

IMO's Contribution to International Law Regulating Maritime Security

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I INTRODUCTION

Safety of life at sea has long been considered a paramount consideration in the application of the law of the sea. Over the years a body of laws has developed concerned with regulating maritime security—indeed this field of law has developed into a major branch of international law. The main goal of this study is to examine the contribution of the International Maritime Organization toward the progressive development and codification of this branch of law. Whilst there are a number of sources of maritime security law, the primary source today is the International Maritime Organization. At present it is the major institutionalised source of maritime security rules. Indeed, it has become, in the post 9/11 New York years, the major forum for the promulgation of international maritime rules regulating maritime security.

Whilst the 1982 United Nations Convention on the Law of the Sea is concerned with maritime security law, given its date, the Convention has had problems coping with contemporary maritime security threats such as terrorism or the proliferation of weapons of mass destruction. Moreover, the Convention also fails to adequately deal with certain maritime security threats that have come to the forefront in the last 30 years, such as crimes against the safety of navigation.

It is submitted that, fortunately the 1982 Convention's inadequacy and, at times, *lacunae*, have been addressed by the work of the International Maritime Organization. This study proposes to examine the Organization's contribution to this important branch of the law of the sea.

Part II will provide an overview of the International Maritime Organization's constitution and work. In particular it will analyse the role of the Organization's governing bodies and its committees, particularly the work

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of the Legal Committee and Maritime Safety Committee. Reference will also be made to the machinery of the International Maritime Organization with respect to promulgating legal instruments. This Part will conclude with a review of the International Maritime Organization's mandate particularly in the field of maritime safety and security.

In Part III, the study will review the International Maritime Organization's efforts in the field of maritime security law. It will commence with an examination of a contemporary definition of maritime security and will then focus on the Organization's response to maritime security in the post *Achille Lauro* period, particularly the adoption of the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation and its Protocol. This Part of the study will also examine the International Maritime Organization's work in the post September 11 period, in particular its work as reflected in the Protocols of 2005 to the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Navigation and its Protocol and the introduction of the International Ship and Port Facility Security Code.

Part IV will discuss how non-International Maritime Organization treaties, in particular the 1982 United Nations Convention on the Law of the Sea, deal with maritime security issues. The position under customary international law will also be examined.

The International Maritime Organization's initiatives to counter a major maritime security threat, piracy and armed robbery against ships, will be the focus of Part V. This specific crime was chosen because it reflects a grave threat to life at sea. In this respect, this article will examine both the International Maritime Organization's legislative instruments and initiatives taken on a regional and international basis. In the case of the former, reference will be made to those efforts in Southeast Asia and off the shores of Somalia. In the case of the latter, reference will be made to the International Maritime Organization's resort to the United Nations Security Council.

Finally, Part VI will present a summary of the International Maritime Organization's main contribution to international law regulating maritime security and any conclusions derived from the analysis made in the previous parts of the study.

II INTRODUCTION TO THE IMO

The International Maritime Organization (IMO) is the principal international organization dealing with maritime affairs. Given the complexities of IMO's contribution to international law regulating maritime security, it is

¹Also referred to as the Organization.

important to get an understanding of its role within the United Nations (UN) and the maritime community, as well as its governance and overall work. Therefore, this Part of the study will provide the reader with a comprehensive overview of the workings of IMO. It will commence with a study of the historical and structural development of the Organization and will then examine IMO's major aims and objectives.

A. IMO's relationship with the United Nations

IMO is a UN specialised agency.² Specialized agencies are those organisations which work closely with the UN through special agreements, but are considered to have their own separate legal personality.³ Although such agencies provide assistance in technical fields, they work towards the same goals and objectives as the UN.⁴ Each specialised agency has a particular role. With respect to IMO, its work is aimed at improving the safety and security of international shipping as well as controlling marine pollution from ships.⁵

B. Historical Development of IMO

The oceans and seas cover over seventy percent of the earth's surface area.⁶ Since time immemorial man has used the oceans for the purpose of trading.⁷ The world economy relies on global trade achieved through trade and its transport by sea.

Shipping has now secured a place as one of the world's most international industries. It became increasingly apparent within the international community that the only way to regulate this industry was through the adoption of a set of internationally recognised rules and standards relating to maritime safety. Numerous countries proposed that a permanent international body should be set up for the purpose of promoting maritime safety more effectively and efficiently.

The fascinating history of IMO began after World War II. In 1946 the United Maritime Consultative Council was set up to tackle any difficulties

²The Charter of the United Nations, Article 59.

³Leroy Bennett, *International Organizations - Principles and Issues* (4th ed., Prentice-Hall International Editions, 1988) 134.

⁴Philippe Sands and Pierre Klein, *Bowett's Law of International Institutions* (6th ed., Sweet & Maxwell 2009) 75.

⁵<http://www.un.org/Overview/uninbrief/institutions.shtml> accessed 26 July 2012.

⁶<http://science.nationalgeographic.com/science/space/solar-system/earth/> accessed 26 July 2012.

⁷Bruce Farthing, *International Shipping: An Introduction to the Policies, Politics and Institutions of the Maritime World* (Lloyd's of London Press Ltd 1987) 1.

that may have arisen in the effort to resume regular peacetime activities,⁸ and also to encourage maritime trade as one of such activities.⁹

During this time the establishment of a permanent intergovernmental organisation in the field of shipping was becoming a clear necessity. UMCC member States recommended the United Nations Economic and Social Council¹⁰ to convene a conference, whose aim would be to set up an Intergovernmental Maritime Consultative Organization (IMCO). The recommendation also included a draft convention which would establish such an international body as a specialised agency of the UN. Governments were then invited to attend the UN Maritime Conference in Geneva in February 1948 in order to evaluate the establishment of such a body within the UN's framework. This was no easy task; in fact the Conference was concluded after seventeen days of intensive debate. Finally, 6 March 1948 marked the adoption of the Convention on the International-Governmental Maritime Consultative Organization¹¹ which formally established IMCO.¹² By the mid-1970s the Organization was no longer merely consultative¹³ and this was a main reason for the IMCO later being renamed the International Maritime Organization in May 1982.¹⁴

C. IMO's Institutional Structure

IMO is mainly made up of the Assembly and Council, but it also carries out its work through a number of committees and sub-committees. The five main technical committees are; the Legal Committee, the Maritime Safety Committee, the Marine Environment Protection Committee, the Technical Co-operation Committee and the Facilitation Committee.¹⁵ IMO is also supported by a Secretariat.

⁸Michel M'Gonigle and Mark Zacher, *Pollution, Politics, and International Law-Tankers at Sea* (University of California Press 1979) 39.

⁹Agustín Blanco-Bazán, *IMO-Historical highlights in the life of a UN Agency* (2004) 6 JOURNAL OF THE HISTORY OF INTERNATIONAL LAW 259, 261.

¹⁰The United Nation Economic and Social Council is one of the principal organs of the UN which is responsible for coordinating the work of UN special agencies. See <<http://www.un.org/en/ecosoc/>> accessed 27 July 2012.

¹¹The Convention on the International Maritime Organization, Geneva, 6 March 1948.

¹²<<http://www.imo.org/About/Pages/Default.aspx>> accessed 28 July 2012.

¹³Wilhelm Lampe, *The New International Maritime Organization and Its Place In Development Of International Maritime Law* (1983) 14 JOURNAL OF MARITIME LAW AND COMMERCE 305, 307.

¹⁴Id. 305.

¹⁵IMO Convention, Article 11.

1. *The Assembly*

The Assembly is considered to be the Organization's supreme governing body and is made up of representatives from all member States.¹⁶ The Assembly is in charge of approving the Organization's overall work programme. Considered to be the most important legislative organ,¹⁷ the Assembly is given the power to adopt resolutions, which are then passed on to the member State Governments as recommendations.¹⁸ It is also empowered to adopt amendments to conventions which are then ratified by those countries that have adhered to them, the process of which will be explained further on in this Part.¹⁹

The Assembly also elects the Council²⁰ and approves the appointment of the Secretary General of IMO.²¹ The Secretary General is considered to be the Organization's principal administrative officer and must keep IMO members abreast of all activities of the Organization. The current Secretary General is Mr. Koji Sekimizu of Japan who was appointed on January 1, 2012.²²

2. *The Council*

The Council is elected by the Assembly for a two year period and is considered to be the executive organ of IMO.²³ In between Assembly meetings,²⁴ the Council takes on the role of governing body of the Organization and performs all the former's functions.²⁵ Some of the Council's main responsibilities include coordinating the various activities of the organs of IMO, and receiving reports, proposals and recommendations of the different committees to be forwarded to the Assembly with the inclusion of its own comments.²⁶ The Council also appoints the Secretary General and enters into agreements vis-à-vis other organisations with approval from the Assembly.

It should be noted that although the Assembly is to perform the functions of the Organization, in practice it is actually the Council that takes action

¹⁶Id., Article 12.

¹⁷Samir Mankabady, *The International Maritime Organization Volume 1 International Shipping Rules* (Croom Helm 1986) 8.

¹⁸IMO Convention, Article 15.

¹⁹See Section 1.6.1.

²⁰IMO Convention, Article 15(d).

²¹Id., Article 22.

²²IMO Council, 106th Session, 27 June -1 July 2011, IMO Doc C/106/D, para.19.

²³<<http://www.imo.org/About/Pages/Structure.aspx>> accessed on 7 August 2012.

²⁴IMO Convention, Article 26.

²⁵This is subject however to the exception relating to the making of recommendations to Governments on maritime safety and pollution prevention which is reserved for the Assembly by article 15(j) of the Convention.

²⁶IMO Convention, Article 21(b).

when it comes to issues concerning the essential purposes of the Organization. These include the drafting of conventions to be recommended to Governments and convening of major conferences.

3. *The Maritime Safety Committee*

The Maritime Safety Committee (MSC) is the Organization's main technical organ²⁷ and is open to all IMO members.²⁸ This Committee deals with those technical matters affecting the safety of shipping²⁹ and includes the task of submitting recommendations and guidelines to the Assembly for future adoption.³⁰ Some of the issues tackled by the Committee include those relating to navigation, maritime safety procedures, construction and equipment of vessels, prevention of collisions at sea, salvage, search and rescue, the transport of dangerous cargoes, as well as any other issues which might affect maritime safety.³¹ The Committee is also kept updated with any recent developments in technical, and in particular, nautical matters³² which may arise. It is important to note that since the 1980s, the MSC has also addressed maritime security issues.³³

4. *The Marine Environmental Protection Committee*

The Marine Environmental Protection Committee (MEPC) which consists of all IMO member States,³⁴ co-ordinates IMO's work on the prevention and control of pollution from ships; specifically it deals with the adoption and enforcement of conventions and measures relating to such issues.³⁵ The MEPC is at the forefront of technical cooperation including the development of regional arrangements to help fight pollution, especially in cases of emergency.³⁶

Both the MSC and the MEPC have their more detailed work carried out by a range of further sub-committees,³⁷ such as the Safety of Navigation (NAV) Committee.³⁸

²⁷The Europa Directory of International Organisations (7th ed., Routledge 2005) 193.

²⁸IMO Convention, Article 27.

²⁹<<http://www.imo.org/About/Pages/Structure.aspx>> accessed 8 August 2012.

³⁰IMO Convention, Article 29.

³¹Id., Article 28(a).

³²Wilhelm Lampe (n. 13) 318.

³³Natalie Klein, *Maritime Security and the Law of the Sea* (Oxford University Press 2011) 8.

³⁴<<http://www.imo.org/about/pages/structure.aspx#4>> accessed 8 August 2012.

³⁵IMO Convention, Article 38(a)(b).

³⁶Samir Mankabady (n. 17) 11.

³⁷<<http://www.uscg.mil/imo/nav/default.asp>> accessed 8 August 2012.

³⁸Id.

5. *The Legal Committee*

The Legal Committee was first established in 1967³⁹ to deal with legal issues which arose in the aftermath of the *Torrey Canyon* disaster.⁴⁰ The Committee was originally set up on *ad hoc* basis but later developed into a permanent body of the IMO. This Committee consists of all member States⁴¹ and meets twice a year to deal with legal matters.⁴² The Committee is now authorised to tackle any legal matters which fall within the scope of the Organization's work and is therefore of crucial importance. Many of the Organization's conventions and protocols have been the result of preparation and work carried out by this Committee. In fact, the Legal Committee recently celebrated many of these achievements and activities at its 100th Session in April 2013.⁴³

6. *The Technical Co-operation Committee*

The Technical Co-operation Committee was first set up to address the need expressed by developing countries for better technical assistance in order to improve their growing shipping industries.⁴⁴ The Committee also consists of all member States.⁴⁵ It tackles any matters concerned with the implementation of technical cooperation projects particularly where IMO acts as a co-operating agency.⁴⁶

7. *The Facilitation Committee*

The Facilitation Committee is an IMO body entrusted with the task of facilitating the entry and exit of ships from ports. This Committee is also made up of all IMO member States.⁴⁷ It works at reducing any unnecessary formalities related to international shipping such as those connected with the arrival and departure of ships, persons and cargo.⁴⁸ However, in more recent

³⁹Michel M'Gonigle and Mark Zacher (n. 8) 47.

⁴⁰On 18 March 1967, the Liberian oil tanker loaded with 120,000 tons of crude oil ran aground between Cornish mainland and the Scilly Isles. This was the largest recorded oil pollution disaster up to that time. See Daniel Vallero and Trevor Letcher, *Unravelling Environmental Disasters* (Elsevier 2012) 140.

⁴¹IMO Convention, Article 32.

⁴²<<http://www.imo.org/ourwork/legal/Pages/Default.aspx>> accessed 9 August 2012.

⁴³<<http://www.imo.org/MediaCentre/HotTopics/LEG100/Pages/default.aspx>> accessed 20 April 2013.

⁴⁴Michel M'Gonigle and Mark Zacher (n. 8) 49.

⁴⁵IMO Convention, Article 42.

⁴⁶*Id.*, Article 43.

⁴⁷<<http://www.imo.org/about/pages/structure.aspx#4>> accessed 8 August 2012.

⁴⁸Samir Mankabady (n. 17) 42.

years the Assembly has encouraged the Facilitation Committee to work on providing a balance between international maritime trade and maritime security concerns.⁴⁹

8. *The Secretariat*

The Secretariat is located at IMO headquarters in London. It is headed by the Secretary General and around 300 international personnel who are recruited on a wide geographical basis.⁵⁰ The Secretariat is entrusted with maintaining good relations with IMO members, as well as encouraging the ratification and implementation of different IMO rules. It is responsible for maintaining records, circulars, minutes as well as any other information which is required to ensure the smooth running of the Organization.⁵¹

D. Instruments adopted by IMO: Developing International Rules and Standards for Maritime Affairs

Since establishment of the IMO, one of its most important tasks has been to develop international rules and standards through the adoption of legal instruments. In the mid twentieth century the existing practice was that shipping nations would regulate maritime affairs through the implementation of their own maritime laws.⁵² Despite the fact that there were a number of already existing treaties, these did not seem to be accepted by the majority of maritime States.⁵³ In the absence of any internationally accepted rules, problems soon arose due to the differing and often contradictory national laws. This was particularly evident in the field of safety of shipping, where conflicting safety rules may lead to maritime disasters. Those countries which insisted on stricter safety measures were at a commercial disadvantage compared to those countries which did not enforce such high standards.⁵⁴

Enforcing universally accepted standards would ensure an equal degree of safety to ships of all States. IMO was founded to provide a forum where

⁴⁹<<http://www.imo.org/About/Pages/Structure.aspx>> accessed 8 August 2012.

⁵⁰IMO Convention, Article 47.

⁵¹Id., Article 48.

⁵²<<http://www.imo.org/knowledgecentre/referencesandarchives/pages/theoriginsofimo.aspx>> accessed 9 August 2012.

⁵³Jens-Uwe Schröder and Anish Arvind Hebbar, *International Standard Setting through the IMO*, World Maritime University, Malmö, Sweden Baltic Master Issue Brief 9 available at <http://www.balticmaster.org/media/files/general_files_693.pdf> accessed 10 August 2012.

⁵⁴<<http://www.imo.org/knowledgecentre/referencesandarchives/pages/theoriginsofimo.aspx>> accessed 10 August 2012.

Governments could discuss and debate maritime issues and establish common rules suitable for universal application. In order to enforce such rules, IMO produces several international instruments which encompass nearly every branch of shipping. The instruments adopted by IMO may be classified into treaty instruments and non-treaty instruments.⁵⁵ Treaty instruments are legally binding once IMO member States agree to be bound by them. These instruments include conventions and their related protocols. Non-treaty instruments take the form of recommendations, codes and guidelines. Unlike treaty instruments, in principle the latter instruments are not legally binding on Governments.⁵⁶ Therefore, States may choose to apply or modify such instruments and may even disregard them entirely. However it must be noted that there are certain IMO codes that are still considered mandatory by the Organization.⁵⁷

1. The Formulation of IMO Treaty Instruments

IMO is most closely involved in the process of adoption of conventions. This process is initiated by a proposal made in one of the various IMO committees and sub-committees. This proposal may be a response to a major international incident, as seen in the case of the *Torrey Canyon* disaster, or a reaction to a new development in the field of maritime law.

The proposal is then discussed and when agreement is reached, it is submitted to the Council which may refer it to the Assembly for its approval to proceed. The Committee then considers the issue at hand in further detail and prepares a draft instrument. Once the draft is completed, it is submitted to the Council and Assembly with a recommendation to convene a diplomatic conference in order to consider its formal adoption.⁵⁸ Such conferences are open not only to IMO member States, but also to all States which are members of the United Nations or its specialised agencies. It is often the case that non-governmental bodies and other consultative organisations also have an interest in the future instrument and are therefore invited to attend the conference as observers.⁵⁹

At the conference, the draft convention, along with any comments on it made by the various Governments and organisations, are discussed. Thereafter, the conference decides whether to approve or refuse the convention's adoption. If there is no consensus among the States then adoption goes

⁵⁵Jens-Uwe Schröder and Anish Arvind Hebbar (n. 53) 10.

⁵⁶These are sometimes referred to as soft law. See Tadenz Grmchalla-Wesierki, *A Framework for Understanding "Soft Law"* (1984) 30 MCGILL LAW JOURNAL 38.

⁵⁷See The Code for Safety for Special Purpose Ships, 2008 Edition.

⁵⁸Samir Mankabady (n. 17) 14.

⁵⁹Jens-Uwe Schröder and Anish Arvind Hebbar (n. 53) 11.

through only where there is a two third majority of those present and voting.⁶⁰ However, it should be noted that most decisions taken at IMO take place on the basis of consensus.

Once adopted, the convention does not immediately come into force—it must first be submitted to individual Governments for ratification.⁶¹ International law provides that through ratification Governments agree to be bound by the convention and to give it the force of law.⁶²

Every convention will provide a number of conditions which have to be made before it enters into force; for example it may need to be ratified by a certain number of countries.⁶³ Once these conditions have been fulfilled the convention will enter into force for the States which have accepted it, but this is usually done after a grace period in order to prepare measures for its implementation into domestic law.⁶⁴

2. *Enforcing IMO Instruments*

It is important to note that IMO instruments cannot be enforced by IMO as IMO possesses no enforcement powers.⁶⁵ The only exception to this is the Convention on Standards of Training, Certification and Watch-keeping for Seafarers.⁶⁶ Therefore, it is the duty of member State Governments to enforce IMO rules by incorporating them into domestic law. For this reason, the International Maritime Law Institute (IMLI) in Malta,⁶⁷ and the World Maritime University (WMU) in Sweden were set up. Such institutions were primarily established in order to train State legal advisors on how to properly implement IMO instruments into their domestic maritime law.⁶⁸

⁶⁰Id.

⁶¹<<http://www.imo.org/About/Conventions/Pages/Home.aspx>> accessed 10 August 2012.

⁶²James Crawford (ed), *Brownlie's Principles of Public International Law* (8th ed., Oxford University Press 2012) 373.

⁶³As was seen in the case of the 1969 International Convention on Tonnage Measurement of Ships which required acceptance by at least twenty five States whose combined merchant fleets represent not less than 65 percent of world tonnage. See the 1969 International Convention on Tonnage Measurements of Ships, Article 17.

⁶⁴Jens-Uwe Schröder and Anish Arvind Hebbar (n. 53) 11.

⁶⁵<<http://www.imo.org/About/Conventions/Pages/Home.aspx>> accessed 10 August 2012.

⁶⁶Alan Khee-Jin Tan, *Vessel Source Marine Pollution-The Law and Politics of International Regulation* (Cambridge 2006) 368.

⁶⁷The International Maritime Law Institute was established in Malta in 1988 under the auspices of IMO, with the aim of training specialists in international maritime law. The Institute provides advanced training in maritime law, administration, education and shipping management. See <<http://www.imli.org/>> accessed 12 August 2012.

⁶⁸Efsthimios Mitropoulos, *IMO 60 Years in the Service of Shipping* in Norman Martínez Gutiérrez (ed), *SERVING THE RULE OF INTERNATIONAL MARITIME LAW – ESSAYS IN HONOUR OF PROFESSOR DAVID JOSEPH ATTARD* (Routledge 2010) 20.

E. IMO's Mandate

IMO's mandate focuses mainly on the promotion of safe, secure, environmentally sound, efficient and sustainable shipping.⁶⁹ This is reflected in article 1(a) of the IMO Convention which sums up the objectives of the Organization.⁷⁰ Even though historically, IMO's mandate was initially limited mainly to matters concerning safety issues, it has expanded over the years to include other important issues, such as maritime security and technical cooperation.⁷¹

1. IMO's role in Maritime Safety

The first diplomatic conference organised by the newly formed IMO dealt with maritime safety and led to the adoption of a new SOLAS Convention, adopted in 1960.⁷² This was then replaced by a new version in 1974, which incorporated amendments to the previous Convention. A significant feature of the 1974 SOLAS Convention⁷³ was the introduction of a new and improved "tacit acceptance procedure" for amendments.⁷⁴ This ensured that unless objected to by a specific number of States, the required amendments would enter into force on a pre-determined date.⁷⁵ Therefore, this procedure facilitated the entry into force of legal instruments, as after the passage of some time it was presumed that involved States agreed with the provisions. The procedure allowed for changes to be made within a shorter period of time, ensuring a smooth process of updating the Convention when needed.

Another important maritime safety convention adopted by the IMO was the International Convention on Load Lines⁷⁶ which entered into force on 21 July 1968. The aim of this Convention was to provide rules concerning the limits to which ships on international voyages may be loaded.⁷⁷ The

⁶⁹IMO Resolution A.1011 (26) (26 November 2009).

⁷⁰To provide machinery for cooperation among Governments in the field of governmental regulation and practices relating to technical matters of all kinds affecting shipping engaged in international trade; to encourage and facilitate the general adoption of the highest practicable standards in matters concerning the maritime safety, efficiency of navigation and prevention and control of marine pollution from ships; and to deal with administrative and legal matters related to the purposes set out in this Article.

⁷¹Efthimios Mitropoulos (n 68) 8.

⁷²The International Convention for Safety of Life at Sea, London, 17 June 1960.

⁷³The International Convention for Safety of Life at Sea, London, 1 November 1974.

⁷⁴<[http://www.imo.org/About/Conventions/ListOfConventions/Pages/International-Convention-for-the-Safety-of-Life-at-Sea-\(SOLAS\),-1974.aspx](http://www.imo.org/About/Conventions/ListOfConventions/Pages/International-Convention-for-the-Safety-of-Life-at-Sea-(SOLAS),-1974.aspx)> accessed 9 August 2012.

⁷⁵SOLAS 74, Article VIII.

⁷⁶The International Convention on Load Lines, London, 5 April 1966.

⁷⁷<<http://www.imo.org/About/Conventions/ListOfConventions/Pages/Default.aspx>> accessed 9 August 2012.

Convention included provisions to determine the freeboard of ships and to ensure sufficient reserve buoyancy.⁷⁸

The Organization also focused its attention on matters such as maritime traffic and the carriage of dangerous goods. The year 1972 marked the adoption of two important IMO conventions in the field of maritime safety: The first was the Convention on International Regulations for Preventing Collisions at Sea⁷⁹ (COLREGs) which aimed at improving navigational safety and also concerned the organisation of traffic separation schemes for vessels; the second was the Convention for Safe Containers⁸⁰ (CSC) which provided international regulations to ensure safety of carriage containers by implementing procedures to test their strength requirements.⁸¹

Ship distress and safety communication was also on IMO's agenda. In 1999 IMO set up the Global Maritime Distress and Safety System (GMDSS)⁸² which guarantees to provide any ship in distress in any part of the world with immediate assistance. The establishment of the GMDSS was also linked to the adoption of the International Convention on Maritime Search and Rescue⁸³ (SAR) which was aimed at improving search and rescue operations at sea.

IMO has also kept the human element at the heart of its work when promoting safe ship operations. In 1978, IMO introduced the first ever convention providing internationally recognised requirements for certification and watch keeping for seafarers. The Convention on Standards of Training, Certification and Watch-keeping for Seafarers⁸⁴ (STCW) came into force in 1984. The Convention was revised in 1995 and introduced an innovative feature which gave IMO the power to inspect the administrative, training and certification procedures of the parties to the Convention.⁸⁵ The Convention underwent another major revision in 2010 to be able to meet the demands of the ever changing shipping industry, (commonly known as the "Manila Amendments").⁸⁶

⁷⁸Id.

⁷⁹The Convention on International Regulations for Preventing Collisions at Sea, London, 20 October 1972.

⁸⁰The Convention for Safe Containers, London, 2 December 1972.

⁸¹<[http://www.imo.org/about/conventions/listofconventions/pages/international-convention-for-safe-containers-\(csc\).aspx](http://www.imo.org/about/conventions/listofconventions/pages/international-convention-for-safe-containers-(csc).aspx)> accessed 9 August 2012.

⁸²SOLAS 74, Chapter IV incorporates the GMDSS.

⁸³The International Convention on Maritime Search and Rescue, Hamburg, 27 April 1979.

⁸⁴The Convention on Standards of Training, Certification and Watch-keeping for Seafarers, London, 7 July 1978.

⁸⁵Id., Chapter 1 Regulation 1/7.

⁸⁶<[http://www.imo.org/About/Conventions/ListOfConventions/Pages/International-Convention-on-Standards-of-Training,-Certification-and-Watchkeeping-for-Seafarers-\(STCW\).aspx](http://www.imo.org/About/Conventions/ListOfConventions/Pages/International-Convention-on-Standards-of-Training,-Certification-and-Watchkeeping-for-Seafarers-(STCW).aspx)> accessed 12 August 2012.

2. IMO's role in the Prevention of Maritime Pollution

The growth of the international oil trade industry also saw an increase in tonnage as well the number of oil tankers on the seas. Unsurprisingly, this led to a rise in marine pollution, particularly oil pollution, which was caused not only by routine shipping operations but also cleaning of cargo tanks.⁸⁷ In particular, the effects of the *Torrey Canyon* disaster alerted the international community to the real dangers that oil pollution poses to our marine environment.

IMO's response to this incident was immediate and resulted in the adoption of a number of conventions and instruments dealing with pollution matters, as well as further amendments to the 1954 International Convention for the Prevention of Pollution by Sea (OILPOL),⁸⁸ adopted in 1969 in order to better address pollution issues. That same year also saw the adoption of the International Convention relating to the Intervention on the High Seas in the Cases of Oil Pollution Casualties.⁸⁹ This Convention provided coastal States the right to take any necessary measures on the high seas to avoid, mitigate or eradicate completely any danger to its coastal interests from oil pollution or a threat thereof following a maritime casualty.⁹⁰

However it was becoming increasingly clear that operational pollution from ships was proving to be a bigger threat than accidental pollution.⁹¹ Consequently it was felt that a new treaty was needed to control such matters. In 1973, IMO convened a major conference to discuss various problems relating to maritime pollution from vessels; this led to the adoption of the International Convention for the Prevention of Pollution from Ships⁹² (MARPOL). This Convention and the Protocol is divided into six annexes dealing not only with oil pollution,⁹³ but also pollution by noxious liquid substances in bulk,⁹⁴ harmful substances carried in packaged form,⁹⁵ sewage,⁹⁶ garbage,⁹⁷ and air pollution.⁹⁸

⁸⁷Efthimios Mitropoulos (n. 68) 13.

⁸⁸The International Convention for the Prevention of Pollution by Sea, London, 1954.

⁸⁹The International Convention relating to the Intervention on the High Seas in the Cases of Oil Pollution Casualties, London, 29 November 1969.

⁹⁰<<http://www.imo.org/about/conventions/listofconventions/pages/international-convention-relating-to-intervention-on-the-high-seas-in-cases-of-oil-pollution-casualties.aspx>> accessed 13 August 2012.

⁹¹Efthimios Mitropoulos (n. 68) 14.

⁹²The International Convention for the Prevention of Pollution from Ships, London, 17 February 1978.

⁹³MARPOL, Annex I.

⁹⁴Id., Annex II.

⁹⁵Id., Annex III.

⁹⁶Id., Annex IV.

⁹⁷Id., Annex V.

⁹⁸Id., Annex VI.

Another anti-pollution IMO initiative was the introduction of a system to respond to catastrophic oil spills. This was provided for in the International Convention on Oil Pollution Preparedness Response and Cooperation⁹⁹ (OPRC) which called for cooperation and mutual assistance from different States in an effort to respond to major oil pollution disasters.¹⁰⁰

IMO also works towards the protection of marine life from the harmful effects of pollution. An example of one of these efforts is the International Convention on the Control of Harmful Anti-fouling Systems¹⁰¹ (AFS) on Ships introduced to protect marine animals from the dangerous effects of metallic compounds in paints used to coat the bottom of ships. Furthermore IMO also took into consideration the ecological harm being caused by introduction of invasive marine species in a non-native environment through discharge of ballast water from ships. In this respect IMO adopted the International Convention for the Control and Management of Ships' Ballast Water and Sediments¹⁰² (BWM), aimed at preventing and eliminating the transfer of harmful aquatic organisms and other pathogens.¹⁰³

The *Torrey Canyon* incident also promoted the Organization's work to ensure effective liability and compensation regimes following such pollution accidents. The International Convention on Civil Liability for Oil Pollution Damage¹⁰⁴ (CLC), adopted in 1969, was aimed at providing sufficient compensation to victims of oil spills at sea. It replaced the system of fault-based liability by a non-fault system and ensured that the ship owner was covered by compulsory insurance. Subsequent to this initiative, further compensation was granted to victims through the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage¹⁰⁵ (FUND). The idea behind this Convention was that if any acci-

⁹⁹The International Convention on Oil Pollution Preparedness Response and Cooperation, London, 20 November 1990.

¹⁰⁰Ten years later after the adoption of the OPRC, IMO also adopted the Protocol on Preparedness, Response and Cooperation to Pollution Incidents by Hazardous and Noxious Substances. This protocol reflects the same principle of mutual assistance as found in the Convention but rather than focusing on oil pollution also applies to other hazardous substances. See <[http://www.imo.org/about/conventions/listofconventions/pages/protocol-on-preparedness,-response-and-cooperation-to-pollution-incidents-by-hazardous-and-noxious-substances-\(oprc-hns-pr.aspx](http://www.imo.org/about/conventions/listofconventions/pages/protocol-on-preparedness,-response-and-cooperation-to-pollution-incidents-by-hazardous-and-noxious-substances-(oprc-hns-pr.aspx)> accessed 14 August 2012.

¹⁰¹The International Convention on the Control of Harmful Anti-fouling Systems, London, 5 October 2001.

¹⁰²The International Convention for the Control and Management of Ships' Ballast Water and Sediments, London, 13 February 2004.

¹⁰³<<http://www.imo.org/OurWork/Environment/BallastWaterManagement/Pages/BWMConvention.aspx>> accessed 13 August 2012.

¹⁰⁴The International Convention on Civil Liability for Oil Pollution Damage, London, 29 November 1969.

¹⁰⁵The International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, London, 18 December 1971.

dent at sea resulting in oil pollution damage exceeds the compensation available under the CLC, the FUND will be available to pay an additional amount while the burden of compensation is shared out more evenly between ship owner and cargo interests.¹⁰⁶

More recently, IMO has also turned its attention to other issues including the removal of ship wrecks and the environmental benefits of ship recycling. In this regard 2007 and 2009 saw the adoption of the Nairobi International Convention on the Removal of Wrecks,¹⁰⁷ and the Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships,¹⁰⁸ respectively.

3. *IMO's Role in Maritime Security*

Despite there being no mention of maritime security as a function in IMO's formal mandate, IMO has always had a responsibility to ensure that transport and travel by sea is as safe as possible.¹⁰⁹ In light of the recent terrorist activities around the world, IMO has had to take action to combat unlawful acts which threaten the safety of international shipping. The Organization now describes maritime security as an intricate part of its responsibilities.¹¹⁰

In light of the above it is clear that IMO has played an important role in building a multi-faceted regime to ensure the safety and security of shipping, and also the prevention of marine pollution from ships.¹¹¹ In particular over the years IMO has worked towards providing a source of international rules regulating maritime security. The next Part of the study will be a review of IMO's efforts in this field. Specific focus will be given to various IMO initiatives such as mandatory measures introduced since 2002, through a number of amendments to the SOLAS Convention including the International Ship and Port Facility Security Code.¹¹²

¹⁰⁶Efthimios Mitropoulos (n. 68) 15.

¹⁰⁷The Nairobi International Convention on the Removal of Wrecks, Nairobi, 18 May 2007.

¹⁰⁸The Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships, Hong Kong, 19 May 2005.

¹⁰⁹Rosalie Balkin, *The International Maritime Organization and Maritime Security* (2006) 30 *TULANE MARITIME LAW JOURNAL* 1, 2.

¹¹⁰<<http://www.imo.org/ourwork/security/Pages/MaritimeSecurity.aspx>> accessed 14 August 2012.

¹¹¹Rosalie Balkin (n. 109) 34.

¹¹²See Section III F.

III

A REVIEW OF IMO'S EFFORTS IN THE FIELD OF MARITIME SECURITY

The risks posed by maritime threats have existed ever since the emergence of commerce at sea. Although some maritime security concerns such as piracy are as old as seafaring itself, they still remain a serious risk for contemporary shipping. However it is only in the last three decades, especially with the advent of international terrorism, that maritime security has become a major international concern. The development of new technologies has made it much easier for relatively small forces to completely disrupt the safety of navigation at sea. Balkin notes that in recent years IMO has placed a great deal of emphasis on maritime security, as reflected in the Organization's mission statement "to promote safe, secure environmentally sound, efficient and sustainable shipping through co-operation."¹¹³ This Part will review the major efforts put forward by IMO to fight security threats at sea. It will begin with an analysis of the term "maritime security," and will continue to examine the specific aims behind maritime security regimes. The rest of Part III will be devoted to the overall development of maritime security, in particular the international legal instruments promulgated by IMO to combat maritime security risks such as crimes against the safety of navigation.¹¹⁴

A. *What is Maritime Security?*

It must be observed that a challenge exists in defining the term "maritime security." This is due to the diverse nature of the field which encompasses many different subject areas.

The term "maritime security" is now generally accepted and widely used by the international community. Despite this fact, there still exists no universal legal definition for the term under international law. In fact, IMO also fails to provide its own specific definition of maritime security. As was explained in Part II, any issues relating to this field have been dealt with under the auspices of the MSC.¹¹⁵

However within the IMO context a distinction is made between the terms "maritime security" and "maritime safety." These IMO responsibilities, i.e.

¹¹³Rosalie Balkin (n. 109) 2.

¹¹⁴These included unlawful acts which threaten the safety of ships and security of their passengers and crew such as hijacking, blowing up vessels or deliberately running them aground and most forms of maritime terrorism.

¹¹⁵Natalie Klein (n. 33) 8.

maritime security and maritime safety, are considered to be complimentary regimes essentially serving the same aim which is to ensure the protection of ships, passengers, crew, cargo and the marine environment. However despite sharing a common goal, the two regimes have distinguishing features; whereas maritime safety is primarily concerned with providing a defence against accidents at sea, maritime security deals with providing a defence against wilful and unlawful acts against ships.¹¹⁶ Therefore, the distinction between the two terms lies in the wilfulness of the act performed.¹¹⁷

Klein observes that the distinction between the two terms has often been blurred. This is especially true considering the fact that the same word has often used to describe both “safety” and “security” in other languages, notably French and Spanish.¹¹⁸

A well-established definition of maritime security is provided by Hawkes who describes maritime security as:

those measures employed by owners, operators, and administrators of vessels, port facilities, offshore installations, and other marine organisations or establishments to protect against threats, seizure, sabotage, piracy, pilferage, annoyance or surprise.¹¹⁹

From an analysis of this definition, one may conclude that implementing a successful maritime security regime requires a combined effort of action from different international, public and private entities, all of whom would benefit from improving international maritime security.

In the absence of an internationally-recognised definition, maritime security has been defined differently according to the context and the way it is being used. Klein confirms this fact as she suggests that the term is hardly ever defined in a categorical manner, but tends to have a more “context-specific meaning.”¹²⁰ For example, from a military point of view, maritime security is concerned with protecting a State’s freedom from any threats to national interest.¹²¹ On the other hand, for shipping operators, maritime security is more focused on the safety and security of maritime transport, where operators wish to ensure a safe journey for cargo and crew free from any kind of criminal activity.¹²²

¹¹⁶Philippe Boisson, *Safety at Sea: Policies, Regulations & International law* (Bureau Veritas 1999) 154.

¹¹⁷Patricia Mallia, *Migrant Smuggling by Sea: Combating a Current Threat to Maritime Security through the Creating of a Co-operative Framework* (Martinus Nijhoff 2010) 1.

¹¹⁸Natalie Klein (n. 33) 8.

¹¹⁹Kenneth Hawkes, *Maritime Security* (Cornell Maritime Press 1989) 9.

¹²⁰Natalie Klein (n. 33) 8.

¹²¹Id.

¹²²Natalie Klein, Joanna Mossop and Donald Rothwell (eds), *Maritime Security International Law and Policy Perspectives from Australia and New Zealand* (Routledge 2010) 5.

In light of the above, it may be said that an act against maritime security is one which uses the sea or ships in a manner that is unlawful, with the result that it threatens the security of a coastal state or vessels, persons, property or the marine environment. However as is seen in this study threats against maritime security are ever evolving, and consequently a precise definition would have to take into account the changing circumstances of international life. In this regard therefore, it is extremely useful to pay particular attention to the analysis of the UN Secretary General in his 2008 Report on the Oceans and the Law of the Sea. In this Report Mr. Ban Ki-Moon also confirms the “context-specific meaning” of the term “maritime security”:

There is no universally accepted definition of the term “maritime security.” Much like the concept of “national security,” it may differ in meaning, depending on the context and the users.¹²³

However in the same Report, he recognises the following seven important threats to maritime security;¹²⁴

1. piracy and armed robbery against ships;¹²⁵
2. terrorist acts involving shipping, offshore installations and other maritime interests;¹²⁶
3. illicit trafficking in arms and weapons of mass destruction;¹²⁷
4. illicit traffic in narcotic drugs and psychotropic substances;¹²⁸
5. smuggling and trafficking of persons by sea;¹²⁹
6. illegal, unreported and unregulated fishing;¹³⁰ and
7. intentional and unlawful damage to the marine environment.¹³¹

¹²³Secretary-General of the United Nations, *Report of the Secretary General on Oceans and the Law of the Sea*, 10 March 2008, UN Doc. A/63/63, para.39.

¹²⁴Some of these threats have been replicated in later reports such as piracy and terrorist acts involving shipping, offshore installations and other maritime interests. See Secretary-General of the United Nations, *Report of the Secretary General on Oceans and the Law of the Sea*, 29 March 2010, UN Doc. A/65/69, para.243-257, Secretary-General of the United Nations, *Report of the Secretary General on Oceans and the Law of the Sea*, 29 August 2011, UN Doc. A/66/70 para.69-91 and Secretary-General of the United Nations, *Report of the Secretary General on Oceans and the Law of the Sea*, 31 August 2012, UN Doc. A/67/79 para.35-40.

¹²⁵Secretary-General of the United Nations, *Report of the Secretary General on Oceans and the Law of the Sea*, 10 March 2008, UN Doc. A/63/63, para.54.

¹²⁶*Id.*, para.63.

¹²⁷*Id.*, para.72.

¹²⁸*Id.*, para.82.

¹²⁹*Id.*, para.89.

¹³⁰*Id.*, para.98.

¹³¹*Id.*, para.107.

One may note that the list of threats provided above in the 2008 Report embraces various concerns presented by different maritime stake holders including shipping operators, law enforcement officials and even maritime security analysts.¹³²

This study will focus on the traditional view of maritime security and therefore will not examine all the maritime threats identified by the UN Secretary General in his 2008 Report. The main threats that will be covered include crimes against the safety of navigation and piracy,¹³³ and armed robbery against ships.¹³⁴

B. Early Measures Taken by IMO to Enhance Maritime Security

As discussed in Part II, IMO has been successful in responding to major maritime disasters as well as preventing the occurrence of further maritime related incidents. It has done so through the implementation of proactive safety measures as well as the adoption of internationally recognised conventions and regulations which deal with specific maritime concerns. Undoubtedly, since the shocking events of 11 September 2001, maritime security has gained considerable interest as a global priority. However even prior to such events, the topic was already an IMO concern and in the 1980's the MSC's work grew considerably as it began tackling maritime security problems.¹³⁵ As previously discussed, the term "maritime security" ensures the safety of trade and the protection ships, persons and cargo against unlawful acts such as maritime fraud and barratry.¹³⁶ One of IMO's earliest efforts in the field of maritime security was a response to fighting such problems.

In 1980, the IMO Council set up a Working Group to study various cases of maritime fraud and also to recommend to the Council measures which would help prevent such cases.¹³⁷ A year later, the IMO Assembly adopted Resolution 504 (XII) entitled "Barratry, Unlawful Seizure of Ships and their Cargoes and Other Forms of Maritime Fraud."¹³⁸ This Resolution called for Governments to review and improve their national legislation to combat further acts of barratry and maritime fraud. In this respect, IMO invited Governments to concentrate in particular on the efficiency and proper regu-

¹³²Natalie Klein (n. 33) 10.

¹³³These threats will be covered in this Part of the study.

¹³⁴See Part IV.

¹³⁵Natalie Klein, Joanna Mossop and Donald Rothwell (n. 122) 6.

¹³⁶Barratry can be described as mutiny on board a ship or a situation where the ship is being taken over by the captain or crew.

¹³⁷Samir Mankabady, *The International Maritime Organisation Volume 2: Accidents at Sea* (Croom Helm 1987) 45.

¹³⁸IMO Resolution.A.504 (XII) (20 November 1981).

lation of shipping registers, and vessel documentary requirements as well as imposing legal penalties for any type of fraudulent acts.¹³⁹

Resolution 504 (XII) also called for cooperation with the International Chamber of Commerce¹⁴⁰ which set up the International Maritime Bureau (IMB).¹⁴¹ In the mid-1980's, the IMB noted an increase in problems relating to insurance and documentary fraud concerning ships. In particular, it found that it was often the case that a ship's true and original identity was being concealed by a simple name change and false documentation.¹⁴² To avoid this particular kind of fraud, IMO set up a voluntary ship identification number scheme by way of Resolution A.600 (15) entitled "IMO Ship Identification Number Scheme."¹⁴³ This scheme assigns a permanent number for identification purposes to every ship which is found on the ship's certificates. This number would remain attached to the ship and not be altered regardless of whether there was a change in flag or the ship's name,¹⁴⁴ thereby providing a more transparent documentation system. When the scheme later became mandatory,¹⁴⁵ a specific criterion for passenger ships of 100 gross tons and more, and cargo ships of 300 gross tons and more, was laid down. Complimenting this initiative, IMO also introduced the adoption of an IMO Unique Company and Registered Owner Identification Number Scheme.¹⁴⁶

C. Major IMO Achievements in the Development of Maritime Security Law

In the late 1980's, the maritime community faced a number of new threats to the security of ships, passengers, cargo and crew. Maritime terrorism in particular was emerging as a powerful threat to the safety of navigation. IMO needed to address such problems and subsequently initiated a number

¹³⁹Id. 7.

¹⁴⁰The International Chamber of Commerce is the largest global business organisation. It is made up of thousands of member companies from many different countries working in every virtually every sector of private enterprise. See <<http://www.iccwbo.org/>> accessed 5 September 2012.

¹⁴¹The IMB is non-profit organisation which was established specifically to fight against all types of maritime crime. See <<http://www.icc-ccs.org/icc/imb>> accessed 5 September 2012.

¹⁴²Rosalie Balkin (n. 109) 4.

¹⁴³IMO Resolution A.600 (15) (19 November 1987).

¹⁴⁴<<http://www.imo.org/ourwork/safety/implementation/pages/imo-identification-number-scheme.aspx>> accessed 23 September 2012.

¹⁴⁵SOLAS Regulation XI/3.

¹⁴⁶Similar to the IMO Ship identification scheme, the IMO unique company and registered owner identification number scheme allocates a permanent number for identification purposes to new or existing companies and registered owners, managing ships of 100 gross tonnage and upwards under their flag, involved in international voyages <[http://www.navcen.uscg.gov/pdf/marcomms/imo/msc_resolutions/MS160\(78\).pdf](http://www.navcen.uscg.gov/pdf/marcomms/imo/msc_resolutions/MS160(78).pdf)> accessed 2 October 2012.

of international legal responses to fight terrorism at sea. These responses are now considered to be amongst the most successful initiatives in the field of maritime security law.

The first initiative was the development of the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation,¹⁴⁷ adopted as a result of the tragic events that took place aboard the *Achille Lauro*. The second initiative was a comprehensive set of maritime measures adopted by IMO in 2002 in response to the horrific September 11 terrorist attacks in the United States. These included a review of existing international maritime security instruments such as the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, and the development of the International Ship and Port Facility Security Code designed to better protect ports from terrorist activities.¹⁴⁸

1. The Achille Lauro Hijacking

One of the earliest terrorist acts recorded in modern maritime history was the hijacking of the *Achille Lauro*.¹⁴⁹ On 3 October 1985, over seven hundred passengers of various nationalities boarded the Italian flag cruise ship in Genoa for an eleven day cruise.¹⁵⁰ During its time at sea the ship was scheduled to stop at various ports including Naples, Alexandria, Port Said and Israel before making its way back to Genoa.¹⁵¹ On 7 October, the ship was sailing from Alexandria to Port Said when it was seized by hijackers¹⁵² from the Palestine Liberation Front (PLF).¹⁵³ Posing as tourist passengers they boarded the ship in Genoa and succeeded in smuggling on board explosives and a number of automatic weapons. After taking control of the vessel, the hijackers then segregated the American and Jewish passengers holding them all hostage.¹⁵⁴

¹⁴⁷The Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Rome, 10 March 1988.

¹⁴⁸<<http://www.imo.org/ourwork/security/instruments/pages/ispscode.aspx>> accessed 4 October 2012.

¹⁴⁹Rosalie Balkin (n. 109) 5.

¹⁵⁰Helmut Tuerk, *Combating Terrorism at Sea - the Suppression of Unlawful Acts Against the Safety of Maritime Navigation* (2008) 15 UNIV. OF MIAMI INTN'L AND COMP. LAW REVIEW 337, 338.

¹⁵¹Michael Bohn, *The Achille Lauro Hijacking: Lessons in the Politics and Prejudice of Terrorism* (Brassey's Inc 2004) 2.

¹⁵²*Id.*

¹⁵³A terrorist group formed in 1977 as a result of a split from the Popular Front for the Liberation of Palestine. The PLF carried out a number of terrorist attacks on Israel across the Lebanese border. See <<http://www.globalsecurity.org/military/world/para/plf.htm>> accessed 5 October 2012.

¹⁵⁴Maximo Quibranza Mejia Jr, *Defining Maritime Violence and Maritime Security*, MARITIME VIOLENCE AND OTHER SECURITY ISSUES AT SEA (World Maritime University Publications 2002) 124.

In return for the safe release of these passengers, the hijackers demanded the release by Israel of 50 Palestinian prisoners. After their demands had not been met and they were refused permission to dock at Tartus, the hijackers shot and threw over board a Jewish passenger who was also a U.S. citizen; a wheelchair-bound man named Mr. Leon Klinghoffer.¹⁵⁵ After this incident, the ship made its way back to Port Said. It took two days of intense negotiation before the hijackers finally surrendered to Egyptian authorities. They agreed to abandon the liner in exchange for safe conduct and were flown towards Tunisia aboard an Egyptian commercial airline.¹⁵⁶ The plane was however intercepted by U.S. Navy F-14 fighters and was forced to land in Sicily, where the hijackers were taken into custody and prosecuted by the Italian authorities.¹⁵⁷

2. *Lacunae in International Law with Regards to Piracy*

The hijacking of the *Achille Lauro* sparked major debate over international law provisions governing piracy. The traditional definition of piracy is found in article 101 of the 1982 United Nations Convention on the Law of the Sea (UNCLOS)¹⁵⁸ which states that 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).¹⁵⁹

¹⁵⁵<http://www.mastermariners.org.au/stories-from-the-past/1-stories-from-the-past/25-the-achille-lauro-story-> accessed 5 October 2012.

¹⁵⁶*Id.*

¹⁵⁷Tracey Madden, *An Analysis of the United States' Response to the Achille Lauro Hijacking* (1988) 8 BOSTON COLL. THIRD WORLD LAW JOURNAL, 137, 138.

¹⁵⁸The United Nations Convention on the Law of the Sea, Montego Bay, 10 December 1982.

¹⁵⁹*Id.*, Article 101.

Article 101 does not provide specific guidance as to what types of “illegal acts of violence or detention” constitute piracy. Tanaka argues that one murder alone could therefore be regarded as an act of piracy.¹⁶⁰ However, attempts to commit any illegal acts are excluded from the definition of piracy.¹⁶¹

An analysis of article 101 suggests three main elements for a piratical act to occur.¹⁶² The first element is that the act must be committed for “private ends.” The requirement of “private ends” was originally inserted in order to distinguish between piratical acts that are motivated by profit and those motivated by ideological reasons, the latter falling outside the meaning of article 101.

The second element is that the act must occur on the high seas¹⁶³ or outside the jurisdiction of any State.¹⁶⁴ Therefore acts which take place in the territorial sea or internal waters of a state are not covered by the international rules on piracy.¹⁶⁵

The third element is that the act must be committed by passengers and crew of one ship or aircraft against the passengers and crew of another ship or aircraft.¹⁶⁶ Consequently piratical acts must involve two ships or aircraft, i.e. the pirate vessel and the victim vessel. Therefore, in accordance with article 101(a)(ii), the seizure of the ship by its own crew or takeover by its own passengers, or vice versa, would not amount to piracy.¹⁶⁷

¹⁶⁰Yoshifumi Tanaka, *The International Law of the Sea* (Cambridge University Press 2012) 355.

¹⁶¹Id.

¹⁶²The definition of piracy found in article 101 of UNCLOS is almost identical to that found in the 1958 Convention on the High Seas which was actually based on the 1956 Draft Articles on the Law of the Sea prepared by in a Report of International Law Commission. See Robert Beckman, *Do We Need a New Convention on Piracy and Armed Robbery Against Ships* in Aldo Chircop, Nomran Letalik, Ted Mc. Dorman and Susan Rolston (eds), *THE REGULATION OF INTERNATIONAL SHIPPING: INTERNATIONAL AND COMPARATIVE PERSPECTIVES – ESSAYS IN HONOR OF EDGAR GOLD*, (Martinus Nijhoff 2012) 77-78.

¹⁶³Article 1 of the 1958 Convention on the High Seas defines high seas as all parts of the sea which are not included in the territorial sea or internal waters of a State. This would refer to open waters which are not subject to the territorial jurisdiction of any state.

¹⁶⁴Although article 101 contains no reference to the exclusive economic zone, illegal acts of violence committed in this zone may also be considered as acts of piracy by virtue of article 58(2). See Section III D.

¹⁶⁵José Luis Jesus, *Protection of Foreign Ships against Piracy and Terrorism at Sea: Legal Aspects* (2003) 18 *INT’L JOUR. OF MARINE AND COASTAL LAW* 363, 379.

¹⁶⁶Therefore it is true to say that if a member of the crew or a passenger of a private ship takes control of that vessel by illegal acts of violence this cannot be considered as piracy. This was also confirmed in article 39(1)(a) of the 1956 Report of the International Law Commission. See Report of the International Law Commission to the General Assembly covering the work of its seventh session, 2 May 1955-8 July, 1955, Yearbook of the International Law Commission, Volume I, 40, available at <[http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes\(e\)/ILC_1955_v1_e.pdf](http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes(e)/ILC_1955_v1_e.pdf)> accessed 6 October 2012.

¹⁶⁷Yoshifumi Tanaka (n. 160) 356.

The legal regime under UNCLOS provides for universal jurisdiction¹⁶⁸ over crimes of piracy, where article 105 states that:

On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. 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.

The seizure of the pirate vessel must be carried out “. . . only by warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect.”¹⁶⁹

The legal problem encountered by the *Achille Lauro* incident was that despite the fact that the hijackers committed illegal acts of violence and detention on the high seas, they did not operate from another ship and their act appeared to be motivated by political aims rather than private ends. Therefore the absence of the first and third elements under UNCLOS prevented such an incident from being considered piracy under international law, even though the U.S. Justice Department wrongly charged the hijackers with piracy on the high seas, hostage taking, and conspiracy.¹⁷⁰ This alerted the international community to the weaknesses of the traditional piracy regime and led to the development of a new, more general, international law to prevent unlawful acts that threatened the safety and security of ships, their passengers and crew.¹⁷¹

3. *Jurisdictional Issues Surrounding the Achille Lauro Affair*

The *Achille Lauro* scenario illustrates perfectly how a crime committed aboard a vessel may attract a number of different national jurisdictions. In light of the facts surrounding the incident, it is possible that at least the following States were entitled to exercise jurisdiction over the persons, vessels and events involved in the incident: 1) Italy by virtue of the fact that the ship

¹⁶⁸Shaw explains that according to the universality principle under international law, a State may exercise jurisdiction in effect of persons accused of certain crimes committed anywhere, irrespective of the nationality of the accused or the nationality of the victim. The logic behind this is that jurisdiction is granted to all States in order to protect the welfare of the international community and to ensure, to the fullest extent possible, that the perpetrators of certain crimes do not escape prosecution. See Malcolm Shaw, *International Law* (6th ed., Cambridge University Press 2008) 668.

¹⁶⁹UNCLOS, Article 107.

¹⁷⁰Maximo Quibranza Mejia Jr (n 154) 124.

¹⁷¹John Bennett, *Maritime Security*, in Clifford Bragdon (ed), *TRANSPORT SECURITY* (Elvesier Inc 2008) 159.

was registered in Italy; 2) the U.S. as one of the passengers killed was a U.S. citizen; 3) Egypt because the vessel was brought into Egyptian territorial waters; and 4) possibly other States which had citizens on board the *Achille Lauro*.

The extraordinary events which emerged from the *Achille Lauro* affair illustrate the potential problem with regard to competing jurisdictions. Once the vessel was released to the Egyptian authorities by the hijackers, the U.S. sought extradition of the hijackers from the Egyptian Government. The response to this request was negative. As an Egyptian civilian airliner carrying the hijackers left Egyptian air space, it was forced by American warplanes to land in the NATO base Sigonella in Sicily. The U.S. government sought the hostages' extradition from Italy. However, Italy refused this request on the basis that it had already asserted jurisdiction over the hijackers considering the fact that Italy was the flag State of the vessel and therefore the offenders should be tried in Italian Courts.¹⁷²

D. International Response to the Achille Lauro Incident

The *Achille Lauro* incident prompted an immediate response from the international community. Less than a month after the tragedy, the first effort put forward by IMO was the adoption in 1985 of Resolution A. 584 (14) on "Measures to Prevent Unlawful Acts Which Threaten the Safety of Ships and Security of Their Passengers and Crew."¹⁷³ The Resolution called for IMO to work on internationally agreed technical measures to ensure security and reduce risk situations on board ships, the need for which was clearly brought to light by the events of the *Achille Lauro* tragedy. Moreover the Resolution requested various stake holders in the shipping industry such as Governments, ship owners and crews, to undergo a review of ship security both in port and on board ships.¹⁷⁴

The Resolution also directed the MSC to cooperate with other IMO committees to produce practical technical measures to be employed by port authorities, Governments, and ship owners amongst others, to safeguard the security of passengers and crews on board ships.¹⁷⁵ In this regard, in 1986 the MSC issued a Circular on "Measures to Prevent Unlawful Acts against Passengers and Crews on board Ships."¹⁷⁶ The Circular provides guidelines

¹⁷²Tracey Madden (n. 157) 138.

¹⁷³IMO Resolution.A.584 (14) (20 November 1985).

¹⁷⁴*Id.*, para.1.

¹⁷⁵*Id.*, para.2.

¹⁷⁶IMO MSC/Circ.443, Measures to Prevent Unlawful Acts against Passengers and Crews on board Ships, 26 September 1986.

on security measures that should be taken by shipmasters, ship-owners, Governments, port authorities, administrators, and port facilities which maintain and service them.¹⁷⁷

It should be observed that so critical was the problem of international terrorism that it quickly garnered the attention of, and action from, the United Nations. Following the adoption of IMO Resolution A. 584 (14), the UN General Assembly adopted Resolution 40/61,¹⁷⁸ calling on all States to:

. . . take all appropriate measures at the national level with a view to the speedy and final elimination of the problem of international terrorism, such as the harmonization of domestic legislation with existing international conventions, the fulfilment of assumed international obligations . . .¹⁷⁹

The Resolution also requested IMO to “study the problem of terrorism aboard or against ships with a view to making recommendations on appropriate measures.”¹⁸⁰

Furthermore, the UN Security Council responded to the issues surrounding the *Achille Lauro* incident by the adoption of Security Council Resolution 579,¹⁸¹ in which it called on States to allow for the effective prevention, prosecution and punishment of all acts of hostage-taking and abduction which are considered as manifestations of international terrorism.

1. The 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation

As has already been examined, the *Achille Lauro* incident demonstrated various *lacunae* in international law by bringing to light the vulnerability surrounding piracy provisions under UNCLOS, as well other conflicting jurisdictional issues surrounding maritime crimes. In order to deal with these problems the international community considered several options. One possibility was to widen the definition of piracy under UNCLOS to cover situations such as the *Achille Lauro* incident. This would be advantageous as it would allow crimes against safety of navigation to attract universal juris-

¹⁷⁷<http://www.internationalmaritimesecurity.co/faq/35-what-maritime-security-measures-existed-before-the-isps-code-and-other-measures-were-adopted/> accessed 8 October 2012.

¹⁷⁸U.N General Assembly, Resolution 40/61 (1985), adopted on 9 December 1985, UN DOC A/RES/40/61 (1985) titled Measures to prevent international terrorism which endangers or takes innocent human lives or jeopardizes fundamental freedoms and study of the underlying causes of those forms of terrorism and acts of violence which lie in misery, frustration, grievance and despair and which cause some people to sacrifice human lives, including their own, in an attempt to effect radical changes.

¹⁷⁹*Id.*, para.5.

¹⁸⁰*Id.*, para.13.

¹⁸¹U.N Security Council, Resolution 579 (1985) adopted by the Security Council at its 2637th meeting, on 18 December 1985, S/RES/579 (1985).

diction. However, at the time this option was not found to be feasible considering the fact that UNCLOS had taken years to conclude and any attempt to amend the Convention would have been too burdensome. Moreover, Treves observes this option would also not be favourable considering that it would limit a State's exclusive jurisdiction over ships flying its flag on the high seas,¹⁸² resulting in an unwillingness to categorise terrorist offences as crimes over which any State could exercise jurisdiction.¹⁸³

Another interesting alternative that was considered was that of developing a network of bilateral treaties modelled on existing hijacking bilateral agreements such as those concluded between Cuba and the U.S.,¹⁸⁴ in particular one agreement concluded on the basis of exchange of notes in 1973 with respect not only to hijacking of aircraft but also of vessels.¹⁸⁵ However bilateral agreements may not always suffice considering the fact that these types of incidents usually involve more than two States having jurisdiction. In fact Brown opines that "... helpful though such bilateral or regional agreements may be in complementing a more general approach, they are no substitute for a convention of global scope."¹⁸⁶

It was clear that there was an urgent need for a legal instrument that would help prevent and suppress acts of maritime terrorism. The solution found would be in the form of a multilateral convention known as the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA).

The idea of the SUA Convention was initiated by a joint proposal from the Governments of Austria, Egypt and Italy presented to the IMO Council at its fifty-seventh session in November 1986. These Governments, two of which were greatly affected by the *Achille Lauro* affair, requested that a Convention be prepared to deal with unlawful acts against the safety of navigation. They considered these acts to:

... endanger innocent human lives, jeopardize the safety of persons and property, seriously affect the operation of maritime services and thus are of grave concern to the international community as a whole.¹⁸⁷

¹⁸²See Section III D.

¹⁸³Tullio Treves, *The Rome Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation* in Natalino Ronzitti (ed) *MARITIME TERRORISM AND INTERNATIONAL LAW* (Martinus Nijhoff, Dordrecht 1990) 69, 70-1.

¹⁸⁴Cuba-United States: Memorandum of Understanding on the Hijacking of Aircraft and Vessels, (1973) 12 *International Legal Materials*, 370.

¹⁸⁵Edward Brown, *The International Law of the Sea Volume 1 Introductory Manual* (Dartmouth 1994) 305.

¹⁸⁶*Id.* 306.

¹⁸⁷<<http://www.imo.org/About/Conventions/ListOfConventions/Pages/SUA-Treaties.aspx>> accessed 17 October 2012.

The aim behind such a proposal was to put in place a set of rules ensuring cooperation amongst States to fight unlawful acts which threaten the safety of navigation. The respective Governments also emphasized the need to distinguish between cases of unlawful acts at sea that are to be covered by the new Convention, and crimes of piracy. As has been discussed above, the regime of piracy¹⁸⁸ was already regulated by an existing internationally codified regime and as such it was viewed that the new Convention should not conflict with these rules.¹⁸⁹ The same thinking was applied to the rules regulating hot pursuit.¹⁹⁰

The IMO Council immediately recognized that such acts are a major concern to the maritime community and unanimously approved the proposal. Consequently an *ad hoc* Preparatory Committee was set up to prepare an effective legal instrument to ensure that those responsible for such maritime crimes will always be brought to justice and not escape prosecution.¹⁹¹ On conclusion of the work put forward by the Preparatory Committee, a conference took place in March 1988 in Rome for the adoption of the SUA Convention as well as a Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf. This Protocol extends the application of the convention to unlawful acts committed against fixed platforms in the continental shelf, such as oil platforms and drilling units.¹⁹²

2. The Features of the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation

Prior to the *Achille Lauro* incident, there already existed a number of UN Conventions dealing with international terrorism, but none of them had specifically addressed issues of maritime terrorism. This is because up until this time terrorism at sea, unlike piracy, had never been considered a serious international problem.¹⁹³ The Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft,¹⁹⁴ the Hague Convention for the

¹⁸⁸See Section II C 2.

¹⁸⁹Helmut Tuerk (n. 150) 345.

¹⁹⁰When elaborating on the doctrine of hot pursuit, Churchill and Lowe explain that the right of hot pursuit allows a warship or military aircraft of a state to pursue a foreign ship which has violated that State's laws within its internal waters or territorial sea and to arrest it on the high seas. See Robin Churchill and Vaughan Lowe, *The Law of the Sea* (3d ed., Manchester University Press 1999) 214-215.

¹⁹¹Rosalie Balkin (n. 109) 7.

¹⁹²In October 2005 IMO adopted new Protocols to the SUA and its protocol on fixed platforms. See Section II E 2.

¹⁹³Helmut Tuerk (n. 150) 334.

¹⁹⁴The Convention on Offences and Certain Other Acts Committed on Board Aircraft, Tokyo, 14 September 1963.

Suppression of Unlawful Seizure of Aircraft¹⁹⁵ and the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation,¹⁹⁶ were used as models in drafting the new Convention.¹⁹⁷ These Conventions enforced the so called *aut dedere aut judicare* principle, as they obliged State parties to arrest offenders, ensuring that they are either prosecuted or extradited.¹⁹⁸ This principle was an important feature passed on to the SUA Convention and will be elaborated on further on in this Section.

The scope of the 1988 SUA Convention is such that persons who commit unlawful acts on board or against ships will be unable to find refuge in the territory of States that are parties to the Convention, and it also provides for action to be taken against such perpetrators.¹⁹⁹

In its opening provisions the SUA Convention defines specific acts which are considered to be criminal offences including seizure of, or exercise of control over, a ship by force or intimidation, and acts of violence against persons on board amongst others.²⁰⁰ As is evident from the description of offences provided in article 3 of the SUA Convention, it is made applicable to a wide category of maritime crimes. Despite the history behind the adoption of the Convention, the offences listed therein are not limited to those committed solely for the purposes of terrorism. As Treves observes “. . . they include most acts of violence at sea, provided there is an international interest in their suppression.”²⁰¹ Such offences include seriously damaging a ship's navigational facilities, interfering with its operation,²⁰² or communicating false information which may endanger the safety of the ship's navigation.²⁰³

¹⁹⁵The Convention for the Suppression of Unlawful Seizure of Aircraft, the Hague, 16 December 1970.

¹⁹⁶The Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Montreal, 23 September 1971.

¹⁹⁷Edward Brown (n. 185) 306.

¹⁹⁸One of the earliest Conventions to introduce the *aut dedere aut judicare* principle was the 1929 International Convention for the Suppression of Counterfeiting Currency. This Convention catered for situations where a State's national law did not permit the extradition of its nationals. Accordingly any nationals returning to their State after committing an offence under the Convention should be punishable as if the crime had been committed in that State. Moreover any non-nationals who commit a crime under the Convention abroad, and then enter a State whose national legislation supports the extra-territorial application of criminal law, should be punished in the same way as if the offence had occurred within that State, assuming that there had been a request made for the offender's extradition that had been refused for reasons unrelated to the crime. See <<http://heid.revues.org/301#tocto2n1>> accessed 16 October 2012.

¹⁹⁹Rosalie Balkin (n. 109) 8.

²⁰⁰SUA Convention, Article 3.

²⁰¹Tullio Treves (n. 183) 543.

²⁰²SUA Convention, Article 3(1)(e).

²⁰³Id. at Article 3(1)(f).

It is interesting to note that despite being designated as the “Convention for the *Suppression of Unlawful Acts Against the Safety of Maritime Navigation*,” it mainly covers events that occur after the illegal acts have taken place including the apprehension,²⁰⁴ conviction and punishment of offenders, rather than the prevention and suppression of those acts.²⁰⁵ Therefore, under the SUA Convention, parties to the Convention are required to criminalise such offences under their national laws and provide for appropriate penalties according to the seriousness of the crime.²⁰⁶ Article 6 of SUA requires State parties to exercise jurisdiction over offences listed in article 3 when:

1. The offence is committed against or on board a ship flying the flag of the State at the time when such an offence is committed.²⁰⁷
2. The offence is committed in the territory or territorial sea of that State.²⁰⁸
3. The offence is committed by a national of that State.²⁰⁹

Moreover a State party also has the option to exercise jurisdiction over any offence when:

1. The offence is committed by a stateless person who has their habitual residence in that State.²¹⁰
2. During the commission of the offence a State national is seized, threatened, injured or killed.²¹¹
3. The offence is committed to compel that State to do or abstain from doing any act.²¹²

From an analysis of these provisions, it is evident that the criteria for the exercise of jurisdiction over any of the crimes listed in article 3 must reflect some sort of link or jurisdictional nexus with the State concerned, for exam-

²⁰⁴Helmut Tuerk, *Reflections on the Contemporary Law of the Sea* (Martinus Nijhoff Publishers 2012) 105.

²⁰⁵Perhaps the only exception to this statement would be article 13 of the SUA Convention which requires State parties to cooperate in the prevention of offences set out in article 3. State parties are to do this by taking practicable measures to prevent preparations in their territories for the commission of those offences both within or outside their territories. Moreover, State parties must exchange information in accordance with their national law and co-ordinating administrative measures to prevent commission of article 3 offences. See SUA, Article 13.

²⁰⁶Edward Brown (n. 185) 307.

²⁰⁷SUA Convention, Article 6(1)(a).

²⁰⁸*Id.*, Article 6(1)(b).

²⁰⁹*Id.*, Article 6(1)(c).

²¹⁰*Id.*, Article 6(2)(a).

²¹¹*Id.*, Article 6(2)(b).

²¹²*Id.*, Article 6(2)(c).

ple flag or territory. Therefore, it would appear that if a State lacked jurisdiction under article 6 and did not extradite the offender, such offender would be able to escape prosecution.²¹³ The aim of the Convention is precisely to avoid such situations. In fact, article 10(1) contains the obligation on State parties to “extradite or prosecute” which ensures that in the circumstances where State parties are unable to prosecute an alleged offender, he or she shall be transferred to another State party who is able to do so:

The State Party in the territory of which the offender or the alleged offender is found shall, in cases to which article 6 applies, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case without delay to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State. Those authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that State.²¹⁴

From an analysis of the above, one may conclude that the SUA Convention represented a step forward in the development of maritime security law as it attempted to develop international law in two directions:

1. The Convention avoids limiting any of the crimes listed in article 3 to any particular location, thereby providing for a set of unlawful acts against a ship or her crew or passengers, without regard to the juridical nature of the waters in which the ship was located or where the attack occurred.²¹⁵
2. The Convention provides for the extensive jurisdiction over offenders wherever they may be located.²¹⁶

The majority of the provisions found in the 1988 SUA Convention apply *mutatis mutandis* to its Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf.²¹⁷ Both of these instruments came into force on 1 March 1992 and have found much support from the international community. In fact as of April 2013, there are 160 contracting States which are party to the 1988 SUA Convention, which accounts for 94.63% of the world's tonnage, and 148 contracting States which are party to the 1988 SUA protocol, which accounts for 89.65% of the world's tonnage.²¹⁸ This can be seen as a positive reflection of the willingness of the international community to take meas-

²¹³Edward Brown (n. 185) 309.

²¹⁴SUA Convention, Article 10(1).

²¹⁵John Bennett (n. 171) 160.

²¹⁶*Id.* 161.

²¹⁷Helmut Tuerk (n. 204) 110.

²¹⁸<<http://www.imo.org/About/Conventions/StatusOfConventions/Pages/Default.aspx>> accessed 1 May 2013.

ures to respond to the serious threats that international maritime terrorism poses to global shipping.

E. The September 11 Attacks

On the morning of 11 September 2001,²¹⁹ nineteen men forming part of the Islamist militant group al-Qaeda took control of four commercial planes and carried out a series of co-ordinated attacks against the U.S. Two of the jet passengers were flown into the World Trade Centre in New York City. A third plane hit the Pentagon in Washington D.C, whilst a fourth plane which was intended to be flown into another target, crashed in a field in Shanksville, Pennsylvania. Over three thousand persons were killed in the attacks, leaving the 9/11 tragedy marked as the worst terrorist attack in U.S. history.²²⁰

The horrific events of this day raised many important security concerns. They revealed not only the extraordinary lengths to which terrorists will go for political or ideological reasons, but also the apparent vulnerabilities of the global transport infrastructure.²²¹ In relation to this one must take into account the increase in efficiency of containerisation systems as a means of transporting cargo. The use of containerisation systems allows ships to enjoy a speedy process of loading and unloading cargo at a port, providing for quicker journeys and reduced port fees. Such systems are economically beneficial to shippers and ship owners. However, an increase in speed often means that the cargo is rarely inspected, leaving only the shipper and recipient aware of the true contents of the container.²²² This apparent lack of transparency in shipping has created a major security threat, especially considering that it is not only the shipping industry that benefits from the effects of globalisation, but also terrorist organisations.

In summary, the events of 9/11 and the use of hijacked aircraft brought about the realisation that vessels themselves could also be used as weapons of mass destruction. Governments were no longer in a position to ignore such realities and immediately took measures to increase security relating to land and air transport. However, securing ports and shipping which support global trade has proved to be more difficult due to the nature of international shipping itself.²²³ In this context IMO has played an active role and pro-

²¹⁹Hereafter referred to as 9/11.

²²⁰<<http://www.history.com/topics/9-11-attacks>> accessed 20 October 2012.

²²¹Rosalie Balkin (n. 109) 16.

²²²Justin Mellor, *Missing the Boat: The Legal and Practical Problems of Prevention of Maritime Terrorism* (2002) 18 AM. UNIV. INTN'L L. REV. 341, 348.

²²³Tamara Renee Shie, *Ports in a Storm? The Nexus Between Counterterrorism, Counter proliferation, and Maritime Security in Southeast Asia* (2004) 4 ISSUES & INSIGHTS 2.

vided technical, legal and administrative measures aimed at strengthening maritime security.²²⁴

1. New Challenges Posed by Terrorism post 9/11

IMO's continued commitment to improving maritime security was once again evidenced by the immediate action taken in the wake of 9/11, as well as other recent terrorist attacks on vessels.²²⁵ Mr. William O'Neil, then the Secretary General of IMO, quickly consulted IMO member States on ways to revise and enhance existing measures to combat threats at sea. In November 2001, the IMO Assembly adopted Resolution A.924 (22) titled a "Review of Measures and Procedures to Prevent Acts of Terrorism which Threaten the Security of Passengers and Crews and the Safety of Ships."²²⁶ In order to address issues surrounding the recent terrorist attacks, the Resolution called on the MSC, Legal Committee and Facilitation Committee to undertake a review of all existing IMO instruments for the purpose of determining whether they needed updating. Such instruments included the 1988 SUA Convention and Protocol thereto. The aim of such a review was to further ensure the prevention and suppression of terrorist acts against ships as well as to improve maritime security measures aboard ships and ashore.

Moreover, as a result of the adoption of Resolution A.924 (22), contracting Governments to SOLAS agreed to set up a diplomatic conference dedicated solely to addressing matters concerning the suppression of terrorism against shipping, as well as strengthening maritime security measures as a whole. This Conference took place at IMO headquarters in London in December, 2002. The Conference attracted much international interest and was attended by over a 100 contracting Governments to SOLAS, as well as observers from IMO member States and IMO associate members.²²⁷

The Conference adopted a number of resolutions and considered a wide range of maritime security issues which showcased its collaboration with other international organisations. For example, Resolution Eight concerned the development of security measures in cooperation with the International

²²⁴José Luis Jesus (n. 165) 389.

²²⁵These include the attacks of the *USS Cole* and *M/V Limburg*. The former was the target of Al-Qaeda attack in Yemen in 2000, which resulted in the death of seventeen individuals and the near sinking of the warship. The latter, a tanker carrying 397,000 barrels of crude oil was attacked by an explosives-laden dinghy also operated by Al Qaeda in 2002. One crew member was killed and 12 other crew members were injured. See <<http://asiastudies.org/file/publication/ashik/article%20for%20web.pdf>> accessed 20 October 2012.

²²⁶IMO Resolution A.924 (22) (20 November 2001).

²²⁷Chris Trelawny, *Maritime Security: Implementation of the ISPS Code* (3d Intermodal Africa 2005 Tanzania Exhibition and Conference, Dar es Salaam, February 2005).

Labour Organisation (ILO).²²⁸ It called for the adoption of a new seafarer's identity document and provided for the establishment of a code of practice for security in all port areas, which was to be developed by a joint IMO/ILO Working Group.²²⁹ In a similar way, Resolution Nine provided for the enhancement of security in cooperation with the World Customs Organisation (WCO)²³⁰ which encouraged the WCO to review and improve security measures for container cargos.

However, the most far-reaching measure adopted at this Conference was Resolution One which introduced a number of amendments to SOLAS, adopted through the tacit acceptance procedure discussed in Part II.²³¹ The most important of these amendments was the introduction of a new Chapter XI-2, "Special measures to enhance maritime security."²³² This Chapter provides a fresh set of regulations dealing with definitions and requirements imposed upon ships and port facilities. Such regulations were supported by the new International Ship and Port Facility Security Code.²³³

2. The 2005 Protocols to the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and its Protocol

As discussed above, a major IMO maritime security initiative sparked off by the events of 9/11 was a revision of the 1988 SUA Convention and its Protocol. In its original version, the 1988 SUA Convention reflects the terroristic scenario and levels of threat present at the time of the *Achille Lauro* incident. Since then, there has been an increased realisation of the proliferation of weapons of mass destruction as well as other new forms of terrorism. As has been discussed, such fears have also been amplified due to the shift in containerisation as a common mode of transport.²³⁴ A number of maritime security initiatives were put forward by the U.S. Government in response to these threats, including the Proliferation Security Initiative (PSI) and the Container Security Initiative (CSI). The CSI was set up to examine containers at their point of origin prior to their being shipped to the U.S.²³⁵

²²⁸The ILO is the international organization responsible for drawing up and overseeing international labour standards. See <[http://www.ilo.org/global/lang—en/index.htm](http://www.ilo.org/global/lang-en/index.htm)> accessed 22 October 2012.

²²⁹Chris Trelawny (n. 227) 4.

²³⁰The WCO is the only intergovernmental organisation focused exclusively on Customs matters, such as the development of global standards, the simplification and harmonization of Customs procedures, trade supply chain security, the facilitation of international trade amongst others. See <<http://www.wcoomd.org/>> accessed 22 October 2012.

²³¹Natalie Klein (n. 33) 158.

²³²Chris Trelawny (n. 227) 3.

²³³The text of the ISPS Code is set out in the Annex to Conference Resolution 2, which was adopted on 12 December 2002.

²³⁴See Section II E.

²³⁵Tamara Renee Shie (n. 223) 2.

The PSI was an initiative aimed at providing collective measures amongst participating countries that would avert the proliferation of weapons of mass destruction and other threats to international peace and security.²³⁶ The PSI calls for the interdiction by the U.S. and other participants to stop and search ships as well as other means of transport for suspected carriage of weapons of mass destruction.²³⁷

These initiatives brought to light the deficiencies of the 1988 SUA Convention particularly in the area of arrest and prosecution of new emerging crimes against the safety of navigation. The task of revising the SUA regime was given to the IMO Legal Committee in accordance with the previously mentioned Resolution A.924 (22). In an examination of the provisions of the 1988 SUA Convention, the Legal Committee highlighted that the crimes defined in the 1988 Convention were considered to be too narrow in light of modern day terrorist attacks including biological and nuclear threats.²³⁸ The 1988 SUA Convention and its Protocol focused on post-crime regulation, rather than the prevention of offences. In fact, these instruments failed to adequately provide for a proper boarding procedure where it would be possible for law enforcement officers to board foreign flagged ships on the high seas to search for alleged terrorists, or to provide assistance to a vessel suspected of being held hostage by terrorists.²³⁹

The Protocol of 2005 to the SUA Convention was adopted in London on 14 October 2005,²⁴⁰ and at the same time another Protocol was adopted to strengthen the 1988 Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf.²⁴¹ The 2005 Protocols are considered to be important measures taken by the maritime community to combat global terrorism.²⁴²

In response to the problems referred to above, the 2005 Protocol amended article 3 of the 1988 Convention to increase the number of offences considered to be unlawful acts under the Convention. According to the new article 3bis(1)(a), an offence within the meaning of the Convention is committed if a person for the purpose referred to unlawfully and intentionally:²⁴³

²³⁶ Zou Keyuan, *New Developments in the International Law of Piracy* (2009) 8 CHINESE JOURNAL OF INTERNATIONAL LAW, 323,340.

²³⁷ Natalie Klein (n. 33) 193-198.

²³⁸ Helmut Tuerk (n. 204) 113.

²³⁹ Rosaline Balkin (n. 109) 23.

²⁴⁰ The Protocol of 2005 to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, London, 14 October 2005.

²⁴¹ The Protocol of 2005 to the Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, London, 14 October 2005.

²⁴² Reto Dürer, *The New SUA Protocols: Developments, Contents and Scope*, lecture delivered at the IMO International Maritime Law Institute, 12 February 2013.

²⁴³ Article 3bis (1)(a) of the SUA Convention as amended by article 4(5) of the 2005 Protocol.

(i) uses against or on a ship or discharges from a ship any explosive, radioactive material or BCN weapon in a manner that causes or is likely to cause death or serious injury or damage; or²⁴⁴

(ii) discharges, from a ship, oil, liquefied natural gas, or other hazardous or noxious substance, which is not covered by subparagraph (a)(i), in such quantity or concentration that causes or is likely to cause death or serious injury or damage; or²⁴⁵

(iii) uses a ship in a manner that causes death or serious injury or damage; or²⁴⁶

(iv) threatens, with or without a condition, as is provided for under national law, to commit an offence set forth in subparagraph (a)(i)(ii) or (iii).²⁴⁷

The 2005 Protocol also introduces a completely new provision which provides a specific procedure to be carried in the boarding of foreign-flagged vessels by officials of another State Party on the high seas.²⁴⁸ However, it is important to note that this boarding procedure is considered consistent with existing international law and does not violate the principle of freedom to navigate.²⁴⁹

According to this procedure set out in the 2005 Protocol to SUA Convention, a requesting State party may board a foreign ship when it has reasonable grounds to suspect that the ship, or any person on board, has been or is about to be involved in the commission of an offence under the Convention.²⁵⁰ The requesting State party may only board the vessel in question after it has received authorisation from its flag State, which may be given generally or on an *ad hoc* basis.²⁵¹ The flag State may also approve the requesting State to exercise powers of arrest, detention and prosecution.²⁵² This provision could therefore help prevent future terrorist attacks by allowing non-flag States to board a terrorist vessel before it arrives at its intended target and is therefore seen as a more effective means of apprehending offenders.²⁵³ This procedure is particularly useful considering that not all flag

²⁴⁴Id.

²⁴⁵Id.

²⁴⁶Id.

²⁴⁷Id.

²⁴⁸Article 8*bis* of the SUA Convention as amended by article 8(2) of the 2005 Protocol.

²⁴⁹See Section 3.5.

²⁵⁰Article 8*bis*(5) of the SUA Convention as amended by article 8(2) of the 2005 Protocol.

²⁵¹Rüdiger Wolfrum, *Fighting Terrorism at Sea: Options and Limitations under International Law*, available at <<http://www.virginia.edu/colp/pdf/Wolfrum-Doherty-Lecture-Terrorism-at-Sea.pdf>> accessed 30 November 2012.

²⁵²Article 8*bis*(8) of the SUA Convention as amended by article 8(2) of the 2005 Protocol.

²⁵³Natalie Klein (n. 33) 173.

States exert the same level of control and regulation over their vessels on the high seas which may create gaps in maritime security.

It is interesting to note that the 2005 Protocol also introduced a new article 11*bis* which provides that none of the listed offences in article 3*bis* are to qualify as political offences, ensuring that a request for extradition or for mutual legal assistance based on such an offence cannot be refused on the grounds that it concerns an offence inspired by political motives.²⁵⁴ This provision is modelled on article 11 of the International Convention for the Suppression of Terrorist Bombings²⁵⁵ which put an end to the idea that terrorism *per se* can have any political offence exception.

The measures provided for in the 2005 Protocols to the SUA Convention are considered to complement the practical measures provided by Chapter XI-2 of SOLAS Convention and the ISPS Code.²⁵⁶ It should be noted that while the ISPS Code provides technical measures to ensure the safety of ships and port facilities as well as to prevent acts of terrorism, it provides no guarantee that these crimes against the safety of navigation will not occur. Therefore the SUA Convention, as amended by the 2005 Protocol, provides the legal framework to allow States to take action against offenders of such crimes.

F. The International Ship and Port Facility Security Code

In the past decade enhancing port security against maritime security threats such as terrorism has become increasingly important because ports are considered to be the interface for international shipping and the delivery of goods, or as Klein observes, they are “the vital starting and end points in maritime transport.”²⁵⁷

As highlighted above, after 9/11, the issue of maritime security was considered by IMO member States as “an extraordinary situation that required extraordinary speed.”²⁵⁸ This in turn led to the speedy adoption of the ISPS Code. Unlike other IMO conventions which saw a time frame of at least ten years before their adoption, the ISPS Code, which provides measures covering world shipping, was drafted, adopted and implemented within a span of two years.²⁵⁹ The ISPS Code was intended to recognise and provide preven-

²⁵⁴Rosaline Balkin (n. 109) 30.

²⁵⁵International Convention for the Suppression of Terrorist Bombings, New York, 15 December 1997.

²⁵⁶Rosaline Balkin (n. 109) 22.

²⁵⁷Natalie Klein (n. 33) 157.

²⁵⁸Prakash Metaparti, *Rhetoric, Rationality in Post-9/11 Maritime Security*, (2010) 37 MAR. POLICY & MGMT. 723.

²⁵⁹*Id.*

tive measures concerning security related incidents and is now considered to be a significant advancement in the laws relating to maritime security.

1. Structure and Application of the International Ship and Port Facility Security Code

The ISPS Code contains two principal parts. The first consists of detailed security related requirements for Government, port authorities and shipping companies which form the mandatory section Part A. Part B contains non-mandatory guidelines and recommendations which ensure that such requirements are met. However, it is interesting to note that some States such as the U.S. now require mandatory compliance with Part B of the Code by all U.S. ships and by foreign flag vessels which call at U.S. ports.²⁶⁰ The same position is now also taken by major classification societies.²⁶¹

The sections outlined in each of the parts mainly correspond to each other, i.e. Part A highlights the principles that maritime stakeholders should adhere to, whilst Part B focuses on how those principles can be put into practice.²⁶² With regard to its application, the Code concerns passenger ships and cargo ships of a minimum 500 gross tonnage engaged on international voyages, mobile offshore drilling units and port facilities serving the aforesaid ships.²⁶³ The Code does not apply to warships or other Government ships used for non-commercial services.²⁶⁴

2. Objectives Behind the International Ship and Port Facility Security Code

One of the shortcomings of the 1988 SUA Convention, prior to its amendment in 2005, was that it failed to provide any sort of preventive measures which would effectively combat unlawful acts against the safety of navigation. The ISPS Code attempts to address such issues. In fact, the approach taken by the ISPS Code is that providing for the security and safety of ships and port facilities essentially entails a risk management activity.²⁶⁵ In each particular case an assessment of the extent of risk to which a port is exposed

²⁶⁰John Bennett (n. 171) 165.

²⁶¹*Id.*

²⁶²Koi Yu Adolf Ng, *Maritime Security Instruments in Practice: a Critical Review of the Implementation of ISPS Code in the Port of Hong Kong* (2009) Department of Logistics and Maritime Studies Research Paper, 334 <http://www.icms.polyu.edu.hk/Papers/IFSPA09-Papers/8_M056.pdf> accessed 23 October 2012.

²⁶³ISPS Code, Section A/3.1.

²⁶⁴*Id.*, Section A/3.3.

²⁶⁵Rosalie Balkin (n. 109) 17.

is examined, as well as what security measures need to be implemented in relation to such risk.²⁶⁶ In fact the IMO holds that the ISPS Code aims:

to provide a standardised, consistent framework for evaluating risk, enabling Governments to offset changes in threat with changes in vulnerability for ships and port facilities through determination of appropriate security levels and corresponding security measures.²⁶⁷

The objectives of the ISPS Code have been outlined in Section A.1.2, these include;

1. To establish an international framework involving cooperation between Contracting Governments, Government agencies, local administrations and the shipping and port industries to detect security threats and take preventive measures against security incidents affecting ships or port facilities used in international trade;²⁶⁸
2. To establish the respective roles and responsibilities of the Contracting Governments, Government agencies, local administrations and the shipping and port industries, at the national and international level for ensuring maritime security;²⁶⁹
3. To ensure early and efficient collection and exchange of security-related information;²⁷⁰
4. To provide a methodology for security assessments so as to have in place plans and procedures to react to changing security levels; and²⁷¹
5. To ensure confidence that adequate and proportionate maritime security measures are in place.²⁷²

The goals behind the ISPS Code are then implemented through a number of minimum functional requirements set out in Section A/1.3. Some of these requirements include: information evaluation with respect to security threats and the exchange of such information between contracting Governments,²⁷³ and ensuring that systems are in place for raising the alarm in response to security incidents.²⁷⁴ Port facilities also require the implementation of secu-

²⁶⁶http://www.imo.org/blast/mainframe.asp?topic_id=583&doc_id=2689#code accessed 23 October 2012.

²⁶⁷<http://www.imo.org/OurWork/Security/FAQ/Pages/Maritime-Security.aspx> accessed 23 October 2012.

²⁶⁸ISPS Code, Section A/1.2.1.

²⁶⁹Id., 1.2.2.

²⁷⁰Id., 1.2.3.

²⁷¹Id., 1.2.4.

²⁷²Id., 1.2.5.

²⁷³Id., 1.3.1.

²⁷⁴Id., 1.3.5.

rity plans and employment of Port Facility Security Officers.²⁷⁵ Moreover, both port facilities and ships must oversee the access and activities of persons and cargo, as well as providing for security communications. Such functional security requirements can only be successfully carried out with the necessary training and drill exercises ensuring overall familiarity with all ship and port security procedures and plans.²⁷⁶

3. Obligations and Responsibilities under the International Ship and Port Facility Security Code

The ISPS Code set out a number of roles and responsibilities for flag, coastal and port States. In addition, the Code also bestows responsibilities on individuals who are to act as Port Facility Security Officers, Company Security Officers and Ship Security Officers.²⁷⁷ In effect the duties accorded to such individuals help to enhance communication and efficiency between vessels, port facilities and flag states. This is essential because the success of the ISPS Code's operation depends on the flow of information between these different entities.²⁷⁸

4. Responsibilities of Contracting Governments under the International Ship and Port Facility Security Code

Under Part A of the ISPS Code, contracting Governments to SOLAS must set appropriate security levels for their ships and port facilities. Certain port facilities and ships will require higher levels of security than others, either for a particular period of time, or permanently. In order to deal with this issue the ISPS Code provides for the international use of three different kinds of security levels: Security Level One which indicates a normal state of affairs; Security Level Two, which lasts for the period of time when there is a heightened risk of a security incident; and Security Level 3 which lasts for the time when there is an imminent or likely risk of a security incident.²⁷⁹ Moreover, contracting States have the responsibility to provide ships flying their flag with any information relating to these security levels and such information should be available to IMO to better co-ordinate communication between Company/Ship Security Officers and the Port Facility Security Officers.²⁸⁰

²⁷⁵Chris Trelawny (n. 227) 5.

²⁷⁶ISPS Code, Section A/1.3.7.

²⁷⁷Natalie Klein (n. 33) 159.

²⁷⁸*Id.* 160.

²⁷⁹ISPS Code, Section A/1.8.

²⁸⁰Rosalie Balkin (n. 109) 18.

5. Responsibilities of Shipping Companies under the International Ship and Port Facility Security Code

The Code obliges all shipping companies to appoint to each of their ships both a Company Security Officer (CSO) and a Ship Security Officer (SSO). The former shall be responsible for guaranteeing that each ship has undergone a Ship Security Assessment²⁸¹ and has put into action a Ship Security Plan. A Ship Security Assessment requires an on scene security survey and the following elements:

1. identification of existing security measures, procedures and operations;²⁸²
2. identification and evaluation of key ship board operations that it is important to protect;²⁸³
3. identification of possible threats to the key ship board operations and the likelihood of their occurrence, in order to establish and prioritise security measures; and²⁸⁴
4. Identification of weaknesses, including human factors in the infrastructure, policies and procedures.²⁸⁵

The Ship Security Plan is defined as:

a plan developed to ensure the application of measures on board the ship designed to protect persons on board, cargo, cargo transport units, ship's stores or the ship from the risks of a security incident.²⁸⁶

The Ship Security Plan sets forth the minimum operational and physical security measures that the ship must employ at all times at Security Level One. However, the plan also provides for additional measures to be implemented to move up to the higher security levels. Corresponding to this, the ISPS Code places similar obligations on contracting Governments in relation to port facility authorities. There must be a Port Facility Security Officer (PFSO) responsible for ensuring that port facilities assessments take place, and that a port facility security plan is in place.²⁸⁷

²⁸¹A sample report for a ship security assessment is available at <http://www.classnk.or.jp/hp/pdf/activities/statutory/isps/Sample_Report_SSA_E_Ver1_Logo.pdf> accessed 25 October 2012.

²⁸²ISPS Code, Section A/8.4.1.

²⁸³Id., 8.4.2.

²⁸⁴Id., 8.4.3.

²⁸⁵Id., 8.4.3.

²⁸⁶ISPS Code, Section A/2.1.4.

²⁸⁷Rosalie Balkin (n. 109) 20.

6. Responsibilities of Port Facilities under the ISPS Code

The ISPS Code requires port facilities to provide a port facility security plan which should be approved by its port State Government and is based on a port facility assessment.²⁸⁸ The port facility security plan indicates the minimum “operational and physical security measures” that a port facility is required to implement at all times²⁸⁹ and shall be drawn up by the Port Facility Security Officer. The port facility is then responsible for responding to security levels set by contracting Governments by putting into operation protective measures set out in the port facility security plan.

In conclusion, IMO’s efforts in the field of maritime security have been successful, particularly when dealing with the new threats to maritime security. In this respect, many IMO rules represent the progressive development of international law, such as for example, the 2005 Protocol to the 1988 SUA Convention. On the other hand, it is also true to say that given the 160 States that have adhered to the 1988 SUA Convention, it may not be unreasonable to consider that many provisions of the 1988 SUA Convention reflect customary international law.

Furthermore, IMO’s effort through the introduction of the ISPS Code ensures a comprehensive treatment of dealing with the problems of maritime security by ensuring that there are rules that cover both shipping and ports. In order to review fully the rules relating to maritime security, it is now proposed to examine the relevant rules found in non-IMO treaties such as UNCLOS and customary international law.

IV MARITIME SECURITY IN NON-IMO TREATIES AND CUSTOMARY INTERNATIONAL LAW

The law regulating maritime security as developed by IMO must also be considered within the context of general international law. In this respect this Part of the study will examine maritime security regimes found both under UNCLOS and customary international law. Maritime security was an important feature of the Third UN Conference on the Law of the Sea²⁹⁰

²⁸⁸John Bennett (n 171) 167.

²⁸⁹Chris Trelawny (n 227) 7.

²⁹⁰UNCLOS III was convened in order to solve certain controversies which had hindered previous attempts at codifying the law of the sea. The Conference involved more than 160 States and consisted of 11 sessions held from 1973 to 1982. See <<http://untreaty.un.org/cod/diplomaticconferences/lawofthesea-1982/lawofthesea-1982.html>> and James Harrison, *Making the Law of the Sea - A Study in the Development of International Law* (Cambridge University Press 2011) 37.

(UNCLOS III) deliberations. In fact, the 1982 Convention which was adopted by this Conference has a number of provisions designed to deal with maritime security threats, such as the violation of territorial sovereignty and piracy. As reflected in the preamble to UNCLOS, it was to be “an important contribution to the maintenance of peace.”²⁹¹

A. Navigational Regimes under UNCLOS and Customary International Law

UNCLOS and customary international law recognise three important navigational regimes which are vital for the maintenance of maritime security; 1) innocent passage which applies in the territorial sea and archipelagic waters;²⁹² 2) transit passage which applies to straits used for international navigation;²⁹³ and 3) archipelagic sea lanes passage which applies to archipelagic waters.²⁹⁴

Each of these regimes attempts to strike a balance between two important competing interests. On the one hand, there exist the interests of coastal States that wish to extend their maritime jurisdiction, not just for economic but also for security reasons; and on the other hand, the interests of States who strive far as possible to maintain freedom of navigation and overflight. There may be certain situations where this delicate balance is upset, as in the case of the passage of foreign warships and their security ramifications when passing through the territorial sea of another State, which shall be discussed later in this Part.²⁹⁵

A coastal State or archipelagic State is interested in protecting its own national interests and sovereignty and will attempt to prevent foreign vessels from causing any prejudice to its security. In this sense, such States may be justified in placing certain limitations on the navigational rights of foreign vessels. Conversely, as correctly pointed out by Bateman, major maritime States might view these restrictions as having a negative impact on their own maritime security, in particular their naval mobility and defence operations.²⁹⁶

²⁹¹UNCLOS, Preamble.

²⁹²*Id.*, Article 17 and Article 52.

²⁹³*Id.*, Articles 37-41.

²⁹⁴*Id.*, Article 53.

²⁹⁵Thomas Windsor, *Innocent Passage of Warships in East Asian Territorial Seas* (2011) 3 AUSTR. JOURNAL OF MARIT. AND OCEAN AFFAIRS 73.

²⁹⁶Sam Bateman, *Security and the Law of the Sea in East Asia: Navigational Regimes and Exclusive Economic Zones* (Society of Legal Scholars and British Institute of International and Comparative Law Symposium on the Law of the Sea, London, March 2005) 2.

1. *The Right of Innocent Passage*

One of the most important institutions relating to the protection of coastal State security is the doctrine of innocent passage. The territorial sea extends up to a limit of twelve nautical miles from the baselines of the coast.²⁹⁷ In this zone, the coastal State exercises territorial jurisdiction not only over the waters, but also the seabed, subsoil and airspace.²⁹⁸ However in the interest of maritime navigation, the sovereignty of a State in this area is limited by the right of innocent passage,²⁹⁹ which allows foreign vessels to traverse through the territorial sea of another State under certain circumstances.³⁰⁰ The right of innocent passage does not, however, extend to aircraft flying in the airspace above a State's territory or territorial sea.³⁰¹

Article 19(1) of UNCLOS provides:

Passage is innocent so long as 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.³⁰²

The same article continues by listing activities which are considered to be “. . . prejudicial to the peace, good order or security of the coastal State” and therefore considered inconsistent with the right of innocent passage. Article 19(2) encompasses several activities which may be considered as threats to the maritime security of a coastal State including military activities,³⁰³ fishing,³⁰⁴ pollution³⁰⁵ and infringements of custom and immigration regulations.³⁰⁶ There has been much debate as to whether the list of activities contemplated in article 19(1) is considered exhaustive. The 1989 United States of America and Union of Soviet Socialist Republic Agreement on the

²⁹⁷UNCLOS, Article 3.

²⁹⁸*Id.*, Article 2(2).

²⁹⁹According to article 17 of UNCLOS, all States enjoy the right of innocent passage through the territorial sea, whether they are coastal or landlocked.

³⁰⁰Under article 18 of UNCLOS, passage of ships envisages either the movement of ships traversing through the territorial sea without entering the internal waters or calling at a roadstead or port facility outside internal waters, or proceeding to or from the internal waters or a call at such roadstead or port facility. The manner of passage should be continuous and expeditious, however a ship may stop or anchor as long as it is incidental to the actual navigation or rendered necessary by *force majeure*, distress or in order to provide assistance to persons, ships or aircraft in danger or distress.

³⁰¹Christopher Pinto, *Maritime Security: The Building of Confidence*, in Josef Goldbat (ed), *MARITIME SECURITY AND THE 1982 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA* (United Nations 1992) 18.

³⁰²The meaning of innocent passage as defined in article 19(1) of UNCLOS is almost identical to article 14(1) of the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone.

³⁰³See UNCLOS, Articles 19(2)(a), 19(2)(b), 19(2)(f).

³⁰⁴*Id.*, Article 19(2)(i).

³⁰⁵*Id.*, Article 19(h).

³⁰⁶*Id.*, Article 19(2)(g).

Uniform Interpretation of Rules of International Law Governing Innocent Passage³⁰⁷ considers the list as exhaustive. This Agreement, which was concluded between two of the major maritime powers at the time, was not applicable to non-party States but was still considered to be very influential in the interpretation of article 19 of UNCLOS.

It is important to note that under article 21 of UNCLOS, coastal States may address some of these maritime security threats through the promulgation of laws and regulations relating to the protection of innocent passage.

UNCLOS provides further protection to coastal State security by empowering States to take the necessary steps in the territorial sea to prevent passage which is no longer innocent.³⁰⁸ Coastal states also have the power to temporarily suspend innocent passage of foreign ships within their territorial sea, provided that this is essential for the protection of their security, including weapon exercises, and provided that such suspension has been published.³⁰⁹ Additionally, in response to non-innocent passage, coastal States are also granted the authority to exercise civil³¹⁰ and criminal jurisdiction in certain cases.

In this regard, perhaps the most significant provision relevant to combating maritime security threats is article 27 of UNCLOS. This provision allows a coastal State to exercise criminal jurisdiction on board a foreign ship passing through their territorial sea, and may also permit the arrest or investigation of that vessel if, 1) the consequences of the crime extend to the coastal State;³¹¹ 2) the crime is of a kind to disturb the peace of the country or the good order of the territorial sea;³¹² 3) 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;³¹³ or 4) such measures are necessary for the suppression of illicit traffic in narcotic drugs or psychotropic substances.³¹⁴

The enforcement and legislative powers exercised by coastal States in relation to the right of innocent passage are then balanced by the duties of the coastal State to ensure that they do not unnecessarily impede this right except in accordance with the provisions of UNCLOS.³¹⁵ Moreover these

³⁰⁷<http://cil.nus.edu.sg/rp/il/pdf/1989%20USAUSSR%20Joint%20Statement%20on%20the%20Uniform%20Interpretation%20of%20Rules%20of%20International%20Law-pdf.pdf> accessed 14 November 2013.

³⁰⁸UNCLOS, Article 25(1).

³⁰⁹Id., Article 25(3).

³¹⁰Id., Article 28.

³¹¹Id., Article 27(a).

³¹²Id., Article 27(b).

³¹³Id., Article 27(c).

³¹⁴Id., Article 27(d).

³¹⁵Id., Article 24 (1).

States are also required to provide publicity if they are aware of any navigational dangers present within their territorial sea.³¹⁶

When discussing the doctrine of innocent passage, one must also take into consideration the legal position of submarines, which are required to navigate on the surface and show their flag at all times when exercising the right of innocent passage in the territorial sea of another State.³¹⁷

2. *The Right of Transit Passage*

Pinto observes that at the opening of UNCLOS III in 1973, most coastal States had extended their territorial seas to twelve nautical miles, while a few claimed maritime jurisdictions up to 200 nautical miles. Consequently, many of the world's straits—which are of vital importance to international navigation and trade—would form part of the territorial sea and are therefore subject to the sovereignty of coastal States concerned.³¹⁸ In order to avoid restricting the freedom of navigation in these areas, UNCLOS provides that in straits used for international navigation, the sovereignty of the coastal State is preserved, subject to the right of transit passage.

This right grants foreign vessels freedom of navigation solely for the purpose of continuous and expeditious transit of the strait.³¹⁹ Moreover, bordering straits may not impede or suspend such transit passage as in the case of innocent passage.³²⁰

However, the limitation placed on the sovereignty of bordering States is balanced with the obligation of foreign vessels exercising the right of transit passage to respect *inter alia* the security interests of bordering strait States. Therefore, foreign vessels are to refrain from any use of threat or force in any manner in violation of the principles of international law found in the UN Charter.³²¹ Furthermore, article 38(3) provides that any activity which is not an exercise of the right of transit passage remains subject to other applicable UNCLOS provisions, including those relating to the regime of innocent passage, where such passage may be suspended under the conditions discussed above.³²²

States bordering straits may adopt laws and regulations relating to transit passage through straits in respect of issues such as safety of navigation, and prevention and reduction of pollution.³²³ However, UNCLOS is silent on the

³¹⁶*Id.*, Article 24(2).

³¹⁷*Id.*, Article 20.

³¹⁸Christopher Pinto (n 301) 20.

³¹⁹UNCLOS, Article 38.

³²⁰*Id.*, Article 38(1).

³²¹*Id.*, Article 39(1)(b).

³²²Robin Churchill and Vaughan Lowe (n. 190) 107.

³²³UNCLOS, Article 42.

question of enforcement powers which a coastal State may take against vessels in international straits.³²⁴ This may cause certain problems when addressing maritime security concerns. As Klein opines, the security of international shipping could be at threat considering that States bordering straits are unable to take proper enforcement measures against incidents such as criminal activities concerning ships or navigational aids.³²⁵ Therefore, in the absence of specific enforcement powers granted to strait States, their capacity to respond to maritime security threats would be limited only to cases where conditions of either transit passage or innocent passage have not been met.³²⁶ Despite such limitations, it seems that maintaining a balance of interests to guarantee passage through international straits used for navigation is so vital that it may hinder any attempts at improvements made by coastal State authorities in order to combat maritime security threats.

3. Archipelagic Sea Lane Passage

According to Bernhardt, one of the most significant changes which UNCLOS brought about in the traditional navigational scheme was the recognition of a mid-oceanic archipelagic State.³²⁷ An archipelagic State³²⁸ exercises sovereignty over the archipelagic waters enclosed by the baselines.³²⁹ In such waters the foreign vessels enjoy the same right of innocent passage as applicable in the territorial sea.³³⁰ Moreover, States also enjoy the right of archipelagic sea lanes passage, which can be described as the exercise of rights of navigation and overflight in the normal mode of "continuous and expeditious and unobstructed transit"³³¹ through archipelagic waters and over sea lanes which may be designated by the archipelagic State.³³² The rights and duties of foreign vessels exercising such archipelagic sea lane passage are identical to those relating to transit passage.³³³

³²⁴The only limited circumstances in which coastal States are allowed to exercise enforcement jurisdiction within Straits is by virtue of Article 233 of UNCLOS and only in cases of pollution causes or threats to the marine environment of the Straits.

³²⁵Natalie Klein (n. 33) 85.

³²⁶*Id.*

³²⁷J. Peter A. Bernhardt, *The Right of Archipelagic Sea Lane Passage: A Primer* (1994) 35 VA. JOURNAL OF INT'L L. 719, 721.

³²⁸According to Article 46 of UNCLOS, an archipelagic State is equivalent to a State which is constituted wholly by one or more archipelagos and may include other islands.

³²⁹Christopher Pinto (n. 301) 107.

³³⁰UNCLOS, Article 52.

³³¹*Id.*, Article 53.

³³²Sam Bateman (n. 296) 8.

³³³UNCLOS, Article 54.

An archipelagic State may designate sea lanes and air routes which are required to be suitable for continuous and expeditious passage of foreign ships and aircraft and these must be approved by IMO as the competent international organisation.³³⁴ In the case where a State fails to designate such sea lanes and air routes, archipelagic sea lane passage may still be exercised via any routes normally used for international navigation.³³⁵ However, as mentioned above, outside such sea lanes, vessels enjoy the right of innocent passage only and there is no right of overflight.³³⁶

B. The Passage of Foreign Warships

UNCLOS provides that:

For the purposes of this Convention, "warship" means a ship belonging to the armed forces of a State bearing the external marks distinguishing such ships of its nationality, under the command of an officer duly commissioned by the government of the State and whose name appears in the appropriate service list or its equivalent, and manned by a crew which is under regular armed forces discipline.³³⁷

Foreign warships are often considered to be a reflection of the military power of their respective States. It is true to say that even in times of peace between such States, the presence of warships may still cause certain tensions.³³⁸ The navigation and passage of foreign warships through territorial seas and straits has been significant for third States for strategic reasons. In fact, the right of passage for foreign warships³³⁹ traversing areas under coastal State sovereignty is now considered to be a well-established derogation from the sovereignty of that State,³⁴⁰ even though there are certain States that still require authorisation or notification in order to allow the passage of such ships.³⁴¹

³³⁴UNCLOS, Article 53(9).

³³⁵*Id.*, Article 53(12).

³³⁶Sam Bateman (n. 296) 8.

³³⁷UNCLOS, Article 29.

³³⁸For example flying the flag can be considered a threat.

³³⁹This right also applies to other Government ships operated for non-commercial purposes.

³⁴⁰Natalie Klein (n. 33) 25.

³⁴¹Over 30 parties from the global South in particular China, require prior notification or authorisation before warships may enter the territorial sea. See Tim Stephens and Donald Rothwell *The LOSC Framework for Maritime Jurisdiction and Enforcement 30 Years On*, (2012) 27 *THE INTN'L JOURNAL OF MARINE AND COASTAL LAW* 701, 703.

1. Innocent Passage and Foreign Warships

Churchill and Lowe regard the right of foreign warships to engage in innocent passage as one of the most controversial aspects of the law of the sea.³⁴² While the International Court of Justice in the Corfu Channel Case³⁴³ held that warships had the right of innocent passage through straits, it specifically avoided pronouncing upon whether or not such vessels enjoyed the right of innocent passage in a foreign territorial sea.³⁴⁴ The matter remains an ongoing issue in international law. Some States which are major naval powers assert that warships do enjoy this right, while States which aren't claim that they do not, and often aim to deny access or request notification to protect their own State security.³⁴⁵

As explained above, Part II of UNCLOS governing the rules relating to innocent passage in the territorial sea affirms that all ships of all States enjoy the right of innocent passage. Subsection C of the same Section provides certain rules applicable to warships and other Government ships operated for non-commercial purposes, but does not expressly provide that foreign warships enjoy the right of innocent passage. However, an interpretation of these provisions would seem to suggest that under UNCLOS, foreign warships enjoy the right of innocent passage through another State's territorial sea just like any other vessel.³⁴⁶ It is important to understand that what determines the innocent passage of warships is the type of activities that they undertake, and not the fact that the vessel is actually a warship. This point was elaborated upon by Kraska in his work "Maritime Power and the Law of the Sea" where he opines that a warship cannot be banned from the territorial sea by a coastal State simply because of its status as a naval vessel.³⁴⁷ This view is supported by the right explicitly accorded to submarines under article 30 of UNCLOS.

As in the case of all other vessels navigating through another State's territorial sea, foreign warships must avoid engaging in any activities which may be considered non-innocent and the situation is even more precarious considering that the majority of activities listed in article 19(2) are likely to be associated with warship operations. Although some of these activities,

³⁴²Robin Churchill and Vaughan Lowe (n. 190) 88.

³⁴³Corfu Chanel Case Judgment of December 15th 1949: I.C.J Reports 1949. p.244.

³⁴⁴Robin Churchill and Vaughn Lowe (n. 190) 88.

³⁴⁵Natalie Klein (n. 33) 39.

³⁴⁶In this respect, the 1989 USA-USSR Joint Statement on the Uniform Interpretation of Rules of International Law Governing Innocent Passage provided that "All ships, including warships, regardless of cargo, armament or means of propulsion, enjoy the right of innocent passage through the territorial sea in accordance with international law, for which neither prior notification nor authorization is required."

³⁴⁷James Kraska, *Maritime Power and the Law of the Sea* (Oxford University Press 2011) 120.

such as the launching, landing or taking on board any military devices would undeniably amount to non-innocent passage under UNCLOS, whether this is true for all warship operations remains ambiguous. For example, Rothwell and Stephens opine that the use of radar by foreign warships whilst in passage is essential for navigational safety but at the same time may also be used for defensive operations.³⁴⁸

2. *The Immunity of Foreign Warships*

Foreign warships are of great importance for national security. Due to the necessity of these ships to carry out their activities without interference by other States, UNCLOS as well as customary international law³⁴⁹ accords them a special status which provides immunity from the jurisdiction of other States.³⁵⁰ This immunity is absolute on the high seas,³⁵¹ in the sense that no third State can promulgate and enforce laws governing warships while in this area.³⁵²

However, in areas which fall under the sovereignty of the coastal State, foreign warships still retain their immunity but there is also the duty of such ships to comply with any laws and regulations which the coastal State may have promulgated concerning passage through their territorial sea under article 21.³⁵³ In relation to warships, the provisions of particular importance are those connected to navigational safety and preservation of the marine environment, as well as the protection and security of the population of the coastal State.³⁵⁴ If a foreign vessel refuses to comply with such laws and regulations and “disregards any request for compliance therewith to it,” a coastal State may require it to leave the territorial sea, with the effect that the right of innocent passage has been violated.³⁵⁵ Moreover, the warship’s flag State is required to take responsibility for any loss caused by non-compliance of its ships and to reimburse the coastal State for any damages incurred.³⁵⁶

However, a coastal State can take no civil or criminal jurisdiction over a foreign warship and this lack of enforcement power may constitute a major challenge when attempting to secure and protect maritime security. A

³⁴⁸Donald Rothwell and Tim Stephens, *The International Law of the Sea* (Hart Publishing 2010) 267.

³⁴⁹Christopher Pinto (n. 301) 13.

³⁵⁰UNCLOS, Article 32.

³⁵¹*Id.*, Article 95.

³⁵²Christopher Pinto (n. 301) 13.

³⁵³UNCLOS, Article 30.

³⁵⁴Natalie Klein (n. 33) 35.

³⁵⁵Donald Rothwell and Tim Stephens (n. 348) 267.

³⁵⁶UNCLOS, Article 31.

Coastal State may only use minimum force when requiring a foreign warship to leave its territorial sea. However, if innocent passage has been lost due to the use of force, then a coastal State is entitled to act in self-defence and may be justified in using more forceful measures, as will be elaborated below.³⁵⁷

It is interesting to note the recent proceedings before the International Tribunal for the Law of the Sea (ITLOS) in the dispute *ARA Libertad (Argentina vs Ghana)*³⁵⁸ which has helped shed some light on the significance of immunities granted to foreign warships.

On October 1 2012, an Argentine naval frigate, the *ARA Libertad*, entered the port of Tema as part of a thirteen-nation goodwill cruise and official engagement visit to West Africa.³⁵⁹ The vessel was scheduled to leave 3 days later. On October 2, a U.S. judgment creditor, NML Capital, filed an application of a Statement of Claim before the High Court of Ghana (Commercial Division). It sought to obtain an order of *in rem* attachment of the *ARA Libertad* to satisfy a judgment against Argentina which had already been granted in the United States in a dispute involving the former's default in payment obligations under sovereign bonds.³⁶⁰ The High Court granted the request for an order attaching the vessel, and consequently the *ARA Libertad* was detained in port by the Ghanaian Maritime Authorities. When *ARA Libertad* refused to comply with the Court order, Ghanaian port authorities cut off all water and electricity supplies to the vessel. Conditions on the ship eventually worsened resulting in its deterioration.³⁶¹

In order to resolve the matter, Argentina submitted to the International Tribunal of the Law of the Sea (ITLOS) a request for the prescription of provisional measures under article 290(5) of UNCLOS.³⁶² In its request of November 14 2012,³⁶³ Argentina asked the Tribunal to allow the following provisional measure:

³⁵⁷Natalie Klein (n. 33) 37.

³⁵⁸*ARA Libertad (Arg. v. Ghana)*, Case. No. 20, Request for the Prescription of Provisional Measures, para. (ITLOS Dec. 15, 2012). All case proceedings until now are available online at <<http://www.itlos.org/index.php?id=222&L=.%2Fetc%2Fpasswd%2500#c1066>> accessed 20 November 2013.

³⁵⁹James Kraska, *A Report on the Case of ARA Libertad (Argentina v. Ghana)*, *International Tribunal for the Law of the Sea Case No.20, Provisional Measures* (2013) 107 AM. JOURNAL OF INT'L LAW 1.

³⁶⁰*Id.*

³⁶¹*Id.*

³⁶²According to this article, if a dispute has been duly submitted to a court or tribunal which considers *prima facie* that it has jurisdiction under this Part XI, Section 5 of the Convention, the court or tribunal may prescribe any provisional measures which it considers appropriate under the circumstances to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment pending the final decision.

³⁶³International Tribunal for the Law of the Sea, Press Release, ITLOS/Press 182, 14 November 2012.

That Ghana unconditionally enable the Argentine warship Frigate *ARA Libertad* to leave the Tema port and the jurisdictional waters of Ghana and to be resupplied to that end.³⁶⁴

In addition Argentina claimed that the *ARA Libertad* was in fact being illegally detained by port authorities in Tema and emphasised the vessel's status as a warship embarked on an official visit to Ghana.³⁶⁵ Therefore, Argentina contended that the detention was in violation of international law, in particular with respect to the immunity of a warship from jurisdiction and execution which is enjoyed by warships by virtue of article 32 of UNCLOS. Ghana submitted that the request for provisional measures should be dismissed and that Argentina be required to pay all Court expenses.³⁶⁶

During proceedings before the Tribunal, Argentina argued that the *ARA Libertad* met the requirements of a warship under article 29 of UNCLOS and therefore was immune from the jurisdiction of any State under article 32 of UNCLOS. Interestingly, Ghana argued that article 32 applies only in the territorial sea and not the internal waters of a State where the vessel was located. However, the Tribunal disagreed with this argument on two accounts and held that, 1) even though "most provisions" in Part II of UNCLOS relate to the territorial sea, the definition of warships in article 29 "may be applicable to all maritime areas;" and 2) the principle that the immunity of warships applies in a State's internal waters is one also found under general international law.³⁶⁷ On the second point, Kraska observes that this also raises interesting questions about the scope of ITLOS' jurisdiction beyond the specific provisions of the text of the Convention.³⁶⁸

Finally, on December 15 2012, ITLOS issued an order for provisional measures pending the final outcome of the case where it held that:

Ghana shall forthwith and unconditionally release the frigate *ARA Libertad* and shall ensure that the frigate *ARA Libertad*, its Commander and crew are able to leave the port of Tema and the maritime areas under the jurisdiction of Ghana, and shall ensure that the frigate *ARA Libertad* is resupplied to that end.³⁶⁹

The Tribunal re-emphasised that "in accordance with general international law, a warship enjoys immunity" (paragraph 95) and that "any act which prevents by force a warship from discharging its mission and duties is a

³⁶⁴Id.

³⁶⁵Id.

³⁶⁶James Kraska, *A Report on the Case of ARA Libertad (Argentina v. Ghana)* (n .359) 3.

³⁶⁷Id. 3.

³⁶⁸Id. 5.

³⁶⁹International Tribunal for the Law of the Sea, Press Release, ITLOS/Press 188, 15 December 2012.

source of conflict that may endanger friendly relations among States” (paragraph 97).³⁷⁰

In conclusion, the order for provisional measures issued by the Tribunal is considered to be significant for it upholds and confirms the essential principles regarding the immunity of warships under international law. In this respect the case of *ARA Libertad (Argentina vs Ghana)* may provide comfort to naval forces about any possible attempts by coastal States and port States to exercise jurisdiction over their warships.³⁷¹

3. Transit Passage and Foreign Warships

As explained above, UNCLOS provides that transit passage applies to all ships transiting straits used for international navigation even where foreign warships pass through the territorial sea between one part of the high seas or exclusive economic zone and another. Foreign warships that engage in transit passage are subject to two main restrictions.³⁷² First, they are to refrain from engaging in activities which may constitute a threat or use of force against the coastal State or any activity which is not incidental to the normal mode of transit.³⁷³ Second, such ships in transit are to abide by generally accepted international rules and regulations regarding safety of life at sea as well as pollution prevention.³⁷⁴ However, in comparison with innocent passage, the regime of transit passage provides foreign warships with greater surface navigational rights.³⁷⁵ This is due to the fact that there can be no suspension of innocent passage through straits,³⁷⁶ unlike in the case of innocent passage under article 25(3) of UNCLOS. Transiting warships may also be allowed to perform various activities provided that they are incidental to passage through the strait and consistent with the navigational security of the unit including the use of radar and sonar.³⁷⁷

There has also been much debate surrounding the term “normal mode” of transit and in the exercise of such mode, which activities may constitute a threat to the security of the coastal State. Klein opines that this term potentially encompasses a wide range of activities being carried out by many different types of military vessels.³⁷⁸ For example, in the case of transit passage

³⁷⁰Id.

³⁷¹James Kraska, *A Report on the Case of ARA Libertad* (n. 359)1.

³⁷²Donald Rothwell and Tim Stephens (n. 348) 272.

³⁷³UNCLOS, Article 39(1)(c).

³⁷⁴UNCLOS, Article 39(1)(d).

³⁷⁵Natalie Klein (n. 33) 33.

³⁷⁶UNCLOS, Article 45(2).

³⁷⁷Donald Rothwell and Tim Stephens (n. 348) 272.

³⁷⁸Natalie Klein (n. 33) 33.

of aircraft carriers, it has been argued that the launching, landing or taking on board of any aircraft is an activity incidental to the normal mode of transit. The publication, United Nations Convention on the Law of the Sea 1982, A Commentary, sheds some light on this issue and highlights that at UNCLOS III, the term was intended to be used in relation to the mode which is usual for navigation of a certain ship making passage in defined circumstances.³⁷⁹ Therefore, whether an activity is considered to be incidental to the normal mode of transit is to be interpreted according to the relevant circumstances in every given situation.

4. Archipelagic Sea Lanes Passage and Foreign Warships

There are a number of important issues concerning the regime of archipelagic sea lane passage for foreign warships.³⁸⁰ Archipelagic sea lane passage is considered to be a right,³⁸¹ as opposed to a freedom and is also non-suspendable. This right of archipelagic sea lane passage is therefore enjoyed by warships without any problems concerning closure.³⁸² However this right is more restricted than that of transit passage because it may only be exercised in designated sea lanes. On this particular issue there has been some debate as to whether foreign warships should be bound by these restrictions due to their sovereign immunity. However, considering the importance of ensuring safety of navigation through these narrow shipping channels, it is suggested that foreign warships should also follow the designated shipping routes.³⁸³ Moreover, while foreign warships retain their right of sovereign immunity within archipelagic waters, they are still required to observe generally accepted international regulations dealing with prevention, reduction and control of pollution.³⁸⁴

C. Maritime Security and the High Seas Regime under UNCLOS

Part VII of UNCLOS dealing with the high seas regime provides that it shall apply "to all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or internal waters of a State or in the arch-

³⁷⁹*United Nations Convention on the Law of the Sea 1982, A Commentary Volume 2* (Martinus Nijhoff Publishers) CEN. FOR OCEANS L. AND POL. UNIV. OF VA. SCH. OF L. 342.

³⁸⁰Under article 52 of UNCLOS, the rules relating to innocent passage in the territorial sea also apply to archipelagic waters including those pertaining to immunity of warships and non-compliance by warships with the laws and regulations of the coastal State.

³⁸¹*Id.*, Article 53.

³⁸²Donald Rothwell and Tim Stephens (n. 348) 274.

³⁸³*Id.*

³⁸⁴See UNCLOS, Article 54 referring to article 39.

ipelagic waters of an archipelagic State.”³⁸⁵ On the high seas all States may engage in the “freedom of the high seas,” which includes *inter alia* those freedoms listed in article 87 of the Convention, including the freedom of navigation. These freedoms shall be exercised by all States with due regard for the interests of other States in the exercise of the freedom of the high seas.³⁸⁶

However ships navigating on the high seas are subject to the exclusive jurisdiction of their flag State:

Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas. A ship may not change its flag during a voyage or while in a port of call, save in the case of a real transfer of ownership or change of registry.³⁸⁷

Part VII of UNCLOS contains several important provisions dealing with maritime security issues particularly in the light of article 88 which provides that “the high seas shall be reserved for peaceful purposes.” On the high seas maritime security is considered to be the collective interest of various States to combat threats against the freedoms of the seas, whilst ensuring that the high seas are used for peaceful purposes.³⁸⁸

It is important to note that this obligation also extends to the exclusive economic zone by virtue of article 58(2) which states:

Articles 88 to 115 and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with this Part.³⁸⁹

The obligation of States to ensure that the high seas are used for peaceful purpose is based on two important principles; 1) non-appropriation of the high seas,³⁹⁰ and 2) exclusive jurisdiction of the flag State.³⁹¹ The latter is of paramount importance for it ensures that flag States are responsible for ensuring maritime security by providing adequate controls over ships flying their flag.³⁹² However, in the interest of maritime security there are also a

³⁸⁵UNCLOS, Article 86.

³⁸⁶Id., Article 87(2).

³⁸⁷Id., Article 91.

³⁸⁸This duty is also reflected in article 301 which deals the rights and duties of State parties which are to be exercised under the Convention in accordance with “peaceful uses of the seas.”

³⁸⁹Id., Article 58(2).

³⁹⁰UNCLOS, Article 89.

³⁹¹Id., Article 91.

³⁹²Moreover, under article 94 of UNCLOS, flag States are required to effectively exercise jurisdiction and control in administrative, technical and social matters over ships flying their flag. However due to the emergence of open registries, said control may not always be adequate, particularly if there is a lack of political support.

number of important exceptions to the principle of exclusive flag State jurisdiction on the high seas. An example of these exceptions is the regime to combat piracy.³⁹³

Article 100 of UNCLOS provides that:

All States shall cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State.

As has been elaborated on in Part III, the duty to cooperate is found in article 100, and facilitated by article 105, and provides for action which may be taken against a pirate ship. According to this article:

On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. 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.³⁹⁴

It is important to note that the seizure of a pirate ship allowed by article 105 can only be carried out by a ship or aircraft clearly marked and identified as being on government service.³⁹⁵ This provision may be useful in the sense that it does not allow private ships to assume government functions.

As discussed in Part II, UNCLOS provides an exception to the exclusive jurisdiction of the flag State on the high seas as it grants universal jurisdiction over crimes of piracy. However despite these powers being granted to all States, today one may conclude that the piracy regime found in UNCLOS is no longer adequate to deal with modern day piracy. Along with the problems surrounding the definition discussed in Part III, mainly that the regime does not cover situations of illegal acts of violence involving just one ship or where members of the crew or passengers take over the ship or acts motivated by ideological goals, other difficulties include the following:

1. The definition of piracy under UNCLOS restricts acts of piracy to those areas outside territorial sovereignty. This is a major short coming of UNCLOS since most attacks occur close to shore in whole or part of the territorial sea. This is even more problematic if the coastal State concerned is unable to ensure effective prevention and suppression of such acts in its territorial sea;³⁹⁶

³⁹³Other exceptions include cases of transporting of slaves under article 99, illicit trafficking of drugs under article 108, unauthorised broadcasting from the high seas under article 109, and Stateless vessels under article 110.

³⁹⁴UNCLOS, Article 100.

³⁹⁵*Id.*, Article 107.

³⁹⁶Yoshifumi Tanaka (n. 160) 357.

2. The piracy regime does not impose a legal duty to cooperate in the eradication of piracy on the high seas and even so the wording of article 105 seems to suggest that States may but not necessarily will take action to prosecute pirates notwithstanding the duty to cooperate in the suppression of piracy found in article 100;

3. The regime contains no mechanism to secure prosecution and punishment of offenders and this is particularly problematic in the case of coastal States which may not have the means to prosecute or punish offenders;³⁹⁷

4. The regime does not impose an obligation on coastal States to criminalise acts of piracy under their domestic laws.³⁹⁸

Therefore these problems along with those discussed in Part III, highlight the inadequacies of the relevant UNCLOS provisions in combating contemporary piracy. As a consequence, IMO has had to step in and deal with these deficiencies of the Convention. The importance of IMO in this respect will be examined in the next Part of this study.³⁹⁹

D. Maritime Security under Customary International Law

As highlighted above it is clear that many of the provisions contained in UNCLOS have major maritime security ramifications. Today, over 160 States are parties to UNCLOS,⁴⁰⁰ and since its entry into force in 1994 it has had a significant influence on State practice.⁴⁰¹ As a result, it may be said that many UNCLOS provisions reflect customary international law, making them binding on all States, even those not party to the Convention.⁴⁰² The different navigational regimes mentioned above have now been firmly established under customary law, as have the provisions dealing with piracy reflected in Part VII of the Convention.⁴⁰³ Apart from reflecting customary international law, UNCLOS also embodies other general aspects of international law⁴⁰⁴ which are relevant to the maintenance of maritime security. An

³⁹⁷José Luis Jesus (n. 165) 380.

³⁹⁸For example until 2009, Malta did not have any piracy provisions in its domestic legislation. See Christopher Attard, *International Maritime Criminal Jurisdiction* (LLD, University of Malta 2007) 72.

³⁹⁹See Part IV.

⁴⁰⁰<http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm> accessed 25 February 2013.

⁴⁰¹Philippe Sands and Jacqueline Peel, *Principles of International Environmental Law* (3d ed., Cambridge University Press 2012) 403.

⁴⁰²*Id.*

⁴⁰³Lawrence Azubuike, *International Law Regime Against Piracy* (2009) 15 ANNUAL SURVEY OF INTERNATIONAL LAW AND COMPARATIVE LAW 43.

⁴⁰⁴In fact in the Preamble to UNCLOS, State Parties to the Convention affirm that "matters not regulated by this Convention continue to be governed by rules and principles of general international law." See UNCLOS, Preamble.

important example of this is the doctrine of self-defence in relation to military activities at sea.

According to article 301 of UNCLOS:

In exercising their rights and performing their duties under this Convention, States Parties shall refrain from any threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the principles of international law embodied in the Charter of the United Nations.

Therefore, UNCLOS prohibits military activities at sea or any other acts which amount to threat or use of force, consistent with the UN Charter which also prohibits the resort to force⁴⁰⁵ except in the exercise of self-defence or where such acts are authorised by the Security Council under Chapter VII.⁴⁰⁶

In relation to a lawful and legitimate exercise of the right of self-defence, the UN Charter holds that:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.⁴⁰⁷

From an analysis of this provision it is clear that the right of self-defence is considered to be intrinsic to all States, and can be exercised either individually or collectively. However, before such right is invoked as a defence, it must be proven that there was a previous armed attack carried out against that particular State. Besides this requirement, Brownlie notes that "although the right to self-defence is established, it is not unconstrained; force used must be necessary and proportionate."⁴⁰⁸ This point was also confirmed by the International Court of Justice in the Nicaragua judgment which explained how:

⁴⁰⁵Id., Article 2(4).

⁴⁰⁶Id., Articles 39-42.

⁴⁰⁷Id., Article 51.

⁴⁰⁸James Crawford (n. 62) 749.

self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law.⁴⁰⁹

Necessity implies that any response taken as an act of self-defence must be limited to achieving legitimate military purposes, while proportionality considers the retaliatory impact of any acts ensuring that minimum harm is caused.⁴¹⁰

In the context of maritime security the right of self-defence has also been considered as a justification for interdictions on the high seas provided that any action taken is necessary and proportionate to an imminent attack.⁴¹¹ In the wake of the 9/11 incidents in New York, the right of self-defence was used as a justification for boarding foreign vessels on the high seas for the purpose of pursuing terrorists.⁴¹² In fact, Van Dyke notes that after the tragic events of that day, the U.S. began boarding vessels located in areas such as the Indian Ocean, Red Sea, and the Strait of Hormuz in an attempt to locate Osama Bin Laden and other al-Qaeda members.⁴¹³ Despite the fact that consent was generally sought before any inspections were carried out, the U.S. Government then notified the maritime industry that even in the absence of such consent, it would still board ships suspected of transporting terrorist suspects.⁴¹⁴ The legal basis for these acts was never elaborated upon, but President Bush considered them to be acts of self-defence in response to the al-Qaeda attacks.⁴¹⁵

Moreover, Wolfrum also argues that States targeted by maritime terrorism may also turn to self-defence.⁴¹⁶ Following 9/11, the UN Security Council adopted Resolution 1368 (2001) of 12 September 2001⁴¹⁷ which while recognising “. . . the inherent rights of individual or collective self-defence . . . ”⁴¹⁸ denounced all acts of terrorism carried out on 9/11 and expressed the importance of combating “by all means threats to international peace and security.” This was also confirmed by the Council of the North Atlantic Treaty

⁴⁰⁹Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America). Merits, Judgment. I.C.J. Reports 1986, p. 14, para.176.

⁴¹⁰CJPME, Fact Sheet: The Legal Right to Self-Defence, available at <<http://www.cjpmo.org/DisplayDocument.aspx?DocumentID=71>> accessed 26 February 2013.

⁴¹¹Natalie Klein (n. 33) 273.

⁴¹²Jon Van Dyke, *Balancing Navigational Freedom with Environment and Security Concerns* (2004) 15 Co. JOU. OF INTN'L ENVIR. LAW AND POL. 19, 25.

⁴¹³Id.

⁴¹⁴Id.

⁴¹⁵Id.

⁴¹⁶Rüdiger Wolfrum (n. 251) 21.

⁴¹⁷UN Security Council, Resolution 1368 (2001) adopted by the Security Council at its 4370th meeting on 12 September 2001, S/RES/1368 (2001).

⁴¹⁸Id.

Organisation (NATO) which held these terrorist acts prompted the use of self-defence in accordance with article 5 of the North Atlantic treaty. Wolfrum argues that the reactions by the UN Security Council and NATO steered away from the traditional doctrine of self-defence, and that acts of self-defence can be sparked off by attacks which by their very nature are equivalent to military attacks, regardless of whether such attacks were carried out by a sovereign State.⁴¹⁹

Finally, it is important to note that an act of self-defence in no way prevents the UN Security Council from taking its own action, and the right of self-defence will only exist until the UN Security Council has taken the necessary measures to maintain international peace and security.⁴²⁰ Moreover, UN members must inform the Security Council of any acts of self-defence that have been taken. It has also been argued that action taken by the Security Council could be considered a better and more appropriate avenue for countering maritime security threats, rather than using armed attacks or acts of self-defence.⁴²¹

In this Part of the study we have seen the importance of IMO's work in complimenting and furthering the maritime security rules found in such treaties such as UNCLOS and rules of customary international law. In the next Part, the study will focus on IMO's contribution to adopting a legal response strategy to one of the world's major maritime threats, piracy and armed robbery against ships.

V

IMO'S INITIATIVES TO COUNTER PIRACY AND ARMED ROBBERY AT SEA

Maritime piracy and the crime of armed robbery against ships are considered to be major maritime security threats which jeopardize not only the safety of seafarers, but also the security of navigation and commerce. It is true to say that the crime of piracy has existed for centuries; however with the passage of time and developments in technology, pirates have developed highly innovative ways of conducting their attacks. Piratical acts are on the increase in certain regions of the world, especially off the coast of Somalia and in the Gulf of Aden. As discussed in previous parts of the study, the international legal regime dealing with piracy in UNCLOS may no longer be considered adequate to combat contemporary piracy. IMO has played a vital

⁴¹⁹Rüdiger Wolfrum (n. 251) 21.

⁴²⁰UN Charter, Article 51.

⁴²¹*Id.*

role in addressing the deficiencies found in the Convention and has had to provide better legal responses to successfully combat piracy and armed robbery at sea.

A. The Definition of Piracy Recognised by IMO

IMO does not provide its own definition of piracy.⁴²² However, it recognizes and accepts the definition of piracy found in article 101 of UNCLOS, which as explained in Part III is now generally accepted as part of customary international law. As discussed in Part II,⁴²³ according to this definition any act of violence or detention or any act of depredation against a ship or aircraft or against persons or property on board such ship or aircraft can be considered as an act of piracy if the act; 1) is carried out by the crew or the passengers of another private ship or aircraft; 2) is motivated by private ends; 3) takes place on the high seas (and by virtue of article 58(2) this also includes the exclusive economic zone.)⁴²⁴

B. The Definition of Armed Robbery against Ships Recognised by IMO

As highlighted above, a piratical act under UNCLOS is one which necessarily takes place on the high seas. Therefore, if the same act takes place within a State's internal waters or territorial sea, it cannot technically be considered as one of piracy under international law. This is problematic since as has already been discussed, most piracy incidents occur in the internal waters, territorial sea or archipelagic waters.⁴²⁵

Such acts have now been termed by the IMO and other international organisations as acts of "armed robbery against ships." IMO first provided a definition of this term in Resolution A.922 (22) adopted on 29 November 2001.⁴²⁶ This Resolution outlines a Code of Practice for the Investigation of

⁴²²In the past other international organisations have provided their own definition of piracy. For example the ICC's IMB has defined piracy as "the act of boarding or attempting to board any ship with the intent to commit theft or any other crime and with the intent or capability to use force in furtherance of that act." The definition used here is broader than that provided for under UNCLOS which restricts acts of piracy to those acts occurring only on the high seas. See D. Anderson, R.de Wijk, S. Haines and J. Stevenson, *Somalia and the Pirates* Working Paper No.33, European Security Forum, December 2009, 10.

⁴²³See Section II C.2

⁴²⁴As stated in Part III, According to Article 58(2) of UNCLOS, Articles 88-115 dealing with the high seas including those dealing with piracy shall also apply to the EEZ.

⁴²⁵ICC International Maritime Bureau, *Piracy and Armed Robbery against Ships*, Annual Report, 1 January- 31 December 2009, 3.

⁴²⁶IMO Resolution A.922 (22) (29 November 2001).

the Crimes of Piracy and Armed Robbery against Ships, and will be discussed further on in this Part.⁴²⁷ For the purposes of this Code, armed robbery is defined as:

any unlawful act of violence or detention or any act of depredation, or threat thereof, other than an act of piracy, directed against a ship or against persons or property on board such a ship, within a State's jurisdiction over such offences.⁴²⁸

In 2009, the IMO Assembly adopted Resolution A.1025 (26)⁴²⁹ requesting the MSC to revise and update the previously adopted Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery against Ships in order to bring it in line with current developments and emerging needs.⁴³⁰ Accordingly, the definition of armed robbery was revised to include:

1. 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;
2. any act of inciting or of intentionally facilitating an act described above.⁴³¹

The definition provided in Resolution A.1025 (26) to a large extent mirrors that found in Resolution A.922 (22). However, there is an important difference in the territorial scope of application of the definition, as the former specifically identifies areas where armed robbery against ships might take place, as opposed to the more general designation "within a State's jurisdiction." A reason for this change was provided in IMO's Report of the Correspondence Group on Piracy.⁴³² As explained in this Report, the decision to modify the previous definition of armed robbery was put forward by the participating countries in a 2008 sub-regional meeting on piracy and armed robbery against ships in the Western Indian Ocean, Gulf of Aden and the Red Sea area, held in Dar es Salaam. The Report held that the new definition takes into consideration the position of France as well as other countries who believed that "the definition of armed robbery against ships should not be applicable to acts committed seaward of the territorial sea."⁴³³

⁴²⁷See Section IV C 3.

⁴²⁸IMO Resolution A.922(22), Annex 2.2.

⁴²⁹IMO Resolution A.1025 (26) (2 December 2009).

⁴³⁰J.Ashley Roach, *General Problematic Issues on Exercise of Jurisdiction over Modern Instances of Piracy* in Clive Symmons (ed), *SELECTED CONTEMPORARY ISSUES IN THE LAW OF THE SEA* (Martinus Nijhoff Publishers 2011) 136.

⁴³¹IMO Resolution A.1025(26), Annex 2.2.

⁴³²<<http://merchantmarine.financelaw.fju.edu.tw/data/IMO/MSC/86/MSC%2086-18-1>> accessed 1 March 2013.

⁴³³*Id.*

The modified definition has included the element of “private ends”⁴³⁴ as a requirement to constitute an act of armed robbery. The participating States argue that this element was introduced in order to bring the definition of armed robbery in line with the one provided for in the Regional Cooperation Agreement on Combating Piracy and Armed Robbery Against Ships in Asia, which shall be discussed further on in this Part of the study.⁴³⁵

However, this definition might be problematic since it seems to exclude any acts of violence against ships or their crews committed seaward of the territorial sea, including offences under the SUA Convention which do not constitute piratical acts. In fact, this opinion is shared by Roach who suggests that IMO should refrain from using such a definition and should instead revert back to the language used in Resolution A.922 (22) which aimed at distinguishing between acts of violence against ships at sea which occur either inside or outside the territorial sea, and piratical acts occurring on the high seas only.⁴³⁶

C. Early Measures Taken by IMO to Combat Piracy and Armed Robbery at Sea

Acts of piracy and armed robbery against ships have plagued the shipping industry for decades. As the world's leading maritime organisation, IMO has been at the forefront of the international efforts to combat such crimes. This is evidenced by a series of resolutions adopted by the IMO Assembly in this respect.

In particular, the MSC has played an important role by promulgating a number of recommendations and guidelines issued in the form of circulars relating to the prevention and suppression of piracy and armed robbery at sea. According to IMO's website, since 1998 the Organization has also been conducting a long term anti-piracy project.⁴³⁷ The first phase commenced by conducting various regional seminars and workshops, which were well attended by Government representatives from those regions which are greatly affected by piracy.⁴³⁸ The second phase included assessment and evaluation missions in different regions with the goal of developing regional agreements on counter piracy actions.⁴³⁹

⁴³⁴See Section II C 2.

⁴³⁵*Id.*

⁴³⁶J. Ashley Roach (n 430) 136.

⁴³⁷<<http://www.imo.org/About/Pages/Default.aspx>> accessed 24 March 2013.

⁴³⁸*Id.*

⁴³⁹*Id.*

1. *IMO Resolutions Aimed at Combating Piracy and Armed Robbery at Sea*

During the early 1980s there was a sudden increase in attacks involving piracy and armed robbery against merchant vessels. This prompted the IMO Assembly to take action through the adoption of Resolution A.545 (13) titled "Measures to Prevent Acts of Piracy and Armed Robbery against Ships."⁴⁴⁰ The Resolution urged Governments, together with ship owners, ship masters and crew to heighten security measures and take all necessary steps "to prevent and suppress acts of piracy and armed robbery against ships in or adjacent to their waters."⁴⁴¹ Moreover any action taken by Governments in this regard was to be communicated to IMO.

From a very early stage, IMO recognised the importance of tracking piratical incidents and keeping proper records concerning attacks as a means of preventing future attacks. By means of Resolution A.545 (13), Governments were also invited to provide statistical analysis of incidents committed against ships flying their flag.⁴⁴² This assisted IMO in compiling data reports, outlining the frequency and location of attacks as well as the circumstances surrounding such attacks.

These reports are now published monthly and include the following details:⁴⁴³

1. Ship's type, name, IMO number, gross tonnage and flag;
2. Date and time of the incident;
3. Position of the incident;
4. Details of the incident;
5. Consequences for the crew, ship and cargo;
6. Action taken by the master and the crew;
7. Information on whether the incident was reported to the coast authority, and if so the details of such authority;
8. The reporting State or International Organization involved; and
9. Information of any coastal State action taken.⁴⁴⁴

⁴⁴⁰IMO Resolution A.545 (13) (17 November 1983).

⁴⁴¹*Id.*, para.2.

⁴⁴²*Id.*, para.4.

⁴⁴³Rosalie Balkin (n. 109) 10.

⁴⁴⁴See IMO's monthly Reports on Acts of Piracy and Armed Robbery against ships available at <<http://www.imo.org/OurWork/Security/SecDocs/Pages/Maritime-Security.aspx>> accessed 3 April 2013.

It is interesting to note that since July 2002, the IMO Secretariat has decided to report incidents of piracy and armed robbery separately from acts of armed robbery committed in port areas, as well as attempted acts of armed robbery.⁴⁴⁵ This may be useful for analysis and data reporting purposes. The latest IMO report on piracy and armed robbery at sea details incidents that occurred in March 2013.⁴⁴⁶ According to the data provided there were a total of 23 incidents, where the majority of attacks occurred in port areas.⁴⁴⁷

Resolution A.545 (13) was later followed by a number of other important resolutions aimed at strengthening international efforts to combat piracy and armed robbery at sea. In particular, Resolution A.683 (17) on the "Prevention and Suppression of Acts of Piracy and Armed Robbery against Ships"⁴⁴⁸ called on Governments to increase their efforts to repress incidents of piracy and armed robbery at sea.⁴⁴⁹ Similarly, Resolution A.738 (18) titled "Measures to Prevent and Suppress Piracy and Armed Robbery against Ships,"⁴⁵⁰ also encouraged Governments *inter alia* to continue their efforts to prevent and suppress these crimes, and also urged them to establish and maintain close liaisons with neighbouring States to facilitate the apprehension and conviction of all persons involved in such piratical acts.⁴⁵¹

2. IMO Guidelines to Prevent Piracy and Armed Robbery at Sea

As discussed in Part II,⁴⁵² IMO's law-making role also includes the promulgation of soft law. This is most evident in the context of fighting maritime piracy, where the Organization has issued numerous guidelines and recommendations to prevent piracy and armed robbery against vessels.

As early as 1993, IMO issued recommendations to Governments as well as guidance to ship owners, ship operators and crews on ways to prevent and suppress acts of piracy and armed robbery at sea. These recommendations were published in the form of a Circular which was revised in 1999, and more recently in 2009. The recommendations outline measures which should be taken by such persons in order to reduce the risk of piracy and armed robbery and any possible responses that may be taken to curb such attacks. As with the previous resolutions adopted by IMO, these particular

⁴⁴⁵J. Ashley Roach (n. 430) 136.

⁴⁴⁶IMO MSC.4/Circ.196, Reports on Acts of Piracy and Armed Robbery against Ships, 29 April 2013.

⁴⁴⁷*Id.*, Annex 1 and 2.

⁴⁴⁸IMO Resolution A.683(17) (6 November 1991).

⁴⁴⁹*Id.*, para. 1.

⁴⁵⁰IMO Resolution A.738(18) (4 November 1993).

⁴⁵¹*Id.*, para. 6.

⁴⁵²See Section II E.

recommendations also stress the importance of reporting attacks (irrespective of whether they were successful or not) to the appropriate coastal State authorities and to relevant maritime administrations.⁴⁵³

The above mentioned Circular provides a series of recommended practices based on reports of previous incidents, information and advice published by commercial organisations, as well as various ship security measures. For example, those vessels which operate in areas prone to piratical attacks are expected to keep on board a ship security plan covering matters such as surveillance, crew responses, and procedures to be carried out following an attack.⁴⁵⁴

IMO MSC.4/Circ.1334, also followed by a later Circular IMO MSC.4/Circ.1333, titled Recommendations to Governments for Preventing and Suppressing Piracy and Armed Robbery against Ships, was issued on 26 June 2009 and provided further guidance to coastal States, port States and flag States on possible ways to avert piratical and armed robbery acts. The two MSC Circulars are now considered as universal guidance on piracy and armed robbery against ships.

3. The IMO Code of Practice for the Investigation of Crimes of Piracy and Armed Robbery against Ships

As discussed above, the IMO Assembly adopted a Code of Practice for the Investigation of Crimes of Piracy and Armed Robbery against Ships in November 2001 by way of Resolution A.922 (22). Later developments and an increase in piratical acts led the IMO Assembly to request the MSC to update and revise the previous Code, and a new code was adopted in December 2009 by means of Resolution A.1025 (26).⁴⁵⁵ Besides a number of improvements made to the investigation procedures, the revised Code places more emphasis on the element of State cooperation in the investigation of any crimes of piracy and armed robbery at sea.

The Code, although recommendatory in nature serves as an important and influential *aide-memoire* which assists in the investigation of crimes of piracy and armed robbery at sea.⁴⁵⁶ It identifies the absence of an effective legal framework to ensure the arrest and punishment of offenders as a major problem amongst States. To this end, the Code recommends that States should establish jurisdiction over offences of piracy and armed robbery against

⁴⁵³IMO MSC.4/Circ.1334. *Piracy and armed robbery against ships, guidance to shipowners and ship operators and crews on preventing and suppressing acts of piracy and armed robbery against ships*, 23 July 2009.

⁴⁵⁴*Id.*, para.21-23.

⁴⁵⁵IMO Resolution A.1025(26) (2 December 2009).

⁴⁵⁶*Id.*, Annex, para.1.

ships and advises them to modify their domestic legislation so as to be able to successfully apprehend and prosecute offenders.⁴⁵⁷ Moreover, States are encouraged to make use of existing international instruments aimed at combating piracy. In particular they are encouraged to incorporate and implement the relevant provisions of UNCLOS, the 1988 SUA Convention and its Protocols which were discussed in Part III and Part II respectively.

IMO has yet again stressed the importance of proper reporting of piracy and armed robbery incidents under the Code. It identifies this tool as a critical element which helps in the investigation and prevention of such crimes. Ship masters are encouraged to report all such incidents to coastal State and port authorities. In turn, these authorities have a responsibility to avoid ships from being unduly delayed or burdening ships with unduly reporting costs.⁴⁵⁸

The Code also encourages the training of so called "investigators,"⁴⁵⁹ individuals that have been assigned by the relevant State to intervene either during or after an act of piracy or armed robbery against a vessel.⁴⁶⁰ The Code sets out an investigative strategy which should be carried out by the designated investigators. This strategy includes; 1) the execution of conventional detective methods; 2) the linkage of anti-piracy measures with efforts to combat other forms of transnational crimes such as anti-smuggling patrols; and 3) cooperation and collaboration with different relevant organisations, including the IMB.⁴⁶¹

The Code also advises investigators on appropriate ways of dealing with initial reports of piracy and armed robbery. Investigators should immediately respond to such incidents and must take the necessary measures to; 1) preserve life; 2) prevent offenders from escaping; 3) warn other ships; 4) protect the crime scene; and 5) secure any evidence at the crime scene.⁴⁶²

Finally, the Code outlines how a proper investigation should take place, depending on the circumstances of each case.⁴⁶³ However, any investigative action taken in such investigations must always be proportionate to the crimes committed. All investigations into alleged acts of piracy and armed robbery should; 1) establish and record all relevant facts; 2) record individual witness accounts; 3) detail the forensic examination of crime scenes; and 4) include a search of intelligence data bases and then distribute the information to the appropriate parties.⁴⁶⁴

⁴⁵⁷Id., para.3.1.

⁴⁵⁸IMO Resolution A.1025 (26) Annex, para.3.3.

⁴⁵⁹Ideally, such individuals must have experience in investigation techniques and should ideally be accustomed and already familiar with a ship environment.

⁴⁶⁰IMO Resolution A.1025(26) Annex, para.2.3.

⁴⁶¹Id., para.5.

⁴⁶²Id., para.6.

⁴⁶³Id., para.7.

⁴⁶⁴Id.

*D. Areas prone to Contemporary Piracy and IMO Regional Responses**1. Southeast Asia*

In the early 2000s, IMO reported a dramatic increase in the number of piratical attacks against merchant vessels in Southeast Asia. According to the 2001 IMO Annual Report on Acts of Piracy and Armed Robbery against Ships,⁴⁶⁵ regions which were most frequently attacked by pirates included the Straits of Malacca and Singapore and the Indonesian waters.

The Southeast Asian region is a vast area covering both the Indonesian and Philippine archipelagos, which together form over 20,000 islands. Collins and Hassan observe that this region provides ideal geographic conditions for piratical attacks to occur due to the narrow shipping channels and surrounding islands which generate a high concentration of maritime traffic.⁴⁶⁶ In fact over 50,000 ships visit the Malacca Straits annually⁴⁶⁷ making it one of the busiest and most important international trade routes between Europe and Asia.⁴⁶⁸

As evidenced by the 2001 IMO Annual Report, most of these attacks or attempted attacks took place within areas of national sovereignty, generally coastal States' territorial seas while ships were either anchored or berthed. Again the situation presents the same challenges discussed earlier, since attacks which occur in areas under national sovereignty including the internal waters, territorial sea and archipelagic waters, do not constitute acts of piracy under international law. As has been examined, such acts are considered to be cases of armed robbery against ships and can only be subject to the exclusive jurisdiction of the coastal State. In order to deal with these problems, the international community turned to developing regional approaches amongst the littoral States to combat these crimes.

Given the rise in piracy, the international community could no longer ignore the volatile situation present in the Malacca Straits and Indonesian waters. One of the most significant efforts to deal with this problem was a

⁴⁶⁵<http://www.imo.org/blast/blastDataHelper.asp?data_id=5018&filename=16-colour.pdf> accessed 10 April 2013.

⁴⁶⁶Rosemary Collins and Daud Hassan, *Applications and Shortcomings of the Law of the Sea in Combating Piracy: A South East Asian Perspective*, (2009) 40 J. OF MAR. L. AND COMM. 89, 108.

⁴⁶⁷Catherine Zara Raymond, *Piracy in Southeast Asia: New Trends, Issues and Responses*, (2005) Institute of Defence and Strategic Studies, Nanyang Technological University, 89, 3. <<http://www.rsis.edu.sg/publications/WorkingPapers/WP89.pdf>> accessed 10 April 2013.

⁴⁶⁸Robert Beckman, *Do We Need a New Convention on Piracy and Armed Robbery Against Ships?* in Aldo Chircop, Nomran Letalik, Ted Mc.Dorman and Susan Rolston (eds), *THE REGULATION OF INTERNATIONAL SHIPPING: INTERNATIONAL AND COMPARATIVE PERSPECTIVES – ESSAYS IN HONOR OF EDGAR GOLD*, (Martinus Nijhoff 2012) 77.

Japanese⁴⁶⁹ inspired initiative aimed at establishing a regional framework amongst States to combat piracy and armed robbery in Asia. This resulted in the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships (ReCAAP), which was concluded by 16 States in the Asian region on 11 November 2004 and later came into force on 4 September 2006.⁴⁷⁰ The initiative represented the first ever regional multilateral Government-to-Government agreement aimed at promoting and encouraging cooperation against piracy and armed robbery at sea in Asia.⁴⁷¹ In order to achieve this goal, one of ReCAAP's most significant features was the establishment of an information sharing centre (ISC) based in Singapore.⁴⁷² The ISC was aimed at facilitating the dissemination of piracy related information between States in the Asian region.

The ReCAAP ISC essentially focuses on 3 important cooperation strategies including; 1) the sharing of information between parties; 2) the implementation of capacity building strategies between parties by sharing practices used to suppress piracy and armed robbery; and 3) encouraging cooperative arrangements with other organisations which may help improve the ability of parties to deal with threats at sea.⁴⁷³ In order to successfully implement these strategies, ReCAAP requires each contracting party to set up a focal point which would act as point of contact for the ISC.⁴⁷⁴ The ISC is then supported by the Information Network System (IFN), a web-based system that exchanges information from the different focal points of the various contracting States.⁴⁷⁵ Since its inception, the IFN has been developing and improving coverage of incidents such as the recent development of a mobile version which permits reporting of incidents through smart phones and tablets.⁴⁷⁶

ReCAAP is considered to be one of the most successful anti-piracy regional operations in recent history and has strengthened cooperation between States to combat major security challenges.⁴⁷⁷ This is evidenced by

⁴⁶⁹This initiative may have been sparked off by the rise in piratical attacks in the Malacca Straits which led to a number of hijacking incidents involving Japanese vessels and crew such as that involving the Japanese cargo vessel the *Tenyu*. See Euan Graham, *Japan's Sea Lane Security, 1940-2004-A Matter of Life or Death?* (Routledge 2006) 185-186.

⁴⁷⁰Joshua Ho, *Combating piracy and armed robbery in Asia: The ReCAAP information Sharing Centre (ISC)* (2009) 33 MAR. POL. 432.

⁴⁷¹<<http://www.recaap.org/AboutReCAAPISC.aspx>> accessed 12 April 2013.

⁴⁷²ReCAAP, Part II Information Sharing Centre, available at <<http://www.recaap.org/Portals/0/docs/About%20ReCAAP%20ISC/ReCAAP%20Agreement.pdf>> accessed 12 April 2013.

⁴⁷³Joshua Ho (n. 470) 432.

⁴⁷⁴ReCAAP, Part III, Cooperation through Information Sharing Centre, Article 9(1).

⁴⁷⁵Miha Hribernik, *Countering Maritime Piracy and Robbery in Southeast Asia-the Role of the ReCAAP Agreement*, Briefing Paper 2012/13, European Institute for Asian Studies 5.

⁴⁷⁶Id.

⁴⁷⁷Id.

a significant decrease in piratical acts in Southeast Asian areas since the operation of the Agreement.⁴⁷⁸ IMO has also recognised the importance of regional cooperation amongst those States which are greatly affected by maritime violence. The Organization has identified ReCAAP as a successful example of regional cooperation, which could also serve as a model to emulate in other areas affected by piracy.⁴⁷⁹ This point was reiterated by the Secretary General of IMO, Mr. Sekimizu, when he visited the ReCAAP ISC in 2012. He applauded the ISC in its efforts on areas of exchange of information concerning piracy and armed robbery incidents amongst contracting States and specifically encouraged collaboration between IMO and ReCAAP ISC.⁴⁸⁰

2. Piracy off the Coast of Somalia and in the Gulf of Aden

By the late 2000s, IMO reported a decline in the number attacks involving piracy and armed robbery against ships occurring in the more traditional piracy hotspots in Southeast Asia. However, by contrast there was instead a dramatic increase in reported attacks occurring in East African regions, particularly off the coast of Somalia and in the Gulf of Aden.⁴⁸¹

Various factors have contributed to the rise in piracy off the coast of Somalia. Firstly, Somalia's geographical position in the Horn of Africa puts it at the crux of several major regional shipping routes, with an estimated 16,000 ships passing through the Red Sea travelling to or from the Suez Canal annually.⁴⁸² As discussed above, this provides fertile ground for pirates and armed robbers who often take advantage of the influx of maritime traf-

⁴⁷⁸According to recent statistics, ReCAAP's Annual Report for 2012, available at <<http://www.recaap.org/Portals/0/docs/Reports/ReCAAP%20ISC%20Annual%20Report%202012.pdf>> provides that there were 132 incidents (123 actual and nine attempted incidents) which highlighted a marked improvement in the situation in Asia in 2012. This was identified as the largest year-on-year decrease (16%) in the total number of incidents reported during the five year reporting period of 2008-2012. It also demonstrated a consecutive downward trend commencing from 2010. The decrease was most apparent at the ports and anchorages in Bangladesh and Vietnam, in the South China Sea and the Straits of Malacca and Singapore. The overall improvement of the situation of piracy and armed robbery against ships in Asia in 2012 highlighted the effectiveness of the ReCAAP information sharing network, and operational-level cooperation and collaboration among the stakeholders, but it should be noted that progress was fragile and reversible.

⁴⁷⁹<<http://www.imo.org/ourwork/security/piracyarmedrobbery/pages/default.aspx>> accessed 20 March 2013.

⁴⁸⁰ReCAAP ISC, Press Release available at <[http://www.recaap.org/Portals/0/docs/News%20and%20Press%20Releases/Visit%20by%20IMO%20Sec-Gen%20Mr%20Koji%20Sekimizu%20\(2012-04-23\).pdf](http://www.recaap.org/Portals/0/docs/News%20and%20Press%20Releases/Visit%20by%20IMO%20Sec-Gen%20Mr%20Koji%20Sekimizu%20(2012-04-23).pdf)> accessed 21 March 2013.

⁴⁸¹<<http://www.imo.org/OurWork/Security/PiracyArmedRobbery/Pages/Default.aspx>> accessed 21 March 2013.

⁴⁸²Karl Sörenson, *State Failure on the High Seas – Reviewing the Somali Piracy*, FOI Somalia Papers: Report 3, Stockholm: Swedish Defence Research Agency, 2008, 8.

fic. Moreover, the poverty brought about by the civil war in Somalia has led to individuals, particularly young men with seagoing experience, to turn to piracy as a source of income by demanding ransoms. Somali pirates are considered to be very dangerous and are most often armed with automatic weapons and rocket-propelled grenades. They usually launch their attacks in one of two ways; either they attempt to board, attack and hijack ships in Somalia's territorial sea, or they use "mother vessels" to launch attacks using smaller boats at very far distances from the coast.⁴⁸³ An example of the latter was the hijacking of the crude oil tanker *Zirku* as it was travelling through the Gulf of Aden. On 28 March 2011, pirates approached the vessel in two small skiffs with arms and rocket-propelled grenades, successfully hijacking the vessel and kidnapping its crew.⁴⁸⁴

Moreover, last year Somalia ranked at the top of the list of most failed States in the world according to the annual Fund for Peace Failed States index.⁴⁸⁵ Somalia lacks an effective Government which is needed to exercise the control to prevent violence either on land or over its surrounding waters. In this respect, the Somalia Transitional Federal Government (TFG), first recognised in 2000, has only been able to provide limited control over Somali territories.⁴⁸⁶ In particular, the TFG lacks the ability to police its own waters, which is considered crucial when combating attempted piracy.⁴⁸⁷

Attacks occurring along the coast of Somalia and in the Gulf of Aden have created serious security challenges for the international community. As has been examined, under international law every State may capture pirate vessels on the high seas. However, in the case of Somali piracy, pirates often hijack vessels on the high seas and then retreat to the territorial sea of Somalia, thus rendering other States powerless to take action against them. This was considered to be a major problem, especially considering that the TFG has proven incapable of taking the necessary measures to secure its own coastline.

⁴⁸³Patricia Mallia, *The fight against Piracy and Armed Robbery against Ships off the Coast of Somalia* in Norman Martínez Gutiérrez (ed), *SERVING THE RULE OF INTERNATIONAL MARITIME LAW – ESSAYS IN HONOUR OF PROFESSOR DAVID JOSEPH ATTARD* (Routledge 2010) 224.

⁴⁸⁴James Harlow, *Soldier at Sea: The Legal and Policy Implications of using Military Security teams to Combat Piracy* (2012) 21 *SO. CAL. INTERDISCIPLINARY L. J.* 561, 562.

⁴⁸⁵<<http://ffp.statesindex.org/rankings-2012-sortable>> accessed 19 April 2013.

⁴⁸⁶Douglas Guilfoyle, *Piracy off Somalia: UN Security Council Resolution 1816 and IMO Regional Counter-Piracy Efforts* (2008) 57 *INTN'L AND COMP. L. QUAR.* 690, 691.

⁴⁸⁷Ömer Direk, Martin Hamilton, Karen Openshaw and Patrick Terry, *Somalia and the Problem of Piracy in International Law* (2010) 6 *ULUSLARARASI HUKUK VE POLITIKA* 115, 116.

3. Early efforts by IMO to Counter Somali Piracy

The troubling situation in Somalia and in the Gulf of Aden has attracted much attention from the international community and IMO has once again played a crucial role in this regard. In 2005, the IMO Assembly adopted Resolution A.979 (24) primarily aimed at increasing awareness and bringing to focus the unstable situation present off the coast of Somalia.⁴⁸⁸ In order to mitigate the problem, the Resolution urged the international community to take into account all relevant international law provisions on piracy and as well as IMO efforts such as the previously mentioned IMO Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery against Ships.⁴⁸⁹

The Resolution also recognised the urgent need to establish appropriate measures to ensure the safety of ships travelling in the territorial sea off the coast of Somalia and the need to protect them from the danger of piracy and armed robbery.⁴⁹⁰ In order to achieve this, IMO, being fully aware of restrictions under international law, considered that the situation required an "exceptional response."⁴⁹¹ It requested the IMO Secretary General to transmit a copy of the Resolution to the UN Secretary General so that he could bring the situation to the attention of the Security Council for further consideration.⁴⁹² In response to this request, the Security Council issued a presidential statement where it encouraged UN member States with military vessels operating near the coast of Somalia to be on the alert for any piracy incidents and in accordance with international law to take the necessary action against such vessels.⁴⁹³ These combined efforts led to a slight decrease in incidents of piracy and armed robbery by late 2006.⁴⁹⁴

However by the beginning of 2007, attacks occurring in the Somali region were once again on the increase.⁴⁹⁵ The most common types of incidents involved the hijacking of ships, passengers, cargo and crew for ransoms, but there was also a new trend emerging, which concerned piratical attacks being carried out on vessels carrying humanitarian aid to Somalia.⁴⁹⁶

⁴⁸⁸IMO Resolution A.979 (24) (23 November 2005).

⁴⁸⁹See Section IV C 3.

⁴⁹⁰IMO Resolution A.979 (24).

⁴⁹¹*Id.* 3.

⁴⁹²*Id.* 5, para.7.

⁴⁹³Christian Bueger, *Security as Performance: Securitization, Piracy and the United Nations Security Council* (Standing Group for International Relations of the ECPR conference, Stockholm, September 2010) 17.

⁴⁹⁴<http://www.stimson.org/spotlight/piracy-trends-in-southeast-asia-and-africa/> accessed 20 April 2013.

⁴⁹⁵*Id.*

⁴⁹⁶Ademun Odeke, *Somali Piracy- Effects on Oceanborne Commerce and Regional Security and Challenges to International Law and World Order* (2011) 25 AUSTR. AND N.Z. MAR. J. 134, 143.

4. UN Security Council Resolutions to Combat Piracy off the Coast of Somalia

In November 2007, IMO continued its efforts to raise awareness concerning the situation plaguing shipping off the coast of Somalia and adopted a new resolution to address the problem. Similar to previous resolutions adopted by the IMO Assembly, Resolution A.1002 (25) on Piracy and Armed Robbery against Ships in Waters off the Coast of Somalia⁴⁹⁷ called for Governments in the region to cooperate with each other and for IMO to implement regional agreements in the hope of further suppressing acts of piracy and armed robbery.⁴⁹⁸

By virtue of this Resolution, IMO requested the TFG to advise the UN Security Council that it:

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 endangering the safety of life at sea . . .⁴⁹⁹

Somalia later accepted and sanctioned the use of such measures on 27 February 2008.⁵⁰⁰ Consequently, the Security Council then took the necessary action and passed Resolution 1816 (2008)⁵⁰¹ on acts of piracy and armed robbery against vessels in territorial waters and the high seas off the coast of Somalia.⁵⁰² The Resolution identified acts of piracy and armed robbery against ships as a major threat to the safety of international maritime navigation, as well as a threat to international peace and security as a whole. It also recognised the efforts of IMO aimed at suppressing piracy and armed robbery, particularly through its continuous reporting of such incidents since 2005. The Resolution also *inter alia* promotes cooperation amongst States possessing naval vessels and military aircraft off the coast of Somalia, and increased information sharing between States, international bodies and international organisations regarding Somali piracy.⁵⁰³

⁴⁹⁷IMO Resolution A.1002 (25) (29 November 2007).

⁴⁹⁸*Id.* 2.

⁴⁹⁹*Id.*, para.6(3).

⁵⁰⁰Douglas Guilfoyle (n 486) 694.

⁵⁰¹UN Security Council, Resolution 1816 (2008) adopted by the Security Council at its 5902nd meeting, on 2 June 2008, S/RES/1816 (2008).

⁵⁰²It is interesting to note that prior to this Resolution, the UN Security Council passed Resolution 1814 (2008), which was aimed at encouraging and improving peace and stability in Somalia. The Resolution did not make reference to Somali piracy, but it is considered to have made way for Resolution 1816 (2008).

⁵⁰³S/RES/1816 (2008), para.2.

Resolution 1816 (2008) was considered to be significant for whilst it reaffirmed the existing international legal framework dealing with piracy provided for in UNCLOS, it presented a new development in international law, where enforcement action may be taken by other States to repress crimes at sea within areas of national jurisdiction, such as the territorial sea of Somalia, but only under defined circumstances which will be elaborated upon below.

This Resolution, acting under Chapter VII of the Charter of the UN,⁵⁰⁴ provided that for a period of six months from the date of its issue, States cooperating with the TFG in the fight against piracy were permitted to enter Somalia's territorial sea, carry out operations and take "all necessary means" to suppress acts of piracy and armed robbery.⁵⁰⁵ As Guilfoyle observes the phrase "all necessary means" is usually connected with a general authorisation to use military force.⁵⁰⁶

However, the powers granted to States by the Security Council by virtue of Resolution 1816 (2008) are subject to certain restrictions. For example, such action may only be taken by States in a manner which is consistent with international law and only after being given the consent of TFG, who has provided advance notice of this consent to the Secretary General of the UN.⁵⁰⁷ Moreover, it should be noted that authorisation provided under this Resolution is exceptional and only applied to the situation in Somalia—the Resolution is not intended to create a new rule of customary international law.⁵⁰⁸

Resolution 1816 (2008) was followed by a series of later resolutions including:

1. Resolution 1838 (2008),⁵⁰⁹ which called upon States to make use of Resolution 1816 (2008) and Resolution 1814 (2008)⁵¹⁰ and encouraged them to take an active part in the fight against piracy on the high seas off the coast of Somalia;⁵¹¹
2. Resolution 1846 (2008)⁵¹² which welcomed efforts from regional organisations to fight piracy and also urged States to make use of the SUA Convention,

⁵⁰⁴See Section 3.5.

⁵⁰⁵S/RES/1816 (2008), para.7.

⁵⁰⁶Douglas Guilfoyle (n 486) 695.

⁵⁰⁷S/RES/1816 (2008), para.7.

⁵⁰⁸*Id.*, para.9.

⁵⁰⁹UN Security Council, Resolution 1838 (2008), adopted by the Security Council at its 5987th meeting, on 7 October 2008, S/RES/1838 (2008).

⁵¹⁰UN Security Council, Resolution 1814 (2008), adopted by the Security Council at its 5893rd meeting, on 15 May 2008, S/RES/1814 (2008).

⁵¹¹*Id.*, para.2.

⁵¹²UN Security Council, Resolution 1846 (2008), adopted by the Security Council at its 6026th meeting on 2 December 2008, S/RES/1846 (2008).

to criminalise offences under their domestic laws, establish jurisdiction over these offences and accept delivery for offenders. This would help ensure the “ . . . successful prosecution of persons suspected of piracy and armed robbery at sea off the coast of Somalia;”⁵¹³

3. Resolution 1851 (2008)⁵¹⁴ reaffirms the need for States and regional organisations to take “all necessary measures that are appropriate in Somalia for the purpose of suppressing acts of piracy and armed robbery at sea,” this includes Somalia’s territorial sea, land and airspace.⁵¹⁵ Jenisch observes that this Resolution marks the first time where military intervention against pirate home bases in a foreign country is permitted provided that any measures taken in this regard are consistent with humanitarian law.⁵¹⁶

Since 2008, the UN Security Council has continued to renew its authorisation for international action in cooperation with the Somali Government to fight acts of piracy and armed robbery against ships. The latest effort in this regard was the adoption of Resolution 2077 (2012).⁵¹⁷

5. The Djibouti Code of Conduct Concerning the Repression of Piracy and Armed Robbery against Ships in the Western Indian Ocean and the Gulf of Aden

As discussed above, IMO identifies the importance of regional cooperation amongst States in the fight against piracy and armed robbery at sea, especially in the East African regions.⁵¹⁸ In order to promote regional cooperative efforts in this area, IMO convened a high-level sub-regional meeting on maritime security, piracy and armed robbery at sea for the Western Indian Ocean, Gulf of Aden and Red Sea States which was held in Djibouti in January 2009.⁵¹⁹ The meeting was attended by 17 States in the region and ultimately led to the adoption of four important resolutions,⁵²⁰ the first of which has become known as the Djibouti Code of Conduct concerning the Repression of Piracy and Armed Robbery against Ships in the Western Indian Ocean and the Gulf of Aden (the Code of Conduct).

⁵¹³Id., para.15.

⁵¹⁴UN Security Council Resolution 1851 (2008), adopted by the Security Council at its 6046th meeting, on 16 December 2008, S/RES/1851 (2008).

⁵¹⁵Id.

⁵¹⁶Uwe Jenisch, *Piracy, Navies and the Law of the Sea: The Case of Somalia* (2009) 8 WORLD MAR. UNI. J. OF MAR. AFF., 123, 137.

⁵¹⁷UN Security Council Resolution 2077 (2012), adopted by the Security Council at its 6867th meeting, on 21 November 2012, S/RES/2077 (2012).

⁵¹⁸<<http://www.imo.org/OurWork/Security/PiracyArmedRobbery/Pages/Default.aspx>> accessed 25 March.

⁵¹⁹IMO Council, 102nd Session. Agenda item 14, IMO Doc C 102/14.

⁵²⁰Id.

As noted by Kraska and Wilson, although the IMO sponsored Code of Conduct is not legally binding it places “. . . the region on the path toward a well-functioning maritime security arrangement.”⁵²¹ It attempts to follow the success of the previous ReCAAP model concluded in 2004.⁵²² There are currently 20 States which have signed the Code, including Djibouti, Somalia, Kenya and Ethiopia, and it remains open for signature by other countries at IMO headquarters in London.⁵²³

The Code of Conduct which became effective on 29 January 2009,⁵²⁴ details the extent of the piracy and armed robbery problem against ships in the Western Indian Ocean and the Gulf of Aden. It takes into account and promotes the application of certain aspects of the UN Security Council Resolutions 1816 (2008), 1838 (2008), 1846 (2008) and 1851 (2008) referred to above.⁵²⁵

Similar to the ReCAAP Agreement, signatories to the Code of Conduct:

1. must carry out investigations and ensure the arrest and prosecution of persons who have committed acts of piracy and armed robbery;⁵²⁶
2. have a duty to interdict and seize any ships suspected of engaging in piratical activities or any armed robbery;⁵²⁷
3. provide proper care and make arrangements for the repatriation of seafarers, fishermen, passengers and any other persons who fall victim to the attacks of pirates and armed robbers;⁵²⁸
4. provide for shared security operations among signatory States, including those signatory to the Agreement as well as countries beyond the region. In particular, it encourages law enforcement officials to embark on patrol ships or aircraft of another signatory State;⁵²⁹ and
5. must commit themselves to share and report information about piratical and armed robbery incidents through a series of national focal points.⁵³⁰

⁵²¹James Kraska and Brian Wilson, *Combating pirates of the Gulf of Aden: The Djibouti Code and the Somali Coast Guard* (2009) OCEANS AND COA. MGMT. 1, 4.

⁵²²William Michael Riesman and Bradley Tennis, *Combating Piracy in East Africa* (2009) 35 YALE J. OF INTN'L L., 14, 21.

⁵²³<<http://www.imo.org/OurWork/Security/PIU/Pages/Signatory-States.aspx>> accessed 26 March 2013.

⁵²⁴IMO Doc. C 102/14, para.7.

⁵²⁵*Id.*, para.8.

⁵²⁶*Id.*, para.9(a).

⁵²⁷*Id.*, para.9(b).

⁵²⁸*Id.*, para.9(c).

⁵²⁹*Id.*, para.9(d).

⁵³⁰Similar to the ReCAAP agreement States are expected to share information using specific maritime sharing centres such as the Maritime Rescue Coordination Centre in Mombasa Kenya, the Sub-Regional Coordination Centre in Dar es Salaam, Tanzania and the regional maritime information centre located in Sana'a Yemen.

Once again IMO highlights the need of States to have in place an effective legal framework which will ensure the arrest and prosecution of pirates and other offenders. To this end, the Code of Conduct also advises signatories to assess their national legislation thereby ensuring that applicable laws are in place to criminalise acts of piracy and armed robbery against ships.⁵³¹ Moreover, signatories to the Code of Conduct are also required to incorporate into their domestic legislation rules dealing with exercise of jurisdiction, conduct of investigation and prosecution of pirates and armed robbers.⁵³²

6. Implementation of the Djibouti Code of Conduct

As referred to above, besides the adoption of Resolution 1 which enshrines the Code of Conduct, the IMO meeting convened in Djibouti saw the adoption of various other resolutions. Resolutions 2 and 3 cover technical cooperation which is required to effectively implement the Code of Conduct.⁵³³ To this end, IMO requests the assistance of States, international organisations and other international programs either directly or through the Organization, to ensure the overall successful operation of the Code of Conduct particularly in those States which may require support for its implementation due to lack of political support or necessary funding.⁵³⁴

Further IMO efforts in this regard include the establishment of the "Project Implementation Unit (PIU)" aimed at supporting and promoting the successful implementation of the Code of Conduct amongst its signatory States. The project is run by a head of unit and a number of trained specialists in the areas of operation, technical and computing systems, and maritime law.⁵³⁵ The PIU's work and the Code of Conduct itself centre on four main pillars:

1. Training: IMO has been overseeing training activities in the Western Indian Oceans and the Gulf of Aden since 2010, including the promotion of inter-agency approaches to maritime security, and skill-based training in coast-guarding which includes logistical, technical and operational training;⁵³⁶
2. Operational Capacity Building: IMO is continually working to raise awareness amongst signatory States concerning the various problems posed by pirates and armed robbers in the region and to develop their maritime law

⁵³¹IMO Doc, C 102/14, para.11.

⁵³²Id.

⁵³³Id., para.12.

⁵³⁴Id.

⁵³⁵International Maritime Organization Maritime Safety Division, Djibouti Code of Conduct Project Implementation Unit, Edition 2 February-August 2012, available at <http://www.imo.org/OurWork/Security/PIU/Documents/PIU_Brochure_2nd_Edition.pdf> accessed 22 April 2013.

⁵³⁶Id.

enforcement capabilities. IMO has also developed a maritime situational awareness (MSA) programme which involves *inter alia* the use of coastal radars, identification and tracking of ships. MSA is aimed at helping States to become more aware of maritime activity throughout the region and thus provide better measures to ensure maritime safety and security;⁵³⁷

3. National Legislation: IMO has collaborated with a number of international organisations to review and assist States with their national legislation on piracy to ensure that it allows for law enforcement, investigation and prosecution of offenders. In order to achieve this aim, throughout 2011 and 2012 IMO set up a number of workshops to address the process of enforcing national laws on piracy amongst others;⁵³⁸ and

4. Information Sharing: The information sharing centres set up in Mombasa, Dar es Salaam and Sana'a coordinate a network of national focal points present in each signatory State. This web portal based network serves as medium for exchanging information on piracy incidents and reports amongst States in the region.⁵³⁹

E. Recent Measures Taken by IMO to Combat Piracy and Armed Robbery at Sea

Due to the cooperative efforts of the international community and IMO in particular, in recent years there has been a substantial decrease in reported incidents involving piracy and armed against ships. However, the problem has in no way been entirely eradicated and Somali-based piracy in particular continues to plague the shipping world by endangering the safety and security of maritime navigation. IMO has had to keep abreast of major developments in this area and continually provides new and updated measures to combat these threats.

1. Best Management Practices for Protection against Somalia Based Pirates

The adoption of Security Council Resolution 1851 (2008)⁵⁴⁰ led to the creation of a UN Contact Group on Piracy off the coast of Somalia (CGPS) in 2009.⁵⁴¹ The CGPS is aimed at facilitating the coordination of actions taken among States and other international organisations to suppress Somali pira-

⁵³⁷Id.

⁵³⁸Id.

⁵³⁹Id.

⁵⁴⁰See Section IV D 4.

⁵⁴¹MSC.1/Circ.1332, *Piracy and armed Robbery against Ships in Waters off the Coast of Somalia*, 16 June 2009, para.1.

cy.⁵⁴² As part of its work, the CGPS set up a number of smaller working groups to deal with specific aspects presented by the threat in East Africa. In particular, Working Group 3 was directed at improving shipping self-awareness. In order to facilitate this aim, industry organisations⁵⁴³ developed what is known as the "Best Management Practices for Protection against Somalia based Pirates" (BMP).⁵⁴⁴ The latest version is MSC.1/Circ 1339 of 14 September 2011, also known as BMP 4.⁵⁴⁵

The introduction to BMP 4 provides that:

The purpose of the Industry BMP contained in this booklet is to assist ships to avoid, deter or delay piracy attacks in the High Risk Area

A High Risk Area:

. . . defines itself by where pirate activity and/ or attacks have taken place. For the purpose of BMP the High Risk Area is an area bounded by Suez and the Strait of Hormuz to the North, 10°S and 78°E.

In particular BMP 4 urges all ships traversing high risk areas to communicate with naval forces in the region and to make use of protective measures to deter piratical attacks.⁵⁴⁶ BMP 4 is divided into 13 Sections which *inter alia* cover risk assessment by ship operators and masters prior to traversing high risk areas,⁵⁴⁷ and procedures to be followed if pirates take control of the vessel⁵⁴⁸ and other ship protection measures.⁵⁴⁹

The BMP 4, which is now in circulation, has found unanimous support from the shipping industry. In fact, many shipping companies that have chosen to adhere to BMP 4 measures and practices have encountered few or no piracy incidents while travelling through high risk areas.⁵⁵⁰ However, unfortunately not all shipping companies are ready to employ such measures. Some aim at reducing their costs by avoiding BMPs altogether, thereby making their ships more vulnerable to potential piratical attacks.⁵⁵¹

⁵⁴²<http://www.thecgps.org/about.do?action=background> accessed 25 April 2013.

⁵⁴³Some of these include the International Association of Independent Tanker Owners, Cruise Lines International Association amongst others.

⁵⁴⁴MSC.1/Circ.1332, para.2.

⁵⁴⁵<http://www.imo.org/MediaCentre/HotTopics/piracy/Documents/1339.pdf> accessed 28 March.

⁵⁴⁶<http://www.worldshipping.org/industry-issues/security/piracy> accessed 25 April 2013.

⁵⁴⁷BMP 4, Section 3.

⁵⁴⁸Id., Section 10.

⁵⁴⁹Id., Section 8.

⁵⁵⁰Sarah Percy and Anja Shortland, *Contemporary Maritime Piracy: Five obstacles to ending Somali Piracy* (2013) 4 GLOBAL POL. 65, 68.

⁵⁵¹Id.

2. Privately Contracted Armed Security Personnel on Board Ships

Besides the BMP 4, the latest preventive measures taken by IMO to beat Somali piracy concern the use of privately contracted armed security personnel (PCASP) aboard vessels. The increased threats to the security of commercial shipping posed by Somali piracy has also led to an increase in the use of private companies offering armed maritime security services.⁵⁵²

IMO, recognising the importance of PCASP, updated and developed further rules regard on the subject. In September 2011, the MSC approved further interim guidance on the operation of PCASP at an inter-sessional meeting of its Maritime Security and Piracy Working Group.⁵⁵³ The meeting which took place at IMO headquarters approved the following Circulars:

1. MSC.1/Circ.1405/Rev.1 on Revised interim guidance to ship-owners, ship operators, and shipmasters on the use of privately contracted armed security personnel on board ships in the high risk area;⁵⁵⁴
2. MSC.1/Circ.1406/Rev.1 on Revised interim recommendations for flag States regarding the use of privately contracted armed security personnel on board ships in the high risk area;⁵⁵⁵
3. 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 seas;⁵⁵⁶ and
4. 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.⁵⁵⁷

The Circulars mentioned above give flag States guidance when considering the use of PCASPs. For example, MSC.1/Circ.1406/Rev.1 *inter alia* pro-

⁵⁵²MSC.1/Circ.1406/Rev.1, Revised interim recommendations for flag States regarding the use of privately contracted armed security personnel on board ships in the high risk area, 16 September 2011, Annex, para.1.

⁵⁵³<http://www.imo.org/OurWork/Security/PiracyArmedRobbery/Pages/Private-Armed-Security.aspx> accessed 20 April 2013.

⁵⁵⁴This has recently been revised by MSC.1/Circ.1405/Rev.2, 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, 25 May 2012.

⁵⁵⁵This has been recently revised by MSC.1/Circ.1406/Rev.2, Revised interim recommendations for flag States regarding the use of privately contracted armed security personnel on board ships in the high risk area, 25 May 2012.

⁵⁵⁶This has recently been updated and revised by MSC.1/Circ.1408/Rev.1, Revised interim recommendations for port and coastal States regarding the use of privately contracted armed security personnel on board ships in the high risk area, 25 May 2012.

⁵⁵⁷MSC.1/Circ.1443, Interim guidance to private maritime security companies providing contracted armed security personnel on board ships in the high risk area, 16 September 2011.

vides a set of criteria that must be fulfilled by private maritime security companies (PMSC),⁵⁵⁸ a selection and vetting process for PMSCs⁵⁵⁹ and training of PSCASPs.⁵⁶⁰ It is important to note that these Circulars emphasize that IMO in no way institutionalises or endorses the use of armed guards.⁵⁶¹ A flag State is free to decide whether to authorise the use of PCASP on board their ships, and if so, under what conditions.⁵⁶² Moreover, it is also crucial that the operation of PCASPs should not be seen as an alternative to the use of best management practices.⁵⁶³

The subject of PMSCs was once again on the MSC's agenda at its ninetieth session carried out between May 16 and 25, 2012. After much debate, the MSC agreed on guidance to private maritime security companies to complement already existing guidance for flag States, port States, coastal States, ship-owners, ship operators and shipmasters developed by IMO.⁵⁶⁴ However, the Agreement was once again clear on the point that the carriage of firearms by seafarers continues to be strongly discouraged and the use of PCASP was only to be used as an exceptional measure in exceptional circumstances and only in high risk areas.⁵⁶⁵

For over 15 States it is now legally permissible to have armed personnel on board ships. Malta is one of these States and has recently enacted new subsidiary legislation entitled "General Authorisation (Protective Security Measures on board ships) Regulations 2013."⁵⁶⁶ These Regulations establish a general authorisation for the carriage and use of firearms on board Maltese ships⁵⁶⁷ by a PCASP authorised to have in his possession, or under his control, firearms and ammunition licensed to a PMSC.⁵⁶⁸

In this Part of the study, the major maritime security threat of piracy and armed robbery has been examined. It is clear that IMO's contribution in combating this threat has been both useful and effective. IMO's speed in responding to crimes of piracy and armed robbery is evident in its work at the UN Security Council and development of regional approaches. IMO's

⁵⁵⁸MSC.1/Circ.1406/Rev.1, Annex, para.2.1.

⁵⁵⁹Id., para.2.3.

⁵⁶⁰Id., para 2.4.

⁵⁶¹Id., para.1.1.

⁵⁶²Id., para.2

⁵⁶³<<http://www.imo.org/OurWork/Security/PiracyArmedRobbery/Pages/Private-Armed-Security.aspx>> accessed 31 March 2013.

⁵⁶⁴Masamachi Hasebe, *The Use of Armed Guards to Defend Against the Threat of Piracy*, lecture delivered at the IMO International Maritime Law Institute, 3 April 2013.

⁵⁶⁵Id.

⁵⁶⁶Regulations, S.L.480.04

⁵⁶⁷Id., article 3(1).

⁵⁶⁸Under the Schedule to the Regulations, armed guards serving on board Maltese flagged vessels are exempt from the provisions of the Arms Act insofar as they are not within Maltese territorial waters.

influential authority was probably the main reason behind the UN Security Council's authorisation to accept the proposal that the combating of piracy should be extended into the territorial sea of Somalia, on an exceptional basis and in the defiance of the established international rules. The exception is extraordinary for it contradicts the general rule of sovereignty in the territorial sea. Nevertheless, it seems justified in the light of the serious piracy problem facing Somalia. It may therefore be asked whether the general rule on the prohibition of the pursuit of piracy into a foreign territorial sea should continue. It is submitted that States may not readily accept a change in this rule and therefore it may not be realistic to expect such changes. Nevertheless, it begs the question, should further *ad hoc* exceptions be totally excluded? In the author's opinion it should be left to the rule of the Security Council to examine each and every request, preferably through the intervention of the IMO as the UN specialised agency primarily responsible for maritime security.

VI CONCLUSIONS

In the light of the research undertaken it can be confirmed that the increase in threats to maritime security requires international legal response strategies to ensure the safety of life and shipping at sea. Whilst UNCLOS contains a number of provisions dealing with maritime security, it does not provide adequate remedies to the current maritime security problems. The text and substance of UNCLOS reflect the circumstances facing UNCLOS III in the 1970s. Consequently, UNCLOS provides comprehensive rules to deal with maritime security threats prevalent at the time. Moreover, UNCLOS has few to no legal provisions dealing with contemporary maritime threats such as maritime terrorism and the proliferation of weapons of mass destruction. Finally, UNCLOS fails to adequately deal with certain threats which have become more complex since the 1970s—this is particularly evident with respect to contemporary piracy and armed robbery at sea. In this respect, whilst a general review of the law relating to maritime security was examined, particular focus was made on the contribution of IMO with respect to creating legal rules to deal with these crimes.

Whilst the protection of maritime security is not referred to as a function of IMO in its formal mandate, the Organization's concern with safety of life at sea and international shipping has meant that it now describes maritime security as an intricate part of its responsibilities. Indeed, it has today become the major source of international rules regulating maritime security. Although IMO does not define maritime security, it considers it intricately

linked with maritime safety. However it should be noted that whilst the rules regulating these two aspects of shipping share a common goal (i.e safety of life and shipping at sea) the rules regulating each area are not identical, for whilst maritime safety primarily focuses on defending against accidents at sea, maritime security deals with the defence against wilful and unlawful acts against ships. Consequently, the distinction that influences the nature of the relevant rules, whilst at times blurred, lies in the wilfulness of the act performed.⁵⁶⁹

This author finds particularly relevant the seven important threats to maritime security as identified by the UN Secretary General in his 2008 Report on the Oceans and Law of Sea,⁵⁷⁰ which *inter alia* include piracy and armed robbery against ships⁵⁷¹ and terrorist acts involving shipping, offshore installations and other maritime interests.⁵⁷² Many of these crimes at sea have been identified in later reports including the Report on the Oceans and Law of the Sea of 29 August 2011⁵⁷³ and 31 August 2012.⁵⁷⁴ However, given the limitation of space, this study focused on IMO's contribution to fighting two of these of these threats, crimes against safety of navigation and piracy and armed robbery against ships.

IMO has been successfully responding to the problems of maritime security since its inception; indeed it has often supplemented the *lacunae* found in international law and in UNCLOS, thereby contributing to the progressive development and codification of maritime security law. In this respect particular reference was made to 1988 SUA Convention.⁵⁷⁵ In many respects, the SUA Convention was required because of the restricted definition of piracy found in the 1982 Convention. The hijacking of the *Achille Lauro* demonstrated the *lacunae* in the law of maritime security when dealing with acts against the safety of navigation, especially when they were motivated by ideological or political motives and therefore falling outside the "private ends" requirement under article 101 of the UNCLOS.⁵⁷⁶

IMO's awareness of problems relating to maritime security was further heightened by the 9/11 terrorist attacks. As with other aspects of interna-

⁵⁶⁹See Section II A.

⁵⁷⁰Secretary-General of the United Nations, *Report of the Secretary General on Oceans and the Law of the Sea*, 10 March 2008, UN Doc. A/63/63, para.39.

⁵⁷¹*Id.*, para.54.

⁵⁷²*Id.*, para.63.

⁵⁷³Secretary-General of the United Nations, *Report of the Secretary General on Oceans and the Law of the Sea*, 29 August 2011, UN Doc. A/66/70 para.69-91

⁵⁷⁴Secretary-General of the United Nations, *Report of the Secretary General on Oceans and the Law of the Sea*, 31 August 2012, UN Doc. A/67/79 para.35-40.

⁵⁷⁵See Section II D 1.

⁵⁷⁶See Section II C 2.

tional life, this tragedy brought to light the need to adopt rules capable of dealing with the contemporary threats against maritime security. In fact, it became painfully obvious that even the provisions of the 1988 SUA Convention were not adequate to deal with the contemporary threats to maritime security. In response to this reality, IMO through its Legal Committee, worked on updating and amending the 1988 SUA Convention. This work led to the Protocols of 2005 to the 1988 SUA Convention and its Protocol.⁵⁷⁷

Complementing this initiative, IMO initiated a process to ensure that its security rules covered port security, since ports are considered to be the interface for international shipping and the delivery of goods. They are in fact the points of commencement and termination of maritime voyages and therefore insecure ports threaten international shipping. One of the advantages and achievements of IMO in this regard is its speed and efficiency in adopting new rules. Given the urgency of the situation it was admirable that within a span of two years, IMO was able to produce the ISPS Code which recognises and provides preventive measures against security related incidents with respects to the ports.

Indeed, the ISPS Code is one of IMO's major achievements in the field of maritime security. It is divided into two parts, where it provides detailed rules for the major shipping stake holders particularly governments, port authorities and shipping companies on a mandatory basis. The Code also contains non-mandatory guidelines and recommendations designed to ensure that these requirements are met. Despite the non-mandatory nature of these guidelines and recommendations, some Governments have started to consider them mandatory. It is clear that through the ISPS Code, IMO has provided the international community with a viable, effective and comprehensive regime regulating the maritime security of ports and shipping, which complements the already existing maritime security rules regulating shipping.⁵⁷⁸

The work of the IMO in the field of maritime security complements other important rules which can be found in treaties not adopted by IMO such as UNCLOS. In fact while UNCLOS contains many provisions dealing with maritime security, it fails to provide adequate response strategies to certain contemporary threats to maritime security. Furthermore, one must remember that the relevant rules of customary international law such as those relating to self-defence continue to be applicable. Indeed, it would be reasonable to state that the work of IMO coupled with important maritime treaties, such as UNCLOS, and the applicable rules of customary international law, form

⁵⁷⁷See Section II E 2.

⁵⁷⁸See Section II F.

a corpus of law that enables the international community to deal effectively with the threats to maritime security.⁵⁷⁹

This conclusion is supported by IMO's contribution to combating piracy and armed robbery against ships. It was seen that in the case of IMO efforts to combat these crimes, much work has been done both in the Legal Committee and Maritime Safety Committee. Fundamental to IMO's legal response is the collection and circulation of information on piratical attacks. Based on this information, IMO was able to establish well-founded measures that enabled effective combating of these maritime crimes. An example of this is the IMO Code of Practice for the Investigation of Crimes of Piracy and Armed Robbery against Ships.⁵⁸⁰

It is significant that IMO's efforts are also based on a regional approach, thereby enabling responses on the basis of the requirements or unique characteristics of a region. The IMO response to piracy in the Southeast Asian region was particularly successful and contributed to the setting up of ReCAAP. With regard to piracy off the coast of Somalia and in the Gulf of Aden, IMO's initiative to raise the matter at the UN Security Council led to resolutions enabling the pursuit of pirates within the territorial sea of Somalia, allowing the fight against piracy to go beyond article 101 of the 1982 Convention which does not allow the pursuit of pirates once they have entered the territorial sea of a State. This prohibition proved to be a major obstacle to combating piracy in this region. IMO's initiative thus ensured that pirates were pursued in the territorial sea where indeed most piratical acts occurred. Reference should also be made to the IMO sponsored Djibouti Code of Conduct concerning the Repression of Piracy and Armed Robbery against Ships in the Western Indian Ocean and the Gulf of Aden.⁵⁸¹

Also examined was the issue of privately contracted armed security personnel on board ships, and the role of IMO to provide a legal regime covering the activities of these personnel. In fact, the presence of such personnel has proven to be a successful deterrent of piracy⁵⁸² and therefore its regulation is of paramount importance. IMO's contribution has ensured that there is a proper regulatory framework within which such personnel can act to protect life and the safety of shipping.⁵⁸³

It appears in the light of the conclusions of this study that it is not realistic to expect any imminent amendments to UNCLOS in order to adopt rules

⁵⁷⁹See Part III.

⁵⁸⁰See Section IV C 3.

⁵⁸¹See Section IV D 5.

⁵⁸²<http://www.icc-ccs.org/news/747-six-month-drop-in-world-piracy-imb-report-shows> accessed 1 May 2013.

⁵⁸³See Section IV F 2.

enabling the international community to effectively combat contemporary maritime security threats. Indeed, launching a modification of UNCLOS would certainly be no easy task, considering the intricacy of the Convention itself and the countless State interests involved which in fact led to its long drafting process. Moreover, there is nothing to suggest that State parties intend on holding a review conference in the near future.⁵⁸⁴ This has meant that the international community, whilst respecting the rules found in UNCLOS, has had to develop certain legal response strategies outside the Convention.

To a large extent it may be possible, preferably through the intervention of IMO, given its responsibilities and achievements in the field of maritime security, to either amend the current international instruments, as in the case of the 1988 SUA Convention, or to adopt new legal instruments. It may also be possible that such new instruments would supplement UNCLOS, such as the 1994 Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, and the 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.

It should be noted that in light of article 312 dealing with the amendment procedure to UNCLOS, provisions may be difficult to change considering that the Convention allows that:

1. After the expiry of a period of 10 years from the date of entry into force of this Convention, a State Party may, by written communication addressed to the Secretary-General of the United Nations, propose specific amendments to this Convention, other than those relating to activities in the Area, and request the convening of a conference to consider such proposed amendments. The Secretary-General shall circulate such communication to all States Parties. If, within 12 months from the date of the circulation of the communication, not less than one half of the States Parties reply favourably to the request, the Secretary-General shall convene the conference.
2. The decision-making procedure applicable at the amendment conference shall be the same as that applicable at the Third United Nations Conference on the Law of the Sea unless otherwise decided by the conference. The conference should make every effort to reach agreement on any amendments by way of consensus and there should be no voting on them until all efforts at consensus have been exhausted.

⁵⁸⁴Zou Keyuan (n. 236) 344.

The somewhat rigid process for amending the Convention once again makes it impracticable, at least for the foreseeable future, to envisage changing the text. Consequently, the international community may also opt for a treaty which could provide an adequate legal basis for combating contemporary maritime threats, even if not binding the 165 State parties to UNCLOS, it may have a limited scope, which may eventually attract more and more State support. It is also true to say that the international community may also favour a regional approach to combating maritime security issues as described in Part IV,⁵⁸⁵ considering that it is not always possible to obtain global support and may be easier to obtain regional support, particularly when the problems of maritime security are more acute in certain regions. Indeed, it may also favour a faster treaty approach, as in regional cases where there is a smaller number of interested States.

Finally another conclusion derived from the study is the demonstration of the need for international maritime security law to catch up with the vast and rapidly changing threats to maritime security. Whilst IMO's work has played an important and vital role in this regard, ultimately the success of its legal instruments, bearing in mind that it has no major enforcement powers, depends on their enforcement by States. There must therefore be the incorporation of these instruments into domestic law if they can be enforced through municipal courts. It may therefore be useful to promote further research on how and to what extent is it possible to ensure that States criminalise threats and acts against maritime security, ensure their prosecution, and in the absence of prosecution provide for the extradition of alleged offenders to ensure that they do not escape prosecution due to some jurisdictional *lacuna*.

⁵⁸⁵ See Part IV, Section D 4.

