

## Legal frameworks for maritime safety and security in the Indian Ocean Region: Prospects and proposals

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### ABSTRACT

The Indian Ocean Rim Association (IORA) identified maritime safety and security as one of the six priority areas for cooperation among the member states. Hence, there is a need to develop a legal framework for maritime security in the Indian Ocean Region, ratify applicable international legal conventions on maritime security and create a system for the resolution of disputes among IORA member states. This paper proposes that there exists a strong case for the IORA charter to be amended to provide for a mechanism that IORA member states can use as a forum for dispute resolution. It argues that such a forum will create a platform for member states for deliberating weighty and controversial issues without jeopardising progress within the association. The paper further proposes the creation of an IORA legal group of experts whose mandate should include the development of a maritime security framework for the Indian Ocean Region, which is critical to the promotion of good order at sea.

### Introduction

During the Indian Ocean Rim Association (IORA) meeting held on November 15, 2011, the Council of Ministers identified “maritime safety and security” as one of the six priority areas for cooperation among the member states.<sup>1</sup> The rise of piracy off the Horn of Africa and the concomitant threat to navigation, commerce and safety of seafarers catapulted maritime safety and security to the top of IORA’s agenda.<sup>2</sup> The estimated economic cost of piracy in 2011 was USD\$6.6–6.9 billion,<sup>3</sup> in comparison to USD\$2.3 billion in 2014.<sup>4</sup> Despite the 65% decline in the cost of piracy between 2011 and 2014, it is a phenomenon that has developed in the larger context of maritime insecurity.<sup>5</sup>

Piracy is not the only security threat in the Indian Ocean (IO);<sup>6</sup> other threats to maritime security according to IORA include: unresolved maritime boundaries; illegal, unregulated and unreported (IUU) fishing; human trafficking; drug smuggling; trafficking in weapons; maritime pollution; and climate change.<sup>7</sup> These threats are interrelated. Piracy off the Horn of Africa is, for instance, perceived to be a reaction to the IUU fishing and illegal dumping of toxic waste in Somali waters.<sup>8</sup> Pirates have used these arguments to justify their criminal activities.<sup>9</sup> Yet piracy has been countered with a disproportionately heavier response<sup>10</sup> compared to IUU fishing and illegal dumping of toxic waste, presumably due to the lack of cogent proof of the latter two.<sup>11</sup>

IORA recognises that the neutralisation of these threats requires an effective integrated, inter-sectoral and multidisciplinary approach.<sup>12</sup> The November 2, 2012, Gurgaon Communiqué stated that the 2013 IORA (then IORARC) seminar on maritime security would “consider concrete proposals of cooperation in this broad area, including institutionalization of a regional mechanism for continuing exchange of views and monitoring of the situation”.<sup>13</sup> Maritime safety and security gained greater prominence in deliberations during various IORA meetings and workshops, resuming in a set of recommendations collated by the IORA secretariat and communicated to the IORA member states.<sup>14</sup>

This paper makes a case for the need to develop a regional dispute resolution mechanism to settle disputes among member states. It also advocates for the creation of an IORA legal expert working group on maritime safety and security to develop a maritime security legal framework for the region. The paper is divided into three parts: The first part analyses the regional dispute resolution mechanisms within the framework of international law; the second part looks at the legal capacity building of member states; and the last part proposes the establishment of an IORA legal expert working group on maritime safety and security.

### **Regional dispute resolution mechanisms within the framework of international law**

Article 2(d) of the IORA Charter excludes from deliberations bilateral and other issues that are likely to generate controversy and be an impediment to regional co-operation efforts. This article falls under “fundamental principles” and therefore applies without qualification or exception to all member states. For states to resolve disputes between them, and especially where such disputes affect the interests of other states within the Indian Ocean Region, there must be good faith deliberation about the dispute. No matter how genuine, such deliberations cannot happen within the IORA framework.

United Nations Convention on the Law of the Sea (UNCLOS), also referred to as the “Constitution of the Oceans”, is a detailed instrument that covers a wide range of issues of governance of ocean spaces and the resources therein. It has 320 articles divided into 17 parts. Each of these parts deals with a cluster of related issues ranging from jurisdiction over ocean spaces, to exploration and exploitation of marine resources, to settlement of disputes and to more general provisions related to the administration of the Convention. The nine annexes to UNCLOS are also deemed part of the Convention by virtue of Article 318. The annexes elaborate on the articles to which they relate and therefore the articles are to be read together with the annexes for a comprehensive understanding.

Some issues such as maritime delimitation, fishing rights, pollution of the marine environment and even piracy – all covered in the 1982 UNCLOS – may generate controversy between IORA member states. Affected states therefore have to look elsewhere. Since all IORA member states and dialogue partners – apart from the United Arab Emirates (UAE) – are among the 167 states party to 1982 UNCLOS, the dispute settlement mechanisms of Part XV of UNCLOS provide possible dispute resolution avenues for affected IORA member states.

Article 279 of UNCLOS requires states to settle their disputes by peaceful means, and makes reference to Article 33 of the United Nations (UN) Charter, which contains similar provisions. Under Article 280, states have the right to choose the peaceful means by which

disputes between them are to be settled. The choice also extends to disputes between states and non-state parties to UNCLOS, such as the International Seabed Authority (ISA). Under Article 283, the disputing parties are to proceed expeditiously to an exchange of views regarding the settlement of the dispute by negotiation or other peaceful means.

If a settlement is not forthcoming through agreed procedures, one of the parties may invite the other to submit to the conciliation procedure laid out in Article 284 and Annex V of UNCLOS. If the invitation is accepted, each party chooses two conciliators, of which one may be its national. The conciliators are nominated from a list to which each party state is entitled to nominate four persons. The four conciliators so nominated choose a fifth person who acts as the chair of the conciliation panel. The panel then has 1 year within which it must hear the parties, submit its report and make recommendations as it deems fit. If the report is acceptable, its implementation marks the end of the dispute. If it is not, then the conciliation process fails.

If settlement is not possible by the aforesaid means, then under Articles 286 and 287 of UNCLOS, the disputing parties have recourse to the compulsory dispute settlement provisions of UNCLOS. The compulsory procedure under Section 2 of Part XV entails binding decisions. The compulsory procedure may be either the International Tribunal for the Law of the Sea, the International Court of Justice, an Annex VII arbitral tribunal or an Annex VIII arbitral tribunal. These bodies apply the rules of UNCLOS and customary international law, although the disputing parties may request a decision to be based on general principles of fairness and equity. The body may appoint non-voting scientific experts to sit with it while hearing the case under Article 289 of UNCLOS. Decisions are by majority vote and are final and binding upon the parties.

State parties to UNCLOS may indicate which of the four bodies to have recourse to in settlement of disputes concerning interpretation and implementation of UNCLOS at any time on or after signing UNCLOS. A state party that has not selected any of the forums available under Article 287 of UNCLOS is deemed to have accepted Annex VII arbitration.

States could also resort to regional dispute resolution mechanisms; for instance, in the case of maritime disputes between IORA member states, they could adopt the African Union's approach to peacemaking, which reflects the preference for consensual decision-making conducted out of the public spotlight. The advantage of the UNCLOS dispute mechanisms is that they are available to IORA member states from different regions.

The member states could also consider amending Article 2(d) of IORA in order to allow IORA to serve as a forum for dispute resolution between IORA member states. For instance, a special body, such as an impartial adjudication/arbitration chamber with a list of members drawn from IORA and non-IORA member states, could be established.

### **Legal capacity building of member states**

Exchange of information, capacity building and the provision of technical assistance amongst IORA member states is an important element for cooperation in enhancing the political will to address the challenges of maritime safety and security.<sup>15</sup> This is one area where there seems to have been progress especially for IORA member states on the western side of the Indian Ocean concerning piracy.

The United Nations Office on Drugs and Crime (UNODC) counter-piracy programme, established in 2009, has trained over 350 police officers, prosecutors, judges and prison staff on various aspects of maritime security.<sup>16</sup> European Union Regional Maritime Capacity Building Mission in the Horn of Africa and the Western Indian Ocean (code-named EUCAP Nestor),<sup>17</sup> a civilian mission established in July 2012, assists host countries in the Horn of Africa and Western Indian Ocean (WIO) regions to develop self-sustaining capacity for continued enhancement of maritime security, including counter-piracy and maritime governance. It provides advice, mentoring and training in three fields: legal, maritime and police. Basic coast guard training is, for example, provided as well as expertise in fields such as law drafting and engineering. Some of the missions' experts are co-located within the authorities dealing with maritime security to support them in their daily work and in the development of organisational structures.

EUCAP Nestor promotes regional cooperation in maritime security and coordinates capacity-building activities. A series of regional events have been organised, such as a regional conference on maritime security in 2013, and a series of regional workshops for prosecutors, judges and other legal practitioners on piracy and other maritime crime in Nairobi and Djibouti.<sup>18</sup>

The Djibouti Regional Maritime Training Centre, established pursuant to the Djibouti Code of Conduct, has carried out four anti-piracy exercises and trained 500 staff members from 20 countries (including all entities of Somalia). The implementation of the training component of the training centre has been through a partnership between Djibouti, the European Union (EU) and the International Maritime Organization (IMO).<sup>19</sup>

In January 2010, at the request of the contact group (established pursuant to Security Council resolution 1851(2008), the UN Secretary-General established the Contact Group International Trust Fund to support initiatives of states countering piracy off the coast of Somalia. The fund is currently administered by the United Nations Development Program (UNDP) Multi-Partner Trust Fund Office (MPTF Office). The overall purpose of the trust fund is to help defray the expenses associated with the prosecution of suspected pirates as well as other activities related to implementing the contact group's objectives regarding combating piracy in all its aspects.<sup>20</sup>

What is apparent from the above is that capacity building has to a large extent been at the initiative of other non-IORA entities such the UN and the EU and states. There is no need for IORA to duplicate these capacity-building initiatives. The most effective solution would be for IORA to forge a partnership with these entities that are already engaged in capacity-building efforts.

### **Establishment of an IORA Legal Group of Experts**

It is proposed that an IORA Legal Group of Experts be established so as to conduct regional training and to develop a legal framework for maritime security in the Indian Ocean Region, the ratification of applicable international legal conventions on maritime security and creating a system for the resolution of disputes among IORA member states.

The IORA charter does not presently provide for the establishment of a Legal Group of Experts. In contrast, the IORA charter provides for the Indian Ocean Rim Academic Group (IORAG), Indian Ocean Rim Business Forum (IORBF) and Working Group on Trade and Investment (WGTI). Establishing an IORA Legal Group of Experts will

require the amendment of the charter in accordance with Article 7 to provide for an IORA Legal Group of Experts with a clearly defined mandate. The mandate should include the development of a maritime security framework, which is critical to the promotion of good order at sea. Good order at sea can only be achieved when the threats to human security emanating from the sea are addressed. Threats emanating from the sea are nevertheless interlinked with landward challenges in both littoral and landlocked states.

## Conclusion

IORA is made up of 20 countries (Australia, Bangladesh, Comoros, India, Indonesia, Iran, Kenya, Malaysia, Madagascar, Mauritius, Mozambique, Oman, Seychelles, Singapore, South Africa, Sri Lanka, Tanzania, Thailand, UAE and Yemen). It has six dialogue partners (China, Egypt, France, Japan, UK and USA) and two observers: the Indian Ocean Tourism Organization (IOTO) and Indian Ocean Research Group (IORG). In order to have an effective, integrated, inter-sectoral and multidisciplinary approach in the light of the diversity across IORA members, partners and observers, a coherent reporting mechanism is required. Although the IORA charter provides for the submission of periodic reports by the Committee of Senior Officials to the Council of Ministers,<sup>21</sup> the Troika to the member states,<sup>22</sup> and the Secretary General to the Council of Ministers,<sup>23</sup> there is no obligation on IORA member states to provide periodic reports on the measures that they have implemented in enhancing maritime safety and security. IORA should consider adopting a reporting mechanism, borrowing – with necessary modifications – the reporting obligations under various human rights treaties.<sup>24</sup>

This reporting mechanism should not, however, be an onerous burden on the states. State reports can be prepared under the supervision of the respective National Focal Points set up under Article 5(g) of the IORA Charter as appropriate. The “National Focal Point” of a country is composed of the officials from the Ministry of Foreign/External Affairs of Member States who coordinate and advance the implementation of the activities of the association and the achievements of its objectives.<sup>25</sup> The reports should be simple, practical and straightforward, and should address: (1) the status of the implementation of the IORA recommendations and realistic timelines for full implementation; (2) successes and challenges in the implementation process. Such a reporting mechanism would be instrumental in gauging the effectiveness of the recommendations. Experts would also be able to have a more concrete basis on which to assess the progress of the implementation of the recommendations.

The IORA Charter would need to be re-written to provide for a mechanism that IORA member states can use as a forum for dispute resolution. This would require a reconsideration of Article 2(d) of the IORA Charter that excludes from deliberations bilateral and other issues that are likely to generate controversy and be an impediment to regional co-operation efforts. IORA is almost in its second decade now; it is no longer an adolescent. It is mature enough for states to deliberate on weighty and controversial issues without jeopardising progress within the association.

IORA should partner with the various entities especially in the western rim of the Indian Ocean that have been engaged in capacity-building efforts. They should learn from the experiences of these organisations and, rather than duplicate their efforts, capacity-building efforts should fill the gaps that have been left by these organisations.

The focus on capacity building has mostly been on piracy. IORA could consider addressing other areas affecting maritime security that have been neglected, such as IUU fishing and illegal dumping of toxic waste. Efforts to counter piracy have been successful as evidenced by the decline of piracy, which shows that if the same enthusiasm is applied in addressing the other security concerns such as IUU fishing and environmental degradation, those efforts would not be fruitless.

Finally, the IORA Charter should be amended to provide for an IORA Legal Group of Experts. The mandate of the legal group of experts should be clearly spelt out in the charter. The composition of the expert group should reflect the geographical diversity of IORA member states, and their specific areas of legal expertise should be wide enough to collectively canvas all relevant maritime security issues affecting IORA member states.

## Notes

1. Indian Ocean Rim Association Home page, *Priority Areas*. <http://www.iora.net/about-us/priority-areas.aspx> (Accessed August 4 2016). The other five areas are: (1) Trade and Investment Facilitation; (2) Fisheries Management; (3) Disaster Risk Reduction; (4) Academic and S&T Cooperation; and (5) Tourism Promotion and Cultural Exchanges.
2. Indian Ocean Rim Association, *11th Meeting of the Council of Ministers of IOR-ARC Bengaluru Communique* dated/issued at Bengaluru, India on 15 November 2011. Available online at [http://www.iora.net/media/60424/bengaluru\\_communiq\\_.pdf](http://www.iora.net/media/60424/bengaluru_communiq_.pdf) (Accessed August 4 2016).
3. Oceans Beyond Piracy; a Project of One Earth Foundation Report titled *The Economic Cost of Somali Piracy Working Paper 2012* pg 16–34. Available online at [http://oceansbeyondpiracy.org/sites/default/files/attachments/View%20Full%20Report\\_3.pdf](http://oceansbeyondpiracy.org/sites/default/files/attachments/View%20Full%20Report_3.pdf) (Accessed August 4 2016).
4. Oceans Beyond Piracy; a Project of One Earth Foundation Report titled *The Economic Cost of Somali Piracy Working Paper 2014* p 4. Available online at [http://oceansbeyondpiracy.org/sites/default/files/attachments/StateofMaritimePiracy\\_2014.pdf](http://oceansbeyondpiracy.org/sites/default/files/attachments/StateofMaritimePiracy_2014.pdf)
5. Christian Bueger, 'After Piracy: Towards an African Maritime Security Architecture' in Francois Vrey and Thomas Mandrup (eds) *Towards Good Order at Sea: African Experiences* (2015), SUNMedia Stellenbosch, Cape Town, South Africa p. 43.
6. *Ibid.*, 44.
7. Indian Ocean Rim Association, *Maritime Safety and Security*. Available online at <http://www.iora.net/about-us/priority-areas/maritime-safety-security.aspx> (Accessed August 4 2016).
8. Mohamed Abshir Waldo, 'The Two Piracies In Somalia: Why The World Ignores The Other?' Available online at [http://imcsnet.org/imcs/docs/somalias\\_twin\\_sea\\_piracies\\_the\\_global\\_aramada.pdf](http://imcsnet.org/imcs/docs/somalias_twin_sea_piracies_the_global_aramada.pdf) (Accessed August 4 2016).
9. Report of the Secretary-General on the Protection of Somali Natural Resources and Waters, S/2011/661, October 25, 2011, para. 1.
10. There have been at least 10 United Nations Security Council (UNSC) resolutions on piracy off the coast of Somalia, namely; 1816 (2008), 1838 (2008), 1846 (2008), 1851 (2008), 1897 (2009), 1918 (2010), 1950 (2010), 1976 (2011), 2015 (2011) and 2020 (2011), six of which have been under Chapter VII of the UN Charter.
11. Report of the Secretary-General on the Protection of Somali Natural Resources and Waters, para. 63.
12. *Supra* note 7 above.
13. Indian Ocean Rim Association, 12th Meeting of the Council of Ministers of IORARC Gurgaon Communique titled *IORARC at 15 - The Next Decade* dated/issued at Gurgaon, India on 2 November 2012. Available online at [http://www.iora.net/media/82940/gurgaon\\_communiq\\_\\_2012.pdf](http://www.iora.net/media/82940/gurgaon_communiq__2012.pdf) (Accessed August 4 2016).

14. IORA Meeting of Experts on Maritime Safety and Security 2015 held on 13 and 14 at Samrat Hotel, New Delhi. Report on the meeting available at <http://www.maritimeindia.org/PastEvents.aspx> (Accessed August 5 2016).
15. Supra note 7 above.
16. See United Nations Office on Drugs and Crime Brochure Issue 11 wv-scribd. Available online at <https://www.scribd.com/document/170531698/UNODC-Brochure-Issue-11-Wv> (Accessed October 10 2016).
17. For the legal basis of EUCAP Nestor see EU Council Decision 2012/389/CFSP, available online at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02012D0389-20151207&qid=1473075547345&from=EN> (Accessed October 10 2016).
18. See Article 14 (4) and (5) of the EU Council Decision 2012/389/CFSP, available online at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02012D0389-20151207&qid=1473075547345&from=EN> (Accessed October 10 2016).
19. See report on the implementation of the *Djibouti Code of Conduct* by the Djibouti Regional Maritime Training Centre, available at <http://www.edumar.org/index.php/en/menu-styles-3/introduction> (Accessed August 5 2016).
20. See annual reports of the *United Nations Trust Fund to Support Initiatives of States Counter-ing Piracy off the Coast of Somalia* since its establishment on 21 December 2012, available at <http://mptf.undp.org/factsheet/fund/APF00> (Accessed August 5 2016).
21. IORA Charter, 5(b)(ii).
22. IORA Charter, 5(d)(ii).
23. IORA Charter, 5(f)(v).
24. See for instance Article 62 of the African Charter on Human and Peoples' Rights where States party to the Charter are required to submit, every two years, a report on the legislative or other measures taken, with a view to giving effect to the rights and freedoms recognised and guaranteed by the Charter. Article 40 of the International Covenant on Civil and Political Rights (ICCPR) on reporting to the Human Rights Committee (HRC); Article 16 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), reporting to the Committee on Economic, Social and Cultural Rights (CESCR); Article 9 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), reporting to the Committee on the Elimination of Racial Discrimination (CERD); Article 18 of the Convention on the Elimination of Discrimination Against Women, reporting to the Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW); Article 19 of the Convention Against Torture, and Other Forms of Cruel, Inhuman or Degrading Treatment and Punishment, reporting to the Committee Against Torture (CAT); Article 44 of the Convention on the Rights of the Child, reporting to the Committee on the Rights of the Child (CRC); Article 73 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, reporting to the Committee on Migrant Workers (CMW).
25. See clause 1(iii) (c) of the *IORA Guidebook on Special Fund* available online at <http://www.iora.net/projects/special-fund/guide-book.aspx> (Accessed August 5 2016).

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