

## Legal, Institutional and Governance Arrangements for Apprehending and Prosecuting Marine Pirates

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## **Dalhousie Marine Piracy Project**

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However, it should be noted that their contribution does not imply endorsement of the report's findings and recommendations, the final authorship and editing remaining the responsibility of the Project Management team.

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## 1. EXECUTIVE SUMMARY

Under the broader mandate of the DMPP, the Law and Governance Module is investigating three (3) major themes that focus on the *origins and manifestations of piracy*; the *apprehension of piracy*; and the *prosecution of piracy*. This Report is a key output from the first phase of the project which primarily utilized desk top research conducted between June 2011 and February 2012. Its main purpose is to serve as a discussion piece for the DMPP external Law and Governance Module working group members. It is anticipated that working group members will critically review the context and analysis of the report for accuracy and omissions, identify priority areas for attention, identify areas for further research and recommend draft policy options anticipated to address issues surrounding the law and governance aspects of contemporary marine piracy. For ease of reference and additional insight, the Report offers some key discussion points within its sections and conclusion.

Whilst by no means exhaustive, the research analysis reflected herein is geared towards answering four major research questions pertaining to:

- 1) The current legal and institutional arrangements for addressing piracy;
- 2) The current legal regime dealing with the apprehension, prosecution and incarceration of pirates;
- 3) The legal status of pirates, child pirates, suspect pirates, organizers and their backers; and,
- 4) The governance conditions that allow piracy to gain a foothold.

The discussions provide an interpretive outline of the three major formulations or definitions of piracy found within international law, a summary of the national approaches taken by States to incorporate those definitions in their national laws dealing with the suppression of crime at sea; and examine how the DMPP-formulated definition complies with current legal practices.

While a plethora of arrangements exist that both directly and indirectly have a role in addressing piracy, the Report also highlights the key arrangements for coordinating and organizing the fight against piracy at the international, regional and other institutional/organizational levels. Given the role of the International Maritime Organization (IMO) as the leading multilateral agency tasked with addressing the issue of piracy, the DMPP Law and Governance team undertook a preliminary analysis to assess the effectiveness of that role in light of the serious issues and challenges presented by the current scale of piracy off the East Coast of Africa, and elsewhere in the world.

Drawing upon several insightful interpretations of the rights, duties and obligations of states in the investigation, apprehension and prosecution of suspect pirates, the resulting analysis concluded that the legal regime and mechanisms employed to date have not been without its challenges and difficulties. In

addition to national courts, several other avenues have been recommended and analyzed, whether they are applicable for prosecuting those found committing or attempting to commit acts of piracy, including those involved in piracy operations, more particularly piracy backers, organizers and financiers. Emphasis has also been placed on those who use Hawala and other value transfer systems to facilitate the movement of funds to aid piracy operations, those who seek to employ children as pirates and those who may be proven guilty of participating in transnational organized crime, or in extreme cases, crimes against humanity. Special consideration was also given to the status and rights of the child, prosecution of young offenders and the problems with returning a child to the worst forms of labor.

In deliberating on the dominant conditions that have seemingly allowed piracy to gain a foothold particularly within the East African region (*Horn of Africa*), some structural indicators evident within functional/strong states were examined as the basis for analyzing the influence of failed states and to some extent, weak states, on maritime piracy operations.

Additionally, analysis of the current literature undertaken for this project suggests that the effectiveness of existing governance regimes at the national, regional and international levels are inextricably linked to the root causes of piracy. Similarly, the linkages between and among relevant institutional arrangements in terms of their functionalities and the process for ensuring data and information, analysis and advice are provided to guide decision-making at national, regional and international levels need to be determined and where necessary, strengthened. From a governance effectiveness perspective, it is evident that there is a broad array of policy actors who are engaged in addressing the problem of marine piracy. As such, the DMPP research has highlighted that considerable emphasis should be placed by scholars, practitioners and decision-makers on the need to understand and address marine piracy at multiple jurisdictional levels.

Before concluding, the Report discusses the initial efforts of the DMPP to develop a generalized predictive model that would provide the global maritime community with a preliminary decision-support tool aimed at anticipating potential piracy ‘hot spots’. The development of this predictive model draws upon the research conducted by all three of the DMPP modules and identifies the socioeconomic, governance, legal and other relevant precursors to the outbreak of contemporary piracy. The policy implications of such a tool are widespread as it can provide the incentives needed for targeted pre-emptive responses to be structured and focused before the problem becomes manifest. Most significantly, it has the potential to modify and enhance governance regimes in areas flagged as potentially susceptible to piracy and more than likely (to experience piracy activity in the near future), with the potential for other global, regional and national security-related risks.



The Report concludes with a reiteration of twenty-five discussion points that were highlighted as a result of the analysis conducted for the four major research questions. It is important to note that while no priority has been assigned to each of these points within the document, reviewers are asked to provide expert judgement on their level of importance for further policy development.

## 2. INTRODUCTION

This report considers legal and institutional responses employed at the international, regional and national levels to counter recent and current outbreaks of piracy, and draws initial deductions from that analysis. It then applies those deductions in the context of legal and institutional responses likely to be required to deal effectively with future outbreaks. Although written as a stand-alone report, it complements, and is complemented by, reports from the other DMPP modules. It therefore represents but one input to the project's analysis of the components necessary to achieve an effective, comprehensive approach to countering piracy.

### *2.1 Purpose of this Draft Report*

This report provides the preliminary findings of the Law and Governance research module. This output from the first phase of the project focuses primarily on desk top research conducted between June 2011 and February 2012. The main purpose of the report is to serve as a discussion piece for the DMPP Intersectoral Working Group members.

It should be noted that Sectoral Working group members have critically reviewed the context and analysis of the first draft report and have indicated some areas of accuracy and omissions. They have also identified additional priority areas for attention and areas for further research.

This thematically-focused review will be incorporated into an integrated cross-sectoral draft report, along with the Operation Responses and Socio-Economic reviews, for assessment and discussion by a broad cross-section of geographic and thematic experts on maritime piracy, spanning all three of the DMPP external working groups: Law and Governance, Socio-Economic and Operational Responses. This cross-sectoral assessment will provide key 'reality checks' during the analysis phase and ensure that different concerns and perspectives are considered and included in the final recommendations put forward by the DMPP.

### *2.2 Law and Governance Module*

The Law and Governance Module investigated three major themes under the broader DMPP project. These themes focused on:

- *The origins and manifestations of piracy*: failed states and other governance gaps, drug related (hijacking vessels for smuggling), vessel robbery, vessel seizure and crew capture for ransom, and linkages between piracy and other forms of illegal activity as well as with legal forms of activity such as fishing

- *The apprehension of Pirates:* an examination of the law dealing with the location and apprehension of pirates in national and international waters including the UN Convention on the Law of the Sea (UNCLOS), other instruments of international law and policy considerations.
- *The prosecution of Pirates:* an examination of the criminal prosecution of pirates in national courts or international tribunals, including a consideration of the implications of human rights law, law of armed conflict, and anti-terrorism legislation.

### 2.3 Research Questions

In consultation with the DMPP members, the Law and Governance Module developed four main questions to guide its research aimed at understanding the origins and manifestations of piracy and the apprehension and prosecution of pirates. These include:

- **What are the current legal and institutional arrangements for addressing piracy?**
  - What is the current legal regime for dealing with piracy at the international, regional and/or national levels?
  - What are the key institutional arrangements currently addressing the problem of piracy at the international, regional and/or national levels and how are they connected?
- **What is the current legal regime dealing with the apprehension, prosecution and incarceration of pirates?**
  - Under what legal regimes have apprehension of pirates been conducted?
  - Under what legal regimes have piracy prosecutions been conducted?
  - Under what legal regimes have incarceration for piracy been conducted?
- **What is the legal status of pirates, suspect pirates, organizers and their backers?**
  - What is the legal status of Pirates under criminal, maritime, human rights and refugee law?
- **What are the governance conditions that allow piracy to gain a foothold?**
  - What are the identifying characteristics of failed or failing states?
  - Is there a link between piracy and the collapse of local fisheries?

- Is there a link between illegal foreign fishing and piracy?
- Does the presence of organized crime contribute to or detract from piracy?

## *2.4 Methods*

The Law and Governance Module utilized desk top research methods as the principal means of data collection. Researchers focused on gathering available background information on the major research topics and generated a number of stand-alone reports to contribute to an understanding of the key research questions. These reports included an assessment of the regional approach for addressing piracy off the coast of Somalia, an examination of the effectiveness of the IMO in addressing piracy, an analysis of the existing literature on failed and failing states, regional assessments on each of the targeted contemporary marine piracy areas, an analysis of global piratical attacks and efforts to prosecute, preliminary application of a governance assessment methodology for piracy off the Guianas-Brazil shelf and ongoing development of a generalized predictive model for piracy outbreaks based on a conceptual piracy cycle. In addition, major piracy research groups were contacted to raise awareness of the DMPP and to obtain both published and unpublished or 'grey literature' research reports that could inform the DMPP analysis.

### 3. PIRACY DEFINED

There is currently no universally accepted definition of piracy. There are definitions which are accepted by the legal communities which are nonetheless too limiting from a naval operations, or socioeconomic perspective. This is further confused by the use of terms like pirate fishing or pirate radio. While there are a number of definitions in national criminal statutes and a list of piratical acts, there is no consistency in national or international instruments. Throughout the years, this has proven to be problematic, as without a standard definition, many legal challenges have arisen in the apprehension and prosecution of piracy suspects.

Some of the confusion can be attributed to a failure to distinguish between the **acts of pirates**, and the **crime or offense of piracy**. In non-legal circles, the terms ‘pirates’ and ‘piracy’ are used widely and imprecisely. However, in legal terms, ‘pirate’ and ‘piracy’ have very narrow and specific meanings. For practical purposes, within an intersectoral setting, the terms may not be used in the strict sense by the non-legal participants. In an effort to identify the perpetrators and the actions of interest, anyone who commits the act is a pirate, and any of the acts they commit is piracy. Undoubtedly, greater care has to be taken in written reports to ensure that the use of terminology is more consistent.

#### 3.1 Current Legal Definitions of Piracy

Based on the extensive legal writings and literature researched for this report, it is concluded that a major concern for States is the ability to deal with piracy or violent crimes at sea in areas beyond their national jurisdiction. Under international law, a state is permitted to enforce its national laws (including criminal law) in its territorial seas, subject to some exceptions such as on-board vessels during innocent passage. However, the predominant problem is dealing with criminal acts taking place on the high seas or in another State’s territorial seas. Since the crime occurs at a sea, and typically at some distance from the legal mechanisms for dealing with criminal activity (police, courts etc) the responsibility for dealing with piracy fell to who ever happened to be on the spot. Historically, the solution to this problem was to make piracy - *violent acts directed against ships their passengers and cargo by criminals at sea* - a matter of universal jurisdiction. For certain acts said to be subject to universal jurisdiction, a State has national jurisdiction to deal with those acts. Universal jurisdiction allows a State to criminalize an action that has no territorial jurisdiction (or other basis of jurisdiction recognized in international law for a State to exercise criminal jurisdiction) with the prosecuting state. This meant that any state capturing a pirate was able to deal with the crime under its domestic law, without necessarily having a connection to the perpetrator, victim, or geographical location where the crime was committed.

In this regard, the effectiveness of the national legal regime in dealing with piracy has often been challenged on two bases:

- whether the arrest of a pirate was in accordance with the rules of international law - if not, the arresting state may have committed a breach of international law for which another state may seek redress ; and,
- whether the arresting state has the necessary legal ability (criminal statutes, court jurisdiction etc.) to prosecute the pirate in its national courts in accordance with the rules and procedures that are required under human rights and humanitarian, diplomatic and consular and other international obligations.

When combined, these elements require that any national definition of piracy must not only be *internationally acceptable*, but also *nationally applicable*.

The ensuing discussions in this section provide an interpretive outline of the three major formulations or definitions of ‘piracy’ or attacks on ships found within national and international law – the Law of Nations, the United Nations Convention on the Law of the Sea (UNCLOS) and the International Convention on the Suppression of Unlawful Acts against the Safety of Navigation (the SUA Convention) though the latter does not specifically use the term piracy. These discussions are followed by a summary of the national approaches taken by States to incorporate each of the Treaty definitions in their national laws dealing with the suppression of crime at sea. Thereafter, the section concludes with a closer examination of how the DMPP-formulated definition stated under section 3.2 complies with current legal practices.

### 3.1.1 Law of Nations

Several jurisdictions, Canada and the United States of America among them, refer to “Piracy as defined by the Law of Nations” in their criminal codes. The initial definition is presented in a ‘circular’ fashion, by stating that piracy is an act that is defined by the law of nations as piracy (Mason, 2010). In the U.S.A, this has called for a legal approach which examined past piracy activities to determine the parameters of piracy in the future.

In preparation for the 1958 United Nations Conference on the Law of the Sea, the International Law Commission undertook an exhaustive study which resulted with a definition for piracy stated in article 15 of the 1958 UN Convention on the High Seas, as consisting 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.*

This precise terminology was incorporated into the 1982 United Nations Convention on the Law of the Sea (UNCLOS), which forms the underlying rationale for the argument that the meaning of the UNCLOS definition (discussed in the next section) is customary international law and vice versa.

Therefore, the major question is whether piracy as defined by the Law of Nations is an evolving concept, and has evolved beyond the strict definition in UNCLOS. This issue is currently under consideration by the United States fourth circuit Court of Appeals. The US statute on piracy 18USC1651 was adopted in 1861. In one United States district court, the meaning of piracy under the Law of Nations is that which existed at the time that the national law was created, which was determined to be sea robbery and the actual taking of property.<sup>1</sup> Meanwhile, another US district court has determined that the concept is evolving, finding that the term could include the actions of negotiating a hostage ransom ashore.<sup>2</sup> Both cases are currently under appeal; and whether other states follow the US lead and recognize a wider interpretation of what constitutes piracy under the Law of Nations in their national courts remains to be seen.

### *3.1.2 UNCLOS Definition*

The definition of piracy under Article 101 of UNCLOS states:

*“Piracy consists of any of the following acts: (a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed: (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft; (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State; (b) any act of voluntary participation in the operation*

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<sup>1</sup> US v. Said (E.D. Va., August 17, 2010)

<sup>2</sup> US v. Shibin (E.D. Va., January 23, 2012)

*of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft; (c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b)."*

As indicated earlier, this definition was copied from the 1958 United Nations Convention on the High Seas with minor editorial changes. A number of legal scholars have since identified several major problems with the definition. These include:

- While the 1958 Convention and UNCLOS recognize universal jurisdiction over the crime of piracy, the definition only applies to acts committed on the high seas, which would also include the contiguous zone and in UNCLOS, the Exclusive Economic Zone. In conformity with the system of zones and corresponding jurisdictions adopted by UNCLOS, acts committed in territorial waters are a matter of national state jurisdiction.
- Both definitions require the acts to be carried out between two vessels, or more precisely, involving attacks by one ship or aircraft against another ship or aircraft. As such, attacks against a ship by criminals who gain entry from shore but seize the vessel on the high seas would not be considered piracy. However, it would be if the criminals had boarded the ship while at sea.
- The question of whether or not the meaning of “committed for private ends” (Dutton, 2011a, p.12) refers to personal gain or to some form of illegal political activity. Arguments are put forward that this section should be interpreted broadly to include acts which lack a public sanction (Guilfoyle, 2009).
- An additional deficiency that the section, as written, prohibits the participation in, inciting of, or intentionally facilitating acts of piracy, but does not explicitly include attempted piracy or preparatory acts, even though this arguably may be implied in section (b). This deficiency would seem to restrict the international crime of piracy only to those who are caught in the act.
- For political reasons, it may not be possible to amend the definition in UNCLOS since many states view the Convention as a package deal and extremely reluctant to do so (Geiss and Petrig, 2011).

### *3.1.3 International Convention on the Suppression of Unlawful Acts against Navigation*

The SUA convention, which had its origins in the terrorist hijackings of the 1980s, has a more comprehensive definition of violent maritime offenses, which while not defined as piracy per se, covers many of the same acts, by the same perpetrators. The Convention states in Article 3 (1)

*Any person commits an offence if that person unlawfully and intentionally: (a) seizes or exercises control over a ship by force or threat thereof or any other form of intimidation; or (b) performs an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of that ship; or (c) destroys a ship or causes damage to a ship or to its cargo which is likely to endanger the safe navigation of that ship; or (d) places or causes to be placed on a ship, by any means whatsoever, a device or substance which is likely to destroy that ship, or cause damage to that ship or its cargo which endangers or is likely to endanger the safe navigation of that ship; or (e) destroys or seriously damages maritime navigational facilities or seriously interferes with their operation, if any such act is likely to endanger the safe navigation of a ship; or (f) communicates information which he knows to be false, thereby endangering the safe navigation of a ship; or (g) injures or kills any person, in connection with the commission or the attempted commission of any of the offences set forth in subparagraphs (a) to (f).*

Significantly, the SUA convention is not based on universal jurisdiction, as it only applies to parties to the Treaty, requiring a connection or nexus between the state and the act, and expanding nature of what the connection might be. In essence, a State is able to prosecute the individual whose acts were committed either against a flag ship by one of its nationals, against one of its national, or found within its territory. Significantly, it would not matter if the attack took place in the territorial sea of another state. However, it requires that the act be one which would have endangered the safety of navigation; and as such a ship attacked in port would likely not be covered by the Convention.

While SUA provides for universal jurisdiction, it does not create jurisdiction to arrest suspects not residing in the country exercising this jurisdiction. Article 5 requires signatory countries to incorporate the prohibitions into their criminal laws, while article 6 provides for an enumerated basis upon which jurisdiction may rest. Further, article 10 requires that suspected offenders be either extradited or submitted to competent authority for prosecution.

### *3.1.4 Approaches to National Definitions – Application by States in their Criminal Law*

In order to prosecute criminals as pirates in national courts, the courts would typically seek a definition of what constitutes piracy in accordance with the prosecuting country's criminal code. As previously stated, there is no consistency in the way piracy is defined under national criminal statutes. However, there appears to be five main types of piracy formulations guiding national law. These include:

- a reference to piracy 'as defined by the Law of Nations';
- a definition based on the UNCLOS formulation;

- a definition incorporating the concept of universal jurisdiction;
- a definition requiring a national nexus; and
- no definition of piracy, but references other criminal offenses such as robbery, murder, hijacking etc.

Another feature of the national piracy definitions that is addressed in the literature is the distinction between piracy occurring on the high seas and certain acts which take place within the territorial seas of the state. In this instance also, there is no consistent national practice.

In essence, domestic courts must find both the definition of a prohibited act and a prohibition/punishment within domestic law in order to prosecute the act as a criminal offence.

Some countries' laws exhibit each enumerated style of piracy definition - reference to piracy as defined in the law of nations. Such examples include:

- The Criminal Code of Canada which contains two provisions related to violent acts in the marine environment. This code distinguishes between piracy, and piratical acts which apply only to attacks on Canadian ships<sup>3</sup>, and have been used to cover such acts as burning of vessels while dockside. Provisions of the SUA convention are also incorporated in the Canadian criminal code.
- The new Somaliland Law on Combating Piracy<sup>4</sup> refers to illegal acts committed by the crew or passengers of a private ship or aircraft or by armed pirates. This would seem to eliminate the need for two vessels, but also defines a ship as including all sea-going vessels, even a canoe, if used for piracy.
- India, prior to recently enacting a national piracy law, utilized the general provisions of the Penal Code as well as several other statutes to prosecute pirates. The new Piracy Bill 2012<sup>5</sup> includes both the UNCLOS definition and action deemed piratical under customary international law. This additional provision would arguably allow for an expanded definition of piracy beyond the strict UNCLOS formulation.

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<sup>3</sup> Canada –**Criminal Code Piracy by law of nations 74.** (1) Every one commits piracy who does any act that, by the law of nations, is piracy. **Piratical Acts 75:** Everyone who, while in or out of Canada, (a) steals a Canadian ship, (b) steals or without lawful authority throws overboard, damages or destroys anything that is part of the cargo, supplies or fittings in a Canadian ship, (c) does or attempts to do a mutinous act on a Canadian ship, or (d) counsels a person to do anything mentioned in paragraph (a), (b) or (c), is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years. R.S., 1985, c. C-46, s. 75; R.S., 1985, c. 27 (1st Supp.),

<sup>4</sup> Republic of Somaliland law on combating piracy (piracy law) law No. 52/2012

<sup>5</sup> The piracy bill, 2012-Bill no. 34 of 2012

### 3.2 Current Practice and the DMPP Definition of Piracy

In the initial stages of this Project, the DMPP team sought to formulate a wider (more encompassing) definition for piracy, thereby making it more relevant to the scope of the study. It was fairly evident from the start of the project that there was no single definition of piracy which adequately addressed the needs of the three modules in identifying and classifying the type of activity to be examined. The legal definitions were too limiting from an operational perspective. Operational definitions, especially those used by reporting agencies often missed large numbers of incidents (as evidenced by their records and databases), because they did not fall into a precisely defined category.

Since the purpose of the study was to examine the problem of piracy on a global basis, it was decided to adopt a functional definition, which would include piracy and piracy-like acts, irrespective of geographical locations. Much effort was also made to eliminate "mission creep" by maintaining a focus on commercial rather than political activities. As a case in point, attacks on local fishing vessels seldom receive much international notice or operational response, while they may represent the largest number of "piracy" incidents.

The main issue relevant to the scope of this report relates to the definition of piracy, which covers a wide spectrum of illegal and violent actions at sea, the objective of which is illegal gain. Although still evolving, the DMPP-formulated definition, at the time of writing this Report, is as follows:

*The participation, planning and support of attempted or actual deliberate (violent) criminal interference with the rights and freedoms of the seas, which target marine craft (vessels) and persons for personal economic gain.*

In attempting to capture the important elements of piracy, but without being limited by the geographical constraints, the above definition would suggest that piracy is a crime having the following attributes:

- i. **Violence:** involving acts directed against persons and property, directly in support of, or ancillary to:
  - a. Theft
  - b. Robbery
  - c. Kidnapping and hostage taking
  - d. Assault, physical and sexual
  - e. Murder
  - f. Seizure and destruction of property

- ii. ***Economically motivated:*** the purpose of piracy is direct economic gain by the pirates, whether it involves the taking of valuables, ransom or extortion payment, or taking property for later use, such as seizing a yacht to be used for smuggling purposes. For this project, piracy does not include politically motivated actions, and would normally not include activities such as:
  - a. Terrorist acts which are predominantly politically motivated
  - b. Illegal radio broadcast (pirate radio)
  - c. IUU fishing (pirate fishing)
  - d. Environmental activism (eco terrorism)
  - e. Drug smuggling
  - f. Slavery
  - g. Mutiny
- iii. ***No direct commercial ownership or proprietary interest:*** Pirates operate, commercially at least, at “arms-length” from their victims, in that their economic gain is not from maritime insurance fraud, battery or the destruction of their own property for financial gain.
- iv. ***On the high seas or within marine territorial jurisdiction:*** piracy occurs in places where vessels of all flags normally have a right of access, which includes the high seas (freedom of navigation) and territorial waters (rights of passage). A single criminal or piratical act may fall under a number of different jurisdictions. While the legal categorization may change, the nature of the act does not, and so any effective solutions have to be able to deal with the problem on both sides of the 12 mile limit.

Throughout the research process, the DMPP team has been mindful of the fact that piracy is an economic crime, where the specifics will continually transform as new opportunities present themselves, or as older ones become more risky or less lucrative.

**Discussion Point #1:** *Given the varying and oftentimes inconsistent definitions of piracy in national law and that the international legal definition is often inadequate, further consideration may be warranted as to whether this reduces the effectiveness of international and national antipiracy measures. In addition, many States have no specific piracy laws at all. Analysis of some of the current literature on this subject further suggests that more consistency would not only ensure that individuals arrested and charged in different jurisdictions face a common standard of prosecution, but may also simplify the transfer of suspects to other jurisdictions for trial, sentencing and incarceration.*



## 4. LEGAL AND GOVERNANCE ARRANGEMENTS FOR ADDRESSING PIRACY

This section of the Report provides an overview of the key arrangements for coordinating and organizing the fight against piracy, at the international, regional and other institutional/organizational levels. While a plethora of arrangements exist that both directly and indirectly have a role in addressing piracy, the following arrangements with a direct mandate are highlighted:

- International - the United Nations Security Council (UNSC) and the UN Division of Ocean Affairs and the Law of the Sea (UNDOALOS); International Maritime Organization (IMO); UN Office on Drugs and Crime (UNODC).
- Regional - South China Sea and Malacca Strait; East Africa / Red Sea /Indian Ocean (Horn of Africa); West Africa (*Gulf of Guinea*); Caribbean Basin; Gulf of Thailand.
- National - United States of America; India; China.
- Other institutional and organization-based arrangements – North Atlantic Treaty Organization (NATO) and the European Union (EU).

Commencing with the key resolutions issued by the UNSC, and pursuant thereto, discussions in the following sections illustrate how international organizations such as the IMO have continually promoted the suppression of piracy and armed robbery against ships, in addition to the contributions made by UNDOALOS, and other work done by UNODC. These discussions progress with a closer examination of the measures employed by regional organizations such as the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (ReCAAP), the Contact Group on Piracy off the Coast of Somalia (CGPCS), African Union (AU), as well as some institutional-based arrangements utilized within European Union (EU), and the North Atlantic Treaty Organization (NATO), among others.

### 4.1 UN-International Models

#### 4.1.1 Resolutions of the United Nations Security Council

Under the United Nations Charter, the United Nations Security Council (UNSC)<sup>6</sup> has primary responsibility for maintaining international peace and security ([Art. 24](#)) and is considered the most

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<sup>6</sup> According to [Art 23 of the UN Charter](#), the Council is made up of 15 nations: five are permanent members and the remaining 10 seats rotate every 2 years among the nations in the UN. The 5 permanent members are China, France, Russia, the United Kingdom and the United States. Each of these nations has “veto power,” which means that whenever any one of these countries votes “no” on a resolution, that resolution

powerful body of the United Nations, on the basis that its decisions are binding on the Members of the UN (Art 25). In its efforts to deal with/address international peace and security issues, directives may range from calling for a ceasefire or an end to violence, sending peacekeeping forces to protect citizens whilst ensuring that relative UN decisions are carried out, to more forceful measures such as economic sanctions or the use of military force.

The issue of piracy has been a main topic of debate in the UN Security Council. With specific focus on monitoring the piracy off the coast of Somalia and expressing concerns about the activities of pirates in that region, the UNSC has intensified its efforts via a number of resolutions, to enhance international and regional cooperation in bringing pirates to justice.

For ease of reference, and for purposes of this Report, emphasis has been placed on highlighting those resolutions that are specifically geared towards *building judicial capacity* and *maritime operations*. These are summarized in Table 2 as follows:

DATE	RESOLUTION	
<b>Building Judicial Capacity / Rule of Law</b>		
2 Dec 2008	<a href="#">1846</a>	Urged states parties to the SUA Convention to implement their obligations under this convention to build judicial capacity for prosecution of persons suspected of piracy and armed robbery at sea ( <b>paragraph 15</b> )
30 Nov 2009	<a href="#">1897</a>	Called on states to assist in strengthening capacity in Somalia, in an effort to bring those to justice who are using Somali territory to plan, facilitate, or undertake acts of piracy and armed robbery at sea ( <b>paragraph 11</b> )
27 Apr 2010	<a href="#">1918</a>	Called on all States, including States in the region, to criminalize piracy under their domestic law and favourably consider the prosecution of suspected, and imprisonment of convicted, pirates apprehended off the coast of Somalia, consistent with applicable international human rights law ( <b>paragraph 2</b> ). <i>This was in recognition that the failure to prosecute persons responsible for acts of piracy and armed robbery at sea off the coast of Somalia undermines anti-piracy efforts of the international community</i> ( <b>paragraph 1</b> )
23 Nov 2010	<a href="#">1950</a>	Reaffirmed its interest in the continued consideration of all seven options for prosecuting suspected pirates described in the Secretary-General’s report (S/2010/394) which provide for different levels of international participation, taking into account further new information and observations from the Secretary-General based on the consultations being conducted by his Special Adviser on Legal Issues Related to Piracy off the Coast of Somalia, with a view to taking further steps to ensure that pirates are held accountable, emphasizing the need for strengthened cooperation of States, regional, and international organizations in achieving this goal ( <b>paragraph 14</b> )

automatically fails. In order for a resolution to pass, all the permanent members must vote “yes.” See further details at <http://www.un.org/sc/members.asp>

11 April 2011	<a href="#">1976</a>	<i>Among others</i> , decided to urgently consider the establishment of specialized Somali courts to try suspected pirates both in Somalia and in the region, including an extraterritorial specialized Somali anti-piracy court ( <b>paragraph 26</b> )
24 Oct 2011 22 Nov 2011	<a href="#">2015</a> <a href="#">2020</a>	Continued its consideration, as a matter of urgency, without prejudice to any further steps to ensure that pirates are held accountable, of the establishment of specialized anti-piracy courts in Somalia and other States in the region with substantial international participation and/or support, and requests that the Secretary-General, in conjunction with UNODC and UNDP, further consult with Somalia and regional States willing to establish such anti-piracy courts on the kind of international assistance, including the provision of international personnel, that would be required to help make such courts operational; the procedural arrangements required for transfer of apprehended pirates and related evidence; the projected case capacity of such courts; and the projected timeline and costs for such courts, and to provide to the Council in the light of such consultations within 90 days detailed implementation proposals for the establishment of such courts, as appropriate ( <b>UNSCR 2015, paragraph 16 &amp; UNSCR 2020, paragraph 16 respectively</b> )
31 Oct 2011	<a href="#">2018</a>	Encouraged the States of the Economic Community of West African States, the Economic Community of Central African States and the Gulf of Guinea Commission to develop a comprehensive strategy, including through: (a) the development of domestic laws and regulations, where these are not in place, criminalizing piracy and armed robbery at sea; (b) the development of a regional framework to counter piracy and armed robbery at sea, including information-sharing and operational coordination mechanisms in the region; (c) the development and strengthening of domestic laws and regulations, as appropriate, to implement relevant international agreements addressing the safety and security of navigation, in accordance with international law ( <b>paragraph 2</b> )
29 Feb 2012	<a href="#">2039</a>	Urged States in the Gulf of Guinea to take prompt action, at national and regional levels with the support of the international community where able, and by mutual agreement, to develop and implement national maritime security strategies, including the establishment of a legal framework for the prevention, and repression of piracy and armed robbery at sea and as well as prosecution of persons engaging in those crimes, and punishment of those convicted of those crimes and encourages regional cooperation in this regard ( <b>paragraph 5</b> )
<b>Maritime Operations</b>		
2 Jun 2008	<a href="#">1816</a>	Allowed states cooperating with the Transitional Federal Government (TFG) to enter the territorial waters of Somalia, for a period of six months, and use all necessary means to repress acts of piracy and armed robbery ( <b>paragraph 7</b> )
2 Dec 2008	<a href="#">1846</a>	Further authorized the above entry for an extended period of one year ( <b>paragraph 10</b> )
16 Dec 2008	<a href="#">1851</a>	Allowed states cooperating with the TFG to conduct land-based missions in Somalia for a period of 12 months ( <b>paragraph 6</b> )
30 Nov 2009 23 Nov 2010	<a href="#">1897</a> <a href="#">1950</a>	Renewed/extended entry into Somali territorial waters and to conduct land-based missions in Somalia for successive one-year periods in resolutions ( <b>UNSCR 1897, paragraph 7 &amp; UNSCR 1950, paragraph 7 respectively</b> )

It is also worthy to note that in the area of *building judicial capacity*, further initiatives and targeted efforts include:

- *Pursuant to the request made under Resolution 1918*<sup>7</sup>:
  - An outline of seven options to prosecute and imprison persons responsible for acts of piracy or armed robbery at sea – via a report presented in July 2010 by the Secretary General. This was followed by the appointment of a special advisor in August 2010, by the UN Secretary General, to identify additional steps in pursuit thereof. (report [S/2010/394](#))
  - Twenty-five (25) proposals geared towards enhancing existing counter-piracy initiatives, as well as a new action plan comprising economic, security, and judicial/correctional measures targeting Somaliland and Puntland, and the establishment of specialized piracy courts in these regions and in Arusha, Tanzania. These proposals were presented in June 2011 ([S/2011/360](#)) by the UN Secretary General, who also presented a report on the modalities for the establishment of specialized Somali anti-piracy courts as recommended by the special advisor.
- *Further to Resolution 2015 and 2020 of 2011*:
  - A number of general and specific implementation measures were recommended to be taken by the Security Council, UNDP, UNODC, and other relevant international organizations, for specialized anti-piracy courts in States in the region ([S/2012/50](#)).

In addition to the UNSC, the **United Nations General Assembly (UNGA)** has also encouraged States to cooperate to address this issue of ‘piracy’ as a threat to maritime safety and security; and also urged States to take appropriate steps under their national law to facilitate the apprehension and prosecution of those who are alleged to have committed acts of piracy. Some noteworthy resolutions include:

- [55/7](#) issued on 27 February 2001
- [59/24](#) issued on 4 February 2005
- [60/30](#), issued on 8 March 2006
- [64/71](#), issued on 15 March 2010

<sup>7</sup> The Secretary-General was requested to present 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 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. (S/2010/394: available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N10/425/07/PDF/N1042507.pdf?OpenElement>)

#### 4.1.2 Contribution of the United Nations Division for Ocean Affairs and the Law of the Sea

The United Nations Division for Ocean Affairs and the Law of the Sea (DOALOS) has consistently been recognized for its role in contributing to the wider acceptance and rational and consistent application of the United Nations Convention on the Law of the Sea (UNCLOS). With regard to those mandates relevant to the repression of piracy, DOALOS as the secretariat of UNCLOS:

- **Provides information and advice to states and intergovernmental organizations**, on the uniform and consistent application of UNCLOS. Its role in assisting all relevant actors to have a good understanding and application of the provisions in UNCLOS - definition of piracy and its legal framework for the repression of piracy under international law<sup>8</sup> - is very important, as these provisions form the basis of the international community's response to piracy.
  - In relation to information (as noted in [paragraph 75 of General Assembly resolution 64/71](#)), it has been compiling national legislation on piracy, to serve as a resource for States, as a collaborative effort with the International Maritime Organization (IMO) and the United Nations Office on Drugs and Crime (UNODC);
- **Monitors relevant developments** in respect of piracy and other crimes at sea and reports on those developments to the General Assembly and also to the Meeting of States Parties to UNCLOS. These reports form part of the annual reports of the Secretary-General on oceans and the law of the sea, and are also utilized as the bases for discussions pertaining to the long-term development of the legal framework by the General Assembly.
- In conjunction with the above, it also **formulates recommendations to the Assembly and other intergovernmental forum** that enhances the understanding of the Convention, and is dedicated to ensuring that it has the capacity to respond to requests for advice and assistance from States in the implementation of the Convention.
  - In pursuit of this objective, a notable area of work is the preparation of a [resource document](#) for those States interested in adopting new legislation on piracy or reviewing existing legislation, which sets forth the elements that could be included in national legislation on piracy pursuant to UNCLOS and complementary provisions of Unlawful

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<sup>8</sup> The 1982 United Nations Convention on the Law of the Sea (UNCLOS) provides the framework for the repression of piracy under international law, in particular in Part VII within [articles 100 to 107 and 110](#)

Acts against the Safety of Maritime Navigation (SUA Convention). Some references are also made to the Protocol of 2005 to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA Protocol), in respect of boarding provisions and additional offences introduced by the Protocol.

#### *4.1.3 The Role of the International Maritime Organization in Combating Piracy*

Given the role of International Maritime Organization (IMO) as one of the major multilateral agencies tasked with addressing the issue of piracy, the DMPP Law and Governance team undertook a preliminary analysis to assess the effectiveness of that role in the light of the serious issues and challenges presented by the current scale of piracy off the East Coast of Africa, and elsewhere in the world. More particularly, the goal of the analysis was to examine the degree to which the mandate and authority assigned to the Organization for dealing with security issues such as piracy is adequate and appropriate and whether the treaty and governance parameters within which it is constrained to operate enable the Organization to meet its responsibilities. A particular focus is the effectiveness of the decision-making challenges associated with IMO's policy development process, involving as it does a multilateral body that must not only work with national administrations, interest groups and industry, but must also interface with numerous other multilateral bodies.

The analysis is proposed as a first step in a multi-step process assessing the effectiveness of the IMO in combating piracy. The intent is that it provides a basis for discussion with those members of the staff of IMO who are engaged in policy development, and program design and implementation, and with leading experts in the field, maritime industry associations and NGOs, with a view to confirming, modifying and/or amplifying observations made in this analysis. It is therefore structured to generate 'Discussion Points', which can then form the basis for such discussions. The second step in the process focused on providing relevant staff in the IMO Secretariat with the opportunity to review the DMPP analysis and to provide feedback on the discussion points. Subsequent steps will focus on soliciting feedback on the discussion points from a broader cross-section of informed stakeholders to shed light on how the IMO is viewed in terms of its effectiveness in combating piracy. The results of the survey is expected to contribute to the discussion on recommended policy options by the DMPP research team and external law and governance, socio-economic and operational sector experts.

It should be stressed that the focus of the preliminary analysis is upon the effectiveness of the IMO and its governance processes in addressing the issue of piracy. While the completed report of the analysis is available for working group members to review, the intent in this report is to highlight some of the key discussion points raised as a result of the analysis (Table 3).



**Table 3. IMO Effectiveness in Combating Piracy – Discussion Points**

Supporting Statements	Discussion Points
<p>The principal role of the International Maritime Organization is set out in Article 1(a) of the Convention that establishes it. It is tasked:  <i>"to provide machinery for cooperation among Governments in the field of governmental regulation and practices relating to technical matters of all kinds affecting shipping engaged in international trade; to encourage and facilitate the general adoption of the highest practicable standards in matters concerning maritime safety, efficiency of navigation and prevention and control of marine pollution from ships".</i></p>	<p>Does the absence of any specific mention of security in the treaty terms that established the International Maritime Organization present any impediments to its effectiveness in addressing the issue of piracy?</p>
<p>IMO's mission statement, as stated in the 2010-2015t Strategic plan for the Organization is as follows:  <i>"The mission of the International Maritime Organization (IMO) as a United Nations specialized agency is to promote safe, secure, environmentally sound, efficient and sustainable shipping through cooperation. This will be accomplished by adopting the highest practicable standards of maritime safety and security, efficiency of navigation and prevention and control of pollution from ships, as well as through consideration of the related legal matters and effective implementation of IMO's instruments with a view to their universal and uniform application."</i></p>	<p>To what degree is there consensus among the membership of the Organization with respect to the reference to security contained in this Mission Statement?</p>
<p>In defining piracy, IMO has been guided by the definition contained in Article 101 of the 1982 United Nations Convention on the Law of the Sea (UNCLOS) (discussed in section 3 above).</p>	<p>To what degree does the UNCLOS definition of piracy present issues for IMO in its counter-piracy activities?</p>
<p>IMO's principal objective for combating piracy has been to encourage the development of regional agreements directed at implementing counter-piracy measures. In this way a goal has been to place principal responsibility for responding to piracy with States geographically positioned close to the location of the piracy problem.</p>	<p>To what degree is IMO's early objective to place principal responsibility for responding to piracy with States located close to the location of the piracy problem currently viewed as appropriate?</p>
<p>IMO has taken a number of initiatives to strengthen the prevailing legal environment in relation to piracy, either as a lead or in collaboration with other agencies. An important player in the advancement of an effective legal regime has been the Contact Group on Piracy Coast of Somalia (CGPCS).</p>	<p>To what degree have IMO's initiatives been effective in improving the global legal framework governing piracy activities? What are the impediments to further success?</p>
<p>IMO has become increasingly engaged in establishing the most effective operational strategies for detecting and suppressing piracy incidents. It has seen its role as one of strengthening the capabilities of regional States to contain and deter piracy. An important initiative, led by IMO, is the <u>Djibouti Code of Conduct</u>, signed on January 29, 2009. Other important initiatives also exist with respect to operations and enforcement.</p>	<p>To what degree does IMO consider that its efforts to strengthen anti-piracy measures through education of ship owners/operators, improving anti-piracy technology, strengthening operational coordination and support, management and oversight of shipping operations, etc. are effective?</p>
<p>IMO clearly sets out its objectives in relation to information gathering, followed by sharing and communication of this information and finally using it to take appropriate action. Working Group 4 of the Djibouti Code is assigned specific responsibilities for information sharing and communications while a second information-related initiative by IMO is the improvement of its <u>Global Integrated Shipping Information System</u> (GISIS) in order to ensure that the IMO website provides a comprehensive range of piracy related information. Another group with information dissemination responsibilities is the CGPCS and its Kampala process.</p>	<p>To what degree does IMO see itself as playing an effective role in the management and dissemination of piracy-related information?</p>
<p>IMO's principal objectives with regard to training are clearly set out in its Action Plan. It is working in co-operation with the EU and the Government of Djibouti in order to pursue the development of the</p>	<p>To what degree does IMO see itself as playing an effective role in the provision of piracy-related training</p>

Supporting Statements	Discussion Points
Djibouti Regional Training Centre (DRTC) and among other initiatives, is working with UNODC and UNDP to establish a legal framework for, and to commence training of, a Somaliland Coastal Monitoring Force.	and development?
IMO has devoted little time and effort to the oversight of the economic performance of shipping	To what degree does IMO see itself as having a role to play in addressing the economic consequences of piracy for shipping?
The humanitarian dimensions of piracy are at the forefront of IMO's interest and concern. However, despite its strong concern for seafarers' interests, IMO is not well positioned to orchestrate a solution to the mistreatment of seafarers caught up in piracy. Most of its efforts are therefore directed at publicizing the scale of the problem and generating international attention and concern.	To what degree does IMO see itself as playing an effective role in protecting the best interests of seafarers who become involved in piracy incidents and their families?
IMO has no direct role in orchestrating the actions required to remove the attraction of piracy from those who currently engage in it but it has organized several workshops and events directed at deterring or suppressing piracy, Particular emphasis is placed on the need for compliance with the guidance provided by IMO on industry best management practices; the need for improved co-operation, communication with, and deployment of, naval forces; and the need for more emphasis on the steps that ships needed to take to avoid becoming victim to pirate attacks.	To what degree does IMO consider that it is playing an effective role in educating governments and industry to the need to take counter-piracy measures so as to deter or suppress piracy incidents?
While the IMO is clearly playing a lead role in many of the dimensions of the piracy problem, it is only one of many entities with responsibilities for addressing this issue, including: the United Nations itself (UNHQ); the African Union (AU); the UN Office on Drugs and Crime (UNODC); UN Food and Agriculture Organization, World Food Program, CGCPS, etc.	To what degree is IMO interfacing effectively and efficiently with other international agencies with responsibilities for addressing the piracy problem?
At the supranational level, an important but comparatively independent player in the piracy debate is the European Union. Additionally, various sectors of industry also feed into the consideration of piracy strategy, including owners or operators of ships, and industry interests that provide services to ships including classification societies, charterers, financiers, brokers, insurance agencies, port authorities, pilots, equipment providers, seafarers, educators, trainers, shipbuilders, designers, etc. IMO must in particular work with the major international shipping associations, including: BIMCO, ISF, ICS, INTERTANKO and INTERCARGO.	To what degree is IMO interfacing effectively and efficiently with the European Union, multilateral bodies such as NATO, various national governments, agencies and navies, and with industry and NGOs to ensure appropriate fulfilment of respective roles and responsibilities for addressing the piracy problem?
In examining IMO's internal structures and procedures, a key issue is the effectiveness of the functioning of the IMO's organizational hierarchy (Assembly, Council, Committees, Sub-Committees and the Secretariat)	To what degree are there any weaknesses in IMO's internal structures and procedures, or confusion or overlap in the mandates and authorities of the various organizational entities, that are negatively impacting IMO's efforts to resolve the piracy issue?
A particular area of concern could be possible weaknesses in IMO's performance arising from issues related to the assembly of the necessary knowledge, competence or expertise in piracy matters among the staff of the IMO Secretariat.	To what degree are members of the Secretariat, who may have been originally hired to address safety issues or to respond to complex environmental issues ideally equipped to address different but equally complex challenges associated with piracy issues?
Possible issues could perhaps arise in relation to the degree of	To what degree are there indications

Supporting Statements	Discussion Points
commitment to the cause by IMO Member States, and in particular the degree of commitment among certain member States to the success of the multilateral endeavour, or the ability of an impacted Coastal State to provide the necessary capacity and expertise to mount the agreed response.	that certain Member States are not currently meeting all their agreed commitments and obligations in relation to counter-piracy measures?
The principal argument supporting a uniform, cohesive, multilaterally developed regime to deal with piracy is that governments and the shipping community need a predictable, consistent regime in order to maximize the effectiveness of the steps taken. The principal negotiating mechanism that this multilateral process relies on for its success is consensus. The problem with the consensus process is that it can be both complex and slow.	To what degree is the consensus process proving problematic in relation to piracy, either because steps needed are seriously weakened in order to achieve the consensus, or differences in the degree of full support result in significant delays in the implementation process?
The membership of the IMO comprises some 168 member States supported by a Secretariat. At issue therefore is the degree to which IMO, through its Technical Cooperation Program, (TCP) is effective in educating Member States, particularly those from developing countries, to the complexities of the piracy challenge.	To what degree is the IMO's TCP achieving success in providing Member States with only limited competencies, the necessary assistance to develop the knowledge and competence to participate effectively in counter-piracy measures?
Since its original establishment, the IMO has been steadily assuming more authority and leverage in ensuring that States Party to various conventions fully meets their obligations. At issue is the degree to which IMO's effectiveness in relation to piracy might be improved by the provision of additional authority and enforcement powers.	To what degree might IMO's effectiveness in addressing piracy be strengthened by additional authorities or powers of enforcement?
The degree to which the effectiveness of the Organization in addressing piracy could be negatively impacted or otherwise compromised by the absence of sufficient funds and resources is a significant concern.	To what degree is IMO's effectiveness in addressing piracy impacted by funding constraints?
A feature of the origins of the more important global governance institutions, (e.g. the WTO, IMF, UNEP, FAO, ILO, UNCTAD, etc.) is that they were originally constructed to operate largely independently. However, as the management of global issues has evolved, so has the need for a higher degree of lateral collaboration across global governance institutions.	To what degree is IMO negatively impacted by public perceptions of shortcomings with the conduct and frequent ineffectiveness of decision-making in other multilateral bodies?

#### 4.1.4 The Work of the United Nations Office on Drugs and Crime

Since its establishment in 1997, the United Nations Office on Drugs and Crime (UNODC) has become a global leader in assisting Member States in their struggle against illicit drugs, crime and terrorism. One such area of support is targeted at prosecuting traffickers and other criminals by providing, among others, legislative assistance in the investigation and prosecution and training for law enforcement and criminal justice officials.

Even though, crime, drugs and terrorism are high-priority issues for the UNODC, in 2009 it signaled its intention to intensify efforts to fight the transnational crime of piracy, with the launch of its Counter-Piracy Programme. UNODC's programme find support in the UNSC's Resolution 1851 (December 2008) which encouraged the states and regional organizations fighting piracy and armed robbery at sea off the

coast of Somalia to increase regional capacity with assistance of UNODC, towards effectively investigating and prosecuting piracy and armed robbery at sea offences. Other Resolutions issued in April 2011 (1976) promote the work of the UNODC in facilitating the transfer of suspected pirates for trial, and convicted pirates for imprisonment, including through relevant transfer agreements or arrangements; and to work towards increasing the prison capacity in Somalia.

This programme essentially supports the prosecution of piracy suspects, providing targeted support to the criminal justice response to piracy in the Horn of Africa and Indian Ocean, with three (3) main objectives:

- Fair and Efficient Trials and Humane and Secure Imprisonment in Regional Prosecuting States
- Humane and Secure Imprisonment for pirates in Somalia
- Fair and Efficient Piracy Trials in Somalia

In focusing on four key areas of law enforcement, prosecution, courts and prisons, the UNDOC has provided legislative review and assistance; support to the police, prosecution and judiciary; logistics and information technology; witness and trial support; prison repairs and refurbishments; training of prosecution, police, maritime authorities and prison management and officers; and the development and sharing of regional expertise.

Even though, the bulk of UNODC’s work is in Kenya, Mauritius, Somaliland, Puntland and Seychelles, it has provided some limited support to other states in the region. Table 4 below gives a summary of the major areas of work and support provided to the police, prosecutors, courts and prisons of regional states that are geared towards assisting them in handling piracy cases, thereby achieving UNODC’s mandate of making investigations and trials fairer and more efficient.

**Table 4. Summary of work and achievements of the UNODC**

LAW ENFORCEMENT	PROSECUTION	COURTS	PRISONS
<p>Issued guidelines for the handover of evidence by naval forces to civilian police that comply with the requirements of regional legal systems.</p> <p>Drafted transfer guidelines for navies wishing to transfer piracy suspects to the Government of Mauritius</p>	<p>Reviewed the legal frameworks of Kenya, Mauritius, Seychelles and Tanzania.</p> <p>Assessed the adequacy for meeting the demands of prosecuting piracy and recommended changes to be implemented in the short, medium and long term.</p>	<p>Facilitated the attendance of witnesses from overseas and provided interpreters and transcription services for trials held in the Kenyan and Seychelles courts.</p>	<p>Assisting in the improvements of prison conditions and capacity in Kenya, Seychelles and Somalia.</p> <p>Some projects undertaken included rebuilding a prison kitchen, equipping prison medical facilities, training medical staff and refurbishing of vehicles.</p>

LAW ENFORCEMENT	PROSECUTION	COURTS	PRISONS
Substantial procurement for police and coast guard, including police vehicles, information technology, police radios, investigative equipment and marine surveillance equipment	Drafted anti-piracy laws (for Somalia) which have been submitted to three authorities in Somalia, for implementation, namely Somaliland, Puntland and Transitional Federal Government, and Djibouti.  Assisted prosecutors develop their legal resources (including online resources), and purchased office equipment and additional office space.	In addition to judicial training, UNODC has introduced computers into the courtrooms along with evidence-viewing facilities and are working towards improving courtroom security.	In addition to providing the essential commodities, it has developed a welfare service to provide prisoners with basic necessities, provided educational and sports equipment for inmates, and improved medical care for all prisoners and supplied office equipment to the prison.
Conducted a number of successful specialists training for police officers and intelligence analysts (some in conjunction with INTERPOL), in crime scene investigation, modern investigative techniques and using modern tools such as forensic mobile phone examination equipment.	Provided transport and accommodation (where necessary) for prosecutor and police, especially to facilitate the attendance at international piracy conferences.  Provided training for judges and prosecutors in the legal aspects of fighting piracy.	In addition to providing training ( <i>evidence collection and courtroom skills</i> ) and administrative support, it has developed and improved court facilities, such as a refurbishment of the Shimo la Tewa Courtroom in Mombasa, Kenya.	UNODC has rebuilt and renovated major portions of the city's main prison, Shimo La Tewa, including completely rebuilding its on-site courthouse; constructed and handed over the new Hargeisa Prison to the Government of Somaliland, completed refurbishment work at Bosasso in Puntland's north, which accommodates extra 200 prisoners. A new prison is to be built in Puntland's capital, Garowe.
Ensured that weapons collected from the pirates have been transferred safely to Nairobi for ballistic examination.	Provided legal representation through various NGOs in cases where the defendants (suspected pirates) have no legal representation.		
Currently refitting an evidence room to allow for the secure storage of weapons and developing training packages for piracy investigations and evidence gathering items.	Provided full time Somali interpreters in support of Seychelles prosecutions and welfare of Somalis in custody.		
	Conducted a Needs Assessment in Sri Lanka, the Maldives and Tanzania to determine the degree/level of preparedness and readiness to prosecute piracy suspects arrested by		



LAW ENFORCEMENT	PROSECUTION	COURTS	PRISONS
	the respective forces; as well as asses the level of willingness to consider prosecuting pirates arrested by foreign navies. This assessment included the capacity of the police, prosecutors, courts and prison service to support piracy trials.		

In meeting its mandate, UNODC has been working closely with a number of other agencies to ensure a coherent response to piracy. In this regard, it works closely with the Contact Group on Piracy off the Coast of Somalia (CGPCS) in its various analyses legal and practical challenges to prosecuting suspected pirates. The UNODC has also conducted a lot of the training of police officers and intelligence analysts was/is conducted in collaboration with INTERPOL.<sup>9</sup>

Even though, the UNODC has provided assistance to States, upon request, to establish a legislative framework that allows for effective and efficient piracy prosecutions, it has not developed model legislation on piracy, but has provided customized assistance based on the specific legal system and practice of the country. In this instance, other partnerships with the IMO and the UN Office of Legal Affairs were crucial in developing first-rate training for maritime justice practitioners based in the region, in an effort to assist them to develop the instruments to respond to piracy and other maritime crimes.

Further, in Somalia and Somaliland, collaboration with UN Political Office in Somalia (UNPOS) and United Nations Development Programme (UNDP) advances its progress in working to deliver fair and efficient piracy trials parallel to delivering secure and humane imprisonment.

It is noted that the UNODC also manages a Trust Fund established in 2010, which according to its Annual Report 2010, supports counter piracy initiatives off the Coast of Somalia, with the primary objective of *“helping to defray the expenses associated with prosecution of suspected pirates, as well as other activities related to implementing the Contact Group’s objectives regarding combating piracy in all its aspects.”* (UNODC, 2011) It has been indicated that the Trust Fund contributes balance of funds required for the construction of a dedicated piracy court in Seychelles as well as funding to support prosecutions in Kenya and Seychelles in 2012. (UNODC, 2012)

<sup>9</sup> The INTERPOL Maritime Piracy Task Force focuses on three main areas to counter maritime piracy, working closely with the international community, namely improving evidence collection, Facilitating data exchange and Building regional capabilities. Further details available at <http://www.interpol.int/Crime-areas/Maritime-piracy/Maritime-piracy>



With particular reference to prison management, the UNODC has embarked on a Piracy Prisoner Transfer Programme (or PPTP) which is designed to deliver a long-term imprisonment solution in Somalia and Somaliland for pirates convicted abroad. The table above, under the Prison item, indicates some areas of UNODC's success in providing secure and humane imprisonment in Hargeisa, Somaliland and soon in Bosasso, Puntland, varying from construction of the facilities, training of staff, mentoring of prison staff, and the support of independent monitoring (UNODC, 2012).

A notable observation regarding the important work of the UNODC in its counter-piracy programme is that it is involved from the point of transfer to the end of the trial process, and onward to the end of the prison sentence.

## 4.2 Regional Models

### 4.2.1 South China Sea and Malacca Strait

Organization and Terms of Agreement	Instruments (associated with each arrangement)			Arrangement Mandates (for Piracy or marine security)	Observations
	Countries (Signatories/ Parties )	Binding	Non-Binding		
<b>The Regional Cooperation Agreement On Combating Piracy And Armed Robbery Against Ships In Asia (ReCAAP)</b>					
Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia is a negotiated multilateral agreement initiated by Japan and opened for signature in November 2004 and entered into force in September 2006. Originally opened only to states in the region but subsequently opened to any state, in accordance with Article 18(5) of the Agreement.	To date, 18 states have become contracting parties including: <ul style="list-style-type: none"> <li>• Bangladesh,</li> <li>• Brunei,</li> <li>• Cambodia,</li> <li>• China,</li> <li>• Denmark,</li> <li>• India,</li> <li>• Japan,</li> <li>• Korea,</li> <li>• Laos,</li> <li>• Myanmar,</li> <li>• Netherlands,</li> <li>• Norway,</li> <li>• Philippines,</li> <li>• Singapore,</li> <li>• Sri Lanka,</li> <li>• Thailand,</li> <li>• United Kingdom</li> <li>• Vietnam</li> </ul>	<p>The ReCAAP Agreement sets out obligations undertaken by member countries to effect measures to combat piracy and armed robbery. It also lays out a framework for cooperation among member countries, with information sharing of as its main pillar.</p> <p>The roles of the ReCAAP ISC are to:</p> <ul style="list-style-type: none"> <li>• serve as a platform for information exchange with the ReCAAP Focal Points via the Information Network System (INS);</li> <li>• facilitate communications and information exchange among participating governments to improve incident response by member</li> </ul>	Does not require states to prosecute or extradite pirates or to share evidence but calls on states, subject to national laws and regulations, to endeavour to do so. Financial contributions from member states are voluntary.	To promote and enhance cooperation against piracy and armed robbery in Asia, IMO Circulars 1333 and 1334 specifies responsibilities for reporting incidents of piracy and armed robbery. In the case of incidents occurring in Asia, ship owners and operators are required to report all incidents of piracy and armed robbery against ships to ReCAAP focal points and contact point.	<p>First regional Government to Government agreement to promote and enhance cooperation to combat piracy and armed robbery against ships.</p> <p>Indonesia and Malaysia, two important states in the region are not party to the Agreement.</p> <p>Does not provide for new enforcement powers, coordinated patrols, joint law enforcement or the pursuit of suspicious vessels in a state’s territorial waters.</p> <p>Sharing of piracy and armed robbery information was seen as helping to improve operational cooperation when responding to incidents as well as enable the development of more effective prevention measures.</p>

Organization and Terms of Agreement	Instruments (associated with each arrangement)			Arrangement Mandates (for Piracy or marine security)	Observations
	Countries (Signatories/ Parties )	Binding	Non-Binding		
		countries; • analyze and provide accurate statistics of the piracy and armed robbery incidents to foster better understanding of the situation in Asia; • facilitate capacity building efforts that help improve the capability of member countries in combating piracy and armed robbery in the region; and • cooperate with organizations and like-minded parties on joint exercises, information sharing, capacity building programme, or other forms of cooperation, as appropriate, and agreed upon among the Contracting Parties.		The ISC undertakes the following activities: • facilitate communications and information exchange between the participating governments to improve incident response by member countries; • provide accurate statistics and analysis of the piracy and sea robbery situation in the Asia region, and: • support capacity building efforts that help improve the capability of member countries to combat piracy and sea robbery in the region.	This is the first time that regional Governments have institutionalized their cooperation in combating piracy and armed robbery against ships in the form of a permanent body with 13-15 full-time staff.  Through its activities, the ReCAAP ISC helps to improve the national response of each member country to combat piracy and armed robbery threats. Through its periodic reports to the shipping community, the ISC helps ships in the region avoid and deter piracy and armed robbery attacks
<b>MALSINDO</b>					
Malacca Strait Patrol Network Security Initiative	Malaysia, Singapore, Indonesia, Thailand		Not sure but it seems to be non-binding.	To better utilize the littoral states’ respective resources in order to combat piracy, terrorism and other criminal actions.	The multilateral measures that Malaysia, Singapore, and Indonesia (joined later by Thailand) initiated enhance the previously existing 1992 bilateral arrangements for
Combination of the MALSINDO Trilateral				Allows for coordinated, not joint	

Organization and Terms of Agreement	Instruments (associated with each arrangement)			Arrangement Mandates (for Piracy or marine security)	Observations
	Countries (Signatories/ Parties )	Binding	Non-Binding		
Patrol Agreement signed in 2004 and the “Eye in the Sky” aerial surveillance agreement signed in 2005				patrols and does not allow for ‘hot pursuit’ into another state’s territorial waters.	<p>patrols between Singapore and Indonesia.</p> <p>Thought to have been developed not to address the threat of piracy or terrorism but of foreign powers intervening in the Strait (Ong-Webb, 2006)</p> <p>Excludes non-littoral states in Malacca Strait</p> <p>Both parts of this agreement have their shortcomings:</p> <ul style="list-style-type: none"> <li>• inadequate numbers of aircraft,</li> <li>• limited patrol frequencies,</li> <li>• limits on how close vessels can come to another state's territorial limit, and</li> <li>• the absence of any right of “hot pursuit” into another state's territorial waters (Murphy 2012)</li> </ul>

4.2.2 East Africa / Red Sea/ Indian Ocean (Horn of Africa)

Organization and Terms of Agreement	Instruments (associated with each arrangement)			Arrangement Mandates (for Piracy or marine security)	Observations
	Countries (Signatories/ Parties)	Binding	Non-Binding		
<b>Contact Group On Piracy Off The Coast Of Somalia (CGPCS)</b>					
<p>In pursuant to the UNSC Resolution 1851, this Group was created in 2009 as a voluntary, ad hoc international forum that brings together and encourages countries, organizations, and industry groups with an interest in combating piracy.</p> <p>This cooperative mechanism acts as a shared point of contact between/among those states and organizations to exchange as well as discuss information and ideas related to the effective repression of piracy and armed robbery at sea off Somalia's coast.</p> <p>The Contact Group coordinates its efforts through five (5) Working Groups and is assisted by the UN Secretariat and the IMO.</p>	<p>Current Parties are:</p> <ul style="list-style-type: none"> <li>• 51 countries</li> <li>• 7 international organizations:                             <ul style="list-style-type: none"> <li>○ AU</li> <li>○ League of Arab States</li> <li>○ EU</li> <li>○ INTERPOL</li> <li>○ IMO</li> <li>○ NATO</li> <li>○ UN Secretariat</li> </ul> </li> </ul> <p>Two (2) major maritime industry groups, which take part as Observers:</p> <ul style="list-style-type: none"> <li>• BIMCO</li> <li>• INTERTANKO</li> </ul>			<p>Of particular relevance to this Report are the efforts of Working Group No2: Judicial Issues, chaired by Denmark, which focuses on judicial mechanisms for deterring piracy.</p> <p>This WG provides specific guidance to members of the Contact Group on the legal framework pertaining to the fight against piracy, including the prosecution of suspected pirates as well as addressing issues of use of force, human rights obligations, transfer of suspects, and improving the capacity of regional states to do with the problem</p> <p>Another one of its mandates is working towards the improvement of the legal instruments available for dealing with piracy. In this regard, this Working Group has developed a number of specific legal tools gathered in a virtual "legal tool box",</p>	<p>This working Group has garnered much support from the UNODC in its various analyses legal and practical challenges to prosecuting suspected pirates; in addition to assistance from UN-DOALOS regarding the applicable international legal regime and human rights obligations to the detention of suspected pirates at sea and their transfer to regional States.</p> <p>Notably, one of its early accomplishments was approving the terms of reference for the international trust fund (managed by the UNODC, referred to under section 4.1.4), which is designed to help defray the expenses associated with the prosecution of piracy suspects as well as other activities undertaken to combat the phenomenon of piracy (UNODC, 2011)</p>

Organization and Terms of Agreement	Instruments (associated with each arrangement)			Arrangement Mandates (for Piracy or marine security)	Observations
	Countries (Signatories/ Parties)	Binding	Non-Binding		
				including on issues such as applicable international law, transfer and ship-riders.	In addition to various analysis and discussions on how to ensure the effective prosecution of suspected pirates, it should be pointed out that this Group’s progress is dependent on the support from the international community for construction of prisons in Somalia and the continuing support of Somali authorities.
<b>Djibouti Code Of Conduct</b>					
The ‘Code of conduct concerning the repression of piracy and armed robbery against ships in the western Indian Ocean and Gulf of Aden’ was signed in January 2009, pursuant to the UNSC’s Resolution 1851. In general, it provides the framework for cooperation to improve those states’ efforts and work in the prevention, interdiction, prosecution and incarceration of those involved in piracy and armed robbery at sea	The Code (as of August 2011) has 18 signatory States from the 21 eligible to join. These include: <ul style="list-style-type: none"> <li>• Comoros</li> <li>• Djibouti</li> <li>• Egypt</li> <li>• Ethiopia</li> <li>• Jordan</li> <li>• Kenya</li> <li>• Madagascar</li> <li>• Maldives</li> <li>• Mauritius</li> <li>• Oman</li> <li>• Saudi Arabia</li> <li>• Seychelles</li> </ul>	In further implementation of the Code, an MOU was signed on May 30, 2011 to allow the IMO to fund the building of a regional training centre in Djibouti, to promote the implementation of the Code. <sup>10</sup>	The Code is not a legally binding instrument, as per provisions in Art 15(a) the Code is not intended to create a binding agreement. However, according to art 13, there is a clear indication that the parties thereto will consult with the aim of arriving at a binding agreement.	Under the Code, parties commit to improve regional co-ordination and cooperation within four broad areas, namely: <ul style="list-style-type: none"> <li>• Information sharing</li> <li>• Capacity Building</li> <li>• Updating Legislation</li> <li>• Regional Training</li> </ul> With regard to <i>information sharing and coordination</i> , the parties collaborate through: <ul style="list-style-type: none"> <li>• a system of national focal points and piracy information exchange centres</li> <li>• three information-sharing</li> </ul>	It has been noted that the Code was inspired by the objectives of ReCAAP and as such, some of its regulations resemble the provisions of RECAAP (Geiss & Petrig, 2011) <p>As such, it may be observed that the functions of the c Djibouti Code of Conduct ISCs are similar to the roles of ReCAAP ISC (as mentioned under section 4.2.1)</p> <p>In light of the above, it was further indicated that it would of great benefit if the Djibouti Code of Conduct ISCs and</p>

<sup>10</sup> See IMO Briefing 30/2011, 31 May 2011, available at <http://www.imo.org/MediaCentre/PressBriefings/Pages/30-djiboutitraining.aspx>

Organization and Terms of Agreement	Instruments (associated with each arrangement)			Arrangement Mandates (for Piracy or marine security)	Observations
	Countries (Signatories/ Parties)	Binding	Non-Binding		
(preamble paragraph 11)	<ul style="list-style-type: none"> <li>• Somalia</li> <li>• Sudan</li> <li>• United Arab Emirates</li> <li>• United Rep. of Tanzania</li> <li>• Yemen</li> </ul> <p>Countries eligible to sign are France, Mozambique and South Africa</p>			<p>centres (Djibouti Code of Conduct ISCs) in Dar es Salaam, United Republic of Tanzania, Mombasa, Kenya and Sana'a, Yemen. The three ISCs were declared operational in the first half of 2011 and have since actively collected and disseminated piracy related information</p> <ul style="list-style-type: none"> <li>• The information exchange centres disseminate alerts regarding imminent threats or incidents to ships, as well as collect, collate and analyze information transmitted through the participants and prepare statistics and reports based on that information</li> </ul> <p>The Code also provides for cooperation in: harmonizing national criminal legislation; and establishing appropriate standards for the apprehension and prosecution of suspect Pirates</p>	<p>ReCAAP ISC pool their resources and work together to share piracy information to address the growing concerns.</p> <p>To this end, on 11 November 2011, with the support and endorsement of the IMO, the Representatives of the three Djibouti Code of Conduct ISCs and ReCAAP ISC agreed to and signed a set of standard operating procedures (SOP) for communicating and exchanging piracy-related information. to pave the way for the Centres' operational link-up to share information on piracy and armed robbery against ships in furtherance of their effort to address the growing challenges<sup>11</sup></p>

<sup>11</sup> According to the IMO Press Briefing, “the move to forge closer ties between the ISCs comes against the background of the continuing threat posed by piracy to maritime trade and the safe passage of ships through the Indian Ocean and the Gulf of Aden. Piracy attacks have been reported close to the western coast of India, a ReCAAP Contracting Party, and many ships with flag or crews from ReCAAP Contracting Parties are being affected. Pooling resources between Djibouti Code of Conduct and ReCAAP ISCs will ensure vital piracy information can be shared across as wide an area as possible”. See Press Briefing: Piracy centres expand information network dd. 11 November 2011, available at <http://www.imo.org/MediaCentre/PressBriefings/Pages/56-piracy-ISCS.aspx>



Organization and Terms of Agreement	Instruments (associated with each arrangement)			Arrangement Mandates (for Piracy or marine security)	Observations
	Countries (Signatories/ Parties)	Binding	Non-Binding		
				<p>It also mandates its members to: ensure the modernization of criminal legislation to ensure the criminalization of piracy and armed robbery against ships, and the appropriate exercises jurisdiction in prosecuting alleged offenders; and to implement of provisions allowing the pursuit of pirate vessels into the territorial sea of signature states once authorization has been granted.</p> <p>In pursuit of the above, the participants have undertaken to review their national legislation with a view to ensuring that there are laws in place to criminalize piracy and armed robbery against ships, and adequate guidelines for the exercise of jurisdiction, conduct of investigations and prosecution of alleged offenders</p>	
<p>The Eastern and Southern Africa - Indian Ocean (ESA-IO) along with the EU has also agreed to create a regional strategy to serve as framework for the prevention and repression of acts of piracy and armed robbery. The development and implementation of the action plan was entrusted to IGAD who presented its report on the 24<sup>th</sup> February 2012 called “Somalia Inland Strategy and Action Plan to Counter and Prevent Piracy 2010 – 2015”: <a href="http://www.icpat.org/index.php/about-us-mainmenu-110/564-validation-workshop-on-piracy-was-conducted">http://www.icpat.org/index.php/about-us-mainmenu-110/564-validation-workshop-on-piracy-was-conducted</a></p>					

## 4.2.3 West Africa (Gulf of Guinea)

Organization and Terms of Agreement	Instruments (associated with each arrangement)			Arrangement Mandates (for Piracy or marine security)	Observations
	Countries (Signatories/ Parties)	Binding	Non-Binding		
<b>AFRICAN UNION</b>					
<p>The African Union (AU) established on 9 July 2002, was formed as a successor to the Organization of African Unity (OAU).</p> <p>Counter-Piracy policy decisions and activities are initiated under the AU's <i>Peace and Security</i> portfolio, with specific focus on Conflict Prevention, Management and Resolution, and Combating Terrorism. Its related objectives include: promoting peace, security, and stability on the continent; promoting democratic principles and institutions, popular participation and good governance.</p> <p>As per the Constitutive Act the primary body charged with implementing these objectives and principles is the <u>Peace and Security</u></p>	<p>The African Union consists of 54 African states.</p> <p>The only all-African state not in the AU is Morocco.</p>	<p>The African Union was established under the Constitutive Act, adopted and signed on 11 July 2000 and entered into force on 26 May 2001. All decisions of the AU (as a decision-making body) are binding on member states.</p> <p>Other binding instruments signed and adopted by West African States include:</p> <ul style="list-style-type: none"> <li>• African Maritime Transport Charter (adopted in 2009)</li> <li>• Durban Resolution On Maritime Safety, Maritime Security And Protection Of The Marine Environment In Africa (adopted in 2009)</li> </ul>		<p>The African Maritime Transport <u>Charter</u> (Chapter VIII) contains provisions concerning maritime safety and security that mandate:</p> <ul style="list-style-type: none"> <li>• Member States revise and harmonize, if necessary, their maritime, port, and inland waterways legislations in order to make them compatible with international instruments and to share information about unlawful acts perpetrated at sea.</li> <li>• With particular regard to piracy, armed robbery and other unlawful acts against shipping, member states adopt effective measures to combat such acts through cooperation with other international bodies.</li> </ul> <p>The <u>Durban Resolution</u> (in condemning all acts of piracy and armed robbery at sea), contains provisions that require member states to enact national legislation and to ratify and implement</p>	<p>The AU is the best forum to formulate policies to effectively combat piracy and other forms of maritime insecurity in Africa. It is well placed to marshal political support and the financial resources necessary to implement the various recommendations on combating maritime insecurity, including piracy.</p>

Organization and Terms of Agreement	Instruments (associated with each arrangement)			Arrangement Mandates (for Piracy or marine security)	Observations
	Countries (Signatories/ Parties)	Binding	Non-Binding		
<p><u>Council</u>. The PSC has the power, among other things, to authorize peace support missions, to impose sanctions in case of unconstitutional change of government, and to "take initiatives and action it deems appropriate" in response to potential or actual conflicts.</p> <p>African Union participates in the Contact Group on Piracy off the Coast of Somalia (CGPCS), the Djibouti Code of Conduct, and the Regional Conferences on Piracy organized by the Eastern and Southern Africa – Indian Ocean (ESA-IO) countries.</p>				international instruments relating to maritime security, such as the International Ship and Ports Security (ISPS) Code.	
<b>Maritime Organization Of West And Central Africa (MOWCA)</b>					
The Maritime Organization for the West and Central Africa (MOWCA) was established in May 1975 as the Ministerial Conference of West and Central African States on Maritime Transport (MINCONMAR). The	20 West and Central African coastal States including: Angola, Benin, Cameroon, Cape Verde, Congo, Côte d’Ivoire, Democratic Republic of the Congo, Equatorial Guinea, Gabon,	The 1975 Charter of Abidjan		Original mandates included assisting member states to cooperatively manage all maritime matters—from port and vessel security to environmental protection.  However, with regard to Piracy, some mandates include:	The organization has initiated several programs that are geared towards capacity building and operational response – e.g. the 2008 establishment of the sub-regional coast guard network for West and Central Africa

Organization and Terms of Agreement	Instruments (associated with each arrangement)			Arrangement Mandates (for Piracy or marine security)	Observations
	Countries (Signatories/ Parties)	Binding	Non-Binding		
<p>name was changed to MOWCA as part of a reformation process in 1999.</p> <p>MOWCA is an intergovernmental regional body mandated to regulate maritime affairs particularly geared towards ensuring a cost-effective shipping service for sub-regional countries that also focused on promoting safety and combating pollution.</p>	<p>Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mauritania, Nigeria, Sao Tome and Principe, Senegal, Sierra Leone and Togo</p> <p>Five (5) landlocked member States including Burkina Faso, the Central African Republic, Chad, Mali and Niger.</p>			<ul style="list-style-type: none"> <li>developing and implementing, as necessary, appropriate national maritime security policies to safeguard maritime trade from all forms of unlawful acts' and;</li> <li>prosecuting, in accordance with relevant domestic laws, perpetrators of all forms of piracy and unlawful acts against seafarers, ships, port facility personnel and port facilities.</li> </ul>	
<p>Memorandum of Understanding (MOU) between the IMO and Maritime Organization of West and Central Africa (MOWCA), which provides:</p> <ul style="list-style-type: none"> <li>An institutional framework for suppressing piracy, armed robbery and other unlawful acts against ships and addressing illegal fishing, drug and weapon trafficking, illegal migration, oil theft, damage to gas pipelines and maritime accident response in the</li> </ul>	<p>Adopted in July 2008 by Twenty member States of MOWCA, including 15 West African Coastal States</p>		<p>The 2008 MOU between the IMO and Maritime Organization of West and Central Africa (MOWCA), for the establishment of a sub-regional integrated coastguard network in West and Central Africa</p>	<p>Mandates are geared towards enhancing maritime safety, security and law enforcement throughout the region, all of which forms the basis of the maritime security strategy within the African Maritime Transport Charter adopted by the African Union in Durban in October 2009.</p> <p>It also serves as the basis for national and regional action plans to be developed by regional States for the implementation of the integrated coastguard function network</p>	<p>Insufficiency of the legal framework for dealing with piracy and policies to address piracy and armed robbery against ships.</p> <p>It is necessary to consider the enactment of national maritime legislation to regulate the activities and the areas of cooperation with other neighboring States.</p>

Organization and Terms of Agreement	Instruments (associated with each arrangement)			Arrangement Mandates (for Piracy or marine security)	Observations
	Countries (Signatories/ Parties)	Binding	Non-Binding		
sub-region.  • Guidelines for coastal surveillance, presence in the exclusive economic zones of the sub-region and enforcement of international conventions, regulations and codes - principally those of IMO and the UN Convention on the Law of the Sea (UNCLOS). It has provisions on a "right of hot pursuit" in case of unlawful acts perpetrated against ships.					

4.2.4 Caribbean Basin

Organization and Terms of Agreement	Instruments (associated with each arrangement)			Arrangement Mandates (for Piracy or marine security)	Observations
	Countries (Signatories/ Parties)	Binding	Non-Binding		
<b>CARICOM –specific institutions</b>					
CARICOM Implementation Agency for Crime and Security (IMPACS) established in 2006 as the nerve Centre	CARICOM Member States including: • Antigua and Barbuda	The Agreement establishing IMPACS and its sub-agencies was signed in 2006		These mandates are specifically geared towards strategic research, program and project implementation, evaluation, analysis and	No government in the Latin America and Caribbean region identifies “piracy” as a concern so, strictly speaking, there are no counter-piracy

Organization and Terms of Agreement	Instruments (associated with each arrangement)			Arrangement Mandates (for Piracy or marine security)	Observations
	Countries (Signatories/ Parties)	Binding	Non-Binding		
<p>for implementing actions and initiatives addressing regional security and law enforcement; along with two sub-agencies, namely:</p> <ul style="list-style-type: none"> <li>• The Regional Intelligence Fusion Centre (RIFC) to provide intelligence support to regional and international stakeholders</li> <li>• The Joint Regional Communications Centre (JRCC) for receiving, analyzing and disseminating passenger information to assist Border Security, Intelligence and Law Enforcement Agencies.</li> </ul>	<ul style="list-style-type: none"> <li>• Barbados</li> <li>• The Bahamas</li> <li>• Belize</li> <li>• Dominica</li> <li>• Grenada</li> <li>• Guyana</li> <li>• Haiti</li> <li>• Jamaica</li> <li>• Montserrat</li> <li>• St. Kitts and Nevis</li> <li>• St. Lucia</li> <li>• St. Vincent and the Grenadines</li> <li>• Suriname</li> <li>• Trinidad and Tobago</li> </ul>	<p>CARICOM Maritime and Air Space Security Cooperation Agreement signed in 2008, also provides a further mechanism for cooperation against a ship and aircraft piracy, hijacking, terrorism and illegal drug trafficking.</p> <p>The above Agreements is further augmented by the CARICOM Arrest Warrant Treaty, also signed in 2008.</p>		<p>mobilization of resources to support the collective fight against serious crime and to counter other security threats in the Region.</p> <p>The Maritime and Air Space Security Cooperation Agreement specifically refer to “the prevention of piracy, hijacking and other serious crimes” (as per Art II, 2, (g)).</p>	<p>policies or practices being followed.</p> <p>The existing structures for maritime security and the countering of transnational organized crime and potential terrorism provide the framework upon which any such activity would almost inevitably be based.</p>
<b>Regional Security System (RSS)</b>					
<p>Established in 1996 to ensure the stability and well-being of Member States through mutual cooperation, in order to maximize regional security in preserving the</p>	<p>RSS Member States are:</p> <ul style="list-style-type: none"> <li>• Antigua and Barbuda,</li> <li>• Barbados,</li> <li>• Dominica,</li> <li>• Grenada,</li> </ul>	<p>Treaty Establishing The Regional Security System (1996).</p> <p>Caribbean Treaty of Mutual Legal Assistance in Serious</p>		<p>General provisions mandate assistance in national emergencies, smuggling prevention, search and rescue, maritime policing and assistance in time of threats to national security.</p>	<p>These existing structures for maritime security and the countering of transnational organized crime and potential terrorism provide the framework upon which any such activity would almost</p>

Organization and Terms of Agreement	Instruments (associated with each arrangement)			Arrangement Mandates (for Piracy or marine security)	Observations
	Countries (Signatories/ Parties)	Binding	Non-Binding		
social and economic development.	<ul style="list-style-type: none"> <li>• St. Kitts and Nevis,</li> <li>• Saint Lucia,</li> <li>• St. Vincent and the Grenadines.</li> </ul>	Criminal Matters, 2005, signed by the RSS member states and non-RSS member states to facilitate procedural matters in criminal enforcement.		<p>In addition to establishing the framework and administrative structure, article 14(2) of the Treaty includes provisions for entry into territorial seas or EEZ of any other member state in the exercise law enforcement powers. This would permit hot pursuit, search, seizure, and arrest of vessels found within the waters of the regional membership.</p> <p>Since these actions are deemed to be acting under the authority of the coastal state, the prosecution of any offenses would rest with the state – thereby requiring further agreement to facilitate same - Caribbean Treaty of Mutual Legal Assistance in Serious Criminal Matters.</p>	inevitably be based.
<b>Ship-Rider Agreements</b> (bilateral arrangements with the United States)					
<p>These agreements signed on a bilateral basis, primarily geared towards maritime counter drug operations.</p> <p>In general, they allow for the embarkation of</p>	<p>Varying Ship rider agreements were signed with:</p> <ul style="list-style-type: none"> <li>• Bahamas</li> <li>• Barbados</li> <li>• Dominica</li> <li>• Dominican Republic</li> </ul>			<p>Provides for US entry into the territorial seas of the island states, but not a reciprocal right for entry into US waters (see Trinidad &amp; Tobago-US Ship rider agreement Art 5-8).</p>	<p>Even though these ship rider agreements are drug oriented, they serve as a possible example of another type of arrangement that may be used in counter-piracy operations. However, these agreements are a source of some concern</p>



Organization and Terms of Agreement	Instruments (associated with each arrangement)			Arrangement Mandates (for Piracy or marine security)	Observations
	Countries (Signatories/ Parties)	Binding	Non-Binding		
regional enforcement personnel on US Coast Guard ships to participate in joint counter drug operations.	<ul style="list-style-type: none"> <li>• Grenada</li> <li>• Jamaica</li> <li>• St. Kitts and Nevis,</li> <li>• St. Vincent and the Grenadines,</li> <li>• St. Lucia,</li> <li>• Trinidad &amp; Tobago.</li> </ul>				<p>by the participating states. There is a consensus, sometimes explicitly stated, that the United States has strong-armed the Caribbean island states into signing these agreements under threat of economic sanctions.</p> <p>When entering into the territorial seas of the participating states, the authority and jurisdiction rests with the coastal state through its embarked personnel.</p> <p>Some of the provisions of these agreements that are controversial relate to the fact that they permit US vessels to enter into the territorial seas even if there are no embarked enforcement personnel, or prior permission has not been granted.</p> <p>Significantly however, under the terms of the agreements, the right and responsibility to prosecute rests with the coastal state.</p>

#### *4.2.5 Gulf of Thailand*

This subsection of the Report highlights the efforts/work of the United Nations High Commission for Refugees (UNHCR) in leading and coordinating the international action that sought to protect the refugees and resolve the refugee problem that occurred in the Gulf of Thailand during the 1980s and early 1990s.

Noticeably, the format of this subsection is not mirrored within the tabular matrix utilized in the previous sections, as the piracy outbreak in the Gulf of Thailand directed against the Vietnamese people (also referred to as the ‘boat people’), was initially considered to be a refugee crisis and not specifically an issue of piracy at sea. As such the regional arrangements that followed serve only as prime example of the measures that could be taken in the reoccurrence of similar crisis.

Since its establishment in 1950, the UNHCR has striven to safeguard the rights and well-being of refugees. In so doing, its efforts are geared towards ensuring that refugees can exercise the right to seek asylum, to find safe refuge in another State and can exercise the options of: returning home voluntarily, integrating locally or resettling in a third country.

UNHCR’s involvement in the Gulf of Thailand was preceded by a crisis involving tens of thousands of asylum-seekers (mainly ethnic Chinese) fleeing from Vietnam after the fall of Saigon government. Many were massacred in the sea by Thai fishermen turned pirates with staggering vehemence and frequency. These Thai pirates were mainly motivated by the promise of booty or centuries-old racial antagonism between the Thai and the Vietnamese. The situation was further compounded by the unwillingness of commercial vessels transiting the region that encountered the refugee boats, to offer assistance and to be responsible for several hundred desperate asylum-seekers. Similar treatment was meted out by some regional naval and Coast Guard vessels, via reputable reports, that refugee vessels were often left to sink, and in some cases prevented from landing or pushed back from shore (Liss, 2011).

As a result of the humanitarian crisis, the UNHCR became the primary responsible agency for dealing with the situation, which saw the initial establishment of a working group with a specific focus on the rescue of asylum-seekers at sea and their eventual resettlement (UNHCR, 1983; 1984). In recognition that it lacked a specific legal mandate, the UNHCR relied on the 1951 United Nations Convention Relating to the Status of Refugees and the International Convention for Safety of Life at Sea in its discussions with the IMO and flag state governments to ensure the rescue of the refugees at sea. These discussions were directed towards determining the mechanisms for landing refugees once they had been rescued.

Prior to the anti-piracy initiative in 1982, it is worth noting that efforts by the UNHCR were seen in the 1979 establishment of The Disembarkation Resettlement Offers (DISERO) Scheme instituted by the six cooperating nations aimed at assisting open-registry states. However, for economic reasons, these states were mostly unable or unwilling to provide safe haven; and by 1984, only 60 refugees had moved/processed through this program. In similar effort, further initiatives included the 1982 Rescue At Sea Resettlement Offers (RASRO) Scheme and the 1984 Rescue of Asylum-Seekers in Distress At Sea Program, both of which were focused on the post rescue settlement of refugees, and not the piracy attacks against the ‘boat people’ while at sea.

In a specific effort to halt the piracy attacks, in 1982 the UNHCR signed a Memorandum of Understanding (MOU) with the Thai government which negotiated the start of an international funded anti-piracy program (at-sea deterrence regime) to be administered by the Thai government. In essence, the MOU included arrangements for the provision of funds to the Royal Thai Navy and Police, towards the provision of maritime and air surveillance. Donor funds totaling \$3.6 million were initially provided for the purchase of several patrol vessels and to cover operating costs (UNHCR, 2000).

Anti-piracy efforts initially focused on sea and air patrols, which produced a gradual decline in the number of attacks. However, the program was considered relatively unsuccessful, due to the difficulty in patrolling large sea areas with a limited number of vessels, coupled with the marked reluctance by the Thai government to accept the asylum-seekers. There were reported instances of refugee vessels in distress being left at sea by naval and commercial vessels, and even some naval vessels taking part in the attacks.

With the limited success of the waterborne antipiracy initiatives, in 1984, the UNHCR anti-piracy programme shifted increasingly toward land-based operations. This involved police patrol of the fishing villages where the pirates were believed to have originated. In this regard, the UNHCR assisted in registering fishing boats, photographing crews, and conducting public awareness campaigns on the penalties for piracy. Other areas of assistance were made in linking piracy victims with police and prosecutors, monitoring court trials, arranging witness transfers from abroad, and providing interpretation services. Subsequent to several arrests and prosecutions under Thai law, a decrease in the number of refugees leaving Vietnam was recorded and the program was terminated in 1991.

A notable observation is that even though the Gulf of Thailand piracy attacks in 1970s and 80s were the most serious and violent in terms of loss of life, it was largely viewed as a humanitarian and refugee problem, and not as an issue of law enforcement and there was neither the political will nor the economic necessity for excessive international involvement.

**Discussion Point #2:** *Based on the lessons learned from regional arrangements described above, what factors may contribute to enhance and/or constrain cooperation among littoral states to respond and pre-empt the threat of piracy?*

**Discussion Point #3:** *Since there is a serious potential for criminal attacks on refugees fleeing by sea from areas of conflict or humanitarian disaster, the need for antipiracy initiatives should always be anticipated. In this light, in the event of a sea borne refugee migration, what political and legal mechanisms should be considered to prevent or to respond to piratical attacks?*

**Discussion Point #4:** *With specific regard to the Caribbean Basin, there is a question that is beyond the scope of this Report, but important to address. If marine piracy becomes a transnational issue in the Caribbean region, are the security and coordination provisions established by Caribbean states for dealing with the narcotics smuggling problem adequate to handle a regional piracy outbreak?*

### 4.3 National Models

The Security Council has continuously noted with concern "that the domestic law of a number of States lacks provisions criminalizing piracy and/or procedural provisions for effective criminal prosecution of suspected pirates"<sup>12</sup> and has called upon "all States to criminalize piracy under their domestic law"<sup>13</sup> Further, it has called on those States that have already enacted national legislation on piracy, to review same to ensure the implementation of the relevant provisions of UNCLOS.

In support of this resolution, the General Assembly of the United Nations has also called upon "States to take appropriate steps under their national law to facilitate the apprehension and prosecution of those who are alleged to have committed acts of piracy ..."<sup>14</sup> and has urged all States to combat piracy actively, inter alia, by adopting measures and by adopting national legislation in co-operation with the International Maritime Organization (IMO).

Some States have enacted national legislation on piracy, most of which have been provided to UN-DOALOS and the IMO Secretariat and are available on the website of UN-DOALOS at: [www.un.org/Depts/los/piracy/piracy.htm](http://www.un.org/Depts/los/piracy/piracy.htm).

This section of the Report focuses on how criminal prosecution of piracy is pursued under domestic regimes such as the USA and China. It also discusses how India has recently moved to enact domestic legislation which provides the necessary legal framework for prosecution of persons for piracy-related crime. These countries were selected on the basis that they are large economies with a major naval presence in the Horn of Africa region. The United States, while a member of most of the regional anti-

<sup>12</sup> Security Council resolution 1918(2010), preamble

<sup>13</sup> Security Council resolution 1950(2010), paragraph 13.

<sup>14</sup> See General Assembly resolution 65/37 of 7 December 2010, paragraph 86.

piracy initiatives, still rely on its national courts for prosecutions of cases involving US ships or citizens. Neither India nor China currently participate in the collective enforcement regimes, but tend to pursue an independent capability, which needs to be examined.

### 4.3.1 *United States of America*

The United States has adopted a two-stream policy to dealing with piracy in the Horn of Africa. First, it actively supports and encourages governments in the region to take action against pirates (Ke, 2007). Second, it maintains a robust military presence in the region which supports its efforts in prosecuting piracy suspects in the USA when crimes involve American citizens and/or vessels. With regard to the former, the US has also entered into prisoner transfer agreements with Kenya and the Seychelles (UKFO, 2011), in addition to transporting a number of piracy suspects to the US for trial.

The government of the United States has been very active in the prosecution of piracy suspects from the Horn of Africa. In addition to the presence of military forces in the region, since the start of the crisis there are also United States Coast Guard and Naval Criminal Investigation Service (NCIS) law enforcement detachments on many vessels. More specifically, these federal law enforcement personnel are equipped with powers of search, seizure and arrest under US law. They are also trained in evidence gathering and other criminal enforcement procedures, all of which work towards ensuring that the accused are brought to trial and prosecution problems are kept at a minimum.

The apprehension, prosecution and sentencing of pirates by the USA within its national courts are based on its incorporation of both definitions of piracy from UNCLOS and the armed robbery provisions of the SUA convention into its national criminal law in addition, the law also provides that a seaman delays violent hands upon his commander to prevent him defending his vessel goods is defined as pirate. Under the 18 USC 1651, the crime of piracy is defined by the “law of nations”, which has seen some discussion in US courts as to whether definition of piracy is still as it was in the 19<sup>th</sup> century - restricted to armed robbery of ships - or whether it has evolved and also now includes the UNCLOS definition.<sup>15</sup> since the United States is not a party to UNCLOS, the court took the view that it had become part of customary international law.

A notable point of illustration is the recent conclusion of the *United States v. Shibin* trial in April 2012, where the accused acted as a negotiator for the ransom, but was found guilty even though he had never been to sea.<sup>16</sup>

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<sup>15</sup> US v. Hasan (E.D. Va., November 9, 2010)

<sup>16</sup> See note 4

### *4.3.2 India*

India has been active in antipiracy efforts in the Indian Ocean and Horn of Africa. In addition to providing naval patrols, it has embarked on protective detachments, without having a piracy statute. India has apprehended, tried and convicted a number of Pirates using the Indian Penal Code, the Unlawful Activities Prevention Act, Arms Act, and a century-old admiralty law with which piracy suspects have been charged with armed robbery, riot, and attempt to murder (Times of India, 2012). This approach has met with mixed success. In one case, the Bombay criminal court convicted on 9 out of 11 charges, and imposed a heavy sentence, however all charges were subsequently overturned on appeal, India's efforts and level of prosecution may add merit to the position that while it is necessary to satisfy the requirements for an internationally-accepted definition of piracy (for purposes of international jurisdiction) national courts do not require a specific piracy provision but they use the appropriate national criminal code offences dealing with armed robbery, kidnapping, assault etc. but may use the appropriate national

At the time of writing, India was in the process of adopting its first national piracy act. A bill is currently before the Indian parliament which will make piracy a crime punishable by death or imprisonment. The definition of piracy in the new act includes both the UNCLOS terminology, in addition to “any act which is deemed piratical under the customary international law” as stated in article 2(1) (e) (iv). This would seem to give India both the widespread acceptance of the UNCLOS formulation, and the ability to incorporate any further expansions as they become accepted, such as organizing or financing pirate enterprises.

### *4.3.3 China*

In addition to having a long history of dealing with piracy, China has recently joined with the international community in the Horn of Africa and has been promoting an international approach to solving the problem. This is a new development considering China's previous tendency to deal with similar issues independently. The 1998 hijacking of a Chinese vessel in the South China Sea resulted in trials under the Chinese penal law, and the execution of 13 convicted Pirates of Indonesian and Chinese nationality (People's Daily Online, 2000).

With the serious effects that the Horn of Africa piracy has had on international shipping, China has for the first time deployed naval vessels outside the South China Sea region to protect Chinese shipping from attack. The People's Liberation Army Navy vessels in the region operate independently from the multinational naval task force. Chinese warships have also been seen escorting Chinese merchant vessels



in a manner of the Second World War North Atlantic convoy system. China participates in SHADE but not in CTF 151 or 150. This may be due to a reluctance to participate in operation with United States naval forces, whose interpretation of the law of the sea is at odds with China's.

China has expressed support for regional solutions to the piracy problem, and has supported the idea of using Somali courts for the prosecution. It is also specifically endorsed the prosecution of pirates under the framework of existing international law, which may also be demonstrative of a reluctance to accept any enhanced definition of piracy beyond that found in UNCLOS, to which it is a contracting party (Communis Hostis Omnium, 2012).

**Discussion Point #5:** *Is the Horn of Africa model of utilizing national courts within the region, with international support, to prosecute pirates a suitable model for use in other regions where piracy is becoming a serious problem? What are the implications for implementing suspect and post-trial transfer schemes in other regions?*

#### 4.4 Other Institutional Arrangements

With particular reference to North American Treaty Organization (NATO) and the European Union (EU), this section of the Report seeks to highlight the major roles undertaken by these two western political alliances in the ongoing antipiracy operations off the coast of Somalia and in the Indian Ocean. In addition to providing organizational support, both NATO and the EU have assigned and directed military units tasked with operational mandates. Notably, the EU's objectives are pursued within an established, clear legal framework (EU, 2011), whilst NATO's work/involvement has been done on the basis of an ad hoc arrangement (Ploch, *et al*, 2009).

Further, since both NATO and the EU have an overlapping membership, there are obviously serious political implications to participating in one or both of these arrangements. Probably most significantly, NATO has a major US presence in all decision-making levels, while the EU does not.

With regard to the specific operations of **NATO**, it may be noted that:

- NATO's main governing body, the North Atlantic Council, established its antipiracy mission and operations based on the authority of the UN Security Council resolutions. Initially in 2008, at the request of the Security Council, NATO approved operational/military protection for the World Food Program vessels providing relief for the famine in the Horn of Africa.
- Further, in 2009 the Council approve operation Ocean Shield, and assigned a multi-ship task force (TF 508), the NATO shipping center at Northwood, UK, and a headquarters cell at

Northwood to conduct and coordinate antipiracy operations in the Horn of Africa region. The NATO shipping center has been acting as a point of contact for vessels transiting the region, in addition to providing advice on the locations of potential threats, and receiving reports of ongoing activities from the merchant ships in the area.

With reference to the **European Union**, it is worthy to mention that:

- The basis for joint operations are authorised under the EU Treaty, within articles 14, 25, and 28. More specifically, art 14 provides ‘*joint actions shall address specific situations where operational action by the union is deemed to be required*’. This is further supported by art 25 which establishes political control and strategic direction; and art 28 which institutes the financial mechanism.
- Its involvement commenced with a European Council decision<sup>17</sup> pertaining to the approval of a joint action plan by the Council earlier in 2008<sup>18</sup>. These decisions were in support of UNSC’s resolutions 1814, 1816, and 1838 to provide support and protection to the World Food Program, to protect the vulnerable vessels, and monitor fishing activity.
- Under this authority the EU instituted Operation Atalanta and assigned EUNAVFOR TF 465 to carry out the mandate. EUNAVFOR has also established the Maritime Security Centre – Horn of Africa (MSC-HOA) as a vessel monitoring and information Center.

There are probably several valid reasons for the difference in approach that NATO and the EU have taken to dealing with an out-of-region piracy situation. The overlapping membership means that most of the EU member states are also members of NATO, and states choose to participate in one and/or both antipiracy operations, in addition to some states participating in CTF 150 and CTF 151. The EU is a more politically cohesive body, with decisions of the council of Europe binding on its members. In addition, the EU has signed collective suspect and prisoner transfer agreements with Kenya, the Seychelles, and Mauritius.

As a result, there will be a more common legal operating framework for the EU operation Atalanta participants than for the NATO operation Ocean Shield. While any EU participant can take advantage of the transfer agreements with respect to any suspect pirates detainees, the NATO operation will have to rely on the individual legal arrangements made by its Participating States. NATO and EU members will be subject to their national laws and policies. In addition, EU operations will also be subject to the

<sup>17</sup> EU Council decision 2008 918 08/12/2008/

<sup>18</sup> EU Council joint action 2008//851

European Court of Human Rights for determination of the legality of its actions. On the one hand, the EU can have a more consistent set of rules of engagement and suspect handling procedures. On the other hand, NATO participants have greater independence of operation.

**Areas for further research:** In discussing NATO and EU authorised missions, there is need to further examine the degree (if any) of legal attribution participating member states retain for detained pirates. In essence, can a detained pirate claim refugee status onboard an EU or NATO vessel? Are there varying human rights standards applicable to these missions, as well as varying degrees of attribution to the state involved? If different, is this important to the level of participation seen from these two missions?

On the political side, the EU's antipiracy strategy will be subject to greater control by the Council of Europe, and will be constrained by EU objectives and other areas, such as fisheries policy, aid and assistance, and environmental protection. Since NATO's function is more limited, primarily to safety and security, there should be fewer outside influences to constrain operations. It remains to be seen whether the EU's relationships with non-member states, such as Russia, China, and India are any easier than NATO's, which is traditionally on the military side being in an adversarial situation with these countries.

**Discussion Point #6:** *In considering the work and contributions of NATO and the EU, these discussions seek to encourage further deliberations regarding the desirability of establishing a specific legal framework for international organizations to pursue a collective approach to the prosecution of piracy.*

## 5. APPREHENSION OF PIRACY SUSPECTS

Among the many critical legal areas examined in this Report are the *rights, duties and obligations of states in the apprehension of piracy suspects at sea*. This has always been one of the major dilemmas facing naval enforcement units, as there are frequent deliberation/determination regarding ‘where’ arrests can be made, ‘who’ can be arrested and ‘what rights’ must be recognized.

Preliminary discussions under section 4.1 have highlighted entities with authority under international law to carry out/execute antipiracy enforcement activities. In this regard, UNCLOS recognizes the traditional constabulary role of navies and warships. Unlike the explicit authority given to warships for pollution enforcement in part XII, article 224, warship’s enforcement authority on the high seas is implied by its right of visit. In the latter instance, under article 110, this extends the customary international law rights to inspect ships encountered (i.e. approach, or hail to determine the identity), to determine their nationality, and to ascertain that they are not carrying out any one of several enumerated proscribed acts.

In article 29, UNCLOS defines a warship as a ship belonging to the armed forces and state, bearing the external marks distinguishing such ships of its nationality, under the command of an officer duly commissioned by the government of the state, and whose name appears in the appropriate service list or its equivalent, and manned by a crew which is under regular armed forces discipline. This definition also covers coast guard vessels, marine police, and fisheries enforcement vessels.

As such, the following discussions seek to present an outline and context of the rights, duties and obligations of states in the investigation and apprehension of suspect pirates.

### 5.1 Apprehension and Investigation on the High Seas

Similar to policing on land, warships, when carrying out their constabulary role have customarily been able to inquire into the identity of a vessel encountered on the high seas, and to determine whether it is involved in certain proscribed activities as set out in UNCLOS Art 110. This right is exercised within several categories (Reuland, 1989).

Firstly, within the right of reconnaissance, a warship is allowed to pass as closely as safety permits, to a vessel to determine its flag, name, and port registry; in addition to observing the overall demeanor the ship. If nothing was out of the ordinary, and a warship was satisfied with the identity of a vessel, no further right of intrusion would exist. This is also referred to as the “Droit de reconnaissance”

However, if there was a reasonable ground for suspicion as to the identity of a vessel or its activities as set out in Art. 110, the warship was allowed to exercise the “droit d’enquete de pavilion” where an

officer of the warship is allowed to board and examine the ship's papers to determine whether it had a valid registration, and right to fly its flag. Again, if nothing untoward was found, the warship had no further justification for detaining the vessel.

In the event that the ship's papers were not in order, or there were reasonable grounds for suspicion that the vessel was engaged in piracy or the slave trade, the warship could undertake a more detailed investigation of the vessel to determine if this is so. If nothing is found, and vessel has incurred expenses as a result of being detained for inspection, the warship's flag state would bear the liability.

This right of visit has been included in UNCLOS article 110, with the addition of a provision allowing inspection for unauthorized broadcast, or pirate radio (Fink, 2010).

However, it must be borne in mind that while international law and the UNCLOS Convention determine the rules that must be followed by a warship in investigating piracy, it is the national criminal law of the state which will govern the exercise of authority. This will include powers of arrest, search and seizure by the warship's crew, whether the courts of the state have jurisdiction outside their own territorial limits, the nature of the charges, and the criminal proceedings. These will determine whether or not the suspect pirates may be successfully prosecuted, and the punishment to be faced.

It is worthy to note that the SUA Convention, while it permits greater scope over the type of criminal activity and geographic location, it does not authorize any independent constabulary activity by warships "seaward of any state's territorial sea". Warships must first obtain the permission of the flag state before boarding, or may board at the request of the flag state. States may take jurisdiction over acts against their flag ships, by or against its nationals, and within its territory, and must try or extradite those who have committed the proscribed acts against other state parties, if they are found within their territory. The SUA Convention does not specifically make provision for flag state duties for individuals on board their ships, which may be assumed from general flag state obligations. Masters are permitted to deliver individuals who they believe have committed an offence under the Convention to any other state party, though it may be presumed that this would have to be done in compliance with other flag state criminal and human rights laws.

### *5.1.1 Issue of Universal Jurisdiction*

What makes piracy different from most other crimes is the issue of universal jurisdiction. Piracy has traditionally been considered such a serious matter that any state capturing a pirate within the high seas was entitled to prosecute irrespective of the nationality of the ship(s), crew, or the pirates or where the piracy took place. This has been codified in UNCLOS article 105 which states that "every state may

seize a pirate ship or aircraft... and arrest the persons and seize the property on board... the courts of the State which carried out the seizure may decide upon the penalties to be imposed...”

Significantly, while the concept of universal jurisdiction allows states to prosecute pirates, states are not required to do so. UNCLOS article 100 requires that states cooperate to the fullest possible extent in the oppression of piracy, but does not specify the extent of this cooperation. The SUA convention makes a greater demand on its State Parties to criminalize and prosecute or extradite for robbery at sea, as it requires a nexus or connection between state and criminal event.

### *5.1.2 Requirement for a National Nexus*

As previously pointed out, UNCLOS does not require any national connection with the pirates for state to take jurisdiction. However, the national criminal law of the states involved often require that the crime be committed by or against one of its nationals, its territory or territorial sea, or against one of the ships. The question is not whether a state can, as a matter of international law, prosecute a pirate, but does it have the will and the national law to do so.

### *5.1.3 Consideration of ‘Outside the Jurisdiction of any State’*

The addition of the term ‘in a place outside the jurisdiction of any state’ in the UNCLOS definition of piracy requires further clarification, particularly on the basis that if piracy is a crime of universal jurisdiction, for piratical purposes, no area is free the jurisdiction of some state. Pirates either operate within the territory or territorial sea of a state, or on the high seas where the crime is under the universal jurisdiction of all states, while the categorization of their crimes, as either piracy, armed robbery at sea, or some other offense will depend on where it occurs.

It may also be presumed that this provision was probably originally inserted to include territorial areas such as uninhabited and undiscovered islands. Currently however, all available islands have been claimed; so arguably the only place outside of national jurisdiction may be a brand-new volcanic island outside the territory of any existing state, or possibly the Antarctic or an ice flow.

The more pertinent discussion is whether in the case of a failed state such as Somalia, the lack of an effective government may mean that the territorial seas are effectively outside of any state’s jurisdiction. This should not be the case, since irrespective of the existence of an actual government; the sovereignty of the state over the area is not really in question. (Geiss and Petrig, 2011). This would preclude the assimilation of the territorial seas of a failed state to "places of beyond national jurisdiction", and require another legal basis for the entry of foreign warships in the territorial sea in pursuit of pirates.



## 5.2 Apprehension and Investigation within Territorial Limits

In general, the apprehension and investigation of ‘piracy’ or more properly ‘armed robbery against ships within the territorial waters of a state’ is that state’s entitlement and responsibility. Since other states may not enter the territorial waters of another state without permission (*except for the exercise of the right of innocent passage*), the primary responsibility for prosecuting crimes and apprehending criminals within the territorial sea rests with the coastal state.

### 5.2.1 Specific National Laws Dealing with Piracy-Like Crimes

In most jurisdictions, the crime of piracy as defined under national criminal law, following the international law definition, occurs on the high seas (which includes the EEZ). Crimes of violence, robbery, murder etc. committed against ships and passengers within the territorial sea are dealt with by the adjacent coastal state utilizing the regular provisions of its criminal law. This may be defined as committing ‘piratical acts’ which are generally acts committed against ships or the safety of navigation. On the other hand, crimes against persons are dealt with through ordinary criminal statutes dealing with robbery, murder etc. This is what makes dealing with piracy so difficult for naval forces operating outside their own territory. While operating on the high seas, warships enforce the national law of their flag. However if authorized, once they enter into the territorial seas of other states, they enforce the laws of that state.

### 5.2.2 Entry into Territorial Seas

Further to discussion above, there are several situations where foreign warships may have or at least claim a legal justification for entering into the territorial sea of another state to take action against piracy. However, these are the exceptions rather than the rule, and there is considerable debate among states as to the legality of some of the practices. Some of these allowances are as follows:

**Under Treaty** - The most obvious mechanism for obtaining permission to enter into the territorial waters of a coastal state to conduct antipiracy operations would be a specific treaty granting permission. There are several possible mechanisms which could be used, though none are specifically in place for dealing with piracy.

**Reciprocal enforcement agreement** - Under such agreement, for example, the Niue Treaty on Cooperation in Fisheries Surveillance and Law Enforcement in the South Pacific Region (1993), there are provisions allowing for warships and enforcement vessels of adjoining countries to enter into the territorial or other waters of their neighbors for the purpose of surveillance and enforcement. While this treaty specifically deals with fisheries matters, other agreements deal with other issues such as drug

smuggling. The treaty includes provisions for a subsidiary agreement allowing a right of entry based on the requirement that the legal authority exercised is that of the coastal state, not the flag state of the enforcement vessel. Currently, New Zealand, Cook Islands, Tokelau, Tonga, Niue and Samoa have such an agreement, with a wider multilateral agreement scheduled for the end of 2012.

Similar provisions found in article 4(5) of the Djibouti Code of Conduct allow the “reverse hot pursuit” of pirate vessels into the territorial sea of member states. In these instances, the code specifies that: *any pursuit of a ship, where there are reasonable grounds to suspect that the ship is engaged in piracy, extending in and over the territorial sea of a Participant is subject to the authority of that Participant. No Participant should pursue such a ship in or over the territory or territorial sea of any coastal State without the permission of that State.* In this instance, it is pointed that the use of the word “should” in the last sentence, makes this provision advisory but not mandatory, though under UNCLOS and customary international law, this would not be the case.

**Ship rider agreements** - Ship rider agreements contain similar provisions that allow vessels from one state to enter into the territorial waters of another for purposes of enforcement.<sup>19</sup> However, most (if not all) ship rider agreements lack reciprocity, wherein, they only permit one state to enter another's waters for enforcement purposes (but not vice versa). A number of ship rider agreements have been entered into, most notably between the United States and the Caribbean island states, and the United States and Canada.

The terms of these agreements generally provide for the placement of enforcement officers (ship rider) of the sending state to be carried on a vessel (normally a warship of the coastal state) for the purposes of enforcing the laws of the coastal state within its territorial seas. The authority and the jurisdiction remain with the coastal state. However, in the absence of enforcement officers from the coastal state, the agreement often gives the other party (sending state) the authority to enter into territorial seas and exercise powers of search and seizure and arrest. The ship rider agreements may specify the type of offences (generally drug smuggling) that the invited vessel can enforce. Usually the agreement will specify in which national courts in the suspect would be tried. For example, in the case of USCG ship riders operating in the Caribbean Basin and West Coast of Central America, when the warship commences enforcement action, the ship actually hoists the USCG flag and operates under USCG law enforcement jurisdiction (especially on the high seas). When operating in this fashion, the suspected drug-runners are prosecuted in (mostly) Florida Courts. Not sure how the operation is conducted where

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<sup>19</sup> Ship rider provisions are also contained in The Djibouti Code of Conduct and are referred to as ‘Embarked Officers’ in Article 7.

the warship operates in its own waters or another country's waters (3rd party coastal state), but one would imagine that suspects apprehended in territorial waters by their own state would be prosecuted in that state. But if apprehended in another state's territorial waters - warship A carrying USCG Ledet team apprehends suspects in State B's waters - the USCG would retain jurisdiction, either by virtue of the agreement or upon consultation with State B.

**Under the authority of the United Nations** - There are several possibilities for warships operating under a United Nations mandate to enter into the territorial sea of another state for the purposes of antipiracy enforcement.

*UN Security Council Resolution:* The major source of a right of entry is through a UN Security Council resolution authorizing some or all UN member states to enter into the territorial waters of the third state for purposes of maritime surveillance and enforcement. This has most recently been exercised in the case of Somali under the 2008 UNSCR 1846, Art 10(a). Security Council resolutions will generally grant a specific authority for action, and specify the area, purpose, duration of the UN sanctioned operation and any limits to be put on the exercise of authority. Since the authority the UNSC is not limited to maritime areas, its resolutions may also authorize incursion onto the land for purposes of 'maintaining the peace'. It should be noted that in the case of Somalia, the UN Security Council adopted resolutions allowing UN member states to enter into Somali waters **following the request from the Transitional Federal Government of Somalia (TFG) for an international assistance to address the problem** and under the condition that "it shall not be considered as establishing customary international law."

*UN Flag Operations:* There have been a number of historical instances where warships taking part in UN operations have flown the UN flag in addition to the flag of their nationality. This situation is recognized under UNCLOS article 93, where contrary to previous articles prohibiting a vessel sailing under two flags, vessels employed on the official services of the UN and its specialized agencies may fly the flag of the organization.

While not specifically authorized by a UNSC resolution to enter the territorial seas of another state, warships operating under the UN flag may have a right to enter into the territorial seas of any UN member state. Under article 105 of the Charter of the United Nations "the organization shall enjoy in the territory of each of its members such privileges and immunities as are necessary for the fulfillment of its purpose". Arguably, a warship engaged in UN antipiracy operations might be permitted to legally enter the waters of any UN member state without obtaining prior consent, to

pursue or apprehend pirates, or even search for them if this was deemed necessary for the ‘fulfillment’ of an antipiracy operation under UN sanction (Allison, 1992).

**Other mechanisms** - Under article 17 of the UNCLOS, all ships enjoy the right of innocent passage through the territorial sea. Article 18 of the Convention further states that passage shall be continuous and expeditious, unless “rendering assistance to persons, ships or aircraft in danger or distress.” If an attack by pirates places a vessel in danger or distress, a warship, while in the territorial sea for purposes of innocent passage, could be entitled to take action, without first obtaining the coastal states permission. This would seem to indicate that while a warship may not enter into the territorial seas of a coastal state without permission to look for pirates, it could take action against them if they are encountered once legitimate innocent passage has commenced. The duty to render assistance is also found in article 98 of UNCLOS, adding the obligation to proceed with all possible speed. It would be expected of any warship engaged therein, would notify and seek permission the coastal state as soon as possible.

*Right of assistance entry:* It is the position of the Government of the United States that ships and aircraft commanders have an obligation to assist those in danger of being lost at sea. This obligation allows entry into the territorial sea to engage in a legitimate effort to render immediate rescue assistance to those in danger or distress at sea without permission of the coastal state. This right applies only to rescues where the location of the persons or property in danger or distress is reasonably well known. However, this does not extend to conducting searches when the location is not well determined (USA, 2010).

It may be argued that an attack by pirates on a vessel is at least as great a hazard to life as fire or collision. On that basis, a warship detecting a pirate attack within an adjacent territorial sea may be justified in entering directly without seeking permission of the coastal state. The USA further maintains that the even if the warship rendering assistance is not directly under attack, its right of self-defence could be extended to protect the vessel being rescued.

It should be pointed out that this is a US government doctrine which has not received a large amount of support from the international community. However, there are very few instances of countries successfully objecting to the United States Navy warship exercising this right (Cohen, 1999).

### 5.3 Catch and Release Problems

One of the most contentious problems in current Horn of Africa antipiracy operations is the issue surrounding the ‘catch and release’ by warships of some of the participating nations. In essence, those warships generally: board and inspect suspect vessels; remove weapons and other piracy related equipment, and thereafter, release the piracy suspects. The underlying reason why this issue is so contentious is that many of the released suspects are caught by other antipiracy forces during subsequent inspections.

Several reasons are given for ‘catch and release’ as a practice. First, the warship involved may not have the necessary legal authority from its own government to arrest and detain piracy suspects. Second, even if these ships do have legal authority, their officers may not have the appropriate training or legal capabilities to ensure that the procedures followed for any arrests and subsequent investigations meet the required legal standard for a successful prosecution in its home state. Third, although this is usually unstated, is the reluctance to take suspects back to the home country for trial and possible incarceration. The cost and humanitarian hardships on the accused are common excuses (Pemberton, 2010).

Other reasons for this apparent practice is the lack of transfer agreements between a warship’s state and another regional state; the fear that domestic laws will not allow such transfers due to humanitarian reasons; and the fear that refugee claims for asylum (discussed in section 5.3.2) would result from prosecuting pirates from third world countries in domestic courts. Although the legal basis for such claims may be poor or suspect, host nations are understandably reluctant to see such claims regardless of the resources required to refute such claims, duration of time for adjudication etc.

#### 5.3.1 Obligation to Prosecute Pirates

There is no obligation under UNCLOS to prosecute pirates, and as such countries are able to determine under what conditions they will or will not turn piracy suspects over for trial. Some argue however, referring to the ILC commentary on article 38 (ILC’s 1956 draft article which is identical to article 100 of the LOS convention), that states would be responsible if they neglect to take measure against pirates when allowed to do so. The precise argument is that insufficient steps from states to bring pirates to justice could result in legal claims brought against these states (Roach, ASIL 2010). However, there is controversy over the authority provided under article 105 of UNCLOS which indicates that “the courts of the State which carried out the seizure may decide upon the penalties to be imposed”

**Additional research** is needed to determine whether this permits third party states to conduct prosecution or whether the arresting state would be required to exercise this jurisdiction.

### 5.3.2 Issue of Refugee Claim

One of the stated concerns with the arrest and prosecution of suspected pirates in the Horn of Africa area is that the suspects may make a claim for asylum in the prosecuting state either at the time of trial, or at the end of a period of incarceration. It has also been put forward that under European human rights laws, a pirate refugee claimant could also make a request for family reunification. Even though this may be seen as somewhat drastic, it is a potentially successful means of gaining entry into Europe or North America (as desperate refugees) from some of the world's most troubled countries (Dutton, 2011b).

However, there are a number of factors which would complicate any attempt by piracy suspects or convicted pirates to gain asylum in Europe or North America. First, since a refugee is someone who is fleeing on a well-founded fear of persecution on racial, religious or other grounds, the pirate who was engaged in criminal activity would not qualify (Dutton, 2011b).

Another point of view that is probably untenable is that a convicted pirate, having completed the term of sentence/incarceration in a western jail, would not be able to return home for fear of being view by his associates as suspicious or untrustworthy – in this instance, fear of criminal reprisal is not considered suitable grounds for granting asylum (Dutton, 2011b). What might be sustainable are claims that upon return, that pirate would be subject to torture or other abuses of human rights. Even if this may be sufficient for *refoulement*, the pirate-refugee claimant would have to prove that a personally specific threat would definitely incur and not just a general threat from an unstable social situation.

### 5.4 Use of force

There are two major issues to be dealt with in considering the use of force for the apprehension and detention of pirates. First is the appropriate level of force which may be used in the boarding of suspect vessels during the apprehension of suspected pirates. A corollary to this is the standard of treatment which must be observed when releasing suspected pirates during 'catch and release'. The second issue is the mistaken or careless use of force against innocent vessels suspected of carrying pirates.

These situations highlight the difficulties faced by naval forces in dealing with heavily armed and extremely dangerous criminals who are suspected of committing serious acts of violence against innocent ships' crews. The general principles respecting the use of force articulated by the International Tribunal on the Law of the Sea are that use of force must be avoided as far as is possible, but where unavoidable, must not go beyond what is reasonable and necessary (ITLOS, 1999). The level of violence associated with contemporary piracy is probably sufficient to justify the prudent use of force without acting in a brutal or punitive manner. This includes the use of force as necessary to disrupt piracy attacks, enforcement of boarding and inspection, when appropriate and apprehension of suspected pirates



etc. It is not sufficient justification to use force as considered under the Laws of Armed Conflict of International Humanitarian Law (i.e. use of deadly force against identified pirates is not justified except in situations of self-defence or defence of others, akin to the use of force authorization enjoyed by law enforcement bodies). This is in contrast to the historical treatment of pirates, who as “enemies of all mankind” could be attacked and destroyed upon sight. (Lieber Code Art 82<sup>20</sup>, advocates that those who took up arms but were not part of a military forces [unlawful combatants], upon capture, “are not entitled to the privileges of prisoners of war, but shall be treated summarily as highway robbers or pirates”).

There are substantiated reports of legitimate fishing vessels and other small crafts being fired upon as suspected pirates. Without a close examination, it is often difficult to determine whether a vessel is engaged in piracy or not. Captured fishing vessels are used as mother ships, and the small vessels used in the attack, are often fishing skiffs or of similar designs. Local fishermen may often be armed for self-defence as well, since they are also the targets of pirate attacks. Foreign vessels transiting through local fishing areas are often approached by local fishing vessels attempting to protect nets and gear. This has been the subject of recent shipping advisories from both the MTC and the NATO shipping centre, and indicates the need both for a clear demarcation of local fishing areas, and a better understanding of local fishing practices.

It should be emphasized that antipiracy operations are law enforcement and not an armed conflict situation. The standard to be applied is based on the principle that the use of force must be avoided as far as possible, and only used to the level necessary to achieve compliance and to ensure the level of safety of personnel involved (Geiz and Petrig, 2011). There is a need for clear international guidelines on appropriate use of force, and for establishing liability where it is used improperly or in error.

#### ***5.4.1 Obligation to Rescue and Safety of Life at Sea***

Most recently, the issue of use of force in the suppression of piracy has received a fair bit of public comment, due to news reports of the harsh treatment of piracy suspects by special operations forces after rescuing a hijacked ship’s crew<sup>21</sup>. Purportedly this video shows suspected pirates being transferred to a vessel that was subsequently blown up. Another report suggests that suspect pirates were set adrift in their boat with no food or water and a broken engine and were never seen again (RIA Novosti, 2010). While these are extreme examples of what may be patently excessive use of force by antipiracy forces, it

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<sup>20</sup> Instructions for the Government of Armies of the United States in the Field (Lieber Code). 24 April 1863.

<sup>21</sup> Russian Navy vs. Somali pirates (available at <http://www.youtube.com/watch?v=oTrkcQJ9i2I>)

highlights the problem faced by military personnel of the standard of care that must be accorded to suspected pirates if they are to be released at sea and not arrested and detained

There are specific legal obligations on states under Article 98 of UNCLOS, the 1979 International Convention on Maritime Search and Rescue and the Safety of Life At Sea Convention, to require that any person in distress at sea be rescued. This leads to the slightly humorous observation that if enforcement officers made a pirate ‘walk the plank’ there would be an immediate duty to rescue him as a soul in distress. This would obviously preclude any efforts to disable or otherwise incapacitate a suspected pirate vessel and abandoning it, and the suspected pirates at sea with no expectation of survival, or to release piracy suspects without ample food, fuel and water to make it to shore. The obligation to render assistance to those in distress at sea would NOT preclude incapacitating a suspect pirate vessel. It would however, require that the suspended pirate(s) be embarked in the warship and then returned to shore.

### *5.5 Status of Pirates and Pirate Suspects*

One of the frequent questions that have arisen in addressing contemporary piracy pertains to the status accorded to pirates or suspect pirates. This question seeks to determine whether pirates are criminals, combatants or some form of quasi combatant, terrorists or possibly a combination of all three. According to the status which pirates received, a further determination is made on whether they can be prosecuted, the applicable laws, rights and other entitlements to be accorded as well as the procedures which must be followed if they are brought before a tribunal or court.

#### *5.5.1 Criminal Status*

Piracy outbreaks in the Horn of Africa were initially attributed to the defensive actions of Somalia’s local Coast Guards who were seeking to provide protection against perceived threats of illegal foreign fishing in Somali waters (Wardheernews, 2009). Despite the underlying rationale for their actions, the hijacking of merchant ships, taking of hostages and demanding ransom for their release became criminal rather than constabulary, especially when accompanied by the brutal treatment meted out against captured crews. If piracy acts are considered criminal, a subsequent query would seek to determine the type/kind of criminals that would be most appropriate to refer to pirates.

There have been some attempts to classify contemporary pirates as some form of terrorist or terrorist associate. While there is no doubt that some pirates operate in close proximity to known terrorist organizations, there is scant evidence to date that the pirates themselves are engaged in any form of terrorist activity, regardless of location, even though there have been reports of some dealings between pirates and terrorists groups in the Horn of Africa (Reuters Africa, 2011). In contrast however, their

motivation seems to be entirely economic, geared towards receiving ransoms (in the case of the Horn of Africa) or seizing cargo, vessels or valuables (in other locations), instead of making a political statement.

**Area for further research:** Pirates' association with terrorist organizations as a growing concern.

However, the reference to pirates as 'ordinary criminals in extraordinary circumstances' may be considered as a fair assessment, as pirates commit robbery, assault, murder and other acts of violence against their victims. These actions are not quantifiably different from the criminal actions onshore. The rhetoric that has been used to describe piracy as a heinous crime is really overstating the fact, as it should be recognized that the act of piracy itself is merely the carrying out of fairly ordinary crimes in the marine environment. It has been argued that as ordinary criminals, they should be dealt with according to the criminal law and procedures of the prosecuting state, on the basis that they are entitled to the full protection of the law, the presumption of innocence before trial (as per the 1966 International Covenant on Civil and Political Rights), and the expectation of punishment after conviction.

Without underplaying the seriousness of the crime, especially to its victims, piracy is a crime directed against persons and property. It should be fairly categorized as crimes against humans, but not crimes against humanity, though there are individual situations where Pirates could commit such acts. The DMPP research would clearly reinforce the assertion that piracy does not compare to genocide and other war crimes. It is a serious crime, but not the most serious crime. A further point to note is that, while the enforcement of piracy laws often rests with the military, prosecution is facilitated through civilian criminal justice systems.

### *5.5.2 Quasi-Combatant Status*

It has been argued that the pirates have a quasi-military status and as such the laws of armed conflict should be applied in their apprehension and trial (Kontorovich, 2009a). This has been particularly applied in regions such as the Horn of Africa where civil war and other armed conflicts take place in close proximity to pirate activities. In these instances, it has proven difficult at times, to determine whether armed individuals are pirates or civilian combatants. One argument put forward is that since military forces are being used against pirates, and on several occasions pirates have actually attacked military vessels, they should be treated as combatants and therefore are entitled to some of the rights under the Geneva Convention (Kontorovich, 2009b).

An analysis of the above argument would indicate that it is not sustainable for two reasons. First, if pirates are involved in a criminal enterprise and are committing criminal acts, the mere fact that they are being confronted by military forces, does not change the status of the act, or the perpetrators. A

combatant status would be more appropriate if these pirates were part of a local conflict, operating strictly against targets from the opposition, and adhering to the required rules of the laws of armed conflict. Second, since military forces are entitled to be targeted during a conflict for purposes of attrition, pirates could be attacked without provocation, or without any evidence that they have committed a specific crime. On the other hand, some scholars have recommended that as criminals they must be arrested and brought to trial for acts and attempted acts of piracy (Guilfoyle, 2010b).

**Further deliberation** is required regarding the legal determination of when conflict is deemed to exist thereby triggering a possible combatant status.

Interestingly, the National Defense Act of Canada 1985 includes ‘pirates’ in its description of the term ‘enemy’<sup>22</sup> which might result in them being tried by court martial. Despite these provisions, in summary, one may conclude that pirates are ordinary criminals to whom the laws of armed conflict do not apply (Guilfoyle, 2010b).

A major problem is using military forces for civilian law enforcement. Even though warships are equipped to carry out search and apprehension activities, they have difficulty in satisfying the requirements of national law and carrying out a legal interdiction. Warships have been doing constabulary duties as one of their major functions for centuries. It is only recently however that increased standards of judicial oversight have emphasized the need for scrupulous attention to the procedural legalities of enforcement, in addition to operational effectiveness.

Warships already conduct and are well versed in conducting legal interdictions pursuant to UNSC authority. However, this would require augmentation (embarked MPs, Legal Advisors etc.) to conduct interdictions, detentions and investigations to a law enforcement standard. Also, most western navies are precluded from conducting straight law enforcement activities (*posse comitatus* in the USA), with the exception of the US Coast Guard which has a dual mandate of maritime law enforcement (USC title 10) and national defence (USC title 14).

**Discussion Point #7:** *What mechanisms for entry into the territorial sea or changes to the regime of hot pursuit might be possible and acceptable to allow antipiracy enforcement forces sufficient latitude to deal with the problem of escaping pirates?*

**Discussion Point #8:** *Is there a need for a designation of ‘pirate waters’ which could be applied to areas of the territorial sea of failed or failing states, and would allow anti-piracy enforcement by foreign warships?*

<sup>22</sup> “enemy” includes armed mutineers, armed rebels, armed rioters and pirates; National Defence Act (R.S.C., 1985, c. N-5 s.2)

## 6. PROSECUTION AND INCARCERATION OF PIRATE SUSPECTS

### 6.1 Successful Pirate Prosecutions

Between 2006 and February 2012, 1091 individuals were being prosecuted or awaiting trial in 17 different countries for piratical acts and of these, 612 have been convicted. A review of the statistics contained in Table 5 would indicate that while the majority of these were carried out in the countries surrounding the Gulf of Aden and Horn of Africa, there were still prosecutions in a number of European countries, United States, India, Korea, and Japan.

The prosecution of pirates has not been without many challenges and difficulties. As previously discussed the principle of universal jurisdiction, all states are entitled to prosecute pirates. However, many states are unable or unwilling to do so, primarily because they lack of the necessary political will to establish the required legal machinery, including appropriate laws, either to make of piracy a crime, or to allow their national courts to exercise jurisdiction.

Further, some states are unwilling to prosecute because of the high costs of conducting trials as well as the costs associated with the incarceration of convicted pirates (Guilfoyle, 2011)

Pertinent to the discussions herein, is the fact that piracy suspects are protected by international standards of human rights, including the 1966 International Covenant on Civil and Political Rights, the 1984 UN Convention against Torture, and in some cases, the 1950 European Convention on Human Rights.

Accordingly, pirates are entitled to humane treatment and the right to a speedy and fair trial, (Chang, 2010). These rights are not only upheld in international human rights conventions, but also by the UN Security Council which includes the requirement to act consistently with international human rights laws as part of the antipiracy resolutions for Somalia in the Horn of Africa, according to article 14 of the 2008 UNSCR 1846.

The issue of capital punishment for pirates is more problematic as many States will not extradite a suspect to another State without assurances that a death sentence would not be imposed.

COUNTRY (Jurisdiction of trial)		Prosecutions / Awaiting Trial	Convicted
1	Belgium	1	1
2	Comoros	6	0
3	France	15	5
4	Germany	10	0
5	India	119	0
6	Japan	4	0
7	Kenya	143	50
8	Madagascar	12	0
9	Malaysia	7	
10	Maldives	41	Awaiting deportation in absence of laws
11	Netherlands	29	10
12	Oman	22	22
13	Republic of Korea	5	5
14	Seychelles	88	63
15	Somalia:		
	Puntland	290	240
	Somaliland	94	68
	South Central	18	0
16	Spain	8	2
17	Tanzania	12	6
18	United States	28	17
19	United Arab Emirates	10	0
20	Yemen	129	123
<b>TOTAL</b>		<b>1091</b>	<b>612</b>

**Table 5 showing the number of Pirates prosecuted or awaiting trial, the number convicted within a total of 20 jurisdictions.** (Source: UNODC, June 2012)

## 6.2 Venues for Piracy Prosecutions

In addition to national courts, several other legal mechanisms have been recommended for prosecuting piracy suspects. While these are as a result of the Somali piracy situation, they might well be appropriate for dealing with piracy outbreaks in other areas as well.

### 6.2.1 National Courts of Apprehending Nations

The major mechanism for dealing with piracy is in the national courts of the apprehending nation. This requires that the state has ‘piracy’ listed as an offence under its national law, and has established the necessary jurisdiction to try the case. Some countries accept that as a result of universal jurisdiction, their courts can prosecute pirates irrespective of the nationality of the victims. However, many states



require a national nexus before proceedings are initiated. In the case of Germany, the state will act in cases where a German national is killed or injured, which involve a German flagship, where German shipping company has been blackmailed, or where the suspect was detained by the German Navy. Currently, the Hamburg Public Prosecutor's office is given the responsibility for prosecuting piracy cases. (Brandt, 2009)

Other states are more reluctant to prosecute and practice 'catch and release', citing the difficulty in satisfying the legal requirements of their national criminal justice system. Typical problems encountered relate to insufficient evidence, inadequate national laws, and lack of jurisdiction of the courts (Guilfoyle, 2011) or procedural difficulties with the handling of suspects, evidence and witnesses.

With regard to the Canadian legal practice, the prosecution will not proceed unless there is a reasonable expectation of a conviction. This means, amongst other things, that evidence must meet the standard required for a Canadian trial and as such, any problems with a chain of custody would result in the evidence being not admissible, thereby resulting in a failed case.

Other major procedural difficulties pertain to transporting the accused before a judge, or providing legal counsel within the required time frame as set out in national law, which may be particularly problematic if the warship is halfway around the world from the courts of jurisdiction. The increasing use of video-equipment (e.g. for witness testimonies) may turn out to be a practical solution to these challenges.

### *6.2.2 Courts Martial or Military Tribunals of Apprehending Nations*

Historically, navies dealt with piracy *in situ*, where pirates could be detained, tried, and executed by the arresting warship without recourse to any external resources or assistance (Kontorovich, 2009a). Even though this may not be a wise decision or a desirable practice, it may be still legally possible under some states' jurisdiction to try pirates by court-martial.

The above submission is based on the premise that for states conducting distant water piracy operation such as those conducted in the Horn of Africa, the flexible provisions of a court-martial may be considered more feasible. This is further supported by the fact that courts-martial need not be located in the state itself, but are designed to be held anywhere that the forces of the country are located. In general, it permits the trial of the suspect at or near the location of the offense, simplifying access to evidence and witnesses. It also avoids long delays and facilities to transport the accused back to the ship's home country for trials (Mason, 2011). Further consideration for employing this mechanism may be given to the probability that it may avoid the refugee claims by suspect pirates prior or during trial.

However, attention must also be drawn to the point that courts-martial are often viewed by the civilian population as not satisfying the requirements for a fair trial, notwithstanding the quality of lawyers and judges who may be available. Furthermore, it has been noted that military authorities may have strong reservations about prosecuting civilian criminals using court-martials (UK, 2010).

### *6.2.3 Transfer of Suspects to National Courts in the Region*

A successful enforcement mechanism that has been utilized in the Horn of Africa, has been the transfer of accused pirates to national courts within that region for trial and if found guilty, subsequent incarceration within those prisons. MOUs currently in force include those between ‘Seychelles and the UK, EU, Denmark and China’, ‘Mauritius and the EU’ and between ‘Tanzania and the UK’ provide the arrangements to ‘hand over’ suspected pirates to those courts for trial. As per the agreed terms, the transferring state typically agrees to hand over the accused and all seized property to the transferee state, which undertakes to conduct prosecution in accordance with international human rights standards (Geiss & Petrig, 2011).

Notably, the signing of these MOUs has been contingent upon the provision of legal support and financial assistance to provide for the added cost of trial and subsequent incarceration. International assistance programs have also employed various methods and funding that seek to refurbish local prisons, train judiciary officials and lawyers, in addition to providing other equipment necessary for upgrading judicial facilities within those countries (UNODC, 2012). All of these improvements have been focused on meeting prescribed international human rights standards and laws for trial or incarceration.

In addition to raising the local standards of criminal justice, these improvements raised concerns regarding inconsistencies in the justice mechanisms (lawyers, translators etc.) and treatment of foreign piracy suspects when compared to standards meted out to local criminals. A further disadvantage was that it raised the cost of justice in the receiving states, which can become quite excessive in the event that a large number of convicted pirates receive lengthy sentences of incarceration in the local prisons (RRTnews, 2010).

**Other areas for research** worth pursuing are related to the many other challenges of the suspect and post-trial transfer schemes.

### *6.2.4 Regional/Special Tribunal*

Rather than relying on national courts, it has also been proposed that special regional tribunals be set up to deal specifically with piracy cases (UNSC, 2011). This proposal, based on several models currently

employed in other jurisdictions (such as the special Court for Sierra Leone) is aimed at establishing a tribunal either through a UN Security Council resolution, or through a regional treaty between local states.

The problem with establishing the tribunal by UNSC resolution is that while piracy is viewed as a serious situation, it is not viewed as a threat to peace (Anderson, 2010). Piracy, though serious, is not likely to bring states into armed conflict. In the case of Somalia, the UNSC resolutions only refer to it as an exacerbating factor to the overall lawlessness in Somalia. It would appear that there is a fairly high threshold to overcome in order to get UN Security Council approval. As a result, any future outbreaks of piracy will have to reach a crisis point before the Security Council could be prompted to take action. This would preclude taking pre-emptive measures before a crisis is reached.

The consent-based, or hybrid model which is being used relatively successfully for the special Court for Sierra Leone, is based on a treaty between the UN and the participating states (Lee, 2010). However, this model may not be appropriate specifically in the Somali case, as there is currently no national government, though the transitional government at the time did consent to the national Security Council resolution. In practical terms, a hybrid tribunal may not offer a substantial improvement over a robust national court system. In fact, investing/dedicating financial resources into a regional body may hinder the improvement of the national system since resources, training, and capacity building would have to be shared with yet another institution.

#### *6.2.5 International Criminal Court*

It has been recommended that pirates are tried in the International Criminal Court (Dutton, 2010). However, during the negotiations establishing the court, ‘piracy’ was not considered as a major threat to world peace and was not included as one of the most serious crimes of concern to the international community.

However, even with a possible amendment to the mandates of the ICC to include piracy, it is doubtful whether this would be an effective mechanism for dealing with the problem of trying individual low-level pirates. Considering the time frames for dealing with current trials and individual cases, and the several hundred piracy suspects awaiting trial, this would overwhelm the Court’s capabilities, and could possibly cause undue trial delays, and incur very considerable costs.

#### *6.2.6 Other International Tribunals*

It has also been suggested that the International Tribunal for the Law of the Sea (ITLOS) might be a suitable body for handling piracy cases (Pemberton, 2010). Since its establishment, this tribunal has been

underutilized as it has not had a large number of cases (ITLOS, n.d.). However, the difficulty is that the Tribunal is established to deal with international rights; boundary delimitations, interpretations of agreements, disputes over resources etc. Its Judges, while extremely knowledgeable in international law, may not have the necessary expertise for dealing with matters of criminal prosecution, human rights, and cases of a highly personal nature. In addition to being distant from the location of any of the crimes, trials would also incur delays in getting suspects to the court and additional services such as translation support, among others. There is also an issue regarding where sentences would be served. On the positive note, having an international adjudicative body with a developed expertise that could deal with piracy cases anywhere in the world might be desirable.

**Discussion Point #9:** *Is there a need for specialized piracy courts at the national, regional or international level?*

### 6.3 Criminal Provisions

The prosecution of pirates within national courts under national laws have resulted in considerable variations in the sentences issued subsequent to conviction. Depending on the jurisdiction, the penalty for piracy can range from a few years, to a few decades, to life imprisonment, to the death penalty, and to death by crucifixion (NRC.NL, 2009). The effectiveness of conviction as a deterrence becomes a moot point when comparing a pirate sentenced to a few months in a rather comfortable European jail, to one who lives in brutal and squalid conditions awaiting execution, and to another (probably the third member of the crew) who may not face prosecution at all but may be caught and released. Undoubtedly, it is not a satisfactory situation if administration of justice is seen to be as unfair and inconsistent.

The specific offence with which a suspect pirate is charged also varies according to the jurisdiction and its national laws. It is a standard element of planning for combined naval forces to take into account the difference in rules of engagement when assigning roles to various ships. Some have robust rules of engagement, which permit them a wide discretion in the use of force. Other nations place extremely rigid controls on when where force can be used and who can be protected. A similar situation exists with coalition or joint antipiracy activities but in this case the determination is who has the most suitable legal authority to allow for search and seizure, investigation, arrest, and prosecution. There still has been no successful attempt at developing uniformed/harmonized laws with respect to the apprehension and prosecution of pirates.

### 6.3.1 Piracy or Other Criminal Acts

The first issue to be considered is whether or not an arresting state has an antipiracy provision in its laws, and if so is it applicable to the situation at hand. If a State's criminal definition of piracy follows the UNCLOS model, it would be restricted to those acts committed on the high seas, involving two vessels. On the other hand, if piracy is defined by the 'Law of Nations' approach, that state may have greater latitude in determining the form of violent crime that can be prosecuted, as this may allow the possibility of improving the definition as states widen their practice with respect to piracy.

The situation was demonstrated during a trio of recent cases in the United States. The United States federal law antipiracy law 18 U.S.C 1651 provides that *whoever, on the high seas, commit the crime of piracy as defined by the law of nations, and was afterwards brought into are found in the United States, shall be imprisoned for life.* This statute was originally passed in 1819, and a subsequent decision in 1820 of the United States Supreme Court, *US v. Smith* defined piracy as "robbery at sea."

In the first of the recent cases referred to above, *US v Said* (2010), a pirate mistakenly and unsuccessfully attacked the United States naval vessel. The US federal court judge determined that the earlier Supreme Court definition of piracy still applied, and that piracy defined by the law of nations had not evolved and since no robbery had actually taken place, there was no crime. Secondly, the case of *US v. Hasan* (2010) also involved an attack on the United States naval vessel. In this instance, the judge found that the definition of piracy had evolved and now included the UNCLOS formulation. Even though the United States is not a signature to UNCLOS, that definition has become part of customary international law, and since the law of nations connotes a changing body of law, the international consensus definition should apply (Mason, 2010). Both these cases are currently on appeal.

The third case, *US v Shubin*, recently concluded at the end of April 2012, where the accused had acted ashore as the negotiator for the ransom of a captured American yacht. The crew were murdered during the course of the crime. Shubin had never actually been at sea during the operation, but his involvement in negotiating on behalf of the pirates was deemed sufficient to have him charged for piracy as well. The court held that the definition of piracy included the inciting or facilitating of piracy, and that he was acting in this capacity, and not as an independent negotiator (Somalia Report, 2012). He was convicted of piracy according to the Law of Nations, conspiracy to commit hostage taking, hostage taking, conspiracy to commit violence against maritime navigation, violence against maritime navigation, kidnapping, conspiracy to commit kidnapping, and use in carrying and discharge of firearm during a crime of violence. Significantly, immediately after the conviction was obtained, US prosecutors announced that they would be seeking the death penalty for three of the accused who were on the yacht and were held responsible for the actual shooting. Shubin was arrested in Puntland by local authorities

and turned over to the USA. Of the rest of the 19 pirates who were on board the yacht at the time of the hijacking, two were killed by US forces, 11 pleaded guilty and were given life sentences, and one was released as a juvenile.

The third case discussed above is noteworthy because it indicates the willingness of the USA to pursue legal action against the kingpins, the onshore organizers and financial backers of piracy, and to include these activities as components of piracy defined by the contemporary law of nations. While this is just a single, albeit major state position, it may be worthwhile consideration for other states use the "law of nations" formulation there criminal law definition of piracy.

One of the major problems in addressing contemporary piracy is that most mechanisms are focused on the sea-borne operations, the attack phase. This ignores the fact that the organization, planning, financial arrangements, and support mechanisms are generally land-based, beyond the purview of contemporary marine piracy laws. Organized piracy may be analogous to the trans-boundary problem of drug smuggling and other transnational criminal activities. A considerable amount of work has been done in dealing with organized criminal groups involved in narcotics smuggling and other land based crimes in an effort to deal with the problems of trans-boundary criminal law enforcement. If modern piracy has reached the same level of sophistication, it may be necessary to adopt similar provisions to allow for a wider number of offenses and greater jurisdiction for their courts.

In other instances where States do not have antipiracy provisions, charges are often laid as regular offenses contained within in national criminal code. For example, pirates in India have been charged under its Penal Code with trespassing, waging war against the country, attempted murder, and armed robbery and in Italy with depredation, damage to a foreign vessel, kidnapping, and illegal possession of weapons.<sup>23</sup>

**Discussion Point # 10:** *should the states adopt models such as the US RICO Statute, or other provisions aimed at the leadership of criminal gangs, to be used against organized piracy?*

### 6.3.2 Attempted Piracy or Preparatory Acts

A more contentious issue relates to the types of activities that will constitute an attempted piracy for purposes of criminal prosecution. The term 'attempt' is generally defined as "*a substantial attempt*

<sup>23</sup> India is currently in the process of passing a piracy statute. <http://www.indianexpress.com/news/61-pirates-brought-to-mumbai-in-court-today/763401/> With regard to Italy see website <http://piracy-law.com/2012/03/27/historic-piracy-trial-opens-in-italy/http://piracy-law.com/2012/03/27/historic-piracy-trial-opens-in-italy/>



towards a commission of an offense”<sup>24</sup> Unlike onshore crimes where entry into private property may well constitute part of the attempt, at sea the occupation of a particular patch of ocean is usually temporary and subject to the rights of other users. As such, it may be difficult to determine whether close proximity and perceived threatening manoeuvring are actually attempts at piracy. Obviously, most attempted boarding of a vessel, firing shots, or other explicit actions would indicate a piratical intent. However, a group of men on the small boat approaching a commercial vessel is often an action by, local fishermen trying to protect their nets and gear.

What adds to the difficulty under UNCLOS is that while there are no specific provisions for attempted piracy, there are provisions for the seizure of a pirate ship, defined as a vessel intended to be used for piracy. UNCLOS does not define the grounds for determining such an intention.

This problem is faced daily by naval patrols, who encounter small boats where the crew behave in a suspicious manner, and on boarding, have been found to have weapons, large supplies of food and fuel, hook ladders, grapples and other climbing gears. Ashore this might be deemed to be burglar or housebreaking tools, the possession of which on private property may constitute an offense. At sea, this is not quite so clear.

It has been suggested that a contemporary version of ‘equipment articles’ provisions similar to what was used during the slave trade, might be an appropriate addition to one or more of the conventions (Kontorovich, 2008). This is based on the premise that possession of several dual-use articles would be *prima facie* proof of intent to commit piracy. Similar provisions have been incorporated into the protocol of the SUA Convention. However in that case, the listed materials were components used for bomb making, and have a less obvious utility in other areas. Aside from weapons, most of the dual-use materials on pirate vessels are relatively common and have multiple uses, such as ropes and ladders tools etc.. The possession of these materials, however, may still be considered as circumstantial evidence when combined with other factors at trial.

#### **6.4 Piracy Backers: Financiers and Supporters**

The provisions of the 2000 United Nations Convention Against Transnational Organized Crime includes commitments by states to create domestic criminal offenses prohibiting the participation in criminal groups, corrupt practices, money laundering and similar activities (UNODC, 2000). In pursuit of this mandate, States are to also cooperate in extradition as well as freezing of assets. The convention applies

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<sup>24</sup> A criminal attempt occurs when a person, with the intent to commit an offense, performs any act that constitutes a *substantial step toward the commission* of that offense." American Law Institute Model Penal Code (1962)



to serious crimes which could include the crime of piracy and may also include some of the ancillary activities which go to support it.

Discussions under this section seek to examine other possible avenues for prosecuting those involved in piracy operations, more particularly piracy backers, whether they are financiers and/or supporters. These discussions specifically emphasize those who use Hawala and other value transfer systems to facilitate the movement of funds to aid piracy operations, in addition those who seek to employ children as pirates and those who may be proven guilty of crimes against humanity.

#### *6.4.1 Hawala and Other Informal Value Transfer Systems*

Hawala is a complex topic to address. It is a vital and positive influence in the countries where it is prevalent, such as Somalia, Afghanistan, and Pakistan, and has deep cultural roots. However, the system lacks regulation, does not adhere to record-keeping standards, and allows clients to remain anonymous. This opens it up to abuse by criminals who use it to fund and launder the proceeds of illegal activity. The system is under surveillance by international financial regulatory bodies, yet it remains notoriously difficult to track. This has led to widespread demand for a deeper understanding of hawala operations and, by some parties, a call for its eradication.

One commonly used definition of the system is “money transfer without money movement” (Jost & Sandhu, 2000). While accurate, this phrase also applies to other forms of transfer, including those between formal banks where transfers can take place immediately without any corresponding physical movement of cash. The real differentiating feature of hawala is its reliance on trust as a control mechanism rather than the use of contracts and legal regulation. Hawala networks are based on strong regional, ethnic, or familial relationships (Pathak, 2003). It is through these shared values that self-regulation becomes possible and, in fact, it is very effective (Schaeffer, 2008).

The second defining characteristic of hawala is its informality. There are no standard practices associated with the transfer of funds, the means of settling debt, or record-keeping. This makes for a network that can easily adapt to changing regulatory, political, and business environments. It also makes hawala an attractive channel for unlawful money transfers. However, despite its potential for negative use, hawala’s informality should not be confused with illegality. In large part, the system is being used by honest individuals for legitimate purposes (Viles, 2008).

Given its deep roots in South Asia and the Middle East, it is unsurprising that IVTS continues to survive. Its adherence to Sharia law adds even greater appeal for Muslim societies (Razavy, 2006). However, hawala offers benefits that go beyond adherence to cultural norms and fills a major gap in available

banking services. As such, much of its success can be attributed to the lack of accessible, affordable financial institutions in the regions where it thrives.

Hawala transfers are extremely fast, often completed within a single day, thanks to the lack of regulatory work required and the extensive range of the networks. Speed is of particular value when funds are being moved into or out of remote areas where, in some cases, it would be not only slow but impossible to send or receive cash. In comparison to formal transfer methods, which can have fees of up to 20%, charges associated with hawala transactions are a mere 2-4% (Sharma, 2006). Anonymity is yet another of the system's perks. This is obviously attractive to criminal users, but many law-abiding citizens lack trust in business and government, as well. Keeping in mind that hawala is most prevalent in countries with lacking infrastructure and widespread corruption, a preference for anonymity is easy to understand.

Hawala networks are extensive and reach nearly everywhere in the world. This is due in large part to increasing global migration rates and technological advances in the telecommunications sector. Since each network is based on shared ethnic or regional identity, a hawala network can be spread as far as its diaspora community and, with increased access to the Internet and cell phones, it is easier than ever to stay connected.

### **The mechanics of hawala**

Remittance is one of the most common uses of hawala. High rates of immigration continue to occur and as of 2009 there were 215 million migrants worldwide remitting some \$351 billion in remittances in 2011, an amount that is three times the size of official development funds (World Bank, 2011), Somalia is a prime example of this phenomenon. It is estimated that up to 70% of the population relies on money received through hawala channels for subsistence, particularly in urban areas (Razavy, 2005). A 2008 U.K. survey of Somali remittance patterns found that 58% of Somalis in the country send remittances home on a monthly basis and 87% do so at least twice a year. Aside from supporting one's family, a common purpose of remittance is for investment in the private sector. This money funds an estimated 80% of startup capital for businesses in the country, where external financing through other means is not an option (Chalmers & Hassan, 2008). Overall, to put things in perspective, estimates suggest that up to \$1.6 billion is handled annually by remittance companies; it is big business. In comparison, total imports in 2006 amounted to \$798 million and total exports to only \$300 million (CIA, 2012). Additionally, UN agencies and non-governmental organizations (NGOs) use hawala to get emergency and humanitarian funds into countries that lack reliable banking infrastructure. In 2011, over \$1.3 billion of official donations flowed into Somalia, predominantly through hawala networks. Hawala channels play an undeniably vital role in Somalia, and interrupting their operations without careful consideration will likely impose dire consequences on the society.

A basic hawala transfer can be illustrated in a fairly straight-forward way. The transaction will be initiated when a customer deposits money with a hawala broker in country A. This broker then contacts another in the recipient country and gives transaction instructions. A promise to settle the debt a later time is established and, finally, the hawala broker in country B delivers the original deposit amount, less a small brokerage fee, to the intended recipient. Note that no money actually changes hands in this scenario; rather, the broker in country A now has a surplus and the broker in country B now has deficit of cash. In its most simple form, this debt will be balanced when another transfer takes place with funds being transferred back from country B to country A. The exchange of transaction information can be made via telephone, email, or fax.

### **Technological developments in the money transfer business in Somalia**

In Somalia, all of the major telecommunications companies offer mobile transfer capabilities. One of these, Somtel, is owned by Dahabshiil, the largest Somali remittance company in operation, and dubs its transfer service E-Dahab (Somtel, 2012). Mobile transfers are not yet competing with traditional hawala channels for international remittance. However, hawala is also used regularly for transfers within the country's borders. In this market, mobile transfers have moved in as direct competition to traditional hawala channels, offering users safety, speed, and low costs. Of course, whether mobile transfers are more or less susceptible to abuse is up for debate.

### **Potential links to piracy**

Given how strongly entrenched hawala is in Somali society, the question arises as to what role it plays in the funding of Somali piracy and the laundering of its proceeds. It is impossible to obtain definite statistics on any aspect of the Somali economy, let alone statistics regarding its criminal activities, given its lack of infrastructure and governance. However, some broad points about the relationship can be drawn.

Piracy is an attractive option to many Somalis as it provides significantly higher income than other job opportunities in the country. Although ill-gotten, the proceeds of piracy arguably have some favorable effects in the community, such as job creation, investment capital, and increased indirect spending. That being said, the negative consequences far outweigh the positive and the business shows no signs of slowing. A Geopolicity study (2011) predicted that piracy income could increase to \$200-400 million by 2015. Based on Somalia's GDP of roughly \$5.9 billion, that would put piracy proceeds at almost 7% of total GDP. This is almost on par with the contribution of industry, which was only 7.4% of the total as of 2008 (CIA, 2010).

It is alleged that members of the Somali diaspora are investing in pirate enterprises through hawala channels, although other reports suggest that there is no evidence for this (International Expert Group on Piracy off the Somali Coast, 2008). On the other end, estimates suggest that approximately 40-50% of ransom proceeds are moving out of the country using hawala, with the rest being reinvested back into the business and redistributed within the community (Geopolicity, 2011). In 2010 a total of \$238 million was paid in ransoms off the coast of the country. Therefore, if 40% of this entire amount moved back through Somali hawala networks, it would account for roughly \$95 million. This amount is undoubtedly high as it is impossible to say what percentage of the ransom money actually enters the country. However, even funds that end up in neighboring nations are not precluded from movement through hawala, thanks to the network's strong presence in these regions. Nonetheless, even using the high \$95 million estimate quoted above, piracy revenue would account for only about 6% of the expected annual hawala outflows. These numbers suggests that, although piracy-related money is certainly being moved through hawala channels, these users make up a small percentage of the total client base. As such, it appears that the movement of ransom proceeds is facilitated by, rather than driving, the existence of hawala.

### **Issues for further consideration**

The issues surrounding hawala are extremely complex. While hawala channels are known to play a role in the movement of illicit funds, and have the capacity to move even greater amounts, that is only one aspect of the business. In many countries, hawala is a mainstay of society and cannot simply be shut down. It fills a gap left by formal banking institutions and gives people access to financial services that they would otherwise be excluded from. In fact, it is the only reliable option for money transfers in countries, such as Somalia, that lack infrastructure and has extreme political corruption. This makes hawala channels a lifeline, vital for getting remittances and emergency/humanitarian aid to those that need it. Furthermore, it has deep cultural roots. An attack on the system could be construed as yet another attack on non-Western culture. However, it is also clear that hawala channels are being used for illegal purposes, from evading taxes to facilitating the trafficking of drugs, arms, and humans, as well as piracy in the Horn of Africa. It is no not surprising therefore that hawala is an attractive channel for these groups; it provides anonymity, is unregulated, and does not adhere to record-keeping processes. All in all, it is extremely difficult to track. Though the majority of users are legitimate, the criminal minority is still a significant size. In light of this, developing ways to better monitor hawala networks is a valuable pursuit but, in doing so, the multi-faceted nature of the issue must be taken into account. It is clear that hawala use will not decline unless viable alternatives are offered.

#### *6.4.2 Criminal Employment of Children*

With half the population of countries in the Horn of Africa being under the age of 18, a large number of pirates caught are juveniles. Their situation is extremely similar to that of child soldiers. They are readily available, financially desperate, under or uneducated with little expectation of employment, and continuously exposed to the violence and degradation found in failed and failing states (Whitman, 2012).

The enticement of apparent wealth that piracy can bring, coupled with more aggressive forms of coercion, has resulted in a serious increase in the number of juvenile members of pirate crews. Traditionally, international programs which target the criminalization of youth, have focused on the street gangs and drug trade, which are by far the most prevalent employer. The 1990 UNGA resolution on the Instrumental Use of Children in Criminal Activities focused on the threat to the children's well-being, and called for measures to eliminate the criminal employment of children by adults (Skinnider, 2009).

A pilot project in South Africa, between 2004 and 2007, titled Children Used by Adults in the Commission of Crime (CUBAC) undertook to study the problem in the Western Cape, and examined how agencies and government could cooperate to eliminate the problem. Once again, this was directed largely at drug gangs in the slums of Johannesburg and Cape Town (ILO, 2006).

Traditionally, the problem of the criminal employment of children was viewed as a national problem. While it can be found in many places around the world, it had to be addressed within the national perspective since it involves criminal activities taking place within an individual country, and the problems of one country would not necessarily affect its neighbors or even more distant states. However, piracy is different given its far reaching effects on members of the shipping industry and global trade. In this case, child pirates have become a global area of concern, and since it may be viewed as an international problem, it may be amenable to an international solution.

It has been emphasized by those involved in the elimination of child exploitation that child piracy is a means of bringing the problem to the attention of those in countries far removed from the actual hardship (Whitman, 2012). It also has a major advantage in that child pirates operate in the international waterways, and are being picked up and detained by foreign naval forces. This makes them not only the responsibility of the detaining forces, but also makes them more accessible to programs designed to remove them from criminality.

There is also a strong belief among those working with child soldiers, that a child or juvenile pirate faces exactly the same situation, in terms of danger to life, exploitation by adults, and other abuses. If there is

no real quantifiable difference between a child soldier and the child pirate, then there are those who would advocate making the employment of children in piracy a crime for which the International Criminal Court should have jurisdiction. This has a number of attractive features, the main one being that it would place those organizers and backers of piracy in an extremely dangerous legal position, as they would be subject to international arrest warrants and extradition to face the Court.

International anti-piracy advocates have long been complaining about the lack of mechanisms that can be used to institute legal action against kingpins or organizers of maritime piracy (SaveOurSeafarers, 2011). Especially in a situation like the Horn of Africa where a large percentage of pirates are under the age of 18, making the employment of juvenile pirates an “international” crime could have a major deterring effect on those who stand behind the enterprises. Treating major piracy leaders who employ child pirates the same as the warlords who employ child soldiers, issuing international arrest warrants, and holding high-profile criminal trials, would make the employment of child Pirates an extremely risky activity. Unlike the number of pirates, the total number of major piracy organizers and kingpins is likely to be fairly small. While states are generally not in favor of establishing another expensive tribunal to deal with piracy per se, the use of some of the existing mechanisms to prosecute the organizers/backers may be an attractive option. Prosecuting them for the criminal employment of children may be a politically more acceptable justification than the participation in "transnational organized crime".

This also would severely deplete the available number of potential piracy participants. On the basis that juvenile pirates should not be returned to the criminal gangs who employ them, one solution might be to place them in special regional school facilities, as is similarly done with child soldiers in the same regions (Whitman, 2012).

**Further investigation:** what practical legal mechanisms can be used for dealing with child Pirates

#### *6.4.3. Crimes against Humanity and War Crimes*

Another key area of discussion in this section relates to whether the organizers or backers of piracy could be considered to be either war criminals, or having committed crimes against humanity for the purpose of prosecution in an international forum. From the earlier analysis, it was obvious that while the International Criminal Court was established to deal with the most serious crimes against humanity, and while individual acts of piracy are a serious crime, piracy itself did not fall in the same category as genocide and apartheid. As such, it would not be desirable to try individual pirates in the ICC.

The situation for the organizers and backers of piracy may be different as the major kingpins or pirate chieftains who never go to sea and collect the largest share of the profits, have traditionally enjoyed



freedom from prosecution. The crimes over which the ICC has jurisdiction include genocide and crimes against humanity and war crimes in the crime of aggression (ICC, 1998). Piracy does not fall within any of those categories. However, upon examination of the enumerated offenses under article 7, crimes against humanity are listed as including “*other inhumane acts of a similar character intentionally causing great suffering or serious injury to body or to mental or physical health.*” Under article 8, dealing with war crimes, the following acts are listed as war crimes: “*willful killing, willfully causing great suffering or serious injury to body or health, excessive extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly, and taking of hostages*”. Carrying out these acts is considered to be a war crime during hostilities. The same acts carried out during peacetime are no less serious.

It is also worth considering that the leaders and organizers of the pirate groups are executing activities in a systematic and repetitive manner, and are not attacking just one ship, but many. On this basis, their acts are more like those of the military and political leaders who are being tried in the ICC. Therefore, it is submitted that amending the statute of the ICC to include ‘leadership in systematic acts of piracy’ could provide a mechanism for bringing the heads of the pirate enterprises to justice. It is unlikely that the number of pirate leaders should be so large as to overburden the capacity of the ICC.

A notable observation is that most current legal mechanisms, courts and laws are adequate for dealing with low-level pirates. However, similar to the narcotics trade, a major concern is that the organizers and backers of piracy tend to avoid prosecution, by staying ashore. This is primarily due to the lack of effective apprehension mechanisms and inadequate laws to criminalize money transfers, financing and operational support. As such, those who benefit from piracy are seldom arrested and put on trial.

**Additional review** on how case law further interprets the terms “Crimes against humanity”, “war crimes” as defined in the ICC Statute.

**Discussion Point# 11:** *Under what provisions of national or international law can backers, organizers, and financiers of piracy operations be tried?*

Underlying the objective of eliminating piracy is the assumption that it is preferable to discourage piracy before the fact rather than prosecute it after. Piracy often originates as a crime of opportunity which subsequently becomes an organized and systematic criminal activity. If states are able to deal with the opportunistic outbreaks effectively and efficiently, there may be no need for the introduction of widespread and costly antipiracy activities to suppress a major outbreak. There may be no need for absolute uniformity in antipiracy measures, laws and procedures. However, this initial study suggests



that there needs to be an expansion of the international laws dealing with all aspects of piracy, to allow states more scope to apprehend and prosecute pirates, backers, organizers and financiers.

**Discussion Point # 12:** *What arrangements are needed to harmonize national laws and mechanisms to permit the effective prosecution of piracy backers, organizers and financiers?*

## 6.5 Incarceration of Convicted Pirates

The incarceration of pirates may be different from other criminal justice proceedings in a fairly significant way. Normally, trial and incarceration takes place within a single national context. In the case of piracy, this is different. Because piracy is a crime of universal jurisdiction, it is entirely possible that the accused from one country, is arrested and tried by a second country, and eventually incarcerated in a third country. This situation places quite a strain on both the criminal justice system and it may be argued, on the criminal pirate himself.

### 6.5.1 Prisoner Transfers

Where a piracy suspect has been arrested and detained by foreign forces, the arresting country has an obligation to ensure that all subsequent legal proceedings are carried out in accordance with its laws (UNSC, 2004). The initial criminal proceedings can be carried out using the same procedures as for other crimes in the jurisdiction, modified suitably to take into account difficulties with language, to ensure a fair trial. However, a sentence of incarceration brings with it a series of difficulties, first trying to integrate the pirates into a foreign cultural setting, and second at the end of his incarceration, trying to re-integrate the pirate into his own society. In the latter instance, this may well be in another country.

Currently, the costs of both trial and incarcerations are borne by the arresting/prosecuting state. As discussed earlier, there are some perceived problems relating to piracy suspects and convicted pirates making refugee claims in the host country. A more desirable outcome could be achieved by transferring the suspects back to their own country for trial and incarceration (UN, 1985). This however, brings with it a series of challenges, since there is an international legal responsibility to ensure the ongoing well-being of the convicted pirate, both within his country, and in any other country where the pirate may be sent.

### 6.5.2 Obligation to Supervise the Standard of Treatment

Most countries are parties to a series of international human rights treaties which inform (or sets out) the rights and protections to be afforded to a convicted person, as well as the duties of the detaining state to

ensure that these rights are maintained, should the person be transferred to another state. The pertinent conventions are:

- International Covenant On Civil And Political Rights (UNGA, 1966)
- The International Convention Against Torture (UNGA, 1984)
- The European Convention On The Condition For Transfer Of Sentenced Persons (Council of Europe, 1983),
- and if the state is a member of the European Union, the European Convention on Human Rights (Council of Europe, 1950).

In general, these conventions place an obligation on any state to ensure that convicted persons are treated in accordance with the minimum standards of international human rights. These include the right to be treated humanely, the right to be treated fairly and impartially before any court or tribunal, and the right not to be sent to any other country where they may face inhuman treatment torture or conditions below the minimum international standards.

In addition to the obligations under the conventions, states may enter into a formal agreement on the transfer of suspects or prisoners. These are referred to as an exchange of letters, or Memorandum of Understanding (MOU).

With regard to arrangements for dealing with pirates in the Horn of Africa, transfer agreements are of two types:

- Firstly, a *suspects transfer agreement*, where individuals suspected of being pirates are transferred to another country for trial and if found guilty, sentencing and incarceration. A number of these agreements have been signed between the European Union and the Seychelles, Kenya and Mauritius (Official Journal of the European, 2009)
- The second type is a *prisoner transfer agreement*<sup>25</sup> where the transferring state sends a convicted felon to a receiving state for the serving of their sentence, and eventual release. These agreements are the far more difficult ones to police, since it requires dealing with two legal systems and two different standards of justice.

The transferring state has the obligation to ensure that the human rights of convicted persons are respected by the receiving State. As this is an ongoing obligation, there is usually a memorandum of understanding or exchange of letters between the states clearly outlining their responsibilities. These

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<sup>25</sup> Model Agreement on the Transfer of Foreign Prisoners and Recommendations on the Treatment of Foreign Prisoners- Adopted by the Seventh Crime Congress, Milan, 26 August-6 September 1985, and endorsed by the General Assembly in resolution 40/32 (United Nations., 1985).

agreements are sometimes confidential, as in addition to spelling out the obligations to respect human rights, they may also include financial compensation or other programs designed to offset the costs incurred by the receiving State in assuming the role of jailer.

**Further Research:** What role (if any) do international NGOs (such as the ICRC) have in overseeing prisoner facilities?

### *6.5.3 Transfers to a Third State*

One issue which is not clear is how these obligations are affected by the onward transfer of a convicted person to a third country. Currently, the agreement between the EU and Kenya requires the EU's written permission before any transfer can be made. Another possibility might be to include a provision requiring any subsequent receiving state agree to the same standard. There is need for clarification regarding what the liability of the first state would be in the event that there was a subsequent breach somewhere farther down the line. A subsequent question would be whether it is sufficient to demand that a state in the chain of custody be a signatory to the appropriate conventions before transfer takes place, or should a higher level of scrutiny by the transferring state be applied. It may be implied that on signing the appropriate conventions, the receiving state assumes the obligation to ensure that any subsequent receiving state is also a signatory or transfer should not take place.

**Discussion Point # 13:** *What are the responsibilities of the initial apprehending state and subsequent states if a pirate suspect or convicted pirate is transferred on to subsequent jurisdictions for sentencing or incarceration?*

## 7. CHILDREN IN PIRACY

There is considerable debate as to whether a child pirate is actually a legally identifiable and recognized category of defendant. Some jurisdictions have treated all piracy suspects the same, irrespective of apparent age, while others spend considerable time and effort determining the age of suspects and ensuring that those who are identified as juveniles are treated appropriately by the legal system.

There are two approaches to this issue. One seeks to identify what is called the Minimum Age of Criminal Responsibility (MACR) while the other applies the standards of the United Nations Convention on the Rights of the Child (UNCRC). However, there is some incompatibility between these approaches. The former tries to determine at what age an individual may be prosecuted for the crime of piracy. The concern is how to prosecute using age appropriate legal procedures. The latter focuses on the welfare of the child and safeguarding the rights afforded through legal protection.

The minimum age of criminal responsibility is determined as age at which an individual can be tried for a serious crime. This age appears to vary between 10 and 16 years with England and Wales at the low end of the spectrum and Scandinavian countries and Canada at the upper end (Cipriani, 2009).

Article 37 of the UNCRC requires that no child be subject to torture and inhuman or degrading treatment, capital punishment, or life in prison without possibility of release. Arrest, detention or prison shall be used only as a measure of last resort and for the shortest appropriate period of time. The convention goes on to specify safeguards and procedures to ensure that juvenile pirates are protected from explication, treated with dignity, and reintegrated into society as quickly as possible.

### 7.1 Status and Rights of the Child

The UNCRC is very specific in defining the age of a child. As noted in Article 1 the term ‘child’ means *every human being below the age of 18 years unless under the law applicable to the child, majority is attained earlier.*

This implies that in most developed countries, where the age of majority is between 18 and 21 years of age, that all suspects under the age of 18 would be considered a child, though the age of criminal responsibility, at which a child may be charged with a criminal offense will vary in different jurisdictions. This will determine both the age at which an individual can be charged for the offense of piracy, and the procedures that must be followed in the handling of young offenders.

This leads to a problem in determining whether or not a suspect is in fact under the age of 18. Since many of the juvenile pirates come from countries where birth records may be poor or nonexistent, often

individuals themselves are unaware of their real age. In several cases forensic evidence has been used to try and determine the probable age of the accused. This can be made more difficult by the poor nutrition and general physical well-being of the individual. It is difficult to determine whether signs of maturity are the result of physical development, or ill health (NCR.NL, 2010).

### *7.2 Prosecution of Young Offenders*

Under the law of most of the world's major industrialized states, a young or juvenile offender must be treated differently from an adult. This would generally mean that they are subject to a different standard of detention before trial, treatment by the investigating authorities for questioning, and type a sentence imposed after conviction, and the location and condition of incarceration.

All of these will have significant implications for the transfer of juvenile piracy suspects for trial, or incarceration after trial. Most prisoner transfer agreements require that the same standard of treatment is accorded to the suspect in the receiving State. Thus, without a recognized standard for juvenile pirates, many jurisdictions will not be able to make use of international transfer agreements for trial or incarceration.

### *7.3 Problems with a Return to a "Worst Form of Child Labour"*

A specific problem exists where underage, or possibly underage piracy suspects are detained or arrested at sea by warships involved in antipiracy activities. Most of the states involved in antipiracy patrols are parties to the International Labour Organization conventions on the worst forms of child labor.<sup>26</sup> State Parties to the convention have agreed to prevent injuries and protect children from the worst forms of child labor. As noted in article 3c, the term 'worst forms of child labor' include the use of procuring or offering every child for illicit activities. While the section specifically mentions trafficking in drugs, it is not restricted to that activity alone. Under the ILO Convention, and the Recommendations for the elimination of the worst forms of child labor, there is the requirement to prevent the engagement of children in or remove them from the worst form of child labor, protecting them from reprisals and providing for their rehabilitation and social integration. There are measures which address the educational physical and psychological needs as well.

International advocates for the rights of the child strongly argue that the combination of these legal requirements mean that when antipiracy forces apprehend suspected pirates who are under the age of 18, they are legally obliged to put them in a safe and suitable location, and not to return them to the adult criminal gangs to which they belong. This would make 'catch and release' of juvenile pirates a legally

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<sup>26</sup> Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour ILO Convention:C182

problematic area. Arresting and detaining a suspected child pirate would require the arresting forces to apply the legal provisions of their national laws concerning the treatment of young or juvenile offenders, as previously discussed. However, releasing a group of suspected pirates, which include those believed to be under 18 years old, would be returning the juveniles to a worst form of child labour. It would be the equivalent of releasing a group of underage “drug mules” back to the drug cartel which employed them in the first place. In practical terms, once a child pirate is in the custody of anti-piracy forces, it may be extremely difficult to discharge obligations with respect to the rights of the child, being unwilling to criminally prosecute them, and unable to release them into a potentially criminal situation.

**Discussion Point # 14:** *Is there a need for a recognized international standard to determine the age of suspected juvenile offenders?*

**Discussion Point # 15:** *What procedures and protocols need to be put in place to allow navies which have detained juvenile pirates to safely discharge their legal obligations while safeguarding the rights of the child in question?*



## 8. THE INFLUENCE OF FAILED AND WEAK STATES

The manifestations of state weakness and failure are not homogenous as they vary from place to place and/or region to region, and are marked by many indicators, primarily analyzed from the economic and political perspectives. In the first instance, focus on the general deterioration of living standards, foreign-exchange shortages, food and fuel scarcities and decreased essential services (medical, educational etc.), among others. In the latter, varying actions of political leaders and their associates have been determined as contributing to state failure as their actions undermine or disregard democratic procedures, legislatures, judicial independence, and in general, control of security and defense forces. The end state of weakness and failure is evident in instances where authority, legitimacy, and capacity of the Government no longer extend throughout the state, but instead are limited either to specific regions or groups.

In recent years, ‘failed and failing’ states, ‘weak and fragile’ states and in the extreme instance, ‘collapsed states’, have been significantly debated and analyzed with specific focus on the consequences and troubling outcomes of these states. Particular concerns surround territories that are somewhat governmentally empty or the States’ inability to enforce laws within their own boundaries or project and protect their interests outside of their geographical limits.

From the onset, it should be pointed out to that the terms ‘**Fragile States**’ even though distinct from ‘**Failed States**’ are relative particularly when comparing the presence or absence of a functional government and the state’s performance and/or capacity (at specific points) to govern its own space. In this document, further reference is made to ‘**Weak States**’ which are also susceptible to fragility or failure because of their limited governance capacity; and ‘**Failing States**’ which exhibit key elements of fragility, and are experiencing organized political violence.

However, whilst by no means exhaustive, this Report outlines some characteristics of **failed and weak states**, specifically those that have been identified as having some influence or are associated with the growth/spread of piracy.

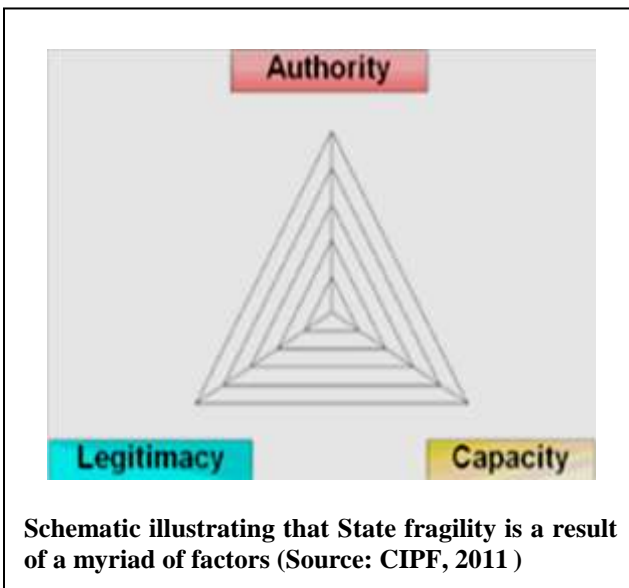
In addition to the research (under the Socio-Economic Module) analyzing the root causes of piracy, the discussions herein are framed around the dominant conditions of state failure and state weakness that seemingly allow piracy to gain a foothold (*particularly within the East African region* ). In so doing, it provides an outline of the structural indicators evident within functional/strong states as the basis for analyzing the essence of state failure within the aforementioned region; and culminates with some key considerations regarding the influence of state weakness and failure on maritime piracy operations.

### 8.1 Essence of State Failure and State Weakness

By and large, functional or strong states control their territories and deliver a high order of political goods to their citizens, including a) high levels of security and safety from political and criminal violence; b) surety of political freedom and civil liberties; and c) creation of environments that are conducive for economic growth. In this regard, various analyses have indicated that these states generally exhibit three (3) structural indicators - **authority**, **legitimacy** and **capacity** - where, weaknesses in one or more of these dimensions can result in an impact on the overall stability of the state (Carment, 2009; CIFP, 2011).

As per the schematic illustration, these structural indicators, utilized by the Country Indicators for Foreign Policy (CIFP) State Fragility project, provides an overall picture of a country’s fragility and trend lines (CIFP, 2011); and also offers the foundation from which to assess failed and failing states.

- Firstly, with regard to **Authority**, a functional State provides the appropriate legislation and laws as well as a stable and secure environment for its citizens and communities. A lack of authority results in a lack of control over legal territory and borders. This may be viewed as a State’s weak or ineffective response to security threats, whether internal or external (Carment, 2009; CIFP, 2011).
- Secondly, a **Legitimate** State has the ability to mandate adherence to its governing regime, various legislation and policies (from its local population), as well as garner recognition and support from its international partners. This is often coupled with the State’s ability to project force and maintain order within domestic boundaries as well as indicate - to those outside of the country’s borders - that it can and will protect its interests, in the diplomatic community or in international waters (Carment, 2009; CIFP, 2011).
- Further, a functional State with **capacity** would have the authority and ability to: mobilize state-owned resources towards productive ends; regulate political and economic affairs; conduct international transactions; and manage basic infrastructure including transportation and



communication networks along with other physical structures such as roads and ports (Carment, 2009; CIFP, 2011).

An analogy of the aforementioned points would highlight that *failed and failing states fundamentally lack the authority, legitimacy and capacity* to control both people and territory. In addition, these countries may also be dominated by criminal and drug-related violence and other forms of civil and international conflict (Carment and Samy, 2010).

Some authors also draw the conclusion that failed states are *inherently violent*, where the rulers/government do not have the will or ability/capacity to provide and maintain safety and security infrastructures for their people (Rotberg, 2002).

Others have inferred that a central government may exist primarily for the security of its rulers, where its citizens and even other government officials are left to provide for themselves (Gros, 1996); and that these states lack the institutional architecture and legal systems to support contractual relationships, property rights and respect for human rights, thereby being unable to enforce laws within their own boundaries and ceasing to be a legitimate government. (Rotberg, 2002)

In summary, a failing state has several characteristics where “...the most common is the **loss of physical control of its territory** or a monopoly on the legitimate use of force” (Foreign Policy, 2009). Other prevalent elements also include:

- “...the **erosion of legitimate authority** to make collective decisions,
- an **inability to provide reasonable public services**, and
- the **inability to interact with other states** as a full member of the international community....
- extensive **corruption and criminal behavior**,
- inability to collect taxes or otherwise draw on citizen support,
- large-scale involuntary dislocation of the population, **sharp economic decline**, group-based inequality,
- institutionalized persecution or discrimination,
- severe demographic pressures, brain drain, and **environmental decay**....” (Foreign Policy, 2009)

Notably, the Failed States Index (*a collaboration of Foreign Policy and The Fund for Peace*) for the last four years has maintained its rankings that Somalia, Chad, Sudan, Congo, Afghanistan and Zimbabwe, among a few others, are prime examples of state failure (Foreign Policy, 2011). It also contends that in each of these cases:

- the central government ceased to function, and has been unable to provide for the well-being (*basic facilities*) of its population or protect it from internal and external threats;
- the weakened state of their economies resulted in the total ruin of education and health care services and a breakdown in physical infrastructure;
- the escalation in crime and violence have allowed opposition protests and civil conflicts etc. resulted in armed uprising and in some instances, the utilization of a variety of small arms, light weapons and explosives.
- huge population shifts and refugee crises, long-term food shortages, and the death of large numbers of civilians (*disease, starvation, direct fighting*) were a culmination of the conflicts and failed economies.

In examining the indicators utilized by the Failed States Index, Nincic (2008) argued that there is a relationship between global pirate attacks and the said failed state indicators, which led to the conclusion that state failure, even though, not a sufficient condition for maritime piracy, may be a necessary condition – the importance of which became more pronounced when analysing the countries within East Africa region.

The **East Africa Region** (*predominantly surrounding the Gulf of Aden/Horn of Africa*) provides an ample illustration of how the conditions within/surrounding failed states may have allowed piracy to take root and flourish as the countries in this region suffer from a combination of: widespread lawlessness, ineffective government, terrorism, insurgency, crime, and abysmal development. More specifically, earlier analyses have shown that:

- Somalia, after years of neglect by the international community, is considered as the world's most comprehensively failed state<sup>27</sup> - perhaps a collapsed state - representing a threat to itself, the Horn of Africa region and the wider world.

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<sup>27</sup> Indeed, ample evidence suggests that by the mid-1980s Somalia was already a failed state. With the partial exception of the security sector, most government institutions began to atrophy in the years following the disastrous Ogaden War with Ethiopia in 1977–78. Fierce government repression, heightened clan cleavages and animosities, gross levels of corruption, and low salaries all combined to accelerate the state's decline. The public school system, a source of pride and progress in the 1970s, crumbled. Production on state-run farms and in factories plummeted. Government ministries were almost entirely dysfunctional despite a bloated civil service, due in part to chronic absenteeism and cronyism; effective and committed civil servants were seen as a threat and removed. Externally, the Somali state became "a ward of the international aid community." Internally, it devolved into an instrument of expression and expropriation, a tool to dominate political opponents and rival clans, expropriate resources, and above all serve as a catchment point for foreign aid that was then diverted into the pockets of civil servants clever,

- Somalia’s governmental organs are non-existent, literally lacking “even a fig leaf of central administration” (Menkhaus, 2003, p 407), with no recognized law or the ability/capacity to enforce that law (Rotberg, 2003).
- The Horn of Africa is characterized by porous borders, weak governments and ineffectual national security systems, all of which have sustained the illegal market in, and illicit use of and high circulation of, small arms and light weapons (Onuoha, 2009).
- In the seven years of the Failed States Index, Somalia has occupied the worst spot (# 1) for the past four years straight (Foreign Policy, 2011).

However, since the early 2000s, the evolving local governance structures and counter-piracy initiatives across Somaliland and Puntland as well as the growing pockets of stability in South-central Somalia shows that the local security, judicial and overall governance initiatives hold much promise in combating piracy than are credited for in spite of the great challenges that any war-torn society grapples with (L&G Working Group Member, 2012).

In Somaliland for example, there is little or no piracy because the Province is too stable to support this type of organised crime, and acted early to suppress it. Somaliland’s response against rumoured pirate groups by catching pirates when they are in the process of organizing themselves (Hansen, 2009), shows that piracy can be curtailed at a local level, despite poverty problems and a weak police force. Further research by the DMPP Operational Responses Module has indicated that the strength of Somaliland is not its offshore capacities, but the efficiency of local law enforcement, including popular militias, in curtailing piracy. Its strength lies in local ownership and control over relevant areas by means of local popularity (DMPP, 2012). More recently, in February 2012, the Somaliland government further strengthened this position by passing new anti-piracy legislation which defines piracy as a crime in Somaliland, allowing authorities to charge pirates (Dahir, 2012).

In addition to Somalia, a closer examination of the surrounding and/or bordering States such Yemen, Eritrea, Sudan and Ethiopia - also at the top list of Failed States Index - demonstrates the prevalence of many fragility indicators. None of these countries has the means of enforcing laws within their own borders, let alone attempting to work together to stem the tide of Somali pirates (Pham, 2010; Mark, 2010).

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powerful, or well-connected enough to place themselves at strategic spigots in the foreign aid pipeline. See Menkhaus, K. (January 01, 2007). Governance without Government in Somalia: Spoilers, State Building, and the Politics of Coping. *International Security*, 31, 3, 74-106.

Further comparisons may also be made with some states in the West African Region, such as the Democratic Republic of Congo, Guinea and the Ivory Coast, which according to the Failed State Index 2011, are ranked in “Critical” danger of failure with all of the remaining countries as being in “Danger” of failure, except for Ghana and Benin (more stable category of “Borderline”) (Foreign Policy, 2011).

Previously, in 2010, the United Nations Office on Drugs and Crime (UNODC) Regional Programme for West Africa 2010-2014 indicated that West African countries were considered as one of the least stable regions in the world, with “no adequate legislative framework and enforcement capacities to address issue of piracy, where legal obstacles are plenty and action requires important logistics and specialized know-how” (UNODC, 2010, p16)

Similar analyses have designated the countries in this region, as having a high degree of political instability, militancy, corruption, social deprivation and crime (both organized and opportunist/subsistence), in addition to battling illicit trafficking as a major challenge to sustainable development (Pham, 2010).

With particular reference to corruption, the United Nations Economic Commission for Africa (UNECA) pointed out that this issue remains the single most important challenge to the eradication of poverty, the creation of predictable and favorable investment environment and their general socioeconomic development (UNECA, 2009). In this light, the African Governance Report II further stated that there is the general perception that the major institutions of government in West Africa, ranging from executive, legislature and the judiciary are corrupt in varying degrees. More specifically, the Report identified Nigeria as having the continent’s most corrupt leadership. (UNECA, 2009)

At this juncture, it should also be mentioned that numerous analyses have advanced many reasons why some states remain weak and may show a high potential to fail. In summary, it is worthy to note that **Weak states** are basically strong, but temporarily or situationally weak and may be characterized by a broad range of geographical, physical, or economic constraints (Foreign Policy, 2009; Gros, 1996; Rotberg, 2002). Some of these states display: various tensions that have not yet become overtly violent; high and increasing level of urban crime; deteriorating infrastructures, schools, hospitals etc. as well as diminishing political good and public services.

To some extent, weak states are still capable of providing security and other critical infrastructure such as transportation and communication networks as well as commodities markets. Even though there may be high levels of corruption, crime, and social problems, weak states such as Indonesia, still function fairly effectively (probably not efficiently) (Hastings, 2009)



## 8.2 Correlation with Maritime Pirate Operations: Key Drivers

Much of the literature on state failure has focused on the causes or on indicators that seek to identify states that are failing or weak (Hastings, 2009; Foreign Policy, 2009; Murphy, 2009; Nincic, 2008; Gros, 1996; Vagg, 1995); and in some instances have also sought to distinguish between failed states and weak states (Menkhaus, 2003; Rotberg, 2002). However, as previously noted, this document seeks to highlight those research findings that point to some linkages between ‘failed and weak states’ to piracy operations/activities. In essence, the ensuing discussions and considerations beg the question of whether it is possible to distinguish the ways in which states have related to piracy: States which cannot do anything against the piracy situation OR States which allow or encourage piracy.

The statement ‘*Pirates flourish where the writ of government has lost its entire sway*’ (Trumbull, 2010, p. 14) is a catch-all phrase that points to the stability of a State as a very important factor in creating opportunities for piracy to flourish. Simply put, it infers that piracy activities are more likely to exist in/surrounding failed and failing States than in stable States and in this regard, one may understand why Somalia and Nigeria have become the epicenters of global piracy (Patrick, 2011).

Some evaluations have determined that piracy activities are closely linked to the failure of national political systems, concluding that “while state collapse is neither necessary nor sufficient to cause an outbreak of maritime piracy, the spectacular failure of the Somali state has certainly facilitated the emergence of the phenomenon by creating the conditions under which the factors which have historically favored it ...” (Pham, 2010, p.330).

With regard to **Failed States**, particular analysis is drawn using the East Africa Region (*Gulf of Aden/Horn of Africa*), where:

- Possible causes of maritime piracy in this region indicate that being a failed state (at least as measured by the Failed State Index) is a necessary, though not sufficient condition for maritime piracy. (Nincic, 2008)
- In addition to the physical (geographical), economic and political conditions that were conducive to outbreaks of piracy, the effective cessation of Somalia as a State in 1991, also created a legal loophole for Somali pirates – as UNCLOS restricts piracy to the high seas – criminal actions within territorial waters of Somalis were literally left un-adjudicated (Pham, 2010).
- It has also been contended that piratical activities in the waters off the Horn of Africa has been as a direct correlation to the anarchy and the absence of a functional national government in Somalia (which led to the proliferation of warlords and armed militias), who engage in piracy or

provide information, protection and support to criminal gangs involved in piracy (Onuoha, 2009).

- A recent study on “An Omani approach for addressing Piracy off the East Coast of Africa” conducted by a United Nations Nippon Fellow (also a member of the DMPP), drew some conclusions that the stability of a state is crucial to creating and enabling opportunities for piracy to flourish; and more so, that piracy activities are more likely to exist in failed and failing states. This research also provided insights on the likelihood of a regional, littoral states’ response to addressing piracy in the region, as opposed to an international response. (Al Nabhani, 2012).
- According to a *Preliminary Survey of Piracy in The Western Indian Ocean, Gulf Of Aden And Bay Of Bengal*, conducted by the Dalhousie Marine Piracy Project (DMPP), the prevalence of piracy in the Gulf of Aden was deemed possible because of the poor governance along much of Somalia’s coast. The Study also describes Somalia as providing the pirates with many options for places to hold the captured vessels until they are released, usually following payment of a ransom (DMPP, 2012).
- Preliminary analysis finds support in Percy and Shortland’s analysis which stated that Somalia represents the perfect collision of **means** (extensive small arms), **motive** (poverty) and **opportunity** (lack of governmental authority and proximity to shipping) for effective pirate operations (Percy and Shortland, 2011).
- From the foregoing, it is inferred that:
  - the political landscape of Failed States encourages kidnappings for ransom, especially those that require time for negotiation and ransom payments. Consequently (and practically) Somali pirates do not seize ships and cargoes for their intrinsic value but rather, seize ships and cargoes in order to extort ransoms. (Pham, 2010). This pattern of operations finds further support in the argument that seizing ships and cargoes would require functioning ports to offload stolen goods and the development of networks to fence them. In addition, disposing of the cargo is significantly more complicated than simply demanding ransom money (Hastings, 2009).
  - the economic landscape of failed states provides the easy and unregulated access to goods necessary for piracy to thrive, such as explosives and firearms. However, the lack of infrastructure for the transport and resale of stolen cargoes imposes a constraint – one that discourages operations that require the movement of goods or people on land or the

use of commodities markets or functioning port facilities. This inference finds particular support in other research studies that suggest that piracy is not primarily a problem of state failure, the absence of infrastructure and in some instances, a complete lack of order, since these conditions increase the risks and the operational costs of piracy (Piracy Studies, 2011)

With regard to *Weak States*, previous discussions would recall that both the political and economic landscapes of these states differ from those of failed States. As such, in contrast to piracy operations in Horn of Africa, it is worthy to note that:

- In analyzing the maps of piratical activities, no clear linkages are indicated between the failed State of Somalia and the emergence and/or prevalence of piracy in that area, as these activities primarily cluster off the coast of Somaliland which is comparatively more stable and functioning. In the opinion of some researchers, "...at the very least, these maps indicate the limited capacity or willingness of authorities in Somaliland to halt such attacks..." (Trumbull, 2010).
- Further, Indonesia and Malaysia have their own challenges and the Failed States Index (Foreign Policy, 2011) indicates that they enjoy a much greater level of stability than Somalia and a number of the West African states that are dealing with piracy. Even so, they are still home to pirates, suggesting that even stable states may be unable (or unwilling) to enforce the rule of law.
- Some pirates need at least one safe port, from where it can seek refuge, refit, and, most importantly, unload and trade/sell the loot – therefore requiring markets and supply networks to support these activities. As aptly put forward by Percy and Shortland, 2011 (*cited in the DMPP Preliminary Survey*), piracy does not thrive on lawlessness and disorder, but benefits from stability that allows them to do business. More specifically, they state that "pirates need an infrastructure and contract security: hostages need to be fed, kept in reasonable condition and under pirates' control for ransoming" (DMPP, 2012).
- Much piracy in Southeast Asia is localized and opportunistic, analogous to the routine crime experienced ashore, with an enabling cultural and social environment that permits criminal groups or sub-cultures to flourish (DMPP, 2011b). Earlier analyses note that piracy is more likely to occur where the geographical layout (close to large ports or a coast fishing community) provides camouflage for both pirates and their targets; and of course, where ships are present (greater shipping density) (Nincic, 2008; Vagg, 1995). Further, piracy is more likely to flourish

where there is local acceptance of the pirates – especially when respect for the state authority is low or non-existent.

- Noticeably, the hijackings in Southeast Asia are more sophisticated than in East Africa, particularly around the South China Sea, where hijackers take full advantage of the complex transportation and communication infrastructure, and the large commodities markets the region affords. In support of this, Hastings (2009) indicate that these operations flourish because these States are strong enough to provide communications and transportation infrastructure; and to support large-scale commodities markets, but too weak to keep transnational hijacking syndicates from taking advantage of those tools. In essence, this weakness encourages more sophisticated operations, where the ship and cargo are seized and sold for a profit. Further analogy may be drawn to the position that the middle-ranking group of weak states offers more long-term advantages to terrorists than either anarchic zones or strong states (Traub, 2011).
- Further, corrupt law enforcement officials are a feature of all areas affected by piracy, not only in the regions discussed herein, but they are certainly a problem in Thailand, the Philippines and even parts of Malaysia along the Malacca Straits. In this region, some writers consider Indonesia as the jurisdiction with “the most notorious reputation...where the Indonesian police and navy have been involved in piracy for years but the central authorities have ignored the problem...” (Murphy, 2009, p.42).
- As such, it may be inferred that Pirates prefer weak states where a minimum of reliable order is available - a particular kind of order that would contribute to strengthening their business operations.

Without a doubt, most security challenges confronting countries with the Africa Region have their origin in the progressive failure of governance and internal conflicts that have served to undermine the development of those countries. Unfortunately, the multitude of factors related to state failure and state weakness are not only the most prominent causes of insecurity onshore, but have also been extended offshore.

The preceding discussions may be considered as confirming that the *stability of a State is a very important factor in creating opportunities for piracy to flourish*; however, some key discussion points require further deliberation and determination as to whether:

- Access to a State is especially important for pirates whose reliance on extortion requires a place where they can conduct negotiations without interruption.

- Piracy is a problem of state failure, the absence of infrastructure and a complete lack of order. These conditions increase the risks and the operational costs of piracy.
- Piracy activities are more likely to exist in and/or surrounding weak states, as a certain level of state weakness is necessary to provide a friendly environment for more than a minimal level of pirate attacks.
- Piracy may not correlate with state failure but with the lack of effective external responses to deal with the deteriorating governance mechanisms.

**Discussion Point # 16:** *Is secure refuge best provided by a state, more so, a failed state, where dire economic situations and non-existent governance of that State, make piracy desirable and allowable?*

**Discussion Point #17:** *Are weak states actually better breeding grounds for sophisticated pirates than failed states (associated with less logistically sophisticated hijackings such as kidnappings for ransom)?*

**Discussion Point # 18:** *Simply identifying states that are struggling to maintain control over their physical territory is unlikely to stem the tide of piracy. What is the likelihood of this variable in predicting growth trends and likely “hot spots” for piracy that have not yet been identified?*

States, individually and collectively, determine whether piracy flourishes or fails, as piracy can thrive where there is the **means, motive and opportunity**, or more specifically: when coastal regions are troubled by war or civil conflicts/disturbances, or their aftermath; in lawless land and sea spaces; where coastal communities are either too weak or isolated to defend themselves; in jurisdictions that are corrupt enough to provide sanctuary/safe havens and/or open markets for stolen good.

## 9. ASSESSING THE EFFECTIVENESS OF GOVERNANCE ARRANGEMENTS

As has been repeatedly noted by scholars, policy makers and those involved in the operational aspects of counter-piracy, failure to sufficiently address the root causes of piracy has been a major limitation to previous and current efforts to effectively address the problem. Additionally, analysis of the current literature undertaken for this project suggests that the effectiveness of existing governance regimes at the national, regional and international levels are inextricably linked to root causes. In the case of failed states such as Somalia, it may be necessary to consider the sub national level as well, since both Somaliland and Puntland act as autonomous governments. In addressing governance, a broad definition has been adopted:

“Governance is the whole of public as well as private interactions taken to solve societal problems and create societal opportunities. It includes the formulation and application of principles guiding those interactions and care for institutions that enable them.” (Kooiman 2003, p.4).

This definition emphasizes that governance is broader than government and includes the full range of stakeholders and interactions. Drawing on work conducted for assessing governance in large marine ecosystems (Fanning et al, 2007; Mahon, Fanning & McConney, 2011a; UNEP, 2011), this section of the report highlights possible challenges and considerations associated with any attempt to assess governance effectiveness in the regions where piracy is prevalent. Two key issues must be considered with regard to an assessment of governance. The first is that governance can only be evaluated against context specific goals and objectives. Some global norms can be assumed at the level of principles, but trade-offs among social, economic and conservation objectives can only be established through an appropriate process at the level of the system that is being assessed. The second key issue is the complexity inherent in the multi-scale, multi-level nature of governance (Mahon, Fanning & McConney, 2011b).

In our view, these issues preclude the possibility of a simple set of universal indicators that can be used to assess governance across regions globally, or even within regions. It indicates the need for a general assessment framework within which each situation can be approached. This framework must allow the flexibility for context specific governance evaluation within a region that can nonetheless ultimately be compared across regions for a global perspective.



### 9.1 Designing a Governance Assessment Methodology

Based on a review of several of the governance frameworks that are available in the literature, the following set of characteristics that an assessment framework should have in order to be flexible while allowing comparison among regions includes:

- It must accommodate both geographical scale and institutional scale, since activities within a region are oftentimes trans-boundary in their effect, if not their source;
- It must accommodate the different types of governance interactions and processes that must co-occur within the framework if governance is to be appropriate;
- Its processes must be iterative on time scales that are appropriate to adaptation and learning; and,
- It must be structured so that different scale and process appropriate indicators can be used in different parts of the framework.

The policy cycle-based, multi scale, multi-level Large Marine Ecosystems (LME) Governance Framework developed by Fanning et al (2007) appears to have most of the desired characteristics. This framework appears to be useful for both designing interventions to improve governance and for assessing governance. The framework is based on linked policy cycles at multiple levels, from local to international. The cycles have a common structure but may vary in nature at different levels and from issue to issue at any given level (Figures 1 and 2).

However, they must be complete in order for there to be effective governance at the level or location in question. Cycles must also be linked vertically with two-way flows if they are to be effectively connected with the remainder of the framework (Figure 3). Incompleteness and disconnectedness are two common dysfunctions observed in ineffective governance regimes. It is also critical for vertical linkages to be established among the decision-making stages of the various cycles. Linkages at other stages such as the technical ones are important but not sufficient. Finally, lateral linkages are also important as they serve to promote shared learning.

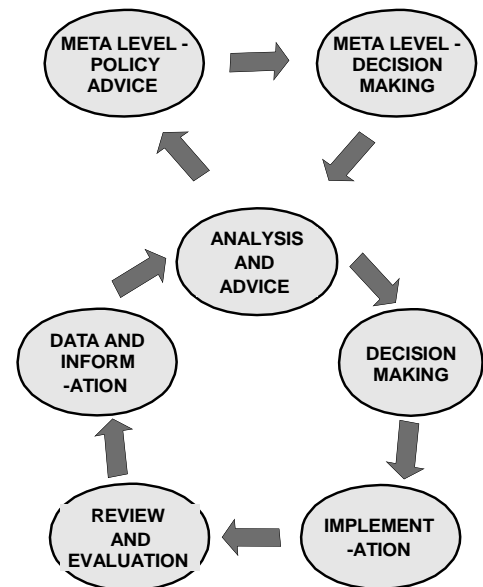
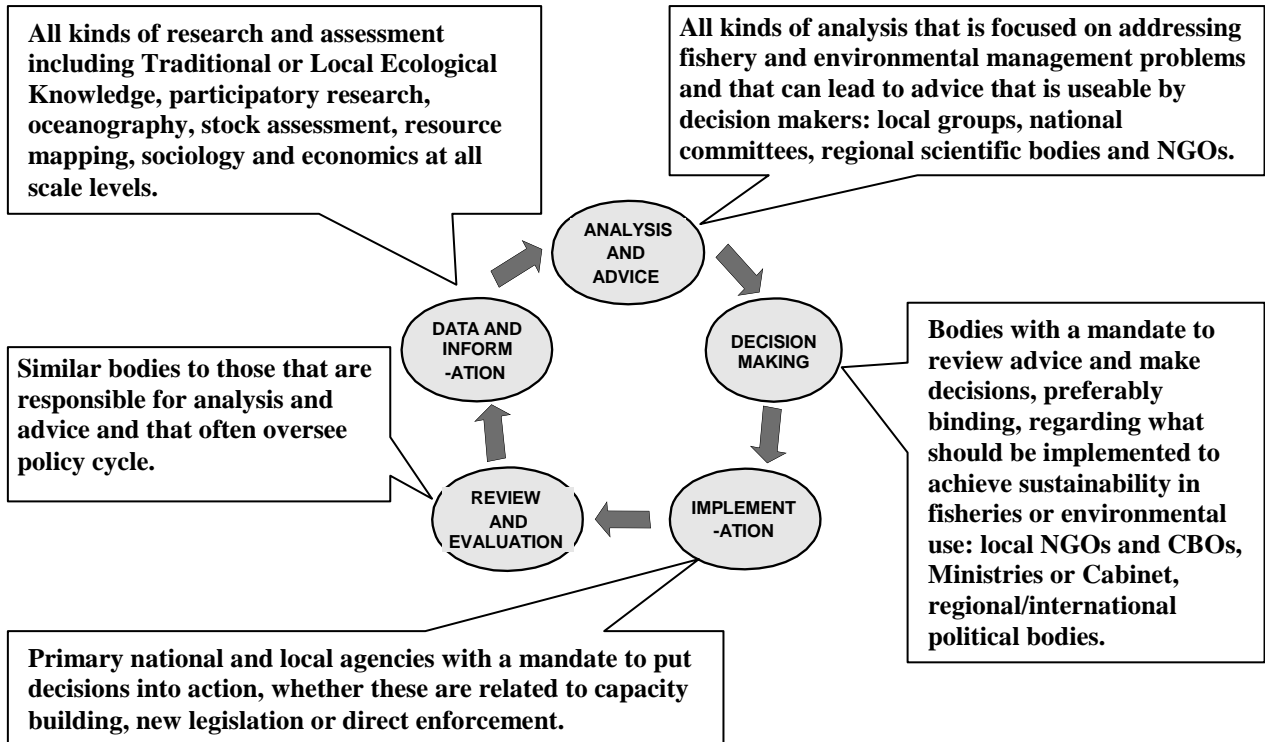


Figure 1 Two-stage policy cycle used for governance assessment

In understanding governance arrangements for addressing piracy at the global and regional levels, understanding what agencies and organizations should have a role in providing meta-level advice and decision making are critical policy issues to be addressed. Similarly, how these arrangements should be linked laterally in terms of their functionalities and vertically, in terms of ensuring data and information and analysis and advice are provided to guide decision-making at national and regional implementation need to be determined.

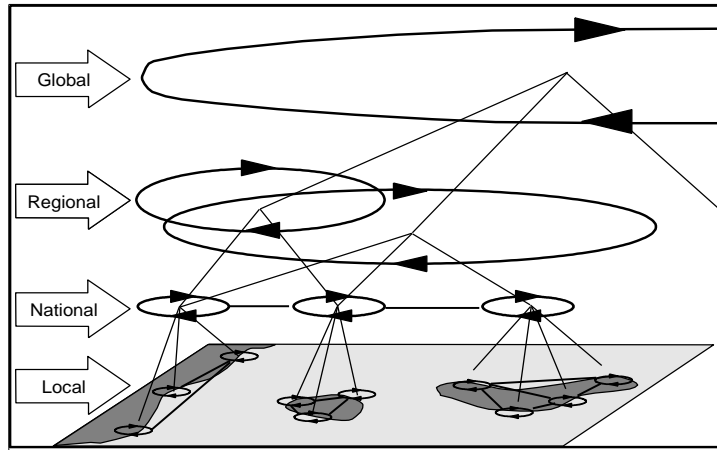


**Figure 2. The diversity of stakeholders that may be involved in the policy cycle depending on cycle stage and scale level.**

The LME governance assessment methodology provides a means to accomplish this level of understanding and comprises two Levels. Level 1 assesses the extent to which trans-boundary governance architecture is in place for the system, but does not assess the performance or functionality of the arrangements comprising the architecture. This Level 1 assessment evaluates whether or not the critical trans-boundary issues are covered by governance arrangements that have full policy cycles. It is expected to reveal the extent to which the issues are covered, whether there are gaps or overlaps in coverage and the nature of the arrangements that are in place. It also addresses the extent to which arrangements are linked within a region.

A governance researcher would not assume that the mere presence of Commission X and Working Group Y established under Agreement A and Law B means that these institutions cover the policy cycles and are linked into a useful structure.

The Level 2 assessment evaluates the functionality and performance of governance arrangements in terms of a fuller range of criteria such as effectiveness, inclusiveness, efficiency and equitability.



**Figure 3. The multi-scale component of the proposed governance framework with vertical and horizontal linkages among the different policy cycles. The multi-level linkages do not necessarily imply a controlling function (Fanning *et al*, 2007).**

## 9.2 Applying the Governance Assessment Methodology

Based on the assessment of international, regional and national arrangements conducted in section 4, it is evident that there is a broad array of policy actors who are engaged in addressing the problem of marine piracy. However, exactly how connected these arrangements are vertically and horizontally at the different jurisdictional and spatial scales are yet to be assessed. One of the objectives of the large marine ecosystem governance assessment methodology is to develop the approach in a way that it can be applied by key stakeholders within each ecosystem as a self-assessment tool (Mahon *et al*, 2011b). This ability is viewed as critical in helping countries conduct assessments of governance effectiveness as it has been shown to be one of the leading factors affecting outbreaks of piracy. The following section illustrates an example of the use of the methodology for assessing the effectiveness of the regional level governance regime to address piracy in the Guianas-Brazil shelf region of the Caribbean.

### 9.2.1 Level 1 Assessment – Governance Arrangements

Several steps are required to determine the governance architecture in place for a particular marine system. This process, as summarised in Table 6, will provide an increased understanding of: the extent to which governance issues are covered (and allow for identification of gaps); the match between governance arrangements and issues; the extent to which arrangements extend outside the region; the extent to which issues are covered by multiple arrangements that could result in conflict; and, because the whole architecture is greater than the sum of its parts, especially for integration of governance at the

trans-boundary level, how well arrangements are clustered to make best use of existing institutions and organisations.

<b>Step</b>	<b>Key points</b>
1. Identify system to be governed	Begin with a clear definition of the system to be governed. Geographical boundaries of the system and the countries involved in the system must be clearly identified.
2. Identify issues to be governed	In some regions, the issues will already have been identified and may have been further explored through a Causal Chain Analysis. Issues may have both a topical and a geographical component, such as the issue of piracy.
3. Identify arrangements for each issue	Determine the extent to which each issue is covered by an identifiable arrangement that is specific to the issue, whether formal or informal. The aim is to evaluate the extent to which the arrangement comprises a complete policy cycle with the potential to function in three modes: (1) The meta-mode (articulation of principles, visions and goals; (2) the institutional mode (agreed ways of doing things reflected in plans and organizations; and, (3) the operational mode. It also examines the extent to which these modes may operate at different scale levels within the same arrangement, hence the need for linkages within arrangements.
4. Identify clustering of arrangements within institutions	Examine the way that arrangements are clustered for operational purposes and/or share common institutions/organisations at different levels. Similar issues may be covered by similar arrangements. There may be efficiency in clustering these arrangements. Alternatively, clustering may occur at higher levels for policy setting or institutional efficiency, but be separated at lower levels.
5. Identify linkages	Identify actual and desirable linkages within and among arrangements and clusters.

The assessment of incompleteness of an arrangement for an issue (Table 7) is based upon whether there are organizations with responsibility for the various stages of the policy cycle for that issue. The columns showing responsible agencies or bodies in Table 8, specific to the issue of piracy, were filled based on information in the literature and the experience of the Caribbean experts. The table for each identified issue in a region can all be reviewed and revised by the relevant stakeholders via several consultative modes, the most interactive but costly of which is face-to-face meeting. Other alternatives are through internet communication or ‘round robin’ edits. Where an organisation or body exists that has the potential to perform a function, but has not demonstrated any evidence of achieving that potential, the completeness receives a zero in order to reflect the current structure. This differs from evaluating the performance of arrangements as done in Level 2 of the governance assessment. It says that structurally the body is basically invisible.

In filling in the information required for Table 8, it does not matter at which stage in the policy cycle the filling in of the governance assessment starts. Some may find it more intuitive to start with ‘data and analysis’ as the first row to be filled in while others may prefer another starting point.

Returning to Table 7, there is an overall incompleteness score of 81% for the policy cycles covering the issue of piracy and the level of priority is assigned 3.0 for this system. The high levels of incompleteness of arrangements for piracy in the Guianas-Brazil shelf area is reflective of the relatively low level of priority given to piracy in this part of the Caribbean due to the absence of incidents affecting major commercial shipping interests. The DMPP Teams suspects that if outbreaks of the nature currently being seen in the Guianas-Brazil region against fishing vessels were to take place in the western Caribbean close to the shipping routes exiting or entering the Panama Canal, that the level of priority would be significantly elevated.

**Table 7: Trans-boundary system governance architecture - System summary for the Guianas-Brazil Shelf region of the Caribbean**

<b>System</b>	<b>Guianas-Brazil Shelf</b> Total number of countries: Six (Brazil, French Guiana, Suriname, Guyana, Trinidad and Tobago, Venezuela)			<b>Region</b>	Wider Caribbean
<b>Fill in these columns, then assess issues using the arrangements tables (insert these tables next)</b>			<b>After filling in the arrangements tables next for each issue, return to fill in these columns using those data</b>		
<b>Trans-boundary issue<sup>a</sup></b>	<b>Descriptive or commonly used name for the arrangement<sup>b</sup></b>	<b>Importance for stakeholders involved<sup>c</sup> average (range)</b>	<b>Incompleteness of governance arrangement<sup>d</sup> (score/category)</b>	<b>Priority for intervention to improve governance<sup>e</sup></b>	<b>Observations<sup>f</sup></b>
Piracy	None named	1	17/3	3	There is no discernible arrangement for this issue. The score that is given relates entirely to national capacity
<b>System architecture incompleteness index<sup>g</sup></b>			17 or 81%	3	<b>System priority for intervention index</b>

**System summary table notes to assist filling in and interpretation**

- What level of detail or disaggregation is appropriate? This can be a matter of choice, and part of the flexibility of the system, but it should ideally be to the level where the trans-boundary issue requires a separate institutional arrangement.
- Ideally this would be the name used by the participants in the arrangement and be documented
- This should be based on existing reports and/or expert judgement, or other sources of regional information. It is to be scored from 0-3 in this table (where none = 0, low = 1, medium = 2 and high = 3).
- The incompleteness score given in this column will be derived from the completeness scores put on the arrangement specific tables by subtracting the latter score from 21, which is the maximum possible. This score will then be reallocated into a category (where none = 0, [1-7] low = 1, [8-14] medium = 2 and [15-21] high = 3) for input into the 'Priority for intervention' column.
- This priority would be calculated as the product of the 'collective priority for countries involved for the issue' and 'incompleteness'. It can range from 0-9. Another way of examining the data in the incompleteness and collective priority columns would be a 2x2 high/low matrix.
- This provides the opportunity for brief comments that may help the user interpret the information provided on the summary page, but it is not intended to be a substitute for explanation in the text.
- Calculate the average.

**Table 8: Transboundary system governance architecture – Summary for piracy-specific arrangements for countries in the Guianas-Brazil Shelf region of the Caribbean**

Arrangement	Guianas-Brazil Piracy Arrangements	Issue	Increasing incidents of piracy, especially against fishers	
Policy cycle stage (governance function) <sup>a</sup>	Responsible organisation or body <sup>b</sup>	Jurisdiction scale level or levels <sup>c</sup>	Completeness <sup>d</sup>	Observations <sup>e</sup>
Meta level - preparation of policy advice				
Meta level - Policy setting or decision-making				
Policy cycle - preparation of management advice				
Policy cycle - Management decision-making				
Policy cycle - Implementation	National enforcement agencies	national	2	
Policy cycle – Review of implementation at strategic and operational levels				
Policy cycle - Provision of data and information	Fishers, mariners, national enforcement agencies	local, national	2	
<b>Total<sup>f</sup></b>			4/21	

Arrangements by issue table notes
<p>a. This column lists the governance functions that are considered to be necessary at two levels: (1) the meta-level of policy preparation and setting; and (2) the policy cycle level.</p> <p>b. The organisation or organisations responsible for the function should be listed here</p> <p>c. These are the level or levels on the jurisdictional scale at which the function is performed. There are five levels on the scale of jurisdiction: local, national, sub-regional, regional, and extra-regional.</p> <p>d. Rate on a scale of 0 = absent, 1 = low (ad hoc, irregular, unsupported by formal documentation or little known by stakeholders) , 2 = medium, 3 = high (clearly identifiable, regular, documented or supported by policy and legislation and widely known among stakeholders)</p> <p>e. This provides the opportunity for brief comments that may help the user interpret the information provided, but is not intended to be a substitute for annotation.</p> <p>f. Assume each step is equally important and receives equal weighting for the completeness overall.</p>

Table 8 focuses on identifying mainly the formal arena in which governance interactions are played out. However, as noted in its definition, governance includes the interactions of all the actors with interests in governance outcomes. In order to understand and assess governance processes, the roles of and interactions among all the actors must be considered, including those in the private and non-governmental sectors.



With regards to step 4 in Table 6, the assessment of clustering is based on the extent to which issue specific arrangements in a system share a responsible body at various policy cycle levels. In the example for the Guianas-Brazil region, clustering is not evident due to the lack of arrangements in place to address piracy within the region.

It is beyond the scope of this research to apply a detailed Level 1 assessment to the regions currently experiencing outbreaks of piracy. However, it is believed that such an analysis could shed considerable insight into identifying gaps in governance arrangements in each of the regions and in targeting areas for improvement at the level of the completeness of policy cycles, as well as enhancing vertical and lateral linkages. More importantly, applying the Level 1 assessment to areas identified through predictive modelling as potential ‘hot spots’ for outbreaks of piracy could serve to guide pre-emptive strategies aimed at averting these outbreaks before they occur.

**Discussion Point # 19:** *Should a major policy response to addressing piracy be focused on identifying and strengthening gaps in governance arrangements at the international, regional and/or national levels?*

### *9.2.2 Level 2 Assessment – Performance of Governance Arrangements*

The Level 2 assessment evaluates the functionality and performance of governance arrangements according to criteria agreed upon by stakeholders. Mahon and others (2011b) provide the conceptual background to a process for examining governance arrangements in trans-boundary water systems.

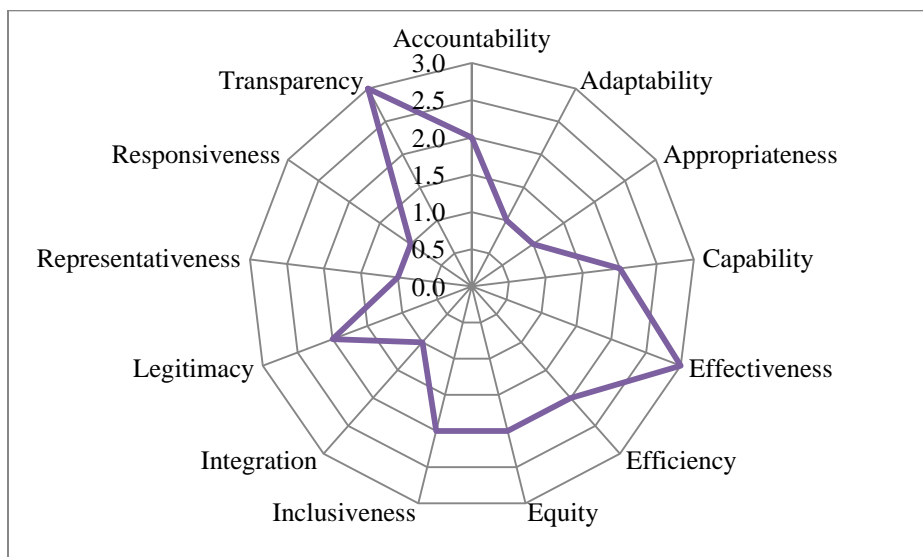
These researchers suggest that the principles guiding the establishment and the functioning of a governance arrangement, and the extent to which they are being observed in the processes, are an important part of an assessment of governance performance. They argue that assessing the presence of principles can provide very practical insight into where governance systems may need the most attention and removes the focus from a sectorally-driven response to piracy to one that addresses its root causes. Key end product principles cited include: sustainability, efficiency, rationality, inclusiveness, equity and responsiveness. In order to reach these ends, process principles include: transparency, accountability, comprehensiveness, participation, representativeness, information and empowerment. Processes and products are linked and overlap. Table 9 lists a suite of 13 potential principles identified in the literature for use in governance performance assessment.

In the Level 2 methodology, representatives of the key stakeholder groups in a region score the importance of having each of the 13 principles associated with the governance arrangement identified for each issue. Response categories were: disagree strongly = 1, disagree =2, agree = 3, agree strongly = 4.

**Table 9. List of potential governance principles to be used in assessing governance performance**

Principle	Statement
Accountability	The persons/agencies responsible for the governance processes can be held responsible for their action/inaction
Adaptability	The process has ways of learning from its experiences and changing what it does
Appropriateness	Under normal conditions, this process seems like the right one for what it is trying to achieve
Capability	The human and financial resources needed for the process meet its responsibility are available.
Effectiveness	This process should succeed in leading to sustainable use of ecosystem resources and/or control harmful practices
Efficiency	This process makes good use of the money, time and human resources available and does not waste them.
Equity	Benefits and burdens that arise from this process are shared fairly, but not necessarily equally, among stakeholders
Inclusiveness	All those who will be affected by this process also have a say in how it works and are not excluded for any reason.
Integration	This process is well connected and coordinated with other related processes.
Legitimacy	The majority of people affected by this process see it as correct and support it, including the authority of leaders
Representativeness	The people involved in this process are accepted by all as being able to speak on behalf of the groups they represent
Responsiveness	When circumstances change this process can respond to the changes in what most think is a reasonable period of time
Transparency	The way that this process works and its outcomes are clearly known to stakeholders through information sharing

Figure 4 provides an example to graphically illustrate how summaries for rankings of principles can be used for comparative purposes in the Level 2 performance assessment of the arrangement for piracy for different stakeholders and/or different countries within a region or across regions. It does not rate the relative importance of the principles since all are taken to be important, but it suggests that performance in general is fair. In this particular example, most scores tend to lie between disagree (score 2) and agree (score 3). The general impression that the processes are moderately functional with regard to the principles means that improvement of these perceptions and scores could be a governance objective. This general conclusion provides the opportunity to reflect on what might be done differently in order to improve the arrangements with respect to the principles. This would probably be best done in consultation with the stakeholders by asking them what they would like to see changed in order for them to agree that the principle was being observed in the process.



**Figure 4. An example of a summary Level 2 assessment of governance principles**

Based on mandates and responsibilities, functional linkages and interactions within governance arrangements as well as between them are critical for an effective governance system. Even if the clustering analysis were to find structural (governance architecture) arrangements that reflect integration as being possible or likely, their existence does not mean that integration is actually taking place. This can best be determined by in depth interviews and by examination of the documentation of the functioning arrangements. Sound architecture is seen as a necessary, but not sufficient condition for the integration required for an effective governance system to address the problem of piracy (Mahon et al, 2011b).

It should also be noted that integration can take place in the absence of appropriate formal structure on an ad hoc basis, through individual initiative and personal contacts. While this is better than nothing and may in cases be all that is possible, given the prevailing architecture in the example for piracy in the Guianas-Brazil region, it is not considered to be a sustainable, transparent, accountable approach to addressing the challenge of countering piracy in the region, or in any other region.

**Discussion Point # 20:** *Given the call by governance scholars to not only ensure functional governance arrangements but to have principled governance arrangements in place if piracy is to be addressed, is there a suite of principles that can be universally agreed upon for assessing governance effectiveness?*

**Discussion Point # 21:** *What deficiencies in the current efforts to focus on strengthening regional level arrangements need to be addressed?*

**Discussion Point # 22:** *Under what conditions might a regional approach not be effective?*

## 10. A GENERALIZED MODEL FOR PREDICTING PIRACY

The DMPP research has highlighted the considerable emphasis being placed by scholars, practitioners and decision-makers on the need to understand and address marine piracy at multiple jurisdictional levels. However, these efforts appear to focus almost exclusively on enhancing sectoral (i.e. operational, economic, legal or social) policy responses to better address the problem once it has arisen. The DMPP recognizes two major policy gaps with this approach which it is designed to address.

The first inadequacy centers on the need by decision makers for policy options that integrate operational, socio-economic and law and governance considerations across spatial scales, so as to ensure a comprehensive analysis of the potential consequences that might result from policy implementation. This need is exemplified by the increasing level of piratical activity in the Indian Ocean, despite implementation of significant operational responses at sea.

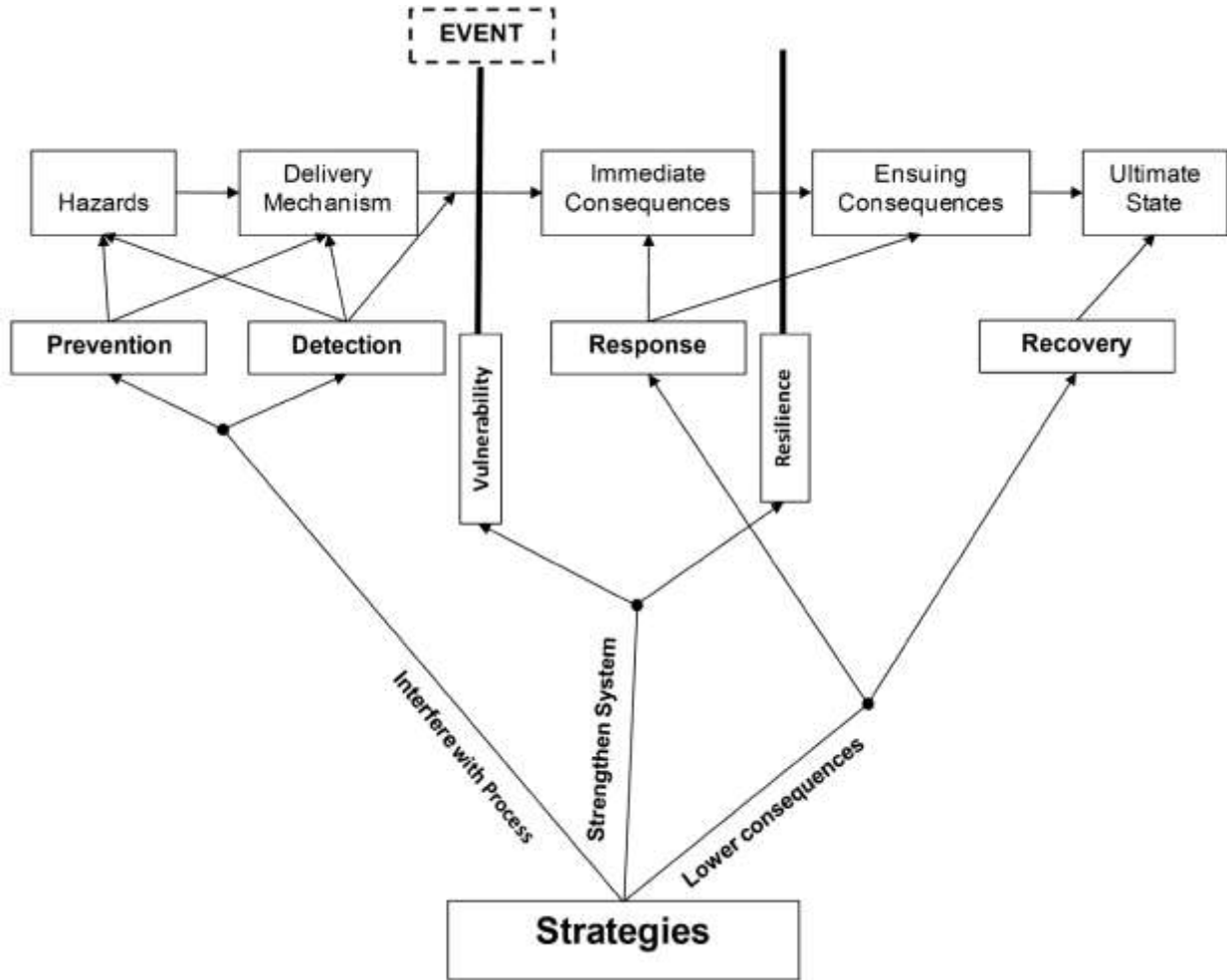
The second inadequacy centers around the need to not only develop an effective responsive strategy that is integrated and comprehensive but to also develop policy options for implementation that use a pre-emptive strategic approach. This approach is specifically focused on reducing vulnerability to potential outbreaks. The DMPP research failed to uncover any evidence in the literature addressing this gap. In fact, there was little evidence of any modeling being undertaken and the only work identified in this regard was an unpublished Honors thesis attempting to predict linkages between duration in captivity and size of ransom paid (Leung, 2010). The need to address this pre-emptive gap is exemplified by the dramatic increase in piratical activity in the Gulf of Guinea while world attention was focused on the Horn of Africa.

These two approaches, reactive and pre-emptive, to minimizing the problem of piracy can be visualized using the framework shown in Figure 5. Although constructed in 2008 by Brooks and Pelot (members of the DMPP team) to illustrate the life cycle of a port security threat, the diagram serves to highlight the types of pre-emptive and reactive strategies that can be developed to deal with different phases of piracy outbreaks.

The assessment focuses on strategies to minimize the risk threat, calculated as the product of the likelihood of the event occurring, the vulnerability inherent in the system and the magnitude of the consequences resulting from the threat. It addresses three primal aspects that distinguish security risk analysis:

- (1) the deliberate intent to cause harm;
- (2) the unpredictable and unique nature of the threats; and
- (3) the adaptability of the ‘enemy’ to attempt to circumvent new security measures.

Figure 5. Strategic framework for minimizing consequences arising from a potential port security threat. (Source: Brooks and Pelot, 2008)



While seemingly intractable, the menace must still be addressed, and risk management approaches are best tailored to deal with these challenges. Strategies in the model serve one or more of three main purposes:

- (a) to lower the probability of an event or incident occurring in future; this includes strategies to interfere with the process (thereby making it more difficult to execute the event) or to detect the plan for a future event (resulting in faster interdiction);
- (b) developing plans to respond to the event, and lower the consequences; this second one includes strategies aimed at remediation and recovery in the case of an event; and
- (c) strategies aimed at strengthening the system, which includes vulnerability assessment, and system redesign to promote system resiliency in the case of an event.

Based on the model, pre-emptive strategies focus on interfering with processes so as to prevent and detect potential risks while reactive strategies serve to strengthen the system by minimizing vulnerability to the event should it arise and building resilience to better withstand the consequences arising from the outbreak. The framework also includes strategies aimed at lowering the consequences of the outbreak through appropriate response implementation, allowing the situation to return to a non-threat state. Using the framework as an example, it is clear that focusing only on the reactive strategies limits the ability of the maritime community to effectively deal with the problem of piracy.

This section of the report describes the initial efforts to date by the DMPP to develop a generalized predictive model that would provide the global maritime community with a preliminary decision-support tool aimed at anticipating potential piracy ‘hot spots’. The policy implications of such a tool are widespread as it can provide the incentives needed for targeted pre-emptive responses to be focused before the problem becomes manifest. Most significantly, it has the potential to modify and enhance governance regimes in areas flagged as potentially susceptible to piracy and as such, areas with the potential for other global, regional and national security-related risks.

### *10.1 The Piracy Cycle*

Research into the development of a predictive model identifying the socioeconomic, governance and legal situations and other relevant precursors to the outbreak of contemporary piracy draws upon the research conducted by all three of the DMPP modules. Nonetheless, work on the predictive model has commenced and is expected to continue over the upcoming months. Critical to the construction of the model is a clear and concise definition of what exactly constitutes an outbreak of piracy (as distinct from a pirate attack) and a conceptual understanding of the steps in the piracy cycle leading to such an outbreak. From a modeling perspective, these two elements provide clarity around what exactly the model is to predict and what input variables could serve to allow the model to do so.

In terms of defining what constitutes a piracy outbreak, namely the dependent variable for the model, researchers have highlighted frequency of occurrence, nature of occurrence (location, size and type of vessel) and severity of violence<sup>28</sup> as three possible parameters contributing to the definition used by the model.<sup>29</sup>

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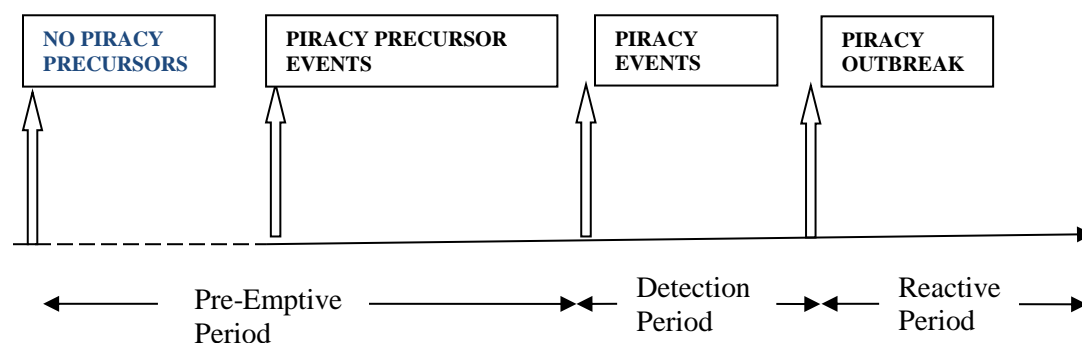
<sup>28</sup> The definition of violence as used by the World Health Organization (2002) is “*The intentional use of physical force or power, threatened or actual, against oneself, another person, or against a group or community, that either results in or has a high likelihood of resulting in injury, death, psychological harm, maldevelopment or deprivation*”

<sup>29</sup> It is important to note that it is not the intention at this stage of model development to be consistent with the UNCLOS definition of piracy and armed robbery.



To provide guidance on the types of input variables that can contribute to a piracy outbreak, a preliminary piracy cycle, as illustrated in Figure 6, was conceptualized by DMPP team members. In order to allow for pre-emptive strategies to be designed and implemented, it was deemed important for the cycle to allow for indicators that relate to the precursor periods to be identified as inputs into the model, i.e. the factors that form the pre-conditions for piratical activity and allow for preventive and detection strategies to be implemented. While correlations would have to be tested, some initial precursor variables include those linked to means, motive and opportunity such as seagoing expertise, the current status of fish stocks, presence of illegal foreign fishing, presence of other forms of criminal activities on land and at sea (e.g. smuggling and drug trafficking), proximity to shipping lanes, level of development and effectiveness of governance regime, etc.

Figure 6. A conceptual piracy cycle for predictive modelling



### 10.2 Identifying Possible Input Indicators

Based on the conceptual cycle leading to piracy outbreaks, a number of inputs variables have been identified. Key among these are the factors on authority, legitimacy and capacity discussed in the Section 9 of this report on state failure and state weakness and the drivers leading to the prevalence of piracy.

A potential list of broad categories of indicators for each of the stages of the piracy cycle has been identified as potentially useful input variables into the model. Some of these indicators are provided in Table 10 below.

Table 10. Potential input variables for the piracy predictive model

CATEGORIES OF POTENTIAL INPUT INDICATORS				
GEOPOLITICAL	OPERATIONAL	ECONOMIC	SOCIAL	SOCIO-ECONOMIC
<ul style="list-style-type: none"> <li>Stability index</li> <li>State fragility index</li> </ul>	<ul style="list-style-type: none"> <li>Vessel tracking systems</li> <li>Regional</li> </ul>	<ul style="list-style-type: none"> <li>Transparency in business</li> <li>Investment risk</li> </ul>	<ul style="list-style-type: none"> <li>Life expectancy</li> <li>Human development</li> </ul>	<ul style="list-style-type: none"> <li>Health of fisheries stock (catch per unit)</li> </ul>

CATEGORIES OF POTENTIAL INPUT INDICATORS				
GEOPOLITICAL	OPERATIONAL	ECONOMIC	SOCIAL	SOCIO-ECONOMIC
<ul style="list-style-type: none"> <li>Failed state index</li> <li>Transparency/democracy/secular government</li> <li>Incidence of civil war/widespread civil unrest</li> <li>Security/policing</li> <li>Anti-piracy laws</li> <li>Judicial Independence (security of tenure, absence of political interference) Effectiveness of courts/prosecution &amp; sentencing,</li> <li>Backlog of courts</li> <li>Customary non-judicial legal systems</li> <li>Coastal/navy cooperation</li> <li>Bilateral agreements</li> <li>Capacity building effort</li> <li>Length of coastline</li> </ul>	<ul style="list-style-type: none"> <li>cooperation reporting system</li> <li>Navy and coast guard</li> <li>Military operating under civilian control</li> <li>Shared maritime domain awareness</li> <li>Support from other countries</li> </ul>	<ul style="list-style-type: none"> <li>Informal banking practices</li> <li>Banking ease index</li> <li>Business logistics performance index</li> <li>Communications Infrastructure</li> <li>Import and export contribution to GDP</li> <li>Shipping proximity, tracking and density</li> </ul>	<ul style="list-style-type: none"> <li>index /GNI poverty, Existence of minimum wage</li> <li>UNICEF indicators - Percentage of government expenditures on health, education, defense</li> <li>Youth employment</li> <li>Child labour rates</li> <li>Homicide rates</li> <li>Organized crime</li> <li>Drug trafficking</li> <li>Clan structure/family style</li> <li>Population demographics</li> </ul>	<ul style="list-style-type: none"> <li>effort)</li> <li>Importance of fisheries to GDP</li> <li>Importance of fisheries to food security</li> <li>Level of subsistence activities</li> <li>Percent protein from fish</li> <li>Percent of fish of total export</li> <li>Maritime tradition Shipbuilding</li> <li>Loss of arable land(strain reliance on maritime resources)</li> </ul>

### 10.3 Developing the Model

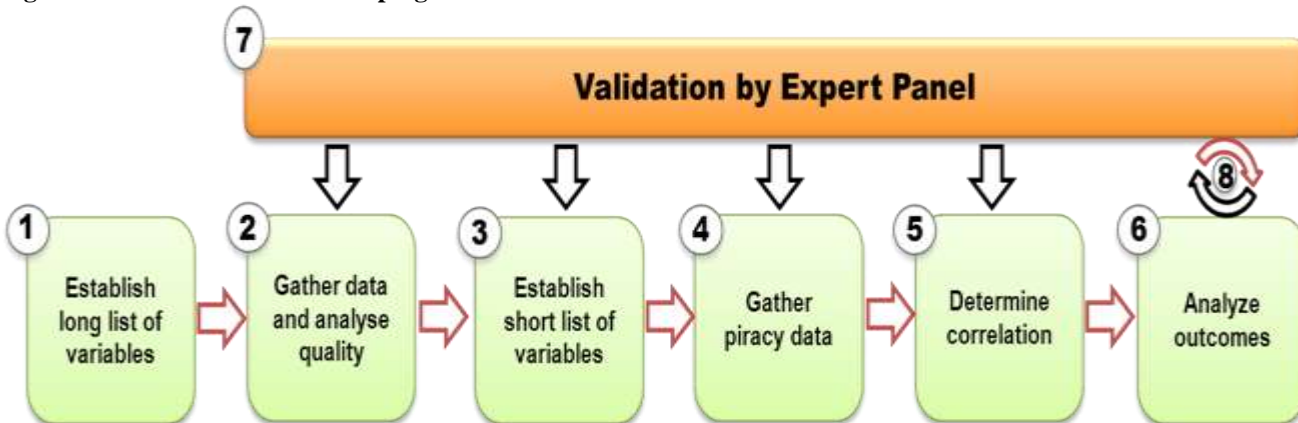
As previously, the development of the piracy predictive model draws on the findings of all of the DMPP researchers and is intended to occur over the upcoming months. Current efforts aimed at developing the model include:

- Refinement of the dependent variable definition on what constitutes an outbreak of piracy.
- Refine list of independent input variables and categories of indicators
- Conduct DMPP team and external experts surveys to:
  - Weigh the various indicators and outputs
  - Identify consensus and divergence of possible critical leading indicators.
- Review source, reliability and availability of the various indicators
- Produce a preliminary model for populating with data from selected input variable

The goal of the model is to determine whether there are measurable variables which are significant indicators of a piracy outbreak. In order to determine if there are such variables, ideally the model will be developed in the following steps:

1. Develop long-list of potential variables, based on research performed during the course of the PIRACY project
2. Gathering of the data and analysing based on data quality criteria
3. Establish a short list of those variables for which data exists that meets the criteria and that are potential key variables
4. Construct database with piracy attacks reported to IMB and categorize based on gravity of incidents using IMB categorization
5. Determine the correlation between the indicator variables and the incidents of piracy outbreaks (IMB data)
6. Analyse results to estimate causality and develop list of variables which could be significant indicators of piracy outbreaks
7. Discuss methodology, data quality and outcomes with expert panel
8. Adjust the model and analyse results

Figure 7. Process Flow for developing the Model



**1: List of variables (long list)**

A long list of almost 40 variables and topics were established based on the research performed in the different modules of the project and included social, economic, governance and operational topics. The

data search would have to show what the best variables were for those topics that were not yet expressed in a well-defined variable. The topics and variables are shown in the **Table 11** below:

**Table 11. Topics and Variables**

Economic	Social	Socio-Economic	Political/Governance	Other Potential Indicators
Transparency in Business	Life Expectancy	Health of Fisheries Stock (catch per unit)	Stability Index	Length of Coastline
Investment Risk	Human Development Index	Importance of (coastal) Fisheries	State Fragility Index/Failed State Index	Size of EEZ
Informal Banking Practices	Quality-Of-Life (QOL) / Subjective Well-Being (SWB)	Percentage of Fish of Total Export	Transparency / Democracy	Mobile Phone Use
Business/Logistics Performance Indicators	Homicide Rates/Organized Crime/Drug Trafficking	Existence of Minimum Wage	Corruption	Internet Use
Average Income	Population Demographics	Youth Employment/Child Labour Rates	incidence of civil war	
GINI Index	Hofstede Cultural Dimensions	Foreign Aid to Country	Security/Policing Expenditure	
Import/Export Maritime Trade	Clan Structure/ Family Style		Military/ navy expenditure	
Shipping Density (x nautical miles from coast)			Anti-Piracy Laws	
			Effectiveness of Courts/Prosecution & Sentencing, Backlog of Courts	
			Informal Justice Systems	
			Coastal/Navy Cooperation/Bilateral Agreements	
			Vessel Tracking Systems/Regional Reporting System	
			Capacity Building Effort, Support from other countries	

**2: Data Collection and Quality Analysis**

Before actually gathering the data on each variable, the quality criteria of the data were established. The main criteria are:

- Trustworthy data (reliable sources, transparency of methodology and comparable between countries)
- Data for multiple years (preferably 1990 – 2012)
- Data for multiple countries (preferably for all coastal states)

The actual data gathering commenced with a “quick scan” of 10 arbitrarily selected variables and several countries. The found information was gathered in a fixed template in order to easily compare the findings and discuss further steps. This template is shown in the figure below.

**Table 12. Example of a Quick Scan Template (Ecuador)**

Status	Category	Indicator	Source	Years covered	Period	Access	Format	Remark 1	Remark 2
No problem		Life expectancy at birth, total (years)	<a href="#">World Bank Data</a>	1960 - 2010	Annual	Free	Excel	Available for almost all countries	
Concern		Population below \$2 a day is the percentage of the population living on less than \$2.00 a day at 2005 international prices	<a href="#">World Bank Data</a>	87,94,95. 98,99,20 00,2003, 2005 - 2010	Annual	Free	Excel	Scattered data	Data for income below 1.25 is even more scattered
Concern		Intentional homicide, count and rate per 100,000 population	<a href="#">UNODC</a>	1995 - 2008	Annual	Free	Excel	Data only from 1995	
No problem		GNI per capita, PPP (current international \$)	<a href="#">World Bank Data</a>	1980- 2010	Annual	Free	Excel		
No problem		Total catch (tonnes) or Coastal Catch	<a href="#">FAO Global Capture Production</a>	1950 - 2010	Annual	Free	Excel	Total catch does not show anything	
Concern	Social	Human Development Index	<a href="#">UNDP Human Development Reports</a>	1980- 2011	Annual	Free	PDF	Composite variable with changes at 2011	Life Expectancy, Mean years of schooling and GNI

Status	Category	Indicator	Source	Years covered	Period	Access	Format	Remark 1	Remark 2
Concern	Economic	Mobile cellular per 100 people	<a href="#">World Bank Data</a>	Mid 1990's-2010	Annual	Free	Excel	Time series dating back only until the mid-1990's	
Concern	Social	Population Demographic: age distribution, Gender split	<a href="#">CIA World Fact Book</a>	1982-2011	Annual	Free	PDF and HTML	Available but level of detail is inconsistent for all years.	Basic population stats in earlier years progressing to more detailed accounts in more recent years in terms of age distribution and gender split.
Concern	Social	Literacy %	<a href="#">CIA World Fact Book</a>	1982-2011	Annual	Free	PDF and HTML	Available but level of detail is inconsistent for all years. Some exact figures used while others are given in terms of ranges e.g. 5-10%	
No problem	Other	Length of Coastline	<a href="#">CIA World Fact Book</a>	1982-2011	Annual	Free	PDF and HTML	Not likely to experience much change over time.	

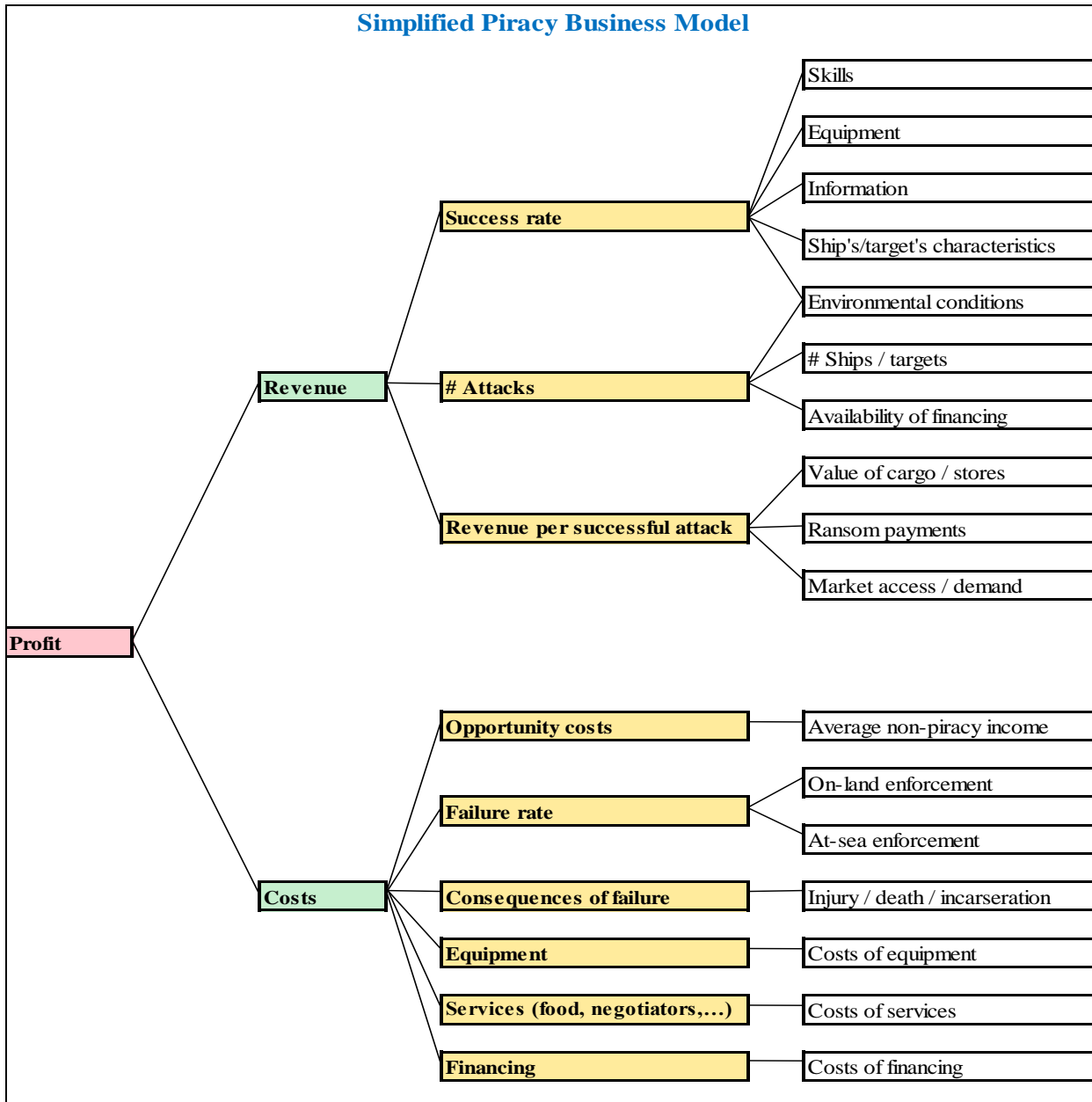
The most useful data sources were the World Bank and United Nations. In addition to comparing the data between countries, these sources provided insight into the methodology used, covered the most countries and years and provided the data in Microsoft Excel format. However, the availability of data still caused concern, because for many variables not all years or countries were covered.

**3: List of variables (short list)**

In order to try to overcome the data shortage issue and proceed in the short term, the long list of indicators was reduced to a set of 10 variables. The reduction of the number of variables was based on team discussions, the availability of data and an analysis of the business model of piracy to determine potential key variables. This simplified business model is illustrated in Figure 8 below:

**Figure 8. Simplified Piracy Business Model**





Eight topic areas for variables were selected based, amongst others, on the piracy business model. These are identified in Table 13 along with the rationale for their selection. The areas identified were: Income/poverty; Corruption; Crime; Vessel Traffic; Access to Information Coastal Fisheries; Ransom/Cargo Value; and Enforcement. Table 13 also indicates the specific variables from which data is to be collected, the source of the information and any specific comments relating to the accessibility of the data.

**Table 13. Discussion of Eight Topic Areas for Variables**

Topic	Reasoning	Variables used and source	Comments
Income/ poverty	Could show to what degree people are looking / desperate for opportunities to make money. It could also show the opportunity costs <sup>30</sup> of piracy	GNI / capita, GINI index. Source World Bank	GNI <sup>31</sup> / capita available for most countries, GINI <sup>32</sup> index suffers from large gaps in years and countries
Corruption	Corruption could contribute to piracy, as officials can be directly involved in attacks, provide information to pirates, facilitate the sale of stolen goods	TI corruption index. Source: Transparency International	The CPI measures perception of corruption based on assessments of independent institutions. Not all years and countries are covered
Crime	The level of crime on land could show to what degree a country already provides the environment for illegal activities, which could expand to sea	Intentional homicides / inhabitants, Persons brought into formal contact with the police (all crimes) / inhabitants. Source: World Bank and UNODC	Gaps in coverage of years and countries, but coverage improves in more recent years
Vessel traffic	The density of the vessel traffic near the coast of a country could provide opportunities for potential pirates to engage in this illegal activity	Number of vessels x nm from coast / time period (exact variable is to be determined)	To be determined
Access to information	Easy access to information on the location of vessels and their content could assist pirates. Also improved communication possibilities between pirates could improve the effectiveness of their operations	Mobile cellular subscriptions / 100 people, Fixed broadband Internet subscribers / 100 people. Source: World Bank	Good coverage by both year and country
Coastal fisheries	The decline in coastal fisheries catches could force (artisanal) fishers to find other means to make a living (potentially piracy). The availability of motorized small fishing vessels provides pirates with the equipment to launch their attacks	Total coastal fishery catch / country, average catch/ fisher, number of motorized (artisanal) fishing vessels / country (information on these variables still needs to be gathered)	Potential sources are <i>The Sea Around Us</i> project and FAO. Further discussions are needed to determine the possibility to gather this information
Ransom / cargo value	The value of the cargo / personal items onboard the vessel and the potential ransom payments could determine	Costs / attack (exact variable is to be determined)	Potential source is the <i>Oceans Beyond Piracy</i> <sup>33</sup> project, but it only provides ransom information in 2011 and only

<sup>30</sup> The opportunity cost in this case refers to the average income that pirates could make when they work in an alternative profession in the same country

<sup>31</sup> According to the World Bank the PPP GNI is gross national income (GNI) converted to international dollars using purchasing power parity rates. An international dollar has the same purchasing power over GNI as a U.S. dollar has in the United States. GNI is the sum of value added by all resident producers plus any product taxes (less subsidies) not included in the valuation of output plus net receipts of primary income (compensation of employees and property income) from abroad.

<sup>32</sup> According to the World Bank the GINI index measures the extent to which the distribution of income (or, in some cases, consumption expenditure) among individuals or households within an economy deviates from a perfectly equal distribution.

<sup>33</sup> Oceans Beyond Piracy (2011, p12). The Economic Costs of Somali Piracy 2011. *One Earth Foundation*. Retrieved from [http://www.oneearthfuture.org/index.php?id=120&pid=37&page=Cost\\_of\\_Piracy](http://www.oneearthfuture.org/index.php?id=120&pid=37&page=Cost_of_Piracy).

Topic	Reasoning	Variables used and source	Comments
	whether pirate operations increase in a certain country / region		for attacks related to Somali pirates
Enforcement	The amount of patrols on land and at sea could determine if pirates can successfully undertake their activities	Military expenditure / country, number of police officers / 100,000 inhabitants (variables for navy / coastguard are to be determined). Source: World Banks and UNODC	Good coverage of military expenditure data, but police per capita data shows large gaps in coverage of years and countries. Navy information is to be gathered

Further variables will be specified and added during the course of developing the model, when possible and necessary. When readily available quantitative databases are lacking, a media search could be used to try to fill the data gaps. This media search could identify indicator variables which may appear in the context of piracy outbreaks (such as crimes against fishing vessels). This will be done in collaboration with Kalev Leetaru, a researcher at the University of Illinois who specializes in advanced automated media content analysis.

#### 4: Piracy Data

Data on piracy incidents has been gathered and for the purpose of developing this model, those incidents will be used that have been reported to the IMB. Bridget Coggins<sup>34</sup> has provided the project with an analysis of the reported incidents for the period 2000 – 2009. This analysis includes information on the level of violence used based on the narratives of the reported incidents:

- 0) No reported violence;
- 1) Armed attack, threats, no physical violence;
- 2) Armed attack, physical violence, no deaths;
- 3) Armed attack, physical violence, one or more death.

These 4 levels of violence will be used as an indicator of the gravity of the piracy incidents. Ideally this would be combined with, for example, the economic impacts and duration of the incidents, but that information is either not available through the IMB or not included in Coggins’ database. These elements could be added at a later stage if the added value is agreed upon and if it justifies the research effort needed.

<sup>34</sup> Assistant Professor of Government at Dartmouth College, Hanover, New Hampshire, USA

### **5, 6 & 7: Correlation, Analysis of Outcomes and Validation by Expert Panel**

In the coming weeks a first statistical analysis will be undertaken to determine the correlation between the short list of variables and piracy incidents across the world. The correlations will be analysed and potential indicators of piracy outbreaks described.

In July 2012, an expert panel will be requested provide feedback on the initial analysis. They will be presented with information on:

- data quality
- methodology
- selection of variables
- correlation of variables
- analysis of preliminary results

The DMPP predictive model will be revised based on the feedback from the ISWG

**Discussion Point # 23:** *Does the approach to developing a predictive model using a conceptual piracy cycle make sense?*

**Discussion Point # 24:** *How useful is a model that serves to predict potential piracy 'hot spots' in actually minimizing the threat that piracy poses?*

**Discussion Point # 25:** *What might strengthen its utility?*

## 11. CONCLUSION

There is no question that the body of literature on marine piracy continues to be expanding at a phenomenal rate, be it academic research, analysis from reputable think tanks, government reports, guidelines or new responses. This research has highlighted the challenge associated with ensuring that the most relevant available data and information is provided for analysis and advice to shape policy responses and best practices.

For this reason, the DMPP team has identified the importance of having a governance framework in place that addresses two essential aspects of decision making. The first concerns the need for an integrated process of decision-making that ensures effective governance arrangements are in place to deal with all aspects of marine piracy. This requires having the appropriate mechanisms for relevant information to be analyzed and provided to shape decisions that are implemented and evaluated for their effectiveness. The second concerns the accessibility and quality of the breadth of substantive knowledge that can be used to address the issue of marine piracy.

Cognizant of the above two components essential for good decision making, this report documents the research and preliminary analysis conducted by the DMPP Law & Governance team and raises a number of issues to be addressed. As noted at the onset of the report, the main issues guiding the development of the research for all three of the DMPP teams was the question of the definition of piracy.

Additional areas of research pertaining to each of the four research questions were identified for this aspect of the integrated research project and are reiterated below.

Identified Areas for Further Research and Potential Policy Action	Section No
<p>Given the varying and oftentimes inconsistent definitions of piracy in national law and that the international legal definition is often inadequate, further consideration may be warranted as to whether this reduces the effectiveness of international and national antipiracy measures. In addition, many States have no specific piracy laws at all. Analysis of some of the current literature on this subject further suggests that more consistency would not only ensure that individuals arrested and charged in different jurisdictions face a common standard of prosecution, but may also simplify the transfer of suspects to other jurisdictions for trial, sentencing and incarceration.</p>	<p>3.2</p>

Identified Areas for Further Research and Potential Policy Action	Section No
<p>Based on the lessons learned from regional arrangements described above, further consideration need to be given to the factors that may contribute to enhance and/or constrain cooperation among littoral states to respond and pre-empt the threat of piracy.</p> <p>Since there is a serious potential for criminal attacks on refugees fleeing by sea from areas of conflict or humanitarian disaster, the need for antipiracy initiatives should always be anticipated. In this light, in the event of a sea borne refugee migration, other political and legal mechanisms should be considered to prevent or to respond to piratical attack.</p> <p>With specific regard to the Caribbean Basin, there is a question that is beyond the scope of this Report, but important to address. If marine piracy becomes a transnational issue in the Caribbean region, are the security and coordination provisions established by Caribbean states for dealing with the narcotics smuggling problem adequate to handle a regional piracy outbreak?</p>	4.2.5
<p>Explore whether the Horn of Africa model of utilizing national courts within the region, with international support, to prosecute pirates is a suitable model for use in other regions where piracy is becoming a serious problem. This may also require the further examination of the implications for implementing suspect and post-trial transfer schemes in other regions.</p>	4.3.3
<p>In considering the work and contributions of NATO and the EU, other discussions should seek to encourage further deliberations regarding the desirability of establishing a specific legal framework for international organizations to pursue a collective approach to the prosecution of piracy.</p>	4.4
<p>Investigate Pirates’ association with terrorist organizations as a growing concern.</p>	5.5
<p>An examination of the mechanisms for entry into the territorial sea or changes to the regime of hot pursuit that might be possible and acceptable to allow antipiracy enforcement forces sufficient latitude to deal with the problem of escaping pirates.</p> <p>Determining whether there is a need for a designation of ‘pirate waters’ which could be applied to areas of the territorial sea of failed or failing states, and would allow anti-piracy enforcement by foreign warships.</p>	5.5.2
<p>Determining whether there is a need for specialized piracy courts at the national, regional or international level.</p>	6.2.6
<p>Ascertaining whether States should adopt models such as the US RICO Statute, or other provisions aimed at the leadership of criminal gangs, to be used against organized piracy.</p>	6.3.1
<p>Examining the arrangements that are needed to harmonize national laws and mechanisms to permit the effective prosecution of piracy backers, organizers and financiers.</p>	6.4.3
<p>Outlining the responsibilities of the initial apprehending state and subsequent states if a pirate suspect or convicted pirate is transferred on to subsequent jurisdictions for sentencing or incarceration.</p>	6.5.3

Identified Areas for Further Research and Potential Policy Action	Section No
Determining if there is a need for a recognized international standard to determine the age of suspected juvenile offenders; and the procedures and protocols need to be put in place to allow navies which have detained juvenile pirates to safely discharge their legal obligations while safeguarding the rights of the child in question.	7.3
Studying whether: <ul style="list-style-type: none"> <li>• secure refuge is best provided by a state, more so, a failed state, where dire economic situations and non-existent governance of that State, make piracy desirable and allowable.</li> <li>• weak states are actually better breeding grounds for sophisticated pirates than failed states (associated with less logistically sophisticated hijackings such as kidnappings for ransom)</li> <li>• states that are struggling to maintain control over their physical territory are unlikely to stem the tide of piracy - what is the likelihood of this variable in predicting growth trends and likely “hot spots” for piracy that have not yet been identified?</li> </ul>	8.2
Deciding whether a major policy response to addressing piracy be focused on identifying and strengthening gaps in governance arrangements at the international, regional and/or national levels.	9.2.1
Given the call by governance scholars to not only ensure functional governance arrangements but to have principled governance arrangements in place if piracy is to be addressed, exploring whether there is a suite of principles that can be universally agreed upon for assessing governance effectiveness.  Examining if there are deficiencies in the current efforts to focus on strengthening regional level arrangements need to be addressed; and under what conditions might a regional approach not be effective.	9.2.2
Developing a predictive model using a conceptual piracy cycle to predict potential piracy ‘hot spots’ in actually minimizing the threat that piracy poses.	10.3

In conclusion, the assessment of the current literature relating to the questions posed by the DMPP team on aspects of law and governance highlighted a number of outstanding areas of research that could not be addressed due to time limitations. Where possible in the document, areas for further research have been flagged. Additionally, returning to the underlying premise of the DMPP, analysis and findings from each of the three thematic areas of research necessarily serve as either inputs to or outputs from these respective thematic research areas. This integration will form the next phase of the research.



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