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International cooperation in combating modern forms of maritime piracy: Legal and policy dimensions

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CHAPTER FOUR: RESPONDING TO MARITIME PIRACY: THE REGIONAL APPROACH⁶³⁵

5.1. INTRODUCTION

Maritime piracy has traditionally been a ‘local’ problem to be dealt with by local authorities.⁶³⁶ For example, with regard to piratical acts off the coasts of Bangladesh, the 2013 annual piracy report of the International Maritime Bureau (“IMB”) noted that “[a]ttacks in Bangladesh have fallen significantly over the past few years because of the efforts of the Bangladesh authorities.”⁶³⁷ Similarly, piratical attacks off the coast of Ecuador, which led to the issuance of a warning for sailors by the U.S.,⁶³⁸ were countered by the Ecuadorian navy.⁶³⁹

⁶³⁵ This chapter will be published as: Yaron Gottlieb, *Responding to Maritime Piracy: The Regional Approach*, forthcoming in 28.1 U.S.F. Mar. L.J. 2016.

⁶³⁶ Christian Bueger, *Responses to Contemporary Piracy: Disentangling the Organizational Field*, in MODERN PIRACY: LEGAL CHALLENGE & RESPONSE 91, 94 (Douglas Guilfoyle ed., 2013). See also Paul R. Williams & Lowry Pressly, *Maritime Piracy: A Sustainable Global Solution*, 46 CASE W. RES. J. INT’L L. 177, 182 (2013) (stating that the solutions to piracy “tend to be localized in scope”).

⁶³⁷ See ICC International Maritime Bureau, *Piracy and Armed Robbery Against Ships Report for the Period 1 January – 30 June 2013*, (2014), available at http://www.iccgermany.de/fileadmin/icc/Meldungen/2013_Q2_IMB_Piracy_Report.pdf. In 2014, the IMB reported an increase in the number of incidents, yet noted again that “[t]he Bangladesh Coast Guard helped respond to many calls of assistance from ship masters” – see *SE Asia Tanker Hijacks Rose in 2014 Despite Global Drop in Sea Piracy*, *IMB Report Reveals*, ICC COMMERCIAL CRIME SERVICES (Jan. 12, 2015), <https://www.icc-ccs.org/news/1040-se-asia-tanker-hijacks-rose-in-2014-despite-global-drop-in-sea-piracy-imb-report-reveals>.

⁶³⁸ See Akiva, *U.S. Consulate Guayaquil Issues Piracy Warning for Ecuador*, *MaritimeTerrorism.com* (Nov. 24, 2008), <http://www.maritimeterrorism.com/2008/11/24/us-consulate-guayaquil-issues-piracy-warning-for-ecuador/>.

In certain areas, piracy was gradually recognized as an inter-state and regional problem.⁶⁴⁰ The spike in Somali piracy led some commentators to view the problem as an increasingly international one,⁶⁴¹ and for calls to identify a global solution to this ‘global problem’.⁶⁴²

This chapter examines three cooperative modalities that have been employed to address maritime piracy in different regions: the South-East Asia and the Caribbean model; the Somali model; and the Gulf of Guinea model. It argues that although maritime piracy has had severe international implications (for example, to international commerce), in essence it has remained a local or, at most, regional problem, rather than a transnational or global criminal activity. Consequently, the counter-piracy initiatives should focus on a tailored regional approach based on existing international frameworks such as the legal framework provided by UNCLOS and supplemented, as needed, by the support of the international community. This conclusion also arises from the comparison between the various regional modalities applied so far despite certain differences. Notably with regard to the way in which the regional responses have been formed (bottom-up, top-down, or a combination of both), there is one common characteristic to all modalities: the prominent role given to regional initiatives and the secondary, complementary role, assumed by the international community.

⁶³⁹ Cf. Ecuador Navy Strengthens Controls Against 'Piracy' on the High Seas, OCEANUSLIVE.ORG (Feb. 13, 2014), <http://www.oceanuslive.org/main/viewnews.aspx?uid=00000827>. In its annual report of 2013, the IMB described the engagement of the Ecuadorian coast guard following a report of an attack against a container. See ICC International Maritime Bureau, *supra* note 637. In 2014, the IMB reported that “[a]ttacks [near Guayaquil] stopped but ships advised to be vigilant.” See Piracy & Armed Robbery Prone Areas and Warnings, ICC-CCS.ORG, <https://www.icc-ccs.org/piracy-reporting-centre/prone-areas-and-warnings>.

⁶⁴⁰ Bueger, *supra* note 636.

⁶⁴¹ *Id.* at 94-95.

⁶⁴² Williams & Pressly, *supra* note 636.

5.2. RATIONALIZING A REGIONAL APPROACH TO ADDRESS MARITIME PIRACY

Addressing challenges through regional mechanisms and frameworks is not a new concept. The UN Charter, for example, permits the use of regional arrangements to confront threats to peace and security.⁶⁴³ It also appears that there is a general trend towards adopting solutions to transnational concerns based on regional initiatives.⁶⁴⁴

Adopting regional strategies is also embedded in various sections of the UNCLOS.⁶⁴⁵ In the realm of maritime piracy, Samuel Menefee argued that “[a] regional approach to contemporary problems of piracy and maritime terrorism can bypass the major flaws of the 1982 Convention”.⁶⁴⁶ He suggested that regional organizations “could provide coordination of

⁶⁴³ UN Charter art. 53, para. 1.

⁶⁴⁴ See LCDR Jon D. Peppetti, JAGC, USN, *Building the Global Maritime Security Network: A Multinational Legal Structure to Combat Transnational Threats*, 55 NAVAL L. REV. 73 (2008) (“The case for a regional solution to collective security threats is strengthened by the predominance of regional efforts to address other transnational concerns involving environmental, intellectual property, and human rights issues.”); Andrea Charron and Clara Portela, *The UN, regional sanctions, and Africa*, 91 International Affairs, Nov. 2015, at 13, 14 (addressing the interplay between the UN and regional sanctions in the context of African. The authors conclude that “The role of regional organizations in African sanctions is prominent...regional arrangements have clearly embraced fully their function as conflict managers” and that “[I]ndeed, the wielding of regional sanctions has often been accompanied by explicit calls for UN action...This suggests that regional organizations active in Africa are fulfilling the role that Chapter VIII of the UN Charter envisaged for them: that of attempting to solve security crises within their own regions by their own means”).

⁶⁴⁵ Cf. (Part XII (Protection and Preservation of the Marine Environment), Section 2 (Global and Regional Cooperation), Article 197 (Cooperation on a Global or Regional Basis); Part XIV (Development and Transfer of Marine Technology), Section 3 (National and Regional Marine Scientific and Technological Centres), Articles 276-277 (establishing and functions of regional centres); and Articles 197, and 268 of UNCLOS; all refer to regional cooperation in various aspects).

⁶⁴⁶ Menefee, *Jamaica Discipline*, *supra* note 25, at 150. See also Samuel Pyeatt Menefee, *Maritime Terror in Europe and the Mediterranean*, 12 Marine Policy 143, 150-51 (1988) (“Regional compacts...are not only feasible,

multilateral efforts, allow for a selected sublimation of sovereignty in the fight against maritime crime, and permit lesser developed countries to deal with outside forces from a position of greater equality.”⁶⁴⁷ As the legal basis for a regional—or, at the minimum, bi-lateral arrangements—Menefee pointed to Article 311(3) of UNCLOS, which enables two or more State Parties to conclude agreements modifying UNCLOS’ provisions.⁶⁴⁸

Menefee’s approach was echoed by other authors such as Timothy Goodman, who submitted that “UNCLOS appears to invite a regional, "Piracy Charter" enforcement approach to piracy provided that such Charters remain consistent with existing international rights and obligations.”⁶⁴⁹ Similarly, in advocating for regionalization of international criminal law enforcement, William Burke-White pointed to the pros and cons of both supranational and national mechanisms and noted that “[b]ecause regional enforcement is situated at a midpoint between the supranational and domestic levels of authority, regional mechanisms are uniquely positioned to strike a balance between these costs and benefits.”⁶⁵⁰ More recently, Christian

but desirable, in that they offer a concerted approach to the problem and prevent...[maritime criminals] from “falling between the cracks”).

⁶⁴⁷ Menefee, *Jamaica Discipline*, *supra* note 25, at 149.

⁶⁴⁸ UNCLOS art. 311(3) reads as follows: “Two or more States Parties may conclude agreements modifying or suspending the operation of provisions of this Convention, applicable solely to the relations between them, provided that such agreements do not relate to a provision derogation from which is incompatible with the effective execution of the object and purpose of this Convention, and provided further that such agreements shall not affect the application of the basic principles embodied herein, and that the provisions of such agreements do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under this Convention.”

⁶⁴⁹ Timothy H. Goodman, *Leaving the Corsair's Name to Other Times: "How to Enforce the Law of Sea Piracy in the 21st Century through Regional International Agreements"*, 31 *Case W. Res. J. Int'l L.* 139, 159 (1999).

⁶⁵⁰ William W. Burke-White, *Regionalization of International Criminal Law Enforcement: A Preliminary Exploration*, 38 *Tex. Int'l L.J.* 729, 734 (2003). See also Brooke A. Bornick, *Case Comment Bounty Hunters and Pirates: Filling in the Gaps of the 1982 U.N. Convention on the Law of the Sea*, 17 *Fla. J. Int'l L.* 259, 266 (2005) (“Most proposals for addressing maritime violence include creating or augmenting regional international bodies or

Bueger and Jan Stockbruegger, pointed to a number of developments supporting the formation of regional (rather than international) security communities in combating maritime piracy.⁶⁵¹

One example of an UNCLOS' shortcoming that poses difficulties in combating acts of piratical nature is the 'high seas' requirement of the piracy definition provided in Article 101 of the Convention.⁶⁵² With regard to piracy in South-East Asia, for example, it has been correctly argued that the geography of the Malacca Straits makes the 'high seas' requirement in the piracy definition "largely inapplicable since large portions of the Straits exist within the territorial waters of the coastal states bordering the Straits."⁶⁵³ Piratical acts committed in areas subject to State's jurisdiction, typically referred to as "armed robbery at sea,"⁶⁵⁴ are not explicitly addressed by UNCLOS. To address this legal gap, regional arrangements concluded in three different regions (South-East Asia, Somalia, and the Gulf of Guinea) cover both piracy and armed robbery at sea, thereby facilitating cooperation among the State Parties also with regard to the latter form of criminal activity.⁶⁵⁵

In addition to addressing difficulties arising from the UNCLOS' provisions on piracy, regional agreements can complement the legal regime of UNCLOS, for example by providing for cooperation mechanisms with regard to extradition and mutual legal assistance, which are not detailed in the UNCLOS piracy section.

creating an international commission on piracy, similar to the International Court of Justice. They encourage regional rather than supranational or domestic responses.").

⁶⁵¹ Christian Bueger and Jan Stockbruegger, *supra* note 454, at 119 (mentioning, *inter alia*, the Djibouti Process and the emphasis of the African union on "regional and global security" as indicators suggesting an emphasis on the regional level).

⁶⁵² See discussion of the UNCLOS definition of piracy *supra* Chapter One.

⁶⁵³ Woolley, *supra* note 229, at 450.

⁶⁵⁴ See *supra* Chapter One.

⁶⁵⁵ See ReCAAP, *infra* note 33; See also the Codes of Conduct of Djibouti and the Gulf of Guinea.

Perhaps the biggest advantage of regional arrangements is their ability to provide tailored solutions.⁶⁵⁶ The most suitable solution for a particular region can be based on geo-political realities, the region's social cohesion, and other unique regional characteristics.⁶⁵⁷ Depending on the situation, the solutions can be long-term or ad hoc; engage existing regional organizations or create new ones; allocate tasks between international and regional arrangements; or invite the assistance of States outside the region or be based on mutual support provided by stronger States within the region to weaker ones.

No less important, regional solutions can be designed to address the concrete piracy modalities affecting the region. One example illustrating the difficulties that might arise from borrowing solutions from one region to another without considering the differences in the piracy modalities is that of the use of private guards on board of commercial ships. This solution has been considered a key factor in reducing piracy attacks off the coast of Somalia,⁶⁵⁸ and has therefore been proposed as part of a “global solution” to piracy.⁶⁵⁹

⁶⁵⁶ See Menefee, *Jamaica Discipline*, *supra* note 25, at 149 (“Regional conventions could thus be established, corresponding with the discrete crime clusters which exist in contemporary piracy and maritime terrorism. Involved coastal states and affected flag states could agree on a finely tuned approach to each problem, taking into account local conditions”); *see also* Bornick, *supra* note 650 (explaining—also by making a reference to Goodman—that “Benefits to a regional approach include a more meaningful consensus and more tailored strategies than a supranational approach would allow.”)

⁶⁵⁷ *See similarly* Art. 197 of UNCLOS concerning cooperation in the Protection and Preservation of the Marine Environment, according to which: “States shall cooperate on a global basis and, as appropriate, on a regional basis, directly or through competent international organizations, in formulating and elaborating international rules, standards and recommended practices and procedures consistent with this Convention, for the protection and preservation of the marine environment, *taking into account characteristic regional features.*” (Emphasis added).

⁶⁵⁸ See Part 4.8.2, references made in fn 554.

⁶⁵⁹ *See* Williams & Pressly, *supra* note 636, at 185-188.

Nonetheless, it has been noted that:

[it] is not clear that armed guards will have the same effect in the Gulf of Guinea as they have off Somalia's coast. . . . As Gulf of Guinea pirates tend not to regard crew life as valuable, increasing violence may only be met with more violence. Nigerian hijackers are known to have more sophisticated weaponry than do most pirates from Somalia; and there is a case where armed Nigerian navy personnel accompanying a commercial vessel were killed by pirates, and the crew taken hostage.⁶⁶⁰

Hence, while regional counter-piracy mechanisms should certainly be developed based on experience gained and lessons learnt from other regions,⁶⁶¹ to optimize the response to the concrete piracy threat in a particular region a tailored solution would be essential.

5.3. THE SOUTH-EAST ASIA AND THE CARIBBEAN CASE-STUDIES

5.3.1. Counter-piracy initiatives in South-East Asia

South-East Asia has been plagued with well-organized pirate groups for centuries, long before piracy's renewed ascent in the late 20th century, and was considered the world's principal piracy

⁶⁶⁰ Adjoa Anyimadu, Maritime Security in the Gulf of Guinea: Lessons Learned from the Indian Ocean, Chatham House 2, 11 (July 2013), available at http://www.chathamhouse.org/sites/files/chathamhouse/public/Research/Africa/0713pp_maritimesecurity_0.pdf.

⁶⁶¹ For example, the Western African countries intended to adopt the piracy prosecution model developed to address piracy off the coast of Somalia. See Julia Malbrook and Sharon Uranie, *Opting for a Preventive Approach! West African Nations Look to Seychelles 'Successful Piracy Prosecution Model'*, SEYCHELLES NEWS AGENCY (Oct. 23 2015), <http://www.seychellesnewsagency.com/articles/3946/Opting+for+a+preventive+approach+West+African+nations+look+to+Seychelles+'successful+piracy+prosecution+model'>.

hotspot before the previous decade's surge in attacks off the coast of Somalia.⁶⁶² Given the fact that one third of the world's shipping passes through this strategically vital section of the Pacific Ocean on an annual basis, piracy in the region has the potential to significantly affect world trade.⁶⁶³

As incidents in South-East Asia became increasingly common at the turn of the 21st century, several antipiracy initiatives, primarily led by Japan, took place across East Asia.⁶⁶⁴ In 2000, the Asia Anti-Piracy Challenge Conference took place in Tokyo.⁶⁶⁵ In 2002, a Joint Declaration of the Association of Southeast Asian Nations ("ASEAN") regarding Cooperation in the Field of Non-Traditional Security Issues was adopted.⁶⁶⁶ The Declaration specifically included among its priorities sea piracy and armed robbery at sea.⁶⁶⁷ A year later, the Tenth

⁶⁶² Miha Hribernik, *Countering Maritime Piracy and Robbery in Southeast Asia - The Role of the ReCAAP Agreement*, EUROPEAN INSTITUTE FOR ASIAN STUDIES 1,3 (March 2013), http://www.eias.org/sites/default/files/EIAS_Briefing_Paper_2013-2_Hribernik.pdf (noting that "since the 1990s, about half of all reported piracy events in the world took place in and around the South China Sea.").

⁶⁶³ *Id.*

⁶⁶⁴ *Id.* at 4.

⁶⁶⁵ *Id.*

⁶⁶⁶ Association of South East Asian Nations, *Joint Declaration of ASEAN and China on Cooperation in the Field of Non-Traditional Security Issues 6th ASEAN-China Summit Phnom Penh* (Nov. 4, 2002), <http://www.asean.org/asean/external-relations/china/item/joint-declaration-of-asean-and-china-on-cooperation-in-the-field-of-non-traditional-security-issues-6th-asean-china-summit-phnom-penh-4-november-2002-2>; [hereinafter *ASEAN Joint DECLARATION*].

⁶⁶⁷ Article II(1) of the Joint Declaration stated that "[T]he priorities at the current stage of cooperation are combating trafficking in illegal drugs, people-smuggling including trafficking in women and children, sea piracy, terrorism, arms-smuggling, money-laundering, international economic crime and cybercrime." *ASEAN Joint Declaration*, *supra* note 666, at art. II(1).

ASEAN Regional Forum (“ARF”) meeting in Cambodia issued a statement on cooperation against piracy and other threats to maritime security.⁶⁶⁸

These initiatives opened the way for the conclusion in November 2004 of the first regional agreement focusing solely on combating piracy and armed robbery at sea: The Regional Co-Operation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (“ReCAAP”).⁶⁶⁹ To date, twenty States have become contracting parties to the agreement.⁶⁷⁰ These include not only regional States but also four European countries (Norway, the Netherlands, Denmark, and the United Kingdom) which, despite their geographical distance, “have an interest in the safety of their substantial merchant fleets that traverse Asian waters on a daily basis.”⁶⁷¹ In 2014, the United States became the last country so far to join ReCAAP.⁶⁷²

In addition to the general obligation undertaken by ReCAAP contracting parties to “make every effort to take effective measures” to combat piratical acts,⁶⁷³ the centerpiece of the agreement is the creation of an Information Sharing Center (“ISC”). The ISC, based in Singapore, serves as a hub for incident reporting and information sharing.⁶⁷⁴ The ReCAAP further prescribes obligations on States Parties to: take measures against vessels and individuals who committed piracy or robbery attacks upon the request of another contracting state; extradite

⁶⁶⁸ Association of South East Asian Nations, *ARF Statement on Cooperation Against Piracy and Other Threats to Security* (June 17, 2003), <http://aseanregionalforum.asean.org/library/arf-chairmans-statements-and-reports.html?id=172>.

⁶⁶⁹ ReCAAP, *supra* note 7.

⁶⁷⁰ See ReCAAP, RECAAP INFORMATION SHARING CENTER, <http://www.recaap.org/>.

⁶⁷¹ See Hribernik, *supra* note 662, at 4.

⁶⁷² Ankit Panda, “US Joins Southeast Asia's War on Piracy”, THE DIPLOMAT, (10 October 2014) <http://thediplomat.com/2014/10/us-joins-southeast-asias-war-on-piracy/>.

⁶⁷³ Article 3, ReCAAP.

⁶⁷⁴ See Hribernik, *supra* note 662, at 4.

such individuals to another contracting state upon request; render mutual legal assistance in criminal matters; and provide assistance in capacity building.⁶⁷⁵

All in all, ReCAAP has been hailed as a significant achievement, and the decrease in attacks in South-East Asia between 2010 and 2012 was attributed, *inter alia*, to its activities.⁶⁷⁶ Its success led to the adoption of two similar agreements addressing piracy and armed robbery at sea in the Indian Ocean and the Gulf of Eden and in West Africa.⁶⁷⁷

Another noteworthy sub-regional initiative in South-East Asia began in July 2004, when Indonesia, Malaysia, and Singapore launched coordinated maritime patrols against piracy and terrorism in the Malacca Straits.⁶⁷⁸ Trilateral coordinated air patrols (“eye in the sky”) began a year later.⁶⁷⁹ In April 2006, the maritime and air initiatives became the Malacca Straits Patrols (MSP).⁶⁸⁰ An additional component – the Intelligence Exchange Group (IEG) was added to the MSP,⁶⁸¹ and in 2008 Thailand joined this undertaking.⁶⁸² The year-round patrols and activities of

⁶⁷⁵ ReCAAP, at art. 11-15. As provided in the Agreement and as common for such agreements, such obligations are qualified: first, by the wording of the provisions, *e.g.* Article 11(1): “A Contracting Party, which has received a request pursuant to Article 10, shall...*make every effort* to take effective and practical measures for implementing such request” (emphasis added); and second, by the standard subjection of the obligations to national law and regulations, *e.g.* Article 13: “A Contracting Party shall, *subject to its national laws and regulations*, endeavor to render mutual legal assistance in criminal matters...” (Emphasis added).

⁶⁷⁶ Hribernik, *supra* note 662, at 4.

⁶⁷⁷ See discussion *infra* on the Djibouti Code of Conduct and the Gulf of Guinea Code of Conduct.

⁶⁷⁸ Michael Bahar, *Attaining Optimal Deterrence at Sea: A Legal and Strategic Theory for Naval Anti-Piracy Operations*, 40 VAND. J. TRANSNAT'L L. 1, 77-78 (2007).

⁶⁷⁹ *Id.* at 78. See also Woolley, *supra* note 229, at 462.

⁶⁸⁰ Woolley, *supra* note 229, at 462-63.

⁶⁸¹ See Malacca Strait Patrols, OCEANS BEYOND PIRACY, <http://oceansbeyondpiracy.org/matrix/malacca-strait-patrols>.

⁶⁸² *Id.*

the MSP are considered as a major contributor to the significant reduction in piratical acts in the Malacca Straits.⁶⁸³

5.3.2. Counter-piracy initiatives in the Caribbean region

In the Caribbean region, maritime piracy flourished in the past.⁶⁸⁴ While the region continues to be considered among the world's main hotspots for piracy,⁶⁸⁵ piratical attacks have not posed threats on the levels seen in South-East Asia or Africa.⁶⁸⁶ Consequently, regional States did not

⁶⁸³ See Woolley, *supra* note 229, at 463 (noting that “[t]he trilateral patrols have been remarkably successful and have resulted in a dramatic reduction in the number of pirate attacks in the Straits.”); see also Malacca Strait Patrols, *supra* note 681 (mentioning that based on the International Maritime Bureau (IMB) record the number of piracy attacks in the Malacca Strait dropped from 38 in 2004 to zero in 2011). The Malacca Straits, according to the IMB, experienced 2 piracy attacks in 2013 and only 1 in 2014. Nonetheless, despite this success, the 2014 IMB annual report noted that a new increase in piracy attacks in the region, indicating that 75% of world piracy attacks were in Asia in 2014- see Prashanth Parameswaran, 75% of World Piracy Attacks Were in Asia in 2014, *The Diplomat*, (Jan. 15, 2015), <http://thediplomat.com/2015/01/75-of-world-piracy-attacks-were-in-asia-in-2014/>.

⁶⁸⁴ Francesca Pellegrino, *Historical and Legal Aspects of Piracy and Armed Robbery Against Shipping*, 43 *J. MAR. L. & Com.* 429, 431 (2012) (noting that “[I]n the XVII century, piracy began to spread in the Sea of the Antilles, the Caribbean, and then to all continents.”).

⁶⁸⁵ See IMO Reports on Acts of Piracy and Armed Robbery Against Ships - Annual Report 2010, MSC.4/Circ.169 1, 2 (2011), http://www.imo.org/KnowledgeCentre/ShipsAndShippingFactsAndFigures/Statisticalresources/Piracy/Documents/Piracy%20annual%20reports%201996%20-%202012/15_MSC_4.Circ.169%20-%202010.pdf (concluding that “it emerges that the areas most affected in 2010 were East Africa and the Far East, in particular the South China Sea, followed by the Indian Ocean, West Africa, South America and the Caribbean”).

⁶⁸⁶ In its 2010 Annual Report, the IMO reported 40 acts of piracy and armed robbery in South America and the Caribbean in comparison to 172 attacks in East Africa, 77 attacks in the Indian Ocean, and 134 in the South China Sea, *see Id.* In 2011, the number of reported incidents in South America and the Caribbean decreased to 29, and in 2012 it continued to decrease to 21, *see* IMO Reports on Acts of Piracy and Armed Robbery Against Ships- Annual Report 2012, MSC.4/Circ.193 (2013), http://www.imo.org/KnowledgeCentre/ShipsAndShippingFactsAndFigures/Statisticalresources/Piracy/Documents/Piracy%20annual%20reports%201996%20-%202012/17_MSC_4.Circ.193%20-%202012.pdf.

consider it necessary to address it as a unique phenomenon and through distinct initiatives and legal instruments such as the ReCAAP.

Nonetheless, it is noteworthy to mention the Caribbean Community and Common Market (“CARICOM”) Maritime and Airspace Security Cooperation Agreement which was concluded in 2008 by a number of States from the Caribbean region.⁶⁸⁷ The CARICOM Agreement identifies piracy, hijacking, and other serious crimes among the activities “likely to compromise the security of a State Party or the region.”⁶⁸⁸ It provides for cooperative arrangements in international waters and for the exchange of operational information,⁶⁸⁹ and addresses the question of jurisdiction over detained vessels.⁶⁹⁰

Notably, the CARICOM Agreement permits Security Force aircrafts or vessels of one State Party to carry out routine security patrols in the waters and airspace of another State Party, and, subject to certain conditions, conduct law enforcement operations in the waters of another State Party.⁶⁹¹ The Agreement also allows security officials of a State Party to board a suspected vessel located in international waters and claiming nationality of another State Party, search the vessel, its cargo and the persons on board, and detain the vessel if they find evidence of any

⁶⁸⁷ CARICOM Maritime and Airspace Security Cooperation Agreement, (July 4, 2008), available through <http://www.caricomlaw.org/Treaties.aspx>[hereinafter *CARICOM Agreement*]. The State Parties to the agreement are: Antigua & Barbuda; St. Kitts & Nevis; Saint Lucia; St. Vincent & The Grenadines; Suriname; Trinidad; & Tobago – see CARICOM Member States, CARICOM.org, http://www.caricom.org/jsp/community/member_states.jsp?menu=community.

⁶⁸⁸ CARICOM Agreement art. I(2)(h).

⁶⁸⁹ CARICOM Agreement art. IX and XII.

⁶⁹⁰ CARICOM Agreement art. XI.

⁶⁹¹ CARICOM Agreement art. VII and VIII.

activity likely to compromise the security of the region or of any State Party.⁶⁹² The Agreement therefore serves as an example of modifications of UNCLOS' provisions in the context of a region⁶⁹³ and in accordance with Article 311, UNCLOS. These modifications can be viewed as “sublimation of sovereignty”⁶⁹⁴ as they have created enforcement jurisdiction for member States in the territorial seas of other member States⁶⁹⁵ or with regard to vessels of another State Party.⁶⁹⁶

In that respect, the CARICOM Agreement goes beyond the South-East Asia initiatives (such as ReCAAP and the MSP), which do not permit a State Party to carry out such enforcement activities. Thus, different from the purely facilitative/coordination role of ReCAAP, the CARICOM Agreement provides not only for supportive activities but also for a “**replacement paradigm**”, namely a situation where activities that are typically reserved solely to officials of a sovereign State, for example law-enforcement activities, are carried out by officials of another State or other bodies (e.g. an international task force), thereby replacing – partially or fully - the role of the officials of the State concerned. In the case of CARICOM, the replacement paradigm is *partial* since the Agreement did not intend to have security officials of

⁶⁹² CARICOM Agreement art. IX. In accordance with paragraph four of this provision, the abovementioned actions (boarding, searching, etc.) should be done in coordination between the State Party whose officials encountered the suspected vessel (the requesting State Party) and the State Party of the vessel's nationality (the requested State Party). Nonetheless, in case no response is obtained from the requested State Party within two hours, the security officials of the requesting State Party are deemed authorized to carry out the various enforcement actions.

⁶⁹³ M.D. Saiful Karim, *Prosecution of Maritime Pirates: The National Court is Dead - Long Live the National Court?* 32 *Wis. Int'l L.J.* 37, 45 n.28 (2014).

⁶⁹⁴ Menefee, *Jamaica Discipline*, *supra* note 25.

⁶⁹⁵ Karim, *supra* note 693.

⁶⁹⁶ In that regard, Article IX of the CARICOM Agreement goes beyond UNCLOS as it expands the right of visit of a suspected vessel located on the high seas to include also suspicion of activities not mentioned in Article 110, UNCLOS (e.g. smuggling – see Article II of the Agreement). If the suspicion is of piratical activities, however, the right of visit may be exercised also in accordance with Article 110, UNCLOS.

one State Party operating entirely instead of officials of another State Party. Conversely, in the context of Somalia the authorization granted to “cooperating States” by the UNSC (following the consent of the TFG) to operate in Somali waters or on land represents a *de facto full replacement*: Though this authorization has no *de jura* implications on Somalia’s rights to continue and exercise its enforcement powers, the inability of Somali officials to carry-out enforcement activities in the country renders that, as a matter of fact, the “cooperating States” replace them in combating piratical activities.

This important difference derives from the political realities in the two regions: the Caribbean & South-East Asia. This difference is also reflected in the general approach in combating maritime (and other) security threats. While States in the Caribbean region were able to reach high level of cooperation emphasizing joint undertakings against threats,⁶⁹⁷ sovereignty remains a key principle in South-East Asia and consequently regional cooperation has remained on the coordination level.⁶⁹⁸

5.3.3. Characterizing the response: from a local to regional approach

The common denominator of the antipiracy initiatives in the two case-studies of South-East Asia and the Caribbean is that in both cases they were driven primarily by regional actors. Whether originating from the initiative of one or more States with clear vested interest in combating

⁶⁹⁷ The joint approach in addressing security threats in the Caribbean region is also illustrated in the creation of the Regional Security System (RSS), a Caribbean regional hybrid organization comprising both military and police personnel. The 1996 Agreement governing the activities of the RSS does not explicitly mentions piracy, but lists among the Organization’s function maritime policing duties. See Purposes and Functions of the RSS, Regional Security System, <http://www.rss.org.bb/about-us/functions-of-the-rss.aspx>.

⁶⁹⁸ See also Woolley, *supra* note 229, at 463 (noting that “the patrols have become an illustration of how vehemently Indonesia and Malaysia guard their sovereignty. The patrols themselves are coordinated, not joint.”).

piracy (e.g. Japan in the case of South-East Asia),⁶⁹⁹ or resulting from a more general regionalization process that has taken place in a particular area, as in the Caribbean, the regional counter-piracy undertakings in both regions can be described as a **bottom-up process** (i.e. from the local to regional). This is not to suggest that the international community did not contribute to the efforts, for example through supporting activities of international organizations such as the International Maritime Organization (“IMO”). Yet the scale and level of involvement of the international community was relatively low, particularly in comparison to the response to piracy off the coast of Somalia or even in the Gulf of Guinea, described in the following sections.

5.4. SOMALIA: FROM THE LOCAL TO THE INTERNATIONAL SPHERE – AND TO THE REGIONAL LEVEL

5.4.1. Somali piracy: a transnational piracy model?

One of the characteristics ascribed to piracy off the coast of Somalia was its alleged transnational nature. For example, Williams and Pressly contended that while the modus operandi of maritime pirates has persisted more-or-less unchanged, what presents a new challenge is the transnational business model of some of today’s pirate organizations.⁷⁰⁰ They further argued that “[m]aritime piracy has evolved from an essentially localized phenomenon of ad hoc banditry conducted by local criminals to one funded by the global networks of transnational organized crime.”⁷⁰¹ They therefore considered that “a localized solution will necessarily meet with only limited success in combating piracy worldwide,”⁷⁰² and viewed the threats posed by Somali piracy as a “global

⁶⁹⁹ Hribernik, *supra* note 662, at 4 (describing Japan’s driving force behind the conclusion of ReCAAP).

⁷⁰⁰ Williams & Pressly, *supra* note 636, 180-81.

⁷⁰¹ *Id.* at 181.

⁷⁰² *Id.* at 186.

problem [that] calls for a global solution.”⁷⁰³ From an organizational perspective, Christian Bueger argues that “with the rise of Somali piracy, the problem of piracy, and with it the organizational field, has become increasingly international.”⁷⁰⁴

Undoubtedly, Somali piracy has posed new threats to the international community in light of the significant volume of trade-by-sea carried-out through the waters off Somalia. As previously noted, piracy attacks caused tremendous financial damage and threatens the lives of seafarers. It is also unquestionable that the response of the international community to Somali piracy was on a different scale in comparison to the response to piracy elsewhere, as evidenced by the engagement of the UNSC and the deployment of navies from various countries outside the region.

Nonetheless, neither the characteristics of Somali piracy nor the response to this phenomenon should be considered as fully international by nature. First, despite the possible existence of transnational aspects with regard to the financing of Somali piracy,⁷⁰⁵ the Somali piracy model did not resemble a transnational criminal activity. Indeed, there has been no indication of an organizational structure that is spread between various regions, has inter-regional links, or otherwise instructs criminal activities in various regions. In that regard, Somali piracy cannot be compared to the activities of terrorist groups such as Al-Qaida and more

⁷⁰³ *Id.* at 182-83. The authors suggested a solution with three fundamental components: 1) using private security on ships; 2) establishing an international piracy court; and 3) allowing private industry the space to innovate and experiment with effective deterrence techniques while holding industry responsible for the cost of those efforts.

⁷⁰⁴ Bueger, *supra* note 636, at 94-95.

⁷⁰⁵ Williams & Pressly, *supra* note 636, 181.

recently the Islamic State, which have carried-out attacks in different regions and established inter-regional links,⁷⁰⁶ or to drug cartels with inter-regional activities and links.⁷⁰⁷

Nor did Somali pirates carry out any piratical acts outside the region (though, granted, the area of their operations has significantly grown between 2008 and 2012).⁷⁰⁸ Somali piracy therefore cannot be compared to criminal activities conducted by groups such as the jewelry-theft ring known as “the Pink Panther”, which carry-out operations using similar modus operandi in various places in the world.⁷⁰⁹

Thus, by its very nature, Somali piracy has remained a local/regional problem—though certainly with severe international implications—rather than a true transnational, let alone global, criminal activity.

⁷⁰⁶ See for example the links between the Al-Qaida’s basis in the Arab peninsula and the terrorist group based in Algeria called Al-Qaida in the Maghreb (AQIM). With regard to the Islamic State, compare to the allegiance announced by the Nigerian-based group Boko Haram to the Islamic State, see *Isis welcomes Boko Haram’s allegiance and plays down coalition ‘victories’*, Guardian (12 March 2015), <http://www.theguardian.com/world/2015/mar/12/isis-welcomes-boko-harams-allegiance-and-plays-down-coalition-victories>).

⁷⁰⁷ See Dr. Nancy E. Brune, *The Brazil-Africa Narco Nexus*, Ams. Q. (Fall 2011) <http://www.americasquarterly.org/brune> (pointing to the links between Brazilian criminal groups and their counterparts in West Africa).

⁷⁰⁸ As noted, the UNSC has expressed its concerns over the extended range of Somali piracy – cf. S.C. Res. 2077, *supra* note 248, ¶ 2 (“The Security Council [is] . . . also gravely concerned by the extended range of the piracy threat into the western Indian Ocean and adjacent sea areas and the increase in pirate capacities.”).

⁷⁰⁹ Giles Tremlett, *The Hunt for the Pink Panther Gang*, GUARDIAN (Aug. 23, 2010), <http://www.theguardian.com/uk/2010/aug/23/pink-panther-jewel-thieves> (“In the era of globalisation, crime knows few frontiers. Jewelry thieves go wherever jewels are to be found, and the Pink Panther gang (so dubbed by the Daily Mail after a London raid in 2003, which mirrored a similar raid in a Peter Sellers Inspector Clouseau film) knows where the very best are on display. They strike in Dubai, Japan, Switzerland, London, Paris or Monte Carlo. Interpol estimates that they have carried out more than 150 raids, netting £200m-worth of jewelry and watches in that time.”).

5.4.2. Characterizing the response to Somali piracy: a gradual regional approach

Considering the local/regional nature of Somali piracy, the international response to it has been focused on a **gradual regional approach**, which took place in two phases: The first followed the outbreak of piratical acts between 2006 and 2008 and was carried-out as an emergency, short-term response. It was characterized by the prompt internationalization of the counter-piracy initiatives: As Somali piracy reached alarming levels and considering the inability of Somali authorities to address the problem as well as the relatively weak response by regional States and organizations, the international community had to rapidly engage through a variety of activities such as dispatching navies and creating international coordination networks. To borrow from scientific terminology describing chemical transformation of material, the direct shift from a local to an international response, skipping, at that first phase, regional counter-piracy initiatives, can be described as a one-way (local directly to international) “**sublimation response process**”.⁷¹⁰

In the second phase, which began in parallel to the international anti-piracy activities, the international community has endeavored to regionalize the counter-piracy activities.⁷¹¹ Different than the bottom-up (i.e. from local to regional) approach in South-East Asia and the Caribbean, the regionalization process in the Somali case reflects a predominantly **top-down** (i.e. from the international to the regional) approach. And the role of the international community in combating

⁷¹⁰ In chemistry, sublimation refers to the process where a solid substance is converted by heat into a vapor, which on cooling condenses again to solid form, without apparent liquefaction. See <http://dictionary.reference.com/browse/sublime>.

⁷¹¹ See Christian Bueger & Mohanvir Singh Saran, *Finding a Regional Solution to Piracy: Is the Djibouti Process the Answer?*, PIRACY STUDIES (Aug. 18, 2012) <http://piracy-studies.org/finding-a-regional-solution-to-piracy-is-the-djibouti-process-the-answer/>. (“A significant component of the long term strategy to counter-piracy originating in Somalia is the attempt to find regional solutions. The idea is to build a regional maritime security infrastructure which can cope with the menace in the long run.”).

Somali piracy has gradually shifted from a leading role (in phase one) to a supportive one (in phase two).

This regionalization approach was manifested on a number of levels. First, not a single international agreement was adopted to address Somali piracy. The only new agreement concluded to address piracy off the coast of Somalia was the Djibouti Code of Conduct, a regional non-binding agreement adopted in 2009⁷¹² and structured based on the ReCAAP model.⁷¹³

The initiative to conclude the Djibouti Code of Conduct was largely driven by the IMO, which organized the Djibouti meeting pursuant to a Resolution adopted by the IMO's Assembly.⁷¹⁴ The Djibouti Code of Conduct is open for signature at the Headquarters of IMO,⁷¹⁵ and the organization remains involved in its implementation through technical co-operation and

⁷¹² According to Article 13 of the Djibouti Code of Conduct, “[W]ithin two years of the effective date of this Code of conduct, and having designated the national focal points referred to in Article 8, the Participants intend to consult, with the assistance of IMO, with the aim of arriving at a binding agreement.”, *Id.* at art. 13. To this date, however, no binding agreement was concluded.

⁷¹³ See Bueger & Saran, *supra* note 711, (“The very successful implementation of the East Asian Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (ReCAAP) which provides a regional structure for cooperation and communication is the role model for such a solution”).

⁷¹⁴ Int’l Maritime Org. [IMO], A.1002(25), ¶ 7, Piracy and Armed Robbery against Ships in Waters off the Coast of Somalia (Dec. 6, 2007), available at

[http://www.imo.org/blast/blastDataHelper.asp?data_id=25332&filename=A1002\(25\).pdf](http://www.imo.org/blast/blastDataHelper.asp?data_id=25332&filename=A1002(25).pdf). Among other things, the Resolution called upon Governments in the region to conclude, in co-operation with IMO, and implement, as soon as possible, a regional agreement to prevent, deter and suppress piracy and armed robbery against ships; As mentioned in the Djibouti Code of Conduct, prior to the meeting in Djibouti (and to the significant spike in Somali piracy), the IMO held other sub-regional meetings in Sana'a in 2005, Muscat in 2006, and Dar es Salaam. Djibouti Code of Conduct, at ¶ 6, Annex.

⁷¹⁵ Djibouti Code of Conduct, Art. 16.

assistance and training activities.⁷¹⁶ The Djibouti Code of Conduct also welcomed the initiatives of other international organizations such as the United Nations Office on Drugs and Crimes (“UNODC”); the United Nations Development Programme (UNDP); the European Commission; and the League of Arab States to provide training, technical assistance and other forms of capacity building to assist participating governments.⁷¹⁷ It therefore serves as an example for a regional agreement initiated and facilitated by international actors.

With regard to the institutional landscape, no permanent international institution was created to counter Somali piracy: On the international level, only loose, ad hoc networks such as the Contact Group off the Coast of Somalia were created. The only new institutions created following the spike in Somali piracy were regionals: The three regional information centers established by the Djibouti Code of Conduct, and the Seychelles-based Regional Fusion and Law Enforcement Centre for Safety and Security at Sea (REFLECS3), formerly known as the Regional Anti-Piracy Prosecution and Intelligence Coordination Centre (“RAPPICC”).⁷¹⁸

The creation of the RAPPICC also reflects the top-bottom gradual regional approach adopted with regard to combating piracy in the region. Unlike the ReCAAP, which, as mentioned, comprises mostly of regional States with a few out-of-region States joining it, RAPPICC’s creation was driven mostly by States outside the region, notably the United Kingdom, and its membership currently includes only one regional State (Seychelles).⁷¹⁹ With a

⁷¹⁶ Djibouti Code of Conduct, Res. 2 & 3.

⁷¹⁷ Djibouti Code of Conduct, Res. 2, Preamble.

⁷¹⁸ See Regional Fusion and Law Enforcement Centre for Safety and Security at Sea (REFLECS3), *Oceans Beyond Piracy*, <http://www.oceansbeyondpiracy.org/matrix/regional-fusion-and-law-enforcement-centre-safety-and-security-sea-reflecs3>. See further discussion on the RAPPICC *infra* Chapter 5.

⁷¹⁹ At the time this dissertation has been finalized, the documents establishing RAPPICC have not been made public, but they are on file with the author.

view to enlarging membership to include more regional States, it was later reported that “the Steering Group [of the Centre] also decided to invite countries from the East African and South Asian regions to join as new members.”⁷²⁰

Another foreseen regional initiative is the planned Seychelles-based Operation Coordination Centre to promote maritime security.⁷²¹ Attempts to create a long-standing counter-piracy structure were also made in already existing regional—rather than international—organizations, including the Intergovernmental Authority for Development (“IGAD”), the East African Community (“EAC”), the South African Development Community (“SADC”), and the African Union (“AU”).⁷²² The engagement of regional organizations was also systematically supported by the UNSC,⁷²³ though their actual involvement in and contribution to the counter-piracy activities has not been dominant.

One of the most evident manifestation of the regional approach to Somali piracy is found in the prosecution of Somali pirates: At least in the earlier days of the spike in Somali piracy, it was evident that transferring captured piracy suspects to prosecution before Somali courts is

⁷²⁰ See Contact Group on Piracy off the Coast of Somalia: Quarterly Update, U.S. DEP’T OF STATE (Dec. 24, 2013) <http://www.state.gov/t/pm/rls/fs/2013/219088.htm>.

⁷²¹ See Hajira Amla, East Africa: Comesa Lends Support for Establishment of EU-Funded Maritime Security Centre in Seychelles, SEYCHELLES NEWS AGENCY (Mar. 30, 2015), <http://allafrica.com/stories/201503302538.html>.

⁷²² See Bueger & Saran, *supra* note 711.

⁷²³ Reference to the role of regional organizations was made in the first UNSC Presidential Statement on Somali piracy, S.C. Pres. Statement, U.N. Doc. S/PRST/2005/54 *supra* note 412; See also S.C. Res. 1816, *supra* note 125; S.C. Res. 1846 *supra* note 296 (where the UNSC called upon “States and regional organizations that have the capacity to do so, to take part actively in the fight against piracy and armed robbery at sea off the coast of Somalia.”).

neither feasible nor desired in light of a host of difficulties such as human rights concerns, the lack of anti-piracy legislation⁷²⁴ and judicial capacity.⁷²⁵

Despite the uncontested fact that suspects could be prosecuted before national courts in application of the universal jurisdiction paradigm and in application of the UNSC Piracy Resolutions,⁷²⁶ it was also clear that most of the countries that took an active part in the naval operations off the coast of Somalia were not keen of bringing the suspected pirates they arrested at sea before their national courts. This derived from legal-technical issues associated with prosecuting pirates away from their homes and from the area where they were captured—for example, problems of translation or difficulties in securing the appearance of naval officer witnesses⁷²⁷—but also (and perhaps chiefly) from the lack of political will to carry out such prosecutions.⁷²⁸

Some commentators called for internationalizing pirates' prosecutions by referring cases to the International Criminal Court (“ICC”) —either through broad interpretation of the Rome

⁷²⁴ See U.N. Secretary-General, Report of the Secretary-General on Specialized Anti-Piracy Courts in Somalia and Other States in the Region, *supra* note 6, ¶ 14.

⁷²⁵ *Id.* at ¶ 13 (“[I]ncreasing the capacity to conduct the prosecution of piracy cases is a major, long-term challenge.”).

⁷²⁶ *Cf.* Sandra L. Hodgkinson et al, *supra* note 149.

⁷²⁷ See Barry Hart Dubner and Sara Fredrickson, *supra* note 245, at 253 (summarizing a number of challenges for prosecution raised by Paul Hallwood & Thomas J. Miceli, *The Law and Economics of International Cooperation Against Maritime Piracy*, U.Conn Dep’t Econ. Working Paper Series 7 (June 2011)).

⁷²⁸ *Cf.* Hodgkinson et al, *supra* note 149, at 107 (“Still, there are countries that do not wish to exercise such criminal jurisdiction. In fact, many national courts have been reluctant to take piracy cases from the high seas or outside of their territorial waters. Some commentators have stated that ‘[t]he practice of dumping pirates on Kenyan authorities reflects wealthier governments’ extreme reluctance to try pirates in their own courts,’ perhaps out of fear that losing the case would allow pirates to claim asylum from the very countries who attempted to prosecute them.”); As Saiful Karim noted, however, “there is no known incident where a Somali pirate has claimed asylum in a Western developed country where they are currently being prosecuted.”, See Saiful Karim, *supra* note 693, at 67.

Statute⁷²⁹ or the adoption of a protocol to the Statute.⁷³⁰ Other ideas included prosecuting pirates before the International Tribunal of the Law of the Sea (“ITLOS”),⁷³¹ establishing a dedicated international piracy court,⁷³² and creating a U.N. flagship that could try pirates.⁷³³ The Lang Report put forward a list of options for prosecution, which included the creation of a Somali extraterritorial jurisdiction court in Arusha, Tanzania (that would later be transferred to Somalia).⁷³⁴

⁷²⁹ Duncan Gaswag, *Does the International Criminal Court Have Jurisdiction Over the Recruitment and Use of Child Pirates and the Interference with the Delivery of Humanitarian Aid by Somali Pirates?*, 19 ILSA J. Int'l & Comp. L. 277, 304 (2012-2013) (suggesting that the pirate kingpins and financiers could be held liable for the crime of recruiting and using child pirates).

⁷³⁰ See Yvonne M. Dutton, *Bringing Pirates to Justice: A Case for Including Piracy within the Jurisdiction of the International Criminal Court*, 11 Chi. J. Int'l L. 197, 201 (2010–2011) (arguing that “piracy is a serious crime affecting the international community” and suggesting that “the International Criminal Court (ICC) is the best international forum to bring an end to the culture of impunity that surrounds piracy offenses”). Dutton further noted that the ICC may sit regionally and proposed to include piracy within the jurisdiction of the ICC by optional protocol (rather than through amendment to the Rome Statute) and for using a separate chamber to adjudicate piracy cases. *Id.* at 232–33.

⁷³¹ Beck Pemberton, *The International Tribunal for the Law of the Sea as a High Court of Piracy*, One Earth Future (Nov. 5 2010), <http://oneearthfuture.org/sites/oneearthfuture.org/files//documents/publications/ITLOS-Beck-Pemberton.pdf>.

⁷³² See Williams and Pressly, *supra* note 636, at 209-213 (suggesting that one prong of a sustainable global solution is the creation of a new international piracy tribunal, ideally under the auspices of the U.N., pursuant to a Security Council resolution based on the powers granted to it under Chapter VII of the U.N. Charter). The call for the creation of a dedicated international court was also supported by representatives of the private sector, for example by Max Johns from the German Shipowners Association, who advocated for the creation of an international court by claiming, “It doesn't make much sense to make lawyers and courts everywhere specialize in such a narrow subject in order to arrive at what could be very different verdicts.” - Jan-Philipp Scholz, *No end in Sight for Pirate Trial in Hamburg*, DEUTSCHE WELLE (May 24, 2011), <http://www.dw-world.de/dw/article/0,,15101199,00.html>.

⁷³³ See Dubner and Fredrickson, *supra* note 245, 252.

⁷³⁴ The Lang Report, *supra* note 53.

What finally emerged from the intensive discussions and plethora of proposals was neither a creation of a new tribunal nor the engagement of any existing international or regional one. Rather, prosecution of Somali pirates took place predominantly before national courts in regional States.⁷³⁵ To facilitate those prosecutions, an emphasis was put by the international community on building the capacity of Somali institutions and those of neighboring countries. This included various capacity-building projects, encouraged by the UNSC,⁷³⁶ of UN agencies such as the UNODC⁷³⁷ together with IMO and the European Union.⁷³⁸ Thus, a regional "Piracy

⁷³⁵ See U.N. Secretary-General, Report of the Secretary-General on Specialized Anti-Piracy Courts in Somalia and Other States in the Region, *supra* note 6, ¶ 2 (providing a "Global Piracy Prosecutions Table" for the years 2006-2012). On the role of national courts in the prosecution of pirates see also Saiful Karim, *supra* note 693, at 40 (arguing that "international law has [instead] anticipated a vital role for national courts for the enforcement of international law relating to piracy. This is an area of international law where the national court is the main judicial institution for the implementation of international law." The author added that "the operationalization of national courts is the most viable option for ensuring the effective prosecution of pirates").

⁷³⁶ Cf. S.C. Res 1897, *supra* note 320, ¶ 11 ("Further noting with appreciation the ongoing efforts by UNODC and UNDP to support efforts to enhance the capacity of the corrections system in Somalia, including regional authorities, to incarcerate convicted pirates consistent with applicable international human rights law"), and S.C. Res. 2077, *supra* note 248, ¶12 ("Welcoming the capacity building efforts in the region made through the International Maritime Organization (IMO) Djibouti Code of Conduct Trust Fund and the Trust Fund Supporting Initiatives of States Countering Piracy off the Coast of Somalia, as well as the European Union's planned programming under EUCAP NESTOR").

⁷³⁷ The activities of the UNODC Maritime Crime Programme (MCP) focuses on assisting states to strengthen their capacity to combat maritime crime. The MCP's activities include ongoing counter-piracy and maritime capacity-building in the Horn of Africa and Indian Ocean regions. See UNODC Maritime Crime Programme, UNODC, <http://www.unodc.org/easternafrika/en/piracy/index.html>.

⁷³⁸ Cf. IMO signs strategic counter-piracy capacity building partnerships with UN agencies and EU, IMO (May 17, 2012), <http://www.imo.org/MediaCentre/PressBriefings/Pages/15-capacitypartnerships.aspx#.VQdE0NLF8u0>; *Building regional maritime capacities*, available at http://eeas.europa.eu/piracy/regional_maritime_capacities_en.htm (describing various EU projects in the region, including the Regional Maritime Security Programme (MASE), through which the EU is supporting the implementation of a regional strategy, which, *inter alia*, is aimed at enhancing judicial capabilities to arrest, transfer, detain and prosecute piracy suspects).

Prosecution Model" was created,⁷³⁹ manifesting the gradual regional approach. As noted by UNODC," [A]lthough piracy is a crime of "universal jurisdiction", which may be prosecuted by any State, the regional model has seen States in the Indian Ocean region take ownership of a regional security issue that affects them directly."⁷⁴⁰

The only aspect where the international community has remained actively and directly involved, in lieu of both regional and local activities (i.e. in application of an international full “**replacement paradigm**”), was with regard to the navies dispatched to the region and the counter-piracy initiatives undertaken by navies and other military forces in Somalia and the region. The authorization given through UNSC Resolutions to enter Somalia for counter-piracy activities derived from the inability of Somalia to interdict pirates and patrol its waters⁷⁴¹ and the relative lack of capacity of regional States and organizations to successfully carry out this function in the vast sea area off the coast of Somalia.⁷⁴² So long as the risk for a new Somali piracy outbreak exists,⁷⁴³ and until Somalia develops an efficient coast guard⁷⁴⁴ or, alternatively,

⁷³⁹ See *Maritime Crime Programme - Indian Ocean*, UNODC, <https://www.unodc.org/unodc/en/piracy/indian-ocean-division.html>. (regarding the “regional piracy prosecution model”).

⁷⁴⁰ *Id.*

⁷⁴¹ See S.C. Res. 1816, *supra* note 125, preamble (“The Security Council [is] . . . [t]aking into account the crisis situation in Somalia, and the lack of capacity of the Transitional Federal Government (TFG) to interdict pirates or patrol and secure either the international sea lanes off the coast of Somalia or Somalia’s territorial waters[.]” This statement was reiterated in later Resolutions.); See also S.C. Res. 1851, *supra* note 189, preamble (Dec. 16, 2008); and S.C. Res. 1897, *supra* note 320, preamble.

⁷⁴² See Bueger & Saran, *supra* note 711 (mentioning that “it is doubtful that at any point in the foreseeable future Djibouti Code of Conduct states will have the level of force that is required to patrol the Western Indian Ocean”).

⁷⁴³ See Drazen Jorgic, Rise in illegal fishing threatens to revive Somali piracy, REUTERS (Mar. 31, 2015), <http://af.reuters.com/article/topNews/idAFKBN0MR1G220150331?pageNumber=1&virtualBrandChannel=0>. (regarding the possibility of renewed piracy attacks).

⁷⁴⁴ See James Bridger, Searching for a Somali Coastguard, CIMSEC (Oct. 8, 2013),

regional States and organizations have the capacity to replace the international navies, this aspect of the international response is likely to persist.

5.5. REGIONAL COUNTER-PIRACY INITIATIVES IN THE GULF OF GUINEA: THE HYBRID APPROACH

Another main hub of contemporary maritime piracy—and certainly a very disconcerting one⁷⁴⁵—is found in West and Central Africa, in particular in the Gulf of Guinea, the coastal zone stretched from Senegal to Angola.

Piracy in the Gulf of Guinea is not a new phenomenon. Since the late 1990s, the region has been facing acts of piracy targeting high-value assets, particularly oil shipments.⁷⁴⁶ The Niger delta region in Nigeria was the initial epicenter of maritime crime.⁷⁴⁷ In 2005, the Movement for the Emancipation of the Niger Delta (“MEND”), a loose coalition of militant

<http://cimsec.org/searching-somali-coastguard/7776> (regarding the challenges in developing Somali coast guard capabilities); see *also* S.C. Res. 2446, U.N. Doc. S/RES/2446 (10 November 2015) (regarding the recent UNSC resolution on piracy off the coast of Somalia, in which the UNSC welcomed “the draft coast guard law which the Somali authorities, with the support of the European Union Naval Force (EUNAVFOR) Operation Atalanta and EUCAP Nestor have submitted to the Council of Ministers for approval by Parliament.”).

⁷⁴⁵ Cf. The Gulf of Guinea: The New Danger Zone, *supra* note 477 (“Within a decade, the Gulf of Guinea has become one of the most dangerous maritime areas in the world.”); Nick Turse, In the Face of Rising Maritime Insecurity, AFRICOM Claims Success and Obama Embraces a Strongman, *World Post* (Nov. 25, 2014), http://www.huffingtonpost.com/nick-turse/pirates-of-the-gulf-of-guinea_b_5881290.html. (quoting Loic Moudouma, a maritime security expert, stating that “The Gulf of Guinea is the most insecure waterway, globally”); Ali Kamal-Deen, *The Anatomy of Gulf of Guinea Piracy*, 68.1 *Naval War C. Rev.* 93, 93 (2015) <https://www.usnwc.edu/getattachment/e95feaa7-8883-4008-b49b-175783f25e43/The-Anatomy-of-Gulf-of-Guinea-Piracy.aspx>. (stating that “[t]oday, the Gulf of Guinea stands as the most dangerous maritime area in terms of the success rate of attacks and violence.”).

⁷⁴⁶ U.N. Secretary-General, Letter dated Jan. 18, 2012 from the Secretary-General addressed to the President of the Security Council, ¶ 5, U.N. Doc. S/2012/45 (Jan. 19, 2012) [hereinafter Letter dated Jan. 18, 2012].

⁷⁴⁷ The Gulf of Guinea: The New Danger Zone, *supra* note 477.

groups that emerged in the Niger Delta, started launching piratical attacks.⁷⁴⁸ The incidents temporarily decreased in 2008 and 2009 following the amnesty pact between the Nigerian Government and the MEND leaders, yet they swelled again between 2010 and 2013.⁷⁴⁹ Moreover, the pirates moved beyond the Niger Delta to carry-out attacks in waters off the coast of neighboring countries such as Benin, Togo, and Ivory Coast,⁷⁵⁰ taking advantage of the weak capacity of those countries to counter the attacks.⁷⁵¹ This is therefore a classic example of a local piracy problem becoming a regional one. Similar to other regions, piracy in the Gulf of Guinea has had international implications, yet (and similar to Somali piracy), it is not a transnational criminal phenomenon by nature.

The growing menace of piratical attacks in the region has drawn the attention of the international community, which was already attuned to piracy threats due to the emergence of attacks off the coast of Somalia around the same time period. Among the main concerns raised were the implications of piracy to the oil exports from countries such as Nigeria and Angola,⁷⁵²

⁷⁴⁸ Kamal-Deen, *supra* note 745, at 98.

⁷⁴⁹ Kamal-Deen, *supra* note 745, at 95, 98; See also Letter dated Jan. 18, 2012, *supra* note 746, at ¶ 5 (“[S]ince 2010, incidents of piracy and armed robbery in the area have risen significantly, making the region the second most acute piracy problem on the African continent.”).

⁷⁵⁰ Kamal-Deen, *supra* note 745, at 100; Joe Bavier, Insight: Nigerian pirate gangs extend reach off West Africa, REUTERS (May 29, 2013) <http://www.reuters.com/article/2013/05/29/us-westafrica-piracy-insight-idUSBRE94S08320130529> (describing that following the amnesty agreement, many Nigerian gangs simply reconfigured their operations and pushed westward, striking first off Benin before stepping up attacks further along the coast in Togo and then heading to Ivory Coast).

⁷⁵¹ Bavier, *supra* note 750 (describing the weak capacity of the coast guard of Ivory Coast).

⁷⁵² Nigeria and Angola are among the world’s 10 biggest crude oil exporters, *see* Anyimadu, *supra* note 660, at ¶ 2.

and the devastating effect of piracy on maritime navigation and on the economies of the countries in the region.⁷⁵³

In a letter dated 27 July, 2011, President Boni Yayi of the Republic of Benin appealed to the international community for help to fight piracy in his country and throughout the Gulf of Guinea.⁷⁵⁴ Subsequently, on October 19, 2011, during an open debate in the Security Council on the matter of “Peace and Security in Africa: Piracy in the Gulf of Guinea”, convened by Nigeria in its capacity as President of the Security Council, the UN Secretary-General confirmed his intention to dispatch an assessment mission to the region and appealed to regional organizations to work together to develop a comprehensive and integrated regional anti-piracy strategy for the Gulf of Guinea. He also encouraged them to build on the existing memorandum of understanding on the establishment of a sub-regional integrated coastguard network in West and Central Africa.⁷⁵⁵

Following the debate, the Security Council, on 31 October, adopted Resolution 2018, its first ever resolution on the issue of piracy in the Gulf of Guinea.⁷⁵⁶ In that resolution, the Council expressed deep concern about the threat posed by piracy and armed robbery to international navigation, security and the economic development of States in the Gulf of Guinea region, and welcomed the intention of the Secretary-General to deploy a United Nations assessment mission to the region, as well as the intention of regional leaders to convene a summit to consider a comprehensive response to the piracy threat in the Gulf of Guinea. A second resolution dedicated

⁷⁵³ See Nigeria’s statement during the debate at the Security Council on 19 October 2011, Letter dated Jan. 18, 2012, *supra* note 746, at ¶ 3.

⁷⁵⁴ Letter dated Jan. 18, 2012, *supra* note 746, at ¶ 1.

⁷⁵⁵ *Id.* at ¶ 3.

⁷⁵⁶ S.C. Res. 2018, *supra* note 249.

to piracy in the Gulf of Guinea, was adopted in February 2012, following the presentation of the Report of the United Nations assessment mission on piracy in the Gulf of Guinea.⁷⁵⁷ Since the piratical attacks in the region have not abated, the Security Council continued to address the matter.⁷⁵⁸

Thus, different than the situation in South-East Asia and the Caribbean, the counter-piracy initiatives did not remain exclusively local or regional. At the same time, the involvement of the international community in addressing piracy in the Gulf of Guinea had different characteristics in comparison to the counter-piracy initiatives launched to combat Somali piracy.

Indeed, the geo-political differences between the two regions necessitated a different approach in addressing the problem: As indicated by Andrew Shapiro, U.S. Assistant Secretary of State for Political-Military Affairs, "[w]hereas in Somalia, we faced an absence of government, in the Gulf of Guinea the exact opposite holds true. There are many sovereign governments with varying degrees of capability but all with their own laws, their own interests."⁷⁵⁹ In that regard, the situation in the Gulf of Guinea resembles that of South-East Asia.

Moreover, in West Africa the regional structures were more developed in comparison to those of Eastern Africa. Some regional maritime institutions were already in place. For example, the 25-nation Maritime Organization of West and Central Africa ("MOWCA") was created to facilitate effective cooperation to improve maritime security. Since its inception in 1975, MOWCA has served as a forum for achieving limited objectives in the maritime domain, such as

⁷⁵⁷ S.C. Res. 2039, *supra* note 249.

⁷⁵⁸ See S.C. Pres. Statement, *supra* note 516.

⁷⁵⁹ Joe Bavier, *supra* note 750; Anyimadu, *supra* note 660, at 7 (noting that "[t]he political and governance situations in most states in the Gulf of Guinea contrast heavily with that of Somalia. Most West African countries have established rule of law, functioning state institutions and relatively good governance").

port management.⁷⁶⁰ In 2006, MOWCA conducted a forum in Dakar, Senegal in conjunction with the IMO for establishing an integrated coast guard network. This led to the development in 2008 of a Memorandum of Understanding (MOU) on the establishment of a sub-regional coast guard network for the West and Central African region.⁷⁶¹ The agreement establishes an institutional framework for close cooperation on the suppression of piracy and armed robbery at sea and other criminal activities such as drug trafficking, fuel theft and smuggling.⁷⁶² The agreement also provides guidelines for coastal surveillance, maintaining a naval presence in the exclusive economic zones, and enforcement of the Law of the Sea Convention.⁷⁶³

Regional organizations were also behind other initiatives. The Economic Community of West African States (ECOWAS), the Economic Community of Central African States (ECCAS) and the Gulf of Guinea Commission (GGC) have convened joint meetings to draft a regional strategy on maritime security. Documents drafted at these meetings were endorsed at a summit of heads of state and government of Central and West Africa in Yaoundé, Cameroon, in June 2013.⁷⁶⁴

⁷⁶⁰ Kraska, J. and Wilson, B., 2009, *Combating Pirates of the Gulf of Aden: The Djibouti Code and the Somali Coast Guard*, Ocean & Coastal Management, 1, 4.

⁷⁶¹ To date, the MOU has been signed by 15 of its 20 coastal member States, see *Integrated Coast Guard Function Network*, INTERNATIONAL MARITIME ORGANIZATION, at <http://www.imo.org/es/OurWork/Security/WestAfrica/Paginas/Integrated-Coast-Guard-Function-Network-.aspx>.

⁷⁶² Kraska & Wilson, *supra* note 760, 4.

⁷⁶³ *Id.*

⁷⁶⁴ See Anyimadu, *supra* note 660, ¶ 2; see also *West and Central Africa regional Agreements and Information Sharing*, INTERNATIONAL MARITIME ORGANIZATION, <http://www.imo.org/en/OurWork/Security/WestAfrica/Pages/Code-of-Conduct-against-illicit-maritime-activity.aspx>.

Notably, at that summit, the countries represented adopted the Gulf of Guinea Code of Conduct. The code explicitly mentions that it was inspired by the Djibouti Code of Conduct,⁷⁶⁵ and adopted similar concepts such as the sharing of information through national focal points and regional centers.⁷⁶⁶ As with the Djibouti Code, it was also adopted as a non-binding, transitional agreement,⁷⁶⁷ with a view to facilitate consultations that would eventually lead to a binding agreement.⁷⁶⁸ Unlike both ReCAAP and the Djibouti Code, which focus exclusively on piracy and armed robbery at sea, the Gulf of Guinea Code takes a more expansive approach by addressing all illicit maritime activities including, for example, maritime terrorism. Respect for sovereign equality and territorial integrity of States, fundamental principles in ReCAAP and Djibouti Code, were also enshrined in the Gulf of Guinea Code of Conduct.⁷⁶⁹ In comparison to the Djibouti Code, the Gulf of Guinea Code of Conduct also foresaw a potential greater role for regional organizations, for instance in the context of information sharing.⁷⁷⁰

⁷⁶⁵ Gulf of Guinea Code of Conduct, Preamble.

⁷⁶⁶ *Id.* at art. 11; *compare to* Art. 8 of the Djibouti Code of Conduct.

⁷⁶⁷ *Id.* at Preamble.

⁷⁶⁸ *Id.* at art. 17 (“Within three (3) years of the effective date of this Code of Conduct, the Signatories intend to consult, at the invitation of the Inter-Regional Coordination Centre to a) Eventually transform this Code of Conduct into a binding multi-lateral agreement.”).

⁷⁶⁹ *Id.* at art. 2(3); The provision also explicitly mentions the principle of non-intervention in the domestic affairs of other States. See also *Id.* at art. 19(j) (“Nothing in this Code of Conduct is intended to...entitle a Signatory to undertake in the territory of another Signatory the exercise of jurisdiction and performance of functions which are exclusively reserved for the authorities of that other Signatory by its national law”). The same provisions appear in the Djibouti Code (Article 15(j)) and the ReCAAP (Article 2(5)). Compare to the above discussion of Articles VII and VIII of the CARICOM Agreement.

⁷⁷⁰ Compare Article 8(2)(c) of the Djibouti Code, according to which the information of national focal points will be communicated to the Secretary General of IMO, with Article 11(3)(c) of the Gulf of Guinea Code, which also mentions the communication of that information to the Secretary General of ECCAS, the President of the ECOWAS Commission, and the GGC Executive Secretary. The same distinction between the two Codes is also found with

The existence of functioning regional structures and certain capabilities of some countries in the region (notably Nigeria),⁷⁷¹ combined with the principle of national sovereignty, defined the international community's approach to piracy in the Gulf of Guinea as one which puts a strong emphasis on the leading role of States and organizations in the region. For example, on 30 August, 2011, in the first reference by the UNSC to the threat of piracy in the Gulf of Guinea, the members of the UNSC recognized "the leadership role of the regional bodies and States on this issue."⁷⁷² This approach was echoed in the two UNSC Resolutions dedicated to piracy and armed robbery at sea in the region.⁷⁷³ In both resolutions, the UNSC underlined that "States in the region have a leadership role to play in this regard, supported by organizations in the region."⁷⁷⁴ One concrete example where the regional States were expected to take the lead was with regard to prosecution of pirates.⁷⁷⁵

regard to incident reporting (Articles 9(2) and 9(3)(b) of the Djibouti Code; Articles 12(2) and 12(3)(b) of the Gulf of Guinea Code).

⁷⁷¹ See *Maritime Security in the Gulf of Guinea*, CHATHAM HOUSE, (March 2013), https://www.chathamhouse.org/sites/files/chathamhouse/public/Research/Africa/0312confreport_maritimesecurity.pdf (Nigeria led joint patrols with regional countries with lesser capabilities such as Benin and Equatorial Guinea).

⁷⁷² See *Press Statement on Piracy, Maritime Armed Robbery in Gulf of Guinea*, *supra* note 478.

⁷⁷³ See S.C. Res. 2018, *supra* note 249; S.C. Res. 2039, *supra* note 249.

⁷⁷⁴ S.C. Res. 2018, *supra* note 249, at Preamble; S.C. Res. 2039, *supra* note 249, at Preamble (UNSC reiterated that "States in the region have a leadership role to play in countering the threat and addressing the underlying causes of piracy and armed robbery at sea in the Gulf of Guinea, in close cooperation with organizations in the region, and their partners."); The same position was also reiterated by the UNSC in its Presidential statement of August 2013, *supra* note 516.

⁷⁷⁵ See S.C. Res. 2018, *supra* note 249 (calling upon "States of ECOWAS, ECCAS and GGC, in conjunction with flag States and States of nationality of victims or of perpetrators of acts of piracy or armed robbery at sea, to cooperate in the prosecution of alleged perpetrators, including facilitators and financiers of acts of piracy and armed robbery at sea committed off the coast of the Gulf of Guinea, in accordance with applicable international law, including human rights law").

In both resolutions the UNSC highlighted the **supportive and secondary rather than leading role** of the international community in combating piracy in the Gulf of Guinea.⁷⁷⁶ A noteworthy example of this paradigm was the international navies' involvement: while off the coast of Somalia navies from various countries and coalitions have been deployed since 2008, filling the vacuum resulting from the lack of capacity of Somalia and regional States, in the Gulf of Guinea international navies have been involved only in **support** of local and regional initiatives. This includes the activities of US Africa Command's (AFRICOM) Africa Partnership Station, an initiative to encourage engagement between international partners, NGOs and partners from a range of African coastal states, in the broad areas of maritime domain awareness, improved maritime infrastructure and professionalism, and better regional integration to enhance response capabilities.⁷⁷⁷ Naval partners from various countries also provided training to navies and coast guards in the region.⁷⁷⁸ Though capacity building and other supportive initiatives were given to individual countries, the focus was on creating a strong, coordinated, regional response to piracy.⁷⁷⁹

⁷⁷⁶ Cf. S.C. Res. 2018, *supra* note 249 & S.C. Res. 2039, *supra* note 249 (referring to the UNSC stressing "the need for international *assistance* as part of a comprehensive strategy to support national and regional efforts to *assist* States in the region with their efforts to address piracy and armed robbery at sea in the Gulf of Guinea.") [Emphasis added].

⁷⁷⁷ See Anyimadu, *supra* note 660, at 8.

⁷⁷⁸ *Id.* (mentioning that "by the end of 2013 the UK Royal Navy frigate HMS Argyll, the Brazilian Navy Ocean Patrol Vessel APA and the Royal Netherlands Navy carrier HNLMS Rotterdam will have visited West Africa. This partnering of navies has great potential to have good effect, particularly if training efforts are geared at the right level. Equipment used by external partners during exercises should be similar to that available to West African navies."); see also Bavier, *supra* note 750 (mentioning that the United States has helped train and equip Nigeria's navy—the region's dominant seagoing force—in an effort to give it the tools to clamp down on the threat emanating from its waters, and that the European Union is funding the training of seven coastguards in the region).

⁷⁷⁹ Bavier, *supra* note 750 (quoting the U.S. Ambassador to Ivory Coast explaining that "It's not a question of building up strong individual navies ... It has to be a regional effort.").

Similar to South-East Asia and Somalia, the counter-piracy initiatives undertaken by regional organizations can also be characterized as only **supportive** by nature, for example through providing technical assistance and capacity building to countries in the region.⁷⁸⁰ Regional States did not intend to confer to regional organizations supranational powers or—as is the case in the Caribbean region—to allow through regional arrangements the interference in their national sovereignty by neighboring States.

In conclusion, the regional paradigm employed in the Gulf of Guinea can be described as located between those of South-East Asia and the Caribbean, on the one hand, and that of Somalia, on the other. It combined both **bottom-up** (local to regional) and **top-down** (international to regional) approaches as well as some direct local-international interaction (e.g. the direct calls for help sent by States to the international community). The involvement of the international community was clearly secondary to and supportive of local and regional initiatives. At no point in time was it intended to replace the regional/local activities, as was the case with naval deployment off the coast of Somalia. Similarly, the regional organizations' role, which has been more noticeable in comparison to Somalia, was of supportive nature.

⁷⁸⁰ See Gulf of Guinea Code of Conduct, *supra* note 131, at Preamble (welcoming technical assistance from various international entities, regional organizations (ECOWAS, ECCAS, GGC, MOWCA), and donor States).

Table: summary of the counter-piracy regionalization process in various regions

	Regionalization process	International engagement*	Regional engagement**
South-East Asia	Bottom-up	Supportive role	Supportive role
Caribbean	Bottom-up	Supportive role	Supportive + partial replacing role
Somalia	Top-down	Supportive + full replacing role	Supportive role
Gulf of Guinea	Bottom-up and top-down	Supportive role	Supportive role

*International engagement: in support of either the regional bodies or regional States

**Regional engagement: in support of regional States

5.6. THE ROLE OF THE INTERNATIONAL COMMUNITY IN COMBATING PIRACY: THE COMPLEMENTARITY PARADIGM

The counter-piracy activities in the different regions described above are not uniform. Yet, one important characteristic can be identified: They all possess a predominant regionalization component, supplemented—and only exceptionally replaced—by efforts of the international community.

The approach of the international community to piracy threat can therefore be described as based on a **complementarity paradigm**. The term “complementarity” is frequently associated with the ICC, whose work has been defined in the Rome Statute, its founding instrument, as “complementary to national criminal jurisdictions.”⁷⁸¹ Specifically, for the ICC to obtain jurisdiction, a state must be either unwilling or unable to genuinely investigate or prosecute.⁷⁸²

Even though not grounded in a legal instrument, the international response to modern maritime piracy is similar in character: it aims at *complementing* rather than *replacing* local and notably regional efforts to combat piracy.⁷⁸³ The international community has therefore stepped in only when it considered that the neither the country concerned nor regional States or the existing regional mechanisms are capable to confront the piracy challenge. The navies dispatched off the coast of Somalia represent the only example so far of such a situation.

Yet, as explained, even in the Somali case, the rest of the international efforts heavily focused on providing assistance to Somalia and regional States, for example through providing institutional and capacity building to their judicial and penitentiary systems. Borrowing once more the terminology used with regard to the ICC’s work, such forms of assistance can be referred to as “*positive complementarity*.” In the context of the ICC, positive complementarity was described as: “(generally), the idea that the Court, and particularly the OTP [Office of the Prosecutor] and Chief Prosecutor, should work to engage national jurisdictions in prosecutions, using various methods to encourage states to prosecute cases domestically whenever

⁷⁸¹ The Rome Statute of the ICC, *supra* note 165, art. 1.

⁷⁸² *Id.* at art. 17.

⁷⁸³ Bueger, *supra* note 636, 94-95 (“It was recognized that the problem [of Somali piracy] demands action by international actors to *complement* the work of regional or national ones” —emphasis added).

possible.”⁷⁸⁴ As was further explained, “[p]ositive complementarity may mean, in certain circumstances, working to actively enhance a state’s ability to carry out investigations and prosecutions that meet international standards.”⁷⁸⁵ This description corresponds to various initiatives of international organizations and agencies (e.g. UNODC) in Somalia and its region.

The complementarity paradigm was echoed also in the various UNSC Resolutions and statements, which, as mentioned, repeatedly highlighted the role of regional countries and organizations in combating piracy. For example, in the UNSC Presidential Statement issued on 19 November 2012 following the debate on the threats posed by maritime piracy in general the UNSC “stressed that the *coordination of efforts at the regional level* is necessary for the development of a comprehensive strategy to counter the threat of piracy and armed robbery at sea, and also notes the need for *international assistance* as part of a comprehensive strategy to support national and regional efforts to assist the Member States undertaking steps to address piracy and armed robbery at sea and the illegal activities connected therewith.”⁷⁸⁶ The UNSC therefore viewed the role of the international community as supportive to regional efforts.

In that statement (and with regard to piracy in the Gulf of Guinea), the UNSC welcomed the initiatives already taken by States and regional organizations, and added that it “encourages international partners to provide *support* to States and regional organizations for the enhancement of their capabilities to counter piracy and armed robbery at sea in the region, including their maritime capability to conduct regional patrols and operations in accordance with

⁷⁸⁴ See Katharine A. Marshall, *Prevention and Complementarity in the International Criminal Court: A Positive Approach*, 17 HUMAN RIGHTS BRIEF 2 (2010), <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1116&context=hrbrief>.

⁷⁸⁵ *Id.*

⁷⁸⁶ S.C. Pres. Statement, S/PRST/2012/24, 19 November 2012 (emphasis added).

applicable law.”⁷⁸⁷ Thus, the complementarity paradigm – and specific positive complementarity – exceeds the scope of investigation and prosecution (as is the case for the ICC) to include other aspects that are crucial to combat piracy such as building maritime capabilities in the region.

In conclusion, the role of the international community in combating maritime piracy can be described as a complementary one to local and regional efforts. The rationale behind this approach is not based solely on the fundamental principle of national sovereignty since piracy is committed on the high seas and all countries have jurisdiction to bring pirates to justice.⁷⁸⁸ It can be attributed to other reasoning, for example the deterring effects of prosecuting the criminals near their communities.⁷⁸⁹ But mostly, it derives from the realization that a sustainable solution to the piracy threats can be found only in bolstering national and regional capabilities. This understanding can also potentially explain why the various international mechanisms created to combat Somali piracy (e.g. the Contact Group) were of temporary, ad hoc, nature, since the expectation was that building national and regional capacities will gradually reduce the need for intervention by the international community.

⁷⁸⁷ *Id* (emphasis added).

⁷⁸⁸ National sovereignty, however, will be relevant where acts of piratical nature take place in territorial waters and the country is capable—yet is unwilling—to counter them. In such situations, an intervention by the international community will probably necessitate a UNSC Resolution adopted under Chapter VII of the UN Charter and after a determination by the UNSC that piratical acts pose threats to international peace and security in the meaning of the Charter.

⁷⁸⁹ See *House of Commons Foreign Affairs Committee, Tenth Report on Piracy of the coast of Somalia*, PARLIAMENT (Dec. 20, 2011), <http://www.publications.parliament.uk/pa/cm201012/cmselect/cmfaaff/1318/131807.htm#a15>, para. 93 (“it is in the interests of trying to solve this problem, of sending a very strong signal to the pirates and the communities that are supporting them that they are prosecuted in the region and detained in the region. It is the same argument that I have applied to the Court Service in this country. If someone commits a serious crime and they are tried near their own community, it will have a bigger deterrent effect and it is going to send a much stronger signal than if they are tried—in this case—many thousands of miles away”).

5.7. CONCLUSION

Maritime piracy remains a local or at most regional problem, though granted with international ramifications. Accordingly, rather than seeking a unified “one size fits all” global solution, it would be advisable to focus on identifying solutions tailored to local and regional needs and the types of threats posed by the specific piracy modalities. A regionalized approach in the maritime piracy field also corresponds to the growing trend towards international regionalism.⁷⁹⁰

Where appropriate and to the extent needed, the regional initiatives should be complemented by the international community and be replaced by it only when lack of capacity prevents regional States from adequately responding to the threat, as was the case off the coast of Somalia. The international community can facilitate the creation and reinforcement of stable regional institutions and legal frameworks, thereby providing long-term response to piracy. It can also assist in coordinating efforts with a view to avoiding “reinventing the wheel” when addressing the emergence of new threats of piracy. The role of IMO in facilitating the adoption of the Djibouti and Gulf of Guinea Codes of Conduct, building on the experiences of the ReCAAP, serves as a good example of a coordinative assistance. Finally, regional initiatives can and should build on existing international frameworks, for example the legal frameworks of UNCLOS and of applicable international human rights conventions.

⁷⁹⁰ Peppetti, *supra* note 644; Goodman, *supra* note 649, at 157 (“[A] regional approach to the piracy issue appears particularly appropriate in light of the growing trend toward international regionalism.”); *See also*—with regard to the UN and regional sanctions—Andrea Charron and Clara Portela, *supra* note 644 (pointing to the relatively high percentage of cases where the UNSC endorsed African regional sanctions as an acknowledgment of efforts taken by African organizations to deal with a crisis, and concluding that “[I]t would seem, therefore, that the UNSC wishes to encourage African regional arrangements by means of the endorsement embodied in a sanctions resolution.”).

In conclusion, whether derived from a bottom-up process or from a top-down complementarity paradigm, regional solutions complementing the national efforts and international frameworks will remain crucial in combating piracy.