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## Transportation of stowaways, drugs and contraband by sea from the Maghreb region : legal and policy aspects

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**WORLD MARITIME UNIVERSITY**

Malmö, Sweden

**TRANSPORTATION OF STOWAWAYS, DRUGS  
AND CONTRABAND BY SEA FROM THE  
MAGHREB REGION:  
Legal and policy aspects**

By

**SEMIR TAREK MAKSEN**

**Algeria**

A dissertation submitted to the World Maritime University in partial  
fulfilment of the requirements for the award of the degree of

**MASTER OF SCIENCE**

in

**MARITIME AFFAIRS**


**(MARITIME LAW AND POLICY)**

2007

## DECLARATION

I certify that all the material in this dissertation that is not my own work has been identified, and that no material is included for which a degree has previously been conferred on me.

The contents of this dissertation reflect my own personal views, and are not necessarily endorsed by the University.

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“For a punishment to be  
just it should consist of only  
such gradations of intensity  
as suffice to deter men from  
committing crimes”

Cesarea Beccaria, (1734-1794) [Bonesana, Marchese di],  
Italian criminologist and penal reformer,  
*“On Crimes and Punishments”*, 1764.

## ABSTRACT

Title of Dissertation: **Transportation of Stowaways, Drugs and Contraband by Sea from the Maghreb region: Legal & policy aspects**

Degree: **MSc**

This dissertation is a study of the sensitive and complex maritime security issues of transportation of stowaways, smuggling drugs and contraband goods by sea from the Maghreb region. It considers the national and international contexts within which those threats have grown and discusses the root causes and consequences of this menace with emphasis on legal and policy aspects. This latter represents a challenge for the Maghreb States related to strategies, decision making fostering new reforms and proactive countermeasures. A particular focus on the notion of “*maritime crime*” is offered.

An overview of the new maritime security concerns faced by the Maghreb region and the evolution of law and policy related to these “*criminal acts*” is provided with regard to the transnational scope, spectrum and continuum of maritime crimes. Particular emphasis is given to the roles of IMO and Maghreb’s policy makers and the usefulness of maritime security assessment tools. A brief look is taken at the policy development in the Maghreb region and its response to the menace. Additionally, the Danish and Swedish experiences in this context are provided. An analysis of different security concepts and models is offered, such as the mapping concept which was evaluated for further use by policy makers.

The concluding chapter examines the findings of the different reviews and analyses carried out. Furthermore, it draws a number of recommendations concerning the legal and policy aspects, potential security measures to be implemented and the need for further studies and investigation in the subject.

**KEYWORDS:** Stowaway, smuggling, contraband, maritime crime, mapping concept, security assessment tool, criminal act, spectrum, continuum, crime.

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## **LIST OF ABBREVIATIONS**

AMC	Algerian Maritime Code
AMU	Arab Maghreb Union
CCPCJ	Commission on Crime Prevention and Criminal Justice
CMI	Comité Maritime International
CND	Commission on Narcotic Drugs
CoE	Council of Europe
CSI	Container Security Initiative
C-TPAT	Customs Trade Partnership against Terrorism
EC	European Commission
ECHR	European Court of Human Rights
ECJ	European Court of Justice
EEZ	Exclusive Economic Zone
ESDP	European Security and Defence Policy
EU	European Union
EUROPOL	European Police Office
FAL	International Convention on Facilitation of Maritime Traffic, 1965
FBI	Federal Bureau of Investigation
GPAC	Global Programme against Corruption
GPAT	Global Programme against Trafficking in Human Beings
HUDOC	European Court of Human Rights Portal (Case-law)
ICJ	International Court of Justice
ICMPD	International Centre for Migration Policy Development
IDPs	Internally Displaced Persons
ILO	International Labour Organization
IMF	International Monetary Fund

IMO	International Maritime Organization
INTERPOL	International Police Organization
IOM	International Organization for Migration
ISPS Code	International Ship and Port Facility Security Code
ISSs	Illegal Sub-Saharan Immigrants
ITLOS	International Tribunal for the Law of the Sea
ITF	International Transport Workers' Federation
MARPOL 73/78	International Convention for the Protection of Pollution from Ships, 1973, as modified by the Protocol of 1978 thereto
MEDA	Mediterranean Development Aid
MENA	Middle East and North Africa
MedMoU	Mediterranean Memorandum of Understanding
MSC	Maritime Safety Committee
MMO	Mediterranean Migration Observatory
OAU	Organization for African Unity
OC	Organized Crime
OCTA	Organized Crime Threat Assessment
OECD	Organisation for Economic Co-operation and Development
OSCE	Organization for Security and Co-operation in Europe
P & I Clubs	Protection and Indemnity Clubs
PFSO	Port Facility Security Officer
PSC	Port State Control
SAR 79	International Convention on Maritime Search and Rescue, 1979
SOLAS 74	International Convention for the Safety of Life at Sea, 1974 and Protocols of 1978 and 1988, as amended in 2004
SSO	Ship Security Officer

SUA 88	Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation 1988, as modified by the Protocol of 2005
TOC	Transnational Organized Crime
TOC Convention	United Nations Convention against Transnational Organized Crime, 2000
UK	United Kingdom
UMA	Union of Arab Maghreb
UN	United Nations
UNCAC	United Nations Convention against Corruption
UNCLOS 82	United Nations Convention on the Law of the Sea, 1982
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNDCP	United Nations International Drug Control Program
UNDP	United Nations Development Programme
UNHCR	United Nations High Commissioner for Refugees
UNICRI	United Nations Interregional Crime and Justice Research Institute
UNODC	United Nations Office on Drugs and Crime
US	United States of America
USCG	United States Coast Guard
WCO	World Customs Organization
WMU	World Maritime University
WTO	World Trade Organization

# CHAPTER 1

## INTRODUCTION

“The more laws and order are made prominent, the more thieves and robbers there will be”-  
Lao-tzu, Chinese Taoist philosopher, 600 BC-531 BC

Potential risks to maritime adventure, such as stowaways, human trafficking, smuggling or transportation of contraband goods by sea are threatening sea trade and creating new concerns to the shipping industry. This phenomenon is increasing and indicates a deep and complex problem in view of the latest records and data published by the competent national authorities and international organizations<sup>1</sup>. Even though the ISPS Code<sup>2</sup> has been implemented and some countries have reinforced their legislation<sup>3</sup> to combat these threats, the situation has not improved in many regions worldwide and particularly in the Maghreb<sup>4</sup>, leading to the necessity of reviewing the existing policy, examining deeply the root causes and finding the most appropriate solutions to tackle these complex issues.

Maritime crimes and illicit activities at sea<sup>5</sup> are still menacing port facilities and ships, creating new risks and various unforeseen events with potentially disastrous consequences for the maritime industry, such as containers being used by

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<sup>1</sup> See Reports on Stowaway Incidents, annual statistics for the year 2006, FAL.2/Circ.102 (January 17, 2007), *International Maritime Organization* (IMO), trends highlighting the increase of stowaways incidents in certain regions for 2006, <[http://www.imo.org/includes/blastDataOnly.asp/data\\_id%3D17422/102.pdf](http://www.imo.org/includes/blastDataOnly.asp/data_id%3D17422/102.pdf)>, (April 4, 2007).

<sup>2</sup> ISPS Code means International Ship and Port Facility Security Code and SOLAS Amendments adopted on 12 December 2002, *International Maritime Organization*, (London: 2003).

<sup>3</sup> As example, U.S *Homeland Security Act*, (U.S), 2002, I, s.101, reinforcement of U.S legislation.

<sup>4</sup> Ninna N. Nyberg Sørensen, *Mediterranean Transit Migration*, Copenhagen: Danish Institute for International Studies, 2006, at pp.26-33, highlighted the sensitive issue on migration from the Maghreb region. The countries in this region are Morocco, Algeria, Tunisia, Libya, Mauritania and the Western Sahara.

<sup>5</sup> See Steven Haines, “The Law of the Sea and Maritime Crime”, in P.A.H. Parritt, *Crime at Sea*, (London: The Nautical Institute, 1996) at p.19.



criminals to transport all sorts of prohibited goods and/or people<sup>6</sup>. In addition, stowaways, cargo crimes and smuggling have become a part of organized crime<sup>7</sup> or syndicates, threatening the transportation system and supply chain, involving in many cases transnational organized crime, because they are the highest profile and lucrative maritime criminal activities worldwide, creating a major profit hub for them.

In this regard, various scenarios including criminals or terrorists trying to board vessels in the same manner as stowaways or smugglers can create a serious menace for the whole transportation chain, and have considerable impacts on safety, security, environment and policy<sup>8</sup>. Disruption of trade, detention, longer delays, fines and penalties are faced by ship owners, imposing higher costs burden on the maritime industry and creating new needs and challenges for their governments to address and solve these sensitive security issues. Criminalization of seafarers<sup>9</sup> and State's responsibility concerns have been raised and pushed on to the international agenda. Public pressure, maritime claims and governments' protests post 9-11 event<sup>10</sup>, and even the implementation of ISPS Code, grew to decrease the incidents in hot spots areas<sup>11</sup>, such as the Maghreb and to compel policy makers to take adequate measures in combating these threats<sup>12</sup>. Maritime security is considered as an integral part of IMO's responsibilities. However, the international instruments

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<sup>6</sup> Chris Trelawny, "Containerized cargo security- a case for "joined up" government", *IMO News* No.2, 2006 at pp.1-3.

<sup>7</sup> *Council of the E.U*, "Organized Crime Report", (Brussels: Council of the European Union, 2005), at p.14.

<sup>8</sup> Fred D. Collie, "*21<sup>st</sup> century Policing-the institutionalization of Homeland Security in local enforcement organizations*", thesis, (Monterey-USA: Naval Postgraduate School, March 2006), pp.47-49.

< <http://handle.dtic.mil/100.2/ADA445343>> , (April, 2007).

<sup>9</sup> See Proshanto K. Mukherjee, "Criminalization and unfair treatment: The seafarer's perspective", Greenwich paper, *CMI*, (Cape Town: Comité Maritime International (CMI), 2006), pp.1-14.

< <http://www.comitemaritime.org/Capetown/pdf/11.pdf>> , (May 3, 2007).

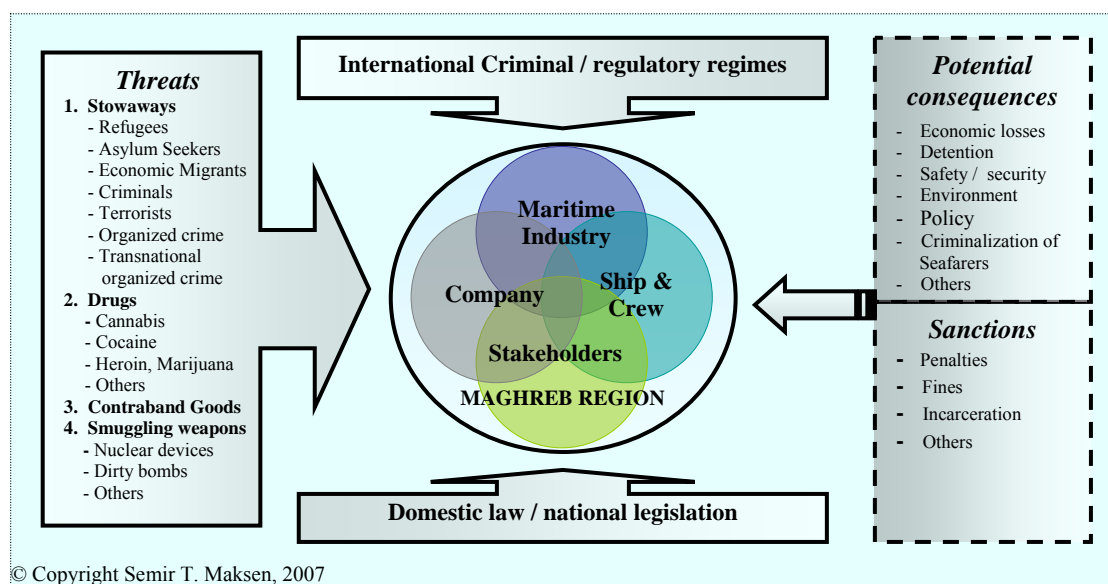
<sup>10</sup> Means the aftermath of the tragic events of the 11 September 2001, which resulted in a dramatic shift of the notion of "security" by introducing new security measures for the maritime industry and concerns, assessing the risks and potential consequences faced by the international shipping community. IMO and ILO responded proactively in considering these sensitive issues.

<sup>11</sup> "Reinforcing the management of the European Union's Southern Maritime Borders, considering the necessity to develop a European model for integrated border management due to public and EU Member States' pressure with regard to issues on illegal migration, stowaways and asylum seekers", Communication 733 final, (Commission of the European Communities, November 30, 2006), pp.1-13.

<sup>12</sup> See John Morrison and Berth Crosland, "*The Trafficking and smuggling of refugees: the end game in European asylum policy?*", Research working paper No.39, (UNHCR, April 15, 2001) at p.2, emphasising on the extra border enforcement and burden-shifting policies related to these issues.

implemented and considered as adequate to prevent stowaways, drugs, contraband of goods and all forms of smuggling failed to reduce the trends observed during recent years<sup>13</sup>. The extent of implementation of these conventions highlighted the difficulties in policy making and drafting legislation, to ensure an efficient satisfactory framework to tackle all issues generated by these threats and challenges faced by the shipping industry. Lack of uniformity and harmonization observed worldwide for domestic law and penal regime for maritime crimes are inadequate.

As illustrated in Figure 1, the Maghreb is facing new security concerns and challenges, which are pushing the maritime sector and trade under pressure. Hence, United Nations (U.N) organizations, European Union (E.U), IMO and ILO are reconsidering the problem of stowaways, drugs and contraband, even though numerous conventions are already dealing with the subject. However, grey areas still persist and there is an unresolved conflict among them, regarding a clear definition of criminal acts and how to deal with them if they are committed on a foreign flag state vessel in state jurisdictions. The examination of previous literature revealed that the existing policies in the Maghreb are inadequate. There is a necessity to address these sensitive issues not previously considered and to conduct an in-depth



**Figure 1: Policy makers and the maritime sector under pressure: stormy era**

<sup>13</sup>See, IMO's annual statistics for 2006 and the trends for the last five years appearing in Appendix C.

analysis of the root causes and consequences related to the menace in the hot areas<sup>14</sup>. As long lapses are present in the described system as mentioned in Figure 1, there will be pressure on the Maghreb region and the shipping industry to ameliorate their policies by improving the legal framework and ensuring harmonization and uniformity of the judicial systems. However, there is little information available on how to resolve the problem by providing adequate solutions in policy formulation.

The main aim of this dissertation is to undertake a critical review of these issues by analysing the legal aspects, the root causes and potential consequences, areas of problems, their impacts on legal regimes, government policies and strategies on the basis of findings, and providing solutions for the Maghreb States and the maritime sector with emphasis on policy proposals.

Therefore, the dissertation itself is divided into chapters as follows:

Chapter 2 provides a historical background to the subject and undertakes a critical review of the existing literature and discusses how the revision process of all related instruments may provide an effective and balanced way to achieve a harmonized and unified legal framework. Chapter 3 examines in-depth the main features of the principal international conventions and domestic laws of the Maghreb States, and highlights areas that need improvement. Chapter 4 then focuses on state responsibility, government policies and strategies. This discussion also examines conflicting interests and assesses their impacts on policy making, and provides an overview of relevant findings and proposals by setting out the social, economic and political implications of such for the Maghreb region. In this context, the Swedish experience<sup>15</sup> on the subject will also be discussed and analyzed. Finally, based on the principal findings an overall verdict of the issue will be offered<sup>16</sup>.

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<sup>14</sup> See “Organized Crime and Irregular Migration from Africa to Europe”, document prepared by Research and Analysis Section of the *United Nations Office on Drugs and Crime*, (UNODC, July, 2006), at p.8.

<sup>15</sup> Personal and electronic interviews were conducted with officials of the Swedish Maritime Administration, customs and police.

<sup>16</sup> The sources used for analysis in this dissertation consist of primary and secondary data, official statistics, journal articles, survey research, academic books, and internet websites and newspapers articles.

## CHAPTER 2

### MARITIME CRIMES: EVOLUTION OF LAW AND POLICY

“Good people do not need laws to tell them to act responsibly, while bad people will find a way around laws” - Plato, Ancient Greek Philosopher, 428 BC-348 BC

#### 2.1 Historical background

The migration phenomenon from Africa to Asia and Europe began with our earliest human ancestors, and the first human societies, approximately one million years ago. People moved or migrated from one location to another, seeking a better life, food, trade, thereby creating massive flows of people<sup>17</sup>. The *Maghreb countries*<sup>18</sup> located in the northern part of Africa are an important piece of this complex process. Due to their geographical position and coastlines boarding the North Atlantic Ocean westward, and the Mediterranean Sea in the northern and eastern parts, the impact of the migration flows in the region has been significant, raising through centuries various complex forms of transnational issues, borders claims, security concerns and tragedies<sup>19</sup>. The rush of people towards Europe has set the stage for various humanitarian catastrophes, such as sea crossings ending in

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<sup>17</sup> For more information on migration in history, see IOM, “*Migration & History*”, the term migration is used to describe movements of people in various situations and context, covering a wide range of behaviours and highlighting the dilemma on the concept of migration and its definition, varying from one jurisdiction to another, involving complex forms of flows, depending on various factors, based on social, economical, political, and cultural considerations. <<http://www.iom.int/jahia/page262.html>>, (April 2, 2007).

<sup>18</sup>The Maghreb countries are *Morocco, Algeria, Tunisia, Libya* and *Mauritania*. The data and references used for the purpose of this dissertation are based only on the three first named countries, and on a regional approach concept for the general debate. See Appendix A for a map of the Maghreb.

<sup>19</sup> Conquests, invasions, population transfers are associated with all forms of human tragedies, trafficking of women and children, refugees, asylum seekers, stowaways, organized crime, transnational criminal organizations, illicit activities, piracy, robbery and various others criminal offences.

deaths of hunger or injuries or starvation and in some cases in drowning or missing after a failed attempt to reach a safe haven<sup>20</sup>.

In contrast, transportation of contraband goods and stowaways have their roots in the earliest human societies, from the ancient Egyptian era to the Babylonian empire, where the Hammurabi Code<sup>21</sup> was the first primitive code of laws, containing an enumeration of crimes and their various settlements for common disputes and citizens' conduct. The "Phoenician"<sup>22</sup> civilization was an enterprising maritime trading culture that spread across the Mediterranean by means of galleys and generated revenues in the Maghreb. In the Roman law, the notion of "*ius privatum*" included personal, property, civil and criminal law; judicial proceeding was a private process, "*iudicium privatum*", and crimes were private, except the most severe ones that were prosecuted by the state<sup>23</sup>. However, the notion of illicit activities at sea, maritime crimes and maritime offences evolved through the centuries; smugglers or "*contrebandiers*"<sup>24</sup> became more diversified and fearsome. During the 13<sup>th</sup> century, crimes and corresponding punishments were severe, when smuggling and various forms of contraband increased<sup>25</sup> in England. Privateering, piracy, organized crime, corruption, trafficking, wreck plunders and stowaways

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<sup>20</sup> Thomas Spijkerboer, "The human costs of border control", *European Journal of Migration and Law*, 28 April 2007 at pp.127-139.

<sup>21</sup> See the Hammurabi Code, c. 1780 BCE at passage 34 "If a . . . or a . . . harm the property of a captain, injure the captain, or take away from the captain a gift presented to him by the king, then the . . . or . . . shall be put to death", it regulated also liquor traffic, false entries or claims against traveling agents, frauds and crimes by introducing a primitive form of policing system, <<http://www.wsu.edu/~dee/MESO/CODE.HTM>>, (March 22, 2007).

<sup>22</sup> See Appendix B for the impacts of the Phoenicians trade route in the Maghreb region, 1200 BC-900 BC.

<sup>23</sup> William Turpin, "Reviewed work(s)-The Criminal Law of Ancient Rome by Olivia .F. Robinson", *The American Historical Review*, Vol.102, No.3 (June, 1997), at pp.792-793. Under Roman law, forgery of documents and counterfeiting were punishable for falsum, but theft and smuggling were treated as private delicts.

<sup>24</sup> *Contrebandier* means smuggler in French, considered as a trafficker of goods using all means of transport.

<sup>25</sup> See Mary Aris, "*Crime and the Sea-The Maritime Dimension, Crime and Punishment a Welsh Perspective*", (Gwynedd Archives Service, 1987) at pp. 27-33. Smuggling began when tax collectors were appointed and poverty made it attractive. Smuggled goods were, inter alia, rum, tea, sugar, salt, coffee, liquors, silk and alcohols. Networks were instituted regarding their sale and new types of ships were used. Entire communities were involved. However, the government actions were proportional to the threats and customs men, searchers and informers were used to collect duties and track down the phenomena of smuggling contraband. Fines, penalties and deportation were enforced to reduce criminal activities prevailing in particular areas.

flourished in Europe and spread worldwide, using new sea routes to colonies or undiscovered lands. Wars and permanent economic and political instability, and the transportation phenomenon of contraband of goods declined in Western Europe due to free trade agreements, moral pressure, customs regulations and taxes; but increased in other parts of the world, particularly in Asia, Africa and the new world, where new colonies, “*comptoirs*”<sup>26</sup> became popular, and tolerated these activities for generating new revenues. In 1509, the legend of Vasco Núñez de Balboa was born, from stowaway to expedition leader<sup>27</sup>, offering new portals to adventurers. The Maghreb countries instead faced instability and numerous conflicts, resulting in an increase of smuggling and migration flows towards southern Europe borders or the Middle East.

At that time, North Africa was under the Ottoman Empire without delimited boundaries and its main activities were characterized by trade, using all means of transportation. The Maghreb Diaspora, ruling tribes, instabilities and conflicts diverted the smuggling activity from caravans to vessels. New portals were explored by primitive smugglers and high skilled merchants trading on a larger scale between Africa and European or Middle East empires around the Mediterranean Sea, where exchanges of goods, habits and new types of contraband were reintroduced to the region and these deeply influenced the local society. New drugs<sup>28</sup> appeared and their impacts on the Maghreb population were significant. However, the tendency of contraband focused mainly on ordinary goods, weapons and commodities. The “*Barbary Coast*”<sup>29</sup>, in the sixteenth century and until the nineteenth centuries was facing numerous issues related to piracy, slave trade, contraband between the continent and the southern part of Europe mainly, and drug culture, such as those

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<sup>26</sup> *Comptoirs* means trading factory; a term used by the French during the past centuries to designate colonies downgraded to comptoirs for commercial purposes.

<sup>27</sup> See *Vasco Núñez de Balboa*, Spanish conquistador, embarking as a stowaway on an expedition organized by Martín Fernández de Enríque. < [http://encycl.opentopia.com/term/Vasco\\_Núñez\\_de\\_Balboa](http://encycl.opentopia.com/term/Vasco_Núñez_de_Balboa) > (April 3, 2007).

<sup>28</sup> See UNODC, surveys in 2005 highlighting the use or trade in the Maghreb of cannabis and cocaine.

<sup>29</sup> Also means *Barbary States* for some scholars; a term used by Europeans to refer to the coast regions in North Africa. Nowadays, they consist of independent countries: Morocco, Algeria, Tunisia and Libya. < [www.infoplease.com/ce6/history/A0806137.html](http://www.infoplease.com/ce6/history/A0806137.html) >, (May 28, 2007).

done by “*kif*”<sup>30</sup> growers from the “*Rif Mountains*”<sup>31</sup>. By the end of the nineteenth century, the Ottoman Empire had declined due to internal conflicts. From the period of colonization to the prohibition era and until recent years, smuggling in all its forms, illicit activities, drugs offences by sea and stowaways<sup>32</sup>, as well as the increasing risk of terrorism became a major problem worldwide and in particular in the Maghreb region, threatening sea trade and the whole maritime industry<sup>33</sup>.

## 2.2 Maritime security concerns: Bottlenecks and Snares

Acts of piracy, robbery, terrorism and smuggling, as defined in the post September 11<sup>th</sup> environment<sup>34</sup>, are not new to the Maghreb States. However, new security concerns emerged, which were not previously considered by the legislators and the whole maritime sector, such as ships and port facilities may provide terrorists or criminals the opportunity and ability to plot and strike targets around sensitive areas, critical infrastructures and vulnerable points. These criminal activities, apart from piracy and terrorism have plagued the international maritime transportation chain well before the 9-11. In contrast, sweeping changes in security aboard ships

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<sup>30</sup> In Morocco, cannabis is known as *kif*, traditionally cultivated in the Rif's area.

<sup>31</sup> Mountainous region situated in the northern part of Morocco, belonging to the Gibraltar Arc, wraps around the northern and southern sides of the Alboran Sea.

< <http://www.britannica.com/eb/article-9063659/Rif>>, (May 28, 2007).

<sup>32</sup> See FAL.2/Circ.103 regarding the *Reports on Stowaways Incidents during the period from January to April 2007*, International Maritime Organization (IMO), London: IMO, (April 24, 2007) at pp.1-24 and MSC.3/Circ.12, “*Unsafe Practices associated with the Trafficking or Transport of Migrants by Sea*”, International Maritime Organization (IMO), London: IMO, (January 19, 2007) at p.22 and p.26.

< [http://www.imo.org/includes/blastDataOnly.asp/data\\_id%3D17499/12.pdf](http://www.imo.org/includes/blastDataOnly.asp/data_id%3D17499/12.pdf)>, (May, 2007).

Additionally, features on human trafficking as published by United Nations Office on Drugs and Crime (UNODC), and the annual report 2007 as well as world drug reports and trends from 2000 to 2006, illustrated the problem of cross-borders and vulnerable communities and their grips. For the Maghreb States considered as transit countries, particular attention on Mauritania was made due to its porous borders and lack of law enforcement agencies dealing with maritime criminal activities and offences. Also, in 2006, a grave humanitarian problem emerged and was noted by that office with emphasis on their impacts on the sea trade and shipping industry. See “*World Drug Report 2006*, volume 1: Analysis”, UNODC, (Geneva: UNPUBH, 2006), < [http://www.unodc.org/pdf/WDR\\_2006/wdr2006\\_volume1.pdf](http://www.unodc.org/pdf/WDR_2006/wdr2006_volume1.pdf)>, (June, 2007).

<sup>33</sup> See Gillian Whittaker, “IMO aims to ease headache caused by stowaways”, *Trade Winds*, (March 16, 2007), at p.42. A response done by the maritime industry due to various concerns raised on the subject and proposed to reduce delays, long procedures and added stress on masters and crews of ships in different regions worldwide, and consequently suggested the creation of an IMO Stowaway Focal Point (SFP).

<sup>34</sup> *Supra*, footnote 10 at p.2, after the 1<sup>st</sup> July 2004; new security requirements were put into force through the implementation of ISPS Code and the development of policy strategies to tackle these issues and their impacts on trade, legislation and public perception.

and at port facilities were established when the International Ship and Port Facility Security Code (ISPS Code)<sup>35</sup> was adopted by IMO in 2002 and entered into force on 1<sup>st</sup> July 2004. Ships navigating high seas and port facilities are obliged to comply with special measures aimed at increasing defence against potential threats or aggressions. Even though the implementation process was done successfully by the Maghreb States<sup>36</sup>, the threats<sup>37</sup> observed and risks involved, highlighted the core of the debate to be undertaken regarding existing laws, policies and new security concerns, which were put into the arena and later, resulted in a paradigm shift of security measures in this region.

Therefore, the first debate starts with the notion of maritime crime and maritime criminal law to provide a clear picture of the topic<sup>38</sup> and to avoid myths or misconceptions<sup>39</sup>.

### **2.3 The nature and threat of maritime crime**

A clear understanding of what is a crime necessitates an appreciation of its juridical nature and form. A crime is defined as a violation of criminal law, a wrong

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<sup>35</sup> The main objectives of ISPS Code are “to establish an international security framework to detect security threats and take all necessary protective measures by fixing clear roles and responsibilities for governments, industry and the personnel involved, ensuring early and efficient collection and exchange of security information, providing methodology for security assessments and finally ensuring confidence between nations that security is in force”, IMO, International Ship and Port Facility Security Code and SOLAS Amendments adopted on 12 December 2002, 2003 ed., London: IMO, at p.6.

<sup>36</sup> The Maghreb States notified and reported to IMO on the different steps undertaken to ensure an efficient and effective implantation of ISPS Code. See Annex J for the status of Conventions regarding these countries.

<sup>37</sup> See, International Organization for Migration (IOM), *Migration Initiatives Appeal 2007*, report, Geneva: IOM, (January, 2007), at pp.23-26, massive sub-Saharan population displaced and transiting through this region to get free passage to Europe, organized crime issues, drugs and terrorism are the main threats faced by the coastal states in the Maghreb; Mediterranean side and Atlantic side are at risks regarding the latest publications on the issue. See, *UNODC Annual Report 2007* and *Europol, EU Organized Crime Threat Assessment, (OCTA)*. <<http://www.europol.europa.eu/publications/OCTA/OCTA2006.pdf>>, (May, 2007).

<sup>38</sup> The general public or an unadvised reader may be confused by the notions of crime, offences, illegal activities at sea and maritime criminal law. The media often present these subjects from different angles, where romanticism and sensation take over reality.

<sup>39</sup> The understanding of crime and the criminal system of a country are primordial to avoid “*myths*” or false “*perceptions*” by the public. Myths are beliefs based on emotion rather than analysis of the subject, whereas, misconception is a failure to understand correctly or to misinterpret a notion on a particular topic. <<http://www.answers.com/perceptions>>, (June, 2007).



which the government deems injurious to the public and prosecutable in a criminal proceeding<sup>40</sup>. Similarly, another definition stipulates that it is “an act or the commission of an act that is forbidden or the omission of a duty that is commanded by a public law and that makes the offender liable to punishment by that law”<sup>41</sup>. Therefore, a crime is considered as an illegal act that threatens the security and good order of society. The use of law regulates human behavior. In this respect the criminal law is the body dealing with crimes and their punishment according to the law in existence that makes it so, constituting an effort to deter others from misbehaving and ensuring equity and fairness in the society. Beccaria<sup>42</sup> argued “that laws should be clear in defining crimes so that judges do not interpret the law, but only decide whether a law has been broken”. This highlights the importance of the relationship between crimes and punishments, implying a fair and recognized criminal justice system acceptable by the society to fix clear lines between the offender and the public. The links between the notion of crime and criminal law are found in two ancient principles; “*nullum crimen sine poena*” and “*nulla poena sine lege*”.

The sources and theory of international criminal law can be found in both convention and non-convention regimes, such as treaties, national legislation or texts prepared by the Comité Maritime International (CMI). The sources of international criminal law are conventions, customs, general principles of law of civilized Nations, judicial decisions and writings of publicists<sup>43</sup>. Maritime crime might be defined as a criminal offence linked to the sea or ships, because it concerns only crimes at sea or on board ships, involving complex issues on jurisdiction, rights and obligations of

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<sup>40</sup> A crime in the widest sense is an act that violates the law. In a narrow sense, it is a violation of criminal law, involving behavior that breaks the criminal law and is liable to public prosecution and punishment.

<sup>41</sup> See definition of crime, < <http://www.m-w.com/dictionary/crime>>, (April 6, 2007).

<sup>42</sup> Cesare Beccaria is an Italian criminologist who wrote an essay on “Crimes and Punishment” in 1764 and stated that a punishment quickly follows a crime. The two ideas of crime and punishment will be associated in a person’s mind. Also, he gave the first proportion between crimes and punishment, such as those related to smuggling, attempted crimes and how to prevent them by introducing the notion of education and pardon.

<sup>43</sup> See Cherif M. Bassiouni, *International Criminal Law, 2<sup>nd</sup> edition, Crimes*, V.I (New York: Transnational Publishers Inc., 1999) at p.11 and p.31. The sources of international law are stipulated in Article 38(1) of the International Court of Justice (ICJ) Statute. It is the core document of international criminal law nowadays.

States and their enforcement regimes<sup>44</sup>. However, crimes committed on shore rest with coastal or port state jurisdiction. Numerous criminal activities fall within this definition and form a breach of law and disciplines at sea, such as piracy, terrorism, drug trafficking, stowaways, maritime fraud<sup>45</sup>, theft, human smuggling, sabotage, transport of slaves, smuggling contraband, illegal fishing and marine environmental offences<sup>46</sup>.

An important point to be highlighted is that there is a difference between crimes and offences both of which fall under the penal regime, depending on the degree of severity of the offence. Criminal offences are more severe than regulatory offences; the sanctions depend on the standard tolerable by the society, and on the spectrum of *mens rea*. The intent to cause a damage or acting recklessness and with the knowledge of that act could damage, fall both under the regime of criminal offences<sup>47</sup>.

Maritime crime is often transnational by nature, involving one or more jurisdictions and revealing the complex issues on diverse sources, which may come into the picture regarding laws, codes, rules and regulations pertaining to criminal activities at sea. The controversy is that various conventions deal with or tackle the same subject from different angles, leading in most cases to different approaches regarding liability regimes and sanctions for a similar case. The lack of uniformity and harmonization of procedures related to maritime crimes have generated new debates and needs at national and international levels. However, crimes are only

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<sup>44</sup> See Glanville Williams, *Textbook of Criminal Law*, 2<sup>nd</sup> ed., London: Stevens & Sons, 1983 at pp.936-937.

<sup>45</sup> The dimensions of international maritime crime, regarding documentary fraud in international trade as mentioned by Eric Ellen in Martin Gill (ed.), *Issues in maritime crime; mayhem at sea*, Leicester: Perpetuity Press, 1995, at pp.4-10, Also described by Eric Ellen and Donald Campbell, *International Maritime Fraud*, London: Sweet & Maxwell, 1981 at p.24 regarding classification of maritime crimes.

<sup>46</sup> See the Convention for the Suppression of Unlawful Acts of Violence against the Safety of Maritime Navigation, SUA convention 88, as amended for the provisions related to the offences and the measures to be taken to establish jurisdiction, also other relevant international instruments such as UN treaties, IMO conventions, IOM and UNODC for conventions on maritime crimes, jurisdictional issues etc.

<sup>47</sup> *Mens rea* in Latin means guilty mind. As pointed out by Professor Mukherjee, the general rule applicable to criminal cases is “*actus non facit reum nisi mens sit rea*”, in “Criminalization and unfair treatment: the seafarer’s perspective, paper presented in seminar”, Capetown: *CMI*, 2006, at pp.1-13.  
< <http://www.cmi2006capetown.info/presentations/Mukherjee.doc>>, (June 10, 2007).

identified by the international framework and the States have only the obligation to establish a penal regime or mechanism in their laws to be in conformity with the requirements specified in it. Lack of specifications on what penal requirements should be, are observed in the maritime sector. Therefore, in different jurisdictions, various forms of liabilities and sanctions are found, regarding maritime crimes and related offences<sup>48</sup>. These problems can be solved for states lacking procedures of enforcement and having difficulties to “transform appropriately an international legislation into national legislation, by using adequate implementation methodologies, based on monistic or dualistic approach”<sup>49</sup>. Another aspect regarding the subject of maritime crimes which needs to be addressed is the notion of transnational and international crimes and the related jurisdictional issues on how a State can exercise its criminal jurisdiction to events or incidents happening within its territories<sup>50</sup>. Complex solutions to jurisdictional issues are available for consideration. One famous case on the subject is the *Wildenhus’s Case*<sup>51</sup>. Also, a lot of differences exist between States regarding the use of general principles on which they may base jurisdiction over crimes according to their domestic law and ratified treaties.

Illicit activities at sea, mainly onboard ships have always been a struggle for policy makers regarding law enforcement related to cargo theft, the growing risk of stowaways smuggled in containers or hidden in vessels, smuggling of prohibited

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<sup>48</sup> See Jayant Abhyankar, “Maritime Crime” in Maximo Q. Mejia Jr. (ed.), *Contemporary Issues in Maritime Security*, Malmö: World Maritime University, 2005 at pp.201-243.

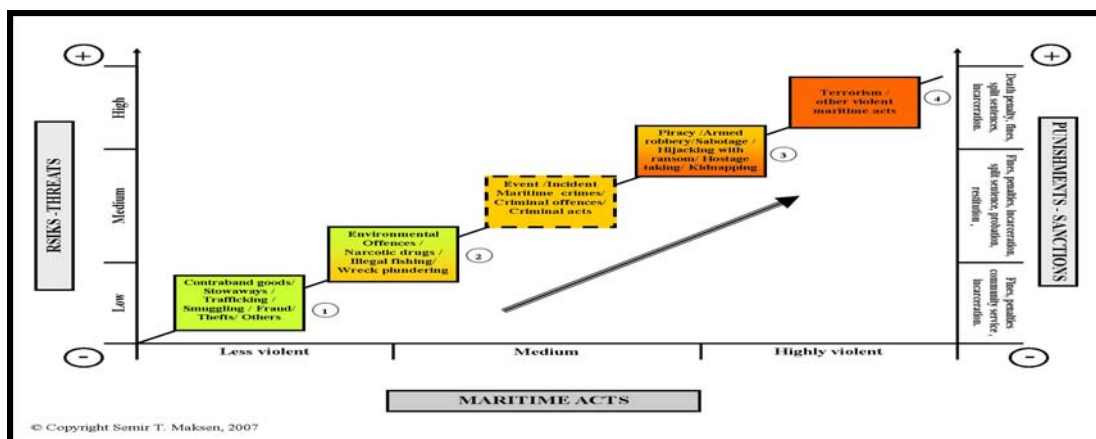
<sup>49</sup> Proshanto K. Mukherjee, “Transformation of conventions into national legislation: piracy and suppression of unlawful acts” in Proshanto K. Mukherjee, Maximo Q. Mejia Jr., Gotthard M.Gauci (ed.), *Maritime Violence and other Security Issues at Sea*, Malmö: World Maritime University, 2005 at pp.71-75.

<sup>50</sup> John Liljedahl, “Transnational and international crimes: jurisdictional issues”, in Proshanto K. Mukherjee, Maximo Q. Mejia Jr., Gotthard M.Gauci (ed.), *Maritime Violence and other Security Issues at Sea*, Malmö: World Maritime University, 2005 at p.115.

<sup>51</sup> *Wildenhus’s Case*, 120.U.S.1 (1887), Wildenhus and Fijens were Belgian sailors aboard a Belgian steamship anchored in the port of Jersey City, New Jersey. In a fight below decks, Wildenhus stabbed and killed Fijens. The Jersey City police learned about this incident and arrested Wildenhus. Several Belgian crew members witnessed this incident and were placed in the port jail as witnesses for the proceedings against Wildenhus. The treaty between Belgium and the US ceded "primary" jurisdiction over onboard crimes to the respective flag States to which the vessels were registered. This foreign official was acting on behalf of Belgium, referring to himself as the "petitioner." The issue was whether the port tranquility doctrine should be applied to deprive the flag State (Belgium) of its primary jurisdiction under the treaty.

<<http://www.vlex.us/caselaw/U-S-Supreme-Court/Wildenhus%2527s-Case-120-U-S-1-1887/2100-20064425%2C01.html>>, (April 7, 2007).

devices , contraband of goods and trafficking of human beings , the involvement of organised criminal groups and transnational issues, creating huge debate on what constitutes maritime crime, criminal offence, regulatory offence and their punishments according to the law and society interests. Consequently, as described in Figure 2, the risks generated by the offence, the nature and form of the maritime crime and their punishments (sanctions) are closely related, and move gradually in time and space with regard to threats involved, depending on each particular feature of the studied case. Also, the perception and the notion of maritime crime may vary from one jurisdiction to another, from country to country or region to region, creating the urgent need for reforms, cooperation in drafting legislation or instigating states to find a new way, based on a common agreement under the umbrella of IMO with the participation and assistance of CMI<sup>52</sup> to tackle these sensitive issues on a fixed agenda. Hence, the results and consequences could be beneficial for developing countries and may lead to the creation of a new Code on maritime crimes, which may be accepted by the whole maritime community for ensuring harmonisation of procedures and unification of rules at all levels in any contracting state or region worldwide. The sanctions are subject to the nature and form of the crime as mentioned in Figure 2. Policy makers may use it for drafting legislation.



**Figure 2: Maritime crimes and their punishments: Threats & Consequences**

<sup>52</sup> The CMI is involved with the issue of maritime crime and is cooperating with the Legal Committee of IMO in drafting model national law dealing with the problem of criminal acts committed on board foreign flag ships. Also, it is considering the issues on maritime violent acts and their impacts on legislation. The CMI stated that “It is vital that a distinction be made between a maritime crime and an inadvertent act leading to a catastrophic result”. Harsh criminal sanctions against seafarers are threatening the sea trade and the whole shipping industry leading to a shortage of crews.

The second point to be introduced and discussed in this debate is related to the spectrum of violent maritime acts in order to cast light on the topical issues.

### 2.3.1 The Spectrum of violent maritime acts

Figure 3 illustrates, on the one hand, the less violent maritime crimes and offences, such as fraud, human trafficking, smuggling, contraband, stowaways, illegal migrants, theft, narcotic drugs smuggling, wreck plundering, illegal fishing and offences against the environment; and highly or more violent maritime acts, such as piracy, armed robbery, sabotage, hijacking with ransom, hostage taking, kidnapping and terrorism on the other hand. The debate commences where the crimes and offences are situated on the scale chosen to classify them in a logical order, highlighting the corresponding risks or threats and the adequate countermeasures.

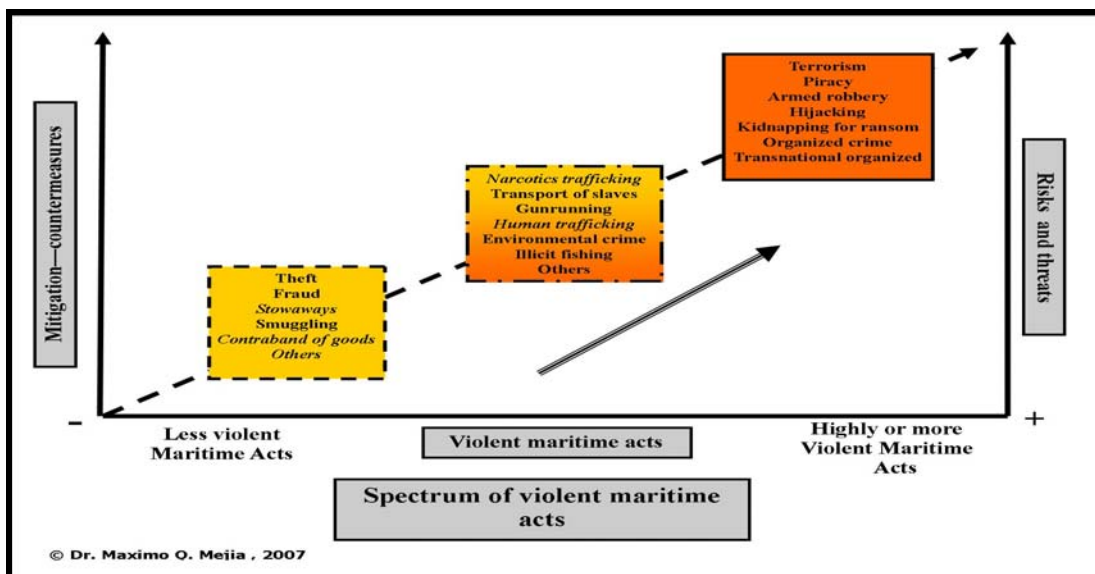


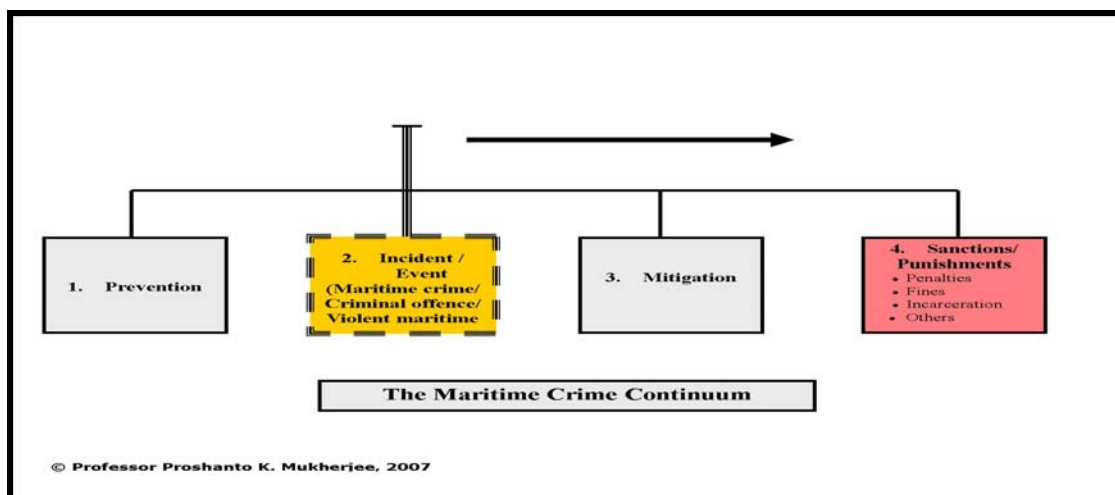
Figure 3: The spectrum of violent Maritime acts<sup>53</sup>

This spectrum highlights the degree of the violent maritime act and related risks or threats, and by analogy the reader can easily deduce the scale of countermeasures needed to mitigate or to reduce the potential consequences. Hence,

<sup>53</sup> This figure has been inspired by MLAW 301, lecture handouts on “*Maritime Crime & Maritime Criminal Law, Advanced Issues in Public and Private Maritime Law*” of Assistant Professor Maximo Q. Mejia, WMU, (March 8, 2007). Risks, threats and countermeasures are easily deduced from the spectrum.

legislators or policy makers may use it as preventive measures to be put into force as a tool to find an acceptable way or a fair balance between maritime crimes and their punishments, and to fix for each case the adequate mitigation procedures needed for drafting or amending existing legislation. The incidents or events linked to the transportation of contraband goods, drugs and stowaways could move easily from less to more or be classed in the middle of the spectrum according to the case. For instance, a stowaway could be an economic migrant, asylum seeker, and refugee or in the worst case a criminal or terrorist, implying different conventions, risks, threats, mitigation and preventive measures, resulting in various forms of punishments. This is one of the reasons that few countries have adopted harmonized procedures or unified rules to deal with those issues or did not ratify particular international instruments conflicting with their interests and existing policy.

Therefore, the analysis of a sort of continuum of the nature and form of the maritime crime or criminal offence is necessary. This continuum starts with prevention, followed by the incident or event corresponding to a crime or criminal offence, then followed by mitigation and ending with sanctions, fines or other remedies depending on the case itself <sup>54</sup>, as illustrated in Figure 4.



**Figure 4: The Maritime crime continuum<sup>55</sup>**

<sup>54</sup> Criminal offences and regulatory offences are different under penal law, the spectrum highlights their location. It permits the prediction of countermeasures needed for mitigation if the preventive measures fail.

<sup>55</sup> This figure has been inspired by MLAW 301, lecture handouts on “*Penal Law, Advanced Issues in Public and Private Maritime Law*” of Professor Proshanto K. Mukherjee, WMU, (March, 2007).

The transportation of contraband goods or the smuggling of various devices could be simply prohibited items falling under a breach of customs provisions, whereas human trafficking, drugs offences, criminals or terrorists may involve various agencies or institutions at all levels, making the global picture more complex to the legislator or policy maker. However, if as an example, nuclear devices are smuggled on board a ship or loaded into a container to be shipped to another port facility, the risks and consequences are not the same. The nature and form of the crime or criminal offences are subject to different sanctions, penalties or fines according to the case, involving different conventions, rules and regulations as they move on the spectrum from less to more highly violent maritime acts. Therefore, a question arises as to the potential consequences for the crew, ship and the environment if the intention is to harm<sup>56</sup>. A risk assessment is needed to thoroughly analyze their impacts and to find the most appropriate measures to be implemented<sup>57</sup>.

The same thinking applies for stowaways, from a normal free passage seeker to a criminal or terrorist striving to get on board for other reasons and using the ship as a weapon, taking hostages and attempting to strand the vessel. The consequences are not the same and it is very difficult for the legislator or policy maker to predict all possible scenarios and preventive measures to be implemented in the national law or to ensure adequate and sufficient mitigation procedures are available and in place. Here, also a move from a normal situation to a catastrophic scenario, changes the spectrum and continuum described above.

Finally, a rational approach to the subject is necessary to find the gaps existing in the legislation and gathering of information for policy and cost/benefit analysis<sup>58</sup>. The spectrum and continuum of crimes are needed and very useful for drafting legislation on criminal law and particularly in adopting new policy or

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<sup>56</sup> See Kenneth G. Hawkes, *Maritime Security*, Maryland: Cornell Maritime Press, 1989 at pp.9-15.

<sup>57</sup> *Supra*, footnote 35 at p.9, ISPS Code fixes the security levels in terms of the threat and provides the appropriate measures to mitigate the risks and consequences. An analogy with the spectrum and continuum on crimes is easily done. ISPS Code Part A Section 2.1.9, 10 and 11, and Part B Section 4.8,9,10,11,12,13.

<sup>58</sup> See David L. Weimer and Aidan R. Vining, *Policy analysis: concepts and practice*, 3<sup>rd</sup> ed., (New Jersey: Prentice Hall, 1999), at pp.41-42 and pp.296-310.

amending existing instruments<sup>59</sup>. Therefore, an overall appreciation on the subject from the legal perspectives is needed to bring into light the salient features of these international conventions, dealing with maritime crimes and enforcement regimes.

The third point to be highlighted and discussed is related to the criminal jurisdiction under UNCLOS 82 with emphasis on the maritime zones, and jurisdictional issues on transnational and international crimes<sup>60</sup>.

### **2.3.2 International crimes and the maritime community**

Numerous crimes against international law are regulated by treaty<sup>61</sup>. In many cases, they are prosecutable before international courts or tribunals, such as the International Court of Justice (ICJ)<sup>62</sup>, International Tribunal for the Law of the Sea (ITLOS)<sup>63</sup> and International Criminal Court (ICC)<sup>64</sup>. First, sovereign States have jurisdiction over their territories allowing them to prosecute the offender and enforcing the law. However, this process is restricted to their territorial borders.

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<sup>59</sup> See Proshanto K. Mukherjee, *Maritime Legislation*, Malmö, World Maritime University (WMU), 2002 at pp.74-81 regarding the drafting process, drafting instructions and the different steps involved in the process. Also, “the language used for drafting is very important for understanding and to be understood” as mentioned by the author.

<sup>60</sup> *Supra*, footnote 43 at p.10, see p.883 and p.887, on organized crime and transnational organized crime issues, and their differences regarding the salient elements or main characteristics of these forms of crimes and shared features, such as that both are profit-motivated and profit-driven. The drug trafficking and abuse phenomenon as crimes against social interests, areas of problems, the need of cooperation and new strategies have been highlighted. The duty to prosecute or extradite the perpetrator raised complex issues on modalities available and the effectiveness of related existing enforcement regimes.

<sup>61</sup> See art.2 of the Vienna Convention on the Law of Treaties, 1969 stipulating that “treaty” means “an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation”.

<sup>62</sup> See art.36(2) of ICJ related to the jurisdiction of the Court in all legal disputes concerning the interpretation of a treaty, any subject of international law, established facts constituting a breach of an international obligation and the system of reparation to be made for the breach of an international obligation.

<sup>63</sup> The tribunal is open to States Parties to the LOSC, 1982, according to art.291, §1 and the entities as referred in art.305, §1(c) to (f), and as stipulated in the Statute of the tribunal in art.20, §1. The tribunal has jurisdiction over any dispute concerning the interpretation or application of the convention, as mentioned in LOSC, 1982, art.288, 297, 298 and under its Statute, art.21 and 22. The applicable law is stipulated in art.293. < [http://www.itlos.org/start2\\_en.html](http://www.itlos.org/start2_en.html)>, (June, 2007).

<sup>64</sup> See ICC Statute, art.5 for the crimes falling within the jurisdiction of ICC. The Rome Statute entered into force on 1<sup>st</sup> July 2002.



Given that States have complete legislative, executive and judicial competence within their borders<sup>65</sup>, it can be implied that State parties to UNCLOS do implement the convention effectively and their national legislation shall meet the standards as defined in it. However, it is apparent that several disputes have arisen worldwide regarding the application and enforcement of domestic laws related to maritime crimes committed on board foreign flag ships while in territorial waters of a State<sup>66</sup>. The case of the M/V “*Saiga*”<sup>67</sup> is an appropriate example which highlights the difficulties generated by breaches of international law.

Secondly, it can be deduced that new challenges have come into the picture which were not considered previously, such as the creation of an international legal order dealing with all criminal matters, permitting an effective implementation process and ensuring that adequate controls are in place to obtain harmonization and unification of rules worldwide and accepted by all States. The end results could only benefit the international community and sovereign States in providing efficient tools to reduce claims and disputes at all levels.

Thirdly, another aspect to be considered is that a violation of international law attributable to a State falls under the umbrella of State Responsibility<sup>68</sup>. The laws governing State Responsibility and criminal law are divergent in relation to the

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<sup>65</sup> *Supra*, footnote 50 at p.12, see p.115. Because State sovereignty is restricted to its territory, the exercise of criminal jurisdiction of a State’s courts is also correspondingly restricted.

<sup>66</sup> In 1998, a joint International Working Group was established and includes in addition to the CMI, BIMCO, ICS, INTERPOL, IGP&I, ICC-IMB, ITF, IUMI and UNOLA/DOALOS to tackle all issues on piracy, robbery at sea, maritime violent acts and maritime crimes. They were charged with drafting a Model National Law concerning these threats and providing effective measures to suppress the lack of uniformity in national laws observed worldwide. Also, the Group is in charge to find appropriate solutions regarding incidents taking place within or just outside waters under coastal State jurisdiction.

<sup>67</sup> See ITLOS, press release 10, 14, 21 and 23 for the details and the different disputes involved, and comments on the case. The 1<sup>st</sup> July 1999, the tribunal declared that Guinea violated the rights of Saint Vincent and the Grenadines in arresting M/V “*Saiga*” and consequently the victim countries were awarded compensation. Also, it allotted compensation for the crew, confiscated cargo and the damage to the vessel. The tribunal stated that “Guinea had used excessive force when arresting the ship”.  
< [http://www.itlos.org/start2\\_en.html](http://www.itlos.org/start2_en.html)>, (May, 2007).

<sup>68</sup> See International Law Commission (ILC), “*Yearbook 2000*”, Volume I, (Geneva: United Nations (UN), 2005), at pp.72-92. <[http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes\(e\)/ILC\\_2000\\_v1\\_e.pdf](http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes(e)/ILC_2000_v1_e.pdf)>, (June, 2007).

sanctions, because the legal consequences under the law of State responsibility<sup>69</sup> aspire only to re-establish a conflicting situation into a normal one by ensuring conformity with the prevailing international law. In contrast, sanctions in international criminal law are of a punitive and preventive nature<sup>70</sup>.

Domestic legislation is the basis for prosecution and punishment of maritime crimes under international law. Where the crime is treaty based, States parties are obliged to declare the offences as criminal<sup>71</sup>. Crimes against maritime navigation could be assimilated in this category. The fundamental principles of the rule of law are that criminal law must start with an enactment by a competent and recognized body creating a criminal offence. The process is done by most countries by enacting these laws pursuant to their Constitution and enumerating the crimes in a Criminal Code or Penal Code or type of Statute, and disseminating the information for publication through the appropriate diplomatic channels.

Finally, the maritime community must be aware of those instruments regarding claims or disputes which could arise, keeping in mind that international crimes are subject to sovereign States' prerogatives with respect to prosecution and punishment; they may have a potent and disruptive chain reaction on the whole maritime sector. State responsibility is concerned with the definition, classification and control of those crimes within its jurisdictions, according to the prevailing laws and policies.

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<sup>69</sup> See James Crawford and Pierre Bodeau and Jacqueline Peel, "The ILC's Draft articles on State Responsibility: toward completion of a second reading", *The American Journal of International Law*, Vol.94, No.4, (October, 2000), at pp.660-674. < <http://www.jstor.org/cgi-bin/jstor/printpage/00029300/di011875/01p00047/0.pdf?backcontext=page&dowhat=Acrobat&config=jstor&userID=c3b2f7a3@mah.se/01cc99331f00501c11e97&0.pdf>>, (June, 2007).

<sup>70</sup> See Robert Cryer, *Prosecuting International Crimes: Selectivity and the International Law Regime*, (Cambridge: Cambridge University Press, 2005), at pp.73-74. International Criminal Law, State rights and responsibilities come into the arena when dealing with international crimes. According to the author, the most important actors for prosecuting international crimes are National Courts. See Rome Statute art.1, which stipulates that "The most serious crimes of concern to the international community as a whole, must not go unpunished and that their effective prosecution must be ensured by taking all appropriate measures at national level and by enhancing international cooperation".

<sup>71</sup> See Gerhard Werle, *Principles of International Criminal Law*, (The Hague: T.M.C Asser Press, 2005) at pp.34-42.

### **2.3.3 The scope of transnational maritime crimes: a dilemma for policy makers?**

Nowadays, transnational organized crime<sup>72</sup> is a major threat to society and trade worldwide<sup>73</sup>. It is an invisible cancer spreading on a large scale its symptoms, resulting in a “complex phenomenon and manifesting itself in numerous activities, such as, drug trafficking, trafficking in human beings, trafficking in firearms, smuggling of migrants, money laundering, corruption etc.”<sup>74</sup> It is evident that one of the principal illegal activities carried out by organized crime syndicates is drug trafficking, generating enormous profit<sup>75</sup>. The situation is worsening with the increase of trade and globalization. Thus, States are attempting to grapple with these sensitive issues by seeking new remedies to counter the threats. However, international criminals continue to cross borders of countries and violate national sovereignties, even though many States are trying to find adequate solutions through international and regional agreements to combat criminal activities which are a menace to all transportation sectors, land, air or sea<sup>76</sup>.

Consequently, various security concerns relate to transnational crimes emerged and legislators or policy makers have to contend with this new dilemma. Criminal activities connected to the sea are transnational in most cases and fall under the umbrella of maritime crimes discussed in the previous paragraphs. To further the debate regarding transnational maritime crimes, a scrutiny of the international law on jurisdiction concepts is necessary to address this nexus, because it provides the basis

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<sup>72</sup> See art.2 (a) regarding the definition adopted for “Organized criminal group” in the United Nations Convention against Transnational Organized Crime, 2000 and its three Protocols for additional information.

<sup>73</sup> See UNODC, “*Results of a pilot survey of forty selected organized criminal groups in sixteen countries*”, Report on the Global Programme against Transnational Organized Crime, Vienna, UNODC, (September, 2002), < [http://www.unodc.org/pdf/crime/publications/Pilot\\_survey.pdf](http://www.unodc.org/pdf/crime/publications/Pilot_survey.pdf) >, (June,2007).

<sup>74</sup> Features of organized crime and objectives of UNODC to combat and countering this threat are described on the world web site < [http://www.unodc.org/unodc/en/organized\\_crime.html](http://www.unodc.org/unodc/en/organized_crime.html) >, (June,2007).

<sup>75</sup> *Ibid.*

<sup>76</sup> See Doug Mackinnon, “Transnational dimensions of maritime crime”, paper presented at the Transnational Crime Conference, Australian Institute of Criminology in association with the Australian Federal Police and Australian Customs Service held in Canberra, 9-10 March 2000, *Australian Institute of Criminology, 2006*, < <http://www.aic.gov.au/conferences/transnational/mackinnon.html> >, (May,2007), at pp.1-10. Overviews of criminal activities at sea and law enforcement practices are highlighted and some solutions given on how to deal with the different issues involved.

for maritime law enforcement activities and procedures. The following is an analysis of the concept of jurisdiction<sup>77</sup>.

- There are three kinds of jurisdictions:

- Legislative,
- Executive, and
- Judicial

- The general principles on which a State may base its jurisdiction are<sup>78</sup>:

- territoriality Principle
- nationality Principle
- universality Principle
- passive Personality Principle
- protective Principle, and
- representational Principle<sup>79</sup> which is relatively new.

At the national level, criminal law is confined within the State's territory, meaning the principle of sovereignty prevails. However, the power of national criminal law outside its jurisdiction is limited, in relation to the different mechanisms existing under international instruments. *The territoriality principle*<sup>80</sup> recognizes that a State may proscribe conduct in its sovereign territory<sup>81</sup>. Thus, States favor exercising jurisdiction themselves, and avoid being bound by or dependent on other States regarding issues related to criminal matters and the State's jurisdiction to

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<sup>77</sup> *Supra*, footnote 70 at p.19; see at pp.75-76 and p.101 for the "traditional" principles of jurisdiction.

<sup>78</sup> *Supra*, footnote 50 at p.12, see at p.115. "Denmark legislation provides that a Danish citizen committing a crime abroad, in the territory of a foreign State, only Denmark will have jurisdiction and could punish him if the conduct is recognized as a crime in the State where this behavior took place".

<sup>79</sup> *Ibid.*, see at p.117. It is mentioned that "States may have jurisdiction over offences committed abroad in particular cases where they have chosen not to follow a request of extradition of the perpetrator to another State. Instead of extradition it is decided to "represent" the requesting States in a prosecution of its own where this State has no independent reason for jurisdiction to hear the case". The advantages of this principle are that it reduces time for prosecution and costs in case of extradition and preserve the interests of the requiring State.

<sup>80</sup> *Ibid.*, see at p.116, "*Subjective territoriality applies* when a material element of an offence occurs within the territory, *objective territoriality applies* when a significant effect of an offence impacts on the asserting State's territory, thus conduct outside the territory that is intended to have impact in the territory also allows for jurisdiction". These notions given by the author highlight the two possibilities regarding territorial issues and their impacts on national legislation.

<sup>81</sup> *Supra*, footnote 70, at p.19. A State has jurisdiction over its territory and domestic law applies.

adjudicate. Every sovereign State enjoys the autonomy to deliver judgments on matters that contain no extra State ingredients and this right comes directly from the international law<sup>82</sup>. *R. v Cumberworth (Adrian David)*<sup>83</sup>. Regarding the *nationality principle*<sup>84</sup>, two notions come into the picture. First, regarding the *active personality theory*, the nationality of the offender is decisive in the granting of jurisdiction. “It entails jurisdictions over crimes committed by a State’s nationals abroad”.<sup>85</sup> This notion permits a State to prohibit and condemn the criminal conduct of its citizens in a foreign country and highlights the effect of domestic law operating outside the State’s territory. Secondly, the *passive nationality principle* is invoked in very few cases, mainly, when a “State claims for its citizen abroad as the victim of a crime and the accommodating State can not granted sufficient protection, security and safety or the victim’s life is endangered”<sup>86</sup>. The difference between them is that the active nationality principle concerns a perpetrator, whereas passive is related to a victim. The *protective principle* can bring a solution in cases in which the violation of a State’s interests justifies the claim for jurisdiction. It is the case when aliens commit acts against the security or independence of a State<sup>87</sup>. Examples of acts falling under crimes are hijacking, killing citizens and terrorists’ activities. These offences could lead to the use of this principle. Also, the nationality of the perpetrator or the territoriality principle is irrelevant in the context of this notion. The *passive*

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<sup>82</sup> See Conny Rijken, *Trafficking in persons: prosecution from a European perspective*, Hague: T.M.C Asser Press, 2003, at pp.34-36.

<sup>83</sup> *R. v Cumberworth (Adrian David)* (1989) 89 Cr. App. R. 187 Times, May 8, 1989 WL 651464. This case highlights the notion of jurisdiction, where a foreign ship is in extraterritorial waters and an offence is committed by a British subject on board a French ship in French waters. “The M.V. Chartres, a French vessel, was at Dieppe with her ramp down. Youths from Sussex, including C caused fighting on board and was arrested on arrival at Newhaven. It was submitted that the Crown Court at Lewes had no jurisdiction to try C because the alleged offence had been committed in a foreign port when the ship was still berthed. Held, dismissing C’s appeal on this point, that (1) the ship had not been fixed to the land in Dieppe with any degree of permanence; (2) in any event, all that was necessary for the Merchant Shipping Act 1894 s. 686(1) to be effective to give jurisdiction was for the ship to be foreign and for C to be a British subject on board who did not belong to that ship. (It might have been different if the ship had been dry-docked or hauled up on to the shore)”. < <http://international.westlaw.com/> >, (June, 2007).

<sup>84</sup> *Supra*, footnote 82 at p.22, see at p.38.

<sup>85</sup> *Supra*, footnote 50 at p.12, see at p.116.

<sup>86</sup> *Supra*, footnote 82 at p.22, see at p.39.

<sup>87</sup> *Ibid.*, at p.39. The protection of victims of crimes abroad is vital, mainly when a State’s citizens are the victims and the perpetrators are aliens. In such cases, State interests and practices enter the arena.

*personality principle* comes into play when a “State applies its criminal law for extraterritorial offences against its nationals as individuals also when the perpetrator is an alien”<sup>88</sup>. Finally, *the universality principle* applies to crimes that are a menace to the whole international community of States in such a way that all nations may both proscribe and punish its occurrence. The nationality of the offender or the location of the offence is irrelevant. This principle refers to crimes that are defined in the international instruments and are criminalized and punishable according to the legislation in force in these States. Universal jurisdiction over piracy, slavery and war crimes falls under this category.

### **2.3.4 Maritime zones and criminal jurisdiction under UNCLOS 82**

Maritime jurisdictions and enforcement regimes regarding the transportation of contraband, illicit narcotics and stowaway issues are extremely complex, particularly with regard to boundary delimitations<sup>89</sup>, transnational offences<sup>90</sup>, the location of the offence, and the nationality of the ship associated with the event, the nationality of the crew or offender and the nature of the offence. The exercise of State jurisdiction<sup>91</sup> is related to all factors described before and varies with the type of jurisdiction involved. Flag States exercise jurisdiction over ships flying its flag, whereas coastal States over waters under their national jurisdiction and port States over ships entering their internal waters<sup>92</sup>.

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<sup>88</sup> *Supra*, footnote 50 at p.12, see at p.116, “This theory is not supported much by the international community, because it conflicts with domestic matters and has been successfully invoked only in domestic courts”.

<sup>89</sup> See Adel Omar Alsied, “Delimitation of Maritime Boundaries with special reference to the EEZ and the IMO Conventions regime: A Libyan Case Study”, *United Nations - The Nippon Foundation Fellow*, (June, 2006), at pp.17-21. < [http://www.un.org/Depts/los/nippon/unff\\_programme\\_home/fellows\\_pages/fellows\\_papers/alsied\\_0506\\_libya.pdf](http://www.un.org/Depts/los/nippon/unff_programme_home/fellows_pages/fellows_papers/alsied_0506_libya.pdf) >, (June 24, 2007).

<sup>90</sup> Neil Boister, *Transnational Criminal Law?*, Vol.14, No.5, *The European Journal of International Law* (EJIL, 2003), at pp.953-976. < <http://ejil.oxfordjournals.org/cgi/reprint/14/5/953.pdf> >, (June 24, 2007).

<sup>91</sup> See Andree Kirchner, *Public International Law* (VAK 06-009), Master Programme in European and International Law, (Stockholm, 2005), at pp.1-21. < [http://mlecture.uni-bremen.de/intern/ws2005\\_2006/fb06/vak-06-009/20051124/folien.pdf](http://mlecture.uni-bremen.de/intern/ws2005_2006/fb06/vak-06-009/20051124/folien.pdf) >, (June 22, 2007).” State jurisdiction is the power of a State under international law to prescribe rules and the authority to enforce judgments made in accordance with them.”

<sup>92</sup> See UNCLOS 82, articles 8,9(g),21(h),25,27,28,33,42,52,94(1)(2),98(1)(2),99, and 100 to 108,110, 111, 127 and 128.

In internal waters<sup>93</sup>, the territoriality principle prevails. A ship remains subject to flag State jurisdiction regardless of its location. However, by the act of entering internal waters, a ship places itself within port State jurisdiction. In some countries, it has complete jurisdiction, in others; it only assumes a right to jurisdiction. The Port State may exercise jurisdiction if the offence affects the peace, security or good order, on the request of the master or flag State and if the offence involves a non –crew member of the vessel, such as a “stowaway”<sup>94</sup>.

In the territorial seas<sup>95</sup>, the coastal State’s criminal jurisdiction can be extended to the outer limit of the territorial sea. Flag State jurisdiction prevails as well as enforcement jurisdiction for offences involving stowaways, violations of custom and immigration regulations<sup>96</sup>, and illicit traffic in drugs. These criminal offences are clear reasons for intervention.

In respect of the contiguous zone, which extends beyond the territorial sea, the enforcement of customs, fiscal and sanitary regulations are allowed, but in the EEZ and the continental shelf, the right of hot pursuit<sup>97</sup> is permitted, whereas in the high seas, vessels engaged in piracy are subject to universal jurisdiction and hot pursuit. Cooperation between States is encouraged in the suppression of illicit drug trafficking<sup>98</sup>.

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<sup>93</sup> See R. R. Churchill and A.V. Lowe, *The Law of the Sea*, 3<sup>rd</sup> ed., Manchester: Manchester University Press, 1999, at pp.60-65. “Coastal States enjoy full territorial sovereignty over its internal waters, no right of innocent passage”. However, the right of access to ports and other internal waters depends on State practice and is often a subject of controversy when it comes to the State interests. The notion of ship in distress is also a dilemma. If criminals are on board and human life is at risk, and the safety and security are compromised, a ship may be refused to access or enter a port /port facilities by a coastal State for many reasons and the customary law right of entry may be denied, even though the ship is considered in distress. As example, terrorists or criminals are taking the crew in hostage on board a foreign vessel in coastal State internal waters. Complex scenarios come into the picture and various unpredictable consequences may result. See, *Cunard S.S. Co. v. Mellon* 262 U.S.100, 43 S.Ct.504 U.S. 1923, for coastal State’s jurisdiction.

<sup>94</sup> See B.A.H. Parritt, *Crime at Sea, A practical guide*, London: The Nautical Institute, 1996 at p.23.

<sup>95</sup> *Supra*, footnote 93; see at pp.94-100 and LOSC, articles 21,24,25,26 and 27. “The Law of the Sea Convention provides for the enforcement of general criminal jurisdiction in some circumstances, under article27, and the existence of general enforcement jurisdiction clearly presupposes the existence of general legislative jurisdiction”. See *United States v. Flores* 289 U.S.137, 53S.Ct.580, 77 L.Ed.1086,1933 A.M.C.649.

<sup>96</sup> *Supra*, footnote 50 at p.12; see p.121 and LOSC, articles 19(g) and 27.

<sup>97</sup> See LOSC, art. 33, controls done by a coastal State in the contiguous zone and art.111, right of hot pursuit.

<sup>98</sup> See LOSC, art. 100 to 107 and 110,111 for piracy provisions, and art.108 related to illicit drug trafficking.

In UNCLOS 82, three categories of violent maritime criminal acts are considered:

1. Transport of slaves, as stipulated in art.99, is prohibited and effective measures must be implemented for prevention and punishment<sup>99</sup>. Also, any slave found on board a ship is immediately free.
2. Drug trafficking, as stipulated in art.108, is illicit and must be suppressed on the high seas; cooperation with other States is suggested<sup>100</sup>.
3. High seas piracy, as stipulated in the articles 100 to 107 and 110.<sup>101</sup>

With respect to drug trafficking, a review of the three conventions is necessary for assessing all the risks involved in the transportation of contraband goods or smuggling on board ships. Also, other instruments published by UNODC<sup>102</sup>, related to crimes and transnational offences associated with illicit drugs must be considered.

1. Single Convention on Narcotic Drugs, 1961 as amended by the 1972 Protocol<sup>103</sup>.
2. Convention on Psychotropic Substances, 1971<sup>104</sup>.
3. Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988<sup>105</sup>.

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<sup>99</sup> UNCLOS 82, in art.99 stipulates, “Every State shall take effective measures to prevent and punish the transport of slaves in ships authorized to fly its flag and to prevent the unlawful use of its flag for that purpose. Any slave taking refuge on board any ship, whatever its flag, shall *ipso facto* be free”.

<sup>100</sup> See UNODC, United Nations Office on Drugs and Crime, Drug control treaties: *Single Convention on Narcotics, 1961; the Convention on Psychotropic Substances, 1971 and the Convention against the illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988*, which are complementary international conventions to be taken into account with UNCLOS, art.108,

<[http://www.unodc.org/unodc/en/drug\\_and\\_crime\\_conventions.html](http://www.unodc.org/unodc/en/drug_and_crime_conventions.html)>, (April 5, 2007).

<sup>101</sup> These articles deal mainly with all issues related to piracy, such as cooperation in repression of piracy on the high seas or any other place outside the jurisdiction of any State, the right of hot pursuit in case of violation of laws and regulations of that State, and such pursuit must begin in the internal waters or territorial seas and may extend to the high seas if the pursuit is not interrupted.

<[http://www.un.org/Depts/los/convention\\_agreements/texts/unclos/unclos\\_e.pdf](http://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf)>, (April 3, 2007).

<sup>102</sup> United Nations Office on Drugs and Crime which is mandated to assist member States in the struggle against illicit drugs, crimes, terrorism, money laundering and corruption.

<sup>103</sup> *Ibid.*, see Single Convention on Narcotic Drugs, 1961,

<[http://www.unodc.org/pdf/convention\\_1961\\_en.pdf](http://www.unodc.org/pdf/convention_1961_en.pdf)>, (March 15, 2007). “Its aim is to combat drug abuse by coordinated international action. It limits the possession, use, and trade in, distribution, import, export, manufacture and production of drugs exclusively to medical and scientific purposes. It combats drug trafficking through international cooperation to deter and discourage drug traffickers”.

<sup>104</sup> *Supra*, footnote 100, see Convention on Psychotropic Substances, 1971,

<[http://www.unodc.org/pdf/convention\\_1971\\_en.pdf](http://www.unodc.org/pdf/convention_1971_en.pdf)>, (March 15, 2007). “The Convention establishes an international control system for psychotropic substances. It responded to the diversification and expansion of the spectrum of drugs of abuse and introduced controls over a number of synthetic drugs according to their abuse potential on the one hand and their therapeutic value on the other”.

<sup>105</sup> *Supra*, footnote 100; see Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988, <[http://www.unodc.org/pdf/convention\\_1988\\_en.pdf](http://www.unodc.org/pdf/convention_1988_en.pdf)>, (March 15, 2007).

“It provides comprehensive measures against drug trafficking, provisions against money laundering, diversion of precursor chemicals and provides for international cooperation through extradition of drug traffickers, controlled deliveries and transfer of proceedings”.



For stowaways, drugs and transportation of contraband goods, the review of related issues and relevant international instruments<sup>106</sup> on organized crime and transnational organized crime have highlighted the urgent needs for framing legislation at national levels for States to tackle the core of the problems.

The fourth point to be expounded in this debate is related to the perception of maritime crimes in the Maghreb and to identify the gaps in the existing legal instruments needing amendments and their impacts on policy.

## **2.4 Maritime Crimes in the Maghreb arena: a call for reforms?**

The source of law was customary law in the Maghreb until the founding of the French colonies. Except for Islamic law which applied to matrimonial matters, French statutory law was applied in North Africa until these three countries (Algeria, Morocco and Tunisia) became independent. However, “*ijtihad*”, case law in Islamic jurisprudence is widely used in that region. For example, in Algeria after 1975, French jurisprudence was abolished, but case law jurisprudence was re-established. The judicial system in the Maghreb is steeped in the civil law tradition; however, it has been considerably influenced by the Islamic legal system and has entrenched in it, local customs and traditions. Penal Codes and Codes of Criminal Procedure are the legal tools available to combat crimes in which are stipulated punishments or sanctions according to the law in force<sup>107</sup>.

The Arab Maghreb Union (AMU), which is a regional body, was created to foster a common approach to deal with shared problems and challenges. Due to incompatible interests of the different States involved, the goal of collectively

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<sup>106</sup> See the United Nations Convention against Transnational Organized Crime, 2000 and its three Protocols for technical aspects and requirements related to the enumerated threats, such as smuggling or trafficking.

<sup>107</sup> Algerian Maritime Code (AMC), Law No.98/05 of 25<sup>th</sup> June 1998, modifying and completing the Ordinance No.76/80 of the 23<sup>rd</sup> October 1976, creation of the Maritime Code, maritime crimes and offences are mentioned in art.479 to 556 of this Code.

grappling with common threats is still in its nascent stage. Hence, the law and policy regarding maritime crimes in those countries do not converge. This poses the biggest challenge for combating the menace and provides compulsion for policy responsiveness to find a balance between the different interests involved and the appropriate legal reforms.

The four points discussed so far were designed to be precursors to the analysis that will follow in the subsequent chapter. In sum, this chapter has highlighted the difficulties regarding the definitions of maritime crimes<sup>108</sup> in different jurisdictions<sup>109</sup>. It also points out weaknesses and the deficiencies in the existing legal framework and the policy needed to combat the threat adequately. It also highlights the divergent views of scholars on the subject<sup>110</sup>.

The reader will in the next chapter be exposed to an incisive analysis of the transportation of stowaways, illicit drugs and contraband goods, followed by a scrutiny of the various international instruments associated with the above matters. A comparison with the domestic legislation of the Maghreb States will be made to propose solutions for effective policy formulation and framing of legislation.

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<sup>108</sup> See the Australian Crimes at Sea Act 2000 as amended at p.11 regarding the definition of criminal act at sea and at p.18 for the definition of maritime offence, meaning an offence against a law that applies in the adjacent area for a State under this scheme. See also on the subject Max Q. Mejia, "Maritime Gerrymandering: Dilemmas in defining piracy, terrorism and other acts of maritime violence", *Journal of International Commercial Law*, 2(2), Ashgate Publishing Limited, 2003, at pp.153-175.

<sup>109</sup> See European University Institute (EUI), "*The Relationship between "General Principles" and Custom in International Criminal Law*", working group on international criminal law, meeting of 22 November 2006, Florence: European University Institute Law Department, 2006 at pp.1-16. The group highlighted that general principles and custom are clearly distinguished concepts in international criminal law.

<sup>110</sup> These difficulties are caused by the differences on the perception of the concept and definition of crime in various jurisdictions. A crime reflects both the general public's basic concerns and public policy, and therefore is an extremely difficult concept, because it varies according to time, place and circumstances. Many scholars have different views on the subject and thereby create a complex debate on the notion of maritime crime, offences and crimes. However, crime and criminal law is affected by public policy. Therefore, policy formulation is an important matter for legislators. See also Proshanto K. Mukherjee, "Implementation of Maritime Conventions and Legislation Development", *lecture handout MLP403*, Maritime Law & Policy course, Malmö: World Maritime University, 2007.

## CHAPTER 3

### THE JUXTAPOSITION OF CURRENT INTERNATIONAL LEGAL DEVELOPMENTS AND MAGHREB LEGISLATORS

“An unjust law is itself a species of violence. Arrest for its breach is more so.”-  
“Mahatma” Mohandas Karamchand Gandhi, Indian Hindu nationalist leader, 1869-1948

#### 3.1 The transportation of stowaways by sea: the Maghreb case

In view of the latest data published by IMO<sup>111</sup>, the problem of stowaways has increased in the Maghreb region and is getting worse worldwide<sup>112</sup>. Even though the ISPS Code has been implemented<sup>113</sup>, port facilities and ships continue to face this old threat, highlighted by new concerns on human suffering, refugees, migrants and asylum seekers, and involving complex issues, such as criminality and terrorism, threatening the whole transportation system in the Mediterranean Sea. The

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<sup>111</sup> *Supra*, footnote 1 at p.1, IMO published the annual statistics for the year 2006 and highlighted 657 stowaway cases, but the analysis was based on 244 stowaway incidents, their location on board ships, the places of embarkation and attempted disembarkation, the nationality of the offenders, the flag States of the ships involved, type of ship and duration of embarkation, according to the reports submitted to the Organization up to 31 December 2006. See FAL.2/Circ.102 for the previous statistics and the FAL.2/Circ.103 for the period of January to April 2007, where 93 incidents were reported, involving 298 stowaways, 29 cases are from the Maghreb region, Morocco (18 cases ; 6,04%), Algeria (7 cases ; 2,35%), Tunisia (4 cases ; 1,34%), for Mauritania and Libya no data are available for the cited period. See Appendix D for the charts and different trends for the Maghreb region.

< [http://www.imo.org/includes/blastDataOnly.asp/data\\_id%3D18743/103.pdf](http://www.imo.org/includes/blastDataOnly.asp/data_id%3D18743/103.pdf) >, (June 20, 2007).

<sup>112</sup> See European University Institute (EUI), *The Relationship between “General Principles” and Custom” in International Criminal Law*, working group on international criminal law, meeting of 22 November 2006, Florence: European University Institute Law Department, 2006 at pp.1-16. An increase of stowaways boarding was noted for the year 2006, creating new concerns on existing enforcement regimes in different States worldwide. A particular attention to the Maghreb’s situation was highlighted as a result of numerous drowning cases reported to the coastal States and media, and where various attempts to reach the European coasts ended in a human tragedy.

<sup>113</sup> ISPS Code is in force since 1<sup>st</sup> July 2004, imposing new measures to secure the shipping activity, IMO guidelines to assist States in the implementation efforts have been published, but the standards adopted in many States are not harmonized and lack in effective implementation has been observed. Poor policies and gaps in national legislation have been reported.

resurrection of the notion of “*harragas*”<sup>114</sup> for the Maghreb inhabitants or “Boat people” for the Europeans during the recent years in North Africa, reveals the challenge and drama faced by these coastal States, regarding the new wave of threats, such as young people trying to get free passage on board commercial ships or using small boats to reach the southern parts of Europe, called by them the “*fortress*” and “*El Dorado*”<sup>115</sup>. The Maghreb countries are considered transit zones for migrants trying to cross the Mediterranean Sea, particularly in ferries trading on regular lines or long distance carriers. However, the picture is more complicated with regard to the phenomenon of illegal migration, because the flow of internal displaced persons (IDPs) or undocumented migrants crossing borders and waiting in temporary zones within countries of this region are generally grouped, then regrouped or moved momentarily to other places without correct statistics on the number of persons concerned<sup>116</sup>. All these factors affect the data on *attempted stowaway* or *stowaway* purely as defined by the international instruments. The increased number of migrants involved in this dangerous adventure, threatening the sea trade is the main concern of the Maghreb States, given the fact that reports reveal that most of the policies

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<sup>114</sup> The term *harraga* means in Arabic getting free passage by any kind of transportation in traveling from one place to another, using unauthorized routes and means to finalize this intended voyage. See the official Algerian newspaper *Le Soir D’Algérie* (February 25, 2007), describing the nature and form of the problem raised by these new threats, ending in numerous dead and drowned of stowaways or free passage seekers from the East coast of Algeria or Tunisia, trying to reach Sardinia, Sicily, Isle of Lampedusa and Malta in small boats overloaded or capsizing in bad weather. The same phenomenon is reported on the West coast of Algeria and Morocco, but the destination is South Spain, Isles of Baleares or France. A tragedy without witnesses and far away from the international preoccupation is still occurring and bringing its list of dead , <<http://www.lesoirdalgerie.com/articles/2007/02/25/article.php?sid=50038&cid=2>>, (June20, 2007).

<sup>115</sup> Dreams of leaving, unemployment, social conditions and harsh environment push more and more candidates to this deadly adventure. *El Dorado* is a Spanish term meaning “Golden region”. This legend began in the 1530s, in the Andes (Colombia) and is still ingrained in the popular thinking in the ex-Spanish colonies. Northern parts of Morocco and western parts of Algeria which were colonized by the Spanish Empire in the past centuries and the local inhabitants have a popular believe that is strongly influenced by this myth. Migration to find a new *El Dorado* is an honor for tribe members, trying to get incomes for their relatives as long misery and unemployment is threatening the survival of their relatives. Therefore, boat people concept or stowaways are not condemned by the local society, but is encouraged at all levels as long as incomes and other opportunities are concerned.

<sup>116</sup> See IOM, “Migration Initiatives Appeal 2007”, Report, (Geneva: IOM, 2007) at pp. 23-26. Also, the reports published by the *International Centre for Migration Policy Development (ICMPD)*, highlighted the dramatic issue of trafficking in human beings, smuggling and the relationship between illegal migration and criminal networks, thus revealing poor policy in the transit and sending countries and their consequences in the receiving States.

regarding these matters are *laissez-faire* and compounded by lack of effective countermeasures to eliminate this menace.

In this regard, the first point that would be examined in this chapter relates to the analysis of the trends, main areas of concern, types of stowaways, root causes and consequences, and risks involved regarding the threats.

### 3.1.1 The analysis of stowaway trends and migration flows

IMO reported in April 2007<sup>117</sup> that from January 1998 to April 2007, the total number of stowaway incidents so far is 2,815 involving 8,593 stowaways. From January to April 2007, the total number of stowaway incidents reported to the Organization is 93 incidents involving 298 stowaways. This data is related to worldwide incidents and concerns only reports emanating from member States. However, it is important to bear in mind that this data must be viewed carefully when analyzing the trends, because every State tries to minimize the number of incidents and does not report the attempted stowaway cases which may bring to light other factors not considered in previous analyses. Therefore, a pragmatic approach is necessary in considering the findings regarding these trends.

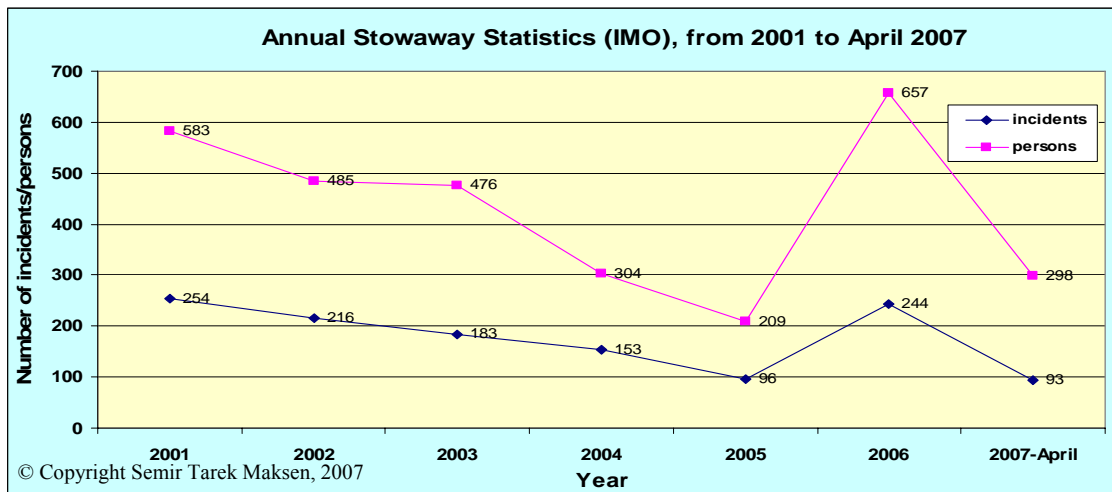
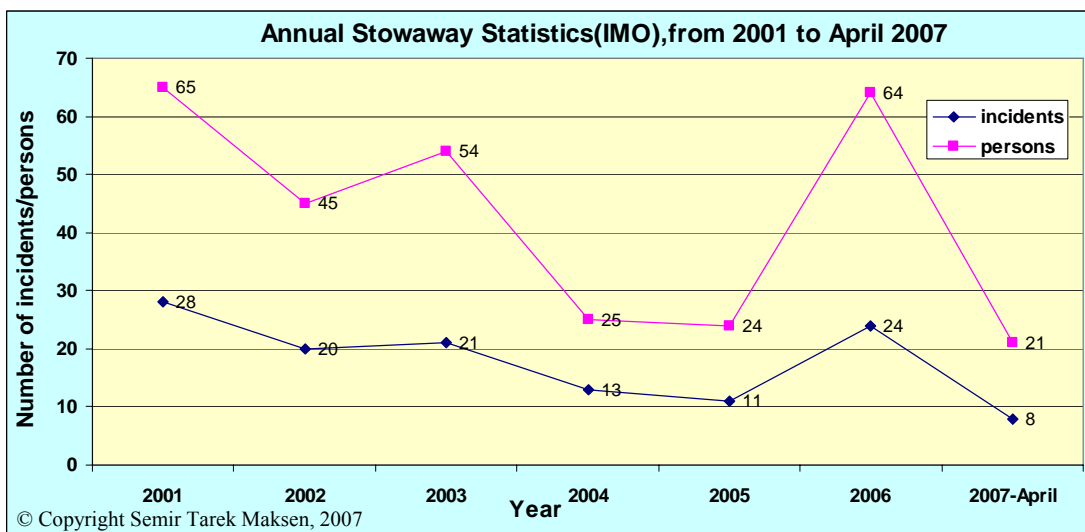


Figure 5: Annual Stowaway Statistics (IMO): From 2001 to April 2007 (Worldwide)

<sup>117</sup> See IMO, “*Reports on Stowaway Incidents*”, (January to April 2007), FAL.2 Circ.103 (24 April 2007) at pp.1-24. <[http://www.imo.org/includes/blastDataOnly.asp/data\\_id%3D18743/103.pdf](http://www.imo.org/includes/blastDataOnly.asp/data_id%3D18743/103.pdf)>, (July 5, 2007).

As can be seen from Figure 5, a steady decline occurred from 2000 to 2005. This downward trend is mainly due to the implementation of the ISPS Code, which entered into force on 1<sup>st</sup> July 2004 and amendments to the FAL Convention<sup>118</sup> adopted in January 2002, and entered into force in 2003. However, a gradual climb from 2005 to July 2007 is observed, confirming the increase of stowaway cases worldwide, particularly in certain regions, such as the Maghreb. In view of the above, a comparative chart is given below to indicate the current trends observed in the Maghreb region<sup>119</sup>.



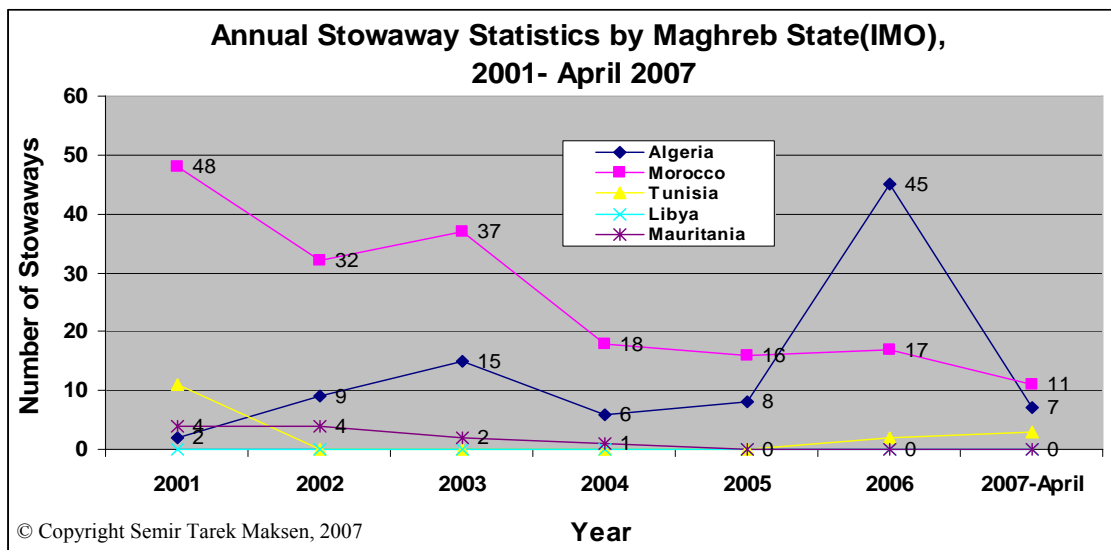
**Figure 6: Annual Stowaway Statistics (IMO): From 2001 to April 2007 (Maghreb Region)**

It can be seen from Figure 6, that from 2001 to 2005 a steady decrease occurred, but from 2005 to 2006, there was a gradual climb. By analyzing the different trends for the year 2007, it is projected to rise steadily. Figure 5 when

<sup>118</sup> See the Convention on Facilitation of International Maritime Traffic, 1965 as amended. Amendments concern mainly the incorporation of standards and recommended practices on dealing with stowaways. “These standards are internationally agreed measures which are necessary and practicable in order to facilitate international maritime traffic and recommended practices as measures the application of which is desirable” as mentioned by this convention. They are also found in the Resolution A.871 (20) adopted on 27 November 1997, “Guidelines on the Allocation of Responsibilities to Seek the Successful Resolution of Stowaways Cases”, establishing basic principles to be applied in dealing with stowaways. Also, the two circulars FAL.2Circ.50 and FAL.2.Circ.50 Rev.1 are relevant regarding this issue. They invite member States to provide the Organization with information on stowaway’s incidents. As result of these reports provided to IMO, quarterly reports on stowaways and statistics are done and recommendations issued.

<sup>119</sup> See Annex E for detailed charts by Maghreb State, regarding the Annual Stowaway Statistics (IMO) for the main ports of *Algeria* and *Morocco*. These two countries have the highest number of stowaway incidents, according to the latest data publish by the Facilitation Committee of IMO. *Casablanca* for *Morocco* and *Algiers* for *Algeria* are the main ports presenting an increased risk with regard to stowaways.

compared with Figure 6 reveals the same tendency of the trends. From these graphs, it may be concluded that the same movements are observed and after the year 2004, even though the ISPS Code has been implemented, the general trend is upward regarding the number of stowaway incidents and persons involved. In view of these findings, a detailed chart by Maghreb State is given below to reveal the present trends and to bring to light the factors contributing to this threat.



**Figure 7: Annual Stowaway Statistics by Maghreb State (IMO), places of embarkation**

As can be seen from Figure 7, Algeria had a dramatic increase in 2006 and Tunisia a gradual climb for the same period. Morocco did not have a significant change regarding the number of stowaways. It can be concluded that these three countries in view of the different trends<sup>120</sup> still have a prevalence of incidents and the menace is confirmed by the analysis of different graphs, which highlight the occurrence in recent years. The study of these trends revealed the main ports of concern, such as *Algiers*, *Arzew* and *Skikda* for Algeria, and *Casablanca*, *Agadir* and *Safi* for Morocco. In Tunisia, two additional ports, *Tunis* and *Rades* ports, previously not considered in the data of IMO, were included. The main types of ships boarded in this region by stowaways are essentially Ro-Ro cargo ships, ferries, container ships and general cargo ships. Recently, the use of pleasure craft, fishing vessels and other

<sup>120</sup> See Annexes C, D, E and F for the different trends observed regarding stowaways and attempted stowaways worldwide and from the Maghreb region.

types of ships for the transportation of stowaways or illegal migrants by sea is increasingly observed in the Mediterranean Sea, and particularly in the Maghreb region. However, these categories falling out of the scope of international instruments are contributing factors to the menace and should be considered as an imperative by policy makers, and efforts should be exerted to tackle the phenomenon in its totality.

The stowaways from the Maghreb region appear to target the following destinations:

- Europe
  - United Kingdom
  - Belgium
  - Italy ( In 2006 & 2007, it is the most targeted country by stowaways)
  - France, Spain , the Netherlands and Greece
- The United States and Canada

It is important to bear in mind that all findings related to the incidents linked to stowaways<sup>121</sup> and the interface of that phenomenon with unsafe practices associated with rescuing and transporting of distressed persons at sea<sup>122</sup>, will be included in the analysis and how proper framing of policies should address these issues<sup>123</sup> will be considered. Different types of stowaway are found at sea and present a threat to port facilities and ships. These include refugees, economic

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<sup>121</sup> See *UK P&I Club*, "Theft incidents and the presence of stowaways in the port of Algiers (Algeria)", Bulletin 444, (December, 2005).

<sup>122</sup> See UNHCR, *Statistical Yearbook 2005, Trends in Displacement, Protection and Solutions*, Geneva: UNHCR, April 2007 at p.9 and p. 13.

<sup>123</sup> See Selected Reference Materials; "*Rescue at Sea, Maritime Interception and Stowaways*", Geneva: UNHCR, November 2006, at pp.197-209. The mass exodus of Maghreb's boat people generated various concern. Also, questions of international criminal law arise where the rescue operation or assistance is necessitated as a consequence of smuggling operations. Past practice and current challenges highlight the need of agreements of coastal States to allow disembarkation of stowaways, asylum-seekers or refugees, and to provide temporary refuge for them until adequate solutions are settled down. The following factors must be considered: the impacts on smuggling and irregular movements, interception practices, resettlement policy and the challenge of dealing with cases found not to be in need of international protection, etc.



migrants, illegal migrants, asylum seekers, and criminals. In the worst case scenario, terrorists may try to access vessels in order to use them as vectors in an attack against a specified target. By the same token, it is important to look deeply into the root causes, which are generally related to economic, social and political factors, such as the escape from civil unrest, religious and cultural persecution or unemployment. Undocumented persons raise the complex issues of personal classification and the appropriate internationally accepted mechanism in processing and handling these cases.

The main places where stowaways hide themselves on board commercial vessels depend on the type and size of the ships targeted<sup>124</sup>, and the time spent alongside or at anchor. Ro-Ro cargo ships are the ones that are singled out the most, followed by ferries, containerships and general cargo ships. Vessels that are characterized by short voyages, short transit time and high speeds are the usual targets of stowaways in the region, due to the fact that strategic information relevant to the vessels movement are easily obtained by them. This highlights the complex issues on vulnerabilities and risks generated by this menace. In the Maghreb, the stowaway crisis is real; national flagged ships or foreign vessels trading in the region are equally targeted without distinction as revealed by statistics published by IMO. Stowaways are still getting on board ships despite various prevention measures<sup>125</sup> taken by shipowners and their crews. Some turn up dead, drowned, killed or are injured by irresponsible masters<sup>126</sup> in their attempts to solve the problem summarily

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<sup>124</sup> Easy access, shortage of crew, few guards or reduced watch on board a ship, aim to facilitate the tasks for potential stowaways. In getting correct information about the target, candidates to this risky adventure deduct easily the weak points or vulnerabilities, which encourage them to decide for an attempt or an offensive without regrets on their unlawful acts. Thus, they often forget that *being a stowaway is considered as a crime and consequently punishable* in accordance with the domestic laws prevailing in this zone. Also, stowaways often compromise the *safety* and *security* of the threatened ship and pose a danger to the whole adventure or maritime expedition, resulting in incalculable risks and potential consequences to him or her self, the crew, passengers, ship, cargo and environment.

<sup>125</sup> See ISPS Code Part A, Section 7 and 14 on security measures to be adopted by ships and port facilities.

<sup>126</sup> See the *Maersk Dubai* Case (1996). Three Romanian stowaways were thrown overboard in the high seas of the North Atlantic. The Captain called them “the fish”, and sent a message in which he made the following statement “I caught the fish”. This case highlights the real drama faced by ships and crews.

in violation of international law on fundamental human rights<sup>127</sup>. These places where stowaways hide themselves include containers, cofferdams, rudder trunks, engine rooms, lifeboats, chain lockers, funnels, pipes, ventilation tunnels, cranes, trucks, stores or other lockers on board ships while such vessels are in port or waiting in an anchorage zone. In some instances, crew cabins are involved inadvertently furnishing a basis for criminalization of seafarers<sup>128</sup> as accomplices to the crime. Hence, reaffirming the notion generally accepted by the maritime community that on board the ship there is no *safe space* or *clean place*, regarding these threats<sup>129</sup>.

### 3.1.2 Analysis of different types of stowaway and their motivation

From the Maghreb towards Europe, several categories of stowaways<sup>130</sup> are identified with respect to transportation by sea.

#### 3.1.2.1 Fortune seekers or economic migrants

In the Maghreb region, they are the most common group and are motivated mainly by the prospect of acquiring better job opportunities and improving their standard of living. This category is very vulnerable and is often targeted by organized crime or criminal gangs, seeking to infiltrate them and use them for criminal activities. This category falls under the Convention on Facilitation of International Maritime Traffic (FAL Convention), 1965 as amended. The definition

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<sup>127</sup> See the Universal Declaration of Human Rights (UDHR) which is the first international statement to use the term “human rights”, and has been adopted by the Human Rights movement as a Charter, where in its article 3 it is stipulated that “Everyone has the right to life, liberty and the security of person”.

<sup>128</sup> See Dimitri Ladischensky, “Adored, reviled, abused, loved by romantics, feared by shipowners, killed by captains: stowaways –the myth and the reality”, *Mare*, No.60, February / March 2007, < [http://www.mare.de/mare/english/pdf/mare60/mare60\\_blindpass1.pdf](http://www.mare.de/mare/english/pdf/mare60/mare60_blindpass1.pdf) >, (June, 2007) at pp.1-5. An Algerian stowaway *Choipai Ahmed* was arrested on board *The Hannover Express* by Captain *Köhns* and given later on asylum in a European country. This “Blinde passagier” caused fear and torment on board.

<sup>129</sup> See Case Study S 006 on stowaways, *Signal experiences, No space is safe*, North of England P & I Association limited, 2006, at pp.1-2. < [www.nepia.com](http://www.nepia.com)>, (June, 2007).

<sup>130</sup> See The North of England P & I Association, “Types of stowaway”, *Signals Special*, No.6, March 6, 2001 at pp. 1-12. < [www.nepia.com](http://www.nepia.com) >, (June, 2007). A clear categorization of stowaways was given and a detailed report on fines country by country, hot spot areas, preventive and remedial measures. Particular attention was given to the African perspective and Maghreb and to Spain regarding the irregular flow of illegal migrants by sea who drowned. The main procedures to be used as guidelines related to stowaway cases threatening ships were explained.

of *ship* or *vessel* is found in the respective IMO conventions<sup>131</sup>. The FAL Convention gives the definition only of *Cruise Ship* in its Annex, Section 1.A. Furthermore, it is critical to make a distinction between the definition of alien who entered the country legally, but whose residential status or visa has expired, and the illegal immigrant who has entered the foreign territory in a clandestine way and often is undocumented. These two offences are considered as crimes<sup>132</sup>. The offences and punishments are different due to the difference in gravity between the two acts. Captains on board vessels trading in the Maghreb zone should be aware of these threats.

### 3.1.2.2 Refugees

The definition of a *refugee* is contained in the 1951 United Nations Convention Relating to the Status of Refugees and its 1967 Protocol relating to the Status of Refugees, which define a refugee as an individual who: “owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality, and is unable or unwilling to avail himself of the protection of that country.”<sup>133</sup> Refugees are protected and their particular status confers those rights, roles and responsibilities according to the prevailing international instruments. Some refugees are in some cases stowaways. This category of stowaway seeks to escape war, persecution, civil unrest and is indicated in many reports<sup>134</sup>. This exposes the

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<sup>131</sup> IMO Conventions are those instruments, such as MARPOL 73/78, SOLAS 74 as amended etc.

<sup>132</sup> See Brigadier B.A.H. Paritt, *Stowaways by Sea, Illegal Immigrants, Refugees, Asylum Seekers, a Nautical Institute practical guide to a growing international problem*, London: Nautical Institute, 1992 at p.44. See also *refugees* in Goodwin-Gill, *The Refugee in International Law*, Oxford: Clarendon Press, 1996.

<sup>133</sup> The term *refugee*, like the people it covers may involve a lot of ground and it is often interpreted from different angles when it comes to the scope of application, regarding rights, roles and responsibilities related to its legal definition. Such divergent views may create new and complex debate for legislators or policy makers on how to tackle this issue related to the notion of refugee. This term does not apply to stateless people, internally displaced persons (IDPs), forced migrants, economic migrants and rejected asylum seekers as example, highlighting the necessity to frame new detailed legal definitions with regard to this sensitive issue. Also, mass exodus or mass flight of threatened population seeking to get on board vessels to cross the Mediterranean Sea is an important point, which should be considered by the Maghreb legislators or policy makers to tackle this international policy issue. See *Cartagena Declaration* and *OAU* for different definitions related to the notion of refugee.

<sup>134</sup> See *Abdel Hakim Tizgha Case*, an Algerian stowaway who entered fraudulently *Boston* on an Algerian LNG Tanker and was granted asylum after a series of trials, even though, he was involved indirectly in the foiled millennium bombing plot as an associate of *Ahmed Ressam*. See, Janice L. Kephart, “Immigration and Terrorism: Moving Beyond the 9/11 Staff Report on Terrorism Travel, Connections”, *The Quarterly Journal*, Vol.5, No.2, Fall 2006, at p.56.

related issue of fraud, undocumented persons and falsified papers etc.<sup>135</sup> In addition; psychological disorders, aggressiveness and impulsiveness are observed in the mentioned group<sup>136</sup>. In general, they move in pairs or groups. North African States are very vulnerable in connection with this issue due to their porous borders and long frontiers which need protection and impose huge costs on the affected governments.

### 3.1.2.3 Asylum seekers

Asylum seekers are called *political refugees*<sup>137</sup> by some scholars, because they are linked to the social political factors prevailing in the country of origin and this category in the Maghreb region present a real risk to commercial ships trading in particular ports in the affected countries, specially, where internally displaced persons or illegal immigrants from the sub-Sahara are present in a huge number. These asylum seekers are refugees seeking asylum in Europe. In many cases, economic migrants claimed asylum to avoid expulsion, detention or repatriation. This category is often tempted to acquire false identification and sometimes pose as refugees from war torn or conflict areas. They usually demonstrate violent tendencies if they are not granted asylum readily. Masters trading in the Mediterranean Sea should be aware of this category of stowaways<sup>138</sup>. However, an asylum seeker who does meet the requirements of the 1951 UN Convention on Refugees is granted the status of refugee and protected under its Articles 31 and 33, against expulsion,

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<sup>135</sup> See “Organized illegal Immigration into the European Union”, *EUROPOL Report*, (The Hague: Europol, January 2007) at pp.1-4, and Trafficking of Human Beings in the European Union, *Europol Report*, (The Hague: Europol, May 2007) at pp.1-6, describing all features related to this menace.  
< <http://www.europol.europa.eu> >, (June 2007).

<sup>136</sup> *Supra*, footnote 128 at p.35; see p.1, the author stipulated that these types of stowaways tend to be impulsive.

<sup>137</sup> *Supra*, footnote 132 at p.36; see p.46-47, the author highlighted the problem of this type of stowaways, while on board commercial vessels; they try to get granted asylum in Europe. The Maghreb region is stated as a high risk area regarding the considered menace related to this category.

<sup>138</sup> See Article 4, Convention on the Reduction of Statelessness, 1961, fixing the conditions on granting a nationality to a person not born in a Contracting State. Article 1, Convention relating to the Status of Stateless Persons, 1954, defines the term *stateless person* as “a person who is not considered as a national by any State under the operation of its law”. Also, the Convention relating to the Status of Refugees, 1951 shall be considered and its Protocol of 1967, fixes the conditions and definitions on *refugees* and gives the different technical modalities related to the use of this international instrument. The Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live, 1985, defines the term *alien* and it applies “to any individual who is not a national of the State in which he or she is present, with due regard to qualifications made in subsequent articles in this convention”.

repatriation and penalties or other punishments in force regarding these offences. Favorable treatments are given to refugees or asylum seekers by international instruments, whereas in some jurisdictions immigration law<sup>139</sup> is more restrictive and does not give such rights to the offender who is classed as an illegal immigrant. Therefore, Captains must act responsibly with respect to safety and health related matters when they encounter such category of stowaways, especially women and children who are entitled to better protection under international law.<sup>140</sup>

#### **3.1.2.4 Criminals or terrorists**

This category of stowaways is the most worrisome and represents a huge concern to the shipping industry and stakeholders. Criminals linked to the organized crime or transnational organized crime or escaping sanctions/punishments after trials in a particular jurisdiction, absconders, deserters etc, fall all under this group of stowaways. They are considered by experts as aggressive, violent and generally uncooperative with the ship's staff or authorities when found or discovered on board a vessel while at sea, at anchor or berthed<sup>141</sup>. This category of stowaways is seldom restricted to individuals, but includes gangs or groups seeking to gain access on board commercial ships, such as ferries or containerships through the weak links existing in the maritime security chain. These criminals operate in accordance with criminal theories or existing networks as described by enforcement agencies, such as Interpol or Europol. The involvement of organized crime has been often documented and published in annual reports by official agencies or organizations working in this field.

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<sup>139</sup> See the *Tampa* case, 2001 in *Vadarlis v. Minister for Immigration and Multicultural Affairs and Others* (Federal Court of Australia, V 900 of 2001). 460 Asylum seekers were held on board the vessel.

<sup>140</sup> A particular attention shall be made by the Captains regarding the issues related to asylum seekers, refugees and stateless people and they shall take into account all international instruments related to the subject, such as UN Conventions, guidelines issued by UNHCR, European Asylum Convention and the Schengen Accords or any other general practices and customs recognized by treaty law.

<sup>141</sup> *Supra*, footnote 130 at p.35; see p.1, it is mentioned that this type of stowaways may be linked or related to other illicit activities, such as contraband, narcotics trafficking or smuggling of prohibited items, etc. these stowaways considered as criminals under international criminal law may present a serious threat to the ship, crew and environment, menacing the whole trade in extreme cases. Particular destinations are prevalent for such offences falling under penal law and are punished in conformity with the prevailing domestic law of the country where the offence occurred.

As long as the impacts of growing globalisation are not adequately addressed by policy makers in resolving all dimensions of the problem, these risks will persist. Hence, organized crime syndicates or transnational organized networks which are motivated to exploit the situation through infiltration and other means would want to get the most out of this lucrative market. Consequently, the use of organized crime mega networks to facilitate the illegal migration trade appears to be increasing, in view of their professionalism and organizational skills in managing groups. They are profit-driven and have well established routes from the Maghreb region towards the South European borders.<sup>142</sup> North Africa is considered as a transit point to enter the European Union (E.U). All types of vessels are targeted by these criminals and they often use detours which lengthens both the voyage and the route and fraught with more risks due to new enforcement regimes adopted by the E.U. In view of the latest Europol reports, captains, public authorities and policy makers should consider this category of stowaways, and take appropriate steps<sup>143</sup> in implementing the requisite preventive and remedial measures. All offences committed by these criminals fall under international criminal law<sup>144</sup> and domestic law. In consequence, problems of detection, investigation, prosecution and punishment of maritime crimes are raised<sup>145</sup>, and the Maghreb States are directly impacted due to their geographic location as all trafficking or smuggling routes of illegal migrants pass through the Maghreb countries, creating huge burden on legislators and policy makers to come up with answers to these threats.

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<sup>142</sup> Smuggling routes are principally from Morocco to Spain, whereas Algeria as a transit country offers multiple choices to the criminal networks due to the immensity of its territory.

<sup>143</sup> The *modus operandi* related to the routes used and contributor factors are *prima facie* elements for investigators.

<sup>144</sup> See Robert Cryer and Håkan Friman and Darryl Robinson and Elisabeth Wilmschurst, *An Introduction to International Criminal Law and Procedure*, (Cambridge: Cambridge University Press, 2007), at p.349 and p.382. Detailed procedures of international criminal investigations and prosecutions are provided and evidentiary rules described.

<sup>145</sup> The main problems are related to the detection of stowaways at the port facilities or adjacent waterfronts, revealing the lack of equipments to detect these threats, lack of information exchange between the different agencies involved, etc. Problems of investigation and prosecution of maritime crimes, mainly regarding the stowaway menace due to lack of trust of victims, lack of evidence, real or oral testimony, lack of technical knowledge on how to use international cooperation tools such as formal or informal mutual legal assistance, lack of systematic criminal procedures for taking testimony expeditiously, problems with the punishment of the maritime crime and corruption, ineffective countermeasures against the enumerated maritime crimes etc.

These criminals also represent a huge menace the ship, crew, cargo and environment, involving various scenarios.<sup>146</sup> The last suicide bombings which happened in the Maghreb highlight the nature and form of the existing threat<sup>147</sup>. The Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 1988 also has relevance in this matter<sup>148</sup>. This convention obliges Contracting Governments either to extradite or prosecute alleged offenders. All Maghreb States have ratified this Convention and its Protocol. However, the 2005 SUA Convention and its Protocol is not in force and will probably take years before entering into force, because many grey areas still persist, such as the definitions on maritime terrorism and maritime crime.

- **Push and Pull Factors:**

What are the main motivation which drives stowaways or migrants to move from the Maghreb towards Europe and targeting all types and means of transportation by sea?<sup>149</sup> From the perspective of the Maghreb region, the following push and pull factors are observed<sup>150</sup>:

- a. The causes and consequences of migration and stowaways flows are social, economic, political and environmental.

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<sup>146</sup> See ISPS Code, Part B, Section 8.9 Section 15.11 for the detailed possible threats to ships and port facilities, such as “damage to, or destruction of the ship or of a port facility, hijacking or seizure of the ship or of persons on board, tampering with cargo, unauthorized access or use, including presence of stowaways, smuggling weapons or equipment, including weapons of mass destruction, use of the ship to carry those intending to cause a security incident and /or their equipment, the use of the ship itself as a weapon or as a mean to cause damage or destruction, attacks from seaward whilst at berth or at anchor , etc.”.

<sup>147</sup> See Hassane Meftahi, “Suicide Bombing Kills 10 in Algeria” , *The Guardian*, July 11, 2007, < <http://www.guardian.co.uk/worldlatest/story/0,-6772444,00.html> >, (July, 2007).

<sup>148</sup> See SUA 88 which stipulates “that its main purpose is to ensure that appropriate action is taken against persons committing unlawful acts against ships, including the seizure of ships by force, acts of violence against persons on board ships, and the placing of devices on board a ship which are likely to damage or destroy it”. < [http://www.imo.org/Conventions/mainframe.asp?topic\\_id=259&doc\\_id=686](http://www.imo.org/Conventions/mainframe.asp?topic_id=259&doc_id=686) >, (July, 2007).

<sup>149</sup> See Ernest George Ravenstein’s laws of migration. He was a geographer of German extraction who worked at the Royal Geographical Society in London. In 1885, he published a paper entitled “*The Laws of Migration*” in the Journal of the Statistical Society. “Any migration is as a result of push forces at the origin and pull forces at the destination” (Push Pull Theory). < [http://www.geog.ucsb.edu/~tobler/publications/pdf\\_docs/movement/migration/Ravenstein.pdf](http://www.geog.ucsb.edu/~tobler/publications/pdf_docs/movement/migration/Ravenstein.pdf) >, (June, 2007).

<sup>150</sup> *Supra*, footnote 135 at p.37; see pp.1-4, giving the reasons that migrants leave their home countries continues to exist and is worsening. The report described the push and pull factors for the Maghreb region.

- b. Push factors: Dissolution and disintegration of multicultural States, social disequilibrium, religious and ethnic conflicts, natural disasters , such as earthquakes, shortage of water, global warming and climate change, discrimination against minority groups, political instability, unemployment, terrorism activities, economic situation, uncontrollable population growth and illegal migrants issues, impoverishments, poor government policies.
- c. Pull Factors: Shortage of manpower and unsaturated labor market, economic prosperity, employment opportunity, family reunion-Diaspora, better health care and life expectancy, comprehensive social security, democratic systems of government, political and social stability, historical links, common languages and existing communities in the sending countries as well as in the receiving States, expectations, human rights, propaganda and ex- colonial ties, climate and attractive regions.<sup>151</sup>

These types of stowaway are targeting ships and port facilities in the Maghreb region because of the following reasons:

- Easy access to port facilities and ships, complicity and corruption in the arena
- Fast speed ships, such as ferries and Ro-Ro cargo ships.
- Availability and easy access to information
- Old port configuration surrounded by human habitation – proximity of cities and suburbs
- Low costs and less risks involved
- Lack of adequate security equipments to detect and deter these threats

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<sup>151</sup> These comments on push and pull factors have been inspired in analyzing newspapers from the Maghreb and by using MLAW 301, lecture handouts on “*Maritime Crime & Maritime Criminal Law, Advanced Issues in Public and Private Maritime Law*” of Assistant Professor Maximo Q. Mejia, WMU, (March 8, 2007). Illegal migration by sea, stowaways and human trafficking /smuggling, threats, types of stowaways and push/pull factors were analyzed and described regarding worldwide trends.



- Poor enforcement agencies and lack of effective implementation of international instruments into national legislation
- Lack of effective preventive and remedial measures, inadequate sanctions or punishments by the repressive legal system , fines and penalties are insufficient in many cases to discourage the offenders
- Poor enforcement regarding the punishment of offenders, overcrowded prisons, social costs; stowaways are seldom jailed and often get free after trials, escape prosecution, etc.
- Organized crime or transnational organized crime networks, local gangs
- Insufficient patrols at sea, in and around port facilities.
- Other reasons.

### 3.1.3 The consequences of having stowaways on board ships

Stowaways on board can cause inter-personal problems, legal issues, financial claims and problems for shipowners as well as State authorities when the vessel is calling in their ports. Additionally, various costs come into the picture, such as those related to delays, detention<sup>152</sup>, maintenance and repatriation.<sup>153</sup> IMO again gets tough on stowaways, because this crisis and dilemma still persist and is not going away as rapidly as it should. Carriers continue to bear the burden of fines and other penalties and even severe punishments have not resolved the issue. The main trends in certain regions are increasing and getting worse<sup>154</sup>. Many countries impose fines under their domestic legislation for having stowaways on board the vessel at its arrival and in case they escape from it<sup>155</sup>. This issue highlights the impacts on the shipping sector, regarding financial and social costs supported by the shipowners or

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<sup>152</sup> See the German M/V *Cap Anamur* Case (2004). In July 2004, the crew of the vessel rescued 37 African asylum seekers from their unseaworthy boat in the Mediterranean Sea and took them aboard. On 12 July 2004, the vessel was allowed to call in Italy. The master and crew were arrested and the ship was seized.

<sup>153</sup> See *ITF*, guidelines, policy on stowaways and their treatment on board. <\_www.itf.org.uk\_>, (July, 2007).

<sup>154</sup> See “Perplexity of the refugee crisis throws masters into deep end”, *Lloyd’s List*, July 9, 2007, < www.lloydlist.com/art/1183553721373 >, (June 30, 2007). “A master who kept the stowaways battened down below because he feared for the safety of his ship if they escaped was accused of being cavalier with their human rights”. 20 stowaways were found and his crew was only 15 on that containership.

<sup>155</sup> Spain imposes a fine equivalent to 160,000 US Dollars if a stowaway escapes while the ship is in its territory. In other countries, the fines vary from 1,000 to 10,000 US Dollars according to the case.

by the public sector<sup>156</sup>. Preventive measures are essential for stowaways' threats in the port as well as on the ship. Therefore, ships' crew and ship operators have to exercise due diligence regarding this menace. IMO guidelines<sup>157</sup> are helpful devices to prevent and ease the resolution of conflicting cases.

The adoption of effective, fair and equitable measures are a huge challenge for legislators in respect of enforcement regimes and the prosecution of the offenders, because they may be in conflict with international treaties which protect the rights of refugees and asylum seekers. Prosecution, detention, expulsion, repatriation or deportation<sup>158</sup> must be done separately and in a transparent manner, i.e.; in *bona fide* tradition. However, the distinction between individuals or groups considered as stowaways, attempted stowaways and other categories is very delicate for the authorities and policy makers, in drafting effective and efficient policies to eliminate these threats. The potential consequences related to this menace are a multi-faceted problem, whereby risks and vulnerabilities are revealed, exposing the grey areas related to enforcement regimes. Given the above, there are huge legal and jurisdictional implications arising from the phenomenon of stowaways or illegal migrants by sea.

The reader will next be introduced to the legal definitions related to the key words and terms associated with this study. Furthermore, a critical analysis of the relevant conventions will also be submitted.

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<sup>156</sup> *Supra*, footnote 151 at p.41, “...once the stowaways are landed, additional costs are coming into the arena, such as health and welfare costs, administrative procedures, etc...”, whereas, “expenses on board the ship for repatriation, fines, delays, cleaning and bedding etc..., fall on the shipowner's side”. See also the risks covered by P&I Clubs, such as those stipulated in rule 19(5) and (6) of North England P&I Club, < [www.nepia.com](http://www.nepia.com) >, (June, 2007). These rules give an overview of claims which may be covered by the Club if the shipowner can prove that all steps have been taken to avoid stowaways boarding the ship. Only diversion expenses imply specific conditions prior consideration of the claim by the insurers.

<sup>157</sup> See IMO Guidelines on the Allocation of Responsibilities to Seek the Successful Resolution of Stowaway cases, Res.A.871 (20), adopted on 27 November 1997, defining clearly the procedures to be adopted by masters, shipowners, port authorities, national administrations, and other related bodies to cooperate to prevent illegal access to a vessel while it is in port, and those related to countries of transit.

<sup>158</sup> See Gilles de Kerchove and Anne Weyembergh, (eds.), *Mutual Recognition of Judicial Decisions in the Penal Field within the European Union*, (Brussels: Université Libre de Brussels, January, 2001). The authors highlighted the need to harmonize and unify the penal procedures in the European Union (E.U) and also emphasized on the need of a mutual recognition regarding the judicial decisions related to the threats described in this chapter.

### 3.1.4 The notion of stowaways and different national legal regimes

The first attempt to tackle the issue was done by CMI with the International Convention relating to stowaways in 1957, giving the first definition of stowaway<sup>159</sup>, measures to be taken when discovered on board and the procedures for disembarkation, and costs for repatriation supported by the shipowner. States did not adhere to it and became later a death born convention, and never entered into force. IMO's response to the threat was the FAL Convention, 1965 as amended<sup>160</sup>, introducing clear definitions on *attempted stowaway*, "A person who is secreted on a ship, or in cargo...., and who is detected on board before it has departed from the port", whereas *stowaway* means "...., detected on board after it has departed from a port or in the cargo while unloading it in the port of arrival, and is reported as a stowaway by the Master to the appropriate authorities". The penal provisions regarding this kind of offence vary from one State to another. As for example, in the USA<sup>161</sup>, ".....shall be fined under this title or imprisoned not more than one year, or both", whereas in the UK<sup>162</sup> a *fine based on a standard scale* is used to determine the sanction. In contrast, in Algeria the Algerian Maritime Code (AMC) in its Article 545 stipulates "that any person who stow away is found on board a ship with intent of using the ship for crossing abroad is punished six (06) months to five (05) years imprisonment and a fine of 10,000 Algerian Dinards to 50,000 Algerian Dinards. The same sanctions apply for seafarers if convicted of complicity..." A disparity in the regimes worldwide is observed, varying from one country to another, regarding fines under their domestic law, proving that their enforcement mechanisms are not harmonized. There is a dire need for new procedures and clear definitions regarding

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<sup>159</sup> See International Convention Relating to Stowaways, 1957 art.1, " stowaway means a person who, at any port or place in the vicinity thereof, secretes himself in a ship without the consent of the shipowner or the Master ....and who is on board after the ship has left that port or place".

<sup>160</sup> The International Convention on Facilitation of International Traffic, 1965 was amended in 2002 and 2005, introducing clear definitions on attempted stowaway and stowaway in Annex section 1, A, fixing standards and recommended practices for all related issues on stowaways.

<sup>161</sup> See US Code , title 18, crimes and criminal procedures part I, ch.107, S.2199, seamen and stowaways, such crimes are fined not more than \$1,000 ,< <http://frwebgate.access.gpo.gov/>>, (April 29,2007).

<sup>162</sup> Under UK Merchant Shipping Act 1995, C.21, S.103 related to stowaways, it is considered as an offence, "...shall be liable on summary conviction to a fine not exceeding level 3 on the standard scale", also under S.104, unauthorized presence on board ship,"....shall be liable on summary conviction to a fine not exceeding level 5 on the standard scale".

< [http://www.opsi.gov.uk/acts/acts1995/Ukpga\\_19950021\\_en\\_5.htm#mdiv103](http://www.opsi.gov.uk/acts/acts1995/Ukpga_19950021_en_5.htm#mdiv103) >, (April 29, 2007).

the notion of “maritime crime” and “maritime offence”. Additionally, all existing conventions do not provide legal definitions on terrorism and maritime terrorism acts. These gaps generate grey areas which are barriers to harmonization and uniformity of procedures and effective interpretation.

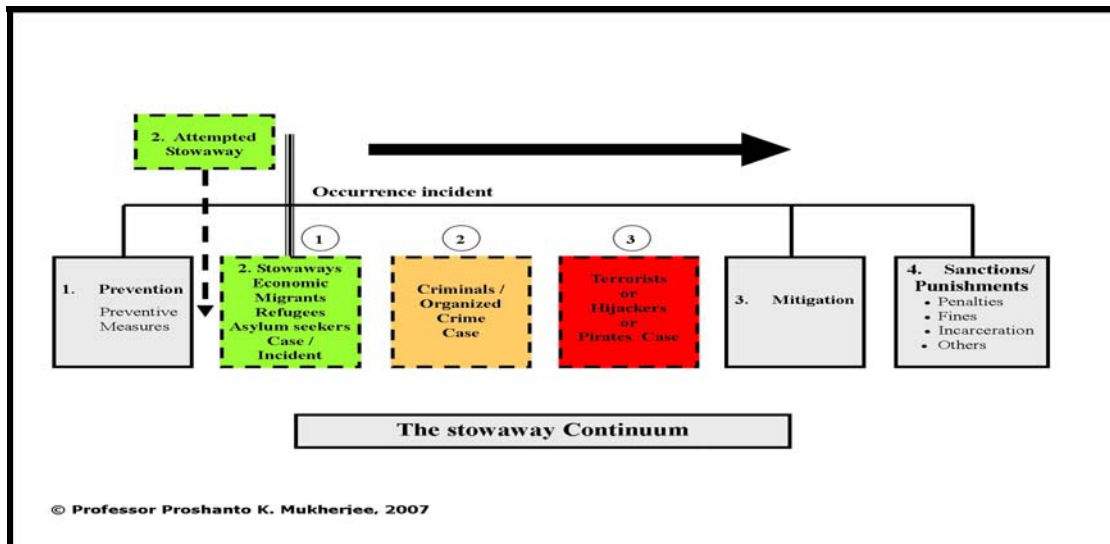


Figure 8: The Stowaway Continuum<sup>163</sup>

As illustrated in Figure 8, the spectrum and continuum vary from less violent maritime criminal acts to high violent maritime criminal acts according to the case, increasing the risks and potential consequences. Different steps are involved in this continuum and various conventions come into light as the incident falls in one of the three categorized scenarios. The preventive measures are the most important factors in maritime security to ensure an efficient and effective system and if they fail, remedial measures or mitigation will reduce the consequences due to the incident<sup>164</sup>.

The legal regimes vary from one State to another and national standards adopted through legislation are the basis for defining the sanctions, such as fines and

<sup>163</sup> This figure has been inspired by MLAW 301, lecture handouts on “Penal Law, Advanced Issues in Public and Private Maritime Law” of Professor Proshanto K. Mukherjee, WMU, (March, 2007). Depending on the considered criminal act which may vary from less to highly violent maritime act.

<sup>164</sup> See Professor P.K. Mukherjee and Max Mejia Jr., “The SUA Convention 2005: a critical evaluation of its effectiveness in suppressing maritime criminal acts”, *The Journal of International Maritime Law*, Vol.12, No.3, May-June 2006, at p.171 and p.176-179. A critical review of SUA convention has been done.

penalties to be considered regarding prosecution of stowaways, attempted stowaways and persons helping them in gaining access to ships. The consequences are various and their impacts on the ship, crew, cargo and the environment are important in case of terrorism. Criminalization of the offenders if they are crew members is another issue to consider, depending on the breaches of the code of conduct or disciplinary code according to the jurisdiction involved. Stowaways as asylum seekers must be treated in compliance with international protection principles set out in relevant treaties<sup>165</sup>. Regarding the issues on stowaways; international legal regimes do not tackle the problem in its totality, so inadequacy and grey areas persist, mainly regarding the treatment of seafarers. The 2005 Protocol of the SUA Convention<sup>166</sup> has introduced an approach to the problem by tackling the issue on human dignity and rights of crew members on board a ship, but nothing on the legal enforcement regime and harmonization of procedures.

The case *Romania v. Chang*<sup>167</sup> traumatized the whole maritime community in 1996, when three stowaways were thrown overboard. On the one hand a proliferation of international instruments strengthens the burden on ships; but on the other hand there are increased costs, delays, and risk of searches, seizure, and other prosecutions. The master alone takes all responsibilities on his shoulder and faces pressures from the external world. He has to decide on what is an *unlawful act*, contrary to the maritime traditions. Fatality or lack of enforcement regimes, are both involved in the tragic events regarding stowaways dying silently without any assistance. The threats will exist and only a common decision at international level

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<sup>165</sup> See the 1951 Refugee Convention, UNHCR and its Protocol 67, relating to the status of refugees, defines exactly the term refugee. Art.1 A (1), International Organization for Migration (IOM) resolutions must be taken into account. < <http://www.iom.int/jahia/jsp/index.jsp>>, (April 8, 2007).

<sup>166</sup> See article 8 bis of 2005 Protocol to the SUA Convention 88, setting some procedures to be followed for ensuring that all person on board are treated in conformity with the applicable provisions of international law on human dignity and rights.

<sup>167</sup> 1997 Carswell NS 127(sub nom. *Romania (State) v. Cheng*), 114 C.C.C. (3d) 289, (sub nom. *Roumania v. Cheng*) 158 N.S.R. (2d) 13, (sub nom. *Roumania v. Cheng*) 466 A.P.R. 13, [1997] N.S.J. No. 106, a Taiwan-flagged container ship has thrown 3 Romanian stowaways overboard in the icy high seas of the Atlantic, murder suspects were released and the Canadian court rejected Romanian request for extradition, only the flag State could investigate and the appropriate actions. <[http://international.westlaw.com/search/default.wl?spa=intmaritime-000&rs=WLIN7.02&fn=\\_top&sv=Split&db=CAN-ALLCASES&vr=2.0&rp=%2fsearch%2fdefault.wl&mt=WestlawInternational](http://international.westlaw.com/search/default.wl?spa=intmaritime-000&rs=WLIN7.02&fn=_top&sv=Split&db=CAN-ALLCASES&vr=2.0&rp=%2fsearch%2fdefault.wl&mt=WestlawInternational)>, (April 18, 2007).

on the issue, based on an effective and proactive approach could resolve the problem in the long term.

The shipmaster has a legal and moral obligation to render assistance to persons in distress at sea<sup>168</sup> without regard to their nationality, status or the circumstances in which they are found. This longstanding maritime tradition is an obligation enshrined in international law<sup>169</sup>.

### 3.2 Transportation of contraband goods and drugs by sea

The notion of “contraband” has not been clearly defined by the international instruments, but in its broad sense it means “an act of smuggling of a property that is unlawfully produced, possessed, or transported”<sup>170</sup>. Even some existing overlapping areas are found; *trafficking* differs from *smuggling*<sup>171</sup>. Acts of contraband concern mainly fraudulent payments, fraudulent loading or unloading carried out either inside the port or along the coast, acts of the removal or substitution during transportation of goods, all acts of customs fraud, violations of legislative or regulatory provisions and acts of importation or exportation without declaration.

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<sup>168</sup> See Rescue at Sea, a guide to principles and practice as applied to migrants and refugees, IMO/UNHCR. Also, UNCLOS 82 in its article 98(1) provides that “Every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers: (a) to render assistance to any person found at sea in danger of being lost; (b) to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him”, and Article 98(2). SOLAS 74, as amended in chapter V, Regulation 33(1), obliges the master of a ship to provide assistance to persons in distress after receiving the information and has the obligation to proceed with all speed to rescue them and to inform SAR services, chapter V, regulation 7 requires State Parties to ensure that distress communication and coordination are existent. The International Convention on Maritime Search and Rescue (SAR), 1979 obliges State Parties to “...ensure that assistance be provided to any person in distress at sea....” (Chapter 2.1.10) and, to “provide medical assistance or other needs, deliver the rescued persons in a safe place.”(Chapter 1.2.3). Guidelines on the Treatment of Persons Rescued at Sea are helpful tools to guide governments and captains of ships for implementing the new amendments as stipulated in MSC.167 (78).

<sup>169</sup> See, Justin Stares and Bryan Reyes, “Brussels issues warning of stranded migrants”, *Lloyd’s List*, May 29, 2007. < <http://www.lloydslist.com/ll/home/index.htm> >, (May, 2007).

<sup>170</sup> Means goods prohibited by law or treaty from being imported or exported, smuggled goods. < <http://research.lawyers.com/glossary/contraband.html> >, (May 8, 2007).

<sup>171</sup> See UNDOC for the distinction between trafficking from smuggling. Therefore, two Protocols are available, one on trafficking and one on smuggling, have been adopted in December 2000 to supplement the UN Convention on Transnational Organized Crime, definitions in both Protocols, art.3(a). Alien smuggling is the procurement of illegal entry by a person into a State assisted by a facilitator who has the objective of making a profit; trafficking involves an additional element of coercion or other forms of violence., < [http://www.unodc.org/pdf/crime/a\\_res\\_55/res5525e.pdf](http://www.unodc.org/pdf/crime/a_res_55/res5525e.pdf) >, (May 18, 2007).

It can be noted that the scope of concern is very large and may involve different enforcement authorities, such as customs, police and other agencies depending on the domestic law regime. The concept of contraband of goods under national legislation often includes provisions related to seizure and confiscation of goods that have been used in connection with a crime<sup>172</sup>. In many States, different enforcement regimes are adopted<sup>173</sup>.

In the Maghreb region, disparities regarding these offences and punishments stipulated in their Penal Codes are observed and the different official reports highlight the increase of narcotics' use and smuggling cases. Therefore, for the same crime or criminal offence, the sanctions, fines or penalties are not uniform worldwide<sup>174</sup> and particularly in this region. It is important to highlight that smuggling contraband by sea is a matter of customs administrations in various countries and evasion of duty or tariffs applicable and bypassing controls are the main motives. In the Maghreb States, the items most frequently smuggled are cigarettes, alcohol, spirits, electronic equipment, jewellery and various others, depending on the market. It is demand driven and changes rapidly with the globalisation and various factors<sup>175</sup>.

Different types of smuggling can be distinguished, such as goods smuggled as transported commodity, or amount of goods smuggled. It can be goods transported by an individual or in large scale using different means of transportation. Regarding

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<sup>172</sup> See US Code title 19, related to customs duties ch.4, III.V on enforcement provisions. < [http://www.access.gpo.gov/uscode/title19/chapter4\\_subtitleiii\\_partv\\_.html](http://www.access.gpo.gov/uscode/title19/chapter4_subtitleiii_partv_.html)> (April 8, 2007).

<sup>173</sup> See J.C. Smith and Brian Hogan, *Criminal Law: Cases and Materials*, 3<sup>rd</sup> edition, London: Butterworth & Co (Publishers) Ltd, 1986, at pp.110-120. The authors highlighted the issue of strict liability and drug offences. *Fernandez Case* [1970], U.K. Crim. LR 277, CA. A seaman was convicted of possessing cannabis when he was given a package to bring into England and he took it. He was caught and found guilty even he did not know that the package contained prohibited drugs. His mental state was an important factor considered by the judges.

<sup>174</sup> See Australian Custom Act 1901 < [http://www.austlii.edu.au/au/legis/cth/consol\\_act/ca1901124/](http://www.austlii.edu.au/au/legis/cth/consol_act/ca1901124/)> (April 20, 2007). See the sanctions, fines and penalties are differently perceived for smuggling cases as mentioned in comparison in the Maghreb penal codes.

<sup>175</sup> See Jagdish N.Bhagwati and Bent Hansen, "A Theoretical Analyse of Smuggling", *The Quarterly Journal of Economics*, Vol.89, No.4 (Nov, 1975), at pp.651-657, < <http://www.jstor.org/cgi-bin/jstor/printpage/00335533/di951822/95p0093r/0.pdf?backcontext=page&dowhat= Acrobat&config=jstor&userID=c3b2f7a3@mah.se/01cc99331400501bc2633&0.pdf>> , (April 8, 2007).

the area of crimes and offences, smuggling activities are crimes of opportunity. As legal systems differ from one State to another, laws on taxation, customs and sanctions also do so. This region is becoming the transit passage<sup>176</sup> for all smugglers and traffickers from or outside the continent, using new routes to convoy their prohibited items to Europe or other destination as published by Europol and WCO reports in 2007. These threats are mainly observed by land and sea routes, because the aviation industry has strengthened the security measures on planes and airports.

The *Keck* case<sup>177</sup> has set the contours of most smuggling regulations in the U.S.A. Enforcement power is exercised by customs in most countries and may board any vessel, and examine the vessel and any merchandise or person carried on board. Vessels may be brought into a port and investigated for compliance with regulations as stipulated in the national legislation. Ships involved in smuggling could be confiscated, sold or destroyed in extreme cases. Law enforcement is one of the most important aspects of the controls regarding smuggling. The risks<sup>178</sup> and potential consequences are that from normal contraband goods, drugs and arms could come into the picture and at the end of the spectrum, terrorist trying to smuggle nuclear devices, safety, security and the environment could be directly affected.

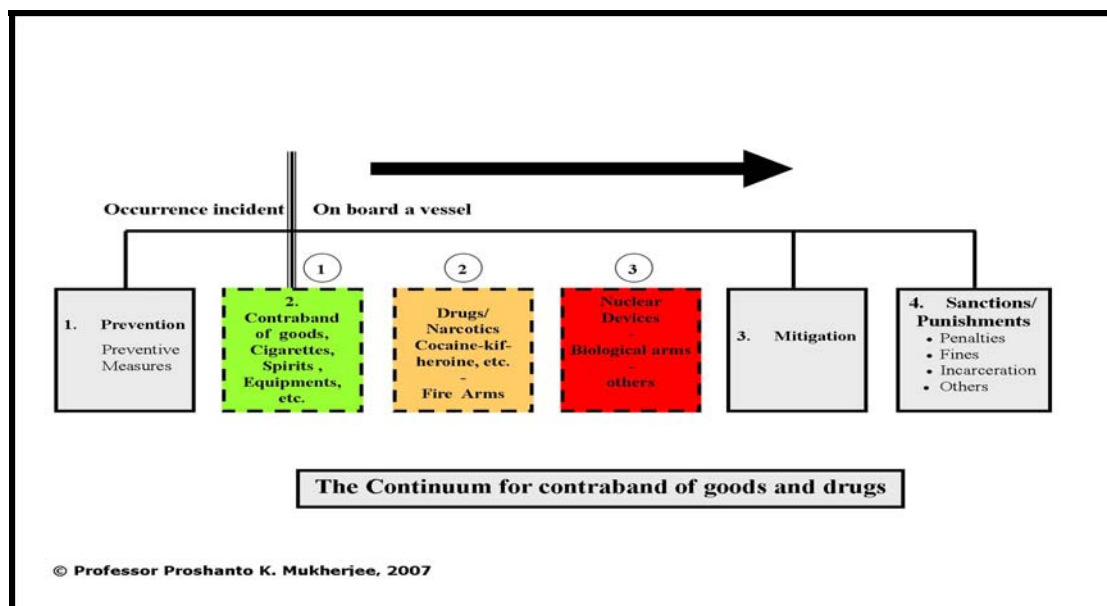
Thus, a continuum for contraband of goods and drugs is needed to understand the relationship between the risks, incidents/threats and the preventive measures on a defined scale. As illustrated in Figure 9 below, from minor to a catastrophic scenario, risks are higher.

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<sup>176</sup> John Zarocostas, "Drug smugglers target countries in three continents for transshipment", *Lloyd's List*, March 8, 2007. Cocaine and new drugs are transshipped through the African continent by the smugglers.

<sup>177</sup> *Keck v. U S*, 172 U.S. 434 (1899), a passenger on a ship attempted to bring diamonds into an US port and was caught during the search aboard that ship by the customs, the Court decided that person was not guilty and did not smuggle, because she had the opportunity to claim them after she would disembark from the ship. < <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=172&invol=434>> ( April 9, 2007). See B.A.H. Paritt, *Illegal Drugs by Sea*, London: The Nautical Institute, 1998 at p.7 and p.24. It is also suggested to use International Chamber of Shipping (ICS), *Drug Trafficking and Drug Abuse: Guidelines for Owners and Masters on Recognition and Detection*, London: Secretary General, ICS, (August 1988).





**Figure 9: The continuum for contraband of goods and drugs**<sup>179</sup>

The *Santorini* case on weapons smuggling in 2003 and *Karine A* case<sup>180</sup> are the most related examples regarding this issue. By analyzing the spectrum, different international instruments described in the beginning of this paper come into the pictures for high violent criminal acts and maritime zones issues. For nuclear devices, SUA 88 and its Protocols<sup>181</sup> and other UN treaties apply. The ISPS Code does not provide a law enforcement provision for States; it is left to national legislation. Criminal legislation deals with misdeclaration to customs and contraband issues, because it is a crime according to the treaties and it falls under the Penal regime, as criminal offence. The main grey areas are the complexity of procedures which hamper the free trade facilitation as stipulated by GATT/WTO, UNCITRAL<sup>182</sup>. The proactive approach is the solution.

<sup>179</sup> *Supra*, see footnote 163 at p.45. The author highlights the usefulness of the continuum for crimes.

<sup>180</sup> The *Karin A* was a 4,000 ton freighter intercepted by the Israel Defense Forces on 3 January 2002 while it carried a wide variety of weapons. While the ship itself was worth an estimated \$400,000 and the civilian cargo used to conceal the weapons approximately \$3,000,000  
< <http://www.globalsecurity.org/military/world/russia/katyusha.htm>>, (May 8, 2007).

<sup>181</sup> SUA 88 means the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 1988 and the 2005 Protocol to the SUA Convention, Article 3 stipulates, "... and the placing of devices on board a ship which are likely to destroy or damage it".

<sup>182</sup> UNCITRAL has published documents on commercial fraud where smuggling was considered as a threat and new procedures were implemented in the shipping industry.

The complexity of procedures under customs provisions must be simplified. Regarding policy issues, overlapping conventions dealing with the same subject exist and new approaches must be implemented, such as enforcement strategies, international co-operation and communication with the organizations involved, effective networks, regional cooperation, audits, and a review of operational procedures by strengthening the sanctions if breaches are detected. As societies move forward, trade is increasing, and the container security will be the main concern as more mega container ships are built. A priority for the effective implementation of measures is necessary. The transport chain risk and multi modal issues will increase, due to new threats, technology, new markets, creating a need for developing countries to overcome the gaps and lack of uniformity. Exchange of information based on intelligence and studies done on database research on crimes should be done.

A review of law enforcement procedure is necessary. For container issues, models based on Container Security initiative and C-TPAT<sup>183</sup> may be used to reinforce the national legislation and strengthen the countermeasures in case of incidents. Drug smuggling by sea is a phenomenon of the illegal drug trade based on the thinking that those who take the least risk earn the most money, while those who take the most risk, earn the least regarding seamen involved in numerous cases. Official reports highlight these trends in the Maghreb region, particularly in Morocco, Algeria<sup>184</sup> and Tunisia. The type of drug smuggled in this area is essentially the *kif*, but *cocaine* and other illicit drugs have entered the arena recently and are threatening

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<sup>183</sup> Customs-Trade Partnership Against Terrorism (C-TPAT): to secure the Supply Chain, and control effectiveness.

<sup>184</sup> The recent case related to the Algerian M/V *El Djorf* belonging to the shipping company CNAN Group was arrested in the port of Antwerp in Belgium for possession on board of an important quantity of kif, 12 stowaways on board and contraband of cigarettes was brought the public attention. The ship was detained as result of an administrative procedure and the penalties for its release were fixed to 100,000 Euros. The vessel was sailing to Turkey, but during the voyage it received an order to deviate to Antwerp. The Algerian authorities at the arrival of the ship in Algiers immediately prosecuted and jailed the master and some managers involved from the shipping company according to the national newspaper *El Watan*, May 2, 2005. < [http://www.elwatan.com/spip.php?page=article&id\\_article=18413](http://www.elwatan.com/spip.php?page=article&id_article=18413) >, (June, 2007).

the whole shipping trade. Ships and other means of transportation by sea are the most targeted in view of the latest incidents<sup>185</sup>.

Law enforcement may become obsolete as globalisation is increasing, and risk management could be a solution for detecting the new threats. Data exchange on crimes, organized crime and transnational organized crime can draw the real picture of the situation as long as security assessment is done on accurate information about threats and implementation processes. The harmonizing of policies to ensure free movement of goods and diminishing the risks are important objectives to realise. Tracking product seizure, counterfeit goods policies have to be strengthened. Contraband of goods by crew on board a ship is a serious breach under the Penal Code and Shipping Legislation<sup>186</sup>. However, in fixing the sanctions by criminalizing seafarers, an important and complex debate for the maritime industry<sup>187</sup> should be raised.

Some actions are needed in the arena of policy making to balance the threats by using high technology and IMO Guidelines, and other treaties related to contraband of goods by sea. A proactive approach is required for policy makers, based on gathering information, co-operation at all levels and commitment of all entities involved by instituting audits, and controlling effective implementation in order to harmonize the procedures, gathering new technologies and analyzing the costs. The main benefit against this cancer threatening the modern society would be on the public side by ensuring effective policy making based on social, political and economical considerations. However, a review and separation of conventions related or linked directly to the same matters could be done, by eliminating ambiguity and overlapping issues.

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<sup>185</sup> Eoin O’Cinneide, “Drug ship seized off Spain, in the Alboran Sea between Spain and Morocco”, *Trade Winds*, (February 16, 2007).

<sup>186</sup> See U.K Merchant Shipping Act 1995 (C. 21) for crew offences.

<sup>187</sup> See Andree Kirchner, “Maritime security: consequences for maritime transport industry”, in *Ocean Yearbook, Vol.19: maritime transport and security*, pp.299-309, *International Ocean Institute (IOI)*, London: University of Chicago Press, 2005.

Transportation of contraband goods and stowaways share some similar ingredients regarding the evolution of events, and associated risks involving potential consequences according to the analysis of their continuum. A minor threat may become a catastrophic scenario or incident if the preventive measures fail. Both need efficient means to mitigate after deterrence and have the same sanctions if a maritime criminal act occurs. Therefore, new tools are needed for policy makers and legislators in the Maghreb, such as efficient and proactive solutions regarding enforcement regimes at all levels. Innovation, harmonization of procedures and cooperation are vital to ensure fairness and equity regarding penalties and fines applied in different jurisdictions. The Maghreb countries facing gaps in their enforcement capabilities and considering to have elaborated statutory provisions in their maritime legislation should enhance the standards used, by addressing the issues on stowaways, criminal offences, fines and penalties with regard to the public welfare and the shipping industry<sup>188</sup>.

Regulatory and penal provisions should be reinforced by assessing all probable threats faced by the ports, port facilities and ships by collaborating with all enforcement authorities and agencies involved in the sector. Regarding certain treaties and international instruments, overlapping issues and new needs may be considered in the short term to tackle all grey areas requiring improvements and harmonization based on regional agreements. Policy proposals may consist in an increased cooperation between all authorities to exchange data on smuggling and stowaways, for gathering information, on the different audits and risk management<sup>189</sup>. Security costs and cost benefit analysis must be done regularly. Enforcement of policy, implementation mechanisms, new countermeasures are needed in view of the latest data published by IMO<sup>190</sup> and UN agencies regarding the issues related to

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<sup>188</sup> See Proshanto K. Mukherjee, *Maritime Legislation*, Malmö: World Maritime University, 2002 at p.186 and p.195. A detailed explanation on different steps to be undertaken in drafting legislation is given by the author. Also, different drafting processes anatomies of statutes, styles and forms are provided.

<sup>189</sup> Ulrich Beck, *Risk Society-Towards a New Modernity*, London: Sage Publications, 1992. The author emphasizes on the perception of risks by the society and the evolution of technology contributing to new threats and challenges.

<sup>190</sup>See IMO report, "Rescue at sea, responding to migrants and asylum", *Seaways*, October 2006.

contraband, smuggling, trafficking and stowaways. The use of IMO guidelines<sup>191</sup>, UN reports and the maritime industry practices<sup>192</sup> could diminish the risks of occurrence by targeting the organized crime and on a basis of regional agreements an exchange of information between all authorities concerned and the building of an international network to facilitate the sea trade.

In conclusion, contraband of goods and drugs as well as stowaway issues could be tackled by resolving the missing legal and technical aspects by encouraging security expertise<sup>193</sup> and building a culture based on awareness and challenges<sup>194</sup>. The Maghreb region considered as a bridge between Europe and the continent will continue to suffer from all these threats and only long term solutions may resolve partly some of them.

The reader will in the next chapter be exposed to policy issues related to State responsibility and government strategies on transportation of stowaways, drugs and contraband goods by sea from a Maghreb regional perspective. The debate also examines conflicting interests and assesses their impacts on policy making.

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<sup>191</sup> IMO guidelines assist in providing the standards to be adopted and give the recommended practices to fight against these threats. See, revised Guidelines on Illicit drug traffick, MSC/Circ.228 (82), December 2006, MSC/Circ. 443, MSC/Circ.559, IMO-Res.A.867 (20), Res.A.871 (20) and A.872 (20), etc.

<sup>192</sup> See Baltic International Maritime Council (BIMCO), “*The shipmaster’s security manual: preventive measures and remedies for drug smuggling, piracy and stowaways*”, Copenhagen: BIMCO, 1998.

<sup>193</sup> See Baltic International Maritime Council (BIMCO), “Ship Security”, *BIMCO Bulletin*, Vol.101, No.6, December, 2006. The authors highlight the need of private security expertise from the shipping industry to enhance maritime security awareness related to ship security issues.

<sup>194</sup> See Paul Lightburn, *International Ship and Port Facility Security Code (ISPS Code): port security handbook*, Surrey: Lloyd’s Register-Fairplay, 2004. The author emphasizes the importance of security awareness and security expertise to tackle all security issues related to ports and port facilities.

## **CHAPTER 4**

### **DEVELOPMENT OF POLICY IN THE MAGHREB REGION: NEW CHALLENGES OR DILEMMA?**

“The welfare of the people is the ultimate law (Salus Populi Suprema Est Lex).”-  
Marcus Tullius Cicero, Roman author, orator and politician, 106 BC-43 BC

#### **4.1 The Maghreb region at the center of maritime security concerns in the Mediterranean arena**

For decades, Maghreb maritime security has been a sensitive issue for policy makers, legislators and strategists, generating numerous debates on both sides of the Mediterranean Sea. As mentioned in the previous chapters, little has changed on stowaways, drugs, contraband goods by sea and related security issues. Even though stowaway legislation and procedures have strengthened in the Maghreb region, they are still a headache for the policy makers and the shipping industry. The ISM Code<sup>195</sup> and the ISPS Code<sup>196</sup> did not create sufficient impact in resolving these threats; their effects are still insignificant in reducing the level of the menace to a minimum acceptable standard anticipated by the whole maritime community as they were intended to foster positive continuous improvements in those States in the Maghreb. The consequential costs and delays generated by such incidents were not previously considered by the shipowners and other stakeholders of the maritime

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<sup>195</sup> See Phil Anderson, *ISM Code: A practical guide to the legal and insurance implications*, 2<sup>nd</sup> ed., London: Lloyd’s Practical Shipping Guides (LLP), 2005 at p.155 and p.164. Criminal liability and insurance implications are highlighted by the author. Failure to comply with the Code may give rise to criminal sanctions under the legislation implementing the Code itself in various jurisdictions.

<sup>196</sup> See Regina Asariotis, “Implementation of the ISPS Code: an overview of recent developments”, *Journal of International Maritime Law*, Vol.12, No.6, July-August 2005, at pp.275-276. Particular areas of concern among interested parties in the shipping industry are exposed, particularly those concerning the access and boarding procedures of ships and the fact that the uniform observance of mandatory regulations imposed by the ISPS Code is still not achieved. The recent cases on stowaways, drugs and contraband by sea in the Maghreb have highlighted the differences in compliance and illustrated that the control measures are still insufficient to counter these threats.

sector, and thus resulted in numerous complex issues, where all the actors involved in the maritime adventure were confronted by an explosion of claims and had to find the most appropriate countermeasures to reduce the effects of such threats.

The role of the Maritime Administration of the flag State<sup>197</sup> is critical, because it performs a number of crucial tasks within this context. As an authority issuing certificates of compliance, the flag State is a key player involved in the whole maritime security system<sup>198</sup>. In the Maghreb, even though the complete security management process was done by different States involved on the due date for implementation of the ISPS Code, the risks shifted and new challenges were faced by policy makers and the shipping industry who had to respond proactively to these new threats. As mentioned by Mejia, “the new regime is complicated and the various threats perceived worldwide, as well as the varying readiness of States to implement IMO instruments....”<sup>199</sup>, have been brought to light during the recent years; and the manner in which they have been done, was influenced by numerous and complex factors. The latest data and graphs from the Maghreb region are shown in Annexes C and D; they highlight the effects of these differences on global shipping and the sea trade. In particular, the recent events and incidents related to stowaways, drugs and contraband which occurred in the Maghreb States confirmed the previous hypothesis put forward by this writer when analyzing the allocation of responsibilities with respect to maritime security assessments and risk analysis of various port incidents

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<sup>197</sup> See UNCLOS 82, article 94 regarding the duties of the flag state.

<sup>198</sup> The ISPS Code in Part A, Section 4.1 stipulates clearly the responsibilities of contracting governments related to the security levels, guidance for protection from security incidents, and Section 4.3 sets out the security related duties which may be delegated to a recognized security organization (RSO) and those which may not, such as approving port facility security assessment (PFSA) and port facility security plan (PFSP), their subsequent amendments, setting of the applicable security level, determining the port facilities which will be required to designate a port facility security officer (PFSO), exercising the controls and compliance measures pursuant to regulation XI-2/9, and establishing clearly the requirements regarding the Declaration of Security (DOS). A test of effectiveness of approved ship security plans and port facility security plans as well as the amendments to them, which the flag States have approved or those which have been approved on their behalf must be done at regular interval to ensure the system is efficient and effective all the time.

<sup>199</sup> See Maximo Q. Mejia Jr. (ed.), *Contemporary Issues in Maritime Security, a selection of papers and presentations from the Workshop-Symposium on the Practical Implementation and Critical Evaluation of the ISPS Code 11-15 August 2003 and the International Symposium on Contemporary Issues in Maritime Security 30 August to 1 September 2004*, Malmö: WMU, 2005 at pp.9-15.

and the link between causes and consequences related to flag states, companies and ships entitled to fly their flags, and masters' responsibilities.

## **4.2 New legal approaches and the revision of existing maritime security regimes: a possible solution for policy makers**

The threats generated by poor enforcement regimes have legal and commercial consequences which are borne by all parties involved in the maritime shipping sector and sea trade. Therefore, a proactive approach should be taken by the national authorities through various reviews of the existing policies and implementation processes already in force in their jurisdictions. Additionally, a continuous security reassessment of port facilities and ships entitled to fly their flags should be done according to a regular schedule in the Maghreb region, as stipulated by the ISPS Code and national law, in order that national designated authorities who are charged with the responsibility to verify the whole risk management system and to control the efficiency and effectiveness of all approved plans and procedures in force since 1<sup>st</sup> July 2004, could act accordingly. New legal and ergonomic considerations<sup>200</sup> as well as law and economics of maritime security<sup>201</sup> aspects should be taken into account by policy makers and legislators when drafting legislation and/or inserting amendments into existing instruments in their domestic law, and when attempting to promote *security awareness* and reduce to a minimum

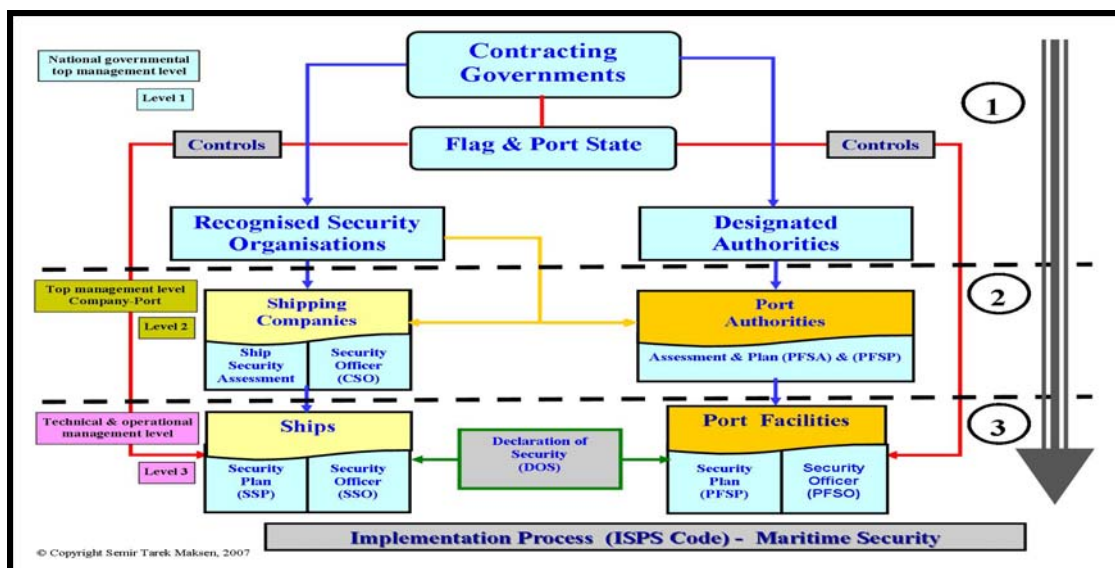
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<sup>200</sup> See Proshanto K. Mukherjee and Max Mejia, "The ISPS Code: legal and ergonomic considerations", in Maximo Q. Mejia Jr. (ed.), *Contemporary Issues in Maritime Security, a selection of papers and presentations from the Workshop-Symposium on the Practical Implementation and Critical Evaluation of the ISPS Code 11-15 August 2003 and the International Symposium on Contemporary Issues in Maritime Security 30 August to 1 September 2004*, Malmö: WMU, 2005 at pp.40-44. The authors have emphasized the human behavioral and biological characteristics, which influence the human interaction with the system. They have also focused on the norms adopted by IMO in rule-making as well as the different steps and processes involved in the implementation of the ISPS Code. Finally, an in-depth analysis on the subject is provided to highlight the changes taking place in the legal maritime security arena, bringing to light the need for new considerations and initiatives by all the actors involved in reviewing legal issues related to this sensitive domain of "*maritime security awareness*".

<sup>201</sup> See Jingjing Xu, "The law and economics of maritime security: selected issues in perspective", in Maximo Q. Mejia Jr. (ed.), *Contemporary Issues in Maritime Security, a selection of papers and presentations from the Workshop-Symposium on the Practical Implementation and Critical Evaluation of the ISPS Code 11-15 August 2003 and the International Symposium on Contemporary Issues in Maritime Security 30 August to 1 September 2004*, Malmö: WMU, 2005 at pp.319-329.



the number of incidents related to the threats described in this dissertation. Additionally, *private law aspects* and *commercial concerns*<sup>202</sup> associated with emerging issues in the domain of maritime security should be considered when analyzing the available data and annual reports on incidents occurring in Maghreb's ports or aboard ships while in their jurisdictions. Trade facilitation and the shipping industry interests must be preserved and policy makers should tackle these sensitive issues from all sides and perspectives to identify the most appropriate methods to be used when assessing, evaluating, reviewing and implementing new legal perspectives to their national legislation. The improvement of preventive and remedial security measures depends on the methods and concepts used during the different steps concerned by the review process as well as the result of cost-benefit-analysis.



**Figure 10:** Flow chart “Implementation Process” (ISPS Code - SOLAS, Ch.XI-2)

As described in Figure 10, a *top down approach* should be carried out when implementing the ISPS Code by the Contracting Government. The policy makers, legislators and experts in maritime security may use this flow chart during the review stage to identify different responsibilities<sup>203</sup> and tasks to be undertaken by the numerous actors involved in the whole system. Three security levels are to be

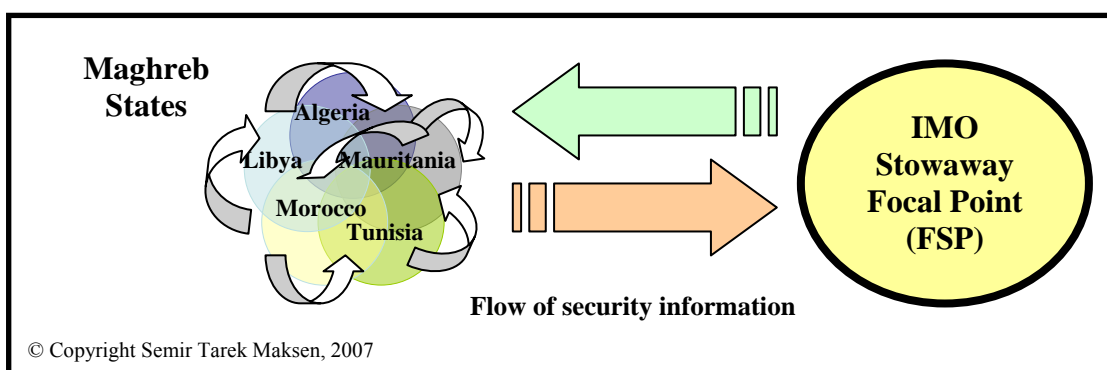
<sup>202</sup> Delays, restriction of maritime commercial operations, detention or expulsion of vessels from ports have huge impacts on the costs suffered by the shipowners or charterers and any other trading party involved.

<sup>203</sup> See the responsibilities of contracting governments, obligations of companies and ships (ISPS code).

considered by a State Party, desiring to ensure the efficiency and effectiveness of its implementation process by giving a clear picture on what should be done and which entity is entitled to do it according to the mandatory provisions of part A of the ISPS Code and the requirements of SOLAS chapter XI-2.

The maritime security verification surveys are conducted by Flag State Administrations<sup>204</sup> or Recognized Security Organizations (RSO) acting on their behalf, to ensure that the security system at all levels of the different parties involved, comply with the requirements stipulated in the ISPS Code part A and SOLAS chapter XI-2, and should be conducted in accordance with internationally accepted audit practices, such as ISO 10011-1.

The IMO guidelines are useful documents giving clear guidance on how to address the different issues at all levels, and thus, policy makers may find important information on required standards, development of procedures and implementation processes. The flows of information and communication channels used to manage the system are vital components which must be taken into account by all parties involved at the different management levels. It should be done internally as well as externally to improve the flow of security information.



**Figure 11: Flow of security information between the Maghreb region & IMO**

<sup>204</sup> See section 4 and 19 Part/ A and the guidance given in Part/B, ISPS Code for the requirements regarding flag State Administrations responsibilities as well as those stipulated in the different sub-sections related to the main parts of the Code and under the regulations of chapter XI-2, SOLAS 74, as amended.

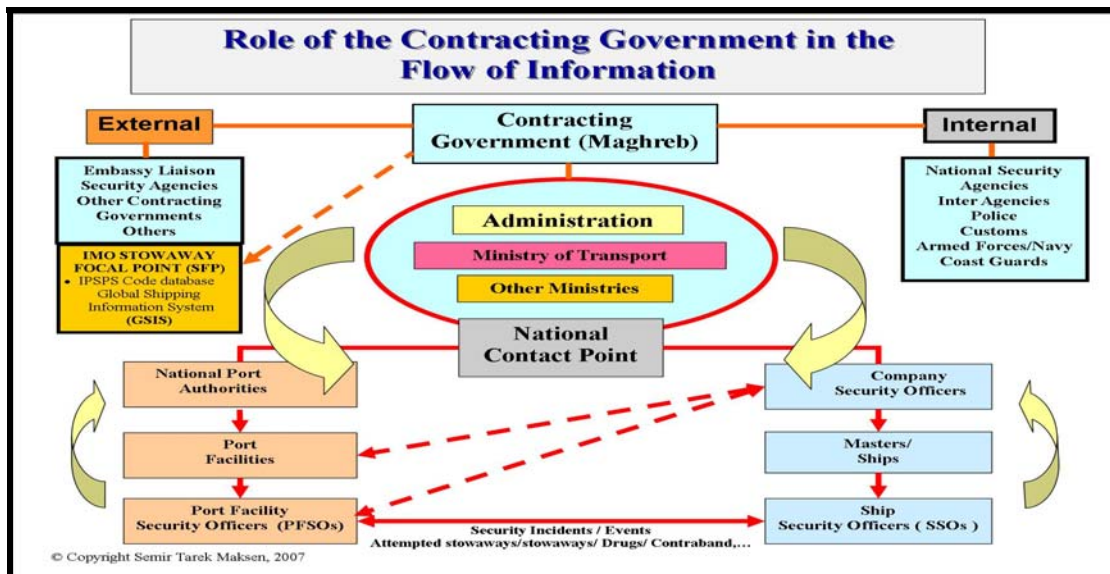


Figure 12: Flow chart “Security Information” (ISPS Code - SOLAS, Ch.XI-2)

As mentioned in Figure 12, the reporting system and flow of security information related to the different threats, incidents, events, data and other related security matters are important components of the system, and are vital to ensure a continuous up dating and exchanges of security information at the security level decided by the competent national authorities. Policy makers may use it as a tool to improve the grey areas in the system and when they are reviewing existing laws.

The establishment of a stowaway focal point (SFP) at IMO is an important proactive step to focus, improve the management of security related information, and obtain up dated data on attempted stowaways/stowaways incidents from Contracting Governments. However, incidents on smuggling drugs on board ships / port facilities or related issues should be considered by IMO, as well as the phenomenon of contraband goods, endangering the maritime adventure in many parts of the world<sup>205</sup>. Clear reports and statistics on those incidents or presumed events, should be provided by Contracting Governments to present an overview of the subject.

<sup>205</sup> *Colley West Shipping Company Ltd. v. Minister of Citizenship and Immigration*, 2006 FC 1419. The court stated that the application for judicial review of a decision ordering the agent to pay the costs of deporting a stowaway who had entered Canada illegally was allowed and the demand for payment quashed. This case highlights the immigration and deportation costs issues and the liability of agent for stowaways.

These reports or data may be useful in examining in-depth the root causes and consequences of those previously enumerated threats, hence, furnishing in the short term the possibility of obtaining efficient and effective procedures, which may assist many States in combating such maritime crimes. New guidelines on these sensitive issues, delivered under IMO auspices would be a revolutionary step in tackling proactively this modern *cancer* with its various *metastases*, threatening the whole shipping industry, as long as globalization and the increase of sea trade are the fixed goals for the coming years.

New concerns on this sensitive subject have been considered by the European Union (EU)<sup>206</sup> and many reports from its member States in 2007 here highlighted the growing risks existing in the Mediterranean Sea arena. Since the Maghreb region is at the centre of their preoccupations and the problem is localized in these transit countries, the solutions to maritime security issues will remain a huge challenge<sup>207</sup>.

From the Maghreb perspective, new legal regimes and amendments are urgently needed including the incorporation of proactive approaches by the member States into their national legislation, to counter attempted stowaways and stowaways' incidents, smuggling of drugs and contraband goods offences, occurring widely as indicated in published reports of IMO, UNODC, WCO and EUROPOL on the subject. These threats cover numerous serious crimes which are aimed at financial and private gain, usually masterminded by organized crime syndicates which facilitate the illegal transport aboard ships of the outlaw commodities and unlawful entry into States, through port facilities in countries of origin, as well as in countries of destination. Urgent efforts to tackle these sensitive issues at a macro level is the

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<sup>206</sup> See EU directives 2005/65/EC, regulation (EC) No. 725/2004, adopted the 31 March 2004, on enhancing ship and port facility security and the Commission regulation (EC) No. 884/2005 of 10 June 2005, laying down procedures for conducting Commission inspection in the field of maritime security, as well as related reports published by the European Union Commissions and their policy implications within the community and related costs shared among the States to implement efficiently and effectively the security measures adopted in the EU. <[www.eur-lex.europa.eu](http://www.eur-lex.europa.eu)>, (July 2007).

<sup>207</sup> See *Europol report*, "Organized Illegal immigration into the European Union", The Hague (Netherlands): Europol, January 2007, <[http://www.europol.europa.eu/publications/Serious\\_Crime\\_Overviews/Facilitated\\_Illegal\\_Immigration\\_FactSheet2007.pdf](http://www.europol.europa.eu/publications/Serious_Crime_Overviews/Facilitated_Illegal_Immigration_FactSheet2007.pdf)>, (July 25, 2007).

first approach, and later at a micro level, attempts need to be made to identify the most appropriate countermeasures to eliminate the risks generated by many grey areas and gaps in national legislation, ports regulations, companies' and ships' procedures. In particular, those described threats menacing the sea trade and endangering the whole shipping sector, bringing to light new concerns to policy makers and legislators in the Maghreb region, such as the criminalization of seafarers<sup>208</sup>, marine insurance claims and numerous other apprehensions from the different involved parties must be carefully analyzed when drafting legislation and pushing new regulations or rules into the national security arena.

### **4.3 Maritime Security Incidents Mapping Concept and Analysis: new perspectives for policy makers**

Another point adding to the debate on these issues is related to the problem of false documents used by the stowaways or provided by criminal organizations to smugglers and traffickers involved in various forms of crimes or offences which were not considered previously by policy makers and legislators, regarding the type, nature and form of these new menaces and the appropriate sanctions, penalties and fines to be incorporated into the existing legislation. Facilitated maritime criminal

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<sup>208</sup> See Proshanto K. Mukherjee, "Criminalization and unfair treatment: the seafarer's perspective", *Journal of International Maritime Law*, vol. 12, No.5, September- October 2006, at pp.325-336. The author stated that "Criminalization with reference to a person means turning someone into a criminal by making his or her activity illegal. Thus, a person is criminalized if that person's conduct or act is criminal". The punishments or the imposition of penal sanctions which defines a crime and permits to distinguish it from a tort or delict, considered as civil wrong. Also, a clear distinction between criminal offence and an offence must be made by the policy makers and legislators when drafting legislation. An offence is more considered as a public welfare or regulatory offence, whereas, a criminal offence is depending on the proof of *mens rea*. The author highlights clearly the distinction between *mens rea* offences and those characterized as *strict liability* or *half way house* offences. These offences are based on proof of *actus reus*. Criminal offences are based on the general principle "*maxim actus non facit reum nisi mens sit rea*", meaning that "only a guilty mind makes an act criminal". The provisions in the penal regimes indicate whether an offence is considered as a *mens rea* or *actus reus* offence. In the maritime regulatory regimes arena, they are considered as "violations" under the SOLAS Convention, ISPS Code requirements, MARPOL Convention, etc. Safety, security and pollution offences often belong to the half-way house category as mentioned by professor Mukherjee. Another important point highlighted by the author is to avoid seafarers to be assimilated as *scapegoats* or victims of existing gaps in legal regimes, resulting in an unfair punishment in many cases. Human rights and particularly fundamental rights in the treatment of seafarers should be considered by the policy makers and legislators when drafting legislation and transforming violations under regulatory regimes into offences in domestic law.

activities in their broad sense cover the production and procurement of falsified documents, providing false visa and permits to presumed stowaways, refugees, or asylum seekers seeking to get access by any available means to port facilities and aboard ships. In the worst case scenario, terrorists smuggled as stowaways hidden on board commercial vessels escape the country of origin and enter illegally a foreign territory to commit unlawful acts against defined targets. In this context, policy makers face complex issues. Dealing with these offences is a huge challenge as well as a dilemma for unprepared Administrations with regard to the most appropriate procedures, countermeasures and responses to this menace. Thus, any maritime crime is revealed as a serious complex problem for the legislator in terms of categorization according to the existing law.

Considering the different UN treaties on the subject and their implementation into the national field is another challenge or dilemma for policy makers and legislators. Issues of organized crime, corruption, trafficking in human beings, counter terrorism, transnational offences, illegal migration, smuggling of drugs by ships or other means of transport by sea, contraband of goods and criminal justice reforms, etc., imply huge sacrifice on the part of the people involved in grappling with these sensitive security matters, as not only expertise in the field is required, but also the participation of the whole society to preserve the social interests<sup>209</sup>. State responsibility<sup>210</sup>, sovereignty and national interests have a bearing on solving these emerging problems. Strict application of the laws and their punishments as stipulated by the existing instruments in the domestic field here featured prominently in determining the most appropriate sanctions to eliminate these threats. However, their

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<sup>209</sup> Security policies are often confronted with strong social, political, and economic interests. Government failures to tackle these sensitive maritime security issues, discussed in this chapter may generate conflicts and claims which hamper policy makers in finding a balanced way to satisfy all parties involved in the problem. Social interests are numerous and must be considered when studying the market and externalities.

<sup>210</sup> See U.N document A/ CN.4/ 315, “*force majeure*” and “*fortuitous event*” as circumstances precluding wrongfulness: survey of State practice, international judicial decisions and doctrine-study prepared by the Secretariat on: “*State responsibility*”, extract from the year book of the International Law Commission, 1978, vol.II(1) at p.91. See also ILC articles 1,2, 3, 4 and 5, *General Principles* on State responsibility, wrongful acts under international law, elements of an internationally wrongful acts of a State, characterization of an act of a State as internationally wrongful and the notion of “*Act of the State*”.

effects are insufficient in light of the latest reported incidents in the Maghreb region. Preventive measures<sup>211</sup> are the most important factors to be considered in protecting critical infrastructures, port facilities, companies and ships, and reducing the vulnerabilities and risks generated by such threats. Remedial measures or mitigation actions<sup>212</sup> come into play only after the incident occurs and provide the last barrier before the existing defense system collapses and affects the general security, safety and environment around it.

When drafting legislation or implementing new regulations and rules into the existing legislation<sup>213</sup>, policy makers and legislators must keep in mind those details and try to revise all existing instruments according to the expressed needs, available data and statistics, reports from recognized experts on the subject, as well as the flow of information at internal and external levels which may predict the likelihood of the situation in advance and thus allow immediate actions to be taken to minimize risks and potential consequences in the short-term. For the long-term, a strict policy analysis on the subject must be undertaken<sup>214</sup>. A closer look at analytical functions is also needed, because the nature of policy analysis can vary widely<sup>215</sup>. As mentioned by Weimer and Vining, “Public policy encourages, discourages, prohibits, or prescribes private actions. Beginning with the premise that individuals generally act in their own best interests, policy analysts bear the burden of providing the rationale for any governmental interference with private choice. The burden applies to evaluating existing policies as well as new initiatives”<sup>216</sup>. As a primordial element in any analysis, it frequently provides the best initial insight into complex situations,

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<sup>211</sup> Preventive measures are those implemented to prevent any incident or event to occur.

<sup>212</sup> Mitigation actions are those measures in place to be used after an incident occurred to mitigate its effects.

<sup>213</sup> *Supra*, see footnote 188 at p.53. See, transformation of conventions into national legislation at p.217.

<sup>214</sup> See David L. Weimer and Aidan R. Vining, *Policy Analysis: concept and practice*, 3<sup>rd</sup> ed., New Jersey: Prentice Hall, Inc., 1998, at pp.28-34.

<sup>215</sup> *Ibid.* at p.39, the author states that a structured analysis that assesses problems, systematically compares alternatives for solving them. Policy makers must have an understanding of political and organizational behavior in order to predict and influence the feasibility of adoption and successful implementation of policies. Technical skills are required as well as a framework for ethics.

<sup>216</sup> *Ibid.* at p.58, the author emphasizes the efficiency of the ideal conceptual model and suggests taking into consideration other factors, such as human dignity, the promotion of fairness, distributional equity, economic opportunity and political participation, etc.

which is the case in stowaways, smuggling and trafficking issues. Rationale for public policy must be taken into account by policy makers, such as social welfare, values, norms, habits, customs, conventions and other factors that influence or affect directly the decision-making process. Additionally, the political feasibility and social indicators<sup>217</sup> must also be considered in drafting legislation or amending regulations in the existing instruments. Another point to be considered is related to the costs generated by regulations<sup>218</sup>. Both law and the economics of maritime security are important components which should be considered when analyzing in-depth security incidents which will give a global overview of the different costs shared by the various parties involved<sup>219</sup> and provide the necessary tools and concepts in overcoming budgetary constraints or interpreting economic effects caused by new security measures or countermeasures implemented by policy makers to solve the problem. Law and economics analysis of a security incident could assist investigators to determine the costs and policy impacts generated by such an event. Thus, incentives, opportunity costs, market mechanisms and prices deducted from the in-depth study of the security incident are vital components to be considered. They provide the most efficient economic approach to law and policy adoption by using Pareto or Kaldor-Hick efficiency<sup>220</sup> concepts according to the case and available parameters to measure the certainty and severity of punishment. Preventive measures

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<sup>217</sup> Social indicators are measures of changes in social welfare, such as unemployment rate, inflation, balance of payment, gross and net national product, etc.

<sup>218</sup> *Supra*, footnote 214 at p.64. It was mentioned that “regulations can be extremely costly and that they operate often through command and control”, and “directives are given, compliance is monitored, and non compliance is punished”. If there is extensive consumer demand for cheap prohibited items or illegal products, the result is increase of smuggling and contraband as well as black markets, which are generating deadweight losses and negative externalities. In the context of criminal sanctions, severe punishments may provide a powerful deterrent, but they may also discourage security agencies or other parties involved from reporting incidents or events on the discussed threats as mentioned in this dissertation.

<sup>219</sup> *Supra*, footnote 201 at p.57. See pp.322-323. The author highlights the utility of optimal level of prevention in terms of cost and benefit for analyzing costs of security incidents.

<sup>220</sup> See James R. Seldon, “Efficacy, effectiveness and efficiency in human resource use: a primer on the three e’s,” *International Journal of Public Administration*, Vol.16, No.7, 1993 at pp.921-943. The author highlights the disputes over resource use, particularly in the public sector and opines that technical efficiency requires getting the most from inputs and allocative efficiency is by far the most problematic. The Pareto principle states that “resources are being used incorrectly if redeploying inputs or redistributing outputs which can add benefits for some members of society without harming any others”. The Kaldor Hicks approach in part overcomes these limitations, but it has a price and sanctions which may imply a willingness to accept its implications by the society. Efficiency is promoted when the total expected social costs are reduced.



and remedial measures must be analyzed separately and carefully. The cost-benefit analysis of the scenario and different actions involved enable the determination of the cost-effectiveness of the used security system. Policy makers, legislators and investigators should keep in mind these basic concepts while seeking to find out the most appropriate solutions to the problem by utilizing economic principles when analyzing maritime security incidents.

In seeking to widen efforts to increase maritime security awareness in the shipping world, IMO needs to consider new proposals for the international maritime community and should call for new solutions to grapple with these challenges, which have highlighted various deficiencies<sup>221</sup>. The initiative of introducing a new member-state scheme will herald a new period in the regulation and protection of shipping and port industries. Thus, flag States should be expected to provide minimum standards of services by ensuring the quality of its services and the training of its personnel involved in policing and managing maritime security processes.<sup>222</sup>

The review of law and policy issues relevant to the “maritime crimes”<sup>223</sup> is an urgent necessity. Maritime security incidents analysed from an ergonomic perspective by using the general principles of law and ergonomics, based on a macro-level analysis, permits the identification of the most relevant active and latent

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<sup>221</sup> David Osler, “IMO to trial Stowaway repatriation aid service”, *Lloyd’s List*, (August 8, 2007). IMO established a “Stowaway Focal Point” (FSP) to assist shipowners and masters in repatriation issues, and to offer assistance as well as support for the disembarkation of stowaways.

<sup>222</sup> See, “IMO audit plan to benefit flags”, *Trade winds*, Vol.16, No.50, (December 16, 2005).

<sup>223</sup> See Max Mejia Jr. and Proshanto, K. Mukherjee, “The SUA Convention 2005: a critical evaluation of its effectiveness in suppressing maritime criminal acts”, *The Journal of International Maritime Law*, Vol.12, No.3, May – June 2006, at pp.170-191. Professor Mukherjee highlights the need to clearly define a “maritime crime”, because the existing conventions in the regulatory arena or in the criminal field do not give a clear and concise explanation on what is considered as a maritime crime as well as the listing of such offences considered as a crime according to international law. The SUA 88 Convention mentions only unlawful acts and deals with a very narrow range of offences. Also, UNCLOS 82 is very limited in the range of offences considered as maritime crimes or falling under the category of maritime violence. It deals mainly with piratical acts on the high seas. The need to broaden the scope to include new offences is necessary and urgent. Additionally, a clear definition on what is a maritime terrorism act is also needed. In the existing international instruments, no definition on terrorism or maritime terrorist act is found, therefore, policy makers and legislators must act proactively, and member States must urge IMO to tackle these issues by redefining certain acts unclearly stated and poorly drafted. Globalization and advanced technology as well as the increase of sea trade push *maritime security* in the forefront to combat and eliminate all new threats which may come to light with time.

conditions<sup>224</sup> that allowed the event to occur. It is a powerful tool for users, if they manage adequately and correctly the concepts proposed in it<sup>225</sup>.

The interpretation of the available information provided in the “*Security Incident Map*” (SecInciMap)<sup>226</sup> may offer to policy makers, legislators and investigators relevant means for in-depth analysis of a complete real scenario related to one of the following threats; stowaways, smuggling drugs or contraband goods by sea. Consequently, recommendations based on findings may be used to improve the existing maritime security law and policy, because the SecInciMap in this case, reconstituted as a “*Maritime Crime Incident Map*” (MarCrimInciMap), can offer a clear view of the deterrent factors, the topography and configuration of scenery and equipment, and the flow of events and acts in a chronological order. Also, this concept which may be adapted to maritime crimes and events highlights the gaps and grey areas found at different levels of management involved in the incident, at the national level from the top level down to the operational level, with regard to the existing international instruments.

This method allows the identification of the areas in law and existing policies at various levels, which need improvement or new input to counter and prevent such incidents from occurring in the future. A clear security assessment of the ship as well as port facilities is needed; thus, it implies a perfect risk security assessment process

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<sup>224</sup> See Maximo Q. Mejia Jr. and Roland Akselsson, ““*AcciMapping*” *Maritime Security Incidents: a Pilot Study*”, Malmö: WMU, 2007, at pp.2-4. Adaptation of the Jens Rasmussen and Inge Svedung AcciMap and the promotion of risk management tools are highlighted by the authors as well as the “*active conditions*” which mean “conditions that have an immediate impact and contributory effect in allowing the occurrence of a maritime security incident”, and “*latent conditions*” which are those conditions that “can lie dormant for a period of time doing no particular harm until they interact with local circumstances to defeat the system’s defences”. These are mentioned by Mejia based on a study done by Reason in 1997.

<sup>225</sup> See Jens-Uwe Schröder, “*Shipboard Security*”, *ISPS Code Workshop*, Malmö: WMU, December 2005. An important step to ensure a perfectly proactive security management system is to implement the most appropriate risk management process to shipboard security as well as to port facilities security. However, port security is more complex and is broader regarding internal and external factors influencing the whole system.

<sup>226</sup> See Jens Rasmussen and Inge Svedung, *Proactive Risk Management in a Dynamic Society*, Karlstad: Risk center, Swedish Rescue Services Agency, 2000, at p.11. An example of *SecInciMap* for a security incident is provided in Annex M.

to obtain the best cost-benefit measures related to the considered system, as mentioned by Schröder.<sup>227</sup>

The main objective of this maritime security incident map is to provide legislators and policy makers with a powerful tool for maritime security management. The “*SecInciMap*”, used in assessing maritime security or crimes, may assist in investigating cases, employing macro-level analysis and providing findings, and finally in assisting the formulation of proposals.

The use of new approaches and concepts is to demonstrate and prove their utility by analyzing a maritime security incident, in order to:

- identify significant factors in order to bring to light the most relevant active and latent conditions;
- conduct a vertical, macro-level analysis of that incident;
- construct and explore the *SecInciMap* ; and to
- detect the most appropriate solutions to eliminate inadequate security measures existing in the system.<sup>228</sup>

As mentioned by Mukherjee and Mejia, “Perhaps, the most significant feature of the ISPS Code is that in contrast with UNCLOS, the SUA Convention, and the CMI’s model national law which all deal with criminal law, the ISPS Code arguably deals with ergonomics, i.e. it attempts to influence the behavior of seafarers and port managers through elaborate regulatory procedures as preventive measures in relation

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<sup>227</sup> See in Annex O, the general security risk assessment process flow chart. The author highlights the difference between safety and security in risk management. “Safety analysis and investigation is based on unplanned events causing disturbance in the system”, whereas, “security focuses on activities planned or designated to cause disturbances in systems. Policy makers should be aware of these differences and make a clear dispatch when safety or security purposes are considered, while drafting legislation. See Jens-Uwe Schröder, “An Introduction to Shipboard Security Risk Assessment”, in Max Mejia Jr. (ed.), *Contemporary Issues in Maritime Security*, Malmö: WMU, 2005, at pp.101-116.

<sup>228</sup> *Supra*, footnote 224 at p.67. Mejia addressed the objectives of this mapping method and the validity as well as the reliability of the interpretation of its results found or expected in a security incident analysis.

to combating criminal offences that pose a threat to maritime security”<sup>229</sup>, highlighting the usefulness of ergonomics in the maritime security arena by trying to solve the problem and finding the deficiencies to be eliminated. Thus, *SecInciMap* or *MarCrimMap* are tools which may assist, help and provide the means needed by policy makers when tackling sensitive security issues or investigating maritime criminal cases or acts, and finding the different gaps related to the responsibilities, duties and procedures at all management levels as well as in the existing legal regimes.

Maritime security incident or events are investigated to identify the causes of their occurrence and to determine the actions that must be taken by the decision makers to prevent recurrence. These security incidents are rarely simple and almost never result from a single cause that could be immediately identified. Thus, the flow of events in cases of stowaways or attempted stowaways<sup>230</sup>, smuggling of drugs or contraband goods by sea is vital for highlighting the grey areas that need improvement. Policy makers should be aware of the gamut of existing models and tools in the shipping industry and other related sectors. Events and causal factor charts are very helpful, but usually the skeleton changes until the maximum information is gathered on the security incident and the chart is fully completed and up dated.

Thus, a chart on the management systems investigated at all management level after a maritime crime or any maritime security incident occurred is provided in Annex Q. It highlights all levels of responsibilities involved in case of an event or incident and provides a clear picture of the scene to be scrutinized.

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<sup>229</sup> See Proshanto K. Mukherjee and Max Mejia Jr. , “Selected issues of law and ergonomics in maritime security”, *Journal of International Maritime Law*, Vol.10, No.4, August- September 2004, at p.323. The authors highlight the various changes that affect the international regimes for maritime security as well as several new initiatives which should be considered by policy makers and legislators when transforming international instruments into domestic law. The legal frame work on the subject falling under public international law, regulatory and criminal law should be carefully reviewed to find out the most appropriate countermeasures to reduce or eliminate the existing grey areas and deficiencies found in the existing instruments. A revision of UNCLOS 82 which may act as an umbrella is suggested by the authors. This approach in the long term will encourage transparency, efficiency, effectiveness and good governance.

<sup>230</sup> See BIMCO, “Stowaways”, *BIMCO Bulletin*, Vol.102, No.3, June 200, at p.91.

Finally, policy makers, legislators and maritime security investigators should use the SecInciMap as a powerful tool which may assist in drafting legislation or preparing reports to correct the deficiencies found in the complete in-depth study of the considered case or scenario<sup>231</sup>.

The recommended practices for assisting policy makers or investigators in cases of maritime security incidents (minor, moderate or major) may be summarized as follows<sup>232</sup>:

1. Receive the complete report of the maritime security incident or final judgment of the case (trial);
2. Organize the incident data, witnesses, newspapers, literature, other reports and information, etc.;
3. Identify and confirm the validity of the deterrent factors related to the criminal intent as well as the active and latent conditions that allowed the maritime security incident to occur;
4. Develop a vertical, macro-level analysis of the maritime security incident by using a top down approach as mentioned in Figure 13;
5. Illustrate the flow of events and acts;
6. Use the conventional symbols to illustrate deterrent factors, active and latent conditions, primary and secondary events, etc.;
7. Construct the MarCrimInciMap/SecInciMap;
8. Make the first assessment and review the findings;
9. Review the SecInciMap and do a second assessment to confirm all deterrent factors contributing to the criminal intent and check the latent and active conditions found through the interpretation of the Map;
10. Establish the final report on the assessed case or maritime security incident by describing each step and summarize the findings;
11. Provide to the interested parties the lessons to be learned after the in-depth study of this maritime security incident;
12. Furnish all details and the complete report to the Maritime Training Institutes and Universities to be transmitted to all maritime students and professionals the lessons to be learned to avoid such incidents from occurring again;
13. Provide all shipping companies, ports and ships entitled to fly the flag of the country with the findings and recommendations;
14. Finally, review the existing laws relating to this maritime security incident, and if necessary propose amendments or any other equivalent proactive measures to eliminate or reduce such threats.

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<sup>231</sup> See Theodore Sampson, *Maritime Risk Analysis and Management: existing practices, existing needs*, LUCRAM, Lund: Lund University Centre for Risk Analysis and Management (LUCRAM), 2002.

<sup>232</sup> *Supra*, footnote 224 at p.67. Mejia describes all steps and approaches to be implemented to obtain a preliminary and subsequently a final assessment of the maritime security incident by using correctly the SecInciMap and to deduct all factors which contributed to the occurrence of the event.

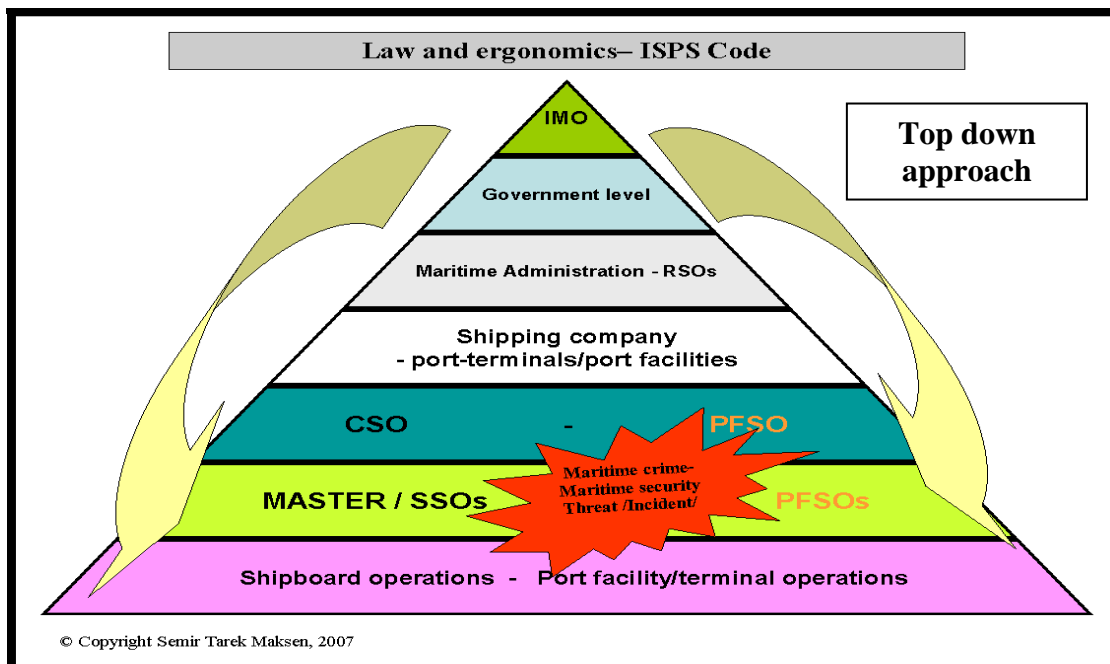


Figure 13: Law and ergonomics- ISPS Code: new perspectives to investigate criminal intents

Figure 13 highlights the usefulness of a top down approach in searching the failures.

#### 4.4 The response of the shipping and port industries and other stakeholders

Morocco remains a source of stowaways and high risk zone for contraband goods and smuggling of drugs, whereas, Algeria, Tunisia and Mauritania are areas affected by migrant stowaways. Since the recent past, these areas have been threatened by new drug routes used by transnational organized gangs with international ramifications. Contraband in this region is very popular and policy makers or legislators face serious issues due to the tolerance of the black markets by authorities, highlighting the complexity of the problem, which is increasing according to Europol's latest report in 2007<sup>233</sup> on the subject. Another point to be considered is that many stowaways migrate to other countries before boarding ocean-going vessels to Europe or destinations as far as the North American continent.

<sup>233</sup> See "EU organized Crime Threat Assessment (OCTA)", 2007, *Europol*, The Hague: Europol, 2007, < [www.europol.europa.eu](http://www.europol.europa.eu) >, (July, 2007). Also, the Annual Report 2006, Europol is relevant regarding these threats menacing the two sides of the Mediterranean Sea. See also WCO's reports on drugs offences.

Policy makers and all parties involved in the maritime adventure trading in or out the Maghreb Region should be aware of this information provided by international organizations or agencies, giving the latest trends and data on the subject. On board commercial vessels, it is crucial that crews are familiar with IMO's guidelines on stowaways and illegal migrants by sea, drugs and other crimes considered as maritime crimes. When, the stowaways are found hidden onboard vessels, masters have to inform immediately their owners and operators, P& I Clubs and document all actions carefully for further investigation reports or inspections. Human rights must be preserved as well as fair treatment<sup>234</sup>. P& I Clubs have the expertise on repatriation<sup>235</sup>, but recently IMO has established the Stowaway Focal Point, the object of which is to manage the reports and data on the subject by assisting in repatriation issues as well as disembarkation of stowaways, facilitation of diplomatic responses to resolve stowaway cases when restrained on board vessels or detained, to promote security awareness among all actors involved in the shipping business, and to consider the claims of other parties directly or indirectly affected by the menace.

As mentioned in the previous chapters, the risks of stowaways, smuggling of drugs and contraband issues are high in the Maghreb region, therefore policy makers of those involved States, should reinforce and strengthen controls and preventive measures in their ports as mandated by the ISPS Code. Particular emphasis should be placed on port security and port facilities assessment to enhance the standards adopted and required by IMO and the internationally agreed principles on the subject. Waterfronts, accesses to the infrastructures or adjacent areas, corruption issues, false documents and other related sensitive matters should be reconsidered and reassessed according to the available statistics and trends.

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<sup>234</sup> See Ernie Forster, "Unwanted guests that can cause a host of troubles", *Lloyd's List*, (June 9, 2006). The recent incident in Durban in South Africa highlighted the difficulties faced by the shipping industry when the master and three crew members were arrested and prosecuted under culpable homicide. After considerable debate, at the end they were heavily fined and received suspended prison sentences. In this episode, the master and crew failed to declare to the owner their presence on board the ship and were friendly to them, allowing them to climb down a rope to swim to the nearest quay. However, two of the seven drowned and the survivors declared to the authorities that they had been forced off the ship.

<sup>235</sup> See Sam Ignarsky, "Home Office could tap into P & I expertise on repatriation", *Lloyd's List*, (May 17, 2006).

Thus, ensuring an effective, coherent and humane response to all these threats remains a major challenge to these concerned States and their policy makers as well as to the shipping industry and its stakeholders. Prevention, cooperation, discipline and order at sea, proactive measures and other solutions should be encouraged at all levels by providing rights to victims, reinforcing border controls as well as water patrols, and giving all possible means to the relevant actors including ports, police, customs, coast guards, navies and intelligence services to counter this menace by promoting efficiency, effectiveness and awareness. Investigation, prosecution and procedural measures and procedures should be reviewed to determine the most appropriate barriers to protect all interests involved in the system, thus enhancing sea trade and commerce in general.

The shipping industry should be aware of the relevant provisions of the UN Vienna Convention, 1988, particularly articles 17, §3 and 4 under which according to the existing agreements or arrangements between those Parties, the flag State may authorize the requesting State to “board the vessel, search the vessel or if evidence of involvement in illicit traffic is found, take appropriate action with respect to the vessel, persons and cargo on board”. Therefore, shipping companies should provide masters and crew on board their ships all documents<sup>236</sup> related to drug smuggling, contraband and other related offences, and establish clear procedures to deal with such security incidents in the case of an event ensuring that audits are carried out and the overall process is monitored and controlled according to the requirements of the ISM and ISPS Codes. The designated person ashore and the CSO should be held

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<sup>236</sup> IMO/ILO guidelines should be provided for all crew members before the ship leaves port and to seafarers training centres as pedagogic support to familiarize and train mariners in combating such threats by using all available legal instruments and guidelines to enhance maritime security awareness. See “Stowaways and refugees”, *BIMCO*, (August 1, 2007). The author highlights causes, such as the great divisions between the poor and rich countries, the growing sense of desperation while legal migration is increasingly tightened and monitored. Thus, numerous stowaways have died after they had hidden themselves in dangerous places on board vessels, such as in containers or ship’s holds without ventilation, ending in tragic and dramatic conclusions. The shipping industry is very involved in these sensible issues as it was mentioned by the BIMCO author, because ships are used as a means of escape from misery and unemployment by desperate people from different nationalities and continents, risking their lives for a better future. Also, the urgent need to assist these wretched people and to put them in a safe haven or place with regard to human fundamental rights, interception issues and safety concerns are highlighted. Charter party consequences of maritime security initiatives should be considered, <<http://www.bimco.org/>>, 2007.



responsible for any breach or misconduct in improving or surveying the implementation processes according to the regulations and rules stipulated by international instruments and national law. Seafarers and all personnel from ports and related activities should be given guidance on how to use efficiently and effectively the related guidelines and instructions given by the authorities and companies on the subject.

The security of maritime cargo and, in particular, containerized maritime cargo, poses challenges from both the legislative and technical viewpoints. All parties involved should be also aware of this issue<sup>237</sup>. Close cooperation between shipping companies, masters and crews, police, customs, coast guards and other related security agencies should be encouraged to tackle this issue. The use of BIMCO<sup>238</sup> documents and instructions to guide ships in cases of stowaway threats or drugs on board may assist the parties in dealing with these offences. ITF procedures<sup>239</sup>, marine insurance companies' rules, the reports of maritime security agencies and organizations, P & I Clubs' special circulars and recommendations are also very helpful for providing excellent guidance to shipowners, crews and other involved parties. The Master's handbook on ship's business<sup>240</sup> is a powerful tool to assist masters in dealing with hostile and unauthorized boarders, as well as drug abuse and trafficking, smuggling and the duty to render aid at sea<sup>241</sup>. The shipping

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<sup>237</sup> See UK P & I Club on crime watch, cargo claims, stowaways, charter parties claims and good practices < <http://www.ukpandi.com/> >, (August 8, 2007).

<sup>238</sup> See BIMCO advices, special circulars, instructions and its anti- drug clauses, ISPS/MTSA Clauses, stowaway clauses and smuggling clauses (BOXTIME Charter Party) etc., < <http://www.bimco.org> >, (August 2, 2007). Restricted areas are described as well as the costs suffered by industry and the urgent need for cooperation between shipowners and authorities to reduce delays, costs and high penalties to ease the shipowner's unfair burden. Preventive measures to tackle drug issues should be implemented on board vessels while in port, including the monitoring of crew, vessel search procedures, the discover of drugs and those related to combat the stowaway threats and related precautions should be observed.

<sup>239</sup> See ITF policy on stowaways, as adopted by the ITF Seafarer's Section Conference, Singapore, 8-10 October 1997. Clear guidance is provided on how to deal with stowaways' issues and efforts to be made to disembark the stowaway in the next first port of destination, fair treatment, care and checks to be done. < <http://www.itfglobal.org/files/seealsodocs/453/Stowaways.pdf>>, (August 2, 2007).

<sup>240</sup> See Tuuli Anna Messer, *Master's handbook on ship's business*, 3<sup>rd</sup> ed., Centreville (Maryland): Cornell Maritime Press, 2001 at pp.4, 10, 22,26,42,54,100 and pp.101 to 111.

<sup>241</sup> See the *MV Clementine Maersk Case* (2005). The Captain of the containership has been blamed and criticized in the tabloid press for bringing 27 refugees who were rescued in the Mediterranean Sea, near Sicily to the UK. This case highlights the conflicts and pressure faced by a master in such a situation.

industry should encourage masters in using all the valuable and useful manuals or handbooks when confronted with such threats<sup>242</sup>.

#### **4.5 The Danish and Swedish experience**

As mentioned by Sjöberg<sup>243</sup>, all governmental agencies involved in combating stowaways, smuggling of drugs and contraband by sea are working closely to tackle these issues. Their main strengths include security information; communication and cooperation between the different actors, such as police, customs and coast guards. They use an integrated network system where particular information and specific trends are surveyed 24hours a day, and exchanges among them are done regularly and assessed continuously. The findings are intelligence based. In Sweden, stowaway threats are presumed to be non-existent, but drug offences and contraband issues are high risks which are threatening many particular regions in that country. Transnational and organized violent crimes are major issues of concerns in this region; but no maritime terrorist activities have been reported in this part of the world. Nevertheless, the data and statistics must be interpreted carefully because there is a direct link between international terrorism and organized crime which share similar features. Cooperation between agencies is the most important aspect highlighted by the interlocutor. The first details of a maritime crime are analyzed carefully and interpreted by different agencies. Then, the final results are communicated, exchanged and reviewed. Training of all people involved in the maritime security field as well as exercises and drills are extremely important factors,

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<sup>242</sup> See Nautical Institute, "The Master's role in collecting evidence", London: *The Nautical Institute*, 1989. Also, The Shipmaster's Security Manual, *BIMCO*, 1998. Preventive measures and remedies for drug smuggling, piracy and stowaways are provided in this manual, < <http://www.bimco.org/> >, (May 8, 2007).

<sup>243</sup> Björn Sjöberg, Senior Intelligence Officer from the Swedish Customs and specialized in law enforcement was interviewed by the writer several hours. As well, port authorities and VTS managers of Malmö port, police and coast guards officers to share the experience and views with regard to the threats described in this dissertation. The main findings and exchanges dwelled on lessons learned by experience and the use of theoretical and operational approaches regarding possible countermeasures or solutions to be implemented to combat and eliminate the menace, its root causes and consequences, the vulnerability, concepts utilized to enforce their laws and mitigation measures in Sweden. Also, a general discussion on appropriate approaches to be implemented regarding the organized crime and its relation with the other threats was held which allowed the writer to confirm certain findings on the subject which encouraged him to carry out an in-depth analysis of the subject.

contributing to the success of the enforcement agency. The writer suggested focusing more on preventive than remedial measures. Screening was mentioned but not considered to be as important as information. During the discussion it was acknowledged that routine work could be a serious impediment to carrying out proper and reviewing the safety and security tasks. Finally, a regional approach and cooperation was considered to be encouraged to combat and eliminate the risks associated with such threats. Notably, the stowaways and drug related offences are treated by the Danish Maritime Authority under its technical regulations<sup>244</sup> for inter alia, fixing the type of offences and their punishments, including fines and supplementary fines if necessary, and the duration of imprisonment. Some sanctions related to stowaways provide for a maximum term of one year, but for special cases 2 years' imprisonment plus supplementary fines may be imposed. Sweden imposes similar sanctions as Denmark with respect to these crimes or offences<sup>245</sup>. The sanctions and preventive measures are important features for such considered offences. Thus, the same conclusions have been found by comparing these two countries which share considerable similarities with respect to these threats and the countermeasures implemented to combat them.

#### **4.6 Maghreb Policies: new countermeasures and challenges**

As mentioned in the previous chapters, the Mediterranean is the main gateway for stowaway threats as well as illegal immigrants into Europe. The Maghreb region is on the forefront regarding these threats. The problems associated with attempted stowaways, stowaways, asylum seekers, illegal immigration, smuggling of drugs by sea and contraband goods at Mediterranean borders are matters of common concern for the entire Maghreb States and the European Union.

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<sup>244</sup> See the Danish Maritime Authority's Technical Regulation No.5 of 19 May 2003 fixing all modalities, preventive measures, treatment of the stowaway, notification procedures, sanctions, fines and imprisonment depending on the case from 1 year max to 2 years according to the nature and form of the offence, age of the stowaway etc.;

<sup>245</sup> See "The Swedish Club" for advice to masters and drug smuggling warnings as well as the statistics for claims reported and analyzed by the Club.  
<[http://www.swedishclub.com/tm\\_loss\\_prevention/advice\\_to\\_masters\\_2005/Advice\\_to\\_masters.htm#Drug smuggling warning](http://www.swedishclub.com/tm_loss_prevention/advice_to_masters_2005/Advice_to_masters.htm#Drug_smuggling_warning)>, (August 5, 2007).

The management of these threats is the responsibility of each State, but preventive and remedial measures are not enough to cease or stop the wave of stowaways and other related issues. Cooperation based on a regional approach and assisting States in the implementation process is vital to ensure that new standards are adopted on a wider scale. Policy makers should think carefully when enforcement regimes or amendments have to be implemented into national law.

As pointed out by Mejia and Mukherjee<sup>246</sup>, the spectrum of violent maritime criminal acts, illustrates increasing levels of sophistication in planning and violence in execution, but decreasing frequency of occurrence. However, stowaways and attempted stowaways, smuggling drugs or contraband goods are increasing in frequency of occurrence, because the sanctions are inadequate, the punishments and incentives are insufficient, and the unwillingness of society to pay the price related to these threats. Safety and security measures involve huge costs and their impacts and the results can be observed only in the long term. Policy makers in the Maghreb region should consider carefully the SUA 2005 Convention and analyze in- depth the pros and cons to determine whether or not to ratify it and its Protocol of 2005. Mukherjee has reviewed all aspects related to the SUA Convention 2005 and stated that the list of unlawful acts has been broadened in the 2005 Protocol, meaning that the scope of offences is wider than those stipulated in SUA 88. New provisions on boarding have been added and when clear grounds exist, and the conditions are fulfilled, the ship flying the flag of another State Party may be boarded by its forces<sup>247</sup>.

Policy makers and practitioners need to develop a comprehensive understanding of the multi-dimensional phenomenon of illegal migration and stowaways in order to manage it effectively. Thus, it is important when drafting legislation to make the distinction between people smuggling and trafficking of human being. Furthermore, clear definitions should be provided and punishments

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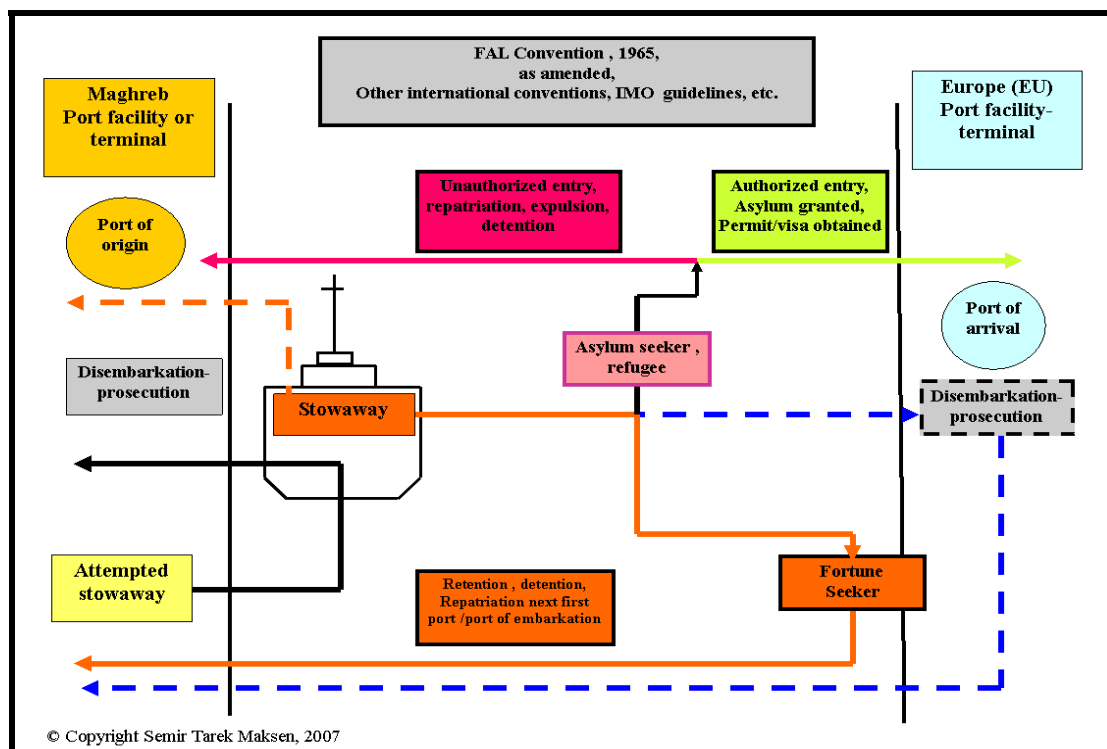
<sup>246</sup> *Supra*, footnote 223 at p.66. The authors have done a critical evaluation of the effectiveness of the SUA 2005 Convention.

<sup>247</sup> *Ibid.* see article 3 and 8 bis of the SUA 2005 Convention.

must be drafted accordingly. The half-way house doctrine is a balanced way to ensure a middle approach between *mens rea* offences and *strict liability* offences when sanctions are decided regarding the different threats, but before putting them into force. All interests, such as public welfare, good governance, and national goals etc., must be taken into account by legislators and policy makers to avoid excessive or diminished punishments accorded to the degree, nature and form of that offence. In summary, the efficient level of deterrence is important to determine the marginal social benefit of crime reduction. It is thus vital and valuable to appreciate and predict the effects of rules designed policy makers and legislators when drafting legislation. A criminal commits a crime if the expected benefit is greater than the expected punishment, hence, policy makers should be aware of the concepts of law and economics which should be applied when adopting legislation for dealing with maritime crimes. However, clear definitions on maritime crimes are needed and a net separation in the legislation between attempted stowaways, stowaways, asylum seekers, fortune seekers and refugees must be made when drafting the offences and related sanctions into national law according to the existing international instruments. The effects as well as a clear understanding of enforcement regimes and how well enforced the regulations are, is an important task for legislators and policy makers in the Maghreb region. The main objectives of law and economics<sup>248</sup> are to profile the legal rules to be used to ensure efficiency and effectiveness in the system, as highlighted in Figure 14. It exposes the different avenues exploited by stowaways and the associated issues of repatriation, detention, expulsion and retention. Particular legal regimes which have been described in the previous chapters prevail concerning refugees, asylum seekers or statelessness stowaways or illegal migrants rescued at sea. Criminal acts or criminals and organized crime members as well as related matters fall under the criminal law regimes in the State where the offence has been committed and also depend on the existing accords between the sending and receiving countries.

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<sup>248</sup> See Paul S. Dempsey and William E. Thoms, *Law and Economic Regulation in Transportation*, London: Quorum Books, 1986, at pp.1-43.



**Figure 14:** Flow chart of transportation of stowaway or asylum seeker or refugee cases and their associated issues

In most cases as described in the flow chart above, stowaways as fortune seekers or asylum seekers or refugees are repatriated<sup>249</sup> to their countries of origin after detention on board the ship or in special designated centers for irregular immigrants, such as those existing in France or Spain, when the authorization of residency is denied. Various complex related issues need further research studies.

The following chapter will expose the reader to the major findings of the research carried out in connection with this dissertation, the conclusions reached and proposals offered as policy recommendations to legislators and policy makers as a final pronouncement on these sensitive subjects.

<sup>249</sup> *Repatriation* from the late Latin "*repatriatus*" means to return to the country of origin. Whereas, *detention* is related to the state of being detained for trial or a period of temporary custody prior to such trial of the offender according to the existing national legal regime. The word "*expulsion*" means the act of forcing out someone from a State or forced return. It is important to highlight the removal measures occurring at the external border of a State, such as the "*refoulement*" of an offender from a country, because he does not fulfill the *legal conditions* for entry into that State. A clear distinction is to be made with "*deportation*", which occurs when a report is made of an offence related to the residency status of the offender on the territory of a State. Expulsion for illegal residency covers numerous issues, such as illegal entry, refusal of renewal of a permit or visa, expulsion for reasons of public order, etc.

## **CHAPTER 5**

### **CONCLUSIONS AND RECOMMENDATIONS**

“Even when laws have been written down, they ought not always to remain unaltered.”-

Aristotle, Greek critic, philosopher and physicist, 384 BC-322 BC

#### **5.1 Conclusions**

This dissertation has attempted to steer the reader through the past and contemporary legal and policy issues relating to the transportation of stowaways, drugs and contraband goods by sea from the Maghreb region. It has highlighted the grey areas and gaps prevailing in the existing international legal regimes and national legislation. Great emphasis has been placed on the policy and security management processes. The enforcement mechanisms and the countermeasures and practices used by the shipping industry and stakeholders to combat and eliminate this perennial cancer with its malignancy and gangrening have been discussed. The research has revealed that the gross inadequacy of the enforcement system has detrimentally affected sea trade and international commerce.

The objective of this dissertation was to undertake a critical review of those threats and to attempt to provide answers to the burning questions of the adequacy of the current international regimes. The relevance of IMO guidelines and instruments has also been critically examined. In pursuance of this stated objective, the existing policies of the Maghreb States with respect to this menace and the strategies employed to counter the scourge have been identified and analysed. The study has revealed certain trends which are supported by statistical data and numerous other factors and conditions confirming the persistency of this menace.

Contemporary security events have in recent times culminated in the adoption of various legal instruments such as the ISPS Code, dealing with maritime security

issues at both national and international levels, and numerous mechanisms have been put into place to raise security deterrence levels. Even so, this study shows that despite those measures the incidence of these threats have greatly increased in the Maghreb region. This could be attributed to the porous borders and the culture of “*laissez faire*”. Recent security incidents have illustrated the inadequacies of the existing legal regimes and their enforcement mechanisms. These are attributable to, *inter alia*, persistent discrepancies with respect to precise definitions, gaps and overlapping matters existing in various international instruments, such as the lack of definitions of maritime crime, terrorism and maritime terrorism at both national and international levels. IMO guidelines on illegal migrants rescued at sea and other associated issues have increased the scope of offences and have perplexed policy makers in their efforts to find appropriate sanctions. This lack of harmonization and unification of laws governing the distinction between crimes and *non-mens rea* offences in the existing penal regimes of Maghreb States, result in inadequate sanctions in the prosecution of the offenders, because the notion of maritime crime is perceived differently by those States. This also has a bearing on jurisdictional issues such as the enforcement regimes of coastal States regarding maritime crimes occurring in the contiguous zone. UNCLOS 82 considers only three maritime violent acts, piracy, slavery and drug offences; its scope is thus too narrow.

These illegal activities are now controlled by transnational organized crime syndicates employing new means such as technology, and given the huge fortunes involved in this illegal trade, they impede the effectiveness and efficiency of responses from government enforcement agencies. This research work has also brought to light the main causes and potential consequences of stowaway threats and the pull and push factors. These crimes are facilitated by poor socio-economic conditions and unstable political and cultural situations prevailing in this region, inducing more candidates to this dangerous adventure. The weakest link in the security chain is port facilities which facilitate easy access to sensitive information related to ships and port facilities.



The study has revealed that the most common type of stowaways is fortune seekers and potential refugees. As a result of stowaways on board ships, shipowners and ship operators face serious consequences. This multi faceted problem warrants a complete reassessment of maritime security risks and vulnerabilities through reviewing of the overall security risk management process. Events have demonstrated time and again that if a maritime crime or security event occurs and is not managed appropriately, the causes will not be revealed and the objectives promulgated through IMO instruments will not be attained. This dissertation has also explained the usefulness of the continuum and spectrum of maritime crimes as well as the *SecInciMap* through which the associated consequences, latent and active conditions and deterrent factors and levels of responsibilities arising out of a security incident can be determined and explained. In addition, it has revealed that the preventive measures are the most important to be considered by policy makers to reduce or eliminate the risks of such occurrences, whereas remedial measures mitigate their effects and are the last barrier of the security system.

The international legal regimes do not tackle the problem in its totality. The appropriate examples falling under this scope are the SUA 2005 Convention and related instruments where definitions and technical aspects are still controversial issues and barriers for their ratification. In this perspective criminalization and unfair treatment of seafarers in cases of maritime security incidents are issues which need more in-depth analysis and consideration from policy makers and legislators. It could be deduced that stowaway threats, contraband goods and smuggling of drugs share similar salient features regarding their root causes and potential consequences. Also, these sensitive issues which were considered by the views of various scholars, legal instruments and the open literature are still controversial and open to debate. As such, an ill-advised reader or policy maker may be easily trapped by the complexity in differentiation or categorization of such offences in terms of determining the most appropriate sanctions according to their forms, nature and scale. Consequently, this research has highlighted the utility of flow charts or appropriate maps which can guide policy makers. The use of the *half way house concept* to find an intermediate

solution to determine sanctions is aptly illustrated. The interviews conducted in the course of the research brought to light the main maritime security components for effectively countering security threats, including the flow of sensitive security information, intelligence, and communication, efficient general risk management process, reporting culture and security awareness.

## **5.2 Recommendations**

As global sea trade and the world economy keep on growing by leaps and bounds, there will be a boost in containerization of carriage of goods by sea with concomitant increase in modernization of port facilities and related infrastructures in the Maghreb region to respond to changing demands. Container security threats, the phenomenon of stowaways, smuggling of drugs and contraband goods will grow in parallel with these developments. In addition, persistent disparities between the general living standards of people in the Maghreb and Africa and those in the developed world will be an impetus for massive illegal migration towards the industrialized world, creating opportunities for organized transnational crime syndicates or cartels to exploit the weaknesses generated by lack of enforcement regimes and poor decision-making at all levels. In this regard, there is an urgent need to decisively tackle the root causes, such as unemployment, drug culture and narcotics trafficking in the Maghreb and other parts of Africa, famine and ethnic conflicts. The deculturization of people groups, massive displacement of people, high costs of living and the aspirations for better life are contributing factors to all these threats.

### **5.2.1 International legal instruments**

To provide the basis for them to act, there is an urgent need for Maghreb States to accede to and transform the provisions of SUA 2005 Convention and its Protocol of 2005 into their national legislation. They can then board suspicious ships and prosecute offenders in accordance with those legal instruments. IMO guidelines and recommendations on maritime security should be considered when drafting

legislation and amending existing instruments. There are clear grounds for adopting appropriate and precise definitions of “maritime crime” and “maritime terrorism”. None of the international legal instruments dealing with these issues adequately define these concepts; consequently, this hampers decisive prosecution of such threats. As the scope of such offences is narrow in most of the existing instruments, for example, the SUA 2005 Convention, there is a need to broaden the scope because of the emergence of new threats not considered previously by policy makers. Regional agreements creating stronger legislation for prosecution of maritime crimes and related non-*mens rea* offences occurring in the contiguous zone should be considered. Since a security system is as strong as its weakest link, a synergistic approach to global security management is suggested. This calls for closer technical cooperation and assistance among regional States and the creation of training opportunities in the maritime security field at all levels. Amendments to UNCLOS 82 provisions are suggested to broaden the scope of States’ jurisdictions over violent maritime acts and offences.

In addition, to effectively and efficiently combat the menace, Maghreb States should give effect to the provisions of the UN Convention on Transnational Organized Crime of 2000 and its Protocols of 2000, and UN Convention against Corruption of 2000 and the Drug Control Treaties and related resolutions into their national laws. IMO could provide a maritime criminal code, based on the same approach as for the ISM or ISPS Codes, where all these offences are precisely and concisely defined and categorized, and related sanctions are prescribed. This possibility may encourage new proactive maritime security measures and create a security awareness culture among member States.

### **5.2.2 Maghreb security policies**

The Maghreb States should adopt new security strategies to counter this menace by promoting security awareness and implementing recently developed concepts and methods, such as the *SecInciMap* or *MarCrimMap*. Policy makers

should consider reviewing all security risk management processes used for the implementation of the ISM and ISPS Codes. Particular emphasis should be placed on preventive and remedial measures to encourage prevention, deterrence and mitigation. Strengthened control measures and additional internal and external audits may diminish the risks of errors or failures. The restricted access to sensitive information should be reinforced by increasing controls and surveillance at all management levels in the organizational structure.

### **5.2.3 New maritime security perspectives for the shipping industry**

Provisions dealing with seafarers' rights, duties and responsibilities linked to maritime security issues to prevent unfair and unjustified criminalization of masters and crew should be enforced. The views of experts in the shipping industry, stakeholders and academics should be taken into account by senior management.

The following broad outline of policy is suggested:

- A broadened security agenda to combat these threats.
- Negotiation of agreements to be encouraged at all levels.
- Integration of the issue of stowaways in the national strategies of reduction of poverty, unemployment and other related root causes.
- Elaboration of common and harmonized policies at all levels, national and regional.
- Implementation of stowaways, drugs/narcotics, smuggling and trafficking, and contraband goods observatories or survey centers, and endow them with forecasting and alert instruments. In addition, data, statistics, trends and reports by security agencies or designated bodies in charge of surveys should be provided.
- Institution of stronger laws and penalties to raise the risk of participating in contraband markets and *laissez faire*.
- The expansion of auditing and verification procedures to all parties involved and systems to increase the risk of detection at all levels in the organizational system.

Finally, this study highlights the need for further research work to be encouraged by the threatened countries themselves. Thus, accurate data, statistics and trends must be provided by them and reported to the designated international organizations to obtain, in the long term, the real impacts of such security measures and policies in the maritime security domain.

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## APPENDICES

### Appendix A

#### Map of the Maghreb States



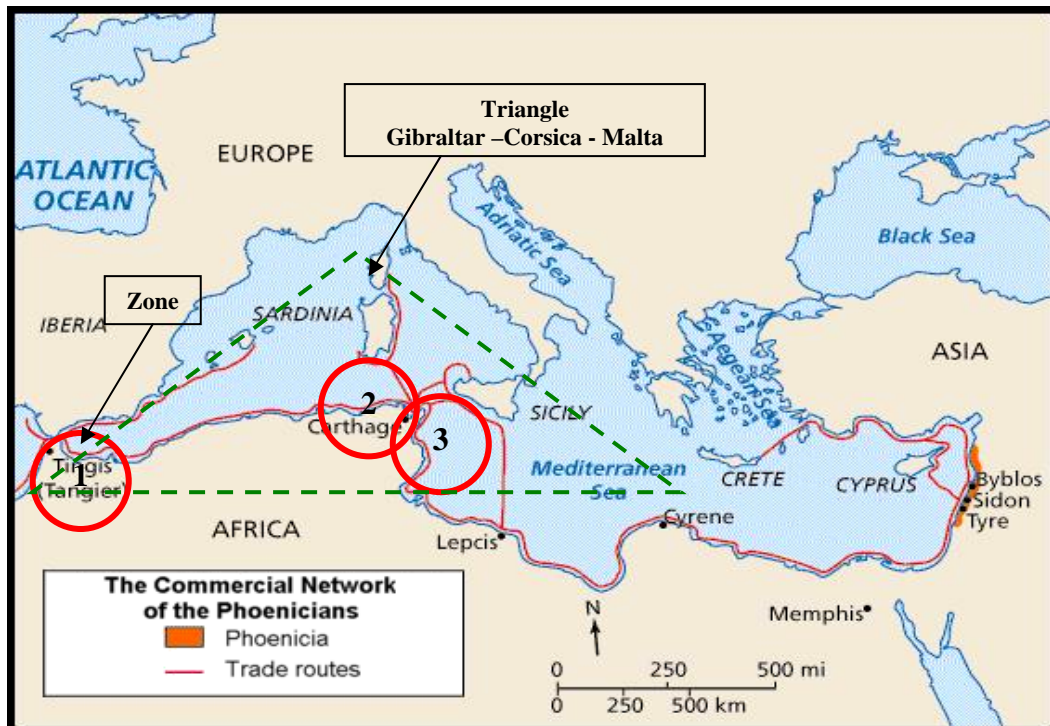
Source: *The Maghreb Review*, quarterly journal on the Maghreb, <<http://www.maghrebreview.com>>, (May, 2007).

\* The Arab Maghreb Union (AMU) includes the following countries: Morocco, Algeria, Tunisia, Libya, Mauritania and the Western Sahara region. The Maghreb States are situated in the highlighted yellow areas on the map.



## Appendix B

### Impacts of the Phoenician trade route in the Maghreb Region



Source: Map of Trade routes used by the Phoenicians – 1200BC, *Wikipedia*, the free encyclopedia < <http://upload.wikimedia.org/wikipedia/en/9/9c/PhoenicianTrade.png> >, (May 31, 2007).

- \* Main zones of trade routes reported for North Africa: from Carthage to Tangier
  - Zone 1 : Strait of Gibraltar & Balears
  - Zone 2 : Sardinia & Corsica
  - Zone 3 : Sicily & Isle Lampedusa & Malta

Maritime activities occurred between these different geographical localities involving trade, flows and displacement of population, associated with various tragedies. Similarly, in 2007, the same movements and trends are observed according to IOM<sup>250</sup> in view of the latest reports published on the subject.

<sup>250</sup> See International Organization for Migration (IOM), *Migration Initiatives 2007*, Report, (Geneva: IOM, January, 2007), at pp. 23-26. Recognizing that the Migration as a key global phenomenon, needing various approaches to tackle in depth the related issues to be addressed by policy makers in the threatened regions.

## **Appendix C**

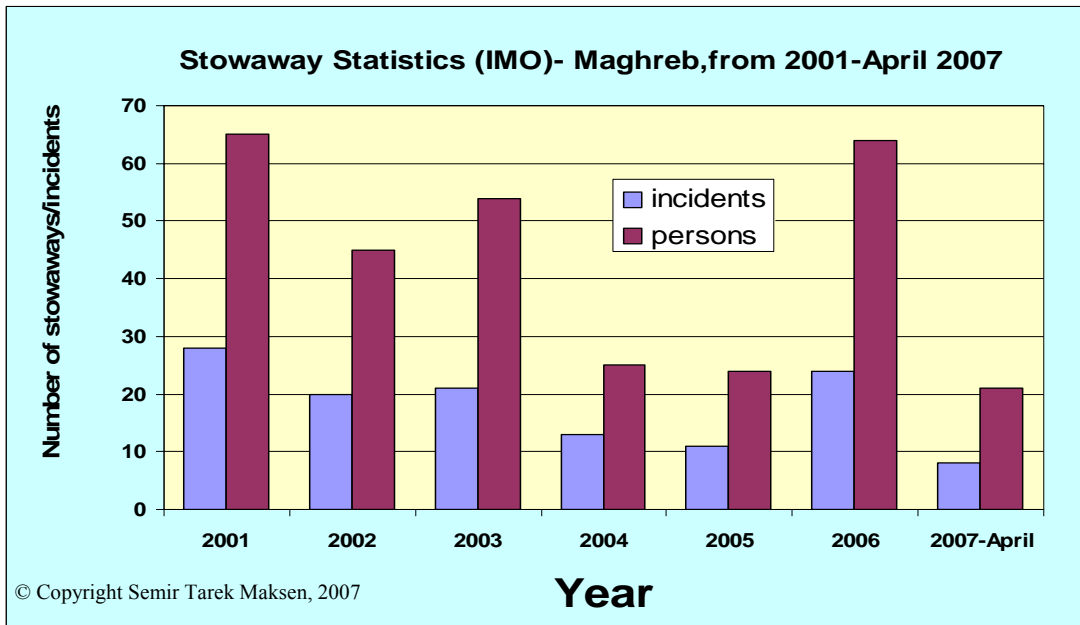
### **Statistics on Stowaways – Maghreb (IMO)**

The following graphs and charts provided in the Annexes C, D and E are based on the data published by the Facilitation Committee of IMO and communicated to all member States. < [www.imo.org](http://www.imo.org) >, (July, 2007).

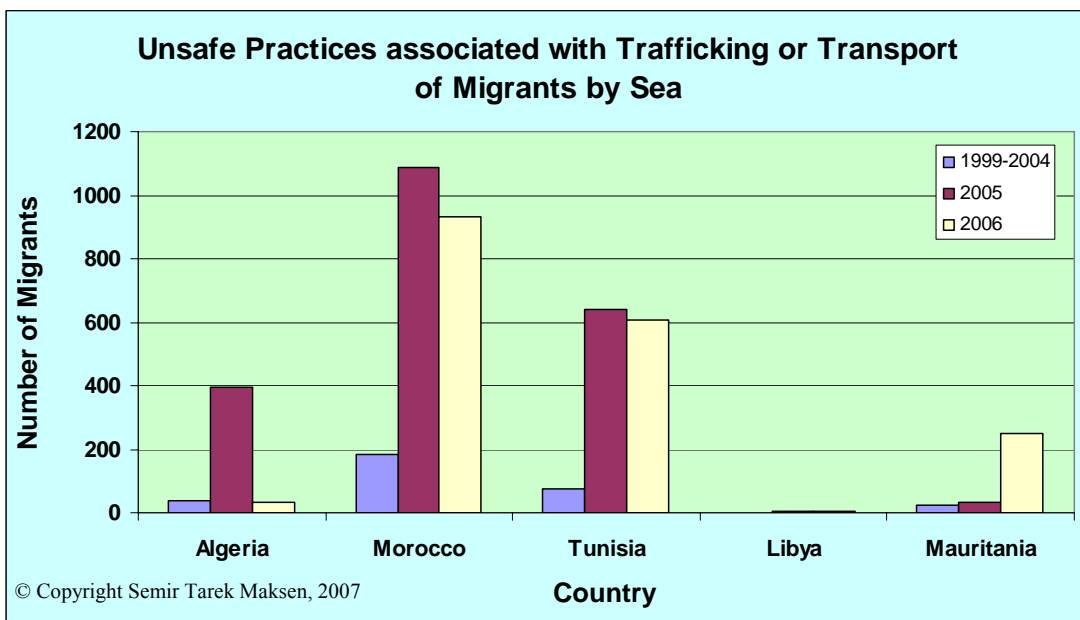
The main documents used are:

1. Reports on Stowaway Incidents – Annual Statistics for the year 2000, IMO – FAL.2 / Circ.71, 7 January 2002  
< [http://www.imo.org/includes/blastDataOnly.asp/data\\_id%3D4507/71.pdf](http://www.imo.org/includes/blastDataOnly.asp/data_id%3D4507/71.pdf) >
2. Reports on Stowaway Incidents – Annual Statistics for the years 2001 and 2002, IMO – FAL.2 / Circ.77, 20 January 2003  
< [http://www.imo.org/includes/blastDataOnly.asp/data\\_id%3D6616/77.pdf](http://www.imo.org/includes/blastDataOnly.asp/data_id%3D6616/77.pdf) >
3. Reports on Stowaway Incidents – Annual Statistics for the years 2002 and 2003, IMO – FAL.2 / Circ.83, 12 July 2004  
< [http://www.imo.org/includes/blastDataOnly.asp/data\\_id%3D9676/83.pdf](http://www.imo.org/includes/blastDataOnly.asp/data_id%3D9676/83.pdf) >
4. Reports on Stowaway Incidents – Annual Statistics for the years 2003 and 2004, IMO – FAL.2 / Circ.89, 3 June 2005  
< [http://www.imo.org/includes/blastDataOnly.asp/data\\_id%3D14994/89.pdf](http://www.imo.org/includes/blastDataOnly.asp/data_id%3D14994/89.pdf) >
5. Reports on Stowaway Incidents – Annual Statistics for the year 2005, IMO – FAL.2 / Circ.95, 30 June 2006  
< [http://www.imo.org/includes/blastDataOnly.asp/data\\_id%3D14847/95.pdf](http://www.imo.org/includes/blastDataOnly.asp/data_id%3D14847/95.pdf) >
6. Reports on Stowaway Incidents – Annual Statistics for the year 2006, IMO – FAL.2 / Circ.102, 17 January 2007  
< [http://www.imo.org/includes/blastDataOnly.asp/data\\_id%3D17422/102.pdf](http://www.imo.org/includes/blastDataOnly.asp/data_id%3D17422/102.pdf) >
7. Reports on Stowaway Incidents – (January to April 2007)  
IMO – FAL.2 / Circ.103, 24 April 2007  
< [http://www.imo.org/includes/blastDataOnly.asp/data\\_id%3D18743/103.pdf](http://www.imo.org/includes/blastDataOnly.asp/data_id%3D18743/103.pdf) >

## Statistics on Stowaways – Maghreb (IMO)

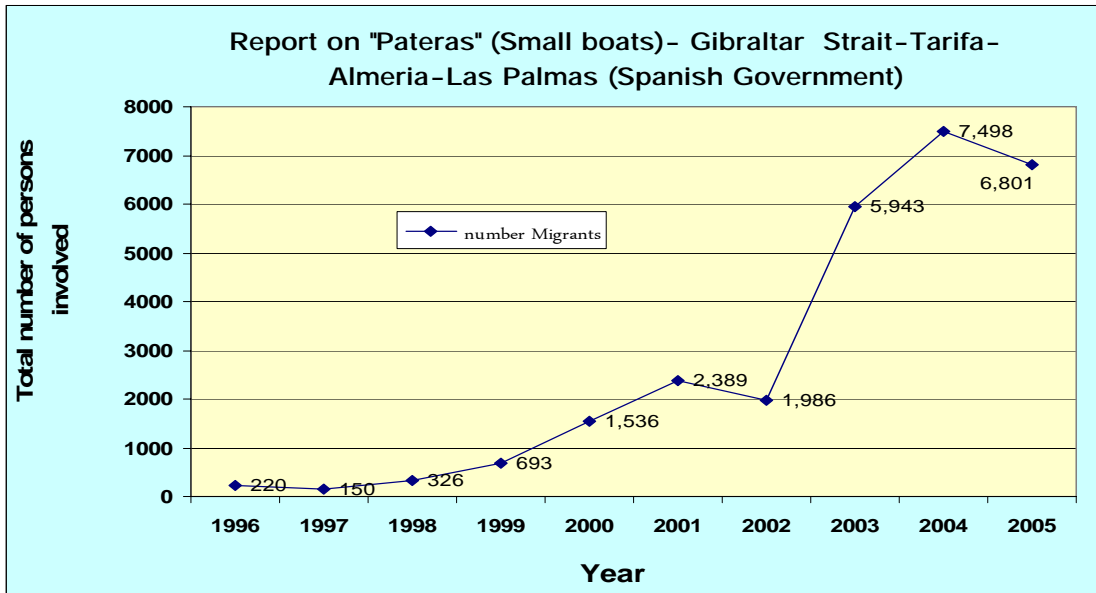


Stowaway Statistics (IMO) - Maghreb: from 2001 to April 2007



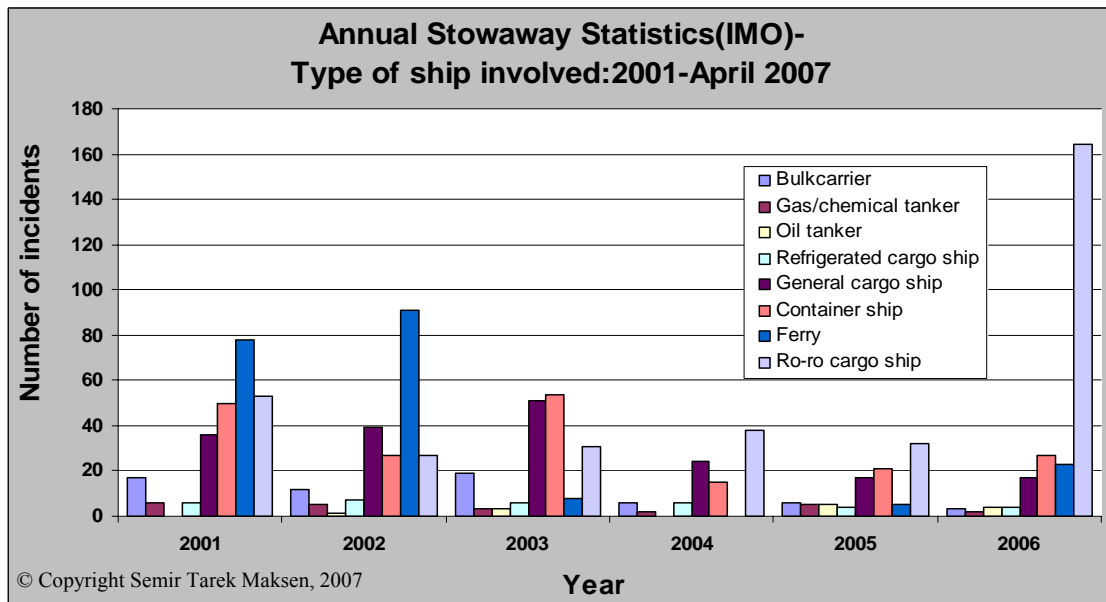
Trafficking or Transport of Migrants from the Maghreb by Sea (IMO)

## Statistics on Trafficking or Transport of Migrants by Sea



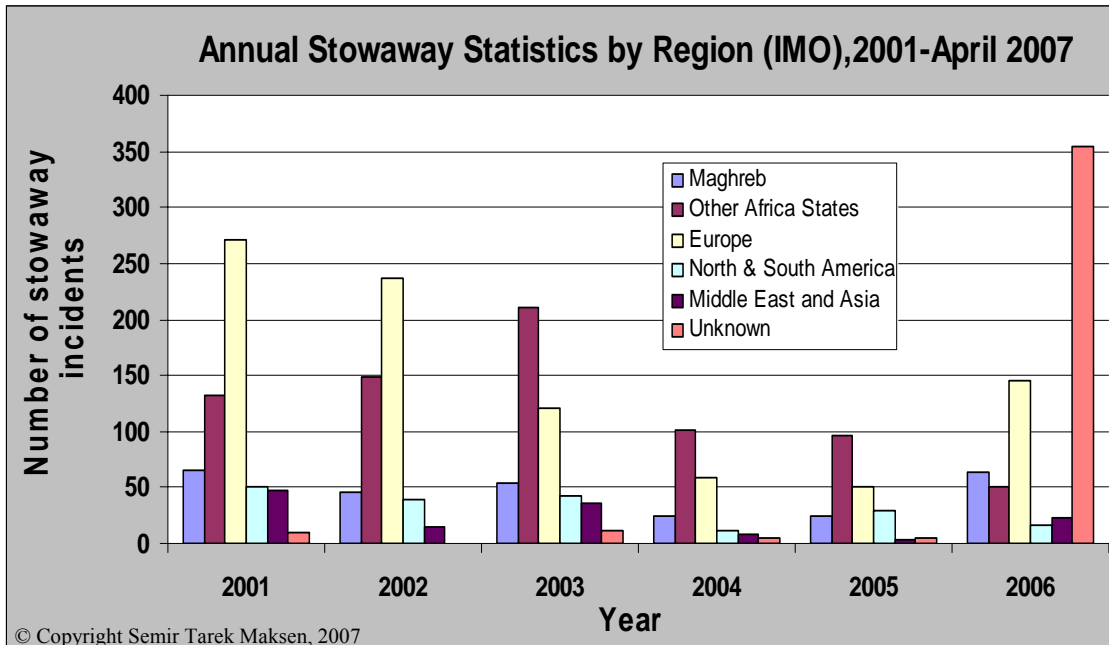
Annual Statistics: Trafficking or Transport of Migrants by Sea from the Maghreb

Source: IMO, MSC.3/Circ.10,Add.1, *Unsafe Practices associated with Trafficking or Transport of Migrants by Sea*, (28 March 2006), at p.6 and MSC.3/Circ.12, (29 January 2007). <[www.imo.org](http://www.imo.org)>.

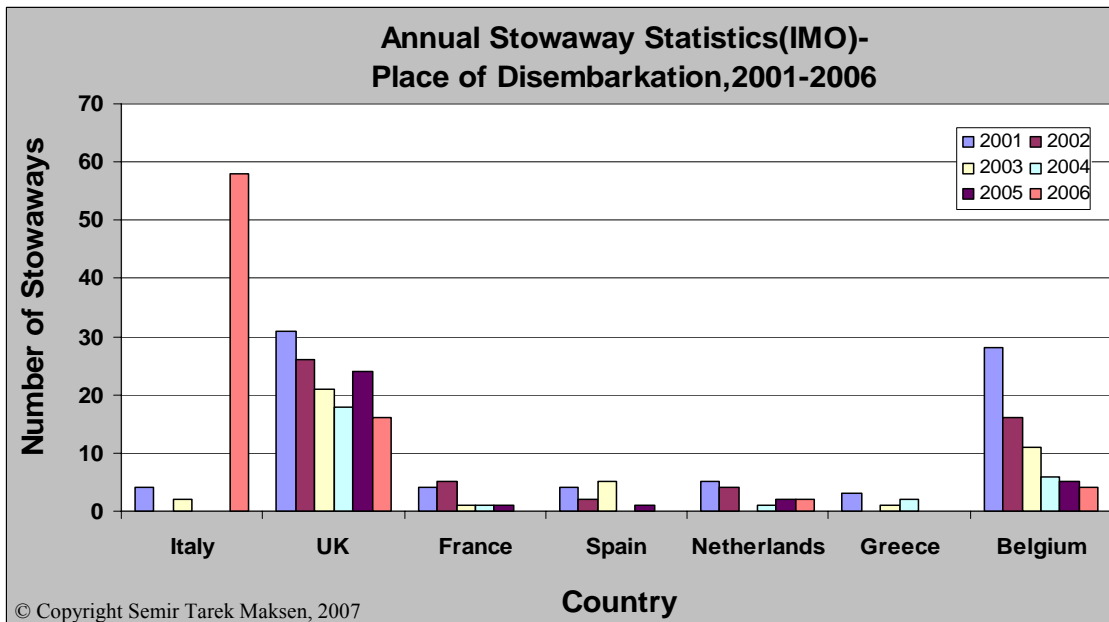


Annual Statistics on Stowaway incidents and type of ships involved-(Worldwide)

## Statistics on Stowaways and Ports of destination in the Maghreb region



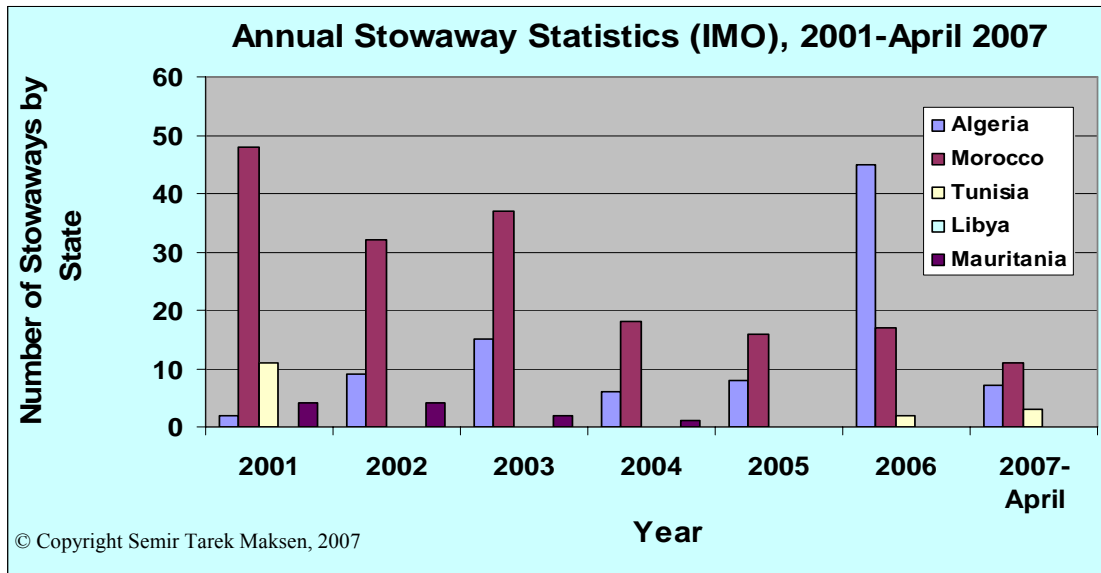
Annual Stowaway Statistics by Region (IMO) – Worldwide



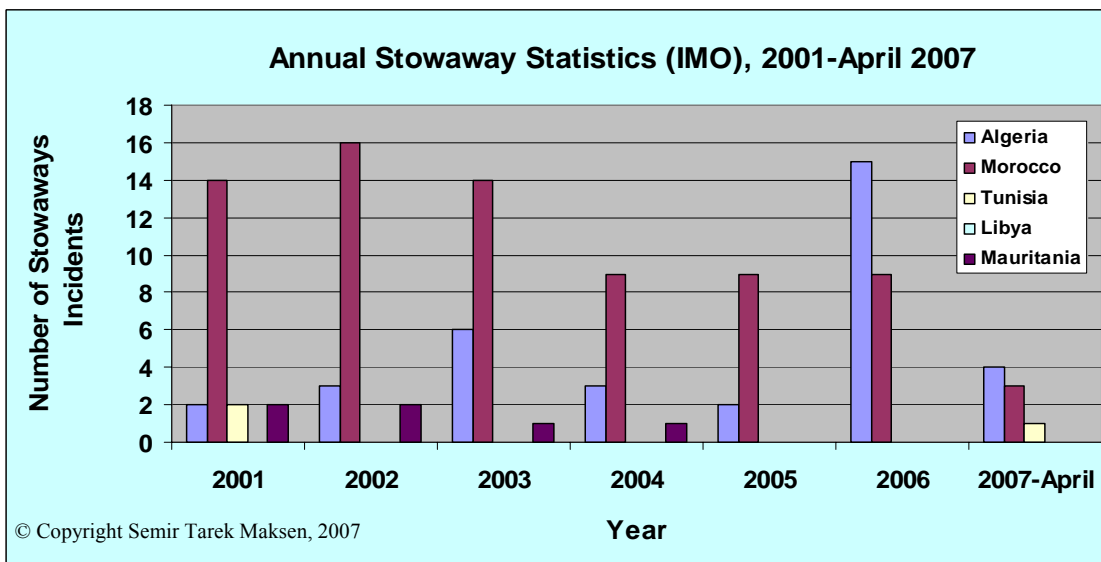
Annual Stowaway Statistics (IMO) in the Maghreb towards Europe

## Appendix D

### Maghreb Stowaway Statistics



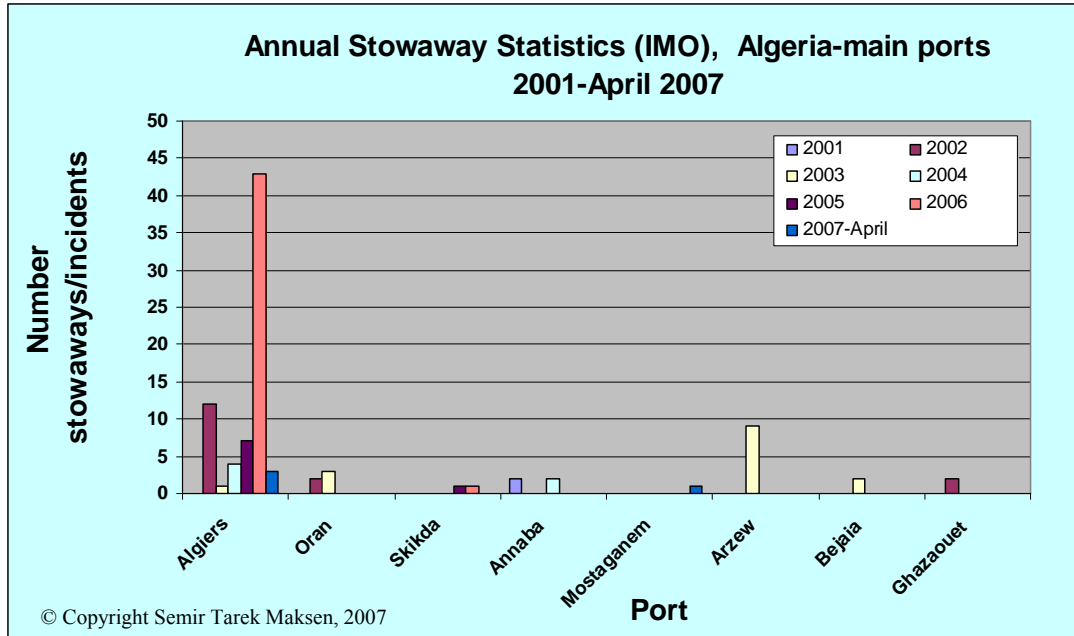
**Annual Stowaway Statistics by Maghreb State, place of embarkation**



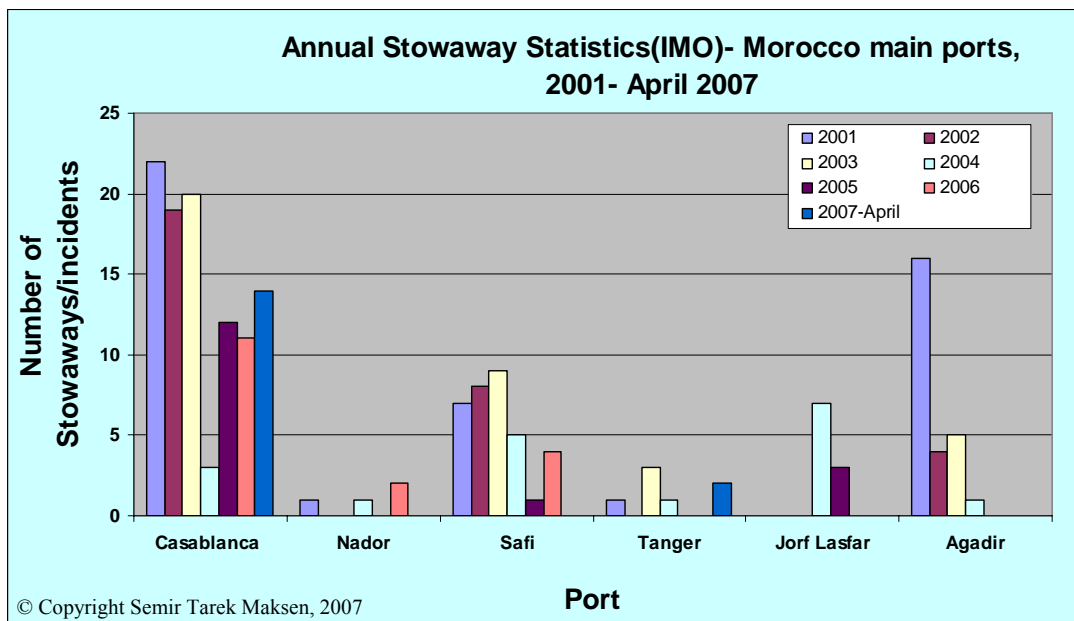
**Annual Stowaway incidents by Maghreb State, place of embarkation**

## Appendix E

### Stowaway Statistics by ports – Maghreb Countries



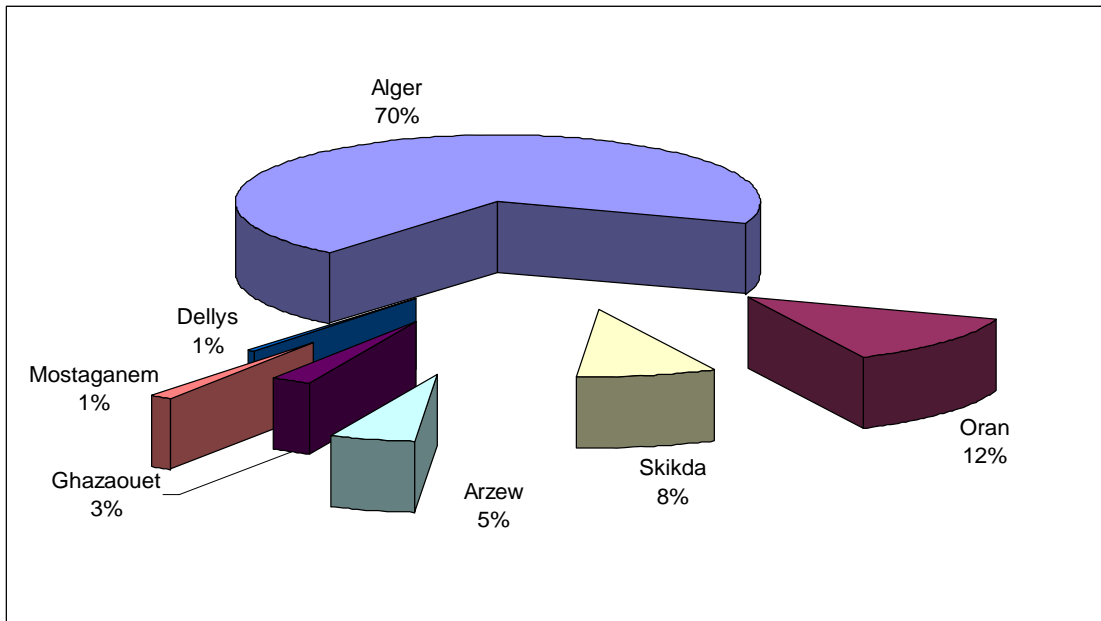
Stowaway Statistics by ports in Algeria: from 2001 to April 2007



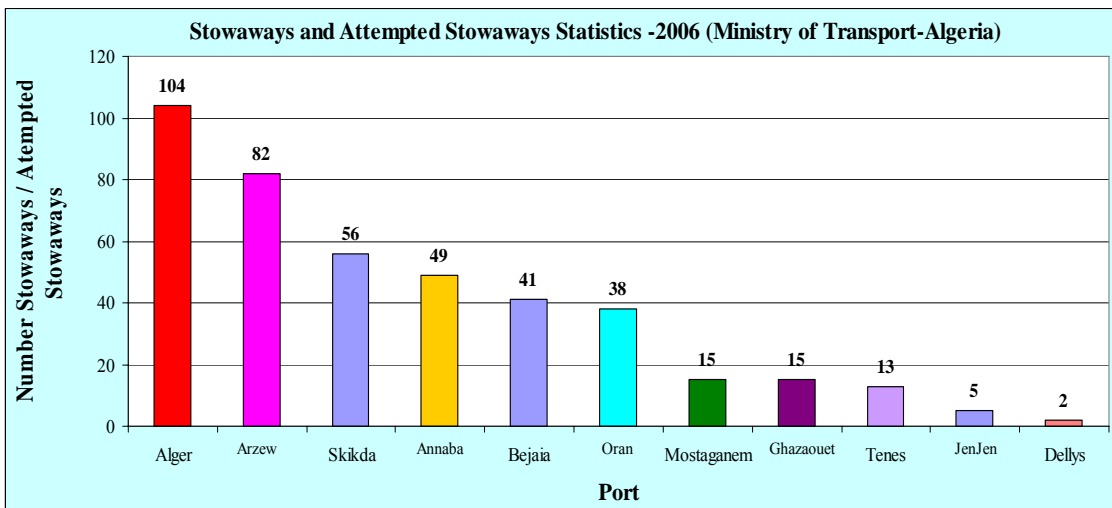
Stowaway Statistics by ports in Morocco: from 2001 to April 2007

## Appendix F

### Stowaways and attempted Stowaways Statistics, Algeria-Year 2006



**Stowaways & Attempted Stowaways by main ports-Algeria (2006)**

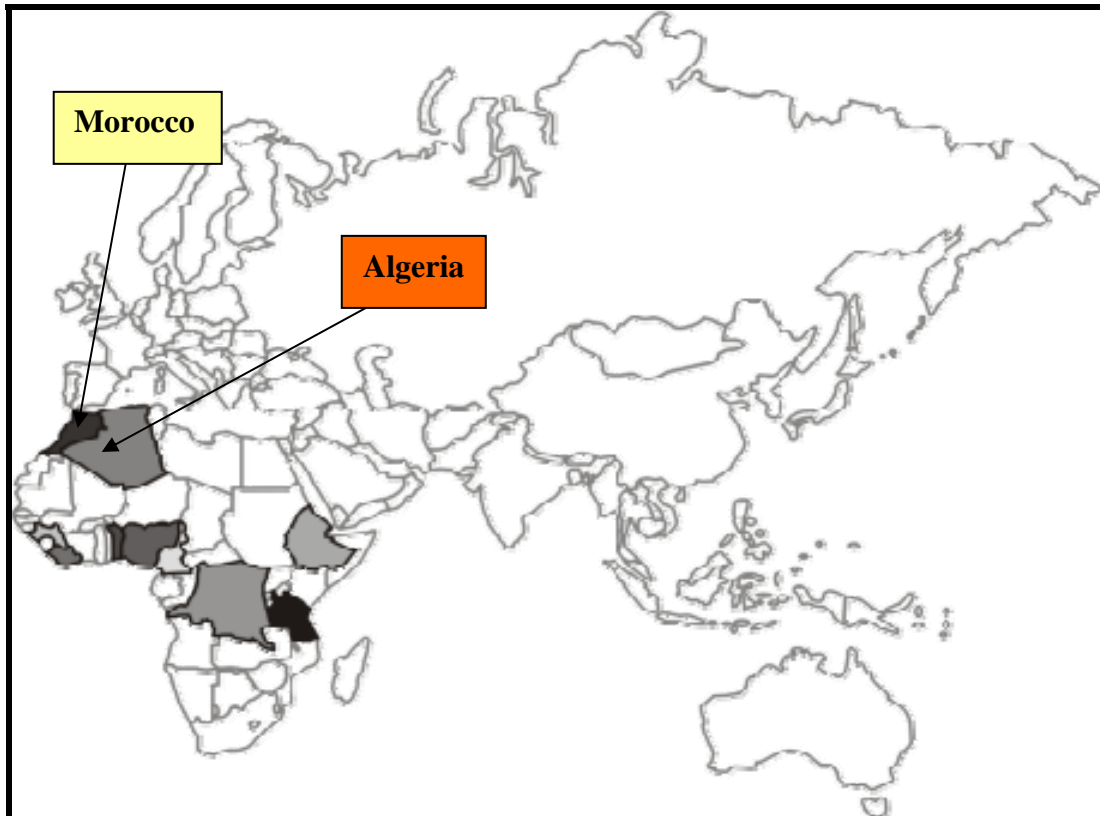


**Stowaways & Attempted Stowaways Statistics by main ports-Algeria (2006)**

Source: Direction de la Marine Marchande (DMM), “Annual Statistics- 2006”, Ministry of Transport – Algeria, < <http://www.ministere-transport.gov.dz/>>, (July, 2007).



**Appendix G**  
**Stowaway Problem Areas – Africa**  
**Long - term: (1989-2007)**



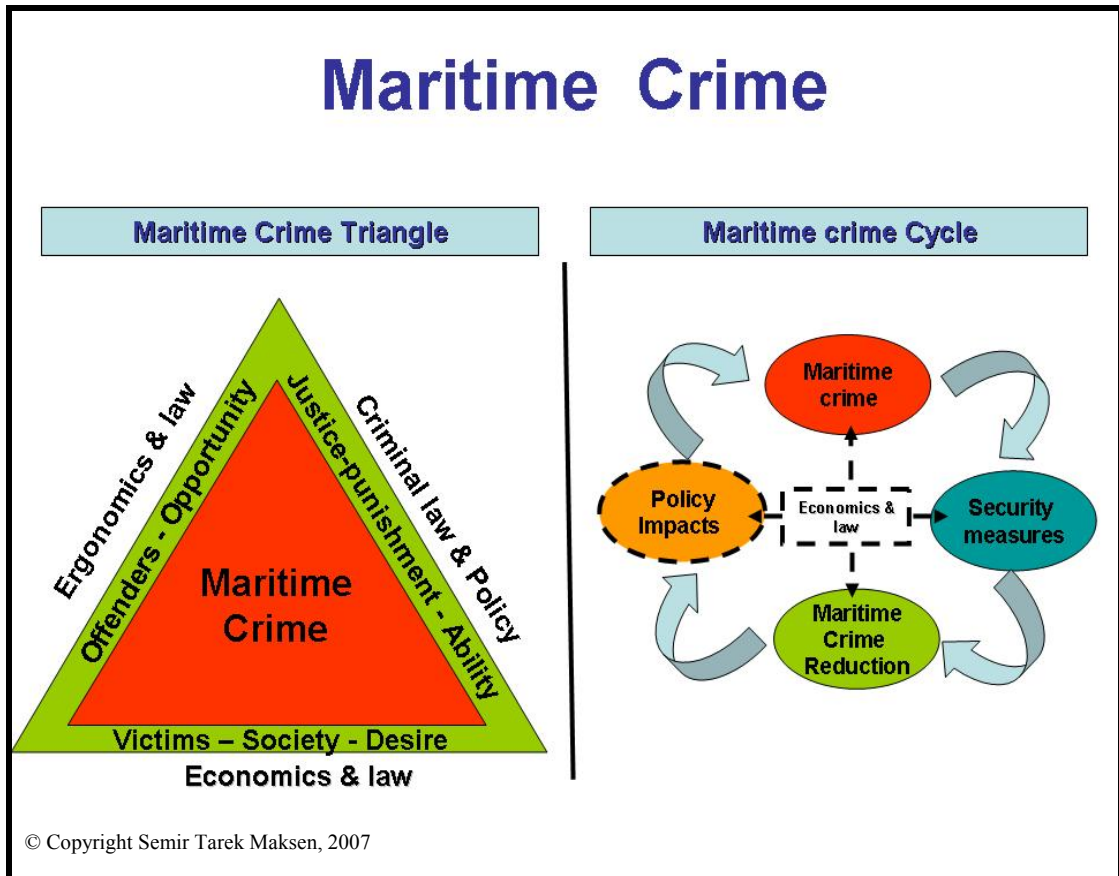
**Map of Stowaway problem areas-2007 (Africa)**

Source: *Robmarine Online services*, <<http://www.robmarine.com/indexe.html>>, (July, 2007).

Africa remains the largest source of stowaway activity and in particular Morocco, followed by Algeria regarding the Maghreb region. In accordance with demands for stowaway related information from P&I clubs, the IMO and the ICS, the latest stowaway data, maps and news on the affected areas have been analyzed by Robmarine services. For Tunisia, Libya and Mauritania, no accurate data are available.

## Appendix H

### Maritime Crime Triangle & Cycle



**The Maritime Crime Triangle and Cycle using Ergonomics -Economics Theories & Law**

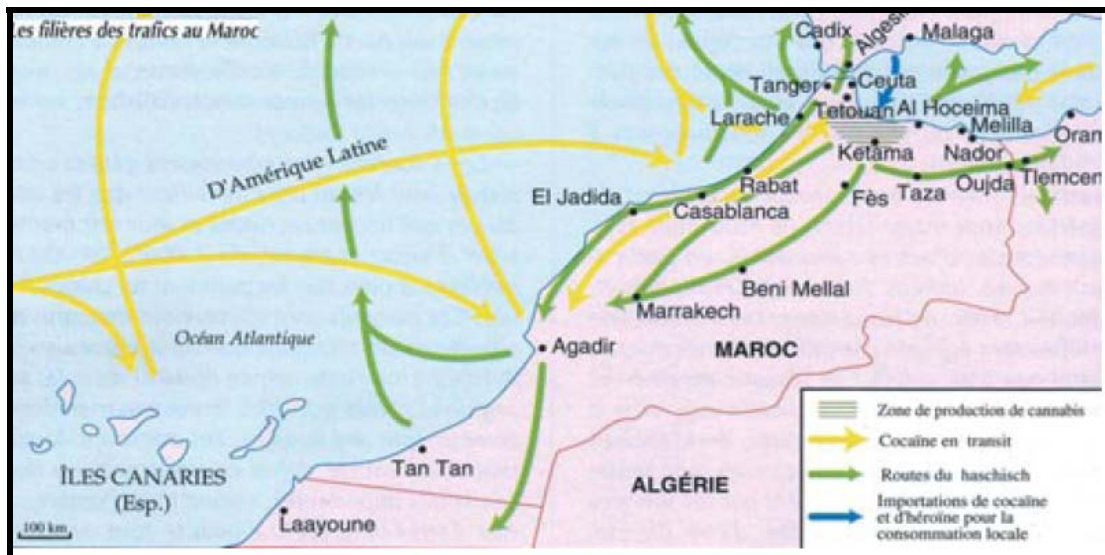
- This triangle is based on the theory of Crime Triangle and has been adapted to the *Maritime Crime* in considering *Ergonomics* and *Economics Principles & Law* in case of an incident.

Elements of the Crime Triangle	Strategy
Opportunity to commit the offence – The Victim	Increase the risk of apprehensions
Ability to commit the offence	Increase the effort required to commit the offence
Desire to commit the offence	Reduce the rewards available to the offender

Source: < <http://www.police.qld.gov.au/Regional+Policing/metroNorth/robbery/triangle.htm> > (July, 2007)

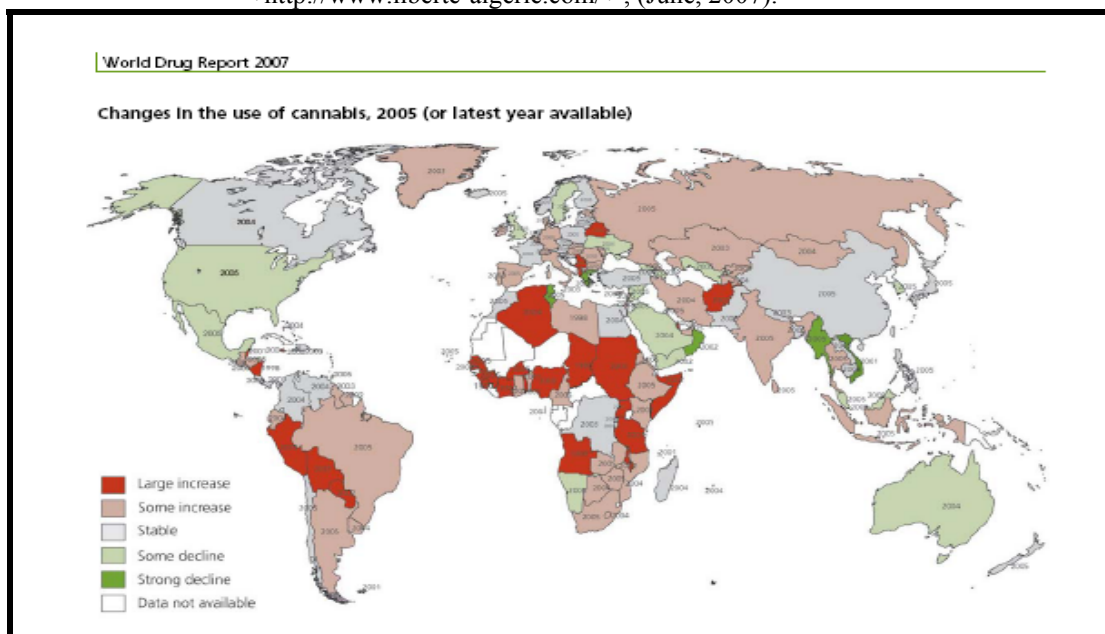
## Appendix I

### The Drug trade in the Maghreb region



The Drug trade and routes in the Maghreb Region in 2007

Source: “Reports of the National Gendarmerie in Algeria regarding the drugs trade and quantity confiscated in 2006-April 2007”, published in the national newspaper *Liberté*, April 30, 2007, < <http://www.liberte-algerie.com/> >, (June, 2007).



Map of the world use of cannabis (kif) – UNODC- World Drug report 2007

Source: United Nations Office of Drugs and Crime (UNODC), *World Drug Report 2007*, (Vienna: UNODC, United Nations Publications), < [http://www.unodc.org/unodc/en/world\\_drug\\_report.html](http://www.unodc.org/unodc/en/world_drug_report.html) >, (July, 2007).



## Appendix K

### IMO Resolutions-Maritime Security

- A.584 (14) Measures to prevent unlawful acts
- A.738 (18) Measures to prevent and suppress piracy/armed robbery against ships
- A.773 (18) Enhancement of Safety of Life at Sea by the Prevention and Suppression of Unsafe Practices associated with alien smuggling by ships
- A.867 (20) Combating unsafe practices associated with the trafficking of transport of migrants by sea
- A.871 (20) Guidelines on the Allocation of Responsibilities to Seek the Successful Resolution of Stowaway Cases
- A.872 (20) Guidelines for the prevention and suppression of the smuggling of drugs, psychotropic substances and precursor chemical on ships engaged in international maritime traffic
- MSC/Circ.896/Rev.1 Interim measures for combating unsafe practices associated with the trafficking or transport of migrants by sea
- A. 920 (22) Review of safety measures and procedures for the treatment of persons rescued at sea
- A. 922 (22) Code of practice for the investigation of the crimes of piracy and armed robbery against ship
- A. 923 (22) Measures to prevent the registration of phantom ships
- A. 924 (22) Review of measures and procedures to prevent acts of terrorism which threaten the security of passengers and crews and the safety of ships
- FAL.7 (29) Adopted on 10 January 2002. Adoption of amendments to the Convention on facilitation of international maritime traffic, 1965, as amended
- MSC.167 (78) Guidelines on the treatment of persons rescued at sea
- MSC/Circ.443 Measures to prevent unlawful acts against passengers and crews onboard ships
- Revised MSC/Circ. 622 Recommendations to Governments for preventing and suppressing piracy and armed robbery against ships
- Revised MSC/Circ.623 Guidance to shipowners and ship operators, shipmasters and crews on preventing acts of piracy and armed robbery against ships

- MSC/Circ. 113 Guidance to masters, companies and duly authorized officers on the requirements relating to the submission of security related information prior to the entry of a ship into port
- MSC/Circ. 1131 Interim guidance on voluntary self-assessment by SOLAS Contracting Governments and by port facilities
- MSC/Circ. 1132 Guidance relating to the implementation of SOLAS Chapter XI-2 and the ISPS Code
- MSC/Circ. 1133 Reminder of the obligation to notify flag States when exercising control and compliance measures
- MSC/Circ. 1067 Early implementation of measures to enhance maritime security
- MSC/Circ. 1072 Guidance on provision of ship security alert systems
- MSC/Circ. 1073 Measures to enhance maritime security- Directives for Maritime Rescue Co-ordination Centres (MRCCS) on acts of violence against ships
- MSC/Circ. 1074 Measures to enhance maritime security. Interim guidelines for the authorization of Recognized Security Organizations (RSO) acting on behalf of the Administration and/or designated authority of a Contracting Government
- MSC/Circ. 1097 Guidance relating to the implementation of SOLAS Chapter XI-2 and the ISPS Code
- MSC/Circ. 1111 Guidance relating to the implementation of SOLAS Chapter XI-2 and the ISPS Code
- MSC/Circ. 1112 Shore leave and access to ships under the ISPS Code
- MSC/Circ. 1154 Guidelines on training and certification for company security officers
- MSC/Circ. 1155 Guidance on the message priority and the testing of ship security alert system
- MSC/Circ. 1156 Guidance on the access of public authorities, emergency response services and pilots on board ships to which SOLAS Chapter XI-2 and the ISPS Code apply
- MSC/Circ. 1157 Interim scheme for the compliance of certain cargo ships with the special measures to enhance maritime security
- MSC/Circ. 1188 Guidelines on training and certification for port facility security officers
- MSC/Circ. 1193 Guidance on voluntary self-assessment by Administration and for ship security

MSC/Circ. 1194 Effective implementation of Chapter XI-2 and the ISPS Code

MSC/Circ. 1217 Interim guidance on voluntary self-assessment by companies and company security officers (CSOs) for ship security

## UNCLOS 82

### **Article 98: Duty to render assistance**

1. Every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers:

- (a) to render assistance to any person found at sea in danger of being lost;
- (b) to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him;
- (c) after a collision, to render assistance to the other ship, its crew and its passengers and, where possible, to inform the other ship of the name of his own ship, its port of registry and the nearest port at which it will call.

2. Every coastal State shall promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea and, where circumstances so require, by way of mutual regional arrangements cooperate with neighbouring States for this purpose.

**Appendix L**  
**SUA 88 Convention**

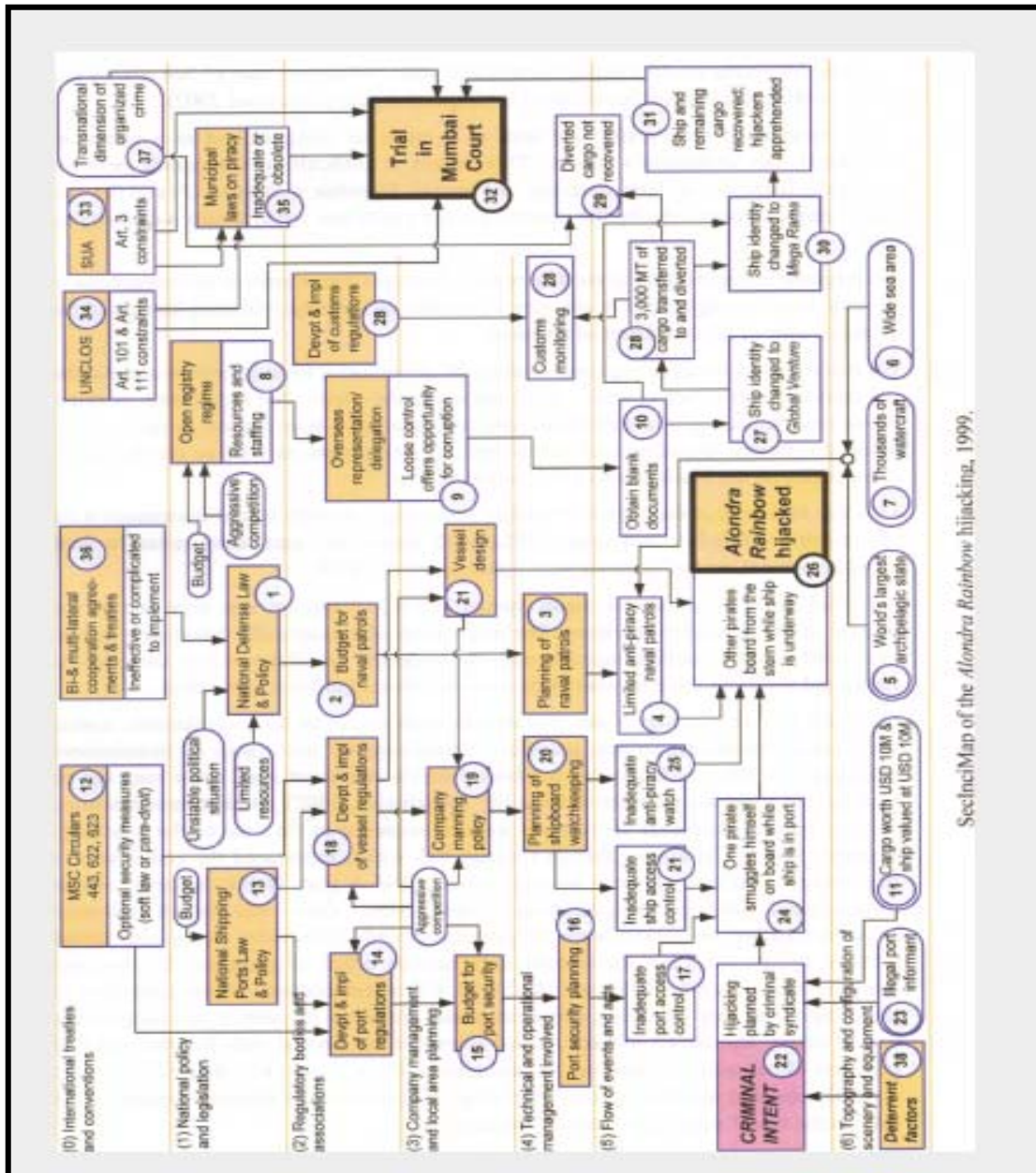
**Article 3**

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



## Appendix M

### The Security Incident Map (SecInciMap )

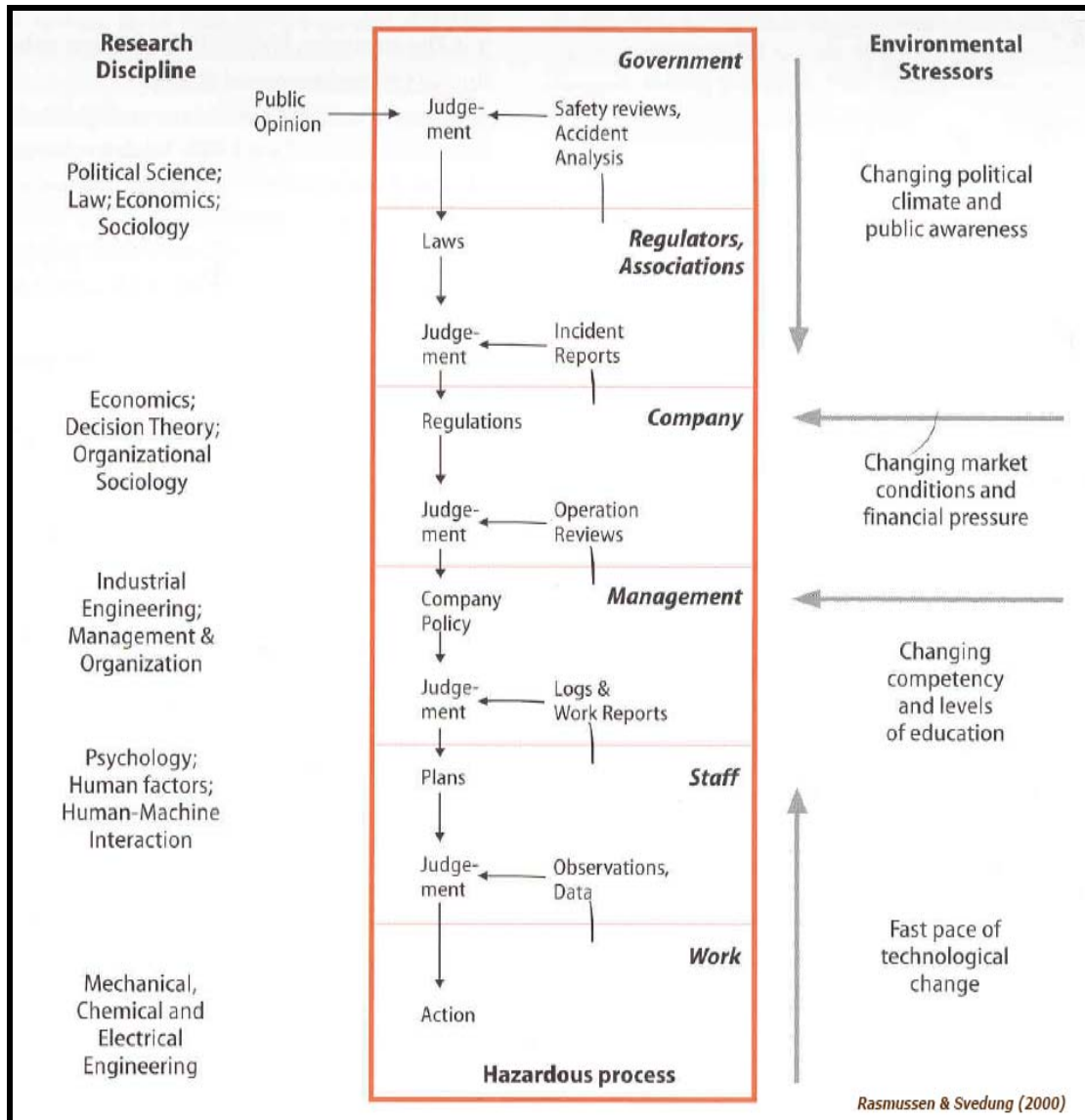


SecInciMap of the *Alondra Rainbow* Incident

Source: Max Q. Mejia Jr. and Roland Akselsson, “*AcciMapping*” *Maritime Security Incidents: a pilot study*”, lecture handouts MLP 402, Maritime Law & Policy course, Malmö: WMU, 2007.

## Appendix N

### Risk Management Process in a Dynamic Society

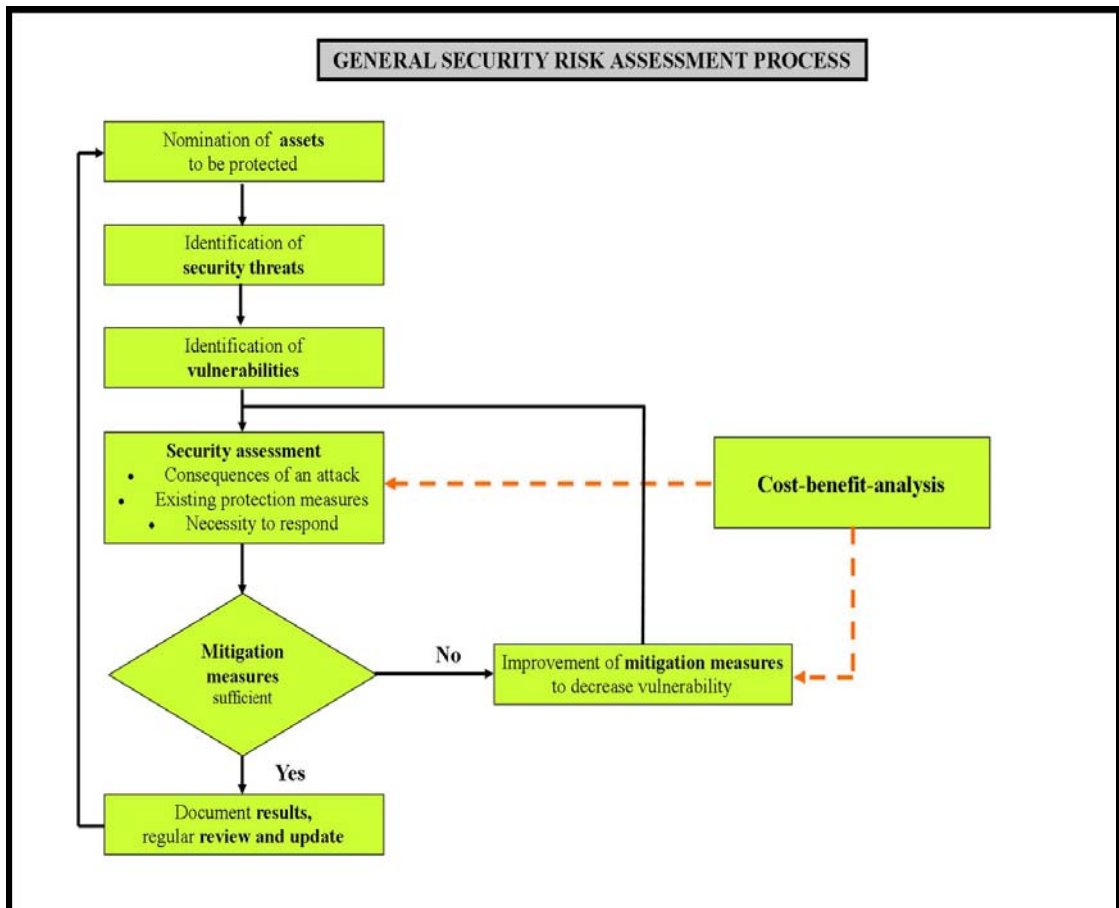


**Risk management in a dynamic society**

Source: Jens Rasmussen and Inge Svedung, *Proactive Risk Management in a Dynamic Society*, Karlstad: Risk center, Swedish Rescue Services Agency, 2000 at p.11.

## Appendix O

### The General Security Risk Assessment Process

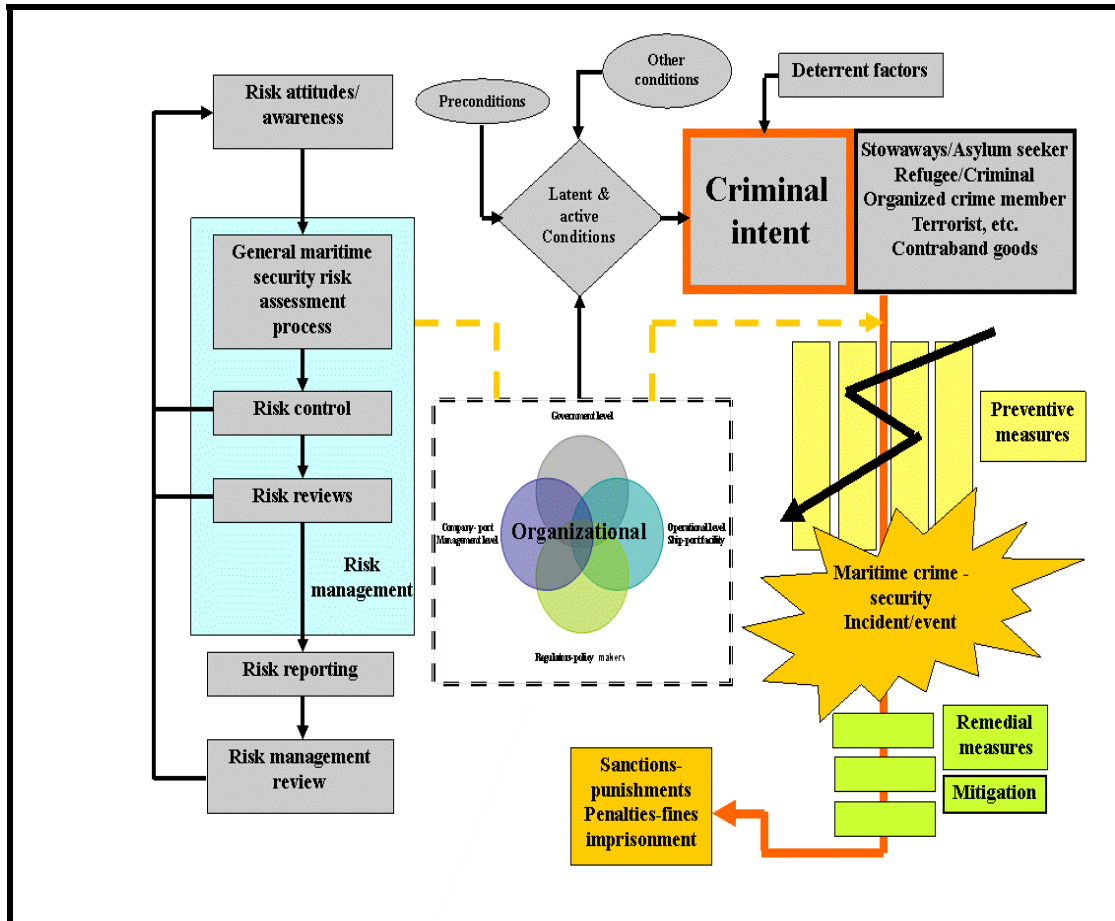


The General Security Risk Assessment Process Flow Chart

Source: Jens - Uwe Schröder, "An introduction to shipboard security assessment", in Maximo Q. Mejia Jr. (ed.), *Contemporary Issues in Maritime Security, a selection of papers and presentations from the Workshop-Symposium on the Practical Implementation and Critical Evaluation of the ISPS Code 11-15 August 2003 and the International Symposium on Contemporary Issues in Maritime Security 30 August to 1 September 2004*, Malmö: WMU, 2005 at p.114.

## Appendix P

### Maritime Crime Progression Map

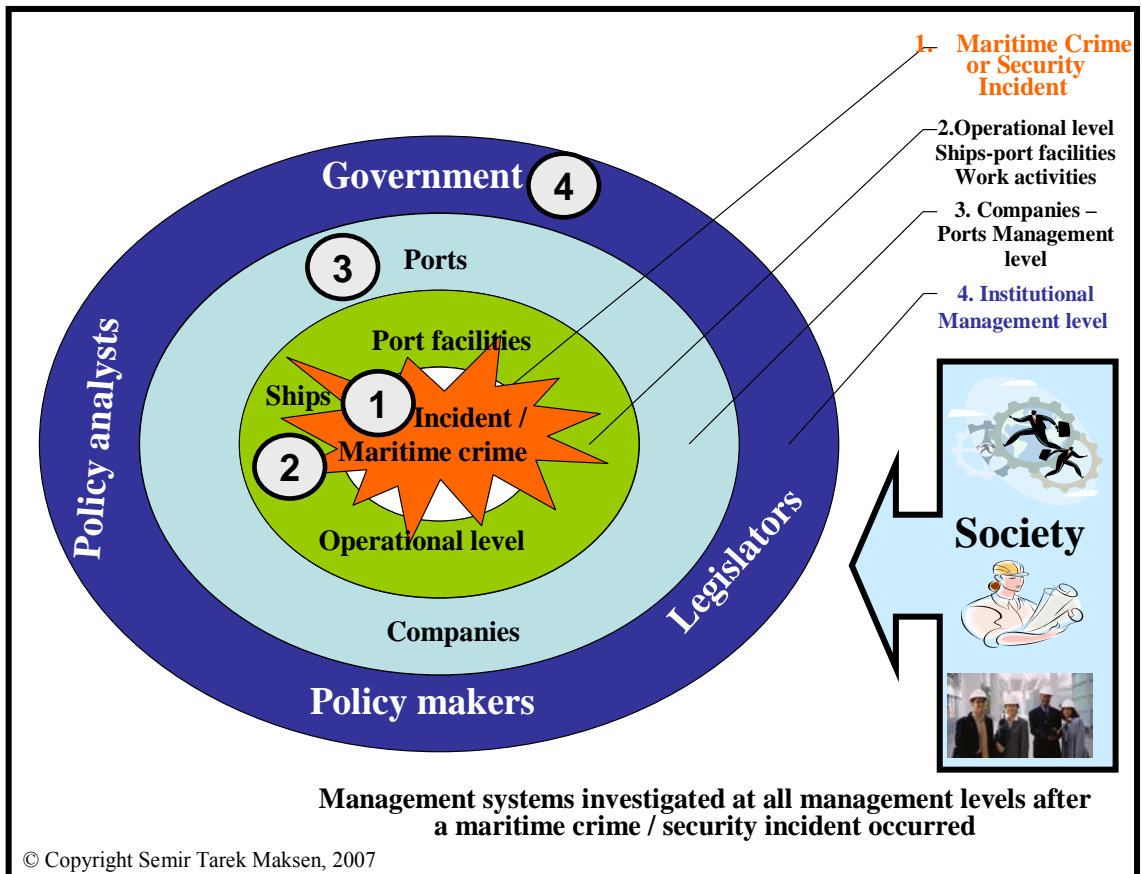


Source: This map was adapted from *SecInciMap* by Max Q. Mejia Jr., 2007, and from *General Maritime Security Assessment Progress Flow Chart* by Jens-Uwe Schröder, 2003 and from *Managing the Risks of Organizational Accidents* by James Reason, 1997.

This map presents an overview of the roles of each component of the system and indicates the flow of events occurring when there is a breakdown of preventive measures, and that only mitigation measures could attenuate the possible effects on the system.

## Appendix Q

### Investigation of Maritime Crimes / Security Incidents



This chart highlights the different levels involved in the management of maritime security domain and their interactions with one another. It shows a hierarchical structure of responsibilities which aids in the identification of areas of failures in the system.