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Modern maritime piracy: The anti-piracy professionals' consciousness of the hard and soft law regulating anti-piracy operations.

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## **Abstract**

Modern maritime piracy is a phenomenon regulated by hard and soft law made by states, international organizations and other lawmakers. Additionally, professionals who participate in anti-piracy operations, either as state agents or private individuals, follow social norms which intermingle with the applicable hard and soft law.

This masters' thesis in Sociology of Law is a study on the legal consciousness of state agents and private individuals working in the anti-piracy domain. The aim of the research is to examine the anti-piracy professionals' level of training in and awareness of relevant laws. Understanding that the applicable hard and soft anti-piracy law is complex, and depicting the current level of legal training and awareness of anti-piracy professionals, are the first steps to be taken in order to reform their training, if needed, and result in a better awareness of law.

In order to explain this complexity of laws regulating anti-piracy, the legal pluralism theory, namely Menski's *kite model* with its four corners of lawmaking sources - nature; society; state law; and international law and human rights law - is applied. The research methods used are: survey research; in-depth interviews; and content analysis of documents.

**Key terms:** Maritime piracy, anti-piracy, legal consciousness, legal pluralism, Menski's kite model, hard law, soft law, social norms.

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## **1. Introduction.**

Maritime piracy is an ancient phenomenon, namely a criminal practice. Although it was almost eliminated for decades, in the beginning of the 21<sup>th</sup> century it made a sudden come-back. Nowadays, think tanks and research institutes across the world include piracy, which is often badged as a “non-traditional” security issue, in their human security issues agenda.<sup>1</sup>

My involvement with the study of modern maritime piracy began in 2013, upon my appointment as a military judge at the Military Court of Chania, Greece. Having a general interest in international law and relevant postgraduate studies, I decided to follow some courses at the NATO Maritime Interdiction Operational Training Center (NMIOTC). Eventually, I got more involved with the NMIOTC by attending its annual conferences, writing a couple of articles for the *Maritime Interdiction Operations Journal*, and, occasionally, delivering some lectures on international law and human rights.

My interaction with state agents and private individuals actively engaged in anti-piracy operations - either as boarding team members or as vessel protection detachment members - has generated concerns on their awareness and understanding of the complex set of laws regulating maritime piracy, which are *conditio sine qua non* for the legitimacy of their actions. This set of laws gradually becomes more complex, since the international community tries to counter maritime piracy not only by using the existing legal framework but also by launching new legislative and operational initiatives. Additionally, although state agents and private individuals working in the anti-piracy domain are obliged to follow many common rules, there are some applicable rules which are different for each category of anti-piracy professionals. Thus, state agents and private individuals must be aware of, understand and apply different sets of laws.

Following the MSc in Sociology of European Law program at Lund University gave me the opportunity to get introduced to sociological theories, such as the legal consciousness and the legal pluralism theory. When the time came for my master’s thesis, I couldn’t resist conducting a research project on maritime piracy in a way that

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<sup>1</sup> Hunter Alan (2013).

it would combine my interest in law with the new paths that sociology of law can open in this field, including the teaching of law.

For the purposes of this research project the following terms are defined and understood as follows:

Maritime piracy: “For an act to be considered piracy under international law, the following conditions must be met: i) the act must be an illegal act of violence, detention, or depredation (the “illegal violence rule”); ii) the act must be motivated by private ends (the “lucre causa rule”); iii) two ships must be involved in the incident, the victim ship and the pirate ship (the “two ship rule”); and iv) the act must be committed on the high seas or waters outside the jurisdiction of any state (the “high seas rule”).<sup>2</sup>

Anti-piracy operations: Actions taken by international organizations, governments and private entities to deter or suppress maritime piracy.

Anti-piracy professionals: State agents and private individuals conducting anti-piracy operations.

State agents: Navy and Coast Guard personnel conducting anti-piracy operations.

Private individuals: Private Maritime Security Companies’ personnel conducting anti-piracy operations.

Hard law: In the context of a state (domestic law), hard law refers to binding legal instruments, such as laws, acts, decrees and ministerial decisions. To constitute hard law, a rule, instrument or decision must be authoritative and prescriptive. In the international domain (international law), hard law includes self-executing treaties or international agreements, as well as customary laws, which create enforceable obligations and rights for states and other international entities. These instruments result in legally enforceable commitments for states and other international subjects.

Soft law: In the context of a state (domestic law), soft law refers to quasi-legal instruments or rules that are neither strictly binding in nature nor completely lacking legal significance. In other words, their binding force is somewhat weaker than the binding force of hard law. In the context of international law, soft law refers to guidelines, policy declarations or codes of conduct which are not directly enforceable.

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<sup>2</sup> Campana Corrado (2014), p. 7.

Social norms: Informal understandings that govern the behavior of members of a society or, in other words, “conceptions about desirable ways of life”.<sup>3</sup> In this master thesis, social norms followed by anti-piracy professionals are categorized as “soft law”.

Values: “Sanctionable standards of conduct”.<sup>4</sup>

Positive law: According to Eugen Ehrlich’s ideas, positive law consists of the compulsory norms of state requiring official enforcement.

Living law: According to Eugen Ehrlich’s ideas, living law consists of the rules of conduct followed by people in their social life. Living law may be different from the laws and norms applied by courts and may contain greater cultural authority than positive law.

Official law: Law-norms which are obligatory for all members of society and protected and enforced by the authoritative power of government.<sup>5</sup>

Unofficial law: Law-norms which are not politically overseen but may be restricted to other groups.<sup>6</sup>

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<sup>3</sup> Deflem Mathieu (2008), p. 198.

<sup>4</sup> Deflem Mathieu (2008), p. 198.

<sup>5</sup> Deflem Mathieu (2008), p. 88.

<sup>6</sup> Deflem Mathieu (2008), p. 88.

## **2. Recognizing the problem.**

### **2.1. Historical background.**

#### **2.1.1 The history of maritime piracy.**

The phenomenon of maritime piracy dates back to the antiquity. Pellegrino<sup>7</sup> traces it in the classical world, namely in Greece. She describes the Aegean Sea as a perfect place for pirates, who could easily hide themselves in the islands and bays, in order to attack merchant vessels sailing nearby. Also, in the High Middle Ages, Vikings and the Danes committed acts of piracy and, in the Middle Ages and during the Renaissance, Saracen pirates infested the Mediterranean coasts. Later, in the 17<sup>th</sup> century, piracy spread in the Sea of Antilles, the Caribbean, and then to all continents.

According to Zou,<sup>8</sup> early references to piracy can be found in *Justinian's Digest* in 529 AD and in *King John's Ordinance* of 1201. The English act on piracy enacted in 1698 was probably the first national law criminalizing piracy. Following the paradigm of England more states, such as Germany and the United States, enacted laws on piracy. Although, initially, piracy was punished as a crime exclusively according to the domestic law of coastal states, the international community soon realized that piracy constituted a threat against maritime navigation in general and decided to regulate it globally. Thus, the law of piracy can be regarded as the oldest branch of international law, particularly of the international law of the sea. The 1856 Treaty of Paris, the first legal document against piracy in the international domain, was followed by several documents, such as the 1889 Montevideo Convention and the 1937 Nyon Agreement. After WWII, the 1958 Geneva Convention on the High Seas (GCHS) and the 1982 UN Convention on the Law of the Sea (UNCLOS) were the most important international conventions containing anti-piracy provisions.

Nowadays, according to both customary and conventional international law, maritime piracy on the high seas is considered as an international crime and all states have the right to suppress it.

The enactment of anti-piracy laws in both national and international domains and the ability of coastal states to gain control over their territorial waters resulted in

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<sup>7</sup> Pellegrino Francesca (2012), pp. 430-431.

<sup>8</sup> Zou Keyuan (2009), pp. 323-324.

the gradual elimination of maritime piracy, which lasted for many decades. Although piracy attacks declined in the 19<sup>th</sup> and 20<sup>th</sup> centuries, a new surge began in the 1990s<sup>9</sup>. This phenomenon never disappeared completely and nowadays it is still present, especially in the Gulf of Aden and in the Horn of Africa, due to the lack of a central government in Somalia able to control the Somali territorial waters,<sup>10</sup> and in the Malacca Strait and the South China Sea. More recent pirates' attacks have been reported in the Atlantic Ocean off the west coast of Africa.

### 2.1.2. Modern anti-piracy operations.

The rise of maritime piracy in the Indian Ocean in the first decade of the 21<sup>st</sup> century prompted international action to protect civilian vessels<sup>11</sup>, mainly by launching anti-piracy operations. The so-called "Somali piracy" and "Malaccan piracy" have become serious threats to maritime navigation.

In the 21<sup>st</sup> century, maritime piracy is not very different from that of the past. Modern pirates use the same methodology as their predecessors. They conduct acts of piracy for the same purpose, by attacking harmless merchant ships, and, in some cases, by killing the sailors, in order to steal the ships' cargo and goods and to share the booty. Modern pirates, armed with highly sophisticated weapons (AK-47, RPGs) use small and nimble boats (skiffs or whalers), often with the support of "mother ships", adopting the traditional technique of water boarding, in order to board fishing boats, cargo ships, container ships and tankers. They take possession of the ship, keep the crew prisoner, divert the ship from maritime routes toward a friendly port, plunder the vessel and demand ransom for the release of any hostages.<sup>12</sup> O' Brien records that, as of 14 May 2013, there were 5 vessels being held hostage and 71 people had been taken hostage by Somali pirates and that by 14 May 2013, there had been 100 pirate attacks worldwide since the start of 2013, with 4 of those resulting in successful hijackings.<sup>13</sup>

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<sup>9</sup> O' Brien Melanie (2014), p. 81.

<sup>10</sup> Pellegrino Francesca (2012), p. 431.

<sup>11</sup> Bürgin Annita Cristina (2014), p. 96.

<sup>12</sup> Pellegrino Francesca (2012), p. 432.

<sup>13</sup> O' Brien Melanie (2014), p. 83.

Year	Type of incidents			Total
	Boarded	Hijacked	Attempt	
1997	100	15	23	138
1998	90	14	31	135
1999	169	12	46	227
2000	235	6	130	371
2001	145	18	75	238
2002	152	26	60	238
2003	180	17	88	285
2004	134	9	63	206
2005	111	23	59	193
2006	104	13	50	167
2007	98	13	56	167
2008	81	46	80	207
2009	153	49	84	406

Table 1: Number of Piracy Acts by Type on the Europe-South East Asia Route.<sup>14</sup>

Statistics on the incidents and the results of maritime piracy are indicative of the seriousness of the phenomenon. The International Maritime Bureau (IMB) reports that, from 2007 to 2012, 45 people were killed as a result of piracy attacks, 243 were injured, and 4,792 were taken hostage.<sup>15</sup> According to Bensassi & Martinez-Zarzoso, in 2009, Somali pirates hijacked 47 vessels, took 867 crewmembers hostage and carried out no less than 217 violent attacks on ships.<sup>16</sup> Ships, particularly commercial vessels and yachts, are under the risk as maritime piracy, especially when they sail in high risk areas.

	2006	2007	2008	2009	2010
Number of Actual and Attempted Attacks	239	263	293	410	455
Number of Ships Fired Upon	7	14	46	121	107
Number of Hostages Taken	188	292	889	1050	1181

Source: ICC-IMB 2010 Report

Table 2: Pirate Attacks 2006-2010.<sup>17</sup>

<sup>14</sup> Bensassi Sami & Martinez-Zarzoso Immaculada (2012), p. 873.

<sup>15</sup> O’ Brien Melanie (2014), p. 84.

<sup>16</sup> Bensassi Sami & Martinez-Zarzoso Immaculada (2012), p. 869.

<sup>17</sup> Dutton Yvonne M. (2012), p. 1114.

Maritime piracy incidents are usually categorized in statistic tables as “actual attacks” (meaning that the vessels were “boarded” or “hijacked”) and “attempted attacks” (meaning that the vessels were not “boarded” or “hijacked”), according to the result of the attack. “Total attacks” are the addition of both “actual” and “attempted attacks”. For example, in total there were 410 piracy attacks in 2009, 445 in 2010, 439 in 2011, and a drop to 297 in 2012.<sup>18</sup>

Year	Reported pirate attacks (actual and attempted)
2003	172
2004	165
2005	148
2006	135
2007	100
2008	96
2009	101

Source: Bradford (2008: 476) and ReCAAP Information Sharing Centre (2009: 8).

Table 3: Reported pirate attacks in South-East Asia, 2003-2007.<sup>19</sup>

Due to maritime piracy, in the shipping sector there has been an increase in: insurance costs; private security on ships travelling through piracy hot spots; amount of money demanded for ransoms; the cost of fuel caused by the need to travel at faster speeds to avoid pirate attacks and/or the need to reroute into a longer route to avoid attacks; the purchase of “ship hardening” security equipment to protect against pirate attacks; and salaries for ship laborers travelling through high risk areas.<sup>20</sup> Moreover, there has been an increasing loss of trade for many countries and maritime companies, as depicted in Tables 4 & 5.

This loss of trade affected the international community as a whole. Nowadays, the list of major stakeholders interested in the suppression of maritime piracy includes international organizations (UN, EU, NATO, IMO etc.), NGOs (ICC-IMB etc.), states (mainly coastal ones), shipping companies, ship-owners, private security companies and insurance companies.

<sup>18</sup> O’ Brien Melanie (2014), p. 82.

<sup>19</sup> Baird Rachel (2012), p. 503.

<sup>20</sup> O’ Brien Melanie (2014), p. 83.

<i>Year</i>	<i>Total maritime trade<sup>a</sup> (millions USD)</i>	<i>Loss of trade<sup>b</sup> (millions USD)</i>
1999	\$279,000	\$10,600
2000	\$337,000	\$12,800
2001	\$341,000	\$13,000
2002	\$343,000	\$13,100
2003	\$356,000	\$13,600
2004	\$403,000	\$15,400
2005	\$448,000	\$17,100
2006	\$519,000	\$19,800
2007	\$598,000	\$22,800
2008	\$643,000	\$24,500

Table 4: Total Maritime Trade and Loss of Trade due to Maritime Piracy<sup>21</sup>.

<i>Year</i>	<i>Percent of hijacking</i>		<i>Loss of trade (Millions USD)</i>	
	<i>Somali pirates</i>	<i>Malaccan pirates</i>	<i>Somali pirates</i>	<i>Malaccan pirates</i>
1999	42%	58%	\$3,840	\$5,370
2000	13%	38%	\$1,390	\$4,170
2001	16%	68%	\$1,770	\$7,690
2002	11%	79%	\$1,210	\$8,870
2003	6%	72%	\$651	\$8,460
2004	0%	80%	\$0	\$10,600
2005	65%	35%	\$9,510	\$5,070
2006	38%	38%	\$6,490	\$6,490
2007	92%	8%	\$18,000	\$1,500
2008	91%	9%	\$19,000	\$1,810

Table 5: Loss of Trade on the East Asian Trade Route due to Piracy<sup>22</sup>.

The rise of maritime piracy first in Somalia and then in other parts of the Indian Ocean and its impact on the maritime sector, led the international community to take measures against it. The prosecution of piracy is permitted under universal jurisdiction, but this is only possible when crimes are not committed in territorial waters. Since 2008, the UNSC has issued several Resolutions on Somali piracy - the first being UNSC Res. 1816 of 2008 - which permit states to enter Somali territorial waters to pursue and capture pirates. Nevertheless, the enactment of universal jurisdiction is particularly problematic for crimes committed in the Malacca Strait, which is all territorial waters of Singapore, Malaysia and Indonesia), and in the South China Sea, over which territorial disputes are ongoing.<sup>23</sup>

Since not all states are willing or capable to participate in anti-piracy operations and the need for maritime security is urgent, a new tendency was born: the privatization of security on the high seas. Many states are highly interested in having ship-owners

<sup>21</sup> Bensassi Sami & Martinez-Zarzoso Immaculada (2012), p. 879.

<sup>22</sup> Bensassi Sami & Martinez-Zarzoso Immaculada (2012), p. 879.

<sup>23</sup> O' Brien Melanie (2014), p. 86.

contracting private security companies, since their Navies lack the ability to protect the commercial or fishing fleets sailing under their flag.<sup>24</sup> This new trend led to the growth of the private maritime security services sector worldwide. Nowadays, the use of both public and private security forces is perceived as the best way to protect lives and national economic interests at sea.

## **2.2. Forming the research questions.**

The IMO divides acts of piracy into two categories based in the geographical and legal divisions of maritime zones; piracy on the high seas is defined as “piracy” in accordance with the UNCLOS, while piracy in the internal waters and territorial sea is defined as “armed robbery against ships”.<sup>25</sup>

Acts of piracy, especially those which take place on the high seas, usually have a legal *nexus* with several jurisdictions, such as the national law of the flag-state and the national law of the country of origin/nationality of both suspects and victims. International law is also applicable when maritime piracy takes place on the high seas or in areas out of the jurisdiction of any state. This concurrent applicability of different sets of laws and regulations, which will be described in detail in the following pages, results in a complex legal construction – Struett et al. call it “the maritime piracy regime complex”<sup>26</sup> – used to regulate modern maritime piracy and anti-piracy operations. This complexity proves problematic because it produces conflict of laws which in turn leads to the poor understanding of applicable laws by persons actively involved in modern anti-piracy operations. Moreover, pirates and anti-piracy professionals use to follow certain social norms, generated by their culture, experience, education, religion etc. Social norms interact with the positive law and render the legal framework officially or unofficially applied in anti-piracy operations more complex.

The aim of my research project is to find out the anti-piracy professionals' actual or perceived level of consciousness of the laws regulating anti-piracy operations. In order to achieve this aim, I will try to answer the following main research question:

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<sup>24</sup> Bürgin Annita Cristina (2014), p. 104.

<sup>25</sup> Zou Keyuan (2009), p. 326.

<sup>26</sup> Struett Michael J. et. al. (2013), pp. 93.

*“How conscious are anti-piracy professionals of the hard and soft law regulating anti-piracy operations and why?”.*

The main research question is further divided in the following sub-questions:

- (i) *“Which is the hard and soft law regulating anti-piracy operations?”.*
- (ii) *“Up to what level are anti-piracy professionals conscious of the hard and soft law regulating anti-piracy operations?”.*
- (iii) *“Which is the anti-piracy professionals’ opinion on their level of consciousness of the hard and soft law regulating anti-piracy operations?”.*
- (iv) *“Why do anti-piracy professionals consider the level of their consciousness of the hard and soft law regulating anti-piracy operations as adequate or inadequate?”.*

Answering the main research question and the four sub-questions may prove important for training and operational reasons. Firstly, the identification and clarification of the laws applicable in anti-piracy operations, and the possible identification of gaps in legal consciousness, will be useful in order to evaluate the content of the existing training courses for anti-piracy professionals. In case that their content doesn’t cover the whole scope of applicable law, the existing training courses may be reformed or new more comprehensive and comprehensible training courses may be developed by public and private educational institutions. Secondly, the enhancement of awareness and understanding of piracy laws by personnel participating in anti-piracy operations, mainly through relevant training courses, will enable them to better perform their law enforcement duties avoiding any illegal action due to negligence. In the long run, this will lead to the establishment of a rule of law culture and to the better implementation of human rights laws on the high seas.

### **2.3. Relevance to sociology of law.**

I consider the research project relevant to the sociology of law discipline, because it refers to a distinct community, the maritime community, composed by persons belonging to different social groups, such as seafarers, military and law enforcement personnel, and even pirates. Individuals working and living offshore for big periods of time behave in a different manner than individuals living onshore. There are certain laws that have been developed for this community, such as the international law of the sea and the maritime law. What is more interesting under the prism of

sociology of law, is that, since they are obliged to coexist and collaborate in a confined place, the vessel, and sometimes face altogether the dangers of the sea, they develop close social relationships and follow specific social norms.

Recently, due to the rise of maritime piracy, a new social group, the private security contractors, was added to the maritime community. This new group provides security services onboard vessels, protecting the crew, the cargo and the vessel from pirates. Hence it has been embraced by the pre-existing groups of the maritime community, such as the seafarers. The interaction of the pre-existing groups with the newcomer is an interesting issue for sociology of law.

Moreover, the research project is relevant to sociology of law, since reference will be made to sociology of law theories and aspects, such as the globalization of (maritime piracy) law, the legal consciousness of anti-piracy professionals, and the legal pluralism in the maritime piracy domain. In order to reflect on the plural legalities which co-exist in the domain of modern maritime piracy Werner Menski's *kite model* will also be used. Menski argues that legal pluralism has today developed to a "plurality of pluralities".<sup>27</sup> Thus, I will try to examine if this idea is applicable in the field of piracy laws.

#### **2.4. Previous research on maritime piracy and anti-piracy.**

The phenomenon of maritime piracy has been analyzed by scholars of various disciplines (law, politics, international relations, economics, security etc) through different prisms.

In all manuals of public international law one can find a chapter dedicated to the international law of the sea, where reference to piracy law is made. By reviewing legal journals, I found out that the majority of recent articles on maritime piracy law

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<sup>27</sup> Menski Werner (2014), pp. 14 and 21.

follow a positivistic approach, focusing either on international law,<sup>28</sup> or on national laws,<sup>29</sup> or on a combination of both.<sup>30</sup>

Zou<sup>31</sup> associated the new developments of the law of piracy with the resurgence of contemporary piracy in the 1990s and the US-led war on terror and described the formation of the modern international law of piracy. According to Nyman,<sup>32</sup> international law has proven unable to provide an effective framework against maritime piracy. Nyman attributed this failure to the two main flows in the treatment of piracy under UNCLOS and proposed solutions to the problem. Hallwood & Miceli<sup>33</sup> - same way as Nyman - maintained that the current international law against maritime piracy cannot be adequately enforced due to inherent weaknesses and propose its reformation. Campana<sup>34</sup> referred to the international law relating to maritime piracy and relevant UNSC Resolutions. He concluded that “Achieving clarity in the international law and in the legal framework of maritime piracy is of primary importance to provide a fast relief from one of the most deplorable scourges affecting the shipping industry”. Almost the same views were expressed by Direk et al.<sup>35</sup> who examined in detail the definition of piracy in international law and surveyed on the UNSC reactions against piracy in Somalia. They argued that neither the numerous attempts by academics to broaden the definition of piracy nor the UNSC *ad hoc* Resolutions will solve the problem of piracy in Somalia. Guilfoyle<sup>36</sup> approached piracy through the lens of the law of armed conflict, the international law of piracy, the law of terrorism, and the law applicable to transnational organized crime.

Dutton<sup>37</sup> conducted research on the anti-piracy laws of almost fifty states and came to the conclusion that most states lack the political will to prosecute pirates, thus

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<sup>28</sup> Zou Keyuan (2009); Nanda Ved P. (2011); Nyman Elizabeth (2011); Direk Ömer F. et al. (2011); Guilfoyle Douglas (2012); Hallwood Paul & Miceli Thomas J. (2013); and Campana Corrado (2014).

<sup>29</sup> Lavrisha Daniel A. (2010); Dutton Yvonne M. (2012); Korontzis Tryfon (2012); and Bürgin Annita Cristina (2014).

<sup>30</sup> Bento Lucas (2011); Davenport Tara (2012); and Struett Michael J. et al. (2013).

<sup>31</sup> Zou Keyuan (2009).

<sup>32</sup> Nyman Elizabeth (2011).

<sup>33</sup> Hallwood Paul & Miceli Thomas J. (2013).

<sup>34</sup> Campana Corrado (2014).

<sup>35</sup> Direk Ömer F. et al. (2011).

<sup>36</sup> Guilfoyle Douglas (2012).

<sup>37</sup> Dutton Yvonne M. (2012).

few of them have enacted comprehensive anti-piracy laws. Previously, Lavrisha<sup>38</sup> researched on the national piracy laws of the USA, Kenya, Australia and France and proposed the update of the US statutory piracy law. Korontzis<sup>39</sup> focused on the close cooperation between international organizations and states, both in the legal and operational level, in order to face the phenomenon of piracy and makes special reference in the Greek legislation. Bürgin<sup>40</sup> researched on the privatization of security trend as far as maritime piracy is concerned. By comparing the development of Spanish law and practice to the German, French and Dutch law and practice she argued that the use of both official and private security forces against pirates is the best way to protect lives and national economic interests.

Bento<sup>41</sup> maintained that current domestic, regional and international legal frameworks failed in combating piracy and suggested that “Effective anti-piracy efforts require uniformity of law, such that legal solutions suppress piracy internationally rather than treat its symptoms in an *ad hoc* local or regional fashion”. Davenport<sup>42</sup> compared the Somali piracy to the piracy in Southeast Asia and evaluated the legal measures taken to facilitate the arrest, prosecution and punishment of pirates. Struett et al.<sup>43</sup> examined four core elemental regimes that are identifiable by their key texts or organizations: the UNCLOS, the SUA Convention, the IMO and the IMB and describe conflicting norms in the maritime piracy regime complex. They maintained that the complexity of laws against piracy is itself a major drawback in the elimination of maritime piracy. Additionally, many lawyers dealt with criminal procedural law issues, such as the jurisdiction of states over piracy and the arrest, detention and prosecution of suspect pirates.<sup>44</sup>

Chang<sup>45</sup> proposed the establishment of regional international piracy tribunals that can apply a uniform definition of piracy and provide the judicial resources to

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<sup>38</sup> Lavrisha Daniel A. (2010).

<sup>39</sup> Korontzis Tryfon (2012).

<sup>40</sup> Bürgin Annita Cristina (2014).

<sup>41</sup> Bento Lucas (2011).

<sup>42</sup> Davenport Douglas (2012).

<sup>43</sup> Struett Michael J. et al. (2013).

<sup>44</sup> Chang Diana (2010); Archibugi Daniele & Chiarugi Marine (2011); Kelley Ryan P. (2011); Dutton Yvonne M. (2012); Fouché Henri (2012); Anderson James (2013); and O’ Brien Melanie (2014).

<sup>45</sup> Chang Diana (2010).

enforce international piracy laws. Archibugi & Chiarugi<sup>46</sup> focused on the unwillingness of many states to prosecute them despite the notion of universal jurisdiction of states over acts of piracy. Nevertheless, they provide information on the prosecution of pirates in the US, Yemen and the Netherlands. Kelley<sup>47</sup> also referred to the extraterritorial and universal jurisdiction of states, focusing on the arrest of suspect pirates and their treatment after being arrested. Fouché<sup>48</sup> made recommendation on how to bridge the gap between military interventions against piracy and the judicial prosecution of suspect pirates. Anderson<sup>49</sup> suggested the reformation of the international regime for the prevention, suppression and prosecution of acts of piracy. Interestingly, O' Brien<sup>50</sup> suggested that pirates should be prosecuted in the ICC.

Other lawyers analyzed human rights issues that occur during anti-piracy operations.<sup>51</sup> De Bont<sup>52</sup> dealt with the application of international human rights law off the coast of Somalia, focusing on the legal issues of detention, transfer to third states and fair trial of suspect pirates. Obokata<sup>53</sup> maintained that the current anti-piracy legal framework, namely the UNCLOS and the SUA Convention, has key weaknesses which should be alleviated through the application of the international human rights law.

Some articles proved to be very helpful for my study: Hodginson et al.<sup>54</sup> and Anderson<sup>55</sup> reflected on recent efforts and reforms of the international legal framework against piracy; Struett et al.<sup>56</sup> identified that there is a maritime piracy regime complex; and Pellegrino<sup>57</sup> discussed historical and legal aspects of maritime piracy.

Beyond legal articles, I managed to discover some very interesting and helpful articles: Bendall<sup>58</sup> and Bensasi & Martinez-Zarzoso<sup>59</sup> have researched on financial

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<sup>46</sup> Archibugi Daniele & Chiarugi Marine (2011).

<sup>47</sup> Kelley Ryan P. (2011).

<sup>48</sup> Fouché Henri (2012).

<sup>49</sup> Anderson James (2013).

<sup>50</sup> O' Brien Melanie (2014).

<sup>51</sup> De Bont Saoirse (2011); and Obokata Tom (2013).

<sup>52</sup> De Bont Saoirse (2011).

<sup>53</sup> Obokata Tom (2013).

<sup>54</sup> Hodginson Sandra L. et al. (2011).

<sup>55</sup> Anderson James (2013).

<sup>56</sup> Struett Michael J. et al. (2013).

<sup>57</sup> Pellegrino Francesca (2012).

<sup>58</sup> Bendall Helene (2010).

<sup>59</sup> Bensasi Sami & Martinez-Zarzoso Immaculada (2012).

effects of modern maritime piracy, mainly its cost to states and the maritime sector; from an international security perspective, different aspects of maritime piracy have been discussed by Nanda,<sup>60</sup> Baird,<sup>61</sup> O' Brien,<sup>62</sup> and Houben.<sup>63</sup>

Nanda<sup>64</sup> focused on international and regional cooperative measures for the suppressions of Somali piracy and the prosecution of suspect pirates. He suggested that the critical elements are “to find appropriate means and authority to apprehend, detain, and prosecute suspected pirates and, to make sufficient arrangements for imprisoning them in the region, or to extradite the suspects”; Baird<sup>65</sup> described the significance of maritime security in Asian waters for international trade and commerce and the responses to piracy in Asia, such as the launching of the ReCAAP; O' Brien<sup>66</sup> analyzed the potential of the ICC to prosecute pirates suggesting that piracy fits within the ICC's jurisdiction as an international crime; and Houben<sup>67</sup> dealt with the EU's Common Security and Defence Policy Missions in the Horn of Africa and concludes that “winning the endgame against Somali piracy can only be done ashore, and this requires the empowerment of the region to lead and to sustain the achievements made so far”. Additionally, Priddy & Casey-Maslen<sup>68</sup> and Petrig<sup>69</sup> identified legal issues and challenges which emerge from the use of Private Maritime Security Companies in anti-piracy operations, such as the use of force and firearms against suspect pirates.

Many studies on maritime piracy focus on certain geographical areas. For example, Direk et al.,<sup>70</sup> Davenport,<sup>71</sup> and Houben<sup>72</sup> focus on Somalia and the Horn of

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<sup>60</sup> Nanda Ved P. (2011).

<sup>61</sup> Baird Rachel (2012).

<sup>62</sup> O' Brien Melanie (2014).

<sup>63</sup> Houben Marcus (2014).

<sup>64</sup> Nanda Ved P. (2011).

<sup>65</sup> Baird Rachel (2012).

<sup>66</sup> O' Brien Melanie (2014).

<sup>67</sup> Houben Marcus (2014).

<sup>68</sup> Priddy Alice & Casey-Maslen Stuart (2012).

<sup>69</sup> Petrig Anna (2013).

<sup>70</sup> Direk Ömer F. et al. (2011).

<sup>71</sup> Davenport Tara (2012).

<sup>72</sup> Houben Marcus (2014).

Africa. Davenport<sup>73</sup> focuses also on the maritime piracy in South-East Asia and Guilfoyle<sup>74</sup> focuses on a wider area, the Indian Ocean.

In order to find literature referring to maritime piracy and sociology of law I searched in the Social Sciences Faculty Library at Lund University<sup>75</sup> by using the terms “maritime piracy and sociology”, and “maritime piracy and sociology of law”, in Google Scholar<sup>76</sup> and in the Social Sciences Research Network<sup>77</sup> by using the words “maritime piracy sociology”, “maritime piracy sociology of law”, and “maritime piracy norms”, and in all the issues of the Maritime Interdiction Operations Journal published by the NMIOTC.<sup>78</sup> Surprisingly, it proved impossible for me to find any recent article or research project analyzing modern maritime piracy through the prism of sociology of law. Although, one can find plenty of academic articles, books and research projects on maritime piracy, mainly referring to the legal and financial issues, there is no previous research on the understanding of laws regulating piracy by personnel participating in anti-piracy operations in relation with the social norms followed by them. The main reason for this gap, in my opinion, is the difficulty in reaching the informants, who either work for the military/law enforcement services or for private maritime security companies. The former are bound by laws which do not allow them to provide restricted information to researchers or talk publicly about them, while the later are reluctant to deliver information to “annoying” and “curious” researchers who want to lift the veil and discover the secrets of their profession.

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<sup>73</sup> Davenport Tara (2012).

<sup>74</sup> Guilfoyle Douglas (2012).

<sup>75</sup> <http://www.sambib.lu.se/en/>

<sup>76</sup> <https://scholar.google.com>

<sup>77</sup> <https://www.ssrn.com/en/>

<sup>78</sup> [http://www.nmiotc.nato.int/#training/Publications/journal\\_en.htm](http://www.nmiotc.nato.int/#training/Publications/journal_en.htm)

### **3. Theorizing: Legal consciousness, legal pluralism and Menski's kite model.**

The legal consciousness theory is regarded as the most adequate for researching on the awareness and understanding of laws by individuals. The term “legal consciousness” is used by social scientists to refer to the ways in which people make sense of law and legal institutions, that is, the understandings which give meanings to people’s experiences and actions.<sup>79</sup> In other words, “The concept legal consciousness is used to name analytically the understandings and meanings of law circulating in social relations. Legal consciousness refers to what people do as well as say about law”.<sup>80</sup> In this light, the legal consciousness theory can be applied, particularly, in the domain of anti-piracy. It can prove useful in order to research on the ways that law is experienced and interpreted by state agents and private individuals participating in anti-piracy operations.

In order to describe the existence of multiple systems of legal obligation within states, the theory of legal pluralism has been developed. I consider this theory suitable for my research because, as far as piracy laws are concerned, it is profound that they do not stem from a single source. On the one hand, states and international organizations issue hard law on maritime piracy. On the other hand, various stakeholders, such as the maritime community (ship-owners, seafarers etc), the private security community and NGOs, produce soft law and influence governments in the official lawmaking procedure.

The legal pluralism theory was initially developed to apply in states. In order to apply the legal pluralism theory on the high seas, where no state has jurisdiction, I have decided to use a modern and non-mainstream legal pluralism theory, the so called Menski’s *kite model*, which takes into consideration international aspects of law, hence it seems more suitable for the purpose of my research.

Werner Menski<sup>81</sup> is an Emeritus Professor at the University of London. He is self-determined as a global legal realism scholar<sup>82</sup>. Since 2006 he has introduced and

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<sup>79</sup> Ewick Patricia & Silbey Susan (1992), p. 734.

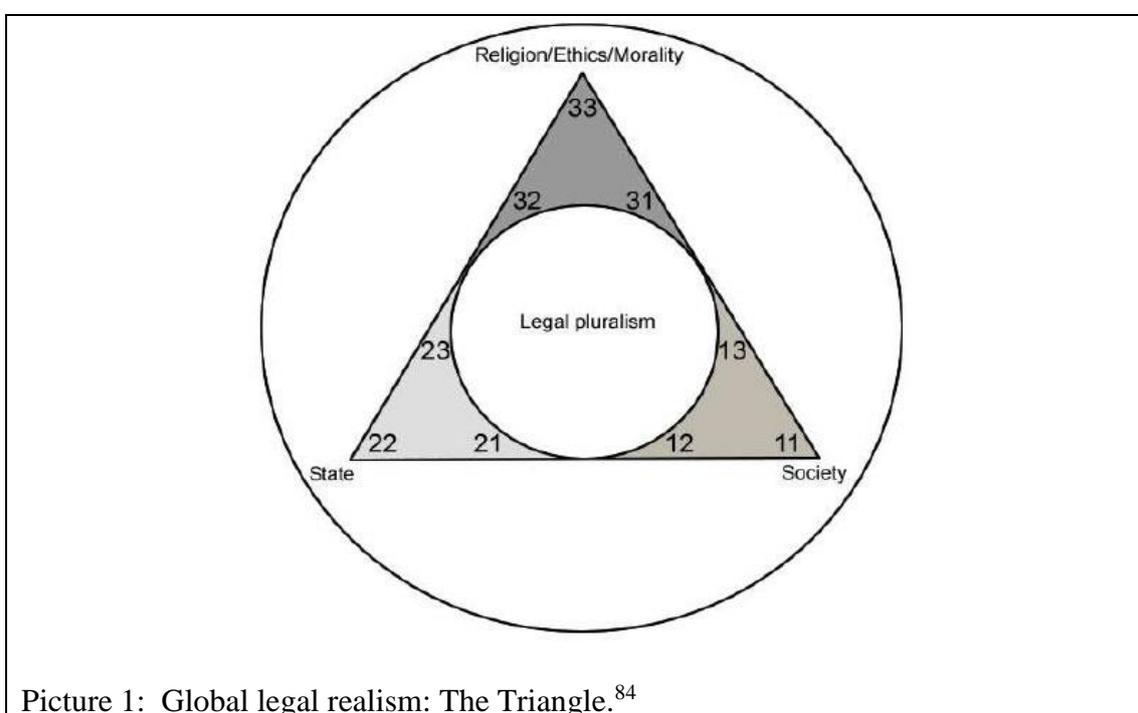
<sup>80</sup> Silbey Susan (2008).

<sup>81</sup> <http://www.wernermenski.co.uk>

<sup>82</sup> Menski Werner (2012), p. 79.

developed the “kite model” for describing and explaining the phenomenon of legal pluralism.

The roots of the “kite model” can be traced back to Masaji Chiba’s ideas, who taught that law is everywhere a combination of “official law”, “unofficial law” and “legal postulates”, the latter being various kinds of value systems, including religion<sup>83</sup>. Legal postulates are clearly old forms of natural law and constitute ground cultural factors. Chiba apparently included in this concept of “legal postulates” also modern human rights and international law principles. This theory closely follows Ehrlich’s theory of “living law”.



Picture 1: Global legal realism: The Triangle.<sup>84</sup>

Starting from Chiba’s tripartite legal structure of law Menski initially developed the triangle of law (see Picture 1) in order to explain and depict legal pluralism. According to Menski, law is a combination of different types of laws, stemming from the state, the society or the religion, the ethics or morality. In order to explore the interactions of these three types of law, the following numbering system was devised:

<sup>83</sup> Menski Werner (2009), p. 43.

<sup>84</sup> Menski Werner (2010), p. 1; and Menski Werner (2012), p. 79.

Corner 1: socio-legal norms and customs.

11 = “pure” customs (which are very rare).

12 = customs influenced by state law.

13 = customs influenced by values.

Corner 2: positivist state law.

22 = “pure” state law (which is rare, too).

21 = state laws influenced by or taken from social norms.

23 = state laws influenced by certain values.

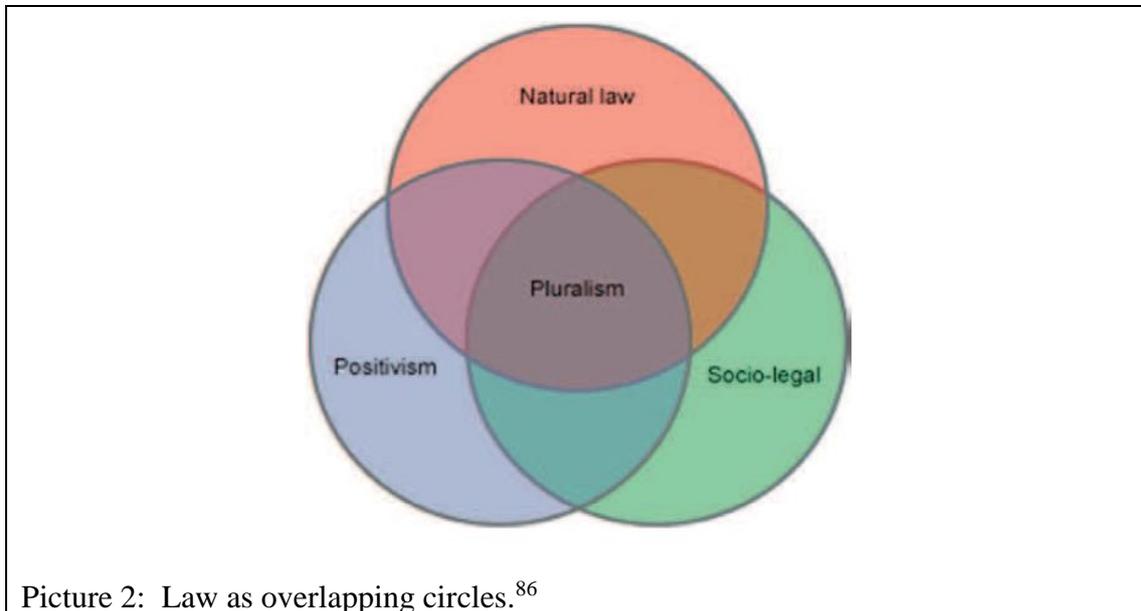
Corner 3: values/ethics (Chiba-sensei’s “legal postulates”).

33 = pure values (probably rare).

31 = values influenced by certain social norms.

32 = values influenced by certain state laws/principles<sup>85</sup>.

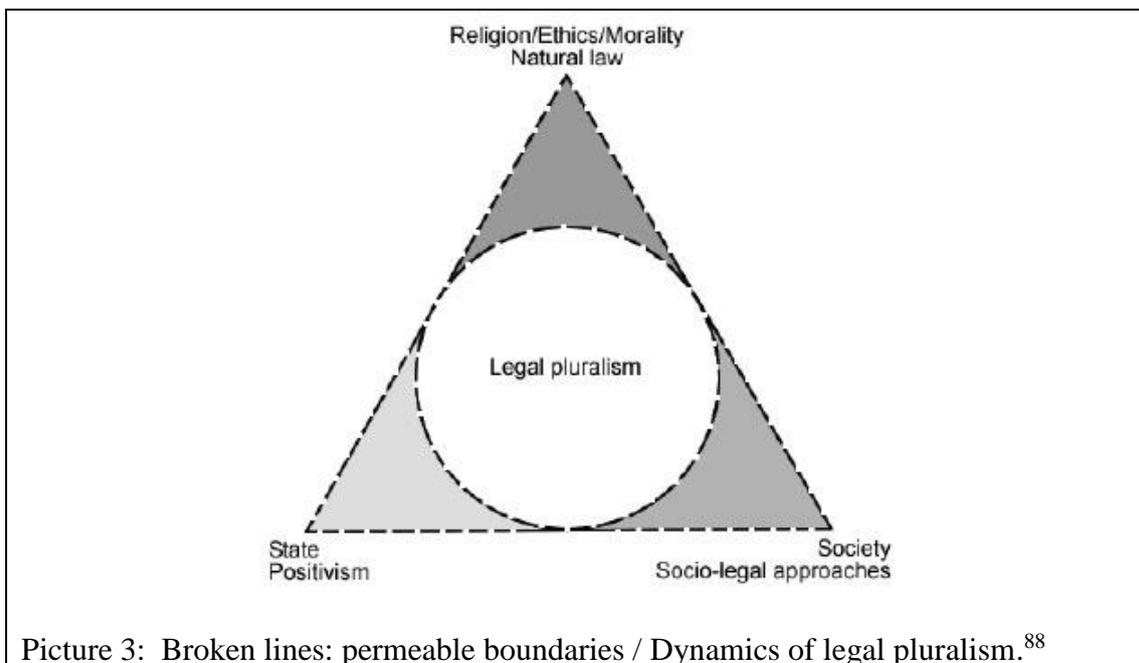
Menski’s triangle of law model can also be depicted by three overlapping circles (see Picture 2). These circles represent positivism (:state), socio-legal theory (:society) and natural law theory (:religion/ethics/morality). In the area in which these three circles overlap, legal pluralism is a fact.



<sup>85</sup> Menski Werner (2014), p. 12.

<sup>86</sup> Menski Werner (2012), p. 80.

Menski was not totally satisfied by the way that his theory was depicted, since he believed that the different elements of law still appeared too box-like.<sup>87</sup> So he introduced a revised picture (see Picture 3) which showed a triangle with broken lines, which indicate the permeability of such boundaries between the different sources of law. In this way, Menski suggested that the worlds of law are inherently plural.



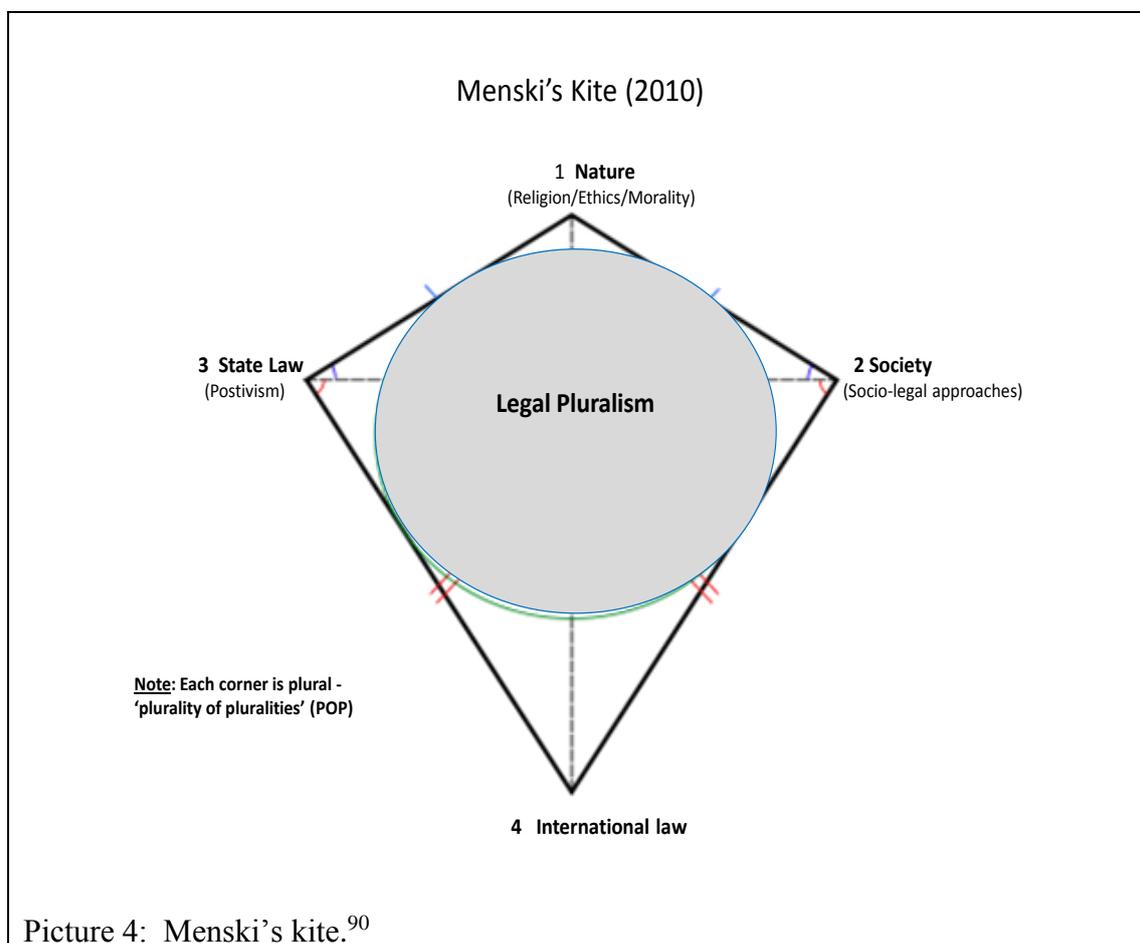
Picture 3: Broken lines: permeable boundaries / Dynamics of legal pluralism.<sup>88</sup>

In 2008, Menski furthered his triangle model by adding another corner, realizing that what Chiba had depicted as “legal postulates” included both traditional and modern values, and they were, in today’s globalized world, in deep tension. This fourth corner depicted the dimensions of international law, globalization and human rights. As a result, the triangle became a pattern with four corners, resembling to a kite, hence the final model was named “Menski’s kite model” (see Picture 4). Menski renumbered the corners in order to reflect the historical shift over time. Corner 1 represents the old natural law, corner 2 represents social norms and various forms of culture, corner 3 represents various state laws and the new corner 4 represents various concepts and forms of international law and human rights. According to Menski, “at any moment of real life and of living law, one finds that instant decisions are being made about the

<sup>87</sup> Menski Werner (2012), p. 80.

<sup>88</sup> Menski Werner (2009), p. 54; Menski Werner (2010), p. 1; and Menski Werner (2012), p. 80.

sequence in which these corners are made to perform as part of the orchestra of living law” and “the kite image seems useful also to convey the dynamic nature of all law”.<sup>89</sup>



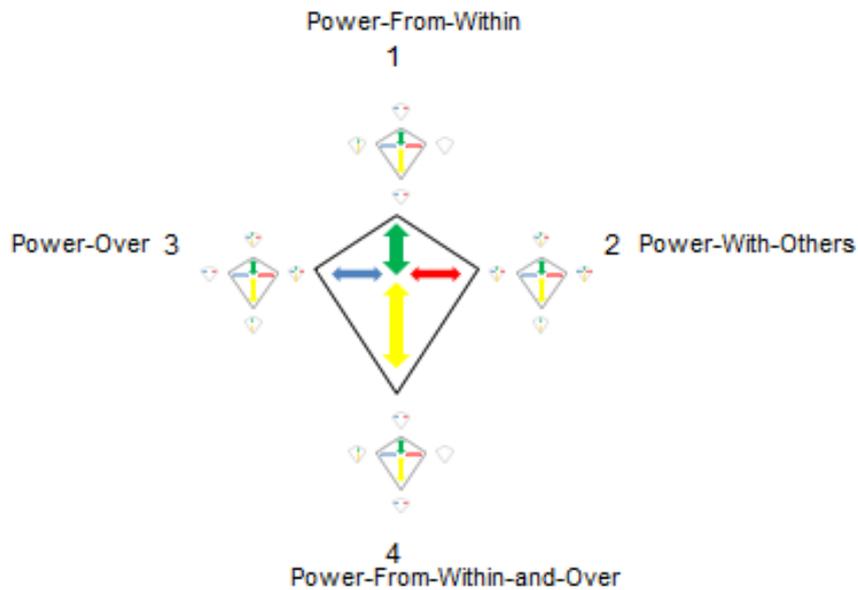
Menski's kite model has recently been further developed to a dynamic kite. In a recent lecture Menski suggested that “law is not just internally plural at the level of the four corners identified above, but it is actually what I now call ‘POP’, a plurality of pluralities. All four corners are themselves plural, experiencing much conflict within themselves”.<sup>91</sup>

<sup>89</sup> Menski Werner (2012), p. 81.

<sup>90</sup> Menski Werner (2009), p. 54; Menski Werner (2010), p. 1; and Menski Werner (2012), p. 81.

<sup>91</sup> Menski Werner (2014), p. 14.

## Decision Map: The Power Kite



Picture 5: The power kite.<sup>92</sup>

Menski's *kite model* refers to legal pluralism in the context of a state. Nevertheless, I believe that it can be very useful in the research over modern maritime piracy since, on the high seas, international law and human rights overlap, officially, with state laws and, unofficially, with all the other sources of laws and norms mentioned by Menski. The high seas are a field where legal pluralism is a reality outside the boundaries of states.

<sup>92</sup> Menski Werner (2014), p. 15.

#### **4. Research methods and data collection.**

In order to apply Menski's *kite model* in the field of modern anti-piracy, I collected data which fall under the four corners of Menski's kite. The research was conducted in a period of two months, from 15 May 2015 to 15 July 2015, and both quantitative and qualitative research methods were used. The target group of the research was twofold: state agents on the one hand and private individuals on the other hand, both participating or having participated in anti-piracy operations. Quantitative data was collected exclusively through a survey research while qualitative data was collected through in-depth interviews and the content analysis of documents.

#### **4.1. Quantitative research methods**

##### **4.1.1. Survey research.**

The survey research through a questionnaire and statistical methods of analysis is considered as the most widespread type of empirical research.<sup>93</sup> It is used to identify the characteristics, opinions, attitudes and previous experiences of a particular group of people in a particular space and time, thus it is often called descriptive quantitative research.<sup>94</sup> The pros of surveys are that they are quite simple in design, a big part of a population can be reached, the data collected can be analyzed through statistical methods, and the time that must be invested by the researcher is relatively short. The survey research suited my research project, firstly, because my aim was to research on the opinions and attitudes of a particular group. Secondly, it suited to my research project for practical reasons. Taking into consideration that the time frame that I was given was too short for a longitudinal research and that the survey research resembles to a camera “snapshot” of an ongoing activity, survey research was the most suitable research method for the occasion. It was extremely difficult to apply other quantitative research designs, such as observation studies, correlational research and developmental designs due to time limits of my research project.

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<sup>93</sup> Kyriazi Nota (2001), p. 99.

<sup>94</sup> Leedy D. Paul & Ormrod Jeanne Ellis (2005), p. 183.

The small-scale survey research was conducted through a questionnaire. The questionnaire<sup>95</sup> was short and simple (2 pages – 13 questions). It was disseminated exclusively to Navy and Coast Guard personnel and private maritime security contractors with current or prior participation in anti-piracy operations. The questionnaire was disseminated in two ways; those who could be reached in person were provided with a paper-pencil questionnaire while those who were far away (e.g. travelling onboard vessels) received the questionnaire in a MS Word format via e-mail.

The return rate of the questionnaire was more or less predicted. Private maritime security contractors were more reluctant than Navy and Coast Guard personnel to fill in the questionnaire and give information on their knowledge and understanding of law, even anonymously. One drawback for the low return rate of personnel working on board vessels was the bad internet connection of vessels. Navy and Coast Guard personnel were more cooperative and willing to give the information asked, since it was constructed in a way that they didn't need to reveal restricted information.

Fortunately, the questionnaire was filled only by persons belonging to the desired target group. The intake of questionnaires stopped by the time that 134 of them were received. This was achieved through the personal acquaintance of the author with many Navy and Coast Guard personnel, who filled in the questionnaire very willingly. The reluctance of private maritime security companies and associations to forward the questionnaire to their employees or members was overcome again through the personal acquaintance of the author with private security contractors, who filled in the questionnaire and convinced the members of their teams, 2-3 each, to do the same. Concluding, taking into consideration the difficulties in reaching the target group, the volume of the sample, can be characterized as good and adequate.

## **4.2. Qualitative research methods.**

### 4.2.1. In-depth interviews.

During in-depth interviews researchers can collect useful information on facts, peoples' beliefs and perspectives about facts, motives, present and past behaviors, standards for behavior etc.<sup>96</sup> Most in-depth interviews are unstructured, open-ended or

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<sup>95</sup> See Appendix.

<sup>96</sup> Leedy D. Paul & Ormrod Jeanne Ellis (2005), p. 146.

semi-structured. In the unstructured interviews researchers can be very flexible in the questions that they pose to the interviewees, despite the fact that they seek answers to certain central questions. In my research project unstructured in-depth interviews were a suitable method of data collection because I had easy access to the interviewees/informants through my personal acquaintance with them and the time frame allowed me to conduct the interviews. Moreover, the answers in the in-depth interviews were correlated with the answers in the questionnaire of the survey research.

In-depth interviews were conducted in a small scale. The “informants” were two Navy officers, the first being a commanding officer and the second being an operational non-commissioned officer of the Navy Special Forces with prior participation in operation EU NAVFOR Atalanta, and three private maritime security contractors working as armed anti-piracy guards on board merchant vessels. All interviews were unstructured and were very helpful in the discovery of the “living law”, namely the legal rules applied and the social norms followed in anti-piracy operations.

#### 4.2.2. Content analysis.

Content analysis, as a method of qualitative data collection, is usually performed in books, newspapers, websites, academic articles, videos and other material recoding human activity. Data is collected through the identification and sampling of material (books, websites etc) and its coding in terms of predetermined characteristics. Content analysis transforms qualitative secondary material to quantitative data.<sup>97</sup> I decided to use content analysis as a secondary tool of data collections, since the majority of my data would be collected through in-depth interviews and survey research. In fact, the content analysis method was used in order to check if the data collected by using other methods is consistent with what is communicated by states, international organizations, maritime companies and other stakeholders through their websites, advertisements and other documents. The aforementioned method of data collection was quite suitable for my research project.

Useful data was collected through appropriate documents, both printed and digital, and audiovisual material. A content analysis of relevant national and international laws and case law was primarily conducted. For this reason many

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<sup>97</sup> Kyriazi Nota (2001), p. 283.

scientific articles and websites of international organizations were read. Visiting the websites of private maritime security companies and associations gave me a wider insight in the regulations and norms applied in anti-piracy operations by the private sector. Watching official and unofficial videos on the interaction between pirates and maritime security contractors during pirate attack gave me an insight on the application of various rules on the use of force. Last but not least, managing to have access to a couple of contracts of employment entitled *Private Security Guard Master Agreement* and *Contract of Engagement of Member of Security Personnel On Board Seagoing Vessels* signed between PMSC established in Cyprus and private security guards, which are usually kept secret to third parties, provided me with useful information on the laws and regulations which are regarded as binding by the contracting members.

Other qualitative research designs, such as the case study, the ethnography, the phenomenological study and the grounded theory study were not followed because they were not suitable for the research topic or due to the time limits of my research project.

In the following chapter the most important laws applicable to and social norms followed in modern maritime piracy, as they resulted from the research, will be listed and briefly analyzed as a basis for further analysis of their understanding by the major actors and stakeholders in the field of anti-piracy operations.

## **5. The hard and soft law applicable in modern anti-piracy operations.**

The structure of this chapter follows the numbering of the sources of law used in Menski's *kite model*. Some of these laws are directly while others are indirectly applicable to modern anti-piracy operations. All the same, some laws are more widespread used than others in the same field.

### **5.1. The 1<sup>st</sup> corner: Nature (Religion/ethics/morality).**

Nature has been considered as the most primitive source of law since antiquity. According to Deflem,<sup>98</sup> "Natural law is the notion that law bears no relation to the actual workings of society but is instead the reflection of universal concepts of truth and justice so profound and foundational to existence that law is held to emanate from nature itself". The ancient idea of the existence of natural law, which is a form of universal law, started developing again since the Middle Age. Natural law is often contrasted to the positive law of states. In modern times, lawyers tend to base mostly on state law or other sources of official law and only recourse to natural law when all other sources of law fail to provide good interpretation of positive law or solutions to legal problems. Natural law embraces rules which stem from religion and beliefs, ethics and morality.

#### **5.1.1. Religion and beliefs.**

In the field of maritime piracy, all stakeholders may follow certain rules deriving from their religion and beliefs. Pirates, seafarers, maritime security contractors, Navy and Coast Guard officers, as individuals, usually belong to a religion or have certain beliefs. Hence, they try to follow the norms and values of their religion and beliefs and not to break their rules when they perform their duties or activities. International organizations, states and their public services (e.g. Armed Forces, Law Enforcement agencies) are usually secular and religiously neutral, which means that they do not adopt a certain religion. Nevertheless, there are some theocratic international organizations and states (e.g. Islamic countries) or private organizations

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<sup>98</sup> Deflem Mathieu (2008), p. 18.

which are characterized by their dedication to a certain religion. Additionally, states may follow political ideologies (e.g. liberalism, communism). So, religion and belief may affect not only individuals but also institutions. In any case, institutions are administered by individuals who belong to religious or belief communities.

In the field of modern maritime piracy and anti-piracy operations, natural law can be called upon mostly during violent confrontations. Religion and beliefs may affect individuals in certain issues, such as the use of force in cases of self-defense, which may lead to wounding or killing another person. Religious beliefs may be crucial in the way that pirates may treat hostages of a different religion. Indeed, sometimes religious rules may overcome state laws in the mind of individuals. Despite that, in most cases, positive law follows the rules of natural law, including religion and beliefs. For example, the inherent right to life, which contains the right of self-preservation, not only derives from natural law but has also been recognized internationally by states and international organizations. In the international law domain, the human rights law recognizes the inherent right of individuals to life and the law of armed conflicts and the international criminal law criminalize the unlawful taking of life. States also recognize the right to life in their constitutions and laws and regulate the way that individuals may lawfully apply force exercising their right to self-defense.

#### 5.1.2. Ethics and morality.

Ethics and morality are also a source of social norms and values, and sometimes binding rules, which are applied by individuals that deal with modern maritime piracy. Morality is more closely connected with religious norms than state laws. Ethics are more easily defined than morality, due to the fact that sometimes they are written down as a set of rules (e.g. professional ethics).

In the field of anti-piracy operations one can identify the applicability of military and law enforcement ethics. For example, Navy officers who participate in EU NAVFOR Atalanta are bound by their national military ethics, based in natural law and usually contained in military manuals and orders.

A very interesting issue is to identify whether pirates follow ethics or not. Direk et al.<sup>99</sup> suggest that the Somali piracy can be viewed as a part of a long and unique

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<sup>99</sup> Direk Ömer F. et al. (2011), p. 228.

tradition of African banditry. Somali pirates can be called *shiftas*, which means bandit or rebel, revolutionary or outlaw. These bandits originated as a form of local militias and have a reputation for being extremely ruthless. However, *shiftas* can also be regarded as “social bandits”, in the wording of Eric Hobsbaum. Indeed, modern Somali pirates follow a code of conduct, as well as a formula for dividing up the proceeds amongst themselves. Although the rule of law has collapsed in Somalia, pirates follow their internal rules and sometimes are admired by their communities as heroes and breadwinners who fight against Western oppression.

Direk’s et al. view is backed up by the view of researchers and members of the maritime security community, who, in their effort to analyze why modern piracy reappeared in Somalia, were astonished to discover that the first Somali pirates conducted acts of piracy believing that they exercise their failed state’s right to exploit the natural resources of its territorial sea mainly by fishing. In fact, the first Somali pirates launched their *illegal activities*, according to the Western point of view, not as pirates but as militias playing the role of primitive local communities’ “Coast Guards”. The first Somali pirates thought of themselves as representatives of their communities or nation who had the inherent or natural right to repel foreign fishing boats from overexploiting Somalia’s natural resources. They tried to substitute the civil services of a state where the rule of law and every normal function of the state were abolished.

Moreover, ethics and morality can be a source of unofficial law in the field of modern maritime piracy. For example, the orders given by the captain of the pirate vessel to the crew and the agreements made among the crew members of the pirate vessel - concerning the treatment of hostages, the sharing of stolen goods etc - are binding rules based on the pirates’ ethics.

## **5.2. The 2<sup>nd</sup> corner: Society (Socio-legal approaches).**

The official law in the context of a state is formed by the government. Despite of the existence of official law, certain groups and communities may develop internal rules, values, and norms<sup>100</sup> which constitute the unofficial law regulating the relations between people belonging to that group or community, but sometimes may also have

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<sup>100</sup> Deflem Mathieu (2008: 198) defines values as “conceptions about desirable ways of life” and norms as “sanctionable standards of conduct”.

impact in the formation, interpretation or application of the official law. Social norms, which are applied by both pirates and anti-piracy professionals, can be defined as their understanding on how they are expected to act or behave in certain situations.

As far as maritime piracy and anti-piracy operations are concerned, there are different groups or communities involved, such as the maritime community (seafarers, fishermen), the private security community (private guards), the Navy and Coast Guard community (military and law enforcement personnel) and the pirates' community, which follow certain socio-legal approaches. This becomes clear if one analyzes the way that members of these groups interact.

Every vessel - commercial, military, fishing etc - constitutes a small society of people living and working together in the same place for a long time and different relations are formed among them. In the maritime community, it is above any doubt that the ship captain exercises extensive authorities - including administrative, disciplinary and interrogative power - and has the final say in any issue. The captain's authority is provided by the state law but also bases in unwritten ethics and customs of the seafarers' community. These written or unwritten rules and norms are the "living law" of the maritime industry and are formed in order to provide solutions to legal and practical problems, especially when ships sail away from the land and their passengers form a distinct and isolated community. It is remarkable that the same rules and customs are followed by the pirates on board their vessels, who also obey to a captain, although the captain is not legally connected and accountable to any state, since pirate ships do not fly the flag of any state. This tradition is also followed by private security personnel on board vessels, who are not considered as members of the crew but live and work inside this small community for short periods of time. The customs, social norms and professional ethics of the private security personnel intermingle with those followed by the seafarers and new social norms, customs, and professional ethics are particularly formed for the maritime security contractors.

These customs and social norms are gradually written down in texts binding for some categories of workers in the maritime industry. These codes of conduct derive from socio-legal approaches. In the beginning they are unofficial and later turn to official documents which constitute a body of soft law followed by professionals. For example, maritime security contractors follow codes of conduct made by associations of maritime

security companies or other private organizations<sup>101</sup>, aiming at regulating the domain of maritime security. For example, the International Code of Conduct Association (ICoCA) has issued the “International Code of Conduct for Private Security Services Providers”.

Additionally to these codes of conduct, the maritime community has developed international standards in order to regulate the operations of private maritime security companies, such as the *Private Maritime Security Contractors’ Security Management System* (ISO 28000:2007 & ISO/PAS 28007:2012) and the *Quality Management System on Maritime Security Services* (ISO 9001:2008). Private maritime security companies also issue standard operational procedures and rules on the use of force by their personnel. Most of these rules and norms are considered as “soft law”.

### **5.3. The 3<sup>rd</sup> corner: State law (Positivism).**

#### 5.3.1. National legislation.

States exercise jurisdiction over their territory including the land, the internal waters and the territorial waters. Additionally, they exercise jurisdiction on vessels registered in their national registry, thus flying their national flag, when they sail on the high seas. The exercise of jurisdiction by modern states presupposes the issuing and enforcement of domestic laws in their territory. State law is usually divided in public and private law. Public law regulates the relationship between the states and private entities or individuals while private law regulates the relationship between private entities and individuals.

States consider maritime piracy and armed robbery against ships as crimes regardless of the legal system that they follow. Particularly, the idea that maritime piracy is a crime is common in states which follow the modern common law or civil law systems as well as in states which follow traditional or religious law systems. In any case, judicial authorities prosecute the alleged perpetrators of these crimes according to their domestic criminal law. Constitutional rights are applicable too.

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<sup>101</sup> The most known are: i) The Security Association for the Maritime Industry (SAMI); ii) The International Association of Maritime Security Professionals (IAMSP); and iii) The International Code of Conduct Association (ICoCA).

Moreover, state laws apply concurrently with international law on the high seas under certain conditions, including incidents of maritime piracy and the regulation of anti-piracy operations conducted by private companies and state agencies.

#### 5.3.1.1. Public law.

As far as maritime piracy and anti-piracy operations are concerned, states issue many laws and regulations. At first, states issue laws (e.g. Penal Code) criminalizing piracy or armed robbery against ships, usually following international legal standards and definitions used in international conventions. State law applies exclusively in modern maritime piracy when the latter takes place in the territorial waters of a state. In this case, many states define it as “armed robbery against ships” instead of “piracy”, a term used when such acts are committed on the high seas. States also issue rules on the prosecution of suspect criminals, including pirates (e.g. Code of Criminal Procedure). Even when state law is exclusively applied, some rules of international law, such as the human rights law, apply at the same time.

Secondly, states issue administrative legislation on the establishment and operation of private companies, such as the maritime companies and the private security companies. The working permits, the social security, the working conditions and salaries of seafarers, the licensing of private security guards, including their permission to carry guns, also fall into the scope of public law.

Type of Law	States
Law of Nations (some with UJ)	US, New Zealand, Canada, Singapore, Malaysia, Israel, Bahamas
Incorporating Treaty Commitments (with UJ)	Bulgaria, Poland, Finland, Oman, Czech Republic, Iran, Latvia, China, France
UNCLOS (mostly with UJ)	South Africa, Malta, UK, Kenya, Tanzania, Cyprus, Liberia, Mauritius, Australia
Defining Piracy without UNCLOS, but with UJ	Thailand, Japan, Greece, Estonia, Ukraine, Germany
Defining Piracy without UJ	Sri Lanka, Denmark, Turkey, South Korea, Georgia, Russia, Albania
Other State Offenses	Austria, Norway, Brazil, UAE, Azerbaijan
No Category	Grenada, Zambia, Argentina, Philippines

Table 6: An overview of the way that national laws criminalize acts of piracy.<sup>102</sup>

<sup>102</sup> Dutton Yvonne M. (2012), p. 1141.

Last, but not least, states issue administrative legislation on the registration of vessels in their national registries, according to international standards. The registration establishes a *nexus* of the vessel with a certain state, which constitutes the legal basis allowing the application of state laws not only in its territory but also on the high seas. Namely, according to UNCLOS, ships follow the law of their flag-state and when sailing on the high seas they are considered territory of the flag-state, which means that the domestic law is applied on them. In this light, for example, Spain considers vessels flying the Spanish flag to be Spanish territory and applies domestic law on private security companies providing services onboard Spanish-flagged vessels as if they were companies providing their services onshore<sup>103</sup>. So, Spain is competent to define every aspect or activity on vessels flying the Spanish flag, including administrative law issues such as the carrying of goods, the activity of maritime security companies, the carrying of weapons by maritime security contractors etc.

#### 5.3.1.2. Private law

In most countries, private law provides for the freedom of contracting which can be limited by the state only under certain conditions. Private entities and individuals may freely conclude contracts aiming at anti-piracy protection by applying rules of private law. In the maritime domain, contracts are being signed between ship-owners and private security companies who provide security to their vessels, and employment contracts are signed between private security companies and security guards. Those contracts follow the provisions of the domestic law of certain states, usually the state where the private security company is established or provides services.

#### 5.3.2. Case law of national courts.

National courts apply the domestic law and sometimes also rules of international law (e.g. human rights law) when they prosecute and punish acts of piracy or when they have to take a decision on incidents connected to anti-piracy operations. The national courts' case law, especially in countries which follow the Common Law system, is an important source of law. Although court decisions are official documents,

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<sup>103</sup> Bürgin Annita Cristina (2014), p. 107.

they show a flexibility and adaptability in different situations because judges do not only apply but also interpret laws.

Although, under international law and UNSC Resolutions, states have the right to exercise criminal jurisdiction over acts of piracy conducted on the high seas, most of them, especially the wealthier, are reluctant to do so, mainly because they believe that if the case is lost, pirates detained in their territory will apply for asylum<sup>104</sup>. Consequently, the national case law on maritime piracy is limited in number. Nevertheless, in the recent years some countries across the world have conducted trials against pirates, such as China,<sup>105</sup> India,<sup>106</sup> Indonesia, Kenya,<sup>107</sup> the Seychelles,<sup>108</sup> the US,<sup>109</sup> and France.<sup>110</sup>

#### **5.4. The 4<sup>th</sup> corner: International law and human rights.**

International law and human right constitute the fourth and newest corner in Menski's kite. International law always played a major role in the regulation of maritime piracy issues since maritime piracy in most cases takes place in the high seas, which means outside of the territory of any state.

The sources of international law in general are listed in Art. 38(1) of the ICJ Statute, as follows: i) International conventions, whether general or particular, establishing rules expressly recognized by the contesting states; ii) international custom, as evidence of a general practice accepted as law; iii) the general principles of law recognized by civilized nations; iv) [...] judicial decisions and the teaching of the

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<sup>104</sup> Hodgkinson Sandra L., Kelly Kevin M., Van Horn Thomas H. et al. (2011), p. 107.

<sup>105</sup> Five cases of piracy - namely the *Tenyu* case, the *Cheung Son* case, the *Marine Fortuner* case, the *Siam Xansai* case, and the *MT Global Mars* case - have been tried by Chinese courts.

<sup>106</sup> The *MV Alondra Rainbow* case and the *MT Enrica Lexie* case have been tried by Indian courts.

<sup>107</sup> Kenya has signed Memoranda of Understanding (MOU) with the US and the UK for the prevention, interdiction, prosecution, and punishment of pirates. There has also been an Exchange of Letters between the EU and Kenya for the transfer of suspected pirates detained by EU NAVFOR Atalanta to Kenya.

<sup>108</sup> There has been an Exchange of Letters between the EU and the Republic of Seychelles concerning the transfer of suspected pirates who have been arrested by the EU NAVFOR Atalanta for prosecution in the national courts of the Seychelles.

<sup>109</sup> The *MAERSK Alabama* case and the *USS Nicholas* case have been tried by US courts.

<sup>110</sup> The *Ponant* case and the *Carré d'As* case have been tried by French courts.

most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law<sup>111</sup>.

Maritime piracy has been regulated both by customary and conventional international law. There are also judicial decisions of international and national courts applying international law on maritime piracy and large academic production of scholarly writings on it.

One can find rules which apply in modern maritime piracy in many sub-sections of international law, such as public international law, international criminal law, international human rights law and international law of the sea.

#### 5.4.1. International Law.

##### 5.4.1.1. Customary International law.

Customary international law is defined as those aspects of international law which derive from custom. In other words, customary international law results from a general and consistent practice of states followed by a sense of legal obligation.

The international jurisdiction of states against pirates is the most common example of customary international law used by lecturers in all law schools. Historically, piracy was recognized as an offence against the law of nations (*ius gentium*). In Ancient Rome, Cicero, reflecting on piracy, expressed the idea that “*pirata non est ex perdullium numero definitus, sed communis hostis omnium*” (piracy is not a crime directed against a definite number of persons, but rather aggression against the community as a whole). The rule “*pirata est hostis generis humani*” (“piracy is a common enemy of all mankind”) derived by this argument.<sup>112</sup> Pellegrino suggests that, according to an ancient rule of customary international law, any state may seize pirate ships on the high seas, whatever their flag, and can prosecute pirates, whatever their nationality.<sup>113</sup>

Concluding, maritime piracy is traditionally considered as an international crime because it offends the right to free passage of persons and goods, including the

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<sup>111</sup> Buergenthal Thomas & Sean D. Murphy (2007), pp. 19-20.

<sup>112</sup> Anderson James (2013), p. 48.

<sup>113</sup> Pellegrino Francesca (2012), p. 433.

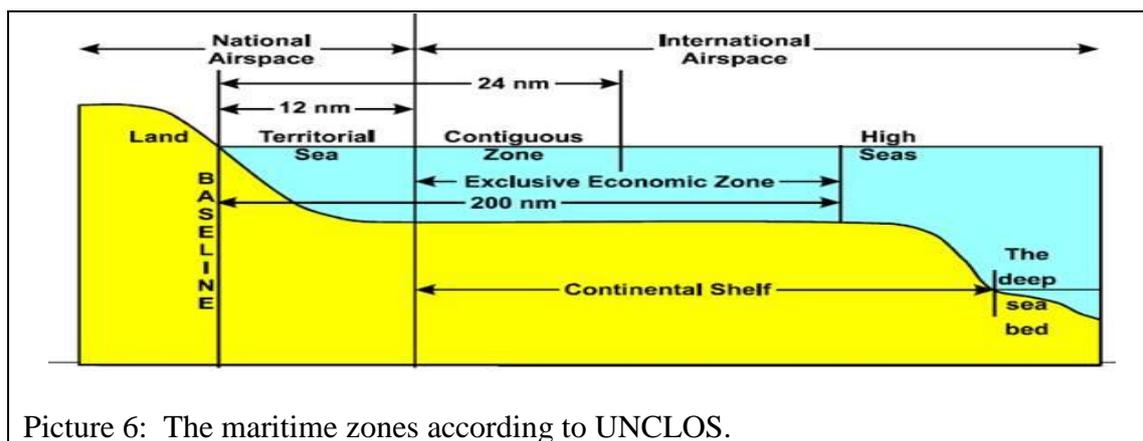
freedom to fish on the high seas, the so-called *mare liberum*, a right initially expressed by Hugo Grotius in 1609 and nowadays crystallized in conventional international law.

#### 5.4.1.2. Conventional International law.

Although, in accordance with customary international law, maritime piracy is without doubt an international crime, states and international organizations have advanced in the legal field by declaring maritime piracy as an international crime also in relevant international treaties.

In 1958, the Geneva Convention on the High Seas (GCHS)<sup>114</sup> was signed. According to Art. 14 of the GCHS, all signatory states undertook the responsibility to 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. Piracy was defined in Art. 15 of the GCHS. Moreover, in Art. 19 of the GCHS, the pre-existing customary international law rule of the international jurisdiction of states over maritime piracy was recorded and transformed into conventional international law

In 1982, a new convention on the law of the sea was signed, which is known as the UN Convention on the Law of the Sea (UNCLOS). UNCLOS replaced the GCHS, as far as the signatory states are concerned. The new rules on maritime piracy, which are more or less the same with the previous rules, are contained in Art. 100-107 of the UNCLOS.



Picture 6: The maritime zones according to UNCLOS.

<sup>114</sup> [http://www.gc.noaa.gov/documents/8\\_1\\_1958\\_high\\_seas.pdf](http://www.gc.noaa.gov/documents/8_1_1958_high_seas.pdf)

In this light, states have the right to repress maritime piracy having as a legal basis either the conventional international law on piracy, if they have signed and ratified the GCHS or the UNCLOS, or the customary international law on piracy, without any further procedure needed.

Additionally to the aforementioned conventions, the international community has taken further steps towards the repression of international crimes, including maritime piracy. More conventions have been signed, such as the 1979 New York Convention against the Taking of Hostages, the 1988 Convention of Rome for the Suppression of Unlawful Acts of Violence against the Safety of Maritime Navigation (SUA Convention) and the Protocol of 2005 to the Convention for the Suppression of Unlawful Acts of Violence against the Safety of Maritime Navigation (SUA Protocol), targeting maritime piracy among other international crimes.

#### 5.4.2. Human Rights Law.

Human rights law, according to the theory of law, is universally applicable and binding, both in peacetime and wartime. Rules of international human rights law can be found in international (e.g the UDHR, the ICCPR) and regional human rights treaties (e.g. the ECHR). They have also been incorporated in the constitutions and laws of most countries.

In the context of maritime piracy and anti-piracy operations there is an ongoing questioning on the way that human rights law is applied. According to Campana,<sup>115</sup> “[t]he international law relating to maritime piracy is not indeed a model of clarity in terms of issues such as [...] the arrest, detention and prosecution of suspects and the protection of human rights of both victims and criminals”.

Hodgkinson et al.,<sup>116</sup> referring to the prosecution of suspect pirates by the Kenyan authorities, have expressed their concern in whether the Kenyan criminal code is sufficient to vindicate prosecutorial interests and on the possible violation of the detainees’ human rights due to the poor prison conditions existing in Kenya.

Obokata<sup>117</sup> considers the extraterritorial application of human rights law as a key challenge to the fight against maritime piracy. Human rights apply both to pirates

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<sup>115</sup> Campana Corrado (2014), p. 7.

<sup>116</sup> Hodgkinson Sandra L., Kelly Kevin M., Van Horn Thomas H. et al. (2011), p. 110.

<sup>117</sup> Obokata Tom (2013), p. 27.

and their victims, hence violation of human rights can occur against both of them. It is undisputed that criminal acts associated with piracy (e.g, the abduction, detention and torture of victims) constitute a clear violation of basic human rights, such as the rights to liberty, health and security. Thus, the rules of international human rights law are very important for the protection of pirate's victims.

On the other hand, the treatment of pirates upon their arrest does not always comply with the established international human rights standards. An important role of a human rights framework is to ensure that the rights of those accused of piracy are sufficiently provided for.<sup>118</sup> Safeguarding the criminal procedural rights of the suspect is always a challenging issue, especially in the context of Maritime Interdiction Operations, when the preliminary inquiry over acts of piracy has to be conducted by Navy personnel onboard warships.<sup>119</sup> In this light, Hodgkinson et al.<sup>120</sup> challenge the fact that the EU agreement with the Seychelles for the prosecution of pirates by the later guarantees certain procedural rights for the accused, but interestingly, it does not ban the use of the death penalty.

According to Obokata,<sup>121</sup> “the key human rights instruments [...] stipulate detailed rules on what states must do to protect the rights of suspects in criminal proceedings, including public hearings by a competent and independent tribunal, presumption of innocence, adequate time and facilities for preparation, and legal assistance. Measures such as free interpretation and consular assistance are also important where pirates are captured by foreign governments and tried in their jurisdictions”. Consequently, it is clear that all state agents and private individuals working in the anti-piracy domain should be aware of the international human rights law, in order to safeguard the human rights of both victims and perpetrators of acts of piracy.

#### 5.4.3. Case law of international courts.

Judicial decisions are not primary sources of international law but rather constitute subsidiary means for the determination of rules of international law. Until

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<sup>118</sup> Obokata Tom (2013), p. 24.

<sup>119</sup> Tsiachris Christos (2014), pp. 10-11.

<sup>120</sup> Hodgkinson Sandra L., Kelly Kevin M., Van Horn Thomas H. et al. (2011) p. 110.

<sup>121</sup> Obokata Tom (2013), p. 24.

now there are no regular or *ad hoc* international courts competent in maritime piracy cases. Piracy is an international crime but doesn't fall in the scope of the International Criminal Court, which tries war crimes, crimes against humanity and the crime of genocide. Thus, maritime piracy cases fall within the scope of national courts. Nevertheless, some piracy cases tried by national courts have been brought before international courts, such as the European Court of Human Rights (ECtHR).

Namely, nine persons convicted for piracy by the French courts in the *Ponant* case and in the *Carré d'As* cases brought their cases before the ECtHR.<sup>122</sup> On 4 December 2015, the ECtHR issued its judgments in *Ali Samatar et al. v. France*, regarding the *Ponant* incident, and in *Hassan et al. v. France*, regarding the *Carré d'As* incident, ruling that France violated Art 5 § 1 and 3 of the ECHR.<sup>123</sup>

The case law of this kind may play the role of a compass in the way that state agents and private individuals taking part in anti-piracy operations should treat arrested and detained suspect pirates.

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<sup>122</sup> Applications nos. 17110/10 and 17301/10, regarding the *Ponant* incident, and Applications nos. 46695/10 and 54588/10, regarding the *Carré d'As* incident.

<sup>123</sup> According to the ECtHR, France violated: i) Art 5 § 1 of the ECHR because the French legal system in force at the relevant time did not provide sufficient protection against arbitrary interference with the right to liberty, and ii) Art. 5 § 3 of the ECHR (right to be brought promptly before a judge) when, upon their arrest in Somalia for piracy and transfer to France, the applicants were transferred to police custody instead of being taken directly to an investigating judge.

## **6. Recent anti-piracy initiatives.**

By the time that maritime piracy reemerged in various areas of our planet, at first the maritime industry and then also the international community, mainly states and international organizations, initiated their efforts for its suppression. New anti-piracy initiatives were launched according to the existing law on piracy.

### **6.1. States.**

States responded to the rise of maritime piracy either alone or in collaboration with other states and international organizations. In the international domain, beginning in 2007, some countries started providing naval escorts to the World Food Programme ships delivering humanitarian aid. At the same period, many states issued new domestic legislation or altered the pre-existing domestic legislation, in order to safeguard maritime navigation and their interests.

Two different trends were followed and a third one which combined elements of the two former. Firstly, some states chose to provide security to vessels flying their flag through the boarding of Vessel Protection Detachment (VPD) manned by law enforcement or military personnel, on them (public security services). Secondly, some states allowed private security guards working for Private Maritime Security Companies (PMSC) to board, either armed or unarmed, on vessels flying their flag (private security services). Thirdly, some states gave the right to ship-owners to choose between or combine public and private security services.

Additionally to changes in their domestic law, in order to achieve maritime security, states also concluded international agreements among them. For example, in 2011, the Spanish defense minister reached an agreement with the Seychelles allowing Spanish tuna fishing fleet to carry on board large caliber weapons.

Beyond Spain, Bürgin<sup>124</sup> describes the German, French and Dutch laws regulating the approval and licensing of maritime security companies and the carrying of weapons by their personnel onboard vessels. She also describes the way that the state laws changed in order to meet the security needs of the maritime navigation industry.

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<sup>124</sup> Bürgin Annita Cristina (2014), p. 109.

Last, but not least, states achieved collaboration among them in anti-piracy operations by multinational agreements, such as the ReCAAP, and partnerships, such as the CMF.

#### 6.1.1. ReCAAP.

The rise of piracy in South-East Asia, particularly in the Malacca Straights, led to the adoption of the first regional multilateral agreement on combating maritime piracy, the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (ReCAAP).<sup>125</sup>

Although the ReCAAP doesn't introduce new laws on piracy, Zou<sup>126</sup> characterizes its adoption as "the most significant development for the international law of piracy". The Agreement obliges Contracting States: i) to prevent and suppress piracy and armed robbery against ships; ii) to arrest pirates or persons who have committed armed robbery against ships; iii) to seize ships or aircrafts used for committing piracy or armed robbery against ships; and iv) to rescue victim ships and victims of piracy or armed robbery against ships.<sup>127</sup>

The ReCAAP is a collaboration agreement between contracting states which includes rules and regulations not binding for non-contracting states, thus they are characterized as "soft law".

#### 6.1.2. CMF.

The Combined Maritime Forces (CMF) is a multi-national naval partnership, which exists to promote security, stability and prosperity on the high seas, including some of the world's most important shipping lanes. One of its focus area is preventing acts of piracy. For this reason, the counter-piracy Combined Task Force-151 (CTF-151) operates under the CMF.

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<sup>125</sup> The initiative belongs to Japan, who had a vested interest in stable maritime security in South-East Asia given that its economy is heavily dependent upon seaborne trade. The ReCAAP was signed in November 2004, long before the adoption of the UNSC Resolutions against piracy, by 16 Asian countries (Bangladesh, Brunei, Cambodia, China, India, Indonesia, Japan, Laos, Malaysia, Myanmar, the Philippines, Sri Lanka, Singapore, South Korea, Thailand and Vietnam) and came into force in September 2006.

<sup>126</sup> Zou Keyuan (2009), p. 333.

<sup>127</sup> Art. 3 of the ReCAAP.

The CTF 151 was established in January 2009 with a specific piracy mission-based mandate under the authority of UNSC Resolutions 1816, 1838, 1846, 1851 and 1897. In conjunction with the NATO and the EU NAVFOR Atalanta, and together with independently deployed naval ships, CTF-151 helps to patrol the Internationally Recommended Transit Corridor (IRTC) in the Gulf Aden.<sup>128</sup>

Participation in the CMF is purely voluntary and no nation is asked to carry out any duty that it is unwilling to conduct. The contribution from each country varies depending on its ability to contribute assets and the availability of those assets at any given time. The 30 nations that comprise CMF are not bound by either a political or military mandate, thus, the CMF is a flexible organization.<sup>129</sup>

## **6.2. International Organizations**

The UN, the NATO and the EU are the most important international political and military organizations which took such initiatives in collaboration with states. Other international organizations of the maritime industry such as the International Chamber of Commerce's International Maritime Bureau (ICC-IMB) and the International Maritime Organization (IMO) seek also to ensure the safe navigation of ships.<sup>130</sup> The activities of the afore mentioned stakeholders brought new ideas in the field of piracy law and led to the formation of new "soft law" on piracy.

### 6.2.1. UN.

The UN has wide-ranging powers (including ones on land) that are used in order to prevent and combat maritime piracy, contrary to the IMO, which deals only with the maritime aspects of this phenomenon.

Regarding maritime piracy in the Horn of Africa, the UNSC has issued a series of UNSC Resolutions (e.g. Resolutions 1814, 1815, 1831, 1838, 1846 and 1851 of 2008) under Chapter VII (Art. 39-51) of the UN Charter. Through these Resolutions the UNSC has invited the international community to react against maritime piracy.<sup>131</sup>

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<sup>128</sup> <http://combinedmaritimeforces.com/ctf-151-counter-piracy/>

<sup>129</sup> <http://combinedmaritimeforces.com/about/>

<sup>130</sup> Chang Diana (2010), p. 276.

<sup>131</sup> Pellegrino Francesca (2012), p. 439.

These various resolutions authorizing and encouraging antipiracy operations have received overwhelming support from UN member states. For example, these Resolutions have been the legal basis for the establishment of the EU NAVFOR Atalanta, the CTF-151 and other initiatives. Moreover, in accordance with UNSC Resolution 1851/2008, under the initiative of the US, an international group, named Contact Group on Piracy off the Coast of Somalia (CGPCS), was established.<sup>132</sup>

#### 6.2.2. IMO.

According to Chang,<sup>133</sup> the IMO's purpose is to develop a regulatory framework to maintain safe, secure, and efficient shipping over the high seas. The IMO divides acts of piracy into two categories by geographical and legal divisions of maritime zones; piracy on the high seas is defined as "piracy" in accordance with the UNCLOS, while acts of piracy in ports or national waters (internal waters and territorial sea) are defined as "armed robbery against ships"<sup>134</sup>.

In the recent years, the IMO has been very active in the field of combating piracy. At first, it has issued a number of Resolutions and Circulars. Pellegrino<sup>135</sup> recalls "the IMO Assembly Resolution A.922(22) adopted in 2011 and entitled "Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery Against Ships" and Resolution A.1002(25) on "Piracy and Armed robbery Against Ships in Waters off the Coast of Somalia", adopted in 2005 and also circulars of the Maritime Safety Committee (MSC/Circ. 622/Rev. 1, 622/Rev. 2, 623/Rev. 3, 623/Rev. 4 and MSC.1/Circ. 1334) containing recommendations to governments to prevent, suppress piracy and drawn up guidelines for owners, operators and crews for the prevention and punishment of this phenomenon".

In 2009, the Djibouti Meeting, under the auspices of the IMO, adopted the *Code of Conduct concerning the Repression of Piracy and Armed Robbery against Ships in*

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<sup>132</sup> Pellegrino Francesca (2012), p. 440.

<sup>133</sup> Chang Diana (2010), p. 277.

<sup>134</sup> Zou Keyuan (2009), p. 326.

<sup>135</sup> Pellegrino Francesca (2012), p. 441.



communications. Last but not least, signatory states undertook the task to review their domestic legislation in order to ensure that there are laws in place to criminalize piracy and armed robbery against ships and to make adequate provision for the exercise of jurisdiction, conduct of investigations and prosecution of alleged offenders.<sup>138</sup> The DCoC is not legally binding, but as “soft law” in the future it can make a change in the development of maritime piracy law.

### 6.2.3. NATO.

NATO has been actively participating in the fights against maritime piracy in the last decades by using its military structure and power according to the relative UNSC Resolutions. NATO conducted “Operation Allied Provider”, “Operation Allied Protector” and “Operation Ocean Shield” in the Horn of Africa. All these operations were based in UNSC Resolutions and international conventions, such as the UNCLOS and the SUA Convention. But they also formed new rules and regulations, such as those contained in the operation plans of the respective anti-piracy operations, which are binding for state agents participating in them.

### 6.2.4. EU.

In order to combat maritime piracy in the Horn of Africa, the EU launched three Common Security and Defense Policy Missions, the EU Naval Force Atalanta (EUNAVFOR), the EU Training Mission in Somalia (EUTM) and the EUCAP Nestor,<sup>139</sup> in accordance with relevant UNSC Resolutions (Nos. 1814, 1816 and 1838 of 2008) and International Law (UNCLOS).

Another initiative of the E.U. in collaboration with the maritime industry is the Maritime Security Centre - Horn of Africa (MSC-HOA), which provides constant monitoring for vessels transiting through the Gulf of Aden. MSC-HOA utilizes an interactive website to post the latest guidance and allows vessels to post their movement through the region.<sup>140</sup>

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<sup>138</sup> <http://www.imo.org/en/OurWork/Security/PIU/Pages/DCoC.aspx>

<sup>139</sup> Houben Marcus (2014), pp. 19-20.

<sup>140</sup> Hodgkinson Sandra L., Kelly Kevin M., Van Horn Thomas H. et al. (2011), p. 103.

### **6.3. Non-Governmental Organizations.**

Maritime piracy is an issue of concern not only for states and international organizations but also for some Non-Governmental Organizations (NGOs). The most active NGO in the fight against maritime piracy is the International Maritime Bureau.

#### 6.3.1. ICC-IMB.

The International Maritime Bureau (IMB) operates in the context of the International Chamber of Commerce (ICC), which is a non-profit organization. Since 1982 the IMB established and operates a Piracy Reporting Center (IMB-PRC) in order to monitor and provide advice on the growing piracy problem worldwide. In 1991 the IMB started keeping records on worldwide piracy activity.<sup>141</sup>

The IMB-ICC is situated in Kuala Lumpur, Malaysia and funded through voluntary contributions, mainly by ship-owners.<sup>142</sup> Its purpose is to provide a centralized information center on pirate attacks and to educate and warn shippers and traders about high-risk areas. The IMB also assists in the investigation and litigation of acts of piracy and has the capacity to track hijacked and phantom vessels.

Moreover, the IMB-PRC has suggested a definition of 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 the act”, which seems to be accepted by the shipping industry but has not been recognized either in international law or domestic law.<sup>143</sup> In this way, the IMB introduces new rules of soft law.

### **6.4. Maritime industry and private security industry.**

The maritime industry was the first affected by the reappearance of maritime piracy in the beginning of the 21st century. Ship-owners adapted very fast to the new security challenges and found recourse to the private security industry, in order to be protected by pirates, long before any initiative was undertaken by states and

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<sup>141</sup> Dutton Yvonne M. (2012), p. 1127.

<sup>142</sup> Chang Diana (2010), p. 276; Anderson James (2013), p. 60.

<sup>143</sup> Zou Keyuan (2009), p. 327.

international organizations. Indeed, it took several years to states and international organizations to coordinate their efforts and provide security to seafarers.

In the beginning, ship-owners started employing armed guards onboard vessels in a way which lied in the borderline between legality and illegality. The majority of the armed guards were ex-military personnel, retired and reservist, mainly from the special forces of the Army, the Navy and the Coast Guard. Active military personnel were also reported to work illegally as armed guards onboard vessels, usually working during their annual leave. At that time, the provision of security services onboard vessels against maritime piracy was not regulated by most national laws. For this reason, armed guards were declared as unskilled seafarers-crew members. The possession and carrying of weapons by private guards was also an issue solved by illegal means.

Recognizing the legislative gap, many states issued new laws allowing Private Security Companies to provide armed or unarmed security services onboard vessels. For example, in 2012 Greece issued a new law adding this service to the services provided by the Private Security Companies. As a consequence, many ne Private Security Companies specialized in maritime security were established and the private maritime security industry flourished.

The development of Private Maritime Security Companies (PMSC) led to the production of new soft law. Additionally to the state law, PMSC established internal regulations, standard operational procedures, best practices and guidelines. The armed or unarmed guards are now called “maritime security contractors”. They form a new community lying between the maritime industry and the private security industry, which develops and follows certain norms and professional ethics.

By reading the PMSC websites one can recognize these internal regulations and practices followed by them. For example, maritime security contractors, before being deployed, should provide a list of certificates, which prove typical and essential skills, such as health certificates, seaman’s book, honorable military or police discharge, clean criminal records, fire arms competency certificate, drug and alcohol screening certificate.

By reading the contracts of employment signed between PMSC and maritime security contractors, one can also understand that they contain several terms regarding

legal issues and the provision of training by the PMSC in the fields of standard operational procedures, rules on the use of force etc.

The afore mentioned soft law regulations, at first issued by single PMSC, were gradually written down in official documents by newly-established associations of PMSC. For example, the International Code of Conduct for Private Security Service Providers' Association (ICoCA)<sup>144</sup> has issued the *International Code of Conduct for Private Security Service Providers* (ICoC)<sup>145</sup>. The ICOC's objectives are: i) to articulate human rights responsibilities of private security companies (PSCs), and ii) to set out international principles and standards for the responsible provision of private security services, particularly when operating in complex environments. In September 2013, 708 PSCs had formally committed to operate in accordance with the ICoC.<sup>146</sup>

Chapters 5 and 6 include a non-exhaustive list and a short description of the official laws regulating anti-piracy operations and some examples of unofficial laws followed by pirates and/or anti-piracy professionals. One can easily realize that the set of rules applied in modern maritime piracy and anti-piracy is very complex and stems from many sources. Menski's *kite model* is a useful tool in an effort to group and analyze these rules. Nevertheless, only empirical data collected according to the methods described in Chapter 4 may prove whether anti-piracy professionals are conscious of the hard and soft law regulating anti-piracy operations and lead to an answer to the main research question and sub-questions of this master's thesis.

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<sup>144</sup> <http://icoca.ch/>

<sup>145</sup> [http://icoca.ch/en/the\\_icoc/](http://icoca.ch/en/the_icoc/)

<sup>146</sup> <http://icoca.ch/en/history/>

## **7. The anti-piracy professionals' consciousness of the legal framework regulating anti-piracy operations.**

Having analyzed the applicable laws in anti-piracy operations and the relevant initiatives taken by IOs, NGOs, states and other stakeholders (maritime companies, private security companies etc.), in the following pages I will reflect on whether those who deal with anti-piracy operations know and understand these laws, analyzing the data collected during my research project taking into consideration the social norms which affect their behavior.

### **7.1. Data analysis.**

#### **7.1.1. Statistical analysis.**

In order to research on the understanding of the law of piracy by state agents and private individuals participating in anti-piracy operations I conducted a survey using a paper-pencil questionnaire.

I used the purposive sampling design<sup>147</sup> because my aim was to have my questionnaire answered only by people having worked or working in the anti-piracy sector, as state agents or private individuals. In a period of two months I managed to gather in total 134 questionnaires filled in exclusively by people who had already participated in anti-piracy operations. The aim of the survey was to measure their training in and awareness and understanding of the laws of piracy.

My sample consists of 90 state agents (Navy and Coast Guard personnel) and 44 private individuals (Private Maritime Security Companies' personnel) of Greek nationality. The 76,5 % of state agents serve in the Navy and the 23,5 % serve in the Coast Guard. Private individuals work in Private Maritime Security Companies (PMSC) as managers (9 %), contractors/armed guards (73 %) and in other positions (18 %), such as operations supervisors. In total, 91 % are men and 9 % are women. All women work in the Navy or Coast Guard.

More precisely, state agents have participated in at least one counter-piracy operation as Command Team Members (26,5%), Boarding Team Members (43,5%),

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<sup>147</sup> Leedy D. Paul & Ormrod Jeanne Ellis (2005), p. 206.

the latter mainly serving in the Navy or in the Coast Guard Special Forces, and in other positions (7 %), such as EUNAVFOR Commander’s Staff Member and CTF-151 Staff Officer Afloat. Quite interestingly, a big rate (23 %) of state agents didn’t give information on their position. A possible reason may be that they were crew of military ships participating in counter-piracy operations but were not actively involved in them (e.g. Navy engineers). On the other hand, private individuals have participated in anti-piracy operations as Command Team Members (27,5 %), Maritime Security Contractors (54,5 %), in other positions (9 %), such as Operations’ Supervisors, and in undefined positions (9 %). In total, the sample was engaged in anti-piracy operations as Command Team Members (27 %), Boarding Team Members (29%), Maritime Security Contractors (18 %), in other positions (7,5 %), and in undefined positions (18,5 %).

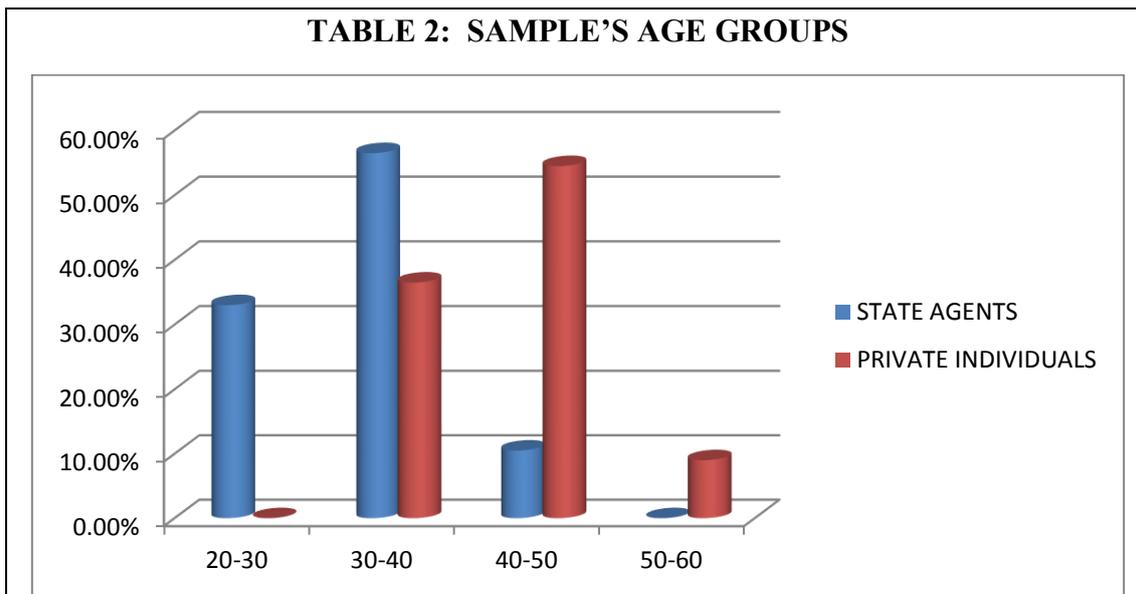
**TABLE 1: SURVEY SAMPLE**



For the statistical analysis, the sample was divided in age groups per decade (20-30, 30-40, 40-50 and 50-60 years old). In total, 22.5 % of the sample belonged to the 20-30 age group, 50% to the 30-40 age group, 24.5 % to the 40-50 age group, and 3 % to the 50-60 age group.

The 33 % of the state agents belonged to the 20-30 age group, the 56.5 % belonged the 30-40 age group, and the rest 10.5 % to the 40-50 age group. Private individuals belonged to the 30-40 age group in a rate of 36.5 %, to the 40-50 age group in a rate or 54.5 %, and to the 50-60 age group in a rate of 9 %.

**TABLE 2: SAMPLE'S AGE GROUPS**

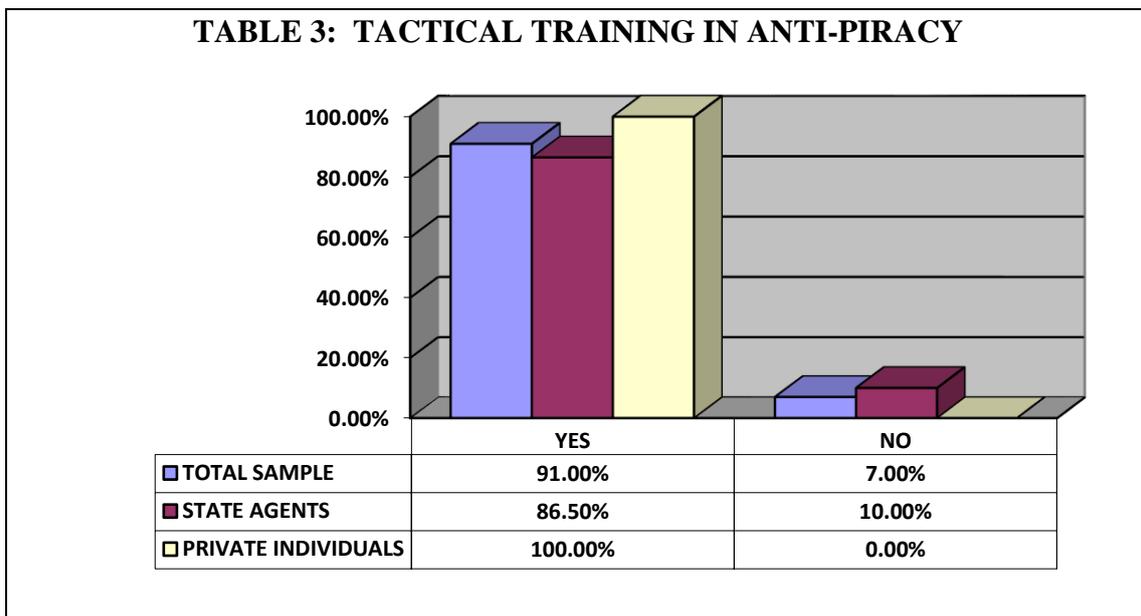


The sample's age groups table shows that, in general, private maritime security contractors are older than Navy and Coast Guard personnel and this may be a proof that retired military/law enforcement personnel jump in the private maritime security industry, where they have the opportunity to gain money using their previous knowledge and experience. In this way they carry their professional norms and ethics to the private maritime security industry.

The questions contained in the questionnaire may be grouped in four groups, each of them researching respectively on: i) the informants' training in legal issues before its deployment in anti-piracy operations, ii) the informants' awareness of international conventions and their implementation by states iii) the informants' perceptions on the applicable law in anti-piracy operations and iii) the informants' self-evaluation of their training and understanding of the piracy laws. The groups of questions are placed in this series so that the informant's reliability can be checked in relation to his previous answers. In the last part of the questionnaire an open-ended question was posed to the informants, asking them to submit any comment on their training and understanding of applicable laws, regulations and norms on piracy and anti-piracy.

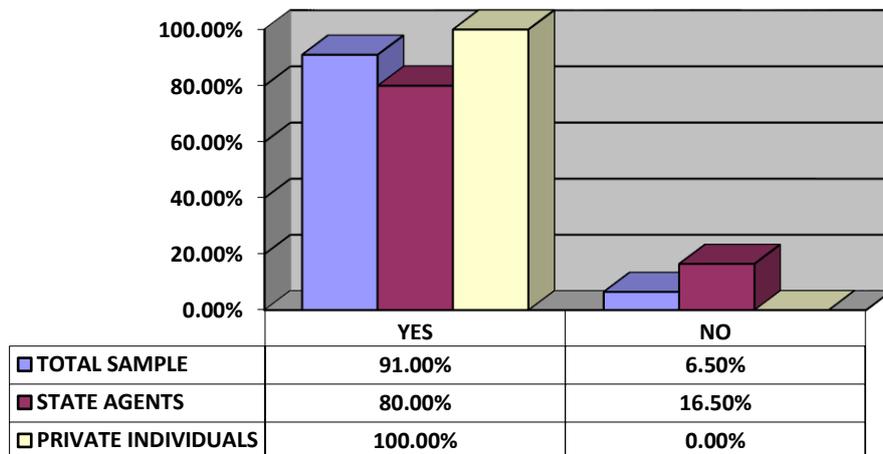
7.1.1.1. Training in law.

As far as training is concerned, the sample was asked to answer the following questions: i) Did you get any training for participation in anti-piracy operations? (Yes/No); ii) Did your training contain legal modules? (Yes/No). If yes, please specify (National Law-International Law-IMO Regulations-Other); iii) Have you been trained in the law of self-defense? (Yes/No); and iv) Have you been trained in the rules of the use of force (armed or unarmed)? (Yes/No). The answers to these questions are shown in the following five tables (Tables 3, 4, 5, 6 and 7):



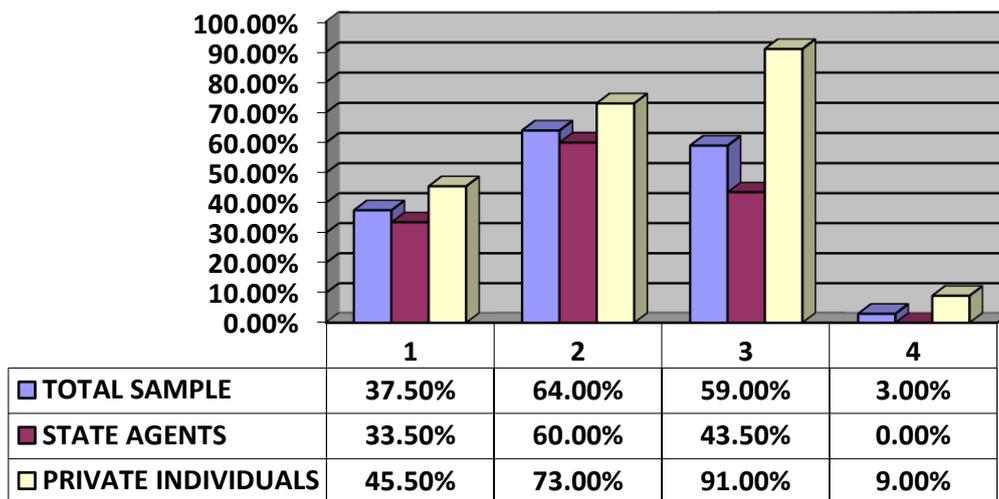
According to Table 3, the vast majority of personnel participating in anti-piracy operations have received tactical training prior to their deployment. Surprisingly, all private individuals have answered that they have received tactical training. As it was mentioned in the in-depth interviews, many of the contractors had already received tactical training during their military service either as professional or as conscripts in the Army or Navy Special Forces and their tactical training was followed by the in-company training provided by the PMSC or by tactical training in private training centers (e.g. in South Africa).

**TABLE 4: THEORETICAL TRAINING IN LEGAL MODULES (1/2)**



According to Table 4, all (100 %) private individuals and 80 % of the state agents have undergone theoretical training in legal modules. In my opinion, not all state agents participating in anti-piracy operations are trained in legal issues, since not all of them will be asked to fulfill tasks where this knowledge is a must (e.g. doctors, engineers and other supporting personnel). The exact content of the sample’s training in legal modules is shown in the following table (Table 5).

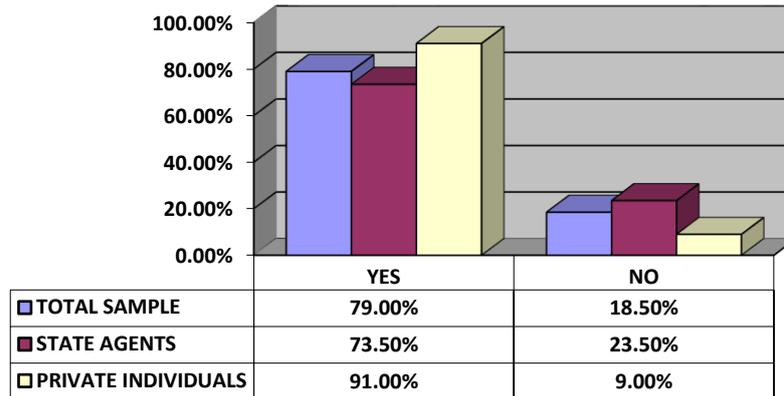
**TABLE 5: THEORETICAL TRAINING IN LEGAL MODULES (2/2)**



- 1: National law.
- 2: International law.
- 3: IMO Regulations.
- 4: Other.

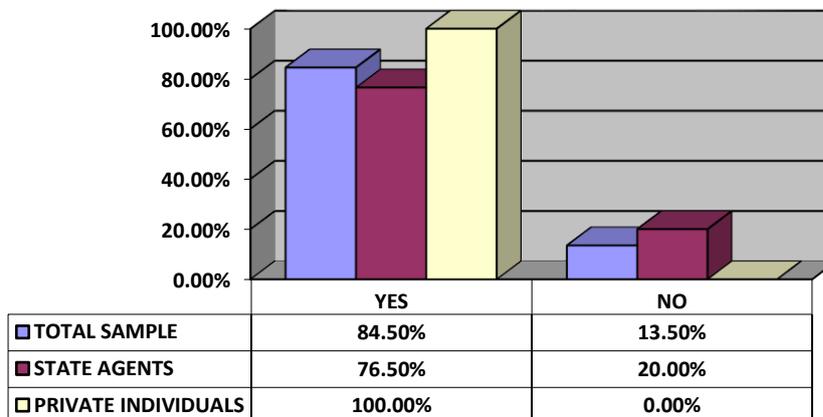
According to Table 5, private individuals are trained in the IMO Regulations (91 %), in the international law (73 %) and in national laws (45.5 %). The state agents' rates in the same modules are lower, reaching the rate of 43.5 %, 60 % and 33.5 % respectively. It is remarkable that only the 33.5 % of state agents are trained in national laws.

**TABLE 6: THEORETICAL TRAINING IN THE LAW OF SELF-DEFENSE**



As far as theoretical training in the law of self-defense is concerned, state agents replied that they have received training in a rate of 73.5 %, while private individuals in a rate of 91 %. It is interesting that private individuals prove to be better trained than state agents in the law of self-defense.

**TABLE 7: THEORETICAL TRAINING IN THE USE OF FORCE**

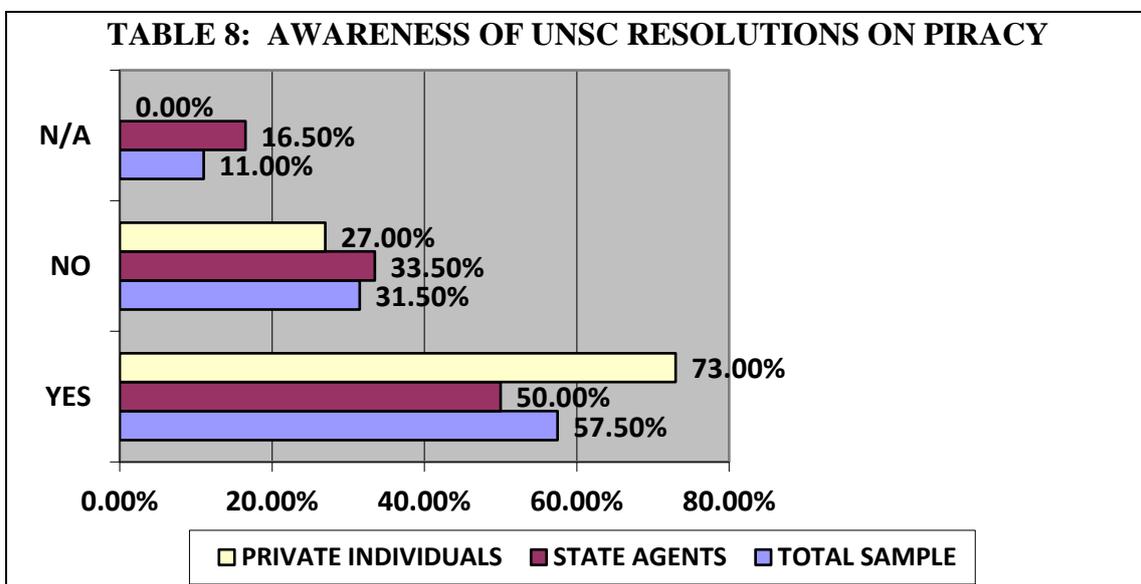


As far as theoretical training in the rules of the use of force is concerned, all private individuals answered that they have received such training while only 76.5 % of state agents answered affirmatively.

Tables 6 and 7 indicate that the legal training of state agents and private individuals focuses in the practical issues of self-defense and the use of force, an indication which is supported by the in-depth interviews and the terms of the employment contracts between PMSC and private armed guards.

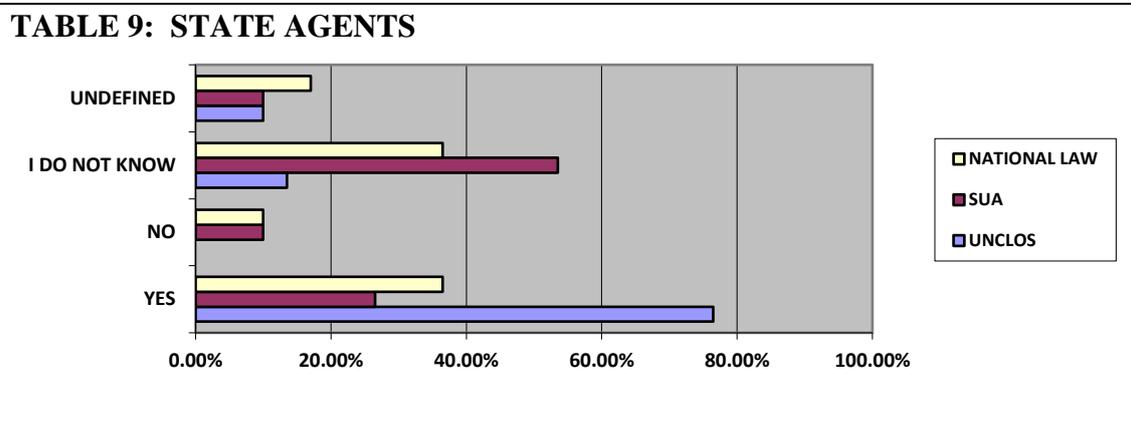
7.1.1.2. Awareness of law.

In order to research on the sample’s awareness of piracy law, the following questions were included in the questionnaire: (a) Has your country ratified or acceded to the United Nations Convention on the Law of the Sea, 1982 (“UNCLOS”)?; (b) Has your country ratified or acceded to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 1988 (“SUA”)?; and (c) If the answer to either (a) or (b) is affirmative, has your country implemented the convention(s) by enactment of national legislation? The answers are depicted in the following tables (Tables 8, 9, 10 and 11).



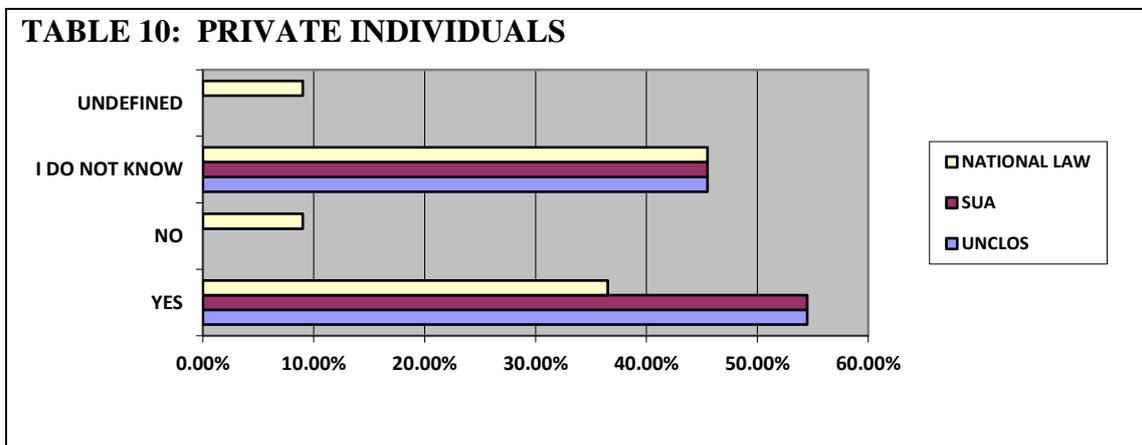
According to Table 8, more private individuals (73 %) than state agents (50 %) are aware of the UNSC Resolutions against piracy. This may happen because usually Coast Guard personnel are trained to deal with piracy or armed robbery against ships

inside the territorial waters. In this case, there is no need to recourse to UNSC Resolutions, since the national law is applicable. In fact, Navy personnel who participate in multinational anti-piracy operations are aware of the relevant UNSC Resolutions, since they receive training before their deployment.



STATE AGENTS	YES	NO	I DO NOT KNOW	UNDEFINED
UNCLOS	76.50 %	00.00 %	13.50 %	10.00 %
SUA CONVENTION	26.50 %	10.00 %	53.50 %	10.00 %
NATIONAL LEGISLATIONS	36.50 %	10.00 %	36.50 %	17.00 %

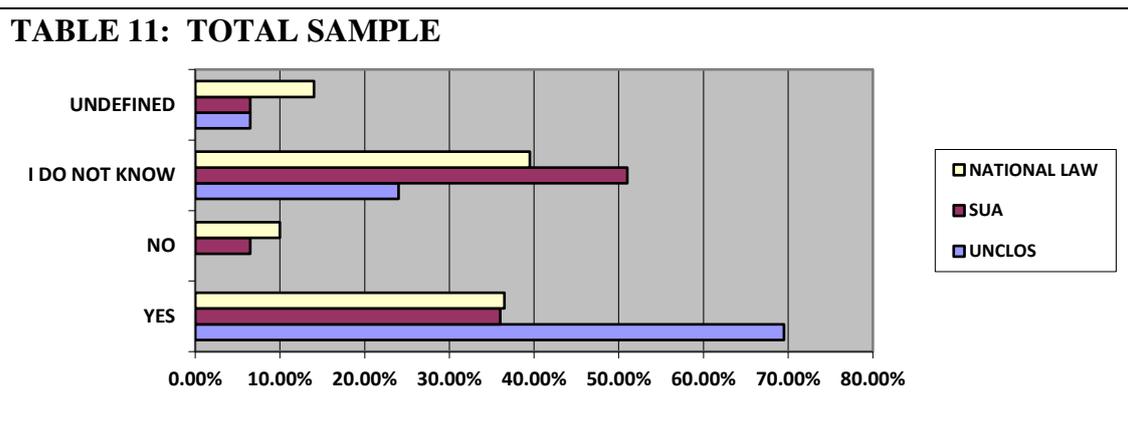
According to Table 9, state agents know that their country has ratified the UNCLOS in a rate of 76.5 %, the SUA Convention in a rate of 26.5 % and that their country has implemented the aforementioned convention(s) by enactment of national legislation in a rate of 36.5 %.



PRIVATE INDIVIDUALS	YES	NO	I DO NOT KNOW	UNDEFINED
UNCLOS	54.50 %	00.00 %	45.50 %	00.00 %
SUA CONVENTION	54.50 %	00.00 %	45.50 %	00.00 %
NATIONAL LEGISLATIONS	36.50 %	09.00 %	45.50 %	09.00 %

According to Table 10, private individuals know that their country has ratified the UNCLOS in a rate of 54.5 %, the SUA Convention in a rate of 54.5 % and that their country has implemented the aforementioned convention(s) by enactment of national legislation in a rate of 36.5 %.

By comparing the results in Tables 9 and 10, one can identify the lack of adequate knowledge of the SUA Convention by state agents, contrary to private individuals.



TOTAL SAMPLE	YES	NO	I DO NOT KNOW	UNDEFINED
UNCLOS	69.50 %	00.00 %	24.00 %	06.50 %
SUA CONVENTION	36.00 %	06.50 %	51.00 %	06.50 %
NATIONAL LEGISLATIONS	36.50 %	10.00 %	39.50 %	14.00 %

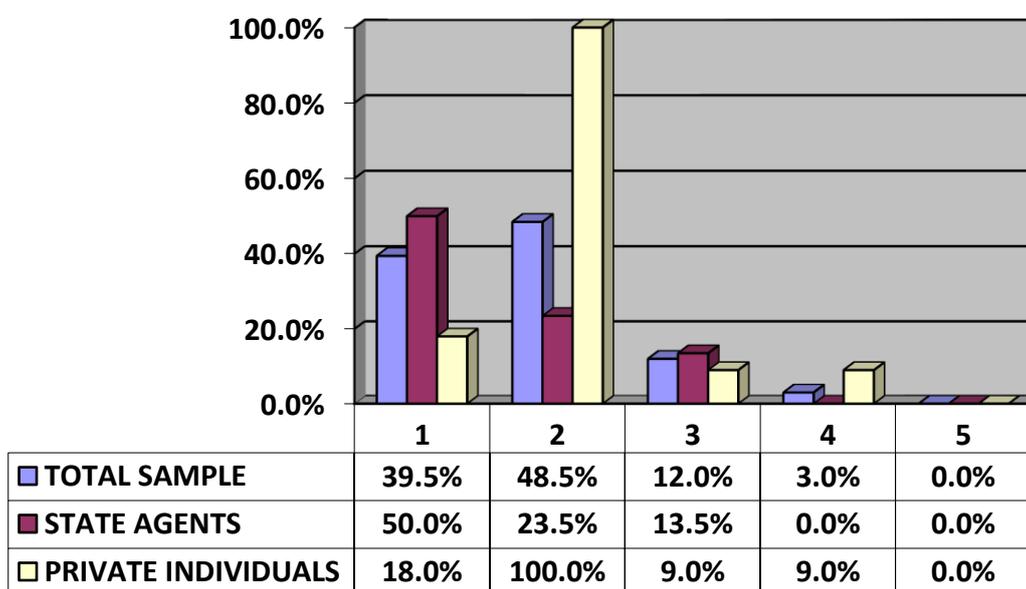
Table 11 depicts the overall knowledge of the piracy laws by the total sample. Surprisingly, only the 36 % of professionals participating in anti-piracy operations are aware of the SUA Convention and only 36.5 % know whether their country has ratified or acceded to the UNCLOS or to the SUA Convention.

### 7.1.1.3. Opinions on the applicable law.

In order to research on the sample's perceptions on which laws are applicable in anti-piracy operations, informants were asked to choose as many answers as they wanted among many possible answers and add any other possible answer.

The question posed to them was the following: "In your opinion, which laws and/or norms are applicable in anti-piracy operations?" and the possible answers were: i) Your national law; ii) The national law of the State whose flag the attacked vessel flies; iii) Conventional International law; iv) IMO Regulations; v) PMSC internal regulations, best practices and guidelines; vi) UNSC Resolutions; vii) International Human Rights Law; viii) International Law of Armed Conflicts (LOAC); ix) Customary International Law; x) Local customs in the area of operation; xi) Military/Law Enforcement personnel's professional regulations and ethics; xii) PMS Contractor's professional regulations and ethics; xiii) The national law of the pirates; xiv) No law is applicable, and xv) Other (please specify). The following three tables depict the answers on the question.

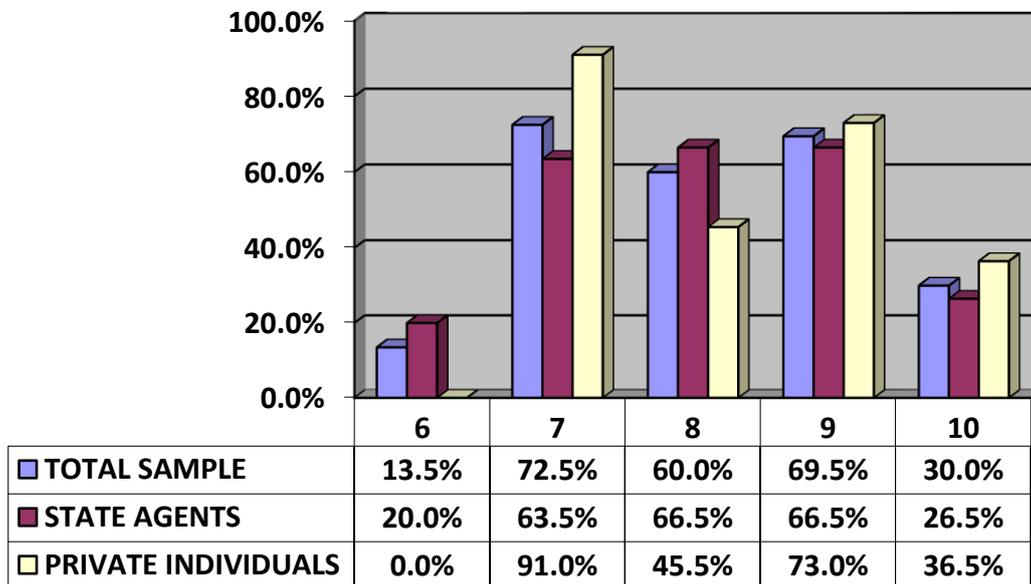
**TABLE 12: PERCEPTION ON THE APPLICABLE LAWS IN ANTI-PIRACY OPERATIONS (1/3)**



- 1: Your national law
- 2: The national law of the State whose flag the vessel flies
- 3: The national law of the pirates
- 4: Local customs in the area of operations
- 5: No law is applicable

According to Table 12, all private individuals (100 %) believe that the national law of the state whose flag the attacked vessel flies is applicable, while only 23.5 % of state agents have the same opinion. State agents in a rate of 50 % believe that their national law is applicable while the rate of private individuals is only 18 %. Private individuals seem to rely more on the flag-state law, mainly because they belong to a crew or to a vessel protection detachment (VPD) which may be multinational, and they are reluctant to answer that the state law of all different states of the crew's origin may apply. Interestingly a small rate of private individuals (9 %) believes that the national law of the pirates and the local customs of the area of operations are applicable. State agents believe that the national law of the pirates is applicable in a rate of 13.5 % and that local customs in the area of operations are not applicable. In my opinion, both state agents and private individuals avoid to choose the pirates' national legislation and the local customs in the area of operations as applicable laws, mainly because their content is difficult to be determined or they are not familiar with them

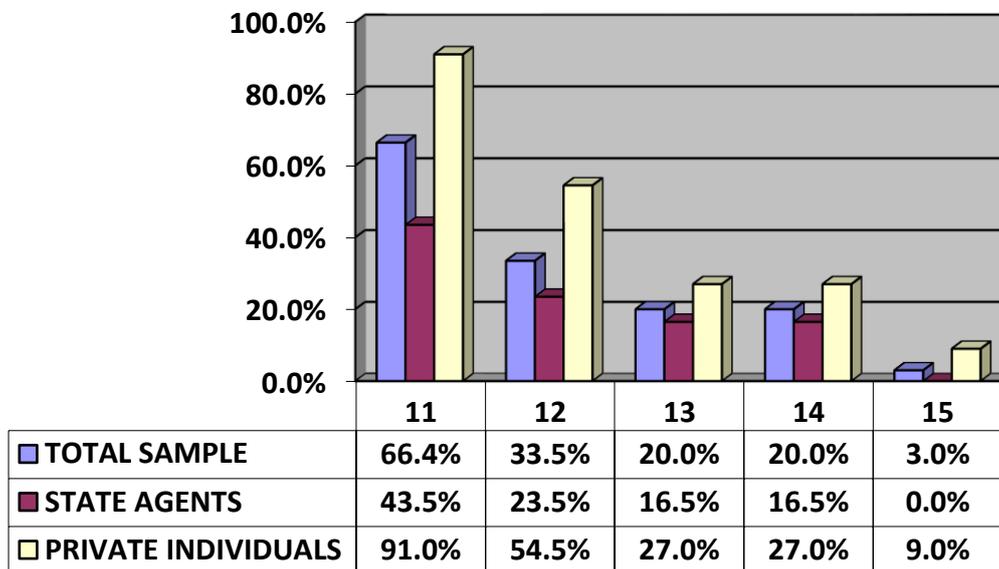
**TABLE 13: PERCEPTION ON THE APPLICABLE LAWS IN ANTI-PIRACY OPERATIONS (2/3)**



- 6: Customary International Law.**
- 7: Conventional International Law.**
- 8: United Nations Security Council Resolutions.**
- 9: International Human Rights Law.**
- 10: International Law of Armed Conflicts (LOAC).**

According to Table 13, customary international law is totally neglected by private individuals, while only 20 % of the state agents chose it. This may occur because most states have already signed and ratified the GCHS or the UNCLOS, which crystallized customary international law, so there is no need to recourse to the later when the former are used. Consequently, 63.5 % of the state agents and 91 % of private individuals replied that conventional international law, mainly the GCHS and the UNCLOS, is applicable. The relevant UNSC Resolutions are applicable according to the 66.5 % of state agents and only the 45.5 % of private individuals. Interestingly, both state agents and private individuals seem to agree in the applicability of the international human rights law, in a rate of 66.5 % and 73 % respectively. In total, 30 % of the sample, analyzed to 26.5 % of state agents and 36.5 % of private individuals believe that the international law of armed conflicts (LOAC), which s a common mistake, since LOAC is applicable only in wartime, which is not the case in anti-piracy operations, which are law enforcement operations in peacetime.

**TABLE 14: PERCEPTION ON THE APPLICABLE LAWS IN ANTI-PIRACY OPERATIONS (3/3)**



- 11: IMO Regulations and the Djibouti Code of Conduct (DCoC).**
- 12: PMSC internal regulations, best practices and guidelines.**
- 13: Military/Law Enforcement professional regulations and ethics.**
- 14: Private Security Contractors' professional regulations and ethics.**
- 15: Other laws.**

According to Table 14, IMO Regulations are chosen in a high rate in total (66.4 %) and in the highest rate by private individuals (91 %). IMO Regulations and the DCoC are well known both to state agents and private individuals, since they constitute more practical tools than international law in general of UNSC Resolutions. Other sets of soft law, such as the PMSC internal regulations, best practices and guidelines, military/law enforcement and private security contractor’s professional regulations and ethics are considered as applicable mainly by private individuals (in a rate of 54.5 %, 27 % and 27 % respectively) while state agents seem to neglect them, since only in a rate of 23.5 %, 16.5 % and 16.5 % respectively have chosen these answers. Finally, only 9% of private individuals have chosen other sets of laws as applicable, such as industry regulatory standards (e.g. ISO/PAS 28007:2012 “Guidelines for Private Maritime Security Companies (PMSC) providing privately contracted armed security personnel (PCASP) on board ships”) <sup>148</sup>.

#### 7.1.1.4. Self-assessment of training and understanding of law.

In the last group of questions, the informants had to ask the following self-assessment questions: (i) Do you believe that your training in the laws regulating anti-piracy is adequate? (Yes/No); and (ii) Do you believe that your understanding of laws regulating anti-piracy is adequate? (Yes/No).

<b>QUESTION</b>	<b>Do you believe that your training in the laws regulating anti-piracy operations is adequate?</b>			<b>Do you believe that your understanding of laws regulating anti-piracy operations is adequate?</b>		
	<b>YES</b>	<b>NO</b>	<b>N/A</b>	<b>YES</b>	<b>NO</b>	<b>N/A</b>
<b>TOTAL SAMPLE</b>	48.50%	44.00%	07.50%	58.00%	34.50%	07.50%
<b>STATE AGENTS</b>	50.00%	43.00%	07.00%	46.50%	46.50%	07.00%
<b>PRIVATE INDIVIDUALS</b>	45.50%	45.50%	09.00%	82.00%	09.00%	09.00%

<sup>148</sup> [http://www.iso.org/iso/catalogue\\_detail?csnumber=42146/](http://www.iso.org/iso/catalogue_detail?csnumber=42146/)

According to Table 15, both state agents and private individuals are more or less shared in whether their training in piracy law is adequate or not. Regarding their answer on whether they have an adequate understanding of piracy laws or not, the majority of private individuals reply affirmatively (82 %) while only 46.5 % of state agents does the same. Similarly, the 46.5 % of state agents believe that their understanding of piracy laws is not adequate.

#### 7.1.1.5. General comments.

In the final part of the questionnaire the informants could write their overall comments in the training and understanding of applicable anti-piracy laws, regulations and norms. The 10 most descriptive comments received are the following:

- 1) Navy Officer (NMIOTC): *“I would like to stress the importance of the knowledge of international human rights law, in order to avoid unpleasant situations”*.
- 2) Navy Officer (CTF-151): *“Because piracy takes place on the high seas, the international laws overrule any national contradicting ones and in training this should be focused on. For military training it should be noted that pirates are non-combatants but rather criminals and all acts should be according to ones done against such”*.
- 3) Navy Officer (SEAL): *“More in depth training is required”*.
- 4) Navy Officer (EU NAVFOR Atalanta): *“The legal framework is always so generic that can never satisfy an operator to the maximum extent of applicability of the law in each case”*.
- 5) Navy Officer (Frigate Command Team Member): *“The major fallback in counter-piracy operations is that the combined Armed Forces of different countries need to comply to all the laws/conventions/resolutions/orders in parallel with national caveats and restrictions”*.
- 6) Navy Officer (Frigate Boarding Team Member): *“Every time that training in the law is conducted, a discussion follows which usually does not lead anywhere. There are conflicting views between the “law” and the crew which operates. One has the impression that the application of the law in the area of operations is very difficult or impossible. For this reason we do not make arrests as easily as we deter piracy”*.
- 7) PMS Contractor A: *“I personally believe that the majority of peers/contractors have very little understanding of the legal framework around piracy”*.

8) PMS Contractor B: *“Currently, the main idea of counter-piracy actions and plans is: “Discourage pirates’ activity and unlawful will by deterring it and not by violent repression or the same”. In that light, BMP4, ICoC, IMO Circulars, ISO/PAS 28007, Rules on the Use of Force (RUF) have been into force and provide for reparation, early warning. Early and progressive implementation of Use of Force along with passive/non-kinetic protection measures aiming at early deterring of unlawful piracy acts and avoid violence escalation. Nevertheless, legitimacy and human rights always should be taken into consideration”.*

9) PMS Contractor C: *“Maritime Security Companies don’t care and make no efforts concerning the knowledge of regulating law from PCAST members. In the best case they will brief you just to take your signature. After that it is your responsibility and in case that something wrong happens, you as PCAST are going to take the blame”.*

10) PMS Contractor D: *“It must be understood by all “colleagues” that our role and aim is the prevention and de-escalation. We are not in this post in order to dispense justice or for actions that have as ideological background our national views and other beliefs. For this reason I believe that the elaboration on and the establishment of a legal framework which will regulate our services is an urgent need”.*

The aforementioned comments are consistent with the findings of the statistical analysis and express the consciousness of the anti-piracy professionals on legal issues and legal training. Particularly, both state agents and private individuals understand the complexity of the anti-piracy legal framework and ask for more in-depth training in legal issues.

#### 7.1.2. Analysis of the in-depth interviews.

During the unconstructed in-depth interviews, the five informants expressed their views on their training in legal issues mainly prior to their deployment in anti-piracy operations.

The two Navy Officers seem to worry about the level of training in legal issues of state agents from different countries who have to collaborate in multinational counter-piracy operations. The first (Commanding Officer) stated: *“Despite the fact that we receive training in legal modules, we still need support by Legal Advisors, especially when our forces participate in multinational operations. In multinational operations we must coordinate our efforts with other nations who follow different*

*rules*". The Operational NCO (Navy SEAL) expressed his concern on the fact that operational team leaders must take decisions quickly without having recourse to specialized legal advice. He stated: *"On a boarding mission the team leader must give orders to the team members which are consistent with our national and the international law. In case of emergency the team leader must take decisions taking into consideration what he was taught during his training in maritime interdiction operations' legal issues. There is a time limitation before our action or reaction and contacting with a legal advisor is in most cases impossible. The complexity of applicable laws may lead to misunderstandings and sometimes to crimes of negligence"*.

The PMS Contractors seem more conscientious on the lack of legal knowledge. PMS Contractor 1 and PMS Contractor 2 admitted that their legal training before becoming operational is *"poor"*. Both stressed the need for better legal training. At the same time, PMS Contractor 1 stated: *"Fortunately, we discuss with each other and we agree that we shall follow the BMP4 and the Rules on the Use of Force given to us by our company"* and PMS Contractor 2 stated: *"Most of my colleagues follow our professional ethics and try to protect the human rights of everybody, even of the pirates. We may not know all the laws of the world, but we have a minimum common knowledge and understanding of basic legal texts"*. PMS Contractor 3 believes that his prior service in the Navy has provided him with some knowledge of laws and rules and stated: *"I understand that, if I follow what I already know as right, if I stay calm and act moderate in any case, I think that I will never be in trouble with justice"*.

The information gathered and the views expressed in the unconstructed in-depth interviews were initially correlated with the information collected through the survey. Indeed, the comments of the interviewees were similar to the written comments in the final part of the survey's questionnaire. Nobody differentiated a lot from what seemed to be a common ground in the opinions expressed in the final part of the survey. Hence, the findings of the in-depth interviews totally support the findings of the survey.

### 7.1.3. Content analysis of documents.

The survey's findings and the findings of the in-depth interviews were further correlated and cross-checked for their validity with the information collected through

the content analysis of documents, such as the PMSC websites and contracts of employment.

The two contracts taken into consideration were entitled “Contract of Engagement of Member of Security Personnel On Board Seagoing Vessels” (hereinafter: Contract 1) and “Private Security Guard Master Agreement” (hereinafter: Contract 2). In both contracts the signatory PMSC was established and operating in Cyprus and in accordance with the Cypriot domestic law.

In Contract 1, which is very detailed, the signatory PMSC (referred to as the “Company”) declares that it operates “[i]n conformity with the existing and applicable Laws and Regulations” and the signatory PMS contractor (referred to as the “Employee”) also undertakes the responsibility to fulfill his tasks “[i]n accordance with the existing and applicable Laws and Regulations”. The PMS contractor has provided the PMSC with credentials that he has clean criminal records, medical, physical and mental fitness and experience and suitable training status in the use and carriage of firearms “[i]n line with the existing and applicable Laws and Regulations”.

Regarding the use of force, the PMC contractor agrees that he “[w]ill at all times follow and apply the Rules for the Use of Force as agreed between the Employer and the Vessel’s Owners”, that his primary function is “[t]he prevention of boarding using the minimal force necessary to do so, on the understanding that there should be a graduated response plan to a pirate attack”, that he “[w]ill at all times take all reasonable steps to avoid the use of force, and if same is used it should be in a manner consistent with applicable law, and in no case should the use of force exceed what is strictly necessary and in all cases proportionate to the threat and appropriate to the situation”, that he “[s]hall have the sole responsibility for any decision taken by him for the use of any force, including targeting and weapon discharge, always in accordance with the Rules for the Use of Force and applicable National Law”, and that he “[s]hall also have the sole responsibility to protect and take care about his own life and corporal integrity at his own and absolute discretion, being always subject to the Rules for the Use of Force as foresaid, and the safety of all persons on board and the vessel herself”.

Regarding the right to self-defense and defense of others, the PMS contractor “[u]ndertakes not to use firearms against persons except in self-defense or defense of others against the imminent threat of death or serious injury, or to prevent the perpetration of particularly serious crime involving great threat to life”.

Moreover, the PMS contractor undertakes the obligation to “[c]omply with all applicable International and Local Laws and Regulations, including but not limited to Health, Safety, Environmental, Licensing, Customs’, Port and Harbors’, Fiscal, Administrative, and Police Regulations, and shall be solely liable for any infringement thereof and their potential consequences legally or otherwise” and that “throughout the period of the performance of his duties on board the Vessel: a. He carries out his duties in accordance with the Company’s Standard Operational Procedures [...]. c. Not to consume alcoholic drinks or any other drinks of non-prescribed ingredients and contents. d. not to make use of medicines without reason and which might affect the performance of his duties, the readiness of their execution and its uninfluenced judgment”.

In Contract 2, which is less detailed than Contract 1, the PMS contractor (referred to as the “private security guard” or the “PSG”) undertakes the following tasks: “[...] d. Using proportionate and considered means to engage with sea borne threats In the Territory to prevent the Vessel from being hijacked; e. Where appropriate and always in accordance with the Rules for the Use of Force (RUF), Standard Operating Procedures (SOP) and relevant national laws, using weapons in an anti-piracy role. The RUF and SOP are to be provided by the Company in written form during the pre-deployment operational briefing and handed out to the Team Leader designated on the Specific Project Agreement”. He also warrants that his services “[s]hall be performed in accordance with, and shall not violate, applicable laws, rules or regulations, and standards prevailing in the industry and the PSG shall obtain all permits or permissions required to comply with such laws, rules or regulations”.

In both contracts national law, international laws and various rules and regulations are mentioned and the MPS contractors undertake the obligation to follow. Nevertheless, these terms are very wide and obscure and presuppose that the PMS contractors have previously undergone legal training.

## **8. Discussion**

Modern maritime piracy is a complex phenomenon regarding its roots and causes and, also, the way that the international community deals with it. In a globalized world, where pirates develop global criminal networks, the existing hard and soft law is not always adequate tools for combating maritime piracy. Nowadays, new initiatives are taking place and the existing hard laws regulating maritime piracy and anti-piracy operations are gradually completed by sets of new soft laws, including social norms of anti-piracy professionals. This procedure is hampered by the fact that different laws are applicable in different high risk areas and the social norms which anti-piracy professionals follow are extremely difficult to be recorded due to the different nationality, religion, education and other characteristics of those professionals.

These problems have long ago been recognized by academics and practitioners involved in anti-piracy operations. Nevertheless, the legal framework regulating modern maritime piracy is complex and, for sure, not a model of clarity, as it was depicted in Chapters 5 and 6. For example, the laws applicable in the Somali piracy are different than the laws applicable in the Malaccan piracy, excluding only the core of international law which is uniform and applies universally. One can recognize a case of “plurality of pluralities”, in accordance with Menki’s ideas.<sup>149</sup>

As far as the anti-piracy community is concerned, it is clear that it is divided in two major groups of actors, namely state agents and private individuals. The former are representatives of their states while the latter are employees of PMSC. Each group has different functions and operational tasks, consequently they are bound by different sets of laws and norms, which they should know, understand and implement or follow.

State agents, usually Navy and Coast Guard personnel, are tasked to act as law enforcement agents in order to protect maritime navigation. So, they have been awarded the competency to enforce the relevant laws of piracy. In most times they have a clear mandate given by their state or an international organization and based in international law or decisions (e.g. UNSC or IMO Resolutions). Since they take actions against piracy on the high seas, they shall apply rules of international law and human rights law. Their national law is also applied when they are onboard their state vessels. The

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<sup>149</sup> Menski Werner (2014), pp. 14 and 21.

applicable national law includes criminal procedural law (e.g. their duty to arrest, detain, investigate and transfer suspect pirates to judicial authorities) and, of course, their professional regulations and ethics.

On the other hand, individuals working as private security guards onboard vessels do not conduct law enforcement operations. This means that they are not tasked to chase pirates but only to prevent pirates' attacks or protect vessels when attacks occur, by applying passive and active measures of defense. In this light, their tasks seem easier than the state agents' task. Nevertheless, the legal framework regulating their case is more complex, since they shall protect vessels not only when they sail on the high seas but also when they sail in the territorial or internal waters of coastal states. Since national laws are different, they shall know and apply the national law of every state they reach, something that is almost impossible. For example, if armed robbery against the protected vessel takes place in the territorial waters of state X, they shall use force applying the right to self-defense or defense of third parties in accordance with the national law of state X, which may differ from the ships' flag state, or from their own national law.

The statistical analysis of the data collected through the survey led to interesting findings. Although state agents are supposed to be better trained and informed on the legal issues of their profession, since they are agents of powerful institutions, the states, in some cases it was proven that private individuals were better trained and informed, despite the fact that they work for PMSC which, normally, cannot be as powerful and organized institutions as states.

The analysis of the in-depth interviews, and of the comments written on the final part of the survey's questionnaire, led to the finding that although state agents and private individuals get training in legal issues before deploying in high risk areas, they still have the feeling that their training is not complete. Regarding training in legal issues, it is clear that hard law is easier to be understood than soft law. Particularly, state agents are used to follow written rules. Private individuals may be more open to soft law, such as Codes of Conduct, because it provides them with general directives on how to act in piracy attacks on the high seas, where states are not always able or willing to exercise authority. Soft law is more flexible and mainly reflects the living law more than the hard law, which is more static and mainly reflects the law in the books.

In this light, the answer to the main question of my research project is that each group of anti-piracy professionals, namely state agents and private individuals, has a different rate of consciousness of the hard and soft law regulating anti-piracy operations. What is common to both groups is their concern in legal issues and their eagerness to receive more training in legal issues.

## **9. Conclusions.**

The aim of this master thesis was to research on the anti-piracy professionals' consciousness of the hard and soft law regulating anti-piracy operations (main research question). In order to facilitate the research procedure, the main research question was divided in four sub-questions.

The hard and soft law regulating anti-piracy operations was listed and analysed by using Menski's *kite model* as a tool in Chapters 5 and 6. In this way I answered the 1<sup>st</sup> sub-question. My effort was to go beyond positivism and include in my analysis not only laws, including recent law making initiatives, but also ethics and social norms which affect the conduct of anti-piracy professionals.

The data collected through the questionnaire, the in-depth interviews, and the content analysis of documents - which were presented in Chapter 7 - provided answers to the 2<sup>nd</sup> and 3<sup>rd</sup> sub-questions. Namely, anti-piracy professionals filled a questionnaire which allowed me to check if they know the hard and soft law regulating anti-piracy operations (2<sup>nd</sup> sub-question). Since the questionnaire *per se* was not enough for researching on the depth of knowledge of the afore mentioned laws, I conducted in-depth interviews, during which the interviewees expressed their opinion on their level of legal consciousness regarding anti-piracy laws (3<sup>rd</sup> sub-question). Moreover, working contracts between PMSC and maritime security guards gave me the opportunity to check the terms referring to legal issues and relate them with the data collected through the questionnaire and the in-depth interviews.

The in-depth interviews provided also some data concerning the reasons for which anti-piracy professionals consider their level of legal consciousness regarding anti-piracy laws as adequate or inadequate (4<sup>th</sup> sub-question).

During the research project, efforts were made to achieve a high level of validity and reliability as far as the data collected were concerned. The time limits of the research project didn't allow me to collect more data, so my efforts concentrated in the high validity and reliability of the data collected. Initially, all informants, who filled-in the questionnaire or gave in-depth interviews, were checked for truly being anti-piracy professionals. I managed to check this issue through my personal acquaintance with anti-piracy professionals, who initially filled in the questionnaire and then proposed me more informants (a method called snowball sampling or chain referral sampling).

During the in-depth interviews, I tried to get information on the interviewees' actual knowledge and understanding of the anti-piracy laws (legal consciousness). Nevertheless, even if an anti-piracy professional declares that he/she knows a certain law, it is very difficult to get proofs that he/she deeply understands the law and that he/she will apply it properly. This became evident in the *MT Enrica Lexie* case.<sup>150</sup> For this reason, the aim of some questions posed to the informants, especially during the in-depth interviews, was to check their honesty. All informants seemed to reply honestly. I can attribute it to the fact that most informants served or had served in the Armed Forces, thus they consider it honorable to be direct and honest in their speech, and to the fact that the questionnaire and the in-depth interviews were anonymous. Indeed, most informants expressed their interest on the research project and found a way to express their concerns on professional issues. They considered the research project as a chance to be heard, and I deeply believe that they used it properly and honestly.

Due to time limits and to the small number of informants, the outcome of the research project is difficult to be generalized, thus more research is needed on the issue. Since there is no previous similar research, this research project may prove useful to lawyers and sociologists of law who will conduct further research in the field of maritime piracy and anti-piracy laws, and may lead to the enhancement of the anti-piracy professionals' legal training and consciousness. In order to achieve the later, there are some big challenges for the maritime and the legal community: the coordination of efforts and the homogenization of law, so that the same rules are applicable in all cases of piracy all over the world; the development of situation-specific responses to particular scenarios (e.g. the evolving piracy/armed robbery against ships in the territorial waters of Nigeria); and the creation of comprehensive training programs for anti-piracy professionals in the field of law, using useful tools, such as Menski's kite model.

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<sup>150</sup> On 15 February 2012, two Indian fishermen were killed off the coast of India after being fired upon by Italian marines onboard the Italian-flagged commercial oil tanker *MT Enrica Lexie*. The two Italian marines were arrested and detained by the Indian authorities. They claimed that they fired upon the fishermen because they believed that they were pirates.



- 6) Have you been trained in the law of self-defense? YES  NO
- 7) Have you been trained in the rules of the use of force (armed or unarmed)?  
YES  NO
- 8) Are you aware of any United Nations Security Council Resolutions against piracy?  
YES  NO
- 9) Has your country ratified or acceded to:
- (a) the United Nations Convention on the Law of the Sea, 1982 ("UNCLOS")?  
YES  NO  I DON'T KNOW
- (b) the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 1988 ("SUA")?  
YES  NO  I DON'T KNOW
- (c) If the answer to either (a) or (b) is affirmative, has your country implemented the convention(s) by enactment of national legislation?  
YES  NO  I DON'T KNOW
- 10) In your opinion, which laws and/or norms are applicable in counter-piracy operations? (you can chose more than one answers)
- Your national law
  - The national law of the State whose flag the attacked vessel flies.
  - Conventional International law
  - IMO Regulations and the Djibouti Code of Conduct (DCoC)
  - PMSC internal regulations, best practices and guidelines
  - United Nations Security Council Resolutions
  - International Human Rights Law
  - International Law of Armed Conflicts (LOAC)
  - Customary International Law
  - Local customs in the area of operation
  - Military/Law Enforcement personnel's professional regulations and ethics
  - PMS Contractor's professional regulations and ethics
  - The national law of the pirates

No law is applicable

Other (please specify): .....

11) Do you believe that your training in the laws regulating anti-/counter-piracy is adequate?

YES  NO

12) Do you believe that your understanding of laws regulating anti-/counter-piracy is adequate?

YES  NO

13) Do you have any comments on your training and understanding of applicable laws, regulations and norms on piracy and anti-/counter-piracy?

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## Abbreviations

Asian JIL – Asian Journal of International Law  
Australian JIA – Australian Journal of International Affairs  
Boston College I&CLR – Boston College International & Comparative Law Review  
Berkeley JIL – Berkeley Journal of International Law  
Chinese JIL – Chinese Journal of International Law  
CPRS – Centre for Peace and Reconciliation Studies  
CSP – Contemporary Security Policy  
DCoC – Djibouti Code of Conduct  
Denver JIL&P – Denver Journal of International Law & Policy  
ECHR – European Convention of Human Rights  
ECtHR – European Court of Human Rights  
EU – European Union  
EU NAVFOR Atalanta – European Union Naval Force Atalanta  
GCHS – Geneva Convention on the High Seas  
GG – Global Governance  
ICCPR – International Covenant on Civil and Political Rights  
ICLQ – International & Comparative Law Quarterly  
ICoCA – International Code of Conduct Association  
IMB – International Maritime Bureau  
IMO – International Maritime Organization  
IJHR – International Journal of Human Rights  
INEGMA – Institute for Near East and Gulf Military Analysis  
JICJ – Journal of International Criminal Justice  
JILIR – Journal of International Law and International Relations  
JIOR – Journal of the Indian Ocean Region  
JL&SR – Journal of Law & Social Research  
JML&C – Journal of Maritime Law & Commerce  
Minnesota LR – Minnesota Law Review  
MIO(s) – Maritime Interdiction Operation(s)  
MP&M – Maritime Policy & Management  
New England LR – New England Law Review

NMIOTC – NATO Maritime Interdiction Operational Training Center  
PER – Potchefstroomse Elektroniese Regsblad  
PQ – Political Quarterly  
ReCAAP – Regional Cooperation Agreement on Combating Piracy and Armed  
Robbery against Ships in Asia  
RES – Review of European Studies  
Res. – Resolution(s)  
RIE – Review of International Economics  
SC&T – Studies in Conflict & Terrorism  
SLR – Socio-Legal Review  
SOLAS Convention – International Convention for the Safety of Life at Sea  
SUA Convention – Convention of 1988 for the Suppression of Unlawful Acts of  
Violence against the Safety of Maritime Navigation  
SUA Protocol – Protocol of 2005 to the Convention of 1988 for the Suppression of  
Unlawful Acts of Violence against the Safety of Maritime  
Navigation  
Tulane LR – Tulane Law Review  
Tulane MLJ - Tulane Maritime Law Journal  
UDHR – Universal Declaration of Human Rights  
UN – United Nations  
UNSC – United Nations Security Council  
UNCLOS – United Nations Convention on the Law of the Sea  
USAK Yearbook – Uluslararası Stratejik Araştırmalar Kurumu Yearbook  
University of Toledo LR – University of Toledo Law Review