

**The phenomenon of Piracy off the Coast of Somalia:  
Challenges and Solutions of the International  
Community**

by

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## **Abstract**

The phenomenon of Somali piracy has appeared several years ago and continues to pose a serious challenge to the international community. Even if piracy is an international crime for which the universal jurisdiction principle applies, states patrolling off the coast of Somalia are facing major problems in prosecuting the pirates. The doctrine of universal jurisdiction provides that any court has jurisdiction to try certain offenders who have committed international crimes like piracy.

Nevertheless the specificity of Somali piracy is closely linked to the political situation of the country which is devastated by a civil war since 1991 and whose Government controls only one part of the capital. The problem is exacerbated by the geography of Somalia. More than 40% of world trade must pass through the narrow straight between the Horn of Africa and the Arabian Peninsula. The chaotic humanitarian situation in Somalia encourages more and more people to commit acts of piracy and, due to the phenomenon of Somali piracy's considerable magnitude, this make it increasingly difficult to implement the solutions envisaged by the international community.

The purpose of this research is to examine the specificity of Somali piracy, to highlight the solutions hitherto proposed and applied. Furthermore, the research tempts to envisage the role of the region in solving this issue.

**WORKING TITLE:**

The phenomenon of Piracy off the Coast of Somalia: Challenges and solutions of the International Community

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## Acronyms

AMISOM	African Union Mission In Somalia
ASEAN	Association of Southeast Asian Nations
AU	African Union
BCN weapons	Biological, Chemical, Nuclear weapons
BMP	Best Management Practice
CGPCS	Contact Group on Piracy off the Coast of Somalia
COMESA	Common Market for Eastern and Southern Africa
EAPCCO	Eastern Africa Police Chiefs Cooperation Organisation
EASSy	Eastern African Submarine Cable System
ECA	Economic Commission for Africa
EEZ	Exclusive Economic Zone
ESA-IO	The Eastern and Southern Africa - Indian Ocean
FAO	Food and Agriculture Organization
GDP	Gross Domestic Product
GPS	Global Positioning System
GPML	Global Programme against Money Laundering
IGAD	Intergovernmental Authority on Development
ILO	International Labour Organization
IMB	International Maritime Bureau
IUU	Illegal Unreported and Unregulated
IAEA	International Atomic Energy Agency (IAEA)
LOSC	Law of the Sea Convention
IAMSP	International Association of Maritime Security Professionals
IMO	International Maritime Organization
IPOA	International Peace Operations Association
MSP	Malacca Strait Patrols
NATO	The North Atlantic Treaty Organization
NGOs	Non Government Organizations
PCASP	Privately Contracted Armed Security Personnel

PMASC	Private Military Security Companies
ReCAAP	The Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia
SOLAS	Safety Of Life At Sea
UNCLOS	United Nations Convention on the Law of the Sea
UN	United Nations
UNDP	United Nations Development Programme
UNEP	United Nations Environment Programme
UNODC	United Nations Office on Drugs and Crime
UNOPS	United Nations Office for Project Services
UNSCR	United Nations Security Council Resolutions
UNTOC	United Nations Convention Against Transnational Organized Crime
USD	United States Dollar
SUA	Convention for the Suppression of Unlawful Acts of Violence against the Safety of Maritime Navigation
TFG	Transitional Federal Government
VHS	Video Home System
VTS	Vessel Traffic System
WFP	World Food Programme

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# INTRODUCTION

The phenomenon of piracy has been known since antiquity. The ancient Egyptians already experienced pirate attacks against merchant ships.

During the late 19th century, the phenomenon was marginal, affecting only a small part of trade merchants and mostly located in specific areas such as Southeast Asia.

Somali piracy is a very specific phenomenon mainly due to the triple realities that are making the problem difficult to fully grasp and infinitely complex to solve.

First, the political situation in the country. Somalia is a State within a permanent civil war in which the periods of lull are few and many peace processes have yielded very little result.

To better understand the Somali context, one should keep in mind that Somalia is composed of a considerable number of tribes, clans and sub-clans that form a social nucleus deeply rooted in society and above which the State Somalis have been imputed.

The period in office of President Siad Barreh increased tribal and clan tensions and led to an implosion of the State and to a geographical division based on tribes and for which the capital Mogadishu is the sad example.

The religious component is a primary factor that determines social relations and customs in the country. This is particularly true in Somalia that religious people have taken considerable place and have benefit from the chaos to organize themselves into a political and military force, along with foreign interventions, has become fundamentally radical.

The current situation of Somalia is characterized by Somaliland in the northwest region of Somalia which proclaimed its independence, the Puntland region of North is seen by some as the epicenter of piracy and southern Somalia composed of different regions more or less independent from the central Government along with religious militias.



**Figure 1: Map of Somalia**  
**Source: United Nations**

The emergence and increase of the number of piracy is closely related to the situation of anarchy into which Somalia is and the lack of capacity of the elected Government (TFG) who controls only a small part of the capital with the vital support of AMISOM troops.

The second aspect which emphasizes the complexity of Somali piracy is the geographical position of Somalia. Highly strategic country off the Gulf of Aden, the mouth of the Red Sea where 40% of global marine transportation transits including oil for western countries.

The third point is the length of the Somali coast. The country has 3,000 km of the coastal strip which make it the first country in Africa in terms of access to water and is an extremely difficult area to monitor for the international forces patrolling off the coast of Somalia.

If the exact beginning of piracy in this region can not be considered accurate (probably early 2000) the reasons advanced by pirates to explain their actions are well known.

The IUU and the dumping of toxic waste are two reasons that have been often raised. Fishermen living mainly from the fishing sector have repeatedly expressed their tired and tired of seeing their fishery resources plundered by foreign fishing vessels who take advantage of the lack of law enforcement forces.

The toxic waste dumping is itself a delicate matter, often seen as rumors and for which no evidence had been presented. However, the 2005 tsunami, including the huge waves that have reached the coast of Somalia raised from the seabed barrels of chemicals beaching them on the coast.

These barrels are, according to the locals, the main cause of the malformation of young children born near of the coast.

The first part of this study will look at the legal tools available to the international community in order to address this well known phenomenon, which for the reasons mentioned above, makes it very complex to efficiently address.

The second part of the study will analyze the economic, social and financial aspects of Somali piracy.

**PART ONE:**

**LEGAL ASPECTS**

# CHAPTER 1: INTERNATIONAL LAW

## SECTION A: INTERNATIONAL LAW

### Paragraph 1: Classic Law of Nations

Piracy is without doubt one of the oldest international crimes. For several centuries maritime transport was the main way of trade between nations and was certainly much safer than transporting on land.

Attracted by the lure of money, the pirates stormed the transport ships, in particular merchant ships.

Faced with increasing incidents of piracy affecting all ships without distinction at sea and the threat they posed to the economy, the major maritime nations decided to establish piracy as a serious crime whose sentence was mostly death.

Therefore, as naval operations increased, piracy started being seen as *hostis humani generis*, which means a threat to all humans. This interpretation suggests that all States and their naval forces are allowed and even encouraged to fight all acts of piracy occurring in high seas.

It's in the eighteenth century that States extended their authority by including the arrest of pirates and pirate ships without any nationality link with the State that proceeded to the seizure; this is the definition of the current principle of universal jurisdiction.

Thus, Piracy is the "original" crime which founded the current concept of universal jurisdiction. In addition to piracy, international law includes other practices as *hostis humani generis*, such as slavery, torture, genocide etc.<sup>1</sup>

For a very long time, the fight against piracy was characterized by rapid executions. The sentence for pirates arrested on the high seas was applied immediately without any trial and consisted, in most of the cases, of death by hanging.<sup>2</sup> The speed of the executions was due to the high cost of a trial but was also motivated by technical reasons. Considering that some acts of piracy were occurring far from the coast, few commanders wanted to carry pirates who would need food and water for sometimes many weeks.

Of course hanging is no longer a common a method used to punish piracy, but the legacy of cooperation among States in combating piracy is reflected in current international law.

Some courts, in their attempts to define acts of piracy, have highlighted certain practices and actions that can be interpreted as acts of piracy thus allowing the prosecution of persons suspected of such acts.

This is the case in the United States where, through the case *United States v. Smith* the Supreme Court in 1820, after recalling the constitutional ability of Congress to define and punish piracy, defines piracy as an act of robbery at sea.<sup>3</sup> This decision is an initial assessment by U.S domestic law of acts that may constitute an act of piracy.

The U.K has produced several acts relating to piracy and defined piracy as intent to kill or attempt on the life of those on board.<sup>4</sup> The act of trading, communicating, throwing goods

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<sup>1</sup> *Yearbook of the ILC*, 1966, vol.II, p.248.

<sup>2</sup> Royal Naval Museum Library, *A brief history of piracy*, 2002.

<sup>3</sup> *United States v. Smith, 1820 ND 5 Wheat. 153 153.*

<sup>4</sup> The National Archives, *Piracy Act 1837*, UK Public General Acts, Section 2.

belonging to a merchant ship overboard or not defending oneself against pirates is an act of piracy.<sup>5</sup>

Similarly, the French law of 10 April 1825 defines acts of piracy in relation to the crew or the captain of the ship and says that acts of piracy are "hostile acts" as is taking control of a French vessel by fraud or violence or committing armed acts of depredation or violence against French ships or vessels of a State with which France is not at war with.<sup>6</sup>

In 1932, the Harvard Research Group established a document composed of 19 articles which refer to all sources related to piracy, using the conventions, international practices, the practices of law recognized by nations at the time, judicial decisions and publications by the most eminent specialists of the time.<sup>7</sup>

This famous document from the Harvard School is called the Harvard Draft Convention. This is the first study undertaken in order to codify and harmonize the practices of States at sea.

Pursuant to the General Assembly Resolution 174 (II) dated 21 November 1947; the International Law Commission is responsible for developing and codifying international law. In 1956, the Commission prepared Draft Articles in which it attempts to codify the international law of the sea<sup>8</sup>. Articles 38 to 47 of the Draft Articles deal specifically with piracy and are largely inspired by the Harvard Draft Convention.

In this report, the Commission recommends holding a conference attended by plenipotentiaries to examine the law of the sea, taking into account that the convention

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<sup>5</sup> The National Archives, *Piracy Act 1721*, Acts of the Parliament of Great Britain, section 1.

<sup>6</sup> Legifrance, *Law n°1825-04-10 of 10 April 1825 for the safety of navigation and maritime trade*, Title 1, art. 2.

<sup>7</sup> Barry Hart Dubner, *The law of international sea piracy*, P.103.

<sup>8</sup> *Yearbook of the international law commission*, volume II, 1956, pp.282-285.

should address “not only the legal but also the technical, biological, economic and political aspects of the problem.”

This will be undertaken in 1958 by the Convention on the High Seas.<sup>9</sup>

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<sup>9</sup> *Convention on the High Seas*, Entered into force on 30 September 1962. United Nations, Treaty Series, vol. 450, p. 11, p. 82.

## **Paragraph 2: Customary International Law of Piracy**

World War II and the devastating consequences it engendered convinced nations of the need to increase cooperation between States in order to protect future generations from the scourge of war. This period was the beginning of the codification of international practices particularly on the high seas.

This consolidation was intended to give more importance to multilateral structure and multilateral negotiations in international relationships.

The Law of the Sea is a component of international law that has evolved to a consolidation of rights and practices. The first instrument is the Convention on the High Seas which has been replaced by UNCLOS in 1982.

Twenty years later, the international community has seen the limits of UNCLOS dispositions against the new kind of violent acts against ships at sea. SUA is born from the international community commitment to develop an instrument that would complement the International Convention of Law of the Sea.

### **I- Convention On the High Seas**

The major nations agreed on codified standards and practices at sea, including an appropriate definition of piracy directly inspired by the draft convention prepared by the Harvard Group. This is the Convention on the High Seas. The Convention on the High Seas in Article 15 defines piracy as follows:

Piracy consists of any of the following acts:

- (1) Any illegal acts of violence, detention or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:

- (a) On the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
- (b) Against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
- (2) Any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
- (3) Any act of inciting or of intentionally facilitating an act described in subparagraph 1 or subparagraph 2 of this article.

The agreement excludes acts of mutiny<sup>10</sup> and recalling the principle that acts of piracy can take place only on the high seas or outside the jurisdiction of a State. The State that has seized the pirates may decide how to proceed to sentence the alleged pirates and “actions to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith”<sup>11</sup>.

It is also stated that the seizure of a vessel may be made only by warships or other ships from a State with authority to perform this task.<sup>12</sup> The following dispositions specify the conditions of seizure of a merchant ship for which must exist “reasonable grounds for suspecting that the ship is engaged in piracy”.<sup>13</sup>

Many countries, particularly in the Soviet block, have highlighted the fact that "the definition of piracy as formulated in the agreement is not consistent with international law and does not meet the need for freedom of navigation on the high seas."<sup>14</sup>

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<sup>10</sup> *Convention on the High Seas*, Article 16, P.5.

<sup>11</sup> *Id.*, Article 19, P.6.

<sup>12</sup> *Id.*, Article 21, P.6.

<sup>13</sup> *Id.*, Article 22, P.6.

<sup>14</sup> *Multilateral Treaties deposited with the Secretary-General*, 2001, Volume 2, Part 1, pp.212-217.

## II- United Nations Convention on the Law of the Sea (UNCLOS)

The discussions about the drafting of a convention on the law of the sea began in 1973 under the aegis of the United Nations. This convention has been created in order to incorporate the international rules already established by the four treaties on the subject signed in Geneva:

- Convention on the Territorial Sea and Contiguous Zone, entry into force: 10 September 1964;
- Convention on the Continental Shelf, entry into force: 10 June 1964;
- Convention on the High Seas, entry into force: 30 September 1962; and,
- Convention on Fishing and Conservation of Living Resources of the High Seas, entry into force: 20 March 1966.

The agreement now called the United Nations Convention on the Law of the Sea (UNCLOS) was opened for signature on 10 December 1982 and came into force on 16 November, 1996.<sup>15</sup>

### 1- Definition of piracy

UNCLOS contains the exact same provisions pertaining to piracy as those established by the Convention on the High Seas of 1958. These provisions contained in articles 100 to 107, are seen as customary international law.

Thus, any illegal act of violence or detention, or depredation committed by the crew or passengers of a ship or a private aircraft, is an act of piracy. Three conditions must be met:

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<sup>15</sup> United Nations Convention on the Law of the Sea, opened for signature at Montego Bay, Jamaica, on 10 December 1982, United Nations, Treaty Series , vol. 1833, p. 3.

- This act must be performed by the crew or passengers of another vessel;
- Acting for private ends; and,
- That the act occurs in high seas.<sup>16</sup>

### **The need for two ships**

Article 101 clearly states that an act of piracy may only be performed by "the crew or passengers of a ship or a private aircraft." This is intended to exclude acts of violence, detention or depredation committed by the team or crew of a ship towards his own ship. This scenario does not fall under the definition of what constitutes an act of piracy and therefore limits the intervention of a foreign warship, and clearly gives jurisdiction to the country's flag ship.

However, a vessel captured by pirates and which would subsequently be used to commit other acts of piracy falls within the definition of piracy established by UNCLOS.

### **Acting for private ends**

Neither the Convention on the High Seas nor even UNCLOS give a clear definition of the term "private ends".

The accuracy of an act of piracy in a purpose of private ends tends to exclude other motivations. Many scholars believe that private ends means private acts of violence, detention or depredation, "*animus furandi*"<sup>17</sup>. But this definition now seems incomplete as acts of violence against ships may also be motivated by revenge<sup>18</sup>. The focus of Article 101 on the criteria of private purposes serves mainly to exclude political motivations.

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<sup>16</sup> UNCLOS, Article 101.

<sup>17</sup> Commentary to Art. 398, *Yearbook of the International Law Commission*, 1956, volume II, p.282.

<sup>18</sup> Report of the Sub-Committee of the League of Nations, cited by the Harvard ``Draft Convention on Piracy'', note 41 above, p. 789.

## **Acts occur on the high seas**

The act of piracy can only occur on the high seas and outside the jurisdiction of a State. In this case, all States and in accordance with Article 105 of the UNCLOS can "seize a pirate ship or aircraft or a ship or aircraft taken as a result of an act of piracy and the hands of pirates, and arrest the persons and seize the property on board." <sup>19</sup>

However, if acts of violence, detention, and depredation are committed in an area under the jurisdiction of a State, then the courts of the coastal State are empowered to prosecute persons under the definition for such acts in the coastal State's domestic law.

## **Right of Visit**

No State has jurisdiction over a ship when it is in an area under the jurisdiction of another State (territorial waters)<sup>20</sup>. Similarly, on the high seas, no State has jurisdiction over a ship unless it is flying the flag of the warship.

However, as we have seen, there are exceptions to this principle allocating jurisdiction to States over a ship in the high sea. These include a) piracy but also other crimes such as: b) slavery, c) used for unauthorized emissions, d) is without nationality or the same nationality as the warship though flying another flag and refuses to fly its flag.<sup>21</sup> This right is limited to the immunity of warships or vessels belonging to a State and intended to be used for non-commercial public service<sup>22</sup>.

Upon seizure of the ship or aircraft taken in order to arrest the persons and seize the property on board, States must comply with the UNCLOS provisions, namely:

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<sup>19</sup> UNCLOS, article 105.

<sup>20</sup> UNCLOS, article 27, p.33.

<sup>21</sup> Id, article 110, p.63.

<sup>22</sup> Id, article 110, para.1.

- The seizure may be carried out only by warships or other vessels “authorized ships clearly marked and identifiable as being on Government service and duly authorized to do so”;<sup>23</sup>
- Naval ships and vessels "belonging to a State or operated by one and used exclusively for Government non-commercial public service"<sup>24</sup> enjoy immunity vis-à-vis all other States; and,
- In case of unfounded boarding, the vessel shall be compensated "for any loss or any damage [...] provided it has not committed any act making it suspect".<sup>25</sup>

## **Jurisdiction**

The issue of the prosecution of pirates is crucial, especially in the case of piracy off the coast of Somalia since it determines the competent courts to judge and imprison pirates.

### **A) Universal Jurisdiction**

The principle of universal jurisdiction refers to commit crimes of such gravity that they are internationally regarded as harmful and are therefore the responsibility of all States without any effect on the location or the nationality of perpetrators or victims.

This principle is based on several principles that define universal jurisdiction. Thus, universal jurisdiction should be a jurisdiction:

- Based on the crime regardless of the location or nationality of perpetrators or victims or link with the State exercising universal jurisdiction;

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<sup>23</sup> Ibid, article 107, p.62.

<sup>24</sup> Ibid, article 96, p.59.

<sup>25</sup> Ibid, article 10, para. 3, p.28.

- This must be performed by the judiciary body of a State against a person accused of committing serious crimes;
- Which a State may invoke as a basis to demand the extradition of a person charged or prosecuted for crimes under international law. People who have been extradited will be tried and punished in accordance with the norms of international law concerning the protection of human rights;
- While exercising universal jurisdiction, the State requesting the extradition must respect the procedural norms including the rights of defendants and victims, of procedural fairness, of the independence and impartiality of justice; and,
- A State must exercise universal jurisdiction in good faith and in accordance with the rights and obligations under international law.<sup>26</sup>

What are international crimes that are subject to universal jurisdiction? These are:

- Slavery; and,
- Piracy.

With the extension of international human rights many other crimes have been added to the list of international crimes, these are the acts of:

- Genocide;
- Crimes against humanity;
- War crimes; and,
- Torture

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<sup>26</sup> Princeton University Program in Law and Public Affairs, *Princeton Principles on Universal Jurisdiction*, 2001, Human Rights Library.

## **B) Universal Jurisdiction and piracy**

As we have seen previously, piracy is considered the enemy of all human beings (*hostis humani generis*) as such, customary international law, including UNCLOS provide an opportunity for all States to seize the vessels and those who have engaged in acts of piracy.

Similarly, every State has the opportunity to prosecute those suspected of having committed acts of piracy, even if these acts have no connection with the State, provided that the courts invoke the universal jurisdiction<sup>27</sup>.

However, the trial of pirates based on universal jurisdiction remains extremely rare. Universal jurisdiction for piracy off the coast of Somalia is mainly exercised by countries other than Western countries<sup>28</sup>.

### **2- Maritime Zones**

UNCLOS was also intended to resolve the important question of delimitation of territorial waters of the States. Thus, UNCLOS established the boundaries corresponding to specific newly created maritime zones.

The delimitation of maritime zones and the identification of waters under the sovereignty of a State is an essential element in determining the judicial competence of States.

Thus, UNCLOS defines several maritime zones around a coastal State with, for each area, specific characteristics such as width but also the rights and obligations:

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<sup>27</sup> It is the case of Kenya Courts which have decided to prosecute pirates even though they were no nexus between Kenya and the pirates.

<sup>28</sup> ASIL Agora : *An empirical examination of universal jurisdiction for piracy*, Eugene Kontorovitch and Steven Art, 2010, Volume 104, Number 3, p.436-453.

- **Internal waters:** Inland waters correspond to waters "below the baseline of the territorial sea"; they correspond to waters located inside the coastal zone. For inland waters, States have the rights to make laws, establish regulation and are not subject to any right of passage.<sup>29</sup>
- **The archipelagic waters:** the archipelagic waters include the waters within archipelagic lines measured by "the extreme points of the outermost islands and drying reefs of the archipelago." These lines must not exceed 100 nautical miles. The State exercises its sovereignty over these waters, but concedes a right of innocent passage through archipelagic waters.<sup>30</sup>
- **The territorial waters:** The territorial waters should not exceed 12 nautical miles and are also subject to regulation and national laws of the coastal State who has the right to use the resources of these waters. States have a right of innocent passage which means it must be continuous and expeditious and should not undermine the peace, good order or security of the coastal State.
- **The contiguous zone:** The contiguous zone shall not exceed 24 nautical miles which must be measured from the same point as that used for measuring the territorial waters (baselines). In the contiguous zone, the coastal State exercises control in order to "prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations in its territory or in its territorial sea."<sup>31</sup>
- **The Exclusive Economic Zone (EEZ):** exclusive economic zone shall not exceed "200 nautical miles from the baselines from which the breadth of the territorial sea is measured". In this zone the coastal State has rights such as economic exclusive exploitation of natural resources. All States have the freedoms of navigation and over flight and the freedom to lay underwater pipelines and targets. While exercising their

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<sup>29</sup> UNCLOS, article 8, p.28.

<sup>30</sup> Ibid, article 47, p.40.

<sup>31</sup> Ibid article 33, p.35.

rights, the States have an obligation to respect the rights and obligations of coastal States.<sup>32</sup>

- **The Continental Shelf:** The continental shelf is regarded as "natural extension" of territorial waters should not exceed "200 nautical miles from the baselines from which the breadth of the territorial sea is measured". The outer limit must not exceed "350 nautical miles from the baselines from which the breadth of the territorial sea is measured or at a distance not exceeding 100 nautical miles from the 2,500 m isobath, which is the line connecting the depth of 2500 meters." The coastal State comprises the continental shelf resources located in "the seabed and subsoil".<sup>33</sup>

### **Exclusive Economic Zone and piracy**

The extension of the jurisdiction of coastal States as stipulated by UNCLOS complicated a little more the problem of piracy. The example of the EEZ, formerly part of the high seas, is the most telling. The piracy provisions of UNCLOS are entirely from the Geneva Convention on the High Seas of 1958 which clearly states that acts of piracy occur only outside the jurisdiction of a coastal State.<sup>34</sup> The question is therefore whether the UNCLOS provisions apply in the EEZ as residual rights and obligations despite the fact that the EEZ is under the jurisdiction of a coastal State. This issue is even more problematic since Article 86 of UNCLOS excludes from the scope EEZ provisions relating to piracy.

However, Article 58 (2) states:

“Articles 88 to 115 and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with this Part.”

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<sup>32</sup> UNCLOS, article 57, p.44.

<sup>33</sup> Ibid, article 76, p.53.

<sup>34</sup> See supra note 16.

In accordance with this Article, the provisions relating to piracy apply to the EEZ in so far as they are not inconsistent with the rights and obligations of States (the freedom of navigation and overflight and the freedom to lay targets and submarine pipelines) but also be compatible with the laws and regulations drafted by the coastal State.

Article 58 (3) further clarifies that:

“In exercising their rights and performing their duties under this Convention in the exclusive economic zone, States shall have due regard to the rights and duties of the coastal State and shall comply with the laws and regulations adopted by the coastal State in accordance with the provisions of this Convention and other rules of international law in so far as they are not incompatible with this Part.”

This article complements article 56 (2) of UNCLOS on the rights of the coastal State in the EEZ which stipulates the rights and obligations of States that the coastal State is complied to respect.

It is argued that Article 58 (3) which refers to the rights and obligations of the coastal State does not limit the applicability of articles 100 to 107 of UNCLOS in the sense that these economic rights must be respected by States fighting piracy, but in no way do they confer a “regulatory power of the coastal State on the performing rights of all States eliminate piracy in the EEZ.”<sup>35</sup>

In the case of Somali piracy, naval operations engaged in the fight against piracy operate in the EEZ of Somalia as well as in the territorial and internal waters under the UN resolutions with the consent of the Transitional Federal Government (TFG) (this part will be examined later).

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<sup>35</sup> ASIL Agora : *Countering piracy off Somalia international law and international institutions*, J.Ashley Roach, 2010, Volume 104, Number 3, p.398-399.

UNCLOS is a synthesis of State practice for hundreds of years and is the main legal instrument currently used by States to fight against the phenomenon of piracy.

### III- Suppression of Unlawful Acts (SUA)

In 1989, the *Achille Lauro*, a ship flying under Italian flag which shuttled between Alexandria and Port Said had been seized by a group of Palestinian fighters who demanded the release of 50 Palestinian fighters by Israel with the threat to kill the hostages if their demand was not honored. After the refusal of Israel, the group killed an American citizen.

The case of the *Achille Lauro* is tragic example of the limits of the definition of piracy under international law. For while some jurisdictions have qualified this act as an act of piracy (which is the case of the American courts<sup>36</sup>) the nature of the facts and the definition of piracy under international law contradict that position.

The aim of the commando was not guided by "private ends" as stated by Article 101 of UNCLOS but it was more politically motivated. According to the definition of piracy the *Achille Lauro* seizure does not constitute an act of piracy. Moreover, the definition provides for the intervention of an additional vessel but in our case there was only one vessel involved where once again, the difficulty of translating these acts as acts of piracy.

This case showed the limits of the definition of piracy as contained in UNCLOS and highlighted the need to fight against these acts of maritime violence so as the implementation of a tool to criminalize such acts. That was Italy's stand, which has urged the international community to fill gaps in the fight against international terrorism<sup>37</sup>.

It is precisely to overcome the shortcomings of UNCLOS and to increase the ability to legally pursue the perpetrators of crimes that the international community, headed by Italy,

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<sup>36</sup> Affairs and Cooperation in Combatting International Terrorism 24 I.L.M. 1509, 1554-57 (1985).

<sup>37</sup> Ronzitti, note 72 above, p. 2.

Egypt and Austria proposed the Convention for the Suppression of Unlawful Acts of Violence against The Safety of Maritime Navigation (SUA Convention).<sup>38</sup>

The SUA came into force on 1 March 1988 and focuses on appropriate action to be taken against people who commit illegal acts against ships. The agreement covers unlawful acts such as the seizure of ships with the use of force, acts of violence against persons on board ship and to introduce equipment on board of aircraft likely to destroy or damage the ship.

The United States and other delegations have raised the idea that the platforms installed in their continental shelves must be protected from unlawful acts and therefore covered by the SUA Convention. The latter proposal is incorporated into the protocol called “Protocol for the Suppression of Unlawful Acts against the Safety of platforms located in the continental shelf.”<sup>39</sup>

### **1- Illegal acts by the Convention**

The SUA Convention provides a list of actions that must be considered illegal. These acts are the result of:

- “(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

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<sup>38</sup> Convention for the Suppression of Unlawful Acts of Violence against The Safety of Maritime Navigation, Entered into Force on 1 March 1992, treaties series, vol.1678, Nos. 28991-29006.

<sup>39</sup> Protocol of 2005 to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, adopted on 1 February 2005, LEG/CONF.15/21.

(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 I, subparagraphs (b), (c) and (e), if that threat is likely to endanger the safe navigation of the ship in question. “<sup>40</sup>

## **2- The geographic scope of the SUA Convention**

Unlike UNCLOS, SUA does not limit in maritime areas. The SUA applies everywhere in the sea, except for the internal waters of a coastal State, but also “if the ship is navigating or is scheduled to navigate into, through or from waters beyond the outer limit of the territorial sea of a single State, or the lateral limits of its territorial sea with adjacent States.”<sup>41</sup>

The agreement covers an area larger than UNCLOS and aims to reduce the impunity of

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<sup>40</sup> SUA Convention, article 3, p.224.

<sup>41</sup> Ibid, article 5, p.226.

perpetrators of acts punishable under the agreement who, by entering into a territorial area, escape from foreign naval forces. And it is precisely to fight against impunity for perpetrators seeking refuge in the territorial waters of a State that the SUA provides certain obligations which States parties must comply.

### **3- Obligations of States under the Convention**

#### **Prevention**

The SUA Convention in its Article 13, provides that all States shall take measures to prevent illegal acts in or outside its territory, exchange information with the aim of preventing illegal acts and finally when an illegal act is committed in the territory of a Member State, the latter must take all steps to ensure that cargo, passengers or crew is not unduly detained or delayed.<sup>42</sup>

It is also the duty of a Member State that has reason to believe that an unlawful act will occur to provide information as quickly as possible to States which have established jurisdiction to entertain such actions.

#### **Jurisdiction**

The most important provision of the SUA Convention is arguably the principle of extradition or prosecution. This principle requires all Member States of the SUA Convention, an international obligation to prosecute offenders within its territory to its own jurisdiction even if the act allegedly occurred in the territory of the State or in another place.<sup>43</sup>

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<sup>42</sup> Ibid, article 13, p.230.

<sup>43</sup> SUA Convention, article 6, para.1-2, p.226 ; article 10, p.229.

The Convention obliges States, where the State within which the offender is found shall not initiate legal proceedings, to extradite offenders to a third State who has exercised his right under the Convention.<sup>44</sup>

The SUA Convention provides several criteria through which a State may invoke its jurisdiction principle and the principle of prosecution or extradition, they are:

- The jurisdiction based on territorial aspect: a State may express its jurisdiction based on where the illegal act was committed (including territorial waters);
- The jurisdiction based on nationality: This jurisdiction is based on the nationality of offenders or the flag of the vessel against which the assault was committed;
- The jurisdiction passive: A State may claim jurisdiction against offenders where one or more of the victims of illegal acts are nationals of that State;
- The universal jurisdiction (see above);
- The jurisdiction based on habitual residence: A State may invoke its jurisdiction when the offender or the victims had their habitual residence in that State; and,
- The jurisdiction based on the State target: The court may be raised if the act is intended to compel a State to act or prevent them from doing an act.

States parties are also obliged to arrest, to ascertain the offender's presence at his trial, cooperate and exchange information and evidence needed to conduct the procedure.<sup>45</sup>

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<sup>44</sup> Ibid, para 4, p.227.

<sup>45</sup> Ibid, article 7, p.227; article 13, para (b), p.231.

In the aftermath of 11 September 2001, it became urgent for the international community to build the capacity to fight acts of violence against ships or ports and the prospect of using seized vessels and to commit acts of violence.

Thus, a reform was seen as paramount need and the SUA was proposed by many States under the auspices of the IMO which decided to arrange a major conference to revise the 1988 SUA in 2002 in London.

#### **4- The 2005 Protocol**

In the preamble, the Protocol of 2005 stressed that terrorist acts threaten international peace and security. The protocol is responsible for extending the provisions of the SUA Convention by introducing additional measures in order to fight against all acts against the safety and security of navigation.

##### **Additional definition of an unlawful act**

Article *3bis* was added by the protocol and expands the illegal acts of the SUA Convention. Without an agreement on the concept of terrorism, States have decided to describe the illegal acts that could be added to the agreement.<sup>46</sup>

Therefore, any person who commits an act which, by its nature and context, is to “intimidate a population or compel a Government or an international organization to do or abstain from doing any act” commits an offense under the SUA Convention.<sup>47</sup>

An act means:

- “The use against or on board a ship or to spill from a ship explosives, radioactive material or BCN weapon, oil, liquefied natural gas or other hazardous or noxious substances in a

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<sup>46</sup> 2005 Protocol, article *3bis*, p.6.

<sup>47</sup> Ibid, article *3bis*, para.1, sub-para.(a), p.6.

manner or in quantities or concentrations which cause or threaten to cause serious injury or damage;

- The use of a vessel in a manner that causes death or serious bodily injury or property damage or threat to commit an offense stated above with or without a requirement according to the domestic law;
- The transportation of explosives or radioactive materials; equipment, materials or software or related technologies that contribute significantly to the design, manufacture or delivery of a BCN weapon; BCN weapons designed to cause or threaten to cause death, serious injury or damage;
- The transportation of raw materials or special fissionable material, equipment or material especially designed or prepared for the processing, use or production of special fissionable material while being fully aware that these materials are intended to be used for a nuclear explosive activity and is not subject to IAEA safeguards; and,
- The deliberate and illegal transport of a person on board a ship knowing that this person has committed one of the offense listed above.”<sup>48</sup>

Is in violation of the SUA Convention, any person who intentionally kills or injures someone while it is in connection with any of the previous offenses, attempts or abets an offense; organizes or contributes to the achievement of one or more offenses.<sup>49</sup>

### **Right to board**

As opposed to piracy, slavery and other crimes, unlawful acts as defined in Article 3 of the SUA Convention do not establish the universal jurisdiction. If certain acts of Article 3 can

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<sup>48</sup> 2005 SUA protocole, article.3<sup>ter</sup>.

<sup>49</sup> Ibis, article 3<sup>quater</sup>, p.8.

constitute acts of international crimes they may, however, not be perceived as such. Unlawful acts do not give the opportunity to a warship to board over a ship flying under a foreign flag.

Thus, and to respond to this constraint of international law, States have introduced an additional provision in the Protocol of 2005: Article 8*bis*.<sup>50</sup> This article provides the procedures and cooperation that must be followed by a State party to board a ship flying under a foreign flag which it has reasonable grounds to believe that either the boat or the people on board have been or are about to be involved in the commission of an offense to the SUA Convention.

In case "the law enforcement officers or agents" of a State Party has substantial grounds for believing that a vessel flying under the flag of another State off the territorial sea committed or is about to commit one or more violations of the agreement then that State must respect the procedure. Article 8a (5) provides that the State must require from (a) The State flag of the vessel a declaration of nationality, (b) in case of confirmation, demand permission to board and search the vessel, its cargo and persons on board, and to interview people on board.<sup>51</sup>

It falls under the flag State to decide how to proceed, but any transaction is subject to the express authorization of the latter without which it is strictly forbidden to take measures against a ship. This last point may be flexible in a case where a ship is witnessing the on going of any act contrary to the SUA Convention.

When submitting the instrument of ratification, acceptance, approval or accession, a State Party may notify its position vis-à-vis vessels flying its flag or displaying its mark of registry:<sup>52</sup>

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<sup>50</sup> Ibid, article 8*bis*, P.10.

<sup>51</sup> 2005 SUA protocol, article 8*bis*.

<sup>52</sup> Ibid, art 8*bis*, para.(d), p.13.

- If there is no reply within a period of four hours after the accused received the request for a declaration of nationality, the State claiming the authority is entitled to proceed with measures involving the boarding, riding board, search and question people; and,
- A State Party which requires a permit is authorized to “board and search a ship, its cargo and persons on board, and to interview people on board to determine whether an offense under section 3, 3a, 3b or 3c has been, is being or is about to be committed.”<sup>53</sup>

Regarding piracy, the SUA and its 2005 Protocol, complement the provisions of UNCLOS including expanding the acts of violence against ships, by extending the geographic scope of the SUA Convention and including an obligation on States Parties to pursue the perpetrators of unlawful acts in case they found refuge in the territory of that State.

## IV- International Law and Piracy

### 1- Modern Piracy

Modern piracy represents a significant challenge to international law because of its complex nature, the importance of maritime transport and the context of economic interdependence of States.

Most countries where offshore piracy is occurring are developing countries, least developed countries or failed countries. These countries are suffering for the vast majority of lack of facilities, equipment, qualified human resources and financial means to implement control forces offshore.

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<sup>53</sup> Ibid, art 8*bis*, para.(e), p.14.

Pirates take advantage of the current difficulties of the State to settle on the coast in order to conduct their activities sometimes with the complicity of local authorities. Financial revenues from these practices are huge and make harder the fight against this phenomenon by the Governments of these States.

The diversity of the crew of the pirate ships and the sophistication of the equipment they use have also increased the difficulty. The specificity of a pirate crew is not in the number of pirates on board, which is often low, but rather in the technicality of its elements.<sup>54</sup>

A pirate ship is composed of sailors familiar with modern navigation and capable of sailing on large size ships; some former military and negotiators polyglot and experienced.

In addition, it appears that some of the pirates are familiar with the principles of international law and in particular their shortcomings. Asian piracy is a perfect example of the ability of pirates to seek refuge within the territorial waters of States or its inland waters with the certainty that foreign warships have no right to penetrate inside these areas.

The spectacular development of maritime transport is a crucial factor in determining the issues of piracy in particular off the coast of Somalia.

Approximately 80% of trade is by sea and a little less than 40% of global transport flows through the East Africa. From 1980 to 2010 the world merchant transmission has increased by 86%, and erecting the safety of merchant ships as a top economic priority.<sup>55</sup>

Economic interdependence of States is widely reflected in ships crossing the Gulf of Aden. It is thus very common for a merchant ship that the crew, the flag, and cargo are of various nationalities. This point deserves attention because it is essential to the jurisdiction of the State which wishes to exercise its jurisdiction over suspected pirates.

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<sup>54</sup> Idarat Maritime, *New Tactics & Equipments in the Somali Pirates' Campaign*, 2009.

<sup>55</sup> UNCTAD Statistic, *Maritime Transport, World Merchant fleet*, 2011.

## **2- International Law**

There are many points especially on piracy to which international law provides no clear answer or for which the response is inadequate. With particular regard to the situation off the coast of Somalia, customary international law does not meet the requirements to fight against modern piracy. Several points are worth noting:

### **A) The Geographical aspect**

The geographical limitation of acts of piracy to the high seas, pursuant to UNCLOS, is based on the principle that acts occurring within the territorial waters of a State are subject to the jurisdiction of the latter which must therefore take actions to fight against such acts. The logic behind this provision was to preserve the sovereignty of States even though piracy is the responsibility of all. However, UNCLOS did not address the scenario of a State unable, for economic or political reasons, to repress such acts occurring in its territorial waters.

It did not foresee that acts of piracy, operating in States mainly composed of islands and therefore require 12 nautical miles of territorial waters, makes the area under national sovereignty extremely wide and makes the suppression of such acts more difficult.<sup>56</sup>

SUA extends the geographical scope to the territorial waters. However, the ability of warships to operate in these waters is necessarily subject to obtaining the authorization by the coastal State. The latter can, according to its capacity, respond before the deadline to the declaration of nationality and authorization request or send a ship to arrest the suspected persons.

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<sup>56</sup> For instance piracy in the Strait of Malacca.

However, the agreement also ignores the scenario of a State, because of limited capacity which can neither respond to the request for authorization or a declaration of nationality within the prescribed time, nor send a warship to the waters. In this case, seizure, arrest and search of vessels are illegal and would give rise to compensation.

In addition, SUA is limited by the fact that if the flag State is not a signatory to the SUA Convention, warships have no authority to stop, seize, search the ship or interview people on board.

### **B) Body of evidence**

UNCLOS defines the pirate ships as vessels which people intend to use to commit acts of piracy. However, the agreement does not specify which evidence shows that people intend to use the ships for piracy. This lack of precision could be explained by the wide range of manoeuvre given to the domestic tribunals to introduce and set up a more clear and precise definition.

This legal vacuum is the cause of the “catch and release” practice of warships patrolling off the coast of Somalia, who release the alleged pirates even though they have found on board with evidence suggesting that they are about to commit acts of piracy.<sup>57</sup>

The fact of carrying weapons is not itself unlawful, even though the weapons, the ship, the origin of the people and the area in which people navigate as a body of evidence suggests that these people will or are about to commit an act punishable under Article 101 of UNCLOS.

International law allows domestic courts to define the evidence that could determine the

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<sup>57</sup> See, e.g., Report of the Special Adviser to the Secretary-General pursuant on Legal Issues Related to Piracy off the Coast of Somalia, UN Doc. S/2011/30\*, (25 January 2011).

nature of the ship arrested.<sup>58</sup> The warships off the coast of Somalia must be familiar with the domestic law of the State to which the alleged pirates will be sent.

To overcome this difficulty, it is proposed to introduce bilateral agreements between States which would contain equipment articles that will list the weapons that may constitute a body of evidence to arrest the ship and people on board under the grounds that the ship is intended to be used to commit an act of piracy.<sup>59</sup>

This proposal is based on the equipment articles established by Great Britain in the 19th century to fight against the slave trade. The fact of finding chains and any other items on board was grounds to arrest the ship and people on board unless the owner of the ship proves the use for which these instruments were intended.<sup>60</sup>

### **C) Jurisdiction**

#### **International Law and judicial cooperation agreements**

UNCLOS stipulates that in case of seizure of a ship or pirate in an area outside the jurisdiction of a State by a ship of war, international law gives the State arresting the possibility “to apprehend the persons and seize the property on board. The courts of the State which carried out the seizure may decide the penalties to be imposed, as well as measures to be taken regarding the ship, aircraft or property, subject to third parties in good faith.”<sup>61</sup>

According to this article, the courts of the State which carried out the seizure are competent to exercise jurisdiction over acts of piracy having occurred on the high seas however, the term “may” is interpreted differently by different specialists. While some consider that this term is merely a possibility left to the arresting State to deal with crimes

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<sup>58</sup> SUA Convention, article 9, p.228; article 10, p.229.

<sup>59</sup>Eugene Kontorovich, *Equipment Articles: An International Evidence Rule for Piracy*, (2011).

<sup>60</sup> *Id.*, p.2.

<sup>61</sup> *See supra* note 19.

committed on the high sea,<sup>62</sup> others believe that the convention by not including any other jurisdiction, allocates responsibility of prosecution to the State that carried out the seizure.<sup>63</sup>

For the proponents of this latter interpretation, the comments of the International Law Commission on Article 43 of the Draft Article reproduced in the Convention on the High Seas and UNCLOS in article 105 reinforce this hypothesis.

The Commission shall record that the right to seize a pirate ship and pirated ship and see the pirates be tried by its court may not fall under the jurisdiction of another State.

This last sentence is at the center of many contradictory analyses on the legal consequences for the State carrying out the seizure.

Some scholars interpret the annotation as the allocation by the Commission of exclusive jurisdiction to the State that arrests the people and seizes property on the ship.

Others believe that the endorsement of the Commission in no way constitutes an obligation for the courts of the arresting States since the Commission only stresses the obligation of a seizure only occurs outside the jurisdiction of a State. They interpret the endorsement of the Commission as an effort to expand the jurisdiction of the coastal State even though it would not have itself made the seizure of the vessel pirated or pirate ship.

This interpretation of the jurisdiction of the State which carried out the seizure is a central matter for the naval forces fighting against piracy off the coast of Somalia since it determines whether or not the fact that arresting pirates automatically opens a judicial procedure in the courts of the State which carried out the seizure, even though another State exercises universal jurisdiction in order to prosecute these pirates.

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<sup>62</sup> See supra note 35, note 42.

<sup>63</sup> *Id.* at note 38.

This legal issue is one of the reasons explaining the practice of "catch and release" practiced by a number of warships off the coast of Somalia when they seize a vessel for which however there are reasonable grounds to suspect that the vessel is involved in piracy.

The provisions of the Convention on the high seas are directly inspired by the Draft Convention prepared by the Harvard Group which lists the practices and rights of the powerful maritime States of the 19th century.

As noted above the will of the international community for greater codification of legal rights gave rise in 1982 to the adoption of UNCLOS, which itself incorporated several provisions of the Convention on the High Seas of 1958 in particular those related to piracy.

The provisions of UNCLOS related to piracy are subject to criticism mainly due to its definition of piracy which require a certain number of factors to be fulfilled and which arguably make these provisions obsolete vis-à-vis modern piracy.

As mentioned above, it is to deal more efficiently with these new threats that numerous countries decided to ratify SUA, which includes provisions supplementing UNCLOS' provisions with respect to the geographical scope and also adds provisions regarding the transfer of alleged suspects of illegal acts to other member States that make the requests.

However, when it comes to Somali piracy, the context of the country, not party to the SUA, and the incapacity of the Government to control its coasts are new challenges to the international community.

Indeed, the provisions of UNCLOS provide precisely that piracy can only be described as acts occurring on high seas and not into coastal States maritime zones (EEZ, territorial water, internal water). However, much of the piracy acts occurring in Gulf of Aden are happening in the Somalia maritime zones.

In addition, the context of the absence of State institutions forced the international community to provide a specific response to piracy off the coast of Somalia.

This response must pass through the establishment of an international legal framework to overcome the constraints explained above and the establishment of a better interaction with the various organizations of the United Nations in charge of different aspects of Somali piracy.

## SECTION B: INTERNATIONAL ORGANIZATIONS

### Paragraph 1: United Nations

#### I- United Nations Security Council Resolutions (UNSCR)

Since 2005, the Secretary-General of the UN was alerted by the alarming number of acts of piracy off the Somali coast and the threat that the increase of such acts posed to national economies but also to the maritime trade in general.

The Security Council took up the issue of piracy under Chapter VII of the UN Charter which provides that the Council may make recommendations to maintain and restore international peace and security in case of threat to the peace, breaches of the peace and acts of aggression.

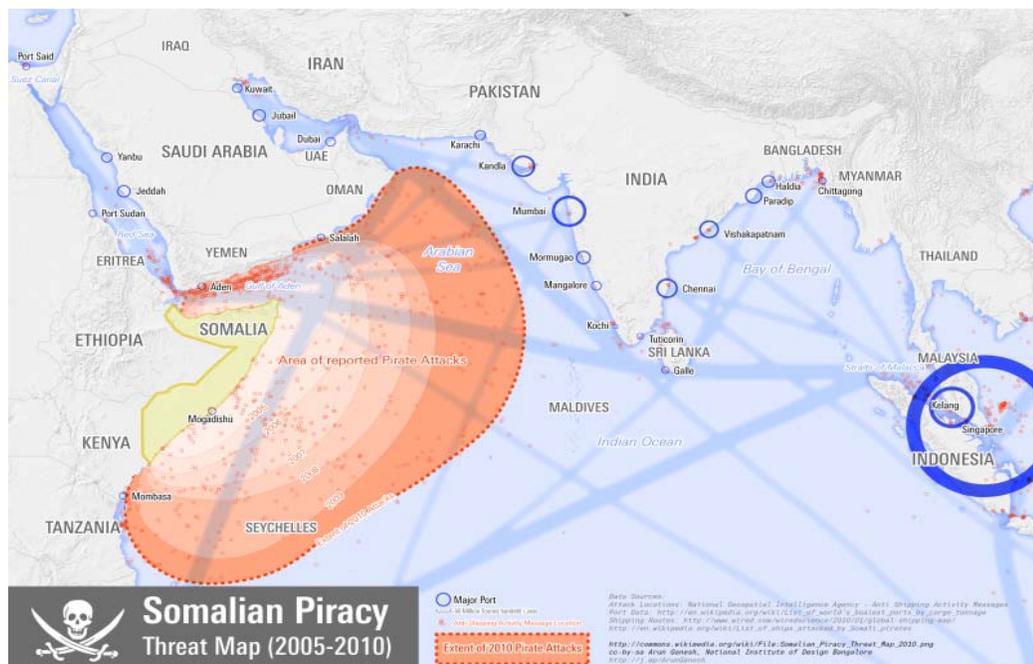


Figure 2: Somalian Piracy Threat Map

Source: Wikipedia

## **1- The question of jurisdiction in Somali waters**

The Security Council of the UN aware of the limits of international law in particular regarding the inability of States to seize, search or arrest persons who have committed an act of piracy in an area under the jurisdiction of a State, decided to adopt a resolution aimed at filling this gap.

On 2 June 2008, the Security Council of the UN adopted Resolution 1816 under Chapter VII of the UN Charter. The resolution provides the possibility for States to enter the territorial and internal waters of Somalia for the purpose of repressing acts of piracy “in a manner consistent with action permitted on the high seas in cases of piracy under the law applicable international.”<sup>64</sup>

This special permission granted to the international community should apply only in accordance with applicable international law on the high seas; this is the case of UNCLOS. International humanitarian law and human rights are also provisions of applicable international law including trial but also imprisonment of suspects.

This resolution raised many reservations from States that are facing acts of piracy and who do not want to see the provisions of this resolution becoming customary international law provisions which would lead to a decrease of the sovereignty of States in their territorial and internal waters.

To address this concern, the resolution States in paragraph 9 that the resolution does not establish a customary international law and it is responding to a request by the TFG in order to help him fight against this phenomenon.

This authorization is only granted for a period of six months and only to States whose TFG

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<sup>64</sup> SC. Res.1816, para.7 (a), (2 June 2008), UN Doc. S/RES/1816.

has provided the names to the Secretary-General and for the purpose of protecting humanitarian convoys.<sup>65</sup>

On 7 October 2008, the Security Council unanimously adopted Resolution 1838 tasked with completing resolution 1816.

Thus, the Security Council calls upon “States whose naval vessels and military aircraft operate on the high seas and airspace off the coast of Somalia to use on the high seas and airspace off the coast of Somalia the necessary means.”<sup>66</sup>

This latest resolution followed a surge in piracy off the Somali coast and in particular the attack on ships such as the French yacht *Ponant*. At the initiative of France, the Security Council took up this issue and reminded the international community of the importance of cooperation of States and organizations for the prevention, operations involving the use of strength and a technical assistance to Somali authorities.

In this resolution, the Security Council expressed its willingness to renew the provisions of Resolution 1816 which was limited to six months but also introduces the possibility of using the Somali airspace for military operations.

## **2- Cooperation and Technical Assistance**

On 2 December 2008, two months after resolution 1838, the Security Council was again seized with the issue of piracy and adopted Resolution 1846 which governs the means of action to curb the phenomenon.

The resolution extends the possibility of intervention by States, whose list has been provided by the TFG, to 12 months and plans to extend it beyond.<sup>67</sup>

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<sup>65</sup> *Id.* at, para.7.

<sup>66</sup> SC.Res.1838, para.2, (7 October 2008), UN Doc. S/RES/1838.

<sup>67</sup> SC. Res.1846, para.10, (2 December 2008), UN Doc. S/RES/1846.

As all previous resolutions, this new resolution calls for collaboration and cooperation among States and also provides assistance to States and regional organizations to help implement measures to fight against piracy.

This resolution calls on States “to issue to ships entitled to fly their flag appropriate advice and guidance on avoidance, evasion, and defensive techniques and measures to take if under the threat of attack or attack when sailing in the waters off the coast of Somalia.”<sup>68</sup>

It also provides technical assistance to coastal States and regional organizations to develop their institutional capacity to monitor and control coastal sea.

Resolution 1846 urges all States to cooperate in order to determine legal jurisdiction but also to take legal action against perpetrators of acts of piracy in particular through “logistics assistance with respect to persons under their jurisdiction and control, such victims and witnesses and persons detained as a result of operations conducted under this resolution.”<sup>69</sup>

The resolution recalls that States parties to the 1988 Convention have an obligation to criminalize such acts as “seizing or exercising control over a ship by force or threat thereof or any other form of intimidation.”<sup>70</sup>

On 16 December 2008, the Security Council expressed its concerned about the increasing acts of piracy and adopted Resolution 1851 which mandated States to strengthen key aspects in the fight against piracy.

Again, the issue of cooperation between States but also with international and regional organizations is emphasized. Thus, States are requested in paragraph 4 of this resolution to

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<sup>68</sup> *Id.* at para.9.

<sup>69</sup> *Id.* at para.14.

<sup>70</sup> *Id.* at para.15.

“establish an international cooperation mechanism to act as a common point of contact between and among States, regional and international organizations on all aspects of combating piracy and armed robbery at sea off Somalia’s coast”.<sup>71</sup> To do so, the resolution encourages States to establish a regional center in order to coordinate information relevant to piracy and armed robbery at sea off the coast of Somalia.

This resolution gives great importance to judicial cooperation including the prompt conclusion of agreements and arrangements between States and international organizations to end impunity for pirates. This resolution calls for embarkation on naval vessels patrolling in the Gulf of Aden of "*officers of the fight against crime*" particularly from the region. This is to facilitate criminal investigations and proceedings and reduce the practice of “catch and release”.<sup>72</sup>

In the same line as resolution 1846, the resolution calls upon the international community to support the TFG, including allowing him “to strengthen its operational capacity to bring to justice those who are using Somali territory to plan, facilitate or undertake criminal acts of piracy and armed robbery at sea.”<sup>73</sup>

The unanimous adoption of UNSCR 1851 is explained by the concern prompted by the exponential increase of the number of attacks and the expanding areas of occurrence of the acts of piracy.

Resolution 1897 adopted on 30 November 2009 by the Security Council extends authorization for intervention on the territory of Somalia States previously listed by the TFG.<sup>74</sup>

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<sup>71</sup> SC. Res.1851, para., (16 December 2008), UN Doc. S/RES/1851.

<sup>72</sup> See *supra* note 57.

<sup>73</sup> See *supra* note 71, para.7.

<sup>74</sup> SC. Res.1897, para.7, (30 November 2009), UN Doc. S/RES/1897.

### 3- The legal component

Pursuant to Resolution 1897, the UN Secretary-General presented a report summarizing the various measures taken by the international community and this in accordance with previous resolutions adopted by the Security Council.<sup>75</sup> It appears from this report that the issue of prosecutions against perpetrators of piracy remains the weak point of the system put in place off the Somali coast.

This reflects the fact that the little agreement or arrangement relating to judicial cooperation among States whose vessels patrolling in East Africa and the countries of the region remain very poor and the practice of "catch and release" is still widespread. In addition most States, including those in the region, either do not define in their national legislation piracy offence or do not have sufficient provisions allowing for effective prosecution.

To remedy this, and to prevent impunity of pirates, the Security Council under the Russian proposal unanimously adopted resolution 1918 on 27 April 2010 which requested the Secretary-General "to present to the Security Council within 3 months a report on possible options to further the aim of prosecuting and imprisoning persons responsible for acts of piracy and armed robbery at sea off the coast of Somalia, including, in particular, options for creating special domestic chambers possibly with international components, a regional tribunal or an international tribunal and corresponding imprisonment arrangements, taking into account the work of the CGPCS, the existing practice in establishing international and mixed tribunals, and the time and the resources necessary to achieve and sustain substantive results."<sup>76</sup>

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<sup>75</sup> See, e.g., Report of the Secretary-General pursuant to Security Council resolution 1897, UN Doc S/2010/556\* (27 October 2010).

<sup>76</sup> SC. Res.1918, para.4, (27 April 2010) UN Doc. S/RES/1918.

On 26 July 2010, the UN Secretary-General presented seven options for the international community to make sure to bring to justice the perpetrators of acts of piracy:<sup>77</sup>

Option 1: Strengthen capacity of States in the region in the prosecution and incarceration with the assistance of the United Nations: raising for instance the high security chamber Shimo la Tewa (Kenya) Secretary-General expressed the wish to retain this option even strengthening it and highlights the need for political involvement from States of the region.

Option 2: Court extraterritorial area with or without UN participation: In the opinion of the Secretary-General this option requires a relatively long time for its implementation and raises the question of capacity and the ability of the Somali judicial system to effectively respond to acts of piracy.

Option 3: Special national chamber, or shared between several States in the region, without the participation of the UN: This option may, according to the Secretary-General, establish justice "two speed" in the State or States concerned and stressed that this option would have real value only if it was to be established in Somalia.

Option 4: Special Chamber within domestic legislation or shared between several States in the region, with the participation of the UN: This raises the question of changing the laws of some States and is more expensive than the previous option, while having the same drawbacks.

Option 5: Regional Court based on a multilateral agreement between States in the region, with the participation of the UN: The Secretary-General stresses that this option has the advantage of strengthening the capacity of States in the region, the proximity for the

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<sup>77</sup> See, e.g., Report of the Secretary-General on possible options to further the aim of prosecuting and imprisoning persons responsible for acts of piracy and armed robbery at sea off the coast of Somalia, including, in particular, options for creating special domestic chambers possibly with international components, a regional tribunal or an international tribunal and corresponding imprisonment arrangements, taking into account the work of the Contact Group on Piracy off the Coast of Somalia, the existing practice in establishing international and mixed tribunals, and the time and resources necessary to achieve and sustain substantive results, UN Doc. S S/2010/394\* (26 July 2010).

transfer to the place of trial and incarceration and the greatest ability than a special chamber within a domestic jurisdiction. However, the costs, time for implementation and risk of reduction of capacity of jurisdiction of the States of the region are the disadvantages of this option.

Option 6: International Tribunal based on an agreement between a State in the region and the UN: This option is for the Secretary-General an expensive one and relatively less effective than previous options. It carries with it the benefits of Option 4 "to a lesser degree probably" and the disadvantages of Option 5.

Option 7: International Tribunal created through a resolution of the Security Council under Chapter VII of the UN Charter: This option has the advantage of having a capacity larger than a special chamber, but the cost and the time their implementations are important dimensions.

To better establish which options may be selected by the international community, the Secretary-General appointed a Special Adviser to identify measures that can be implemented to allow States to take legal action against those who are involved in piracy activities.

The Special Adviser presented his report 18 January 2011 in which he offers 25 recommendations based on "a comprehensive and multifaceted" with the simultaneous use of three levers: economic, security and judicial / prison.<sup>78</sup>

The Special Adviser emphasizes the important role of Somalia in the eradication of this phenomenon by proposing the creation of two specialized courts and prisons located in Puntland and Somaliland. It also retains the Option 2 of United Nations Secretary-General

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<sup>78</sup> See Letter dated 24 January 2011 from the Secretary-General to the President of the Security Council, UN Doc. S/2011/30 (25 January 2011).

through the creation of an extraterritorial tribunal that could be installed in Arusha, Tanzania.<sup>79</sup>

Following the example of the Secretary-General, the Special Adviser highlights the importance of preventive measures including increasing local development in Somalia so as to reduce the attractiveness of piracy to the Somalis. This measure, he says, can be effective with the combination of three major aspects: the disappearance of the impunity of pirates who must always be tried and imprisoned, an upstream prevention of such vessels through the introduction of measures stipulated in the *Best Management Practices* and capacity building of police but also coastguards of the countries in the region, particularly Somalia.<sup>80</sup>

The Special Adviser emphasizes the need of a harmonized legal, police and prison States in the region which, in his report, have a key role to play.

On 11 April 2011, the Security Council adopted Resolution 1976 which provides for the establishment of a broad legal framework to fight against the phenomenon of piracy off the Somali coast.

In line with the report of the Special Adviser, the resolution gives a large place in Somalia in the suppression of acts of piracy and provides:

- strengthening the capacities of countries, particularly through the possibility of creating specialized courts of Somalia and the possibility of a court extraterritorial;
- Improve domestic law through the adoption of laws with the assistance of UNODC and UNDP to assist Somalia to provide judicial and police capacity to intervene on the ground;

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<sup>79</sup> *Id.* at para.10, p.3.

<sup>80</sup> *Id.* at, para.4, p.9; para.80, p.28; para.34, p.18.

- The conclusion of agreements for transfer between States so as to transfer the suspects to a place of trial and eventually to the place of incarceration;
- The construction of prison in Puntland and Somaliland and the training of prison unit; and,
- Strengthen the capacities of coast guards including providing means for monitoring coastal land.

Resolution 1976 also highlights the various measures to be undertaken by the international community to strengthen the legal corpus such as:

The need to establish piracy as a criminal offense under the domestic law of countries and calls on countries to prosecute perpetrators of acts of piracy under the universal jurisdiction but also encouraging, facilitating and understanding in to commit an act of piracy:

- The importance of investigating and prosecuting even imposed sanctions against the sponsors of such acts;<sup>81</sup>
- Improve the procedural setting for collecting and preserving evidence and facilitate the transmission thereof to the competent authorities;
- In accordance with international law, it is asked to UNDOC and INTERPOL to consider a legal framework for the retention of the alleged pirates at sea; and,<sup>82</sup>
- Calls upon States to fight against illegal fishing and illegal deposits of hazardous materials.<sup>83</sup>

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<sup>81</sup> SC. Res. 1976, para.16, (11 April 2011), UN Doc. S/RES/1976.

<sup>82</sup> *Id.* at para.16.

<sup>83</sup> *Id.* at para.7.

The resolution urges the Secretary-General to prepare a report within two months spelling out the conditions of institution of a special court both in Somalia and outside Somali territory pursuant to the recommendations of the Special Adviser.<sup>84</sup>

The Secretary-General presented his report on 15 June 2011, detailing the conditions of institution of a special court in Somalia and outside Somali territory.

The Secretary-General indicated that for Somalia, the courts of Puntland and Somaliland would be appropriate to judge the alleged pirates.<sup>85</sup> The report stresses out that several prerequisite measures must be taken:

- The creation of a criminal and procedural framework in compliance with international treaties;
- The construction of adequate premises and allocation of equipment and materials;
- The training of judges, prosecutors, police investigators and defense counsels on specific piracy-related criminal procedures and provisions, with the assistance of international experts;
- Security guarantee to persons involved in the process, and which should be integrated into the costs;
- The increase of prison capacities in the two regions and training of prison units to be consistent with international standards in this domain;
- Cooperation between Somalia and the forces patrolling off the coast to ensure the transfer of prisoners (currently inexistent with the exception of Seychelles); and,
- Harmonization of the collection and the admissibility of evidences between the States of the region and Somalia.<sup>86</sup>

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<sup>84</sup> *Id.* at para.26

<sup>85</sup> *See, e.g.*, Report of the Secretary-General on the modalities for the establishment of specialized Somali anti-piracy courts, para. 7, UN Doc. S/2011/360\* (15 June 2011).

<sup>86</sup> *Id.* at para.14, 16, 17, 26, 28; 32, 34.

The costs to run such a court would stand at \$24,434,720 USD over three years.<sup>87</sup>

An extraterritorial court would require an analysis of the different elements to be able to define its terms and conditions:

- The position of the States of the region in relation to this solution: The Somali federal authorities and Somali authorities in Puntland are reluctant. Somaliland expressed no objection, but does not wish to host it. Tanzania indicated that it could host the court; however, several points should be clarified;
- The legal and judicial implications of this action: Depending on the nature of this extraterritorial court, Somali authorities (federal and regional) will have to examine its compatibility with other legal instruments (Constitution), ratify an agreement with the host State, spell out the competences of the authorities responsible for investigations in an extraterritorial court, and an adequate legislative framework for the host State;
- The legal framework of the court: The court should apply the criminal laws of Somalia, which must be modified to include an anti-piracy law;
- Security and premises: Security is one of the crucial points and requires the implementation of various preventive measures. The premises of the ICTR for Rwanda, should the Tanzania option be retained, should be available as well as various other premises;
- Training of judges, prosecutors, police investigators and defense counsels: Judges may be multi-racial (Somali and

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<sup>87</sup> *Id.* at para.42.

international judges) and may include judges from the Somali Diaspora;

- Cooperation with the States patrolling (as with the Somali court) and,
- Incarceration and collection of evidence: The court should have incarceration facilities to detain alleged pirates before and during their trial. Whereas, the facilities in Tanzania do not meet international standards. The Common Law-based method of collection of evidence applicable in Somalia should be the reference. The main difficulty is the presentation of witnesses (videoconferencing posing obvious technical problems).<sup>88</sup>

According to the report, it is difficult to estimate the cost of such an operation and the time needed for its implementation.

## II- United Nations Office on Drugs and Crimes (UNODC)

The UNDOC's mandate is to assist countries in the fight against illicit drugs, crime and terrorism through capacity building of member countries; seeking to increase countries' expertise in the field of drug and crimes and assistance in the establishment of national and international legal instruments.

Encouraged by resolution 1851 of the Security Council of UN, UNDOC took the initiative "to achieve effective Measures to remedy the cause, capacities and incidents of piracy and armed robbery off the coast of Somalia."<sup>89</sup> UNDOC has published papers and implemented various measures to help Somalia but also the countries of the region.

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<sup>88</sup> *Id* at paras. 53-88.

<sup>89</sup> *See supra* note 71.

## 1- The UNDOC counter-Piracy program

The counter-piracy program has been commonly launched by the European Commission and UNDOC and it is based in Nairobi. This program aims to enhance the legal capacities of Somalia and its neighbouring countries in order to conduct in these countries trials in compliance with international treaties.<sup>90</sup>

The strategy of UNODC is to assist countries who express the desire to improve their ability to judge and imprison people convicted through the provision of equipment, implementation of training activities and dissemination of advice.

The program is intended to help, in addition to Somalia, countries of the region that express the wish to conduct a fair trial and to improve conditions of detention of persons who have been found guilty in accordance with international law.

In addition to Somalia, Kenya is the second country in the region that has requested the expertise of UNODC in May 2009 in order to adapt its legal system to meet the requirements of piracy. Seychelles, Mauritius, Tanzania and the Maldives also benefit from this assistance program of UNDOC.

In Kenya's case, the assistance of UNODC is reflected, among others, by training advisers appointed by the State Attorney General who led the prosecution against those suspected of piracy; by assistantship in the testimony of victims; and interpretation.<sup>91</sup>

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<sup>90</sup> UNODC, *counter-Piracy program*, UNODC.COM, February 2011, at [http://www.unodc.org/documents/easternafrika/piracy/20110209.UNODC\\_Counter\\_Piracy\\_February\\_Issue.pdf](http://www.unodc.org/documents/easternafrika/piracy/20110209.UNODC_Counter_Piracy_February_Issue.pdf).

<sup>91</sup> See, ASIL Agora: *Kenya's Piracy Prosecutions*, James Thuo Gathii, 2010, Volume 104, p.433.

## 2- Piracy Prisoner Transfer Programme (PPTP)

In addition to technical assistance, UNODC, acting pursuant to the report of the Special Adviser for piracy which advocated a "Somalization" of solutions of piracy, launched the Prisoner Transfer Program (PPTP). This is a program returning sentenced pirates to their home countries after their conviction in a third country.<sup>92</sup>

Such an operation requires an agreement that provides for transfer arrangements between States whose vessels patrolling off the Somali coast and the recipient State. These agreements may take the form of bilateral or multilateral.

Kenya, for example, has concluded bilateral agreements with several countries including Great Britain, the United States, European Union and Denmark and so on. The agreement with the European Union States, for instance, that Kenya is bound by the provisions of international law including the provisions of human rights including the prohibition of the use of torture and other inhuman treatment, the prohibition of arbitrary detention and in accordance with the conditions of a fair trial: "humanely shall conduct free and in international human rights obligations, including the prohibition against torture and cruel, inhumane and degrading treatment or punishment, the prohibition of arbitrary detention and in accordance with the requirement to have a fair trial".<sup>93</sup>

UNDOC plays a facilitating role by providing technical support for the conclusion of an agreement between States such as that recently concluded between the Seychelles and the TFG and two other countries in the region.<sup>94</sup>

Through this program, UNDOC also responsible for the renovation, even the building of

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<sup>92</sup> See supra note 90, p.10 (The PPTP is part of the Counter-Piracy strategy).

<sup>93</sup> EU-Kenya, Mar. 6, 2009, 2009 O.J. (L 79) 49 at

<http://ec.europa.eu/world/agreements/downloadFile.do?fullText=yes&treatyTransId=13445>.

<sup>94</sup> Nation, *Seychelles signs historic accord on transfer of jailed Somali pirates*, Nation.sc, February 12, 2011, at <http://www.nation.sc/index.php?art=22405>. There is a Transfer agreement signed between Seychelles and Mauritius on 21 July 2011 at <http://www.eturbonews.com/24134/seychelles-and-mauritius-sign-pirates-transfer-agreement>.

penitentiaries for the holding of those convicted of piracy. In Kenya, it is the Shimo la Tewa prison located in Mombasa which contains the alleged pirates awaiting their trial.<sup>95</sup>

UNOPS has begun construction of two prisons in Somalia, one in Somaliland and Puntland, and the other is scheduled to be completed in early 2012.<sup>96</sup> The agency was also busy renovating the prison in Hargeisa, Somaliland and also the one of Bossaso in Puntland.

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<sup>95</sup> UNODC, Shimo La Tewa: the centre of Kenya's fight against piracy, 31 March 2011, *at* <http://www.unodc.org/unodc/en/frontpage/2011/March/shimo-la-tewa-the-centre-of-kenyas-fight-against-piracy.html>.

<sup>96</sup> UNOPS is undertaking the construction of two prisons as part of the Rule of Law & Security (ROLS) set up by UNDP Somalia. *at* <http://www.so.undp.org/index.php/Rule-of-Law-Security.html>.

### III- International Maritime Organisation (IMO)

The IMO is one of the most important international organizations in charge of maritime safety and security. 169 Member States comprise this United Nations agency who plays a crucial role in the prevention and dissemination of information between Member States and the maritime industry groups.

Its mandate includes “to provide machinery for Cooperation among Governments in the Field of Governmental regulation and Practices Relating to Technical Matters Affecting All kinds of shipping Engaged in international trade, to encourage adoption and Facilitate the General of the highest practicable standards in maritime safety regarding matters, efficiency of navigation and prevention and control of marine pollution from ships.”<sup>97</sup>

Since the 80's, the IMO has considered the issue of maritime security because of piracy activities threatening shipping in the Strait of Malacca. The agency developed a set of measures to fight against these practices and facilitate the cooperation of States in the region of Southeast Asia by providing a wide range of expertise.

One of them was in the ratification of regional cooperation agreement entrusted with creating instruments to coordinate actions of the countries in the region affected by the phenomenon (The Regional Cooperation Agreement on Combating Piracy and Armed Robbery Against Ships in Asia: RECAAP).<sup>98</sup>

The IMO is one of the first organizations to become alarmed at number of attacks against merchant ships off the coast of Somalia and who took a series of decisions, establishing a number of guides and practical and facilitate the adoption of multilateral agreements including:

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<sup>97</sup> The IMO Convention, article 1(a), entered into force in 1958 and has been signed by 170 States.

<sup>98</sup> Available at <http://www.recaap.org>.

## **1- Resolution A.1026 (26)<sup>99</sup>**

The Assembly of the IMO on December 2<sup>nd</sup>, 2009 adopted the resolution A.1026 (26) which incorporates the essential parts of the draft resolution submitted by the Sub-Committee on Safety of Navigation (NAV), entitled piracy and armed robbery Against Ships in waters off the coast of Somalia.

The resolution supports the resolutions of the UN Security Council, in particular the extension for a period of 12 months of the authorization of entry on Somali territory, and calls upon parties:

“to assist to take action, within the provisions of international law, to ensure that [...] all acts or attempted acts of piracy and armed robbery against ships are terminated forthwith and any plans for committing such acts are abandoned; and any hijacked ships, seafarers serving in them and any other persons on board are immediately and unconditionally released and that no harm is caused to them.”<sup>100</sup>

The resolution recommends that vessels to sail through the international transit corridor (also contained in the Best Management Practice) and call upon the States parties to take legal and judicial measures to enable “to receive, prosecute or extradite any pirates or suspected pirates and armed robbers.”<sup>101</sup>

## **2- MSC.1/Circ.1333 1334**

On 4 August 2010 the IMO’ Secretary-General provides the Circular MSC.1/Circ.1333 and 1334 which established a number of recommendations to Governments and a guide for

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<sup>99</sup> IMO. Res. A 26/Res.1026, (3 December 2009).

<sup>100</sup> *Id at* para.2.

<sup>101</sup> *Id at* para.5 (1).

ships owners and ships operators so as to prevent and suppress acts of piracy off the Somali coast and in the region of the Arabian Sea.<sup>102</sup>

This practical guide provides a number of measures of prevention, some of them are contained in the report of the Special Adviser of the Secretary-General of the United Nations, including sailing at high speed, setting up turret, corridor, water hose, barbed wire etc ... it is worth to note that the presence of these instruments of prevention are reflected in insurance contracts.

### **3- SN.1/Circ.281**

On 3 August 2009, the IMO transmitted to Member States Circular 281 which provides information on international transit corridor and urges member States to take appropriate measures to inform ships owners, ships operators and crew to implement measures contained in the Circular so as the provisions of previous circulars (MSC.1/Circ.1334, MSC.1/Circ.1332, MSC.1/Circ.1302).<sup>103</sup>

### **4- Djibouti Code of Conduct**

The Djibouti code of conduct is a document of Regional Cooperation adopted in 2009 in Djibouti and for which the IMO has contributed with its expertise and experience (it will be more extensively discussed in the next section).<sup>104</sup>

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<sup>102</sup> See, Circular MSC.1/Circ.1333 Available at [http://www5.imo.org/SharePoint/blastDataHelper.asp/data\\_id%3D25884/1333.pdf](http://www5.imo.org/SharePoint/blastDataHelper.asp/data_id%3D25884/1333.pdf).

<sup>103</sup> NAV, Circular SN.1/Circ.281, (3 August 2009).

<sup>104</sup> Available at <http://www.imo.org/OurWork/Security/PIU/Documents/DCoC%20English.pdf>.

#### IV- UNPOS

UNPOS, created in 1995, has a mandate to support the efforts of the UN Secretary-General for establishing peace and national reconciliation through the preparation of reports and guides as well as building relationships with Somali personalities.

Convinced that solutions to fight against piracy is the stabilization of Somalia, the former UN Special Representative for Somalia, Mr. Ould-Abdallah called on the international community “to bring an appropriate and new support to the Somali authorities to help them address effectively the root causes of piracy.”<sup>105</sup>

UNPOS attends meetings of CGPCS and its role is to support the process of pacification and the strengthening of capacities of the Somali Government in order him to fulfil some of its sovereign prerogatives.

The reports of the Special Representative constitute elements of appreciation of the situation in Somalia from which the international community develops new decisions.

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<sup>105</sup> UNPOS, *Latest acts of piracy are renewed provocations*, Press Release 012 (2009).

## Paragraph 2: Other Organizations

### I- Contact Group on Piracy Off the Coast of Somalia (CGPCS)

In accordance with Resolution 1851 which provides for the establishment of a mechanism for international cooperation to serve “as a common point of contact between States and between them and regional and international organizations”,<sup>106</sup> the international community decided to create the Contact Group on piracy off the Coast of Somalia.

The group is composed of 60 States, international organizations and industry groups and is responsible for coordinating the various aspects of the fight against piracy.

The CGPCS consists of five working groups, each chaired by a country:

- Working Group 1: **Military and Operational Coordination, Information Sharing, and Capacity Building**, chaired by the United Kingdom, focuses on force generation, operational coordination and capacity-building;
- Working Group 2: **Judicial Issues**, chaired by Denmark, focuses on judicial mechanisms for deterring piracy;
- Working Group 3: **Strengthening Shipping Self-Awareness and Other Capabilities**, chaired by the United States (Republic of Korea in March 2012), works closely with the commercial shipping industry to enhance awareness and improve capabilities;
- Working Group 4: **Public Information**, chaired by Egypt, seeks to make clear to the world, and especially to the Somali public, the damage being done by pirates; and,

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<sup>106</sup> See *supra* note 71, para.4

- Working 5: **Financial Flows**, chaired by Italy, focuses on the illicit financial flows associated with piracy in order to disrupt the pirate enterprise ashore.<sup>107</sup>

The CGPCS meets three times a year at UN headquarters in New York and its working groups frequently publish their views on issues related to the area studied.

The group's mandate is to facilitate operational coordination of naval forces to create a partnership with industry groups to reduce the risks of pirate attacks through the establishment of preventive measures and monitor expenditures related to the procedures legal action against perpetrators of acts of piracy.

## II- North Atlantic Treaty Organization (NATO)

NATO is a military organization comprising 28 countries and in charge of the military defence of its members.

In accordance with UN resolutions calling on States and international organizations to fight against piracy in particular off the coast of Somalia, the command of NATO deployed naval forces in the Horn of Africa.<sup>108</sup>

NATO naval forces were in charge of escorting WFP ships through Operation Allied Protector, which lasted from March to August 2009.

The command of NATO in 2009 launched Operation Ocean Shield. This new operation has a broader mandate than its predecessor, including “to help regional States that so request, to develop their own capacity to fight against piracy activities.”<sup>109</sup>

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<sup>107</sup> See at <http://www.state.gov/t/pm/ppa/piracy/contactgroup/index.htm>.

<sup>108</sup> See at [http://www.nato.int/cps/en/natolive/topics\\_48815.htm](http://www.nato.int/cps/en/natolive/topics_48815.htm).

<sup>109</sup> See at <http://www.au.int/en/about/nutshell>.

The command in charge of coordinating the activities is based in Bahrain. <sup>110</sup>

### III- African Union

The African Union in its capacity as a continental organization is responsible for “strengthening the unity and solidarity of African States, coordinate and intensify cooperation for development to defend the sovereignty and territorial integrity of Member States, and to foster international cooperation in the framework of the UN.” <sup>111</sup>

In accordance with its mandate, the African Union adopted the Abuja Declaration on Maritime Transport and the African Maritime Transport Charter. <sup>112</sup>

The declaration stipulates that Member States should cooperate at the bilateral, regional and international levels in order to remove the illegal acts, acts of piracy, terrorism, etc.

Article 26 of the declaration stresses the need for States to take all measures to fight against acts of piracy, armed robbery and illegal acts through cooperation with international bodies.

This Charter provides in Chapter VII of cooperation, information exchange and mutual assistance by Member States to ensure the safety and maritime security in particular through the establishment of mechanism for cooperation and harmonization of laws national. African Union is currently developing an African Integrated Maritime Strategy to facilitate implementation of the Charter, with emphasis on threats to maritime security such as piracy. <sup>113</sup>

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<sup>110</sup> The charter has been adopted by the African Minister of Transport during the second African Union Conference which take place in Durban, South Africa, the Revised version of the Charter has been adopted on 36 July 2010; charter *available at* <http://www.au.int/en/content/revised-african-maritime-transport-charter>.

<sup>111</sup> *Id at* article 12, para.4.

<sup>112</sup> *Id at* article 26, para.2.

<sup>113</sup> African Union, “**Maritime security and safety in Africa: moving from talking to taking concrete action**” Press release N°47/2010.

## IV- Interpol

Interpol is a police cooperation organization with 187 members and aims to prevent and arrest the perpetrators of international crimes.

Request by the interior ministers of the G-8, Interpol through his Secretary-General said it is ready to join international agencies that fight against piracy off the Somali coast.<sup>114</sup>

Interpol calls for stronger legal capacities of States to facilitate the work of organizations fighting against piracy in that it allows to “establish links between boxes to facilitate apprehension of potential suspects and to support The Prosecution.”<sup>115</sup>

In 2006, Interpol has developed the project BADA against maritime piracy in Asia, and provides “to identify members of gangs, existing hierarchies, Areas of operation, modus operandi and links to other criminal activities.”<sup>116</sup>

The agency provides technical assistance to teams of investigators from countries in the region, particularly Kenya and Somalia through training activities regarding investigative techniques facilitating the judicial process (fingerprint readers, smart phone etc. ...).<sup>117</sup>

In January 2010, Interpol hosted an international conference on combating financial piracy. This conference aimed to coordinate cooperation in financial investigations through the creation of a task force that would coordinate activities to combat piracy of such order “to uncover the main financing networks and traffic pattern money.”<sup>118</sup>

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<sup>114</sup> Interpol Press release, available at <http://www.interpol.int/News-and-media/News-media-releases/2009/PR052>.

<sup>115</sup> *Id.*,

<sup>116</sup> Available at [http://www.un.org/depts/los/consultative\\_process/mar\\_sec\\_submissions/interpol.pdf](http://www.un.org/depts/los/consultative_process/mar_sec_submissions/interpol.pdf).

<sup>117</sup> Interpol News, “**INTERPOL/UNODC analysis training boosts East Africa capacity to investigate maritime piracy**”, (2011) available at <https://www.interpol.int/Public/ICPO/PressReleases/PR2011/News20110207.asp>.

<sup>118</sup> Available at <http://www.interpol.int/News-and-media/News-media-releases/2010/PR004>.

The Security Council also urged the various UN agencies to work together to fight against this phenomenon and to implement an instrument of coordination between the different actors involved in the fight against piracy including the CGPCS.

Following the request of the international community, the Secretary-General proposed different solutions to solve the difficult problems regarding the trials location and the incarceration of pirates as reflected in the reports described above.

It appears that most of these proposals are oriented towards a regionalization of the solutions and the involvement of two regions of Somalia. These solutions imply the establishment of regional structure to coordinate various activities and national structures that would work with regional institutions.

It would be useful to make a comparison of a successful regional structure and to study the regional structures already implemented in the Gulf of Aden and the legal provisions of States at the national level and their degree of implication in the fight against Somali piracy and the organizers behind it.

# CHAPTER 2: REGIONAL AND NATIONAL LAW

## SECTION A: REGIONAL LAW

### Paragraph 1: Asian Cooperation

Regional cooperation is one of the key aspects of the mechanisms implemented by the international community to fight against piracy. It supplements the provisions of international law and constitutes a major component in the prevention and suppression of pirate attacks as well as the rescue of ships sailing off the Gulf of Aden.

To clearly understand the components and challenges of regional cooperation, it is useful to consider the Asian regional cooperation in its response to piracy acts.

#### I- Asian regional cooperation

Since the 1990's, there has been a revamp or upsurge of piracy acts, notably with the piracy acts in Southeast Asia. The total number of incidents recorded between 1984 and 2002 stands at 2626 and this figure has tripled in ten years. Indonesia was ranked as the country with the highest pirate-infested maritime zone and in 2000 Asian piracy represented 65% of the total incidents at sea.<sup>119</sup>

Faced with this scourge, various international organizations, including the IMO and the United Nations, appealed to the countries of the region to cooperate and implement a set of coordination mechanisms to help, on the one hand, overcome all the legal and physical

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<sup>119</sup> Zou Keyuan, "Seeking effectiveness for the crackdown of piracy at sea", Journal of International Affairs; Fall 2005; 59, 1; ABI/INFORM Global.

barriers and, on the other hand, to repress this feeling of impunity enjoyed by pirates as a result of the lack of coordination, notably, legal.

Regional agreements are critical as they supplement the provisions of international law. An example is the pursuit of ships: pursuant to Article 111 of UNCLOS, the pursuit of a foreign ship may only ensue should the ship be sailing in the territorial waters, contiguous zones or EEZ of a coastal State, in violation of the rights applicable in the area (see maritime zones above). The pursuit must be ended if the foreign ship enters the territorial sea of its State or that of another State.

Similarly, the advocacy of the existence in international law of extradition agreements between two States for the transfer of one or more piracy act suspect, where a request is made by a third country interested in, and competent to hear the case, may contribute to the impunity of the pirates. The request of the third State is often rejected in the absence of such an agreement and where the State of origin of the suspects does not initiate any legal proceedings.

Consequently, in a bid to overcome these shortcomings, the countries of the Southern Asian region adopted a series of measures to enhance cooperation between the States of the region. The instant response of the coastal countries explains their fear to see their sovereignty diminished with the intervention of foreign countries in their territorial waters and economic zones to suppress piracy acts themselves.

Efforts to fight against piracy acts off the Strait of Malacca mobilized more countries other than the countries of the region and were implemented at several levels: national, bilateral, trilateral and multilateral.

### **1- National Mobilization**

Coastal countries deployed more efforts to fight against this phenomenon. In addition to the desire of Governments to ascertain their resolve, these countries were able to demonstrate

their response capabilities to the international community. The economic costs ensuing from the fight against piracy acts are not inconsiderable, which justifies the efforts made by the Governments of coastal countries to eliminate this phenomenon.

Thus, Indonesia instituted Special Patrols and Forces specifically devoted to the fight against piracy. The Government set up a command center liaising directly with commercial maritime industries and is resolved to fight against poverty, which promotes piracy acts in the coastal areas.<sup>120</sup>

Similarly, the Government of Malaysia in 2005 took a series of security measures (creation of special anti-piracy task force), strengthened the capacities of coast guards (Malaysian Maritime Enforcement Agency) and acquired modern equipment (boat, radar, etc.).<sup>121</sup>

In Singapore, the authorities also implemented new security measures, notably improving the systems of surveillance and information exchange and building the capacities of Coast Guards.

## 2- **Bilateral cooperation**

At the level of the coastal countries, Malaysia and Indonesia as well as Indonesia and Singapore concluded bilateral agreements aimed at enhancing cooperation, notably through joint patrols in areas under their jurisdictions, and exchange of information.

Other countries also contributed to the efforts of the countries of the region. Japan granted three patrol boats to the Indonesian Navy in December 2007, plus 15 million USD on 7 November 2008 “to increase its ability to promote safety of navigation in the straits of

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<sup>120</sup> Prof. DR. Hasjim Djalal, “**The Development of Cooperation on the Straits of Malacca and Singapore**”, Nippon Foundation, November 2011.

<sup>121</sup> Id.,

Malacca and Singapore by establishing Vessel Traffic System (VTS) in Batu Ampar and a number of sensor stations to collect information on the traffic”<sup>122</sup>.

The United States equally contributed by providing 15 patrol boats to the Indonesian Navy and training of Malaysian Coast Guards (20 to 26 October 2008 in Detroit and cities in California).

### **3- Trilateral Cooperation**

#### **A) Cooperation Mechanism**

A meeting was held in Kuala Lumpur from 18 to 20 September 2006, during which a decision was taken to put in place a cooperation mechanism between the coastal States and the countries that use the Straits of Malacca for Maritime Security and Environment Protection “for burden sharing.”<sup>123</sup>

Several meetings (Batam, Jakarta, Kuala Lumpur) were held to confirm the implementation of cooperation mechanisms and spell out the principles under which these cooperation mechanisms will operate:

- Recognition of the territorial sovereignty and jurisdictional sovereignty of the coastal State;
- Pursuant to Article 43 of UNCLOS; and,
- The TTEG (Tripartite Technical Experts Group) will be the focus points for activities undertaken in the Strait.

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<sup>122</sup> Id., Para.38

<sup>123</sup> See *supra* note 119 para.11.

The cooperation mechanism includes three components:

- **Cooperation Forum (CF)** for dialogue and open discussion among the coastal States and the users;
- **Project Coordination Committee (PCC)** for the implementation of cooperative programs in cooperation with the sponsors of the project; and,
- **Aids to Navigation Fund (ANF)**.

It was agreed that the implementation, structure and process of these cooperation mechanisms must be flexible and simple, and should not hinder the institution of bilateral agreements or creation of specific projects.

These provisions result from negotiations between the different countries affected by piracy and are intended to ponder on the concerns of States, notably the fear of States of losing their sovereignty within their territorial waters.

## **B) Malacca Strait Patrols**

The Malacca Strait Patrols (MSP) is a set of cooperative security measures primarily initiated by the coastal countries (Malaysia, Singapore, and Indonesia), which Thailand joined in 2008:

- In 2004, the Southeastern Asian countries most affected by piracy mobilized 17 warships to patrol their respective territorial waters and economic zones. This operation dubbed "MALSINDO" laid the foundation of a multilateral agreement later called Malacca Straits Sea Patrols (MSSP);
- Eyes in the sky (EIS) was an operation launched in September 2005 and made up of air patrols responsible for identifying suspicious ships and crafts. Unlike the previous patrols, these

air patrols are authorised to fly over the airways of participating countries and each country should provide two patrols per week. Countries that are not MSP members may take part in these operations; however, no country outside the region has been involved so far;

- The third component is the Intelligence Exchange Group (IEG) launched in 2006. This covers cooperation between State Parties intelligence services to help in analyzing information and enhance the efficiency of naval operations. To this end, State Parties implemented the Malacca Straits Patrol Information System (MSP-IS), an information system that allows users to exchange information in real time and help improve the speed of data transmission and,
- Joint Coordinating Committee (JCC) is the transmission, information exchange and coordination channel for all the activities undertaken by Member States.

#### **4- Multilateral Cooperation**

##### **A) The Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (ReCAAP)**

The need to reach a multilateral agreement for the implementation of information exchange mechanisms was increasingly advocated as acts of piracy multiplied and became more elaborate, such as the attack against the *Alondra Rainbow*.

At the ASEAN Summit in November 2001, Japan proposed the adoption of a legal document to enhance cooperation between the countries of the region for a more efficient fight against piracy. In November 2004, following Japan's initiative, many countries of the region (ASEAN countries including Japan, Bangladesh, South Korea, India and China) met

in Tokyo to adopt the first multilateral regional agreement: the Regional Cooperation Agreement on Combating Piracy and Armed Robbery Against Ships in Asia, ReCAAP.

The agreement includes several forms and categories of regional cooperation, notably through the creation of the Information Sharing Centre (ISC) in charge of collecting, compiling and analyzing information related to piracy acts and armed robbery, and preparing statistics and reports based on this information. Based in Singapore, the center will equally be responsible for disseminating early warning signals to contracting parties.

The center shall be built on three pillars:

- Information Sharing: The agreement provides the creation of a national focus point in charge of transmitting information to ships; cooperation between the contracting parties for the detection and arrest of people guilty of acts prohibited by the Agreement; seizure of ships used for such acts or even the rescue of ships and victims of such acts;
- Capacity building: The Parties shall cooperate to improve capacities for the prevention and suppression of acts of piracy, notably through the training of coast guards, allocation of equipment and materials, technical assistance and simulated training; and,
- Mutual Legal Assistance and Extradition: The contracting Parties shall cooperate to mitigate the impunity enjoyed by pirates by extraditing persons suspected of a crime or crimes prohibited by the agreement, following a request made by another contracting party. The agreement also provides legal assistance to any contracting party that will directly make the request to another party.

## **B) Information Fusion Centre (IFC)<sup>124</sup>**

Based in Singapore since 27 April 2009, IFC is a center that analyzes information on maritime safety and intended to strengthen national and multilateral cooperation. Its role is to collect, consolidate and analyze information obtained with the collaboration of ISC-ReCAAP, Western Pacific Naval Symposium, Regional Maritime Information Exchange or the Malacca Straits Patrols Information System.

The center uses this information to enhance methods of detecting threats to maritime safety and build the analytical capacities of reinforcement units such as the coast guards.

IFC, which is operational since 2010, is located in the Changi C2 Centre of the Changi Naval Base. The center works in close collaboration with different intelligence agencies such as the United States or Australian intelligence services, which provide technical support and facilitate the coordination and exchange of information.

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<sup>124</sup> The center has set up a website which post information in live : <https://www.infofusioncentre.gov.sg>.

## Paragraph 2: Gulf of Aden Cooperation

### I- The component of the Gulf of Aden Cooperation

#### 1- National

Seychelles obtains assistance from UNODC, in collaboration with the European Union, for its police forces, coast guards, prosecutors, prisons and courts by providing them with Somali interpreters.<sup>125</sup>

Germany, Canada and Australia launched a cooperation program, which includes training security forces on legal proceedings and evidence collection, and allocating up-to-date equipment. Seychelles also receives support from China, India and the United States.<sup>126</sup>

Mauritius is assisted by India, which in April 2009 trained several squads on the fight against piracy and the deployment of warships to jointly contribute to the surveillance of Mauritian maritime zones against piracy acts and illegal fishing. Following its acceptance in 2010 to prosecute pirates, Mauritius has benefited, via UNODC, from the training of its Coast Guards and allocation of equipment and materials (vehicles, computers, radios, video conferencing etc.). Mauritius's Coast Guard security forces are trained by the United States, while France and the United Kingdom train the gendarmerie forces.<sup>127</sup>

The European Union and UNDOC have pledged to support the Kenyan Government's desire to prosecute and imprison pirates. As a matter of fact, the courts of Kenya were the first of the region that have prosecuted and convicted pirated. UNDOC provides technical

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<sup>125</sup> UN news center.

<http://www.un.org/apps/news/story.asp?NewsID=34601&Cr=piracy&Cr1=&Kw1=piracy&Kw2=&Kw3=>

<sup>126</sup> Two frigates arrived in Seychelles on the 12th April, 2011, at <http://www.eturbonews.com/22279/china-and-seychelles-solidify-fight-against-piracy>.

<sup>127</sup> US are providing trainings to Mauritius coast guards, available at US Department State's website at <http://www.state.gov/r/pa/ei/bgn/2833.htm>; The Navy (Indian Naval Marine Commandos) trained Mauritius's Coast Guards, at <http://www.stratpost.com/navy-trains-mauritius-cg-in-anti-piracy-ops>.

assistance and equipment through the construction and rehabilitation of prisons, training of coast guards and strengthening of laws. Kenyan courts equally receive technical assistance (interpreters, online resources etc.).<sup>128</sup>

Tanzania's legal framework is currently under review and the country should also benefit from the support of UNDOC and the international community to strengthen its capacity to judge and imprison pirates.<sup>129</sup>

## **2- Bilateral**

There are very few bilateral agreements between or among countries of the Gulf of Aden and the Indian Ocean. The region of Puntland announced on 12 May 2011 its intention to receive the Somali pirates detained in Seychelles prisons.<sup>130</sup>

Djibouti ratified a bilateral extradition agreement with Ethiopia and made the commitment to extradite under specific conditions persons guilty of crimes punishable by the local laws of both countries.<sup>131</sup>

Moreover, UNODC's strategy to fight against piracy includes a prisoner transfer program, making it possible to transfer persons found guilty of piracy.<sup>132</sup>

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<sup>128</sup> At <http://www.unodc.org/easternafrika/en/about-unodc-eastern-africa/ongoing-projects.html>.

<sup>129</sup> Tanzania as well as Maldives benefits from UNDOC assistance in the field of Judicial, prisons building, police programmes, *available at*

[http://www.unodc.org/documents/easternafrika//piracy/UNODC\\_Brochure\\_final25.05.11.pdf](http://www.unodc.org/documents/easternafrika//piracy/UNODC_Brochure_final25.05.11.pdf) .

<sup>130</sup> [http://www.unodc.org/documents/easternafrika//piracy/PPP\\_Brochure\\_4.pdf](http://www.unodc.org/documents/easternafrika//piracy/PPP_Brochure_4.pdf).

<sup>131</sup> *Africa South of the Sahara*, Europa Publications, (33<sup>rd</sup> Edition. 2004).

<sup>132</sup> *See supra* note 90.

### 3- Multilateral

#### A) Djibouti Code of Conduct

The Djibouti Code of Conduct was adopted on 29 January 2009 following a conference held in Djibouti under the auspices of the IMO.<sup>133</sup>

Similar to the ReCAAP, the Djibouti Code of Conduct institutes a series of legal provisions that allow its members to enhance their cooperation in several areas to fight more efficiently against Somali piracy:

- **Legal cooperation:** Signatories to this agreement commit to cooperate in the investigation, arrest and prosecution of persons over who hang serious suspicions of acts of piracy, armed robbery and ship capture, as well as the rescue of ships victim of acts of piracy. The courts of the State that made the arrest are competent with regards to the ship and the property. This "preliminary" right may be waived in favour of the courts of another State signatory to the agreement;<sup>134</sup>
- **Cooperation in information exchange:** The Code requires that parties cooperate in improving information exchange for the prevention and elimination of acts of piracy. It recommends the appointment by each party of a national representative, who will facilitate the transmission of information on the attacks of ships and other information on the situation of national legislations, and their transmission to information exchange centres located in three countries of the region (Kenya, Yemen and Tanzania) and a regional training centre in Djibouti. These centers will be responsible for (like the ReCAAP-ISC)

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<sup>133</sup> See *supra* note 104.

<sup>134</sup> Djibouti Code of Conduct, article 2, article 4.

collecting, compiling and analyzing the information provided by the parties and preparing statistics and reports that will be presented to the parties, the maritime community and the Secretary-General the International Maritime Organization; and,<sup>135</sup>

- **Technical assistance and cooperation:** the Djibouti Code of Conduct appended to document N°2 appeals to member States of the IMO and of many international organizations to support, directly or via the IMO, parties' endeavours to efficiently implement the provisions of the Code of Conduct.

The States signatories to this agreement have expressed their intention

“to review their national legislations to ensure that the laws applicable in their countries help to prosecute persons guilty of criminal acts of piracy and armed robbery against ships [...] appropriate policies to ensure the exercise of the judicial power, conduct of investigations and prosecution of the alleged offenders”.<sup>136</sup>

The memorandum of agreement for the construction of the Djibouti training centre was signed on 31 May 2011 pursuant to Article 1 of the appended document N°3 of the Djibouti Code of Conduct, which provides that the centre will organise training sessions to enhance the knowledge Government officers of the States signatories to the agreement and improve the harmonisation of provisions of the Code.

The Code of Conduct is not binding; however, member States must meet two years after the effectiveness of the Djibouti Code of Conduct to establish a binding agreement.<sup>137</sup>

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<sup>135</sup> Id. article 8, article 9.

<sup>136</sup> Id, article 11.

<sup>137</sup> Id. Article 13.

The Code was ratified by 18 countries out of the 21 eligible; France, Mozambique and South Africa are yet to sign.

## II- The Eastern and Southern Africa - Indian Ocean (ESA-IO) Regional Strategy and Regional Plan of Action

A critical meeting was held on 7 October 2010 in Grand Bay (Mauritius) between different States of the region and representatives of the European Union. This meeting was an opportunity for representatives of ministries to make a joint statement recommending the creation of a regional strategy to serve as framework for the prevention and repression of acts of piracy and armed robbery.

This statement advocates an approach founded on three pillars:

- “Develop, agree and implement a Somalia Inland Action Plan to counter and prevent piracy”.<sup>138</sup> The development and implementation of the action plan was entrusted to IGAD, which is a regional organisation with the mission to “Promote and maintain peace and security and humanitarian affairs”;<sup>139</sup>
- Encourage States of the region to apprehend and prosecute pirates with the support of the international community; and,
- Strengthen the capacities of States to help control their maritime zones.

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<sup>138</sup> Joint Communiqué from the Eastern and Southern Africa – Indian Ocean Ministers and European Union High Representative, Grand Bay, Republic of Mauritius, (7th October 2010).

<sup>139</sup> Mission of IGAD at <http://igad.int>.

The statement also advocates the implementation of a regional action plan to help materialise the regional strategy, notably in the area of “exchange of information, cooperation, joint action, and capacity-building as cross-cutting principles.”<sup>140</sup>

It equally suggests that the ESA-IO interregional coordination committee should serve as secretariat for the new coordination mechanism in charge of planning and implementing the regional strategy and regional action plan. However, it seems the States taking part in the meeting are unable to reach consensus; consequently, the proposal is at a deadlock.

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<sup>140</sup> *See supra* note 138.

### III- Eastern Africa Police Chiefs Cooperation Organisation (EAPCCO)

The EAPCCO is an East African State's police cooperation organisation founded in Kampala in 1998, with the aim of improving cooperation and uniting the efforts of the police forces to fight against transnational crimes.<sup>141</sup>

It consists of eleven members including Kenya, Seychelles, Djibouti, Tanzania and Somalia. It aims at strengthening cooperation between police units, developing strategies to improve collaboration, sharing information between members and making recommendations to Governments on aspects that could enhance effective collaboration, and organising regional training programmes.<sup>142</sup>

Transnational crimes targeted by the organization include:

- Anti-terrorism;
- Motor vehicle theft;
- Anti-drugs;
- Economic crimes and corruption;
- Illegal firearms;
- Cattle rustling;
- Environmental and Wildlife crime; and,
- Trafficking in human beings and Illegal immigrants.<sup>143</sup>

The organization is founded on a number of principles such as the respect of sovereignty, compliance with human rights and equality among police units.

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<sup>141</sup> Available at <https://www.interpol.int/Public/ICPO/SRB/EAPCCO.pdf>.

<sup>142</sup> EAPCCO's Constitution, article 3.

<sup>143</sup> See *supra* note 141.

Interpol is one of the key partners of EAPCCO; the countries' national offices are the units liaising with the organization and Interpol's regional office serves as secretariat to the organisation (Nairobi, Kenya).

#### IV- Intergovernmental Authority on Development (IGAD)

Made up of six countries of the Horn of Africa (Djibouti, Ethiopia, Eritrea, Kenya, Uganda, Somalia and Sudan), the Intergovernmental Authority on Development was founded in 1996 and is based in Djibouti. Its mission includes:

- Food Security and environmental protection;
- Promotion and maintenance of peace and security and humanitarian affairs; and,
- Economic cooperation and integration.<sup>144</sup>

As a regional organization, IGAD is especially active in the peace process in Somalia and the implementation of actions to curb the phenomenon of piracy, which stands as a threat to the Somali population that is dependent on humanitarian assistance and transportation in general.

In its attempt to harmonize the policies of its member States and facilitate regional cooperation, notably in the judicial sector to fight against international crimes, the organization proposed two agreements on mutual assistance in criminal matters and extradition to members States.

The conventions adopted by the Council of Ministers at the 33<sup>rd</sup> Session of IGAD, under the supervision of the Anti-Terrorism Capacity Building Program, spell out the conditions and procedures for mutual assistance and extradition of persons suspected of crime.<sup>145</sup>

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<sup>144</sup> See *supra* note 139.

The agreement on extradition specifies the grounds for a State to refuse to extradite one of its citizens to another State Party that shall make the request.

“When the offense requiring extradition has been committed outside the territory of both the State party and requesting State, and where the law of the State party does not authorise the prosecution of persons for similar offenses committed outside its territory.”<sup>145</sup>

This last point excludes offenses committed outside the territory of the State Party and that of the requesting State: in this case, the notion of territory may be defined as the territorial waters and EEZ. This aspect of the Agreement excludes acts committed in areas outside the jurisdiction of a State Party, which is the case of most acts of piracy in the Gulf of Aden.

One disadvantage of this agreement is the fact that it is limited to the States Parties, which excludes thereof key stakeholders such as Seychelles, Mauritius and France (Reunion). However, it illustrates the existence of a regional political will for more enhanced regional cooperation, notably for criminal matters.

## V- Regional cooperation and specificities of Somali piracy

There are major differences between the Asian piracy and the Somali piracy, which explain the difficulties in implementing an efficient regional cooperation in the East Africa region based on the Asian model of regional cooperation.

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<sup>145</sup> The 33<sup>rd</sup> Session of the Council of Ministers was held in Djibouti from December 7th and 8th, 2009, at [http://igad.int/attachments/155\\_Council\\_Communique\\_General\\_FINAL.pdf](http://igad.int/attachments/155_Council_Communique_General_FINAL.pdf).

<sup>146</sup> IGAD Convention of Extradition, article 6, para. 2.

## **1- Level of development**

There is a significant development gap between the Asian countries affected by piracy and the countries of the Gulf of Aden.

The development gap is equally significant among the Asian countries affected by acts of piracy, both in relation to the HDI and GDP per capita, and the degree of integration of their economies into the global market. Consequently, this group consists of highly developed countries (Singapore, Japan, and South-Korea), relatively developed countries (Malaysia) and developing countries (Indonesia, Thailand).<sup>147</sup>

The presence of developed countries accounts for the level of efficiency of these coordination mechanisms, which receive material and human resources from these countries. For example, the IFC and ISC are based in Singapore, which enjoys several modern facilities and installations. This facilitates the coordination of actions against piracy, notably for the distribution of information among countries.

In the Horn of Africa, the possibility of making use of the facilities of another country in the region is hampered by the fact that these countries are among the least developed countries and lack the required human and material resources, which limits the effectiveness of regional cooperation.

## **2- Lack of experience in regional cooperation**

Anti-piracy regional operations in Asia have benefited from an existing regional cooperation among Asian countries in other areas other than maritime safety. In 1967, ten countries of Southeast Asia created a political, economic and cultural organisation aimed at

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<sup>147</sup> HDI has been implemented by UNDP as measure tool. Data are available at <http://hdr.undp.org/en/statistics>.

strengthening cooperation, mutual assistance and security between member countries of the ASEAN region.<sup>148</sup>

This organization recorded several achievements that were materialised by the creation of a free trade area (ASEAN Free Trade Area), a regional parliament (ASEAN Inter-parliamentary Organization) and several other cultural activities to promote the cultural specificity of member countries.

The ASEAN provided a useful platform to develop the model in the fight against piracy between countries affected by piracy in Southeast Asia, for many administrative sectors in these countries had some experience in regional cooperation.

The countries in the Horn of Africa do not enjoy such an advanced regional integration. Admittedly, there exist regional organizations operating in various sectors (IGAD, ECA, and COMESA); however, there is no specific organization involving all the countries of the region affected by Somali piracy activities and most of these regional organizations were founded twenty years ago or less.

National administrations' lack of significant experience in regional coordination makes it difficult to transpose the Asian regional cooperation model into countries of the Gulf of Aden.

### **3- The specificity of Somalia**

It is obvious that the political and security situation of Somalia is the key to the implementation of an effective regional cooperation. Asian countries were assisted materially and technically by regional and extra-regional countries; this strengthened their surveillance and control capacities along their coasts.

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<sup>148</sup> Aims and purposes of ASEAN *available at*: <http://www.asean.org/64.htm>.

In the case of Somalia, the difficulty faced was the powerlessness of the Transitional Federal Government, which controls only a part of the capital, the risk of misappropriation of the materials allocated for other purposes as well as the risk that the newly trained members of the units reinforcing controls along the Somali coast could decide to join one of the several Somali armed groups.

The Somali context, characterized by the absence of an efficient administration and lack of resources to ensure the application of laws and regional provisions, is an obstacle to regional integration which requires constant collaboration and a stable environment.

## SECTION B: NATIONAL LAW

### Paragraph 1: Review of national law

The last aspect of the legislative plan for the fight against piracy is the criminalization of piracy acts in the domestic law. The IMO distinguishes between acts of piracy (which only occur on high seas pursuant to customary international law) and armed robbery which occurs in an area under the jurisdiction of a State.<sup>149</sup>

The incorporation of provisions of international treaties into domestic laws varies depending on countries' legal systems. In some cases, it is unnecessary to enact new laws to implement the provisions of a treaty that are applicable in the national court upon their entry into force. The monist legal system provides that in case of contradiction between the treaty and the domestic law, the latter should be amended to ensure it complies with international law.<sup>150</sup>

However, the dualist system provides that the international law and the domestic law are separate entities and, prior to any application, the treaty must be incorporated into the domestic law. In this dualist system, national judges are only bound by the provisions of the treaty after their incorporation into the domestic law (act of transformation), even though the obligations of the treaty are applicable to the country upon its signing and entry into force. The two systems are applicable in the countries of the Gulf of Aden and the Indian Ocean.

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<sup>149</sup> Definition available at <http://www.maritimeterrorism.com/definitions>.

<sup>150</sup> Brînduța Marian, *The dualist and monist theories. International law's comprehension of these theories*, Vol.1-2, (2007).

## I- Djibouti

Djibouti inherited the French legal system (monist) and, thus, uses a definition of piracy similar to the definition contained in the code of Maritime Affairs of the old French Law<sup>151</sup> of 18 January 1982<sup>152</sup>. Section 208 of the Code defines a pirate as any:

- Crew member of a Djiboutian ship, who has committed or intends to commit an act of degradation or violence against a Djibouti-registered ship or other ship sailing under the flag of a State with which Djibouti is not at war;
- Crew member of a foreign ship with which Djibouti is not in war, who commits or intends to commit the acts described above against a ship Djibouti; and,
- Crew member of a Djiboutian ship, who tries to take control of a ship either through fraudulent means or through violence on the master.

The act of “seizing or forcefully taking or violently threatening to take control of an aircraft, ship or other means of transport [...] is punishable by 20 years imprisonment.”<sup>153</sup>

If the acts described in section 385 are accompanied “by torture or acts of barbarism, or result in the death of a person”, the code provides for life imprisonment<sup>154</sup>. The Djibouti Maritime Code is limited to its territorial waters and is not applicable outside this zone unless the victim or perpetrator is a Djibouti national.

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<sup>151</sup> See *supra* note 6.

<sup>152</sup> Law n°212/AN/82 of 18 janvier 1982 on Maritime Affairs Code.

<sup>153</sup> *Id.*, article 385.

<sup>154</sup> *Id.* Article 386.

Djibouti signed on 5 January, 2009, a bilateral agreement with the European Union on the status of the European anti-piracy forces (Atalanta) in the Djibouti territory. According to this bilateral agreement, EU forces are exempt of paying customs, dues, visa purchases, they benefit of immunity from Djiboutian jurisdiction and have the right of freedom movement within, territory of Djibouti including territorial waters and airspace for the purposes of operation.<sup>155</sup>

## II- Seychelles

Seychelles inherited the English legal system and equally has laws that criminalize piracy. These laws are a direct calque of the English law.

The National Assembly adopted a law on 11 March 2010, to modify the penal code and provide a number of provisions relating mainly to piracy<sup>156</sup>. The amendment incorporates the key provisions of UNCLOS<sup>157</sup> and provides that the security forces of Seychelles “shall on the high seas, or may in other places outside the jurisdiction of any State, seize a pirate ship [...] arrest the persons and seize the property on board.”

The amendment gives the courts of Seychelles universal jurisdiction by providing that "the courts of Seychelles shall have jurisdiction to try an offence of piracy whether the offence is committed within the territory of Seychelles or outside the territory of Seychelles"<sup>158</sup>.

The code provides for the prosecution of persons suspected of committing or attempting to commit acts prohibited by the Penal Code, and equally provides a sentence of up to 30 years of imprisonment and a fine amounting to 1 million Rupee ( USD \$76,000).

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<sup>155</sup> Bilateral agreement between the European Union and the Republic of Djibouti on the status of the European Union-led forces in the Republic of Djibouti in the framework of the EU military operation Atalanta, EU-Djibouti, Jan.01, 2009 O.J. (L33) 41 (2009).

<sup>156</sup> Penal Code Amendment Bill N°5 of 2010 *available at* <http://ddata.over-blog.com/xxxyyy/0/50/29/09/Docs-Textes/CodePenalSeychellesAmend-Sey100311.pdf>.

<sup>157</sup> *Id.* Titre 2 para 4.

<sup>158</sup> *Id.* Titre 2 para (a).

Seychelles and the European Union have an exchange of letters on the terms and conditions of transfer of persons suspected of acts of piracy and armed robbery<sup>159</sup>. Seychelles signed a similar transfer agreement with the United States and Denmark.<sup>160</sup>

### III- Yemen

The Yemen penal code criminalizes piracy acts and Yemeni courts have jurisdiction to judge crimes perpetrated within and without its territorial waters.

Persons found guilty of acts of piracy in Yemen are sentenced to death, which is an obstacle to the transfer of convicted prisoners to Yemen pursuant to international human rights standards.

### IV- Madagascar

The Maritime Code is the main legal document used by Malagasy judges to hear cases of piracy acts.

The Malagasy Maritime Code includes anti-piracy provisions similar to those contained in UNCLOS.<sup>161</sup> The code also provides a definition of a pirate as follows:

- Any person traveling with no documents;
- Any person in possession of commissions granted by several powers or States;

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<sup>159</sup> Exchange of Letters between the European Union and the Republic of Seychelles on the Conditions and Modalities for the Transfer of Suspected Pirates and Armed Robbers from EUNAVFOR to the Republic of Seychelles and for their Treatment after such Transfer, EU-Seychelles, Oct.26, 2009 O.J. L315 35 (2009).

<sup>160</sup> The United States and Seychelles signed a Memorandum of Understanding about the transfer of suspected pirates from US custody to the Seychelles to incarceration on 14 July 2010. On 25 March 2011, Denmark signed an agreement with Seychelles to hand over pirates to be prosecuted.

<sup>161</sup> Law n°99-028 of 3 February 2000 *portant refonte du Code maritime*, Chapter 5.

- Any person who commits acts of depredation or violence against ships;
- Any person who commits acts of hostility under a false flag;
- Any person who commits acts of fraud or violence against a captain in a bid to seize a Malagasy ship; and,
- Any person who hands over a Malagasy ship to pirates or to the enemy.<sup>162</sup>

The penalty incurred by pirates in most of these cases is hard labour for life (with the exception of persons traveling without documents, where crew members are sentenced to hard labour for a limited duration, unlike the officers who are sentenced for life.)

## V- Somalia

The federal and regional parliament did not adopt any anti-piracy law. Puntland's legislation is not compatible with the definition of piracy of UNCLOS.<sup>163</sup>

However, the federal parliament is expected to adopt an anti-piracy legislation which would allow prosecuting and imprisoning convicted pirates.<sup>164</sup>

## VI- Tanzania

Tanzania is signatory of UNCLOS and penalizes acts of piracy in its penal code<sup>165</sup>. In May 2010, the Tanzanian parliament adopted an amendment to the anti-piracy law to make for the prosecution of persons arrested in international waters. Tanzanian Courts will therefore be competent to judge acts of piracy occurring outside the territorial waters. The amendment reads as follows:

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<sup>162</sup> *Id.* Chapter13.

<sup>163</sup> *See supra* note 78.

<sup>164</sup> CGPCS, tenth plenary session, New York, 17 November 2011.

<sup>165</sup> At <http://www.thecitizen.co.tz/news/4-national-news/1861-uk-lauds-tanzania-for-enacting-anti-piracy-law.html>.

6.-(1) The jurisdiction of the Courts of Tanzania for the purposes of this Code extends to-

(a) every place and within the territorial waters; any offence committed by a citizen of Tanzania in any place outside Tanzania; any offence committed by any person on an aircraft registered in Tanzania; and,

(d) offences committed by any person on the high seas.

(2) For the purposes of this section the term “high seas” means the open seas of the world outside the jurisdiction of any State.<sup>166</sup>

Since the entry into force of this Act, 11 people have been tried and convicted.<sup>167</sup>

An important point in the amendment is that section 66 (3) provides that no prosecuting would be started if the pirate ship is not registered in Tanzania, “unless there is special arrangement between the arresting State or agency and Tanzania.” The following paragraph is more specific and spells out that no prosecution will be started without the consent of “the Director of Public Prosecutions.”<sup>168</sup>

The European Union formally urged Tanzania to integrate the prosecution of persons arrested to help fight against piracy.

## VII- Kenya

Kenya inherited its legal system from Great Britain (Common Law). The country is signatory to UNCLOS.

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<sup>166</sup> THE WRITTEN LAWS (MISCELLANEOUS AMENDMENTS) (NO.2) ACT, 2010  
<http://www.parliament.go.tz/Polis/PAMS/Docs/11-2010.pdf>.

<sup>167</sup> At <http://www.thecitizen.co.tz/news/51-other-news/8446-eleven-pirates-serving-jail-terms-in-tanzania>.

<sup>168</sup> See *supra* note 166, section 66(3).

Article 69 of the Kenyan Penal Code, inherited from the colonial English law, prohibited acts of piracy. Article 69 was replaced by the Merchant Shipping Act in June 2009, which provides a broader and more modern definition of piracy.<sup>169</sup>

Article 369 of Merchant Shipping Act provides a definition of piracy similar to the one under Article 101 of UNCLOS. This law also provides a broader definition of piracy which includes acts spelled out in the SUA Convention of 1988. Additionally, it also provides an opportunity for courts to hear and judge crimes committed in Kenya or elsewhere:

- (a) Whether the ship [...] is in Kenya or elsewhere.
- (b) Whether any such acts [...] is committed in Kenya or elsewhere
- (c) Whatever the nationality of the person committing the act.<sup>170</sup>

Article 371 provides that:

Any person who-

- (a) commits any act of piracy ;
- (b) in territorial waters, commits any act of armed robbery against ships shall be liable, upon conviction, to imprisonment for life.

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<sup>169</sup> See *supra* note 91 p.429.

<sup>170</sup> See the Merchant Shipping Act 2009, Article 370 (4).

## Chapter Summary

Customary international law included as reflected in UNCLOS provides number of provisions relating to the fight against piracy, but it appears they are not fit to new forms of piracy, particularly piracy off the coast of Somalia.

To address these deficits, the Security Council of the United Nations has adopted a number of resolutions to circumvent the limits imposed by UNCLOS but also tried to try and provide solutions to piracy off the coast of Somalia.

Thus, Resolution 1816 and 1838 allow ships pre-authorized by the TFG to enter Somali territorial waters and to use its airspace in order to fight against piracy in accordance with the human rights and humanitarian law provisions.

In addition, the Council called for increased cooperation between States and international organizations and for the establishment of cooperation mechanisms to coordinate strategies. Thus, the international community has implemented a three level cooperation.

Internationally, the CGPCS was established in order to coordinate the actions of States, international organizations and industry groups in the fight against piracy.

At the regional level, at the initiative of the IMO which has been inspired by Asian cooperation, 18 countries from the Indian Ocean region have ratified the Djibouti Code of Conduct aimed to strengthen the cooperation between the countries of the region on legal aspect, exchange of information and technical assistance. We have seen that the adaptability of the Asian model to the countries in the Indian Ocean region had several difficulties due to the specificities of these countries. A similar problem of adaptability is evident among States Parties to the Djibouti Code.

At the bilateral level, countries that have expressed a desire to prosecute and imprison those

suspected of acts of piracy benefit from the expertise of various specialized international organizations (discussed above). Some States in the region such as Kenya and Seychelles have received assistance from countries whose vessels are patrolling off the Gulf of Aden with whom they have signed bilateral transfer agreements.

With respect to prosecutions the Security Council, taking into account the Secretary-General reports, adopted several resolutions such as resolution 1976 which considers the possibility of creating an extraterritorial court which could be based in Tanzania, rehabilitate and building prisons in Somalia and strengthening the Coast Guard capacity.

However, numerous questions remain concerning the capacity of trials of this court, the lack of bilateral transfer agreements between States whose vessels arrest suspected pirates on the high seas and possibly Tanzania and Somalia that are incarcerating these pirates. There also remain some challenges including the rejection of the TFG to the creation of an extraterritorial court and the will of Somaliland to imprison only the citizens of Somaliland.

The international community agrees that the legal actions can only be effective by combining them with the establishment of alternative activities ashore.

In an attempt to better understand the issues of piracy, we will try to look at the economic and financial aspects of piracy are examined with respect to the costs but also the financial system that underlies the phenomenon of Somali piracy. Development of Somalia through which the international community can try to offer alternative activities other than piracy to Somali people, will also be examined.

## **PART TWO:**

# **OTHER ASPECTS OF PIRACY AND ROOT CAUSES**

# Chapter 1: Economic and Financial Impact

## Section A: Economic costs

### Paragraph 1: Direct Economic Costs of Piracy

#### I- Ransom Costs

Ransoms have been on the increase, as well as the attacks against ships and sizes of the latter. The average ransom paid for a ship and its crew in 2005 stood at USD 150 000 compared to USD 5.4 million per ship in 2010.<sup>171</sup>

To some this trend will continue if the situation remains unchanged, and the amounts will soar from USD 75 million to USD 238 million by 2010, and USD 400 million by 2015.<sup>172</sup>

Ransoms are mostly paid in cash and in notes of small denomination (\$100 or \$50); some of these ransoms are dropped off directly by air using helicopters or delivered directly by a person designated for the purpose (some private security companies are employed for these tasks).<sup>173</sup>

However, some countries (e.g. the United States and States members of the European Union) prohibit the payment of ransoms that could be used to finance terrorism.<sup>174</sup>

The International Maritime Bureau described the first quarter of 2011 as the worst period in terms of attacks against ships off the Somali coast, reaching a record level of more than 166 attacks in such a short time.<sup>175</sup>

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<sup>171</sup> Ocean Beyond Piracy, *The Economic Cost of Maritime Piracy*, One Earth Future, December 2010, p.9.

<sup>172</sup> Gulfnews, "The Spoil of Piracy", May 2011 available at <http://gulfnews.com/business/features/the-spoils-of-piracy-1.804626>.

<sup>173</sup> Modupe Ogunbayo, *War on Piracy: The Enemies Within*, NewsWatch Magazine, (2009).

<sup>174</sup> Patriots Act of 2001, H.R 3162, 107<sup>th</sup> cong. §805 (2001).

<sup>175</sup> ICC, Attacks off the Somali coast drive piracy to record high, reports IMB, at <http://www.icc-ccs.org/news/441-attacks-off-the-somali-coast-drive-piracy-to-record-high-reports-imb>.

It is difficult to accurately estimate the amount of ransoms paid throughout 2011 due to the inability to obtain information on the payments made in 2011, as well as the exact number of successful attacks perpetrated in the Indian Ocean. However, based on the number of attacks identified by IMB in July 2011 and the average payments contained in the study by OceanBeyondPiracy, we have been able to come up with the following data has been compiled as an estimated amount of ransoms paid throughout 2011.

Based on the similar approximations made in the OceanBeyondPiracy study, it is more accurate to multiply the figures by two to get an approximate cost of ransoms paid in 2010 and 2011, roughly \$1.012 billion.

**Table 1: Cost of Ransoms**

	<b>Average Ransom</b>	<b>Total number of Successful Hijackings</b>	<b>Cost of Ransoms</b>
2010	\$5,4 million	44	\$238 million
2011	\$4 million	67 <sup>176</sup>	\$268 million
	Cost of Ransom 2010 and 2011		\$506 million

## II- Insurance Costs

Insurance costs are crucial in determining piracy costs. Actually, insurance companies covering ships, crews and cargo against all incidents, including piracy, have significantly adjusted their rates proportionally to the increase of piracy acts notably off the Gulf of Aden.

It is estimated that Ship-owners pay USD120 million to London-based insurance companies to cover their ships against piracy risks.<sup>177</sup>

These companies offer ship-owners four types of insurance policies to protect ships crossing the Gulf of Aden: War Risk, Kidnap & Ransom Insurance (K&R), Cargo, Hull and Machinery Marine Risk (H&M) and Protection and Indemnity (P&I).

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<sup>176</sup> 38 hijackings in July 2011 according to the IMB live piracy map, 5 successful hijackings per month.

<sup>177</sup> Edmonton journal, **Piracy insurance costs shipowners \$120M**, 23 June 2011.

## 1- K&R insurance

The K&R policy covers the crew and ship against piracy risks by refunding the ransom paid within a period consented by the parties.

The classic K&R policy covers the repayment of ransoms paid to free crew members and not the ship. However, the singularity of the Somali piracy, notably the fact that Somali pirates demand a single ransom covering both the ship and its crew, companies offering the K&R policy were requested to equally include the ships in the ransom repayments.

The classic K&R policy comprises the repayment of:

- Ransoms for the release of crew members;
- Fees for a public relations consultant;
- Fees for interpretation;
- Fees for an independent negotiator;
- Medical and psychiatric fees; and,
- Travel costs for the insured.<sup>178</sup>

Not all ship-owners take out the K&R insurance, chiefly because there is an alleged overlap between the war risk insurance and the K&R. But companies offering K&R insurance argue that their companies work with a network of professional consultants used to negotiating with pirates, whereas, these consultants are additional costs to other insurance companies.

Below is a list of major insurance companies offering K&R insurance and the professional consultants working with them:

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<sup>178</sup> March, 'Piracy – the insurance implications', June 2011 available at <http://documents.marsh.com/documents/piracywhitepaper07-11-11.pdf>.

**Table 2: K&R insurers companies**

<b>Insurer</b>	<b>Response Consultant</b>
Aspen	AKE Group
Catlin	Security Exchange
Chartis	Clayton Consultants
CV Starr	Neil Young Associates
Griffin	BGN Risk
Hiscox	Control Risks
Travelers	ASI Global

In general, a K&R insurance costs at most \$5 million for a 14-knot ship, whereas; a ship at least five meters long equipped with minimum security, including a water jet and citadel, costs between \$12,000 and US \$18,000 for a trip along the Gulf of Aden.<sup>179</sup>

## **2- War Risk**

The War risk insurance is an additional fee comprising a transit in an area listed as a war risk area. In March 2011, the area classified war risk area was extended by the Joint War Committee of the London Insurance Market. This area was extended as follows:

- “On the north-west, by the Red Sea, south of Latitude 15° N
- On the west of the Gulf of Oman by Longitude 58° E
- On the east, Longitude 78° E
- And on the south, Latitude 12° S”<sup>180</sup>

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<sup>179</sup> *Id.*, P.9.

<sup>180</sup> UK War Risks, Renewal of the Association’s cover for the policy year available at: <http://www.ukwarrisks.com>.



**Figure 3: War Risk Area**  
**Source: UK War Risk**

The UK Ship-owners also extended the zone in which piracy acts are most likely to occur.<sup>181</sup>

Insurance companies offering War Risk insurance propose to reduce the amounts based on the following:

- If a K&R insurance has been taken out;
- Characteristics of the ship (speed, ballast or laden);
- Use of PMCS; and,
- All strategies aimed at reducing risks.

The following table presents the major companies offering this insurance:

**Table 3: War Risk insurer companies**

<b>Insurers</b> <sup>182</sup>	<b>Country of Origine</b>
Lloyd’s syndicates (Liberty, O’Farrell, Watkins and XL Syndicates)	UK
GAREX	France
Hellenic War Risks Association	Greece
Den Norske Krigsforsikring for Skib	Norway

<sup>181</sup> UK ship-owners extending the existing ‘high risk’ piracy area into the Indian Ocean.

<sup>182</sup> See supra note 178 p.6.

The Japanese War Pool	Japan
the Arab War Risks Insurance Syndicate	the Arab states in the Arabian Gulf
the Combined Group of War Risks Associations	UK

### 3- Hull and Machinery Marine risk (H&M)

The H&M marine risk covers ships against damage during the trip. This damage may be collision, shipwreck, or other damage resulting from a confrontation with pirates, etc.

Another specificity of the H&M marine risk is the repayment of ransoms to the limit consented. We discovered in the case of the Somali piracy that pirates generally make no distinction between the crew and the ship.

Several questions are raised in the insurance industry concerning, notably, the seeming overlap between the H&M Marine Risk and the War Risk, particularly in relation to the repayment of ransoms. The fees for an H&M Marine risk depend on several factors; however, these fees can be estimated using the following formula:

Number of ships transiting through the Gulf of Aden yearly: 28,000

Number of ships hijacked in 2010: 44

Number of ships hijacked in 2011: 67

Average amount of ransoms for the year 2010: 5.4 million

Average amount of ransoms for the year 2011: 5.4 million

Average amount for negotiations, equipment transportation: 3 million

The average amount for a H&M Marine Risk would be:

- For 2010:  $5.4 \text{ million} + 3\text{million} \times 44 \div 28\ 000 = \text{USD } \$13\ 200$
- For 2011:  $5.4 \text{ million} + 3\text{million} \times 67 \div 28\ 000 = \text{USD } \$20\ 100$

#### 4- Cargo insurance

Cargo insurance covers goods and other commodities transported by the ship. The resurgence of piracy acts also led to an increase in cargo insurance fees.

#### 5- Protection and Indemnity (P&I)

The Protection and Indemnity policy covers the ship owner against a third party.

Thus, the P&I covers:

- Loss of life;
- Personal Injury;
- Crew replacement; and,
- Effect of losing a crew.<sup>183</sup>

However, the P&I Club remarked that if a ship-owner is not legally bound to pay a ransom, then the P&I insurance will not pay or repay the ransom. Insurance costs have been estimated at USD \$ 3, 213 billion for 70% of those who purchase insurance premiums or USD \$459 million for 10% of ship-owners who purchase insurance premiums.<sup>184</sup>

### III- The Cape of Good Hope

The Gulf of Aden has become one of the most dangerous areas for ships wishing to cross the Suez Canal to reach Europe or elsewhere. The costs of ransoms, insurance policies and other security measures have become so high that some ship-owners are considering transiting via the Cape of Good Hope off the coast of South Africa.

This detour also entails additional costs primarily due to the duration of the journey. It takes on average an additional 10 to 12 days to a ship wishing to bypass the Gulf of Aden.<sup>185</sup>

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<sup>183</sup> See supra note 178, p.10.

<sup>184</sup> See supra note 171 p.12.

<sup>185</sup> Jonathan Saul, “**Somali pirate threat diverting grains shipments**”, 14 January 2011, Reuters.

Fuel prices have significantly increased over the last ten years, mainly due to the global geopolitical situation.<sup>186</sup> Ship-owners should equally take these costs into account in calculating their profitability before taking the decision to deviate via the Cape of Good Hope.

Despite the piracy risks, a good number of ship-owners deem that the costs of rerouting via the Cape of Good Hope are rather too high; they choose to implement security measures (BMP, PMASC, etc.) and try their luck through the Gulf of Aden.

According to the study conducted by One Earth Future in 2010, the cost ship-owners will have to incur if they decide to transit through the Cape of Good Hope stands at USD \$1,000,000 for ten days.<sup>187</sup> However, a recent study by the same institution advanced that the number of vessels crossing the Cape of Good Hope has been overestimated and should be reviewed and reduced.<sup>188</sup>

#### IV- The cost of security equipments

Ship-owners implemented a series of security measures to reduce the risk in having their ships hijacked. The Best Management Practice proposed in 2010 provides a list of measures aimed at enhancing the security of ships and reducing risks of attacks.<sup>189</sup>

These measures are also among the recommendations of the Special Adviser of the Secretary-General of the United Nations, Mr. Jack Lang, to ship-owners. The Special Adviser added that insurance companies must play a key role in the implementation of these measures by encouraging ship-owners to follow the BMP recommendations.<sup>190</sup> A few of these measures should be implemented by the ships prior to crossing the Gulf of Aden; these include notably the installation of citadels, water jets or barbed wire around the ship.

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<sup>186</sup> Business Insider “**Global Cost of Piracy is now \$12 Billion Per Year: Oil Industry No.1 Target**” 23 March 2011.

<sup>187</sup> See supra note 171.

<sup>188</sup> Geopolicity, “**The Economics of Piracy**”, May 2011.

<sup>189</sup> Best Management Practices for Protection against Somalia Based Piracy *available at*: [http://www.mschoa.org/bmp3/Documents/BMP4%20low%20resolution%20\(3\).pdf](http://www.mschoa.org/bmp3/Documents/BMP4%20low%20resolution%20(3).pdf).

<sup>190</sup> See supra note 78 p.18.

Other measures are a series of actions that ships must comply with, such as sailing at top speed in the area concerned, or calling on convoy escorts and enjoying the presence of warships of some countries along the Gulf of Aden.

It has been estimated in 2010 that the cost of implementation of these measures by ship owners at USD \$363 million for 10% of the ships, or USD \$2.5 billion for 70% of the ships transiting through the Gulf of Aden annually.<sup>191</sup>

These estimates were made by taking five of the security measures mostly used by ship owners:

- Licensed Security Guards;
- Sonic Deterrent Equipment;
- Barbed/Razor Wire;
- Sandbags; and,
- Electric Fences.<sup>192</sup>

## V- Other costs

The equivalent costs for the deployment of warships off the Gulf of Aden to deter pirates from attacking, escort of merchant ships and escort of humanitarian ships were estimated at \$2 billion spent each year.

Moreover, the international community through UNDOC and the CGPCS Trust Fund, has undertaken to assist willing States in taking legal actions against people arrested for piracy acts.

This materialized in the signing of MOUs between countries whose ships sail off the Gulf of Aden and countries of the region (see above). The costs incurred for legal actions taken against persons accused of piracy acts were estimated in 2010 at \$31 289 199.<sup>193</sup>

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<sup>191</sup> See supra note 171.

<sup>192</sup> See supra note 78 p.15.

<sup>193</sup> *Id.*, P.19.

The costs incurred in running the various organizations set up to fight against this phenomenon have been estimated at \$24.5 million (this includes the ReCAAP that deals with piracy in Asia; the cost of the Somali piracy stands at \$22.5 million, if we consider that the \$5 million from UNDOC have been totally allocated to countries of the Indian Ocean).

## **Paragraph 2: Indirect Economic Costs of Piracy**

### **I- Regional impact**

The lack of studies and accurate and comprehensive data on the actual impact of piracy on the economies of the countries of the region makes it difficult to come up with reliable and comprehensive estimates on the impact of piracy on the various sectors of the countries of the Gulf of Aden and the Indian Ocean. However, some countries have published national estimates of this impact or provided some background information through their official representatives.

#### **1- Tanzania**

The Livestock Development and Fisheries Deputy Minister, Benedict Ole-Nangoro, specified the impact of piracy in the Ocean Indian on the revenue obtained from the license fees of fishing vessels, which was estimated at USD \$2,074,400 for 71 fishing vessels instead of USD \$4,000;000 for 120-150 fishing vessels registered in 2010/2011.<sup>194</sup>

It should be noted that the licence fee is different depending on whether it is a foreign fishing vessel (USD 12 000 for three months and USD \$2,000 per year) or a local vessel (USD \$4,500 for three month and USD 300 per year).<sup>195</sup>

#### **2- Kenya**

It is difficult to give the exact figures of the impact on the fishery sector in Kenya. However, it is clear that piracy is at the root of the increase in the prices of seafood, which has greatly impacted the lifestyle of the people living along the coast and for whom seafood are the main source of feeding (eg Mombasa).

Piracy has also had an unexpected impact on the local fishing sector. The upsurge of piracy acts has reduced large-scale fishing in the area; whereas some people assert that the local

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<sup>194</sup> Natalia Real, “**Piracy concerns obstruct fishing activities**”, *available at* <http://www.fis-net.com/fis/worldnews/worldnews.asp?monthyear=6-2011&day=17&id=43681&l=e&country=&special=&ndb=1&df=0>

<sup>195</sup> **Tanzania Govt: Piracy impacting on fishing vessel registration**, By IN2EASTAFRICA, June 16<sup>th</sup> 2011.

fishing sector is in good shape and that local fishermen are making more abundant catches since the decrease in the number of large-capacity fishing vessels.<sup>196</sup>

However, it would be more cautious to moderate these statements, mainly because the period of resurgence of piracy acts, may be estimated from 2007 to 2010, seems to me too short to bring about a huge abundance of fish resources.

### 3- Seychelles

The Seychelles is one of the countries greatly hit by the piracy acts perpetrated in the Indian Ocean, for most of its economy depends on fishing products (11.2% of GDP) and tourism (25.5 % of GDP), two sectors seriously affected by the Somali piracy, and 95% of its trade is by sea. The impact of piracy on the economy of Seychelles is as follows:

- “Revenue from Fishing is down by 30%;
- Revenue from Tourism is down by 15%;
- Revenue from Shipping has decreased by 30%; and,
- Fuel and bunkering receipts are down by 35%”.<sup>197</sup>

The Minister for the Environment and Natural Resources has projected that the impact of piracy activities on fishing and the other sectors of Seychelles’s economy will be to the tune of USD 10, 5 billion per year.<sup>198</sup>

### 4- Yemen

Like the other countries of the region, Yemen is affected by the upsurge of piracy acts and expansion of the geographical zones of operation of Somali pirates who operate close to the Yemeni coast. Yemeni officials have estimated that piracy acts have cost USD 150 million to the Yemeni economy, mainly due to lack of revenues from the fishing sector.<sup>199</sup>

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<sup>196</sup> Jason Straziuso, **Kenya fishermen see upside to pirates: more fish**, 11 January 2010.

<sup>197</sup> The Secretariat of the African, Caribbean and Pacific Group of States Documents, **Piracy the Seychelles**.

<sup>198</sup> See supra note 171.

<sup>199</sup> **Piracy costs Yemen’s fishery sector USD 150 million**, Yemen Times, 15 November 2010.

## 5- Djibouti

Like the other countries of the region, it is difficult to estimate the actual direct impact of piracy on the economy of Djibouti. However, the country's economy is directly linked to the activities of its port, one of the largest in the region, which is directly affected by the piracy acts. The recent expansion of the War Risk Area to Djibouti will affect the number of ships stopping at the port of Djibouti and, consequently, reduce State revenues.<sup>200</sup>

## 6- Egypt

It is clear that the global economic crisis slowed down global maritime traffic and, consequently, reduced the revenues Egypt obtained from the Suez Canal. The fees for crossing the Suez Canal are between USD 200,000 and USD 600,000 per vessel.<sup>201</sup> An average of 28 000 ships sail through the Suez Canal each year, which for Egypt corresponds to revenues between USD 7 billion and USD 16, 8 billion per year. It is also estimated that 3,000 ships decide to go round the Gulf of Aden and, thus, the Suez Canal. These 3,000 ships represent for Egypt a shortfall between USD 600 million and USD 1.8 billion per year.

It is difficult to obtain accurate data due to the vagueness of the exact number of ships transiting via Cape of Good Hope and the exact percentage of reduction of global marine traffic caused by the global economic crisis.

## II- Global Economic Impact

The cost of piracy in 2010 was estimated at USD 4.9 billion and USD 8.3 billion.<sup>202</sup> This estimate, which is modifiable due to the gradual increase of piracy acts and amounts of ransoms, may have been obtained by an addition of the following:

- Ransom costs;
- Insurance costs;
- Costs of rerouting via the Cape of Good Hope;

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<sup>200</sup> See supra note 180.

<sup>201</sup> Marad, “**Economic Impact of Piracy in the Gulf of Aden on Global Trade**”.

<sup>202</sup> See supra note 188.

- Costs of equipping the ship with security devices;
- Expenses related to the presence of warships in the region;
- Operating costs of organizations in charge of fighting against the phenomenon;  
and,
- Costs on regional economies.

## **Section B: Financial Aspects**

### **Paragraph 1: Financial System in Somalia**

The international community's paramount concern is to know how the ransoms given to pirates are used and how they are reinvested by the latter.

The fight against piracy off the Somali coast inevitably entails controlling the use of the money paid for ransoms. However, tracking down these ransoms is seemingly extremely delicate and difficult due to the fact that the money transits via a rather complex route out of Somalia and the chaos in the country stops any on-site intervention.

#### **I- Hawala System**

##### **1- Origin of the System**

The Hawala system comes from Asia and the Middle-East; it is a traditional system of payment used by merchants several centuries ago. Hawala is based on the trust in each member of the system. This financial tool, traditionally used by merchants to pay off their suppliers, has many obvious security advantages, for it prevents the merchants from transporting this money personally thus curtailing the risk of being robbed.

The Hawala system, although more ancient than the modern financial systems, is still often employed in Asia and the Middle-East, and has been developed in Africa and in countries of the North.<sup>203</sup>

##### **2- System Operation**

The system's operation is very simple and is based on the speed of communication between two agents. The person wishing to send a certain amount of money to a certain destination

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<sup>203</sup> Mohammed E.Q, Samuel M.M, John F.W, “**Informal Funds Transfer Systems: An Analysis of the Informal Hawala System**” The International Monetary Fund and the World Bank, 24 March 2003.

goes to the office of an agent using this system; the latter (for a fee) contacts the agent closest to the destination of the beneficiary, who receives the money sent by the agent.

This system relies mainly on trust and commitment. Thus, the agent who receives the money first knows that the agent on the spot has sufficient funds and that the latter will also provide the amount requested to the beneficiary. In return, the partner is convinced that his partner who sent the payment request will also pay back the amount advanced. The only condition is that the agents must periodically match their statements and work out the accounts among the agents, notably to pay back the difference in any form.

### **3- System Advantages**

Hawala helps not only to apply exchange rates different from the current rate, but also to be exempt from taxes and regulations. Today, this system has many advantages making it more preferable than a traditional bank:

- Exchange rates and sending charges are cheaper;
- The transaction is fast, on average the same day or the next day;
- Complex operations can be made easily;
- Lack of administrative procedures (few documents required);
- The difficulty to know the agents who are members of the system (the advantage of not having to issue bills); and,
- Non-requirement for officers to pass any information to the authorities (eg taxation department).

This system is widely used not only by the Diaspora living in northern countries to send money to their families, but also by businessmen in Asia, the Middle East and Africa. This system is specifically interesting to those who, out of fear of instability, want to transfer money abroad without having to justify their transactions before their local authorities. It should be noted that this system is mostly practiced in countries that have a high number of their people coming from Asia and the Middle East, but also countries in the Gulf, where there are many business activities.

In 2003, it was estimated that the global amount of the Hawala system transactions had reached USD \$100,000 million<sup>204</sup>. This amount does not fully reflect the reality, for a number of countries do not have the resources to identify the amounts transferred.

#### **4- Legality of the system**

The Hawala system in itself is not illegal. It is an important financial tool for communities wishing to transfer funds rapidly, and businessmen wanting to avoid traditional administrative bottlenecks, notably in developing countries.

It is essential to distinguish between Black Hawala and White Hawala. White Hawala is the traditional transfer of funds used in most cases; it is a key financial instrument in the life of many communities. Conversely, Black Hawala is the perversion of this system for illegal purposes, such as money laundering and the financing of illegal activities such as terrorism and piracy.

In some Asian countries, the system is not illegal; however, applying an exchange rate different from the current official rate is illegal. Moreover, these countries require a clear administrative follow-up procedure to better identify the transactions.

It is prohibited in some countries (United-States), but tolerated in other countries (Great Britain). Paradoxically, the hard regulations of a country increase the activities of this system which offers an alternative to people.

#### **5- Hawala and illegal activities**

This system is particularly known to and followed by Interpol investigators, who see it as a new system of money laundering or financing of terrorist activities. Actually, this system was singled out after the September 11 attacks as one of the means through which the terrorists obtained large sums of money necessary to carry out the attacks.<sup>205</sup>

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<sup>204</sup> Roger Ballard, “A background report on the operation of informal value transfer systems (Hawala)”, 6 April 2003

<sup>205</sup> BBC news “Hawala system under scrutiny”, 8 November 2001.

The inability to track the funds, identify the members of the network, state the amounts received or even intercept these payments complicates the fight against transnational crimes (which greatly benefit from this system). Interpol has identified three phases in the money laundering process in which the Hawala system can be integrated.<sup>206</sup>

#### Phase 1: Placement

Placement is the first step in the money laundering process. This is a cash deposit made in a bank, but at an amount lower than the amount from which the bank is required to carry out an investigation. These deposits are "disguised" and justified by the depositors as legal revenues made from restaurants or other legal activities. Consequently, the process consists in falsifying legal business accounts, often adjusted upwards to include the amounts received from other illegal activities.

In the Hawala system, most of the agents have legal activities, which they use as a cover. In most cases, they prefer to have money in cash rather than draw the attention of bank authorities.

#### Phase 2: Layering

This second step consists of a series of complex banking operations between different bank accounts, different banks or countries. These operations are generally justified by the purchase or repurchase of goods or commodities in one or more countries with the intent to render extremely tasking the tracking of these payments. The complexity of these operations often relates not only to the amounts committed but also the level of organization of criminals. The difficulty faced by the criminals is that if a transaction were to draw the attention of the bank authorities, the latter would be able to follow the transaction, thanks to the "paper trail", right to the initial depositor and, thus, uncover all the criminals.

However, in the case of the Hawala system, given that no document is issued throughout the transfer process and that the system involves an international money transfer network

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<sup>206</sup> INTERPOL, "The hawala alternative remittance system and its role in money laundering", January 2000.

justified by the mixture of legal and illegal activities; it is specifically difficult to track down these transactions.

### Step 3: Integration

This is the final step in the process; it consists in depositing the funds in bank accounts. These funds are thus considered "clean" and can be used to make purchases or used otherwise in any country. For example, the Hawala system can be used to send money withdrawn from an account to people, who may reinvest it in illegal activities or through legal activities already existing in other illegal activities.

## II- The Hawala system and piracy

The Hawala system is used by people involved in piracy activities to transfer funds obtained from ransoms out of Somalia and also to reinvest these funds in various legal or illegal activities.<sup>207</sup>

Through the system described above, ransoms paid transit via countries in which the Hawala system is widely used. These funds are thereon distributed to pirate groups that may then reinvest in other activities.<sup>208</sup> It is stated that the percentage of ransoms transferred out of Somalia could be roughly 40% to 60%; that is, if we refer to the amount of ransoms paid in 2010 (USD 238 million), then USD 95 million have been transferred out of the country.<sup>209</sup>

### 1- Transfer of funds

Since the fall of Siad Barre's Government, several million Somalis have fled Somalia and sought refuge in countries of the region and beyond. Somalis are present in almost every continent and the vast majorities are integrated into their host countries.

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<sup>207</sup> BBC "Chasing the Somali piracy money trail" 24 May 2009.

<sup>208</sup> Jay Bahadur "**Deadly Waters, Inside The Hidden World Of Somalia's Pirates**" Profile Books, 02 June 2011, ISBN: 9781846683633.

<sup>209</sup> Financial Action Task Force , **Organised Maritime Piracy and Related Kidnapping for Ransom**, July 2011.

A good number of Somalis live in neighboring Kenya, and in the Middle East (Yemen, UAE, Saudi Arabia, etc), Europe (Britain, Netherlands, the Scandinavian countries, etc) Asia-Pacific (Australia) and North America (Canada and United States).

Because the Hawala system is community-based, its agents use this very important network of Somali expatriates to transfer funds from one country to another. As a result, the Somali Hawala is one of the communities that make most use of this financial tool with Pakistanis, Indians, Afghans and Bangladeshis.

The Hawala system is particularly extensive in countries where the Somali community owns legal businesses (Nairobi, Dubai, London, etc). These places are sometimes used to transit funds.<sup>210</sup> It should be noted that this system is in most cases legal and used for commercial purposes and to send money to families left behind.

However, the system is also perverted by persons involved in piracy activities, who take advantage of the "underground" nature of this system to launder the funds obtained from ransoms.

## **2- Reinvestment of ransoms**

Once transferred out of Somalia and "legalized" through the mechanism described above, the ransom can be reinvested. Persons involved in piracy activities invest in different sectors out of Somalia:

- Real estate: this is the main investment sector; persons involved in piracy activities buy houses, buildings or other estates. In some countries of the region, the extensive acquisition of properties significantly increased market prices and made access to property extremely expensive for the local population<sup>211</sup>. Regarding the specific case of Kenya, it is estimated that piracy

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<sup>210</sup> See supra note 205.

<sup>211</sup> Available at <http://www.voanews.com/english/news/africa/Kenyan-Government-Investigates-Possible-Pirate-Ties-to-Real-Estate-Boom-94607164.html>.

has no real impact on the rise of estate prices given the pirates' other functional expenses.<sup>212</sup>

- Legal activities (import-export businesses, telephone shops, etc): the financial groups created by piracy activities also invest in other activities and establish legal businesses in many countries, including countries of the north.

Ransoms are also used to reinvest in Somalia including in the following:

- Weapons;
- Navigational technologies (GPS and VHS radio);
- Fast fiberglass boats;
- Satellite cell phones;
- Manpower (translators and people who can use automatic tracking devices); and,
- Khat and cars.

### **3- Fight against money laundering**

The fight against the trafficking of finances obtained from piracy acts is an essential component in the international anti-piracy strategy.

The international community has recognized that the fight against illicit financing is as important as the fight at high seas, and many countries and organizations have endeavored to appeal to the international community to take effective measures to prevent the laundering of money obtained from ransoms.<sup>213</sup>

This explains why the Security Council adopted the Resolution 1950 in November 2010, urging States "to further investigate international criminal networks involved in piracy off the coast of Somalia, including those responsible for illicit financing and facilitation."<sup>214</sup>

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<sup>212</sup> See supra note 208.

<sup>213</sup> CGPCS, First plenary session, New York, January 14, 2009.

<sup>214</sup> SC. Res. 1950, para.16, (23 November 2010), UN Doc. S/RES/1950.

Similarly, the Working Group Number 2 chaired by the Denmark within the CGPCS reflected the financial aspect of piracy as a key component in the fight against the phenomenon of piracy off the Somali coast. As the anti-piracy international strategies coordinating body, CGPCS during its workshop on Judicial Issues reflected on illegal financial flows in close collaboration with other organizations responsible for the financial aspects of piracy, such as UNDOC, UNTOC and EUROPOL.<sup>215</sup> During the meeting of CGPCS on 10 June, 2010, the working group decided to convene a meeting of experts as part of the Financial Action Task Force to promote and develop national and international policies to fight against money laundering.<sup>216</sup>

Resolution 1950 calls on States to cooperate with Interpol (see the role of the organization above) in investigations on these practices.

As a police organization, Interpol has technical resources and a network that make it indispensable in assisting States in investigations. Moreover, the organization agreed to an international conference on this issue on 19 to 20 January 2010, sponsored by the United States and intended to provide States with a platform for information exchange and alert, and tools to help identify networks and money flows.<sup>217</sup> In this regard, Interpol created a global database to disseminate information and share proofs to help strengthen anti-piracy measures in cooperation with Europol (Office Intergovernmental bureau bringing together the police forces of the European Union).

UNDOC equally held a meeting in Nairobi on 17 and 19 May 2011 to address the issue of piracy and its links with illegal funding.<sup>218</sup> The Global Programme Against Money Laundering (GPML), a program under the supervision of the UNDOC, was founded in 1997. In 2008, it included another component into the programme: Countering Financing Terrorism (CFT). Its role is to "Assist States in building effective Legal, Regulatory and law enforcement capacities in compliance with anti-money laundering / countering the financing of terrorism worldwide-Accepted standards."<sup>219</sup>

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<sup>215</sup> CGPCS, Ninth Session, Seychelles, 14 July 2011.

<sup>216</sup> CGPCS, Sixth Session, New York, 10 June 2010.

<sup>217</sup> Interpol Media Release, <http://www.interpol.int/Public/ICPO/PressReleases/PR2010/News20100119.asp>.

<sup>218</sup> UNODC "Awash with money - organized crime and its financial links to Somali piracy", 25 May 2011.

<sup>219</sup> GPML, Final Report, Project number GLOU40, February 2011 *available at* [http://www.unodc.org/documents/commissions/WG-GOVandFiN/Final\\_Report\\_on\\_the\\_Evaluation\\_of\\_GPML\\_9Feb2011.pdf](http://www.unodc.org/documents/commissions/WG-GOVandFiN/Final_Report_on_the_Evaluation_of_GPML_9Feb2011.pdf).

During the meeting in Seoul on 29 June, 2011, the ad hoc committee requested the GPML to produce a report on illicit financial flows linked to piracy off the coast of Somalia, in collaboration with the World Bank.

## **Paragraph 2: The Emergence of New Businesses**

Over the past six years, piracy acts off the coast of Somalia have soared considerably and had great impact on global and regional economies.

The escalation of these acts and steady pace of hostage-taking operations suggest that a solid organization has been put in place both in Somalia and elsewhere. Hostage-taking, the logistics required for their captivity (food and others), the negotiation and payment of the ransom are all aspects that have generated new "jobs" and new "markets".

### **I- Logistics on the Ground**

The rate of piracy acts off the Somali coast, the ever increasing number of hostages and the huge sums paid to pirates incite the people living around these pirates to organize themselves and also enjoy the income generated from these activities. Piracy has an impact on the social structure and economic reality of the surrounding villages.

#### **1- Social Impact**

The massive inflow of money and ever increasing number of young people engaged in piracy activities have altered the social landscape of the areas surrounding the coasts where pirates operate.

Their lifestyles, often characterized by heavy drinking, drug abuse and use of prostitutes, break all the taboos of the Somali society that is extremely codified and marked by strict respect of Muslim precepts.<sup>220</sup>

The Somali people, rather inflexible when it comes to tradition and principles, are becoming accustomed to mingling with people whose lifestyles are in contradiction with their own, in addition to the non-negligible force of attraction of these newly rich people to young and underprivileged women. This issue is particularly raised when we suggest the possible existence of a partnership between the pirates and Muslim extremist groups. The latter

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<sup>220</sup> Rudolph Atallah “**Pirate Financing: Understanding and Combating a Complex System**”

advocate a life guided by the respect of a rigid interpretation of Islam, which is the exact opposite of the life lived by the young pirates. However, it is clear that the amounts of money involved are large enough to give rise to selective agreements.

## 2- Economic Impact

Piracy activities have real economic benefits on the villages surrounding the area controlled by the pirates, who have received a large inflow of money.

The villages through the elders receive a share (5%) of the ransoms for granting pirates the right to dock near their coasts.<sup>221</sup> These populations are directly or indirectly involved in piracy activities by:

- Selling food to pirates and hostages;
- Sometimes watching over hostages;
- Setting stalls and opening shops around the area; and,
- Leasing the areas on which pirates dock.

## II- Private Military Army and Security Companies (PMASC)

“Legally established international firms offering services that involve the potential to exercise force in a systematic way and by military or paramilitary means, as well as the enhancement, the transfer, the facilitation, the deterrence, or the defusing of this potential, or the knowledge required to implement it, to clients.”<sup>222</sup>

Although the number of PMASC has not increased as such, their area of expertise has, on the other hand completely changed and led to a substantial diversification of the services they offer to their clients.

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<sup>221</sup> *Id.*,

<sup>222</sup> Ortiz, Carlos, **Private Armed Forces and Global Security: A Guide to the Issues** (Santa Barbara, Denver, Oxford: Praeger, March 2010), page 48.

Several PMASC were for many years specialized in providing services to private transport companies to ensure the safety of their crew members and goods. The escalation of piracy acts off the Gulf of Aden opened a new market for these companies, where they can sell out their customized services to several private transport companies.

### **1- Who are they?**

There are several private security companies; most of them are specialized in security services such as providing armed men or bodyguards for risky areas.

A large majority of these PMASC operate in very dangerous areas. The increase of piracy acts encouraged a good number of security companies to venture into this new market by offering services to marine companies whose vessels crossed the Gulf of Aden. Not all PMASC are made up of professionals; you also find people with no specific qualifications attracted by the huge sums that are paid by the shipping companies to the PMASC. These people offer their services at amounts much lower than those charged by the PMASC recognized.

To help deal with this situation, the PMASC implemented a code of ethics: the International Association of Maritime Security Professionals (IAMSP). This code of conduct ensures that the PMASC that are signatories are properly trained, understand the procedures and regulations, and are ethically beyond reproach. The IAMSP has 400 members.<sup>223</sup>

In April 2001, the International Peace Operations Association (IPOA) was created to support the young industry of private security companies. Based in Washington, the IPOA imposes a number of principles to its members such as compliance with ethical standards, transparency and dialogue with the authorities and compliance with international legal instruments. The IPOA has 58 active members since the departure of the controversial Blackwater Worldwide following the scandals in Iraq.

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<sup>223</sup> Available at <http://iamsponline.org/>

## **2- Services offered**

### **A) Surveys and Recommendations**

The PMASC propose an inspection of the ports, ships and other marine facilities in order to come up with recommendations to correct deficiencies, strengthen systems and improve the overall security of the ships and crew members. These services rely on international regulations in this domain such as the IMO Best Management Practice (BMP), The International Code of Conduct for Private Security Service Providers, UNCLOS or the IMO.

### **B) Counter-piracy services**

Most of the PMASCs specialised in counter-piracy activities offer services designed for ship companies in order to reduce risks of attacks and possibilities to be high-jacked. These include having armed groups on board. The group is “scalable, dependent on vessel size, type, freeboard and speed”<sup>224</sup>. The PMASC also provide for the management of incidents such as conducting negotiations in the case of kidnapping, transit monitoring and operation management.

### **C) Training**

Training is one of the common components of the PMASC. They offer custom-designed training programmes to their clients in compliance with international regulations and the code of conduct. When it comes to piracy, they use the Best Management Practices and IMO’s regulation as basis for their training programmes.

### **D) Cash couriers**

An increasing number of PMASC recommend ship owners to deliver ransoms to pirates directly on site. Ransoms may be deposited either by air or transported by land.

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<sup>224</sup> Aegis Maritime Security *available at* <http://www.aegisworld.com/index.php/maritime-services-2>

## E) Fees

It is difficult to determine exactly the amount that is paid to the PMASC because most maritime transport companies tend to be secretive on the use of such services, but also because the amounts depend on many variables such as the size of the ship.

However, it is reasonable to estimate that the amount for a private security force on board varies between USD \$4,000 and USD \$9,000 per day, that is, about USD \$55,000 to USD \$100,000 to cross the Gulf of Aden.<sup>225</sup>

### 3- The sensitive nature of the PMASC

The use of the PMASC remains a sensitive issue due to the lack of transparency and the limited control exercised by public authorities on their activities. Most of them are based in difficult countries where there is little or no control and monitoring of their activities.

It is estimated that the defence of public interests and use of force should be the prerogative of public authorities and not entrusted to private entities.

The presence of armed men in merchant vessels amplifies the threat of an upsurge of violence and risk of an even heavier exchange of gunfire between pirates and the armed groups, and considerable risks for the safety of crew members, the merchant ship and the goods. Moreover, there are persistent doubts about the training of the armed groups who board the ships, for if it is insufficient it may lead to a disproportionate use of violence and countless consequences for the safety of the people around. Additionally, the many and repeated scandals of illegal and violent actions undertaken by members of security groups in war-torn areas like Iraq have largely entertained the sensitive nature of this issue.<sup>226</sup>

The very rigid laws regarding the presence of weapons in some ports and boats force some PMASC to sign agreements with local agencies whereby the latter provide them with weapons, which they throw into sea prior to their arrival at the ports of destination. These practices are denounced as enhancing arms trafficking where the PMASC operate.<sup>227</sup>

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<sup>225</sup> Sandra Jontz, “**Hired guns secure ships, stir controversy**”, 15 February 2010.

<sup>226</sup> Members of Blackwater opened fire on people in Nisour square in Baghdad. It turns out that they opened fire without apparent justification, killing 17 civilians and wounded 24; BBC news, “**Blackwater working again in Iraq**”, 21 September 2007.

<sup>227</sup> Bradley Hope “**Firearms an odd casualty of piracy**”, 6 February 2011.

Finally, criticisms have been raised as to their cooperation with local Governments, who provide them with agents and equipment, thus diverting these resources from their initial public uses.<sup>228</sup>

#### 4- Standpoint of the international community on the issue

At the end of its 89th Session held from 11 to 20 May 2011, the Maritime Safety Committee of the IMO published two documents intended to regulate "the employment of privately contracted armed security personnel on board transiting the high-risk piracy area off the coast of Somalia and in the Gulf of Aden and the wider Indian Ocean."<sup>229</sup>

The first document (MSC.1/Circ.1406) contains recommendations to Flag States on the use of armed groups on board. It recommends Flag States to implement a legal framework that spells out the conditions of use of the PMASC and urges them to consider the possibility of an escalation of violence with the use of the PMASC.

The second document (MSC.1/Circ.1405) is intended for ship-owners and underscores the enforcement of the rules and regulations implemented by the Flag States, which ship-owners must comply with when employing the PMASC or PCASP (privately contracted armed security personnel). The document stresses the complementary role of the PCASP, which must under no circumstance replace the BMP and can be used only after an assessment of risks with the involvement of the ship master. The document includes:

“sections on risk assessment, selection criteria, insurance cover, command and control, management and use of weapons and ammunition at all time when on board, and rules for the use of force as agreed between the ship-owner, the private maritime security company and the master.”<sup>230</sup>

In September 2011, the Committee held an intersessional meeting to present a guide for the States, ports and coastal States. This document (MSC.1/Circ.1408) calls upon States, ports and coastal states to facilitate the passage of private security companies' ships escorting

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<sup>228</sup> Carolin Liss “**Private Military and Security Companies in the Fight against Maritime Piracy**” .

<sup>229</sup> IMO media center, press briefing: 27, 20 May 2011 *available at* <http://www.imo.org/mediacentre/pressbriefings/pages/27-msc-89-piracy.aspx>

<sup>230</sup> Id.,

merchant vessels. This circular comes after the denial of Egypt, in September 2011, to let a ship that was carrying weapons on board, cross through the Suez Canal.

The issue of the PMASC is still sensitive, and many countries do not authorise armed men in ships flying their flag. However, some countries authorise the presence of armed men in ships; these are Great Britain and more recently Italy<sup>231</sup>. Alternatively, some countries have a rather vague legislation (e.g. France where there is not legislation about armed group). In the United States, the issue is being debated and the U.S. Congress is yet to rule on the authorisation of armed men on board ships, which is prohibited to date. United Kingdom authorizes armed groups on board in British ships.<sup>232</sup>

### III- Private Negotiators

It seems necessary to look into the negotiation mechanism. Piracy, like any other activity, is perceived by pirates as a business in which instead of negotiating goods, they negotiate human lives. It is important to consider this aspect to better understand how pirates act, notably, vis-à-vis the hostages.

The primary objective of pirates is to be paid a satisfactory amount for the release of the ship and crew members. Consequently, it is not in their interest to kill hostages or damage the goods contained in the ship. Surprisingly, pirates honour their commitments. Once the amount of the ransom is stated and paid to the pirates, the latter release the ship and crew members. Honouring a commitment made is part of a business principle; they have no reason not to honour their commitments, for this could put at risk the entire system.

Moreover, by killing hostages not only do they lose their credibility vis-à-vis the ship-owners, but their action may also provoke the warships patrolling off the Somali coast to take radical actions such as using force, whereas, they have so far rejected this option in favor of the payment of a ransom. Admittedly, the deplorable conditions of captivity and psychological consequences for those held hostage are considerable; however, the aim here is to understand the viewpoint of the pirates to whom only the ransom counts.

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<sup>231</sup> Italie authorizes armed group since 13 July 2011 in high risk area

<sup>232</sup> BBC news "Somali piracy: Armed guards to protect UK ships" 30 October 2011

Once the action groups have captured a boat, they endeavour to dock the boat on the Somali coast where a well laid out scheme is provided to them. Once the pirates arrive at the coast, they start negotiations with the ship-owner, which may sometimes take several months.

Negotiators are the people who negotiate with ship-owners on the amount of ransom demanded by pirates for the release of the ship and its crew members.<sup>233</sup> These negotiators are selected primarily for their language skills and knowledge of negotiations. Actually, it is sometimes surprising to realize that some negotiators speak English fluently; there has been at least one case where an English teacher took part in the negotiations.<sup>234</sup>

These negotiators can either be present in Somalia or come from other parts of Somalia, or be found out of Somalia and negotiate with the ship-owners from abroad. These negotiators receive a percentage of the amounts negotiated, which may reach 5% of the ransom. Given the increase in ransoms, there is equally an increase in the number of negotiators who offer their language skills to pirates.

These negotiators play a key role in the resolution of talks. In some cases, these negotiators proposed to ship-owners to convince pirates to reduce the amount of the ransom, in return a certain amount was paid into their private bank accounts.<sup>235</sup>

#### IV- The New Safety Equipments

The increasing number of acts of piracy and the numerous consequences that generate for crew member health are prompting more and more ship owners to use a variety of security measures to reduce the threat. In January 2010, the British company Proform has developed a non-lethal laser weapons that disorient assailants and could cause additional symptom such as vomiting or dizziness.<sup>236</sup> This laser was originally dedicated for commercial use and was intended to exclude persons unwanted near to ships as it could be the case for paparazzi. This same type of equipment is also used by the security department of the United States.

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<sup>233</sup> Stockbruegger, “**The Mogadishu Roadmap: towards a joint maritime security policy for Somalia?**” 15 October 2011, p.224

<sup>234</sup> BBC news, “**Inside story of Somali pirate attack**” 4 June 2009

<sup>235</sup> See supra note 207.

<sup>236</sup> IMO, Maritime Knowledge Centre, Volume XXII . No. 1, January 2010, p.9

However, its functions are also useful to prevent pirate attacks off the Gulf of Aden. The price of the unit is estimated at USD \$ 85,000 and would have a reach of 4 km.

In January 2011, the British company BAE Systems announced it has developed a non-lethal laser that can dazzle and blind the attacker temporarily from a distance of 1.5 km. This weapon was developed, according to their inventors, to confuse pirates and encourage them to retreat once the element of surprise did not take place.<sup>237</sup>

This weapon passed through a series of security checks in order to not have the consequence for the attackers in the permanent loss of sight. Such equipment is strictly prohibited by the United Nations Convention on Certain Conventional Weapons in its Protocol IV.

On 30 August 2011, the same British company presented its new safety equipment for ships and intended to reduce risks from piracy.<sup>238</sup> This is a laser cannon, the company has produced in collaboration with Boeing, in partnership with the U.S Navy designs specifically to prevent piracy.



**Figure 4: MK 38 MOD 2 Tactical Laser System**  
Source: BAE System

The MK 38 MOD 2 Tactical Laser System is a highly sophisticated laser gun in charge of identifying pre-determined targets (small vessel) and by using a laser beam of 10 kilowatts burn the engine of the attackers.

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<sup>237</sup> BAE System News Release, “**BAE Systems Develops Non-Lethal Laser to Defend Against Pirate Attacks on Commercial Shipping**”, 10 January 2011.

<sup>238</sup> BAE system News Release, “**BAE Systems Completes Successful Test of Mk 38 Tactical Laser System Concept**”, 30 August 2011.

Tested in the United States, this device is the most advanced non-lethal safety equipment. It is intended to equip the United States Coast Guards. The safety equipments market has been specially developed over the past ten years, it was particularly marked by innovation and improving the physical characteristics of the safety equipments. These markets represent several hundred million US dollars and are a growing sector mainly because of the resurgence of piracy and the need for the ship owner to implement efficient security measures in order to protect the ships and their crew members.

## Chapter 2: Root causes

### Section A: Onshore development

Piracy acts are only one of the consequences of the chaotic situation prevailing in Somalia, characterised by the absence of a Government capable of meeting its sovereign obligations. Recognising that long-term solutions must include a resolution of the situation on the ground, the international community has repeatedly expressed through the resolutions of the United Nations Security Council its desire to strengthen the capacities of the Somali Government.<sup>239</sup>

Since the fall of Siad Barre's Government in 1992, the international community has attempted various approaches to restore order and put an end to the ceaseless civil wars that are devastating Somalia. Unfortunately, none of these measures has achieved any tangible success and the scenes of killings and carnage are henceforth part and parcel of the Somali society. However, it should be noted that an economy exists in Somalia, mainly thanks to the funds sent by the Somali Diaspora and which is estimated at close to USD 1 billion.<sup>240</sup> Somalia has huge resources and industries that can help in the reconstruction of the Somali State.

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<sup>239</sup> See supra note 67.

<sup>240</sup> World Bank, Country Brief *available at*

<http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/AFRICAEXT/SOMALIAEXTN/0,,menuPK:367675~pagePK:141132~piPK:141107~theSitePK:367665,00.html>.

## Paragraph 1: The “high economic potential areas” in Somalia

### I- Agriculture

Prior to the civil war of Somalia, the country was a major exporter of agricultural products in Africa and was famous for the production of banana (over 120 000 tons exported yearly) and other products harvested from farms located in the south of the country. Agriculture is the largest industry in the Somali economy, accounting for 65% of the GDP, standing at roughly USD 5.896 billion in 2010.<sup>241</sup>

The agricultural sector is critical for a large number of Somalis who live on these products and which also constitute a source of income thanks to their exportation. The products from agriculture are presented below:

**Table 4: Agriculture products in Somalia**

• bananas,	• sugarcane,
• sorghum,	• mangoes,
• corn,	• sesame seeds,
• coconuts,	• beans;
• rice,	• cattle,
• sheep,	• goats;
• fish	

The agricultural sector is currently almost inexistent; the land used for agriculture is only a small portion of the country's capacities. The central cause is evidently the civil war with the use of military materials that are noxious to production, destroying all the crops in the space of five years from the beginning of the civil war.

The insecurity experienced by farmers, the blocked roads making any attempts to transport goods dangerous, the expropriation of land by armed militias, the departure of the most experienced farmers, the lack of financial resources, the lack of transport infrastructures, and the lack of land irrigation have all destroyed the agricultural activities in the country.

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<sup>241</sup> CIA worldfactbook available at <https://www.cia.gov/library/publications/the-world-factbook/geos/so.html>.

Agriculture has become a dangerous and marginal activity.<sup>242</sup> However, Somalia has a large agricultural potential, including the fertile areas for agriculture located around the two main rivers of Juba and Shabelle.

### **1- Juba and Shebelle Rivers**

Juba and Shabelle are the two largest rivers out of the nine in Somalia. Juba and Shabelle run largely in Ethiopia but also across Somalia. River Juba stretches over 1,804 km, 804 km in Ethiopia and 1,004 km in Somalia. River Shabelle stretches over 2,526km (1,290km in Ethiopia and 1,236 km in Somalia).

The pre-war Government had undertaken a number of measures to optimally exploit the resources of the two rivers with irrigation.

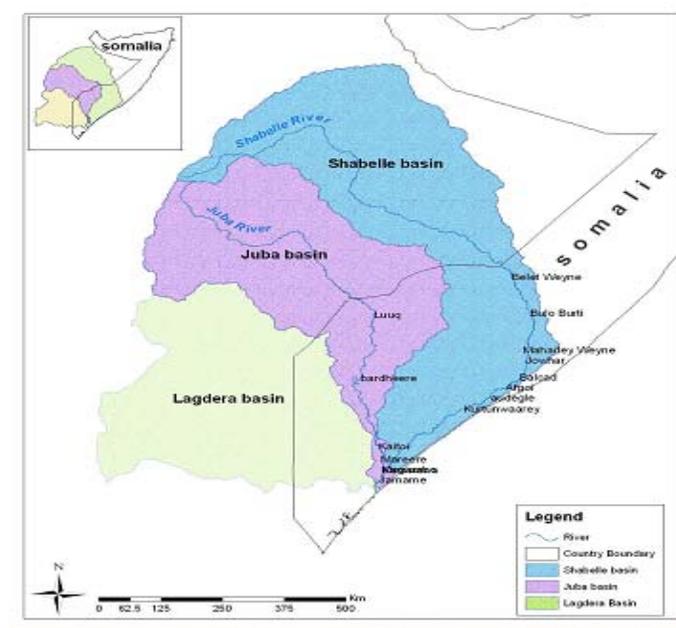
In 1988, the Minister of Agriculture had estimated that 222, 000 ha of land were irrigated following the construction of canal systems on River Shabelle that measured 5,000 km long.<sup>243</sup>

The extraction of water from River Juba had further increased since it was estimated that in 1990, 150-170 liters of water was extracted every second.

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<sup>242</sup> European Union, “**Identification of the Agriculture Programme For Somalia**” Contract No. 9 ACP SO 3/52, April 2010 p.2-9.

<sup>243</sup> **Water for Agriculture and Energy in Africa: the Challenges of Climate Change**, Sirte, Libyan Arab Jamahiriya, 15-17 December 2008.



**Figure 5: Juba and Shabelle Rivers**  
Source : Swalim

The map shows the irrigation projects put in place before the war and the irrigation potentials of the areas located around the Juba and Shabelle rivers. Irrigation infrastructures completely collapsed after the civil war of 1991, and information on the hydrogeology formation and sub-soils of the rivers is necessary.

In collaboration with the European Union, the FAO conducted a geological study of the area and, notably, took an aerial photograph of the geographical and morphological structure of area that revealed the enormous potentials of the rivers for Somalia's agricultural sector. The efficient exploitation of the areas surrounding the Juba and Shabelle rivers is one of Somalia's most important development projects, for it may help reduce risks of famine (such as the one of 2011 that is ravaging Somalia and the wider sub-region) and also generate income from the export of agricultural products.<sup>244</sup>

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<sup>244</sup> EU, FAO "Hydraulic Analysis of Rivers Juba and Shabelle in Somalia" Project Report No.W-13, August 2009.

## II- Telecommunications

Telecommunications is one of the growing sectors in Somalia; despite the war, the sector records net growth in terms of activities and subscriptions.

Before the civil war of Somalia, the sector was not particularly developed mainly due to the State's control of the network and services and because the Ministry of Telecommunications was the sole provider and regulator of telecommunication services.

After the war, and with the absence of any regulatory organ, private telecommunication companies emerged. According to some this demonstrated there was a genuine demand from Somalis who wished to have information on the political situation in the different regions of the country. The current Government is trying its best to enforce some rules in telecommunications services in Somalia to attract investors, but the task seems difficult insofar as companies have become accustomed to operating without any regulation, and consumers are accustomed to very low prices.<sup>245</sup>

Consequently, on 10 April 2011, the Parliament of Somaliland (self-proclaimed republic) adopted the Telecommunications Act, which seeks to regulate telecommunications services in the region. This initiative will help the region to implement a legal framework for the collection of taxes from activities undertaken by telecommunications companies and also attract foreign investors to whom the issue of regulation is central.

There are several major telecommunications providers in Somalia, who are competing aggressively to get market share:

- Hurmuud Telecom Inc.;
- Telecom Somalia;
- Nationlink Telecom;
- Somafone Telecommunications Service Co; and,
- Olympic.

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<sup>245</sup> Reuters Africa “**Somalia to regulate, tax telecoms sector – minister**”, 14 January 2011.

Telecom Somalia was the first to provide landlines and mobile services, followed by Hurmuud Nationlink and Telecom. The lines are installed in just three days compared to the several days or weeks seen in some countries around the world; local calls are free for a monthly sum of USD 0.04.<sup>246</sup>

In 2005, the three largest telephone companies (Hurmuud, Nationlink and Olympic) agreed to set their prices and extend access to their networks. Thus, these companies offer extremely low and competitive prices adapted to subscribers' incomes (70% of the population has less than \$2 per day to live). This is also possible because of the absence of a State institution that would demand taxes. The cost of a telephone call is \$ 0.03 per minute, which is one of the lowest rates in Africa.<sup>247</sup>

These telephone companies are also successful because everyone benefits from the services offered by them, a central tool to communicate both inside and out of Somalia. About 1.5 million people use telephone services in Somalia; these services are used by much of the population, including armed groups who have every reason to look forward to the development of these services.

However, there are sometimes disagreements between the armed groups and the telecommunications companies as the former request companies to pay them a certain percentage for operating in their areas of control. Some companies have been banned from operating in these areas and forced to turn off their signals.<sup>248</sup>

In the capital and in several cities around Somalia, there are several cybercafés offering Internet access ranging from 11mb/s to 150mb/s depending on the location. This connection speed will certainly increase following the intention of the Somali Government to get connected to the Eastern African Submarine Cable System (EASSy) fiber optic cable.<sup>249</sup>

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<sup>246</sup> BBC news “**Telecoms thriving in lawless Somalia**”, 19 November 2004.

<sup>247</sup> **Somalia Telecommunication Companies Reduce Calling Rates**, 21 February 2011 *available at* <http://www.bar-kulan.com/2011/02/21/somalia-telecommunication-companies-reduce-calling-rates>.

<sup>248</sup> Somaliland press “**SOMALIA: Financial dispute leaves thousands without communication**”, 4 August 2011.

<sup>249</sup> *Available at:* [http://www.eassy.org/network\\_overview.html](http://www.eassy.org/network_overview.html).

Additionally, there are many mobile services offered by telecommunications companies, including mobile-banking that offers quick payments via the mobile phone, to which a number of money transfer companies are associated.<sup>250</sup>

The Telecommunications sector is undoubtedly a booming industry which, unlike other economic sectors of the country, has developed considerably due to the lack of a regulatory body. This sector is ever growing and employing many more Somalis. It is truly an asset for the reconstruction of Somalia, for it allows traders to continue their business transactions, the Diaspora to continue sending money on which depend a vast majority of Somalis, and also constitutes a valuable income-generator both for the telecommunications companies and the local authorities if a tax is imposed.

### III- Fishery

The fishery sector in Somalia is undoubtedly one of the sectors with the highest development potential.

Somalia has 3,000 km of coastline, making it the first African country in terms of length of coastline; it is estimated that 30,000 people depend mainly on fishery products and 60,000 people as additional products.<sup>251</sup>

According to a survey conducted in 1981, the most abundant number of small pelagic fish was observed off the Somali coast, between Ras Asir and Ras Hafun. The fish species found off the coast of Somalia include:

**Table 5: Fish species Off the coast of Somalia**

<ul style="list-style-type: none"> <li>• Indian oil sardine (Sardinella longiceps),</li> </ul>	<ul style="list-style-type: none"> <li>• Tuna</li> </ul>
<ul style="list-style-type: none"> <li>• round herring (Decapterus macrosoma)</li> </ul>	<ul style="list-style-type: none"> <li>• Sharks and Rays</li> </ul>
<ul style="list-style-type: none"> <li>• scads (Decapterus merudsi)</li> </ul>	<ul style="list-style-type: none"> <li>• Spiny lobster,</li> </ul>

<sup>250</sup> University of Oxford “Dahabshil and Somalia's Telecommunications Revolution”, 29 June 2011

<sup>251</sup> Istanbul conference on Somalia, 21 – 23 May 2010.

• snappers	• shrimp,
• Porgies	• turtles,
• groupers	• oysters,
• pony fishred	• crabs
• sea herders	• Other species <sup>252</sup>

The Somali fishery sector in the 80's already produced well below its potential with 30,000 tons per year, whereas the country has an annual capacity of 1 million tons. Fishing was done traditionally and mainly under the supervision of the Somali Fishermen Cooperative, which had 700 boats of 6m to 8m long and private fishermen with about 100 boats of similar sizes. The country's sole commercial company was owned by the State (Somalfish) and had at that time 11 ships of 23 to 27 metres long.<sup>253</sup>

The State created 19 cooperatives of fishermen, which were charge, *inter alia*, setting the price of catches that ranged between USD 0.24 and USD 0.80 / Kg. The products are mainly for domestic consumption, even though sales were constrained by the habits of the people who preferred other meats and the prices of fish that were considered high despite the campaigns of the Somali Government. Somalia exported very few fish to foreign countries, mainly Italy.

In the 80's, the Government of Somalia put in place several ventures that granted access to the fishing vessels of certain countries to fish in the country's territorial waters. These were Italy (Italian Somali-venture), Iraq (Siadco), and USSR in 1974. The country received several aids from States and international organisations and these aids amounted to about USD 22 million.<sup>254</sup>

- The Danish Government through The Danish International Development Agency;
- The German Government (Federal Republic of Germany);
- The Japanese Government;

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<sup>252</sup> Mohamed Yassin, “**Somali fisheries development and management**”, June 1981.

<sup>253</sup> Foreign Fishery Developments, “**Somali Fishing Industry Has Potential for Growth**” Marine Fisheries Review, December 1982.

<sup>254</sup> Id.,

- The Swedish Government through The Swedish International Development Agency;
- The British Government; and,
- UNDP.

Currently, fishing represents about 2% of the GDP of Somalia, with a total production of 18,000 tons in 2008<sup>255</sup>. Somalia's fishing sector faces several constraints such as the lack of infrastructure dedicated to fishing (cold room, etc), fishing equipment (boats, nets, etc), institutional problems (lack of electricity, no authority issuing licenses, etc), lack of knowledge in the commercialisation of goods and specific legislation.

The fishery sector in Somalia represents a high potential for the development of the coastal areas of Somalia and is also part of the strategy of the international community in a bid to reduce piracy by offering people living along the coast an alternative to piracy.

This sector is also vital to help reduce food insecurity faced by the local population, especially during severe drought.

It is also worth mentioning that many accuse foreign vessels of dumping toxic waste off the coast of Somalia. If these accusations were to be confirmed by the United Nations, it would be necessary to conduct studies to determine the impact of these spills on the current stock of fish and, obviously, their reactivity rate to establish how dangerous they are to the health of the final consumers. These studies may be conducted by UNEP in collaboration with the FAO.

Additionally, IUU fishing activities are also of great importance for the development of the sector. It is estimated that USD 95 million worth of export revenue is lost due to IUU fishing.

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<sup>255</sup> ACP fish II, <http://acpfish2-eu.org/index.php?page=somalia&hl=en>

## V- Other resources

Somalia also has natural resources it could exploit and export. These include:

**Table 6: Natural resources products in Somalia**

Salt	Natural gas (5663 billion cu m)
Zinc	Gypsum
Copper	Tin
Manganese	Uranium
Iron ore	Oil

These reserves are currently not exploited, but they represent an important foreign exchange earner, notably considering the price of some resources like copper.

## Paragraph 2: Local development

### I- Development of a local economy

Over the past 20 years, the international community has focused its development efforts in Somalia on the institution of a central Government capable of restoring order and undertaking its sovereign duties.

Unfortunately, most of these initiatives have proven to be a failure. According to some experts, this failure is due to the international community's tendency to ignore the inter-clan competitions that undermine Somalia and impede all attempts to restore order.<sup>256</sup>

It is also advanced that development projects should incorporate these specific aspects of the Somali society by supporting the emergence of local economic initiatives that could be an alternative to piracy, especially among the youths.

The special nature of the Somali situation characterised by a territorial division based on criteria such as the strong presence of a clan in local decision-making organs or the mistrust of the Government are certainly factors that must be taken into account in the development strategy for Somalia.

Consequently, experts have proposed the implementation of a global local strategy that would include a strategy for infrastructure, economic and human development, strengthening the institutions of local communities and building the capacities of forces of law and order.

Some experts claim that international aid to Somalia tends to go through the central Government which, given the context, needs too much time to be efficient. They reckon that the aid must be allocated directly to the local communities that are made up of various actors capable of executing this aid effectively:<sup>257</sup>

- Public-Private Partnerships;

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<sup>256</sup> Martin N. Murphy and Joseph Saba, “**Countering Piracy: The Potential of Onshore Development**”

<sup>257</sup> Lange Schermerhorn “**The Man from Minnesota: A Model for Local Economic Development?**”

- international and local NGOs;
- philanthropic foundations;
- trade and affinity associations;
- social service;
- Organization; and,
- Members of the ethnic diasporas.<sup>258</sup>

This strategy is also founded on the development of a number of sectors such as telecommunications, fishery, agriculture, natural resources exploitation and development of transport infrastructures to open up the regions.

This point of view centred on local development has several advantages:

- Avoiding the slowness of the central administration;
- Improved identification of local needs;
- Immediate visibility of project's efficiency;
- Immediate impact on the communities (creating jobs, etc); and,
- Greater involvement of the Diaspora.

However, some criticisms can be raised. Direct aid to the local populations and local initiative groups may further weaken the central Government and encourage more regions and different groups concentrated in one geographical area to disaffiliate from it.

## II- Social aspects of Piracy

As mentioned above, the Somali society is one in which traditions and social relations are largely based on the respect of Islamic principles. The Somali culture is ancient and chiefly drawn from Arabic culture that introduced Islam in the 10th Century AD.

The lives lived by pirates are contrary to the culture and tradition of the Somali people, for a good number of pirates consume alcohol and drugs, and are involved with prostitution. These

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<sup>258</sup> Id.,

practices are condemned by the elders who, faced with the huge sums of money obtained from ransoms and their economic situations, remain silent.

This situation is most displeasing to the community, notably because it is currently established that more and more youths are involved in piracy activities, with the risk that these teenagers could go to sea and never return. Several hundreds of young people have disappeared at sea; this situation affects notably the communities that depend on fishing, with the demographic and social consequences that ensue.

The Somali culture, notably for those living along the coastline, has experienced tremendous changes over the past five years. The massive inflow of money, young girls' attraction to these young relatively wealthy pirates and the lifestyles of pirates are all having a severe impact on the principles binding these communities, notably for the elders.

A number of people think elders have an important role to play: firstly, by dissuading young Somalis from indulging in these activities, and secondly, by endeavouring to change the perception the Somali people have of piracy.

### III- Initiatives of the International Community

#### 1- International Labour Organization (ILO)

In collaboration with the UK Department for International Development (DFID), the International Labour Organization is proposing the implementation of a programme in Somalia to turn the people away from piracy.

This program complements the strategy of the international community in its fight against piracy by improving the living standards of the Somali people. This program, dubbed ILO Employment-Intensive Job Creation Program and aims at involving the local communities through employment-generating projects by improving access and infrastructure, reviving local markets and building local skills and capacities.<sup>259</sup>

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<sup>259</sup> ILO press and media center “**Somalia: addressing the root causes of piracy and warlordism,**” 13 October 2009

Therefore, the objective is to train Somalis in infrastructure project management, to create jobs, open up the local regions, promote dialogue between communities and facilitate trade.

The program has launched several initiatives, such as the construction of new roads between the Allula and Baargaal districts, and created 1,900 new jobs.<sup>260</sup>

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<sup>260</sup> Id.,

## Chapter Summary

Piracy represents a significant cost for the international community. It results in direct costs related to ransom, insurance, diversion via the Cape of Good Hope and the cost of safety equipment and other related costs. But also indirect costs that represents the impact on countries in the region. In 2010, the cost of piracy off the coast of Somalia was estimated between USD 4.9 billion to USD 8.3 billion.

It is also worth noting that acts of piracy have different financial impacts including an increase of new security equipment, private security companies and new businesses such as negotiators have emerged.

If the financial aspects of piracy and particularly to the ransoms paid to pirate are examined, it is clear that the system used by pirates to transfer the money out of Somalia is based on a "traditional" transfer system used in Asia and the Middle East and Asia for centuries: hawala. Through this system of funds transfer, financiers and others directly involved in piracy reinvest these funds in various activities ranging from legal activities to the purchase of various technologies to be used to commit acts of piracy.

In response, The Security Council and the CGPCS called for further collaboration between States and international organizations to fight against illegal financial flows.

Somalia has many onshore development capabilities which can be developed by the States and international organizations to offer alternatives activities to Somali people.

## **Final Remarks**

It has been demonstrated that even though the customary international law provisions contained in UNCLOS specifically address piracy, the definition of piracy, the geographical scope or the question of jurisdiction do not seem to be able to respond to the threat of modern piracy and particularly piracy off the coast of Somalia.

The international community tried to address the lack of adaptability of customary international law through the adoption by the Security Council of several resolutions including the authorization to enter Somali territorial waters (with the request of the Transitional Federal Government), the call for international cooperation and capacity building of countries in the region.

The solution to the thorny problem of the location of trial and incarceration of suspects seems to be moving towards the creation of an extraterritorial court and the construction and rehabilitation of prisons in Somalia (Somaliland and Puntland).

Many challenges and questions remain concerning the capacity of this new tribunal, the hostility of the Federal Government of Somalia, the will of Somaliland only to incarcerate its citizens, the lack of transfer agreements between the countries of the region or the need for prisons in Somalia to comply with international law on the treatment of prisoners (hard to guarantee).

However, these difficulties must be overcome as soon as possible seen the growing costs of piracy which continue to pose a serious threat to international shipping. In 2010, piracy off the coast of Somalia cost between USD \$4.9 and USD \$8.3 billion to the international community and this figure could increase along with the insurance costs and ransoms, not to mention the cost of shipping thus ultimately the cost of consumer goods worldwide.

The organizational capacity of financial pirates clearly demonstrate the sophistication of the system in place in Somalia and the urgent need for a more precise international community response through a deeper involvement of regional countries with the participation of specialized international organizations.

Piracy also creates parallel activities that are developing along with the increase in acts of piracy. These activities, private security companies would be the perfect example, reap substantial benefits.

Most countries agree that the military measures, judicial and other measures can be only effective by incorporating them into a larger system that would encompass the establishment of alternative activities onshore.

Somalia has important natural resources and there are promising industries which need to be developed. For now, there are few activities undertaken by the international community on the ground.

Acts of piracy off the coast of Somalia will be eradicated only through a comprehensive and multidimensional approach, including the establishment of alternative activities in Somalia, the establishment of the judicial system to reduce impunity for pirates, an increase in preventive measures for vessels transiting off the coast of Somalia and the conclusion of the political peace process so that the country can establish institutions capable of ensuring its sovereign prerogatives.

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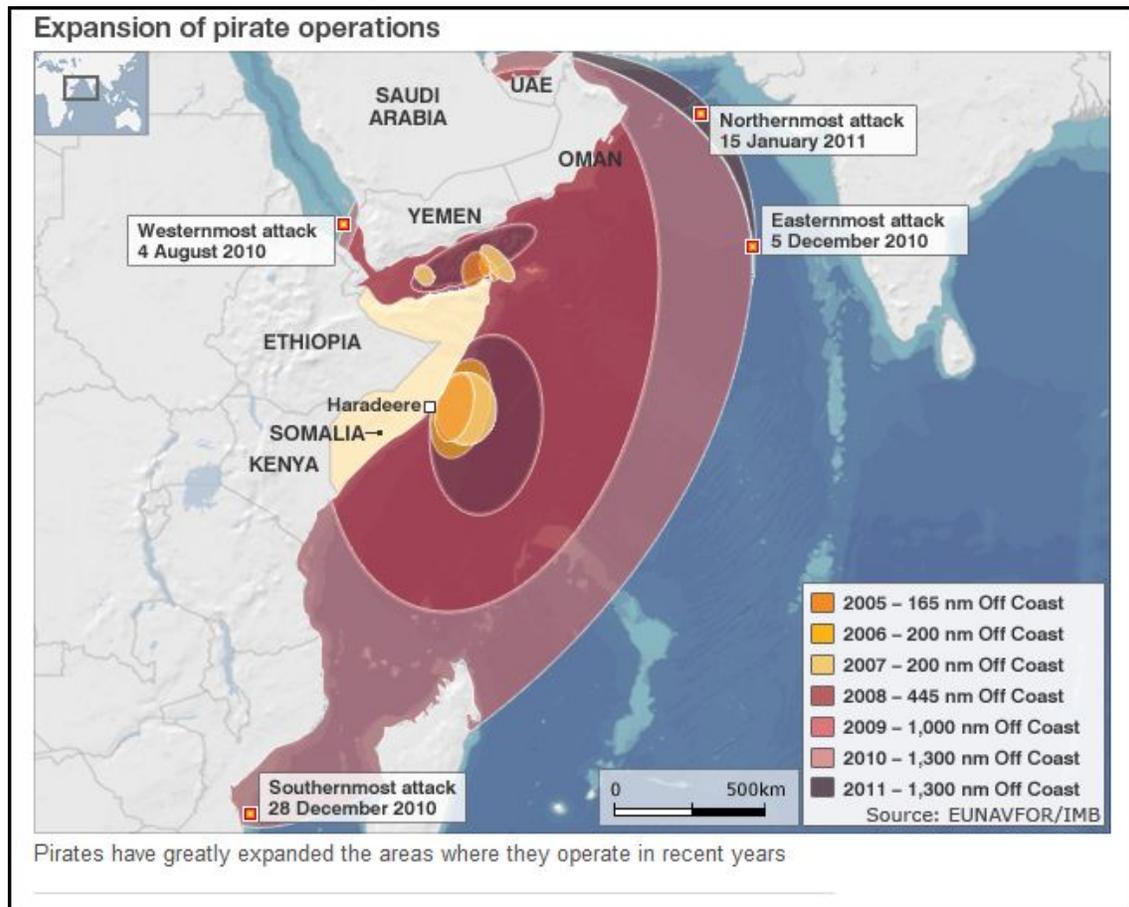
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### Annexe 1: Main pirates groups

<b>Groups</b>	<b>Leader names</b>	<b>Location</b>	<b>Comments</b>
The National Volunteer Coast Guard	Garaad Mohamed	Kismayu on the southern coast.	Interception of small boats and fishing vessels
The Marka group	Sheikh Yusuf Mohamed Siad	Marka (South of Mogadishu)	They are organized, violent and are using mother ships
Puntland Group	unknown	Puntland	Small group but located in a strategic area
Somali marines	Abdi Mohamed Afweyne	Puntland	Well organized with a military structure

## Annexe 2: Expansion of piracy operation



Source: EUNAVFOR/IMB

### Annexe 3: National laws related to piracy

Country	Law	Year	Articles	Sentences
Djibouti	n°212/AN/82 <i>Code des Affaires Maritimes</i>	18 January 1982	Sections 208/ 385/ 386	20 years imprisonment to life imprisonment
Seychelles	Penal Code Amendment Bill N°5 of 2010	11 March 2010	Titre 2/ Para.4	30 years of imprisonment and a fine amounting to 1 million Rupee.
Madagascar	Loi n°99-028 Code maritime	3 February 2000	Chapter 5 and 13	Hard labour for life or for limited duration.
Somalia	none	none	none	none
Tanzania	THE WRITTEN LAWS (MISCELLANEOUS AMENDMENTS) (NO.2) ACT	May 2010	Section 6/ 66	Life imprisonment
Kenya	Merchant Shipping Act	June 2009	Articles 69/369/371	Life imprisonment
France	LOI n° 2011-13	5 January 2011		
South Africa	Defence Act no.42	2002	Article 24-29	Life imprisonment
Mozambique	Codigo Penal	31 August 2006	Article 162	sixteen to twenty years imprisonment
Comoros	Maritime Code		Article 81	
United Arab Emirates	Commercial Maritime Law No.26	1981	Articles 208-210	Life imprisonment
Oman	Penal code	1974	Article 285	Life imprisonment
Mauritius	The Merchant Bill	2006	Part X, sub-part I, Article 211	A term not exceeding 60 years

**Annexe 4: International conventions status on November 2011**

Country	UNCLOS	SUA	SUA 88	SUA 05	UNTOC	HC	UNTFC	UNCAC
Comoros	21 Jun 1994	4 Jun 2008 (a)	✓	X	NS	25 Sep 2003	25 Sep 2003	10 Dec 2003 (s)
Djibouti	8 Oct 1991	7 Sep 2004 (a)	✓	X	20 Apr 2005 (a)	1 Jun 2004	13 Mar 2006	20 Apr 2005
Egypt	26 Aug 1983	8 Apr 1993	✓	X	5 Mar 2004	2 Oct 1981	1 Mar 2005	25 Feb 2005
Eritrea	NS	NS	X	X	NS	NS	NS	NS
Ethiopia	NS	NS	X	X	NS	16 Apr 2003	NS	26 Nov 2007
France	11 Apr 1996	1 Mar 1992	✓	X	29 Oct 2002	9 Jun 2000	7 Jan 2002	11 Jul 2005
Jordan	27 Nov 1995	30 Sep 2004	✓	X	NS	19 Feb 1986	28 Aug 2003	24 Feb 2005
Kenya	2 Mar 1989	21 Apr 2002 (a)	✓	X	5 Jan 2005 (a)	8 Dec 1981	27 Jun 2003	9 Dec 2003
Madagascar	22 Au 2001	14 Dec 2006 (a)	✓	X	15 Sep 2005	24 Sep 2003	24 Sep 2003	22 Sep 2004
Maldives	7 Sep 2000	NS	X	X	NS	NS	20 Apr 2004 (a)	22 Mar 2007
Mauritius	4 Nov 1994	1 Nov 2004 (a)	✓	X	24 Sep 2003 (a)	17 Oct 1980	14 Dec 2004	15 Dec 2004
Mozambique	13 Mar 1997	8 Apr 2003 (a)	✓	X	20 Sep 2006	14 Jan 2003	14 Jan 2003	9 Apr 2008
Oman	17 Aug 1989	1 Mar 1992 (a)	✓	X	13 May 2005 (a)	22 Jul 1988	NS	NS
Saudi Arabia	24 Apr 1996	3 May 2006 (a)	✓	X	20 Jul 2007	8 Jan 1991	23 Aug 2007	NS
Seychelles	16 Sep 1991	1 Mar 1992	✓	X	22 Jun 2004	12 Nov 2003	30 Mar 2004	16 Mar 2006
Somalia	24 Jul 1989	NS	X	X	NS	NS	19 Dec 2001 (S)	NS
South Africa	23 Dec 1997	6 Oct 2005	✓	X	20 Feb 2004	23 Sep 2003	1 May 2003	22 Nov 2004
Sudan	23 Jan 1985	20 Aug 2000 (a)	✓	X	NS	19 Jun 1990	5 May 2003	14 Jan 2005 (s)
Tanzania	30 Sep 1985	9 Aug 2005 (a)	X	X	24 May 2006	22 Jan 2003 (a)	22 Jan 2003 (a)	25 May 2005
United Arab Emirates	NS	14 Dec 2005 (a)	✓	X	NS	24 Sep 2003	23 Sep 2005 (a)	22 Feb 2006
Yemen	21 Jul 1987	28 Sep 2000 (a)	✓	X	NS	14 Jul 2000	3 Mar 2010 (a)	7 Nov 2005

UNCLOS: United Nations Convention for the Law of the Sea

SUA: Convention for the suppression of unlawful acts against the safety of maritime navigation, Rome, 10 March 1988

HC: International Convention Against the Taking of Hostages, New York, 17 December 1979

UNTOC: United Nations Convention Against Transnational Organized Crime, New York, 15 November 2000

TFC: International Convention for the Suppression of the Financing of Terrorism, New York, 9 December 1999\*

UNCAC: United Nations Convention Against Corruption

(a): accession

(s): signature

NS: No Signatory

\* There are no evidences that piracy off the coast of Somalia is financing terrorism.

**Annexe 5: Global Piracy Prosecutions (updated by UNODC on 12 October 2011)**

<b>Country</b>	<b>Number Held</b>	<b>Notes</b>	
Belgium	1	1 convicted, final appeal expected next week	
Comoros	6		
France	15		
Germany	10		
India	121		
Japan	4		
Kenya	143	50 Convicted	
Madagascar	12		
Malaysia	7		
Maldives	34	Awaiting deportation in absence of law under which to prosecute	
Netherlands	29	10 convicted	
Oman	12	All convicted	
Seychelles	64	52 convicted	
Somalia	Puntland	290	Approximately 240 convicted
	Somaliland	94	68 convicted (approximately 60 released)
	South Central	18	Status of trial unclear
Republic of Korea	5	5 convicted, appeal pending before Supreme Court	
Spain	2	Both convicted	
Tanzania	12	6 convicted	
United Arab Emirates	10		
United States	28	17 convicted	
Yemen	129	123 convicted and 6 acquitted	
<b>TOTAL STATES: 20</b>	<b>1046</b>		