocols

<sup>92</sup> Eg. the UNODC and the IMO regarding areas of terrorism at sea, piracy and armed robbery and other maritime security matters – see [www.unodc.org](http://www.unodc.org) and [www.imo.org](http://www.imo.org); it should be noted that the functions of these two institutions in their respective fields are not identical as the IMO, being an intergovernmental organisation can make regulations whereas the UNODC cannot; also the roles of the UNODC and of the INCB in relation to the area of illicit drugs and illicit drug control

<sup>93</sup> See the UN Secretary General's Bulletin ST/SGB/2004/6, 15 March 2004 establishing the UNODC

established and functioning in this context. The mandate of the UNODC<sup>96</sup> extends to drugs, arms organised crime money-laundering and terrorism while the IMO deals with maritime issues<sup>97</sup> including maritime security,<sup>98</sup> and the work of the IAEA<sup>99</sup> extends to nuclear energy and technology.

In addition, the powers and duties of international institutions may be defined and even limited within the context of their mandate relating to maritime security. For instance, the mandate may stipulate that an institution promote cooperation among States in implementing the provisions of a convention or it may bestow a power to make regulations. Substantively, the role of international institutions may include the facilitation of consultations and cooperation on relevant issues among the States Parties;<sup>100</sup> addressing inter-related issues in the context of sustainable development;<sup>101</sup> carrying out activities with a view to achieving prevention and control;<sup>102</sup> strengthening regional cooperation;<sup>103</sup> serving as a repository for technical expertise;<sup>104</sup> providing machinery for cooperation among Governments in the field of governmental regulation and practices relating to technical matters affecting shipping engaged in international trade;<sup>105</sup> encourage the removal of discriminatory action and unnecessary restrictions by Governments;<sup>106</sup> facilitating technical cooperation;<sup>107</sup> providing training and educational opportunities and encouraging the exchange of such among States Parties;<sup>108</sup> and the adoption of standards of safety.<sup>109</sup> The powers of an international institution may also be implied, for example, although the CWC does not expressly provide for the provision of training and

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<sup>94</sup> See the Convention establishing the IMO

<sup>95</sup> See the Statute of the IAEA

<sup>96</sup> See s2 SG's Bulletin *op. cit.* n 93 regarding functions of the UNODC which include implementing the organisation's crime and drug programmes and "addressing the interrelated issues of drug control, crime prevention and international terrorism in the context of sustainable development and human security".

<sup>97</sup> See art I of the 1948 Convention establishing the IMO; see also arts II and III

<sup>98</sup> *Infra* n 110

<sup>99</sup> See the Statute of the IAEA, arts II and III

<sup>100</sup> See art VIII para. 31 of the Chemical Weapons Convention

<sup>101</sup> SGs Bulletin regarding the UNODC, *op. cit.* n 93, s 2.1

<sup>102</sup> *Ibid.* s 2.3 (a)

<sup>103</sup> *Ibid.*

<sup>104</sup> *Ibid.*, s 2.2 (a) and 2.3 (b))

<sup>105</sup> See Convention establishing the IMO, art 1(a)

<sup>106</sup> *Ibid.*, art 1(b)

<sup>107</sup> *Ibid.*, art 2(e)

<sup>108</sup> See the IAEA Statute at art III para 4

<sup>109</sup> *Ibid.*, art III para 6; also see IMO Convention at art 1(a)

educational opportunities such a mandate is implied when articles VIII and X are taken together. In addition, the use of general language allows for the construction of a mandate to encompass activities not explicitly provided for. For example, provision in the CWC for the promotion of cooperation among States does not preclude the strengthening of regional cooperation although it does not stipulate such strengthening as the constitutive instrument of the UNODC does. From this perspective, the language of the empowering provisions is very significant and conventions tend to use fairly broad terms in order to avoid unduly constraining institutions in performing their functions.

Nonetheless, it is possible, with the right language, to apply a broader interpretation of an institution's mandate than that used in preceding years in order to adapt its functions to accommodate an emerging threat or issue. The IMO is a case in point where, following the *Achille Lauro* incident in 1985 and upon the realisation that there was a dearth of legal provision against maritime terrorism, it undertook the task of drafting and negotiating the 1988 SUA Convention and Protocol under its mandate in matters concerning maritime safety and since then has continued to address maritime security as an element of maritime safety.<sup>110</sup> This provision was originally taken to encompass matters relating to shipping and ship conditions but has evolved today to include matters of maritime security including port-State security.

Therefore, the role of international institutions in the maritime security framework is varied and wide. However, their purposes and functions are geared at achieving maritime security goals at the international and national levels. The way in which these goals are achieved depends upon their mandates, that is to say, their prescribed functions and objectives, how ever they may be interpreted or construed. On the national level, the goal of each institution is invariably to promote and facilitate implementation of substantive provisions of relevant international instruments and in this way their impact is very significant to individual States.

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<sup>110</sup> The IMO's work in this area was later endorsed by the UN General Assembly which called upon it to "study the problem of terrorism aboard or against ships with a view to making recommendations on appropriate measures" See General Assembly Resolution A/RES/40/61 of December 9, 1984 entitled, *Measures to prevent international terrorism which endangers or takes innocent human lives or jeopardises fundamental freedoms and study of the underlying causes of those forms of terrorism and acts of violence which in misery, frustration, grievance and despair and which cause some people to sacrifice human lives, including their own, in an attempt to effect radical changes* at OP13

It is clear that today's maritime security threats have additional economic and social ramifications for States all over the world, necessitating immediate global action to combat them. However, as a result of legal lacunae arising mainly from traditional rules and principles of jurisdiction as well as from varying national border control policies, State action on an individual basis proved ineffective in preventing and punishing criminal activity. It therefore became necessary for States to cooperate and tackle these threats firstly through international conventions and other legal instruments to close the jurisdictional and systemic gaps that stymied the effective countering of maritime crime. By expanding the jurisdictional reach of States with regard to taking action against alleged offenders, by closing systemic gaps in national border control procedures and policies, and by achieving universal participation of States in such instruments States have set the stage for the elimination of safe havens for perpetrators of such maritime crimes. Domestic implementation of maritime security instruments is however required before these responsive measures can have any tangible effect and the international community has to this end also assumed a role in assuring implementation largely through international institutions. However, as will be illustrated in the following paragraphs, domestic implementation can be a complex process with far-reaching implications within national systems.

#### B. NATIONAL IMPLICATIONS ARISING FROM THE INTERNATIONAL LEGAL FRAMEWORK

The maritime security framework in place at the international level evolved as a response to global security threats. This response and equally the maritime framework itself will have no tangible effect if it is not implemented at the national level. National implementation is therefore a crucial aspect of strengthening international maritime security and accordingly activities on one level have major implications for the other. As such, the implementation of international security provisions can result in significant legal and institutional accommodations being made domestically. Widespread failure to make these accommodations and to implement international provisions could have a nugatory effect on the international framework. It is important to consider these legal and institutional implications associated with implementation before discussing actual implementation of substantive security provisions.

## 1. Legal and Institutional Implications

### (i) *Legislative Requirements*

Legislation is the genesis of implementation as it is from legislation that all the necessary measures to be taken derive their legitimacy. Therefore, the drafting thereof must necessarily provide for not only the creation of offences and the penalties for committing them but also for institutional and systemic support mechanisms. As such, there are domestic legal implications arising from international requirements that States, *inter alia*, create offences and provide for their punishment, take measures to prevent the smuggling of contraband across their national borders, take appropriate interdiction and enforcement measures against offenders, and verify compliance with relevant international instruments.

The drafting of legislation for even one area of maritime security requires, on the part of the relevant government agency, a review of national legislation followed by an assessment of the extent to which the international requirements are already met and the level of work required to effect full compliance. Accordingly, the draughtsman would have to decide whether a whole new body of legislation may be necessary or whether amendments to existing laws would suffice. The draughtsman must also be furnished with substantive details as to designated or established institutions, their mandate and functions, authorised officials, their competence to perform special functions, and licensing requirements and procedures. Furthermore, provisions must be compatible with constitutional requirements and reconciliation with other laws and by-laws should be assured.

### (ii) *Institutional requirements*

From an institutional perspective many ancillary measures must be in place for the achievement of full compliance with international requirements. Firstly, a Ministry or government agency must be designated to assume executive responsibility for the particular issue and such an agency should be equipped with the human and material resources to handle such administration. In addition, the overlapping nature of maritime security issues is such that it may be decided that an inter-agency committee or body should be formed to play a designated role in the coordination of security matters and/ or matters relevant to implementation. In another

respect a National Authority (NA) would have to be established or designated. An NA can also take the form of an inter-agency committee or office set up to manage and oversee the performance of national duties and obligations pursuant to the relevant international convention or any form that suits the circumstances and systemic structure of the State. However, whether a NA is designated, established, inter-agency in composition or a single office it also would require human resources with the requisite knowledge and training as well as material resources including computer databases and specialised technology. Government agencies with more of a technical stake in maritime security such as the coast guard, the military and the police force, by virtue of having heightened roles and responsibilities in a new system of maritime security, will require upgrading in respect of specialised training, equipment and perhaps, in some States, numbers to deal with any of the given maritime threats.

(iii) *Systemic requirements*

Measures regarding licensing of otherwise contraband material such as firearms or certain imported chemicals necessitate the elaboration of licensing procedures regarding the contraband or type of contraband in question but, depending on the institutional structure of the State, these may fall under the purview of different agencies. Additionally, where there are reporting requirements, mechanisms and systems for efficient information gathering and collation should be in place. In cases where inspection of industrial sites by NAs are required, States should have in place human and material resources to carry out inspections on a meaningful scale and to readily store and disseminate gathered information. Protocols and procedures must be installed for the purpose of reacting to or diffusing threatening or potentially threatening situations especially in the handling of BCN materials.

2. Resource Implications

(i) *Material and Human Resource Requirements*

Material and human resources are central to the functioning of a national maritime security regime as institutions and systems must be run and managed by people and equipment and

facilities are needed to carry out its objectives. In the context of today's maritime security threats, very highly technological equipment is required for law enforcement and other agencies to keep up or stay ahead of criminals who generally have the financial resources to continuously update and improve on their methods of evasion. Technical and administrative agencies, including law enforcement agencies, health and first response services, should have at their disposal, *inter alia*, an adequate fleet of ships for patrolling territorial and surrounding waters, machines for detecting BCN and highly explosive materials at ports and at sea, protective gear and equipment for employees and staff required to expose themselves to potentially dangerous substances, an adequate fleet of vehicles for law enforcement and first response services in the event of a crisis, teaching and educational equipment for continuous training and drilling of employees in key institutions, computer databases for the practical storage and easy dissemination of data and information, and state of the art communications systems at sea and on land.

In this regard, a high quantity and quality of human resources are needed. The systems and issues that require monitoring are abundant, overlapping and complex as well as highly sensitive and therefore many hands are needed to manage them in accordance with high levels of education, training and integrity. Therefore, to operate an effective maritime security regime on a national level highly trained, incorruptible employees and staff are essential.

(ii) *Financial Resources*

At the root of all the institutional, systemic, human and material resource implications is the matter of financial resources, for without funding to pay for all the requirements they cannot be fulfilled. States, therefore, need access to adequate funding to meet their implementation obligations under the international maritime security framework. As a result, differences in the financial resource bases of States dramatically affect their implementation capabilities at the national level which in turn has implications on the international plane. As it stands, developing countries, the financial resource bases of which are limited and in some cases dismal compared with those of developed countries, face a number of challenges in relation to effective implementation of the international maritime security framework. Small Island Developing

States (SIDS), such as the Caribbean States of CARICOM are especially challenged in this regard because they are limited in respect of not only their financial resource base but also their human and natural resource bases.

At the international level, where the battle against maritime security threats is initiated, a legal framework has been developed in response to the major threats to maritime security, sealing legal and systemic lacunae that stymie effective apprehension and prosecution of suspected perpetrators. The key features of this framework include the expansion of grounds for exercising jurisdiction to allow States with an interest in prosecuting suspected perpetrators of these crimes greater reach beyond their national territories, the obligation to prosecute suspected perpetrators in their territories or alternatively extradite them to States that will do so, and the imposition of certain domestic border control measures to be taken by States. To ensure that this framework applies to every corner of the globe thereby eliminating safe havens for perpetrators of the relevant maritime crimes, it is necessary to achieve universal participation in the applicable international instruments. To this end, States Parties to the various instruments and especially international institutions which specialise in attaining security objectives and which are charged with ensuring the implementation of maritime security instruments, work towards bringing about the participation of non-States Parties in the relevant instruments.

Therefore, the said international maritime security framework, with universal participation, is poised to eliminate safe havens and significantly increase apprehension and prosecution of suspected offenders. However, without universal domestic implementation, the international legal framework cannot be translated into action and may be rendered nugatory in the context of closing jurisdictional and systemic lacunae and in effectively combating maritime threats. Domestic implementation of maritime instruments, nonetheless, has internal systemic and resource ramifications which demand a great deal of financial, human and material input as well as sufficient capacity to expand and increase domestic institutions. Therefore, the wealth and capacity of States directly affect the potency of an international framework for combating international maritime threats.

From this perspective, Part II of this thesis will examine the ramifications for SIDS, namely CARICOM States which are characteristically developing countries with limited capacity and resources. This part will further explore the opportunities to circumvent capacity and resource deficiencies particularly through regional cooperation mechanisms and international collaborations.

## **II. ENHANCING CAPACITY FOR EFFECTIVE IMPLEMENTATION OF MARITIME SECURITY GOALS**

The international maritime security framework must be implemented nationally in order for its provisions to have any practical effect. Accommodations must therefore be made at the domestic level both legally and infrastructurally in order to properly implement international security instruments. For the States of the Caribbean Community (CARICOM), these necessary accommodations are major challenges in and of themselves in view of their status as Small Island Developing States (hereafter referred to as 'SIDS'). The peculiar vulnerabilities of SIDS impose significant limitations on their capacity to make structural and other adjustments necessary for effectively weaving the international security framework into the domestic social fabric. Accordingly, the implementation process for the States of CARICOM is one involving capacity building and finding ways of overcoming capacity and resource limitations and, from this perspective, the issue of sustainable development is central to the issue of maritime security in CARICOM. Ironically, although the international community recognises sustainable development as crucial to the survival of SIDS and has pledged to work towards that end in a number of cross-sectoral areas the issue of maritime security does not place high in the sustainable development agenda. Still it is important to understand the predicament of SIDS and the ways in which the sustainable development agenda impact upon the maritime security agenda.

## A. IMPLEMENTATION OF THE INTERNATIONAL FRAMEWORK IN CARICOM STATES

### 1. The Caribbean and CARICOM States

#### (i) *Background and Context*

Geographically, the Caribbean comprises the countries in and bordering the Caribbean Basin which stretches from the tip of Florida westward along the Gulf Coast, south along the Mexican coast through Central America and across the Northern coast of South America. The Caribbean therefore consists of island States and countries situated in Central and South America while the Basin itself is located between South and North America. Politically, the Caribbean is also part of the larger regional grouping known as Latin America and the Caribbean which includes the South American continent. Within Latin America and the Caribbean other regional groupings exist usually subject to agreement for a wide range of political, economic and/ or social reasons.<sup>111</sup> In the Caribbean, the Caribbean Community also known as CARICOM is one such grouping consisting at present of fifteen countries, mostly English-speaking and mostly island States. It was essentially a regional trade agreement creating a common market with a common external tariff (CET) but has been deepened in the last ten or so years with a view to forming a single market and economy.<sup>112</sup>

The current Members of CARICOM are Antigua and Barbuda, The Bahamas,<sup>113</sup> Barbados, Belize, Dominica, Grenada, Guyana, Haiti,<sup>114</sup> Jamaica, Montserrat,<sup>115</sup> St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Suriname, and Trinidad and Tobago. Each of these States typifies a small State by every known definition.<sup>116</sup> The populations of these countries range

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<sup>111</sup> Examples of these are the Caribbean Community (CARICOM), the Organisation of Eastern Caribbean States (OECS), the Association of Caribbean States (ACS), MERCOSUR

<sup>112</sup> See *infra* section II.B.1(ii) – *Regional Integration*

<sup>113</sup> The Bahamas although a member of the community opted not to participate in the common market under the 1973 Treaty and remains outside of the single market arrangement under the Revised Treaty of Chaguaramas

<sup>114</sup> Haiti, though a member of the Community is not at present party to the single market

<sup>115</sup> Montserrat is the only Member that is not an independent State and which remains a British subject

<sup>116</sup> “The size of a country can be measured in terms of its population, its land area or its gross national product. Some studies prefer to use population as an index of size, while others take a composite index of the three variables.” -See *Small Island Developing States and their Vulnerabilities* (September, 1995) by Lino Briguglio, Director, Island and Small States Institute, University of Malta, referencing Downes (1988) and Jalan (1982), and Briguglio (1993, Appendix 1). See <http://www.geic.or.jp/islands/docs/lino.html> for publication.

generally from over 47,000<sup>117</sup> to just under 2.7 million<sup>118</sup> with Jamaica, Trinidad and Haiti being the only of these to exceed 1 million and Haiti standing out at a population of over 7 million.<sup>119</sup> The Gross Domestic Product of these countries ranged in 2004 (in USD millions) from approximately 293 to 2886 to 9086 to 12,579.<sup>120</sup> The physical sizes of the island States vary from a minimum 102 square km to 10, 991 square km while the mainland states occupy 22,966 sq km, 27,750 sq km, 163, 820 sq km and 216,970 sq km of land.<sup>121</sup>

Despite generally stable social and political systems<sup>122</sup> and, for the most part, relatively well educated populations, these Caribbean territories are infrastructurally weak and exceptionally vulnerable economically, as they depend heavily on imported goods and commodities with an insufficient infrastructural and resource base to satisfy their own food and energy requirements. Their major revenue earning industries, tourism and agriculture, are also high risk and operate, in the global context, at a relatively low level. There is some industrialisation in mostly base commodities, though on a very small scale, with Trinidad and Jamaica having the largest industrial base via their respective oil and bauxite industries. Jamaica is the third largest exporter of bauxite in the world<sup>123</sup> but generally industry in CARICOM as a foreign exchange earner operates at a very small and uncompetitive scale in the global arena. As such, the export base of these nations is not highly diversified which, economically, is another high risk factor. Consequently, globalisation has taken a heavy toll on CARICOM States and forced many of them to substitute alternative industries such as services and tourism for industries that were traditionally their chief or major revenue earners.<sup>124</sup> Therefore, as a result of limited resources and limited capacity, foreign investment has become a key source of revenue and a number of

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<sup>117</sup> Saint Kitts and Nevis: population 47,318 (2004) -

[http://caricom.org/jsp/community/st\\_kitts\\_nevis.jsp?menu=community](http://caricom.org/jsp/community/st_kitts_nevis.jsp?menu=community)

<sup>118</sup> Jamaica: population 2,644,600 in 2004 - <http://caricom.org/jsp/community/jamaica.jsp?menu=community>

<sup>119</sup> Haiti: population 7,482,000 (1997) - <http://caricom.org/jsp/community/haiti.jsp?menu=community>

<sup>120</sup> Dominica, Barbados, Jamaica and Trinidad and Tobago respectively based on 2004 statistics – [www.caricom.org](http://www.caricom.org)

<sup>121</sup> *Ibid.*

<sup>122</sup> The Commonwealth Caribbean States are democratic countries for the most part built on the British Westminster style of Government. There have been incidents of unrest over time – coup in Grenada in 1979 and attempted coup in 1983 leading to the United States military intervention in Grenada; attempted coup in Trinidad in 1991; Some political upheaval in Jamaica in the late 1970's

<sup>123</sup> See [www.caricom.org](http://www.caricom.org)

<sup>124</sup> Sugar in the 1980s and, more recently in the late 1990s, bananas. For details on the Banana dispute see the World Trade Organisation Case, Dispute DS27 *Regime for the Importation, Sale and Distribution of Bananas*. This case may be found at [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds27\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds27_e.htm)

islands in this context have turned to the establishment of offshore banking sectors.<sup>125</sup> However, the resource and capacity limitations of CARICOM States continue to impact their development and by extension their ability to accomplish, *inter alia*, maritime security obligations.

(ii) *Resource and Capacity Limitations*

The economic and physical reality of CARICOM States is typical of Small Island Developing States (SIDS) across the globe. In a maritime security context, their resource and capacity limitations stymie their ability to fully and swiftly satisfy the legislative, institutional and systemic requirements<sup>126</sup> for effective implementation of the international security framework.

As SIDS with small populations, human resources are limited and therefore the expansion of personnel in key institutions such as law enforcement, border control and emergency services is a significant challenge, much less finding persons with the requisite training and expertise in adequate numbers. Furthermore, limited finances and expertise, particularly in novel areas such as BCN, make it difficult to provide all the necessary training on a regular long term basis. Human resource deficiencies such as these also present challenges for designated institutions or national authorities required to carry out on-site inspections. Such deficiencies also affect the timely drafting of security legislation as understaffed Government legal offices may be unable to dedicate the time to quickly carry out the necessary assessments and draft enactments and subsidiary legislation to implement the entire international framework. The ability of legal drafters to proceed with the drafting of legislation is also dependent at certain stages on instruction from other agencies which suffer similar setbacks due to insufficient staff, limited institutional capacity and financial shortcomings.

The lack of material resources also affects the ability of CARICOM States to achieve effective implementation. An inadequate number of essential materials such as boats and vehicles to pursue suspects and react quickly to emergencies in disaster situations can be counterproductive to the goals of the security framework. Additionally, it can have a nugatory effect on training of

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<sup>125</sup> See *supra* I.A.1(ii)(b) – *Corporate Devices* and *infra* section II.A.3(ii) – *Conflicts of Interest Arising from Security and Sustainable Development Agendas*

<sup>126</sup> See *supra* section I.B – *National Implications Arising from the International Legal Framework*

law enforcement and military forces from the perspective that training may stand the risk of falling into desuetude without the necessary equipment to reinforce it and put lessons learned into practice. The achievement of certain security goals is also frustrated by a lack of detection equipment at ports of entry and on warships and State-owned vessels; protective equipment for emergency service personnel and other personnel exposed to, *inter alia*, BCN and their precursors; and computer and data-base software for storing and disseminating information and for accessing centralised information in relation to a multiplicity of areas including law enforcement and border control, storage and transfer of chemicals, and for verification and reporting purposes.

Institutional incapacity is also a very major obstacle to full and effective implementation of the international maritime security framework. Many of the institutions required to support a viable and functioning maritime security regime are insufficiently developed or ill-equipped or do not exist in the SIDS of CARICOM. Limited capacity therefore makes it difficult to create and develop these institutions as the requisite infrastructure and resources are simply not present or readily available. Therefore, in the interim, institutions already unable to fully cope are designated with additional responsibilities thereby adding to the burden placed on the already weak infrastructure.

As developing States, there is also a dearth of financial resources which are essential and at the heart of removing all the resource and capacity limitations experienced by CARICOM States. Resource and capacity building is an essential part of the implementation process for CARICOM States and appropriate financing must be secured in order to achieve this on a long-term sustainable basis.

Such, however, is the plight of SIDS which are uniquely vulnerable to certain risk factors beyond their control. The problem of resource and capacity deficiency affects SIDS in all fields and sectors and has presented a challenge taken up in the international arena to achieve their sustainable development.

## 2. SIDS and Sustainable Development

### (i) *The Special Vulnerabilities of SIDS*

This classification as SIDS highlights the special vulnerabilities faced by developing island states as a result of factors beyond their control, which typically include their small size, insularity and remoteness, disaster proneness, and environmental fragility.<sup>127</sup> Although they are afflicted by economic difficulties and confronted by development imperatives similar to those of developing countries in general, the difficulties that SIDS face in the pursuit of sustainable development are particularly severe and complex as a result of their peculiar vulnerabilities.<sup>128</sup> They not only impact on each other but they also have very far-reaching implications for the economic, social and environmental fabrics of SIDS.

#### a) Economic Vulnerabilities due to Small Size

The relatively small physical stature of SIDS creates significant economic disadvantages for them. SIDS are generally, because of their size, heavily dependent on foreign exchange earnings as a result of limited natural resource bases and low inter-industry linkages, resulting in high export content relative to GDP. Their smallness also tends to inhibit import substitution possibilities typically resulting in a protected economic environment with products of lower quality, high prices and a parallel market in foreign produced goods. Small domestic markets and consequent dependence upon exports is another precipitated disadvantage. The limited ability of small States to diversify their exports rendering them dependent on a narrow range of goods and services also increases exposure to economic risk and intensifies problems associated with dependence on international trade. SIDS also have very little control over the domestic pricing of their imported and exported products<sup>129</sup> to a significantly greater degree than other developing countries due to their small volume of trade relative to world markets in the same products. The small size of SIDS also limit their ability to exploit economies of scale mostly because of

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<sup>127</sup> See Briguglio, *Small Island Developing States and their Vulnerabilities* (September, 1995) *supra*. n 116

<sup>128</sup> See paragraph 3 of the Barbados Programme of Action (BPOA), *infra* n 134 and n 135

<sup>129</sup> *Op. cit.* n 127: "SIDS have negligible control on the prices of the products they export and import. All developing countries are to an extent price takers, but SIDS tend to be price takers to a much higher degree due to the relative very small volume of trade in relation to the world markets in products they import and export."

indivisibilities and limited scope for specialisation, resulting in high per unit costs of production, high costs of infrastructural construction and utilisation per capita, high per unit costs of training specialised man-power and a high degree of dependence on imported technologies since smallness also stymies the development of home-spun technology. Small size also presents limitations on domestic competition. Small economies do not generate a great deal of domestic competition as the small population size does not support a large number of businesses producing the same product, hence oligopolistic and monopolistic organisations tend to ensue.

SIDS also tend to encounter problems relating to public administration. In this context, small size provides a small human resource base from which experienced and efficient administrators are drawn and simultaneously reduces human resource competition which in one respect may compound the deficiency in experienced and efficient administrators. In any event, specialised training often has to be obtained overseas in large countries without certainty or guarantee that acquired skills, despite a need for them, can be utilised at home. Brain and skills drain therefore ensues as skilled professionals migrate to larger countries where they have opportunities to use their skills and quite often SIDS rely on larger countries, usually a former coloniser, for certain aspects of public administration. In addition, many government functions tend to be very expensive per capita when the population is small, due to the fact that certain expenses are not divisible in proportion to the number of users.<sup>130</sup>

#### b) Insularity and Remoteness

All islands are insular but not all islands are remotely situated. Nonetheless, both insularity and remoteness give rise to problems associated with transport and communication. Firstly, the per unit cost of transport in relation to exports tends to be relatively higher in SIDS than in other countries. The fact that they are separated from their trading partners by sea limits their transport options to shipment by sea or air which is far more expensive than transport by land. Additionally, small economies tend to require relatively small and fragmented cargoes, leading to high per unit costs. Simultaneously, the small size of SIDS often excluded them from the

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<sup>130</sup> For example, overseas diplomatic missions of small islands states are often undermanned, and many such states are represented by roving ambassadors – *Op. cit.* n 127

major sea and air transport routes, resulting in delays and constraints to the exploitation of advantages of modern and technologically advanced means of transport.

Another disadvantage is the uncertainties of supply that arise as a result of insularity and remoteness from the main commercial centres. This disadvantage tends to manifest as time delays and unreliability in transport services which creates uncertainties in the provision of industrial supplies.<sup>131</sup> Another problem is that when transport is not frequent and/or regular, enterprises in islands find it difficult to meet sudden changes in demand, unless they keep large stocks. This implies additional cost of production, associated with tied up capital, rent of warehousing and wages of storekeepers.

#### c) Proneness to Natural Disasters

Many SIDS experience natural disasters as a result of hurricanes, earthquakes, landslides and volcanic eruptions. The impact of a natural disaster on an island economy is generally relatively larger in terms of damage per unit of area and costs per capita, due to the small size of the country. Some of the effects of natural disasters on small economies include the devastation of the agricultural sector, the wiping out of entire village settlements, the disruption of a high proportion of communication services and injury or death of a relatively high percentage of inhabitants, therefore threatening in some instances the very survival of some SIDS.

#### d) Environmental Factors

National accounts statistics do not normally take into consideration environmental degradation and resource depletion and, therefore, GNP statistics may give a picture of growth and development, while in reality the country may be experiencing a process of long-term unsustainability and degradation. In the case of SIDS, environmental problems are likely to be particularly intense due to pressures arising from economic development and to the environmental characteristics of SIDS themselves.

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<sup>131</sup> These disadvantages are more intense for islands that are archipelagic and dispersed over a wide area – *op. cit.* n 127

Stress on the environment arising from the process of economic development in SIDS tends to be much higher than in other countries as a result of increased demand for residential housing and industrial production, intense use of the coastal zone for tourism and marine related activities, the generation of a relatively large amount of waste, and increased demand for natural resources, some of which are non-renewable. Consequently, fast depletion of agricultural land, beaches and coastlines, non-renewable natural resources, as well as, increased pollution are real problems facing SIDS with greater potential impact than in other developing countries due to their small size.<sup>132</sup>

Apart from the pressures of economic development, SIDS also face problems associated with their geographical and natural characteristics such as their tendency to have unique and very fragile ecosystems.<sup>133</sup> Consequently their ecosystems can become endangered very easily. The issue of global warming and sea level rise is also a major environmental threat. Many SIDS, especially the low-lying coral atoll ones, are faced with the prospect of proportionately large land losses while others face complete submersion as a result of sea level rise. Erosion of their individual coastlines, which in relation to the land-mass is relatively large, is also a major problem due to high exposure of the land-mass to sea-waves and winds.

#### e) Other characteristics of SIDS

Other important characteristics of SIDS include dependence on foreign sources of finance and demographic changes. Some SIDS have a very high degree of dependence on foreign sources of finance including remittances from emigrants and development assistance from donor countries and these inflows from abroad have enabled many SIDS to attain high standards of living and to offset trade deficits. Demographically, changes in SIDS can be very pronounced due to emigration, or in the case of archipelagos, emigration from one island to another caused by

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<sup>132</sup> Some SIDS have experienced depletion or near depletion of such natural resources. This happened for example in the case of Fiji (gold), Vanuatu (manganese), Haiti (bauxite), Nauru (phosphate) and Trinidad and Tobago (oil) – See *op. cit.* n 127

<sup>133</sup> The uniqueness, which is an outcome of the insularity of SIDS, renders such islands as important contributors to global diversity. The fragility is the result of the low level of resistance of SIDS to outside influences, endangering bird and other endemic species of flora and fauna –Briguglio, *op.cit.* n 127; Also see para 4 of the BPOA: “Small islands tend to have high degrees of endemism and levels of biodiversity, but the relatively small numbers of the various species impose high risks of extinction and create a need for protection”

attraction of urban centres in terms of jobs and education, sometimes giving rise to brain and skill drains and social upheavals.

Taking into full consideration all the vulnerabilities of SIDS, it is clear that action was necessary to offset the disadvantages that arise as a result of the unique characteristics of SIDS. The limited options of SIDS also present special challenges to the planning and implementation of sustainable development. Development is not a simple issue in this regard since their vulnerabilities impose constraints to economic and social development as well as expose the environment to depletion and degradation. Special action was required to mitigate constraints and to accomplish sustainable development. To this extent the international community took on the challenge of setting about the achievement of sustainable development in relation to SIDS.

(ii) *The Agenda for Sustainable Development*

In response to their problems, the international community including SIDS have pledged to work together to address constraints to sustainable development posed by their vulnerabilities. The Barbados Programme of Action and the Mauritius Strategy<sup>134</sup>, *inter alia*, are key tools toward achieving sustainable development for SIDS, as they prescribe courses of action at the national, regional and international levels for cooperation and assistance in a number of key cross-sectoral areas including capacity-building and human resource development; institutional development; cooperation in the transfer of environmentally sound technologies; trade and economic diversification; and finance.<sup>135</sup> The BPoA remains the blueprint addressing national and regional sustainable development<sup>136</sup> while the Mauritius Strategy provides the follow-up strategy for implementation of the BPoA.<sup>137</sup>

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<sup>134</sup> The *Barbados Programme of Action for the Sustainable Development of Small Island Developing States* was adopted at the Barbados global Conference *op.cit.* n 128 and the *Mauritius Strategy for the further Implementation of the Programme of Action for the Sustainable Development of Small Island Developing States* was agreed in 2005

<sup>135</sup> See the *Barbados Programme of Action*, Report of the Global Conference on the Sustainable Development of Small Island Developing States, Chap. I, Resolution I, Annex II, Preamble, paragraph 17

<sup>136</sup> See para 1 Mauritius Strategy, *op.cit.* n 134

<sup>137</sup> Along with the Barbados Programme of Action, the Rio Principles, the full implementation of Agenda 21, the Johannesburg Plan of Implementation and the outcomes of other relevant major United Nations conferences and

The decided approach to sustainable development is a holistic and integrated one taking account of and incorporating the three pillars of sustainable development – economic, social and environmental aspects of development – setting out basic principles and specific actions to be taken at the national, regional and international levels in respect of identified priority areas to support sustainable development in SIDS.<sup>138</sup> Financial and technical cooperation and assistance is also a recognised key component in achieving sustainable development in SIDS as a means of circumventing the peculiar constraints to implementation that SIDS experience.<sup>139</sup> Priority areas to be addressed as identified in the BPoA include climate change and sea level rise; natural and environmental disasters; waste management; coastal and marine, fresh water, land, energy, tourism and biodiversity resources; transportation and communication; science and technology; graduation from LDC status; globalisation and trade liberalisation; sustainable capacity development and education for sustainable development; national and regional enabling environments; health; knowledge management and information for decision-making; culture; and implementation.<sup>140</sup>

The Plan and the Strategy, however, have suffered some setbacks. Even in the text of the Mauritius Strategy it is acknowledged<sup>141</sup> that there had been an overall decline in official development assistance (ODA) since 1994. The Mauritius Strategy also notes the observation of an increase in “*ad hoc* stand alone projects” rather than a “programmed or strategic approach.”<sup>142</sup> Caribbean governments have also lamented the “unsatisfactory and uneven progress made by the international community ... in implementing global commitments in the economic and social fields.”<sup>143</sup> Other setbacks that have been cited in relation to the implementation of the Mauritius Strategy include lack of stakeholder support at the regional and international level for implementation of the priorities in the Strategy; lack of the necessary institutional and planning capacity within countries; lack of political will and commitment with insufficient budgetary

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summits, including the Monterrey Consensus, all contribute to the sustainable development of small island developing States – See para 1 *ibid.*

<sup>138</sup> *Ibid.*

<sup>139</sup> See para 11 of the BPoA

<sup>140</sup> See the BPoA, *op.cit.* n 134

<sup>141</sup> See paragraph 3

<sup>142</sup> *Ibid.*

<sup>143</sup> See the Declaration of Bridgetown issued on the occasion of the Second Summit of Heads of State and Government of the Caribbean Community (CARICOM) and the Republic of Cuba, 8 December 2005, Bridgetown, Barbados. A copy is available at [http://www.caricom.org/jsp/pressreleases/pres215\\_05.jsp](http://www.caricom.org/jsp/pressreleases/pres215_05.jsp)

support in key areas; limited participation of key stakeholders in implementation mechanisms at the national level; the need for improvement to aid coordination mechanisms and the effectiveness and efficiency of aid delivery; the need for strengthened coordination, monitoring and evaluation; and the fact of detailed progress reports overly burdening already stretched public services.<sup>144</sup>

The BPoA and the Mauritius Strategy along with other related instruments in support of sustainable development in SIDS<sup>145</sup> have set out an elaborate framework not only for the mitigation of weaknesses and vulnerabilities but also for the implementation of the framework fundamentally at the national level, and also regionally, by SIDS themselves but with technical and financial support from the international community. The relevant instruments have prioritised a number of areas for focus on development but the problems facing SIDS in respect of institutional and technical incapacity and human and financial resource deficiency affect all areas and sectors including security. Curiously, the issue of security does not appear to place very highly on the agenda for sustainable development.

### 3. Security and Sustainable Development

#### (i) *Security on the Sustainable Development Agenda*

In the quest for sustainable development a great deal of emphasis is placed on climate change, protection of marine resources, biodiversity, and land-based and other sources of marine pollution. In the cadre of sustainable development marine security is vital but the focus is generally placed on environmental preservation and consequently encompasses maritime safety in its traditional sense rather than maritime security.<sup>146</sup> This is ironic considering that maritime

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<sup>144</sup> See United Nations Economic and Social Council for Asia and the Pacific (ESCAP), Doc. E/ESCAP/SB/PIDC (9)/3, 3 March 2006 entitled, *Follow-up to the Mauritius Strategy for the further Implementation of the Programme of Action for the Sustainable Development of Small Island Developing States at the Regional and Sub-regional Levels*, Section II, page 6. This document applied specifically to the SIDS in the Pacific Region but is comparable to the circumstances of the SIDS in the Caribbean Region.

<sup>145</sup> See *op.cit.* n137

<sup>146</sup> The IMO has interpreted its mandate to address maritime safety as inclusive of maritime security *supra* n 110 but this is not the meaning used here; also see section I.A.2(ii) – *The Role of International Institutions*

security is inextricably linked to at least two of the three pillars of sustainable development.<sup>147</sup> Narcotics and human trafficking, piracy and terrorism can have a direct and equally devastating impact on the social and economic fabric of small island societies. Low crime rates, peaceful sea faring, a climate free of fear of terrorism, social stability, and minimal institutional corruption - all of which are compromised by the major maritime security threats – are central to, *inter alia*, a thriving tourism industry, attracting foreign investment, and a robust fishing industry. Accordingly, underdevelopment in sectors and areas relating to security can also have devastating effects on the economies of SIDS. Furthermore, the challenges confronted by all SIDS and that affect identified priority area also affect and, in fact, impede full and effective implementation of international maritime security agreements in SIDS.

That having been said, the Mauritius Strategy does acknowledge the issue of security as a multi-dimensional concept including small arms and narcotic trafficking, environmental degradation, food and water security and the impact of terrorism on vital economic sectors, and recognises its relevance and place in the agenda for sustainable development.<sup>148</sup> However, the Strategy also reflects the separate umbrella under which these aspects of security are tackled by stating:

Implementation of the sustainable development agenda for small island developing States must proceed notwithstanding the current emphasis on security. In this regard, the international community acknowledges the increased financial and administrative obligation at the national level that this places on all small island developing States as part of the global fight against terrorism and reaffirms the importance of international cooperation and technical and financial support to small island developing States where necessary.<sup>149</sup>

The Mauritius Strategy also acknowledges the issue of security, albeit in a very minor way, within the context of the priority area of implementation and under the umbrella of

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<sup>147</sup> See *supra* section II.A.2.(ii) – *The Agenda for Sustainable Development*; also see paragraph 1 of the Mauritius Strategy

<sup>148</sup> Paragraph 8

<sup>149</sup> *Ibid.*

“transport and security”. In this regard, paragraph 78 *bis* provides that SIDS, with the necessary support of the international community,<sup>150</sup> will take action in, *inter alia*:

to promote access to appropriate technology and increased technical and other assistance to further develop and manage transport infrastructure in small island developing States to meet international requirements, including those relating to security, as well as to minimize environmental impacts.<sup>151</sup>

Accordingly, security matters do not receive comparable attention on the Sustainable Development agenda for SIDS. Rather, security is addressed separately in the international arena in its own right and the issues of capacity building and resource enhancement are addressed within this context instead of the other way around. Needless to say, the approach here is neither holistic nor integrated.<sup>152</sup>

Notwithstanding this, the key to SIDS implementation of international maritime security instruments lies in the BPoA and the follow-up strategy. Given that the challenges to maritime security implementation are development based the approach outlined by the BPoA and the Strategy are necessarily applicable to maritime security implementation.

However, another aspect of development that impedes effective combat of international security threats and which perpetuates gaps in the maritime security framework is the friction that can occur between interests in different areas of benefit to States. This occurs as a natural part of international political life in relation to all States, developed and developing. In the context of SIDS and sustainable development the quest for economic growth has provided a few competing interests in relation to the quest for maritime security.

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<sup>150</sup> ‘Necessary support’ includes support through the facilitation and improvement of access to existing resources and, where appropriate, through allocation of dedicated financial resources – See para 78 *bis*

<sup>151</sup> See para 78 *bis* (j)

<sup>152</sup> See *infra* section II.B.3 – *Extra-Regional Action Within the CARICOM Region*

(ii) *Conflicts of Interest arising from Security and Sustainable Development Agendas*

As previously indicated, the assurance of maritime security is essential to economic stability and consequent growth,<sup>153</sup> however, other more immediately gratifying sources of revenue may reduce any rush to eliminate all the potential maritime threats. Due to the economic vulnerabilities that SIDS undergo<sup>154</sup> many SIDS, particularly in the Caribbean region and in CARICOM have turned to offshore business services which permit the incorporation of International Business Corporations (IBCs). IBCs are too often used as corporate devices<sup>155</sup> in conjunction with others<sup>156</sup> to cloak the identities of transnational criminals using ships and vessels across a number of different territories to peddle their illicit fare. Furthermore, some Registry countries, a number of which are SIDS, advertise anonymity, the use of bearer shares and other typical cloaking devices as an incentive to attract ship owners to register under their nationality. In non-registry countries, the problem arises where there are few conditions attached to the incorporation of IBCs and little regulation on their business activities thereafter. Therefore an IBC may, on account of its legal personality arising out of its incorporation in a non-registry State, incorporate another company in its name in a registry State and subsequently register a ship under the name of the subsidiary company. With the help of other corporate devices, the true beneficial owners of such a vessel could become virtually untraceable.

This therefore calls for tighter controls and regulations on IBCs and certain aspects of the offshore business sector. However, this sector is so lucrative to States with vulnerable economies that many of them would be very reluctant to remove or minimise the very features that attract so many of them in the first place. Offshore financial sectors and IBCs are by no means illegitimate or illegal but their current practices allow them to be easily used as vectors for illicit activity. As such, the problem necessitates discussion and analysis on the part of affected SIDS as to how a balance may be struck between the immediate economic benefit derived from this particular

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<sup>153</sup> See *supra* section II.A.3 (i) – *Security on the Sustainable Development Agenda*

<sup>154</sup> See *supra* II.A.1.(ii) – *Resource and Capacity Limitations*

<sup>155</sup> See *supra* I.A.1.(ii)(b) – *Corporate Devices*

<sup>156</sup> *Ibid.*

revenue earner and mitigating the negative security and possible economic consequences it may bring about in the long term.

Nonetheless, this issue of international business facilities versus maritime security assurance is only one manifestation of a larger issue. This is not the first and only instance where economic factors rival security aspirations although it may be unique in that the economic benefit accrues to the SIDS. Globalisation and trade liberalisation which have been touted as ultimately economically beneficial to all States, a principle which is adhered to in the context of the Mauritius Strategy,<sup>157</sup> has placed SIDS in a counter-productive position where the attainment of maritime security goals are concerned. The loss of agricultural industries such as bananas in the Eastern Caribbean<sup>158</sup> and other crops in countries such as Colombia opens the door for farmers, and in some cases, fisherfolk who can no longer eke a living from their traditional trade to turn to more non-traditional and in fact illicit farming activities to support themselves and their families. While the Mauritius Strategy addresses as an area of priority the development of agriculture and fisheries,<sup>159</sup> the setbacks to the BPoA and the Strategy means that these areas are not necessarily addressed with sufficient alacrity on the ground. There is provision however in the context of security for addressing rural development and viable alternative farming practices.<sup>160</sup>

Nonetheless, these highlight the interconnectedness of issues concerning sustainable development and the way in which maritime security in relation to SIDS is directly and indirectly affected. Maritime security in relation to SIDS and ergo in relation to the States of CARICOM is not simply a matter of implementing legislation and putting institutions in place pursuant to international legal requirements. Maritime security is necessarily, as a result of the peculiar features and vulnerabilities of SIDS, a matter of creating institutional capacity and finding ways and means of strengthening and enhancing resource bases whether through external cooperation and assistance or internal re-evaluation, in order to implement legislation and establish institutions. Cooperation and assistance, as recognised by the BPoA and the Mauritius

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<sup>157</sup> See Part XIII of the Mauritius Strategy

<sup>158</sup> For details on the Banana dispute see the World Trade Organisation Case, Dispute DS27 *Regime for the Importation, Sale and Distribution of Bananas*. This case may be found at [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds27\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds27_e.htm)

<sup>159</sup> See para 78*bis* (g) and (h), and para 37 of the Mauritius Strategy

<sup>160</sup> See UN Narcotic trafficking Convention, art. 14(3)

Strategy, is essential to achieving this. SIDS are primarily responsible for their own implementation of the BPoA and Strategy but can also access technical and financial cooperation and assistance at the regional and international levels. From a regional perspective, more often than not neighbouring States share many of the same challenges and interests. Therefore, cooperation at the regional level can be sometimes more symbiotic in character than at the international level. As a consequence of these shared interests and concerns there tends to be some kind of regional machinery or mechanisms that allow neighbouring States to address their issues collectively as well as buffer their mutual interests. In the Caribbean Region and the wider region of the Americas there are several such mechanisms some of which are accessible to CARICOM States in addition to CARICOM itself. As the BPoA and Strategy recognise the value of regional strategies and as the regional machinery in the Caribbean and the Americas is quite active, it is important to examine how this type of machinery may be utilised as a vehicle to achieve effective implementation of maritime security goals.

#### B. REGIONAL MACHINERY AS A BRIDGE FOR IMPLEMENTATION LACUNAE

CARICOM States face a number of limitations as SIDS which must be overcome in order to implement the international maritime security framework. Accordingly, cooperation with and assistance from external entities has come to play a significant role in maritime security implementation in CARICOM. In this regard, regional collaboration has played a major role not only in implementation but in the sustainable development of CARICOM States. CARICOM, itself, formed as part of an integration process, was a means of increasing economic and political viability in the global arena and has deepened tremendously since its inception, enabling the pooling of resources in an increasing number of areas. The Organisation of American States (hereafter 'the OAS'), of which CARICOM States are members, is another forum for regional cooperation in a broad range of areas but its level of cooperation is not as deep as that of CARICOM. The Organisation of Eastern Caribbean States (hereafter 'the OECS'), a much smaller collaborative effort than the OAS and CARICOM but on the brink of being the deepest is also an example of regional cooperation. All these regional mechanisms, therefore, provide opportunities for CARICOM States, through cooperation and assistance, to mitigate and perhaps

even overcome some of their capacity and resource limitations. In utilising the different regional mechanisms available to meet their various security-related requirements, CARICOM States may be able to address a broader range of security shortcomings simultaneously. However, before discussing ways in which regional organisations contribute to effective maritime security implementation, it is useful to look at the types of relevant regional processes that exist in the Americas and examine the way in which cooperation is effected through them.

### 1. Regional Processes

States in geographical proximity to one another tend to have overlapping political and economic interests, and cultural and social similarities often exist as well. Accordingly, some form of cooperation becomes inevitable whether it is in the context of economics and trade, foreign policy coordination, regional security or even social policy. The depth of cooperation is determined by the participating States and will ordinarily hinge on their particular needs and the level of cooperation that bestows optimal benefits to the individual States. In some cases, cooperation takes place to such a level that ordinary national barriers such as those imposed on trade and the movement of persons, goods and services, are removed thereby creating one economic space within the region. Cooperation to this depth becomes a process of integration. The most famous example of regional integration is the European Union which was the first and is the largest, most complex regional grouping in the world. The depth of European cooperation is such that it the EU itself is a supranational institution to which each individual Member State must give priority. The example of the EU also illustrates that the process of integration is mutable and usually the evolutionary result of some shallower initial form of cooperation.

In the Caribbean, there are regional organisations that exemplify both examples. CARICOM and the OECS are examples of integration processes, though to different degrees whereas the OAS, a broader regional organisation covering the region of the Americas, exemplifies regional cooperation rather than integration. In any event, these organisations with their varying depths of functionality can serve in different ways as vehicles for advancing maritime security implementation in CARICOM States.

(i) *Regional Cooperation*

(a) The OAS

*Objectives and Mandate*

The Organisation of American States (OAS) is an example of extensive regional cooperation,<sup>161</sup> comprising all the States of the Americas save Cuba.<sup>162</sup> The purpose of the OAS generally is to achieve an order of peace and justice in the Americas, to promote the solidarity of American States, to strengthen their collaboration, and to defend their sovereignty, their territorial integrity and their independence.<sup>163</sup> To this end, the work of the organisation is meant, *inter alia*, to strengthen the peace and security of the American continent; promote and consolidate representative democracy with due respect for the principle of non-intervention; prevent possible causes of difficulties and to ensure the pacific settlement of disputes that may arise among the Members; provide common action on the part of Member States in the event of aggression; seek the solution of political, juridical and economic problems that may arise among Member States; promote, by cooperative action, their economic, social and cultural development; eradicate extreme poverty, which constitutes an obstacle to the full democratic development of the peoples of the hemisphere; and achieve an effective limitation of conventional weapons that will make it possible to devote the largest amount of resources to the economic and social development of the member States.<sup>164</sup> In achieving these aims and objectives the work of the OAS should be guided by and give effect to principles of, *inter alia*, non-intervention and respect for State sovereignty, conformity with international law, non-aggression, equality of individual citizens and human rights, social justice and social security, and democracy.<sup>165</sup>

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<sup>161</sup> The Organisation of American States (OAS) was established by the Charter of the OAS which was signed in Bogotá, Colombia in 1948 and entered into force on December 13, 1951. All the independent Member States of CARICOM are members of the OAS. See [www.oas.org](http://www.oas.org)

<sup>162</sup> Cuba was excluded at the insistence of the United States which would not have participated if Cuba was permitted to join

<sup>163</sup> Article 1 of the OAS Charter

<sup>164</sup> Article 2 of Charter

<sup>165</sup> Article 3 of Charter

Therefore, the OAS mandate provides for the achievement and maintenance of the comprehensive security of the Americas.<sup>166</sup> The Charter and the configuration of the Organisation itself provide mechanisms for the military security of the region. Its organs provide a forum for political debates and discussions on various issues including diverging interests of Member States and these is also facility for the pacific settlement of disputes should a dispute eventually erupt. The OAS has also embarked on projects to eliminate poverty pursuant to its mandate and attempted to negotiate a hemispheric free trade agreement. Over the years the OAS has concluded several conventions and created a number of institutions including an inter-American Commission and Court on human rights accessible by individuals, conventions against terrorism and organised crime, and institutions such as CICTE and CICAD to promote and bring about the implementation of inter-American and international legal instruments on security.

### *The Role of the OAS in relation to Regional Security*

The Inter-American system has produced a plethora of conventions and sub-organisations, many of which were created by inter-American conventions to ensure the achievement of their objects and purposes.<sup>167</sup> As such, the area of security is no exception and is, in fact, an area that has received a great deal of attention in this regard. Conventions have been adopted in relation to the collective defence of the Region from armed attack most notably in the form of the Rio Treaty<sup>168</sup> and the Treaty of Tlatelolco.<sup>169</sup> Other conventions address security from the perspective of

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<sup>166</sup> United Nations General Assembly Resolution (UNGA) A/RES/42/94: *Comprehensive System of International Peace and Security*, 7 December 1987, preambular paragraph (pp) 10: "Emphasizing that, in accordance with the Charter, universal and comprehensive security requires joint efforts of all the participants in international relations, without exception, in the crucial, essential for international security and interrelated areas of disarmament, peaceful settlement of crises and conflicts, economic development and co-operation, preservation of the environment, and promotion and protection of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion,"

<sup>167</sup> *Supra* section I.A.2(ii) – *The Role of International Institutions*

<sup>168</sup> The Inter-American Treaty on Reciprocal Assistance 1947, see [www.oas.org/juridico/English/sigs/b-29.html](http://www.oas.org/juridico/English/sigs/b-29.html)

<sup>169</sup> Note that the treaty of Tlatelolco although negotiated within the Americas with exclusive coverage of the Americas is not strictly speaking a treaty of the OAS nor is OPANAL an OAS sub-organisation. This convention was a trailblazer in its time as it provided for the creation of the first nuclear-weapon free zone (NWFZ) after Antarctica. It remains very unique today in that it not only binds Member States of the region to prohibit and prevent testing, use, manufacture, production or acquisition or any form of possession of nuclear weapons in their territories but it also by way of its Additional Protocol II obliges the major nuclear-weapon powers to refrain from using or threatening to use nuclear weapons against the States Parties to the Treaty or from contributing to their violation of the Treaty. Additional Protocol II was ratified by China, France, the Russian Federation (then the USSR), the United Kingdom and the United States between 1969 and 1979. In addition, the Treaty creates a control and

criminal activity in the Region and cooperation among countries in the Region to curb and eliminate such criminal activities.

Therefore, many of the inter-American security provisions relate to threats to maritime security either directly or indirectly. Accordingly, conventions have been adopted in relation to terrorism; extradition; trafficking in minors; mutual legal assistance in criminal matters; corruption; and firearms.<sup>170</sup> As they deal with many of the same issues, several of the inter-American conventions mirror corresponding UN conventions<sup>171</sup> though not necessarily in every respect. On the other hand, some inter-American conventions are essentially multilateral versions of treaties that are traditionally concluded bilaterally.<sup>172</sup> As a result of these conventions, provision has been made at the international level for States Parties to assume prescriptive jurisdiction in relation to certain offences and to provide technical and mutual legal assistance to each other in the exercise of enforcement jurisdiction.<sup>173</sup>

The OAS is also mindful of the issues of capacity and resource limitations that pervade the Region's States, and consequently plays an active role in addressing the capacity and resource deficiencies faced by many of its Member States in relation to their implementation of security instruments and related programmes, particularly in the areas of drugs and terrorism. Through its specialised agencies, namely CICTE and CICAD, the OAS actively participates in projects and

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safeguard system. Under the safeguard system Member States are required to negotiate agreements with the IAEA for the application of their safeguards to their respective peaceful nuclear activities. The control system, which includes inspections by the IAEA, is aimed at verifying (a) that devices, services and facilities intended for peaceful uses of nuclear energy are not used in the testing or manufacture of nuclear weapons, (b) that none of the activities prohibited in Article I of this Treaty are carried out in the territory of the Contracting Parties with nuclear materials or weapons introduced from abroad, and (c) that explosions for peaceful purposes are compatible with Article 18 of this Treaty. The Treaty also establishes the inter-governmental Agency for the Prohibition of Nuclear Weapons in Latin America and the Caribbean (OPANAL) which oversees compliance with the Treaty and convokes meetings and consultations related to the established purposes, means and procedures of the Treaty. Member States are required to submit to OPANAL and to the IAEA, for their information, semi-annual reports stating that no prohibited activity has occurred in their respective territories.

<sup>170</sup> See list of Inter-American Conventions at [http://www.oas.org/DIL/treaties\\_subject.htm](http://www.oas.org/DIL/treaties_subject.htm)

<sup>171</sup> For example the Inter-American Convention against Corruption

<sup>172</sup> The Inter-American Convention on Mutual Legal Assistance in Criminal Matters, the Optional Protocol related to the Inter-American Convention on Mutual Legal Assistance in Criminal Matters, and the Inter-American Convention on Extradition

<sup>173</sup> Inter-American Convention Against the Illicit manufacturing of and Trafficking in Firearms, Ammunitions, Explosives and Other Related Materials, and Inter-American Convention on International Traffic in Minors; also see *infra* section II.B.2(i)(a) – *Mechanisms for Cooperation and Assistance*

collaborations geared at tackling security issues in Member States as well as development and capacity building issues.

The OAS and its institutions are therefore vehicles for its Members to achieve collective and individual objectives through cooperation, coordination and technical assistance. This cooperation runs fairly deep as the organisation is also concerned with citizens and the operation of governing systems on the national level, and since individuals may also appeal to the inter-American system from their national judicial systems for relief.<sup>174</sup> However, it represents by no means an integrative process nor does its mandate provide for any such process to take place. The regional integrative process is a much deeper form of cooperation which, as will be shown, has its place in achieving certain economic, social and political goals.

#### (ii) *Regional Integration*

Certain features which set the integration process apart from other regional cooperative arrangements include provision for the harmonisation of laws of Member States; a common or single economic space; harmonised social and economic policies; free movement of persons, services and capital; the right of establishment or any number of combinations of these. Embarking on such an integration process can allow for greater economic and international political acumen through the pooling of resources and the coordination of foreign policy; increased market size; and greater market diversification. The theme of resource pooling and coordination translates in the context of security to the establishment of common and shared institutions and mechanisms.

#### (a) CARICOM

#### *Objectives and Mandate*

CARICOM is an example of regional integration. The Caribbean Community (CARICOM) was established by the Treaty of Chaguaramas in Chaguaramas, Trinidad on July 4, 1973. The Treaty

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<sup>174</sup> See Inter-American Convention on Human Rights ("Pact of San Jose, Costa Rica"), Chapter VIII on the Inter-American Court on Human Rights; also see chapter VII on the Commission on Human Rights at <http://www.oas.org/juridico/english/treaties/b-32.html>

established the Community whereas the Annex to the Treaty created and governed the CARICOM Common Market. CARICOM was established as a Regional Trade Agreement (RTA) providing for coordination and cooperation in certain areas including foreign policy, tertiary education, regional banking and so forth. The original objectives of the Community were to achieve economic integration among the Member States, coordination of foreign policies, and functional cooperation in certain common services and activities as well as areas of social, cultural and technological development. Therefore, at its inception CARICOM was intended to be an integration process for the purposes of economic growth and development within Member States. The integration process at this stage of CARICOM's development was, however, a relatively shallow one<sup>175</sup> and the organisation faced a great deal of criticism with regard to its effectiveness and utility to Member States at the national level.<sup>176</sup>

Eventually, the Community moved towards deepening its level of cooperation through the adoption of the Revised Treaty of Chaguaramas<sup>177</sup> which provided a much more ambitious mandate to effectively transform the Common Market into a CARICOM Single Market and Economy (CSME). The Community's revised objectives, therefore, include the achievement of improved standards of living and work for its citizens; full employment of labour and other factors of production; accelerated, coordinated and sustained economic development and convergence; expansion of trade and economic relations with third states; enhanced levels of international competitiveness; organisation for increased production and productivity; the achievement of a greater measure of economic leverage and effectiveness of Member States in dealing with third states, groups of states and entities of any description; enhanced coordination of member states' foreign and economic policies; and enhanced functional cooperation.<sup>178</sup> For

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<sup>175</sup> Although there was provision for a common external tariff (CET), nationalistic barriers to establishment, movement of capital, services and persons remained in place

<sup>176</sup> See Kenneth Hall and Byron Blake, *The Caribbean Community: Administrative and Institutional Aspects* Journal of Common Market Studies 1977-78, Vol. 16, p 211 at pp221 and 222; See also Prof. P.K. Menon, *Regional Integration: A Case Study of the Caribbean Community [CARICOM]*, Korean Journal of Comparative Law, Vol. 24, December 1996 p 197 at pp249 and 250

<sup>177</sup> Protocol I amending the Treaty establishing the Caribbean Community; Protocol II on establishment and the movement of services and capital; Protocol III on industrial policy; Protocol IV regarding trade policy; Protocol V on agricultural policy; Protocol VI on transport policy; Protocol VII on disadvantaged countries regions and sectors; Protocol VIII on competition policy, consumer protection, dumping and subsidies; and Protocol IX on dispute settlement

<sup>178</sup> Article 6 of the Revised Treaty of Chaguaramas

the purpose of enhancing functional cooperation the Community is mandated to carry out more efficient operation of common services and activities for the benefit of its peoples; accelerated promotion of greater understanding among its peoples and the advancement of their social, cultural and technical development; and intensified activities in areas such as health, education, transportation and telecommunications.

CARICOM's revised mandate also bears more detailed and comprehensive provisions on policy, its harmonisation among Members, and its implementation at the national level for the purpose of creating a single economic market. Accordingly, it makes these provisions in the areas of trade policy, industry, services and freedom of movement of nationals, sectoral development, transport policy, competition policy and consumer protection, assistance to disadvantaged Members and sectors, and dispute settlement mechanisms. The institutions within the Organisation have also been modified to promote efficiency.

One of the most significant features of the Single Market and Economy is the removal of barriers to the movement of capital, goods and services, and the creation of a right of establishment. This level of integration, though not quite as deep,<sup>179</sup> is comparable to that of the European Union which evolved from a much shallower process to the *sui generis* institution that exists today. The significance of this level of integration for the SIDS of CARICOM is that, although together they are still 'small' by any definition<sup>180</sup> and they retain the status of 'developing', there is now the opportunity to present to the world as, *inter alia*, a larger political voice and a larger resource base for dealing with capacity and implementation issues. The CARICOM integration process therefore provides a forum for the shared obstacles to implementation of the international maritime framework to be collectively addressed and mitigated.

### *The Role of CARICOM in relation to Regional Security*

Although the Revised Treaty of Chaguaramas deepens the integration process to cover various aspects of social and cultural life in CARICOM countries, it does not specifically address

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<sup>179</sup> The EU has a Parliament and electoral system and issues directives and regulations some of which have direct effect upon individual citizens; See Paul Craig and Grainne De Burca, *EU Law Text Cases and Materials*, 3<sup>rd</sup> edition. See also the cases of Van Gend en Loos [1963] ECR 1, Costa v ENEL, [1964] ECR 585, and Van Duyn v Home Office [1974] ECR 337

<sup>180</sup> *Op. cit.* n 116

security or security related matters. There is no reference to or provision for a policy on regional security or a harmonised policy on international security. The only mention of security is in article 225 where it is indicated that nothing in the Revised Treaty prevents the making of national laws or policies in the interest of national security or pursuant to national obligations in relation to international peace and security. This exclusion of matters security-oriented changed however with the addition of security cooperation as the fourth pillar of the Community.<sup>181</sup> The issue of security has risen tremendously in priority as States continue to battle the illicit traffic in narcotics and arms through and into the Region as a result of organised crime. They have also become more aware and more conscious of the threat of terrorism and are cognisant of the social and economic ramifications security issues pose for the Region. Maritime security is of particular importance since, besides the air, the sea is a major vector for the entry of security threats into Caribbean societies and more problematic in terms of policing the shorelines.

Pursuant to a 2001 mandate from the CARICOM Heads of Government a task force was established to examine the crime and security situation in the Region and to make recommendations. Following the subsequent attacks of September 11, 2001 the scope of the task force's work necessarily expanded in respect of the original mandate from the Heads. The report of the task force,<sup>182</sup> delivered in 2002, covered a number of security threats, namely, illegal drugs and firearms, corruption, rising crime against persons and property, criminal deportees, growing lawlessness, poverty and inequity, and terrorism. One of over 100 recommendations made by the task force was that there should be developed a Regional Strategic Framework involving further scrutiny of all the task force recommendations and forming the basis of meetings between CARICOM and potential donors for the purpose of determining specific areas of collaboration and funding of the short and medium term priorities of the Framework. To this end, CARICOM in 2005 devised a Management Framework for Crime and Security encompassing a Council of Ministers for Security and Law Enforcement (CONSLE), a Security Policy Advisory Committee (SEPAC) and an Implementation Agency for Crime and Security (IMPACS). The role of the CONSLE is to oversee policy direction and to report to the Conference of Heads of Government of CARICOM to which the system is accountable. IMPACS, which reports directly to the

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<sup>181</sup> This occurred as a result of a decision of the Heads of Government in 2005

<sup>182</sup> See [http://www.caricom.org/jsp/community/regional\\_issues/crime\\_and\\_security\\_task\\_force\\_report\\_2002.pdf](http://www.caricom.org/jsp/community/regional_issues/crime_and_security_task_force_report_2002.pdf)

CONSLE, is the implementing centre of the Framework as it has primary responsibility for the implementation of the regional crime and security agenda.<sup>183</sup>

In respect of implementing the agenda, CARICOM has participated in collaborations with other States, as well as international and regional organisations for financial and technical assistance to develop projects in Member States on capacity building, drug abuse programmes, coast guard and law enforcement training and many other maritime security related matters. CARICOM also enters into such collaborations for the purpose of establishing or enhancing agencies or facilities within the Organisation. Furthermore, these agencies and facilities of CARICOM mandated to deal with particular maritime security matters very often are mandated to carry out security functions that serve all the Member States. The Joint regional Communications Centre (JRCC),<sup>184</sup> for example serves as an information and communications focal point in respect of, *inter alia*, border security and passenger information in relation to all the CARICOM States.

#### (b) The OECS

##### *Objectives and Mandate*

The Organisation of Eastern Caribbean States (OECS) comprises seven member states of the Eastern Caribbean region – Antigua and Barbuda, the Commonwealth of Dominica, Grenada, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, and Montserrat<sup>185</sup> – and two associate member states – Anguilla and the British Virgin Islands. A subset of the Member States of CARICOM, the islands of the Eastern Caribbean have a historically close relationship apart from shared language and culture. So close were their ties that there was once discussion of forming a political union.<sup>186</sup>

The OECS was formed in 1981 by the Treaty of Basseterre as a post-independence replacement for the pre-independence West Indies (Associated States) Council of Ministers (WISA) and the

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<sup>183</sup> The implementation of this mechanism is still underway

<sup>184</sup> See *infra* section II.B.2 (ii) (b)

<sup>185</sup> Montserrat is still a British dependency but is regarded and operates as a full member of the Organisation by virtue of Article 3 of the Treaty of Basseterre

<sup>186</sup> OECS Secretariat, July 1988: *Why a Political Union of OECS Countries? The Background and the Issues*

Eastern Caribbean Common Market (ECCM).<sup>187</sup> The objects and purposes of the OECS are essentially to bring about among its members cooperation, solidarity and unity in key areas of social, economic and political life including at both the regional and international levels. To this end the Treaty of Basseterre provides for coordination, harmonisation and joint policy-making in a non-exhaustive list of areas including foreign relations and overseas representation, external communications and transportation including civil aviation, economic integration, the judiciary, matters relating to the sea and its resources, and mutual defence and security.<sup>188</sup> Its common institutions include the Eastern Caribbean Central Bank (ECCB); the Eastern Caribbean (EC) dollar; the Eastern Caribbean Supreme Court; and the Eastern Caribbean Civil Aviation Directorate.

In the context of OECS integration the question of monetary policy, for instance, is settled and the OECS also maintains joint diplomatic representation in Brussels, Geneva and Ottawa. The OECS framework also includes a legal unit, which deals with, *inter alia*, questions of law reform and legislative harmonisation, coordination of judicial reform, trade negotiations, and the provision of routine legal services. In this regard, it provides support to OECS members, the Secretariat, and subsidiary institutions.<sup>189</sup>

However, despite the CSME process the OECS continues to deepen its own integration. The organisation is now poised to become an economic union comparable to the integration arrangements of the EU,<sup>190</sup> creating a single economic and financial space while the organisation itself features an Assembly comprising Members of Parliament of Member States and, in respect of certain issues, legislative powers and power to impose regulations with direct effect on Member States. The new OECS, unlike CARICOM, is expressly designed to be a supranational organisation but remaining true to the ultimate pursuits and objectives of the 1981 Treaty. The new OECS Treaty of Basse Terre is reportedly due to be signed on December 29, 2009 in Basse Terre, St. Kitts.<sup>191</sup>

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<sup>187</sup> See *ibid.*

<sup>188</sup> See article 3 of the Treaty of Basse Terre

<sup>189</sup> *Op. cit.* n 186 and [www.oecs.org](http://www.oecs.org)

<sup>190</sup> See <http://oecs.org/regional-integration/economic-union-series>

<sup>191</sup> See news article at <http://world-countries.net/archives/5752>: *Montserrat unable to sign OECS economic union treaty next week*

Prior to its move to create an economic union, the depth of OECS integration may have been said in some ways to be greater than that of CARICOM. The OECS model of integration had even been posited by some as one for CARICOM to follow<sup>192</sup> since, despite inefficiencies that characteristically plague systems in societies with limited capacity and resource bases, the OECS demonstrates a successful sharing of several institutions at the regional level that perform core services and functions at the domestic level. The OECS accomplishments in this respect bode well for the formation of an even deeper union and although the new Treaty has fewer express provisions regarding security as compared with the 1981 Treaty, the nature of the new organisation does not preclude and in fact facilitates the OECS in working towards maritime security goals.

### *The Role of the OECS in relation to Regional Security*

One of the institutions established by the Treaty of Basse Terre is the Defence and Security Committee. This committee is responsible to the Authority and comprises the Ministers of Defence of the individual Member States or those designated by their respective Heads of Government to sit on the Committee. Its role is to take appropriate action on any issue referred by the Authority and to make recommendations to the Authority where appropriate. It may also advise the authority on matters related to external defence and on arrangements for collective security.

Article 4 of the treaty expressly provides that the Defence and Security Committee is responsible for coordinating the efforts of member states in the area of collective defence and the preservation of peace and security against external aggression, and in respect of the development of close ties among member states in matters of external defence and security in exercise of the inherent right of individual or collective self-defence recognised by Article 51 of the UN Charter. Therefore, the Treaty of Basseterre contemplates security arrangements among Member states and the matter of collective self-defence permitted under Article 51 of the UN Charter.

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<sup>192</sup> See Christopher P. Malcolms, *Caribbean Integration Within the CARICOM Framework: The Socio-historical, Economic, and Political Dynamics of a Regional Response to a Global Phenomenon*, 2004 Law and Business Review of the Americas, Winter 2004 (10 Law & Bus. Rev. Am. 35)

Furthermore, the OECS countries and Barbados are parties to the Treaty establishing the Regional Security System (RSS), a security force comprising military and law enforcement officers from each of the Member States. The RSS has engaged in peace-keeping as well as disaster relief missions in the Region, and is mandated to ensure the collective security of its Member States.

Under the new Treaty of Basse Terre the Defence and Security Committee will cease to exist as will all the other committees established under the 1981 Treaty. Express provision regarding 'defence and security' is not present in the new Treaty, nor is 'defence and security' specified as one of the areas on which the relevant organs may legislate.<sup>193</sup> The RSS will be unaffected by the new Treaty as it is established by a separate agreement among the OECS States and Barbados and will therefore continue to carry out its mandate in the Region. However, it would seem that under the new Treaty the role of the Organisation in the area of security has not been developed at all and may even have downplayed.

## 2. Regional Action at the Domestic Level

As previously indicated, these regional organisations engage in security-related activities within the States of the regions or sub-regions they are mandated to cover. They most aptly do this via their institutions or via legal instruments with binding effect on signatory States. In this way they further the security agenda through cooperative and assistance lending mechanisms or through mechanisms based on collective contribution and resource pooling. Either way, all these regional initiatives provide the SIDS of CARICOM with various opportunities to mitigate their obstacles to implementation.

### (i) *Cooperation and Assistance*

The provision of cooperation and assistance to and among developing States is an important aspect of achieving domestic implementation of international security instruments. There are a number of regional agreements that expressly or impliedly call for such cooperation and

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<sup>193</sup> Information on this was new and extensive research had not been done on this issue; See <http://oecs.org/regional-integration/economic-union-series> for more information on the new draft treaty

assistance to take place and there are also certain key regional institutions that actively enable that cooperation to take place.

a) Mechanisms for Cooperation and Assistance

*The Inter-American Convention Against Terrorism*

The Inter-American Convention Against Terrorism was adopted at the second plenary session held on June 3, 2002 by resolution AG/RES. 1840 (XXXII-O/02). The objectives of the Convention are to prevent, punish, and eliminate terrorism to which end the States Parties are required to adopt the necessary domestic measures and to strengthen cooperation among them. The Convention also provides for States Parties to sign and ratify 10 of the 13 universal legal instruments on terrorism<sup>194</sup> which are expressly the source of “offences” to which the Convention refers. The necessary domestic measures to be taken include the institution of a legal and regulatory regime to prevent, combat, and eradicate the financing of terrorism while enabling effective international cooperation in this regard. However, this convention most notably provides for cooperation among States Parties on border controls to, *inter alia*, detect and prevent the international movement of terrorists and trafficking in arms or other materials intended to support terrorist activities,<sup>195</sup> and for general cooperation among law enforcement

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<sup>194</sup> Today these conventions are referred to collectively as the 13 conventions on terrorism but at the time of the adoption of the Inter-American Convention there were only 10. They are: (a) Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague on December 16, 1970; (b) Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on September 23, 1971; (c) Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, adopted by the General Assembly of the United Nations on December 14, 1973. (d) International Convention against the Taking of Hostages, adopted by the General Assembly of the United Nations on December 17, 1979; (e) Convention on the Physical Protection of Nuclear Material, signed at Vienna on March 3, 1980; (f) Protocol on the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on February 24, 1988; (g) Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, done at Rome on March 10, 1988; (h) Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, done at Rome on March 10, 1988; (i) International Convention for the Suppression of Terrorist Bombings, adopted by the General Assembly of the United Nations on December 15, 1997; (j) International Convention for the Suppression of the Financing of Terrorism, adopted by the General Assembly of the United Nations on December 9, 1999. Since the adoption of the Inter-American Convention the 2005 SUA Protocols and the 2005 International Convention for the Suppression of Acts of Nuclear Terrorism (nuclear Terrorism Convention) followed.

<sup>195</sup> Article 7

authorities.<sup>196</sup> This convention also stipulates the provision of mutual legal assistance among States Parties with respect to the prevention, investigation, and prosecution of the offences established in the said universal legal instruments,<sup>197</sup> as well as conditions for the transfer of persons in custody for purposes of identification, testimony, or otherwise providing assistance in obtaining evidence for the investigation or prosecution of offences established in the said instruments.<sup>198</sup> There is also provision for training and the promotion of technical cooperation at the national, bilateral, sub-regional and regional levels;<sup>199</sup> provision for cooperation through the OAS including through CICTE;<sup>200</sup> and consultations among States Parties with a view to achieving implementation of the Convention.<sup>201</sup>

Accordingly, this convention lays the foundation for States of the OAS to commit to participating in the international legal framework against terrorism and in doing so to cooperate with each other so as to overcome jurisdictional impediments to detecting terrorists and bringing them to justice. It further provides for cooperation to build capacity and to bring about the full implementation of the Convention.

### *The Inter-American Convention against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives and Other related Materials 1997*

This Convention predates the UN Convention on Transnational Organised Crime. Its purpose is to prevent, combat, and eradicate the illicit manufacturing of and trafficking in firearms, ammunition, explosives, and other related materials, and to promote and facilitate cooperation and exchange of information and experience among States Parties for this purpose. The Convention provides for the creation of offences in relation to the illicit manufacture and traffic in firearms. It also requires, without prejudice to other rules of jurisdiction utilised under domestic law, that States Parties take measures to assume jurisdiction, on the basis of territoriality and when an alleged offender is present in their territories. States may also take measures to assume jurisdiction on the basis of nationality of the alleged offender. The

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<sup>196</sup> Article 8

<sup>197</sup> Article 9

<sup>198</sup> Article 10

<sup>199</sup> Article 16

<sup>200</sup> Article 17

<sup>201</sup> Article 18

Convention further includes a ‘prosecute or extradite’ obligation upon Parties when an alleged offender is found to be present in their respective territories and like the inter-American Convention on Terrorism it contains cooperation and capacity building provisions, namely, in relation to exchange of information,<sup>202</sup> cooperation,<sup>203</sup> exchange of experience and training,<sup>204</sup> technical assistance,<sup>205</sup> mutual legal assistance,<sup>206</sup> extradition,<sup>207</sup> and the establishment and functions of a consultative Committee on implementation.<sup>208</sup> This Convention does not correspond to the relevant Protocol to the Convention on Transnational Organised Crime verbatim but it conveys essentially the same aims.

### *The Inter-American Convention on Mutual Legal Assistance in Criminal Matters*

This Convention provides for rendering of mutual assistance among States Parties in investigations, prosecutions, and proceedings that pertain to crimes over which the requesting state has jurisdiction at the time the assistance is requested. It provides for the establishment or designation of a central authority in each Member State as focal points for all matters relating to the Convention, in particular, issuing and receiving requests for assistance. The scope of assistance that may be rendered includes procedures relating to notification of rulings and judgments; taking of testimony or statements from persons; and summoning of witnesses and expert witnesses to provide testimony; searches or seizures; transfer of detained persons for the purpose of this convention. Other provisions relate to, *inter alia*, conditions for refusal to lend assistance; the procedure for requesting assistance; requests for search seizure, attachment and surrender of property; service of judicial decisions, judgments, and verdicts; testimony in both the requesting and the requested States; transfer of persons subject to criminal proceedings, transmittal of information and records; and limitations on the use of information and evidence.

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<sup>202</sup> Article XIII

<sup>203</sup> Article XIV

<sup>204</sup> Article XV

<sup>205</sup> Article XVI

<sup>206</sup> Article XVII

<sup>207</sup> Article XIX

<sup>208</sup> Article XX

Mutual Assistance Treaties are typically bilateral. However, the Inter-American system has with this treaty laid the foundation for a mutual assistance regime in the Americas. In this way, many of the transboundary hurdles that would present themselves in prosecuting maritime security related crimes may be more easily cleared as between any two countries in the inter-American system.

### *CICAD*

The Inter-American Drug Abuse Commission (CICAD) was established by the OAS General Assembly in 1986 as the policy forum of the Western Hemisphere on all aspects of the drug problem. The core mission of CICAD is to enhance the human and institutional capacities of its member states to reduce the production, trafficking and use of illegal drugs, and to address the health, social and criminal consequences of the illicit trade. CICAD aims, *inter alia*, to foster multilateral cooperation on drug issues in the Americas; execute action programs to strengthen the capacity of CICAD member states to prevent and treat licit and illicit drug abuse; combat production of illicit drugs and prevent traffickers from reaping profits there from; to promote drug-related research, information exchange, specialised training, and technical assistance; and to develop and recommend minimum standards for, *inter alia*, drug-related legislation, treatment, and drug-control measures. CICAD carries out regular multilateral evaluations of progress (MEM) by Member States in all aspects of the drug problem.

CICAD also promotes regional cooperation and coordination among OAS Member States through action programmes, carried out by its permanent Secretariat, to prevent and treat substance abuse; reduce the supply and availability of illicit drugs; strengthen national drug control institutions and machinery; improve firearms and money laundering control laws and practice; develop alternate sources of income for growers of coca, poppy, and marijuana; assist member governments in improving their data gathering and analysis on all aspects of the drug issue; and help member states and the hemisphere as a whole to measure their progress over time in addressing the drug problem.<sup>209</sup>

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<sup>209</sup> See <http://www.cicad.oas.org/EN/AboutCICAD.asp>

### *The Inter-American Committee Against Terrorism (CICTE)*

CICTE is responsible for the coordination of efforts to protect the Region from terrorism. It operates largely through the exchange of information amongst government officials, subject matter experts and decision makers working together to strengthen hemispheric solidarity and security. One of its major projects is the Maritime Security Programme which takes a three-pronged approach to strengthening the capacity of Member States to effectively comply with the security requirements of the IMO ISPS Code.<sup>210</sup> The three areas of approach are:

- a) Port facility security and training needs assessments, and follow-up training which entails companies experienced in maritime security contracted by CICTE to conduct port facility security training needs assessments, the results of which serve as a basis for CICTE in tandem with the contractor to tailor security training to address and mitigate identified vulnerabilities and risks;
- b) Crisis Management Exercises (CMEs) are implemented as simulation exercises at the strategic level with the objective of effectively assessing the complex nature of the response capacities and mandates of each of the entities involved in a crisis situation within a port facility, and to identifying vulnerabilities in port facilities security plans;<sup>211</sup> and
- c) Workshops on best practices in the implementation of international maritime security standards which include sub-regional workshops on best practices in port security and implementation of the ISPS Code and workshops on the APEC Manual on Maritime Security Drills and Exercises designed to enhance Member States' capacity to comply with international maritime security standards, to promote within each sub-region a better understanding of maritime security threats and vulnerabilities, and to increase

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<sup>210</sup> International Convention for the Safety of Life at Sea (SOLAS), Chapter XI-2/2: International Ship and Port Facility Security (ISPS) Code

<sup>211</sup> The Secretariat organises the events and the PSAP partners in the US Coast Guard and Transport Canada provide additional expertise. Observers are invited from other countries in order to train trainers and facilitate CMEs in other countries. See <http://www.cicte.oas.org/Rev/en/Programs/Port.asp>

coordination, cooperation, and the exchange of information and best practices among those responsible for maritime security in the region.

These are some examples of regional mechanisms for cooperation which in this instance all apply to the States of the Americas. Therefore, CARICOM States as part of this system have the opportunity to benefit from the cooperation and assistance of regional agencies and of a wide range of countries at various stages of development in relation to crucial matters such as capacity building and technical and legal assistance. However, institutions still have to be managed according to the resource limitations of SIDS and even with the assistance and cooperation of friendly States in building institutional capacity it is still more efficient and expedient for the SIDS of CARICOM to combine their available resources and access shared institutions in relation to certain aspects of maritime security.

(ii) *Pooled Resources and Shared Institutions*

States engaged in an integration process, as in the case of those engaged in a cooperative arrangement such as those of the OAS,<sup>212</sup> exercise cooperation and assistance among themselves through legal instruments and the institutions of the organisation. However, unlike the cooperative arrangement, the integrative process more typically features the creation of common institutions and mechanisms in key areas with a view to achieving certain goals at the national level.<sup>213</sup> In the case of SIDS with limited resources, this is especially crucial. Therefore, cooperation among small-island developing Member States typically involves the pooling of individual resources<sup>214</sup> to achieve certain ends and the use of shared regional institutions as substitutes for individual national ones.<sup>215</sup> Through its institutions and legal instruments

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<sup>212</sup> *Supra* section II.B.1(i)(a)

<sup>213</sup> The European Union is an example of an integrative process notwithstanding its overall *sui generis* character

<sup>214</sup> For example the formation of regional organisations such as the OECS and CARICOM for the purpose of achieving, *inter alia*, greater advantages in trade, certain foreign policy objectives and national/regional defence mechanisms such as the RSS (although Barbados has a national Defence force, many OECS countries do not). See *supra* section II.B.1(ii)(b) – (OECS) *Role in Relation to Regional Security* and see *infra* II.B.2(ii)(a) – *The RSS*

<sup>215</sup> For example the University of the West Indies; the Eastern Caribbean Court of Appeal which serves as the appellate court for all the OECS Member States; also the Caribbean Court of Justice (CCJ) in its appellate jurisdiction has this potential in relation to all CARICOM Member States (including OECS countries) but to date only a few CARICOM States have accepted its jurisdiction as their final court of appeal

facilitating this level of cooperation, such States are able to achieve certain national goals via the regional apparatus. CARICOM as well as the OECS provide examples of such mechanisms for the pooling of resources in the CMASCA, the Arrest Warrant Treaty and the RSS.

a) Mechanisms for Pooling Resources

### *CMASCA*

The CARICOM Maritime and Airspace Security Cooperation Agreement (CMASCA) is essentially a multilateral ship-rider and ship-boarding agreement among the Member States of CARICOM. The CMASCA appears to draw inspiration from both the ship-boarding provisions of the SUA Convention<sup>216</sup> as well as the ship-riding and ship-boarding provisions of bilateral ship-rider agreements between individual States of the Region and the United States.<sup>217</sup> However there are some unique provisions in his agreement that may be the source of hesitation within CARICOM.

The CMASCA is more than a drug interdiction Treaty.<sup>218</sup> The interdiction operations cover “any activity likely to compromise the security of the Region or of any State Party” including drug or arms trafficking, acts of terrorism, smuggling, serious or potentially serious pollution of the environment, piracy, hijacking and other serious crimes.<sup>219</sup> Security force operations therefore are carried out in relation to any of these activities.<sup>220</sup> In addition, one of the *raison d’être* of this Agreement appears, from provision at article II and its preambular paragraphs, to be to maximise the limited resources of individual States Parties by pooling them collectively for greater national and regional maritime security and law enforcement coverage.

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<sup>216</sup> Article *8bis* of the 2005 Protocol to the SUA

<sup>217</sup> Antigua and Barbuda, Barbados, St. Kitts and Nevis and Jamaica are a few of the CARICOM countries that have bilateral Shiprider Agreements with the United States

<sup>218</sup> See preambular paragraph 5 of the CMASCA and especially articles I and II. The CMASCA envisions intervention in activities reasonably suspected of involving, *inter alia*, terrorism, smuggling, illegal immigration, pollution of the environment, and damage to off-shore installations.

<sup>219</sup> Article I(2), CMASCA

<sup>220</sup> Article II(2), *Ibid*

### *Ship-Boarding Provisions*

Under the CMASCA a State Party may conduct security force operations with the prior informed consent of the coastal State Party's competent authorities or where a ship rider of the coastal State so authorises.<sup>221</sup> State parties may also patrol territorial and archipelagic waters of coastal States Parties and in doing so make take necessary to address compromising activity where (a) no security force vessel (SFV) is in the immediate vicinity, (b) no security force official (SFO) of the coastal State Party is riding the SFV, and (c) where notice is given to the competent authority of the coastal State Party and no objection is made. Once these conditions have been met the SFOs may investigate, board and search the suspect vessel and if evidence of compromising activity is found, detain the vessel pending expeditious instructions from the coastal State Party. Arrests such as these, in territorial waters, involve the handing over of the suspects to the coastal State authorities for processing and prosecution.

This is a prime example of the pooling of resources where in essence the boundaries between States are removed for security purposes and all security forces may patrol waters across the Region. However, the condition of informed consent still presents a barrier of sorts.<sup>222</sup>

In international waters,<sup>223</sup> that is, waters seaward of the territorial sea of the coastal State Party, security forces may, where they encounter a suspect vessel claiming the nationality of another State Party, verify the claim of nationality with the competent authority of the State Party. In the event, that the claim is verified the competent authority may, upon request, authorise the boarding and search of the suspect vessel and if evidence of activity likely to compromise security is found, authorise the SFOs to detain the vessel pending its instructions as to the exercise of jurisdiction.<sup>224</sup> Alternatively, the competent authority may decide to conduct the boarding and search with its own SFOs, to have its SFOs conduct it together with the requesting SFOs or it may decide to deny permission to board at all. The competent authority of the flag State Party may provide authorisation in any event if two hours elapse and nationality still has not been verified.

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<sup>221</sup> Article VIII

<sup>222</sup> See Klein, *op. cit.* n 75

<sup>223</sup> Article IX, CMASCA

<sup>224</sup> See article XI CMASCA

However, if the requested State Party does not respond to the request of the SFOs within two hours the SFOs shall assume that the claim of nationality has been refuted by the State Party.<sup>225</sup> Where the claim of nationality is assumed to have been refuted, the requesting State Party is deemed to have been authorised to board the suspect vessel for the purpose of inspecting the vessel's documents, questioning the persons on board, and searching it to determine if it is engaged in any activity likely to compromise the security of a State Party or the Region.

This provision presents somewhat of an anomaly. First if nationality is deemed to have been refuted then grounds for searching the vessel would presumably be the suspicion of statelessness pursuant to article 110 of UNCLOS which would hence apply. The SFOs would therefore be conducting a right of visit pursuant to article 110 which should be conducted with the caution conveyed by article 110. Accordingly, this provision of the CAMASCA should be clearer as to whether the right of visit is being exercised after the lapse of 2 hours without a response. This would be a more prudent measure to prevent exposure of either party to liability under UNCLOS in the event that errors or breakdowns in communication occur and damage to the suspect vessel ensues as the result of an improperly conducted search. That having been said much depends on the particular maritime zones in which operations take place and the type of activity being observed by the SFV. The CMASCA definition of 'international waters' would include, where applicable, the EEZ and the contiguous zone (CZ).<sup>226</sup> In the contiguous zone, a state may exercise control necessary to prevent infringement of customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea and punish infringements of said laws and regulations committed in the territory or territorial sea.<sup>227</sup> Accordingly, the boarding and searching of suspect vessels pursuant to enforcement of the coastal State Party's laws and regulations regarding the CZ would not attract the same liabilities as if operations took place for instance in the high seas (HS).<sup>228</sup> The same principle would apply for the EEZ if the vessel was suspected of or observed engaging in conduct contrary to its obligations to the coastal State Party

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<sup>225</sup> Article IX(4)(a) CMASCA

<sup>226</sup> Article I(1), CMASCA: *"International waters" means all parts of the sea not included in the territorial sea, internal waters and archipelagic waters of any State*

<sup>227</sup> Article 33 of UNCLOS

<sup>228</sup> *Ibid.*

under UNCLOS, such as causing injury to offshore installations or causing pollution to the environment.

In addition, the CMASCA provides at article IX(6) that where the suspect vessel claims nationality of another State Party but does not fly the flag of that State Party, does not display any marks of its registration or nationality and claims to have no documentation on board, SFOs are authorised by virtue of the Agreement itself to board the vessel for the purpose of locating and examining its documentation. If documentation is found the SFOs may proceed according to the articles preceding article IX. If no documentation or other physical evidence is found the State Party whose nationality was claimed may not object to the SFOs assimilating the vessel to a ship without nationality.

### *Jurisdiction*

Curiously, paragraph 3 provides that except in the context of a suspect vessel fleeing the territorial waters of the coastal State Party or where the suspect vessel claims the nationality of the coastal State Party, the State Party which conducts the boarding and search shall have the right to exercise jurisdiction in cases arising in the coastal State Party's CZ. It is not clear why this provision has been made in relation to the CZ. The coastal State Party would have declared this zone to prevent the infringement of and to enforce its customs laws. The general gist of the CMASCA is that the laws of the State Party with primary jurisdiction are to be enforced by the SFOs. There is even provision at article XV for the assurance that all States Parties and SFOs are apprised of the laws and policies of each State Party and also provision at article XIII that while in the waters of other States Parties SFOs must act in accordance with the applicable national laws and policies of the other State Party, international law and accepted international practices. It is not clear why an exception has been made in the case of the CZ. It stands to reason that if a suspect vessel was found engaging in compromising conduct in a zone regulated by the coastal state, the coastal State would be the party with primary jurisdiction, particularly if the compromising conduct directly violates any applicable laws of the coastal State Party.

Article XVII deals with the disposition of seized property. It provides that assets seized as a result of operations undertaken on board vessels subject to the jurisdiction of a State Party or in

the territory or waters of a State Party are to be disposed of according to the national laws of that Party. Where the assets are seized seaward of the territorial sea of a State disposal shall be subject primarily to a formula decided by the States Parties or in the absence of such a formula according to the laws of the seizing State Party.

A ship rider/ ship boarding agreement among CARICOM States, is practical and logical not only in the context of strengthened maritime security but also in the context of integration. Such an agreement in addition to the bilateral ship rider agreements in the region would provide better coverage of the regional waters. However, as is clear in the context of the bilateral ship riders some States are more guarded in respect of matters of sovereignty. In the Caribbean context this may also be complicated by one of the very things that unite the Member States – their proximity. The maritime space separating these countries is largely undelimited and that has been and certainly can be in the future, a source of conflict and distrust between and among neighbours.<sup>229</sup> In all the circumstances, the CMASCA will barely have any bite if the full complement of Member States is not on board. As every State in the region is party to a bilateral ship rider agreement there must be some reachable compromise that suits all involved. The text could be negotiated until a consensus document is reached or where consensus appears impossible, perhaps carefully worded reservations as to the operation of certain provisions may be permitted. The operation of such reservations would of course be governed by the 1969 Vienna Convention on the Law of Treaties (VCLT).

### *The RSS*

The OECS has one military force which serves the organisation, its member states and Barbados collectively. By Memorandum of Understanding between four of the OECS states<sup>230</sup> and Barbados the Regional Security System<sup>231</sup> (RSS) was created in 1982. The RSS is essentially an

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<sup>229</sup> Recent examples of boundary conflicts within the region include Guyana and Suriname where military force was actually used by Suriname to eject surveyors licensed by the Government of Guyana to conduct work in an area that Guyana regarded as its sovereign territory. The boundary dispute between Barbados and Trinidad and Tobago is another example. Both these disputes have since been resolved by arbitration pursuant to Part XV of UNCLOS and in accordance with Annex VII.

<sup>230</sup> Antigua and Barbuda, Dominica, St. Lucia, and St. Vincent and the Grenadines

<sup>231</sup> See [website](#)

armed force comprising soldiers and law enforcement officers contributed by the contracting states for the purpose of providing fast-moving, non-bureaucratic defence and security upon request. The members of the force are trained together as a unit. The RSS was created during the cold war at a time when the region was seeing some shifts in the political and ideological paradigm and some feared that regional instability might ensue.

The RSS played a peace keeping role during and after the 1983 United States intervention in Grenada when the then Marxist Government imploded and anarchy ensued in Grenada. This was at the mandate of the OECS and Barbados which, along with Jamaica, agreed to invite the United States to intervene in Grenada, contrary to the views of the other members of CARICOM. The RSS also played a similar role in the aftermath of the attempted coup in Trinidad and Tobago in 1990. The RSS has also been deployed for humanitarian missions following major natural disasters such as the in Grenada which was devastated after the passage of hurricane Ivan in 2004.

By 1985 all the independent members of the OECS were party to the RSS MOU. In 1992 the MOU was updated and in 1996 the RSS attained juridical status under the Treaty establishing the RSS signed in St. Georges, Grenada.

The purposes and functions of the System are generally to promote cooperation among the Member States in the prevention and interdiction of traffic in illegal narcotic drugs, in national emergencies, search and rescue, immigration control, fisheries protection, customs and excise control maritime policing duties, natural and other disasters, pollution control, combating threats to national security, the prevention of smuggling, and in the protection of off-shore installations and exclusive economic zones.<sup>232</sup>

#### b) Shared Institutions

Pursuant to a 2001 mandate from the CARICOM Heads of Government a task force was established to examine the crime and security situation in the Region and to make recommendations. Following the subsequent attacks of September 11, 2001 the scope of the task force's work necessarily expanded in respect of the original mandate from the Heads. The report

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<sup>232</sup> Article 4 of the RSS Treaty

of the task force,<sup>233</sup> delivered in 2002, covered a number of security threats, namely, illegal drugs and firearms, corruption, rising crime against persons and property, criminal deportees, growing lawlessness, poverty and inequity, and terrorism. One of over 100 recommendations made by the task force was that there should be developed a Regional Strategic Framework involving further scrutiny of all the task force recommendations and forming the basis of meetings between CARICOM and potential donors for the purpose of determining specific areas of collaboration and funding of the short and medium term priorities of the Framework. To this end, CARICOM in 2005 established a Management Framework for Crime and Security encompassing a Council of Ministers for Security and Law Enforcement (CONSLE), a Security Policy Advisory Committee (SEPAC) and an Implementation Agency for Crime and Security (IMPACS). The role of the CONSLE is to oversee policy direction and to report to the Conference of Heads of Government of CARICOM to which the system is accountable. IMPACS, which reports directly to the CONSLE, is the implementing centre of the Framework as it has primary responsibility for the implementation of the regional crime and security agenda.

The Framework first ‘flexed its muscles’ during the Region’s hosting of the Cricket World Cup in 2007 which brought thousands of visitors and dignitaries from around the world to the Caribbean. The Region received a great deal of technical assistance and training from their counterparts in the United States, the United Kingdom and the European Union while security agreements were signed among Member States, massive amounts of security-related legislation were drafted and implemented, and institutions were established. Much of the legislation, treaties and institutions implemented were temporary for the purpose of delivering a successful and incident free Cricket World Cup while some of it was retained as ‘legacy items’. Among these were the Joint Regional Communication Centre (JRCC), the Advanced Passenger Information System (APIS), and the Regional Intelligence Fusion Centre (RIFC). Since its formation the Regional Framework has taken on new projects and partnerships as well as taken responsibility for old ones.

Like the OAS, CARICOM is also the source of a number of sub-organisations and treaties. Such organisations relevant to security include:

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<sup>233</sup> Copy is available at [http://www.caricom.org/jsp/community/regional\\_issues/crime\\_and\\_security\\_task\\_force\\_report\\_2002.pdf](http://www.caricom.org/jsp/community/regional_issues/crime_and_security_task_force_report_2002.pdf)

- a) Association of Caribbean Commissioners of Police (ACCP)
- b) Caribbean National Security Conference of Chiefs (CANSEC)
- c) Caribbean Customs Law Enforcement Council (CCLEC)
- d) Caribbean Drug Control Coordination Mechanism (CCM)
- e) Regional Anti-Crime Major Investment Team (RAMIT)
- f) Regional Co-ordinating Mechanism (RCM)
- g) Regional Training Centre (RedTRAC)
- h) Regional Rapid Response Mechanism (RRRM)
- i) Caribbean Regional Law enforcement Training Coordination Group (RTCG)
- j) University of the West Indies (UWI)

The University of the West Indies is one of a number of CARICOM's associate institutions and one of its greater success stories. CARICOM is also undertaking projects in security related areas with the University of the West Indies.

CARICOM has also engaged for a number of years in extra-regional collaborations namely with the European Union, the United Kingdom, and the United States of America in training, drug interdiction, technical and financial assistance projects. These projects have been executed through the relevant CARICOM institutions and their international counterparts. These collaborations also proved especially productive during the hosting of the Cricket World Cup activities in 2007 which heralded a special collaboration with INTERPOL. These partnerships

led to the creation of the single domestic space and saw fast-track implementation of a number of security mechanisms that have been retained and are currently being strengthened.<sup>234</sup>

### 3. Extra-regional Action within the CARICOM Region

#### (i) *Cooperation and Assistance*

The Caribbean, due to its economic and resource challenges, has been engaged in partnerships outside the Region where these strategic partners have been in a position to render assistance or engage in trade or collaborate with Caribbean countries on issues of common interest or social value to both parties. In the area of security CARICOM maintains such relations with extra-regional States as well as organisation. The following is not an exhaustive list of these collaborations but an account of some major ones. Other contributions to Caribbean security have been made in one form or other by, *inter alia*, the governments of Canada as well as Australia, other countries in the Greater Caribbean Region and other international organisations.

#### (a) The EU/ LAC Partnership

Collaboration between the European Community and the countries of Latin America and the Caribbean (LAC) dates back to the 1960's and 70's. Certainly, the Caribbean has had political, cultural and economic ties dating well before that and since independence a cooperative and even preferential relationship<sup>235</sup> had been maintained in a number of social and economic areas. In 2006, the European Commission adopted the communication on the EU strategy for the Caribbean, which was geared towards an enhanced EU–Caribbean partnership in several overlapping areas:

- a) a political partnership based on shared values, in particular on good and effective governance as a key to the consolidation of democracy, to respect of human rights;

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<sup>234</sup> *Supra* p 11

<sup>235</sup> The Cotonou Agreement, the Economic Partnership Agreement. The EU is the Caribbean's largest donor and its second largest trading partner. See *infra* n236

- key components will include institutional support as well as the promotion of transparency and exchange of information to fight corruption as well as corporate and financial malpractices;
- b) addressing economic and environmental opportunities and vulnerabilities focusing on support to regional integration and market building, increasing competitiveness as well as increasing the region's capacity in natural disaster management with emphasis on risk reduction, preparedness, early warning, prevention and mitigation;
  - c) promoting social cohesion and combating poverty, including the fight against HIV/AIDS, strengthening of healthcare systems, as well as the fight against illicit drugs.<sup>236</sup>

The EU has been particularly supportive of CARICOM's integration efforts and has funded programmes in this area and many others including sustainable development and disaster preparedness programmes. Such projects include:

- a) The Regional Weather Radar Warning System aimed at reducing Caribbean vulnerability to natural disasters;
- b) The Caribbean Integration Support Programme: Institutional Support IMPACS aimed at contributing to the enhancement of the institutional capacity of IMPACS in order to strengthen and assist regional institutions in the fight against illegal drugs; and
- c) Capacity Building and Institutional Support for the Caribbean Court of Justice (CCJ) for the purpose of contributing to the primary jurisdiction of the CCJ and to the sustainability of the Court.

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<sup>236</sup> See *'The strategic partnership between the European Union, Latin America and the Caribbean: a joint commitment'*, **European Commission**, Directorate-General for External Relations, Latin America Directorate, B-1049 Brussels. Copy available at [http://ec.europa.eu/external\\_relations/index.htm](http://ec.europa.eu/external_relations/index.htm)

Given the challenges faced by Caribbean countries in respect of security issues, capacity building programmes in this area as well as in relation to the Justice system contribute to the improvement of Caribbean implementation capabilities.

### *Coordination and Cooperation Mechanism on Drugs*

The Coordination and Cooperation Mechanism on Drugs between Latin America the Caribbean (LAC) and the European Union (EU) is a unique bi-regional forum for identifying new approaches and exchanging proposals, ideas and experiences in combating the challenges posed by the global drug problem.<sup>237</sup> The principles which guide this mechanism include the principle of shared responsibility, the need to take an integrated and balanced approach to the problem in conformity with national and international law, the principles of sovereignty, territorial integrity and non-intervention in the internal affairs of states, respect for all human rights and fundamental freedoms, the principles reflected in the Panama Action Plan and the commitments of the UNGASS on Drugs of 1998. Accordingly, the Mechanism is mindful and supportive of the sustainable development element of drug-related issues in Latin America and the Caribbean.

Annual Meetings of the Mechanism are held in cities of the States participating in the Mechanism and the outcome declarations pledging their further cooperation on agreed priorities are referred to by the names of the cities in which there were concluded. The relevant declarations to date are the Declarations of Panama City (Panama, 1999), Lisbon (Portugal 2000), Cochabamba (Bolivia 2001), Madrid (Spain 2002), Cartagena de Indias (Colombia 2003), Dublin (Ireland 2004), Lima (Peru 2005), Vienna (Austria 2006), Port of Spain (Trinidad 2007), Hofburg (Vienna 2008) and Quito (Ecuador 2009).

Initiatives under this mechanism include:

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<sup>237</sup> 2008 Report

- a) EU-LAC Intelligence Sharing Working Group the objective of which is to help Latin American and Caribbean countries increase their effectiveness in combating drug trafficking and other organised crime by increasing the exchange of operational intelligence as among themselves and among them and the EU members of the Mechanism;
- b) A project improving drug treatment, rehabilitation and harm reduction in European, Latin American and Caribbean cities made possible by the EC North-South Drugs Budget Line, for the purpose of setting up a network of contacts among cities and promoting the exchange of information and best practices on drug policies existing at the level of cities;<sup>238</sup>
- c) Cooperation between LAC countries and West African countries to target the new and increasing phenomenon of cocaine trafficking from Latin America to West Africa, launched in 2006 and also financed by the EC North-South budget line;<sup>239</sup>

European Community external assistance instruments include the Stability Instrument which replaces the North-South Drugs Budget Line that ceased to exist following a reorganisation of the EC instruments for external assistance. It is a broader budgetary mechanism which aims to tackle crises and instability and address trans-border challenges including nuclear safety and non-proliferation, the fight against trafficking, organised crime and terrorism. Technical and financial assistance flowing from this instrument will apply to, *inter alia*, measures to strengthen the capacity of law enforcement and judicial authorities involved in the fight against the illicit trafficking of drugs. There is also the Financing Agreement between the EU Commission and Cariforum signed in 2006 for the 9th EDF Caribbean Integration Support Programme. Pursuant to this Agreement €2,000,000.00 were earmarked for Supply and Demand for Illicit Drugs with

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<sup>238</sup> The European Commission signed in December 2006 a project contract with CICAD as its partner and implementing agency.

<sup>239</sup> This project was implemented by the UNODC office in Colombia and aims at the creation of a network for the intelligence sharing and law enforcement cooperation between the two regions. It mainly involves training and capacity building of law enforcement officials on both sides of the Atlantic.

three main components: demand reduction, capacity building for law enforcement agencies and IMPACS.

(b) United Kingdom/ CARICOM

Given historical and colonial ties the UK has maintained strong links with the countries of CARICOM. In addition, most of CARICOM are members of the Commonwealth. As a Member of the EU and one of the key partners in the EU/LAC partnership the UK has also contributed to development and capacity building in the Caribbean Region. The two meet at regular summits to discuss and pledge attention to a variety of issues including security. To this extent, UK and Caribbean Ministers resolved to work closely together to address security threats, including terrorism, drug trafficking and organised crime, and to develop and support the regional institutions necessary to combat them. They have also recognised the benefits of enhancing the legislative framework in the fight against crime and prioritised this as a matter to pursue through their national parliaments where this has not already been done. The UK has provided technical and financial assistance towards social economic and security programmes.

(c) United States/ CARICOM

The United States has also provided assistance in areas of maritime security through, *inter alia*, U.S. agencies or its embassies. The US State Department has been involved through the OAS to coordinate and fund projects to improve maritime security. The United States Coast Guard (USCG) is also involved in the Region through its International Port Security Program to assess the effectiveness of implemented anti-terrorism measures in other countries. In particular, the Coast Guard monitors the implementation of ISPS Code requirements in Caribbean countries and provides them with best practices to help them improve port security. U.S. Customs and Border Protection has provided training assistance to a number of Caribbean nations and is also operating its Container Security Initiative (CSI) in the Bahamas, the Dominican Republic, Honduras, and Jamaica. Under the CSI, Customs and Border Protection staff are placed at foreign seaports to screen containers for weapons of mass destruction. In relation to the security of containers in ports, the U.S. Department of Energy also has efforts under way in the Caribbean Basin related to its Megaports Initiative, which provides equipment to scan containers

for nuclear and radiological materials. The U.S. Agency for International Development (USAID), active throughout the Caribbean via its role in administering assistance programs, also has contributed funds directly toward a project to help Haiti comply with the requirements of the ISPS Code. The U.S. Department of Defence (DOD), through its Southern Command (SOUTHCOM), is active in the Caribbean through its Enduring Friendship program, which seeks to achieve regional security cooperation and build maritime security capabilities. Additionally, there are several interagency efforts under way in the region to help secure cargo and counter illicit trafficking, migration, and narco-terrorism operations.<sup>240</sup>

#### (d) Activities of International Organisations

A number of United Nations Organisations have also been active in the Region. The UNODC, UNODA, and UNLIREC have been instrumental in coordinating several regional workshops directed toward Caribbean government officials and covering different aspects of the illegal drug problem, illicit arms, terrorism and human trafficking. These organisations have also been involved in projects in these areas in the Caribbean.

The UNODC has field offices in strategic regions. Although the UNODC closed its Office in the Caribbean in 2006 it maintains a presence and conducts programs in the Caribbean through one of its five Offices in Latin America. The UNODC coordinated a comprehensive drug programme initiated around 2002 with the objective of enhancing the capacity of Governments in the Caribbean to formulate and implement effective national and regional drug control policies and programmes. This project involved interventions in demand reduction suppression of illicit drug traffic; training was provided in data collection and research methodologies in support of the Caribbean Drug Information Network; and educating and working with young people in some countries in an effort to curb drug abuse and violence associated with drugs as well as promote awareness regarding HIV and drugs. Advice and assistance was also provided in respect of drafting new precursor control legislation and OECS countries and Barbados to promote better

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<sup>240</sup> See (U.S.) Government Accountability Office (GAO), Information on Port Security in the Caribbean Basin, GAO-07-804R, (Washington D.C.: June 29, 2007)

use of sentencing options and alternatives to custodial sentences for drug addicts. Supporting partners in this project included the European Commission, UNAIDS, and CICAD.

UNODA projects include the Firearms Policy and Legal Planning Caribbean Assistance Package the focus of which was public security. The project targeted mainly Antigua & Barbuda, Jamaica and Trinidad & Tobago given increasingly high rates of murder and violent crime in these countries. The objectives of the project were to strengthen the long-term, self-sustaining national capacities of policy-makers in combating illicit firearms trafficking and implementing firearms instruments through:

- a) increasing national capacities for the effective implementation of firearms instruments;
- b) strengthening multi-sectoral coordination when combating illicit firearms trafficking; and
- c) assisting in the harmonisation of national legislation with international firearms instruments.

Another project involved Maritime Border Control in the Caribbean and was aimed at Caribbean States generally. Its objectives were to generate information from a Maritime Border Control perspective on the current firearms situation in Caribbean States; promote standardisation of law enforcement training throughout the Caribbean; and strengthen the national capacities and expertise of Caribbean States to tackle micro and macro challenges in dealing with increased armed violence and crime. This project also took into heavy consideration the findings of the Regional Task Force in 2002. In respect of these issues, UN-LiREC had been developing and offering assistance initiatives to help strengthen the infrastructure and coordinated response by Caribbean States to curb illicit firearms trafficking and protect the security and well-being of their citizens.

## *INTERPOL*

CARICOM's most notable collaboration with INTERPOL was during the Cricket World Cup event. In assisting CARICOM with its preparation to receive thousands of patrons from across

the globe all at once, INTERPOL was heavily involved in training of law enforcement officers and also introduced technology and mechanisms that have remained since World Cup 2007. For the World Cup, the Caribbean was introduced to INTERPOL-developed technology called Mind/Find that allows law enforcement officers at airports and seaports to instantly check passports against INTERPOL's global database of stolen and lost travel documents. The database contains information on more than 13 million such documents from over 120 countries.

## CONCLUSION

While regional processes may serve as facilitators of the implementation of the international maritime security framework, there is only so much that regional bodies can do. Effective implementation takes place at the national level and therefore follow through must ultimately take place there. Whereas some regional institutions may perform national functions for Member States other institutions must inevitably exist on the national plane. Likewise, model legislation may be produced by international or regional institutions but until it is drafted locally and enacted it has no effect nationally or internationally. Therefore, beyond regional strategies for implementation in Member States there must be national follow through strategies.

The lack of enabling legislation in CARICOM States is one of the first hurdles to overcome in implementing the international framework. There are a number of reasons across the Region for this and they include the colossal size of the work required in comparison to the available human resources. Another is that in some cases the training required in drafting legislation for this specialised area of law is lacking. There is also the fact that maritime security legislation necessarily provides for matters within the purview of other government agencies and lack of coordination between agencies or differences in priority placement in relation to security matters can frustrate the drafting process due to a lack of the appropriate information being determined and furnished by stakeholder Ministries.

Model legislation is generally provided by stakeholder international institutions. The UNODC provides model legislation as well as drafting manuals in relation to transnational organised crime,<sup>241</sup> terrorism<sup>242</sup> and drug trafficking<sup>243</sup> in all their aspects. The OPCW also provides model legislation for chemical weapons and the management of chemical substances. The OPCW also works with States to develop legislation tailored to fit the needs of particular States or

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<sup>241</sup> See UNODC *Legislative Guide for the United Nations Convention against Transnational Organised Crime and the Protocols thereto*

<sup>242</sup> See UNODC *Legislative Guide to the Universal Legal Regime Against Terrorism*

<sup>243</sup> ditto

Regions.<sup>244</sup> For example, in 1999 the OECS Secretariat consulted with the OPCW on the incorporation of chemical weapon enabling provisions into model legislation that was being drafted for the expansion of pesticides regulation in OECS Member States. The result was a jointly sponsored OPCW/ OECS workshop in 2000 conducted for OECS Member States on the model legislation that came out of those consultations.<sup>245</sup>

Within CARICOM there is the Legislative Drafting Facility. This Facility, *inter alia*, manages an electronic communication forum enabling the sharing of information among Attorneys General, Chief Parliamentary Counsel, the Legal Division of the Secretariat and the CARICOM Legislative Drafting Facility. This forum known as CARICOMLaw.org has a clear directive to provide support to Member States in the discharge of their Treaty obligations to enact domestic legislation giving effect to the objects and purposes of the CSME. This system is intended to provide access to ongoing legislative work in Member States and in the CARICOM Secretariat with a view to reducing duplication and enabling more efficient use of the region's human resources in legal drafting.<sup>246</sup> Although this forum is currently focussed on the drafting of CSME-related legislation, its structure and function presents possibilities for future adaptation to maritime security and other enabling legislation.

International institutions also hold workshops regularly on the implementation of the relevant legal instruments, including in relation to drafting legislation. Some workshops have been designed for legal drafters and focussed on the drafting of enabling legislation. Training workshops including enabling legislation on the agenda have been conducted by the UNODC, the OPCW, and the 1540 Committee, to name a few, in collaboration with donor countries and sometimes with each other. The UNODC also offers to provide consultants regarding the drafting of legislation and completion of the groundwork to countries in need of assistance to expedite the process.

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<sup>244</sup> See [www.opcw.org](http://www.opcw.org)

<sup>245</sup> See OPCW document S/190/2000 dated 23/05/2000 entitled *An Integrated Approach to National Implementing Legislation Model Act Developed by the Secretariat of the Organisation of Eastern Caribbean States at <http://www.opcw.org/our-work/implementation-support/national-implementing-legislation/models-checklists-questionnaires/#c1141>*. It is notable that at present none of the OECS countries are included on the list of countries that have implemented the Chemicals Weapons Convention. One country, St. Kitts and Nevis, is listed as having implemented the BWC but this predates the OECS/ OPCW initiative

<sup>246</sup> See <http://www.caricomlaw.org/about.php>

An examination of relevant model legislation and an evaluation of national legal provision on the relevant subject matter should be undertaken in order to plan a legislative strategy. The utilisation of a consultant can go a long way in this respect provided that the consultant assumes the role of advisor and assistant taking account of the State's national systems rather than that of a dictator insisting on one particular course of action. The role of a consultant in this context should be to work with CARICOM States to achieve a strategy that fits their systemic framework while accomplishing desired goals and, where the two are at cross-purposes, identifying problem areas and developing strategies for fixing or deflecting those problems. The development of a comprehensive legislative strategy would enable CARICOM States to identify training needs more easily and to anticipate possible bumps in the road.

Some donors prefer to provide consultants on an individual country basis rather than to go through the regional machinery. This, however, does not preclude CARICOM from playing a significant coordinating role. CARICOM, perhaps through the Drafting Facility or CARICOMlaw.org, could be used as a forum for information sharing and for conveying to other Member States the strategies and techniques acquired through training for expeditious drafting of domestic legislation. Through CARICOM, the Member States could provide mutual assistance and assign deadlines to reach goals at pivotal stages of the process. This form of close coordination could prove the difference in achieving effective results on the national level, as all too often regional efforts fail to translate into action in the municipal legal systems of States, or the level of implementation varies significantly among Member States progressing at different paces.

In the case of the OECS, the matter may be simplified by the new Treaty once it enters into force. It may be possible in the new system for enabling legislation to be implemented at the OECS level with direct effect on the national level.

The supportive institutions necessary for effective implementation of the international maritime security framework in CARICOM States are either absent or lacking the necessary enabling mechanisms to carry out their proper functions. Accordingly, CARICOM channels a great deal of effort into collaborations with other States to embark on capacity building initiatives. However, at the national level coordination of such projects is also essential to the reaping of substantial benefits, as institutional capacity is reliant on several other factors such as the

provision of adequate material resources, continuous training for human resource development, intra-institutional systems that foster effective performance and extra-institutional systems that allow for swift implementation of capacity building and other initiatives. As such, the absence of any one of these elements in a given institution can result in the frustration of capacity building efforts. Lack of coordination of initiatives can lead to situations where, for example, specialised training programmes are obtained and provided to personnel in institutions which lack the appropriate material resources to put the training into practice. In such a scenario, the training may fall into desuetude, rendering the investment in human resource enhancement useless to the institution and inconsequential to the broader scheme of capacity building and greater maritime security.

Institutions to be established or enhanced for the purposes of maritime security include port facilities and border control zones, coast guard, military and law enforcement institutions, health and emergency response institutions, national authorities possibly with varying configurations and functions, and executive administrative departments such as government Ministries. Building capacity to achieve effective operation of all these institutions is in fact a colossal task. Therefore, major assistance measures must be undertaken in order to accomplish it. Again, international organisations with responsibility for relevant conventions are useful in this regard, as they tend to offer mechanisms to help accomplish goals, including assistance in finding donor countries to assist financially with projects. The regional machinery would be instrumental in collaborating with international organisations, seeking donors and negotiating agreements for cooperation in capacity building projects in the area of maritime security but national governments should ensure that they shape the execution of such projects to suit their particular needs.

In CARICOM States, human resource challenges tend to take the form of there not being sufficient expertise in given areas, particularly in the area of maritime security. Training in various areas of security such as maritime interdiction, emergency response to incidents involving BCN, the handling of certain data and technology, and border and customs control measures and procedures, is therefore necessary. Although this training is received through collaborative arrangements on the regional and international levels, national governments must take measures to ensure that it is passed on and remains in the system. Very often individuals

receive training from overseas but there their domestic institutions lack mechanisms for harnessing the information and passing it on to other members of the institution.

Governments may overcome this by mandating persons who receive specialised training to hold seminars for colleagues and other agencies showcasing what was learned. Governments could also, depending on the subject matter of the training, include or develop mechanisms for including educational institutions in training programmes so that they may model courses for the benefit of their students in the region. The UWI, the University of Guyana, the Anton de Kom University of Suriname, and the University of Haiti as well as community colleges could be utilised to a greater extent to further training and development of CARICOM citizens in some aspects of maritime security.

Besides working towards implementation of the established international maritime framework, CARICOM should also seek to address other security concerns are within its security interests but left unresolved in the international arena. The issue of corporate transparency and the registration of ships is one such area of great importance to CARICOM States, since a significant number of them engage in the offshore industry and others are ship registry countries. On one hand, CARICOM security may be jeopardised if these industries continue to operate unchecked and on the hand, if a major incident occurs beyond CARICOM as a result of lax corporate and registry procedures, CARICOM registry and corporate procedures could suffer under the ensuing pressure and possibly draconian measures of other States.<sup>247</sup>

CARICOM States could work towards negotiating among themselves compromises to strike a balance between ensuring security and earning foreign exchange derived from these industries. It is recommended that in the case of improving corporate security Governments should consider one or more of the following options:

- 1) mandating the disclosure of beneficial ownership of corporate vehicles to authorities responsible for the establishment or incorporation phase and imposing an obligation to update this information in a timely manner when changes take place;

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<sup>247</sup> See Final Report of the Maritime Transport Committee on Ownership and Control of Ships, *Maritime Security – options to Improve Transparency in the Ownership and Control of Ships*, Directorate for Science, Technology and Industry, Organisation for Economic Cooperation and Development, June 2004

- 2) imposing an obligation on corporate intermediaries to obtain and verify records of the beneficial ownership and control of corporate entities that they establish and administer, or for which they provide fiduciary duties; and/ or
- 3) relying on an investigative system where authorities could obtain through compulsory or court-issued mechanisms information on beneficial ownership and control for security and law enforcement purposes.<sup>248</sup>

Likewise in the area of ship registration the report of the OECD recommends that a compromised could be reached by promoting confidentiality rather than anonymity. This means that as an alternative to anonymity ship registries would promise non-disclosure of the owners' identities except at the request of law enforcement authorities in the course of their duties. In this way, legitimate ship owners would not be entirely put off and security standards are maintained.

The report also recommends that, *inter alia*:

- 1) ship registers have proper procedures in place for identification of persons seeking to register ships;
- 2) personnel should be trained in procedures and provided with adequate resources to identify beneficial owners or ships;
- 3) the registration of ships whose beneficial owners cannot be adequately identified should be avoided;
- 4) ship-owning arrangements involving foreign corporate vehicles , particularly from jurisdictions that promote anonymity, should be carefully scrutinised;
- 5) nationality requirements should be carefully monitored;
- 6) the use of bearer shares in the owner ship of vessels should be avoided and the use of nominee directors, office holders and shareholders should be eliminated or strictly regulated;

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<sup>248</sup> *Ibid.*

- 7) information should be made available to competent authorities when appropriate; and
- 8) a substantive local presence in the jurisdiction should be required of the ship owner.

CARICOM States should at least address this issue with a view to resolving security risks. CARICOM States may also wish to broach the subject beyond the CARICOM region since there are other flag States, certainly in the Caribbean and in the wider Americas that would pose a great deal of competition to CARICOM interests if they are not encouraged to also modify their corporate and ship registry practices.

The nature of maritime security threats today is such that international cooperation is necessary to combat them. Through Conventions and other legal instruments the International Community has developed a framework of legal provisions which must necessarily be implemented into the domestic legal systems of States and which upon full implementation by all nations would result in a universal penal system from which international criminals would not likely escape. The reality, however, is that implementation is not a simple and straightforward task for all States. Developing States and especially SIDS face many challenges in doing so. The special challenges of SIDS are characterised by their inherent features of smallness, insularity and remoteness, proneness to natural disaster, and environmental factors, and ultimately they lack the capacity to effectively implement the maritime security framework. While the global agenda for the sustainable development of SIDS is comprehensive it has suffered some setbacks and in any event does not focus on security as an area of priority. The special task of SIDS is therefore to work towards implementation of the framework while simultaneously increasing capacity to support it.

In this regard, the regional organisational machinery has proven to be a valuable facilitator of the implementation of international maritime security provisions in CARICOM States. The OAS as a forum for cooperation with larger more developed countries in the Americas and a vehicle for initiating security and capacity building projects in member States has contributed to the progress of these States and remains a viable medium for putting national maritime security

schemes into action. CARICOM itself provides a valuable forum for collaboration and discussion and more importantly it is a medium for the pooling of resources and the creation of common institutions for Member States allowing them to make the most of their limited resources. The OECS has been invaluable to the SIDS of the Eastern Caribbean within the CARICOM setting in a similar fashion. With the impending deepening of the OECS integration process there is opportunity for the implementation process in this sub-region to take place more easily through the new legislative power of the Organisation.

Although these regional organisations have deepened and created more institutions for the benefit of their Members the full effect of these benefits cannot be reaped without the appropriate follow-through at the national level. Implementation ultimately takes place domestically, and although regional organisations can facilitate matters of, *inter alia*, model legislation, training for personnel, the acquisition of computer databases and capacity for gathering statistics national governments must coordinate these benefits according to their own needs and in a way that would bring about the efficient functioning of institutions. Furthermore, national governments must utilise the development benefits derived from international and regional assistance in such a way that national institutions can pass on and perpetuate the training and technology received. It is for this reason that national plans in tandem with regional efforts are crucial. In fact, national plans could also guide the regional effort towards more effective results.

Full and effective maritime security implementation in the Caribbean is a long way off but progress is slowly being made. Closer attention needs to be paid to the follow-through at the national level and to coordination of national implementation efforts. If CARICOM is to become security-ready as one domestic space individual states must harmonise their pace of implementation and of capacity building. The CARICOM and OECS role in this regard could be one of strict coordination and mutual assistance. As things stand, a gradual accomplishment of implementation goals may take clear shape with the regional security framework seen through to the end utilising resources within and outside of the Caribbean to give effect to specific goals.

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