



**Global crime governance off the eastern Africa littoral: does the response to piracy in the Western Indian Ocean provide a model?**

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## **DECLARATION**

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## ABSTRACT

The transnational character of contemporary organized crime has resulted in cooperative efforts to address crimes which pose a mutual threat to multiple entities across the globe. But are such collective efforts achieving their aims? One such partnership, or group of partnerships, which has, is the global response to Somali piracy in the Western Indian Ocean off eastern Africa. While it has not eradicated piracy or the conditions giving rise thereto, it has effectively contained attacks. This achievement, and the public-private partnerships which gave effect to these efforts, is unprecedented for a response to transnational organized crime at sea. This has sparked debate regarding the response's utility for other transnational organized crimes which continue to plague the world's oceans.

Although counter-piracy has been the object of much research due to its international nature, cooperative responses to other forms of transnational organized crime off the eastern Africa littoral have been neglected. In particular, the utility of counter-piracy for these other organized crimes is under-examined. This thesis therefore aims to present evidence to answer the research question: does the global governance response to Somali piracy provide a model for responding to other forms of transnational organized crime in the Western Indian Ocean?

The research straddles criminology and law and is grounded in the theoretical frameworks of global governance, organized crime and maritime security. Research data was generated through a literature review, complimented by expert interviews and participant observation. This thesis uses the case studies of heroin and ivory trafficking in the Western Indian Ocean to consider comparative lessons from counter-piracy. It considers each crime's modus operandi, applicable international legal frameworks, impact, responding actors and existing and potential responses. It does so in order to illuminate the conditions under which global governance efforts against transnational organized crime at sea are likely to emerge and achieve success. The responses to piracy, heroin and ivory trafficking are considered at the hand of five paradigms, originally applied to counter-piracy responses by Prof. Christian Bueger. Each paradigm problematizes different aspects of each crime and discusses the resulting responses. The paradigms are categorized as the security, legal, economic, development and humanitarian paradigms.

The findings suggest that global crime governance efforts are perhaps more at home at sea than on land and that different crimes mobilize responding actors to enter the maritime domain for different reasons. In addition to threatening national interests, states and other entities responding to maritime crimes are equally influenced by other factors, including corruption, modus operandi, strategic interests, international legal frameworks and human rights concerns. These factors also influence their chosen responses. Significantly, the research found that the private actors integral to counter-piracy are absent in the response to heroin and ivory trafficking, leaving a lacuna which, if not filled, will continue to facilitate the use of the oceans for illicit means. It is concluded that although counter-piracy holds many valuable lessons for global crime governance at sea, a response mimicking counter-piracy is unlikely to form in efforts to counter other forms of transnational organized crimes in the Western Indian Ocean.

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## LIST OF ABBREVIATIONS

<b>AIMS</b>	2050 Africa's Integrated Maritime Strategy
<b>AMISOM</b>	African Union Mission in Somalia
<b>ANU</b>	Anti-narcotics Unit
<b>AU</b>	African Union
<b>BMP</b>	Best Management Practices
<b>CCP</b>	Container Control Programme
<b>CGMCS</b>	Contact Group on Maritime Crime in the Sulu and Celebes Seas
<b>CGPCS</b>	Contact Group on Piracy off the Coast of Somalia
<b>CITES</b>	Convention on International Trade in Endangered Species of Wild Fauna and Flora of 1973
<b>CMF</b>	Combined Maritime Forces
<b>CPP</b>	Counter Piracy Programme
<b>CTF 150</b>	Combined Task Force 150
<b>CTF 151</b>	Combined Task Force 150
<b>DCOC</b>	Djibouti Code of Conduct Concerning the Repression of Piracy and Armed Robbery against Ships in the Western Indian Ocean and the Gulf of Aden
<b>EAGLE</b>	Eco Activists for Governance and Law Enforcement
<b>ECOWAS</b>	Economic Community for West African States
<b>EEZ</b>	Exclusive Economic Zone
<b>ETIS</b>	Elephant Trade Information System (ETIS)
<b>EU</b>	European Union
<b>EUNAVFOR</b>	European Union's Naval Force
<b>FGS</b>	Federal Government of Somalia
<b>GEF</b>	Global Environment Facility
<b>GMCP</b>	Global Maritime Crime Programme
<b>ICRC</b>	International Committee of the Red Cross
<b>ICU</b>	Islamic Courts Union
<b>IMB</b>	International Maritime Bureau

<b>IMO</b>	International Maritime Organization
<b>INCB</b>	International Narcotics Control Board
<b>IOFMC</b>	Indian Ocean Forum on Maritime Crime
<b>ISPS Code</b>	International Ship and Port Facility Security Code
<b>ISS</b>	Institute for Security Studies
<b>IUCN</b>	International Union for the Conservation of Nature
<b>IUU</b>	Illegal, Unreported and Unregulated
<b>KDF</b>	Kenyan Defence Force
<b>KWS</b>	Kenya Wildlife Services
<b>MDA</b>	Maritime Domain Awareness
<b>MIKE</b>	Monitoring of Illegal Killing of Elephants
<b>MSC-HOA</b>	Maritime Security Centre – Horn of Africa
<b>NATO</b>	North Atlantic Treaty Organization
<b>NCA</b>	National Crime Agency
<b>NGO</b>	Non-governmental Organization
<b>NIAP</b>	National Ivory Action Plan
<b>NOSET</b>	Nairobi Outreach Services Trust
<b>OBP</b>	Oceans Beyond Piracy
<b>OOS</b>	Operation Ocean Shield
<b>PCU</b>	Joint Port Control Unit
<b>PEPFAR</b>	United States President’s Emergency Plan for AIDS Relief
<b>PIKE</b>	Proportion of Illegally Killed Elephants
<b>PPM</b>	Pirate Prosecution Model
<b>PPTP</b>	Pirate Prisoner Transfer Programme
<b>ReCAAP</b>	Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia
<b>RMCM</b>	Regional Maritime Coordination Mechanism
<b>SAM</b>	Shared Awareness Meetings
<b>SHADE</b>	Shared Awareness and Deconfliction

<b>SOLAS</b>	Safety of Life at Sea Convention of 1974
<b>SRSP</b>	Somali Revolutionary Socialist Party
<b>TEU</b>	Twenty-foot Equivalent unit
<b>TFG</b>	Transitional Federal Government
<b>TOC</b>	Transnational Organized Crime
<b>UK</b>	United Kingdom
<b>UKMTO</b>	United Kingdom Maritime Trade Operation
<b>UN</b>	United Nations
<b>UNCAC</b>	United Nations Convention against Corruption of 2003
<b>UNCLOS</b>	United Nations Convention on the Law of the Sea of 1982
<b>UNDP</b>	United Nations Development Programme
<b>UNODC</b>	United Nations Office on Drugs and Crime
<b>UNPOS</b>	United Nations Political Office for Somalia
<b>UNSC</b>	United Nations Security Council
<b>UNTOC</b>	United Nations Convention against Transnational Organized Crime of 2000
<b>US</b>	United States of America
<b>WACD</b>	West African Commission on Drugs
<b>WDR</b>	World Drug Report
<b>WFP</b>	World Food Programme
<b>WG</b>	Working Group
<b>WIO</b>	Western Indian Ocean

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## 1 Introduction

### 1.1 Transnational organized crime in the Western Indian Ocean

The oceans make up seventy per cent of the earth's surface, fifty per cent of which represents the high seas – the ocean space which is under the jurisdiction of no single state. While this may appear to be no man's land, the high seas have historically been frequented by merchant vessels, navies and criminal actors, all of whom exploit the benefits of operating at sea in pursuit of profit, power, connection and opportunity. As the processes of globalization have connected the world, the seas have provided the means to do so. This has included transnational organized criminal networks who, like legitimate businesses, have expanded globally.<sup>1</sup> As a result, vessels carrying pirates, wildlife products, drugs, arms, illegally caught fish or migrants, could cross paths as they transit the seas.

This is no different in the Western Indian Ocean (WIO) along eastern Africa's coastline, which comprises of Somalia, Kenya, Tanzania, Mozambique, South Africa and the Indian Ocean islands.<sup>2</sup> Criminality in the WIO caught the world's attention in the mid-2000s when pirates off the coast of Somalia began to capture vessels and crew, holding them hostage until the payment of a ransom. This saw the resurgence of one of the oldest forms of transnational organized crime (TOC) which was thought to be nearly eradicated in the modern era.<sup>3</sup> What began as isolated, opportunistic attacks close to Somalia's coastline, quickly escalated into a successful business model which saw vessels being captured as far away as the Mozambique Channel. Soon, a few armed men from one of the world's most fragile states managed to hold world trade hostage, capturing close to two-hundred vessels by 2012.<sup>4</sup>

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<sup>1</sup> See, for example, Naim, M. 2007. *Illicit: how smugglers, traffickers and copycats are hijacking the global economy*. New York: Arrow Books; Hall, T. 2012. Geographies of the illicit: globalization and organized crime. *Progress in Human Geography*. 37(3). DOI: 10.1177/0309132512460906.

<sup>2</sup> UNEP-Nairobi Convention and WIOMSA. 2016. *The regional state of the coast report: Western Indian Ocean*. Nairobi: UNEP and WIOMSA: 435; Obura, D. 2017. *Reviving the Western Indian Ocean economy: actions for a sustainable future*. World Wildlife Fund International. Gland: WWF: 12.

<sup>3</sup> Jacobi, A.P. 2014. *Global governance and transnational crime: situating the Contact Group*. Working paper of the Lessons Learned Project of the Contact Group on Piracy off the Coast of Somalia. Cardiff: Cardiff University: 2.

<sup>4</sup> Bueger, C. & Stockbruegger, J. 2016. Pirates, drugs and navies: why the Western Indian Ocean needs a new security architecture. *Rusi Journal*. 161 (5): 46. DOI: 10.1080/03071847.2016.1253375.

In 2008, the United Nations Security Council (UNSC) declared Somali piracy a threat to international peace and security, setting into motion possibly the most collaborative effort ever in response to TOC, both on land and at sea. The response is a form of global governance, whereby state and non-state national and international actors collectively govern a mutual problem. Governments from across the globe partnered with the shipping industry and other non-state actors to effectively contain Somali piracy by 2013. This was achieved by a combination of security, legal, law enforcement and development efforts collectively implemented by governments, private entities, international organizations and non-governmental organizations (NGOs).

Counter-piracy's success and multi-stakeholder partnerships have however not spilled over into other forms of TOC at sea. It was therefore not only unprecedented at the time of its inception, but a similar package of responses is yet to be implemented elsewhere. In 2019, Yuri Fedotov, the then Executive Director of the United Nations Office on Drugs and Crime (UNODC) stated:

“Transnational maritime crime is increasingly sophisticated, and it is expanding, both in terms of size and types of criminal activities [...] These crimes pose an immediate danger to people's lives and safety, they undermine human rights, hinder sustainable development and [...] threaten international peace and security.”<sup>5</sup>

Other forms of TOC at sea persist across the globe at an alarming rate, with dire consequences. The rapid increase in pirate attacks in the WIO over a short space of time is illustrative of the potential threat which TOC actors can pose in the global maritime domain - endangering seafarers, trade, resources, livelihoods, the environment and overall security at sea. Despite the success of counter-piracy resulting in few successful attacks since 2013, a UNODC report published in the same year documented the largely unhindered flow of heroin, ivory and migrants in the WIO between Africa, Asia and the Middle East.<sup>6</sup> In addition to piracy, a variety of vessels therefore facilitate multiple other maritime security

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<sup>5</sup> Fedotov, Y. 2019. *Remarks at the Security Council debate on transnational organized crime at sea as a threat to international peace and security*. Security Council debate on transnational organized crime at sea as a threat to international peace and security, New York, 5 February 2019. Available: <http://www.unodc.org/unodc/en/speeches/2019/unsc-tocsea-050219.html> [accessed 27 February 2019].

<sup>6</sup> Wright, J. 2013. *Transnational organized crime in Eastern Africa: a threat assessment*. Vienna: UNODC.

threats along the eastern coast of Africa.<sup>7</sup> Numerous commodities can be added to this list, including charcoal, arms and illegally caught fish. These transnational maritime crimes<sup>8</sup> are executed in a relatively securitized environment, at least in maritime terms, and while there are efforts to respond to them, they are not equally comprehensive or as effective as the counter-piracy regime.

The transnational character of contemporary organized crime has resulted in what one might refer to as the 'rhetoric of cooperation', as policy makers, practitioners and academics all observe how transnational cooperation holds the key to effectively countering TOC activities.<sup>9</sup> Cooperation is also the main objective of the primary international legal instrument applicable to TOC, the United Nations Convention against Transnational Organized Crime of 2000 (UNTOC).<sup>10</sup> UNTOC aims to give effect to inter-state cooperation against TOC and notes how law enforcement cannot be limited by state borders, because criminals are not.<sup>11</sup> Other key legal frameworks like the United Nations Convention on the Law of the Sea of 1982 (UNCLOS)<sup>12</sup> and the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 (Vienna Convention)<sup>13</sup> also prioritize cooperation against TOC. The need for cooperation was also repeatedly emphasised in interviews with practitioners during fieldwork for this thesis. It is therefore not surprising that the generally desired response to TOC is to encourage and form partnerships across borders in order to collectively address these crimes which pose a mutual threat to multiple

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<sup>7</sup> Schbley, G. & Rosenau, W. 2013. *Piracy, illegal fishing, and maritime insecurity in Somali, Kenya, and Tanzania*. Arlington: CNA: 4.

<sup>8</sup> Piracy, heroin and ivory trafficking are also referred to as maritime crimes. 'Maritime crime' is yet to be defined by academics. Instead of defining it, scholars tend to specify certain crimes as maritime crimes, without identifying which elements make these crimes 'maritime crimes'. See, for example, Percy, S. 2016. Maritime crime and naval response. *Survival*. 58(3): 155 - 186. DOI:10.1080/00396338.2016.1186986; Global Maritime Crime Programme (GMCP). 2017. *Maritime crime: a manual for criminal justice practitioners*. Vienna: UNODC: 3; UNODC. n.d.a. *Global Maritime Crime Programme*. Available: [https://www.unodc.org/unodc/en/piracy/index\\_new.html](https://www.unodc.org/unodc/en/piracy/index_new.html) [accessed 15 April 2018].

<sup>9</sup> Although a widely used term, the complexity and practical implications of 'cooperation' are often not fully understood by those emphasizing its importance and centrality to countering illicit markets. See, for example, Dandurand, Y. 2020. *Organized crime, illegal markets, and police governance*. International Centre for Criminal Law Reform. Available: [https://www.researchgate.net/publication/341611537\\_Organized\\_Crime\\_Illegal\\_Markets\\_and\\_Police\\_Governance](https://www.researchgate.net/publication/341611537_Organized_Crime_Illegal_Markets_and_Police_Governance) [accessed 19 February 2021].

<sup>10</sup> *United Nations Convention on Transnational Organized Crime*. 15 November 2000, New York, 40 ILM 353.

<sup>11</sup> Ibid: foreword.

<sup>12</sup> *United Nations Convention on the Law of the Sea*. 10 December 1982, Montego Bay, 1833 UNTS.

<sup>13</sup> *United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*. 20 December 1988, Vienna, 28 ILM 497.

countries and other entities. This is reflected in the WIO where the expansion of TOC cannot be countered solely by the local and regional institutions in place.

But are such cooperative partnerships being established and are they succeeding? Dandurand notes how “international criminal procedure and law enforcement cooperation have experienced some striking changes since the adoption of [UNTOC] [...] western nations have poured hundreds of millions of dollars into developing an international cooperation regime, but the results of these efforts have been disappointing”.<sup>14</sup> The counter-piracy partnership however, is one such effort which has achieved its key aims. While not eradicating Somali piracy or its causes,<sup>15</sup> a combined set of initiatives have effectively contained it and hold many lessons on global governance, governance of the oceans and responding to TOC more generally. As many efforts to combat TOC have proved largely ineffective, the success of counter-piracy has sparked debate regarding its potential replicability and utility for piracy in other world regions,<sup>16</sup> as well as other TOCs.<sup>17</sup> With the exception of piracy, and perhaps also migrant smuggling, examples of such global cooperative efforts to respond to TOC at sea have not been the subject of much academic enquiry. Standing, for example, has noted how “data and comparative evidence on what works in terms of fighting organized crime has historically been absent, which makes understanding international best practice extremely difficult.”<sup>18</sup> Similarly, more evidence is needed to confirm or discount the utility of counter-piracy responses for other TOCs at sea.

Despite being the primary policy response, partnerships in response to TOC at sea and their formation or failure to form has received little scholarly attention beyond counter-piracy. Multilateral coalitions are often discussed in as far as they exist during wartime and, in

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<sup>14</sup> Dandurand. 2020: 9.

<sup>15</sup> See Chapters 5 & 8.

<sup>16</sup> Institute for Security Studies (ISS). 2019. *Gulf of Guinea must look east to solve its pirate problem*. 2 August. Available: <https://www.defenceweb.co.za/security/maritime-security/iss-gulf-of-guinea-must-look-east-to-solve-its-pirate-problem/> [accessed 4 November 2019]; Chul, H. 2014. Working with the private sector. In *Fighting piracy off the coast of Somalia: lessons learned from the Contact Group*. (Report no 20). T. Tardy, Ed. Paris: Institute for Security Studies: 47.

<sup>17</sup> Bruwer, C. 2019b. Somali piracy and countering other organised crimes at sea. *The Conversation*. 5 March. Available: <https://theconversation.com/somali-piracy-and-countering-other-organised-crimes-at-sea-112732> [accessed 19 March 2019]; Jacobi. 2014: 7; Interview Participants 1; 2; 3 & 4; Huggins, J. & Madsen, J.V. 2014. The CGPCS: the evolution of multilateralism to multi-stakeholder collaboration. In *Fighting piracy off the coast of Somalia: lessons learned from the Contact Group*.

<sup>18</sup> Standing, A. 2010. *Transnational organized crime and the Palermo Convention: a reality check*. New York: International Peace Institute: 9.

relation to non-state threats, coalitions are often discussed in the field of terrorism.<sup>19</sup> While piracy and terrorism in the Horn of Africa have received extensive international attention, this has not been the case for these other non-traditional security threats which remain under-examined.<sup>20</sup>

## 1.2 Research objective

This thesis aims to contribute to our understanding of global governance efforts in response to TOC in the maritime domain. It does so by drawing comparative lessons from counter-piracy which could benefit responses to other TOCs at sea. It considers what cooperation in response to TOC at sea looks like in practice, who cooperates, why and how. This heeds the call by scholars like Whelan and Dupont who have noted that “much more methodologically rigorous work is needed in a variety of contexts to advance our knowledge of how security networks form and function [...] Researchers should concentrate on what makes security networks effective and what causes them to fail”.<sup>21</sup>

Heroin and ivory trafficking to and from eastern Africa via the WIO will serve as case studies. Whilst there are many commodities being trafficked or smuggled in the region, research at the onset of data collection suggested that three illicit commodities dominated eastern African waters in terms of volume and impact - heroin trafficking, ivory trafficking and the combined markets of human trafficking and migrant smuggling.<sup>22</sup> I have chosen ivory and heroin trafficking as case studies in order to establish how the modus operandi, impact, responses, responders and applicable legal frameworks in place to counter them are similar, or how they differ. This is done to establish which responses are likely to be most effective and how responses similar to counter-piracy can potentially benefit responses to heroin and ivory trafficking. Having two case studies of different illicit commodities provides a useful

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<sup>19</sup> See, for example, Bensahel, N. 2006. A coalition of coalitions: international cooperation against terrorism. *Coastal Management*. 29(1). DOI: 10.1080/10576100500351284.

<sup>20</sup> Schbley & Rosenau. 2013: 8 - 9. Also see Van Zyl, I. & Lycan, T. 2020. East African terror groups are exploiting the seas. *Institute for Security Studies*. 13 October. Available: [https://issafrica.org/iss-today/east-african-terror-groups-are-exploiting-the-seas?utm\\_source=BenchmarkEmail&utm\\_campaign=ISS\\_Today&utm\\_medium=email](https://issafrica.org/iss-today/east-african-terror-groups-are-exploiting-the-seas?utm_source=BenchmarkEmail&utm_campaign=ISS_Today&utm_medium=email) [accessed 13 October 2020].

<sup>21</sup> Whelan, C. & Dupont, B. 2017. Taking stock of networks across the security field: A review, typology and research agenda. *Policing and Society*. 27(6): 683 - 684. DOI: 10.1080/10439463.2017.1356297.

<sup>22</sup> Wright. 2013: 8.

comparative evidence base from which to establish how maritime trafficking is conducted and how this influences responders' efforts to counter it.

It is necessary to acknowledge that the nature of the crimes of piracy, heroin trafficking and ivory trafficking are very different. Notable differences, which will be detailed in the methodology and case study chapters, include the applicable legal frameworks, the modus operandi, the actors committing the crimes and the fact that unlike piracy and heroin trafficking, ivory trafficking is typically not responded to at sea. These crimes also do not necessarily converge.<sup>23</sup> Some have also argued that perhaps the conditions surrounding Somali piracy were too unique to replicate the counter-response.<sup>24</sup> As Jacobi noted "policy learning often suffers from the fact that political situations can be unique, and solutions for one case might be less successful in another."<sup>25</sup> While counter-piracy actors had clearly defined their problem, having general consensus on what piracy is and why it had to be countered, this is not necessarily the case with a crime like drug trafficking, which has always been a contentious issue.<sup>26</sup> In addition, ivory trafficking has no comparable legal framework to piracy and drug trafficking on which to base a response.<sup>27</sup> These qualities complicate establishing similar wide-ranging partnerships to those of counter-piracy.

I however argue that there are enough similarities between the crimes to draw comparative lessons from the responses to piracy, heroin and ivory trafficking, such as the use of maritime transport, some of the responding actors and the exploitation of the same geographic region and eastern African states. The fact that the enquiry is concentrated in a specific region and therefore not assessing responses to TOC at sea globally also makes it

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<sup>23</sup> For a detailed discussion on illicit market convergence, see for example, USAID. 2020. *Strengthening rule of law approaches to address organized crime: criminal market convergence*. Available: <https://globalinitiative.net/analysis/strengthening-rule-of-law-approaches-to-address-organized-crime-criminal-market-convergence/> [accessed 19 February 2021]; Shelley, L.I. & Picarelli, J.T. 2002. Methods not motives: implications of the convergence of international organized crime and terrorism. *Police Practice and Research*. 3(4): 305 - 318. DOI: 10.1080/1561426022000032079; Mbiyozo, A. & Reitano, T. 2014. *Unholy alliances: organized crime in southern Africa*. Geneva: The Global Initiative against Transnational Organized Crime.

<sup>24</sup> Interview Participant 1. 2017. Cape Town, South Africa.

<sup>25</sup> Jacobi. 2014: 2.

<sup>26</sup> Ibid: 5 - 6.

<sup>27</sup> Although the Convention on International Trade in Endangered Species of Wild Fauna and Flora of 1973 (CITES) regulates international trade in wildlife products, it is a trade treaty and has no provisions applicable to the exercise of extra-territorial jurisdiction.

more likely to succeed.<sup>28</sup> The crimes are all present in the region because criminal networks target the same regional vulnerabilities – weak governance, corruption, limited cross-border law enforcement capacity and vulnerable communities who could potentially be recruited into illicit activity. As Wright notes, “until the rule of law is firmly established in the region, these crimes and others like them are likely to continue.”<sup>29</sup>

Because transnational crimes often fall under more than one policy stovepipe and under multiple jurisdictions, and because the transnational, non-state nature of these crimes is difficult to understand, responders have struggled to formulate effective responses to them.<sup>30</sup> And while we know that inter-agency, regional, bilateral and multilateral cooperation is needed to combat non-state and transnational crime,<sup>31</sup> a scholarly enquiry can shed light on the composition, activities and motivations of such partnerships at sea. As an equally robust cooperative response such as counter-piracy is yet to be put in place in response to heroin and ivory trafficking, this thesis seeks to answer the following question:

Does the global governance response to Somali piracy provide a model for addressing other forms of TOC in the WIO off eastern Africa?

The idea of imitating counter-piracy responses is not new. Part of the response to Somali piracy was modelled on the response to piracy in Asia.<sup>32</sup> This enquiry could therefore also have considered its replication to piracy elsewhere, such as in the Gulf of Guinea where attacks are growing in frequency and the kidnap for ransom modality is increasingly being employed.<sup>33</sup> I have however chosen to consider its applicability to other forms of TOC in the WIO, where the structures for possible replication are already in place. These other illicit

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<sup>28</sup> Ibid: 7.

<sup>29</sup> Wright. 2013: 3.

<sup>30</sup> See, for example, Dandurand. 2020: 11 – 15.

<sup>31</sup> Chatterjee, A. 2014. Non-traditional maritime security threats in the Indian Ocean region. *Maritime Affairs: Journal of the National Maritime Foundation of India*. 10(2): 78. DOI: 10.1080/09733159.2014.972669; Dandurand. 2020.

<sup>32</sup> Bueger, C. 2018. Territory, authority, expertise: global governance and the counter-piracy assemblage. *European Journal of International Relation*. 24(3): 625. DOI:10.1177/1354066117725155; Kraska, J. 2009. Coalition strategy and the pirates of the Gulf of Aden and the Red Sea. *Comparative Strategy*. 28(3). DOI: 10.1080/01495930903025250.

<sup>33</sup> See, for example, Defence Web. 2020a. *Crew kidnappings increase in the Gulf of Guinea*. 21 January. Available: <http://www.defenceweb.co.za/featured/crew-kidnappings-increase-in-the-gulf-of-guinea/> [accessed 15 July 2020]; Defence Web. 2020b. *Increased insurance costs in Gulf of Guinea as piracy rises*. 19 October. Available: <https://www.defenceweb.co.za/security/maritime-security/increased-insurance-costs-in-gulf-of-guinea-as-piracy-rises/> [accessed 20 October 2020].

markets are also in need of a more robust response. What became clear early on in this enquiry however was not only the complexity of such global partnerships, but also a set of reasons, often raised in interviews, that suggested that the nature of the heroin and ivory markets might not motivate a similar reaction from the international community. It also did not consider the comparative lessons which the responses to all three crimes could hold for one other.

Examining the duplication of the counter-piracy response to heroin and ivory trafficking would therefore be of little value without also enquiring whether conditions exist for similar partnerships to form and how these partnerships would function. Therefore, as the research progressed, the enquiry focussed more on the nature of responding actors, their motivations for responding, which influences their response are subjected to and whether they are likely to cooperate on a level similar to that of the counter-piracy regime. More broadly, and critically, this provides insight into why and how responses to TOCs at sea are ideally governed.

Despite the broader focus of the enquiry, the counter-piracy literature remains a useful starting point from which to explore partnerships and responses to TOC at sea. Particularly helpful in this regard is Bueger's labelling of counter-piracy paradigms, each describing a different problem posed by piracy, thereby determining the resulting responders and responses. These are the security, legal, economic, development and humanitarian paradigms.<sup>34</sup> These paradigms provide a guide to not only understanding how different actors problematize piracy, but also how this leads to a group of practitioners which employ certain policy responses to address its different problematic aspects.<sup>35</sup> This thesis uses these paradigms to classify the counter-piracy responses, but builds on them by populating each paradigm with additional literary sources and empirical findings from the fieldwork. The concept of paradigms is then utilized as an analytical framework to also understand the responses to ivory and heroin trafficking. This approach, classifying responses to maritime crimes other than piracy under different paradigms, provides a way to explore the characteristics of responses to different criminal markets or TOCs at sea. A broad reading of

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<sup>34</sup> Bueger, C. 2013a. Orchestrating the response: Somali piracy and ontological complexity. *Global Policy*. 4(1). DOI: 10.1111/j.1758-5899.2012.00194.

<sup>35</sup> Bueger. 2013a: 88.

the literature, guided by response-specific paradigms, allows the formulation of a framework which is used to interrogate the formation and behaviour of partnerships and their responses to heroin and ivory trafficking. This is reflective of the third wave of the study of global governance, which questions how global governance activities are executed.<sup>36</sup>

This thesis therefore contributes to knowledge and policy development in the following ways: First, it provides empirical evidence that allows an analysis of different forms of TOC from a maritime perspective. Using this data, it then compares and contrasts the responses put in place to counter them. Second, it draws on counter-piracy approaches off the coast of Somalia to determine whether a similar model can be applied to two other illicit markets with a maritime dimension, namely heroin and ivory trafficking. Finally, it suggests a wider conceptual framework from which to consider how TOC at sea is ideally confronted, from land and sea, including by focusing on key commonalities between the markets. At a time when those countering TOC are struggling to keep up with cross-border criminal networks and to formulate and implement effective response to their illicit activities,<sup>37</sup> these are necessary contributions to an often fragmented debate.

### **1.3 Chapter outline**

This thesis is divided into 9 chapters. *Chapter 1* has introduced the research objective. *Chapter 2* describes the methods used to gather and analyse data and considers the challenges and opportunities which were navigated along the way. *Chapter 3* contextualizes the prevalence of TOC in the WIO around eastern Africa by considering it in accordance with global realities and broader debates around TOC, maritime security, globalization and global governance. It considers how crime and those who choose to counter it have adjusted to its increasingly transnational and non-state nature.

*Chapter 4* contextualizes the emergence of piracy from Somalia's shores. It considers its unique manifestation in Somalia and discusses the exceptional nature of piracy being afforded universal jurisdiction. *Chapter 5* details and analyses selected counter-piracy actors

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<sup>36</sup> Bueger. 2018: 616 – 617. Also see Whelan & Dupont. 2017: 683.

<sup>37</sup> Dandurand. 2020.

and responses. It does so at the hand of Bueger's counter-piracy paradigms which serve as ordering device.

*Chapters 6 and 7* explore the case studies of heroin and ivory trafficking. It describes the political economy of each market, the modus operandi used by traffickers and the impact of these crimes on eastern Africa. It then moves to the applicable international legal frameworks and illustrates how these are utilized, or not utilized, in responding to these crimes in the WIO. Responses are again considered in terms of paradigms.

*Chapter 8* considers the findings from the field research and draws from the literature in the previous chapters in order to answer the research question and present gained insights into why actors respond to TOC at sea, how they respond and when they are likely to respond in future. From this, comparative lessons are drawn to inform future responses to TOC in the WIO.

*Chapter 9* provides concluding remarks in answer to the research question and suggests a way forward.

## 2 Methodology

### 2.1 Overview of methods

The research design necessitated the production of qualitative empirical data as evidence to answer the research question, which seeks to gain insight into the opinions and experiences of those responding to TOC at sea. The empirical evidence produced includes primary data, analysing existing data and integrating the empirical and conceptual data. Data was gathered by three methods - a literature review, expert interviews and participant observation. The majority of data was gathered by reviewing the now vast body of literature on piracy, heroin and ivory trafficking, organized crime, maritime security and global governance. The literature was focused primarily on the nature of the three illicit markets as well as the legal frameworks, practices and policies in place to counter them. The literature was then complemented by empirical data gathered from qualitative interviews with practitioners working to counter these three crimes in eastern Africa, as well as data from participant observation undertaken at selected events and during informal interactions. An analysis of the three crimes and resulting counter-measures are presented based on a combination of the data. By using a combination of the literature review and the findings from the interviews and participant observation, a conclusion was reached which offers insights into responses to TOC at sea.

### 2.2 Geography and focus

While the states being researched are easily identifiable, the maritime area is harder to comprehend. The WIO covers 30 million km<sup>2</sup>, equalling 8.1 per cent of the world's ocean surface. The region has a coastline of 15,000 km and encompasses over 6 million km<sup>2</sup> of exclusive economic zones (EEZs). It is bordered by the eastern Africa states of Somalia, Kenya, Tanzania, Mozambique, South Africa, Comoros, Madagascar, Seychelles, Mauritius and Reunion.<sup>38</sup>

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<sup>38</sup> UNEP. 2009. *Transboundary diagnostic analysis of land-based sources and activities in the Western Indian Ocean*. Nairobi: UNEP: xi. Available: <https://wedocs.unep.org/handle/20.500.11822/8739> [accessed 12 December 2018].



**Figure 1: Western Indian Ocean and littoral states**

Illicit markets do not remain static and the researched markets underwent numerous changes since the research commenced. Although the thesis also provides a brief overview of the historical development of the crimes and counter measures in question, the relevant period ranges from the mid-2000s, when Somali piracy emerged, to 2021. With regards to the selection of heroin and ivory trafficking as case studies, a comparative study on other forms of TOC in the WIO is beneficial as these crimes are committed within the same maritime space, namely in the Coastal state waters and the high seas of the WIO. They affect many of the same regional states as piracy. The actors who responded are also similar to the responders to Somali piracy, including various national, regional and international actors. The transnational nature of these crimes, the exploitation of the same collection of states, the actors who respond and the regional counter-measures already in place provide enough similarities to provide insight into the research question.

A regional focus illuminates the commonalities in the conditions giving rise to the crimes and contextualizes the responding actors, as well as their motivations to respond. The regional focus also sheds light on the likelihood of similar partnerships forming in response to heroin and ivory trafficking. While comparing research sites in the same geographic

region, or at least in a similar setting, minimizes the potential differences between sites, the disparities between piracy, heroin and ivory trafficking are acknowledged. As Chapters 4 – 7 will show, these crimes are executed by different criminal networks using different *modi operandi*. The sources and drivers of demand and supply of each illicit market are also unique. Piracy, heroin and ivory trafficking have different international and national legal frameworks applicable to them and the responding entities have varying capacities and resources to employ in their chosen responses. Each crime also affects each state differently. But as Bryman notes:

“the key to comparative design is its ability to allow the distinguishing characteristics of two or more cases to act as a springboard for theoretical reflections about contrasting findings.”<sup>39</sup>

A comparative research design will juxtapose the crimes of piracy, heroin and ivory trafficking in order to draw comparative lessons to answer the research question. Comparing piracy to two crimes instead of one ensures robust answers to the research questions and provides a rich evidence base to help test the validity of the argument.

## **2.3 Data gathering methods**

### **2.3.1 Literature review**

The key materials drawn from include primary sources such as international legal frameworks and UNSC resolutions. The most important primary texts are the international legal instruments applicable to crimes at sea, as these prescribe what international law would allow in terms of steps to be taken to counter such crimes. Primary legal instruments include UNCLOS, UNTOC, the Vienna Convention and the Convention on International Trade in Endangered Species of Wild Fauna and Flora of 1973 (CITES).<sup>40</sup> Secondary sources of literature include journal articles, books, research - and institutional reports and media articles.

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<sup>39</sup> Bryman, A. 2012. *Social research methods*. New York: Oxford University Press: 75.

<sup>40</sup> Convention on International Trade in Endangered Species of Wild Fauna and Flora, 3 March 1973, Geneva, 993 UNTS.

### 2.3.2 Qualitative Interviews

The literature review identified gaps and contestations which I explored through interview data. The purpose of the qualitative research interview is to “contribute to a body of knowledge that is conceptual and theoretical and is based on the meanings that life experiences hold for the interviewees [...] [It can] foster learning about individual experiences and perspectives on a given set of issues”<sup>41</sup> and provides “shared understandings of a particular group.”<sup>42</sup>

#### 2.3.2.1 Selection of research participants

During the interviews, national, regional and international responses to TOC at sea were discussed. To provide insight into the research question, participants needed to share “critical similarities related to the research question.”<sup>43</sup> All research participants were involved in responses to TOC in eastern Africa as the data had to provide insight into applicable legal frameworks, current responses, potential future responses and commentary on the replication of some of the counter-piracy responses, as well as the international community’s interest in implementing a similar response. Research participants were therefore selected based on their knowledge and expertise which enabled them to provide insight into these questions as they have first-hand experience of their organization’s activities and policies. As Stewardt has noted “policies are not independent of the processes that gave rise to them. Many policies evolve over time, and the process by which that evolution occurs is important to understanding those policies.”<sup>44</sup> The research participants could therefore provide insight into the development of policies which resulted in the responses in place.

Research participants included actors who participate in the creation, implementation and management of the responses to piracy, heroin and ivory trafficking, and the effects thereof, in eastern Africa. This included participants from international organizations like

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<sup>41</sup> DiCicco-Bloom, B. & Crabtree, B. 2006. The qualitative research interview. *Medical Education*. 40: 314. DOI:10.1111/j.1365-2929.2006.02418.

<sup>42</sup> Ibid: 317.

<sup>43</sup> Ibid: 317.

<sup>44</sup> Stewardt, D.W. 2014: What is policy? And why does it matter? *Journal of Public Policy and Marketing*. 33(1): 2. DOI: 10.1509/jppm.33.1.1.

the European Union (EU) and the United Nations (UN), government agencies such as anti-narcotics units (ANU) and Kenya Wildlife Services (KWS), and non-governmental organizations (NGOs) like the Eco Activists for Governance and Law Enforcement (EAGLE) Network and the Nairobi Outreach Services Trust (NOSET). Participants were therefore practitioners in the form of law enforcement officers, programme coordinators, activists, conservationists and aid workers. Academics who have researched the activities of these entities were also interviewed.

All participants were interviewed in their professional capacity. They are considered experts because they work in a relevant position in one of the entities being researched. This gives them insight into the organization's activities<sup>45</sup> and gives them access to contextual knowledge which cannot be accessed otherwise.<sup>46</sup> This knowledge includes technical and procedural knowledge, knowledge of their organization's motivations,<sup>47</sup> and the structure of the organization.<sup>48</sup> Experts serve the purpose of acting as surrogates for a wider group of people within their organization and share their practical insider knowledge. Experts also increase your access to the field of study and suggest other potential participants,<sup>49</sup> as was often the case.

Insight gained from practical experience set the interviews apart from the literature. Every participant I spoke to had to fit the following criteria – they had to work for an entity responding to either piracy, heroin or ivory trafficking and the effects thereof, they had to hold a more senior position and they had to know enough about the programmes which their entity implements in order to answer questions about it. The criteria for academic research participants had an additional requirement – these interviewees must have studied or participated in some of the responding entities' activities.

Experts know the international legal framework and policies on which their work relies. They therefore know what is allowed in law, how the law shaped the creation of counter-

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<sup>45</sup> Bogner, A. & Menz, W. 2009. The theory-generating expert interview: epistemological interest, forms of knowledge, interaction. In *Interviewing experts*. A. Bogner, B. Littig & W. Menz, Eds. Hampshire: Palgrave Macmillan: 55.

<sup>46</sup> Littig, B. 2009. Interviewing the elite – interviewing experts: is there a difference? In *Interviewing experts*: 100.

<sup>47</sup> Bogner & Menz. 2009: 55.

<sup>48</sup> Littig. 2009: 100.

<sup>49</sup> Bogner, A., Littig, B. & Menz, W. 2009. *Interviewing experts*. Hampshire: Palgrave Macmillan: 2.

measures and how it continues to do so. Experts also know the illicit markets against which the counter-measures are implemented, allowing them to comment on how counter-measures were shaped around the applicable international legal frameworks and the modus operandi of criminal networks, as well as what their successes and challenges are. They can also comment on potential future responses. Their views are important because they participate in, and are therefore stakeholders, in the programme being evaluated and therefore have an interest in the outcome of the research.<sup>50</sup>

Some of the experts can also be considered as ‘elites’ in their organizations.<sup>51</sup> Such elites are in middle to senior management positions, they have industry experience, have probably been with the organization for a long time and have a broad network of relationships.<sup>52</sup> They are influential, well-informed and are selected due to their expertise which are relevant to the research, as well as their perspective on their organization. Elites can provide overviews of their organization and its work, its relationship with other entities and they can comment on the organization’s history, policy development and future plans.<sup>53</sup>

Participants ranged from an International Committee of the Red Cross (ICRC) aid worker from eastern Europe who noted how in Somalia it’s all “rock and roll” in order to survive, to the former naval officer who ended up making a career out of counter-piracy work and who noted “I was a soldier, I didn’t know shit about maritime crime”, to the conservationist who called anti-trade conservation NGOs “evil”. There were identifiable trends in the different participants of the three illicit markets. Very few were ‘neutral’ about their work, if they were, it typically revealed a lack of insight and knowledge on their part. Interviews were not gender, race or age specific. It is regretful that while many women were observed during the research period, no women were interviewed. This reflects the trend of expert interviews being dominated by men.<sup>54</sup>

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<sup>50</sup> Wroblewski, A. & Leitner, A. 2009. Between scientific standards and claims to efficiency: expert interviews in programme evaluation. In *Interviewing experts*: 235 - 236.

<sup>51</sup> Littig. 2009: 98.

<sup>52</sup> Welch, C., Marschan-Piekkari, R., Penttinen, H. & Tahvanainen, M. 2002. Interviewing elites in international organizations: a balancing act for the researcher. *International Business Review*. 11(1). DOI: 10.1016/S0969-5931(02)00039-2.

<sup>53</sup> Bryman. 2012: 155 – 156.

<sup>54</sup> Meuser, M. & Nagel, U. 2009. Expert interview and changes in knowledge production. In *Interviewing experts*: 34.

### 2.3.2.2 Conducting interviews

Research participants were invited to participate in an interview via e-mail or telephonically. No one declined, although a few could not be interviewed due to logistical difficulties, such as intermittent internet in Somalia. The initial e-mail outlined the nature and purpose of the research and included an 'Information and Consent Form'.<sup>55</sup> All interviews were conducted face-to-face, while one was conducted telephonically. Consent to record the interviews was obtained from research participants and all interviews, except for two, were recorded. Where participant consent was not received, hand-written notes were taken.

Purposive sampling was used to identify research participants. This is a form of sampling where the researcher aims to sample participants in a strategic way, choosing participants which are relevant to the research question.<sup>56</sup> During initial interviews, snowball sampling was used to identify other participants who could contribute meaningful data to the research. The snowball method "yields a study sample through referrals made among people who share or know of others who possess some characteristics that are of research interest."<sup>57</sup> Snowball sampling proved invaluable as the research participants knew who their counterparts were and who could provide insight into the research questions.

Interviews were semi-structured and took the form of an informal discussion. Semi-structured interviews consist of a set of pre-selected, open-ended questions and allow for questions to be added as the dialogue progresses.<sup>58</sup> While some questions remained constant throughout, others were different for each illicit market and some were specifically tailored to the research participant being interviewed in order to harness the participant's knowledge on a particular subject. Although the questions can vary between research participants, the basic research question remained the same in order to ensure that "a relatively homogenous group will have shared experiences about the topic."<sup>59</sup>

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<sup>55</sup> See Annexure B.

<sup>56</sup> Bryman. 2012: 714.

<sup>57</sup> Biernacki, P. & Waldorf, D. 1981. Snowball sampling: problems and techniques of chain referral sampling. *Sociological Methods & Research*. 10(2): 141 - 163. DOI:10.1177/004912418101000205.

<sup>58</sup> DiCicco-Bloom & Crabtree. 2006: 315.

<sup>59</sup> Ibid: 316.

Establishing rapport in the interviews was important as the research participants needed to trust me.<sup>60</sup> It is important for researchers to “present themselves as someone who is neither firmly entrenched in the mainstream nor too far at any particular margin.”<sup>61</sup> Some participants seemed apprehensive at the onset of interviews, but relaxed once they realized that I was familiar with their field of work and took a genuine interest in their opinions. This is typical of expert interviews and can be considered as experts viewing you as a co-expert once they realise you hold similar knowledge to them.<sup>62</sup> This is reflective of research participants’ ‘stages of rapport’, which range from apprehension, to exploration, to cooperation, and finally, to participation.<sup>63</sup>

Interviews typically lasted for ninety minutes and were conducted at the participant’s office or home or at a coffee shop suggested by the participant. One took place in a car while driving through a national park. My contact details were given to the participants in order to address any further questions or concerns once the interview had been concluded. The details of the research ethics committee (REC) was also provided on the Consent Form.

### **2.3.2.3 Access to participants**

Most interviews were conducted during a three month internship with the UNODC Global Maritime Crime Programme (GMCP) in Nairobi in 2016, as well as during a month-long research trip in 2018. Kenya is the regional hub of East Africa and many organizations and entities are either headquartered there or have staff deployed there. Being based in the research site for an extended period made participants more accessible. The internship was never meant to be an entry point to gain access to potential participants, I merely wanted to learn about the GMCP’s work as the programme was instrumental in the counter-piracy response and had expanded into other maritime crimes. In retrospect, the internship was likely the reason for having the access to the participants that I had. It also meant that I ‘entered’ my field of study and to some extent went from being an outsider to an insider. There are advantages and disadvantages to this, especially with regards to bias, but it likely

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<sup>60</sup> Ibid: 316.

<sup>61</sup> Miller, J. & Glassner, B. 2008. The “inside” and the “outside”: finding realities in interviews. In *Qualitative research: theory, method and practice*. D. Silverman, Ed. London: SAGE: 130.

<sup>62</sup> Bogner & Menz. 2009: 58.

<sup>63</sup> DiCicco-Bloom & Crabtree. 2006: 316.

improved the quality of the data that I was able to gather. Scholars like Lewis even suggest that only insiders can provide true accounts.<sup>64</sup>

Participants were accessed directly or via an introduction, typically by another research participant. Introductions are a common way of gaining access to elites.<sup>65</sup> Initial access to participants was usually gained with relative ease. Once our shared interest became known, the response was overwhelmingly positive. The entities whose employees I spoke to were often also familiar with each other and cooperated on certain projects. Where a participant was accessed via an introduction, it was specifically noted that I was conducting the interview in my personal capacity. However, being affiliated with the UN could still have resulted in the perception of bias.

Prior to snowball sampling, identifying key people in the different entities I spoke to was difficult. If, for example, an organization does not answer its e-mails, pick up its phones or respond to an introductory e-mail sent by a counterpart on your behalf, access is impossible. Some participants also agreed to meet with me, but made it impossible to do so, such as never agreeing to a time or place or simply not arriving for a scheduled meeting. For example, after arriving for a meeting with one participant, he informed me that I had to get permission to speak with him from his supervisor in Lyon. After an expensive trip across Nairobi and numerous e-mails to both the participant and his supervisor, I never received a response again. This was the only problematic gatekeeper which I encountered. The overwhelming majority of participants however were accommodating, often speaking with me for over two hours or inviting me to events that would be helpful for my research. One participant took me from his office to the Port of Dar es Salaam and on board a heroin trafficking dhow. Another invited me to Tsavo National Park to experience his workday as an investigating officer.

### **2.3.3 Participant observation**

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<sup>64</sup> Unluer, S. 2012. Being an insider researcher while conducting case study research. *The Qualitative Report*. 17(29): 9. DOI: 10.46743/2160-3715/2012.1752.

<sup>65</sup> Bryman. 2012: 115 – 116.

Participant observation allows the researcher to immerse themselves in a social setting for a period of time to observe participants' behaviour and conversations<sup>66</sup> and to "see as others see."<sup>67</sup> It is also a way of ensuring that information is not limited to that exchanged during interviews, but to get a glimpse of the social worlds which exist for research participants outside of interviews.<sup>68</sup> It can unearth data which qualitative interviews cannot, as interviews typically entail more fleeting contact with participants.<sup>69</sup>

Participant observation was initially not a planned data gathering method. However, I increasingly found myself in settings which lent themselves thereto. Participant observation was undertaken during my internship, as well as at subsequent unrelated workshops, conferences and other events on maritime security and TOC. I would take notes as I found something of value being said or done. The internship allowed for prolonged participant observation during a period of three months. It also opened the door for a continuing relationship with the UN and being employed as a consultant for the GMCP during 2018 and again as a staff member during 2020. The consultancy presented the opportunity for participant observation at three workshops which lasted four to five days at a time. Participants were also observed at numerous other unrelated events, such as round tables. Cohen has noted how conferences and workshops can be rich sources of data.<sup>70</sup> This was indeed the case as I observed attendees. For example, one round table in South Africa had fishermen in attendance. Hearing their perspective versus that of all the official attendees gave a previously unheard perspective on policies which directly affect them, yet failed to include them in the policy-making process. Some fishermen spoke openly about being former abalone poachers as they had no other source of income and had been denied access to marine resources.

I was an active participant in only two of these workshops and at the remainder, I was able to engage informally with participants during breaks. Two groups were typically observed, namely colleagues and their counterparts from other entities with whom they regularly work. Most UN workshops and conferences had country-specific delegations, a few

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<sup>66</sup> Ibid: 714.

<sup>67</sup> Ibid: 2012: 494.

<sup>68</sup> Miller & Glassner. 2008: 126 – 128.

<sup>69</sup> Bryman. 2012: 494.

<sup>70</sup> Cohen, S. 1997. Conference life: the rough guide. *The American Sociologist*. 28(3): 69 - 84. DOI:10.1007/s12108-997-1015-2.

politicians and the UN staff or consultants who were hosting them. These participants were as described in Section 2.3.2.1 – experts holding positions in relevant entities, such as law enforcement officers or prosecutors. Researchers who were observed typically included academics who work on issues of TOC, illicit markets, maritime security and international law. Observing academics also helped to identify whether there were disconnects between academia and practitioners. I was also able to observe participants during 2020 when I was a GMCP staff member, including five Somali piracy suspects whose welfare I was responsible for, giving me a glimpse into their realities.

Data gathered by participant observation typically provided context, rather than primary data. Marshall and Rossman have noted how such close interaction with participants allows for a subjective researcher account which can increase the understanding and quality of the qualitative data.<sup>71</sup> Although it is the least used data gathering method, it yielded interesting findings. It revealed that the need for better responses to TOC and cooperation in the process of doing so is noted at every gathering on maritime crime and TOC more generally. It also increased my understanding of regional capacity and commitment to address TOC, outside of that supported by the international community. Other interesting revelations were, for example, from a conference on maritime governance in Africa, where the continent's drug trafficking problem was almost ignored, while its future potential as transit region for weapons of mass destruction enjoyed much attention. Another conference in Southeast Asia revealed that until illegal migration between small islands was resolved, the region was not particularly interested in engaging on other forms of maritime crime. And then there were instances where stakeholders admitted to not adhering to international law or openly supported the war on drugs.

## **2.4 Research bias**

The researcher's own identity shapes both the research questions and the data. It is necessary to reflect on this and consider to which extent I was an insider or outsider in my research community.<sup>72</sup> My affiliation with the UN is specifically noted. I started out as an

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<sup>71</sup> Marshall, C. & Rossman, B. 2011. *Designing qualitative research*. 5<sup>th</sup> ed. Thousand Oaks: SAGE: 101.

<sup>72</sup> Gottlieb, A. 2006. Ethnography: theory and methods. In *A handbook for social science field research: essays and bibliographic sources on research design and methods*. E. Perecman & S.R. Curran, Eds. Thousand Oaks: SAGE: 59.

outsider, but gradually became more immersed in my field of research, first as a UN intern, then as a consultant and finally as a staff member. This could arguably cause me to favour UN perspectives, activities and ideas. However, this official affiliation only lasted for twenty months out of six and a half years during the research. I also do not always agree with UN policies and interviewed enough research participants not affiliated with the UN, that I had various other influences to draw from. Participants were sometimes critical of the UN, which helped to maintain perspective. Having completed much of the literature review before traveling to the research site also helped shape opinions of my own. I was also always participating in my research site as a junior member, never being asked for or stating opinions in an official capacity, instead observing from the side lines. While I could be perceived as an insider, I considered myself an observer more than a participant. I also explained at the outset of each interview that that this work was for my thesis and not my professional duties.

It is also necessary to account for bias in participant selection.<sup>73</sup> While it is assumed that most participants were truthful in their answers, there is always the possibility that they do not wish to share their true views, especially if they are uncertain who their answers will be exposed to. My affiliation with the UN could have skewed participants' perception of me and they might also not have been entirely truthful as a result. This possibility was perhaps most likely for research participants who worked for competing entities. However, many participants who I gained access to by myself, or through a source unrelated to the UN, were unfamiliar with the work of the GMCP and therefore considered me merely as a researcher. Where data was relevant but suspected of not being truthful, it was either discarded or used to provide context or prove a point.

Another bias which could skew the research findings is the lack of reliable data on illicit markets as criminal networks seek to hide their activities. TOC often also manifests in fragile and insecure states, such as Somalia, which makes reliable data collection even more challenging. There are therefore limitations to gathering and interpreting data on

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<sup>73</sup> Smith, J. & Noble, H. 2014. Bias in research. *Evidence-based nursing*. 17(4): 101. DOI: 10.1136/eb-2014-101946.

clandestine markets. Participants often noted this.<sup>74</sup> For example, Participant 18, who works on wildlife trafficking, cautioned:

“You always have bias of what is visible, obviously criminal activity is mostly invisible, it is mostly covert [...] You have huge data, all stuff that is not really your story because if you know them very well it means that they are an easier part of your problem. So, you just see the tip of an iceberg and say ‘here is the research’. That is not the research [...] most of your research is covert, most of your research is difficult to understand”.<sup>75</sup>

The participant also noted the failure to look at TOCs in their totality as another possible bias. Focussing only on ivory poachers, while ignoring the larger trafficking networks, is an example of this.<sup>76</sup> Understanding an illicit market is paramount to penetrating TOC networks and responding to their activities.<sup>77</sup> So too is an understanding of the interests which these crimes threaten, as it can provide insight into the formation of responses. But because of these biases, any primary or secondary qualitative data on illicit markets was treated with caution as many accounts of such activities could merely be suspicion.<sup>78</sup> In addition, the aim of this research is not to produce primary data directly related to the activities of organized criminal groups, but instead to consider what is already known and based on that, to produce primary data on how best to respond thereto. These biases can also be reduced by obtaining validation from different respondents and comparing their accounts, by acknowledging data which deviates from one’s own, by undertaking persistent and prolonged participant observation, triangulating data and having the data independently

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<sup>74</sup> Interview Participant 22. 2016. Nairobi, Kenya. He noted, for example: “[t]hat’s the problem with any illicit product. We don’t know the size of the market.”

<sup>75</sup> Interview Participant 18. 2018. Telephonic interview.

<sup>76</sup> Interview Participant 18 noted: “[T]hen you get to your conservation organisation and they talk to you about poachers in their own area...and they tell you ivory is passing through here. Ivory doesn’t pass through, it doesn’t have legs, it is taken by criminal organisations. So, you cannot see a flow of something in a specific point or place. That is a misleading way to understand a crime that is international...So, I think even in your interviews you will have a lot of bias, and it is very difficult because we get it from researchers, we get it from journalists. They get headlines on organized crime [...] and then when they come to talk to conservation, conservation talks to them about some poachers around the field [...] all conservation projects that is not geared towards combating the illegal trade or even mapping the illegal trade. It is to defend the small protected area from some poachers arriving in, and very, very far away from the actual phenomenon.”

<sup>77</sup> Dandurand. 2020: 8.

<sup>78</sup> Schbley. & Rosenau. 2013: 10 - 11.

analysed by other researchers.<sup>79</sup> Apart from having the data analysed by other researchers, these steps were taken. Having more than one data gathering method also serves to reduce bias.

## **2.5 Data analysis, reliability and validity**

Before the data could be analysed, the interviews had to be transcribed. Recording and transcribing interviews allows re-examination of conversations and allows the data to be scrutinized by other.<sup>80</sup> It also allows research participants to read through and confirm their answers should they wish to. Transcriptions were done by myself and a professional transcription service. After the transcriptions were completed, I went through them in conjunction with the audio recordings in order to compare the content and ensure that they were correct. The recordings often allowed context to be added to the text of transcriptions.

### **2.5.1 Analysing the data**

Grounded theory was used to analyse the data. It is a data analysis method whereby theory or concepts are generated from the data. In grounded theory, a close relationship exists between the data, analysis and theories or concepts derived from them. Data analysis and collection therefore often take place in tandem<sup>81</sup> and inform each other.<sup>82</sup> Grounded theory has also been called the 'constant comparative method'.<sup>83</sup> It was therefore a suitable method for this dissertation. During the research phase, data analysis began informally. This allowed for some interview questions to be adjusted according to the emerging data and led to the identification of more research participants and data sources.<sup>84</sup> Coding is one of the central processes of grounded theory as it allows theories, concepts or themes to emerge.<sup>85</sup>

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<sup>79</sup> Smith & Noble. 2014: 100 - 101.

<sup>80</sup> Bryman. 2012: 482.

<sup>81</sup> Ibid: 387; 567 – 575; 712.

<sup>82</sup> Charmaz, K. 2011. Grounded theory methods in social justice research. In *The SAGE handbook of qualitative research*. N.K. Denzin & S.Y. Lincoln, Eds. Thousand Oaks: SAGE: 359 – 361.

<sup>83</sup> Corbin, J. & Strauss, A. 1994. Grounded theory methodology: an overview in strategies of qualitative enquiry. In *The SAGE Handbook of qualitative research*: 273. Also see Charmaz. 2011: 361.

<sup>84</sup> DiCicco-Bloom & Crabtree. 2006: 317 – 318.

<sup>85</sup> Bryman. 2012: 568 - 570.

I coded the interview data manually in order for context to be preserved. This allowed categories to emerge, which were explored at the hand of the theory.<sup>86</sup>

### 2.5.2 Validity and reliability

Data must be reliable and valid. If data from the secondary and primary data sources consistently confirm certain facts, it will support reliability and could be used as evidence as it establishes the desired link between the problem, claim, evidence and methods. Reliability relates to the consistency of processes used to analyse the data.<sup>87</sup> It has been defined as “the degree to which the finding is independent of accidental circumstances of the research” and “whether or not (or under what conditions) the ethnographer would expect to obtain the same finding if he or she tried again in the same way.”<sup>88</sup> Recording the interviews, transcribing them and taking field notes contributed to reliability. This allows for the data to be scrutinized by others.<sup>89</sup>

Reliability further links with validity, as validity assumes reliability.<sup>90</sup> Validity refers to the “integrity and application of the methods and the precision in which the findings accurately reflect the data.”<sup>91</sup> Validity is tested by establishing if the question is truly measuring what it intends to measure.<sup>92</sup> It is further supported when observations and theory correspond and by the ability to generalize the results of a study beyond the context of the current research.<sup>93</sup> TOC at sea is a growing problem across the globe and the results of this research also holds value for counter-responses elsewhere. Using the same research design and applying it in another region experiencing maritime crimes will likely produce similar results, although specific to that context.

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<sup>86</sup> Bogner, A., Littig, B. & Menz, W. 2009: 35 – 36.

<sup>87</sup> Smith. & Noble. 2014: 100.

<sup>88</sup> Perakyla, A. 2008. Reliability and validity in research based on naturally occurring social interaction. In *Qualitative Research: theory, method and practice*: 285.

<sup>89</sup> For more on the utility of audio recordings and transcripts, see Perakyla. 2008: 285.

<sup>90</sup> Bryman. 2012: 172

<sup>91</sup> Smith & Noble. 2014: 100.

<sup>92</sup> Bryman. 2012: 170.

<sup>93</sup> Ibid: 711.

While all attempts were made to ensure validity and reliability, it must be accepted that qualitative data is rarely conclusive, but rather suggestive.<sup>94</sup> This is particularly noteworthy when studying clandestine TOCs. Data on TOC also often comes from various, fragmented and speculative sources from which drawing conclusions is difficult. The challenge therefore is to draw reliable conclusions from the available data. Adding anecdotal evidence from people working in the field to the literary data could therefore assist in identifying more fully the nature of criminal markets and trends.<sup>95</sup>

The data generated by the three data gathering methods were combined, interpreted and cross-checked through triangulation, which is the process of using different methodologies in the study of a phenomenon in order to test validity.<sup>96</sup> It is the process of considering research from two or more perspectives. In this thesis, this is the consideration of data from the literature reviews, interviews and participant observation.

## **2.6 Ethical considerations**

As the research design involves human subjects, ethics clearance was required. The University of Cape Town initially granted ethics clearance in September 2015, which was renewed annually. The ethics committee had no objections or concerns regarding the research.<sup>97</sup> Prior to meeting with participants, I sent them an e-mail which briefly set out the purpose of the research and explained why they had been asked to participate. An 'Information Sheet and Consent Form'<sup>98</sup> was attached so that participants could familiarize themselves with the research topic before interviews commenced. On the day of the interview, the nature and purpose of the research was again explained to the participants and a hard copy of form was provided to them.

As the participants were selected for their specific positions in relevant organizations, anonymity is impossible. Only one research participant requested not to be identified and

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<sup>94</sup> Sofaer, S. 2002. Qualitative research methods. *International Journal for Quality in Health Care*. 14 (4): 334. DOI: 10.1093/intqhc/14.4.329.

<sup>95</sup> UNODC. 2009a. *Organized crime and trafficking in eastern Africa: a discussion paper*. Vienna: UNODC: 7.

<sup>96</sup> Flick, U. 2018. Triangulation. In *The SAGE handbook of qualitative research*: 445.

<sup>97</sup> Refer to ethics approval letter attached as Annexure A.

<sup>98</sup> See Annexure B.

did not wish to be recorded. A lot of the information gathered from the participants is in the public domain or is policy-orientated.

The risk of harm to participants was negligible. But while my research project entailed no harm to participants, their line of work often does. During the course of the research, one person with whom I had been in contact, Wayne Lotter, was assassinated as a result of his work,<sup>99</sup> while another, Esmond Martin, was murdered under unknown circumstances,<sup>100</sup> though possibly linked to his work. Both were working on the illicit ivory trade. Other participants often also worked in insecure areas, such as Somalia, where affiliates have been killed or experience mental distress. These revelations were typically made during informal discussions and gave me additional insight into the research participants' working conditions.

Given this and after careful consideration, I have chosen to mask the identity of participants, as in retrospect I was of the opinion that the content of certain interviews was of a sensitive nature. I have instead attached a list of the participants' positions and affiliations.<sup>101</sup>

## 2.7 Conclusion

This chapter has described this thesis' qualitative research design and the resulting data gathering and analysing tools. It has indicated how the use of a literature review, coupled with interview data and participant observation, provided the necessary insights into the research question. It has justified my decision to compare three illicit markets and has acknowledged their differences. It has considered possible research and participant bias and explained how I navigated access to the research participants and the challenges I encountered. Having explained the research methods, the next chapter begins the research journey as it contextualizes piracy, heroin and ivory trafficking at the hand of broader realities of globalization, maritime security and global governance.

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<sup>99</sup> News24. 2018. *Tanzanian police accused of failure in conservationist death*. 25 January. Available: <https://www.news24.com/Africa/News/tanzanian-police-accused-of-failure-in-conservationist-death-20180125> [accessed 30 January 2019].

<sup>100</sup> BBC. 2018a. *Esmond Bradley Martin: ivory investigator killed in Kenya*. 5 February. Available: <https://www.bbc.com/news/world-africa-42943503> [accessed 30 January 2019].

<sup>101</sup> See Annexure C.

### 3 Globalization of crime, maritime (in)security and global counter-measures

*“Thanks to al-Qaeda the world now knows what a group of highly motivated individuals owing allegiance to no nation and empowered by globalization can do. The problem is that the world still thinks of these networks in terms of terrorism. Yet [...] profit can be as powerful a motivator as God. Networks of stateless traders in illicit goods are changing the world as much as terrorists are, probably more.”<sup>102</sup>*

The commission of TOC at sea and the resulting responses are both a result and reflection of globalization, which has allowed both crime and the governing thereof to become global endeavours. By considering crime within the context of globalization, we begin to understand why organized crime habitually crosses borders and how the processes of globalization have allowed those who respond to these crimes to do the same. Such global efforts to respond to crime are forms of global governance and are now regularly found at sea as TOC increasingly poses a threat in and from the global maritime domain. The concepts of globalization, maritime security and global governance, therefore provide insight into why TOC is so at home in the maritime domain, which interests it threatens, how actors choose to respond and why the only prospect of success is to counter these crimes on an equally transnational and multi-actor level. The first section of this chapter focuses on the expansion of organized crime globally and into the maritime domain, while the second section focuses on the globalization and evolution of responses. This chapter therefore aims to provide context to the chapters on piracy, heroin and ivory trafficking.

#### 3.1 Beyond borders: the globalization of organized crime

Piracy, heroin and ivory trafficking are forms of TOC,<sup>103</sup> committed by criminal networks across state borders pursuing ‘crime as business’<sup>104</sup> as they trade in illicit goods and services in exchange for a financial, material or other benefit. More often than not, corruption is a

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<sup>102</sup> Naim. 2007: 6.

<sup>103</sup> The definition of ‘organized crime’ remains debated. For a detailed discussion on the definition, see Hall. 2012: 369; Varese, F. 2010. What is organized crime? In *Organized crime: critical concepts in Criminology*. F. Varese, Ed. London: Routledge; Varese, F. 2011. *Mafias on the move*. New Jersey: Princeton University Press; Von Lampe, K. 2016. *Organized crime: analysing illegal activities, criminal structures, and extra-legal governance*. Thousand Oaks: Sage: 16 – 17; 26; 31; Naylor, R.T. 2003. Towards a general theory of profit-driven crimes. *British Journal of Criminology*. 43(2003): 82. DOI: 10.1093/bjc/43.1.81.

<sup>104</sup> Von Lampe. 2016.

core element of their activities, with some scholars suggesting that corruption is a defining characteristic of organized crime in Africa.<sup>105</sup> Piracy, heroin and ivory trafficking all “operate with the collusion of corrupt officials, who ensure that the law is not enforced.”<sup>106</sup> As Naim notes, big businesses have always sought to gain access, influence and government protection, this is no different for illicit businesses.<sup>107</sup> Where organized criminal networks were once considered to be confined to certain territories, they now operate globally.<sup>108</sup> Participant 21, from the United Kingdom’s (UK) National Crime Agency (NCA), confirmed this:

“[T]hese crimes now, it’s a lot more international. I used to deal with Colombian cartels [...] [W]hen you used to look at them, almost exclusively, those drugs were sold on to the local populace, local crime, it was Columbian to Columbian [...] Now, they will pretty much deal with anybody. So, crime generally has become a lot more global”.<sup>109</sup>

Contemporary illicit trade is the result of criminal networks exploiting the spoils of globalization as the gap between supply and demand has narrowed,<sup>110</sup> allowing them to establish a truly global enterprise. This does not mean that these networks had no transnational activities before, but their transnational activity greatly increased in the twentieth century as globalization facilitated the expansion of both commerce and crime.<sup>111</sup> After the end of the Cold War, barriers between states began breaking down. Today, the world is an inter-connected place where physical distance is less of an obstacle due to ever-increasing means to circumvent it. TOC networks exploit these advances which include liberalization of markets, the expansion of trade and travel, and developments in finance,

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<sup>105</sup> Ellis, S. & Shaw, M. 2015. Does organized crime exist in Africa? *African Affairs*. 114 (457): 510. Also see Dandurand. 2020: 2. DOI: 10.1093/afraf/adv035.

<sup>106</sup> Wright. 2013: 8. Also see Gastrow, P. 2011. *Termites at work: transnational organized crime and state erosion in Kenya*. New York: International Peace Institute.

<sup>107</sup> Naim. 2007: 8.

<sup>108</sup> See, for example, Varese. 2010 & Von Lampe. 2016: 15 – 31; Radisch, J. 2016. *Illicit trade: convergence of criminal networks*. Paris: OECD: 20 – 21.

<sup>109</sup> Interview Participant 21. 2016. Dar es Salaam, Tanzania.

<sup>110</sup> Kelley, R. J., Maghan, J. & Serio, J. 2005. *Illicit trafficking: a reference handbook*. Santa Barbara: ABC-Clio: 2-7.

<sup>111</sup> Boister, N. 2003. The trend to 'universal extradition' over subsidiary universal jurisdiction in the suppression of transnational crime: transnational and organized crime. *Acta Juridica*. 1(1): 287. Also see Radisch. 2016: 22.

economic and communication technology.<sup>112</sup> The aims of these networks – to supply illicit goods or services and infiltrate business and government operations – have therefore not changed, they have merely set their sights internationally.

Globalization describes this process of increased connection and inter-dependence of states and people as a result of borders opening up to increased flows of people, goods, finance and ideas. Globalization also describes the changes which national and international institutions and policies facilitating such flows have undergone.<sup>113</sup> These processes have benefitted licit and illicit trade as transportation and technological innovations have allowed both legitimate actors and TOC networks to grow their businesses.<sup>114</sup> Increased licit trade allows TOC networks to embed illicit commodities in licit markets, obscuring their activities among masses of legitimate trade. Hall argues that failure to account for the illicit economy's role in globalization results in the failure to capture its complexity.<sup>115</sup>

But there is an added dimension to criminal networks exploiting globalization. Despite the potential economic opportunity which globalization holds for many, it has left others disenfranchised.<sup>116</sup> Globalization has also driven cross-border migration, unemployment, urbanization, resource depletion<sup>117</sup> and an over-supply of labour in the Global South.<sup>118</sup> This creates an enabling environment for the formation of networks of corruption and organized crime, often with transnational links<sup>119</sup> as criminal networks step in to provide opportunity to individuals and communities who have been marginalized. This renders TOC activity both the result of and the response to globalization<sup>120</sup> and provides insight into illicit trade activity which often serves as an alternative source of income in developing and fragile

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<sup>112</sup> See, for example, Picarelli, J.T. 2011. The evolution of transnational organized crime. *National Institute of Justice*. 2 November. Available: <https://nij.ojp.gov/topics/articles/evolution-transnational-organized-crime> [accessed 24 September 2019].

<sup>113</sup> World Health Organization. n.d. *Globalization*. Available: <https://www.who.int/topics/globalization/en/> [accessed 25 February 2019].

<sup>114</sup> Andreas, P. 2015. International politics and the illicit global economy. *Perspectives on politics*. 13(3): 283; Radisch. 2016: 21. DOI:10.1017/S1537592715001358.

<sup>115</sup> Hall. 2012.

<sup>116</sup> Kelley et al. 2005; Organisation for Economic Cooperation and Development (OECD). 2012. *Transnational organized crime and fragile states*. OECD Development Cooperation Working Papers W/P 2/2012. Paris: OECD: 2 – 7.

<sup>117</sup> Kaldor, M. 2007. *New and old wars*. 2<sup>nd</sup> ed. Stanford: Stanford University Press: 87.

<sup>118</sup> Hall. 2012: 372.

<sup>119</sup> Kaldor. 2007: 87.

<sup>120</sup> Kelley et al. 2005: 2- 7.

regions.<sup>121</sup> This reflects the literature which attributes a social element to organized crime.<sup>122</sup>

Albanese therefore rightly asserts that “[TOC] can be considered the modern extension of organized crime in the globalized era.”<sup>123</sup> This transnational nature has been acknowledged by the UNSC which has referred to organized criminal groups as self-perpetuating associations of individuals who traverse national boundaries in the pursuit of attaining money, power and influence, completely or partially by illegal means. They then protect these activities either by violence, corruption or the transnational structure of their organization, and the use of transnational commerce or communication mechanisms.<sup>124</sup> Due to their global expansion, TOC network membership is now a combination of local and international actors from source, transit, destination and even third states.<sup>125</sup> Castells has labelled this phenomenon ‘global crime’, explaining how criminal groups from all over the world “have come together in a global, diversified network.”<sup>126</sup> Globalization therefore helps to explain how TOC networks now consist of both illicit businessmen disguised as politicians in suits on one side of the world, and impoverished members from the developing world earning a living on battered old boats on the high seas.

The increasingly transnational character of organized crime led to the adoption of the United Nations Convention on Transnational Organized Crime (UNTOC) in 2000 in an attempt to facilitate an equally transnational response.<sup>127</sup> UNTOC’s protocols on migrant smuggling, human and arms trafficking indicate that these are forms of TOC, yet the

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<sup>121</sup> Ibid: 2005; OECD. 2012: 2 – 7.

<sup>122</sup> Von Lampe. 2016: 19 – 20; Standing. 2010.

<sup>123</sup> Albanese, J.S. 2012: Deciphering the linkages between organized crime and transnational crime. *Journal of International Affairs*. 66(1): 1 - 4. UNODC. n.d.h. *Illicit trafficking and smuggling*. Available: <http://www.unodc.org/laopdr/en/Overview/Rule-of-law/Illicit-trafficking.html> [accessed 11 November 2019]; Boister. 2003: 287.

<sup>124</sup> Khan, S. & Singh, S.B. 2014. The economics of transnational organized crime (TOC) in the maritime domain: drug trafficking in Africa and the Southern African continent. *Journal of Social Science*. 41(3): 524. DOI: 10.1080/09718923.2014.11893387.

<sup>125</sup> For discussions of different trafficking networks, see Chapters 4, 6 & 7, as well as Von Lampe. 2016; Haysom, S., Gastrow P. & Shaw, M. 2018. *The heroin coast: a political economy along the eastern African seaboard*. (Research Paper Issue 04 June). Pretoria: Institute for Security Studies; UNODC. 2016b. *The Afghan opiate trade and Africa: a baseline assessment*. Vienna: UNODC; Dimova, M. 2014. *A new agenda for policing: understanding the heroin trade in Eastern Africa*. London: SOAS Department of Politics/Department of Development Studies; Naim. 2007.

<sup>126</sup> Castells, M. 2000. *End of millennium*. 2<sup>nd</sup> ed. Oxford: Blackwell: 167.

<sup>127</sup> *United Nations Convention against Transnational Organized Crime*: foreword; Standing. 2010: 1.

Convention lacks a definition of 'organized crime.' Instead, **UNTOC Articles 2(a) and 2(b)** define an 'organized criminal group' and 'serious crime', to which the Convention applies:

*“2. (a) “Organized criminal group” shall mean a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit;*

*(b) “Serious crime” shall mean conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty.”*

**UNTOC Article 5(1)** requires states to criminalize participation in an organized criminal group.

### **3.2 Maritime security and TOC in the maritime domain**

Vessels were the first connecting node between continents and some of the earliest forms of globalization were the voyages of discovery and ocean trade, such as the triangular trade of slaves, raw materials and manufactures, between Africa, the 'New World' and Western Europe, via the Atlantic Ocean.<sup>128</sup> Today, all corners of the globe are connected by sea lanes of communication. As organized crime has expanded globally, the oceans increasingly serve either as a transport node for illicit commodities or as the source of illicit activities such as illegal, unreported and unregulated (IUU) fishing and piracy.<sup>129</sup> The oceans provide a massive arena for criminal networks to connect source, transit and destination states. Fifty per cent of the oceans are international waters. Because no state has sovereign power in these waters, it poses unique challenges to law enforcement and presents a breeding ground for transnational crime.<sup>130</sup> Therefore, while the oceans serve as a connecting node facilitating the processes of globalization, its vast size and mostly unregulated nature allows

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<sup>128</sup> Findley, R. 1990. The “triangular trade” and the Atlantic economy of the eighteenth century: a simple general-equilibrium model. *Essays in International Finance*. 177. New Jersey: Princeton University: 1 – 2.

<sup>129</sup> Fedotov. 2019.

<sup>130</sup> Raymond, C. Z. & Morrien, A. 2009. Maritime security and its evolution since 9/11. In *Lloyd's MIU handbook of maritime security*. R. Herbert-Burns, S. Bateman & P. Lehr, Eds. Boca Raton: Taylor and Francis: 3.

for illicit activities to remain largely undetected. This attracts criminal activity<sup>131</sup> and allows networks to avoid obstacles encountered on land.

The oceans are simply too vast to patrol in their totality. This is evident if one considers that despite the large naval presence in the WIO in response to piracy, illicit commodities like drugs and wildlife products have continued to traverse the region. Like any other businesspeople, organized criminal networks aim to maximize profits and minimize risk. Using the oceans is therefore beneficial to their business model. In addition to limited law enforcement at sea, large volumes of commodities can be moved in a single shipment, especially in comparison to by land or air. Operating at sea is however not all smooth sailing, not for criminal networks or those countering their activities. As is evident in the difficulties in interdicting illicit activities, apprehending suspects and gathering evidence at sea, there are many challenges unique to operating in the maritime domain. Criminal networks and law enforcement face long sea journeys, unpredictable weather and even threats from other criminal networks, such as pirates. The volumes of illicit activity at sea however suggest that the benefits far outweigh the risks.

### **3.2.1 The evolution of maritime security**

Maritime security gained prominence in academic literature in the early 2000s.<sup>132</sup> This was the outflow of maritime terrorism incidents, the 2001 World Trade Centre terror attacks and piracy in the Malacca Strait. But it was the rise of Somali piracy that truly triggered current academic debates.<sup>133</sup> The concept of maritime security is therefore a relatively recent construct and primarily concerns the management and control of human activity in the maritime domain.<sup>134</sup> Although the term is widely debated, there are generally agreed understandings of its meaning, or what constitutes a threat to maritime security.<sup>135</sup> Maritime security can refer to a concept or set of practices.<sup>136</sup> It can be an ideal end

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<sup>131</sup> Klein, N. 2011. *Maritime security and the law of the sea*. New York: Oxford University Press: 4; 7; 13. Also see Hall. 2012: 367.

<sup>132</sup> Germond, B. & Germond-Duret, C. 2016. Ocean governance and maritime security in a peaceful environment: the case of the European Union. *Marine Policy*. 66: 131. DOI: 10.1016/j.marpol.2016.01.010.

<sup>133</sup> Germond, B. 2015. The geopolitical dimension of maritime security. *Marine Policy*. 54 (2015): 137. DOI: 10.1016/j.marpol.2014.12.013; Raymond & Morrien. 2009: 3.

<sup>134</sup> Germond & Germond-Duret. 2016: 125.

<sup>135</sup> Klein. 2011: 8 - 11. & Raymond & Morrien. 2009: 9.

<sup>136</sup> Germond. 2015: 141.

state,<sup>137</sup> the absence of certain things or a dynamic activity. It has different meanings depending on the context to which it is applied and the threat it describes.

Before the end of the Cold War, maritime security was state-centric and associated primarily with military interests at sea.<sup>138</sup> It entailed the protection of states' immediately adjacent waters from being used in ways which could threaten political independence, territorial integrity and resources.<sup>139</sup> But after the Cold War, transnational, non-state actors emerged as the dominant security threat,<sup>140</sup> including TOC networks and terrorists. The concept of maritime security therefore expanded to include these non-state threats.<sup>141</sup> This caused states and other international actors to adopt a more comprehensive and pro-active approach to maritime security, focussing on the exercise of the monopoly on the legitimate use of violence at sea to ensure good governance and security in the maritime domain.<sup>142</sup> As a result, navies expanded their focus from using force to secure their own maritime territory, to also focussing on soft security in an effort to protect trade, transport and resources, and share information. These interests at which soft security measures are aimed have given rise to increased claims over ocean space as states wish to expand their control.<sup>143</sup> It has also given rise to increased cooperation at sea.<sup>144</sup>

The processes of globalization have allowed an increasingly large area of ocean space to be exploited by TOC networks, which in turn threatens a broader range of economic, security and environmental interests. Maritime security therefore now also includes more recent, expanded interpretations of security,<sup>145</sup> encompassing four primary domains: national security, environmental security, economic security and human security.<sup>146</sup> Stakeholders

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<sup>137</sup>Bueger, C. 2015a. What is maritime security? *Marine Policy*. 53 (2015): 159. DOI: 10.1016/j.marpol.2014.12.005.

<sup>138</sup> Germond. 2015: 138.

<sup>139</sup> Ibid: 138; Klein. 2011: 6 – 8.

<sup>140</sup> Seyle, C. & Madsen, J. 2015. *Non-state actors in maritime security*. One Earth Future Policy Brief. Broomfield: One Earth Future Foundation: 23 – 26; Trelawny, C. 2013. Maritime security beyond military operations: a civilian perspective. *Rusi Journal*. 158 (1): 48 - 49. DOI: 10.1080/03071847.2013.774639.

<sup>141</sup> Trelawny. 2013; Seyle & Madsen. 2015: 23 – 26.

<sup>142</sup> Germond. 2015: 138.

<sup>143</sup> Klein. 2011: 6 – 8.

<sup>144</sup> Kaldor. 2007: ix.

<sup>145</sup> Klein. 2011: 6.

<sup>146</sup> Bueger, C., Edmunds, T. & Ryan, B.J. 2019. Maritime security: the uncharted politics of the global sea. *International Affairs*. 95(5): 973 – 974. DOI: 10.1093/ia/iiz145.

differ on the primary interests which maritime security seeks to protect,<sup>147</sup> as their interpretation depends on their context. For example, navies wish to ensure freedom of navigation, the flow of commerce, the protection of resources and securing the maritime domain against threats such as TOC.<sup>148</sup> To navies, maritime security is therefore a dynamic and active concept which includes activities such as maritime domain awareness (MDA). For the shipping industry however, maritime security is a state of peaceful existence which allows them to transport cargo whilst navies protect them.<sup>149</sup>

The terror attacks on the World Trade Centre alerted the world to the potential threat posed by non-state actors and led to a greater emphasis on communal interests being at stake when security is threatened.<sup>150</sup> The attacks highlighted the vulnerability of transport systems to be used in the execution of terrorist acts. This was confirmed by the terror attacks on ships prior to and in short succession after 9/11. After these incidents, the perception of merchant shipping shifted as security agencies appreciated that merchant vessels could be used to commit more terror acts.<sup>151</sup> Maritime terror attacks are however uncommon,<sup>152</sup> while other maritime threats, like TOC, are rife.<sup>153</sup> The result of these maritime incidents was that merchant vessels and their cargo went from being the object of protection to the object against which the world needed to be protected,<sup>154</sup> mainly to safeguard world trade.<sup>155</sup> This again illustrates the general shift in security-thinking which is now primarily focussed on non-state threats, both on land and at sea. More recent events such as the tensions in the South China Sea,<sup>156</sup> the attacks on vessels off the Gulf of Oman<sup>157</sup>

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<sup>147</sup> See, for example Bueger. 2015a: 161.

<sup>148</sup> Klein. 2011: 8 - 9.

<sup>149</sup> Trelawny, 2013: 48; Klein. 2011: 8 – 9.

<sup>150</sup> Klein. 2011: 1; Raymond & Morrien. 2009: 3.

<sup>151</sup> Raymond & Morrien. 2009: 3 – 4; Trelawny. 2013: 49.

<sup>152</sup> See, for example, Collins, V.E. 2014. A lust for treasure and a love of gold...or desperation? Global facilitation of piracy, neoliberal policies and the control of the Somali Pirate. *Critical Criminology*. 22 (2014): 440. DOI 10.1007/s10612-014-9239-2.

<sup>153</sup> For a critique of the focus on terrorism to the detriment of TOC, see Standing. 2010: 1 – 2; Naim. 2007: 5 - 6; Schbley & Rosenau. 2013: 8 - 9.

<sup>154</sup> See, for example, Raymond & Morrien. 2009: 3 - 4; Trelawny. 2013: 49;

<sup>155</sup> Klein. 2011: 1.

<sup>156</sup> Bueger. 2015: 159.

<sup>157</sup> Cotovio, V., Regan. H. & Fox, K. 2019. Two tankers struck in apparent attack in Gulf of Oman. *CNN*. 13 June. Available: <https://edition.cnn.com/2019/06/13/middleeast/sea-of-oman-tanker-intl/index.html> [accessed 2 October 2019].

terrorism in northern Mozambique<sup>158</sup> and the explosion in the Port of Beirut<sup>159</sup> have drawn additional concern to the potential impact of insecurity at sea. As international trade has become increasingly threatened from the oceans, the maritime dimension of security and the threat it poses to the global economy has been elevated to the top of political agendas.

In the absence of an agreed definition of maritime security, stakeholders have also attempted to instead identify ‘maritime threats’. Maritime security is then achieved when these threats are absent.<sup>160</sup> Maritime threats are the focus of this thesis. It is argued that the absence of these threats will contribute to maritime security around eastern Africa. The UNSC,<sup>161</sup> EU<sup>162</sup> and the African Union (AU) have all identified piracy and drug trafficking as such threats. The AU’s 2050 Africa’s Integrated Maritime Strategy (AIMS), the first maritime security strategy for Africa,<sup>163</sup> also considers the following as additional threats in the African maritime domain: armed robbery, arms trafficking, illegal oil bunkering, oil and fuel theft, terrorism, human trafficking, people smuggling, IUU fishing and environmental crimes such as oil spills and toxic waste dumping.<sup>164</sup> I argue that wildlife trafficking must be added to this list due to the majority of illicit wildlife products being moved in multiple tonne shipments primarily by sea.

These TOCs are not necessarily coercive like traditional security threats, but their impacts clearly justify counter measures by stakeholders<sup>165</sup> ranging from states, to the shipping industry, NGOs and civil society. Vorrath has noted that “[TOC] is accompanied far more often by economic damage, environmental degradation, health problems and corruption

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<sup>158</sup> D’Orsi, C. 2020. Catalogue of failures behind growing humanitarian crisis in northern Mozambique. *The Conversation*. 8 November. Available: <https://theconversation.com/catalogue-of-failures-behind-growing-humanitarian-crisis-in-northern-mozambique-149343> [accessed 8 December 2020]; Barigazzi, J. 2021. Portugal wants EU to help Mozambique military fight jihadists. *Politico*. 12 March. Available: <https://www.politico.eu/article/portugal-wants-eu-to-train-mozambique-military-in-isis-fight/> [accessed 6 April 2020]; Brewster, D. 2021. The Mozambique Channel is the next security hotspot. *The Interpreter*. 19 March. Available: <https://www.lowyinstitute.org/the-interpreter/mozambique-channel-next-security-hotspot> [accessed 6 April].

<sup>159</sup> BBC News. 2020. *Beirut explosion: how ships deadly cargo ended up at port*. 7 August. Available: <https://www.bbc.com/news/world-middle-east-53683082> [accessed 2 February 2021].

<sup>160</sup> Bueger. 2015a: 159.

<sup>161</sup> Klein. 2011: 9 – 10.

<sup>162</sup> Bueger. 2015a: 162.

<sup>163</sup> African Union. 2012. *2050 Africa’s Integrated Maritime Strategy*. Available: [https://cggrps.com/wp-content/uploads/2050-AIM-Strategy\\_EN.pdf](https://cggrps.com/wp-content/uploads/2050-AIM-Strategy_EN.pdf) [accessed 10 October 2019].

<sup>164</sup> African Union. 2012: 11.

<sup>165</sup> Klein. 2011: 9 – 10.

than by widespread violence and instability.”<sup>166</sup> Drug trafficking at sea is an example of a crime which is not necessarily accompanied by coercion, but which gravely threatens other interests, such as public health and the corruption of institutions.

### 3.2.2 The land and sea nexus

Maritime security should be considered in parallel with territorial security, as security interests at sea affect territory on land<sup>167</sup> and vice versa. TOC at sea sets into motion a chain of activities which eventually reaches land. For example, once heroin finds its way onto land, it can increase local use. Similarly, once an elephant is killed, it threatens elephant populations and livelihoods. The crossing between land and sea and the subsequent overland movement of commodities also results in corruption along the way. The impact of maritime insecurity on land therefore poses the biggest threat to states.

Equally, good governance and stability extends off-shore<sup>168</sup> and we are seeing a reflection of irregular threats on land playing out in Africa’s maritime domain.<sup>169</sup> Maritime threats therefore also manifest in relation to territorial conditions. Somali piracy is an example of the failure to protect maritime territory from the effects of the crisis on land.<sup>170</sup> Therefore, as Ban Ki Moon noted, “[...]the issues before us highlight the inter-connected nature of the challenges of our age [...] they spill into the seas.”<sup>171</sup> Accordingly, Klein has defined maritime security as “the protection of a state’s land and maritime territory, infrastructure, economy, environment and society from certain harmful acts occurring at sea.”<sup>172</sup> As many states

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<sup>166</sup> Vorrath, J. 2015. *Organized crime and development challenges and policy options in West Africa’s fragile states*. Berlin: German Institute for International and Security Affairs: 8.

<sup>167</sup> Klein. 2011: 4; 7.

<sup>168</sup> Vreÿ, F. 2014. Entering the blue: conflict resolution and prevention at sea off the coast of East Africa. *Journal of the Indian Ocean*. 10(2): 22. DOI: 10.1080/19480881.2014.952956; United Nations. 2009. *Secretary General, addressing international donors’ conference, spells out priorities for international efforts to enhance security in Somalia*. 23 April. Available: <http://www.un.org/News/Press/docs/2009/sgsm12203.doc.htm> [accessed 28 September 2018]; Glück, Z. 2010. Maritime piracy, capital and securitization: the case of Somalia. In *The African state in a changing global context: breakdowns and transformations*. G. Hyden, I. Tarrosy & L. Szabo, Eds. Munster: LIT Verlag.

<sup>169</sup> Vreÿ. 2014: 208 – 209.

<sup>170</sup> Campling, L. & Colas, A. 2017. Capitalism and the sea: sovereignty, territory and appropriation in the global Ocean. *Environment and Planning D: Society and Space*. 0(0): 787. DOI: 10.1177/0263775817737319.

<sup>171</sup> Glück. 2010: 83.

<sup>172</sup> Klein. 2011: 10 - 11.

struggle to exercise control across their land territory,<sup>173</sup> it is doubtful if they could exercise control across their maritime domain and almost certainly not on the high seas where many of today's TOCs materialize. The land-sea nexus also illustrates why Coastal states are especially at risk when the seas are unsafe – where landlocked states face security threats emanating from land, Coastal states also face threats from the sea.

This section has considered different interpretations of maritime security. For the purpose of this thesis, maritime security is defined as a concept which gives rise to certain practices. It is defined as the ideal end state where ocean spaces are generally not exploited for illicit activities. Measures implemented to achieve this include preventative and reactive measures on land and at sea, such as measures aimed at achieving economic and political stability, disruption, arrest and prosecution. On the opposite spectrum, maritime insecurity is the *de facto* state of territorial and international waters being exploited in ways which threaten security.

### **3.3 The emergence of transnational organized crime in the Western Indian Ocean off the coast of eastern Africa**

Criminal activity does not manifest in a vacuum. The WIO forms part of a larger geopolitical context. The illicit markets for piracy, heroin and ivory are therefore the product of particular conditions within this geospatial arena and globally. Responses to these crimes also reflect these conditions and are subject thereto. To understand the manifestation of these crimes and construct an effective response, one must enquire why eastern Africa and the WIO have integrated into the Indian Ocean criminal economy and became a recurring scene of crime. These conditions should be taken into account when formulating responses.

Geography plays a pivotal role in the type of threats which manifest in a region.<sup>174</sup> TOC networks are business savvy, they keep up with global conditions in an attempt to keep the risk of detection to a minimum and profits high. They will therefore use trade routes which allow this. This is reflected in pirates emanating from areas near busy sea lanes and

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<sup>173</sup> Herbst, J. 2000. *States and power in Africa: comparative lessons on authority and control*. Princeton: Princeton University Press; Garland, D. 1996. The limits of the sovereign state: strategies of crime control in contemporary society. *British Journal of Criminology*. 3(4).

<sup>174</sup> Germond. 2015: 139; Potgieter, T. 2012. *Maritime security in the Indian Ocean: strategic setting and features*. (Paper No. 236). Pretoria: ISS.

traffickers being attracted to long coastlines and islands away from law enforcement pressure. Most of Africa's islands are located in the Indian Ocean and the region is bursting with maritime trade. There are many open borders and the region is nestled between many source and destination states for various illicit markets, making it an ideal transit and also source region. Large regional ports further allow the region to engage with wealthier markets globally.<sup>175</sup>

Because of many shipping chokepoints, preying pirates have a wealth of vessels to choose from and as the Horn is too unstable, eastern Africa is Africa's closest import and export point to Asia. This explains why ports like Mombasa, Dar es Salaam<sup>176</sup> and Maputo are key export points for commodities such as ivory. Similarly, the region is ideally placed to serve as a transit zone for heroin from Pakistan and Iran. Heroin trafficking dhows undertaking the journey across the Indian Ocean do not look out of place as centuries old dhow trade routes are also used to move illicit commodities. Numerous islands also allow TOC networks to operate away from watchful law enforcement.

Herbst argues that the fundamental challenge facing African states post-independence is exerting control across the continent's many vast, scarcely inhabited and inhospitable territories. Geography therefore plays a fundamental role in the nature of African states and political geography is a given.<sup>177</sup> If African states struggle to exert control across their land territory, they are unlikely to be able to do so across their maritime domain, which is sometimes bigger than their landmass. Seychelles for example has a total land mass of 455km<sup>2</sup>, while its EEZ is 1.374 million km<sup>2</sup>.<sup>178</sup>

Geopolitics describes the local and international political processes within a specific location.<sup>179</sup> Hall argues that geographers of criminal activity often measure geography and crime in a local context, but fail to explore how this is influenced by global conditions.<sup>180</sup> The importance of considering how global realities influence crime in a certain locale reflects the idea that "processes in space unfold not necessarily or exclusively as a result of local

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<sup>175</sup> Wright. 2013: 8.

<sup>176</sup> Ibid: 28.

<sup>177</sup> Herbst. 2000: 3; 12; 17 – 20; 246.

<sup>178</sup> United Nations Environmental Programme (UNEP). 2008. *Seychelles: national marine ecosystem diagnostic analysis*: 1. Nairobi: UNEP.

<sup>179</sup> Germond. 2015: 137 - 141.

<sup>180</sup> Hall. 2012: 2.

conditions but rather through networked interactions with distant places.”<sup>181</sup> This is also the case in eastern Africa. An example of the influence of global conditions on local TOC activity is seen in the heroin trade. Increased law enforcement and conflicts on the Balkan route, coupled with record breaking opium harvests in Afghanistan, have resulted in increased heroin production and increased trafficking on the WIO route. Turning to the ivory market, growing affluence<sup>182</sup> and the global financial crisis in 2008, resulted in more Chinese investing in ivory, leading to increased poaching and trafficking in Africa.<sup>183</sup>

Thirty-eight of Africa’s fifty-four states are Coastal states and islands. These states experience a plethora of maritime threats, both in their own waters and from the high seas. This has been attributed to African states being ‘sea blind’, reflecting a “general lack of interest in the importance of the seas and of humanity’s dependency on their safe, secure and sustainable usage.”<sup>184</sup> This is not unique to Africa and is seen across the globe. Participant 4, a senior UN official working on maritime crime, summarized sea blindness in East Africa as follows:

“These countries don’t generally look to the sea. They also don’t have long standing armies, much for domestic reasons or internal security reasons [...] they have no idea, they drop bombs on their own country if they’re at war with another [...] there’s not much sea vision, but traditionally, in East Africa particularly, there’s not been much of a perception of the value of resources out at sea. So they’ve all been quite happy seeing vessels coming in and stealing fish and not doing much about it.”<sup>185</sup>

Sea blindness can therefore arguably also translate to a lack of political will. In fairness, apart from illegal fishing, the region hardly had to take to the seas to protect its interests prior to Somali piracy. As a result, its maritime capacities are weak as states have failed to put measures in place to address threats emanating from the sea. This is due to the presence of more important priorities on land and the absence, either factually or

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<sup>181</sup> Ibid: 10.

<sup>182</sup> Wright. 2013: 30.

<sup>183</sup> See Chapter 6.

<sup>184</sup> Walker, T. & Reeva, D. 2019. Promising signs of Africa’s global leadership on maritime security. 19 February. *ISS*. Available: <https://issafrica.org/iss-today/promising-signs-of-africas-global-leadership-on-maritime-security> [accessed 10 October 2019].

<sup>185</sup> Interview Participant 4. 2016. Nairobi, Kenya.

perceived, of threats from the sea.<sup>186</sup> Some participants argued that most regional states cannot even patrol their own territorial seas.<sup>187</sup> Sea blindness can therefore be unintentional and the result of having no awareness of what happens at sea. Participant 28, a senior UN official working on TOC noted: “[w]hat happens on the high seas is, with respect, a rumour to most African countries [...] they have no idea what is going on there and that is why they don’t worry about it”.<sup>188</sup>

Wright argues that TOC is neglected due to limited law enforcement resources which are primarily directed towards domestic organized crimes.<sup>189</sup> Vreÿ similarly suggests that African states have tended to concentrate security efforts on land because maritime threats have not yet threatened regime security in a similar manner to land-based security concerns.<sup>190</sup> Participant 28 similarly noted how African militaries have been focused on liberation wars which did not have maritime components, which is why they have not traditionally been maritime orientated. Regardless of the reason, TOC networks exploit this absence of security measures along eastern Africa’s coast. As a naval officer stressed, “states need to realize the strategic importance of the maritime domain, or the criminal will.”<sup>191</sup>

The Indian Ocean is one of the most strategic ocean spaces on the globe,<sup>192</sup> holding oil resources<sup>193</sup> and carrying massive volumes of vital trade.<sup>194</sup> For these reasons, states wish to keep the region threat free,<sup>195</sup> including from TOC networks who wish to tap into these

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<sup>186</sup> Interview Participant 5, interviewed in 2016 in Nairobi, noted: “even in countries like Kenya that should be a lot more informed than some of the smaller countries, you find that the political leadership really know very little about the sea.”

<sup>187</sup> Interview Participants 4; 5; 9 & 28.

<sup>188</sup> Interview Participant 28. 2016. Nairobi, Kenya.

<sup>189</sup> Wright. 2013: 8.

<sup>190</sup> Vreÿ. 2014: 208 – 209.

<sup>191</sup> *Proceedings of the First International Workshop on Combating Transnational Threats - through collaborative efforts in policy making, law enforcement and capacity building*. 2017. 3 – 5 May. Stellenbosch: University of Stellenbosch Security Institute for Governance and Leadership (SIGLA), Defence Threat Reduction Agency (DTRA) International Counter-proliferation Program (ICP), the Naval Criminal Investigative Service (NCIS) & United States Embassy, South Africa.

<sup>192</sup> Herbert-Burns, R. 2012. *Countering piracy, trafficking, and terrorism: ensuring maritime security in the Indian Ocean*. Washington: STIMSON: 1.

<sup>193</sup> What are the 7 continents. n.d. *Indian Ocean*. Available: <https://www.whatarethe7continents.com/indian-ocean/> [accessed 7 April 2018]; Potgieter. 2012: 2.

<sup>194</sup> Potgieter. 2012: 2; 11; Gopaldas, R. 2018. The proxy battle for Africa’s Indian Ocean states: must the island nations align with India or China, or can they straddle both to achieve maximum economic value? *ISS*. 22 October. Available: <https://issafrica.org/iss-today/the-proxy-battle-for-africas-indian-ocean-states> [accessed 1 October 2019]; Herbert-Burns. 2012: 1.

<sup>195</sup> Potgieter. 2012: 17.

markets or embed their illicit commodities behind licit trades. Herbert-Burns however suggests that the Indian Ocean is the most insecure maritime domain globally.<sup>196</sup> It borders various regions with longstanding conflicts, such as the Horn and Middle East and there are various forms of insecurity along the littoral. There are insurgencies in Yemen and Iraq, terrorism in Pakistan, Somalia, Kenya, Mozambique and Sri Lanka and TOC in all coastal states.<sup>197</sup> Maritime security in the Indian Ocean is the result of these non-state actors also entering the maritime domain and fundamentally affecting the security of the region.<sup>198</sup> There are also various territorial and ethnic disputes in the region and Asian states have for a long time been engaged in conflict over dominating geopolitical power. As also noted by participants, maritime crime in eastern Africa is therefore also the result of conditions in the wider Indian Ocean region.<sup>199</sup> Ellis and Shaw further note how “crime develops in relation to the state and society with which it coexists”.<sup>200</sup> Having a favourable location from which to operate is therefore not enough. Instead, a combination of conditions attracts TOC activity.<sup>201</sup> Scholars like Klantschnig,<sup>202</sup> Herbert-Burns<sup>203</sup> and Wright<sup>204</sup> note conditions including general insecurity, state fragility, terrorism, weak law enforcement and badly policed transport hubs, the presence of a variety of maritime modes of transport and service routes along consumer and demand states, lack of alternative livelihoods and enough stability allowing criminal networks to function. All of these scholars noted the presence of corruption. TOC is therefore the product of much larger governance issues.<sup>205</sup> Indeed, the foreword to UNTOC notes that organized criminal networks thrive in states with weak institutions.<sup>206</sup>

Factors attracting criminal networks however vary from state to state. It could be that corrupt officials or weak law enforcement in Tanzanian ports are its main attraction, while

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<sup>196</sup> Herbert-Burns. 2012: 17.

<sup>197</sup> Ibid: 2012: 1; Bateman, S. 2016. Maritime security governance in the Indian Ocean region. *Journal of the Indian Ocean region*. 12(1): 8. <http://dx.doi.org/10.1080/19480881.2016.1138709>; Interview Participant 5. 2016. Nairobi, Kenya.

<sup>198</sup> Potgieter. 2012: 1.

<sup>199</sup> Gopaldas. 2018.

<sup>200</sup> Ellis & Shaw. 2015: 17.

<sup>201</sup> See, for example, Raisch. 2016: 31.

<sup>202</sup> Klantschnig, G., Dimova, M. & Cross, H. 2016. Africa and the drugs trade revisited. *Review of African Political Economy*. 43(148): 167. DOI: 10.1080/03056244.2016.1170312.

<sup>203</sup> Herbert-Burns. 2012: 4.

<sup>204</sup> Wright. 2013: 8.

<sup>205</sup> Ibid: 8.

<sup>206</sup> United Nations Convention against Transnational Organized Crime: foreword.

the infrastructure and location of Kenya is considered its most valuable asset. In addition, different illicit markets also have different drivers. For example, over-production of opium in Afghanistan might have caused more heroin being moved via eastern Africa as traffickers look for new markets. Poaching of elephants in eastern Africa might be because West and Central African elephant numbers have plummeted and because Kenya, Tanzania and Mozambique provide easy access to Asia for export.

The Organized Crime Index has found that East Africa ranks highest in organized criminality on the African continent.<sup>207</sup> While much has been written about what attracts criminal activity, two practitioners best summarized the allure of eastern Africa for TOC networks. Participant 18, the founder of an anti-corruption wildlife NGO, noted:

“crime many times is like any other commercial activity. The places that have a lot of commercial activity also [have] a lot of crime, where business people [...] will base themselves, is the same place where criminal businessmen base themselves for obvious reasons.”<sup>208</sup>

Participant 28 explained how the combination of a few strong economies possessing good banking infrastructure and transport hubs like ports, coupled with just enough instability, creates a favourable environment for organized crime. Like most businesspeople, TOC networks seek an environment which is favourable for business activities and therefore embed themselves in states where business is relatively easy. For this reason, certain regions in Somalia are not conducive to TOC, as the conflict and lack of infrastructure make for a difficult working environment. Just as you wouldn't open a corner shop there, you wouldn't run an organized crime business. Although Somalia does experience terrorism and TOC activity such as piracy, these originate from within the country itself. There is a fine line between having the necessary infrastructure, while also having enough destabilising factors such as a lack of good governance, accountability, weak government capacity, weak law enforcement and border control and corruption. According to the practitioner, “that is unfortunately what you are seeing in eastern Africa.”<sup>209</sup>

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<sup>207</sup> ENACT. 2019. *Organized Crime Index Africa 2019*. Pretoria: ISS, Global initiative against Transnational Organized Crime & Interpol: 69.

<sup>208</sup> Interview Participant 18. 2018.

<sup>209</sup> Interview Participant 28. 2016.

A level of political stability is indeed an advantage when trafficking illicit commodities.<sup>210</sup> Somali piracy, for example, reportedly thrived during times of stability.<sup>211</sup> Organized criminals prefer strong economic hubs where they have access to skilled bankers, accountants and lawyers and where communication, transactions, transport and import and export of illicit shipments are relatively easy to arrange. This is why a country like Kenya is targeted by TOC networks, being an economic hub from where transit can be facilitated, but also because law enforcement at borders is weak or corrupt.<sup>212</sup> Corruption is likely key to the region's attraction and ports known to be lax or employ corrupt officials are popular with traffickers.<sup>213</sup>

Eastern Africa has been the scene of recent political changes, highly contested elections, widespread corruption and a range of maritime security tensions, which further weaken the region's already limited ability to respond to TOC. With highly contested elections comes the risk that political players will engage in TOC to fund their election campaigns. Shortland and Varese illustrate this by using protection theory to explain how economic and political conditions, rather than geography, attract a crime like piracy. These conditions result in pirate activity being either protected or rejected by local actors. Where local government institutions are too strong, pirates will be pushed out as political elites do not need piracy to fund their political activities. But where local conditions are too anarchic, pirates cannot operate as there is no market for protection. Instead, a middle way with political actors willing to protect pirate activity in exchange for an income is the ideal breeding ground, such as in areas where votes are needed. But when there is sufficient revenue from other sources, pirates are unlikely to be tolerated.<sup>214</sup>

The complexity of the region also complicates cooperation to address TOC. This is exploited by TOC networks. Border and diplomatic disputes, states' own agendas, corruption, illicit activity and conflict in states like Somalia have resulted in low capacity and rendered large areas off-limits for law enforcement, making cooperation between regional states, as well as

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<sup>210</sup> Kamal-deen, A. 2017. *Narcotics in West Africa*. Proceedings of the First International Workshop on Combating Transnational Threats.

<sup>211</sup> Shortland, A. & Varese, F. 2014. The protector's choice: an application of protection theory to Somali piracy. *British Journal of Criminology*. 54(5): 744. DOI:10.1093/bjc/azu046.

<sup>212</sup> Interview Participant 28. 2016.

<sup>213</sup> Wright. 2013: 8.

<sup>214</sup> Shortland & Varese 2014: 743 - 746.

with the international community, difficult. The region consists of states with varying levels of stability. There are relatively strong states, such as Kenya, but also fragile states like Somalia. There are states which have only recently emerged from conflict like Rwanda, and others which are on a downward trend like Mozambique. All of these factors combine on a macro-political level to complicate counter-efforts, which makes it possible for organized criminals to operate and connect globally with their own, as well as with other networks, undetected.<sup>215</sup>

Numerous internal and external factors therefore converge to attract TOC networks to eastern Africa. Though some consider African sea-blindness to be a thing of the past,<sup>216</sup> there is a continued lack of sea-going capacity, including maritime law enforcement ability and cooperation. Therefore, despite a large extra-territorial presence in the WIO, regional states continue to have a limited presence at sea as they lack the necessary capacity. This lack of a maritime presence continues to be exploited by criminal networks.

### **3.4 Global crime governance: global interventions against distant threats**

#### **3.4.1 From state to non-state threats, to state and non-state responses**

As security threats shifted from a state to non-state nature, the responding actors have also changed. The Cold War subjected Indian Ocean littoral states, including those in Africa, to the competition between superpowers. When it ended, so did the security balance in the Indian Ocean, resulting in a less stable region with rivalries, conflicts and weak governance structures with little capacity to counter increasing maritime insecurity.<sup>217</sup> This is also the case in the WIO which is now the scene of various non-traditional security threats.<sup>218</sup> The Indian Ocean is of great strategic importance. To illustrate - Somali piracy caused China to deploy its first mission outside of East Asia in four-hundred years.<sup>219</sup> What happens in these waters is therefore of global concern. This is reflective of how globalization has caused

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<sup>215</sup> Interview Participant 28. 2016. Also see Fund for Peace. 2014. *Fragile States Index 2014*. Washington: Fund for Peace: 3; Ellis & Shaw. 2015.

<sup>216</sup> Blaine, M. & Walker, T. 2019. *Proceedings of the round table event 'Caught between AIMS and Lomé: why do African States still not care about the seas and oceans?'* 26 September. Stellenbosch: Security Institute for Governance and Leadership (SIGLA) and Stable Seas.

<sup>217</sup> Potgieter. 2012: 2; Seyle & Madsen. 2015: 23 – 26.

<sup>218</sup> Potgieter. 2012: 2.

<sup>219</sup> Kraska. 2009: 201.

security threats to directly impact states on the opposite side of the globe.<sup>220</sup> Therefore, while sovereignty and national interests remain fundamental to maritime security, communal interests are at stake when responding to transnational maritime threats. This has caused states' domestic and foreign policies to become entangled.<sup>221</sup>

Because non-state threats are not confined to a territory, they are not easily deterred or contained.<sup>222</sup> Borders are an advantage to criminal networks, but a barrier to law enforcement agencies<sup>223</sup> as criminals do not have to adhere to jurisdiction limitations, while law enforcement does. This is no different for non-state threats at sea, especially on the high seas, which present additional challenges such as the fact that, with a few exceptions, only the Flag State of a vessel has jurisdiction to respond to its actions and no state has the capacity to respond to TOC at sea alone. This non-state transnational character of contemporary security threats has proven too complex for traditional security apparatus to counter<sup>224</sup> and has necessitated the reimagining of responses and the expansion of responding actors.<sup>225</sup> The number of states being exploited, the different legal systems, and the multiple nationalities involved in the commission of TOC, leave little room for a response restricted to national boundaries. As a different response to the traditional military response is required,<sup>226</sup> responding actors have had to adjust accordingly.

In response to this changing security landscape, there have been an increasing number of cooperative transnational responses, pooling resources to address transnational threats. In the WIO, these efforts have been driven mainly by states from outside of the region, which is reflective of how global crime governance is often driven by the West.<sup>227</sup> It is now widely acknowledged that a transnational cooperative response is the only response which has reasonable prospects of effectively countering TOC. This is evidenced in the establishment of international bodies like Interpol, and treaties, conventions and agreements between states which regulate inter-state behaviour and lay down common rules on global crime

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<sup>220</sup> Rosenau, J.N. 1995. Governance in the twenty-first century. *Global Governance*. 1(1): 13; Klein. 2011: 1; Radisch. 2016: 20.

<sup>221</sup> Klein. 2011: 1 - 6.

<sup>222</sup> Weiss, T. 2011. The blurring border between the police and the military: a debate without foundations. *Cooperation and Conflict*. 46(3): 398. DOI: 10.1177/0010836711416961.

<sup>223</sup> Naim. 2007: 8.

<sup>224</sup> Chatterjee. 2014: 78.

<sup>225</sup> Vreÿ. 2014: 205.

<sup>226</sup> Seyle & Madsen. 2015: 23–26; Kraska. 2009: 197.

<sup>227</sup> Jacobi. 2014: 3.

governance.<sup>228</sup> The international frameworks applicable to TOC also place great emphasis on the need to cooperate.<sup>229</sup>

The first forms of global crime governance<sup>230</sup> against what we now consider TOC however predate the Cold War. Much earlier manifestations include the British abolishment of slavery in the seventeenth century<sup>231</sup> and the criminalization of privateering into piracy in the eighteenth century.<sup>232</sup> The abolishment of slavery saw the Royal Navy go from protecting the Atlantic slave trade,<sup>233</sup> to countering it by concluding inter-State treaties which allowed them to board and seize foreign vessels suspected of being engaged in the slave trade.<sup>234</sup> This right is now contained in UNCLOS.<sup>235</sup> While the term 'TOC' was not yet applied to piracy and slavery at the time, it is clear to see why slavery and piracy are today recognized as TOCs. It is perhaps also no coincidence that some of the earliest forms of cooperation against TOC manifested in the maritime space.

What is however a more recent development, is that state actors have not only joined forces with each other, but have also been joined by non-state actors. Therefore, similar to the changing nature of the threat, the responders to these threats have evolved.<sup>236</sup> This is reflective of contemporary global governance efforts whereby state and non-state actors cooperate in managing policy problems.<sup>237</sup> The counter-piracy response is perhaps the prime example of this. Traditional security actors' roles have also changed, such as navies taking on a constabulary role. Instead of waging war, navies now serve a diplomatic role and maintain good order at sea by acting as deterrents, escorting vessels, arresting suspects and

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<sup>228</sup> Ibid: 2- 4.

<sup>229</sup> See, for example, UNTOC Articles 1; 18; 19; 26; 27; 30; UNCLOS Articles 100; 108; 109; 117; 118 & Article 17(1) of the Vienna Convention; UN Security Council. 2015. *SC RES 2240 on migrant smuggling and human trafficking into, through and from the Libyan territory and off the coast of Libya*, 14 October. S/RES/2240 (2015). Available: <https://www.refworld.org/docid/561df72f4.html> [accessed 10 December 2019]; UN Security Council. 2008a. *SC RES 1816 on acts of piracy and armed robbery against vessels in territorial waters and the high seas off the coast of Somalia*, 2 June. S/RES/1816 (2008). Available: <https://www.refworld.org/docid/48464c622.html> [accessed 30 October 2019]; Kraska. 2009: 205 – 206.

<sup>230</sup> Jacobi. 2014: 2.

<sup>231</sup> Hochschild, A. 2005. *Bury the chains*. London: Macmillan: 348.

<sup>232</sup> Hassan, D. & Hasan, S. 2017: Effectiveness of the current regimes to combat piracy in the Gulf of Guinea: an evaluation. *African Journal of Legal Studies*. 10(1): 7. DOI: 10.1163/17087384-12340014.

<sup>233</sup> Hochschild. 2005: 69.

<sup>234</sup> PDavis. n.d. *Legislation on the slave trade*. Available: <http://www.pdavis.nl/SlaverBackground.htm> [accessed 26 June 2018].

<sup>235</sup> UNCLOS Articles 99 & 110.

<sup>236</sup> Seyle & Madsen. 2015: 23–26.

<sup>237</sup> Jacobi. 2014: 2.

collecting evidence.<sup>238</sup> Where navies traditionally would behave coercively, they now cooperate to address mutual security threats, along with these non-state actors.<sup>239</sup>

Most notable about these transnational and cooperative responses is that the state closest to the 'source' of the crime is no longer necessarily the primary responder. Instead, they are often joined, or even replaced, by more powerful states and non-state actors. As global governance theory explains, this cooperative multi-actor response to a challenge traditionally addressed by the state, is not limited to crime and is also seen in other spheres of governance. The period after the Cold War therefore gave rise not only to globalization, but also global governance as a means to deal with its effects. The 1990s saw a growing consciousness of human rights, stronger international institutions, humanitarianism and more vibrant civil societies,<sup>240</sup> all of which play a role in governance as it is exercised today.

### **3.4.2 Global governance**

Cooperative responses to TOC can be understood in terms of global governance theory, which sheds light on how actors cooperate to exercise control over communal threats. Global governance underpins the idea that governments are not the only entities engaged in governing. It explains how states are influenced by a combination of local and global affairs and interact with global and local actors in order to govern these realities. As Rosenau states:

“in an ever more interdependent world where what happens in one corner or at one level may have consequences for what occurs at every other corner and level, it seems a mistake to adhere to a narrow definition in which only formal institutions at the national and international levels are considered relevant.”

He accordingly defines global governance as “the pursuit of goals through exercise of control which has transnational repercussions.” Various entities participate in global governance – states, international organizations, communities and even family units. Systems of control of all levels of human activity therefore contribute to global governance

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<sup>238</sup> Potgieter. 2012: 13; Vreÿ. 2014: 208.

<sup>239</sup> Potgieter. 2012: 1 – 2; Kaldor. 2007: ix.

<sup>240</sup> Kaldor. 2007: ix.

activities.<sup>241</sup> This also includes TOC networks and terrorist groups<sup>242</sup> who perform government-like functions, either in lieu of traditional governance structures or alongside them. Finkelstein, drawing on Rosenau, concludes that global governance must be considered as an activity and not merely a concept. He therefore defines global governance as “governing, without sovereign authority [and] relationships that transcend national frontiers. Global governance is doing internationally what governments do at home.”<sup>243</sup> Jang et al similarly note how global governance relates to

“the interaction of myriad collective or individual entities emanating from various societal and professional orientations, which form networks that engage to address issues that threaten local and global communities. Global governance is concerned with issues that have become too complex for a single state to address alone.”<sup>244</sup>

Global governance also encompasses localization. Rosenau explains how “processes of globalization and localization are simultaneously unfolding on a worldwide scale” and that this in some instances results in mechanisms of control which extend beyond state borders due to weak national governance capacity.<sup>245</sup> State authority is also impacted by economic and political relations internationally, which have resulted in the increased participation of non-state actors in global processes.<sup>246</sup> Burris et al suggest that such combined state and non-state governance efforts illustrate that states do not have a monopoly on governance and can themselves be governed by non-state actors.<sup>247</sup> Others however argue that global governance does not diminish the power of the state, but that states merely contract out some of their functions.<sup>248</sup> Both views are correct, depending on the context. These opposing views are further explored in Chapter 5 on the responses to Somali piracy.

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<sup>241</sup> Rosenau. 1995: 13.

<sup>242</sup> Burris, S., Kempa, M. & Shearing, C. 2008. Changes in governance: a cross-disciplinary review of current scholarship. *Akron Law Review*. 41(1): 3 - 4; Jang, J., McSparren, J. & Rashchupkina, Y. 2015. Global governance: present and future. *Palgrave Communications*: 2. DOI: 10.1057/palcomms.2015.45.

<sup>243</sup> Finkelstein, L.S. 1995. What is global governance? *Global Governance*. 1(3): 369. DOI: 10.1163/19426720-001-03-90000007.

<sup>244</sup> Jang, McSparren, & Rashchupkina. 2015: 1.

<sup>245</sup> Rosenau. 1995: 19.

<sup>246</sup> Jang, McSparren, & Rashchupkina. 2015: 2.

<sup>247</sup> Burris, Kempa. & Shearing. 2008: 3 - 4.

<sup>248</sup> Abrahamsen, R. & Williams, M.C. 2009. Security beyond the state: global security assemblages in international politics. *International Political Sociology*. 2009(3). DOI: 10.1111/j.1749-5687.2008.00060.

Groupings of actors which combine powers to address a mutual security concern<sup>249</sup> have been described as, *inter alia*, coalitions,<sup>250</sup> assemblages,<sup>251</sup> and security communities<sup>252</sup> or security networks.<sup>253</sup> This thesis refers to such groupings in response to TOC at sea as ‘partnerships’, but where the literature refers to these partnerships in a specific way, the author’s original wording is used. Chasek has defined coalitions as “an ad hoc grouping of nations uniting for a specific purpose.”<sup>254</sup> Dupont suggests that coalitions also form in order to reduce complexity from multiple responses.<sup>255</sup> Gamson describes the members of such coalitions as social units,<sup>256</sup> thereby not limiting memberships to states. This is most reflective of contemporary partnerships against TOC at sea which now often include non-state actors such as international organizations or private stakeholders like the shipping industry. There can also be coalitions within coalitions.<sup>257</sup> The importance of non-state actors and the formation of coalitions within coalitions was illustrated in counter-piracy.

As will be discussed in Chapter 5, counter-piracy’s success is often attributed to its extremely focussed agenda – eradicating piracy, not rebuilding Somalia. Gamson suggests that the stability of a coalition relies on this tacit neutrality of matters outside the scope of the coalition’s purpose. Coalitions therefore do not necessarily reflect an ongoing relationship between stakeholders. Instead they are temporary, can be ad hoc and may cease once a threat has been countered. This allows for cooperation between actors which would perhaps not otherwise interact.<sup>258</sup> This is reflected in rival states which cooperated in response to Somali piracy, such as the US, China, Iran and Russia.<sup>259</sup> The literature on

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<sup>249</sup> Chasek, P. 2015. Negotiating coalitions. In *Essential concepts of global environmental governance*. J. Morrin & A. Orsini, Eds. Abington: Routledge: 130.

<sup>250</sup> Kraska. 2009; Bensahel. 2006; De Oliveira, A.R., Faria, J.R. & Silva, E.C.D. 2018. Transnational terrorism: externalities and coalition formation. *Journal of Conflict Resolution*. 62(3). DOI: 10.1177/0022002716660586.

<sup>251</sup> Gould, A. 2017. Global assemblages and counter-piracy: public and private in maritime policing. *Policing and Society*. 27(4). DOI: 10.1080/10439463.2015.1072180; Bueger. 2018; Abrahamsen & Williams. 2009.

<sup>252</sup> Bueger, C. 2013b. Communities of security practice at work? The emerging African maritime security regime. *African Security*. 6(3-4). DOI: 10.1080/19392206.2013.853579.

<sup>253</sup> Whelan & Dupont. 2017.

<sup>254</sup> Chasek. 2015: 130.

<sup>255</sup> Du Pont, C. 1996. Negotiation as coalition building. *International Negotiation*. 1: 61. DOI:10.1163/157180696X00287.

<sup>256</sup> Gamson, W. A. 1961. A theory of coalition formation. *American Sociological Review*. 26(3): 374. DOI:10.2307/2090664.

<sup>257</sup> Bensahel. 2006: 36.

<sup>258</sup> Gamson. 1961: 373 - 374.

<sup>259</sup> Bueger. 2018: 615; Bueger, C. & Stockbruegger, J. 2013. Security communities, alliances and macro-securitization: the practices of counter-piracy governance. In *Maritime piracy and the construction of global governance*. M.J Struett, J.D Carlson & M.T Nance, Eds. New York: Routledge: 100.

security communities also notes how a community is not characterized by its alliance or formal actions such as treaties, but rather its shared interest and day to day practices.<sup>260</sup> Such partnerships can also change according to the changing nature of the threat or the stakeholders.<sup>261</sup> This will be explored in subsequent chapters.

Similar to coalitions, Abrahamsen and Williams have described a ‘security assemblage’ as a setting where global, local, public and private security actors “interact, cooperate and compete to produce new institutions, practices, and forms of security governance.”<sup>262</sup> Scholars have used ‘assemblages’ to specifically refer to the cooperation between public and private actors, such as in response to Somali piracy.<sup>263</sup> It could also be applied to NGO involvement in countering heroin and ivory trafficking. In contrast to Rosenau, Williams and Abrahamsen argue that instead of global governance resulting in the erosion of state power, it is in fact the state privatising or shifting some of its security functions elsewhere and using that as an extension of state authority. This is reflective of contemporary transnational security governance<sup>264</sup> whereby new security institutions and practices are both local and global, private and public.<sup>265</sup> Assemblages are therefore arguably a type of coalition in which there is public-private cooperation.

### **3.5 Contemporary maritime security governance**

One attempt at defining maritime security considers the actions implemented to achieve maritime security.<sup>266</sup> Potgieter, for example, considers maritime security as the prevention of illicit activity in the maritime domain.<sup>267</sup> For Germond, maritime security is a concept “referring to the security of the maritime domain or as a set of policies, regulations, measures and operations to secure the maritime domain.”<sup>268</sup> The WIO has been the site of many maritime security governance experiments<sup>269</sup> and therefore provides ample examples

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<sup>260</sup> Bueger. 2015a: 163.

<sup>261</sup> Bensahel. 2006: 41.

<sup>262</sup> Abrahamsen & Williams. 2009: 3.

<sup>263</sup> Bueger. 2018; Gould. 2017; Abrahamsen & Williams. 2009.

<sup>264</sup> Abrahamsen & Williams. 2009: 1-3.

<sup>265</sup> Ibid: 15.

<sup>266</sup> See, for example, Bueger. 2018; Potgieter. 2012: 1; Germond. 2015: 138.

<sup>267</sup> Potgieter. 2012: 1 & Germond. 2015: 138.

<sup>268</sup> Germond. 2015: 137 - 138.

<sup>269</sup> Bueger. 2018; Campling & Colas. 2017.

of such measures. This section aims to explain why and on what basis different actors respond to insecurity at sea.

### 3.5.1 In pursuit of control at sea: rights and motivations

As the responses to slavery and both historical and contemporary piracy have illustrated, cooperative partnerships are perhaps even more at home at sea than on land. This includes between state and non-state actors. As state and non-state actors increasingly enter the maritime domain, Seyle and Madsen argue that private actors can play a more meaningful role at sea than on land because of their prominence in the maritime domain and because the maritime stakeholder community is quite small. They add that:

“[t]he enormous sizes of naval areas of operation create challenges in maintaining force projection and situational awareness, and the inclusion of non-state actors in information sharing can act to support security. In addition, the relatively small number of commercial and [NGO] entities that work in the maritime domain compared to land-based situations makes it much easier to identify relevant stakeholders and coordinate them toward addressing problems.”<sup>270</sup>

This can also be applied to inter-state cooperation at sea. While the rights and obligations of states are clear in maritime zones under a Coastal State’s jurisdiction, the position is more complex when a crime is committed on the high seas. Technology now allows for larger ocean areas to be exploited and states have shown an increased interest in extending their national claims to larger areas offshore. UNCLOS allows them to exercise their rights and jurisdiction over their territorial waters, EEZs and contiguous zone,<sup>271</sup> but the majority of ocean space, the high seas, belongs to everyone and no one at the same time. Grotius termed this *mare liberum* - the freedom of the seas.<sup>272</sup> According to Grotius, “the sea is common to all, because it is so limitless that it cannot become a possession of any one, and

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<sup>270</sup> Seyle & Madsen. 2009: research summary.

<sup>271</sup> Khan & Singh. 2014: 526.

<sup>272</sup> Grotius, H. 1609. *Mare liberum*. Translated by R. Hakluyt. Available: [https://scholar.harvard.edu/files/armitage/files/free\\_sea\\_ebook.pdf](https://scholar.harvard.edu/files/armitage/files/free_sea_ebook.pdf) [accessed 10 December 2019].

because it is adapted for the use of all".<sup>273</sup> The principal of *mare liberum* is now codified in UNCLOS Article 87(1).<sup>274</sup>

The high seas fall under no state's jurisdiction and may be used by all, including navies and private vessels. But UNCLOS limits this to the high seas. *Mare liberum* is subject to certain limitations, most importantly the use of the high seas for peaceful purposes<sup>275</sup> and the exclusive jurisdiction of Coastal States in their maritime zones. This is reflective of the principle of *mare clausum*, or the 'closed sea,' which stipulates that some seas are appropriated by states. States are afforded jurisdiction over their nearest waters in order to exercise control and protect their security and resource interests in these spaces,<sup>276</sup> although external states maintain a right of innocent passage through these maritime zones.

International law stipulates what states are allowed to do in response to TOC at sea. This depends primarily on where at sea the activity is responded to and is most challenging when illicit activity takes place on the high seas. In response to this, a number of international treaties have sought different ways to address law enforcement powers at sea. UNCLOS is the primary instrument regulating the rights and obligations of states on the world's oceans. UNCLOS was the outcome of the International Maritime Organization's (IMO) attempt to create a single convention regulating the use of the oceans which was acceptable by all states. It has achieved near universal acceptance and provides a legal framework for managing marine resources in a sustainable way.<sup>277</sup> The following forms the basis of criminal jurisdiction at sea:

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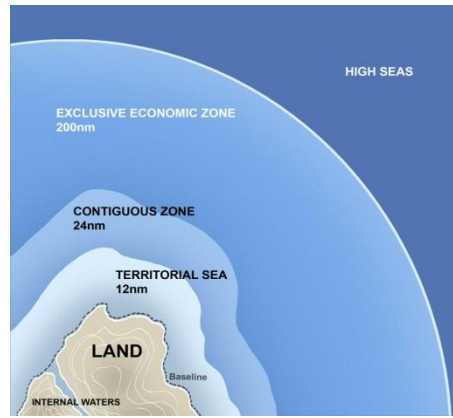
<sup>273</sup> Klein. 2011: 13.

<sup>274</sup> See Annexure D.

<sup>275</sup> UNCLOS Article 88.

<sup>276</sup> Papastavridis, E. 2013. *The interception of vessels on the high seas: contemporary challenges to the legal order of the oceans*. Oxford: Hart Publishing: 27.

<sup>277</sup> Khan & Singh. 2014: 527.



**Figure 2: Maritime Zones**

**Flag State:** The state in which a vessel is registered (flagged), or is otherwise entitled to fly its flag, such as by basis of ownership or nationality, has primary criminal jurisdiction over matters taking place on board that vessel.<sup>278</sup> Vessels on the high seas can be assimilated to the territory of the Flag State.<sup>279</sup> The vessel shall have the Flag State's nationality as per UNCLOS Article 91 and it is as if crimes committed on board the vessel were committed in the state's territory. This jurisdiction is of particular importance on the high seas and is complicated by flags of convenience.

**Crimes in internal waters:** Internal waters are bodies of water on the landward side of a state's baseline,<sup>280</sup> such as river mouths and ports. The right of a Coastal State in such waters is almost identical to those afforded over its land territory and it has sovereignty in these waters. The Coastal State therefore has criminal jurisdiction over crimes committed in its internal waters, regardless of the nationality of the vessel on which the crime is committed. The Flag State's rights give way to the jurisdiction of the Coastal State.<sup>281</sup>

**Crimes in the territorial sea:** The territorial sea is the area within 12 nautical miles from a state's baseline. Coastal States have sovereignty in these waters and may establish jurisdiction over criminal matters committed in this zone if the crime affects the Coastal State, if it disturbs the peace of the Coastal State or the good order of the territorial sea; if a

<sup>278</sup> UNCLOS Articles 91; 92 & 94; UNODC GMCP. 2017: 27.

<sup>279</sup> Guilfoyle, D. 2009a. *Treaty jurisdiction over pirates: a compilation of legal texts with introductory notes*. Prepared for the 3rd meeting of Working Group 2 on Legal Issues of the Contact Group on Piracy off the Coast of Somalia: 17.

<sup>280</sup> UNCLOS Article 8.

<sup>281</sup> UNCLOS Article 8; UNODC GMCP. 2017: 28 - 29.

Flag State requests assistance from the Coastal State or if necessary to suppress drug trafficking.<sup>282</sup>

**Crimes in contiguous zone:** The contiguous zone is the area extending 12 nautical miles from the outer limit of a state's territorial sea. States must proclaim this zone. Criminal jurisdiction in this zone is twofold and will be discussed in Chapter 6 on drug trafficking, but suffice to say that Coastal States may act against violations, or potential violations, against their fiscal, immigration, sanitary and custom regulations.<sup>283</sup>

**Crimes in EEZ:** A state's EEZ is the area extending up to 200 nautical miles from the baseline from which the territorial sea is measured.<sup>284</sup> Coastal States only have criminal jurisdiction over a limited number of illicit activities, namely offences related to the exploration, exploitation, conservation and management of marine resources in the EEZ, such as IUU fishing.<sup>285</sup> To assert these rights a state must have proclaimed an EEZ.<sup>286</sup>

**Crimes in international waters:** All waters not part of any state's internal waters, territorial sea, archipelagic waters, contiguous zone or EEZ are considered the high seas.<sup>287</sup> Only Flag state jurisdiction will apply on the high seas, with a few exceptions<sup>288</sup> as discussed in following chapters.

There is therefore a tension between limiting and expanding control at sea. Although *mare liberum* and *mare clausum* appear to be contrasting principles, Papastavridis argues that the two are complimentary. This is because jurists have historically agreed that states must be afforded the right to control the waters nearest to their coast, reserving the right to freedom of navigation for the high seas. It was the need to protect the public order of the oceans which gave rise to additional maritime zones such as the contiguous zone and EEZ, enabling Coastal States to restrict adverse activities like smuggling in their nearest waters.<sup>289</sup> Klein argues that it was not only the need for public order. Instead, the expanded interpretation of security to include economic, political, societal and environmental

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<sup>282</sup> UNCLOS Article 27; UNODC GMCP. 2017: 29 – 33.

<sup>283</sup> UNCLOS Article 33.

<sup>284</sup> UNCLOS Article 57.

<sup>285</sup> UNCLOS Article 56.

<sup>286</sup> UNCLOS Article 56; UNODC GMCP. 2017: 42 – 44.

<sup>287</sup> UNCLOS Article 86.

<sup>288</sup> UNCLOS Article 110.

<sup>289</sup> Papastavridis. 2013: 36 – 39.

interests, has resulted in states wishing to exercise control over larger areas of ocean space and to have the exclusive use thereof. The law of the sea has allowed for this<sup>290</sup> and the limitations to the freedom of the seas have increased over time to even include restrictions on foreign vessels on the high seas, such as those engaged in piracy and TOCs<sup>291</sup> like drug trafficking<sup>292</sup> and migrant smuggling.<sup>293</sup> Maritime security governance mechanisms restricting freedom of the seas are therefore not static and can adapt as threats emerge. For example, the transport of slaves was initially permitted, but in time became an *erga omnes* obligation on all states. The law of the sea therefore reflects these changing priorities.<sup>294</sup>

Claiming larger portions of the ocean requires states to extend their jurisdiction. This in itself poses a security threat as states claim maritime zones without having the ability, or perhaps even the intention, to act against threats in those spaces. Yet, Germond and Germond-Duret assert that contemporary states and civil society expect increased governance of the maritime domain in order to ensure security and good order at sea. This is also reflected in the evolution of security post-Cold War to extend beyond land.<sup>295</sup> If the oceans are perceived as a mutual interest, it is the responsibility of all states to secure the maritime space<sup>296</sup> and this should be reflected in the development, application and interpretation of legal norms, such as the law of the sea.<sup>297</sup> The UNSC Resolutions on Somali piracy and migrant smuggling are arguably examples of this, as countering both these crimes are in the common interest of numerous states. While some states may choose not to cooperate, instead prioritizing their own interests, the counter-piracy response has illustrated that affected states have little choice but to cooperate when a threat is beyond their individual competencies. An equally robust response is however absent against heroin and ivory trafficking.

Although the sea is often referred to as ungovernable, increasing efforts<sup>298</sup> to respond to maritime threats imply that the sea is worthy of being controlled. UNCLOS confirms this. As

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<sup>290</sup> Klein. 2011: 6 – 8.

<sup>291</sup> Papastavridis. 2013: 36 – 39.

<sup>292</sup> Vienna Convention Article 17.

<sup>293</sup> UNTOC Migrant Smuggling Protocol Article 8.

<sup>294</sup> Klein. 2011: 11- 12.

<sup>295</sup> Germond & Germond-Duret. 2016: 124 - 126.

<sup>296</sup> Klein. 2011: 2 - 3.

<sup>297</sup> Ibid: 18 - 19.

<sup>298</sup> See, for example, Bateman. 2016: 5 - 23.

states have claimed EEZs, forty per cent of the oceans have come under some form of control.<sup>299</sup> Campling and Colas argue that “capitalism has used the oceans as a laboratory to experiment with, and generally enforce novel combinations of sovereignty, territory and appropriation.”<sup>300</sup> Glück argues that the WIO’s strategic and geopolitical importance was already evident in the colonial era and that the current securitization in response to Somali piracy is the contemporary equivalent of colonial ambitions for sea routes. This, Glück and Germond<sup>301</sup> argue, is the protection of capital circulation and *mare liberum* by enclosing maritime spaces under the guise of securitization. A crime like piracy is an obstacle to this circulation and was in fact the initial motivation for extending state monopoly on the use of force to the oceans. This process of producing security space at sea therefore has its roots in colonial history surrounding maritime security. Today, the production of security space is achieved by legal, military and disciplinary institutions and infrastructure such as those employed to counter-piracy.<sup>302</sup> As the following chapters will show, they are however significantly weaker for other forms of TOC which do not threaten economic interests.

Geopolitics help to explain the motivation and strategies of actors within a region. This applies to illicit actors and those who respond to their activities. Geopolitics offer an explanation to how geography constrains politics, how states go about bypassing such constraints and how they use geography to their advantage when doing so. It describes how geography informs and limits maritime security mechanisms and limits the sea power to be exercised by states. Maritime security activities are intrinsically geopolitical as it is the projection of power and the extension of a state’s control beyond a state’s boundaries and into the global maritime domain.<sup>303</sup> States project this power through their navies which functionally extend their control to the opposite side of the globe if necessary. As also seen in the WIO, states justify this projection of power and desire to increase control over maritime space in the name of their supposed legal, ethical and political responsibility to

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<sup>299</sup> Germond & Germond-Duret. 2016: 124 - 131.

<sup>300</sup> Campling & Colas. 2017: 3.

<sup>301</sup> Germond. 2015: 137 – 141.

<sup>302</sup> Glück, Z. 2015. Piracy and the production of security space. *Environment and Planning D: Society and Space*. 33 (2015): 643 - 647. DOI:10.1068/d14245p.

<sup>303</sup> Germond. 2015: 124; 126; 137 - 141.

protect and manage the global commons, or because of states' security interests in protecting themselves from the flow of goods and people from adjacent regions.<sup>304</sup>

Controlling ocean space far away from national territory is therefore strategically important. Germond calls this post-modern territorial expansion, which can be used to reach national goals under the guise of contributing to global maritime security governance.<sup>305</sup> Potgieter supports this idea, offering the example of actors using counter-piracy as a means of 'protecting the common good', when in fact, they wish to establish a strategic presence in the WIO.<sup>306</sup> Germond concludes that a definition of maritime security which fails to consider geopolitics, fails to understand the strategies of various actors in the maritime domain.<sup>307</sup>

### **3.5.2 Maritime security governance in the Indian and Western Indian Ocean**

The geopolitics of the Indian Ocean influence the response to maritime threats in the WIO. The Indian Ocean connects Africa, Asia and the Middle East with the Americas and Europe. It is therefore arguably at the centre of contemporary geopolitics.<sup>308</sup> As it is one of the most strategically important maritime spaces in the world, it has also become one of the most securitized. The Indian Ocean is bordered by 48 states and islands, all of which have a maritime presence to varying extents. There is also a heavy presence of extra-territorial states due to strategic interests or security concerns.

The international presence in the Indian Ocean is reflective of whose interests are being protected. Many of the world's powerful nations have historically maintained a presence in the region, including the US, India, China and the UK. The extra-territorial presence is primarily because of shipping choke points and large volumes of trade passing through the region.<sup>309</sup> These chokepoints are vulnerable to security threats. In addition to TOC, there is youth unemployment, population growth, terrorism and weak governance which results in

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<sup>304</sup> Germond & Germond-Duret. 2016: 124 – 126; Interview Participant 28. 2016.

<sup>305</sup> Germond. 2015: 137 – 141 & Glück. 2015: 643 - 647.

<sup>306</sup> Potgieter. 2012: 13. Research participants also supported this idea.

<sup>307</sup> Germond. 2015: 132.

<sup>308</sup> Van Nieuwkerk, A. 2018. South Africa and the Indian Ocean: assessing strategic interests and roles. *University of the Witwatersrand*. Available: <https://www.wits.ac.za/news/sources/wsg-news/2018/south-africa-and-the-indian-ocean-assessing-strategic-interests-and-roles.html> [accessed 7 October 2019].

<sup>309</sup> Potgieter. 2012: 2.

instability and migration on the Indian Ocean rim, all of which threaten external states.<sup>310</sup> The international presence is also due to competition between regional and extra-territorial powers with interests in the region, such as China and India who use their presence in the Indian Ocean for maritime expansion.<sup>311</sup>

External states maintain a presence through their navies.<sup>312</sup> Considering that navies' role in the modern era is to safeguard trade, this presence is not surprising.<sup>313</sup> The presence of many of these external navies in the WIO was triggered by Somali piracy and has caused the Indian Ocean to have one of the biggest concentrations of navies during peacetime.<sup>314</sup> There are also a growing number of foreign naval bases in the region. Djibouti alone houses the bases of France, the US, China, Japan and Italy.<sup>315</sup> These bases serve as a platform for naval diplomacy and the projection of power<sup>316</sup> and give states quick access, leverage and influence over energy resources and national security priorities.<sup>317</sup> But what is perhaps most notable of maritime security governance in the WIO, is the presence of non-state actors, primarily as a result of private industry counter-piracy measures. Potgieter suggests that the key variables influencing maritime security in the Indian Ocean are these non-state actors, militarization of the region, and the presence of major and extra-territorial powers.<sup>318</sup>

As global governance processes work, these external actors interact with the eastern African littoral states. It has been argued that African states are neglecting TOC as most initiatives are driven by the international community.<sup>319</sup> Although maritime security in the WIO is often driven by these external actors, regional states' agency cannot be marginalized. While some may argue that their meagre presence is due to sea blindness, it is arguably driven by the fact that few African states have sufficient resources and capabilities to counter TOC at

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<sup>310</sup> Van Nieuwkerk. 2018.

<sup>311</sup> Gopaldas. 2018; Van Nieuwkerk. 2018. For more on the impact of external powers in the Indian Ocean, see, for example, Potgieter. 2012: 17; OECD. 2018. *States of Fragility 2018*. Paris: OECD Publishing: 28, 30. Available: <https://doi.org/10.1787/9789264302075-en56> [accessed 30 October 2019].

<sup>312</sup> Potgieter. 2012: 17.

<sup>313</sup> Germond & Germond-Duret. 2016: 126; Potgieter. 2012: 4.

<sup>314</sup> Vreÿ. 2014: 209.

<sup>315</sup> Shen, S. 2019. Why Djibouti hosts naval bases of various foreign powers. *Defence Web*. 29 March. Available: <http://www.ejinsight.com/20190325-why-djibouti-hosts-naval-bases-of-various-foreign-powers/> [accessed 7 October 2019].

<sup>316</sup> Germond. 2015: 139; Interview Participant 28. 2016.

<sup>317</sup> Gopaldas. 2018.

<sup>318</sup> Potgieter. 2012: 1 - 2.

<sup>319</sup> Shaw, M. & Reitano, T. 2013. *The evolution of organized crime in Africa: towards a new response*. (Paper No. 244). Pretoria: ISS: 3.

sea. Bateman has singled out East African countries as being least capable in this regard.<sup>320</sup> African states have historically been absent from the Indian Ocean. With the exception of perhaps South Africa, no African WIO littoral states have been able to exert sea power.<sup>321</sup> The South African navy is the only regional navy which has blue water capacity – the ability to operate far from shore - and even this capacity is limited due to few assets.

Eastern African states can therefore only access their nearest waters and cannot compete with the capability of international naval fleets operating on and from the high seas. Despite persisting suggestions of African sea blindness,<sup>322</sup> the negative consequences of neglecting ocean territories and maritime strategies have caused the continent to increasingly grasp the importance of maritime security.<sup>323</sup> Somali piracy caused African states and the larger international community to realize that offshore threats pose a grave danger to various interests and have a global impact. There was also a renewed appreciation of the relationship between African and global security<sup>324</sup> as globalization has increased Africa's ability to impact the global economy and stability.<sup>325</sup> The trafficking of heroin and cocaine via eastern and western Africa has also highlighted Africa's role in global threats. As a result, maritime security increasingly finds its way onto the agenda of African governments,<sup>326</sup> the AU and regional bodies such as the South African Development Community (SADC). An ocean awakening however means little if most African states remain unable to extend security offshore.<sup>327</sup> Vreÿ argues that the ongoing inability to operate far from shore will have little impact on maritime security threats which, coupled with the interplay with threats on land, leaves African states vulnerable.<sup>328</sup> The terror in northern Mozambique and the use of boats by the insurgents is perhaps the most stark example of this.<sup>329</sup> Regional

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<sup>320</sup> Bateman. 2016: 10.

<sup>321</sup> Malaquias, A. 2017. Drugs, WMD and Africa. *Proceedings of the First International Workshop on Combating Transnational Threats*.

<sup>322</sup> Walker & Reeva. 2019.

<sup>323</sup> Malaquias. 2017.

<sup>324</sup> Ibid; Vreÿ. 2014: 203; 206.

<sup>325</sup> Shaw, M. 2014. Organized crime in Africa. In *Transnational organized crime: an overview from six continents*. J. Albanese & P. Reichel, Eds. London: Sage: 94.

<sup>326</sup> Vreÿ. 2014: 203; 206; 215.

<sup>327</sup> Malaquias. 2017.

<sup>328</sup> Vreÿ. 2014: 209 - 210.

<sup>329</sup> Ramsay, S. 2021. Mozambique insurgency: unseen pictures show 'carnage' of Islamic State attack that killed dozens. *Skynews*. 5 April. Available: <https://news.sky.com/story/unseen-pictures-show-carnage-of-islamic-state-attack-that-killed-british-man-in-mozambique-12265947> [accessed 10 April 2021].

states must however find a way to be part of the responses<sup>330</sup> to TOC at sea. The response to Somali piracy has shown the meaningful role to be played by them.

Gastrow argued in 2011 that the international community did not consider organized crime in East Africa a serious threat.<sup>331</sup> Shaw and Reitano argue that eastern Africa has been the slowest region on the continent to unite in the response against rising levels of TOC<sup>332</sup> as it lacks the ability to effectively cooperate.<sup>333</sup> Because of the limited capacity of African states, the majority of their maritime security activities have been responsive. They have also been controversial at times, such as Kenya's President Kenyatta ordering the destruction of a heroin trafficking yacht despite a court ordering its preservation for evidence. A positive exception includes Operation Copper which is conducted in terms of a bilateral agreement between South Africa and Mozambique to patrol the southern WIO<sup>334</sup> in recognition of maritime security threats shifting south.<sup>335</sup> Part of the motivation for Operation Copper's establishment was because its patrol area falls outside of the international community's counter-piracy patrol area. It is therefore a promising commitment from south-eastern African states to patrol their coastlines.<sup>336</sup> However, its operation is greatly limited by resource constraints and as a result there have been periods of no patrols.<sup>337</sup>

Another example is the trilateral Memorandum of Understanding (MoU) concluded in 2012 between Mozambique, Tanzania and South Africa, agreeing to cooperate in maritime security matters and to conduct joint counter-piracy exercises.<sup>338</sup> This is South Africa's only trilateral defence agreement.<sup>339</sup> Another notable contribution of eastern African states has been law reforms criminalizing TOC activities at sea and their criminal justice response to

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<sup>330</sup> Herbert-Burns. 2012: 17.

<sup>331</sup> Gastrow. 2011: 10.

<sup>332</sup> Shaw & Reitano. 2013: 19.

<sup>333</sup> Intergovernmental Authority on Development. 2014. *Draft report on transnational organized crime in the IGAD region*. Intergovernmental Authority on Development, Global Initiative against Transnational Organized Crime & University of Cape Town: 10.

<sup>334</sup> Vreÿ. 2014: 212 - 214.

<sup>335</sup> South Africa Department of Defence. n.d. *Operation Copper - maritime security in the Mozambican channel*. Available: [http://www.dod.mil.za/operations/international/operation\\_copper.htm](http://www.dod.mil.za/operations/international/operation_copper.htm) [accessed 10 October 2019].

<sup>336</sup> Vreÿ. 2014: 212 - 214.

<sup>337</sup> DefenceWeb. 2018. *Ramaphosa approves Op Copper extension*. 20 April. Available: <https://www.defenceweb.co.za/security/maritime-security/ramaphosa-approves-op-copper-extension/> [accessed 10 October 2019].

<sup>338</sup> Lautier, J. 2013. SADC and maritime security. *Africa Conflict Monthly Monitor*. May Edition: 75.

<sup>339</sup> Parliamentary Monitoring Group. 2019. *Question NW21 to the Minister of Defence and Military Veterans*. 14 February. Available: <https://pmg.org.za/committee-question/10956/> [accessed 21 October 2019].

Somali piracy, although this relies primarily on receiving suspects from international navies. A country like Seychelles has been integral in the fight against maritime crime in the region, but even their capable coast guard has a limited patrol range. These regional efforts to participate in countering TOC at sea however illustrate that regional states have a vital role to play, even with their limited abilities.

### **3.6 Conclusion**

TOC in eastern Africa's surrounding waters reflects a global trend in non-state actors increasingly posing a threat from the world's oceans as the result of globalization. Eastern Africa is now central to many TOCs as internal and external criminal networks have sought opportunities across its borders. The maritime nature of these threats presents unique challenges, which have shaped the current interpretation of maritime security and has necessitated a re-imagining of counter-responses which now includes both state and non-state actors working cooperatively in global governance partnerships. TOC in the WIO is the result of a combination of local, regional and global conditions, resulting in a global enterprise. It is this global nature which poses the biggest challenge in stemming these threats. Yet, as the response to Somali piracy has shown, this should not be a barrier to establish responses, as this globalized nature also allows for a global response. The following chapters will explore piracy, heroin and ivory trafficking, considering the applicable legal frameworks, modus operandi and resulting responses in order to understand the nature of cooperative responses to these crimes.

## 4 Bandits of the sea - piracy and its emergence in the Horn of Africa

While TOC might seem like a construct of recent times, especially in terms of international law, various organized crimes have existed for centuries.<sup>340</sup> Maritime piracy is as old as seaborne trade,<sup>341</sup> but after its near eradication centuries ago, these 'organized maritime bandits'<sup>342</sup> appeared mostly in the imagination. Now, a new pirate has emerged as the result of economic and political instability in many of the world's littoral states. Similar to historical piracy, its contemporary equivalent has a global reach, posing a threat to many world regions as armed pirates are looking for vessels to hijack in order to steal or sell the vessel and cargo or to negotiate ransom for the return of the vessel, crew and commodities. Pirates are currently active in Southeast Asia,<sup>343</sup> the Gulf of Guinea<sup>344</sup> and have re-emerged in the Caribbean.<sup>345</sup> But none of these regions have captured the world's attention quite like Somalia.

This chapter forms the contextual and legal basis for engaging the responses to Somali piracy in Chapter 5. The first section contextualizes piracy's historical development and its eventual emergence in Somalia.<sup>346</sup> It explains how robbery at sea turned into a legitimate means of warfare before being criminalized as piracy and eventually becoming a crime of universal jurisdiction in international law. The second section then considers the exceptional legal framework applicable to piracy. By considering piracy's historical trajectory and its manifestation in Somalia in the 21<sup>st</sup> century, many ironies and parallels are identified which helps us to understand the responses to piracy, and perhaps also other TOCs at sea, as discussed in following chapters.

### 4.1 From simple sea robbers to threat to international peace and security

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<sup>340</sup> Von Lampe. 2016: 15 – 27.

<sup>341</sup> World Bank. 2013. *The pirates of Somalia: ending the threat, rebuilding a nation*. Washington: World Bank: xxi.

<sup>342</sup> Kraska. 2009: 198.

<sup>343</sup> Mccauley, A. 2014. Pirates in Southeast Asia: the most dangerous waters in the world. *TIME*. Available: <https://time.com/piracy-southeast-asia-malacca-strait/> [accessed 21 November 2019].

<sup>344</sup> Sow, M. 2018. Figures of the week: piracy increasing in the Gulf of Guinea. *Brookings Institute*. 2 August. Available: <https://www.brookings.edu/blog/africa-in-focus/2018/08/02/figures-of-the-week-piracy-increasing-in-the-gulf-of-guinea/> [accessed 21 November 2019].

<sup>345</sup> BBC. 2019b. *Venezuelan pirates - the new scourge of the Caribbean*. 28 January. Available: <https://www.bbc.com/news/stories-47003108> [accessed 21 November 2019].

<sup>346</sup> For a full history of piracy, see Konstam, A. 2019. *The pirate world: a history of the most notorious sea robbers*. Oxford: Osprey Publishing.

Pirates have preyed on seafarers for as long as maritime commerce has existed and have since scoured the waters surrounding Europe, Africa, the Caribbean, and the South China Sea.<sup>347</sup> Pirates were initially considered as combatants in war times,<sup>348</sup> with the Roman Empire tolerating piracy as a means to weaken enemy states and to provide naval training opportunities.<sup>349</sup> Pirates were therefore not always considered criminals. State-sponsored pirates, called privateers, were contracted by states to conduct legitimate acts of war<sup>350</sup> similar to a navy. Today, this would be the equivalent of States employing private security at sea due to limited military assets. One could also equate this to pirates acting against IUU fishing on behalf of Somalia, as discussed in following sections. Over time, there was to be a distinction between sea robbers seizing vessels and goods on their own accord and those doing so as part of the state-sponsored act of privateering. While privateering was still allowed, piracy was eventually incorporated as a crime in English law.<sup>351</sup>

States continued to authorized privateers to prey on other states' shipping vessels in an effort to weaken their claims over the world's oceans. But as the Royal Navy gained naval supremacy, privateering became increasingly criminalized by the UK and other European nations, causing former privateers to turn to piracy.<sup>352</sup> Privateering was declared illegal through the Paris Declaration Respecting Maritime Law in 1856. The declaration meant that states were responsible for all vessels engaged in military operations<sup>353</sup> and led to the increased importance of Flag State responsibility for vessel actions.<sup>354</sup> Flag State responsibility and jurisdiction are now reflected in UNCLOS Articles 92 and 94.

Global pirate activity then mostly died down until the twenty-first century, before it re-emerged in the Gulf of Guinea, the Gulf of Aden and again in the South China Sea. Of these regions, only piracy off the Horn of Africa, and limited incidents in the Gulf of Guinea, qualify

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<sup>347</sup>Oceans Beyond Piracy. n.d.a. *Evolution of piracy: historical piracy*: 1 - 2. Available: <http://oceansbeyondpiracy.org/sites/default/files/attachments/Historical%20Piracy.pdf> [accessed 31 October 2017].

<sup>348</sup> Hassan & Hasan. 2017: 2.

<sup>349</sup> Oceans Beyond Piracy. n.d.a: 1 - 2.

<sup>350</sup> Hassan & Hasan. 2017: 8.

<sup>351</sup> Ibid: 2.

<sup>352</sup> Ibid: 6 – 8; Oceans Beyond Piracy. n.d.a: 1.

<sup>353</sup> Oceans Beyond Piracy. n.d.a: 2.; Collins. 2014: 438; Haywood, R. & Spivak, R. 2012. *Maritime piracy*. Oxfordshire: Routledge: 36; Encyclopaedia Britannica. n.d. *Privateering*. Available: <https://www.britannica.com/topic/privateer> [accessed 31 October 2017].

<sup>354</sup> Oceans Beyond Piracy. n.d.a: 2.

as ‘piracy’<sup>355</sup> as per the international law definition, which requires acts of piracy to take place on the high seas. Although resembling historical piracy, contemporary ‘piracy’ no longer takes place primarily on the high seas, it is no longer state-sponsored and requires a new set of skills, weapons and strategies. Counter-measures are also no longer limited to naval actions,<sup>356</sup> as discussed in Chapter 5.

## 4.2 The emergence of piracy in Somalia

This section considers the conditions in Somalia giving rise to piracy,<sup>357</sup> the pirates’ modus operandi, the structure of pirate networks and piracy’s impact on Somalia and the wider region.

Somalia has been without a *de facto* central government since 1991 when the Somali Revolutionary Socialist Party (SRSP) was ousted.<sup>358</sup> It has experienced ongoing inter- and

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<sup>355</sup> Ibid: 1 - 2

<sup>356</sup> Hassan & Hasan. 2017: 8.

<sup>357</sup> There is a dense literature on the state of Somalia. See, for example, US Department of State. n.d. *Somalia*. Available: <http://www.state.gov/j/cso/where/engagements/somalia/index.htm> [accessed 15 June 2015]; Oluoch, F. 2014. AMISOM progresses despite PM changes. *The East African*. 27 December. Available: <http://www.theeastafrican.co.ke/news/Amisom-progresses-despite-PM-changes/-/2558/2570748/-/10I9079z/-/index.html> [accessed 15 June 2015]; United Nations. 2015. *Report of the Secretary-General on Somalia January 2015*. S/2015/51. 23 January. Available: <https://reliefweb.int/sites/reliefweb.int/files/resources/N1501704.pdf> [accessed 19 October 2017]; Scott, K. 2014. *Prosecuting pirates: lessons learned and continuing challenges*. Oceans Beyond Piracy Research Report. Bloomfield: One Earth Future Foundation: 27-28; World Bank. 2013: 161; International Crisis Group. 2011. *Somalia: the Transitional Government on life support*. Africa Report 170. 21 February. Available: <https://d2071andvip0wj.cloudfront.net/170-somalia-the-transitional-government-on-life-support.pdf> [accessed 11 October 2020]; Hiiraan Online. 2015. *Somalia peace process needs paradigm shift to address realities - expert*. 8 January 2015. Available: [http://www.hiiraan.com/news4/2015/Jan/97668/somalia peace process needs paradigm shift to address realities experts.aspx](http://www.hiiraan.com/news4/2015/Jan/97668/somalia%20peace%20process%20needs%20paradigm%20shift%20to%20address%20realities%20experts.aspx) [accessed 15 June 2015]; Hanson, S. & Kaplan. E. 2008. Somalia’s Transitional Government. *Council on Foreign Relations*. 12 May. Available: <http://www.cfr.org/somalia/somalias-transitional-government/p12475#p0> [accessed 12 December 2019]; Stanford University. n.d. *Mapping military organizations: Islamic Courts Union*. Available: <http://web.stanford.edu/group/mappingmilitants/cgi-bin/groups/view/107> [accessed 6 October 2017]; Meduna, M.M. 2012. Somalia: failed state expired? *SAIS Europe Journal of Global Affairs*. 1 April. Available: <http://saisjournal.org/posts/somalia-failed-state-expired> [accessed 11 October 2017].

<sup>358</sup> For a more detailed history of Somalia, see, for example: Clapham, C. 2017. *The Horn of Africa: state formation and decay*. London: Hurst & Company; Menkhous, K. 2009. Somalia: what went wrong?. *The RUSI Journal*. 154 (2009). DOI: 10.1080/03071840903216395; Leeson, P.T. 2007. Better off stateless: Somalia before and after government collapse. *Journal of Comparative Economics*. 35 (2007). DOI: 10.1016/j.jce.2007.10.001; Solomon, H. 2014. Somalia’s clans and the need to go beyond the Nation-state. *Africa Insight*. 44 (2); Bueger, C. 2015b. Learning from piracy: future challenges of maritime security governance. *Global Affairs*. 1(2015): 34 DOI: 10.1080/23340460.2015.960170; The Guardian. 2012. *Somalia: a history of events from 1950 to the present - in pictures*. 23 February. Available: <https://www.theguardian.com/global-development/gallery/2012/feb/23/somalia-history-events-in-pictures> [accessed 20 December 2017]; Meduna. 2012.

intra-state conflicts,<sup>359</sup> terrorism, natural disasters,<sup>360</sup> failed state-building attempts, fruitless external interventions at the cost of traditional systems<sup>361</sup> and failure by the international community to acknowledge the autonomy of the only truly functioning forms of government in northern Somalia. This fragility is the result of decades of internal, regional<sup>362</sup> and global conditions which have caused Somalia to be fragmented and conflict-ridden.<sup>363</sup> Understanding why various attempts to restore security and stability have failed is necessary to understand why some Somalis turned to piracy and why this mobilised the international community to respond on a scale never experienced before.

There have been several attempts at state formation in Somalia. This includes the strict Sharia-based Islamic Courts Union (ICU)<sup>364</sup> which eventually gave rise to al-Shabaab,<sup>365</sup> the internationally backed Transitional Federal Government (TFG)<sup>366</sup> and the current and first internationally recognised government since 1991, the Federal Government of Somalia (FGS).<sup>367</sup> The FGS's reach however fails to extend even across Mogadishu<sup>368</sup> as international

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<sup>359</sup> See, for example, Solomon. 2014: 187.

<sup>360</sup> Leeson. 2007: 692; Wright. 2013: 25.

<sup>361</sup> World Bank. 2013: 137 - 138.

<sup>362</sup> Clapham. 2017: 189.

<sup>363</sup> A staff member of the ICRC noted during a seminar: "A twenty five year war generates such destruction and loss of infrastructure that people lose completely their livelihoods, their means of coping with emergencies, and they put the population that remains into these chronic conflicts into a very vulnerable position [...] They don't have no coping mechanism for any drought, for any food or for anything because it's way too long. And those type of conflicts that go over ten or fifteen years get a life of their own".

<sup>364</sup> See, for example, World Bank. 2013: 140 - 141; Clapham. 2017: 16; 151 – 155; Menkhaus. 2009: 7; Stanford University. n.d; Samatar, A.I., Lindberg, M. & Mahayni, B. 2010. The dialectics of piracy: the rich versus the poor. *Third World Quarterly*. 31(8): 1384. DOI:10.1080/01436597.2010.538238.

<sup>365</sup> See, for example, World Bank. 2013: 141.

<sup>366</sup> See, for example, Clapham. 2017: 152 – 155; Leeson. 2007: 692; Meduna. 2012; Hanson & Kaplan. 2008; World Bank. 2013: 161; Stanford University. n.d.

<sup>367</sup> See, for example, Clapham. 2017: 155 – 157; United Nations. 2015; Oluoch. 2014; Hiiraan Online. 2015; Collins. 2014: 445; Thomas. T.T. 2014. Next up in Somalia's fragile transition: bridge political divides. *World Politics Review*. 26 January 2014. Available: <http://www.worldpoliticsreview.com/articles/15176/next-up-in-somalia-s-fragile-transition-bridge-political-divide> [accessed 15 June 2015]; Burke, J. 2017. Somalis greet 'new dawn' as US dual national wins presidency. *The Guardian*. 8 February. Available: <https://www.theguardian.com/world/2017/feb/08/somali-presidential-election-won-mohamed-abdullahi-mohamed> [accessed 15 October 2017]; United Nations Development Programme. 2017. *Somalia*. Available: <http://www.so.undp.org/> [accessed 15 December 2017]; Kiley, S. 2018. Funding al-Shabaab: how aid money ends up in terror group's hands. *CNN*. 12 February. Available: <https://edition.cnn.com/2018/02/12/africa/somalia-al-shabaab-foreign-aid-intl/index.html> [accessed 12 February 2019]; UN Security Council. 2017. *Report of the Secretary-General on Somalia December 2017*. S/2017/1109. Available: [http://www.un.org/ga/search/view\\_doc.asp?symbol=S/2017/1109](http://www.un.org/ga/search/view_doc.asp?symbol=S/2017/1109) [accessed 12 February 2018]; Security Council Report. 2017. *August 2017 Monthly Forecast: Somalia*. 31 July. Available: [http://www.securitycouncilreport.org/monthly-forecast/2017-08/somalia\\_31.php](http://www.securitycouncilreport.org/monthly-forecast/2017-08/somalia_31.php) [accessed 6 October 2019]; US Department of State. n.d.

interventions, coupled with Somalia's clan-based affinity and historical territorial and governance challenges, remain an obstacle to current attempts at traditional state formation. Instead, clans have been the primary provider of public goods.<sup>369</sup> The African Union Mission in Somalia (AMISOM), a peacekeeping mission, has controlled territory on behalf of the TFG and the FGS since 2007.<sup>370</sup> Many are however of the opinion that if AMISOM and international assistance are to withdraw, the FGS will collapse.<sup>371</sup> Research participants referred to AMISOM as a circus<sup>372</sup> and to the FGS as the Mogadishu Town Council because "they don't deliver anything [...] it is about all they control."<sup>373</sup> The FGS is also fraught with corruption.<sup>374</sup>

Somalia is divided into *de facto* autonomous regions, each experiencing varying levels of instability<sup>375</sup> and each governing itself with varying levels of success.<sup>376</sup> As Participant 9, a former political advisor to the EU in Somalia, noted, "it's the regional administrations that have the support of the people and that are much closer to their constituents who are going to bring about actual government."<sup>377</sup> The south of Somalia is the most unstable<sup>378</sup> and Mogadishu, Somalia's capital, is considered most volatile. At the height of piracy, pirate activity was however primarily concentrated further north in Puntland, which has a relatively successful administration resembling a government.<sup>379</sup> According to Kraska, "Puntland authorities have provided a modicum of order in contrast to the mayhem of Mogadishu farther to the south."<sup>380</sup> Craze also called Puntland relatively peaceful in

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<sup>368</sup> Scott. 2014: 27 - 28; World Bank. 2013: 161; International Crisis Group. 2011; Interview Participants 8 & 28. 2016.

<sup>369</sup> See, for example, Clapham. 2017: 14 - 22; 56; 59; Leeson. 2007: 691; World Bank. 2013: 137 - 140; Solomon. 2014: 181 - 182; 186; 192, Interview Participants 6 & 9. 2016.

<sup>370</sup> Clapham. 2017: 152 - 155.

<sup>371</sup> Ibid: 191; Personal communications. 2016. Nairobi, Kenya; Interview Participant 2. 2018. Nairobi, Kenya.

<sup>372</sup> Interview Participant 7. 2016. Nairobi, Kenya.

<sup>373</sup> Interview Participant 2. 2018; Interview Participant 8. 2016. Also see Scott. 2014: 27 - 28; World Bank. 2013: 161.

<sup>374</sup> Interviews Participants 2; 3; 4; 8 & 9.

<sup>375</sup> See, for example, Clapham. 2017: 143 - 149.

<sup>376</sup> Solomon. 2014: 192; Hassan, K. 2011. *A Review of Somalia's (& semi-autonomous regions) fisheries legislation & management SF/2011/11*. Ebene: Indian Ocean Commission Smart Fish Programme. Available: [http://commissionoceanindien.org/fileadmin/projets/smartfish/Rapport/A\\_REVIEW\\_OF\\_SOMALIAS\\_AND\\_FISHERIES\\_LEG\\_MANAGEMENT.pdf](http://commissionoceanindien.org/fileadmin/projets/smartfish/Rapport/A_REVIEW_OF_SOMALIAS_AND_FISHERIES_LEG_MANAGEMENT.pdf) [accessed 11 October 2017].

<sup>377</sup> Interview Participant 9. 2016. Nairobi, Kenya.

<sup>378</sup> World Bank. 2013: 128 - 142.

<sup>379</sup> Clapham. 2017: 141 - 143.

<sup>380</sup> Kraska. 2009: 113.

comparison to other regions, having a “relatively functional” local government, security force and judiciary.<sup>381</sup>

Further north, Somaliland, Somalia’s most stable region, functions more like a sovereign state<sup>382</sup> than Somalia as a whole may ever be able to. Herbst has suggested that African states are “born easily, but do not die”,<sup>383</sup> suggesting that that some states, such as Somalia, are a legal fiction, considered by the international system as sovereign states despite having no sovereign qualities.<sup>384</sup> Clapham therefore argues that the FGS will likely fall apart if the international community were to withdraw its support and will never be able to offer any meaningful public services because the package which the international system applies to state building is not suited to the peculiarities of Somalia.<sup>385</sup> Somaliland however has shown what the possibilities of statehood can be when societies are left to organize themselves.<sup>386</sup>

Scholars like Herbst and Clapham have written extensive works on African state formation<sup>387</sup> and the need for African governance structures to be tailored to African realities, even if this does not resemble a government to the West. Clapham argues in favour of Somalia governing themselves as they see fit,<sup>388</sup> because the Western means of governance are not suited to Somalia and will continue to fail.<sup>389</sup> Participant 9 commented that having grown up without a government, the clan is the only form of government many Somalis know.<sup>390</sup> Participant 6, an aid worker in Somalia, also noted the aversion to Western governance structures in Somalia:

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<sup>381</sup> Craze, S. 2017. Somali pirates are back. Only a strong state can put an end to its activities. *The Conversation*. 3 July. Available: <https://theconversation.com/somali-pirates-are-back-only-a-strong-state-can-put-an-end-to-their-activities-80157> [accessed 2 February 2020].

<sup>382</sup> See, for example, Clapham. 2017: 141 – 142; 160 – 166; 178; 189; World Bank. 2013: 142.

<sup>383</sup> Herbst. 2000: 272.

<sup>384</sup> Ibid: 261; 266; Interview Participant 28. 2016.

<sup>385</sup> Clapham. 2017: 191. Interview Participants often commented on the need for governance structures in Somalia to be tailored to the needs of the Somali people and not to the traditional governance checklist used by the West. Statehood is however assumed a necessary constituent of global order (Clapham. 2017: 177) and anything that does not reflect this is considered as problematic by the international community.

<sup>386</sup> Clapham. 2017: 167.

<sup>387</sup> Herbst. 2000: 252.

<sup>388</sup> See, for example, Clapham. 2017; Leeson. 2007; Solomon. 2014; World Bank. 2013: xxv; Patriarca, G. 2013. Macroeconomic implications and strategies for disrupting the financial piracy networks. In *Insecurity at sea: piracy and other risks to navigation*. G. Andreone, G. Bevilacqua, G. Cataldi & C. Cinelli, Eds. Napoli: Giannini Editore: 227.

<sup>389</sup> Clapham. 2017: 157 – 158.

<sup>390</sup> Interview Participant 9. 2016.

“[i]t’s something that you sense also with the general population. They had enough of these displacements. They had enough of this horrible life. They want to settle. So I think in theory they want a government [...]to function like a normal country [...] but at the same time they recognise that maybe this is not the right approach.”<sup>391</sup>

Similarly, attempts to implement responses addressing piracy or any of Somalia’s other challenges are unlikely to succeed if the needs of Somalis are ignored.<sup>392</sup> As Kraska states:

“the West does not need a piracy policy, it needs a Somali policy [...] that recognizes the regional and tribal authorities that do the real work of bringing greater stability to a nation awash in hardship.”<sup>393</sup>

The longevity of the conflict in Somalia has devastated many parts of the country.<sup>394</sup> The instability has resulted in poverty, famine and a lack of basic human rights<sup>395</sup> with nearly half of Somalis relying on aid.<sup>396</sup> Insecurity in certain regions is such that an aid organization like the ICRC has to move around with armed escorts.<sup>397</sup> After many years at number one, Somalia currently occupies the second position on the Fund for Peace Fragile States Index, having only recently been overtaken by South Sudan and Yemen respectively.<sup>398</sup> This is however arguably not a reflection of improvement in Somalia, but rather rapidly

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<sup>391</sup> Interview Participant 6. 2016. Nairobi, Kenya. Interview Participant 2 also commented: “[Y]ou have to look to where Somalia has come from. From a very moderate Islamic country, back before Siad Barre [...]Then to the restrictions of Siad Barre which then lead to an extremist regime that then got replaced by, what is the word, convenient arrangements between extremists and clans and what the international community wanted, to where you are now with what the international community wants because, you know, they didn’t want it to become the centre or the heart of terrorist activity that influences the region. And it occupies a very strategic position in the Indian Ocean. And are they willing? The problem with successive governments from the transitional federal governments now is being corruption. In a way that that means that you have Ministers that come into office, and their sole objective is that they know they’re not going to be there very long and to make as much money as possible. So huge amounts of Somali revenue is just devoted to the, this sort of hierarchy.”

<sup>392</sup> Interview Participant 6. 2016.

<sup>393</sup> Kraska, J. 2010. Freakonomics of maritime piracy. *Brown Journal of World Affairs*. 16(2): 118.

<sup>394</sup> See, for example, Clapham. 2017: 29; World Bank. 2016. *Data: Somalia*. Available: <https://data.worldbank.org/country/somalia> [accessed 15 December 2017]; United Nations Development Programme. 2017; Kiley. 2018; UN Security Council. 2017; Raich, J. 2016. *International Committee of the Red Cross Presentation*. 12 April. South African Institute for International Affairs, Cape Town: SAIIA.

<sup>395</sup> Collins. 2014: 445.

<sup>396</sup> Security Council Report. 2017.

<sup>397</sup> Interview Participant 6. 2016.

<sup>398</sup> Fund for Peace. 2020. *Fragile States Index 2020*. Available <https://fragilestatesindex.org/data/> [accessed 15 July 2020].

deteriorating conditions in Yemen and South Sudan. Somalia is therefore the most fragile state experiencing pirate activity globally.

Considering the situation in Somalia, it is not surprising that a TOC like piracy soon emerged as piracy is appearing in regions where governments are unable to enforce maritime law and to prevent their territorial waters from producing acts of piracy.<sup>399</sup> Civil war, anarchy and failed external interventions have led to the disintegration of state institutions and it was in this space of insecurity, economic collapse and opportunity for predation, that Somali piracy emerged.<sup>400</sup> Weak governance, lack of alternative economic opportunity and weak rule of law have historically been reasons why piracy has emerged.<sup>401</sup> As Kraska notes:

“[w]hether occurring in the Caribbean Sea in the eighteenth century or in the Gulf of Aden in the twenty-first century, nothing is as inimical to piracy as peace, good government, and the rule of law.”<sup>402</sup>

### **4.3 The political economy of Somali piracy**

It is important to identify the conditions giving rise to piracy, as these must be addressed for piracy to not only be suppressed, but eradicated. There are two dominating narratives which account for the emergence of Somali piracy – it either developed as a product of state failure and opportunism, or due to Somalis acting as a coastguard in absence of a government to do so on their behalf.<sup>403</sup> It arguably resulted as a consequence of both due to the opportunity which conditions in Somalia presented. Keating suggests that piracy emerged in 2005 due to political and economic conditions combining to form a desperate

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<sup>399</sup> Bevilacqua, G. 2013. Corporate social responsibility: an alternative development strategy for piracy management. In *Insecurity at sea: piracy and other risks to navigation*: 110.

<sup>400</sup> Schbley & Rosenau. 2013: 13; Clapham. 2017: 143 – 149.

<sup>401</sup> Hassan & Hasan. 2017: 1. Also see Vagg, J. 1993. Context and linkage: reflections on comparative research and 'internationalism' in Criminology. *The British Journal of Criminology*. 33(4): 549 - 550. DOI: 10.1093/oxfordjournals.bjc.a048358.

<sup>402</sup> Kraska. 2009: 200.

<sup>403</sup> Bueger, C. 2013c. Practice, pirates and coast guards: the grand narrative of Somali piracy. *Third World Quarterly*. 34 (10): 1812; 1825. DOI:10.1080/01436597.2013.851896; Keating, T. 2013. The political economy of Somali piracy. *SAIS Review of International Affairs*. 33(1): 185; 187. DOI: 10.1353/sais.2013.0009.

situation to which warlords, fishermen and militias responded and soon realized its profitability as a business model.<sup>404</sup>

According to the pirates' narrative, they took to the seas to protect their waters from foreign exploitation, acting as a 'coast guard' and fining foreign vessels who were illegally fishing in their waters. This is similar to pirates during the renaissance who extracted taxes from vessels for using disputed sea lanes.<sup>405</sup> However, by the mid-2000s, the model changed<sup>406</sup> and the first successful hijacking for ransom took place in 2005. Attacks quickly increased and by 2007 the Somali coast was home to the most pirate activity in the world.<sup>407</sup> While initial attacks were concentrated in territorial seas near the Somali coast, by 2006 pirates expanded deeper into the WIO and onto the high seas.<sup>408</sup> The area covered by pirates eventually extended over 4 million km<sup>2</sup> into the WIO with attacks recorded as far off as Mozambique and Madagascar.<sup>409</sup> Attacks peaked in 2010 when fifty successful attacks were recorded. This was despite the presence of navies deployed in the area since 2008. A high rate of attacks continued throughout 2011 before more than halving in 2012.<sup>410</sup> Regardless of the catalyst, what arguably started as defending Somalia's resources and security in its territorial waters, had shifted into extracting ransoms from the shipping industry, turning piracy into a lucrative business.<sup>411</sup>

#### **4.3.1 Filling the void: pirates as Coast Guard**

Somalia has the longest coastline and the fifth largest EEZ on mainland Africa. Its waters hold some of the most valuable fish stocks globally.<sup>412</sup> This, coupled with Somalia's lack of government institutions able to protect its maritime domain, paved the way for exploitation by foreign vessels that began illegally fishing and dumping toxic waste in its waters.<sup>413</sup>

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<sup>404</sup> Keating. 2013: 185 - 188. Also see Wright. 2013: 35; Samatar et al. 2010; Glück. 2010; Zwolski, K. & Kaunert, C. 2014. Somalia versus Captain "Hook": assessing the EU's security actorness in countering piracy off the Horn of Africa. *Cambridge Review of International Affairs*. 27 (3): 598. DOI: 10.1080/09557571.2012.678295.

<sup>405</sup> Guilfoyle. 2009a: 26.

<sup>406</sup> World Bank. 2013: 6; Bevilacqua. 2013: 111; Patriarca. 2013: 227.

<sup>407</sup> Menkhaus. 2009: 9.

<sup>408</sup> Haywood & Spivak. 2012: 14.

<sup>409</sup> World Bank. 2013: 6; 88; Bevilacqua. 2013: 111.

<sup>410</sup> World Bank. 2013: xxi; 88.

<sup>411</sup> World Bank. 2013: 6; Bevilacqua. 2013: 111; Patriarca. 2013: 227.

<sup>412</sup> Schbley & Rosenau. 2013: 15 – 16. Also see Bevilacqua. 2013: 111 & Hassan. 2011: 5.

<sup>413</sup> Bevilacqua. 2013: 111 & Hassan. 2011: 5; Also see Persson, L., Lindop, A., Harper, S., Zyllich, K. & Zeller, D. 2015. Failed state: reconstruction of domestic fisheries catches in Somalia 1950 – 2010. In *Fisheries catch*

Foreign fishing vessels came from Europe, Asia and other African countries, reportedly catching fish worth hundreds of millions of dollars annually.<sup>414</sup> Somalia's coastal communities are some of the most marginalized populations within the country. While most Somalis are pastoralists, coastal communities rely mostly on subsistence fishing. IUU fishing activities and maritime insecurity therefore threaten these coastal communities' livelihoods.<sup>415</sup>

In response, Somalis began arming themselves against these foreign vessels, which they saw as 'resource pirates'.<sup>416</sup> The absence of government-sponsored protection created a vacuum which enabled pirates to defend Somalia's waters from illegal activities, acting as a quasi-coast guard.<sup>417</sup> Here a combination of 'coast guard duties' and state failure overlap. Owing to the lack of alternative security institutions, pirates argued that their behaviour is not criminal, but a service to their country. One pirate noted:

"we don't consider ourselves sea bandits...we consider sea bandits those who illegally fish in our seas and dump waste in our seas and carry weapons in our seas. We are simply patrolling our seas. Think of us like a coast guard."<sup>418</sup>

This reference to 'sea bandits' echoes Hobsbawm's work which explains how banditry initially had a social dimension,<sup>419</sup> as reflected in the coast guard narrative.

Prior to 1991, foreign fishing vessels paid local militias and warlords to protect their illegal activities in Somalia's waters.<sup>420</sup> A fact often left unmentioned however, is that until more recently, Somalia did not have an EEZ. This meant that foreign vessels were allowed to fish much closer to Somalia's territorial waters than they would have been had Somalia legally had an EEZ of 200 nautical miles as per UNCLOS.<sup>421</sup> Somalia declared an EEZ in 1971,

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*reconstructions in the Western Indian Ocean, 1950–2010*. F. Le Manach & D. Pauly, Eds. Fisheries Centre Research Reports 23(2). Vancouver: Fisheries Centre, University of British Columbia: 112 - 112.

<sup>414</sup> Samatar et al. 2010: 1385. It has been suggested that up to half of catches across the WIO are illegally done: Schbley & Rosenau. 2013: 15 - 16.

<sup>415</sup> Bueger. 2015b: 36.

<sup>416</sup> Samatar et al. 2010: 1391.

<sup>417</sup> Patriarca. 2013: 227.

<sup>418</sup> Gittleman, J. 2008. Somali pirates tell their side: they want only money. *New York Times*. 30 September. Available: <http://www.nytimes.com/2008/10/01/world/africa/01pirates.html?mcubz=2> [accessed 10 October 2017].

<sup>419</sup> Hobsbawm, E.J. 1972. *Bandits*. Harmondsworth: Penguin: 1 - 19.

<sup>420</sup> Persson et al. 2015: 11; 122; Interview Participant 4. 2016. Nairobi, Kenya.

<sup>421</sup> Interview Participant 4. 2016.

although it was not recognized by international law. Somalia could only claim an EEZ in 1989 when they ratified UNCLOS.<sup>422</sup> Since 1989, there have however been many reports of vessels fishing illegally right off the Somali coastline in the country's territorial waters<sup>423</sup> and destroying local fishing equipment, for which there can be no justification. Some pirate attacks in Somalia's EEZ have indeed been of these illegal fishing vessels.<sup>424</sup> Participant 4 noted how Somalis however never accepted that they did not have an EEZ and that it was perhaps still legal to fish without a license in Somalia's EEZ because they did not have fishing laws or a licensing scheme.<sup>425</sup> Because of this, licenses are often faked.<sup>426</sup>

During the 1990s, pirates were indeed acting against exploitative foreign vessels. These 'defensive pirates' included members of the former SRSP's coast guard. They demanded no ransom and were simply interested in protecting Somalia's resources.<sup>427</sup> They called themselves the Somali Volunteer National Coast Guard and either negotiated with foreign vessels, tried to scare them off or requested them to pay a fishing tax or fine.<sup>428</sup> Between 2000 and 2006, Somaliland and Puntland employed private security firms to act against IUU fishing vessels, but vessels would simply leave Somali waters once approached by private security, which had no jurisdiction to act against them in international waters.<sup>429</sup> This use of private security mimics privateering. It was around this time that the kidnap for ransom business model developed. The hijacking of ships was then seen as taxation for depleting Somalia's resources.<sup>430</sup>

IUU fishing continues in Somalia's waters<sup>431</sup> and explains why some Somalis, including members of the FGS, remain supportive of piracy. Participant 2, working for Oceans Beyond Piracy (OBP), noted the continuing fleet of IUU fishing vessels in Somalia's waters:

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<sup>422</sup> Persson et al. 2015: 112.

<sup>423</sup> Samatar et al. 2015: 1385.

<sup>424</sup> Persson et al. 2015: 121.

<sup>425</sup> Interview Participants 4 & 9. 2016.

<sup>426</sup> Interview Participant 9. 2016.

<sup>427</sup> Samatar et al. 2015: 1386 – 1390. Wright. 2013: 35.

<sup>428</sup> Keating. 2013: 186.

<sup>429</sup> Persson et al. 2015: 121.

<sup>430</sup> Schbley & Rosenau. 2013. 19.

<sup>431</sup> UN Security Council. 2019. *Renewing authorization for international naval forces fighting piracy off coast of Somalia, security council unanimously adopts resolution 2500 (2019)*. Available: <https://www.un.org/press/en/2019/sc14039.doc.htm> [accessed 1 February 2020].

“[I]f you stand on the beach you can see some of these ships out there, it is not surprising that these guys are pissed off [...] And I’m not talking about the tuna fleets offshore, it’s mostly in territorial waters, these completely unlicensed or illegally licensed, unflagged or flagged for convenience vessels who are just, you know, raping the coast. On top of that it is a very aggressive business, so your little Somali fisherman in his skiff comes up against, you know, a big fishing vessel from South East Asia or Iran, most places they run them over.”<sup>432</sup>

Piracy therefore cannot be delinked from IUU fishing. Fisheries have also been credited with fuelling instability because warlords and foreign fishing companies benefit from IUU fishing.<sup>433</sup> Navies patrolling Somalia’s waters as part of counter-piracy efforts are however not mandated to respond to IUU fishing, they only report on such activity.<sup>434</sup> There are suggestions that if navies were to act against IUU fishing in Somali waters, there would be no need for piracy. However, while defending Somalia’s waters in order to protect livelihoods makes economic sense, it does not explain why pirate attacks expanded to thousands of nautical miles from the Somali coast.<sup>435</sup> This can only be explained by the pursuit of profit. The evidence therefore simply does not support the ‘aggrieved fisherman’ narrative anymore<sup>436</sup> and acting against IUU fishing alone will not affect the profit driven business model. Haywood and Spivak even suggest that Somali pirates had in fact targeted vessels not engaged in IUU fishing or toxic waste dumping since piracy’s inception.<sup>437</sup>

Ironically, since piracy’s decline, former pirates have turned to enabling IUU fishing by providing fishing ‘licenses’ and armed on-board security.<sup>438</sup> Many pirates also evoke the defence of being fishermen when they are caught, but as noted during an informal communication in Seychelles, “they say they are catching fish, but the ‘fish’ they are catching are our people”.<sup>439</sup>

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<sup>432</sup> Interview Participant 2. 2018.

<sup>433</sup> Persson et al. 2015: 121.

<sup>434</sup> Interview Participant 2. 2018 & Interview Participant 9. 2016.

<sup>435</sup> World Bank. 2013: xxi; Patriarca. 2013: 227; Schbley & Rosenau. 2013: 3 – 4; Samatar et al. 2010: 1386 – 1390; Wright. 2013: 36.

<sup>436</sup> Schbley & Rosenau. 2013: 3 - 4.

<sup>437</sup> Haywood & Spivak. 2012: 14.

<sup>438</sup> Schbley & Rosenau. 2013: 3 – 4; Wright. 2013: 36; Interview Participants 4 & 9. 2016.

<sup>439</sup> Informal communication. Seychelles, September 2020.

### 4.3.2 The bigger picture: state failure sets sail

In addition to pirates acting as ‘coast guard’, state failure is noted as the main causal factor of piracy.<sup>440</sup> Spikes in attacks were recorded from 1992, coinciding with state failure.<sup>441</sup> The absence of attacks in stable areas of Somalia, like Somaliland, and few incidents prior to 1991 support the state failure narrative.<sup>442</sup> Although state fragility giving rise to criminal activity is a complex and contested issue,<sup>443</sup> it is arguably what has caused Somalis to turn to piracy. The absence of proper governing institutions means that Somalia’s land and maritime territory is insecure,<sup>444</sup> which enabled foreign vessels to exploit Somalia’s waters.<sup>445</sup> Illicit businesses often flourish in weak states as organized criminal networks can replace public institutions that are not performing or which don’t exist. In Somalia, the lack of a government allowed pirates to replace security institutions, but it also allowed illicit activities to be committed without any consequences.<sup>446</sup> Therefore, while initial attacks may have been executed by aggrieved Somalis defending themselves, their success resulted in some turning into oceangoing racketeers who saw an economic opportunity and seized it.<sup>447</sup> Samatar et al however suggest that the original ‘defensive pirates’ were not the ones who shifted to kidnap for ransom and that this was instead criminals who saw an opportunity.<sup>448</sup>

The state failure narrative can explain how poverty, disorder, conflict and weak or non-existent governance and law enforcement have created favourable conditions for piracy, which some turn to for its quick and high turnover rate.<sup>449</sup> The desperate situation in Somalia therefore contributes to a criminogenic environment which has made piracy an economic viability<sup>450</sup> and an accepted practice by some who believe that it is an income

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<sup>440</sup> See, for example, Samatar et al. 2010; Kraska. 2009: 200.

<sup>441</sup> Collins. 2017: 428. Also see Schbley & Rosenau. 2013: 13.

<sup>442</sup> Samatar et al. 2010: 1384; 1390.

<sup>443</sup> See, for example, Miraglia, P., Ochoa. R. & Briscoe, I. 2012. *Transnational organized crime and fragile states*. OECD Development Cooperation Working Paper 3 of 2012. Paris: OECD Publishing.

<sup>444</sup> As Chapter 2 explained, a state like Somalia with very limited resources and numerous land based challenges is likely to neglect their maritime domain.

<sup>445</sup> See, for example, Kraska. 2009: 116.

<sup>446</sup> Patriarca. 2013: 226; Keating. 2013: 186.

<sup>447</sup> Schbley & Rosenau. 2013: 20.

<sup>448</sup> Samatar et al. 2010: 1386.

<sup>449</sup> Zwolski & Kaunert. 2014: 598.

<sup>450</sup> Collins. 2014: 445.

generating alternative which boosts local economic growth and development.<sup>451</sup> This is reflective of how isolation from alternative income sources can attract illicit activity. Such societies do not necessarily have a culture of accepting illegality, but these outside forces may influence them to tolerate illicit activity.<sup>452</sup> Kamola has noted how piracy can be “understood as creative (and profitable) attempts to develop a vibrant economic sphere within a place marginalized from the world economy for more than a century”.<sup>453</sup>

It is widely concurred that the only solution to piracy is to improve the political situation in Somalia by establishing a Somali state which is viable on a central and local level.<sup>454</sup> But some are sceptic of the state failure narrative for this very reason. Glück warns that attributing piracy to the single cause of state failure, anarchy and lawlessness might be over simplifying different social realities and the complex nature of the phenomenon. The general response to address state failure would be to establish the rule of law and create a strong central government, which is what is currently playing out in Somalia. By attributing piracy to state failure, it legitimizes the harsh measures implemented by the international community to counter it, all in support of creating a central government.<sup>455</sup> However, while establishing some sort of authority to provide governing services, infrastructure and livelihoods would likely help to eradicate the root causes of piracy, it does not have to fit the traditional state-building model employed by the international community.

The argument in favour of state failure also helps to explain why piracy is not endemic to all Somali regions. The vast majority of attacks have been concentrated in Puntland and Galmudug, which are considered to be more stable than southern Somalia, but not nearly as stable as Somaliland. A political economy model can explain the emergence of piracy in areas of intermediate political fragmentation, similar to literature on the favourable conditions for TOC groups to operate in a weak but not failed state. Galmudug and Puntland both experience lower levels of insecurity and instability in comparison to southern Somalia.

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<sup>451</sup> Patriarca. 2013: 240.

<sup>452</sup> Shortland & Varese. 2014: 19 – 20.

<sup>453</sup> Kamola, I. 2012. Capitalism at sea: piracy and “state failure” in the Gulf of Aden. In *Globalization, social movements and peace building*. J. Smith & E. Verdeja, Eds. New York: Syracuse University Press: 17.

<sup>454</sup> World Bank. 2013: xi, xxv; Kraska. 2009; Interview Participants 4; 5 & 9.

<sup>455</sup> Glück. 2011: 84.

The dynamics of politics in a region like Puntland or Galmudug are therefore different to a region where anarchy reigns and where neither pirates nor the FGS can operate.<sup>456</sup>

Half of Somalia's coastline is located in Puntland,<sup>457</sup> most of which is far away from Puntland's functioning urban centres and therefore far away from government control.<sup>458</sup>

The decline of local security institutions and the inability to continue funding the coastguard and police forces further contributed to piracy's emergence there.<sup>459</sup> By 2013, after attacks had declined as a result of counter measures, most pirate activity had shifted south to Galmudug where security, government control and international assistance were less.<sup>460</sup> This illustrates displacement of TOC activity to areas with more favourable conditions.<sup>461</sup> As the World Bank correctly noted:

“Piracy moves in when a central or regional authority is weak, corrupt or undermined by infighting, often along clan lines, so that pirates can hope to effect the balance of power to favour their interests. But when changes in the political landscape are too frequent or the political equilibrium is too fragile, the stability necessary for piracy operations is no longer present.”<sup>462</sup>

Therefore, during times when conditions were unfavourable, attacks reportedly shifted to Somaliland.<sup>463</sup> As noted in Chapter 2, Shortland and Varese<sup>464</sup> have explained how pirates establish themselves where they can form the necessary relationships on land to assist them in conducting their operations. In Puntland and Galmudug, pirates can leverage local political and social support to provide their activities with protection. This would not be possible in regions where governance and the rule of law are too strong.<sup>465</sup> Puntland now has a maritime police force and Galmudug has a coast guard. Although both have limited

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<sup>456</sup> World Bank. 2013: 128 - 148. Also see Shortland & Varese. 2014.

<sup>457</sup> Kraska. 2009: 112.

<sup>458</sup> World Bank. 2013: 148.

<sup>459</sup> Bridger, J.M. 2013. *Safe seas at what price? The costs, benefits and future of NATO's Operation Ocean Shield*. (NATO Research Paper No. 95). Rome: NATO Defence College: 2.

<sup>460</sup> Ibid: 8; World Bank. 2013: 149.

<sup>461</sup> Wright. 2013: 37.

<sup>462</sup> World Bank. 2013: 142 - 150.

<sup>463</sup> Hastings. 2009: 19; World Bank. 2013: 89; 147.

<sup>464</sup> Shortland & Varese. 2014: 3 - 6.

<sup>465</sup> World Bank. 2013: 142 - 150.

capacity, they have successfully responded to a handful of maritime incidents and have created pockets of secure maritime space.<sup>466</sup>

### 4.3.3 A combination of enabling factors

Vagg has noted that “[e]xplanations for piracy have to start with a statement of opportunity couched in economic, legal, and geographical terms, and also in terms of the possibilities and likelihood of capture or deterrence, and the consequences.”<sup>467</sup> A combination of many factors therefore best explain the emergence of piracy, of which IUU fishing, toxic waste dumping and state fragility are only some. Although some influential factors are the consequence of state fragility, such as weak law enforcement<sup>468</sup> and a lack of income alternatives,<sup>469</sup> others are unrelated. For example, Keating suggests that the catalyst for the increase in attacks in 2005 was the Indian Ocean tsunami in 2004 which damaged Puntland’s coastline. Hundreds of Somalis were killed, fishing gear, boats and villages were destroyed and toxic waste washed ashore. The waste caused illness and further weakened the economic viability of the region. It also led to further resentment of foreign states exploiting Somali waters and was the final straw for Somalis who believed the international community was exploiting their waters.<sup>470</sup>

Haywood and Spivak suggest that the combination of poverty, the lack of a government to prevent piracy and access to vital sea lanes best explain the emergence of Somali piracy.<sup>471</sup> Heavy sea traffic attracts pirate activity,<sup>472</sup> especially where maritime chokepoints cause vessels to slow down in areas of existing maritime insecurity or criminal activity.<sup>473</sup>

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<sup>466</sup> Oceans Beyond Piracy. 2017. *The state of Somali piracy 2016: assessing the economic and human cost*. Available: <http://oceansbeyondpiracy.org/reports/sop/east-africa> [accessed 10 October 2018].

<sup>467</sup> Vagg. 1993: 549 - 550.

<sup>468</sup> See, for example, Vagg. 1993: 549 – 550; Bueger. 2013c: 1814; Zwolski & Kaunert. 2014: 598; Chalk, P. 2008. *The maritime dimension of international security terrorism, piracy, and challenges for the United States*. Rand Corporation: Santa Monica: 11; Bryant, W., Townsley, M. & Leclerc, B. 2014. Preventing maritime pirate attacks: a conjunctive analysis of the effectiveness of ship protection measures recommended by the International Maritime Organisation. *Journal of Transportation Security*. 7 (2014): 70. DOI: 10.1007/s12198-013-0130-2.

<sup>469</sup> See, for example, Vagg. 1993; Hobsbawm. 1972; Bueger. 2013c: 1814; Bueger. 2015b: 33.

<sup>470</sup> Keating. 2013: 185 - 188. Also see Wright. 2013: 35; Samatar et al. 2010; Glück. 2010.

<sup>471</sup> Haywood & Spivak. 2012: 16. Also see Bueger. 2013c: 1814.

<sup>472</sup> Interview Participant 4. 2016; Hassan & Hasan. 2017: 6; Chalk. 2008: 11; Bryant et al. 2014: 70.

<sup>473</sup> Chalk. 2008: 11; Bryant et al. 2014: 70.

Geography therefore plays a vital role.<sup>474</sup> This is also evident in other regions plagued by piracy, such as the Gulf of Guinea near the oil rich Niger delta. Participant 4 added the importance of the willingness of shipping companies to pay ransoms.<sup>475</sup> This is because piracy related costs such as increased insurance premiums and vessel rerouting far outweigh the amounts requested as ransom.<sup>476</sup> While ransom amounts represent a large amount to pirate networks, it is merely a ‘nuisance tax’ for the shipping industry and their insurers.<sup>477</sup> Chalk further notes the prevalence of small arms, increased land-based insecurity which leads to the neglect of maritime security, corruption and weak criminal justice systems which allow state officials to become involved in pirate activities.<sup>478</sup>

Bueger added the importance of having the necessary infrastructure, cultural acceptability, and a population with potential recruits and skills<sup>479</sup> or criminal-minded entrepreneurs. In terms of cultural acceptability and skills, Menkhaus has noted that pirates are merely applying the same practices as Somali gangs and militias, such as extortion and kidnapping for ransom.<sup>480</sup> Participants also noted how pirates are businessmen who use these skills to diversify once they cannot engage in piracy. As Participant 3, a staff member of OBP, noted, “if a bunch of former pirates stop gun running or doing stuff, it doesn’t make them pirates, it makes them a bunch of criminals who have now decided to help Al-Shabaab and make money out of it.”<sup>481</sup> Participant 4 also noted:

“they would rather be doing pirating because that’s where the money is. [...] [Y]ou take one oil tanker and one deal and you’re sorted. But they are doing smaller things now in the absence of this”.<sup>482</sup>

This section has considered the drivers behind piracy and concludes that defending Somalia’s coastal waters does not explain the eventual capturing of vessels on the high seas. Instead, the absence of a state to respond to piracy, in combination with the factors discussed above, meant that the business model of kidnap for ransom was effective and

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<sup>474</sup> Vagg. 1993. Also see Hobsbawm. 1972; Bueger. 2015b: 33.

<sup>475</sup> Interview Participant 4. 2016.

<sup>476</sup> Glück. 2015: 654. Also see Haywood & Spivak. 2012: 19.

<sup>477</sup> Menkhaus. 2009: 9.

<sup>478</sup> Chalk. 2008: 11; Bryant et al. 2014: 70.

<sup>479</sup> Bueger. 2013c: 1814.

<sup>480</sup> Bueger. 2015b: 33; 36.

<sup>481</sup> Interview Participant 3. 2018. Nairobi, Kenya.

<sup>482</sup> Interview Participant 4. 2016.

quickly resulted in a crisis for the shipping industry with attacks taking place in one of the world's busiest shipping lanes. As Participant 2 noted, pirates were "heroes to start with, because they were getting rid of these evil illegal fishing vessels. But in reality they weren't making much money and they became pretty nasty people".<sup>483</sup>

#### 4.4 The kidnap for ransom modus operandi

The kidnap for ransom modus operandi employed by Somali pirates has historical roots,<sup>484</sup> but has been rare in recent times as attacks elsewhere concentrate primarily on the theft of commodities or vessels.<sup>485</sup> Kidnap for ransom has however been increasing rapidly in the Gulf of Guinea since 2020.<sup>486</sup> In the same way that the lack of infrastructure hampers licit business, state failure hampers the sophistication of pirate operations.<sup>487</sup> Kidnapping in Somalia was necessitated by the fact that Somalia has little infrastructure to support pirate logistics and there is no market with a demand for vessels or cargo.<sup>488</sup> Hijacking ships and taking crews hostage is therefore more profitable<sup>489</sup> and shipping companies have willingly paid ransoms rather than paying increased insurance premiums.<sup>490</sup> Somali piracy can be juxtaposed with the more sophisticated attacks in Asia and the Gulf of Guinea where weak but not failed states allow vessels and cargo to be sold. In comparison, little infrastructure is needed for drawn-out ransom negotiations. Hastings notes:

"[a] state unable or unwilling to broadcast its power over its territory is also a state that does not maintain road, airport, or seaport facilities, and transportation infrastructure, normally a public good, breaks down, harming both legitimate and illegitimate activities that require moving goods significant distances. The lack of formal markets also means that groups seeking to make money by selling large

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<sup>483</sup> Interview Participant 2. 2018.

<sup>484</sup> Haywood & Spivak. 2012: 13; Oceans Beyond Piracy. n.d.a: 2.

<sup>485</sup> Oceans Beyond Piracy. n.d.a: 1 – 2.

<sup>486</sup> Han, M. 2020. Seafarer kidnappings by pirates in Gulf of Guinea surge in H1 2020. *Seatrade Maritime News*. Available: <https://www.seatrade-maritime.com/piracy/seafarer-kidnappings-pirates-gulf-guinea-surge-h1-2020> [accessed 15 July 2020].

<sup>487</sup> Hastings. 2009: 213 – 219.

<sup>488</sup> Patriarca. 2013: 226; Zwolski & Kaunert. 2014: 594.

<sup>489</sup> Zwolski & Kaunert. 2014: 594.

<sup>490</sup> Menkhaus. 2009: 9; Glück. 2015: 654; Interview Participant 4. 2016.

quantities of commodities that have value primarily in more developed economies have difficulty finding buyers.”<sup>491</sup>

Attacks gradually expanded from Somali waters onto the high seas. This was partly due to successful counter-measures causing vessels to sail further away from Somalia and the use of motherships extending pirates’ range.<sup>492</sup> A hijacking has two distinct operations - the armed offshore operation and the supporting operation onshore.<sup>493</sup> Attacks require capital for bribes and salaries, as well as vessels, weapons and navigational equipment. Specific attacks can be planned after doing market research to identify vessels that would be willing and able to pay ransom, often resulting in Western vessels being targeted.<sup>494</sup> Vessels can however also be chosen at random.

Attacks were initially staged from small skiffs like those used by local fishermen.<sup>495</sup> These are weather dependant, causing pirate activity to decline during the monsoon season and to shift between areas.<sup>496</sup> The sophistication of attacks however increased over time<sup>497</sup> as pirates began acquiring larger motherships from which their skiffs could be launched to access the targeted vessel. This was necessitated as the attack area expanded and vessels had to cover longer distances. The use of a mothership has various advantages, such as the ability to operate over large areas, being able to remain at sea for longer and blending into sea traffic. They are also less dependent on weather conditions.<sup>498</sup>

Small skiffs are hidden on the mothership to avoid detection by the targeted vessel or patrolling navies.<sup>499</sup> One or more skiffs approach the victim vessel and gain access by ladders or ropes. A few pirates access the bridge and instruct the crew to slow down or stop the vessel,<sup>500</sup> allowing the rest of the pirate crew to board. Pirates are well-armed and have been known to use AK-47s and machine guns, often from old state supplies. They also use

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<sup>491</sup> Hastings. 2009: 213 – 219.

<sup>492</sup> Wright. 2013: 36 – 41; World Bank. 2013: 92.

<sup>493</sup> World Bank. 2013: xxiv; 93.

<sup>494</sup> Keating. 2013: 188.

<sup>495</sup> Wright. 2013: 41.

<sup>496</sup> World Bank. 2013: 92.

<sup>497</sup> Scott. 2014: 5.

<sup>498</sup> World Bank. 2013: 90; Bevilacqua, G. 2013: 111; Wright. 2013: 40 – 42.

<sup>499</sup> World Bank. 2013: 90.

<sup>500</sup> Bryant, Townsley, & Leclerc. 2014: 71.

rocket propelled grenades.<sup>501</sup> Once approached by navies, weapons and ladders are typically jettisoned to discard evidence. This encouraged an initial catch and release approach by navies, due to the difficulty of proving a case without physical evidence.<sup>502</sup>

Once the vessel has been hijacked, ransom negotiations commence. Pirates take the vessel and hostages either to shore or close to shore, from where ransom negotiations can last years.<sup>503</sup> Somali piracy for a long time was unique in that, prior to counter-efforts, pirates could anchor for long periods of time or hold vessels in territorial waters indefinitely because there was no state pursuing them for their criminal activity.<sup>504</sup> Ransom payments can be orchestrated by the vessel owner, vessel operator, insurance companies<sup>505</sup> or private security firms.<sup>506</sup> The largest recorded ransom was USD 9.5 million.<sup>507</sup> The ransom proceeds are split among everyone who participated in the attack, including those who provided financial resources and those who provided political capital. The largest share goes to the financiers.<sup>508</sup>

Attacks on the high seas, the remarkably wide catchment area, the frequency of attacks and the use of kidnap for ransom are all features unique to Somali piracy.<sup>509</sup> Regardless of their motivation, pirates are entrepreneurs who established a very successful criminal enterprise,<sup>510</sup> minimizing the costs of operations and maximizing ransom payments.<sup>511</sup> They managed to achieve 218 successful attacks, capturing around 3,700 crew members between 2005 and 2013.<sup>512</sup> Until the counter-piracy response was put in place, the benefits far outweighed the risks with much more money to be made from one successful attack than income by other means.<sup>513</sup> However, piracy is not easy money<sup>514</sup> and the low level pirates who take all the risk are the ones who get the least amount of money and often pay with

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<sup>501</sup> Ibid: 72; Bevilacqua, G. 2013: 111; Wright. 2013: 42.

<sup>502</sup> World Bank. 2013: 114.

<sup>503</sup> Oceans Beyond Piracy. 2017; World Bank. 2013: 94; Wright. 2013: 42.

<sup>504</sup> Hastings. 2009: 216; Haywood & Spivak. 2012: 13; World Bank. 2013: 94 - 95.

<sup>505</sup> Wright. 2013: 43.

<sup>506</sup> World Bank. 2013: 94 - 95.

<sup>507</sup> Keating. 2013: 188.

<sup>508</sup> See, for example, World Bank. 2013: 95; 110; 118; Kraska. 2009: 115.

<sup>509</sup> World Bank. 2013: xxi.

<sup>510</sup> Interview Participant 5. 2016.

<sup>511</sup> Kraska, J. 2009: 117.

<sup>512</sup> Patriarca. 2013: 227.

<sup>513</sup> Keating. 2013: 188.

<sup>514</sup> Interview Participant 3. 2018.

their lives or imprisonment. Piracy became increasingly high risk as the counter-response was set in motion.<sup>515</sup>

#### 4.5 Pirate networks

Similar to the methods used, TOC networks must be understood in order to effectively target them. TOC networks have indeed been the subject of much research as it helps to understand the social relationships and modus operandi employed by network members. This section briefly summarizes typical pirate networks operating in Somalia.

First, there are the kingpins or instigators, the pirate leader and financiers who orchestrate the greater operation and decision-making processes.<sup>516</sup> Instigators and financiers can be warlords, clan elders, corrupt officials, members of the diaspora, overseas contacts,<sup>517</sup> previously successful pirates,<sup>518</sup> criminals engaged in other illegal acts or businessmen.<sup>519</sup> Kingpins are often leaders in their clans and have influence in government.<sup>520</sup> While clan dynamics and affiliations help to explain the business model,<sup>521</sup> the kingpins and financiers are not necessarily from the same clan.<sup>522</sup> Kingpins are also not necessarily Somali,<sup>523</sup> and could be from elsewhere, such as surrounding states.<sup>524</sup> The kingpin identifies a pirate commander who will organize an attack. The pirate commander then assembles a team. Funds are provided or gathered from the investors at the outset of an operation, although some are not pre-funded. Funding could be in the form of money or supplies<sup>525</sup> and non-network members can also contribute weapons or money in order to share in the ransom.<sup>526</sup>

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<sup>515</sup> Interview Participant 2. 2018.

<sup>516</sup> Scott. 2014: 8.

<sup>517</sup> Keating. 2013: 188; World Bank. 2013: 89.

<sup>518</sup> Wright. 2013: 43.

<sup>519</sup> World Bank. 2013: 89; Interview Participant 9. 2016.

<sup>520</sup> Interview Participants 2 & 3. 2018.

<sup>521</sup> World Bank. 2013: xxv.

<sup>522</sup> Ibid: 75.

<sup>523</sup> World Bank. 2013: 89.

<sup>524</sup> Interview Participant 3. 2016.

<sup>525</sup> World Bank. 2013: 89.

<sup>526</sup> Kraska. 2009: 115 - 116.

Then there are the foot soldiers executing the attack and guarding the vessels and hostages during ransom negotiations.<sup>527</sup> These members make up the bulk of the operation.<sup>528</sup> They are often former fishermen who have the required skills to carry out an attack at sea. They can also be militia or mercenaries who can handle weapons and fight and young people who can operate technology.<sup>529</sup> While most are from the coast, some reportedly moved there to share in the piracy spoils.<sup>530</sup> The onshore members ensure that the pirates and hostages have accommodation and food. They provide access to the coast and to markets and provide protection against other criminal groups and law enforcement agencies.<sup>531</sup> There are also higher level on-shore members, such as negotiators<sup>532</sup> and accountants.<sup>533</sup>

As with all forms of TOC, piracy requires a level of protection or collusion to operate effectively. Security services, the police and government officials have all been linked to benefitting from piracy.<sup>534</sup> Al-Shabaab, militia, clan elders and businessmen are also bribed and the bribing of Puntland government officials is reportedly part of the business plan. Force or financial incentives are usually used to get stakeholder support.<sup>535</sup>

#### **4.6 The impact of piracy**

The impact of Somali piracy is multifaceted and a matter of differing perspectives.<sup>536</sup> Most focus on its impact on world trade and international security, giving more attention to its perceived threat than the structural conditions in Somalia which produce it. Collins argues that the interest in piracy is disproportionate to the threat it poses, while the dire humanitarian situation in Somalia is largely ignored.<sup>537</sup> Piracy is hardly the biggest obstacle facing Somalia and many scholars are indeed critical of this. Menkhaus has remarked how,

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<sup>527</sup> Scott. 2014: 8; Wright. 2013: 44.

<sup>528</sup> World Bank. 2013: 111; Oceans Beyond Piracy. 2014. *The state of maritime piracy 2014: assessing the economic and human cost*: 34 - 35. Available: <http://oceansbeyondpiracy.org/publications/state-maritime-piracy-2014> [accessed 15 July 2015].

<sup>529</sup> Kraska. 2009: 113; 115.

<sup>530</sup> Wright. 2013: 44.

<sup>531</sup> World Bank. 2013: xxiv; 93.

<sup>532</sup> Scott. 2014: 8.

<sup>533</sup> Keating. 2013: 188; World Bank. 2013: 93.

<sup>534</sup> Kraska. 2009: 113 - 116.

<sup>535</sup> World Bank. 2013: 143 - 144.

<sup>536</sup> For a detailed discussion on the different impact, see World Bank. 2013: 15 – 82.

<sup>537</sup> Collins. 2014: 438 - 441.

“[i]n the midst of these seismic political and security developments, the international community seized on an entirely different story coming out of Somalia – namely, the piracy epidemic.” He considers piracy a “second-order security threat”, especially when compared to al-Shabaab<sup>538</sup> and adds:

“[e]xternal actors have a long record of injecting arms and funds into Somalia, but rarely get the outcome they seek on their investment. But they do have a good degree of success in blocking unwanted outcomes in Somalia.”<sup>539</sup>

Krosiak has echoed these sentiments of piracy gripping the international community’s attention as opposed to the chaos of the last three decades,<sup>540</sup> while Kraska notes how global attention only turns to Somalia once its problems cross its borders.<sup>541</sup> He however also favours the narrative of its ‘devastating’ impact on trade:

“Piracy endangers sea lanes of communication, interferes with freedom of navigation and the free flow of commerce, and undermines regional stability. Maritime piracy has a vicious history, undermining the shipping network essential for maintaining global communications, trade, and political stability. The devastating effect [...] goes beyond the immediate threat to seafarers, cargo and ships. As piracy spirals out of control off the Somali coast, concern has grown about the threat to global trade as well as the effect of millions of dollars in ransom flowing into the hands of piracy clans and warlords operating from the Puntland region”.<sup>542</sup>

#### 4.6.1 Crew members

The human cost of piracy should be considered its greatest impact<sup>543</sup> as crew members are the primary victims. Some correctly argue that this consequence is downplayed.<sup>544</sup>

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<sup>538</sup> Menkhaus. 2009: 9.

<sup>539</sup> Ibid: 11.

<sup>540</sup> Krosiak, D. 2008. Somalia: “Oh my gosh, pirates!” *International Crisis Group*. 29 April. Available: <https://www.crisisgroup.org/africa/horn-africa/somalia/somalia-oh-my-gosh-pirates> [accessed 10 October 2017].

<sup>541</sup> Kraska. 2009: 208.

<sup>542</sup> Ibid: 200.

<sup>543</sup> See, for example, Haywood & Spivak. 2012: 18.

<sup>544</sup> Chalk. 2008: xii; 15; Interview Participant 2. 2018.

Participant 2, who worked with hostages, noted: “they didn’t give a shit about the poor guys on the boats.”<sup>545</sup> He told of how when vessels and cargoes were lost, insurance companies did not bother paying for crews and “they just became forgotten.” He recounted crew experiences:

“they killed some but they tortured quite a few [...] [W]e’ve had stories from guys that we’ve released, you know, pretty horrendous, [...] they had a swimming pool on the ship and [...]and it was all full of shit and stuff and they made them stay in it and they peed on them. Then this person was hung upside down by his legs and beaten, all of that was aimed at a phone call to the owner while they were doing it, or a phone call to the family [...], to increase the pressure and put up the price. It was extremely unpleasant and very violent, and the guys in the prison unit deserve everything they’re getting [...] Only the ship and the cargo was of value, they didn’t care about the crew and the people, the crew were just a means of, you know, getting a ransom.”<sup>546</sup>

The International Maritime Bureau (IMB) has suggested that the level of violence experienced in pirate attacks around Africa is greater than elsewhere due to the availability of weapons as the result of many conflicts and civil wars.<sup>547</sup> However, while Somali pirates may be violent, similar attacks in Southeast Asia, while not piracy in terms of UNCLOS, have been much more deadly.<sup>548</sup> Chalk argues that if the violence aimed at crew members was executed as part of a terror attack, the global community would be outraged. Yet, because these incidents are happening at sea and out of sight, they are perceived as less serious.<sup>549</sup> This echoes Naim’s suggestion that the world’s attention on terrorism has neglected the impacts of TOC. The UN has noted how by threatening nationals from across the globe, piracy threatens international peace and security.<sup>550</sup> Indeed, numerous nationalities can be found on one vessel. Despite this, the suffering of crew members is not considered the most urgent impact as the counter-piracy response was aimed primarily at protecting trade.

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<sup>545</sup> Interview Participant 2. 2018.

<sup>546</sup> Interview Participant 3. 2018.

<sup>547</sup> De Vries, I. & Meyer, J. 2014. The role of Interpol in combating maritime piracy. *Acta Criminologica: South African Journal of Criminology*. [Special Edition]: 111.

<sup>548</sup> McCauley. 2014.

<sup>549</sup> Chalk. 2008: 15.

<sup>550</sup> United Nations Division for Ocean Affairs and the Law of the Sea. 2012. *Piracy under international law*. 24 May. Available: <http://www.un.org/depts/los/piracy/piracy.htm> [19 September 2017]; Bevilacqua. 2013: 113.

#### 4.6.2 World trade and international peace and security

While piracy's impact on international peace and security and world trade are two different impacts, they are often grouped together in order to reflect the seriousness thereof. As Gould has noted, "[o]wing to its links to [...] poor governance, as well as its great cost to national economies, piracy is now seen as a 'threat to international peace and security' rather than just a threat to commercial shipping."<sup>551</sup> The impact on world trade is indisputable, while the suggestion that piracy threatens international peace and security typically refers to piracy worsening the fragile situation in Somalia, thereby threatening international peace and security.<sup>552</sup> The economic impact on trade is however perceived as the primary impact of Somali piracy as it disrupts commerce, threatens navigation and results in increased costs to the shipping industry and consumers.<sup>553</sup> It has been estimated that piracy cost the world economy USD 18 billion in 2010 alone.<sup>554</sup> These costs include insurance, ransom payments, vessel rerouting and increasing vessel speed.<sup>555</sup>

Somali piracy affects the WIO and Gulf of Aden, which is a vital artery of world trade<sup>556</sup> and forms part of the fastest sea route between East Asia and Europe.<sup>557</sup> At its height, piracy threatened the vessels of major shipping nations like Denmark, which houses the world's biggest shipping fleet, owned by Maersk. A threat to Maersk is therefore a threat to Denmark itself. Global trade and the shipping industry rely on fast and effective transport of cargo, without unnecessary delays caused by corruption, bureaucracy and piracy, affecting the supply chain.<sup>558</sup> Having to sail an alternative route around Africa would drastically increase delivery times and costs and would force vessels to pass by the Gulf of Guinea, which is increasingly unsafe. Piracy's impact on world trade as the motivation for the counter-response is further unpacked in Chapter 8.

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<sup>551</sup> Gould. 2017: 411.

<sup>552</sup> See Chapter 5.

<sup>553</sup> United Nations Division for Ocean Affairs and the Law of the Sea. 2012; Bevilacqua. 2013: 113; Chalk. 2008: xii; 15; Haywood & Spivak. 2012: 18 - 19; Struett, M.J., Carlson, J.D. & Nance, M.T. Eds. 2013. *Maritime piracy and the construction of global governance*. New York: Routledge: 5.

<sup>554</sup> Schbley & Rosenau. 2013: 14; World Bank. 2013: 22.

<sup>555</sup> Bueger. 2013a: 91.

<sup>556</sup> World Food Programme. 2007. *Coordinated action urged: piracy threatens UN lifeline to Somalia*. 7 October. Available: <https://www.wfp.org/news/news-release/coordinated-action-urged-piracy-threatens-un-lifeline-somalia> [accessed 4 October 2017].

<sup>557</sup> Glück. 2015: 643.

<sup>558</sup> Trelawny. 2013: 48.

### 4.6.3 Local and regional impact

The impact of piracy on Somalia is often neglected. There are suggestions that piracy has benefitted Somalia, bringing money to regions and communities with few other income streams. Shortland suggests that ransoms make out a large percentage of Puntland's GDP, suggesting that the Puntland government may be funded by piracy.<sup>559</sup> Participant 3 argued that most ransom money ended up outside of Somalia and whatever did remain there did not contribute to development and remained concentrated in the hands of an important few.<sup>560</sup> Others have argued that fish stocks increased as foreign fishing vessels were driven away,<sup>561</sup> but research by the World Bank suggests otherwise.<sup>562</sup> Some also argue that piracy brought renewed attention and funding to the crisis in Somalia because of the security threat al-Shabaab and piracy poses.<sup>563</sup> These 'benefits' are however fleeting and are outweighed by piracy's detrimental impacts.

Piracy encourages corruption by government officials, further undermining the state's legitimacy. It could also fund further conflicts.<sup>564</sup> While Puntland and Somaliland have criminalized piracy, the FGS refuses to pass a piracy bill, reportedly because members of the government still believe that it is a legitimate activity and likely because some continue to benefit from it. Participant 2 noted how the FGS has protected a lot of pirate leaders<sup>565</sup> and when Participant 4 was asked if the FGS will ever pass a piracy law, he firmly answered "never" because of this connection.<sup>566</sup> Another threat has been to food security. Ninety per cent of food aid arrives in Somalia by sea and if these flows are disrupted, millions of people are affected.<sup>567</sup> By 2007, four World Food Programme (WFP) vessels had been attacked.<sup>568</sup>

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<sup>559</sup> Shortland, A. 2012. *Treasure mapped: using satellite imagery to track the developmental effects of Somali piracy*. Chatham House Arica Programme Paper 2012/01. London: Chatham House: 4; World Bank. 2013: 149.

<sup>560</sup> Interview Participant 3. 2018.

<sup>561</sup> Kraska. 2009: 116.

<sup>562</sup> World Bank. 2013: 60 – 63.

<sup>563</sup> Interview Participants 2; 3 & 8.

<sup>564</sup> Chalk. 2008: xii, 15; Haywood & Spivak. 2012: 20.

<sup>565</sup> Interview Participant 2. 2018.

<sup>566</sup> Interview Participant 4. 2016.

<sup>567</sup> UN News. 2008. *Security Council and Ban call for naval and air action against Somali pirates*. Available: <https://news.un.org/en/story/2008/10/276932-security-council-and-ban-call-naval-and-air-action-against-somali-pirates> [accessed 1 February 2020]. Also see World Food Programme. 2007.

<sup>568</sup> United Nations. 2007. *Pirates hijack UN food ship off Somalia*. 26 February. Available: <https://news.un.org/en/story/2007/02/210172-pirates-hijack-un-food-ship-somalia> [accessed 12 December 2020].

Piracy also has the ability to threaten the environment as pirates without the necessary skills can cause vessel accidents which could lead to oil and cargo spills.<sup>569</sup> There are also accounts of conflicts between pirates in areas around pirate activity.<sup>570</sup> Pirate activity often results in violence. Local fishermen have had their vessels and equipment stolen by pirates<sup>571</sup> and have been mistaken for pirates and subsequently killed by private security. A lot of violence is the result of counter efforts by navies, private armed security and other law enforcement bodies. Participant 4 noted that pirates surrender easily to navies because they know that navies must adhere to rules of engagement, whereas private security guards use force indiscriminately:

“[T]he navies were never really into killing individuals [...] a warship could turn up and boat full of marines with thousands of guns would come towards them, they wouldn't put up much of a fight. So, they tended to get captured, which is why the handbook for the navies are much more strict about how they use force. They're not gonna kill somebody who has surrendered. Whereas the private security companies, when pirates fire one round [...] they would just fire lots of ammunition [...] So, they are much more likely to get killed by private security [...] Private security used force until the threat has gone away and navies tended to catch them because pirates tend to put their arms up and when they saw a warship coming.”<sup>572</sup>

Piracy has also greatly affected surrounding states like Seychelles and Kenya, as piracy scared away tourists and made trade to and from these countries a likely target due to the proximity to Somalia.<sup>573</sup> People living in Seychelles, for example, often recall the period during which one could not go deep sea fishing without an armed escort. Piracy also requires costly resources to counter, which regional states often lack.<sup>574</sup>

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2019]. Also see Khan & Singh. 2013: 526; United Nations Division for Ocean Affairs and the Law of the Sea. 2012; Bevilacqua. 2013: 113.

<sup>569</sup> United Nations Division for Ocean Affairs and the Law of the Sea. 2012. Bevilacqua. 2013: 113; Chalk. 2008: xii; 15.

<sup>570</sup> Kraska: 2009: 116; Bueger. 2013a: 91; Bueger, C. 2013d. Responses to contemporary piracy: disentangling the organizational field. In *Modern piracy: legal challenges and responses*. D. Guilfoyle, Ed. Cheltenham: Edward Elgar: 15; Bueger. 2015b: 38; Bueger, C. 2012. Drops in the bucket? A review of onshore responses to Somali piracy. *World Maritime University Journal of Maritime Affairs*. 11: 6. DOI 10.1007/s13437-012-0022-5; Bueger. 2013a: 91; Bueger. 2013d: 15 & Bueger. 2015b: 38.

<sup>571</sup> Haywood & Spivak. 2012: 119.

<sup>572</sup> Interview Participant 4. 2016.

<sup>573</sup> Interview Participant 4. 2016.

<sup>574</sup> See, for example, Haywood & Spivak. 2012: 20; Struett, Carlson & Nance. 2013: 4.

#### 4.7 Piracy as a crime in International Law: the United Nations Convention on the Law of the Sea

The evolving interpretation of pirates as participants in war to common criminals led to acts of piracy being incorporated as crimes into national and international laws. This paved the way for applying national laws at sea, as well as using force to protect commercial interests threatened by pirates.<sup>575</sup> Although piracy can qualify as a TOC in terms of UNTOC,<sup>576</sup> only UNCLOS, the key international legal framework applicable to piracy,<sup>577</sup> is outlined below. UNCLOS is the codification of customary international law applicable to piracy.<sup>578</sup> It provides guidance to states on their rights and obligation to respond thereto<sup>579</sup> and affords piracy universal jurisdiction.

##### Article 101 of UNCLOS defines piracy as:

*“(a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:*

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<sup>575</sup> Ibid: 2.

<sup>576</sup> UNCLOS preceded UNTOC and piracy is never expressly mentioned in UNTOC, while crimes like drug trafficking and trafficking in wildlife are. Somali piracy however also qualifies as an organized crime under UNTOC if it fits the definitions as per Article 2 of being a serious transnational crime committed by an organized criminal group. Piracy is a transnational crime because it is prepared or planned in one state and committed in another, namely on a vessel which is considered to be the territory of the Flag State. The most important provision of UNTOC for the purposes of TOC at sea is Article 15(b) which establishes Flag State jurisdiction over TOC when the “offence is committed on board a vessel that is flying the flag of that state Party [...] at the time that the offence is committed.” This is confirmation of Flag State jurisdiction as per UNCLOS Article 92. The definition of piracy under UNCLOS meant to include pirates that operate from land in support of the maritime leg of the operation. UNTOC Article 5(1) criminalizes participation in an organized criminal group, which will cover network members both on land and at sea. UNTOC Articles 12 – 14 can also be used to deal with ransom proceeds as the proceeds of crime and the detailed mutual legal assistance regime in Article 18 can be used for pirate prosecutions in the absence of other agreements between states. Again, UNTOC will only be of effect if states incorporate its provisions into their domestic legislation. For more on piracy in terms of UNTOC, see Guilfoyle. 2009a: 34 - 37.

<sup>577</sup> UNCLOS superseded the 1958 United Nations Convention on the High Seas which was the first international convention to codify and define the crime of piracy in Article 15. Article 15 was repeated almost verbatim in UNCLOS Article 101, which superseded the High Seas Convention and holds the current universally accepted definition of piracy. The Convention also defines ‘freedom of the high seas’ and the ‘high seas’, which are important as piratical acts can only be committed on the high seas or seaward of a state’s territorial sea.

<sup>578</sup> Guilfoyle, D. & Mclaughlin, R. 2019. The crime of piracy. In *The African Court of Justice and Human and Peoples’ Rights in context: development and challenges*. C.C. Jalloh, K.M. Clarke & V.O. Nmehielle, Eds. Cambridge: Cambridge University Press: 389; IMO. 2011a. *Piracy: elements of national legislation pursuant to the United Nations Convention on the Law of the Sea, 1982. (Circular letter 3180)*. 17 May: 4. Available: [http://www.un.org/depts/los/piracy/circular\\_letter\\_3180.pdf](http://www.un.org/depts/los/piracy/circular_letter_3180.pdf) [accessed 19 September 2020].

<sup>579</sup> See, for example, Bruwer, C. & Vreÿ, F. Eds. 2017. *Lecture Series on maritime security governance off Africa*. UNODC & Stellenbosch University. Stellenbosch: African SUN Media.

*(i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;*

*(ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any state;*

*(b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;*

*(c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b)."*

This definition should be read with UNCLOS Articles 58(2), 102<sup>580</sup> and 103.<sup>581</sup> Article 58(2) provides that piratical acts committed within an EEZ also constitute acts of piracy. Piracy is therefore considered a high seas crime, a characteristic not shared with any other TOCs.<sup>582</sup> **UNCLOS Article 110(1)(a)** provides that an authorized government vessel has the right to visit a vessel reasonably suspected of engaging in piracy in order to verify its flag.<sup>583</sup> If such a vessel is found to be engaged in piracy, the vessel and crew may be seized and the suspects prosecuted in terms of **UNCLOS Article 105**, which affords universal jurisdiction to piracy.<sup>584</sup>

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<sup>580</sup> See Annexure D.

<sup>581</sup> See Annexure D.

<sup>582</sup> UNCLOS does not provide for acts similar to piracy which are committed in Coastal States' territorial and internal waters, such as is the case in the Gulf of Guinea. Nor does it provide for attacks where there aren't two vessels involved, such as where a vessel is attacked by its own passengers, and where the attack is not for private ends. The Convention on Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA Convention), 10 March 1988, Rome, 27 ILM 672, as amended by the Protocol of 9 May 2005, IMO Doc. LEG 90/15) was drafted to allow recourse for such acts and therefore complements the piracy provisions of UNCLOS. The Convention is however generally considered to be aimed at terrorism and its drafting was the outflow of an internal attack from on board a vessel by the Palestine Liberation Front on the Achille Lauro vessel. The aim of SUA is to cover all forms of violence aimed at shipping which endanger vessels, crews and maritime navigation, without distinguishing between acts committed on the high seas or in territorial waters. Acts similar to piracy, but which do not take place on the high seas, are generally referred to as armed robbery at sea. The SUA Convention and its Protocols however provide no automatic rights of enforcement on the high seas and its potential impact on responding to piracy off the Horn of Africa is therefore limited, as this provision is already contained in Articles 105 and 110 of UNCLOS. For more on the SUA Convention, see IMO. 2011b. *Uniform and consistent application of the provisions of international conventions relating to piracy. (Circular letter 3180)*. 17 May. London: IMO: 2-6; Guilfoyle. 2009a: 3; 12 – 14, 19; Hastings, J. 2009. Geographies of state failure and sophistication in maritime piracy hijackings. *Political Geography*. 28(2009): 213–217. DOI:10.1016/j.polgeo.2009.05.006; Defence Technical Information Centre. 2013. *Regional analysis Western Indian Ocean HOA-GOA*: 29 – 30.

<sup>583</sup> UNCLOS Article 110 is limited by UNCLOS Articles 95 and 96 which forbid the visitation of vessels entitled to immunity, such as another warship or government vessel.

<sup>584</sup> Guilfoyle. 2009a: 5.

*“On the high seas, or in any other place outside the jurisdiction of any state, every state may seize a pirate ship [...], or a ship [...]taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the state which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ship”.*

Although Article 105 only refers to the seizing state, customary international law provides that any state may assert jurisdiction over pirate suspects in order to prosecute them, allowing “a state prosecuting conduct committed by a foreigner in a foreign territory which does not have any effects within the prosecuting state’s territory or upon its nationals or against its vital interests”.<sup>585</sup> This is however subject to such a state having incorporated the right to exercise universal jurisdiction into its domestic legislation as international conventions are of no effect otherwise.<sup>586</sup> In accordance with ordinary criminal jurisdiction, the states from which the pirates, victims and vessel originate can also establish jurisdiction in terms of active and passive personality principles.<sup>587</sup> In 1927, the Permanent Court of International Justice alluded to universal jurisdiction applicable to piracy even before international laws on piracy were codified. In the *S.S Lotus* case the court stated that:

“[a]s the scene of the pirate's operations is the high seas, which it is not the right or duty of any nation to police, he is denied the protection of the flag which he may carry, and is treated as [...] the enemy of mankind [...] whom any nation may in the interest of all capture and punish.”<sup>588</sup>

This position was eventually confirmed through subsequent case law and Article 19 of the 1958 Convention on the High Seas.<sup>589</sup>

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<sup>585</sup> Guilfoyle, D. 2016. *International criminal law*. Oxford: Oxford University Press: 37.

<sup>586</sup> United Nations General Assembly. 2010. *Resolution A/RES/64/71 on oceans and the Law of the Sea*, 12 March. A/RES/64/71 (2009). Available: [http://www.un.org/en/development/desa/population/migration/generalassembly/docs/A\\_RES\\_64\\_71\\_E.pdf](http://www.un.org/en/development/desa/population/migration/generalassembly/docs/A_RES_64_71_E.pdf) [accessed 19 September 2017]. Also see IMO. 2011a: 3; IMO. 2011c. *Establishment of a legislative framework to allow for effective and efficient piracy prosecutions*. 17 May. IMO: London: 1 – 2. Available: [https://www.un.org/Depts/los/piracy/circular\\_letter\\_3180.pdf](https://www.un.org/Depts/los/piracy/circular_letter_3180.pdf) [accessed 11 December 2018].

<sup>587</sup> Guilfoyle. 2009a: 6.

<sup>588</sup> Noyes, J.E. 1990. An introduction to the international law of piracy. *California Western International Law Journal*. 21(1190): 114; *The S.S. Lotus (France v Turkey)*, 1927, PCIJ.

<sup>589</sup> United Nations Convention on the High Seas. 1958. 29 April, Geneva. 6465 UNTS 450.

International law stipulates that criminal jurisdiction is the prerogative of sovereign states which may only exercise jurisdiction over its territories or vessels registered under its flag, as well as extra-territorially, provided there is a link between the state and the offence.<sup>590</sup> The universal jurisdiction afforded to piracy is however an exception to this,<sup>591</sup> which is an extremely rare characteristic which piracy shares with only the most serious of international crimes such as crimes against humanity and genocide. States are however often reluctant to prosecute pirates and Article 105 places no duty on them to do so.<sup>592</sup> However, read with **UNCLOS Article 100** which places a *duty* on all states to cooperate to the fullest possible extent in the repression of piracy, Guilfoyle argues that states should prosecute pirates whenever possible and if they cannot, they should transfer the suspects to another state for prosecution.<sup>593</sup> But as Chapter 5 will illustrate, this is not always the case as many states have neglected to enact domestic legislation to enable them to exercise this duty.<sup>594</sup>

Prosecuting states are free to impose any penalties in accordance with their national laws.<sup>595</sup> This is a point of contestation,<sup>596</sup> as committing the same crimes in the same region results in vastly different sentences across jurisdictions. As Participant 3 noted, “depending on where they were prosecuted, so, in the US [...] pirates were given forty, fifty years, whereas other places it was four.” This is however generally accepted practice as the discretion in imposing sentences is reflected in the wide ranging sentences applied to piracy across the globe.<sup>597</sup> Another concern which states may have is that handing over suspects for prosecution can subject them to human rights abuses, such as the death penalty. But, as the death penalty is increasingly abolished globally, the crime of piracy is very rarely subject thereto. States are therefore less apprehensive to hand over suspects to another state for prosecution, regardless of the discrepancies in penalties. Piracy is also an international

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<sup>590</sup> Kontorovich, E. 2004. The piracy analogy: modern universal jurisdiction’s hollow foundation. *Harvard International Law Journal*. 45(1): 188. DOI: 10.2139/ssrn.385900

<sup>591</sup> IMO. 2011a: 3.

<sup>592</sup> Guilfoyle. 2009a: 6; Guilfoyle. 2016: 39.

<sup>593</sup> Guilfoyle. 2009a: 6.

<sup>594</sup> Ibid: 2009a: 1.

<sup>595</sup> Paust, J.J., Bassiouni, M.C., Scharf, M.P., Sadat, L.N., Gurulé, J. & Zagaris, B. 2007. *International Criminal law: cases and materials*. Durham: Carolina Academic Press: 162.

<sup>596</sup> See, for example, Collins, V.E. 2015. Guilty until proven guilty?: an examination of the anti-piracy response at the interactional level. *International Journal of Law, Crime and Justice*. 43 (2015). DOI: 10.1016/j.ijlcrj.2014.07.004.

<sup>597</sup> Goodwin, J.M. 2006. Universal jurisdiction and the pirate: time for an old couple to part. *Vanderbilt Journal of Transnational Law*. 39(3): 997.

crime and no other international crime is punishable by the death penalty in any of the international tribunals.<sup>598</sup> Most courts have however adopted the approach that piracy is a serious crime deserving of a harsh sentence. Fears of human rights abuses will again be discussed in Chapter 6 on heroin trafficking.

#### 4.7.1 Piracy as a crime of universal jurisdiction

It is necessary to enquire how piracy has developed from a state-sponsored activity, to “simply robbery on the high seas without letters of marque or other state sanction”,<sup>599</sup> to one of only a handful of international crimes afforded universal jurisdiction. Such an enquiry is especially important to understand why actors choose to respond and because there are peculiarities around piracy being afforded such far-reaching jurisdiction. No other TOCs are afforded universal jurisdiction, despite their inherent transnational character and grave impacts. As Chapters 6 to 8 will show, states will also not agree to such broad jurisdictional powers for any other TOCs at sea, which is a barrier to successful responses.

International crimes are those considered most serious by the international community. This includes genocide, crimes against humanity and war crimes.<sup>600</sup> These crimes are created through customary law or agreements between states,<sup>601</sup> such as Conventions, and are universally obligatory to punish. The primary conventions applicable to piracy are however different to the conventions applicable to the other international crimes.<sup>602</sup> Piracy, along with genocide, war crimes, crimes against humanity, crimes of aggression, slavery and torture, is considered *jus cogens*.<sup>603</sup> *Jus cogens* are rules of customary international law which cannot be derogated from and which trump all other international law as it enjoys a

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<sup>598</sup> Kontorovich, E. 2012. *The penalties for piracy: an empirical study of national prosecution of international crime*. Faculty Working Papers. (Paper 211): 7. Available: <http://scholarlycommons.law.northwestern.edu/facultyworkingpapers/211> [accessed 21 November 2019].

<sup>599</sup> Guilfoyle & McLaughlin. 2019: 390 - 391.

<sup>600</sup> Open Society Foundation. n.d. *Fact sheet: international crimes*. New York: Open Society Foundation: 1. Available: [https://www.opensocietyfoundations.org/sites/default/files/mx-factsheet-icl-20160603\\_0.pdf](https://www.opensocietyfoundations.org/sites/default/files/mx-factsheet-icl-20160603_0.pdf) [accessed 12 October 2017].

<sup>601</sup> Paust et al. 2007: 5 – 6; United Nations. 1945. *United Nations Charter and the Statute of the International Court of Justice*. 26 June, San Francisco: Article 35. Available: [http://legal.un.org/avl/pdf/ha/sicj/ici\\_statute\\_e.pdf](http://legal.un.org/avl/pdf/ha/sicj/ici_statute_e.pdf) [accessed 1 November 2017].

<sup>602</sup> United Nations. 2014. *Framework of analysis for atrocity crimes: a tool for prevention*. New York: United Nations: 1.

<sup>603</sup> Bassiouni, C.M. 1997. *Jus cogens and erga omnes*. *Law and Contemporary Problems*. 59(4): 68.

higher status.<sup>604</sup> The international prohibitions against piracy and slavery are the oldest forms of *jus cogens*.<sup>605</sup> *Jus cogens* crimes impose *obligatio erga omnes* on states, which includes the obligation to prosecute or extradite those suspected of such crimes.<sup>606</sup> *Obligatio erga omnes* are obligations owing to all human kind and not just to certain states and their nationals.<sup>607</sup>

*Jus cogens* crimes are considered very serious in scope and gravity and are afforded universal jurisdiction.<sup>608</sup> According to Guilfoyle, crimes enjoy universal jurisdiction if it is of a particularly heinous nature, or if crimes, although not as shocking, affect the international legal order and in doing so affects all states, or where states have agreed that a specific crime will enjoy universal jurisdiction.<sup>609</sup> Piracy was in fact the first crime of universal jurisdiction and remained the only such crime for centuries as the law of nations never afforded universal jurisdiction to any other crimes. This is despite the fact that atrocities like genocide have always 'shocked the conscience of humanity' much more than piracy. These crimes were only afforded universal jurisdiction after World War II by the War Crime tribunals, based on the reasoning that any nation must be able to punish such heinous crimes.<sup>610</sup> Why does piracy share this exceptional jurisdiction with only the most heinous of crimes against mankind? There are two primary perspectives on this – one favouring piracy's unique character as a high seas crime and one favouring its impact.

#### 4.7.1.1 Piracy's *sui generis* character

Scholars like Kontorovich and Noyes suggest that universal jurisdiction applies because of the unique characteristics and the challenges posed by piracy's commission on the high seas, rather than the seriousness of the offence. The fact that piracy takes place in

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<sup>604</sup> Paust et al. 2007: 7; Smith, S.E. 2013. *Piracy, slavery, and the limits of international law: the gap between the rhetoric and reality of jus cogens*. Available: <https://search.proquest.com/docview/1373283429?pq-origsite=gscholar> [accessed 1 November 2017]; Guilfoyle. 2016: 8.

<sup>605</sup> Smith. 2013: Abstract.

<sup>606</sup> Bassiouni. 1997: 63.

<sup>607</sup> Paust et al. 2007: 7; Guilfoyle. 2016: 38.

<sup>608</sup> Rahmonov, A. 2011. Piracy off the coast of Somalia: in search of the solution. *Cornell Law School Inter-University Graduate Student Conference Papers*. (Paper 54): 8.

<sup>609</sup> Guilfoyle. 2016: 38.

<sup>610</sup> Kontorovich. 2004: 184 – 195; 205; 227 - 228.

international waters outside the territory of any state indeed poses unique difficulties in countering it.<sup>611</sup> Noyes notes, “[t]he conceptual case for universal jurisdiction concerning pirates emphasizes that pirates are not subject to the authority of any state and are a threat to all states.”<sup>612</sup> While this is not entirely correct, as Flag States and the states from which pirates originate, maintain jurisdiction, the motivation for universal jurisdiction could indeed have been due to the difficulty of containing crime at sea. This unique character of piracy was noted in the *S.S Lotus* case<sup>613</sup> and has caused some jurists to suggest that piracy is perhaps the only crime of universal jurisdiction in customary law. In the International Court of Justice case of the *Democratic Republic of the Congo v Belgium*,<sup>614</sup> Judge Ranjeva stated as follows:

“Universal jurisdiction [...] may be explained by the lack of any predetermined sovereignty over the high seas and by the regime of their freedom; thus, normally, the jurisdiction of the Flag State serves as the mechanism which ensures respect for the law. But since piracy by definition involves the pirate's denial and evasion of the jurisdiction of any state system, the exercise of universal jurisdiction enables the legal order to be re-established. In this particular situation [...] the conferring of universal jurisdiction [...] is explained by the harm done to the international system of state jurisdiction. The inherent seriousness of the offence itself has, however, not been deemed sufficient *per se* to establish universal jurisdiction. Universal jurisdiction has not been established over any other offence committed on the high seas”.<sup>615</sup>

#### 4.7.1.2 The *gravitas* of piracy

Interestingly, it appears that most scholars and jurists assume and accept that universal jurisdiction applies to piracy based on its gravity and that this is justified by the need for any

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<sup>611</sup> Ibid: 186 – 187; 223.

<sup>612</sup> Noyes. 1990: 115.

<sup>613</sup> Kontorovich. 2004: 184 – 195; 218.

<sup>614</sup> *Case Concerning the Arrest Warrant of 11 April 2000 (Congo v Belgium)*, 14 February 2002, ICJ; Guilfoyle. 2016: 38.

<sup>615</sup> Judge Ranjeva in *Congo v Belgium*.

state to be able to punish the most heinous of crimes.<sup>616</sup> Goodwin however argues that pirates are today only labelled as *hostis humanis generis* because they have historically been afforded universal jurisdiction.<sup>617</sup> Courts have however primarily considered piracy a serious offence with a global impact. This has also been the case in eastern African courts which have tried the majority of Somali pirate suspects. The Supreme Court of Seychelles, for example, noted:

“the enormity of the threat that piracy poses to maritime enterprise is phenomenal and has the potential to disrupt international law, order and maritime security environment at sea, which in turn impacts on the international system of trade.”<sup>618</sup>

UNSC resolutions on Somali piracy also note the gravity of the offence, primarily its impact on trade and its ability to exacerbate the political situation in Somalia. International courts have defined heinous crimes as acts which shock the conscience of mankind, which damage vital international interests, impair the foundations and security of the international community and which violate universal values and humanitarian principles enshrined in criminal law systems. Although piracy is often accompanied by violence and impairs security when crew members are kidnapped, it is hardly comparable in gravity to war crimes and it is questionable how it fits the definition of a heinous crime. The only element which it likely fulfils is the violation of international interests in the form of commerce.<sup>619</sup> The argument against piracy’s heinousness is also supported by the fact that when stakeholders initially considered the correct approach to countering piracy, it was dealt with as a crime which was more related to robbery and banditry than to war crimes.<sup>620</sup>

#### **4.7.1.3 A combination of piracy’s gravity and unique character**

Others, like Rahmonov, support both perspectives, suggesting that universal jurisdiction’s application to piracy is due to its commission outside the territory of any state, but also because piracy has historically been executed with severe violence and has caused

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<sup>616</sup> Kontorovich. 2004: 184 - 195.

<sup>617</sup> Goodwin. 2006: 994.

<sup>618</sup> Kontorovich. 2012: 15.

<sup>619</sup> Kontorovich. 2004: 196 – 199.

<sup>620</sup> Huggins & Madsen. 2014: 20.

significant economic losses to states. Grotius perhaps also relied on both motivations, labelling piracy as a crime against all humanity.<sup>621</sup> He called Portuguese pirates “worthy objects of universal hatred in that they were harmful to all mankind” because they plunder on the high seas, which are the connecting highway between all nations.<sup>622</sup> There are also legal positivists who argue that the only form of international law relevant for piracy relates to jurisdiction, because it remains the prerogative of individual states if and how they will incorporate piracy into their national legislation.<sup>623</sup> Interestingly, universal jurisdiction was applied in very few piracy prosecutions prior to the emergence of Somali piracy.<sup>624</sup>

#### 4.8 Conclusion

This chapter has illustrated how conditions in Somalia, including a lack of legitimate economic opportunities and institutions able to combat crime, aligned with its location near one of the world’s busiest shipping lanes to give rise to piracy. Some of these conditions may have been exacerbated by the international community now wishing to combat piracy. It further showed why Somali pirates employ the kidnap for ransom modus operandi and which interests their attacks threaten. These unique features illustrate how TOC is the product of and response to global and local conditions. The pirates’ narratives also reflect how the illegality of piracy is in the eye of the beholder, which is important to take into account in attempts to counter it. It however appears that piracy’s impact on world trade has been and will continue to be the primary consideration in choosing counter-responses. Piracy’s historical trajectory into a high seas crime has caused it to be uniquely afforded universal jurisdiction, which forms the basis of the response discussed in the following chapter.

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<sup>621</sup> Rahmonov. 2011: 8 - 9; Paust et al. 2007: 5

<sup>622</sup> Kempe, M. 2007. Beyond the law: the image of piracy in the legal writings of Hugo Grotius. *Grotiana*. 26(1): 388. DOI: 10.1163/ej.9789004175136.i-422.102.

<sup>623</sup> Noyes. 1990: 114 – 115; Boister. 2012: 28.

<sup>624</sup> Noyes. 1990: 115; Kontorovich. 2004: 192.

## 5 The global response to Somali piracy

What was perhaps more remarkable than the efficiency of pirate attacks and the speed with which they gained momentum, was how swiftly it was halted by a coordinated effort by the international community.<sup>625</sup> As no Somali institutions could counter piracy alone, other states and stakeholders stepped in. Most notably, states did not act in isolation. They were joined by non-state actors who were equally moved to respond due to piracy's wide ranging impact, resulting in a myriad of responses on a scale never experienced in response to a TOC at sea.



**Figure 3: Piracy incidents between January & March**



**Figure 4: Piracy incidents between January & September 2020**

Although pirate skiffs are still spotted in the Indian Ocean daily<sup>626</sup> and despite renewed isolated incidents since 2017,<sup>627</sup> by 2013 Somali piracy was contained and is now largely considered a thing of the past. For piracy to decline, the benefits must decrease and the risk must increase.<sup>628</sup> According to Participant 4, a senior UN staff member working on counter-

<sup>625</sup> Figure 3 shows piracy incidents in the WIO in 2011. Braesch, C. 2011. Preventing piracy: taking action before attacks occur. *Coast Guard Compass*. 8 March. Available: <https://coastguard.dodlive.mil/2011/03/preventing-piracy-taking-action-before-attacks-occur/> [accessed 16 October 2019]; Figure 4 shows piracy incidents between January and September 2019. ICC International Maritime Bureau. 2019. *Piracy and armed robbery against ships: report for the period 1 January to 30 September 2019*. London: ICC International Maritime Bureau.

<sup>626</sup> Chul. 2014: 47.

<sup>627</sup> Graham, L. 2017. Somali piracy is back with a \$1.7 billion problem after shipping firms lower vigilance. *CNBC*. 3 May. Available: <https://www.cnbc.com/2017/05/03/somali-piracy-is-back-17-billion-dollar-problem-shipping-firms-lower-vigilance.html> [accessed 10 October 2017].

<sup>628</sup> Kraska. 2010: 117.

piracy, this is exactly why Somali piracy declined. The response turned piracy from a venture with little risk of being captured or killed and a high likelihood of capturing a vessel, to an activity with significant risk of being captured or killed and a low likelihood of capturing a vessel.<sup>629</sup> Piracy was contained primarily by naval patrols, private armed guards on board shipping vessels and a legal finish resulting in prosecutions which put an end to the initial ‘catch and release’ practice whereby pirates were apprehended, but not arrested.<sup>630</sup> Participant 4 described the key responses as follows:

“There’s the naval operations, which have disrupted piracy effectively, particularly the maritime patrolling by air as you can catch glimpses of where the groups are. The private armed security on the ships which has been very, very effective, although there was great reluctance about this from maritime organisations [...] there’s never been a ship with armed guards hijacked [...] and then I think the third thing is that there has been a legal finish to the arrests [...] So we didn’t have this catch and release thing where the message went to the pirates that if you were caught, providing you weren’t killed, you know, you were captured then they would give you food and fuel to make sure that you can get home [...] It was when we started seeing three hundred pirates ending up doing long periods in prison, that did happen. Maybe some of them will think twice.”<sup>631</sup>

While pirates need few resources to execute attacks, it took multiple actors and billions of dollars to stop them. The response is often called ‘unprecedented’ as the international community has never before collectively responded to a non-state maritime security threat on this scale. The response is characterized by the unique complementarity and cooperation between a large number of public and private actors. This is particularly noteworthy because piracy had not previously formed part of contemporary global crime governance efforts - it wasn’t necessary.<sup>632</sup> Now, it is imperative. Campling and Colas note how modern piracy has “turned parts of the ocean-space into a laboratory for new multilateral forms of governance and force that are largely absent on land.”<sup>633</sup> Counter-piracy comprises a

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<sup>629</sup> Interview Participant 4. 2016.

<sup>630</sup> Interview Participant 3. 2018 & Interview Participant 4. 2016.

<sup>631</sup> Interview Participant 4. 2016.

<sup>632</sup> Jacobi. 2014: 1.

<sup>633</sup> Campling & Colas. 2017: 787.

combination of activities by a variety of stakeholders enabled primarily by UNSC Resolutions and UNCLOS. Responding states included everyone from rivals like the US, Russia, China and Iran, to regional states like Kenya and Seychelles, and major shipping nations like Denmark. These states cooperated and coordinated their efforts not only with each other, but also with international organizations, the shipping industry and NGOs.

Piracy and counter-piracy are complex issues to make sense of. It takes place outside of state territory, yet affects numerous state and non-state actors. It has a transnational character in that the shipping company, cargo owner, insurance provider, Flag state and crew from a vessel can all have different nationalities and so too the responding actors. states all have different piracy laws and deal with piracy differently. Piracy also affects different areas of international relations, including world trade, TOC and humanitarian aid, all governed by different international treaties and addressed by different actors. Countering piracy is therefore a complicated exercise and explains why a few thousand pirates proved so challenging to overcome by the powerful international community.<sup>634</sup>

Due to the complexity of piracy and counter-piracy it has “become very difficult to navigate through the increasingly complex and rapidly developing organizational jungle of counter-piracy”.<sup>635</sup> This chapter however attempts to do so in order to make sense of selected responses and actors. This helps one to understand its utility for other TOCs at sea and provides comparative opportunities for mutual learning by identifying failures and successes. An in-depth analysis of all responses is a thesis on its own. Therefore, the discussion of a handful of chosen responses will address only that deemed necessary to understand the nature, strengths and weaknesses of the response and to consider its utility for other TOCs in the following chapters. The chosen responses to be discussed, together with Chapter 8, arguably provide one of the most comprehensive analytical discussions on counter-piracy, including an analysis of its successes and failures. This is based on the literature and interviews with participants working in counter-piracy and related activities, such as development or humanitarian efforts in Somalia.

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<sup>634</sup> Bueger. 2013a: 87.

<sup>635</sup> Bueger. 2013a: 91.

The Chapter commences by discussing the different drivers of the response, followed by the key counter-piracy actors. It then considers the three stages of the response – initiation, governance and implementation. The responses are discussed at the hand of Bueger’s counter-piracy paradigms, starting from the most resourced responses at sea before moving to the least resourced responses on land. Responses are categorized under the security, legal, economic, development and humanitarian paradigms. These all represent different pillars of the overall response and if one were to be removed, the response’s impact will be weakened. The discussion of responses at the hand of paradigms sets the stage for the comparative discussion of the responses, motivations and implementing actors who address heroin and ivory trafficking, in Chapters 6 and 7.

### **5.1 What drove the large-scale effort and how were responses selected?**

Piracy has traditionally been perceived as an issue of maritime safety and was addressed by organizations such as the International Maritime Organization (IMO) and shipping associations. This narrow understanding however broadened since the 1990s when it was acknowledged that piracy, like other maritime security threats, also threatens other interests, as discussed in Chapter 4. It relates to development and politics and has its roots in broader governance issues. Because of its multi-dimensional nature, it requires a multi-disciplinary response by various specialized actors<sup>636</sup> and it was apparent from the outset that no single international body, and certainly not the FGS, could counter piracy on behalf of the international community.<sup>637</sup> It was a combination of this multi-dimensional character, its increasingly international nature as attacks moved onto the high seas, and Somalia’s inability to counter it, which led to the multifaceted response. The response was driven from outside the Horn and eastern Africa region by a combination of private and public actors. The main actors were, as is typical of global crime governance, primarily from the West.<sup>638</sup> Although cooperating with the TFG and the FGS, the weakness of these successive governments and the seriousness of the threat posed by piracy allowed the international community to dictate the response. The unique response also came about because there

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<sup>636</sup> Bueger. 2013d: 3 - 4.

<sup>637</sup> Swarttouw, H. & Hopkins, D.L. 2014. The Contact Group on Piracy off the Coast of Somalia: genesis, rationale and objectives. In *Fighting piracy off the coast of Somalia: lessons learned from the Contact Group*: 11.

<sup>638</sup> Jacobi. 2014: 3.

was no existing model applied to other crimes which was suited to address piracy.<sup>639</sup> Participant 1, an academic, further suggested that the novelty of piracy motivated the response and that this also speaks to when stakeholders will respond again:

“To create an environment like that is not so easy and for that you have to look at what makes piracy particular, because it’s exotic, it’s exciting. There was a mutual interest [...] It was a new problem and one of the oldest problems at the same time.”<sup>640</sup>

Therefore, because no one knew how to deal with piracy, there was a lot of freedom in formulating the response.<sup>641</sup> This is arguably different for wildlife and drug trafficking, which are not as novel in their current manifestations, although they are arguably novel in their scale. There are also no new instruments or agreements aimed at addressing them, although participants expressed the need for new and innovative responses to the challenges linked to TOC at sea,<sup>642</sup> as discussed in Chapters 6 and 7.

Huggins and Madsen argue that the conditions typically compelling international responses were absent with the threat of Somali piracy and traditional cooperative mechanisms were therefore ruled out. First, there was no Somali government to pressure or support in a counter-response. Second, pirate attacks took place on the high seas, causing states to assume that international customary law and existing treaties would provide a sufficient legal framework to respond. However, the costly nature of criminal justice processes and the possibility of convicted pirates seeking asylum had deterred states from acting as they did not want to host trials and be responsible for pirate suspects. This is why pirates were initially released by navies, highlighting how the existing rule of law structures applicable to piracy were inadequate to deter pirates and to compel states to act against them. Third, piracy did not trigger any mutual defence treaties and arguably no vital national interests, apart from maritime commerce, were threatened. Pirates were also acting in their private capacity and states could therefore not act against Somalia. Fourth, major Flag states were not necessarily associated with the navies trying to protect their ships. Novel ways therefore

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<sup>639</sup> Interview Participant 4. 2016.

<sup>640</sup> Interview Participant 1. 2017.

<sup>641</sup> Interview Participant 1. 2017.

<sup>642</sup> Interview Participant 1. 2017 & Interview Participants 4 & 15. 2016.

had to be sought to bring about cooperation between Flag states and international navies. Finally, the public was initially indifferent to piracy as they were unaware of its impact.<sup>643</sup> These factors, coupled with the de-territorialised nature of piracy and the multiple potential stakeholders concerned<sup>644</sup> were all reasons for the unique response.

The range of stakeholders participating in counter-piracy affords it a great degree of legitimacy.<sup>645</sup> But there are differing opinions on what truly drove actors to respond - assisting Somalia, rescuing hostages, protecting trade or perhaps gaining a strategic presence in the region? The response is typically attributed either to the protection of the international community's interests or providing humanitarian assistance to Somalia. It is argued that eliminating piracy will improve security in Somalia and the East African region and that the economic costs of piracy are taxing on the global economy and therefore should be eradicated.<sup>646</sup> The motivation for responding to TOC at sea is important, as it is unlikely that there would be as an equally far-reaching response to crimes which do not threaten vital interests of public or private actors able to respond.

Scholars like McGahan and Lee support the humanitarian and security threat posed by piracy as the key motivation for the international community's response. While they concede that economic and political motivations are also present, they argue that Somalia's humanitarian crisis is more prominent in UN resolutions. They argue that there is no longer a strict differentiation between security and humanitarian concerns, that the two are intricately linked as fragile states pose a threat to themselves and the international community, which justifies efforts to improve their conditions.<sup>647</sup> While this is correct, counter-piracy efforts are concentrated in a small region and primarily at sea, while land-based responses have been minimal and are yet to improve the structural conditions causing piracy and the humanitarian crisis. Addressing the fragility of Somalia has therefore not been at the top of the international community's counter-piracy agenda, while

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<sup>643</sup> Huggins & Madsen. 2014: 18 – 19.

<sup>644</sup> Tardy, T. 2014. *Fighting piracy off the coast of Somalia: lessons learned from the Contact Group*: 8.

<sup>645</sup> McGahan, K. & Lee, T. 2012. Frames, humanitarianism, and legitimacy: explaining the anti-piracy regime in the Gulf of Aden. In *Maritime piracy and the construction of global governance*. J. Carlson, M. Nance & M. Struett, Eds. New York: Routledge: 149.

<sup>646</sup> World Bank. 2013: xi.

<sup>647</sup> McGahan & Lee. 2012: 150 - 155.

protecting economic interests has.<sup>648</sup> Participant 9 from the EU illustrated this as he explained that interest in piracy is waning because it no longer affects states economically and that if counter-piracy was motivated by humanitarianism, money would be pouring into Somalia at the same rate as at the height of piracy.<sup>649</sup> McGahan and Lee's perspective may be illustrative of Glück's argument that the security threat posed by piracy and state fragility is used as a smokescreen for establishing a central government in Somalia.<sup>650</sup>

More evidence disproving a humanitarian motivation is found in the nature of resources spent. In 2011, at the height of piracy, USD 6.6 billion were dedicated to military efforts, while a mere USD 4.5 million was dedicated to humanitarian aid.<sup>651</sup> In 2016, OBP estimated that piracy related costs to industry totalled USD 1.7 billion and piracy deterring measures totalled USD 1.5 billion.<sup>652</sup> The ransom proceeds made by pirates and the costs incurred by the international community to suppress piracy are therefore extremely disproportionate, suggesting that a different approach to one focussed on security and law enforcement is worth exploring.<sup>653</sup> The fact that most counter-piracy policies are developed by actors other than Somalia also creates the impression that these measures are implemented to protect the interests of the entities who put them in place and not the state to which they apply.<sup>654</sup> This is discussed in Chapter 8, though it should be noted that Somalia's limited capacity has rendered it unable to steer the response.

As discussed in Chapter 2, scholars like Glück and Collins support protecting economic interests as the key motivation for the international response focussed on securitization at sea. Collins suggests that the militarization of counter-piracy is purely to protect economic interests, which is now also driven by counter-piracy having developed into a very profitable security industry.<sup>655</sup> Glück similarly argues that counter-piracy securitization is aimed at protecting capital circulation and freedom of the seas by enclosing maritime space. This constructs spacial domination, allowing trade to continue, yet suppresses pirate activity.

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<sup>648</sup> Collins. 2014: 441.

<sup>649</sup> Interview Participant 9. 2016.

<sup>650</sup> See Chapter 3.

<sup>651</sup> Collins. 2014: 443.

<sup>652</sup> Oceans Beyond Piracy. 2017.

<sup>653</sup> World Bank. 2013: xxv.

<sup>654</sup> Collins. 2014: 444.

<sup>655</sup> Collins. 2014: 443.

Such measures are typically applied to post-colonial states, like Somalia, to mitigate the threat which they pose to economic interests. Glück argues that these measures also produce criminalization and violence and serve to reinforce historical global divisions of power, class, race and property.<sup>656</sup> Examples include private security guards' killing of fishermen suspected of being pirates<sup>657</sup> and piracy trials where suspects understand little of the proceedings.<sup>658</sup> Having observed a piracy trial, I can attest to this.

Research participants agreed that the aim of counter-piracy is to protect the economic interests of affected states and the shipping industry. Part of this was however also to empower Somalia and other regional states to address piracy. Some regional states, like Kenya and Seychelles were eventually to play pivotal roles by prosecuting the majority of pirates. The motivations for the response as perceived by research participants are further discussed in Chapter 8.

## **5.2 The key counter-piracy actors**

Chapter 2 outlined how actors who respond to security threats form partnerships. The counter-piracy actors fit these descriptions, as they too are a social group of practitioners addressing the same problem. Piracy might be the only thing that these actors have in common, but they use a shared understanding, objectives and means to address it.<sup>659</sup> Most counter-piracy actors are stakeholders directly affected by piracy. They best represent a security assemblage as they include private and public actors.<sup>660</sup> The private response is primarily that of the shipping industry, which includes the use of private security companies. The public response is that of states and international organizations. The absolute reliance on cooperation between private and public entities is a characteristic unique to counter-piracy. Without such complementary, the responses would have had a limited impact. This might explain the limited impact of responses to heroin and ivory trafficking, as the shipping industry is largely absent despite its centrality to the trafficking models.

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<sup>656</sup> Glück. 2015: 643 - 656.

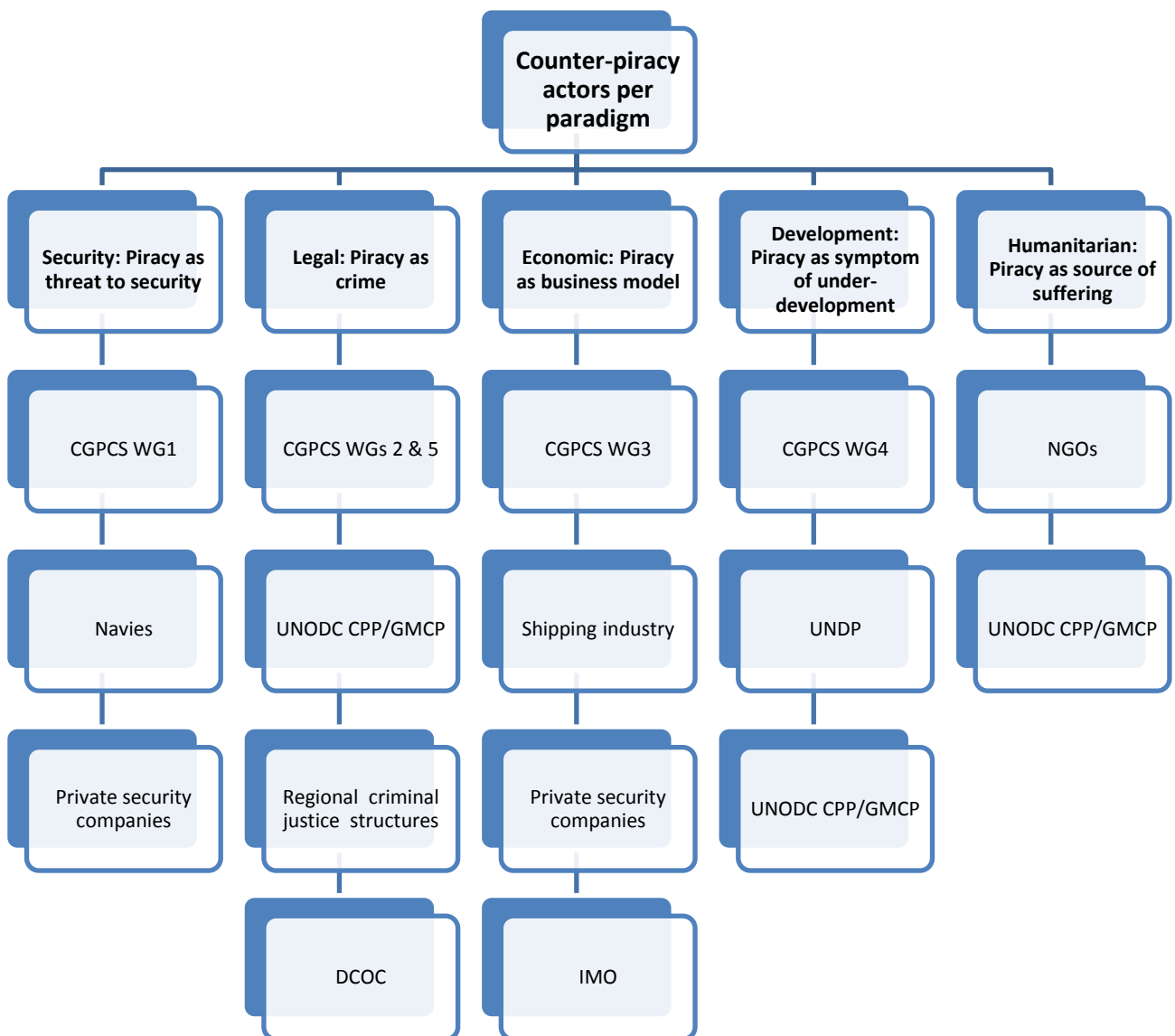
<sup>657</sup> Patriarca. 2013: 235.

<sup>658</sup> Collins. 2015.

<sup>659</sup> Bueger. 2013a: 88.

<sup>660</sup> See, for example, Gould. 2017; Abrahamsen & Williams. 2009; Bueger. 2018.

Most key actors are from outside of eastern Africa. Although regional states have played an important role, they often rely on external actors for capacity building and resource provision. Regional cooperation was often also initiated by the international community. This is likely either due to a lack of resources and capacity, or due to a lack of political will and the inclination to focus maritime security measures, if they exist, no further than territorial seas.<sup>661</sup> As noted in Chapter 2, this is not unique to eastern Africa or even Africa. The key actors are illustrated per counter-piracy paradigm in the diagram below.



<sup>661</sup> Defence Technical Information Centre. 2013: 31.

### 5.2.1 The Contact Group on Piracy off the Coast of Somalia (CGPCS)

Because Somalia could not coordinate the response, another entity needed to do so. The result was the creation of the CGPCS,<sup>662</sup> which is the overarching coordination body widely credited for being the reason for counter-piracy's success.<sup>663</sup> It was established pursuant to UNSC Resolution 1851 of 2008, which called for the creation of an international cooperation mechanism as a focal point between states and organizations.<sup>664</sup> The CGPCS does not implement responses, it only coordinates the efforts of counter-piracy actors.

### 5.2.2 The United Nations

UN agencies have played a central role in the response.<sup>665</sup> UNSC Resolutions, along with UNCLOS, have provided the primary legal basis for counter-piracy efforts.<sup>666</sup> UNSC Resolution 1851 of 2008 requested a possible leadership and coordinating role for the UN in the counter-piracy campaign.<sup>667</sup> But by 2009, the complexity and magnitude of counter-piracy naval operations led to the realization that the UN did not have the resources or capacity to successfully coordinate and lead counter-piracy military operations. This role was then filled by the CGPCS, with the UN primarily focussing on capacity building. The UN and the CGPCS have however effectively cooperated in coordinating the responses and marrying counter-piracy with maritime capacity-building goals in Somalia.<sup>668</sup>

Due to no existing UN programme being suited for the task, the UNODC's Counter Piracy Programme (CPP) was established and has played the most prominent role in capacity-

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<sup>662</sup> Jacobi. 2014: 5.

<sup>663</sup> Swarttouw & Hopkins. 2014: 12.

<sup>664</sup> Huggins & Madsen. 2014: 23; Houben, M. 2014. Operational coordination of naval operations and capacity building. In *Fighting piracy off the coast of Somalia: lessons learned from the Contact Group*: 28; UN Security Council. 2008b. *Security Council resolution 1851 (2008) on fight against piracy and armed robbery at sea off the coast of Somalia*, 16 December. S/RES/1851 (2008). Available: <https://www.refworld.org/docid/4952044e2.html> [accessed 2 February 2021].

<sup>665</sup> Singhal, A. 2014. The Contact Group and the UN: two complementary forms of multilateralism. In *Fighting piracy off the coast of Somalia: lessons learned from the Contact Group*: 64.

<sup>666</sup> Bueger. 2018: 623.

<sup>667</sup> UN Security Council. 2008b.

<sup>668</sup> Singhal. 2014: 65 – 66; 69; Tardy. 2014: 3; 8; UN Security Council. 2009. *Report of the Secretary-General pursuant to Security Council resolution 1846 (2008)*, 16 March. (S/2009/146). Available: <https://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Somalia%20S%202009%20146.pdf> [accessed 2 February 2021].

building efforts since.<sup>669</sup> Most of its work is aimed at building law enforcement, criminal justice and correctional services capacity in order to apprehend, prosecute and imprison those suspected of committing maritime crimes.<sup>670</sup> Another prominent UN entity has been the IMO, the UN's maritime agency. As representative of the shipping industry, the IMO was primarily involved in the efforts of the shipping industry and the Djibouti Code of Conduct Concerning the Repression of Piracy and Armed Robbery against Ships in the Western Indian Ocean and the Gulf of Aden (DCOC). While the shipping industry looked to the IMO for assistance after initial attacks, the CPP became the key UN agency involved in the response.<sup>671</sup> The IMO is also the custodian of the International Ship and Port Facility Security (ISPS) Code discussed in Chapter 7.

### 5.2.3 European Union

Numerous states participate in counter-piracy, but the EU and its member states have been the most influential regional organization. They have deployed navies and area key counter-piracy donor. The EU also has a capacity building body aimed at maritime security in Somalia, namely EUCAP Somalia (formerly EUCAP NESTOR) and the EU MASE project, which has a regional maritime capacity building focus.

### 5.2.4 Somalia and regional states

The maritime law enforcement capacity of some eastern African states prior to Somali piracy was limited. Since then, states including Somalia, Kenya, Tanzania, Mauritius and Seychelles' capacity has improved as the result of increased awareness of maritime security threats and capacity building efforts. Regional states' primary role is in conducting piracy trials. This is done in terms of the Pirate Prosecution Model (PPM), which is one of the counter-piracy response's most innovative successes. While the role of Somalia in the counter-piracy regime has been limited due to its limited capacity, counter-piracy efforts do

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<sup>669</sup> Scott. 2014: 30 - 31; Bueger. 2013a: 92.

<sup>670</sup> Bueger. 2013a: 92.

<sup>671</sup> For more on the IMO's work and involvement in counter-piracy, see, for example, IMO. n.d.b. *Brief history of IMO*. Available: <http://www.imo.org/en/About/HistoryOfIMO/Pages/Default.aspx> [accessed 19 March 2018]; De Vries & Meyer. 2014: 108; Bryant, Townsley & Leclerc: 80; Bueger. 2013d: 5 – 6; IMO. n.d.a. *Djibouti Code of Conduct*. Available: <https://www.imo.org/en/OurWork/Security/Pages/DCoC.aspx> [accessed 2 February 2021].

take place in consultation with Somali institutions. The TFG was Somalia's central government at the height of piracy, but Somaliland and Puntland's administrations have been the primary governance institutions participating in counter-piracy. Somalia also receives a lot of capacity building assistance. The Somaliland Coast Guard<sup>672</sup> and the Puntland Maritime Police,<sup>673</sup> have been the product of such efforts.

### 5.2.5 Other states

Numerous states from across the globe have participated in counter-piracy efforts. This includes deploying navies, acting as donors or implementing capacity building programmes. The US for example has been a key donor and heads one of the naval coalitions, the Combined Maritime Forces (CMF).

### 5.2.6 Navies

Navies, along with private security, are responsible for suppressing pirate activity at sea. Three major naval coalitions initially patrolled the WIO and escorted vessels - the European Union's Naval Force's (EUNAVFOR) Operation Atalanta, the CMF and the North Atlantic Treaty Organization's (NATO) three consecutive missions, the last of which was Operation Ocean Shield (OOS). NATO's counter-piracy mandate ended in 2016.<sup>674</sup> Many independent states have also contributed naval assets.

### 5.2.7 The shipping industry

The primary responsibility for keeping vessels safe lies with Flag States and the shipping industry. One of the key reasons for the decline in successful attacks was the shipping industry's implementation of vessel protection measures. These measures have been so effective that the shipping industry is considered an equal partner in the success of

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<sup>672</sup> Somaliland Coast Guard. n.d. *Our mission*. Available: <https://somalilandcoastguard.org/> [accessed 22 January 2020].

<sup>673</sup> Puntland Maritime Police Force. n.d. *Puntland Maritime Police Force*. Available: <https://pmpf.wordpress.com/> [accessed 22 January 2020].

<sup>674</sup> NATO. n.d. *Operation Ocean Shield*. Available: <https://mc.nato.int/missions/operation-ocean-shield> [accessed 8 January 2019].

counter-piracy. Renewed attempted attacks have been attributed to the relaxation of these measures<sup>675</sup> as piracy is erroneously perceived as eradicated.

### 5.2.8 Missing in action: the African Union

The AU has been a platform for deliberations on piracy and maritime security.<sup>676</sup> But despite adopting AIMS in 2014 and the 2016 Lomé Charter on Maritime Security, which has only been ratified by Togo and Benin,<sup>677</sup> the AU has not had a meaningful impact on counter-piracy. Maritime security practices in Africa are instead undertaken on the sub-regional level, such as by the Economic Community for West African States (ECOWAS) and the DCOG.<sup>678</sup> Therefore, while an external regional body like the EU has been instrumental in counter-piracy, the AU, from whose region piracy emerged, has had very little influence.

#### A. STAGE ONE: Initiating the response

Sections A and B consider how the counter-piracy response was initiated and governed, after which the responses are discussed. The response was initiated by the UNSC, which is responsible for maintaining international peace and security. To do this, its member states have the power to take decisions and make recommendations which are binding.<sup>679</sup> The first UNSC statement on piracy was issued in 2006, followed by UNSC Resolutions 1801 and 1814 of 2008, which requested naval assistance to protect WFP vessels transporting aid to Somalia.<sup>680</sup> This caused states to deploy their navies to escort vessels carrying aid, and eventually also merchant vessels, past eastern Africa.<sup>681</sup>

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<sup>675</sup> Graham. 2017.

<sup>676</sup> Bueger. 2013d: 6.

<sup>677</sup> African Union. 2016. *African Charter on Maritime Security and Safety and Development in Africa (Lomé Charter)*. Available: <https://au.int/sites/default/files/treaties/37286-sl-AFRICAN%20CHARTER%20ON%20MARITIME%20SECURITY%20AND%20SAFETY%20AND%20DEVELOPMENT%20IN%20AFRICA%20%28LOME%20CHARTER%29.pdf> [accessed 16 July 2020].

<sup>678</sup> Stockbruegger, J. 2014. Reclaiming the maritime? The AU's new maritime strategy. *Piracy Studies*. 2 February. Available: <http://piracy-studies.org/reclaiming-the-maritime-the-aus-new-maritime-strategy/> [accessed 2 February 2021].

<sup>679</sup> De Vries & Meyer. 2014: 109.

<sup>680</sup> Defence Technical Information Centre. 2013: 16. Also see Khan & Singh. 2014: 526; United Nations Division for Ocean Affairs and the Law of the Sea. 2012; Bevilacqua. 2013: 113.

<sup>681</sup> Huggins & Madsen. 2014: 11; 18; Bridger. 2013: 2; UN Security Council. 2008c. *Res 1801 of 2008 on renewing the authorization of member states of the African Union to maintain the African Union Mission in Somalia for a further period of 6 months*, 20 February. S/RES/1801(2008). Available:

UNSC Resolution 1816 of 2008 was the first piracy-specific resolution and authorized foreign navies to enter Somalia's territorial waters and use all means necessary to suppress piracy and armed robbery at sea.<sup>682</sup> Such actions were authorized on land and at sea, provided the TFG was consulted.<sup>683</sup> Resolution 1816 is significant as it provided extraordinary authorization for states to respond to piracy even in territorial seas, despite piracy being a high seas crime and territorial seas falling under Coastal State jurisdiction. Such authorizations are only allowed when a matter is considered a threat to international peace and security and is authorized in terms of the UN Charter Chapter VII Article 42 on the use of force.<sup>684</sup> The resolution reaffirmed the UNSC's concern over the attacks on WFP and merchant vessels and the effect of piracy on international navigation.<sup>685</sup> This resolution, and subsequent resolutions, also noted the roles and responsibilities, and the need for cooperation among regional organizations, states, UN entities and the shipping industry.<sup>686</sup> UNSC Resolution 1816's authorization has been extended since 2008.

## **B. STAGE TWO: governing the response**

This section focuses only on the international counter-piracy governing mechanism, the CGPCS. National and regional governing efforts, such as the Kampala Process or Regional Maritime Coordination Mechanism (RMCM), are not discussed.<sup>687</sup>

The CGPCS is primarily responsible for governing and coordinating counter-piracy efforts and for developing new, or interpreting pre-existing, counter-piracy norms, rules and

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<http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Somalia%20S%20RES%201801.pdf> [accessed 2 February 2021].

<sup>682</sup> Singhal. 2014: 64; Bueger. 2013d: 5; UN Security Council. 2008a.

<sup>683</sup> Defence Technical Information Centre. 2013: 16.

<sup>684</sup> United Nations. n.d. Chapter VII: action with respect to threats to the peace, breaches of the peace, and acts of aggression. *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI. Available: <https://www.un.org/en/sections/un-charter/chapter-vii/index.html> [accessed 22 October 2020].

<sup>685</sup> UN Security Council Resolution 1816.

<sup>686</sup> Singhal. 2014: 64.

<sup>687</sup> For more on these efforts, see, for example, UNODC. 2011a. *Trust Fund to Support Initiatives of States Countering Piracy off The Coast of Somalia project document*. Available: [https://www.unodc.org/pdf/missions/pdfPiracy/Projects/April2011/UNOPS - Establishing Piracy Focal Points in TFG Puntland Somaliland and Galmadug.doc#:~:text=The%20Kampala%20Process%20is%20the,information%20sharing%20amongst%20the%20Somali](https://www.unodc.org/pdf/missions/pdfPiracy/Projects/April2011/UNOPS_-_Establishing_Piracy_Focal_Points_in_TFG_Puntland_Somaliland_and_Galmadug.doc#:~:text=The%20Kampala%20Process%20is%20the,information%20sharing%20amongst%20the%20Somali) [accessed 2 February 2021]; Houben. 2014: 33; Safeseas. 2018. *Mastering maritime security: reflexive capacity building and the Western Indian Ocean experience*. Available: <http://www.safeseas.net/wp-content/uploads/2018/02/Mastering-Maritime-Security-final.pdf> [accessed 2 February 2021].

standards.<sup>688</sup> It is an informal mechanism which resulted from the need to harmonize all the individual operational and political counter-piracy efforts. While the UNODC<sup>689</sup> and IMO<sup>690</sup> were considered for the role, neither was suitable as non-state actors needed to be able to participate in decision-making.<sup>691</sup> The CGPCS enabled this as membership is open to private and public stakeholders who can contribute to counter-piracy or that are directly affected by piracy.<sup>692</sup> Members therefore ranged from powerful states like the US, to Somalia, to the shipping industry and NGOs.<sup>693</sup>

The CGPCS is widely considered to be the reason for the success of the counter-piracy response. UNSC Resolutions have acknowledged this success and it is considered to be politically legitimate despite its informal nature.<sup>694</sup> It provides a platform for deliberation and decision-making, while members are responsible for implementing activities. It was the “primary political enabler” of many of the responses because it managed to unify national and international counter-piracy efforts. The CGPCS’s informal nature allows for practices to be adapted as necessary<sup>695</sup> and allows for political cooperation among actors who might not have interacted with one another were it not for their mutual interest in piracy.<sup>696</sup> A decision was made to favour “practicality over politics and process”<sup>697</sup> and the CGPCS is therefore considered to have managed to remain depoliticized. Participant 1 explained how this was key to the CGPCS’s success:

“[Y]ou don’t have governments negotiating as monolithic blocks. The USA talking to Russia, the diplomats talking to the diplomats, the navies talking to the navies. [...] So you have these different functional layers, talking to each other and talking amongst each other. I think that’s an amazing feature. This also allows you to drive out the

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<sup>688</sup> Bueger. 2013d: 5 – 8.

<sup>689</sup> See Swarttouw & Hopkins. 2014: 11 – 12; Singhal. 2014: 68.

<sup>690</sup> See Huggins & Madsen. 2014: 20.

<sup>691</sup> Singhal. 2014: 68.

<sup>692</sup> Tardy. 2014: 7; Huggins & Madsen. 2014: 21.

<sup>693</sup> Bueger, C. 2014. Experimental governance: can the lessons of the CGPCS be transferred to other policy fields? In *Fighting piracy off the coast of Somalia: lessons learned from the Contact Group*: 81 – 82; Swarttouw & Hopkins. 2014: 13; Lessons from piracy. n.d. FAQ. Available: <http://www.lessonsfrompiracy.net/faq/> [accessed 15 July 2017].

<sup>694</sup> Missiroli, A. & Popowski, M. 2014. Foreword. In *Fighting piracy off the coast of Somalia: lessons learned from the Contact Group*: 4; Singhal. 2014: 69.

<sup>695</sup> Swarttouw & Hopkins. 2014: 12 – 14; 17; Tardy. 2014: 3; 8.

<sup>696</sup> Tardy. 2014: 3; 8.

<sup>697</sup> Huggins & Madsen. 2014: 25.

general geopolitical problems, intentions and also the diplomatic fights [...] I also wouldn't underestimate the family spirit [...]. [P]eople actually knew each other [...]. They achieved something together. They met three, four times a year. Because of that, we have the grandmother, mom, you have the weird Russian uncle".<sup>698</sup>

The importance of having a mechanism facilitating relationships for cooperation therefore cannot be underestimated. He further noted:

"the Chinese and the Japanese, both from the Ministry of Foreign Affairs, both in charge of maritime security, having a chat, which would have never happened. Next week they would go and fight over their islands, threatening each other over war [...] there's lots of cooperation miracles. Look at the EU and NATO, it's also unprecedented, never worked together."

The CGPCS has no formal rules and its mandate allows it to maintain a strict focus on Somali piracy.<sup>699</sup> Participants agreed that this strict focus contributed to its success<sup>700</sup> as the situation in Somalia was kept off the agenda. Those wishing to cooperate could therefore do so knowing that their cooperation is limited to counter-piracy. This is reflective of Gamson's suggestion that tacit neutrality of matters outside the scope of a coalition's purpose is a characteristic of successful coalitions.<sup>701</sup>

The CGPCS's plenary meets bi-annually, although the majority of the work is done in more frequent working group (WG) meetings.<sup>702</sup> Decisions made during meetings are non-binding. Instead, the CGPCS issues communiqués, which helps to harmonize the various participants' efforts and update members on the GCPCS's activities. If formal action is required, UN member states can initiate resolutions.<sup>703</sup> The CGPCS however attempts to hold participants accountable by requiring that they report on their activities.<sup>704</sup> The WGs provide a frequent meeting point for ideas to be exchanged and eventually, a network of experts formed. The WGs allow for international cooperation and solutions which are

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<sup>698</sup> Interview Participant 1. 2017.

<sup>699</sup> Tardy. 2014: 3; 8; 10; Bueger. 2014: 81.

<sup>700</sup> Interview Participant 1. 2017.

<sup>701</sup> See Chapter 2.

<sup>702</sup> Swarttouw & Hopkins. 2014: 15.

<sup>703</sup> Missiroli & Popowski. 2014: 4.

<sup>704</sup> Bueger. 2013d: 6.

understood by both policy makers and experts.<sup>705</sup> The work discussed in WGs is then implemented by members.

Participant 1 noted how doing things differently was key to counter-piracy's success: "What I really found fascinating is this creative flexibility because all of these meetings [...] are structured by this question, what can you do differently? What haven't we really tackled yet? [...] Coming up with something new and this is also why they ran out of steam in 2013 because then it worked way too well." The CGPCS is therefore not without challenges. Its informal nature means that members can withdraw at any time, which is especially problematic if key members withdraw.<sup>706</sup> Now that piracy is no longer a crisis, the CGPCS seems to have served its purpose.<sup>707</sup> As attacks plunged, so has the interest in the CGPCS, with major contributors no longer attending its limited meetings.<sup>708</sup> Research participants noted how the international community has lost its appetite to participate. The CGPCS now meets infrequently and its WGs have been greatly reduced, both in number and in effort. Participant 2 explained:<sup>709</sup>

"[T]here are only two remaining working groups. One is an [operations] working group that looks at threat and risk and what the shipping industry needs to do still, it still keeps the shipping industry and the navy working together. The other is the regional capacity building [WG] [...] There are other minor ones lurking around at the bottom but I suspect the Contact Group won't survive."<sup>710</sup>

The downward trend in CGPCS activity and discussions on restructuring the group began in 2013 after piracy's decline. There were two main suggestions – to change the CGPCS into a global piracy group or into a regional WIO maritime crime and maritime security group. While the international community wants the CGPCS to conclude, eastern Africa and WIO states pushed for it to continue and to extend its work to other maritime security threats in the WIO.<sup>711</sup> States like India, Russia and China wanted the group to become a global piracy

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<sup>705</sup> Bueger. 2014: 81.

<sup>706</sup> Singhal. 2014: 68 – 69.

<sup>707</sup> Interview Participants 1; 2; 3; 4 & 9.

<sup>708</sup> Interview Participant 4. 2016.

<sup>709</sup> Interview Participant 2. 2018 & Interview Participant 4. 2016.

<sup>710</sup> Interview Participant 2. 2018.

<sup>711</sup> Interview Participant 1; 2; 3 & 4.

contact group.<sup>712</sup> Making it a global piracy group would make sense because “while piracy in Somalia is quietened down, it’s still very alive and well in other parts of the world”.<sup>713</sup> This option was however rejected and the biggest support for the CGPCS’s continued existence now comes from regional states. Participant 2 explained how the CGPCS eventually shifted from being Western to regionally-led.<sup>714</sup> This suited the Western stakeholders as they were no longer interested in running it. One participant jokingly told of how the EU funded Seychelles to take over the chair.<sup>715</sup> Kenya is the current chair after taking over from Seychelles.

The CGPCS still only focuses on piracy. Participant 4 however argues that by the time regional states began chairing the CGPCS, the piracy threat had dissipated and even a regional focus on piracy no longer makes sense.<sup>716</sup> The EU however wants to make it a sleeping mechanism<sup>717</sup> to be activated when necessary.<sup>718</sup> Participant 4 explained that states like the US and European States are afraid that concluding the CGPCS would send a message to pirates that the international response to piracy has ended: “I don’t think Somali pirate gangs really take any notice of what the Contact Group’s doing. But that’s their feeling that it sends a message that we are no longer keeping an eye on Somali piracy and its return.”<sup>719</sup> He said a new UNSC Resolution would be necessary to change the scope of the CGPCS, but that even the UNSC does not wish for the CGPCS to continue due to their priorities now being elsewhere.<sup>720</sup>

Other global challenges, such as migrant smuggling in the Mediterranean, are now more urgent and, for many stakeholders, much closer to home.<sup>721</sup> Participant 1 suggested that for a mechanism like the CGPCS to survive it might need a major nation like India, which has a strategic interest in the region and wants to be perceived as a ‘power player’, to advocate for it, but because India is more concerned with national than international interests, they

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<sup>712</sup> Interview Participant 1. 2017 & Interview Participant 3. 2018.

<sup>713</sup> Interview Participant 3. 2018.

<sup>714</sup> Interview Participant 2. 2018.

<sup>715</sup> Interview Participant 1. 2017.

<sup>716</sup> Interview Participant 4. 2016.

<sup>717</sup> Interview Participant 1. 2017 & Interview Participant 4. 2016.

<sup>718</sup> Interview Participant 1. 2017.

<sup>719</sup> Interview Participant 4. 2016.

<sup>720</sup> Interview Participant 4. 2016.

<sup>721</sup> Interview Participant 9. 2016.

are unlikely to do so.<sup>722</sup> There is also no appetite to use the CGPCS to address broader maritime security challenges or piracy elsewhere. Some members have however expanded their focus to include broader maritime security challenges in the WIO.

The CGPCS also left onshore activities mostly to regional actors whose efforts were less successful when compared to the Western-led suppression of piracy offshore. As with most counter-piracy efforts, the CGPCS's effects were therefore seen mainly at sea.<sup>723</sup> Although the CGPCS has had regional representation, at the height of piracy it was Western-led. Somalia and its different regions were represented in different WGs and meetings,<sup>724</sup> but its impact was limited due to its lack of capacity. Tardy attributes the weak regional ownership of piracy on a few Western states dominating the CGPCS's work.<sup>725</sup> Participant 5 similarly suggested that regional states were marginalized as entities like the CGPCS's main aim was not to involve all the necessary stakeholders, including Somalia and regional states, but rather to be used as a way to coordinate international effort.<sup>726</sup> However, eastern African states are now driving what is left of the CGPCS and it might eventually evolve into a regional mechanism.<sup>727</sup>

Despite these challenges, the informal manner in which the CGPCS has been set up illustrates how a new type of security institution and governance mechanism bringing together multiple stakeholders can be more effective in addressing non-traditional, and novel security concerns.<sup>728</sup> Its success has caused debate on whether it can be applied to other security threats. Some argue that replicating its activities will be difficult due to the unique jurisdiction applicable to piracy and the unique local and regional context giving rise to Somali piracy.<sup>729</sup> However, if there is anything to be learned from the CGPCS, it is worth

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<sup>722</sup> Interview Participant 1. 2017.

<sup>723</sup> Huggins & Madsen. 2014: 25.

<sup>724</sup> See, for example, Gaas, M.H. 2014. A Somali perspective on the Contact Group. In *Fighting piracy off the coast of Somalia: lessons learned from the Contact Group*: 72; Huggins & Madsen. 2014: 24.

<sup>725</sup> Tardy. 2014: 10.

<sup>726</sup> Interview Participant 5. 2016.

<sup>727</sup> Interview Participants 2 & 3. 2018.

<sup>728</sup> Tardy. 2014: 3, 8.

<sup>729</sup> Jacobi. 2014.

exploring.<sup>730</sup> A similar contact group on maritime crimes now exists on the Sulu and Celebes Seas in Asia,<sup>731</sup> and there have been calls for one in the Mediterranean.<sup>732</sup>

### C. STAGE THREE: establishing and implementing the response

This section discusses selected responses by using Bueger's five paradigms which underpin piracy and the response thereto. Each paradigm reflects a different manner of thinking about and acting against piracy. It is a useful tool to navigate the complex character of piracy and counter-piracy as each paradigm identifies different and competing reasons for why piracy is problematic. This then dictates who responds thereto and how.<sup>733</sup> While Bueger's paradigms are the guidance tool, this chapter builds on each paradigm by populating it with additional literature sources and empirical findings from the fieldwork in order to provide an unparalleled synthesized overview of the different aspects of global governance responses to piracy. This will be repeated as the paradigms are applied in the chapters on heroin and ivory trafficking.

The **security paradigm** classifies piracy as a threat to national and international security. It is then addressed by military means and force.<sup>734</sup> The **legal paradigm** classifies piracy as a crime which is to be addressed and punished by law enforcement measures. The **economic paradigm** considers piracy to be a business model which is addressed primarily by the shipping industry. The **development paradigm** classifies piracy as a symptom of structural conditions and under-development. This is addressed by development responses aimed at improving the conditions on land causing piracy. Finally, the **humanitarian paradigm** classifies piracy as a source of suffering. This is generally addressed by humanitarian relief organizations and NGOs.<sup>735</sup>

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<sup>730</sup> Swarttouw & Hopkins. 2014: 11; 17

<sup>731</sup> Global Maritime Crime Programme. 2019a. *Global Maritime Crime Programme Annual Report 2018*. Available: [https://www.unodc.org/documents/Maritime\\_crime/20190131 - GMCP Annual Report 2018.pdf](https://www.unodc.org/documents/Maritime_crime/20190131_-_GMCP_Annual_Report_2018.pdf) [accessed 2 February 2021].

<sup>732</sup> Interview Participant 9. 2016.

<sup>733</sup> Bueger. 2013a: 86 – 88.

<sup>734</sup> Ibid: 87; Bueger. 2012: 3.

<sup>735</sup> Bueger. 2013a: 87; Bueger. 2012: 3.

Some responses are hybrids falling under more than one paradigm. One example is navies which arrest pirates and protect vessels carrying humanitarian aid, thereby falling under the security, law enforcement and humanitarian paradigms. Such tensions and overlapping aims are however inevitable due to piracy’s multifaceted impact. Hybrid responses have the benefit of addressing multiple problematic aspects of piracy.<sup>736</sup> The below sections discuss the key actors and activities under each paradigms.

**Table 1: Counter-piracy paradigms and key responses**

<b>Paradigm</b>	<b>Piracy problematized as:</b>	<b>Key responses</b>	<b>Key Actors/instruments</b>	<b>Land or sea based</b>
<b>Security</b>	Security threat	<ul style="list-style-type: none"> <li>• Naval patrols</li> <li>• Apprehending pirates</li> <li>• Private security guards on merchant vessels</li> <li>• Regional maritime security capacity building</li> </ul>	<ul style="list-style-type: none"> <li>• UNSC</li> <li>• CGPCS WG1</li> <li>• Navies</li> <li>• SHADE mechanism</li> <li>• Private Security companies</li> </ul>	Primarily sea
<b>Legal</b>	Crime	<ul style="list-style-type: none"> <li>• Law reforms</li> <li>• Prosecution model</li> <li>• Pirate prisoner transfers</li> <li>• Law enforcement capacity building</li> <li>• Criminal justice capacity building</li> <li>• Correctional Services capacity building</li> </ul>	<ul style="list-style-type: none"> <li>• CGPCS WG2</li> <li>• Navies</li> <li>• Regional states</li> <li>• UNODC</li> <li>• EU</li> <li>• DCOC</li> </ul>	Land and sea
<b>Economic</b>	Business model	<ul style="list-style-type: none"> <li>• Best Management Practices</li> <li>• Vessel protections measures</li> <li>• Private security guards on vessels</li> </ul>	<ul style="list-style-type: none"> <li>• Shipping industry</li> <li>• Private security companies</li> <li>• CGPCS WG3</li> <li>• IMO</li> </ul>	Sea

<sup>736</sup> Bueger. 2013a: 91 – 92.

<b>Development</b>	Symptom of under-development	<ul style="list-style-type: none"> <li>• Alternative livelihood programmes</li> <li>• Rehabilitation and reintegration</li> <li>• Public awareness campaigns</li> </ul>	<ul style="list-style-type: none"> <li>• UNDP</li> <li>• CGPCS WG4</li> <li>• UNODC</li> </ul>	Primarily land
<b>Humanitarian</b>	Source of suffering	<ul style="list-style-type: none"> <li>• Assistance to victims of piracy</li> </ul>	<ul style="list-style-type: none"> <li>• NGOs</li> <li>• UNODC</li> </ul>	Primarily land

### 5.3 Responses under the Security Paradigm

The initial response and the primary responses thereafter have been security responses. Such responses aim to address piracy as a threat to national and international security.<sup>737</sup> It is then countered by the use of force. Under this paradigm, pirates are the enemy and their threatening nature has been affirmed in UNSC Resolutions which have authorized the use of force against them. Classifying piracy as a threat elevates it to the highest political level and justifies taking extraordinary measures, such as military action, to combat it.<sup>738</sup> Activities falling under this paradigm include the protection of vulnerable vessels, disrupting piracy, recapturing hijacked vessels and improving regional maritime security capacity. Security responses are implemented primarily by traditional security actors in the form of navies, as well as non-traditional security actors like private security companies.<sup>739</sup> Navies are however considered the primary actor in the overall response<sup>740</sup> as they are responsible for protecting vessels, maritime domain awareness (MDA), disrupting pirate activities, arresting suspects and recapturing vessels. Private security companies in turn provide on-board security to vessels or escort them. Security measures are applied primarily at sea, but may also include measures on land such as destroying pirate bases.<sup>741</sup>

The majority of resources have been spent on security responses. While these efforts' success is undeniable, they are extremely expensive and due to the vast areas which naval patrols need to cover, they are not impassable as is evidenced in the fact that piracy did not immediately decline after navies were first deployed. This is why many shipping vessels

<sup>737</sup> Bueger. 2012: 3.

<sup>738</sup> Bueger. 2013a: 88 - 89.

<sup>739</sup> Bueger. 2013d: 10 - 12.

<sup>740</sup> Bueger. 2013a: 90.

<sup>741</sup> Bueger. 2013d: 10.

opted to employ private security teams.<sup>742</sup> Scholars have been critical of security efforts, arguing that such efforts have been implemented at an excessive and disproportionate cost when compared to other efforts, such as humanitarian aid.<sup>743</sup> As discussed in Chapter 4, it has also generated violence. The primary security responses are discussed below.

### 5.3.1 Coordinating the security response

As the CGPCS has shown, governing and coordinating responses can be as instrumental in a response's success as the effort itself. WG1 has been the most instrumental WG. Since its inception, until 2014, WG1 was tasked with naval coordination and judicial and law enforcement capacity building in Somalia and the WIO region.<sup>744</sup> Only WG1's work aimed at naval operations and maritime capacity building is discussed in this section.

At the outset and at the height of piracy, the area which navies needed to cover spanned over 2.2 million square miles.<sup>745</sup> Naval coordination was necessary if patrols were to be effective in this vast area and EUNAVFOR and the CMF therefore initiated Shared Awareness and Deconfliction (SHADE) meetings in 2009. SHADE meetings soon became the key operational coordination mechanism bringing together all counter-piracy navies.<sup>746</sup> Members include independent navies and other stakeholders, such as non-force providing states, regional states, international organizations and shipping industry representatives<sup>747</sup> and SHADE then provides operational updates to the CGPCS plenary.<sup>748</sup> To remove concerns around the sharing of command and control activities, SHADE meetings are instead focused on information-sharing, thereby also allowing more stakeholders to participate.<sup>749</sup> Tactical

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<sup>742</sup> Bevilacqua. 2013: 114 – 115.

<sup>743</sup> Collins. 2014: 441.

<sup>744</sup> Houben. 2014: 28 – 30.

<sup>745</sup> Bridger. 2013: 6.

<sup>746</sup> Trelawny. 2013: 50. Also see Houben. 2014: 28 – 29; Oceans Beyond Piracy. n.d.b. *An interactive guide to international efforts to address piracy off the coast of Somalia. Shared Awareness and Deconfliction (SHADE)*. Available: <http://oceansbeyondpiracy.org/matrix/shared-awareness-and-deconfliction-shade> [accessed 29 April 2016].

<sup>747</sup> Bueger. 2013d: 11; Oceans Beyond Piracy. n.d.b.

<sup>748</sup> Huggins & Madsen. 2014: 27. Also see Houben. 2014: 28 & Bueger. 2013d: 11.

<sup>749</sup> Oceans Beyond Piracy. n.d.b; Houben. 2014: 29. Also see Seyle, C. 2015. Unsafe sea migration, and the real counter-piracy lessons. *One Earth Future Foundation*. 11 May. Available: <http://oneearthfuture.org/research/blogs/conor-seyle/unsafe-sea-migration-and-real-counter-piracy-lessons> [accessed 15 June 2016].

and operational information is shared<sup>750</sup> and patrols in the High Risk Area, where attacks are most likely, are coordinated.<sup>751</sup>

Like the CGPCS, SHADE is considered an unprecedented multi-stakeholder cooperation mechanism<sup>752</sup> as it managed to bring together public and private security actors in an unprecedented way. The cooperation between unlikely allies was noted as one of SHADE's biggest contributions. Because of participation by states like the US, Iran, China and Russia, there is motivation for SHADE meetings to continue despite piracy's decline. This is not based on countering other maritime crimes, but because of maintaining engagement between these states.<sup>753</sup> SHADE's success is attributed to its informal nature and ability to avoid political level engagement by solely focussing on sharing information which could improve MDA and avoid conflicting or duplicated activities. After SHADE's success, it was hoped that its non-binding and inclusive nature enabling on-sea cooperation between unlikely partners can be duplicated to other policy areas and global challenges.<sup>754</sup> This has now happened as SHADE has been replicated as SHADE MED in response to migrant smuggling in the Mediterranean<sup>755</sup> and as Shared Awareness Meetings (SAM) in Singapore.<sup>756</sup> There is also speculation that the CGPCS will eventually fall away and that SHADE will take its place,<sup>757</sup> which implies that on-sea efforts will remain the CGPCS's only focus. The reproduction of an instrument like SHADE is proof of its perceived utility.

SHADE has however also had its challenges.<sup>758</sup> It has not had continued regional participation as its meetings are held in Bahrain. Transferring the mechanism's gains to the

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<sup>750</sup> Huggins & Madsen. 2014: 27; Swarttouw & Hopkins. 2014: 16.

<sup>751</sup> Bueger. 2013d: 11; Houben. 2014: 29.

<sup>752</sup> Trelawny. 2013: 50.

<sup>753</sup> Interview Participant 4. 2016.

<sup>754</sup> Houben. 2014: 29 & Huggins & Madsen. 2014: 27. Observer Research Foundation. 2016. *Can SHADE success story be applied to Southeast Asia?* 16 May. Available: <https://www.orfonline.org/research/can-shade-success-story-be-applied-to-southeast-asia-2/> [accessed 2 February 2021]. Also see Ghosh, P.K. 2016. Shared Awareness and Deconfliction Initiative: can the success story be applied to Southeast Asia? *Indo Pacific Defence Forum*. 23 February. Available: <https://ipdefenseforum.com/shared-awareness-and-deconfliction-initiative/> [accessed 23 January 2020].

<sup>755</sup> EUNAVFOR Operation Sophia. n.d. *About us*. Available: <https://www.operationsophia.eu/shade-med/> [accessed 7 January 2020].

<sup>756</sup> See, for example, Daniel K. Inpuye Asia-Pacific Center for Security Studies. n.d. *Building shared awareness in Southeast Asia*. Available: <https://apcss.org/building-maritime-shared-awareness-in-southeast-asia/> [accessed 23 January 2020].

<sup>757</sup> Interview Participants 2 & 3. 2018.

<sup>758</sup> Trelawny. 2013: 50.

region is also challenging due to the region's limited sea-going capacity.<sup>759</sup> Some participants also questioned SHADE's relevance since piracy's decline.<sup>760</sup> Meetings have reduced in frequency, but Participant 1 suggested that some states are likely to continue SHADE meetings, as "SHADE is no longer about piracy [...] it's about a hell of a lot of other things. It's the unintended consequences. All of a sudden you have this security forum now that ensures peace, naval peace, in the WIO".<sup>761</sup>

### 5.3.2 Naval deployments

Navies have historically been the key counter-piracy actor and the deployment of navies to the Gulf of Aden was also the first response to Somali piracy.<sup>762</sup> Navies have patrolled the WIO on a daily basis since 2008, although naval deployments have shrunk since piracy's decline.<sup>763</sup> The naval presence includes the naval coalitions of EUNAVFOR,<sup>764</sup> CMF<sup>765</sup> and NATO, as well as independently deployed navies. Navies are mandated to deter, suppress and disrupt pirate activity. This includes protecting and escorting vulnerable vessels,<sup>766</sup> surveying the Somali coast and waters, cooperating with other stakeholders and improving the maritime capacity of regional states. EUNAVFOR is also mandated to monitor fishing activities near Somalia.<sup>767</sup> Commenting on western naval activities in the region, Participant 9 criticized the EU for wanting to replicate European naval structures in Somalia: "[T]o bring a model of double hazard military civilian functions into Somalia, ah, what a disaster in the making! [...] And then we want to enforce that on Somalis that are quite confused on maritime security?"<sup>768</sup> This shows how, similar to western-led state formation efforts in Somalia, counter-piracy could be counter-productive.

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<sup>759</sup> Houben. 2014: 33 – 34.

<sup>760</sup> Interview Participant 1. 2017 & Interview Participant 4. 2016.

<sup>761</sup> Interview Participant 1. 2017.

<sup>762</sup> See, for example, Houben. 2014: 28; Oceans Beyond Piracy. 2014: 17; Zwolski and Kaunert. 2014: 600.

<sup>763</sup> Oceans Beyond Piracy. 2014: 17; Interview Participant 2. 2018 & Interview Participant 9. 2016.

<sup>764</sup> See, for example, EUNAVFOR Operation Atalanta. n.d. *Mission*. Available: <https://eunavfor.eu/mission/> [accessed 8 January 2020].

<sup>765</sup> See, for example, Combined Maritime Forces. n.d.a. *CTF 151: counter-piracy*. Available: <https://combinedmaritimeforces.com/ctf-151-counter-piracy/> [accessed 8 January 2019].

<sup>766</sup> Oceans Beyond Piracy. 2014: 16.

<sup>767</sup> EUNAVFOR Operation Atalanta. n.d; Combined Maritime Forces. n.d.a; NATO. n.d. Bridger. 2013: 6.

<sup>768</sup> Interview Participant 9. 2016.

All navies operating in the WIO are authorized by UNSC Resolutions<sup>769</sup> which allow them to use force on the high seas and in Somalia's territorial waters "as may be necessary to maintain and restore international peace and stability".<sup>770</sup> They may also use force on land, though this has been minimal and with limited impact.<sup>771</sup> However, as discussed in Chapter 4, navies typically do not use force proactively against pirates.<sup>772</sup> Instead, they arrest suspects and gather evidence<sup>773</sup> before handing them over to prosecuting states, thereby simulating law enforcement rather than a navy.<sup>774</sup> Weiss argues that the blending of military and police functions has been perceived by different scholars as undesirable, nothing new or non-existent.<sup>775</sup> Regardless of whether this overlap is met with approval or caution, it is increasingly seen in the TOC landscape. Interviews confirmed this. Participants seemed uncertain of how navies' role as potential law enforcers should be managed. Some argued that navies and law enforcement should remain separate because "[l]aw enforcement isn't navies' work."<sup>776</sup> This kind of thinking might oppose expanding navies' role in addressing TOCs at sea to crimes other than piracy. Others were however of the view that navies should engage in non-traditional activities in order to remain relevant and contribute to countering other maritime security threats.<sup>777</sup>

Navies have played an important role in MDA in the WIO, thereby contributing to maritime security in general and arguably presenting an obstacle to other maritime threats like trafficking.<sup>778</sup> But while navies may have a deterrent effect,<sup>779</sup> they have limited powers in terms of international law to respond to other forms of maritime crime on the high seas and their influence, especially now that patrols have declined, is limited. Regardless, navies do play an important role in their ability to create and enforce certain maritime conditions

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<sup>769</sup> UN Security Council. 2020. *Resolution 2554 (2020) on piracy and armed robbery at sea off the coast of Somalia*, 4 December. S/RES/2554 (2020). Available: [https://undocs.org/S/RES/2554\(2020\)](https://undocs.org/S/RES/2554(2020)) [accessed 31 December 2020].

<sup>770</sup> World Bank. 2013: 158.

<sup>771</sup> For land-based military action, see Cinelli, C. 2013. The EU military land-based operation against Somali piracy: critical remarks. In *Insecurity at sea: piracy and other risks to navigation*: 76 – 90.

<sup>772</sup> Interview Participant 4. 2016. Also see Bueger. 2013a: 90.

<sup>773</sup> Bueger. 2012: 3.

<sup>774</sup> Tonelli, E. 2013. Insecurity at sea: piracy and other risks to navigation. In *Insecurity at sea: piracy and other risks to navigation*: 60.

<sup>775</sup> Weiss. 2011: 396 - 405.

<sup>776</sup> Interview Participant 22. 2016.

<sup>777</sup> Interview Participant 3. 2018 & Interview Participant 8. 2016.

<sup>778</sup> Bridger. 2013: 5 - 6.

<sup>779</sup> As noted by, *inter alia*, Interview Participants 1; 4 & 5.

which allow for multilateral private and public actions at sea.<sup>780</sup> The naval cooperation can also continue to be used to form relationships, build trust and to legitimize often criticized international efforts,<sup>781</sup> such as through naval interaction with regional counterparts.<sup>782</sup>

Navies also serve a capacity building role by conducting exercises with regional maritime law enforcement entities. This is however limited in comparison to other capacity building actors like the UNODC and EU and will not be discussed in detail. Despite efforts to improve regional capacity, East African maritime law enforcement entities have a limited impact on piracy. Kenya, Tanzania and Djibouti have navies and Seychelles has a coast guard, but none of these entities have the ability to operate far beyond their own waters where piracy takes place. It has been suggested that the foreign naval presence around Africa is due to this shortage of African naval responses to maritime security challenges,<sup>783</sup> thereby acting as their substitute. Relationship building has also been difficult due to tensions between East African states.<sup>784</sup> Therefore, while counter-piracy efforts resulted in unprecedented naval cooperation, some navies remain cautious of each other's capabilities and intentions.<sup>785</sup> In addition, since piracy has been contained, naval interest in the WIO is waning and patrols are declining. This is despite various other illicit activities taking place in the same maritime space. There are however states who wish to maintain their naval presence in the WIO, for reasons such as strategic interests. This is discussed in Chapter 8.

The foreign naval presence was meant to be temporary to allow navies to contribute to maritime security and regional maritime security capacity building, after which regional law enforcement entities were meant to take over. This reflects the traditional position that militaries are deployed in extreme circumstances and once order is established, law enforcement takes over.<sup>786</sup> But according to Participant 4, this is a pipedream:

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<sup>780</sup> Vreÿ, F. 2014b. Perspectives on maritime cooperation in the Gulf Of Guinea. *Acta Criminologica: South African Journal of Criminology (Special Edition)*: 29.

<sup>781</sup> Bridger. 2013: 6. Interview Participant 2. 2018 & Interview Participant 5. 2016.

<sup>782</sup> Gaas. 2014: 72; Bridger. 2013: 5 - 6.

<sup>783</sup> Atta-Asamoah, A. 2019. Proceed with caution: Africa's growing foreign military presence. *ISS*. 27 August. Available: <https://issafrica.org/iss-today/proceed-with-caution-africas-growing-foreign-military-presence> [accessed 2 March 2021]; Interview Participants 2 & 3. 2018.

<sup>784</sup> Defence Technical Information Centre. 2013: 7.

<sup>785</sup> *Ibid*: 3.

<sup>786</sup> Weiss. 2011: 401

“the concept was, we’ll send our navies in to patrol and to secure the Gulf of Aden and the Horn of Africa and then all of these countries working together will eventually take over that patrolling in the field (laughs) [...] It’s never going to happen. In fifty or hundred years from now, when they have the same fleet, which cost us a fortune, we can barely afford this for ourselves. Do you think that Somalia is ever going to have the frigates to patrol? No.”<sup>787</sup>

This again draws into question the excessive cost of security measures.

### **5.3.3 Private Security**

Piracy failed to meaningfully decline after navies were deployed. Instead, attacks increased as pirates expanded their area of operations. This set the ball rolling for the multi-stakeholder response in addition to the deployment of navies. One of the additional efforts was private security. Their use falls primarily under the economic paradigm.

### **5.3.4 Maritime security capacity building**

Capacity building is meant to compliment international efforts and enable regional states to secure their own waters in the long-term without external assistance. This would also contribute to global maritime security<sup>788</sup> as threats from the region will be prevented from venturing onto the high seas. These efforts were also initiated after piracy failed to decline once navies were deployed and it became apparent that international efforts had to be complimented by onshore capacity-building. This includes training and resourcing regional maritime law enforcement entities as well as improving surveillance and information-sharing.<sup>789</sup> Some of these responses therefore overlap with the legal and development paradigms. The majority of capacity building efforts are discussed under the legal paradigm, as the region’s maritime law enforcement institutions have been the primary focus of such efforts due to limited naval assets.

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<sup>787</sup> Interview Participant 9. 2016.

<sup>788</sup> Zwolski and Kaunert. 2014: 8.

<sup>789</sup> Houben. 2014: 30 - 31; Bueger. 2013d: 11; Bueger. 2012: 3.

## 5.4 Responses under the Legal Paradigm

Whereas militaries protect states against collective enemies, law enforcement typically deals with individuals breaking the law.<sup>790</sup> The legal paradigm therefore considers a pirate to be a criminal rather than an enemy as per the security paradigm.<sup>791</sup> Under this paradigm, piracy does not need to be elevated above normal politics. Instead, it can be dealt with in terms of existing national and international criminal law<sup>792</sup> and is addressed by law enforcement and criminal justice measures such as arrest, prosecution and imprisonment.<sup>793</sup> The main actors under this paradigm are law enforcement agencies, criminal justice actors and those working to improve their capacity.

While security responses are concentrated primarily at sea, law enforcement efforts take place primarily on land. In both the legal and security paradigms, land based responses are aimed at one of two things, they either develop regional facilities in the form of courts, prisons and the training of judicial officials (EUCAP NESTOR & UNODC), or they improve the region's security governance by training and optimizing maritime law enforcement entities such as coastguards (DCOC, EUCAP NESTOR and UNODC).<sup>794</sup> This section discusses the key responses under this paradigm.

### 5.4.1 Deliberating the legal and law enforcement response

Between 2009 and 2014, WG2, the CGPCS's legal forum was tasked with addressing all piracy-related legal challenges. Its most significant achievements were the creation of a forum of legal experts which could discuss solutions and provide guidance and legal certainty to those acting against pirates. It also developed the Piracy Prisoner Transfer Programme (PPTP) with the UNODC, as well as a prosecution toolbox which offers guidance on matters such as prosecution, international law, human rights, use of force, transfer of convicted pirates and private armed guards.<sup>795</sup>

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<sup>790</sup> Weiss. 2011: 401.

<sup>791</sup> Bueger. 2013a: 90.

<sup>792</sup> Bueger. 2012: 3.

<sup>793</sup> Bueger. 2013d: 13.

<sup>794</sup> Bueger. 2012: 3.

<sup>795</sup> Liisberg, J.B. 2014. The legal aspects of counter-piracy. In *Fighting piracy off the coast of Somalia: lessons learned from the Contact Group*: 35 - 39.

Members of WG2 have included defence and justice ministries, academia and prosecutors and regional representation has been commendable.<sup>796</sup> The majority of regional states, apart from Somalia, have now sufficiently reformed their laws to allow them to prosecute piracy. WG2 has also played a key role in criminal justice capacity building efforts. WG2's mandate therefore overlaps with WG1 in as far as law enforcement responses are concerned as both coordinated legal and judicial capacity building efforts. WG1's work in this regard included coordinating assistance to regional states to draft laws, renovate courts and prisons and train court staff. WG1's role however was more effective in terms of naval coordination.<sup>797</sup>

The UNODC CPP, now called the Global Maritime Crime Programme (GMCP) has been the key agency working to improve the regional law enforcement and criminal justice response to piracy<sup>798</sup> and has been one of the main actors implementing CGPCS activities.<sup>799</sup> Similar to the CGPCS, the CPP was established after the UNSC called for a concerted international effort in response to piracy.<sup>800</sup> As previously mentioned, the initial response was to apprehend suspects and return them to Somalia without any repercussions. In 2011, the UN reported that ninety per cent of pirates were released in this manner.<sup>801</sup> The CPP was therefore established to fill this gap by developing a legal finish,<sup>802</sup> resulting in the CPP playing a central role in enabling arrests and prosecutions, as well as the human rights compliant treatment of suspects and convicted pirates. The majority of the CPP's work was undertaken in Mauritius, Seychelles, Tanzania and Kenya.<sup>803</sup> Its objectives were to ensure fair trials and humane and secure imprisonment and to enable Somalia to conduct fair trials in the long-term.<sup>804</sup>

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<sup>796</sup> Ibid: 35 – 39.

<sup>797</sup> See Houben. 2014: 28 – 32.

<sup>798</sup> Bueger. 2013d: 12.

<sup>799</sup> Singhal. 2014: 66.

<sup>800</sup> United Nations Independent Evaluation Unit. 2013. *In-depth evaluation of the Counter Piracy Programme combating maritime piracy in the Horn of Africa and the Indian Ocean: increasing regional capacities to deter, detain and prosecute pirates*. Vienna: UNODC: 2; UNODC. n.d.a; UN Security Council. 2008b.

<sup>801</sup> World Bank. 2013: 159.

<sup>802</sup> United Nations Independent Evaluation Unit. 2013: vi.

<sup>803</sup> See, for example, UNODC. 2011b. *Counter Piracy Programme: 1*. Available: [https://www.unodc.org/documents/Piracy/UNODC\\_Brochure\\_Issue\\_6\\_WV.pdf](https://www.unodc.org/documents/Piracy/UNODC_Brochure_Issue_6_WV.pdf) [accessed 15 June 2015].

<sup>804</sup> Scott. 2014: 30-31; UNODC. 2011b.

#### 5.4.2 Law reforms

Before states may arrest pirates, their national legislation must allow them to exercise universal jurisdiction, as well as to prosecute acts of piracy or to hand suspects over to another state for prosecution. As Somali piracy was a new phenomenon, it had not previously been necessary to consider such provisions in national laws and many regional states therefore required law reforms to criminalize piracy and exercise universal jurisdiction. WG2 and the CPP assisted them to do so.<sup>805</sup> Ironically, although regional law reforms have been successful, the FGS is yet to pass a piracy law, while Puntland and Somaliland have. That means that it is not a criminal act to be a pirate in Somalia, except in Puntland and Somaliland.<sup>806</sup> This can partially be attributed to piracy's history as a protection measure against external exploitation, as well as possible government involvement in piracy.<sup>807</sup> When asked if the FGS will pass a piracy law, Participant 4 responded:

“Parliament in Mogadishu has repeatedly refused to pass a law and say ‘pirates prevent IUU fishing and toxic waste dumping and pirates are heroes.’ So, Somalia, which is the country in the world with probably the most pirates, [is] one of the very few countries in the world which doesn't have a piracy law.”<sup>808</sup>

#### 5.4.3 Orchestrating an international legal finish

The globalization of crime presents two key legal challenges – transnational jurisdiction and extradition.<sup>809</sup> These challenges also arose in counter-piracy. Western navies, which apprehend most pirates, were often unwilling or unable to prosecute them<sup>810</sup> due to inadequate national legislation, the fear that the human rights of suspects might be

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<sup>805</sup> UNODC. n.d.b. *Piracy prisoner transfer programme*. Available: <http://www.unodc.org/unodc/en/piracy/piracy-prisoner-transfer-programme.html> [accessed 15 April 2015];

World Bank. 2013: 159.

<sup>806</sup> Interview Participant 4. 2016.

<sup>807</sup> Bueger. 2012: 11 – 13.

<sup>808</sup> Interview Participant 4. 2016.

<sup>809</sup> Boister. 2003: 287.

<sup>810</sup> Petrig, A. 2013. Arrest, detention and transfer of piracy suspects: a critical appraisal of the German Courier case decision. In *Insecurity at sea: piracy and other risks to navigation*: 153.

violated<sup>811</sup> and the general unwillingness of states to take responsibility for piracy. This led to the catch and release approach similar to the practice which persists with heroin traffickers, as discussed in the following chapter. A legal finish was therefore needed.<sup>812</sup> Although East African states lacked the ability to apprehend pirates at sea, they were willing to conduct prosecutions until such time as Somalia was able to conduct trials.<sup>813</sup> The combination of these factors resulted in the establishment of the Pirate Prosecution Model (PPM) whereby foreign navies can arrest suspects and transfer them to regional states for prosecution. The model is based on universal jurisdiction. The establishment of the PPM was led by WG2 and the CPP, which assisted with the drafting and implementation of transfer agreements between arresting and prosecuting states.<sup>814</sup>

The PPM was developed as follows: First, regional states' legislation had to be reformed to allow them to prosecute pirate suspects. Second, regional states had to conclude transfer agreements with foreign navies allowing them to transfer suspects to regional states for trial.<sup>815</sup> Navies must request the transfer, which the regional state may accept or reject based on, for example, insufficient evidence. Finally, if a transfer is accepted, the prosecuting state will continue with investigations and prosecute the suspects in terms of its national law.<sup>816</sup>

Regional states therefore had to be equipped to conduct trials and imprisonments.<sup>817</sup> The CPP/GMCP has assisted states to do so, including providing interpreters, transporting witnesses and paying defence fees. These efforts are aimed at ensuring human rights compliant trials.<sup>818</sup> Efforts to achieve this can also fall under the humanitarian paradigm. The PPM has been a successful, innovative criminal justice response allowing regional states to take ownership of a regional security problem. The first states which volunteered to

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<sup>811</sup> Trelawny. 2013: 50.

<sup>812</sup> UNODC. n.d.a. Also see: Liisberg. 2014: 35 – 37.

<sup>813</sup> Liisberg. 2014: 36 – 37.

<sup>814</sup> Scott. 2014: 30 - 31.

<sup>815</sup> UNODC. n.d.c. *Maritime Crime Programme - Indian Ocean*. Available: <http://www.unodc.org/unodc/en/piracy/indian-ocean-division.html> [accessed 2 February 2021]; Bueger. 2012:3

<sup>816</sup> UNODC.2011b.

<sup>817</sup> Ibid.

<sup>818</sup> UNODC. n.d.c; Houben. 2014: 30; United Nations Independent Evaluation Unit. 2013: xiv; World Bank. 2013: 159.

prosecute pirates were Kenya, Seychelles, Tanzania and Mauritius.<sup>819</sup> External states have however also conducted pirate trials, such as the US and Belgium.<sup>820</sup> As UNCLOS Article 105 does not prescribe any procedures to be applied when pirates are arrested and is silent on procedural safeguards to protect their human rights,<sup>821</sup> the PPM managed to fill this procedural gap.

#### **5.4.4 All locked up and nowhere to go - transferring pirates back to Somalia**

Because the PPM would have caused regional prisons to be overburdened with pirates who were also being deprived of the opportunity to be imprisoned close to home, WG2, the CPP and regional states developed the Pirate Prisoner Transfer Programme (PPTP). The PPTP allows convicted pirates to be transferred back to Somalia to serve their sentence,<sup>822</sup> provided the prisoner and states involved consent.<sup>823</sup> Reasons not to consent can range from the prosecuting state not approving of prison conditions in the receiving state, to pirates fearing persecution in Somalia.

The PPTP has a legal reform and correctional dimension. In line with the principle of dual-criminality, convicted pirates may only be transferred back to a state where piracy has been criminalized. Regional correctional and prison laws therefore had to be amended to allow for such transfers. As discussed, Puntland and Somaliland<sup>824</sup> criminalized piracy, allowing convicted pirates to be imprisoned there. Some are however also imprisoned in Mogadishu. Complementing transfer agreements are capacity building efforts aimed at improving regional correctional facilities and long-term capacity to house inmates in line with international standards.<sup>825</sup> In Somalia, the majority of this work was done with Puntland and Somaliland, as well as in Mogadishu. These efforts have been very successful and have included establishing a custodial corps in Somaliland and Puntland<sup>826</sup> and the building of

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<sup>819</sup> UNODC. n.d.c. Also see Liisberg. 2014: 35 – 37.

<sup>820</sup> See, for example, Collins. 2014.

<sup>821</sup> Petrig. 2013: 161.

<sup>822</sup> Liisberg. 2014: 35 – 37. Also see UNODC. n.d.b.

<sup>823</sup> Interview Participant 4. 2016; UNODC. n.d.b.

<sup>824</sup> UNODC. n.d.b; World Bank. 2013: 159.

<sup>825</sup> See, for example, UNODC. n.d.c; Houben. 2014: 30; United Nations Independent Evaluation Unit. 2013: xiv; World Bank. 2013: 159.

<sup>826</sup> UNODC. n.d.b.

prison and court buildings by the CPP<sup>827</sup> and other UN agencies like the United Nations Development Programme (UNDP), as well as the broader international community. Correctional capacity building efforts therefore have the aim of equipping regional prisons to house pirates, but by default benefit correctional capacity in general.<sup>828</sup>

This process whereby a pirate can be arrested, tried and imprisoned by three different states has proven effective and sustainable.<sup>829</sup> It must however be noted that the majority of prosecutions have been of low level pirates, while only a handful of kingpins have been prosecuted.<sup>830</sup> The PPM and PPTP have also allowed for local and regional ownership of pirate prosecutions<sup>831</sup> and transferring pirates back home is also conducive to their rehabilitation and reintegration back into society.<sup>832</sup> These initiatives have likely also been a deterrent.<sup>833</sup> Participant 4 suggested that if you question pirates on why they ceased attacks, they will likely reply that it is because they saw how many pirates never returned and they did not know if this was because they were imprisoned or killed.<sup>834</sup>

As piracy has declined, the CPP/ GMCP shifted its attention to maritime crime globally.<sup>835</sup> By using the knowledge and expertise gained from counter-piracy, the GMCP now assists states across the globe to build on, enhance and combine their capacities to counter maritime crime in general.<sup>836</sup> The GMCP's aim remains building law enforcement and criminal justice capacity to enable regions experiencing maritime crime to address it themselves.<sup>837</sup> The programme continues to develop Somalia's capacities to protect its own maritime domain and it continues to facilitate the PPM and the PPTP. The GMCP is arguably the entity which

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<sup>827</sup> See, for example, Vannier, R. & Uranie, S. 2015. First trial starts before the Seychelles dedicated court for piracy and maritime crime cases. *Seychelles News Agency*. 2 June. Available: <http://www.seychellesnewsagency.com/articles/3066/First+trial+starts+before+the+Seychelles+dedicated+court+for+piracy+and+maritime+crime+cases> [accessed 2 February 2021]; UNODC. 2019a. *UNODC inaugurates Mogadishu prison, court complex in latest support to Somalia*. Available: <https://www.unodc.org/unodc/en/frontpage/2019/February/unodc-inaugurates-mogadishu-prison--court-complex-in-latest-support-to-somalia.html> [accessed 2 February 2021].

<sup>828</sup> UNODC. n.d.b; Interview Participant 6. 2016.

<sup>829</sup> Liisberg. 2014: 37.

<sup>830</sup> Scott. 2014: 8; Interview Participant 3. 2018.

<sup>831</sup> Liisberg. 2014: 35

<sup>832</sup> UNODC. n.d.b.

<sup>833</sup> Interview Participant 4. 2016; Bueger. 2012: 3.

<sup>834</sup> Interview Participant 4. 2016.

<sup>835</sup> UNODC. n.d.a.

<sup>836</sup> Houben. 2014: 30.

<sup>837</sup> UNODC n.d.a.

most capitalized on the momentum created by counter-piracy. There is a separate UN programme on Wildlife and Forest Crime and the GMCP therefore does not work on ivory trafficking, although one of its outflows, the Indian Ocean Forum on Maritime Crime (IOFMC), does include a wildlife crime component. This leaves the maritime leg of the ivory trafficking model vulnerable to a continued lack of maritime based responses.

#### **5.4.5 Regional capacity building**

A large component of the activities under the legal paradigm has been regional capacity building efforts, not only of criminal justice and correctional institutions, but also in the form of maritime law enforcement training and resource provision. Capacity building efforts aimed at regional maritime law enforcement entities have however had a limited effect on piracy due to their limited patrol range, but it does hold promise for other maritime crimes. This is discussed in the following chapters. Notable capacity building projects have been implemented by actors such as the CPP/GMCP, EU, UNDP and IMO. These efforts are multiple and on-going.<sup>838</sup> Participants suggested that counter-piracy measures were never for the sole benefit of counter-piracy but instead were meant to be beneficial for combatting other maritime crimes and establishing the rule of law.<sup>839</sup> Examples include improved regional prisons and courts.<sup>840</sup> Participant 5, working for the IMO and the DCOC, similarly noted how existing institutions expanding their scope to other maritime crimes will continue to benefit counter-piracy.<sup>841</sup>

#### **5.4.6 ‘Regional commitment’: the Djibouti Code of Conduct (DCOC)**

The DCOC is the primary regional instrument aimed at piracy and provides a framework for cooperation and capacity building. It is non-binding and was adopted in 2009 by WIO littoral states from Africa and the Gulf. Signatories declare their intention to adhere to international

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<sup>838</sup> For more on capacity building efforts, see, for example, Scott. 2014: 30-31; UNODC. 2011b; Bueger. 2013d: 13; Oceans Beyond Piracy. n.d.c. *United Nations Development Programme (UNDP)*. Available: <http://oceansbeyondpiracy.org/matrix/united-nations-development-programme-undp> [accessed 15 August 2016]; Singhal. 2014: 66; Houben. 2014: 31; Bueger. 2013d: 12 - 13; Madsen, J.V. & Kane-Hartnett, L. 2014. Towards a regional solution to Somali piracy : challenges and opportunities. *ASPJ Africa & Francophonie*: 7; EUCAP-NESTOR. n.d. *Mission*. Available: [https://www.eucap-nestor.eu/en/mission/mission\\_facts\\_and\\_figures/](https://www.eucap-nestor.eu/en/mission/mission_facts_and_figures/) [accessed 15 August 2015].

<sup>839</sup> Interview Participant 2. 2018 & Interview Participant 4. 2016.

<sup>840</sup> Interview Participant 2. 2018.

<sup>841</sup> Interview Participant 5. 2016.

law and to cooperate in counter-piracy efforts, including investigations, arrests and prosecution. They also agree to conduct shared patrols, which includes authorizing officials to embark on patrol vessels of other states, known as ship riders.<sup>842</sup> Ship riders are discussed in Chapter 6.



**Figure 5: DCOC members States  
(IMO. n.d.a)**

The DCOC was adopted after the IMO, which was instrumental in adopting, legitimizing and implementing the Code,<sup>843</sup> convened a meeting for regional states to deliberate on how they could address piracy.<sup>844</sup> The DCOC is internationally funded by donations to the DCOC Trust Fund,<sup>845</sup> which was established with the assistance of the CGPCG.<sup>846</sup> The Code allows for technical cooperation between signatories, the IMO and other counter-piracy actors. The IMO entered into partnerships with actors like the EU and UNODC in order to increase the implementation of the code and to develop law enforcement and maritime infrastructure.<sup>847</sup> Its 'regional' nature is therefore debateable.

Similar to the UNODC and EU, the DCOC aims to implement capacity building efforts to strengthen member states' response to piracy such as through training, information-sharing

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<sup>842</sup> IMO. n.d.a.

<sup>843</sup> Bueger. 2013d: 5 – 6.

<sup>844</sup> IMO. n.d.c. *Maritime security and piracy.* Available: <http://www.imo.org/en/OurWork/Security/Pages/MaritimeSecurity.aspx> [accessed 21 April 2016].

<sup>845</sup> Madsen & Kane-Hartnett. 2014: 10.

<sup>846</sup> Bueger. 2013d: 6.

<sup>847</sup> IMO. n.d.d. *Content and evolution of the Djibouti Code of Conduct.* Available: <http://www.imo.org/en/OurWork/Security/PIU/Pages/Content-and-Evolution-of-the-Djibouti-Code-of-Conduct.aspx> [accessed 15 July 2019].

and law reforms. It has however had limited activities and has not been as successful as other entities' similar efforts and will therefore not be discussed in detail.<sup>848</sup> What is however unique to the DCOC is that it established three information sharing centres - in Mombasa, Dar es Salaam and Sana'a. These are responsible for information-sharing among DCOC signatories.<sup>849</sup> It was hoped that the experience of naval operations and other information-sharing centres such as those of the EU and CMF could be carried over to the DCOC centres. As with most regional capacity building efforts, this would enable regional states to play a key role in addressing maritime threats, allowing international naval operations to focus their attention elsewhere.<sup>850</sup> This has however not happened and research participants were very sceptical of the centres' effectiveness.<sup>851</sup> The DCOC was also supposed to mimic the success of another regional instrument aimed at counter-piracy cooperation, the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (ReCAAP). However, where ReCAAP has been implemented by regional states, the DCOC has instead been implemented by the IMO and its partners.<sup>852</sup> This again creates scepticism as to the regional ownership the Code set out to achieve.

In 2017, the DCOC members adopted the Jeddah Amendment, expanding the Code's scope to other maritime crimes such as IUU fishing, narcotics and wildlife trafficking. Cooperation to address these crimes is agreed upon as a basis for sustainable development of the maritime sector and developing the region's blue economy.<sup>853</sup> Participant 5 explained the thought process:

“[W]hy don't we use the processes used to fight piracy, to fight other maritime crimes? Why don't we use the lessons that we have learnt in fighting piracy to [...] suppress other maritime crimes? [...] The West Africa Code of Conduct was modelled on the [DCOC]. But they were wiser. They improved on what we had. So, we actually call it Djibouti Code Plus. Because they then looked at dealing with all other maritime

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<sup>848</sup> For more on the DCOC capacity building efforts, see IMO. n.d.d; IMO. n.d.a; Bueger. 2013d: 11 – 12; Defence Technical Information Centre. 2013: 26.

<sup>849</sup> IMO. n.d.a; Defence Technical Information Centre. 2013: 26.

<sup>850</sup> Trelawny. 2013: 51; Interview Participant 9. 2016.

<sup>851</sup> Interview Participants 1; 2; 4; 5 & 9.

<sup>852</sup> Madsen & Kane-Hartnett. 2014: 10-15; IMO. n.d.c.

<sup>853</sup> IMO. 2017. *Regional maritime piracy agreement broadened to cover other illicit maritime activity*. 13 January. Available: <http://www.imo.org/en/MediaCentre/PressBriefings/Pages/4-DCOC-widened.aspx> [accessed 13 January 2019]; IMO. n.d.a.

crimes. So, now we're sort of like playing catch-up. We spoke to the members and they expressed exactly what you are saying about the increase in other crimes. Especially IUU fishing is a big problem. Some of the members are extremely concerned about IUU fishing because, like, the Somalis obviously say it was one of the causes of piracy in the first place, and therefore [...] some would even argue that if that is not addressed you'll start seeing people taking the law into their hands".<sup>854</sup>

The amendment is an interesting addition, as many are of the opinion that the DCOC and its activities failed to have an impact on piracy and yet now has been expanded. As Participant 4 noted, piracy declined because of "[n]aval forces, private security and to some extent UNODC's work in making sure that you weren't released".<sup>855</sup> He said that the DCOC had no impact on any of these. Nearly all those who spoke of the DCOC, including some who were involved in implementing the Code, felt that it achieved very little in terms of training and capacity building. Participant 4 noted:

"I don't believe in the [DCOC] [...] There seems to be loads of states signing it to say that they're going to contribute to suppressing piracy. Something which is an obligation under [UNCLOS] anyway because they all ratified it. So Saudi Arabia is saying [...] 'we're going to [...] play a role in suppressing piracy'. It's only the government stating their international law obligation. And they've done nothing. And one of the characteristics of the [DCOC] is maybe they have done absolutely nothing apart from signing up the [DCOC] [...] So it's an easy way to say we're doing something about piracy, when actually the Gulf countries haven't done anything in terms of navy operations...the [UK] and Canada, I mean, they just send ships to patrol this part of the world when there's greatly rich and wealthy states that benefit hugely from international trade, have done nothing."<sup>856</sup>

Participant 1 noted that short term training courses and the introduction of complicated technology are reasons why capacity building under the DCOC did not work. This was also mentioned by other participants who felt that regional states are offered all kinds of technologies which they would perhaps be better off without:

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<sup>854</sup> Interview Participant 5. 2016.

<sup>855</sup> Interview Participant 4. 2016.

<sup>856</sup> Interview Participant 4. 2016.

“I know this one example of Czech researcher and he was flown to give a training in a frame of the [DCOC] [...] on how to use Google Maps and how to put incidents on it. And I spoke to some people who had this training and they just didn’t see the point, why they needed this to start with. And then it was more, you know, the white magician coming from Eastern Europe, performing his magical show [...] But there’s no connection to the everyday life [...] he then went back, a year later, he was supposed to do the follow-up but there was zero memory of what he had done. So, this is how capacity building doesn’t work.”<sup>857</sup>

Another issue is that key WIO nations like India and Pakistan are not signatories to the DCOC. Participants were also critical of the contribution of the DCOC information sharing centres. Participant 1 said that no one would trust the DCOC information sharing centres to do similar work to the EU’s centre and that the centres were merely sharing information provided by EUNAVFOR.<sup>858</sup> Participant 4 said: “[t]hey’re completely not effective [...] We phoned the one in Mombasa a few times and no one’s ever answered”.<sup>859</sup> Participant 5 noted the irony of having a counter-piracy information sharing centre in Yemen which is in the grip of a civil war.<sup>860</sup>

The DCOC training centre in Djibouti is equally perceived as a failure.<sup>861</sup> Participants noted that it is only based in Djibouti because France<sup>862</sup> and Japan, the donor, wanted it there and that Djibouti is a very difficult place to work in.<sup>863</sup> Of this Participant 2 said:

“At one stage it had goats living in the bottom area, probably not true, I don’t know [...] They spend a substantial amount of money to get everybody together, but we haven’t really seen an outcome. So much so that they have asked to join together with the Contact Group’s regional capacity building group and to combine two working groups on capacity building and to coordinate some of this activity”.<sup>864</sup>

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<sup>857</sup> Interview Participant 1. 2017.

<sup>858</sup> Interview Participant 1. 2017.

<sup>859</sup> Interview Participant 4. 2016.

<sup>860</sup> Interview Participant 5. 2016.

<sup>861</sup> Interview Participants 1; 4; 5 & 9.

<sup>862</sup> Interview Participant 9. 2016.

<sup>863</sup> Interview Participant 5. 2016.

<sup>864</sup> Interview Participant 2. 2018.

Participants 1 and 9 however still consider the DCOC as a good resource, because it provides a platform to develop relationships between states.<sup>865</sup> Participant 9 however still believed that it achieved very little operationally and in terms of cooperation.<sup>866</sup>

#### **5.4.7 Attempting to disrupt pirate networks on land**

WG5, called 'Disrupting pirate networks ashore', is mandated to coordinate efforts to disrupt piracy on shore, primarily by disrupting its financial gains. WG5's aims are threefold: a) identify, prosecute and convict pirate leaders, financiers, organizers and negotiators, b) reduce the amount of ransom paid and c) track and recover ransoms. These aims have the purpose of eliminating piracy's lucrative nature, which is its key driver. Because measures aimed at sea are expensive and unsustainable, justifying their long-term existence has become difficult. WG5's aim of making piracy less lucrative is therefore considered a long-term onshore solution which could allow defensive measures at sea to be relaxed. However, because kingpins and financiers are not part of the physical attack, they are elusive. Tracking pirate proceeds can therefore also help to identify them.

Identifying, intercepting and countering the financial activities of TOC networks are key to disrupting their activities. But as with most TOCs, the money trail is badly understood due to its clandestine nature and the money laundering tactics used by criminal networks. It is one of most difficult and therefore arguably still one of the least effective counter-responses. Even developed states with resources and expertise struggle to trace and disrupt the proceeds of crime and to identify senior TOC network members. This is exacerbated in a place like Somalia where paperless informal value transfer systems like Hawala are used.<sup>867</sup> The group has thus far had limited success in identifying senior members of pirate networks<sup>868</sup> and efforts to reduce ransom payments are not transferable to the other forms

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<sup>865</sup> Interview Participant 1. 2017 & Interview Participant 9. 2016.

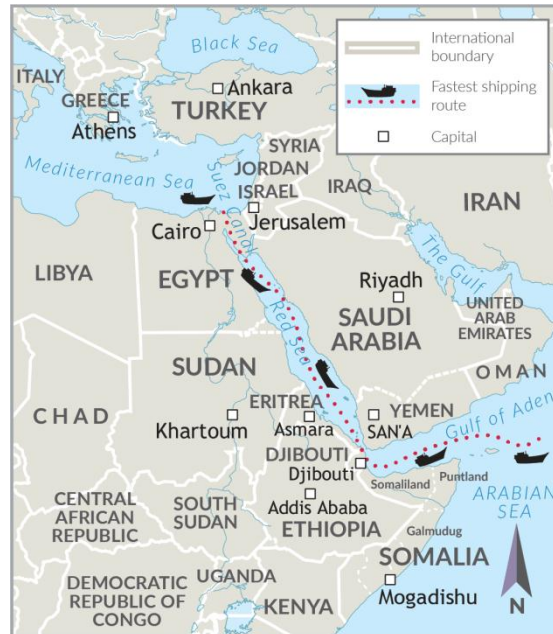
<sup>866</sup> Interview Participant 9. 2016.

<sup>867</sup> Maresca, G. 2014. Fighting piracy along the money trail. In *Fighting piracy off the coast of Somalia: lessons learned from the Contact Group*: 55 – 62. For an explanation of the hawala system, see Patriarca. 2013: 237; World Bank. 2013: 60.

<sup>868</sup> Maresca. 2014: 58 – 59.

of TOC. Regional achievements in this regard are therefore likely to remain limited. These efforts are also not unique to counter-piracy and will not be considered further.<sup>869</sup>

## 5.5 Responses under the Economic Paradigm



**Figure 6: Suez Canal**

Under the economic paradigm, piracy is problematic because it imposes costs on the shipping industry. Pirates want to maximize benefits and minimize costs, both monetary and otherwise, such as arrest. In response, the shipping industry wants to maximize the risk and operational costs to pirates, while keeping industry costs, such as ransom payments and vessel protection measures, at a minimum.<sup>870</sup> The main actor under the economic paradigm is the shipping industry and responses are typically measures put in place to protect vessels from hijackings. This includes following best management practices (BMP), which have been a key contributor to the decline in attacks. Participant 5 explained:

“the success of counter- piracy has been the employment of armed teams on ships and [...] [BMP] in the high-risk area [...] [T]he navies might think they have solved the problem but in reality [...] the number of ships that are available is very small. Currently I think it is one ship and it can’t be everywhere. So it relies very much on aerial surveillance and intelligence and queuing to maybe be in the right place at the right time. The biggest deterrent isn’t the navy, its industry practices, the industry

<sup>869</sup> For more on this, see Maresca. 2014: 55 – 62; World Bank. 2013: 160.

<sup>870</sup> Bueger. 2013a: 87 – 90; Bueger. 2012: 3.

telling their ships to sail further out at sea, they're reporting in and out of high-risk area, carrying armed guards, that is probably the most single successful factor".<sup>871</sup>

### 5.5.1 Coordinating a private response

WG3 coordinates the work of the shipping industry with states.<sup>872</sup> Because navies alone could not protect vessels, additional measures by the shipping industry were necessitated and WG3 was established to address these. WG3's biggest achievement has been the development of Best Management Practices to Deter Piracy and Enhance Maritime Security in the Red Sea, Gulf of Aden, Indian Ocean and Arabian Sea (BMP).<sup>873</sup> These BMP provide crews and vessel owners with practical guidelines on how to protect themselves.<sup>874</sup>

WG3 had a diverse group of participants, including the shipping industry, navies, governments and NGOs. This enabled inputs on technical counter-measures and views from industry and states who had to ensure that flagged vessels adhere to what was discussed at meetings. The participation of the private sector, especially the shipping industry, should ideally be replicated in measures to counter other maritime crimes. This is discussed in subsequent chapters. WG3 is also responsible for dealing with the welfare of victims and their families and has issued guidelines on how to prepare companies and crews for an attack. It has also issued piracy-related guidelines on matters such as labour laws and ship-owners insurance and support to families. These guidelines have been endorsed by the CGPCS and IMO and now serve as a guide across the globe.<sup>875</sup> WG3's work therefore also partially falls under the humanitarian paradigm.

Although the shipping industry should also be central in addressing heroin and ivory trafficking, vessel protection measures as applied to piracy do not apply to these crimes. But because they were integral to piracy's decline, these are briefly discussed below.

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<sup>871</sup> Interview Participant 2. 2018.

<sup>872</sup> Interview Participant 1. 2017.

<sup>873</sup> EUNAVFOR. 2018. *Best Management Practices 5*. Available: <https://eunavfor.eu/wp-content/uploads/2018/06/BMP5-PP.pdf> [accessed 17 January 2019].

<sup>874</sup> Chul. 2014: 41; Forte, G. 2013. Recent developments on piracy affecting the shipping industry. In *Fighting piracy off the coast of Somalia: lessons learned from the Contact Group*: 185.

<sup>875</sup> Chul. 2014: 43 – 45.

## 5.5.2 Best management practises for ships

The BMP were developed by the shipping industry in collaboration with WG3 and the IMO.<sup>876</sup> Full implementation of the BMP are vessels' best defence against attacks<sup>877</sup> and their relaxation has been credited for causing resurgent attacks. As responses under the economic paradigm attempt to keep industry costs low by applying defensive measures, such as making vessels difficult to board,<sup>878</sup> these measures are addressed in the BMP. The BMP also define the High Risk Area where vessels are expected to adhere to BMP and IMO guidelines.<sup>879</sup> The BMP contain three fundamental requirements to keep vessels safe – vessels and crew must implement protection measures, they must report to the United Kingdom Maritime Trade Operation (UKMTO) in Dubai before, during and after transit and they must register with the EU's Maritime Security Centre – Horn of Africa (MSC-HOA) to keep navies informed of their transit.<sup>880</sup> Vessel protection measures include measures such as having water sprayers and armed guards on board.<sup>881</sup>

The use of private security also falls under the security paradigm. Armed guards were necessitated because navies alone could not prevent attacks and as attacks increased, certain insurance companies required their use before issuing insurance to shipping companies.<sup>882</sup> Initially, private security companies provided training to crewmembers and were engaged in ransom negotiations. Since 2009, they began being deployed on-board vessels traversing the High Risk Area.<sup>883</sup> The allowance of on board private security was in fact the result of the shipping industry pressuring Flag states to allow them on board for insurance purposes.<sup>884</sup> Participant 28 noted how large companies like Maersk have a political dimension as they often fund political parties. This illustrates how, as suggested by

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<sup>876</sup> Ibid: 41; World Bank. 2013: 158.

<sup>877</sup> Bueger. 2015b: 37. Also see Bryant, Townsley & Leclerc. 2014: 70.

<sup>878</sup> Bueger. 2012: 3.

<sup>879</sup> Trelawny. 2013: 50.

<sup>880</sup> EUNAVFOR. 2018: 4; Madsen & Kane-Hartnett. 2014: 6.

<sup>881</sup> EUNAVFOR. 2018: 23 - 40; Bryant, Townsley & Leclerc. 2014: 72. Also see Bueger. 2018: 625.

<sup>882</sup> See, for example, Herbert-Burns. 2012: 12.

<sup>883</sup> Bueger. 2013d: 12.

<sup>884</sup> Frier, C. 2018. Armed on-board protection of Danish vessels authorisation and use of force in self-defence in a legal perspective. *Erasmus Law Review*. 4 (2018). DOI: 10.5553/ELR.000129; Mudric, M. 2011. Armed guards on vessels: insurance and liability. *Poredbeno pomorsko pravo*. 50 (2011): 240 – 241; Interview Participant 1. 2017 & Interview Participant 2. 2018.

Burris et al, state actors can themselves be governed by non-state actors.<sup>885</sup> Gould has theorized the role of private security in the maritime domain as follows:

“Perhaps states, private security actors and the maritime community recognise that the interests (and authority) of the commercial shipping industry, and not the democratic interest of the nation, provide the moral basis for thinking about a ‘collective good’ in offshore security provision, and thus that the state has no automatic, significant role in enforcing it. At the same time, the state may see its responsibilities as a security guarantor as diminished beyond the boundaries of its territory, and its exclusive authority to distribute authority over and use coercive force (if it ever existed) as not worth protecting [...] In such an assemblage, the maritime community recognises that private security actors have near-equal authority to states in enforcing a ‘civilised’ security defined by private interests, rather than the democratic security logics through which state policing institutions are constituted.”<sup>886</sup>

Although the use of armed guards was initially discouraged by the IMO due to the many legal, practical and ethical issues which could arise, they eventually endorsed their use.<sup>887</sup> While the BMP do not actively endorse the use of armed guards, it provides general guidelines on their deployment.<sup>888</sup> WG2 also deliberated on the use of private armed security, their use of force and the need for uniform rules on the matter.<sup>889</sup> The key challenge related to armed guards relates to their use of force. Armed guards acting on the high seas do not have to adhere to the regulations applicable to arms in ports and there have been incidents of guards killing fishermen. Some vessels have instead opted for private security companies accompanying them on their own patrol vessels.<sup>890</sup> Another related issue is the use of floating armoury vessels where security personnel can stay and acquire weapons. This however falls outside the scope of this thesis, but can clearly pose a security

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<sup>885</sup> Burris, Kempa & Shearing. 2008: 3 - 4.

<sup>886</sup> Gould. 2017: 416.

<sup>887</sup> World Bank. 2013: 159.

<sup>888</sup> EUNAVFOR. 2018: 19.

<sup>889</sup> Liisberg. 2014: 35 - 39.

<sup>890</sup> Defence Technical Information Centre. 2013: 12 – 13.

risk. Using private security to counter piracy resembles a return to Flag states using privateers,<sup>891</sup> but this time in response to its descendant – piracy.

The shipping industry's reaction to piracy has therefore led to a form of privatization of maritime security and at the heart of it are not international navies but private security companies.<sup>892</sup> Participant 1 however noted the importance of cooperation between private security companies and navies:

“The private armed guards only work because there are the navies that can react to incidents. Because otherwise, I mean, the helicopter to arrive [...]it takes about forty-five minutes. In the worst case, it takes forty-five hours. So, the private armed guards cover that window. So, if the navies wouldn't be there, what would happen? You would have a shootout and that can last [days]”.<sup>893</sup>

## 5.6 Responses under the Development Paradigm

Vagg, reflecting on Hobsbawm's work on bandits, notes how pirates emerge from conditions of economic under-development.<sup>894</sup> This was illustrated in Chapters 2 and 4. Participant 2 noted: “if they've got livelihoods, food and work, they're not going to go to sea and be pirates.”<sup>895</sup> This however likely only applies to the foot soldiers. The main target under the development paradigm is therefore not pirates, but the lack of development giving rise to piracy.<sup>896</sup> Development responses aim to address poverty, lack of livelihoods, lack of functional governing institutions, a breakdown of the rule of law<sup>897</sup> and the cultural acceptability of being a pirate.<sup>898</sup> Because the FGS lacks the ability to develop infrastructure and economic opportunities needed for development,<sup>899</sup> such efforts are primarily driven by the West. The reasoning behind addressing root causes is that by improving these, Somalis

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<sup>891</sup> Gould. 2017: 412.

<sup>892</sup> Defence Technical Information Centre. 2013: 12.

<sup>893</sup> Interview Participant 1. 2017.

<sup>894</sup> Vagg. 1993. Also see Hobsbawm. 1972.

<sup>895</sup> Interview Participant 2. 2016.

<sup>896</sup> Bueger. 2013a: 91. Also see Collins. 2014: 445.

<sup>897</sup> Bueger. 2013a: 91; Interview Participants 2; 3; 4; 9 & 12.

<sup>898</sup> Bueger. 2013d: 13 – 14.

<sup>899</sup> Swarttouw & Hopkins. 2014: 17.

will not need to turn to piracy and if they do, there will be governance structures able to prevent and punish their actions.

Piracy-specific development efforts are however neglected as sea-based security, legal and economic responses receive the vast majority of funding.<sup>900</sup> The Institute for Security Studies (ISS) estimated that no more than one per cent of the funds spent on counter-piracy measures have been directed towards long-term solutions<sup>901</sup> and before 2011 the CGPCS Trust Fund had not funded any development projects.<sup>902</sup> But as the counter-piracy regime developed and attacks increased, it became apparent that piracy will only be mitigated if conditions on land are also improved.<sup>903</sup> In 2010, UNSC Resolution 1950 acknowledged this link between Somalia's structural problems and piracy and called for a more comprehensive response to both.<sup>904</sup> Now that attacks have declined and the high cost of the short-term response becomes unjustifiable,<sup>905</sup> the international community has focussed more attention on long term capacity building.<sup>906</sup>

Participants stressed the failure to address the causes of piracy on land,<sup>907</sup> but also justified their sea-based interventions. Participant 4 shared his thoughts on this:

“[S]ecurity responses are the only responses that work. The development response, you know, imagine if you're sending people into dangerous deserts of Somalia and work on Somalia that way. Police officers make 100 USD a month, these guys are making 2 million dollars a vessel and you think they're gonna go away?”<sup>908</sup>

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<sup>900</sup> Bueger. 2012: 11; Bridger. 2013: 5. Also see Oceans Beyond Piracy. 2018. *The state of maritime piracy 2017*. Broomfield: One Earth Future Foundation. Available: [http://oceansbeyondpiracy.org/sites/default/files/one\\_earth\\_future\\_state\\_of\\_piracy\\_report\\_2017.pdf](http://oceansbeyondpiracy.org/sites/default/files/one_earth_future_state_of_piracy_report_2017.pdf) [accessed 15 June 2019].

<sup>901</sup> Huggins & Madsen. 2014: 26.

<sup>902</sup> Bueger. 2012: 11.

<sup>903</sup> Chul. 2014: 47.

<sup>904</sup> Collins. 2014: 444; UN Security Council. 2010a. *Security Council resolution 1950 (2010) on acts of piracy and armed robbery against vessels in the waters off the coast of Somalia*, 23 November. S/RES/1950(2010): 3. Available: <https://www.refworld.org/docid/4cf763c92.html> [accessed 2 February 2021]; UN Security Council. 2010b. *Report of the Secretary-General on Somalia*, 30 December. S/2010/675. Available: [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/2010/675](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2010/675) [accessed 2 February 2021]; Bevilacqua. 2013: 115 – 117.

<sup>905</sup> Madsen, Kane-Hartnett & Oceans Beyond Piracy. 2013: 7 – 8; World Bank. 2013: xxv.

<sup>906</sup> Bridger. 2013: 5; Schbley & Rosenau. 2013.

<sup>907</sup> Interview Participants 2; 3; 4; 9 & 12.

<sup>908</sup> Interview Participant 4. 2016.

The CGPCS's sole focus on piracy led to the sea-based crisis response instead of dealing with sustainable long-term solutions.<sup>909</sup> By concentrating law enforcement efforts at sea and failing to improve the root causes<sup>910</sup> "nothing has changed in this area where the pirates live [...] there's nothing to do."<sup>911</sup> Participant 2 also noted that "there is still no capacity on shore" as navies left to address maritime security threats elsewhere, leaving Somalia to fend for themselves.<sup>912</sup> Piracy therefore remains an attractive means of income and fears that piracy will re-emerge once measures are relaxed<sup>913</sup> are reasonable considering renewed attacks. The counter-piracy response has also raised concerns over the securitization of aid, as security concerns have trumped long-term development objectives. Similar to scholars like Menkhaus, development actors generally feel that piracy should not be the international community's top priority in Somalia.<sup>914</sup>

Since long before piracy emerged, Somalia has received large amounts of aid and development funding. Development work is however limited by the insecure conditions in many regions.<sup>915</sup> Participants also noted how corruption within the FGS is undermining development work. As Participant 2 noted: "all of them collectively are eating up the money that is there to do developmental, even worse still, the humanitarian effort is completely undermined by corruption."<sup>916</sup> When participants described their land-based work in Somalia, there was an overwhelming sense of frustration and perhaps hopelessness at their work having any long-term impact.<sup>917</sup> It is therefore not surprising that counter-piracy measures are largely focussed at sea and will likely remain there. While participants still hoped to address root causes, they did not foresee achieving significant results. Participant 4 noted that although their efforts aimed at creating livelihoods failed, they would continue to attempt implementing rule of law projects.<sup>918</sup> Participant 9 emphasized the impact of insecurity on their work: "you have to accept that there's a level of risk, and that's a constant battle. How careful can you be without having your hands tied behind your back

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<sup>909</sup> Huggins & Madsen. 2014: 25.

<sup>910</sup> Zwolski and Kaunert. 2014: 604.

<sup>911</sup> Interview Participant 8. 2016. Nairobi, Kenya. Interview Participant 2 also noted this.

<sup>912</sup> Interview Participant 2. 2018.

<sup>913</sup> Maresca. 2014: 57.

<sup>914</sup> Bueger. 2012: 13.

<sup>915</sup> Zwolski and Kaunert. 2014: 594 – 598.

<sup>916</sup> Interview Participant 2. 2016.

<sup>917</sup> Interview Participants 4; 8 & 9.

<sup>918</sup> Interview Participant 4. 2016.

and doing absolutely nothing, just sitting in your compound?”<sup>919</sup> In addition to insecurity, absent governance structures limit addressing root causes and building institutions as there are few local counterparts to work with.<sup>920</sup> But even though development responses have had limited success, development actors argue that small victories are better than no attempt at all.

Participant 3 criticized the international community for allocating few resources to onshore development activities, including building regional states’ maritime law enforcement capacity. But he also acknowledged that the immediate aim was mitigating the problem at sea and that the crisis at the height of piracy made it difficult to respond otherwise:

“[I]n 2011/2012, [...] a thousand seafarers being held at one point [...] it was a true crisis, and it was really just fixing that problem. So not a whole lot of, looked towards the long-term solution. I don’t know how they would have actually done it differently”.<sup>921</sup>

Participant 2 agreed:

“[T]he threats to the international economy, you can see why the internationals reacted [...] in their own best interests. Their best interests didn’t really include what to do with the causes of piracy, but the [CGPCS] that they created took a broader look at this, and legal issues and all that, it introduced a working group on capacity building. But the capacity building was primarily aimed at building Somali maritime policing security capacity, it still wasn’t really aimed at the causes. There were a couple of programs, mostly funded by the EU and some from [Food and Agriculture Organization], even now, that then started to look at the issues of the coastal communities. But it hasn’t been that extensive, it’s pretty small in comparison”.<sup>922</sup>

Participant 9 was of the opinion that instead of ineffective training aimed at capacity building and focussed on maritime structures, his organization should have focussed on

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<sup>919</sup> Interview Participant 9. 2016.

<sup>920</sup> Interview Participants 5; 8 & 9.

<sup>921</sup> Interview Participant 3. 2018.

<sup>922</sup> Interview Participant 2. 2018.

improving governance structures. This is however problematic because it is a long-term goal and donors want to see quick results:

“[D]onors, they want to see the practical training. What are you doing? Where is the training? How often do they train? And when we’re talking about governance, we’re saying, well, really if you’re training people you’re wasting the resources because those people are not absorbed into any organisation”.<sup>923</sup>

He described the difficulty of convincing the EU that although piracy was originally addressed as an external threat to be addressed at sea, it was perhaps necessary to address it as an internal organized crime threat in Somalia and focus efforts on land. He however questioned the potential of land-based efforts in Somalia:

“I don’t really see how the root causes could have been addressed or could even be addressed now. Every country in the globe is struggling with how you employ your youth, including Somalia which has this huge level of unemployment [...] How do you create jobs in such an insecure country? It would have to be in the security sector and help the Somali authorities take control of their own ... I think it has to be on land, and that was a missed opportunit[y], they were focusing too much on the sea [...] as opposed to helping the security forces on land [...]The international community had a very military focus on Somalia, helping the Somali national army and AMISOM stabilise the country. And now they’re realising, wait a minute, why is the military fighting on domestic soil...and then the fact about the long-term ability just not coming out of the military offences. They say that they’re chasing their own tail. They will chase al-Shabaab and then go somewhere else. It’s a never-ending cycle [...] I don’t know why we didn’t wake up to the fact earlier and say that we should be investing in civilian law enforcement and try to help the local level authority to have sufficient capacity to stop, to get rid of al-Shabaab”.<sup>924</sup>

From the interviews it appears that responses aimed on land were perceived as the least successful and most challenging. This included the regional coordination and information sharing centres, land-based capacity building efforts and strengthening government

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<sup>923</sup> Interview Participant 9. 2016.

<sup>924</sup> Interview Participant 9. 2016.

institutions. Because of the challenges of working in Somalia, Participant 4, noted: “[T]hey would do what they can do rather than doing what needs to be done. The natural reflex of the United Nations.”<sup>925</sup> He also noted the challenge of pleasing donors:

“[T]his is where the UN is not the best, I mean, the EU is one of the worst offenders too, they all do their own thing. They get a donor, they find some money and they do that, whether it is needed or not is another question. Whether they’re doing what they’re doing actually generates more capacity [...] is questionable”.<sup>926</sup>

It could however be argued that development is not the responsibility of counter-piracy actors.<sup>927</sup> There was arguably no real alternative but to establish the security and law enforcement responses and then complementing them with development responses aimed at piracy. A lot of the work aimed at root causes also falls under typical development work, which is far removed from the maritime, legal or law enforcement focus of the responders. Until security and basic capacities improve, relying on development to eradicate piracy will remain a fantasy. Perhaps counter-piracy actors should reconcile with the fact that they are better off focussing their efforts at sea, in ports and on building maritime security capacity. It is arguably not the responsibility of maritime crime responders to address root causes and it is perhaps justifiable that they focus their efforts on that which they are trying to immediately contain. However, this must not prevent partnerships and cooperation with development actors who have often been embedded in the region for a long time and can make valuable partners.

Although major development responses are not aimed directly at piracy, they do contribute to regional maritime security capabilities.<sup>928</sup> The same can be said for law enforcement and security capacity building aimed at piracy, which contributes to development of regional law enforcement and criminal justice institutions. This illustrates how the security, legal and development paradigms overlap. Piracy-related developmental needs are therefore addressed either in terms of general capacity building projects by counter-piracy actors, by general development work not aimed at piracy, such as the UNDP’s on-going efforts on

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<sup>925</sup> Interview Participant 4. 2016.

<sup>926</sup> Interview Participant 2. 2018.

<sup>927</sup> For more on this debate, see, for example, Bueger. 2012: 11; Bridger. 2013: 5.

<sup>928</sup> Bevilacqua. 2013: 117.

institution building, and sometimes by development work aimed specifically at piracy.<sup>929</sup> Counter-piracy development responses are typically targeted at the local level, particularly at affected coastal communities. Three main responses exist - rehabilitation and reintegration, creating alternative livelihoods and awareness or prevention campaigns focussed on perceptions of piracy.<sup>930</sup> Only the piracy-specific development efforts which hold value for other forms of TOC are discussed below and only briefly, as their impact on the decline of piracy was negligible.

### 5.6.1 Framing piracy

WG4 was the only WG which fell exclusively under the development paradigm. It was tasked with raising public awareness and establishing communications to Somalis. It developed and coordinated all messaging among the CGPCS and WGs and assisted Somali officials with their own counter-piracy messaging. WG4 held meetings with inputs from Somali diaspora communities and youth leaders, and from that drafted and adopted a communication strategy.<sup>931</sup> Messaging campaigns are aimed at deterrence by raising awareness that piracy is an illegitimate activity with negative consequences. Participants noted how communities played an important role in pushing out pirates and not allowing them to anchor in their communities.<sup>932</sup> Actors which have carried out such campaigns include the UNODC, the UN Political Office for Somalia (UNPOS),<sup>933</sup> NATO, Norwegian Church Aid and the Puntland administration. Similar to WG4, these entities cooperated with local women's groups, clan elders, religious leaders and village authorities in coastal towns. Different media were used to spread the message, which included amnesty for pirates willing to denounce piracy. While it is reported that most campaigns were successful, they did have shortcomings such as not addressing the motivations behind piracy, such as IUU fishing. It is therefore important to focus such campaigns within the local context, instead of appearing to be Western propaganda.<sup>934</sup>

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<sup>929</sup> See, for example, Defence Technical Information Centre. 2013: 23; Bueger. 2013d: 13 – 14; Oceans Beyond Piracy. n.d.c.

<sup>930</sup> Bueger. 2012: 1- 4; Bueger. 2013d: 13 – 14.

<sup>931</sup> Meron, D.M. 2014. Raising public awareness. In *Fighting piracy off the coast of Somalia: lessons learned from the Contact Group*: 50 – 53.

<sup>932</sup> Interview Participant 3. 2018 & Interview Participant 9. 2016.

<sup>933</sup> Meron. 2014: 50 – 53.

<sup>934</sup> Bueger. 2012: 4 – 8.

## 5.6.2 Creating alternative livelihoods

Alternative livelihood programmes are aimed at providing income-generating alternatives to prospective pirates. Although piracy is dangerous work, there are few lucrative alternatives for the mostly unemployed youth on the Somali coast. This is due to the protracted conflict and lack of development, but also because living on the coast requires Somalis to engage in other forms of employment than the pastoralists living in the interior. Fishing is one of the few alternatives to piracy, but comes with its own risks, such as being mistaken for a pirate, or falling prey to them. Piracy can therefore seem to be the least hazardous<sup>935</sup> and more lucrative option. While there are also other livelihood programmes,<sup>936</sup> such as OBP's programme whereby they provide interest-free micro-loans to Somalis who use this for agriculture, fisheries and other activities,<sup>937</sup> the majority of alternative livelihood programmes are aimed at the fisheries sector. This is because it is a viable industry on the coast, but also because of its connection to piracy and the need for Somalis to benefit from their own resources as IUU fishing continues in Somalia's waters.<sup>938</sup>

One example is Somali Fair Fishing which works to develop the fishing sector with the help of funds from OBP.<sup>939</sup> Establishing a viable fishing industry in Somalia is however hampered by the lack of infrastructure and the inability to process and export fish.<sup>940</sup> Efforts to develop the local fishing industry would therefore need to be accompanied by development of ports, which would provide employment opportunities and the infrastructure needed for trade.<sup>941</sup> Roads leading to and from existing ports must also be prioritized for development.<sup>942</sup> These efforts are further hampered by corruption related to IUU fishing in Somalia's waters. Participant 9 noted how this jeopardises efforts to work on improving the fisheries sector:

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<sup>935</sup> Patriarca. 2013: 235. Also see Bueger. 2012: 9 – 10.

<sup>936</sup> For example, see World Bank. 2013: 162; 178.

<sup>937</sup> Interview Participant 2. 2018.

<sup>938</sup> See, for example, Bruwer. 2019.

<sup>939</sup> Bueger. 2013d: 13 – 14; Bailey, S. 2020. Stopping Somalia's pirates by building a fishing industry. *CNN*. 7 January. Available: <https://edition.cnn.com/2020/01/07/business/somali-piracy-fair-fishing-intl/index.html> [accessed 2 February 2021].

<sup>940</sup> Interview Participants 2 & 3. 2018.

<sup>941</sup> Reuters. 2019. *Qatar to build new port in Somalia's Hoby*. 20 August. Available: <https://www.reuters.com/article/somalia-qatar-port/qatar-to-build-new-port-in-somalias-hoby-idUSL5N25G1PB> [accessed 21 January 2019].

<sup>942</sup> Bueger. 2012: 10.

“Clearly someone in the government is selling licenses, is capable of producing licences. So the corruption issue, you don’t want to get your shit in order, and then you’re blaming us ... I’m sure just like with [...] other forms of organized crime, people are getting some money and putting [it] in their back pockets.”<sup>943</sup>

The majority of alternative livelihood programmes have been implemented after piracy’s decline. But truly providing viable, long-term alternative livelihood options means that there needs to be major development assistance to improve Somalia’s infrastructure and economy, which is arguably not the role of counter-piracy actors.

### **5.6.3 Rehabilitation and reintegration**

Rehabilitation and reintegration programmes are aimed at former pirates<sup>944</sup> in an attempt to prevent them from returning to piracy and to re-integrate them into society. In areas where piracy is not culturally acceptable, it can be difficult for former pirates to return to their communities and they might seek refuge with pirate networks. This is a phenomena often experienced by ex-convicts and combatants.<sup>945</sup> One example of rehabilitation efforts is vocational training and education of imprisoned pirates,<sup>946</sup> aimed at providing them with skills to find work after release. Such efforts also fall under both the legal and development paradigm as they are implemented in terms of correctional capacity building efforts. One participant suggested that skills acquired as a pirate could perhaps be put to use by enrolling former pirates in Somalia’s security apparatus such as the police or coast guard.<sup>947</sup> Though this can be a risk due to many pirates’ links to warlords and politicians, such efforts would fall under both the law enforcement and development paradigm. Similarly, former pirates are now acting as security guards on vessels operating around Somalia.<sup>948</sup>

## **5.7 Responses under the Humanitarian Paradigm**

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<sup>943</sup> Interview Participant 9. 2016.

<sup>944</sup> For examples of such efforts, see Bueger. 2012: 9.

<sup>945</sup> Bueger. 2012: 8.

<sup>946</sup> UNODC. n.d.b.

<sup>947</sup> World Bank. 2013: 177.

<sup>948</sup> Interview Participants 4 & 9. 2016.

The victims of piracy are the main focus under this paradigm.<sup>949</sup> This includes the victims of an attack and their families, as well as communities housing pirates.<sup>950</sup> Under this paradigm, piracy is seen as a source of suffering and is dealt with primarily by humanitarian organizations. Efforts under this paradigm are minor in comparison to the others<sup>951</sup> and so too are the resources allocated to it. This contributes to the labelling of the counter-piracy response as one of mere containment and driven by international priorities rather than humanitarian crises. Most international humanitarian aid provided to Somalia has gone towards emergency food assistance and not to long-term development<sup>952</sup> or counter-piracy. Similar to development responses, most projects do not specifically target humanitarian issues resulting from piracy. Instead, piracy is included in the scope of other projects.<sup>953</sup>

### 5.7.1 Assistance to crew members

Crew members and their families are acutely affected by piracy, including the fear of attacks and the stress experienced during hostage-taking. In addition, hostages are sometimes left to fend for themselves. As Participant 2 explained, “[e]very so often [...] a crew got taken ashore or the ship sank or something, and then once they got ashore there was no ship, no cargo, nobody gave a damn and [...] they just became forgotten.”<sup>954</sup> In the absence of shipping companies acting on behalf of their crew, other actors stepped in. The primary actors working with hostages have been OBP and the UNODC.<sup>955</sup> OBP has secured the release of many hostages and offered them support services.<sup>956</sup> The last hostages held by Somali pirates were released in September 2020.<sup>957</sup>

### 5.7.2 Safeguarding pirates’ human rights

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<sup>949</sup> Bueger. 2013a: 91.

<sup>950</sup> For more on efforts aimed at communities housing pirates, see, for example, Bueger. 2012: 6; Bueger. 2013a: 91; Bueger. 2013d: 15 & Bueger. 2015b: 38.

<sup>951</sup> Bueger. 2013a: 91.

<sup>952</sup> World Bank. 2013: 162.

<sup>953</sup> Bueger. 2013d: 15.

<sup>954</sup> Interview Participant 2. 2018.

<sup>955</sup> Bueger. 2013a: 91; Bueger. 2013d: 15 & Bueger. 2015b: 38.

<sup>956</sup> Bueger. 2013c: 91.

<sup>957</sup> Defence Web. 2020c. *No more hostages held by Somali pirates*. 2 October. Available: <https://www.defenceweb.co.za/security/maritime-security/no-more-hostages-held-by-somali-pirates/> [accessed 3 October 2020].

Safeguarding the rights of suspected pirates overlaps with the law enforcement paradigm which also has a human rights component. However, while enforcing human rights is the direct aim of humanitarian organizations, law enforcement actors might only adhere to upholding human rights when working towards other aims. Human rights groups have played an important role under this paradigm. Organizations such as Amnesty International and Human Rights Watch act as watchdogs during arrest, imprisonment and transfer. UN agencies and the ICRC also provide assistance to prisoners. UNODC provides infrastructure and monitors prison conditions and provides legal assistance to pirate suspects, while the ICRC, for example, reaches out to the families of suspects.<sup>958</sup>

## 5.8 Conclusion

Despite its questionable sustainability, the response to piracy has been truly exceptional. Although not eradicating piracy, it has achieved its aim - a drastic decline in attacks. This was achieved by a complex combination of security, legal, economic, development and humanitarian responses which were steered by an equally unprecedented governing mechanism - the CGPCS. The triumph of the response is attributed to the partnership between regional actors and the international community and public and private actors. Though the threat was mutual, different actors employed different tools and activities to counter it. The response was enabled by national and international law, authorizations by the UNSC and agreements between states and the private sector. Counter-piracy has therefore been an unprecedented global governance experiment from which there is much to be learned. As Noyes noted in relation to piracy, “modern instances of violence at sea are often different in kind and purpose from the depredations and privateering of old, thus suggesting the need for reform of outmoded legal formulations.”<sup>959</sup> This is what the counter-piracy community has done.

Counter-piracy has however also shown the weaknesses of the international system to respond to TOC by measures other than security and law enforcement. As Participant 3 noted, “the problem of piracy was largely mitigated at sea, but piracy continued to exist in

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<sup>958</sup> Bueger. 2013d: 15 -16; Interview Participant 6. 2016.

<sup>959</sup> Noyes. 1990.

one way or the other.”<sup>960</sup> The causes of piracy remain intact and as soon as navies leave the region and private security measures are relaxed, piracy will resume.<sup>961</sup> Participant 4 explained it as follows:

“At the moment the perception of pirates I think is that there are more armed guards and more warships out there than there really are. But they will work it out for themselves. I mean, it is quite widely reported on [...] there’s a lot of ships going close to Somalia, it’s quite expensive to take a route down in the Indian Ocean, if you’re going Europe bound to East Africa. So, they’re starting to come closer to the coast as well. So, if one of them breaks down and the pirates have a sniff around and they’ve made sure there aren’t private security, they’ll take it.”<sup>962</sup>

Participant 5 noted:

“I think the problem for me now is [...] we know that we’ve got X number of bad people out there, we haven’t really dealt with them, right? We have stopped them from accessing the ships at sea to pirate them, but they are still out there. We are still protecting these ships from being pirated because you know, they’ve got their armed soldiers, armed guards on board, there are navies out there, so they are preventing this happening. And these guys are idle. They’ve got resources, they’ve got money, they’ve got weapons [...] if you take away these forces they will go back to it, especially when they don’t have any effective law enforcement in Somalia”.<sup>963</sup>

Participant 21 shared similar sentiments:

“[T]here’s a lot of young people there, sitting with no money, thinking, give me the opportunity. They have a lot of guns and if you look at the instability up there still, it is not good. Yes, there are some projects, major projects going on trying to improve the infrastructure, but as soon as you take the people with weapons off those boats, it’s

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<sup>960</sup> Interview Participant 3. 2018.

<sup>961</sup> Interview Participants 3; 4 & 5. 2016.

<sup>962</sup> Interview Participant 4. 2016.

<sup>963</sup> Interview Participant 5. 2016.

gonna come back [...] I don't think it will ever stop, it will be suppressed until you change the country in general".<sup>964</sup>

In the meantime, insurance companies and private security companies are cashing in, while the situation in Somalia remains unchanged.<sup>965</sup> The response has also shown how regional actors were marginalized due to their limited resources and that the impact of capacity building efforts to improve this is questionable. This brings into question the ability of the international community to mitigate TOCs in the long-term, especially as their interest in addressing certain crimes start to wane. Yet, despite these shortcomings, the successes of counter-piracy are a treasure trove holding many global governance possibilities in response to other maritime crimes which continue to plague the world's oceans. The following two chapters will explore two such crimes - heroin and ivory trafficking - and Chapter 8 will consider lessons from counter-piracy.

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<sup>964</sup> Interview Participant 21. 2016.

<sup>965</sup> Collins. 2014: 444; UN Security Council. 2010a; Bevilacqua. 2014: 115 – 117.

## 6 Heroin trafficking in the Western Indian Ocean and eastern Africa

During the same period in which Somali piracy reached its peak and then began to decline, maritime heroin seizures along the Swahili coast stretching from Kenya to Mozambique became increasingly frequent.<sup>966</sup> Heroin trafficking across the entire African continent increased exponentially between 2005 and 2009<sup>967</sup> and by 2013, an estimated 22 – 40 tonnes of heroin was trafficked through East Africa annually.<sup>968</sup> Then, in 2014, the largest ever seizure of heroin outside of Afghanistan and its neighbouring countries was made when over a tonne of heroin was seized from a dhow off Mombasa.<sup>969</sup> It is difficult to ascertain whether the increase in seizures is due to heroin moving through the WIO more frequently or because maritime law enforcement entities became more vigilant or better equipped to identify and respond to criminal activities in the WIO,<sup>970</sup> perhaps as a result of counter-piracy efforts. It is likely as a result of both, as piracy has triggered more awareness of the WIO being exploited by criminal networks of all kinds, but also because the maritime trafficking route has gained prominence due to pressure on land.<sup>971</sup> Most recently, it

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<sup>966</sup> Cole, A. 2014. *Heroin trafficking in the Indian Ocean: trends and responses*. 1-2 December. Galle: *Galle Dialogue: cooperation and collaboration for maritime prosperity*: 1; UNODC. 2015a. *World Drug Report 2015*. Vienna: UNODC: Preface; Panapress. 2010. *US congratulates Tanzania on heroin haul interception*. 15 March. Available: <http://www.panapress.com/US-congratulates-Tanzania-on-heroin-haul-interception--13-534331-17-lang2-index.html> [accessed 24 July 2017]; Opalo, K. 2017. War on drugs: Kenya, the forgotten hotspot of the heroin trade. *The Elephant*. 7 April. Available: <https://www.theelephant.info/dispatches/2017/04/07/war-on-drugs-kenya-the-forgotten-hotspot-of-the-heroin-trade/> [accessed 30 July 2017]; Schbley & Rosenau. 2013: 26; Wright. 2013: 21.

<sup>967</sup> Mbwambo, J., McCurdy, S.A., Myers, B., Lambdin, B., Kilonzo, G.P. & Kaduri, P. 2012. Drug trafficking, use, and HIV risk: the need for comprehensive interventions. *SAHARA-J: Journal of Social Aspects of HIV/AIDS*. 9(3): 155. DOI: 10.1080/17290376.2012.743832; Bybee, A.N. 2012. The twenty-first century expansion of the transnational drug trade in Africa. *Journal of International Affairs*. 66(1): 75 - 76.

<sup>968</sup> Wright. 2013: 1; 25; Opalo. 2017.

<sup>969</sup> Bloom, D. 2014. Navy seizes a tonne of heroin worth £160 million hidden inside sacks of cement on a tiny sailing boat in the Indian Ocean. *Daily Mail*. 26 April. Available: <http://www.dailymail.co.uk/news/article-2613646/Navy-seizes-TONNE-heroin-worth-160million-hidden-inside-sacks-cement-tiny-sailing-boat-Indian-Ocean.html> [accessed 24 July 2017]; The Economist. 2015. *The smack track*. 17 January. Available: <http://www.economist.com/news/middle-east-and-africa/21639560-east-african-states-are-being-undermined-heroin-smuggling-smack-track> [accessed 15 June 2015]; Indian Ocean Forum on Maritime Crime, Southern Route Partnership & UNODC. 2016. *Drug trafficking on the Southern Route and impact on coastal states*. Conference Paper October 2016: 9. Available: <http://www.southernroute.org/download/Drug%20Trafficking%20on%20the%20Southern%20Route.pdf> [accessed 15 April 2020].

<sup>970</sup> Dimova, M. 2016. 'The first dragon to slay': unpacking Kenya's war on drugs. *Review of African Political Economy*. 43(148): 229. DOI:10.1080/03056244.2016.1169165; Cole. 2014: 2; UNODC. n.d.e. *Drug trafficking patterns to and from Eastern Africa*. Available: <https://www.unodc.org/easternafrica/en/illicit-drugs/drug-trafficking-patterns.html> [accessed 3 February 2021].

<sup>971</sup> UNODC. 2016c. *World Drug Report 2016*. Vienna: UNODC: xiii; UNODC. 2017. *World Drug Report 2017*. Vienna: UNODC. Booklet 1: 18; The Economist. 2015: 3; Wright. 2013: 21 - 22; Dimova. 2016: 229.

appears that maritime heroin trafficking routes have experienced increased traffic as the result of land based controls to curb COVID19 infections.<sup>972</sup> This reflects how trafficking networks adapt to a change in circumstances by turning to new routes and modes of transportation.<sup>973</sup>

Yet, while the impact of heroin trafficking in the WIO is likely more severe and on a larger scale than that of piracy, especially from a human security and harm perspective, the response has been slower, less cooperative, less innovative and is yet to deviate from traditional responses prescribed by international law. This is despite numerous calls for increased cooperation and capacity assistance between eastern African states and the international community.<sup>974</sup> The response has therefore been very different to that of piracy, despite sharing a similar geographic area, an equally, if not more, devastating impact and similar responding entities. As Participant 21 noted, piracy was truly an international problem and had an international instrument allowing for criminal jurisdiction to treat it as such. This resulted in unmatched global cooperation in the maritime domain which is yet to be replicated to other maritime crimes.<sup>975</sup>

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<sup>972</sup> UNODC. 2020a. *World Drug Report 2020*. Vienna: UNODC. Booklet 1: 25.

<sup>973</sup> Jorgic, D. 2011. East Africa seeks help to stem surge in heroin smuggling: U.N. *Reuters*. 11 August. Available: <http://www.reuters.com/article/2014/08/11/us-africa-drugs-idUSKBN0GB1J220140811> [accessed 17 June 2016].

<sup>974</sup> See, for example, UNODC. 2020a. Booklet 6: 22 - 36; UNODC. 2009b. *Commission on Narcotic Drugs Resolution 52/3: 31*. Available: [https://www.unodc.org/documents/commissions/CND/Drug\\_Resolutions/2000-2009/2009/CND\\_Res-52-3.pdf](https://www.unodc.org/documents/commissions/CND/Drug_Resolutions/2000-2009/2009/CND_Res-52-3.pdf) [accessed 25 April 2017]; Wright. 2013: 6; 46 – 47; UNODC. 2016b: 67 - 68; Van der Waag, I. 2013. Conference Report: Third international conference on Strategic Theory, Maritime Security off eastern Africa: beyond piracy. 2013. *Journal of African Union Studies*. 2(3&4): 14; UNODC. 2016b: 11; United Nations. 2012. *The UN Secretary-General's five-year action agenda*. Available: [https://www.un.org/sg/sites/www.un.org.sg/files/atoms/files/sg\\_agenda\\_2012.pdf](https://www.un.org/sg/sites/www.un.org.sg/files/atoms/files/sg_agenda_2012.pdf) [accessed 24 April 2017]; UN Security Council. 2013. *Statement by the President of the Security Council. S/PRST/2013/22*. Available: [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/PRST/2013/22](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/PRST/2013/22) [accessed 25 April 2017]; UN Security Council. 2014. *Security Council resolution 2195 (2014) on preventing and combating terrorism, including terrorism benefitting from transnational organized crime*, 19 December. S/RES/2195 (2014). Available: <https://www.refworld.org/docid/54b4fd874.html> [accessed 3 February 2021]; INCB. 2016. *Report of the International Narcotics Control Board for 2016*. Vienna: UNODC: 104; WACD. 2014. *Not just in transit: drugs, the state and society in West Africa*. Geneva: Kofi Annan Foundation: 56. Available: <http://www.wacommissionondrugs.org/report/> [accessed 26 April 2017]; Security Council Report. 2013. *Drug trafficking in West Africa and the Sahel: briefing and presidential statement*. Available: <https://www.securitycouncilreport.org/whatsinblue/2013/12/drug-trafficking-in-west-africa-and-the-sahel-briefing-and-presidential-statement.php> [accessed 3 February 2021]; All Africa. 2015. *Kenya and Tanzania to fight terrorism, drug trafficking and poaching jointly*. 5 October. Available: <http://allafrica.com/stories/201510060372.html> [accessed 30 July 2017].

<sup>975</sup> Interview Participant 21. 2016.

This chapter draws from the literature and interviews with participants working to respond to heroin trafficking and its impacts. Interview participants include law enforcement agencies, international organizations and harm reduction workers. Participants were questioned on the impact of the heroin market in eastern Africa, efforts to combat it, the legal basis of responses and what more effective responses would entail. The interviews revealed both strong consensus and differences of opinions on key issues, to eventually lead to a conclusion on how best to respond to heroin trafficking and its impact in eastern Africa, discussed in Chapter 8. As with all illicit markets, apart from seizure data, there is limited reliable data available on the trade,<sup>976</sup> especially in Africa.<sup>977</sup> There is also the risk that arrest and seizure data reflect increased policing rather than consumer and trafficking trends,<sup>978</sup> or the size of the market and the threat it truly poses.<sup>979</sup> The research interviews therefore also served to shed more light on these aspects.

This chapter outlines the legal framework applicable to maritime drug seizures, as contained primarily in UNCLOS and the Vienna Convention. Bueger's analytical framework of paradigms, as applied to counter-piracy in the previous chapter, is then used to consider the responses to heroin trafficking by similarly classifying them under the security, legal, economic, development and humanitarian paradigms. This is a novel way of understanding the responses to heroin trafficking and illuminates some of the shortcomings of the response. An unpacking of the responses reveals that they are currently inadequate to address the extent of heroin trafficking across the WIO and into eastern Africa and that a nuanced response more similar to counter-piracy is required.

## **6.1 The southern heroin trafficking route through eastern Africa**

This section describes the heroin trafficking route past eastern Africa, the conditions attracting traffickers to the region and the modus operandi used. It aims to sketch an overview which is sufficient to put the application of the legal frameworks and the responses into context.

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<sup>976</sup> UNODC. 2016b: 9; 12; Clarke, C.P. 2016. The global illicit trade in illegal narcotics. In: *Illicit trade – converging criminal networks, OECD Reviews of Risk Management Policies*. Paris: OECD Publishing: 181 – 185; Bybee. 2012: 80; INCB. 2016: 105.

<sup>977</sup> UNODC. 2020a. Booklet 4: 10.

<sup>978</sup> Klantschnig, Dimova & Cross. 2016: 168; Clarke. 2016: 204.

<sup>979</sup> UNODC. n.d.e.

Heroin makes its way to eastern Africa along the Southern Route, a network of maritime trafficking routes which follows a southern direction through the Indian Ocean<sup>980</sup> on route to primarily Europe.<sup>981</sup> One of these routes passes through eastern Africa and extends from Kenya, perhaps even Somalia, to South Africa and the Indian Ocean islands of Seychelles, Mauritius, Madagascar and Zanzibar.<sup>982</sup> Between 2009 and 2014, seizures on the Southern route increased by eighty per cent and totalled 3.6 tonnes annually. Most of this was seized in Africa, primarily in East Africa,<sup>983</sup> which serves mostly as transit region. Traffickers are attracted to eastern Africa for many of the reasons discussed in Chapter 2 – corruption,<sup>984</sup> the region’s location in-between the heroin producing region of the Golden Crescent and consumer states,<sup>985</sup> many remote islands,<sup>986</sup> numerous modes of maritime transportation,<sup>987</sup> long and porous land and maritime borders, substantial sea traffic and the relative stability of the region.<sup>988</sup> The region is considered functional enough with effective transport and financial infrastructure to facilitate trade, but also has sufficient weaknesses attracting illicit activity, such as corrupt entities and weak law enforcement capacity.<sup>989</sup>

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<sup>980</sup> UNODC. 2015b. *Afghan opiate trafficking through the Southern Route*. Vienna: UNODC: 10; UNODC. 2016c: xiii; The Economist. 2015: 3.

<sup>981</sup> UNODC. 2020a. Booklet 13: 18; UNODC.2015a: preface; UNODC. 2015b: 10; 12; UNODC. 2016c: xiii; The Economist. 2015; Indian Ocean Forum on Maritime Crime, Southern Route Partnership, UNODC. 2016: 5.

<sup>982</sup> See, for example, UNODC: 2015b: 90; 99; Cole. 2014: 2; The Economist. 2015; See, for example, UNODC. 2016b: 63 – 64; Indian Ocean Forum on Maritime Crime, Southern Route Partnership, UNODC. 2016: 21; Haysom, Gastrow & Shaw. 2018: 8.

<sup>983</sup> UNODC. 2016c: 30.

<sup>984</sup> Herbert-Burns. 2012: 4; Wright. 2013: 8; Wagner, D. 2014. Kenya, corruption and terrorism. *Huffington Post*. 18 June. Available: [http://www.huffingtonpost.com/daniel-wagner/kenya-corruption-and-terr\\_b\\_5505869.html](http://www.huffingtonpost.com/daniel-wagner/kenya-corruption-and-terr_b_5505869.html) [accessed 29 June 2017]; Carrier, N. & Klantschnig, G. 2012. *Africa and the war on drugs*. London: Zed Books: 108 – 109.

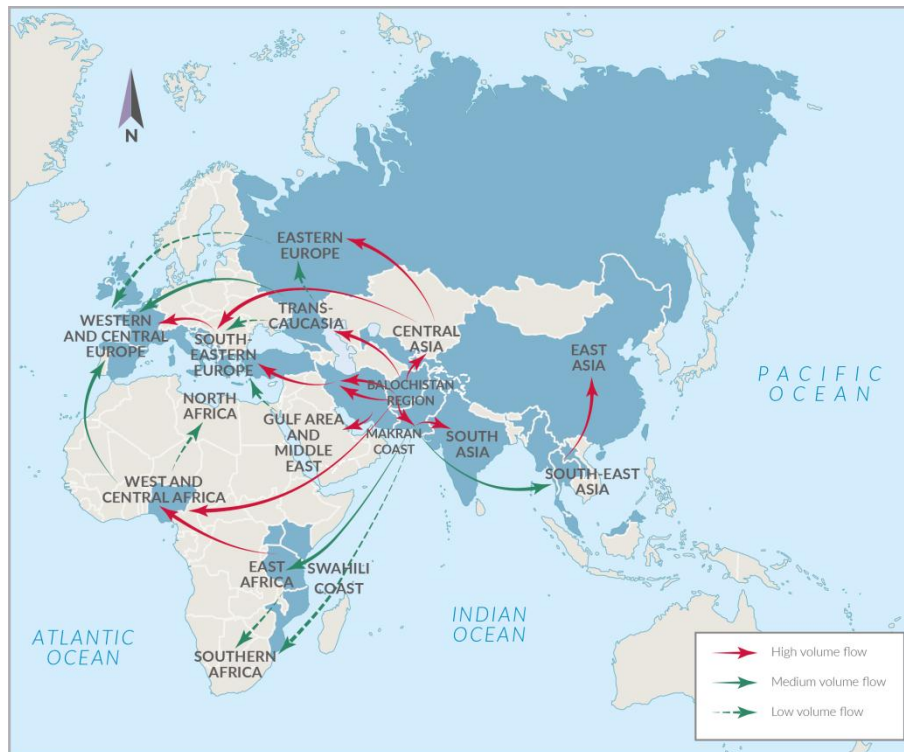
<sup>985</sup> UNODC. 2016b: 22; McCurdy, S. & Kaduri, P. 2016. The political economy of heroin and crack cocaine in Tanzania. *Review of African Political Economy*. 43(148): 313. DOI:10.1080/03056244.2016.1170678; Dimova. 2016: 229.

<sup>986</sup> Schubert, M. 2014. The impact of drug trafficking on informal security actors in Kenya. *Africa Spectrum*. 3(2014): 64. Also see, for example, WACD. 2014: 28.

<sup>987</sup> Herbert-Burns. 2012: 4.

<sup>988</sup> Schubert. 2014: 58; 65; Interview Participant 27. 2016. Nairobi, Kenya. Also see WACD. 2014: 27; Aikins, M. 2014. Afghanistan: the making of a narco-state. *Rolling Stone Magazine*. 4 December. Available: <http://www.rollingstone.com/politics/news/afghanistan-the-making-of-a-narco-state-20141204> [accessed 15 June 2016].

<sup>989</sup> For a discussion on this, see, for example, Haysom, Gastrow & Shaw. 2018: 13.



**Figure 7: Heroin trafficking routes between 2014 – 2018 (Map reworked from UNODC. 2020a. Booklet 1: 9)**

Heroin is produced from opium derived from the seeds of the poppy flower. Afghanistan accounts for two thirds of global opium production<sup>990</sup> and has had record harvests in recent years.<sup>991</sup> It is estimated that up to forty per cent of Afghan heroin is moved via the Southern Route.<sup>992</sup> Large heroin shipments follow a route from Afghanistan through the Baluchistan region to neighbouring Iran and Pakistan.<sup>993</sup> The Baluchistan region is controlled by the Taliban<sup>994</sup> and powerful families in the trafficking business.<sup>995</sup> From there, the heroin makes its way to Iran and Pakistan’s coastlines, known as the Makran coast,<sup>996</sup> before being loaded

<sup>990</sup> UNODC. 2017. Booklet 3: 13. Also see UNODC. 2016c: 29.

<sup>991</sup> In 2017, Afghanistan produced its highest recorded opium harvest with 328, 000 hectares of poppy under cultivation. The UNODC has estimated that a harvest of this size has the potential to produce 550 – 900 tons of heroin with a purity of around 50-90%: UNODC. 2018a. *Last year’s record opium production in Afghanistan threatens sustainable development, latest survey reveals*. 21 May. Available: <http://www.unodc.org/unodc/en/frontpage/2018/May/last-years-record-opium-production-in-afghanistan-threatens-sustainable-development--latest-survey-reveals.html> [accessed 30 July 2018]; McCurdy & Kaduri. 2016: 313; UNODC. 2020a. Booklet 3: 10.

<sup>992</sup> Interview Participant 28. 2016.

<sup>993</sup> UNODC. 2015b: 10; Aikins. 2014.

<sup>994</sup> Roggio, B. 2010. US Marines launch operation against Taliban stronghold near the Pakistani border. *Defenceweb*. 30 October. Available: [http://www.longwarjournal.org/archives/2010/10/us\\_marines\\_launch\\_op.php](http://www.longwarjournal.org/archives/2010/10/us_marines_launch_op.php) [accessed 28 July 2017].

<sup>995</sup> Wright. 2013: 24.

<sup>996</sup> Ibid: 4; European Monitoring Centre for Drugs and Drug Addiction. 2015. *European Drug Report: trends and developments*. Luxembourg: Publications Office of the European Union. Available: <https://www.emcdda.europa.eu/system/files/publications/974/TDAT15001ENN.pdf> [accessed 3 February

onto wooden vessels known as dhows<sup>997</sup> which undertake the journey across the Indian Ocean. There are indications that heroin is perhaps pre-sold to buyers in eastern Africa, as seizures have contained differently labelled packages.<sup>998</sup>

There is debate regarding when the Southern Route began being used,<sup>999</sup> ranging from being an old and established route,<sup>1000</sup> to one gaining traction only in the 2000s.<sup>1001</sup> A 2009 report by the UNODC which assessed trafficking threats in eastern Africa<sup>1002</sup> failed to mention maritime trafficking at all. It is however notable that an increase in seizures was only identified in 2010. Between 2010 and 2012, more heroin was seized in East Africa than in the previous two decades combined<sup>1003</sup> and by 2018, fifty-two per cent of all heroin seized in Africa was seized in East Africa.<sup>1004</sup> Regardless of when the route began gaining traction, it continues to be a popular choice, considering on-going, large seizures across the Indian Ocean<sup>1005</sup> and increased regional use. The 2019 World Drug Report (WDR), like most reports in recent years, has warned that Africa is becoming increasingly vulnerable as it gains popularity with heroin traffickers.<sup>1006</sup> Eastern Africa is then typically singled out as the

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2021]. Also see UNODC Country Office Pakistan. 2008. *Illicit drug trends in Pakistan*. Pakistan: UNODC. Available: [http://www.unodc.org/documents/regional/central-asia/Illicit%20Drug%20Trends%20Report\\_Pakistan\\_rev1.pdf](http://www.unodc.org/documents/regional/central-asia/Illicit%20Drug%20Trends%20Report_Pakistan_rev1.pdf) [accessed 17 June 2016]; UNODC. 2015b: 11, 46 – 52; Interview Participant 22. 2016.

<sup>997</sup> UNODC. 2015b: 90. For more information on dhows, see, for example, Haysom, Gastrow & Shaw. 2018: 7.

<sup>998</sup> Interview Participants 22 & 23. 2016.

<sup>999</sup> Dimova. 2016: 229. For a discussion on the development of routes in eastern Africa, see, for example, Bybee. 2012 & Haysom, Gastrow & Shaw. 2018: 2018.

<sup>1000</sup> UNODC. 2015b: 90; Allen, K. 2006. Traffickers' drugs haven in Kenya. *BBC*. 9 May. Available: <http://news.bbc.co.uk/2/hi/africa/4753377.stm> [accessed 19 May 2017]; McCurdy & Kaduri. 2016: 312; Mbwambo et al. 2012: 155; Haysom, Gastrow & Shaw. 2018: 8; Interview Participant 22. 2016.

<sup>1001</sup> The Economist. 2015; UNODC. 2009a: 29; UNODC. 2009b; McCurdy & Kaduri. 2016: 313.

<sup>1002</sup> UNODC. 2009a.

<sup>1003</sup> Wright. 2013; Indian Ocean Forum on Maritime Crime, Southern Route Partnership, UNODC. 2016: 5; UNODC. 2015b: 4; 88. Europe also began to report increased seizures from Africa and the Southern Route during this time: UNODC. 2015a: 44; UNODC. 2015b: 11; 96; UNODC. 2016c: 29.

<sup>1004</sup> UNODC. 2020a. Booklet 3: 15.

<sup>1005</sup> Panapress. 2010; Opalo. 2017; Schbley & Rosenau. 2013: 26; Wright. 2013: 21; Bloom. 2014; The Economist 2015; Mc Connell, T. 2015. Record heroin seizures off East Africa: UN. *Yahoo News*. 25 June. Available: <https://www.yahoo.com/news/record-heroin-seizures-off-east-africa-un-160314580.html> [accessed 24 July 2017]; UNODC. 2015a: 45; CGTN. 2017. *The Smack Track: Turkey seizes a ton of heroin in Congo-flagged ship raid*. 9 June. Available: [https://news.cgtn.com/news/3d516a4e7849444e/share\\_p.html](https://news.cgtn.com/news/3d516a4e7849444e/share_p.html) [accessed 19 June 2017].

<sup>1005</sup> Klantschnig, Dimova & Cross. 2016: 167; Ghosh, P.K. 2014. The East African connection: Tanzania holds Iranians, Pakistanis in huge heroin bust. *IB Times*. 2 May. Available: <http://www.ibtimes.com/east-african-connection-tanzania-holds-iranians-pakistanis-huge-heroin-bust-1553510> [accessed 20 June 2017]; UNODC. 2016b: 21. European Monitoring Centre for Drugs and Drug Addiction. 2015.

<sup>1006</sup> UNODC. 2019b. *World Drug Report 2019*. Vienna: UNODC; Bybee. 2012: 70 – 71; Dimova. 2016: 230. Also see O'Regan, D. 2012. Narco-states: Africa's next menace. *New York Times*. 12 March. Available:

epicenter.<sup>1007</sup> The 2017 WDR also noted that Africa was experiencing the sharpest global increase in heroin use, which it attributed to its role in the Southern Route.<sup>1008</sup>

The maritime route is likely the result of displacement as overland routes servicing Europe have presented increased challenges.<sup>1009</sup> The traditional heroin trafficking route, the Balkan route<sup>1010</sup> gained numerous new country borders after the breakup of Yugoslavia<sup>1011</sup> and has been increasingly policed. It has also been experiencing conflicts, such as the Syrian war, which displaces trafficking activity due to insecurity.<sup>1012</sup> New heroin trafficking routes also began being explored when the war on terror and war on drugs coalesced and heroin transshipments out of Afghanistan became heavily surveyed. But instead of destroying the trade or addressing demand, these factors caused routes to shift to East Africa, which presented a safer transshipment point.<sup>1013</sup> Although there is strong evidence of the southern route increasingly being used,<sup>1014</sup> it is also possible that seizures increased as international navies began to patrol the WIO.<sup>1015</sup>

The changing nature of heroin trafficking from land to sea complicates efforts to respond.<sup>1016</sup> The maritime route is beneficial to traffickers who can move large shipments undetected by exploiting the WIO's islands and long coastlines with limited law enforcement.<sup>1017</sup> The notion that maritime trafficking is preferred for large shipments is supported by the fact that, apart from large seizures made in Afghanistan, Pakistan and Iran, the largest seizures are being made on the high seas.<sup>1018</sup> Three participants also noted how islands make the route more attractive as they are difficult to protect, surrounded by

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[http://www.nytimes.com/2012/03/13/opinion/narco-states-africas-next-menace.html?\\_r=0](http://www.nytimes.com/2012/03/13/opinion/narco-states-africas-next-menace.html?_r=0) [accessed 15 June 2015].

<sup>1007</sup> See, for example, UNODC. 2015a: Preface; Mbwambo et al. 2012: 155; UNODC: 2015b: 86.

<sup>1008</sup> UNODC. 2017. Booklet 3.

<sup>1009</sup> See, for example, Clarke. 2016: 190 – 191; 196; Foster, K. 2012. Croatia: corruption, organized crime and the Balkan Route. 25 January. Adriatic Institute for Public Policy. Available: <http://www.adriaticinstitute.org/?action=article&id=32> [accessed 28 July 2017].

<sup>1010</sup> Cole. 2014: 2; Foster. 2012; UNODC. 2015b: 33. Also see The Economist. 2015; UNODC. 2019b.

<sup>1011</sup> Interview Participants 22 & 28. 2016.

<sup>1012</sup> The Economist. 2015; Interview Participant 28. 2016.

<sup>1013</sup> This could have been the case as early as the 1990s. See Dimova. 2016: 229 – 230; UNODC. 2015b: 15; 122; Wright. 2013: 21. Also see Klantschnig, Dimova & Cross. 2016: 167.

<sup>1014</sup> INCB. 2016: 48.

<sup>1015</sup> Interview Participant 22. 2016.

<sup>1016</sup> UNODC. 2016b: 11.

<sup>1017</sup> Mbogo, S. 2013. Drug traffickers turn East Africa into hub. *The East African*. 19 October. Available: <http://www.theeastafrican.co.ke/news/Drug-traffickers-turn-East-Africa-into-hub/-/2558/2039324/-/87yfoj/-/index.html> [accessed 28 July 2017]; Clarke. 2016: 191; Jorgic. 2011.

<sup>1018</sup> UNODC. 2015b: 18.

water and allow traffickers to operate from many locations. Islands also increase territorial waters and EEZs. As later sections will show, this is why assistance by international navies has been helpful,<sup>1019</sup> as they have the assets to patrol large bodies of water and further away from land. Seizures often totalling multiple tonnes have been seized in the waters around Southern Route states.<sup>1020</sup> But considering that most seizures have been made on the high seas by international navies, regional states appear to be ill-equipped, perhaps ill-willed, to address drug trafficking in their own waters. This is reflective of the suggestion that states claim large maritime territories, despite being unable to enforce the law at sea.<sup>1021</sup>

### 6.1.1 Modus operandi

Heroin is primarily moved, or at least seized, on board dhows, although other vessels are also used.<sup>1022</sup> Maritime trade routes between Pakistan, Iran and eastern Africa have existed for centuries and so has dhow travel between Asia and the Swahili coast.<sup>1023</sup> Dhows are reportedly used because they are rarely searched, can carry other cargo to conceal heroin and often dock at remote ports.<sup>1024</sup> They are therefore not subjected to law enforcement scrutiny like containers moving through key ports. They do however seem slightly out of place in modern times, especially the further south they travel. As Participant 21 working in Tanzania explained, there is no commercial reason for them to be too far south and that “if you see an Iranian fishing dhow this far south, it’s doing one thing and one thing only - smuggling.”<sup>1025</sup> Upon reaching eastern Africa, the drugs are typically collected by smaller vessels,<sup>1026</sup> including local fishing vessels, speedboats and yachts.<sup>1027</sup> Dhows can either wait for these vessels outside of territorial waters or they can enter territorial waters, as has

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<sup>1019</sup> Interview Participants 22; 26 & 30. 2016.

<sup>1020</sup> UNODC. 2016d. Between 2013 and 2016, the CMF coalition aimed at drug seizures seized 9.3 tonnes of high purity heroin from dhows.

<sup>1021</sup> See Chapter 2.

<sup>1022</sup> UNODC. 2015b: 54; 86; 94; European Monitoring Centre for Drugs and Drug Addiction. 2015; Capital News. 2015. *Kenya blows up heroin-smuggling yacht*. 14 August. Available: <http://www.capitalfm.co.ke/news/2015/08/kenya-blows-up-heroin-smuggling-yacht/> [accessed 28 July 2017].

<sup>1023</sup> UNODC. 2016b: 24; McCurdy & Kaduri. 2016: 313.

<sup>1024</sup> Wright. 2013: 4; 19; UNODC. 2015b: 90.

<sup>1025</sup> Interview Participant 21. 2016.

<sup>1026</sup> Dimova. 2014: 3; Blum, C. 2016. *Transnational organized crime in southern Africa and Mozambique*. Mozambique: Friedrich-Ebert-Stiftung: 17; UNODC. 2015b: 93; Interpol. 2020. *Illicit goods trafficking via port and airport facilities in Africa*. Lyon: Interpol: 24.

<sup>1027</sup> Interview Participants 21 & 26. 2016; Informal communication in Seychelles.

been the case in Tanzania and Seychelles. Dhows are perhaps more likely to enter territorial waters where these waters cover a large area, such as around island states. If dhows do dock, this is typically on smaller islands.<sup>1028</sup>



**Figure 8: Seized heroin trafficking dhow, Dar es Salaam (Bruwer, C. 2016)**

Participant 26 noted how the modus operandi changed over time.<sup>1029</sup> In keeping with trafficking routes shifting in response to law enforcement pressure which is a mere inconvenience for traffickers,<sup>1030</sup> the landing points off eastern Africa gradually moved south of Kenya.<sup>1031</sup> By 2016, Participant 21 reported that the majority of offloads were being done in Tanzania and Mozambique as a result of the lack of law enforcement around southern Tanzania and Mozambique and its islands, especially since security in northern Mozambique began deteriorating.<sup>1032</sup> Participant 28, a senior UN staff member, also attributed the use of Tanzania and Mozambique to the increased focus on Kenya and Somalia due to counter-terrorism efforts,<sup>1033</sup> which could now similarly lead to displacement from Mozambique. Dhows are weather dependant and are known to sail during favourable monsoon

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<sup>1028</sup> Dimova. 2014: 3. Dhows can also drop shipments off at various points including isolated inlets, ports, harbours, mangroves and beaches: UNODC. 2016b: 22.

<sup>1029</sup> Interview Participant 26. 2016. Stonetown, Zanzibar.

<sup>1030</sup> Clarke. 2016: 203.

<sup>1031</sup> See, for example, Indian Ocean Forum on Maritime Crime, Southern Route Partnership, UNODC. 2016: 13; Global Initiative against Transnational Organized Crime. 2019. *Civil Society Observatory of illicit economies in eastern and southern Africa: risk bulletin issue #1*. 5 November. Available: <https://globalinitiative.net/analysis/esa-obs-bulletin-1/> [accessed 3 February 2021].

<sup>1032</sup> Interview Participant 21. Also see Walker, T. 2020. Maritime security can help resolve the Mozambique insurgency. 14 July. ISS. Available: [https://issafrica.org/iss-today/maritime-security-can-help-resolve-the-mozambique-insurgency?utm\\_source=BenchmarkEmail&utm\\_campaign=ISS\\_Today&utm\\_medium=email](https://issafrica.org/iss-today/maritime-security-can-help-resolve-the-mozambique-insurgency?utm_source=BenchmarkEmail&utm_campaign=ISS_Today&utm_medium=email) [accessed 3 August 2020]. For a detailed discussion on heroin trafficking through Mozambique, see, for example, Blum. 2016; UNODC. 2016b: 39; Haysom, Gastrow & Shaw. 2018.

<sup>1033</sup> Interview Participant 28. 2016.

seasons,<sup>1034</sup> but participants reported that dhows began sailing even in adverse weather conditions, as they were expected to be inactive during such periods.<sup>1035</sup> As Participant 26 said: “[N]owadays they play with the wind, when it’s rough, it’s when they come in...There’s a phrase that’s probably true, when there’s heavy waves, there’s a way.”<sup>1036</sup> Trafficking networks also adjust to political changes as cooperation with the state becomes more or less likely.<sup>1037</sup>

Upon reaching eastern Africa, shipments are divided into smaller consignments for onward distribution.<sup>1038</sup> Some heroin however remains behind, fuelling local addiction. Little is known about onward land based routes apart from seizure data,<sup>1039</sup> but onward trafficking by air and road is popular and takes advantage of Africa’s porous borders.<sup>1040</sup> Some suggest that heroin is moved from East Africa to South Africa and shipped onward from there.<sup>1041</sup> There have been large land-based heroin seizures in border areas between Mozambique and South Africa.<sup>1042</sup> Many of the drugs passing through eastern Africa likely end up in South Africa for onward distribution to Europe. South Africa is probably one of the biggest drug

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<sup>1034</sup> UNODC. 2013: 23. 2016.

<sup>1035</sup> Interview Participants 21 & 26. 2016.

<sup>1036</sup> Interview Participants 30. He added that “you take time to respond but they already move [...] They are not waiting for you for analysing. They just act. Because we know this business is illegal. They can do everything illegally. They can do anything. They can kill. They can do everything. They don’t care, because it is illegal, immoral.”

<sup>1037</sup> Opalo. 2017; Haysom, Gastrow & Shaw. 2018: 15.

<sup>1038</sup> See, for example, The Economist. 2015. Interview Participant 26 noted that onward shipment is evidenced in the large quantities being seized relative to the size of some of the transit states. Transshipment takes place across numerous regional states and other regions like West Africa.

<sup>1039</sup> UNODC. 2015b: 93; 95 – 96. There are however some sources, see for example, Blum. 2016: 11, 16 - 17; The Economist. 2015; Boshoff, J. 2017. Middelburg situated in popular drug route. *Middelburg Observer*. 25 July. Available: <http://mobserver.co.za/69733/middelburg-situated-popular-drug-route/> [accessed 26 July 2017].

<sup>1040</sup> Dimova. 2014: 4; Interview Participant 22. 2016. Also see Clarke. 2016: 190 – 191; Mbogo. 2013; UNODC. 2016b: 53; Wright. 2013: 23; 26; Haysom, Gastrow & Shaw. 2018: 3.

<sup>1041</sup> Clarke. 2016: 190 – 191; Mbogo. 2013; Haysom, Gastrow & Shaw. 2018: 3; Interview Participant 21. 2016. Also see Wright. 2013: 4; The Economist. 2015; Interpol. 2020: 29.

<sup>1042</sup> Dolley, C. 2017. Underworld ties in R104m heroin bust at border post- informant. *News24*. 15 June. Available: <http://www.news24.com/SouthAfrica/News/underworld-ties-in-r104m-heroin-bust-at-border-post-informant-20170615> [accessed 28 July 2017]; IOL. 2017. *Three arrested, R100m worth heroin seized in drug bust*. 14 June. Available: <http://www.iol.co.za/news/south-africa/kwazulu-natal/three-arrested-r100m-worth-heroin-seized-in-drug-bust-9784596> [accessed 28 July 2017]; ENCA. 2016. *Man to appear for smuggling R50-mil worth of heroin in fuel tank*. 7 March. Available: <https://www.enca.com/south-africa/mozambican-appear-court-over-r50m-heroin-prado> [accessed 28 July 2017]. Also see US Department of State Bureau of Diplomatic Security. 2015. *South Africa 2015 crime and safety report*. Available: <https://www.osac.gov/pages/ContentReportDetails.aspx?cid=17042> [accessed 28 July 2017].

transit states in the world due to its location<sup>1043</sup> and transport infrastructure.<sup>1044</sup> It is also sub-Saharan's main drug consumer.<sup>1045</sup>

It is likely that small islands receive heroin mostly from dhows and yachts, but that heroin is shipped by container from South Africa and Mozambique.<sup>1046</sup> Despite limited evidence thereof, container trafficking to eastern Africa has been suspected for many years<sup>1047</sup> and container seizures are common elsewhere on the route, such as off Pakistan, Iran and Sri Lanka.<sup>1048</sup> The International Narcotics Control Board (INCB) has also attributed the increased use of heroin in Africa to increased container trade and its use for trafficking heroin.<sup>1049</sup> Traffickers might increasingly rely on this mode of transport to blend into global commodity flows,<sup>1050</sup> especially as container shipping takes over some dhow routes.<sup>1051</sup> Dhows will only travel up to Mozambique,<sup>1052</sup> but not as far as South Africa. In a rare seizure indicating container trafficking, a large seizure of nearly one tonne of heroin in South Africa was of heroin destined for container shipment to Europe.<sup>1053</sup>

While container trafficking is likely also employed across eastern Africa,<sup>1054</sup> there has been little evidence of it.<sup>1055</sup> There have however been containerized cocaine seizures from South America<sup>1056</sup> and South Africa is a hotspot for containerized cocaine.<sup>1057</sup> The overwhelming

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<sup>1043</sup> Interview Participant 21. Also see UNODC. 2016b: 39; European Monitoring Centre for Drugs and Drug Addiction. 2015.

<sup>1044</sup> UNODC. 2016b: 38.

<sup>1045</sup> Peltzer, K., Ramlagan, S., Johnson, B.D. & Phaswana-Mafuya, N. 2010. Illicit drug use and treatment in South Africa: a review. *Substance use & misuse*. 45(13): 2221 - 2243. DOI:10.3109/10826084.2010.481594. Also see Haysom, Gastrow & Shaw. 2018.

<sup>1046</sup> Interview Participant 22. 2016. Also see, Haysom, Gastrow & Shaw. 2018: 3; 7.

<sup>1047</sup> UNODC. 2015b: 88; 94.

<sup>1048</sup> New York Times. 2013. *Sri Lankan agents seize 550 pounds of heroin*. 31 August. Available: <https://www.nytimes.com/2013/09/01/world/asia/sri-lanka-seizes-550-pounds-of-heroin.html>. [accessed 7 June 2018]; Indian Ocean Forum on Maritime Crime, Southern Route Partnership, UNODC. 2016: 15.

<sup>1049</sup> INCB. 2016: 48, 107; UNODC. 2016b: 25.

<sup>1050</sup> UNODC. 2015b: 12; 94 – 95.

<sup>1051</sup> UNODC. 2016b: 25.

<sup>1052</sup> See, for example, Indian Ocean Forum on Maritime Crime, Southern Route Partnership, UNODC. 2016: 13.

<sup>1053</sup> Bruwer, C. 2017. Heroin trafficking through South Africa: why here and why now? *The Conversation*. 15 August. Available: <https://theconversation.com/heroin-trafficking-through-south-africa-why-here-and-why-now-81627> [accessed 3 October 2018].

<sup>1054</sup> Interview Participants 11; 21 & 26. 2016.

<sup>1055</sup> Interview Participant 22. 2016.

<sup>1056</sup> Dubois, A. 2016. Cocaine haul worth £4.8m presented in Kenyan court during trial of British aristocrat for drug smuggling. 11 November. *The Telegraph*. Available: <http://www.telegraph.co.uk/news/2016/11/11/cocaine-haul-worth-48m-presented-in-kenyan-court-during-trial-of/> [accessed 27 July 2017]; Interview Participant 21. For more on cocaine trafficking in the WIO, also see, for example, UNODC. 2016b: 25; UNODC. 2017. Booklet 1: 19; Bybee. 2012: 75; UNODC. 2009a: 30; McCurdy & Kaduri. 2016: 312; 315 – 316; Bagnoli, L. & Bodrero, L. 2015. Kenya's drug barons. *Collectiv*. 16 April. Available:

majority of eastern Africa's ivory is also trafficked in containers.<sup>1058</sup> This indicates the ease with which containers can cross eastern Africa's borders, with or without the payment of a bribe as efficient ports and corrupt officials are attractive to traffickers.<sup>1059</sup> As dhows are quite conspicuous and treated with suspicion, container trafficking might be the natural next preference.<sup>1060</sup> Container shipments are often hidden among licit commodities,<sup>1061</sup> as has been illustrated with containerized ivory shipments to Asia and cocaine to West Africa. Two participants working in Tanzania commented that there has to be container trafficking through Tanzania, despite concrete evidence thereof.<sup>1062</sup>

Participants were critical of regional states' ability to respond to heroin trafficking in ports. One participant described how Tanzania had not yet had a rummaging team at the time of the interview, that Dar es Salaam had had no seizures in the port for a long time, that there was a lack of inter-agency cooperation and communication and that the authorities would continue to seize nothing if they did not even know what to look for.<sup>1063</sup> There are also various reports of politicians and businessmen facilitating container trafficking through regional ports<sup>1064</sup> and that proceeds from heroin trafficking in Kenya are laundered through forwarding and clearing agents.<sup>1065</sup> The shortcomings in responding to container trafficking are discussed in Chapter 7.

### 6.1.2 Heroin trafficking networks

Southern Route trafficking networks include multiple nationalities from across the route and elsewhere,<sup>1066</sup> which complicates exposing and responding to their activities.<sup>1067</sup> So too does

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<https://correctiv.org/en/investigations/mafia-africa/articles/2015/04/16/kenyas-drug-barons/> [accessed 30 July 2017]; Ariff, Y. 2016. Almost 800kg of cocaine found in a ship. *Adaderana*. 9 December. Available: <http://www.adaderana.lk/news/38174/almost-800kg-of-cocaine-found-in-a-ship> [accessed 31 July 2017].

<sup>1057</sup> See, for example, Evans, J. 2020. R14.1m cocaine stash intercepted at Ngqura harbour. *News24*. 8 February. Available: <https://www.news24.com/news24/SouthAfrica/News/r141m-cocaine-stash-intercepted-at-ngqura-harbour-20210208> [accessed 5 March 2021].

<sup>1058</sup> Wright. 2013: 28.

<sup>1059</sup> Carrier & Klantschnig. 2012: 115.

<sup>1060</sup> UNODC. 2015b: 95.

<sup>1061</sup> See, for example, Haysom, Gastrow & Shaw. 2018: 14.

<sup>1062</sup> Interview Participant 11. 2016. Dar es Salaam, Tanzania & Interview Participant 27. 2016.

<sup>1063</sup> Interview Participant 21. 2016.

<sup>1064</sup> Haysom, Gastrow & Shaw. 2018: 7; 16; 18; 23-24.

<sup>1065</sup> Opalo. 2017.

<sup>1066</sup> For more detail on trafficking networks in eastern Africa, see, for example, UNODC. 2016b: 9 – 11; 54; UNODC. 2015b: 18; 93; 103; 122; Haysom, Gastrow & Shaw. 2018; Bybee. 2012: 69; 74; Carrier & Klantschnig. 2012: 94; INCB. 2016: 48; Dimova. 2016: 230; 234; Dimova. 2014: 7 - 9; Goldsmith. 2017; Opalo. 2017; Schbley

the fact that there is no single network running the trade, but instead fluid networks who are not very organized.<sup>1068</sup> Most dhows and crews are from Iran and Pakistan,<sup>1069</sup> but multiple nationalities are often arrested in a single seizure and often also includes eastern and West Africans.<sup>1070</sup> Globalization has resulted in African and Asian diaspora communities across the trafficking route, which helps to explain multinational network membership.<sup>1071</sup> Eastern Africans likely take over once shipments reach their coastline.<sup>1072</sup> The proliferation of drugs on the continent has led to increased involvement by Africans in trafficking networks, turning them from mere facilitators, to running some of the operations.<sup>1073</sup> This illustrates the market opportunities that come with a change in routes,<sup>1074</sup> not only for trafficking networks, but also for those in need of a livelihood in transit states.<sup>1075</sup> Similar to the cultural acceptability of being a pirate, Bybee argues that African societal values of wealth accumulation provides a large pool of potential traffickers who see drug trafficking as a means of income and distributing wealth in unequal societies.<sup>1076</sup>

Participant 21 noted that dhow crews are ‘simple villagers’ who are paid a lot of money in comparison to legitimate income opportunities to take the dhow to eastern Africa and back. They also believe that there are ‘narcotics representatives’ on board, who take control of offloading the drugs. He explained that while the dhow crew might not know much about the shipment, these representatives

“know a lot more than is being let on. Obviously one of them would be the captain. So, they’re your, probably, the two most valuable crew members. And they’re the people that the organized criminal groups don’t like losing, along with the vessel. So

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& Rosenau. 2013: 26; Blum. 2016: 17; Schubert. 2014: 67 – 68; Ratliff, E.A., Kaduri, P., Masao, F., Mbwambo, J.K & McCurdy, S.A. 2015. Harm reduction as a complex adaptive system: A dynamic framework for analysing Tanzanian policies concerning heroin use. *International Journal on Drug Policy*. 30(1): 10 - 12. DOI:10.1016/j.drugpo.2015.12.008.

<sup>1067</sup> The Economist. 2015.

<sup>1068</sup> Dimova. 2014: 9; Haysom, Gastrow & Shaw. 2018: 2; 19.

<sup>1069</sup> UNODC. 2016b: 54. Iranian dhows have been intercepted by Tanzania, Zanzibar, Kenya and Seychelles: Interview Participants 4; 21; 26 & 27. 2016.

<sup>1070</sup> UNODC. 2009a: 29; UNODC. n.d.a; Interview Participants 21 & 27. 2016. Also see UNODC. 2016b: 9; 10; 53 - 57; Haysom, Gastrow & Shaw. 2018; UNODC 2015b: 44; Mbwambo et al. 2012: 155; INCB. 2016: 48; Wright. 2013: 24; Opalo. 2017.

<sup>1071</sup> For example, UNODC. 2016b: 9; 15; 54 – 56; Dimova. 2016: 229; McCurdy & Kaduri. 2016: 313.

<sup>1072</sup> UNODC. 2016b: 9; 54; UNODC. 2015b: 93; Wright. 2013: 24.

<sup>1073</sup> Bybee. 2012: 69; UNODC. 2015b: 103; Dimova. 2016: 230.

<sup>1074</sup> UNODC. 2016b: 15; UNODC. 2015b: 18; Ratliff et al. 2015: 10.

<sup>1075</sup> Bybee. 2012: 74; INCB. 2016: 48.

<sup>1076</sup> Bybee. 2012: 72.

really and truthfully, it's probably an order of preference, the vessel and the two team members of the crew, then the drugs, then nothing really, they don't care about the rest of the crew."

The same participant explained the increasingly transnational character of crime and how this expands business opportunities for drug traffickers increasingly using eastern Africa to also move other drugs than heroin.<sup>1077</sup>

Finally, more ominous members are state officials or businessmen who facilitate activities. Wright suggests that understanding corruption in East Africa is key to understanding organized criminal activity. It is what attracts traffickers to the region and reflects deeper governance issues.<sup>1078</sup> In Kenya, Tanzania and Mozambique, criminal networks with close links to political and security elites are reportedly controlling the transshipments.<sup>1079</sup> Corrupt individuals facilitate networks' activities in varying ways by offering them protection in exchange for financial benefits. This could also be done to hold onto power.<sup>1080</sup> Politicians with business interests are well placed to facilitate criminal activities by means of providing contacts and protection. Dimova has referred to corrupt 'membership' as of a secondary nature to the trafficking network.<sup>1081</sup> However, their facilitating role must not be underestimated as it is a key driver.

Organized criminal networks form security, business and political relationships in order to avoid controls or to co-opt them if necessary.<sup>1082</sup> Corruption in the heroin trade in eastern Africa has been well documented,<sup>1083</sup> although it is rarely accompanied by concrete

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<sup>1077</sup> Interview Participant 21. 2016.

<sup>1078</sup> Wright. 2013: 8.

<sup>1079</sup> The Economist. 2015: 3.

<sup>1080</sup> Carrier & Klantschnig. 2012: 108 – 109; Opalo. 2017. Haysom, Gastrow & Shaw. 2018: 15.

<sup>1081</sup> Dimova. 2014: 10; Dimova. 2016: 234 - 236.

<sup>1082</sup> WACD. 2014: 20.

<sup>1083</sup> See, for example, Schubert. 2014: 56; 67 - 68; Wright. 2013: 8; Opalo. 2017; Dimova. 2014: 10; Dimova. 2016: 227; 236; The Economist. 2015; Opalo, K. 2012. The drug war moves east as cartels' influence in Africa grows. *Footnote1*. 5 September. Available: <http://footnote1.com/the-drug-war-moves-east-as-cartels-influence-in-africa-grows-in-africa/> [accessed 15 June 2015]; Gettleman, J. 2015. An anti-corruption plea in Kenya: please just steal a little. *New York Times*. Available: <https://www.nytimes.com/2015/11/05/world/africa/kenya-government-corruption.html> [accessed 29 June 2017]; WACD. 2014: 20; Carrier & Klantschnig. 2012: 108 – 109; Cole. 2014: 3; Blum. 2016: 16; 30; Bryson, D. 2011. Mozambique, a budding narco-state? *Mail & Guardian*. 23 March. Available: <http://mg.co.za/article/2011-03-23-mozambique-a-budding-narcostate/> [accessed 28 July 2017]; UNODC. 2016b: 39; Meeson-Frizelle, R. 2014. Mozambique: Africa's new narco-state? *The Guardian*. 22 April. Available: <https://www.theguardian.com/world/2014/apr/22/mozambique-africas-new-narco-state> [accessed 15 June

evidence or convictions. Similar to Shortland and Varese's study of protection theory and Somali piracy, Opalo notes how drug trafficking networks also change in response to political changes. Interestingly, many of Kenya's high profile suspected traffickers own or previously owned freight clearing or forwarding companies<sup>1084</sup> - a red flag for container trafficking.

## 6.2 The impact of heroin trafficking

Heroin trafficking has various harms all along the trade chain.<sup>1085</sup> As Participant 2 commented, "I don't think there's much argument about the drug trade and how dangerous it is to everybody involved in the process, whether it's, you know, in the poppy fields of Afghanistan all through the Southern Route and into the users in Europe."<sup>1086</sup> This section considers heroin trafficking's key impacts in order to ascertain how they influence responses. Typical impacts often noted include drugs threatening development, health, stability, security and the rule of law.<sup>1087</sup> While this may be accurate, it is often assumed without scrutiny. In support of scholars like Carrier and Klantschnig,<sup>1088</sup> the interviews revealed that the impacts of heroin trafficking are not necessarily what they are typically portrayed as, such as instability and violence.<sup>1089</sup> At least not initially. Participants' perceived impacts depended on their field of work and where they were from.

Klantschnig et al argue that the violence caused by criminalization and law enforcement aimed at drug markets is worse than the violence generated by the trade itself.<sup>1090</sup> Others however argue that the heroin-related violence in eastern Africa is downplayed and is increasing, especially in places like Cape Town where gang wars erupt daily.<sup>1091</sup> Participants

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2015]; GAN Business anti-corruption portal. *Mozambique Corruption Report*. Available: <http://www.business-anti-corruption.com/country-profiles/mozambique> [accessed 28 July 2017].

<sup>1084</sup> Opalo. 2017.

<sup>1085</sup> For a detailed discussion on the impact of drug use, see UNODC. 2020a. Booklet 5 on socio economic characteristics and drug use disorders.

<sup>1086</sup> Interview Participant 2. 2018.

<sup>1087</sup> See, for example, Klantschnig, Dimova & Cross. 2016: 168; UNODC. 2016b: 8; Bybee. 2012: 70; Clarke. 2016: 192; UNODC. 2009b.

<sup>1088</sup> Carrier & Klantschnig. 2012: 100. Also see Opalo. 2012 & WACD. 2014: 23.

<sup>1089</sup> UNODC. 2016b: 8 – 9; 61; Bybee. 2012: 70; Carrier & Klantschnig. 2012: 7; European Monitoring Centre for Drugs and Drug Addiction. 2015; WACD. 2014: 23; Schubert. 2014: 67 – 68; UNODC. 2020a. Booklet 6: 48 – 49.

<sup>1090</sup> Klantschnig, Dimova & Cross. 2016: 169 – 170; Carrier & Klantschnig. 2012: 120. Also see UNODC. 2020a. Booklet 6: 48 – 49.

<sup>1091</sup> Haysom, Gastrow & Shaw. 2018: 39 – 40.

typically linked heroin-related conflict to competition between different networks, intra-network tensions and the violence between networks and police.<sup>1092</sup> Goldstein termed this ‘systemic violence’ stemming from networks’ efforts to protect their trade. But participants did not yet consider violence as a big large by-product of the route’s eastern Africa leg. This could be because where corruption is endemic, violence might not be necessary to control the trade.<sup>1093</sup> This may well be the case in eastern Africa. Participant 21 noted how dhow traffickers weren’t armed and recalled only finding a weapon on board once:

“[T]hat was very much for self-protection in case that load is ripped off by somebody, and probably a bit of piracy at the time as well. So, we’ve never found a gun on board, nor have they ever threatened anybody. They know not to. Because when they get stopped by a coalition warship, what is the point in stuffing a Kalashnikov up in the air when you’ve got a two-billion-pound warship and a load of very nasty marines?”<sup>55</sup>

The reference to traffickers protecting themselves against pirates illustrates the interplay between different crimes. The routinely suggested impacts of drug trafficking were therefore not necessarily highlighted by participants, while the following impacts were.

### 6.2.1 Increased regional consumption

Transit states often experience an increase in drug use<sup>1094</sup> and this is no different in eastern Africa.<sup>1095</sup> As heroin use across Africa has drastically increased,<sup>1096</sup> half of heroin users are

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<sup>1092</sup> Also see, for example, Schubert. 2014: 67 – 68; 72; WACD. 2014: 23.

<sup>1093</sup> UNODC. 2020a. Booklet 6: 49; 53 – 54.

<sup>1094</sup> INCB. 2016: 52.

<sup>1095</sup> For more details on regional consumption in eastern Africa, see UNODC: 2015b: 87; Bybee. 2012: 75; UNODC. 2016b: 39; UNODC. 2015a: 49; UNODC. 2014b. *World Drug Report 2014*. Vienna: UNODC: Annex: x; INCB. 2016: 52; Beiser, V. 2015. Heroin use is soaring in one of the world’s unlikeliest places. *Take Part*. 26 March. Available: <http://www.takepart.com/article/2015/03/26/east-africa-heroin-use> [accessed 25 July 2017]; Schubert. 2014: 66 – 68; Jorgic. 2015; Weldon, K. 2013. An analysis of drug abuse along the coastal region of Kenya. *International NGO Journal*. 8(7): 153; 158. DOI:10.5897/INGOJ2013.0277B; Goldsmith, P. 2017. Nyimbo yatoka ngomani: rise and fall of the Swahili Coast. *The Elephant*. 31 March. Available: <https://www.theelephant.info/history/2017/03/31/nyimbo-yatoka-ngomani-rise-and-fall-of-the-swahili-coast/> [accessed 30 July 2017]; Haysom, Gastrow & Shaw. 2018: 3; 7-8.

<sup>1096</sup> UNODC. 2017. *World Drug Report 2017*. Vienna: UNODC: Booklet 3. Also see UNODC. 2016c: Preface; xii; McCurdy & Kaduri. 2016: 313.

now found in East Africa.<sup>1097</sup> In addition to displacement of routes, increased heroin flows through eastern Africa might also be attributed to this increased regional<sup>1098</sup> and continental demand.<sup>1099</sup> Only a minority of participants however identified increased local use as a key impact. Participant 21 described the development of heroin use in regional states:

“One of the big problems in countries that we see that this transits through, is the increase in the heroin addiction [...] there is quite a lot of an increase here [...] I think it is concentrated in the urban areas [...] and the coastal [areas]. One of the big problems is that [...] they pay the middlemen in product. So, they are creating a market for it over here. We have seen it in other countries where it transits through, the addiction rate increases [...]. So, it is actually creating a problem here [...] when you talk to a country’s governments and having talked to judges and stuff like this and that really resonates with them.”<sup>1100</sup>

Coastal regions like Mombasa and Dar es Salaam are often hardest hit by increased local use as this is where heroin first reaches land.<sup>1101</sup> Participant 22, a UNODC staff member, also confirmed how local fishermen are paid in heroin, which they then need to convert into cash, thereby contributing to the local market.<sup>1102</sup> Although heroin use has been prevalent in the region since at least the 1980s, there is little doubt that it has increased as the Southern Route gained prominence.<sup>1103</sup> Participants also explained how drugs use can spread quickly, especially on small islands like Zanzibar,<sup>1104</sup> and Seychelles,<sup>1105</sup> which both

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<sup>1097</sup> UNODC. 2016b: 44. Consumption data should however be considered with caution, as it is often based on limited and dated data on supply, trafficking and demand: Wright. 2013: 1; 24 - 25.

<sup>1098</sup> Wright. 2013: 21; Schubert. 2014: 64; McCurdy & Kaduri. 2016: 313.

<sup>1099</sup> Bybee. 2012: 75 - 76.

<sup>1100</sup> Interview Participant 21. 2016; Also see Haysom, Gastrow & Shaw. 2018: 11.

<sup>1101</sup> Interview Participants 23 & 27. 2016. Also see Mbogo. 2013; Haysom, Gastrow & Shaw. 2018: 10 – 11; 16; Craig, J. 2013. Kenya’s heroin problem exposed: brown sugar, smack & syringes part 2. *Lifestyle Magazine*. 1 February. Available: <http://www.capitalfm.co.ke/lifestyle/2013/02/01/kenyas-heroin-problem-exposed-brown-sugar-smack-syringes-part-2/> [accessed 29 June 2017]; Dimova. 2014: 5.

<sup>1102</sup> Interview Participant 22. 2016. The payment of low level traffickers in heroin was also been mentioned during informal discussions in Seychelles.

<sup>1103</sup> For detailed discussions on the development of regional trafficking and use, see, for example, Wright. 2013: 19 - 22; Goldsmith. 2017; Opalo. 2017; Craig. 2013; UNODC. 1996. *Rapid assessment of drug abuse in Kenya*. Available: [https://www.unodc.org/unodc/en/data-and-analysis/bulletin/bulletin\\_1996-01-01\\_1\\_page006.html#s002](https://www.unodc.org/unodc/en/data-and-analysis/bulletin/bulletin_1996-01-01_1_page006.html#s002) [accessed 29 June 2017]; Beckerleg, S., Sadiq, A. & Telfer, M. 2006. Heroin use in Zanzibar: a survey. *Drugs and Alcohol Today*. 6(2). DOI:10.1108/17459265200600034; Opalo. 2017; UNODC. 2016b: 47; 54; Ratliff et al: 10; Blum. 2016: 16; McCurdy & Kaduri. 2016: 312 - 314.

<sup>1104</sup> Interview Participants 26 & 30. 2016.

now have one of the highest concentrations of heroin users in the world as a result of its location along the Southern Route.<sup>1106</sup> As the price of heroin increases the further along it travels, prices around eastern Africa are cheap,<sup>1107</sup> making heroin accessible to all classes of society,<sup>1108</sup> especially during times of over-supply.

Increased use comes with the risk of disease, especially HIV<sup>1109</sup> and hepatitis C.<sup>1110</sup> This places pressure on ill-equipped regional health systems.<sup>1111</sup> Although regional states are now implementing harm reduction measures,<sup>1112</sup> these measures are still badly understood and criticized by citizens and even law enforcement who believe that it normalizes drug use.<sup>1113</sup> Although most participants did not stress increased regional use as the biggest impact of heroin trafficking, this might reflect the nature of participants' work rather than the seriousness of increased use, which is undeniable. Other drugs are also increasingly entering the region. A harm reduction worker in Seychelles noted: "When I got here it was a heroin problem, now it's a fucking everything problem."<sup>1114</sup> Increased regional use has serious societal<sup>1115</sup> and economic impacts,<sup>1116</sup> all of which cause harm.

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<sup>1105</sup> Saigal, K. 2019. Why Seychelles has world's worst heroin problem. *BBC*. 21 November. Available: <https://www.bbc.com/news/world-africa-50488877> [accessed 14 April 2020].

<sup>1106</sup> Blum. 2016: 17.

<sup>1107</sup> Interview Participants 21; 22 & 26. 2016.

<sup>1108</sup> See, for example, Chesang, R. 2013. Drug abuse among the youth in Kenya. *International Journal of Scientific & Technology research*. 2(6): 126 - 131.

<sup>1109</sup> McCurdy & Kaduri: 312; Schubert. 2014: 64; UNODC. 2016b: 21; Securun Palet, L. 2014. From Gold coast to Coke Coast. *Ozy*. 10 September. Available: <http://www.ozy.com/acumen/from-gold-coast-to-coke-coast/31961> [accessed 3 February 2021]; Craig. 2013.

<sup>1110</sup> Kahuthia-Gathu, R., Okwarah, P., Gakunju, R. & Thungu, J. 2013. Trends and emerging drugs in Kenya: a case study in Mombasa and Nairobi County. *Journal of Applied Biosciences*. 67: 5308. DOI: 10.4314/jab.v67i0.95055; Interview Participants 23 & 26. 2016.

<sup>1111</sup> See, for example, UNODC. 2016b: 45; Clarke. 2016: 197.

<sup>1112</sup> See, for example, Carrier & Klantschnig. 2012: 134; UNODC. n.d.f. *Pillar V: prevention of drug use, treatment and care of drug use disorders and HIV and AIDS prevention and care*. Available: <http://www.unodc.org/easternafrika/en/sub-programme-V.html> [accessed 15 June 2015]; Beiser. 2015; The Omari Project. n.d. Available: <https://www.facebook.com/The-Omari-Project-161286687227600/?fref=ts> [accessed June 2017]; Opalo. 2017; UNODC. n.d.b; Stone, K. 2016. *Global state of harm reduction 2016: regional overview sub-Saharan Africa*. London: Harm Reduction International: 7; Craig. 2013.

<sup>1113</sup> Interview Participant 23. 2016. Nairobi, Kenya.

<sup>1114</sup> Personal communication. 2020. Mahe, Seychelles.

<sup>1115</sup> Participants 23; 24 & 26. 2016. Also see, for example, All Africa. 2011. *East Africa: special report - Afghan heroin traffickers targeting Tanzania, East Africa*. 28 August. Available: <http://allafrica.com/stories/201108290937.html> [accessed 15 June 2015]; UNODC. n.d.e.

<sup>1116</sup> Interview Participant 27, a Kenya ANU officer, noted how drug trafficking for example negatively impacts on economies as drug profits are laundered and increased local use requires allocating resources to set up and maintaining rehabilitation centres.

## 6.2.2 Corruption

As further detailed in Chapter 8, participants considered corruption, not increased use, to be the primary impact of drug trafficking. This could reflect the nature of most participants' work in law enforcement. Corruption as driver of heroin trafficking in eastern Africa has been well documented.<sup>1117</sup> So too has the fact that it is a consequence of TOC in transit states.<sup>1118</sup> It has also facilitated increased regional use as those meant to prevent heroin from infiltrating the region are instead facilitating it.<sup>1119</sup> A lack of capacity to respond to drug trafficking, coupled with corruption, can paralyse regional states to effectively act against it<sup>1120</sup> as has the potential to destabilize the region by eroding state institutions meant to combat it.<sup>1121</sup> Participant 28 noted that drug trafficking and corruption go hand in hand and warned that there is potential that drug trafficking networks can become so imbedded in the region that politicians, law enforcers and prosecutors could eventually become their pawns.<sup>1122</sup> This has happened in West Africa.<sup>1123</sup> The proliferation of heroin in Kenya, and arguably the entire eastern Africa, has been described as a natural progression from West Africa's cocaine crisis<sup>1124</sup> and therefore has the potential to similarly undermine East African states.<sup>1125</sup> The same can be said for pirates in the Gulf of Guinea who are increasingly imitating Somali pirates' kidnapping modus operandi.

Participant 27, a policeman from Kenya's Anti-narcotics Unit, commented that high level people are involved in drug trafficking and Participant 23, a Kenyan harm reduction worker, described how the state might become involved in drug trafficking activity after I asked him

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<sup>1117</sup> See, for example, Schubert. 2014: 58; 64 – 65; 27; WACD. 2014: 27; Aikins. 2014; Opalo. 2017; Blum. 2016; Mbwambo et al. 2012: 157; Lehloeny, P.M. 2016. Regulation of illegal trade in narcotics in the age of globalisation: the SADC case. *Acta Criminologica*. 29(3): 7 – 8; Haysom, Gastrow & Shaw. 2018.

<sup>1118</sup> See, for example, Clarke. 2016: 192; Schubert. 2014: 67 - 68.

<sup>1119</sup> See, for example, Opalo. 2017; Opalo. 2012; Jorgic. 2015; Dimova. 2016: 237; Githongo, J. 2015. Corruption has opened door to Al-Shabaab in Kenya. *The Guardian*. 19 March. Available: <https://www.theguardian.com/world/2015/mar/19/corruption-has-opened-door-to-al-shabaab-in-kenya> [accessed 29 June 2017].

<sup>1120</sup> Carrier & Klantschnig. 2012: 55; 106.

<sup>1121</sup> Security Council Report. 2013; Gastrow. 2011.

<sup>1122</sup> Also see Indian Ocean Forum on Maritime Crime, Southern Route Partnership, UNODC. 2016: 22.

<sup>1123</sup> See WACD. 2014; Indian Ocean Forum on Maritime Crime, Southern Route Partnership, UNODC. 2016: 23.

<sup>1124</sup> Dimova. 2016: 228.

<sup>1125</sup> The Economist. 2015. The UNODC has equally warned that if the Southern Route is to replace the Balkan route, the impact will be equally 'enormous' to the impact of cocaine in West Africa: Wright. 2013: 22.

if there is high level corruption linked to the heroin trade in Kenya. He said the police are intimidated, so they have little choice but to accept bribes:

“because if you refuse the money you are giving your life. And also, if you take the money, you close your mouth completely [...] and once they realize you close your mouth, you become their partner in business.”<sup>1126</sup>

These protection fees allow traffickers to operate. Most corrupt government officials however offer such protection willingly because of the attractive benefits. Such corruption and breakdown of security institutions creates an enabling environment for trafficking networks to exploit the political system.<sup>1127</sup> Participant 24, another harm reduction worker in Kenya, confirmed the involvement of police officers and high level officials.<sup>1128</sup> Participant 28 explained how corruption is likely facilitating regional drug trafficking, explaining that if the estimated amount of heroin truly passes through eastern Africa, then the maritime seizures are small and the seizures on land even smaller. Corruption could explain why large shipments ‘disappear’ after reaching land.<sup>1129</sup> The lack of land based seizures could therefore be due to corruption or inadequate allocation of resources and weak border patrols, rather than the absence of shipments.<sup>1130</sup> He also suggested that police seize heroin and then sell it back to traffickers.<sup>1131</sup>

Bayert, Ellis and Hibou warned that African governments’ facilitation of organized crime has become so institutionalized that the states themselves are criminalized.<sup>1132</sup> This does not yet seem to be the case in eastern Africa. Klantschnig et al argue that linking drug trafficking to the criminalization of states is too generalized to reflect the true relationship between the state and drug producers, traffickers and consumers.<sup>1133</sup> Ellis however eventually, along with scholars like Shaw and Dimova, warned against overly concentrating on corruption, as this

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<sup>1126</sup> Interview Participant 23. 2016. Also see Indian Ocean Forum on Maritime Crime, Southern Route Partnership, UNODC. 2016: 22 on law enforcement being fearful of traffickers.

<sup>1127</sup> Schubert. 2014: 58.

<sup>1128</sup> Interview Participant 24. 2016. Nairobi, Kenya.

<sup>1129</sup> Interview Participant 28. 2016. Also see UNODC. 2016b: 8.

<sup>1130</sup> UNODC. 2016b: 25; Allen. 2006.

<sup>1131</sup> Interview Participant 28. 2016.

<sup>1132</sup> Bayert, J., Ellis, S. & Hibou, B. 1999. *The criminalization of the state in Africa*. Oxford: Currey. Also see Bybee. 2012: 77 – 78; Gastrow. 2011.

<sup>1133</sup> Klantschnig, Dimova & Cross. 2016: 169 - 170.

neglects other vital drivers and impacts of the trade.<sup>1134</sup> Klanschnig et al argue that reliance on weak data has created the current narrative on drugs which focuses on drugs endangering societies, development, stability, health, economies and governance. It moves international donors to provide funding for repressive policies and improved law enforcement, while the impact of such responses on livelihoods and socio-economic development has remained under-researched.<sup>1135</sup>

Participant 25, a UN staff member working in Nigeria, where a lot of eastern Africa heroin transits through, stressed the prevalence of corruption and the importance of preventative measures against drug trafficking before its impact becomes irreversible. He pointed out how both Mexico and Nigeria once only served as transit regions and now are key players in the global cocaine trade.<sup>1136</sup> The insights into the impact of heroin trafficking on eastern African states suggest that a lack of political will<sup>1137</sup> to respond can have dire impacts on the region over time. Regional states therefore need to mitigate heroin trafficking and its impacts.

### **6.3 The international legal framework applicable to drug trafficking at sea**

This section scrutinizes the international legal frameworks guiding states in their responses to heroin trafficking, namely UNCLOS and the Vienna Convention. UNTOC also applies to drug trafficking and Article 15 confirms Flag state jurisdiction as reflected in UNCLOS.<sup>1138</sup> But UNTOC does not have a protocol aimed at drug trafficking as drug trafficking is addressed in the Vienna Convention which preceded UNTOC. The majority of participants were knowledgeable about the content and implementation of the legal frameworks, but also of its limitations and therefore suggested potential alternatives, discussed in Chapter 8.

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<sup>1134</sup> Dimova. 2016: 237 - 238.

<sup>1135</sup> Klantschnig, Dimova & Cross. 2016: 168. Also see, see for example, UNODC. 2016b: 9, 67; Lehloenyana. 2016: 7 – 8; Clarke. 2016: 195; Mashiri, E & Sebele-Mpofu, F.Y. 2015. Illicit trade, economic growth and the role of customs: a literature review. *World Customs Journal* 9(2): 42.

<sup>1136</sup> Interview Participant 25. 2017. Lagos, Nigeria.

<sup>1137</sup> Dimova. 2016: 233 - 234.

<sup>1138</sup> States which have not ratified the Vienna Convention, but which have ratified UNTOC, can however reply on UNTOC Article 15(2)(c), UNTOC's jurisdiction clause, to respond to drug trafficking at sea. See Annexure D. However, considering that Article 15(2) is subject to the sovereign rights of states as per Article 4, and the difficulty in proving the intention to commit a crime in a state's territory before it has been committed, this right to establish jurisdiction can be very challenging to prove. Whether this will allow boarding of a foreign flagged vessel has also not been explored.

### 6.3.1 The United Nations Convention on the Law of the Sea (UNCLOS)

Although UNCLOS is the primary international instrument applicable to piracy, it has limited provisions on drug trafficking. Apart from UNCLOS Article 27 (1)(d), UNCLOS Article 108<sup>1139</sup> is the only drug-specific article and calls for cooperation to address drug trafficking at sea. Article 108 however provides no further guidance and places no obligation on states to respond. As outlined in Chapter 2, the jurisdiction applicable to criminal activity depends on the maritime zone where an offence is committed. States' rights and obligations in this regard are set out in UNCLOS. With the exception of Flag State jurisdiction and piracy, states' criminal jurisdiction erodes the further away from their coastline criminal activities take place. Coastal States enjoy the following rights in their maritime zones:

Maritime Zone	UNCLOS Article	Which acts may be responded to?	Rights of the Coastal State
Internal waters	Article 8	All criminal offences	Arrest and prosecute
Territorial sea and archipelagic waters	Article 2–4 and 27; Article 47 & 49	Criminal offences which: (a) consequences of the crime extend to the Coastal State; (b) crime is of a kind to disturb the peace of the country or the good order of the territorial sea; (c) assistance of the local authorities has been requested by the master of the ship or by a diplomatic agent or consular officer of the Flag State and (d) such measures are necessary for the suppression of illicit traffic in narcotic drugs or psychotropic substances	Arrest and prosecute
Contiguous zone	Article 33 <sup>a</sup>	Criminal offences which break or are intended to break fiscal, immigration, sanitary and custom (FISC) laws in Coastal State's territory or territorial seas	Prevent attempts, arrest and prosecute committed offences (Guilfoyle 2009)
EEZ	Article 55–59	Criminal matters affecting Coastal State's sovereign rights to its economic resources and economic exploitation of the zone	Arrest and prosecute

**Figure 9: Jurisdiction in Coastal State maritime zones (Bruwer, C. 2020. *Smuggling and trafficking of illicit goods by sea. In Global challenges in maritime security: an introduction.* L. Otto, Ed. Cham: Springer: 59)**

<sup>1139</sup> See Annexure D.

In terms of UNCLOS Article 94, the Flag State has primary jurisdiction over trafficking on board its vessels.<sup>1140</sup> This position however changes once vessels move into the maritime territory of Coastal States. States may arrest and prosecute drug trafficking vessels and crew in their internal waters and territorial seas.<sup>1141</sup> Jurisdiction in the contiguous is generally understood to include drug trafficking as it breaks customs regulations<sup>1142</sup> and therefore can be prosecuted, provided the drug trafficking offence has already been committed in the Coastal State's territory or territorial seas.<sup>1143</sup>

Coastal States may not respond to drug trafficking in their EEZs, unless committed on a Flag State vessel, or if authorized by another Flag State, or if the vessel is stateless. Hot pursuit and constructive presence are also exceptions to this.<sup>1144</sup> A final exception to Flag State jurisdiction is UNCLOS Article 110<sup>1145</sup> which provides that certain foreign flagged or unflagged vessels may be boarded. Article 110(1)(d) provides for such boarding on suspicion of the vessel being without nationality. A vessel is considered stateless if it is not registered in any state or, in absence of registration, does not have the right to fly any state's flag based on an affiliation such as ownership.<sup>1146</sup>

As illustrated in below sections, heroin trafficking vessels often do not show signs of registry and are indeed boarded on this basis. Which actions states may take after such boarding, is however a matter of contention as UNCLOS is silent on this. It is debated whether a stateless vessel and its crew can be arrested and prosecuted for illicit activity on the high seas. Some believe that any state may establish jurisdiction over a stateless vessel as it enjoys the protection of no state. Others require an additional nexus for establishing

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<sup>1140</sup> For example, Kenya's Narcotic Drugs and Psychotropic Substances Control Act of 2012 Article 65 notes how any drug related act which constitutes an offence on land, shall constitute an offence if committed on board a Kenyan vessel.

<sup>1141</sup> Global Maritime Crime Programme. 2017: 87.

<sup>1142</sup> UNODC. 2004. *Practical Guide for competent national authorities under Article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988*. Vienna: UNODC: 11.

<sup>1143</sup> Global Maritime Crime Programme. 2017: 40 - 42; Guilfoyle, D. 2009b. *Intercepting vessels at sea*. New York: Cambridge University Press: 13.

<sup>1144</sup> UNCLOS Article 111; Global Maritime Crime Programme. 2017: 59 – 62.

<sup>1145</sup> See Annexure D.

<sup>1146</sup> Guilfoyle. 2009b: 95. Vessels are also considered to be stateless if the master fails to make a valid claim of registry, if the claim of registry is denied or not confirmed by the claimed state, if the claimed state is not recognized by the boarding state or the vessel is flying two flags as per UNCLOS Article 92: McLaughlin, R. 2016a. Authorizations for maritime law enforcement operations. *International Review of the Red Cross*. 98(2): 486 – 487. doi:10.1017/S1816383117000340.

jurisdiction, such as a link to an offender.<sup>1147</sup> On this point, Coventry notes: “State practice forming custom should be widespread and consistent, not a limited number of unilateral acts by several powerful, like-minded states accompanied by acquiescing silence from the global community.”<sup>1148</sup> Current dominant state practice reflects that no jurisdiction can be established over a stateless vessel and crew.<sup>1149</sup>

### 6.3.2 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna Convention)

Unlike piracy, UNCLOS provides no legal basis for states to respond to drug trafficking on the high seas or in a state’s EEZ when such drug trafficking takes place on board a foreign flagged vessel.<sup>1150</sup> An additional legal basis is required. Article 3 of the Vienna Convention requires states to criminalize drug trafficking and Article 4 establishes jurisdiction over such offences, which includes a *duty* to establish jurisdiction over drug trafficking by Flag State vessels and the *option* to establish jurisdiction over offences committed by a state’s nationals or where an offence “is committed on board a vessel concerning which that Party has been authorized to take appropriate action pursuant to Article 17”.<sup>1151</sup>

Article 17 applies specifically at sea. Scholars agree that it applies to all maritime zones beyond the territorial sea,<sup>1152</sup> and probably also the contiguous zone, should this zone have been claimed. Article 17(1) of the Vienna Convention echoes UNCLOS Article 108 and calls for cooperation in suppressing drug trafficking at sea. It also sets out the powers available to states to respond to drug trafficking on board foreign vessels and therefore contains exceptions to Flag State jurisdiction. This is important as navies intercepting heroin

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<sup>1147</sup> See, for example, Gallagher A.T. & David F. 2014. *The international law of migrant smuggling*. Cambridge: Cambridge University Press: 245 – 246; Guilfoyle. 2009b: 17 – 18; 108; 185; 297; Papastavridis. 2013: 208; Coventry, T. 2019. Appropriate measures at sea: extraterritorial enforcement jurisdiction over stateless migrant smuggling vessels. *Maritime Safety and Security Law Journal*. 2019-2020(7): 28; United Nations International Law Commission. 2018. *Draft conclusions on identification of customary international law, with commentaries*. Available: [https://legal.un.org/ilc/texts/instruments/english/commentaries/1\\_13\\_2018.pdf](https://legal.un.org/ilc/texts/instruments/english/commentaries/1_13_2018.pdf) [accessed 3 February 2021].

<sup>1148</sup> Coventry. 2019.

<sup>1149</sup> Papastavridis, E.D. 2016. Crimes at sea: a Law of the Sea perspective. In *The IMLI manual on International Maritime Law volume III: Marine Environmental Law and Maritime Security Law*. Attard, D., Fitzmaurice, M., Martinez, N. & Hamza, R., Eds. Oxford: Oxford University Press: 30; 32.

<sup>1150</sup> Papastavridis. 2016: 29 - 32.

<sup>1151</sup> Article 4(1)(a)(ii) & Article 4(1)(b)(ii). Also see Papastavridis. 2013: 213.

<sup>1152</sup> UNODC. 2004: 113 – 114; Guilfoyle. 2009b: 83 - 84; Papastavridis. 2013: 212.

trafficking in the WIO rarely share the nationality of the trafficking vessel. Figure 10 summarizes Article 17:

Article	Nationality of suspect vessel	Which State may exercise which powers?
Article 17(2)	Vessels flagged to the Boarding State & Stateless vessels	Flag State may request another State to assist in suppressing such acts. The position with regards to arrest and prosecution of stateless vessels and its crew is debated <sup>a</sup>
Article 17(3) & (4)	Foreign flagged vessels seaward of territorial sea <sup>b</sup>	Intercepting State may request confirmation of registry from Flag State Upon confirmation, Intercepting State may board, search and request authorisation to take appropriate measures Flag State may authorise such appropriate measures with regards to crew, vessel and cargo if evidence of drug trafficking is found
Article 17(9)		States are encouraged to enter into pre-existing agreements to facilitate boarding of each other's vessels

**Figure 10: Jurisdiction in terms of Article 17 of the Vienna Convention (Bruwer. 2020: 66)**

Article 17(2) provides that states may request assistance to address drug trafficking on board their flag vessels and stateless vessels, but it does not elaborate on whether this would include arrest and prosecution. In the case of flagged vessels, it is assumed that such assistance would include such actions as authorized in terms of Article 17(4).<sup>1153</sup> For stateless vessels, this position is debated, but I agree with the school of thought that no further law enforcement action other than boarding is allowed. Sub-articles 17(3) and 17(4) set out under which circumstances a foreign drug trafficking vessel may be boarded. If evidence of drug trafficking is found, the Flag State may be requested to authorize appropriate measures against such trafficking. Appropriate measures must be determined by the Flag State and may include arrest and prosecution. But because Article 4(b)(ii) does not oblige states to establish jurisdiction over foreign vessels,<sup>1154</sup> they often do not wish to.

#### **6.4 Responses to heroin trafficking in the Western Indian Ocean off eastern Africa**

The first half of this chapter has illustrated which heroin trafficking activities need to be countered and what the options and motivations for doing so are. This section considers current responses by using Bueger's analytical framework of paradigms as applied in

<sup>1153</sup> UNODC. 2004: 122.

<sup>1154</sup> See, for example, Papastavridis. 2013: 211 - 213.

Chapter 5 and similarly applies paradigms to heroin trafficking as a way of understanding the responses. This is a novel use of paradigms as analytical lens which has not previously been applied to responses to heroin trafficking. Its utility lies in identifying how heroin trafficking is problematized in different ways, thereby revealing whether current responses and international legal frameworks are sufficient to counter it.

Unlike piracy which is centred around Somalia and the WIO, drug production, transit and consumption encompass states from across the globe. Different responses are therefore aimed at different links in the trade chain. This thesis however focuses on those related to maritime trafficking and efforts to counter it, and the effects thereof, in eastern Africa.

**Table 2: Drug trafficking paradigms and key responses**

<b>Paradigm</b>	<b>Drug trafficking problematized as:</b>	<b>Key responses</b>	<b>Key Actors/instruments</b>	<b>Land or sea based</b>
<b>Security</b>	Security threat	<ul style="list-style-type: none"> <li>• Naval patrols</li> <li>• Seizure of drugs on the high sea</li> </ul>	<ul style="list-style-type: none"> <li>• Navies</li> </ul>	Sea
<b>Legal</b>	Crime	<ul style="list-style-type: none"> <li>• Law reforms</li> <li>• Arrest in Coastal State waters</li> <li>• Prosecution</li> <li>• Law enforcement capacity building</li> </ul>	<ul style="list-style-type: none"> <li>• Regional Maritime Law Enforcement</li> <li>• Navies</li> <li>• UNODC</li> </ul>	Land and sea
<b>Economic</b>	Business model	<ul style="list-style-type: none"> <li>• N/A</li> </ul>	<ul style="list-style-type: none"> <li>• Shipping industry</li> </ul>	Land
<b>Development</b>	Symptom of under-development	<ul style="list-style-type: none"> <li>• Regional maritime security capacity building</li> </ul>	<ul style="list-style-type: none"> <li>• UNODC</li> <li>• Navies</li> <li>• EU</li> </ul>	Land
<b>Humanitarian</b>	Source of suffering	<ul style="list-style-type: none"> <li>• Harm reduction efforts</li> </ul>	<ul style="list-style-type: none"> <li>• NGOs</li> <li>• UNODC health</li> </ul>	Land

## 6.5 Responses under the Security Paradigm

When the security paradigm was applied to counter-narcotics efforts in eastern Africa and the WIO, it revealed that heroin trafficking, specifically on the high seas, is responded to as a threat, primarily by states from the Global North.<sup>1155</sup> This differs from how regional states perceive it and respond, as illustrated under the legal paradigm. The main actors under this paradigm are international navies, specifically the naval coalition of the CMF Combined Task Force 150 (CTF 150), which patrols the WIO in addition to the CMF's counter-piracy coalition, CTF 151. The CMF is currently the most effective actor countering heroin trafficking in the WIO.

CTF 150's mandate is counter-terrorism,<sup>1156</sup> which they use to seize heroin on the basis that it funds terror groups based primarily in Afghanistan, Iran and Pakistan, including the Taliban and Al-Qaeda.<sup>1157</sup> This intervention is therefore not based on the impact of heroin in destination or transit states, or the fact that navies are the only state apparatus able to operate on the high seas, but rather on the threat posed to international security by terrorism.<sup>1158</sup> Scholars and international organizations alike have however warned against over-emphasising the link between drug trafficking and terrorism, which can obscure the complex nature of trafficking. Such perceived links are often sought in order to justify draconian responses.<sup>1159</sup> Scholars have also warned that the focus on drugs primarily as a security issue, rather than a development issue, has resulted in many of the drug-related problems experienced in Africa today.<sup>1160</sup>

The CMF's area of patrol spans nearly 5.2 million kms<sup>2</sup> on the high seas<sup>1161</sup> and they cannot seize all heroin passing through this vast area alone. The CMF has no African membership,

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<sup>1155</sup> See, for example, Dimova. 2016: 227 – 228; Clarke. 2016: 198.

<sup>1156</sup> Combined Maritime Forces. n.d.b. CTF150: maritime security. Available: <https://combinedmaritimeforces.com/ctf-150-maritime-security/> [accessed 3 February 2021].

<sup>1157</sup> Combined Maritime Forces. n.d.b; Participants 21 & 22. 2016. Also see Indian Ocean Forum on Maritime Crime, Southern Route Partnership, UNODC. 2016: 17 - 20; UNODC. 2016b: 63 – 64; Opalo. 2012; Clarke. 2016: 198; Jacob, A. 2014. Terror groups on backfoot after drug seizures on seas. *Khaleej Times*. 2 June. Available: [http://www.khaleejtimes.com/kt-article-display-1.asp?xfile=data/international/2014/june/international\\_june26.xml&section=international](http://www.khaleejtimes.com/kt-article-display-1.asp?xfile=data/international/2014/june/international_june26.xml&section=international) [accessed 29 July 2017].

<sup>1158</sup> See, for example, Opalo. 2012; Jacob. 2014; UNODC. 2016b: 63 – 64; Clarke. 2016: 198.

<sup>1159</sup> WACD. 2014: 23; Klantschnig, Dimova & Cross. 2016: 168 - 170.

<sup>1160</sup> Klantschnig, Dimova & Cross. 2016: 171.

<sup>1161</sup> Combined Maritime Forces. n.d.b.

similar to how no African navy responded to the UNSC's call for an international response to Somali piracy.<sup>1162</sup> While this could be a reflection of absent political will, it is also a reflection of eastern African navies' inability to operate outside their own waters. All heroin seizures on the high seas around eastern Africa have therefore been made by the CMF and not regional states. It has also been suggested that if dhows manage to avoid the CMF, their shipment is nearly guaranteed to arrive at its destination.

UNCLOS and the Vienna Convention provide limited options for responding to drug trafficking by foreign vessels on the high seas. This, in addition to corruption, is currently the biggest obstacle to countering drug trafficking in the WIO. Article 17 of the Vienna Convention limits state action to that authorized by the Flag State. Most dhows moving heroin across the WIO and into eastern African states are from Iran and Pakistan. While Article 17 provides that Iran and Pakistan can be requested to allow another state to board their vessel, participants were insistent that the two states will not give such authorization. This means that the Vienna Convention is currently superfluous to address the heroin trafficking model in the WIO as it fails to effect arrests and prosecutions. Instead, foreign vessels are boarded in terms of UNCLOS Article 110(1)(d) on the basis of statelessness,<sup>1163</sup> as most heroin trafficking vessels intercepted in the WIO cannot provide proof of their Flag state, despite their origin being known as primarily Iran and Pakistan. As noted in Chapter 5, transnational crime presents two key legal challenges – transnational jurisdiction and extradition.<sup>1164</sup> This is also the case for heroin trafficking in the WIO.

### **6.5.1 The shortcomings the Vienna Convention**

States do not use Article 17 of the Vienna Convention to interdict heroin trafficking vessels on the high seas of the WIO for three reasons. First, the majority of heroin trafficking vessels on the Southern Route are considered stateless.<sup>1165</sup> Article 17(2) of the Vienna Convention only provides for states to request cooperation in suppressing drug trafficking on board such vessels. It does not expressly allow for such vessels to be boarded. UNCLOS Article 110(1)(d)

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<sup>1162</sup>Jagganath, G. 2014. Maritime security challenges for South Africa in the India Ocean Region (IOR): the southern and east coast of Africa. *Man in India*. 94(3): 402.

<sup>1163</sup> Interview Participant 21; Informal communication. 2018. Nairobi, Kenya.

<sup>1164</sup> Boister. 2003: 287.

<sup>1165</sup> Interview Participants 2; 3; 4; 21 & 22.

however does authorize boarding of vessels suspected of being stateless in order to confirm their flag. Second, despite being *de jure* stateless, the vessels are in fact known to be primarily from Iran and Pakistan.<sup>1166</sup> Participant 21 explained navies' approach to boarding stateless vessels in the WIO: "We know that most of these vessels are Iranian [...] but they don't have sufficient paperwork to say they're Iranian. Hence why they're allowed to [board] under Article 110."<sup>1167</sup> Scholars have noted that no vessel can truly be stateless, as they all belong to someone. Participants however agreed that Iran and Pakistan are highly unlikely to give boarding authorization when requested to do so in terms of Article 17(3).<sup>1168</sup>

Participant 22 considered Iran and Pakistan's position with regards to the Southern Route and noted that because Iran has clamped down on domestic heroin supply and consumption, they deny their role in the trade.<sup>1169</sup> The majority of heroin seizures in the Golden Crescent are made in Iran.<sup>1170</sup> Pakistan has an agency exclusively devoted to countering heroin trafficking which has had great success, although heroin continues to move through the Baluchistan region which, to quote Participant 22, "is basically lawless even though Pakistan usually say that's not the case."<sup>1171</sup> The Baluchistan region is mountainous with a simmering insurgency, run by warlords using heroin profits to buy weapons. He added that the agency's reach is limited due to Pakistan's large population and because it operates far from regions where trafficking takes place:

"[F]rom what I've been told, so the international navy sitting there can actually see, they know, that basically the dhows just sit off the coast...and then they get supplied with the heroin straight onto the boat and then they take off".<sup>1172</sup>

Finally, participants suggested that even if these Flag States were to give boarding authorization, the international community fear that this could result in human rights violations. Participants noted how draconian drug trafficking penalties in Iran and Pakistan discourage foreign navies to arrest drug trafficking crews, even when they believe that legal

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<sup>1166</sup> Interview Participants 4; 21 & 22; informal communications.

<sup>1167</sup> Interview Participant 21. 2016.

<sup>1168</sup> Interview Participants 4; 21; 22; informal communications & participant observation.

<sup>1169</sup> Interview Participant 22. 2016. Nairobi, Kenya.

<sup>1170</sup> UNODC. 2015a: 42; UNODC. 2015b: 50; UNODC. 2020a. Booklet 3: 12.

<sup>1171</sup> Interview Participant 22. 2016; Also see Indian Ocean Forum on Maritime Crime, Southern Route Partnership, UNODC. 2016: 19.

<sup>1172</sup> Interview Participant 22. 2016.

precedent for arrest exists.<sup>1173</sup> One participant explained law enforcement's dilemma: "[T]hey don't want to be responsible for the people [...] getting sent back to Iran where they'll be executed".<sup>1174</sup> The possible imposition of the death penalty for drug trafficking offence is known to discourage extradition.<sup>1175</sup>

Iran and Pakistan both impose the death penalty for drug trafficking offences.<sup>1176</sup> Iran is one of the most prolific executioners for drug offences despite recent reforms, while Pakistan has not executed anyone for trafficking offences in the past decade, despite imposing the death penalty.<sup>1177</sup> Dhows might even prefer to depart from Pakistan to avoid harsh penalties in Iran.<sup>1178</sup> The fear is that the arresting state could infringe their international human rights treaty obligations if they were to arrest or extradite the crew.<sup>1179</sup> Participant 4 explained:

"The other risk which concerns some navies is that there's some human rights abuse for which you are culpable [...] [T]he Europeans think [...] if you transfer a person to the control of another state and that state mistreats them, that's on you. That's certainly what the European Convention on Human Rights would say and the Canadians and the Australians with their human rights law would say the same thing, that if you take an individual and transfer it to Kenya without knowing what's going to happen to him at the police station, that comes back on you."

This view was confirmed by Participant 21 who noted that they must adhere to human rights treaties and domestic human right legislation extra-territorially. They therefore cannot arrest Iranian drug trafficking crews as there is no guarantee that they will be exempt from execution once returned to Iran. The potential danger of such human rights violations was also apparent during a gathering of law enforcement entities from another region. At the meeting, the war on drugs took centre stage as certain states shared their governments' efforts to combat trafficking, in support of the bloodbath that the war on drugs leaves behind. It is therefore not surprising that some states choose to refrain from

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<sup>1173</sup> Interview Participants 4; 21 & 22. 2016.

<sup>1174</sup> Interview Participant 22. 2016 .

<sup>1175</sup> UNODC. 2020a. Booklet 6: 29.

<sup>1176</sup> Girelli, G. 2019. *The death penalty for drug offences: global overview 2018*. London: Harm Reduction International: 23.

<sup>1177</sup> Ibid: 25; 31.

<sup>1178</sup> Wright. 2013: 23

<sup>1179</sup> Interview Participants 4 & 21. 2016.

achieving a legal finish rather than risking violating human rights treaties. The potential of human rights abuses was dealt with in the counter-piracy response as discussed in Chapter 4. Ironically, in response to its increased use as a Southern route transit state, Sri Lanka has recently reinstated the death penalty for drug trafficking offences, although they are yet to execute anyone.<sup>1180</sup> As Sri Lanka is one of the states regularly intercepting heroin trafficking vessels in their own waters, they are free to enforce their national drug trafficking laws.

For the reasons provided above, Article 17 of the Vienna Convention is currently superfluous for seizing heroin on the high seas of the WIO. It does however still provide a legal basis for seizures and prosecutions in other regions where Flag States authorize foreign navies to board their vessels.

### **6.5.2 Boarding in terms of UNCLOS Article 110**

One participant explained how a boarding and seizure in terms of UNCLOS Article 110 takes place:

“[M]ost of the dhows that they come across doing this route either aren’t flying a flag, or its uncertain to what the flag is, or if they have been sighted beforehand [...] and they hadn’t had a flag and then they have got a flag now, they can still board them. And this is done in conjunction with the legal advisors in Bahrain [...] They will request an Article 110 boarding to verify the nationality of the ship. Now invariably, when they get on board, there is no proper paperwork on these ships [...] But if the captain, and if the legal advisors in Bahrain, are satisfied that there is insufficient paperwork to determine the nationality of the vessel, then they may declare that vessel stateless. That’s laid down procedures. What they will then do is [...], they will simulate that vessel under their own flag nation and if they deem that it is necessary and with permission, they can then conduct a search of that vessel if they think its suspect [...] During the course of that investigation they might find some drugs. Those drugs will then be seized and thrown overboard”.<sup>1181</sup>

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<sup>1180</sup>Dissanayake, D. 2019. The solution to drug trafficking in Sri Lanka. *Amnesty International*. 19 June. Available: <https://www.amnesty.org/en/latest/news/2019/06/sri-lanka-the-solution-to-drug-trafficking-in-sri-lanka/> [accessed 15 April 2020].

<sup>1181</sup>The Participant asked that his identity be hidden. Although this is accepted state practice and despite UNCLOS Article 110 allowing for a vessel to be examined to verify its flag, Interview Participant 4 considers it a

Participant 4 offered a practical example of why navies have few alternatives to using UNCLOS:

“[I]f Spain wants to call a British vessel off Spain they will be able to get a number and phone up and get permission [...] But this does not work if you try and call Iran or Pakistan [...] [Y]ou can imagine, if you’re a Danish warship where you want to attempt to board an Iranian vessel without the permission of the Iranian government, but this, given the physical contexts at the moment, not many countries would want to do that [...] [W]ould Iran ever give permission for a US warship to board an Iranian vessel under any circumstances? Probably not. So[...], we’ve either got this fiction under [UNCLOS] when you go on board, saying we’re going to verify the Flag state because the flag wasn’t shown... and we got on board and the guy said, ‘oh, sorry, sorry, I forgot to put the flag up’, you know, a Pakistani or Somali or whatever. And you say, ‘well, while we’re here, we find hundred kilograms of heroin concealed under the deck.’ So, what were you doing looking under the deck if you were trying to verify the flag? You say you did a security sweep. Look, the only other way you can do it is with the permission of the Flag State, and given who the Flag States are, it’s not easy to get.”<sup>1182</sup>

Participants engaged in law enforcement confirmed that current state practice is that if drugs are found, it is thrown overboard and the vessel and crew are free to go as Article 110 provides no legal basis to detain the vessel or crew on the high seas.<sup>1183</sup> While some may argue that there is also no jurisdictional basis for seizing the heroin, it is hard to imagine that anyone would contest such a seizure in court. Many states accept this practice and agree that once a vessel is declared stateless, they may establish their national jurisdiction on that vessel, allowing the illicit shipment to be seized. Participant 22 however questioned the

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legal fiction when the examination is used to search for drugs instead: “[I]f you’re boarding a vessel because you saw its flag and it is hanging around in Pakistan and coming down and it’s hiding, it’s not carrying any cargo and yet it’s arriving all the way from Pakistan to East Africa and you also, there’s no-one taking telephone calls for example, and then you board it on the basis of verifying its Flag State, that is a legal fiction. I mean, if you’re a police officer and you enter somebody’s house on the basis of what you thought there might be fire inside when actually, you’ve been observing it for days and you find a drug dealer, I mean, you get in trouble with the court. So it’s a bit of a legal fiction, but it is one of the tools that the navies use”.

<sup>1182</sup> Interview Participant 4. 2016.

<sup>1183</sup> As also explained by Participants 21 & 22. 2016.

lawfulness of establishing national laws on board foreign vessels in international waters<sup>1184</sup> and the position remains debated among states and academics with differing views.<sup>1185</sup> Seychelles is the only regional state whose Misuse of Drugs Act<sup>1186</sup> allows the arrest and prosecution of the crew of stateless drug trafficking vessels on the high seas and some may consider this creeping jurisdiction.

If establishing national laws on a stateless vessel is considered legal, one could question why states do not use their national jurisdiction to also arrest the vessel and crew. This is arguably due to both practical and ‘humanitarian’ reasons. Similar to why states are not using Article 17 of the Vienna Convention, participants fear that if they were to arrest and prosecute the crew, they could be subjected to the death penalty in Iran or Pakistan. In addition, international navies might not wish to take on the logistical task of having to take vessels and crews thousands of nautical miles to land for prosecution.<sup>1187</sup> Such logistics are however not considered too much effort for counter-piracy patrols, although the legal basis is more certain, the majority of suspects are taken to selected regional states for prosecution and pirates are not subjected to the death penalty in prosecuting states.<sup>1188</sup> This is why a similar model for drug trafficking offences on the high seas could provide a solution.

The catch and release modality employed when interdicting heroin trafficking vessels on the high seas of the WIO therefore lacks a legal finish, limiting law enforcement efforts’ impact. Participant 21 explained why this is the case:

“[T]he trade has not really overly been affected in terms of the amount coming down here. In terms of the way they conduct it, it has, but in terms of the amount coming down here, it hasn’t. So, for instance, they have changed their route, they’ve adapted, which they always knew they would do. The more you get them, the more they will adapt. However, we believe strongly that the actual flow of it hasn’t actually decreased.”<sup>1189</sup>

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<sup>1184</sup> Interview Participant 22. 2016.

<sup>1185</sup> See, for example, Guilfoyle. 2009b; Coventry. 2019.

<sup>1186</sup> Misuse of Drugs Act 5 of 2016.

<sup>1187</sup> Interview Participant 21. 2016.

<sup>1188</sup> Kontorovich. 2012: 7. Their treatment upon return to Somalia is however questionable.

<sup>1189</sup> Interview Participant 21. 2016.

The lack of a legal finish was initially the thorn in the side of the counter-piracy response, until the PPM was developed.

Therefore, currently, arrest and seizure of drug trafficking vessels and crews on the high seas of the WIO can only be undertaken by the Flag State, or if authorized by the Flag State in terms of Article 17(4) of the Vienna Convention. Because this is unlikely and because UNCLOS Article 110 provides no legal basis for arrest, participants rely on regional Coastal States' exercise of territorial jurisdiction to ensure a legal finish. Regional states are however yet to take full ownership of the heroin trafficking problem and to make significant seizures. The other, highly unlikely, alternative, is to amend the international legal frameworks to allow foreign vessels to be intercepted on the high seas without Flag State consent. Yet, despite many of the barriers to successful counter-trafficking measures being due to 'ageing' international instruments not catering for current trends in TOC, they are unlikely to ever be amended.<sup>1190</sup> UNCLOS is primarily meant to ensure freedom of navigation and shipping, not inhibit it.<sup>1191</sup> Participant 22 noted: "The hurdle is that, you know, freedom of the international waters, Flag State sovereignty [...] [R]ealistically, UNCLOS will never get amended on Flag State authority".<sup>1192</sup>

Participants however expressed the need for a legal framework similar to universal jurisdiction in order to counter heroin trafficking on the high seas. This would allow vessels, crews and cargo to be seized on the high seas, the vessel to be removed from circulation and the crew to be prosecuted. This would result in a legal finish, the lack of which was identified by participants as the key barrier to combatting heroin trafficking through eastern Africa. A quasi-universal interdiction regime would also be practical because dhows, unlike container vessels, are apprehended, boarded and searched at sea.

Merely ratifying multilateral instruments does not offer protection against crime. These instruments must be reflected in national policies and legislation that should be implemented.<sup>1193</sup> Participants emphasized this.<sup>1194</sup> Participant 3 noted that because the international legal frameworks are highly unlikely to change, states should amend their

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<sup>1190</sup> Interview Participants 3; 21 & 22.

<sup>1191</sup> Interview Participant 21. 2016.

<sup>1192</sup> Interview Participant 22. 2016.

<sup>1193</sup> Lehloeny. 2016: 11.

<sup>1194</sup> Interview Participants 4 & 22. 2016.

national legislation to allow them to address the contemporary manifestation of maritime crimes.<sup>1195</sup> States can also use their existing laws creatively.<sup>1196</sup> Participant 21 suggested that instead of trying to amend international law, law enforcement in Southern Route states should be improved.<sup>1197</sup> This would put the responsibility on regional states to respond to heroin trafficking in their maritime zones, thereby not leaving it up to the international navies on the high seas. Capacities and political will however have to improve greatly if eastern Africa is to lead the response.

In conclusion, the interviews have shown that broadening jurisdictional powers won't necessarily result in an improved response, as there are many additional factors to take into account, such as non-cooperative states, corruption and human rights concerns. Instead, participants suggested alternative responses, discussed in Chapter 8.

## **6.6 Responses under the Legal Paradigm**

Regional states address heroin trafficking under the legal paradigm. Under this paradigm, drug trafficking is considered a crime and drug interceptions require the exercise of criminal jurisdiction in regional states' waters. Although guided by UNCLOS, it is executed in terms of domestic legislation. Regional states are concerned with the impact of drugs on their country, not its funding of terror groups. But despite some significant interceptions, seizures in regional Coastal States' waters are the exception rather than the rule due to limited regional capacity to identify and intercept shipments.<sup>1198</sup> It is possibly also due to a lack of understanding of the impact of heroin entering the local market and increasing local use, as well as corruption.<sup>1199</sup> For this reason, the CMF is currently responsible for most heroin seizures around eastern Africa, especially large seizures.

### **6.6.1 Maritime Law Enforcement**

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<sup>1195</sup> Interview Participant 3. 2018.

<sup>1196</sup> Interview Participants 4 & 12. 2016; Informal communication. 2016. Voi, Kenya.

<sup>1197</sup> Interview Participant 21. 2016.

<sup>1198</sup> See, for example, Dimova. 2016: 237; Meeson-Frizelle. 2014; Hamad, H.B. 2016. The role of flag states in maritime security governance: a case study of the East African Community. *Research on Humanities and Social Sciences*. 6(14): 100 – 101; Opalo. 2017; Jorgic. 2011.

<sup>1199</sup> See, for example, Dimova. 2016: 231 – 234; Mbwambo et al. 2012: 157.

While international navies serve as a shield disrupting heroin from entering eastern Africa, their efforts must be complimented by regional states able to respond to shipments evading the CMF.<sup>1200</sup> Although no regional state has blue water capacity to interdict drug trafficking vessels on the high seas, they remain responsible for securing their own waters. There are on-going maritime law enforcement capacity building efforts in the region, such as by the UNODC, working to increase regional states' ability to counter maritime crimes.<sup>1201</sup> These efforts have resulted in improved capacity and some seizures, but not yet at the level of the CMF and certainly incomparable to the amount of heroin which continues to enter the region.

International drug enforcement agencies from the UK and US also have a presence in the region<sup>1202</sup> and cooperate with regional states to assist with capacity building and providing resources. Participant 27 noted that as the Kenyan government allocates limited resources to the ANU, they feel more supported by these external partners.<sup>1203</sup> Scholars like Dimova have however warned that such assistance can push the Western agenda of the war on drugs.<sup>1204</sup> And while there is cooperation between international and regional counterparts, there is often limited cooperation between local ones, such as customs and ANUs.<sup>1205</sup> The lack of cooperation between national counterparts was often noted during informal discussions.

Many regional interceptions are the result of international intelligence,<sup>1206</sup> or international assistance,<sup>1207</sup> although they sometimes also result in cooperation between different local law enforcement entities, which is promising.<sup>1208</sup> Participant 21 explained how, prior to their arrival in Tanzania, there were very few effective maritime patrols. This was evidenced by the first heroin trafficking dhow intercepted by Tanzania which approached the coastline at

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<sup>1200</sup> Wright. 2013: 6; 46 - 47.

<sup>1201</sup> This includes improving skills to gather information, use technology, board and search vessels and even providing regional states with maritime assets, such as boats. Some states even donate patrol vessels to one another.

<sup>1202</sup> DEA. n.d. *African Region*. Available: <https://www.dea.gov/divisions/international/africa.shtml> [accessed 15 June 2017].

<sup>1203</sup> Interview Participant 27. 2016.

<sup>1204</sup> Dimova. 2016: 227 - 228.

<sup>1205</sup> Interview Participant 27. 2016.

<sup>1206</sup> Interview Participant 27 & Informal communications Seychelles.

<sup>1207</sup> Interview Participant 21. 2016.

<sup>1208</sup> As noted by, for example, Interview Participants 21 & 27. 2016.

night with its lights on and made no attempt to appear inconspicuous. When they were apprehended, “they didn’t know what had hit them at the time because it has never happened before. So that’s just the kind of threat level they saw coming into Tanzanian waters at the time, which was none.”<sup>1209</sup>

Participant 27 relayed that maritime shipments are mostly identified by intelligence because it is too expensive to patrol the coastline.<sup>1210</sup> There have also been a few alternative regional responses, such as blowing up heroin trafficking vessels in Kenya.<sup>1211</sup> These are however exceptional, although it is routinely done in places like Indonesia in response to IUU fishing.<sup>1212</sup> As Participants 2 and 5 noted, destroying vessels is a deterrent, because “if you want to transport heroin [...] you don’t want your ship to go around Kenya because you’ll lose your ship.”<sup>1213</sup> This has however not been a routine response by Kenya and seized vessels are of much better use if they could be used for training or maritime patrols. As discussed in the previous section, vessels intercepted on the high seas are not being seized, allowing them to undertake repeat trips across the Indian Ocean.<sup>1214</sup>

### 6.6.2 Criminal justice efforts

Maritime law enforcement efforts must be complimented by a judicial process allowing prosecution of traffickers caught in Coastal State waters and on the high seas.<sup>1215</sup> But the region’s capacity in this regard remains limited. While states like Seychelles have recently reformed their laws to allow them to establish broader jurisdiction for drug trafficking

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<sup>1209</sup> Interview Participant 21. 2016.

<sup>1210</sup> Interview Participant 27. 2016.

<sup>1211</sup> Capital News. 2015.

<sup>1212</sup> Chan, F. 2017. Indonesia blows up and sinks another 81 fishing boats for poaching. *Straits Times*. 2 April. Available: <https://www.straitstimes.com/asia/se-asia/indonesia-blows-up-and-sinks-another-81-fishing-boats-for-poaching> [accessed 3 February 2021].

<sup>1213</sup> Interview Participant 5. 2016. This was confirmed by a court case in Seychelles where the owner of a heroin trafficking dhow requested the court to return his dhow. On the subject, Participant 2, speaking about interdicting charcoal shipments, noted of Indonesia, “[T]he Indonesian Fisheries Ministry is, it is akin to Adolf Hitler for illegal fishing, they catch a fishing boat in their waters illegally fishing, they take the crew off and blow the boat up, no judicial process, nothing, they just blow the boat up [...] The owners of the boat, the people who are going to buy the product, you know, all suffer, the deterrent is significant. So maybe we should be destroying, you’ve still got to capture the damn thing and with only one naval ship in the region who’s got sexy drugs to interdict, blowing a charcoal ship up doesn’t sound very sexy.”

<sup>1214</sup> Interview Participant 21 noted: “We believe there aren’t many dhows doing this. So, we think they’re just multiple, they’re doing it again and again”.

<sup>1215</sup> Wright. 2013: 6; 46 - 47.

crimes,<sup>1216</sup> other states are yet to follow. While counter-piracy capacity building also focussed on improving regional courts, this is yet to meaningfully improve regional courts' ability to try drug trafficking cases, especially of high ranking traffickers.<sup>1217</sup> This might be because the courts are not receiving many traffickers to try and when they do, little evidence and weak investigations often lead to botched trials. While there have been a few successful regional prosecutions of foreign heroin traffickers,<sup>1218</sup> the majority of traffickers apprehended on the southern route are low level traffickers. A notable exception is Kenya's Akasha brothers which were extradited and successfully prosecuted by the US.<sup>1219</sup> Regional prosecutions of Iranian drug traffickers illustrate that these states are not as concerned about the repercussions which drug traffickers may face once they return home.

Although law enforcement plays an important role in drug control, the West African Commission on Drugs (WACD), formed in response to West Africa's cocaine crisis, rightly called for the law to be applied to the 'powerful and well connected', instead of the vulnerable, poor and uneducated. The focus on low level traffickers and users is a by-product of the failed war on drugs.<sup>1220</sup> In the process, counter-narcotic measures are utilized to show the public that the state is not corrupt, but powerful and in control.<sup>1221</sup> But this fails to affect the trafficking model as low level traffickers are in ample supply. This is also the case for counter-piracy which focuses on foot soldiers. When asked what was required to improve Kenya's response to heroin trafficking, Participant 27 suggested that they need a legal framework that will promote faster and effective prosecution of cases and to establish courts with the necessary capacity to effectively try drug cases.<sup>1222</sup>

## 6.7 Responses under the Economic Paradigm

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<sup>1216</sup> Misuse of Drugs Act 5 of 2016.

<sup>1217</sup> See, for example, Indian Ocean Forum on Maritime Crime, Southern Route Partnership, UNODC. 2016: 22.

<sup>1218</sup> See, for example, The East African. 2019. *US court drives the last nail in Akasha drug empire coffin*. 30 December. Available: <https://www.theeastafrican.co.ke/news/ea/US-court-drives-the-last-nail-in-Akasha-drug-empire-coffin/4552908-5401778-15qeicq/index.html> [accessed 17 April 2020]; News24. 2017. *Tanzania orders 'drug kingpin' be extradited to US*. 15 April. Available: <https://www.news24.com/Africa/News/tanzaniaorders-drug-kingpin-be-extradited-to-us-20170414> [accessed 3 February 2021].

<sup>1219</sup> Dimova. 2016: 227 – 228; Blum. 2016: 17, 27; The East African. 2019; Standard Media Kenya. 2019. *Three judges face extradition to USA over Akasha brothers bribe*. 9 November. Available: <https://www.standardmedia.co.ke/article/2001348650/three-judges-face-extradition-to-usa-over-akasha-brothers-bribe> [accessed 17 April 2020].

<sup>1220</sup> WACD. 2014: Declaration; Klantschnig, Dimova & Cross. 2016: 171.

<sup>1221</sup> Dimova. 2016: 231 – 234. Also see Haysom, Gastrow & Shaw. 2018: 23.

<sup>1222</sup> Interview Participant 27. 2016.

The economic paradigm is absent for heroin trafficking. The economic paradigm would consider heroin trafficking as a business model which imposes costs on the shipping industry. It would then be responded to by private entities who aim to increase its risk and decrease its reward.<sup>1223</sup> Despite heroin being moved on vessels which belong to individuals and companies, the public-private partnerships integral to counter-piracy are absent for heroin trafficking. Dhow owners likely are active participants in the trafficking networks, which explains their absence in the response, but shipping companies must take more responsibility for illicit shipments on their vessels. This remains to be done, as shipping companies are either unaware of illicit shipments or because some perhaps benefit from it. This participation of private industry in the response and the importance of law enforcement in ports is discussed in Chapters 7 and 8.

The absence of a legal finish also means that the business model of drug trafficking is not broken, as vessels remain in circulation and continue to move shipments. The only deterrent is currently the seizure of heroin, which as one participant put it, there is plenty more of. Therefore, while an argument can be made that the risk to traffickers increases due to seizures, it is not to an extent that it outweighs the benefits. The lack of effective demand and supply reduction efforts further contributes to this.

## **6.8 Responses under the Development Paradigm**

Under the development paradigm, drug trafficking is considered a symptom of under-development. The law enforcement capacity building efforts under the legal paradigm also fall under the development paradigm as they aim to improve regional institutions. While improving regional institutions was key to counter-piracy, equal effort has not been put into improving the ability of regional law enforcement institutions to specifically address heroin trafficking. While general maritime security and law enforcement capacity building efforts continue to be implemented by international organizations such as the UNODC, these are aimed at maritime crime in general and has had a limited impact on the region's ability to seize heroin. As someone in Seychelles observed, “[the police] can’t even tell the difference

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<sup>1223</sup> Scholars have however noted how drug trafficking is low risk and high return. See, for example, Dimova. 2016: 236.

between flour and powder.”<sup>1224</sup> At a time when drug-specific development funding has drastically declined globally, African states have expressed that the drug control development assistance provided by the international community fails to meet their needs.<sup>1225</sup> But, as Participants 2 and 3 stated, one must simultaneously question what regional states have done to help themselves.<sup>1226</sup>

Another form of development effort is addressing heroin trafficking’s socio-economic causes,<sup>1227</sup> which is similar to efforts to address the root causes of piracy. Although integral to countering the trade, these efforts are arguably not the responsibility of those addressing heroin trafficking at sea and will not be discussed further. Participant 23 also argued that it is more important to first address heroin as a harm, rather than an issue of development: “[T]he empowerment we are talking about should not be limited to economic empowerment first. If a user is stigmatized, what will economic empowerment help him? Let’s make him human, so he sees himself as somebody.”<sup>1228</sup>

## 6.9 Responses under the Humanitarian Paradigm

The immense focus on the criminal elements of drug trafficking neglects demand.<sup>1229</sup> Participant 26, a legal officer from the Commission for National Coordination of Drugs Control in Zanzibar, explained the importance of reducing demand: “[I]t’s hard to finish this heroin business. The only thing that is there is to help the users to stop so that the ones who are selling, they will not get someone to sell for them.”<sup>1230</sup> The criminalization of drug use incites corruption in the criminal justice system and worsens health and social challenges as treatment remains out of reach of users.<sup>1231</sup> Efforts under the humanitarian paradigm address this as it considers drug trafficking and drug use as a source of harm or suffering. Harm reduction measures are progressively being introduced by regional governments, recognising users as victims. This reflects a gradual global shift away from waging war on

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<sup>1224</sup> Informal communication in Seychelles. 2020.

<sup>1225</sup> UNODC. 2020a. Booklet 6: 29 - 30.

<sup>1226</sup> Interview Participants 2 & 3. 2018.

<sup>1227</sup> McCurdy & Kaduri. 2016: 317. For a detailed discussion, see UNODC. 2020a. Booklet 6: 37 - 47.

<sup>1228</sup> Interview Participant 23. 2016.

<sup>1229</sup> Carrier & Klantschnig. 2012: 104; Mbwambo et al. 2012: 157. Also see WACD. 2014: declaration.

<sup>1230</sup> Interview Participant 24. 2016.

<sup>1231</sup> WACD. 2014: 9.

drugs towards a harm reduction approach.<sup>1232</sup> There is also precedent for policy change in the AU Plan of Action on Drug Control, which emphasizes the importance of public health and human rights in drug control policies.<sup>1233</sup> This is a major shift in policy for Africa and calls for a balance between harm -, demand - and supply reduction.<sup>1234</sup>

Instead of potentially western-influenced and funded law enforcement clampdowns, Klantschnig et al also argue that drug trafficking must primarily be addressed through a development lens, instead putting resources towards drug users.<sup>1235</sup> This is because supply reduction efforts fail to address health implications.<sup>1236</sup> Harm reduction efforts fill this gap by focusing on primary prevention efforts, establishing methadone clinics, recovery houses and support programmes. These are aimed not only at addressing demand,<sup>1237</sup> but also to curb HIV and hepatitis C infections. Mbwambo et al argue that HIV intervention and treatment programmes in Africa have neglected the drug using population<sup>1238</sup> and harm reduction programmes therefore fill this gap. Harm reduction efforts also seek to prevent overdoses as the purity along the Southern Route is high and the price is cheap due to an over-supply<sup>1239</sup> and eastern Africa being one of its first destinations.<sup>1240</sup> Opalo has also attributed the very pure, yet, cheap heroin in Kenya to corruption.<sup>1241</sup>

Heroin is the drug which most east Africans receive treatment for.<sup>1242</sup> Treatment centres and other harm reduction efforts are often supported by local and international NGOs and international organizations, such as the Global Fund, United States President's Emergency Plan for AIDS Relief (PEPFAR) and the UN's health agencies. While this has alleviated pressure on health systems having to treat the growing number of users, measures such as

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<sup>1232</sup> Ratliff et al. 2015: 11 – 12; Klantschnig, Dimova & Cross. 2016: 167.

<sup>1233</sup> WACD. 2014: 16; 35.

<sup>1234</sup> International Drug Policy Consortium. 2017. *Drug policy in Africa: towards a human rights-based approach*. Available: [http://fileserver.idpc.net/library/IDPC-advocacy-note\\_Human-rights-in-Africa.pdf](http://fileserver.idpc.net/library/IDPC-advocacy-note_Human-rights-in-Africa.pdf) [accessed 3 February 2021].

<sup>1235</sup> Lehloenya. 2016: 9.

<sup>1236</sup> Klantschnig, Dimova & Cross. 2016: 171. Examples include the impact of increased seizures which results in low quality drugs and therefore, increased injecting drug use.

<sup>1237</sup> See, for example, Stone. 2016: 6; McCurdy & Kaduri. 2016: 317; Palet. 2014; Carrier & Klantschnig. 2012: 134; UNODC. n.d.f; Beiser. 2015.

<sup>1238</sup> Mbwambo et al. 2016: 157.

<sup>1239</sup> McCurdy & Kaduri. 2016: 313; Interview Participant 22. 2016. 3.9 tonnes of heroin seized by the CMF in the Indian Ocean between 2012 to 2014 had an average purity of 62%, with a maximum of 82.5%: UNODC. 2016c: 38. Also see Indian Ocean Forum on Maritime Crime, Southern Route Partnership, UNODC. 2016: 10.

<sup>1240</sup> Interview Participants 21 & 22. 2016.

<sup>1241</sup> Opalo. 2017.

<sup>1242</sup> UNODC. 2020a. 4: 22.

needle and syringe supply are still perceived by many in the region as encouraging drug use,<sup>1243</sup> while users continue to be stigmatized.<sup>1244</sup> And despite harm reduction programmes across the region, drug policies remain primarily repressive.<sup>1245</sup> In a primarily Muslim area like Zanzibar, participants explained how harm reduction measures were initially underground as the use of drugs is haram. As harm reduction measures in Zanzibar became more accepted practice, it became funded by the Global Fund, which also funds other regional states like Kenya, Seychelles and Mauritius.<sup>1246</sup>

Harm reduction measures in Africa still face many obstacles.<sup>1247</sup> Participant 23 from Kenya also noted how, despite implementing such programs, harm reduction efforts and curbing HIV infections are not governments' main priority. He added that interventions are instead often driven by NGOs or international agencies or development partners because "African governments don't actually allocate funds for it."<sup>1248</sup> Drug dealers have also intimidated harm reduction workers as they have lost customers.<sup>1249</sup>

Most regional resources continue to be spent on law enforcement instead of harm reduction efforts.<sup>1250</sup> The full range of impacts is therefore not sufficiently addressed. Overly focussing on drug supply also fails to address the corruption that accompanies drug trafficking. The WACD considered this dilemma and concluded that policies aimed at law enforcement are causing harm. Responses must therefore be tailored to address the needs of each supply, demand and transit state<sup>1251</sup> with a focus that goes beyond law enforcement. The WACD therefore called for balanced international assistance aimed not only at security and justice elements, but also treatment and harm reduction work.<sup>1252</sup>

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<sup>1243</sup> Ratliff et al. 2015: 13; Interview Participant 23. 2016.

<sup>1244</sup> Interview Participants 26 & 30. 2016; WACD. 2014: 9.

<sup>1245</sup> See, for example, Dimova. 2016: 231; Ratliff et al. 2015: 13 - 14.

<sup>1246</sup> Interview Participants 26 & 30. 2016; Global Fund. n.d. *Global Fund data explorer*. Available: <https://data.theglobalfund.org/investments/home> [accessed 29 February 2020]; Millati Islami World Services. n.d. *What is Millati Islam: 12 steps*. Available: <http://www.millatiislami.org/Welcome/12-steps> [accessed 29 February 2020].

<sup>1247</sup> Interview Participants 22 & 23. 2016. Also see, for example, Ratliff et al. 2015: 13 – 14; Craig. 2013; International Drug Policy Consortium. 2017.

<sup>1248</sup> Interview Participant 23. 2016.

<sup>1249</sup> Interview Participant 24. 2016; Personal communication, Kenya. 2016.

<sup>1250</sup> Carrier & Klantschnig. 2012: 129.

<sup>1251</sup> Vice. 2015. *Kofi Annan: the War on Drugs has failed in West Africa and around the world*. 28 March. Available: [http://www.vice.com/en\\_uk/read/kofi-annan-the-war-on-drugs-has-failed-in-west-africa-and-around-the-world](http://www.vice.com/en_uk/read/kofi-annan-the-war-on-drugs-has-failed-in-west-africa-and-around-the-world) [accessed 15 April 2017].

<sup>1252</sup> WACD. 2014: 10.

Although the region has shown commitment to addressing these challenges, these must continue to be supported by the law enforcement-focused international community.

## 6.10 Conclusion

This chapter has contributed to our understanding of heroin trafficking and its impact in eastern Africa. It described the motivations for utilizing the route, the modus operandi used and has scrutinized the legal frameworks shaping current responses. Existing responses were considered at the hand of counter-narcotics paradigms. UNCLOS and the Vienna Convention were found to be insufficient to base counter-efforts on, and therefore to effectively counter heroin trafficking on the high seas of the WIO, as it lacks a legal finish due to Flag State consent being required to seize heroin for foreign trafficking vessels. It was also found that human rights concerns further discourage a legal finish and that the shipping industry is largely absent in the response, despite being integral to counter-piracy's success in the same region. While interdicting drugs at sea likely has the biggest impact on the availability of drugs in eastern Africa,<sup>1253</sup> it cannot prevent all shipments from entering the region. Although the current burden-sharing with international navies is a good short term defence, regional states need to be able to secure their own waters in the long-term.<sup>1254</sup> And importantly, such efforts must be complimented by efforts towards addressing regional demand.<sup>1255</sup> Both of these necessities are currently overshadowed by the primarily security and law enforcement focus of the international community and regional states.

As was also stressed by participants, UNSC Resolution 2195/2014 cited that it is critical to “[strengthen] trans-regional and international cooperation on a basis of a common and shared responsibility to counter the world drug problem and related criminal activities.”<sup>1256</sup> The challenges posed by heroin trafficking in Africa surpass the ability of individual states to respond to them. They link and impact on developed and developing regions, all of which must unite in their response.<sup>1257</sup> Finally, eastern African states need to end the current

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<sup>1253</sup> UNODC. 2015a: 37; Indian Ocean Forum on Maritime Crime, Southern Route Partnership, UNODC. 2016: 9.

<sup>1254</sup> Ncube, M. & Baker, M.L. 2011. Beyond pirates and drugs: unlocking Africa's maritime potential and economic development. *African Security review*. 20(1): 67. DOI:10.1080/10246029.2011.561019.

<sup>1255</sup> Wright. 2013: 6; 46 - 47.

<sup>1256</sup> UN Security Council. 2014. Also see INCB. 2016. 104.

<sup>1257</sup> UNODC. 2016b: 11.

culture of impunity for corrupt facilitators of drug trafficking<sup>1258</sup> if any counter-efforts are to succeed. As the response to piracy has shown, states need to start looking beyond textbook responses based on existing international law to address the on-going threat posed by heroin trafficking through eastern Africa and find creative ways to cooperate with other states and non-state actors. A more innovative response with elements of counter-piracy is discussed in Chapter 8.

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<sup>1258</sup> Cole, 2014: 3.

## 7 Ivory trafficking between eastern Africa and Asia

The WIO and eastern Africa are not only frequented by pirates and drug traffickers, it is also at the heart of the illicit ivory trade. Similar to increased heroin trafficking, ivory trafficking within and from the region rapidly increased around the same time as Somali piracy. This is further confirmation of the region's vulnerability to TOC networks as a result of its location, limited law enforcement ability and corruption.<sup>1259</sup> Wildlife crime has increasingly gained attention<sup>1260</sup> due to the cruelty inflicted on many African species in order to satisfy demand concentrated primarily in Asia.<sup>1261</sup> Among the estimated 800 million twenty-foot equivalent units (TEU) containers moved across the ocean annually<sup>1262</sup> are various live species and wildlife products including pangolins, rhino horn and elephant ivory. As eastern Africa is ideally situated near Asia and boasts well-developed transport infrastructure,<sup>1263</sup> states like Kenya,<sup>1264</sup> Tanzania<sup>1265</sup> and Mozambique<sup>1266</sup> have served as continental chokepoints for

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<sup>1259</sup> Wright. 2013. 2013: 3.

<sup>1260</sup> See, for example, UNODC. 2020b. *World Wildlife Crime Report*. Vienna: UNODC: 9.

<sup>1261</sup> Bruwer, C. 2019a. Lions, tigers and bears: wildlife trafficking in the age of globalisation. *The Conversation*. 20 February. Available: <https://www.dailymaverick.co.za/article/2019-02-20-lions-tigers-and-bears-wildlife-trafficking-in-the-age-of-globalisation/> [accessed 28 May 2020].

<sup>1262</sup> Kinyua, B.C. 2020. Kenya leading IMO talks on clamping down on wildlife trafficking. *Maritime Executive*. 4 October. Available: <https://www.maritime-executive.com/editorials/kenya-leading-imo-talks-on-clamping-down-on-wildlife-trafficking> [accessed 18 February 2021].

<sup>1263</sup> Carlson, K., Wright, J. & Donges, H. 2015. In the line of fire: elephant and rhino poaching in Africa. In *Small Arms Survey 2015*. Geneva: Graduate Institute Geneva: 11; Outhwaite, W. & Little, L. 2020. *Countering wildlife trafficking through Kenya's seaports*. Cambridge: Traffic: 2 – 3. Available: <https://www.traffic.org/publications/reports/workshop-proceedings-countering-wildlife-trafficking-through-kenyas-ports/> [accessed 15 November 2020].

<sup>1264</sup> For more detailed discussions on ivory trafficking and Kenya, see, for example, Somerville, K. 2017a. 'White gold': Kenya's black tale of greed. *The Marjan Centre*. 15 February. Available: <https://themarjancentre.wordpress.com/> [accessed 2 March 2017]; Thouless, C.R. et al. 2016. *African Elephant Status Report 2016: an update from the African Elephant Database*. Occasional Paper Series of the IUCN Species Survival Commission, No. 60 IUCN/SSC Africa elephant Specialist Group. Gland: IUCN: 105 – 108; Vogt, H. 2015. East Africa's biggest port emerges as major transit point for smuggling, threatening Africa's elephants. *The Wall Street Journal*. 18 November. Available: <https://www.wsj.com/articles/kenyan-port-is-hub-for-illicit-ivory-trade-1447720944> [accessed 28 February 2017]; UNODC. 2016a. *World Wildlife Crime Report*. Geneva: UNODC: 42; Elephant Action League (EAL) & Wildleaks. 2015. *Flash mission report: Port of Mombasa, Kenya*: 1 -2, 8, 10. Available: <https://wildleaks.org/fr/flash-rapport-mombasa-port-un-danger-pour-lafrique/> [accessed 15 August 2016]; EWN. 2016. *Kenya seizes nearly 2 tonnes of ivory from shipment bound for Cambodia*. 23 December. Available: <http://ewn.co.za/2016/12/23/kenya-seizes-nearly-2-tonnes-of-ivory-from-shipment-bound-for-cambodia> [accessed 30 March 2017].

<sup>1265</sup> For a more detailed discussion on ivory trafficking in Tanzania, see, for example, Blanc, J.J., Thouless, C.R., Hart, J.A., Dublin, H.T., Douglas-Hamilton, I., Craig, G.C. & Barnes, R.F.W. 2003. *African Elephant Status Report 2002: an update from the African Elephant Database*. IUCN/SSC African Elephant Specialist Group. Gland: IUCN.; Environmental Investigation Agency (EIA). 2014. *Vanishing point: criminality, corruption and the devastation of Tanzania's elephants*. London: EIA; Somerville, K. 2017b. The toxic legacy of Tanzania's ivory.

multiple-ton ivory shipments, whilst also suffering substantial elephant population declines due to poaching.<sup>1267</sup> In 2020, elephants were listed as endangered by the International Union for the Conservation of Nature (IUCN).<sup>1268</sup>

Ivory trafficking has been written on extensively from a landward perspective, but it has been neglected in discussions on maritime security. The ocean is however the main vector for moving illicit wildlife products and the integral role of the shipping and transport industry in trafficking wildlife was acknowledged by the UN General Assembly in 2018.<sup>1269</sup> Seventy-two per cent of ivory is trafficked in containers by sea,<sup>1270</sup> thereby highlighting the need to not only respond to wildlife trafficking at sea, but also to security weaknesses in ports and maritime supply chains<sup>1271</sup> as a means of achieving maritime security. This chapter draws from the literature and insights provided by interviews with CITES and UN staff, wildlife law enforcement officers, conservationists and academics, in order to unpack the maritime trafficking of ivory between eastern Africa and Asia. It follows a similar structure to Chapter 6 by considering the trade and its impacts. It then turns to the international legal framework and how this has shaped current responses. Responses are again considered at the hand of paradigms, namely the security, legal, economic, development and humanitarian paradigms.

The salient characteristics of any illicit market also drive the ivory trade. Central to all of these are governance structures which have failed to combat supply, demand and the

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*The Marjan Centre*. 28 February. Available: <https://themarjancentre.wordpress.com/> [accessed 2 March 2017]; Little, L. 2020. *Countering wildlife trafficking through Tanzania's sea ports*. Cambridge: Traffic.

<sup>1266</sup> For a more detailed discussion on ivory trafficking in Mozambique, see, for example, Wildlife Conservation Society (WCS). 2015a. *Govt of Mozambique announces major decline in national elephant population*. 26 May. Available: <https://newsroom.wcs.org/News-Releases/articleType/ArticleView/articleId/6760/Govt-of-Mozambique-announces-major-decline-in-national-elephant-population.aspx> [accessed 9 February 2017]; Baptista, A. 2019. Mozambique – police warn of rise in poaching in Gorongosa. *Africa Sustainable Conservation News*. 25 October. Available: <https://africasustainableconservation.com/2019/10/26/mozambique-police-warn-of-rise-in-poaching-in-gorongosa/> [accessed 23 May 2020]; EIA. 2017. *The Shuidong connection: exposing the global hub of the illegal ivory trade*. London: EIA.

<sup>1267</sup> Thoulouss et al. 2016: 140; CITES. 2019a. *Report on the Elephant Trade Information System (ETIS)*. Proceedings of the eighteenth meeting of the Conference of the Parties. 23 May – 3 June, Colombo. CoP18 Doc. 69.3: 14. Available: <https://cites.org/sites/default/files/eng/cop/18/doc/E-CoP18-069-03.pdf> [accessed 5 February 2021]; Interview Participant 14. 2016. Nairobi, Kenya.

<sup>1268</sup> IUCN.

<sup>1269</sup> Kinyua. 2020.

<sup>1270</sup> Traffic. 2020. *Countering wildlife trafficking through Kenya's seaports: workshop proceedings*. Cambridge: Traffic: 1.

<sup>1271</sup> See, for example, EAL & Wildleaks. 2015: 10; Outhwaite & Little. 2020; Little. 2020.

movement of ivory.<sup>1272</sup> The focus of this chapter is on responses to the transport of ivory between eastern Africa and Asia, with limited focus on demand and supply. This must not take away from the reality that supply, demand<sup>1273</sup> and everything in-between are intricately linked and that for the trade to be eradicated, all nodes must be addressed collectively. In addition, due to the clandestine nature of the illicit ivory market, it is acknowledged that related data must be considered with caution.<sup>1274</sup> Yet, unlike heroin trafficking where the victims may seem invisible, wildlife crimes leave behind mutilated victims, offering more quantifiable proof of the trade.

It is further noted that the illegal ivory trade has been a moving target since the research commenced. Demand and poaching fluctuate as it is influenced by factors including government endorsement, cultural beliefs,<sup>1275</sup> economic developments<sup>1276</sup> and political changes.<sup>1277</sup> The primary ivory market in China has gone from legal, to illegal, to all wildlife markets possibly being banned due to the link between wildlife consumption and COVID-19,<sup>1278</sup> which in turn appears to have caused increases in poaching due to the decline in

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<sup>1272</sup> CITES. 2019b. *Report on Monitoring the Illegal Killing of Elephants (MIKE)*. Proceedings of the eighteenth meeting of the Conference of the Parties. 23 May – 3 June, Colombo. CoP18 Doc. 69.2: 10. Available: <https://cites.org/sites/default/files/eng/cop/18/doc/E-CoP18-069-02.pdf> [accessed 11 February 2021].

<sup>1273</sup> For detailed research on ivory demand, see for example, Miller, M. 2016. How can conservationists convince consumers not to buy ivory? *Cool Green Science*. 8 June. Available: <http://blog.nature.org/science/2016/06/08/conservation-convince-consumers-not-buy-ivory-elephants-endangered-rhinos/> [accessed 1 December 2017]; Yufang, G. & Clark, S.G. 2014. Elephant ivory trade in China: trends and drivers. *Biological Conservation*. 180 (2014): 29. DOI: 10.1016/j.biocon.2014.09.020.

<sup>1274</sup> Interview Participant 15. 2016 & Interview Participant 18. 2018. Also see UNODC. 2020b: 113.

<sup>1275</sup> Interview Participant 16. 2016. Nairobi, Kenya; Yufang & Clark. 2014: 23- 30; Russo, C. 2014. A young Chinese conservationist discusses his country's role in the ivory trade. *National Geographic*. 2 June. Available: <http://voices.nationalgeographic.com/2014/06/02/a-young-chinese-conservationist-discusses-his-countrys-role-in-the-ivory-trade/> [accessed 28 February 2017]; EIA. 2014: 28 - 29; Yufang & Clark. 2014: 24; CITES Secretariat. 2005. *Technical Mission Report: verification mission related to the control of internal trade in ivory in China*. Available: <https://www.cites.org/sites/default/files/eng/com/sc/53/E53-20-1.pdf> [accessed 1 December 2016].

<sup>1276</sup> Interview Participants 14; 15 & 16. 2016; Stiles, D. 2004. The ivory trade and elephant conservation. *Environmental Conservation*. 31 (4): 312. DOI:10.1017/S0376892904001614; Yufang & Clark. 2014: 29; EIA. 2014: 29; Crosta, A., Beckner, M. & Sutherland, K. 2015. *Blending ivory: China's old loopholes, new hopes*. Los Angeles: EAL: 42; McLellan, E. et al. 2014. Illicit wildlife trafficking: an environmental, economic and social issue. *Perspectives*. 14 (2004). Nairobi: UNEP: 3; Save the Elephants. 2015. *Sharp fall in the prices of elephant tusks in China*. 7 December. Available: <http://savetheelephants.org/about-ste/press-media/?detail=sharp-fall-in-the-prices-of-elephant-tusks-in-china> [accessed 28 February 2017]; Martin, E. & Vigne, L. 2010: Consumption of elephant and mammoth ivory increases in southern China. *Pachyderm*. 49(1); Yufang & Clark. 2014: 23 - 30; Russo. 2014;

<sup>1277</sup> Chaiklin, M. 2010. Ivory in world history – early modern trade in context. *History Compass*. 8(6): 537 – 539. DOI:10.1111/j.1478-0542.2010.00680; Yufang & Clark. 2014: 24.

<sup>1278</sup> See, for example. UNODC. 2020b: 34; Chelin, R. & Daghar, M. 2020. China's mixed messages on wildlife trade since COVID-19. *ISS*. 2 November. Available:

tourism-related income in Africa.<sup>1279</sup> Increased poaching could also be due to a ‘maximum harvest strategy’ as criminal networks anticipate lower supply due to the looming closures of markets.<sup>1280</sup> The price of ivory has fluctuated greatly and so have levels of poaching and demand. But despite these changes, ivory continues to be trafficked in large quantities across the Indian Ocean, sometimes years after it was harvested.

## 7.1 Elephant poaching and trafficking in eastern Africa

### 7.1.1 Demand

African elephant (*Loxodonta Africana*) ivory has been sought-after for centuries to make items such as piano keys, jewellery and carvings.<sup>1281</sup> This demand has remained, primarily in Asia where ivory carvings are acquired as investments and are considered a status symbol.<sup>1282</sup> China is the end destination of the majority of African ivory and most seizures have been made there.<sup>1283</sup> Ivory markets in nearby states like Vietnam also cater primarily for the Chinese.<sup>1284</sup> The US is the world’s second largest ivory consumer, although the great majority of this is legal antique ivory.<sup>1285</sup> This is in sharp contrast to investigations carried out in China, Hong Kong and Vietnam, where almost all ivory for sale was illegally acquired.<sup>1286</sup>

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<https://issafrica.org/iss-today/chinas-mixed-messages-on-wildlife-trade-since-covid-19> [accessed 12 November 2020].

<sup>1279</sup> See, for example, Marshall, C. 2020. How the Covid-19 pandemic is threatening Africa’s wildlife. 6 May. *BBC*. Available: <https://www.bbc.com/news/av/world-africa-52564615/how-the-covid-19-pandemic-is-threatening-africa-s-wildlife> [accessed 13 May 2020]. Prior to the pandemic, poaching had been declining. See For example, Dengler, R. 2019. Elephant poaching is decreasing as ivory demand slows. *Discover Magazine*. 3 June. Available: <https://www.discovermagazine.com/planet-earth/elephant-poaching-is-decreasing-as-ivory-demand-slows> [accessed 11 February 2021].

<sup>1280</sup> Interview Participant 16. 2016.

<sup>1281</sup> Chaiklin. 2010: 535; Naylor, R.T. 2005. The underworld of ivory. *Crime, Law and Social Change*. 42 (2005): 266. DOI:10.1007/s10611-005-2143-7.

<sup>1282</sup> Yufang & Clark. 2014: 23 - 30; Russo. 2014; Chaiklin. 2010: 537 – 539.

<sup>1283</sup> CITES 2016b: 15; Varung, V., Ewing, T. & Miller, J. 2014. *Out of Africa: mapping the global trade in illicit elephant ivory*. Washington: C4ADS: 3.

<sup>1284</sup> Interview Participant 14. 2016. Also see CITES. 2019a: 19 – 20. For more detail on ivory trafficking through Hong Kong, see, for example, CITES. 2016b: 19; Martin, E. & Martin, C. 2011. Large and mostly legitimate: Hong Kong's mammoth and elephant ivory trade. *Pachyderm*. 50(1): 37 - 49; EIA. 2014a: 26 – 27; CITES. 2016b: 19; Crosta, Beckner & Sutherland. 2015: 18.

<sup>1285</sup> Interview Participants 14 & 15. 2016. For discussions on key illegal ivory markets, see, for example, Brennan, A.J. & Kalsi, J.K. 2015. Elephant poaching & ivory trafficking problems in sub-saharan Africa: an application of O’Hara’s principles of political economy. *Ecological Economics*. 120 (2015): 326 Available: DOI:10.1016/j.ecolecon.2015.08.013.

<sup>1286</sup> As noted by Interview Participant 14.2016. Also see Crosta, Beckner & Sutherland. 2015: 16.

With few Asian elephants left, demand is satisfied almost exclusively by African elephant ivory.<sup>1287</sup> This is in contravention of an international trade ban imposed in 1989 when member states of the Convention on the International Trade in Endangered Species of Wild Fauna and Flora (CITES), the key international instrument applicable to international wildlife trade, voted to ban international trade in ivory. This was the result of a drastic decline in African elephants in the period leading up to the ban which was attributed to the regulated international ivory trade catering for primarily Japanese and Chinese demand.<sup>1288</sup> Half of Africa's elephants reportedly succumbed to poaching during this time.<sup>1289</sup> The ban did however not translate into domestic trade bans and key consumer states like China continued to allow legal domestic markets<sup>1290</sup> despite few sources of legal supply.

Southern African states with sustainable populations were allowed to sell their ivory to Asian states during two regulated sales after the ban. It was hoped these sales would eliminate illegal trade,<sup>1291</sup> but the available supply was not enough to satisfy demand. The impact of the international trade ban<sup>1292</sup> and once-off sales<sup>1293</sup> remain fiercely debated. It is

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<sup>1287</sup>Wright. 2013: 30; Defenders of wildlife. *Basic facts about elephants*. n.d. Available: <http://www.defenders.org/elephant/basic-facts> [accessed 3 February 2017]; Chaiklin. 2010: 537 – 539.

<sup>1288</sup>Lemieux, A.M. & Clarke, R.V. 2009. The international ban on ivory sales and its effects on elephant poaching in Africa. *British Journal of Criminology*. 49(2009): 458. DOI:10.1093/bjc/azp030; Roberts, A.M. 2014. Detailed look at the ivory trade and the poaching of elephants. *Quinnipiac Law Review*. 33(2014): 569. DOI:10.1525/sp.2007.54.1.23.

<sup>1289</sup>Roberts. 2014: 569; Brennan & Kalsi. 2015: 318. For more sources on poaching before the 1989 ban, see, for example, EIA. 2014: 2; Naylor. 2005: 278.

<sup>1290</sup>The Guardian. 2017. *Alone, China's ban on ivory could make life worse for elephants*. 6 January. Available: [https://www.theguardian.com/environment/2017/jan/06/china-ban-ivory-life-worse-elephants-poaching?CMP=share\\_btn\\_tw](https://www.theguardian.com/environment/2017/jan/06/china-ban-ivory-life-worse-elephants-poaching?CMP=share_btn_tw) [accessed 15 February 2017].

<sup>1291</sup>Yufang & Clark. 2014: 24; CITES Secretariat. 2005.

<sup>1292</sup>For discussions the 1989 ban, as well as its impact, see, for example, International Fund for Animal Welfare (IFAW). 2006. *Ivory market in China - China ivory trade survey report*. Yarmouth Port: IFAW: 6. Available: <http://www.ifaw.org/sites/default/files/Ivory%20Market%20in%20China%20China%20Ivory%20trade%20survey%20report%20-%202006.pdf> [accessed 6 February 2017]; Yufang & Clark. 2014: 23 – 30; Stiles. 2004: 312; 319; Russo. 2014; Lemieux & Clarke. 2009: 459; 463; Naylor. 2005: 287; Brennan & Kalsi. 2015: 321 – 322; Blanc et al. 2003: 5; Wittemyer, G., Northrup, J.M., Blanc, J., Douglas-Hamilton, I., Omondi, O. & Burnham, K.P. 2014. Illegal killing for ivory drives global decline in African elephants. *Proceedings of the National Academy of Science of the United States of America*. 111(36): 1. DOI:10.1073/pnas.1403984111

<sup>1293</sup>For more on the once-off sales regulation and impact, see Roberts. 2014: 571; Naylor. 2005: 289; Thouless et al. 2016: 129; Stiles. 2004: 309; Carlson, Wright & Donges. 2015: 11; Crosta, Beckner & Sutherland. 2015: 1; CITES. 2019a: 4; CITES. 2008. *Ivory auctions raise 15 million USD for elephant conservation*. 7 November. Available: [https://cites.org/eng/news/pr/2008/081107\\_ivory.shtml](https://cites.org/eng/news/pr/2008/081107_ivory.shtml) [accessed 28 February 2017]; Great Elephant Census. 2016. *Conservation*. Available: <http://www.greatelephantcensus.com/background-on-conservation/> [accessed 2 December 2016]; CITES. 2016a. Report on Monitoring the Illegal Killing of Elephants (MIKE). *Proceedings of the Seventeenth meeting of the Conference of the Parties*. 24 September – 5 October 2016: 8. Available: [https://cites.org/eng/prog/mike/data\\_and\\_reports](https://cites.org/eng/prog/mike/data_and_reports) [accessed 5 February 2021]; Royal Institute for International Affairs (RIIA). 2002. *International environmental crime: the nature and control of international black markets*. London: RIIA: 10; 15; Morell, V. 2016. Study takes sharp tusk to effort to legalize

however hard to argue with continued poaching after both events.<sup>1294</sup> After the last sale in 2008, a moratorium on future sales was put in place, which meant that despite China's efforts to regulate their domestic market, they were not to receive ivory again for at least nine years. Chinese ivory buyers therefore had to seek poached ivory to meet demand.<sup>1295</sup> Participant 15, a senior CITES staff member, was of the opinion that if China had a more regular legal supply, it might have curbed poaching, because no matter how well China could regulate its domestic market, there was no supply.<sup>1296</sup>

The international ban in parallel with high demand, ineffective conservation policies, legal domestic markets and once-off sales has led to a confused situation where the ivory market is primarily illicit and satisfied by African ivory. The most recent spate of poaching began across Africa<sup>1297</sup> around 2006.<sup>1298</sup> In 2017, CITES parties passed a resolution to close down all domestic ivory markets.<sup>1299</sup> This, ongoing poaching and the resulting international pressure have now forced China<sup>1300</sup> and Hong Kong<sup>1301</sup> to implement domestic ivory bans. While bans do little to address demand and it remains to be seen if the parallel closure of international and domestic markets will have the desired impact, there are early indications

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ivory trade. *Science*. 353(6305): 1196. DOI: 10.1126/science.353.6305.1196; The Ecologist. 2016. *Proposal for a ban on international trade in elephant ivory is defeated at the CITES conference*. 3 October. Available: [http://www.theecologist.org/News/news\\_round\\_up/2988188/proposal\\_for\\_a\\_ban\\_on\\_international\\_trade\\_in\\_elephant\\_ivory\\_is\\_defeated\\_at\\_the\\_cites\\_conference.html](http://www.theecologist.org/News/news_round_up/2988188/proposal_for_a_ban_on_international_trade_in_elephant_ivory_is_defeated_at_the_cites_conference.html) [accessed 28 February 2017]; Bale, R. 2016. A big day at CITES: no ivory or rhino horn trade. *National Geographic*. 3 October. Available: <http://voices.nationalgeographic.com/2016/10/03/184016/> [accessed 28 February 2017].

<sup>1294</sup> Also see Yufang & Clark. 2014: 24; CITES Secretariat. 2005; CITES 2016b: 19; Wright. 2013: 31; EIA. 2014: 28, 30; Crosta, Beckner & Sutherland. 2015: 1.

<sup>1295</sup> For more on the moratorium, see, for example, Great Elephant Census. 2016. For more on demand reduction efforts, see, for example, Brennan & Kalsi. 2015: 332, 334; EIA. 2014: 33.

<sup>1296</sup> Interview Participant 15. 2016. Nairobi, Kenya; CITES. 2016a: 8; UNODC. 2016a: 10; 31.

<sup>1297</sup> Brennan & Kalsi. 2015: 318.

<sup>1298</sup> CITES. 2016a: 2; Interview Participant 15. 2016.

<sup>1299</sup> The Ecologist. 2016.

<sup>1300</sup> BBC. 2018c. *China's ban on ivory trade comes into force*. 1 January. Available: <https://www.bbc.com/news/world-asia-china-42532017> [accessed 22 August 2018]; Actman, J. 2016. China to shut down its ivory trade by the end of 2017. *National Geographic*. 30 December. Available: <http://news.nationalgeographic.com/2016/12/wildlife-watch-china-legal-ivory-market-african-elephants/> [accessed 27 January 2017]; Smith, J.F. 2016. U.S bans commercial trade of African elephant ivory. *New York Times*. 2 June. Available: [http://mobile.nytimes.com/2016/06/03/world/africa/elephant-ivory-ban.html?\\_r=0&referrer=https%3A%2F%2Fwww.google.co.uk%2F](http://mobile.nytimes.com/2016/06/03/world/africa/elephant-ivory-ban.html?_r=0&referrer=https%3A%2F%2Fwww.google.co.uk%2F) [accessed 28 February 2017]; CITES. 2016b: 19.

<sup>1301</sup> BBC. 2018b. *Hong Kong bans ivory trade in 'historic' vote*. 31 January. Available: <https://www.bbc.com/news/world-asia-china-42891204> [accessed 22 August 2018]; Dasgupta, S. 2016. Japan to ban ivory trade by 2021. *Mongabay*. 22 December. Available: <https://news.mongabay.com/2016/12/hong-kong-to-ban-ivory-trade-by-2021/> [accessed 1 March 2017].

that demand may have retracted.<sup>1302</sup> The COVID-19 pandemic, which origin has been attributed to wet markets in China, has now resulted in China possibly banning all wildlife consumption.<sup>1303</sup> Illegal trade in other species like pangolins can therefore also be monitored to establish the efficacy or failure of bans to combat illegal trade. If demand does not simultaneously decline, the closure of all domestic markets can give black market traders a monopoly and force all trade underground<sup>1304</sup> instead of causing the market to retract.

As Participant 16, a wildlife trade researcher, explained, two categories of demand must be distinguished:

“There is consumer demand for the worked ivory and then there is demand for the raw ivory [...] demand for the raw ivory has completely different drivers than demand for the worked ivory. And what is driving the poaching [...] [is] demand for the raw ivory, not ivory to manufacture pretty things. They’re stockpiling it. They have stockpiled at least 1000 tons of ivory that has not been worked. And it’s because of the bans.”

Raw ivory is in demand by speculators who buy in bulk.<sup>1305</sup> Participant 16 suggests that speculators are likely in the ivory industry, with connections to government.<sup>1306</sup> Participant 14, also a well-known wildlife trade investigator, noted that there are large amounts of ivory that fail to reach the retail market, which can only be explained by stockpiling. He observed:

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<sup>1302</sup> WWF & GlobeScan. 2019. *Demand under the ban - China ivory consumption research 2019*. Available: [https://wwfint.awsassets.panda.org/downloads/demand\\_under\\_the\\_ban\\_china\\_ivory\\_consumption\\_research\\_2019\\_final.pdf](https://wwfint.awsassets.panda.org/downloads/demand_under_the_ban_china_ivory_consumption_research_2019_final.pdf) [accessed 9 February 2021].

<sup>1303</sup> See, for example. UNODC. 2020b: 34; Chelin & Daghar. 2020; Mukpo, A. 2020. As calls to shutter wildlife markets grow, China struggles with an industry worth billions. *Mongabay*. Available: <https://news.mongabay.com/2020/04/as-calls-to-shutter-wildlife-markets-grow-china-struggles-with-an-industry-worth-billions/> [accessed 5 February 2021].

<sup>1304</sup> Interview Participant 14. 2015; Crosta, Beckner & Sutherland. 2015: 1; 33; 39; The Guardian. 2017. Also see CITES. 2016b: 19; IFAW. 2008. *Criminal nature: the global security implications of the illegal wildlife trade*. Yarmouth Port: IFAW: 3; Lavorgna, A. 2014. Wildlife trafficking in the internet age. *Crime Science*. 3 (5): 9. DOI:10.1186/s40163-014-0005-2; Sochan, R. 2020. Traders are stockpiling ivory, rhino horns in SEA. *African Elephant Journal*. 7 May. Available: <https://africanelephantjournal.com/traders-are-stockpiling-ivory-rhino-horns-in-sea/> [accessed 7 May 2020].

<sup>1305</sup> Interview Participants 15 & 16. 2016. Also see UNODC. 2016a: 10, 46; Yufang & Clark. 2014: 23 – 30; Russo. 201; CITES. 2016a: 8.

<sup>1306</sup> Interview Participant 16. 2016.

“We know the approximate number of elephants being poached, we know the approximate weight per elephant in number of kilos, and we know that China and Vietnam are taking a huge quantity. But there is still an unknown amount that is probably being stockpiled.”<sup>1307</sup>

It is reported that Asian buyers again increased stockpiling ivory in 2020 due to COVID-19 travel restrictions to China.<sup>1308</sup>

### 7.1.2 Supply

The two species of African elephants - savannah elephants and forest elephants - are found across 37 African states.<sup>1309</sup> The majority are savannah elephants, found primarily in southern and eastern Africa.<sup>1310</sup> Much smaller populations of forest elephants are found in Central and West Africa<sup>1311</sup> where they have been significantly reduced by conflict and decades-long poaching. Elephant population estimates are important to identify whether populations are increasing, decreasing or stable, and to inform conservation policies. Population data is however open to scrutiny due to the difficulty in counting wild animals and locating carcasses.<sup>1312</sup> Yet, despite these challenges, the estimates are becoming increasingly accurate. Having less elephants to count also plays a role.<sup>1313</sup> Due to this thesis’s focus on maritime trafficking, population declines are only briefly noted to illustrate the scale of the market.

CITES established the Monitoring of Illegal Killing of Elephants (MIKE) Programme<sup>1314</sup> and the Elephant Trade Information System (ETIS)<sup>1315</sup> in 1997. MIKE data is based on carcass

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<sup>1307</sup> Interview Participant 14. 2016; UNODC. 2016a: 41. Also see UNODC. 2020b: 11.

<sup>1308</sup> Sochan. 2020.

<sup>1309</sup> Thouless, C.R. et al. 2016: 2; 29. The distinction between the two sub-species is important, as it helps to identify where an elephant was killed: Chaiklin. 2010: 531. Also see Wasser, S.K, Brown, L., Mailand, C., Mondol, S., Clark, W., Laurie, C. & Weir, B.S. 2015. Genetic Assignment of large seizures of elephant ivory reveals Africa’s major poaching hotspots. *Science*. 349 (6243): 84 - 85. DOI: 10.1126/science.aaa2457.

<sup>1310</sup> Thouless et al. 2016: 6.

<sup>1311</sup> Wasser et al. 2015: 84.

<sup>1312</sup> Interview Participant 15. 2016; Thouless et al. 2016: 20 – 21; Wasser et al. 2015: 87; UNODC. 2016a: 46; Underwood, F.M., Burn, R.W. & Milliken, T. 2013. Dissecting the illegal ivory trade: an analysis of ivory seizures data. *PLoS ONE*. 8 (10): 1 – 3. DOI:10.1371/journal.pone.0076539.

<sup>1313</sup> Interview Participant 16. 2016.

<sup>1314</sup> For detail on how MIKE works, see CITES. 2016a: 1 – 2; 10; 42.

counts and is used to calculate the Proportion of Illegally Killed Elephants (PIKE).<sup>1316</sup> A PIKE level of more than 0.5 indicates that more elephants are killed illegally than are dying from other causes.<sup>1317</sup> From MIKE and PIKE data one can calculate the poached ivory in circulation based on the approximation that 10 kg of ivory is harvested from each elephant.<sup>1318</sup> ETIS uses seizure data received from states to measure illegal trade activity and to assess how these are related to measures such as bans.<sup>1319</sup> Counting worked items at markets is another measurement tool. Such counts have produced a fraction of ivory in comparison to the hundreds of tonnes moved annually.<sup>1320</sup> It is therefore assumed the remaining ivory is traded illegally and that the majority of retail demand is illicit.<sup>1321</sup>

Continental PIKE levels began increasing in 2006, peaked in 2011<sup>1322</sup> and then began to decrease.<sup>1323</sup> By 2010, more elephants were being poached than those who died of other causes<sup>1324</sup> and all measurement efforts over the past few years have indicated significant population declines across Africa.<sup>1325</sup> Population declines are also influenced by growing human populations, human-animal conflict, habitat destruction and climate change.<sup>1326</sup> Regrettably, the urgency of addressing poaching often subverts attention from these equally devastating drivers. In 2016, the first continental decline in elephant populations in twenty-five years was identified. This was attributed primarily to poaching to supply Chinese demand.<sup>1327</sup> Because of measurement tools like MIKE, we know much more about elephant

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<sup>1315</sup> For detail on how ETIS works, see Carlson, Wright & Donges. 2015: 11; Underwood, Burn & Milliken. 2013. 1–2; CITES. 2016c. *Notification to the Parties No. 2016/007*. Available: <https://cites.org/sites/default/files/notif/E-Notif-2016-007.pdf> [accessed 25 November 2016].

<sup>1316</sup> Wasser et al. 2015: 87; CITES. 2016a: 2.

<sup>1317</sup> EIA. 2014: 4.

<sup>1318</sup> UNODC. 2016a: 41. For a more detailed discussion, see, for example, Lusseau, D. & Lee, P. 2016. Can we sustainably harvest ivory? *Current Biology*. 26(21): 1. DOI:10.1016/j.cub.2016.08.060.

<sup>1319</sup> CITES. 2016b: 1.

<sup>1320</sup> Interview Participant 14. 2016. Also see CITES. 2019a.

<sup>1321</sup> UNODC. 2016a: 17.

<sup>1322</sup> CITES. 2016a: 2; CITES. 2019b: 4. Also see EIA. 2014: 3; Wittemyer et al. 2014: 1.

<sup>1323</sup> CITES. 2020. *Monitoring the Illegal Killing of Elephants (MIKE) report: PIKE trend analysis – methodology and results*. Geneva: CITES: 7. CITES. 2019b: 16; CITES. 2016b: 7; Interview Participant 15. 2016.

<sup>1324</sup> Thouless et al. 2016: 29; CITES. 2016b: 23. Also see CITES, IUCN & TRAFFIC. 2013. *Status of African Elephant populations and levels of illegal killing and the illegal trade in ivory*. Available: <http://goo.gl/Z3uuZE> [accessed 28 February 2017]; Carlson, Wright & Donges. 2015: 6.

<sup>1325</sup> UNODC. 2020b: 50.

<sup>1326</sup> Chen, F. 2015. Poachers and snobs: demand for rarity and the effects of antipoaching policies. *Conservation Letters*. 9 (1): 65. DOI:10.1111/conl.12181; Outhwaite & Little. 2020: 2.

<sup>1327</sup> Thouless et al. 2016: 3 – 5; 29; 89; Wasser et al. 2015: 84; Somerville. 2017b. Also see Stiles. 2004: 312; Douglas-Hamilton, I. 1979. *The African elephant action plan*. Nairobi: IUCN; UNODC. 2016a: 42.

populations and the ivory trade than we did when the ban was imposed in 1989.<sup>1328</sup> And it is hard to argue with tens of thousands of carcasses with their tusks removed. Seizures reported to ETIS between 2008 and 2017 totalled nearly 393,100 kgs,<sup>1329</sup> the equivalent of almost 40,000 elephants. And those are only the seizures which were reported by states.

Illegal trade activity has been parallel to poaching rates since 2008.<sup>1330</sup> This is to be expected as increased poaching leads to increased supply, resulting in increased trade activity.<sup>1331</sup> Transactions peaked at its highest ever, including the pre-ban period, in 2013<sup>1332</sup> and then began to decline.<sup>1333</sup> Large seizures began increasing again in 2019 when the three biggest ever seizures were made since the 1989 ban.<sup>1334</sup> While this could indicate increased law enforcement effort, or trade resuming in large quantities, it is suspected that these seizures were of stockpiled ivory sold in anticipation of a price drop. The seizures were not accompanied by simultaneous increases in poaching and the low price of ivory indicates that supply may now exceed demand.<sup>1335</sup> The increase in poaching caused by the consequences of COVID-19 will influence these trends further.

East Africa was hit hard by the most recent wave of poaching with Tanzania losing an estimated sixty per cent of its elephants during this time.<sup>1336</sup> Mozambique and Tanzania were found to have MIKE sites where PIKE levels were above 0.7.<sup>1337</sup> Although Kenya experienced a surge in poaching between 2008 and 2012, its elephant populations were

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<sup>1328</sup> CITES. n.d.e *What is CITES?* Available: <https://www.cites.org/eng/disc/what.php> [accessed 27 February 2017].

<sup>1329</sup> CITES. 2019a: 5.

<sup>1330</sup> Thouless et al. 2016: 31. For a more detailed discussion on the changes in ETIS data over time, see, for example, CITES. 2019a: 7 - 8.

<sup>1331</sup> EIA. 2014: 4

<sup>1332</sup> CITES. 2016b: 10; 24 & CITES. 2019a: 7.

<sup>1333</sup> For more insight into the fluctuation in ivory trade activity data from 2006 - present, see, for example, CITES. 2019a: 7 – 10; 20; UNODC. 2020b: 47; 54; Cerling. T.E., Barnette, J., Chesson, L.A., Douglas-Hamilton, I., Gobush, K.S., Uno, K.T., Wasser, S.K. & Xu, X. 2016. Radiocarbon dating of seized ivory confirms rapid decline in African Elephant populations and provides insight into illegal trade. *Proceedings of the National Academy of Sciences*. 113 (47): 1. DOI:10.1073/pnas.1614938113.

<sup>1334</sup> Traffic. 2020: 4.

<sup>1335</sup> UNODC. 2020b: 14.

<sup>1336</sup> Thouless et al. 2016: 3 – 5; 89; 124; For more detailed data on poaching and trafficking trends in East Africa, see, for example, CITES. 2016b: 14; Wasser et al. 2015: 84; Somerville. 2017b; UNODC. 2020b: 48.

<sup>1337</sup> CITES. 2016a: 3. For more on poaching in Tanzania, see, for example, EIA. 2014: 6, 12; United Nations Educational, Scientific and Cultural Organization (UNESCO). n.d.b. *List of world heritage in danger*. Available: <http://whc.unesco.org/en/danger/> [accessed 1 March 2017]; Crosta, Beckner & Sutherland. 2015: 8; Wasser et al. 2015: 85; Thouless et al. 2016: 126. For more on the Selous, see UNESCO. n.d.a. *Selous Game Reserve*. Available: <http://whc.unesco.org/en/list/199> [accessed 1 March 2017].

stable during the surge in Tanzania and Mozambique.<sup>1338</sup> East Africa's PIKE values peaked with the continental peak in 2011, but has been below 0.5 since 2014.<sup>1339</sup> Similar to continental improvements, PIKE levels in eastern Africa dropped dramatically by 2017 to 0.22. While this likely reflects decreased poaching, it could be due to higher natural mortality rates at some sites. There is also evidence that poaching has shifted to Mozambique and South Africa.<sup>1340</sup> Both states are often linked to the ivory trade in East Africa, but Mozambique's elephants have suffered hardest with at least a quarter of its elephants being lost between 2006 and 2016,<sup>1341</sup> primarily due to poaching.<sup>1342</sup>

Although most ivory in circulation has been poached, sources also include legal ivory purchased pre-1989, ivory acquired during the once-off sales and leakages from government or private stockpiles.<sup>1343</sup> Stockpiles leakages in corrupt regions are almost guaranteed<sup>1344</sup> and have been reported in eastern Africa.<sup>1345</sup>

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<sup>1338</sup> Thouless et al. 2016: 105 - 108.

<sup>1339</sup> Ibid: 89 - 90.

<sup>1340</sup> CITES. 2019b: 5 - 6. Also see, for example, Roberts. 2014: 572; CITES. 2014. *Elephant conservation, illegal killing and ivory Trade*. Geneva: CITES Standing Committee: 32. Available:

[http://www.cites.org/sites/default/files/eng/com/sc/65/E-SC65-42-01\\_2.pdf](http://www.cites.org/sites/default/files/eng/com/sc/65/E-SC65-42-01_2.pdf) [accessed 1 March 2017];

Thouless et al. 2016: 129; 175.

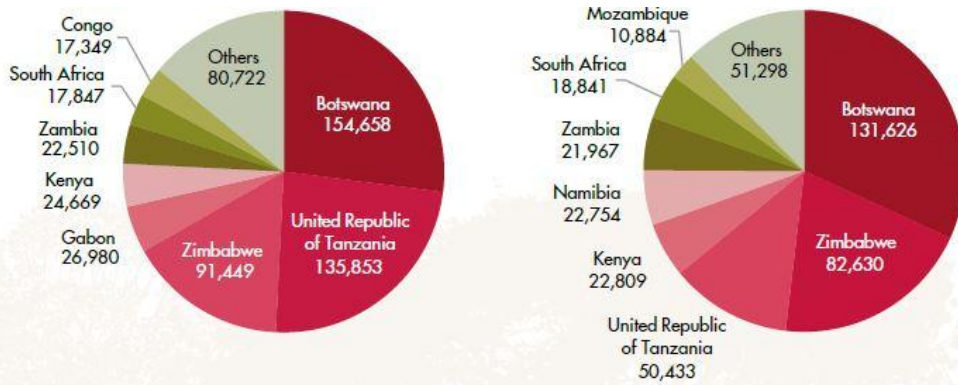
<sup>1341</sup> Thouless et al. 2016: 140; 162 -163; Interview Participant 15. 2016. Also see Roberts. 2014: 572; Crosta, Beckner & Sutherland. 2015: 8; Earth league International. 2015a. *Pushing ivory out of Africa: a criminal intelligence analysis of elephant poaching and ivory trafficking in East Africa: 2*. Available: <https://earthleagueinternational.org/pushing-ivory-out-of-africa/> [accessed 28 February 2017]; Bennett, E.L. 2015. Legal ivory trade in a corrupt world and its impact on African elephant populations. *Conservation Biology*. 29 (1): 55. DOI:10.1111/cobi.12377.

<sup>1342</sup> Wildlife Conservation Society. 2015a. For more on poaching in Mozambique, see, for example, EIA. 2014: 25.

<sup>1343</sup> CITES. 2016b: 23. Also see UNODC. 2016a: 42; UNODC. 2020b: 115 – 116.

<sup>1344</sup> Wright. 2013: 31; Interview Participant 16. 2016.

<sup>1345</sup> CITES. 2016b: 23 - 26. For more on stockpiles, also see, for example, Baptista. 2019; UNODC. 2016a: 11. Also see CITES. n.d.d. *Resolution Conf. 9.10 - Disposal of illegally traded, confiscated and accumulated specimens*. Available: <https://cites.org/sites/default/files/eng/cop/15/doc/E15-18A05.pdf> [accessed 28 February 2017].



**Figure 11: Elephant populations in 2006 compared to 2015 (UNODC. 2020b: 48)**

### 7.1.3 Modus operandi

The ivory trafficking modus operandi entails poaching, moving tusks to an international transport node and the subsequent movement of ivory to consumers abroad.<sup>1346</sup> The maritime trafficking focus of this thesis negates the need to discuss poaching in depth, although this must not distract from the importance of seeking ways to eradicate poaching by creating a sustainable relationship between communities and surrounding wildlife.

Once ivory has been harvested, it is moved to airports<sup>1347</sup> or ports for shipment. Poachers may even target an area because it is located near a port, like the Selous in Tanzania.<sup>1348</sup> The overwhelming majority of ivory is of large quantities of raw ivory moved from seaports in containers on board commercial vessels.<sup>1349</sup> Eastern Africa is Africa’s ivory chokepoint and therefore both a source and transit region. Participant 12, a staff member of a wildlife NGO in Kenya, explained how local people are likely the key transport node until ivory reaches port:

“They use locals either as tracker, as carriers, as couriers, [...] to kill elephants and transport them to the distributor who takes it to the middleman who takes it to the kingpin. So, by the time it gets to the kingpin it has gone through seven or eight other hands too. And all of them locals.”<sup>1350</sup>

<sup>1346</sup> For a more detailed discussion of modus operandi, see, for example, UNODC. 2020b: 124.

<sup>1347</sup> Thouless et al. 2016: 99; Wright. 2013: 5, 28.

<sup>1348</sup> EIA. 2014: 6; UNESCO. n.d.b.

<sup>1349</sup> Wright. 2013: 32. Also see CITES. 2016b: 20; CITES. 2019a: 18 – 19.

<sup>1350</sup> Interview Participant 12. 2016. Nairobi, Kenya.

A greater variety of TOC network members become involved once ivory needs to be moved. Ivory is often moved across many borders<sup>1351</sup> before exiting Africa. Although crossing official borders can be a challenge, bribes are at the order of the day and unofficial border crossings known as *panja* or rat routes can be used.<sup>1352</sup> Ivory can be moved by rail or road, using motorcycles, trucks and cars.<sup>1353</sup> Tusks can be transported individually or can be consolidated until a shipment is the desired size.<sup>1354</sup>

When data collection commenced in 2015, Kenya and Tanzania had been the epicentre of ivory exports.<sup>1355</sup> Mombasa, Dar es Salaam and Zanzibar are where most global ivory seizures have been made or originated from. The ivory shipped from there is from eastern, central and southern Africa as the region's ports service many surrounding states.<sup>1356</sup> Between 2002 and 2017, 55 tonnes of seized ivory was linked to Mombasa alone. Mombasa's popularity with traffickers has been attributed to its well-developed port infrastructure with limited security measures at container terminals and freight stations, as well as weak law enforcement along Kenya's coastline. These factors, coupled with corruption, attract those wishing to move illicit goods through ports.<sup>1357</sup> Two thirds of seizures made within Kenya or Tanzania, or in which these states were implicated, have been of consignments of 500kg or more. Shipments of over 500kgs of ivory are the hallmark of TOC due to the necessary expertise required to arrange such large shipments.<sup>1358</sup> Mass elephant killings provide further evidence of TOC networks controlling where ivory is harvested, stored and shipped.<sup>1359</sup>

In the past few years, poaching and trafficking in both Kenya and Tanzania has significantly declined. While this is likely due to a decline in trade as the result of successful regional interventions, it could also reflect a decrease in seizures as both states remain in the top ten

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<sup>1351</sup> Outhwaite & Little. 2020: 3.

<sup>1352</sup> Interview Participant 16. 2016. Also see Outhwaite & Little. 2020: 10.

<sup>1353</sup> See, for example, EAL. 2015: 5 - 6.

<sup>1354</sup> See, for example, Wright. 2013: 31, 33; Carlson, Wright & Donges. 2015: 14; EIA. 2014: 16 – 17.

<sup>1355</sup> Carlson, Wright & Donges. 2015: 11. Also see CITES. 2016b: 14 – 21; Traffic. 2020: 4, 15; Vogt. 2015; UNODC. 2016a: 42. For more on ivory trafficking through Mombasa, see, EAL and Wildleaks. 2015; EWN. 2016; Roberts. 2014: 574; CITES. 2019a: 19; Traffic. 2020: 4; CITES. 2016b: 14; 18; Thouless et al. 2016: 90.

<sup>1356</sup> Wright. 2013: 28, 32; CITES. 2016b: 18; UNODC. 2016a: 43 – 44; Outhwaite & Little. 2020: 2; Interview Participant 12. 2016. Also see Crosta, Beckner & Sutherland. 2015: 8; Wasser et al. 2015: 85.

<sup>1357</sup> Traffic. 2020: 5 - 6. Also see EAL and Wildleaks. 2015: 1; 10.

<sup>1358</sup> CITES. 2016b: 14 - 15, 19; McLellan. 2014: 5; CITES. 2019b: 9. Also see UNODC. 2016a: 44.

<sup>1359</sup> Carlson, Wright & Donges. 2015: 14; Wright. 2013: 31.

states involved in the international ivory trade.<sup>1360</sup> 2019 ETIS data indicates that illegal trade activity has shifted south, resulting in Mozambique now being eastern Africa’s key ivory exit point. This shift has been attributed to increased law enforcement efforts in Tanzania after its identification as a hotspot.<sup>1361</sup> Most seizures in Mozambique have also been larger than 500kgs, indicating the involvement of TOC networks and the likelihood of corruption acting as facilitator.<sup>1362</sup> South Africa is also emerging as an important exit point. While some ivory is sourced in South Africa, it likely serves mostly as a consolidation point.<sup>1363</sup> Tusks can be shipped alone or concealed among legal commodities such as timber, tea and nuts.<sup>1364</sup> Existing shipping companies are knowingly or unknowingly used to move the ivory and front companies are sometimes used to hide the illicit product.<sup>1365</sup> Ivory shipments are also managed by additional companies before exiting the continent, including freight forwarding and clearing agents.<sup>1366</sup> Participant 15 from CITES noted how “[i]f you are a freighter of sorts or a clearing company [...] and you are known for not asking questions about what is being carried, then you’ll be used and you are then part of the trade chain.”<sup>1367</sup>

Where heroin trafficking dhows exploit the limits of international law on the high seas, ivory traffickers exploit security vulnerabilities on land, in the shipping industry and seaports<sup>1368</sup> as maritime container shipments are subject to few controls.<sup>1369</sup> Although dhows<sup>1370</sup> and other vessels are used to move ivory, such as between eastern African states, this is on a much smaller scale.<sup>1371</sup> Unlike dhows, commercial shipping vessels are not weather-

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<sup>1360</sup> CITES. 2019a: 20 – 21; Outhwaite & Little. 2020: 9.

<sup>1361</sup> CITES. 2019a: 18. Also see Crosta, Beckner & Sutherland, K. 2015: 8; Wasser et al. 2015: 85; CITES. 2016b: 22; EIA. n.d. *Illegal trade seizures: large-scale elephant ivory seizures*. Available: <https://eia-international.org/wildlife/wildlife-trade-maps/large-scale-elephant-ivory-seizures/> [accessed 5 February 2021]; EIA. 2018. *Taking stock: an assessment of progress under the National Ivory Action Plan process*. London: EIA: 32. Available: <https://eia-international.org/wp-content/uploads/EIA-report-NIAP-2018.pdf> [accessed 5 February 2021].

<sup>1362</sup> CITES. 2019a: 14. For more on illicit trade activity in Mozambique, also see Thouless et al. 2016: 162; CITES. 2016b: 22.

<sup>1363</sup> CITES. 2019a: 20; CITES. 2019b: 5. Also see Thouless et al. 2016: 175.

<sup>1364</sup> Outhwaite & Little. 2020: 12. Also see, for example, Vogt. 2015; EAL and Wildleaks. 2015: 2, 5 – 6; Roberts. 2014: 574; UNODC. 2020b: 53.

<sup>1365</sup> Crosta, Beckner & Sutherland. 2015: 9; Traffic. 2020: 5; 15; Outhwaite & Little. 2020: 14; Interpol. 2020: 26.

<sup>1366</sup> Outhwaite & Little. 2020: 14.

<sup>1367</sup> Kenya Ports Authority (KPA). 2020. *Kenya Ports Authority Handbook 2020*. Mombasa: KPA: 8.

<sup>1368</sup> EAL. 2015: 2; Outhwaite & Little. 2020: 3.

<sup>1369</sup> Outhwaite & Little. 2020: 3.

<sup>1370</sup> Informal communication. 2019. Cape Town, South Africa; Wright. 2013: 5, 28; Naylor. 2005: 279; EIA. 2014: 16 – 17; 24.

<sup>1371</sup> EIA. 2014: 25.

dependent and sail year-round. Containers are less conspicuous and have provided TOC networks with all the benefits it provides to legitimate multinational companies – cost effective and fast transport to existing and new markets.<sup>1372</sup> It allows for bulk shipments, yet is low risk<sup>1373</sup> due to concealment possibilities among other containers and the limitations of risk profiling and searching.<sup>1374</sup> This is confirmed by the fact that even people are smuggled in containers.<sup>1375</sup> The biggest container vessels can carry over twenty thousand TEU containers.<sup>1376</sup> Between 2018 and 2019, Mombasa handled nearly 30 million tons of cargo,<sup>1377</sup> looking for contraband on loaded container vessels is therefore the equivalent of looking for a needle in a haystack. Few containers are scanned in port and risk profiling and intelligence, which are vital to locate illicit shipments, rarely produce seizures.

From eastern Africa, ivory makes its way across the WIO, often transiting through various Asian states.<sup>1378</sup> Transshipment possibilities are plentiful due to abundant trade links between Africa and Asia.<sup>1379</sup> Transshipment could be the result of shipping companies' sailing schedules, an attempt to consolidate shipments or to hide the shipment's origin from customs.<sup>1380</sup> Analogous to a decline in PIKE levels, as well as a decline in seizures in key African states, the amount of ivory moved through China and Hong Kong has declined,<sup>1381</sup> which could be due to the closure of domestic markets and increased law enforcement. These gains are however threatened by growing cross-border markets such as Vietnam,<sup>1382</sup> suggesting that traffickers have adjusted routes in accordance with law enforcement

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<sup>1372</sup> Griffiths, H. & Jenks, M. 2012. *Maritime transport and destabilizing commodity flows*. Sipri Policy Paper 32. Solna: Stockholm International Peace Research Institute: 47.

<sup>1373</sup> Traffic. 2020: 1; Outhwaite & Little. 2020: 3.

<sup>1374</sup> For the benefits of container trafficking, see, for example, Griffiths & Jenks. 2012: vi.

<sup>1375</sup> Aljazeera. 2020. *More than 60 people found dead in cargo container in Mozambique*. 25 March. Available: <https://www.aljazeera.com/news/2020/03/60-people-dead-cargo-container-mozambique-200324104510678.html> [accessed 6 June 2020]; Griffiths & Jenks. 2012: 31.

<sup>1376</sup> Marine Insight. 2020. *Top 10 world's largest container ships in 2020*. 19 December. Available: <https://www.marineinsight.com/know-more/top-10-worlds-largest-container-ships-in-2019/#:~:text=OOCL%20Hong%20Kong&text=With%20a%20length%20of%20399.87,largest%20container%20ship%20ever%20built> [accessed 6 June 2020].

<sup>1377</sup> EAL and Wildleaks. 2015: 2.

<sup>1378</sup> CITES. 2016b: 14 – 21; 23. Also see CITES. 2019a: 17 – 18.

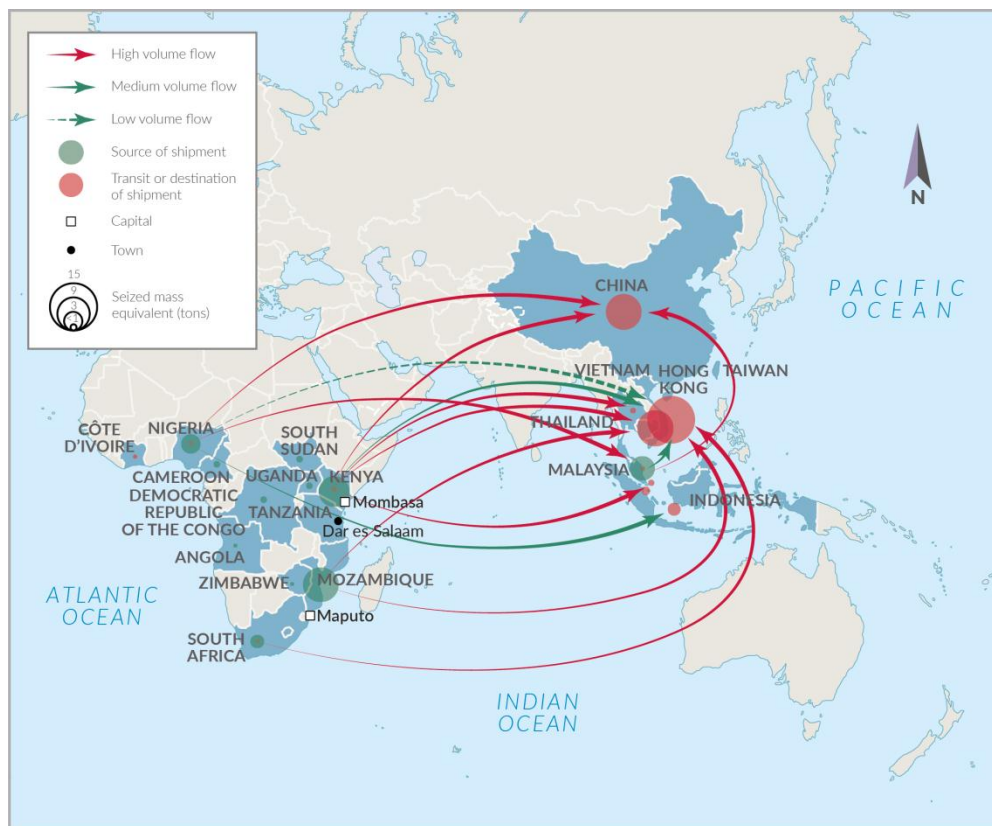
<sup>1379</sup> Bennett. 2015: 55.

<sup>1380</sup> EIA. 2014: 26; EIA. 2017: 11; Crosta, Beckner & Sutherland. 2015: 9; Interpol. 2020: 21 - 22.

<sup>1381</sup> UNODC. 2020b: 25.

<sup>1382</sup> CITES. 2019a: 13 – 15; 17 – 19. Also see CITES. 2016b: 20.

pressure.<sup>1383</sup> The largest ever ivory seizure was made in Da Nang port in Vietnam in 2019, totalling over nine tonnes.<sup>1384</sup>



**Figure 12: Ivory trafficking routes between 2014 and 2018 (Map reworked from UNODC. 2020b: 4)**

In addition to weak law enforcement, ivory trafficking through Asia and eastern Africa can be attributed to wide scale corruption.<sup>1385</sup> Kenya, Tanzania and Mozambique all have very low scores on the International Peace Institute’s Corruption Perception Index,<sup>1386</sup> which rates perceived levels of corruption in the public sector. This indicates that these states which experience most ivory trafficking are fraught with corruption. This takes on many forms and ranges from high level corruption to low level bribery. It involves political and economic elites, corruption in wildlife departments, stockpile leakages, judicial failures and

<sup>1383</sup> CITES. 2016b: 20; Interview Participant 14. 2016. Also see EIA. 2014: 27; Crosta, Beckner & Sutherland. 2015: 40.

<sup>1384</sup> EIA. n.d.

<sup>1385</sup> See, for example, CITES. 2019a; UNODC. 2020b; CITES. 2016b: 20; 22.

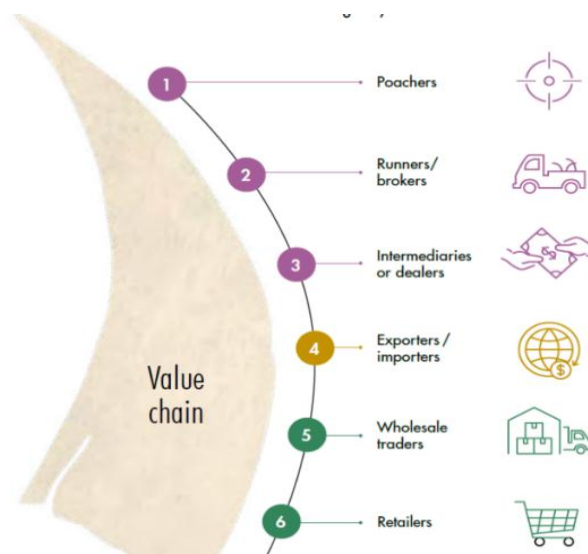
<sup>1386</sup> CITES. 2019a: 14 – 15; Transparency International. 2020. *Mozambique*. Available: <https://www.transparency.org/en/countries/mozambique#> [accessed 17 November 2020].

corruption in ports.<sup>1387</sup> Government officials facilitate poaching and trafficking by providing diplomatic cover by way of documentation and accepting bribes or by abusing conservation funds.<sup>1388</sup>

While convergence between illicit markets is rarely proven, it appears that ivory traffickers have expanded into pangolin trafficking as demand for pangolin products currently topples ivory demand. There have been numerous seizures of shipments carrying large quantities of both commodities.<sup>1389</sup>

#### 7.1.4 Trafficking networks

This section provides a brief overview of trafficking networks.<sup>1390</sup> Due to their clandestine nature, there remains much research to be done to understand their structures and operations.<sup>1391</sup> This section is therefore not meant to provide a detailed analysis, but rather to form a basis for understanding how responses are utilized to counter the entire network.



**Figure 13: Ivory trafficking value chain (UNODC. 2020b: 112)**

<sup>1387</sup> CITES. 2016b: 18; Vogt. 2015.; Osarigo, C. 2016. Kenya – Mombasa port corruption and the illegal ivory trade. *Africa journalism the world*. 1 November. Available: <https://africajournalismtheworld.com/2016/11/01/kenya-mombasa-port-corruption-and-the-illegal-ivory-trade/> [accessed 9 February 2017].

<sup>1388</sup> Lemieux & Clarke. 2009: 458.

<sup>1389</sup> UNODC. 2020b: 15; 53; Interpol. 2020: 26.

<sup>1390</sup> For a detailed description on trafficking networks, see UNODC. 2020b: 11.

<sup>1391</sup> See, for example, UNODC. 2016a: 11; Carlson, Wright & Donges. 2015: 11; Pires, S.F. & Moreto, W. 2011. Preventing wildlife crimes: solutions that can overcome the ‘Tragedy of the Commons’. *European Journal on Criminal Policy and Research*. 17(2): 118. DOI: 10.1007/s10610-011-9141-3.

Ivory trafficking networks' membership is a combination of actors from across the trafficking route. Networks can be divided into poachers, middlemen like brokers, transporters, importers and exporters, corrupt facilitators such as government officials, retail traders<sup>1392</sup> and kingpins.<sup>1393</sup> Chinese networks connected to African economic and political elites are reportedly running the trade, with members based in Africa to support poaching networks and facilitate transport to Asia.<sup>1394</sup> TRAFFIC further suggests that Chinese and Vietnamese networks operate through Africa-based TOC networks and have near-total control of the trade.<sup>1395</sup>

Although not always the case,<sup>1396</sup> poachers typically come from communities living near elephants.<sup>1397</sup> These communities are often poor and receive no benefit from the surrounding wildlife. Instead, they are frequently the victims of ill-guided conservation efforts and have to live with the consequences of sharing their space with elephants as habitats are being destroyed, human settlements and agricultural land expand and livestock increasingly grazes in elephant range.<sup>1398</sup> Participant 15 explained the alienation of communities in wildlife areas, as well as why they make good poachers:

“[I]t’s not so long ago that these protected areas were created. Either they or their parents would have gone out there to hunt as part of traditional subsistence. In Tsavo, there was the Walyangulu tribe that specialized in killing elephants with long bows [and] [...] poison arrows...they were specialists at that. They know the area, they know the behaviour of the elephants, and they know how you do it.”<sup>1399</sup>

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<sup>1392</sup> Brennan & Kalsi. 2015: 326; Carlson, Wright & Donges. 2015: 18; Crosta, Beckner & Sutherland. 2015: 9; UNODC. 2020b: 111; Interview Participant 16. 2016.

<sup>1393</sup> Wright. 2013: 33.

<sup>1394</sup> CITES 2016b: 16 – 18; 20; McLellan. 2014: 5. Interview Participant 11. 2016.

<sup>1395</sup> CITES. 2019a: 17, 19.

<sup>1396</sup> See, for example, UNODC. 2016a: 43; Carlson, Wright & Donges. 2015: 7; Wright. 2013: 5; 33; EAL. 2015: 5 – 6.

<sup>1397</sup> Wright. 2013: 33.

<sup>1398</sup> Carlson, Wright & Donges. 2015: 26.

<sup>1399</sup> Interview Participant 15. 2016.

Eastern Africa has a long history of ivory trade which transformed from a pre-colonial legal trade activity into a crime.<sup>1400</sup> Similar to pirates, poachers were therefore not always classified as criminals. Participant 18, the director of a wildlife NGO focussing on corruption, rightly noted that the cruelty which often accompanies poaching causes the focus on illicit wildlife trade to be on poachers, instead of on the entire criminal trade chain enabling the trade.<sup>1401</sup> While poaching is cruel, labelling all poachers as evil does not reflect the complexity of poaching. While some poach for profit and reconcile with committing a crime, others poach to survive.<sup>1402</sup> Poachers can also cross borders.<sup>1403</sup> It has been estimated that at one stage half of the poachers and traffickers active within Mozambique's Niassa Reserve were Tanzanians who were assisted by corrupt officials facilitating the trade on both sides of the border.<sup>1404</sup> Participant 14 suggested that the poaching in Mozambique is driven by Chinese ivory buyers in the north of the country.<sup>1405</sup> Armed militias and military officers are also known to poach,<sup>1406</sup> such as in Gorongosa National Park.<sup>1407</sup>

Elephants may be killed with traditional weapons such as arrows, snares and poison,<sup>1408</sup> or high calibre hunting rifles and military style weapons, which complicate anti-poaching and endanger rangers. Weapons are widely available and often sourced from conflict zones across Africa. Seized weapons from government stockpiles are also leaked.<sup>1409</sup> While most poaching is assumed to be commissioned, ivory can also be harvested opportunistically.<sup>1410</sup> Poachers may collate ivory shipments or this can be done by middlemen which can be

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<sup>1400</sup> For a historic overview of wildlife utilization and poaching in East Africa, see for example, Biggs, D., Holden, M.H, Brackowski, A. R. & Possingham, H.P. 2016. Elephant poaching: track the impact of Kenya's ivory burn. *Nature*. 534(7606): 179-179. DOI: 10.1038/534179a; Somerville. 2017a; Somerville. 2017b.

<sup>1401</sup> Interview Participant 18. 2018.

<sup>1402</sup> For more on the nature and drivers of poaching, see, for example, Campbell, J. 2015. Tackling the illicit African wildlife trade. *Council on foreign Relations*. 19 September. Available: <http://www.cfr.org/africa-sub-saharan/tackling-illicit-african-wildlife-trade/p37031> [accessed 27 February 2017]. Also see Moneron, S., Armstrong, A. & Newton, D. 2020: The people beyond the poaching: interviews with convicted wildlife offenders in South Africa. *Traffic*. Available: <https://www.traffic.org/publications/reports/the-people-beyond-the-poaching/> [accessed 1 October 2020]; Yufang & Clark. 2014: 29.

<sup>1403</sup> Carlson, Wright & Donges. 2015: 7; 14 – 17; Wright. 2013: 33; EIA. 2014: 25. Also see UNODC. 2020b: 53.

<sup>1404</sup> EIA. 2014: 25.

<sup>1405</sup> Interview Participant 14. 2016. For more on poaching in Mozambique, also see EIA. 2014: 25.

<sup>1406</sup> Carlson, Wright & Donges. 2015: 7.

<sup>1407</sup> Interview Participant 14. 2016; Siyabona Africa. n.d. *Gorongosa National Park: Mozambique wildlife guide*. Available: [http://www.mozambique.co.za/Mozambique\\_Wildlife-travel/gorongosa-national-park.html](http://www.mozambique.co.za/Mozambique_Wildlife-travel/gorongosa-national-park.html) [accessed 16 May 2020]. For more on ivory poaching in Gorongosa, see Gorongosa. n.d. *Our story*. Available: <http://www.gorongosa.org/our-story/timeline> [accessed 15 March 2017]; Baptista. 2019.

<sup>1408</sup> Carlson, Wright & Donges. 2015: 10; 15; 17; 21; Wright. 2013: 33; Interview Participant 19. Voi, Kenya.

<sup>1409</sup> Carlson, Wright & Donges. 2015: 7; 17; 29.

<sup>1410</sup> Wright. 2013: 31.

Africans or Asians operating in either continent.<sup>1411</sup> Middlemen provide poachers with supplies and pay bribes to facilitate the movement of ivory. Senior middlemen can be government officials, businessmen, diplomats or military officers.<sup>1412</sup>

While most network members operating in Africa are African, Asian members living in eastern Africa assist with the network's operations, such as Vietnamese operating in Mozambique and South Africa.<sup>1413</sup> There is also a large Chinese presence across Africa, which opens up avenues for acquiring ivory.<sup>1414</sup> It appears that Asian members might be running exports from Africa, as well as imports in China.<sup>1415</sup> According to the UNODC, Chinese living in East Africa act as the main middlemen, ensuring the procurement, processing and transport of ivory.<sup>1416</sup> Chinese living in Mozambique, who run logging companies and export timber from Pemba and Mocimboa da Praia, are using these shipments to also move ivory.<sup>1417</sup>

The literature and interviews suggest that while there are numerous poachers and middlemen,<sup>1418</sup> there may be only a small number of people controlling the trade. This is based on links between seized shipments,<sup>1419</sup> their large size, the concentration of poaching in certain areas<sup>1420</sup> and the fact that the skills required to move ivory by shipping containers suggests a limited number of networks involved.<sup>1421</sup> Some argue that only removing these kingpins will cause the demise of the networks. As one participant explained: “[t]he brokers will go away, poachers will go away, but these big guys don’t go away.”<sup>1422</sup>

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<sup>1411</sup> See, for example, Brennan & Kalsi. 2015: 326; UNODC. 2020b: 111.

<sup>1412</sup> Brennan & Kalsi. 2015: 326; EAL. 2015: 4.

<sup>1413</sup> See, for example, CITES 2016b: 16 – 18; 20 - 21; McLellan. 2014: 5; UNODC. 2020b: 109; EIA. 2018: 38.

<sup>1414</sup> Yufang & Clark. 2014: 29.

<sup>1415</sup> See, for example, Crosta, Beckner & Sutherland. 2015: 9; Brennan & Kalsi. 2015: 327.

<sup>1416</sup> Wright. 2013: 5; 33; CITES. 2016b: 20.

<sup>1417</sup> EIA. 2014: 25; Interview Participants 14 & 16. 2016.

<sup>1418</sup> Interview Participant 14. 2016.

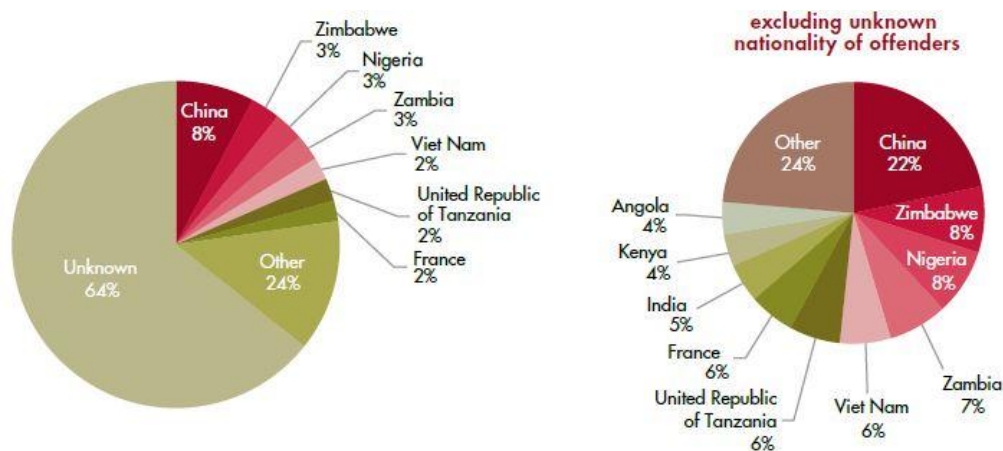
<sup>1419</sup> UNODC. 2020b: 53.

<sup>1420</sup> UNODC. 2016a: 45.

<sup>1421</sup> EAL. 2015: 4; UNODC. 2020b: 53; Interview Participant 14. 2016. Interview Participant 18 also described the networks as follows: “[E]ach one of them has been having branches in at least seven, eight countries in Africa, at least. Hundreds and hundreds of poaches across, it is a very tight operation, it’s not a demand-supply kind of thing, it is an organized crime monopoly. And each one of them has been disseminating thirty thousand or fifty thousand elephant”.

<sup>1422</sup> Interview Participant 19. 2016.

Others however suggest that these networks instead centre around those who provide logistics and that networks will reorganize themselves after kingpins are removed.<sup>1423</sup> These have been described as “loosely organized networks of individuals with some specialist knowledge of the area in which they work, who have often been overtaken by regulations. Activities are organized in the sense in which informal unity and reciprocity may be found [...] no dictator or central office directs work of members.”<sup>1424</sup> Instead, these networks organize themselves according to business, family, tribal and personal relationships and can adjust to changes in laws, law enforcement, infrastructure and politics.<sup>1425</sup>



**Figure 14: Nationalities arrested for ivory trafficking 2009 – 2018 (UNODC. 2020b: 54)**

## 7.2 The impact of ivory trafficking

The sustainable utilization of wildlife benefits humans and animals, especially in regions with little income potential. Instead, wildlife crime undermines animal populations, development, security, good governance, the rule of law and the general welfare of people living with wildlife.<sup>1426</sup> Losing wildlife affects the economic and social development of many communities<sup>1427</sup> and threatens species with extinction. Treating wildlife crime as a mere conservation issue therefore underestimates its scale and fails to address its various impacts.<sup>1428</sup> This section considers the key impacts of ivory trafficking as reflected in

<sup>1423</sup> EAL. 2015: 2.

<sup>1424</sup> RIIA. 2002: 2; 4; 7.

<sup>1425</sup> EAL. 2015: 3. Also see Traffic. 2020: 5.

<sup>1426</sup> McLellan. 2014: 1 - 2; UNODC. 2016a: 3.

<sup>1427</sup> Lavorgna. 2014: 2.

<sup>1428</sup> McLellan. et al. 2014: 1- 2.

literature and interviews in order to understand how impacts influence responses. Similar to heroin trafficking, it reflects that the impacts are not always as generic as suggested.

### **7.2.1 Endangering elephant populations**

The key impact of ivory trafficking is the attrition of the species, which has an impact on biodiversity. Although this impact was an underlying theme in all interviews, participants often did not mention it as a key impact. This could be because it is obvious, or it could reflect the nature of participants' work primarily in law enforcement. Related to declining elephant populations is the socio-economic impact,<sup>1429</sup> such as economic losses that accompany it. Tourists are either scared away by poaching when it is particularly endemic, or if the animals for which they pay to see have disappeared.

### **7.2.2 Violence**

Participants often mentioned the violence linked to the illegal wildlife trade. Wildlife crime is almost always accompanied by violence directed at wildlife, frontline law enforcement and sometimes also against communities and conservationists.<sup>1430</sup> Unlike the other participants, Participant 18 argued that ivory trafficking results in more internal than external violence, as different gangs compete over ivory or territory, or deals gone bad. He added that if a law enforcement officer were to be killed in relation to ivory trafficking, it could be because they had links to trafficking networks. While he acknowledged that his organization's employees' lives are sometimes threatened, he believed that ivory trafficking results in less violence than other TOCs. No other participants however shared this view. Participant 21 noted:

“when you look at the level of violence around it [...], especially Kenya, they've got tens of dozens of police officers killed up north in the gun fights there[...] [I]t shows

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<sup>1429</sup> UNODC. 2020b: 19.

<sup>1430</sup> See, for example, Hauser, C. 2017. Crusader who saved elephants from poachers is shot dead in Tanzania. *New York Times*. 18 August. Available: <https://www.nytimes.com/2017/08/18/world/africa/elephant-poachers-wayne-lotter.html> [accessed 9 February 2021]; Naylor. 2005: 261.

the level of violence that they would go to, to get their trade going. But yeah, wildlife is a whole different ball game”.<sup>1431</sup>

Many rangers are injured or killed in conflicts with poachers as both become increasingly militarized, while communities are sometimes subjected to human rights abuses during anti-poaching operations, such as Tanzania’s controversial Operation Tokomeza.<sup>1432</sup> While military tactics are accepted practice against piracy, the militarization of conservation is met with resistance, primarily due to its effects on communities. From interviews with KWS investigating officers, militarization appears to be the norm. But unlike piracy, wildlife-related violence cannot be isolated at sea where violent crime often enjoys impunity.<sup>1433</sup>

### 7.2.3 Insecurity and instability

A frequently suggested impact of TOC is that it fuels insecurity<sup>1434</sup> and instability.<sup>1435</sup> Participants were critical of this. Participant 15 noted: “I would say it’s the other way around [...] If you have instability and insecurity, then it’s probably more likely that you’re going to have ivory poaching.”<sup>1436</sup> Conflicts are indeed known to influence elephant populations.<sup>1437</sup> Participant 15 conceded that in other African regions, wildlife crime does contribute to insecurity and instability, but that this was not yet the case in eastern Africa.<sup>1438</sup> And while criminal networks are attracted by institutional weaknesses, insecurity and instability are not a blanket impact of their activities. Participant 16 warned how ivory trafficking in the region could potentially impact on stability:

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<sup>1431</sup> Interview Participant 21. 2016.

<sup>1432</sup> Brooks, C. & Hopkins, M. 2016. How protecting animals led to allegations of torture and rape. *National Geographic*. 19 September. Available: <https://www.nationalgeographic.com/news/2016/09/wildlife-tanzania-poaching-human-rights-abuses/> [accessed 5 February 2021].

<sup>1433</sup> Fouché, H. 2015. Policing maritime borders: dealing with seaborne threats and transnational organised crime. *Servamus Community-based Safety and Security Magazine*. 108 (11): 47.

<sup>1434</sup> See, for example UNODC. 2020b: 19.

<sup>1435</sup> Traffic. 2012. *Illicit wildlife trafficking recognized as a new form of transnational organized crime*. 22 October. Available: <http://www.traffic.org/home/2012/10/22/illicit-wildlife-trafficking-recognized-as-a-new-form-of-tra.html> [accessed 15 October 2016].

<sup>1436</sup> Interview Participant 15. 2016.

<sup>1437</sup> Lemieux & Clarke. 2009: 461.

<sup>1438</sup> Interview Participant 15 noted: “[I]n sort of northern DRC, CAR, Sudan, where the LRA is, well, heck yes that is quite established that they do poaching [...] you would use whatever you can to raise money and elephants is just one of those things. But this whole story about how Al-Shabaab would come all the way down to Kenya, I mean of course the poaching that happened in the 70s, 80s, there were a lot of Somalis, whether they were Somalis from Somalia or that part of Somalia that became part of Kenya, I don’t know. But there was a link, I just don’t think it’s going on anymore.”

“The only way you can make things unstable is if you do these paramilitary attacks on communities. You're going to create rebel groups [...] If Tanzania starts doing Tokomeza fulltime [...] you're going to get rebel groups fighting the government, because you're going to be giving them arms. They get arms, they start fighting back. That's how these things start. You start rustling them up. So, they have to be very careful what they do, otherwise things are going to get out of hand.”<sup>1439</sup>

He warned of the potential of this as international entities often provide resources to militarized responses, including weapons, technology and training:

“[W]ith all this money that's going to start pouring in for all this paramilitary anti-poaching things, it's going to make a mess [...] If you go into a country where the country government is not that strong, Tanzania is a good example of that, if you start concentrating a lot of military power in one place [...] you'll get some nutcase wildlife guy who's going to stage a coup, because he's got the weapons to do that [...] You start concentrating power in the wildlife people, you're going to see some real problems.”<sup>1440</sup>

It is therefore concluded that although there is potential for ivory trafficking in eastern Africa to result in insecurity and instability, this is not yet the case. States like Mozambique however are at risk due to high levels of corruption and increasing insecurity, including terrorist activity, in the north. Ivory has previously funded conflict in Mozambique.<sup>1441</sup>

#### 7.2.4 Corruption

Corruption as impact of TOC was perhaps most prevalent during discussions on ivory trafficking as participants noted high level corruption driving the trade.<sup>1442</sup> Anecdotes were shared of ivory being transported in government vehicles,<sup>1443</sup> implicated wildlife officers,<sup>1444</sup>

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<sup>1439</sup> Interview Participant 16. 2016.

<sup>1440</sup> Interview Participant 16. 2016.

<sup>1441</sup> Fine Maron, D. 2018. Under poaching pressure, elephants are evolving to lose their tusks. *National Geographic*. 9 November. Available: <https://www.nationalgeographic.com/animals/2018/11/wildlife-watch-news-tuskless-elephants-behavior-change/> [accessed 7 May 2020]; Naylor. 2005: 278.

<sup>1442</sup> Interview Participants 12; 14; 15; 16; 18 & 21. For more on corruption facilitating wildlife crime, see for example, EIA. 2018: 26; UNODC. 2020b: 17.

<sup>1443</sup> Interview Participant 11. 2016.

<sup>1444</sup> Interview Participant 13. Nairobi, Kenya. Also see Somerville. 2017a.

leakage from government stockpiles,<sup>1445</sup> port officials letting illicit shipments pass through<sup>1446</sup> and KWS revenue funding election campaigns.<sup>1447</sup> In both Kenya and Tanzania, for example, the state had a monopoly on ivory after independence and used it to enrich themselves, thereby institutionalizing the illegal trade involving many corrupt civil servants, politicians and business elite. This corruption was further fuelled as former ivory traders had to bribe law enforcement to ensure their continued access to ivory.<sup>1448</sup> Today, the corruption continues. Participant 11, from the UNODC Global Programme for Combating Wildlife and Forest Crime, commented on corruption in wildlife trafficking:

“I guess the biggest effect is through the corruption side of things. Stability, no, I don’t see that as an issue really. Mainly on the corruption side, because it fuels mistrust, which means people won’t share information, they keep it to themselves [...] And people buy their way out of problems. It’s the biggest risk and it continues. There have been questions on court decisions, people have been acquitted, they had very strong cases and there are questions about how they managed to do that.”

Participant 16 explained the high-level involvement as follows:

“[W]ith the global financial crisis in 2007, 2008 and 2009, then demand really went up because all the Chinese wanted to buy ivory as an investment vehicle. It brought in all the politicians [...] in places like Kenya and Tanzania. And then the whole nature of the thing changed. I mean, they were keeping ivory in the statehouse in Mombasa, before it went to the port [...] [T]hey were bribing all the port officials to not scan the ivory containers, they were told not to scan them. It came from high up. The commissioner of police in Mombasa was in on the whole thing”.

He also suggested that ivory is merely one conduit of many:

“These guys have rackets in sugar, [...]importing cars. They got rackets exporting minerals, that's all they do, rackets. I don’t even know how these economies function. Kenya is doing remarkably well for all the corruption here. I'm really

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<sup>1445</sup> Interview Participant 16. 2016.

<sup>1446</sup> Interview Participant 17. 2016. Nairobi, Kenya.

<sup>1447</sup> Personal Communication. 2016. Voi, Kenya.

<sup>1448</sup> Somerville. 2017a; Somerville. 2017b; Interview Participant 16. 2016.

surprised how well they're doing. But you go to a place like the DRC, you can see what it's done. It's just trashing everything."<sup>1449</sup>

Corruption in eastern African states and its ports has been widely documented<sup>1450</sup> and was mentioned by a number of participants.<sup>1451</sup> The port of Mombasa is an excellent example of criminal networks working with political elites to facilitate and benefit from the ivory trade.<sup>1452</sup> Since steps have been taken to address ivory trafficking through Kenyan ports and the corruption that facilitates it,<sup>1453</sup> this appears to have improved.<sup>1454</sup> Participant 16 however suggested that this could be a mere kneejerk response and was done to restore Kenya's image as the elephant crisis gained momentum. Due to Kenya's leading role in the fight against ivory trade, they have been in the spotlight as ivory remains a hot topic. He argues that once that interest fades, some highly placed figures might return to the ivory business.<sup>1455</sup>

High-level politicians in Tanzania are also involved in the trade,<sup>1456</sup> aided by a growing Chinese presence in Tanzania.<sup>1457</sup> There have also been major efforts to remove corrupt officials from the port in Dar es Salaam.<sup>1458</sup> Further north, Mozambique is equally fraught with corruption.<sup>1459</sup> This includes customs officials,<sup>1460</sup> policemen who have hired their

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<sup>1449</sup> Interview Participant 16. 2016.

<sup>1450</sup> See, for example, EAL and Wildleaks. 2015: 7-8; Osarigo. 2016.

<sup>1451</sup> Interview Participant 11 based in Tanzania, for example, commented: "I would be able to say from the suspensions, the arrests over the last few months, that it must have been absolutely rife. I have not seen it face to face, but just by the nature of that, the suspensions continue [...] [I]t is good in a way that they are making a stand and trying to sort it out. But it is certainly further than the port as well. And there are lots of examples".

<sup>1452</sup> Somerville. 2017a; Somerville. 2017b.

<sup>1453</sup> See, for example, Osarigo. 2016; Mwambingu, R. 2017. Mombasa port fails to tame corruption cartels. *Mediamax*. 4 January. Available: <http://www.mediamaxnetwork.co.ke/business/286491/286491/> [accessed 8 February 2017]; EWN. 2016.

<sup>1454</sup> See, for example, Traffic. 2020.

<sup>1455</sup> Interview Participant 16. 2016.

<sup>1456</sup> Interview Participant 16. 2016; EIA. 2018: 40.

<sup>1457</sup> Somerville. 2017a; Somerville, K. 2017b.

<sup>1458</sup> See, Container Management. 2015. *Tanzania Ports Authority hit by corruption sackings*. 9 December. Available: <https://container-mag.com/2015/12/09/tanzania-ports-authority-hit-by-corruption-sackings/> [accessed 18 February 2021].

<sup>1459</sup> See, for example, EIA. 2017.

<sup>1460</sup> Mashiri & Sebele-Mpofu. 2015: 45.

weapons to poachers, army officers who have poached<sup>1461</sup> and ivory being stolen from government stockpiles.<sup>1462</sup> Participant 16 described one Mozambican network as follows:

“[T]here are these local big guys that run the Niassa area. They're these very wealthy guys who are known as the rhino poachers, they all have big houses, they know who they are [...] and they pay off protection, they got the police under them, they got the local government under them, they got the Chinese backing them.”<sup>1463</sup>

Ivory trafficking is therefore not only facilitated by corruption, it also results in corruption as important people want to share in the spoils. But countering corruption related to TOC is challenging. Participant 12 argued, “where one of them becomes one of ‘them’, it becomes difficult for them to prosecute.”<sup>1464</sup> In both Kenya and Tanzania, corruption is considered one of the major barriers to combatting wildlife trafficking and other TOCs.<sup>1465</sup> Participant 12 noted, “[w]ildlife crime itself is a corrupt practice. So when you say corruption, you’re defining the problem by defining it again.”<sup>1466</sup> Resolutions have been passed by CITES Parties and Parties to the United Nations Convention against Corruption of 2003 (UNCAC)<sup>1467</sup> in an attempt to combat corruption in wildlife trafficking. In 2019, UNCAC Parties adopted a resolution aimed at preventing corruption which can impact on the environment. This reflects the key role of corruption in wildlife trafficking.<sup>1468</sup>

### 7.3 International legal framework

This section discusses the legal frameworks applicable to ivory trafficking. There is however no international criminal law framework aimed exclusively at the criminal aspects of wildlife trade.<sup>1469</sup> Unlike piracy, wildlife is not covered in a more general framework like UNCLOS,

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<sup>1461</sup> Wildlife Conservation Society. 2015a; Wildlife Conservation Society. 2015b. *Mozambique makes a stand against wildlife crime*. 6 July. Available: <https://newsroom.wcs.org/News-Releases/articleType/ArticleView/articleId/6899/Mozambique-makes-a-stand-against-wildlife-crime.aspx> [accessed 9 February 2017].

<sup>1462</sup> CITES. 2016b: 23.

<sup>1463</sup> Interview Participant 16. 2016.

<sup>1464</sup> Interview Participant 12. 2016.

<sup>1465</sup> Traffic. 2019. *Countering wildlife trafficking through Tanzania’s seaports: workshop proceedings*. Cambridge: Traffic: 23; Traffic. 2020: 28.

<sup>1466</sup> Interview Participant 12. 2016.

<sup>1467</sup> United Nations Convention against Corruption. 31 October 2003, New York, 2349 UNTS.

<sup>1468</sup> UNODC. 2020b: 20.

<sup>1469</sup> International Consortium on Combatting Wildlife Crime. 2012. *Wildlife and forest crime analytic toolkit*. Vienna: UNODC.

nor is it protected by its own framework, like drugs. A combination of the below frameworks can however be used to establish jurisdiction over wildlife crimes, including at sea.

### **7.3.1 The United Nations Convention on the Law of the Sea (UNCLOS)**

Unlike piracy and drugs, wildlife trafficking does not feature in UNCLOS. UNCLOS provides jurisdictional direction to states responding to wildlife trafficking in their maritime zones and on board flag vessels,<sup>1470</sup> but apart from fisheries crimes, it offers no guidance on responding to wildlife crimes on the high seas. There is also no other legal instrument authorizing additional jurisdiction powers similar to the Vienna Convention with regards to ivory trafficking on the high seas.

### **7.3.2 Convention against Transnational Organized Crime (UNTOC)**

In accordance with UNTOC, international trafficking of ivory, when executed by an organized criminal group and punishable by at least four years imprisonment, is a form of TOC. As with drug trafficking, UNTOC's most important article applicable to ivory trafficking at sea is Article 15 which confirms Flag State jurisdiction on the high seas. Wildlife crime<sup>1471</sup> was only officially recognized as a TOC in 2012 by UNTOC member states.<sup>1472</sup> In 2015, the UN General Assembly adopted Resolution 69/314 on Tackling Illicit Trafficking in Wildlife, which called upon states to criminalize wildlife trafficking and adopt legislative measures to address such crimes, as well as to address supply and demand.<sup>1473</sup> States should also use UNTOC's provisions on international assistance to give effect to international cooperation.<sup>1474</sup> UNTOC has detailed provisions on mutual legal assistance<sup>1475</sup> as well as joint investigations, extradition and controlled deliveries. But it does not authorize states to respond to foreign vessels trafficking wildlife on the high seas.

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<sup>1470</sup> As prescribed in UNCLOS Articles 8; 27; 33; 57 & 94. See Chapter 2.

<sup>1471</sup> For a definition of 'wildlife crime', see CITES. n.d.a. *Wildlife crime*. Available: <https://www.cites.org/eng/prog/iccwc.php/Wildlife-Crime> [accessed 6 February 2017]; UNODC. 2016a: 23 - 25.

<sup>1472</sup> Traffic. 2012.

<sup>1473</sup> United Nations General Assembly. 2015. *Resolution 69/314 on tackling illicit trafficking in wildlife*. 19 August. A/RES/69/314. Available: [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/RES/69/314](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/69/314) [accessed 28 March 2017].

<sup>1474</sup> UNODC. 2020b: 23.

<sup>1475</sup> Guilfoyle. 2009b: 35 - 36.

### 7.3.3 Convention on the International Trade in Endangered Species of Wild Fauna and Flora (CITES)

CITES is the primary international instrument aimed at protecting vulnerable species and through which policy work is done. It is however not a criminal law treaty or aimed directly at trafficking. It is an international trade treaty whereby members agree to trade in species in a sustainable way that does not threaten their survival. It therefore only regulates international trade, while domestic markets remain a sovereign decision. CITES Article VIII requires state parties to penalize trade in violation of CITES,<sup>1476</sup> but it does not provide any detail on possible interdiction regimes. Like UNCLOS, CITES is nearly universally ratified. Species are listed on one of three appendices depending on the level of protection they require. The 1989 ivory ban was given effect by moving nearly all African elephants to Appendix I which prohibits international trade.<sup>1477</sup> The elephant populations of South Africa, Namibia, Botswana and Zimbabwe have however remained on Appendix II,<sup>1478</sup> allowing limited international trade from stockpiles<sup>1479</sup> under strict conditions.<sup>1480</sup> If a species is not on an appendix, it can be traded freely.<sup>1481</sup>

States must incorporate CITES provisions into domestic legislation, such as criminalizing the import and export of ivory. The appendices are legally binding and failure to comply with CITES provisions can result in trade sanctions, although this is aimed at states instead of trafficking networks and can have an adverse economic impact on a non-compliant state.<sup>1482</sup> Unlike many other conventions, CITES therefore does have enforcement and compliance measures.<sup>1483</sup> But Participant 14 argues that the bans are hardly used.<sup>1484</sup> CITES can also

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<sup>1476</sup> For more on CITES, see CITES. n.d.b. *How Cites works*. Available: <https://cites.org/eng/disc/how.php> [accessed 12 November 2016]; UNODC. 2016a: 13; 24; Thouless et al. 2016: 31 – 32; UNODC. 2020b: 9.

<sup>1477</sup> Pre-ban or antique ivory may still be internationally traded, but this falls outside the scope of this discussion. See CITES. n.d.c. *Appendix I, II and III*. Available: <https://www.cites.org/eng/app/appendices.php> [accessed 28 February 2017].

<sup>1478</sup> The Ecologist. 2016.

<sup>1479</sup> Yufang & Clark. 2014: 24; CITES Secretariat. 2005.

<sup>1480</sup> CITES. 2008; UNODC. 2016a: 13.

<sup>1481</sup> UNODC. 2016a: 13

<sup>1482</sup> UNODC. 2016a: 23 - 24

<sup>1483</sup> Interview Participant 15. 2016.

<sup>1484</sup> Interview Participant 14. 2016.

only recommend that countries suspend trade with non-compliant states but CITES cannot enforce it themselves.<sup>1485</sup>

### 7.3.4 International Ship and Port Facility Security (ISPS) Code

Most ivory is moved on board vessels to which the ISPS Code<sup>1486</sup> applies. As discussed in Chapter 2, the response to the 2001 terror attacks was to protect the world from the potential dangers posed by the transport industry, which resulted in the adoption of new instruments to address weaknesses in transport systems. One of the outflows was the establishment of the ISPS code by the IMO in 2004. The Code was enacted as an amendment to the Safety of Life at Sea Convention of 1974 (SOLAS) and aims to improve maritime security.<sup>1487</sup> The objective was to provide assurance to Flag States that their vessels would be safe in foreign ports, as well as to assure Coastal States that the vessels entering their ports pose no threat.<sup>1488</sup> The Code offers guidance on security measures on board vessels and in ports and requires states, port authorities and shipping companies to implement certain safety measures.<sup>1489</sup> It sets out best management practices, similar to the BMP guidelines applicable to piracy. The Code therefore holds potential for setting security standards prevent TOC activity. In accordance with the Code, each vessel is meant to have a security plan which includes measures to prevent its use for carrying unauthorized items and measures to regulate access to the port and cargo handling.<sup>1490</sup>

The Code stresses the importance of ship and port security measures causing minimal delays to goods and people moved through ports.<sup>1491</sup> This reflects a tension between prioritizing trade and countering illicit shipments. Nothing however precludes states from implementing the security measures on board their flag vessels and in their ports as they deem fit. While these measures aimed at the shipping industry are likely the best weapon

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<sup>1485</sup> Interview Participant 15. 2016.

<sup>1486</sup> For a detailed discussion on the impact of ISPS code on port and maritime security, see, for example, Mazaheri, A. 2008. *How the ISPS code affects the port and port activities*. Master's Thesis. University College of Borås.

<sup>1487</sup> Raymond & Morrien. 2009: 3 - 4; Trelawny. 2013: 49.

<sup>1488</sup> Trelawny. 2013: 49.

<sup>1489</sup> Mazaheri. 2008: 10.

<sup>1490</sup> International ship suppliers and services association. 2016. *ISPS Code guidelines for ship suppliers*. London: International ship suppliers and services association: 18 - 21. Also see Papastavridis. 2013: 129.

<sup>1491</sup> International ship suppliers and services association. 2016: 18.

against containerized ivory trafficking and other maritime crimes,<sup>1492</sup> it is also one of the hardest to achieve.

#### 7.4 Responses to ivory trafficking in the Western Indian Ocean<sup>1493</sup>

Responses to ivory trafficking differ from heroin trafficking and piracy as ivory trafficking is not typically responded to at sea. This case study therefore highlights the importance of securing maritime infrastructure and supply chains on land to prevent the use of the oceans for illicit means. This section considers the responses to ivory trafficking at the hand of the security, law enforcement, economic, development and humanitarian paradigms. As with piracy and heroin trafficking, ivory trafficking encompasses elements of each paradigm.

**Table 3: Ivory trafficking paradigms and key responses**

Paradigm	Ivory trafficking problematized as:	Key responses	Key Actors/instruments	Land or sea based
<b>Security</b>	Security threat	<ul style="list-style-type: none"> <li>• Militarization of conservation</li> </ul>	<ul style="list-style-type: none"> <li>• Regional states</li> <li>• NGOs</li> </ul>	Land
<b>Legal</b>	Crime	<ul style="list-style-type: none"> <li>• Law reforms</li> <li>• Law enforcement capacity building</li> <li>• Prosecutions</li> <li>• Criminal justice capacity building</li> </ul>	<ul style="list-style-type: none"> <li>• Regional states</li> <li>• International organizations</li> <li>• NGOs</li> </ul>	Almost exclusively on land
<b>Economic</b>	Business model	<ul style="list-style-type: none"> <li>• N/A</li> </ul>	<ul style="list-style-type: none"> <li>• Shipping industry</li> </ul>	Land and sea

<sup>1492</sup> Griffiths & Jenks. 2012: 33.

<sup>1493</sup> UNODC. n.d.g. *Criminalization of wildlife trafficking*. Available: <https://www.unodc.org/e4j/en/wildlife-crime/module-3/key-issues/criminalization-of-wildlife-trafficking.html> [accessed 15 November 2020].

<b>Development</b>	Symptom of under-development	<ul style="list-style-type: none"> <li>• Alternative livelihood programmes</li> <li>• Public awareness campaigns</li> <li>• Capacity building</li> </ul>	<ul style="list-style-type: none"> <li>• NGOs</li> <li>• International organizations</li> </ul>	Land
<b>Humanitarian</b>	Source of suffering	<ul style="list-style-type: none"> <li>• Projects caring for elephants</li> <li>• Projects aimed at protecting communities</li> </ul>	<ul style="list-style-type: none"> <li>• NGOs</li> </ul>	Land

#### 7.4.1 Security paradigm

Under the security paradigm, ivory trafficking is considered a threat which must be addressed by extraordinary means, such as the use of force. While no responses aimed at ivory trafficking at sea fall under this paradigm, the paradigm is prominent in anti-poaching on land. Where the previous chapters have shown how piracy and heroin trafficking are addressed as threats, particularly by the international actors at sea, ivory trafficking is rarely responded to at sea. This likely indicates that external interventions at or from the high seas are easier to achieve than on land and that it is more complex to respond to container trafficking than smaller vessels like dhows. Where there is an overlap with the security paradigm, is with the militarization of conservation, often funded by the international community.

The militarization of conservation is a hybrid between a security and law enforcement response as the activities resemble a military's use of force, yet are implemented by law enforcement entities. Participant 19, a KWS investigating officer, reflected on his training:

“I had this notion in mind that I was going to be taught about animals’ behaviour [...] But I get to Manyani the first day and I saw hell, because there it is strictly paramilitary training that you do for six months. So, you sleep, drink discipline [...].

The paramilitary training is more focused on what they call field craft, military. Field craft is a way of surviving in the wild, how to fight, guerrilla kind of wars and all that [...] In those six months of paramilitary training, I don't even remember one day of being taught how an elephant behaves. It's how you handle your weapon, how you shoot, how do you find poachers [...] you come out to be a soldier, from a civilian to a soldier.”<sup>1494</sup>

When questioned on militarization, Participant 20, a senior KWS staff member, asked “what's wrong with that?” and questioned why you would not be armed if you are dealing with an armed poacher. Participant 19 told of how one NGO's staff member was teaching KWS rangers his skills which he learned in the US military.<sup>1495</sup> If you look at that organization's website, it could be mistaken for a military organization, not one aimed at conservation. Participant 11 noted that many anti-poaching efforts are funded by external states or NGOs as regional governments lack resources. Conservation groups in Kenya put immense pressure on its government to employ hundreds of additional rangers, creating an anti-poaching unit, as well as the more robust wildlife laws.<sup>1496</sup> Tanzania has also deployed additional rangers<sup>1497</sup> and turned to militarization in order to address exceptionally high level of poaching around 2013. Tanzania's Operation Tokomeza is often used to illustrate a severely failed militarized response to poaching,<sup>1498</sup> yet militarization seems to remain the order of the day.

#### 7.4.2 Legal paradigm

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<sup>1494</sup> Interview Participant 19. 2016.

<sup>1495</sup> Interview Participant 19. 2016.

<sup>1496</sup> See, for example, Global Initiative against Transnational Organized Crime. 2015. *Paula Kahumbu, hands off our Elephants*. 17 May. Available: <https://globalinitiative.net/analysis/interview-paula-kahumbu-hands-off-our-elephants-campaign/> [accessed 5 February 2021]; WildAid. n.d. *Elephants*. Available: <https://wildaid.org/programs/elephants/> [accessed 3 June 2020].

<sup>1497</sup> Interview Participant 11. 2016.

<sup>1498</sup> Interview Participant 15. 2016. For more on Operation Tokomeza, see, for example, Brooks & Hopkins. 2016; EIA. 2014: 6; 12; Carlson, Wright & Donges. 2015: 26 - 27; Ng'wanakilala, F. 2013. Tanzanian president sacks four ministers over poaching abuses. *Reuters*. 21 December. Available: <http://www.reuters.com/article/us-tanzania-politics-idUSBRE9BK04X20131221> [accessed 1 March 2017]; United States Congress. *Eliminate, neutralize, and disrupt wildlife trafficking Act of 2016*. Available: <https://www.congress.gov/114/plaws/publ231/PLAW-114publ231.pdf> [accessed 1 March 2017].

Most responses to ivory trafficking fall under the legal paradigm. Wildlife criminals exploit gaps in criminal justice systems and law enforcement<sup>1499</sup> and their actions are dealt with as a crime. This section focuses primarily on law enforcement responses in ports, which is trivial in scale and impact when compared to on-sea efforts against piracy and heroin trafficking. The law enforcement response to ivory trafficking takes place primarily on land along trafficking routes, ports and borders. This is different from heroin trafficking where heroin is seized and disposed of at sea by navies. It is also different to piracy, which is responded to almost exclusively at sea, also by navies. Commercial shipping vessels are not typically boarded for searches at sea. Instead, most seizures are made in ports, often acting on intelligence or container risk profiling. The Coastal State's laws will therefore apply. When asked if wildlife trafficking is targeted at sea, Participant 11 replied "I guess not. That is probably because a lot of the sort of international task forces have been focusing on drugs, their intelligence is coming from the drugs world".<sup>1500</sup>

In addition, targeting ivory trafficking at sea implies that an elephant has already been killed. Counter-efforts would therefore ideally be effective at the community level to discourage poaching. Another reason why ivory trafficking is not addressed at sea is because unlike piracy and drugs, it lacks a legal framework allowing the seizure of wildlife products on board foreign flagged vessels on the high seas. The participants working on ivory trafficking were most vocal about law enforcement being the most effective counter-measure.<sup>1501</sup> Participant 14 insisted that instead of creating new laws, existing ones must merely be enforced. He noted: "Implement the laws better and reduce corruption."<sup>1502</sup> He also stressed the importance of law enforcement in physical ivory markets in Africa:

"The important issue is to conserve the African elephant and to do that what we need to do is to put more resources into simple law enforcement [...] So, we know what needs to be done and some countries are doing a good job. Kenya is doing a good job [...] Then what you need to tackle are these illegal ivory markets. They're all illegal from the government's point of view [...], but for some reason which I don't fully understand, the international community is not putting enough pressure onto

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<sup>1499</sup> UNODC. 2016a: 3.

<sup>1500</sup> Interview Participant 11. 2016.

<sup>1501</sup> Interview Participants 12 & 19. 2016.

<sup>1502</sup> Interview Participant 14. 2016.

these countries to do anything [...] [T]hen what you need to do on the other side of the continent, of the world, is to get them to not improve their laws, to implement their laws. And the main country there is Vietnam. We've been able to move around very easily in Vietnam, we've been able to interview people [...] to photograph people, [...] to interview the customers who are almost all Chinese, because they don't fear anybody coming around. But it's all completely illegal. The raw ivory is being smuggled into Vietnam illegally from Africa. The worked art is being smuggled out of Vietnam illegally and imported illegally into China [...] what we need are not new regulations, what we need is simply law enforcement if you want to save the elephants."<sup>1503</sup>

When a state has been identified as playing a role in ivory poaching or trafficking, CITES may require it to develop a National Ivory Action Plan (NIAP) containing provisions on addressing the illegal ivory trade.<sup>1504</sup> Once states have brought poaching and trafficking under control, they may exit the NIAP process. The establishment of NIAPs by regional states seem to have inspired progress as these states indeed strengthened laws, law enforcement and prosecutions.<sup>1505</sup> The NIAPs of Kenya, Tanzania and Mozambique however do not include measures to address corruption,<sup>1506</sup> despite possibly being an ideal platform to consider and implement counter-corruption efforts and measures aimed at the transport industry.

#### **7.4.2.1 Law reforms: national legislation in eastern Africa**

Wildlife crimes have been considered as a lesser form of TOC. As Participant 12 noted, "most countries don't even recognize wildlife crime as an offence. It's a minor offence." He added that it was only after some time that "all law enforcement agencies have now reasoned to the fact that wildlife crime is now a real crime."<sup>1507</sup> States need to bring their laws in line with UNTOC if they wish to prosecute ivory trafficking as serious TOC. Similar to

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<sup>1503</sup> Interview Participant 14. 2016.

<sup>1504</sup> Thouless et al. 2016: 31 – 32.

<sup>1505</sup> CITES. 2016b: 18; Outhwaite & Little. 2020: 11. For a discussion on NIAPs, see EIA. 2018.

<sup>1506</sup> EIA. 2018: 5.

<sup>1507</sup> Interview Participant 12. 2016.

the response to Somali piracy, key states reformed their laws as wildlife crimes began to gain traction in the 2000s. This includes regional states like Mozambique<sup>1508</sup> and Kenya.<sup>1509</sup> Kenya's Wildlife Conservation and Management Act is now said to be the "harshest law on the planet" for wildlife crimes<sup>1510</sup> with Kenya's Minister for Tourism and Wildlife even hinting at possibly imposing the death penalty for certain crimes.<sup>1511</sup> While harsher laws could deter trafficking networks, they tend to merely shift to other, often nearby, states with weaker laws or implementation.<sup>1512</sup> As Participant 12 stated on Kenya's legislation, "in essence what our country is saying is, if you really need to go do the trafficking, just don't do it here."<sup>1513</sup> An example is the use of Zanzibar which has not criminalized ivory trafficking, possibly because elephants are a non-endemic species. It is therefore not only exploited for all the reasons that attract traffickers to islands,<sup>1514</sup> but also because of impunity. Another example is cross-border poaching between Tanzania and Kenya. As Participant 12 noted:

"Look at the legislation between Tanzania and Kenya where we share trans-boundary protection zones [...] [W]e exchange a lot of our wildlife. Our wildlife go and they don't come back. We notice it, they do. Something needs to be addressed and when you look at it, it's a legal response. Our legal response is stronger, in Tanzania it's free for all."<sup>1515</sup>

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<sup>1508</sup>See, for example, *Conservation Areas Act of 2013*. Article 55. Available: <http://earthmind.org/files/redlac10/7K-New-Conservation-Areas-Act-of-2013-Mozambique.pdf> [accessed 31 March 2017]; USAID. 2014. *Enforcing Mozambique's new law on wildlife poaching*. December. Available: <https://www.usaid.gov/results-data/success-stories/conservation-and-law-partnering-stop-poaching-mozambique> [accessed 9 February 2016]; Yeld, J. 2014. Mozambique puts bite into poaching laws. *IOL*. Available:

<http://www.iol.co.za/news/mozambique-puts-bite-into-poaching-laws-1679621#.VTeir6laKUK> [accessed 9 February 2017]; CITES. 2016b: 22; EIA. 2018: 32.

<sup>1509</sup>*Wildlife Conservation and Management Act 47 of 2013*. Available: [http://www.ktf.co.ke/documents/The\\_wildlife\\_conservation\\_and\\_management\\_bill\\_2013.pdf](http://www.ktf.co.ke/documents/The_wildlife_conservation_and_management_bill_2013.pdf) [accessed 1 November 2017]; Carlson, Wright & Donges. 2015: 24.

<sup>1510</sup>Interview Participant 12. 2016.

<sup>1511</sup>Masse, M. 2018. Kenya's death penalty plan for poachers has stirred a hornet's nest. *The Conversation*. 22 May. Available: <https://theconversation.com/kenyas-death-penalty-plan-for-poachers-has-stirred-a-hornets-nest-96865> [accessed 9 February 2020].

<sup>1512</sup>UNODC. 2020b: 12.

<sup>1513</sup>Interview Participant 12. 2016.

<sup>1514</sup>EIA. 2014: 23 – 24.

<sup>1515</sup>Interview Participant 12. 2016.

While this statement is misleading on Tanzania’s successful efforts to address ivory trafficking, which has included kingpins being arrested,<sup>1516</sup> it does illustrate that its transnational nature requires harmonized legislation in all implicated states to provide sufficient protection against trafficking,<sup>1517</sup> including of non-endemic species.<sup>1518</sup> The failure by states to enforce their laws equally therefore allows wildlife crimes to cross borders.<sup>1519</sup>

#### 7.4.2.2 Law enforcement in the field

As discussed under the security paradigm, a lot of international organizations and NGO assistance has focussed on law enforcement capacity building, such as by CITES and the UNODC. Regional states like Kenya and Tanzania have also increased law enforcement and criminal justice efforts. For example, Tanzania has established frameworks and bodies aimed specifically at wildlife crimes, including the National Anti-Poaching Strategy, the National Wildlife and Forest Security Committee and the National Anti-poaching Task Force. These entities are aimed at all levels of criminal network operations, from the poacher to the kingpin, and have resulted in the arrest of arguably the largest number of kingpins<sup>1520</sup> of all regional states. The majority of ivory-related prosecutions however remain at the level of poachers.<sup>1521</sup> Kenya for example has reported a ninety-eight per cent conviction rate for poaching offences, but bringing down entire networks and high-level arrests linked to large scale shipments remain the exception.<sup>1522</sup> This might be due to the failure to appreciate the importance of transnational investigations,<sup>1523</sup> as illustrated by the opinion of Participant 12:

“Kenya has no capacity to get the high-level traffickers. The high-level traffickers are in other countries. Our mutual legal assistance are not that strong to get someone

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<sup>1516</sup> See, for example, BBC. 2019a. *Chinese 'Ivory Queen' Yang Fenglan jailed in Tanzania*. 19 February. Available: <https://www.bbc.com/news/world-africa-47294715#:~:text=Tanzania%20has%20sentenced%20Yang%20Fenglan,tusks%20from%20some%20400%20elphants> [accessed 9 February 2021]; Earth League International. 2015b. *“The Devil”, most wanted ivory trafficker in Tanzania, arrested*. 29 October. Available: <https://earthleagueinternational.org/2015/10/29/the-devil-most-wanted-ivory-trafficker-in-tanzania-arrested/> [accessed 9 February 2021].

<sup>1517</sup> Traffic. 2019: annex II; Traffic. 2020: 13. Interview Participant 14. 2016. Also see Crosta, Beckner & Sutherland. 2015: 40; UNODC. 2020b: 20.

<sup>1518</sup> See, for example, UNODC. 2020b: 20.

<sup>1519</sup> Outhwaite & Little. 2020: 2; UNODC. 2020b: 12; Traffic. 2019: 8; Interview Participant 14. 2016.

<sup>1520</sup> Traffic. 2019: 10.

<sup>1521</sup> See, for example, EIA. 2018.

<sup>1522</sup> Traffic. 2020a: 15.

<sup>1523</sup> Interview Participant 20. 2018. Nairobi, Kenya.

extradited from Shanghai or Singapore [...] We don't even have MLAs with other countries [...] All we can do is get the people who are here. As it turns out, they are low level traffickers."<sup>1524</sup>

There have however been incidences of wildlife traffickers being extradited to Kenya.<sup>1525</sup> There have also been criminal justice efforts aimed at courts. Wildlife Direct, an NGO, began to monitor wildlife crime cases in Kenya's courts, in order to improve capacity to try such cases. Participant 12 explained how their presence in the court room puts pressure on prosecutors to perform, but also supports them as there is typically a lone prosecutor against a large defence team. The project, which is implemented in cooperation with the Kenyan judiciary, has also assisted the judiciary to improve its wildlife case management systems.

#### **7.4.2.3 Law enforcement in ports and the shipping industry**

Containers are rarely searched at sea, though this has previously reaped rewards, such as when 20 tonnes of cocaine was seized from a container vessel.<sup>1526</sup> At-sea searches could therefore prevent ivory from reaching land and possibly disappearing. This is however exceptional as containers are almost exclusively searched on land. Because CITES addresses international trade, most CITES-related enforcement takes place at ports of entry instead of exit.<sup>1527</sup> Port security measures in eastern Africa are indeed limited,<sup>1528</sup> which is a crucial gap in regional states' response to ivory trafficking<sup>1529</sup> as seaports form bottlenecks which provide opportunities for interception.<sup>1530</sup> Most large ivory seizures are made in ports in transit or destination states, reflecting the failure by African states to detect them. Illicit shipments are typically identified by intelligence, container risk profiling, scans or physical searches. However, if containers are not identified to be searched, a shipment is unlikely to

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<sup>1524</sup> Interview Participant 12. 2016. Interview Participant 13 also noted how low level network members make out the bulk of arrests in Kenya.

<sup>1525</sup> EIA. 2018: 26.

<sup>1526</sup> Paris, C. 2019. Inside shipping's record cocaine bust. *Wall Street Journal*. 24 July. Available: [https://www.wsj.com/articles/inside-shippings-record-cocaine-bust-11563960604?mod=article\\_inline](https://www.wsj.com/articles/inside-shippings-record-cocaine-bust-11563960604?mod=article_inline) [accessed 6 June 2020].

<sup>1527</sup> UNODC. 2020b: 30.

<sup>1528</sup> See, for example, Haysom, Gastrow and Shaw. 2018: 10.

<sup>1529</sup> See, for example, EIA. 2018.

<sup>1530</sup> Outhwaite & Little. 2020: 3; Traffic. 2020a: 5.

be located. Less than two per cent of global container throughput is inspected<sup>1531</sup> and only a small percentage of ivory seizures are made by random inspections. The rest are made on intelligence and risk profiling.<sup>1532</sup> Participant 2 noted how seizures in eastern Africa are mostly made on intelligence provided by the international community.<sup>1533</sup> And they do not necessarily lead to arrests. As Participant 18 noted, “every time we get a container seized without an arrest is a failure of law enforcement.”<sup>1534</sup> Another challenge is that ports are more interested in revenue collection than locating illicit shipments.<sup>1535</sup>

Customs and other law enforcement entities fail to identify illicit shipments not only due to a lack of capacity, but also due to widespread corruption in ports.<sup>1536</sup> Ports are a Coastal State responsibility. As a result, scans are traditionally used for imports which could negatively affect the Coastal State, while exports are neglected. In addition, container risk profiling is complicated and has limited success.<sup>1537</sup> It therefore appears that as soon as a vessel leaves or enters a port, the security around whatever may be on that vessel becomes the responsibility of the Coastal State receiving the container.

Kenya and Tanzania have scaled up their law enforcement efforts in ports and it appears to be reaping some rewards.<sup>1538</sup> The latest ETIS data suggests that 9 out of 10 seizures linked to Kenya and Tanzania are made by these states themselves.<sup>1539</sup> But these efforts to increase checks run the risk of slowing down trade<sup>1540</sup> and have arguably still had a limited impact. For example, an ivory shipment of 2 tonnes successfully left the Port of Mombasa in 2016, before being recalled back to Mombasa after intelligence of its illicit content was received.<sup>1541</sup> There are reports that the limited scanners in Mombasa are used

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<sup>1531</sup> UNODC. 2020c. *Cross-regional wildlife conservation in eastern and southern Africa and the Indian Ocean*. Available: [https://www.unodc.org/documents/easternafrika//WCP/UNODC\\_infographic\\_on\\_EU\\_funded\\_CRWC\\_programme\\_and\\_the\\_response\\_to\\_Covid-19\\_Kenya.pdf](https://www.unodc.org/documents/easternafrika//WCP/UNODC_infographic_on_EU_funded_CRWC_programme_and_the_response_to_Covid-19_Kenya.pdf) [accessed 15 May 2020].

<sup>1532</sup> UNODC. 2020b: 53.

<sup>1533</sup> Interview Participant 2. 2018.

<sup>1534</sup> Interview Participant 18. 2018.

<sup>1535</sup> Interview Participants 11; 17 & 21. 2016.

<sup>1536</sup> See, for example UNODC. 2020b: 17.

<sup>1537</sup> Traffic. 2019: 7.

<sup>1538</sup> CITES. 2019a: 14; 20 - 21; Vogt. 2015.

<sup>1539</sup> CITES. 2019a: 14.

<sup>1540</sup> Paris. 2020; EAL and Wildleaks. 2015: 5 – 6.

<sup>1541</sup> EWN. 2016.

incorrectly<sup>1542</sup> and an engineer in the port recalled being told that the scanners are only used during presidential visits.<sup>1543</sup>

While most port-based measures have been locally implemented, they have often been assisted by external entities or states. The best example is the World Customs Organization and UNODC Container Control Programme (CCP), which aims to foster inter-agency cooperation by setting up Joint Port Control Units (PCU) consisting of different law enforcement agencies, often including wildlife officers.<sup>1544</sup> All PCUs are connected, allowing them to exchange information. PCUs have seized 30 tonnes of ivory across the 59 states in which it operates globally,<sup>1545</sup> including the 9 tonne seizure in Vietnam<sup>1546</sup> which was made with the help of software used by PCUs. The same software has helped to identify 5 tonnes of pangolin scale shipments in Vietnam. The system profiles shipments by using electronic manifest data from shipping companies.<sup>1547</sup> Participant 27 from Kenya's ANU expressed the desire for the ANU to be included in the Kenyan PCU and to have access to the Port Automatic Operation Systems that allow profiling of imports and exports, believing this would result in more drug seizures as well.<sup>1548</sup> The need for inter-agency cooperation to counter TOC is therefore also evident when it comes to ports. In eastern Africa, PCUs are based in Mombasa, Dar es Salaam and Zanzibar,<sup>1549</sup> though not yet in Maputo.<sup>1550</sup>

International assistance in terms of law enforcement in ports is primarily in the form of capacity building, which is different to heroin and ivory trafficking where states from the Global North actively participate in law enforcement efforts. One example is the UNDP Global Environment Facility (GEF) project aimed at combatting maritime trafficking of wildlife between Africa and Asia. It was established in 2019 and aims to build the capacity of port entities in Mombasa, Dar es Salaam and Zanzibar, as well as to strengthen South-South

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<sup>1542</sup> EAL and Wildleaks. 2015: 5 – 6.

<sup>1543</sup> Personal communication. 2017. Cape Town, South Africa.

<sup>1544</sup> UNODC. 2018b: 31.

<sup>1545</sup> Traffic. 2019: 14. Also see UNODC. 2018b: 10.

<sup>1546</sup> UNODC. 2018b: 12.

<sup>1547</sup> Traffic. 2019: 13.

<sup>1548</sup> Interview Participant 27. 2016.

<sup>1549</sup> UNODC. 2019c. *UNODC and Mozambique discuss strategic roadmap against transnational organized crime, drugs and terrorism*. 18 September. Available: <https://www.unodc.org/unodc/en/frontpage/2019/September/unodc-and-mozambique-discuss-a-comprehensive-strategic-roadmap-against-transnational-organized-crime--drugs-and-terrorism.html> [accessed 25 May 2020].

<sup>1550</sup> Container Control Programme. 2020. *Annual report 2019*. Vienna: UNODC: 35.

cooperation to combat wildlife trafficking through regional chokepoints. The programme aims to increase capacity to use intelligence to intercept wildlife shipments, implementation of CITES, cooperation between law enforcement and private shipping industry and introducing automatic risk profiling in Mombasa and Dar es Salaam.<sup>1551</sup> This is a new initiative and its impact remains to be seen.

### 7.4.3 Economic paradigm

The economic paradigm considers ivory trafficking a business model<sup>1552</sup> and traffickers as economic actors. Participant 14 emphasized this: “Everything is economic, there is no explanation at all for any of this, except people trying to make money - the poachers, the craftsmen or the guys at the other end.”<sup>1553</sup> The response would then be to increase the risk and reduce the reward for traffickers. While the economic paradigm and the self-regulating response of the shipping industry were key to counter-piracy, it is near absent from the ocean-leg of ivory trafficking. This is despite ivory being moved on board commercial shipping vessels. It is not only shipping companies that are exploited by, or aid, trafficking operations, but also companies providing ancillary services,<sup>1554</sup> such as freight forwarding. If these companies fail to prevent their use for illicit shipments, law enforcement must locate shipments. The lack of a private industry response has been attributed to the ignorance of the shipping industry of the impact of wildlife trafficking on the industry and the role that they can play in countering it.<sup>1555</sup>

Suggestions on improving the response to ivory trafficking should therefore focus on what action the shipping industry can take. One such existing effort is the Buckingham Palace Declaration which members of the transport and shipping industries signed in 2016 to illustrate their commitment to cooperate with law enforcement to combat illicit wildlife trade in the transport industry, which includes shipping. The declaration was developed by the ‘Transport Taskforce’ which was set up to foster relationships with the private sector. In addition to the ISPS Code and the Buckingham Palace Declaration, the IMO has agreed to

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<sup>1551</sup> UNODC. 2019.

<sup>1552</sup> RIIA. 2002: 7; EAL. 2015: 3; Routes. n.d. *Wildlife trafficking*. Available: <https://routespartnership.org/about-routes/background> [accessed 25 May 2020].

<sup>1553</sup> Interview Participant 14. 2016.

<sup>1554</sup> See, for example, Khan & Singh. 2013: 524; RIIA. 2002: 7.

<sup>1555</sup> Traffic. 2019: annex.

develop guidelines on preventing and suppressing the shipping industry's use for wildlife trafficking after Kenya proposed such guidelines to the IMO in 2020.<sup>1556</sup> Such guidelines will be similar to the BMP, though they are only to be developed in 2022.<sup>1557</sup>

Another perspective on the economic paradigm exists for ivory trafficking. The poaching crisis fuels debate from those for and those against legal trade, using the argument that legalizing or banning ivory will increase the risk and benefit of the trade. Elephants have always been a contested species at CITES due to this divide.<sup>1558</sup> Many economic models have been applied to ivory trafficking, typically to illustrate that either a ban or legalization will end illegal trade.<sup>1559</sup> Due to the ongoing closure of markets, it is fair to say that the prohibitionists' campaign is currently most successful. But there are also many advocates, including academics and conservationists, who believe that the risk and benefit analysis of ivory trade will be reversed once it is legalized and regulated simultaneously with demand management.<sup>1560</sup> Although this issue goes to the heart of eradicating the trade, it falls outside the scope of this thesis as the foreseeable future will be dominated by bans.<sup>1561</sup>

#### 7.4.4 Development paradigm

Similar to heroin trafficking and piracy, the development paradigm's aims are twofold – promote development to provide alternative livelihoods<sup>1562</sup> and develop law enforcement and governance institutions able to combat ivory trafficking. Under this paradigm, poaching is considered a by-product of structural conditions which cause people to join criminal networks,<sup>1563</sup> while the lack of strong institutions fail to combat trafficking. Similar to

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<sup>1556</sup> Kinyua. 2020; IMO. 2021a. *FAL Convention at heart of IMO response to illegal wildlife trade*. 11 February. Available: <https://www.imo.org/en/MediaCentre/Pages/WhatsNew-1581.aspx> [accessed 18 February 2021].

<sup>1557</sup> IMO. 2021b. *Proceedings of the Asia dialogue on responses to wildlife trafficking in maritime transport*, 9 February, Zoom Webinar.

<sup>1558</sup> Fine Maron, D. 2019. Elephant ivory trade talks heat up in Geneva. *National Geographic*. 23 August. Available: <https://www.nationalgeographic.com/animals/2019/08/elephant-ivory-trade-at-cites/> [accessed 23 May 2020].

<sup>1559</sup> See, for example, Nadal, A. & Aguyao, F. 2014. Legalizing ivory trade: taking to new heights a dangerous policy proposal. *National Geographic*. 22 October. Available: <https://blog.nationalgeographic.org/2014/10/22/legalizing-ivory-trade-taking-to-new-heights-a-dangerous-policy-proposal/> [accessed 5 February 2015].

<sup>1560</sup> Interview Participant 16. 2016.

<sup>1561</sup> See, for example, Morell. 2016; The Ecologist. 2016; Bale. 2016; CITES. 2019b: 4.

<sup>1562</sup> UNODC. 2020b: 25.

<sup>1563</sup> See, for example, Routes. n.d; Bueger. 2013c: 91.

counter-piracy,<sup>1564</sup> the root causes of ivory trafficking include weak law enforcement, corruption and poverty. Efforts are therefore aimed at engaging local communities.<sup>1565</sup> Of all three illicit markets, the ivory market will likely benefit the most from a traditional development response. This is because the relationship between most poachers and elephants is one which is driven by a lack of economic alternatives. Efforts aimed at this often take on the form of establishing community-run conservancies around wildlife range.<sup>1566</sup> Participant 11 explained how these work, but also why they are challenging:

“[T]he community benefits from the revenue, so they get a percentage of the revenue from whatever, the hunting licences, conservation fees or tourism, to incentivise them to kind of protect the wildlife. It’s difficult to gauge to what extent it has been successful [...] the poaching still goes on. It’s difficult to change that when you’ve got impoverished communities, probably high unemployment and available natural resources for them to live on.”

Participant 16 also noted that money earmarked for communities often ends up in the hands of corrupt officials. COVID19’s impact on tourism now further threatens community-based efforts and has caused resurgent poaching. Development efforts aimed at improving governance structures, such as weak law enforcement, overlap with the legal paradigm. Also similar to piracy, awareness campaigns fall under this paradigm. Awareness campaigns are typically aimed at educating people about the impact and consequences of ivory trafficking, using the horrors of poaching to convince the public that ivory trade must be banned or that losing elephants results in lost tourism revenue.<sup>1567</sup>

#### **7.4.5 Humanitarian paradigm**

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<sup>1564</sup> Bueger. 2013d: 13; Bueger. 2013a: 91.

<sup>1565</sup> UNODC. 2020b: 25; UNODC. 2016a: 3.

<sup>1566</sup> See, for example, Miller, M.L. 2005. Good news for elephants: how these communities reduced poaching by 35% per cent. *Cool Green Science*. 30 November. Available: <https://blog.nature.org/science/2015/11/30/good-news-elephants-community-reduce-poaching-35-percent/> [accessed 9 February 2021].

<sup>1567</sup> Examples include Wildlife Direct. n.d. *Hands off our elephants*. Available: <https://wildlifedirect.org/hands-off-our-elephants/> [accessed 3 June 2020]; Global Initiative against Transnational Organized Crime. 2015; WildAid. n.d.

The humanitarian paradigm considers ivory trafficking as a source of suffering and the main victims are elephants.<sup>1568</sup> While the paradigm wanes in comparison to security and law enforcement, numerous NGOs take care of orphaned or injured elephants.<sup>1569</sup> Other initiatives include efforts to keep elephants from encroaching on human territory.<sup>1570</sup> Efforts aimed at communities surrounding wildlife can also fall under the humanitarian paradigm as they can also be considered victims of the trade and its consequences.

## 7.5 Conclusion

This chapter has illustrated how, to quote CITES, “[t]he illegal ivory trade is a complex dynamic system involving many different countries and players with different drivers acting at different places and on different temporal and spatial scales along the trade chain.”<sup>1571</sup> To counter this, multiple stakeholders, including private actors like the shipping industry, must be engaged in partnerships on a national, regional and international level to address the different problematic aspects thereof. The discussion of responses at the hand of paradigms has illustrated how most responses are aimed at security and law enforcement efforts aimed at poaching and trafficking on land, while economic and development response are neglected. Key to this is the absence of the shipping industry in the response despite being responsible for the movement of most ivory shipments. While there are indications of private-public partnerships starting to form, it needs to happen on a much larger and coordinated international scale to effectively counter ivory trafficking networks. As Participant 12 noted: “[There was a global concerted effort to counter piracy. But they completely did not put in the same effort when it came to wildlife crime.”<sup>1572</sup>

Because of Flag State jurisdiction and no equivalent to maritime-focused legal frameworks applicable to wildlife trafficking, the onus falls on Coastal States to detect illicit shipments during export and import. Port security measures, complimented by security measures implemented by the shipping industry, are likely to have the biggest impact on the trade

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<sup>1568</sup> For a discussion on animals as victims, see Flynn, M. & Hall, M. 2017. The case for a victimology of nonhuman animal harms. *Contemporary Justice Review*. 20(3). DOI: 10.1080/10282580.2017.1348898.

<sup>1569</sup> See, for example, Sheldrick Wildlife Trust. n.d. Available: <https://www.sheldrickwildlifetrust.org/> [accessed 9 February 2021].

<sup>1570</sup> See, for example, Save the Elephants. n.d. *Elephants and bees*. Available: <https://elephantsandbees.com/> [accessed 3 June 2020].

<sup>1571</sup> CITES. 2019a: 8.

<sup>1572</sup> Interview Participant 12. 2016.

from a law enforcement perspective, yet the shipping and transport industry is yet to share equal responsibility for carrying multiple tonne ivory shipments and taking steps to prevent it. Corruption also remains a significant barrier and prosecutions, especially of those responsible for orchestrating large shipments, remain mostly elusive. While improved law enforcement measures are promising, these must be accompanied by successful prosecutions of high-level traffickers and those in government facilitating the trade.

Ivory trafficking is typically not considered a maritime crime. This argument likely applies to all terrestrial wildlife moved across the ocean. However, if the maritime transport were to be removed, the modus operandi would fail. It is therefore equally worthy of attention to other maritime crimes and needs to form part of discussions on maritime security. Yet, despite this and similar to piracy and heroin trafficking, the long-term solution lies on land in addressing the drivers of demand and supply. Relying on a legal or illegal ivory market to stop the poaching has an uncertain outcome and by the time that such controls are in place, it might be too late to save certain elephant populations. It is only when consumers can move away from seeing ivory as a status symbol that demand is likely to go down. Similarly, it is only once communities living around wildlife can benefit from them through other means than poaching that ivory supply can go down. This must be accompanied by conservation and law enforcement policies that do not militarize communities into alienation. The possibilities of a combination of such responses is discussed in Chapter 8.

## **8 Missing the boat – counter-piracy signals the need for a paradigm shift in responding to transnational organized crime at sea**

This chapter discusses the insights gained in pursuit of answering the thesis' core research question: does the global governance response to Somali piracy provide a model for responding to other forms of TOC in the WIO off eastern Africa? The previous chapters have shown that while counter-piracy and the governing thereof hold many lessons in global crime governance, it does not in itself provide a replicable model for responding to other forms of TOC in the WIO. This is primarily because of piracy's unique legal framework affording it universal jurisdiction, Somalia's inability to prevent it and the exceptional political will driving the global response due to the threat it posed to shipping and trade. Comparing the possibilities for responses to piracy, heroin and ivory trafficking, has also highlighted both structural impediments and the necessity for what might be termed a 'unity of will', driven in this case by powerful external, rather than internal actors, all of which make a response similar to counter-piracy unlikely. The degree to which corruption remains a central impediment and a measure of lack of regional will to initiate and implement successful interventions, is also considered in this chapter.

The first section of this chapter will collectively consider the insights gained from each paradigm as applied to the responses to all three crimes. This reveals why and how actors respond to TOC at sea. The second section will discuss factors influencing responses to heroin and ivory trafficking, further making the replication of counter-piracy unlikely. It discusses nuances in heroin and ivory trafficking, such as how the impact of illicit markets shape responding actors and their responses. It identifies corruption as key commonality between all three markets and suggests that this is the crucial element which must collectively be countered to mitigate TOC. Finally, the third section will suggest alternative responses to heroin and ivory trafficking, all of which contain elements of counter-piracy's most successful characteristics – a governing mechanism, a prosecution model and the participation of private actors.

### **8.1 Paradigms as analytical framework for understanding responses to piracy, heroin and ivory trafficking**

The responses to piracy, heroin and ivory trafficking were all discussed within the framework of paradigms, which were first applied to counter-piracy responses by Bueger.<sup>1573</sup> The application of the security, legal, economic, development and humanitarian paradigms to responses to heroin and ivory trafficking was however a novel undertaking. Bueger's framework of paradigms served several purposes. First, it allowed for a methodical ordering of responses to heroin and ivory trafficking which has not previously been undertaken. This served the purpose of exposing the different problems posed by the illicit markets, thereby revealing the motivations and framing of policies by those who respond to these crimes. It further highlighted the nature of actors which gather in global crime governance efforts to address policy problems at sea and illustrated how responses and responders to TOC are primarily a hybrid of security and law enforcement actors, and state and non-state actors, interacting on land and sea. This interaction is sometimes innovative and purposeful, such as counter-piracy, or traditional and unimaginative, such as in response to heroin trafficking.

Second, in addition to ordering responses, the paradigms allowed detail to be added which shed light on the activities and actors operating under each paradigm. This resulted in a composite overview of the responses to three different TOCs at sea. Third, by applying the same ordering framework to all three markets, comparisons could be drawn between different actors, their activities and motivations. This illuminated similarities across the three illicit markets, but it also revealed distinct differences in the legal frameworks applicable to the different responses, as well as differences on how the illicit markets and their impacts are perceived and therefore regulated. Finally, as the interview data was incorporated into each categorized response, the paradigms indirectly served to order interview data, which revealed nuance and formative factors at play in each response. It suggested successes and failures, consensus and disagreements on varying themes. The use of paradigms as framework in this way is an extension of their utility to accommodate views from the field.

As suggested in Chapter 2, the comparative case study methodology truly did act as springboard for reflections about contrasting findings on the responses to the three crimes.

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<sup>1573</sup> Bueger. 2013a.

<sup>1574</sup> Bueger's framework allowed for an in-depth comparative analysis of responses to three unrelated TOCs, but the framework was also expanded by using it as an ordering device in new ways. This allowed for sufficient evidence to emerge to answer the research question. As this chapter will show, this research not only enhanced Bueger's paradigms, it also identified a missing paradigm which must be considered if TOC is to be more effectively countered – a paradigm focussing on the governing of responses and corruption. It therefore proposes a wider conceptual framework from which to consider how TOC at sea is ideally governed.

The following section will consider what the paradigms revealed about responses to TOC in the WIO and considers collective insights from all three markets and all three groups of interview participants.

### **8.1.1 The security paradigm**

Despite Flag States being afforded the responsibility and jurisdiction to respond to TOC on board their vessels, navies from outside eastern Africa and typically from the Global North, serve as the key actors under this paradigm for both piracy and heroin trafficking. This is because the Flag States in question lack the ability or the political will to respond to crimes on board their vessels. Under this paradigm, foreign navies operate on the high seas. This is the result of UNCLOS only allowing them to respond to these crimes on the high seas, but also because the vessels used by pirates and heroin traffickers lend themselves to an at-sea response and are perceived as a threat which needs to be eliminated. Ivory trafficking is likely not responded to at sea for this reason. The dominance of this paradigm by actors from the Global North is therefore due to their perception of piracy and heroin trafficking as a security threat, but it is also explained by their access to assets, arguably limiting access to the high seas to wealthier, more powerful states who have historically had a presence at sea. This was confirmed by participants who suggested that regional states can hardly patrol their own waters and lack the ability to operate on the high seas.<sup>1575</sup> The successive governments of Somalia, for example, have had no capacity to respond to piracy at sea and

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<sup>1574</sup> Bryman. 2012: 75.

<sup>1575</sup> Interview Participants 4; 5; 9 & 28.

regional states with more resources, such as Seychelles, had little to spare to contribute to the international counter-piracy effort beyond their own waters.

In keeping with the changing role of navies from coercive to cooperative in response to non-state threats,<sup>1576</sup> navies act in partnership and perform a largely constabulary role under this paradigm. Their activities more closely resemble law enforcement entities, but they are necessitated to be the key actors at sea due to being the only branch of government able to operate on the high seas. Their use of force is in fact limited and incomparable to the force used by law enforcement entities on land responding to ivory trafficking under this paradigm. Bueger's distinction between the security and law enforcement paradigms may perhaps then be better explained not by the use of force, but rather navies' ability to operate far from land. These are forms of soft security whereby navies seek to protect national interests further afield, often cooperating with others in doing so,<sup>1577</sup> such as by forming naval coalitions in response to piracy and heroin trafficking.

As suggested in Chapter 3, these attempts to establish maritime security are justified in the name of protecting and managing the global commons, or because of states' security interests in protecting themselves from threats from afar.<sup>1578</sup> Participants however argued that the naval presence on the high seas of the WIO is for the protection of external national interests and not to assist eastern African states to address TOCs threatening the region, although it was sometimes masked as such.<sup>1579</sup>

### **8.1.2 The legal paradigm**

Responses under the legal paradigm are concentrated on regional entities responsible for enforcing the criminal laws of Coastal States. Regional states and international organizations doing law enforcement and criminal justice capacity building of regional states are the key actors under this paradigm for heroin and ivory trafficking. However, navies, instead of maritime law enforcement entities, are the key constabulary actors under this paradigm for

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<sup>1576</sup> See, for example, Bateman. 2016: 7 & Chapter 3.

<sup>1577</sup> Klein. 2011: 6 – 8.

<sup>1578</sup> Germond & Germond-Duret. 2016: 124 - 126.

<sup>1579</sup> See Chapter 3.

piracy. This is because of the limited number of Somali institutions able to respond thereto and because of piracy being a high seas crime, therefore lending itself to a naval response by foreign navies able to operate in international waters.

Efforts under this paradigm have focussed on improving regional states' capacity to counter piracy, heroin and ivory trafficking. While this reflects partnerships between regional states and international organizations like the UN or foreign law enforcement entities like the NCA providing capacity building, this is not yet at a multilateral level as seen in response to the legal challenges posed by piracy. It has also had a limited impact.<sup>1580</sup> Participant 4, who heads one of the key UNODC agencies working on TOC, for example suggested that there is still no effective maritime law enforcement capacity from Egypt to South Africa and yet eastern Africa's few and small navies are expected to patrol their sections of this massive and strategically important maritime domain.<sup>1581</sup>

One of the key responses under the legal paradigm for piracy was the development of the PPM to deal with the initial lack of a legal finish. The response to heroin trafficking now finds itself in a similar legal lacuna as statelessness is the ultimate flag of convenience due to legal uncertainty and fears of human rights abuses once traffickers are returned to Iran or Pakistan. While navies responding to piracy have jurisdiction to arrest pirates in terms of UNCLOS Article 105, both UNCLOS Article 110 and Article 17 of the Vienna Convention fall short of allowing the arrest of crew members on board the stateless vessels used to move heroin across the high seas of the WIO. Participants working on law enforcement identified this lack of a legal finish as the key barrier to countering heroin trafficking in the WIO. As a result, research participants suggested, *inter alia*, a jurisdictional regime resembling the PPM. This is discussed in Section 8.3.

Ivory trafficking is responded to primarily on land. Because of the omission to board commercial vessels suspected of ivory trafficking at sea, a broader jurisdictional framework resembling universal jurisdiction as applicable to piracy and as suggested against heroin

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<sup>1580</sup> Interview Participants 1; 2; 3; 4 & 15. Participant 2 noted: "[W]e will do what we can, say, oh, well, we are training the Galmudug coast guard. Bullshit, build them a coast guard station, give them boats, maintenance [...] But the EU come in, pick them up and take them out to a naval ship, give them lots of training, send them back in and they don't get a salary, so they go back to fishing."

<sup>1581</sup> Interview Participant 4. 2016. Nairobi, Kenya.

trafficking will be of little use for responding to ivory trafficking on the high seas. Current ivory interceptions are not based on international legal frameworks but on domestic legislation. A broader international legal framework or the enforcement of existing frameworks aimed at regulating security in the shipping industry, due to the shipping industry's intrinsic role in wildlife trafficking, is likely to reap more rewards. This is discussed in Section 8.3. Due to the land-based nature of the response, the case study of ivory trafficking supports the importance of interpretations of maritime security also encompassing the security of maritime infrastructure on land.

Finally, it was noted how borders are an advantage to criminal networks, but a barrier to law enforcement agencies<sup>1582</sup> as they must adhere to jurisdiction limitations. All three case studies have shown that increased law enforcement and security responses have merely caused TOC networks to shift operations, shopping around for jurisdictions with less stringent law enforcement. Some participants also noted one of their biggest challenges as neighbouring countries having weaker laws or not implementing their laws<sup>1583</sup> and not being able to give effect to cross-border operations.<sup>1584</sup> Harmonizing the legal frameworks of key states involved in the trade is therefore important, provided this is done in conjunction with measures to mitigate the causes and harms of these crimes under the economic, development and humanitarian paradigms. While law reforms guided by a group of international legal experts and practitioners were key to counter-piracy, it has been ad hoc and domestically driven for heroin and ivory trafficking.

### **8.1.3 The economic paradigm**

Although the shipping industry was the primary victim of piracy, its role is inverted with heroin and ivory trafficking as it serves instead as key facilitator of illicit shipments, either through negligence or complicity. While the shipping industry was key to counter-piracy, acting as equal security partner to states and international organizations and even having a CGPCS WG facilitating cooperation between the shipping industry and states, it is near absent in the responses to heroin and ivory trafficking. Chapter 7 illustrated the

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<sup>1582</sup> Naim. 2007: 8.

<sup>1583</sup> Interview Participants 12; 14; 26 & 27. Also see Radisch. 2016: 32.

<sup>1584</sup> Interview Participant 22. 2016.

consequences of the shipping industry not participating in the response – the continuation of widespread poaching and ivory trafficking due to impunity. The trafficking of illicit commodities by container also incites and exacerbates corruption in regional states. This illustrates the importance of the formation of security assemblages, with the primary objective of incorporating the shipping industry in responses due to their centrality to the trafficking model. This must be extended to ports as they are the key institution servicing the shipping industry. Port security measures, complimented by security measures implemented by the shipping industry, are likely to have the biggest impact on illicit trades from a law enforcement perspective. It will also alleviate the pressure on over-burdened regional law enforcement entities and not expose them to potential corruption.

The absence or prominence of the economic paradigm in counter-efforts illuminates how the perceived impact and interests threatened by TOC determines who responds and how. This suggests that when TOC at sea threatens economic interests as significant as global shipping, stakeholders are more likely to work together to forge a response. As the interest threatened by heroin and ivory trafficking are not primarily economic, responses have been on a smaller and ad hoc scale. This shows that it is unlikely that there would be an equally far-reaching response to crimes which do not threaten the vital interests of public or private actors with the resources to respond to them.

#### **8.1.4 The development paradigm**

All three illicit markets have shown that TOC networks merely shift in response to security and law enforcement efforts. As these are focussed primarily at sea, it illustrates that a focus solely at sea may suppress TOC, but it will not eradicate it. This is because such responses fail to address the causes of these crimes, which are typically left to development actors implementing general development projects. Key causes of concern, both globally and in eastern Africa, include the failure to address demand for illicit commodities, corruption, weak governance and a lack of livelihood options. TOC in eastern Africa is the product of these broader governance issues.<sup>1585</sup> The literature however suggests, and many

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<sup>1585</sup> Wright. 2013: 8.

participants, including those directly engaged in the effort, agreed, that their land-based responses, which were typically aimed at development, were not very successful.<sup>1586</sup>

The supply of all three illicit markets has a social dimension,<sup>1587</sup> serving as an alternative source of income which enjoys a level of legitimacy due to limited legitimate alternatives. If left unaddressed, this will continue to drive supply. This is also the case with endemic corruption and weak institutions unable to prevent or respond to these crimes. The key response under this paradigm for all three illicit markets is therefore capacity building efforts aimed primarily at regional law enforcement and criminal justice structures, thereby also constituting legal responses. Efforts to create alternative livelihoods also fall under this paradigm. Similar to how counter-piracy neglected the causes of piracy on land, the neglect of the drivers of heroin and ivory trafficking will produce the same outcome. The problem with development efforts aimed at improving regional institutional capacity to address TOC at sea is that they are typically project-based and rarely have a long-term impact such as developing entire institutions.<sup>1588</sup> The failure by the international community to support the establishment of Somali institutions able to counter piracy despite three decades of attempts perhaps best illustrates this.

While development actors are typically states and international organizations, NGOs have also played a key role in response to all three illicit markets, thereby again illustrating the importance of incorporating non-state actors in efforts to curb TOC. This is reflective of the suggestion by Burris et al that combined state and non-state governance efforts are illustrative of states no longer having a monopoly on governance and themselves possibly being governed by non-state actors.<sup>1589</sup> This is seen in the pressure NGOs put on governments to respond to ivory trafficking after ivory poaching spiked.

### **8.1.5 The humanitarian paradigm**

In all three illicit markets, humanitarian responses are the most neglected, thereby failing to prioritize the key harms caused by these crimes. Considering the resources applied towards

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<sup>1586</sup> Interview Participants 4; 8; 9 & 22.

<sup>1587</sup> See Hobsbawm. 1972: 1 - 19; Von Lampe. 2016: 19 – 20. Standing. 2010.

<sup>1588</sup> Interview Participant 3; 9 & 15.

<sup>1589</sup> Burris, Kempa. & Shearing. 2008: 3 - 4.

security and law enforcement responses, those who are most harmed by the impact of the three crimes receive the least amount of resources. The focus on these crimes is therefore on the perpetrators, not the victims. In addition, the harms are often addressed primarily by non-state actors like NGOs, stepping in where the state has left a void. This is reflective of non-state actors stepping into the role of the state, though it does not reflect such actors governing the states themselves. This again shows the importance of non-state actors cooperating with traditional state actors to respond to contemporary manifestations of TOC and its multifaceted impacts.

## **8.2 Additional factors influencing responses to transnational organized crime**

While the paradigms have illustrated why different actors consider TOC at sea as problematic, many factors contribute to their perceptions and chosen responses. This section considers how selected factors influence the responders and responses to piracy, heroin and ivory trafficking, namely corruption, the failure by regional states to effectively respond, national priorities and the impact of the crimes.

Chapters 6 and 7 showed that the commercial interests which drove the counter-piracy assemblage, and the coalitions against slavery and privateering in the 18th century, are absent for heroin and ivory trafficking. Other interests therefore have to evoke a response. In addition to exploring whether new responses can be established or existing responses replicated, an enquiry as to whether stakeholders are willing to respond had to be undertaken. The previous chapters have revealed that piracy, its international legal framework and the interests which it threatened, were so unique that the same combination of factors, and therefore also the resulting responses, are unlikely to be replicated.<sup>1590</sup> It's truly global impact also resulted in states forming relationships where previously there weren't any and might not be again. This is important because the interviews suggest that a combination of these factors determine whether counter-efforts will form.

The different interests at play when choosing to respond to TOC were mentioned by participants questioned on all three illicit markets. Their collective insights are presented in

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<sup>1590</sup> Also see, for example, Jacobi. 2014.

this section. Participants noted how states prioritize threats and will pay most attention to those which are most imminent and pose the greatest danger. The willingness or failure to act differs across the markets, but participants from all three markets suggested that if a state does not perceive an illicit market as a threat to their national interests, they will not act against it.<sup>1591</sup> While this is true for the international community and regional states, these remarks were mostly aimed at states from the Global North. No external response is therefore solely in the interest of assisting eastern African states to counter TOC, but is instead motivated by protecting national interests. For example, if a major state is absent from counter-drug trafficking efforts off eastern Africa, they likely do not perceive it as a serious threat to their nation.

The threat posed by the three illicit markets is perceived differently by different actors. This was illustrated in the application of the paradigms in Chapters 5 - 7. Declining wildlife populations and drug users do not seem to evoke the same reaction from the international community as a threat to their economies. This makes piracy unique. Despite the fact that nationals from numerous states are the main victims of piracy, if piracy had not threatened world trade, the extent of the international response would likely have been limited. This is telling for other maritime crimes. The below sections consider key factors which motivate or discourage responses.

### **8.2.1 Corruption**

As discussed in Chapters 6 and 7, many participants consider corruption to be the primary impact of TOC at sea. Most participants suggested that corruption is a necessary element of TOC and that it can be a barrier to any response's success.<sup>1592</sup> Participant 17, a UN staff member, noted how "any trafficking process would be facilitated by some degrees of corruption along the chain,"<sup>1593</sup> while Participant 13, working for a wildlife NGO in Kenya, noted "in all the major investigations we've looked at, there were elements of the Kenya Revenue Authority or police or someone involved in the process leading up to the

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<sup>1591</sup> Interview Participants 2; 3; 9; 12; 21; 22 & 28.

<sup>1592</sup> Interview Participants 2; 4; 6; 8; 9; 11; 12; 13; 14; 16; 17; 18; 21; 22; 23; 25; 26; 27 & 28.

<sup>1593</sup> Interview Participant 17. 2016.

seizure”.<sup>1594</sup> The general opinion can be summarised as described by Participant 4, a senior figure in the response to TOC at sea:

“I think you’ve got to put corruption right in the centre of your discussion [...] if the UNODC had only one programme in East Africa, across the whole regional office, it should be the one that we’ve not got – corruption.”<sup>1595</sup>

Comments such as “if we don’t come across corruption then we are not doing our job properly”,<sup>1596</sup> “to succeed in drug cases, you must combat corruption”,<sup>1597</sup> “if you don’t clean up the corruption that’s going on there, you’ll continue to have these problems”<sup>1598</sup> support this view. Participants felt that responses will have a limited effect if corruption accompanying TOC is not countered.

Some participants supported the suggestion by Hibou, Bayert and Ellis<sup>1599</sup> that corruption is so entrenched in Africa that traditional counter-measures are futile.<sup>1600</sup> Participant 4 noted:

“[I]f you’re going to tackle corruption in East Africa, you’re going to have to come up with some very exciting, novel ideas for doing it and its not down to anti-corruption commissions, or training judges and prosecutors...Corruption like this is the golden strand right through everything in society, whether it’s the police, getting university results that you wouldn’t have [...], commercial operations. It is absolutely through society and how do you tackle that? It’s not a ‘Oh! We’ve got it as part of a work plan.’”<sup>1601</sup>

Participant 15 from CITES similarly noted:

“I just don’t think that it is up to a convention on trade or any NGOs, I don’t think they have the expertise to help. I don’t know enough about what you do to solve corruption. But again, I would think it has to do with that capacity and the strength of institutions as opposed to the strength of individuals [...]. And that really is kind of

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<sup>1594</sup> Interview Participant 13. 2016.

<sup>1595</sup> Interview Participant 4. 2016.

<sup>1596</sup> Interview Participant 21. 2016.

<sup>1597</sup> Interview Participant 26. 2016.

<sup>1598</sup> Interview Participant 14. 2016.

<sup>1599</sup> As discussed in Chapter 6.

<sup>1600</sup> Interview Participants 4; 15 & 21. 2016.

<sup>1601</sup> Interview Participant 4. 2016.

tricky in the African culture, it doesn't gel very well with traditional governance mechanisms [...] I don't think you'll break it through workshops (laughs)".<sup>1602</sup>

Counter-corruption measures never even featured at workshops where participants were observed, but as suggested by the interviews, it would have been pointless. According to Participant 21 working on drug trafficking in Tanzania: "you will never get rid of it, you just have to work around it,"<sup>1603</sup> suggesting that corruption must be reconciled with as a necessary evil in the region. This was also illustrated by other participants who acknowledged working in the face of overt corruption. Participant 21 added how corruption is

"the African way of doing business and it's a way that they make more money for their retirement. I don't think there is probably not one police officer who has never not taken a bribe. No there isn't. Even if it is for a road trafficking offence, you can ask some of our most trusted police officers, they'll tell you. It's just the way it is [...] I think when you look at the statistics, like some of the corruption scale indexes, Tanzania features very, very highly there. It has got one of the most corrupt police forces in Africa... so is it any worse or any better than the other African countries? I don't think so."

He added that where high level corruption is involved, it is undermining the fabric of society, yet Tanzanians do nothing about it: "[T]he government know that they can get away with this stuff, no one really bats an eye."<sup>1604</sup> The perceived entrenched nature of corruption was also noted by Participant 15 who referred to the book 'Africa Works',<sup>1605</sup> to explain how business is conducted in Africa and how disorder is used as a political instrument. He noted:

"I do know from living here that there is no problem that cannot be resolved. Everything has a solution. And when you are in that business, then you use the tools that are available to you. So, I would expect that it plays quite a role and to what level? Again, in general, African societies tend to have this little pyramidal structure this sort of, there's never sort of a rogue out there, everybody is part of this little

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<sup>1602</sup> Interview Participant 15. 2016.

<sup>1603</sup> Interview Participant 21. 2016.

<sup>1604</sup> Interview Participant 21. 2016.

<sup>1605</sup> Chabal, P. & Daloz, J. 1999. *Africa works: disorder as political instrument*. Oxford: James Currey Publishers.

pyramid. And you hear, and I don't have any evidence for this, but you hear that the police that sort of stops cars and extract bribes from drivers, are not just collecting money for themselves [...], they have a quota that they have to fill every day for somebody at the police station. They have to pay their dues. So it goes high".<sup>1606</sup>

Despite the suggestions that counter-corruption measures should be the primary intervention, hardly any programming being researched had components focussed on corruption. An exception is the EAGLE Network (Eco Activists for Governance and Law Enforcement) which has countering corruption linked to wildlife trafficking at its core. Participant 18, a senior staff member of the network, noted why this is their focus:

"[C]orruption is by all means the major obstacle for wildlife law enforcers. The workshops do not improve anything, never did, never have [...] [O]rganized crime is facilitated by corruption. Corruption is prevalent in court and prevalent in the wildlife officers and in the police forces [...] In eighty-five per cent of all of the arrests we intercept and combat a corruption attempt [...] Then in the court, I can show you that in eighty per cent of them we have corruption attempts documented and combatted".<sup>1607</sup>

He believes that governments like Kenya and NGOs claim huge successes in countering wildlife crime, yet very few traffickers and corrupt officials have been successfully prosecuted. Instead, he noted, "they are just let off the hook and their cases disappear. So here in Kenya...it is catastrophic now."<sup>1608</sup>

For the most part, comments like "it is something we are trying to help with, not through my programme generally, but joining up with the anti-corruption people"<sup>1609</sup> were often made. The same can be said for money-laundering, as both are notoriously difficult to counter. Where these are not prioritized by national governments, it appears to also be neglected by the international community. While the international community will intervene in matters affecting their own states, corruption and money laundering on a national level does not really concern them. As Participant 4 noted:

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<sup>1606</sup> Interview Participant 15. 2016.

<sup>1607</sup> Interview Participant 18. 2018.

<sup>1608</sup> Interview Participant 18. 2018.

<sup>1609</sup> Interview Participant 11. 2016.

“You can’t really do much about money laundering unless all the states in the region are determined to disrupt it. I think you have to question the interests of some states in this region [...] of disrupting money laundering [...] if you’ve got the situations where political leaders are paid a nominal salary as head of state and yet they are massively rich, which happens in a lot of African countries, I think it must be that that money is being laundered in some way. So, their commitment to disrupt, [...] having effective money laundering provisions, is not a priority.”<sup>1610</sup>

The level of corruption and money laundering in the region was noted by residents of Seychelles, which referred to Seychelles as “the laundry room” and “the most corrupt country I have ever been”.<sup>1611</sup> Some participants added that corruption could be the reason for the failure to implement counter responses as those tasked with eliminating illicit activities instead benefit from them. One example is Tanzania’s Operation Tokomeza, which two participants suggested may have been halted because high-ranking officials “didn’t want it to happen.”<sup>1612</sup> Participant 16, who has researched ivory trafficking for decades, said:

“[T]here were a few high-level politicians in Tanzania involved in the ivory trade. Very heavily. The ivory in Selous has been driven up in wildlife department vehicles [...] [T]hey’ve even given the names in the newspapers. The guys who’s the, it is the head of the national party, Chama Cha Mapinduzi [...] I think he was secretary general, he was involved in the ivory trade.”<sup>1613</sup>

Two participants also saw corruption as the reason for insufficient regional cooperation on TOC.<sup>1614</sup> Three participants used the example of the involvement of the Kenyan Defence Force (KDF) in smuggling charcoal between Kenya and Somalia in violation of a UNSC sanction to illustrate why nothing is being done about it:<sup>1615</sup>

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<sup>1610</sup> Interview Participant 4. 2016.

<sup>1611</sup> Personal communications, Mahe, Seychelles. 2020.

<sup>1612</sup> Interview Participants 15 & 16. 2016.

<sup>1613</sup> Interview Participant 16. 2016.

<sup>1614</sup> Interview Participants 9 & 28. 2016.

<sup>1615</sup> Interview Participants 2; 3 & 9. See Rawlence, B. 2015. *Black and white: Kenya’s criminal rackets in Somalia*. Nairobi: Journalists for Justice.

“[T]he [UNSC] has banned charcoal exports from Somalia because it is funding Al-Shabaab [...] sugar comes back in the other way on the same ships [...] from the UAE, goes into Kismaayo and then because of the collusion with Kenyan forces, they smuggle them into Kenya. Well, it’s not smuggled, it’s just driven into Kenya by the [KDF], sugar is also subject to a series of fines. So, how is it that Kenya as a country, who’s seriously affected by terrorism from Al-Shabaab, whose soldiers are deployed in Somalia with AMISOM, are dying in their hundreds because of engagements with Al-Shabaab that are being funded by charcoal and sugar, which they’re allowing their defence forces to smuggle into Kenya? [...] Until they start accepting responsibility and instead of filling their own pockets [...] their soldiers are going to keep digging to die, they are still going to have a terrorist and serious crime problem.”<sup>1616</sup>

Similarly, when asked how the region is doing on information and intelligence-sharing, Participant 18 noted “they share intelligence, with the traffickers!”<sup>1617</sup> Participant 22 from the UN similarly noted:

“it’s really just getting the buy-in from the international community and those regional states to actually want to prosecute [...] the risk is...who is controlling the heroin trafficking [...] through the countries in question? And, you know, that other sort of barriers to political will when you’ve got potentially interests in the trafficking, in all sorts of crime, let alone the trafficking of heroin.”<sup>1618</sup>

Corruption not only accompanies TOC and discourages responses, it also attracts illicit activity. This has been extensively covered in the literature, yet policy and programming responses continue to treat corruption and organized crime as separate phenomena. Although UNTOC Article 8 calls on state parties to criminalize corruption, the connection between TOC, governance and corruption is hardly at the centre of UNTOC. As Participant 25 heading a drug trafficking programme noted “it’s obviously logical that the reason that they come through Africa [...] is because there is weak institutions here [...] and the fact that you can buy your way out of most things in countries like this”.<sup>1619</sup> Although participants

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<sup>1616</sup> Interview Participant 2. 2018.

<sup>1617</sup> Interview Participant 18. 2018.

<sup>1618</sup> Interview Participant 22. 2016.

<sup>1619</sup> Interview Participant 25. 2017.

admitted to not always having tangible proof of corrupt activities, they were convinced of its existence and impact.<sup>1620</sup>

Corruption also impacts attempts at alternative counter-measures, such as harm reduction in the case of heroin and legalization in the case of ivory. Two participants working on harm reduction efforts in Kenya were of the opinion that drug users are specifically targeted by police as dealers and ‘barons’ are tipped off by police prior to raids. This leads to the continued criminalization of users instead of traffickers and kingpins.<sup>1621</sup> Corruption was also noted as a barrier to the legalization of international trade in ivory.<sup>1622</sup> Participant 13 noted “I think when you can explain to people the argument of putting proceeds from selling ivory back into conservancy in pretty well every government in Africa, the money is not going to conservancy, its going into somebody’s pocket.”<sup>1623</sup>

Corruption is present in all three illicit markets. Although the link between corruption and piracy is rarely discussed in the piracy literature, the issue of piracy exacerbating corruption in Somalia as discussed in Chapters 4 and 5 has been mentioned in UNSC Resolutions.<sup>1624</sup> Participants<sup>1625</sup> often referred to the FGS and regional institutions’ corrupt practices and links to piracy, from protecting pirate leaders and issuing them diplomatic passports, corruption undermining humanitarian efforts,<sup>1626</sup> Somalia refusing to pass piracy legislation<sup>1627</sup> and unlawfully selling fishing licences.<sup>1628</sup> The high turn-over rate of Somali government officials is also said to fuel corruption, as officials, who are often from the diaspora, know they will not be in the position for long and therefore try to maximize their income.<sup>1629</sup> This constant change in office bearers also poses challenges to continuity of any

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<sup>1620</sup> Interview Participants 21; 22 & 25.

<sup>1621</sup> Interview Participants 24 & 29. 2016.

<sup>1622</sup> Interview Participants 13 & 14. 2016.

<sup>1623</sup> Interview Participant 13. 2016.

<sup>1624</sup> See, for example, United Nations. 2018. *Security Council adopts Resolution 2442 (2018), authorizing 12-month extension for international naval forces fighting piracy off Somali coast*, 6 November. SC/13566. Available: <https://www.un.org/press/en/2018/sc13566.doc.htm> [accessed 4 February 2021].

<sup>1625</sup> Interview Participants 2; 3; 4; 8 & 9.

<sup>1626</sup> Interview Participant 2. 2018.

<sup>1627</sup> Interview Participant 4. 2016.

<sup>1628</sup> Interview Participant 9. 2016; Wright. 2013: 36.

<sup>1629</sup> Interview Participant 2. 2018 & Interview Participant 4. 2016. As Participant 4 noted: “[T]here’s strong incentives to see if you can make some personal wealth during that time. There’s no interest in the country in the long term.”

capacity building efforts implemented by the international community.<sup>1630</sup> Engaging in corrupt activities as a means to supplement income was also noted in relation to the other markets.<sup>1631</sup>

Corruption in the region ranges from customs officials in ports,<sup>1632</sup> to senior government officials and the judiciary responsible for adjudicating TOC cases.<sup>1633</sup> As Participant 17 explained: “somewhere along there, there has to be corruption, either in officers turning a blind eye, or in officers basically providing falsified documentation”.<sup>1634</sup> The type of corruption differs, depending on the criminal modus operandi used. For example, moving containerized heroin through a port requires a higher level of protection than dropping off heroin at sea under the cover of darkness.<sup>1635</sup>

Participant 21 noted how sharing information with a policeman can be safer than sharing it with a minister, as the minister could have closer ties to the criminal network to which the information pertains.<sup>1636</sup> Participant 18 considered high level politicians involved in wildlife trafficking as untouchable:

“[I]t is like South Africa and Kenya, playing it tough and saying, ‘oh, we will kill those poachers in the field.’ Who cares? These are your foot soldiers, you know very well who are the big people from your government, but they are untouchable. So, nobody wants to talk about it. You have police officers who have been arrested, where are they? [...] [A] false narrative of people talking about the small poachers and avoiding the real people behind it, because they are strong. Because they are powerful”.<sup>1637</sup>

Participants further suggested that corruption drives responses to piracy and heroin trafficking out to sea in an attempt to avoid corruption on land.<sup>1638</sup> This is because such responses prevent illicit commodities from leaving or reaching land in eastern Africa. The

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<sup>1630</sup> Participant observation; Interview Participant 1. 2017.

<sup>1631</sup> Interview Participants 4 & 19. 2016.

<sup>1632</sup> Interview Participants 11 & 25. 2016.

<sup>1633</sup> Interview Participant 27. 2016.

<sup>1634</sup> Interview Participant 17. 2016.

<sup>1635</sup> Interview Participant 22. 2016.

<sup>1636</sup> Interview Participant 21. 2016.

<sup>1637</sup> Interview Participant 18. 2018.

<sup>1638</sup> Interview Participants 4; 21 & 22.

motivation for this however differed for piracy and heroin trafficking. Participants suggested that heroin should ideally be seized prior to reaching eastern Africa's shores as it is easier to apprehend drugs at sea than on land. An international law enforcement officer working on heroin trafficking noted how one of their officers was intimidated and told that they were not welcome in Mozambique. For this reason, their work is better based at sea.<sup>1639</sup> As discussed in Chapter 6, participants feared the possible consequences of international navies letting drugs pass into territorial waters.<sup>1640</sup> Participants noted on more than one occasion that heroin seized in Kenya has mysteriously disappeared. This is however not unique to Kenya, as a participant working in Tanzania explained: "as soon as you drop that off on land, the drugs are likely to disappear. It has happened here before, [...] in Kenya, [...] in Mozambique."<sup>1641</sup> Participant 22 noted:

"[S]topping it before it gets to the borders to corrupt people is the ideal situation. Getting it on sea is the best possible scenario...I suppose the key to interdiction at sea is to get a large quantity for a relatively small investment. Once it hits the land [...] you really got no chance to actually getting the heroin"<sup>1642</sup>

The inherently maritime character of piracy is arguably the reason for counter-piracy's success. Maritime interdictions not only prevent attacks, but also allow states other than Somalia to be the primary entities controlling the response. The failure of the FGS to act against piracy and perhaps also their protection of pirate suspects was noted as a reason why efforts are concentrated at sea. As one participant explained:

"[W]e would say that it's impossible to operate in Somalia so we can do it from outside of Somalia, regional states and navies, and suppress it that way, because the Somali government show no commitment to doing this. The FGS held [...] one of the Somali piracy leaders for three weeks in Mogadishu and they let him go. They haven't passed a piracy law, I mean!"<sup>1643</sup>

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<sup>1639</sup> Interview Participant 21. 2016.

<sup>1640</sup> Interview Participant 4. 2016.

<sup>1641</sup> Interview Participant 21. 2016.

<sup>1642</sup> Interview Participant 22. 2016.

<sup>1643</sup> Interview Participant 4. 2016.

The interviews therefore suggested that corruption not only impacts on the effectiveness of responses, but it also dictates which responses stakeholders choose to implement. The interviews suggest that countering corruption must be incorporated, if not put at the centre, of any responses to TOC in the region. Yet, while the literature on organized crime may have long highlighted the impact of corruption, the discussion around responding to illicit markets has tended to ‘stovepipe’ responses. Policy and programming responses also generally continue to treat corruption and organized crime as separate phenomena. This divide is also reflected in the fact that the international conventions on organized crime (UNTOC) and corruption (UNCAC) occupy separate policy spaces and many UN programmes address one or the other, but not both collectively.<sup>1644</sup> This was also evident during interviews, although the interviews in fact showed that countering corruption in the organized crime space is neglected.

While it was not directly mentioned in interviews, it was sometimes implied that one reason for the failure to link organized crime and corruption was that when building national or regional partnerships against TOC, suggestions of endemic corruption, particularly within the political elite, is seen as undermining efforts at achieving unity. That can make corruption, as several participants implied, the elephant in the room in discussions on TOC. This point is critical in the sense that a key element of the problem and response may have to be downplayed in the short term in order to build viable partnerships. The policy ‘stovepiping’ then may have both political and practical reasons.

There is of course the danger that attributing the region’s woes to corruption over-simplifies a very complex problem, instead of acknowledging that current counter-measures against TOC are themselves inadequate. The fact that corruption is perceived as entrenched in African society was also only expressed by participants from the Global North. Ironically

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<sup>1644</sup> Although UNTOC contains provisions on corruption, there is no connection between the governing mechanisms of UNTOC and UNCAC. For commentary on the need to integrate the provisions of UNTOC and UNCAC in responses to TOC and corruption, see, for example, Zvekic, U. 2018. Greater integration, cooperation needed in UN instruments to prevent organized crime and corruption. *UNCAC Coalition*. 14 February. Available: <https://uncaccoalition.org/greater-integration-cooperation-needed-in-un-instruments-to-prevent-organized-crime-and-corruption/> [accessed 16 May 2021]; Zvekic, U. 2021. Integrating the UNCAC and the UNTOC for effective prevention and international cooperation. In *The Palermo Convention at twenty: institutional and substantive challenges*. S. Forlati, Ed. Leiden: Brill. DOI: [https://doi.org/10.1163/9789004448414\\_006](https://doi.org/10.1163/9789004448414_006); Tennant, I. 2021. *All roads lead to Rome: towards a coordinated multilateral response to organized crime and corruption*. Geneva: Global Initiative against Transnational Organized Crime.

perhaps, participants, including those who were critical of corruption in the region, were also quick to defend the civil servants of the region, often noting how the majority of them are honest, hard-working individuals who do not engage in corrupt activity, apart from perhaps, small scale bribes.<sup>1645</sup> But considering that the majority of responses to TOC at sea are security and law enforcement focussed, corruption, if prevalent at the scale as perceived by an overwhelming majority of participants, will allow even the most stringent of such measures to have limited success.

### **8.2.2 The failure by regional states to counter TOC**

As the above section on corruption has illustrated, the failure by regional states to implement responses to TOC at sea impacts on the response by the international community. A few participants working directly with ministries and law enforcement entities also identified a lack of political will from regional states as one of their biggest challenges.<sup>1646</sup> As previous chapters have shown, it should however be noted that regional states might have the will but lack the capacity to contribute to responses. As Participant 18 from an NGO noted, “the reason why we exist is because of governments that do not function”.<sup>1647</sup> Participant 9 noted for example that even regional states like Seychelles and Djibouti who were capable of looking after their own waters, had no additional capacity to assist Somalia at sea.<sup>1648</sup> Although regional states implement their own responses and contribute to international efforts, regional contributions are often a drop in the ocean compared to well-resourced, collective international efforts. Some participants questioned the impact of regional efforts, with some noting that regional states are not doing enough to “help themselves”:<sup>1649</sup>

“maybe one question would be why aren’t these countries prioritising their kind of maritime space more, it can be a huge income generator through the blue economy

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<sup>1645</sup> Interview Participants 12; 14; 20 & 21.

<sup>1646</sup> Interview Participants 4; 9; 22 & 27.

<sup>1647</sup> Interview Participant 18. 2018.

<sup>1648</sup> Interview Participant 9. 2016.

<sup>1649</sup> Interview Participant 2. 2018.

and everything, but they're not going to be able to capitalise on that until [...] it's more secure and everything. So why aren't they prioritising that more?"<sup>1650</sup>

Some were critical of the lack of cooperation from regional states<sup>1651</sup> and noted how there is general distrust among most states, which discourages cooperation. Participant 9 commented:

"I think they're unwilling to acknowledge the fact that they have major issues with their own capacity [...] similar to KDF and all the other figures, 'we don't need help from anyone', because I think that might uncover a lot of issues, whether its corruption or mismanagement."<sup>1652</sup>

One participant working for the UN noted their failure to persuade the FGS to respond to piracy as one of their biggest disappointments:

"I think you'd have to question the progress the [FGS] has made on piracy. It's been an erratic contributor to international forums on counter-piracy [...] constantly changing its representation and changing their mind that they need to comply, making different statements, constantly talking that illegal fishing is the source of all piracy evils, which is simply not the case and hasn't been for some years. Failing to pass a piracy law [...] you have to give them three out of ten really."<sup>1653</sup>

The political situation in Somalia has also severely hampered effective land-based capacity building work.<sup>1654</sup> Participant 9 explained the obstacles:

"it's been parliament that has not passed legislation, there has been too much internal fighting, and kind of weak governance as well, nobody really understands their roles".<sup>1655</sup>

It was noted that if an illicit market is perceived as a threat and states in eastern Africa failed to act against it, the international community would intervene. In such a case, the

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<sup>1650</sup> Interview Participant 3. 2018.

<sup>1651</sup> Interview Participants 4, 9, 12 & 28.

<sup>1652</sup> Interview Participant 9. 2016.

<sup>1653</sup> Interview Participant 4. 2016.

<sup>1654</sup> Interview Participants 4; 6; 7; 8 & 9.

<sup>1655</sup> Interview Participant 9. 2016.

intervention almost replaces regional action. In the case of piracy, this intervention was done primarily at sea by foreign navies. With ivory it is done primarily by NGOs on land. For the heroin market, it is somewhere in between - a combination of international states assisting regional states on land and sometimes in their territorial waters. The international community however takes full control in international waters. The nature of these interventions reflects the limitations of international interventions against TOC on land versus that allowed at sea, as prescribed by international law and, in the case of piracy, UNSC Resolutions.

The 'substitution' of a responding state by the international community was described by Participant 4 as follows:

“[I]f a Panamanian flagged vessel is taken by pirates off Somalia, the primary responsibility is with Panama [...] Secondary, you would say [...] ‘Panama, what are you going to do? What’s your military intervention going to be?’ The answer is nothing. The second responsibility is to be taken by Somali pirates’ state. ‘Somalia, what are you going to do?’ Nothing. So, the responsibility is with the other regional states, I suppose, to do something and then the final responsibility would be the Canadian navy, who has no interest in this case whatsoever, or the U.S navy or the British navy or whatever. And they end up doing ninety per cent of the work and the people who are primarily responsible is the state where the flag is held, or the pirates’ state, they do nothing.”<sup>1656</sup>

At the onset of piracy, arguably up to the present day, there weren’t many Somali institutions to cooperate with, especially at the federal level. Participant 5 noted that even if there is political will to support regional states, working in fragile states with weak institutions is difficult.<sup>1657</sup> With regards to Somalia he noted:

“when you’re dealing with a fragile country it becomes very difficult now to really put pressure onto the Somali government...especially when a country that is, some of the people that you have to deal with are almost warlords or have been warlords.

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<sup>1656</sup> Interview Participant 4. 2016.

<sup>1657</sup> Interview Participant 5. 2016.

It becomes a big problem [...] in the absence of proper governance, to actually implement such a program in those countries.”<sup>1658</sup>

Focussing efforts primarily at sea where the Somali government had no presence or resources was therefore possible. However, where regional institutions are strong enough to partner with the international community, there is likely to be either regional cooperation or push back.

The inability of national institutions to respond is one of the reasons why such robust international interventions, including military action on land and in Somalia’s territorial waters, were authorized by the UNSC in response to piracy.<sup>1659</sup> The lack of capacity of the Libyan government is also noted in the UNSC authorizations in response to migrant smuggling.<sup>1660</sup> Similar measures by the international community might therefore only exist in regions where there is little regional government capacity. As discussed in Chapter 3, Rosenau has noted how the absence of national capacity is then filled by global governance efforts by external entities. This could also explain the lack of a similar counter-piracy response in the Gulf of Guinea, as some states in West Africa do not want foreign navies there.<sup>1661</sup> West Africa has more naval capacity than eastern Africa and the Niger delta provides ample reasons to keep foreign interests at bay. This could explain why responses to the other two illicit markets are much slower in gaining traction, as the surrounding regional states involved are in no way as fragile as Somalia and will not tolerate similarly scaled interventions in which they play little part. This was expressed especially in the case of drug trafficking with regards to Iran not cooperating with counter-trafficking measures on the southern route, despite the well documented involvement of their nationals and vessels.<sup>1662</sup> Similar UNSC authorizations to piracy are also absent for drug and wildlife trafficking, reflecting that these are not yet perceived as posing a threat to international peace and

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<sup>1658</sup> Interview Participant 5. 2016.

<sup>1659</sup> UN Security Council. 2018a.

<sup>1660</sup> UN Security Council. 2015.

<sup>1661</sup> Okafor-Yarwood, I. 2020. Covid-19 in Africa: from disruption to opportunities for sustainable intra-African maritime security cooperation. *African Leadership Centre*. Available: <https://www.africanleadershipcentre.org/index.php/covid-19-research/633-covid-19-in-africa-from-disruption-to-opportunities-for-sustainable-intra-african-maritime-security-cooperation> [accessed 15 May 2020].

<sup>1662</sup> Interview Participants 4; 21 & 22.

security to the same extent as piracy.<sup>1663</sup> Any counter-responses are therefore limited to existing treaties or ad hoc agreements between states.

### **8.2.3 National Priorities**

Protecting national interests was often expressed by participants as being the primary motivation for implementing counter-measures. Threats to national priorities seemed to enjoy the following order of priority to participants who commented on the motivations of the international community to respond to TOC in the WIO - threats to their economy, terror threats, irregular migration<sup>1664</sup> and then only narcotics and wildlife trafficking. As participant 4 argued, with the continuing migrant crisis in the Mediterranean and ever-present terror threats, it is not surprising that countering drug and wildlife trafficking are not top of the international community's agenda.<sup>1665</sup>

Migrant smuggling in the Mediterranean is the maritime crime which has arguably seen the most similar responses to counter-piracy, reflecting the threat level which especially the EU ascribes to it. It also lends itself to a primarily maritime response, again similar to piracy. Counter-piracy mechanisms which have been replicated in the Mediterranean include an EU naval deployment and the replication of SHADE. There is also a UNSC Resolution authorizing extraordinary measures against vessels suspected of being involved in migrant smuggling off the coast of Libya. Similar to the resolutions on piracy, these resolutions note how migrant smuggling exacerbates the situation in Libya.<sup>1666</sup> The perceived interests threatened by piracy, heroin and ivory trafficking as suggested by interviews are discussed below.

#### **8.2.3.1 Piracy**

The order in which threats are prioritized as the result of which interests they threaten could explain why counter-piracy activities have declined considerably. As two participants noted, "as piracy has dropped off, the international economic interest has waned and now you see almost no interest in it"<sup>1667</sup> and "a lot of that effort and coordination that was really

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<sup>1663</sup> United Nations. 2018.

<sup>1664</sup> Interview Participants 1; 4 &9.

<sup>1665</sup> Interview Participant 4. 2016.

<sup>1666</sup> UN Security Council. 2015.

<sup>1667</sup> Interview Participant 2 . 2018.

alive and vibrant during that time has really slacked off”.<sup>1668</sup> The counter-piracy participants were clear about what motivated the counter-piracy response - economic and strategic interests. Participants rebuked suggestions that the situation in Somalia or the safety of seafarers motivated the counter-response. Statements included “they didn’t give a shit about the poor guys on the boats”<sup>1669</sup> and “the saddest thing is that the world did not fix their problem, they just stalled everything. They literally came in to fight piracy.”<sup>1670</sup> Another noted:

“[O]ur interest in piracy is declining because we’re not feeling the economic, it’s no longer affecting our shipping as the EU. So, really, we don’t care. If it was humanitarian, we’d be pouring lots and lots of money into Somalia. I mean, the poor people have to do piracy just to find jobs”.<sup>1671</sup>

Piracy threatened the economies of regional states by affecting trade and the price of goods.<sup>1672</sup> It also threatened European states as large volumes of European shipping pass through the WIO. The threat to European shipping was specifically noted by counter-piracy Participants 2 and 4 as driving the international response.<sup>1673</sup> According to Participant 2, who noted that the response was due to purely economic self-interest driven by the threat posed to commercial shipping and the price of oil, goods and insurance,

“[n]o one ever really gave a shit about Somalia, you know, a whole lot of rag tag blokes in a little boat went out [...] and changed the price of oil and seriously fucked up international shipping and nobody would have done, would have cared less about Somalia. Piracy really focused the international community’s attention on [Somalia] and not what was really going on in the political process”.<sup>1674</sup>

Participant 1 offered an additional explanation as to why Somali piracy drew a global response - the Horn of Africa is in “no one’s back yard”. This is different from a crime like migrant smuggling which is concentrated near, and also impacts, primarily on Europe. For

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<sup>1668</sup> Interview Participant 3. 2018.

<sup>1669</sup> Interview Participant 2. 2018.

<sup>1670</sup> Interview Participant 12. 2016.

<sup>1671</sup> Interview Participant 9. 2016.

<sup>1672</sup> Interview Participant 2. 2018 & Interview Participant 4. 2016.

<sup>1673</sup> Interview Participant 2. 2018 & Interview Participant 4. 2016.

<sup>1674</sup> Interview Participant 2. He added: “So in some ways piracy has had a, gosh, no, I can’t say it has had a positive effect, but it certainly has drawn a lot of attention”.

this reason, Europe wishes to address it alone and it is unlikely that other entities like the US navy will respond thereto.<sup>1675</sup> The fact that Somali piracy was happening on the high seas of the WIO, yet affected many states, played an important role in the assortment of responding actors. Participant 4 echoed Huggins and Madsen<sup>1676</sup> by noting that the counter-piracy response also came about because Somalia could not provide a better alternative and because there was no existing model, such as those typically applied to terrorism, which suited the counter-piracy needs.<sup>1677</sup>

Piracy in the WIO escalated quickly in comparison to other, more insidious maritime crimes, like drug trafficking. It quickly became apparent that there was a crisis, which resulted in quick action.<sup>1678</sup> Participant 4 noted that nobody was very enthusiastic about counter-piracy, but that “piracy was a big, big problem because it affected where it hurt most, and the stakes were very, very high. So, there’s no way that there couldn’t have been a lot focus on it.”<sup>1679</sup> Participant 3 similarly noted:

“I think a lot of that came out because it was a crisis, like there is a similar SHADE process going on in the Mediterranean now for the migrants. So when it gets to that level, that’s when the international community cooperates a lot more”.<sup>1680</sup>

He then explained the absence of a similar counter-piracy response in other regions where piracy’s impact is not felt globally:

“[W]e’re not seeing any of these similar structures for other piracy stuff like in the Gulf of Guinea or South East Asia, even though it is quite a bad thing there too. Like last year in South East Asia there were as many people killed that year by pirates/Abu Sayyaf as ever during the Somalia stuff. And so, it’s just a whole lot different, you know, who is affected by it and that sort of thing, so there’s just not as much attention around it. I think largely it doesn’t affect [...] big Western Shipping

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<sup>1675</sup> Interview Participant 1. 2017.

<sup>1676</sup> See Chapter 5.

<sup>1677</sup> Interview Participant 4. 2016.

<sup>1678</sup> Similar to what Interview Participant 2 said; “The legal finish for the piracy, you know, came out of, it was purely utility”.

<sup>1679</sup> Interview Participant 4. 2016.

<sup>1680</sup> Interview Participant 3. 2018.

agencies or not as directly and it is not [on] such a huge scale or anything either, you know? There is not hundreds of ships being hijacked and stuff every year” .<sup>1681</sup>

Menkhaus at the onset of counter-piracy noted:

“Some sceptics contend that the robust naval response has more to do with navies seeking to use anti-piracy as a training exercise, an opportunity to improve coordination with other navies, and a justification for their own budgets at a time when naval operations have been less central in the global war on terror.”<sup>1682</sup>

Some participants confirmed this, noting that certain states used piracy as a means for the international community to establish and maintain a strategic presence in the region, which was done under the guise of protecting world trade and assisting Somalia.<sup>1683</sup> Participant 1 explained: “Now everyone is in the WIO and they’re going to stay there, it’s about naval diplomacy”. He noted how the Japanese Defence Force used counter-piracy as a giant training exercise, as it was the first time they operated outside of their normal area. They also built up their naval facilities.<sup>1684</sup> This mimics the Roman Empire’s tolerance of piracy, using it as a training opportunity. As discussed in Chapter 3, the competition at sea is why certain states, like Japan, also have a direct interest in the security of the region.<sup>1685</sup> Two other participants noted how piracy gave countries a reason to enter the region, but also an excuse for their navies to remain there,<sup>1686</sup> especially since their presence is already accepted. It has also given them a renewed purpose.<sup>1687</sup> Their continued presence is beneficial because states can then use their naval platform as an evidence collection platform, a show of force and a geopolitical statement.<sup>1688</sup>

### 8.2.3.2 Heroin

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<sup>1681</sup> Interview Participant 3. 2018.

<sup>1682</sup> Menkhaus. 2009: 9.

<sup>1683</sup> This echoes Germond and Potgieter’s views discussed in Chapter 3.

<sup>1684</sup> Interview Participant 1. 2017.

<sup>1685</sup> Personal communication, September 2019.

<sup>1686</sup> Interview Participants 8 & 28. 2016.

<sup>1687</sup> Interview Participant 8. 2016.

<sup>1688</sup> Interview Participant 28. 2016.

Unlike piracy, heroin and ivory trafficking do not primarily threaten economic interests.<sup>1689</sup> Instead, international actors respond to heroin trafficking because it funds terror groups.<sup>1690</sup>

Participant 21 explained this:

“CTF150, which is actually, when you look at their remit, not to do with drug trafficking, it had to do with counter-terrorism. Out of that terrorism falls the dhows, because they are all connected to extremism [...] the reason why this is happening, because the Americans are there. The Americans are obviously very interested in intelligence and security of the region, and out of that then falls the dhow trafficking which is counter narcotic. We suggest by the time it gets onto that dhow, it’s in the hands, or probably even before, in the hands of criminal organisations who are terrorist organizations, so it very much is counter-narcotics and is very much crime, it is very much within the remit of law enforcement agencies who would like to do something about that.”<sup>1691</sup>

As Participant 22 from Kenya also explained:

“the only reason why they’re interested really, I mean, the only reason why they can be interested...is because of their link to terrorism. So, if there wasn’t that link to terrorism with the heroin trafficking, the CMF probably wouldn’t be involved at all anyway. And potentially...the extent of the trade, it wouldn’t have even been noticed.”<sup>1692</sup>

Participants also noted how this explains the US’s involvement in Somalia, which is primarily because of counter-terrorism priorities around Al-Shabaab.<sup>1693</sup> Participant 3 added that such national security threats can lead to increased donors in a place like Somalia, including development funding, but that if the terror threat was not there, the funding likely also wouldn’t be.<sup>1694</sup> This is similar to piracy drawing large amounts of donor funding to Somalia. It will also not be surprising if the scramble for securing the Mozambican Channel will begin

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<sup>1689</sup> See Chapters 6 and 7.

<sup>1690</sup> Interview Participant 22. 2016.

<sup>1691</sup> Interview Participant 21. 2016.

<sup>1692</sup> Interview Participant 22. 2016.

<sup>1693</sup> Interview Participant 3. 2018 & Interview Participant 6. 2016.

<sup>1694</sup> Interview Participant 3. 2018.

with earnest now that the threat of terror has led to the killing of foreigners in the Palma attacks. This is despite the heroin threat in Mozambique for many years already.<sup>1695</sup>

In spite of the link to terrorism, countering heroin trafficking in the WIO is still not at the top of political agendas, while the migrant crisis and terrorism are.<sup>1696</sup> This could be because the terror groups associated with the heroin trade are not currently perceived as the biggest terror threat to a place like Europe. For Europe then, the threat is linked to the fact that southern route heroin is primarily destined for their local markets. Participant 21, an NCA officer who indeed explained that they are operating in eastern Africa because of the threat which heroin trafficking poses to the UK, also noted that maritime crimes like drug trafficking are not perceived as big a threat as piracy. He noted that piracy was truly an international problem as it affected world trade and quickly escalated to become a key priority, including for the UN. But this has not been the case with drugs.<sup>1697</sup>

Participant 22 suggested a lack of interest in cooperation, with regional governments not necessarily interested in working with the international navies on drug trafficking and arguably vice versa. He said this was because

“[I]aw enforcement isn’t navies’ work, so that’s probably the key issue, plus it costs a lot of money to have your boats floating around doing stuff, whereas really, they’re just interested in keeping the shipping lanes safe for the merchants [...] But, yeah, I mean there’s one good reason. The other one is they don’t want to be responsible for prosecuting, they don’t want to be responsible for the people, you know, getting sent back to Iran where they’ll be executed [...]. So, there’s all sorts of political reasons why they’re not interested, but it also comes up to that UNCLOS question as well, you know. The freedom of the high seas is an issue as well. So yeah, there’s a lot of reasons why they’re not interested.”<sup>1698</sup>

### 8.2.3.3 Ivory

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<sup>1695</sup> Barigazzi. 2021; Brewster. 2021.

<sup>1696</sup> Interview Participants 4; 8 & 9. 2016.

<sup>1697</sup> Interview Participant 21. 2016.

<sup>1698</sup> Interview Participant 22. 2016.

The interests threatened by ivory trafficking were not often mentioned beyond generating violence and corruption. It is however fair to say that these consequences manifest primarily in Africa. This is illustrated in the majority of responses being implemented by or aimed at African states. When questioned why the international community's response to wildlife trafficking has lagged behind piracy, Participant 12 suggested:

“B]ecause the problem is so far removed from them. They see it as an African issue. By buying ivory bangles they don't understand that it's that demand that is securing the destruction of wildlife.”<sup>1699</sup>

The disconnect between demand and supply is perhaps most noticeable in the ivory trade. Western influence over policies which apply in Africa was also noted by Participant 15 who suggested that policies like trade bans serve the desires of the West to the detriment of elephant range states:

“Western NGO's and government have a lot of influence over African countries, those who want no legal trade are expecting the countries with all the elephant, who are amongst the poorest countries in the world, to pay the bill, despite the fact that they have the lowest capacity in the world, people are dying from hunger and all sorts of things and we want them to protect this world heritage, elephants, there's something wrong with that.”<sup>1700</sup>

This illustrates the need for a global governance effort able to bridge the gap between demand and supply. Participant 12 noted this:

“[Y]ou see how our governments cooperate when they work together with drug trafficking. But when it comes to wildlife, they don't do the same and they all have the same level of damage. We just hope that countries will get to that level [...] For us to get our stuff together and get our house in order, make sure poverty is not a big deal, is a hundred years away [...] elephants will be extinct in seven. So, the

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<sup>1699</sup> Interview Participant 12. 2016.

<sup>1700</sup> Interview Participant 15. 2016.

whole point of there being a global concerted effort for wildlife is very important.”<sup>1701</sup>

#### **8.2.4 The impact of transnational organized crime at sea**

Ellis and Shaw suggest that a better understanding of the impact of organized crime on developing states is necessary in order to formulate alternative policy responses to law enforcement which have failed to curb TOC.<sup>1702</sup> This is why participants were questioned on the perceived impacts of TOC at sea, as these influence their chosen responses. Counter-piracy has illustrated how a holistic response, of which law enforcement is but one component, can target different problematic elements of TOC, though with varying levels of success. The impact of piracy, heroin and ivory trafficking is therefore important, as it provides insight into the motivations for a response, as well as the resulting responses.

When questioned on the perceived impact of the three crimes, participants’ perceptions differed across the markets. It also differed from the impacts typically associated with TOC in literature, such as violence, insecurity and instability.<sup>1703</sup> This was discussed in Chapters 4, 6 and 7. Participants were adamant that corruption is both a key driver and a primary impact of TOC in the region. For example, Participant 21, in addition to commenting that crime in general contributes to high levels of corruption in Tanzania, stated:

“[W]e know that judges are being corrupted, the rule of law is being corrupted, politicians are being corrupted, so we know government practices have been corrupted and possibly, should we say, tailored to meet the needs of smugglers?”

As the paradigms have shown, the impacts as perceived by responders influences their resulting response. Considering that the typical impact of TOC is considered to be insecurity and instability, it is not surprising that the primary responses are law enforcement and security responses, often driven by the West. Participants were however sceptical of these responses, noting that they could be implemented with ulterior motives. Participant 15 explained:

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<sup>1701</sup> Interview Participant 12. 2016.

<sup>1702</sup> Ellis & Shaw. 2014: 528.

<sup>1703</sup> See, for example, Mashiri & Sebele-Mpofu. 2015; Khan & Singh. 2014: 523; Bybee. 2012: 80.

“[T]his is all part of a whole other battle that is going on in the media space, and I mean the links to things like Al-Shabaab have been well discredited by various organizations [...] But it’s something that attracts attention [...] Because you put it in the national security agenda, it justifies spending money on it. That’s why. But whether that is a true thing, is a different story.”<sup>1704</sup>

Regardless of what the impacts are, it is possible that regional states underestimate these or their potential to increase in intensity. And the insidious impacts might be most damaging, such as its impact on economies, the provision of social goods<sup>1705</sup> and democratic systems.<sup>1706</sup> While internal wars have been the biggest threat to African societies, many fear that TOC will take over as the primary threat to stability<sup>1707</sup> as it has the ability to infiltrate all levels of society. While this was found to not yet be the case in eastern Africa, this is true elsewhere on the continent and some participants warned that TOC should therefore be prevented from reaching such levels.

The interviews have shown that the primary interest of the international community in responding to TOC is national interests, rather than assisting impacted regions. As a result, building the capacity of eastern African states to combat TOC is considered a means to mitigate the threat posed to the Western state rather than an act of goodwill. If this were not the case, there would likely be more states as opposed to NGO involvement in wildlife trafficking counter-measures, for example. The participants were of the opinion that neither heroin nor ivory trafficking will solicit a response equal to that of piracy, because these crimes are not considered as threatening. As participant 21 from the NCA noted,

“[i]t’s changing international law and legislation which is great if you’ve got something that’s affecting a lot people like piracy, but not so great if you’ve got something most people sit and scratching their head and say, ‘well, we don’t really know about that, how that would affect me.’”<sup>1708</sup>

### 8.3 Lessons from counter-piracy

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<sup>1704</sup> Interview Participant 15. 2016.

<sup>1705</sup> Khan & Singh. 2013: 524; Mashiri & Sebele-Mpofu. 2015: 41 – 42.

<sup>1706</sup> Khan & Singh. 2013: 523; 531.

<sup>1707</sup> Bybee. 2012: 80.

<sup>1708</sup> Interview Participant 21. 2016.

Counter-piracy responses are unlikely to be expanded or replicated in response to heroin and ivory trafficking due to piracy's unique high seas character resulting in it being afforded universal jurisdiction, as well as its threatening of global economic interest which heroin and ivory trafficking do not. However, key elements of counter-piracy can still provide direction to stakeholders acting against heroin and ivory trafficking. This section suggests an additional paradigm aimed at addressing governance challenges related to responding to TOC at sea, as well as suggesting alternative responses to heroin and ivory trafficking, all of which take direction from unique characteristics of counter-piracy.

### **8.3.1 Governance of responses: introduction of a governance paradigm**

Overarching to individual responses which achieved success and in keeping with the cooperation rhetoric in response to TOC, most participants emphasized the necessity of global cooperation between multiple entities responding to TOC. This was evidenced in the response to piracy and led to the establishment of the CGPCS, which had multiple stakeholders collectively implementing a multitude of responses. These were puzzle pieces without which the response would not have achieved the desired results. Upadhyaya has noted how “[t]he key take away from the Somali piracy experience has been that public-private partnership between the navies and the shipping industry – facilitated by the [CGPCS] in this case – is the way ahead for maritime security in the twenty-first century”.<sup>1709</sup> Both he and Bateman have therefore called for the establishment of maritime security coordination mechanisms in the Indian Ocean.<sup>1710</sup> Participant 3 similarly noted the unique nature of the interaction experienced in the CGPCS:

“[T]he Contact Group is quite unique as an interactional institution [...] it really was a good example of people cooperating together and, you know, a lot of different interests came together during the crisis and really worked together quite well on that, and kind of a way that doesn't really happen too much in interactional fora [...] it was the multi-faceted nature of it was just like all these things have to work together, whether it was cooperation, navies, governance stuff, livelihoods, capacity

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<sup>1709</sup> Upadhyaya, S. 2016. Multilateral maritime security cooperation in the Indian Ocean region: status and prospects. *Journal of the Indian Ocean region*. 12(1): 9 - 45. DOI: 10.1080/19480881.2016.1138712

<sup>1710</sup> Bateman. 2016; Upadhyaya. 2016.

building, you name it, in order for this to really work. Now it's, if you do one by itself and it is not going to fix the problem.”<sup>1711</sup>

Participant 2 also noted the importance of cooperation from regional entities:

“It was the level of cooperation that was needed, one organisation on its own couldn't fix it, the navy couldn't fix it. [...] [Y]ou need a degree of Somali cooperation and the cooperation of the regional countries, as well, so it was the multi-faceted bit of it that has been unique [...] [I]n some of the other maritime crimes now you don't have some maritime crime equivalent of the Contact Group or a SHADE equivalent in other areas where you need that cooperation.”<sup>1712</sup>

Many participants noted the difficulty of achieving inter-state and inter-agency cooperation in practice and how this was also a challenge in eastern Africa.<sup>1713</sup> It was however achieved in counter-piracy, which means it can be achieved again. The absence of a similar overarching coordination body in response to other maritime crimes is detrimental to the response, as there is no central decision-making body to identify the necessary responses and opportunities for cooperation between all responding entities. Participants also identified an additional governance-related effort which is missing from responses to all three TOCs -targeted efforts aimed at corrupt elements driving the trade. It is therefore suggested that an additional paradigm be introduced to acknowledge these problematic aspects of both heroin and ivory trafficking - a governance paradigm. This paradigm problematizes heroin and ivory trafficking as challenges of weak governance - lacking cohesive governance and being facilitated by corruption.

Although WIO states occasionally gather to discuss heroin trafficking,<sup>1714</sup> these meetings are not used to coordinate the efforts of states, nor do they include non-state actors like the shipping industry. It is only the CMF which coordinates the naval response. There is also no body regularly gathering to coordinate an international response to ivory trafficking, as CITES parties only deliberate on trade measures. The CGPCS has however shown how

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<sup>1711</sup> Interview Participant 3. 2018.

<sup>1712</sup> Interview Participant 2. 2018.

<sup>1713</sup> Interview Participants 2; 4; 5; 9; 17; 21; 22 & 25.

<sup>1714</sup> Southern Route Partnership. n.d. *About us*. Available: <http://www.southernroute.org/> [accessed 22 March 2020].

informal cooperation mechanisms encompassing implicated state and non-state actors are well suited to address contemporary TOCs. The CGPCS allowed all stakeholders to formulate and participate in the response. As criminal networks have perfected the art of coordinating complicated cross-border maritime shipments, this must be equally countered by a governance mechanism steering the international policy responses of public and private actors acting as an assemblage. As Chapter 5 has illustrated, due to the lack of international appetite to expand the CGPCS's work to maritime crime in the WIO region, another mechanism must be considered. As Participant 18 noted,

“there needs to be a shift in how we deal with the problem, the problem that is international in nature, the problem that is organized crime in nature, cannot be solved on a local level, so the whole system of this area and the perspective of the area is obsolete to the threats we have right now.”<sup>1715</sup>

The second governance challenge under this paradigm is that TOC at sea is a problem of corruption, which nearly all participants identified as both a key cause and consequence of TOC in eastern Africa. By ignoring or incorporating counter-corruption measures as an afterthought when formulating responses, one of its key drivers remains unaddressed. Instead, intentional anti-corruption measures, which can be guided by UNTOC and UNCAC, are desperately needed to mitigate the impact of TOC. This will however largely depend on measures taken by Coastal and Flag States. Participant 28 emphasized that corruption must be addressed at a political level before it can be tackled at an operational level,<sup>1716</sup> which can be challenging for law enforcement and security actors mostly working with regional governments operationally.

Participant 4 suggested that the response to piracy came about because there were no existing crime models which could provide a suited response.<sup>1717</sup> Therefore, as also suggested by Participant 1, such extraordinary circumstances would likely have to arise again before similar cooperation by unlikely allies, as was experienced in the CGPCS, would be possible.<sup>1718</sup> No maritime crimes in the WIO have elicited this reaction yet. While the

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<sup>1715</sup> Interview Participant 18. 2018.

<sup>1716</sup> Interview Participant 28. 2016.

<sup>1717</sup> Interview Participant 4. 2016.

<sup>1718</sup> Interview Participant 1. 2017.

GMCP has established a Contact Group on Maritime Crime in the Sulu and Celebes Seas (CGMCSCS), its work is not comparable to the CGPCS and its focus area falls outside of the WIO. As suggested in the name, the CGMCSCS's focus is on maritime crime in general, which is likely a lesson learned from the CGPCS. Should a similar governance mechanism not be established in the WIO, the below alternatives to heroin and ivory trafficking are plausible.

### **8.3.2 Suggested responses to heroin trafficking**

Considering that existing counter-piracy structures are unlikely to be replicated in the response to heroin trafficking, this section presents the suggestions from the interviews on how the current responses can be improved or how alternative measures might produce a legal finish. Research participants engaged in security and law enforcement responses to piracy and heroin trafficking expressed the need for equally broad jurisdictional powers to respond to heroin trafficking. These participants noted how effective law enforcement and a legal finish will be the best outcome for countering heroin trafficking. While the responses suggested by the law enforcement participants consist of law enforcement and security cooperation between different states, the participants working on harm reduction however noted the need for a holistic response not only focussed on law enforcement. As participant 26 noted: “we can’t win the war on drugs by only using supply reduction.”<sup>1719</sup>

As discussed in Chapter 6, UNCLOS and the Vienna Convention were found to be insufficient to base counter-efforts on and to effectively counter heroin trafficking in the WIO. No international legal framework is therefore currently in place to give effect to prosecutions after heroin has been seized from the primarily stateless vessels on the high seas of the WIO. Statelessness on the high seas is therefore advantageous to trafficking networks as few crimes may be responded to after boarding such vessels. This is telling for future responses and potential replication of counter-piracy responses. The lack of a legal finish results in little deterrence for traffickers as there is no imprisonment or asset forfeiture.<sup>1720</sup> Participants however agreed that, although traffickers are aware that foreign navies have no mandate to arrest them on the high seas, the CMF is a deterrent because traffickers do not

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<sup>1719</sup> Interview Participants 26 & 30. 2016.

<sup>1720</sup> UNODC. 2014a. *Addressing narcotics trafficking on the high seas of the Indian Ocean: targeting the Southern Route*. UNODC Maritime Crime Programme:2-3.

want to have to account for seized shipments.<sup>1721</sup> They also know navies could use force against them.<sup>1722</sup> Participants however also agreed that this will not put a stop to the trade and that a legal finish was needed. Participant 2 emphasized this:

“[W]e very urgently need a legal finish to the drug trafficking problem and the legal tools to do with it [...] on a similar basis to the universal jurisdiction of piracy”.<sup>1723</sup>

Suggested ways to achieve this were typically divided into two scenarios - where drugs are seized on the high seas and where drugs are seized in Coastal State waters. Participants engaged in responses to heroin trafficking were not hopeful that either UNCLOS or the Vienna Convention would be expanded to allow jurisdiction similar to universal jurisdiction.<sup>1724</sup> These legal frameworks are already the sum of many compromises by states clinging to sovereignty. Drug trafficking has also never been recognized as a *jus cogens* crime and has never had universal jurisdiction applied thereto which would allow the prosecution of foreign drug traffickers arrested on the high seas without Flag State consent.<sup>1725</sup> Instead, participants hoped for a response giving effect to cooperative agreements between Flag States, international navies, regional states and the states from which drug traffickers originate. Participants considered such agreements to be the region’s best defence to counter the heroin trade and its impacts. This will however ultimately depend on regional states’ commitment to cooperate.<sup>1726</sup>

All of the suggestions require regional states to take the lead by arresting traffickers and conducting trials. This makes sense as most of the interdicted shipments are likely to end up in those states. Participant 21 rightly noted that for regional states to take control of the legal finish, their law enforcement must be greatly improved and trafficking vessels must be

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<sup>1721</sup> Interview Participants 2; 3; 5 & 9.

<sup>1722</sup> Interview Participant 28. 2016.

<sup>1723</sup> Interview Participant 2. 2018.

<sup>1724</sup> Interview Participant 2; 4; 21 & 22.

<sup>1725</sup> Dubner, B.H. & Arias, M.C. 2017. Under International Law, must a ship on the high seas fly the flag of a state in order to avoid being a stateless vessel? Is a flag painted on either side of the ship sufficient to identify it? *U.S.F. Maritime Law Journal*. 29 (2): 132.

<sup>1726</sup> Interview Participant 22 noted that: “[A] lot of the domestic legislation doesn’t necessarily anticipate cross-border cooperation. So, they have to legalise cross-border activities in terms of investigations and prosecutions, and I think, yeah, UNTOC actually sort of encourages that, so does the Vienna Drug Convention as well. It talks about joint investigation teams and stuff, so countries who are worried about, you know, the reach of their law enforcement and/or prosecutions, if they’ve signed up to those conventions there’s already precedent there to say that it’s okay to actually have cooperation cross-border.”

seized in order to prevent their return.<sup>1727</sup> Interceptions in regional Coastal State waters will allow regional states to prosecute. Therefore, instead of hoping that international legal frameworks would be changed, it is better to enable interdictions in the countries that drugs flow through. Participant 21 explained this as follows:

“[W]hen you look at the way ahead [...] improving the capability, capacity of places like Tanzania, Mozambique and indeed Kenya and places like Seychelles, where it’s been effective as well, and getting them more on board to doing these kinds of operational activities as the way forward. Secondly, followed by the efforts of CTF-150 [...] my focus is looking a bit more regionally as well, for having the best effect on the trade coming down through from the Indian Ocean.”<sup>1728</sup>

The suggested responses are each discussed below.

### **8.3.2.1 Regional heroin prosecution model**

The first option is to have a prosecution model similar to the PPM which allows suspects apprehended by the CMF on the high seas to be prosecuted by regional states.<sup>1729</sup> The UN has suggested the potential utility of the PPM for other maritime crimes.<sup>1730</sup> Participant 2 described how a regional drug prosecution model would resemble the PPM:

“[B]asically international jurisdiction so anybody can deal with the crime, can be arrested in one country and prosecuted in another and imprisoned by a third. But getting the international law that allows that could take some time [...] but it is certainly the question at the moment and that everybody is talking about, the legal finish to the drugs.”<sup>1731</sup>

Some participants noted the lack of cooperation, and perhaps even the lack of interest to cooperate, between regional states and the CMF when it comes to drug trafficking.<sup>1732</sup> But this does not mean that cooperation cannot be achieved for drug trafficking, as no states

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<sup>1727</sup> Interview Participant 21. 2016.

<sup>1728</sup> Interview Participant 21. 2016.

<sup>1729</sup> Interview Participant 22. 2016.

<sup>1730</sup> UNODC. 2014a: 2 - 3.

<sup>1731</sup> Interview Participant 2. 2018.

<sup>1732</sup> Interview Participants 22 & 27.

were initially keen on the PPM either and perhaps still aren't. Participant 2 felt that if agreements with regional states could be concluded to facilitate a legal finish for piracy, it must be possible for drugs:

“[I]t was purely utility [...] I was in the defence attaché of the UK at the time, our ship captured a whole bunch of pirates, what do we do with them? Where can we hand them off to? We need a MOU with Kenya or the Seychelles immediately, you know, our ship is steering to the Seychelles [...] I don't want to fight with the Seychelles, we can agree with the government on an MOU in 24 hours [...] If you can do that in piracy you can do that for drugs”.<sup>1733</sup>

However, neither UNCLOS, nor the Vienna Convention provide for prosecuting drug traffickers apprehended by a foreign vessel on the high seas, without Flag State consent. Any agreements between states therefore must include Flag States authorization for international navies to interdict and arrest foreign crewmembers and for regional states to prosecute and possibly imprison them. The problem with this model remains that if suspects were to be returned to Iran or Pakistan, even after sentencing, there would be no guarantee that they will not be subjected to human rights abuses. Participant 22 noted that this was partly also motivation for the PPM, as European states did not want to be responsible for prosecuting pirates.<sup>1734</sup> While pirates have been tried outside of East Africa, such cases have been exceptional and were mostly limited to where nationals of those states were the victims of an attack.

Regional drug prosecution agreements would therefore need to consist of the following: a) Flag State authorization for foreign navies to interdict and arrest crewmembers apprehended on board their vessels b) Agreements between Flag States, interdicting navies and regional states to hand over suspects to regional states for prosecution and possibly also imprisonment c) Agreements between the Flag States, interdicting states, regional states and states of nationality of the suspects or convicted traffickers that they will not be subjected to inhumane treatment, including upon returning to their country. This can also be in the form of a prisoner transfer programme similar to the PPTP. However, as discussed in Chapter 6, despite the desire for such a prosecution model, participants explained that

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<sup>1733</sup> Interview Participant 2. 2018.

<sup>1734</sup> Interview Participant 22. 2016.

getting states like Iran and Pakistan to participate in such agreements is unlikely and a regional prosecution model is therefore not a viable option for the foreseeable future.

One exception to this could be if the UNSC authorizes extraordinary measures against heroin trafficking on the high seas if they declare heroin trafficking in the WIO a threat to international peace and security under Chapter VII of the UN Charter, thereby circumventing Flag State authority.<sup>1735</sup> This was done in response to the migrant crisis in the Mediterranean,<sup>1736</sup> allowing migrant smuggling vessels to be seized. Whilst there was a Security Council debate in 2019 on the threat posed by TOC at sea and despite heroin funding terror organizations, which threatens international peace and security, such a resolution remains elusive.<sup>1737</sup> And again, it will not safeguard suspects from potential human rights abuses in Iran or Pakistan.

A final challenge with a regional prosecution model is that it will have little effect if efforts continue to be aimed at low level traffickers and fail to target the orchestrators and address all aspects of the trafficking model, such as also seizing vessels. Achieving higher level arrests would require improved intelligence gathering and sharing, investigations covering the entire Southern Route and therefore international cooperation and coordination. But this will rely heavily on political will globally.<sup>1738</sup>

### **8.3.2.2 Shadowing by international navies**

The second option entails international navies ‘shadowing’ drug trafficking vessels around Coastal State waters and tipping off the Coastal State which will then respond once the

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<sup>1735</sup> Global Maritime Crime Programme. 2019b. *Maritime crime: a manual for criminal justice practitioners*. 2<sup>nd</sup> ed. Nairobi: UNODC: 151 – 152; Global Maritime Crime Programme. 2017: 92. For a detailed discussion of this, see McLaughlin, R. 2016b. Towards a more effective counter-drugs regime in the Indian Ocean. *Journal of the Indian Ocean region*. 12(1): 30 – 32. DOI:10.1080/19480881.2016.1138710.

<sup>1736</sup> UN Security Council. 2015.

<sup>1737</sup> The closest to such as resolution has been a Presidential Statement on the effect of cocaine trafficking on governance in West Africa. See Security Council Report. 2013. There have also been Presidential Statements issued regarding concerns around increased transnational trafficking and drug trafficking. See, for example, United Nations Office for West Africa. 2012. *S.C. presidential statement on transnational crime, drug trafficking, piracy, terrorism in W.A –Sahel*. Available: <https://unowa.unmissions.org/sc-presidential-statement-transnational-crime-drug-trafficking-piracy-terrorism-wa-sahel> [accessed 3 February 2021].

<sup>1738</sup> UNODC. 2016b: 67.

vessel enters their territorial seas.<sup>1739</sup> Participant 22 explained how this works and why this is the best option for interdicting and prosecuting stateless vessels:

“[T]he boat will then cross into territorial waters, and this is like with the UK navy, the model would be then to contact the law enforcement who are trained in interdictions at sea [...] being given information by the international community that it is [...] reasonably suspected that there’s heroin on board that particular dhow. They then act on that information and board the ship [...] once it’s in territorial waters”.<sup>1740</sup>

Such a boarding is authorized in terms of UNCLOS Article 27(1)(d). This interdiction model could be especially beneficial in island states where territorial waters are large, but assets limited, allowing targeted interdictions in waters where domestic laws apply. Participant 21 explained the process of interdictions in territorial seas: “[T]he beauty of what we do here, there’s no argument [...] we use domestic law. [You] come into Dar es Salaam and we’re going to rip your boat apart and arrest you”.<sup>1741</sup> Participant 4 gave an example of how shadowing has had successful results in the region:

“[T]here’s a guy held in a Seychelles prison at the moment, an Iranian guy, who has been caught twice previously moving heroin across the Indian Ocean, released by the Australian navy because they can’t hold him. In this case he went through the Seychelles territorial seas on his way to Zanzibar and they told the Seychelles and they were able to arrest him, because he was in their territorial seas and they then prosecuted him [...] many of these vessels go into territorial seas at some stage”.<sup>1742</sup>

Yet, while shadowing has resulted in successful interdictions by the Seychelles, Kenya and Tanzania, Participant 4 was of the opinion that there is a risk that drugs entering the territorial seas of certain regional states might disappear due to corruption:

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<sup>1739</sup> Global Maritime Crime Programme. 2019b: 151.

<sup>1740</sup> Interview Participant 22. 2016; Participants 4 & 21 also said shadowing is the second best option after using UNCLOS Article 110.

<sup>1741</sup> Interview Participant 21. 2016.

<sup>1742</sup> Interview Participant 4. 2016.

“The risk of that on navies, I would say, is either the drugs carry on with their journey, there’s a big show, trial, the vessel is destroyed and you’ll never see that 700 kilos of heroin ever again.”<sup>1743</sup>

This might be why ship riders could be preferred to notifying regional states of a vessel entering its territorial seas, thereby placing the responsibility for a legal finish solely on regional states. The law enforcement orientated participants were however not optimistic about this, primarily due to lacking capacity and fears of corruption. In addition to the risk of corruption resulting from regional seizures, there is also the risk that regional states could fail to successfully intercept the vessel. By 2016, only five per cent of all heroin seizures around East Africa were made in territorial seas.<sup>1744</sup>

### **8.3.2.3 Law Enforcement Detachments (LEDETs) or ship riders**

The third option applies to international navies or law enforcement in the territorial seas of regional states. International navies or drug enforcement agencies would have a law enforcement officer from the regional state on board their vessel, allowing the regional state to establish their criminal jurisdiction in terms of UNCLOS Article 27, despite being on board a foreign vessel and the international navy assisting with the boarding and arrest. The regional law enforcement officer is known as a ship rider or law enforcement detachment (LEDET).<sup>1745</sup> Participants favoured regional ship riders or LEDETs<sup>1746</sup> as the best alternative to having broader jurisdictional powers similar to universal jurisdiction.<sup>1747</sup> Ship riders and LEDETs are therefore another way of expanding law enforcement capacity, assets and range. It is a growing form of much-needed cooperation in the maritime domain which serves as force multiplier.<sup>1748</sup> LEDETs have facilitated heroin seizures in Tanzania and consisted of having a range of Tanzanian law enforcement officers on NCA vessels. Participant 21

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<sup>1743</sup> Interview Participant 4. 2016.

<sup>1744</sup> Indian Ocean Forum on Maritime Crime, Southern Route Partnership, UNODC. 2016: 9.

<sup>1745</sup> Interview Participants 11 & 22. 2016. The DCOC and UNSC Resolutions have made provision for the use of ship riders in response to piracy, although they were never used as the idea was not to have Somali officers on board, but officers from states willing to prosecute suspects. This defied the purpose of establishing jurisdiction in territorial waters: Papastravridis. 2013: 187 – 188.

<sup>1746</sup> Interview Participants 11; 21 & 22. 2016.

<sup>1747</sup> Interview Participant 5 also noted that ship riders could be a useful capacity building tool and trust building exercise, which could also potentially be used on vessels patrolling for IUU fishing activity.

<sup>1748</sup> Global Maritime Crime Programme. 2020. *Maritime crime: a manual for criminal justice practitioners*. 3<sup>rd</sup> ed. Vienna: UNODC: 188.

expressed their intention to conclude similar LEDET agreements with places like Seychelles, which already has good criminal justice structures as a result of their counter-piracy efforts, thereby equipping them to conduct drug trafficking trials.<sup>1749</sup> This has however not materialized. The DCOC provides for the use of ship riders<sup>1750</sup> and their utility has also been suggested for countering wildlife crimes.<sup>1751</sup>

For both the regional prosecution model and LEDETs, international navies or law enforcement entities would have to be willing to conclude agreements and cooperate with regional counterparts.<sup>1752</sup> But with the exception of the agreements between the NCA and Tanzania, ship riders or LEDETs are yet to be utilized in the WIO.<sup>1753</sup> Mistrust of regional Coastal States was noted as one of the factors discouraging their use. This is due to insufficient capacity, fears of corruption and the complex nature of such agreements. Participant 4 explained the challenges of these agreements:

“[W]hich navy is going to provide these vessels that they’re going to ride on? The answer is none. Navies are not interested in getting an armed Somali or Tanzanian on their vessel for a long period. I mean there are ship rider agreements in Tanzania which allows Tanzanian officers to go on ships from the UK, for very limited periods for a particular arrest...But in the Caribbean you have got huge interests by developed navies, the US, UK, the Netherlands particularly, in disrupting the heroin trafficking. Lots of war ships, small sea area. Whereas here, I don’t see foreign navies [...] having a Kenyan boarding team on board. I mean, there can be a huge number of ship rider agreements, but they’re not straight forward, but what will happen if one Kenyan shoots another Kenyan soldier? [...] There’s a lot of legal aspects if you get into it, but no obvious benefit for the state undertaking the ship rider agreement... and they’re awfully expensive”<sup>1754</sup>

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<sup>1749</sup> Interview Participant 21. 2016.

<sup>1750</sup> For a detailed discussion on ship riders and LEDETs, see Global Maritime Crime Programme. 2020.

<sup>1751</sup> Global Maritime Crime Programme. 2020: 192.

<sup>1752</sup> Interview Participant 22. 2016.

<sup>1753</sup> Papastravidis. 2013: 189.

<sup>1754</sup> Interview Participant 4. 2016.

From the suggested responses, it appears that agreements between individual states might be the most promising way forward<sup>1755</sup> as the law enforcement options suggested by participants are forms of bilateral or multilateral agreements. This indicates that such agreements, rather than relying on or amending existing international law, are the best way forward to collectively address heroin trafficking at sea. Article 17(9) of the Vienna Convention encourages such agreements, which will allow for foreign vessels and crew to be visited,<sup>1756</sup> arrested and prosecuted.<sup>1757</sup> Similar agreements already exist in other regions, such as those between South American states and the US<sup>1758</sup> and EU member states. The inclination to conclude bilateral and multilateral agreements is also reflected in the counter-piracy response. Although the response relied on universal jurisdiction, the PPM was given effect by agreements between international navies and regional states which accepted suspects for prosecution and agreed with Somalia to transfer suspects after conviction. Participant 22 explained why such agreements are ideal:

“[T]he trouble is, as soon as anyone starts mentioning jurisdiction on the high seas, every country in the world starts to get nervous [...] I think probably the most effective way is bilateral agreements or multilateral agreements, the model that the U.S has with the South American states, where they get permission beforehand by states to pursue and prosecute their boats.”<sup>1759</sup>

As mentioned, participants were pessimistic about such agreements being reached between interdicting states and the Flag States of heroin trafficking vessels in the WIO, and also cited the potential human rights violations which such agreements could cause as discouraging states from concluding such agreements.<sup>1760</sup> States have also noted how slow formal procedures and the lack of agreements aimed at facilitating operational cooperation hampers international cooperation to counter the drug trade.<sup>1761</sup> Agreements should therefore allow for similar flexibility as those in response to piracy. Participant 11 also noted

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<sup>1755</sup> Khan & Singh. 2013: 533; UNODC. 2015b: 125.

<sup>1756</sup> Papastavridis.2016: 18.

<sup>1757</sup> Such agreements are in line with UNCLOS Article 92: “1. Ships shall sail under the flag of one state only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas”. Also See Papastavridis. 2013: 209.

<sup>1758</sup> Interview Participant 22. 2016.

<sup>1759</sup> Interview Participant 22. 2016.

<sup>1760</sup> Interview Participants 4; 21 & 22.

<sup>1761</sup> UNODC. 2020a. Booklet 6: 26.

the potential utility of ship riders in wildlife crimes, saying “it has been done for drugs, why can’t it be done for wildlife or other crimes if we look at tightening up the legal basis?”<sup>1762</sup>

Despite noting that regional states should take responsibility for addressing drug trafficking through eastern Africa, some participants from the Global North expressed that interdictions should ideally be undertaken primarily on the high seas, thereby not necessitating the participation of regional states. To this end, a final option would be to have pre-existing agreements between interdicting navies and the Flag State of trafficking vessels, or with the states of which traffickers are nationals. This would allow international navies to arrest and prosecute these vessels and crew. No participants however mentioned this and because participants believed that such agreement are highly unlikely, it is not considered a reasonable possibility. The next viable option is ship rider agreements. If such agreements were to be concluded, it would be between interdicting navies and regional states, apply only in territorial seas, and be on a bilateral basis. While this has not been used much in the WIO, such agreements have now been concluded in West Africa.

Considering the suggested responses by research participants, Figure 15 illustrates the current options for intercepting foreign drug trafficking vessels on the high seas:

Maritime Zone	Instrument and Article	Which suspicious vessels may be visited?	Rights of intercepting State
High seas	UNCLOS Article 110	110(1)(e): Vessel refuses to show flag or flying a false flag, but is in fact of the same nationality as the warship wishing to board	Board, search, arrest and prosecute
		110(1)(d): Vessel is without nationality	Board, search and perhaps arrest and prosecute
	Multilateral and bilateral crime-specific treaties	Vessels suspected of conduct as stipulated by treaty	Board and take such steps as authorised by Flag State or treaty, can include prosecution
	United Nations Charter Chapter VII Authorisation	Vessels suspected of engaging in activity which threatens international peace and security (United Nations n.d.)	Board, arrest and prosecute, or such actions as authorised by Security Council, including the use of force <sup>a</sup>

**Figure 15: Jurisdiction on the high seas (Bruwer. 2020: 60)**

<sup>1762</sup> Interview Participant 11. 2016.

As was also stressed by participants, UNSC Resolution 2195/2014 cited that it is critical to “[strengthen] trans-regional and international cooperation on a basis of a common and shared responsibility to counter the world drug problem and related criminal activities.”<sup>1763</sup> The challenges posed by heroin trafficking in Africa surpass the ability of individual states to respond to them. They link and impact on developed and developing regions, all of which must unite in their response.<sup>1764</sup> A more innovative response will rely on agreements between key states, but also the cooperation of the shipping industry. Finally, eastern African states need to end the current culture of impunity for corrupt facilitators<sup>1765</sup> if any counter-efforts are to succeed. This can be done by strengthening the rule of law<sup>1766</sup> but also addressing all impacts of the trade through eastern Africa. As the response to piracy has shown, states need to start looking beyond existing international law to address the on-going threat posed by heroin trafficking through eastern Africa and find creative ways to cooperate with other states and non-state actors.

### **8.3.3 Suggested responses to ivory trafficking**

The cooperative legal finish which was orchestrated for piracy is also absent from ivory trafficking as national laws apply to ivory which is seized almost exclusively on land. While there are regional cross-border agreements on wildlife, such as the tripartite agreement between South Africa, Tanzania and Mozambique, there are no agreements aimed at addressing the maritime leg of the trafficking networks’ modus operandi. And while national efforts in eastern Africa have positively impacted poaching and trafficking activity, international and inter-agency cooperation remain insufficient to counter entire transnational ivory trafficking networks, especially their activities at sea. Participants interviewed on ivory were however not focussed on responding to the illegal trade at sea, but rather on improving law enforcement efforts on land. As ivory will continue to be seized primarily in ports, African and Asian states known to be involved in the trafficking model can conclude agreements on cooperating in transnational investigations as such cooperation has

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<sup>1763</sup> UN Security Council. 2014. Also see INCB. 2016. 104.

<sup>1764</sup> UNODC. 2016b: 11.

<sup>1765</sup> Cole. 2014: 3.

<sup>1766</sup> Wright. 2013: 6; 46 - 47.

been known to be poor. There is precedent for this in UNTOC which contains detailed provisions on cross-border cooperation. This was discussed in Chapter 7.

The following suggested responses are therefore based on literature and lessons extracted from piracy, as well as limited participant insights:

### **8.3.3.1 Law reforms: International law**

While regional states commit to cooperate against illicit wildlife trade in terms of cooperative frameworks like the DCOC and the Lusaka Agreement on Cooperative Enforcement Operations directed at Illegal Trade in Wild Fauna and Flora,<sup>1767</sup> these are not legal instruments and provide no basis to respond to wildlife trafficking. There have long been deliberations on adding a wildlife protocol to UNTOC, but parties are yet to agree to this.<sup>1768</sup> To address the maritime leg of ivory trafficking, such a protocol could be similar to, for example, the Smuggling of Migrants Protocol which allows states to request Flag State authorization to board a foreign vessel suspected of wildlife trafficking. However, while a legal framework similar to this and Article 17(3) of the Vienna Convention would provide much needed jurisdictional powers, it will arguably also be of little benefit to respond to ivory trafficking on the high seas due to the container trafficking modus operandi. Containers are inspected and intercepted primarily on land, and only a select few are subject to searches. Coastal State law enforcement authorities like customs in the state in which ivory is seized therefore establish jurisdiction over these crimes instead of states intercepting illicit shipments in international waters. This allows for a legal finish as states are free to exercise enforcement jurisdiction in their own maritime zones and prosecute suspects.

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<sup>1767</sup> Lusaka Agreement on cooperative enforcement operations directed at illegal trade in wild fauna and flora. n.d. Available: [http://lusakaagreement.org/?page\\_id=126](http://lusakaagreement.org/?page_id=126) [accessed 7 April 2017].

<sup>1768</sup> A draft Protocol has been suggested. See Scanlon, J.E. 2020. *New global agreement to address serious gaps in environmental law*. IUCN. Available: <https://www.iucn.org/news/world-commission-environmental-law/202010/new-global-agreement-address-serious-gaps-environmental-law> [accessed 18 November 2020]; Global Initiative to end Wildlife Crime. 2020. *Form and content of a possible protocol on the illicit trafficking of wildlife*. Available: <https://endwildlifecrime.org/wp-content/uploads/2020/10/Possible-UNTOC-Protocol.pdf> [accessed 18 November 2020].

Where smaller vessels like dhows transport ivory, such a legal framework could be beneficial. An indication that such a framework is desirable would be if UNCLOS Article 110 was also used to board suspected ivory trafficking vessels in the WIO based on statelessness. As is the case with Article 17 of the Vienna Convention, such an instrument will allow for interdictions of foreign vessels at sea, in anticipation that trafficking networks might adapt their modus operandi over time and diversify from using container vessels. Those countering ivory trafficking therefore need to be cautious of criminal networks shifting modus operandi on land and at sea in response to law enforcement.<sup>1769</sup> In addition to UNTOC and CITES, states could also conclude bilateral or regional agreements to facilitate international cooperation,<sup>1770</sup> as has been done in response to piracy and drug trafficking.

### **8.3.3.2 Improve shipping security through public-private assemblages**

Chapter 5 demonstrated the key role of the shipping industry in counter-piracy, taking security into their own hands by implementing vessel protection measures and closely cooperating with security actors like navies. Chapter 7 equally illustrated the centrality of the shipping industry to the ivory trafficking model. Yet, despite the multiple tonne shipments of ivory, and likely also heroin, being moved in containers on board shipping vessels, the shipping industry has been largely absent from the response. Their absence is likely due to the limited impact which ivory trafficking has on the industry. Whereas the counter-piracy cooperation therefore took on the form of a security assemblage, cooperation in response to ivory trafficking more resembles ad hoc partnerships, if at all.

While the ISPS Code guides states on how to safeguard ports and Flag vessels from their use for illicit activities, there is little pressure on the shipping industry to implement measures preventing their use for trafficking. Until the shipping industry becomes a key partner in implementing tougher security measures along the entire trade chain, any law enforcement efforts will have a limited impact and vessels will continue being used to transport illicit goods. The absence of public-private partnerships therefore enables TOC at sea. Scholars

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<sup>1769</sup> Pires & Moreto. 2011: 118. Also see, for example, EIA. 2014: 27; Crosta, Beckner & Sutherland. 2015: 40.

<sup>1770</sup> UNODC. 2020b: 23.

like Bateman<sup>1771</sup> and Upadhyaya<sup>1772</sup> have noted the need for partnerships between law enforcement and the shipping industry to achieve maritime security.

The IMO has also acknowledged the need for all stakeholders involved in cargo control to cooperate in partnerships. This must include “governments, all of the control authorities and security agencies with an interest in maritime cargo, the consignors, companies and cargo-handling agents”.<sup>1773</sup> But this has not yet materialized, despite the fact that a public-private assemblage similar to the one established to counter Somali piracy, can greatly improve supply chain security currently exploited to traffic wildlife. Flag States also need to adhere to their Flag State responsibilities and give account for their vessels’ actions. As the shipping industry pressed Flag States to allow private security on board their vessels, Flag and Coastal States must press the shipping industry to adhere to the ISPS code and other measures to prevent their use for wildlife trafficking. If this is not done, CITES trade bans should be considered.

Due to the centrality of the shipping industry in the ivory trafficking model, a collective effort by the shipping industry and law enforcement entities in ports is the best weapon against ivory trafficking. If shipping companies fail to identify illicit shipments, it becomes the responsibility of lesser resourced law enforcement entities which have to profile millions of containers. Traffic, one of the key organizations working on the illegal wildlife trade, has noted how there is a lack of mechanisms for state agencies to communicate and cooperate with the shipping industry.<sup>1774</sup> Existing multilateral partnerships such as those established by the Buckingham Palace Declaration or the UNODC CCP or DCOC could however form the basis for engagement with the shipping industry. Suggestions to improve industry efforts include sharing information between law enforcement and the shipping industry,<sup>1775</sup> training private port actors on security, developing greater awareness of wildlife crimes, sensitization on how the shipping industry can assist law enforcement to profile containers and improve supply chain security, and the need to make industry actors aware of the

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<sup>1771</sup> Bateman. 2016.

<sup>1772</sup> Upadhyaya. 2016: 42 – 43.

<sup>1773</sup> Trelawny, C. 2015. Tackling the trafficking of illegal wildlife products. *IMO News*. Issue 2. Available: <http://www.imo.org/en/MediaCentre/HotTopics/piracy/Documents/Tackling%20the%20trafficking%20of%20il%20legal%20wildlife%20products.pdf> [accessed 7 May 2020]: 41.

<sup>1774</sup> Traffic. 2019: 8.

<sup>1775</sup> United for Wildlife. n.d. *Buckingham Palace Declaration*. Available: <https://unitedforwildlife.org/the-buckingham-palace-declaration/> [accessed 18 February 2021].

harms which ivory trafficking can cause them.<sup>1776</sup> An example is of a vessel belonging to the Mediterranean Shipping Company which was used to traffic cocaine. It was removed from circulation for investigations which lasted weeks, thereby delaying scheduled shipments.<sup>1777</sup> Like ivory traffickers, heroin traffickers also use vessels and containers belonging to the large global shipping and container companies to move heroin to Africa<sup>1778</sup> and measures to address this will also therefore impact heroin trafficking.

Shipping and related companies regularly used for trafficking must be exposed.<sup>1779</sup> Yet, despite most large ivory seizures being made in shipping containers,<sup>1780</sup> little information is available about the implicated companies on the shipping paperwork, which is also often falsified or incomplete. Without cooperation between law enforcement, the shipping industry and interdicting, source and transit states, this information will not be uncovered. Kenyan prosecutors have noted how the failure to identify the implicated companies and the source and destination of shipments cause investigations to stall.<sup>1781</sup> NGO's are also putting pressure on law enforcement to focus on transport, shipping and clearing agents, their finances and organization because, despite large seizures being linked to such companies, they remain under-investigated.<sup>1782</sup> Participant 13, from an NGO, noted:

“a number of NGOs that are involved in this in East Africa is pressing for law enforcement agencies to start looking at the financial aspects and the companies and organizations that are actually involved in the shipping. So to date, in our big cases there has been no examination of the shipping companies involved with the conduits [...], transport, shipping, clearing agents any of that or following the money trail in any way, shape or form. That is something that we want to not only get into ourselves, but press the law enforcement to do.”<sup>1783</sup>

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<sup>1776</sup> Traffic. 2019: 15; 23.

<sup>1777</sup> Paris, C. 2020. Global shipping faces troubling new smuggling questions. *Wall Street Journal*. 6 January. <https://www.wsj.com/articles/global-shipping-faces-troubling-new-smuggling-questions-11578330634> [accessed 6 June 2020].

<sup>1778</sup> Griffiths & Jenks. 2012: 35 - 37.

<sup>1779</sup> UNODC. 2020b: 22.

<sup>1780</sup> Wright. 2013: 5; 28.

<sup>1781</sup> Outhwaite & Little. 2020: 14.

<sup>1782</sup> Interview Participant 13. 2016.

<sup>1783</sup> Interview Participant 13. 2016.

There is a need for greater information exchange from shipping and related companies.<sup>1784</sup> While both law enforcement and the private sector tightly guard information, shipping companies should be willing to share cargo manifests and information about clients with law enforcement entities.<sup>1785</sup> This should be done in advance of shipment to allow containers to be risk profiled and inspected<sup>1786</sup> before being loaded onto vessels.<sup>1787</sup> For example, if law enforcement has access to shippers' databases, it would benefit both law enforcement and shippers as law enforcement can identify suspicious shipments, thereby also safeguarding these companies from illicit activity. If law enforcement is provided with sufficient shipment information, the need to disrupt shipments will also be less.<sup>1788</sup> But to achieve this, shipping companies need to know who their customers are,<sup>1789</sup> which they often don't. One participant however questioned their supposed ignorance, saying "we know about everything that comes through here right? It kind of makes sense that they would?"<sup>1790</sup> In Kenya for example, many ivory shipments are hidden behind fictitious companies, making it impossible to identify its origin. To address this, Article 99 of Kenya's Wildlife and Conservation Management Act now provides for criminal liability for entities recklessly enabling the import and export of wildlife products.<sup>1791</sup> Other regional states could replicate this.

Shipping companies typically also do not verify the cargo being moved on their vessels because containers are sealed by the time they are loaded. Cargo manifests and bills of lading, which indicate the details of the cargo being moved, also indemnify carriers in cases where cargo is misdeclared. For this reason, those managing containers prior to being

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<sup>1784</sup> For more on securing shipping containers and merchant vessels, see Van de Voort, M., O'Brien K.A., Rahman A. & Valeri, L. 2003. *"Seacurity": improving the security of the global sea-container shipping system*. Santa Monica: RAND Europe.

<sup>1785</sup> Dermody, L., Dunne, A. & Griffiths, H. 2013. Access to shipping companies' data could help turn the tide against maritime smugglers. *Stockholm International Peace Research Institute (SIPRI)*. 17 June. Available: <https://www.sipri.org/commentary/2013/17-june-2013-access-shipping-companies-data-could-help-turn-tide-against-maritime-smugglers> [accessed 5 February 2021].

<sup>1786</sup> Traffic. 2020: 12; Traffic. 2019: 23. Late submission of export documents has been identified as a challenge in Tanzania for example: Traffic. 2019: 14.

<sup>1787</sup> Traffic. 2019: 7.

<sup>1788</sup> Dermody, Dunne & Griffiths. 2013.

<sup>1789</sup> Traffic. 2019. Kenya: 15.

<sup>1790</sup> Interview Participant 12. 2016.

<sup>1791</sup> Traffic. 2020: 15. Also see Wildlife Direct. 2016. *Wildlife offences in Kenya: points to prove*. Nairobi: Wildlife Direct. Available: <https://wildlifedirect.org/wp-content/uploads/2017/03/Rapid-Reference-Guide-2016.pdf> [accessed 9 February 2021].

sealed, such as shipping agents, should be held responsible for their content.<sup>1792</sup> As also suggested by the IMO, the primary responsibility for checking containers and their contents is where containers are loaded,<sup>1793</sup> regardless of where this is. This illustrates the need to move up the supply chain to ensure security in preparation for export,<sup>1794</sup> which in turn ensures greater maritime security. Here, freight forwarders and clearing agents will be key.<sup>1795</sup>

Where liability may fall on the shipping company, is if seals have been tampered with on board their vessels. It is however difficult to prove shipping agent liability and awareness of illicit shipments considering the number of workers handling containers from the shipper's warehouse until it is loaded in port. If a seal has not been tampered with and a container is without identifying marks, it is likely to go unnoticed. For this reason, illicit shipments and container tracking numbers are typically identified by intelligence, not because they look suspicious. And for this to happen requires inter-agency and inter-state cooperation.<sup>1796</sup> Therefore, while states carry responsibility for securing borders to prevent transnational movement, transport entities are responsible for ensuring supply chain security as the container is moved.<sup>1797</sup> One step which companies can take to ensure greater supply chain security is to become certified as Authorized Economic Operators, certifying that they are trusted cargo handlers due to adherence to certain security requirements.<sup>1798</sup>

### **8.3.3.3 Improve port security as part of maritime security efforts**

Efforts to achieve maritime security must also include efforts to achieve security at the interface between land and sea – ports. Many of the interview participants for both heroin and ivory trafficking emphasized the need to secure ports. Participant 21 noted how ports are an opportunity for effecting seizures of shipments missed at sea:

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<sup>1792</sup> Griffiths & Jenks. 2012: 35 - 37.

<sup>1793</sup> Trelawny. 2015: 41.

<sup>1794</sup> Traffic. 2020: 28; Traffic. 2019: 23.

<sup>1795</sup> Traffic. 2019: 7.

<sup>1796</sup> Griffiths & Jenks. 2012: 35 - 37.

<sup>1797</sup> Trelawny. 2015: 41.

<sup>1798</sup> Traffic. 2019: 8; 23.

“If you’ve suddenly got viable enforcement in the port, it would probably really, really have an effect [...] [W]e know that the maritime traffickers have adapted and that they’re using slightly different methodologies to drop it off, we now need to adapt to that and get ahead of the curve [...] At the port we have a chance to affect it”.<sup>1799</sup>

Implicated states must equip their ports to identify failures by the shipping industry which allow their ports to be used for trafficking. Once containers enter ports, Coastal State law enforcement entities play the key role in ensuring container’s security<sup>1800</sup> and need to collaborate with the shipping industry.<sup>1801</sup> This has been a challenge in eastern Africa due to a lack of scanning, searching and profiling capacity.<sup>1802</sup> A combination of sufficient efforts to ensure supply chain security could result in less containers needing to be scanned, thereby not interrupting trade.<sup>1803</sup> Law enforcement entities must also aim for more than seizures, as it is the investigation which follows which will identify the greater trafficking network. As noted in chapter 7, seizures do not equal arrests and most seizures are not analyzed for their origin,<sup>1804</sup> even though identifying poaching and trafficking hotspots will allow law enforcement efforts to be focussed.<sup>1805</sup> Controlled deliveries can also be used more to gain insight into trafficking modus operandi.<sup>1806</sup> But because containers are moved internationally, commitment from all stakeholders is required. Fostering these relationships is the current challenge, but instruments like the CGPCS, SHADE and DCOC can provide a blueprint for this.

During interviews, ports appeared equally insecure to the high seas. Participant 21, for example, remarked: “when you look at Mombasa [...], you saw the mess, just, you can take anything in there. You can take anything into Dar es Salaam as well. So, I would use the port.”<sup>1807</sup> Many participants also perceived corruption to be endemic in eastern African

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<sup>1799</sup> Interview Participant 21. 2016.

<sup>1800</sup> Traffic. 2020. Kenya: 11.

<sup>1801</sup> Traffic. 2019: 7; Traffic. 2020: 10.

<sup>1802</sup> Traffic. 2020: 11; Traffic. 2019: 14.

<sup>1803</sup> Traffic. 2019: 8, 23. Also see Griffiths & Jenks. 2012: 47;

<sup>1804</sup> CITES. 2019b: 5.

<sup>1805</sup> Wasser et al. 2015: 84.

<sup>1806</sup> UNODC. 2020b: 21. See UNTOC Article 1 (i).

<sup>1807</sup> Interview Participant 21. 2016.

ports.<sup>1808</sup> While participants noted the increase in infrastructure in regional ports, including general trade-enhancing infrastructure and scanning equipment,<sup>1809</sup> they noted that ports are notoriously difficult to work in due to the presence of numerous, and sometimes competing, interests<sup>1810</sup> and because the region's ability to identify and apprehend illicit shipments remains limited.<sup>1811</sup> This is because ports are primarily concerned with revenue collection, not identifying illicit shipments.<sup>1812</sup> Overly secure ports could in fact discourage trade.<sup>1813</sup> Participant 11, considering the situation in Dar es Salaam, described it as follows:

“The priority is revenue collection basically, so that was all they were focussing on, not the seizure of wildlife products [...] There was security scanning for counter-terrorist purposes, explosives and that kind of thing, there were scanners, and they were doing checks on imports for revenue purposes and that was more or less it. So, they were never really actively looking [for] contraband... I think in some ways, they weren't concerned, the shippers want to keep the loads moving, to not hold up loads, rather than searching”.<sup>1814</sup>

Participant 21 noted how the Port of Dar es Salaam hadn't had a significant seizure in ages. He remarked that scans yield limited results if port entities didn't know what they were looking for:

“[T]hey don't have a search team for containers, they've got a massive container port [...] ‘What do you do on the boats, do you go and search them?’ No, they don't go and search the boats. So again, it is just being walked off by crew, almost certainly. That's how I would do it. Container and walk off by foot. It's easy. There's

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<sup>1808</sup> Interview Participants 11; 13; 17 & 25.

<sup>1809</sup> Interview Participants 17 & 21. 2016.

<sup>1810</sup> Interview Participant 11; 21 & 25.

<sup>1811</sup> Interview Participants 17 & 21. 2016.

<sup>1812</sup> Interview Participants 11; 15; 17 & 21.

<sup>1813</sup> “[S]ecurity brings some benefits to the port, such as market reputation, increased throughput as some shippers might prefer a secure port, minimization of the risk of an unlawful act occurring and hence of consequent economic loss, and in general a competitive advantage to the port over its competitors. On the other hand, there are concerns about the negative impact of security, such as a possible decrease in port performance, the substantial investments required to develop and maintain security, and the potential for losing throughput to neighbouring ports that do not apply the appropriate security measures and so are able to provide lower charges for ships using their port services.” Ng, A. & Vaggelas, G.K. 2012. Port security: the ISPS Code. In *The Blackwell Companion to Maritime Economics*. W.K. Talley, Ed. West Sussex: Blackwell Publishing: 694.

<sup>1814</sup> Interview Participant 11. 2016.

no real enforcement at the port down here. You could see that when we were in the port this morning, we were walking in and out, not challenged or anything”.<sup>1815</sup>

One way to improve port security is by implementing the ISPS code, which has been poorly implemented in ports worldwide, including in Africa.<sup>1816</sup> Projects like the UNODC and WCO’s CCP<sup>1817</sup> were also rarely mentioned by participants unless I brought it up, possibly indicating its perceived utility. Participant 17 however explained how these units can improve both revenue collection and identify illegal shipments:

“[T]he non-fiscal approach on fighting crime is not very much established and this is why the key aim of this unit is on fighting crime rather than revenue collection [...] [B]ecause the smuggling technique or the under-declaring technique is very similar, that is actually contributing to revenue collection.”<sup>1818</sup>

While many look to the sea for law enforcement efforts, responders are aware that the solutions are on land where preventative action will be more effective than reactive responses. Illicit activity intercepted on the high seas, though having its own challenges, avoids having to deal with land based challenges and entities in ports. However, similar to piracy, a response concentrated at sea may contain crime but it will not address its causes on land, which cause TOC networks to merely adapt their modus operandi.

#### **8.3.3.4 Legalization and consumptive use of wildlife**

Unlike heroin trafficking, the suggested responses to ivory trafficking are all aimed on land. One such response suggested by two very vocal participants working on wildlife trafficking is the sustainable utilization of ivory. Participant 16 opined that a legal market with guaranteed supply would halt black market speculation and poaching.<sup>1819</sup> Many argue that sustainable use of wildlife is the only way to mitigate poaching and generate funding for conservation. This means that the ivory trade must be legalized and that communities must

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<sup>1815</sup> Interview Participant 21. 2016.

<sup>1816</sup> Raymond & Morrien. 2009: 4 – 7.

<sup>1817</sup> UNODC. 2018b. *Container Control Programme Annual report 2017*. Vienna: UNODC: 31. Available: [https://www.unodc.org/documents/Container-control-programme/17-08688\\_CCP\\_AR2017\\_eBook.pdf](https://www.unodc.org/documents/Container-control-programme/17-08688_CCP_AR2017_eBook.pdf) [accessed 4 February 2021].

<sup>1818</sup> Interview Participant 17. 2016.

<sup>1819</sup> Interview Participant 16. 2016.

benefit from wildlife for them to have an incentive to protect them. Consumptive use also includes tourism and trophy hunting which allows for areas to be reserved for wildlife.<sup>1820</sup>

Participant 15 commented on the utility of hunting for conservation:

“Things like hunting are absolutely necessary to raise revenue, to run the parks and the wildlife. Otherwise, where does the money come from? Does it come from the Tanzanian taxpayer who is often struggling to eat? [...]If in order to conserve a population, you have to kill some [...]I want to conserve them and in the long-term I think the only way to do that is to make them sustainable.”<sup>1821</sup>

Hunting has been banned in many countries, such as Kenya, where it has been banned along with almost all other consumptive use of wildlife.<sup>1822</sup> Limited hunting is allowed in Mozambique and Tanzania.<sup>1823</sup> Those against legal ivory trade are often also those most vocal against hunting. This debate however falls outside the scope of this thesis.<sup>1824</sup>

#### 8.4 Conclusion

This chapter has discussed selected findings in answer to the research question. It has collectively considered the findings as produced by applying Bueger’s paradigms as analytical framework to understand responses to piracy, heroin and ivory trafficking. It has shown which interests motivate actors to respond to TOC at sea and has illustrated how contemporary manifestations of TOC at sea require a move away from existing responses

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<sup>1820</sup> For more on hunting, see, for example, Crosta, Beckner & Sutherland. 2015: 24 – 25; 38; Norton-Griffiths, M. 2007. How many wildebeest do you need? *World Economics* 8 (2): 52; Save the Rhino. 2019. *Trophy hunting and sustainable use: rhinos*. 12 July. Available: <https://www.savetherhino.org/thorny-issues/trophy-hunting-and-sustainable-use-rhinos/> [accessed 5 February 2021]; Mahr, K. 2019. Why Botswana is lifting its ban on elephant trophy hunting. *NPR*. 28 September. Available: <https://www.npr.org/sections/goatsandsoda/2019/09/28/763994654/why-botswana-is-lifting-its-ban-on-elephant-trophy-hunting> [accessed 24 May 2020].

<sup>1821</sup> Interview Participant 15. 2016.

<sup>1822</sup> Norton-Griffiths. 2007: 42- 43.

<sup>1823</sup> Thouless et al. 2016: 32; Africa Geographic. 2019. *Trophy hunting in Africa is in decline, and no longer pays its way*. 8 March. Available: <https://africageographic.com/stories/trophy-hunting-africa-decline-no-longer-pays-way/> [accessed 24 May 2020]; Tairo, A. 2019. *Tanzania bans UAE firm from hunting for violation of rules*. African Elephant Journal. 12 August. Available: <https://africanelephantjournal.com/tanzania-bans-uae-firm-from-hunting-for-violation-of-rules/> [accessed 24 May 2020]; Hance, J. 2017. Mozambique: 6,000 animals to rewild park is part-funded by trophy hunting. *The Guardian*. 19 June. Available: <https://www.theguardian.com/environment/radical-conservation/2017/jun/19/rewilding-mozambique-trophy-hunting-elephants-giraffe-poaching-zimbabwe-sango-save-zinave> [accessed 24 May 2020].

<sup>1824</sup> For additional information on consumptive use of wildlife and hunting, see, for example, Mahr. 2019; Thouless et al. 2016: 33; WWF. 2015; Africa Geographic. 2019; Tairo. 2019; Hance. 2017.

towards creative ways to effectively address contemporary manifestations of TOC at sea. As the existing international legal frameworks allow for a limited response not able to address the entire TOC modus operandi, counter-piracy has illustrated the utility of bilateral and multilateral agreements between states. It has also illustrated how cooperative mechanisms between states and other entities, like the shipping industry, can provide more effective means to address maritime crimes.

This chapter has further illustrated how regional weaknesses, such as corruption, prevent responses from being successful and may even result in isolating the international responses at sea. It has shown that while there are often calls for additional responses to the traditional security and law enforcement responses, these responses are unlikely to lose traction soon. They have however in some instances taken on a hybrid nature as the line between security and law enforcement responses are often blurred, arguably increasing their popularity as a global governance mechanism aimed at soft security.

This chapter has illustrated how the most reasonable prospect of achieving the arrest and prosecution of heroin and ivory traffickers on the high seas or in ports, is to strengthen regional law enforcement and conclude bilateral or multilateral agreements between implicated states, as well as the shipping industry in the case of container trafficking. This again emphasizes the importance of regional ownership and cooperation to counter TOC at sea and reflects the inter-state agreements to establish the PPM and PPTP to give effect to counter-piracy cooperative agreements. It also reflects the success of public-private cooperation between all counter-piracy actors and the shipping industry.

## 9 Towards a better response to transnational organized crime at sea

This thesis intended to contribute to our understanding of global governance efforts against TOC at sea by considering which responses have formed against piracy, heroin and ivory trafficking. It sought to gather evidence to answer the research question - does counter-piracy provide a model response to other TOCs in the WIO? The enquiry was triggered by the success of counter-piracy and the suggestion that a similar global governance effort can be established to counter other maritime crimes.

Using counter-piracy as vantage point, evidence was generated by drawing comparative lessons from counter-piracy and the case studies of heroin and ivory trafficking. Responses were considered through the lens of Bueger's counter-piracy paradigms and applying similar paradigms to responses to heroin and ivory trafficking. By understanding how crimes are problematized in terms of which interests they are perceived to threaten, the paradigms brought meaning to responses. Research interviews provided further context to responses and responders. A synthesis of the empirical data from the research interviews and the data generated by utilizing paradigms to organize responses, led to the formulation of a framework which shed light on which actors choose to respond, which motivations and means influence their decision to cooperate, and how they formulate and implement responses. All of these aspects combined to allow comparative lessons to inform future initiatives against TOC in the WIO by providing insight into the conditions under which partnerships in response to TOC at sea form and achieve their aims.

The research has shown how the oceans are a facilitator of globalization and interaction between states, merchants and criminals. It is a place of perceived lawlessness, yet also perhaps a place where law enforcement possibilities exceed that which is possible on land. As suggested in Chapter 3, this likely explains why some of the first global governance initiatives against TOC took place at sea. This is not only because some of the oldest forms of TOC like piracy and the transport of slaves manifested at sea, but also because the oceans provide unique opportunities, and the necessity, for cooperation. This has given rise to unique forms of global governance as states are influenced by a combination of local and global affairs and interact with global and local actors in order to govern these realities at sea. These global crime governance mechanisms have been established to deal with the

effects of equally globalized TOC networks, including those in the maritime domain which pose a threat to communal maritime security interests.

These interventions are on a local, regional and international scale and are often aimed at threats on opposite corners of the globe. In response to these threats, states project their power through maritime assets in the global maritime domain and, to a limited extent, through extra-territorial mechanisms on land. The research has also shown how the activities and actors participating in these partnerships differ depending on the crimes they encounter. This is influenced by, *inter alia*, international and national legal frameworks, the motivation to suppress undesired outcomes from abroad, the desire to expand control across maritime territory, national interests, human rights concerns, the impact of crimes, criminal modus operandi, available maritime assets and the prevalence of corruption.

As illustrated in Chapter 8, the above conditions all led to the conclusion that while the global governance response to Somali piracy does not in itself provide a replicable model for responding to other forms of TOC in the WIO, it does hold many unique lessons which must be taken into account in future efforts to counter other TOCs at sea. This chapter concludes the thesis by considering the implications of the findings and outlining its contribution. It then suggests areas for future research before offering closing remarks.

### **9.1 Implications for responses to transnational organized crime at sea**

By using paradigms as a means to analyze responses, this thesis has proposed a wider conceptual framework from which to consider why and how TOC at sea is governed. In doing so it has also made a comparative contribution by considering different forms of TOC from a maritime perspective and compared and contrasted the causal factors, impacts and responses put in place to counter them. This informed the policy contribution, which drew on counter-piracy to determine whether a similar global governance model can be applied to the illicit markets of heroin and ivory trafficking. While this study found that this is unlikely, primarily due to the interests threatened by piracy and the applicable legal frameworks enabling a response, it did identify key commonalities which must be central to all responses to TOC at sea if they are to effectively mitigate its affects. These include countering corruption, governing the responses of global actors and incorporating private actors in the response, as illustrated in the counter-piracy security assemblage. Finally, it

suggested alternative responses to heroin and ivory trafficking, all of which contain key elements of counter-piracy and are forms of global governance partnerships.

### **9.1.1 Partnerships in response to TOC at sea**

Chapter 3 illustrated why resources and efforts must ideally be combined to form multi-stakeholder mechanisms as the primary weapon against communal threats to maritime security, such as TOC. The challenges in countering complex, transnational crimes like piracy, heroin and ivory trafficking have confirmed this. Perhaps most importantly, the research has also shown that global crime governance efforts should include implicated private actors<sup>1825</sup> if they are to achieve their aims. While the counter-piracy assemblage consisted of public and private entities, the partnership in response to heroin trafficking at sea consists almost exclusively of states. It thereby resembles a more traditional coalition as defined by Chasek - an ad hoc grouping of states uniting for a specific purpose. Ivory trafficking partnerships are typically made up of states and NGOs, though the majority of responses are implemented by these actors in isolation and on land. There is arguably therefore not a true international partnership in response to ivory trafficking.

This thesis has however provided strong motivation for the vital role of private actors, especially the shipping industry, in global governance efforts in the maritime domain. This suggests that security assemblages, as theorized by Abrahamsen and Williams, will be most effective at countering TOC at sea, due to the inherent presence of private actors like the shipping industry in the trafficking modus operandi. The partnerships responding to heroin and ivory trafficking cannot therefore be said to truly resemble assemblages as these private actors do not participate in the response. The private actors which do participate in the response, such as those working under the humanitarian paradigm, do not form part of security actors and operate on land. While Abrahamsen and Williams consider security assemblages as the state actively participating in privatising or shifting security functions elsewhere and using that as an extension of state authority, cooperation with the shipping industry would be the exercise of obligatory Flag State jurisdiction in terms of UNCLOS.

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<sup>1825</sup> Chatterjee. 2014: 78; Vreÿ. 2014: 205; Seyle & Madsen. 2015: 23 – 26; Traffic. 2019: 3; Abrahamsen & Williams. 2009: 15.

The research suggests that perhaps the most important partnership of all is that between regional states. While the response needs an international effort to address its inherent transnational nature, parallel to this must be a regional and national effort aimed at that which attracts TOC to the region. Existing responses by regional states, such as participation in the PPM, illustrate that regional states have a vital role to play in countering TOC in the region,<sup>1826</sup> even with limited resources. This commitment should be replicated in response to all maritime crimes in the region. There are on-going capacity building efforts by the Global North to improve regional capabilities, but one has to question how the extra-regional dominance of the waters around eastern Africa affect regional states' agency in responding to regional maritime threats themselves. Van Nieuwkerk argues that Africa's maritime security policies are influenced by these extra-regional actors to such an extent that it is hard to distinguish whose interests are being pursued in the maritime domain.<sup>1827</sup> But the extra-territorial presence does have its advantages. Despite the questionable deterrence value for crimes other than piracy, the international presence has meant that the waters are at least more secure than they would likely have been were it not for the emergence of piracy.

Ideally, regional states would be able to contribute to maritime security efforts as equal partners to the better-resourced extra-territorial states, but this depends on the achievements of these capacity building efforts and a fundamental shift in security thinking from land to sea.<sup>1828</sup> Regional states must recognize the importance of the ocean in sustaining its economies<sup>1829</sup> and now that there is an increased awareness of TOC around eastern Africa, there is an opportunity for preventative action to be taken and for regional states to address their maritime security concerns. This will contribute to legitimate opportunities for their citizens and to be considered a safe region open for trade.

### **9.1.2 International instruments for cooperation**

Global crime governance efforts are made possible by the formation of international entities, treaties, agreements and UNSC resolutions, which prescribe the rules according to

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<sup>1826</sup> Herbert-Burns. 2012: 17.

<sup>1827</sup> Gopal. 2014.

<sup>1828</sup> Potgieter. 2012: 18.

<sup>1829</sup> Khan & Singh. 2014: 523.

which these cooperative forms of governance will function.<sup>1830</sup> The research interviews revealed that the existing international multilateral legal frameworks however fall short of providing the necessary basis for an effective response to contemporary TOC at sea, including heroin and ivory trafficking in the WIO. This means that it may also fall short to address crime elsewhere. While this may lead one to suggest that international legal frameworks must be expanded to cover a broader range of maritime crimes and afford states wider jurisdictional powers, the research has shown that it will not improve the response to heroin and ivory trafficking, as other factors, such as corruption and human rights concerns, also come into play.

As Chapter 4 has illustrated, piracy is afforded universal jurisdiction primarily because of its historical execution on the high seas beyond the reach of any state. But counter-piracy has shown that although piracy is one of the oldest crimes at sea, the response thereto was modernized by states through agreements which suited the affected stakeholders, thereby complementing universal jurisdiction. Yet, such measures have not yet been afforded to heroin trafficking, the vessels of which also often evade national jurisdictions by remaining on the high seas while drugs are collected by other vessels. This illustrates that the historical development of crimes also plays a role in jurisdiction as exercised today. But as counter-piracy has shown, maritime security governance mechanisms restricting freedom of the seas do not have to remain static and can be adapted.

Although no other TOCs are afforded universal jurisdiction, direction can be taken from the agreements concluded between states to give effect to counter-piracy off the coast of Somalia. This includes lobbying for a UNSC resolution should heroin or ivory trafficking become perceived as threatening international peace and security, as well as bilateral and multilateral agreements between states similar to the ones giving effect to the PPM and PPTP. This supports the finding that bilateral or multilateral agreements between states are the best way to complement international legal frameworks which do not offer sufficient interdiction options. This should include agreements with the Flag States of implicated private actors.

## **9.2 Potential areas for future research**

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<sup>1830</sup> Jacobi. 2014: 2- 4.

Due to the amount of data generated as a result of researching three distinct crimes, the focus of the thesis had to be directed to only that which was necessary to answer the research question. However, throughout the course of the research, areas of research which justify further exploration were identified:

- Applying the framework of paradigms to better understand responses to piracy in other world regions, such as the Gulf of Guinea;
- Using the framework of paradigms in order to understand responses to maritime crimes in other regions of Africa, such as migrant smuggling in North Africa;
- Exploring existing bilateral or multilateral agreements in response to TOC in order to consider their utility for TOC in the WIO;
- A comparative study of responses to cocaine trafficking in Western Africa and heroin trafficking in eastern Africa;
- A qualitative study of the impact of illicit markets on the region, to better inform policy;
- An in-depth study of the prevalence and nature of corrupt facilitation of TOC in eastern Africa in order to formulate effective responses.

### 9.3 Concluding remarks

Global and regional conditions have aligned to form the perfect storm for perpetrating numerous TOCs in the WIO off eastern Africa. These crimes form stark contrasts. The shipping industry shifts between victim and perpetrator. The jurisdiction applicable to piracy is exclusive to the high seas, yet, for other TOCs it is limited to Flag States and Coastal State maritime zones. While *mare clausum* affords states the right and responsibility to protect their own waters against TOC, *mare librum* on the high seas allows only for Flag State jurisdiction and limited exceptions thereto. But these contrasts need only be restrictive if stakeholders fail so seek cooperative opportunities beyond the limits of existing international law. If international legal frameworks do not sufficiently provide for responses to TOC on the high seas, stakeholders may conclude agreements agreeing to alternative jurisdiction regimes as allowed in UNCLOS.<sup>1831</sup>

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<sup>1831</sup> UNCLOS Article 92.

The counter-piracy regime has illustrated how creative responses to maritime crimes can be successful, even if only at sea. This thesis has demonstrated that there is indeed much to learn from counter-piracy when it comes to countering contemporary manifestations of maritime crime. Key to this is the need for a multi-stakeholder governing body able to oversee the response, as well as the need for private actors to be equal partners in preventing their use for illicit activity at sea. The failure of counter-piracy to equally address piracy from a development and humanitarian perspective and to tailor responses to the context of Somalia threatens to be repeated by those providing resources to counter heroin and ivory trafficking. This indicates the need for a more holistic response to address the drivers of supply, demand and everything in-between, both on land and at sea.

Some scholars have suggested that the conditions surrounding Somali piracy were too exceptional to replicate the counter-response<sup>1832</sup> and that certain political situations can be too unique to be able to duplicate solutions from one problem to the next.<sup>1833</sup> This appears to be true of counter-piracy. The counter-piracy regime likely succeeded because the issue at hand was limited to a specific geographical area and was supported by numerous stakeholders who all had a mutual interest in combatting it.<sup>1834</sup> In addition, the unique jurisdiction applicable thereto, the fragile state from which it originated, the magnitude of the threat it posed to trade, strategic interests and numerous nationalities, and the near-absence of a national counterpart, drove the international response. But these qualities are absent for heroin and ivory trafficking, which appear to be perceived as second order threats in comparison to piracy.

Also absent is the application of an equally broad legal framework and interest by the shipping industry to participate in the response. In addition, the fragile state of Somalia was both the reason for piracy's emergence, as well as the enabler of the international response, along with the application of universal jurisdiction. But the primary states affected by heroin and ivory trafficking boast much stronger institutions than Somalia and a response in their waters in which they play little part can therefore not be imposed on them. There is also the regional threat of corruption which, if it persists, will not only allow any responses to be

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<sup>1832</sup> Interview Participant 1. 2017.

<sup>1833</sup> Jacobi. 2014: 2.

<sup>1834</sup> Singhal. 2014: 70.

circumvented, but it could take over the very institutions mandated to protect regional states from TOC, leaving the region between the devil and the deep blue sea. If the region and extra-territorial actors however take direction from counter-piracy, its lessons in global governance of TOC at sea can benefit the creation of a more creative and holistic response.

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## ANNEXURE A - Ethics approval letter



### Faculty of Law

#### Research Ethics Committee

Private Bag X3 Rondebosch, 7701 South Africa  
Room 6.28 Kramer Building, Middle Campus  
Tel: +27 021 650 3080 Fax: +27 021 650 5660  
E-mail: [lamize.viljoen@uct.ac.za](mailto:lamize.viljoen@uct.ac.za)  
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21 September 2015

**Ms Carina Bruwer (BRWCAR019)**  
c/o Prof Mark Shaw's Office  
Centre of Criminology  
Kramer Law Building  
Faculty of Law, UCT

Contact details of applicant:

email: [carinabruwer@gmail.com](mailto:carinabruwer@gmail.com)  
Mobile: 082 8154626

Dear Ms Bruwer

Re: Clearance Process for L23-2015: "Understanding and Responding to Maritime Trafficking off the East African Rim: Do the Measures against Piracy off the Horn of Africa provide a Model?"

Thank you for your application which was reviewed by the committee on 17/09/2015.

The Research Ethics Committee of the Law Faculty very much appreciates the considerable effort put into the application.

This study has been carefully considered and all ethical issues have been adequately addressed.

Ethics clearance is granted with effect from 17 September 2015 for 12 months subject to renewal for another 12 months. Please note that any material changes to the proposal will need to be cleared as an amendment.

With best wishes,

Signature Removed

ff  
Dr Julie Berg  
REC: CHAIR

## ANNEXURE B – Consent form

### ***Consent to participate in research interviews to be conducted by Carina Bruwer for the purposes of obtaining a PhD Degree in Criminology***

**By signing this Consent Form, I acknowledge that I understand and agree to the following:**

- I am aware of the nature and purpose of the research;
- My participation in the project is voluntary;
- Should I choose to participate, but later wish to withdraw from the project, I will be free to do so without any adverse consequences;
- Interviews will be scheduled at a time and place convenient to me and no costs shall be borne by myself;
- Interviews will last no longer than 1h30mins;
- A set of pre-selected questions will be discussed, followed by an informal discussion;
- No remuneration will be provided for my participation;
- I consent/do not consent to the recording of the interview, either via audio or video recording
- Information received from me shall be confidential, unless I agree to its release;
- If so requested, all necessary measures shall be taken to protect my identity;
- Collected data will be used solely for research purposes;
- I shall inform the researcher should I wish to receive feedback regarding the final outcome of the research.

Signed by \_\_\_\_\_ at \_\_\_\_\_ on this \_\_\_\_\_ day of \_\_\_\_\_.

\_\_\_\_\_  
Participant

\_\_\_\_\_  
Researcher

***If you have concerns about the research, its risks and benefits or about your rights as a research participant in this study, you may contact the University of Cape Town Law Faculty Research Ethics Committee Administrator, Mrs Lamize Viljoen, at 021 650 3080 or at [lamize.viljoen@uct.ac.za](mailto:lamize.viljoen@uct.ac.za). Alternatively, you may write to the Law Faculty Research Ethics Committee Administrator, Room 6.28 Kramer Law Building, Law Faculty, UCT, Private Bag, Rondebosch 7701.***

### ANNEXURE C – List of interview participants

Participant	Group	Affiliation	Position
1.	Piracy	Academic	Professor
2.	Piracy	Oceans Beyond Piracy	Hostages Programme staff member
3.	Piracy	Oceans Beyond Piracy	Researcher
4.	Piracy/ heroin	UNODC Global Maritime Crime Programme (GMCP)	Senior staff member
5.	Piracy	International Maritime Organization (IMO)	Project officer responsible for implementation of DCOC
6.	Piracy	International Committee of the Red Cross (ICRC)	Protection coordinator
7.	Piracy	International Committee of the Red Cross (ICRC)	Economic security coordinator
8.	Piracy	UNODC Global Maritime Crime Programme (GMCP)	Consultant
9.	Piracy	EUCAP NESTOR/ EUCAP Somalia	Political Advisor
11.	Ivory	UNODC Global Programme for Combating Wildlife and Forest Crime	Project coordinator and law enforcement advisor
12.	Ivory	Wildlife Direct	Head of legal Affairs
13.	Ivory	Wildlife Direct	Researcher
14.	Ivory	Save the Elephants	Academic/researcher
15.	Ivory	Independent researcher	Academic/researcher
16.	Ivory	CITES	Senior programme coordinator
17.	Ivory	UNODC Global Programme for Combating Wildlife and Forest Crime	Senior programme coordinator
18.	Ivory	EAGLE Network	Senior staff member
19.	Ivory	Kenya Wildlife Service (KWS)	Investigating Officer
20.	Ivory	Kenya Wildlife Service (KWS)	Senior Investigating Officer
21.	Heroin	National Crime Agency (NCA)	Liaison officer
22.	Heroin	UNODC GMCP	Programme coordinator
23.	Heroin	Nairobi Outreach Services Trust (NOSET)	Senior staff member
24.	Heroin	NOSET	Staff member
25.	Heroin	UNODC	Programme coordinator
26.	Heroin	Commission for National Coordination of Drugs Control in Zanzibar	Legal officer
27.	Heroin	Kenya Anti-narcotics Unit	
28.	Heroin	UNODC Programme for TOC, illicit trafficking and counter-terrorism	Senior staff member
29.	Heroin	Former heroin user	-
30.	Heroin	Commission for National Coordination of Drugs Control in Zanzibar	Addiction behaviour specialist

## ANNEXURE D – Relevant legal provisions

### UNCLOS

**UNCLOS Article 87(1):** “1. The high seas are open to all states, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law. It comprises, inter alia, both for coastal and land-locked states: (a) freedom of navigation; [...] (e) freedom of fishing [...] 2. These freedoms shall be exercised by all states with due regard for the interests of other states in their exercise of the freedom of the high seas.”

**UNCLOS Article 102:** “The acts of piracy, as defined in article 101, committed by a warship, government ship or government aircraft whose crew has mutinied and taken control of the ship or aircraft are assimilated to acts committed by a private ship or aircraft.”

**UNCLOS Article 103:** “A ship or aircraft is considered a pirate ship or aircraft if it is intended by the persons in dominant control to be used for the purpose of committing one of the acts referred to in article 101. The same applies if the ship or aircraft has been used to commit any such act, so long as it remains under the control of the persons guilty of that act.”

**UNCLOS Article 108:** “1. All states shall cooperate in the suppression of illicit traffic in narcotic drugs and psychotropic substances engaged in by ships on the high seas contrary to international conventions. 2. Any state which has reasonable grounds for believing that a ship flying its flag is engaged in illicit traffic in narcotic drugs or psychotropic substances may request the cooperation of other states to suppress such traffic.”

**UNCLOS Article 110:** “1. [...] a warship which encounters on the high seas a foreign ship, other than a ship entitled to complete immunity in accordance with Articles 95 and 96, is not justified in boarding it unless there is reasonable ground for suspecting that: [...] d) the ship is without nationality; or e) though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship. 2. [...] the warship may proceed to

verify the ship's right to fly its flag [...] 2. If suspicion remains after the documents have been checked, it may proceed to a further examination on board the ship [...].”

## **UNTOC**

**UNTOC Article 15(2)(c):** “2. Subject to article 4 of this Convention, a state party may also establish its jurisdiction over any such offence when: (a) The offence is committed against a national of that state party; (b) The offence is committed by a national of that state party or a stateless person who has his or her habitual residence in its territory; or (c) The offence is: (i) One of those established in accordance with article 5, paragraph 1, of this Convention and is committed outside its territory with a view to the commission of a serious crime within its territory”.