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The Impact of Somali Piracy
on Seafarers' Rights
A Cross-Disciplinary Assessment

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Summary

Background

Somali piracy and armed robbery against ships remain to be one of the major global concerns today. Since 2007, over 1,500 piracy and piratical attacks were reported to the IMB Piracy Reporting Centre. These figures were gradually increased over the years, along with the degree of maritime violence.

Somali pirates, with the urge of ransom payments, have consequently become more threatening and violent against their hostages. Seafarers, who are caught in the crossfire, are exposed to severe fundamental human rights violations during their captivity. They are kidnapped, murdered, tortured and threatened. They are being held as hostages for months. At any given time, over 100,000 seafarers are transiting this 'violent' area, or at least preparing to transit with absolute fear and horror. After their release, the traumatised effects of their captivity remain to pose threats to their livelihood.

The impact of piracy on seafarers' rights is a largely unexplored fragment of law, which needs further attention. In this regard, there seems to be various complex issues that need to be addressed. Hence, the main purpose of this thesis is to shed light on the complexities and critically analyse the alleged deficiencies and shortcomings in the current legal system.

In other words, the author aims to provide a cross-disciplinary assessment of the relevant legal system. Consequently, the author expects to bring global attention to the possible legal deficiencies that currently prevent adequate legal safeguards from being established to protect seafarers in the context of piracy.

Research Focus

In order to explore the issue at hand and reach the main purpose of this thesis, the author formulated three main research questions and seven objectives:

1. Which seafarers' rights are violated and/or affected in cases of piracy?
2. What are the current safeguards for the legal protection of these rights?
3. What are the deficiencies or shortcomings in the current system and how can this system be made more effective?

Objectives:

1. Examine the historical background related to the evolution of anti-piracy laws and seafarers' rights as well as the situation in Somalia.

2. Identify certain seafarers' rights, which are likely to be violated and/or affected as a result of the threat of piracy.
3. Provide a legal analysis for the current legal framework (focusing on the international and regional legal domains) regarding the human or labour rights of seafarers identified above.
4. Discuss issues of liability and jurisdiction of States as well as duties of the ship owner towards seafarers.
5. Briefly explore the available enforcement mechanisms under international and regional legal regimes, and methods of national implementation and enforcement under municipal laws.
6. Introduce and critically analyse the deficiencies or shortcomings in the current legal framework.
7. Identify alternative ways of providing effective safeguards for the protection of seafarers' rights in cases of piracy.

Main Findings

Seafarers' rights, as human beings, include the right to life, freedom from torture, cruel, inhuman or degrading treatment, freedom from forced labour, freedom from discrimination, and right to a legal remedy and access to justice. Seafarers' rights, as employees, include the right to safe and healthy working conditions, right to health and medical care, right to fair remuneration, right to free employment services and continuity of employment, right to social security and welfare, and right to repatriation. Subsequently, the author has analysed the identified rights in line with the relevant international and regional frameworks, which was then followed by a discussion on liability issues and enforcement mechanisms.

Regarding the last research question, Chapter 4 focused on a number of current deficiencies relating to the liability of States and individuals towards the seafarer, applicability of human rights law on vessels, problems caused by the proliferation of open flag registries, disharmony and diversification among distinct legal frameworks and fields of law, and insufficiency of the current enforcement mechanisms.

Primarily, the author has established that maritime law is the common link, binding the fragments of human rights law and criminal law together. The link between human rights law and maritime law is particularly clear in MLC 2006. It is also clear that States have the obligation to protect human rights of people who are subject to their jurisdiction. These issues are reaffirmed under MLC 2006, by establishing extraterritorial jurisdiction of flag States towards seafarers working on board vessels. However, international law remains vague and fragmented regarding the question of whether States have a positive obligation to protect certain rights of seafarers or merely have an optional possibility. Followed by a number of examples, the author argued that the wide recognition and implementation of MLC 2006 might be promoted as a starting point. Meanwhile, the problem of open flag registries could also be resolved through effective application of positive obligations imposed under MLC 2006.

When the author focused on the current disharmony and diversification, she has provided various examples in this regard. For instance, the scope of piratical offences at the international and national level varies greatly, as well as the human rights regimes at the international, regional and national level. Similar discrepancies exist relating to the enforcement regimes. It is established that the current international and regional enforcement regimes are not sufficient to tackle the issue at hand. Thus, the author has combined these findings with a number of initial suggestions:

1. Widespread recognition and national implementation of CMI's Model National Law should be promoted with regard to piracy laws at the national level.
2. Universal application and proper implementation of MLC 2006 must be promoted regarding the effective protection of seafarers' rights.
3. International Labour Organization should consider further amendments to MLC 2006 on the security dimension of protection of seafarers' rights. Meanwhile, BMP Guidelines might be updated and turned into hard laws.

Suggestions on Further Research

Due to limitations in space, it is inevitable that the research related to this thesis has led to identifying more issues regarding piracy and seafarers' rights than can reasonably be accommodated in a master's thesis. Thus, the author puts forward a number of suggestions for further research.

First, in-depth research should be conducted to explore the extent of positive obligation of States towards the seafarer and the possibility of extending this scope under MLC 2006.

Second, the selected national legal regimes in relation to the protection of seafarers' rights in cases of piracy and the extent of ship owners' duties towards the seafarer should be examined by a comparative analysis. Simultaneously, a survey of the signatory States of MLC 2006, such as Liberia, Panama and Norway, might be brought together regarding the application and implementation of the standards stipulated under the Convention.

Finally, the prospects and modalities for the ILO to amend MLC 2006 regarding security-based threats due to maritime violence should be analysed. It should be examined whether this suggestion constitutes a reliable suggestion for the problem, or whether other alternatives might be applicable in this regard.

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Abbreviations

AC	African Charter on Human and Peoples' Rights, 1981
ACHR	American Convention on Human Rights, 1969
AOS	The Apostleship of the Sea
BIMCO	The Baltic and International Maritime Council
BMP	Best Management Practices
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984
CCPR	International Covenant on Civil and Political Rights, 1966
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women, 1979
CERD	International Convention on the Elimination of All Forms of Racial Discrimination, 1965
CESCR	International Covenant on Economic, Social and Cultural Rights, 1966
CMI	Comite Maritime International
CRC	Convention on the Rights of the Child, 1989
CTF-151	Combined Task Force 151
ECHR	European Convention on Human Rights, 1950
ESC	European Social Charter, 1961
ECJ	European Court of Justice
EU NAVFOR	The European Union Naval Force
EU	European Union
GAOR	General Assembly Official Records
High Seas Convention	Geneva Convention on the High Seas, 1958
Hostages Convention	International Convention against the Taking of Hostages, 1979
ICC	International Chamber of Commerce
ICJ	International Court of Justice
ICS	International Chamber of Shipping
ILC	International Law Commission
ILO	International Labour Organization
IMB	International Maritime Bureau
IMO	International Maritime Organization
INTERTANKO	International Association of Independent Tanker Owners
IRTC	Internationally Recommended Transit Corridor
ISF	International Shipping Federation
ITLOS	International Tribunal for the Law of the Sea
ISM Code	International Safety Management Code
ISPS Code	International Ship and Port Facility Security Code
ITF	International Transport Workers Federation

IUU	Illegal, Unreported and Unregulated Fishing
JMC	Joint Maritime Commission
MSC	Maritime Safety Committee
MSCHOA	Maritime Security Centre Horn of Africa
MLC 2006	Maritime Labour Convention, 2006
NATO	North Atlantic Treaty Organization
NGO	Non-governmental organization
OAS	Organization of American States
P&I Insurance	Protection and Indemnity Insurance
PCASP	Privately Contracted Armed Security Personnel
POEA	Philippine Overseas Employment Administration
QB	Queen's Bench Division
ReCAAP	The Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia
RPG	Rocket-propelled Grenade
SCI	Seamen's Church Institute
SOLAS	International Convention for the Safety of Life at Sea, 1974, as amended
SOS	SaveOurSeafarers Campaign
SRI	Seafarers' Rights International
SUA	United Nations Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 1988, as amended
TFC Convention	International Convention for the Suppression of the Financing of Terrorism, 1999
TOC Convention	United Nations Convention against Transnational Organised Crime, 2000
UDHR	Universal Declaration of Human Rights, 1948
UN	United Nations
UNCHR	United Nations Commission on Human Rights
UNCLOS	United Nations Convention on the Law of the Sea, 1982
UNDP	United Nations Development Programme
UNGA	United Nations General Assembly
UNHRC	United Nations Human Rights Council
WMU	World Maritime University

1 Introduction

1.1 Overview

“They kept us in a state of terror – we were beaten constantly with metal poles. I managed to avoid the worst violence, but I saw my crewmates being thrashed with sticks and having electric probes attached to their genitals, and one man was suspended by ropes from the ship’s mast for several hours. Even when I could not see the torturing, I could hear the screams. I can still hear the screams to this day.”¹

- Dipendra Rathore

In April 2010, Dipendra Rathore, a 22-year old Indian seafarer, and his 21 crewmates were kidnapped 120 miles south of Oman, when navigating towards Norway, and held hostage for 8 months in Somalia. Dipendra Rathore, is only one of over 895 victims of pirate attacks reported in 2011.² Statistically, more than half of those 895 seafarers are victims of Somali pirates.³ The words of Heimann, Chairman of the SOS SaveOurSeafarers campaign, reveal the horrific part of being a seafarer:

“Hundreds of these seafarers have been subjected to horrific torture including being hung by the ankles over the side of the ship, being shut in the ship’s freezer room, having cable ties tightened round the genitals, being beaten, punched and kicked. Many of these seafarers remain traumatised and unable to return to their seafaring careers long after the hijack is over, if at all.”⁴

Somali piracy and armed robbery against ships remain to be one of the major global concerns today. It costs the global economy around \$7 to \$12 billion per year.⁵ Since 2007, over 1,500 piracy and piratical attacks were reported to the IMB Piracy Reporting Centre. These figures were gradually increased over the years, along with the degree of maritime violence.

Somali pirates, with the urge of ransom payments, have consequently become more threatening and violent against their hostages. Seafarers, who are caught in the crossfire, are exposed to severe fundamental human rights violations during their captivity. They are

¹ Dipendra Rathore, ‘Experience: I was kidnapped by Somali pirates’ *The Guardian* (London, 11 June 2011) <<http://www.guardian.co.uk/lifeandstyle/2011/jun/11/kidnapped-by-somali-pirates-experience>> accessed 15 February 2012.

² ICC-IMB, ‘Piracy and Armed Robbery Against Ships: Report for the Period 1 January – 31 December 2011’ (London, 2012) 11-12.

³ *Ibid.*

⁴ ‘Seafarer death toll mounts as Somali pirates hijack, torture, intimidate and murder.’ *Save Our Seafarers Press Office*. (London, 21 June 2011). <<http://www.saveourseafarers.com/press-office.html>> accessed 15 February 2012.

⁵ ‘The Cost of Piracy – Broken Down’ (USA, 17 January 2011) <http://gcaptain.com/cost-piracy-broken?20504&utm_source=feedburner&utm_medium=feed&utm_campaign=Feed:+Gcaptain+> accessed 15 February 2012.

kidnapped, murdered, tortured and threatened. They are being held as hostages for months. At any given time, over 100,000 seafarers are transiting this ‘violent’ area, or at least preparing to transit with absolute fear and horror. After their release, the traumatised effects of their captivity remain to pose threats to their livelihood.

Somali threats have been neglected for decades until the attacks increased drastically by the mid-2000s due to distinct political or economic reasons.⁶ Even though the international community has begun to respond to these attacks, there seems to be a number of complexities that needs to be addressed before reaching an effective solution to the problem. While numerous legal debates take place in order to suppress Somali piracy, the attacks continue to have its tragic effects over seafarers. The international community needs to address this issue immediately and come up with an effective long-term legal solution for the protection of seafarers’ rights in cases of piracy. Ban Ki Moon calls on everyone to “never forget the detrimental impact of piracy on the innocent seafarers themselves – the men and women who face all manner of hardship in transporting the world’s precious cargo. They are on the frontlines of this battle. Their welfare and safety must also be at the forefront of our concerns.”⁷

1.2 Problem Definition and Purpose

Lately, various scholars have published a large array of legal texts mainly focusing on the prosecution of pirates. However, less attention had been given to the issue of the legal protection of seafarers’ rights in cases of piracy, which remained too vague for practical and effective solutions.

There seems to be a number of legal complexities regarding the distinct multi-dimensional nature of the issue at hand. First, there are at least three different fields of law that intersect at the international level. Seafarers’ rights as human beings and employees on board a ship naturally bring the human rights law into the picture. Piracy bears the characteristics of a criminal offence and the well-known negative effects of maritime piracy and armed robbery at sea upon effective protection of seafarers’ rights calls for the field of criminal law. Certainly, the fact that seafarers work on board ships involved in the commercial transport of goods and persons by sea necessarily brings into the picture the body of relevant maritime law. It seems that maritime law is the common link, bringing criminal law and human rights together in this context.⁸

Second, in order to reveal current legal safeguards provided for seafarers in such cases, it is essential to examine international and regional legal domains through the magnifying glass, because certain discrepancies may exist between each jurisdiction. Moreover, the issue of national implementation may potentially add up to complexities and discrepancies. Thus, this hazy mixture of distinct bodies of law and different jurisdictions

⁶ See Supplement A below.

⁷ UN Secretary General Ban Ki Moon, ‘Piracy Orchestrating the Response’ (London, 3 February 2011) <<http://www.un.org/sg/statements/?nid=5073>> accessed 4 May 2012.

⁸ See Chapter 4 for a detailed discussion on this issue.

with different enforcement mechanisms may cause extreme difficulties in terms of harmonised application and enforcement of current laws. This situation, in turn, unravels a complex set of questions that remain unanswered.

Third, the current trend of open flag registry⁹ in terms of nationality of ships is a unique problem in today's maritime law, and plays a major part in the adequate protection of these rights. The open flag phenomenon makes the question of who owes the duty to protect such rights difficult to answer. While it is considered a universal obligation, it is generally accepted that the specific responsibility to protect human rights rests in the State. Moreover, ship owners also owe certain duties to seafarers arising out of their employment relationship. Such liability may or may not give rise to an action in law of torts or contract law in certain jurisdictions, which needs to be explained as well.

Hence, the main purpose of this thesis is to shed light on the complexities briefly mentioned above and critically analyse the alleged deficiencies and shortcomings in the current legal system. In other words, the author aims to provide a cross-disciplinary assessment of the relevant legal system. Consequently, the author expects to bring global attention to the possible legal deficiencies that currently prevent adequate legal safeguards from being established to protect seafarers in the context of piracy.

1.3 Research Questions and Objectives

This thesis is a response to the global piracy crisis and its catastrophic effects on seafarers. The legal protection of seafarers' rights in cases of piracy, *inter alia*, retains its significance since the resurrection of modern piracy. To address this issue, the author formulated three main research questions:

Question 1: Which seafarers' rights are violated and/or affected in cases of piracy?

Question 2: What are the current safeguards for the legal protection of these rights?

Question 3: What are the deficiencies or shortcomings in the current system and how can this system be made more effective?

Undoubtedly, a number of objectives need to facilitate the research questions presented above. Seven objectives are presented as follows:

1. Examine the historical background related to the evolution of anti-piracy laws and seafarers' rights as well as the situation in Somalia.

⁹ ITF has an ongoing campaign against open registries, which is referred by ITF as 'flags of convenience.'

2. Identify certain seafarers' rights, which are likely to be violated and/or affected as a result of the threat of piracy.
3. Provide a legal analysis for the current legal framework (focusing on the international and regional legal domains) regarding the human or labour rights of seafarers identified above.
4. Discuss issues of liability and jurisdiction of States as well as duties of the ship owner towards seafarers.
5. Briefly explore the available enforcement mechanisms under international and regional legal regimes, and methods of national implementation and enforcement under municipal laws.
6. Introduce and critically analyse the deficiencies or shortcomings in the current legal framework.
7. Identify alternative ways of providing effective safeguards for the protection of seafarers' rights in cases of piracy.

When answering the above-stated questions, the author will pay great attention to issues mentioned in Part 1.2 before reaching to the main purpose of this thesis.

1.4 Research Methods

Parallel to the main aim of this thesis, research questions and objectives; the author mainly used a traditional legal dogmatic methodology, where she has reviewed various sources of law.

Primary sources include main sources of public international law and international maritime law, international and regional human rights instruments, UN resolutions and documents, ILO conventions on labour rights, relevant legal instruments of IMO, judicial decisions, and examples of relevant domestic laws where appropriate or necessary.

Secondary sources include books, articles, theses, working papers, conference papers, seminar notes and presentations, statistical reports, news reports, and official websites. Usage of the collected data differs depending on the expected outcome of each Chapter.¹⁰

The primary method applied in Chapter 2 is of a legal historical nature. Thus, the author based its examination on both historical and legal sources. Throughout Chapter 3, the author has reviewed, interpreted and analysed the collected data by the traditional legal method and descriptive analysis method. Where appropriate, comparative analysis method is used to draw a legal comparison selected legal regimes. Moreover, Chapter 3.2.1 required a comprehensive review of statistical reports, narratives of seafarers, and news reports due to its fact-based methodology. Chapter 4, on the other hand, includes critical analysis method parallel to the legal background provided in previous chapters.

¹⁰ Data collection and analysis is restricted in line with the scope and delimitations stated below.

1.5 Scope and Delimitations

Due to the wide range of jurisdictions, fields of law, maritime zones and affected areas, victims and actors involved in the context of seafarers' rights and maritime piracy, this thesis is bound to have several delimitations. Thus, the scope and limitations of this study are listed as follows:

- This thesis concerns with only seafarers, including masters of vessels. However, it will not discuss the issue of the protection of fundamental human rights of passengers.¹¹
- Piracy incidents caused by Somali pirates will be the only focus of the author because more than half of the pirate attacks, occurred in Somalian territorial waters, Gulf of Aden, Red Sea, Arabian Sea, Indian Ocean and off Oman are ascribed to Somali pirates.
- The fundamental human rights and labour rights of seafarers other than those specifically identified in Chapter 3.1 will be outside the scope of this thesis.
- Within Chapter 3, main jurisdictions and/or legal instruments of interest will be consisted of international and regional legal instruments and enforcement mechanisms.
- National jurisdictions are generally outside the scope of this thesis. However, examples of certain municipal laws are provided where appropriate.
- Since this thesis concerns with maritime piracy and armed robbery against ships, other types of maritime violence such as terrorism and discussions thereof will be outside the scope of this thesis.
- As the title implies, the human cost to Somalia, human rights of pirates, will be outside the scope of this thesis.
- The focus remains on the maritime law instruments.
- Attempts for the suppression of piracy will be outside the scope of this thesis, whereas attempts towards the protection of seafarers' rights in cases of piracy will be examined.

¹¹ A recent definition of 'seafarer' can be found under Article II(1)(f) of MLC 2006, which is "any person who is employed or engaged or works in any capacity on board a ship to which this Convention applies."

1.6 Structure of the Thesis

Following the present introductory chapter, Chapter 2 provides for a brief historical background with regard to maritime piracy, seafarers' rights, and the situation in Somalia. The evolution of fundamental human rights and labour rights in general is summarised before drawing a parallel between such rights and the seafarer. In the context of maritime piracy, this Chapter also introduces the reader to the rebirth of piracy and armed robbery against vessels. In order to understand the reasoning behind Somali piracy, the author briefly examines the political and economic reasons from which the Somali piracy eventually derived.

Chapter 3 initially focuses on the international legal framework of piracy and armed robbery against ships, counter-piracy measures, and humanitarian response against piracy. The second part identifies the potentially affected rights of seafarers, examines the international and regional legal framework of the identified rights, discusses jurisdictional issues as well as the duties and liabilities of States and individuals, and reviews the available enforcement mechanisms and remedies available for seafarers. Where appropriate, comparative discussions will take place between the reviewed legal frameworks and enforcement mechanisms.

Chapter 4 dives deeper into the critical discussion of relevant issues and identify certain deficiencies relating to the effective protection of seafarers' rights in cases of piracy. This Chapter analyses and answers the research questions, by identifying certain deficiencies and shortcomings within the reviewed jurisdictions and enforcement mechanisms. It also includes a critical analysis of the identified deficiencies and shortcomings along with a few suggestions and alternative ways for tackling the main issues. Chapter 5 finalises the thesis with some concluding remarks and suggestions on further research.

2 Historical Background

2.1 Evolution of Anti-Piracy Laws

The phenomenon of piracy has been ongoing since the commencement of carriage of goods by sea.¹² Evidently, piratical acts have increased in war times or parallel to temporary anarchy and chaos raged on land. Throughout the history, vulnerable areas at sea were exposed to such threats, particularly in war times, when the hostility among States raised the opportunity for raiding. Illegality becomes possible where there is no effective legal order.¹³

In ancient times, most commonly known pirate groups include the Illyrians, operating in the Adriatic Sea during the Hellenistic period.¹⁴ Illyrians also tainted the Roman Empire. Slavery was at its peak during the ancient Roman period, when victims on board the captured vessels were being sold on slave markets.¹⁵ Slave trade used to be very significant to the Roman Empire, because around one-third of the Roman population was consisted of slaves.¹⁶ However, piracy and armed robbery at sea remained to be a major problem for the Roman economy, since Roman shipping also received damage from piratical operations. Pirates captured even Julius Caesar, and demanded ransom from the Empire.¹⁷ Thus, the Roman Empire created a naval force consisted of 200 vessels and some 22,000 troops in order to eliminate the piracy threat.¹⁸

Vikings were another renowned pirate group in medieval Europe, based in the Scandinavian area, operating through all Western Europe. There was no central power in Europe during the Middle Ages, which triggered piratical operations. Muslim pirates, on the other hand, tainted the Mediterranean Sea during that period.¹⁹

It seems that, occasionally, a number of ancient empires gave pirates fair quarter due to the importance of slavery at times, whereas in early modern times, piracy was excused in terms of the ‘privateering’ phenomenon.²⁰ During these periods, piratical acts were not described as a

¹² P. G. Widd, ‘The Seafarer, Piracy and the Law: A Human Rights Approach’ (DPhil thesis, University of Greenwich 2008) 21.

¹³ J. Peter Pham, ‘Putting Somali piracy in context’ [2010] 28:3 *Journal of Contemporary African Studies* 325, 326. See 2.3 below for the situation in Somalia.

¹⁴ Bruno Ciceri, ‘Piracy: A New Emergency, What is the Response of AOS?’ (AOS Regional Meeting East Far East Asia, Philippines, 2009).

¹⁵ Robert C. Ritchie, ‘Piracy’ in John B. Hattendorf (ed), *The Oxford Encyclopedia of Maritime History* (Oxford University Press 2007) 296-300.

¹⁶ Widd (n 12) 23.

¹⁷ Joshua Michael Goodwin, ‘Universal Jurisdiction and the Pirate: Time for an Old Couple to Part’ [2006] 39 *Vanderbilt Journal of Transnational Law* 973, 978.

¹⁸ Widd (n 12) 24.

¹⁹ Ciceri (n 14).

²⁰ Kempe describes privateers as ‘legalised’ pirates. See Michael Kempe, ‘Even in the Remotest Corners of the World’: Globalized Piracy and International Law, 1500-1900’ [2010] 5 *Journal of Global History* 353. ‘Privateer’ was used to define a private vessel or Master “who had a commission from a government through a Letter of Marque to operate against the sea borne trade of an enemy in time of war.” Commissioning privateers, instead

criminal offence, and were legitimised. For instance, the British Empire was known to reward some triumphant pirates or privateers with knighthood.²¹

Antiquity of anti-piracy laws seems questionable given the limited historical records on the issue. Widd alleges that the ‘unlawful or forceful seizure of a vessel’ was punishable by imprisonment under the Babylonian Code of Hammurabi, which arguably dates back to 1900 BC.²² Furthermore, Widd refers back to the Rhodian Maritime Code, which was used as a basis for the ancient Roman anti-piracy laws.²³ Keyuan, on the other hand, alleges that the first domestic anti-piracy law dates back to the seventeenth century, in 1698, when Great Britain specifically defined the act of piracy as a criminal offence punishable by law.²⁴ Between 17th and 19th century, States continued to criminalise the act of piracy at the national level.²⁵

By the end of 17th century, Cicero used the term *hostis humani generis*, acknowledging that pirates are enemies of the humankind.²⁶ Then this term began to be used in order to grant universal jurisdiction to any court situated at any municipality where a pirate is arrested.²⁷ *Hostis* was regarded as enemies in cases of war, excluding robbers and brigands. Under the current regime on piracy, the labelling of pirates as *hostis humani generis*, which may result in the application of universal jurisdiction is highly arguable unless the modern piracy phenomenon is considered a war in the legal context.

The path to the current regime in UNCLOS was relatively lengthy; first efforts towards criminalising piracy at an international level occurred by the end of the 19th century.²⁸ As States began to establish their State navies, privateers become unemployed and as a result of conducting piracy attacks on every vessel, all States began to criminalise the act of piracy,

of setting up a navy, was very common during between 16th and 18th centuries, particularly by England, France, Spain and the Netherlands. During this period, privateers and pirates were usually the same people. See Widd (n 12) 5-6.

²¹ Sir Walter Raleigh and Sir Henry Morgan are two famous examples. “Pirates brought revenue to the sovereign, weakened enemies by attacking their vessels and settlements, and supplied European markets with scarce goods at affordable prices,” illustrated Keyuan, drawing attention to the contribution of pirates in this context. See Zou Keyuan, ‘Quelling Sea Piracy in East Asia: China’s Domestic Endeavour and Regional Co-operation’ [2004] 10:4 *Journal of International Maritime Law* 327.

²² Widd (n 12) 4. Mukherjee stated that the Code dates back to the period between 2000 and 1600 B.C., see Proshanto K. Mukherjee, *Maritime Legislation* (WMU Publications 2002) 11. However, Mukherjee remained silent on the alleged laws on piracy in this Code.

²³ According to Widd, the word ‘piracy’ began to appear in ancient texts as early as around 800-500 B.C. Widd (n 12) 4. There have been numerous attempts to define the word and its scope throughout legal history; however, it still remains to be a problem, which is discussed under Chapter 3.1.1.

²⁴ Keyuan (n 21).

²⁵ For example, see Alfred P. Rubin, *The Law of Piracy* (2nd edn, Transnational Publishers, Inc., 1998) 131-311, for the examples of the United States of America and Great Britain.

²⁶ *Ibid.*, 17-18.

²⁷ Widd (n 12) 6.

²⁸ Robin Geiß and Anna Petrig, *Piracy and Armed Robbery at Sea: The Legal Framework for Counter-Piracy Operations in Somalia and the Gulf of Aden* (Oxford University Press 2011) 1.

including privateering.²⁹ In 1856, Declaration of Paris put an end to the privateering phenomenon; while in 1889, Montevideo Convention introduced a general principle in this context that ‘suppression of piracy was the responsibility of mankind.’ Purportedly, Nyon Agreement was the first international instrument, which defined certain piratical acts as ‘piracy’ in 1937. In its Preamble, it is clearly stated that the sinking of merchant ships and acts against the most elementary dictates of humanity should be treated as acts of piracy.³⁰

Until 1958, rules relating to piracy existed in customary international law,³¹ which was then codified and formulated in the Geneva Convention on the High Seas (the High Seas Convention).³² Article 15 of the High Seas Convention is initially formulated as part of a research conducted by Harvard Law School in 1932, which was later used by the International Law Commission (ILC).³³ ILC based its first draft provisions on this research. During the diplomatic conference leading to the High Seas Convention, inclusion of anti-piracy provisions were criticised by a number of States due to the common view of piracy not being a critical problem. It was mostly seen as an ancient phenomenon rather than a current threat. Nevertheless, majority of States was supporting the inclusion of those provisions. Consequently, the amended versions of draft provisions were adopted within the High Seas Convention. This Article presented the first globally accepted definition of piracy in international law.³⁴

Contrary to the negative comments expressed during the diplomatic conference, the alarming increase of notorious piracy attacks made its mark on the modern era following the Vietnam War (Second Indochina War; 1959-1975) in the Southeast Asia.³⁵ Common types of Southeast Asian piracy attacks included opportunistic attacks for muggings as well as sophisticated and more violent attacks for stealing ships and diverting its cargo to other ports, a phenomenon known as ‘phantom vessels’.³⁶

Meanwhile, in 1981, ICC has established the International Maritime Bureau as a specialised division of its anti-crime arm, the Commercial Crime Services, in order to assist in the suppression of maritime violence

²⁹ Widd (n 12) 6. For more information, see Thaine Lennox-Gentle, ‘Piracy, Sea Robbery, and Terrorism: Enforcing Laws to Deter Ransom Payments and Hijacking’ [2010] 37 *Transportation Law Journal* 199, and Kempe (n 20).

³⁰ The Nyon Agreement is adopted and entered into force on 14 September 1937, when nine countries agreed to collectively suppress piratical acts occurred during the Spanish Civil War <<http://www.icrc.org/ihl.nsf/FULL/335?OpenDocument>> accessed 9 April 2012.

³¹ After World War I, in 1924, a Committee of Legal Experts were established under the auspices of the League of Nations in order to identify and list the suitable subjects of international law for codification. Piracy issue was enlisted within these subjects. See Geiß and Petrig (n 28) 2 and Widd (n 12) 6.

³² Keyuan (n 21).

³³ Widd (n 12) 6-7. Consequent to this research project, a Draft Convention on Piracy was prepared. The research also included a comprehensive document of the relevant piracy laws and a brief report on the theoretical arguments relating to piracy in 1932. See Geiß and Petrig (n 28) 2.

³⁴ Widd (n 12) 6-7, and Geiß and Petrig (n 28) 3.

³⁵ Ritchie (n 15).

³⁶ Max Mejia and Proshanto Mukherjee, ‘Selected Issues of Law and Ergonomics in Maritime Security’ [2004] 10 *The Journal of International Maritime Law* 316, 319.

and fraud.³⁷ Following the establishment of its Piracy Reporting Centre, IMB commenced publication of statistical reports for worldwide pirate attacks in 1992.³⁸

The wording of Article 15 in the High Seas Convention remained unchanged, except for punctuation, in the United Nations Convention on the Law of the Sea, 1982 (hereinafter ‘UNCLOS’),³⁹ which is where the international law on the subject partially stands today. The majority view, in this context, indicates that the piracy rules stipulated in UNCLOS reflects customary international law.⁴⁰ Article 101 of UNCLOS, defining piracy, has been harshly criticised at an international level regarding its applicability over certain cases. Following the wakeup call of *Achille Lauro* incident,⁴¹ the legal loopholes and deficiencies of Article 101 resulted in re-consideration of the international piracy law. In order to circumvent these deficiencies and encompass certain loopholes that are otherwise excluded from the scope of UNCLOS, IMO has introduced the notion of ‘armed robbery against ships’ to the international community.

In 1983, IMO adopted a resolution, stating that States shall take “all measures necessary to prevent and suppress acts of piracy and armed robbery from ships in or adjacent to their waters, including strengthening of their security measures.”⁴² Since 1990s, IMO passed several resolutions and circulars relating to piracy and armed robbery against ships.⁴³ Other relevant contributions of IMO relating to maritime security include regulatory laws adopted in 2002, such as amendments made to Chapters V and XI of SOLAS and the ISPS Code, which is a mandatory part of the SOLAS regime. ISPS Code, for instance, requires seafarers as well as shipping companies to implement measures to deter piracy.

In 1988, SUA Convention, an ostensibly anti-terrorist instrument, had the collateral effect of filling the alleged loopholes of the UNCLOS

³⁷ Maritime fraud, especially in the ‘phantom vessel’ phenomenon, used to have a great run back in those days. IMO, Resolution A.504(XII), ‘Barratry, Unlawful Seizure of Ships and Their Cargoes and Other Forms of Maritime Fraud’, 20 November 1981, para. 5 and 9, passed in the same year, urged States and other relevant organisations to co-operate and exchange information with the IMB.

³⁸ For more information, see <<http://www.icc-ccs.org/home/imb>> accessed 10 March 2012.

³⁹ However, minor modifications are noticeable, i.e. UNCLOS Art. 107 seems to have a narrower scope than its ascendant Art. 21 of the High Seas Convention. See Geiß and Petrig (n 28) 4.

⁴⁰ Geiß and Petrig (n 28) 4.

⁴¹ For the summarised version of the *Achille Lauro* incident, see Mark D. Larsen, ‘The *Achille Lauro* Incident and the Permissible Use of Force’ [1987] 9 *Loyola of Los Angeles International and Comparative Law Review* 481, 481-483. See also Mejia and Mukherjee (n 36) 321, which reads: “The drama ended with the *Achille Lauro* sailing back to Egypt and the terrorists being loaded onto an Egyptian aircraft which was later forced to land in Italy by American warplanes. During the highly complex negotiations that ensued, the United States’ request for custody of the terrorists was denied and, to the American government’s chagrin, the terrorists eventually escaped to Yugoslavia. It was this event that prompted the formulation and adoption of the SUA Convention, where provisions for extradition are prominently featured.”

⁴² IMO, Resolution A.545(13), ‘Measures to Prevent and Suppress Piracy and Armed Robbery against Ships’, 17 November 1983.

⁴³ Some of these instruments will be examined throughout Chapter 3.

anti-piracy regime.⁴⁴ SUA Convention is a widely ratified international criminal law instrument exclusively designed against terrorism and other offences, which is unique in the maritime field. In response to the 9/11 attacks, SUA was revised and amended in 2005, expanding the scope of Article 3 and introducing shipboarding provisions among others.

There are other international criminal law treaties that may be relevant, including the Hostages Convention 1979,⁴⁵ Terrorism Financing Convention 1999,⁴⁶ and TOC Convention 2000.⁴⁷ Although the focus of these instruments is on terrorism in general, they are capable, just like SUA, of contributing to the international legal framework against piracy and armed robbery against ships.⁴⁸

Other significant steps taken for the suppression of piracy include the regional co-operation of States such as ReCAAP against Southeast Asian piracy threats, and the Djibouti Code of Conduct against the recent Somali piracy crisis. Moreover, CMI prepared a Draft National Law to harmonise national piracy laws all over the world. Last but not least, numerous initiatives have been working in order to suppress piracy as well as to protect seafarers' rights in practical terms, which will be discussed below in Chapter 3.1. and 3.2.

While the phantom vessel phenomenon has been suppressed in the mid-2000s, Somali pirates began to infest the Africa/Red Sea area by hijacking of vessels and kidnapping of the crew for ransom demands. Outbreak of Somali piracy is at an alarming level today.⁴⁹

2.2 Evolution of Seafarers' Rights

Shipboard conditions for seafarers were harsh in ancient times. There was no legal protection for seafarers through State intervention up until 19th century. Ancient maritime codes were mainly dealing with the commercial side of the maritime industry, such as the rights and obligations of cargo owners and carriers. The main shipboard customs and regulations related to seafarers were consisted of traditional unwritten customs, which deemed applicable on board a ship on the high seas. These customs would become part of the customary law in cases where one brings another to Court based on a particular custom.⁵⁰

Apart from customs, seafarers had a common crew culture through which collaboration existed, for instance, when dealing with hazards at sea such as early piracy. While the powers of the Master were relatively wider in terms of good order on board a ship, particularly within 18th and 19th centuries, seafarers used to have informal networks to differ 'good and bad'

⁴⁴ 1988 UN Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA), as amended.

⁴⁵ The International Convention Against the Taking of Hostages, 1979.

⁴⁶ The International Convention for the Suppression of the Financing of Terrorism, 1999.

⁴⁷ The United Nations Convention Against Transnational Organized Crime, 2000.

⁴⁸ See Chapter 3.

⁴⁹ See Chapter 3.1 for a factual analysis and the cost of Somali piracy to seafarers.

⁵⁰ Deirdre Fitzpatrick and Michael Anderson (eds), *Seafarers' Rights* (Oxford University Press, 2005) 3-14.

ships prior to their employment at sea.⁵¹ Furthermore, seafarers could mutiny as a weapon against unjust conditions of shipboard and employment, which is similar to labour strikes of today.⁵²

In the 19th century, States began to show a relatively larger interest in international maritime trade in order to improve their economies. Great Britain, for instance, used to carry half of the world trade back in that century. Thus, the British Parliament enacted the British Merchant Shipping Act in 1850, with the aim of improving shipboard standards for masters and seafarers. Attempts towards protection of seafarers at the national level continued with the establishment of the Mission to Seamen in 1856 and many other initiatives.⁵³

Meanwhile at the international level, labour rights in general gained recognition through the inception of ILO in 1919. As of today, ILO still holds the major significance with its scope of universally regulating the working and employment conditions of seafarers. Starting from 1920, ILO has been promoting seafarer rights by adopting Conventions and Recommendations specifically related to maritime labour. Although its overall efficiency is questionable, it appears that ILO's inception commenced a new era for the protection of seafarers' rights in the global context.⁵⁴

On the other hand, fundamental rights of humans began to develop as early as in 13th century, with the earliest exemplary instrument, known as the Magna Carta. Other examples of early human rights instruments include the English Bill of Rights, 1689, the Declaration of the Rights of Man and of the Citizen, 1789, followed by the French Revolution, the American Declaration of Independence, 1776, and other national constitutions.⁵⁵ Despite all the national efforts to promote fundamental human rights, these rights have arguably gained first international recognition in the 20th century. It is noteworthy that, allegedly, the labour rights gained international recognition before the fundamental human rights.⁵⁶

Following the end of World War II, in 1945, the United Nations was established by the signing of the UN Charter on 26th June, which finally brought fundamental human rights into the picture at an international level. The Charter has provisions specifically related to the protection of human rights, and all members of the UN agreed upon taking necessary measures for the State protection. In 1946, the UN Commission on Human Rights (UNCHR) was established. UNCHR was replaced by the United Nations Human Rights Council (UNHRC) in 2006. The Universal Declaration of Human Rights (UDHR) was initially prepared by the UNCHR before

⁵¹ Fitzpatrick and Anderson (n 50) 9-10.

⁵² Cheryl A. Fury, 'Labor Conditions for Seafarers' in John B. Hattendorf (ed), *The Oxford Encyclopedia of Maritime History, Volume 2* (Oxford University Press 2007) 313.

⁵³ Fitzpatrick and Anderson (n 50) 15-16.

⁵⁴ *Ibid.*, 22.

⁵⁵ For instance, the Mexican Constitution of 1917, the Constitution of the Soviet Union of 1918, and the German Constitution of 1919.

⁵⁶ For a general understanding on the historical evolution of human rights, see Magdalena Sepúlveda and others, *Human Rights Reference Handbook* (3rd edn, University for Peace 2004) 3-5.

adopted by the UN General Assembly in 1948.⁵⁷ In the same year, IMO was established to deal with the maritime industry at an international level. However, IMO does not “create” rights; it mainly governs the international maritime field through regulatory laws. IMO Conventions impose obligations on States and other relevant actors of the field, and through this approach, they create certain benefits for seafarers. In other words, IMO promotes for the protection of seafarers rights incidental to their main aim, which are promoting safety and security in shipping and preserving the marine environment.⁵⁸

Since 1950s, regional recognition of human rights has gained significant attention around the same decade, while UN has adopted a number of human rights conventions at the international level. Today there are three main regional human rights conventions applicable within three continents. The European Convention on Human Rights (ECHR) is adopted in 1950. In Europe, there is also another instrument named the European Social Charter (ESC), which is adopted in 1961. The inter-American human rights system is governed by the American Convention on Human Rights (ACHR), adopted in 1969. The African Charter on Human and Peoples’ Rights (AC) is adopted in 1981, in order to promote the protection of human rights in Africa.⁵⁹

At the national level, numerous countries have implemented measures within their constitutional mechanisms to protect international and regional human rights. The implementation procedure may be complex, which will be discussed in Chapter 3.2.4.3 below.

⁵⁷ *Ibid.*

⁵⁸ Fitzpatrick and Anderson (n 50) 48.

⁵⁹ For a thorough discussion over the regional mechanisms and human rights conventions mentioned, see Sepúlveda (n 56) 125-179.

2.3 The Situation of Somalia

This part briefly explains a number of reasons behind the rise of Somali piracy. The absence of an effective central government is viewed to be the main reason behind the rise of Somali piracy. Various scholars have a number of theories regarding the *raison d'être* behind the collapse of Somali statehood. For instance, the genealogy and nomadic clan dynamics of the Somali society during pre-colonial times allegedly made it difficult for Somalis to adapt to a unified central statehood after independence.⁶⁰

Somalia is another example of post-World War II decolonization process, which gained its independence in 1960.⁶¹ However, it has gradually divided into pieces starting from October 1969, when the president of Somalia Abdirashid Ali Shermakee was assassinated. Major-General Mohammed Siyaad Barre took control of the Somali government and imposed military dictatorship after the assassination. Meanwhile, Somalia became party to the African Charter on Human and People's Rights in July 1985.⁶²

The Barre regime eventually collapsed in the beginning of 1991. Indeed, the overthrow of Somali dictator Barre in 1991 caused a civil war, further division and violence along with the lack of an effective central government in Somalia. Following the collapse of the Barre regime, one part of Somalia proclaimed unilateral independence in 1991 forming a self-declared republic named Somaliland. Meanwhile, few other parts formed autonomous statehood, such as Puntland in 1998 and Galmudug in 2006. In 2004, Transitional Federal Government has been established, aiming to provide a central political force in Somalia.⁶³ There have been at least a dozen of attempts to maintain political stability in Somalia, all of which have failed.⁶⁴ Undoubtedly, there are various legal loopholes hindering the efforts towards the suppression of piracy in Somalia.⁶⁵ UN currently has a

⁶⁰ For more information on the Somali clan system, see Brian Hesse, 'Introduction: The myth of 'Somalia'' and Peter Pham, 'Putting Somali piracy in context' in Brian Hesse (ed), *Somalia: State Collapse, Terrorism and Piracy* (Routledge 2011) 3-6 and 78-82.

⁶¹ In the same vein, Pham (n 60) 79 reads: "Modern 'Somalia' was born out of a union between the British Protectorate of Somaliland, which became independent as the State of Somaliland on 26 June 1960, and the territory then administered by Italy as a United Nations trust and which had, before the Second World War, been an Italian colony. The latter received its independence on 1 July 1960, and the two states, under the influence of the African nationalism fashionable during the period, entered into a union, even though, common language and religion notwithstanding, they had never developed a common sense of nationhood."

⁶² See 'Ratification Table: African Charter on Human and Peoples' Rights' <<http://www.achpr.org/instruments/achpr/ratification/>> for the full list of ratifications, accessed 22 April 2012.

⁶³ Hesse (n 60) 1-6. See also Note 14 of Santiago Iglesias Baniela, 'Piracy at Sea: Somalia an Area of Great Concern' [2010] 63 *The Journal of Navigation* 191, 195.

⁶⁴ For more information on the political background and current state of Somalia, see Christopher Totten and Matthew Bernal, 'Somali Piracy: Jurisdictional Issues, Enforcement Problems and Potential Solutions' [2010] 41 *Georgetown Journal of International Law* 377, 381-384.

⁶⁵ See Chapter 3.1 below.

humanitarian assistance in Somalia, with an approximate \$530 million contribution provided in 2011.⁶⁶

Apart from the political instability, there are other factors to be taken into consideration in order to clearly view the ‘perfect storm’ facilitating the Somali piracy today.⁶⁷ Somalia has a very vulnerable economy mainly due to the ongoing civil war for decades, and allegedly, the depletion of fish stocks through toxic waste dumping and illegal fishing off the coast of Somalia. Somalia today faces extreme poverty, high risk of malnutrition and infectious disease, as well as extreme starvation.⁶⁸ Somalia, as a country whose economy is mainly dependent on fishing, greatly suffered from the increased illegal, unreported and unregulated (IUU) fishing since the outbreak of civil war. Reportedly, in 2005, an estimated seven hundred foreign fishing vessels have been actively fishing off the coast of Somalia without any authorisation.⁶⁹ Since local fishermen’s welfare were put at risk, so gravely that they have gradually been engaging more and more in piracy activities.⁷⁰

Moreover, geographical conditions of the area are very significant factors in terms of piracy activities. The Gulf of Aden is known as the main route of the maritime shipping industry, linking Europe, the Middle East and Asia. Due to the vast level of the maritime traffic, today, this area serves as a ‘hunting ground’ for pirates.⁷¹ Consequently, Somali piracy has received great attention among its warlords and other civilians. It is mainly an economically motivated organised crime today, and remains a profitable business for Somali pirates.

⁶⁶ Ioannis Chapsos, ‘From Human to Maritime Security: The Implications and Cost of Piracy’ (2011) Research Institute for European and American Studies, Research Paper, 3. For more information on the UN efforts as well as the African Union efforts towards tackling the Somali piracy issue, see Totten and Bernal (n 64) 385-390.

⁶⁷ Pham (n 60) 82.

⁶⁸ Totten and Bernal (n 64) 384-385.

⁶⁹ John C. Payne, *Piracy Today: Fighting Villainy on the High Seas* (Sheridan House 2010) 16-18.

⁷⁰ For more information on the factors behind the piracy activities, types of Somali attacks, and reasons behind the gradual shift of activity areas, see Baniela (n 63)195-198.

⁷¹ Pham (n 60) 82.

3 Legal Framework, Enforcement Mechanisms, and Practical Measures

This Chapter consists of a comprehensive analysis of the relevant legal framework both related to piracy and armed robbery at sea and seafarers' rights, the relevant enforcement mechanisms and practical measures related to the issue at hand.

Chapter 3.1 focuses on the criminal element of the issue at hand, which is piracy and armed robbery against ships. The first part reviews the international legal framework and identifies the challenges faced in the process of criminalisation of piratical acts, such as the definition and scope of this maritime offence. The second part provides a detailed legal analysis regarding the framework behind the current measures for the suppression of piracy at the international, regional and multi-national level. The final part briefly explores the current attempts of several initiatives and humanitarian responses against piracy.

Chapter 3.2 explores the human rights element, the protection of seafarers' rights, which consists of four parts. The first part attempts to identify the potentially affected or violated rights with a fact-based methodology. Following this study, Chapter 3.2.2 reviews the relevant legal framework related to the identified rights. It is important to note that both chapters include a detailed review of maritime instruments due to the fact that both fragments are closely linked to the maritime field. Maritime law is the common link between the two legal fields, which is discussed under Chapter 4.3 below.

Chapter 3.2.3 analyses the jurisdictional element of the relevant legal framework, which was reviewed in the previous chapter. Furthermore, this part examines duties and liabilities of States and individuals towards the seafarer.

In Chapter 3.2.4, the discussion revolves around the enforcement mechanisms and remedies available for seafarers. Available mechanisms are reviewed and discussed both at the international and regional level. Moreover, the final sub-heading emphasised on methods and challenges relating to the national implementation of the international and regional legal framework.

3.1 Piracy and Armed Robbery Against Ships

3.1.1 International Legal Framework

Criminalisation of the piratical acts has brought the necessity of defining piracy in proper terms in order to determine and clarify the scope of this *sui generis* criminal offence. Since its scope may affect a seafarer's possibility of obtaining redress after a piratical act, drawing the borderlines of this offence is significant for the purposes of this study.⁷² It is evident from history that numerous groups have defined piracy in a distinct manner, often contradicting with each other, and this diversity added another difficulty towards its application and enforcement.⁷³ Hence, this part initially focuses on the definitional dilemma of the offence of piracy at an international level, and then briefly attempts to shed some light over the legal basis behind the current counter-piracy activities today.

UNCLOS provides us with the starting point since the generally accepted definition and scope of 'piracy' is developed through the UNCLOS regime today. Article 101 reads as follows:⁷⁴

Piracy consists of any of the following acts:

- (a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
 - (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
 - (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
- (b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
- (c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).

Thus, the main elements of the UNCLOS definition consists of an illegal act of violence motivated by private gain, to be directed against another vessel or the persons and property on board, and to be committed by persons on board a private ship on the high seas or outside the jurisdiction of any State.⁷⁵ Due to its limited scope of jurisdiction, this definition has been subject to harsh criticisms particularly after the infamous *Achille Lauro* incident. It was considered a "highly restrictive and narrow formula,"⁷⁶ due to three main reasons:

⁷² This issue is discussed throughout Chapter 3 and 4.

⁷³ See Chapter 2.1 for the etymology of the word 'piracy' and discussions surrounding the terminology, and Max Mejia, 'Maritime Gerrymandering: Dilemmas in Defining Piracy, Terrorism and other Acts of Maritime Violence' [2003] 2:2 *Journal of International Commercial Law* 153.

⁷⁴ Article 15 of the Geneva Convention on the High Seas, 1958, is considered the predecessor of this provision. For more information, see Chapter 2.1.

⁷⁵ Mejia (n 73) 160.

⁷⁶ *Ibid.*

1. Article 101 only applied to offences committed on the high seas or in *terra nullius*. Offences committed inside the jurisdiction of any State are excluded from the scope of this provision.
2. The intention is required to be for private ends, meaning that it will not be applicable for piratical acts unless it is a mere extortion. In other words, UNCLOS definition excludes acts of war or terrorism, where the motive is political.
3. Article 101 requires two ships to be involved in the incident. Therefore, illegal acts of violence committed by passengers or crew on board are not described as piracy under UNCLOS.

The *Achille Lauro* incident in 1985 undoubtedly was a wake-up call for the international community. Consequently, IMO⁷⁷ first adopted a resolution recommending States to implement measures ‘to prevent unlawful acts against passengers and crews on board ships.’⁷⁸ Similar instruments in the aviation industry existed years before this incident, but there was no convention relating to maritime terrorism.⁷⁹ Later, the SUA Convention was adopted in 1988, aiming to ensure that States take appropriate action against persons committing similar offences on board ships. The focus of this convention was to provide an international legal framework for terrorism; however, it can also be applied to incidents involving piracy and armed robbery against ships.⁸⁰ It is also noteworthy that IMO has not used the word ‘security’ in this Convention, but it can be regarded as a principal instrument of ‘maritime security’. Furthermore, the word ‘piracy’ does not exist in the SUA Convention, but it includes a number of offences that are sufficient to be considered as piracy, being part of ‘maritime violence’.⁸¹ According to the SUA Convention, the motive and venue of the offence are irrelevant. Moreover, unlike the UNCLOS definition, Article 3 of the SUA Convention covers attempted offences.⁸² Thus, SUA offences have a wider scope than the UNCLOS regime.⁸³

IMO further developed another term, ‘armed robbery against ships’, for piratical offences other than those defined under UNCLOS. IMO has initially described this term in its draft code of practice for the investigation of crimes of piracy and armed robbery against ships introduced in the

⁷⁷ IMO is a specialised agency of the UN, which was established in 1948. IMO mainly deals with safety and security of international shipping among other things. In this regard, IMO generates international treaty instruments in order to set standards in the shipping industry. However, IMO resolutions are soft-law instruments. See the general discussion over soft-law instruments in Alan Boyle, ‘Some Reflections on the Relation of Treaties and Soft Law’ [1999] 48 *International and Comparative Law Quarterly* 901.

⁷⁸ Jayant Abhyankar, ‘Piracy and Maritime Violence: A Global Update’ in Proshanto K. Mukherjee and others (eds), *Maritime Violence and Other Security Issues at Sea* (WMU Publications 2002) 24.

⁷⁹ John Liljedahl, ‘Transnational and International Crimes: Jurisdictional Issues’ in Proshanto K. Mukherjee and others (eds), *Maritime Violence and Other Security Issues at Sea* (WMU Publications 2002) 124-125.

⁸⁰ Abhyankar (n 78) 24.

⁸¹ See Supplement B for the full text of offences prescribed under Article 3 as amended.

⁸² *Ibid.*

⁸³ See in general, Matteo Del Chicca, ‘Universal Jurisdiction as Obligation to Prosecute or Extradite’ [2012] 11:1 *WMU Journal of Maritime Affairs* 83.

beginning of 2000s.⁸⁴ The latest IMO definition of ‘armed robbery’ is provided under its Resolution A.1025(26):⁸⁵

2.2. “Armed robbery against ships” means any of the following acts:

- .1 any illegal act of violence or detention or any act of depredation, or threat thereof, other than an act of piracy, committed for private ends and directed against a ship or against persons or property on board such a ship, within a State’s internal waters, archipelagic waters and territorial sea;
- .2 any act of inciting or of intentionally facilitating an act described above.

The commission of this act requires the motive of private gain under the IMO’s definition. However, SUA Convention seems to have filled the loophole in this regard. It is evident from the wording that IMO’s definition aims to compensate for the exclusive character of the UNCLOS regime related to jurisdiction. However, the scope of ‘armed robbery’ still does not cover acts that take place within a State’s contiguous zone and exclusive economic zone, which needs further clarification.⁸⁶

IMB, on the other hand, defined piracy as “an act of boarding any vessel with the intent to commit theft or any other crime and with the intent or capability to use force in the furtherance of that act.”⁸⁷ While this definition does not include the requirement of the motivation of private ends, it does not remove the obstacle of two ships requirement. Nevertheless, IMB has abandoned its definition in favour of the UNCLOS and IMO definitions, which was just as well since the original IMB definition had no legal standing in international law.⁸⁸

In summary, two distinct international regimes, namely UNCLOS and SUA Convention, define and criminalise piratical acts.⁸⁹ Each regime is applicable on different incidents depending on the motive and venue of the crime. Each State implements the relevant legal framework in a different way, which leads to more complexities.⁹⁰ Moreover, various international organisations or institutions have adopted other terms and definitions in order to cover certain loopholes. These efforts remain as soft-law unless States implement such offences into their domestic criminal law system. This patchwork quilt caused numerous difficulties in application and

⁸⁴ IMO, Resolution A.922(22), ‘Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery Against Ships’, 29 November 2001. The term first appeared in IMO, MSC/Circ.984, ‘Draft Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery Against Ships’, 20 December 2000.

⁸⁵ IMO, Resolution A.1025(26), ‘Code of Practice for the Investigation of Crimes of Piracy and Armed Robbery Against Ships’, 2 December 2009.

⁸⁶ Proper interpretation of Articles 33 and 58 of UNCLOS, relating to the contiguous zone and the exclusive economic zone is necessary in this regard.

⁸⁷ ICC-IMB, ‘Piracy and Armed Robbery Against Ships: Report for the Period 1 January – 31 December 2009’ (London, 2010) 3.

⁸⁸ See e.g. ICC-IMB (n 2) where the IMB definition does not exist anymore.

⁸⁹ While IMO Resolution A.1025(26), cited above, provides for a definition, it does not criminalise piracy. IMO’s resolutions are soft laws. SUA Convention, on the other hand, defines offences of maritime violence in general and does not specifically define maritime piracy.

⁹⁰ See Chapter 3.2.4.3 for a detailed discussion.

enforcement, leading to complex and inefficient mechanisms for crimes of piracy and armed robbery against ships.⁹¹

Subsequently, in 2001, CMI adopted a Model National Law on Acts of Piracy or Maritime Violence, with the aim of reaching uniformity in municipal laws of States, which arguably settles the dilemma of two distinct terms.⁹² Its primary objective is ‘to ensure that no act of piracy or maritime violence falls outside the jurisdiction of affected states to prosecute and punish these crimes or, alternatively, to extradite for prosecution in another state.’⁹³ The Model National Law deals with the offence of piracy and armed robbery together with offences described under the SUA Convention, among other things, and stands as a single document including all types of maritime violence. Introducing the offence of ‘maritime violence’ ceased the limited application of both UNCLOS and SUA Convention. However, the Model National Law does not seem to have gained widespread acceptance in terms of national implementation. Nevertheless, it is hoped that this instrument will be given effect through international law and municipal laws of States in order to reach uniformity in application.

Certainly, the international legal framework above only represents the instruments that are relevant to the criminalisation of the global piracy crisis today and implementation an effective crime and punishment regime for arrested pirates.⁹⁴ For the suppression of Somali piracy, on the other hand, there are numerous efforts shown by the international community today regardless of whether or not such efforts are based on a legal framework, which are discussed below.

3.1.2 Counter-Piracy Measures

In response to the Somali piracy, there are a number of security measures taken by the international community. Before illustrating these security measures, it is noteworthy to mention the possible implications of the current legal framework provided under international law. UNCLOS, for instance, imposes a number of responsibilities over States. Article 98(2) obliges flag States to ensure that its ships fulfil the international safety standards,⁹⁵ whereas Article 100 obliges all States to co-operate fully for the

⁹¹ For a variety of national legislation on piracy, see the webpage of the UN Division for Ocean Affairs and the Law of the Sea, updated on 26 October 2011, <http://www.un.org/depts/los/piracy/piracy_national_legislation.htm> accessed 22 March 2012.

⁹² With reference to the definition of ‘piracy’ and ‘armed robbery against ships’. See Mejia (n 73) 173-175.

⁹³ Mejia and Mukherjee (n 36) 321. For more information on CMI’s Model National Law, see Samuel Pyeatt Menefee, ‘A Model National Law on Acts of Piracy or Maritime Violence’ in Proshanto K. Mukherjee and others (eds), *Maritime Violence and Other Security Issues at Sea* (WMU Publications 2002) 101.

⁹⁴ There are other international treaty instruments, which might be relevant in this context, such as the International Convention Against the Taking of Hostages, 1979, the International Convention for the Suppression of the Financing of Terrorism, 1999, and the UN Convention Against Transnational Organized Crime, 2000. However, these conventions are outside the scope of this thesis.

⁹⁵ Flag States have other responsibilities under Article 94 of UNCLOS, which is examined in Chapter 3.2.3.1 below.

suppression of piracy in the relevant areas of jurisdiction stipulated under Article 101.⁹⁶ Along with debates related to international responsibility of States, jurisdictional issues and enforcement powers have been subjected to numerous legal discussions regarding the suppression of piracy.⁹⁷

Nevertheless, in the light of these obligations, certain international enforcement powers are bestowed on States in order to suppress piracy by all possible means. For instance, Article 110(1)(a) of UNCLOS⁹⁸ conveys the right of warships boarding on a foreign ship when they have reasonable grounds to suspect that the ship is engaged in piracy. Most importantly, States are allowed to seize a pirate ship and arrest pirates under Article 105 of UNCLOS, which reads as follows:

“On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to ships, aircraft or property, subject to the rights of third parties acting in good faith.”

Bearing in mind the limited application of the UNCLOS regime, these enforcement powers are extended through two UN Security Council Resolutions that are adopted.⁹⁹ Thus, States are allowed to enter into the Somali territory and actively take part in the suppression of piracy and armed robbery at sea off the coast of Somalia ‘by deploying naval vessels and military aircraft, and through seizure and disposition of boats, vessels, arms and other related equipment used in the commission of piracy [...]’.

Subsequent to a conference held in 2008, IMO has adopted a Code of Conduct relating to the suppression of piracy activities in the Western Indian Ocean and the Gulf of Aden.¹⁰⁰ Accordingly, the participant States

⁹⁶ See UNGA Res. 61, GAOR, 40th Sess., at 9, U.N. Doc. A/Res/40/61 (1985), where all States were urged “unilaterally and in co-operation with other States, as well as relevant United Nations organs, to contribute to the progressive elimination of causes underlying international terrorism and to pay special attention to all situations, including colonialism, racism and situations involving mass and flagrant violations of human rights and fundamental freedoms and those involving alien occupation, that may give rise to international terrorism and may endanger international peace and security.”

⁹⁷ In relation to jurisdictional issues, see Liljedahl (n 79) 115. Regarding the enforcement powers, see Geiß and Petrig (n 28) 55-135.

⁹⁸ Former Article 22 of the Geneva Convention on High Seas, 1958.

⁹⁹ UN Security Council, *Security Council resolution 1851 (2008) [on fight against piracy and armed robbery at sea off the coast of Somalia]*, 16 December 2008, S/RES/1851 (2008) para.6, and UN Security Council, *Security Council resolution 1846 (2008) [on repressing acts of piracy and armed robbery at sea off the coast of Somalia]*, 2 December 2008, S/RES/1846 (2008) para.9. The latter resolution is being renewed every year. Unlike IMO Resolutions, UN Security Council Resolutions are hard-law instruments. For instance, the Council of the European Union recently extended Operation Atalanta’s area of operations to include Somali coastal territory as well as its territorial and internal waters based on the UNSC Resolutions mentioned above, prior to conduct its first operation to destroy equipment on the Somali coastline on 15 May 2012. See Council Decision 7216/12/EC Council extends EU counter-piracy operation Atalanta [2012] <http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/EN/foraff/129216.pdf> accessed 30 May 2012.

¹⁰⁰ IMO, Code of Conduct Concerning the Repression of Piracy and Armed Robbery Against Ships in the Western Indian Ocean and the Gulf of Aden, Annex, IMO, Council

reached a consensus with regard to co-operation towards sharing and reporting of relevant information, interdiction of the suspicious vessels or aircrafts, and apprehension and prosecution pirates. In addition, the participant States agreed to co-operate towards ‘facilitating proper care, treatment and repatriation for seafarers, fishermen, other shipboard personnel and passengers subject to piracy or armed robbery against ships, particularly those who have been subjected to violence.’¹⁰¹ However, the main deficiency of this instrument seems to be that it remains as soft law, thus, it is not a legally binding instrument.

Currently, there are three main multinational task forces operating for the suppression of piracy:¹⁰²

1. United States- coordinated Combined Task Force 151 (CTF-151)
2. NATO’s ‘Operation Ocean Shield’, and
3. The European Union Naval Force (EU NAVFOR ‘Operation Atalanta’).

Furthermore, many States contribute to the suppression activities either under the umbrella of the UN or through independent naval deployments. Parallel to the recent co-operation of States, pinpointed above, MSCHOA has introduced the Internationally Recommended Transit Corridor (IRTC) in February 2009, for vessels transiting through the Gulf of Aden.¹⁰³ These activities are, *ab initio*, in conformity with the international enforcement powers of States.

The latest version of Best Management Practices (BMP) represents another exemplary effort of the international community.¹⁰⁴ BMP4 provides suggestions for ship operators and masters of ships transiting through the ‘high risk area’, which is encompassed under Section 2. *Inter alia*, Section 8 of BMP4 suggests a number of security measures including ‘armed private maritime security contractors.’ Parallel to this suggestion, known as ‘the use of privately contracted armed security personnel’ (PCASP), IMO has adopted four circulars, including recommendations for flag States, port and coastal States, ship owners, ship operators and shipmasters.¹⁰⁵ Lately,

Doc. C 102/14 (3 April 2009) (hereinafter ‘Djibouti Code of Conduct’). A similar co-operation project had been initiated for the suppression of piracy activities in Asia, but is formed as a treaty instrument, known as the ReCAAP Agreement (Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia, 2004, entered into force in 2006). ReCAAP assisted States to suppress piracy at a regional level, which was arguably the most efficient co-operative mechanism established for the suppression of piracy.

¹⁰¹ IMO, Code of Conduct Concerning the Repression of Piracy and Armed Robbery Against Ships in the Western Indian Ocean and the Gulf of Aden, Annex, IMO Council Doc. C 102/14 (3 April 2009), Attachment 1, Resolution 1, Annex, Article 2(1)(d).

¹⁰² Pham (n 60) 77. See also P. van Huizen, ‘Netherlands State Practice for the Parliamentary Year 2008-2009’ in I. F. Dekker and E. Hey (eds) *Netherlands Yearbook of International Law Volume 41, 2010: Necessity Across International Law* (Springer 2011) 241.

¹⁰³ ICC-IMB (n 2) 21-22.

¹⁰⁴ BMP4 denotes the fourth iteration of the BMP series. BMP4 was produced in August 2011, by a number of well-known actors of the shipping industry, such as INTERTANKO, ICS, ITF, IMB and BIMCO.

¹⁰⁵ See, *inter alia*, IMO, MSC.1/Circ.1408, ‘Interim Recommendations for Port and Coastal States Regarding the Use of Privately Contracted Armed Security Personnel’, 16 September

combining the military support of States with usage of Privately Contracted Armed Security Personnel (PCASP) and efforts shown in line with the Best Management Practices (BMP) seems to have reduced the number of successful attacks.¹⁰⁶ IMB, in its latest annual report, called for attention to the currently unregulated regime of PCASP and stated that this issue needs to be adequately addressed.¹⁰⁷ While IMO has produced some guidelines related to PCASP, there are no international hard-law instruments regulating the usage of PCASP onboard ships.

3.1.3 Humanitarian Response to Piracy

There are a number of initiatives set up in response to piracy for practical purposes. Such initiatives include global trade and workers unions, such as ITF and ICS/ISF,¹⁰⁸ as well as specific humanitarian activities, such as SOS (SaveOurSeafarers) and Maritime Piracy Campaign¹⁰⁹ and activities undertaken by Seafarers' Rights International and Seamen's Church Institute.¹¹⁰

ITF is a lobbying organisation, which represents over 4.5 million workers, including 600,000 seafarers of 155 countries, and has an official status in a number of organisations, such as IMO and ILO. Within its official status, ITF has the mandate to provide information and have an education department developing training instruments and guidelines for seafarers among other things. ISF is the international employers' organisation, whereas ICS is the chamber of national ship owners' associations for the global shipping industry.

SaveOurSeafarers was initiated in March 2011 with the purpose of raising awareness related to the human and economic cost of piracy incidents. Thirty organisations and a number of States are in support of this campaign.¹¹¹ The campaign invites governments to prioritise a number of key elements, which are:

1. Reducing the effectiveness of the easily-identifiable mother ships.

2011; IMO, MSC.1/Circ.1406/Rev.1, 'Revised Interim Recommendations for Flag States, Regarding the Use of Privately Contracted Armed Security Personnel on Board Ships in the High Risk Area', 16 September 2011; and IMO, MSC.1/Circ.1405/Rev.1 on 'Revised Interim Guidance to Shipowners, Ship Operators, and Shipmasters on the Use of Privately Contracted Armed Security Personnel on Board Ships in the High Risk Area', 16 September 2011. See also, IMO, MSC-FAL.1/Circ.2, 'Questionnaire on Information on Port and Coastal State Requirements Related to Privately Contracted Armed Security Personnel on Board Ships', 22 September 2011, which aims to gather further information from States.

¹⁰⁶ ICC-IMB (n 2) 24 and 38.

¹⁰⁷ *Ibid.*, 24.

¹⁰⁸ Official Website of ITF: www.itfglobal.org; and ICS/ISF: www.marisec.org

¹⁰⁹ Official Website for the SOS Campaign: www.saveourseafarers.com, in which supporters may send out letters to their chosen Head of Government in order to present their concerns over the issue. More than 30,000 letters have been sent to the respected governments within a year.

¹¹⁰ Official Website of the Seafarers' Rights International: www.seafarersrights.org; Official Website of the Seamen's Church Institute: <http://www.seamenschurch.org/>.

¹¹¹ These organisations include shipping and ship owners' associations and federations, P&I Insurance clubs, IMB, ITF, and ICS/ISF, along with worldwide support from the Philippines, South Africa, the Netherlands, the UAE, and a number of European countries.

2. Authorising naval forces to hold pirates and deliver them for prosecution and punishment.
3. Fully criminalising all acts of piracy and intent to commit piracy under national laws, in accordance with their mandatory duty to cooperate to suppress piracy under international conventions.
4. Authorising naval forces to take action against pirates and their equipment ashore.
5. Increasing naval assets available in this area.
6. Providing greater protection and support for seafarers.
7. Tracing and criminalising the organisers and financiers behind the criminal networks.

Seafarers' Rights International is launched on the World Maritime Day,¹¹² in the year 2010, which was also designated by IMO as 'the Year of the Seafarer.' SRI operates hand in hand with ITF, and currently works in areas of research, education and training of selected issues. Seamen's Church Institute, on the other hand, is a charity organisation, initially founded as early as in 1834 in North America. Among other things, SCI provides educational and legal services for seafarers.

3.2 Seafarers' Human and Labour Rights

3.2.1 Introduction

Prior to a comprehensive analysis of the relevant legal framework, it is essential to identify the potentially affected fundamental human rights and labour rights corresponding to the main aim and objectives of the present study. Different types of piratical attacks with distinct purposes occur at sea. Some of these attacks may be considered as 'maritime muggings', where the attacks merely involve petty thefts or sophisticated attacks including the phantom vessel phenomenon. The latest trend of Somali piracy involves hijacking and theft of the vessel and its cargo as well as its crew. In most cases, Somali pirates kidnap seafarers and demand ransom payments.¹¹³ IMB's annual reports on piracy reveal a number of rights, which have been severely violated under captivity, such as the right to life, the freedom from torture, cruel, inhuman or degrading treatment, the right to a legal remedy and access to justice, and the right to health and medical care. However, these are not the only affected rights and certainly not exclusive to the nature of this study. For instance, when a seafarer is taken as a hostage, other issues may arise during captivity. Most of these issues concern with seafarers' labour rights, such as the right to safe and healthy working conditions,¹¹⁴ the right to fair wages, and the right to social security and welfare.

¹¹² World Maritime Day is celebrated by IMO every year. Each government may set the precise date, but is generally celebrated during the last week of September. In 2010, World Maritime Day was celebrated by IMO on 23rd September 2010.

¹¹³ See also Pottengal Mukundan, 'Piracy and Armed Attacks against Vessels Today' [2004] 10 *The Journal of International Maritime Law* 308.

¹¹⁴ The distinction between safety and security needs to be drawn in this context, which is discussed in Chapter 3.2.2.6 below.

In addition, other fundamental rights may need consideration in due regard, though they are not being primarily or necessarily violated in this context, such as forced labour, and the freedom from discrimination.¹¹⁵ Most of these rights are at risk of violation throughout the whole context; prior to their captivity, during an attempt to commit the piratical attack, when pirates succeed in boarding, and when the ship is hijacked. The threat continues when the crewmembers are taken as hostages or being kidnapped, and in cases of captivity, after the seafarer's release.

Hence, the below list of identified rights shall present not only the identified right, but also the elucidation for the nature of the relevant right at risk in this context.¹¹⁶ Using a fact-based analogy, the human cost of Somali piracy on seafarers will be revealed before the author analyses the factual contexts on a legal basis in Chapter 3.2.2.

3.2.1.1 Fundamental Human Rights

The 2011 annual piracy report of IMB reveals that the loss of life is relatively rare considering the frequency of the attacks, since the main reason behind taking seafarers under captivity include demands for ransom. Between 2007 and 2011, 42 seafarers are killed as a consequence of pirate attacks, whereas 42 seafarers went missing. However, there still is a risk of the loss of life not only during the attack, but also whilst the seafarers are in captivity mainly because seafarers are subjected to brutal living conditions that severely endanger their life.¹¹⁷ Loss of life may occur even during a rescue mission.¹¹⁸ According to the observations of SOS,¹¹⁹ main causes of the deaths include “deliberate murder by pirates, suicide during the period of captivity, death from malnutrition and disease, death by drowning, or heart failure just after the hijacking.”¹²⁰ There are two incidents, which are

¹¹⁵ For instance, universal prohibition of child labour is also likely to be violated in cases of piracy, but victims of such violation are under-aged pirates, in general, which is outside the scope of this thesis.

¹¹⁶ Three main human rights instruments, UDHR, 1948, CCPR, 1966 and CESCR, 1966, are used for guidance in order to divide the relevant rights into human and labour rights, which will be discussed thoroughly below.

¹¹⁷ Reportedly, a number of seafarers have lost their lives under captivity because of poor malnutrition and lack of medical care, see Kaija Hurlburt, ‘The Human Cost of Somali Piracy’ (2011) Oceans Beyond Piracy Working Paper, 17.

¹¹⁸ e.g., In September 2011, two seafarers were caught in the crossfire during the rescue mission of the Royal Navy of Oman, reported in ‘Two Crew Die During Hijack Rescue,’ *ITF Seafarers Maritime News* (London, 9 September 2011)

<http://www.itfseafarers.org/maritime_news.cfm/newsdetail/6387/region/6/section/0/order/1> accessed 11 March 2012. In February 2012, two seafarers died during the operation conducted by a Danish warship, reported in ‘Hostage Rescue Ends in Tragedy,’ *ITF Seafarers Maritime News* (London, 2 March 2012)

<http://www.itfseafarers.org/maritime_news.cfm/newsdetail/7109/region/6/section/0/order/1> accessed 11 March 2012. See also the narrative related to the hijacking of M/Y Tanit, reported in Jason Burke, ‘How Somali Pirates Hijacked the Lemaçons’s sailing trip of a lifetime’ *The Guardian* (London, 4 October 2009)

<<http://www.guardian.co.uk/world/2009/oct/04/pirates-kidnap-sailing-lemacons>> accessed 23 April 2012.

¹¹⁹ SOS SaveOurSeafarers Campaign.

¹²⁰ ‘More Seafarers Suffer at Pirate Hands,’ *ITF Seafarers Maritime News* (24 June 2011) <http://www.itfseafarers.org/maritime_news.cfm/newsdetail/6133/region/6/section/0/order/1> accessed 11 March 2012.

alleged to be the first reported loss of life under captivity of Somali pirates. Reportedly, the 2011 hijacking of *SV Quest* led to death of four seafarers, whereas the attempted hijacking of *MV Belluga Nomination* the same year resulted in death of two seafarers.¹²¹

Undeniably, many seafarers are exposed to assault, threats, personal injury and other types of violent treatment as a result of a particular piracy incident. The degree of Somali pirate violence has gradually increased over the years.¹²² In 2011, Mukundan, the director of IMB, has affirmed that “Crewmen are being physically tortured during captivity.”¹²³ Although it seems that the human cost of Somali piracy upon seafarers are underreported, underrated and misunderstood,¹²⁴ Hurlburt, in her leading study on the Human Cost of Somali Piracy,¹²⁵ revealed some peculiar facts and figures and drew the curtains behind which numerous severe physical and psychological abuse occurs every day under captivity. For instance, under captivity, many seafarers are tortured or physically abused by deprivation of proper food and water as well as lack of access to medical care, and consistent beatings.¹²⁶ Moreover, ‘death threats and mock executions’ deeply affect seafarers’ psychological health while in captivity.¹²⁷

Although it may not seem relevant at first instance, reports have shown that some seafarers were being forced to attack other vessels when their vessel is hijacked and is used as a ‘mother ship’ for further pirate attacks.¹²⁸ According to Hurlburt’s reports, 516 seafarers were used as human shields or forced to collaborate in further pirate attacks in 2010.

Last but not least, a seafarer may be exposed to greater human rights violations under captivity based on his nationality or religion.¹²⁹ For instance, Somali pirates may become more violent and cruel towards a seafarer once they learn that he is from a Christian-oriented society.

3.2.1.2 Labour Rights

Seafarers being exposed to the threat of Somali piracy on a daily basis results in insecure working conditions. Somali pirates open fire with RPGs or machine guns when they attack vessels. Any accident or disease is more likely to occur under such circumstances. For instance, master of the captured vessel *MV Iceberg 1*, stated that “Diseases have appeared among crew members, some have haemorrhoids, one has lost his eyesight and

¹²¹ Hurlburt (n 117) 12.

¹²² See Supplement A.

¹²³ Steven Jones, ‘Tipping Point’ *Maritime Security Review* (12 May 2011) <www.marsecreview.com/2011/05/tipping-point> accessed 23 March 2012.

¹²⁴ Criticising the media, Chapsos stated that piracy incidents are ‘overemphasised and overdramatised’ and the media generally portrays an incident ‘as entertaining Hollywood productions.’ See Ioannis Chapsos, ‘From Human to Maritime Security: The Implications and Cost of Piracy’ (2011) Research Institute for European and American Studies, Research Paper, 3.

¹²⁵ Hurlburt (n 117).

¹²⁶ *Ibid.*, 17.

¹²⁷ *Ibid.*, 17.

¹²⁸ *Ibid.*, 12 and 18.

¹²⁹ Hurlburt stated that “[...] they are less likely to be released and more likely to be targeted for abuse simply because of their nationality.” *Ibid.*, 12.

another has serious stomach problems... The water we have is unclean and we have only one meal a day, boiled rice, that's it. The crew is suffering physically and mentally.”¹³⁰

After their release, the traumatising effects of captivity will most likely continue and it may be necessary to provide further psychiatric or psychological care for the long-term post-traumatic distress.¹³¹ Symptoms may occur long after the incident.¹³² Nevertheless, seafarers must receive immediate health and medical care after their release. It must be kept in mind that not only seafarers suffer from distress, but their families are also affected in the long run. Impacts of captivity may have traumatised effects over families of seafarers as well, which may require further psychological care of professionals.

Piracy incidents may result in unreasonable salary deductions or even non-payment of wages. For instance, subsequent to the *Charelle*'s release after six months, a seafarer reported that they received wages for five months only.¹³³ Allegedly, *Faina*'s owners have deducted \$200 from a number of seafarers, who have called their families under captivity. Such deductions or non-payments lead to violations of seafarers' labour rights, if not a breach of their employment contract.¹³⁴

For protection against unemployment, Bockmann pointed out the concern over 're-employability' in her news report due to concerns over ability to work at sea after possible post-traumatic distress.¹³⁵ The impact of piracy upon seafarers after release can be detrimental. The seafarer may become unable to work for months, a period that needs to be covered with an allowance while a seafarer is unemployed.

3.2.2 Legal Framework of Relevant Seafarers' Rights

Before reviewing the relevant legal framework, it is significant to mention the general characteristics of human rights law due to the close linkage between seafarers' rights and human rights in general. The notion of human rights today has three core characteristics. First, human rights are inherent in every person, so that they cannot be granted or purchased. Second, human

¹³⁰ *Ibid.*, 16, note 20.

¹³¹ *Ibid.*, 19. Moreover, Stevenson, director of SCI, asserted that some seafarers may have long-term negative effects including “repetitive thoughts and daydreams about what happened, ongoing and distressing dreams about what happened, a sense of trying to avoid thinking about or feeling something, feeling less excited about things previously anticipated with pleasure, feeling less connected to family and friends, difficulty sleeping and outbursts of anger.” See Douglas B. Stevenson, ‘Assessing the Effects of Piracy on Seafarers’ (Conference on Combating Piracy, 4th Official Piracy Update, Hamburg, 2010).

¹³² Michael Stuart Garfinkle, ‘Post-Piracy Care for Seafarers: Guidelines’ (2011) The Seamen's Church Institute Working Paper Version 3.0.

¹³³ *Charelle*, a German-flagged vessel, was hijacked in 12 June 2009 with ten seafarers on board. After Somali pirates received a ransom payment, they released *Charelle* on 3 December 2009, six months after the hijacking. <<http://www.itfseafarers.org/charelle.cfm>> accessed 17 February 2012.

¹³⁴ See Chapter 3.2.2.8 below.

¹³⁵ Michelle Wiese Bockmann, ‘Seafarer's Late Night Call that Revealed Human Cost of Piracy’ *Lloyd's List* (London, 19 April 2011) 4.

rights are inalienable, and third, they are equally applicable on every person. Moreover, the main duties are imposed on States, and not individuals. There are two distinct kinds of effects derived from human rights. The ‘vertical effect’, that implies the state-individual relations, whereas the ‘horizontal effect’ implies the state intervention on individual-individual relations. Thus, States have negative obligations derived from the vertical effect of human rights, whereas the horizontal effect imposes positive obligations on States to take a further step to protect human rights.¹³⁶

Similar to other areas of international law, human rights at an international level derive from four distinct sources of law.¹³⁷ These are international conventions, customs, general principles and subsidiary means for the determination of rules of law, including judicial decisions and scholarly work.¹³⁸

These rights are classified in distinct manners; however, it is generally accepted that human rights are indivisible, meaning that ‘no right is more important than any other.’¹³⁹ Another dilemma of human rights law relates to its universal application. This debate mainly derives from the widespread recognition and global application of the main sources of human rights by a majority of States, which leads to the perception that certain rights are part of *jus cogens*, a peremptory norm.¹⁴⁰ For instance, UDHR is considered to be of *jus cogens* character since it was agreed upon by most States from all regions without any objection.¹⁴¹

Today, international human rights are largely applicable in most regions and States. Europe, Africa and America have their own regional human rights regimes, and many States have implemented the international human rights into their constitution or municipal laws.

In the context of seafarers’ fundamental human rights, main international and regional human rights treaties will be relied upon, such as UDHR (1948), CCPR (1966), CESCR (1966), ESC (1961), ECHR (1950), ACHR (1969), and AC (1981). Conventions covering rights of the maritime labour are mainly adopted by ILO; since its inception in 1919, ILO has

¹³⁶ Sepúlveda (n 56) 6.

¹³⁷ 1945 Statute of the International Court of Justice (hereinafter ‘the ICJ Statute’) is widely recognised as an authoritative source in this regard. Article 38(1) of the ICJ Statute reads as follows: “The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations; (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.”

¹³⁸ See Sepúlveda (n 56) 19-28.

¹³⁹ For more information on classification of human rights at an international level, see Sepúlveda (n 56) 7-13.

¹⁴⁰ With regard to the debate over the universality of human rights, see Sepúlveda (n 56) 13-15, and Rainer Arnold, ‘Are Human Rights Universal and Binding?’ in Brown and Snyder (eds), *General Reports of the XVIIIth Congress of the International Academy of Comparative Law* (Springer 2012) 581.

¹⁴¹ Sepúlveda (n 56) 14.

adopted around forty conventions and thirty recommendations specifically related to the protection of seafarers' rights.¹⁴²

In 2006, ILO has codified many of its instruments adopted within a period of eighty years, to produce a single and coherent instrument and update the existing rules and standards stipulated under a large array of ILO instruments. This latest work of ILO is known as the Maritime Labour Convention, opened for signature in 2006. Article 10 of MLC 2006 listed 37 ILO conventions that have been revised under the umbrella of this new regime. Although MLC 2006 is not in force yet, it is expected to enter into force in few years.¹⁴³

The legal instruments mentioned above, and more, will be examined in line with the identified seafarers' rights. Vulnerability of seafarers, both as human beings and labour force, is a common perception derived from the fact that they are both migrant workers¹⁴⁴ and are employed on board ships transiting through international waters.¹⁴⁵ Thus, it is very significant to acknowledge the vulnerable nature of seafaring business as well as to address the issue of effective application of the relevant law.

It is assumed that States are obliged to protect inherent rights of seafarers, and to provide adequate safeguards to protect life on board vessels flying its flag. Such obligation derives from the territorial principle where the offence wholly or partially occurs within the territory of the flag State.¹⁴⁶ The same principle extends to coastal and port States if the crime is committed either within the internal archipelagic or territorial waters of a coastal State, or within the port of a State.¹⁴⁷ Liability issues are discussed later in this Chapter.

3.2.2.1 Right to Life

The right to life is declared under Article 3 of the UDHR, which might be regarded as the foundation for all other international, regional and national legal instruments referring to its protection. Article 3 states that "Everyone has the right to life, liberty and security of person." Article 6(1) of the CCPR takes this statement further:¹⁴⁸

"Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."

¹⁴² Fitzpatrick and Anderson (n 50) 39.

¹⁴³ As required in Article VIII(3) of MLC 2006, the Convention will enter into force 12 months after 30 States have ratified MLC with a total share in the world gross tonnage of ships of 33 per cent. The tonnage requirement is already satisfied; however, four more States need to ratify MLC 2006.

¹⁴⁴ Sepúlveda (n 56) 369-374, where 'migrant workers' are classified as part of vulnerable groups subjected to special protection.

¹⁴⁵ Deirdre Fitzpatrick, 'Out of Sight, Not Out of Mind' *BIMCO Bulletin* (Vol.106, 2011) 33.

¹⁴⁶ Liljedahl (n 79) 116-117. See also Article 94 of the UNCLOS, imposing responsibility over flag States, and Chapter 3.2.3 below for an in-depth discussion.

¹⁴⁷ Fitzpatrick and Anderson (n 50) 54.

¹⁴⁸ Article 6 of the CCPR considers the abolition of death penalty; it does not abolish the death penalty, but it recognises that the sentence of death may only be imposed for the most serious offences by a competent Court.

All other regional human rights instruments declare and regulate the right to life with similar wording.¹⁴⁹ Many national jurisdictions include this fundamental human right as part of their constitution.¹⁵⁰ It is noteworthy that the UN Human Rights Committee, as part of the obligation of States, points out the obligation ‘to protect the lives of workers and trades union officials from injury or death inflicted by any individual, whether acting in a public or private capacity.’¹⁵¹ This statement stressed the horizontal effect of this right, which indicates the positive obligation of States. This is directly related to the present violations occurred as part of the Somali piracy. Moreover, this extension links the right to life with a seafarer’s right to have safe and healthy working conditions.

3.2.2.2 Freedom from Torture, Cruel, Inhuman or Degrading Treatment

Prohibition of torture, cruel, inhuman or degrading treatment is stipulated under Article 5 of the UDHR as “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” Similar wording appears in other human rights instruments, both at an international, regional, and national level.¹⁵²

In *Gómez López v. Guatemala*,¹⁵³ the petitioner alleged that his rights to life, humane treatment, fair trial and judicial protection and several other freedoms stipulated under the ACHR are severely violated and the government of Guatemala has denied legal protection. The Commission reaffirmed, *inter alia*, the international obligation and duty of State authorities and government officials “to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights. As a consequence of this obligation, the States must prevent, investigate, and punish any violation of the rights recognized by the Convention.”¹⁵⁴ It is noteworthy that even though the petitioner has not died, Guatemala was found in violation of the right to life of the petitioner, based on the vital threat that might result in his loss of life.

¹⁴⁹ See Article 2(1) of the ECHR, Article 4 of the ACHR, and Article 4 of AC.

¹⁵⁰ But see Human Rights Act 1998 of the United Kingdom. United Kingdom has not codified a single constitutional document, and due to the parliamentary sovereignty, no hierarchy exists between Parliamentary statutes. However, a number of Parliamentary statutes arguably have a constitutional position that, including Human Rights Act 1998 which is considered to have higher status than other statutes by L.J. Laws, in his *obiter*, in *Thoburn v Sunderland City Council* [2003] Q.B. 151 (QB) 186. This doctrine is heavily debated in the United Kingdom.

¹⁵¹ Fitzpatrick and Anderson (n 50) 53.

¹⁵² See Article 7 of the CCPR, Article 3 of the ECHR, Article 5(2) of the ACHR, and Article 5 of the AC. See also Schedule 1, Article 3 of the Human Rights Act 1998 (UK). Article 1 of CAT on the other hand excludes perpetrators other than officials. See Fitzpatrick and Anderson (n 50) 56.

¹⁵³ Case 11.303, Report No. 29/96, Inter-Am.Ch.H.R., OEA/Ser.L/V/II.95 Doc. 7 rev. at 425 (1997).

¹⁵⁴ I/A Court H.R., Velásquez Rodríguez Case, Judgment of July 29, 1988, para. 166, as cited in *Gómez López v. Guatemala*, Case 11.303, Report No. 29/96, Inter-Am.Ch.H.R., OEA/Ser.L/V/II.95 Doc. 7 rev. at 425 (1997), para.104.

States are obliged to protect persons from torture, cruel, inhuman or degrading treatment by taking appropriate measures for protection. Therefore, protection of this right may also be considered a positive obligation of States. In cases of Somali piracy, the attitude of pirates towards seafarers, explained above, is sufficient for the violation of these provisions.

3.2.2.3 Freedom from Forced Labour

International law prohibits forced labour and slavery under Article 4 of UDHR and Article 8 of CCPR, which states that no one shall be held in slavery or servitude; slavery and the slave trade in all their forms shall be prohibited. In addition, Article 8(3) of CCPR prohibits forced or compulsory labour subject to certain exceptions. Similar prohibitions exist at a regional level.¹⁵⁵ These exceptions, nonetheless, are not applicable to the cases where Somali pirates force seafarers to conduct further piracy operations and use them as ‘human shields’. For further discussions, it is important to note that Article 4(2) of the CCPR emphasised on the non-derogable nature of this right.

There are a number of specific human rights instruments prohibiting slavery, such as the Slavery Convention of 1926, as amended in 1953, and the Supplementary Convention on the Abolition of Slavery of 1956. The generally accepted definition of slavery can be found in these conventions.¹⁵⁶

ILO, on the other hand, evoked the right of persons to be free from forced labour.¹⁵⁷ The only internationally recognised definition of ‘forced labour’ is stipulated under ILO instruments. Hence, Article 2(2) of ILO C29 defines forced labour as “all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.”¹⁵⁸ Signatories to C29, for instance, undertake to suppress forced labour in all its forms,¹⁵⁹ and apply the Convention to the places under her jurisdiction.¹⁶⁰ ILO C105 is adopted in 1957, which has updated and modernised the provisions of C29. In C105, Article 1 includes a paragraph specifying the method of mobilising and using labour with an aim of economic development being subjected to suppression by Signatories.¹⁶¹ This particular provision articulates the dangers faced by seafarers under captivity today, where they are used as

¹⁵⁵ Article 4 and 5 of ECHR, Article 6 of ACHR, and Article 5 of AC.

¹⁵⁶ Article 1(1) of the Slavery Convention, 1926, defines slavery as “the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.”

¹⁵⁷ See ILO Convention C029: Forced Labour Convention (14th Conference Session Geneva 28 June 1930) and ILO Convention C105: Abolition of Forced Labour Convention (40th Conference Session Geneva 25 June 1957) in this regard.

¹⁵⁸ Subject to exceptions stated under Article 2 of ILO Convention C029: Forced Labour Convention (14th Conference Session Geneva 28 June 1930).

¹⁵⁹ Article 1 of ILO Convention C029: Forced Labour Convention (14th Conference Session Geneva 28 June 1930).

¹⁶⁰ Article 26(1) of ILO Convention C029: Forced Labour Convention (14th Conference Session Geneva 28 June 1930).

¹⁶¹ Article 1(b) of ILO Convention C105: Abolition of Forced Labour Convention (40th Conference Session Geneva 25 June 1957).

‘human shields’ or forced to aid and abet in further attacks. Article III(b) of MLC 2006 also provides that signatory States shall have the law and regulations in respect of ‘the elimination of all forms of forced or compulsory labour.’

3.2.2.4 Freedom from Discrimination

All forms of discrimination are strictly prohibited under a variety of international and regional conventions. Most importantly, all rights stipulated under Chapter 3.2.2 shall be enjoyed on a non-discriminatory basis. Many international and regional instruments prohibit all forms of discrimination in general,¹⁶² whereas ILO provides for specific non-discriminatory rules relating to equal pay for equal work, and equal standards of employment.¹⁶³

There are specific provisions of certain instruments that are worth mentioning in this context, such as Article 1 of CERD and Articles 2, 3 and 19 of the African Charter. CERD is an instrument specifically adopted to eliminate all forms of discrimination, and Article 1 defines racial discrimination as follows:

any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, or an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

CERD, Articles 2, 5 and 6 impose duties on signatory States, such as the duty to provide effective protection and remedy within its jurisdiction. Article 5(b) of CERD, for instance, guarantees, *inter alia*, the right to security of individuals and protection by the signatory State against violence or bodily harm regardless of the perpetrator, and imposes this obligation on States parties.

Under the African Charter, Article 2 puts an emphasis on the non-discriminatory application of all rights and freedoms stipulated under the Charter, whereas Article 3 provides for equality and equal protection in the legal context. Article 19, on the other hand, provides that all human beings are equal, they shall enjoy equal respect and same rights, and nothing shall justify the domination of a person by another. Thus, the application and enforcement of legal rights of an individual are guaranteed under the Charter. In particular, Article 3(d) of MLC 2006 reads as follows:

Each Member shall satisfy itself that the provisions of its law and regulations respect, in the context of this Convention, the fundamental rights to:
(d) the elimination of discrimination in respect of employment and occupation.

¹⁶² See UN Charter Article 1(3); UDHR Article 2; CCPR Article 3 and 26; CESCR Articles 2 and 3; ECHR Article 14; ACHR Articles 24 and 27; American Declaration of the Rights and Duties of Man Article 2; CERD Articles 1, 2, 5 and 6, for rules relating to racial discrimination; and CEDAW Articles 1 and 2, for non-discriminatory rules against women.

¹⁶³ ILO Convention C100: Equal Remuneration Convention (34th Conference Session Geneva 29 June 1951) provides for equal pay for equal work, whereas ILO Convention C111: Discrimination (Employment and Occupation) Convention (42th Conference Session Geneva 25 June 1958) prohibits discrimination in employment or occupation.

Based on the pro-Islamic bias of some Somali pirates, many seafarers with a Christian background are exposed to more severe threats, and such actions may suffice for direct discrimination.

3.2.2.5 Right to a Legal Remedy and Access to Justice

Many of the international and regional human rights instruments guarantee the right to a legal remedy and access to justice in similar terms. Accordingly, an individual has the right to apply to a Court for redress, the right to be represented by a lawyer at Court, the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal created by law, and the right to access to an effective enforcement system, among other things.¹⁶⁴ If a person cannot access to a Court, or an effective redress due to technicalities, that State will be in violation of such right.¹⁶⁵

Regional conventions focus more on rights of the perpetrator during criminal proceedings. In addition to the rights of the perpetrator, Article 25 of the ACHR recognises the right to judicial protection granted to every person. African Charter, Article 7(1)(a), in particular, reads as follows:

1. Every individual shall have the right to have his cause heard. This comprises:
 - (a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;

This provision does not mention the aspect of ‘fair and public hearing’, but access to justice and judicial protection is specifically recognised. Nevertheless, basic rules relating to this right may be witnessed in every human rights instrument. In this regard, it is debatable whether above-mentioned seafarers’ rights are affected due to the vague position of available enforcement mechanisms.

3.2.2.6 Right to Safe and Healthy Working Conditions

Primarily, the right to safe and healthy working conditions is guaranteed under ILO instruments since this right is peculiar to the labour force.¹⁶⁶

¹⁶⁴ See Article 8 of UDHR, Article 6 of ECHR, Article 8 and 25 of ACHR, Article 7(1)(a) of AC, Article 6 of CERD, Articles 13 and 14 of CAT, Article 37(d) of CRC, and Article 2(3) of CCPR.

¹⁶⁵ Fitzpatrick and Anderson (n 50) 59.

¹⁶⁶ Some of the instruments relating to safety include ILO Convention C147: Merchant Shipping (Minimum Standards) Convention (62nd Conference Session Geneva 29 October 1976), and ILO Recommendation R155: Merchant Shipping (Improvement of Standards) Recommendation (62nd Conference Session Geneva 29 October 1976) for minimum standards; ILO Convention C180: Seafarers’ Hours of Work and the Manning of Ships Convention (84th Conference Session Geneva 22 October 1996) for safe crewing; ILO Convention C133: Accommodation of Crews (Supplementary Provisions) Convention (55th Conference Session Geneva 30 October 1970) for crew accommodation; ILO Convention C68: Food and Catering (Ships’ Crews) Convention (28th Conference Session Geneva 27 June 1946) and ILO Convention C69: Certification of Ships’ Cooks Convention (28th Conference Session Geneva 27 June 1946) for food and catering; ILO Convention C53: Officers’ Competency Certificates Convention (21st Conference Session Geneva 24 October 1936) for training and qualifications; and ILO Convention C134: Prevention of Accidents (Seafarers) Convention (55th Conference Session Geneva 30 October 1970) for accident prevention. See also Fitzpatrick and Anderson (n 50) 67-69.

Article 7 of CESCER and Article 3 of ESC also recognises the right to just, favourable, safety and healthy conditions of work, related to the minimisation of occupational hazards in particular. Moreover, IMO has also adopted a number of instruments regarding safety conditions on board ships.¹⁶⁷

For the purposes of this thesis, a distinction needs to be drawn between ‘safety’ and ‘security’ in order to properly delimit the relevant protection schemes for seafarers. Maritime safety is described as ‘those measures employed by owners, operators, and administrators of vessels, port facilities, offshore installations, and other marine organizations or establishments to prevent or minimize the occurrence of mishaps or incidents at sea that may be caused by substandard ships, unqualified crew, or operator error.’ However, maritime security provides measures to ‘protect against seizure, sabotage, piracy, pilferage, annoyance, or surprise.’¹⁶⁸ Thus, it is highly debatable whether the above-mentioned provisions are applicable on piracy activities since most of these instruments regulate the ‘safety dimension’ of labour force, and not security. Article IV(1) of MLC 2006, for instance, states that “Every seafarer has the right to a safe and secure workplace.” However, Regulation 4.3 on health and safety protection and accident prevention only deals with occupational safety and health. On the other hand, the word ‘secure’ appears regarding the threshold for manning standards, where States are obliged to ensure the safety and security of the ship and its personnel, under all operating conditions.¹⁶⁹ Nevertheless, Article IV(1) seems to refer back to the ISM and ISPS Codes of SOLAS; the former dealing with safety, the latter dealing with security.

3.2.2.7 Right to Health and Medical Care

The right to health and medical care is guaranteed under Article 25 of UDHR, Article 12 of CESCER, Article 24 of CRC, Article 11 of ESC, Article 12 of CEDAW, and Article 10 of the San Salvador Protocol to ACHR. Moreover, ILO has adopted more specific treaty instruments in this regard.¹⁷⁰ It is worth mentioning that the right to health and medical care

¹⁶⁷ See, e.g., IMO, Resolution A.890(21), ‘Principles of Safe Manning’, 25 November 1999; IMO, Resolution A.955(23), ‘Amendments to the Principles of Safe Manning (Resolution A.890(21))’, 5 December 2003. Furthermore, a joint IMO/ILO ad hoc group established a number of options providing financial security measures in cases of loss of life or personal injury claims, which led to IMO, Resolution A.931(22), ‘Guidelines on Shipowners’ Responsibilities in Respect of Contractual Claims for Personal Injury to or Death of Seafarers’, 29 November 2001. IMO Resolutions, however, remain as soft laws. See also Fitzpatrick and Anderson (n 50) 70.

¹⁶⁸ For a full discussion over the dilemma surrounding the two terms, see Mejia (n 73).

¹⁶⁹ MLC 2006, Regulation 2.7(1) and Standard A2.7(1).

¹⁷⁰ ILO Convention C073: Medical Examination (Seafarers) Convention (28th Conference Session Geneva 29 June 1946), Article 3 of ILO Convention C016: Medical Examination of Young Persons (Sea) Convention (3rd Conference Session Geneva 11 November 1921), ILO Convention C164: Health Protection and Medical Care (Seafarers) Convention (74th Conference Session Geneva 8 October 1987), ILO Convention C130: Medical Care and Sickness Benefits Convention (53rd Conference Session Geneva 25 June 1969), and ILO Convention C055: Shipowners’ Liability (Sick and Injured Seamen) Convention (21st Conference Session Geneva 24 October 1936).

links to safe and healthy working conditions, health care freedom and access to a health care system.¹⁷¹

Under ILO C55, the obligation to cover medical care and maintenance of a seafarer, inflicted during active service, vests in the ship owner.¹⁷² Moreover, Article IV(4) of MLC 2006 recognises every seafarer's right to health protection, medical care, welfare measures and other forms of social protection. This right is extended within the convention under Regulation 4, which is consisted of a comprehensive set of regulations and a protection scheme for these rights.

3.2.2.8 Right to Fair Remuneration

The right to fair remuneration is protected under Article 23 of UDHR, Article 7(a) of CESCR, and Article 4 of ESC, but the key instruments in this regard are adopted under the auspices of ILO.¹⁷³ Regulation 2.2 of MLC, 2006, also regulates the standards of wages and provides further guidelines to ensure that seafarers are remunerated for their services on board.

Since non-payment of or deductions from wages under captivity often occurs in relation to the affected rights in cases of piracy, this issue will be examined in the light of current legal framework. *Inter alia*, C55 imposes an obligation on ship owners to pay full remuneration when a seafarer remains on board a vessel.¹⁷⁴ Latest initiatives at the national level are moving forward towards a proper wages scheme for seafarers to receive extra remuneration during their captivity. Philippine Overseas Employment Administration have passed a resolution in 2008, declaring Gulf of Aden as the 'high risk zone', stated that seafarers shall receive double the amount of their basic wage, overtime pay and leave pay both while transiting through

¹⁷¹ Fitzpatrick and Anderson (n 50) 74.

¹⁷² Article 4 of ILO Convention C055: Shipowners' Liability (Sick and Injured Seamen) Convention (21st Conference Session Geneva 24 October 1936) reads: "The shipowner shall be liable to defray the expense of medical care and maintenance until the sick or injured person has been cured, or until the sickness or incapacity has been declared of a permanent character."

¹⁷³ See ILO Convention C057: Hours of Work and Manning (Sea) Convention (21st Conference Session Geneva 24 October 1936); ILO Convention C076: Wages, Hours of Work and Manning (Sea) Convention (28th Conference Session Geneva 29 June 1946); ILO Convention C093: Wages, Hours of Work and Manning (Sea) Convention (Revised) (32nd Conference Session Geneva 18 June 1949); ILO Convention C109: Wages, Hours of Work and Manning (Sea) Convention (Revised) (41st Conference Session Geneva 14 May 1958); ILO Convention C180: Seafarers' Hours of Work and the Manning of Ships Convention (84th Conference Session Geneva 22 October 1996); ILO Convention C095: Protection of Wages Convention (32nd Conference Session Geneva 1 July 1949); ILO Recommendation R109: Wages, Hours of Work and Manning (Sea) Recommendation (41st Conference Session Geneva 14 May 1958); and ILO Recommendation R187: Seafarers' Wages, Hours of Work and the Manning of Ships Recommendation (84th Conference Session Geneva 22 October 1996). Apart from JMC's periodical threshold for minimum basic wages, ITF&ISF's Joint Working Group sets total monthly wage package on a regular basis. 'Wages' is not defined under international human rights law, but ESC's Committee adopted a decency threshold in this regard. The estimated minimum basic wage does not include overtime, bonuses, allowances, paid leave or any other additional remuneration. Furthermore, ILO C095 and C109, cited above, stretch the remedy arising out of maritime liens to the protection of seafarers' wages.

¹⁷⁴ Article 5(1)(a) of ILO Convention C055: Shipowners' Liability (Sick and Injured Seamen) Convention (21st Conference Session Geneva 24 October 1936).

Gulf of Aden and under captivity.¹⁷⁵ However, there seems to be no counterpart at the international level.

3.2.2.9 Right to Free Employment Services and Continuity of Employment

ILO has adopted a number of treaty instruments for the protection of the right to free employment services and continuity of employment.¹⁷⁶ Article 2 of ILO C9, revised by ILO C179, emphasizes the non-chargeable nature of employment searching. ILO C145, on the other hand, focuses on the obligation of States to develop its policies to encourage providing continuous or regular employment for qualified seafarers. Moreover, Regulation 1.4 of MLC, 2006, sets out similar rules prohibiting seafarer recruitment or placement services from charging fees.¹⁷⁷

In this context, it is important to examine whether the existent rules are applicable when a seafarer chooses not to work onboard a ship transiting through pirated waters, and whether he has the option to suspend his employment, and get re-employed. In the light of the above-mentioned provisions, it appears that there is no specific rule relating to such conditions at an international level.

3.2.2.10 Right to Social Security and Welfare

The right to social security and welfare is guaranteed under both general human rights conventions and ILO conventions. Article 25(1) of UDHR declares the right to a standard of living adequate for the health and well-being of himself and of his family, including ‘necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his

¹⁷⁵ POEA, Board Resolution No.4/2008, 7 October 2008, para.3 reads: “That the seafarer, while sailing within the declared high-risk zone, shall receive double the amount of his basic wage, overtime pay, and leave pay. On any death, injury or illness while sailing within the high risk zone, the seafarer shall also be entitled to a double amount of compensation and benefits. The higher pay and higher death and disability compensation and benefits provided herein shall be limited to the duration of vessel’s transit through the “high risk zone” and in case of detention of the seafarer, the duration thereof. The Master must immediately notify his Shipowner/Manning Agent and the crew on board the date and time of his vessel’s entry and exit from the coverage of the “high risk” zone as defined herein.” This resolution binds employers who are contracted with Filipino employees under the Administration.

¹⁷⁶ See Article 2 of ILO Convention C009: Placing of Seamen Convention (2nd Conference Session Geneva 10 July 1920); ILO Convention C179: Recruitment and Placement of Seafarers Convention (84th Conference Session Geneva 22 October 1996); and ILO Convention C145: Continuity of Employment (Seafarers) Convention (62nd Conference Session Geneva 28 October 1976).

¹⁷⁷ Standard A1.4(5)(b) of MLC 2006, in particular, reads: “A Member adopting a system [...] shall, in its laws and regulations or other measures, at a minimum require that no fees or other charges for seafarer recruitment or placement or for providing employment to seafarers are borne directly or indirectly, in whole or in part, by the seafarer, other than the cost of the seafarer obtaining a national statutory medical certificate, the national seafarer’s book and a passport or other similar personal travel documents, not including, however, the cost of visas, which shall be borne by the shipowner.”

control.’ Article 9 of CESCR affirms the right of persons to social security, including social insurance.¹⁷⁸

At the regional level, Article 12(1) puts an obligation on Member States to establish or maintain a system of social security.¹⁷⁹ Neither ECHR nor the African Charter has adopted a specific provision related to the right to social security and welfare.

ILO, on the other hand, has adopted a number of conventions and recommendations regarding this particular right.¹⁸⁰ ILO’s latest production, MLC 2006, also includes a number of regulations. Article IV on seafarers’ employment and social rights, to begin with, stated that “Every seafarer has a right to health protection, medical care, welfare measures and other forms of social protection.” This right is extended within the convention under Regulation 4.5, aiming to ensure that ‘measures are taken with a view to providing seafarers with access to social security protection.’ The extent of this protection is emerged under Standard A4.5(1) as “medical care, sickness benefit, unemployment benefit, old-age benefit, employment injury benefit, family benefit, maternity benefit, invalidity benefit and survivors’ benefit, complementing the protection provided for under Regulations 4.1, on medical care, and 4.2, on ship owners’ liability, and under other titles of this Convention.”

The obligation to establish a comprehensive social security system is imposed on all Member States in favour of ‘all seafarers ordinarily resident in its territory.’¹⁸¹ It is clear from the wording that this right mainly refers to a positive obligation to be fulfilled by the crew supplying countries. Hence, it is important for the major crew-supplying countries to ratify this Convention and implement its provisions in order to improve the minimum standards for seafarers.

3.2.2.11 Right to Repatriation

The right to repatriation of a seafarer is guaranteed under a number of ILO conventions.¹⁸² In this regard, the duty of repatriation vests initially on the

¹⁷⁸ Article 5(e)(iv) of CERD and Articles 11(1)(e), 11(2)(b) and 13(a) of CEDAW provide for similar rules.

¹⁷⁹ Article 12 and 13 of the European Social Charter regulates this right in detail. Article 16 of the American Declaration of Human Rights briefly defines the right to social security.

¹⁸⁰ ILO Convention C070: Social Security (Seafarers) Convention (28th Conference Session Geneva 28 June 1946); ILO Convention C165: Social Security (Seafarers) Convention (Revised) (74th Conference Session Geneva 9 October 1987); ILO Convention C163: Seafarers’ Welfare Convention (74th Conference Session Geneva 8 October 1987); ILO Convention C056: Sickness Insurance (Sea) Convention (21st Conference Session Geneva 24 October 1936); ILO Convention C071: Seafarers’ Pensions Convention (28th Conference Session Geneva 28 July 1946); ILO Convention C008: Unemployment Indemnity (Shipwreck) Convention (2nd Conference Session Geneva 9 July 1920); and ILO Recommendation R010: Unemployment Insurance (Seamen) Recommendation (2nd Conference Session Geneva 9 July 1920).

¹⁸¹ Standard A4.5(3) of MLC 2006.

¹⁸² See ILO Convention C23: Repatriation of Seamen Convention (9th Conference Session Geneva 23 July 1926); ILO Convention C166: Repatriation of Seafarers Convention (Revised) (74th Conference Session Geneva 9 October 1987); Articles 5, 28 and 36 of Vienna Convention on Consular Relations and Optional Protocol 1963, concerning with duties of Port States; IMO/ILO Resolution A.930(22), ‘Guidelines on Provision of

ship owner.¹⁸³ If the ship owner cannot be reached, flag State has the responsibility to repatriate a seafarer.¹⁸⁴ If these duties cannot be enforced, port State or the crew supplying country has concurrent liabilities for repatriation.¹⁸⁵

MLC 2006, also regulates the minimum standards relating to the repatriation of seafarers. Regulation 2.5(1) states that “Seafarers have a right to be repatriated at no cost to themselves in the circumstances and under the conditions specified in the Code. Such circumstances are prescribed in Standard A2.5, which provides for the similar rules stipulated under ILO C166. The only exception to the ‘no-cost borne by the seafarer’ is provided under Standard A2.5(3), which reads “[...] except where the seafarer has been found, in accordance with national laws or regulations or other measures or applicable collective bargaining agreements, to be in serious default of the seafarer’s employment obligations.” The wording of this provision necessitates for proper national implementation, since each municipal law may have different rules regarding the required burden of proof.

3.2.3 Issues of Liability and Jurisdiction

Assessment of the notion of liability and jurisdiction is essential in terms of application and enforcement of the legal framework reviewed above. Liability is considered a qualitative phenomenon, based on a person’s wrongful conduct leading to an infringement of the law. In legal terms, liability and responsibility needs to be distinguished. Whilst two terms are used interchangeably in some jurisdictions; liability arises only when there is a breach of responsibility of which has legal consequences.¹⁸⁶

Depending on the severity and type of the wrongful conduct, there are different types of liability arising out in distinct fields of law. Liability may arise both in public and private legal domains. For instance, contractual liabilities and tortious liabilities have different foundations, where the former requires an agreement, and the latter concerns with duties. The claimant has different legal standpoints to build up a case under distinct fields of law.

Furthermore, a particular State must have the capacity to legislate instruments applicable on a vessel and people on board that vessel, and through its Courts or tribunals, the State must have the power to exercise its enforcement powers and resolve the dispute. This is known as jurisdiction, which has a two-fold nature.¹⁸⁷ ‘Legislative jurisdiction’ is the power to

Financial Security in Case of Abandonment of Seafarers’, 29 November 2001; and Regulation 2.5 of MLC 2006.

¹⁸³ ILO Convention C166: Repatriation of Seafarers Convention (Revised) (74th Conference Session Geneva 9 October 1987), Articles 4.4 and 4.5.

¹⁸⁴ *Ibid.*, Article 5.

¹⁸⁵ *Ibid.*, Article 5.

¹⁸⁶ Proshanto Mukherjee, ‘Liability Issues Pertaining to Maritime Safety’ (International Conference on Marine and Maritime Affairs, Plymouth, 2011) 5.

¹⁸⁷ Shaw mentions the concept of ‘executive jurisdiction’ in this context, which relates to the capacity to State action within the territory of another. This form of jurisdiction is

enact laws that is vested in the legislative body of a particular State. Legislative jurisdiction arise in three different ways; *ratione loci*, *ratione personae*, and *ratione materiae*.¹⁸⁸ On the other hand, ‘enforcement jurisdiction’ takes place co-existent with or independent from legislation jurisdiction, which relates to the power of Courts and tribunals to enforce those laws prescribed by the legislative body.¹⁸⁹

In the light of the above, it is significant to discuss whether States or private individuals, such as ship owners or managing companies, have the duty or obligation arising out of the current legal framework to respond to the incidents affecting seafarers negatively. Considering the fact that enforcement of seafarers’ rights stipulated under international or regional conventions mostly takes place at a national level,¹⁹⁰ it is significant, to discuss which States have the obligation and jurisdiction to enforce the relevant rules. Regarding vessels, there are three main groups of States, generally accepted under the international maritime law; flag States, coastal States, and port States.¹⁹¹ In the context of this thesis, the jurisdiction exercised by the major crew supplying countries will also be examined, along with the private law remedies available to seafarers.

3.2.3.1 Jurisdiction and Responsibility of States

In international law, there are certain responsibilities imposed on States mainly arising out of treaty instruments of which they are signatories. States may have a variety of liabilities and jurisdiction depending on the nationality or location of the vessel, nationality of the ship owner or the managing company, nationality of the seafarer, and even the subject matter involved.¹⁹²

Every ship has a nationality. Due to the common perception of ships being an extension to a State’s land territory, the ship is theoretically subjected to the quasi-territorial jurisdiction of the State whose nationality that ship belongs to, under customary international law. Hence, people on board a ship are to be protected exclusively under municipal laws of flag States, irrespective of the location of that ship. However, in other States’ ports and maritime zones, legislative jurisdiction of coastal and port States may concurrently apply on board a ship.¹⁹³

generally not allowed subject to limited exceptions under international law. See Malcolm N. Shaw, *International Law* (6th edn, Cambridge University Press, 2008) 650-651.

¹⁸⁸ By reason of the place, person, and subject matter.

¹⁸⁹ Fitzpatrick and Anderson (n 50) 132. Jurisdiction of a State on civil and criminal matters differs upon a number of grounds. Moreover, grounds for State jurisdiction arising out of public and private international law are not identical. For more information, see Shaw (n 187) 645-696.

¹⁹⁰ Fitzpatrick and Anderson (n 50) 132.

¹⁹¹ See e.g., IMO, MSC.1/Circ.1408, ‘Interim Recommendations for Port and Coastal States Regarding the Use of Privately Contracted Armed Security Personnel On Board Ships in the High Risk Area’, 16 September 2011, where consideration was given to both flag, port and coastal States.

¹⁹² In this context, State Responsibility for the suppression of piracy needs to be distinguished from State Responsibility to protect seafarers’ rights employed on board ships flying its flag.

¹⁹³ Fitzpatrick and Anderson (n 50) 135.

Furthermore, flag States have exclusive enforcement jurisdiction over ships flying its flag, and people on board these ships, when the ship is located in its ports and maritime zones, or on the high seas. It is either the coastal State or port State's jurisdiction to enforce its laws when a foreign ship is located within its territorial waters or ports.¹⁹⁴

UNCLOS is the primary instrument to govern the duties and responsibilities of States in the maritime context. Jurisdictional powers of port and coastal States are governed under provisions related to maritime zones.¹⁹⁵ Nevertheless, it is clear that the jurisdiction and control over vessels sailing on the high seas primarily lies in the flag State.¹⁹⁶ Article 94(1) of UNCLOS explicitly imposes an obligation for States to exercise jurisdiction and control in administrative, technical and social matters over ships flying its flag.¹⁹⁷ The relevant part in this context is the duty to exercise jurisdiction and control in social matters, which relates to the affairs of seafarers and shipboard issues.

Inter alia, UNCLOS imposes other obligations on flag States, such as to assume jurisdiction under its internal law over vessels flying their flags and their masters, officers and crew members in respect of administrative, technical and social matters concerning the ship,¹⁹⁸ and to take safety measures to the manning of ships, labour conditions and the training of crews, taking into account the applicable international instruments.¹⁹⁹ Under Article 94(5), States are required to conform to generally accepted international regulations, procedures and practices when taking the measures mentioned above. This provision arguably imposes a legal obligation on States, and thus, it is not subject to discretion of States.²⁰⁰

UNCLOS does not mention applicable security measures against criminal activities or protection of seafarers' rights at sea among the

¹⁹⁴ *Ibid.*, 135-136.

¹⁹⁵ In relation to territorial sea and contiguous zone of coastal States, see Articles 2, 21, 27, 28 and 33 of UNCLOS. Relating to the exclusive economic zone of coastal States, see Articles 56 and 73.

¹⁹⁶ Article 92(1) of UNCLOS reads, "Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas. [...]"

¹⁹⁷ As the title of this provision implies, flag States are those States whose flag a vessel is entitled to fly. This entitlement determines which nationality the vessel belongs to, and is provided through the State registry. See Article 91 of UNCLOS, in this regard, which requires a genuine link to exist between the State and the vessel. For a discussion of what suffices for the 'genuine link' to exist, see *The M/V 'Saiga' (No 2) (Saint Vincent and the Grenadines v Guinea)* (Judgment of 1 July 1999) ITLOS Reports 1999. Following the increase of States with open registry, which does not require any link between the State and the ship; numerous debates and criticisms take place at an international level. For instance, ITF has commenced with a political and industrial campaign called 'Flags of Convenience Campaign', defining FOCs as 'where beneficial ownership and control of a vessel is found to lie elsewhere than in the country of the flag the vessel is flying, the vessel is considered as sailing under a flag of convenience.' See ITF, 'Flags of Convenience Campaign' <<http://www.itfglobal.org/flags-convenience/index.cfm>> accessed 26 March 2012.

¹⁹⁸ Article 94(2)(b) of UNCLOS.

¹⁹⁹ Article 94(3)(b) of UNCLOS.

²⁰⁰ Fitzpatrick and Anderson (n 50) 136.

jurisdiction and responsibility of flag States.²⁰¹ These issues seem to overlap with fields of international criminal law and international human rights law, and thus, they are not governed under the UNCLOS regime. However, customary international law arguably includes a number of rules relating to the protection of seafarers' rights, including the criminalisation and suppression of piracy.²⁰²

Different human rights conventions, ILO, and IMO instruments have distinct rules relating to the liability and jurisdiction of States. For instance, Article 2(1) of CCPR imposes an obligation on Member States to undertake 'to respect and ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant.' Moreover, each Member State undertakes to "take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant" under Article 2(2). Thus, Member States are required not only to 'respect and ensure', but also to take positive action to 'adopt' necessary laws and regulations in this context. Similarly, Article V of MLC 2006 imposes a positive obligation on States to "implement and enforce laws or regulations or other measures that it has adopted to fulfil its commitments under this Convention with respect to ships and seafarers under its jurisdiction." In contrast with general human rights instruments, MLC seems to extend its jurisdictional application by expressly providing for flag State jurisdiction.²⁰³ In order to examine the liability and jurisdiction of States, proper interpretation of each treaty is necessary.²⁰⁴

Depending on the location of the vessel and subject matter involved, coastal and port States have concurrent jurisdiction and responsibility on board vessels. Moreover, in some cases, States of nationality of the ship owner or managing company, and even the crew-supplying country may have certain responsibilities in regards to the protection of seafarers' employed on board vessels.²⁰⁵ However, flag States seem to have exclusive or concurrent jurisdiction and liability in many, if not most, cases, to protect seafarers' rights employed on board ships flying their flags.

In theory, every State has both legislative and enforcement jurisdiction on the high seas or in *terra nullius* if a criminal act is so severe that it is considered as part of *jus cogens*, which is known as universal

²⁰¹ However, in general, Article 100 of UNCLOS reads, "All States shall cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State." This duty is not only limited to high seas or *terra nullius*, but also the extent of co-operation is not specified.

²⁰² Fitzpatrick and Anderson (n 50) 136-137.

²⁰³ In this regard, it can be argued that the quasi-territorial principle, which is peculiar to maritime law, is expressly adopted under MLC.

²⁰⁴ See Fitzpatrick and Anderson (n 50) 137-148 for a discussion regarding the flag State jurisdiction in human rights conventions as well as IMO and ILO standards.

²⁰⁵ *The M/V 'Saiga' (No 2) (Saint Vincent and the Grenadines v Guinea)* (Judgment of 1 July 1999) ITLOS Reports 1999, para. 106 link the ship and every person involved or interested in its operations and things on board to the flag State. Moreover, crew-supplying States are not obliged to protect human rights of its national seafarers working on board foreign vessels, stipulated under international human rights treaties and ILO Conventions. See Fitzpatrick and Anderson (n 50) 164-166.

jurisdiction under customary international law.²⁰⁶ Piratical acts are considered *jus cogens* under customary international law. Thus, while this doctrine seems more relevant to the suppression of piracy and not the protection of seafarers' rights, the two matters are undoubtedly linked together.

3.2.3.2 Liability of Individuals or Companies under Private Law

Duties of the ship owner²⁰⁷ mainly derive from municipal laws of States either through the law of contract or in the form of employer's negligence in the law of torts.²⁰⁸ Furthermore, minimum standards for a variety of duties are regulated at the international level. Different approaches are available under civil law and common law jurisdictions, where the former generally adopts written legislation, and the latter relies on case law as well as the Parliamentary statutes in force.

When a seafarer agrees to work on board a ship, an employment agreement should be signed between the seafarer and his employer, who is usually the ship owner. Both parties undertake certain contractual duties under this contract. These duties may be imposed under this particular contract or by the general principles of the law of contracts in general. States may have a different approach in their contract law. However, a legally binding contract has various fragments, which are widely recognised in almost every municipal law. These include requirements of offer and acceptance, existence of consideration, intention to create legal relations, legal capacity to enter into a contract, and some other principles and formalities, which are specific to each jurisdiction and type of contract.²⁰⁹

Law of torts is the body of law governing civil wrongs of individuals, which includes the liability arising out of the negligent conduct of employers towards their employees. This is known as the employer's negligence, which falls under the scope of the law of negligence.²¹⁰ Under

²⁰⁶ Sepúlveda (n 56).

²⁰⁷ 'Ship owner' is defined in Article II(1)(j) of MLC, 2006 as "the owner of the ship or another organization or person, such as the manager, agent or bareboat charterer, who has assumed the responsibility for the operation of the ship from the owner and who, on assuming such responsibility, has agreed to take over the duties and responsibilities imposed on ship owners in accordance with this Convention, regardless of whether any other organization or persons fulfil certain of the duties and responsibilities on behalf of the ship owner."

²⁰⁸ Other relevant fields of law include company law, considering that today, many ships are operated by managing companies; employment law, dealing with the characteristics of the employment relationship, formed at the national level; and insurance law, governing the rules relating to the insurance policies through which seafarers may seek redress.

²⁰⁹ For example, English common law does not require a contract to be written in order to deem it valid, but under the Employment Rights Act 1996, the employer must provide 'a written statement of terms of employment' to the employee. See Elizabeth A. Martin (ed), *A Dictionary of Law* (5th edn, Oxford University Press, 2003) 114. See also Ali D. Haidar, *Global Claims in Construction* (Springer, 2011) 17-49, which examines general principles and doctrines of contract law in detail.

²¹⁰ See, for example, Nicholas Kouladis, *Principles of Law Relating to International Trade* (Springer, 2006) 68-70, which listed the general principles of negligence and reads, "For the claimant to succeed in an action in the tort of negligence he must show that: i) the

this specific type of negligence, employers owe a duty of care to their employees. Ship owners, as employers, may also have tortious liabilities towards the seafarer derived from the law of torts under domestic legal systems. While employers have the duty to provide for the occupational safety of their employees, it is not clear whether this duty expands into the protection of seafarers rights in cases of piracy, and if so, to what extent this protection is required by ship owners.

Both concepts imply fault-based liability to be imposed on ship owners. If the seafarer establishes a satisfactory claim based on employer's negligence or violation of his employment agreement, he may seek redress from a national Court.

Seafarers may face a variety of complex issues under private law regimes, such as identification of the correct defendant, diversity of time bars in each national jurisdiction, enforceability of foreign judgments, diversity of civil procedural rules including the requirements for available pre-trial security, jurisdictional issues, priorities relating to maritime liens, and others.²¹¹ These difficulties raise the significance of adopting minimum standards at the national level, which will be discussed thoroughly in Chapter 4.1.2 below.

3.2.4 Available Enforcement Mechanisms and Remedies

Enforcement of the treaty instruments above are subject to different mechanisms at an international and regional level. While a number of instruments are governed through supervisory mechanisms to determine compliance of States, others give rights to either States or individuals to bring another State to a designated Court or tribunal.²¹²

Moreover, it is significant to examine how these international or regional standards need to be implemented at a national level, due to the simple fact that most international enforcement mechanisms does not give the right to sue at an individual level and hence, these rights are typically enforced at a national level.²¹³

For the purposes of this thesis, piracy-related enforcement mechanisms need to be addressed due to the fact that there are different regimes governing the enforcement of piracy-related legal instruments.

defendant owed him a duty of care, and, ii) the defendant was in breach of that duty, and iii) loss or damage has been caused to the claimant by this breach.”

²¹¹ For a detailed discussion on each of these aspects, see Fitzpatrick and Anderson (n 50) 169-226.

²¹² Varieties of these enforcement mechanisms are listed in Fitzpatrick and Anderson (n 50) 93, Table 3.2, which is consisted of “State v State Adjudication or Complaint, Individual v State Adjudication, Individual v State Complaint, International Supervision Mechanism Reports, International Supervision Mechanism Complaints, State v Ship/Owner or other private party, Individual v State National Courts, Individual v Ship/Owner or other private party National Courts.”

²¹³ Fitzpatrick and Anderson (n 50) 83.

3.2.4.1 International Mechanisms

At an international level, there are numerous international supervisory and enforcement mechanisms available for human rights treaties. Both treaty- and Charter-based mechanisms of UN, along with its principal juridical organ, known as the International Court of Justice,²¹⁴ and mechanisms of its specialised agencies, such as ILO and IMO regimes, involve different procedures.²¹⁵ With regard to the criminal and maritime nature of piracy incidents, distinct enforcement regimes of UNCLOS and other piracy-related maritime and criminal treaties along with the specialised world courts, such as the International Criminal Court will be briefly examined.

Under Article 13 of the UN Charter, the General Assembly of UN has empowered to provide human rights studies and recommendations.²¹⁶ The Commission of Human Rights, which is now replaced by the Human Rights Council, is a subsidiary body of UN General Assembly. It produces periodical human rights reviews at an international level. Meanwhile, the Sub-Commission on the Promotion and Protection of Human Rights is established under the same resolution,²¹⁷ which has been producing annual reports on 'all states that had proclaimed, extended or ended a state of emergency.'²¹⁸ Under the auspices of the UN human rights treaties, nine 'treaty bodies' are established.²¹⁹ Among those, the ones established under CCPR, CESCR, CAT, CERD, and CEDAW would be briefly examined.

Under Part IV of CCPR, the Human Rights Committee was established. It receives reports from States every five years among other things. It may receive inter-state complaints subject to a State's discretion informed by a declaration. Following the amendment made under Protocol 1 to CCPR, the Committee may now receive individual complaints provided that, *inter alia*, the applicant has exhausted all domestic remedies. The Committee is not a binding decision-making body, nor has it an enforcement mechanism to apply sanctions.²²⁰

Under CESCR, States are obliged to send periodical reports to the Economic and Social Council within five-year intervals. Moreover, the Committee on Economic, Social and Cultural Rights have been established, which is not empowered to hear individual applications nor has it a procedure for inter-state complaints.²²¹

The Committee on the Elimination of Racial Discrimination has been established under CERD. States are obliged to submit reports to this

²¹⁴ Under Article 92 of the UN Charter, ICJ (formerly known as PCIJ) is the principal judicial organ of the United Nations.

²¹⁵ See Supplement D for a simplified table of compliance and enforcement mechanisms.

²¹⁶ Three UNGA Committees relating to human rights are Social, Humanitarian and Council Committee, Legal Committee, and Political and Security Committees.

²¹⁷ UN General Assembly, *Human Rights Council: resolution / adopted by the General Assembly*, 3 April 2006, A/RES/60/251.

²¹⁸ Shaw (n 187) 303-308.

²¹⁹ Among these 'UN Treaty Bodies', all of them have reporting procedures, seven of them may receive individual complaints, five of them may receive inter-state complaints, and three of them may inquire into allegations of violations. See, in general, Shaw (n 187) 302-337; Fitzpatrick and Anderson (n 50) 92-99; and Sepúlveda (n 56) 53-66 and 77-115.

²²⁰ Shaw (n 187) 314-322.

²²¹ *Ibid.*, 308-311.

Committee within two-year intervals. Inter-state complaints are allowed under Article 11, whereas under Article 14, the Committee may hear individual complaints subject to the discretion of States.²²²

CAT and CEDAW have established similar Committees under which the individual complaints are allowed subject to exceptions. Article 22 of CAT requires State declaration to allow the required competency for its Committee to hear individual applications, and under an Optional Protocol to CEDAW, adopted in 1999, its Committee may hear individual applications provided that all domestic remedies are exhausted.

Under the ILO regime, States are obliged to submit periodical reports, which are then examined under two distinct committees.²²³ Moreover, ILO has three complaint procedures available; the representation procedure under Articles 24 and 25 of the ILO Constitution, complaint procedure under Article 26 of the ILO Constitution and special procedures stipulated in two ILO Conventions.²²⁴ Neither the representation nor the complaint procedures are judicial, and their decisions are not binding. Moreover, individual complaints of seafarers are not admissible within these procedures, unless a complaint has been filed via their union representatives.

On the other hand, IMO imposes certain obligations on States in order to fulfil its standards; however, there are no direct rights or remedies for seafarers under the IMO enforcement regime.²²⁵ SUA and SOLAS, in this context, include distinct regimes for application and enforcement of rules. SUA identifies crime and obligates States to either prosecute or extradite the perpetrators.²²⁶ Thus, it does not have a particular enforcement regime. SOLAS, on the other hand, is enforced through statutory surveys leading to certificates, which are inspected through the Port State Control mechanism.²²⁷

Nevertheless, UN has a principal juridical organ, as mentioned before, which is known as the International Court of Justice. ICJ deals with dispute settlement between States and provides advisory opinions for UN organs and agencies including IMO and ILO. ICJ may hear cases only when both States are agreed upon seeking for assistance of ICJ for the settlement of their dispute. Other international juridical organs include the International Criminal Court and ITLOS; however, the effect of these Courts on seafarers' rights is highly debatable.

International Criminal Court (ICC) has a very limited jurisdiction. It is empowered to hear only the 'most serious crimes of concern to the

²²² *Ibid.*, 311-314.

²²³ Article 22 of the ILO Constitution.

²²⁴ ILO Convention C087: Freedom of Association and Protection of the Right to Organise Convention (31st Conference Session Geneva 9 July 1948) and ILO Convention C098: Right to Organise and Collective Bargaining Convention (32nd Conference Session Geneva 1 July 1949).

²²⁵ Fitzpatrick and Anderson (n 50) 106-108.

²²⁶ See, e.g., Supplement B for the full text of Articles 3, 3bis, 3ter, and 3quater, defining maritime offences. See also Articles 5, 5bis, 6 and 7 for obligations imposed on Member States.

²²⁷ See, e.g., Chapters XI-1 and XI-2 of SOLAS for special measures to enhance maritime security.

international community'.²²⁸ Although the draft Statute of ICC included a list of treaty provisions, which would constitute a serious crime and thus, give competency to ICC, they were removed from the original treaty. This list included SUA provisions. Shaw has listed the international crimes the ICC has competency to hear related cases, but piracy is not included in the list.²²⁹ ITLOS, on the other hand, is a tribunal designed to settle disputes between States that are party to the UNCLOS and to interpret relevant provisions of UNCLOS.²³⁰ Therefore, ITLOS rarely has a direct impact on seafarers.

To sum it up, there is a proliferation of application and enforcement mechanisms at an international level. Main advantages and disadvantages of each mechanism and this diversity as a whole will be discussed under Chapter 4.4 below.

3.2.4.2 Regional Mechanisms

Apart from the international mechanisms for enforcement, almost every region has its own human rights enforcement mechanism established under the auspices of the relevant treaty instruments. Moreover, regional efforts to suppress piracy are relevant in the context of piracy-related human rights violations.

While all three regional systems for the protection of human rights provide for enforcement mechanisms, only the Council of Europe system provides for individual application with direct judicial remedy through the European Court of Human Rights. ECHR accepts both inter-state and individual complaints under Articles 33 and 34 of the Convention. For individual application, the petitioner needs to apply to the Court within six months after he has exhausted all domestic remedies. Moreover, its application and enforcement is restricted to the States Parties only. ECHR has territorial jurisdiction when a human rights violation occur on board ships transiting through European waters. Since Somalia is neither a European State, nor do such violations take place within Europe, this issue limits ECHR's application for seafarers' rights in cases of Somali piracy. Similarly, ECJ does not have any relevance here due to the same restrictions.²³¹

As it was described earlier, there are two principal human rights treaties at the European level. While ESC, 1961, initially provided only for a reporting procedure in order to monitor compliance of States, its revised version, adopted in 1996, added a collective complaints procedure available

²²⁸ Article 5(1) of the Rome Statute of the International Criminal Court, 1998. These crimes are limited to the crime of genocide, crimes against humanity, war crimes, and the crimes of aggression. It is highly debatable whether piracy is among any of these categories. See Widd (n 12) 230-245, and Chicca (n 83) in this respect.

²²⁹ Shaw (n 187) 430-440.

²³⁰ Annex VI of the UNCLOS. On its effectiveness for seafarers' rights, see Fitzpatrick and Anderson (n 50) 121-123.

²³¹ ECJ has been established under the European Union regime. It is not available for individual applications.

for NGOs. However, there is no individual complaint procedure provided under the ESC regime.²³²

Within the inter-American system, there is a Commission and a Court for the application and enforcement of human rights stipulated under ACHR.²³³ The Inter-American Commission on Human Rights is established in 1959, allowing complaints by individuals, NGOs that are officially recognised by States, and States themselves.²³⁴ There are a number of admissibility requirements, including a six-month limitation period after domestic exhaustion of national remedies.²³⁵ The Commission renders its decisions through reports, which are not binding. On the other hand, the Inter-American Court of Human Rights allows application by States and referrals from the Commission subject to the discretion of States regarding its competency, and deals mainly with the interpretation and application of the provisions stipulated under the ACHR.²³⁶ Moreover, the Court, unlike the Commission, may render judgments ordering for compensation, and its decisions are binding on the relevant State.

The African human rights system provides for a Commission only, which is established under the auspices of the Organization of African Unity.²³⁷ The African Commission on Human and Peoples' Rights allows individual, officially recognised NGOs and State complaints. It has a fact-finding procedure, and it can make referrals to governments. There are indeed a number of restrictions for an admissible complaint before the Commission.²³⁸

²³² See Fitzpatrick and Anderson (n 50) 109-113 and Sepúlveda (n 56) 125-143 for more information on the human rights enforcement mechanisms at European level.

²³³ See Fitzpatrick and Anderson (n 50) 113-116 and Sepúlveda (n 56) 145-157 on the inter-American human rights system.

²³⁴ The Commission is, in fact, an autonomous body established under the Charter of the Organization of American States (OAS). See Chapter XV of the OAS Charter and Chapter VII of the ACHR.

²³⁵ Article 46 of the ACHR.

²³⁶ The Court is established under Articles 52-60 of the ACHR.

²³⁷ Article 30 of the AC. See also Sepúlveda (n 56) 159-170 on the African human rights system.

²³⁸ These restrictions include exhaustion of domestic remedies, application within a reasonable time, and few others under Article 56 of the AC.

3.2.4.3 State Implementation and National Courts

While exploring the relevant national laws in depth is outside the scope of this thesis, it is significant to examine the methods and processes through which international and regional laws, discussed above, are implemented into national jurisdictions. The process of implementation can be complex due to the variety of available methods and distinct approaches at the national level regarding how the international or regional laws apply in national court systems. In other words, this chapter will discuss the State implementation of international and regional standards, as well as the enforceability of a particular standard in domestic courts.

Considering that, many of the applicable standards discussed above were derived from treaty instruments; Vienna Convention on the Law of Treaties, adopted in 1969, is the main instrument for the national implementation methodologies.²³⁹ If a State has expressed its consent to be bound by a treaty, that treaty will be legally binding on that State provided that it has already entered into force.²⁴⁰ Article 11 of the Convention states that expressing consent may be by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed.²⁴¹ These stages may occur simultaneously. When a State already expressed its consent to be bound by a treaty according to this Convention, Article 18 affirms the obligation of not to defeat the object and purpose of a treaty before its entry into force. Article 26, on the other hand, affirms the doctrine of good faith regarding the binding nature of treaties and State application. Other relevant issues regulated under this Convention include formulation and other legal rules relating to reservations, rules of interpretation, rules regarding non-member States, amendment and modification of treaties, and rules regarding termination or suspension of treaties.

Once a State expresses its consent to be bound by a treaty, “it undertakes both negative obligations, namely to refrain from actions that violate the terms of the treaty, and positive obligations, namely to take affirmative action to guarantee that the rights are protected.”²⁴² Rules of implementation differ depending on whether the State has a monist or dualist system. As part of the monistic approach, a treaty instrument automatically becomes part of the municipal law following its ratification or accession. Further legislative action is not required. However, constitutional law may require adoption of an enabling legislation approving such ratification. Whether or not the monist States requires official publication or an enabling legislation depends on the constitutional law of each State.²⁴³

²³⁹ Vienna Convention on the Law of Treaties, adopted on 23 May 1969, entered into force on 27 January 1980.

²⁴⁰ *Ibid.*, Article 24(1) reads: “A treaty enters into force in such manner and upon such date as it may provide or as the negotiating States may agree.” Thus, the requirements for entry into force depend how States have agreed when adopting each treaty instrument.

²⁴¹ See, e.g., Article 12 (by signature), Article 13 (by an exchange of instruments constituting a treaty), Article 14 (by ratification, acceptance or approval) and Article 15 (by a treaty expressed by accession) for the detailed rules.

²⁴² Fitzpatrick and Anderson (n 50) 89.

²⁴³ See the examples provided in Mukherjee (n 22) 126-128.

Another complexity in this regard is the applicability and enforceability of treaties that are not self-executing. Whether a State has monist or dualist method of implementation is indifferent; treaties that are not self-executing need to be given effect through further legislative action even by the monist States. However, it is rather complex to determine whether a particular treaty is self-executing or requires further action.²⁴⁴ This may result in complex arguments during a trial due to the enforceability of a particular international standard in domestic courts. The fate of such cases may entirely rely on judicial interpretation. In order to overcome this complexity, the national legislative bodies need to ensure further clarification when implementing an international standard into the municipal law.

On the contrary, dualistic systems require for further legislative action irrespective of the above issues. States need to incorporate the treaty instrument into its domestic law by a separate legislation.²⁴⁵ For instance, United Kingdom has adopted the Human Rights Act 1998 in order to give effect to the rights and freedoms stipulated under the European Convention on Human Rights.²⁴⁶ Similarly, United Kingdom's Carriage of Goods by Sea Act 1979 is adopted by the Parliament in order to implement the Hague-Visby Rules.²⁴⁷ It is arguable whether this method causes further inconsistencies in practice; however, this discussion is outside the scope of this thesis.

²⁴⁴ Mukherjee states that such determination is a matter for 'judicial interpretation', in Mukherjee (n 22) 128.

²⁴⁵ For more information on the dualistic method, see Mukherjee (n 22) 128-133.

²⁴⁶ See the introduction of the Human Rights Act 1998.

²⁴⁷ Mukherjee (n 22) 130.

4 Critical Legal Analysis

4.1 Liability Issues

4.1.1 State Responsibility

States are the foundation of international law, and each State has its own territorial sovereignty and integrity under international law. Among other things, this sovereign power, also known as ‘domestic jurisdiction’ empowers States with jurisdictional and enforcement powers.²⁴⁸ On the other hand, States are limited in ways of which it exercises such powers. Developed as an exception to State sovereignty, the concept of State responsibility allows international law to interfere with State practice under exceptional circumstances.²⁴⁹

Contrary to the notion of State responsibility under international law, the obligation of States to protect individual human rights of those subject to their jurisdiction is the primary fragment of the issue in hand.²⁵⁰ Although discussions for the State responsibility to protect individuals existed in older times, it is still under development today.²⁵¹ In general, this moral compass greatly contributed to the development of international and regional human rights protection mechanisms with the recognition of the responsibility of States upon its people. Its maritime extension, on the other side of the coin, seems to stretch into persons employed on board ships flying the flag of a State through the extension of territorial sovereignty.²⁵²

Certain duties are attached to a State’s sovereign rights under international law. It seems that the obligation to protect seafarers’ rights under international law mainly falls under the hands of flag States. In the seafarer’s context, it is crucial to discuss to what extent these duties provide a safeguard for seafarers against possible human rights inflictions. Evidently, certain rights of seafarers are being suspended while they are in captivity, which, in theory, should not exist. Having due regard to the characteristics of some of the identified seafarers’ rights, positive obligation might be required from States in order to reverse this suspension and take further action to prevent harm inflicted by other individuals (mostly foreigners). Unless the positive obligation exists, it is arguable whether States are in violation of international law by omission. For instance,

²⁴⁸ For detailed information on the concept of territory under international law, see Shaw (n 187) 487-552. On the concept of jurisdiction, see Shaw (n 187) 645-696.

²⁴⁹ *Ibid.*, 778.

²⁵⁰ State responsibility arises when an international legal obligation exists between two States, through which a violation occurs by way of an unlawful act or omission resulting in loss or damage that is imputable to the responsible State. See Shaw (n 187).

²⁵¹ See, for example, Rousseau approached the concept of State sovereignty, that is indivisible and inalienable, derived from a ‘social contract’ between the State and its people through which a pre-eminent linkage is drawn State vis-à-vis its people. See Jean Jacques Rousseau, *The Social Contract* (first published 1762, Penguin Classics 1968).

²⁵² See Chapter 4.2 below.

widespread international recognition exists in terms of State protection of a person's right to life and freedom from torture as peremptory norms in international law. However, it is arguable whether this principle extends to cases where the State, not only protects its people by refraining from inflicting such harm itself, but also by taking positive action to protect its people from violations of these rights inflicted by other individuals in territories beyond that State's jurisdiction. Similar to the way Del Chicca expressed his views regarding the prosecution of pirates,²⁵³ the question of whether a State is obliged to protect seafarers' rights in accordance with international treaty law or merely has an optional possibility arises in this context.

It is widely recognised that the ICJ Statute is a starting point regarding the sources of international law. According to Article 38(1), international conventions, international custom and the recognised general principles are the primary sources of international law. Moreover, the scholarly works as well as judicial decisions are secondary sources of international law.²⁵⁴ According to the customary international law, the co-operation in the suppression of piracy and the protection of a number of fundamental human rights are obligations *erga omnes*, forming peremptory norms.²⁵⁵ Regarding human rights, UDHR provisions are recognised as bearing the characteristics of *jus cogens* due to wide recognition of States.²⁵⁶ On the other hand, States have treaty-based obligations, derived from international conventions that the consent is deposited in accordance with the Vienna Convention.²⁵⁷ The binding force of treaties upon the Parties and the principle of *pacta sunt servanda* (good faith) is emphasised in the Vienna Convention.²⁵⁸ Thus, States are bound to conform to international law and carry out its obligations provided accordingly. In his dissertation, Widd has taken this argument further and argued that flag or coastal States 'have a positive duty to secure basic human rights of the seafarer against violations carried out or threatened not by the State but by private persons, *ie* the pirate.'²⁵⁹

In general, the obligation of States to protect human rights of its people who are subjected to their jurisdiction is an accepted rule of

²⁵³ See Chicca (n 83).

²⁵⁴ Article 38(1)(d) refers to Article 59, which reads: "The decision of the Court has no binding force except between the parties and in respect of that particular case."

²⁵⁵ Article 53 of the Vienna Convention on the Law of Treaties, 1969, emphasised on the superseding application of *jus cogens* over treaty law, and the non-applicability of derogations over such norms. However, the principle of *opinio juris* may cease the application of *jus cogens* when a State has persistently objected to a recognised norm. See Brownlie's list of instruments within which customary international law may derive from, Ian Brownlie, *Principles of Public International Law* (7th edn, Oxford University Press 2008) and commentary of International Law Commission, in *Yearbook of the International Law Commission, 1966, vol. II*, document A/CN.4/SER.A/1966/Add.1, 247-249.

²⁵⁶ UDHR was agreed upon by States without any negative votes and only eight abstentions. See Sepúlveda (n 56) 14. See also *Barcelona Traction Light and Power Company* [1970] ICJ Reports 3.

²⁵⁷ Vienna Convention on the Law of Treaties, 1969, Articles 11-17.

²⁵⁸ Vienna Convention on the Law of Treaties, 1969, Article 26.

²⁵⁹ Widd (n 12) 2.

international law, and this obligation is non-delegable.²⁶⁰ However, the extent of the positive obligation of States towards such protection seems vague and fragmented. Thus, this thesis attempts to provide a number of examples in line with the identified seafarers' rights.

MLC 2006 provides the most recent, comprehensive and arguably more effective examples for the imposition of such duties, not only upon flag States, but also on coastal and port States, and crew supplying countries. For instance, under MLC, flag States are obliged to give effect to the convention exercise its jurisdiction and control on ships.²⁶¹ Coastal and port States have concurrent jurisdiction regarding seafarer recruitment and placement services provided that these are established in their territories.²⁶² Title V, in particular, imposes various positive obligations both for flag States, port States and crew supplying countries.²⁶³ Under Regulation 5.3(1), for example, crew supplying States have the responsibility to ensure the implementation of the MLC requirements regarding the recruitment and placement of seafarers as well as the social security protection of seafarers that are its nationals or are resident or are otherwise domiciled in its territory. It may be argued that this presents a potential stumbling block against MLC ratification by major crew-supplying countries. Nevertheless, widespread implementation of this Convention might be a starting point towards the imposition of certain positive obligations on States and consequently, promoting seafarers rights to a certain extent.

Whether or not States have the positive obligation for such protection remains trivial if not followed by effective interference of international law. Connection of human rights law vis-à-vis flag State responsibility became particularly problematic with the proliferation of open registry states. Today, "a multi national crew may be recruited by international agencies; they are employed under flags which are not those of the States of the ship owners, who may also be anonymous in names and places of residence. The vessels may be mortgaged and insured in other States, managed from yet another, chartered elsewhere, and carry cargoes for a variety of shippers."²⁶⁴

In the same vein:

Thirty years ago, most of the world's seafarers were citizens of the nations represented in their ships' flags and ports of registry. In the early years of the twenty-first century, not only are the crews of most internationally trading ships working under foreign flags, they are also likely to be sailing in mixed nationality crews.²⁶⁵

²⁶⁰ Similar arguments exist regarding piracy, presented in M. C. Pugh, 'Piracy and Armed Robbery at Sea: Problems and Remedies' [1993] 2:1 *Low Intensity Conflict and Law Enforcement* 1, 3.

²⁶¹ MLC 2006, Article V(2) and Regulation 5.1.1(1).

²⁶² MLC 2006, Article V(5).

²⁶³ Regulation 5.1, 5.2 and 5.3 of MLC 2006 respectively.

²⁶⁴ Widd (n 12) 2. Today, most open flag registries do not have a single seafarer working on board ships flying its flag, including Panama, Liberia, Bahamas, and Malta. Widd (n 12) 65.

²⁶⁵ International Labour Office, *The Global Seafarer: Living and Working Conditions in a Globalized Industry* (ILO 2004) 1.

In many cases today, if not most, there is no genuine link between the flag State and the captured vessel, as presented above. It is difficult to encourage these flag States to co-operate actively in the human rights protection of seafarers' employed on board vessels flying their flag.²⁶⁶ In the context of Somali piracy, it is particularly problematic to co-operate actively in the suppression of piracy considering the lack of naval resources mainly due to their economies. The propagation of open registries in the late period reveals the significance of the genuine link requirement due to complexities leading to ineffective application of law.

As Klein affirms the existence of the inclusive maritime security interests against global threats, such as piracy, the perpetrators may still hide behind 'lawlessness' of flag States, meaning the lack of effective legal mechanisms with regard to the particular issue in hand.²⁶⁷ Hence, the flag merely represents a piece of coloured rag if law and order does not reach beyond its existence. Effective application of positive obligation gains significance here, since in the long run, such application may lose its charm and may cease the existence of open registries in its entirety. Considering that, open registries are mainly a form of business for States; effective insertion of positive obligation may overburden this strategy through possible financial implications of these duties.

Nevertheless, this thesis promotes the widespread recognition and implementation of the minimum standards and obligations stipulated under the new Maritime Labour Convention. Undoubtedly, the vagueness of State responsibility in this context demands further research; however, using MLC as a starting point may improve the protection of seafarers' rights, since it imposes a number of responsibilities to States to be implemented into their municipal laws.

The aim towards uniformity and universality of the adequate and effective standards for the protection of seafarers' rights might be partially successful through implementation of the minimum standards at the national level. This implementation process may not only assist in the clarification of the State responsibility in this context, but also may increase the harmony between different jurisdictions, which might positively affect the enforcement system at the national level.

4.1.2 Duties of the Ship Owner

As discussed above in Chapter 3.2.3.2, ship owners may have a variety of duties, which is vital to establish before seeking for redress in national courts. The question here is whether ship owners have a duty to compensate a seafarer, whose rights are affected as a result of a piracy incident. In the same vein, it is important to discuss whether such violations give rise to a claim under the law of torts or contract law. In general, obligation to protect human rights is imposed on States, and not on individuals. This obligation

²⁶⁶ The concept of genuine link. Diversification of crew, flags and ownership of vessels.

²⁶⁷ See Natalie Klein (ed), *Maritime Security and the Law of the Sea* (Oxford University Press, 2011) in general, and K. X. Li and Jim Mi Ng, 'International Maritime Conventions: Seafarers' Safety and Human Rights' [2002] 33 *Journal of Maritime Law and Commerce* 383-384. See also Chapter 4.4 below.

cannot be delegated on individuals. However, ship owners may have a variety of obligations for their employees, arising out of their employment relationship. Seafarers may rely on their employment contracts and they need to prove a breach of that contract under contract law of the selected jurisdiction. Law of torts may also be used as a weapon deriving from the doctrine of negligence. Employer's negligence may serve as a legal basis under the law of torts in this context. Different approaches are available under common and civil law jurisdictions.

For example, Panamanian law requires ship owners to provide unemployment indemnity up to three months of wages for seafarers in cases of loss of a vessel.²⁶⁸ This seems like a rare privilege provided to seafarers at the national level. However, it is arguable what suffices for 'loss of a vessel' and whether this statutory right is applicable in this context. Meanwhile, in Philippines, ship owners are required to pay double the amount of their seafarers' basic wage, overtime pay, and leave pay while transiting through Gulf of Aden and during their captivity. Moreover, in cases of death, injury or illness occurred during this period, seafarers can be awarded to a double amount of compensation and benefits.²⁶⁹ On the other hand, the essence of imposing a duty on the ship owner to compensate the seafarer in cases of death or personal injury during service is similar in national jurisdictions. While death or personal injury occurred due to occupational hazards may generally raise a cause of action based on fault-based liability, piracy incidents are at first instance out of ship owners' control. However, ship owners' continuous duty of care might be argued at Court, when he knowingly directs his vessel in transit through the high-risk areas. Nevertheless, some countries like Greece and Norway has a statutory compensation regime for work-related illnesses or accidents,²⁷⁰ whereas English and Cypriot legal regimes require a negligence to be established on a fault based liability under common law.²⁷¹ Whether this tortious liability extends to death or injury occurred due to piracy-related incidents remains unclear and untested.²⁷² What seems clear is that there is a general disharmony existing at the national level.

Nevertheless, international law, as mentioned above, provides minimum standards imposed on ship owners. If these minimum standards are followed by widespread national implementation, it might be considered a significant step towards harmony. For instance, ship owners have the duty to exercise due diligence to provide a seaworthy vessel. This obligation is mainly stipulated under private maritime law conventions, and it might give rise to a contractual or tortious claim for compensation provided that the

²⁶⁸ Fitzpatrick and Anderson (n 50) 396.

²⁶⁹ See Chapter 3.2.2.8 above.

²⁷⁰ Fitzpatrick and Anderson (n 50) 324-325, 376.

²⁷¹ *Ibid.*, 298-300 and 504-505. De-colonised by Great Britain in 1960, Cypriot Law still has the effect of English common law in its legal regime, and considered to have a hybrid legal system, having the characteristics of both civil and common law regimes. Thus, the law of negligence is not only regulated under the Civil Wrongs Cap. 148, but also guided by English case-law.

²⁷² See Chapter 5.2 below.

personal injury occurred due to unseaworthiness of the vessel.²⁷³ Moreover, the ISM Code adopts various measures to be fulfilled by the managing company to ensure the safety of a ship, which is considered relevant to the duty of seaworthiness.²⁷⁴ Although lack of these measures may not directly constitute an evidence of unseaworthiness, it may at least serve as *prima facie* evidence to prove the company's lack of due diligence.²⁷⁵ In the context of maritime security, BMP guidelines bear considerable significance, even though they currently do not have legally binding characteristics.²⁷⁶

Apart from the minimum standards indicated in the private maritime law conventions and IMO instruments, ILO has been adopting numerous instruments in order to set minimum standards regarding maritime labour.²⁷⁷ The inception of MLC 2006, ILO has codified and modified its previous conventions including C147 on Merchant Shipping (Minimum Standards) Convention. *Inter alia*, the Convention refers to duties of the ship owner within its provisions. It seems that the main responsibility vests in States, to ensure that ship owners fulfil their duties stipulated under the Convention. For instance, Regulation 4.2 aims to impose a duty on ship owners by way of national laws with regard to financial consequences of sickness, injury or death occurred during the seafaring service. Similar to the Panamanian legal regime, Regulation 2.6 refers to the unemployment indemnity in case of ship's loss or foundering. While the laws of Panama sets the maximum limit to three months of wages, MLC 2006 states that the payable indemnity can be limited to two months of wages.²⁷⁸ Moreover, Regulation 2.1 sets a minimum standard for seafarers' employment agreements in general, to be signed by both the ship owner and the seafarer, which includes the duty of ship owners to provide health and security protection benefits for their seafarers.²⁷⁹ Overall, MLC seems to have succeeded in regulating the minimum standards for seafarers through a single comprehensive legal framework. If the majority of States adopts the MLC threshold, a degree of certainty and harmony seems achievable.

Moreover, if counter-piracy measures, such as suggestions set forth in BMP, are incorporated into the ISPS Code, or adopted as an IMO resolution, this supplement may speed up the national implementation process in order to impose positive duty on ship owners. As of today, IMO circulars encourage States to consider BMP guidelines.²⁸⁰ Although IMO

²⁷³ See e.g., Hague-Visby Rules Article III(1)(a) and Article IV(1), and Rotterdam Rules, Article 14(a).

²⁷⁴ See, e.g., Articles 6 and 10 of the ISM Code, which generally deals with specific obligations of the managing company.

²⁷⁵ For more information on the implications of the ISM Code, see Thomas A. Mensah, 'The Place of the ISPS Code in the Legal International Regime' [2003] 3:1 *WMU Journal of Maritime Affairs* 17. For a comparison between the ISM Code and the ISPS Code, see Proshanto K. Mukherjee, 'The ISM Code and the ISPS Code: A Critical Legal Analysis of Two SOLAS Regimes' [2007] 6:2 *WMU Journal of Maritime Affairs* 147.

²⁷⁶ See Chapter 3.1.2.

²⁷⁷ See Chapter 3.2.

²⁷⁸ Guideline B2.6(1) of MLC 2006.

²⁷⁹ Standard A2.1(4)(h) of MLC 2006.

²⁸⁰ IMO, MSC.1/Circ.1339, 'Piracy and Armed Robbery Against Ships In Waters Off the Coast of Somalia', 14 September 2011, para 5. See also the Malmö Declaration, adopted

circulars are soft laws, they are still persuasive in character. The notion of the ship owner's liability to maintain a seaworthy ship gains significance in this context. Bainbridge argues, *inter alia*, that ship owners have the liability to protect seafarers with onboard security measures and apply BMP guidelines in a proper manner, along with the duty of care to ensure the welfare of seafarers and their families.²⁸¹ Whether this liability may have derived from the seaworthiness principle is subject to discussion. While a number of States have implemented various standards into their domestic law either at the minimum level, or above the threshold through extended obligations in line with their legal systems.

Furthermore, it is significant to assess the possibility of imposing a positive duty on States whose nationals are either ship owners or managing companies. Undoubtedly, States need to ensure that their employers do not violate the human rights of their employees. Moreover, it might be argued that a ship owner has a continuous duty of care, and by knowingly placing his vessel in transit through the dangerous waters might result in breach of that duty. Since these issues are largely untested, it is difficult to reach a clear answer.

Considering the diversification of the nationalities of ship owners and seafarers, and municipal laws of States, it is crucial to seek harmony at the national level. Reaching harmony as a whole is unrealistic due to a variety of conditions affecting the law and practice of States. However, harmonisation is reachable to a certain degree if States give effect to the international minimum standards, mentioned above, in their municipal laws.

4.2 Applicability of Human Rights Law on Ships

Due to the significance of effective application of law, this part aims to discover whether any legal vacuum or uncertainty exists in terms of the applicability of human rights law in the maritime context and the extent of such jurisdiction. Certain rights are regarded to have universal application under customary international law, as mentioned above, which arguably constitutes universal jurisdiction regardless of the persons or venue of alleged violation. However, the extent and enforceability of this jurisdiction is highly debatable and complex. Besides, it seems that this form of jurisdiction does not stretch beyond few of the identified rights. In this context, States should have jurisdictional and enforcement capacity and power to apply its domestic law.

States have the responsibility to protect human rights of people in their territory and those subject to their jurisdiction. Application of domestic jurisdiction on people in its territory based on domestic jurisdiction is a

subsequent to the International Conference on Piracy at Sea, 17-19 October 2011, Malmö, Sweden, which calls on companies and individuals to ensure the full and effective implementation of the latest version of Best Management Practices for Protection against Somali Based Piracy.

²⁸¹ John Bainbridge, 'Piracy: Responsibilities' (International Conference on Combating Piracy, Hamburg, 2010)

clearly established principle. However, ascertaining the legal extent and practical issues regarding the latter aspect, that is the exercise of jurisdiction seems vague and complex. Regarding piracy, it is rather difficult to draw concrete borders as for the extent of State responsibility as well as its jurisdictional and enforcement powers to protect seafarers employed on board vessels flying its flag.

Various principles are pursued in international law in terms of extended jurisdiction. Such bases include the flag State principle deriving from both the nationality principle, as flags of ships represent the nationality of a ship,²⁸² and arguably, the territorial principle, as ships might be considered as the extended territories of States.²⁸³ The latter concept links to the principle of quasi-territorial application of jurisdiction on ships, otherwise known as the ‘floating territory’ concept. Deriving from this principle, States may claim domestic jurisdiction since its ships are considered extension of its land territory. While quasi-territorial jurisdiction only exists in respect of vessels and aircrafts, extraterritorial jurisdiction can be noticed in almost every field of law.

In order to examine the extraterritorial applicability of human rights, one needs to interpret the jurisdictional clauses of each human rights instrument. In principle, many of the human rights instruments include provisions on jurisdiction permitting for extended application beyond the land territory of a State. Using the quasi-territorial jurisdiction here may automatically extend State capacity to exercise its powers. Owing to its scope, this type of jurisdiction appears in either maritime or aviation fields. How this rule reflects itself in the human rights field seems vague. However, once a jurisdiction is established one way or another, in principle, it should be possible to exercise that jurisdiction in all contexts. Legal instruments for counter-piracy do not seem to extend to the human rights protection of seafarers; however, human rights law in general should be applicable law in cases of piracy. Nevertheless, States are deemed to have the responsibility and jurisdiction to protect human and labour rights of their nationals, residents or persons who are domiciled in their territory.

4.3 Disharmony of International, Regional and National Legal Frameworks

In light of the comprehensive legal framework regarding the issue in hand, it is very likely to stumble upon various discrepancies both within and between each framework and field of law. While, at the international level, different instruments on a particular aspect may already overlap or be in conflict with each other, the potential for the situation to become even more complex is heightened not only by the diversity of frameworks at the regional and national level, but even more so by the interface between these three (international, regional, national). Whenever the relevant legislators attempt to cover certain loopholes in law, it is possible that diversity will

²⁸² Article 94 of UNCLOS.

²⁸³ Article 91(2) of UNCLOS. See also Article V of MLC 2006 and Chapter 3.2.3.1 in this regard.

occur, which eventually causes discrepancies and uncertainties, another form of legal loopholes.

With regard to the laws of piracy, the diversity of laws and legal opinions still exists in terms of defining and determining the scope of piratical acts within international law. It is very crucial for the purpose of identifying the crime, and unless the scope of the offence is clarified, it is possible to find more loopholes and inconsistencies in terms of application.²⁸⁴ If international law contains a variety of different rules in relation to the same issue, States are given the option to choose the most beneficial rule and implement it accordingly. The degree of this crime and its punishment may differ, such as the form and extent of sanctions. This has resulted in a large array of different municipal laws for the same offence, which, in many cases, at least in the context of this thesis, has an international link and needs harmony for effective solutions for this very particular reason.²⁸⁵ Scholars have affirmed this bifurcation, resulting in ‘a body of law that lacks harmony’.²⁸⁶ Hence, as of today, the relevant legal framework remains to be ‘fragmented and complex’.²⁸⁷

Similar to the definitional and scope-related dilemma of piratical acts, there is still a general confusion with regard to the difference between safety and security, as witnessed in some legal instruments. Article IV of MLC 2006, for instance, provides for the right to a ‘safe and secure workplace’, which eventually removes the word ‘secure’ from its regulations and focuses more on the occupational hazards. On the other hand, the word ‘secure’ appears regarding the threshold for manning standards, where States are obliged to ensure the safety and security of the ship and its personnel, under all operating conditions.²⁸⁸ Since it is established that safety refers to the occupational hazards, it does not relate to piracy. Instead, piracy has always been linked to the security standards. Considering that, many general human rights documents grant the right for safe workplace for workers, and not secure, either this dilemma has been overseen in human rights law, or even if it was considered, the issue remains untouched. How this confusion may influence the wording and application of general human rights documents is unclear.²⁸⁹

At the international level, the legal framework relating to the suppression of piracy mainly relates to criminal or penal law, whereas protection of seafarers’ rights generally falls within the scope of human rights law. There are similarities as well as differences between these regimes. While sources of international law, in general, derive from a common source,²⁹⁰ these regimes may have different customary laws, peremptory norms, and general principles specific to each field of law. Having due regard to the cause and effect of these regimes in this context,

²⁸⁴ See Chapter 3.1.1, where this particular disharmony is examined and discussed in detail, in the context of various international approaches and their implications, such as challenges faced in practice.

²⁸⁵ See Note 91 above.

²⁸⁶ Lennox-Gentle (n 29) 400.

²⁸⁷ Geiß and Petrig (n 28) 54.

²⁸⁸ MLC 2006, Regulation 2.7(1) and Standard A2.7(1).

²⁸⁹ See Chapter 3.2.2.6.

²⁹⁰ ICJ Statute Article 38(1) is widely recognised. See Chapter 3 above.

drawing a link between the two regimes is significant for effective solutions. What both regimes seem to have in common in this context is maritime law. Piracy is an act of maritime violence perpetrated at sea, where simultaneously, certain rights of seafarers are violated. This author is of the view that maritime law is the link, binding the two legal regimes together. The latest example is the Maritime Labour Convention, gaining more importance in this context, which handles the issue in the maritime context by including flag State, port State, and crew supplying State responsibilities. Currently, MLC does not include a comprehensive framework for the protection of seafarers' rights related to maritime security. However, in time, with the aid of its simplified amendment procedure and in accordance with ILO's agenda, protection of seafarers' rights in cases of maritime violence might be inserted into the Convention.

In the context of the protection of seafarers' rights, as discussed in detail under Chapter 3, such protection at the international level is, in principle, provided through imposition of duties on States or other relevant actors, mainly under general human rights conventions or specific ILO conventions designated to protect labour rights. Furthermore, discrepancies may exist between international and regional legal frameworks. For instance, as for the right to a legal remedy and access to justice, while international conventions regulate rights of the victim, such as 'the right to apply to a Court for redress' and 'access to an effective enforcement system', regional conventions place more emphasis on rights of the perpetrator rather than the victim.²⁹¹ Undoubtedly, several discrepancies exist within distinct regional legal frameworks and their enforcement regimes. The European Union and the Council of Europe are recognised to have more stringent regimes than those of Inter-American and African human rights regimes. If a State enters into the European Union, it is obliged to follow the entire mandatory *acquis communautaire*. Moreover, the European Court of Human Rights is known for its effective enforcement regime, which seems more useful than those of other regional human rights enforcement mechanisms.²⁹²

Another reason why a large divergence exists between applicable laws is that some States ratify a number of international or regional treaties whereas others choose to opt out due to various reasons. Deriving from the diversity of interests of each State, such as the commercial industry, political geography, economic sufficiency, or international relations; it is inevitable to observe equally diverse jurisdictions. For instance, almost every African State has ratified SUA Convention, except Somalia.²⁹³ Hostages Convention is also not ratified by Somalia, under which States are obliged to criminalise hostage taking under their domestic law²⁹⁴ and establish jurisdiction over this particular offence.²⁹⁵ On the other hand, even if Somalia has ratified this Convention, it is debatable whether it is capable of fulfilling these standards.

²⁹¹ See Chapter 3.2.2.5.

²⁹² This issue is discussed below in Chapter 4.4.

²⁹³ See Supplement C for the ratification statistics of certain countries.

²⁹⁴ Article 2 of the Hostages Convention.

²⁹⁵ Article 5 of the Hostages Convention.

In addition, States may not be able to fully implement a treaty it has ratified. For instance, Somalia has declared 200 nautical miles of territorial waters, even though it is a party to UNCLOS.²⁹⁶ Besides, methods of implementation differ, as discussed above,²⁹⁷ which may result in further diversification. In dualist regimes, the adopted national law may not fully be in line with the treaty instrument. In monist regimes, the ratified convention may not be self-executing, and may require further legal steps to be taken by the ratifying State. Each State also has distinct procedural rules in terms of application. Consequently, this diversification results in ineffective enforcement of the relevant legal framework, which is discussed below.

As discussed above, in Chapter 4.1.1, this thesis advocates the immediate widespread recognition and implementation of the minimum standards regulated under MLC 2006. MLC is the latest contribution of ILO to the seafaring industry, which serves as a milestone at this point. Although it does not expressly provide for the protection of seafarers' rights in cases of piracy or other types of maritime violence, the simplified amendment procedure introduced under this regime seems useful for further development.

4.4 Critique over the Enforcement Mechanisms

Adequate enforcement of the applicable law is the very essence of effective legal regimes. Where a particular law is not enforceable, it may merely have an influential effect at the most. As mentioned above, there are different enforcement regimes under international, regional and national legal frameworks.²⁹⁸ Their efficiency depends entirely on the actual and solid positive outcome, no matter how comprehensive all these legal frameworks might be, which ought to be surmised by the applicable enforcement mechanisms.

This thesis argues that the current applicable enforcement regimes at the international and regional level are not sufficient to tackle the issue of the protection of seafarers' rights in piracy due to a number of reasons. First, all of these enforcement regimes require prior consent of States, either through ratification of a treaty or further confirmation on the jurisdiction of a particular Court. This is mainly due to the fundamental principle of State sovereignty under international law. It is very difficult to influence States in a positive manner, if they are unwilling or finding it practically difficult to implement a particular regime and give effect to its standards.²⁹⁹ This also affirms another reason why such proliferation exists at the national level.³⁰⁰

²⁹⁶ Article 1(1) of Law No. 37 on the Territorial Sea and Ports, adopted on 10 September 1972, <<http://somalitalk.com/2011/badda/law37.html>> accessed 27 April 2012.

²⁹⁷ Chapter 3.2.4.3.

²⁹⁸ See Chapter 3.2.4 above and Supplement D below.

²⁹⁹ See Fitzpatrick and Anderson (n 50) 104-106, where the authors discussed the effectiveness of ILO supervisory mechanisms and stated that 'some States are unwilling to give effect to Conventions' among other things.

³⁰⁰ Chapter 4.3.

Second, the variety of applicable regimes established a number of mechanisms; either provides a forum for complaints among States only, or sets up supervisory mechanisms to ensure that a contracting State party fulfils its treaty-based obligations.³⁰¹ Ostensibly, only one of these enforcement regimes provide for direct protection of rights towards judicial remedy, which is the European Court of Human Rights. However, ECHR may rarely have adequate jurisdiction to hear a case in this context. Some of the UN treaty bodies have individual complaint procedures, but unfortunately, they do not provide for directly enforceable rights.

Hence, main reasons include the superseding application of State sovereignty and ineffective procedures or methods of the applicable enforcement regimes. The available enforcement mechanisms generally do not provide for a legally binding outcome, nor can they award compensation for seafarers. Besides, a seafarer might need to wait for years until a judgment or decision has been rendered, even if he has succeeded to establish a case in any of these enforcement regimes. Thus, most of these rights remain in theory.

For instance, Somalia is a signatory to African Charter and CERD. Enforcement mechanisms provided under these instruments are not sufficient for individual application.³⁰² Furthermore, Somalia is currently under no position to promote or improve the human rights standards within its territory since it can be considered as a failing state. The Transitional Government has no enforcement powers in many parts of the Somali territory and the Civil War is ongoing.³⁰³

Nevertheless, certain scholars came up with few suggestions in order to improve the effectiveness of the enforcement regimes at the international level. These suggestions include using the ICC regime regarding the issue at hand, or setting up a Human Rights Court at an international level. However, not a solid step has been taken towards an international enforcement mechanism in the form of a judicial organ. Compliance and enforcement mechanism established under MLC 2006 seems more effective than some international and regional enforcement mechanisms.³⁰⁴ Undoubtedly, establishing an enforcement regime mainly relying on the national enforcement systems may have a number of pitfalls in practice.

Diversity in application and the present proliferation of national enforcement systems also cause discrepancies. Procedural rules for the national courts each State may differ largely. In some jurisdictions, one may observe unnecessary and excessive delays in the judicial system, whereas in others, procedural limitations and technicalities may prevent one from seeking redress.

It might be difficult to determine in many national regimes, regarding the approach and the adequate Court for having a particular case heard. It entirely depends on the nature of the claim. As a starting point, rights of persons are mainly stated out under the constitutional law of each nation. However, as established above, certain individuals may have a

³⁰¹ See Chapter 3.2.4 and Supplement D.

³⁰² See Chapter 3.2.4 above.

³⁰³ See Chapter 2.3 for the situation in Somalia.

³⁰⁴ Title 5 of MLC 2006.

number of duties and liabilities towards the seafarer, based on an employment relationship. These duties and liabilities may give rise to a contractual or tortious claim in civil courts.

It is clear that MLC 2006 has chosen a maritime-based enforcement system by imposing obligations on flag States, port States and crew supplying countries. Particularly, provisions in Regulation 5.2 on Port State Control improves the compliance and enforcement regime of MLC 2006 very significantly. After the convention has entered into force, the effectiveness of this system can be tested and improved by further amendments, if it is required.

4.5 Commentary

While focusing on various elements and pointing out certain discrepancies, the author also aimed to draw the entire picture with regard to the protection of seafarers' rights in cases of piracy. This thesis presents a giant web of conflicts, linking various actors with each other. In general, the root of the piracy problem seems ineffective legal protection by States. Hence, difficulties arise in respect of the enforcement of laws.

As mentioned above in Chapter 3.2.1, the degree of violence and number of attacks have increased to a greater extent, even though the current attempts for suppression of piracy seems to have reduced the success rate of these attacks. These attempts include armed security guards on board and intervention by naval vessels. It is important to consider that such attempts for the suppression of piracy do not necessarily induce positive implications on the protection of seafarers' rights. On the contrary, as the success rates are low, pirates are attacking more and becoming more violent in order to succeed. Latest news reports show another example of an 'accidental' tragedy. Reportedly, two Filipino seafarers have recently died during a rescue operation, who have allegedly been used as human shields by Somali pirates.³⁰⁵

Harmonisation, codification and simplification of the relevant legal frameworks and enforcement mechanisms are vital for the purposes of this thesis. While reviewing the law, the author has observed the diversification within the system apart from the legal vacuums and loopholes. Legal systems become ineffective when not only legal vacuums or loopholes exist, but also when there is diversification and unnecessary proliferation of laws within the system. In order to avoid the diversification, the author has a number of preliminary suggestions. First, the widespread implementation of CMI's Model National Law should be promoted as a starting point in order to bring harmony to the national legal systems regarding domestic laws on piracy. Second, the widespread implementation of MLC 2006 provisions should be promoted regarding seafarers' rights. Third, the International Labour Organisation should consider further amendments to MLC 2006 regarding security-related threats against the protection of seafarers' rights.

³⁰⁵ 'Rescues counter Somali pirates', *ITF Media Release* (13 April 2012) <<http://www.itfglobal.org/news-online/index.cfm/newsdetail/7283/>> accessed 27 April 2012.

Meanwhile, as an alternative, the security dimension might be strengthened by hardening the BMP Guidelines. This approach might be pursued by the implementation of these guidelines by States, adopting and improving these guidelines through IMO Resolutions, or attaching them into the ISPS Code.

Each of these suggestions is wide and comprehensive, enough to constitute distinct research topics on their own. Regarding the suggestion on amending MLC 2006, it is significant to establish whether ILO has the necessary objective and agenda to insert this security dimension into its convention. In this regard, Juan Somavia, the Director-General of ILO, stated that “the primary goal of the ILO today is to promote opportunities for women and men to obtain decent and productive work, in conditions of freedom, equity, security and human dignity.”³⁰⁶ Furthermore, ILO Constitution’s Preamble requires for the improvement of labour standards by the ‘protection of the worker against sickness, disease and injury arising out of his employment’ among other things.³⁰⁷ Hence, it seems that ILO has the capacity to proceed for further amendments. However, a detailed analysis with a prescriptive method must be conducted on how this amendment might take place and what might be included.

Co-operation of States, relevant organisations, corporate entities and individuals is very crucial. Its significance is presented in the widely recognised international conventions, such as UNCLOS. Undoubtedly, the ultimate solution in this context, meaning the protection of seafarers’ rights in cases of piracy is to remove the element of piracy from the picture, entirely, through complete suppression of maritime piracy by ‘all States’.³⁰⁸ Success factor depends on how the land-based conflicts are tackled through humanitarian intervention. Somalia is considered a ‘failed State’ today. Indeed, diversity and fragmentation of the relevant regimes fails to provide an effective solution.

The web of conflicts is characterised by the articulation of different issues in separate instruments and a disharmony in attempts at untying each knot in co-operation with the relevant actors. However, full co-operation is possible only once the web of conflicts is resolved and there is unity of purpose. The ultimate aim is to bring all problems and responses under one umbrella, under which all the relevant actors will be able to unite, ready for compromise and sacrifice if deemed necessary, and act in co-operation with each other. Unfortunately, people often forget their duties, but only remember their rights. However, rights cannot exist in absence of duties and vice versa. To fulfil such duties, positive action is necessary at most times. As there are many diverse interests involved, co-operation not only in the suppression of piracy, but also bringing legal order to the land-based conflicts is the first crucial step towards achieving a lasting solution.

³⁰⁶ See ‘Mission and Objectives’ provided in the official ILO webpage
<<http://www.ilo.org/global/about-the-ilo/mission-and-objectives/lang--en/index.htm>>
accessed 10 May 2012.

³⁰⁷ Preamble of the Constitution for the International Labour Organisation, 1919.

³⁰⁸ UNCLOS, Article 100.

5 Conclusion

5.1 Summary of the Findings

In order to fulfil the main purpose of this thesis, the author has attempted to answer few research questions that are facilitated by a number of objectives.

The author has identified a number of seafarers' rights in Chapter 3, assisted both by a fact-based analysis and by reviewing the international and regional frameworks. Accordingly, the rights of the seafarer, qua human being, include the right to life, freedom from torture, cruel, inhuman or degrading treatment, freedom from forced labour, freedom from discrimination, and right to a legal remedy and access to justice. In like manner, the rights of the seafarer, qua employee, include the right to safe and healthy working conditions, right to health and medical care, right to fair remuneration, right to free employment services and continuity of employment, right to social security and welfare, and right to repatriation. Subsequently, the author has analysed the identified rights in line with the relevant international and regional frameworks, which was then followed by a discussion on liability issues and enforcement mechanisms.

Following the comprehensive discussion over the current safeguards, the author has identified certain deficiencies in the current legal system and came up with a few suggestions to be considered as a starting point. For this purpose, Chapter 4 focused on a number of current deficiencies relating to the liability of States and individuals towards the seafarer, applicability of human rights law on vessels, problems caused by the proliferation of open flag registries, disharmony and diversification among distinct legal frameworks and fields of law, and insufficiency of the current enforcement mechanisms.

Primarily, the author has established that maritime law is the common link, binding the fragments of human rights law and criminal law together. The link between human rights law and maritime law is particularly clear in MLC 2006. It is also clear that States have the obligation to protect human rights of people who are subject to their jurisdiction. These issues are reaffirmed under MLC 2006, by establishing extraterritorial jurisdiction of flag States towards seafarers working on board vessels. However, international law remains vague and fragmented regarding the question of whether States have a positive obligation to protect certain rights of seafarers or merely have an optional possibility. Followed by a number of examples, the author argued that the wide recognition and implementation of MLC 2006 might be promoted as a starting point. Meanwhile, the problem of open flag registries could also be resolved through effective application of positive obligations imposed under MLC 2006.

When the author focused on the current disharmony and diversification, she has provided various examples in this regard. For instance, the scope of piratical offences at the international and national level varies greatly, as well as the human rights regimes at the international,

regional and national level. Similar discrepancies exist relating to the enforcement regimes. It is established that the current international and regional enforcement regimes are not sufficient to tackle the issue at hand. Unless States express prior consent for jurisdiction, these enforcement regimes are not applicable. Even if the jurisdiction problem is resolved, the outcome of such regimes might not be legally binding or not enforceable. Moreover, most of them do not provide effective remedies for seafarers. Thus, the author has combined these findings with a number of initial suggestions:

1. Widespread recognition and national implementation of CMI's Model National Law should be promoted with regard to piracy laws at the national level.
2. Universal application and proper implementation of MLC 2006 must be promoted regarding the effective protection of seafarers' rights.
3. International Labour Organization should consider further amendments to MLC 2006 on the security dimension of protection of seafarers' rights. Meanwhile, BMP Guidelines might be updated and turned into hard laws.

Naturally, the suggestions outlined above need to be elaborated and analysed in detail. This leads to the final sub-chapter relating to the suggestions on further research.

5.2 Suggestions on Further Research

Due to limitations in space, it is inevitable that the research related to this thesis has led to identifying more issues regarding piracy and seafarers' rights than can reasonably be accommodated in a master's thesis. Thus, the author puts forward a number of suggestions for further research.

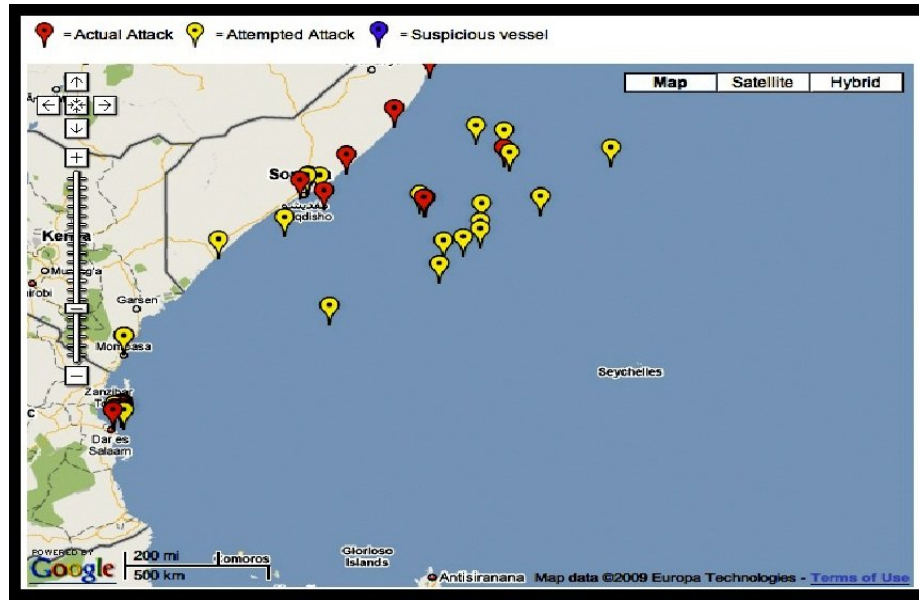
First, in-depth research should be conducted to explore the extent of positive obligation of States towards the seafarer and the possibility of extending this scope under MLC 2006.

Second, the selected national legal regimes in relation to the protection of seafarers' rights in cases of piracy and the extent of ship owners' duties towards the seafarer should be examined by a comparative analysis. Simultaneously, a survey of the signatory States of MLC 2006, such as Liberia, Panama and Norway, might be brought together regarding the application and implementation of the standards stipulated under the Convention.

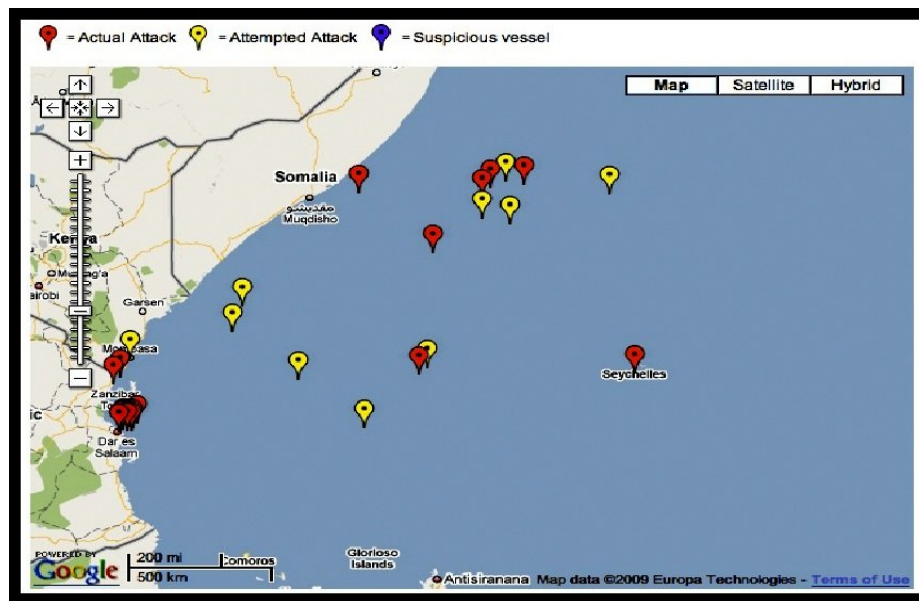
Finally, the prospects and modalities for the ILO to amend MLC 2006 regarding security-based threats due to maritime violence should be analysed. It should be examined whether this suggestion constitutes a reliable suggestion for the problem, or whether other alternatives might be applicable in this regard.

Appendix A

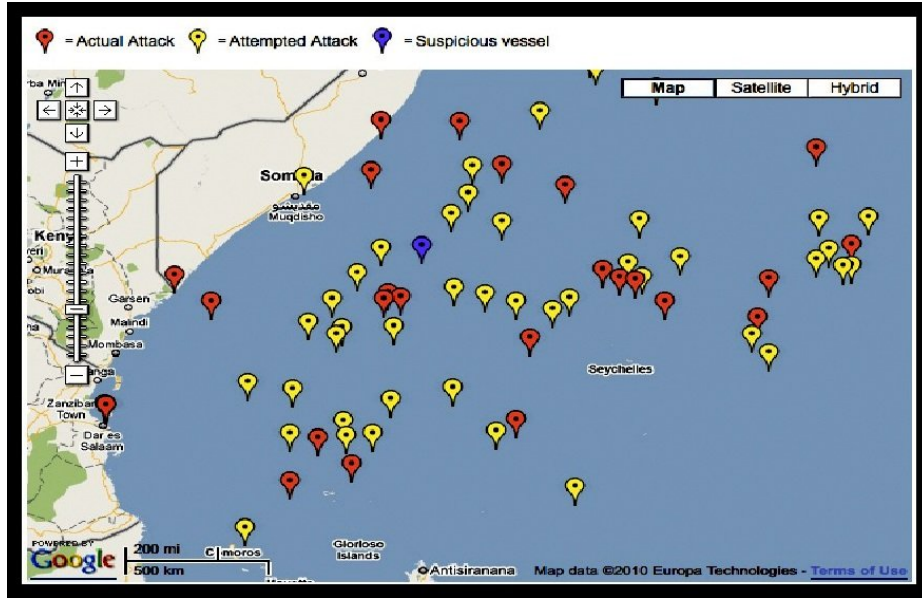
Piratical attacks off the coast of Somalia in 2007



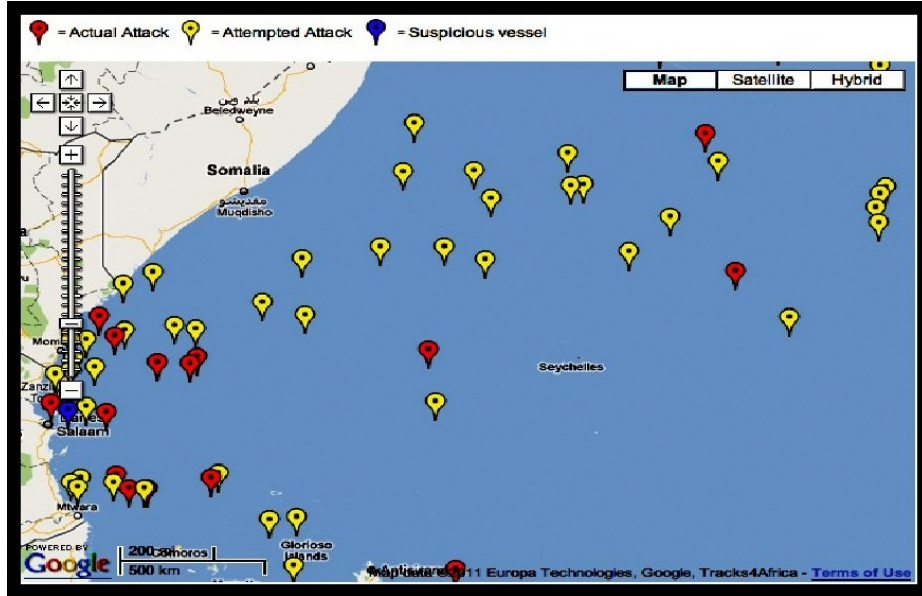
Piratical attacks off the coast of Somalia in 2008



Piratical attacks off the coast of Somalia in 2009



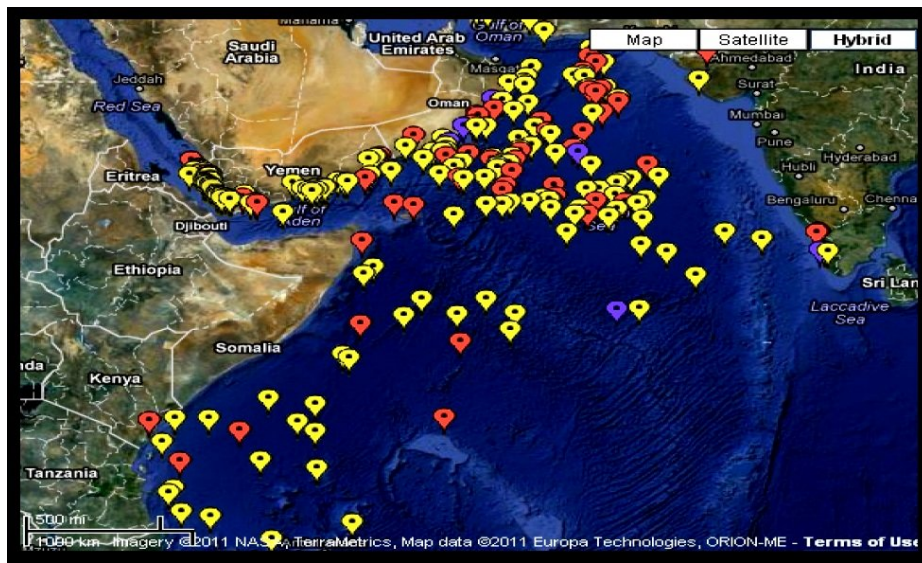
Piratical attacks off the coast of Somalia in 2010



Worldwide piratical attacks in 2011



Piratical attacks off the coast of Somalia in 2011



Source: Official Website of IMB Piracy Reporting Centre
<http://www.icc-ccs.org/piracy-reporting-centre>

Appendix B

Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 1988 as amended by its Protocol of 2005 (SUA Convention), Article 3.

Article 3

1. Any person commits an offence within the meaning of this Convention if that person unlawfully and intentionally:
 - (a) seizes or exercises control over a ship by force or threat thereof or any other form of intimidation; or
 - (b) performs an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of that ship; or
 - (c) destroys a ship or causes damage to a ship or to its cargo which is likely to endanger the safe navigation of that ship; or
 - (d) places or causes to be placed on a ship, by any means whatsoever, a device or substance which is likely to destroy that ship, or cause damage to that ship or its cargo which endangers or is likely to endanger the safe navigation of that ship; or
 - (e) destroys or seriously damages maritime navigational facilities or seriously interferes with their operation, if any such act is likely to endanger the safe navigation of a ship; or
 - (f) communicates information which that person knows to be false, thereby endangering the safe navigation of a ship.
2. Any person also commits an offence if that person threatens, with or without a conditions, as is provided for under national law, aimed at compelling a physical or juridical person to do or refrain from doing any act, to commit any of the offences set forth in paragraphs 1 (b), (c), and (e), if that threat is likely to endanger the safe navigation of the ship in question.

Article 3bis

1. Any person commits an offence within the meaning of this Convention if that person unlawfully and intentionally:
 - (a) when the purpose of the act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act:
 - (i) uses against or on a ship or discharges from a ship any explosive, radioactive material or BCN weapon in a manner that causes or is likely to cause death or serious injury or damage; or
 - (ii) discharges, from a ship, oil, liquefied natural gas, or other hazardous or noxious substance, which is not covered by subparagraph (a)(i), in such quantity or concentration that causes or is likely to cause death or serious injury or damage; or

- (iii) uses a ship in a manner that causes death or serious injury or damage; or
 - (iv) threatens, with or without a condition, as is provided for under national law, to commit an offence set forth in subparagraph (a)(i), (ii) or (iii); or
- (b) transports on board a ship:
- (i) any explosive or radioactive material, knowing that it is intended to be used to cause, or in a threat to cause, with or without a condition, as is provided for under national law, death or serious injury or damage for the purpose of intimidating a population, or compelling a government or an international organization to do or to abstain from doing any act; or
 - (ii) any BCN weapon, knowing it to be a BCN weapon as defined in article 1; or
 - (iii) any source material, special fissionable material, or equipment or material especially designed or prepared for the processing, use or production of special fissionable material, knowing that it is intended to be used in a nuclear explosive activity or in any other nuclear activity not under safeguards pursuant to an IAEA comprehensive safeguards agreement; or
 - (iv) any equipment, materials or software or related technology that significantly contributes to the design, manufacture or delivery of a BCN weapon, with the intention that it will be used for such purpose.
2. It shall not be an offence within the meaning of this Convention to transport an item or material covered by paragraph 1(b)(iii) or, insofar as it relates to a nuclear weapon or other nuclear explosive device, paragraph 1(b)(iv), if such item or material is transported to or from the territory of, or is otherwise transported under the control of, a State Party to the Treaty on the Non-Proliferation of Nuclear Weapons where:
- (a) the resulting transfer or receipt, including internal to a State, of the item or material is not contrary to such State Party's obligations under the Treaty on the Non-Proliferation of Nuclear Weapons and,
 - (b) if the item or material is intended for the delivery system of a nuclear weapon or other nuclear explosive device of a State Party to the Treaty on the Non-Proliferation of Nuclear Weapons, the holding of such weapon or device is not contrary to that State Party's obligations under that Treaty.

Article 3ter

Any person commits an offence within the meaning of this Convention if that person unlawfully and intentionally transports another person on board a ship knowing that the person has committed an act that constitutes an offence set forth in article 3, *3bis* or *3quater* or an offence set forth in any

treaty listed in the Annex, and intending to assist that person to evade criminal prosecution.

Article 3^{quater}

Any person also commits an offence within the meaning of this Convention if that person:

- (a) unlawfully and intentionally injures or kills any person in connection with the commission of any of the offences set forth in article 3, paragraph 1, article 3^{bis}, or article 3^{ter}; or
- (b) attempts to commit an offence set forth in article 3, paragraph 1, article 3^{bis}, paragraph 1(a)(i), (ii) or (iii), or subparagraph (a) of this article; or
- (c) participates as an accomplice in an offence set forth in article 3, article 3^{bis}, article 3^{ter}, or subparagraph (a) or (b) of this article; or
- (d) organizes or directs others to commit an offence set forth in article 3, article 3^{bis}, article 3^{ter}, or subparagraph (a) or (b) of this article; or
- (e) contributes to the commission of one or more offences set forth in article 3, article 3^{bis}, article 3^{ter} or subparagraph (a) or (b) of this article, by a group of persons acting with a common purpose, intentionally and either:
 - (i) with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of an offence set forth in article 3, 3^{bis} or 3^{ter}; or
 - (ii) in the knowledge of the intention of the group to commit an offence set forth in article 3, 3^{bis} or 3^{ter}.

CMI Draft Guidelines – Title on Maritime Criminal Acts, Article 1.³⁰⁹

Article 1(2)

A maritime criminal act is committed when, for any unlawful purpose:

- (a) any person or persons, intentionally or knowingly and without regard to the consequences:
 - (i) injure or kill any person or persons in connection with the commission or the attempted commission of any of the offences set forth in paragraph 2(a) (ii)-(x) or (b) of this article; or
 - (ii) perform or threaten an act of violence against a person or persons on board a ship; or
 - (iii) seize or exercise control over a ship or any person or persons on board by actual force or by any other form of intimidation or by deception; or
 - (iv) engage in an act resulting in unlawful detention of a person or a ship; or

³⁰⁹ See Annex to IMO, LEG 93/12/1, 'Maritime Criminal Acts – Draft Guidelines for National Legislation, submitted by the Comité Maritime International (CMI)' 15 August 2007.

- (v) destroy or cause damage to a ship or a ship's cargo, a maritime structure, or an aid to navigation; or
 - (vi) employ in the commission of a criminal act any device or substance which is likely to destroy or cause damage to a ship, its equipment or cargo, or an aid to navigation; or
 - (vii) destroy, remove or cause damage to a maritime structure or navigational aid or facility, or interferes with its operation, if that act would be likely to endanger the safe navigation of a ship or ships; or
 - (viii) engage in an act involving interference with navigational, life support, emergency response or other safety equipment, if that act would be likely to endanger the safe operation or navigation of a ship or ships or a person or persons on board a ship; or
 - (ix) communicate false information endangering or being likely to endanger the safe operation or navigation of a ship or ships; or
 - (x) endanger or damage the marine environment, or the coastline, maritime installations or facilities, or related interests of any State; or
 - (xi) engage in any of the acts described in paragraph 2 (a)(i)-(x) of this article, to the extent applicable, where such acts involve a maritime structure or affect a person or persons on a maritime structure; or
 - (xii) obtain possession of a ship or maritime structure, wherever located, by theft or deception; or
 - (xiii) obtain possession of a ship's tackle, equipment or appurtenances, having substantial aggregate value, wherever located, by theft or deception; or
 - (xiv) obtain possession of a ship's cargo while on board and having substantial aggregate value, by theft or deception; or
 - (xv) obtain possession by theft or deception, committed on board a ship or maritime structure, of property having substantial aggregate value that belongs to the owner of the ship or structure or to any person legitimately on board whether or not engaged in the service of the ship or maritime structure; or
 - (xvi) knowingly receives possession of and/or converts any property described in paragraph 2(a)(xii)-(xv) of this article acquired by unlawful means; or
- (b) any person or persons, intentionally or knowingly and without regard to the consequences:
- (i) engage in an act constituting an offence under the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 2005; or
 - (ii) engage in an act constituting an offence under the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, 2005; or

- (c) The provisions of paragraphs 2 (a) and (b) 2 of this article shall not be construed so as to impede otherwise lawful measures taken in the course of a labour dispute.

Article 1(3)

An act of piracy is committed when any person or persons:

- (i) engage in piracy as that act is defined by Article 15 of the 1958 Convention on the High Seas; or
- (ii) engage in piracy as that act is defined by Article 101 of the 1982 Convention on the Law of the Sea.

Article 1(4)

An act of piracy is also committed when any person or persons, for any unlawful purpose, intentionally or knowingly and without regard to the consequences:

- (i) engage in an act defined as piracy under the national criminal code; or
- (ii) engage in an act held to constitute piracy by a decision of the national court of ultimate jurisdiction currently in force; or
- (iii) engage in an act deemed piratical under applicable customary international law.

Article 1(5)

An attempt or conspiracy to commit any of the offences listed in paragraphs 2, 3 or 4 of this article, or any unlawful effort intended to aid, abet, counsel or procure the commission of any of these offences shall constitute a maritime criminal act.

Article 1(6)

A threat to commit any of the offences listed in paragraphs 2, 3 or 4 of this article shall constitute a maritime criminal act.

Appendix C

Table of Ratifications³¹⁰

	Panama	Liberia	Philippines	Cyprus	Norway	Greece	UK	US	Somalia
UNCLOS	●	●	● ³¹¹	●	●	●	●	✗ ³¹²	● ³¹³
High Seas Con	✓	✓	✗	●	✗	✗	●	●	✗
SUA 1988	●	●	●	●	●	●	●	●	✗
SUA 2005	●	✗	✗	✗	✗	✗	✗	✗	✗
Hostages Con.	●	●	●	●	●	●	●	●	✗
SOLAS	●	●	● ³¹⁴	●	●	●	●	●	✗
CCPR	●	● ³¹⁵	●	●	●	●	● ³¹⁶	● ³¹⁷	● ³¹⁸
CESCR ³¹⁹	●	●	●	●	●	●	●	✓ ³²⁰	● ³²¹
CERD ³²²	●	●	●	●	●	●	●	●	●
CEDAW	●	● ³²³	●	●	●	● ³²⁴	●	✓ ³²⁵	✗

³¹⁰ Reservations to the following instruments, if deposited, are excluded from this table.

³¹¹ Philippines is not a party to the agreement for the implementation of the provisions of the Convention of 10 December 1982 (relating to the conservation and management of straddling fish stocks and highly migratory fish stocks), which is part of UNCLOS.

³¹² However, U.S. has signed the agreement for the implementation of the provisions of the Convention of 10 December 1982, on 21 August 1996.

³¹³ Somalia has signed the original convention; however, it is not a party to the agreement relating to the implementation of Part XI of the Convention of 10 December 1982, and the agreement for the implementation of the provisions of the Convention of 10 December 1982 relating to fisheries.

³¹⁴ Philippines is a party to the original convention, but not a party to its protocols.

³¹⁵ Liberia has signed the first optional protocol to CCPR, but has not ratified it.

³¹⁶ UK is not a party to the first optional protocol of CCPR.

³¹⁷ U.S. is a party to the original convention, but not a party to its protocols.

³¹⁸ Somalia is not a party to the second optional protocol of CCPR.

³¹⁹ None of these States are parties to the optional protocol to CESCR yet, which has adopted on 10 December 2008.

³²⁰ U.S. is not a party to the second optional protocol to CESCR, aiming at the abolition of the death penalty, adopted on 15 December 1989.

³²¹ Somalia is not a party to the second optional protocol to CESCR, aiming at the abolition of the death penalty, adopted on 15 December 1989.

³²² However, Greece, Panama, Philippines, Somalia and U.S. have not officially deposited their acceptance for the amendment to Article 8 of CERD, 15 January 1992.

³²³ Liberia has signed, but it is not ratified the optional protocol to CEDAW.

³²⁴ Greece has not deposited its acceptance for the amendment to Article 20(1) of CEDAW, 22 December 1995.

³²⁵ U.S. has not deposited its acceptance for the amendment to Article 20(1) of CEDAW, 22 December 1995. It is also not a party to the optional protocol, adopted on 6 October 1999.

CAT	● ³²⁶	●	●	●	● ³²⁷	● ³²⁸	●	● ³²⁹	● ³³⁰
Slavery Con.	✘	✓	●	●	✓	✓	✓	✓	✘
ILO C147	✘	● ³³¹	✘	●	●	●	●	● ³³²	✘
MLC 2006	●	●	✘	✘	●	✘	✘	✘	✘

- Ratified
- ✘ Not ratified
- ✓ Signed, but not ratified

³²⁶ Panama has not deposited its acceptance for the amendments to Articles 17(7) and 18(5) of CAT.

³²⁷ Norway has signed, but not ratified the optional protocol to CAT, adopted in 2002.

³²⁸ Greece has not deposited its acceptance for the amendments to Articles 17(7) and 18(5) of CAT. It has signed, but not ratified the optional protocol, adopted in 2002, as of today.

³²⁹ U.S. has not deposited its acceptance for the amendments to Articles 17(7) and 18(5) of CAT. U.S. has not ratified the optional protocol to CAT.

³³⁰ Somalia has not deposited its acceptance for the amendments to Articles 17(7) and 18(5) of CAT. Moreover, it has not ratified the optional protocol to CAT.

³³¹ Liberia is a party to the original convention, but not a party to the protocol of 1996.

³³² U.S. is a party to the original convention, but not a party to the protocol of 1996.

Appendix D

Table 3.2 Compliance and enforcement mechanisms³³³

Parties / Mechanism	Examples	Seafarers' Procedural Rights
State v State Adjudication or Complaint	<ul style="list-style-type: none"> • International Court of Justice • International Tribunal for the Law of the Sea • European Court of Human Rights • UN Committees on Human Rights • ILO complaint procedure 	<ul style="list-style-type: none"> • No direct rights for seafarers • Possible for a State to take up an action on behalf of a seafarer under diplomatic protection • Conceivable that a group may be given intervener status in ITLOS litigation
Individual v State Adjudication	<ul style="list-style-type: none"> • European Court of Human Rights 	<ul style="list-style-type: none"> • Direct rights to a judicial remedy
Individual v State Complaint	<ul style="list-style-type: none"> • Human Rights Committee • ILO complaint procedure (complainant must be delegate of ILC) 	<ul style="list-style-type: none"> • Procedural rights to complain, but findings not directly enforceable
International Supervision Mechanism Reports	<ul style="list-style-type: none"> • Human Rights Committee • Committee on Economic, Social and Cultural Rights • ILO Committee of Experts • Reports under ESC 	<ul style="list-style-type: none"> • Individuals and groups can bring information to the attention of committees, but no directly enforceable rights
International Supervision Mechanism Complaints	<ul style="list-style-type: none"> • Human Rights Committee • ILO complaint procedure (complainant must be delegate of ILC) • ESC Collective complaints procedure • Inter American Commission • African Commission on Human and Peoples Rights 	<ul style="list-style-type: none"> • Individuals and/or groups can submit complaint, but findings not directly enforceable
State v Ship Owner or other private party	<ul style="list-style-type: none"> • Flag State, Port State, Coastal State enforcement of IMO and ILO Conventions and UNCLOS, Eg. Paris MOU, Tokyo MOU 	<ul style="list-style-type: none"> • Rarely gives seafarers direct legal rights of action, but may provide a channel for seafarer complaints
Individual v State National Courts	<ul style="list-style-type: none"> • Enforcement of international standards in national courts (where incorporated) • Actions against public bodies where seafarers' rights are part of national law (eg enforcement of constitutional rights) 	National level: see Chapters 6-17
Individual v Ship/Owner or other private party National Courts	<ul style="list-style-type: none"> • Wage claim • Personal injury action 	National level: see Chapters 6-17

³³³ Reproduced from Fitzpatrick and Anderson (n 50) 93.

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- ❖ Constitution for the International Labour Organisation, 1919
- ❖ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984
- ❖ Convention on the Elimination of All Forms of Discrimination against Women, 1979
- ❖ Convention on the Rights of the Child, 1989
- ❖ Hague Rules as Amended by the Brussels Protocol 1968
- ❖ International Convention Against the Taking of Hostages, 1979.
- ❖ International Convention for the Safety of Life at Sea, 1974, as amended
- ❖ International Convention for the Suppression of the Financing of Terrorism, 1999.
- ❖ International Convention on the Elimination of All Forms of Racial Discrimination, 1965
- ❖ International Covenant on Civil and Political Rights, 1966
- ❖ International Covenant on Economic, Social and Cultural Rights, 1966
- ❖ International Safety Management Code
- ❖ International Ship and Port Facility Security Code
- ❖ Rome Statute of the International Criminal Court, 1998.
- ❖ Slavery Convention of 1926, as amended in 1953, and the Supplementary Convention on the Abolition of Slavery of 1956
- ❖ The Charter of the United Nations, 1945
- ❖ The Geneva Convention on the High Seas, 1958.
- ❖ The Nyon Agreement of 1937.
- ❖ United Nations Convention Against Transnational Organized Crime, 2000.
- ❖ United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (Rotterdam Rules), 2008
- ❖ United Nations Convention on the Law of the Sea, 1982
- ❖ Vienna Convention on Consular Relations and Optional Protocol 1963
- ❖ Vienna Convention on the Law of Treaties, adopted on 23 May 1969, entered into force on 27 January 1980.

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- ❖ ILO Convention C008: Unemployment Indemnity (Shipwreck) Convention (2nd Conference Session Geneva 9 July 1920)
- ❖ ILO Convention C009: Placing of Seamen Convention (2nd Conference Session Geneva 10 July 1920)
- ❖ ILO Convention C016: Medical Examination of Young Persons (Sea) Convention (3rd Conference Session Geneva 11 November 1921)
- ❖ ILO Convention C023: Repatriation of Seamen Convention (9th Conference Session Geneva 23 July 1926)
- ❖ ILO Convention C029: Forced Labour Convention (14th Conference Session Geneva 28 June 1930)
- ❖ ILO Convention C053: Officers' Competency Certificates Convention (21st Conference Session Geneva 24 October 1936)
- ❖ ILO Convention C055: Shipowners' Liability (Sick and Injured Seamen) Convention (21st Conference Session Geneva 24 October 1936).
- ❖ ILO Convention C056: Sickness Insurance (Sea) Convention (21st Conference Session Geneva 24 October 1936)
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- ❖ ILO Convention C069: Certification of Ships' Cooks Convention (28th Conference Session Geneva 27 June 1946)
- ❖ ILO Convention C070: Social Security (Seafarers) Convention (28th Conference Session Geneva 28 June 1946)
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- ❖ ILO Convention C073: Medical Examination (Seafarers) Convention (28th Conference Session Geneva 29 June 1946)
- ❖ ILO Convention C076: Wages, Hours of Work and Manning (Sea) Convention (28th Conference Session Geneva 29 June 1946)
- ❖ ILO Convention C087: Freedom of Association and Protection of the Right to Organise Convention (31st Conference Session Geneva 9 July 1948)
- ❖ ILO Convention C093: Wages, Hours of Work and Manning (Sea) Convention (Revised) (32nd Conference Session Geneva 18 June 1949)
- ❖ ILO Convention C095: Protection of Wages Convention (32nd Conference Session Geneva 1 July 1949)
- ❖ ILO Convention C098: Right to Organise and Collective Bargaining Convention (32nd Conference Session Geneva 1 July 1949).
- ❖ ILO Convention C100: Equal Remuneration Convention (34th Conference Session Geneva 29 June 1951)
- ❖ ILO Convention C105: Abolition of Forced Labour Convention (40th Conference Session Geneva 25 June 1957)

- ❖ ILO Convention C109: Wages, Hours of Work and Manning (Sea) Convention (Revised) (41st Conference Session Geneva 14 May 1958)
- ❖ ILO Convention C111: Discrimination (Employment and Occupation) Convention (42th Conference Session Geneva 25 June 1958)
- ❖ ILO Convention C130: Medical Care and Sickness Benefits Convention (53rd Conference Session Geneva 25 June 1969)
- ❖ ILO Convention C133: Accommodation of Crews (Supplementary Provisions) Convention (55th Conference Session Geneva 30 October 1970)
- ❖ ILO Convention C134: Prevention of Accidents (Seafarers) Convention (55th Conference Session Geneva 30 October 1970)
- ❖ ILO Convention C145: Continuity of Employment (Seafarers) Convention (62nd Conference Session Geneva 28 October 1976).
- ❖ ILO Convention C147: Merchant Shipping (Minimum Standards) Convention (62nd Conference Session Geneva 29 October 1976)
- ❖ ILO Convention C163: Seafarers' Welfare Convention (74th Conference Session Geneva 8 October 1987)
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