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# Addressing Maritime Violence through a Changing Dynamic of International Law-Making: Supplementation within Evolution

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## Abstract

Violence at sea has long been a problem for the international community, although the nature and preponderance of incidents has evolved over time. This issue was dealt with in a cursory manner in the 1982 United Nations Convention on the Law of the Sea and therefore states have had to develop the legal framework through other instruments in order to address growing problems of maritime violence.

This thesis examines mechanisms of change in the development of international law concerning maritime violence. It considers how international law has responded to this threat, and analyses a variety of different law-making techniques. This study observes that major international law-making activities concerning maritime violence in the recent decades have been in response to international incidents and crises, such as the *Achille Lauro*, the September 11 attacks, and the Somali piracy crisis. Counterfactually speaking, such law-making acts would not have taken place if these crises had not happened.

The study also notes another shift of focus in making international rules aiming to tackle maritime violence away from customary international law and multilateral treaties towards an incremental dependence on United Nations Security Council resolutions, International Maritime Organization's initiatives, regional cooperative measures, and treaty interpretation techniques for filling the gaps left in the United Nations Convention on the Law of the Sea.

With this shift in law-making in mind, the thesis first explores gaps in law regarding piracy and terrorism at sea and reviews the negotiation of two major maritime terrorism treaties, i.e. the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and its 2005 Protocol. Secondly, it then inspects the United Nations Security Council's law-making activities in combating terrorism and piracy. Thirdly, it surveys the creation and evolution of the Proliferation Security Initiative and also scrutinises the United States-led bilateral ship-boarding agreements for combating transportation of weapons of mass destruction. Finally, it compares and contrasts the regional approaches across Asia, Africa and Europe in the fight against piracy and armed robbery at sea.

The thesis contends that each of the law-making technique employed in fighting maritime violence is not alternative or optional to one another, but rather used in a supplementary fashion to the overarching framework of the law of the sea.

## Declaration of Original Work

I certify that this thesis I have presented for examination for the PhD degree of the University of Edinburgh is solely my own work. It has not been submitted for any other degree or professional qualification.

Winston Yu-Tsang Wu
4 December 2017

# Table of contents

# Abbreviations

| | |
|---|---|
| ASEAN | The Association of Southeast Asian Nations |
| BYIL | British Yearbook of International Law |
| CUP | Cambridge University Press |
| Djibouti Code of Conduct | Code of Conduct concerning the Repression of Piracy and Armed Robbery against Ships in the Western Indian Ocean and the Gulf of Aden |
| DJILP | Denver Journal of International Law and Policy |
| EEZ | Exclusive Economic Zone |
| EJIL | European Journal of International Law |
| EU | European Union |
| GYIL | German Yearbook of International Law |
| HILJ | Harvard International Law Journal |
| ICJ | International Court of Justice |
| ICLQ | International and Comparative Law Quarterly |
| ICLR | International Community Law Review |
| IJMCL | International Journal of Marine and Coastal Law |
| ILC | International Law Commission |
| ILM | International Legal Materials |
| ILR | International Law Reports |
| IMB | International Maritime Bureau |
| IMO | International Maritime Organization |
| ISC | Information Sharing Centre |
| ITLOS | International Tribunal for the Law of the Sea |
| IYBHR | Israel Yearbook on Human Rights |
| IYIL | Italian Yearbook of International Law |
| JCSL | Journal of Conflict and Security Law |

| | |
|---|---|
| JICJ | Journal of International Criminal Justice |
| JMLC | Journal of Maritime Law and Commerce |
| LJIL | Leiden Journal of International Law |
| LPICT | Law and Practice of International Courts and Tribunals |
| MLLWR | Military Law and the Law of War Review |
| NGOs | non-governmental organizations |
| NYIL | Netherlands Yearbook of International Law |
| ODIL | Ocean Development and International Law |
| OUP | Oxford University Press |
| PCA | Permanent Court of Arbitration |
| PSI | Proliferation Security Initiative |
| QIL | Questions of International Law |
| ReCAAP | Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia, 2004, 2398 UNTS 199; (2005) 44 ILM 839. |
| SUA Convention | Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 1988, 1678 UNTS 201 |
| SUA Protocol | Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 2005<br>IMO Doc. LEG/CONF.15/21, 1 November 2005 |
| UN | United Nations |
| UN Charter | Charter of the United Nations, 1945 |
| UNCLOS | United Nations Convention on the Law of the Sea, 1982 |
| UNGA/GA | United Nations General Assembly/General Assembly |
| UNSC/SC | United Nations Security Council/Security Council |
| VCLT | Vienna Convention on the Law of Treaties, 1969 |
| VJIL | Virginia Journal of International Law |
| WMD | Weapons of Mass Destruction |
| Yaoundé Code of Conduct | Code of Conduct concerning the Repression of Piracy, Armed Robbery against Ships, and Illicit Maritime Activity in the West and Central Africa |
| YJIL | Yale Journal of International Law |

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**Chapter 1**

# Maritime Violence and the Coherent Development of International Law-Making

'Change begets change. Nothing propagates so fast.'
Charles Dickens, *Martin Chuzzlewit*, Chapter 18 (1844).

'Through my academic life, I tried to change the law, especially at the College. In this vein, I always supported and sought changes in the law of the sea.'

René-Jean Dupuy (1993)[1]

## I. Introduction

This study concerns maritime violence and international law-making in the changing world. The issue deserves a thorough analysis for two reasons. First, maritime violence is politically-oriented, from its nature and evolution in history.[2] Maritime violence has caused profound political and legal problems in the past decades, thus it needs to be regulated by international law. There are obvious gaps in law for dealing with maritime violence. For example, the well-known *Achillie Lauro* hijacking in 1985[3] and the recent Somali piracy phenomenon[4] indicated that new

[1] René-Jean Dupuy (1918-1997), a French international lawyer, this quote derives from Cassese's 'Interview with René-Jean Dupuy: June 1993', A Cassese, *Five Masters of International Law: Conversations with R.-J. Dupuy, E. Jiménez de Aréchaga, R. Jennings, L. Henkin and O. Schachter* (Hart 2011) 23-24.; Lagrange observed that Professor Dupuy's greatest merit was 'constantly remaining aware of international law as a dynamic system subjected to changes triggered by the social system, indeed like any historical phenomenon.' E Lagrange, 'The Thoughts of René-Jean Dupuy: Methodology or Poetry of International Law?' (2011) 22 *EJIL* 425, 431.

[2] G Simpson, 'Piracy and the Origins of Enmity' in M Craven and M Fitzmaurice (eds.) *Time, History and International Law* (Brill 2006) 219.; G Chaliland and A Blin, *The History of Terrorism: From Antiquity to Al Qaeda* (University of California Press 2007)

[3] See Chapter 3; and for example, MK Bohn, *The Achille Lauro Hijacking: Lessons of Politics and Prejudice of Terrorism* (Brassey's US 2004); A Cassese, *Terrorism, Politics and Law: the Achille Lauro Affair* (Polity 1989); GP McGinley, 'The *Achille Lauro* Affair: Implication for International Law' (1985) 52 *Tennessee Law Review* 691.; GR Constaninople, 'Towards a New Definition of Piracy: The *Achille Lauro* Incident' (1986) 25 *VJIL* 723.

[4] See Chapter 4; for example, JG Dalton et al, 'Introductory Note to United Nations Security Council: Piracy and Armed Robbery at Sea: Resolutions 1816, 1846, 1851 (2009) 48 *ILM* 129.; B van Ginkel and F-P van der Putten (eds.) *The International Response to Somali Piracy: Challenges and*

rules and cooperative measures needed to be created for filling those legal gaps.

Second, in a general sense about the nature of law, 'law must be stable and yet it cannot stand still. Hence all thinking about law has struggled to reconcile the conflicting demands of the need of stability and of the need of change.'[5] In a specific sense of international law, it has been noticed that 'whether by treaty or custom, general international law is difficult to make or change.'[6] Likewise, it has also been observed that traditional sources doctrine of international law has become less suited to the need of the changing international community.[7]

This research is trying to answer five questions: (1) What are the mechanisms of change in the sense of developing international law for tackling maritime violence? (2) What are the trigger and catalyst for making laws in the fight against violence at sea? (3) What is the trend of international law-making in relation to maritime violence? (4) Did the law develop in a coherent way? (5) What lessons can be learned from the law-making history in this area?

In this research, maritime violence covers crimes of maritime piracy and terrorism, including the transportation of Weapons of Mass Destruction (WMD) at sea.[8] It may seem at the first sight that a concrete concept of crimes of piracy or

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*Opportunities* (Martinus Nijhoff 2010); E Papastavridia, *The Interception of Vessels on the High Seas: Contemporary Challenges to the Legal Order of the Oceans* (Hart 2013) 161-197.; T Treves, 'Piracy, Law of the Sea, and Use of Force: Developments off the Coast of Somalia' (2009) 20 *EJIL* 399.; D Guilfoyle, *Shipping Interdiction and the Law of the Sea* (CUP 2009) 61-74.

[5] R Pound, *Interpretation of Legal History* (CUP 1923) 1.

[6] L Henkin, *International Law: Politics and Values* (Kluwer Law International 1995) 42.

[7] W Friedman, *The Changing Structure of International Law* (Stevens and Sons 1964) 370.

[8] There is no general accepted definition concerning maritime violence, but piracy and maritime terrorism are considered in the scope of maritime violence. MQ Meija, Jr, 'Defining Maritime Violence and Maritime Security' in PK Mukherjee et al (eds.) *Maritime Violence and Other Security Issues at Sea* (WMU Publications 2002) 27.; S Davidson, International Law and the Suppression of Maritime Violence' in R Burchill et al (eds.) *International Conflict and Security Law* (CUP 2005) 265.; MH Nordquist et al (eds.) *Legal Challenges in Maritime Security* (Martinus Nijhoff 2008).

terrorism at sea should be defined here; however, there is no need to do that, because those available concepts and gaps in existing international law are fundamental elements for developing the thesis. They will be discussed in subsequent chapters.

## II. Theoretical Framework

Before proceeding to the general theoretical framework for analysis, it would be helpful for clarifying the concept of 'law-making' in the first place. The nature of international law-making is continuous and no-ending phase, so observed by Danilenko.[9] The reason is straightforward, international law has to reflect the changing conditions in the international community. He categorised two general ways of law-making for accommodating the changing needs. First, it involves law-making in new areas, which indicates issues or problems ungoverned by international law. The second way is to 'reflects the need for a constant upgrading and refinement of the already existing law'.[10] The two ways of international law-making do not necessarily exclude one another. For example, to upgrade a treaty law like 1988 SUA Convention can also cover new areas regarding the transportation of WMD at sea.[11]

In addition, the term international 'law-making' shows a semantic shift in literature. Klabbers argues:

> The term 'law-making' has come to replace the more traditional term 'sources doctrine', presumably because 'law-making' carries more dynamic and politically astute overtones. 'Sources' suggest that the law springs somewhere, in much the same way as a river may have its source in a mountain stream; 'law-making' on the other hand, evokes a

[9] G M Danilenko, *Law-Making in the International Community* (Martinus Nijhoff 1993) 1.
[10] Ibid, 1-5.
[11] See Chapter 3.

> less pastoral image and is far more suggestive of law being man made and, possibly, coming in many different guises.[12]

In other words, by using the term international law-making, this study is trying to capture more dynamic aspects of the legal development about maritime violence.

## A. Incident and Crisis as Law-Making Trigger

International incidents and crises have the potential for providing good atmosphere for international law-making activities easier and speedier. It is not a new idea to say that some of the historic momentum for developing international law was based on international incidents and crises.[13] Charlesworth once made a comment that 'international lawyers revel in a good crisis. A crisis provides a focus for the development of the discipline and it also allows international lawyers the sense that their work is of immediate, intense relevance.'[14]

Incidents and crises catch our eyes easily, which means incidents and crises facilely capture political figures, diplomats, journalists and international lawyers' attention. Well-known incidents and crises so effortlessly attract everyone's

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[12] J Klabbers, *International law* (CUP 2013) 40.; this semantic change is represented by, A Boyle and C Chinkin, *The Making of International Law* (OUP 2007)

[13] WM Reisman and AR Willard, *International Incidents: The Law that Counts in World Politics* (Princeton University Press 1988); R Withana, *Power, Politics, Law: International Law and State Behaviour during International Crises* (Martinus Nijhoff 2008); WV Genugten and M Bulterman, 'Crises: Concern and Fuel for International Law and International Lawyers' (2013) 44 *NYIL* 1.; B Authers and H Chalesworth, 'The Crisis and the Quotidian in International Human Rights Law' (2013) 44 *NYIL* 19.; JM Armaya-Castro, 'International Refugees and Irregular Migrants: Caught in the Mundane Shadow of Crisis' (2013) 44 *NYIL* 65.; E Bikundo, 'Saving Humanity from Hell: International Criminal Law and Permanent Crisis' (2013) 44 *NYIL* 89.; K Mickelson, 'Between Crisis and Complacency: Seeking Commitment in International Environmental Law' (2013) 44 *NYIL* 139.; S Kirchner, 'Effective Law-Making in Times of Global Crisis: A Role for International Organizations' (2010) 2 *Goettingen Journal of International Law* 267.

[14] H Charlesworth, 'International Law: A Discipline of Crisis' (2002) 65 *Modern Law Review* 377. However, her opinion was just contrary to the usefulness of crises and incidents in international law. She thinks that taking the Kosovo crisis as a case study, the crisis research model contains many limitations. For example, the negotiability of facts; the lack of analytical progress, which means to analyse a crisis without taking previous crises or relevant incidents into consideration; or to concentrate on some series of events and often to miss the larger picture, see ibid, 382-386.

concern.[15] It has been observed, the interest in incidents is hardly novel, the point is that most incidents and crises are highly politically oriented.[16]

International lawyers basically admit that 'there can never be a complete separation between law and policy…the inextricable bonds linking law and politics must be recognised.' [17] Likewise, as claimed by Boyle and Chinkin, that international law-making is not purely undertaken by lawyers, 'It is a political activity, which requires above all the political initiative, energy and skill to set the process in motion sustain it thereafter.'[18] Furthermore, as Ranganathan rightly observed, 'the claim that international law is political appears everywhere; the difference lies in the perceptions of the character and modes of its politics, and of how they relate to international politics *per se*.'[19]

In terms of analysing the international political influence from the incidents and crises to real law-making process and results, this research takes an idea as the starting point: international law is a process of communication among all relevant actors involving a series of ongoing authoritative decisions.[20] This is the approach developed by the so called New Haven School, or policy-oriented perspective of

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[15] O Gross and FN *Aoláin, Law in Times of Crisis: Emergency Powers in Theory and Practice (CUP 2006)*

[16] WM Reisman, 'International Incidents: Introduction to a New Genre in the Study of International Law' in *International Incidents: The Law that Counts in World Politics* 3-24,; WM Reisman and AR Willard, 'The Study of Incidents: Epilogue and Prologue' in ibid, 263-270.

[17] MN Shaw, *International Law* (CUP, 6th edition 2008) 11.; KE Whittington et al, 'The Study of Law and Politics' in KE Whittington et al (eds.) *The Oxford Handbook of Law and Politics* (OUP 2008) 3.;B Simmons, 'International Law and International Relations' in ibid, 187.

[18] Boyle and Chinkin, *The Making of International law* 103.; Louis Henkin also argued that 'law-making is a political activity, the resulting law is determined by political forces in the system.' See L Henkin, *International Law: Politics and Values* (Kluwer Law International 1995) 43.; R Kolb, *Theory of International Law* (Bloomsbury 2016) 279-291.

[19] Original emphasis, see S Ranganathan, *Strategically Treaty Conflicts and the Politics of International Law* (CUP 2014) 17.

[20] R Higgins, *Problems and Process: International Law and How We Use It* (Clarendon 1994) 10.; see also J Crawford, 'Chance, Order, Change: The Course of International Law', (2013) 365 *Recueil des Cours* 9, 21-22.

international law.[21] A general feature of this approach is that it does not focus on analysis of international rules; instead, it concerns more on how law-making policies and legal decisions are made.[22] Moreover, the New Haven School does not only consider the influence of states and state officials to international law-making, it also takes international organizations, NGOs, the media, and significant events into consideration.[23] It was based on this general feature that a group of the New Haven School scholars took some incidents and crises as an analytical factor for observing how specific incidents and crises shape international norms, particularly under the context that traditional sources of international law are not fully applicable.[24]

In considering international law-making, the main concerns of this incident analytical perspective draw inferences from international politics and the expectations of politically relevant actors.[25] This incident method, as Falk argued, constitutes the discrete interactions between international law and politics,[26] it also 'provides the best available means of comprehending the legislative potential of facts in relations to different topics and different geopolitical configurations on a local, regional or global scale.'[27]

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[21] LC Chen, *An Introduction to Contemporary International Law: A Policy-Oriented Perspective* (OUP, 3rd edition 2015) 14-21.; WM Reisman, 'The Quest for World Order and Human Dignity in the Twenty First Century: Constitutive Process and Individual Commitment', (2012) 351 *Recueil des Cours*, Chapter V.

[22] WM Reisman, 'International Lawmaking: A Process of Communication: The Harold D. Lasswell Memorial Lecture' American Society of International Law Proceedings (1981)' in M Koskennemi (ed.) *Sources of International Law* (Ashgate 2000) 497.

[23] WM Reisman, 'Unilateral Action and Transformation of the World Constitutive Process: The Special Problem of Humanitarian Intervention' (2000) 11 *EJIL* 3.

[24] WM Reisman, 'International Incidents: Introduction to a New Genre in the Study of International Law' in WM Reisman and AR Willard, *International Incidents: The Law that Counts in World Politics* 3, 5.; WM Reisman and AR Willard, 'The Study of Incidents: Epilogue and Prologue' in ibid, 263, 268.

[25] AR Wllard, 'Incidents: An Essay in Method' in WM Reisman and AR Willard, *International Incidents: The Law that Counts in World Politics* 25.

[26] R Falk, 'The Validity of the Incidents Genre Feature' (1987) 12 *YJIL* 376, 378.

[27] Ibid, 379.

In addition, scrutinising international responses of incidents 'makes us appreciate not only the pervasiveness of law but also its embeddedness in geopolitics and its subordination to power dynamics.'[28] Evaluating the law-making potential from incidents in effect helps international lawyers to see international law-making and norm-shaping through the lens of political advisers and foreign policy makers.[29] Moreover, to examine the impact of incidents with respect to the formation of international law is to equip 'non-lawyers to discern non-regulative functions of international law-for example, the crystallization of a controversy through the invocation of legal justifications to articulate opposing claims-as well as the play of power variables upon regulative expectations.'[30] Accordingly, compared to other theoretical approaches to the study of international law,[31] the New Haven School approach contains the most dynamic character between law and policy, action and reaction, stimulate and response.[32]

In the study, it shows that incidents and crises are particularly important to the development of international law concerning maritime violence. Counterfactually speaking, relevant law-making acts would probably not have taken place if these crises and incidents had not happened.[33] To sum up, incidents and crises triggered

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[28] Ibid, 380.

[29] Reisman, 'International Incidents: Introduction to a New Genre in the Study of International Law' 5-6.; Resiman and Willard, 'The Study of Incidents: Epilogue and Prologue' in WM Reisman and AR Willard, *International Incidents: The Law that Counts in World Politics* 263, 266-268.

[30] Ibid.

[31] See SR Ratner et al 'Symposium: Method in International Law (1999) 93 *AJIL* 291.; P Allot et al, *Theory and International Law: An Introduction* (BIICL 1991); I Scobbie, 'Wicked Heresies or Legitimate Perspectives? Theory and International Law' in MD Evans (ed.) *International Law* (OUP, 2nd edition 2006) 83.; PF Diehl and C Ku, *The Dynamics of International Law* (CUP 2010); P Allot et al, *Theory and International Law: An Introduction* (BIICL 1991)

[32] H Saberi, 'Yale's Policy Science and International Law: Between Legal Formalism and Policy Conceptualism' in A Orford et al (eds.) *The Oxford Handbook of the Theory of International Law* (OUP 2016) 427.; R Kolb, *Theory of International Law* (Bloomsbury 2016) 279, 289-291.; A Bianchi, *International Law Theories: An Inquiry into Different Ways of Thinking* (OUP 2016) 91-109.

[33] H Duffy, *The War on Terror and the Framework of International Law* (CUP 2005); G Nesi (ed.),

the political and law-making forces for stimulating change in the fight against maritime violence.

## B. Relevant Incidents and Crises

There are two sets of incidents that have driven law-making in relation to maritime violence in the last two decades: increases in piracy and terrorism at sea.

Whilst piracy has a long history,[34] it has resurfaced in recent years as a major challenge for maritime law enforcement. In particular, Somali pirates have caught our eyes in the past decade.[35] Geopolitically, the waters of Indian Ocean and the Gulf of Aden are considered as critical sea lanes of communication (SLOC) that link Europe and the Middle East.[36] Over 20,000 ships a year pass this SLOC with 12% of the world's oil supply,[37] and hence it stimulated the great powers and shipping industry to calculate the economic cost.[38]

It may be a bit difficult to identify which incident was serious enough to let the international community start to pay attention to the gaps of international law in dealing with pirates. However, there were two incidents which made international

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*International Cooperation in Counter-Terrorism: The United Nations and Regional Organizations in the Fight against Terrorism* (Ashgate 2006)

[34] BH Dubner, *The International Law of Sea Piracy* (Martinus Nijhoff 1980); AP Rubin, *The Law of Piracy* (Transnational Publishers, 2nd edition 1998); D Heller-Roazen, *The Enemy of All: Piracy and the Law of Nations* (Zone Books 2009).; PB Birnie, 'Piracy: Past, Present and Future' (1987) 11 *Marine Policy* 163.

[35] R Geib and A Petrig, *Piracy and Armed Robbery at Sea: The Legal Framework for Counter-Piracy Operations in Somalia and the Gulf of Aden* (OUP 2011); see also J Kraska, *Contemporary Maritime Piracy: International, Strategy and Diplomacy at Se*a (Praeger 2011); E Papastavridia, *The Interception of Vessels on the High Seas: Contemporary Challenges to the Legal Order of the Oceans* (Hart 2013) 161-196.

[36] JR Holmes, 'The Interplay between Counterpiracy and Indian Ocean Geopolitics' in B van Ginkel and F van der Putten (eds.) The *International Response to Somali piracy: Challenges and Opportunities* (Leiden Nijhoff, 2010) 153.

[37] J Kraska and B Wilson, 'Fighting Pirates: the Pen and the Sword', *World Policy Journal* (Winter 2008/9) 41.

[38] J Kraska, 'Freaknomics of Maritime Piracy' 16 *Brown Journal of World Affairs* (2009-2010) 109.

headlines.

The first one was World Food Programme ships attacked by Somali pirates in 2007, and that incident was explicitly mentioned in the UNSC resolution 1816.[39] The second one was the French luxury yacht *Le Ponant* attacked and boarded by Somali pirates in April 2008.[40]

At the peak of the Somali piracy phenomenon, it was estimated that Somali piracy cost the international community over one billion US dollars a year from increased insurance premiums, freight expenses, and the cost of rerouting ships to avoid shipping through some dangerous areas.[41] The shipping insurance rates have risen to 20,000 US dollars per voyage in 2009, and this is a forty fold increase compared to year 2008.[42]

A report published in 2011 on the economic cost of Somali piracy found that the total money spent in 2011 was between 6.6 to 6.9 billion US dollars, and the shipping industry bore 5.3 to 5.5 billion US dollars, which is about 80% of these costs The governmental spending on Somali pirates was about 1.3 billion US dollars,

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[39] See the Preamble of UNSC Resolution 1816, UN Doc S/RES/1816 (2 June 2008); 'New pirate attack on aid ship; WFP urges high-level international action against Somali piracy' , World Food Programme, 21 May 2007, https://www.wfp.org/news/news-release/new-pirate-attack-aid-ship-wfp-urges-high-level-international-action-against-somali-piracy

[40] 'France: Pirates Captured, Hostages Freed', CBS News, 11 April 2008, http://www.cbsnews.com/news/france-pirates-captured-hostages-freed/ ; P Lehr, 'Security Council Resolutions on Somali Piracy' in V Popovski and T Fraser (eds.), *The Security Council as Global Legislator* (Routledge 2014) 143, 146.; See for example, Wikipedia contains some information about those incidents, it may not be complete, but are all well known incidents, https://en.wikipedia.org/wiki/List_of_ships_attacked_by_Somali_pirates

[41] RO King, 'Ocean Piracy and Its Impact on Insurance' CRS Report for Congress, R44081 (December 3 2008); Stephanie Hanson, "Combating Maritime Piracy," Backgrounder, Council for Foreign Relations (January 7, 2010), http://www.cfr.org/publication/18376/combating_maritime_piracy.html

[42] R Gilpin, "Counting the Costs of Somali Piracy," United States Institute of Peace Working Paper, June 2009. http://www.usip.org/files/resources/1_0.pdf

about 19.5% of the total cost.[43]

The Financial Action Task Force (FATF) on money laundering also estimated that the total ransom money paid to Somali pirates in 2006 was 5 million US dollars; 25 million US dollars in 2007; 70 million US dollars in 2008; 80 million US dollars in 2009; and then 180 million US dollars in 2010.[44]

But this piracy problem does not only happen in the Gulf of Aden or off the coast of Somalia; piratical acts also can be found in Western Africa and Southeast Asia.[45] The latest report issued in 2016 by Oceans Beyond Pirates (OBP) shows that the situation in the Gulf of Aden area is getting better in 2015; the piracy attacks in Southeast Asia also in steep declines in 2015. However, the Gulf of Guinea in West Africa has become the most dangerous place in facing pirates at the same time. It found that the economic cost in Western Indian Ocean, including the coast of Somalia was 1.32 billion US dollars, 73% of which was borne by shipping industry, other expenditure was shared by navies. In the Gulf of Guinea, the economic cost was about 719.6 million US dollars, 61% of the cost was borne by the shipping industry, and naval expenditure was about 276 million US dollars. In the Southeast Asia, the cost of stolen goods and stolen cargos combined together was about 10 million US dollars.[46]

As alluded above, these incidents and the cost of piracy made the UNSC take

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[43] Ocean beyond Piracy, *The Economic Cost of Somali Piracy, 2011* (One Earth Future Foundation, 2011) 1.

[44] FATF Report, *Organised Maritime Piracy and Related Kidnapping for Ransom* (FATFJuly 2011) 18.

[45] P Lehr (ed.), *Violence at Sea: Piracy in the Age of Global Terrorism* (Routledge 2007); MN Murphy, *Small Boats, Weak States, Dirty Money: Piracy and Maritime Terrorism in the Modern World* (Columbia University Press 2009)

[46] 'The State of Maritime Piracy: the Economic and Human Cost 2015' (OBP 2016) http://oceansbeyondpiracy.org/reports/sop2015

action and it has issued more than a dozen resolutions for fighting the problem.[47] In addition, some incidents occurred in Southeast Asia which also made regional states reached the ReCAAP in 2004 for dealing with regional piracy problem.[48]

While the above survey indicates that serial incidents and crises reflect the inner motive for international law-making in relation to maritime piracy, the economic and cost consideration has been deep within the political actions. However, international responses to terrorism were different because relevant actions reflected more political and strategic thoughts, simultaneously with the lead of the US.

It is not necessary for present purposes to comprehensively discuss and define the concept of maritime terrorism,[49] but rather it is sufficient to illustrate three different types of maritime terrorism incidents.[50] The first is the *Achille Lauro* type, which was about some terrorists conducted internal hijacking activity on the high seas. This incident and gaps in the law resulted in the creation of the SUA Convention in 1988.[51] The second is the *USS Cole* type, which was a US warship attacked by terrorist bombing in a Yemen's port, solely under a state's sovereignty. The third is the *So San* or *BBC China* type,[52] which represents some legal gaps in interdicting ships transferring WMD on the high seas. The *So San* and *BBC China*

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[47] See Chapter 4.
[48] See Chapter 6.
[49] MS Karim, *Maritime Terrorism and the Role of Judicial Decisions in the International Legal Order* (Martinus Nijhoff 2016) 40-45.; G Luft and A Korin, 'Terrorism Goes to Sea' (2004) 83 *Foreign Affairs* 61.
[50] Some detailed illustration in Chapter 3 and 5.; more relevant incidents, J Kraska and R Pedrozo, *International Maritime Security Law* (Mrtinus Nijhoff 2013) 739-744.
[51] See Chapter 3. For example, N Ronzitti (eds.) *Maritime Terrorism and International Law* (Martinus Nijhoff 1990); T Treves, 'The Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation' (1998) 2 *Singapore Journal of International & Comparative Law* 541.; CC Joyner, 'Suppression of Terrorism on the High Seas: The 1988 IMO Convention on the Safety of Maritime Navigation' (1989) 19 *IYBHR* 343.
[52] *So San* and *BBC China* both are ships' name. *BBC China* has nothing to do with BBC or China, see Chapter 5.

incidents let the US established the PSI in 2003.[53]

One significant factor should be noted that there was no such a speedy political willingness or international law-making response about terrorist activities during the Cold War, especially compared to the numbers of relevant legal documents issued after the 911 incident.[54] In fact, the law-making speed was never as quick as how and what the UNSC did for responding the 911 incident.[55] This kind of heavy weight intervention to combating international terrorism and counter-proliferation of WMD would be unthinkable during the Cold War. In other words, a bigger picture of international law-making about maritime violence has been under the context of the 911 terrorist attacks in the past decade. This phenomenon reinforces the theme of this study that there is a changing dynamic between politics and law, thus illustrates the reality that 'politics is much closer to the heart of the system than is perceived within national legal orders, and power much more in evidence.'[56]

## C. Gaps in Law

Gaps in law are naturally about the motivation, incentives or practical problems

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[53] See Chapter 5; For example, G Venturini, 'The Proliferation Security Initiative: A tentative Assessment' in JL Balck-Branch and D Fleck (eds.) *Nuclear Non-Proliferation in International Law*, Volume II (TMC Asser 2016) 213.; M Byer, 'Policing the High Seas: the Proliferation Security Initiative' (2004) 98 *YJIL* 526.; CH Allen, 'Limits on the Use of Force in Maritime Operations in Support of WMD Counter-Proliferation Initiatives' (2005) 35 *IYBHR* 115.; WHV Heinegg, 'The Proliferation Security Initiative: Security vs Freedom of Navigation?' (2005) 35 *IYBHR* 181.; S Kaye, 'The Proliferation Security Initiative in the Maritime Domain' (2005) 35 *IYBHR* 205.; S Kaye, 'Freedom of Navigation in a Post 9/11 World: Security and Creeping Jurisiction' in D Freestone et al (eds.) *The Law of the Sea: Progress and Prospect* (OUP 2006) 347.

[54] See the compiled documents provided in B Saul (ed.) *Terrorism* (Hart 2012)

[55] See Chapter 4.; for example, M Happold, 'Security Council Resolution 1373 and the Constitution of the United Nations' (2003) 16 *LJIL* 593.; B Olivia and P van Ham(eds.) *Global Non-Proliferation and Counter-Terrorism: the Impact of UNSCR 1540* (Brookings Institution 2007)

[56] MN Shaw, *International Law* (CUP, 7th edition 2014) 9.; RH Steinberg and JM Zasloff, 'Power and International Law' (2006) 100 *AJIL* 64.; O Yasuaki, 'International Law in and with International Politics: The Functions of International Law in International Society' (2003) 14 *EJIL* 105.; V Lowe, The Politics of Law-Making: Are the Method and Character of Norm Creation Changing?' in M Byers (ed.) *The Role of Law in International Politics* (OUP 2000) 207.

in law. As Lauterpacht queried,

> In what, then, does the peculiarity of the question of gaps in international law lie?...They are the scarcity and indefiniteness of substantive rules of international law as the result of the comparative immaturity of the system, of the scarcity of precedent, both judicial and in the practice of States, and of the imperfections of law-creating and law-amending process.[57]

The purpose here is not going to conceptualise what the gap or silence in law is or what legal ambiguity or uncertainty is about. It may do so in terms of different cases and scenarios.[58] For example, in the *Nuclear Weapons Advisory Opinion*, whether that case produces a '*non liquet*' situation once aroused some ICJ judges and commentators' debates.[59] This Latin term literally means 'it is not clear'.[60] Why it is not clear? Because the Court stated:

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[57] H Lauterpacht, *The Function of Law in the International Community* (OUP 1933) 70.

[58] For example, Kammerhofer suggests, 'A gap in the law or *lacuna* is the absence of something that arguably ought to be there. Gaps are a negative quantity they depend for their 'existence' on the 'other' that surrounds them.' in J Kammerhofer, 'Gaps, the Nuclear Weapons Advisory Opinion and the Structure of International legal Argument between Theory and Practice' (2009) 80 *BYIL* 333.; Quane apply the term of silence in the Kosovo Advisory Opinion, see H Quane, 'Silence in International Law' (2014) 84 *BYIL* 240.; May also compare the cases in the World Trade Organization, see I van Damme, *Treaty Interpretation by the WTO Appellate Body* (OUP 2009), Chapter 4.

[59] For example, S Neff, 'In Search of Clarity: *Non Liquet* and International Law' in KH Kaikobad and M Bohlander (eds.) *International Law and Power: Perspectives on Legal Order and Justice: Essays in Honour of Colin Warbrick* (Martinus Nijhoff 2009) 63.; D Bodansky, 'Non Liquet and the Incompleteness of International Law' in LBD Chazournes and P Sands (eds.), *International Law, the International Court of Justice and Nuclear Weapons* (CUP 1999) 153.; M Koskenniemi, 'The Silence of Law/The Voice of Justice' in ibid, 488.; P Weil 'The Court Cannot Conclude Definitely…' Non Liquet Revisited' (1998) 36 *Columbia Journal of Transnational Law* 109. MJ Aznar-Gomez, 'the 1996 Nuclear Weapons Advisory Opinion and *Non-Liquet* in International Law (1999) 48 *ICLQ* 3.; IF Dekker and WG Werner, 'The Completeness of International Law and Hamlet's Dilemma' in IF Dekker and HHG Post, *On the Foundations and Sources of International Law* (TMC Asser2003) 5.

[60] Neff, 'In Search of Clarity: *Non Liquet* and International Law', 63.; Bodansky, 'Non Liquet and the Incompleteness of International Law' 154.; The non liquet issue had been discussed before the case. See for example, H Lauterpacht, *The Function of Law in the International Community* (Clarendon 1933) 60-77, 111-134. J Stone, 'Non Liquet and the Function of Law in International Law' (1959) 35 *BYIL* 124.; I Tammelo, 'On the Logical Openness of Legal Orders: A Model Analysis of Law with Special Reference to the Logical Status of Non Liquet in International Law' (1959) 8 *AJIL* 187.

> However, in view of the current state of international law, and of the elements at its disposal, the Court cannot conclude definitely whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake….'[61]

Accordingly, gaps, *lacuana*, silence, *non liquet*, ambiguity, or uncertainty,[62] etc., all are terms used in legal scholarship for describing some elements are missing in law. Sometimes the missing is purposeful, because in diplomatic negotiation, some terms adopted was based on the willingness to compromise for reaching consensus.[63]

In other words, the objective here is simply to depict a fact: with the stimulation of international incidents and crises, the first natural response is to check whether we have sufficient international law to deal with it. A basic distinction is that, for example, in the *Achille Lauro* incident, there is no provision in UNCLOS or relevant treaties for dealing with internal hijacking on the high seas. Hence, that is a clear legal gap.[64]

On the contrary, in some of the anti-whaling activities on the high seas, whether those protesters are pirates or not, would be another question.[65] On this issue,

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[61] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion* [1996] ICJ Rep 226, para. 105. See also dissenting opinion of Judge Higgins, [1996] ICJ Rep 583.; and Judge Schwebel's dissenting opinion [1996] ICJ Rep 322.

[62] J Kammerhofer, *Uncertainty in International Law* (Routledge 2011)

[63] P Sands, *Lawless World: America and the Making and Breaking of Global Rules* (Penguin 2005) 78.

[64] See Chapter 2.

[65] the so called eco-terrorism, see JE Roeschke, 'Eco-Terrorism and Piracy on the High Seas: Japanese Whaling and the Rights of Private Groups to Enforce International Conservation Law in Neutral Waters' (2009) 20 *Villanova Environmental Law Journal* 99.; A Kanehara, 'So-Called "Eco-Piracy" and Interventions by NGOs to Protest against Scientific Research Whaling on the High Seas: An Evaluation of the Japanese Position' in CR Symmons (ed.) *Selected Contemporary Issues in the Law of the Sea* (Martinus Nijhoff, 2011) 195.; J Teulings, 'Peaceful Protests against Whaling on the High Seas—A Human Rights-Based Approach' in ibid 221.

UNCLOS provides guidance in Article 101(a), which says that 'any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft.'[66] It means that the law is there, the key is how to apply and interpret the term 'for private ends' into facts.[67] That is to say, it is more about ambiguous and uncertain aspects in its real meaning.[68]

In terms of maritime piracy, there are laws regulating piratical acts. It is a crime regulated by customary international law and codified in Article 22 of the 1958 High Seas Convention[69] and UNCLOS Article 110,[70] thus the piracy contention is more about interpretation of the definition. In other words, the piracy terms used in treaty law are no different to customary international law.

However, some relationships are not as clear as the piracy case illustrated. For example, there is no specific provision in UNCLOS regulating maritime terrorism issues, whether the crimes of maritime terrorism or any interdiction measures have been crystallised as customary international law in the making of 1988 SUA Convention and 2005 SUA Protocol would be interesting to discover. To this end, it needs to illustrate some basic relationship between treaty and custom. Also, a theoretical structure for conducting analyses in this thesis should be explained.

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[66] R Churchill, 'The Piracy Provisions of the UN Convention on the Law of the Sea--Fit for Purpose?' in P Koutrakos and A Skordas (eds.) *The Law and Practice of Piracy at Sea: European and International Perspectives* (Hart 2014) 9, 13-16.

[67] AN Honniball, 'Private Political Activists and the International Law Definition of Piracy: Acting for 'Private Ends' (2015) *36 Adelaide Law Review* 279.; R Churchill, 'The Piracy Provisions of the UN Convention on the Law of the Sea--Fit for Purpose?'16-18.

[68] See Chapter 2.

[69] Convention on the High Seas (Done at Vienna, 29 April 1958; entered into force, 30 September 1962) 450 UNTS 82.

[70] DR Rothwell and T Stephens, *The International Law of the Sea* (Bloomsbury, 2nd edition 2016) 171.; Guilfoyle, *Shipping Interdiction and the Law of the Sea* 26.; RR Churchill and AV Lowe, *The Law of the Sea* (Manchester University Press, 3rd edition 1999) 210.

## III. Changing Mechanisms for International Law-Making

The conventional beginning for the discussion of international law-making is the ICJ Statute Article 38,[71] which lists international conventions, custom, general principle of law, judicial decisions, and teachings of publicists as the sources of international law. The sources doctrine is still important in the sense that it is the starting point for identifying and applying law. However, these sources must also be able to be adapted in order to take into account the new legal challenges and unexpected incidents and crises. It is under this context, a changing dynamic of utilising other law-making tools and mechanisms is underway.

This research examines six evolving law-making tools and related mechanisms in the fight of maritime violence. They are the basic relationship between treaties and custom; the influence of judicial decisions; mechanisms in amending and modifying treaties; the hegemonic role of the US in international community; the regional approaches in making international law; the use of soft law and some international organizations' efforts.

### A. Law-Making through Multilateral Treaties and Custom

It has been observed that 'modern attempts at making the law of the sea have sought to establish an international regime of a truly global character that would be applicable to all states.'[72] However, based on the decentralised nature of the international legal system and there is 'no constitutional or jurisprudential bar to such

[71] The most comprehensive analysis on this provision, see A Pellet, 'Article 38' in A Zimmerman et al(eds.) *The Statute of the International Court of Justice: A Commentary* (OUP, 2nd edition 2012) 731-870.; Cf. J Charney, 'International Lawmaking-Article 38 of the ICJ Statute Reconsidered' in J Delbruck (ed.) *New Trends in International Lawmaking-International 'Legislation' in the Public Interest* (Dunker and Humblot 1997) 171.

[72] J Harrison, *Making the Law of the Sea*: *A Study in the Development of International Law* (CUP 2011) 1-2.

universal international lawmaking',[73] it is important to consider not only the impact of treaties and custom to the development of the law of the sea, but also how multilateral treaties and custom interact with each other and the reason why they are tools for developing universal international law.[74]

There are four types of relationship between treaty and custom. The first type refers to a situation that a treaty simply codifies and declares existing customary international law.[75] Cases of this kind include the 1961 Vienna Convention on Diplomatic Relations[76] and the 1969 Vienna Convention of the Law of Treaties.[77]

The second type refers to some rules and principles which have been crystallised as having attained customary law status in a multilateral treaty negotiation or preparation process, prior to or by the time of the adoption of that treaty.[78] Lots of this type results from the work of the International Law Commission.[79] For example, even before UNCLOS entered into force in 1994, the regime of EEZ had passed into customary international law.[80] The Court held in the 1985 *Libya/Malta Continental Shelf* case that 'the institution of the exclusive economic zone, with its rule on entitlement by reason of distance, is shown by the practice of States to have become a part of customary law.'[81]

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[73] JI Charney, 'Universal International law' (1993) 87 *AJIL* 529, 551.
[74] CW Jenks, *The Common Law of Mankind* ( Stevens & Sons 1958) 80 ff.
[75] RR Baxter, 'Treaties and Custom' (1970) 129 *Recueil des Cours* 27, 36-56.
[76] Vienna Convention on Diplomatic Relations (Done, 18 April 1961; entered into force, 24 April 1964) 500 UNTS 95.
[77] Vienna Convention of the Law of Treaties (Done, 22 May 1969; entered into force, 29 January 1980) 1155 UNTS 331; H Thirlway, 'The Sources of International Law' in MD Evans (ed.) *International Law* (OUP, 4th edition 2014) 91, 108
[78] *North Sea Continental Shelf Cases* (Germany/Denmark; Netherlands) Judgment [1969] ICJ Rep 3, paras. 61-63.
[79] H Thirlway, 'The Sources of International Law', ibid.; Crawford, 'Chance, Order, Change: The Course of International Law', (2013) 365 *Recueil des Cours* 107-108.
[80] RR Churchill and AV Lowe, *The Law of the Sea* 18.
[81] *Case Concerning the Continental Shelf* (Libya/Malta) Judgment [1985] ICJ Rep 13, para. 34.

The third type is the by-product of the second type, which relates to the near-agreements of some multilateral treaty-making process. For example, the Court suggested in the 1974 *Fisheries Jurisdiction* case, the failed 1960 law of the sea conference concerning the questions of the breadth of the territorial sea and fisheries rights did not prevent the law evolve over time. Therefore, the Court concluded that 'after the Conference, the law evolved through the practice of States on the basis of the debates and near-agreements at the Conference. Two concepts have crystallized as customary law in recent years arising out of the general consensus revealed at that Conference.'[82] In summary, customary international can be crystallised even when there was no conclusion reached in a treaty law-making conference.[83]

The fourth type concerns the situation where a multilateral treaty has entered into force, and the non-parties also think it is necessary to apply the treaty rules. Then all relevant state practices may be seen as leading the treaty law to become customary international law. For example, UNCLOS Article 121 concerning the regime of islands have been recognised by the Court as having become customary international law in the 2001 *Qatar/Bahrain* case[84] and 2012 *Nicaragua/ Colombia* case.[85] In fact, there are many examples illustrating that some UNCLOS provisions have become customary international law.[86]

In short, having in mind the interaction between treaty and custom would be helpful for considering recent international legal development regarding maritime

[82] *Fisheries Jurisdiction Case* (UK v. Iceland) Judgment [1974] ICJ Rep 3, para. 52.
[83] Y Dinstein, 'The Interaction between Customary International Law and Treaties' (2006) 322 *Recueil des Cours* 247, 359.
[84] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)* Merits, Judgment [2001] ICJ Rep 40, para. 167, 185, 195.
[85] *Territorial and Maritime Dispute* (Nicaragua v. Colombia) Judgment [2012] ICJ Rep 624, para. 139.
[86] JA Roach, 'Today's Customary International Law of the Sea' (2014) 45 *ODIL* 239.

violence.

## B. The Role of Judicial Decisions

In terms of international and national courts' role, some scholars and practitioners suggest that when there are some gaps, the courts and tribunals should exert their judicial-making role, for preserving the completeness of the legal system.[87] Put it this way, modern courts and tribunals in effect 'do more than apply the law'.[88]

One issue should be considered first, whether there is any distinction between treaty application and interpretation. A short answer is yes. As argued by Judge Shahabudden that 'since it is not possible to apply a treaty except on the basis of some interpretation of it…It seems arguable that the two elements constitute a compendious term of art generally covering all dispute'.[89] Thus logically speaking, a treaty must firstly to be interpreted then proceed to the real application stage in the context of dispute settlement.[90]

From a general legal perspective, Reisman defines application of a treaty or other international law as 'the decision function in which prescriptions are put into effect in specific instances'.[91] This is perhaps the reason why courts, no matter

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[87] For example, Judge Higgins and Lauterpacht argued this point. See *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion [1996] ICJ Rep 66.; Higgins, dissenting opinion, [1996] ICJ Rep 583.; H Lauterpacht, *The Function of Law in the International Community* 63-65.

[88] Boyle and Chinkin, *The Making of International Law* 310.; A Tzanakopoulos and CJ Tams, 'Introduction: Domestic Courts as Agents of Development of International Law' (2013) 26 *LJIL* 531.

[89] Separate Opinion of Judge Shahabudden, *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, Advisory Opinion [1988] ICJ Rep 57, 59.

[90] See also R Gardiner, *Treaty Interpretation* (OUP 2008) 26-29.

[91] WM Reisman, 'The Quest for World Order and Human Dignity in the Twenty First Century: Constitutive Process and Individual Commitment', (2012) 351 *Recueil des Cours* (2012) 13, 165.

international or national courts, do more than apply the law.[92] When they apply the law, judges must also interpret it, especially when the terms or concepts are ambiguous or uncertain, such as the requirement of 'for private ends' in committing the crime of piracy. Therefore, interpretation is seen as a mechanism for developing international law,[93] particularly if we consider that UNCLOS is a living instrument.[94]

In recent years, there are notable international and national case law concerning the interpretation and application of the UNCLOS piracy provision.[95] Based on this reality, to see whether relevant cases are consistently developed and whether through the case law that the piracy provision in UNCLOS has been modified, evolved and giving it a new meaning,[96] will also be a theme to this research. Moreover, pursuant to VCLT Article 31(2)(a) and (b), 'any agreement' relating to the treaty between all the parties or 'any instrument' which is made by one or more parties can be taken

[92] On the role of international courts' law-making role, see C Tams, 'Meta-Custom and the Court' A Study in Judicial Law-Making' (2015) 14 *LPICT* 51.; Boyle and Chinkin, *the Making of International Law*, Chapter 6.; S Talmon, 'Determing Customary International Law: The ICJ's Methodology between Induction, Deduction and Assertion' (2015) 26 *EJIL* 417.;On the role of national courts' role in developing international law, see J d'Aspremont, 'The Systemic Integration of International Law by Domestic Courts: Domestic Judges as Architects of the Consistency of the International Leal Order' in OK Fauchald and A Nolkaemper (eds.) *The Practice of International and National Courts and the (De-)Fragmentation of International Law* (Hart 2012) 141.; A Tzanakopoulos, 'Domestic Courts in International Law: The International Judicial Function of National Courts' (2011) 34 *Loyola of Los Angeles International and Comparative Law Review* 133.; A Tzanakopoulos, 'Domestic Judicial Lawmaking' in C Brolmann and Y Radi (eds.) *Research Handbook on the Theory and Practice of International Lawmaking* (Edward Elgar 2016) 222.; HP Aust et al, 'Unity or Uniformity? Domestic Courts and Treaty Interpretation' (2014) 27 *LJIL* 75.

[93] I Venzke, *How Interpretation Makes International law: Semantic Change and Normative Twists* (OUP 2012)

[94] M Wood, 'Reflections on the United Nations Convention on the Law of the Sea: A Living Instrument' in J Barrett and R Barnes (eds.) *Law of the Sea: UNCLOS as a Living Treaty* (BIICL 2016) lxxvii.; J Barrett, 'The UN Convention on the Law of the Sea: A "Living" Treaty?' in ibid 3.

[95] See Chapter 2.

[96] E Bjorge, *The Evolutionary Interpretation of Treaties* (OUP 2014); Cf. C Djeffal, *Static and Evolutive Treaty Interpretation: A Functional Reconstruction* (CUP 2016); M Fitzmaurice, 'Dynamic (Evolutive) Interpretation of Treaties: Part I' (2008) 21 *Hague Yearbook of International Law* 101.; M Fitzmaurice, 'Dynamic (Evolutive) Interpretation of Treaties: Part II' (2009) 22 *Hague Yearbook of International Law* 3.; J Harrison, 'Judicial Law-Making and the Developing Order of the Oceans' (2007) 22 *IJMCL* 283.

into account for interpreting UNCLOS. In addition to 'any subsequent practice' provided in VCLT 31(2)(b) as an element for treaty interpretation,[97] Article 31(3)(a) and (c) also provides that 'any subsequent agreement' and 'any relevant rules of international law' applicable to the parties of UNCLOS are also important for bringing change.[98]

For instance, in the *Navigational Rights* case, the ICJ interpreted a term 'for the purposes of commerce' in a bilateral treaty between Nicaragua and Costa Rica. The Court ultimately interpreted the term to include practice concerning tourism, and suggested that term is 'capable of evolving, not one fixed once and for all, so as to make allowance for, among other things, developments of international law.'[99] The ICJ also concluded that those terms 'was likely to evolve over time' hence 'to have an evolving meaning'.[100]

A similar situation was in the *Japanese Whaling* case, the Court considered that the Article VII of the 1946 International Convention for the Regulation of Whaling as 'an evolving instrument', though it did not decide to interpret the 'lethal methods' should 'avoid an adverse effect on the relevant stocks', the basic point is that international treaties are likely to evolve over time.[101]

To sum up, by analysing recent international and national case law in relation to

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[97] G Nolte (ed.) *Treaties and Subsequent Practice* (OUP 2013)

[98] See A Boyle, 'Further Development of the Law of the Sea Convention: Mechanism for Change' (2005) 54 *ICLQ* 563.; McLachlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convection' (2005) 54 *ICLQ* 279.

[99] *Dispute regarding Navigational and Related Rights (Costa Rica v Nicaragua),* Judgment, ICJ Rep [2009] 213, para. 64.

[100] Ibid, para. 66. See M Dawidowicz' The Effects of the Passage of Time on the Interpretation of Treaties: Some Reflections on Costa Rica v Nicaragua' (2011) 24 *LJIL* 201.

[101] *Whaling in the Arctic (Australia v Japan: New Zealand intervening)*, Judgment [2014] ICJ Rep 226, para. 45, 85.; see JJ Smith, 'Evolving to Conservation?: The International Court's Decision in the Australia/Japan Whaling Case' (2014) 45 *ODIL* 301.

UNCLOS piracy provision, this research will examine whether relevant cases are consistent and whether the meaning of piracy has evolved.

### C. The Incentive to Amend and Modify Treaties

Klabbers observed that 'treaty revision is a curiously under-analysed phenomenon in international law.'[102] The reason, perhaps, had been illustrated sixty something years ago by Lord McNair, 'As a question of law, there is not much to be said upon the revision of treaties'.[103] No matter how things have changed, McNair's comment still reflects certain reality.[104] The reason is because that the treaty amendment or modification issue 'is primarily political'.[105] However, the function of treaty amendment or modification is important in the sense that it is a mechanism for things to evolve and change in order to meet the new challenges.

The basic rule of treaty amendment and modification is stipulated by the 1969 VCLT Articles 39-41,[106] and whether treaty can be amended or modified mainly depending on consent of the parties.[107] However, according to Kolb, we can categorise treaty amendment and modification procedure into two types.[108]

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[102] J Klabbers, 'Treaties, Amendment and Revision' (December 2006) in *Max Planck Encyclopedia of Public International Law*, online version, para. 19.
[103] AD McNair, *The Law of Treaties* (OUP 1961) 534.
[104] D Freestone and AGO Elferink, 'Flexibility and Innovation in the Law of the Sea—Will the LOS Convention Amendment Procedures Ever Be Used?' in AGO Elferink (ed.) *Stability and Change in the Law of the Sea: The Role of the LOS Convention* (Martinus Nijhoff 2005) 169.; Harrison, *Making the Law of the Sea*, Ch. 3.; N Kontou, *The Termination and Revision of Treaties in the Light of New Customary International Law* (OUP 1994); MJ Bowman, 'The Multilateral Treaty Amendment Process: A Case Study' (1995) 44 *ICLQ* 540.; B de White, 'Rules of Change in International Law: How Special is the European Community?' (1994) *NYIL* 299.;
[105] Crawford, *Brownlie's Principles of Public International Law* 386.; A Aust, *Modern Treaty Law and Practice* (CUP, 3rd edition 2013) 232-233.
[106] On these three provisions, see O Dorr and K Schmalenbach (eds.) *Vienna Convention on the Law of Treaties: A Commentary* (Springer 2012) 699-727.
[107] B Simma, 'Consent: Strains of Treaty System' in RSJ MacDonald and DM Johnson (eds.) *The Structure and Process of International Law* (Martinus Nijhoff, 1983) 485-551.
[108] Kolb, *The Law of Treaties: An Introduction* 194 ff.

The first is the informal modification through subsequent practice. Even though legally speaking, subsequent practice is different from modification;[109] the second type is the formal amendment and modification procedure prescribed by the VCLT or by each treaty's provisions. But the distinction is 'often very fine'.[110] It should be noted that the International Law Commission has been working on this subsequent practice topic for some years.[111] An informal way of modifying the treaty had been drafted in the 1966 ILC Draft article 38 of the law of treaties; it was formulated as 'A treaty may be modified by subsequent practice in the application of the treaty establishing the agreement of the parties to modify its provisions'.[112]

Kolb explains that this draft article was deleted at the conference for the reasons: (1) This rule is customary international rule, and to accept the wording 'subsequent practice' in the treaty could undermine the stability of the VCLT as a treaty law. (2) Every state party will all eager to provide their subsequent practice if this issue is raised during the potential modification procedure and that may make the procedure more complicated.[113]

Based on this general understanding, this research tries to see whether there is possibility or incentive to amend UNCLOS and how this treaty amendment and modification mechanism works in relation to UNCLOS and maritime violence.

## D. The Impetus of US Hegemonic Law-Making

Another mechanism for accommodating changing circumstances depends on

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[109] Cf. VCLT Article 31(3)(b) and 39-41.
[110] Crawford, *Brownlie's Principles of Public International Law* 386.
[111] International Law Commission, 'Subsequent Agreement and Subsequent Practice in Relation to Interpretation of Treaties', http://legal.un.org/ilc/guide/1_11.shtml
[112] ILC, *Yearbook of the International Law Commission* (1966-II) 231 ff.
[113] Kolb, *Law of Treaties: An Introduction* 194.

great powers or say, hegemons' law-making intention and law-making activities.[114] By its nature, maritime violence concerns highly politicised issues and it has the ability to arouse public anxiety. This character makes it easier to get attention and responses from the international community. It seems that among great powers, the US has been particularly willing to take initiatives and solve the problems in the fight agaisnt maritime violence.

When it comes to the concept of hegemony, it intrinsically touches upon the relationship between law and politics again.[115] Traditional international law pattern and obligation is established at the bilateral level of relations between individual states.[116] As Simma understood, bilateralism has shifted to the direction of upholding community interest. According to his explanation, this community interest could be seen as a 'consensus be left to the free disposition of States individually or *inter se* but is recognized and sanctioned by international law as a matter of concern to all States.'[117] In fact, one aspect of bilateralism is that in the traditional bilateral foreign relations, especially when negotiating a treaty or facilitating cooperation, the smaller state is far easier to be influenced or managed by great powers. Hence the bilateral form of international law is basically shaped and 'also more receptive to exceptional rules for powerful states'.[118]

As we can see in many US-led drugs trafficking treaties signed between the US

[114] N Crisch, 'International in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order' (2005) 16 *EJIL* 369.; C Cai, 'New Great Powers and International Law in the 21st Century' (2013) 24 *EJIL* 755.
[115] SV Scott, *International Law in World Politics: An Introduction* (Lynne Rinner 2004)
[116] B Simma, 'From Bilateralism to Community Interest' (1994) 250 *Recueil des cours* 230.
[117] Simma, ibid, 233.
[118] N Crisch, 'International in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order' 390.

and some smaller states in the Caribbean Sea,[119] all reflected this pattern. Also, under the background of the PSI, the US also signed bilateral ship-boarding treaties with less powerful states,[120] such as Panama, Liberia, Malta, ranked as the top 10 of the world's leading shipping registries.[121]

Furthermore, just as Rothwell labelled the PSI as 'multi-unilateralism',[122] this term more or less described the deeds between the US and the PSI participants, Rothwell claimed, 'the phenomena of multi-unilateralism has been building over he past few years.'[123] On one hand, it was unilaterally announced by the US President Bush in 2003 in Poland. But in reality, it has attracted more than 100 states as

[119] Agreement between the United States of America and Haiti concerning Cooperation to Suppress Illicit Maritime Drug Traffic (Signed at Port au Prince October 17 1997), KAV 6079.; Agreement between the United States of America and St. Lucia concerning Maritime Counter-Drug Operations (Signed at Castries April 20 1995), KAV 4240.; Agreement between the United States of America and Barbados concerning Cooperation in Suppressing Illicit Maritime Drug Trafficking (Signed at Bridgetown June 25 1997), TIAS 12872.; Agreement between the United States of America and the Republic of Columbia to Suppress Illicit Traffic by Sea (Signed at Bogota February 20 1997), TIAS 12835.; Protocol between the United States of America and Venezuela (Signed at Caracas July 23 1997), TIAS 12876.; Agreement between the United States of America and Saint Christopher and Nevis (Signed at Basseterre April 13 1995), KAV4231.; Agreement between the United States of America and Belize (Signed at Belmopan December 23 1992), TIAS 11914.; Agreement between the United States of America and the Dominican Republic (Signed at Santo Domingo March 23 1990), TIAS 12620.; Agreement between the United States of America and Grenada (Signed at St. George May 16 1995), TIAS 12648.; Agreement between the United States of America and the Grenadines, (Signed at Kingston and Bridgetown June 29 and July 4 1995), TIAS 12676.; Agreement between the United States of America and Tobago (Signed at Port of Spain March 4 1996), TIAS 12732.; Agreement between the United States of America and Costa Rica, as Amended by the Protocol of July 2, 1999 (Signed at San Jose December 1 1998), KAV 5643.

[120] Including Antigua and Barbuda, Bahamas, Belize, Croatia, Cyprus, Liberia, Malta, Marshall Islands, Mongolia, Panama, St. Vincent and Grenadines. See the official website of the US State Department at http://www.state.gov/t/isn/c27733.htm ; See H Jessen,' United States' Bilateral Shipboarding Agreements: Upholding Law of the Sea Principles while Updating State Practice' in H Ringbom (ed.) *Jurisdiction over Ships: Post-UNCLOS Developments in the Law of the Sea* (Brill Nijhoff 2015) 50.; Guilfoyle, *Shipping Interdiction and the Law of the Sea* 246-254.

[121] International Transport Workers' Federation, http://www.itfglobal.org/en/transport-sectors/seafarers/in-focus/flags-of-convenience-campaign/; https://en.wikipedia.org/wiki/List_of_flags_of_convenience; Chapter 5.

[122] DR Rowthwell, 'The Impact of State Practice on the Jurisdictional Framework Contained in the LOS Convention: A Commentary' in AGO Elferink (ed) *Stability and Change in the Law of the Sea: the Role of the LOS Convention* (Martinus Nijhoff 2005) 145, 157.

[123] DR Rothwell, 'The Proliferation Security Initiative: Amending the Convention on the Law of the Sea by Stealth' in DD Caron and HN Scheiber (eds.) *The Oceans in the Nuclear Age: Legacies and Risks* (Brill Nijhoff 2010) 285, 293.

participants now.[124] Whether this is really unilateralism[125] in modern international law-making will be scrutinised.

A set of questions in relation to the role of US hegemony in international law had been asked and discussed some years ago. The discussion was mainly about whether, by its own capability and willingness, the US Hegemony can make some fundamental changes for promoting international community's interests, changing customary international law, or doing things unilaterally, etc.[126] One of the interesting answers was 'it is too early to tell!'.[127] Hence it might be an opportunity for this research to test how the US wield its hegemonic power for making international law concerning maritime violence. In short, the focus of hegemonic law-making will be on the role of the US.[128]

## E. Regionalism as an International Law-Making Forum

It should be noted that one clear development of international law-making is regionalism, or say, regional approaches to international law-making.[129] These

[124] As of October 2015, there are 105 countries support the PSI, see its official website, http://www.psi-online.info/

[125] P-M Dupuy, 'The Place and Role of Unilateralism in Contemporary International Law (2000) 11 *EJIL* 1.; P Sands, 'Unilateralism, Values, and International Law' (2000) 11*EJIL* 291.; R Wedgewood, 'Unilateral Action in the UN System' (2000) 11 *EJIL* 349.; A Boyle, 'EU Unilateralism and the Law of the Sea' (2006) 21 *IJMCL* 15.; G Shaffer and D Bodansky, 'Transnationalism, Unilateralism and International Law' (2011) 1 TEL 31.; M Hakimi, 'Unfriendly Unilateralism' (2014) 55 *HILJ* 105.; M Garner, 'Channeling Unilateralism' (2015) 56 *HILJ* 297.

[126] M Byers and G Nolte (eds.), *United States Hegemony and the Foundations of International Law* (CUP 2004); JF Murphy, *The United States and the Rule of Law in International Affairs* (CUP 2004); DM Malone and YF Khong (eds.) *Unilateralism and US Foreign Policy: International Perspectives* (Lynne Rinner 2003)

[127] J Nolte, 'Conclusion' in M Byers and G Nolte (eds.), *United States Hegemony and the Foundations of International Law* (CUP 2004) 491.

[128] See Chapter 5, on the analysis of US power in world politics, see JS Nye Jr., *Is the American Century Over?* (Global Future 2015); Z Brzezinski, *The Choice: Global Dominance or Global Leadership* (Basic Books 2005).

[129] J Crawford, 'Universalism and Regionalism from the Perspective of the Work of the International Law Commission' in J Crawford, *International Law as an Open System: Selected Essays* (Cameron May 2002) 575. ;WE Butler, 'Regional and Sectional Diversities in International Law' in B Cheng

regional approaches have been identified in marine environment protection,[130] economic integration [131] international security, [132] and dispute settlement mechanism,[133] etc.

Regionalism is not something difficult to imagine. Even in the UN Charter, 'regional arrangement' is stipulated in Chapter VIII, from Article 52-54. Base on the three provisions, UNSC is empowered a leading role with the coordination and cooperation of regional organizations in dealing regional affairs.[134]

On one hand, regionalism and regional approaches are positive forces in developing international law;[135] however, on the other hand, regionalism may undermine universal standards of international law and it may also create barriers to international cooperation. In other words, regionalism is potentially to be sectionalism.[136]

A concurring theme would be the fragmentation of international law.[137] Regionalism potentially has some ingredients in producing diversity and divergences in the sense of international law-making.[138] Nonetheless, as observed by Crawford,

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(eds.) *International Law: Teaching and Practice* (Stevens and Sons 1982) 45.

[130] Y Tanaka, 'The Institutional Application of the Law of *Dedoublement Fonctionnel* in Marine Environment Protection: A Critical Assessment of Regional Regimes' (2014) 57 *GYIL* 143.; DM Johnson (eds.) *Regionalization of the Law of the Sea* (Ballinger 1978); J Crawford and DR Rothwell (eds.) *The Law of the Sea in the Asian Pacific Region* (Martinus Nijhoff 1995)

[131] SY Chia and MG Plummer, *ASEAN Economic Cooperation and Integration* (CUP 2015)

[132] D Winther, *Regional Maintenance of Peace and Security under International Law* (Routledge 2014)

[133] J Crawford, 'Chance, Order, Change: The Course of International Law' 243-244.

[134] A Abass, *Regional Organizations and the Development of Collective Security: Beyond Chapter VIII of the UN Charter* (Hart 2004)

[135] L Fawcett, 'Regionalism: From Concept to Contemporary Practice' in MJ Aznar and ME Footer (eds.) *Select Proceedings of the European Society of International Law 2012*: *Volume 4* (Hart 2016)7.

[136] WE Butler, 'Regional and Sectional Diversities in International Law' in B Cheng (ed.) *International Law: Teaching and Practice* (Stevens and Sons 1982) 45, 48-49

[137] B Simma, 'Universality of International Law from the Perspective of a Practitioner'(2009) 20 *EJIL* 265.

[138] C Shreuer, 'Regionalism v. Universalism' (1995) 6 *EJIL* 477.

diversity is a 'less pronounced' issue in international law.[139] The rationale behind why regionalism deserves attention and analysis in the development of international law perhaps is derived from an assumption: 'an assumption of universality'.[140]

It has been observed that 'when the question of regionalism is raised this is usually done in order to discuss the question of the universality of international law'.[141] If regional diversity may create conflict of norms and fragmentation in international law, it then may jeopardise or carry dangers to the universality of international law. This fear of diversity is particularly significant in the sphere of human rights law and keeping peace in conflict areas given those values are putative universal.[142] However, as Harrison observed, this fragmented phenomenon in relation to law-making is not new,[143] because the 'decentralization has always been a feature of international law system'.[144] Following this logic, it is not sensible to be suspicious or feared of the phenomenon of regionalism.

In addition, the ILC Report on Fragmentation explained that the concept of regionalism can be seen as a set of approaches and methods for examining international law. Among different perspectives of regionalism, one sense of regionalism is to considerer it as 'a privileged forum for international

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[139] J Crawford, 'Universalism and Regionalism from the Perspective of the Work of the International Law Commission' in J Crawford, *International Law as an Open System: Selected Essays* (Cameron May 2002) 575, 576.
[140] Crawford, 'Chance, Order, Change: The Course of International Law' 240.
[141] M Koskenniemi, Report of the Study Group of the International Law Commission, 'Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law', 58th session, 4 April 2006, A/CN.4/L.682 (ILC Report on Fragmentation), para. 195.
[142] D Shraga, 'Universalism and Regionalism-A Balance of Power Re-Struck' in MJ Aznar and ME Footer (eds.) *Select Proceedings of the European Society of International Law 2012*: *Volume 4* (Hart 2016) 181.; ILC Report on Fragmentation, para. 216.
[143] See also W Jenks, 'The Conflict of Law-Making Treaties' (1953) 30 *BYIL* 401.
[144] Harrison, *Making the Law of the Sea*, 238.

law-making'.[145] For example, the environmental norms and rules established under UNEP's regional seas programmes,[146] the adoption of the 1992 Helsinki Convention[147] and the 1992 OSPAR Convention.[148]

In fact, regionalism has been established for combating maritime piracy. For example, ReCAAP was sign by most of the ASEAN states.[149] In recent years, following the cooperation based on the 2009 Djibouti Code of Conduct,[150] the coastal states in the Gulf of Guinea also signed the Yaoundé Code of Conduct in June 2013.[151] Interesting enough, the two Codes of Conduct were initiated and currently are still supported by the IMO. Is the ReCAAP so different compared to the aforementioned two Codes of Conduct?

In terms of its legal nature, ReCAAP is treaty law, the two Codes of Conduct are soft law, thus it would be interesting to compare the three regional instruments and see how they interact with one another.[152] Moreover, since regionalism is one of the mechanisms for changing and making international law, whether we can confirm that the old rules relating to maritime violence are interconnected to the latest

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[145] Ibid, para. 205.
[146] See the UNEP website at https://www.unep.org/regionalseas/who-we-are/regional-seas-programmes
[147] Convention on the Protection of the Marine Environment of the Baltic Sea Area, 1992, 2099 UNTS 197.
[148] Convention for the Protection of the Marine Environment of the North-East Atlantic, 1992, 2354 UNTS 67
[149] The exceptions are Malaysia and Indonesia.
[150] IMO Doc C 102/14 (3 April 2009), Annex: Code of Conduct Concerning the Repression of Piracy and Armed Robbery against Ships in the Western Indian and the Gulf of Aden (done and effective on 29 January 2009).
[151] Code of Conduct Concerning the Repression of Piracy, Armed Robbery against Ships and Illicit Maritime Security in West and Central Africa (done on 25 June 2013), http://www.imo.org/en/OurWork/Security/WestAfrica/Documents/code_of_conduct%20signed%20from%20ECOWAS%20site.pdf; See the IMO website at http://www.imo.org/en/OurWork/security/piu/pages/dcoc.aspx
[152] This is a typical regime interaction issue, see MA Young (ed.) *Regime Interaction in International Law*: *Facing Fragmentation* (CUP 2012)

normative development, would be an answer to the fundamental hope for universal international law.[153] It is based on this context that regional approaches need to be assessed.[154]

## F. Soft Law as Ingredient in International Law-Making

Dame Rosalyn Higgins observed that 'the days of the mega international treaty-making conference seem over…In the recent years, we have rather seen so-called law-making resolutions attempt to fulfil some of the same functions.'[155] Her observation is generally echoed by some international lawyers. For example, Pellet noticed that 'no great multilateral conventions have been concluded'[156] since the end of the Cold War. This links to Kolb's observation, 'in many areas, the treaty has become too burdensome an instrument: long to prepare and to negotiate; potentially long to be ratified; uncertain on entry into force; difficult to modify and adapt.'[157] Thus he claims that 'soft law mechanisms allow the bypassing of some of these traps.' [158] This phenomenon reflects a major change in international community: there are increasing numbers of soft law.[159]

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[153] JI Charney, 'Universal International Law' (1993) 87 *AJIL* 529.; Harrison, *Making the Law of the Sea* 2.

[154] See Chapter 6.

[155] R Higgins, 'The United Nations at 70 Years: The Impact upon International Law' (2015) 65 *ICLQ* 1, 2. ; Cf. R Higgins, *The Development of International Law through the Political Organs of the United Nations* (OUP 1963).

[156] A Pellet, 'Less is more: International Law of the 21st Century-Law without Faith' in J Crawford and S Nouwen (eds.) *International Law 1989-2010: A Performance Appraisal, Select Proceedings of the European Society of International Law*, 3rd Volume (Hart 2012) 81, 86.

[157] R Kolb, *The Law of Treaties: An Introduction* (Edward Elgar 2016) 270.

[158] Kolb, ibid.; just name some literature on soft law here, AT Guzman and TL Meyer, 'International Soft Law' (2010) 2 *Journal of Legal Analysis* 171.; J Ellis, 'Shades of Grey: Soft Law and the Validity of Public International Law (2012) 25 *LJIL* 313.; M Goldmann, 'We Need to Cut Off the Head of the King: Past, Present, and Future Approaches to International Soft Law (2012) 25 *LJIL* 335.;

[159] D Shelton (ed.) *Commitment and Compliance: the Role of Non-Binding Norms in the International System* (OUP 2000); C Brummer, *Soft Law and the Global Financial System* (CUP 2011); C Brummer, 'Why Soft Law Dominates Financial- and Not Trade' (2010) 13 *Journal of*

What is the essence of soft law and how does soft law function in international law-making? First, the essence of soft law is that it is not binding. Second, the nature of soft law reflects in the diversity of its usefulness and applicable arena, thus it is not easy to make generalisations concerning its real effect. Therefore, it is important to give examples for illustrating the legal significance of soft law.

There are four types of soft law in international law-making.[160] The first is so-called declaratory law-making, which helps to facilitate treaty negotiation. Two examples are the most important in this kind: the 1948 Universal Declaration of Human Rights [161] and the 1992 Rio Declaration on Environment and Development.[162] Other examples include International Atomic and Energy Agency's Guidelines and safety recommendations[163] for amplifying and interpreting the 1994 Convention on Nuclear Safety,[164] UNGA resolutions on outer space[165] and climate change,[166] etc.

In terms of its legal effect, the Universal Declaration is expressly soft, neither formed as a treaty nor concrete legal obligation was endowed; but it represents the

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*International Economic Law* 623.; AK Bjorklund and A Reinisch, *International Investment Law and Soft Law* (Edward Elgar 2012); D Thürer, 'Soft Law' (March 2007) *Max Planck Encyclopedia of Public International Law,* online version; P Birnie et al, *International Law and the Environment* (OUP, 3rd edition 2009) 34-37.; P Sands et al, *Principles of International Environmental Law* (CUP, 3rd edition 2012) 95.;

[160] This categorisation draws upon AE Boyle, 'The Choice of a Treaty: Interaction between Hard and Soft Law in United Nations Law-Making' in S Chesterman and S Villalpando (eds), *Oxford Handbook of UN Treaties* (OUP, 2018).; A Boyle, 'Soft Law in International Law-Making' in MD Evans (ed.), *International Law* (OUP, 4th edition 2014) 118.

[161] UN Doc. A/Res/217(III) (10 December 1948).

[162] UN Doc. A/CONF151/26 (Vol. I) (14 June 1992)

[163] See relevant documents at http://www-ns.iaea.org/standards/

[164] Adopted on 17 June 1994, IAEA-INFC1RC/449, 33 *ILM* 1514.

[165] Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space, UN Doc. A/Res/1962 (XVIII) (13 December 1963), which reflects in 1967 Convention on Outer Space, 610 UNTS 205.

[166] Protection of Global Climate for Present and Future Generations of Mankind, UN Doc. A/Res/43/53 (6 December 1988). This reflects in the UN Framework Convention on Climate Change (Done, 9 May 1992; entered into force, 21 March 1994), 1771 UNTS 107.

general will of the UN member states' in upholding the relevant human rights provisions specified in the UN Charter.[167] Therefore, it is reasonable to take the Universal Declaration into the interpretation process for developing the law of international human rights.[168]

In addition, some provisions of the Universal Declaration has become customary international law, thus it can be applied in the judicial deliberation process by international courts.[169] Further, it has become the bedrock for negotiating two significant human rights treaties, namely, the International Covenant on Civil and Political Rights[170] and the International Covenant on Economic, Social and Cultural Rights.[171] Furthermore, some further human rights treaty law negotiations also followed a similar pattern. For example, the 1965 Convention on the Elimination of All Forms of Racial Discrimination[172] was initiated and negotiated following the adoption of several UNGA Resolutions.[173]

The weight of the 1992 Rio Declaration on Environment and Development reflects in its impact in all relevant international environmental law arenas. For example, the Court directly referred to it in the 1996 *Nuclear Weapons Advisory Opinion*.[174] Further, the UNGA considered it as containing fundamental principles with regard to sustainable development.[175] Moreover, for the reason that it was

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[167] UN Charter, art. 1(3), 55, 56, 62, 76.
[168] T Meron, *Human Rights and Humanitarian Norms as Customary Law* (OUP 1991) 88-89.
[169] *Questions relating to the Obligation to Prosecute or Extradite* (Belgium v. Senegal), Judgment [2012], ICJ Rep 422, para. 99.
[170] 999 UNTS 171 (16 December 1966)
[171] 993 UNTS 3 (16 December 1966)
[172] 660 UNTS 195 (22 December 1965)
[173] Including the UN Declaration on the Elimination of All Forms of Racial Discrimination, UN Doc. A/Res/1904 (XVIII) (20 November 1963), see the Preamble of the 1965 Convention.
[174] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion [1996] ICJ Rep 66., paras. 29-30.
[175] UN Doc. A/RES/47/190 (22 December 10992); UN Doc. A/RES/47/191 (23 January 1993)

adopted by consensus, the Rio Declaration represents 'something of a package deal, rather like the 1982 UNCLOS'.[176] In addition, the Rio Declaring also tried to integrate and balance the interests between developed and developing countries, thus Principle 7 referred to the principle of 'common but differentiated responsibility'. Since then, the developing countries started to take part in the substantial making of international environmental law.[177]

The second type of soft law relates to the codification and progressive development of international law. An example is the adoption of the ILC draft articles on the law of state responsibility.[178] Though it has not become a formal treaty law after forty-years codification, collected by the UN Secretary General in 2007, states refereed to it for no less than 129 cases before international courts and tribunals.[179] Other examples include the identification of customary international law, subsequent agreement and subsequent practice in relation to interpretation of treaties.[180]

The third type of soft law concerns subsidiary rules and standards. Because some treaty provisions are designed and written in broad and general terms,[181] they need to be supplemented and given some details through annexes, additional agreements, protocols, or guidelines for applying those general principles into practice. For example, in order to create some degrees of dynamism, UNCLOS uses the so-called 'implied reference' in the wording of 'generally accepted international

[176] See Rio Declaration Principle 3 and 4; Boyle, 'The Choice of a Treaty: Interaction between Hard and Soft Law in United Nations Law-Making'
[177] D Freestone, 'The Road from Rio: International Environmental Law after the Earth Summit' (1994) 6 *Journal of Environmental Law* 193.
[178] UN Doc. A/Res/56/83 (12 December 2001)
[179] J Crawford, *State Responsibility: the General Part* (CUP 2013) 43.
[180] See the ILC website, http://legal.un.org/ilc/
[181] RR Baxter, 'International Law in "Her Finite Variety"' (1980) 29 *ICLQ* 549.

standards'[182] or 'competent international organization'[183] for accommodating the potential change of rules over time. The IMO is probably the most significant international organization in issuing such rules and standards for regulating international shipping[184] and marine pollution.[185]

Soft law in this type also includes the 1995 Code of Conduct on Responsible Fisheries[186] and 2001 International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (IUU Fishing),[187] both were issued by the Food and Agriculture Organization (FAO) and their core function is to implement the 1993 Agreement to Promote Compliance with Conservation Measures on the High Seas[188], the 1995 Fish Stocks Agreement[189] and UNCLOS.[190] These examples illustrate the ways how soft law and hard law interact and enhance each other, as Boyle observed, the nature of 'these instruments may not be legally binding, their interaction with related treaties can transform their legal status into something more.'[191]

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[182] See eg. UNCLOS, art. 21(2).; B Vukas, 'General Accepted International rules and Standards' in A Soons (ed.), *Implementation of the Law of the Sea Convention through International Institutions* (Law of the Sea Institute 1990) 405.

[183] See eg. UNCLOS, art. 211(5).; JD Kingham and DM McRae, 'Competent International Organization and the Law of the Sea' (1979) *Marine Policy* 106.

[184] Harrison, *Making the Law of the Sea*, Ch. 6.; J Bai, 'The IMO Polar Code: the Emerging Rules of Arctic Shipping Governance (2015) 30 *IJMCL* 674.

[185] See IMO, Implications of the United Nations Convention on the Law of the Sea for the International Maritime Organization, IMO Doc. LEG/MISC.8 (30 January 2014)

[186] Adopted on 31 October 1995, at http://www.fao.org/3/a-v9878e.pdf

[187] Adopted on 23 June 2001, at http://www.fao.org/3/a-y1224e.pdf

[188] Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (Done 24 November 1993; entered into force, 24 April 2003), 2221 UNTS 120.

[189] Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (Done, 4 December 1995; entered into force, 11 December 2011), 2167 UNTS 88.

[190] See more discussions in E Hey (ed.) *Developments in International Fisheries Law* (Brill 1999)

[191] Boyle, 'The Choice of a Treaty: Interaction between Hard and Soft Law in United Nations Law-Making'

The fourth type is about the usefulness of soft law in treaty interpretation. It is notable in some international case law that the Court admitted the influence of soft law instruments in relation to issues of decolonisation and the use of force.[192] In addition, the Court also noted that some international organizations' non-binding recommendations, guidelines and resolutions, once they were adopted 'by consensus or by a unanimous vote,' they may be relevant for treaty interpretation,[193] because those soft law instruments are within the meaning of VCLT 31(3)(a)and (b).[194] Also, as we have seen from previous discussion, the FAO Code of Conduct on Responsible Fisheries and Plan of Action on IUU Fishing can be considered as having the same influence to the interpretation of UNCLOS, 1993 Compliance Agreement and 1995 Fish Stocks Agreement. Likewise, though Agenda 21[195] is a soft law document and does not amend UNCLOS, it certainly has a continuing role in interpreting and implementing UNCLOS.

Taken together from the aforementioned sections, the thesis intends to highlight the relevance of soft law in the coherent development of international law-making relating to maritime violence. In addition, the thesis also aims to scrutinise the inter-relationship between various law-making techniques. For example, it is obvious that UNCLOS provides provisions for regional cooperation in enclosed and semi-enclosed seas;[196] at the same time, it does not confine regional cooperation in

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[192] Declaration on the Granting of Independence to Colonial Countries and Peoples, Un Doc. A/Res/1514 (XV)(14 December 1960); *Western Sahara*, Advisory Opinion [1975], ICJ Rep 12.; Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in accordance with the Charter of the United Nations, UN Doc. A/Res/25/2625 (24 October 1970); *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America) Merits, (Judgment) [1986] ICJ Rep 14.

[193] *Whaling in the Arctic*, para. 46.

[194] Ibid, para. 83.

[195] United Nations Conference on Environment & Development Rio de Janerio, Brazil, 3 to 14 June 1992, at https://sustainabledevelopment.un.org/content/documents/Agenda21.pdf

[196] UNCLOS, art. 122-123.

hard or soft law forms. Thus a soft law instrument such as the PSI can logically be seen as relevant rules of international law in the application or interpretation of UNCLOS on security issues at sea.

Moreover, UNCLOS Article 311(3) also designs to limit the right and power of contracting parties to derogate from the Convention, and provided further agreements shall not affect the application of basic principles embedded in it. In other words, UNCLOS prevails over later-concluded international instruments if a provision is incompatible with the object and purpose the Convention.

Based on this sense of the coherent development of international law-making, it will be illustrated in Chapter 3 and 4 that several UNSC and UNGA resolutions concerning terrorism helped to facilitate the 1988 SUA Convention and 2005 SUA Protocol's negotiations and to fill in the gaps of law in relation to maritime violence. It will be seen in Chapter 6 that regional arrangements of the ReCAAP, Djibouti Code and Yaoundé Code of Conduct do assist the development of maritime piracy law within the scope of UNCLOS.

In short, this study will examine how relevant international organizations involve in areas of maritime piracy and terrorism; whether they can offer new opportunity for developing customary international law[197] will also be a subject in the thesis. Ultimately, this study endeavours to discover the inter-relationships of recent normative evolution and law-making techniques in relation to maritime

[197] By demonstrating state practice and *opinio juris* in international organizations, see J Harrison, *Making the Law of the Sea* 16.; I Johnstone, 'Law-Making through the Operational Activities of International Organizations' (2008) 40 *George Washington International Law Review* 87.; M Wood, 'International Organizations and Customary International Law' (2015) 48 *Vanderbilt Journal of Transnational Law* 609.

violence.[198]

## IV. Overview

The thesis is structured as follows:

Chapter 2 covers four major issues. The first is the problem of UNCLOS piracy provisions, in which it will identify relevant gaps in law concerning maritime piracy and terrorism. Second, it analyses the significance of international and national case law, aiming to know whether judicial decisions have potential to fill in legal gaps or help to develop the law. Third, it ties to identify legal gaps with regard to maritime terrorism. Fourth, it seeks to answer whether the UNCLOS amendment procedure will be used in the near future.

Chapter 3 discusses the multilateral treaty-making process of 1988 SUA Convention and 2005 SUA Protocol. It covers three main issues. First, it identifies how those treaty provisions came from and identifies their strength and weakness separately. Second, it compares the negotiation methods and techniques used in the two treaty-making process, it will consider what the lessons can be learned. Third, it inspects the most important provision, namely, Article 8*bis* of 2005 SUA Protocol concerning interdiction of WMD at sea, the curiosity is to excavate its significance and legal status.

Chapter 4 moves to the actions made by the UNSC. It tackles three main themes. The first centres on the law-making role and past experiences of the UNSC. It then deals with the contents of counter-terrorism resolutions. The point is trying to discover what can be improved in the future. The third inspects all the piracy-related

[198] See Chapter 5 on the evolution of the PSI and Chapter 6 on piracy-related soft law.

resolutions. It endeavours to know what the innovations that the UNSC has made for fight maritime piracy.

Chapter 5 considers the role of the US under the context of hegemonic law-making in relation to WMD interdiction at sea. It mainly focuses on three subjects. The first is the creation, the ingredients and evolution of the PSI. Second, it scrutinises the strength and weakness of the PSI and the PSI bilateral ship-boarding agreements. Third, it examines whether the PSI has the potential to become customary international or not.

Chapter 6 explores four regional types in the fight of maritime piracy. It begins with the evolution about IMO's involvement in responding to piracy. It then discusses the law-making effect of ReCAAP in Southeast Asia. Third, it compares and contrasts the similar and different parts of ReCAAP, Djibouti and Yaoundé Codes of Conduct. Also, it tries to evaluate if the three approaches can be improved. Lastly, it considers some cross-regional interactions and arrangements for transferring suspects of piracy and information-sharing.

Chapter 7 is the final conclusion. The central argument of the thesis is that traditional international law-making instruments and mechanism have changed, from the focus of customary international law, multilateral treaties incrementally moves to rely on UNSC resolutions, IMO's initiatives, regional soft law measures and treaty interpretation techniques for filling gaps left in UNCLOS.

The thesis contends that the law surrounding maritime violence has been developed in a coherent way. In other words, the law-making techniques discussed in this research are often used in a complementary fashion, not necessarily applied as alternatives to one another. In short, this is a changing dynamic in the sphere of

international law-making, and that is the right way for dealing with maritime violence.

**Chapter 2**

# Identifying Legal Gaps over Maritime Violence: Judicial Decisions, Textual Considerations and Amendment of UNCLOS

Prince: 'Seal up the mouth of outrage for a while, till we can clear these ambiguities. And know their spring, their head, their true descent.'

William Shakespeare, *Romeo and Juliet* (1595), Act 5, Scene 3.

## I. Introduction

A Somali pirate was interview by New York Times journalist Gettleman in December 2008:

> '"They can't stop us," said Jama Ali, one of the pirates aboard a Ukrainian freighter packed with weapons that was hijacked in September and was still being held. He explained how he and his men hid out on a rock near the narrow mouth of the Red Sea and waited for the big gray ships with the guns to pass before pouncing on slow-moving tankers. Even if foreign navies nab some members of his crew, Mr. Jama said, he is not worried. He said his men would probably get no more punishment than a free ride back to the beach, which has happened several times. "We know international law," Mr. Jama said.'[1]

As indicated in the interview above, some pirates are very aware of the loopholes regarding international law of piracy. Therefore, in this chapter, it will firstly look into the provisions concerning jurisdictional issues about piracy at sea. In recent years, there are some international and national case law concerning the interpretation and application of the UNCLOS piracy provisions[2] in prosecuting

[1] J Gettleman, '*Pirates Outmaneuver Warships Off Somalia'* NY Times, 15 Dec 2008, at A6.
[2] Only very limited international case law exists, two recent cases on piracy UNCLOS provisions

pirate[3] and anti-whaling activists.[4] Accordingly, it then proceeds to scrutinise whether international and national courts have contributed to the development of law in this field. While there are basic elements of maritime piracy provided in UNCLOS, no such a maritime terrorism concept can be found in UNCLOS. The focus of the second part will then be shifted to the analysis of the gaps in relevant provisions concerning maritime terrorism. The third section consists of the discussion on whether the international community needs to go to amend UNCLOS and whether it is worth doing for ultimately solve the problem.

## II. Maritime Piracy and Gaps in UNCLOS: Implications of International and National Case Law

Logically speaking, the first step for any law enforcement and implementation activity is to identify those applicable laws and how the process goes. When the

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include the *Arctic Sunrise* rises in ITLOS and PCA, See the *Arctic Sunrise* Case (Kingdom of the Netherlands v Russian Federation) Order, ITLOS (22 November 2013); *In the Matter of the Arctic Sunrise Arbitration*, Award, PCA (14 August 2015). Cf. J Harrison, 'The Arctic Sunrise Arbitration (Netherlands v Russia) (2016) 31 *IJMCL* 145.; R Caddell, 'Platforms, Protestors and Provisional Measures: The Arctic Sunrise Dispute and Environmental Activism at Sea' (2015) 45 *NYIL* 358.; AGO Elferink, 'The Arctic Sunrise Incident: A Multi-faced Law of the Sea with Human Rights Dimension' (2014) 29 *IJMCL* 244.; D Guilfoyle and C Miles, 'Provisional Measures and MV Arctic Sunrise' (2014) 108 *AJIL* 271.

[3] About national prosecution, for example, in the United States of America, *US v Dire*, 680 F3D 446, US Court of Appeals for the Fourth Circuit (23 May 2012); US v Ali Mohamed Ali, US Court of Appeals, Case no. 12-3056 (11 June 2013); in other countries such as Seychelles and Kenya, the list of cases and judgments can be found at http://www.piracylegalforum.org/resources/case-law/; D Guilfoyle, 'Prosecuting Somali Pirates: A Critical Evaluation of the Options' (2012) 10 *JICJ* 767.; M Gardner, 'Piracy Prosecutions in National Courts' (2012) 10 *JICJ* 797.; MP Scharf et al (eds.) *Prosecuting Maritime Piracy: Domestic Solutions to International Crimes* (CUP 2015); AFT Fernando, 'An Insight into Piracy Prosecutions in the Republic of Seychelles' 41 *Commonwealth Law Bulletin* 173.; In Japan, see K Furuya, and J Tsuruta, 'The Guanabara Case—The First Prosecution of Somali Pirates under the Japanese Piracy Act' (2013) 28 *IJMCL* 719.

[4] So called 'eco-terrorists', see The Institute of Cetacean Research v Sea Shepherd Conservation Society, Case No. 12-35266, US Court of Appeals for the Ninth Circuit (25 February 2013); Sea Shepherd Conservation Society v Institute of Cetacean Research, Application No. 12A790, US Supreme Court (13 February 2013); The Institute of Cetacean Research v Sea Shepherd Society, Case No. c11-2043RAJ, US District Court for Western District of Washington (19 March 2012); JD Stockton, 'Pirates Who Neither Pillage Nor Plunder? The Ninth Circuit is On Board' (2014) 8 *Federal Courts Law Review* 185.; D Doby, 'Whale Wars: How to End the Violence on the High Seas' (2013) 44 *JMLC* 135.; AM Caprari, 'Lovable Pirates? The Legal Implications of the Battle between Environmentalists and Whalers in the Southern Ocean' (2010) 42 *Connecticut Law Review* 1493.

international community got confused about what the legal tools are and what can be used for dealing with pirates, states and experts not only tried to identify relevant international rules[5] but also tried to look for the gaps and problems embedded in them.[6]

## A. The Problem: Piracy at Sea

Pursuant to UNCLOS Article 101:

> Piracy consists of any of the following acts:
> (a) any illegal acts of violence or 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 inciting or of intentionally facilitating an act described in subparagraph (a) or (b).

As a matter of treaty law, only those states that ratified the 1958 High Seas Convention[7] are bound by the following definition, which is very close to the UNCLOS definition, Article 15 of the High Seas Convention provides:

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[5] D Guilfoyle, 'Treaty Jurisdiction over Pirates: A Compilation of Legal Texts with Introductory Notes', http://ucl.academia.edu/DouglasGuilfoyle/Papers/116803/Treaty_Jurisdiction_over_Pirates_A_Compilation_of_Legal_Texts_with_Introductory_Notes

[6] D Guilfoyle et al., 'Piracy off Somali: The Challenges for International Law' (2009) 103 *American Society of International Law Proceedings* 89.; D Doby, 'Piracy Jure Gentium: The Jurisdictional Conflict of the High Seas and Territorial Waters (2010) 42 *JMLC* 561.

[7] As of May 2017, there are 63 parties to the High Seas Convention, the complete list is at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXI-2&chapter=21&lang=en

> 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.

From the definitions provided above, piracy contains four elements: (1) Any illegal acts of violence or detention or depredation; (2) For private ends by crew of passengers; (3) On the highs seas; (4) Against another ship or aircraft. However, there are some noticeable gaps and flaws in UNCLOS provisions.

These four elements all point to gaps and ambiguities in law. First of all, the reference to 'illegal' acts of violence is imprecise. Logically speaking, the language of UNCLOS Article 105 provides that 'every state "may" seize a pirate or aircraft, or a ship or aircraft taken by piracy and under control of pirates'.[8] This indicates that the exercise of prescriptive or enforcement jurisdiction is only a possibility, not a strict obligation.[9] That also means to prosecute pirates or not is simply a state's

[8] UNCLOS, art. 105.
[9] T Treves, 'Piracy, Law of the Sea, and Use of Force: Developments off the Coast of Somalia' (2009) 20 *EJIL* 399, 402.; E Kontorovich, 'A Guantanamo on the Sea: The Difficulty of Prosecuting Pirates and Terrorists' (2010) 98 *California Law Review* 243, 270-271.

discretion.[10] Even though piracy is a crime generally recognised in the sphere of universal jurisdiction,[11] it still depends on a state's discretion.[12] In short, universal jurisdiction is 'an option, not a duty'.[13] As a result, the real criteria of the 'illegal' acts should be defined or legislated by domestic laws.[14] In terms of the law enforcement activity of every state, the criterion of illegality is therefore irrelevant to international law.[15]

Second, there have been different opinions about what constitutes 'for private ends'.[16] Some argue that political-motivated behaviours cannot be piracy[17], and some suggest that it just reflects the rule that governmental ships cannot commit piracy.[18] This debate is important because it involves the possibility that environmental activists could be considered as pirates at sea, and this issue will be

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[10] D Guilfoyle, 'The Legal Challenges in Fighting Piracy' in B. van Ginkel and F. van der Putten (eds.) The *International Response to Somali piracy: Challenges and Opportunities* 127, 130.

[11] A Cassese et al (eds.) *International Criminal Law: Cases and Commentary* (OUP 2011) 312-321.; See UN Doc S/RES/1976 (11 April 2011), it expressly said that 'piracy is a crime subject to universal jurisdiction', para. 14.

[12] MS Karim, 'Is There an International Obligation to Prosecute Pirates?' (2011) LVIII *NILR* 387.

[13] E Kontorovich, 'The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation,' (2004) 45 *HILJ* 183, 192.; R O'Keefe, 'Universal Jurisdiction: Clarifying the Basic Concept' (2004) 2 *JICJ* 737.

[14] AP Rubin, *The Law of Piracy* (Transnational Publishers, 2nd edition 1998) 373.; JM Goodwin, 'Universal Jurisdiction and the Pirate: Time for An Old Couple to Part' (2006) 39 *Vanderbilt Journal of Transnational Law* 973, 1007-1010.

[15] R Geib and A Petrig, *Piracy and Armed Robbery at Sea: The Legal Framework for Counter-Piracy Operations in Somalia and the Gulf of Aden* (OUP 2011) 60.

[16] Guilfoyle, *Shipping Interdiction and the Law of the Sea* 33-36.; R Churchill, 'The Piracy Provisions of the UN Convention on the Law of the Sea--Fit for Purpose?' in P Koutrakos and A Skordas (eds.) *The Law and Practice of Piracy at Sea: European and International Perspectives* (Hart 2014) 9, 16-18.; AN Honniball, 'Private Political Activists and the International Law Definition of Piracy: Acting for 'Private Ends' (2015) *Adelaide Law Review* 279.; Y Tanaka, *The International Law of the Sea* (CUP, 2nd edition 2015) 379-381.

[17] I Brownlie, *Principles of International Law* (7th ed. OUP, 2008) 232.; MN Shaw, *International Law* (CUP, 6th edition 2008) 615.; Cf. the Santa Maria belligerent incident, LC Green, 'The Santa Maria: Rebels or Pirates' (1961) 37 *BYIL* 496.; WP Willig, 'The Santa Maria Incident: A Grey Zone between Unrecognised Insurgency on the High Seas and Piracy Jure Gentium' (1961) 25 *Albany Law Review* 299.

[18] M Halberstam, 'Terrorism on the High Seas: The Achille Lauro, Piracy and the IMO Convention on Maritime Saefty' (1988) *AJIL* 269, 278-284.; Guilfoyle, *Shipping Interdiction and the Law of the Sea* 36-40.; LB Sohn et al., *Law of the Sea in a Nutshell* (West Publishing, 2nd edition 2010) 455-467.

discussed further later.

Third, to state that piracy can only occur on the high seas is problematic.[19] This urged the IMO and ReCAAP to create the phrase 'armed robbery against ships', which means piratical crime within a coastal state's territorial sea.[20]

Fourth, the two-ship requirement means that internal hijacking cannot be piracy.[21] This was the situation happened in the *Achille Lauro* terrorism incident.[22]

Based on this general understanding, the next section aims to check whether existing case law has contributed to the development of law.

## B. International Case Law

As some experts argued, prosecuting maritime pirates and terrorists is difficult, and it does reflect the reality in exiting cases.[23] Since there are only a few cases judged by international courts and tribunals concerning the offence of piracy based on international law, these cases certainly deserve more attention by international

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[19] J Bellish, 'A High Seas Requirement for Inciters and International Facilitators of Piracy *Jure Gentium* and Its (Lack of) Implications for Impunity' (2013) 15 *San Diego International Law Journal* 115.; G White, 'Landlubbers as Pirates: the Lack of "High Seas" Requirement for the Incitement and International Facilitation of Piracy' (2013) 27 *Emory International Law Review* 705.

[20] See ReCAAP art. 1(2); IMO defines 'armed robbery against ships' as: a) any illegal act of violence or 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 on board such a ship, within a State's internal waters, archipelagic waters and territorial sea; (b) any act of inciting or of intentionally facilitating an act described above.; Cf. IMO Resolution A.1025(26) (18 January 2010), A 26/Res.1025.

[21] RC Beckman, 'The Piracy Regime under UNCLOS: Problems and Prospects for Cooperation' in RC Beckman and JA Roach (eds.), *Piracy and International Maritime Crimes in ASEAN: Prospect for Cooperation* (Edward Elgar 2012) 17, 29.; R Haywood and R Spivak, *Maritime Piracy* (Routledge 2012) 93-94.

[22] See Chapter 3.

[23] Kontorovich, 'A Guantanamo on the Sea: The Difficulty of Prosecuting Pirates and Terrorists' ; E Kontorovich, 'An Empirical Examination of Universal Jurisdiction for Piracy' (2010) 104 *AJIL* 436.; E Kontorovich, 'The Piracy Prosecution Paradox: Political and Procedural Problems with Enforcing Order on the High Seas' (2012) 13 *Law and Ethics* 107.; O Ambani, 'Prosecuting Piracy in the Horn of Africa: The Case of Kenya' in C Murungu and J Biegon (eds.) *Prosecuting International Crimes in Africa* (Pretoria University Law Press, 2011) 233.

lawyers. In the following section, two international cases will be examined first.

### 1. Arctic Sunrise Case

The first case and dispute about prosecuting pirates is the *Arctic Sunrise* case. It is the No. 22 case listed in the ITLOS, and later on referred to the Permanent Court of Arbitration (PCA).[24] The background of the dispute was about the Greenpeace International's protest action in the Arctic in September 2013. It was between the Netherlands and the Russian Federation. Part of the dispute was whether the Arctic Sunrise's protest against the fixed platform *Prirazlomnaya* was piratical and terrorist acts. At the beginning of boarding the ship and arresting crew members from the *Arctic Sunrise* in the exclusive economic zone of Russia, the Russian government's position was that the protest of the *Arctic Sunrise* was suspected of piracy and terrorism.[25] So the Tribunal had to examine whether those activities were sufficient to be counted as piracy or terrorist.

The Tribunal firstly quoted the UNCLOS Article 101 concerning the definition of piracy. It then clearly stated that 'an essential requirement of Article 101 is that the act of piracy be directed "against another ship" and yet 'the *Prirazlomnaya* is not a ship. It is an offshore ice-resistant fixed platform.'[26] The Tribunal noted that even Russian President Putin and his human rights adviser Mikhail Fedotov both stated that those activities 'are obviously not pirates', and that 'there isn't the slightest justification for accusing the crew of the Arctic Sunrise of piracy'.[27] Having

[24] The *Arctic Sunrise* case, see the initial proceeding and the ITLOS Order, https://www.itlos.org/en/cases/list-of-cases/case-no-22/; and the PCA proceedings and Award, https://pcacases.com/web/view/21
[25] Award of the *Arctic Sunrise* Case, para. 236.
[26] Ibid, para. 238.
[27] Ibid, para. 239.

considered the law, the facts and the aforementioned statements, the Tribunal concluded that it 'need not consider the other elements required to show piracy within the meaning of Article 101.'[28] In other words, because it is clear that there is no such two-ship requirement, arguing that the activities were piracy would not be sensible. However, as the dispute was about the element of one ship 'against another ship', it makes no further room for considering other elements of piracy stipulated by UNCLOS Article 101. Consequently, the Tribunal did not clarify any specific issues.

When it comes to the offence about maritime terrorist, some news agency and the Russian Coast Guard reported that the *Arctic Sunrise* was a threat of terrorist attack, though the crew members were never charged with terrorism offences.[29] While the Tribunal mentioned the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf ('SUA Fixed Platforms Protocol' as abbreviated by the Award), it did notice that the Protocol empowers states to take enforcement measures within a 500-metre zone around an installation or structure of a fixed platform if there are reasonable grounds to suspect vessels engaging terrorist offence. Nevertheless, the Tribunal said that 'there is no right to seize or board vessels in the EEZ in relation to such offences where such action would not otherwise be authorised by the Convention'.[30]

On the other hand, the Tribunal also considered whether there was reasonable grounds for Russia to take preventive action against any possible future terrorist

[28] Ibid, para. 240.
[29] Ibid, para. 276-277.
[30] Ibid, para. 278.

attack on 19 September 2013.[31] Based on the facts and evidence the Tribunal examined, it ruled that the intention and ways that the *Arctic Sunrise* protested were clearly not about terrorist threats, hence it concluded that 'there were no reasonable grounds for the Russian authorities to suspect the *Arctic Sunrise* of terrorism and therefore any purported suspicion of potential terrorism could not provide a legal basis for the measures taken by Russia'.[32]

The method the Tribunal adopted to examine the evidence about whether the *Arctic Sunrise* was acting and intending to do terrorist attack was simple. Based on Greenpeace's several statements that the protest would be 'non-violent' and that the Russian authorities 'were aware of the likelihood of a protest action by the *Arctic Sunrise* at the *Prirazlomnaya*',[33] the Tribunal 'does not accept that there were reasonable grounds for the Russian authorities to consider that, on this particular occasion, the *Arctic Sunrise* intended to resort to terrorism to achieve its ends.'[34] Precisely speaking, there were no convincing subjective intention and no objective, factual performance to show that terrorist attacks had been implemented by the *Arctic Sunrise*.

In short, on the one hand, the *Arctic Sunrise* case does touch upon the meaning of piracy and the possible interpretation of terrorism. On the other hand, based on the factual activities of the *Arctic Sunrise* and its intention to utilise the non-violent protest at the *Prirazlomnaya*, the Tribunal did not have to interpret the provisions of UNCLOS or the SUA Convention and Protocol. Despite that it is a good judgment, it unfortunately neither adds anything new nor develops the law concerning

[31] Ibid, para. 315.
[32] Ibid, para. 322.
[33] Ibid, para. 319
[34]. Ibid.

maritime piracy and terrorism. In other words, it is irrelevant for filling or clarifying gaps such as what constitutes 'private ends'.

### 2. Enrica Lexie Case

The second case is the *Enrica Lexie* case,[35] which is disputed between Italy and India[36] about an Italian-Flagged oil-container ship equipped with Italian Navy marines. On 15 February 2012, two fishermen were shot dead by two marines around 20.5 nautical miles off the Coast of India. The Indian authority arrested the two marines and charged them with murder and homicide under the Indian Penal Code in the first place.[37] Later in January 2014, India decided to charge them by invoking SUA Convention. However, Italy protested that it would associate this incident with a terrorist affair. So after about three months, India dropped the SUA charges[38] and downgraded the charges from murder to violence, which would avoid the two marines facing the death penalty.[39]

The disputed issues include, for example, whether the situation and condition can satisfy the requirement of 'urgency' in the context of provisional measures;[40]

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[35] A chronology about this case with lots of news resources, see the Wikipedia, https://en.wikipedia.org/wiki/Enrica_Lexie_case

[36] The *Enrica Lexie* Incident (Italy v. India), Provisional Measures (24 August 2015), https://www.itlos.org/en/cases/list-of-cases/case-no-24/ and the PCA website, https://pcacases.com/web/view/117

[37] 'Top Indian Court to Rule on Charges Italian Marines should Face' 10 February 2014, Reuters, at http://www.reuters.com/article/us-india-marines-idUSBREA190DN20140210 ; 'Italian Warns India of European Response to Marines Trial' 10 February 2014, BBC News, http://www.bbc.com/news/world-europe-26118155 ;

[38] 'India to Drop SUA Act against Italian Marines' 22 February 2014, http://www.madhyamam.com/en/node/20994

[39] 'India Drops Death Penalty Clause as Europe Bats for Italian Marines' 7 February 2014, http://www.thehindu.com/news/national/italian-marines-will-not-face-death-penalty-govt/article5664848.ece

[40] See for example, the all dissenting opinions of the Order of the *Enrica Lexie* case, Provisional Measures, at https://www.itlos.org/en/cases/list-of-cases/case-no-24/ ; M Lando, 'Establishing the Existence of a "Dispute" under UNCLOS at the Provisional Measures Stage: the *Enrica Lexie* Case' (2015) 22 *QIL* 3; I Papanicolopulu, Consideration of Humanity in the *Enrica Lexie* Case' (2015)

whether Italy has exclusive flag state jurisdiction or India has coastal state jurisdiction over the case and the two marines;[41] whether the two marines enjoy functional immunity;[42] or whether the use of vessel protection detachment (VPD) is lawful under international law.[43] However, none of these issues are relevant to the central question in this chapter, namely, does it help to clarify the gaps in UNCLOS in relation to piracy and terrorism at sea?

In fact, we may only discover that the whole incident was developed under the counter-piracy scenario, and as Del Vecchio argued, it is difficult to claim that those acts of piracy in the Indian Ocean are considered as terrorist threats.[44] In other words, these potential or possible piratical behaviours by the Indian fishing boat *St. Anthony* in the *Enrica Lexie* case should thus be placed within the ambit of international piracy law, and the financial gains of the piratical actions then should be seen as 'private ends'.

Italy maintains that the incident took place at approximately 20.5 nautical miles off the coast of India;[45] the Indian High Court of Kerala and the Supreme Court also confirmed that 'the place of occurrence would be within the Contiguous Zone of

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22*QIL* 25.

[41] A Del Vecchio, 'The Fight against Piracy and the *Enrica Lexie* Case' in L del Castillo (ed.) *Law of the Sea, From Grotius to the International Tribunal for the Law of the Sea: Liber Amicorum Judge Hugo Caminos* (Brill 2015) 397.

[42] N Ronzitti, 'The *Enrica Lexie* Incident, Law of the Sea and the Immunity of State Officials Issues (2013) 22 *IYIL* 3.; V Eboli and JP Pierini, 'Coastal State Jurisdiction over Vessel Protection Detachments and Immunity Issues: The *Enrica Lexie* Case' (2012) 51 *MLLWR* 117.

[43] C Schofield, 'Arming Merchant Vessels: Enhancing or Imperiling Maritime Safety and Security' (2014) 2 *Korean Journal of International and Comparative Law* 46.; M Tondini, 'Some Legal and Non-Legal Reflections on the Use of Armed Protection Teams on Board Merchant Vessels: An Introduction to the Topic' (2012) 51 *MLLWR* 7.; CR Symmons, 'Embarking Vessel Protection Detachments and Private Armed Guards on Board Commercial Vessels: International Legal Consequences and Problems under the Law of the Sea' (2012) 51 *MLLWR* 21.; K Neri, 'The Use of Force by Military Vessel Protection Detachments' (2012) 51 *MLLWR* 73.; M Zwanenburg, 'Military Vessel Protection Detachments: the Experience of the Netherlands' (2012) 51 *MLLWR* 97.

[44] A Del Vecchio, 'The Fight against Piracy and the *Enrica Lexie* Case' 408.

[45] See The *Enrica Lexie Incident* (Italy v. India), ITLOS, Provisional Measures, Order, para. 36.

India which overlaps with the Exclusive Economic Zone'.[46] Pursuant to UNCLOS Article 33, this is the contiguous zone. However, at the same time, it is also a part of the EEZ. Here, the piracy provision can certainly apply to the EEZ according to Article 58(2). Moreover, if Article 58, 94, 97 and piracy-related provisions are taken into consideration together,[47] Italy would seem to rightfully enjoy flag state's jurisdiction over the case.[48] Under such circumstances, it would seem that India has no right to exercise coastal state's criminal jurisdiction over the incident.[49]

In sum, the above two international cases do not add anything new to the law of piracy or maritime terrorism. While this argument may not be completely fair given that the *Enrica Lexie* case is still pending in the PCA as of March 2017,[50] the real disputed issues in both cases had never been surrounded with the gaps or ambiguity of the UNCLOS piracy provision. The definition of piracy in applying to the facts is relatively straightforward in these two cases.

In the next section, cases of national courts will be examined to see if national courts can be of help in clarifying the meaning of UNCLOS piracy provisions when the international cases fail to do so.

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[46] Republic of Italy v Union of India, Indian Supreme Court's Judgment (18 January 2013), para. 18.; the High Court's Judgment, No. 4542 (29 May 2012), para. 20.; see also GM Farnelli, 'Back to Lotus? A Recent Decision by the Supreme Court of India on an Incident of Navigation in the Contiguous Zone' (2014) 16 *International Community Law Review* 106.

[47] For example, the duty to cooperate for combating piracy, UNCLOS art. 100.

[48] Ambassador Cesare Maria Ragaglini, the Italian Representative to the United Nations, stated in an UNSC debates on piracy on 19 November 2012, that 'Freedom of Navigation will be meaningless concept if the exclusive jurisdiction of the flag State in the international waters is not guaranteed.' P Gargiulo and G Nesi (eds.), 'Italian Practice relating to International Law' (2014) 22 IYIL 415, 425.

[49] UNCLOS art.27.

[50] But according to the verbatim records of the *Enrica Lexie* case, the focus was still on the human rights aspect of the law of the sea, probably can conclude that the final Award will not touch upon the meaning, application and interpretation of piracy provisions. See the records at https://pcacases.com/web/view/117

## C. National Case Law

What concerns this section is those national cases which engaged in interpreting the disputed concept 'for private ends' in the UNCLOS definition of maritime piracy, because this concept elicited the debate about how to distinguish environmental activists from terrorism and piracy at sea.[51]

In Summer 2013, when the oral proceedings of the *Japanese Whaling* case was processing in the ICJ, two of Japan's counsel, Payam Akhavan and Yuji Iwasawa both demonstrated that the environmental activists, i.e. Sea Shepherd's violent sabotage activities against Japan's whaling ships 'is of the great relevance to this case'. Akhavan stated:

> 'Sea Shepherd's violent actions have been repeatedly condemned by the IWC (International Whaling Commission) and the International Maritime Organization. The United States Federal Bureau of Investigation has labelled it as "eco terrorism". On 25 February 2013, the United Stated Court of Appeal for the Ninth Circuit held that the Sea Shepherd attacks against Japanese research vessels are, I quote, "the very embodiment of piracy" under international law. There is currently an Interpol Red Notice against its notorious founder Paul Watson, for multiple charges in different countries….A Quick glance at the Sea Shepherd

[51] It should be noted that piracy under national law may not be the same as international law stipulated. Crimes or offences that may be characterised as piratical acts under national law do not necessarily reflect the definition and meaning of piracy in international law, J Crawford, *Brownlie's Principles of Public International Law* (OUP, 8th edition 2012) 302-303.; see discussions in S Shnider, 'Universal Jurisdiction over "Operation of a Pirate Ship": The Legality of the Evolving Piracy Definition in Regional Prosecutions' (2013) 38 *North Carolina Journal of International Commercial Regulation* 473, 517 ff.; A Odeke, 'Somali Piracy: Jurisdiction over Foreign Ships in Domestic Courts and Third States under International Law' (2011) 17 *Journal of International Maritime Law* 121.; JT Gathii, 'Jurisdiction to Prosecute Non-National Pirates Captured by Third States under Kenyan and International Law (2010) 31 *Loyola of Los Angeles International and Comparative Law Review* 363.

> website demonstrates what is a private army used to wage war against Japanese research vessels on the high seas,….on the first day of the hearing, a Sea Shepherd representative spoke to journalists outside this courtroom. He proudly claimed that the opening of this case "was a vindication of the group's controversial tactics….Mr. Watson had stated publicly, "if Australia or New Zealand…can agree to take legal action, Sea Shepherd will agree to back off our aggressive tactics."'[52]

Following the same view, Iwasawa claimed that Australia downplayed the violence of Sea Shepherd.[53] While Paul Watson and the participants of the Sea Shepherd address themselves as 'the whale warrior: a pirate for sea;[54] the use of the terms 'warrior' or 'pirate' is more like campaign slogans rather than meaningful application of international law. Meanwhile, how the US Court of Appeal judged the case and whether or not its reasoning is convincing are to be discussed.

The appeal background is that on 19 March 2012, the US Western District Court of Washington issued its decision (*Sea Shepherd I*) about the dispute between the Institute of Cetacean Research, a Japan's research foundation and the Sea Shepherd Conservation Society. In the District Curt's decision, Sea Shepherd won the first case, thus the Institute of Cetacean Research appealed the case to the Ninth Circuit Court of Appeal. The Appeal Court rendered it decision on 24 May 2013

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[52] Prof. Akhavan, CR 2013/12, 2 July 2913, para. 72-82.; footnotes quoted in the verbatim records are omitted.; the so called eco-terrorism, see JE Roeschke, 'Eco-Terrorism and Piracy on the High Seas: Japanese Whaling and the Rights of Private Groups to Enforce International Conservation Law in Neutral Waters' (2009) 20 Villanova Environmental Law Journal 99.; A Kanehara, 'So-Called "Eco-Piracy" and Interventions by NGOs to Protest against Scientific Research Whaling on the High Seas: An Evaluation of the Japanese Position' in CR Symmons (ed.) *Selected Contemporay Issues in the Law of the Sea* (Martinus Nijhoff, 2011) 195.; J Teulings, 'Peacful Protests against Whaling on the High Seas—A Human Rights-Based Approach' in ibid 221.

[53] Prof. Iwasawa, CR 2013/16, 4 July 2013, para. 17-20.

[54] See for example their video selling at amazon at https://www.amazon.com/Whale-Warrior-Pirate-Sea/dp/B002V19MAU ; or on youtube at https://www.youtube.com/watch?v=1nzbTsrOUxw

(*Sea Shepherd II*).

A major point and dispute was about whether the Sea Shepherd's activity and tactics were considered as piracy, or, to be more precise, are their behaviours qualified as 'for private ends' under international law of piracy.

The US Western District Court firstly confirmed that UNCLOS Article 101, which reflects customary international law, and represents modern definition of piracy. It held that the Institute of Cetacean Research had failed to demonstrate that Sea Shepherd's tactics and activity can be regarded as for private ends. The District Court formed their reasoning by stating following points: First, the whalers cite no authority that defines private ends.[55] Second, in the ordinary scenario, maritime pirates seek financial gains, and that is the prototypical private end. A related fact is that Sea Shepherd is not interested in financial gains.[56] Third, the District Court was aware of none concerning an international consensus on this private ends issue. Therefore, the District Court cannot say that there is a universal norm against violence in pursuit of the protection of marine life.[57]

The Appeal Court's decision was authored by Chief Judge Alex Kozinski,[58] In the first paragraph of the Opinion of the Court of Appeal, he stated:

> You don't need a peg log or an eye patch. When you ram ships; hurl glass containers of acid; drag metal-reinforced ropes in the water to damage propellers and rudders; launch smoke

[55] 'Institute of Cetacean Research and Others v. Sea Shepherd Conservation Society and Others; United States Districts Court, Western Districts of Washington, 19 March 2012; United States Court of Appeal for the Ninth Circuit, 24 May 2013' (2014) 156 *ILR* 718, 738.
[56] Ibid.
[57] Ibid, 752.
[58] Whose opinions and writing style are often praised as humour, direct and uncluttered., DA Golden, 'Humor, the Law and Judge Kozinski's Greatest Hits' (1992) 2 *Brigham Young University Law Review* 507

> bombs and flares with hooks; and point high-powered lasers at other ships, you are, without a doubt, a pirate, no matter how high-minded you believe your purpose to be.[59]

In the Appeal Court's decision, it also confirmed and reiterated that UNCLOS Article 101, also the 1958 High Seas Convention Article 15, provide almost identical definition, which means that this definition is the basis for considering the case. The Appeal Court's reasoning can be summarised as follows: First, the District Court's interpretation on what constitutes 'violence' and 'private ends' was wrong. It regarded that the 'private ends' is too limited to those pursued for financial enrichment. The Appeal Court considered the term 'private' is normally understood as an antonym to 'public', and often connects to matters that are not necessarily connected to finance. Second, according to some scholarly works and US case law,[60] the Appeal Court thought that the history of piracy law shows that the concept of 'privates ends' implicates acts taken not on behalf of a state. Third, it referred to a 1986 Belgian case law, the *Castle John*,[61] and considered that is the case which had held the environmental activism as for private ends. Therefore, it concluded that the meaning of private ends includes 'those pursued on personal, moral, or philosophical grounds, such as Sea Shepherd's professed environmental goals'.[62] Fourth, the Appeal Court further interpreted the term 'violence', it criticised that the

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[59] 'Institute of Cetacean Research and Others v. Sea Shepherd Conservation Society and Others; United States Districts Court, Western Districts of Washington, 19 March 2012; United States Court of Appeal for the Ninth Circuit, 24 May 2013', 755.

[60] The Appeal Court quoted D Guilfoyle, 'Piracy Off Somalia: UN Security Council Resolution 1816 and IMO Regional Counter-Piracy Efforts' (2008) 67 *ICLQ* 690.; M Bahar, 'Attaining Optimal Deterrence at Sea: A Legal and Strategic Theory for Naval Anti-Piracy Operations' (2007) 40 *Vanderbilt Journal of Transnational Law* 1.; Hamony v. United States 43 US (2 How.) 210 (1844).

[61] 'Castle John and Nederlandse Stiching Sirius v NV Mabeco and NV Parfin, Belgian Cour of Cassation, 19 December 1986', 77 *ILR* 537.

[62] 'Institute of Cetacean Research and Others v. Sea Shepherd Conservation Society and Others; United States Districts Court, Western Districts of Washington, 19 March 2012; United States Court of Appeal for the Ninth Circuit, 24 May 2013', 756.

District Court's interpretation 'was equally off-base' and 'citing no precedent'.[63] It regarded that it is 'commonsense understanding of the term' that Sea Shepherd's acts can be reckoned as 'clear instances of violent acts for private ends, the very embodiment of piracy.'[64]

There are a variety of ways to examine whether or not the Appeal Court's reasoning is sensible and convincing. First of all, we need to analyse the *Castle John* case, which was the basis of Appeal Court's reasoning. The Belgian Court of Appeal firstly used the 1958 High Seas Convention Article 15 as the starting point for considering whether the ship *Castle John* owned by Greenpeace, had committed piracy or not. The Belgian Court of Appeal considered that the Greenpeace's object of the protest was to alert public opinion regarding the discharge at sea of waste products, and 'those acts were committed for personal ends'.[65] The Court concluded that 'personal motives such as hatred, the desire for vengeance or the wish to take justice into their hands are not excluded in this case',[66] it also referred to the original decision 'that the acts in question were committed for personal ends, in particular the pursuit by the applicant of the objects set out in its articles of association.'[67] Consequently, those acts were committed 'purely in support of a personal view concerning a particular problem, even if they reflected a political perspective.'[68]

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[63] Ibid.
[64] 'Institute of Cetacean Research and Others v. Sea Shepherd Conservation Society and Others; United States Districts Court, Western Districts of Washington, 19 March 2012; United States Court of Appeal for the Ninth Circuit, 24 May 2013' , 756-757.
[65] 'Castle John and Nederlandse Stiching Sirius v NV Mabeco and NV Parfin, Belgian Cour of Cassation, 19 December 1986' 539.
[66] Ibid, 540.
[67] Ibid.
[68] Ibid.

Second, it has been deemed problematic to equate private ends to personal ends. Therefore, Churchill noticed that the *Castle John* decision 'has been strongly criticised[69] and should probably be regarded as incorrect.'[70] If the *Castle John* case is not a correct decision, then certainly the Appeal Court's reasoning in the *Sea Shepherd II* case would not be a good one, either. However, Churchill also thinks that 'the perpetrators believe themselves to be serving the public good does not render their ends public.'[71]

Third, to claim those environmental activists as pirates would be going too far from UNCLOS drafters' intention. Hence commentators argued that in the *Castle John* and the *Sea Shepherd II* case, the two national courts in effect invented a new definition of piracy.[72] This leads to the question about the original meaning of 'for private ends'. A general sense is to exclude the acts of civil-war belligerents, rebels and political motivated objects, because 'all acts of violence lacking State sanction are acts undertaken "for private ends."'[73] With this logic in mind, a fair argument would be that the opposite side of the term private ends would not be political ends but public ends. This indicates that terrorists are acting for political ends,[74] not

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[69] Which Churchill meant SP Menefee, 'The Case of the *Castle John*, or Greenbeard the Pirate?: Environmentalism, Piracy and the Development of International Law' (1993) 24 *California Western International Law Journal* 1.

[70] Churchill, 'The Piracy Provisions of the UN Convention on the Law of the Sea--Fit for Purpose?' 18.

[71] Ibid.

[72] SP Menefee, 'The Case of the *Castle John*, or Greenbeard the Pirate?: Environmentalism, Piracy and the Development of International Law' (1993) 24 *California Western International Law Journal* 1, 16.; BH Dubner and C Pastorius, 'On the Ninth Circuit's New Definition of Piracy: Japan Whalers v. Sea Shepherd—Who are the Real "Pirates" (I.E. Plunderers)' (2014) 45 *JMLC* 415.

[73] D Guilfoyle, 'Piracy Off Somalia: UN Security Council Resolution 1816 and IMO Regional Counter-Piracy Efforts' (2008) 67 *ICLQ* 690, 693.

[74] This point was made by the Seychelles Supreme Court's in the *Dahir* case, but its reasoning was based on Seychelles' criminal law and thus has been questioned by commentators, see Supreme Court of Seychelles, Republic vs. Dahir and others [2010] SCSC 81, http://www.seylii.org/sc/judgment/supreme-court/2010/81 ; Churchill, 'The Piracy Provisions of the UN Convention on the Law of the Sea--Fit for Purpose?' 17.; M Gardiner, 'Piracy Prosecution in National Courts' (2012) 10 *JICJ* 797, 811.

public ends, but those environmental protestors are certainly acting for public ends, not political ends.[75]

Nevertheless, the real problem is that 'there is no realistic possibility of the international community redefining the term.'[76] For this reason, we may either hope that there are more and more environmental protests and more cases to be judged by national courts across the world, or hope that courts will apply and interpret the law in the same direction, avoid producing contradictory decisions; just as Honniball rightly observed that 'current precedents are insufficient to establish a recognised definition of "private ends" under international law.'[77] He noted that if these precedents can be followed in the future, then the nature and scope of piracy will not 'exclude violent acts perpetrated by individuals from effective punishment merely because such actors were motivated by political goals.'[78]

### D. Expecting Future Judicial Dialogue

To date, neither international courts and tribunals nor national courts have contributed to the evolution of international law with regard to maritime piracy and terrorism. Moreover, if these cases are rare, there seems to be little hope or effect to accumulate those precedents, thus not much expectation should be held towards

[75] G Plent, 'Civilian Protest Vessels and the Law of the Sea' (1983) 14 *NYIL* 133.; G Plent, 'International Law and Direct Action Protests at Sea: Twenty Years On' (2002) 33 *NYIL* 75.
[76] W Magnuson, 'Marine Conservation Campaigners as Pirate: The Consequences of Sea Shepherd' (2014) 44 *Environmental Law* 923, 958.; only some countries can invent and redefine the law of piracy in respect of their national law; see for example, I Van Hespen, 'Developing the Concept of Maritime Piracy: A Comparative Legal Analysis of International Law and Domestic Legislation' (2016) 31 *IJMCL* 1.
[77] AN Honniball, 'Private Political Activists and the International Law Definition of Piracy: Acting for 'Private Ends' 328.
[78] Ibid.

them in terms of developing the law.[79]

However, from a positive point of view, this process can be seen as international law-making process,[80] because international courts and national courts are making judicial dialogue[81] from the rare precedents.[82]

On the one hand, these cases do help accumulate some issues and problems to be considered[83] even if it is quite difficult to discern whether or not courts have developed something solid.[84] Because of these cases, there has been a process of communication, be it the communication between the courts and academia, the NGOs and governmental officials, or the general public and the media. This process incrementally reflects the so-called democratization of international law-making in the modern international legal system.[85]

On the other hand, this process also proves that crises and incidents do matter

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[79] Some commentators appear to expect much on it, see I Stribis, 'Who is a Pirate: On Customary International law and Jurisdiction in Domestic Courts' in G Andreone et al (eds.) *Insecurity at Sea: Piracy and Other Risks to Navigation* (Giannini Editore 2013) 17, 32.; GM Farnelli, 'Terrorists under Jolly Roger? Recent Trend on Piracy and Maritime Terrorism' in ibid, 193, 208.

[80] A Tzanakopoulos, 'Domestic Judicial Lawmaking' in C Brolmann and Y Radi (eds.) *Research Handbook on the Theory and Practice of International Lawmaking* (Edward Elgar 2016) 222.

[81] MS Karim, 'Prosecution or Maritime Pirates: the National Court is Dead-Long Live the National Court?' (2014) 20 *Wisconsin International Law Journal* 101,136-157.; AM Slaughter, *A New World Order* (Princeton University Press 2004) Ch. 2.; A Tzanakopoulos, 'Judicial Dialogue in Multi-level Governance: the Impact of Solange Argument' in OK Fauchald and A Nolkaemper (eds.) *The Practice of International and National Courts and the (De-)Fragmentation of International Law* (Hart 2012) 185.

[82] *Jurisdictional Immunity of the State* (Germany v Italy: Greece Intervening) Judgment [2012], ICJ Rep 99.

[83] A Tzanakopoulos and CJ Tams, 'Introduction: Domestic Courts as Agents of Development of International Law' (2013) 26 *LJIL* 531.; R O'keefe, 'Domestic Court as Agent of Development of the International Law of Jurisdiction' (2013) 26 *LJIL* 541.; and other essays in the symposium.

[84] Thus using methods for systemic integration of these national cases with international cases is important, see J d'Aspremont, 'The Systemic Integration of International Law by Domestic Courts: Domestic Judges as Architects of the Consistency of the International Leal Order' in OK Fauchald and A Nolkaemper (eds.) *The Practice of International and National Courts and the (De-)Fragmentation of International Law* (Hart 2012) 141.

[85] WM Reisman, 'The Quest for World Order and Human Dignity in the Twenty First Century: Constitutive Process and Individual Commitment', (2012) 351 *Recueil des Cours* 135-137.

in forming international law of maritime violence. If there were no such controversial incidents illustrated above, it would not be possible to see these judicial precedents.

In short, the real problem is that when the negotiators were drafting the piracy provisions of the UNCLOS and 1958 High Sea Convention, there was a lack of attention in incorporating future maritime violence scenarios. During that past few decades before the rise of Somali pirates, maritime piracy was of little practical concern and was deemed 'a thing of the past'.[86] Thus it is reasonable that the drafters cannot foresee the problem. It so happened that the issue about maritime terrorists was also out of imagination during the negotiations.

## III. Identifying Legal Gaps over Maritime Terrorism

There is no general recognised definition on what is maritime terrorism.[87] The reason is simply because that there is just no general accepted consensus and definition about the term 'terrorism' in international law.[88]

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[86] See S Davidson, 'Dangerous Waters: Combating Maritime Piracy in Asia' (2000) 9 *Asian Yearbook of International Law* 3, 5.; E Kontorovich, 'A Guantanamo on the Sea: The Difficulty of Prosecuting Pirates and Terrorists' (2010) 98 *California Law Review* 243, 270.

[87] See the discussion about some definitions of maritime terrorism in MS Karim, *Maritime Terrorism and the Role of Judicial Decisions in the International Legal Order* (Martinus Nijhoff 2016) 8-9, 40-41.; A definition provided by the Council for Security Cooperation in the Asia Pacific (CSCAP) Working Group might be taken into consideration, it defines maritime terrorism as 'the undertaking of terrorist acts and activities within the maritime environment, using or against vessels or fixed platforms at sea or in port, or against any one of their passengers or personnel, against coastal facilities or settlements, including tourist resorts, port areas and port towns or cities.' at http://www.maritimeterrorism.com/definitions/ ; some commentators take this definition as their analytical departure, see Y Alexander, 'Maritime Terrorism: An Overview of Challenges and Responses' in Y Alexander and TB Richardson (eds.) *Terror on the High Seas: From Piracy to Strategic Challenge* (ABC-CLIO 2009) 1, 8.; JSC Mellor, 'Missing the Boat: The Legal and Practical Problems of the Prevention of Maritime Terrorism' (2002) 18 *American International Law Review* 341.

[88] B Saul, *Defining Terrorism in International Law* (OUP 2006); B Saul, 'The Emerging International Law of Terrorism' in B Saul (ed.) *Terrorism* (Hart, 2012), lxvii.; MS Karim, *Maritime Terrorism and the Role of Judicial Decisions in the International Legal Order* 43-45.; B Saul, 'Terrorism as a Transnational Crime' in N Boister and RJ Cyrrie (eds.) *Routledge Handbook of Transnational Criminal Law* (Routledge 2015) 394.

According to the Appeal Chamber of the Special Tribunal for Lebanon relating to the crime of terrorism, it said:

> Although it is held by many scholars and experts that no widely accepted definition of terrorism has evolved in world society because of the marked different views on some issues,…..As we shall see, a number of treaties, UN resolutions, and the legislative and judicial practice of States evince the formation of a general opinio juris in the international community, accompanied by a practice consistent with such opinion, to the effect that a customary rule of international law regarding the international crime of terrorism, at least in time of peace, has indeed emerged. This customary rule requires the following three key elements: (i) the perpetration of a criminal act (such as murder, kidnapping, hostage-taking, arson, and so on), or threatening such an act; (ii) the intent to spread fear among the population (which would generally entail the creation of public danger or directly or indirectly coerce a national or international authority to take some action, or to refrain from taking it; (iii) when the act involves a transnational element.[89]

While there is no accepted definition on terrorism or maritime terrorism, if we apply some connotations mentioned above, certain activities can fit within the scope of maritime terrorism[90]: for example, WMD transportation,[91] the internal hijacking

[89] *Prosecutor v. Ayyash et al., Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging*, STL-11-01 (STL AC, 16 February 2011), paras. 83 and 85.; see also B Saul, 'Legislating from a Radical Hague: The United Nations Special Tribunal for Lebanon Invents an International Crime of Transnational Terrorism' (2011) 21 *LJIL* 677; K Ambos, 'Judicial Creativity at the Special Tribunal for Lebanon: Is There a Crime of Terrorism in International Law (2011) 21 *LJIL* 655.

[90] On Relevant terrorist groups and incidents, see J Kraska and R Pedrozo, *International Maritime Security Law* (Mrtinus Nijhoff 2013) 739 ff.

[91] E Papastavridis' Maritime Terrorism in International Law' in B Saul (ed.) *Research Handbook on International Law and Terrorism* (Edward Elgar 2014) 74, 76-77.; on relevant legal issues regarding WMD, DH Joyner, *International Law and the Proliferation of Weapons of Mass Destruction* (OUP 2009)

of a vessel at sea (the *Achille Lauro*),[92] and the terrorist bombing within a state's jurisdiction (the *USS Cole* case).[93] What concerns most in this part is WMD transportation, because this activity reflects and reveals several potential gaps and ambiguities in UNCLOS. Accordingly, the main purpose of this section is to assess and realise these legal gaps before proceeding to the analysis of law-making techniques concerning maritime terrorism in the following chapters.

### A. Considerations in the Territorial Sea

The territorial sea is a maritime zone under a state's sovereignty not exceeding the 12 nautical miles limits set up from the baseline.[94] However, that sovereignty power is not without limitation because the right of innocent passage is an essential component in the territorial sea. UNCLOS Article 18(1) firstly indicates that 'passage means navigation through the territorial sea for the purpose of: (a) traversing that sea without entering internal waters or calling at a roadstead or port facility outside internal waters; or (b) proceeding to or from internal waters or a call at such roadstead or port facility.' Secondly, passage shall be continuous and expeditious. Pursuant to Article 19 (1), innocent passage refers to an activity 'so long it is not prejudicial to the peace, good order or security of the coastal State. Such passage shall take place in conformity with this Convention and with other rules of international law.' The meaning of the wordings in this paragraph will be

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[92] See Chapter 3.

[93] On 12th October 2000, while the US Navy destroyer named *USS Cole* was refuelled a in the Port of Aden in Yemen, it was suddenly attacked by a small boat carrying two suicide bombers and explosives. The incident caused nineteen soldiers killed and thirty-nine were injured. This is another type of maritime terrorism. It happened at sea, in a port and within the sovereignty of a state, therefore, the coastal state has jurisdiction to arrest suspects and try for offences committed within its territory. R Miniter, *Losing Bin Laden: How Bill Clinton's Failure Unleashed Global Terror* (Regnery Publishing Inc 2004) Ch. 3.

[94] UNCLOS, art. 3.

discussed later.

UNCLOS Article 19(2) stipulates a list, which provides several kinds of non-innocent activities, they are:

> (a) any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations;
> (b) any exercise or practice with weapons of any kind;
> (c) any act aimed at collecting information to the prejudice of the defence or security of the coastal State;
> (d) any act of propaganda aimed at affecting the defence or security of the coastal State;
> (e) the launching, landing or taking on board of any aircraft;
> (f) the launching, landing or taking on board of any military device;
> (g) the loading or unloading of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal State;
> (h) any act of wilful and serious pollution contrary to this Convention;
> (i) any fishing activities;
> (j) the carrying out of research or survey activities;
> (k) any act aimed at interfering with any systems of communication or any other facilities or installations of the coastal State;
> (l) any other activity not having a direct bearing on passage.

These conditions call for two comments. First, it is not clear whether it is an exhaustive list or not,[95] though Allen opines that this debate is perhaps purely

[95] Cf. DR Rothwell 'Innocent Passage in the Territorial Sea' in DR Rothwell and S Bateman (eds.) *Navigational Rights and Freedoms and the New Law of the Sea* (Brill 2000) 74.; K Hakapaa and EJ

academic because the US and former Soviet Union took the position that Article 19(2) was an exhaustive list.[96] It can be seen that there is no specific wording on terrorism or transportation of WMD. However, this does mean that there is no potential room for taking terrorism-related crimes into the category.

For example, Article 19(2)(l) provides: 'any other activity not having a direct bearing on passage'. This paragraph is potentially wide enough to be thought as 'a catch-all clause by a costal state inclined to a narrow view of innocence.'[97] During UNCLOS negotiations, this subparagraph was criticised by some states, they considered this has an 'open-ended character'.[98] Accordingly, coastal states have some discretion in determining what constitutes 'any other activity' and 'not direct bearing.' It seems that the phrase is 'troubling and potentially open to abuse…however, there is little practice to suggest that this provision has in effect been misused.'[99] In other words, there is still possibility to abuse this provision; however, there is now no evidence to suggest coastal states take pure WMD transportation as non-innocent activity.

Second, commentators generally opine that the nature of innocent passage is evaluated by its manner rather than the destination, motive of passage or the type of ship.[100] This understanding is similar to the Court's judgment in the *Corfu Channel*

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Molenaar, 'Innocent Passage: Past and Present' (1999) 23 *Marine Policy* 131.; RR Churchill and AV Lowe, *The Law of the Sea* (Manchester University Press, 3rd edition 1999) 85-88.

96 CH Allen, *Maritime Counterproliferation Operations and the Rule of Law* (Praeger Security International 2007) 115.; 'Uniform Interpretation of Norms of International Law Governing Innocent Passage (US-USSR)' (1989) 28 *ILM* 1444.

97 Allen, ibid.

98 MH Nordquist et al (eds.) *United Nations Convention on the Law of the Sea 1982: A Commentary, Volume II* (Martinus Nijhoff 1993), (hereafter *Virginia Commentary II*), 'Article 19' 164, 177.

99 DR Rothwell and T Stephens, *The International Law of the Sea* (Bloomsbury, 2ed edition 2016) 232.

100 Y Tanaka, *The International Law of the Sea* (CUP, 2nd edition 2015) 88.; DR Rothwell and T Stephens, *The International Law of the Sea* 232.

Case, in which the Court specified: 'It remains, therefore, to consider whether the *manner* in which the passage was carried out was consistent with the principle of innocent passage'.[101] This judgement bears a question: whether a coastal state can invoke Article 19(2)(a) for rendering a foreign vessel transporting WMD to a third state as non-innocent. In fact, there is no record to suggest that a foreign vessel carrying WMD while passing the territorial sea of a costal state can be deemed as non-innocent.[102]

### 1. Peace, Good Order and Security

Generally speaking, there are two set of terms needs to be interpreted in relation to Article 19(1)(2), 21(1), 25(3) and Article 27(1)(b). The first set is about 'peace, good order and security'. The second is about 'other rules of international law.'

First, by applying common sense, or in the sense of international law to the concept of security,[103] it is pretty natural to take terrorism, proliferation of WMD or piracy as threats that could hamper the 'peace, good order and security' of a state.[104] If it is in the scenario of suicide bombing within the territorial sea, a coastal state can exert its power to enforce the law, just like in the port or internal waters. That would be as simple as it could be. Article 21 essentially gives rights to coastal states for adopting laws and regulations relating to innocent passage, as long as those rules are

[101] Emphasis is original, derives from *Corfu Channel* Case (UK/Albania), Merits [1949], ICJ Rep, 4, 30.
[102] Guilfoyle, *Shipping Interdiction and the Law of the Sea* 241.
[103] ME Footer et al (eds.) *Security and International Law* (Hart 2016); there are many well-known security concepts being discussed in this edited book, from human security, environmental security, regional security, responsibility to protect, terrorism, maritime piracy; to arms control, security interests in international investment law, climate change and cyber attack, these concepts are all perceived as representing security threats and security concerns in international law.
[104] N Klein et al (eds.) *Maritime Security: International Law and Policy Perspectives from Australia and New Zealand* (Routledge 2011)

generally accepted international standards and rules and applicable through due publicity.[105]

But if the case is about transporting WMD in the territorial sea of a coastal state, that would be difficult to meet the conditions stipulated in those provisions.

Let us consider whether there is any technique to rightly apply and interpret the terms 'peace, good order, or security'. During the UNCLOS negotiations, there was 'no attempt to explain those terms, and this left the determination to the discretion of the coastal State'.[106] This is also depicted by Lowe and Churchill, when they discussed the right of innocent passage, they held a similar view that 'the right has been interpreted liberally, as is often the case where rights protect security interests.'[107]

If there is no any applicable or acceptable interpretation to 'peace, good order or security', are there some experiences which can be used in clarifying at least a bit about the terms?

In the *Nicaragua* case, one of the Court's task was to interpret a phrase 'considers necessary for the protection of its essential security interest' in the article XXI of the 1956 bilateral treaty between the US and Nicaragua. The Court firstly said that 'any interpretation or application of the Treaty lies within the Court's jurisdiction'.[108] Then the Court illustrated:

> It is difficult to deny that self-defence against an armed

[105] UNCLOS art. 21(2) and (3).
[106] *Virginia Commentary II*, 'Article 19' 167. There is no such a discussion or explanation in UNCLOS art. 25 and 27 regarding the terms of 'peace, good order or security'. See ibid, 228 and 237
[107] Churchill and Lowe, *The Law of the Sea* 87.
[108] *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America) Merits, (Judgment) [1986] ICJ Rep 14., para. 222.

> attack corresponds to measures necessary to protect essential interests. But the concept of essential security interests certainly extends beyond the concept of an armed attack, and has been subject to very broad interpretations in the past. The Court has therefore to assess whether the risk run by these "essential security interests" is reasonable, and secondly, whether the measures presented as being designed to protect these interest are not merely useful but "necessary".[109]

As the Court found no evidence to prove that the embargo was necessary to put upon Nicaragua for protecting those American 'essential security interests', thus the US was in breach of that bilateral treaty.[110] In fact, the same 'essential security interests' issue had been raised and discussed in the *Oil Platform* case.[111] Again, the US lost the case with a similar reasoning.[112]

It may be argued that the Court did not establish any criteria for determining what the concept 'essential security interests' implicates in a general sense. In other words, the Court was of no help in clarifying the concept.

Outside of the use of force picture, for example, pursuant to Article XXI of the 1994 GATT on 'security exceptions', it stipulates:

> Nothing in this Agreement shall be construed:
> (a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or
> (b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests

[109] Ibid, para. 224
[110] Ibid, para. 281-82
[111] *Oil Platforms* (Islamic Republic of Iran v. United States of America) Judgment, ICJ Reports [2003], paras. 40-43, 72-73.
[112] Ibid, para. 125.

(i) relating to fissionable materials or the materials from which they are derived;

(ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;

(iii) taken in time of war or other emergency in international relations; or

(c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

According to WTO's Analytical Index and commentators' explanation, this article was designed for striking a balance between a state's national security concern and free trade. As one GATT drafter said, 'We cannot make it too tight, because we cannot prohibit measures which are needed purely for security reasons. On the other hand, we cannot make it so broad that, under the guise of security, countries will put on measures which really have a commercial purpose'.[113]

However, as Bossche observed, the reality is that this provision has been interpreted broadly by some Members of the WTO; and to date, 'these expectations have never been invoked in any panel of the Appellate Body of the WTO'.[114]

As a matter of fact, it is naturally no need to clearly define about the concept of security or good order. It does not help at all. Nevertheless, it does not mean states can interpret the terms arbitrarily.

In short, there are no criteria to assess whether some transportation of WMD

[113] WTO, Analytical Index, 'Article XXI', https://www.wto.org/english/res_e/booksp_e/gatt_ai_e/art21_e.pdf

[114] PVD Bossche, *The Law and Policy of the World Trade Organization: Text, Cases and Materials* (CUP, 2nd edition 2008) 664-667.

and related materials can be formed as real threats to a coastal state or not. Therefore, interpretation and application of provisions about 'peace, order and security' mainly depends on a state's discretion.

### 2. Other Rules of International Law

There is another term which needs to be clarified.[115] In UNCLOS Article 19(1) and 21(1), both refer to 'in conformity with this Convention and other rules of international law'.[116] What does this term 'other rules of international law' implicate?

From the negotiation records, it was once drafted as 'the principles of international law embodied in the Charter of the United Nations';[117] therefore, to include the UNSC resolutions would be sensible. That is also the general opinion shared by commentators.[118] Thus, the significance of UNSC resolutions on terrorism and WMD is one factor that cannot be ignored in combating maritime terrorism.

### 3. Criminal Jurisdiction

Another issue is about UNCLOS Article 27 on the criminal jurisdiction on board a foreign ship. It may be a bit strange because pursuant to the first and fifth paragraph of this provision, they suggest that states 'should not' and 'may not' do

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[115] A recent case law with detailed discussion about this term, *In the Matter of the Chagos Marine Protected Area Arbitration* (Mauritius v UK), Award, PCA (18 March 2015), paras. 500-516.
[116] UNCLOS art. 19(1) and 21(1)
[117] *Virginia Commentary II*, 'Article 19' 164, 174-75.
[118] Of course there are other relevant rules of international law can be referred to, see DR Rothwell et al (eds.) *The Oxford Handbook of the Law of the Sea* (OUP 2015) 91, 106.; cf. S Talmon, 'The Security Council as World Legislature' (2005) 99 *AJIL* 175, 179.; Guilfoyle, *Shipping Interdiction and the Law of the Sea* 242.

something on board the ship for exert their criminal jurisdiction.[119] But in the third and fourth paragraph, they both provide that states 'shall' do something if meet the conditions provided in the article.[120] An explanation is that during negotiation, this article was an attempt to strike a balance between the right of the coastal states and flag states.[121] Hence, it is correct to argue that the term 'should not' is 'hortatory'.[122] That means coastal states should be cautious and should not do something more than the conducts provided in Article 27(1)(a)-(d). And it was confirmed that the conducts in the list is 'exhaustive'.[123] From the view of avoiding conflict of interests between flag and coastal states, Article 27(4) expressly provide that 'due regard' is required for preserving the stability and interests of freedom of navigation.

The final point would be whether or not Article 27(5) can be applied to the WMD-related transporting activities at sea. Though this paragraph states the coastal states 'may not' take any steps for ships which are just passing through the territorial sea while the crimes have already committed before passing. The tone of the term

[119] UNCLOS art. 27(1) :'The criminal jurisdiction of the coastal State should not be exercised on board a foreign ship passing through the territorial sea to arrest any person or to conduct any investigation in connection with any crime committed on board the ship during its passage, save only in the following cases:….' art. 27(5) provides: 'Except as provided in Part XII or with respect to violations of laws and regulations adopted in accordance with Part V, the coastal State may not take any steps on board a foreign ship passing through the territorial sea to arrest any person or to conduct any investigation in connection with any crime committed before the ship entered the territorial sea, if the ship, proceeding from a foreign port, is only passing through the territorial sea without entering internal waters.'

[120] UNCLOS, art. 27(3): 'In the cases provided for in paragraphs 1 and 2, the coastal State shall, if the master so requests, notify a diplomatic agent or consular officer of the flag State before taking any steps, and shall facilitate contact between such agent or officer and the ship's crew. In cases of emergency this notification may be communicated while the measures are being taken.' Article 27(4):' In considering whether or in what manner an arrest should be made, the local authorities shall have due regard to the interests of navigation.'

[121] *Virginia Commentary II*, 'Article 27' 237, 239.

[122] Guilfoyle, *Shipping Interdiction and the Law of the Sea* 11-12, 242.

[123] *Virginia Commentary II*, 'Article 27' 242.; the four conducts are: (a) if the consequences of the crime extend to the coastal State;(b) if the crime is of a kind to disturb the peace of the country or the good order of the territorial sea;(c) if the assistance of the local authorities has been requested by the master of the ship or by a diplomatic agent or consular officer of the flag State; or(d) if such measures are necessary for the suppression of illicit traffic in narcotic drugs or psychotropic substances.

‘may not’ can be considered hortatory, gentle, and even ambiguous. In reality, this kind of phrase does not prohibit coastal states to execute their national laws, if they insist. Since the purpose is to strike a balance between the rights of coastal states and flag states, it only implicitly tells coastal states that if states insist to do something and have understood the meaning of the sentence ‘shall have due regard’ in the fourth paragraph, then states concerned should contemplate what the consequences may incur.

Ultimately, if a coastal state does not want to provoke a diplomatic and legal dispute with some other powerful states, it may try to ignore Article 27(5). Nonetheless, with the legal obligation embedded in the UNSC Resolution 1540,[124] it seems that UNSC resolution would supplement the exceptions enclosed in this paragraph. In other words, with a stronger obligation imposed by the UNSC Resolution 1540, Article 27(5) can be applied to the scenarios of WMD-related transportation by sea.

### 4. Nuclear-related Ships and Substances

A relevant question about innocent passage is whether WMD and related materials can be managed by UNCLOS Article 22 and 23. Article 22 concerns sea lanes and traffic separation in the territorial sea, and Article 23 regulates nuclear-powered ships and ships carrying nuclear and other dangerous or noxious substances. It can be said that the warships which are run by nuclear power had been noticed and discussed since the beginning of the UNCLOS negotiation,[125] because such an nuclear-powered warships managed by some great powers have been there

[124] UN Doc S/Res/1540 (28 April 2004)
[125] *Virginia Commentary II*, ‘Article 22’ and ‘Article 23’ 204-216, 217-220.

for years. It is quite obvious that at that time, again, the focus in the two articles did not include non-state actors such as terrorist groups. Not only that there was no intention to regulate maritime terrorism but also that UNCLOS simply could not do so.

It is generally understood that terrorists normally do not have access to own a ship run by nuclear power. Some related issues concerning those 'inherently dangerous or noxious substances' transported by merchant ships have been examined with the development of different national law, international rules and modern technology.[126] That is to say, the two provisions are in effect quite difficult to be applied in real maritime terrorism scenario. Likewise, only when coastal states have reliable intelligence would these two provisions be made applicable to potential WMD materials transferred under the guise of merchant ships

### 5. Straits and Archipelagic Waters

Lastly, transit passage and innocent passage in the international straits[127] or innocent passage in archipelagic waters and sea lanes[128] also reflect the principle of freedom of navigation, though the two regimes are newly invented by UNCLOS.[129] In legal terms, the two regimes have their own separate characters.[130] However,

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[126] JM Van Dyke, 'Ocean Transport of Radioactive Fuel and Waste' in DD Caron and HN Scheiber, *The Oceans in the Nuclear Age: Legacies and Risks* (Martinus Nijhoff, 2014) 147.; T Treves, 'Navigation of Ships with Nuclear Cargoes: Dialogue between Flag and Coastal States as a Method for Managing the Dispute,' in ibid 217.; CH Allen, 'Cargoes of Doom: National Strategies of the US to Combat the Illicit Transport of Weapons of Mass Destruction by Sea' in ibid 295.

[127] UNCLOS art. 37-45.; DD Caron and N Oral (ed.) *Navigating Straits: Challenges for International Law* (Brill 2014); H Caminos and VP Cogliati-Bantz, *The Legal Regime of Straits* (CUP 2014)

[128] UNCLOS, art. 52-53.; Y Tanaka, *The International Law of the Sea* 116-118.

[129] Though the regimes of straits may not be completely new, see Churchill and Lowe, *The Law of the Sea* 102-115,125-129.

[130] That is the logic that UNCLOS regulates in Part III and IV. See also the comparison in H Caminos and VP Cogliati-Bantz, *The Legal Regime of Straits* Ch. 4.

under the consideration of maritime terrorism, the nature of the rules applied in managing transit passage or passage in the archipelagic waters and sea lanes is not so much different if compared to innocent passage in the territorial sea.[131] For example, UNCLOS Article 42 empowers states bordering straits by allowing them to 'adopt laws and regulations' in respects of safety of navigation, prevention of discharge of oil oily wastes and other noxious substances.[132]

However, the problem perhaps not just lies in prescriptive jurisdiction,[133] because there is this argument that states bordering international straits might not have sufficient enforcement power.[134] For example, Shearer noticed that 'there is no direct prohibition of enforcement measures by the coastal States in straits, nor any direct recognition of them'.[135] He referred to Article 233 together with Article 42 and 44 and argued that 'if ordinary territorial seas jurisdiction existed in straits, Article 233 would be otiose or at least unnecessary'.[136] Nonetheless, this ambiguity may not be that difficult to solve. If states bordering international straits have already legislated their own laws in criminalising some activities into real offences, even Shearer concluded that once the passage was not performed as transit passage, states 'might therefore be boarded, and arrested if found to have committed offences against the laws of the coastal States which it is entitled to apply to its territorial

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131 Shearer observed: 'There seems, however, to be no practical difference between the status of archipelagic waters and territorial waters except with respect to archipelagic sea-lanes passage.' IA Shearer, 'Problems of Jurisdiction and Law Enforcement against Delinquent Vessels,' (1986) 35 *ICLQ* 320, 333.

132 UNCLOS art. 42 also provides that 'such laws and regulations shall not discriminate in form and or in fact among foreign ships or in their application have the practical effects of denying, hampering or impairing the right of transit passage', see also UNCLOS, art. 42(1) and 42(2).

133 Caminos and Cogliati-Bantz, *The Legal Regime of Strait*, Ch 7.

134 Ibid 280-290.

135 Shearer, 'Problems of Jurisdiction and Law Enforcement against Delinquent Vessels,' 331.

136 Ibid, 332.

sea.'[137]

## B. Considerations beyond Territorial Sea

### 1. Contiguous Zone

When maritime terrorism happens in other maritime zones beyond the territorial sea, then the situation will become relatively more complex. Fortunately, contiguous zone is still not difficult to comprehend in the scenario of terrorist bombing or WMD transportation.

By definition, the contiguous zone is a zone that may not extend beyond 24 nautical miles.[138] As it is a part of the EEZ and part of the high sea, freedom of navigation is applicable in it. Since UNCLOS Article 33 provides the only provision, it seems that the contiguous zone is relatively easy to deal with. In fact, it is 'less straightforward' for tackling maritime terrorism.[139] The nature of the contiguous zone is a zone set up for 'security' consideration.[140] Nonetheless, because of the term 'security' was initially considered 'extremely vague', hence it was drafted in a more concrete way.[141] That is why the scope of preventing 'infringement of its customs, fiscal, immigration or sanitary laws and regulations' was inscribed in UNCLOS.

Taking potential terrorism or WMD transportation activities into account would

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[137] Ibid.
[138] UNCLOS, art. 33(2).
[139] Guilfoyle, *Shipping Interdiction and the Law of the Sea* 242.
[140] Rothwell and Stephens claim that the contiguous zone is 'not a general security zone', but this conclusion is derived from the only evidence of the proactive protest by the US to other coastal states' law and regulations regarding the contiguous zone. It seems not a convincing point. DR Rothwell and T Stephens, *The International Law of the Sea* 83.
[141] *Virginia Commentary II*, 'Article 33' 266, 274.; FC Leiner, 'Maritime Security Zones: Prohibited Yet Perpetuated' (1983) 24 *VJIL* 967, 976-981.

be both sensible and suitable if only the purpose of security and the nature of the continuous zone are taken into consideration, but this leads to the question about how the law enforcement authorities proceed in this matter. If there is only tiny potential and that the possibility is so low, along with having no reliable intelligence on the given ship regarding what is going on there, the coastal states would find it difficult to exercise 'the control necessary'[142] to the potential crime. Accordingly, the control must be limited to 'inspections and warnings, and cannot include arrest or forcible taking into port'.[143] Other than that, it seems that there is little coastal states can do about it.[144]

### 2. Exclusive Economic Zone

In the Exclusive Economic Zone (EEZ),[145] all states enjoy the freedom of navigation. the coastal states enjoy sovereign rights for exploring and exploiting living and non-living natural resources.[146] The jurisdiction covers the establishment of artificial islands, installations and structures, marine scientific research as well as the preservation of marine environment.[147] Pursuant to UNCLOS Article 58(2), some enforcement jurisdiction can be applied to EEZ as long as they are not incompatible with the rules stipulated in the high seas part. Also, According to Article 58(1) and (2), the EEZ regime imports the high seas freedoms of navigation into it.

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[142] UNCLOS, art. 33(1).
[143] Shearer, 'Problems of Jurisdiction and Law Enforcement against Delinquent Vessels,' 330.
[144] These control and preventive measures would probably go too far if extending to detain or seize the ship.; N Klein, *Maritime Security and the Law of the Sea* (OUP 2011) 88.; Guilfoyle, *Shipping Interdiction and the Law of the Sea* 243.
[145] UNCLOS art. 57 provides that 'the exclusive economic zone shall not extend beyond 200 nautical miles'.
from the baselines from which the breadth of the territorial sea is measured.
[146] UNCLOS, art. 56(1)(a).
[147] UNCLOS, art. 56(2) and (60), the exclusive right over artificial islands, installations, and structures also applies to continental shelf. See also UNCLOS art. 80.

In a maritime terrorist incident such as suicide bombing or a cruise being kidnapped in the EEZ, it might be unlikely to enforce criminal laws the coastal states have already enacted, and the reason perhaps is that these activities are obviously not connected to sovereign rights.[148] This flaw has contributed to new developments and state practice indicating that the enforcement jurisdiction in the EZZ 'appears to have expanded dramatically'.[149]

While the recent practice about the right of visit and hot pursuit has been used and applicable to the EEZ,[150] maritime terrorism by its nature is a criminal offence under the turf of criminal law.[151] Therefore, if there is no recognized prescriptive jurisdiction granted by UNCLOS to deal with terrorist offences in the EEZ, then it is logically inappropriate to enforce national laws to potential maritime terrorism offences such as WMD transportation.

It has been noticed that since the 911 terrorist attacks, a growing number of practice indicates that more states have 'the willingness to interfere with navigational rights and freedoms on grounds of maritime security'.[152] For example, Australia tried to establish its 'Australian Maritime Identification System' in 2004. It was based on the designation of 'Maritime Identification Zone', the width of which is 1,000 nautical miles from an Australian coastline. The announced purpose of this designation is to accumulate all relevant information for protecting its national

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[148] Klein, *Maritime Security and the Law of the Sea* 89.; D Guilfoyle, 'Maritime Interdiction: What Challenges Lie Ahead?' (2014) *Revue Belge de Droit International* 94, 109-120.
[149] JM Van Dyke, 'The Disappearing Right to Navigational Freedom in the Exclusive Economic Zone' (2005) 29 *Marine Policy* 107, 109.
[150] For example, see the *M/V Saiga* case (No. 2) (Saint Vincent and Grenadines v. Guinea); (1999) 38 *ILM* 1323.
[151] A Blanco-Bazan, 'Suppressing Unlawful Acts: IMO Incursion in the Field of Criminal Law' in Ndiaye and Wolfrum (eds.) *Law of the Sea, Environmental and Settlement of Disputes* (Martinus Nijhoff 2007) 713.
[152] Rothwell and T Stephens, *The International Law of the Sea* 99-100.

security interests and preventing proliferation of WMD.[153] As Klein observed, the implication of such development is that maritime security threats 'will only be improved when there is proper alignment between national and international laws.'[154]

### 3. High Seas

On the high seas, freedom of navigation naturally exists.[155] If the extent of a coastal state's jurisdictional power is characterized as from the highest near the shore to almost zero when reaching the high seas,[156] then logically speaking, the extent of freedom of navigation is from almost zero near the coast to the highest extent when reaching the high seas.

Two questions await answers with regards to maritime terrorism on the high seas: first, how does UNCLOS address stateless ships if those ships are used for transporting WMD? Second, can the high seas regime or the exclusive rights of flag states adequately deal with it?

A stateless ship is defined as a ship 'sails under the flags of two or more States, using them according to convenience, may not claim any nationality…and may be assimilated to a ship without nationality'.[157] In the *So San* incident,[158] it was initially identified as a North Korean ship and then confirmed it was registered in

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[153] N Klein, 'Legal Implications of Australia's Maritime Identification System' (2006) 55 *ICLQ* 337.; N Klein, 'Legal Limitations on Ensuring Australia's Maritime Security' (2006) 7 *Melbourne Journal of International Law* 307.

[154] N Klein, 'Maritime Security' in Rothwell, DR et al (eds.) *The Oxford Handbook of the Law of the Sea* (OUP 2015) 582, 591.

[155] UNCLOS art. 87.

[156] W Gilmore, 'Narcotics Interdiction at Sea: US-UK Co-Operation' (1989) 13 *Marine Policy* 218, 219.

[157] UNCLOS art. 92(2)

[158] See more discussion in Chapter 5.

Cambodia with a different name. The Spanish navy interdicted the ship with reasonable suspicion about whether it is stateless or not. This can certainly be justified by UNCLOS Article 110.[159]

The problem or gap is not whether UNCLOS can interdict stateless ships or not, but relates to a clear omission that no provision can be used for seizing or detaining stateless ships.[160] The drafters' consideration has been claimed as 'difficult to understand'.[161] Moreover, the right to visit or search is only under five grounds:[162] piracy, slave trade, unauthorised broadcasting, stateless ships and flying a foreign nation's flag or refuse to show its flag. As such, WMD transportation or potential terrorist activity clearly does not serve as a legal ground for utilising the right of visit.

In sum, the object of identifying potential legal gaps concerning maritime violence is to reflect some law-making needs in the evolution of the law of the sea. The reason why these legal gaps and ambiguities exist is because whe UNCLOS was being negotiated, maritime terrorism or terrorist-like scenario was not an issue and not a foreseeable problem.[163] That being said, if these problems stem from the original treaty-making process, the question about the likelihood to modify or amend the UNCLOS for filling such gaps or clarifying ambiguities thus surfaces.

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[159] Because there was a reasonable ground, see UNCLOS, art. 110(1)(e).

[160] MA Becker, 'The Shifting Public Order of the Oceans: Freedom of Navigation and the Interdiction of Ships at Sea' (2005) 46 *HILJ* 131, 184-185.

[161] Guilfoyle, *Shipping Interdiction and the Law of the Sea* 18.

[162] UNCLOS, art. 101(1) provides: 'Except where acts of interference derive from powers conferred by treaty, a warship which encounters on the high seas a foreign ship, other than a ship entitled to complete immunity in accordance with articles 95 and 96, is not justified in boarding it unless there is reasonable ground for suspecting that: (a) the ship is engaged in piracy;(b) the ship is engaged in the slave trade;(c) the ship is engaged in unauthorized broadcasting and the flag State of the warship has jurisdiction under article 109;(d) the ship is without nationality; or (e) though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship.'

[163] Not only maritime terrorism was not a major issue during the negotiation process, maritime piracy was not a serious concern, either.

## IV. Amendment and Modification of UNCLOS

There are two general ways to let the UNCLOS being adapted with the changes and challenges of new political, scientific and technological developments in international society. One way is to use the UNCLOS amendment procedures;[164] the other way is to go through the UNCLOS Article 311(3)[165] and other treaty modification techniques.[166] This section is not going to deal with the UNCLOS formal amendment procedures in detail, because this topic has been satisfactorily examined elsewhere.[167] Rather, the question being examined is the need for adjustment or amendment concerning maritime violence.

### A. Risks by Using the UNCLOS Amendment Procedures

To put it simply, it is not worth using the UNCLOS formal amendment procedures, and nor should it be used in the near future.

It is general consensus that it is 'unlikely' and 'unworkable in practice' that the UNCLOS will be amended by the formal procedures.[168] In other words, it is not

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[164] UNCLOS, art. 312-314, 316.

[165] UNCLOS, art. 311(3) provides:' Two or more States Parties may conclude agreements modifying or suspending the operation of provisions of this Convention, applicable solely to the relations between them, provided that such agreements do not relate to a provision derogation from which is incompatible with the effective execution of the object and purpose of this Convention, and provided further that such agreements shall not affect the application of the basic principles embodied herein, and that the provisions of such agreements do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under this Convention.'

[166] A Aust, *Modern Treaty Law and Practice* (CUP, 3rd edition 2013) Ch. 15.; R Kolb, *The Law of Treaties: An Introduction* (Edward Elgar 2016) Ch. X.

[167] J Harrison, *Making the Law of the Sea: A Study in the Development of International Law* (CUP 2011) 65-70.; D Freestone and AGO Elferink, 'Flexibility and Innovation in the Law of the Sea—Will the LOS Convention Amendment Procedures Ever Be Used?' in AGO Elferink (ed.) *Stability and Change in the Law of the Sea: The Role of the LOS Convention* (Martinus Nijhoff 2005) 169.

[168] J Harrison, *Making the Law of the Sea* 84.; I Buga, 'Between Stability and Change in the Law of the Sea Convention: Subsequent Practice, Treaty Modification and Regime Interaction' in DR Rothwell et al (eds.) *The Oxford Handbook of the Law of the Sea* (OUP 2015) 46.; SP Menefee, 'Foreign Naval Intervention in Cases of Piracy: Problems of Strategies' (1999) 14 *IJMCL* 353, 370.; D Freestone and AGO Elferink, 'Flexibility and Innovation in the Law of the Sea—Will the LOS

impossible in the sense that nothing is impossible, and since the drafters have considered it and wrote it into the treaty, it is always possible. However, as Albert Einstein once said: 'In theory, theory and practice are the same; in practice, they are not;'[169] in theory, it is possible to utilise the amendment procedures, but in practice, it is almost impossible to put those provisions in action.

Commentators generally share the following views that explain why the amendment procedures should not be used: First, it would be time-consuming, and may jeopardize the integrity and coherence of the balanced maritime interests formed by the 'package deal' negotiation method. Second, the original political consensus and compromises could be undermined by different and selective amendment proposals, and it may rouse some original and unnecessary controversies again. Third, it could impede the universal ratification of the UNCLOS and might threaten the legitimacy and process of the formation of customary international law of the sea. Fourth, even if the amendment can be done, it will create a long period of uncertainty about the effects and legal status of those new provisions.[170]

Among all related discussions about the potential risks and usefulness of the UNCLOS amendment procedures, Oxman's analysis deserves a special attention:

> One should not confuse unwillingness to agree with legal inability to do so. Nothing in the Convention either

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Convention Amendment Procedures Ever Be Used?' 218.

[169] Quoted from O Sender and M Wood, 'The Emergence of Customary International Law: Between Theory and Practice' in C Brolmann and Y Radi (eds.) *Research Handbook on the Theory and Practice of International Lawmaking* (Edward Elgar 2016) 133.

[170] Harrison, *Making the Law of the Sea* 68-70, 84.; D Freestone and AGO Elferink, 'Flexibility and Innovation in the Law of the Sea—Will the LOS Convention Amendment Procedures Ever Be Used?' 218-219.; BH Oxman, 'Tools for Change: The Amendment Procedure' in *Proceedings of the Twentieth Anniversary Commemoration of the Opening for Signature of the UNCLOS* (United Nations 2003) 195, 198, 205-206.

> requires States to insist on exercising rights or to refuse to accept new duties by agreement; in many cases, quite the opposite is suggested by the Convention. If there are political obstacles to an agreement on the matter, there is little reason to believe those obstacles will disappear in the context of a negotiation of amendments.[171]

In short, formal amendment is almost impossible and should not be used.[172] Consequently, we need to find other means to let UNCLOS fitting into the new circumstances.

## B. Other Means to Modification

It is argued that the distinction between treaty amendment and modification is a

[171] BH Oxman, 'Tools for Change: The Amendment Procedure' 207.

[172] Ukraine transmitted a draft comprehensive convention on the suppression of acts of piracy at sea to the UNGA in October 2010, but did not receive much attention from the member states of the UN. In hindsight, the reason is that round late 2010, interest-concerned states have decided not to set up a specialised court for prosecuting pirates, but Ukraine's proposal clearly suggested the need to establish a specialized international court, see Ukraine's draft convention, art. 26-49.; Cf. UNSC's several reports on this specialised courts issue, 'Letter dated 1 October 2010 from the Permanent Representative of Ukraine to the United Nations addressed to the Secretary-General', UN Doc A/65/489 (6 October 2010); 'Report of the Secretary-General on Possible Options to Further the Aim of Prosecuting and Imprisoning Persons Responsible for Acts of Piracy and Armed Robbery at Sea off the Coast of Somalia, including, in particular, Options for Creating Special Domestic Chambers Possibly with International Components, A Regional Tribunal or An International Tribunal and Corresponding Imprisonment Arrangements, Taking into Account the Work of the Contact Group on Piracy off the Coast of Somalia, the Existing Practice in Establishing International and Mixed Tribunals, and the Time and Necessary to Achieve and Sustain Substantive Results' UN Doc S/2010/394 (26 July 2010); 'Letter Dated 24 January 2011from the Secretary-General to the President of the Security Council' UN Doc S/2011/30 (25 January 2011); 'Report of the Secretary-General on the Modalities for the Establishment of Specialized Somali Anti-Piracy Courts' UN Doc S/2010/360 (15 June 2011); 'Report of the Secretary-General on Specialized Anti-Piracy Courts in Somalia and Other States in the Region' UN Doc S/2012/50 (20 January 2012); Cf. D Guilfoyle, 'Prosecuting Somali Pirates: A Critical Evaluation of the Options' (2012) 10 *JICJ* 767.; L Bento, 'Toward an International Law of Sui generis: How the Dual Nature of Maritime Piracy Law Enables Piracy to Flourish' (2011) 29 *Berkeley Journal of International Law* 399, 441-447.; YM Dutton, 'Bringing Pirates to Justice: A Case for Including Piracy within the Jurisdiction of the International Criminal Court' (2010-2011) 11 *Chicago Journal of International Law* 197, 231-241.; R Geib and A Petrig, *Piracy and Armed Robbery at Sea: The Legal Framework for Counter-Piracy Operations in Somalia and the Gulf of Aden* (OUP 2011) 179-186.; H Tuerk, 'Combating Piracy: New Approaches to an Ancient Issue' in L del Castillo (ed.) *Law of the Sea, From Grotius to the International Tribunal for the Law of the Sea: Liber Amicorum Judge Hugo Caminos* (Brill 2015) 469, 492.; A Middelburg, *Piracy in a Legal Context: Prosecution of Pirate Operating off the Somali Coast* (Wolf Legal 2011) 47-84.; BH Dubner and K Greene, 'On the Creation of a New Legal Regime to Try Sea Pirates' 41 *JMLC* (2010) 439

fluid one. For example, Aust used 'amendment' to cover both the concept of amendment and modification (i.e. subsequent practice).[173] In contrast, Kolb used 'modification' to cover formal modification (i.e. amendment) and informal modification (i.e. subsequent practice).[174] While the treaty interpretation through subsequent practice[175] can be distinguished from the concept of treaty modification, 'the distinction is often rather fine'.[176]

There are many examples that can illustrate how the UNCLOS has been *de facto* amended. For instance, the creation of the 1994 Implementing Agreement[177] and the 1995 Fish Stocks Agreement[178] are two obvious additions to the UNCLOS. The two treaties do in fact 'change or amend' UNCLOS.[179] Other examples include the decisions of the Meetings of the States Parties which have effectively made new law for managing some procedural and administrative issues such as the judges' election for the ITLOS, the information submission deadline to the Commission on the Limits of the Continental Shelf, etc.[180]

Under this context, the central question is whether the term 'may' in UNCLOS Article 105 implicates that the initial pirates-arresting states can transfer those

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[173] A Aust, *Modern Treaty Law and Practice* (CUP, 3rd edition 2013) 233.
[174] R Kolb, *The Law of Treaties: An Introduction* (Edward Elgar 2016) 193-194.
[175] VCLT art. 31(3)(b).
[176] J Crawford, *Brownlie's Principles of Public International Law* 386.; I Buga, 'Between Stability and Change in the Law of the Sea Convention: Subsequent Practice, Treaty Modification and Regime Interaction' 49.
[177] The 1994 Agreement Relating to the Implementation of Part XI of the 1982 Convention on the Law of the Sea of December 10, 1982 (1994) 33 *ILM* 1309.
[178] The 1995 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of December 10, 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (1995) 34 *ILM* 1542.
[179] D Freestone and AGO Elferink, 'Flexibility and Innovation in the Law of the Sea—Will the LOS Convention Amendment Procedures Ever Be Used?' 219.
[180] Harrison, *Making the Law of the Sea* 70-83.; L Lijnzaad, 'Formal and Informal Processes in the contemporary Law of the Sea at the United Nations, a Practitioner's view (2014) 57 *GYIL* 111.; Hakapaa, 'Oceans and the Law of the Sea at the UN General Assembly' (2010) 2 *Aegean Review on the Law of the Sea* 53.

suspects to non-arresting states for later prosecution and sentence.[181] Some argue that there is no such rights embedded in this provision,[182] but some argue third states can, if incorporating UNCLOS Article 100 on the duty to cooperate[183] altogether.[184] While there does not seem to have a clear answer in the *Virginia Commentary*,[185] Roach claimed that those who believe that third states cannot prosecute those pirates misread 'the ILC commentary and its context, which relate to enforcement jurisdiction…..the view that cooperation in the suppression of piracy by transferring captured pirates to another state for prosecution is entirely consistent with international law of piracy'.[186] In other words, the character of Article 105 has been incrementally modified by subsequent state practice; as argued by Buga, 'this represents more than a merely "procedural" change',[187] and this development does not damage the objects and purposes of the UNCLOS at all.

In sum, there is no need to amend UNCLOS for creating new rules relating to maritime violence.

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[181] Buga, 'Between Stability and Change in the Law of the Sea Convention: Subsequent Practice, Treaty Modification and Regime Interaction' 58-59.

[182] E Kontorovich, 'Case Report: United States v. Shi (2009) 103 *AJIL* 734, 739.; E Papastavridis, 'Piracy off Somalia: "The Emperors and the Thieves of the Oceans" in the 21st Century' in A Abass (ed.) *Protecting Human Security in Africa* (OUP 2010) 122, 142.; see also ILC, Report of the International Law Commission, 18th Session, UN Doc A/3159 (1956) 283, the comment to art. 43 then became art.19 of the 1958 High Seas Convention, it said: 'This right cannot be exercised at a place under the jurisdiction of another State'.

[183] The heading of art. 100 is 'Duty to Cooperate in the Repression of Piracy', it provides, '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.'

[184] T Treves, 'Piracy and the International Law of the Sea' in D Guilfoyle (ed.) *Modern Piracy: Legal Challenges and Responses* (Edward Elgar 2013) 117, 122.

[185] SN Nandan et al (eds.) *United Nations Convention on the Law of the Sea 1982: A Commentary, Vol.III* (Martinus Nijhoff 1995), 'Article 105', 212-216.

[186] JA Roach, 'Countering Piracy in Somali: International Law and International Institutions' (2010) 104 *AJIL* 397, 404-405.

[187] Buga, 'Between Stability and Change in the Law of the Sea Convention: Subsequent Practice, Treaty Modification and Regime Interaction' 59.

## V. Conclusion

Throughout this chapter, gaps and ambiguities regarding maritime violence have been identified. To understand these deficiencies in UNCLOS is a sort of precursor and bedrock for proceeding to the next stage analysis about what potential international law-making needs will reflect in reality and how those law-making techniques can be employed.

Existing case law indicates that international and national courts' contribution to the development of maritime violence is limited. In short, perhaps the only thing that we should expect is to wait for more judicial dialogue among international and national courts.

This chapter also argues that using the formal UNCLOS amendment procedures is almost impossible, thus other modification methods must be considered.

The key point is that interpretation by courts and UNCLOS amendment procedure are not the only ways for dealing with relevant legal gaps and ambiguities; there is a variety of means for addressing these problems with regard to maritime violence. It has been clearly observed in the following chapters that those law-making techniques are supplementing, supporting and enhancing one another. Therefore, it is necessary to look into other law-making mechanisms and to see what change has been achieved.

**Chapter 3**

# Multilateral and Diplomatic Processes over Maritime Terrorism: Treaties as Law-Making Instruments

If you go with a raging ulcer to see a doctor, you should not hope for much relief if you describe it as a mild stomachache. It is your job to have the other side understands exactly how important and legitimate your interests are.

Roger Fisher and William Ury (1991)[1]

## I. Introduction

Treaty-making represents one of the traditional ways of international law-making.[2] In filling legal gaps and clarifying ambiguities relating to maritime terrorism, the method of making treaties and amending these instruments in a multilateral forum have been chosen for developing the law in this sphere. The two results are the 1988 SUA[3] Convention and its 2005 Protocol[4].

The following sections contain two parts: the first is about the making of the SUA 1988 Convention. The *Achille Lauro* incident is the key reason for making the

[1] R Fisher and W Ury, *Getting to Yes: Negotiating Agreement without Giving In* (Houghton 2nd ed. Mifflin 1991) 50.

[2] R Wolfrum and V Röben, *Development of International Law in Treaty Making* (Springer 2005); K Schmalenbach, 'Lawmaking by Treaty: Negotiation and Adoption of Treaty Texts' in C Brolmann and Y Radi (eds.) *Research Handbook on the Theory and Practice of International Lawmaking* (Edward Elgar 2016) 87.; 'D Costelloe and M Fitzmaurice, 'Lawmaking by Treaty: Conclusion of Treaties and Evolution of Treaty Regimes in Practice' in ibid, 111.; A Boyle and C Chinkin, *The Making of International Law* (OUP 2007) 232 ff.

[3] As of 14 March 2017, there are 166 Contracting Parties to the 1988 SUA Convention, the combined merchant fleets of which constitute approximately 95.31% of the gross tonnage of the world's merchant fleet, see IMO, *Status of Multilateral Conventions and Instruments in Respect of which the International Maritime Organization or Its Secretary-General Performs Depositary or Other Functions*, 424;
http://www.imo.org/en/About/Conventions/StatusOfConventions/Documents/Status%20-%202017.pdf

[4] As of 14 March 2017, there are 41 Contracting Parties to the 1988 SUA Protocol, (the combined merchant fleets of which constitute approximately 39.24% of the gross tonnage of the world's merchant fleet, see ibid, 439.

1988 SUA Convention. Thus it is necessary to know some facts and legal issues surrounding the incident. Also, it will consider how the treaty was formulated by the so-called 'sectoral approach' of counter-terrorism treaties.[5] It will then investigate its strength and weakness.

The second part aims to understand how the SUA amendment was initiated and proceeded. It will also look into the leading role of the United States of America in the law-making process. The central feature of the SUA Protocol is that it developed a new ship-boarding regime by emulating the 1988 Drugs Convention[6] and the Migrant Smuggling Protocol[7] of the 2000 UN Convention against Transnational Organized Crime.[8] Accordingly, how these regimes interact with one another and what lessons can be learned from the multilateral and diplomatic process will be scrutinised.

Though UNCLOS did not deal with maritime terrorism and left some gaps in law, this chapter shows that the UNGA and UNSC both issued some resolutions and guided the direction of further negotiations after the *Achille Lauro* and 911 incidents. At the same time, multilateral treaties have been taken as law-making instruments for complementing and supporting other law-making and norm-formulating efforts in the fight against maritime terrorism..

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[5] B Saul, 'Terrorism as a Transnational Crime' in N Boister and RJ Cyrrie (eds.) *Routledge Handbook of Transnational Criminal Law* (Routledge 2015) 394, 396-402.; B Saul, 'The Emerging International Law of Terrorism' in B Saul (ed.) *Terrorism* (Hart 2012) lxvii.; H Tuerk, 'Combating Terrorism at Sea—The Suppression of Unlawful Acts against the Safety of Maritime Navigation' (2007-2008) 15 *University of Miami International and Comparative Law Review* 337, 365.;

[6] 'United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988', (1989) 28 *ILM* 497.

[7] 'The Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime 2000' (2001) 40 *ILM* 384. (hereafter, the Migrant Smuggling Protocol)

[8] '2000 United Nations Convention of Transnational Organized Crime' (2001) 40 *ILM* 335.; D McClean, *Transnational Organized Crime: A Commentary on the UN Convention and Its Protocol* (OUP 2007).

## II. The Making of the 1988 SUA Convention

### A. The *Achille Lauro* Incident

On the first day of October 1985, just about a week before the *Achille Lauro* hijacking, some members of the PLO killed three Israel civilian on a yacht outside the coast of Cyprus, the Israel Air Force struck the PLO base in Tunis, Tunisia; and about 60 PLO members were killed. Then as thought as a response to the air strike, then it came to the day of the *Achille Lauro* incident.[9]

On 7th October, there were four armed young, the youngest was only seventeen years old, who belonged to one faction of the PLO; namely, the Palestine Liberation Front (PLF). They boarded the Cruise *Achille Lauro* and tried to kidnap the ship. They were surprised and discovered when they were clearing their weapons. For that moment, there were at least 97 passengers on board, including twelve American civilians. They demanded for the release of 50 Palestinians who were in Israel's prison. On 8th October, because there was no further progress regarding the negotiation, they killed an American named Leon Kinghoffer, a Jewish-American who can only move from the wheelchair. Later on they dumped the body at the sea.

On 9th October, the four terrorist surrounded based on an agreement with Egypt, the Federal Republic of Germany and Italy, for exchanging the passengers' safety. Reagan, the US President immediately asked for extraditing these terrorists back to US. For not jeopardising too much of their relationship with the PLO, Egypt allowed the hijackers to leave their territory. On 10th October, the hijackers were transported by Egyptian aircraft, however, they were intercepted by four US aircrafts and forced them to land in Signonella, a NATO base in Sicily island. Although the US

[9] MK Bohn, *The Achille Lauro Hijacking: Lessons of Politics and Prejudice of Terrorism* (Brassey's US 2004) Ch.3.

government requested to extradite the suspects, it was refused by the Italian government. At the end of the incident, four hijackers with other accomplice were on trial in the Italian Courts. The hijackers were all released in the past decade by the Italian prisons after serving twenty something years of their thirty years jail sentence.[10]

The *Achille Lauro* was flying the Italian Flag when the hijacking was being conducted; it was at the location off the coast of Egypt around 30 miles,[11] equal to about 25 nautical miles from Egyptian Port Said. That is to say, it was on the high sea.

The whole incident, the complete political, legal process and multilateral negotiation for extraditing the hijackers, including the Italian courts' judgments, was far too complicated than Cassese expected. Therefore, he did a great research on relevant governments' political opinions, legal standing and reasoning; and concluded that 'in times of crisis, states revert to the old individualistic patterns of behaviours typical of the period when the community was born, around the Peace of Westphalia (1648). It is a sad conclusion'.[12]

In other words, Cassese reckoned that all the regular rules in managing the use of force, piracy, terrorism, extradition were not that useful at all. He may be correct based on his research on different aspects of the *Achille Lauro* incident. However, He did not consider and somehow ignored the further influence of the *Achille Lauro*, for developing and making the law with regard to maritime terrorism. That was the topic for the IMO to deal with, and the outcome was the creation of 1988 SUA

[10] M Miskin, 'Achille Lauro Murderer Released in Italy' (4/30/2009) ; http://www.israelnationalnews.com/News/News.aspx/131125#.V06jo9R96t8

[11] GP McGinley, 'The *Achille Lauro* Affair: Implication for International Law' (1985) 52 *Tennessee Law Review* 691, 695. It cited *the New York Times* of Oct 8, 1985, at 1.

[12] A Cassese, *Terrorism, Politics and Law: the Achille Lauro Affair* (Polity 1989) 145.

Convention.

What can be identified firstly regarding the *Achille Lauro* incident is the so called 'internal hijacking', as alluded in chapter one. Pursuant to UNCLOS Article 101(a) (i) and (ii), an offence of piracy consists of any illegal acts of violence of detention…on the high seas, against another ship or aircraft, persons or property outside the jurisdiction of any state. This 'against another ship' is nicknamed as 'two-ship' requirement. There was no such a two-ship condition can be met in the incident.

Even if it can, assuming that it was an incident from a terrorist ship against the *Achille Lauro*, it still cannot meet the condition 'committed for private ends by the crew or the passengers'.[13] Even though at that time, there were some commentators thought that modern piracy should broaden its scope to include terrorist acts concerning 'public ends or political ends'.[14] In sum, the *Achille Lauro* incident tells us that the first gap in UNCLOS relating to piracy is: when the two-ship requirement cannot be met in a piratical incident, there is no way to establish the piracy offence.

## B. The Initial and the Final Stage

In response to the *Achille Lauro* incident, the President of the UNSC issued a statement to criticise the terrorist attack.[15] The IMO Assembly also passed a resolution in November and then established a working group to study measures in preventing unlawful acts against ships and crew.[16] Later in December, the UNGA adopted a resolution requesting the IMO to not only recommend measures but also

[13] UNCLOS, art.101(a)
[14] GR Constaninople, 'Towards a New Definition of Piracy: The *Achille Lauro* Incident' (1986) 25 *Virginia Journal of International Law* 723.
[15] UN Doc S/17554 (9 October 1985).
[16] IMO Doc Res. A. 584(14) (20 November 1985).

engage actively in preventing international terrorism.[17] While Italy prepared for the first draft for a future treaty in suppressing the unlawful acts against the safety of maritime navigation, Austria and Egypt joined the initial drafting process in collaboration with Italy. On 25 September 1986, the three states submitted the IMO a request for a new agenda for considering a new convention in suppressing terrorism at sea.[18]

The IMO Council took the proposal and established an *ad hoc* Committee with the mandate for drafting the convention. The *ad hoc* Committee held two sessions in London from 2-6 March 1987 and then in Rome from 18-22 May 1987.[19] These two sessions resulted in two drafts of the SUA Convention and the Fixed Platforms Protocol.[20] The diplomatic conference was held in Rome from 1-10 March 1988. According to Plant,[21] due to limited financial resources, no summary records of the diplomatic conference were kept.[22] However, there is a record of relevant decisions and working papers of the conference.[23]

The negotiation result was 69 participating states signed the Final Act, while 23 of the 79 participants signed the SUA Convention. One issue should be noted, in paragraph 23 of the Final Act, there is a statement showing a compromise between

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[17] UN Doc A/RES/40/61 (9 December 1985).; The Preamble of the 1988 SUA Convention expressly recalled the above IMO and the UNGA resolution.

[18] IMO Doc C57/25, quoted from T Treves, 'The Rome Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation', in N Ronzitti, *Maritime Terrorism and International Law* (Martinus Nijhoff 1990) 69 and 86, n. 3.

[19] IMO Doc PCUA 1/4 (16 March 1987); IMO Doc PCUA 2/5 (2 June 1987); See Treves, ibid, 69 and 86, note 4-5.,

[20] Protocol for the Suppression of Unlawful Acts against the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf. The final document is IMO Doc. SUA/CONF/16/Rev.2 (10 March 1988).; N Ronzitti, 'The Prevention and Suppression of Terrorism against Fixed Platforms on the Continental Shelf' in N Ronzitti, *Maritime Terrorism and International Law* (Martinus Nijhoff 1990) 91.

[21] British Foreign and Commonwealth Office (FCO) Legal Adviser, served as Vice-Chairman of the Drafting Committee of the diplomatic conference.

[22] G Plant, 'The Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation' (1990) 39 *ICLQ* 27, 30.

[23] See the documents list IMO Doc SUA/CONF/INF.3 (5 October 1988).

concerned states about SUA Convention Article 4,[24] it provides:

> In relation to Article 4 of the Convention for Suppression of Unlawful Acts against the Safety of Navigation some delegations were in favour of the inclusion of Article 4, paragraph 1, of straits used for international navigation. Other delegations pointed out that it was unnecessary to include them since navigation in such straits was one of the situations envisaged in Article 4, paragraph 1. Therefore, the Convention will apply in straits used for international navigation, without prejudice to the legal status of the waters forming such straits in accordance with relevant conventions and other rules of international law.[25]

It seems that this statement was in attempt to guarantee the applicable law of the sea rules that coastal and other states' rights over the waters of the straits are not changed.[26] In fact, the reason to leave the statement in the Final Act was because Saudi Arabia proposed that offences covered in Article 3 should be included if committed in international straits. The key issue at that time was whether cabotage should be covered, or only navigation beyond the limits of the coastal states should be covered.[27] Those negotiations seemed to reach a compromise on this provision, because it excluded cabotage that takes place exclusively in the territorial sea of a coastal state. However, foreign ships that enter or leave the territorial sea or are scheduled to do so are all covered in the treaty. In other words, Saudi Arabia's proposal about inserting the term

[24] SUA Convention, art. 4.
[25] IMO Doc SUA/CONF/17 (29 March 1988).
[26] T Treves, 'The Rome Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation' 76 -77.
[27] IMO Doc SUA/CONF/CW/WP.14 (2 March 1988); IMO Doc SUA/CONF.Corr2 (2 March 1988); IMO Doc SUA/COF/8 (20 January 1988); IMO Doc SUA/CONF/CW/WP.4 (1 March 1988); IMO Doc SUA/CONF/CW/WP.23 (4 March 1988).; IMO Doc SUA/CONF/CW/WP.23 (7 March 1988).

'international straits' was rejected.[28]

In addition to this compromise in the Final Act, there are also some other features about the negotiation method worth mentioning.

### C. *Ad Hoc* Committee and Consensus Law-Making

As one of the negotiators at the diplomatic conference, Plant noted three essential elements during the negotiation. First, the establishment of the *ad hoc* Committee was 'fortunate', [29] because it helped form a broad range of expertise from various legal fields. Thus the *ad hoc* Committee could emphasise the practical aspects of the law by focusing on precedents 'rather than rewriting the law'.[30] Second, with the auspices of the IMO and by embracing IMO's spirit and function in maritime affairs, the negotiation tried to avoid the alignment of political blocs. Third, the new treaties were adopted by consensus,[31] a typical decision-making method used in the IMO.[32]

Consensus does not mean unanimity,[33] a general understanding of consensus is

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[28] Plant doubted whether this paragraph 23 in the Final Act can be used for interpretation in accordance of the VCLT art. 32.;Plant, 'The Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation', 40.; VCLT art. 32 provides: 'Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.'

[29] Ibid, 31.

[30] Ibid.

[31] See also P Kirsch, 'The 1988 ICAO and IMO Conferences: An International Consensus Against Terrorism' (1989-1990) 12 *Dalhousie Law Journal* 5, 33.; Kirsch was Canadian Deputy Permanent Representative to the UN, served as the Chairman of the Committee of the Whole of the diplomatic conference.

[32] N Gaskell, 'Decision Making of the Legal Committee of the International Maritime Organization' (2003) 18 *IJMCL* 155. The practice of IMO decision-making method is generally taken by consensus. See J Harrison, *Making the Law of the Sea: A Study in the Development of International Law* (CUP 2011) 161.

[33] Though Plant considered that it is 'tantamount to unanimity', see G Plant, 'The Third United Nations Conference on the Law of the Sea and the Preparatory Commission: Models for United

that it is designed for negotiators to reach a decision but avoid voting.[34] There are many definitions about what consensus means and certain ingredients it contains, though the difference is slight in essence.[35] For example, UNCLOS defines consensus as 'the absence of any formal objection';[36] Szasz considered consensus is 'taking a decision only when no participant opposes it so strongly as to insist on blocking it';[37] Berridge defines consensus as 'an attempt to achieve an agreement of all participants in a multilateral conference without the need for a vote and its inevitable divisiveness.'[38] In fact, Sabel observed that in recent practice, 'the terms of "consensus", "general agreement" or "without a vote" are used interchangeablely', [39] and states 'regard the three terms synonymous.'[40] Despite there are numerous definitions, the reason why consensus is important in international law-making is because it is 'a state of art emerging from negotiations.'[41]

The rationale of developing the consensus method in international negotiations was captured by Buzan decades ago, he observed that the expansion of members in international community has let majority voting increasingly useless for lawmaking decision because of the danger powerful alienated minorities. The need is for a technique that will ensure very broadly based support for decision in a highly

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Nations Law-Making?' (1987) 33 *ICLQ* 525, 526.

[34] Boyle and Chinkin, *The Making of International Law* 157.

[35] See discussion in R Sabel, *Procedure at International Conferences: A Study of the Rules at the UN and at Inter-Governmental Conferences* (CUP, 2nd edition 2006) 335-338.

[36] UNCLOS, art. 161 (8)(e).

[37] PC Szasa, 'Improving the International Legislative Process' in EB Weiss (ed.) *Selected Essays on Understanding International Institutions and the Legislative Process* (Transnational 2001) 16.

[38] GR Berridge, *Diplomacy: Theory and Practice* (Palgrave, 3rd edition 2005) 24.

[39] R Sabel, *Procedure at International Conferences: A Study of the Rules at the UN and at Inter-Governmental Conferences* 338.

[40] Ibid.

[41] J Evensen, 'Working Methods and Procedures in the Third United Nations Conference on the Law of the Sea' (1986) 199 *Recueil des Cours* 415, 486.; see also J Kaufmann (ed.) *Effective Negotiation: Case Studies in Conference Diplomacy* (Martinuss Nijhoff 1989)

divided system, and it is on this ground that consensus exercises its appeal.'[42] However, to utilise the technique of consensus does not indicate that it is impossible to take a vote in the decision making process of the IMO or other international conferences.[43] Just rightly as Sabel noted, 'No treaty-making conference has adopted such a pure form of consensus and it appears unlikely that it will be adopted in the future.'[44] Therefore, having rules about voting in any given international forum can logically become a threat or incentive to reach consensus.[45]

In addition, it has been noted that consensus law-making 'can have powerful law-making effect'[46] if combines with a package deal such as UNCLOS did and if that so, new customary international law 'may come into being very quickly'.[47] Hence it would be more sensible to see consensus as 'a specific form of law-making process'[48] instead of considering it a more effective method of negotiation. Nonetheless, this does not mean there are no disadvantages by using the technique of consensus. For instance, consensus may slow the negotiation process because attempts muse be made to overcome every substantive objection. Also, the result is likely not the best solution for tackling challenges. Moreover, if compromise cannot be achieved, the product of negotiation may result in a weaker content and

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[42] B Buzan, 'Negotiation by Consensus: Developments in Technique at the United Nations Conference on the Law of the Sea' (1981) 75 *AJIL* 324, 326.
[43] Thus sometime consensus can be 'a double-edged sword', see A Boyle and C Chinkin, *The Making of International Law* 158.; but at the same time, it is necessary to have voting rules to give some legverages for weaker participants in the decision making process, see B Buzan, 'Negotiation by Consensus: Developments in Technique at the United Nations Conference on the Law of the Sea' 331.
[44] R Sabel, *Procedure at International Conferences: A Study of the Rules at the UN and at Inter-Governmental Conferences* 344.
[45] D Vignes, 'Will the Third Conference on the Law of the Sea Work According to the Consensus Rule' (1975) 69 *AJIL* 119.
[46] Boyle and Chinkin, *The Making of International Law* 160.
[47] Ibid.
[48] Ibid.

ambiguous text.[49]

In short, having the conception of consensus in mind would help to understand how international negotiations proceed in a treaty-making process and in a multilateral forum.

## D. Transplanting the Sectoral Approach of Terrorism Offences to the Maritime Sphere

The sectoral approach means that law-makers targeted similar considerations in regulating terrorist's acts and related violence by modelling and transplanting existing anti-terrorism treaties.[50] However, all these sectoral approaches did not define the crime of terrorism in international law.[51] There may be some slightly different contents in criminalising terrorist acts, but the central feature of the sectoral approach is to adopt and apply the principle of either extradite or prosecute (*aut dedere aut judicare*).[52]

### 1. Either Extradite or Prosecute

In the reasoning of the *Obligation to Prosecute or Extradite* case, the Court explained the basic element in this principle is 'the obligation for the State to

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[49] Ibid, 159.

[50] For example, Convention for the Suppression of Unlawful Seizure of Aircraft ('the Hague Convention', adopted 16 December 1970, entered into force 14 October 1971, 860 UNTS 105); Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation ('the Montreal Convention), adopted 23 September 1971, entered into force 26 January 1973, 974 UNTS 178); International Convention against the Taking of Hostages (adopted 17 December 1979, entered into force 3 June 198, 1316, UNTS 205)

[51] B Saul, *Defining Terrorism in International Law* (OUP 2006) Ch 3.

[52] See the discussion in the International Law Commission on the Obligation to Extradite or Prosecute (*aut dedere aut judicare*), , http://legal.un.org/ilc/guide/7_6.shtml ; particularly the Final Report of the International Law Commission, 7 August 2014, Yearbook of the International Law Commission, 2014, vol. II (Part Two), http://legal.un.org/ilc/texts/instruments/english/reports/7_6_2014.pdf

criminalize torture and to establish its jurisdiction over it finds its equivalent in the provisions of many international conventions for the combating of international crimes.'[53] Therefore, the purpose of the sectoral approach in combating terrorism is to eliminate possible safe havens and hence to ensure that terrorist acts can be punished.[54]

Although the Court did not explain the relationship between the obligation of either extradite or prosecute, it did state that if a Contracting Party adopted legislation and criminalised torture, and 'give its courts universal jurisdiction in the matter and make an inquiry into the facts. These obligations, taken as a whole, may be regarded as elements of a single conventional mechanism aimed at preventing suspects from escaping the consequences of their criminal responsibility, if proven.'[55] The Final Report of the ILC on this topic demonstrates that if the crime was committed abroad and 'with no nexus to the forum State, the obligation to extradite or prosecute would necessarily reflect an exercise of universal jurisdiction,…if a State can exercise jurisdiction on another basis, universal jurisdiction may not necessarily invoke.'[56]

As explained in the Chapter 2, universal jurisdiction over maritime piracy is an option, not a duty. Under UNCLOS Article 105, it only provides that states 'may'

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[53] *Questions relating to the Obligation to Prosecute or Extradite* (Belgium v. Senegal), Judgment [2012], ICJ Rep 422, para. 75.

[54] ibid, para. 74.;The Court considered the Torture Convention Article 5(2), 6(2) and 7(1) altogether, explained that 'the purpose of all these obligations is to enable proceedings to be brought against the suspect, in the absence of his extradition, and to achieve the object and purpose of the Convention, which is to make more effective the struggle against torture by avoiding impunity for the perpetrators of such acts.'

[55] ibid, para. 91.

[56] ILC, Yearbook of the International Law Commission, 2014, vol. II (Part Two), p. 8., para. 65.1(18), http://legal.un.org/ilc/texts/instruments/english/reports/7_6_2014.pdf

seize a pirate ship or aircraft taken by piracy and under control by pirates.[57] As a result, prosecuting pirates is not a treaty or customary law obligation.

Kolb considered the difference between universal jurisdiction and the obligation of either extradite or prosecute is often 'a problem of definition'.[58] He indicated four core differences: first, the either extradite or prosecute is not universal but limited to specific treaty; second, universal jurisdiction is 'a right, an entitlement, but the principle of either extradite or prosecute is a duty'[59]; third, universal jurisdiction is a title to try, but the either extradite or prosecute obligation is 'an alternative of either trying or extraditing'[60]; fourth, universal jurisdiction only applies to a limited category of crime, but the either extradite or prosecute obligation is embedded in 'a larger category of crimes.'[61] From Kolb's perspective, if a crime must be an offence against the fundamental value of the international community, such as the concept surrounding *jus cogens or erga emnes* norms,[62] then the either extradite or prosecute thus indeed cannot be seen as universal.

However, he stressed that 'there is no reason to deny that the universal jurisdiction could operate only between the parties to a given agreement.'[63] In other words, the obligation of either extradite or prosecute contains the character of a certain extent of universal jurisdiction in terms of its relativity. At the same time, it also upholds a compulsory duty along with a somewhat subsidiary nature in

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[57] UNCLOS, art. 105.
[58] R Kolb, 'The Exercise of Criminal Jurisdiction over International Terrorists', in A Bianchi (eds.) *Enforcing International Norms Against Terrorism* (Hart 2004) 227, 252.
[59] Ibid.
[60] Ibid.
[61] Ibid.
[62] *Questions relating to the Obligation to Prosecute or Extradite*, Judgment, paras. 67-70.
[63] Kolb, 'The Exercise of Criminal Jurisdiction over International Terrorists', 253.

anti-terrorism conventions.[64] Following this logic, to say that the obligation contained in all the related sectoral anti-terrorism treaties is quasi-universal jurisdiction would be reasonable.[65]

In short, when this obligation was being drafted into the SUA Convention Article 10, no contention arose, because 'it is not intended…to defer in substance from the precedents.'[66]

### 2. Two Categories of Jurisdiction

There are two types of jurisdiction in Article 6. One is compulsory, and the other is discretionary. Article 6(1) represents the compulsory type; it provides that states 'shall' take measures to establish its jurisdiction'. Article 6(2) represents the discretionary type; it provides that states 'may' also establish its jurisdiction over offences listed in Article 3. It went on smoothly in drafting the part of compulsory jurisdiction, because most of this provision was probably modelled on the Article 5 of the 1979 Hostage Convention.[67]

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[64] Ibid.

[65] D Guilfoyle, 'Piracy and Suppression of Unlawful Acts against the Safety of Maritime Navigation 'in N Boister and RJ Currie (eds.) *Routledge Handbook of Transnational Criminal Law* (Routledge 2015) 364, 378.

[66] Plant, 'The Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation', 49.

[67] International Convention against the Taking of Hostages, (adopted 17 December 1979, entered into force 03 June 1983, 1316 UNTS 205), art. 5 provides:

1. 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: (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 persons who have their habitual residence in its territory; (c) In order to compel that State to do or abstain from doing any act; or (d) With respect to a hostage who is a national of that State, if that State considers it appropriate.
2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over the offences set forth in article 1 in cases where the alleged offender is present in its territory and it does not extradite him to any of the States mentioned in paragraph 1 of this Article.
3. This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law.

On the other hand, certain controversies existed in the discretionary category. Article 6(2)(a) was drafted from the Hostage Convention, while Article 6(2)(b) and (c) exemplified a compromise on the passive personality and protective principle of jurisdiction.[68] The inclusion of the two kinds of jurisdiction and scenarios considered were just the reality happened in the *Achille Lauro* incident. It could simply expect that the US would request for the two types of additional jurisdiction basis, and it was later confirmed by Halberstram, the US head delegation to the diplomatic conference; that the inclusion of the discretionary jurisdiction was necessary to the US.[69] Halberstram also stated:

> One delegation indicated that it might propose that the extradite or prosecute requirement apply only with respect to requests by states that assert jurisdiction under mandatory provisions and that it is not apply to requests by states that assert jurisdiction under the optional provisions. Such a proposal, if adopted, would effectively vitiate the provisions for optional jurisdiction.[70]

Undoubtedly, some delegations might fear an excessive proliferation of jurisdictional basis in agreeing some new rules in the treaty. Before the delegations reached that final compromise, the Chairman chose to take a series of indicative votes,[71] and the whole provision was ultimately accepted by 'a comfortable majority'.[72]

### 3. Political Offence Exception

[68] MN Shaw, *International Law* (CUP, 6th edition 2008) 652-668.
[69] M Halberstam, 'Terrorism on the High Seas: The Achille Lauro, Piracy and the IMO Convention on Maritime Safety' (1988) 82 *AJIL* 269, 296-302.
[70] Ibid, 300.
[71] Plant, 'The Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation', 46.
[72] Kirsch, 'The 1988 ICAO and IMO Conferences: An International Consensus Against Terrorism', 20.

Kuwait delivered a proposal borrowed from Article 9 of the Hostage Convention, and that would prohibit extradition if the request of jurisdiction was based on religion, ethnic questions or political opinions.[73] This kind of provision is denoted as 'political offence exception'.[74] This turned out to be quite controversial at the diplomatic conference. Kirsch noted that the Eastern European states 'had never liked it', though they have become parties to the Hostage Convention; he further recorded an interaction during the negotiation: 'The superpowers resisted. The Arab Sates found this attitude, particularly the reversal of Western States…and threatened to vote against the whole Convention if some accommodation was not found.'[75] The final result was therefore to reject the Kuwaiti proposal but wrote the 'shall pay due regard' wording into Article 11(6).[76]

In sum, the sectoral approach of transplanting the terrorism related offences to the maritime sphere was the law-making method in the negotiation of SUA Convention. It was certainly a first step for the law of the sea regime to interact with counter-terrorism regimes, and the drafters of the SUA tried to use this method to avoid possible conflicts among existing treaties.

## E. National Liberation Movement and State-Sponsored Terrorism

The relationship between national liberation movements and terrorism or

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[73] See the Kuwaiti proposal, IMO Doc SUA/CONF/CW/WP.7/Rev.1 (3 March 1988).

[74] G Gilbert, *Transnational Fugitive Offenders in International Law: Extradition and Other Mechanism* (Martinus Njhoff 1998) 203-329.; AD Sofaer, 'The Political Offense Exception and Terrorism' (1987) 15 *Denver Journal of International Law and Policy* 125.; S Sedley, *The Law of Extradition in the United Kingdom* (The Round Hall Press 1995) 145-150.; WC Gilmore, 'Extradition and the Political Offence Exception: Reflections on United Kingdom Law and Practice' (1992) 18 *Commonwealth Law Bulletin* 701

[75] Kirsch, 'The 1988 ICAO and IMO Conferences', 22.

[76] Art. 11(6) reads: 6. 'In considering a request for the extradition of an alleged offender pursuant to this Convention, the requested State shall pay due regard to whether his rights as Bet forth in Article 7, paragraph 3, can be effected in the requesting State.'

state-sponsored terrorism has been considered to contain both the political and legal nature in negotiations concerning anti-terrorism.[77] Therefore, at the diplomatic conference, Cuba firstly proposed that based on the principle of self-determination, a paragraph was needed in the Preamble of the Convention to reaffirm the legitimacy and struggle of all peoples under colonial, racist or other forms of regimes, 'in particular, the national liberation movements.'[78]

Later, Algeria submitted another proposal with a similar intention,[79] but it seems that Algeria did not urge to discuss this issue further 'probably in order to avoid creating a divisive problem in an atmosphere where…participating States were clearly striving for consensus.'[80] At the end of the negotiation on this issue, none of their proposals were accepted, while the only reference or compromise was an insertion of a paragraph in the Preamble, a reiteration of a UNGA resolution.[81]

Another related issue was the concept of state-sponsored terrorism. Though the concept was never clear and potentially extremely broad to include many possible conditions, Kuwait suggested before the diplomatic conference that a conditional phrase was needed in the offences listed in Article 3(1), 'even if acting on behalf of a

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[77] E Chadwick, *Self-Determination, Terrorism and the International Humanitarian Law of Armed Conflict* (Mrtinus Nijhoff 2012); E Chadwick, 'Terrorism and Self-Determination' in B Saul (eds.) *Research Handbook of International Law and Terrorism* (Edwar Elgar 2014) 298.; K Trapp, 'Terrorism and the International Law of State Responsibility' in ibid, 39.; D Byman, *Deadly Connections: States that Sponsor Terrorism* (CUP 2005)

[78] IMO Doc SUA/CONF/CW/WP.10 (2 March 1988).

[79] IMO Doc SUA/CONF/CW/WP.13 (2 March 1988).

[80] Kirsch, 'The 1988 ICAO and IMO Conferences' 27.

[81] The seventh paragraph of the Preamble reads: 'RECALLING resolution 40/611 of the General Assembly of the United Nations of 9 December 1985 which, inter alia, "urges all States unilaterally and in co-operation with other States, as well as relevant United Nations organs. to contribute to the progressive elimination of causes underlying international terrorism and to pay special attention to all situations, including colonialism, racism and situations involving mass and flagrant violations of human rights and fundamental freedoms and those involving alien occupation, that may give rise to international terrorism and may endanger international peace and security".

Government.' [82] Saudi Arabia and Nicaragua subsequently proposed adding governments as potential offenders.[83] But the proposals were not accepted for negotiation.

In fact, these proposals could be seen as reflections of political atmosphere in different regions at that time. A similar example was that Saudi Arabia and Iran introduced proposals about offences for the interference of maritime shipping in international straits,[84] and that was clearly influenced by the Iraq-Iran War during 1980-1988.[85] Fortunately, these issues did not hinder the purpose of the negotiation: to adopt a treaty reflecting the *Achille Lauro* incident. Hence those highly political-related issues were all either rejected or abandoned at the diplomatic conference.

## F. Achievements and Deficiencies

The conclusion of the Convention comprises 22 Articles. Excluding the Preamble, it can be divided into six parts. Articles 1 to 4 concern the definition of the 'ship' and that of ships not covered in the Convention, maritime terrorism offences, and the geographical scope they can apply to. Articles 5 to 16 cover the either extradite or prosecute obligation and subsequent jurisdictional basis, including custody, inquiry, delivery and extradition procedure. Article 16 is about the dispute settlement. Articles 17-22 are about the signature, entry into force, revision criteria and procedure.

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[82] IMO Doc SUA/CONF/12 (17 January 1988).
[83] IMO Doc SUA/CONF/CW/WP.14 (3 March 1988); IMO Doc SUA/CONF/CW/WP/WP.33 (7 March 1988).
[84] IMO Doc SUA/CONF/CW/WP.14 (3 March 1988); IMO Doc SUA/CONF/CW/WP.3 (1 March 1988).
[85] A de Guttry and N Ronzitti, *The Iraq-Iran War(1980-1988) and the Law of Naval Warfare* (CUP 1993)

Also, in terms of the contents, the ten Articles adopted in the Fixed Platform Protocol are quite similar to the Convention. For example, Article 1 'applies to Article 5, 7 and 10-16 of the Convention', and they 'shall also apply mutatis mutandis to the offences set forth in Article 2' of the Protocol. Article 3 of the Protocol is completely identical to Article 6 of the Convention. Compared to the Convention, the difference can be seen in Articles 5-10, which emphasize the signature, entry into force, and revision procedure.

If taking stock of the result of the Convention, what has achieved and what has not? In terms of the achievements, first of all, it was adopted by consensus, a negotiation method used regularly in the IMO but not used in the former negations of anti-terrorism treaties. A trait of this consensus law-making method, illustrated by the Vice Chairman of the diplomatic conference, was that participating states needed not 'to accept controversial provisions'.[86]

Second, to a large extent, the Convention solved a major issue occurred in the *Achille Lauro* incident: not only maritime terrorism offences[87] were made, but also the internal hijacking act would not be seen as piracy or something close to piracy, and it thus filled the gap left in the UNCLOS piracy provisions. Further, although the Convention was not designed for combating maritime piracy, now it can be used as a tool for dealing with piratical acts.[88]

Third, including the additional jurisdiction basis in Article 6(2)(b) and(c) was a success, particularly for states like the US, which always have interests 'in seeing

[86] Kirsch, 'The 1988 ICAO and IMO Conferences', 29.
[87] SUA Convention, art. 3.
[88] All the Somali piracy-related UNSC resolutions mentioned the use of SUA Convention is important in combating piracy at sea; JG Dalton et al, 'Introductory Note to United Nations Security Council: Piracy and Armed Robbery at Sea: Resolutions 1816, 1846, 1851' (2009) 48 *ILM* 129.

offenders brought to justice.'[89]

Fourth, it was the first step to take the international law of terrorism into the law of the sea, especially when the either extradite or prosecute obligation was transferred from other precedents can be reckoned as an achievement. It also indicated that the international community was willing to modify the existing law by treaty for governing criminal jurisdiction at sea.[90]

During the negotiation, flaws or regrets might have been foreseen, as compromising some terms and conditions might be inevitable. Below are the four identified ones.

First, it seems that there is no solid or strict obligation to extradite the potential offenders.[91] Article 11(2) provides that if one of the requesting Parties 'has no extradition treaty' with the requested Party, 'the requested State Party may, at its option, consider this Convention as a legal basis for extradition…extradition shall be subject to the other conditions provided by the law of the requested State Party'.[92]

Francioni criticised that the words of 'at its option' would give some requested states an excuse to avoid extraditing offenders to the requesting state. He considered that during the 1960s and 1970s, there were hundreds of terrorists requested in extradition, but only a handful of these offenders were actually extradited.[93] Although in the scenario of a failed extradition, the prosecution may still be able to

[89] Halberstam, 'Terrorism on the High Seas: The Achille Lauro, Piracy and the IMO Convention on Maritime Safety' 309.
[90] Plant, 'The Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation' 55-56.
[91] CC Joyner, 'Suppression of Terrorism on the High Sea: the 1988 IMO Convention on the Safety of Maritime Navigation' (1989) 19 *IYBHR* 341, 366.
[92] SUA Convention, art. 11(2).
[93] F Francioni, 'Maritime Terrorism and International Law: The Rome Convention of 1988' (1988) 31 *GYIL* 263, 283.

be conducted in the national state of the offender, the potential problem is that it would be a violation of the treaty obligation if it does happen between the Contracting Parties.[94]

Second, there is no real obligation to render the suspects for prosecution and punishment.[95] Article 10(1) does provide that to submit the case 'without delay to its competent authorities for the purpose of prosecution… those authorities shall take their decision in the same manner as in the case of any other offence of a grave nature'. [96] Francioni contested that this provision 'leaves ample room for discretionary appreciation for a *prima facie* case exists for prosecuting an offender'.[97]

Though Treves thought this observation was well founded, he did not think it is a critical deficiency in the Convention based on two reasons: first, Article 11 was modelled from other anti-terrorism treaties; second, It should take into account the reality that most of the judicial institutions in a state 'is independent from the executive power, and that sometimes the prosecutors do not depend on the government.'[98] That is to say, even if this is a loophole, it may not be serious. The views of Treves are to be preferred.

The third deficiency would be that there is no explicit provision indicating the exception of the political offences.[99] It could be argued that according to Article11

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[94] T Treves, 'The Convention for the Suppression of Unlawful Acts Agaisnt the Safety of Maritime Navigation' (1998) 2 *Singapore Journal of International and Comparative Law* 541, 553.
[95] C Tiribelli, 'Time to Update the 1988 Rome Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation' (2006) 8 *Oregon Review of International Law* 133, 152.
[96] SUA Convention, art. 10(1).
[97] F Francioni, 'Maritime Terrorism and International Law' 284.
[98] Treves, 'The Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation', 553.
[99] Ibid.

(3), that extradition 'shall be subject to other conditions provided by the law of the requested State Party', hence a contracting party would apply their domestic law regarding the principle of extradition for avoiding extradition to acts concerning terrorism connotations.[100]

The final deficiency is about the ship-boarding procedure, including the right of visit and search, safeguards, etc. None of these issues were brought into discussion at the diplomatic conference, probably because the law-making approach was emulated from existing anti-terrorism treaties of the aviation sphere. In any event, without an adequate enforcement procedure, SUA Convention can only apply to maritime terrorism offences after one has been committed. It means that SUA Convention does not have deterrent function in preventing maritime terrorism.[101]

Further, SUA Convention Article 9 provides that nothing 'shall affect in any way the rules of international law pertaining to the competence of States to exercise investigative or enforcement jurisdiction on board ships not flying their flag'.[102] This shows that the exclusive right of the flag states for exercising legislative and enforcement jurisdiction over ships on the high sea has always been reckoned as one of the fundamental principles in customary international law of the sea, as also enshrined in UNCLOS.[103]

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[100] There were two neglected issues which Francioni thought it might be helpful if they had been considered at the diplomatic conference. One is the state-sponsored terrorism; the other one is the legality of self-help measures to rescue a ship from terrorists at sea. F Francioni, 'Maritime Terrorism and International Law', 285-287.; D Freestone, 'The 1988 International Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation' (1989) 3 *International Journal of Estuarine and Coastal Law* 305, 311-312.

[101] IMO Doc LEG 84/6 (13 March 2002), para. 7.

[102] SUA Convention, art. 9.

[103] UNCLOS, art. 92.

## G. Conclusion

The SUA Convention is the first international treaty in dealing with maritime terrorism. It thus carries a significant weight in showing that the international community at that time was willing to make law in the form of a treaty, filling the gap about the internal hijacking, which was not considered and included during the UNCLOS negotiations.[104] While it took the international community as long as two and a half years to respond to the *Achille Lauro* incident by making a new treaty, it did fill the gaps by making the SUA Convention.

The negotiation process also signified that it was an attempt of letting the regimes of anti-terrorism and the law of the sea to interact and learn from each other, [105] thus reduced the potential fragmentation in the development of international law.[106] Though the attitude of the participating states tended to be 'rather conservative when it comes to the creation of new rules',[107] and most of the bold or controversial proposals were either rejected, ignored or never discussed at the diplomatic conference, the Convention nevertheless began to stand as a starting point for considering all the potential terrorist acts at sea after the year of 1988. And that has made all the difference.

Approximately 18 years later, a new instrument was made to revise the SUA Convention. It was initiated by the stimulation of the September 11 attacks. Two key questions must ask before analysing the law-making process. Are there any

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[104] CC Joyner, 'The 1988 IMO Convention on the Safety of Navigation: Towards a Legal Remedy for Terrorism at Sea' (1988) 31 *GYIL* 230, 261.
[105] Freestone, 'The 1988 International Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation', 306-307.;
[106] JL Dunoff, 'A New Approach to Regime Interaction' in M Young (ed.) *Regime Interaction in International Law: Facing Fragmentation* (CUP 2012) 136.
[107] Kirsch, 'The 1988 ICAO and IMO Conferences' 22.

differences in its nature, scope or in the law-making method between making the 1988 SUA Convention and the 2005 Protocol?[108] What are the strength and weakness of the new provisions?

## III. The Making of the 2005 SUA Protocol

The day right after the 911 attacks, the UNGA swiftly issued a resolution 56/88, condemning the terrorist attacks in the United States; it 'calls for international cooperation to prevent and eradicate acts of terrorism. [109] The UNSC also adopted resolution 1368 for condemning 'in the strongest terms the horrifying terrorist attacks'.[110] A week later, the UNSC issued Resolution 1373 under Chapter VII of the UN Charter,[111] deciding that 'all states' shall prevent, suppress and refrain from supporting terrorist acts and the financing of terrorism. The UNSC also requested 'all states' to find ways of intensifying and accelerating the exchange of operational information regarding actions or movements of terrorists and its networks, including fully implementing the relevant international conventions.[112]

In late November, the IMO Assembly adopted resolution A.924(22), requesting the Maritime Safety Committee and the Legal Committee 'to undertake, on a high priority basis,' to review and to ascertain whether there is a need to update existing international instruments and other relevant IMO instruments for preventing and suppressing 'terrorists acts against ships at sea and in port and to improve security aboard and ashore, in order to reduce any associated risks to passengers, crews and

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[108] SUA Protocol, art. 15(2) provides that 'Articles 1 to 16 of the Convention, as revised by this Protocol, together with articles 17 to 24 of this Protocol and the Annex thereto, shall constitute and be called the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 2005 (2005 SUA Convention)'.

[109] UN Doc A/Res/56/88 (12 September 2001).

[110] UN Doc S/Res/1368 (12 September 2001).

[111] UN Doc S/Res/1373 (28 September 2001).

[112] On UNSC Resolution 1373, see more discussion in Chapter 4.

port personnel on board ships and in port areas and to the vessels and their cargoes.[113] As a result, it conducted a series of reviews regarding the SUA Convention and the 1974 Convention on the Safety of Life at Sea (SOLAS), and so on.

### A. Initial Considerations and the Role of the US

As now we see the most important result in the reviewing and law-making process is the creation of new maritime terrorism offences and the ship-boarding provisions to the SUA 2005 Protocol.[114] However, this was only a part of the initial suggestions.

The IMO suggested in March 2002 that the first three possible issues needed to be considered were as follows: (1) Expanding 'the offences in article 3 to ensure that a wider range of unlawful acts are covered by the Convention in the light of the experience of 11 September; (2) Enlarging the scope of application to cover domestic cabotage navigation; (3) Strengthening the regulations on jurisdiction and extradition, such as making it obligatory not to use the political offence exception in order to deny extradition'.[115]

A few days later in the same month, the US submitted its first review opinion to the IMO. Likewise, no ship-boarding procedure was suggested, but the US proposed to add new offences concerning non-proliferation, harmful substances, piracy and armed robbery at sea, taking ships as weapons, etc., to Article 3 of the SUA

[113] The document is entitled: 'Review of Measure and Procedures to Prevent Acts of Terrorism which Threaten the Security of Passengers and Crews and the Safety of Ships', IMO Doc A/22/Res 924 (20 November 2011).
[114] Namely, SUA Protocol art. 3*bis*, 3*ter*, 3*quater* and 8*bis.*
[115] IMO Doc LEG 84/6, 13 (March 2002), para. 13.

Convention.[116] Turkey also submitted its proposal to amend the SUA Convention but only on the new offences about Article 3.[117]

During the initial stage of reviewing the SUA Convention, a Correspondence Group was established and led by the US.[118] In August 2002, the US submitted the first draft Convention for discussion, and then the ship-boarding issue was raised.[119] In the draft Convention, the US stated:

> Such procedures have evolved over the past 14 years, first in article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988, and more recently in articles 7 to 9 of the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, as well as the recently concluded Agreement Concerning Co-operation in Suppressing Illicit Maritime and Air Trafficking in Narcotic Drugs and Psychotropic Substances in the Caribbean Area.[120]

With the draft amendments to the SUA Convention and the Fixed Platforms Protocol, the real negotiation started at the 85th Session of the IMO Legal Committee in October 2002. At the outset of discussing the US draft amendments, most delegations expressed their concerns about the draft Article 8*bis*. It was recorded that

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[116] IMO Doc LEG 84/6/1 (22 March 2002).
[117] IMO Doc LEG 84/6/2 (22 March 2002).
[118] IMO Doc LEG 84/5 (17 August 2002), para 2, the Correspondence Group was open to all Members of the IMO, including organizations which have consultative status with the IMO, see R Balkin, 'The International Maritime Organization and Maritime Security' (2006) 30 *Tulane Maritime Law Journal* 1, 25.
[119] IMO Doc LEG 84/5 (17 August 2002), para. 10-14.
[120] Ibid, para. 11.; Agreement Concerning Co-operation in Suppressing Illicit Maritime and Air Trafficking in Narcotic Drugs and Psychotropic Substances in the Caribbean Area (The Caribbean Drugs Agreement), W Gilmore, *Agreement Concerning Co-operation in Suppressing Illicit Maritime and Air Trafficking in Narcotic Drugs and Psychotropic Substances in the Caribbean Area, 2003* (The Stationary Office, 2005); this treaty can also be found at the US Department of State, http://www.state.gov/s/l/2005/87198.htm

this boarding procedure provision 'involved considerations not only of a legal but also of a political kind.'[121] There were also doubts regarding 'the potential lack of compatibility between the proposed boarding procedures and the principles of freedom of navigation and flag State jurisdiction.'[122] Whether there is any 'compelling need of such an article, and the potential for abuse in its practical application'[123] were also mentioned.

This boarding procedure suggestion also includes the possibility of adding additional safeguards for seafarer's safety. Furthermore, the issue regarding whether other existing treaties could be adapted for use in the SUA context was brought up. For example, the delegations specified that the Caribbean Drugs Agreement 'should not be used' as precedent.[124] The reason was that neither the unique geographic features nor the incapability of many states in the region could be considered the legitimate grounds to adopt the Caribbean Drugs Agreement.[125]

Before the Legal Committee continued to review the SUA Convention, a by-product was produced in December 2002, and that is the International Ship and Port Facility Code (ISPS Code).[126]

## B. By-product: the ISPS Code

The IMO held a diplomatic conference from 9-13 in December 2002. It updated the Chapter XI-2: Special Measures to Enhance Maritime Security of the

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[121] Report of the Legal Committee on the Work of Its 85th Session, IMO Doc LEG 85/11 (5 November 2002) (hereafter, the 85th Session Report), para. 89.
[122] Ibid.
[123] Ibid.
[124] The 85th Session Report, para. 92.
[125] The 85th Session Report, para. 90-93.
[126] ZO Ozcayir, 'The International Ship and Port Facility Security Code (ISPS) Code' (2003) 9 *Journal of International Maritime Law* 6.

International Convention for the Safety of Life at Sea (1974 SOLAS)[127] and adopted a set of maritime security measures including the ISPS Code, which is the most significant technical measure in promoting maritime safety and security. The reason why it can be thought as a by-product to 2005 SUA Protocol is that when negotiating the Preamble of the SUA Protocol, the IMO Secretariat suggested that 'given the fact that the ISPS Code was also developed in response to IMO Resolution A.924(22)…to prevent and suppress acts of maritime terrorism, the Secretariat also suggests the inclusion of a reference to the ISPS Code in the preamble of the draft Protocol of 2005'.[128] It was then accepted and put into the Preamble of the SUA Protocol.

The ISPS Code is designed to identify potential threats and suspicious acts at sea. It applies to passengers and cargo ships of 500 gross tonnages or more, including high speed-passenger craft, mobile offshore drilling units and port facilities serving such ships engaged on international voyages. War ships, governmental ships used for non-commercial purpose[129] and any fishing vessels are excluded.[130]

The ISPS Code is divided into two parts. Part A includes mandatory requirements regarding regulations of gathering, assessing and exchanging information of security threats, providing means for raising alarms, requiring ship and port facility security plans, training drills, etc. [131] Part B contains recommendatory but specific detailed guidelines for teaching contracting parties

[127] Done in London , 1 November 1974, entry into force, 25 May 1980, 1184 UNTS 278.
[128] IMO Doc LEG/CONF.15/7 (1 August 2005), para. 4.
[129] IMO Doc SOLAS/CONF.5/34 (17 December 2002), see also IMO, *ISPS Code: 2003 Edition* (IMO 2003) 6.
[130] N Klein, *Maritime Security and the Law of the Sea* (OUP 2011) 65.
[131] IMO Doc SOLAS/CONF.5/34 (17 December 2002), 4-25.

how to implement Part A. For instance, ways and methods for establishing contact points, setting security levels, making port facility security plans, and controlling the security measure are provided.[132]

The objective of the Code is to establish an international framework involving close cooperation between contracting parties of the SOLAS. The rationale behind these technical measures is to utilise the 'risk management' concept, and thus it tries to 'provide a standardised, consistent framework for evaluating risk, enabling governments to offset changes in threat levels with changes in vulnerability for ships and port facilities'.[133]

There are some concerns about whether some flag states have the capability to comply with the requirements, because states need to spend money in establishing facilities, buying equipments and training officers.[134] However, it has been favourably complied.[135] Accordingly, about '86% of ships and 69% of port facilities had their security plans approved by the July 2004 deadline, and thus 'it was a source of satisfaction to the IMO…which indicates that the international community was not simply paying lip service to the idea of heightened security and compliance with the new measures'.[136]

Although some ships not covered by the ISPS Code may potentially cause

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[132] IMO, ibid, 31-87.
[133] HG Hesse, 'Maritime Security in a Multilateral Context: IMO Activities to Enhance Maritime Security' (2003) 18 *IJMCL* 327, 331.
[134] R Asariotis, 'Implementing of the ISPS Code: An Overview of Recent Developments' (2005) 11 *Journal of International Maritime Law* 266, 267-9.'Editorial: The International Ship and Port Facility Security (ISPS) Code: Public and Civil Law at Crossroads?' (2006) 12 *Journal of International Maritime Law* 223.; Report of the United Nations Conference on Trade and Development (UNCTAD), 'Maritime Security: ISPS Code Implementation, Cost and Related Financing', 14 March 2007, http://unctad.org/en/Docs/sdtetlb20071_en.pdf
[135] Klein, *Maritime Security and the Law of the Sea* 162.
[136] Balkin, 'The International Maritime Organization and Maritime Security' 21.

difficulties and create loopholes in preventing maritime terrorism, the Code still represents a successful example reflecting the shared interest of the international community in reducing risks at sea.[137]

### C. Consensus, Voting Procedure and Objections

The IMO announced on 4 May 2005 that a diplomatic conference will be held in the IMO headquarter from 10-14 October for amending the SUA Convention. Subsequently, provisional agenda[138] and rule of procedure were also provided.[139]

A procedural issue as well as a law-making method needs to be compared in the first place before entering into the analysis of the substantial negotiation process. The methods used in negotiating the provisions of the SUA Protocol were basically identical to the SUA Convention, i.e. consensus. However, according to Rule 34 of the decision making procedure at the diplomatic conference, the voting method shall normally be 'by show of hands'. Nonetheless, if requested by any representative, it may use the 'roll-call vote' by the English alphabetical order of the names of the participating states. If this voting method is used, then the result 'shall be inserted in the record of the meeting concerned'. As there is no such a record, so no roll-call vote was used at the diplomatic conference.

According to Rule 32, all matters of substance shall be taken 'by two-thirds', but on matters of procedure, the rule shall be 'simple majority'.[140] It seems that the decisions were taken by the two-thirds majority vote, but evidence shows that the

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[137] Klein, *Maritime Security and the Law of the Sea* 159, 162.
[138] IMO Doc LEG/CONF.15/1 (4 May 2005) (provisional agenda)
[139] IMO Doc LEG/CONF.15/2 (4 May 2005) (provisional rules of procedure)
[140] Rule 58 of the conference procedure stipulates that observers such as international organizations or non-governmental organizations may participate, but shall not have the right to vote.

final texts of the SUA Protocol was still adopted by consensus while there might be some indicative votes taken at the diplomatic conference. Young, a Senior Legal Office of the IMO who was also a participant at the conference,[141] stated that the conference did not have the budget to record all the positions of each state. Therefore, such records do not exist.[142] Evidence can also be found from one Record of Decisions. In short, in deciding the Final Act of the SUA Protocol, the Record shows that the decision was made by consensus.[143]

Nevertheless, both India and Pakistan did not sign the SUA Protocol.[144] Pakistan expressed its pity that the negotiation 'was conducted in an arbitrary manner inconsistent with the UN principles of consensus for negotiating such international agreements'.[145] India argued that as the review process did not address its concerns and 'did not conform to the principle of consensus', [146] and thus 'it could not join the consensus'.[147]

It was reasonable that India and Pakistan did not sign the SUA Protocol in terms of their concern. But it does not make sense to state that the adoption was not

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[141] See the 'List of participants', IMO Doc LEG/CONF. 15/INF.1 (14 October 2005).

[142] C Young, 'Balancing Maritime Security and Freedom of Navigation on the High Sea: A Study of the Multilateral Negotiation Process in Action' (2005) 24 *University of Queensland Law Journal* 355, 382.

[143] IMO Doc LEG/CONF. 15/RD/2 (Records of Decisions on 14 October 2015, 9.30 am to 12.15 pm.) (14 November 2005), para. 15.

[144] The real reason was that the inclusion of the Non-Proliferation Treaty (NPT) and dual-use materials into the SUA Protocol , which had been considered that the inclusion would exceed the mandate of the SUA Convention.

[145] IMO Doc LEG/CONF. 15/RD/2, Annex 1: Annex 2: 'Statement of Pakistan'.; It should be noted that Pakistan have already made a similar statement once in the 89th session of the Legal Committee, Annex 3: 'Reservation by the Delegation of Pakistan with Regard to the Revision of the SUA Convention and Protocol', Report of the Legal Committee on the Work of Its 89th Session, IMO Doc LEG 89/16 (4 November 2004) (the 89th Session Report).; India also made a similar statements twice, Annex 2: 'Reservation by the Delegation of India with Regard to the Revision of the SUA Convention and Protocol', ibid.; Annex 2: 'Reservation by the Delegation of India with Regard to the Revision of the SUA Convention and Protocol', Report of the Legal Committee on the Work of Its 90th Session(the 90th Session Report), IMO Doc. LEG 90/15 (9 May 2005).

[146] IMO Doc LEG/CONF. 15/RD/2, Annex 1: 'Statement of India';

[147] Ibid.

made by consensus, or adopted in an arbitrary manner. Moreover, in the last sentence of India's statement, it expressly said that 'it could not join the consensus'. That is to say, the SUA Protocol was certainly adopted by consensus.[148]

The reason why it was rational for the two states not to sign the Protocol was that they have consistently rejected the idea of transforming the nuclear material-transporting acts as new maritime terrorism offences into the SUA Protocol due to the following three reasons. First, they are not parties to the Treaty on the Non-Proliferation of Nuclear Weapons (NPT).[149] Second, they thought that would exceed the mandate of the IMO.[150] Third, it may hinder their use of merchant ships in transporting nuclear or dual-use materials for their civilian power plants. It was observed that these few states 'have cautioned against the temptation to cast the IMO Convention in the NPT framework',[151] or the way around, 'through the back door of the SUA Convention' for criminalising the acts of transporting nuclear or dual-use materials.[152]

While Russia also had these concerns about dual-use materials, it issued a statement indicating that it 'maintained its reservations with regard to subparagraph 1(b)(iv) of its article 3*bis*, because in its opinion, the definition of the dual-use

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[148] I appreciated the explanation and clarification from Dr Dorota Lost-Sieminska, who is Head of the IMO Legal Affairs Office, Legal Affairs and External Relations Division; and I appreciated Dr. Rosalie Balkin's explanation. Dr. Balkin was an participant of the diplomatic conference also Director of Legal Affairs and External Relations of the IMO at that time (email exchange, on file with the author)

[149] 1968 Treaty on the Non-Proliferation of Nuclear Weapons (Done on 1 July 1968, entered into force on 5 March 1970) 729 UNTS 16.

[150] But the majority of delegations did not agree with this view point, see Report of the Legal Committee on the Work of Its 88th Session(the 88th Session Report), IMO Doc. LEG 88/13 (18 May 2004), para. 39-44.

[151] Balkin, 'The International Maritime Organization and Maritime Security' 27-28.

[152] Ibid.

offence contained is excessively wide and may open for subjective interpretation.'[153] Consequently, Russia holds the view that 'nothing in the article 3*bis*…gives to any party the right to interdict transport or prosecute persons who are effecting such transport.[154]

Despite it being a heated and highly sensitive issue, it seems clear that the diplomatic conference did not put Article 3*bis* or the whole Protocol to the vote,[155] and it was probably because Article 3*bis* (2) has made clear exemptions to states parties to the NPT. In other words, if they can transport nuclear and related materials without violating the NPT obligations, and the contents of these statements are not contrary to the very idea of the SUA Protocol, then everything will be fine.[156]

In sum, the SUA Protocol was adopted by consensus with a general sense that consensus does not mean unanimity. If other parts of a treaty did not arouse too much controversy, the majority can still adopt an instrument by consensus, i.e. without going to vote.

### D. New Offences and Political Offence Exemption

Since the IMO began to review the SUA in early 2002, it took IMO roughly three years to negotiate the SUA Protocol before it was finally adopted in October 2005, and this was longer than the time spent in negotiating the SUA Convention. If we calculate the number of negotiation sessions in the Legal Committee, there were nine sessions in total, combining delegations discussions and debate sessions

[153] IMO Doc LEG/CONF. 15/RD/2, Annex 3: 'Statement of Russia'.
[154] Ibid.
[155] There is no record showing that the SUA Protocol or art. 3*bis* had been put to the vote.
[156] At least some positive attitude to the substance of the treaty is necessary in these statements, see R Sabel, *Procedure at International Conferences: A Study of the Rules at the UN and at Inter-Governmental Conferences* 345-346.

regarding text drafting. Among which, seven were formal sessions, from 84th to 90th sessions of the Legal Committee; two were additional inter-sessional working groups discussion.[157]

To a large extent, most of the substantial concerns were discussed and more or less solved before the diplomatic conference was taking place. The Legal Committee prepared for procedural rules, conference schedule and draft texts of the Protocol.[158] Only a number of political and policy issues needed to be decided at the conference. The aforementioned NPT issue was one of them. Other examples include the criteria about how many states will be needed for allowing the new Protocol to enter into force; draft text of the Article 5(d) of the Article 8*bis*, and some blank square bracket needs to be filled, and so on.[159]

Major issues in the negotiations can be identified and separated into two lines. The first line is about the new maritime terrorism offences and the question of political offence exception. The second line is about freedom of navigation, ship-boarding regimes interaction, human rights and safeguards, which will be dealt later.

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[157] IMO, the 85th Session Report, para. 107; Report of the Legal Committee on the Work of Its 84th Session, IMO Doc LEG 84/13 (7 May 2002) (the 84th Session Report); Report of the Legal Committee on the Work of Its 86th Session, IMO Doc. LEG 86/15 (2 May 2003) (the 86th Session Report); Report of the Legal Committee on the Work of Its 87th Session, IMO Doc. LEG 87/17 (23 October 2003) (87th Session Report); IMO, ibid, the 90th Session Report.

[158] IMO Doc LEG/CONF.15/1 (4 May 2005) (provisional agenda); IMO Doc LEG/CONF.15/2 (4 May 2005) (provisional rules of procedure)

[159] Young, 'Balancing Maritime Security and Freedom of Navigation on the High Sea: A Study of the Multilateral Negotiation Process in Action', 381-382.; LEG/CONF.15/3 (draft text of the Protocol), (4May 2005) and LEG/CONF.15/4(draft text of the Protocol to SUA 1988 Fixed Platforms Protocol), (4 May 2005).; Draft art. 5(d) was marked with a bracket, which means that it still needs some further discussions. It provides, '[If a requested State, which has not made a declaration in accordance with the subparagraphs 5(e) or 5(f) of this article, does not comply with its obligation under paragraphs 1 and 2 to this article to respond to either of the requests pursuant to the subparagraphs 5(a) and 5(b) of the present article, the requesting Party shall consider the need to warn other States Parties concerned.]'

The negotiation records show that most of the new offences were widely supported at its final meeting in April 2005.[160] The first part of offences such as 'uses against or on a ship or discharges from a ship any explosive, radioactive material or BCN[161] weapon in a manner that causes or is likely to cause death or serious injury or damage; discharges, from a ship, oil, liquefied natural gas, or other hazardous or noxious substance; uses a ship in a manner that causes death or serious injury or damage',[162] were relatively easy to reach an agreement, because most of the offences are clear reflection to the 911 incident.

However, some delegations still thought that draft texts were too vague and difficult to apply.[163] Consequently, it can be observed that few states were not satisfied about taking a vote for approving the draft text regarding new offences. The 90th Session Report of the Legal Committee indicates that 'the Committee approved the basic text with majority…a number of delegations were not satisfied with this decision, noting there was no consensus and that these issues should be decided by consensus rather than by majority vote'.[164] But the Legal Committee also noted that the purpose of approving this draft provision was to narrow the differences so that the new treaty can be adopted with as many delegations as possible.

The second part of offences is about transporting biological, chemical and nuclear materials, though this part has encountered some difficulties such as doubts concerning the dual-use provision, i.e. Article 3*bis* (1)(b)(iv). It was suggested by some delegations that this part of texts should be put into square brackets for further

[160] IMO, the 90th Session Report, para. 33-59.
[161] This is the abbreviation of 'biological, chemical and nuclear', as illustrated in SUA Protocol, art. 1(b).
[162] SUA Protocol, art. 3bis (1)(a)(i)(ii)(iii).
[163] The 90th Session Report, para. 39-40.
[164] The 90th Session Report, para. 41.

negotiation, but a majority of delegations approved to remove the brackets.[165]

The third part is related to Article 3*ter* and 3*quater*; the two provisions are about terrorist's motive. No evidence shows that any strong objection was ever made to exclude this *mens rea* component during the negotiation process.

Another issue was to expressly eliminate the political offence exemption,[166] while only few delegations cautioned its removal in the beginning.[167] The provision is modeled from Article 11 of the 1997 Terrorist Bombing Convention[168] and Article 14 of the 1999 Terrorist Financing of Terrorism.[169] It may be conceived as another direct response to the 911 incident. In short, to remove the political offence exemption helps fill the gap and clarifies the uncertainty in the SUA 1988 Convention.

### E. Ship-Boarding Regime: SUA Protocol Article 8*bis*

The second line in making the SUA Protocol is about the right of visit and search; this boarding activity has been commonly called as shipping interdiction or interception.[170] The nature of it is law enforcement or enforcement jurisdiction at sea.

This Article 8*bis* is the most important part of the SUA Protocol. It took most of

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[165] Ibid, para. 48.
[166] SUA Protocol, art. 11*bis*.
[167] The 85th Session Report, para, 84.
[168] International Convention for the Suppression of Terrorist Bombing (adopted 15 December 1997 by UNGA resolution 52/164, entered into force 23 May 2001, 2149 UNTS 256); Balkin, 'The International Maritime Organization and Maritime Security' 30-31.
[169] International Convention for the Suppression of the Financing of Terrorism (adopted 09 December 1999, entered into force 10 April 2002, 2178 UNTS 197 ); the 85th Session Report, para. 85.
[170] E Papastavridia, *The Interception of Vessels on the High Seas: Contemporary Challenges to the Legal Order of the Oceans* (Hart 2013); D Guilfoyle, *Shipping Interdiction and the Law of the Sea* (CUP 2009)

the delegations' time and energy to discuss, debate and negotiate until the last day of the diplomatic conference. As a participant vividly described, the Article 8*bis* is 'an extremely long article, which in itself, reads like a treaty within a treaty; it has its own preamble principles and detailed procedural prescriptions. It really looks like a symbol of the irruption of the new times into an old treaty.'[171]

Article 8*bis* is designed for the states parties to cooperate and suppress maritime terrorism to the fullest extent and shall respond to the boarding requests as expeditiously as possible.[172] Once the boarding request is issued by the requesting state, certain information should be provided, such as the name of the suspect ship, the IMO ship identification number, the ports of origin and destination, etc.[173] When it comes to boarding, the state parties shall take into account the danger and difficulties they may encounter when boarding the suspect ship.[174] It also requests state parties to have 'reasonable grounds to suspect'[175] a maritime terrorism offence has been, is being or is about to be committed.[176]

A pre-conditional matter before exercising the boarding procedure is to identify the nationality of a given ship, i.e. a ship flying the flag or displaying marks of registry.[177] After confirming the nationality of the ship and obtaining information

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[171] A Blanco-Bazan, 'Suppressing Unlawful Acts: IMO Incursion in the Field of Criminal Law in TM Ndiaye and RWolfrum (eds.), *Law of the Sea, Environmental Law and Settlement of Disputes: Liber Amicorum Judge Thomas A. Mensah* (Brill 2007) 713, 725.; Dr. Blanco-Bazan who at that time was Senior Deputy Director of the IMO Legal team; one of the participants at the diplomatic conference. See the 'List of participants', IMO Doc. LEG/CONF. 15/INF.1 (14 October 2005).; Papastavridia, *The Interception of Vessels on the High Seas: Contemporary Challenges to the Legal Order of the Oceans* 132.

[172] SUA Protocol, art. 8*bis*(1).

[173] Ibid, art. 8*bis*(2).

[174] Ibid, art. 8*bis*(3)

[175] The first draft of the US proposal used the 'reasonable ground to believe', see IMO Doc LEG 86/5 (26 February 2003)

[176] SUA Protocol, art. 8*bis*(4).

[177] Ibid, art. 8*bis*(5) and (5)(a).

about the reasonable grounds, it proceeds to the exact boarding procedure.[178] A relevant question here is how to know that the information required is enough for holding the reasonable grounds to suspect? For example, India argued that the flag state may 'also seek further information if this is deemed necessary'[179], but the Legal Committee considered that this concern 'was already covered' in Article 8*bis* (5).[180] Also, Article 8*bis* (7) does provide that the requested party can ask for 'additional information from the requesting Party'. Therefore, conditions imposed on the authorisation process seem enough for not giving the requesting party discretionary or arbitrary power to decide the reasonable grounds to suspect.

If a ship's nationality is confirmed and reasonable grounds can be established, the requesting state shall ask the flag state for authorization. Here the flag state has options as listed: it may authorize the boarding, conduct the boarding by their own law enforcement mechanism or with the requesting state, or it may subject to the conditions of requiring more information, or the conditions about how the boarding should be taken.[181] The options show that the flag state still holds the absolute power to manage the boarding procedure. This authorization method is the principle boarding procedure.

Alternatively, upon or after depositing the ratification document to the IMO, there are two other ways to authorise the boarding. First, a state party may notify the IMO Secretary-General that it would allow authorisation to board, search and question persons on the suspected ship if there is no response from the requested

[178] Ibid, art. 8*bis*(5)(b).
[179] The 90th Session Report, para. 66-67.
[180] Ibid.
[181] SUA Protocol, art. 8*bis*(5)(c) and (7).

state within four hours.[182] Second, a state party may also notify the IMO Secretary-General that it would authorise the boarding.[183]

To sum up, the nature of the two options is flag state's prior authorisation. However, the primary rule of authorisation, as mentioned above, is still on a case-by-case basis. In other words, it does not change the traditional exclusive rights held by the flag state over ships of their nationality.

The geographical application of the SUA Protocol is a maritime zone 'located seaward of any State's territorial sea'.[184] Although it does not expressly indicate whether the place is on the high seas or the EEZ, this does not seem to be an issue, because the Protocol provides that state parties 'shall take due account of the needs not to interfere with or to affect the rights and obligations and the exercise of jurisdiction of coastal States in accordance with international law of the sea'.[185] In the Preamble of the Protocol, it expressly acknowledged the importance of UNCLOS and customary international law of the sea. On the other hand, according to UNCLOS 58(2), the EEZ contains the nature of the high seas.[186] If a state does not declare their EEZ, then area outside the territorial sea is to be deemed as high seas, hence no need to write the EEZ or the high seas wording in the text.

Another question is related to the four-hour time limit. When negotiating about whether it should include a time limit for receiving the confirmation of a suspect ship's nationality, some delegations suggested that 'unless a clear time limit was

[182] Ibid, art. 8*bis*(5)(d)
[183] Ibid, art. 8*bis*(5)(e).
[184] Ibid, art. 8*bis*(5).
[185] Ibid, art. 8*bis*(10)(c)(i); some delegations has already noted at the initial stage that it should ensure that it is not inconsistent with other rules of international law, including UNCLOS. See IMO Doc. LEG 86/Corr.1 (13 March 2003), Annex 1, 6.
[186] RR Churchill and AV Lowe, *The Law of the Sea* (Manchester University Press, 3rd edition 1999) 160-179.

established, legal uncertainty would arise as to what the requesting Party would be entitled to do in the event an answer was not received'.[187]

China doubted this time limit scheme, stating that 'since the time zones and infrastructures of countries vary from each other, it is unreasonable and impracticable to set a uniform time limit'.[188] While the majority of delegations supported China's reasoning, they also indicated that 'if the absence of reply was interpreted as an authorization to board, this would be unacceptable to many delegations, since such an authorization in many jurisdictions could only be granted by the courts of the flag State'.[189] As a consequence, this time limit proposal for automatic authorization was rejected. Nevertheless, the four-hour tacit acceptance scheme was compromised, drafted and adopted at the diplomatic conference as one of the alternative options for authorizing the boarding.[190]

On the one hand, no matter which authorization option of the boarding procedure a state party chooses, the flag state has the exclusive rights over the suspect ship even if the requesting state has detained it. On the other hand, the flag state may consent the exercise of the jurisdiction to the requesting state or a third state.[191]

During the negotiation, it was noted that pursuant to Article 6 of the SUA Convention, there might be a potential jurisdictional conflict between a state (or states) which has rights for prosecuting the maritime terrorists and the other state (or states) which may also claim that it has jurisdiction, arguing that there are some

[187] The 89th Session Report, para. 47.
[188] IMO Doc LEG 89/4/3 (22 September 2004), para. 6.
[189] The 89th Session Report, para. 48.
[190] IMO Doc. LEG/CONF.15/DC/1 (13 October 2005).
[191] SUA Protocol, art. 8*bis*(8)

victims of its national. As a result, it was necessary to regulate about which state in question 'should have the primary right to exercise its jurisdiction'.[192] Nonetheless, the Legal Committee also took some possible situations into account, 'in which it would be more sensible to allow the intervening State-or a third State-to exercise its jurisdiction'.[193] The purpose is to avoid unnecessary conflicts in competing jurisdiction for prosecution.

One of the major concerns after states started to negotiate the new boarding procedure was the use of force and subsequent safeguards,[194] particularly when some boarding scenarios over maritime terrorists may be quite serious and unpredictable. These concerns were most reflected by opinions of NGOs,[195] such as the International Chamber of Shipping (ICS), the International Shipping Federation (ISF) and the International Confederation of Free Trade Unions (ICFTU).[196]

Take the ICFTU for example. It reminded the correspondence group that the 1995 Fish Stocks Agreement[197] provides 'The degree of force used shall not exceed that reasonably required in the circumstances'.[198] Also, it suggested that the Legal Committee should consider the Judgment of the *M/V Saiga* (No.2) case, which

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[192] The 89th Session Report, para. 55.
[193] Ibid, para. 56.
[194] Discussions on the safeguards questions and relevant case law, see J Harrison, 'Safeguards against Excessive Enforcement Measures in the Exclusive Economic Zone' in H Ringbom (ed.) *Jurisdiction over Ships: Post-UNCLOS Developments in the Law of the Sea* (Brill Nijhoff 2015) 217.
[195] The growing importance of NGOs and civil society in international law-making process has been noticed for some time, see for example, L Doswald-Beck, 'Participation of Non-Governmental Entities in Treaty Making: The Case of Conventional Weapons' in V Gowlland-Debbas (eds.) *Multilateral Treaty Making* (Martinuss Nijhoff 2000) 41.; Boyle and Chinkin, *The Making of International Law* Ch. 2.
[196] IMO Doc LEG 88/3/2 (19 March 2004) and IMO Doc LEG 88/3/3 (19 March 2004).; IMO Doc LEG/CON.15/14 (20 September 2005).
[197] 1995 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (Done, 4 December 1995; entered into force 11 December 2001) 2167 UNTS 3.
[198] The Fish Stocks Agreement, art. 22(1)(f).

adjudicated that 'the use of force muse be avoided as far as possible and, where forces is unavoidable, it must not go beyond what is reasonable and necessary in the circumstances'.[199] The final result of the provision provides that the use of force 'shall be avoided except when necessary to ensure the safety of its officials and persons on board, or where the officials are obstructed in the execution of the authorized actions. Any use of force pursuant to this article shall not exceed the minimum degree of force which is necessary and reasonable in the circumstances.'[200]

The US noted that in drafting the SUA Protocol, the objective was to seek a balance 'between security concerns with the human rights of seafarers and the legitimate interests of the shipping interests by providing enhanced protection for innocent seafarers and carriers'.[201] These safeguards include, for example, general principles in taking due account of the need not to endanger the safety of life at sea[202] and not to prejudice the commercial or legal interests of the flag state.[203] They also comply with applicable international human rights law[204] and apply measures environmentally sound under circumstances.[205]

In addition, they ensure the master of a ship is known of the intention to aboard the ship.[206] The other set of safeguards is connected to issues of state responsibility.[207] For example, if there is no sufficient evidence to prove the grounds

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[199] *The M/V Saiga (No.2) case* (Saint Vincent and the Grenadines v Guinea), Judgment (1999), para. 155.
[200] SUA Protocol, art. 8*bis*(9).
[201] IMO Doc. LEG/CON.15/15 (20 September 2005), para. 23.
[202] SUA Protocol, art. 8*bis*(10)(a)(i).
[203] Ibid, art. 8*bis*(10)(a)(v).; see also JL Jesus, 'Protection of Foreign Ships against Piracy and Terrorism at Sea: Legal Aspects' (2003) 18 *IJMCL* 363, 396.
[204] SUA Protocol, art. 8*bis*(10)(a)(ii).
[205] Ibid, art. 8*bis*(10)(a)(vi).
[206] Ibid, art. 8*bis*(10)(a)(viii).
[207] Guilfoyle, *Shipping Interdiction and the Law of the Sea* Ch.12; P Wendel, *State Responsibility for Interferences with the Freedom of Navigation in Public International Law* (Springer 2007)

for boarding, or such measures are unlawful or are exceeding the proportionality based on the available information, the state taking those measures shall be liable for any damage, harm or loss.[208]

The final provisions of the Article 8*bis* provide that state parties are encouraged to develop procedures for joint operations, and states 'may conclude the agreements or arrangements among them to facilitate law-enforcement'.[209] Commentators interpreted that these agreements or arrangements could let the US maintain the existence of the Proliferation Security Initiative and related bilateral ship-boarding agreements.[210]

On the one hand, Article 8*bis* is a comprehensive new ship-boarding regime in suppressing maritime terrorism, and it is believed that 'if (Article 8*bis* is) adopted, it will create new international law'[211] for boarding foreign ships suspected of conducting maritime terrorism. However, on the other hand, even the US, the first initiator and the most important advocate of this Protocol, also considered that 'the boarding procedures do not change existing international maritime law and or infringe upon the traditional principle of freedom of navigation.'[212]

In short, SUA Protocol is certainly a new treaty law in suppressing potential maritime terrorists, but the question is, how different it is if we compare with other existing treaties regarding ship-boarding procedures?

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[208] SUA Protocol, art. 8*bis*(10)(b).
[209] Ibid, art. 8*bis*(12), (13).
[210] J Kraska and R Pedrozo, *International Maritime Security Law* (Mrtinus Nijhoff 2013) 821.; N Klein, 'The Right of Visit and the 2005 Protocol on the Suppression of Unlawful Acts against the Safety of Maritime Navigation' (2007) 35 *Denver Journal of International Law and Policy* 287, 328.
[211] Balkin, 'The International Maritime Organization and Maritime Security' 28.
[212] IMO Doc LEG/CON.15/15 (20 September 2005), para. 22.

## F. Regime Interaction and Comparison of Ship-Boarding Procedures

The SUA Protocol was not originated from nowhere. It did specifically indicate in the first US draft Protocol that the boarding procedures and safeguards were adopted from UNCLOS, High Seas Convention, the Drugs Convention, and the Migrant Smuggling Protocol. The US also provided a table detailing the overlap between the draft new offences and the Terrorists Bombing Convention.[213]

In terms of the final outcome, it appears that there is no need to depict how the SUA Protocol learned from other anti-terrorism treaties, particularly on the new offences, because it expressly stipulates that the new offences should also consider offences set forth in any treaties listed in the Annex of the SUA Protocol.[214] The nature of the added offences came from the so-called sectoral approach by modelling the offences of existing anti-terrorism treaties, but comparatively the boarding procedures are not clear. Therefore, a simple comparison would be necessary in seeking the distinctions.

In terms of treaty provisions and terms or sentences used in relevant treaties

[213] IMO Doc LEG 85/4 (17 August 2002), Annex 1: Draft Protocol to the Convention for the Suppression of Unlawful Acts Agaisnt the Safety of Maritime Navigation, 9 ; Annex 3: Table Dealing with Overlap.

[214] SUA Protocol, art. 3*ter* and Annex. The Annex, now it also reads as art. 7. There are nine existing anti-terrorism treaties: 1 Convention for the Suppression of Unlawful Seizure of Aircraft, done at The Hague on 16 December 1970.;2 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, done at Montreal on 23 September 1971.; 3 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, adopted by the General Assembly of the United Nations on 14 December 1973.; 4 International Convention against the Taking of Hostages, adopted by the General Assembly of the United Nations on 17 December 1979.; 5 Convention on the Physical Protection of Nuclear Material, done at Vienna on 26 October 1979.; 6 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, done at Montreal on 24 February 1988.; 7 Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, done at Rome on 10 March 1988. ;8 International Convention for the Suppression of Terrorist Bombings, adopted by the General Assembly of the United Nations on 15 December 1997.; 9 International Convention for the Suppression of the Financing of Terrorism, adopted by the General Assembly of the United Nations on 9 December 1999.

with regard to ship-boarding procedures, SUA Protocol Article 8*bis*(1) is modelled from Article 17(1) of the Drugs Convention and Article 7 of the Migrant Smuggling Protocol. These provisions are all about general obligations for cooperation to the fullest extent. Article 8*bis*(4) is quite similar to Article 17(2) and (3) of the Drugs Convention and Article 8(1) of the Migrant Smuggling Protocol, as these provisions are related to nationality of a state party and reasonable grounds to suspect. Article 8*bis*(7) is likely derived from Article 17(6) of the Drugs Convention and Article 8(5) of the Migrant Smuggling Convention, because they all claim that a state party shall not take additional measures without the express authorization of the flag state or authorize the boarding with conditions parties mutually agreed. As indicated above, Article 8*bis*(7) was emulated from Article22(1)(f) of the Fish Stocks Agreement.

With some precedents and similarities derived from the Drugs Convention and the Migrant Smuggling Protocol, the safeguards provision Article 8*bis*(10) could be regarded as the most important part in the boarding procedure and in the treaty-making process. Not only that we see the involvement of NGOs and shipping industry in the making of the provisions, but also it does make progress in boarding procedures and its related potential consequences.

For example, the chapeau of the Migrant Smuggling Protocol Article 9 specifically provides that it is ‘safeguard clauses’. Article 8*bis*(10)(a) of the SUA Protocol uses three ‘due account’, five ‘ensure’ and one ‘take reasonable efforts’ clauses in trying to broaden the scope of detailed measures which need to be carefully enforced. If we refer to the 1988 Drugs Convention, we see that it only provides that states parties ‘shall take due account’ not to endanger the safety of life

at sea[215] and 'shall take the due account of the need not to interfere with or affect the rights and obligations' of the coastal states.[216]

Furthermore, Article 8*bis*(10)(b) stipulates the state responsibility issue. State parties are liable for compensating damage or loss caused by their unfounded grounds or unreasonable measures. While there are no traces of such a regulation from the Drugs Convention, in essence, the spirit of this clause can be found in Article 9(2) of the Migrant Smuggling Protocol, UNCLOS Article 110(3) and the High Seas Convention Article 22(3).[217]

Beyond the range of the safeguards, Article 8*bis*(12) and (13) encourage states parties to develop more detailed procedure to enforce joint operations and to reach agreements or arrangements between them. These two paragraphs can be deemed that it was modelled from Article 17(9) of the Drugs Convention and Article (17) of the Migrant Smuggling Protocol.

A curious question that may be asked here: where did the 'four-hour' limit come from? Apparently, it did not come from the Drugs Convention, did not come from the Migrant Smuggling Protocol, and did not come from UNCLOS or the High Sea Convention. It came from the Caribbean Drugs Agreement Article 6. It provides that 'requests for verification of nationality shall be answered expeditiously and all efforts shall be made to provide such answers as soon as possible, but in any event within four (4) hours'.[218]

At the time of the initial stage, it can be seen clearly that the US had already

[215] The Drugs Convention, art. 17(5).
[216] Ibid, art. 17(11).This is similar to SUA Protocol, art. 8*bis*(10)(c)(i).
[217] Kraska and Pedrozo, *International Maritime Security Law* 837-838.
[218] The Caribbean Drugs Agreement, art. 6(4).

indicated that the Caribbean Drugs Agreement was one of the recent development regarding ship-boarding procedure, though it was not considered as an appropriate precedent by many delegations in terms of its geographical location and the nature of the subject matter.[219]

In fact, this four-hour limit was not invented by the Caribbean Drugs Agreement but derived from the 1995 Council of Europe's Drugs Agreement.[220] Article 7 stipulates that 'the flag State shall immediately acknowledge receipt of a request for authorisation under Article 6 and shall communicate a decision thereon as soon as possible and, wherever practicable, within four hours of receipt of the request.' The Explainer Report of the Agreement only indicates that 'the four hour time limit mentioned in the agreement should be regarded as the latest time for communication of the decision in most cases.'[221] In short, there is no sufficient basis for taking this invention as a general rule.

It seems that we see no documented significant influence from the Caribbean Drugs Agreement to the SUA Protocol; however, only SUA Protocol and the Caribbean Drugs Agreement have some options for the authorization for boarding. Therefore, the Caribbean Drugs Agreement 'may have had some influence on the 2005 Protocol'.[222]

In sum, one or two regional treaty law may not be considered as strong

[219] The 85th Session Report, para. 90-93.
[220] Agreement on Illicit Traffic by Sea, implementing Article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Adopted 31 January 1995, not yet into force, ETS 156); https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/156
[221] Explanatory Report to the Agreement on Illicit Traffic by Sea, implementing Article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances; https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016800cb5ea, para. 40.
[222] SD MacDonald, 'The SUA 2005 Protocol: A Critical Reflection' (2013) *IJMCL* 485, 507.

evidence for creating general rules of international law of the sea. That was probably why the so-called shiprider (law enforcement officials)[223] provisions were never considered in the negotiation process. Shipriders can enforce law within a state party's territorial sea. If the negotiators cannot agree that the four-hour time limit is the principle authorization method, then it can imagine that 'these developments simply went too far for many states'.[224]

## G. Achievement and Deficiency

In the matter of making a treaty, to broaden the new offences and to create a new boarding regime with sufficient safeguards would certainly be identifiable achievements. However, the treaty only binds upon signatory parties, and thus it cannot grant other rights or impose other obligations to third parties.[225] To sum up, the effectiveness depends on its ratification and real practice.[226]

Deficiencies or limits may be more easily to be identified. First, the enforcement measures and exclusive rights remain in the hands of the flag state. Like how the US described the Protocol, it does not change existing rules of international law of the sea.[227] Second, the requirement of express authorization from the flag state may undercut its utility if the flag state chooses to delay or decline the authorization.[228] For those states concerning more about maritime

[223] The Caribbean Drugs Agreement, art. 8, 9 and 12.
[224] MacDonald, 'The SUA 2005 Protocol' 510.
[225] VCLT, art. 34.
[226] CA Harrington, 'Heightended Security: The Need to Incorporate Articles 3Bis(1)(A) and Article 8Bis (5)(E) of the 2005 Draft SUA Protocol into Part VII of the United Nations Convention on the Law of Sea' (2007) 16 *Pacific Rim Law and Policy Journal* 107, 131-132.
[227] Kraska and Pedrozo, *International Maritime Security Law* 834.; H Tuerk, Combating Terrorism at Sea--The Suppression of Unlawful Acts against the Safety of Maritime Navigation' (2007-2008) 15 *University of Miami International and Comparative Law Review* 327, 363.
[228] N Klein, 'The Right of Visit and the 2005 Protocol on the Suppression of Unlawful Acts against the Safety of Maritime Navigation' (2007) 35 *Denver Journal of International Law and Policy* 287,

terrorism, using the Protocol may not guarantee effectiveness. For example, if states reckon that using the cooperative framework of the PSI will be more efficient than using the SUA Protocol, then the Protocol will in effect become redundant, and for states that may not be so worried about maritime terrorism, the new boarding regime might be too intrusive as far as the sovereignty and exclusive right of the flag state issue are concerned.[229]

## IV. Conclusion

As 'negotiation in the classic diplomatic sense assumes parties more anxious to agree than to disagree,'[230] anxiety and tension appeared in both the SUA 1988 Convention and 2005 Protocol negotiation process.

On the last day at the diplomatic conference of the SUA Protocol, Mitropoulos, the Secretary-General of the IMO who stated that the conference 'will go down in the annals of IMO history as possibly the one most political charged…we are running a race against time in our efforts to prevent and suppress unlawful acts against safety of maritime navigation'.[231] The reasoning of the inference of 'the one most political charged' is yet unknown. However, the fact is that the 2005 SUA Protocol negotiation took more time than 1988 SUA Convention to compromise a draft before going to the diplomatic conference. While the 911 was a bigger terrorism incident than the *Achille Lauro*, this reality did not make the SUA Protocol negotiation easier.

On the other hand, there was no evidence to reflect that the NGOs or the

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[229] MacDonald, 'The SUA 2005 Protocol', 515.

[230] This is a famous quote from Dean Acheson, a former US Secretary of State, H-W Jeong, *International Negotiation: Process and Strategies* (CUP 2016) 107.

[231] IMO Doc LEG/CONF.15/INF.5 (21 October 2005).

shipping industry contribute significantly to the 1988 SUA Convention, but records show that in negotiating SUA Protocol, the ICS, ISF and ICFTU did contribute a lot to protecting seafarers and safety at sea. The IMO worked as a forum in discussing issues and negotiation, but it seems not sensible to argue that it played some sort of law-maker's role. In the making of the SUA 1988 Convention, Italy, Austria and Egypt occupied more important roles, while the US took the lead in preparing several versions of the draft texts in negotiating the SUA Protocol.

Regarding treaty-making methods, if we compare the preparations of the SUA 1988 Convention and 2005 SUA Protocol, it appears that an *ad hoc* committee for SUA Convention functions more effectively than the Legal Committee in the matter of negotiating the SUA 2005 Protocol. Unlike getting heated debates so early and easily in the IMO Legal Committee, through an *ad hoc* committee, consultation with experts could take place first, and this tecninque would result in a more neutral and less controversial draft. If that was the situation, it might let the US not so eagerly to present a complete draft all by itself. After all, it was a highly political charged maritime terrorism agenda. When a great power acted too eagerly in such a multilateral form with such a highly sensitive issue, it might cause some counter-effects if some states felt huge pressure imposed by such as a powerful state.

A related law-making issue is consensus. The SUA 1988 Convention was highly praised for its being adopted by consensus. While the SUA Protocol was adopted by consensus, there was no praise to this consensus method. As stated earlier, for some unknown reasons, India and Pakistan claimed that it was not adopted by consensus. In hindsight, it seems that consensus was not a useful law-making technique in a given treaty-making forum with regard to maritime

terrorism compared to previous decades.

In terms of regime interaction for avoiding potential conflicts in competing jurisdiction and in considering what precedents can be used, it should be noted that both the SUA Convention and SUA Protocol did well. The negotiators were all aware of the provisions in new treaties should be in consistence with existing law of terrorism and the law of the sea.

It is observed that the negotiation of the 2005 SUA Protocol might 'have contributed to the crystallisation of a customary international law prohibition on WMD transportation' only if it is widely ratified.[232] In reality, it has not. As of August 2017, there are only 41 parties to the 2005 SUA Protocol.[233] Even if it is widely ratified, it is necessary to see how many states choose the opt-in clause for the deemed consent authorisation regarding interdiction at sea. Until now, it seems that no any party is willing to choose this opt-in interdiction procedure.[234] Nonetheless, the SUA Protocol did make some progress regarding future changes with respect to international rules of maritime terrorism. To a certain extent, the concept of sovereignty and exclusive right of flag state has been loosened.

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[232] D Guilfoyle, 'Maritime Security' in J Barrett and R Barnes (eds.) *Law of the Sea: UNCLOS as a Living Treaty* (BIICL 2016) 329, 341.; TL McDorman, 'Maritime Terrorism and the International Law of Boarding of Vessels at Sea: A Brief Assessment of the New Developments' in DD Caron and HN Scheiber (eds.) *The Oceans in the Nuclear Age: Legacies and Risks* (Brill Nijhoff 2010) 239,263.

[233] Contracting parties are: Algeria, Antigua and Barbuda, Austria, Bulgaria, Congo, Cook Islands, Côte d'Ivoire, Cuba, Dominican Republic, Djibouti, Estonia, Fiji, Germany, Greece, Jamaica, Latvia, Liechtenstein, Marshall Islands, Mauritania, Nauru, Netherlands, Nigeria, Norway, Palau, Panama, Portugal ,Qatar, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, San Marino, Saudi Arabia, Serbia, Spain, Sweden, Switzerland, Togo, Turkey, United States of America, Uruguay, Vanuatu. See IMO, *Status of Multilateral Conventions and Instruments in Respect of which the International Maritime Organization or Its Secretary-General Performs Depositary or Other Functions*, 432 ff. http://www.imo.org/en/About/Conventions/StatusOfConventions/Documents/Status%20-%202017.pdf

[234] Ibid

The Korean delegate's final statement at the SUA Protocol diplomatic conference grasped this changing nature and atmosphere in making this new development:

> For hundreds of years after Hugo Grotius prevailed in his famous controversy with John Selden, the principle of the freedom of the high seas has been applied across the seas. Although this principle has in some part been slowly eroded by the expansion of the territorial sea as well as the creation of other zones of functional jurisdiction, the freedom of the high seas lies at the heart of the law of the sea and has contributed significantly to the ever-increasing navigation, trade, and travel among peoples and nations. This time, the freedom of the high seas is somewhat limited, paradoxically to ensure the uninterrupted flow of international seaborne trade, navigation and travel. My delegation believes that this limitation of the exclusive jurisdiction competence of the flag State is, in a sense, the inevitable result of changed security circumstances.[235]

The above statement indicates that while this traditional multilateral treaty-making mechanism has some obvious flaws; for example, it takes too much time to negotiate a treaty, even if it is adopted, the life and future of specific instrument is unpredictable. However, multilateral treaty-making forum and the diplomatic processes may still help to push forward a trend or to generate a positive atmosphere in thinking what the rules that the international community needs for tackling new challenges.

After all, to expect a revolutionary change in a multilateral treaty-making forum would be unrealistic,[236] especially when facing a highly political charged

[235] IMO Doc LEG/CONF.15/RD/2, Annex 8: 'Statement of the Republic of Korea'.
[236] A Boyle, 'Further Development of the Law of the Sea Convention: Mechanism for Change' (2005) 54 *ICLQ* 563, 584.

issue such as maritime terrorism.

**Chapter 4**

# UN Security Council Resolutions as Law-Making Instruments: From Terrorism to Piracy

'Mr. Collins had only to change from Jane to Elizabeth—and it was soon done, done while Mrs. Bennet was stirring the fire.'

Jane Austen, *Pride and Prejudice* (1813), ch 15.[1]

'The character, shape and the content of international law—as of the national law—are determined by prevailing political forces within the political system, as refracted through the way law is made.'

Louis Henkin (1979)[2]

## I. Introduction

After the 911 incident, the growth in UN Security Council (SC) resolutions has attracted significant academic interest with respect to the role of the Security Council in international Law-Making.[3]

The two well known examples are Resolution 1373[4] and 1540[5], both triggered significant debates in discovering its legislative power and limits in international law-making concerning terrorism and weapons of mass destruction.[6] Accordingly,

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[1] J Austen, *Pride and Prejudice* (Wordsworth 1993) 49.

[2] L Henkin, *How Nations Behave: Law and Foreign Policy* (Columbia University Press, 2nd edition 1979) 32.

[3] V Popovski and T Fraser (eds.) *The Security Council as Global Legislator* (Routledge 2014); A Boyle and C Chinkin, *The Making of International Law* (OUP 2007) 3-10.; A Boyle et al, 'The United Nations Security Council's Legislative and Enforcement Powers and Climate Change' (2016) Scottish Centre for International Law Working Paper Series, No. 14, http://www.scil.ed.ac.uk/__data/assets/pdf_file/0003/213096/Boyle_Hartmann_Savaresi_SCIL_Working_Paper_14.pdf, 5-7, 9-11.; SR Ratner, 'The Security Council and International Law' in DM Malone (ed.), *The UN Security Council: From the Cold War to the 21st Century* (Lynne Rienner 2004) 591.

[4] UN Doc S/Res/1373 (28 September 2001).

[5] UN Doc S/Res/1540 (28 April 2004).

[6] PC Szasz, 'The Security Council Starts Legislating' (2002) 96 *AJIL* 901.; M Fremuth and J Griebel, 'On the Security Council as a Legislator: A Blessing or a Curse for the International Community' (2007) 76 *Nordic Journal of International Law* 339.; LMH Martinez, 'The Legislative Role of the

some commentators have argued that the SC is working as the 'world legislature'.[7]

Moreover, with the rise of maritime piracy in East and West Africa around the year of 2007, the UNSC has since then issued more than a dozen resolutions on fighting piracy at sea. From the Resolution 1816[8] to the latest Resolution 2316[9], all represent efforts by the SC to broaden the meaning of what constitutes a 'threat to international peace and security'.[10]

Do these terrorism-related resolutions impose new obligations to all states? Do they help to reduce or mitigate terrorism at sea? Have piracy-related resolutions changed the international law of piracy codified in UNCLOS and customary international law? These questions are concerned not only with the SC's legislative power, but also with practical question of whether the SC should issue more legislative resolutions to contribute to the common interests of the international community.

This chapter is structured as follows for answering the questions above: First, it briefly surveys the legal competence of the SC granted by the UN Charter. Second, it presents some precedents with regard to SC's legislative role. Third, it analyses

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Security Council in Its Fight against Terrorism: Legal, Political and Practical Limits' 57 *ICLQ* (2008) 333.; N Tsagourias, 'Security Council Legislation, Article 2(7) of the UN Charter, and the Principle of Subsidiarity' (2011) *LJIL* 539.; E Rosand, 'The Security Council as "Global Legislator": Ultra Vires or Ultra Innovative?' (2004-2005) 28 *Fordham International Law Journal* 542.; A Bianchi, 'Assessing the Effectiveness of UN Security Council's Anti-Terrorism Measures: the Quest for Legitimacy and Cohesion' (2005) 17 *EJIL* 881.; B Olivia and P van Ham(eds.) *Global Non-Proliferation and Counter-Terrorism: the Impact of UNSCR 1540* (Brookings Institution 2007); M Happold, 'Security Council Resolution 1373 and the Constitution of the United Nations' (2003) 16 *LJIL* 593.; B Elberling, 'The Ultra Vires Character of Legislative Action by the Security Council' (2005) 2 *International Organizations Law Review* 337.; JE Alvarez, *International Organizations as Law-Makers* (OUP 2006) 184-216.; EC Luck, 'Tackling Terrorism' in DM Malone (ed.), *The UN Security Council: From the Cold War to the 21st Century* (Lynne Rienner 2004) 85.

[7] S Talmon, 'The Security Council as World Legislature' (2005) 99 *AJIL* 175.; JE Alvarez, *International Organizations as Law-Makers* (OUP 2006) 184-198.

[8] UN Doc S/Res/1816 (2 June 2008)

[9] UN Doc S/Res/2316 (9 November 2016)

[10] UN Charter, art. 24, 39.

whether those resolutions on terrorism and WMD are creating norms in fighting maritime terrorism. Fourth, it considers whether the SC is filling some gaps in international piracy law.

Given the lengthy and time-consuming process of multilateral treaties law-making, and the unpredictability of national ratification of treaties, the SC may offer a faster mechanism to form international norms and effective means of tackling problems concerning maritime terrorism and piracy at sea.

In other words, by examining these UNSC resolutions, this chapter argues that the Security Council is assuming a stronger legislative role in international law than it previously had, and in doing so, it has the potential to shape international norms on maritime terrorism and piracy. However, this development does not mean that the SC ignored the usefulness of multilateral treaties or soft law techniques; rather, the SC has been supporting all relevant law-making instruments as well as innovated several new techniques by itself.

## II. Security Council's Law-Making Power

The function and primary responsibility of the SC is to maintain international peace and security.[11] Article 39 of the UN Charter provides that the SC 'shall determine the existence of any threat to the peace, breech of the peace, or act of aggression and shall make recommendations, or decides what measures shall be taken in accordance with Article 41 and 42, to maintain or restore international peace and security'.[12] After rendering a decision, the 'Members of the United

[11] UN Charter, art. 24(1).; F Krisch, 'Chapter VII' in B Simma (ed.) *The Charter of the United Nations: A Commentary* (OUP 2002) 701-716
[12] UN Charter, art. 39.

Nations agree to accept and carry out the decisions.'[13]

Although the SC resolutions are not deemed as traditional sources of international law, as stipulated in Article 38 of the Statute of the ICJ, the case law of the ICJ has regarded SC resolutions as 'coming within the scope of the traditional sources of international law.'[14] To illustrate this development, Dame Rosalyn Higgins, shortly before she was elected an ICJ Judge, said 'we must not lose sight of Security Council resolutions in our examination of the process of creating norms in the international system,'[15]

Contrary to conservative views suggesting that the SC is not an organ for legislating substantive international law and is only for interpreting and applying existing norms.[16] The drafters of the UN Charter in fact intended to let the powers of the SC to be enough broad, flexible and discretionary.[17] Although this does not mean that the SC powers is without limits or constraints,[18] but as Wood argued that the 'effects of these limits in practice has been slight'.[19] Therefore, while there were debates about what constitutes threat to the peace and international security, the

[13] UN Charter, art. 25.
[14] *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie* (Libyan Arab Jamahiriya v. United Kingdom), Preliminary Objections, Judgment [1998], ICJ Rep 9; M Plachta, 'The Lockerbie Case: The Role of the Security Council in Enforcing the Principle of Aut Dedere Aut Judicare' (2001) 12 *EJIL* 125.
[15] R Higgins, *Problems and Process: International Law and How We Use It* (Clarendon 1994) 28
[16] MP de Brichambaut, 'The Role of the United Nations Security Council in the International Legal System' in M Byers (ed.) *The Role of Law in International Politics* (OUP 2000) 269, 275.
[17] DM Malone, 'The Security Council in the Post-Cold War Era: A Study in the Creative Interpretation of the UN Charter' 36 *NYU Journal of International Law and Politics* (2002-2003) 487.; E Papastavridis, 'Interpretation of Security Council Resolutions under the Chapter VII in the Aftermath of the Iraqi Crisis' 56 *ICLQ* (2007) 83, 89-94, 107-118
[18] S Lamb, 'Legal Limits to United Nations Security Council Powers' in GS Goodwin-Gill (ed) *The Reality of International Law: Essays in Honour of Ian Brownlie* (OUP 1999) 361.; DH Joyner, 'Non-Proliferation Law and the United Nations System: Resolution 1540 and the Limits of the Power of the Security Council' (2007) 20 *LJIL* 489.; A Boyle et al, 'The United Nations Security Council's Legislative and Enforcement Powers and Climate Change' 7-9.; J Crawford, 'Chance, Order, Change: The Course of International Law' (2013) 365 *Recueil des Cours* 304-308.
[19] M Wood, 'The United Nations Security Council' (July 2007) *Max Planck Encyclopedia of Public International Law*, online version, para. 18.

connotation of this concept to date has expanded to include international terrorism, transporting WMD, humanitarian disasters.[20]

Furthermore, in the *Tadic* case, the Appeal Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) stated that '"the act of aggression" is more amenable to a legal determination, "the threat to the peace" is more a political concept.'[21] Thus the ICTY continued to say: 'Article 39 leaves the choice of means and their evaluation to the Security Council, which enjoys wide discretion powers in this regard.'[22]

Following the same logic, Talmon has predicted in 2005 that in future years, perhaps this threat to the peace concept can expand to cover issues of transnational organized crime, drugs trafficking, maritime piracy and refugee flows; thus 'it may be argued that every situation that the Council has identified as a threat to the peace in a particular conflict situation potentially qualified as a threat to the peace per se.'[23] His observation rightly predicted the later development about SC resolutions of maritime piracy .

As alluded above, even though the limits of the SC powers are not significant, 'there must be a genuine link between the general obligations imposed and the maintenance of international peace and security'.[24] Moreover, the UN Charter does not give the SC a monopoly right in considering matters of international peace and security. Article 11 of the UN Charter provides that 'the General Assembly may consider the general principles of co-operation in the maintenance of international

[20] MJ Matheson, *Council Unbound: The Growth of UN Decision Making on Conflict and Post Conflict Issues after the Cold War* (United States Institute of Peace Press 2006)
[21] *Prosecutor v. Tadic*, Case IT-94-1-AR72 (1995) 35 *ILM* (1996) 32., para. 29.
[22] Ibid, para. 39.
[23] Talmon, 'The Security Council as World Legislature' 181.
[24] Ibid, 183.

peace and security',[25] it also 'may make recommendations with regard to such principles to the Members or to the Security Council or both'.[26] The General Assembly (GA) may also discuss questions or situations about international peace and security, but whatever action or recommendation is necessary 'shall be referred' to the SC.

In other words, the GA has the power to talk and make proposals but has no power to take action; the action and measures shall be taken or recommended by the SC, only the SC has the power to make legally binding resolutions.[27] Perhaps for this reason and by way of analogy, Koskenniemi described that the SC and GA are '[A] police man and a Temple of Justice', which means that the SC should establish and maintain international order, and the GA should deal with the acceptability of that order.[28]

A practical question would be, what are the precedents which best illustrated the legislative role of SC in forming international law?

## III. Security Council's Law-Making Experiences

A well-known case is Resolution 687 (1991)[29] regarding the Gulf War ceasefire. This resolution stated that Iraq is 'liable under international law for any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign governments, nationals and corporations',[30] as a result of Iraq's unlawful invasion and occupation of Kuwait. It also created a Compensation

[25] UN Charter, art. 11(1).
[26] Ibid.
[27] UN Charter, art. 25.
[28] M Koskenniemi, 'The Police in the Temple: Order, Justice and the UN: A Dialectical View' (1995) 6 *EJIL* 325, 338.
[29] UN Doc S/Res/687 (3 April 1991)
[30] Ibid, para. 16.

Commission to settle claims brought pursuant to the resolution.[31]

Another more far-reaching precedent is Resolution 827 (1993)[32].Through which the SC determined to establish an *ad hoc* International Criminal Tribunal namely, the ICTY for prosecuting those responsible for committing serious violations of international humanitarian law. At the same time, the SC also adopted a Statute deciding the substantive and procedural rules to be applied by the tribunal. Although the legitimacy of this legislative action underwent a lot of debates during that time,[33] the Appeal Chamber of the ICTY asserted that the SC did have the authority under Article 41 of the UN Charter to establish the tribunal.[34]

The SC followed this precedent when it established the International Criminal Tribunal for Rwanda (ICTR) by Resolution 955 in 1994.[35] Then, in August 2000, the SC adopted Resolution 1315,[36] requesting the UN Secretary-General to begin negotiations with the Sierra Leonean government to create a Special Court for Sierra Leone. In fact, as some commentators noticed, these tribunals constituted 'an innovative and increasingly well-developed body of jurisprudence on contemporary international criminal law and procedure.'[37]

The SC's legislative moves have also entered the sphere of humanitarian catastrophes.[38] Since the end of the Cold War, the SC has adopted several resolutions concerning the use of 'all necessary means' in dealing with humanitarian

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[31] C Gray, 'After the Cease Fire: Iraq, The Security Council and the Use of Force' (1994) 65 *BYIL* 135.; D Malone, *The International Struggle over Iraq: Politics in the UN Security Council 1980-2005* (OUP 2007) 72-92.
[32] UN Doc S/Res/827 (25 May 1993)
[33] R Kolb, 'The Jurisprudence of the Yugoslavia and Rwandan Criminal Tribunals on their Jurisdiction and on Criminal Crimes', 71 *BYIL* (2000) 259.
[34] *Prosecutor v. Tadic*, Case IT-94-1-AR72 (1995) 35 *ILM* (1996) 32.
[35] UN Doc S/Res/955 (8 November 1994)
[36] UN Doc S/Res/1315 (14 August 2000)
[37] Boyle and Chinkin, *The Making of International Law* 112, 270-271, 297-298; R Cryer, et al., *An Introduction to International Criminal Law and Procedure* (CUP, 2nd edition 2010) 181-197.
[38] EC Luck, *UN Security Council: Practice and Promise* (Routledge 2006) 81-92.

intervention affairs. Although these law-making innovations remain controversial, they nevertheless have appeared in cases such as Somalia, Rwanda, Bosnia, Haiti and Kosovo.[39]

The most relevant examples to this study are Resolution 1373 and Resolution 1540. The SC was acting under Chapter VII when it adopted the two Resolutions. Compared to the above cases, these two resolutions can be seen as qualitatively different exercises of the SC's innovative legislation. For example, in the above cases, when the UNSC was addressing the threats posed by a single state or from the failure of a single state, it was in the position responding to a specific situation.

However, pursuant to Resolutions 1373 and 1540, the SC was responding to global threats posed by international terrorism and offering a global approach to help addressing them. Its responses were not directed to any particular group or terrorist act but to all possible future acts of terrorism.[40]

In addition, the two Resolutions were not imposed for a time-limited purpose, whereas the former cases all explicitly or implicitly deal with a time-limited object This means that neither Resolution 1373 nor Resolution 1540 contain an explicit or implicit time limitation.[41] In other words, the two Resolutions can be practiced forever until the SC decides to terminate them someday for some reasons.

In terms of their legislative nature, Resolution 1373 and 1540 are the same. They both impose on 'all states' some general obligations in combating terrorism, and targeting non-state actors, namely, terrorists. They both transfer consent-based

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[39] S Murphy, *Humanitarian Intervention: The United Nations in an Evolving World Order* (University of Pennsylvania Press 1996); D Malone, *Decision-Making in the UN Security Council: The Case of Haiti (1990-1997)* (OUP 1998) 98-154.; C Greenwood, 'International Law and the NATO Intervention in Kosovo' (2000) 49 *ICLQ* 926.

[40] J Alvarez, 'The Security Council's War on Terrorism' in E. de Wet and A. Nollkaemper (eds.) *Review of the Security Council by Member States* (Intersentia Publishers, 2003) 119, 120-121.

[41] J Alvarez, 'Hegemonic International Law Revisited' (2003) 97 *AJIL*, 874, 901.

obligations of anti-terrorism and non-proliferation treaties to all states.[42] It has been observed that their application and influence in effect exceed and expand the scope covered in the 1999 Terrorist Financing Convention and other non-proliferation treaties.[43]

However, in terms of the measures contained, they are different. Resolution 1371 decides that states shall refrain from supporting terrorist acts no matter in any particular form. It further calls on all states to cooperate through information sharing and has established the Counter-Terrorism Committee[44] for implementing the Resolution and the Counter-Terrorism Committee Executive Directorate as its monitoring institution.[45] Resolution 1540 also created a 1540 Committee[46] but its function is mainly for sharing experiences in technical issues concerning non-proliferation.[47]

Having reviewed the general features of the SC's law-making activities, it appears that the most appropriate timing to wield this law-making power is when there exists some lacuna in the laws pertinent to an emergent situation.[48] In these situations, the SC may serve the function of creating techniques or mechanism to interpret and apply existing international legal rules to a specific threat that is causing deterioration in international peace and security.[49] The advantage of the

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[42] For example, the 1999 International Convention for the Suppression of the Financing of Terrorism, 1968 Treaty on the Non-Proliferation of Nuclear Weapons.

[43] LM Hinojosa-Martinez, 'A Critical Assessment of the United Nations Security Council Resolution 1373' in B Saul, *Research Handbook on International Law and Terrorism* (Edward Elgar 2014) 626, 628.; M Asada, 'Security Council Resolution 1540 to Combat WMD Terrorism: Effectiveness and Legitimacy in International Legislation' (2009) 13 *JCSL* 303, 314.

[44] S/Res/1373, para. 6

[45] E Rosand, 'Security Council Resolution 1373, the Counter-Terrorism Committee, and the Fight against Terrorism' (2003) 97 *AJIL* 333.; see the official website, https://www.un.org/sc/ctc/

[46] S/Res/1540, para. 4.

[47] See the official website, http://www.un.org/en/sc/1540/

[48] JE Stromseth, 'An Imperial Security Council? Implementing Security Council Resolutions 1373 and 1390' (2003) 97 *American Society of International Law Proceedings* 41.

[49] M Wood, 'Security Council Working Methods and Procedure: Recent Developments' (1996) 45

SC's law-making power in this regard is that it can fill these existing legal or enforcement gaps quickly. This competence can create binding obligations[50] that are more effective than treaty negotiations.

In other words, the question of whether the SC is competent to legislate or to make law is not simply a theoretical or an elusive one. The above precedents show that the legislative activities of the SC can be speedy and efficient in terms of its effects. While there exist doubts about the legitimacy of this law-making competence,[51] the reality is that the SC only consists of 15 member states. One could always argue that only 15 states cannot represent the entire international community.

## IV. Security Council Resolution 1540 and Weapons of Mass Destruction

The next question to consider is: what is the practical influence and usefulness of Resolutions 1373 and 1540 in combating maritime terrorism?

In fact, only Resolution 1540 is directly linked to the activities of maritime terrorism, because it aims at to preventing the transport and shipment of WMD materials, including WMD delivery system. The main focus of Resolution 1373 is to tackle the logistics and financial support of terrorist groups, entities or persons, though it also aims to eliminate 'the supply of weapons of terrorists.'[52] Likewise, Resolutionn1373 notes with concern of the connection of terrorism and transnational

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*ICLQ* 150.; M Wood, 'The Interpretation of Security Council Resolutions' (1998) 2 *Max Planck Yearbook of United Nations Law* 73.; S Yee, 'The Dynamic Interplay between the Interpreters of Security Council Resolutions' (2012) 11 *Chinese Journal of International Law* 613.

[50] Boyle and Chinkin, *The Making of International Law* 110.; MD Oberg, 'The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ' (2005) 16 *EJIL* 879, 884-885.

[51] A Bianchi, 'Ad-hocism and the Rule of Law' (2002)13 *EJIL* 263, 271-272.; N Jain, 'A Separate Law for peacekeepers: The Clash between the Security Council and the International Criminal Court' (2005)16 *EJIL* 239.; DD Caron, 'The Legitimacy of the Collective Security of the Security Council' (1993)87 *AJIL* 552.; JE Alvarez, 'Judging the Security Council' (1996) 90 *AJIL* 1, 5, 14-20.

[52] S/Res 1373, para. 2(a)

organized crime, illicit drugs, money-laundering, illegal arms trafficking and other potential deadly materials.[53] However, Resolution 1373 does not expressly deal with the question about transportation of WMD and its related materials.

### A. Significance

Resolution 1540 has been described as making 'a significant milestone in the development of international law on the subject of WMD proliferation'.[54] This is because the Resolution not only imposes specific non-proliferation obligations on all states,[55] but also presents the SC's formal attempt at regulating proliferation of WMD and related materials. Another illustration of Resolution 1540 legal effect is that it reflects 'other rules of international law' stipulated in many international treaties. For example, UNCLOS 19(1) provides that innocent passage shall take place in accordance with UNCLOS and with 'other rules of international law'.[56] Thus when considering threats or activities which may jeopardise innocent passage, states shall take Resolution 1540 as another legal source.

The text of Resolution 1540 provides that all states shall refrain from supporting non-state actors' 'transport, transfer or use of chemical or biological weapons and their means of delivery.'[57] Also, all states 'shall adopt and enforce appropriate effective laws',[58] 'take and enforce effective measures to establish

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[53] S/Res 1373, para. 4

[54] DH Joyner, 'The Proliferation Security Initiative: Nonproliferation, Counterproliferation and International Law (2005) 30 *YJIL* 507, 540.

[55] For example, the SC has issued Resolution 1718 (2006) and 1874(2009) on North Korea's non-proliferation problem; and Resolution 1747(2007) and 1929(2010) on Iran's non-proliferation problem, but these Resolutions only have limited effects. The most important reason is that these Resolutions did not create or impose general obligations to WMD proliferations and no boarding measures were mentioned. See UN Doc S/Res/1718 (14 October 2006); UN Doc S/Res/1874 (12 June 2009); UN Doc S/Res/1747 (24 March 2007); UN Doc S/Res1929 (9 June 2010)

[56] UNCLOS, art. 19(1).

[57] S/Res/1540, para. 1

[58] Ibid, para. 2.

domestic controls'[59] for prohibiting proliferation of the WMD. The essence of Resolution 1540 is to ask states to establish prescriptive jurisdiction and enforcement jurisdiction in tacking the proliferation of WMD. In short, with regard to 'transfer, transport, proliferate, transit, trans-shipment', it makes sense that these activities may go through sea. That is the fundamental difference between the two Resolutions.

## B. Potential Problems

There are some potential problems in implementing Resolution 1540. First, it is questionable whether Resolution 1540 has sufficient legal basis for imposing on all states a general obligation to interdict WMD and related materials. The terms used in Resolution 1540 are quite vague, even though it has tried to explain a bit more, by putting a footnote in defining what is 'means for delivery' and 'related materials'.[60] Nonetheless, as Talmon rightly noted, 'the unclear language, vague definitions, and lack of specific standards may result in time-consuming and painstaking in legislative process at the national level'.[61] After all, one important element in carrying out Resolution 1540 is domestic enforcement and effective national legislation, yet the vagueness of the Resolution may hinder this domestic enforcement process in states.

Second, there is no explicit language referring to 'interdiction', 'boarding' or 'interception' in the Resolution's text; accordingly, there is no way to authorise or request an authorisation for boarding a ship suspected carrying WMD by simply relying on the Resolution. Evidence shows that during the informal consultation and

[59] Ibid, para. 3.
[60] S/Res/1540.
[61] Talmon, 'The Security Council as World Legislature'190.

formal discussion stages in the SC,[62] China expressly opposed insertion of the word 'interdiction' in what is now paragraph 10 of the Resolution. Before passing Resolution 1540, China's Representative stated in the SC meeting that 'China's proposals are reflected in the current draft, and a reference to interdiction was deleted at the request of the Chinese delegation.'[63] One should also notice that paragraph 10 uses the words 'calls upon' rather than 'decides' to describe how states should take action. This illustrates the observation that it is more akin to 'invitation-making instead of obligation imposing'.[64]

Third, it concerns a reflection of a political compromise on the concerns of terrorism and WMD, Resolution 1540 more or less fails to provide measures and tools for enforcement actions.[65] Accordingly, when interpreting and applying these UN Chapter VII resolutions in real situation or enforcing measures in specific incident, states should always be cautious and be ware that 'any unilateral action involving the use or threat of force should not be lightly presumed.'[66]

Although Resolution 1540 does not provide clear support for interdiction of ships suspected of carrying WMD and related materials, it is the source for enhancing and upholding the legality of the Proliferation Security Initiative.[67] The reason is that paragraph 10 of Resolution 1540 does call upon all states to cooperate by using their national law and 'consistent with international law' in preventing

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[62] For understanding the meeting procedures in the SC, see SD Bailey and S Daws, The Procedure of the UN Security Council (3rd ed. Clarendon 1998) Ch. 2.
[63] UN Doc S/PV.4950 (22 April 2004), 6.
[64] DH Joyner, 'The Proliferation Security Initiative: Nonproliferation, Counterproliferation and International Law (2005) 30 *YJIL* 507, 541.; M Byers, 'Policing the High Seas: the Proliferation Security Initiative' (2004) 98 *AJIL* 526, 532.; N Klein, *Maritime Security and the Law of the Sea* (OUP 2011) 283.
[65] CH Allen, *Maritime Counterproliferation Operations and the Rule of Law* (Praeger Security International 2007) 147.
[66] E Papastavridis' Maritime Terrorism in International Law' in B Saul (ed.) *Research Handbook on International Law and Terrorism* (Edward Elgar 2014) 74, 84.
[67] This PSI issue will be dealt in Chapter 5, Section III.

proliferation of WMD.[68] At the time of adopting this Resolution, 2005 SUA Protocol was still under negotiation, thus illustrating the influence of the two Resolutions on SUA drafting and discussion process. The Preamble of the 2005 SUA Protocol clearly recalls that both Resolution 1373 and 1540 should be taken into consideration.[69]

It remains to be seen whether the SC and the Members of the SC have sufficient willingness to go a bit further for imposing more concrete obligations in regulating maritime terrorism. Resolution 1540 does set up some norms and obligations but does not go too far for prescribing the exact enforcement measures and procedures. One could speculate whether the timing of adopting Resolution 1540 might have led to a different outcome. If Resolution 1540 had been discussed immediately after the 911 incident, following the discussion of Resolution 1373, would the result have been different?

This counter-factual question may have several imaginative answers, but the point is that it was obvious that the timing of discussing Resolution 1540 was not ideal for about three years passed between the 911 incident in September 2001 and the adoption of Resolution 1540 in April 2004. Around that time, only one news was significant to the Resolution: Dr. Abdul Qadeer Khan who has been reckoned as the father of Pakistani's Nuclear weapons, confessed in February 2004 that he had transferred nuclear technology to Iran and Syria.[70]

In short, a key advantage of the SC's law-making role is that it takes less time and to impose binding obligations on states or to consolidate an existing

[68] S/Res/1540, para. 10.
[69] See 2005 SUA Protocol.
[70] See the BBC file on Abdul Qadeer Khan**,**
http://news.bbc.co.uk/1/hi/world/south_asia/3343621.stm

international norm.[71] On the contrary, if the timing is not right and there is no grave security, atrocity and peace concerns at hands, SC actions may result in a less useful or less cheerful outcome for upholding international peace and security. In other words, even if the SC might produce common interests for the international community, the fruit may not taste so sweet if it plants the seeds in the wrong season.

To some extent, when the timing is not right, the SC may only be explicitly showing some great powers' law-making intention, without regarding for the common interest of the international community. This will make states reluctant to accept the outcome and political pressure.[72] Put another way, the Permanent Five Members of the SC always have to face doubts about the legitimacy[73] and their unbalanced bargaining power over less powerful states.[74] Therefore, if the SC cannot seize the moment to tackle threats to international peace and security, it had better wait for the next crisis or next proper timing. That said, of course no one wishes for more international incidents harming international peace and security.

## V. Piracy and Armed Robbery around the Horn of Africa

Apart from intervening on terrorism and WMD issues, the SC also has dealt with piracy problems in the past few years. As of November 2016, the SC has issued more than a dozen resolutions in dealing piracy problems off the coast of Somalia.[75]

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[71] H Blix, 'UN Security Council vs. Weapons of Mass Destruction' (2016) 85 *Nordic Journal of International Law* 147, 152.

[72] N Crisch, 'International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order' (2005) 16 *EJIL* 369.

[73] TM Franck,' The Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Power Disequilibrium' (2006) 100 *AJIL* 88.; R Lavalle, 'A Novel, If Awkward, Exercise in International Law-Making: Security Council Resolution 1540 (2004)' (2004) 51 *Netherlands International Law Review* 411, 437.

[74] DF Vagts, 'Hegemonic International law' (2001) 95 *AJIL* 843.; JE Alvarez, 'Hegemonic International Law Visited' (2003) 97 *AJIL* 873.

[75] UN Doc S/Res/1814 (15 May 2008); UN Doc S/Res/1816 (2 June 2008); UN Doc S/Res/1838 (7

Among these, only Resolution 1918(2010), 1976(2011) and 2015(2011) were not issued under Chapter VII of the UN Charter. The following section will discuss the background of these SC resolutions, and the rationale of characterising piracy as a threat to international peace and security. It also scrutinises some general features and innovations of these resolutions in combating Somali pirates and analyses certain law-making issues. The key question being asked is: do these SC resolutions concerning pirates off the coast of Somalia change the general international law of piracy?

### A. Initial Responses

The SC began in 2008 to formally adopt resolutions on how to combat Somali piracy. It appears that the ascent or the resurgence of a piracy scourge off the coast of Somalia had previously not been noticed by the SC. However, this perception was totally contrasted to the reality.[76]

In a Statement made by the President of the SC in late 2005, it has more or less noticed that the piratical acts and incidents at sea have increased, and thus expressed 'serious concern over the increasing incidents of piracy off the coast of Somalia. The Council condemns recent hijackings of vessels in the area, particularly of ships

October 2008); UN Doc S/Res/1848 (2 December 2008); UN Doc S/Res/1851 (16 December 2008); UN Doc S/Res 1897 (30 November 2008); UN Doc S/Res 1918 (27 April 2010); UN Doc S/Res/1950 (23 November 2010);UN Doc S/Res/1976 (11 April 2011); UN Doc S/Res/2015(24 October 2011); UN Doc S/Res/2020 (22 November 2011); UN Doc S/Res/2077 (21 November 2012); UN Doc S/Res/2125 (18 November 2013); UN Doc S/Res/2184(12 November 2014); UN Doc S/Res/2246 (10 November 2015); UN Doc S/Res/2316 (9 November 2016)

[76] Different years of The Reports of the UN Secretary-General on Oceans and the Law of the Sea also noticed this piracy scourge before the international community responded, several Reports identified piracy as a kind of maritime security threats. See, for example, UN Doc A/Res/63/63 (10 March 2008), para. 39-62.; UN Doc A/Res/57/57 (7 March 2002), para. 142-155.; UN Doc A/Res/58/65 (3 March 2003), para.101.; Cf. UN Doc A/Res/70/235 (15 March 2016), para. 109-129.; UN Doc A/Res/66/70/1dd.2 (29 August 2011), para. 69-83.

carrying humanitarian supplies to Somalia.'[77] Among those incidents, a well-known hijacking by the Somali pirates in that year was of a ship called *MV Semlow*, which carried UN World Food Programme supplies.[78]

Later on in anther Presidential Statement issue in March 2006, the SC took note of 'the increasing incidents of piracy and armed robbery against ships in waters off the coast of Somalia. The Council encourages Member States whose naval vessels and military aircraft operate in international waters and airspace adjacent to the coast of Somalia to be vigilant to any incident of piracy therein and to take appropriate action to protect merchant shipping, in particular the transportation of humanitarian aid.' This Statement was also the first time that the SC clearly stated that counter-piracy activities should be 'in line with relevant international law.'[79]

After two months, the SC formally considered the Somali piracy problem in its Preamble of Resolution 1676,[80] reiterating that it was concerned about the increasing piratical acts occurring off the coast of Somalia. This Resolution was adopted under Chapter VII, though the context was solely the deteriorating political and humanitarian situation of Somalia.[81]

In fact, in October 2005, the SC established a Committee on Somalia based on the request citing paragraph 3 (i) of the Resolution 1630 (2005)[82]. The SC requested the Chairman[83] of the Committee to submit a report covering all the tasks set out in

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[77] S/PRST/2005/54 (9 November 2005).
[78] 'Pirates hijack tsunami aid ship', BBC News, 30 June, 2005, http://news.bbc.co.uk/1/hi/world/africa/4636695.stm
[79] S/PRST/2006/11 (15 March 2006)
[80] S/RES/1676 (10 May 2006)
[81] The SC began to deal with the situation regarding Somalia's conflict and famine problem in Resolution 751, UN Doc S/Res/751 (24 April 1992)
[82] UN Doc S/Res/1630 (14 October 2005)
[83] Mr. Nassir Abdulaziz Al-Nasser

the previous resolutions.[84] The Chairman submitted the said report to the SC in 2006. In that Report, it first traced the root causes of piracy and presented a brief evolution of piracy in Somalia. It also found that even in the 1980s, during the time of the Siyad Barre regime, Somali pirates had once posed as law enforcement officers in order to board ships for looting.[85] They typically initiated violent acts on a ship by using verbal commands and warnings and only scarcely used automatic weapons and other armaments.[86]

This Report noticed that another type of Somali pirates emerged as the self-described coast guards. They targeted vessels were engaged in illegal, unregulated and unreported fishing (IUU fishing) or were engaged in dumping toxic waste substances in the Somali coastal waters.[87] What was discovered at that time was that this type of grass-roots enforcement by the coast guards, coupled with the activity of the armed robbers, evolved into a much more sophisticated and lucrative money-making activity.[88]

Serving as a preliminary survey, the Report admitted that the information provided was 'far from complete'.[89] This meant that prior to the Somali piracy problem was being thrust into the public eye, the SC had already noticed this phenomenon but offered no solution. In short, this Report sent out the initial caveat, but during the reporting year of 2006, just a year before the ascent of the Somali problem, it seemed to think there was no need to consider this topic in more detail

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[84] 'Letter Dated 4 May 2006 from the Chairman of the Security Council Committee Established Pursuant to Resolution 751 (1992) concerning Somalia Addressed to the President of the Security Council', S/2006/229 (4 May 2006)

[85] See also M. Murphy, *Somalia: The New Barbary?* 11-14

[86] S/2006/229, para. 76-80

[87] KL Panjabi, 'The Pirates of Somalia: Opportunistic Predators or Environmental Prey?' (2010) 34 *William and Mary Environmental Law and Policy Review* 377.

[88] S/2006/229, para. 81.

[89] Ibid, para. 82.

within the SC.

Finally in August 2007, perhaps with the reality that the piracy phenomenon was clear enough at that time, the SC issued Resolution 1772 to expressly encourage Member states 'to take appropriate action to protect merchant shipping, in particular the transportation of humanitarian aid, against any such act, in line with relevant international law.'[90] A few months later in early 2008, because some states had started to take action against pirates in the Gulf of Aden, the SC adopted Resolution 1801 and welcomed 'the contribution made by France to protect the World Food Programme naval convoys and the support now provided by Denmark to this end'.[91]

Resolution 1816 was the first document in which the SC considered the Somali piracy an issue under Chapter VII. The SC noticed the seriousness of the Somali piracy issue perhaps from IMO Assembly Resolution A.979(24) in 2005,[92]and Resolution A. 1002(25) in 2007.[93] In considering the IMO Resolutions, there was a dynamic of institutional interactions between the SC and the IMO. For example, the IMO paid attention to how the SC or the General Assembly (GA) addressed the piracy issue.[94] However, it was the IMO that firstly requested the Transitional Federal Government of Somalia to give its 'consents to warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service, which are operating in the Indian Ocean, entering its territorial sea when engaging in operations against pirates or suspected pirates and armed robbers.'[95]

In any event, the SC then fully and formally began to focus on the piracy

[90] S/RES/1772 (20 August 2007), para. 18.
[91] S/RES/1801 (20 February 2008), para. 12.
[92] IMO Doc A.(24)Res. 979 (6 February 2005); this Resolution was revoked by Resolution A.1002(25).
[93] IMO Doc A 25/Res.1002 (6 December 2007)
[94] Ibid.
[95] Ibid.

problem off the coast of Somalia in Resolution 1816. This Resolution signifies the beginning of taking Somali piracy as a threat to international peace and security.

## B. Threat to International Peace and Security

All of the Chapter VII resolutions on Somali piracy illustrate: '*Determining* that the incidents of piracy and armed robbery at sea off the coast of Somalia, as well as the activity of pirate groups in Somalia, are an important factor exacerbating the situation in Somalia, which continues to constitute a threat to international peace and security in the region.'[96] It has been noted that 'it is the situation in Somalia which constitute the threat to international peace and security, not the piracy and armed robbery as such.'[97]

The first reason for explaining this observation perhaps is that the SC has almost routinely adopted resolutions under Chapter VII concerning the situation in Somalia.[98] Secondly, the text of these resolutions only shows that piracy and armed robbery are exacerbating the situation, it does not directly indicate that piracy and armed robbery is a threat to international peace and security. Thus it can be seen that piracy is a kind of collateral damage caused by the political instability and conflict in Somalia. We can observe that all these Resolutions concerning Somali pirates never explicitly determine that piracy and armed robbery constitute a threat to international peace and security.

Therefore, there is an implicit link between piracy and international peace and security. If there were no political turmoil in Somali, then there are no conditions to

[96] Original emphasis, see for example, Resolution 1816 and 2316.
[97] D Guilfoyle, 'Piracy off Somalia: UN Security Council Resolution 1816 and IMO Regional Counter-Piracy Efforts' (2008) 57 *ICLQ* 690, 695.
[98] For example, Resolution 773, UN Doc S/RES/733 (23 January 1992); T Treves, 'Piracy and International law of the Sea' in D Guilfoyle (ed) *Modern Piracy: Legal Challenges and Responses* (Edward Elgar 2012) 117, 123.

'exacerbate' the situation there. In some of the SC meetings on Somalia, it was recorded that for example, China, Indonesia, South Africa or Argentina were reluctant to agree that piracy and armed robbery alone can constitute a threat to international peace and security.[99] The rather cautious wording and purpose is for 'avoiding the criticism which the Council often incurs when applying this notion to matters hitherto not considered to be covered by the notion of threat to international peace and security.'[100]

In the piracy situation in West Africa region, this cautious approach can be seen more clearly. Resolution 2018(2011) and 2039(2012) took notes on the piracy and armed robbery situation surrounding the Gulf of Guinea; but the two Resolutions were not adopted under Chapter VII.[101] Simma commented that 'Given the absence of large-scale organized violence and the primary effects of piracy on economic action, this caution…seems justified.'[102]

To some extent, the rationale is quite obvious because there is not a serious 'failed state' problem in the Gulf of Guinea. However, it remains to be seen whether the SC will someday determine the situation there can constitute a threat to international peace and security. In the past few years, with the decreasing number of Somali piracy incidents, and the rising number of the piracy problem in the Gulf of Guinea, it appears that the SC began to take the Gulf of Guinea pirates more seriously. It has issued Presidential Statements and taken one formal meeting to discuss its concern about piracy and armed robbery in that region.[103]

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[99] Press Release, SC/10820 (19 November 2012); UN Doc S/PV.5902 (2 June 2008).
[100] Treves, 'Piracy and International law of the Sea' 124.
[101] UN Doc S/RES/2018 (31 October 2011); UN Doc S/RES/2039 (29 February 2012)
[102] B Simma, 'Article 39', in B Simma et al (eds.) *The Charter of the United Nations: A Commentary*, Volume II (OUP, 3rd edition 2012) 1272,1283.
[103] S/PRST/2016/4 ( 25 April 2016); S/PRST/2013/13 (14 August 2013); S/PV.7016 (14 August 2013).

Nevertheless, there are other considerations for the SC to determine that piracy and armed robbery off the coast of Somalia are threats to international peace and security. For example, piratical acts endanger international navigation and cargos shipping, the consequence of which are commercial interests and the global economy. Thus since Resolution 1816, the SC has addressed Somali piracy by separating the issue from the original Somali political and humanitarian scenario. That is to say, there are two tracks now in dealing with problems arising from the disorderly situation of Somalia. One is still focusing on bringing order and peace back to Somalia, the other is tackling pirates. It can be said that though the SC does not explicitly define the activity of piracy and armed robbery as threats to peace and security, it indeed *de facto* treats such acts as threats to international peace and security.[104]

In short, the SC started to broaden its scope and expand the nature of what constitutes international peace and security from Somali piracy.

### C. The Saving Clause and Entering into Territorial Sea

Unlike Resolution 1373 and 1540 on terrorism and WMD, Somali piracy Resolutions all contain a time limit for implementing the SC's recommendations. This can be described as a saving clause. Resolution 1816 contained a six-month saving clause with June 2008 as time limit.[105] This saving clause was then repeatedly extended for another twelve months in SC Resolutions 1851(2008),[106] 1897(2009),[107] 1950(2010),[108] 2020(2011)[109] 2077(2012),[110] 2125(2013),[111] 2184

[104] Y Gottlieb, 'The Security Council's Maritime Piracy Resolutions: A Critical Assessment' (2015) 24 *Minnesota Journal of International Law* 1, 28
[105] S/Res/1816, para. 7.
[106] S/Res/1851, para. 10,
[107] S/Res/1897, para. 7.

(2014),[112] 2246(2015)[113] and 2316(2016)[114]. In the near future, we can foresee that the SC will renew the twelve months period every year, based on the request of the Somali authorities.

Another condition also can be found in some of the aforementioned Resolutions, which is that the Resolutions:

> Applies only with respect to the situation in Somalia and shall not affect the rights and obligations or responsibilities of member states under international law, including any right or obligations under the United Nations Convention on the Law of the Sea…the resolution shall not be considered as establishing customary international law.[115]

This design effectively meets the different needs and interest of the cooperating states, and it is also related to a typical sovereignty issue.

All the Preambles of the Resolutions on Somali piracy repeat that the Resolution 'Reaffirms its respect for the sovereignty, territorial integrity, political independence and the unity of Somalia.'

To be precise, this sovereignty issue consists of two elements. The first is about recognition of states in international law.[116] For those who recognised the Transitional Federal Government of Somalia (TFG) as the genuine government of Somalia, the condition makes it clear that these resolutions accomplish 'no more

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[108] S/Res/1950, para. 7.
[109] S/Res/2020, para. 9.
[110] S/Res/2077, para. 12.
[111] S/Res/2125, para. 12.
[112] S/Res/2184, para. 13
[113] S/Res/2246, para. 14.
[114] S/Res/2316, para. 14.
[115] For example, S/Res/1816, para. 9; S/Res/1851, para. 10; S/Res/1897, para. 8; S/Res/1950, para. 8; S/Res/2020, para. 10.; S/Res/2316, para. 15.
[116] J Crawford, *The Creation of States in International Law* (OUP, 2nd edition 2006) 17-28

than what Somalia and cooperating states could have accomplished on their own.'[117] At the same time, for those who have not recognised the TFG, the resolutions provide the basic legal and legitimate position for them to suppress pirates in the territorial sea of Somalia. Secondly, for those who fundamentally see Somalia as a failed state, the saving clause affirms that this Somali situation is unique.[118]

But one political change should be noted that in September 2011, new 'Somali authorities' were established by competing Somali political factions and with the help of the UN.[119] Hence we can see that before 2011, Somali piracy Resolutions all stated 'TFG', but since 2011, they have replaced the term TFG with 'Somali authorities.'

With regards to law-making, the SC decides in Resolutions 1816[120] and 1846[121] that states may:

> (a) Enter the territorial waters of Somalia for the purpose of repressing acts of piracy and armed robbery at sea, in a manner consistent with such action permitted on the high seas with respect to piracy under relevant international law;
> (b) Use, within the territorial waters of Somalia, in a manner consistent with action permitted on the high seas with respect to piracy under relevant international law, all necessary means to repress acts of piracy and armed robbery.

This innovative move of entering Somali territorial seas has been called

[117] JG Dalton et al. 'Introductory Note to the United Nations Security Council: Piracy and Armed Robbery at Sea: Resolutions 1816, 1846 and 1851' 48 *ILM* (2009) 129, 130.
[118] MD Evans and S Galani, 'Piracy and the Development of International Law' in P Koutrakos and A Skordas (eds.) *The Law and Practice of Piracy at Sea: European and International Perspectives* (Hart 2014) 343, 364-365.
[119] S/2011/759 (9 December 2011)
[120] S/Res/1816, para. 7
[121] S/Res/1846, para. 10.

'reverse hot pursuit',[122] which is contrary to the conventional right of hot pursuit from within the territorial sea to the high sea. However, arguably the right of such a reverse hot pursuit has never been recognised or developed by virtue of customary international law.[123] Even though several Resolutions welcome the adoption of the Djibouti Code of Conduct,[124] Article 15 (j) of the Djibouti Code of Conduct expressly denies any right of foreign vessels to enter another state's territorial waters. This right can only be admitted with the consent of the coastal state. Perhaps the legal effect of such a decision would be too far-reaching, so the SC must provides the saving clause, expressly stating that it shall not be seen as establishing customary international law.

With the political change of Somali after 2011, the wording and terms used in the Somali piracy Resolutions have changed. Since Resolution 2077, the SC started to recognise and underline the 'primary responsibility of the Somali authorities in the fight against piracy and armed robbery at sea off the coast of Somali'.[125] However, it still 'encourages Member States to continue to cooperate…at sea off the coast of Somalia'.[126] This means that states can still exert their enforcement power in Somalia's territorial sea.

Apparently, as the saving clause implicates, the enactment of the Resolutions cannot not be seen as establishing customary international law. The Resolutions all

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[122] 'Letter Dated 24 January 2011from the Secretary-General to the President of the Security Council' S/2011/30 (25 January 2011) Annex 2: List of Individuals Consulted (The Lang Report), para. 37-40.; B Gilmore, 'Counter-Drug Operations at Sea: Developments and Prospects' 25 *Commonwealth Law Bulletin* (1999) 609, 612.; Guilfoyle, *Shipping Interdiction and the Law of the Sea* 92.

[123] R Geib and A petrig, *Piracy and Armed Robbery at Sea: The Legal Framework for Counter-Piracy Operations in Somalia and the Gulf of Aden* (OUP 2011) 67-68.; but it has been developed by treaty law, art. 8 of the Caribbean Drugs Agreement has reckoned and foreseen the right of reverse hot pursue.

[124] Preamble of the UNSC Resoluions 2020, 2015, 1897.1846.

[125] For example, Resolution 2077, Preamble and para. 12; Resolution 2316, Preamble and para. 4.

[126] Ibid.

clearly stated that Member states of the UN have no intention to change customary law. Nevertheless, this does not mean there is no any possibility or precondition to bring changes to the customary piracy law, i.e. UNCLOS provisions on piracy. It might be useful to ask what constitutes the rationale of setting up UNCLOS Article 105?

First of all, the geographical application of UNCLOS Article 105 is on the high seas. It also provides for applications 'in any other place outside the jurisdiction of any State'.[127] This indicates that in normal scenarios, we never assume that a state has no effective legislative or enforcement or adjudicative enforcement in their own territorial sea. But this embarrassment has been the real scenario happening in Somalia. For example, only until recently has it finally drafted its national coast guard law, but it still has no anti-piracy and relevant maritime law.[128]

Secondly, it follows that when and if there are other similar failed state situations happened in another region, the SC can intervene in the situation again, authorise the same measure based on its legislative power, or by the consent provided by the given failed state. Of course, this kind of scenario is less likely to happen, but it reveals that the logic behind the existing customary law may not be completely convincing.

In other words, the Somali piracy problem accidently disclosed another legal gap or at the very least, a special circumstance in UNCLOS. The SC's move in expanding the geographical scope of arresting and capturing pirates into Somalia's territorial sea is in effect filling such a gap left in UNCLOS.[129] In sum, the SC does

[127] UNCLOS, art. 105.
[128] S/Res/2246, para. 4.; S/Res/2315, para. 4.
[129] Treves argued that either based on SC resolutions or invited by the Somali authorities can justify such an geographical expansion to the territorial sea. T Treves, 'Piracy, Law of the Sea and Use of Force' (2009) 20 *EJIL* 399, 406-408.

make a slight change in UNCLOS Article 105, though it is on an *ad hoc* basis. Nonetheless, as long as the resolutions are legally binding, *ad hoc* law-making is still law-making.

### D. Ship-Rider Agreements

Besides the above basic arrangements, one specific designation to combat Somali pirates was generated from both Resolutions 1851 and 1897. The Resolutions stated that the SC:

> Invites all states and regional organizations fighting piracy off the coast of Somalia to conclude special agreements or arrangements with countries willing to take custody of pirates in order to embark law enforcement officials ("shipriders") from the latter countries, in particular countries in the region…provided that the advance consent of the TFG is obtained for the exercise of third state jurisdiction by shipriders in Somali territorial waters and that such agreements and arrangements do not prejudice the effective implementation of the SUA Convention.

A basic understanding of the concept of a shiprider is: a local law enforcement official is authorised to embark upon another state's coastguard or navy vessel.[130] A more detailed description could be: 'a law-enforcement official from state A embarked on a vessel of state B who may, subject to specific treaty arrangements, authorise intervention aboard state A's vessels (or in its territorial waters) or arrest persons at sea under the law of state A.'[131] However, the real definition much

[130] M Williams, 'Caribbean Shiprider Agreements: Sunk by Banana Trade War?' (2000) 31 *University of Inter-American Law Review*' 163, 183-184.
[131] Guilfoyle, 'The legal Challenges in Fighting Piracy' B. van Ginkel and F. van der Putten (eds.) The *International Response to Somali piracy: Challenges and Opportunities* (Martinus Nijhoff 2012) 127, 138-139.

depends on how specific shiprider agreements are designed and shaped.[132] For example, a recent bilateral shiprider agreement between the United States and the Gambia defines that a shiprider 'means a Security Force Official of one Party (the designating Party) authorised to embark on a Security Force vessel or aircraft of the other party (the other or authorizing Party)'.[133]

Why this measure could be described as special is simply because most of the states are not very familiar with shiprider agreements. The origin of shiprider agreements traces back to almost three decades ago.

### 1. Origin and Rationale

The origin of the concept of shiprider agreements stems from counter-drug operations in the 1980s.[134] For instance, according to Article 17 (9) of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988, 'Parties shall consider entering into bilateral or regional agreements or arrangements'[135] (i.e. shiprider agreements) to carry out or to enhance the effectiveness of law enforcement at sea. The Commentary book on the Drugs Convention plainly states that Article 17 'contains highly innovative law enforcement provisions to promote the interdiction of vessels engaged in the illicit

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[132] A sound case, see WC Gilmore, *Agreement concerning Co-operation in Suppressing Illicit Maritime and Air Trafficking in Narcotic Drugs and Psychotropic Substances in the Caribbean Area* (The Stationary Office 2005) 1-7, 19-22.

[133] Art. 1 of the Agreement concerning Cooperation to Suppress Illicit Transnational Maritime Activity between the United States of America and the Gambia (Signed at Banjul, October 10 2011), KAV 9392 i.

[134] E Abrams, 'The Shiprider Solution: Policing the Caribbean' (1996) 3 *National Interest* 86, 87-88.; H Henke, 'Between Rocks and A Hard Place: The "Shiprider Controversy" and the Question of Caribbean Sovereignty' (1998) 35 *International Studies* 4.; SA Haughton, 'Bilateral Diplomacy: Rethinking the Jamaica-US Shiprider Agreement' 3 *The Hague Journal of Diplomacy* (2008) 253, 257-270.

[135] Also see *Commentary on The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988* (United Nations Publication, 1998) 332-333.

traffic in drugs by sea'[136]

Since 1980s, a number of bilateral shiprider agreements were concluded with regard to counter-drug dealings[137] and illegal fishing.[138] That is to say, each shiprider agreement is designed to meet specific purpose. The negotiation of relevant shiprider agreements has been led by the US. With a clear emphasis on effective law enforcement, these agreements are primarily designed to overcome jurisdictional hurdles[139] and to receive the coastal state's consent for letting the shipriders to board, visit and search suspected ships.[140]

In general, shiprider agreements have been executed to counter three problems: counter illicit drugs, proliferation of weapons of mass destruction and illegal fishing activities. Briefly examining these practical applications of shiprider agreements underscores some implications for scenarios happening off the coast of the Horn of Africa.

A first thing to bear in mind is that the United Sates is the most experienced country in negotiating and implementing these shiprider agreements. In reality, it was the US that invented modern shiprider agreements from counter-drug operations.[141]

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[136] Ibid, 323.; B Gilmore, 'Counter-Drug Operations at Sea: Developments and Prospects' (1999) 25 *Commonwealth Law Bulletin* 609.; WC Gilmore, 'Narcotics Interdiction at Sea: The 1995 Council of Europe Agreement' (1996) 20 *Marine Policy* 3.

[137] See Chapter 1, Section D, fn. 119.

[138] Memorandum of Understanding between the United States of America and the People's Republic of China on Effective Cooperation and Implementation of the United Nations General Assembly Resolution 46/215 of December 20, 1991 (Signed at Washington, D.C. December 3 1993), KAV 3727.; R Rayfuse, 'Regulation and Enforcement in the Law of the Sea: Emerging Assertions of a Right to Non-Flag State Enforcement in the High Sea Fisheries and Disarmament Context' 24 *Australian Yearbook of International Law* (2005) 181.; Guilfoyle, *Shipping Interdiction and the Law of the Sea* 119-124.

[139] M Byers, 'Policing the High Seas: The Proliferation Security Initiative' 98 *AJIL* (2004) 526.

[140] J Kraska, 'Broken Tailing at Sea: The Peacetime International Law of Visit, Board, Search and Seizure' (2010-2011) 16 *Ocean and Coastal Law Journal* 1, 11-17.

[141] W Gilmore, 'Narcotic Interdiction at Sea: UK-US Cooperation' (1989) 13 *Marine Policy* 218.

Second, the purpose of counter-drugs agreements is to pursue traffickers who use the so-called 'go-fast' speedy boats in the Caribbean Sea area. In theory, these bilateral treaty arrangements allow both parties to allocate their shipriders and to authorise the other party into their territorial sea. In practice, because of the limitations of Caribbean states' capacity to enforce their national laws in combating drug-trafficking activities, the real law-enforcement effects are created by the US.[142]

Third, in the context of countering illegal fishing, precedents also show that in the management area of the North Pacific Anadromous Fish Commission (NPAFC),[143] for example, China and the US concluded a shiprider agreement in 1993. This agreement allows joint boarding and inspection under special permission of the flag state, but in practice, most of the cases were enforced by the US. Past experiences show that the effectiveness of the NPAFC has rested upon the voluntary cooperation of non-parties, such as China, South Korea and Taiwan. A significant implication from this precedent is that the weight of China's role is critical, as Guilfoyle observed, 'without Chinese-cooperation under the ship-rider agreement it is difficult to envisage an effective high-seas inspection regime in the area.'[144]

In essence, we may find three implications from the above precedents. First, shiprider agreements are a kind of *ad hoc* arrangement based on the consent of one side of the treaty parties. There is no ground to suggest any customary international could be established by shiprider agreements.[145]

Second, the political will of each state to cooperate in any one of these scenarios is highly critical. It is quite clear that in the case of countering Somali

[142] Guilfoyle, *Shipping Interdiction and the Law of the Sea* 91.
[143] See NPAFC official website at http://www.npafc.org/new/index.html
[144] Guilfoyle, *Shipping Interdiction and the Law of the Sea* 124
[145] Byers, 'Policing the High Seas' 529-534.

piracy, a firm political will has been declared by the SC.

Third, shiprider agreements could be a useful means of increasing the policing and evidence collecting skills on board multinational naval ships off the coast of Somalia. The shipriders sent from regional countries subsequently can gain experiences in prosecuting pirates. Ultimately, since it is unlikely to forever rely on multilateral military cooperation or assistance from international organisations, shiprider agreements thus would be a useful mechanism for capacity building in the region.

### 2. Strength and Weakness

The reason that the SC encourages states to reach shiprider agreements is because shiprider agreements can 'facilitate the investigation and prosecution of persons detained as a result of operations' conducted under Resolutions 1851 and 1897.[146] Proponents also argue that shipriders help to execute law enforcement measures and may bring specialised expertise such as forensic skills.[147] Consequently, the critical function of shiprider agreements is a special mechanism for enabling the exercise of adjudicative jurisdiction over pirates and armed robbery off the coast of Somalia.[148]

One testament in reflecting the advantage of using shipriders was presented by the Executive Director of the UNODC. He expressly stated that 'I encourage "ship riders" to be deployed on warships operating off the Horn of Africa in order to arrest pirates and bring them to justice in neighbouring countries'.[149]

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[146] S/Res/1851, para. 3.; S/Res/1897, para. 6

[147] Frederick Lorenz and Kelly Paradis, 'Evidentiary Issues in Piracy Prosecutions' in MP Scharf et al (eds.) *Prosecuting Maritime Piracy: Domestic Solutions to International Crimes* (CUP 2015) 207, 235.

[148] Geib and Petrig, *Piracy and Armed Robbery at Sea* 88.

[149] 'UNODC Proposes Measures to Stop Piracy in the Horn of Africa' (17 December 2008),

However, it would be unrealistic to suggest that there is no potential weakness within the shiprider frameworks. And these weaknesses may be the reason that the SC began to omit references to shiprider agreements since Resolution 1950. Four scenarios should be considered.

First, the use of shiprider agreements fundamentally challenges the rationale of 'one ship, one law' under the law of the sea.[150] The very rationale and purpose of UNCLOS is to increase the legal certainty by including the prohibition of using a flag according to convenience.[151] A potential legal ambiguity arises from the interpretation and application of a different national law of both parties at the same time. For example, Article 7 (4) of the Djibouti Code of Conduct provides that shipriders 'may assist the host Participant and conduct operations from the host Participant ship or aircraft if expressly requested to do so…and acted upon in a manner that is not prohibited by the laws and policies of both Participants.' Nevertheless, this provision gives no guidance on how to strike a balance between two different legal regimes in a specific scenario. If some controversial issues concerning the technical and procedural measures arise, or if a violation of human rights is evoked, it would be difficult to reach a resolution.

Second, pursuant to Article 107 of the UNCLOS, a pirate ship can only be seized 'by warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service to that effect'[152]; commentary on this

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http://www.unodc.org/unodc/en/press/releases/2008-12.16.html

[150] IY Tesfalidet, 'Shiprider Institution: Questions of Jurisdiction and State Responsibility' in ED Ppastavridis and KN Trapp (eds.) *Crimes at Sea* (Martinus Nijhoff 2014) 609, 624-626.

[151] B Vukas and D Vidas, 'Flag of Convenience and High Sea Fishing: The Emergence of a Legal Framework' in OS Stokke (ed.) *Governing High Sea Fisheries: The Interplay of Global and Regional Regimes* (OUP 2001) 53-82.

[152] UNCLOS, art. 107.

provision notes that it reduces legal uncertainty.[153] However, shipriders cannot be easily identified, because they are deployed on the other participant's ship. In reality, the use of shiprider agreements could potentially circumvent the UNCLOS.[154]

Third, according to Resolution 1851 and 1897, it seems that both resolutions foresaw the possible abuses of using shiprider agreements. Both the Resolutions state that 'such agreements or arrangements do not prejudice the effective implementation of the SUA Convention.'[155] A curiosity arises as to how this safeguard clause should be interpreted? Logically speaking, if a shiprider carries out an arrest, the suspect will be prosecuted under the jurisdiction of this shiprider's state. If a party of the SUA Convention arrests a suspect at sea, then it must fulfil its obligation as to either prosecute or extradite. Thus the implication of shiprider agreements in such a scenario is not clear.

Fourth, the unsettled maritime delimitation between Somalia and its three neighbours (Kenya, Djibouti and Yemen) should also be taken into consideration.[156] On one hand, Somalia seems not have acclaimed an exclusive economic zone in accordance with UNCLOS. On the other hand, it adopted a national law No. 37 in 1972, declaring that it extends its territorial sea to 200 miles, which is not consistent with UNCLOS. The lack of information on whether Somali legislation is harmonised with UNCLOS creates legal ambiguity.[157] In other words, even if there are sufficient well-trained Somali shipriders who could enforce their national law, there still will be a fundamental difficulty with regard to the width of its territorial

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[153] MH Nordquist et al (eds.) *United Nations Convention on the Law of the Sea 1982: A Commentary*, *Volume II* (Martinus Nijhoff 1993) 222.
[154] Klein, *Maritime Security and the Law of the Sea* 92-93
[155] S/Res/1851, para. 3.; S/Res/1897, para. 6.
[156] T Neumann and TR Salomon, 'Fishing in Troubled Waters: Somalia's Maritime Zone and the Case for Reinterpretation' 16 *ASIL Insight* (March 15 2012), http://www.asil.org/insights120315.cfm
[157] S/2011/661 para. 27-31.; S/2011/30 (The Lang Report) para. 89.

sea and the boundary with Somalia's neighbours.[158]

In short, the SC has been trying to fill the legal gaps between the effective law enforcement and the absence of rule of law in Somalia by issuing relevant SC resolutions. However, the hard truth is, no shiprider agreement has ever been established with Somalia and it seems that the idea has largely been abandoned.[159]

## E. Armed Robbery at Sea and the Two-Ships Requirement

In all the piracy relevant SC Resolutions, it seems that there is no difference between the two concepts of piracy and armed robbery at sea. However, there is no general or recognised definition of armed robbery at sea. At least, there is no such definition in UNCLOS.

The IMO defines 'armed robbery against ships' in its Assembly Resolution A.922(22), as 'any unlawful act of violence or detention or any act of depredation, or thereof, other than act of piracy, directed against a ship or against persons or property on board such a ship, *within a State's jurisdiction over such offences*.'[160]

Following a similar vein, the 2004 ReCAAP Article 1(2) defines 'armed robbery against ships' as:

> (a) any illegal act of violence or detention, or any act of depredation, committed for private ends and directed against a ship, or against persons or property on board such ship, in a place *within a Contracting Party's jurisdiction over such offences*; (b) any act of voluntary participation in the operation of a ship with knowledge of facts making it a ship for armed robbery against ships; (c) any act of inciting or

[158] See the pending maritime delimitation case between Somalia and Kenya, *Maritime Delimitation in the Indian Ocean* (Somalia v Kenya), http://www.icj-cij.org/docket/index.php?p1=3&p2=1&k=00&case=161&code=SK

[159] Frederick Lorenz and Kelly Paradis, 'Evidentiary Issues in Piracy Prosecutions' 235-236.

[160] IMO Doc. A/22/Res.922 (22 January 2002), emphasis added.

> of intentionally facilitating an act described in subparagraph (a) or (b).[161]

In 2009 Djibouti Code of Conduct Article 1(2), and the 2013 Yaounde Code of Conduct Article 1(4), 'armed robbery against ships' is an act consisting of:

> (a) unlawful act of violence or 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 on board such a ship, *within a State's internal waters, archipelagic waters and territorial sea*;(b) any act of inciting or of intentionally facilitating an act described in subparagraph (a).

We cans see that there are some differences in its terms and conditions. First, in these definitions, it is clear that the crime of armed robbery is in the maritime zone of territorial seas, these definitions do not specify that the act be committed on the high seas or the EEZ. It should be noted again that the UNCLOS high seas provisions generally cover the EEZ.[162] Second, these definitions do not specify that an armed robbery requires a ship against another ship,[163] i.e. two-ship requirement.

It is unknown whether the drafters or those who were involved in negotiating the texts of piracy Resolutions were conscious of these differences in definitions, as there is no record that they ever discussed this. However, to assume that those legal advisers represented in the UN who do not know or comprehend those definitions would be unreasonable, since the IMO or individual states have been involving in combating piracy for some years, it is reasonable to assume that the legal advisers in the UNSC were aware of the differences. Therefore, whether there is any legal

[161] ReCAAP, art. 1(2), emphasis added.
[162] UNCLOS, art. 58(2).
[163] UNCLOS, art. 101(a)(2).

significance to distinguish the two terms is questionable, because the SC Resolutions on piracy 'could be read as eliminating the distinction between piracy and armed robbery at sea'.[164]

This understanding or interpretation would in effect expand the UNCLOS definition of piracy to cover all piratical acts in the territorial sea. Though it may not be considered as forming new customary international law, but the SC does fill the gap left in UNCLOS. In the sense of reading and interpreting the term 'piracy and armed robbery at sea', they are the same thing. In another sense, based on a real and practical need for combating pirates in Somalia's territorial sea, the SC has to let the two become one, even without giving any reason.

A further implication would be, pursuant to these SC piracy Resolutions, piracy can be committed in anywhere, as long as it is committed at sea. The SC has blurred the line between piracy and armed robbery at sea. If there is still a need to distinguish the two concepts, and only if someone prefers, now we can call those piratical acts committed on the high sea as piracy, and those committed in the territorial sea as armed robbery. In short, the SC is trying to set new norms by filling gaps. It does not change the customary international law of piracy codified in UNCLOS, but it gives the international community an exception to the rule.

The second issue is whether the two-ship requirement should be considered invalid and not useful. The aforementioned definitions do not specify the two-ship requirement and the SC has not clarified whether the two-ship requirement is still necessary. Therefore, following the same logic, it can be argued that there is no need to apply the two-ship requirement in combating piracy and armed robbery in the

[164] Geib and Petrig, *Piracy and Armed Robbery at Sea* 74.; H Tuerk 'The Resurgence of Piracy: A Phenomenon of Modern Times' (2009) 17 *University of Miami International and Comparative Law Review* 1, 14-15.

territorial sea. As long as the SC is able to authorise states to enter into Somalia's territorial sea or any failed state's territorial sea, armed robbery equals piracy and no two-ship requirement is entailed in the concept of armed robbery in the territorial sea. But of course, even if this exceptional rule can be applied to other states, probably the saving clause of not being recognised as forming customary international law will still be established.

## F. Prosecuting Pirates

There has been some doubts as to whether a state can transfer the suspect pirates to another state for prosecution after arresting them. Pursuant to UNCLOS Article 105, 'every State may seize a pirate ship …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.'[165] This provision was designated as a reflection of the universal jurisdiction concept. However, whether only the seizing state can prosecute and sentence the suspect is debatable.[166]

While treaty interpretation may result in different outcome, because interpretation always entails different bases of value and varieties of facts and problems,[167] it should be noted that the prevailing view takes the point that pirates should be prosecuted by the capturing states.[168] The *Virginia Commentary* also makes a similar observation that the second sentence of Article 105 'implies that the courts of the State which carried out the seizure will apply national law, including,

[165] UNCLOS, art. 105.
[166] Geib and Petrig, *Piracy and Armed Robbery at Sea* 143-151.; E Somers, 'Prosecution of Alleged Pirates in the 1982 Law of the Sea Convention: Is Outsourcing the Solution?' (2014) *Revue Belge de Droit International* 109, 119-125.; with the accompanying texts and literature.
[167] R Kolb, *The Law of Treaties: An Introduction* (Edward Elgar 2016) 134.
[168] ibid.

where appropriate, the national rules governing the conflict of laws.'[169]

Consequently, the question being asked here is whether the SC Resolutions help to clarify or confirm specific positions in existing literature, or on the contrary that the SC is developing the law.

First of all, it should separate contemporary sate practice from piracy-related Resolutions. State practice shows that some states like the US, UK and EU have concluded some regional agreements with Kenya, Seychelles, etc.[170] The essence of these so called 'transfer agreements' is to transfer captured pirates to other states for prosecution. Though theoretically, the transfer agreements can be seen as a means to interpretation; but on the other hand, the distinction between treaty modification and interpretation through subsequent practice 'is often rather fine'.[171] In other words, these subsequent practices have changed or modified the meaning of UNCLOS Article 105.[172]

Second, SC Resolutions on Somali piracy only call upon states to criminalise piracy under their domestic law and to prosecute and imprison those suspected pirates the SC has never mentioned whether prosecution can be done by those capturing states. Recent Resolutions expressly 'decide to keep these matters under

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[169] MH Nordquist et al (eds.) *United Nations Convention on the Law of the Sea 1982: A Commentary, Volume III* (Martinus Nijhoff 1995) 216.

[170] E Kontorovich, 'Introductory Note to Exchange of Letters between the European Union and the Government of Kenya on the Conditions and Modalities for the Transfer of Persons Suspected of Having Committed Acts of Piracy' (2009) 48 *ILM* 747; 'Exchange of Letters between the European Union and the Government of Kenya on the Conditions and Modalities for the Transfer of Persons Suspected of Having Committed Acts of Piracy' (2009) 48 *ILM* 751.; 'Exchange of Letters between the European Union and the Republic of Seychelles on the Conditions and Modalities for the Transfer of Suspected Pirates and Armed Robbers from EUNAVFOR to the Republic of Seychelles and for their Treatment after such Transfer', Official Journal of the European Union ( 2 December 2009), L 315/37.; see more discussion in Chapter 6, Section VI.

[171] J Crawford, *Bronwlie's Principles of Public International Law* (OUP, 8th edition 2012) 386.

[172] I Buga, 'Between Stability and Change in the Law of the Sea Convention: Subsequent Practice, Treaty Modification and Regime Interaction' in DR Rothwell et al (eds.) *The Oxford Handbook of the Law of the Sea* (OUP 2015) 46.

review, including, as appropriate, the establishment of a specialized anti-piracy court in Somalia with substantial international participation'.[173]

Reading together these Resolutions and UNCLOS Article 105, one could argue that even if there is no legal connection between the capturing state and the prosecuting state, it would not violate international law. Although the SC has not directly endorsed recent practice in prosecuting pirates, proposal for a specialised court may be deemed as evidence to show that a new norm concerning Article 105 is arising.[174] It has been observed that recent state practice with regard to Somali pirates in effect changed the law of piracy.[175] This argument can be further advance by considering UNCLOS as a living instrument: that can evolve over time for adapting new circumstances and new social changes in the international community.[176]

## G. Private Ends

As discussed in Chapter 2, the term 'private ends' has been controversial. As argued earlier, the term should be separated into two categories: one is those who act

[173] Since SC Resolution 1950, para. 16, each Resolution contains such a suggestion; S/Res/2077, para. 19.; S/Res/2184, para. 18.; S/Res/2316, para. 19.; S/Res/2246, para. 19.; see also 'Report of the Secretary-General on the Modalities for the Establishment of Specialized Somali Anti-Piracy Courts' S/2010/360 (15 June 2011); 'Report of the Secretary-General on Specialized Anti-Piracy Courts in Somalia and Other States in the Region' S/2012/50 (20 January 2012)

[174] Somers, 'Prosecution of Alleged Pirates in the 1982 Law of the Sea Convention: Is Outsourcing the Solution?' 128.; But Treves holds a different view, that if consider that all the measures taken in Somali piracy resolutions shall not be seen as establishing customary international law, then it may not 'give rise to a new rule of customary law', T Treves, 'The Fight against Piracy and the Law of the Sea' (2013) 22 *IYIL* 23, 35.

[175] S Talmon, 'The Security Council as Dispenser of (or with) International Law' in J Crawford and S Newen (eds.) *Selected Proceedings of the European Society of International Law, Volume 3* (Hart 2012) 243, 249.; I Buga, 'Between Stability and Change in the Law of the Sea Convention: Subsequent Practice, Treaty Modification and Regime Interaction' 46-68.; I Burga, 'A Critical Look at the Law of Treaties: Giving Recognition to Informal Means of Treaty Adaptation' in C Ryngaert et al (eds.), *What's Wrong in International Law*: *Liber Amicorum A.H.A. Soons* (Brill Nijhoff 2015) 232.

[176] M Wood, 'Reflections on the United Nations Convention on the Law of the Sea: A Living Instrument' in J Barett and R Barnes (eds.) *Law of the Sea: UNCLOS as a Living Treaty* (BIICL 2016) lxxvii.

as belligerents, the nature of which contains clear political ends; the other is those who act as environmental protesters, their acts reflect intended for public ends. Generally speaking, applying private ends to pirates or Somali pirates would be a relatively easy issue.

First, the SC has been careful not to link terrorism with piracy in all piracy-related incidents and Resolutions. The reason may be simply because that there is 'no clear link' between Al-Shabaab and any pirates groups in Somalia.[177] Moreover, based on some researchers' field work, Al-Shabaab and some other Islamic terrorism factions fight with pirates groups from time to time.[178] As a result of this phenomenon, it can be seen that Somali pirates, pirates in the Gulf of Guinea or in Southeast Asia, are all acting for financial gains, not political ends.

Second, the SC has repeatedly called upon states to prevent and combat any criminal networks that assist, organize or facilitate illicit financial profits from such piratical acts.[179] The most direct reminder from the SC about the nature of piracy was delivered in paragraph 27 of Resolution 2077, in which the SC '*emphasizes* that the concerns about protection of the marine environment as well as resources should not be allowed to mask the true nature of piracy off the coast of Somalia which is a transnational criminal enterprise driven primarily by the opportunity for financial gain.'[180]

In short, the SC does not develop or clarify the meaning of the term 'for private ends'; however, it does confirm or to some extent clarify that the primary rule in

[177] FATF Report, *Organised Maritime Piracy and Related Kidnapping for Ransom* (FATF, July 2011) 9..
[178] Currun Singg, 'Al Shabaab fights the Pirates' (22 October 2012), New York Times, http://www.nytimes.com/2013/10/23/opinion/international/al-shabab-fights-the-pirates.html
[179] S/Res/2125, para. 9.; S/Res/2184, para. 17.; S/Res/2316, para. 18.; S/Res/2246, para. 18.
[180] S/Res/2077, para. 28 (original emphasis).

applying and interpreting this concept to piracy would be piracy for financial gains.

## H. International Cooperative Networks

The SC incrementally developed international cooperative mechanism for jointly combating piracy in the Horn of Africa.[181] It has been observed that 'international cooperation sometimes occurs in "big bangs", in which states jump suddenly from low to high levels of cooperation' on a specific issue.[182] In fact, on the issue of Somali piracy, not only states but also private sectors such as insurance companies and shipping companies are all involved in this cooperative network.[183]

Flowing from a rather strict sense of law-making to a less strict concept of law-making or norm-setting,[184] cooperation can mean substantive cooperation through treaty or customary law; can indicate a broader participation in law enforcement activities; or refer to cooperation through non-binding instruments.[185] It can be observed that the SC accelerates these cooperative networks. It is not surprising that many SC resolutions containing a sentence or paragraph which asks or urges all states and international organizations to cooperate with each other on any given incident.[186]

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[181] There are other developments in the Gulf of Guinea, see K-D Ali, *Maritime Security Cooperation in the Gulf of Guinea* (Brill 2015)

[182] KW Abott and D Snidal, 'Pathways to international cooperation' in E Benvenisti and M Hirsch (eds.) *The Impact of International Law on International Cooperation: Theoretical Perspectives* (CUP 2004) 50.

[183] D Konig, 'Maritime Security: Cooperative Means to Address New Challenges' (2014) *GYIL* 209.

[184] MW Hasanat, 'Diverse Soft-Law Cooperation Forms in the Arctic: Do They Complement or Contradict with Each Other?' (2012) 14 *International Community Law Review*) 273. ; D Winsor and KA Getz, 'Multilateral Cooperation to Combat Corruption: Normative Regimes despite Mixed Motives and Diverse Values' (2000) 33 *Cornell International law Journal* 731.; S Barret, 'International Cooperation and the International Commons' (2000)10 *Duke Environmental Law and Policy Forum* 131.

[185] C Chinkin, 'Normative Development in the International Legal System' in D Shelton (ed) *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (OUP 2000) 21.

[186] P Mallia, 'The Fight against Piracy and Armed Robbery against Ships off the Coast of Somali:

The resolutions on Somali piracy hence are not exceptions. In terms of the language used, they are not any kind of innovations. However, based on the development of different modalities of cooperation and coordination amongst states and not-state actors,[187] it can be seen that cooperation on the matters of Somali piracy is quite unique. Consequently the Resolutions on piracy still can be reckoned as innovations in international law-making. It has been a continued and dynamic interaction between the SC, international organizations, individual states and the private sectors, and non-governmental organizations.

For example, paragraph 4 of Resolution 1851 encourages all states and international organizations to 'establish an international cooperation mechanism to act as a common point of contact…on all aspects' of combating Somali pirates, and thus the former United States Secretary of State Condoleezza Rice convened the first meeting of the Contact Group on Piracy off the Coast of Somalia (CGPCS) in New York on 14 January 2009.[188] The latest 19th plenary session was held in October 2016 in Seychelles.[189]

The CGPCS has established five working groups. Group 1 is entrusted with naval coordination, and is chaired by the UK. Group 2 is chaired by Denmark and deals with international and national legal issues. Group 3 is chaired by the US and works closely with the maritime industry and the IMO. Group 4 is chaired by Egypt and focuses mainly on public diplomacy. Group 5 is chaired by Italy and is responsible for identifying the financial networks of pirates. The CGPCS identified

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International Cooperation Illustrated' in N. A. M. Gutierrez (ed.) *Serving the Rule of International Maritime Law* (Routldge, 2010) 216-232.

[187] J Kraska and B Wilson, 'The Pirates of the Gulf of Aden: The Coalition is the Strategy' 43 *Stanford Journal of International Law* (2009) 243.

[188] 'Report of the Secretary-General Pursuant to Security Council Resolution 1846 (2008)' S2009/146 (16 March 2009) para. 11.

[189] See the session final Communiqué , http://www.lessonsfrompiracy.net/files/2016/07/Communique-of-the-19th-Plenary-of-the-CGPCS.pdf

itself as an international forum, which has brought together more than 60 countries and international organizations to work together and meet regularly for the purpose of preventing piracy off the Somali coast.[190]

The CGPCS has two significant achievements. The first one, accomplished by the working Group 2, is the development of a legal framework for transferring sentenced pirates from prosecuting states to Somalia for incarceration. This has let the Seychelles and Somalia to reach an agreement involving the administrations of Puntland and Somaliland.[191]

The other contribution is the establishment of the International Trust Fund to Support Initiatives of States Countering Piracy off the Coast of Somalia.[192] The key purpose of setting up the Trust Fund is to support projects ranging from renovating overcrowded prisons to building up prosecution capacity in the region. By October 2011, the Trust Fund had received about 8.3 million US dollars and the Board of the Fund has recommended the disbursement of about 7 million US dollars on a total of 14 projects.[193] From December 2012 to October 2016, it received another 13.4 million US dollars, mainly for providing training and capacity building projects,[194] in areas such as facilitating prosecution[195] and transferring prisoners.[196]

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[190] R Haywood and R Spivak, *Maritime Piracy* (Routledge 2012) 44-45.; also see CGPCS website at http://www.lessonsfrompiracy.net/about/

[191] 'Report of the Secretary-General Pursuant to Security Council Resolution 1950 (2010)' S/2011/662 (25 October 2011), para. 22-23.

[192] Which is also supported by S/Res/1897, para. 13.

[193] Ibid, para. 28-29.; 'Report of the Secretary-General on Possible Options to Further the Aim of Prosecuting and Imprisoning Persons Responsible for Acts of Piracy and Armed Robbery at Sea off the Coast of Somalia, including, in particular, Options for Creating Special Domestic Chambers Possibly with International Components, A Regional Tribunal or An International Tribunal and Corresponding Imprisonment Arrangements, Taking into Account the Work of the Contact Group on Piracy off the Coast of Somalia, the Existing Practice in Establishing International and Mixed Tribunals, and the Time and Necessary to Achieve and Sustain Substantive Results' S/2010/394 (26 July 2010), Appendix II on the CGPCS, para. 12-13. (the Options Report)

[194] DA Zach et al, *Burden-Sharing Multi-Level Governance: A Study of the Contact Group on Piracy off the Coast of Somalia* (One Earth Future and Oceans Beyond Piracy 2013)

[195] D Guilfoyle, 'Prosecuting Pirates: The Contact Group on Piracy off the Coast of Somali,

Another innovative way of cooperation was developed in the sphere of exchanging information between states and International Organizations. For example, The International Criminal Police Organization (INTERPOL) has developed a 'maritime piracy global database', which intends to integrate a diverse collection of maritime piracy information and intelligence to support the ongoing investigations and prosecutions.[197]

The main purpose of setting up the database is to circulate the information more effectively. In fact, it is quite necessary to develop an information sharing system, since it can be observed from these Resolutions or subsequent Reports submitted to the SC, that there are not just many, but perhaps too many international organizations, NGOs and respective organs of any individual state involved in the counter-piracy networks. For example, participants include: the IMO, the United Nations Office on Drugs and Crime (UNODC)[198], North Atlantic Treaty Organization (NATO), EU Maritime Security Centre in the Horn of Africa (MSCHOA), European Police Office (Europol), United Nations Development Programme (UNDP), the Baltic and the International Maritime Council (BIMCO), International Maritime Bureau of the International Chamber of Commerce (ICC-IMB), United Kingdom Maritime Trade Operations (UKMTO), etc., and the list can be much longer than one might expect.[199]

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Governance and International Law' (2013) 4 *Global Policy* 73.

[196] 'Report of the Secretary-General on the Situation with Respect to Piracy and Armed Robbery at Sea off the Coast of Somalia', S2016/843 (7 October 2016), para. 27-43.

[197] 'Report of the Secretary-general Pursuant to Security Council 1950 (2010)' S/2011/662 (25 October 2011) para. 60-61. Relevant information and cooperative organizations with the INTERPOL, see its website on maritime piracy at http://www.interpol.int/Crime-areas/Maritime-piracy/Maritime-piracy

[198] E de Coning and G Stolsvik, 'Combating Organised Crime at Sea: What Role for the United Nations Office on Drugs and Crime?' (2013) *IJMCL* 189.

[199] 'Letter Dated 24 January 2011from the Secretary-General to the President of the Security Council' S/2011/30 (25 January 2011) Annex 2: List of Individuals Consulted.

While the cooperative network among these organizations and related mechanisms[200] cannot be thought as a traditional arena for custom or treaty-making or standard-setting, it does illustrate a more flexible and dynamic mechanism for formulating international norms, shaping mutual expectations, consolidating self-interests, and ultimately serving the interests of the international community.[201] After all, 'each international law action contributes separately to the development of a specific norm as well as more generally to the overall capacity of international law to function effectively through a strong operating system.'[202] That is to say, the SC intervened this issue by identifying the importance of cooperation obligation[203] of UNCLOS in each Resolution concerning piracy at sea.[204] It has also brought many participants into this issue area. In terms of broader participation, the records to date seem no need to verify further. The most interesting part of the process perhaps is whether any soft law or non-binding norms have been developed?

The answer is simply 'yes'. For example, CGPCS Working Group 2 started to discuss the privately contracted armed security personnel (PCASP) in 2009, though in that year, a conclusion could not be reached.[205] In the first few years of the SC's

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[200] Such as the Shared Awareness Deconfliction Process (SHADE), it is not an organization; it does not coordinate naval operations, but seeks to avoid redundancies within naval task force or independent operations. Though it has no formal decision-making power, it has been considered highly effective. D Guilfoyle, 'Somali Pirates as Agents of Change in International Law-Making and Organization' (2012) 1 *Cambridge Journal of International and Comparative Law* 81, 98-100.; D Guilfoyle, 'Maritime Security' in J Barret and R Barnes (eds.) *Law of the Sea: UNCLOS as a Living Treaty* (BIICL 2016) 329, 346. ; MD Evans and S Galani, 'Piracy and the Development of International Law' 343, 359.

[201] Guilfoyle, 'Somali Pirates as Agents of Change in International Law-Making and Organization', 100.

[202] PF Diel and Charlotte Ku, *The Dynamics of International Law* (CUP 2010) 172.

[203] UNCLOS art. 100 provides that all states 'shall co-operate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any other state.' See R Wolfrum, 'The Obligation to Cooperate in the Fight against Piracy-Legal Considerations' (2009) 116 *Hogaku Shinpo (Chuo Law Review)* 81.

[204] Though as Wolfrum noted, UNCLOS art. 100 'has not been referred' by the UNSC, 'it nevertheless is the legal basis of the ongoing efforts to suppress piracy' in ibid, 98.

[205] T Tardy (ed) *Fighting Piracy off the Coast of Somalia: Lessons Learned from the Contact Group*

consideration, it seems that it did not take private sector or other NGOs' contribution into their resolutions. An explanation might be that there was no time to think about what private sectors can do. Looking back, the burden of responding quickly to international incidents and crisis always is always on the SC, related organizations and great powers. It may be pretty natural to ignore NGOs or private sectors or shipping industry in the first place.

In any event, the SC first mentioned PCASP in the Preamble of Resolution 2020, recognising the work of the IMO and CGPCS on PCASP in a short sentence. However, in Resolution 2077, the SC formally expressed its appreciation with respect to:

> The efforts made by the IMO and the shipping industry to develop and update guidance, best management practices, and recommendations to assist ships to prevent and suppress piracy attacks off the coast of Somalia, including in the Gulf of Aden, and the Indian Ocean area, and *recognizing* the work of the IMO, and the Contact Group on Piracy off the Coast of Somalia (CGPCS); in this regard, notes the efforts of the International Organization for Standardization, which has developed industry standards of training and certification for Private Maritime Security Companies when providing privately contracted armed security personnel on board ships in high-risk areas.[206]

After Resolution 2077, it can be seen that the SC began to reiterate the importance of the IMO and private sectors in developing soft law guidance, recommendation and necessary standards concerning seafarers and PCASP for tackling ongoing piracy problems. Consequently, in the 2013 Report on Somali

(EU Institute for Security Studies 2014) 10.
[206] S/Res/2077, Preamble.

piracy, the SC stated:

> A number of measures have led to a decline in attacks: improved international and regional cooperation on counter-piracy efforts, including better intelligence- and information-sharing; targeted actions by the international naval presence to discourage and disrupt Somali pirates; increased application of IMO guidance and of the Best Management Practices for Protection against Somalia-based Piracy, developed by the shipping industry; and prosecution of suspected pirates and imprisonment of those convicted. The adoption of self-protection and situational awareness measures by commercial ships, including the deployment of privately contracted armed security personnel on board vessels and vessel protection detachments, are also believed to have contributed to the decrease in piracy attacks.[207]

The SC incrementally and gradually noted that NGOs such as the International Organization of Standardization and the shipping industry are all important in contributing to the norm setting process. Since Resolution 2184, the SC even further noted that 'the joint counter-piracy efforts of States, regions, organizations, the maritime industry, the private sector, think tanks and civil society have resulted in a sharp decline in pirate attacks'.[208] We will come back to this soft law-making mechanism concerning piracy at sea in Chapter 6.

Though the SC cannot impose obligations to civil society or private sectors, past experiences in preventing blood diamonds or other regional conflicts did encourage or invite the private sector and civil society to cooperate with official

[207] 'Report of the Secretary-General on the Situation with Respect to Piracy and Armed Robbery at Sea off the Coast of Somalia', S/2013/623 (21 October 2013), para. 4
[208] See Preamble of the Resolution 2184 and 2316.

governments and international organizations.[209]

In sum, while to encourage or urge further and deeper international cooperation is not an innovation only by SC resolutions, the SC has nonetheless undergone its own evolution under the context of the counter-piracy theme.

## VI. Conclusion

It should be recalled firstly that the time when the 2005 SUA Protocol negotiations was undergone during the years after the 911 attacks was just the same period that SC and its resolutions were being issued for responding international peace and security. That is to say, the SC has simultaneously supplemented the normative development relating to maritime violence. It can be clearly seen that those SC resolutions have been made and taken as international law-making instruments in responding terrorism in general and piracy in specific scenarios.

Before leaving this chapter, a last question needs to be answered. Is there any possibility that a conflict of norms scenario will arise between UNCLOS and SC resolutions? Yes, it is possible, but it largely depends on how we interpret 'other rules of international law' stipulated in Article 19(1). Based on the above analysis, before deciding Resolution 1540, the language 'interdiction' was deleted by the request of China. This indicates that members of the SC have been rather carefully discussing and formulating the terms and trying to avoid potential conflicts of interests. A further question would be if such conflict arises, can international law solve it?

The answer might be straightforward. Article 103 of the UN Charter provides

[209] A Peters, 'Article 26' in B Simma et al (eds.) *The Charter of the United Nations: A Commentary*, Volume II (OUP 3rd edition 2012) 787, 802.; BK Woodward, 'International Lawmaking and Civil Society' in C Brolmann and Y Radi (eds.) *Research Handbook on Theory and Practice of International Lawmaking* (Edward Elgar 2016) 286.

that the Charter obligations shall prevail, provided the SC decision is legally binding.[210] Thus the conflict is less likely to happen; and when it happens, the UN Charter is the solution.[211]

It has been claimed that 'the law rarely displays a tendency to respond too quickly to social change, and international law is no exception'.[212] It is quite true in the sense of treaty or customary international law-making or under the context of litigation and dispute settlement procedure.

Nonetheless, as this chapter shows, the SC can respond quickly to terrorism and piracy at sea. That is its unique merit and advantage, as long as the timing is right and the subject matter is about international peace and security.[213] While Kelsen considered almost 60 years ago that the function of the SC is to preserve peace, not to enforce law,[214] recent practice in the sphere of terrorism and piracy at sea has shown that the SC works far better on these issues than how it performed during the Cold War era. The SC has done more than preserving the peace.

Yet when international crises and major incidents arise, what and how can the international community ask for quick response? Having recourse to the SC would be an answer, and perhaps the only answer. As Alvarez vividly put:

> The UN Security Council is the *deus ex machina* of the international legal system. Whenever international lawyers confront a legal gap-a perennial problem in a system lacking a single legislative organ, a credible police authority, or

[210] JR Leiæ, Andreas Paulus, 'Article 103' in B Simma et al (eds.) *The Charter of the United Nations: A Commentary*, Volume II (3rd edition OUP 2012) 2110.
[211] RR Churchill, 'Conflict between United Nations Security Council Resolutions and the 1982 United Convention on the Law of the Sea, and Their Resolution' (2008) 84 *International Law Studies* 143, 148 and 154.
[212] V Lowe, 'The Function of Litigation in International Society' (2012) 61 *ICLQ* 209, 216.
[213] Boyle and Chinkin, *The Making of International Law* 115.
[214] H Kelson, *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems* (London Institute of World Affairs 1951) 249.

> a judiciary with compulsory jurisdiction or need to resolve a conflict between two competing legal principles in a system notoriously lacking a hierarchically superior settler of such conflicts, the Security Council is our potential "god in the wings" to resolve our difficulties.[215]

International law-making is a political activity. This characteristic is especially evident by the composition of the SC and its rather speedy responses to international crises and incidents. The SC may impose firm obligations, it may fill legal gaps, it may create international institutions and tribunals, it may enforce sanctions, it may change the meaning of UNCLOS piracy provisions, etc. Yet, even the SC and its resolutions can be used as lawmaking instruments for addressing so many issues by its legislative power, a benevolent state or a normal man would never wish for more international crises and incidents.

[215] JE Alvarez, 'Review Essay: Between Law and Power' (2005) 99 *AJIL* 926.

**Chapter 5**

# The US Hegemony in Soft and Bilateral Law-Making: The Proliferation Security Initiative and Ship-Boarding Agreements

'I don't drop players, I make changes.'

Bill Shankly (1973)[1]

'This is not a partnership of equals. Nothing close to it. If you are to be my vice president. You will do what I ask. And we will not have this conversation every time you feel uncomfortable with what I ask you to do, or how I choose to conduct myself. "That's our dynamic".'

President Francis J. 'Frank' Underwood, 'House of Cards', Season 3(2014), Episode 11.[2]

## I. Introduction

Most of the time, the idea of hegemony represents imperialism[3] and unilateralism.[4] For this reason, the word 'hegemony' has rarely been seen as a word with positive connotations.[5] However, whether we like it or not is one thing, what the reality it is would be another. The reality what we live in is the time of hegemony,

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[1] Bill Shankly (1914-1981), this is from 'A football manager's view' in *Guardian* (24 December 1973), 'Sports Quote of the Year' in N Sherrin (ed.), *The Oxford Dictionary of Humorous Quotations* (OUP 1995) 314.

[2] This conversation can be watched on youtube at https://www.youtube.com/watch?v=hYULcDHwCiM

[3] A Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP 2004); K Miles, *The Origins of International Investment Law: Empire, Environment and the Safeguard of Capital* (CUP 2013) 71-122.

[4] GJ Ikenberry, 'Getting Hegemony Right' (2001) 63 *National Interest* 17.; P-M Dupuy, 'The Place and Role of Unilateralism in Contemporary International Law (2000) 11*EJIL* 1.; P Sands, 'Unilateralism, Values, and International Law' (2000) 11*EJIL* 291.; M Garner, 'Channeling Unilateralism' (2015) 56 *HILJ* 297, 339-351. TJ Farer, 'Editorial Comment: Beyond the Charter Frame: Unilateralism or Condominium' (2002) 96 *AJIL* 359.; DM Malone and YF Khong (eds.), *Unilateralism and US Foreign Policy* (Lynne Rienner 2003); WG Grewe, translated by M Byers, *The Epoch of International Law* (Walter de Gruyter 2000)

[5] D Thurer, 'Hegemony' (April 2011) and J Kammerhofer, 'Superpowers and Great Powers' (August 2009) in *Max Planck Encyclopedia of Public International Law*, on-line version; G Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (CUP 2004); J van der Vyver et al, 'The Single Superpower and the Future of International Law' (2000) 94 *American Society of International Law Proceedings* 64 .

a time which has been considered that the United States is the only, lonely super power after the collapse of the Soviet Union.[6] This means that the US is the dominant state in the word arena.[7]

This chapter explores a set of hegemonic law-making issues by examining the origin and evolution of PSI, which is a set of enforcement measures for preventing and stopping at sea the transport of WMD, their delivery system, and related materials.

The PSI has been described as an example of 'multi-unilateralism'.[8] It was initiated by the US and followed by more than 100 participants to date.[9] Apparently, from commentators' eye, it naturally contains connotations of unilateralism.[10] However, is it really an example of unilateralism? What is the legal nature of the PSI? Does it add new norms for combating maritime terrorism? Can we say that it has fulfilled what the US wanted thus it can be seen as evidence of hegemonic law-making? Has the US unilaterally made international law, created new obligation and formed new international norms, without needing the assistance of other states?

To answer these questions, it will first introduce the PSI and analyse its legal

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[6] SP Huntington, 'The Lonely Superpower' (1999) 78 *Foreign Affairs* 35.; M Byers and G Nolte (eds.), *United States Hegemony and the Foundations of International Law* (CUP 2004)

[7] Z Brzezinski, *The Choice: Global Dominance or Global Leadership* (Basic Books 2005); JS Nye Jr., *Is the American Century Over?* (Global Future 2015); JS Nye Jr., *Soft Power: The Means to Success in World Politics* (Public Affairs 2005)

[8] DR Rothwell, 'The Impact of State Practice on the Jurisdictional Framework Contained in the LOS Convention: A Commentary' in AGO Elferink (ed) *Stability and Change in the Law of the Sea: the Role of the LOS Convention* (Martinus Nijhoff 2005) 145, 156-157.

[9] As of October 2015, there are 105 countries support the PSI, see PSI official website, http://www.psi-online.info/

[10] AC Winner, 'The Proliferation Security Initiative: The New Face of Interdiction' (2005) 28 *Washington Quarterly* 129.; especially based on the perspective of promoting the US national interest, IP Barry, 'The Right of Visit, Search and Seizure of Foreign Flagged Vessels on the High Seas Pursuant to Customary International Law: A Defense of the Proliferation Security Initiative' (2004) 33 *Hofstra Law Review* 299, 330.

nature, applicable scope and participants. Second, this chapter will discuss whether the PSI and the UNSC terrorism-related resolutions enhance each other. Third, it will consider whether during the PSI's initial formation, the concurrent 2005 SUA Protocol negotiations had an influence on the PSI. The final section will scrutinise 11 bilateral ship-boarding agreements the US signed between 2004 and 2010.[11] It will compare the features, advantages and usefulness of these bilateral treaties and their relationship with the PSI.

Ultimately, as this chapter will argue, the PSI and US-led bilateral ship-barding agreements both illustrate the impetus and influence in leading normative development relating to maritime violence as well as showing the limits of the US hegemonic law-making power.

## II. Response to Incidents

The PSI was announced by former US President George W. Bush in Krakow, Poland on 31 May 2003.[12] The backdrop to this announcement was the incident of the *So San* ship interdiction at sea.[13]

This interdiction occurred on 9 December 2002 in the Indian Ocean, some 600 miles off the coast of Yemen,[14] apparently on the high sea. The *So San* was a vessel with a clear North Korean flag on its funnel. The US navy had tracked the *So San*

[11] Agreements with Liberia, the Marshall Islands, Panama, Croatia, Cyprus, Belize, Malta, Mongolia, Bahamas, Saint Vincent and the Grenadines, Antigua and Barbuda.
[12] See US State Department's official information about the background, http://www.state.gov/t/isn/c10390.htm ; and US State Department of State, Fact Sheet, Bureau of Nonproliferation, 'Proliferation Security Initiative Frequently Asked Questions (FAQ)', http://2001-2009.state.gov/t/isn/rls/fs/46839.htm ; the time just about two months after launching the Iraq War. The Iraq war began on 20 March 2003.
[13] MJ Valencia, *The Proliferation Security Initiative: Making Waves in Asia*, Adelphi Papers 376 (IISS 2005) 35.
[14] R Chesney, The Proliferation Security Initiative and Interdiction of Weapons of Mass Destruction on the High Seas, (2003) 13 *National Strategy Forum Review* 5.

for about a month since it left a North Korean port. The US government then asked a nearby Spanish navy warship *Navarra* to check on the vessel. When checked by the Spanish warship, the *So San* master said the ship was registered in Cambodia, and their cargo was for Yemen.[15] However, no ship's name as *So San* can be indentified in the international register of ships.

Later on, the Cambodia government confirmed that there was a ship might be meeting the description of the *So San* ship, but it was registered under the name *Pan Hope*. Therefore, the Spanish navy suspected that it was a stateless vessel,[16] and decided to aboard the vessel. At that moment, the *So San* was trying to run away, so the Spanish warship fired some warning shots and boarded the ship.[17]

When the Spanish navy was checking the vessel, relevant papers showed that it was registered in Cambodia. They also found 15 Scud missiles and tanks containing a rocket-fuel additive and about 100 barrels of unidentified chemicals. The US navy then took control from the Spanish navy. Nevertheless, because Yemen government protested that it had legitimate reason for purchasing the Scud missiles from North Korea for Yemen's national defence. The final decision was made by the reason of the need to cooperate with Yemen in the war on terror; therefore, the ship was released.[18]

A notable trigger for developing the PSI was perhaps based on the statement

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[15] DH Joyner, *International Law and the Proliferation of Weapons of Mass Destruction* (OUP 2009) 300.

[16] If it was a stateless ship for drugs trafficking, some states like the US assert a general jurisdiction over those stateless ships. See Churchill and Lowe, *The Law of the Sea* 214.; see also US v Marino-Garcia 679 F.2d 1373(1982). Cert denied 459 US 1114 (1983); E. M. Kornblau, 'United States v. Marino-Garica: Criminal Jurisdiction over Stateless Vessels on the High Seas' (1983) 9 *Brooklyn Journal of International Law* 141.

[17] Valencia, *The Proliferation Security Initiative: Making Waves in Asia* 35-36.

[18] Joyner, *International Law and the Proliferation of Weapons of Mass Destruction* 300-301.

made by the US White House Spokesman Ari Fleisher when he was asked about the incident on 11 December 2002:

> 'There is no provision under international law prohibiting Yemen from accepting delivery of missiles from North Korea….while there is authority to stop and search, in this instance there is no clear authority to seize the shipment of the Scud missiles from North Korea to Yemen and therefore the merchant vessel is being released.'[19]

Another notable incident was the *BBC China*.[20] It was revealed in December 2003, but the incident occurred on 4 October 2003. It was a German-flagged ship carrying centrifuge parts, and those parts might be used for nuclear weapons. The ship departed from Malaysia and was on the way to Libya. The US asked the German government to stop and search the vessel in the Mediterranean Sea, but whether it was on the high seas or other maritime zones was not revealed.

In fact, the issue was easier than the *So San* scenario, because the nationality of the ship was German. The US apparently pushed some pressure to the German government and had the ship owner agreed to bring it to Taranto, Italy, where it was detained. This incident was claimed by the US as a successful interdiction under the guidance of the PSI;[21] however, it was also claimed by commentators that such a claim was not correct.[22]

It is assumed that there are and must have had many other cases, but most of

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[19] Press Briefing by Ari Fleshcer (11 December 2002), at [20] The ship is neither related to BBC nor to China, see Barry Schweid, "U.S. Nabbed Libya Nuke Parts," *CBS News* (1 January 2004), at www.cbenews.com/stories/2004/01/14/world/main593139.shtml

[20] The ship is neither related to BBC nor to China, see Barry Schweid, "U.S. Nabbed Libya Nuke Parts," *CBS News* (1 January 2004), at www.cbenews.com/stories/2004/01/14/world/main593139.shtml

[21] YH Song, 'The U.S.-Led Proliferation Security Initiative and UNCLOS: Legality, Implementation, and an Assessment' (2007) 38 *ODIL* 101, 121.

[22] B Boese 'False Claims of PSI Success,' *The Washington Times* (17 August, 2005), http://www.washingtontimes.com/news/2005/aug/16/20050816-102613-7087r/

these interdiction details are being kept secret.[23] Analysts speculated that the purpose of keeping secret is to 'protect intelligence sources and methods, or perhaps to hide any violations of international law or negative publicity'.[24]

## III. The Proliferation Security Initiative

The PSI appeared to be a new channel for interdiction at sea outside of international treaties and multilateral export control regimes. It articulated the importance of countering proliferation once it has occurred and managing the consequences of WMD. In particular, interdiction of WMD-related materials gained more prominence.

John Bolton, who has been called as 'the architect of PSI',[25] recalled that the US was more interested in states who had real operational capabilities, including intelligence and military capabilities; thus the question about whether the EU should be invited was dismissed.[26] The first meeting of the PSI was in Madrid, Spain on 12 June 2003, with 11 states participating in the so-called 'Core Group': Australia, France, Germany, Italy, Japan, Netherlands, Poland, Portugal, Spain, the UK, and the US. The second meeting was held in July in Brisbane, Australia. A key subject of the discussion was 'outreach' and how to turn the PSI into a real operation.[27]

Though some of the participants like Japan and Korea had some doubts about whether the USA was moving too fast and too aggressively,[28] the third meeting was

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[23] N Klein, *Maritime Security and the Law of the Sea* (OUP 2011) 206.
[24] MJ Valencia, *The Proliferation Security Initiative: Making Waves in Asia* 38.
[25] M Byers, 'Policing the High Seas: the Proliferation Security Initiative' (2004) 98 *AJIL* 526, 541
[26] JR Bolton, *Surrender Is Not An Option: Defending America at the United Nations and Abroad* (Simon and Schuster 2007) 123.; But Asian countries were considered, MJ Valencia, 'The Proliferation Security Initiative and Asia' in DD Caron and HN Scheiber (eds.) *The Oceans in the Nuclear Age: Legacies and Risks* (Brill Nijhoff 2010) 265.
[27] Bolton, ibid, 124.
[28] Valencia, *The Proliferation Security Initiative* 28.

held in Paris in early September 2003. The result was significant because participants reached an agreement about the Statement of Interdiction Principles. At this stage, as a British diplomat remarked, 'we wanted an activity, not an organization'.[29] Though the US kept China and Russia fully briefed on PSI progress, the US intended 'not to leave PSI's fate in the hands of others'.[30] The sharp contrast was the Six-Party Talks on North Korea and EU's participation in the negotiation of Iran's nuclear weapons. In other words, the PSI participants 'wanted to get something going that was not wishy-washy or watered down, and then bring others on board.'[31]

### A. Objective and Nature

The objective of the PSI is to prevent WMD trafficking at sea. It is also a global effort that aims to stop shipments of WMD, their delivery system and related materials. It tries to establish a more dynamic, creative and active approach to preventing proliferation to or from states and non-state actors of such concern. This approach includes policing and interdiction activities at sea committed by supporters of the PSI.[32]

The PSI is a set of enforcement measures, not a formal treaty-based activity or an international organization with constitutive instrument. It is best understood as a kind of partnerships that aims to establish the basis of cooperation on specific scenarios when the situation arises.[33] It does not create binding legal obligation for

[29] Bolton, *Surrender Is Not An Option* 126.
[30] Ibid.
[31] Ibid.
[32] The most clear explanation about its objective can be found on the PSI official website, http://www.psi-online.info/
[33] DH Joyner, 'The Proliferation Security Initiative: Nonproliferation, Counterproliferation, and International Law' 30 *YJIL* (2005) 507, 541-545.; WH von Heinegg, 'The Proliferation Security

participants, but does represent a political commitment to form best practices to stop shipments of WMD. PSI participants attempts to use existing national and international legal authorities for relevant interdictions at sea.

## B. Participants and Scope

The participants of the PSI have evolved significantly since 2003. In 2005, there were only 30 states; as of October 2015, it had 105 states in this interdiction framework.[34] Among the Permanent five Members of the UN, however, China does not endorse the PSI.[35] Furthermore, some countries with the capacity and incentive to utilise WMD related materials have not endorsed the PSI, such as Indonesia, India, Pakistan, South Africa, Egypt, and Brazil.[36]

In August 2005, the Core Group was dismantled because the large number of states that wanted to join the PSI discussions and operations and meant that retaining the Core Group was not an appropriate option.[37] An Operational Experts Group (OEG) had already been established in early 2004 to operationalise the PSI mission and Interdiction Principles. The OEG was composed of 21 members: the original Core Group states plus Argentina, Canada, Denmark, Greece, New Zealand, Norway, Russia, Singapore, South Korea, and Turkey.[38] OEG states play some leading roles in the PSI and those OEG meetings serve as a forum for discussing and developing

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Initiative: Security vs. Freedom of Navigation' (2005) 35 *IYBHR* 181, 195-196.

[34] That is the latest number of participants, http://www.psi-online.info/

[35] M Yu, 'China's Position on the Proliferation Security Initiative and Its Reappraisal' (2010) 3 *Journal of East Asia and International Law* 49.

[36] See for example, TV Thomas, 'The Proliferation Security Initiative: Towards Regulation of Navigational Freedoms in UNCLOS? An Indian Perspective' (2009) 8 *Chinese Journal of International Law* 657.

[37] SJ Koch, 'Interdiction and Law Enforcement to Counter Nuclear Proliferation' in NE Busch and JF Pilat (eds.) *Routledge Handbook of Nuclear Proliferation and Policy* (Routledge 2015) 265, 267.

[38] The list can be seen from the PSI website, http://www.psi-online.info/contentblob/3630338/Daten/2602979/operationalexpertsgroup.pdf

concepts to further the effectiveness of the PSI. For example, the OEG seeks to develop and enhance PSI states' capabilities by considering a range of issues, from legal matters to rapid-decision making in case of an interdiction.[39]

There are basically three types of activities under the PSI cooperative framework. The first is formal meetings, including intelligence and experience sharing. The second is training exercises, the most important part of which is to learn and share shipping interdiction skills.[40] The third is the actual seizure operations.[41] Before 2009, the OEG met annually for about three to five times. There were also some regional meetings and workshops for sharing experiences and intelligence. In 2009, the OEG decided to meet more often at the regional level.[42]

In 2011, the OEG states acknowledged the joint efforts of PSI participants, and took note of the need to shorten decision-making time and to help some participants develop capabilities to conduct real interdiction operations. The OEG thus formulated the Critical Capabilities and Practices (CCP), but there is no detailed information or public available news about the contents of the CCP, only a short statement on the US State Department website.[43]

At the tenth anniversary of the PSI, participants met in Warsaw, Poland in May 2013 and expressed their willingness to take more concrete steps and actions in

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[39] See PSI Operational Experts Group at its website, http://www.psi-online.info/Vertretung/psi/en/04-Operational-Experts-Group/0-operational-experts-group.html ; the latest meeting was held on April 2016 in London, see http://www.psi-online.info/contentblob/4800426/Daten/6490731/2016_London_PSI_Operational_Experts_Group_Chairs_Summary.pdf

[40] YH Song, 'The US-Led Proliferation Security Initiative and UNCLOS: Legality, Implementation and an Assessment' (2007) 38 *ODIL* 101, 106-109.

[41] Valencia, *The Proliferation Security Initiative* 30.

[42] See PSI Calendar of Events, http://www.state.gov/t/isn/c27700.htm

[43] 'PSI-Endorsing States Undertake Effort to Build Critical Capabilities and Practices (CCP) for Interdicting WMD', http://www.state.gov/t/isn/20112012/166732.htm

preventing the spread of WMD and its related materials. The Meeting produced four Statements on: strengthening the commitment of PSI participants; ensuring a robust PSI; enhancing the CCP; and strengthening national authorities for action and expanding strategic communications.

In January 2016 at the Mid-Level Political Meeting of the PSI participants, Thomas Countryman, the Assistant Secretary of State served as Chairmen and summarised that the discussions at the Meeting highlighted the importance of PSI exercise rotations and reiterated the call to endorsing states to continue examining ways to strengthen national laws, including on export control. He also urged states to consolidate international legal frameworks, such as 'through becoming Parties to the 2005 Protocol to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation and the 2010 Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation'.[44]

In sum, two points should be made: First, since the very beginning, though the PSI was unilaterally announced by the US President Bush, it did not fit into the category of unilateralism because all discussions and the formulation of the Interdiction Principles have been conducted in a multilateral way. Therefore, hegemonic law-making may not be necessarily reflecting the approach of unilateralism, it can be multilateralism in nature, or can contain the component of multilateralism. Particularly if we define multilateralism as 'the cooperation of three or more states in a given area of international relations', and define unilateralism as 'a tendency to opt out of multilateral framework (whether existing or proposed) or to act alone in addressing a particular global or regional challenge rather than choosing

[44] 'Proliferation Security Initiative 2016 Mid-Level Political Meeting: Chairman's Summary', http://www.state.gov/t/isn/rls/rm/2016/251822.htm

to participate in collective action'.[45] Second, though the PSI has no formal organizational structure, and was not designed as a treaty-based institution, its Political Meetings with all participants may be seen as 'the assembly of States parties'; and the OEG states may be thought as 'the executive body and the focal point to a secretariat'.[46]

### C. Statement of Interdiction Principles

The essence the PSI is reflected in its Statement of Interdiction Principles,[47] which calls to action all states concerned with WMD proliferation's threat to international peace and security. First, states are urged to undertake effective measures to interdict the transfer or transport of WMD, their delivery system and related materials to and from states and non-state actors.

Second, states should procedures for a rapid exchange of intelligence and information concerning suspected WMD proliferation activities. The Statement also recommends to dedicating appropriate resources to interdiction operation and capabilities to maximising coordination with all participants.

Third, states are encouraged to review and strengthen their relevant national authorities where necessary to accomplish these objectives, and work to strengthen relevant international law in supporting these commitment.

Fourth, the Statement aims to take specific actions in interdiction efforts

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[45] DM Malone and YF Khong, 'Unilateralism and U.S. Foreign Policy: International Perspectives' in DM Malone and YF Khong (eds.) *Unilateralism and U.S. Foreign Policy: International Perspectives* (Lynne Rienner 2003) 2-3.

[46] G Venturini, 'The Proliferation Security Initiative: A Tentative Assessment' in in JL Balck-Branch and D Fleck (eds.) *Nuclear Non-Proliferation in International Law*, Volume II (TMC Asser 2016) 213, 218.

[47] See the US Department of State, Fact Sheet on the PSI, https://www.state.gov/t/isn/c27726.htm

concerning cargoes of WMD, their delivery system and related materials, to the extent their national legal authorities permit and consistent with obligations under relevant international legal frameworks.

The Preamble of the Statement of Interdiction Principles illustrates that participants are ‘committed to establish a more coordinated and effective basis through which to impede and stop shipments of WMD, delivery systems, and related materials flowing to and from states and non-state actors’. Participants should also consider their own national legal authorities and in accordance with relevant international law and frameworks, including the UN Security Council. There are only four paragraphs (principles) in the Statement. The first three principles reiterate the objectives and scope of the PSI:

> 1. Undertake effective measures, either alone or in concert with other states, for interdicting the transfer or transport of WMD, their delivery systems, and related materials to and from states and non-state actors of proliferation concern. "States or non-state actors of proliferation concern" generally refers to those countries or entities that the PSI participants involved establish should be subject to interdiction activities because they are engaged in proliferation through: (1) efforts to develop or acquire chemical, biological, or nuclear weapons and associated delivery systems; or (2) transfers (either selling, receiving, or facilitating) of WMD, their delivery systems, or related materials.
>
> 2. Adopt streamlined procedures for rapid exchange of relevant information concerning suspected proliferation activity, protecting the confidential character of classified information provided by other states as part of this initiative, dedicate appropriate resources and efforts to interdiction operations and capabilities, and

> maximize coordination among participants in interdiction efforts.
>
> 3. Review and work to strengthen their relevant national legal authorities where necessary to accomplish these objectives, and work to strengthen when necessary relevant international law and frameworks in appropriate ways to support these commitments.

Some general features of the first three paragraphs can be identified: First of all, at the time of adopting the Statement, UNSC Resolution 1373 was already issued,[48] but Resolution 1540[49] had not been discussed. It can be speculated that at that time, the US and the Core Group states were intending to go through the UNSC for requesting a resolution in addressing the problem of WMD and related materials. Second, the targets of the PSI expand to non-state actors, which is identical with the UNSC Resolution 1540. Third, the three principles are about intelligence sharing, though it has been observed that 'there are no present plans to turn the PSI into a new intelligence sharing forum'.[50]

The most important part is Principle 4, as can be seen below:

> 4. Take specific actions in support of interdiction efforts regarding cargoes of WMD, their delivery systems, or related materials, to the extent their national legal authorities permit and consistent with their obligations under international law and frameworks, to include:
>
> a. Not to transport or assist in the transport of any such cargoes to or from states or non-state actors of proliferation concern, and not to allow any persons subject to their jurisdiction to do so.

[48] UN Doc S/RES/1373 (28 September 2001)
[49] UN Doc S/RES/1540 (28 April 2004)
[50] CH Allen, *Maritime Counterproliferation Operations and the Rule of Law* (Prager Security International 2007) 157.

b. At their own initiative, or at the request and good cause shown by another state, to take action to board and search any vessel flying their flag in their internal waters or territorial seas, or areas beyond the territorial seas of any other state, that is reasonably suspected of transporting such cargoes to or from states or non-state actors of proliferation concern, and to seize such cargoes that are identified.

c. To seriously consider providing consent under the appropriate circumstances to the boarding and searching of its own flag vessels by other states, and to the seizure of such WMD-related cargoes in such vessels that may be identified by such states.

d. To take appropriate actions to (1) stop and/or search in their internal waters, territorial seas, or contiguous zones (when declared) vessels that are reasonably suspected of carrying such cargoes to or from states or non-state actors of proliferation concern and to seize such cargoes that are identified; and (2) to enforce conditions on vessels entering or leaving their ports, internal waters or territorial seas that are reasonably suspected of carrying such cargoes, such as requiring that such vessels be subject to boarding, search, and seizure of such cargoes prior to entry.

e. At their own initiative or upon the request and good cause shown by another state, to (1) require aircraft that are reasonably suspected of carrying such cargoes to or from states or non-state actors of proliferation concern and that are transiting their airspace to land for inspection and seize any such cargoes that are identified; and/or (2) deny aircraft reasonably suspected of carrying such cargoes transit rights through their airspace in advance of such flights.

> f. If their ports, airfields, or other facilities are used as transshipment points for shipment of such cargoes to or from states or non-state actors of proliferation concern, to inspect vessels, aircraft, or other modes of transport reasonably suspected of carrying such cargoes, and to seize such cargoes that are identified.

The first issue that Principle 4 would encounter is that there is no definition with regard to 'WMD, its delivery system and related materials'. This definitional vagueness perhaps can be solved by the UNSC Resolution 1540, though the definition included in the Resolution still is not so clear.

Principle 4(a) emphasises the significant role of non-state actors and the flag state in taking actions against proliferation. In referring to 'assist in the transport' and 'any persons subject to their jurisdiction', 'assist' indicates that the real actions in this category can be quite broad. States would need sufficient intelligence to verify whether the potential suspects are really assisting the transport or not. Also, 'any persons' could include not only the master and crew of the ship, but also the ship owner or the ship's shareholders.

Principle 4(b) reaffirms the responsibility of the flag state in enforcing its national law or relevant international law within or beyond their territorial sea. It provides conditions that if a state has no capability to interdict a ship suspected in transporting WMD and related materials, it may request another state with 'good cause' to help interdict the ship 'reasonably suspected' of transporting those WMD materials . However, there is no any standard in defining or deciding the range of good cause or reasonable suspicion. The US State Department only provides that 'in

responding to such a request, each state will, of necessity, decide for itself whether the information provided by the requesting state warrants acceding to the request.'[51]

It seems that it fully depends on each state's own discretion. Likewise, it uses similar but not totally identical language of UNCLOS. For example, UNCLOS Article 108 provides 'reasonable grounds for believing',[52] Article 110 provides 'reasonable grounds for suspecting', Article 110(3) further provides 'if the suspicions prove to be unfounded', then the requesting state shall bear responsibility.[53] But there are no safeguards referenced in the Interdiction Principles.

Moreover, to confirm that the condition is satisfied of fitting the reasonable suspicion, a state would need all relevant intelligence. Yet, as Allen noted, 'If forced to choose between disclosing intelligence that might reveal its sources and methods—particularly if the source is another state's intelligence agencies or assets—or withholding the information, knowing that it will therefore be unable to discharge its burden of proof, most states will choose the latter course of action.'[54]

Principle 4(c) confirms the exclusive right of the flag state over ships flying their flag. However, because the PSI does not contain strict legal obligation, it can only be seen as 'an instrument falling in the realm of soft law'.[55] Thus the PSI only suggests 'to seriously consider' providing consent. Further, to reinforce this

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[51] 'Proliferation Security Initiative Frequently Asked Questions', https://2001-2009.state.gov/t/isn/rls/fs/105213.htm

[52] UNCLOS, art. 108.

[53] UNCLOS, art. 110.

[54] Allen, *Maritime Counterproliferation Operations and the Rule of Law* 159-160.

[55] F Spadi, 'Bolstering the Proliferation Security Initiative at Sea: A Comparative Analysis of Ship-boarding as Bilateral and Multilateral Implementing Mechanism' (2006) 75 *Nordic Journal of International Law* 249, 251.; A Etzioni, 'Tomorrow's Institution Today: The Promise of the Proliferation Security Initiative' (2009) 88 *Foreign Affairs* 7.

consideration, the US subsequently signed the 11 ship-boarding agreements, which will be discussed in a later section.

Principle 4(d) concerns the boarding zones at sea, from the internal water to the high seas. As discussed in Chapter 2, a mere transportation of WMD, delivery system and its related materials passing a coastal state's territorial sea may not be considered to be violating UNCLOS Article 19(2) with respect to innocent passage. Particularly the shipment of dual-use materials is naturally difficult to identify.[56] If in the contiguous zone, the coastal state only has limited power in customs, fiscal, immigration and sanitation issues; accordingly, it would be difficult to use the Statement of Principles to trump the UNCLOS. Another prerequisite for PSI participants is that a participating state needs to adopt a domestic law for criminalizing the transportation of WMD and related materials.

Principle 4(e) extends the interdiction actions from the sea to the air and land. As the US State Department illustrated, 'PSI actions may be taken to interdict shipments transported by land and air. PSI exercises have been held to practice interdictions in all three environments. PSI experts have exchanged information on their respective legal authorities regarding potential air interceptions, and are continuing to discuss how these authorities might be applied.'[57] Perhaps this is the least problematic principle, because there is no international law restricting interdiction of WMD and related materials in a state's land territory. Also, if there is a domestic legislation concerning the crime of transferring WMD and its related materials, then to require a given aircraft to land or to deny entry into a state's

[56] JA Roach, 'PSI and SUA: An Update' in MH Nordquist et al (eds.) *Legal Challenges in Maritime Security* (Martinus Nijhoff 2008) 281, 289-290.
[57] 'Proliferation Security Initiative Frequently Asked Questions', https://2001-2009.state.gov/t/isn/rls/fs/105213.htm

territory would be consistent with customary international law in the aviation law area.[58]

In short, the Statement shows that the nature of the commitment and the language used reveal that it is a political commitment: a gentlemen's agreement. The key feature of the Principles is that any action towards concrete implementation of the PSI is founded on the consent of the states concerned. That means the basis of interdiction activities is based on the willingness of participants either to take or allow those interdictions.[59] States wish to inspect and board a foreign vessel on the high seas suspected of transporting WMD will need prior consent of the flag state. Also, vessels are suspected of transporting WMD to states or non-state actors through internal water, territorial sea, or contiguous zone can be interdicted only by the coastal state, or by prior consent of the coastal state.

### D. Effectiveness

Due to insufficient information, it is very difficult to analyse whether the PSI and the Interdiction Principles are really useful and effective in real operations. Almost all commentators have mentioned this difficulty. For example, Dunne said that 'the lack of available information on PSI interdictions, and a reluctance to attribute interdictions to the PSI, makes meaningful analysis of real cases difficult.'[60] Guilfoyle said that 'the effectiveness of the PSI…is very hard to judge, principally

[58] A Dunne, 'The Proliferation Security Initiative: Legal Considerations and Operational Realities' (2013), SIPRI Policy Paper, No 36 (May 2013) 22-23.; N Ronzitti, 'The Proliferation Security Initiative and International Law' In: Fischer-Lescano et al (eds), *Frieden in Freiheit—Peace in Liberty—Paix en Liberte. Festschrift fur Michael Bothe zum 70. Geburtstag. Nomos Verlagsgesellschaft* (Baden 2008) 269, 228.
[59] Valencia, 'The Proliferation Security Initiative' 25.
[60] Dunne, 'The Proliferation Security Initiative' 30.

because these are not the type of activity that tends to be publicly reported.'[61] Klein noted that 'information as to what interdictions have actually taken place under the rubric of the PSI is scarce'.[62] This means that even we wanted to check whether sufficient state practices exist would be quite impossible.

Moreover, it has been questioned whether PSI has really contributed to some interdictions, since the US have had some cooperative mechanisms with specific states to interdict WMD shipments even before the establishment of the PSI.[63]

Though there is no sufficient information regarding real interdictions, a calendar of PSI training exercises is posted on the official websites of the US State Department[64] and the PSI official website.[65] We can presume that through the joint training exercises, participants have gained some knowledge and experiences in interdicting WMD, its delivery system and related materials.

In the initial years of the PSI, commentators questioned whether the PSI was consistent with UNCLOS or whether it was legal under international of the sea.[66] Over the past decade, those concerns 'seem to have been largely superseded by the smooth management of its activities'.[67] Further, the relevant UNSC resolutions help to dissolve some doubts regarding the PSI. In short, though the nature of the PSI Interdiction Principles are 'vague in nature', it does not change or infringe the

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[61] Guilfoyle, 'Maritime Interdiction: What Challenge Lie Ahead?' (2014) *Reue Belge De Droit International* 94, 105.
[62] Klein, *Maritime Security and the Law of the Sea* 206.
[63] MB Nikitin, 'Proliferation Security Initiative (PSI) (2012), CRS Report for Congress (RL34327) 2-3.
[64] 'Calendar of Events', http://www.state.gov/t/isn/c27700.htm
[65] 'Activities', http://www.psi-online.info/Vertretung/psi/en/02-activities/0-activities.html
[66] S Logan, 'The Proliferation Security Initiative: Navigating the Legal Challenges' 14 *Journal of Transactional Law and Policy* (2005) 253.; J Su, 'The Proliferation Security Initiative and Interdiction at Sea: A Chinese Perspective 43 *ODIL* (2012) 96.
[67] Venturini, 'The Proliferation Security Initiative: A Tentative Assessment' 231

fundamental principles of freedom of navigation or the exclusive rights of flag state jurisdiction.[68]

The PSI also promotes multilateral cooperative mechanisms.[69] At the very least, the PSI 'has helped to galvanize a widespread consensus on the pre-eminence of non-proliferation goals and the need for stronger forms of collective actions to address the problem.'[70]

## IV. Relationship with the UN Security Council Resolutions

The US maintains the position that the PSI Statement of Interdiction Principles is consistent with the UNSC resolution 1540, adopted under Chapter VII of the UN Charter on 28 April 2004. Pursuant to Resolution 1540, it 'calls upon all States, in accordance with their national legal authorities and legislation and consistent with international law, to take cooperative action to prevent illicit trafficking in nuclear, chemical or biological weapons, their means, and related materials.'[71] While this Resolution does not explicitly mention the PSI, nor does it authorise interdiction operations by all states, the quoted paragraph can be considered as a sort of an implicit endorsement of the PSI.[72]

Resolution 1540 imposes a general obligation to prevent transhipment of WMD and related materials. The Resolution also obliges all states to establish domestic

[68] Gavouneli stated that 'whatever the eventual use of the PSI framework, the starting point remains the jurisdiction of the flag state.' G Gavouneli, *Functional Jurisdiction in the Law of the Sea* (Martinus Nijhoff 2007) 177.
[69] R Beckman, 'Jurisdiction over Pirates and Maritime Terrorists' in C Schofield et al (eds.) *The Limits of Maritime Jurisdiction* (Martinus Nijhoff 2014) 349, 371.
[70] MA Becker, 'The Shifting Public Order of the Oceans: Freedom of Navigation and the Interdiction of Ships at Sea' (2005) 46 *HILJ* 131, 167.
[71] S/Res/1540, para. 10.
[72] But it should be interpreted with caution, particularly in the situation of the use of force, see E Papastavridis' Maritime Terrorism in International Law' in B Saul (ed.) *Research Handbook on International Law and Terrorism* (Edward Elgar 2014) 74, 84.

controls to prevent the proliferation of weapons of mass destruction and their means of delivery.[73] It further decides that all states shall:

> Establish, develop, review and maintain appropriate effective national export and trans-shipment controls over such items, including appropriate laws and regulations to control export, transit, trans-shipment and re-export and controls on providing funds and services related to such export and trans-shipment such as financing, and transporting that would contribute to proliferation.[74]

Therefore, Resolution 1540 was originally invoked by the US to legitimise the PSI, and is certainly more important than the 1992 UNSC presidential statement which affirmed that proliferation of all WMD constituted a threat to international peace and security.[75]

Since 2006, the UNSC has adopted a series of resolutions to tackle North Korea and Iran's nuclear proliferation. The SC adopted Resolution 1718 in response to North Korea's nuclear test.[76] This Resolution decides:

> In order to ensure compliance with the requirements of this paragraph, and thereby preventing illicit trafficking in nuclear, chemical or biological weapons, their means of delivery and related materials, all Member States are called upon to take, in accordance with their national authorities and legislation, and consistent with international law, cooperative action including through inspection of cargo to and from the DPRK, as necessary.[77]

As we can see, in this paragraph, it only 'call upon' member states to take

[73] S/Res/1540, para. 3
[74] S/Res/1540, para. 3(d).
[75] See the PSI website, http://www.psi-online.info/Vertretung/psi/en/07-statement/Interdiction-Principes.html
[76] UN Doc S/Res/1718 (14 October 2006)
[77] Ibid, para. 8(f).

actions, implying a rather implicit and voluntary basis for interdicting North Korea's WMD and related materials.

Following North Korea's subsequent nuclear bomb tests in 2009, 2013 and 2016, the SC adopted three UN Charter Chapter VII Resolutions 1874, 2094 and 2321 in response.[78] Resolution 1874 only uses two voluntary paragraphs to 'call upon' states to interdict WMD and related materials, requiring the 'reasonable grounds to believe' that the suspect ship holds these substances and requiring flag state consent if it is on the high seas.[79]

Resolution 2094 uses a rather strong attitude in dealing with the same nuclear weapons test problem, deciding that 'if any vessel has refused to allow an inspection after such an inspection has been authorized by the vessel's flag State,'[80] or if any North Korean vessel has refused to be inspected, then all states shall not allow the vessels enter into their ports. It further calls upon states to 'deny permission to any aircraft to take off from, land in or overfly their territory, if they have information that provides reasonable grounds to believe that the aircraft contains items the supply, sale, transfer or export'[81] with regard to WMD, its delivery system and related materials. This decision is just like what PSI Interdiction Principle 4(e) stipulates. It is also the first time that a UNSC resolution requests for air interdiction in combating WMD.[82]

Moreover, Resolution 2321 decides that if there are 'reasonable grounds to

[78] UN Doc S/Res/1874 (12 June 2009); UN Doc S/Res/2094 (7 March 2013), UN Doc S/Res/2321 ( 30 November 2016)
[79] S/Res/1874, para. 12-13.
[80] S/Res/2094, para. 17.
[81] Ibid.
[82] See more detailed analysis on other aspects of the Resolution 2094, KT Jordan, 'United Nations Security Council Resolution 2094 on Nuclear Nonproliferation in North Korea: Introductory Note' (2013) 52 *ILM* 1196.

believe if the vessels are or have been related to nuclear-or ballistic missile-related programmes or activities', member states shall require the flag state to take any one or all the four measures: (1) de-flag the vessel; (2) direct the vessel to a port identified by the SC; (3) prohibit a designated vessel from entering their ports, unless in case of emergency; freeze the vessel's asset.[83]

As for tackling Iran's WMD and nuclear proliferation situation, the SC adopted 1737, 1747, 1803 and 1929.[84] These Resolutions on Iran's nuclear programme are more or less modelled on Resolutions on North Korea. In Resolution 1737, it decided that all states shall:

> Take the necessary measures to prevent the supply, sale or transfer directly or indirectly from their territories, or by their nationals or using their flag vessels or aircraft to, or for the use in or benefit of, Iran, and whether or not originating in their territories, of all items, materials, equipment, goods and technology which could contribute to Iran's enrichment-related, reprocessing or heavy water-related activities, or to the development of nuclear weapon delivery systems.[85]

Resolution 1747, 1803 and 1929 all tried to emphasize and enhance the importance of the sanctions on Iran. Resolution 1929 is linked to the PSI, it calls upon all states to 'inspect, in accordance with their national authorities and legislation and consistent with international law, in particular the law of the sea and relevant international civil aviation agreements, all cargo to and from Iran, in their territory, including seaports and airports,'[86] if there are reasonable grounds to

[83] S/Res/2321, para. 12.
[84] UN Doc S/Res/1737 (27 December 2006); UN Doc S/Res/1747 (24 March 2007); UN Doc S/Res/1803 (3 March 2008); UN Doc S/Res/1929 (9 June 2010).
[85] S/Res/1737, para. 3
[86] S/Res/1929, para. 14.

believe the cargo contains WMD and related materials.

Ultimately, these SC Resolutions can be recognized as 'relevant international law', in terms of acting under Chapter VII, and relates to international peace and security. However, they only have limited effects on practical enforcement operations at sea.

First, Resolution 1540 does not specifically mention 'interdiction' in the texts. Second, as can be seen clearly, these Resolutions all required flag state consent for taking those effective measures. This means that the SC did not create new international law with respect to ship-boarding procedure,[87] thus these Resolutions do not have a substantive impact on a flag state's exclusive jurisdiction and do not impair the fundamental principle of freedom of navigation.[88]

Perhaps Bolton had already noticed this would happen someday, and thus he said at the initial stage of the PSI, 'whether there are gaps or ambiguities in our authorities, we may consider seeking additional sources for such authority, as circumstance dictate. What we do not believe, however, is that only the Security Council can grant the authority we need, and that may be the real source of the criticism we face.'[89] Despite Bolton's statement, over time, the US has not conducted any unilateral interdiction at sea over other state's vessel. In a similar vein, the PSI participants have not sought to find other sources to justify the PSI Interdiction Principles.

One explanation for not having recourse to other sources might be that there is

[87] Allen, *Maritime Counterproliferation Operations and the Rule of Law* 146.
[88] Guilfoyle, 'Maritime Interdiction: What Challenge Lie Ahead?' 107.
[89] JR Bolton, 'Legitimacy in International Affairs: The American Perspective in Theory and Operation', Remarks to the Federalist Society, Washington, D.C. (13 November, 2003), https://2001-2009.state.gov/t/us/rm/26143.htm

no other method to justify a non-consensual flag state jurisdiction on the high seas. A second explanation might be that the US knew that it would be difficult to change existing law so it tried to use the bilateral ship-boarding agreements with flag of convenience states, to circumventing some difficulties and there will still be able to produce some results in combating maritime terrorism. Nonetheless, this cannot explain why there has not concluded any new bilateral ship-boarding agreements since 2010. A third explanation might be that the US or those initial like-minded states never had the idea to create a 'unilateral norm of intervention which could, perhaps, one day be used against its own interests.'[90]

In sum, even if the UNSC resolutions can be taken as a source of international law in combating maritime terrorism, interdiction needs those resolutions to authorise the enforcement power more directly and concretely. What the international community has in hand is totally not enough, hence the flag state jurisdiction prevails. It would be unrealistic to highlight the PSI's legitimacy or effectiveness by just relying on the UNSC resolutions.[91]

## V. US-Led Bilateral Ship-Boarding Agreements

To increase the influence of the PSI and to broaden the involvement of states, the US started to negotiate and conclude bilateral ship-boarding agreements in 2004. The US has been negotiating with these flag of convenience states since 2004. Sequentially, The US concluded bilateral-ship boarding agreements with Liberia,[92]

[90] Guilfoyle, 'Maritime Interdiction: What Challenge Lie Ahead?' 107.

[91] Perhaps this is why Kuhn argued that the best way is to amend the UNCLOS and to create a Chamber for Proliferation issues in ITLOS, See A Kuhn, 'All Aboard: Developing an International Institution to Combat the Proliferation of Weapons of Mass Destruction' (2014) 46 *George Washington International Law Review* 849, 870-873

[92] Agreement Between the Government of the United States of America and the Government of the Republic of Liberia Concerning Cooperation To Suppress the Proliferation of Weapons of Mass

Panama,[93] the Marshall Islands[94] in 2004. In 2005, three other agreements were concluded with Croatia,[95] Cyprus,[96] and Belize.[97] It adopted the agreement with Malta[98] and Mongolia[99] in 2007; with the Bahamas[100] in 2008. The US further concluded two agreements with Saint Vincent and the Grenadines[101], Antigua and Barbuda[102] in 2010.[103]

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Destruction, Their Delivery Systems, and Related Materials By Sea (Signed August 4, 2005; entered into force October 19, 2005.); http://2001-2009.state.gov/t/isn/trty/50809.htm

[93] Amendment to the Supplementary Arrangement Between the Government of the United States of America and the Government of the Republic of Panama to the Arrangement Between the Government of the United States of America and the Government of Panama for Support and Assistance from the United States Coast Guard for the National Maritime Service of the Ministry of Government and Justice (Signed May 12, 2004; provisionally applied from May 12, 2004; entered into force December 1, 2004); http://www.state.gov/t/isn/trty/32858.htm

[94] Agreement Between the Government of the United States of America and the Government of the Republic of the Marshall Islands Concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, Their Delivery Systems, and Related Materials by Sea (Signed August 13, 2004; provisionally applied from August 13, 2004; entered into force November 24, 2004); http://www.state.gov/t/isn/trty/35237.htm

[95] Agreement Between the Government of the United States of America and the Government of the Republic of Croatia Concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, Their Delivery Systems, and Related Materials(Signed June 1, 2005; entered into force March 5, 2007); http://www.state.gov/t/isn/trty/47086.htm

[96] Agreement Between the Government of the United States of America and the Government of the Republic of Cyprus Concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, Their Delivery Systems, and Related Materials By Sea (Signed July 25, 2005; entered into force January 12, 2006); http://www.state.gov/t/isn/trty/50274.htm

[97] Agreement Between the Government of the United States of America and the Government of Belize Concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, Their Delivery Systems, and Related Materials By Sea (Signed August 4, 2005; entered into force October 19, 2005); http://2001-2009.state.gov/t/isn/trty/50809.htm

[98] Agreement Between The Government Of The United States Of America And The Government Of Malta Concerning Cooperation To Suppress The Proliferation Of Weapons Of Mass Destruction, Their Delivery Systems, And Related Materials By Sea (Signed March 15, 2007; entered into force December 19, 2007); http://www.state.gov/t/isn/trty/81883.htm

[99] Agreement Between The Government Of The United States Of America And The Government Of Mongolia Concerning Cooperation To Suppress The Proliferation Of Weapons Of Mass Destruction, Their Delivery Systems, And Related Materials By Sea (Signed October 23, 2007; entered into force February 20, 2008); http://www.state.gov/t/isn/trty/94626.htm

[100] Agreement Between the Government of the Commonwealth of the Bahamas and the Government of the United States of America Concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, Their Delivery Systems, and Related Materials By Sea (Signed August 11, 2008; not in force); http://www.state.gov/t/isn/trty/108223.htm

[101] Agreement Between the Government of the United States of America and the Government of Saint Vincent and the Grenadines Concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, Their Delivery Systems, and Related Materials By Sea (Signed 11 May 2010); https://www.state.gov/documents/organization/142927.pdf

[102] Agreement Between the Government of the United States of America and the Government of

Since the last agreement signed in May 2010 with Saint Vincent and Grenadines, there have been no further agreements concluded with other states. This does not mean there is no possibility to negotiate agreements with other states. It was noted that the US initially intended to conclude about 20 agreements, including with Greece, but some have failed.[104] The rationale behind these bilateral agreements is that these states have limited security forces and capacity to enforce relevant international law. All the 11 ship-boarding agreements have similar provisions.[105]

The US State Department expressly states that these agreements are modelled after the agreements between the US and Caribbean states on counter-narcotics trafficking.[106] In essence, the object and purpose of forming these bilateral agreements is to promote cooperation between the parties to enable them to prevent the transportation of WMD proliferation.

### A. General Features

In the preambles of the bilateral agreements, they all recall some general sources of international law concerning WMD. These documents include the 31

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Antigua and Barbuda Concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, Their Delivery Systems, and Related Materials By Sea (Signed 26 April 2010); https://www.state.gov/documents/organization/154075.pdf

[103] Among the 11 states signed the ship-boarding agreements, perhaps only Mongolia and Croatia are not considered as targets of flag of convenience.

[104] H Jessen, 'United States' Bilateral Shipboarding Agreements'—Upholding Law of the Sea Principles while Updating State Practice' H Ringbom (ed.) *Jurisdiction over Ships: Post-UNCLOS Developments in the Law of the Sea* (Brill Nijhoff 2015) 50, 64.

[105] The model PSI agreement with commentary, see JA Roach, 'Proliferation Security Initiative (PSI): Countering Proliferation by Sea' in MH Nordquist et al (eds.) *Recent Development in the Law of the Sea and China* (Martinus Nijhoff 2005) 351.

[106] See the official introduction from US State Department website, http://www.state.gov/t/isn/c27733.htm ; For an overview of these agreements, see L Davis-Matts, 'International Drug Trafficking and the Law of the Sea: Outstanding Issues and Bilateral Responses with Emphasis on US Caribbean Agreements' (2000) 14 *Ocean Yearbook* 360.

January 1992 UNSC Presidential statement, the UNSC Resolution 1540, 1968 Non-Proliferation Treaty, 1973 Convention on the Prohibition of the Development, Production, and Stockpiling of Bacteriological and Toxin Weapons and on their Destruction, 1993 Convection on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction and the 2002 International Ship and Port Facility Security Code (ISPS Code). Most of the preambles state that the agreement is guided by the PSI Statement of Interdiction Principles, with the exception of the US-Liberia's agreement, which does not mention the PSI. Also, all agreements reference the customary international law of the sea and UNCLOS.

Each of the agreements defines some basic terms concerning WMD and its related materials. The agreements also define states and non-state actors as 'those countries or entities' who are believed to engage in trafficking WMD, their delivery system and related materials. Security force vessels which are used to interdict at sea are warships and ships that can be 'clearly marked and identifiable as being government service'.[107]

One of the difficulties in the definition is that related materials are defined as 'materials, equipment and technology, of whatever nature, which are related to and destined for use in the development, production, utilization, or delivery of WMD'.[108] These agreements do not address dual-use materials, but it has been noticed that most of the related materials are dual-use in nature.[109]

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[107] For example, US-Marshal Islands Agreement, art. 1(10).; US-Croatia Agreement, art. 1(6).
[108] For example, US-Antigua and Barbuda Agreement, art. 1(4).; US-Malta Agreement, art. 2(3).
[109] ME Beck, 'The Promise and Limits of the PSI' (2004) 10 *The Monitor* 16,http://faculty.maxwell.syr.edu/rdenever/PPA%20730-11/Proliferation%20Security.pdf

These agreements do not specifically criminalise WMD trafficking, instead, leaving this issue for the flag state to decide based on its 'constitution and laws'.[110] While the flag state has primary jurisdiction, it may waive its primary right and consent to the exercise of jurisdiction of the other party.[111]

In general law enforcement situations, to waive the right of a flag state's jurisdiction to prosecute does not mean the boarding state can enforce the domestic law of the other party. The reason is simply that no state can enforce any country's domestic law. So conceptually speaking, a distinction should be made between the consent to board a ship and the consent to exercise further jurisdiction to prosecute by using the boarding state's domestic law.

In fact, under the context of US counter-narcotics scenarios, there is no such competing jurisdictional issue, because a flag state's consent will make the ship 'subject to the jurisdiction of the United States.'[112] There is a special design with respect to the procedure for settling jurisdictional issue in the contiguous zone, and that is the boarding state 'shall have the right to exercise jurisdiction'.[113] However, if the scenario is a suspect ship 'fleeing from the territorial sea' from a party's territorial sea, then that party shall obtain the jurisdiction.

While it is clear that the flag state still has the primary jurisdiction, if there is no relevant domestic law concerning these WMD crimes in these states or there is no capability or no willingness to enforce such domestic law, in effect let the US

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[110] For example, US-Bahamas Agreement, art. 2(3).; US-Saint Vincent and the Grenadines Agreement, art. 2(3).

[111] For example, US-Antigua and Barbuda Agreement, art. 5(1).; US-Liberia Agreement, art. 5(4).; US-Marshall Islands Agreement, art. 5(4).

[112] Allen, *Maritime Counterproliferation Operations and the Rule of Law* 127

[113] For example, US-Antigua and Barbuda Agreement, art. 5(2).; US-Saint Vincent and Grenadines, article 6(2).; US-Malta Agreement, art.6(3).

have jurisdiction to prosecute the suspects. However, until now, it seems that there is no such case that has been prosecuted in this matter.

As noted above, information and intelligence are critical in interdicting ships carrying WMD and related materials. Thus these agreements emphasise the parties shall ensure the security forces are informed of its respective applicable laws and policies. An important designation is to set up 'points of contact' for exchanging relevant information, detailed communication, decisions and instructions. And the points of contacts shall 'have the capability to receive, process and respond to requests and reports "at any time".'[114]

## B. Deemed Consent for Ship-Boarding

Once the nationality of a suspect ship can be confirmed by the flag state, or 'no documentation or other physical evidence of nationality is available',[115] the requesting state can 'assimilate the vessel to a ship without nationality in accordance of international law'.[116] This 'international law' used here certainly reflects UNCLOS Article 110(1)(c). This point is apparently important by taking account of the *So San* incident. In terms of information, the contents of any request shall contain some basic information, for example, the ship's name, the registration number, home port and the port of origin and destination. If the request is sent orally, then the requesting party 'shall confirm the request in writing by facsimile or e-mail as soon as possible'.[117]

After receiving the request, the requested party has four choices: (1) to conduct

[114] For example, US-Croatia Agreement, art. 11(2).; US-Liberia Agreement, art. 11(2).
[115] For example, US-Malta Agreement, art. 5(4).; US-Bhamas Agreement, art. 4(4).
[116] For example, US-Cyptus Agreement, art. 4(4).; US-Mongolia art. 4(4).
[117] US-Marshall Islands Agreement, art. 4(2).; US-Antigua and Barbuda Agreement, art. 4(2).

the boarding by its self; (2) to authorise the boarding by the requesting state; (3) to board the suspect ship together with the requesting party; (4) to deny the permission.[118] However, these agreements provide a limited time for responding to the request; if there is no response in the time agreed, then the requesting party 'will be deemed to have been authorized to board the suspect vessel for the purpose of inspecting the vessels documents, questioning the persons on board, and searching the vessel to determine whether it is engaged in proliferation by sea'.[119] There are only two types of the limited time: either 'two' hours or 'four' hours. The two hours group include Liberia, Panama, Mongolia, Belize, Bahamas, Antigua and Barbuda, and Saint Vincent and Grenadines.[120] The four hours group's members are the Marshall Islands, Croatia, Cyprus and Malta.[121]

An exception is the condition stipulated in US-Croatia Agreement, which does not grant the deemed or tacit consent to the requesting party, but only provides that a request shall receive response within four hours. The requested party may ask for 'additional information and conditions relating to responsibility for and the extent of measures to be taken.'[122] Most importantly, the requesting sate 'shall not board the vessel without the express written authorization' from the requested state.[123]

Another special feature of these bilateral ship-boarding agreements is that the agreement may confer rights to third parties. In terms of VCLT, a treaty 'does not

[118] For example, US-Antigua and Barbuda Agreement, art. 4(3)(a).; US-Saint Vincent and Grenadines, art. 4(3)(a).
[119] For example, US-Antigua and Barbuda Agreement, art. 4(3)(d).; US-Saint Vincent and Grenadines, art. 4(3)(c).
[120] For example, US-Liberia Agreement, art. 4(3)(d).; US-Belize Agreement, article 4(3)(e).
[121] For example, US-Marshall Islands Agreement, art. 4(3)(d).
[122] For example, US-Croatia Agreement, art. 4(4)(c).
[123] For example, US-Croatia Agreement, art. 4(4)(d).

create either obligations or rights for a third State without its consent'.[124] However, in the bilateral agreements with Liberia, Panama, the Marshall Islands, Mongolia, Antigua and Barbuda, and Saint Vincent and Grenadines, the parties 'may extend, mutatis mutandis, all rights concerning suspect vessels claiming its nationality' to third parties if it is deemed appropriate.[125]

## C. Safeguards

The bilateral agreements provide some safeguards in taking account of the security of the vessel and cargo, including 'not to endanger the safety of life at sea' and 'not to prejudice the commercial or legal interests' of the flag state.[126] With available means and measures, account is also taken in considering international human rights law and environmental circumstances. A further safeguard is related to the use of force, the specific provision emphasise that the use of force 'shall be avoided except when necessary' to ensure the security forces and the crew members on board,[127] and the use of force 'shall not exceed the minimum degree of the force which is necessary and reasonable'.[128]

Also, this kind of provision reminds the parties that one shall not impair the inherent right of self-defence of either party. Moreover, there is one provision related to an interdiction that is unwarranted or cause 'damage, harm, injury, death or loss resulting from an operation'.[129] Likewise, if any loss or death is suffered by 'any improper or unreasonable action', the parties shall consult at the request of either

[124] VCLT, art. 34.
[125] For example, US-Antigua and Barbuda Agreement, art. 18(1).; US Saint Vincent and Grenadines, art. 19(1).
[126] For example US-Mongolia Agreement, art. 8(1).; US-Liberia Agreement, art. 8(1).
[127] For example, US-Antigua and Barbuda Agreement, art. 9(1). US-Mongolia Agreement art. 9(1).
[128] For example, US-Cyprus Agreement art. 9(3).; US--Antigua and Barbuda Agreement, art. 9(2).
[129] For example, US-Bahamas Agreement, art. 13(2).; US-Malta Agreement, art. 16(2).

party to resolve the dispute and decide the compensation or payment.[130]

## D. Assessment

It has been noted that the US has used 'its comparative advantages in diplomatic and legal resources'[131] with 'unequal bargaining power' and to tailor these bilateral agreements to US interest and advantage.[132] Hence 'it is problematic as it once again calls attention to the prevailing inequality at law of states in matters of nuclear non-proliferation'.[133]

An example of how this unequal bargaining power is wielded is the two-hour or four-hour time limit to the deemed authorisation boarding procedure. In terms of practicality, both the two-hour and four-hour scheme are 'grossly inadequate'[134] for evaluating the information provided by the requesting state, thus this arrangement can be thought as 'designed to limit rather than encourage consultation'[135] or 'merely serving as a window-dressing acknowledgement'.[136] Ultimately, it does not make sense for any state to verify relevant WMD information in such a short time, since the nature of WMD interdiction cannot be accomplished in only a few hours.[137] In foreseeable scenarios, it is almost impracticable for those less powerful and less capable states to take on the interdiction role.

A connected issue pertains to the provision concerning third parties. It is observed that the US 'may seek permission from the flag state to permit a third state to conduct the boarding'.[138] However, this kind of arrangement perhaps can only be made in a bilateral agreement led by the US. In fact, this legal strategy is reasonable

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130 US-Antigua and Barbuda Agreement, arti. 13; US-Marshall Islands Agreement, art. 13.
131 Guilfoyle, *Shipping Interdiction and the Law of the Sea* 248
132 Jessen, 'United States' Bilateral Shipboarding Agreements—Upholding Law of the Sea Principles while Updating State Practice' 68-69
133 G Handl, 'The Nuclear Non-Proliferation Regime: Legitimacy as a Function of Process' (2010) 19 *Tulane Journal of International and Comparative Law* 1, 38.
134 JI Garvey, 'The International Institutional Imperative: For Countering the Spread of Weapons of Mass Destruction: The Proliferation Security Initiative' (2005) *Journal of Conflict and Security Law* 125, 133.
135 Ibid, 142.
136 Ibid.
137 Ibid.
138 Klein, *Maritime Security and the Law of the Sea* 190.

from the position of a hegemon.[139] Krisch explained that bilateral negotiations are 'far more likely to be influenced by the superior power of one party than multilateral negotiations,…the bilateral from is also more receptive to exceptional rules for powerful states.'[140] This explanation is precisely the case in negotiating the PSI bilateral agreements. In the sense of filling gaps in law, these treaties do help to close some gaps left in UNCLOS, but there are only eleven agreements which is simply too few to change existing international law. The reality is that no any new agreement has been concluded in the past few years.

In sum, the rules stipulated in the PSI Interdiction Principles and related bilateral agreements have 'not been proven to be agent for change at all'.[141] Though the PSI Interdiction Principles may not be seen as legal revolution in designing the terms and conditions of the agreements, they have been considered as some sort of 'evolutionary bilateral results of the multilateral accord'.[142] This multilateral accord indicates that the SUA Protocol negotiation had some impact on the bilateral PSI agreements. The question is how and to what extent the SUA Protocol influenced the making of bilateral agreements.

## VI. The PSI as International Law-Making?

Whether the PSI, its Statement of Interdiction Principles and those bilateral agreements have some impact to change customary international law concerning interdicting WMD has been questioned. Perry has argued that the PSI 'will tend to give counterproliferation interdictions the strength of customary international law',[143] although he did mention the importance of both the elements of customary

[139] AM Syrigos, 'Developments on the Interdiction of Vessels on the High Seas' (2006) in A Strati et al (eds.) *Unresolved Issues and New Challenges to the Law of the Sea* (Mrtinus Nijhoff 2006) 149, 201

[140] Krisch, 'International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order' 390.

[141] S Kaye, 'Maritime Security in the Post 9/11 World' in C Schofield et al(eds.) *The Limits of Maritime Jurisdiction* (Martinus Nijhoff 2014) 327, 348.; S Kaye, 'The Proliferation Security Initiative in the Maritime Domain' (2005) 35 *IYBHR* 205.

[142] Jenssen, 'United States' Bilateral Shipboarding Agreements' 73.

[143] TC Perry, 'Blurring the Ocean Zones: The Effect of the Proliferation Security Initiative on the Customary International Law of the Sea' (2006) 37 *ODIL* 37, 44.

international law, namely, *opinio juris* and state practice.

However, there are two factors which he considered much more important: the growing number of 'specially affected states' and 'the ability of a hegemonic coalition to gradually force acceptance of a customary norm upon the world community through the persistent exercise of power'[144]. Hence his observation emphasized the role of state practice in shaping customary international law.

In addition, Perry did not add any evidence on the element of *opinio juris*. Doodlin also made a similar argument. He considered the hegemonic role of the US will be bringing more state practice and will be 'gradually establishing it as an international norm and then as creating a perceived duty, a matter of customary norm.'[145]

Perry and Doodline are both incorrect about the process of the formation of customary international law. In the *North Sea Continental Shelf* cases, the ICJ stated that in all events, customary international law should be 'of a fundamentally norm-creating character'.[146] What the Court appears to have meant is that such a rule should be one capable of binding states generally. *opinio juris* is that states believe that a practice generally contains a legal obligation, or the intention to treat it as obligatory.[147] Such a belief should be complemented by 'whether acting unilaterally or conjointly, were or shortly became parties' to a convention in question, at the same time, should acting actually or potentially in the application of such a

[144] Ibid, 45.
[145] JA Doodlin, 'The Proliferation Security Initiative: Cornerstone of A New International Norm' (2006) 59 *Naval War College Review* 29, 51.; a similar view was also taken by TV Thomas, 'The Proliferation Security Initiative: Towards Relegation of Navigational Freedoms in UNCLOS: An Indian Perspective' (2009) 8 *Chinese Journal of International Law* 657, 679.
[146] *North Sea Continental Shelf Cases (Federal Republic of Germany v. Netherlands & Denmark)* (Judgment) [1969] ICJ Rep 3., para. 77.
[147] *North Sea Continental Shelf* cases, para. 72.

convention.'[148]

State practice consists of what states do and say factually, and what they are perceived to be doing and saying. State practice may be voluntary or involuntary in the process of forming customary international law. In the *Nicaragua* case, the Court stated that it 'has to emphasize that, as was observed in the *North Continental Shelf* cases, for a new customary law to be formed, not only must the acts concerned 'amount to settled practice', but they must be accompanied by the *opinio juris sive necessitates*. Either the States taking such action or other states in a position to react to it, states must have behaved so their conduct is 'evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it.'[149]

Since the nature of the PSI is only a political commitment without indicating a legal obligation, there should be no 'fundamentally norm creating character' contained in the PSI. Furthermore, the rationale of the US bilateral ship-boarding agreements with those 'flag of convenience' states is that these treaties reveal they need a formal treaty and other kinds of consent from the flag state. These bilateral treaties exemplify the reality that they are designed for reinforcing contemporary law, rather than creating new norms and thus do not have any substantive impact on the formation of customary international law.

To a large extent, Perry and Doodlin's view reflect some concerns about a hegemon or some other great powers' intention to change existing law or to implicitly create law only through state practice.[150] However, even those who claim

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[148] Ibid, para. 76.

[149] *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America) Merits, (Judgment) [1986] ICJ Rep 14., para. 207.; *North Sea Continental Shelf* cases, para. 77.

[150] See also, R Beckman and T Davenport, 'Maritime Terrorism and the Law of the Sea: Basic Principles and New Challenges' in MH Nordquist, et al (eds.) *The Law of the Sea Convention: US*

'the more the practice, the less the need for the subjective elements,'[151] still admit that 'it is necessary to demonstrate some sort of *opinio juris*'.[152] While scholars emphasise one side or the other element of customary international law,[153] international courts and tribunals 'consistently apply the two-element approach in ascertaining whether a rule of customary international law has emerged.'[154] This is why Klein commented that 'the extent that the PSI is likely to achieve changes in international law appears to be limited by the very nature of the activity'.[155]

In addition, since the PSI is a political commitment, if the PSI participants do not follow the Statement of Interdiction Principles, there will be no legal consequences but only political consequences; this feature shows 'the political nature of the PSI, rather than supporting any move towards the creation of new legal regime.'[156]

Also, there is shortage of available information regarding PSI interdictions. Even if there are many state practices of interdiction, the rationale for keeping interdiction activities as secrets 'tends to diminish the likelihood' of forming new international norms.[157] Furthermore, even if someone wishes to argue that there is an intention to create a binding obligation or that clear *opino juris* exist, one will also encounter contradictory opinions. For example, Byers commented that it should

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*Accession and Globalization* (Martinus Nifhoff 2012) 229, 255.

[151] International Law Association, 'Report on the Formation of Customary International Law' (2000) 41.

[152] Ibid, 34.

[153] AZ Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation' (2001) 95 *AJIL* 757.; BD Lepard, *Customary International Law: A New Theory with Practical Application* (CUP 2010); MP Scharf, *Customary International Law in Times of Fundamental Change: Recognizing Grotian Moments* (CUP 2010)

[154] O Sender and M Wood, 'The Emergence of Customary International Law: Between Theory and Practice' in C Brölmann and Y Radi (eds.) *Research Handbook on the Theory and Practice of International Lawmaking* (Edward Elgar 2016) 133, 145.

[155] Klein, *Maritime Security and the Law of the Sea* 205.

[156] Ibid, 207.

[157] Ibid, 206.

not be assumed that the US is seeking to change customary international law in this area.[158]

In sum, it is generally accepted that hegemons or great powers always wield more influence on the formation of international law, regardless of what kinds of law.[159] The nature of the PSI is still facing the fundamental difficulty of lacking *opinio juris* in the process for forming customary international law. Consequently, the practice of those states can hardly be considered as having the potential to form customary international law.[160]

## VII. Alternative Explanations concerning International Law-Making

Nonetheless, if we do not take such a traditional, formal and strict view point in considering international law-making, the conclusion will be quite different. In a more dynamic and broader concept of international law or international law-making,[161] the PSI suffices to be deemed as an agent of international law-making.

At least three approaches can be used to accord the PSI a sort of international law-making. First, according to Pauwelyn et al, an informal international law-making under the context of global governance contains three elements: output, process and actors. Output refers to an international cooperation which does not generate a formal treaty or other traditional sources of international law, but produces some 'guideline, standard, declaration, or even more informal policy

[158] M Byers, 'Policing the High Seas: The Proliferation Security Initiative' 542.
[159] International Law Association's Final Report on the Formation of Customary International Law (2000) 26., at http://www.ila-hq.org/index.php/committees
[160] MD Evans, 'The Law of the Sea' in MD Evans (ed.) International Law (OUP, 4th edition 2014) 651, 670.; MJ Valencia, 'Is the PSI the Cornerstone of A New International Norm' (2006) 59 *Naval War College Review* 122.
[161] C Brölmann and Y Radi, 'Introduction: International Lawmaking in a Global World' in Brölmann and Y Radi (eds.) *Research Handbook on the Theory and Practice of International Lawmaking* (Edward Elgar 2016) 1, 6-7.

coordination and exchange.'[162] Process indicates that an international cooperation 'occurs in a loosely organized network or forum rather than traditional international organization'.[163] Actors refer to participants other than traditional diplomatic actors, such as other ministries or domestic regulators.[164] Accordingly, the concept of informal international law-making is defined as:

> Cross-border cooperation between public authorities, with or without the participation of private actors and/or international organizations, in a form other than a traditional international organization, and /or as between actors other than traditional diplomatic actors and/or which does not result in a formal treaty or other traditional sources of international law.[165]

If we apply this concept of international law-making to the PSI, these scholars argue that it is qualified as informal international law-making.[166] However, they do not specify why and how in detail and do not discuss elements of the PSI. As the aforementioned shows, in terms of output, the PSI has not created new customary norms or a general multilateral treaty in shipping interdiction on the high seas.[167] Nonetheless, the PSI does have the Statement of Interdiction Principles and has generated the Critical Capability and Practice initiative in doing training drills. Therefore, these documents suffice to be seen as output in the concept of informal international law-making.

In terms of process, though the PSI is not an organization but an activity, its

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[162] J Pauwelyn, 'An Introduction to Informal International Law-Making' in J Pauwelyn et al (eds.) *Informal International Lawmaking* (OUP 2012) 15.
[163] Ibid, 17.
[164] Ibid, 19.
[165] Ibid, 21-22.
[166] J Pauwelyn, et al, 'When Structures Become Shackles: Stagnation and Dynamics in International Lawmaking' (2014) 25 *EJIL* 734, 738.
[167] D Guilfoyle, 'Counter Proliferation Activities and Freedom of Navigation' in MH Norduquist et al (eds.) *Freedom of Navigation and Globalization* (Brill 2015) 71, 81.

members have 'repeatedly expressed commitments and the interests of the states acting within the PSI framework to work more actively',[168] and its informal network has evolved over time. Now it has a regular political meeting and OEG, with the former analogous to an informal assembly, and the latter an executive body.

In terms of actors, John Bolton recalled in December 2003, 'in fact, with the adoption of the statement of interdiction principles, there was not really much more for the diplomats to do except hand over responsibility to their operational colleagues.'[169] Thus we can speculate that the operational activities are performed by navy, coast guard or some other intelligence or customs officials. These actors certainly are in the category of informal law-making. In short, with the sharing of experiences throughout the network, an international cooperative norm is merging in this WMD interdiction issue area.

A second approach is the New Haven School's policy-orientated approach. It can be seen as singling out the 'process' factor from the above approach.[170] New Haven School sees law-making or norm-forming processes as reflecting action and reaction, claim and counterclaim by states or other participants in the international community.[171] It is dynamic in the sense that this approach takes a lot of values, choices and political power into consideration.[172] However, one of the criticisms it received is that the way it sees law and law-making processes at the service of a given state or a great power's preference. Hence Kolb argued that 'this approach is

[168] PJ Kwast, 'Maritime Interdiction of Weapons of Mass Destruction in an International Legal Perspective' (2007) 38 *NYIL* 163, 229.
[169] Bolton, *Surrender Is Not An Option* 128.
[170] R Higgins, *Problems and Process: International Law and How We Use It* (Clarendon 1994)
[171] J Crawford, 'Chance, Order, Change: The Course of International Law' (2013) 365 *Recueil des Cours* 1-2.
[172] H Saberi, 'Yale's Policy Science and International Law: Between Legal Formalism and Policy Conceptualism' in A Orford et al (eds.) *The Oxford Handbook of the Theory of International Law* (OUP 2016) 427.; A Bianchi, *International Law Theories: An Inquiry into Different Ways of Thinking* (OUP 2016) 91-109.

teleological', and if taken to the extreme, can be 'a school of unilateralism in disguise'.[173]

Nonetheless, the criticism of this approach can also mirror its own merit. The reason is that traditional source doctrine does not accord much value to a hegemon or great power's role in international law-making. This is because in the context of forming customary international law or treaty law, a hegemon or superpower cannot have a more influential position in this law-making process. Though powerful states may have more widespread state practices and certainly have more opportunities to impose their opinions and interests upon other less power states, they do not have more votes than other states.[174]

The difficulty of making or changing customary international law or multilateral treaty law opens up the possibility of making more non-binding norms, instruments[175] and informal policy and cooperative networks.[176] This phenomenon has occurred not only in our time, but also throughout history. As Krisch observed, when the international legal order cannot be fully controlled by a given hegemon in a certain time, it will try to broaden the scope of soft law and make the law-making process more flexible and informal.[177] This observation rightly grasps the essence of the PSI. Again, here we see the PSI as a creature of US hegemony, but the US did not go it alone by using unilateralism. Rather, the US established the PSI in a more subtle and flexible way by building the PSI as an activity, not an organization. The reason for utilising this mechanism may be speed and efficiency. Hence it can be

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[173] R Kolb, *Theory of International Law* (Bloomsbury 2016) 290-291.
[174] J Kammenrhofer, 'Superpowers and Great Powers', para. 10-12.
[175] D Shlton, *Commitment and Compliance: The Role of Non-Binding Norms in the International System* (OUP 2000)
[176] AM Slaughter, *The New World Order* (2004)
[177] N Krisch, 'International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order' (2005) 16 *EJIL* 369, 391-393.

argued that the PSI reflects a dynamic mechanism of cooperation in formation, or a process of creating a non-binding norm.

A further question would be, if the PSI contains a soft law and non-binding norm format, what exactly is this norm? How should we describe it? In terms of time sequence, the PSI was initiated in 2003, then the USC Resolution 1540 followed in 2004, and the SUA Protocol was adopted in 2005. In between 2003 and until 2010, some bilateral ship-boarding agreements were reached. Accordingly, it may be reasonable to say that the PSI triggered the debates in the sphere of maritime terrorism law. The PSI also set stages or other formal law-making processes in the IMO and the UNSC. Therefore, we might call this initial non-binding norm as a kind of incentive and motivation for legal change in shipping interdiction.[178]

The third approach that the evolution of the PSI can be considered as international law-making is the international regimes approach.[179] This view of law-making and norm-setting is that international regimes are often created when a formal agreement cannot be reached efficiently or when the cost of doing so would be too costly. A regime is usually formed with a functional objective and under such a circumstance; a hegemonic state still has a powerful role in shaping an international regime.[180] However, once the regime has been established, it will naturally evolve and be shaped by its internal and external factors and actors, and

[178] Some writers considered the PSI may be regarded as an 'avant-garde' for the development of international law in the area of WMD non-proliferation regime, though they described this 'coalition of the willing' is a kind of 'informal co-operation'. See M Marlirsch, and F Prill, 'The Proliferation Security Initiative and the 2005 Protocol to the SUA Convention' 67 *ZaoRV* (2007) 229, 239-240.
[179] JL Dunoff, 'A New Approach to Regime Interaction' in M Young (ed.) *Regime Interaction in International Law: Facing Fragmentation* (CUP 2012) 136.; O Young, *International Cooperation: Building Regimes for Natural Resources and the Environment* (Cornell University Press 1989)
[180] R Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy* (Princeton University Press 1984); M Koskenniemi, 'Hegemonic Regimes' in M Young (ed.) *Regime Interaction in International Law: Facing Fragmentation* (CUP 2012) 305.

general international environment.

Consequently, if we consider an international regime as 'sets of principles, norms, rules and decision-making procedures around which actors' expectations converge in a given area of international relations,'[181] the PSI may suffice to be reckoned as a regime with a general sense of obligation because of its political commitment.[182] The norms and rules are contained in the Statement of Interdiction Principles and some practical training manuals.[183] In short, it can be thought a part of the greater non-proliferation regime in international law.

## VIII. Impacts on the SUA 2005 Protocol

At the beginning of the SUA Protocol drafting stage in August 2002, the US proposed to incorporate the new interdiction developments in the text. There were two methods in the US proposal concerning how the flag State could authorize another state to board a suspect vessel claiming its nationality located seaward of any State's territorial sea: 'either advance authorization when the enumerated conditions are met; or a procedure for granting authorization on an as-requested basis, including authorization when no reply is given within four hours.'[184]

However, as the final result of Article 8*bis* shows, the US did not achieve their initial objective by bringing the time limits into the SUA Protocol. To some extent, the time limit is written in the Article 8*bis*, but as an 'opt in' condition which means that the first principle is still based on flag state authorization. Upon receipt of a

[181] S Krasner, 'Structural Causes and Regime Consequences: Regimes as Intervening Variables in S Krasner (ed.) *International Regimes* (Cornell University Press 1983) 1, 3.
[182] Valencia, *The Proliferation Security Initiative* 40-41.
[183] Dunne, ''The Proliferation Security Initiative'5.; C Wolf et al, *U.S. Combat Commands' Participation in the Proliferation Security Initiative: A Training Manual* (RAND 2008).
[184] IMO Doc LEG85/4 (17 August 2002), para. 12.

boarding request, the flag state have four options: authorize the boarding, to board the ship by itself, to board the ship together with the requesting state or decline the request.[185] The 'opt in' procedure means when a state has ratified the Protocol, it can notify the IMO Secretary-General that it accepts if there is 'no response within four hours of the acknowledgement of receipt of a request to confirm nationality', the requesting party is 'granted authorization to board and search the ship'.[186]

This final result has two meanings: first, the US failed its ambition in the multilateral forum, even though in terms of its hegemonic status, it was powerful and influential in the negotiation process. Second, As Jenssen noted, 'it is very tempting to believe' that the SUA Protocol 'directly contributed to the developments relating to bilateral-agreed maritime counter-WMD operations under the PSI'.[187] But the reality is it only had 'limited effects on the developments of US bilateral shipboarding agreements over the past ten years.'[188]

Therefore, this is hard evidence that hegemonic law-making does not mean it can do whatever it wanted. A better way to see the significance of PSI and bilateral ship-boarding agreements is that they fill in some gaps with regard to maritime terrorism, but this arrangement is 'merely another tool in the armoury to promote maritime security'.[189] Or one could say a paradigm shift has been triggered by the PSI Interdiction Principles, the bilateral agreements and the SUA Protocol.[190] If the international community consider that a paradigm shift is needed for benefiting all

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185 Art. 8*bis*(5)(c)(i).
186 Art. 8*bis*(5)(c)(ii).
187 Jessen, 'United States' Bilateral Shipboarding Agreements' 65.
188 Ibid, 66.
189 Klein, *Maritime Security and the Law of the Sea*' 192.
190 H Clark, ''Staying Afloat in International Law: The Proliferation Security Initiative's Implications for Freedom of Navigation' (2007) 21 *Ocean Yearbook* 441, 469.

states, then this shift from the strict sense of exclusive flag state jurisdiction on the high seas to a looser version of flag state control would be legitimate.[191]

After all, change in law is difficult and usually happens through a slow process. Change is not always revolutionary, thus commentators argued that 'even a small change in emphasis may have produced a different, and arguably more effective, legal regime' in tackling terrorism and proliferation at sea.[192]

## IX. Conclusion

Four questions and answers can summarise the points made in this chapter: First of all, was the PSI created by the US unilateralism? No, the PSI is a result of multilateralism.

Second, does the Statement of the Interdiction Principles change customary international law concerning exclusive right of flag state's jurisdiction and freedom of navigation? No, in the strictest sense of international law-making and the formation of customary international law, it does not change anything.

Third, do the PSI bilateral ship-boarding agreements and the SUA Protocol fulfil the expectation of the US? Yes and no. It is certainly true that the US can wield its dominant power in shaping rules in bilateral circumstances; however, the PSI and SUA Protocol reflect that the US cannot get what it wants in a multilateral law-making arena.

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[191] JL Jesus, 'Protection of Foreign Ships against Piracy and Terrorism at Sea: Legal Aspects' (2003) 18 *IJMCL* 363, 395.

[192] H Tuerk, 'Combating Terrorism at Sea—The Suppression of Unlawful Accts against the Safety of Maritime Navigation' (2007-2008) 15 *University of Miami International and Comparative Law Review* 337, 366-367.; N Klein, 'The Right of Visit and the 2005 Protocol on the Suppression of Unlawful Acts against the Safety of Maritime Navigation' (2007) 35 *Denver Journal of International Law and Policy* 287, 331-332.

Fourth, if the US cannot get what it wants in multilateral settings, then is the question about hegemonic law-making meaningful? If it does not and cannot make some fundamental changes in the development of international law, why should we care about a hegemon's behaviours in the sense of international law-making?

There are three aspects of an answer to this question: interactions between unilateralism and multilateralism; interactions between hard and soft law-making; interactions between law and politics.

First, conceptually speaking, hegemonic law-making does not always mean unilateralism, it may only implicate 'leadership rather than command'.[193] As Kohen noted, 'the US government made considerable progress toward multilateralism in different fields of international cooperation against terrorism, with only one exception, that is the use of force.'[194]

The US tried to change the nature and scope of shipping interdiction after the 911 theorist attacks: it began by using the IMO multilateral forum, followed by the announcement of the PSI and by reaching subsequent bilateral agreements. Though it has not succeeded in changing existing law codified in UNCLOS or customary international law, it did convince the international community that there is a need to change the existing legal framework for combating maritime terrorism.

The US was unable to exercise its hegemonic weight in brining a foundational change in the law of the sea, but, as noted above, a slight evolution in law has been triggered and considered. If there is a lesson in this process, it might be that it is

[193] DF Vagts, 'Hegemonic Law-Making' (2001) 95 *AJIL* 843.
[194] MG Kohen, 'The Use of Force by the United States after the End of the Cold War, and Its Impact on International Law' in M Byers and G Nolte (eds.), *United States Hegemony and the Foundations of International Law* (CUP 2004) 197, 229.

almost impossible to change law on a revolutionary scale by multilateralism, let alone by US unilateral actions. Consequently, there is no need to worry about whether and how the US will unilaterally change law. The US just cannot change international law 'the American way.'[195]

Second, there can be a counter-argument that the US has changed some aspects of soft law or normative development of international cooperation in the field of WMD proliferation at sea. In essence, different questions lead to different answers, just like some lawyers' legal strategy will influence the judges' thinking. Accordingly, different nature of concepts leads to different meanings of international law-making. Conventional wisdom suggests that International hard law such as customary or treaty law occupies the critical role in the sense of traditional sources of international law. Nonetheless, if we apply the concept of informal international making or international regimes approach to conceptualizing the PSI and relevant American moves, an argument can be made that the cooperative mechanisms against maritime terrorism are still law-making, just not in the sense of the traditional way.

Third, international law and great powers have never easily coexisted in a happy relationship.[196] It cannot be denied that the law of the sea or general international law has always been pushed or moved forward by the dominant powers in different times of history.[197] It would be unrealistic not to admit that a hegemon like the US is able to influence the direction of how international law evolves; however, it would

[195] V Lowe et al, 'Comments on Chapters 16 and 17' in M Byers and G Nolte (eds.), *United States Hegemony and the Foundations of International Law* (CUP 2004) 477, 489.
[196] O Yasuaki, 'International Law in and with International Politics: The Functions of International Law in International Society' (2003) 14 *EJIL* 105.; RH Steinberg and JM Zasloff, 'Power and International Law' (2006) 100 *AJIL* 64.; MA Rogoff, 'Review: French Studies in International Law' (2011) 105 *AJIL* 819.
[197] J Kraska, *Maritime Power and the Law of the Sea: Expeditionary Operations in World Politics* (OUP 2011) 159

also be naïve to argue that US law-making influence has been enhanced in times of the US hegemony.

A distinction muse be made between the force of law and the force of power. The interaction between international law and international politics, as Krisch beautifully articulates, 'is always under pressure from powerful states and needs to bow to their demands in order not to be entirely sidelined. Yet it can provide its particular value to the powerful only if it does not completely bow to them: once it appears merely as a tool, it will be unable to provide them legitimacy they seek.'[198]

Ultimately, this chapter shows that these US-led soft law and bilateral treaties do not contradict the normative development in relation to multilateral treaties such as the SUA Convention and Protocol or the resolutions adopted by the UNSC. As such, these instruments should rather be deeming as mutually assured supplementation in the following years of the coherent development of international law-making.

The point being made lastly is a normative one: if we believe that terrorism at sea, on land or in the air constitutes threats to our daily life, and so long as US law-making initiatives contain elements of promoting community interests, complement certain norm-setting instruments, then we shall expect more hegemonic law-making. As noted above, it does no harm if a hegemon cannot succeed, and at the very least the US hegemony may prod the international legal system to accommodate the changing nature of problems and the need for legal evolution. Such episode is another face of international law-making and political reality in action.

[198] Krisch, 'International Law in Times of Hegemony' 408.

**Chapter 6**

# Regional Treaty and Soft Law-Making in the Fight agaisnt Maritime Piracy

George Smiley: '"The Story of my meeting with Karla," he resumed, "belonged very much to the mood of the period."'

John *le Carré, Tinker, Tailor, Soldier, Spy* (1973)[1]

## I. Introduction

There have been a lot of regional approaches developed in some specific areas such as regional economic integration,[2] regional human rights regimes,[3] regional seas programmes in the marine environment area,[4] regional fisheries management organizations, [5] regional security cooperation [6] and regional arms control arrangements;[7] this phenomenon has spilled over to the maritime piracy field.

There are four kinds of regional arrangements in combating maritime piracy. The first one was developed in 2004 in Asia, namely, the Regional Cooperation

[1] John *le Carré, Tinker, Tailor, Soldier, Spy* (Sceptre 1974) 230.
[2] SY Chia and MG Plummer, *ASEAN Economic Cooperation and Integration: Progress, Challenges and Future Directions* (CUP 2015); M Besson, *Regionalism and Globalization in East Asia: Politics, Security and Economic Development* (Palgrave, 2nd edition Macmillan 2014)
[3] D Shelton, *Regional Protection of Human Rights* (OUP 2008); T-U Baik, *Emerging Regional Human Rights Systems in Asia* (CUP 2012)
[4] Regional Seas Programmers under the United Nations Environment Programme, http://www.unep.org/regionalseas/
[5] For example, International Commission for the Conservation of Atlantic Tunas (ICCAT);Indian Ocean Tuna Commission (IOTC);Western and Central Pacific Fisheries Commission (WCPFC);Inter-American Tropical Tuna Commission (IATTC);Commission for the Conservation of Southern Bluefin Tuna (CCSBT);North-East Atlantic Fisheries Commission (NEAFC);Northwest Atlantic Fisheries Organization (NAFO);North Atlantic Salmon Conservation Organisation (NASCO);South-East Atlantic Fisheries Organisation (SEAFO);South Indian Ocean Fisheries Agreement (SIOFA);South Pacific Regional Fisheries Management Organisation (SPRFMO);Convention on Conservation of Antarctic Marine Living Resources (CCAMLR);General Fisheries Commission for the Mediterranean (GFCM);Convention on the Conservation and Management of Pollock Resources in the Central Bering Sea (CCBSP)
[6] D Winther, *Regional Maintenance of Peace and Security under International Law* (Routledge 2015)
[7] GM Selim, *Global and Regional Approaches to Arms Control in the Middle East: A Critical Assessment from the Arab World* (Springer 2013)

Agreement on Combating Piracy and Armed Robbery against Ships in Asia (ReCAAP).

Along with the rampant phenomenon of Somali piracy, the second one was developed in East Africa in 2009. This cooperation framework is the Code of Conduct concerning the Repression of Piracy and Armed Robbery against Ships in the Western Indian Ocean and the Gulf of Aden (Djibouti Code of Conduct).

The third is a rather recent episode following the Djibouti Code of Conduct but developed in West Africa. The Code of Conduct concerning the Repression of Piracy, Armed Robbery against Ships, and Illicit Maritime Activity in the West and Central Africa, which was adopted in June 2013 in Yaoundé, Cameroon (Yaoundé Code of Conduct).

The fourth regional arrangement is something different from the above three. It is about establishing bilateral treaties for transferring suspects for prosecution in Kenya, Mauritius, Tanzania, etc. To be more precisely, the US, UK, EU have concluded these bilateral treaties for transferring pirates to aforementioned states.

A worth noting character of the Djibouti Code of Conduct and Yaoundé Code of Conduct is that they were both initiated and supported by the IMO, an organization that contains a universal character in charge of varieties of maritime issues.[8] It should be noted that the IMO has been dealing with the maritime piracy issue for three decades.[9] Therefore, this chapter will firstly introduce what the IMO has accomplished in tackling maritime piracy, trace the origin and evolution of the

[8] KR Simmonds, *The International Maritime Organization* (Simmonds &Hill 1994); MH Nordquist and JN Moore (eds.) *Current Maritime Issues and the International Maritime Organization* 1999).
[9] R Balkin, 'The International Maritime Organization and Maritime Security' (2006) 30 *Tulane Maritime Journal* 1, 9-12.

ReCAAP, Djibouti Code of Conduct and Yaoundé Code of Conduct; and will then scrutinise their strengths and weaknesses. Lastly, it will also investigate how these treaty and soft law regimes further develop the law concerning piracy.

One of key observations from scrutinising these law-making instruments is that there is no potential threat to the coherent development of international law-making concerning maritime violence. On the contrary, these new efforts and arrangements work in a rather smooth and supplementing style to each other.

## II. The International Maritime Organization and Maritime Piracy

The role of the IMO has been noticed that it 'remains the single most important organization in the fight against piracy',[10] and participating in all of the piracy-related law-making and norm-creating process.[11] The phenomenon of sometimes sporadic and sometimes rampant acts of piracy let the IMO grasping several opportunities to lobby for international cooperation with governments, NGOs and the shipping industry. For example, the IMO former Secretary-General Mr. Efthimios Mitropoulos contributed a lot and has been a public advocate for communication and for obtaining necessary support from the IMO Council, UN Secretary-General and the UN Security Council in the recent development of international cooperation in suppressing piracy.[12] It is against this backdrop that some initial and major efforts regarding IMO's contribution to the development of

[10] M Jacobsson, 'International Legal Cooperation to Combat Piracy in the Horn of Africa' in R Beckman and J Roach (eds.) *Piracy and International Maritime Crimes in ASEAN: Prospects for Cooperation* (Edward Elgar) 95, 104.

[11] On the function of the IMO and its general law-making and standard-setting process concerning maritime affairs, MS. Karim, P*revention of Pollution of the Marine Environment from Vessels: The Potential and Limits of the International Maritime Organization* (Springer 2015) 15-41.; J Harrison, *Making the Law of the Sea: A Study in the Development of International Law* (CUP 2011) 154-165.

[12] JA Roach, 'IMO Policies and Actions Regarding Piracy' in DD Caron and N Oral (ed.) *Navigating Straits: Challenges for International Law* (Brill 2014) 241, 262.

maritime piracy should be illustrated first.

### A. Initial Efforts

The IMO Assembly adopted its first resolution on piracy in 1983, Resolution A.543(13) titled 'Measures to Prevent Acts of Piracy and Armed Robbery against Ships';[13] it interpreted and recalled Article 16(j) of the Convention on the International Maritime Organization,[14] indicating that regulations concerning maritime safety are related to the function of the Assembly. It also requested governments to provide relevant information about piracy and armed robbery at sea to IMO and urged governments to take actions in tackling the problem and to keep the matter under review.

Adopted in 1991, Resolution A.543(13) was followed by Resolution A.683(17) and was titled 'Prevention and Suppression of Acts of Piracy and Armed Robbery against Ships'.[15] It recognised the grave danger of piracy and armed robbery to life and navigational environment. It urged governments to take all necessary actions in suppressing piracy and armed robbery against ships. This document also noted the UNCLOS piracy provisions and remedies against those piratical acts.

In 1993, the Assembly passed Resolution A.738(18), 'Measures to Prevent and Suppress Piracy and Armed Robbery against Ships',[16] in which it expressly recalled the UNCLOS Article 100, asking all states to cooperate to the fullest extent in the repression of piracy and armed robbery on the high seas or any other places outside the jurisdiction of any state. This resolution urged states to maintain close ties with

[13] IMO Doc A.543(13) (29 February 1983).
[14] Convention on the International Maritime Organization, 1958, 289 UNTS 48.
[15] IMO Doc A.683(17) ( 21 November 1991).
[16] IMO Doc A.738(18) (17 November 1993).

neighbouring states for further cooperation. Also, it invited governments to consider the use of surveillance and detection techniques in preventing piratical acts. Furthermore, it asked governments to instruct national rescue coordination centres for promptly informing the security forces in warning or implementing the contingency plans. Finally, it recommended these coordination centres are capable of communicating in English at all times.

The IMO Assembly took another two resolutions on the same day in November 2001. Resolution A.922(22) was titled 'Code of Practice for the Investigation of Crimes of Piracy and Armed Robbery against Ships,'[17] and Resolution A.923(22) was named 'Measures to Prevent the Registration of "Phantom" Ships.[18]

Resolution A.922(22) firstly recalled the SUA Convention and UNCLOS then recognised the continued increase of piracy and armed robbery activities worldwide.[19] It also noted that one of the reasons that made piracy rampant was the lack of effective legislation concerning such crimes. This Code of Practice was developed by some regional seminars and workshops under the auspices of the IMO. This Resolution was also the first time that IMO gave a definition to the concept of armed robbery at sea.

In the Annex of Resolution A.922(22), it articulated, 'armed robbery against ships' means 'any unlawful act of violence or detention or any act of depredation, or threat thereof, other than an act of piracy, directed against a ship or against persons

[17] IMO Doc A.922(22) (29 November 2001).
[18] Ibid.
[19] Some historical background about the development and atmosphere in Southeast Asia, see JA Roach, 'Enhancing Maritime Security in the Straits of Malacca and Singapore' (2005) 59 *Journal of International Affairs* 97.; K von Hoesslin, 'Piracy and Armed Robbery against Ships in the ASEAN Region: Incidents and Trends' in R Beckman and J Roach (eds.) *Piracy and International Maritime Crimes in ASEAN: Prospects for Cooperation* (Edward Elgar) 119.

or property on board such a ship, *within a State's jurisdiction* over such offences.'[20] It further illustrated the investigation strategy in distributing intelligence and information, securing evidence and taking into account of the seriousness of the situation about the loss of property and life.

Since the point of issuing Resolution A.923(22) was to invited all governments to exhaust all means to prevent the registration of phantom ships, it urged governments to verify the identity of the ships flying their flag, including the IMO Ship Identification Number, the proof of ownership by ways of paper or electronically verification process.

**B. Major Efforts**

Following the rising problem of Somali piracy in between 2007 and 2008, the IMO Assembly requested the Maritime Safety Committee to update the previous Code of Practice, and it resulted in two resolutions. The Assembly adopted Resolution A.1002(25) under the title of 'Piracy and Armed Robbery against Ships in Waters off the Coast of Somalia.'[21] It encouraged states to address threats to maritime safety and security through bilateral and multilateral instruments and cooperative mechanisms. It also urged states to combat piracy in cooperation with the IMO.

In addition, Resolution A.1002(25) urged states to adopt national legislation in criminalising piracy and armed robbery against ships and in accordance of international law. Moreover, it called upon states to become parties to 1988 SUA Convention and 2005 SUA Protocol. Most importantly, it requested the Transitional

[20] Emphasis added.
[21] IMO Doc A.1002(25), (6 December 2007).

Government of Somalia to take necessary actions to prevent and suppress acts of piracy and armed robbery. These requests included advising the UNSC that it consents to warships or military aircrafts entering into its territorial waters. As mentioned in Chapter 4, this resolution brought the UN SC passed Resolution 1816(2008).[22]

The adoption of Resolution A. 1025(26) was issued for updating the previous 'Code of Practice for Investigation of Crime and Armed Robbery against Ships'.[23] The revised Code of Practice emphasised the international cooperation aspects in the investigation of piratical acts. It redefined the armed robbery against ships as:

> [a]ny illegal act of violence or detention or 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 on board such a ship, with a State's internal waters, archipelagic waters and territorial sea; any act of inciting or of intentional facilitating an act described above.

It further illustrates how to conduct an investigation in an efficient way. Basically, no big changes were added to the revoked Resolution A.922(22), and the new definition with respect to armed robbery against ships is deemed the most important part of this resolution.

The change of the definition of armed robbery against ships, as explained by the Report of the Correspondence Group on Piracy,[24] was based on the following reason: the Sub-regional meeting on piracy and armed robbery against ships in the Western Indian Ocean, Gulf of Aden and Red Sea area, which was held in Dar es

[22] S/Res/1816 (2 June 2008).
[23] IMO Doc. A.1025(26), (18 January 2010).
[24] IMO Doc. MSC 86/18/1 (24 February 2009).

Salaam, United Republic of Tanzania, from 14 to 18 April 2008, agreed to modify the original definition. Consistent with the ReCAAP, the motive for private ends has been added to the definition. The formulation of 'within internal waters, archipelagic waters and territorial sea' replaced the phrase 'within a State's jurisdiction'. The new formulation reflects the views of France, supported by other States participating in the meeting, that the definition for armed robbery against ships should not be applicable to acts committed seaward of the territorial sea.

Roach noticed that this change might be problematic, because 'it omits any acts of violence against ships or their crews committed seaward of the territorial sea, such as SUA offence or hostage-taking, not amounting to piracy.'[25] Hence he suggested that the IMO should revert to the old definition.[26]

Almost at the same time, IMO Maritime Safety Committee also adopted two Circulars for providing recommendations to governments and the shipping industries about how to practically suppress and prevent piracy and armed robbery at sea. IMO MSC.1/Circ.1333 was titled 'Recommendations to Governments for Preventing and Suppressing Piracy and Armed Robbery against Ships'[27] and was replaced by MSC.1Cir.1333/Rev.1 in 2015.[28] MSC.1Circ.1334 was titled 'Guidance to Shipowners and Ship Operators, Shipmaster and Crews on Preventing and Suppressing Acts of Piracy and Armed Robbery against Ships'.[29] These measures include some technical issues and piracy-prevention techniques, including the use of

[25] JA Roach, 'General Problematic Issues on Exercise of Jurisdiction over Modern Instances of Piracy' in CR Symmons (ed.) *Selected Contemporary Issues in the Law of the Sea* (Martinus Nijhoff, 2011) 119, 136.
[26] This view is also shared by other commentators, see F Attard, 'IMO's Contribution to International Law Regulating Maritime Security' (2014) 45 *JMLC* 479, 541.
[27] MSC.1/Cir.1333 (26 June 2009).
[28] MSC.1.Circ.1333/Rev.1 (12 June 2015).
[29] MSC.1/Cir.1334 (23 June 2009).

distress flares, the use of defensive measure, non-lethal devices, firearms, unarmed security personnel, privately contracted armed security personnel, military team or law enforcement officers authorised by governments. It even includes the UN Guidance on how to survive as a hostage if kidnapped by pirates.[30] These Circulars provide relevant information about model agreement for regional cooperation, the format regarding the ways to report to the IMO with respect to the voyages in approaching piracy and armed robbery threat areas.[31]

While these documents are in the category of non-binding norms, soft law,[32] they are now considered as 'universal guidance' on problems of piracy and armed robbery at sea.[33] However, since these documents are non-binding guidance, if a huge cost might incur, then some governments or shipping industries may not apply the guidance. For example, the IMO adopted MSC.1/Circ.1339, 'Best Management Practices for Protection against Somalia based Pirates (BMP)',[34] which is the fourth edition of the series documents on the same issue.

Commentators noticed that not all shipping companies are interested in taking the BMP, because the cost of applying those measures is very high and the possibility of being kidnapped by pirates is so low. For example, it was estimated that about 0.9% of ships were kidnapped around the Gulf of Aden and Western Indian Ocean. In real numbers, there are about 25,000 ships passing the Suez Canal

[30] Ibid, Appendix 4.
[31] The Maritime Safety Committee also adopted 'Guidelines to Assist in the Investigation of the Crimes of Piracy and Armed Robbery against Ships', MSC.1/Circ.1404 (23 May 2011).
[32] It has been noted that Somali pirates have had impacts on the making of soft law, see D Guifoyle, 'Piracy off Somalia and Counter-Piracy Efforts,' in D Guilfoyle (ed.), *Modern Piracy: Legal Challenges and Response* (Edward Elgar 2013) 35.; F Attard, 'IMO's Contribution to International Law Regulating Maritime Security' 543.
[33] Attard, ibid, 544.
[34] MSC.1/Circ.1339 (14 September 2011).

every year, but in 2011only about 300 encountered pirates.[35]

## C. Privately Contracted Armed Security Personnel

In response to the need of the shipping industry and in securing the safety of sea lanes of communication,[36] the IMO has also developed guidance on the use of privately contracted armed security personnel (PCASP) for protecting seafarers and fishermen.[37] As indicated by the IMO, the guidance was developed for dealing with issues regarding the use of PCASP. These documents are: (1) MSC.1/Circ.1443 on Interim Guidance to private maritime security companies providing contracted armed security personnel on board ships in the High Risk Area; [38] (2) MSC.1/Circ.1408 on Interim recommendations for port and coastal States regarding the use of privately contracted armed security personnel on board ships in the High Risk Area;[39](3) MSC.1/Circ.1406/Rev.3 on Revised interim recommendations for flag States regarding the use of privately contracted armed security personnel on

[35] S Percy and A Shortland, 'Contemporary Maritime Piracy: Five Obstacles to Ending Somali Piracy' (2013) 4 *Global Policy* 65, 68, 71.

[36] K Bichou et al (eds.) *Maritime Transport Security: Issues, Challenges and National Policies* (Edward Elgar 2013); C Berude and P Cullen (eds.) *Maritime Private Security: Market Responses to Piracy, Terrorism and Waterborne Security Risks in the 21st Century* (Routledge 2012); M McNichloas, *Maritime Security: An Introduction* (Butterworth-Heinemann; 2 edition 2016)

[37] J Kraska, 'Excessive Coastal State Jurisdiction: Ship Board Armed Security Personnel' in H Ringbom (ed.) *Jurisdiction over Ships: Post-UNCLOS Developments in the Law of the Sea* (Brill Nijhoff 2015) 167.; J Kraska, 'International and Comparative Regulation of Private Maritime Security Companies Employed in Counter-Piracy' in *Modern Piracy: Legal Challenges and Response* (Edward Elgar 2013) 219.; A Petrig, 'The Use of Force and Firearms by Private Maritime Security Companies against Suspected Pirates' (2013) 62 *ICLQ* 667.; YM Dutton, 'Gunslinger on the High Seas: A Call for Regulation' (2013) 24 *Duke Journal of Comparative and International Law* 107.; BH Dubner and C Pastorius, 'On the Effectiveness of Private Security Guards on Board Merchant Ships off the Coast of Somalia-Where is the Piracy? What are the Leal Ramifications?' (2014) 39 *North Carolina Journal of International and Commercial Regulation* 1029.; IV Hespen, 'Protecting Merchant Ships from Maritime Piracy by Privately Contracted Armed Security Personnel: A Comparative Analysis of Flag State Legislation and Port and Coastal State Requirements' (2014) 45 *JMLC* 361.

[38] MSC.1/Circ.1443 (25 May 2012).

[39] MSC.1/Circ.1408 (16 September 2011).

board ships in the High Risk Area;[40](4) MSC.1/Circ.1405/Rev.2 on Revised interim guidance to shipowners, ship operators and shipmasters on the use of privately contracted armed security personnel on board ships in the High Risk Area;[41] (5) MSC-FAL.1/Circ.2 : Questionnaire on information on port and coastal State requirements related to privately contracted armed security personnel on board ships, which is aimed at gathering information on current requirements.[42]

Although the PSASP issue has been considered in the IMO, it was agreed that the IMO is not the best place to develop the criteria for issuing certification concerning PCASP; rather, it considered that the best institution would be the International Organization for Standardization (ISO), thus IMO forwarded all relevant IMO guidance to ISO to serve as the base documents to be used in developing an appropriate ISO standard. Also, the IMO works with the World Customs Organization in discussing some compliance requirements in relation to PCASP.[43] In short, the use of PCASP was 'strongly discouraged',[44] and even if it needs to be used, it would be under exceptional circumstances.[45]

In fact, IMO's response to the Somali piracy has been quite fast, and it can be argued that it moves as quickly as the UN Security Council goes. The difference is the legal status of their documents. All IMO resolutions, guidance or circulars are non-binding; they only carry recommendatory weight, unlike the influence of UN

[40] MSC.1/Circ.1406/Rev.3 (12 June 2015).
[41] MSC.1/Circ.1405/Rev.2 (25 May 2012).
[42] MSC-FAL.1/Circ.2, 22 (September 2011).
[43] See the IMO website, http://www.imo.org/en/OurWork/Security/PiracyArmedRobbery/Pages/Private-Armed-Security.aspx
[44] F Attard, 'IMO's Contribution to International Law Regulating Maritime Security' 559.
[45] Among all relevant PCASP issues, perhaps what public international lawyers interest most is questions about state responsibility, see D Guilfoyle, 'Defending Individual Ships from Pirates,' in C Chinkin and F Baetens (eds.) *Sovereignty, Statehood and State Responsibility: Essays in Honour of James Crawford* (CUP 2015) 307.

Security Council resolutions issued under Chapter VII of the UN Charter.

## III. Making the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia

The ReCAAP is the first regional treaty in Asia for promoting and enhancing international cooperation against piracy and armed robbery at sea.[46] It was adopted in Tokyo on 11 November 2004 and entered into force on 4 September 2006. To date, 20 States have become contracting parties to ReCAAP.[47]

### A. Japan's Initiative for Responding Incidents

The Agreement was initiated by Japan's Prime Minister Obuchi Keizo in November 1999. The incentive was when a Japanese owned cargo ship MV *Alondra Rainbow* was hijacked by a group of armed Indonesian pirates when navigating in the Strait of Malacca in October 1999.[48] It was noted that because this incident 'drew great media attention in Japan, that triggered the Japanese government's initiative'[49] to develop ReCAAP with Southeast Asian states. According to Japan's Ministry of Foreign Affairs, there were another two incidents also important in stimulating their efforts for negotiating this treaty. One was the disappearing of the

[46] On some other military, diplomatic and transnational policy measures within ASEAN countries , T Chalermpalanupap and M Ibnez, 'ASEAN Measures in Combating Piracy and Other Maritime Crimes' in RC Beckman and JA Roach (eds.), *Piracy and International Maritime Crimes in ASEAN: Prospect for Cooperation* (Edward Elgar 2012) 139.; AJ Young, *Contemporary Maritime Piracy in Southeast Asia: History, Causes and Remedies* (Institute of Southeast Asian Studies 2007)

[47] The contracting parties are Australia, the People's Republic of Bangladesh, Brunei Darussalam, the Kingdom of Cambodia, the People's Republic of China, the Kingdom of Denmark, the Republic of India, Japan, the Republic of Korea, the Lao People's Democratic Republic, the Republic of the Union of Myanmar, the Kingdom of the Netherlands, the Kingdom of Norway, the Republic of the Philippines, the Republic of Singapore, the Democratic Socialist Republic of Sri Lanka, the Kingdom of Thailand, the United Kingdom, the United States of America and the Socialist Republic of Viet Nam; see the ReCAAP website http://www.recaap.org/AboutReCAAPISC.aspx

[48] '14 hijackers of Japanese ship convicted', 26 February 2003, *The Times of India*, http://timesofindia.indiatimes.com/city/mumbai/14-hijackers-of-Japanese-ship-convicted/articleshow/38606802.cms

[49] M Hayahsi, 'Introductory Note to the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia' (2005) 44 *ILM* 826.

ship M/V *Tenyu* after departing from Kuala Tanjong on the Indonesian island of Sumatra bound for Inchon in the Republic of Korea in September 1998. The vessel itself was later discovered at Zhangjiagang in Jiangsu Province, China, but its crew and cargo (about 3,000 tons of aluminum ingots) remain missing. The other incident was the M/V Global Mars incident in February 2000. The ship was attacked off Phuket in Thailand after departing Port Klang in Malaysia bound for Haldia in India.[50]

Japan's Prime Minister Obuchi proposed a meeting with related states at the ASEAN + 1 (Japan) summit in Manila in November 1999, and this led to the Regional Conference on Combating Piracy and Armed Robbery against Ships in Tokyo in April 2000. While heads of governmental agencies from 16 Asian states participated in the conference, the US, Australia and the Russian Federation, the Director of IMO Maritime Safety Division and shipping industries attended as observers. The meeting record was submitted by Japan and kept by the IMO.[51]

The Conference adopted two documents; the first one is called 'Asia Anti-Piracy Challenges 2000,' and the objective was to declare the intention for combating piracy and armed robbery at sea in Asia. The second document is called the 'Model Action Plan for Maritime Policy Authorities and Private Maritime Related Concerns to Combat Piracy and Armed Robbery against Ships'; it set forth a number of specific actions to be taken by relevant states and the shipping industries. For example, the self-protection, information sharing measures, the use of defensive

[50] 'Present State of the Piracy Problem and Japan's Efforts', Ministry of Foreign Affairs of Japan, December 2001, http://www.mofa.go.jp/policy/piracy/problem0112.html
[51] MSC 73/INF.4 (25 August 2000).

measures, etc.[52]

Participants further endorsed the 'Tokyo Appeal', which was a document adopted a month earlier in the 'International Conference of All Maritime Related Concerns, both Governmental and Private, on Combating Piracy and Armed Robbery against Ships' held in Tokyo. The Tokyo Appeal emphasized the flag state's responsibility in enforcing relevant law upon their ships, the port and costal states' role in the territorial waters, the importance of preventive measures and the need to strengthen the network of intelligence sharing.[53]

Since then, Japan actively organised meetings and seminars for developing an international mechanism. It became clear that Japan intended to make a treaty law around 2001 after it held the 'Asian Cooperation Conference on Combating Piracy and Armed Robbery against Ships' in October 2001, and it gradually gained support from Southeast Asian governments and shipping industries.[54] Therefore, Japan began to draft an agreement and sell the idea at the ASEAN+3 (China, Japan and South Korea). The detailed negotiation process is unknown, because there is no public source available for analysis. Nonetheless, it is believed that the preparatory documents for negotiation and negotiation records are kept in each participant's foreign ministry. Japan, Singapore and Laos later signed the treaty in April 2005 and deposited the notification in Singapore.[55]

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[52] Ibid, Annex 2, and Annex 4.
[53] Ibid, Annex 3.
[54] Present State of the Piracy Problem and Japan's Efforts', Ministry of Foreign Affairs of Japan, December 2001, http://www.mofa.go.jp/policy/piracy/problem0112.html
[55] 'Signing and Deposit of Instrument of Notification of the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia', Ministry of Foreign Affairs of Japan, (April 28, 2005), http://www.mofa.go.jp/announce/announce/2005/4/0428.html ; ReCAAP, art. 18 provides that Singapore is the depository of this treaty.

## B. Arrangements

It was noted that there was no problem in copying the definition of piracy from UNCLOS, but the definition about 'armed robbery against ships' was not so certain.[56] However, the participants reached a relatively easy consensus to apply the IMO's definition with slight modification as provided in ReCAAP Article1(2)(a) (b)and (c): 'any illegal act of violence or detention, or any act of depredation, committed for private ends and directed against a ship, or against persons or property on board such ship, in a place within a Contracting Party's jurisdiction over such offences; any act of voluntary participation in the operation of a ship with knowledge of facts making it a ship for armed robbery against ships; any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).' It should be noted that ReCAAP is the first international treaty recognising the IMO's non-legally binding definition of armed robbery.[57]

The ReCAAP comprises five parts and 22 Articles. Articles 1-3 indicate general definitions of terms, obligations and rights of contracting parties. It states that nothing shall affect the right and obligations of any party under international agreements to which that state is a party.[58] This agreement shall also not affect the immunities of warships;[59] the position to any dispute concerning territorial sovereignty;[60] the exercise of jurisdiction which are exclusively reserved for the authorities in performing their jurisdictional function by its national law.[61] Parties

[56] M Hayahsi, 'Introductory Note to the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia' 827.
[57] K Zou, 'New Developments in the in the International Law of Piracy' (2009) 8 *Chinese Journal of International Law* 323, 327.
[58] ReCAAP, art. 2(2).
[59] Ibid, art. 2(3).
[60] Ibid, art. 2(4).
[61] Ibid, art. 2(5)

shall make every effort to take effective measures in fighting pirates in accordance international law and their national law. These measures include: to prevent and suppress piracy and armed robbery; [62] to arrest and seize ships or aircraft or persons who committed the crime of piracy and armed robbery against ships;[63] to rescue victims and victim ships.[64]

Articles 4-8 stipulate the function and structure of the 'Information Sharing Center' (ISC), which is set up in Singapore.[65] As the ISC stands as an international organization, the members all enjoy functional privileges and immunities.[66] Its Governing Council is composed of one representative from each of the party and shall meet at least once a year in Singapore.[67] The working method is designed for the Executive Director in charge of the administrative, operational and financial matters,[68] but the decision shall be determined by the Governing Council by consensus.[69] The financial sources include the host state (Singapore)[70] and other voluntary contributions of contracting parties, international organizations and any other contributions agreed by the Governing Council.[71]

As its name implicates, the ISC's chief objective is to share information about all relevant piracy issues concerned. These functions cover: managing and maintaining the expeditious flow of all incidents;[72] collecting, collating, analysing

[62] Ibid, art. 3(1)(a).
[63] Ibid, art. 3(1)(b).
[64] Ibid, art. 3(1)(c).
[65] Ibid, art. 4(2)
[66] Ibid, art. 5(1), (2).
[67] Ibid, art. 4(4).
[68] Ibid, art. 4(5), (8), (9).
[69] Ibid, art. 4(6).
[70] Ibid, art. 6(1)(a).
[71] Ibid, art. 6(1)(b),(c),(d).
[72] Ibid, art. 7(a)

and circulating those relevant information;[73] preparing statistics and analytical reports;[74] providing appropriate alerts to parties if there is a reasonable ground to believe that a piracy or armed robbery threat is imminent.[75] The operation of the ISC is to ensure it works in an effective and transparent manner.[76] In carrying out its daily job, it shall keep all the confidential information safe and shall not release and disseminate unless the consent is given by the information provider party.[77]

ReCAAP Articles 9-11 designate that each party shall designate a focal point and shall ensure an effective and smooth communication.[78] Parties shall make every effort to request the ships flying their flag to provide relevant information concerning piracy and armed robbery against ships to relevant national authorities and focal points.[79] Also, if there is any information about an imminent piracy or armed robbery threat, the party are obliged promptly notify the ISC and when other parties receive an alert from the ISC, it shall promptly disseminate the alert to ships.[80] Apart from sharing relevant information concerning piracy and armed robbery against ships, a party may request any other party to directly cooperate or through the ISC for detecting persons, ships or aircrafts who are conducting piratical acts at sea.[81] Moreover, a party may request any other parties to take appropriate measures for arresting or seizing ships within the limits by its national laws and applicable rules of international law.[82] Likewise, parties may directly or through the

[73] Ibid, art. 7(b),(e),(f).
[74] Ibid, art. 7(c).
[75] Ibid, art. 7(d).
[76] Ibid, art. 8(3).
[77] Ibid, art. 8(2), (9)(2).
[78] Ibid, art. 9(1), (3)
[79] Ibid, art. 9(4).
[80] Ibid, art. 9(5), (6).
[81] Ibid, art. 10(1).
[82] Ibid, art. 10(2).

ISC to request to take measure for rescuing victim ships and victims.[83] The exception that it shall request directly to any other parties not through the ISC is issues involving extradition or mutual legal assistance.[84] The requested parties are obliged to make every effort to take practical measures and may seek additional information for implementing such request.[85] After taking measures, the requested party shall promptly notify the ISC of relevant information on what measures has been taken.[86]

ReCAAP Articles 12-16 cover the general obligation for cooperation in extradition, mutual legal assistance and capacity building. Subject to its national laws and regulations, a contracting party shall endeavour to extradite pirates or who committed armed robbery at the request of another party.[87] A contracting party shall also endeavour to render mutual legal assistance in criminal matters, including submitting evidence related to the criminal acts regarding piracy and armed robbery against ships.[88]

In terms of capacity building, parties are obliged to cooperate to the fullest extent if other parties require capacity building assistance.[89] These cooperative mechanisms may include educational and capacity training programmes for sharing experiences and best practices.[90] If parties are willing to, a further joint exercise agreement or other forms or cooperation can be established.[91] For further

[83] Ibid, art. 10(3).
[84] Ibid, art. 10(5).
[85] Ibid, art. 11(1), (2).
[86] Ibid, art. 11(3)
[87] Ibid, art. 12.
[88] Ibid, art. 13.
[89] Ibid, art. 14(1), (2).
[90] Ibid, art. 14(3).
[91] Ibid, art. 15.

encouraging cooperation, each party is obliged to take protective measures in fighting piracy and armed robbery at sea, it particularly emphasises the recommendations adopted by the IMO.[92]

The final part contains provisions of dispute settlement, criteria for entering into force,[93] amendment, withdraw and registration procedure. The fundamental method for settling dispute concerning the interpretation or application of ReCAAP is through negotiations in accordance with applicable rules of international law.[94] Article 18(5) provides that 'it shall be open for accession by any State', and if there is no 'written objection' by a party with 90 days then that state may deposit the instrument of accession with the depository, and will become a party after 60 days.

Accordingly, we have seen that some European states like the UK, Denmark, Norway and the Netherlands are parties to the ReCAAP.[95] If any contracting party would like to amend the treaty, it may propose an amendment at any time, but the amendment shall be adopted with the consent of all parties and it will enter into force after 90 days if expected by all contracting parties.[96] Any party can withdrawal at any time and will take effect after 180 days after the depository receiving the formal notification.[97]

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[92] Ibid, art. 16.
[93] Ibid, art. 18(3).
[94] Ibid, art. 17.
[95] There are 20 Parties to ReCAAP: Australia, the People's Republic of Bangladesh, Brunei Darussalam, the Kingdom of Cambodia, the People's Republic of China, the Kingdom of Denmark, the Republic of India, Japan, the Republic of Korea, the Lao People's Democratic Republic, the Republic of the Union of Myanmar, the Kingdom of the Netherlands, the Kingdom of Norway, the Republic of the Philippines, the Republic of Singapore, the Democratic Socialist Republic of Sri Lanka, the Kingdom of Thailand, the United Kingdom, the United States of America and the Socialist Republic of Viet Nam., see ReCAAP website, http://www.recaap.org/AboutReCAAPISC.aspx ; the latest representatives in the Governing Council, see http://www.recaap.org/LinkClick.aspx?fileticket=02i-hwQNXU8%3d&tabid=93&mid=542
[96] Ibid, art. 19.
[97] Ibid, art. 20.

## C. Strength and Weakness

The set up of the ISC has been considered a success and have had influence in easing piratical acts situation in Southeast Asia.[98] Its strengths can be identified in three aspects of international cooperation.[99] First of all, it requests parties to establish focal points for communication, alerting potential threats, facilitating investigations and exchanging data and intelligence about piracy and armed robbery against ships.[100]

Second, The ISC has arranged continuous capacity building workshops for strengthening participants' law enforcement techniques and skills, it can be speculated that those workshops would be very useful for less-experienced and less-capable states.[101]

Third, the function of ReCAAP and ISC is to share information and let parties to obtain adequate and updated intelligence and knowledge about piratical acts in the region, it has gained fruitful experiences and developed well-organised methods in tacking piracy and armed robbery issues. By way of holding conferences and seminars with other states, international organizations, shipping industries around

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[98] M Hribernik, 'Countering Maritime Piracy and Robbery in Southeast Asia-the Role of the ReCAAP Agreement'(2013) Briefing Paper 2013/2, European Institute for Asian Studies, http://www.eias.org/wp-content/uploads/2016/04/EIAS_Briefing_Paper_2013-2_Hribernik.pdf ; H Teurk, *Reflections on the Contemporary Law of the Sea* (Martinuss Nijhoff) 86.; but there are contradictory views which suggested that the effect of ReCAAP is unclear or limited. See DM Ong, 'Alternative Approaches to Piracy and Armed Robbery in Southeast Asian Waters and off the Horn of Africa: A Comparative Perspective' in P Koutrakos and A Skordas (eds.) *The Law and Practice of Piracy at Sea: European and International Perspectives* (Hart 2014) 267, 285.; R Haywood and R Spivak, *Maritime Piracy* (Routledge 2012) 47.

[99] See other aspects under a bigger context of Southeast Asia, T Davenport, 'Combating Piracy and Armed Robbery in Southeast Asia: An Evolution in Cooperation' in MH Nordquist et al (eds.) *Freedom of Navigation and Globalization* (Brill 2015) 9.

[100] See the latest focal points update in October 2015, http://www.recaap.org/LinkClick.aspx?fileticket=YjzhJqHXGoQ%3d&tabid=93&mid=542

[101] For example, 'Press Release: ReCAAP ISC Capability Building Workshop 9/16' on 23 June 2016' , http://www.recaap.org/LinkClick.aspx?fileticket=dm_njubwu2Y%3d&tabid=80&mid=393

the world, it has had the chance to share its own experience with the Djibouti Code of Conduct.[102]

The above cooperative mechanisms and measures should be seen under the obligation of UNCLOS Article 100, which stipulates that 'all states shall cooperate to the fullest possible extent'.[103] As Wolfrum noted, such obligation has to be implemented on the international level and the nature of this obligation is procedural.[104] It should be noted that this provision is identical to 1958 High Seas Convention Article 14,[105] which was originated from Article 38 of the draft High Sea Convention.[106] The ILC provided a comment to this draft provision 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. Obviously, the State must be allowed a certain latitude as to the measures it should take to this end in any individual case.'[107]

We can see that 'a certain latitude' perhaps only indicates that states can decide what it wants for cooperation, it does not speak any further about what the scope or limits are with respect to this certain latitude; which means that the obligation imposed on Article 100 is 'very vague'.[108] In a sense, there is a duty to cooperate; in

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[102] 'ReCAAP's ISC Contribution to the Djibouti Code of Conduct', 24 February 2014, http://www.recaap.org/LinkClick.aspx?fileticket=sf_Tcgby0IY%3d&tabid=93&mid=542

[103] UNCLOS, art. 100.

[104] R Wolfrum, 'The Obligation to Cooperate in the Fight against Piracy-Legal Considerations' (2009) 116 *Hogaku Shinpo (Chuo Law Review)* 81, 88.

[105] Convention on the High Seas (done on 29 April 1958, entered into force on 30 September 1962) 450 UNTS 82.

[106] 'Report of the International Law Commission to the General Assembly covering the Work of Its Eighth Session, 23 April-4 July 1956'(UN Doc A. A/3159) in *Yearbook of the International Law Commission 1956*, Vol. 2, 260.

[107] Ibid, 282.

[108] RC Beckman, 'The Piracy Regime under UNCLOS: Problems and Prospects for Cooperation' in RC Beckman and JA Roach (eds.), *Piracy and International Maritime Crimes in ASEAN: Prospect for Cooperation* (Edward Elgar 2012) 17, 27.

another sense, if a state refuses to cooperate for suppressing piracy on the high seas, it would be difficult to argue that it violates Article 100.[109] Moreover, this obligation is only concerned cooperation 'on the high seas or in any other place outside the jurisdiction of any state',[110] it is irrelevant to the newly invented concept of armed robbery in the territorial sea. Hence there is a role for ReCAAP to play in terms of developing the obligation of cooperation for combating piracy at sea.

Though the strengths can be easily identified, there are some visible weaknesses existed. For example, first, for some considerations about national sovereignty, Malaysia and Indonesia have not ratified ReCAAP,[111] it is a clear operational loophole.[112] The effectiveness of this regional treaty regime cannot be seen as complete without the two countries.[113]

Second, as Beckman observed that 'it is highly unlikely that Indonesia or any other country in Southeast Asia…would consent to naval or coast guard vessels from other states patrolling its waters.'[114] This problem also relates to another flaw that the ISC was not designed for law-enforcement activities or boarding authorisation. It was made to let useful information and intelligence flow among the parties, thus in terms of enacting real operations, the ISC has no role to play.[115] It only acts as an

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[109] Ibid.
[110] UNCLOS, art. 100.
[111] N Passas and A Twyman-Ghoshal, 'Controlling Piracy in Southeast Asia-Thinning Outside the Box' in RC Beckman and JA Roach (eds.), *Piracy and International Maritime Crimes in ASEAN: Prospect for Cooperation* (Edward Elgar 2012) 62, 77.
[112] But the ReCAAP parties have established technical communication channels with these non-parties in combating maritime piracy and for emergent rescuing missions at sea; see ReCAAP, *Commemorating A Decade of Regional Cooperation, 2006-2016* (ReCAAP 2016) 82-83.
[113] DM Ong, 'Alternative Approaches to Piracy and Armed Robbery in Southeast Asian Waters and off the Horn of Africa: A Comparative Perspective' 285.
[114] R Beckman, 'Piracy and Armed Robbery against Ships in Southeast Asia' in D Gulfoyle (ed.) *Modern Piracy: Legal Challenges and Responses* (Edward Elgar 2013) 13, 28.
[115] J Ho, 'Combating Piracy and Armed Robbery in Asia: The ReCAAP Information Sharing Centre (ISC)' (2009) 33 *Marine Policy* 431, 433.

indirect channel for exchanging views, knowledge, experiences and information through the agencies of the parties.

Third, the ISC experiences which it collected and developed in the past decade may be an asset for combating maritime terrorism and potential transportation or WMD. However, it has no any mandate in the maritime terrorism matter. But if some parties have the willingness to broaden the scope of the ISC's mandate, it may not be that difficult to amend the treaty, since the requirement is not very high, ReCAAP Article 19 provides that 'Any Contracting Party may propose an amendment to this Agreement, any time after the Agreement enters into force. Such amendment shall be adopted with the consent of all Contracting Parties.'[116] This means if there is a political will, then ReCAAP should be and can be easily amended. After all, it is only about information sharing. If the ISC are proud of their achievement, then it should try to expand the boundaries of their profession.

## D. Conclusion

Although it is clear that the ReCAAP' Governing Council 'shall make policies and shall take decisions' concerning all the matters of the ISC,[117] it appears that the ISC has no law-making power for regulating piracy and armed robbery issues. Those policies and decisions can only be thought as international organizations' administrative law, not relevant to substantive issues. To date, the only document which might contain some soft law element is the so called 'Regional Guidance to Counter Piracy and Armed Robbery against Ships in Asia'.[118] But the future and

[116] ReCAAP, art. 19.
[117] ReCAAP, art. 4(5) and (6).
[118] This Guidance was issued on 17 February 2016, it contains procedures about how to plan the preventive and protective measures, methods to training the crew members, reporting the incidents

effectiveness of the Guidance is unknown and difficult to analyse at the moment.

In terms of treaty law-making, while ReCAAP is a regional treaty, it is obvious that its armed robbery definition derived from the IMO. Thus if only to consider the armed robbery term, ReCAAP is a reflection of universal law-making process but resulted at the regional level. Most interestingly, the original mother definition on armed robbery at sea was based on IMO soft law documents. The adoption of the term armed robbery in ReCAAP in effect crystallised the IMO-initiated soft law and let it become a regional treaty law.

In a sense, it cannot be denied that ReCAAP and the ISC have provided some innovations and incrementally have accumulated many experiences for information sharing and capacity building.[119] Nevertheless, these activities are more about the assessment of effectiveness of the regime thus does not fall within the scope of this research. In another sense, in terms of regime interaction and ways to learning from other regions and organizations, this treaty regime has developed a new norm for international cooperation. That is to say, though the ISC can only provide guidance for participants, when it shared those guidance and experiences to other regions, it spills over the norm to other regions. That is what ReCAAP has been trying to do in the past few years, particularly in response to problems off the Coast of Somalia.[120]

Therefore, there is no potential diversity or conflict of norms in making the ReCAAP in the law of the sea concerning piracy and armed robbery. In fact, the

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and other risk assessment knowledge, http://www.recaap.org/DesktopModules/Bring2mind/DMX/Download.aspx?Command=Core_Download&EntryId=423&PortalId=0&TabId=78

[119] See information on its website, http://www.recaap.org/

[120] 'ReCAAP ISC's Contribution to the Djibouti Code of Conduct' (24 February 2014) http://www.recaap.org/LinkClick.aspx?fileticket=sf_Tcgby0IY%3d&tabid=93&mid=542

ReCAAP upholds the idea of universal international law.

As we have seen, the ReCAAP is a good case for accommodating new needs and it does not raise issues about conflict of rules in international law, can we also see the positive developments from the two Codes of Conduct in East and West African regions?

## IV. Djibouti Code of Conduct and the Gulf of Aden

In late 2007, with the rising problems of Somali piracy, the IMO Assembly Resolution A.1002(25) firstly called upon governments in the region to conclude such an agreement and in cooperation with the IMO in order to prevent and suppress piracy and armed robbery against ships.[121]

In fact, before the final Djibouti Meeting held in 2009, the IMO had already sponsored three previous workshops in Yemen, Oman and Tanzania on issues of international cooperation for suppressing piracy and armed robbery at sea.[122]

The Djibouti Code of Conduct was adopted on 29 January 2009 in Djibouti. The Meeting was held from 26-29 January and convened by the IMO. Participants were (17 out of 21 states)[123]: Comoros, Djibouti, Egypt, Ethiopia, France, Jordan, Kenya, Madagascar, Maldives, Oman, Saudi Arabia, Seychelles, Somalia, South Africa, Sudan, Tanzania and Yemen.[124] As of March 2017, 20 states have signed the Djibouti Code of Conduct.[125]

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[121] IMO Doc A.1002(25) (27 November 2007).
[122] IMO Doc MS 85/9 (1 Dec 2008).
[123] Comoros, Djibouti, Egypt, Eritrea, Ethiopia, France, Jordan, Kenya, Madagascar, Maldives, Mauritius, Mozambique, Oman, Saudi Arabia, Seychelles, Somalia, South Africa, Sudan, the United Arab Emirates, Tanzania and Yemen
[124] Observers included12 states outside the region, 4 UN bodies, 9 intergovernmental organizations, 3 NGOs. See IMO Doc C 102/14 (3 April 2009), Annex: Record of the Meeting.
[125] See the IMO website, http://www.imo.org/en/OurWork/Security/PIU/Pages/DCoC.aspx ; France

### A. Features and Designation

The Djibouti Code of Conduct is the first agreement for combating maritime piracy in the region. The Meeting adopted four resolutions and the Code is formed by 17 articles. Resolution 1 specifically pointed out that the signatories to the Code agreed to cooperate in a manner consistent with international law in four areas:

> (a) the investigation, arrest and prosecution of persons, who are reasonably suspected of having committed acts of piracy and armed robbery against ships, including those inciting or intentionally facilitating such acts;
> (b) the interdiction and seizure of suspect ships and property on board such ships;
> (c) the rescue of ships, persons and property subject to piracy and armed robbery and the facilitation of proper care, treatment and repatriation of seafarers, fishermen, other shipboard personnel and passengers subject to such acts, particularly those who have been subjected to violence;
> (d) the conduct of shared operations, both among signatory States and with navies from countries outside the region, such as nominating law enforcement or other authorized officials to embark on patrol ships or aircraft of another signatory.[126]

In addition, the Code was designed for regional states to share information concerning maritime piracy through existing national infrastructure and arrangements, for example, the Regional Maritime Rescue Coordination Centre in Mombasa, Kenya and a number of regional information centres.[127] The signatories also undertook and ensured that there are relevant laws in place to criminalise and

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is eligible to sign the Djibouti Code, but until now, it is the only exception to the Djibouti Code of Conduct.

[126] IMO Doc C 102/14, para. 9.

[127] IMO, Ibid, para. 10.

prosecute pirates.[128]

Moreover, Resolution 1 clearly stated that the 'within two years of the effective date of the Code of conduct, and having designated the national focal pints referred to article 8 of the Code of conduct, consult, with the assistance of IMO, with the aim of arriving at a binding agreement.'[129] That is to say, the Djibouti Code of Conduct is a non-binding instrument.[130]

Resolution 2 requested states and international organizations, such as IMO, the United Nations Development Programme (UNDP) and the United Nations Office on Drugs and the Crime (UNODC), the European Commission (EC), the ReCAAP-Information Sharing Centre and the maritime industry to provide assistance for effectively implementing the Code of Conduct.[131]

Resolution 3 acknowledged that 'a uniform manner' for training officials is one of the critical parts for achieving the success of cooperation. Thus the Code invites the IMO to promote technical cooperation for the 'wide, effective and uniform implementation of the provisions of the Code'[132] Resolution 4 expressed the appreciations to Governments of Djibouti, Japan, Korea and Norway for financial support of the Meeting.[133]

The Djibouti Code of Conduct was inspired by ReCAAP,[134] and the inspiration

[128] IMO, Ibid, para. 11.; Djibouti Code of Conduct, art. 11.
[129] IMO, Ibid, Attachment 1: Resolution 1, para 2(1).; Djibouti Code of Conduct, art. 13.
[130] Djibouti Code of Conduct, art. 15(a).
[131] IMO Doc C 102/14, Attachemtn2: Resolution 2, para. 3.
[132] Ibid, Attachemtn3: Resolution 3, Preamble and para. 3.
[133] Ibid, Attachment 4: Resolution 4.
[134] Djibouti Code of Conduct, Preamble.; The definition of the Code about piracy and armed robbery against ships, as discussed in Chapter 4, is almost the same to the ReCAAP and identical to the Yaoundé Code of Conduct. also see above discussion on IMO's contribution with respect to the concept of armed robbery against ships.

indicates that the focus of the Code is about information-sharing and capacity-building.[135] To a large extent, the only difference between the ReCAAP and the Djibouti Code of Conduct perhaps is only on its legal status,[136] the former is a treaty, the latter is a non-binding soft law instrument. The Code is only design to suppress piracy and armed robbery at sea,[137] and each participant is requested to cooperate to the fullest extent in arresting, prosecuting pirates, seizing pirate ships, and rescuing ships, persons and property subject to piracy.[138] It provides that no state is allowed to pursue a pirate ship 'in or over the territory of territorial sea of any coastal State without the permission of that State'.[139] However, the Participants of the Code can waive its primary rights to exercise jurisdiction and authorise other Participant to enforce its laws against captured pirates.[140]

One of the designations of the Code is the use of the embarked offices,[141] the so-called shipriders. However, as discussed in Chapter 4, this law enforcement measure has not been really applied to real cases in the region.[142]

Article 8(1) of the Djibouti Code of Conduct provides that each Participant should designate a national focal point in order to ensure cooperation, coordination and facilitate an effective and smooth communications. At the time of adopting the Djibouti Code of Conduct, three piracy information exchange centres (ISCs) was

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[135] Djibouti Code of Conduct, art. 2.; J kraska, 'Brandishing Leal Tools in the Fight against Maritime Piracy' in MH Nordquist, et al (eds.) *The Law of the Sea Convention: US Accession and Globalization* (Martinus Nifhoff 2012) 258, 270.-271.; N Klein, *Maritime Security and the Law of the Sea* (OUP 2011) 244.

[136] R Geib and A petrig, *Piracy and Armed Robbery at Sea: The Legal Framework for Counter-Piracy Operations in Somalia and the Gulf of Aden* (OUP 2011) 49.

[137] Djibouti Code of Conduct, art. 4(1), 5(1).

[138] Ibid, art. 4(3).

[139] Ibid, art. 4(5).; art. 15(j) specifies that the function of jurisdiction in the territory of another Participant is exclusively reserved for the authorities of that other Participant.

[140] Ibid, art. 4(7).

[141] Ibid, art. 7.

[142] Chapter 4.

supposed to be situated in Mombasa, Kenya; Dar es Salaam, Tanzania and Sana'a Yemen.[143] As the cooperative and coordinative activities evolved, all three centres started to function in late 2011.[144] The purpose of establishing these information centres and national focal points is to disseminate 'appropriate alerts within their respective areas of responsibility regarding imminent threats or incidents of ships'.[145]

Moreover, the Participants intend to keep each other fully informed with respect to applicable national laws and guidance, particularly subjects about interdiction, investigation, prosecution and dispositions of captured pirates.[146] The Code also intends to follow IMO's approach in uniformly collecting, reporting and analysing the information and ultimately for disseminating those piracy-related information.[147] But similar to ReCAAP, the Djibouti Code also intends to respect the confidentiality of information from each Participant.[148] In terms of capacity building affairs, the Djibouti Code of Conduct encourages the Participants to undertake publication of handbooks and convening seminars, educational and training programmes in furtherance of the Code.[149] Furthermore, they may request assistance for arranging other forms of cooperation, such as joint exercises.[150]

In terms of the Djibouti Code's weakness, first, it is not a legally binding instrument, though the Participants intended to conclude a formal and binding

[143] At the time of adopting the Code, the third city where the information exchange centre will be established was not yet decided. In around October 2011, it is known that it will be situated in Sana'a, Yemen.; Kraska, 'Brandishing Leal Tools in the Fight against Maritime Piracy' 273.
[144] 'Piracy Information-Sharing Centre in Mombasa Commissioned' (2011) 2 *IMO News Magazine*, 9.
[145] Djibouti Code of Conduct, art. 8(3)
[146] Ibid, 8(7).
[147] Ibid, art. 9.
[148] Ibid, art. 8(6).
[149] Ibid., and art. 10(4).
[150] Ibid, art. 10(3).

agreement within two years of the effective date the Code, but it seems nothing really progressed to the multilateral treaty-making phase. Though in November 2015, signatories of the Djibouti Code of Conduct have agreed to work towards extending its scope to address other illicit maritime crimes, such as maritime terrorism, environmental crimes, human trafficking and illegal, unreported and unregulated fishing (IUU Fishing).[151]

Second, a general difficulty for reporting piratical acts to a flag state's national focal point is that commercial ships or fishing trawlers do not always do so when they have seen or encountered piracy-related incidents,[152] especially the law enforcement capacity of such a state is perceived very weak. Third, it can be seen that existing international law with respect to hot pursuit, claims of injury or loss[153] were not changed by the Djibouti Code of Conduct.

Therefore, Haywood and Spivak doubted whether the Djibouti Code of Conduct can be a successful story in the fight against piracy at sea, they commented:

> Unlike ReCAAP, all the stipulations are voluntary, and the level of actual commitment has been very modest,….the initiative for establishing the Djibouti Code came from the IMO rather than the regional countries themselves…it remains to seen whether the Djibouti Code will become a self-sustaining organization in the long term.[154]

## B. Impacts on the Duty to Cooperate

Nonetheless, the aforementioned limitations do not reflect its real achievements

[151] IMO, 'Regional Agreement on Maritime Piracy to Broaden Scope to Other Illicit Maritime Activity' IMO Briefing: 46 (13 November 2015), http://www.imo.org/en/mediacentre/pressbriefings/pages/46-drtc-dcoc.aspx

[152] Klein, Maritime Security and the Law of the Sea 244.

[153] Djibouti Code of Conduct, art. 5(2), 14.

[154] R Haywood and R Spivak, *Maritime Piracy* (Routledge 2012) 49.

on broadening the meaning of the obligation in international cooperation for suppressing maritime piracy. In other words, 'the recognition of improving information sharing was a first important step forward in suppressing piracy and armed robbery at sea.'[155] As indicated above in this chapter, what really need to be observed are the broadening scope and the meaning of the duty to cooperate for combating piracy and armed robbery at sea.

The importance and the crucial role of international cooperation on maritime violence and security issues has been emphasising by several UNGA Resolutions on Oceans and the Law of the Sea in the past decade:[156]

> *Recognizes* the crucial role of international cooperation at the global, regional, subregional 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, 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.[157]

These UNGA also reiterates the significance of information-sharing, prompt reporting of acts of piracy and armed robbery incidents and takes note of the

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[155] Klein, *Maritime Security and the Law of the Sea* 244.

[156] Preamble of the Djibouti Code of Conduct also noted the importance of international cooperation.

[157] UN DOC A/Res/63/111 (12 February 2009), para. 61.; see also UN Doc A/Res/ 71/257 (20 February 2017), para. 117; UN Doc A/Res/70/135 (15 March 2016), para. 109.; UN Doc A/Res/68/70 (27 February 2014), para. 93.; UN Doc A/Res/ Doc UN A/Res/67/78 (18 April 2013), para. 88.; UN Doc A/Res/66/231 (5 April 2012), para. 81.; UN Doc A/Res/65/37 A (5 May 2011), para. 82.; UN Doc A/Res/64/71 (12 March 2010), para. 69.; UN Doc A/Res/62/215 (14 March 2008), para. 61-62.

important role of the IMO in assisting states potentially affected by maritime piracy.[158] In short, such UNGA Resolutions can be deemed as *opinio juris* in the formation of customary international law, and have certain effects in conjunction with multilateral treaties for providing evidence of emerging rules of international law.[159] Therefore, it is also important and necessary to provide evidence of state practice in supporting the emerging rules of international law on the meaning of international cooperation in the fight against piracy at sea.

One of the practices made by the signatories of the Djibouti Code of Conduct was to establish a regional training centre In October 2011, a Memorandum of Understanding (MOU)[160] was signed between the IMO and the Djibouti for establishing such a regional training centre,[161] and it was officially opened in Doraleh, Djibouti in November 2015.[162]

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[158] See for example, UN Doc A/Res/ 71/257, para. 121.; UN DOC A/Res/63/111, para. 62.

[159] J Crawford, *Bronwlie's Principles of Public International Law* (OUP, 8th edition 2012) 42.; A Boyle, 'Soft Law in International Law-Making' in MD Evans (ed.) *International Law* (OUP, 4th edition 2014)118, 125, 130-131.; A Clapham, *Brierly's Law of Nations* (OUP 7th edition 2012) 77.; A Pellet, 'Complementarity on International Treaty Law, Customary Law and Non-Contractual Law-Making' in R Wolfrum and V Röben (eds.), *Development of International Law in Treaty Making* (Springer 2005) 409, 412-413.

[160] On the nature and practice of MOUs in international law-making, A Aust, 'Alternatives to Treaty-Making: MOU as Political Commitments' in DB Hollis, *The Oxford Guide to Treaties* (OUP 2012) 46.

[161] IMO, 'Regional Training Centre in Djibouti – MOU Signed' IMO Briefing: 30 (31 May 2011), http://www.imo.org/en/MediaCentre/PressBriefings/Pages/30-djiboutitraining.aspx#.WNilINR96t8 ; Roach, 'IMO Policies and Actions Regarding Piracy' 260.

[162] IMO, 'Regional Agreement on Maritime Piracy to Broaden Scope to Other Illicit Activity', (12 November 2015), http://www.imo.org/en/mediacentre/pressbriefings/pages/46-drtc-dcoc.aspx; see also UN Doc A/Res/66/231 (5 April 2012), para. 81.; UN Doc A/Res/65/37 A (5 May 2011), para. 82.; UN Doc A/Res/64/71 (12 March 2010), para. 69.; UN Doc A/Res/62/215 (14 March 2008), para. 61-62.

[162] J Crawford, *Bronwlie's Principles of Public International Law* (OUP, 8th edition 2012) 42.; A Boyle, 'Soft Law in International Law-Making' in MD Evans (ed.) *International Law* (OUP, 4th edition 2014)118, 125, 130-131.; A Clapham, *Brierly's Law of Nations* (OUP 7th edition 2012) 77.; A Pellet, 'Complementarity on International Treaty Law, Customary Law and Non-Contractual Law-Making' in R Wolfrum and V Röben (eds.), *Development of International Law in Treaty Making* (Springer 2005) 409, 412-413.

[162] On the nature and practice of MOUs in international law-making, A Aust, 'Alternatives to Treaty-Making: MOU as Political Commitments' in DB Hollis, *The Oxford Guide to Treaties* (OUP

IMO also funds the Djibouti Regional Training Centre and has facilitated about 60 training courses and more than 1000 officials have been trained.[163]

Another practice was the three ISCs in Mombasa, Dar es Sallam and Sana's signed an agreement with ReCAAP-ISC for establishing a set of standard operating procedures for communicating and exchanging piracy-related information and will result in a major expansion of the reporting area of such incidents.[164] The decision to connect closer ties between the four ISCs came against the context of the continuing threat of maritime piracy to trade and ships through the Indian Ocean and the Gulf of Aden.

India, a ReCAAP Contracting Party, and many ships with flag or crews from ReCAAP Contracting Parties are being affected. The Djibouti Code of Conduct and ReCAAP ISCs have since then trying to ensure piracy information can be shared as wide as possible.[165] The IMO also supports continued dialogue between the four ISCs and aim to promote regimes action and collaboration through sharing experiences on capacity building.[166]

In addition, a Project Implementation Unit (PIU) was established at the IMO in April 2010 for further implementing the Djibouti Code of Conduct. It functions with

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2012) 46.

[162] IMO, 'Regional Training Centre in Djibouti – MOU Signed' IMO Briefing: 30 (31 May 2011), http://www.imo.org/en/MediaCentre/PressBriefings/Pages/30-djiboutitraining.aspx#.WNilINR96t8 ; Roach, 'IMO Policies and Actions Regarding Piracy' 260.

[162] IMO, 'Regional Agreement on Mritime Piracy to Broaden Scope to Other Illicit Maritime Activity' Briefing: 46 (13 November 2015), http://www.imo.org/en/mediacentre/pressbriefings/pages/46-drtc-dcoc.aspx

[163] See for example, UN Doc A/Res/ 71/257, para. 121.; UN DOC A/Res/63/111, para. 62.

[164] IMO, 'Piracy Centre Expanded Information Network', IMO Briefing: 56 (11 November 2011), http://www.imo.org/en/MediaCentre/PressBriefings/Pages/56-piracy-ISCS.aspx#.WNij49R96t8

[165] Ibid.

[166] Roach, 'IMO Policies and Actions Regarding Piracy' 260.

the auspices of the IMO Djibouti Code Trust Fund.[167] The PIU aims to provide four functions:[168] First, it has been overseeing training activities, including logistical, technical, and operational exercises. Second, the PIU has been working on the development of law enforcement capacity and has developed a maritime situational awareness programme which includes the upgrade of hard ware, general infrastructure about the use of radar, long range identification and tracking of ships.[169] Third, it set up a number of workshops with the support of relevant international organizations for ensuring each Participant's national law is applicable to crimes of piracy and armed robbery; also focusing on the process of enforcing those national laws, prosecution, and investigation. Fourth, the need to interact with and to learn from the ReCAAP's information-sharing experiences has not been ignored.[170]

For example, a joint ReCAAP-Djibouti Code of Conduct seminar was held in Tokyo in December 2012. The purpose of the seminar was to enhance the mutual understanding and promote networks for information sharing on issues of piracy and armed robbery.[171] These interactions, experience-sharing conferences and networks have deepened the significance of the role of the epistemic communities in suppressing maritime piracy and in effect promoted the interests of the international

[167] The Trust Fund received voluntary financial supports from France, Japan, Norway, Korea and Saudi Arabia, etc.; 'Saudi Arabia Boost to IMO Djibouti Code Trust Fund to Combat Piracy' IMO Briefing: 48 (21 November 2011), http://www.imo.org/en/MediaCentre/PressBriefings/Pages/48-saudiarabiadjibouti.aspx#.WNij8tR96t8

[168] Attard, 'IMO's Contribution to International Law Regulating Maritime Security' 555-556.

[169] The IMO Website on the Djibouti Code of Conduct, http://www.imo.org/en/OurWork/Security/PIU/Pages/DCoC.aspx ; J Kraska and R Pedrozo, *International Maritime Security Law* (Mrtinus Nijhoff 2013) 721-722.; Roach, 'IMO Policies and Actions Regarding in Piracy' 261.

[170] All individual, joint practices and information are provided in IMO, Djibouti Code of Conduct: Project Implementation Unit, Edition 1, June 2011-January 2012; Edition 2 February-August 2012; Edition 3, September 2012-March 2013; Edition 4, November 2014-August 2015.

[171] See information in ibid, Edition 3.

community.[172]

It may be seen from the first impression that the Djibouti Code of Conduct does not contain equal international law-making influence compared to ReCAAP. However, with the aggregated practices of ReCAAP and the Djibouti Code of Conduct, the duty to cooperate in the fight against maritime piracy has been enhanced and expanded to areas of information sharing, capacity building and educational training.

This development expressly shows that the vague and general UNCLOS Article 100 usage of 'shall co-operate to the fullest extent'[173] has been explored and excavated throughout the evolution of the binding ReCAAP and the non-binding Djibouti Code thus the contents about what should be included in this cooperation duty is clearer and more concrete than a few decades ago.

Moreover, the exchange of views and interactions between the three ISCs of the Djibouti Code of Conduct and the ReCAAP-ISC help to harmonise the potential inconsistent state practice in Asia and Africa.[174] In other words, the two regional regimes interaction did not produce fragmentation effect in law but to reflect and follow the rules made by the IMO. If to take IMO resolutions and guidance on issues of maritime piracy as another kind of *opinio juris* produced from an international organization, then the combined effect of ReCAAP and Djibouti Code surely can be evidence of state practice in supporting emerging rules of customary law in the fight against maritime piracy.

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[172] MA Young, 'Regime Interaction in Creating, Implementing and Enforcing International Law' in M Young (ed.) *Regime Interaction in International Law: Facing Fragmentation* (CUP 2012) 85, 19-110.
[173] UNCLOS, art. 100.
[174] J Kraska and R Pedrozo, *International Maritime Security Law* 723.

## V. Yaoundé Code of Conduct and the Gulf of Guinea

The UN Security Council noted the rising security threats posed by piracy and armed robbery, drugs trafficking and other organized crimes in the Gulf of Guinea in 2011.[175] The SC conducted an assessment mission in November 2011 for investigating the seriousness and real situations in the region.[176] The results showed that in 2011, there was no collective intelligence and surveillance system across the region, including 'the coastal radars covering the Gulf of Guinea coastline.'[177] Also, there were no optimal financial appropriation and contributions in the maritime sectors, thus it needs funds to procure and sustain maritime security equipment and to implement capacity-building training programmes.[178]

Moreover, there was no any formal system of information-gathering and sharing exists between states or regional organizations, hence the SC suggested that the region will require information-sharing standard, joint training programmes and maritime policing operations.[179] Most importantly, the SC found that there were no adequate legal frameworks concerning international cooperation in the suppression of maritime piracy.[180]

The SC then issued Resolution 2039 which urges states in the region to:

> [t]ake prompt action….with the support of the international

[175] UN Doc S/Res/2018 (31 October 2011).
[176] On maritime security issues and specific details across the region, see K-D Ali, *Maritime Security Cooperation in the Gulf of Guinea: Prospects and Challenges* (Martinus Nijhoff 2015) 88-111; K-D Ali, 'The Anatomy of Gulf of Guinea Piracy' (2015) 68 *Naval War College Review* 93.
[177] 'Report of the United Nations Assessment Mission on Piracy in the Guld of Guinea (7-24 November 2011), S/2012/45 (19 Jnauary 2012), para. 54.
[178] Ibid, para. 55.
[179] Ibid, para. 56.; it seems that the situation of lacking capacity to enforce law and relevant regional states do not improve much in gathering information, see 'Letter dated 6 April 2016 from the Representative of Angola, China and Senegal to the United Nations to the Secretary-General' UN Doc S/2016/321 (6 April 2016).
[180] Ibid, para. 57.

> community, and by mutual agreement, to develop and implement national maritime security strategies, including for the establishment of a legal framework for the prevention, and suppression of piracy and armed robbery at sea as well as prosecution of persons engaging in those crimes, and punishment of those convicted of those crimes and encourages regional cooperation in this regard.[181]

Pursuant to UNSC Resolution 2018 and 2039, and built on relevant security related provisions of the 2008 Memorandum of Understanding (MOU) on the Establishment of a Sub-regional Integrated Coast Guard Function Network in West and Central Africa (IMO/MOWCA MOU),[182] the IMO assisted the Economic Community of Central and African States (ECCAS)[183], the Economic Community of West African States (ECOWAS)[184] and the Gulf of Guinea Commission (GGC)[185] to negotiate the Yaoundé Code of Conduct. The Strategy to form the Code of Conduct was initially endorsed at ministerial level by a meeting held in Benin. It was then formally adopted on 25 June 2013 in Yaoundé, Cameroon, by 25 representatives (including 13 Presidents) from West and Central African Countries.[186] The signatories are: Angola, Benin, Burkina Faso, Burundi, Cameroon, Cape Verde, the Central African Republic, Chad, Congo, Côte d'Ivoire, the Democratic Republic of Congo, Equatorial Guinea, Gabon, the Gambia, Ghana,

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[181] UN Doc S/Res/2039 (29 February 2012), para. 5.; see also 'Letter dated 6 November 2012 from the Permanent Representative of India to the United Nations addressed to the Secretary-General', UN Doc S/2012/814 (7 November 2012);

[182] In cooperation with the Maritime Organization of West and Central Africa (MOWCA), the IMO developed this MOU for regional maritime cooperation, which has been signed by 16 coastal states (out of 20 states) in West and Central Africa, IMO website, http://www.imo.org/en/OurWork/Security/WestAfrica/Pages/Strengthening-Maritime-in-West-and-Central-Africa.aspx

[183] See ECCAS website, http://www.ceeac-eccas.org/index.php/fr/

[184] See ECOWAS website, http://www.ecowas.int/

[185] See GCC website, http://cggrps.org/en/the-gulf-of-guinea-commission/

[186] Ibid. see also 'Statement by the President of the Security Council' UN Doc S/PRST/2013/13 (14 August 2013)

Guinea, Guinea Bissau, Liberia, Mali, Niger, Nigeria, Sao Tome and Principe, Senegal, Sierra Leone, and Togo.[187]

### A. Features and Designation

The Yaoundé Code of Conduct aims to develop a legal framework for international and regional cooperation in the fight not only on piracy and armed robbery at sea, but also to consider 'transnational organized crimes in the maritime domain'. The term includes but is not limited to any of the following acts committed at sea:[188]

(a) Money laundering.
(b) Illegal arms and drugs trafficking.
(c) Piracy and armed robbery at sea.
(d) Illegal oil bunkering.
(e) Crude oil theft.
(f) Human trafficking.
(g) Maritime pollution.
(h) IUU fishing.
(i) Illegal dumping of toxic waste.
(j) Maritime terrorism and hostage taking.
(k) Vandalisation of offshore oil infrastructure.

Accordingly, the first identifiable feature of the Yaoundé Code is that it does

[187] Yaoundé Code of Conduct, http://www.imo.org/en/OurWork/Security/WestAfrica/Documents/code_of_conduct%20signed%20from%20ECOWAS%20site.pdf ; also see 'Declaration o the Heads and Government of Central and West African States on Maritime Safety and Security in their Common Maritime Domain', adopted on 25 June 2013 in Yaoundé, Cameroon.; 'IMO Secretary-General Welcomes Adoption of New West and Central Africa Piracy and Maritime Law Enforcement Cod by Heads of States' IMO Briefing: 23 (26 June 2013), http://www.imo.org/en/MediaCentre/PressBriefings/Pages/23-westandcentralafricacode.aspx#.WNkFAdR96t8 ; there is no public available or updated information about whether there are any new signatories. See the IMO Website, http://www.imo.org/en/OurWork/Security/WestAfrica/Pages/Strengthening-Maritime-in-West-and-Central-Africa.aspx

[188] Yaoundé Code of Conduct, art.1(5).

not specifically focus on maritime piracy; rather, it takes a comprehensive approach to cover varieties of organized crimes at sea.

Second, the Yaoundé Code welcomes a number or global and regional organizations in assisting technical training and providing forms of capacity building to combat transnational organized crime at sea,[189] which includes United Nations Regional Office for West Africa (UNOWA) and Central Africa (UNOCA), the United Nations Office on Drugs and Crime (UNODC), IMO, ECOWAS, ECCAS and GCC. Therefore, it can be observed that the scope of the Yaoundé Code is quite different from the ReCAAP and Djibouti Code of Conduct.

Third, its legal status, as indicated in Article 17, 'within three years of the effective date of this Code of Conduct, the signatories intend to consult and….to (a) eventually transform this Code of Conduct into a binding multi-lateral agreement.'[190] That is to say, it is a non-binding legal instrument, identical to and inspired by the Djibouti Code of Conduct.[191]

Fourth, similar to the Djibouti Code of Conduct, the Yaoundé Code aims at: sharing and report information; interdicting ships suspected of engaging in transnational organized crimes at sea; ensuring suspects can be apprehended and prosecuted; facilitating proper care and treatment, particularly to those who have been subjected to violence at sea.[192]

However, unlike the Djibouti Code of Conduct, it reaffirms 'the principles of sovereign equality and territorial integrity of States and that of non-intervention in

[189] Ibid, Preamble.
[190] Ibid, art. 17(a).
[191] Ibid, Preamble.
[192] Ibid, art. 2(1).

the domestic affairs of other States.'[193] Also, it contains one provision on the heading of 'guiding principles', which intends to cooperate and coordinate to the fullest extent; however, for fulfilling the objectives in international cooperation, 'a balance is maintained between the need to enhance maritime security and facilitation of maritime traffic and to avoid unnecessary delays to international trade in West and Central Africa.'[194] It is doubtful whether this provision can be of help or on the country, a possible excuse and hindrance to future cooperation in implementing the Yaoundé Code of Conduct.

Fifth, the Yaoundé Code emphasises the importance of harmonising national implementation of security measures at sea.[195] One interesting development is that the Code provides a separate regulation on IUU fishing. Article 8 highlights the importance of policy harmonization for conservation, management and sustainable use of marine living resources. It should be noted that in such a soft law, this provision uses the obligatory term 'shall', it provides that signatories 'shall consult at the bilateral, sub-regional level' and 'shall cooperate and collaborate with sub-regional fishers bodies and the Food and Agriculture Organization.'[196] It seems that only this requirement on IUU fishing is mandatory. Other provisions only use 'should', 'may' or 'intend' in formulating the rules in the fight of maritime organized crimes.

To some extent, it is difficult to understand why only put the 'shall' term in the Code and only relates to IUU fishing. One aspect of the explanation is the food security and declining resources of fisheries in the Gulf of Guinea. This

[193] Ibid, art.2(3).
[194] Ibid, art. 3.
[195] Ibid, art. 4(3), 8(1).
[196] Ibid, art. 8.

phenomenon has been reckoned as a major threat in the region.[197] However, there are many identifiable threats in the region, such as migrant smuggling, drugs and arms trafficking, including those transnational organized crimes stipulated in the Yaoundé Code of Conduct.[198] Perhaps this development reflects a reality that compared to other security threats in the region, food security is the most important one among others.

Sixth, it also contains a provision to encourage signatories to conclude shiprider agreements.[199] However, as similar to the situation off the Coast of Somalia, there are some maritime boundaries which have not been delimited in the Gulf of Guinea.[200] These inconclusive maritime boundary areas in effect can generate some uncertain or unnecessary jurisdictional issues in law enforcement activities.[201]

Nonetheless, the real weakness of the Yaoundé Code of Conduct perhaps reflects in its over-ambitious targets on varieties of crimes at sea and duplication of several parallel policy initiatives pursued by ECOWAS, ECCAS and GGC, hence it has been criticised as unrealistic, confusion, 'no indication that it can be sustained in the future… thereby creating further uncertainty'.[202] Is this a fair observation or a too harsh criticism?

## B. Impacts on the Duty to Cooperate

Unlike the Djibouti Code of Conduct, the Yaoundé Code of Conduct Article 10

[197] Ali, *Maritime Security Cooperation in the Gulf of Guinea: Prospects and Challenges* 98-106.
[198] Ali, Ibid, 88-111.
[199] Yaoundé Code of Conduct, art. 9.
[200] C Schofield and K-D Ali, 'Combating Piracy and Armed Robbery at Sea: from Somalia to the Gulf of Aden' in R Warner and S Kaye, *Routledge Handbook of Maritime Regulation and Enforcement* (Routldege 2015) 77, 286-287.
[201] Ibid, 287.
[202] Ali, *Maritime Security Cooperation in the Gulf of Guinea: Prospects and Challenges* 244.

and 11 do not inform too much detail about whether signatories are going to establish information sharing centres in specific cities. Hence the two provisions themselves do not reflect much positive impacts on the duty to cooperate.[203]

A development with respect to the Yaoundé Code was IMO issued Assembly Resolution A.1069(28) in November 2013 for urging governments to cooperate for strengthening legal frameworks, coordinating law enforcement activities and sharing information, making financial contributions to the IMO West and Central Africa Security Trust Fund.[204] The IMO did provide a strategy in 2015 for implementing the Yaoundé Code of Conduct and in conjunction with the IMO/MOWCA MOU.[205] However, it seems that this strategy has not produced fruitful state practice or operational measures. Or perhaps it is too early to make a judgment.

Yet, two regional centres have been established in order to ensure the effective coordination in the Gulf of Guinea. The Maritime Trade Information Sharing Centre-Gulf of Guinea (MTISC-GoG) was fully operated in Ghana in October 2014. It functions as a vital resource for the shipping industry and as a part of contributions of the Yaoundé Code of Conduct.[206] In fact, MTISC-GoG has ceased to operate in June 2016. It then has been replaced by the Maritime Domain Awareness for Trade– Gulf of Guinea (MDAT-GoG).[207]

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[203] Though art. 10 and 11 of the Yaoundé Code of Conduct are almost identical to Djibouti Code of Conduct art. 8 and 9.

[204] IMO Doc A/28/Res.1069 (5 February 2014).; IMO, 'Implementing Sustainable Maritime Security Measures in West and Central Africa' (September 2015), para. 10.; http://www.imo.org/en/OurWork/Security/WestAfrica/Documents/IMO%20WCA%20Strategy%20September%202015_English_final.pdf

[205] IMO, ibid, Annex A: Critical Measures to be Implemented.

[206] IMO, 'West and Central Africa Regional Arrangements and Information Sharing', http://www.imo.org/en/OurWork/Security/WestAfrica/Pages/Code-of-Conduct-against-illicit-maritime-activity.aspx

[207] 'Maritime Trade Information Centre', http://www.shipping.nato.int/nsc/operations/news/2016/the-maritime-trade-information-sharing-centr

The IMO assisted the ECCAS, ECOWAS and GGC in establishing the Interregional Coordination Center for the Implementation of Regional Strategy for Maritime Safety and Security in Central and West Africa (ICC) in June 2014.[208] Its main function is to work as means for the three regional organizations for channelling cooperation, coordination and communication.[209]

In short, in contrast to the Djibouti Code of Conduct, it is clear that the Yaoundé Code of Conduct produces less possibility and creativity in state practice with regard to the duty to cooperate in the suppression of piracy and armed robbery against ships. That is to say, to date, the Yaoundé Code of Conduct has no clear potential for setting new standards or promoting emerging rules of international law in contrast with the Djibouti Code of Conduct and ReCAAP.

## VI. Cross-Regional Arrangements on Transferring of Suspected Pirates and Information-Sharing

There are other regional and cross-regional arrangements in dealing with maritime piracy. First of all, the European Union (EU) launched the European Naval (EUNAVFOR) Somalia Operation Atalanta for activities concerning law enforcement and interdiction mission off the coast of Somalia since November

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e-gulf-of-guinea-mtiscgog.aspx

[208] See ICC's formal website, http://cicyaounde.org/

[209] The decision of establishing the ICC was based on two documents: Declaration of the Heads of State and Government of Central and West African States on Maritime Safety and Security in their Common Maritime Domain' , adopted on the same day of the Djibouti Code of Conduct, i.e. 25 June 2013, http://www.imo.org/en/OurWork/Security/WestAfrica/Documents/Declaration%20of%20the%20Heads%20of%20State%20and%20Government%20on%20Maritime%20Safety%20and%20Security.pdf; Additional Protocol to the Memorandum of Understanding among ECCAS, ECOWA, and GGC on Safety and Security in the Central and West Africa Maritime Space relating to the Organization and Functioning of the Inter-Regional Coordination Center for the Implementation of Regional Strategy for Maritime Safety and Security in Central and West Africa (adopted in Yaoundé, 5 June 2014), http://cicyaounde.org/wp-content/uploads/2015/04/AdditionalProtocoltoMoU_EN.pdf

2008.[210]

The nature of which is based on the European Common Security and Defence Policy. Its mandate has been prolonged several times by the European Council; most recently a two-year extension was proved until 31 December 2018.[211] The object of Operation Atalanta is to deter, prevent and repress of acts of piracy and armed robbery off the Somalia coast. The cooperating partners of the mission include some non-EU members such as Norway and Serbia, South Korea, Colombia, etc.[212] Many international organizations such as the United Nations World Food Programme (WFP), United Nations Office for Drugs and Crime (UNODC), North Atlantic Treaty Organization (NATO), the International Police Organization (INTERPOL) also participate in cooperation with regard to law enforcement and judicial issues of maritime piracy in the region.[213]

Secondly, the arrangements include information-sharing networks established by the INTERPOL, the European Police Organization (EUROPOL) and individual states.[214] And such information is open to share with piracy-concerned states and international organizations. For example, the INTERPOL developed two important

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[210] European Council, Council Joint Action 2008/851/CFSP of November 2008 on a European Union Military Operation to Contribute to the Deterrence, Prevention and Repression of Acts of Piracy and Armed Robbery off the Coast of Somalia, *Official Journal of the European Union* (12 November2008) L 301/33.; see discussions on its legal basis and related responsibility issues in Efthymios Papastavridis, 'EUNAVOR Operation Atalanta off Somalia: The EU in Unchartered Legal Waters?' (2015) 64 *ICLQ* 533.; Ricardo Gosalbo and Sonja Boelaert, 'The European' Comprehensive Approach to Combating Piracy at Sea: Legal Issues' in P Koutrakos, and A Skordas (eds.), *The Law and Practice of Piracy at Sea: European and International Perspectives* (Hart 2014) 81.

[211] 'Press Release: EUNAVFOR Somalia Operation Atalanta: operation's mandate extended until 31 December 2018', 28 November 2016, http://www.consilium.europa.eu/press-releases-pdf/2016/11/47244650832_en.pdf

[212] See EUNAFOR official website, http://eunavfor.eu/

[213] See Operation Atlanta's Information Booklet, (May 2017) at http://eunavfor.eu/wp-content/uploads/2017/05/2017May_Booklet-Eng.pdf

[214] Frederick Lorenz and Kelly Paradis, 'Evidentiary Issues in Piracy Prosecutions' in MP Scharf et al (eds.) *Prosecuting Maritime Piracy: Domestic Solutions to International Crimes* (CUP 2015) 207, 229-230.

database for assisting piracy prosecution and prevention. One is the Global Database on Maritime Piracy, the other is the Digital Photo Album Database. The two database systems include more than 4,000 records in relation to 1,100 suspected pirates and 300 photographs, possible financiers, telephone numbers and bank accounts which have been used for ransom payments.[215] Additionally, the US also established the US Naval Criminal Investigative Service (NCIS) for cultivating forensic expertise by using digital biometric devices in order to search and identify suspected pirates.[216] As observed by the INTERPOL, these database networks and information-sharing efforts have been quite successful. States such as Belgium has used the database for verifying and bringing back suspected pirates for prosecution.[217]

Further, if we apply alternative views on international law-making or norm-setting, [218] these international cooperation and information-sharing mechanisms can seen as promoting a greater sense of obligation and normative development for combating piracy at sea.

Thirdly, there are some treaties concluded between the EU and four African states, namely Kenya,[219] Seychelles,[220] Mauritius[221] and Tanzania.[222] The UK and

[215] INTERPOL, 'Intelligence' at https://www.interpol.int/Crime-areas/Maritime-piracy/Intelligence
[216] Frederick Lorenz and Kelly Paradis, 'Evidentiary Issues in Piracy Prosecutions' 232.
[217] Ibid.
[218] Chapter 5, Section VII.
[219] 'Exchange of Letters between the European Union and the Government of Kenya on the Conditions and Modalities for the Transfer of Persons Suspected of Having Committed Acts of Piracy' (2009) 48 *ILM* 751.
[220] 'Exchange of Letters between the European Union and the Republic of Seychelles on the Conditions and Modalities for the Transfer of Suspected Pirates and Armed Robbers from EUNAVFOR to the Republic of Seychelles and for their Treatment after such Transfer', *Official Journal of the European Union* ( 2 December2009), L 315/37.
[221] 'Agreement between the European Union and the Republic of Mauritius on the Conditions of Transfer of Suspected Pirates and Associated Seized Property from the European Union-led Naval Force to the Republic of Mauritius and on the Conditions of Suspected Pirates after Transfer' Official Journal of the European Union (30 December 2011), L 254/3.

the US also have reached bilateral instruments with Kenya for transferring suspected pirates for prosecution in Kenya.[223] According to some news reports, Denmark also adopted a bilateral treaty with Kenya for transferring suspects and prosecution. In addition, it seems that China and Canada also tried to reach a similar agreement with Kenya.[224] Moreover, the EU started to negotiate other transfer agreements with South Africa, and Uganda in 2010, though no any instrument has been concluded since then.[225]

The general feature of EU's four transfer agreements with Kenya, Seychelles and Mauritius contains three elements: the requirement of fair trial and appropriate detention procedure; the financial support to upgrade the prison facilities to meet international standards; the potential indirect removal to third states for prosecution.[226]

As discussed in Chapter 4,[227] these transfer agreements can be used for the purpose of treaty interpretation and they have substantially broadened the nature and scope of UNCLOS Article 105 and the meaning of cooperation in the fight against maritime piracy. In short, these cross-regional arrangements and interactions

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[222] 'Agreement between the European Union and the United Republic of Tanzania on the Conditions of Transfer of Suspected Pirates and Associated Seized Property from the European Union-led Naval Force to the United Republic of Tanzania', *Official Journal of the European Union* (11April 2014), L 108/3.

[223] But these agreements have not been made public, James Thuo Gathii, 'Kenya's Piracy Prosecutions' (2010) 104 *AJIL* 416, 416-417.; JA Roach, 'Countering Piracy off Somalia: International Law and International Institutions' (2010) 104 *AJIL* 397, 403-404.

[224] Ibid.

[225] Daniel Thym, 'Transfer Agreement for Pirates Concluded by the EU-a Case Study on the Human Rights Accountability of the Common Security and Defence Policy' in P Koutrakos, and A Skordas (eds.), *The Law and Practice of Piracy at Sea: European and International Perspectives* (Hart 2014) 167, 170.

[226] Ibid, 174-177.; a thorough examination of relevant human rights issues concerning these suspected pirates' transferring conditions, see Anna Petrig, *Human Rights and Law Enforcement at Sea: Arrest, Detention and Transfer of Piracy Suspects* (Brill/Nijhoff 2014)

[227] Chapter, 4, Section V-F.

mutually enhance the legal and normative development in fighting maritime piracy.

## VII. Conclusion

Theoretically speaking, regionalism poses suspicion and doubts to the integrity and universality of international law.[228] As the IL Report on Fragmentation of observed, the problem of fragmentation refers:

> [s]pecialized law-making and institution-building tends to take place with relative ignorance of legislative and institutional activities in the adjoining fields and of the general principles of and practices of international law. The result is conflicts between rules or rule-system, deviating institutional practices and, possibly, the loss of an overall perspective on the law.

Accordingly, the potential problem of conflict of rules and the issue of universality has been questioned by international lawyers and international relations experts. Their concern focused on the interplay and relative ignorance of public and private sectors in involving the standard-setting, norm-shaping, law-making and policy-coordinating process in the fight against piracy and armed robbery at sea.[229]

Nevertheless, as this chapter demonstrates, the danger or threat to the coherent development of international law-making is overstated. On the contrary, throughout

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[228] J Crawford, 'Universalism and Regionalism from the Perspective of the Work of the International Law Commission' in J Crawford, *International Law as an Open System: Selected Essays* (Cameron May 2002) 575.; J Crawford, 'Chance, Order, Change: The Course of International Law' (2013) 365 *Recueil des Cours* 9, 240.; M Koskenniemi, Report of the Study Group of the International Law Commission, 'Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law', 58th session, 4 April 2006, A/CN.4/L.682 (ILC Report on Fragmentation), para. 195.

[229] C Bueger and J Stockbruegger, 'Security Communities, Alliances and Macrosecuritization: the Practice of Counter-Piracy Governance' in JD Carlson, *Maritime Piracy and the Construction of Global Governance* (Roultledge 2013) 99.; MT Nance and MJ Struett, 'Conflicting Constructions: Maritime Piracy and Cooperation under Regime Complexes' in ibid, 125.; D Guilfoyle, 'Policy Tensions and the Legal Regime Governing Piracy' in D Gulfoyle (ed.) *Modern Piracy: Legal Challenges and Responses* (Edward Elgar 2013) 325.

the lead of the IMO and the EU, these regional and cross-regional regimes made their own international instruments without making rules conflicted with other existing rules and norms in relation to maritime piracy. This development implicates that information-sharing and transparency in making relevant rules and promoting norms are important factors for combating piracy at sea, because there are so many stakeholders and participants, public or private, involved in the problem-solving, diplomatic and negotiation processes.[230]

Looking back, perhaps the most important development in law was not on the law enforcement aspects, but the pre-enforcement procedure concerning information-sharing.[231] On the one hand, it seems a pity that more enforcement, concrete policing investigation and prosecution measures regarding the duty to cooperate had not been made in the law-making process. On the other hand, what the international community has gained from the past few decades is not a package deal, but an incrementally clearer obligation and complementary guidance on how and what to cooperate in the suppression of maritime piracy.

In short, regionalism represents some fragmented steps 'in what seems to be an enduring movement towards universality'.[232] Hence the sporadic and piecemeal evolution of international law-making concerning maritime piracy is surely on the track towards universal international law.

[230] A Boyle and K McCall-Smith, 'Transparency in International Law-making' in A Bianchi and A Peters (eds.) *Transparency in International Law* (CUP 2013) 419, 435.
[231] Klein, *Maritime Security and the Law of the Sea* 255-256.
[232] Crawford, 'Chance, Order, Change: The Course of International Law' 252.

**Chapter 7**

# Conclusions

Minister Jim Hacker: 'Will you give me a straight answer to a straight question?'

Sir Humphrey Appleby: 'Oh, well, Minister, as long as you are not asking me to resort to crude generalizations and vulgar over-simplifications such as a simple yes or no, I shall do my utmost to oblige.'

'The Writing on the Wall' (1980), *Yes Minister*, BBC TV Series[1]

This study was designed to answer questions about the catalyst, mechanisms of change and the trends in making international law concerning maritime violence. The thesis considers whether the law develops in a coherent way, what are the lessons from the law-making history and what should international lawyers expect from the changing circumstances in the fight against maritime violence.

For answering the questions, this study firstly surveyed the gaps in law and the possibility of using the UNCLOS amendment procedure in Chapter 2. Secondly, the thesis considered the making of 1988 SUA Convention and 2005 SUA Protocol in the fight against maritime terrorism in Chapter 3. Thirdly, it went on to review the legislative role of the UNSC for combating violence at sea in Chapter 4. Fourthly, the thesis investigated how the US responded to maritime violence and relevant law-making activities in Chapter 5. Fifthly, the theme of regional approaches for tackling maritime violence and whether regionalism has been cultivated in a coherent fashion along with the UNCLOS framework was explored in Chapter 6.

The thesis started from expressing the view that UNCLOS did not really develop the law on maritime violence, rather simply replicate, with minor

[1] Season 1, Episode 5, can watch it at https://www.youtube.com/watch?v=ZFqKJ_ghvl8

modifications, the existing law relating to piracy at sea. However, the law did not just freeze in time and it has evolved in this field since the adoption of UNCLOS. The main reason for this evolution is a series of influential incidents and crises, which triggered the law-making intention and activities for combating maritime violence.

The response to relevant incidents and crises has been multifaceted, and specific actors such as the US, the IMO and the UNSC took the lead for creating new international instruments and mechanisms for accommodating the changing nature of violence at sea. Counterfactually speaking, if there were no *Achillie Lauro* hijacking, the 911 terrorist attacks, the *So San* interdiction, Somali piracy crisis, etc., subsequent law-making acts would probably not have taken place.[2] This phenomenon indicates that incidents and crises function as an engine for identifying gaps in law as well as a catalyst for international law-making.

Maritime violence is not the only area where there are legal gaps and challenges.[3] The law-making history of the law of the sea shows that states addressed certain legal problems in UNCLOS through the adoption of the two implementing agreements, namely, the Part XI Agreement[4] and the Fish Stocks Agreement.[5] It seems now that a third implementing agreement on the management

[2] I Venzke, 'What If? Counterfactual (Hi)Stories of International Law (December 6, 2016). Amsterdam Center for International Law No. 2016-21; Amsterdam Law School Research Paper No. 2016-66. Available at SSRN: https://ssrn.com/abstract=2881226

[3] S Yanai, 'Can the UNCLOS Address Challenges of the 21st Century' (2014) 57 *GYIL* 43, 58-62.; V Golitsyn, 'Major Challenges of Globalisation for Seas and Oceans: Legal Aspects in D Vidas (ed.) *Law, Technology and Science for Oceans in Globalisation: IUU Fishing, Oil Pollution, Bioprospecting, Outer Continental Shelf* (Martinus Nijhoff 2010) 59.

[4] Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 (done 28 July 1994, entered into force 28 July 1996), 1836 UNTS 42.

[5] Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling and Migratory Fish Stocks (done 4 August 1995, entered into force 11 December 2001), 2167 UNTS 88.

of marine biological diversity beyond areas of national jurisdiction is on the way of creation.[6] However, the trend of law-making concerning maritime violence did not follow such a course but rather relied on a variety of binding and non-binding instruments, including multilateral treaties, bilateral treaties, the UNSC resolutions, the IMO's initiatives and soft law. In other words, those important tools for change have emerged outside the legal framework of UNCLOS.[7]

International law-making in relation to maritime violence has many faces. First, courts have some roles to play for filling gaps in law. On the one hand, national courts' decisions are rare and sometimes contradictory. As discussed in Chapter 2, international and national courts did not really resolve the environmental activist disputes with respect to the definition of piracy. On the other hand, there has been no significant international case law in dealing with the ambiguity regarding the term 'for private ends' in the law of maritime piracy. Nonetheless, this does not mean that it is impossible for international courts and tribunals to interpret the term in the future. For example, the arbitrators on the *Arctic Sunrise* case would not have dismissed the opportunity for interpreting the 'for private ends' concept if the two-ship requirement was filled. If an international court and tribunal gives an interpretation, then it certainly has the potential for becoming an authority on this issue and the ambiguity may be resolved.

Second, multilateral treaties such as the 1988 SUA Convention and 2005 SUA

[6] Though its future is uncertain, see UN Doc A/Res/69/292 (6 July 2015); R Barnes, 'The Proposed LOSC Implementing Agreement on Areas Beyond National Jurisdiction and Its Impact on International Fisheries Law' (2016) 31 *IJMCL* 583.

[7] T Treves, 'The Development of the Law of the Sea since the Adoption of the UN Convention on the Law of the Sea: Achievements and Challenges for the Future' in D Vidas (ed.) *Law, Technology and Science for Oceans in Globalisation: IUU Fishing, Oil Pollution, Bioprospecting, Outer Continental Shelf* (Martinus Nijhoff 2010) 41, 50-51.

Protocol have been used as law-making instruments, but it is doubtful that important provisions have become customary international law for fighting maritime violence, particularly when it touches on issues of interdictions at sea. After all, treaties are only binding on the contracting parties, thus for those non-parties of the 2005 SUA Protocol, they will refer back to the exclusive right of flag state jurisdiction pursuant to UNCLOS and customary law of the sea. In other words, multilateral treaties in this field only reflect limited usefulness in tackling maritime violence.[8]

Third, though the PSI has no potential for becoming customary international law for interdicting the WMD and related materials, it can be seen as an emerging cooperative norm shaped and lead by the US. It should be noted and should not be ignored that the US hegemony occupies the most influential role in initiating proposals and leading the direction of international law-making in fighting violence at sea.

Fourth, the UNSC has not adopted a comprehensive approach on issues of WMD proliferation and piracy. It did take a comprehensive approach in the Resolution 1373 and 1540 by imposing obligations on 'all states'. However, the UNSC tackled Iran and North Korea's WMD Proliferation problem on a case-by-case ground. Likewise, the UNSC's attitude on maritime piracy was based on a region-by-region approach with respect to Somali piracy and piratical acts in the Gulf of Guinea.

[8] Bolkin noted that 'given the fact that the 1988 SUA Convention and Protocol have, to date, rarely been used by any State Party', R Blakin, ''The International Maritime Organization and Maritime Security' (2006) 30 *Tulane Maritime Law Journal* 1, 25.; the only case applied the SUA Convention was a US case, but it was a wrong judgment thus severely criticized by commentators, E Kontorovich, 'Case Report: United States v. Shi (2009) 103 *AJIL* 734.; N Smith, 'Piratical Jurisdiction: the Plundering of Due Process in the Case of Shi' (2009) 23 *Emory International Law Review* 693.

Fifth, the ReCAAP, the Djibouti Code, Yaoundé Code of Conduct and cross-regional transfer agreements represent a variety of solutions to the problem of maritime piracy along with the efforts made by the IMO, the UN, EU and other international organizations. The most important contribution made by these soft law and treaty instruments is they are deepening and broadening the meaning with respect to 'the duty to cooperate' for suppressing piracy at sea. Concrete measures include establishing information sharing institutions and strengthening law enforcement capacity.

It has been seen that these instruments and norms derive from many sources, institutions and organizations. This development probably generates the first impression that such a fragmented international law-making process is creating conflicts or potential conflicts of international law. However, this research has demonstrated that the law developed in a coherent way and did not produce substantive or competing rules against one another. That is to say, the nature of this kind of fragmented international law-making is benign and productive, because instruments concerned have been mutually complementing and supportive. As long as law-makers have taken relevant legal regimes into consideration during the diplomatic and negotiation course and do not create conflict of rules, then this sporadic and fragmented law-making process is not necessarily a bad thing.

Indeed, this process reveals that there has been interplay and synergy between different international law-making instruments and attempts, what requires to be recapped in the last part of the thesis is the inter-relationship between the various techniques and how they may support each other.

In terms of an inductive perspective, it has been noted that some multilateral

treaties such as the 1992 Convention on Biological Diversity[9] and the 1994 WTO Agreement[10] can be systematically integrated into the UNCLOS framework.[11] This indicates that 'a major law-making treaty such as UNCLOS has an ongoing impact on the structuring of later law-making agreements that affect matters regulated by UNCLOS.' [12] It has also been observed that contemporary maritime-related international institutions have been assisting one another in promoting cooperation and coordination for harmonising potential conflict of norms.[13]

When law-makers and initiators decided to take multilateral treaty law as an instrument for developing the law relating to maritime violence, such as the time before convening the SUA diplomatic conferences, related UNGA, SC and IMO resolutions paved the way for negotiating the two SUA treaties. In addition, the SC's law-making Resolutions 1373 and 1540 are the sources for justifying the legality of the PSI. Though the nature of the PSI is soft law, it constitutes the normative basis for later-concluded bilateral ship-boarding treaties. Looking back, as noted in Chapter 5, the SUA Protocol also contributed to the development of PSI-related bilateral treaties. When the right moment comes, and if there is strong consensus for a change based on existing soft law instruments, a treaty is not necessary; if the willingness to change is not strong enough, a multilateral treaty or poorly ratified agreement will not necessarily strengthen it.[14]

Moreover, by utilising SC's piracy-concerned resolutions, the SC and the IMO

[9] 1760 UNTS 79.
[10] Marrakesh Agreement Establishing the World Trade Organization, 1867 UNTS 154.
[11] A Boyle and C Chinkin, *The Making of International Law* (OUP 2007) 256-259.
[12] Ibid, 257.
[13] J Harrison, *Making the Law of the Sea: A Study in the Development of International Law* (CUP 2011) 278-292.
[14] Boyle and Chinkin, *The Making of International Law* 228-229.

worked closely for tacking piracy crises in Africa. As has been observed, the SC resolutions provide the EU and other stakeholders a legitimate reason for sending naval forces to the Coast off Somalia. This also gave them the incentive for negotiating suspects-transferred agreements, which means these instruments were indirectly promoted by the SC resolutions. Likewise, as argued in Chapter 4, this development has in effect changed the meaning of UNCLOS Article 105.

Besides, the IMO was the leading organization to make those soft law instruments in regulating maritime piracy. It was also the IMO who initially proposed the two Codes of Conducts for regional cooperation in the Gulf of Aden and the Gulf of Guinea. Not only the norm of information-sharing requirements and the practice of cooperative networks can be deemed as emerging rules of customary international law, but they also can be used for interpretation purpose pursuant to VCLT 31(3)(b) and (c), i.e. subsequent practice and relevant rules of international law. What is more, the information-sharing and the capacity building measures established either by treaty or soft laws among the regions concerned are qualified as mutually assured supplementation to the UNCLOS framework for fighting maritime piracy.

It is truism that no legal or social circumstances are static and law evolves while general situations and social needs change. The pith of considering significant incidents and crises is that they always contains some unforeseeable and unpredictable scenarios, hence new legal gaps and difficulties may be revealed when new incidents and crises occur. Yet the thesis concludes that previous experiences in this field have proved that the international community was able to deal with new challenges in a coherent and subtle way.

If the way that international normative development proceeded in the twentieth century can be analogous to the style how a symphony orchestra prepare and perform its own musical composition and songs; then the nature of the twenty-first century international law-making is more like performing the jazz music. The essence is that law-makers need to constantly improvise and regularly make dialogues with their own instruments and colleagues around the world. In short, to improvise does not necessarily lead to conflicting or inharmonious outcome; improvisation can be coherent and concordant.[15] By utilising the law-making mechanisms discussed in this study, the idea of universal international law of the sea will survive for combating maritime violence, though it looks like a bit fragmented at first sight.

[15] As the ILC commented, 'ccoherence is valued positively owing to the connection it has with predictability and legal security….alongside coherence, pluralism should be understood as a constitutive value of the system.'; see M Koskenniemi, Report of the Study Group of the International Law Commission, 'Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law', 58th session, 4 April 2006, A/CN.4/L.682, para. 491.

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# Lay Summary

Violence at sea has long been a problem for the international community, although the nature and preponderance of incidents has evolved over time. This issue was dealt with in a cursory manner in the 1982 United Nations Convention on the Law of the Sea and therefore states have had to develop the legal framework through other instruments in order to address growing problems of maritime violence.

This thesis examines mechanisms of change in the development of international law concerning maritime violence. It considers how international law has responded to this threat, and analyses a variety of different law-making techniques. This study observes that major international law-making activities concerning maritime violence in the recent decades have been in response to international incidents and crises, such as the *Achille Lauro*, the September 11 attacks, and the Somali piracy crisis. Counterfactually speaking, such law-making acts would not have taken place if these crises had not happened.

The study also notes another shift of focus in making international rules aiming to tackle maritime violence away from customary international law and multilateral treaties towards an incremental dependence on United Nations Security Council resolutions, International Maritime Organization's initiatives, regional cooperative measures, and treaty interpretation techniques for filling the gaps left in the United Nations Convention on the Law of the Sea.

With this shift in law-making in mind, the thesis first explores gaps in law regarding piracy and terrorism at sea and reviews the negotiation of two major maritime terrorism treaties, i.e. the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and its 2005 Protocol. Secondly, it then inspects the United Nations Security Council's law-making activities in combating terrorism and piracy. Thirdly, it surveys the creation and evolution of the Proliferation Security Initiative and also scrutinises the United States-led bilateral ship-boarding agreements for combating transportation of weapons of mass destruction. Finally, it compares and contrasts the regional approaches across Asia, Africa and Europe in the fight against piracy and armed robbery at sea.

The thesis contends that each of the law-making technique employed in fighting maritime violence is not alternative or optional to one another, but rather used in a supplementary fashion to the overarching framework of the law of the sea.