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# International Cooperation on the Repression of Piracy and Armed Robbery at Sea under the UNCLOS

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*As maritime criminal activities are increasingly committed across the borders, States have come to establish mechanisms of international cooperation to be implemented in territorial seas. This article examines such mechanisms with regards to the crime of piracy and armed robbery at sea from the perspective of public international law. This article tackles the significance of the mechanisms imposed on the zonal approach, particularly paying attention to the nature of these crimes. It concludes that under the frameworks, States are allowed to pursue various objectives such as securing the safety of navigation, maintaining security, or protecting the local economy. They do not, however, fundamentally alter the nature of the zonal approach. Nonetheless, by setting up a forum of dialogue between the coastal States and the user States, it promotes maritime governance of territorial seas.*

## Keywords

Piracy, Armed Robbery at Sea, Law of the Sea, Maritime Security, International Cooperation.

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## I. Introduction

This article examines the impact of international cooperation mechanisms with regards to the crime of piracy and armed robbery at sea under international law. ‘Piracy’ is defined as “illegal acts of violence, detention or any act of depredation committed on the high seas” under Article 15 of the High Seas Convention<sup>1</sup> and Article 105 of the United Nations Convention on the Law of the Sea (“UNCLOS”).<sup>2</sup> “Armed robbery at sea” is a violent act against ships or persons committed in the territorial sea.<sup>3</sup> While the definitional elements of armed robbery at sea are far from settled under international law, the common divisor is that the crime is committed in an area which is exclusively under a State’s jurisdiction.<sup>4</sup> E.g., the Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery against Ships adopted by International Maritime Organization (“IMO”) defines “armed robbery against ships” as “any unlawful act of violence or detention or any act of depredation, or threat thereof, other than act of piracy, directed against a ship or against persons or property on board such a ship, within a State’s jurisdiction over such offences.”<sup>5</sup> This article would use this term in consistent with the IMO’s definition.

The occurrence of piracy and armed robbery at sea was relatively infrequent during the Cold War.<sup>6</sup> It was not until the late 1990s that the increase of these crimes raised serious concerns.<sup>7</sup> The number of incidents in the post-Cold War era has increased primarily due to political and economic instability and poverty in developing countries.<sup>8</sup> In addition, as the US and the former Soviet Union partially withdrew their naval forces in Southern Hemisphere, in particular in the Indian Ocean, States’ control over the area was loosened, which pushed the escalation of the maritime violence.<sup>9</sup>

<sup>1</sup> Convention on the High Seas, Apr. 29, 1958, 450 U.N.T.S. 82.

<sup>2</sup> United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397.

<sup>3</sup> R. GEISS & A. PETRIG, *PIRACY AND ARMED ROBBERY AT SEA: THE LEGAL FRAMEWORK FOR COUNTER-PIRACY OPERATIONS IN SOMALIA AND THE GULF OF ADEN* 73 (2011).

<sup>4</sup> *Id.*

<sup>5</sup> International Maritime Organization, *Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery against Ships*, IMO Doc. A22/Res.1922 (Jan. 22, 2009), available at [http://www.imo.org/blast/blastDataHelper.asp?data\\_id=24575&filename=A922\(22\).pdf](http://www.imo.org/blast/blastDataHelper.asp?data_id=24575&filename=A922(22).pdf) (last visited on Oct. 25, 2014).

<sup>6</sup> For details, see D. Rosenberg & C. Chung, *Maritime Security in the South China Sea: Coordinating Coastal and User State Priorities*, 39 OCEAN DEV. & INT’L L. 51 (2008).

<sup>7</sup> *Id.* See also, R. CHURCHILL & A. V. LOWE, *LAW OF THE SEAS* 210, n.13 (1999).

<sup>8</sup> GEISS & PETRIG, *supra* note 3, at 286.

<sup>9</sup> S. Davidson, *International law and the suppression of maritime violence*, in *INTERNATIONAL CONFLICT AND SECURITY LAW: ESSAYS IN MEMORY OF HILAIRE MCCOUBREY* 265 (R. Burchill, et al. eds., 2005). See also J. KRASKA, *CONTEMPORARY*

The current international legal order against maritime crimes is based on the 'zonal approach,' which divides the sea into jurisdictional spaces.<sup>10</sup> Under this approach, individual States have exclusive rights in their territorial sea and the area beyond national jurisdiction is open to every State. However, there are matters that require international cooperation beyond such jurisdictional divisions. With this regards, Donald Rothwell and Tim Stephen points out that the UNCLOS provides "an important legal framework to enable a shift from a sovereign-rights and issue-specific perspective to an integrated approach to oceans management."<sup>11</sup> This shift is exactly observed in the context of environmental protection and fishery management.<sup>12</sup>

Then, a question follows whether it is also the case in the maritime crime regulation. When one looks into the social facts of the maritime violence in the post-Cold War era, it is not difficult to see that the crimes are interconnected with organized crimes, lack of proper governance, poverty, illicit trafficking or destruction of the environment. However, the mechanism of the regulation of crimes under the UNCLOS itself is quite simple, i.e., it sticks to the zonal approach.<sup>13</sup> It turned out to be not effective, because the offenders easily cross the jurisdictional borders. As the intensity of piracy and armed robbery at sea increased, States began to create supplemental international cooperation mechanisms to deal with the crime.

The primary purpose of this paper is to explore whether such recent practices may be characterized as the 'shift' that Rothwell and Stephen describes. The practices are categorized as bilateral and regional agreements (Part II), multilateral arrangements (Part III) and the mechanisms created under Security Council resolutions (Part IV). In the end, it concludes that these mechanisms allow States to pursue various objectives such as securing the safety of navigation, maintaining security or protecting the local economy. They do not alter the nature of the zonal approach, nor are they without restrictions. Nonetheless, the development of dialogue between the coastal State and the user States promotes maritime governance of the territorial seas.

MARITIME PIRACY: INTERNATIONAL LAW, STRATEGY, AND DIPLOMACY AT SEA 35 (2011).

<sup>10</sup> UN Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, *THE LAW OF THE SEA: ENFORCEMENT BY COASTAL STATES: LEGISLATIVE HISTORY OF ARTICLE 220 OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1* (2005) *See also* D. ROTHWELL & T. STEPHEN, *THE INTERNATIONAL LAW OF THE SEA 206* (2010); Y. TANAKA, *A DUAL APPROACH TO OCEAN GOVERNANCE: THE CASES OF ZONAL AND INTEGRATED MANAGEMENT IN INTERNATIONAL LAW OF THE SEA 1* (2013).

<sup>11</sup> ROTHWELL & STEPHEN, *supra* note 10.

<sup>12</sup> TANAKA, *supra* note 10.

<sup>13</sup> UNCLOS arts. 99-109.

## II. Bilateral and Regional Agreements

### A. The Case of the Malacca Strait

There are two major areas where international cooperation against piracy and armed robbery at sea was carried out under bilateral or regional agreements; they are the Malacca Strait and the Horn of Africa.

The Malacca Strait is a narrow waterway, whose geographical condition made the region vulnerable to maritime violence. In the early 2000s, the number of armed robberies at sea increased drastically.<sup>14</sup> In response, Malaysia, Indonesia, and Singapore have made efforts to cooperate in patrolling the area and arresting the offenders in region.

These three States have occasionally undertaken co-patrol since the early 1990s.<sup>15</sup> In June 1992, Indonesia and Singapore agreed to establish a direct operational code between their navies, which introduced a provision for coordinating pursuits across territorial boundaries.<sup>16</sup> In the same year, Indonesia and Malaysia agreed to establish a joint Maritime Operation Planning Team.<sup>17</sup> This new organization was to conduct coordinated patrols along the common borders in the Malacca Strait.<sup>18</sup> It aimed to develop a joint border committee mechanism, which already included joint naval and police exercises and operations in the Malacca Strait.<sup>19</sup> The main purposes of both programs were to coordinate patrol activities and to share information.<sup>20</sup> Each arrangement emphasized that the enforcement forces should remain within their own zones of national maritime jurisdiction.<sup>21</sup>

In July 2004, the bilateral arrangements expanded to a trilateral one with the coordinated patrols of the Strait (hereinafter MALSINDO agreement).<sup>22</sup> This

<sup>14</sup> For details, see R. Beckman, *The Piracy Regime under UNCLOS: Problems and Prospects for Cooperation*, in *PIRACY AND INTERNATIONAL MARITIME CRIMES IN ASEAN: PROSPECTS FOR COOPERATION* 17 (R. Beckman & J. Roach eds., 2012).

<sup>15</sup> R. Beckman, *Issues of Public International Law relating to Piracy and Armed Robbery against Ships in the Malacca and Singapore Straits*, 3 *SING. J. INT'L & COMP. L* 512 (1999).

<sup>16</sup> R. BECKMAN, C. GRUNDY-WARR & V. FORBES, *ACTS OF PIRACY IN THE MALACCA AND SINGAPORE STRAITS* 18 (Maritime Briefings Series vol. 1:4, 1994).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> It was launched by the Chiefs of Armed Forces from Indonesia, Malaysia and Singapore, onboard the Kri Tanjung Dalpele on July 20, 2004. See G. ONG-WEBB, *PIRACY, MARITIME TERRORISM AND SECURING THE MALACCA STRAITS*, 155 (2006).

arrangement basically prohibited operations within another State's territorial waters. For the first time, however, it allowed warships from these three countries to enter another's waters while pursuing pirates with the prior consent of the coastal State.<sup>23</sup> The three States have agreed upon the trilateral cooperative mechanism in May 2008 which includes the same provision.<sup>24</sup> In September 2008, Thailand joined this Agreement.<sup>25</sup> Meanwhile, in 2005, the arrangement was expanded to include aerial co-patrol named "Eye in the Sky," thus allowing foreign aircraft to come into the territorial airspace of a country.<sup>26</sup> Guilfoyle points out that such an arrangement was possible because these aircrafts do not directly engage in any law enforcement action and over-flight is seen as less intrusive by the coastal States.<sup>27</sup> While the expansion of co-patrol in their territorial sea is solely based on the consent of the coastal State, it is worth noting that the diplomatic relations among these States have not always been friendly.

## B. The Case of the Horn of Africa

### 1. Djibouti Code of Conduct

The case of the Horn of Africa is more complicated than the case of the Malacca Strait, because a number of user States are directly involved in the lawmaking process. Since the late 2000s maritime violence has been increasing in the Gulf of Aden as a result of the chaotic situation of Somalia. Then, States in the region instituted the Djibouti Code of Conduct (hereinafter Code of Conduct),<sup>28</sup> which was adopted at the IMO conferences in 2008 and 2009.<sup>29</sup> The Code of Conduct stipulates that: "Any pursuit of a ship, where there are reasonable grounds to suspect that the ship is engaged in piracy, extending in and over the territorial seas, is subject to

<sup>23</sup> D. GUILFOYLE, *SHIPPING INTERDICTION AND THE LAW OF THE SEA* 55 (2009).

<sup>24</sup> *Id.*

<sup>25</sup> There existed a bilateral agreement on judicial cooperation between Malaysia and Thailand, which was renewed in 2003 to include joint maritime patrol. See S. WU & K. ZOU, *MARITIME SECURITY IN THE SOUTH CHINA SEA* 62 (2009).

<sup>26</sup> *Id.*

<sup>27</sup> GUILFOYLE, *supra* note 23, at 56.

<sup>28</sup> *Code of Conduct Concerning the Repression of Piracy and Armed Robbery against Ships in the Western Indian Ocean and the Gulf of Aden 2009*, IMO Record of the Meeting, Attachment 1, 29 January 2009, available at <http://www.imo.org/OurWork/Security/PIU/Pages/DCoC.aspx> (last visited on Sept. 27, 2014).

<sup>29</sup> *Draft Memorandum of Understanding Concerning the Repression of Piracy and Armed Robbery against Ships in the Western Indian Ocean, the Gulf of Aden, and the Red Sea*, IMO Report, Sub-Regional Meeting on Piracy and Armed Robbery Against Ships in the Western Indian Ocean, Gulf of Aden and Red Sea Area, 14-18 Apr. 2008, TC 0153-08-2000, Annex 7 (Apr. 18, 2008), art. 7, available at <http://www.sjofartsverket.se/pages/15413/100-7.pdf> (last visited on Oct. 25, 2014).

the authority of the coastal State.<sup>30</sup> It lays down that no participant should pursue such a ship in or over the territory or territorial seas of any coastal State without the permission of that State.<sup>31</sup> It also provides that: “Unless otherwise arranged by the affected participants, any seizure made in the territorial seas of a participant [with the permission of the coastal State] should be subject to the jurisdiction of that participant.”<sup>32</sup> At present, however, no State is implementing this provision yet.

## 2. *Transfer Agreements*

Additionally, the States which send their naval forces to the Gulf of Aden have concluded transfer agreements with the coastal States in this area because they are reluctant to take the suspect back to their countries.<sup>33</sup> A transfer agreement allows for the cooperating State to transfer a suspect to the neighboring countries without depending on an extradition procedure.

E.g., the EU-Seychelles Exchange of Letters<sup>34</sup> contains a provision for joint patrol in a territorial sea. Namely, it stipulates that the Government of the Republic of Seychelles may authorize the EU Naval Force (“EUNAVFOR”) to transfer suspected pirates and armed robbers captured in the course of its operations in the exclusive economic zone (“EEZ”), territorial seas, archipelagic waters, and internal waters of the Republic of Seychelles. This authorization is extended to protecting Seychelles flagged vessels and Seychellois Citizens on a non-Seychelles flagged vessel beyond the limit aforementioned and in other circumstances on the high seas at the discretion of the Republic of the Seychelles.<sup>35</sup> Thus, the Exchange of Letters provides for a comprehensive consent by the Seychelles of the EU’s entering into its territorial waters. This arrangement could be drafted mainly due to the Seychelles’ geographical condition consisting of more than 100 islands with a vast maritime area which cannot be controlled by its own maritime police patrol. There is no other comparable provision in any published transfer agreement.

<sup>30</sup> Code of Conduct art. 4(5).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* art 4(8).

<sup>33</sup> For details, see GEISS & PETRIG, *supra* note 3, at 198; J. T. Gathii, *Jurisdiction to Prosecute Non-National Pirates Captured by Third States under Kenyan and International Law*, 31 *LOY. L.A. INT’L & COMP. L. REV.* 363 (2009).

<sup>34</sup> Exchange of Letters between the European Union and the Republic of Seychelles on the Conditions and Modalities for the Transfer of Suspected Pirates and Armed Robbers from EUNAVFOR to the Republic of Seychelles and for their Treatment after such Transfer, OJ L 315/43.

<sup>35</sup> *Id.*

### 3. Ship-Rider Agreements

Finally, the arrangement under ship-rider agreements was also used as a form of international cooperation in the territorial seas. Under this type of agreement, a designated law enforcement officer of the coastal State, i.e., a ship-rider embarks on the patrol ships or aircraft of the cooperating State, thereby allowing the cooperating State's vessel to enter the territorial sea of the coastal State. It is formally a law enforcement of the coastal State.<sup>36</sup> The cooperating State assists the ship-rider to collect evidence, to arrest the offender, or otherwise to enforce the law of the coastal State. The ship-rider agreement has been recognized as a sustainable solution in order to promote international cooperation of law enforcement in territorial waters. It allows the coastal State to implement only its law, thus saving on expensive procedures of international cooperation in which two laws are enforced. Such an agreement is all the more helpful when the cooperating State lacks the laws at the national level to deal with piracy or armed robbery in foreign territorial seas. When the coastal State does not have sufficient police power for effective control, the cooperating State can provide the necessary support.<sup>37</sup>

The ship-rider agreement originally emerged as part of narcotic drug regulations between the US and Canada as well as Latin American countries.<sup>38</sup> In the latter case, a ship-rider agreement may allow the cooperating State to patrol the territorial seas or archipelagic waters with or without the ship-rider.<sup>39</sup>

The framework of the ship-rider agreement was endorsed by IMO in 2000 under

<sup>36</sup> For the origin and the concept of the ship-rider agreement, see S. MacDONALD & B. ZAGARIS, *INTERNATIONAL HANDBOOK ON DRUG CONTROL* 150 (1992).

<sup>37</sup> *Id.*

<sup>38</sup> Framework Agreement on Integrated Cross-Border Maritime Law Enforcement Operations between The Government of Canada and the Government of the United States of America, available at [https://www.dhs.gov/xlibrary/assets/shiprider\\_agreement.pdf](https://www.dhs.gov/xlibrary/assets/shiprider_agreement.pdf) (last visited on Aug. 24, 2014). For detailed description, see D. D. Ujczko, *Welcoming remarks and the Canada-United States Relationship – the Common Cause Agenda*, 34 CAN.-U.S. L. J. 1 (2009).

<sup>39</sup> Most of the anti-narcotic treaties include such provision: US - Barbados Agreement, art. 5, signed on June 25, 1997, entered into force on Oct. 11, 1998; US - Colombia Agreement, art. 4, signed on Feb. 20, 1997, entered into force on Feb. 20, 1997; US - Costa Rica Agreement, art. 3, signed on Dec. 1, 1998, entered into force on Nov. 19, 1999; US - Dominica Agreement, art. 2, signed and entered into force on Apr. 19, 1995; US - Dominican Republic, art. 2, signed and entered into force on May 20, 2003; US - Guatemala Agreement, art. 3, signed on Jun. 19, 2003, entered into force on Oct. 10, 2003; US - Haiti Agreement, art., signed on Oct. 17, 1997, entered into force on Sept. 5, 2002; US - Honduras Agreement, art. 3, signed on Mar. 29, 2000, entered into force on Jan. 30, 2001; US - Nicaragua Agreement, art. 3, signed on June 1, 2001, entered into force on Nov. 15, 2001; US - Saint Kitts art. 2, signed and entered into force on Apr. 13, 1995; US - Santa Lucia art. 2, signed and entered into force on Apr. 20, 1995; US - Suriname art. 2, signed on Dec. 1, 1998, entered into force on Aug. 26, 1999; Caribbean Agreement art. 5, opened for signature on Apr. 10, 2003. For the list of US maritime law enforcement agreements, see List of maritime counter narcotics law enforcement agreements signed by the United States as of August 2005, available at <http://www.state.gov/s/l/2005/87199.htm> (last visited on Aug. 24, 2014).

the “Draft Regional Agreement on Cooperation in Preventing and Suppressing Acts of Piracy and Armed Robbery against Ships.”<sup>40</sup> In addition, while dealing with the case of the Horn of Africa, UN Security Council Resolution 1851 invited States and regional organizations to conclude ship-rider agreement in 2008.<sup>41</sup> Furthermore, the Code of Conduct encourages that State parties establish such mechanisms on a bilateral basis.<sup>42</sup>

However, no practice of the ship-rider system has been reported by now. This silence may be mainly due to the following two reasons. First, these States along the Horn of Africa lack an established internal system in order to secure maritime safety.<sup>43</sup> They do not have sufficient police power in the first place; it was not until recently that neighboring States including Djibouti, Kenya, Tanzania, and Yemen established their own coast guards instead of relying on their navies. Second, financial resources are insufficient both at the domestic and international levels.<sup>44</sup> In fact, a major obstacle is a lack of resources at the international level to implement anti-piracy policies through international cooperation.

In connection with the Code of Conduct, the IMO established a multi-national unit in April 2010, the Project Implementation Unit (“PIU”), to develop a detailed implementation plan in cooperation with the signatory States of the Code of Conduct. The implementation plan is being funded primarily through the IMO Djibouti Code Trust Fund, a multi-donor voluntary fund. The user States, such as Japan or the EU members, are providing the financial resources for this fund. At present, PIU has a limited budget,<sup>45</sup> which is not sufficient to restore the security of the area. Nonetheless, it is noteworthy that this type of arrangement was recognized as useful for combating piracy and armed robbery at sea.

### III. The Multilateral Arrangements

While there are various types of multilateral frameworks for the purpose of harmonizing State parties’ national anti-piracy laws and enhancing cooperation in

<sup>40</sup> IMO, MSC/Circ.622 Rev. 1, MSC/Circ. 623.Rev.1.

<sup>41</sup> S.C. Res.1851, U.N. Doc. S/RES/1851 (Dec. 16, 2008), ¶ 3.

<sup>42</sup> Code of Conduct art. 7.

<sup>43</sup> *Id.*

<sup>44</sup> BECKMAN & ROACH, *supra* note 14, at 105.

<sup>45</sup> *Id.*



their enforcement, none of them go so far as to allow a State to enter into another State's territory for law enforcement. Compared to the bilateral agreements, the multilateral arrangements play even more limited roles in establishing law enforcement mechanisms in the territorial sea. Attempts were made, but they were not successful.

There are various types of multilateral frameworks for harmonizing State parties' national anti-piracy laws and enhancing cooperation in their enforcement. However, none of them go so far as to allow foreign States to enter into their territories for the law enforcement. There are two specialized international institutions, the IMO and the UN Office on Drugs and Crime ("UNODC") leading the States in suppressing piracy. The IMO and its Maritime Security Committee ("MSC") have played major roles for the past 20 years in dealing with piracy in the context of promoting maritime safety. It has endorsed many international cooperation frameworks in order to deal effectively with piracy and armed robbery against ships. UNODC is also engaged in the repression of piracy. After the Special Representative of the UN Secretary-General for Somalia requested the UNODC's assistance, the organization started the "Counter Piracy Program,"<sup>46</sup> in order to support piracy prosecutions which had already commenced.<sup>47</sup>

Although these international institutions push member States to cooperate, when it comes to law enforcement in its territorial seas, the practice remains restrictive, especially when interstate relations are complex. In 1999, the IMO adopted a recommendation that:

existing agreements...shall be reviewed, if necessary, to allow for the extension of entry and pursuit into the territorial sea of the State(s) with ... practical operational procedures which will ensure the granting of permission to extend pursuit into another jurisdiction being received by the pursuing vessel at very short notice.<sup>48</sup>

This recommendation reflects the IMO's focus on regulating territorial seas in addition to the high seas. However, this recommendation has not been fully supported by the member States. In the following part, the cases of Malacca Strait, the West Coast of Africa, and the Horn of Africa will be analyzed.

<sup>46</sup> Counter Piracy Programme, *Report of United Nations Office of Drugs and Crime* (Nov. 2009), available at [http://www.unodc.org/documents/easternafrika/piracy/UNODC\\_Counter\\_Piracy\\_Programme.pdf](http://www.unodc.org/documents/easternafrika/piracy/UNODC_Counter_Piracy_Programme.pdf) (last visited on Aug. 24, 2014).

<sup>47</sup> *Id.*

<sup>48</sup> MSC/Circ.622 Rev. 1, ¶ 21 (3).

## A. The Malacca Strait

The coastal States along the Malacca Strait were more anxious about their territorial integrity than maintaining maritime security in the region. When the user States of the strait, such as the US or Japan, first tried to introduce a co-patrol system in the area, government officials and the media in Indonesia and Malaysia objected to the idea so vehemently that the plan could not be materialized.<sup>49</sup>

In March 2004, the US proposed establishing the Regional Maritime Security Initiative (“RMSI”) to suppress piracy in the Malacca and Singapore Straits.<sup>50</sup> RMSI was a protocol initially to improve international cooperation against transnational security threats in Southeast Asia.<sup>51</sup> At that time, the then-commander of the US Pacific Command (“PACOM”) testified before US Congress that PACOM was considering “putting Special Operations Forces on high-speed vessels so that [we] can use boats that might be incorporated with these vessels to conduct effective interdiction.”<sup>52</sup> In Indonesia, the press misconstrued his comments as announcing a plan to put forces in the Strait of Malacca.<sup>53</sup> Both Indonesia and Malaysia, strongly reacting to this regulation, asserted that the presence of foreign forces in the area was unacceptable.<sup>54</sup> In June 2004, the then-US Defense Secretary Donald Rumsfeld stated that RMSI had been misinterpreted so that the US would never intend to station forces in the Strait.<sup>55</sup> However, the initial plan had been damaged beyond repair. Afterwards, the US began a series of bilateral naval exercises to promote the maritime security of the Southeast Asian region.<sup>56</sup> Beginning with Singapore, it

<sup>49</sup> For details, see ROSENBERG & CHUNG, *supra* note 6 at 55.

<sup>50</sup> United States Department of State, *International Outreach and Coordination Strategy for National Strategy for Maritime Security*, Appendix B (July 2005) at 5, available at [http://www.dhs.gov/xlibrary/assets/HSPD\\_IOCPlan.pdf](http://www.dhs.gov/xlibrary/assets/HSPD_IOCPlan.pdf) (last visited on Aug. 24, 2014).

<sup>51</sup> I. Storey, *Securing Southeast Asia Sea Lanes: A Work in Progress*, 6 ASIA POL’Y 95 (2008). See also J. Bradford, *The Growing Prospects for Maritime Security Cooperation in Southeast Asia* 58 NAVAL WAR C. REV. 63 (2005).

<sup>52</sup> Testimony of Admiral Thomas B. Fargo, Commander US Pacific Command (US Navy), before the House Armed Services Committee, United States House of Representatives, Mar. 31, 2004, available at [http://www.dod.mil/dodgc/olc/testimony\\_old/108\\_second.html](http://www.dod.mil/dodgc/olc/testimony_old/108_second.html) (last visited on Aug. 24, 2014).

<sup>53</sup> *Id.* For details, see I. Susanti, *A glimpse of the surreal regional Security Community arrangement*, THE JAKARTA POST, June 26, 2004, available at <http://www.thejakartapost.com/news/2004/06/26/glimpse-surreal-regional-security-community-arrangement.html>; Fadli&E.M. Bayuni, *Show of force launched to protect vital strait*, THE JAKARTA POST, July 21, 2004, available at <http://www.thejakartapost.com/news/2004/07/21/show-force-launched-protect-vital-strait.html> (all last visited on Aug. 24, 2014).

<sup>54</sup> D. Rosenberg, *D. Straits; Competing Security Priorities in the South China Sea*, THE ASIA-PACIFIC J., Apr. 13, 2005, available at <http://www.japanfocus.org/-David-Rosenberg/1773> (last visited on Aug. 24, 2014).

<sup>55</sup> See *Rumsfeld Warns against Appeasement of Terrorists*, N. Y. TIMES, June 5, 2004, available at <http://www.nytimes.com/2004/06/05/world/rumsfeld-warns-against-appeasement-of-terrorists.html> (last visited on Aug. 24, 2014).

<sup>56</sup> E. John, *The United States and Southeast Asia: Developments, Trends, and Policy Choices, Statement before the House Committee on International Relations, Subcommittee on Asia and the Pacific*, (Sept. 21, 2005), available at <http://2001->

continued separate bilateral exercises with Malaysia, Thailand, Brunei, Indonesia, and the Philippines,<sup>57</sup> all of which were conducted on the high seas.<sup>58</sup>

Moreover, Japan proposed establishing the Ocean Peacekeeping (“OPK”) program only to face similar objections from the coastal States.<sup>59</sup> The purpose of this program was not only to promote maritime security, but also to protect the maritime environment and resources.<sup>60</sup> In order to achieve these aims, the program suggested joint patrol of both the territorial seas of the region and the high seas. Indonesia, Malaysia, Singapore, and other regional countries, in particular, China, clarified that they were unwilling to enforce this plan.<sup>61</sup>

Japan thus changed its strategy and took a lead in establishing the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (“ReCAAP”).<sup>62</sup> The ReCAAP aimed to promote international cooperation by not only establishing an information-sharing center, but also providing technical and financial assistance among State parties.<sup>63</sup> Nonetheless, to date, Indonesia and Malaysia have not ratified the ReCAAP because they do not desire to undertake treaty obligations in their territorial seas.<sup>64</sup> This does not mean that they are unwilling to suppress piracy in the area on a multilateral basis. Both countries participated in the negotiation process and cooperated with the ReCAAP regime at an operational level. They attended the Second Annual Meeting of the ReCAAP ISC Governing Council held in February 2008 as observers.<sup>65</sup> Nonetheless, the fact that they have not ratified the agreement shows how coastal States are reluctant to comply with international regulations in their own territories.

## B. West Coast of Africa

In the case of the West Coast of Africa, the Maritime Organization of West and

2009.state.gov/p/eap/rls/rm/2005/53683.htm (last visited on Aug. 24, 2014).

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> S. Takai & K. Akimoto, *Ocean Peace Keeping and New Roles for Maritime Force*, 1 NATIONAL INSTITUTE FOR DEFENSE STUDIES SECURITY REPORT 57-79 (2000). *See also* S. Takai, *Legal Aspects of OPK in PEACEKEEPING AND INTERNATIONAL RELATIONS* (L.B. Pearson Canadian International Peacekeeping Training Ctr., 1997).

<sup>60</sup> Takai & Akimoto, *supra* note 59.

<sup>61</sup> *Id.*

<sup>62</sup> For details, *see* the official website of the ReCAAP, *available at* <http://www.recaap.org> (last visited on Aug. 24, 2014).

<sup>63</sup> The Information Sharing Center (“ISC”) was established in Singapore on November 29, 2006. *See id.*

<sup>64</sup> GEISS & PETRIG, *supra* note 3. *See also* BECKMAN & ROACH, *supra* note 14.

<sup>65</sup> The ReCAAP Information Sharing Centre establishes itself as an authority on piracy and armed robbery against ships, and develops as the focus of anti-piracy co-operation in Asia. *See* the official website of the ReCAAP, *available at* <http://www.recaap.org/Home.aspx> (last visited on Aug. 24, 2014).

Central Africa (“MOWCA”) has adopted a memorandum of understanding (“MOU”), which is neither legally binding nor yet in force.<sup>66</sup> This MOU, aiming to promote the cooperation among the States,<sup>67</sup> regulates not only piracy but also other unlawful acts.<sup>68</sup> It provides for information sharing, patrol coordination on the high seas, and domestic integration of the institutions concerned, such as naval units, coastal patrol and law enforcement agencies, shipping companies, seafarers, and port authorities.<sup>69</sup> The MOU divides the maritime area into four zones each of which is directed by a principal coordinator. However, this MOU does not allow foreign police to cooperate in law enforcement in territorial seas. Instead, it repeatedly emphasizes that law enforcement shall be consistent with the UNCLOS and that territorial sovereignty of each party State shall be respected.<sup>70</sup> Even if a crime occurs in a territorial sea, a foreign maritime authority is merely allowed to approach the principal coordinator of the zone so that s/he can inform the national coastguard of the concerned coastal State.<sup>71</sup>

### C. Horn of Africa

In the case of Horn of Africa, the Contact Group on Piracy off the coast of Somalia was established in January 2009 following the American initiative.<sup>72</sup> As many as 28 States mainly from East Asia, the Middle East, Europe, and Africa, and six regional or international organizations joined it.<sup>73</sup> The US characterized this group as “an international cooperation mechanism against piracy, as called for in UNSC Resolution 1851, which was also sponsored by the US in December 2008.”<sup>74</sup> The agenda of its working groups remained military and operational coordination, information sharing, capacity building, judicial issues, commercial industry coordination, and public information.<sup>75</sup>

<sup>66</sup> MOWCA, Memorandum of Understanding on the Establishment of a Sub-Regional Integrated Coast Guard Network in West and Central Africa, MOWCA/XIII GA.08/8 (adopted on July 30-31, 2008).

<sup>67</sup> *Id.* pmbl.

<sup>68</sup> *Id.* art. 4 (1).

<sup>69</sup> *Id.* art. 5.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* art. 26.

<sup>72</sup> US Department of States, Bureau of Public Affairs, Office of the Spokesman, *The Contact Group on Piracy off the Coast of Somalia: Fact Sheet*, May 18, 2009, available at <http://www.state.gov/r/pa/prs/ps/2009/05/123584.htm> (last visited on Aug. 24, 2014).

<sup>73</sup> *Id.* The six organizations are the African Union, the Arab League, the European Union, the International Maritime Organization, the North Atlantic Treaty Organization (“NATO”), and the United Nations Secretariat.

<sup>74</sup> *Id.*

<sup>75</sup> See the official website of Contact Group, available at <http://www.thecgps.org> (last visited on Aug. 24, 2014); GREAT

The situation in Somalia concerns all the user States in the Gulf of Aden, which is a vital shipping waterway, connecting the Indian Ocean and the Suez Canal. The impact of piracy in this area is not only confined to maritime security, but also provoking other crimes such as the illegal trafficking of drugs or weapons and illegal fishing. Such instability hinders the maritime trade and tourism of coastal States; their economic situation thus worsens, causing more crimes.<sup>76</sup> Somalia and all of the relevant States fully recognize the necessity to stop this vicious cycle. Therefore, they are willing to provide financial and technical assistance to Somalia and other countries in the region. The Contact Group, however, did not go so far as to examine the coordination of enforcement jurisdiction.<sup>77</sup>

In sum, there is no multilateral arrangement which allows States to exercise their jurisdiction in other States' territorial seas at this stage. Rosenberg and Chung list the explanations why multilateral arrangements are lacking in the region as follows.<sup>78</sup> First, the user States have divergent priorities and activities in securing maritime safety.<sup>79</sup> Second, the coastal States give a higher priority to protecting national sovereignty than to collective efforts for antipiracy and counterterrorism.<sup>80</sup> Third, there are mutual suspicions about the military and intelligence-gathering activities that are becoming more intensive, intrusive, controversial, and dangerous.<sup>81</sup> Fourth, in the case of the South China Sea, many governments have not shared enthusiasm about US antiterrorism efforts, which are deemed to lack reciprocity and transparency.<sup>82</sup>

## IV. Security Council Resolutions

These days, the UN Security Council has taken the lead in promoting international cooperation for the suppression of the maritime violence.<sup>83</sup> In 2008, the Security

BRITAIN: PARLIAMENT: HOUSE OF COMMONS: FOREIGN AFFAIRS COMMITTEE; R. OTTAWAY, *PIRACY OFF THE COAST OF SOMALIA: TENTH REPORT OF SESSION 2010-2012*, 40 (2012).

<sup>76</sup> M. Silva, *Somalia: State Failure, Piracy, and the Challenge to International Law*, 50 VA. J. INT'L L. 553 (2009).

<sup>77</sup> *Supra* note 75.

<sup>78</sup> ROSENBERG & CHUNG, *supra* note 6, at 61.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> S.C. Res. 1838, U.N. Doc. S/RES/1838 (Oct. 7, 2008); S.C. Res. 1846, U.N. Doc. S/RES/1846 (Dec. 2, 2008); S.C. Res. 1851, U.N. Doc. S/RES/1851 (Dec. 16, 2008); S.C. Res. 1897, U.N. Doc. S/RES/1897 (Nov. 30, 2009).

Council adopted Resolution 1816 allowing State parties to enter the territorial waters of Somalia to repress acts of piracy and armed robbery against ships for the first time.<sup>84</sup> It also permitted States to use all necessary measures against the same acts,<sup>85</sup> thereby authorizing States to enforce laws in a foreign territorial sea. Resolution 1851 extended the scope over which the States could take measures not only in Somalia's territorial sea, but also on its land.<sup>86</sup> It affirms that the authorization provided applies only with respect to the situation in Somalia and shall not affect the rights, obligations, or responsibilities of member States.<sup>87</sup> The Resolution repeatedly maintains that the resolution would not constitute a State practice which affects customary international law.<sup>88</sup>

One may question whether these practices affect the UNCLOS regime. Both Resolutions 1816 and 1851 were adopted under Chapter VII of the UN Charter. In general, a Security Council's decision under Chapter VII may authorize States to undertake actions in a foreign territory without the consent of that territorial State.<sup>89</sup> However, it would be misleading to interpret these resolutions as creating a new basis for law enforcement that is not provided in the UNCLOS. They clearly stipulate that taking such measures requires the advance consent of the Transitional Federal Government ("TFG")<sup>90</sup> of Somalia and that the law enforcement shall be conducted in a manner consistent with the UNCLOS.<sup>91</sup> Resolution 1816 affirms that international law, as reflected in the UNCLOS, sets out the legal framework applicable to this situation.<sup>92</sup> Hence, it requests that cooperating States take appropriate steps to ensure that the activities they undertake pursuant to the authorization do not have the practical effect of denying or impairing the right of the innocent passage of ships of any third State.<sup>93</sup>

In general, when the UNSC refers to Chapter VII, it would denote some sort of coercive actions. In the case of Somalia, such coercive actions are the entrance of foreign naval forces into Somalia's territorial sea<sup>94</sup> and the authorization to take all

<sup>84</sup> S.C. Res. 1816, U.N. Doc. S/RES/1816, ¶ 7(a).

<sup>85</sup> *Id.* ¶ 7(b).

<sup>86</sup> S.C. Res. 1851, ¶ 6.

<sup>87</sup> *Id.* ¶ 10.

<sup>88</sup> *Id.*

<sup>89</sup> UN Charter art. 25.

<sup>90</sup> *Supra* note 86, ¶ 7.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* pmb1.

<sup>93</sup> *Id.* ¶ 8.

<sup>94</sup> S.C. Res. 1816, U.N. Doc. S/RES/1816, ¶ 7(a).

necessary measures to suppress piracy.<sup>95</sup> However, States could have taken these actions without the Security Council's authorization under Chapter VII because they had the prior consent of TFG.

Admittedly, several arguments claimed that the reference to Chapter VII was preferable for the following reasons.<sup>96</sup> First, because the TFG has not established effective control over the whole territory and some States have not recognized the TFG as a legitimate government, the Security Council's resolutions would promote cooperation between the TFG and such States.<sup>97</sup> Yet, the Security Council could have encouraged States to cooperate with the TFG without reference to the particular chapter; this explanation does not contain a persuasive rationale. Second, it is arguable that the Security Council allowed the use of military force when it authorized the use of "all necessary means."<sup>98</sup> However, this interpretation is inconsistent with the phrase provided in the same paragraph that such use of means shall be "in a manner consistent with action permitted on the high seas with respect to piracy under relevant international law."<sup>99</sup> The *travaux préparatoires* of these resolutions show that these resolutions would not have been adopted but for the requirement of the TFG's prior consent. The member States of the Security Council, in particular, Indonesia, emphasized the importance of the consent of the coastal State.<sup>100</sup>

Therefore, it could even be argued that the reference to Chapter VII is not necessary to adopt the resolution. Nonetheless, the Security Council's authorization spared States from hesitating to enter into Somali territorial sea so that these States were able to focus on other issues such as the burden allocation of the judicial processes of the offenders.<sup>101</sup>

<sup>95</sup> *Id.* ¶ 7(b).

<sup>96</sup> For the argument, see, e.g., H. Sakai, *The Suppression of 'Piracy' in Somalia Coast and the United Nations Security Council Resolutions* [ソマリア沖における「海賊」の取締りと国連安保理決議], in CURRENT ISSUES OF INTERNATIONAL LAWMAKING: Festschrift in Honour of Professor Hisakazu Fujita's 70th Birthday [藤田久一先生古稀記念 国際立法の最前線] (S. Sakamoto ed., 2009). <available only in Japanese>

<sup>97</sup> *Id.*

<sup>98</sup> For the examples of the resolutions which used the term "all the necessary measures," see S.C. Res. 678, U.N. Doc. S/RES/678 (Nov. 29, 1990); S.C. Res 1452, U.N. Doc. S/RES/1452 (Dec. 29, 2002).

<sup>99</sup> S.C. Res. 1816, U.N. Doc. S/RES/1816, ¶ 7(a). [Emphasis added]

<sup>100</sup> *Supra* note 96.

<sup>101</sup> International Expert Group on Piracy off the Somali Coast, *Piracy off the Somali Coast, Final Report*, Workshop commissioned by the Special Representative of Secretary General of the UN to Somalia Ambassador Ahmedou Ould-Abdallah, Nairobi, Nov. 10-21, 2008, available at [http://www.imcsnet.org/imcs/docs/somalia\\_piracy\\_intl\\_experts\\_report\\_consolidated.pdf](http://www.imcsnet.org/imcs/docs/somalia_piracy_intl_experts_report_consolidated.pdf) (last visited on Aug. 24, 2014). See also Security Council, *Report of the Secretary-General on possible options to further the aim of prosecuting and imprisoning persons responsible for acts of piracy and armed robbery against ships off the coast of Somalia*, July 26, 2010, S/2010/394, available at <http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Somalia%20S2010%20>

## V. Conclusion

Although the zonal approach has turned out to be insufficient for governing the ocean in almost every field of the law of the sea, the traditional framework remains unchanged when it comes to criminal law enforcement. By examining recent State practices, the author would make the following three points.

First, none of the multilateral agreements have altered the long-standing zonal approach. States have common interests in information sharing, financial contributions, technical assistance, and joint training. However, they do not allow a foreign State to enter into its territorial seas on a multilateral basis.

Second, there are a limited number of specific bilateral or regional agreements which allow the State parties to enforce their own criminal jurisdiction in the other State's territorial sea. These State practices, however, do not affect the zonal approach, because the law enforcement is eventually based upon the consent of the coastal State. In addition, when such agreements are established, it is always the case that a strong political tie exists among the State parties, which makes it inappropriate to generalize such practices.

Last, Security Council Resolution 1816, which allows States to enter into the territorial seas of Somalia, is not any sort of exception to the UNCLOS regime. The resolution requires the consent of the government of Somalia beforehand, and explicitly provides that it does not affect customary international law.

When the coastal States lack the capability to maintain maritime order, user States and the neighboring States have tried to preserve maritime security. Yet, they have not gone far enough to turn over the zonal approach. The repression of piracy and armed robbery at sea in the territorial sea is still a work in progress.