

**“Iran’s Legal Perspective on Maritime Security Challenges in the Indian Ocean Region”**

Stronger Cooperation to Eliminate Maritime Organized Crimes at Sea under International Law

By

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## Acronyms

AMISOM	African Union Mission In Somalia
ASEAN	Association of Southeast Asian Nations
AU	African Union
BMP	Best Management Practice
CGPCS	Contact Group on Piracy off the Coast of Somalia
CPT	The UNODC Counter-Piracy Programme
EEZ	Exclusive Economic Zone
FAO	Food and Agriculture Organization
HSP	The UNODC Hostage Support Programme
IGAD	Intergovernmental Authority on Development
IMB	International Maritime Bureau
IUU	Illegal Unreported and Unregulated
ILC	International Law Commission
LOSC	Law of the Sea Convention
IMO	International Maritime Organization
NATO	The North Atlantic Treaty Organization
PPTP	The UNODC Piracy Prisoner Transfer Programme
RECAAP	The Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia
SOLAS	Safety Of Life At Sea
UNCLOS	United Nations Convention on the Law of the Sea

UN	United Nations
UNDP	United Nations Development Programme
UNEP	United Nations Environment Programme
UNODC	United Nations Office on Drugs and Crime
UNGA	United Nations General Assembly
UNSCR	United Nations Security Council Resolutions
UNTOC	United Nations Convention Against Transnational Organized Crime
SUA	Convention for the Suppression of Unlawful Acts of Violence against the Safety of Maritime Navigation
TFG	Transitional Federal Government
WFP	World Food Programme
WMD	Weapons of Mass Destruction

*For my Family*

*For their great heart, patience, love, consideration and devotion*

*And for my country, IRAN*

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**Introduction**

The Indian Ocean is gaining more strategic importance for regional countries as well as non-regional powers in terms of trade, energy, transportation, biological, mineral resources to name a few.<sup>1</sup> In the same line, there are several threats to its security, including but not limited to the risks of intrastate conflicts and instability, terrorism, maritime piracy and armed robbery against ships, smuggling in all its forms, and illegal, unreported and unregulated fishing. Moreover, climate change, sea-level rise and natural disasters are other non-traditional security threats, which have in recent years been evident in the region.

Being the third-largest of the world's five oceans, Indian Ocean straddles Asia in the north, Africa in the west, Indo-China in the east and Antarctica in the south. The significance of the Indian Ocean region in international trade is and has been for long one of the driving forces for regional and world economic powers to think about it strategically.<sup>2</sup> Where it comes to energy security, such factor has made this large body of water geo-strategically important as it hosts major international sea lines of transportation, which allows petroleum produced mainly in Persian Gulf surrounding countries to end users in Far East Asia and other parts of the world. The Indian Ocean is home to four critical access waterways— the Suez Canal (Egypt), Bab el Mandeb (Djibouti-Yemen), Strait of Hormuz (Iran-Oman), and the Strait of Malacca (Indonesia-Malaysia)— the Indian Ocean connects the Middle East, Africa and East Asia with Europe and the Americas.<sup>3</sup>

There are a number of issues that threaten the safety and security of the world, particularly one of the most significant oceans, the Indian Ocean Region. It is truism that globalization has brought prosperity to the major transnational criminal groups around the world. Piracy and armed robbery against vessels are not isolated cases exceptionally happen in this strategic ocean. Noteworthy to add, maritime security threats are consisted of unlawful or hostile exploitation of the maritime domain, terrorist attacks, criminal acts, or hostile activities

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<sup>1</sup> To study further about the Indian Ocean significance, please see: John Garofano and Andrea Dew, *Deep Currents and Rising Tides: The Indian Ocean and International Security*, Georgetown University Press, Washington, 2013.

<sup>2</sup> For a detailed discussion on the historical role of IOR in world trade, see Milo Kearney, *The Indian Ocean Region in World History* (New York: Routledge, 2004).

<sup>3</sup>Dr. Sunil Kumar Agarwal, *Contemporary Challenges of Security in the Indian Ocean Region*, SSRN, available at: [http:// file:///D:/My%20Documents/Downloads/SSRN-id1874606.pdf/](http://file:///D:/My%20Documents/Downloads/SSRN-id1874606.pdf/)

in maritime domain. In other words, the main concerns refer to the destructive effects of transnational criminal crimes, such as application of weapons of mass destruction (WMD), illegal seaborne immigration, smuggling of people, drugs, weapons and other contraband, as well as environmental threats for example, major pollution incidents and illegal dumping.<sup>4</sup>

For all such concerns, security comes first. Among other things, acts of piracy have challenged the regional security particularly in recent years. “There is a need to address the challenge posed by piracy very urgently. Piracy poses security challenges with an international dimension that necessitates a multidimensional approach.”<sup>5</sup> In this regard, to achieve the goal of addressing piracy and other security threats, an organized network consisting of a high degree of holistic cooperation and coordination is required in addition to due process of collecting and exchanging information and intelligence on a timely basis.<sup>6</sup>

Historically indeed, piracy is not a new phenomenon. It has existed since time immemorial. Pirates have historically had different names during the history.<sup>7</sup> The Roman Statesman, Cicero, though it is sometimes contested, is credited as being the first who declared pirates “*hostis humani generis*” or enemies of humanity.<sup>8</sup> As pirates waged war against not just one state but all states, they were considered to be subject to universal jurisdiction by any state.<sup>9</sup> Therefore, “all nations were endowed with authority to assert jurisdiction over pirates since the crime is so heinous and ships of all nations are at risks. In response, all nations were deemed to be free to declare war against piracy; indeed not only did every community enjoy

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<sup>4</sup> UN Documents, A/63/63, Oceans and Law of the Sea, Report of the Secretary-General, Mar. 10, 2008, para.39.

<sup>5</sup> Paul Musili Wambua, *The jurisdictional challenges to the prosecution of piracy cases in Kenya: mixed fortunes for a perfect model in the global war against piracy*, World Maritime University 2012. at 97. Available at: [http://download.springer.com/static/pdf/647/art%253A10.1007%252Fs13437-012-0021-6.pdf?auth66=1410360154\\_d60e8fae61bff3477a3b77129e025d26&ext=.pdf](http://download.springer.com/static/pdf/647/art%253A10.1007%252Fs13437-012-0021-6.pdf?auth66=1410360154_d60e8fae61bff3477a3b77129e025d26&ext=.pdf).

<sup>6</sup> Ibid.

<sup>7</sup> References to piracy can be found in both Homer’s poems, “The Iliad” and “The Odyssey”.

<sup>8</sup> I. Shearer, Piracy, Max Plank Encyclopedia of Public International Law, para. 6 (2009).

<sup>9</sup> L. Azubuike, International Law Regime against Piracy, 15<sup>th</sup> Annual Survey, 15 International and Comparative Law 43, 2009, At 46.

the right of self-defense against piracy, but all civilized states had an affirmative obligation to suppress the crime.”<sup>10</sup>

Historically there has been disagreement as to whether or not “privateers” and “corsairs”<sup>11</sup>, individuals granted a “letter of marquee” authorizing them to capture enemy merchant ships should be treated as pirates.<sup>12</sup> “Although major piracy and privateering ended in the 19<sup>th</sup> Century, maritime crime including piracy has continued as a global phenomenon since, particularly in areas of weak law enforcement and security instability”.<sup>13</sup> Despite of the declination of piracy attacks in the nineteenth and twentieth century, a new surge began in the 1990s.<sup>14</sup> Capturing ships off the coast of Somalia and holding them and their crews for ransom had occurred since then.<sup>15</sup> It was originally carried out by armed groups acting mostly in the territorial sea and claiming to protect Somalia’s fishing resources, which were pillaged by foreign fishermen, and its coastal waters, that were used as a dumping ground for waste in the absence of law enforcement institutions. The ramifications of these attacks are significant, not only in terms of the unimaginable anxiety of crew members and their families but also in terms of costs to ship owners, cargo owners, insurers and coastal states in the region.

The International Maritime Bureau’s<sup>16</sup> Piracy Reporting Centre (IMB PRC) reported there have been 231 pirate attacks against vessels since the beginning of 2014.<sup>17</sup> As for 2013, a

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<sup>10</sup> James Kraska, *Contemporary Maritime Piracy*, United States of America, PRAEGER, 2011, At 106.

<sup>11</sup> Comes from Latin ‘*corsa*’ meaning raid.

<sup>12</sup> For further study about the history of piracy, see: A. Morita, *Piracy Jure Gentium*, Revisited- For Japan’s Future Contribution, 51 Japanese Yearbook of International law 76, At 93 (2008).

<sup>13</sup> Public Side Event of the 16<sup>th</sup> Plenary Meeting of the Contact Group on Piracy off the Coast of Somalia (CGPCS), military Lessons on Somali Piracy off the Coast of Somalia- Areas for Enquiry, A ‘Food for Thought’ Paper by Captain P N Olive OBE Royal Navy (Outgoing Chief of Staff EU NAVFOR), The CGPCS held its Sixteenth Plenary Session at the UN Headquarters in New York on 14 May 2014, under the Chairmanship of the European Union.

<sup>14</sup> Chris Bellamy, “Maritime Piracy: Return of the World’s Second-Oldest security Problem” (2011) 156 The Royal United Services Institute Journal 78, At 78.

<sup>15</sup> In the past decade, acts of piracy have been developing increasingly, especially off the coast of Somalia, Gulf of Aden, the South China Sea, and in the Straits of Malacca.

<sup>16</sup> The International Maritime Bureau (IMB) is a specialized division of the International Chamber Of Commerce (ICC). The IMB is a non-profit making organization, established in 1981 to act as a focal point in the fight against all types of maritime crime and malpractice. The IMB has a MOU with the

total of 264 incidents of piracy and armed robbery against ships have been reported to the PRC. This is an 11 % decrease from the 2012 figures of 297 and a massive 41 % decrease from 2011 (445 incidents) when Somali piracy was at its peak. Globally, 12 vessels were hijacked, 202 boarded, 22 fired upon and a further 28 reported attacks making 2013 the lowest number of reported incidents since 2007.<sup>18</sup> *In a recent incident*, an Oil Tanker (Savina Caylyn) was attacked near the Yemeni island of Socotra by five pirates boarded and turned off its tracking systems, disabling surveillance of the 105,000-ton vessel by its insurance company.<sup>19</sup>

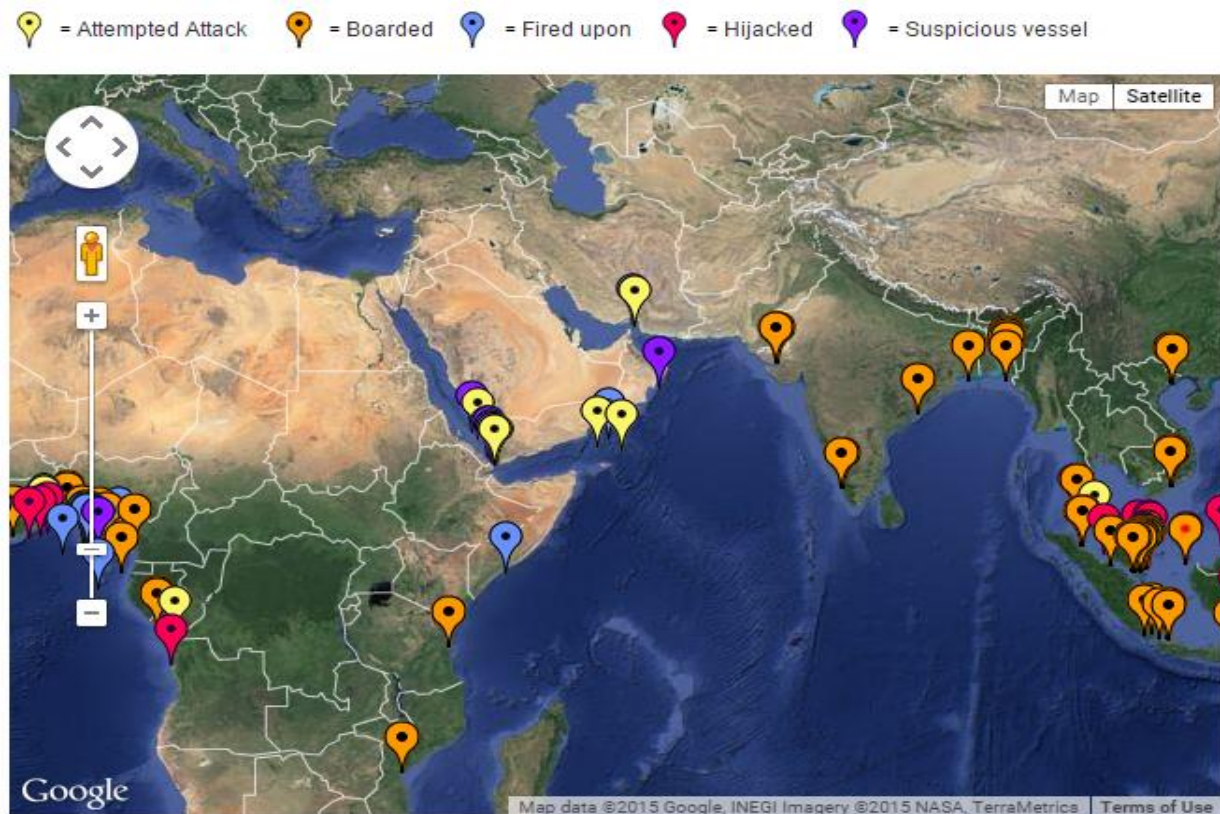
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World Customs Organization (WCO) and has observer status with Interpol (ICPO).<http://www.icc-ccs.org/icc/imb>

<sup>17</sup> International Maritime Bureau Piracy Reporting Centre (IMB PRC) follows the definition of Piracy as laid down in Article 101 of the 1982 United Nations Convention on the Law of the Sea (UNCLOS) and Armed Robbery as laid down in Resolution A.1025 (26) adopted on 2 December 2009 at the 26th Assembly Session of the International Maritime Organization (IMO). The aforementioned report is available in: <http://www.icc-ccs.org/piracy-reporting-centre/live-piracy-report/>

<sup>18</sup> According to IMB report, the single biggest reason for the drop in worldwide piracy and armed robbery is the decrease in the overall attacks carried out by Somali pirates. The Gulf of Guinea region accounted for 48 of the 264 incidents in 2013. Most of the attacks in the Indonesian anchorages and waters remain low-level opportunistic thefts and these accounted for more than 50% of all vessels boarded in 2013 and the fourth consecutive year of increased armed robbery activity.

<sup>19</sup> <<http://www.theguardian.com/business/2014/jun/16/satellite-data-perspective-insurance-farming-piracy>>



Eradicating maritime piracy and armed robbery against ships from all over the world is a significant challenge. As the legal perspective, notably, the United Nations Convention on the Law Of the Sea (1982) and its predecessor, the Convention on the High Seas (1958), accompanied with the SUA Convention, the Hostages Convention and 2000 United Nations Convention against Transnational Organized Crime (UNTOC) and some other international and regional instruments provide an effective legal framework for the arrest, prosecution and punishment of perpetrators of acts of kidnap for ransom and ship hijacking.

However, the new increase of piratical movements in the coast of Somalia, Gulf of Aden, Indian Ocean region and recently Sea of Oman and Persian Gulf and on the other side of the Africa continent, in the coast of Nigeria and Gulf of Guinea have been seriously witnessed in the current decade. Despite concerted efforts by the regional states and the international community to address piracy off the coast of Somalia, the menace still persists. Piracy has emerged as a highly lucrative business. The modus operandi of pirates has, accordingly,

become more and more sophisticated.<sup>20</sup> This is noteworthy to mention that the United Nations Security Council has linked the activities of pirates off the coast of Somalia with the notion of a threat to international peace and security.

The success in capturing ships and crews and in obtaining substantial amounts of money as ransom, as well as their efficient way of dealing with money so obtained, have already connected the new emergence of Somali pirates to the historic notion of '*hostis humani generis*'. The danger for navigation through a choke point of international traffic, as well as the outrage aroused by pirates' attacks on ships carrying humanitarian supplies to the Somali population, have been decisive in alarming states from all over the world. It also appears that pirate groups are engaged in the systematic corruption of local officials.<sup>21</sup>

In addition to protecting commercial vessels in the region, there has been a great concern of the international community to cooperate in combating piratical activities and fight against the impunity of pirates. A final suggestion in this relation is to criminalize acts of piracy and armed robberies against vessels in the internal legal framework of the countries engaged in global fight against pirates and prosecute pirates. Piracy is a crime of universal jurisdiction, granting all countries the right to prosecute and, all of the countries which are able and willing to contribute to this cause should be welcomed to do so. Nonetheless, many countries whose ships have been attacked by pirates have chosen not to prosecute due to the difficulty of obtaining evidence and witness testimony, the costs involved with translation and detention, and the fear that pirates may claim asylum in prosecuting countries.

It has gone without saying that the contributions made by countries to fight against piracy off the coast of Somalia have been well recognized and commended by the international community and relevant UN bodies. In this regard, all countries should be determined to continue their important contributions to the cause of maritime safety and security by

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<sup>20</sup> Report of the Secretary-General on the situation in Somalia, delivered to the Security Council, U.N. Doc. S/2009/684 (Jan. 8, 2010), January 2010 Report, Para.23.

<sup>21</sup> United Nations, UNODC, Piracy-Background, available at: [www.unodc.org/eastern\\_africa/en/piracy/background.html](http://www.unodc.org/eastern_africa/en/piracy/background.html) (cited in Robin Geiss, Anna Petrig, *Piracy and Armed at Sea; The Legal Framework for Counter-Piracy Operations in Somalia and the Gulf of Aden*, Oxford University Press, 2011.



preventing and addressing piracy and armed robbery against ships in the pirate stricken regions in the Indian Ocean.

It is noteworthy to mention that piracy hot spots have changed from locations such as the Caribbean to those such as the Strait of Malacca (between Malaysia, Singapore, and Indonesia), the South China Sea, the Gulf of Guinea, and off the coast of Somalia into the Indian Ocean and the Red Sea (Gulf of Aden). The impact of piracy is felt most by its direct victims: those on the ships that are hijacked. These victims experience physical and mental suffering, the consequences of which can last for years. However, the growth and spread of piracy is creating an effect that stretches beyond oceans and beyond borders. The roots of piracy in state collapse, conflict, and instability demonstrate that the piracy problem is an international peace and security at both ends of the spectrum.

Because of the significance of the Indian Ocean and its choke points in international navigation and the export of goods and oil resources between the countries, some of those who are more concerned with, have already deployed their military navy to the area. Quite significantly, the Security Council of the United Nations pursuant to the Secretary-General's report has commended the aforementioned efforts by Iran's navy and some other countries which have deployed ships or aircrafts in the region to combat piracy and armed robbery threats.

The Islamic Republic of Iran<sup>22</sup> since 2008 has dispatched its navy to the Indian Ocean region especially to the Gulf of Aden and Northern waterways of the Indian Ocean to patrol the waters using submarines and other advanced naval weaponry in order to contribute to the maintenance of peace and security in the region. However, the main reasons of such a security strategy are to promote Iran's strategic interests in its territorial waters, Strait of Hormuz, continental shelf, Exclusive Economic Zone, continental shelf and the high seas, in addition to safeguarding the maritime merchant fleet and oil tankers from the invasion of violent pirates and sea-robbers.

It is truism that piracy is a global problem that endangers maritime security interests on a global scale. For the purpose of this present thesis, the readers should keep in mind that there

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<sup>22</sup> Hereinafter referred to as "Iran"

is a positive and synergistic relationship between drawing a modern piracy policy, strengthening Iran's interagency coordination and enhancing international cooperation. The process of developing a contemporary piracy policy has helped Iran to draw the policy toward a more effective coordination and enhanced international cooperation. It is with the concrete view to the fact that "the complexity of issues involved in maritime security and the diversity of interests at stake are broader in scope than any single state or group of states can effectively handle."<sup>23</sup>

In order to conduct a comprehensive research on maritime security challenges in the Indian Ocean and emphasizing on Organized Crimes committed at sea, the objectives of this thesis are as follows:

- What is international legal framework applicable on maritime security threats to deal with maritime organized crimes under international law?
- What are the significant elements of a stronger cooperation to eliminate maritime crimes at sea under international law and law of the sea?
- What is Iran's legal perspective on maritime security challenges in the Indian Ocean Region?
- How can Iran contribute to strengthening existing cooperation arrangements to tackle maritime security challenges in the region?
- How can criminalization of piracy and armed robbery movements at the national level [in the context of regional cooperation] contribute to a better fight against pirates and armed robbery groups in the region?
- How can cooperation at the regional level be strengthened to maintain maritime security in the region, especially regarding the eradication of acts of piracy and armed robbery movements and security threats under international law?

In order to answer the key questions, I intend to divide my thesis into two parts. The first part one will address Maritime organized crimes in the Indian Ocean region and international legal framework in this regard. The second part will consider enhancing cooperation at the regional level and capacity development at the national level. The first Chapter of the first part

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<sup>23</sup> Paul Musili Wambua, Op.cit, at 96.

will deal with maritime organized crimes in the Indian Ocean region and the international legal framework applicable on that and the chapter 2 of the first part will address the international community efforts to fight against piracy and armed robbery threats. Subsequently, chapter one of the second part of thesis will conduct an analysis regarding maritime security approaches in Iran's legal framework and Ocean governance contribution and the second chapter will discuss how to achieve a stronger cooperation to eliminate maritime organized crime under International law and law of the sea. By this overview, this thesis will try to clarify Iran's Legal Perspective on Maritime Security Challenges in the Indian Ocean region and how a stronger cooperation can contribute to eliminating maritime organized crimes at Sea. To this end the whole integrity of the thesis sees the various aspects and dimensions of the topic from international law perspective.

## **Part one: Maritime organized crimes in the Indian Ocean Region and international legal framework**

The law of the sea which has been in a state of development and evolution since at least the seventeenth century has principally been centred on aspects of maritime security. Since the time of the earliest debates between Grotius and Selden with respect to the freedom of the high seas, maritime security and national security have been fundamental to the progressive development of the law of the sea.<sup>24</sup> As has been observed, “the formidable acceleration of information exchanges, the increased trade in goods and services as well as the movement of individuals from one part of the world to another, have transformed our economic, social and political environment in both positive and negative ways, as well as the paradigm of national and international security.”<sup>25</sup>

In view of the significance of maritime security for neighbouring countries lied in the Indian Ocean region and for the whole world benefits from the aforementioned strategic Ocean of the earth, maritime organized crimes are considered as serious threats to international peace and security. In order to address the issues of regional and international threats to maritime security “in an increasingly networked and multifaceted global environment, a comprehensive and coordinated interagency approach must be adopted.”<sup>26</sup> In this regard, “information gathering and dissipation and close coordination are vital to effective maritime security.”<sup>27</sup>

Accordingly and to address critical security threats and the applicable international legal framework applicable, the first part of this thesis will focus on explaining in detail about the most significant maritime organized crimes committed at seas particularly in the Indian Ocean region and the international legal framework applicable in combating the maritime crimes threatening the security of the region.

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<sup>24</sup> Natalie Klein, Joanna Mossop and Donald R. Rothwell (ed), “Maritime Security, International Law and Policy Perspectives from Australia and New Zealand”, Routledge, 2010, pp 23-24.

<sup>25</sup> Manimuthu Gandhi, *National Security and Maritime Law: Emergence of Unilateralism and Other Forms of Challenges to Universal International Law*, in Indian Journal of International Law, Vol 49, 2009, pp 509-520, at 509.

<sup>26</sup>Paul MusiliWambua, op.cit, At 97.

<sup>27</sup> Ibid.

## **Chapter 1: Maritime organized crimes in the Indian Ocean Region and law of the sea**

Chapter one of this part, first of all will address maritime organized crimes playing as maritime security challenges in the Indian Ocean Region and in the second section it will address the legal regime for combating piracy and armed robbery which is a matter of importance in the light of the thesis's perspectives.

### **3. Maritime organized crimes as security challenges in the Indian Ocean Region**

Nowadays, the Indian Ocean like other strategic waterways existing on this planet is suffering from maritime organized crimes committed on its shores and off shores. Accordingly, the first part of this section will discuss the most important maritime security challenges threatening the Indian Ocean region and then it will address maritime security challenges posed by piracy and armed robbery against ships at sea in the aforementioned region.

#### **1,1 The most important Maritime security challenges threatening the Indian Ocean Region**

Maritime security is a very broad issue encompassing many aspects. The term can conjure up different meanings depending upon various individual or organizational interests, or even political or ideological basis thereof. Accordingly, the concept may be defined as an interconnected and unpredictable mix of traditional and irregular warfare, transnational terrorism, and organized crimes mainly such as piracy, weapons proliferation, drug trafficking, and other illicit activities, and intended as the protection of ships and port facilities from variety of acts of maritime violence.

On the other hand, one can define maritime security as a concept of enhancing global stability, ocean governance, and maritime border protection, security regulation of the maritime transportation system and securing freedom of navigation for the benefit of all nations. In addition to the above-mentioned definition, the ocean governance approach to maritime security has a strong marine environmental bias, but unlike the fundamentalist view, is placed firmly within the international political and legal framework that sets the context for

ocean management.<sup>28</sup> As James Kraska and Raul Pedrozo suggest “any definition of maritime security must at least include all four elements of national power that constitute diplomacy, intelligence or information, military, and economic means. Beyond the marine or oceans aspects of ‘DIME’ (abbreviation of the above-mentioned elements), maritime security may involve environmental or cultural interest.”<sup>29</sup> With respect to the limited scope of this thesis, it will be focused particularly on piracy, armed robbery and maritime terrorism in our study. With this perspective, the study will then illustrate an introductory note to maritime security challenges in the Indian Ocean region and will briefly discuss about the legal framework lied in maritime security paradigms in international law.

From the perspective of the United Nations, the Secretary-General has acknowledged that there is no agreed definition of ‘maritime security’, and has instead identified what activities are commonly perceived as threats to maritime security.<sup>30</sup> In his 2008 ‘Report on Oceans and the law of the Sea’, the Secretary-General identified seven specific threats to maritime security. These threats are as follows:

*First, piracy and armed robbery against ships, which particularly endanger the welfare of seafarers and the security of navigation and commerce. Second, terrorist acts involving shipping, offshore installation and other maritime interests, in view of the widespread effects, including significant economic impact, that may result from such an attack. Third, illicit trafficking in arms and weapons of mass destruction. Fourth, illicit trafficking in narcotic drugs and psychotropic substances, which takes into account that ‘approximately 70 percent of the total quantity of drugs seized is confiscated either during or after transportation by sea’. Fifth, smuggling and trafficking of persons by sea, posing risks due to the common use of unseaworthy vessels, the inhumane conditions on board, the possibility of abandoned at sea by the smugglers, and the difficulties caused to those undertaking rescues at sea. Sixth,*

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<sup>28</sup> For a concise overview see: Daniel Moran, “The Maritime Governance System” in Andrew T.H. Tan, ed., *The Politics of Maritime Power: A Survey*, Routledge, London, 2007, pp. 115-130.

<sup>29</sup> James Kraska and Raul Pedrozo, “*International Maritime Security Law*”, Martinus Nijhoff Publishers, 2013, at 5.

<sup>30</sup> Secretary-General of the United Nations, ‘Report of the Secretary-General on Oceans and the law of the Sea’, 10 March 2008, UN Doc. A/63/63, Para. 39.

*illegal, unreported and unregulated (IUU) fishing in light of the identification of food security as a major threat to international peace and security. Finally, intentional and unlawful damage to the marine environment as a particularly grave form of maritime pollution due to the potential to threaten the security of one or more states given the impact on social and economic interests of coastal states.*

In addition, according to the aforementioned report of the Secretary-General on the United Nations, maritime security operations, also called maritime constabulary operations, are necessary to address maritime transnational crime, terrorism, maritime piracy, illicit trafficking, and maritime proliferation of chemical, biological, nuclear, radiological weapons and high explosives that constitute some of the most vexing threats to maritime security.<sup>31</sup> Therefore, the UN has placed these categories of security threats which pose serious challenges to maritime security.

The International Maritime Organization (IMO) also has addressed questions of maritime security under the auspices of its Maritime Safety Committee since the 1980s. In this context, a distinction is drawn between maritime safety and maritime security. Maritime safety refers to preventing or minimizing the occurrence of accidents at sea that may be caused by sub-standard ships, unqualified crew or operator error, whereas maritime security is related to protection against unlawful and deliberate acts.<sup>32</sup> To consider the relationship between two important paradigms in elaborating the discussions in my thesis, it should be noted that “in many aspects the fusion of maritime security and maritime safety is unavoidable. The legal regimes that regulate each activity are less distinct today than in the past and now share common and mutually reinforcing objectives.”<sup>33</sup> “The international regime of maritime security consists of conventional rules that originally regulate limited criminal activities and refer to ‘maritime safety’ only as the protection of life at sea. Subsequent amendments dealt with a variety of forms of violence at sea and introduced the new concept of ‘maritime

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<sup>31</sup> UN Documents, A/63/63, Oceans and Law of the Sea, Report of the Secretary-General, Mar. 10, 2008, para.39.

<sup>32</sup> P.K. Mukherjee and M.Q.Mejia Jr, “The ISPS Code: Legal and Ergonomic Considerations’ in M.Q.Mejia Jr (ed), *Contemporary Issues in Maritime Security*, Malmo: World Maritime University, 2004, pp33, 34.

<sup>33</sup> James Kraska and Raul Pedrozo, “*International Maritime Security Law*”, Op.cit, at 5.

security' intended as the protection of ships and port facilities from acts of terrorism, piracy, hijacking and sabotage.”<sup>34</sup>

According to the report of the High Level Workshop on Transnational Organized Crimes, Convened by the European Union and INTERPOL on May 2014,<sup>35</sup> the concept of organized crime at sea has many facets, and covers numerous issues such as piracy, illegal fishing and money laundering and the scope of the challenge posed by the aforementioned organized crimes at sea is much broader than initially perceived. Accordingly proper maritime governance and security goes far beyond just acts of piracy and armed robbery at sea. Better responses are required to a broad range of cross-border and organized crimes including seaborne trafficking of arms, narcotics and human beings, as well as IUU fishing, the illegal dumping of waste, among others. These crimes require a proactive and vigilant approach, as they have widespread impact on the economic, social and security status of vulnerable populations.

Today's pirates and criminals are usually well-organized and well-equipped with advanced communications, weapons and high speed craft. Therefore, the world community is currently also faced with some legal challenges in combating piracy and armed robbery against ships at seas. The growth of the continuing problem of transnational organized crimes committed at sea, including piracy, has serious implications for the security of navigation and the safety of seafarers.

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<sup>34</sup> Anna Oriolo, “*The Multilateral Approach of the EU Maritime Security Policy: The Fight Against Piracy, Terrorism and Violence at Sea*”, *The Global Community: Yearbook of International Law and Jurisprudence*, 2009, Issue 1, pp251-266, At 254.

<sup>35</sup> The report of the High Level Workshop on Transnational Organized Crimes, Convened by the European Union and INTERPOL on May, 20-21, 2014, with 150 representatives from the law enforcement and justice sectors, Financial Intelligence Units and private sector of more than 20 countries in regions affected by maritime crime, as well as EU Member States to share experiences and ideas regarding the functioning of networks of transnational crime at sea. Cited in “Combating Transnational Organized Crime at Sea - following the money trail and pursuing networks and organizers of maritime crime”, Report of the High Level Workshop, Convened by the European Union and INTERPOL, 20-21 May 2014, Brussels. Available at:

[http://www.crimson.eu.com/assets/2014/06/Combating\\_Transnational\\_Organised\\_Crime\\_at\\_Sea\\_-\\_Report\\_of\\_the\\_High\\_Level\\_Workshop.pdf](http://www.crimson.eu.com/assets/2014/06/Combating_Transnational_Organised_Crime_at_Sea_-_Report_of_the_High_Level_Workshop.pdf)



The piracy and hijacking incidents in the Gulf of Aden and Malacca Strait, according to one perspective, have been triggered by poverty, low levels of economic development, and weak governance, as piracy was taken as an alternative means of livelihood.<sup>36</sup> Accordingly, the fishermen who were affected by IUU fishing in the coast of Somalia had taken piracy as a new way of life. It should be also noted that IUU fishing in the Indian Ocean has been large in scale. IUU fishing depletes fish stocks, destroys marine habitats, distorts competition, puts honest fishers at an unfair disadvantage, and weakens coastal communities, particularly in developing countries. According to a report by an independent UK-based Global Ocean Commission, “this illegal practice makes it difficult to manage fishery quota, harms local fishermen who have to head deeper for their daily catch, and is also linked to other crimes such as trafficking of drugs, weapons and humans.”<sup>37</sup>

Without doubt, maritime piracy is a threat to international peace and security. Piracy is not just about the theft of a ship, but all the crimes that go along with that robbery. Such crimes include hostage-taking, infliction of grave injuries, torture, and even killing. As Murphy has pointed out “in many ways piracy is a more complex challenge than proliferation. The threat it presents is less dramatic and more diffuse. Piracy is not just about what happens at sea. Its roots lie on land where it is fed by political corruption, poor government, and under resourced and poorly motivated law enforcement.”<sup>38</sup> However, some authors suggest that “On the diplomatic front, the efforts of the IMO are paying off, and nations have been successful in developing a mutually agreeable framework for ensuring maritime safety and security.

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<sup>36</sup> Mario Silva, *Somalia: State Failure, Piracy and the Challenge to International Law*, 2010, Available at: <<http://www.vjil.org/articles/somalia-state-failure-piracy-and-the-challenge-to-international-law>>

<sup>37</sup> Available at: <http://www.muscatdaily.com/Archive/Oman/Illegal-fishing-a-problem-in-Indian-Ocean-Omani-vessels-also-involved-37s4> Also noted that “(IUU) fishing is costing Indian Ocean countries billions of dollars in lost revenue. Estimates of the cost of IUU fishing suggest that it may account for as much as one-fifth of the total global catch, valued between US\$10bn and US\$23.5bn per year.”

<sup>38</sup> Martin N. Murphy, ‘Piracy and UNCLOS: Does International Law help Regional States Combat Piracy?’ in Lehr (ed.), *Violence at sea; piracy in the age of global terrorism*, Routledge, New York, 2007, pp.82-155, at 179.

Nowhere have these efforts been more productive than in developing an international regime to address the threat of maritime piracy off the coast of Somalia.”<sup>39</sup>

However, as *James Kraska* suggests, “maritime security law is experiencing a renaissance. Over the past two decades, the international law pertaining to maritime security evolved from a set of rules designed to avoid naval warfare by keeping maritime powers apart, toward a new global framework designed to facilitate maritime security cooperation by bringing countries together to reach common goals”.<sup>40</sup> In this regard, I will consider the applicable legal regime and the cooperative approach in fighting against maritime security threats in the Indian Ocean in the following sections.

## **1.2 Maritime security challenges threatening the Indian Ocean Region posed by piracy and armed robbery against ships at seas**

A scrutiny of the principle *modus operandi* and the pirates’ business model in recent years of the increasing nature of the severity of the crime show that the main focus of pirates off the Horn of Africa has been to take vessels and hostages for ransom. Whilst the focus in the early stages of the current phenomenon (2008-2009) was on hijacking vessels for ransom, targeting people as hostages for ransoms has risen in prominence. This has prompted a number of new pirate business models, including splitting hostage groups and holding them in a variety of locations ashore (to make military hostage recovery operations more difficult), and opportunistic shore based kidnapping.<sup>41</sup>

Contemporary piracy and armed robbery against ships is not limited to Somalia. In recent years for instance, piracy in the Gulf of Guinea has been the subject of the UN Security Council’s attention. Piracy and armed robbery against ships in Southeast Asia has also been a source of international concern in recent years. However during the last decade piracy in

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<sup>39</sup>James Kraska, “America’s Maritime Priorities in Asia”, in(ed) by Joshua H. Ho and Sam Bateman, *Maritime challenges and Priorities in Asia, Implications from regional Security*, Routledge, 2012. Pp 247-248.

<sup>40</sup> James Kraska, “Grasping the Influence of Law on Sea Power”, 62 NAVAL WAR CLL. REV., Summer 2009, At 113-114.

<sup>41</sup> The United Nations Office on Drugs and Crime (UNODC), Hostage Support Programme, (Project 045- Part of the Maritime Crime Programme), 11 April 2014.

Somalia has been at the center of international attention, resulting in legal developments whose relevance may, in some cases, go beyond the specific situation off the coasts of Somalia.

Piracy has been a serious threat against safety of maritime navigation, life of seamen, crew members and passengers of ships, domestic economy of countries and global trade, maritime environment and safety of coastal and non-coastal ships. The neighboring states in the region have been suffering from the destructive effects of piracy and armed robbery upon it. The responses of international community and actions of governments in criminalizing the phenomenon in domestic law and international responsibility of them in violation of their international obligations can be very important in this regard. The international community has to resort not only to preventive actions, but also to a long-term multi-dimensional solution to address this serious threat. This phenomenon now represents a very serious menace to navigations coming from the Suez Canal and going through the Gulf of Aden to the narrow area between the Horn of Africa and the Arabian Peninsula.

Most of the attacks occurred in the aforementioned area are considered “armed robbery against ships” and not piracy under UNCLOS. This is because the attacks take place near the coast either when the ships are in port or at anchor, within straits used for international navigation (quite notably such as the Hormuz Strait) or when they are transiting in the territorial sea.<sup>42</sup> It should be noted here that as stipulated in UNCLOS, the regime dealing with piracy only applies to acts of piracy that have taken place on the high seas and in the EEZs of States. Piracy under UNCLOS can only take place seawards from territorial waters. Attacks against ships in areas under territorial sovereignty such as ports, inland waters, archipelagic waters and territorial seas, are not considered acts of piracy governed by the UNCLOS regime but are defined as “armed robbery against ships” by International Maritime Organization. This distinction will be discussed later where I explain the conventional definition of piracy and armed robbery against ships.

Maritime piracy flourishes in weak and failed states and accordingly in the failed region as we are witnessing in the west side of the Indian Ocean region spreading all through the other

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<sup>42</sup>Robbert Beckman, “The 1988 SUA Convention and the 2005 SUA Protocol: Tools to Combat Piracy, Armed Robbery and Maritime Terrorism” 2 Maritime Affairs (No.2) 1 (2006) At 2 (Beckman, 2002).

sides of that region. As Murphy suggests<sup>43</sup> it can only be suppressed by on-shore remedies and vigorous maritime patrolling. Seven major factors that enable piracy to flourish in his view are as follows:

- 1) Legal and jurisdictional weakness, for the first factor, he explains that “the legal and jurisdictional difficulties that law enforcement agencies face help to reduce the risks run by pirates.”
- 2) Favorable geography: geographical features play an important role in piracy movements as Murphy quoted Jack A. Gottschalk and Brian P. Flanagan’s observation, “piracy is only sustainable in places that offer a combination of rewarding hunting grounds, moderate levels of risk and proximate safe havens.”<sup>44</sup>
- 3) Conflict and disorder is the third factor in Murphy’s view, he suggests that “piracy and criminality at sea generally- can thrive when coastal regions are troubled by war or civil disturbance, or their aftermath, as the absence of law-enforcing authorities and desperate circumstances combine to draw people towards criminality.”
- 4) Under-funded law enforcement (inadequate security): Inadequate state funding and training of police, coast guards and navies in Murphy’s perspective allows pirates the freedom to operate. Furthermore, he believes that “law enforcement at sea is expensive; there are huge sea areas to be protected... It also requires shore-based command and control facilities with access to dependable information about ship movements and cargoes, and reliable intelligence about pirate activity.”
- 5) Permissive political environment is the latter factor he suggests as “where permissive environments exist within states and their territorial waters, they generally come about either because the political environment is corrupt locally or nationally, or because law enforcement is under-fundable.”
- 6) Cultural acceptability: In Murphy’s view, piracy thrives where it is culturally acceptable, an important fact that is often overlooked. Furthermore, piracy frequently operates on a clan or

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<sup>43</sup> Martin N. Murphy, *Contemporary Piracy and Maritime Terrorism; the threat to international security*, Routledge, 2007, at 40.

<sup>44</sup> Jack A. Gottschalk and Brian P. Flanagan, *Jolly Roger with an Uzi: The Rise and Threat of Modern Piracy*, (Annapolis, MD: Naval Institute Press, 2000). at.3.

family basis, as in Somalia and in the Horn of Africa where a tradition has existed for generations.

- 7) Finally he mentions the promise of reward as the latest factor flourishing piracy and armed robbery against vessels; as the Organization for Economic Cooperation and Development (OECD) has observed, piracy can also be a highly lucrative venture.<sup>45</sup> Sums that might appear partly in the developed world make piracy well worth the risks to those involved.<sup>46</sup>

The problem of piracy and armed robbery disrupts the critical sea lines of transportation in the two maritime choke points, one on the western end of Indian Ocean region- Bab el Mandeb and the Strait of Hormuz and one on the eastern end- the Malacca strait - complicating the geo-strategic scenario essentially needed for the well-being of the region and the world at large. Due to the *sui generis* situation in Somalia, this region has recently emerged as a hub of maritime piratical activities with the increasing incidences of piracy in the strategic waterways of the Indian Ocean.<sup>47</sup>

## **2. The legal regime for combating piracy and armed robbery**

The first part of this section discusses the international law of piracy including piracy provisions of the United Nations Convention on the Law of the Sea (1982) and its predecessor, the Convention on the High Seas (1958); and the second part will consider universal jurisdiction and jurisdictional challenges of the national courts to prosecute and try suspected pirates. It will then review whether, and if so how, these provisions in particular and other UNCLOS articles more generally, can be used to aid or facilitate regional cooperation between states in their efforts to suppress or control the vicious, criminal acts of piracy.

Finally, this thesis, in the light of the answers to the aforementioned questions, will attempt to draw some conclusions about the direction of individual state and regional

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<sup>45</sup> OECD Maritime Transport Committee, *Security in Maritime Transport: Risk Factors and Economic Impact*, at 14. Cited in Martin N. Murphy, *Contemporary Piracy and Maritime Terrorism, the threat to international security*, op.cit, at 17.

<sup>46</sup> Martin N. Murphy, *Contemporary Piracy and Maritime Terrorism, the threat to international security*, op.cit, at 13-17.

<sup>47</sup> This issue will be briefly discussed in the second part of the thesis and here I will respectively address the legal regime applicable for tackling piracy and armed robbery against ships.

antipiracy policy in the future and the role UNCLOS could play in both. In addition, it will touch on the SUA Convention and other legal instruments constituting the international legal regime applying to piracy. This will serve as a prelude to asking how useful they are under present conditions.

## **2.1. International law of piracy**

First of all, it is noteworthy to be mentioned that here in this section, I will illustrate the international law of piracy and jurisdictional approaches applicable to prosecute individuals suspected of crimes of piracy and armed robbery against ships at seas.

The crime of piracy is clearly defined under international law and mainly customary international law. As briefly described in previous pages, maritime piracy has had a long history as a threat to international security and it was in fact the first international crime, with pirates considered as *hostis humani generis* (enemies of humanity)<sup>48</sup> and piracy is the original crime under universal jurisdiction.<sup>49</sup>

Quite significantly, some theorists believe that there is a frequent mistake in the legal analysis of maritime piracy as an “international crime” or an offence against the law of nations and they suggest that piracy is not an international crime. Actually their argument is based on the fact that an international crime is sort of a crime that may be prosecuted in an international criminal court or tribunal, such as the International Criminal Court at The Hague. In their opinion, to the contrary, “piracy is a domestic or municipal crime of universal jurisdiction, meaning that international law recognizes that all nations may assert jurisdiction over such cases, but they can do so through domestic criminal law systems. The terms ‘international crime’ would become relevant to describe piracy only if the international community develops

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<sup>48</sup> However, piracy was excluded from the Rome Statute because of the fact that piracy is a crime committed for personal gains, and it is also not a crime committed by state actors. See Melanie O'BRIEN, “Where security meets justice: prosecuting maritime piracy in the International Criminal Court”, *Asian Journal of International Law*, Volume 4, Issue 1, pp. 81-102.

<sup>49</sup> See Eugene Kontrovich, the “Define and Punish” Clause and the Limits of Universal Jurisdiction, 103 *Northwestern University Law Review* 149, 151 (2009).

a functional international criminal tribunal with jurisdiction over the crime.”<sup>50</sup> There were initiatives to this end which the thesis should briefly take a look at them.

### **1932 Draft Convention on Piracy**

The first concerted effort at codifying the crime of piracy came about in 1932, in the form of a Draft Convention on Piracy- the so-called “Harvard Draft”.<sup>51</sup> The draft was established by the Harvard Research Group as a document composed of 19 articles which refer to all sources related to piracy, using the conventions, international practices, the practices of law recognized by nations at the time, judicial decisions and publications by the most eminent specialists of the time.<sup>52</sup>

This document was produced by a dozen American law professors to “suggest the principle points for discussion and the possible solutions of the problems which may arise in a [future] codification conference.”<sup>53</sup> The draft recognized the lack of consensus on a core definition of piracy.<sup>54</sup> A key contribution of the Draft Convention was therefore to define piracy as one of acts committed in a place outside the territorial jurisdiction of any State.<sup>55</sup> Article 3 set out these acts as follows:

1. Any act of violence or of depredation committed with intent to rob, rape, wound, enslave, imprison or kill a person or with intent to steal or destroy property, for private ends without bona fide purpose of asserting a claim of right, provided that the act is connected with an attack on or from the sea or in or from the air. If the act is connected with an attack which starts from on board ship, either that ship or another ship which is involved must be a pirate ship or a ship without national character.

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<sup>50</sup> James Kraska, *Contemporary Maritime Piracy*, Op.cit, At 106-107.

<sup>51</sup> Harvard Research in International Law, Draft Convention on Piracy, 26 AJIL Supp. 743 (1932).

<sup>52</sup> Barry Hart Dubner, *The law of international sea piracy, Developments in International Law Series*, Brill Academic Publishers, 1980, At 103.

<sup>53</sup> Harvard Research in International Law, Draft Convention on Piracy, op.cit, At 764.

<sup>54</sup> Ibid. At 769.

<sup>55</sup> Ibid. At 743.

2. Any act of voluntary participation in the operation of a ship with knowledge of facts which make it a pirate ship.
3. Any act of instigation or of international facilitation of an act described in paragraph 1 or paragraph 2 of this article.<sup>56</sup>

In addition, article two confirms the principle of universal jurisdiction over piracy, stating “every state has jurisdiction to prevent piracy and to seize and punish persons and to seize and dispose of property because of piracy.”<sup>57</sup> Article 14 explicitly provides for universal jurisdiction, stating that a nation that has taken lawful custody of a pirate may prosecute and punish the pirate.<sup>58</sup>

### **The Convention on the High Seas (1958)**

The International Law Commission<sup>59</sup> in an attempt to codify the international law of the sea took up the issue of Piracy in 1956<sup>60</sup>, defining the crime of piracy in Article 39 of the Draft Articles. The ILC commentaries also make clear that for acts to fall within the definition of piracy, they must be committed for private ends, in international waters, by a private ship or aircraft, and that two ships must be involved. That is to say, there is a “two ship” requirement; “acts committed on board a ship by the crew or passengers and directed against the ship itself or against persons or property on the ship, cannot be regarded as acts of piracy.”<sup>61</sup>

The Diplomatic Conference on codification of the law of the sea on the Convention on the High Seas (1958) agreed on codified standards and practices at sea, including an appropriate definition of piracy directly inspired by the draft convention prepared by the

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<sup>56</sup> Ibid.

<sup>57</sup> Ibid.

<sup>58</sup> Ibid. At 745-46.

<sup>59</sup> The International Law Commission pursuant to the General Assembly Resolution 174 (II) dated 21 November 1947 is responsible for developing and codifying international law.

<sup>60</sup> *Yearbook of the international law commission*, volume II, 1956, at.282-285.

<sup>61</sup> Report of the International Law Commission as incorporated as document series in Kristen E. Boon, Aziz Huq and Douglas C. Lovelace, JR. (editors) *Terrorism, Commentary on Security Documents, ( Piracy and International Maritime Security)*, Volume 113, Oxford, 2011, At 3.



Harvard Group. The Convention on the High Seas (1958) in Article 15 defines piracy as follows:

“Piracy consists of any of the following acts:

(1) Any illegal acts of violence, detention or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:

(a) On the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;

(b) Against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;

(2) Any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;

(3) Any act of inciting or of intentionally facilitating an act described in subparagraph 1 or subparagraph 2 of this article.

The Convention recalls the principle that acts of piracy can take place only on the high seas or outside the jurisdiction of a State. The State that has seized the pirates may decide how to proceed to sentence the alleged pirates and “actions to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith”<sup>62</sup>

It is also stated that the seizure of a vessel may be made only by warships or other ships from a State with authority to perform this task.<sup>63</sup> The following dispositions specify the conditions of seizure of a merchant ship for which must exist based on “reasonable grounds for suspecting that the ship is engaged in piracy”.<sup>64</sup>

### **Piracy provisions of the United Nations Convention on the Law of the Sea (1982)**

Here, let’s look at the Convention provisions regarding to piracy and discuss the deficiencies whenever it is possible. The international law of piracy is set out in article 100 to 107 and 110

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<sup>62</sup> Convention on the High Seas, 1958, Article 19, At 6.

<sup>63</sup> Id., Article 21, At 6.

<sup>64</sup> Id., Article 22, At 6.

of UN Convention on the Law of the Sea (UNCLOS). These relevant articles of UNCLOS repeat almost literally in articles 14 to 22 of the Convention on the High Seas of 1958, either as a matter of customary or of conventional law, these articles state the law as currently in force. These two conventions, may be considered together as their wording is almost identical. Both derive from an international desire to codify the laws relating to the sea, including those dealing with piracy.

The piracy provisions of UNCLOS are concerned solely with piracy on the high seas. Arguably, the piracy provisions of UNCLOS (articles 100-107) are arguably based on history they stand to confront a high seas scourge whose time has passed. The renewed form of piracy operates usually no more than a few miles from a coastline and often in the congested waters of straits used for international navigation. Pursuant to article 101 of UNCLOS, which reiterates article 15 of the Convention on the High Seas, piracy is defined as follows:

- a) Any illegal acts of violence, detention or any act of depredation committed for private ends by the crew or the passengers of a private ship or a private aircraft and directed:
  - (i) On the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
  - (ii) Against a ship, aircraft, persons or property in a place outside the jurisdiction of any state.
- b) Any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
- c) Any act of incitement or of international facilitation of an act described in Subparagraph (a) or Subparagraph (b) of this article.

Although the definition of piracy includes only action on the high seas, by virtue of article 58 (2) of UNCLOS it also applies to the exclusive economic zone, as that article states that “article 88 to 115 and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with this Part” (Part V “Exclusive Economic Zone”), which encompasses the articles relating to piracy.

A significant number of acts of violence at sea which theoretically meet criteria established by the definition of piracy takes place in the territorial waters of coastal states, and therefore cannot be defined as piracy. Therefore it was quite logical that the International Maritime Organization in its 2001 Code of Practice for the investigation of the Crimes of

Piracy and Armed Robbery against Ships should draw a clear distinction between these two categories of acts. “Piracy is defined in the Code as meaning unlawful acts as set out in article 101 of UNCLOS, while “armed robbery” is defined as “Any illegal act of violence of detention, or any act of depredation, or threat thereof, other than an act of piracy committed for private ends and directed against a ship, or against persons or property onboard such ship, within a State’s internal waters and territorial sea.”<sup>65</sup>

Therefore, an attack on a ship in a maritime zone under the sovereignty of a State is not considered piracy under international law. Since the attack took place within its territorial sovereignty, the general criminal law of the coastal State applies. The only State with the authority to exercise police power over such attacks is the coastal State. The fact that national legislation in some States classifies attacks on ships within the territorial sea as piracy is of no significance under international law. It follows from the above that universal jurisdiction is not applicable to acts confined to ocean areas within a state’s territorial jurisdiction, which are considered “armed robbery”, and the suppression of such acts is the responsibility of the coastal states in the waters of which such acts take place.<sup>66</sup>

Article 100 of UNCLOS, provides that “all states shall cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any state”.<sup>67</sup> Significantly, Article 101 provides a definition of piracy, but it imposes no obligation on States parties to enact national legislation making piracy as defined in UNCLOS a criminal offence with appropriate penalties. Moreover, Article 101 imposes no obligation on States to make acts of piracy outside the territorial sovereignty of any State an offence. However, as some authors truly believe “in order for the problem of pirate impunity to be overcome, uniform domestic anti-piracy legislation across states needs to be coupled with a demonstrable willingness on the part of all states to prosecute and extradite perpetrators, not

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<sup>65</sup> See “The Code of Practice for the Investigation of Crimes of Piracy and Armed Robbery against Ships”, IMO Assembly Resolution A. 1025 (26), adopted 18 December 2009. See also See IMO Res. A. 545 (13) of 17 November 1983.

<sup>66</sup> Douglas Guilfoyle, Piracy off Somalia: UN Security Council Resolution 1816 and IMO Regional Counter-Piracy Efforts, 57 International and Comparative Law Quarterly 690, p.694 (2008).

<sup>67</sup> This question will be discussed later in chapter 2 of the second part of this thesis.

simply deport them.”<sup>68</sup> One can see there is a gap in the criteria sets out in the UNCLOS articles regarding an obligation for State Parties to be undertaken in order to legally confront with the problem of piracy.

Article 105 of UNCLOS gives every State the right, in areas outside the territorial sovereignty of any State, to seize pirate ships and the property on board and to arrest the pirates, but it imposes no obligation on States to exercise such right. Article 105 imposes no obligation on States to make the changes necessary within their domestic legal system to give their courts’ jurisdiction to try pirates who commit acts of piracy against foreign ships outside of their territorial sea. Under Article 105 of UNCLOS no jurisdictional link is necessary between the State exercising jurisdiction and the suspected offender(s), pirate ship(s) or victim(s).

It follows from the forgoing that “although the current rules of international law on piracy are not entirely without deficiencies, as all other universally accepted rules of international law, they represent a balance of interests of the subject and thus correspond to a political reality. In other words, they constitute a set of norms that the world community of States is prepared to accept as international rules governing activities for the suppression of piracy.”<sup>69</sup> By an overview, it is noteworthy to emphasize that “twenty years later, the international community has seen the limits of UNCLOS dispositions against the new kind of violent acts against ships at sea. SUA (the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation) is born from the international community commitment to develop an instrument that would complement the International Convention of Law of the Sea.”<sup>70</sup>

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<sup>68</sup> Martin N. Murphy, *Contemporary Piracy and Maritime Terrorism; The Threat to International Security*, Op.cit, at 13.

<sup>69</sup> Vladimir Golitsyn, *Maritime Security (Case of Piracy)*, In “Coexistence, cooperation and solidarity”, *Liber Amicorum: Rudiger Wolfrum*, Edited by Holger Hestermeyer (et al), Martinus Nijhoff Publishers, 2012, at 1176.

<sup>70</sup> Abbas Daher Djama, *The phenomenon of piracy off the coast of Somalia: challenges and solutions of the international community*, UN-Nippon 2011 Fellowship, December 2011, at 9. Available at: [http://www.un.org/depts/los/nippon/unnnff\\_programme\\_home/fellows\\_pages/fellows\\_papers/djama\\_1112\\_djibouti.pdf](http://www.un.org/depts/los/nippon/unnnff_programme_home/fellows_pages/fellows_papers/djama_1112_djibouti.pdf)>

## Universal jurisdiction and Jurisdictional challenges of the national courts to prosecute and try pirates

The crime of maritime piracy has had a rich history in domestic and international law. As noted in the introduction part of this thesis, piracy is one of the first crimes in which universal jurisdiction applied and pirates as Cicero denounced are considered as *hostis humani generis*, a Latin term meaning “enemy of all mankind”. “Piracy by the law of nations, in its jurisdictional aspects, is *sui generis*. Though statutes may provide for its punishment, it is an offence against the law of nations; and as the scene of the pirate’s operations is the high seas, which it is not the right or the duty of any nation to police, he is denied the protection of the flag he may carry, and is treated as an outlaw, as the enemy of mankind whom any nation may in the interest of all capture and punish.”<sup>71</sup> By describing piracy under the law of nations in its jurisdictional aspects, as *sui generis*, international law regards piracy as a unique feature.<sup>72</sup>

However, there are some difficulties in applying universal jurisdiction over pirates off the coast of Somalia. While approximately 1,200 pirates have been, or are being prosecuted in various parts of the world, almost all of them have been, or are low- level skiff pirates, with the international community and only a few countries engaged in limited proactive efforts to prosecute pirate leaders and financiers.<sup>73</sup>

As some scholars argue, “Several states, including Canada, China, Denmark, the United Kingdom and the United States, as well as the EU have sought a solution to this dilemma by concluding agreements with Kenya under which pirates captured by their warships were to be tried in that country neighboring Somalia. However, “Sub-contracting” or “out-sourcing” criminal proceedings by transferring the trail of Somali pirates to Kenya was problematic. The latter state can hardly be called a beacon of the respect for human rights, including those particularly relevant to the treatment of detainees and fair trial”<sup>74</sup>

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<sup>71</sup> Moore, the Lotus case, at 70.

<sup>72</sup> James Kraska, *Contemporary Maritime Piracy*, Op.cit, at 106.

<sup>73</sup> Kenneth Scott, *Prosecuting pirates: Lessons learned and continuing challenges*, Oceans Beyond Piracy, available at: <<http://oceansbeyondpiracy.org/obp-reports/>>

<sup>74</sup> Hanspeter Neuhold, *The return of piracy: Problems, parallels, paradoxes*, In “Coexistence, cooperation and solidarity”, Op.cit, at.1252-1253.

Piracy as defined in article 101 of UNCLOS should be a crime punishable by severe penalties but according to IMO report, only a few countries fully incorporate the definition of piracy contained in article 101 as well as a jurisdictional framework based upon the concept of universal jurisdiction. Secondly, in most cases, piracy is not addressed as an independent, separate offence with its own jurisdictional framework.

Courts should have jurisdiction to try persons who commit acts of piracy outside the territorial sovereignty of any State, even when such acts are committed by foreign nationals against foreign ships. UNCLOS has set a collection of rights and obligations of States with respect to the suppression of piracy. As a right, a warship is entitled to board a foreign ship on the high seas if there are reasonable grounds for suspecting, inter alia, that the ship is engaged in piracy under article 110 of UNCLOS.

However, first and the most important element is universal jurisdiction which UNCLOS grants to every state over acts of piracy as an exception to the jurisdiction of the flag state on the high seas.<sup>75</sup> Accordingly, under article 105 of UNCLOS, a warship of any flag or other ship on government service<sup>76</sup> has the power to seize, on the high seas, a pirate ship or a ship under the control of pirates and arrest the persons and seize the property on board.<sup>77</sup> Further, once seized, “the courts of the state which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith.”<sup>78</sup> So while according to the first sentence of Article 105, “every State” may seize a pirate ship, arrest the persons and seize the property on board, only the courts of the seizing State may institute legal proceedings according to a possible reading of Article 105. This view had been held in legal literature.<sup>79</sup>

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<sup>75</sup> Article 92 of UNCLOS,

<sup>76</sup> Article 107 and article 111 (5) of UNCLOS.

<sup>77</sup> Article 105 of UNCLOS.

<sup>78</sup> Article 105 of UNCLOS.

<sup>79</sup> Geiss and Petrig, *Piracy and Armed Robbery at Sea, the Legal Framework for Counter-Piracy Operations in Somalia and the Gulf of Aden*, Oxford, 2011, pp.143-151.

UNCLOS does provide coastal states with the right to pursue foreign vessels outside of territorial waters if the competent authorities have good reason to believe that the ship has violated the laws and regulations of that State.<sup>80</sup> This right, known as the right of hot pursuit, must be commenced when the foreign ship or one of its boats is within the internal waters, the archipelagic waters, the territorial sea or the contiguous zone of the pursuing State, and may only be continued outside the territorial sea or the contiguous zone if the pursuit has not been interrupted. The right of hot pursuit ceases as soon as the ship pursued enters the territorial sea of its own State or of a third State.<sup>81</sup>

Article 105 does not place any obligation upon a seizing State to prosecute a suspected pirate and merely provides that the courts of the seizing State *may* decide upon the penalties to be imposed. Neither is there an obligation to extradite to another State which has jurisdiction.<sup>82</sup> Despite, some considerations may cause the fact that the seizing State often lacks the political will and resources to prosecute suspected pirates and to face them to a fair trial and as an obvious result, one can witness that most of the suspected pirates are frequently released without encountering justice. For example, some reasons stand for the heavy costs of prosecution and fulfilling the obligations to bring an arrested or detained pirate promptly before a judge, or another authorized officer by law to exercise judicial power within a reasonable time, providing transporting witnesses and evidence from remote countries,<sup>83</sup> in which the incidents occurred with this knowledge that in some cases the acts of piracy take place on-shore and off-shore and it is very difficult to afford all those obligations in a due manner.

Moreover, some State parties to the European Convention on Human Rights and fundamental freedoms have serious concerns about pirates who may ask for asylum on this basis that they would be posed to severe torture or even the death penalty in case of extradition

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<sup>80</sup> Article 111 of UNCLOS.

<sup>81</sup> Article 111 (3) of UNCLOS.

<sup>82</sup> Douglas Guilfoyle, "Treaty Jurisdiction over Pirates: A Compilation of Legal Texts with Introductory Notes", prepared for the third Meeting of Working Group 2 on Legal Issues of the Contact Group off the Coast of Somalia, Copenhagen, 26-27 August 2009, at 5, Available at:

<[http://www.academia.edu/195470/Treaty\\_Jurisdiction\\_over\\_Pirates\\_A\\_Compilation\\_of\\_Legal\\_Texts\\_with\\_Introductory\\_Notes](http://www.academia.edu/195470/Treaty_Jurisdiction_over_Pirates_A_Compilation_of_Legal_Texts_with_Introductory_Notes)>

<sup>83</sup>HanspeterNeuhold, op.cit, pp1251-1252.

to their national country. Furthermore, after obtaining the so called asylum, they may try to re-communicate and reunion with the organized groups of their friends, families and relatives who may have their arms on the fire of piracy.

Consequently, it should be also noted that despite the status of piracy as a crime of universal jurisdiction, a careful study by Eugene Kontorovich found that of all clear cases of piracy punishable under universal jurisdiction, international prosecution occurred in no more than 1.47 percent. “This figure includes the unprecedented international response to the Somali piracy surge that began in 2008, which accounts for the vast majority of prosecutions.”<sup>84</sup>

## **2.2 Other international legal instruments to combat maritime piracy**

In accordance with the abovementioned issues regarding the compatibility of UNCLOS with the new emergence of organized techniques and the spreading nature of the crime of piracy and armed robbery, one should take note that some other international legal instruments such as the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (1988 SUA Convention) and its 2005 Protocol, UNTOC Convention and the International Convention Against the Taking of Hostages (1979) fill the gaps regarding the limitations and deficiencies in UNCLOS Convention provisions on piracy. They would give the international community a set of useful tools to combat piracy and armed robbery at sea. The existing international conventions can be, of course, supplemented by bilateral treaties when necessary.

### **Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (1988 SUA Convention)**

As some scholars argue, the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (well-known as SUA Convention) is generally recognized as supplementing UNCLOS provisions on piracy. The SUA Convention is considered an “International Crime” Convention in that it is part of international conventions adopted to address transnational crimes. This group of conventions includes the convention for the

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<sup>84</sup> Eugene Kontorovich and Steven Art, An Empirical Examination of Universal Jurisdiction for piracy 104 *American Journal of International Law* 436 and 444 (July 2010). Cited in James Kraska, *Contemporary Maritime Piracy*, Op.cit, at 107.



Suppression of Unlawful Seizure of Aircraft, 1970, the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, 1971, the International Convention on Crimes Against Diplomatically Protected Persons including Diplomatic Agents, 1973, and the International Convention Against the Taking of Hostages, 1979.

In the wake of the Achille Lauro seizure,<sup>85</sup> the International Maritime Organization (IMO) prepared a study of the problem of terrorism on board or against ships. This led to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation in 1988, now referred to more generally as the SUA, or sometimes the ‘Rome Convention.’ It should be mentioned that “this Achille Lauro case showed the limits of the definition of piracy as contained in UNCLOS and highlighted the need to fight against these acts of maritime violence so as the implementation of a tool to criminalize such acts. The aim of the commando was not guided by "private ends" as stated by Article 101 of UNCLOS but it was more politically motivated. According to the definition of piracy the Achille Lauro seizure does not constitute an act of piracy. Moreover, the definition provides for the intervention of an additional vessel but in our case there was only one vessel involved where once again, the difficulty of translating these acts as acts of piracy.”<sup>86</sup>

Although there is a widespread assumption that the SUA is concerned solely with terrorist acts, the word “terrorism” does not occur in the text. Instead it addressed specific acts such as ship seizure and violence by those on board that could result in physical injury or damage to the ship or its cargo. Therefore the SUA arguably has some utility against criminal hijackings even though the drafters made no attempt to enlarge the definition of piracy to include acts prejudicial to maritime safety; in fact they viewed piracy as a separate issue. Instead they took as their models, the Hague and Montreal Conventions against aircraft hijacking, which led to two important differences, compared to the piracy provisions. First, the SUA is applicable everywhere, even in territorial waters providing the ship under attack is

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<sup>85</sup> For further study about the incident, see: Samuel Pyeatt Menefee, “International Legal Framework (UNCLOS, SUA, and UN Resolutions): How Adequate Are They In Tackling Piracy”, In *Selected Issues in Maritime Law and Policy*, Edited by Maximo Quibranza Mejia Jr and Proshanto Kumar Mukherjee, , Nova Science, 2013. And also see: Anna Oriolo, “*The Multilateral Approach of the EU Maritime Security Policy: The Fight Against Piracy, Terrorism and Violence at Sea*”, Op.cit.

<sup>86</sup> Abbas Daher Djama, Op.cit, At 20.

coming from or proceeding to an international destination. Second, state parties must enact domestic legislation to make Convention offences punishable under their laws. However, it also suffers from some unfortunate weaknesses: the main aim of the Convention is prosecution, not prevention; its central purpose is to ensure that States either prosecute or extradite.

Consequently, and in contrast to treaty and customary law on piracy, the SUA does not recognize or authorize preventive constabulary activity at sea. It is not applicable if the violence on board is insufficient to compromise maritime safety. As Murphy suggests, “while SUA was designed to deal with politically motivated violence at sea, because it addresses acts such as ship seizure and violence on board and damage to ships and cargo, it could also be applicable to piracy where violence is involved.”<sup>87</sup> However, it seems that nowadays piracy does always involve (threats of) violence and perhaps one could not make a distinction between piracy and violence in any cases. Finally it should be noted that in another words, “the SUA came into force on 1 March 1988 and focuses on appropriate action to be taken against people who commit illegal acts against ships. The agreement covers unlawful acts such as the seizure of ships with the use of force, acts of violence against persons on board ship and to introduce equipment on board of aircraft likely to destroy or damage the ship.”<sup>88</sup>

The SUA provides a list of actions that must be considered illegal. These acts are the result of:

- “(a) Seizes or exercises control over a ship by force or threat thereof or any other form of intimidation; or
- (b) Performs an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of that ship; or
- (c) Destroys a ship or causes damage to a ship or to its cargo which is likely to endanger the safe navigation of that ship; or

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<sup>87</sup> Martin N. Murphy, *Contemporary Piracy and Maritime Terrorism, the threat to international security*, op.cit, at 13.

<sup>88</sup> Abbas Daher Djama, Op.cit, At 21.

(d) Places or causes to be placed on a ship, by any means whatsoever, a device or substance which is likely to destroy that ship, or cause damage to that ship or its cargo which endangers or is likely to endanger the safe navigation of that ship; or (e) destroys or seriously damages maritime navigational facilities or seriously interferes with their operation, if any such act is likely to endanger the safe navigation of a ship; or

(f) Communicates information which he knows to be false, thereby endangering the safe navigation of a ship; or

(g) Injures or kills any person, in connection with the commission or the attempted commission of any of the offences set forth in subparagraphs (a) to (f).

2. Any person also commits an offence if that person:

(a) Attempts to commit any of the offences set forth in paragraph 1; or

(b) Abets the commission of any of the offences set forth in paragraph 1 perpetrated by any person or is otherwise an accomplice of a person who commits such an offence; or

(c) Threatens, with or without a condition, as is provided for under national law, aimed at compelling a physical or juridical person to do or refrain from doing any act, to commit any of the offences set forth in paragraph I, subparagraphs (b), (c) and (e), if that threat is likely to endanger the safe navigation of the ship in question.”<sup>89</sup>

Unlike the UNCLOS provisions on piracy which only apply in the high seas and EEZ, the SUA applies no matter where the acts are committed, whether in the territorial sea, archipelagic waters, exclusive economic zone, international straits or the high sea except for the internal waters of a coastal State, provided that the ship “is navigating or is scheduled to navigate into, through or from waters beyond the outer limit of the territorial sea of a single State, or the lateral limits of its territorial sea with adjacent States.”<sup>90</sup> According to the second paragraph of the Article 4, the Convention is also applicable when the offender or alleged offender is found in the territory of a State party other than the state referred to in Article 4 (1). Therefore, one can conclude that while the majority of hijacking attacks in Somalia coasts,

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<sup>89</sup> Convention for the Suppression of Unlawful Acts of Violence against The Safety of Maritime Navigation, Entered into Force on 1 March 1992, treaties series, vol.1678, Nos. 28991-29006.

<sup>90</sup> Article 4 (1) of the SUA Convention,

Gulf of Aden and Indian Ocean Region occur within territorial waters and mainly waters along with the ships' destination and would hence meet this requirement of this Article.

In addition, the SUA as set forth in the Article 3 (2)(b) has extended the provision provided in the Article 101(b) of UNCLOS by covering the act of organizing SUA offences which may occur on shore. This criterion in the SUA provisions is very significant to be useful in some cases of maritime hijacking in which the attacks do not occur offshore or in the high seas and accordingly, the UNCLOS would lack the competence to be applied.

Under the SUA provisions, the State Party has an obligation to establish jurisdiction over specific offences described in the Convention, accordingly to make these acts of criminal offences punishable by serious penalties under their domestic law and adopt implementing legislation giving their courts' jurisdiction over persons who commit those offences.<sup>91</sup> Unlike UNCLOS in which piracy is considered as an offence subject to universal jurisdiction, the SUA Convention requires a jurisdictional nexus between the offence and the State Party who wants to prosecute the alleged offender. It allows for the prosecution of offender without requiring any nexus to the prosecuting State except the presence of the offender.<sup>92</sup>

As described below, the SUA Convention does apply over the more serious crimes of hijacking a vessel which would clearly fall under the definition provided in the first paragraph of the Article 3 of the SUA Convention, including acts of "seizing or exercising control over a ship by force or threat thereof or any other form of intimidation". Although the SUA Convention is commonly described as a "counter-terrorism" convention,<sup>93</sup> it does not require any terrorist or political motivation, therefore can be applicable to the acts of hijacking of vessels for the purpose of taking money or ransom.

The most important provision of the SUA Convention is the principle of extradition or prosecution. This principle requires all States Parties of the SUA Convention, an international

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<sup>91</sup> Article 3 of the SUA Convention.

<sup>92</sup> Douglas Guilfoyle, *Treaty jurisdiction over Pirates: A Compilation of Legal Texts with Introductory Notes*, Op.cit, at 15.

<sup>93</sup> Robert Beckman and Tara Davenport, *Enhancing Regional Cooperation on Piracy and Maritime Crimes*, In *Non-Traditional Security Issues and the South China Sea; Shaping a New Framework for Cooperation*", Shicun Wu and KeyuanZou (editors), Ashgate Publishing Company, 2014, at 153.

obligation to prosecute offenders within its territory to its own jurisdiction even if the act allegedly occurred in the territory of the State or in another place.

The Convention obliges States, where the State within which the offender is found shall not initiate legal proceedings, to extradite offenders to a third State who has exercised his right under the Convention.<sup>94</sup> However, if persons who are alleged to have committed an offence under the SUA Convention are found in the territory of a State Party, that State Party is required to take the alleged offender into custody.<sup>95</sup> If that State Party does not extradite the alleged offender to another competent State Party, it is required to “submit the case without delay to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State.”<sup>96</sup>

This requirement is in contrast to the “discretionary right”<sup>97</sup> to prosecute provided for in UNCLOS.<sup>98</sup> “More recently, the prosecute or extradite provisions of SUA have proved particularly useful in connection with piracies off the Horn of Africa; it has been noted that, except for Ethiopia, Eritrea, and Somalia, all states within a thousand nautical miles of the Gulf of Aden are signatories to the Convention.”<sup>99</sup>

Under article 8 (1) of the SUA Convention, the master of a ship of a State Party (“the flag State) may deliver to the authorities of any other State Parties (“the receiving Party”) any person who he has reasonable grounds to believe has committed one of the offences set forth in Article 3, provided that the master whenever practicable and if possible gives notice of delivery

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<sup>94</sup> Article 6, para.1-2; Article 10 of the SUA Convention.

<sup>95</sup> Article 7 (1) of the SUA Convention.

<sup>96</sup> Article 10 (1) of the SUA Convention.

<sup>97</sup> As some argue the nature of this right as a discretionary one under UNCLOS.... Please see, Robert Beckman and Tara Davenport, *Enhancing Regional Cooperation on Piracy and Maritime Crimes*, op,cit, At 155.

<sup>98</sup> Article 105 of UNCLOS.

<sup>99</sup> Statement of RADM William Baumgartner on International Piracy on the High Seas before the Subcommittee on Coast Guard & Maritime Transportation, Committee on Transportation & Infrastructure, U.S. House of Representatives, February 4, 2009. <http://www.findthatdoc.com/search-74230188-hPDF/download-documents-hoa-testimony-radm-william-baumgartner-uscg-pdf.htm>(visited February 3, 2013).

of the suspect before entering the territorial sea of the receiving State and the flag State furnishes the receiving State with any relevant evidence.<sup>100</sup>

On October 14, 2005, a second Protocol to the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation was adopted at the IMO. This protocol is responsible for extending the provisions of the SUA Convention by introducing additional measures in order to fight against all acts against the safety and security of navigation. In addition, “what was missing from the 1988 Convention was effectively a means to apprehend offenders. The inclusion of a procedure in the 2005 Protocol to allow states to board ships marks a shift from merely providing awful bases to establish jurisdiction to creating the means to exercise jurisdiction.”<sup>101</sup>

Actually one can consider offences criminalized under the 2005 SUA Conventions as divided to offences which continued under the SUA Convention and new offences including use of weapons of mass destruction (WMD), transport of WMD and accomplishing, adding and abetting those crimes mentioned. In the preamble, the Protocol of 2005 stressed that terrorist acts threaten international peace and security, however, the Protocol’s adoption “not only to reflect developments in relation to the suppression of international terrorism, but also to create a new legal basis by which states will be able to exercise the right of visit on the high seas.”<sup>102</sup> In this regard, it is noteworthy that the Protocol of 2005 to the SUA Convention is another international legal instrument which can be applied in combating piracy movements and armed robbery operations against ships at seas.<sup>103</sup>

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<sup>100</sup> Article 8 (2) of the SUA Convention.

<sup>101</sup> 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, 2008, at 287-288, Available at: <<http://djilp.org/wp-content/uploads/2011/08/The-Right-Visit-2005-Protocol-Suppression-Unlawful-Acts-Against-Safety-Maritime-Navigation-Natalie-Klein.pdf>>

<sup>102</sup> Natalie Klein, *The Right of Visit and the 2005 Protocol on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation*, Op.cit, at 289.

<sup>103</sup> See Protocol of 2005 to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, adopted on 1 February 2005, LEG/CONF.15/21. Available at:<[http://www.unodc.org/tldb/en/2005\\_Cons\\_Version\\_Conv\\_and\\_Prot\\_Maritime\\_Navigation.html](http://www.unodc.org/tldb/en/2005_Cons_Version_Conv_and_Prot_Maritime_Navigation.html)>

## **International Convention Against the Taking of Hostages (1979)**

The International Convention Against the Taking of Hostages (Hereinafter the Hostages Convention) like SUA Convention is an international crimes convention and similar to SUA Convention in some aspects can be applied to international crimes such as piracy and armed robbery against ships. In case of new emergence of piracy operations particularly “Somali business model” that has been adopted by criminal syndicated off the coast of Somalia and Gulf of Aden and in the Indian Ocean, well-organized hijackings are being committed and the acts of hostage taking are true examples of offences under 1979 Hostages Convention because apart from the severe conditions imposed for the Hostages and the violence applied to treat them, they intend to hold the crew hostage until ransom is paid by the ship or ship operators. Accordingly, although unlike the SUA Convention, the Hostages Convention does not specifically deal with maritime offences, but the 1979 Hostages Convention is a general convention which applies to all acts of hostage-taking, whether they occur on land or at sea. The Convention is relevant to maritime crimes in instances where, in the commission of attacks on ships, the passengers or crew are also held as hostages for ransom. It may also apply in situations where crew members are taken captive and threatened to be injured or killed especially in the case of modern piracy and armed robbery and it would be in the common interest of States in the region to ratify and effectively implement the 1979 International Convention against the Taking of Hostages.

Article 1 of the Convention states that:

“Any person who seizes or detains and threatens to kill, to injure or to continue to detain another person (“the hostage”) in order to compel a third party, namely a State, an international government organization, a natural or juridical person, or group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage commits the offence of taking of hostages (“hostage-taking”) within the meaning of this Convention.

Any person who:

- (a) Attempts to commit an act of hostage-taking, or

- (b) Participates as an accomplice of anyone who commits or attempts to commit an act of hostage-taking

Likewise commits an offence for the purpose of this Convention.”

There is no requirement for any terrorist or political motive. Offences established under national law must be punishable by appropriate penalties which take into account the grave nature of those offences.<sup>104</sup> The kidnapping of crew for ransom, whether done pursuant to a ship-hijacking or not, clearly falls within the definition of hostage-taking in Article 1.

According to part (b) of the article 1, the Hostages Convention therefore would cover an on-shore organization of offences such as an organization of the acts of kidnap of crew for ransom as well as persons who negotiate or launder ransom money on behalf of the perpetrators.

According to article 13 of the Hostages Convention, the Convention does not apply “where the offence is committed within a single State, the hostage and the alleged offender are nationals of that State and the alleged offender is found in the territory of that State.” Otherwise the Convention has no express territorial limitations to apply over offences occurring anywhere, including on vessels, only if it meets the jurisdictional requirement sets out in the Convention.

There are some important provisions in the Hostages Convention which are common to all international crime conventions. The Convention contains similar obligations to the SUA Convention in that once the alleged offender is present within the territory of a State Party, that State Party has the obligation to take the offender into custody or take other measures to ensure his presence for such time as is necessary to enable any criminal or extradition proceedings to be instituted. That State Party shall immediately make a preliminary inquiry into the facts.<sup>105</sup>

Each State Party shall take such measures as may be necessary to establish its jurisdiction over any of the offences set forth in article 1 which are committed:

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<sup>104</sup> Article 2, Hostages Convention.

<sup>105</sup> Article 6 (1) of the Hostages Convention.



- a. In its territory or on board a ship or aircraft registered in that State;
- b. By any of its nationals, or if that State considers it appropriate, by those stateless persons who have their habitual residence in its territory;
- c. In order to compel that state to do or abstain from doing any act;
- d. With respect to a hostage who is a national of that State if that State considers it appropriate.

State Parties are also obliged to establish jurisdiction over the offender if the alleged offender is in its territory and it does not extradite him to any of the States who have jurisdiction. And it points out that “The Convention does not exclude any criminal jurisdiction exercised in accordance with internal law.”<sup>106</sup>

According to the Hostages Convention, any State Party in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State. Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a grave nature under the law of that State.<sup>107</sup>

The Hostages Convention follows the same scheme as the 1988 SUA Convention with respect to jurisdiction, obligation to extradite or prosecute and has set out similar provisions as mechanisms to facilitate extradition, including allowing State Parties to consider the Convention as a basis for extradition in the absence of an extradition treaty.<sup>108</sup>

The Hostages convention also contains similar provisions in the prevention of offences as the SUA Convention.<sup>109</sup> In addition according to article 11 of the Hostages Convention, States Parties shall afford one another the assistance in connection with criminal proceedings brought in respect of the offences set forth in article 1, including the supply of all evidence at their disposal necessary for the proceedings. It has also been noted that the provision of the

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<sup>106</sup> Article 5 of the Hostages Convention.

<sup>107</sup> Article 8 (1) of the Hostages Convention.

<sup>108</sup> Article 10 of the Hostages Convention.

<sup>109</sup> Article 4 of the Hostages Convention.

first paragraph of article 11 shall not affect obligations concerning mutual judicial assistance embodied in any other treaty.

### **United Nations Convention against Transnational Organized Crime (2000)**

The United Nations Convention against Transnational Organized Crime (UNTOC),<sup>110</sup> is a United Nations- sponsored treaty against transnational organized crime and likewise the Hostages Convention can be discussed as a convention to be applied in our piracy considerations. The Convention was adopted by a resolution of the United Nations General Assembly on 15 November 2000. As of August 2014, the Convention has been ratified by 180 states. The Convention came into force on 29 September 2003.<sup>111</sup> It is also called the Palermo Convention and its three protocols (the Palermo Protocols) are:

- Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children; and<sup>112</sup>
- Protocol against the Smuggling of Migrants by Land, Sea and Air<sup>113</sup>
- Protocol against the Illicit Manufacturing and Trafficking in Firearms<sup>114</sup>

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<sup>110</sup> In the late 1990's, the United Nations stressed the priority of a draft convention to address the global threats from transnational organized crime. In December 2000, the UN Convention on Transnational Crime was approved and signed in Palermo. The document is available at: <http://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf>

<sup>111</sup> To study the United Nation Convention Against Transnational Organized Crime, refer to the treaty status:

<[https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVIII12&chapter=18&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII12&chapter=18&lang=en)>

<sup>112</sup>The Protocol was adopted by the United Nations General Assembly in 2000 and entered into force on 25 December 2003. As of August 2014 it has been ratified by 161 states. Available at:

<[http://www.uncjin.org/Documents/Conventions/dcatoc/final\\_documents\\_2/convention\\_%20traff\\_eng.pdf](http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_%20traff_eng.pdf)>

<sup>113</sup>The Smuggling Protocol entered into force on 28 January 2004. As of August 2014, the protocol has been signed by 112 states and ratified by 139 states. Available at:

<[http://www.uncjin.org/Documents/Conventions/dcatoc/final\\_documents\\_2/convention\\_smug\\_eng.pdf](http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_smug_eng.pdf)>

<sup>114</sup> The Protocol was adopted by the United Nations General Assembly as Resolution 55/255 on 31 May 2001; the treaty entered into force on 3 July 2005. It was signed by 52 parties and as of August 2014 it has 110 parties, including 109 states and the European Union. Available at: <[https://treaties.un.org/doc/source/RecentTexts/18-12\\_c\\_E.pdf](https://treaties.un.org/doc/source/RecentTexts/18-12_c_E.pdf)>

The main purpose of the Palermo Convention against Transnational Organized Crimes has been to combat “international or transnational crime”.<sup>115</sup> Although like the Hostages Convention, the Palermo Convention was not drafted with the purpose of dealing with maritime offences; its provisions can be used to criminalize kidnap of crew or ship hijacking. Modern piracy and armed robbery movements sophisticated with heinous violence and taking advantages of modern technology as an illegal gift for pirates, has emerged as an organized threat to the most significant maritime waterways of the world. Increasingly, scouts appear to be used to provide intelligence on the movement of vessels and to monitor major ports in neighboring countries.<sup>116</sup>

The offences to which the 2000 Palermo Convention applies for are as follows:

- a) “Criminalization of participation in an organized criminal group”.<sup>117</sup>
- b) “Criminalization of laundering of the proceeds of the crime”<sup>118</sup>
- c) “Serious crime”<sup>119</sup> which is defined as “conduct constituting an offence punishable by a maximum deprivation of liberty of four years”.<sup>120</sup>

Under article 5 (1) (a) of the Palermo Convention, “participation in an organized criminal group” is defined as:

- i. Agreeing with one or more other persons to commit a serious crime for a purpose relating directly or indirectly to the obtaining of a financial or other material benefit and, where required by domestic law, involving an act undertaken by one of the participants in furtherance of the agreement or involving an organized criminal group;

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<sup>115</sup> Gerhard Kemp, “The United Nations Convention Against Transnational Organized Crimes: A milestone in international criminal law”, 14 South African Journal of criminal Justice 152 (2001), at 152.

<sup>116</sup> United Nations, Monitoring Group on Somalia, Report, Dec. 10, 2008, para.136.

<sup>117</sup> Article 3 (1)(a) and Article 5 of the Palermo Convention.

<sup>118</sup> Article 3 (1) (a) and Article 6 of the Palermo Convention.

<sup>119</sup> Article 3 (1) (b) of the Palermo Convention.

<sup>120</sup> Article 2 (b) of the Palermo Convention.

- ii. Conduct by a person who, with knowledge of either the aim and general criminal activity of an organized criminal group or its intention to commit the crimes in question, take an active part in:
  - a. Criminal activities of the organized criminal group;
  - b. Other activities of the organized criminal group in the knowledge that his or her participation will contribute to the achievement of the above-described criminal aim;
  - c. Organizing, directing, aiding, abetting, facilitating or counseling the commission of serious crime involving an organized criminal group.

The way this Convention has defined laundering of proceeds of crime is noteworthy and is a unique practice by this instrument. Under article 6 (1), “each State Party shall adopt, in accordance with fundamental principles of its domestic law, such legislative and other measures s may be necessary to establish as criminal offences, when committed intentionally. The “act of laundering of proceeds of crime”<sup>121</sup> is defined as:

- a. (i) The Conversion or transfer of property, knowing that such property is the proceeds of crime, for the purpose of concealing or disguising the illicit origin of the property or of helping any person who is involved in the commission of the predicate offence to evade the legal consequences of his or her action;  
  
(ii) The concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to property, knowing that such property is the proceeds of crime;
- b. Subject to the basic concepts of its legal system:
  - i. The acquisition, possession or use of property, knowing, at the time of receipt, that such property is the proceeds of crime;
  - ii. Participation in, association with or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counseling the commission of any of the offences established in accordance with this article.

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<sup>121</sup> Article 6 (1) of the Palermo Convention.

The primary advantage of the Palermo Convention is that “it can be used to criminalize the onshore preparation and organization of attacks against vessels at sea, and that it criminalizes other activities associated with such attacks such as money laundering.”<sup>122</sup>

Moreover, under Article 3 of the Palermo Convention, the criminal acts in which Palermo Convention applies are offences criminalized in the aforementioned Convention must have two criteria as the main requirements: they must be committed by an “organized criminal group” and be “transnational in nature”.<sup>123</sup>

An “organized criminal group” is defined under Article 2 (a) as:

“A structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or material benefit.”

An offence is “transnational in nature” under Article 3 (2) if:

- a. It is committed in more than one State;
- b. It is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State;
- c. It is committed in one State but involves an organized criminal group that engages in criminal activities in more than one State; or
- d. It is committed in one State but has substantial effects in another State.

Consequently, the Convention can be applied to the perpetrators who are responsible for the organization and perpetration of attacks in one jurisdiction where the attacks occur in another country’s territorial waters because it would be an offence of “*Participation in an organized criminal group*” or a “serious crime” as described in the aforementioned articles of the Palermo Convention.

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<sup>122</sup> Robert Beckman and Tara Davenport, *Enhancing Regional Cooperation on Piracy and Maritime Crimes*, Op.cit, at 159.

<sup>123</sup> Article 3 (1) of the Palermo Convention.

Based on what have been described so far, one can simply conclude that the Convention applies on State Parties in many cases of organized attacks of maritime piracy and armed robbery occurring off the coasts of Somalia, the Gulf of Aden and other crucial parts of the Indian Ocean region. The Convention will apply to those who participate in other acts associated with these attacks under the offence of the “*act of laundering the proceeds of crime*” too, for instance, ransom money has to be transferred and thus, those who receive and circulate ransom money on behalf of the criminal syndicates would be committing “an act of laundering the proceeds of crime” under article 6 of the Palermo Convention.<sup>124</sup>

The Palermo Convention requires state parties to establish jurisdiction over the offences pointed out in the Convention, if “they are committed in the territory of the State Party”<sup>125</sup> or “on board a vessel that is flying the flag of that State Party or an aircraft that is registered under the laws of that State Party at the time the offence is committed”.<sup>126</sup>

The jurisdiction under Palermo Convention the same as the SUA Convention and the Hostages Convention is based both a nexus to the offence and a form of universal jurisdiction as some described as “quasi-universal” jurisdiction<sup>127</sup> depending on the presence of the offender in the territory of a State Party.

The State Party under Palermo Convention also *may* establish jurisdiction when:

- a. The offence is committed against a national of that State Party;<sup>128</sup>
- b. The offence is committed by a national of that State Party or a stateless person who has his or her habitual residence in its territory;<sup>129</sup>

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<sup>124</sup> Robert Beckman and Tara Davenport, *Enhancing Regional Cooperation on Piracy and Maritime Crimes*, op.cit, at 161.

<sup>125</sup> Article 15 (1) (a) of the Palermo Convention.

<sup>126</sup> Article 15 (1) (b) of the Palermo Convention.

<sup>127</sup> Douglas Guilfoyle, *Treaty jurisdiction over Pirates: A Compilation of Legal Texts with Introductory Notes*, Op.cit, at 4.

<sup>128</sup> Article 15 (2)(a) of the Palermo Convention.

<sup>129</sup> Article 15 (2)(b) of the Palermo Convention.

- c. The offence is the offence of participation in an organized criminal group and one of the offences is committed outside the territory of the State Party, with a view to the commission of a serious crime within its territory;<sup>130</sup>
- d. When the alleged offender is present in the territory and it does not extradite him or her.<sup>131</sup>

The Palermo Convention provides obligations over alleged offenders once they are within the territory of a State Party. A State Party in which the described offender is found is obliged to either extradite such alleged offenders or prosecute them pursuant to article 16 (10). Accordingly, it appears as if a request from another State is a prerequisite to a duty to submit a case for prosecution.<sup>132</sup> It also contains similar provisions like the SUA and Hostages Convention as a set of mechanisms to facilitate extradition described in Article 16 of the Palermo Convention.

The review of the existing legal instruments provides for this clear understanding that the United Nations Convention on the Law Of the Sea (1982) and its predecessor, the Convention on the High Seas (1958), together with the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA), the 1979 Hostages Convention and 2000 United Nations Convention against Transnational Organized Crime (UNTOC) have set an effective legal framework and a comprehensive toolbox for the arrest, prosecution and punishment of perpetrators of acts of kidnap for ransom and ship hijacking and all other illicit crimes including drug and contraband smuggling and money laundering.

With regard to the provision of a procedural setting for collecting and preserving evidence and facilitate investigation and prosecution of suspected criminals, particularly the process of convicting pirates and armed robbers, it is noteworthy that the regulations under UNCLOS, SUA Convention, Hostages Convention and UNTOC all do not deal with the problem of evidence collection at sea. As a key suggestion in order to fill this gap, the Code of

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<sup>130</sup> Article 15 (2)(c) (i) of the Palermo Convention.

<sup>131</sup> Article 15 (4) of the Palermo Convention.

<sup>132</sup> Douglas Guilfoyle, *Treaty jurisdiction over Pirates: A Compilation of Legal Texts with Introductory Notes*, Op.cit, at 35.

Practice as a complementary tool can provide a comprehensive framework for the process of investigation of acts of piracy and armed robbery against ships at seas.

The Code of Practice adopted by the IMO provides guidelines for the training of investigators in inter alia the arrest of offenders, securing of evidence, gathering and assessing related information from all available sources. Accordingly, States should ensure that personnel on their warships and patrol vessels follow the Code of Practice. For the purpose of this thesis, this should be emphasized that States in the Indian Ocean region should adopt the IMO Code of Practice for the Investigation of Crimes of Piracy and Armed Robbery Against Ships.<sup>133</sup>

## **Chapter 2: International community to fight against piracy and armed robbery challenges**

Maritime piracy and armed robbery against vessels off the coast of Somalia, Gulf of Aden, strategic areas in the Indian Ocean, and in recent years, the Gulf of Guinea, have continued to develop into an international crisis involving very large human and economic costs and demanding the attention of States, international organizations, industry around the world and the international community as a whole. The United Nations' Security Council and General Assembly, the International Maritime Organization (IMO), the International Maritime Bureau (IMB), The United Nations Office on Drugs and Organized Crime (UNODC), the European Union (EU), and the North Atlantic Treaty Organization (NATO), INTERPOL and the Contact Group on Piracy off the Coast of Somalia (CGPCS), both individually and collectively, are the main global and regional bodies and organizations which have been involved in anti-piracy activities that have led to a down turn in the increased acts of piracy. Industry bodies have also increasingly recognized that international shipping has an affirmative responsibility to protect seafarers and ships through adoption of Best Management Practices (BMP) that include passive vessel security measures, or even by hiring privately contracted armed security.

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<sup>133</sup> International Maritime Organization, *Code of Practice for the Investigation of Crimes of Piracy and Armed Robbery Against Ships*, IMO Assembly Resolution A. 1025 (26), adopted 18 December 2009.



In the following Chapter, two issues will be discussed. The first Section will analyze the counter-piracy efforts launched by United Nations to combat piracy and the second one will discuss the functions of the relevant global and regional bodies to fight against maritime organized crimes under international law.

### **3. United Nations and fighting against maritime security threats**

Within the framework of the United Nations, a variety of bodies and agencies are active in terms of the counter-piracy measures to eradicate the root causes of the wide-spreading phenomenon. UN Security Council has adopted several resolutions on these issues and the International Maritime Organization (IMO) as a United Nations' specialized agency amended the existing conventions to respond to the growing threat of terrorism at sea.<sup>134</sup> Furthermore, Secretary-General of the United Nations and Special Representative of the Secretary-General to Somalia and United Nations Political Office for Somalia (UNPOS), the latter which is recently succeeded by United Nations Assistance Mission in Somalia (UNSOM)<sup>135</sup> accompanied with the General Assembly and the Security Council have all contributed to a mixed history of dealing with piracy and maritime threats in the framework of the United Nations.

To study the role and place of United Nations bodies in fighting against maritime security threats, the following section analyzes the counter-piracy efforts made by abovementioned United Nations bodies specifically resolutions adopted by the UN Security Council. Then, it will address the role and place of the United Nations Office on Drugs and Crime (UNODC) and its programs in fighting against maritime organized crimes particularly maritime piracy.

#### **1.1 Resolutions adopted by United Nations Security Council and GA: Implementation of monitoring mechanisms by regional states**

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<sup>134</sup> We discussed in detail about the role and framework of the International Maritime Organization in the previous section.

<sup>135</sup> See: <<http://unpos.unmissions.org>>

United Nations has initiated elaborate efforts to eradicate piracy and armed robbery against ships at seas. The efforts of UN are well exemplified by the intervention of the United Nations Security Council (UNSC). It was three years after the revision of the SUA Convention, at the urging of the Secretary-General of the IMO that the Security Council became specifically involved in efforts to repress maritime piracy and armed robbery against ships which had been growing in strategic arenas of the world. In 2008, the UNSC adopted no less than ten Chapter VII-based Resolutions (UNSCRs) aimed at containing the escalating threat of piracy and armed robbery against ships off the coast of Somalia.

On 25 September 2008 Somali pirates captured the Ukrainian ship *Faina*, with a cargo of combat tanks and other weaponry and notably on 15 November 2008, Somali pirates hijacked the oil tanker *Sirius Star* at around 450 nautical miles southeast of the coast of Mombasa, Kenya. These incidents renewed international efforts to stem maritime piracy and, on October 7, 2008, the United Nations Security Council, acting under Chapter VII of the Charter, adopted resolution 1838 which “calls upon all States interested in the security of maritime activities to take part actively in the fight against piracy on the high seas off the coast of Somalia, in particular by deploying naval vessels and military aircrafts.”<sup>136</sup>

Furthermore, Security Council resolution 1851 authorizes states to undertake anti-piracy operations in Somali territorial waters as well as ashore and permits the seizure of property reasonably suspected to have been involved in the commission of acts of piracy.<sup>137</sup> There are currently a number of international fleets dedicated to combating piracy in the region that may benefit from this authority. The resolution was adopted in the wake of the seizure of the French luxury yacht *Le Ponant* by Somali pirates on 4 April 2008. French forces tracked

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<sup>136</sup> See SC Res. 1838 (Oct.7,2008). The Security Council specified that this resolution applies only with respect to the situation in Somalia and that “it shall not be considered as establishing customary international law” (para. 9).

<sup>137</sup> See SC Res. 1851 of 16 December 2008.

down and captured six pirates on the Somali mainland and recovered some of the ransom money paid for the release of the ship and its crew.<sup>138</sup>

UNSCRs 1816, 1838, 1846, and 1851 of 2008 gave authorization for states and regional organizations cooperating with the Somali Transitional Federal Government (TFG) to enter Somalia's territorial waters and use "all necessary means" such as deploying naval vessels and military aircraft, as well as seizing and disposing of boats, vessels, arms, and related equipment used for piracy. Subsequently, this was followed by another four resolutions in 2009.<sup>139</sup> The role of outside states and organizations in anti-piracy operations in Somali waters was again renewed<sup>140</sup> by the Security Council resolution 1897 of 2009 and a specific call was made "to bring to justice those who are using Somali territory to plan, facilitate, or undertake criminal acts of piracy and armed robbery at sea" noting "that any measures undertaken pursuant to this paragraph shall be consistent with applicable international human rights law."<sup>141</sup> The resolution in its Para 8 also "affirms that the authorizations renewed in this resolution apply only with respect to the situation in Somalia and shall not affect the rights or obligations or responsibilities of Member States under international law, including any rights or obligations under the Convention, with respect to any other situation, and underscores in particular that this resolution shall not be considered as establishing customary international law; and affirms further that such authorizations have been renewed only following the receipt of the 2 and 6 November 2009 letters conveying the consent of the TFG."<sup>142</sup>

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<sup>138</sup> For a further clarification on the legal situation, see: Tullio Treves, Piracy, law of the Sea, and Use of Force: Developments off the Coast of Somalia, *European Journal of International Law*, Volume 20, No 399, 2009, at 404. Cited in Hanspeter Neuhold, *Op.cit.*, at 1256.

<sup>139</sup> Available at: <[http://www.un.org/docs/sc/unsc\\_resolutions09.htm](http://www.un.org/docs/sc/unsc_resolutions09.htm)>

<sup>140</sup> United Nations Security Council resolution 1897, S/RES/1897 (2009), para 3.

<sup>141</sup> *Ibid.*, para 11.

<sup>142</sup> United Nations Security Council Resolution 1897, S/RES/1897, adopted on 30 November 2009. Moreover, paragraph 90 of resolution 66/231 of the General Assembly (adopted on December 2011) reiterates this issue which reads: "... the authorization in resolution 1816 (2008), and the provisions in resolutions 1838 (2008), 1846 (2008), 1851 (2008), 1897 (2009) and 1950 (2010) apply only to the situation in Somalia and do not affect the rights, obligations or responsibilities of Member States under international law, including any rights or obligations under the Convention, with respects to any other situation, and underscores, in particular, the fact that they are not to be considered as establishing customary international law;"

In April 2010, resolution 1918 dealt with the prosecution of individuals charged with piracy, affirming that “the failure to prosecute persons responsible for acts of piracy and armed robbery at sea off the coast of Somalia undermines anti-piracy efforts of the international community,”<sup>143</sup> and calling “on all States, including States in the region, to criminalize piracy under their domestic law and favorably consider the prosecution of suspected, and imprisonment of convicted pirates apprehended off the coast of Somalia, consistent with applicable international human rights law.”<sup>144</sup>

In April 2011, the Security Council adopted resolution 1976 encouraging States and regional organizations “to assist Somalia and other States of the region in strengthening their counter-piracy law enforcement capacities, including implementation of anti-money-laundering laws, the establishment of Financial Investigation Units and strengthening forensic capacities.”<sup>145</sup> The resolution 1976 also welcomed “the readiness of the national and regional administrations of Somalia to cooperate with each other and with other States who have prosecuted suspected pirates with a view to enabling convicted pirates to be repatriated back to Somalia under suitable prisoner transfer agreements,”<sup>146</sup> urged the construction of additional prisons in Puntland and Somaliland,<sup>147</sup> “requests the TFG, with the assistance of UNODC, to elaborate and adopt a complete set of counter-piracy laws,”<sup>148</sup> and decided “to urgently consider the establishment of specialized Somali courts to try suspected pirates both in Somalia and in the region, including an extraterritorial Somali specialized anti-piracy court.”<sup>149</sup> Furthermore, resolution 2015 adopted on October 2011, “calls upon UNODC, UNDP and other international partners to further their efforts to support the development of domestic legislation,

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<sup>143</sup> United Nations Security Council Resolution 1918, S/RES/1918 (2010), Para.1.

<sup>144</sup> Id, para 2.

<sup>145</sup> United Nations Security Council, Resolution 1976, S/RES/1976 (2011), para 17.

<sup>146</sup> Id, para 21.

<sup>147</sup> Id, para 22.

<sup>148</sup> Id, para 23.

<sup>149</sup> Id, para 26.

agreements and mechanisms that would allow the effective prosecution of suspected pirates, and the transfer and imprisonment of convicted pirates.<sup>150</sup>

Afterwards, Security Council resolution 2020 adopted in November 2011, in addition to reiterating many of the measures it had previously called for, stressed the need “for a comprehensive response to repress piracy and tackle its underlying causes by the international community.”<sup>151</sup> Accordingly, the Security Council unanimously adopted Resolution 2077 in order to renew pressure on States and regional organizations to fight sea crimes and urged the international community to develop a comprehensive response to discourage acts of piracy and armed robbery against ships at sea. The resolution called on member states to enact domestic legislation that criminalizes piracy and to assist Somalia in prosecuting pirates and requests that Somalia work with the United Nations to enact a comprehensive set of anti-piracy laws as an integral part of combating the phenomenon.<sup>152</sup>

On November 18, 2013, the United Nations Security Council in resolution 2125 called upon Somali authorities “to pass a complete set of anti-piracy laws without delay.” The Security Council urged States, working with the relevant international organizations, to adopt legislation to facilitate prosecution of suspected pirates. The resolution recognized that “on-going instability in Somalia contributes to the problem of piracy and armed robbery at sea off the coast of Somalia, while piracy, in turn, exacerbates instability by introducing large amounts of illicit cash that fuels additional crime and corruption in Somalia”. Accordingly, the Security Council calls upon Somali authorities, Member States, and regional authorities to “take part in the fight against piracy and armed robbery at sea” through military action and assistance, and decided that the arms embargo on Somalia does not apply to supplies of weapons and military equipment for this purpose. The Security Council also reiterated its decision to consider establishing a specialized anti-piracy court in Somalia.<sup>153</sup>

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<sup>150</sup>United Nations Security Council, Resolution 2015, S/RES/2015 (2011), paras 7-8 and 16-17.

<sup>151</sup>United Nations Security Council, Resolution 2020, S/RES/2020 (2011) para 2.

<sup>152</sup> United Nations Security Council, Resolution 2077 of 21 November, 2012.

<sup>153</sup> United Nations Security Council, Resolution 2125 of 18 November, 2013.

The recent Security Council resolutions concerning the situation in Somalia might, at first glance, appear to be a remedy specifically adapted to a single regional situation. “The lack of control which Somalia has over its own territory and maritime waters is probably unique in today’s world. While the temporal restrictions in the resolutions, not to mention the attempts to prevent them from becoming customary international law might suggest that they are a “one-off” whose only bearing is on the current situation in Somalia”<sup>154</sup>

With regard to the activities done by the United Nations General Assembly, It is noteworthy to be mentioned that on 14 December 1981, GA adopted resolution 36/125 which was a report of the United Nations High Commissioner for Refugees and was not directly related to maritime security and piracy issues, but expressed the need for “greater international efforts in the suppression of piracy on the high seas, in accordance with their international obligations, and to take appropriate action to protect asylum seekers from acts of violence at sea.”<sup>155</sup> Furthermore, UN General Assembly has been contributing to the international fight against piracy and other criminal activities in maritime domain by adopting annual resolutions to address the issues regarding oceans and law of the sea. Accordingly, since 1984 the General Assembly has considered developments pertaining to UNCLOS as well as those relating to ocean affairs and the law of the sea, initially under the item entitled “Law of the Sea” and then since 1998 under the item entitled “Oceans and the Law of the Sea” by adopting resolution 52/26.<sup>156</sup> In addition, the General Assembly at its fifty-fourth session, decided to establish an open-ended informal consultative process in order to facilitate the annual review by the General Assembly of developments in ocean affairs <sup>157</sup>. Collectively by its regulatory framework, the General Assembly contributes to a comprehensive development of the oceans and the law of the sea and one of its most significant implications refers to the ongoing threats

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<sup>154</sup> Samuel Pyeatt Menefee, “International Legal Framework (UNCLOS, SUA, and UN Resolutions): How Adequate Are They In Tackling Piracy”, In Maximo Quibranza Mejia Jr and Proshanto Kumar Mukherjee, *Selected Issues in Maritime Law and Policy*, Nova Science, 2013, at 219.

<sup>155</sup> United Nations General Assembly Resolution 36/125, A/RES/36/125 (1981); available at: <<http://www.unhcr.org/3ae69ee314.html>>

<sup>156</sup> United Nations General Assembly Resolution 52/26, A/RES/52/26, adopted on 2 March 1998, available at: <[http://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/RES/52/26&Lang=E](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/52/26&Lang=E)>

<sup>157</sup> United Nations General Assembly Resolution 54/33, A/RES/54/33, adopted on 18 January 2000, available at: <[http://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/RES/54/33&Lang=E](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/54/33&Lang=E)>

of maritime piracy and armed robbery against ships at seas as stipulated in the most recently resolutions on “Oceans and the Law of the Sea”.<sup>158</sup>

In its resolution A/RES/68/70, adopted on 9 December 2013, the General Assembly recognized “the crucial role of international cooperation at the global, regional, sub-regional and bilateral levels in combating, in accordance with international law, threats to maritime security, including piracy, armed robbery at sea, and terrorist acts against shipping, offshore installations and other maritime interests, through bilateral and multilateral instruments and mechanisms aimed at monitoring, preventing and responding to such threats, the enhanced sharing of information among States relevant to the detection, prevention and suppression of such threats, and the prosecution of offenders with due regard to national legislation, and the need for sustained capacity-building to support such objectives”.<sup>159</sup> The resolution also welcomed “the significant decrease in reported incidents of piracy off the coast of Somalia, which are at the lowest level since 2006, continues to be gravely concerned by the ongoing threat that piracy and armed robbery at sea continue to pose to the region, and acknowledges Security Council resolution 2125 (2013).”<sup>160</sup>

## **1.2 The United Nations Office on Drugs and Crime (UNODC)**

The UNODC handles a range of issues including corruption, organized crime, human trafficking, money laundering, terrorism prevention and piracy among others. It is a relatively young body of UN, having been founded in 1997 following a merger between the United Nations Drug Control Programme and the Centre for International Crime Prevention.<sup>161</sup> The

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<sup>158</sup> United Nations General Assembly Resolution 68/70, A/RES/68/70, adopted on 9 December 2013, available at:

<http://daccess-ddsny.un.org/doc/UNDOC/GEN/N13/443/65/PDF/N1344365.pdf?OpenElement>

<sup>159</sup> Para 93 of the UNGA Resolution 68/70. Ibid.

<sup>160</sup> Para 106 of the UNGA Resolution 68/70. Ibid.

<sup>161</sup> Emma Pryor, *The Counter- piracy Efforts of the UN Office on Drugs and Crime*, 3 November 2012, Available at: <<http://www.e-ir.info/2012/11/03/the-counter-piracy-efforts-of-the-un-office-on-drugs-and-crime>>

work of the UNODC is based upon three fundamental pillars: <sup>162</sup> “Field-based technical cooperation projects”<sup>163</sup>, “research and analytical work”<sup>164</sup> and “normative work”.<sup>165</sup>

The UNODC’s mandate is to assist countries in the fight against illicit drugs, crime and terrorism through capacity building of member countries; seeking to increase countries’ expertise in the field of drug and crimes and assistance in the establishment of national and international legal instruments. Encouraged by resolution 1851 of the Security Council of UN, UNODC took the initiative “to achieve effective Measures to remedy the cause, capacities and incidents of piracy and armed robbery off the coast of Somalia.”<sup>166</sup> UNODC has published papers and successfully implemented various measures to help Somalia but also the countries of the region.<sup>167</sup>

The UN Secretary-General’s Special Representative for Somalia responding to the surge in incidents of piracy and armed robbery against vessels off the coast of Somalia especially in 2007 and 2008 requested the UNODC’s assistance. Pursuant to its mandate to assist member states in combating illegal drugs, crime and terrorism,<sup>168</sup> the agency responded by making an accomplished overview of the situation and preparing a detailed report setting out the causes and possible responses.<sup>169</sup>

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<sup>162</sup> See UNODC website: <<http://www.unodc.org/unodc/en/about-unodc/index.html?ref=menutop>>

<sup>163</sup> Field-based technical cooperation projects to enhance the capacity of Member States to counteract illicit drugs, crime and terrorism.

<sup>164</sup> Research and analytical work to increase knowledge and understanding of drugs and crime issues and expand the evidence base for policy and operational decisions.

<sup>165</sup> Normative work to assist States in the ratification and implementation of the relevant international treaties, the development of domestic legislation on drugs, crime and terrorism, and the provision of secretariat and substantive services to the treaty-based and governing bodies.

<sup>166</sup> SC. Res.1851, para., (16 December 2008), UN Doc. S/RES/1851.

<sup>167</sup> Abbas Daher Djama, op.cit, at 48.

<sup>168</sup> UN Office on Drugs and Crime [UNODC], About UNODC (2010), at <http://www.unodc.org/unodc/en/about-unodc/>.

<sup>169</sup> International Expert Group on Piracy off the Somali Coast, Piracy off the Somali Coast (Workshop Commissioned by the Special Representative of the Secretary General of the UN to Somalia Ambassador Ahmed ouOuld-Abdallah, Nov. 21, 2008), available at:



### 3.2.1 The UNODC Counter-Piracy Programme (CPT)

The European Commission and UNODC launched the joint counter-piracy programme in 2009 to enhance criminal justice capacity among Somalia's neighbors and ensure that the trial and imprisonment of suspected pirates passed to them is humane and efficient and take place within a sound rule of law framework. After Somalia, notably Kenya is the second country in the region that has requested the expertise of UNODC in May 2009 in order to adapt its legal system to meet the requirements of piracy provisions under international law and, initially, the counter-piracy programme planned to assist Kenya to respond to increasing numbers of attacks by Somali pirates. Since then, UNODC's scope of counter piracy measures has been widened considerably and now, it works in six countries within the Somali basin region.<sup>170</sup> Apart from Somalia and Kenya, Seychelles, Mauritius, Tanzania and the Maldives also benefit from this assistance programme of UNODC.<sup>171</sup>

The UNODC Counter-Piracy Programme has three objectives: the first one is fair and effective trials and imprisonment in regional countries. The second one refers to humane and secure imprisonment in Somalia and the third is fair and efficient trials in Somalia. UNODC has also welcomed and supported the establishment of the CGPCS, a model of effective international cooperation in response to a complex regional security issue. UNODC works closely with Working Groups I (Capacity Building) and II (Legal Issues) to support a coherent response in the region.<sup>172</sup>

The UNODC Counter-Piracy Strategy recognizes two fundamental facts in the aforementioned programme; "First, that the only viable long-term solution to solving the Somali piracy problem lies in the restoration of law and order in Somalia (including its waters). Second, that the solution is some years off."<sup>173</sup>

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< [http://www.imcsnet.org/imcs/docs/somalia\\_piracy\\_intl\\_experts\\_report\\_consolidated.pdf](http://www.imcsnet.org/imcs/docs/somalia_piracy_intl_experts_report_consolidated.pdf) >

<sup>170</sup> See UNODC, 2012. *Counter Piracy Programme: Support to the Trial and Related Treatment of Piracy Suspects – Issue 8*, Vienna: UNODC.

<sup>171</sup> Abbas Daher Djama, op.cit.

<sup>172</sup> Ibid.

<sup>173</sup> Counter-piracy programme, support to the trial and related treatment of piracy suspects, op.cit.

UNODC is also investing in a long-term solution: the restoration of the rule of law in Somalia. This programme aims to enhance the legal capacities of Somalia and its neighboring countries in order to conduct in these countries trials in compliance with international treaties. The Programme operates from UNODC's Regional Office for East Africa in Nairobi and maintains close ties with the navies who carry out the enforcement operations (notably the EU forces conducting Operation ATALANTA), the donor community and the criminal justice authorities in those states who are playing a part in the fight against piracy. The Programme employs experts in the full range of criminal justice disciplines who have developed expertise in piracy cases.<sup>174</sup>

The deployment of counter-piracy naval forces off Somalia in 2008 and Kenya's agreement to receive and prosecute captured Somali suspects prompted the UNODC and the European Union to set up a small office in Nairobi to manage an EU programme to assist Kenya and the Seychelles in carrying out these tasks.<sup>175</sup>

### **3.2.2 The UNODC Piracy Prisoner Transfer Programme (PPTP)**

The UNODC Piracy Prisoner Transfer Programme (PPTP) is part of the Counter-Piracy Strategy. The counter piracy programme works to achieve its two main aims; support of regional piracy prosecutions and greater prison capacity in Somalia through the Piracy Prison Transfer Programme.

In terms of prosecution mechanisms in cases of piracy and armed robbery against ships off Somali coasts and offshore, monitoring of the prisons of individuals suspected of piracy and armed robbery is one of the main objectives of the UNODC Piracy Prisoner Transfer Programme to ensure that it is being run in accordance with international standards and that transferred prisoners are being held for the appropriate term.

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<sup>174</sup> Counter-piracy programme, support to the trial and related treatment of piracy suspects, February 2011. (28 August, 2014) Available at:

<[http://www.unodc.org/documents/easternafrika/piracy/20110209.UNODC\\_Counter\\_Piracy\\_February\\_Issue.pdf](http://www.unodc.org/documents/easternafrika/piracy/20110209.UNODC_Counter_Piracy_February_Issue.pdf)>

<sup>175</sup> UNODC/EC, Joint European Commission/ UNODC Program; EU Support to the trial and Related Treatment of Piracy Suspects (May 2009) cited in J. Ashley Roach, *Countering Piracy off Somalia: International Law and International Institutions*, Agora: Piracy Prosecutions, ASIL, No. 104, 2010, pp 397-416. Available at: <<https://www.brandeis.edu/ethics/pdfs/internationaljustice/Piracy.pdf>>

Prisoner transfers are governed by the domestic laws of the sending and receiving states and often by bilateral treaties. Certain international human rights instruments may also apply in this case. In addition, some of the transfer arrangements between arresting states require the prosecuting state to seek the agreement of the arresting state before transferring convicted pirates to Somalia. UNODC will therefore engage with the relevant authorities to try and identify more immediate solutions to prisoner transfers to Somalia. These include the use of recently refurbished prison facilities in the Somali regions. UNODC is working with the Transitional Federal Government of Somalia and the regional authorities to help them draft and implement appropriate domestic law provisions. This work has been done in cooperation with Working Group II of the Contact Group on Piracy off the Coast of Somalia.<sup>176</sup>

As one author<sup>177</sup> argues, State Counsels<sup>178</sup> which potentially offer a much better quality prosecution of these cases than police inspectors, have received comprehensive support from the EU-United Nations Office on Drugs and Crime's Counter-Piracy programme in Kenya. The UN-UNODC counter-piracy programme has also provided support for prosecutors dedicated to piracy prosecutions in terms of "office improvements, evidence handover routines and training in the law of the sea."<sup>179</sup> However it has also been noted that the programme has "a heavy case loads and the fact that the witnesses in these cases are likely to already have left Kenya does not make them amenable to expeditious prosecution without the EU-UNODC's counter-piracy programme in ensuring witness delivery to trial, funding the provision of interpreters and overcoming other bottlenecks."<sup>180</sup>

### **3.2.3 The UNODC Hostage Support Programme (HSP)**

The Hostage Support Programme (HSP) was born out of the strong desire of those involved in counter piracy to provide support to the victims of Piracy off the Coast of Somalia. Initially the

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<sup>176</sup> Counter-piracy programme, support to the trial and related treatment of piracy suspects, op.cit.

<sup>177</sup> James thuo Gathii, *Kenya's Piracy Prosecutions*, ASIL, No.104, pp.416-436, Available at: <file:///C:/Users/zt/Downloads/SSRN-id1698768.pdf>

<sup>178</sup> State Counsels are those lawyers who deputized from the Office of the Public Prosecutor in the Attorney General's Chambers. It is cited in previous reference.

<sup>179</sup> United Nations Office on Drugs and Crime, UNODC and Piracy, available at <http://www.undoc.org/undoc/en/piracy/index.html>. Cited in ibid.

<sup>180</sup> James thuoGathii, *Kenya's Piracy Prosecutions*, op.cit.

programme was carried out as an unfunded activity jointly between UNODC and UNPOS (United Nations Political Office for Somalia). After several successful hostage support activities, most notably the repatriation of 14 Myanmar citizens, the programme attracted funding support from the Contact Group for Piracy off the Coast of Somalia (CGPCS). The programme continued to be managed jointly by UNODC and UNPOS until the latter was dissolved in May 2012. The programme now continues, using the same staff on a contract basis but managed by two consultants under direction from the UNODC Global Maritime Crime Programme Headquarter in Vienna.<sup>181</sup>

The Hostage Support Programme (HSP), implemented by UNODC and the United Nations Political Office for Somalia (UNPOS), until the end of the latter's mandate in June 2013, has so far provided humanitarian assistance and support in recovery and repatriation of 93 hostages. In summary, the HSP deserves the full support of the UN to achieve its aims, even if this requires some novel and flexible approaches be taken in light of the challenges presented by short term situational changes, and the difficulties of facilitating local humanitarian assistance in the context of Somalia. Further, based on its goal, whilst it is expected that the need for this particular hostages support programme will soon evaporate as a consequence of the release of all remaining Somali pirate-held hostages, the lesson learned during this programme could be made useful in other programs.<sup>182</sup>

#### **4. Relevant global and regional bodies in the fight against maritime organized crimes under international law**

This Section will discuss main global and regional bodies associated with counter-piracy operations and efforts. Therefore, it will first discuss the International Maritime Organization (IMO) and the International Maritime Bureau (IMB) and then it will briefly discover the main significant efforts made by the Contact Group on Piracy off the Coast of Somalia (CGPCS), the European Union and NATO, and their role in combating piracy.

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<sup>181</sup> The United Nations Office on Drugs and Crime (UNODC), Hostage Support Program, Part of the Maritime Crime Program (Project 045), 11 April 2014.

<sup>182</sup> Ibid.

## **2.1 International Maritime Organization (IMO) and the International Maritime Bureau (IMB) and piracy**

### **2.1.1 The role of International Maritime Organization (IMO) and its regulatory framework**

Following the Second World War, the cooperative efforts by the international community were largely placed on an institutional footing through the creation of specialized international organizations. Particularly, in this respect, in 1948 in order to provide a permanent forum for the discussion of shipping issues, and amendment of shipping standards, the community of states established the International Maritime Organization (IMO) as a specialized agency of the United Nations.<sup>183</sup> Although the organization was created primarily as a forum to discuss maritime affairs and to recommend action to its members, it has come to play a central role in preparing technical standards for shipping.<sup>184</sup>

According to article 1(a) of the IMO Convention which entered into force in 1958, its mandate is “to provide machinery for cooperation among governments in the field of governmental regulation and practices relating to technical matters affecting all kinds of shipping engaged in international trade, to encourage adoption and facilitate the general of the highest practicable standards in maritime safety regarding matters, efficiency of navigation and prevention and control of marine pollution from ships.”

It should be noted here that “the main activities and tasks of IMO since its establishment have been to develop and maintain a comprehensive regulatory framework for international shipping. Its mandate was originally limited to safety-related issues, but very soon it has been expanded to include other issues closely interrelated with shipping such as environmental, legal matters, technical co-operation and many topics affecting the overall efficiency of shipping – such as for example how to deal with stowaways or how a cargo manifest should be transmitted to the authorities ashore; piracy and armed robbery against

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<sup>183</sup> Formerly the Intergovernmental Maritime Consultative Organization or IMCO. Its name was changed by amendments adopted in 1975. See: James Harrison, *Making the law of the sea: a study in the development of international law*, Cambridge [etc.], 2011, at 154.

<sup>184</sup> IMO Convention, Article 2 (a) and (c). Cited in James Harrison, *Ibid*, at 158.

ships. Most recently IMO has focused its activities in the security topic which has obtained a key importance nowadays, following the recent terrorist attacks of 2001.”<sup>185</sup>

It is significant to bear in mind that “the IMO provides a standing forum dedicated to the discussion and resolution of maritime issues. Moreover, the widespread participation of states and non-state actors in the work of the IMO, as well as the decision-making procedures it employs, both contribute to its success as a key institution in the evolution of the law of the sea.”<sup>186</sup>

The International Maritime Organization (IMO) has adopted many legal instruments aimed at minimizing maritime security threats. Accordingly, in 2002, member States of the IMO adopted major revisions to the 1974 Convention on the Safety of Life at Sea (SOLAS)<sup>187</sup> and in 2005 the international body completely revised the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA Convention, as discussed in detail in the previous chapter).

The SOLAS Convention for Safety Of Life At Sea,<sup>188</sup> in its successive forms is generally regarded as the most important of all international treaties concerning the safety of merchant ships. The treaty generally speaking deals with the seaworthiness of ships of all types. The first SOLAS Convention was adopted by a diplomatic conference in 1914, in response to the Titanic disaster. The second version was adopted in 1929, the third in 1948, and the fourth version as one of the first acts of the IMO when it came into existence was a new SOLAS convention in 1960. The main objective of the SOLAS is to specify minimum technical standards, inter alia for the construction, life-saving equipment, radio

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<sup>185</sup> Eliza Gagatsi, “*Review of Maritime Transport Safety and Security Practices and Compliance levels: case studies in Europe and South East Asia*”, 2010. Available at:

<file:///C:/Users/zt/Downloads/review\_maritime\_transport\_safety\_security\_europe\_south-east-asia.pdf>

<sup>186</sup> James Harrison, Op.cit, at 199.

<sup>187</sup> For further information, see:  
<[http://www.imo.org/About/Conventions/ListOfConventions/Pages/International-Convention-for-the-Safety-of-Life-at-Sea-\(SOLAS\),-1974.aspx](http://www.imo.org/About/Conventions/ListOfConventions/Pages/International-Convention-for-the-Safety-of-Life-at-Sea-(SOLAS),-1974.aspx)>

<sup>188</sup> To study the SOLAS Convention, please see:

<<https://treaties.un.org/doc/Publication/UNTS/Volume%201184/volume-1184-I-18961-English.pdf>>

communications, safety of navigation, carriage of cargoes including hazardous cargoes, safety management on ships, and measures to enhance maritime security and it generally can be useful in the legal framework for fighting against maritime piracy and armed robbery threats.

For the purpose of this paper and with regard to piracy and armed robbery threats spreading all over the world, the International Maritime Organization (IMO) has taken a leadership role in coordinating efforts to alleviate the problem from the maritime perspective. Accordingly, facilitating discussions between industry, member states, security forces, and other UN agencies with an interest in piracy and other maritime-security issues is a key element of the work of the Organization, as is the development of both mandatory instruments and guidance. IMO has worked collectively to effect solutions in response to piracy phenomena especially off the coasts of Somalia, Gulf of Aden and the Indian Ocean in consultation with representatives of Governments, other UN organizations (the United Nations Office on Drugs and Crime and the World Food Programme); naval and military personnel; the shipping industry; seafarers and other concerned entities and individuals from the aforementioned regions of concern.<sup>189</sup>

The IMO has also issued a variety of codes and requirements including inter alia, as the International Ship and Port Facility Security Code (ISPS Code),<sup>190</sup> IMO Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery against Ships, and the requirement for Long-Range Identification and Tracking of Ships. IMO has also adopted various resolutions and circulars aimed at combating piracy and armed robbery movements.<sup>191</sup> The core objective of IMO resolutions in response to piracy and armed robbery against ships in

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<sup>189</sup> See: <<http://www.imo.org/OurWork/Security/PiracyArmedRobbery/Pages/Default.aspx>>

<sup>190</sup> The International Ship and Port Facility code (ISPS) was established in 2002 and entered into force on 1 July 2004. It sets out detailed standards and requirements relating to the security of the ship and the immediate ship/port interface, within an international framework for cooperation among Governments and their agencies, local administrations, shipping companies, port authorities and aiming to detect security threats and take measures to prevent security incidents affecting ships and port facilities used in international trade. For further information, see IMO website, available at: <<http://www.imo.org/ourwork/security/instruments/pages/ispscode.aspx>>

<sup>191</sup> These include inter alia Circular MSC.1/Circ.1333 1334, SN.1/Circ.281 and resolutions A.1002 (25), A.1026 (26), and A.1044 (27).

the waters off the coast of Somalia<sup>192</sup> is to support the resolutions of the UN Security Council and extend the scope of the obligations and duties of IMO member States to fight against this problem. In the meanwhile, the IMO's Maritime Safety Committee (MSC) continues to stress the importance of self-protection as a deterrent to successful piracy attacks.<sup>193</sup>

In undertaking effective initiatives to counter piracy and armed robbery at sea, IMO has been implementing a long- term project which began in 1998. The first phase of its project consisted of a number of regional seminars and workshops attended by Government representatives from countries in piracy-infested areas of the world; while phase two consisted of a number of evaluation and assessment missions to different regions. IMO's aim has been to foster the development of regional agreements on implementation of counter piracy measures.<sup>194</sup>

Under the auspices of the IMO and its counterparts, regional cooperation among States has an important role in solving the problem of piracy and armed robbery against ships, as evidenced by the success of the regional anti-piracy operation in the Straits of Malacca and Singapore. The Regional Cooperation Agreement on Combating Piracy and Armed Robbery against ships in Asia (RECAAP), which was concluded in November 2004 by 16 countries in Asia, and includes the RECAAP Information Sharing Centre (ISC) for facilitating the sharing of piracy-related information.<sup>195</sup>

In a regional response to maritime piracy insurgency off the coasts of Somalia and the Gulf of Aden, under the auspices of IMO at a high-level meeting in January 2009, an important regional agreement was adopted in Djibouti by States of the region. The Djibouti Code of Conduct<sup>196</sup> concerning the Repression of Piracy and Armed Robbery against Ships in the

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<sup>192</sup> For a further study in the aforementioned resolutions, see Abbas Daher Djama, op.cit.

<sup>193</sup> <http://www.imo.org/OurWork/Security/PiracyArmedRobbery/Pages/Default.aspx>

<sup>194</sup> See: Abbas Daher Djama, op.cit.

<sup>195</sup> Further information about RECAAP is available at: <<http://www.recaap.org>>

<sup>196</sup> The Djibouti Meeting adopted the Code of Conduct concerning the Repression of Piracy and Armed Robbery against Ships in the Western Indian Ocean and the Gulf of Aden, which was signed on 29 January 2009 by the representatives of Djibouti, Ethiopia, Kenya, Madagascar, Maldives, Seychelles, Somalia, the United Republic of Tanzania and Yemen. In addition, Comoros, Egypt, Eritrea, Jordan,



Western Indian Ocean and the Gulf of Aden recognizes the extent of the abovementioned problem in the region and takes into account and promotes the implementation of those aspects of UN Security Council resolutions 1816 (2008), 1838 (2008), 1846 (2008) and 1851 (2008) and of UN General Assembly resolution 63/111, which fall within the competence of IMO.<sup>197</sup> The Djibouti Code of Conduct urges the State parties to cooperate to the fullest possible extent, and in a manner consistent with international law, in the repression of piracy and armed robbery movements and commit themselves towards sharing and reporting relevant information through a system of national focal points and information centers.<sup>198</sup>

In addition to aforementioned significance and crucial functions it has played to assist in anti-piracy measures, IMO issues reports on piracy and armed robbery against ships submitted by Member Governments and international organizations. The reports include names and descriptions of ships attacked, position and time of attack, consequences to the crew, ship or cargo and actions taken by the crew and coastal authorities and are now circulated monthly, with annual summaries.<sup>199</sup>

### **2.1.2 The International Maritime Bureau (IMB) and piracy and armed robbery**

The International Maritime Bureau (IMB) is a specialized division of the International Chamber Of Commerce (ICC) and represents the shipping industry. The IMB is a non-profit making organization, established in 1981 to act as a focal point in the fight against all types of maritime crime and malpractice.<sup>200</sup> The International Maritime Organization (IMO) in its resolution A 504 (XII) (5) and (9) adopted on 20 November 1981, has inter alia, urged governments, all interests and organizations to cooperate and exchange information with each

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Mauritius, Mozambique, Oman, Saudi Arabia, South Africa, Sudan and the United Arab Emirates have since signed the Djibouti Code of Conduct. For further information, Please see: <<http://www.imo.org/OurWork/Security/PIU/Pages/DCCMeeting.aspx>>

<sup>197</sup> <<http://www.imo.org/OurWork/Security/PIU/Pages/DCCMeeting.aspx>>

<sup>198</sup> <<http://www.imo.org/OurWork/Security/PiracyArmedRobbery/Pages/Default.aspx>>

<sup>199</sup> Ibid.

<sup>200</sup> For further study, see IMB (PRC) website: <<http://www.icc-ccs.org/piracy-reporting-centre>>

other and the IMB with a view to maintaining and developing a coordinated action in combating maritime fraud and malpractice to protect the integrity of international trade.<sup>201</sup>

Quite significantly, the International Maritime Bureau (IMB) aware of the escalating level of piracy and armed robbery decided to provide a free service to the seafarer and established the 24 hour IMB Piracy Reporting Centre (PRC) in Kuala Lumpur, Malaysia. The PRC follows the definition of Piracy as laid down in Article 101 of the 1982 United Nations Convention on the Law of the Sea (UNCLOS) and Armed Robbery as laid down in resolution A.1025 (26) adopted on 2 December 2009 at the 26th Assembly Session of the International Maritime Organization (IMO). The main function of the PRC is twofold according to IMB Piracy Report Center information:<sup>202</sup>

- 1) To be a single point of contact for ship Masters anywhere in the world who are under piratical or armed robbery attack. The information received from the Masters is immediately relayed to the local law enforcement agencies requesting assistance.
- 2) The information received from the ship Masters is immediately broadcast to all vessels in the Ocean region - thus providing vital information and increasing the Masters Domain awareness.

The PRC works and shares information with the IMO, various governmental, inter-governmental and law enforcement agencies including all industry bodies in an attempt to understand the nature of this crime and reduce its effects to crew, vessel and cargo. The key services of the PRC are provided free of charge to all ships irrespective of their ownership or flag. These services are as follows:<sup>203</sup>

- 1) Issuing daily status reports on piracy and armed robbery to ships via broadcasts on the Inmarsat- C Safety NET service,
- 2) Reporting piracy and armed robbery at sea incidents to law enforcement,
- 3) Helping local law enforcement apprehend pirates and assist in bringing them to justice,

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<sup>201</sup> (ICPO). See further: <<http://www.icc-ccs.org/icc/imb>>

<sup>202</sup> Ibid.

<sup>203</sup> see IMB (PRC) website.

- 4) Assisting ship owners whose vessels have been attacked or hijacked,
- 5) Assisting crewmembers whose vessels have been attacked,
- 6) Providing updates on pirate activity via the internet,
- 7) Providing free updates to and ship owners and managers in-charge of the safety and security of their vessels
- 8) Publishing comprehensive quarterly and annual reports detailing piracy statistics

The main aim of the PRC is to raise awareness within the shipping industry, which includes the shipmaster, ship-owner, insurance companies, traders, etc, of the areas of high risk associated with piratical attacks or specific ports and anchorages associated with armed robberies on board ships.

It should be noted here that being a trusted point of reporting for worldwide piracy and armed robbery incidents, the International Maritime Bureau's Piracy Report Center is able to immediately identify any shift in this criminal activity and alert all concerned parties. The PRC in its 2009 set of guidelines for avoiding pirate attacks has recommended States to stay six hundred nautical miles from the coastline when traveling past the East African coast.<sup>204</sup> The recommended buffer only applies outside the Gulf of Aden, which has a mean width of roughly three hundred nautical miles, and therefore remains inadequate in some cases of piratical incidents which occur outside the aforementioned domain. However, the reports are compiled from the primary and best source of information from direct victims and secondary sources which makes IMB piracy reports a comprehensive, publicly available source of information rivaled only by the IMO.

## **4.2 Other organizations**

### **2.2.1 European Union and the North Atlantic Treaty Organization (NATO)**

Maritime transport has a vital importance for the European Union and it is the main trading partner of two thirds of the planet with the biggest proportion of sea-borne trade. Consequently, it is of an essential importance to develop maritime transport by enhancing

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<sup>204</sup>International Maritime Bureau's Piracy Report Center, Best Management Practices to Deter Piracy in the Gulf of Aden and off the Coast of Somalia 6 (2009), available at: <<http://www.icc-ccs.org/images/stories/pdfs/bmp.pdf>>.

security of European ships and port facilities as well.<sup>205</sup> European Commission in 2006, adopted the Green Paper on a future EU Maritime Policy, named “Towards a Future Maritime Policy for the Union: A European Vision for the Oceans and Seas”, which includes maritime terrorism and piracy among the sea-related risks and threats to be prevented and combated by this policy.<sup>206</sup>

The European Union (EU) and NATO have dispatched naval forces to the Somali Coast to deter piratical attacks. In 2008, the European Union launched a military operation – EU NAVFOR Somalia/ Operation “Atlanta”, the EU’s first-ever naval taskforce against piracy, which authorizes the EU forces to provide protection to merchant vessels cruising in the areas where it is deployed in order to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coasts. The EU taskforce operations were commended by the UN Security Council at the preamble of the resolution number 1838 adopted in 2008. The EU has also contributed to a fair trial process of prosecuting pirates by signing an agreement with Kenya on the conditions of transfer of persons detained in the course of counter-piracy operations by EUNAVFOR ATALANTA to Kenya for prosecution. However quite significantly, NATO and the EU have refrained from military engagement in Somalia<sup>207</sup> and leave the task of contributing to peace and stability in the country to an understaffed and insufficiently equipped African Union Mission in Somalia (AMISOM) which received a mandate including the authorization to use force from the UN Security Council in SC Res. 1744 of 27 January 2007.<sup>208</sup>

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<sup>205</sup> Anna Oriolo, Op.cit, at 253.

<sup>206</sup> The Green Paper aims to promote sustainable development on the basis of environmental and socio-economic aspects relating to uses and exploitation of maritime spaces and resources. For more information on the European Commission’s Green Paper “*Towards a Future Maritime Policy for the Union: A European Vision for the Oceans and Seas*”, please see Ibid, at 253-254.

<sup>207</sup> The EU is conducting the European Union Training Mission Somalia (EUTM Somalia) which is to contribute to the training of Somali Security forces on the basis of Council Decisions 2010/96/CFSP of 15 February 2010 and 2010/197/CFSP of 31 March 2010. This mission, on whom the Council agreed on 25 January 2010, takes place in Uganda where Somali forces have already been trained.

<sup>208</sup> Cited in “Hanspeter Neuhold, *The return of piracy: Problems, parallels, paradoxes*, In “Coexistence, cooperation and solidarity”, Op.cit, at 1258.

With regard to the global security at sea, where appropriate, the programme on maritime routes<sup>209</sup> will support and complement existing EU initiatives, to achieve a “better compliance with the international legal framework, a reduction of incidents of piracy and armed robbery at sea, more secure ports, better policing to counter illegal trafficking, improved administrative capacity to fight against crime and terrorism and enhanced risk-preparedness for both conventional and [chemical, biological, radiological and nuclear risks].”<sup>210</sup>

In accordance with UN resolutions calling on States and international organizations to fight against piracy in particular off the coast of Somalia, NATO has undertaken multiple operations in the area to combat piracy and protect shipping lanes. The first two, Operation Allied Provider and Operation Allied Protector, were intended to deter, defend against, and disrupt pirate activity off the Somali coast and particularly in the later operation; NATO was initially in charge of escorting WFP ships through the monitoring process. These operations have been replaced and enhanced by Operation Ocean Shield, which also offers to assist states in the region in developing their own counter-piracy abilities.<sup>211</sup>

#### **2.2.4 African Union**

The African Union is responsible for “strengthening the unity and solidarity of African States, coordinate and intensify cooperation for development to defend the sovereignty and territorial integrity of Member States, and to foster international cooperation in the framework of the UN.”<sup>212</sup> Therefore, in accordance with its mandate, the African Union adopted “Revised African Maritime Transport Charter” in 2010, stipulating that “States Parties shall enact legislation and take all the necessary measures to give full effect to this Charter and all other relevant international instrument codes and regulations in the area of maritime, port safety and security in order to ensure safe, secure and efficient shipping and port operations.”

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<sup>209</sup> The European Community Program on “critical maritime routes” for 2009-2011. It’s initial focus is on the Malacca Straits, the Bab-el-Mandeb Straits, and the Gulf of Aden.

<sup>210</sup> Anna Oriolo, *Op.cit.*, at 257-258.

<sup>211</sup> See at [http://www.nato.int/cps/en/natolive/topics\\_48815.htm](http://www.nato.int/cps/en/natolive/topics_48815.htm).

<sup>212</sup> See article 12, para.4 of the Charter of the African Union, a revised version of the Charter has been adopted on 36 July 2010; available at <<http://www.au.int/en/content/revised-african-maritime-transport-charter>>

Subsequently, according to the Para 2 of Article 26 of the declaration, it should be emphasized that “States Parties shall adopt effective measures to combat acts of piracy, armed robbery and other unlawful acts against shipping through co-operation with other international bodies.”<sup>213</sup>

The African Union is currently developing an African Integrated Maritime Strategy to facilitate implementation of the Charter, with emphasis on threats to maritime security such as piracy. The African Union in this regard in 2012 has set deadline for a continent-wide maritime strategy for 2050, a target that may prove untenable with the emphasis on the fact that ‘sea blindness’ or the neglect of maritime opportunities or risks is costing Africa dearly in terms of lost revenue and security.<sup>214</sup>

Beside the general strategies of African Union in promoting maritime security in Africa, the Durban Resolution on Maritime Safety, Maritime Security and Protection of the Marine Environment in 2009<sup>215</sup> also declares the African Union’s shared commitment to tackle the issues of maritime safety, security, transport, and environmental protection. It recognizes the role of African Union to coordinate and provide a mandate to set up a common policy aimed at preventing and combating marine pollution and protecting maritime security. The Durban Resolution condemns all acts of piracy and armed robbery at sea and contains provisions for member states to enact national legislation and to ratify and implement international instruments relating to maritime security, such as the International Ship and Ports Security (ISPS) code.<sup>216</sup> It encourages the African regional economic communities to undertake supplementary projects in area where there is need to build local maritime capacity and invites member states to provide the resources necessary to ensure the safety, security and protection of the marine environment.

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<sup>213</sup> The Abuja Declaration on Maritime Transport and the African Maritime Transport Charter, article 26, para.2 of the Ibid.

<sup>214</sup> “African Union sets deadline for continent-wide maritime strategy”, the Guardian, see available at: <http://www.theguardian.com/global-development/2012/oct/26/african-union-deadline-maritime-strategy>

<sup>215</sup> Durban Resolution on Maritime Safety, Maritime Security and Protection of the Marine Environment in Africa, 2009, available at: <[http://pages.au.int/sites/default/files/Durban%20resolution\\_1.pdf](http://pages.au.int/sites/default/files/Durban%20resolution_1.pdf)>

<sup>216</sup> See at: <<http://www.imo.org/OurWork/Security/Instruments/Pages/ISPSCode.aspx>>

The African Union supports the initiatives of the Maritime Organization for West and Central Africa (MOWCA) and IMO on establishing an Integrated Coast Guard Network in the sub-region and promotes sub-regional cooperation and coordination in the provision of coast guard functions inclusive of maritime intelligence, surveillance, safety and security, protection of environment and search and rescue.<sup>217</sup>

### **2.2.5 Contact Group on Piracy off the Coast of Somalia (CGPCS)**

The Contact Group on Piracy off the Coast of Somalia was established on 14 January 2009 pursuant to UN Security Council resolution 1851 (2008) to facilitate the coordination of actions among more than 60 states and organizations to fight piracy off the coast of Somalia. It was created to establish a mechanism for international cooperation to serve “as a common point of contact between States and regional and international organizations”<sup>218</sup> to address piracy and it has been evidenced that since its creation, the CGPCS through increased coordination and information sharing among states, the private sector (e.g. shipping industry, insurance companies) and non-governmental organizations has contributed to a marked reduction in the number of pirate attacks and hijackings.<sup>219</sup>

From the 1st of January 2014 the European Union will assume for one year the chairmanship of the Contact Group on Piracy off the Coast of Somalia (CGPCS). The chairmanship of the Contact Group is a joint endeavor of the European External Action Service (EEAS) and the European Commission and will continue the work carried out in 2013 under the chairmanship of the United States.<sup>220</sup> The EU and the entire CGPCS are keen to mobilize international support to eradicate Somali piracy once and for all, not only by addressing the

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<sup>217</sup> See at: <<http://oceansbeyondpiracy.org/african-union-au>>

<sup>218</sup> SC. Res.1851, (16 December 2008), UN Doc. S/RES/1851.

<sup>219</sup> [http://europa.eu/rapid/press-release\\_IP-13-1314\\_en.htm](http://europa.eu/rapid/press-release_IP-13-1314_en.htm)

<sup>220</sup> Ibid.

symptoms at sea but also by addressing the root causes of piracy ashore.<sup>221</sup> The Contact Group remains an indispensable mechanism to combat piracy off the coast of Somalia.

The CGPCS operates through five working groups as follows:

**Working Group 1:** It has been renamed the Working Group on Capacity Building and focuses on military and operational coordination, information sharing, capacity building and force generation. According to the update to the group in 2014, it will be co-chaired by the UK and the Indian Ocean Commission.<sup>222</sup>

**Working Group 2:** The working group has been transformed into the ‘Legal Forum of the CGPCS’, preserving the legal network as a virtual legal forum of legal experts and focuses on judicial mechanisms for deterring piracy. According to the update to the group in 2014, it will be co-chaired by Mauritius and Portugal.<sup>223</sup>

**Working Group 3:** The WG3 has been renamed ‘Maritime Counter-Piracy and Mitigation Operations’ according to the new decision of the group. It focuses on strengthening shipping self-awareness, and will bring, amongst others, commercial shipping industry, navies and seafarers organizations together to enhance awareness and improve other capabilities. This WG will be co-chaired by Japan, Seychelles and the United Arab Emirates.<sup>224</sup>

**Working Group 4:** Public Information, chaired by Egypt, seeks to make clear to the world, and especially to the Somali public, the damage being done by pirates.<sup>225</sup>

**Working Group 5:** The WG5 has been renamed ‘Disrupting Pirate Networks Ashore’ and will continue to be chaired by Italy and focus on financial flows tracking associated with piracy in

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<sup>221</sup> See “Suspect Pirates Transferred to Seychelles for Possible Prosecution”, available at: <<http://www.maritime-executive.com/article/Suspect-Pirates-Transferred-to-Seychelles-for-Possible-Prosecution-2014-01-30>>

<sup>222</sup> <http://www.thecgps.org/work.do?action=workSub1>

<sup>223</sup> <http://www.thecgps.org/work.do?action=workSub2>

<sup>224</sup> <http://www.thecgps.org/work.do?action=workSub3>

<sup>225</sup> <http://www.thecgps.org/work.do?action=workSub4>



order to disrupt the pirate enterprise ashore and arresting piracy kingpins. Law enforcement expertise will be concentrated in a dedicated, autonomous Task Force.<sup>226</sup>

The CGPCS meets three times a year at UN headquarters in New York and its working groups frequently publish their expert views on issues related to the area studied.<sup>227</sup> The group's mandate is “to facilitate operational coordination of naval forces to create a partnership with industry groups to reduce the risks of pirate attacks through the establishment of preventive measures and monitor expenditures related to the procedures legal action against perpetrators of acts of piracy.”<sup>228</sup>

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<sup>226</sup> <http://www.thecgps.org/work.do?action=workAd>

<sup>227</sup> For a complete inquiry I the mandate and tasks of the Contact Group, see: Communiqué of the Contact Group on Piracy off the Coast of Somalia, Sixteenth Plenary Session, United Nations Head Quarters, 14 May 2014. Available at: <[http://www.eeas.europa.eu/statements/docs/2014/140516\\_02\\_en.pdf](http://www.eeas.europa.eu/statements/docs/2014/140516_02_en.pdf)>

<sup>228</sup> Abbas Daher Djama, *Op.cit*, at 57.

## **Part 2: Enhancing cooperation at the regional level and capacity development at the national level**

As a conclusion to the substantial legal materials of the part one of the thesis, any comprehensive response to the ongoing threats of pirates and organized criminals to maritime security would have two main perspectives: The first is related to the instrumental measures and the management of the crisis situation; and the second explores that the protective measures to be implemented are in prevention and also in defence of upcoming incidents that may occur. These objectives can only be reached by a closer cooperation mechanism among the littoral and affected regional states and with a broader international community as a whole.

Undoubtedly, the promotion of harmonized measures and joint action is more effective than unilateralism. In this sense, the flourishing of international and regional cooperation has been extensive on numerous maritime issues and is a core element of combating maritime violence as piracy, armed robbery and terrorism. Quite significantly the approach towards maritime governance has traditionally been driven through the national governments on the individual country level and building up into multilateral arrangements or global international organizations such as the UN and IMO as its specialized agency.

In this part of the thesis, I will discuss issues relating to enhancing this kind of cooperation based on international law at the regional level and capacity development at the national level to address maritime organized crimes threatening the Indian Ocean. To this end, this significant part will first examine maritime security approaches in Iran's legal framework and Ocean governance contribution based on this perspective and it will further draw the attention to the main question which examines 'how to achieve a stronger cooperation to eliminate maritime organized crime under International law and law of the sea and what are the upcoming and existing problems and their solutions in this regard'.

## **Chapter 1: Maritime security approaches in Iran's legal framework and Ocean governance contribution**

As explained in the first part of the present thesis, piracy and relevant crimes thereof are a global problem that endangers maritime security interests on a global scale. It is important to keep in mind that there is a positive and synergistic relationship between articulating a modern counter piracy policy, strengthening Iran's interagency coordination and enhancing international cooperation. The process of developing a contemporary counter piracy policy has helped to focus Iran's interagency resources toward more effective coordination and enhanced international cooperation. As it is evidentially notable, a high level of repeated violence and Insecurity in the maritime domain would call for an international crisis management mechanism mainly a cooperation mechanism among states at the regional and international level in order to effectively address them.<sup>229</sup>

This chapter will therefore explore maritime security approaches in Iran's legal framework and Ocean governance contribution with two main perspectives. The first significant one refers to Iran's legal perspective on maritime organized crimes threatening the Indian Ocean Region and its contribution to the regional security by strengthening existing arrangements and the second, Iran's maritime activities in the Indian Ocean to maintain maritime security and capacity development approaches at the national level particularly with regard to piracy movements.

### **1. Iran's legal perspective on maritime organized crimes threatening the Indian Ocean Region; Contribution to the regional security**

Iran is located in southwestern Asia between the Persian Gulf and the Sea of Oman to the south, and the Caspian Sea to the North. It has an area of 1,648,000 square km (628,000 square mile). Iran's coastline on the south along the Persian Gulf and the Sea of Oman is 1,880 km (1,168 miles long). Iran has the longest shoreline on the Persian Gulf and Sea of Oman as well,

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<sup>229</sup> Paul Musili Wambua, The jurisdictional challenges to the prosecution of piracy cases in Kenya: mixed fortunes for a perfect model in the global war against piracy, World Maritime University 2012. Available at: [http://download.springer.com/static/pdf/647/art%253A10.1007%252Fs13437-012-0021-6.pdf?auth66=1410360154\\_d60e8fae61bff3477a3b77129e025d26&ext=.pdf](http://download.springer.com/static/pdf/647/art%253A10.1007%252Fs13437-012-0021-6.pdf?auth66=1410360154_d60e8fae61bff3477a3b77129e025d26&ext=.pdf)

and is the only state located on the entire length of the northern coast of Gulf and the Sea of Oman from the Arvand River (shat al Arab) up to Govater (Pakistan border).<sup>230</sup> In this sense, maritime security issues are of great significance for the country and its economic, social and comprehensive growth depends on contributing to high secure ocean governance and more discipline oriented policies toward the transportation of goods by its national merchant fleet and communications with other nations through oceans. The following section examines the Iran's legal perspectives on maritime organized crimes in the Indian Ocean region and its contribution to regional security by strengthening existing arrangements of the region.

### **1.1 Indian Ocean and considerations on maritime organized crime**

The Indian Ocean, the third largest ocean in the world, occupies approximately 20 percent of the Earth's sea surface, covering a total area of 73.56 million square miles. This significant ocean is bounded to the north by the Indian subcontinent; to the west and northwest by the east African coast and Arabian Peninsula, respectively; to the east by Thailand, the Malay Peninsula, Indonesia, and Australia; and to the south by the oceanic margin with the Southern Ocean. At its easternmost extremity, the Indian Ocean touches the Pacific Ocean at the 147 E meridian, running south from South East Cape on Tasmania to 60S latitude. The Indian Ocean encompasses several regional seas and sea areas; the Andaman Sea, the Arabian Sea, the Bay of Bengal, the Great Australian Bight, the Gulf of Aden, the Gulf of Oman, the Laccadive Sea, the Mozambique Channel, the Persian Gulf, and the Red Sea. As has been mentioned in some Indian Ocean researches, the seven key chokepoints in the Indian Ocean region are as follows: the Mozambique Channel, the Bab el Mandeb, the Suez Canal, the Strait of Hormuz, the Malacca Straits, the Sunda Straits, and the Lombok Strait.<sup>231</sup>

The northernmost extent of the Indian Ocean is the Iranian port of Bandar Imam Khomeini in the Persian Gulf and at the mouth of it, the Strait of Hormuz, is of major economic significance to regional and world shipping lines. In fact it should be considered as

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<sup>230</sup> Report of the Second Regional Forum on Maritime Manpower Planning, Training, Utilization and Networking of Centers of Excellence, Country Report From Islamic Republic of Iran, Economic and Social Commission for Asia and the Pacific, Bangkok, 15-17 October 2003.

<sup>231</sup> For further studies on the strategic importance of the Indian Ocean, see: David Michel and Russell Sticklor (ed.), *Indian Ocean Rising: Maritime Security and Policy Challenges*, STIMSON, July 2012.

one of the most important straits economically, since it serves as a crucially significant strait affording the international community facilitated opportunity to conduct passage of goods, services and resources, with oil shipments at the heart of its economic importance.<sup>232</sup>

Transnational organized crime has notably been increasing across the Indian Ocean Region and has had a significant maritime dimension. A variety of sources of insecurity that afflict the region exist within one of the world's most important strategic and commercial spaces, with the Persian Gulf serving as the world market's most significant source of crude oil and the northern Indian Ocean playing the role of a critical sector of the globe's trading.<sup>233</sup> Amongst the threats affecting the security of the region, illicit migration and drug smuggling have been going on for generations, especially where people on both sides of modern borders share ethnic and family ties. In this regard, activities concerned not only include persistent challenges to maritime security, such as piracy or fisheries, but also contemporary challenges, in the form of maritime terror proliferation of WMD, drug trafficking and illicit migration. In some cases, particularly, in case of piracy and armed robbery against vessels which nowadays would manifest in various types of violence at sea and land, organized criminal groups would be associated with more than one illicit activity on seas and would result in significant obstacles both in respect of the prevention of such crimes and the applicable legal framework.<sup>234</sup>

Due attention should be paid to piracy and armed robbery at sea- particularly off the Somali coast- which remain top maritime security concerns in the Indian Ocean Region. It should be added that despite the efforts done by a multinational coalition to patrol the waters off east Africa, the area impacted by the Somali piracy remains enormous at approximately 2.5 million square miles, with pirates' use of mother ships enabling piracy movements to be

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<sup>232</sup> It should be noted that on land the Indian Ocean region is bounded and variously influenced by its surrounding states: Australia, Bahrain, Bangladesh, Comoros, Djibouti, East Timor, Egypt, Eritrea, India, Indonesia, Iran, Iraq, Jordan, Kenya, Kuwait, Madagascar, Malaysia, Maldives, Mauritius, Mozambique, Myanmar, Oman, Pakistan, Palestine, Qatar, Saudi Arabia, Seychelles, Singapore, Somalia, South Africa, Sri Lanka, Sudan, Tanzania, Thailand, United Arab Emirates, and Yemen.

<sup>233</sup> David Michel and Russell Sticklor, *Op.cit*, at 12.

<sup>234</sup> Efthymios Papastavridis, *The Interception of Vessels on the High Seas; Contemporary Challenges to the Legal Order of the Oceans*, HART publishing, Oxford and Portland, Oregon, 2013, at 14.

committed against vessels at very great distance from the coast.<sup>235</sup> Undoubtedly, piracy and armed robbery as the main security concern of the region can undermine local and regional (and subsequently international) security and stability. In this regard, the following section will first discuss briefly other maritime organized crimes threatening the Indian Ocean Region and afterwards it will focus on the framework applicable to the piracy threats to the Indian Ocean security according to Iran's legal perspective.

### **1) Illicit migration and Trafficking in arms, drugs and people**

The sustained trafficking of illicit narcotics, drugs, weapons and people within and via the Indian Ocean in addition to the smuggling of migrants, oil, cigarettes, charcoal, endangered species, and other contraband have been continuing as a great concern for the neighbouring states in the region.

With regard to the organized crimes of human trafficking and smuggling of migrants in the region, one should be mindful of the legal difference between the two, as they are often mistakenly considered interchangeable. Technically speaking, these are the most important differences between the two. First difference is the element of consent. Smuggling of migrants involves their consent. Although the migrants may have to go through difficult or even life threatening situations, but this does not happen against their will and without their consent. On the other hand, trafficking victims have never consented to the situation. In many cases, they initially consented to put themselves in the hands of the traffickers without knowing what is actually awaiting them, and that consent has been rendered meaningless by the coercive, deceptive or abusive action of the traffickers.

The second difference is the element of exploitation. Migrant smuggling ends with the migrants' arrival at their destination, whereas trafficking involves the ongoing exploitation of the victim. The migrants pay their smugglers in order to be smuggled, while abusing the victims of human trafficking is the source of profit for traffickers.

Due to economic and social situations, many of the countries located in the Indian Ocean region are considered source countries for both smuggling of migrants and human

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<sup>235</sup> Ibid, p 12.

trafficking. The criminal organizations who are often involved in many other transnational organized crimes have been taking advantage of this situation in order to maximize their illicit profits. In terms of refugees and illegal immigrants, particularly in times of war, there are always some innocent people who need to flee in order to not to be killed. Either in times of major political change, there will also be those who feel they can no longer stay in their homeland.<sup>236</sup>

In the region concerned, there are two main routes, the first one from the southern Red Sea and Horn of Africa to the southern Arabian Peninsula and the second one from the Asian subcontinent to the eastern Arabian Peninsula and Persian Gulf.<sup>237</sup> Iran like Bahrain, Kuwait, Qatar, Saudi Arabia, UAE and Yemen is one of the destination countries for illicit migrants or trafficked people. It has regulated this crime in its domestic law.

Trafficking in drugs by sea remains a major source of income for many transnational organized criminal groups. Three types of illicit narcotics dominate trafficking in the Indian Ocean; heroin (opiates), amphetamine-type stimulants (ATS), and cannabis. In this regard, the flows of greatest concern are the Afghan heroin/opiate trafficking to Europe via Iran, Pakistan and United Arab Emirates (UAE), and via the Arabian Sea, Red Sea and Suez Canal shipping routes.<sup>238</sup> Small-arms trafficking in the Indian Ocean is “an integral part of broader transnational crime that includes terrorism, drug trafficking, money laundering, piracy and human trafficking.”<sup>239</sup> Small arms are widely available in the region, and trafficking by sea is the preferred means of movement.

Drug trafficking is a global illicit trade involving the cultivation, manufacture, distribution and sale of substances which are subject to drug prohibition laws. UNODC is continuously monitoring and researching global illicit drug markets in order to gain a more

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<sup>236</sup> Ove Tvedt, ‘Drug trafficking, refugees, and illegal immigrants’, In *Maritime Violence and Other Security Issues at Sea*, edited by Proshano K.Mukherjee, Maximo Q.Mejia Jr and Gotthard M.Gauci, WMU Publication, 2002, at 171.

<sup>237</sup> David Michel and Russell Sticklor, *Op.cit*, at 27-28.

<sup>238</sup> *Ibid*, at 26.

<sup>239</sup> Rizal Sukma, “The Problem of small Arms in Southeast Asia: An Overview,” in *Small Is (Not) Beautiful: The Problem of Small Arms in Southeast Asia*, ed. Philipe Jusario Vermonte (Jakarta: Center for Strategic and International Studies, 2004), p.9.

comprehensive understanding of their dynamics. The Balkan and northern routes are the main heroin trafficking corridors linking Afghanistan to the huge markets of the Russian Federation and Western Europe. The Balkan route traverses the Islamic Republic of Iran (often via Pakistan), Turkey, Greece and Bulgaria across South-East Europe to the Western European market, with an annual market value of some \$20 billion.<sup>240</sup>

## **2) Maritime terrorism and proliferation of WMD**

A variety of instances of interference on the high seas and particularly on the Indian Ocean region pertain to the threats posed by international terrorism and proliferation of WMD. The definition of terrorism has been disputed on numerous occasions with difficulties in coming to an agreement.<sup>241</sup> As target operations occurs on land, maritime targets might become more attractive to terrorist groups. The main maritime terrorist threat in the region over the past decade has been usually seen as coming from Al-Qaida (specifically in the Arabian Peninsula) and other extremist associated groups either by attacking maritime targets or intent to launch such attacks in the strategic waterways of the region (such as Bab al-Mandeb) to build up a huge cause of terror.

Although there is no evidence that Al-Shabab group in the other side of the Gulf of Aden has a maritime attack capability or is actively planning maritime operations off shore or on the high seas, there have evidently been indications that prove that Al-Qaida in the Arabian Peninsula has initiated to advance its alliance with an affiliate, Al-Shabab to assist them in their terrorist activities off the coasts of Somalia and on its land and other related areas.<sup>242</sup> The more catastrophic scenarios highlight possible attacks on liquefied natural gas or liquefied petroleum gas tankers, either through the planting of devices on board or by the use of a tanker as a mobile weapon to strike secondary targets.

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<sup>240</sup> <https://www.unodc.org/unodc/en/drug-trafficking/index.html>, to see a world drug report, visit: <https://www.unodc.org/wdr2014/>

<sup>241</sup> For studying different definitions of terrorism, see: Lucio Salonio and Rajeev Sinha, 'International, regional and national approaches towards maritime security issues of terrorism', In *Maritime Violence and Other Security Issues at Sea*, Op.cit, at 222.

<sup>242</sup> David Michel and Russell Sticklor, Op.cit. at 29.



Generally speaking, the potential for cooperation between pirates and terrorists is often overstated in writings that emphasize possible linkages between pirates and terrorists.<sup>243</sup> Piracy and maritime terrorism might involve a similar *modus operandi* by the attackers, but piracy is conducted for private ends, while terrorism has political motives. In assessments of the risk of maritime terrorism, pirates have been seen as having skills and expertise that might be attractive to a terrorist group, but these are not particularly specialized, and they are readily available. These are many former naval personnel, fishermen, and commercial seafarers in Southeast Asia with knowledge and experience that could be used by a terrorist group. This has also been witnessed in the eastern parts of the Indian Ocean where Somali-based piracy and maritime terrorism may get involved dramatically.

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<sup>243</sup> For example, Graham Gerard Ong, "Ships Can Be Dangerous, Too: Coupling Piracy and Terrorism in Southeast Asia's Maritime Security Framework," in *Piracy in Southeast Asia: Status, Issues, and Responses*, ed. Derek Johnson and Mark Valencia (Singapore: Institute of Southeast Asian Studies, 2005), pp. 45-76.

### 3) The crime of illegal, unreported and unregulated fishing in the Indian Ocean

Illegal, unreported and unregulated fishing has become a serious problem in the Indian Ocean region, especially for Iran and the neighboring states in Persian Gulf and Sea of Oman. Though not completely recognized as an organized crime in any cases, the crime has been increasing in the western Indian Ocean's most important fishing areas, most notably in the important tuna grounds. Increasing the capability of coastal states to manage and regulate fishing in their EEZ and reducing IUU fishing on the high seas has been a critical maritime issue for all states bordering the Indian Ocean.<sup>244</sup> Combating IUU fishing has been one of the main issues on the international fisheries agenda for the past decade, as it has been recognized as a major threat to fisheries conservation and marine biodiversity.<sup>245</sup> It is reported that "in case of fisheries, more than 75 percent of the world's fish stocks are reported as already fully exploited or overexploited and increasing numbers of marine species are considered threatened or endangered".<sup>246</sup>

With regard to the serious problem of IUU fishing in the Indian Ocean region, many states have been affected by a various range of depletion of stocks and Somalia and the Gulf of Aden have been a salient example. With the depletion of fish stocks in the region, many coastal villages have lost their basic means of livelihood and have been tempted into illegal activities and have turned into networks through which more sophisticated organized crimes might operate in, for example, human, drug or arms smuggling, maritime terrorism or even piracy. In some- but certainly not all cases, the masterminds behind smuggling, opportunistic businessmen, criminal gangs and other illegal maritime operations usually use the local villagers as "foot soldiers" and thus keep themselves at arm's length from the illegal activity.<sup>247</sup>

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<sup>244</sup> David Michel and Russell Sticklor, Op.cit, at 15.

<sup>245</sup> See T Lobach, 'Combating IUU Fishing: Interaction of Global and Regional Initiatives', in Vidas D (ed), *Law, Technology and Science for Oceans in Globalization: IUU Fishing, Oil Pollution, Bioprospecting, Outer Continental Shelf* (Leiden: Martinus Nijhoff, 2010) 109, 109.

<sup>246</sup> R Rayfuse, 'Moving Beyond the Tragedy of Global Commons: The Grotian Legacy and the Future of Sustainable Management of the Biodiversity of the High Seas', in Leary D and Pisupati B (eds), *the Future of International Environmental Law* (Tokyo: United Nations University Press, 2010) 201, 204.

<sup>247</sup> Bruce A. Elleman, Andrew Forbes, David Rosenberg, *Piracy and Maritime Crime, Historical and Modern Case Studies*, Naval War College Newport Papers, Newport, Rhode Island, at 142.

Some of the developing states in the region have limited resources to invest in their coast guard to make it capable of patrolling their EEZ and enforcing fishery regulations. However, Somalia has remained as a case in point regarding the loss of a national resource due to a lack of capacity for offshore management and regulation and this issue has posed the threat of piracy and armed robbery occurring off the coasts of Somalia, as a very serious crime to peace and security of the international community.<sup>248</sup> In the lack of a development of a national government capable of regulating activities in its own EEZ, many offshore resources will be left vulnerable to illegal, unreported and unregulated fishing, with a great economic loss both to the concerned state and to local fisheries industries.

#### **4) The crime of piracy and armed robbery against vessels- Somali Basin and Arabian Sea along with Sea of Oman and Persian Gulf**

Maritime security concerns in the Indian Ocean continue to be dominated by piracy and armed robbery at sea, specially the hijacking of merchant vessels by well-armed Somalia-based pirates. Actually a combination of factors serves to explain how piracy and attacks against shipping have become such a significant and enduring challenge to freedom of navigation in the Indian Ocean. As some explain,<sup>249</sup> one fundamental consideration is that the Horn of Africa borders key shipping lanes linking the Mediterranean to the Indian Ocean by way of the Suez Canal and Strait of Bab el-Mandeb through the Red Sea.

Although as reflected at the global scale,<sup>250</sup> the number of reported piracy attacks in the region has trended steadily downward in recent years, nevertheless, the area affected by Somali piracy remains vast –approximately 2.5 million square miles, encompassing all parts of the Arabian Sea, Gulf of Aden, Gulf of Oman, and the southern Red Sea.<sup>251</sup> However pirate tactics and modes operandi vary across the region and it has been frequently witnessed that after a course of time, pirates have considerably adapted and broadened their range of activities and

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<sup>248</sup> David Michel and Russell Sticklor, Op.cit, at 76.

<sup>249</sup> John Garofano and Andrea J. Dew (ed.), *Deep Currents and Rising Tides; the Indian Ocean and International Security*, Georgetown University Press, 30 April 2013, at 119.

<sup>250</sup> To study reasons discussing this argument, see:

<<http://oceansbeyondpiracy.org/sites/default/files/attachments/SoP2013-Digital.pdf>>

<sup>251</sup> David Michel and Russell Sticklor, Op.cit, at 24.

there is evidence of pirates becoming better equipped and organized, more flexible and responsive to counter-piracy efforts of the international community.<sup>252</sup> The Somali-based pirates utilizing sophisticated tools and modern weapons of various types including the captured merchant vessels in addition to dhows and fishing vessels as mother ships, explore the shipping routes through the Mozambique Channel, off Madagascar, near the Seychelles, towards the Maldives, and into the Arabian Sea and in some cases the Persian Gulf. It has been even witnessed that piracy attacks occurred within 200 miles of India, some 1500 miles from Somalia and far away from its coasts. Therefore, the piracy infested area stretches across thousands of miles, from the Southern Red Sea to the Arabian Sea and Sea of Oman.<sup>253</sup>

As the most heavily travelled and high-value Sea routes in the world, the points of confluence of sea lanes in the Indian Ocean and South China Sea have become an attractive hunting ground for pirates. Small-scale piracy- based on the capture of ships and cargo over the past few years near the Horn of Africa and the Strait of Malacca- has been supplanted by capture and ransom activities against lightly crewed vessels with high-value cargoes travelling from the Persian Gulf and the Suez Canal, even as piracy in the eastern Indian Ocean has declined.<sup>254</sup> According to the IMB Piracy Report Centre, there have been 231 worldwide incidents reported to the centre in 2014 which among them, majority of incidents belongs to the Indian Ocean region.<sup>255</sup>

### **3.2 Iran's relevant legislation and policies to tackle maritime security threats and current status of participation in international and regional instruments**

The previous paragraphs discussed the most significant maritime security threats in the Indian Ocean and how they affect Iran and other countries in the region. Here, I will address Iran's

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<sup>252</sup> John Garofano and Andrea J. Dew, Op.cit, at 115.

<sup>253</sup> Charles H. Norchi and Gwenaëlle Proutiere-Maulion, *Piracy, in comprehensive perspective: problems, strategies, law*, Editions A. Pedone & Hart, 2012, at 45.

<sup>254</sup> David Michel and Russell Sticklor, at 76.

<sup>255</sup> In a recent attack against an oil tanker around Musandam Island in Oman, in 30 March 2014, six persons in a skiff armed with machine gun approached a tanker underway and fired towards the accommodation and bridge. The master raised the alarm and mustered all crew. However, upon hearing the alarm the persons aborted the attempted attack and moved away. Available at: <<http://www.icccs.org/piracy-reporting-centre/live-piracy-map>>

relevant legislation and policies toward the aforementioned maritime security threats and current status of Iran's participation in international and regional instruments. Because of the importance of the maritime security threats of piracy and armed robbery in the Indian Ocean for the purpose of this thesis, the following section of this chapter will afterwards elaborate on Iran's legal framework and policies in this regard.

With regard to the threats of drugs trafficking, quite significantly, the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances<sup>256</sup> is considered as a comprehensive instrument in which the State Parties are obliged to an international cooperation through, for example, extradition of drug traffickers, controlled deliveries and transfer of proceedings. The Convention provides comprehensive measures against drug trafficking, including provisions against money laundering and the diversion of precursor chemicals.

The Islamic Republic of Iran has signed the Convention at 20 December 1988 and has ratified it in December 7, 1992 and has been implementing it since then.<sup>257</sup> In addition, it is noteworthy to mention that Iran in its domestic law has enacted a Law on Combating Human Trafficking in 2004 which inhibits "trafficking in or out of the borders of the country, or authorized or unauthorized transiting of people out of the borders of the country by coercion or duress or deceit or intimidation or abusing of one's power or position with the purpose of prostitution or removal of organs of body, slavery and marriage."<sup>258</sup>

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<sup>256</sup> The Convention was adopted by the United Nations Conference for the Adoption of a Convention against Illicit Traffic in Narcotic Drugs and psychotropic Substances, held at Vienna from 25 November to 20 December 1988. See: *International Legal Materials*, 1988, issue 21, p 1261. The Conference was convened pursuant to resolution 1988/8 of 25 May 1988 of the Economic and Social Council acting on the basis of the General Assembly resolutions 39/141 of 14 December 1984 and 42/111 of 7 December 1987. As at 20 September 2014, the Convention had 189 State Parties; see: <[https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=VI-19&chapter=6&lang=en#EndDec](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=VI-19&chapter=6&lang=en#EndDec)>

<sup>257</sup> However, it has expressed reservation to article 6, paragraph 3, of the Convention, with the argument that this provision is incompatible with its domestic law. The Government furthermore made a reservation to article 32, paragraph 2 and 3, since it does not consider itself bound to compulsory jurisdiction of the International Court of Justice and believe that any disputes arising between the Parties concerning the interpretation or application of the Convention should be resolved through direct negotiations by diplomatic means.

<sup>258</sup> See article 1 of the "Law on Combating Human Trafficking", July 18, 2004.

The Islamic Republic of Iran is a party to the Convention of the Organization of the Islamic Conference on Combating International Terrorism which was adopted in 1999.<sup>259</sup> According to this convention, “*Pursuant to the tenets of the tolerant Islamic Sharia which reject all forms of violence and terrorism, and in particular specially those based on extremism and call for protection of human rights, which provisions are paralleled by the principles and rules of international law founded on cooperation between peoples for the establishment of peace*”

The Convention of the Organization of the Islamic Conference on Combating International Terrorism defines "Terrorism" as “any act of violence or threat thereof notwithstanding its motives or intentions perpetrated to carry out an individual or collective criminal plan with the aim of terrorizing people or threatening to harm them or imperiling their lives, honor, freedoms, security or rights or exposing the environment or any facility or public or private property to hazards or occupying or seizing them, or endangering a national resource, or international facilities, or threatening the stability, territorial integrity, political unity or sovereignty of independent States.”<sup>260</sup>

In addition to the aforementioned international mechanisms regarding the conviction of terrorism, the Parliament of the Islamic Republic of Iran in 2009 has enacted legislation that requires the government to revise the commercial and economic relations with states who are sponsors of terrorism. More recently, the parliament has enacted a new act on punishment of the perpetrators of smuggling of weapons and ammunition and carriers of illegal weapons and ammunition in 2011.<sup>261</sup> Furthermore, the parliament has been considering a new act proposed by the former government regarding Combating the Financing of Terrorism since 2012 and the new government has been continuing its support to this very important issue.<sup>262</sup>

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<sup>259</sup> See for further study:<[http://www.oic-oci.org/english/convention/terrorism\\_convention.htm](http://www.oic-oci.org/english/convention/terrorism_convention.htm)>

<sup>260</sup> See article 1 of the the Convention of the Organization of the Islamic Conference on Combating International Terrorism, 1999.

<sup>261</sup> See: <http://rc.majlis.ir/fa/law/show/797924> It should be noted that even in 1972, the country had act on intensification of the punishment of smuggling of weapons and ammunition and armed smugglers and it is still in force.

<sup>262</sup> For further study on this act, please see:< <http://en.parliran.ir>>

Noteworthy to add is that as a global response to the threat, in 1999, the international community, pursuant to the GA resolution 54/109 of 9 December 1999 at the fourth session adopted the International Convention for the Suppression of the Financing of Terrorism. The Convention ‘bearing in mind the purposes and principles of the Charter of the United Nations concerning the maintenance of international peace and security and the promotion of good-neighborliness and friendly relations and cooperation among States and deeply concerned about the worldwide escalation of acts of terrorism in all its forms and manifestations’ recognizes ‘the urgent need to enhance international cooperation among states in devising and adopting effective measures for the prevention of the financing of terrorism as well as for its suppression through the prosecution and punishment of its perpetrators.’<sup>263</sup> The Convention would have also potential applicability to piracy movements, particularly with regard to its financing networks and violence involved in recent cases.<sup>264</sup> However, this thesis in its first part has explored the legal framework applicable to the crime of piracy and armed robbery in the Indian Ocean in detail and will not further discuss it in this opportunity.

With regard to the crime of IUU fishing, the international community has endeavored to address this particular problem either by globally adopting multilateral instruments, such as the UN Fish Stocks Agreement (1995) and the Compliance Agreement (1993), or regionally by the action of an arrangement of regional fisheries management organizations (RFMOs). With regard to the regional fight against IUU fishing in the Persian Gulf and Sea of Oman region, Iran accompanied by Bahrain, Iraq, Kuwait, Oman, Qatar, Saudi Arabia and United Arab Emirates have been active in conservation and management of especially straddling fish stocks and highly migratory fish stocks and they have been members of the Indian Ocean Tuna Commission.<sup>265</sup> The Islamic Republic of Iran has also been very active in fisheries management agreements and regional organizations as well. Notably Iran has been a member

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<sup>263</sup> The International Convention for the Suppression of the Financing of Terrorism, New York, 9 December 1999. As at 20 September 2014, the Convention had 186 State Parties.

<sup>264</sup> Charles H. Norchi and Gwenaëlle Proutiere-Maulion, *Op.cit*, At 342-343.

<sup>265</sup> The Indian Ocean Tuna Commission (IOTC) is an intergovernmental organization responsible for the management of tuna and tuna-like species in the Indian Ocean. It works to achieve this by promoting cooperation among its Contracting Parties and Cooperating Non-Contracting Parties in order to ensure the conservation and appropriate utilization of fish stocks and encouraging the sustainable development of fisheries. Iran joined Indian Ocean Tuna Commission in 28 of January, 2002. See IOTC website for further information. Available at: <<http://www.iotc.org>>

of the Regional Commission for Fisheries (RECOFI) and has ratified the agreement for the establishment of the Commission in 2001.<sup>266</sup> Iran has in addition concluded some bilateral agreements with other countries to cooperate in fisheries issues.

## **2. Iranian perspectives toward piratical threats to maritime security in the Indian Ocean; capacity development approaches at the national level**

The following section will first discuss Iran's maritime activities and operations in the Indian Ocean to maintain maritime security and it will further explore on the necessity of adopting an anti-piracy law describing different legal frameworks of different countries (especially neighbouring countries in the Indian Ocean region) and Iran's legal perspective. It will finally explain the initiatives in this regard. It is considered that these should be enhanced to boost capacity building development at Iran's national legal framework.

### **2.1 Iran's maritime activities in the Indian Ocean to maintain maritime security particularly with regard to piracy incidents**

In the following part of the thesis, I will discuss Iran's maritime activities in the Indian Ocean in the view of maintaining maritime security particularly with regard to piracy movements and subsequently, the following part would discuss activities taken by Islamic Republic of Iran's Navy in cooperation with Islamic Republic of Iran's Shipping Lines and Ports, Maritime Organization (PMO) and other relevant maritime organs.

### **Iranian naval operations and the UN Security Council's positive response**

In terms of repressing the ongoing threat of pirates and armed robbers in the Indian Ocean region particularly off the coasts of Somalia, the Gulf of Aden and Arabian Sea, as already discussed in the previous part of this thesis, there have been undertaken some activities by

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<sup>266</sup> The purpose of the Regional Commission for Fisheries (RECOFI) is to promote the development, conservation, rational management and best utilization of living marine resources, as well as the sustainable development of aquaculture within its area of Agreement. The Secretariat is currently provided by FAO. It is based at the seat of the FAO Regional Office for the Near East and North Africa in Cairo. See RECOFI website for further information. Available at: <<http://www.fao.org/fishery/rfb/recofi/en>>



international community and regional communities which contributed to constructing a more secure maritime order. Notably, the United Nations aimed at strengthening and assisting states to improve the security situation on land and offshore, which is essential for a better cooperation to fight piracy and armed robbery against ships in affected areas has linked the activities of pirates off the coast of Somalia with the notion of a threat to international peace and security.<sup>267</sup> The Security Council in its Chapter VII Resolutions calls on all member states to take part in the fight against piracy. To this end, effectively patrolling the massive Indian Ocean and Gulf of Aden region requires the combined efforts of dozens of nations.<sup>268</sup> Pursuant to the regulations of which international law set up for cooperation against pirates, “a salient element of the international response to piracy off the coasts of Somalia has been a military one in the shape of an enhanced naval presence and increased patrols off the Somali coasts. Naval vessels from a diverse array of interested states including the United States, a number of European states (notably Britain, Germany, France, and Spain), Australia, India, Iran, South Korea, Malaysia, Turkey, and Russia have been active in the fight against piracy over the past four years and consequently remarkable and unprecedented international naval cooperation designed to counter piracy and armed robbery threats against any kind of vessels. Within the region, antipiracy efforts are coordinated, and information is shared under the ‘Code of Conduct’ concluded in Djibouti on January 29, 2009.”<sup>269</sup>

Being bound to the international obligation to fight against piracy and armed robbery attacks, over the course of the last years, the Islamic Republic of Iran navy has been conducting more naval exercises near the strategic Strait of Hormuz, through which the majority of the regional States’ oil passes. Iran is a major petroleum exporter and depends on maritime shipping to get its products reach to its customers around the globe. Petroleum exports also account for roughly 75 percent of government income. In return, oil tankers are

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<sup>267</sup> As previously discussed in the first part of the present thesis, Since resolution 733, the Security Council in its resolutions related to the situation in Somalia has routinely invoked Chapter VII as regards the situation in Somalia, and state that such situation constitutes or continues to constitute “a threat to international peace and security”.

<sup>268</sup> “Iran sends sub, Warships on Red Sea Patrol”, available at: <http://www.defensenews.com/story.php?id=7538488>; Karl Vick.

<sup>269</sup> John Garofano and Andrea J. Dew, *Op.cit.*, at 133. This thesis discusses the Djibouti ‘Code of Conduct’ details in different paragraphs especially in the second part.

particularly valued by pirates because of the high ransoms that can be demanded for their return due to the reliance of many countries on the petroleum trade.<sup>270</sup>

In order to protect the maintenance of Iran's maritime borders along with deterrence and defense towards any threat to the maritime security Iranian government officials has taken the threat posed by Somali piracy seriously and deployed warships to the Gulf of Aden to ensure safe shipping lanes for all of its vessels. It has been witnessed that the main reasons of such a security strategy are to promote Iran's strategic interests in its territorial waters, Strait of Hormuz, continental shelf, Exclusive Economic Zone, continental shelf and the high seas, in addition to safeguarding the maritime merchant fleet and oil tankers from the invasion of violent pirates and sea-robbers.

In response to these attacks, Iran has been since 2008 dispatching its navy to the Indian Ocean region especially to the Gulf of Aden to patrol the waters using submarines and other advanced naval weaponry in order to increase its capabilities in contributing to the maintenance of peace and security in the region. It should also be added that since the beginning of the counter-piracy operations in 2008, there have been 157 incidents of countering pirates by the Iranian Navy according to the report of its navy in 2014. In this regard, quite significantly, the Security Council of the United Nations pursuant to the Secretary-General's report has commended the aforementioned efforts by Iran's navy and some other countries which have deployed ships or aircrafts in the region to combat piracy and armed robbery threats. The Security Council in its resolution 1950 adopted on 23 November 2010 has appreciated "efforts of the EU operation Atlanta, North Atlantic Treaty Organization operations Allied Protector and Ocean Shield, Combined Maritime Forces' Combined Task Force 151, and other States acting in a national capacity in cooperation with the TFG and each other, to suppress piracy and to protect vulnerable ships transiting through the waters off the coast of Somalia, and welcomed the efforts of individual countries, including China, India, Islamic Republic of Iran, Japan, Malaysia, Republic of Korea, Russian Federation, Saudi Arabia, and Yemen, which have deployed ships and/or aircraft in the region, as stated in the

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1. <sup>270</sup> Christopher L. Daniels, *Somali Piracy and Terrorism in the Horn of Africa*, Scarecrow Press, 2012, at 75.

Secretary-General's report (S/2010/394).”<sup>271</sup> This appraisal has been followed up by resolution number 2020 on 22 November 2011 pursuant to the Secretary-General's report on 2011 with regard to the countries which have taken some significant measures to combat maritime piracy and armed robbery against ships at sea.<sup>272</sup>

Analyzing the history of Iranian naval initiatives in countering the piracy crime, the most important primary case in late 2008 refers to the hijacking of the Hong Kong MV *Delight*.<sup>273</sup> Subsequently, after being affected by the serious threats posed by pirates mainly in the hijacking of MV *Dianat*, the Islamic Republic of Iran has become one of 25 countries deploying warships in the important waterways in the Indian Ocean especially in Hormuz Strait, Arabian Sea, Gulf of Aden and Suez Canal to protect against piracy movements and maritime violence. The Iranian Navy in cooperation with the Islamic Republic of Iran's Shipping Lines and Ports and Maritime Organization, dispatched its vessels to the high seas to defend- as its primary goal- the Iranian merchant vessels which are in danger of being attacked by pirates in order to receive huge ransom. In another noteworthy counter-piracy operation, the navy has rescued Iranian vessel *SININ* in July 2011 and an Iranian merchant vessel *EGLANTIN* off the northern part of the Indian Ocean in March 2012.

The Iranian Navy has rescued some foreign vessels from the hijacking by pirates. In a significant incident, the Iranian navy in the first quarter of 2012 released a Chinese ship that was under complete siege of the pirates; the rescue operation was carried at the request of the Chinese government which later offered its official appreciation and gratitude to Iran for the successful operation.<sup>274</sup> In the rescue operation to release the pirates-boarded Chinese merchant vessel- *XIANG-HUA-MEN*<sup>275</sup>, Iran Navy with the cooperation with the Iran's Shipping Lines

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<sup>271</sup> UN Security Council , Resolution S/RES/1950(2010) in its preliminary paragraphs.

<sup>272</sup> UN Security Council , Resolution S/RES/2020 (2011) referring to the Secretary-General's report (S/2011/662).

<sup>273</sup> In MV *Delight* piracy incident, the ship was loaded with thousands of tons of grain heading to Iran, when it, along with its crew of twenty-five, was captured in the Gulf of Aden by Somali pirates. See: Christopher L. Daniels, Op.cit, at 74.

<sup>274</sup> <<http://english.farsnews.com>>, Tehran, 2 Sep 14.

<sup>275</sup> The Chinese vessel was passing the Indian Ocean to reach the Imam Khomeini port in the south part of Iran.

and the Ports and Maritime Organization of Iran dispatched its integrated fleet to respond to the request for assistance of the Chinese vessel and after successfully defeating 9 pirates originally from BOSASO, Somalia, escorted the Chinese ship to Bandar Abbas district. According to Iranian Navy Commander Rear-Admiral Sayyari, the head of the Islamic Republic of Iran Navy, the Navy also rescued a Liberia-flagged merchant ship in the Sea of Oman in 2011 after the foreign vessel declared an emergency situation. The captain of the vessel had informed that five of his crew members were badly burnt and were in need of immediate medical aid.<sup>276</sup> Interestingly Iran's navy even helped a U.S.-flagged cargo ship that was attacked by pirates off the United Arab Emirates.<sup>277</sup> In addition, the US navy has also rescued an Iranian fishing vessel after hijacking by the pirates in the northern Arabian Sea.<sup>278</sup> Quite significantly, only from March to May 2011, the Iranian Navy had eleven separate encounters with Somali pirates. One of the more dramatic attacks occurred in May 2011, when Somali pirates attempted to hijack the oil tanker *Damavand*. After the Iranian Navy was informed of the attack, they quickly swooped in and were able to repel the pirates.<sup>279</sup>

More recently, the Iranian warships patrolling the regional waters have rescued several trade vessels in three combat operations against sea pirates in the Red Sea, according to Rear-Admiral Habibollah Sayyari on 2 September of 2014. "We have had three battles against pirates in the high seas, especially in the Red Sea, just in the current week, which has resulted in rescuing several Iranian ships from organized attacks by the sea pirates", the Admiral said that his forces were conducting reconnaissance and relief operations in the Strait of Hormuz, Sea of Oman and Northern Indian Ocean. The commander further referred to the frequent cases of aid and assistance by the Iranian warships to the vessels of other countries in international waters, including "the rescue and escort of large trade ships and vessels of nearly 25 countries in the Gulf of Aden".<sup>280</sup>

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<sup>276</sup> Ibid.

<sup>277</sup> Available at: <<http://www.bloomberg.com/news/2012-05-23/maersk-line-thwarts-attack-by-pirates-north-east-of-fujairah.html>> and also see: <<http://edition.cnn.com/2012/05/24/world/meast/iran-pirates>>

<sup>278</sup> Available at: <<http://www.cbsnews.com/news/us-rescues-iranian-ship-held-by-pirates>>

<sup>279</sup> Christopher L. Daniels, Op.cit, at 75.

<sup>280</sup> Fars News Agency website, Tehran, in English, 2 Sep 14. Available at: <<http://english.farsnews.com/>>

As a recent action, the 31st fleet of the Iranian navy, comprising Bayandor destroyer and Bandar Abbas military ship, has set sail for the high seas as part of Iran's plans to protect the country's cargo ships and oil tankers in different shipping routes. According to the report of Navy Public Relations Bureau, in another recent attack, the commandos of Iranian Navy's 31st Flotilla forced pirates in the Aden Gulf to flee, after several unsuccessful attacks against an Iranian oil tanker. The pirates, sailing on 12 boats in different times in eight hours, tried to attack the tanker in the area of Aden Gulf and Bab-el-Mandeb Strait, which was unsuccessful. Actually during one week, they attacked four times the Iranian vessels, and in all times they were forced to flee because of Iranian naval forces presence in the scene.<sup>281</sup> The Iranian Navy's 31st fleet of warships in addition has rescued a Chinese container ship from a pirate attack in the Gulf of Aden in 17 of September 2014 in their second time to retake a Chinese container ship hijacked by pirates. Shortly after the emergency call, Iran's "Bayandor" destroyer rushed to the scene and foiled the hijacking of the Chinese ship.<sup>282</sup>

Furthermore, in terms of boosting regional cooperation to combat against piracy and armed robbery against ships, Iran participates in the 19-member grouping of the Indian Ocean RIM – Association for Regional Cooperation (IOR-ARC) which also includes India, Yemen, Australia, Bangladesh, Indonesia, Kenya, Madagascar, Malaysia, Mauritius, Mozambique, Oman, Singapore, South Africa, Sri Lanka, Tanzania, Thailand, the UAE and Seychelles. The IOR-ARC issued the Bangalore Declaration last November, agreeing to share information, experiences and best practices in the fight against maritime piracy.<sup>283</sup>

### **Ports and Maritime Organization (P.M.O)**

The Ports and Maritime Organization (P.M.O) is the Iranian focal point to IMO and international organizations on maritime issues and reflects Iranian Government perspectives in regional and international maritime forums. It provides various technical and operational information and necessary guidelines to help ship owners, merchant vessels and Iranian

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<sup>281</sup> Islamic Republic News Agency website, Tehran, in English, 5 Sep 14. Available at: <http://www.irna.ir/en/>

<sup>282</sup> <http://www.presstv.com/detail/2014/09/17/379044/iran-navy-saves-china-ship-from-pirates/>

<sup>283</sup> More information available at: <<http://www.iora.net>>

shipping lines to prevent and also counter possible pirate attacks during their navigation on the dangerous waterways in Persian Gulf, Arabian Sea, Gulf of Aden, Malacca Strait and Red Sea.

PMO according to the statutory functions of Ministry of Road and Transport is responsible and deals with port activity and navigation. However, once a time, subjects and functions of PMO pertaining to shipping and ports were extended and the organization was assigned the task of exercising the authority of the Government to control all ports and maritime affairs, implementation of port and coastal shipping regulations, promoting shipping and commerce, collecting port duties and taxes and registering Iranian vessels.<sup>284</sup> It should be mentioned here that national merchant fleet and running the ships in terms of shipping and maritime trade and has no link with Ports and Maritime Organization and is under the Ministry of Commerce.<sup>285</sup>

Piracy regulations and maritime guidelines on which PMO of Iran as an active member of IMO is a party,<sup>286</sup> aside from legal commitments of the government according to international obligations are as follows:

- 1- MSC.1/Circ.1337-Piracy and Armed Robbery Against Ships in Water Off the Coast of Somalia, Best Management Practice to Deter;
- 2- A 28-Res.1069 –Prevention and Suppression OF Piracy, Armed Robbery against ships and Illicit Maritime Activity in the Gulf of Guinea;

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<sup>284</sup> See PMO history at: <<http://www.pmo.ir/en/aboutpmo/history>>

<sup>285</sup> The basic information therein this paragraph is mainly based on the “Report of the Second Regional Forum on Maritime Manpower Planning, Training, Utilization and Networking of Centers of Excellence”, op.cit.

<sup>286</sup> Iran is a member of “International Maritime Organization” (IMO) as of 1948, and it is a party to the following international conventions pertaining to maritime affairs: Facilitation Convention (1965), Load Lines Convention (1966), Tonnage Convention (1969), Intervention Convention (1969), London Convention (1972), CSC Convention (1972), COLREG Convention (1972), Intervention Protocol (1973), MARPOL (1973/78 annex I,II,V), SOLAS Convention (1974), INMARSAT Convention (1976), INMARSAT OA (1976), SOLAS Protocol (1978), STCW Convention (1978), SAR Convention (1979), SALVAGE Convention (1989), OPRC Convention (1990), INMARSAT amendment (1998).The Iranian “Maritime Act”, in force as of 1965, which is modeled on some European countries’ maritime law, has incorporated relevant international rules and maritime customs.

3- SOLAS XI-2 Piracy Counter Measures, MSC.305 (87), 17/5/2010, Guidelines on operational procedures for the promulgation of maritime safety information concerning acts of piracy and piracy counter-measure operations;<sup>287</sup>

4- SOLAS CH V Security Information Distribution, MSC.298(87), 21/5/2010.

Furthermore, PMO's training centers and facilities, aiming at improving the standard needs for its merchant fleets and educating the ship-owners and merchant vessels to combat pirates' and armed robbers' attacks against ships through their maritime routes, are scattered in the northern ports of Iran along the Caspian Sea and in the south along the Persian Gulf.

## **2.2 Anti-piracy law and Iran's legal perspective; Initiatives in Progress**

The efforts by the States of the Indian Ocean region and the international community to curb piracy and maritime insecurity off the coast of Somalia and the Gulf of Aden have been greatly hampered by lack of appropriate legislative frameworks both at the international and national levels. At the international level, the most significant limitations to the legislative framework are posed by restrictive definitional and jurisdictional scopes in the provisions of article 101 of the United Nations Convention on the Law of the Sea (UNCLOS) as mainly explained in the previous part of this thesis.<sup>288</sup> The efforts by the international community have gradually been promoted and the debate has narrowed down to how to most effectively deal with pirates following their capture in a way that will further the overall efforts made to counter piracy off the coast of states in the region.

In respect of the integrated cooperation regime in the Indian Ocean region in fighting against organized crime at seas, 'some of the key States must come forward to forge regional multilateral solutions to address piracy, hijacking, trafficking, IUU fishing, terrorism, and the integrity of EEZs. The most notable States in this group include Australia, India, Saudi Arabia, UAE, Oman, Pakistan, Iran, and South Africa. While not all these states and powers will be (or

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<sup>287</sup> [http://bushehrport.pmo.ir/pso\\_content/media/law/634466676458959306.pdf](http://bushehrport.pmo.ir/pso_content/media/law/634466676458959306.pdf)

<sup>288</sup> It has been discussed in part I of the current thesis.

can be) grouped to address every challenge, opportunities for security cooperation and confidence-building measures in the IOR exist in abundance.’<sup>289</sup>

It is noteworthy to mention that although the cooperative solutions through regional approaches are ways to fight piracy, the focal point still remain the national jurisdiction of regional States. As Paul Musili Wambua suggests, ‘domestication of the key international instruments governing maritime security primarily UNCLOS and the SUA Convention and harmonization of regional legislative frameworks to promote greater cooperation and facilitate burden sharing in prosecution of perpetrators of maritime crimes is *sine qua non* in the success of fight against piracy.’<sup>290</sup>

As Yvonne M. Dutton explains there are different types of legal frameworks of states with regard to the issue of criminalizing piracy and universal jurisdiction to prosecute individuals suspected of acts of piracy and armed robbery against vessels at sea.<sup>291</sup> She gives a clarification between different states as “States with laws defining piracy according to the law of nations, States that directly incorporate international treaty commitments, States with laws defining piracy as a separate offense with a framework for exercising universal jurisdiction, States with laws defining piracy without a framework for exercising universal jurisdiction and States relying on general criminal laws without a framework for exercising universal jurisdiction”. In addition, she explains the deficiencies in domestic implication of international treaty provisions.

The Security Council has noted with concern "that the domestic law of a number of States lacks provisions criminalizing piracy and/or procedural provisions for effective criminal prosecution of suspected pirates"<sup>292</sup> and called upon "all States to criminalize piracy under their

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<sup>289</sup> David Michel and Russell Sticklor, Op.cit, at 39.

<sup>290</sup> Paul Musili Wambua, op.cit, p 98.

<sup>291</sup> Yvonne M. Dutton, “Maritime Piracy and the Impunity Gap: Domestic Implementation of International Treaty Provisions” in *Maritime Piracy and the Construction of Global Governance*, edited by Michael J. Struett, Jon D. Carlson, and Mark T.Nance, Routledge, The New International Relations Series, 2013.

<sup>292</sup> See Security Council resolution 1918(2010), preamble.



domestic law<sup>293</sup> "Moreover, States that have already enacted national legislation on piracy may wish to review it to ensure the implementation of the relevant provisions of UNCLOS. The General Assembly of the United Nations has also called upon "States to take appropriate steps under their national law to facilitate the apprehension and prosecution of those who are alleged to have committed acts of piracy..."<sup>294</sup> and has urged all States to combat piracy actively, inter alia, by adopting measures and by adopting national legislation in co-operation with the International Maritime Organization (IMO).<sup>295</sup>

Subsequently, according to the Letter from the Secretary-General to the President of the Security Council dated 23 March 2012 with regard to the compilation of information received from Member States identified important measures have been taken by states to criminalize piracy under their domestic law and to support the prosecution of individuals suspected of piracy off the coast of Somalia and imprisonment of convicted pirates.<sup>296</sup> Moreover, according to IMO Legal Committee Document, LEG 98/8 in 2011,<sup>297</sup> the states' piracy laws 'might be useful to States which were either developing national legislation on piracy, or reviewing existing legislation on piracy'.<sup>298</sup>

In response to the enquiry made by an IMO Circular Letter dated December 2008 asking for the status of the domestic laws regarding to prosecution of piracy and its criminal punishment, Iran stated that it has no specific piracy provision that explicitly observe UNCLOS or the SUA Convention, but that persons committing acts that could be regarded as "piracy" under customary international law can be convicted under Article 653 of the Islamic

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<sup>293</sup> Security Council resolution 1950(2010), paragraph 13.

<sup>294</sup> See General Assembly resolution 65/37 of 7 December 2010, paragraph 86.

<sup>295</sup> Ibid., paragraph 85.

<sup>296</sup> [http://www.un.org/ga/search/view\\_doc.asp?symbol=S/2012/177](http://www.un.org/ga/search/view_doc.asp?symbol=S/2012/177)

<sup>297</sup> The IMO Secretariat at its ninety-seventh Session, provided the Legal Committee with its review of national legislation on piracy submitted by Member States in response to Circular Letter No.2933 of 23 December 2008. The Circular Letter containing states' piracy laws maintained by the UN Division for Ocean Affairs and the Law of the Sea (DOALOS), together with the IMO and the United Nations Office on Drugs and Crime (UNODC). For further study, see: IMO Legal Committee Document, LEG 98/8, "Uniform and consistent application of the provisions of international conventions relating to piracy", 18 February 2011. Available at: <[http://www.un.org/depts/los/piracy/circular\\_letter\\_3180.pdf](http://www.un.org/depts/los/piracy/circular_letter_3180.pdf)>

<sup>298</sup> Ibid.

Penal Code of the Islamic Republic of Iran (1991).<sup>299</sup> In addition, in relation to piracy, the offender's acts, as the case may be, could be also convicted under articles 185 and 683 of Islamic Penal Code of Iran.<sup>300</sup> It is noteworthy that apart from this legislation, the Islamic Republic of Iran has no specific municipal law to deal with piracy.

According to the IMO Circular on states' piracy laws, Iran amongst other countries as including China, France, Bulgaria, Poland, Finland, Oman, Czech Republic and Latvia has been a state which directly incorporated international treaty commitments into their legal framework. Iran legal texts do not address piracy in its domestic legislation, however, under the article 9 of Iranian Civil Law,<sup>301</sup> its treaty obligations have become part of its domestic laws, and therefore, it can be understood that piracy should be an offence over which they can exercise universal jurisdiction because the country follows a monist tradition and permit direct incorporation of treaties to which the state is a party. In addition, the country's Penal Code recognizes the concept of universal jurisdiction in that it applies to crimes committed by foreign nationals abroad where allowed by an international agreement to which the country is a party.<sup>302</sup>

However, the aforementioned provisions are not sufficient in cases of maritime piracy and armed robbery and cannot justify prosecuting individuals suspected of piracy before Iranian courts. The discussed Penal Code provisions do not define piracy and existing legal framework falls short of the international standards that are set in UNCLOS Articles 101 to

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<sup>299</sup> If any guilty acts are committed by any person that could be regarded as "piracy" under customary international law, Iranian courts could convict offenders, under article 653 of "Islamic Punishment Act" which provides that any person who commits brigandage in ways and highways, whatsoever, if he/she couldn't be regarded as "Mohareb", is liable to imprisonment from 3 to 15 years. It should be mentioned that "Moharebeh" in accordance with "Sharia Law" is resorting to arms in order to frighten people.

<sup>300</sup> Article 185: Any person who commits armed robbery and brigandage and endangers the security of people or ways by weapon and causes fear and terror, is regarded as "Mohareb".

Article 683: "Any kind of plunder age and wasting of goods, articles, foods and products violently done by a group consisting of more than 3 persons, if they could not be regarded as "Mohareb", are liable to imprisonment from 2 to 5 years.

<sup>301</sup> Article 9 of the Civil Code of Iran.

<sup>302</sup> Article 9 of the Islamic penal Code of Iran.

107.<sup>303</sup> Furthermore, Iran is a party to SUA and according to article 5 of SUA Convention: Iran is obliged to make the offences set forth in article 3 punishable by appropriate penalties. Although the article does not prescribe specific penalties for any of the offences and merely provides that the penalties should be "appropriate [taking] into account the grave nature of those offences".<sup>304</sup>

Hence, as a conclusion, in Iran, it is difficult to prosecute suspected pirates according to the existing legal framework and in recent years, the initiatives have been underway to adopt a new anti-piracy law or adding a new provision to the existing Penal Code. In addition as we already explored extensively about the increasing trends of maritime activities and operations of the Islamic Republic of Iran in the Indian Ocean to maintain maritime security, the attention should almost be paid to the importance of having a comprehensive legal framework to prosecute and deal with the apprehended suspected pirates and armed robbers in the hands of the Iranian naval forces. In this regard, formal legislations need to be enacted to tackle piracy and to integrate the provisions of UNCLOS 1982 and the IMO Convention on the suppression of Unlawful Acts against the Safety of Maritime Navigation (1988). Iran should enact an internal legislation on suppressing the unlawful acts of maritime crimes particularly piracy and armed robbery against ships at seas. Hence, in order to fill this gap, the relevant legal department in the Ministry of Foreign Affairs has started some initiative discussions aimed at finalizing draft legislation as a preliminary base to finally formulate sophisticated regulations to tackle piracy and armed robbery against ships.

## **Chapter 2: How to achieve stronger cooperation to eliminate maritime organized crime under international law and law of the sea: problems and solutions**

In order to achieve stronger cooperation to eliminate maritime organized crime under international law and law of the sea and addressing the legal, social and economic challenges and their solutions, the first section of this chapter will discuss some considerations on the root

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<sup>303</sup> It should be noted that although Iran is a party to the Geneva Convention on the High Seas 1958 and has been a negotiating party to UNCLOS and signed the Convention in 1982, but it has not ratified the Convention.

<sup>304</sup> Article 5 of SUA Convention. For further study of SUA Convention provisions, see part 1 of this thesis.

causes of serious threats to maritime security in the Indian Ocean, particularly from preventive and countermeasure perspectives. Obviously all solutions to the challenges which will be discussed are achievable only through a cooperative mechanism in accordance with international law. To achieve to this goal, in the next and latest section of this thesis, I will discuss the regional capacity building for cooperation to eliminate maritime organized crime in the Indian Ocean. The thesis finally will address the way forward for a comprehensive and multidimensional approach, in particular with an emphasis on the Iranian perspective.

## **2. Considerations on the root causes of serious threats to maritime security in the Indian Ocean; Preventive and countermeasure perspectives**

### **2.1 Root causes for serious threats to maritime security in the Indian Ocean (particularly piracy and armed robbery against vessels)**

There are several causal factors which appear important in explaining the reasons of the apparent phenomena of maritime crimes in the Indian Ocean, particularly piracy and armed robbery against ships in its strategic choke points. Rather than seeing in isolation each of the different types of maritime crimes in the Indian Ocean region mentioned in the preceding sections, the real challenge is to understand their root causes and choose appropriate responses in a more holistic manner.

As stipulated in the first part of the present thesis, according to the IMO and IMB statistics since the beginning of the 21<sup>st</sup> century and onward, maritime piracy and armed robbery against fishing boats and any kind of other vessels at seas reemerged off the coast of Somalia and it has been evident that many cases of piratical incidents in the Gulf of Aden, the Indian Ocean and Arabian Sea have been arising from a Somali-based piracy. In addition, piracy has severally affected the economies of the neighboring states. With this regard, the underlying dynamics of maritime piracy and its reemergence off the Somali coast may lead one to find out the casual reasons for the current challenge of the unsecured shipping lines in the region.

The collapse of the functioning state and lack of governance in Somalia and its neighbors in African continent has been caused by poor governance and economic turmoil, and the

absence of the central government along with other problems constitute the root causes of rampant scale of piracy incidents and maritime terrorism off coasts and subsequently in the high seas particularly off the Horn of Africa and the Gulf of Aden. The problem of instability in failed states has been considered as a great concern particularly in Somalia and consequently within the entire region. The growing division and tensions between the Somali Islamists, violations of the UN arms embargo and insufficient influence of the African Union Mission in Somalia (AMISOM) in addition to the role of external factors in internal issues have further exacerbated the challenges arising from political instability. Several interference instances and hostile situations have been evident in Somalia and its neighboring states, specifically tensions in Ethiopia, Eritrea and interference of external States.<sup>305</sup> Subsequently high rewards of piracy and ransom payments flourishing strongly in a little functioning state with a weak law enforcement system, particularly in the central and southern parts of Somalia along with an ineffective security structure in Puntland<sup>306</sup> have exacerbated the problem of maritime crimes committed off the coasts of the country and spreading all through the region. As experts unanimously declare, the widespread maritime criminality off the Horn of Africa and the Indian Ocean is an extension of the land-based violence and general poverty and in this respect, the main threats of criminal activities arise from Somalia and its utmost scale of internal chaos, humanitarian crisis and socio-political instability which have been mainly thrived after the collapse of Siad Barre government in 1991.<sup>307</sup> Quite significantly security, development, and governance constitute three inseparable factors based on which one can make a distinction between a failed state and a functioning state.<sup>308</sup> In addition, lack of economic development and failure in affording security of the community are among the major contributing factors in the conflicts distressed the country.

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<sup>305</sup> For further study in respect of this argument, see Ruchita Beri, *Op.cit*, at 458-462.

<sup>306</sup> Organized Crimes such as arms smuggling, human trafficking, piracy and corruption have spiraled Puntland since Abdullahi Yusuf left the area to head the trans Federal Government at Mogadishu in October 2004.

<sup>307</sup> Human development statistics compiled by international relief agencies typically designate over 70 per cent of the Somali population as undernourished. Peter Chalk interviews, Washington D.C., December 2008 and January 2009. Cited in Peter Chalk, *The Evolving Dynamics of Piracy and Armed Robbery at Sea in the Modern Era: Scope, Dimensions, Dangers and Policy Responses*, Maritime Affairs, Journal of National Maritime Foundation of India, Volume 5, No 1, 2009, pp1-21.

<sup>308</sup> Christopher L. Daniels, *Op.cit*, at 116.

The nexus between the onset of piracy and the depleted fishery in Somalia is quite apparent. As it has been explained in some arguments,<sup>309</sup> genuine economic hardship and a sense of grievance against foreign exploitation of Somalia's maritime resources particularly illegal, unreported and unregulated overfishing and illegal dumping of toxic wastes into Somali territorial waters has inspired pirates to declare themselves as "volunteer coast guards of Somalia" and has therefore served to legitimize their activities in the eyes of their communities. Particularly from the Somali fishing communities' perspective, foreign fishing vessels have been ranged with flagged states allegedly from Italy, Pakistan, China, France, Germany, Korea, Spain, Japan, the UK, Taiwan, and Portugal, amongst others.<sup>310</sup> As some reports revealed it has been witnessed that illegal fishing not only depleted a huge amount of the fishing stocks especially in the Somalia's EEZ but also led to material damages and loss of life in the confrontations that arose between Somali fishermen and the foreign ships that were engaged in illegal fishing and exploiting Somalia's maritime resources.<sup>311</sup> These confrontations have been subsequently escalated by pretended 'volunteer coast guards of Somalia' safeguarding and overseeing self-defined offshore territorial corridors and finally have been transformed the Somali fishermen who once used light transportable weapons taking control of the fishing trawlers into professional pirates.<sup>312</sup> As Stig Jarle Hansen observes:

‘while pirates probably do play a role in reducing illegal fishing, not least because of the *scare factor* that they create, slow-moving bulk carriers and cargo ships transporting valuable cargo to Africa, Asia, and Europe –not trawlers- have been their main target, at least until 2010. These vessels offer easy prey with the potential for a high reward.

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<sup>309</sup> Ruchita Beri, *Op.cit*, at 456. Also noted in: Zakieh Taghizadeh, *Evolution in Combating Piracy in International Law*, Ganj-e Danesh, 2012, (The book is originally in Persian and for the purpose of this paper, has been translated by the author). See also Ishaan Tharoor, *How Somalia's Fishermen Became Pirates*, Time, 18 April 2009; Ademun Odeke, Somali Piracy-underlying causes and new challenges to international law and world order: A Panoramic View, 2009, available at: <[http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=ademun\\_odeke](http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=ademun_odeke)>; and RaneeKhooshieLal Panjabi, *The Pirates of Somalia: Opportunistic Predators or Environmental Prey?*, Available at: <<http://www.elpr.org/wp-content/uploads/2010/11/panjabi.pdf>>

<sup>310</sup> RaneeKhooshieLal Panjabi, *Op.cit*.

<sup>311</sup> IGAD Capacity Building Program Against Terrorism (ICPAT), Report on the Impact of Piracy on the IGAD Region, ICPAT, Addis Ababa, 2009. Zakieh Taghizadeh, *Op.cit*, at 74-80 in explanation on the root causes of piracy off the coast of Somalia.

<sup>312</sup> Ruchita Beri, *Op.cit*, at 454.

This would seem to suggest that piracy, far from being altruistic, is a *for-profit* business that actively seeks out the most lucrative vessels to attack.’<sup>313</sup>

There are no doubt that these heavily armed syndicated pirates are using the aforementioned arguments partially to excuse their criminal activities committed at sea off the coasts of the Gulf of Aden, Red Sea and other eastern parts of the Indian Ocean. However, the importance should be given to monitoring illegal fishing and engaging the region in cleanup and reconstruction goals as an effective way in addressing the root causes of maritime crimes. In this respect, the United Nations Security Council in its resolution 2020 adopted on 22 November 2011 reaffirms its respect for the sovereignty, territorial integrity, political independence and unity of Somalia, the country’s rights with respect to offshore natural resources, including fisheries- in accordance with international law- and recalls the importance of preventing illegal fishing and illegal dumping, including of toxic substances, with an stress on the necessity to investigate allegations of such illegal fishing and dumping.<sup>314</sup> Furthermore, the Security Council in this resolution urges States “individually or within the framework of competent international organizations to positively consider investigating allegations of illegal fishing and illegal dumping, including of toxic substances, with a view to prosecuting such offences when committed by persons under their jurisdiction; and takes note of the Secretary-General’s intention to include updates on these issues in his future reports relating to piracy off the Coast of Somalia”.

This phenomenon of criminal activities has also been facilitated by the widespread availability of light weapons and global proliferation of small arms in wider East Africa. It has been witnessed that in a more destructive and sophisticated way, vast transportation of unregulated arms and heavy trafficking of weapons through the region have provided pirates with the extensive range of munitions including from light/heavy caliber machine guns and

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<sup>313</sup> Stig Jarle Hansen, *The Dynamics of Somali Piracy*, Studies in Conflict & Terrorism, Routledge, Vol 35, pp 523-530, 2012, at 523-524.

<sup>314</sup> See UNSC Resolution 2020, adopted on 22 November 2011. The resolution notes with appreciation in this respect the report of the Secretary-General on the protection of Somali natural resources and water (S/2011/661) prepared pursuant to paragraph 7 of Security Council Resolution 1976 (2011).

automatic assault rifles to anti-ship mines, hand-held mortars and RPGs as well.<sup>315</sup> Furthermore it has been evident that corruption and easily compromised judicial structures, as Peter Chalk argues<sup>316</sup>, either by “providing intelligence on ship movements and locations to helping with the rapid discharge of stolen cargoes” or “constraining coastal patrols whenever they appear to be making substantial progress in denting attacks” and this reality in administrative of Somalia has largely led to an exacerbation of illegal and criminal incidents off its coasts with the existing evidences which suggest that the government officials in Puntland have benefited from piracy and armed robbery against vessels off the coasts and have been engaging in the criminal activities committed at it shore and off-shore.<sup>317</sup>

To add to the aforementioned reasons for the flourishing piracy surge, as some have argued,<sup>318</sup> the global financial crisis and the associated downturn in international shipping have already had implications for maritime security, including for the incidence of piracy and armed robbery at seas. In this term, their argument is that in face of the shipping downturn, ship owners may be tempted to employ cheaper crews, reduce crew numbers and lower the maintenance standards. Therefore, aside from any other effects, these trends could increase vulnerability to maritime security threats especially piracy and armed robbery attacks in the region of study. On the other hand and as a separate reason for piracy thriving in the Horn of Africa is the ready willingness of ship owners to pay increasingly large sums of money for the return of their vessels and cargoes has provided added incentive for engaging in criminal

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<sup>315</sup> Peter Chalk, *Piracy Off the Horn of Africa: Scope, Dimensions, Causes and Responses*, RAND Corporation, 2009, at 97. Available at: [http://www.rand.org/content/dam/rand/pubs/testimonies/2009/RAND\\_CT317.pdf](http://www.rand.org/content/dam/rand/pubs/testimonies/2009/RAND_CT317.pdf)>. See also Chalk, *The Evolving Dynamics of Piracy and Armed Robbery at Sea in the Modern Era: Scope, Dimensions, Dangers and Policy Responses*, Op.cit, at 8. For a concise overview of the dynamics of the global proliferation of small arms and their impact, see Gideon Burrows, *Kalashnikov AK47*, The New Internationalist, Oxford, 2006.

<sup>316</sup> Peter Chalk, *The Evolving Dynamics of Piracy and Armed Robbery at Sea in the Modern Era: Scope, Dimensions, Dangers and Policy Responses*, Op.cit, at 6-7.

<sup>317</sup> Cited in RuchitaBeri, *Piracy in Somalia: Addressing the Root Causes*, Strategic Analysis, Vol 35, No 3, 2011, 452-464, at 456.

<sup>318</sup> Sam Bateman, *Maritime security implications of the international shipping recession*, The Australian Journal of Maritime and Ocean Affairs, Volume 1, No. 4, December 2009, pp. 109-117. Also see: Sam Bateman, Jane Chan, “Piracy and Armed Robbery against Ships in the South China Sea- possible Causes and Solutions”, In *Non-Traditional Security Issues and the South China Sea; Shaping a New Framework for Cooperation*”, Op.cit, at 140.



activities as for many gangs, the prospect of windfall profits is separately worthy with the assumption of confrontation with detention and prosecution.<sup>319</sup>

The root causes of piracy primarily stem from land and lies in addressing the chaos on shore and confronting with domestic and regional challenges in the Horn of Africa and other affected countries in the Indian Ocean region. Therefore, more attention needs to be paid to addressing the underlying socio-economic drivers that exacerbate the piracy and armed robbery challenges in order to develop a long-term strategy towards maritime threats in the Indian Ocean.

Furthermore, It should be noted that the problem of piracy and armed robbery cannot be solved by military means without a detailed analysis of socio-economic aspects (particularly of those domestic, regional or international characteristics). This paper reiterates the importance of supporting local and coastal communities to tackle the underlying causes of piracy and improving effective use of Somali waters through regional maritime capacity building measures. In this respect a comprehensive approach mainly as cooperative solutions through regional approaches aimed at tackling both current symptoms and root causes of the problem is needed. The following section will examine the remedial and preventive approach towards a coherent strategy approach to the aforementioned root causes.

## **1.2 Preventive strategies and countermeasure solutions to the root causes of maritime crimes in the region**

The thesis has addressed some of the major developments in piracy and armed sea robbery incidents in the north and western parts of the Indian Ocean as well as some prominent root causes of the criminal activities and their gradually sophisticated syndicates. In order to deal with the root causes to achieve success in the fight against piratical activities, it is true that

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<sup>319</sup> IMB, *Piracy and Armed Maritime Violence: Annual Report*, 1 January-31 December 2008, at 26, Cited in Peter Chalk, *The Evolving Dynamics of Piracy and Armed Robbery at Sea in the Modern Era: Scope, Dimensions, Dangers and Policy Responses*, Op.cit, at 8.

strengthening military operations against pirates and a sufficient patrol regime would lead to a decrease in piracy criminal activities; however, it cannot be regarded as a comprehensive and sustainable response. This part of the thesis will address the most salient solutions and significant preventive strategies to combat the root causes of maritime crimes in the region. Here, in the following section, preventive strategies toward the increasing phenomenon of piracy and armed robbery against vessels will be discussed firstly and afterwards the section will analyze the global and regional solutions to combat the challenges after occurring off the coasts and congested shipping lanes of the ocean.

### **Prediction and detection of piracy and armed sea robbery efforts through information sharing and adapting new technologies**

It is significant to be noted that an increase in preventive measures for vessels transiting off the choke points of the Indian Ocean is an alternative to prevent piratical attacks and a more detailed and sophisticated intelligence would make the naval patrols more productive and fruitful.<sup>320</sup> ‘Detection and recognition of suspicious activity requires utilization of all available information including sensors, intelligence, and operational information for monitoring the most vulnerable entities and facilities such as commercial ships, harbors, linked coastal areas, etc.’<sup>321</sup> One of the most salient efforts to prevent and combat piracy and armed robbery against ships is to predict and recognize a piratical effort through information sharing and this strategy can be achievable through collaborative human-centric information systems,<sup>322</sup> using data-driven simulation for analysis of maritime piracy<sup>323</sup>, attitudes of anti-piracy intelligence<sup>324</sup> and

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<sup>320</sup> Martin Murphy, *Counter Piracy in Historical Context: Paradox, Policy and Rhetoric*, Studies in Conflict and Terrorism, Vol 35, No 1, Routledge, 2012, pp 507-522, at 518.

<sup>321</sup> Galina Rogova, Jesus Garcia, “Contextual knowledge and information fusion for maritime piracy surveillance”, In *Prediction and Recognition of Piracy Efforts Using Collaborative Human-Centric Information Systems*, E. Bosse et al. (Eds.), IOS Press, pp 80-87, 2013, at 81.

<sup>322</sup> Prediction and Recognition of Piracy Efforts Using Collaborative Human-Centric Information Systems, E. Bosse et al. (Eds.), IOS Press, 2013.

<sup>323</sup> The data-driven simulation model and the tools have been considered by IMO for potential use in assessing future operational counter-piracy measures, including new transit corridors and extended schemes. For further studying this strategy, See: Ondrej Vanek, Michal Jakob and Michal Pechoucek, “Using data-driven simulation for analysis of maritime piracy”, In *Prediction and Recognition of Piracy*

contextual knowledge and information fusion for maritime piracy surveillance.<sup>325</sup> The knowledge of all applicable rules mainly such as IMO security protocols, including information obtaining from Automatic Identification Systems, ISPS codes (International Ship and Port Facility Security), ship-to-shore alarms, and security and inspections can be essential for understanding the situation, evaluation of the normalcy of operations, and detecting possible piratical threat.<sup>326</sup> In addition, improving the existing system on piracy control including the reinforcement of IMB Piracy Reporting Center and SHIPLOC and utilization of a satellite-based system to track vessels should be addressed in order to tackle the phenomena.<sup>327</sup> SHIPLOC arrangement which has been established by the second part of the chapter XI of SOLAS Convention is able to inform the ship's owner, International Centre for Maritime and the authorities of the flag state, immediately after the occurrence of an accident. This mechanism's sufficient certainty has been sponsored by the IMB and it can be used effectively to prevent and hamper criminal acts of piracy and armed robbery against vessels.<sup>328</sup>

### **Duties and obligations of shipping communities**

The shipping industries have to contribute to maintaining vigilance and implementing basic antipiracy measures in order to prevent and combat the criminal activities. They should provide

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*Efforts Using Collaborative Human-Centric Information Systems*, E. Bosse et al. (Eds.), IOS Press, pp 109-113, 2013.

<sup>324</sup> To study further regarding ways of increasing anti-piracy forces' opportunities for succeeding by drawing on and lessons can be adapted from other forms of irregular conflicts in the past, see: Russell W. Glenn, "Anti-piracy intelligence: adapting lessons from other forms of irregular conflict", In *Prediction and Recognition of Piracy Efforts Using Collaborative Human-Centric Information Systems*, E. Bosse et al. (Eds.), IOS Press, pp 54-67, 2013.

<sup>325</sup> "Surveillance means and methods developed for asymmetric warfare and vastly published in the literature may be used for building a maritime surveillance picture.", For further information on maritime piracy surveillance methods, see: Galina Rogova and Jesus Garcia, "Contextual knowledge and information fusion for maritime piracy surveillance", *Op.cit*, p80-87.

<sup>326</sup> *Ibid*, at 84.

<sup>327</sup> John Mo, *Options to Combat Maritime Piracy in Southeast Asia*, Ocean Development & International Law, Vol 33, No 3-4, 2002, at 354. Emphasizing that SHIPLOC which is a vessel tracking system developed by IMB and CLS (a satellite tracking system operator) should be reinforced to be used effectively in preventing piratical criminal acts.

<sup>328</sup> Jayant Abhyankar, *Piracy and Maritime Violence: A Continuing Threat to Maritime Industry*, ICC International Maritime Bureau, November 2002, at 12. See also: Roger Tomberlin, *Vessel Security and Maritime Insurance: Will Maritime Insurance Policies Diminish When Defensive Measures Are Employed Against Piracy and Maritime Terrorism?*, 2008, at 45.

sufficient information and technical standards for ship owners through training courses and technical assistance. In contrast, ship owners must effectively play their part in ensuring that their vessels are well maintained and the operators, the masters and crew follow the best management practices guidelines and procedures as recommended by the IMO.<sup>329</sup> In this sense, ship owners should obey the circular MSC.1/Circ.1333 and 1334 of the Maritime Safety Committee (MSC) of the IMO which emphasizes the need for reporting and has put in place multiple channels for reporting to ensure quick response and necessary action taken. The circular provides informative “guidance to ship owners and ship operators, shipmasters and crews on preventing and suppressing acts of piracy and armed robbery against ships.”<sup>330</sup> As Bateman suggests, it is quite important to bear in mind that ultimately, the ship owners will have to take responsibility for the safety and maintenance of their vessel, and cargo and the training of their crew, to be able to practice self-help in the first instance. In addition, in this regard, the United Nations Security Council resolution 1851 in its paragraph 12 has urged states in collaboration with the shipping and insurance industries, and the IMO to continue to develop avoidance, evasion, and defensive best practices and advisories to take when they are under attack or sailing in waters off the coast of Somalia. Under the Security Council’s aforementioned resolution, states are urged to make their citizens and vessels available for forensic investigation as appropriate at the first port of call immediately following an act or attempted act of piracy or armed robbery at sea or release from captivity.

Best Management Practices (BMP) are very crucial in fighting against pirates’ attacks and ship owners are obliged to take these practices serious in order to prevent or either reduce the adverse effects of the attacks. It should be noted here that privatization of anti-piracy defense efforts is another countermeasure solution to the piracy and armed robbery challenges to maritime security. In this respect, Private Security Companies (PSCs) are a part of BMP in the shipping industry to protect vessels against criminal activities. The services which PSCs can provide are as security intelligence, risk assessment and consulting, security services (training crews, vessel escorts, guards on board, training local security forces, acting as local

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<sup>329</sup> Sam Bateman, Jane Chan, *Op.cit*, p 141.

<sup>330</sup> IMO MSC.1/Circ. 1334, International Maritime Organization, 23 June 2009, available at: <[http://www.imo.org/circulars/mainframe.asp?topic\\_id=327](http://www.imo.org/circulars/mainframe.asp?topic_id=327)>.

security forces), crisis response (hijacking negotiation) and intervention (liberate hostages or ships).<sup>331</sup>

This aim of anti-piracy defense efforts to fight against sea criminals, either by an allowance for crew's self-defense or establishing private military security guards on board could be a subject of a more detailed study than the present thesis. As some believes, "not only should the crew be allowed and encouraged to fight off pirates, but States should also allow them to carry the proper equipment on board of their vessels".<sup>332</sup> Although in reality, this theory of crew's self-defense might be problematic in some aspects, mainly legal perspective, as no country has jurisdiction over the high seas, and thus the legal hurdle to a ship arming itself is the law of its state, which may permit or deny ship crews the right to carry arms.<sup>333</sup> Furthermore, applying weapons on board of vessels carried by inexperienced crew could lead in oil/gas accidents, environmental pollution and many serious maritime incidents at seas and may not be prescribed in every case.<sup>334</sup> It is significant to bear in mind that privatization of anti-piracy defense efforts and allowing privately owned, armed ships to escort the commercial vessels are applicable for States without the stability or resources to provide protection, and states that cannot adequately patrol their sea-lanes.<sup>335</sup> However, As John Mu suggests, "the readiness of a ship and its crew to engage in military confrontation with pirates will aggravate the severity of pirate attacks", and therefore, "even if the coastal governments can be convinced that arming cargo ships is a feasible way to combat piracy today, there is still uncertainty and possible escalation of the problem".<sup>336</sup>

## **Capacity building and law enforcement initiatives in the region**

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<sup>331</sup> For further study on Private Security Companies (PSCs), see: Lars BangertStruwe, *Private Security Companies (PSCs) as a Piracy Countermeasure*, Studies in Conflict & Terrorism, Vol 35, Routledge, 2012, pp 588-596.

<sup>332</sup> Ethan C. Stiles, *Reforming Current International Law to Combat Modern Sea Piracy*, Suffolk Transnational Law, Review- Summer 2004, Vol 27, No.2, at 313.

<sup>333</sup> See: UNCLOS, art 92.

<sup>334</sup> Zakieh Taghizadeh, *Op.cit*, at 154-155. (Translated by the author)

<sup>335</sup> Ethan C. Stiles, *Op.cit*, at 317.

<sup>336</sup> John Mo, *Op.cit*, at 354.

Having considered the root causes of the piracy phenomenon and other criminal threats in the Indian Ocean, a comprehensive and multidimensional approach should be applied including the establishment of key regional partnerships and strengthening the existing regional arrangements. “Roots of the piracy lie in the collapse of a national economy and government structure in some developing countries. Consequently, piracy can only be eradicated by strengthening the capacity of such developing States through regional or global cooperative arrangements to comply with their responsibility to prevent acts of piracy and other acts of violence at sea and activities connected with such acts.”<sup>337</sup>

Particularly, from Somali-based approach to the phenomenon, the conclusion of the political peace process for Somalia is a significant key in order to help the country to establish institutions capable of ensuring its sovereign prerogatives.<sup>338</sup> Besides, improvement of port security can avoid terrorist groups overwhelming the control of strategic ports allowing their syndicates to smuggle weapons and people into Somalia.<sup>339</sup>

It is important to bear in mind that “most security challenges confronting Africa have their origin in the progressive failure of governance and internal contradictions that serve to undermine human development. The factors are legion, but corruption, marginalization and injustice figure as the most prominent causes of insecurity onshore, which have now been extended offshore.”<sup>340</sup> Furthermore, as Murphy suggests, “any collective security solution to piracy originating in a failed state such as Somalia would, in other words, need to embrace some level of state-building as the first step in a layered approach.”<sup>341</sup>

Ultimately in this respect, in order to deal with underlying causes to the maritime crimes’ threats arising from failed and unstable states such as Somalia in the region, the international community and the regional States should take serious steps in engaging the region in reconstruction goals, elimination of piracy networks, harmonizing the procedures in

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<sup>337</sup> Vladimir Golitsyn, *Op.cit*, at 1176.

<sup>338</sup> Abbas Daher Djama, *Op.cit*, at 140.

<sup>339</sup> Christopher L. Daniels, *Op.cit*, at 109.

<sup>340</sup> Freedom Onuoha, Sea Piracy and Maritime Security in the Horn of Africa: The Somali Coast and Gulf of Aden in Perspective, *African Security Review*, Vol 18, No 3, pp 31-44, 2009, at 43.

<sup>341</sup> Martin Murphy, *Counter Piracy in Historical Context: Paradox, Policy and Rhetoric*, *Op.cit*, at 518.

ransom payments<sup>342</sup> and monitoring illegal fishing and illegal dumping of toxic wastes into Somali waters. In addition, restoring a functioning central government and improving law enforcement initiatives in the country through a political will of both the nationals and the international community and increasing funding for peacekeeping operations in Somalia<sup>343</sup> and other instable States in the region would contribute to peace and security of the region which will finally lead to hampering the ability of terrorist organizations to wage attacks in the affected areas of high risks. It is crucial to bring justice to the Somali coastal communities in long-term efforts in order to eradicate piracy and armed robbery of the coasts and through the Gulf of Aden.<sup>344</sup>

### **Establishment of the judicial system to reduce impunity for pirates**

Another challenging factor as explained in the previous section is the unwillingness of many nations to pursue the suspected pirates and put the criminals to a fair justice process. In other words, naval forces have been generally reluctant to exercise their authority based on the reasons explained in the first Part of this thesis regarding the legal issues pertaining to the prosecution of Somali pirates.<sup>345</sup> In order to tackle this challenge, the international community

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<sup>342</sup> For further study on suggestion of eliminating ransom payments, see: Christopher L. Daniels, *Op.cit*, at 113-114. It either explains that reaching an international consensus on refusing to pay ransoms will be a difficult task: “One of the major obstacles in the battle is the maritime industry, which views piracy as an issue that can be handled by simply purchasing additional insurance. Insurance companies typically pay the ransoms through ship owners’ claims and recoup their cost by charging all ships passing through the area additional fees for coverage.” In addition pirates “used hostages as human shields to deter naval forces from rescuing hijacked vessels and began harming their captives once ashore to force the early payment of ransom.” Explained in Martin Murphy, *Counter Piracy in Historical Context: Paradox, Policy and Rhetoric*, *Op.cit*, at 517.

<sup>343</sup> In this respect, “the United Nations must assume its full responsibilities in Somalia, in particular by authorizing without any further delay the establishment of an international stabilization force. It should build on an enhanced AMISOM (the African Union Mission to Somalia) and further the cause of peace, security and reconciliation in Somalia, as well as facilitate the urgent deployment of a UN peacekeeping operation that could take over from AMISOM and support the long-term stabilization and reconstruction in Somalia.”, See Freedom Onuoha, *Op.cit*, at 43.

<sup>344</sup> Christopher L. Daniels, *Op.cit*, at 115.

<sup>345</sup> ‘It is important to bear in mind that “the overwhelming majority of states, as evidenced by the negotiations of UNCLOS and more recently by discussions in the Security Council on the situation in Somali waters, are reluctant to accept any possibility of enforcement action by third states in their territorial waters without the express consent of the coastal state concerned.’ Cited in: Vladimir Golitsyn, *Op.cit*, at 1169.

should take necessary initiatives to ensure to bring to justice the perpetrators of acts of piracy. To achieve this goal, legal capability and judicial capacity of the courts of the regional countries must be strengthened in order to put an end to immunity of pirates from appearing before justice.<sup>346</sup> Furthermore, in this regard and in order to offer a solution, the UN Secretary-General has presented seven options for prosecuting suspected pirates<sup>347</sup> and so far, there has been some significant progress in the options presented and the international community has been seeking a coherent judicial solution to put an end to the challenges of prosecution of pirates. Consequently, several countries and organizations engaging in naval patrolling off the Horn of Africa, including the United Kingdom, United States, and the European Union, have concluded “transfer for trial” agreements with the prosecuting states in order to facilitate the process of detention and prosecution in the neighboring states including mainly in Kenya and Seychelles. Initiatives on signing similar agreements with Mauritius, Tanzania, and Maldives have also been taken.<sup>348</sup> In addition to tackling the challenges of prosecuting pirates, the UNODC has proposed a new mechanism, Ship-Rider Agreement which has been endorsed by UN Security Council resolutions. According to these agreements, the deployment of law enforcement officials from African coastal States on board naval vessels would be authorized, with the power to arrest suspected pirates and send them back to their national courts to be

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<sup>346</sup> Zakieh Taghizadeh, *Op.cit*, at 152 (Translated by the Author).

<sup>347</sup> The UN Secretary-General report on 26 July 2010. The options of the report of the UN Secretary-General to the Security Council are as follows: Option 1: Strengthen capacity of States in the region in the prosecution and incarceration with the assistance of the United Nations. Option 2: Court extraterritorial area with or without UN participation. Option 3: Special national chamber, or shared between several States in the region, without the participation of the UN. Option 4: Special Chamber within domestic legislation or shared between several States in the region, with the participation of the UN. Option 5: Regional Court based on a multilateral agreement between States in the region, with the participation of the UN. Option 6: International Tribunal based on an agreement between a State in the region and the UN. Option 7: International Tribunal created through a resolution of the Security Council under Chapter VII of the UN Charter.

<sup>348</sup> “Under the “transfer for trial” agreements, the latter neighboring countries agree to act as a third party to prosecute pirates captured by the former in exchange to aid and assistance for their judicial capacity building.” Tara Davenport, *Legal Measures to Combat Piracy and Armed Robbery in the Horn of Africa and in Southeast Asia: A Comparison*, Studies in Conflict & Terrorism, Vol 35, No 1, Routledge, pp 570-587, 2012, at 576.



tried. However, these agreements have not been fully successful as they need to be signed by the coastal states, many of which are reluctant to do so.<sup>349</sup>

Furthermore, in order to develop the legal capacity of Somalia, the UN Special Advisor's Report to the Secretary-General on Legal Issues Related to Piracy off the Coast of Somalia (2011) has proposed the establishment of a court system comprising a specialized court in Puntland, a specialized court in Somaliland and an extraterritorial Somali specialized court in Arusha, Tanzania, which would eventually be transferred to Mogadishu.<sup>350</sup> This proposal aimed at the "Somalization" of solutions upon which counter-piracy efforts must necessarily rely to get finally harmonized with the situation of Somali-based piracy. Furthermore, the Security Council in its resolution 1976 under Chapter VII of the Charter, adopted on 11 April 2011, decided to urgently consider the establishment of specialized Somali courts to try pirates, including by an extraterritorial Somali specialized antipiracy court recommended in the UN Special Advisor's Report and requested the Secretary-General to report within two months on the modalities of such prosecution mechanisms.<sup>351</sup> As Tara Davenport observes "the major advantage of such a court system proposed by the UN Special Advisor, in contrast to a court in Kenya or Seychelles trying Somali pirates, is that the latter lack the necessary interest, capacity and hence the political will to prosecute Somali pirates."<sup>352</sup>

### **3. Capacity building for cooperation to eliminate maritime organized crimes in the Indian Ocean and the way forward to achieve this end**

This section aims at answering to the main significant questions of this thesis, as "What are the significant elements of a stronger cooperation to eliminate maritime crimes at sea under international law and law of the sea?" and "How can cooperation at the regional level be strengthened to maintain maritime security in the region, especially regarding the eradication of acts of piracy and armed robbery movements and security threats under international law?"

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<sup>349</sup> See "Ship Riders: Tackling Somali Pirates at Sea", available at: <http://www.unodc.org/unodc/en/frontpage/ship-riders-tackling-somali-pirates-at-sea.html>.

<sup>350</sup> UN Special Advisor's Report to the Secretary-General on Legal Issues Related to Piracy off the Coast of Somalia, S/2011/30, 24 January 2011, proposal 25.

<sup>351</sup> United Nations Security Council Resolution 1976, adopted on 11 April 2011.

<sup>352</sup> Tara Davenport, Op.cit, at 577.

For this purpose, the section will first elaborate on international obligations of States in the region to cooperate to maintain maritime peace and security and then it explains specific areas for capacity building to cooperate in demolishing maritime crimes, from international, regional, sub-regional and national perspectives and it will ultimately address the way forward to accomplish to this end.

### **3.1 International obligation of States in the region to cooperate to maintain maritime peace and security**

International cooperation, whether directly among States or through the involvement of related international organizations or other international mechanisms eliminating maritime crimes at seas has been regarded as an indispensable key component of the global fight against piracy and armed sea robbery.<sup>353</sup> In this respect, it is noteworthy that any international effort to suppress piracy and combat robbery against ships must take place in a manner that is consistent with the rules and principles of public international law governing criminal jurisdiction and in particular cooperation in criminal matters, including detention, prosecution and extradition of the criminals. Accordingly indeed, such a cooperation mechanism must be consistent with the legal regime established for the law of the sea, which is set out in UNCLOS.<sup>354</sup>

However, one of the most controversial and debated questions in this regard is “whether the provisions of UNCLOS on piracy provide States only with a right to suppress piracy or also with a duty to do so, and whether States should be obliged to adopt and implement anti-piracy legislation”.<sup>355</sup> In this regard, Article 100 of UNCLOS, contains the precise wording of article 14 of the 1958 Geneva Convention on the High Seas, under the title of “Duty to cooperate in the repression of piracy” provides that “all states shall cooperate to the

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<sup>353</sup> It has been considered repeatedly in many international instruments and forums as follows in this section. The main example is the document number A/62/66/Add.1 Para. 94, Oceans and the Law of the Sea, Report of the Secretary General Addendum, 31 August 2007.

<sup>354</sup> As the Security Council has repeatedly reaffirmed, “that international law, as reflected in the United Nations Convention on the Law of the Sea of 10 December 1982 (‘The Convention’), sets out the legal framework applicable to combating piracy and armed robbery at sea, as well as other ocean activities” articulated in the Security Council resolution 1897 (2009), adopted on 30 November 2009.

<sup>355</sup> As Helmut Tuerk suggests, “every State not only has a right, but also a duty, to take action to curb piratical activities.” H. Tuerk, *Combating Terrorism at Sea- The Suppression of Unlawful Acts against the Safety of Maritime Navigation*, 15 University of Miami International and Comparative Law Review 337, pp.347-353 (2007-2008).

fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any state”.

The strong wording of the article has stipulated the unique characteristic of the article, knowing that it is the one and only provision in UNCLOS whose title is exactly the “duty to cooperate” and all states parties are obliged to cooperate to this end to the fullest possible extent. As it is evident that piracy provisions of UNCLOS have been regarded as customary international law and must be executed in a manner which is in accordance with international obligations of States. Being compared to other sections of UNCLOS that specify the various areas and means of cooperation<sup>356</sup>, the aforementioned section of UNCLOS titled “duty to cooperate in the repression of piracy” has not articulated “the specific obligations that falls within the scope of the general duty to cooperate, thereby leaving this provision open to interpretation with regard to the means that should be employed by States to fulfill their obligation.”<sup>357</sup> Although the International Law Commission (ILC) in its commentary on article 38 of the High Seas Convention, stated that “Any State having an opportunity of taking measures against piracy, and neglecting to do so, would be failing in a duty laid upon it by international law.”<sup>358</sup>

Similarly with regard to the obligation to cooperate, according to the Article 13 of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (the SUA Convention), States Parties shall cooperate in the prevention of SUA offences and furthermore, under Article 12 of SUA Convention they are required to afford one another the greatest measure of cooperation in connection with criminal proceedings to prosecute the offenders.<sup>359</sup>

Notably the UN Security Council in its resolutions related to the threats of maritime piracy and armed robbery against ships off the coasts of Somalia and more recently in the Gulf of Guinea, highlighted the importance of the international cooperation and respectfully urged

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<sup>356</sup>As including article 123 on cooperation of States bordering enclosed or semi-enclosed seas or article 143 on collaboration in the field of marine scientific research

<sup>357</sup> Yaron Gottlieb, *Combating Maritime Piracy: Inter-Disciplinary Cooperation and Information Sharing*, *Case Western Journal of International Law*, VOL 47, 2014, at 4.

<sup>358</sup> ILC Commentary to article 38, 1956. Cited in Ibid.

<sup>359</sup> See Article 12 and Article 13 of the SUA Convention.

all States to cooperate with each other and with international organizations in combating the aforementioned threats. This emphasis is more evident in the norms in which the Security Council is in place to harmonize the international coordination with regard to the situation in Somalia.

The General Assembly has also repeatedly encouraged States to cooperate to address piracy and armed robbery at sea in its resolutions on oceans and the law of the sea. The General Assembly primarily since its resolution adopted in 22 December 2007 on Oceans and the Law of the Sea has encouraged States to cooperate in addressing threats to maritime safety and security through bilateral and multilateral instruments and mechanisms aimed at monitoring, preventing and responding to such threats. It has further urged “all States, in cooperation with the International Maritime Organization,<sup>360</sup> to actively combat piracy and armed robbery at sea by adopting measures, including those relating to assistance with capacity-building through training of seafarers, port staff and enforcement personnel in the prevention, reporting and investigation of incidents, bringing the alleged perpetrators to justice, in accordance with international law, and by adopting national legislation, as well as providing enforcement vessels and equipment and guarding against fraudulent ship registration.”<sup>361</sup> Furthermore, in its resolution 64/71 of 4 December 2009, the General Assembly recognized “the crucial role of international cooperation at the global, regional, sub regional and bilateral levels in combating, in accordance with international law, threats to maritime security, including piracy”.<sup>362</sup>

Notwithstanding UNCLOS’s shortcoming in not stipulating the specific obligations that falls within the scope of the general duty to cooperate to repress illegal activities of pirates at seas, as Yaron Gottlieb argues that Article 100 should be interpreted broadly in a manner that can be applied to ensure the international community’s common interest in protecting the

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<sup>360</sup>As noted in the first part of this thesis, the International Maritime Organization has also urged governments, all interests and organizations to cooperate and exchange information with each other and the IMB with a view to maintaining and developing a coordinated action in combating maritime fraud IMO Resolution A 504 (XII) (5) and (9) adopted on 20 November 1981. In addition, the IMO is convinced of the need for governments to cooperate and to take, as a matter of the highest priority, all necessary action to prevent and suppress any costs of piracy and armed robbery against ships’. See Resolution A.922(22).

<sup>361</sup> UN General Assembly Resolution A/RES/62/215 of 22 December 2007.

<sup>362</sup> UN General Assembly Resolution A/RES/64/71 of 4 December 2009

freedom of navigation.<sup>363</sup> In applying the broader interpretation, the presumption on cooperation in the face of piracy derives from the general principle of good faith in fulfilling treaty obligation and “a State that was in a position to act and failed to do so carries the burden of justifying-based on factual, legal or other grounds- its lack of action.”<sup>364</sup> For the purpose of assessing compliance with the duty to cooperate, the “Due Diligence Principle”, a fundamental principle of international law,<sup>365</sup> can be applied to justify the specific obligation which can be identified based on the general guideline sets out in article 100 of UNCLOS. These obligations are in general as including the whole piracy provisions of which should be interpreted in light of the general guidelines and requisite significant obligations such as the duty to exchange relevant information relating to piratical experiences. It is noteworthy that under the concept of Due Diligence Principle, “the concept implies an obligation of conduct, not of result.”<sup>366</sup> In other terms, as an actual consequence for cooperation in the field of combating piracy, it is intended to guarantee the obligation to conduct activities and cooperate to the full extent to prevent piratical acts and repressing its adjacent crimes.

### **The duty to exchange information and evidence as a specific obligation under the general duty to cooperate**

As mentioned, the duty to exchange relevant information as a particular obligation derives from the general duty to cooperate to suppress criminal acts of piracy and armed robbery against ships. In this respect, to ensure successful information cooperation in counter-piracy and armed sea robbery operations, information sharing is impartibly significant to guarantee the prosperity. Furthermore, other relevant international and regional instruments and organizations have explicitly emphasized on the importance of information sharing as part of

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<sup>363</sup> Yaron Gottlieb, *Op.cit*, at 5, quoting Douglas Guilfoyle, *Shipping Interdiction and the Law of the Sea*, *Op.cit*, at 38. Cited in Yaron Gottlieb, *Op.cit*, at 5.

<sup>364</sup> For further studying the application of the mentioned theory for the purpose of assessing compliance with the duty to cooperate, see: Yaron Gottlieb, *Op.cit*, at 5-8.

<sup>365</sup> For further study regarding the Due Diligence Principle, see: Robert P. Barnidge, *The Due Diligence Principle under International Law*, *Int'l Comm. L. Rev*, Vol 8, No 81, 2006, at 121.

<sup>366</sup> According to the ILC Draft Articles on the Law of the Non-Navigational Uses of International Watercourses (1994), “obligation of due diligence contained in article 7 sets the threshold for lawful State activity. It is not intended to guarantee that in utilizing an international watercourse significant harm would not occur. It is an obligation of conduct, not an obligation of result.” Cited in Yaron Gottlieb, *Op.cit*, at 8.

international cooperation in addressing the piracy incidents. According to the SUA Convention in its article 13, all States shall take measures to prevent illegal acts in or outside their respective territories, exchange information in accordance with their national laws, and coordinating administrative and other measures taken as appropriate to prevent the commission of offences set forth in the article with the aim of preventing illegal acts and finally when an illegal act is committed in the territory of a Member State, the latter must take all steps to ensure that cargo, passengers or crew is not unduly detained or delayed.<sup>367</sup>

Significantly in this regard, the United Nations General Assembly recognized ‘the crucial role of international cooperation at the global, regional, sub-regional and bilateral levels in combating, in accordance with international law, threats to maritime security, including piracy, armed robbery at sea, terrorist acts against shipping, offshore installations and other maritime interests’, and emphasized that this goal should be achieved through ‘bilateral and multilateral instruments and mechanisms aimed at monitoring, preventing and responding to such threats’. The GA also take note of necessity of ‘the enhanced sharing of information among States relevant to the detection, prevention and suppression of such threats, and the prosecution of offenders with due regard to national legislation.’<sup>368</sup>

In this regard, the UN Security Council in its resolution 1950, underlined the importance of continuing to enhance the collection, preservation and transmission to competent authorities of evidence of acts of piracy<sup>369</sup> and later in the resolution 1976, adopted on 11 April 2011, reiterating said provisions, inviting States, individually or in cooperation with regional organizations, UNODC and INTERPOL, to examine domestic procedures for the preservation of evidence and assist Somalia and other States in the region in strengthening their counter-piracy law enforcement capacities. It also urges States and international organizations to share evidence and information for anti-piracy law enforcement purposes with a view to ensuring effective prosecution. In addition, the UN Security Council has urged all States to share

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<sup>367</sup> SUA Convention, article 13.

<sup>368</sup> See UNGA Resolution 63/111 (5 December 2008), UN Doc A/RES/63/111, Para. 61. Similarly, see UNGA Resolution 66/231 (24 December 2011) UN Doc A/RES/66/231, Para. 81, and UNGA Resolution 67/78 (18 April 2013) UN Doc A/RES/67/78, Para. 88.

<sup>369</sup> See UNSC Resolution 1950 (S/RES/1950 (2010), adopted on 23 November 2010.

information on acts related to piracy and armed robbery at sea and highlighted the importance of sharing evidence and information among States and international organizations for anti-piracy law enforcement purposes including with regard to the key figures of the criminal networks involved in piracy and armed robbery against vessels off the coast of Somalia.<sup>370</sup>

At the regional level, an excellent example of promoting an information sharing mechanism to contribute to effective and timely cooperation to eliminate illegal activities against vessels mainly piratical movements refers to the ReCAAP mechanism; the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against ships in Asia. As Tara Davenport has explained, “the signing of the Regional Cooperation Agreement Against Piracy and Armed Robbery and the establishment of the ReCAAP Information Sharing Centre in Singapore has also enhanced cooperation in combating piracy and armed robbery in the region mainly through the exchange of information and analysis of incidents of piracy and armed robbery.”<sup>371</sup>

Furthermore, the Djibouti Code of Conduct agreement (adopted in 2009) and the Code of Conduct (adopted in 2013 in Cameroon), which were both inspired by the Japanese-sponsored agreement, ReCAAP, articulate that the cooperation among the States Parties to the Codes shall include coordination and exchanging of relevant information as a need to designate a national focal point to facilitate effective flow of information.<sup>372</sup> The primary purpose of the Djibouti Code of Conduct is to facilitate information sharing and incident reporting between the particular states to enhance long-term regional cooperation against piracy and armed robbery against vessels in the region.<sup>373</sup>

Nonetheless there are some challenges which have been regarded problematic with respect to the information sharing duty and as Yaron Gottlieb explained, they are considered as: “scope of the duty to share information and the national security exception”, “challenges

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<sup>370</sup> See UNSC Resolution 2077, (S/RES/2077 (2012), adopted on 21 November 2012.

<sup>371</sup> Tara Davenport, *Op.cit*, at 579.

<sup>372</sup> See Article 8 of the Djibouti Code of Conduct, articulated as “Coordination and Information Sharing”. And similarly article 11 of the Gulf of Guinea Code of Conduct.

<sup>373</sup> James Kraska, *Coalition Strategy and the Pirates of the Gulf of Aden and the Red Sea*, Comparative Strategy, Vol 28, No 197, 2009, at 204.

deriving from the nature of the crime and the entities involved in counter-piracy operations”, and “the proliferation of information networks and its discontents”.<sup>374</sup> In other words and in elaborating more in detail on the most predominant challenge to the duty to share information (i.e. the national security exception), it is quite noteworthy that national security concerns serves as a tool used by States to justify their decision not to share relevant information which in many cases refrained to be revealed as classified information.<sup>375</sup> Notwithstanding the challenges mentioned, the circulation of comprehensive information as a key component of the duty to cooperate between navies engaging in operations against pirates and law enforcement entities must be promoted in order to achieve a holistic cooperative approach to repress maritime piracy and armed robbery attacks. This goal needs to be achieved through a comprehensive maritime policy and cooperative mechanism of mutual legal assistance between the countries in the region. In this regard, this thesis refers to the areas for capacity building to cooperate in undermining maritime crimes at seas.

### **3.2 Certain areas for capacity building for cooperation in eliminating maritime crimes: the way forward**

This part will elaborate certain areas for capacity building for cooperation in eliminating maritime crimes in the Indian Ocean region. These areas of capacity building include implementation of international obligations to eradicate maritime crimes at seas at the regional and sub-regional levels through enhancing political, socio-economic and more significantly legal and criminal justice cooperation with regard to investigation, prosecution and extradition of suspected criminals and information/evidence sharing networks. Finally, it will discuss the way forward to achieve this goal.

Certain areas for building capacity are exemplified in regional, multilateral, sub-regional and bilateral cooperation and boosting coordinated maritime policy strategy among all countries concerned in the region (i.e. for the purpose of this thesis, specifically the countries

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<sup>374</sup> To learn more about the challenges mentioned, please study Yaron Gottlieb, *Op.cit.*

<sup>375</sup> Natalie Klein, *Maritime Security and the Law of the Sea*, Oxford, 2011, at 254. (Explaining the problem of national security interests.)



adjacent to the Persian Gulf and Sea of Oman region). In order to appropriately eliminate maritime threats and the lucrative nature of criminal activities at sea, ‘these capacities should be multilateral and centralized and must seek to integrate the implementation of various convention regimes at the regional level, while remaining flexible and adaptive in implementing a proactive policy.’<sup>376</sup>

An increased support should be given to nascent regional and sub-regional arrangements that have been instituted to deal with organized crimes committed in the Indian Ocean. For the purpose of this thesis, in order to provide a comprehensive model for regional and sub-regional arrangements in the concerned region to tackle piracy and armed robbery against ships, ReCAAP is an example of an effective regime for regional cooperation toward a holistic coordinated approach to repress the abovementioned. ReCAAP should be regarded as an effective step forward to suppress piracy and armed robbery and its value in securing the Straits of Malacca has been outstanding.

Another promising initiative, the Djibouti Code of Conduct, which signed on 30 January 2009, calls on member States to enact appropriate legislation to facilitate the arrest and prosecution of suspected pirates. The Djibouti Code of Conduct, which is aimed at developing the regional states’ capacity concerning investigation, arrest and prosecution of suspected pirates, including those inciting or internationally facilitating such acts, could form the basis of a regional agreement in the Persian Gulf and Sea of Oman region with regard to a comprehensive cooperation mechanism for fighting maritime crimes and particularly, serious threats posed by piracy and armed robbery.

Furthermore, in the field of boosting a strong capacity-building structure in the region, the regional States should enact harmonized suitable legislation in accordance with international instruments making any attacks against ships an offence punishable under their legal systems. To this end, criminalization of threats imposed on maritime security in the Indian Ocean in the domestic legislation of all States of the region is an integral step in effective repression strategy of these criminal activities. As truly emphasized in previous chapters, upgrading appropriate existing regional organizations has to be taken seriously to ensure the coordination and harmonization of policies and laws as well as establishing more

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<sup>376</sup> Ibid, at 491.

fully fledged criminal justice cooperation mechanisms between the affected states to prevent maritime crimes including piracy and armed robbery against ships and maritime terrorism.

Furthermore, States in the region should conclude a regional agreement with the purpose of strengthening regional cooperation and coordination among all States in the region to effectively prevent and suppress illegal activities in the region including piracy and armed robbery attacks against ships. In this respect, a salient suggestion would be to establish a new regional mechanism for collecting, sharing, and analyzing relevant information through information sharing center and making all patrolling States' capacities more coordinated and efficient.

With regard to the aforementioned legal model of cooperation in the Malacca Strait, the regional states adjacent to the Persian Gulf, the Sea of Oman and the Arabian Sea should agree to adopt regional cooperative arrangements in order to arrest any alleged offenders who come into their custody. Furthermore, governments in the region should strengthen their commitment to international obligations deriving from binding international instruments in a way that an arresting state has an obligation to either prosecute the alleged offenders in its courts or extradite them to the requesting state. The coastal states should provide their country with appropriate legislative provisions regarding the extradition of offenders who are suspected of having committed offences by attacking ships at sea and they should further agree to ensure the greatest extent of cooperation in investigation of attacks on ships at seas.<sup>377</sup>

These legal provisions could be based upon the guidelines and codes of conduct such as IMO Draft Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery Against Ships, in a manner consistent with international obligations of States particularly international human rights and humanitarian law as reflected in international law. Besides, it should be strongly encouraged to fully cooperate with regional and international organizations by all means, particularly with the IMO and IMB Reporting Center with respect to reports dealing with incidents constituting piracy or armed robbery against ships. In addition, all states of the Persian Gulf and Sea of Oman region should follow to persuade the Vienna-based UN

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<sup>377</sup> Robert C. Beckman, *Combating Piracy and Armed Robbery Against Ships in southeast Asia: The Way Forward*, Ocean Development & International Law, Vol. 33, No. 3-4, pp 317-341, 2002, at 331.

Programme in Transnational Organized Crime to deal with those attacks that can be classified as major criminal hijacks.

As a matter of law, most major criminal hijacks are offences under the 1988 SUA Convention and due to the aforementioned deficiencies in scope and jurisdictional shortcoming in piracy provisions, UNCLOS is unable to encompass majority of attacks and hijacks. In addition, the current international framework for countering piracy, which is based on UNCLOS regime, should either be modified by the international community to make it more relevant to contemporary maritime violence or accompanied by additional instruments that impose greater obligations and responsibilities on signatory states. States in the region should try to implement existing arrangements and join other relevant conventions in order to suppress unlawful attacks against maritime navigation in the region.<sup>378</sup>

Besides, considerations should be given to develop more robust mechanisms to address lack of capacity and security challenges in the Indian Ocean region and existence of underpinnings for the lack of a regional multileveled maritime policy. In this respect, ‘an innovative approach to piracy control or an innovative model of international cooperation must be developed if an effective system or mechanism of international control is to be achieved.’<sup>379</sup> To this end, cooperative ventures, maximizing dialogue at all levels, integrating procedures and establishing permanent institutions to manage sustained cooperation and expanding the cooperative network to fight piracy could be considered as the best way of dealing with the phenomenon either through bilateral or multilateral mechanisms. In order to undertake maritime security observations in policy making, there is an urgent need to ‘embody limited confidence-building measures as well as fully operational alliances which have been considered as an effective solution toward an integrated maritime policy.’<sup>380</sup>

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<sup>378</sup> In previous chapter, it was mentioned that the Islamic Republic of Iran has remained a signatory part to UNCLOS for decades and it has been considering the ratification of the Convention for some years now.

<sup>379</sup> John Mo, *Options to Combat Maritime Piracy in Southeast Asia*, Op.cit, at 349.

<sup>380</sup> John F. Bradford, *Shifting the Tides Against Piracy in Southeast Asian Waters*, Asian Survey, Vol. 48, No. 3, 2008, pp. 473-491, at 488.

In addition, in order to achieve a more robust coordinated policy toward suppressing criminals in the region, the existing naval patrol arrangements should be enhanced and be revised periodically to determine whether adjustments or modifications are necessary based on realities. In other words, in order to harmonize ocean governance strategies of regional states and undertaking an efficient maritime security policy toward developing sufficient regional capacity building, establishing a coordinative mechanism among navies including (conducting joint exercises with the coast guards of countries), law enforcement agencies, and the private sector through providing necessary funds needs be viewed as a priority.

However, “much greater focus should be devoted to promoting the coastal monitoring and interdiction capabilities of littoral States abutting pirate-infested waters and these examples of government, non-governmental, and private sector involvement in the suppression of piracy and armed robbery at sea must be incorporated into a horizontally and vertically integrated governance structure so that the collective knowledge and actions of all stakeholders are coordinated into a unified action.”<sup>381</sup> The international community should make further increasing efforts to sponsor public-private partnerships aimed at better employing and utilizing communication and defensive technologies.<sup>382</sup>

It is noteworthy to mention here that “measures to control maritime crimes in the region should not be focused solely on piracy and armed sea robbery prevention or the risks of maritime terrorism. Such measures should recognize the interests of all stakeholders and encompass other illegal activities at sea, such as the prevention of trafficking in arms, drugs, and persons, as well as the operational dimensions of maritime safety, search and rescue, and marine environmental protection (violations). In particular, bilateral agreements between neighboring countries are essential for the reduction of illegal migration and smuggling and

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<sup>381</sup> Elisabeth Mann Borgese and Francois N. Bailet, *Technology Cooperation and Transfer, Piracy and Armed Robbery at Sea: A Discussion Paper in Two Parts for UNICPOLOS II*, **Ocean Yearbook**, Vol. 17, (edited by Elisabeth Mann Borgese, Also Chircop and Moira McConnell, The International Ocean Institute, Marine and Environmental Law Programme Dalhousie Law School, 2003, at 489.

<sup>382</sup> Defensive technologies including as ShipLoc (a basic, but effective satellite tracking system that has long been endorsed by the IMB), SecureShip (a not-lethal electrical perimeter fence designed to prevent unauthorized boarding), and long-range acoustic devices that emit loud disorienting blasts of sound. Cited in Peter Chalk, *The Evolving Dynamics of Piracy and Armed Robbery at Sea in the Modern Era: Scope, Dimensions, Dangers and Policy Responses*, *Op.cit*, at 14.

particularly in terms of combating piracy and armed robbery incidents.”<sup>383</sup> It is also important to endeavor to end impunity for perpetrators of such crimes including through legal cooperation between regional States.

Cooperation with the shipping community is also another way forward to the regional communities in the region in order to strengthen maritime security and boosting the capacity building measures. In this regard, ‘shipping companies must be given greater financial incentive to institute basic security protocols- including avoiding dangerous routes, maintaining constant anti-piracy watches, keeping close contact with shore and nearby vessels, developing and practicing anti-piracy contingency plans- through the offer of lower insurance premiums.’<sup>384</sup>

One of the serious challenges to regional coordination and cooperation in suppression of piracy is that many pirates were released unpunished after the hijacking of the vessels. To prevent this deficiency, strengthening extradition mechanism between the interested countries in the region is highly recommended. ‘A durable solution to bringing the Somali pirates and future piracy offenders to justice, which is consistent with human rights prescriptions and distributes the burden of investigation, prosecution, and punishment of alleged offenders more equitably among states, will depend on further development of the international law framework and its domestic implementation.’<sup>385</sup>

At the national level of capacity building measures, as outlined by this research, consideration should be given to addressing the domestic legal context and deficiencies existed in legislations. Strong political will and social demand on preserving ocean governance goals and ultimately boosting a coordinated mechanism to address maritime security challenges are also necessary. It is also noteworthy to underline that the component ‘key to enlarging regional maritime security cooperative networks will be the development of mutual understanding of each state’s interests and the use of that knowledge to creatively tailor their relationships in

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<sup>383</sup> Bruce A. Elleman, Andrew Forbes, David Rosenberg, *Op.cit*, at 146.

<sup>384</sup> Peter Chalk, *Evolving Dynamics of Piracy and Armed Robbery at Sea in the Modern Era: Scope, Dimensions, Dangers and Policy Responses*, *Op.cit*, at 14.

<sup>385</sup> John Garofano, Andrea J. Dew, *Op.cit*, at 148-9.

order to maximize value and minimize risk.”<sup>386</sup> This will definitely add to effective and efficient outcomes of the maritime operations to strengthen security in the region.

## **Final Remarks**

The overlook through the existing legal instruments provides this clear understanding that the United Nations Convention on the Law Of the Sea (1982) and its predecessor, the Convention on the High Seas (1958), together with the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA) and its 2005 Protocol, the 1979 Hostages Convention and 2000 United Nations Convention against Transnational Organized Crime (UNTOC) have set an effective legal framework and a comprehensive toolbox for the arrest, prosecution and punishment of perpetrators of acts of kidnap for ransom and ship hijacking and all other illicit crimes including drug and contraband smuggling and money laundering.

The current modus operandi of all illegal activists at seas in a comparative approach clearly characterized by the use of the latest information technologies and highly adaptive lucrative structures which in contrast necessitates applying a proactive and flexible approach to achieve the prosperity in confronting with those ocean criminals. While pirates and criminals have been taking advantage of using information and advanced communications and technologies in their criminal operations, the organizational capacity of financial criminals networks clearly demonstrate the sophistication of the illegal activities and organized maritime crimes in the region.

The regional organized crimes will be eradicated only through such a comprehensive and multidimensional approach, including the establishment of alternative activities for the coastal communities, the establishment of the judicial system to reduce impunity for wrongdoers, an improvement in preventive measures for vessels transiting the region due to the sophisticated activities of criminal networks and activists. This would enable key stakeholders in regional maritime security to better adapt their activities in providing safety and security in waterways and the entire Indian Ocean region. Furthermore, governments in the region should

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<sup>386</sup> John F. Bradford, *Op.cit*, at 488.

strengthen their commitment to international obligations deriving from binding international instruments in a way that an arresting state has an obligation to either prosecute the alleged offenders in its courts or extradite them to the requesting state.

In this respect, a more proactive and comprehensive approach is not only desirable but indeed essential. Iran acting as its separate part will continue to contribute to better implementation of existing international and regional instruments regarding maritime security and furthermore to better involve in law enforcement initiatives of the Indian Ocean holistic cooperative mechanisms. International law and regional arrangements between States and regional organizations provide appropriate legal basis to this end.

However, the whole international community's response must be integrated toward the adverse effects of maritime organized crimes which continue to be considered as a serious threat to regional and international shipping and security. Besides, considerations should be given to develop more robust mechanisms to address lack of capacity and security challenges in the Indian Ocean region and existence of underpinnings for the lack of a regional multileveled maritime policy.

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