Anna Petrig (ed.)

Sea Piracy Law / Droit de la piraterie maritime

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Sea Piracy Law

Selected National Legal Frameworks and Regional Legislative Approaches

Droit de la piraterie maritime

Cadres juridiques nationaux et approches législatives régionales

Anna Petrig (ed.)

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I wish to express my deep gratitude to Prof. Dr. Dr. h.c. mult. *Ulrich Sieber*, Director at the Max Planck Institute for Foreign and International Criminal Law in Freiburg (Germany), who has supported the Sea Piracy Project with great enthusiasm. I am also very grateful to *Justin Bachmann*, LL.B., admitted to the Supreme Court of Victoria (Australia), for his valuable support in editing the book at hand. Without his help, the publication of this book would not have been possible. I also owe special thanks to *Elisabeth Schneider*, Maîtrise en droit/DEA, who was responsible for the French proof-reading. Furthermore, I would like to mention the professional support we received from the staff of the publication department, namely from *Ines Hofmann* and *Irene Kortel*.

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Freiburg (Germany), November 2010 *Anna Petrig*

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J'aimerais exprimer ma gratitude profonde au Professeur Dr Dr h.c. mult. *Ulrich Sieber*, Directeur de l'Institut Max Planck pour le droit pénal étranger et international à Freiburg (Allemagne) qui a soutenu le projet sur la piraterie maritime avec beaucoup d'enthousiasme. Sans l'aide précieuse de *Justin Bachmann*, LL.B. admis au barreau de Victoria (Australie), cet ouvrage n'aurait pas pu être publié et je lui dois mes sincères remerciements. Pour la correction des textes en français j'aimerais sincèrement remercier à *Elisabeth Schneider*, doctorante en droit/DEA. Enfin, je dois également souligner l'aide que j'ai reçu de la maison d'édition de l'Institut Max Planck, notamment de la part d'*Ines Hofmann* et d'*Irene Kortel*.

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Freiburg (Allemagne), novembre 2010 *Anna Petrig*

Introduction

While the drafters of the 1982 United Nations Convention on the Law of the Sea largely perceived piracy as an outdated 18th century phenomenon,[1] increasing pirate activities off the coast of Somalia since 2008 have once more spurred the international community into action. The Security Council adopted various Chapter VII-based Resolutions[2] in which it has set itself the ambitious objective of the full and durable eradication of piracy.[3] In order to attain this goal, the Security Council has considerably expanded the range of enforcement powers against pirates and armed robbers at sea.[4] However, as far as criminal prosecution of piracy suspects is concerned, the counter-piracy Resolutions do not go beyond calling for enhanced interstate cooperation in criminal matters and urging states to fully implement international treaties relevant for the criminal prosecution of piracy, such as the SUA and Hostage Conventions.[5]

The heavy impact of the counter-piracy Security Council Resolutions on enforcement powers on the one hand and the little influence they had on criminal prosecution of piracy and armed robbery at sea on the other hand, is mirrored on the operational level. While the call to take enforcement measures against pirates and armed robbers at sea has been heeded by an unprecedented number of states, these states are, once having arrested piracy suspects, quite reluctant to prosecute them in their domestic courts. Currently, only a handful of arresting or victim states are administering criminal justice over alleged pirates, notably, France, Spain, the Netherlands, the United States of America, Yemen, and Germany.[6] The majority of

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[1] *Geiß, Robin/Petrig, Anna*, Piracy and Armed Robbery at Sea – The Legal Framework for Counter-Piracy Operations in Somalia and the Gulf of Aden (forthcoming).

[2] S.C. Res. 1816, U.N. Doc. S/RES/1816 (June 2, 2008); S.C. Res. 1838, U.N. Doc. S/RES/1838 (Oct. 7, 2008); S.C. Res. 1846, U.N. Doc. S/RES/1846 (Dec. 2, 2008) [hereinafter: S.C. Res. 1846]; S.C. Res. 1851, U.N. Doc. S/RES/1851 (Dec. 16, 2008) [hereinafter: S.C. Res. 1851]; S.C. Res. 1897, U.N. Doc. S/RES/1897 (Nov. 30, 2009) [hereinafter: S.C. Res. 1897]; S.C. Res. 1918, U.N. Doc. S/RES/1918 (April 27, 2010).

[3] S.C. Res. 1846, preambular para. 10, and S.C. Res. 1897, preambular para. 13.

[4] S.C. Res. 1846, para. 10, and S.C. Res. 1851, para. 6; both authorizations have been prolonged until December 2010 by virtue of S.C. Res. 1897, para. 7.

[5] Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, *adopted* March 10, 1988, 1678 U.N.T.S. 221; International Convention against the Taking of Hostages, *adopted* Dec. 18, 1979, 1316 U.N.T.S. 205.

[6] Report of the Secretary-General on possible options to further the aim of prosecuting and imprisoning persons responsible for acts of piracy and armed robbery at sea off the coast of Somalia, including, in particular, options for creating special domestic chambers possibly with international components, a regional tribunal or an international tribunal and

suspects are instead transferred to states of the region in order to prosecute them, often on the basis of specific transfer agreements.[7]

In light of this regional approach to prosecuting pirates and armed robbers at sea, Part I of this book focuses on the piracy law of three African states. Given that by the end of October 2009 over 100 piracy suspects were undergoing trial in Kenya, the country is the main burden-carrier in the criminal prosecution of pirates.[8] Therefore, the first article of this book is devoted to the legal framework for prosecuting pirates under Kenyan law (Dr. *Paul Wambua*, The Legislative Framework for Adjudication of Piracy Cases in Kenya: Review of the Jurisdictional and Procedural Challenges and the Institutional Capacity). The second article analyzes the national piracy law in Tanzania (*Raphael Kamuli*, Tanzania's Legal Framework on Sea Piracy: An Obligatory but Inconsistent Model). Given that in March 2010 the Council of the European Union authorized the High Representative to open negotiations with Tanzania on the conclusion of a transfer agreement,[9] the prosecution of pirates in Tanzania will most probably gain importance in the near future. The third article focuses on the State of Djibouti (*Aïd Ahmed Ibrahim*, Le cadre juridique relatif à la piraterie maritime à Djibouti), which is assuming an important role at a diplomatic level and in international cooperation in the area of sea piracy.

The Security Council not only urges individual states to criminalize piracy under their domestic law and to favorably consider the prosecution of suspects,[10] but also stresses in its various Resolutions the importance of international and regional cooperation in combating piracy. Part II of this book, therefore, focuses on regional legislative approaches (to be) taken in order to more effectively combat and prose-

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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, U.N. Doc. S/2010/394 (July 26, 2010).

[7] See e.g. the Exchange of Letters between the European Union and the Government of Kenya on the conditions and modalities for the transfer of persons suspected of having committed acts of piracy and detained by the European Union-led naval force (EUNAVFOR), and seized property in the possession of EUNAVFOR, from EUNAVFOR to Kenya and for their treatment after such transfer, 2009 O.J. (L 79) 49–59 (EU); this Exchange of Letters was approved by the Council of the European Union, Council Decision 2009/293/CFSP, 2009 O.J. (L 79) 47–48 (EU); Exchange of Letters between the European Union and the Republic of Seychelles on the Conditions and Modalities for the Transfer of Suspected Pirates and Armed Robbers from EUNAVFOR to the Republic of Seychelles and for their Treatment after such Transfer, 2009 O.J. (L 315) 37–43 (EU); this Exchange of Letters was approved by the Council of the European Union, Council Decision 2009/877/CFSP, 2009 O.J. (L 315) 35–36 (EU).

[8] Report of the Secretary-General pursuant to Security Council resolution 1846 (2008), delivered to the Security Council, U.N. Doc. S/2009/590 (Nov. 13, 2009), para. 46.

[9] Council of the European Union, Press Release, 3005th Council Meeting, Foreign Affairs, Brussels, March 22, 2010, *available at* www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/EN/foraff/113482.pdf (last visited June 16, 2010).

[10] S.C. Res. 1918, para. 2.

cute piracy and armed robbery at sea. The first article deals with the Regional Co-operation Agreement on Combating Piracy and Armed Robbery against Ships in Asia and asks what lessons could be learned from this Asian regional approach for the Somali context (Dr. *Maximo Mejia*, Regional Cooperation in Combating Piracy and Armed Robbery against Ships: Learning Lessons from ReCAAP). The second article discusses how and within which institutional framework African national piracy laws could be harmonized in order to come to a coordinated, regional and thus more effective approach in combating piracy (Dr. *Henri Fouché*, Harmonized Legal Framework for Africa as an Instrument to Combat Sea Piracy).

Piracy law is continually evolving. This publication deals with the law on piracy as it stood at the end of 2009.

Avant-propos

Les auteurs de la Convention des Nations Unies sur le droit de la mer de 1982 ont largement perçu la piraterie maritime comme un phénomène dépassé du 18e siècle.[1] Pourtant, la montée d'actes de piraterie maritime au large des côtes somaliennes en 2008 a contraint la communauté internationale à agir à nouveau. Le Conseil de Sécurité a adopté plusieurs résolutions basées sur le Chapitre VII de la Charte des Nations Unies[2] dans lesquelles il se fixe l'objectif ambitieux d'une éradication totale et durable de la piraterie maritime.[3] Afin d'atteindre cet objectif, le Conseil de Sécurité a considérablement élargi les compétences policières contre les personnes soupçonnées de commettre des actes de piraterie maritime ou de vol à main armée en mer.[4] Pourtant, en ce qui concerne la poursuite pénale de personnes suspectes de piraterie maritime et de vol à main armée en mer, les résolutions anti-pirates ne vont pas au-delà d'un appel à la communauté internationale d'intensifier la coopération interétatique en matière pénale et de pleinement mettre en œuvre les traités internationaux pertinents pour la répression pénale de la piraterie maritime comme la Convention pour la répression d'actes illicites contre la sécurité de la navigation maritime et la Convention internationale contre la prise d'otages.[5]

Alors que les résolutions anti-pirates du Conseil de Sécurité prévoient des compétences policières accrues à l'encontre les personnes qui commettent des actes de piraterie maritime ou de vol à main armée en mer, elles n'ont que très peu influencé le système de répression pénale de ces mêmes crimes. Cette divergence au niveau normatif est également visible au niveau opérationnel. Alors que la demande du Conseil de Sécurité de participer à la lutte contre la piraterie maritime et les vols à

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[1] *Geiß, Robin/Petrig, Anna*, Piracy and Armed Robbery at Sea – The Legal Framework for Counter-Piracy Operations in Somalia and the Gulf of Aden (à paraître).

[2] Résolution du Conseil de Sécurité 1816, U.N. Doc. S/RES/1816 (2 juin 2008); Résolution du Conseil de Sécurité 1838, U.N. Doc. S/RES/1838 (7 octobre 2008); Résolution du Conseil de Sécurité 1846, U.N. Doc. S/RES/1846 (2 décembre 2008) [ci-après: Résolution 1846]; Résolution du Conseil de Sécurité 1851, U.N. Doc. S/RES/1851 (16 décembre 2008) [ci-après: Résolution 1851]; Résolution du Conseil de Sécurité 1897, U.N. Doc. S/RES/1897 (30 novembre 2009) [ci-après: Résolution 1897]; Résolution du Conseil de Sécurité 1918, U.N. Doc. S/RES/1918 (27 avril 2010).

[3] Résolution 1846, paragraphe 10 de la Préambule et Résolution 1897, paragraphe 13 de la Préambule.

[4] Résolution 1846, paragraphe 10 et Résolution 1851, paragraphe 6; les deux autorisations étaient prolongées jusqu'en décembre 2010 par Résolution 1897, paragraphe 7.

[5] Convention pour la répression d'actes illicites contre la sécurité de la navigation maritime du 10 mars 1988, 1678 U.N.T.S. 234; Convention internationale contre la prise d'otages du 18 décembre 1979, 1316 U.N.T.S. 212.

main armée au large des côtes somaliennes était suivie par un bon nombre d'États – fait sans précédent –, ces mêmes États se montrent plutôt réticents à poursuivre les pirates arrêtées par leurs propres tribunaux. En effet, jusqu'à présent, très peu d'actions en justice ont été intentées par les États dont les navires effectuent des patrouilles et arrêtent des pirates ou par les États dont les ressortissants ou le bateau étaient victimes d'une attaque de pirates. Font exception la France, l'Espagne, les Pays-Bas, les États-Unis d'Amérique, le Yémen et l'Allemagne.[6] La majorité de suspects arrêtés est en général transférée pour leur poursuite pénale vers des États de la région, souvent sur la base d'un accord de transfert.[7]

Face à l'approche régionale dans la poursuite pénale de personnes soupçonnées d'être responsables d'actes de piraterie maritime et de vol à main armée en mer, la première partie de cet ouvrage présente les cadres juridiques nationaux portant sur la piraterie maritime et le vol à main armée en mer de trois États africains: Kenya, Tanzanie, Djibouti. Etant donné qu'en octobre 2009 des poursuites pénales contre plus de 100 suspects de la piraterie maritime étaient en cours au Kenya, ce pays assume une responsabilité primordiale dans la répression pénale de la piraterie maritime.[8] C'est pour cette raison que nous avons consacré le premier article du présent ouvrage au cadre juridique relatif à la poursuite pénale de la piraterie maritime au Kenya (Dr *Paul Wambua*, The Legislative Framework for Adjudication of Piracy Cases in Kenya: Review of the Jurisdictional and Procedural Challenges and the Institutional Capacity). Le deuxième article met en lumière le droit national de

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[6] Rapport du Secrétaire général sur les différentes options possibles pour mieux parvenir à poursuivre et incarcérer les personnes responsables d'actes de piraterie et de vols à main armée commis au large des côtes somaliennes, y compris, en particulier, sur des options tendant à créer dans les juridictions nationales des chambres spéciales, éventuellement dotées d'éléments internationaux, ou à créer un tribunal régional ou encore à créer un tribunal international, et sur les accords correspondants en matière pénitentiaire, en tenant compte des travaux du Groupe de contact pour la lutte contre la piraterie au large des côtes somaliennes, des précédents en matière de création de tribunaux internationaux et de tribunaux mixtes, et du temps et des moyens nécessaires pour obtenir des résultats concrets et durables, U.N. Doc. S/2010/394 (26 juillet 2010).

[7] Voir par exemple l'échange de lettres entre l'Union européenne et le gouvernement du Kenya sur les conditions et les modalités régissant le transfert, de la force navale placée sous la direction de l'Union européenne (EUNAVFOR) au Kenya, des personnes soupçonnées d'avoir commis des actes de piraterie ou des vols à main armée dans les eaux territoriales de la Somalie ou du Kenya qui sont retenues par l'EUNAVFOR et de leurs biens saisis en possession de cette dernière, ainsi que leur traitement après un tel transfert, 2009 J.O. (L 79) 49–59 (UE); approuvé par le Conseil de l'Union européenne avec décision 2009/293/PESC, 2009 J.O. (L 79) 47–48 (UE); échange de lettres entre l'Union européenne et la République des Seychelles sur les conditions et les modalités régissant le transfert, de l'EUNAVFOR à la République des Seychelles, des personnes suspectées d'actes de piraterie ou de vols à main armée, ainsi que leur traitement après un tel transfert, 2009 J.O. (L 315) 37-43 (UE); approuvé par le Conseil de l'Union européenne par décision 2009/877/PESC, 2009 J.O. (L 315) 35–36 (UE).

[8] Rapport présenté par le Secrétaire général en application de la résolution 1846 (2008) du Conseil de sécurité, U.N. Doc. S/2009/590 (13 novembre 2009), paragraphe 46.

piraterie maritime en Tanzanie (*Raphael Kamuli*, Tanzania's Legal Framework on Sea Piracy: An Obligatory but Inconsistent Model). En mars 2010, le Conseil de l'Union européenne a autorisé la Haute représentante d'ouvrir des négociations avec la Tanzanie sur la conclusion d'un accord de transfert.[9] La poursuite pénale de pirates dans ce pays va ainsi très probablement gagner de l'importance dans un avenir prochain. Le troisième article présente le cadre juridique relatif à la piraterie maritime dans la République de Djibouti qui assume un rôle important dans la lutte contre la piraterie maritime au niveau diplomatique et de la coopération internationale (*Aïd Ahmed Ibrahim*, Le cadre juridique relatif à la piraterie maritime à Djibouti).

Le Conseil de Sécurité n'engage pas seulement tous les États à ériger la piraterie maritime en tant qu'infraction pénale dans leur droit interne et à envisager favorablement de poursuivre les personnes soupçonnées de piraterie maritime,[10] mais souligne également l'importance de la coopération internationale et régionale dans ses différentes résolutions anti-pirates. C'est la raison pour laquelle la deuxième partie de cet ouvrage traite la question de savoir quelles sont les approches législatives régionales qui pourront être mises en œuvre en vue de prévenir, réprimer et poursuivre plus efficacement la piraterie somalienne. Le premier article consiste en une analyse du *Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia* et met en évidence quelles sont les expériences de cette approche législative régionale asiatique pouvant êtres utiles dans le contexte somalien (Dr *Maximo Mejia*, Regional Cooperation in Combating Piracy and Armed Robbery against Ships: Learning Lessons from ReCAAP). Le second article envisage comment et au sein de quelle institution le droit national de la piraterie maritime pourrait être harmonisé sur le continent africain pour permettre une approche régionale coordonnée et ainsi plus efficace dans la lutte contre la piraterie maritime (Dr *Henri Fouché*, Harmonized Legal Framework for Africa as an Instrument to Combat Sea Piracy).

Le droit de piraterie maritime est en constant développement. Cet ouvrage prend en compte le droit de la piraterie maritime dans l'état où il se trouvait à la fin de l'année 2009.

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[9] Conseil de l'Union européenne, communiqué de presse, 3005ième session du Conseil, affaires étrangères, Bruxelles, 22 mars 2010, *disponible sous:* www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/EN/foraff/113482.pdf (accès le 16 juin 2010).

[10] Résolution 1918, paragraphe 2.

Contents

Table des matières

The Legal Framework for Adjudication of Piracy Cases in Kenya: Review of the Jurisdictional and Procedural Challenges and the Institutional Capacity

Paul Musili Wambua

Contents

I. Introduction

"There are at least three analytically distinct problems that must be seen clearly before it is possible to understand the growth of English law relating to piracy and its relationship to international law. First, there is the question of jurisdiction: is there a court in England empowered by English law to consider the case? Second, there is the question of substance: is the particular act complained of a violation of English law? Third, there is the question of the reach outside England of the prescriptions of English law and the enforcement jurisdiction of English courts. Each of these problems contains within it a whole host of subsidiary questions and the answers to any one of them change the pattern in ways that affect the whole problem, and indeed, the perceptions of all three problems." [1]

"The word piracy has been applied to acts of murder, robbery, plunder, rape and other villainous deeds which have transpired over centuries of mankind's history. Since the latter half of the 20th century, multilateral treaties have been the accepted vehicle utilized by states in order to embody these developments in express agreement fixing new legal norms. But it takes time and much patience for such agreements to be reached and brought into force." [2]

The two quotations above capture in a nutshell the issues addressed by this paper. The first quotation focuses on the complex interface between international law and national laws as they apply to the exercise of the enforcement and adjudicative jurisdiction with regard to the crime of piracy. The second quotation captures the complexity of the process of the international community endeavoring to resolve the conflict between individual state sovereignty and the interests of the international community in dealing with the crime of piracy.

Despite the long existence of the word piracy, it was unknown to many Kenyan legal scholars and indeed was of little significance to most Kenyan legal practitioners until 2006. The significance of the word pirate or piracy to most Kenyans can be traced to the recent upsurge in piratical attacks off the coast of Somalia and the ensuing trials by Kenyan courts of suspected pirates arrested by navies of the United States, the European Union and the United Kingdom and handed over to the Kenyan authorities under the terms of bilateral agreements – the Memoranda of Understanding (MoUs) – between Kenya and these western maritime nations.[3]

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[1] *Rubin, Alfred*, Law of Piracy. 2nd ed. New York 1998, p. 46.

[2] *Dubner, Barry*, Law of International Sea Piracy. 2nd ed. The Hague/Boston/London 1980, p. 1.

[3] The first Memorandum of Understanding (MOU) was signed between Kenya and the United Kingdom in December 2008 and the second with the United States on Jan. 16, 2009. These two Memoranda of Understanding remain confidential and have not been made public. A third Memorandum of Understanding was signed with the European Union

Prior to the enactment of the Merchant Shipping Act in 2009,[4] the offence of piracy was provided for under Section 69 of the Penal Code.[5] The Merchant Shipping Act has not only extended the jurisdiction of the Kenyan courts to try piracy committed by non-nationals in the high seas, it also defines more extensively and comprehensively the offence of piracy than how it was previously defined under the repealed Section 69 of the Penal Code.

The extended criminal jurisdiction and Kenya's onerous commitment to try non-nationals under the Memoranda of Understanding has posed practical challenges to the exercise of the new criminal jurisdiction by Kenyan courts. Though benevolent and in line with the provisions of the United Nations Convention on the Law of the Sea[6] that all nations should cooperate to the fullest in suppressing piracy, Kenya's commitment under the Memoranda of Understanding to try non-national suspected pirates has added an extra burden to an already congested criminal justice system and exposes Kenya to potential civil liability under the Memoranda of Understanding.

Besides the extra burden to an already congested criminal justice system, there are other relevant issues which touch on human rights abuses, procedural fairness and compliance with constitutional guarantees on fair trial. In undertaking the piracy trials, the Kenyan courts have also to contend with the challenges of the archaic statutory provisions on evidentiary proof. Further, there is a new challenge to

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on March 6, 2009: Exchange of Letters between the European Union and the government of Kenya on the conditions and modalities for the transfer of persons suspected of having committed acts of piracy and detained by the European Union-Led Naval Force (EUNAVFOR), and seized property in the possession of EUNAVFOR, from EUNAVFOR to Kenya and for their treatment after such transfer, 2009 O.J. (L 79) 49–59 (EU) [hereinafter: Kenya/EU MoU]; this Exchange of Letters was approved by the Council of the European Union, Council Decision 2009/293/CFSP, 2009 O.J. (L 79) 47–48 (EU). It is indicated that China and Sweden also may have signed Memoranda of Understanding with similar provisions as the three signed with the United Kingdom, the United States and the European Union. The key provision of these agreements is that Kenya agrees to try in its national courts suspected pirates arrested in the high seas or off the coast of Somalia by the navies of the United States, the United Kingdom, Sweden, China and the states contributing to the European Union mission Atalanta. For the Kenya/EU MoU see *Gekara*, *Emeka-Mayaka*, Daily Nation, Leaders Question the Trial of Somali Pirates in Kenyan Courts, *available at* www.nation.co.ke/News/-/1056/610466/-/uk9mt7/-/index.html (last visited April 21, 2010) and House of Commons Debates, Kenya: Piracy, *available at* www.parliament.the-stationery-office.co.uk/pa/cm200809/cmhansrd/cm090507/text/90507w0008.htm (last visited April 21, 2010).

[4] Merchant Shipping Act (Act No. 4 of 2009); the Merchant Shipping Act came into force on Sept. 1, 2009 [hereinafter: Merchant Shipping Act]. The laws of Kenya are *available at* www.kenyalaw.org/kenyalaw/klr_home/ (last visited May 10, 2010).

[5] Penal Code (Chapter 63 Laws of Kenya) [hereinafter: Penal Code].

[6] United Nations Convention on the Law of the Sea, *adopted* Dec. 10, 1982, 1883 U.N.T.S. 3 [hereinafter: UNCLOS]. Art. 100 UNCLOS requires that all states shall cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any state.

the courts' jurisdiction arising from the repealing of Section 69 of the Penal Code by the Merchant Shipping Act, which does not provide for the continuity of the pending criminal cases against suspected pirates.

Initially (Part II.), the paper examines the domestication of the international legal framework on piracy, including the frameworks of UNCLOS, the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation[7] and the United Nations Security Council Resolutions on piracy and armed robbery against ships off the coast of Somalia.[8] Secondly (Part III.), the paper analyzes adjudicative jurisdictional challenges, namely, Kenya's new extended extraterritorial jurisdiction and the legislative framework governing the trial processes of the piracy cases to establish whether indeed the Magistrates' Courts (referred to as subordinate courts) have jurisdiction to try the piracy cases. It also analyses the repealing provisions of the Merchant Shipping Act to determine whether they provide for continuity of the pending piracy cases commenced under Section 69 of the Penal Code, which was repealed by the Merchant Shipping Act. It also examines the nature and contents of the Memoranda of Understanding and the potential civil liability against Kenya for unlawful confinement in case of acquittals of suspected pirates. It then evaluates the serious challenges faced by Kenyan courts in trying the piracy cases, including the challenge of ensuring that the trials meet accepted international standards as to procedural fairness; the burden of the prosecution to secure the attendance of witnesses and procure admissible evidence; the need to upgrade prison facilities to accommodate the pirates in custody pending trial and after sentence; and the requirement to provide defense counsel and translators in order to assure a fair trial that meets internationally accepted standards. Following (Part IV.), the paper examines the preventive statutory provisions as contained in the proposed Proceeds of Crime and Money Laundering Bill and the Anti-Corruption and Economic Crimes Act, in so far as they are relevant to the fight against piracy off the coast of Somalia. Finally (Part V.), the paper discusses the after trial challenges faced by Kenya.

Based on the foregoing analysis, the paper concludes that the legislative framework under the Merchant Shipping Act grants extensive jurisdiction that exceeds Kenya's obligations under the SUA Convention, but that the same does not accord

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[7] Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, *adopted* March 10, 1988, 1678 U.N.T.S. 221 [hereinafter: SUA Convention]. Kenya has ratified the treaty and is therefore bound by its provisions: Status of Multilateral Conventions and Instruments in Respect of which the International Maritime Organization (IMO) or its Secretary-General Performs Depositary or Other Functions as at 31 December 2009, *available at* www.imo.org (follow "legal" hyperlink, then follow "IMO Conventions" hyperlink, then follow "Depositary Information on IMO Conventions" hyperlink) (last visited May 10, 2010).

[8] S.C. Res. 1816, U.N. Doc. S/RES/1816 (June 2, 2008) [hereinafter: S.C. Res. 1816]; S.C. Res. 1846, U.N. Doc. S/RES/1846 (Dec. 2, 2008) [hereinafter: S.C. Res. 1846]; S.C. Res. 1851, U.N. Doc. S/RES/1851 (Dec. 16, 2008) [hereinafter: S.C. Res. 1851].

with the provisions of Kenya's Constitution and other statutory provisions. Therefore, the trials are null and void and in breach of the Constitution and could expose Kenya to potential civil liability. The chances of suspected pirates being acquitted are very high given the fact that the Merchant Shipping Act does not provide for the continuity of the pending piracy cases and yet it has repealed Section 69 of the Penal Code, i.e. the law under which the suspects were charged. The Memoranda of Understanding do not have an indemnity clause on the basis of which Kenya could recover from the other states party to the Memoranda of Understanding (the states exercising enforcement jurisdiction), should the suspected pirates be acquitted by the courts and opt to commence civil action for recovery of damages for wrongful confinement.

The paper further concludes that as framework documents, the Memoranda of Understanding do not evenly distribute obligations between the parties and there is a need to enter into fresh agreements that include all the regional states and evenly distribute the obligations and responsibilities for the arrest, trial and imprisonment of convicted pirates. It is argued in this paper that the Memoranda of Understanding place an unnecessary burden on the congested Kenyan criminal justice system and overstretched prison service and, therefore, the Memoranda of Understanding are lopsided and burdensome on Kenya. As a result, there is need for renegotiation and review of these agreements. The paper also notes that the Memoranda of Understanding are short term documents, whereas the expected average period to complete a criminal case from the subordinate court to the Court of Appeal is about seven years. Besides the obligations arising from the lengthy trial period, there is also the obligation on Kenya to keep the convicted pirates in prison for the full term of jail sentence.

II. The Domestication of the International Legal Framework

Kenya has signed and ratified a number of international instruments, which make provision for the offence of piracy. The key instruments are UNCLOS, the SUA Convention, the Djibouti Code of Conduct and the Draft African Maritime Transport Charter.[9] This section of the paper will examine the provisions of each of these international and regional instruments as well as the United Nations Security Council Resolutions and how these have found expression in Kenya's domestic legal framework against piracy.

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[9] Organisation of African Unity, Draft African Maritime Transport Charter, *adopted* in Addis Ababa (Ethiopia) on Dec. 15, 1993 [hereinafter: Draft African Maritime Transport Charter]; the full text is *available at* www.africa-union.org/root/au/Documents/Treaties/Text/AFRICAN_MARITIME_TRANSPORT.pdf (last visited May 10, 2010).

A. Piracy under the UNCLOS Regime

Kenya played a key role in the formulation of UNCLOS, especially the inclusion of the provisions on the exclusive economic zone.[10] However, even though Kenya was active in the formulation and adoption of UNCLOS, it has since not shown an equal zeal in domesticating the provisions of UNCLOS. Kenya signed UNCLOS in December 1982, but it was not until March 1989 that it ratified the Convention.[11] Following Kenya's ratification of UNCLOS, the Maritime Zones Act was enacted in 1989[12] to domesticate the provisions of the convention dealing with delineation of maritime zones.[13] Prior to the enactment of the Merchant Shipping Act, no other statute fully domesticated the provisions on UNCLOS relating to piracy.[14] The Merchant Shipping Act domesticates the provisions of piracy in UNCLOS as well as the SUA Convention.[15] It also domesticates the International Convention for the Safety of Life at Sea[16]and its protocols of 1978 and 1988 as well as the International Ship and Port Facility Security Code (ISPS Code).[17]

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[10] The exclusive economic zone concept was first put by Kenya to the Asian-African Legal Consultative Committee in January 1971 and to the United Nations Sea Bed Committee the following year and received support from many Asian and African states: Conclusions in the General Report of the African States Regional Seminar on the Law of the Sea held in Yaoundé, June 1972, UN Leg. Ser. B/16, p. 601; ND, 1, p. 250. At about the same time Kenya was pushing for the concept of exclusive economic zone, the Latin American states evolved the concept of the patrimonial sea: see Declaration of Santa Domingo, June 1972, UN Leg. Ser. B/16, p. 599; ND, 1, p. 247. This declaration was a culmination of earlier Latin American proclamations in particular the Montevideo Declaration on the Law of the Sea, 1970 and the Lima Declaration on the Law of the Sea, 1970: UN Leg. Ser. B/16, pp. 586 and 587; ND 1, pp. 235 and 237.

[11] United Nations Treaty Collection, Status of Treaties, Chapter XXI, Law of the Sea, 2. Convention on the High Seas, *available at* http://treaties.un.org/Pages/Participation Status.aspx (last visited Feb. 10, 2010).

[12] Maritime Zones Act (Chapter 371 Laws of Kenya) [hereinafter: Maritime Zones Act].

[13] The Maritime Zones Act reiterates the provisions of UNCLOS on the delimitation of maritime zones in a near *verbatim* manner but it does not provide a suitable institutional framework for the implementation of the UNCLOS provisions. Section 10 Maritime Zones Act preserved the provisions of the Territorial Waters Act (repealed) empowering the minister to unilaterally decide whether or not an act or omission occurred in Kenya's maritime zones.

[14] Kenya as a dualist state must enact an enabling statute to give effect to the provisions of an international convention, which it has signed, ratified or to which it has acceded.

[15] Section 368 Merchant Shipping Act adopts the definition of piracy contained in Art. 101 UNCLOS. Section 369 Merchant Shipping Act adopts the offences contained in Art. 3 SUA Convention of hijacking and destroying ships with some minor modifications; Art. 5 SUA Convention provides that each state party shall make the offences set forth in Art. 3 SUA Convention punishable by appropriate penalties, which take into account the grave nature of these offences. As subsidiary legislation to the Merchant Shipping Act, the Merchant Shipping (Application of Safety Convention, 1974) Order LN 60/2004 was enacted.

[16] International Convention for the Safety of Life at Sea (SOLAS) 1974, 1184 U.N.T.S. 2.

[17] International Ship and Port Security (ISPS) Code (IMO Doc. SOLAS/CONF.5/34, Annex 1 (Dec. 12, 2002), containing Resolution 2 of the Dec. 2002 conference, which

B. The Piracy Provisions of the SUA Convention

Although Kenya had ratified the SUA Convention, no legislative framework had been put in place to domesticate its provisions until the last quarter of 2009. With the enactment of the Merchant Shipping Act on September 1, 2009, the SUA Convention has now been fully domesticated. Section 369 of the Merchant Shipping Act adopts the offences of hijacking and destroying of ships,[18] contained in Art. 3 of the SUA Convention. Art. 6(1) and (2) of the SUA Convention requires that there be a *nexus* between the offence committed and the state establishing jurisdiction.[19] The *nexus* is established if the ship flies the flag of the state;[20] if the offence is committed in the territory of the state or its territorial sea;[21] if the offence is committed by a national of that state;[22] if the offence is committed by a stateless person whose habitual residence is in that state;[23] if a national of that state is seized, threatened, injured or killed in the process of committing the offence;[24] or if the offence is committed to compel that state to do or abstain from doing any act.[25]

By aligning the provisions of its legislation to the SUA Convention, Kenya has not only followed the practice by most states party to the convention, but has also surpassed the implementation measures taken by other states by creating extraterritorial jurisdiction for the SUA Convention offences.[26] Kenya's new legislation also provides jurisdiction over acts of violence committed in the high seas in line with Art. 9 of the SUA Convention.[27]

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contains in its Annex the ISPS Code). For the domestication of the ISPS Code see the Merchant Shipping (Maritime Security) Regulations 2004.

[18] Section 369(6) Merchant Shipping Act.

[19] While Art. 6(1) and (2) SUA Convention require a *nexus*, this does not hold true for Art. 6(4) SUA Convention.

[20] Art. 6 para. 1 (a) SUA Convention.

[21] Art. 6 para. 1 (b) SUA Convention.

[22] Art. 6 para. 1 (c) SUA Convention.

[23] Art. 6 para. 2 (a) SUA Convention.

[24] Art. 6 para. 2 (b) SUA Convention.

[25] Art. 6 para. 2 (c) SUA Convention.

[26] *Gathii, James*, Jurisdiction to Prosecute Non-National Pirates Captured by Third States under Kenyan and International Law, p. 16, *available at* htpp://papers.ssrn.com/sol3/papers.cfm?abstract_id=1360981 (last visited April 21, 2010) notes that the United States implementing legislation 18 U.S.C.A. § 2280 closely follows the SUA Convention but unlike Kenya's new legislation does not have extraterritorial provisions.

[27] Art. 9 SUA Convention provides that the Convention does not in any way affect "the rules of international law pertaining to the competence of States to exercise investigative or enforcement jurisdiction on board ships not flying their flag." See also *Gathii*, *supra* note 26, p. 16.

C. The Djibouti Code of Conduct on Piracy

The Djibouti Code of Conduct is an International Maritime Organization (IMO) sponsored regional agreement, which was adopted in Djibouti on January 29, 2009, involving eight coastal states (including Kenya) and one hinterland state from the Western Indian Ocean region, and other states from the Gulf of Aden and the Red Sea areas, which was adopted in Djibouti on January 29, 2009.[28] The Djibouti Code of Conduct is the culmination of a series of regional seminars and workshops sponsored by the International Maritime Organization, convened pursuant to the decisions of the 100th and 101st sessions of the Council of the International Maritime Organization in relation to the vital shipping lanes and the threat of piracy and armed robbery against ships.[29] The Djibouti Code of Conduct is not a binding agreement or treaty and the framers were careful to illustrate this by the adoption of the term "Code of Conduct" rather than "treaty", "convention" or "agreement".[30] Perhaps this aspect of the Djibouti Code of Conduct reflects its major weakness.

The Djibouti Code of Conduct has very progressive provisions in combating piracy and armed robbery against ships. It adopts the definition of piracy as contained in Art. 101 of UNCLOS,[31] but unlike UNCLOS further provides for the offence of armed robbery against ships by adopting the definition of the offence provided by the International Maritime Organization.[32] Also unlike UNCLOS, the Djibouti Code of Conduct more specifically provides that where a state participant carries out a seizure, such a state participant may, "subject to its national laws, and in consultation with other interested entities, waive its primary right to exercise jurisdiction and authorize any other Participant to enforce its laws against the ship and/or

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[28] Code of Conduct Concerning the Repression of Piracy and Armed Robbery against Ships in the Western Indian Ocean and the Gulf of Aden, advance copy *available at* www.fco.gov.uk/resources/en/pdf/pdf9/piracy-djibouti-meeting (last visited Feb. 10, 2010) [hereinafter: Djibouti Code of Conduct]. The seventeen states which sent delegates to the Djibouti meeting were: Comoros, Djibouti, Egypt, Ethiopia, France, Jordan, Kenya, Madagascar, Maldives, Oman, Saudi Arabia, Seychelles, Somalia, South Africa, Sudan, United Republic of Tanzania and Yemen. Twelve other states as well as nine intergovernmental organizations and two non-governmental organizations participated as observers.

[29] The Djibouti meeting, which was held from Jan. 26–29, 2009 was preceded by a sub-regional seminar on piracy and armed robbery against ships and maritime security held in Sana'a (Yemen) from April 9–13, 2005; sub-regional workshop on piracy and armed robbery against ships held in Muscat (Oman) from Jan. 14–18, 2006; and the sub-regional meeting on piracy and armed robbery against ships which also prepared the draft instrument of the Code held in Dar-es-Salaam (United Republic of Tanzania) during the period of April 14–18, 2008.

[30] Art. 13 Djibouti Code of Conduct provides: "Within two years of the effective date of this Code of conduct, and having designated the national focal points referred to in Art. 8, the Participants intend to consult, with the assistance of IMO, with the aim of arriving at a binding agreement."

[31] Art. 1(1) Djibouti Code of Conduct.

[32] Art. 1(2) Djibouti Code of Conduct.

persons on board."[33] The Djibouti Code of Conduct also respects the territorial sea of the participants by preserving the jurisdiction and authority of the state participant where seizure takes place within the territorial sea of such a state participant.[34] In line with the SUA Convention, the Djibouti Code of Conduct requires participants to create the offences of piracy and armed robbery against ships and to establish jurisdiction for the prosecution or repatriation of offenders.[35]

To bring the existing Memoranda of Understanding framework into the purview of the Djibouti Code of Conduct, Art. 7 provides for armed officials of participants to embark on the patrol ships and aircraft of another state participant[36] and such embarked officials "may assist the host participant and conduct operations from the host participant ship or aircraft if expressly requested to do so by the host participant."[37] This provision of the Djibouti Code of Conduct is aimed at facilitating the subsequent exercise of adjudicative jurisdiction by the national courts of the state of the embarked officials.

The most progressive provisions of the Djibouti Code of Conduct as far as combating piracy is concerned are Arts. 11 and 14. The Djibouti Code of Conduct requires participants to undertake comprehensive review of national legislation to ensure that there are national 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."[38] The lack of an indemnity clause – the major weakness of the current Memoranda of Understanding framework – has been catered for by the provision that any claim for damages, injury or loss resulting from an operation carried out under the Djibouti Code of Conduct shall be handled by the state participant whose authorities conducted the operation, in accordance with the national laws of that state.[39] This provision of the Code cushions a state participant, which undertakes prosecution of pirates from the risk of civil claims arising from the enforcement action on the high seas of other state participants.

As noted above, Kenya has already reviewed its legislation to meet the requirements of the Djibouti Code of Conduct. The Merchant Shipping Act has not only criminalized piracy but has also created the offence of armed robbery against ships and further created extraterritorial jurisdiction for the Kenyan courts. Kenya has agreed to undertake prosecutions of pirates under the existing Memoranda of Un-

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[33] Art. 4(7) Djibouti Code of Conduct.

[34] Arts. 4(8) and 5(2) Djibouti Code of Conduct.

[35] Arts. 2 and 4 Djibouti Code of Conduct.

[36] Arts. 7(1), (2) and (3) Djibouti Code of Conduct.

[37] Art. 7(4) Djibouti Code of Conduct.

[38] Art. 11 Djibouti Code of Conduct.

[39] Art. 14 Djibouti Code of Conduct.

derstanding framework. Approximately 100 pirates are awaiting trial at the Chief Magistrate's Court in Mombasa.[40]

D. The Piracy Provisions in the Draft African Maritime Transport Charter

The Second African Union Conference of Ministers responsible for maritime transport met in Durban (South Africa) and adopted the African Maritime Transport Charter[41] and a resolution on maritime security, safety and protection of the marine environment.[42] The draft charter is yet to be adopted by the African Union heads of states summit and, therefore, is not yet binding on the member states. The framework of the charter is to create harmonized policy, legal and institutional frameworks for the maritime sector in Africa.[43] In particular, the draft maritime charter calls for the member states to enact legislation to give full effect to the charter and all relevant international instruments, codes and regulations "in the area of maritime, port safety and security"[44] and to adopt effective measures to combat piracy, armed robbery against ships and other unlawful acts against shipping through cooperation with other international bodies.[45]

Kenya has already given effect to the provisions of the charter on combating piracy by the enactment of the Merchant Shipping Act in 2009, which establishes a comprehensive statutory framework for the prosecution of pirates. The Merchant Shipping Act also domesticates virtually all international conventions ratified by Kenya.[46] Kenya has also actively participated in the regional seminars and workshops on piracy and armed robbery against ships. In a way, therefore, it would be correct to argue that Kenya has honored most, if not all, of the obligations placed by the draft charter for combating piracy.

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[40] Report of the Secretary-General pursuant to Security Council resolution 1846 (2008), delivered to the Security Council. U.N. Doc. S/2009/590 (Nov. 13, 2009), para. 46.

[41] See *supra* note 9.

[42] The meeting was held on Oct. 15–16, 2009 and was preceded by a preparatory meeting of experts which took place Oct. 12–14, 2009 at the same venue; for detail see African Union, First African Union Conference of Ministers Responsible for Maritime Transport, Feb. 19–21, 2007, Abuja (Nigeria), Report of the Experts Meeting, AU Doc. AU/EXP/MT/Rpt(I), *available at* www.africa-union.org/root/ua/Conferences/2007/fevrier/IE/doc/Report_The_Experts_Meeting.pdf (last visited April 21, 2010).

[43] Arts. 3 and 23 Draft African Maritime Transport Charter.

[44] Art. 26(1) Draft African Maritime Transport Charter.

[45] Art. 26(2) Draft African Maritime Transport Charter.

[46] See *supra* note 15.

E. The Framework of the United Nations Security Council Resolutions

In 2008 and 2009 the United Nations Security Council adopted a whole range of Chapter VII based Resolutions[47] aimed at containing the escalating threat of piracy and armed robbery against ships off the coast of Somalia.[48] The sheer number of Security Council Resolutions underlines the deep concern of the international community triggered by the escalation of piracy and armed robbery against ships off the coast of Somalia.

Of all Security Council Resolutions on Somalia, it is Resolutions 1816, 1846 and 1851 adopted in 2008, which have generated intense academic debate and comment. This debate can partly be explained by the words used in the drafting of the Resolutions; much of the debate has to do with what the Security Council meant, or did not mean by the words used in the Resolutions. Although the Security Council gave a wide discretion to the member states engaged in the repression of piracy and armed robbery against ships off the coast of Somalia, it tempered its language by invoking the framework of international law and restricting the extraordinary remedial measures to the unique situation in Somalia.

The wording of the three Security Council Resolutions – 1816, 1846 and 1851 – ranges from generally permissive in Resolution 1816, to more discretionary language in Resolution 1846, to the more definite tone in Resolution 1851. Resolution 1846 permits states to enter the territorial waters of Somalia and to use "all necessary means to repress acts of piracy and armed robbery at sea."[49] The Security Council, however, added that such entry into Somalia's territorial waters was to be "consistent with such action permitted on the high seas with respect to piracy under relevant international law;"[50] and that it "applies only with respect to the situation in Somalia and shall not affect the rights or obligations or responsibilities of member states under international law."[51] It is the breadth and width of the permission granted to member states under Security Council Resolution 1851 to enter Somalia and to "undertake all necessary measures that are appropriate in Somalia, for the purpose of suppressing acts of piracy and armed robbery at sea"[52] that has generated most controversy. In interpreting these words, it is possible to give a liberal

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[47] Art. 42 of Chapter VII of the United Nations Charter authorizes the Security Council to take enforcement action by air, land or sea in order to maintain or restore international peace and security.

[48] The most important Security Council counter-piracy Resolutions are the following: S.C. Res. 1838, U.N. Doc. S/RES/1838 (Oct. 7, 2008), S.C. Res. 1846, S.C. Res. 1851, S.C. Res. 1897, U.N. Doc. S/RES/1897 (Nov. 30, 2009).

[49] S.C. Res 1846, para. 10(b).

[50] *Id*.

[51] *Id*. para. 9.

[52] S.C. Res 1851, para. 6.

interpretation (to encompass every imaginable activity in the course of intervention) just as it is possible to give a restricted meaning to the words (to limit the activities to what is permissible under international law and relevant conventions).

While the Security Council Resolutions extended the mandate of the states exercising enforcement jurisdiction against pirates and armed robbers at sea operating in Somalia's territory, territorial waters and off the coast of Somalia, they did not apply to the exercise of adjudicative jurisdiction. The words used in the various Resolutions granting mandate to member states to enter Somalia's territorial waters and "use all necessary means to repress piracy and armed robbery" cannot be interpreted so as to impose a duty on member states to prosecute apprehended pirates. Whereas the right to exercise enforcement jurisdiction against pirates and pirate ships in the high seas is granted to member states under the universality principle, there is no obligation placed on member states to combat armed robbery at sea within the territorial waters of a member state or to prosecute apprehended pirates under their national laws.[53] Indeed Security Council Resolution 1851 specifically calls on member states to enter into "special agreements or arrangements with countries willing to take custody of the pirates in order to embark law enforcement officers (shipriders) from the latter countries."[54] The Security Council Resolution further calls on the countries in the region to "facilitate investigation and prosecution of persons detained as a result of operations conducted under this resolution."[55] The language is not such that it imposes an obligation on member states to prosecute apprehended pirates and armed robbers at sea.

The spirit of the Security Council Resolutions has been captured by the Djibouti Code of Conduct which obliges member states to either prosecute or repatriate pirates and armed robbers at sea; to make arrangements and agreements for the prosecution of such pirates or armed robbers at sea;[56] and to facilitate the use of embarked officials to apprehend pirates[57] so as to provide the missing link between enforcement jurisdiction and adjudicative jurisdiction where the jurisdictions are exercised by different states participants. As noted above, Kenya has overshot its obligations under the SUA Convention and the Djibouti Code of Conduct by entering into Memoranda of Understanding to prosecute pirates apprehended in the high

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[53] See the discussion on this point in The Harvard Draft Convention on Piracy, Supplement Research in International Law, 26 American Journal of International Law Supplement 739 and 751–760 (1932), where it is noted (p. 760) that "piracy is not a crime by the law of nations. It is the basis of an extra ordinary jurisdiction in every state to seize and to prosecute and punish persons, and to seize and dispose of property, for factual offences which are committed outside the territorial and other ordinary jurisdiction of the prosecuting state." See also *Rubin*, *supra* note 1, p. 360, and *Dubner*, *supra* note 2, pp. 37–65.

[54] S.C. Res. 1851, para. 3.

[55] *Id*.

[56] See, for example, Art. 2(1)(c) and Art. 4(3)(a), (6) and (7) Djibouti Code of Conduct.

[57] Art. 7 Djibouti Code of Conduct.

seas by other states participants. Further, it has reviewed its legislation to create extraterritorial jurisdiction for the prosecution of pirates and to create the offence of armed robbery against ships in its territorial waters. However, what is in doubt is whether the expansive extraterritorial jurisdiction under the Merchant Shipping Act can be used to prosecute armed robbers at sea caught in Somalia's territorial waters, as the definition of piracy in the Merchant Shipping Act adopts the definition in Art. 101 of UNCLOS, limiting piracy to acts committed on the high seas.

III. The Adjudicative Jurisdictional Challenges

A. The Jurisdictional Basis for the Trial of Piracy Cases

The jurisdictional basis for the trial of the offence of piracy by the Kenyan courts can be found in the Memoranda of Understanding, the Constitution of Kenya,[58] and other statutory provisions including the Judicature Act,[59] the Penal Code,[60] the Criminal Procedure Code[61] and, presently, the new Merchant Shipping Act.[62]

The jurisdiction to try piracy cases by Kenyan courts has not been the subject of much judicial interpretation and very few cases are reported on the subject. This

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[58] Section 60(1) Constitution of Kenya Act [hereinafter: Kenyan Constitution] provides: "There shall be a High Court, which shall be a superior court of record, and which shall subject to section 60A have unlimited original jurisdiction in civil and criminal matters and such other jurisdiction and powers as may be conferred on it by this Constitution or any other law."

[59] Section 4 Judicature Act (Chapter 8 Laws of Kenya) [hereinafter: Judicature Act] provides: "(1) The High Court *shall* be a court of admiralty, and *shall* exercise admiralty jurisdiction in all matters arising on the high seas, or in territorial waters, or upon any lake or other navigable inland waters in Kenya. (2) The admiralty jurisdiction of the High Court *shall* be exercisable – (a) over and in respect of the same persons, things and matters, and (b) in the same manner and to the same extent, and (c) in accordance with the same procedure, as in the High Court in England, and shall be exercised in conformity with international laws and comity of nations. (3) In the exercise of its admiralty jurisdiction, the High Court may exercise all its powers which it possesses for the purpose of its other civil jurisdiction." (emphasis added). The mandatory nature of this provision is to be noted.

[60] Section 69 Penal Code, which was repealed by the Merchant Shipping Act, provides that: "(1) Any person who, in territorial waters or upon the high seas, commits any act of piracy *jure gentium* is guilty of the offence of piracy." And states: "(3) Any person who is guilty of the offence of piracy is liable to imprisonment for life." This Section is to be read together with Section 4 Criminal Procedure Code.

[61] See Section 4 and First Schedule of the Criminal Procedure Code (Chapter 75 Laws of Kenya) [hereinafter: Criminal Procedure Code]. All the pending piracy cases have been commenced in the subordinate courts under Section 4 Criminal Procedure Code.

[62] Section 369 Merchant Shipping Act adopts the definition of piracy of Art. 101 UNCLOS and Section 371 Merchant Shipping Act provides for the penalties for the offences of piracy and armed robbery against ships: "Any person who – (a) commits any acts of piracy; (b) in territorial waters, commits any act of armed robbery against ships shall be liable, upon conviction, to imprisonment for life."

scarcity in judicial interpretation is explained by the fact that until very recently the Kenyan courts did not try piracy cases, the first reported case being heard by the courts in 2006.[63]

Three issues have arisen for consideration by the courts: firstly, whether the Magistrates' Courts specifically have the requisite statutory jurisdiction to try piracy cases under Section 69 Penal Code, which was repealed; and secondly, whether Kenyan courts generally have extraterritorial jurisdiction to try suspected pirates for the offence of piracy committed outside Kenya. A third issue which touches on jurisdiction but which has not yet been dealt with by the courts is the effect of the repealing provisions of the Merchant Shipping Act[64] on the pending criminal cases against suspected pirates. It should be noted that all the pending criminal cases against suspected pirates were commenced under the repealed Section 69 Penal Code and, therefore, much of the discussion in the ensuing paragraphs will touch on the judgments delivered by the courts on the challenges to jurisdiction under the repealed section. The nature of the jurisdiction granted by the Merchant Shipping Act will be discussed in subsequent paragraphs.

1. Jurisdiction under the Criminal Procedure Code and Magistrates' Courts Act

Kenya has a court structure which operates at different levels.[65] At each level the courts are vested with jurisdiction to try criminal and civil cases. At the apex of the structure is the Court of Appeal which has only appellate jurisdiction and hears criminal and civil appeals from the High Court.[66] The High Court is vested with unlimited original criminal and civil jurisdiction and also with power of judicial review over cases handled by the subordinate courts.[67] The High Court hears appeals in criminal, civil and customary law claims from the subordinate courts. Below the High Court are the subordinate courts, comprising of the Residents Magistrates' Courts[68] and the District Magistrates' Courts.[69] Under Section 5 of the

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[63] See *Axe, David*, Wired, Somali Pirates Face Justice, Finally, Dec. 15, 2008, *available at* http://blog.wired.com/defense/2008/12/pirates-have-th.html (last visited April 21, 2010). The first case to be heard by Kenyan courts was Mombasa Criminal Case no. 464 of 2006 (later High Court Criminal Appeal Nos. 198–207 of 2008 *Hassan M Ahmed & Others v Republic* [2009] eKLR) in respect of 10 pirates arrested and handed over to Kenya by the United States Navy after an attack on the Indian vessel *Safina al Bisarat* on Jan. 16, 2006 [hereinafter: *Hassan M Ahmed* case].

[64] Section 454 Merchant Shipping Act.

[65] See generally the provisions of Chapter IV Kenyan Constitution and Section 3 Judicature Act.

[66] Section 64 Kenyan Constitution; see also Section 3 Appellate Jurisdiction Act.

[67] Sections 60 and 65 Kenyan Constitution.

[68] Established under Section 3 Magistrates' Courts Act (Chapter 10 Laws of Kenya).

[69] Section 7 Kenyan Constitution.

Magistrates' Court Act the Chief Justice is given power to enhance the civil jurisdiction of a Chief Magistrate, Senior Principal Magistrate, Principal Magistrate, Senior Resident Magistrate or Resident Magistrate. There is no power to increase the criminal jurisdiction of the Magistrates' Courts granted under the provisions of the Act.

The jurisdiction to try piracy cases is granted to the Magistrates' Courts by Section 4 of the Criminal Procedure Code as read together with the First Schedule, which vests jurisdiction in either the High Court or the subordinate courts held by the Chief Magistrate, Senior Principal Magistrate, Principal Magistrate or Senior Resident Magistrate. The Section appears to contradict the provisions of Section 4 of the Judicature Act which vests exclusive jurisdiction in the High Court to "exercise admiralty jurisdiction in all matters arising on the high seas, or in territorial waters, or upon any lake or other navigable inland waters in Kenya."[70]

In *Hassan M Ahmed and Others v Republic* the appeal judge did not consider the apparent contradiction between Section 4 of the Criminal Procedure Code and Section 4 of the Judicature Act.[71] This apparent contradiction in the provisions of the two statutes was not argued before the court and the appeal judge dealt with the broad objection to jurisdiction of the court under the second point of the exercise of universal jurisdiction by Kenyan courts. Upon a closer look at the provisions of Section 4 of the Judicature Act, it is reasonable to argue that its mandatory provisions (by the use of the word "shall") on jurisdiction[72] are to be preferred to the permissive provisions (by the use of the word "may") in the Criminal Procedure Code whose objective is to make provision for the procedure to be followed in criminal cases. Although it is difficult to predict what the appeal judge would have found had the point been argued before him, at least it is reasonable to contend that such an argument would have found favor with the court as the most reasonable way to give effect to the provisions of the two statutes.

The appeal judge's finding that UNCLOS had been domesticated in Kenya is not convincing and is incorrect. The judge simply accepted the argument by the counsel for the respondent that UNCLOS had been domesticated "because a contrary view had not been given by the counsel for appellants." Kenya is a dualist state and, therefore, parliament has to pass enabling statutes to give effect to international conventions which the country has signed, acceded to or ratified.[73] Until the

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[70] Section 4 Judicature Act.

[71] *Hassan M Ahmed* case, *supra* note 63.

[72] The preamble Section of the Judicature Act states: "An Act of Parliament to make provision concerning the jurisdiction of the High Court, the Court of Appeal and subordinate courts, and to make additional provision concerning the High Court, the Court of Appeal and subordinate courts and the judges and officers of courts."

[73] See *Okunda v Republic* [1970] EA 453; *The East African Community v Republic* [1970] EA 457 (per Mwendwa CJ); and the comments of the House of Lords in *Re Piracy Jure Gentium* (1934) AC 586. In *R.M. (suing thro' Next friend) J.K. Cradle (The Child*

last quarter of 2009, the Kenyan parliament had only enacted a single piece of legislation to domesticate part of the provisions dealing with delineation of maritime zones; to date no single Kenyan law domesticates all the provisions of UNCLOS.[74]

As for the offence of piracy, the first Kenyan statute to domesticate relevant UNCLOS provisions is the Merchant Shipping Act, which adopts the piracy definition as contained in Art. 101 UNCLOS and creates the offence of "armed robbery against ships" in territorial waters.[75] The definition of piracy in the repealed Section 69 of the Penal Code has often presented a problem to both the prosecutors and the court, as no specific definition is given of the offence of piracy *jure gentium* and, therefore, the elements of the offence are not given. This lack of a clear provision on the elements of the offence of piracy was raised in the *Hassan M Ahmed* case and has also been raised in all other pending piracy cases brought under the provisions of the repealed Section 69 of the Penal Code.[76] In the *Hassan M Ahmed* case, the court circumvented the problem by a blanket adoption of the definition of piracy of the UNCLOS on the ground that Kenya had ratified the Convention. The overall outlook of the judgment lacks a thorough and comprehensive analysis of the law and international conventions relevant to the offence of piracy.

Before examining the universal jurisdiction to try piracy cases in Kenya, there is one more challenge to the court's jurisdiction which is likely to be raised by the accused in respect of the pending piracy cases: the lack of the court's jurisdiction to convict on the basis of a non-existent provision of the law. As it was noted above,

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Fund) Millie v A.G. Civil Case No. 2002 (Nairobi) [2006] eKLR, the High Court noted that even where a treaty has been ratified but is yet to be implemented by a domesticating statute, the court will take this into account in interpreting an ambiguous Section of a statute. See also *R v Keyn* (1876) 2 Ex.D.63, p. 203, where the court held that (per Cockburn CJ): "Nor, in my opinion, would the clearest unanimous assent on the part of other nations be sufficient to authorize the tribunals of this country to apply, without an act of parliament, what would practically amount to a new law. In so doing, we should be unjustifiably usurping the province of the legislature. The assent of nations is doubtless sufficient to give the power of parliamentary legislation in a matter otherwise within the sphere of international law; but it would be powerless to confer without such legislation a jurisdiction over foreigners in foreign ships on a portion of the high seas." This decision was affirmed in *R v Bow Street Metro. Stipendiary Magistrate, Exparte Pinochet Ugarte* (No. 3) (2000) 1 AC 147 holding that it was only after the coming into force of Section 134 Criminal Justice Act of 1998 that English criminal courts acquired jurisdiction over extraterritorial torture. See also *Bassiouni*, *M. Cherif*, Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice, 42 Virginia Journal of International Law 136–151 (2001), who argues that universal jurisdiction over piracy is firmly established under international law and that it developed in parting the national laws and practices of major seafaring nations.

[74] Although Kenya signed UNCLOS in December 1982, it was not until March 1989 that it ratified the Convention: see *supra* note 11.

[75] Part XVI of the Merchant Shipping Act.

[76] See *Ondari*, *Jacob*, The Prosecution of Piracy Cases: The Kenyan Prosecutors' Experience to Date, p. 3 (unpublished paper with the author on file). The author of the paper enumerates twelve major challenges that Kenyan prosecutors face in piracy cases.

all the pending piracy cases were commenced under the repealed Section 69 of the Penal Code. Upon repeal, a section of the law ceases to exist and no offence can be created under the (non-existent) section. Consequently, no court can convict or sentence on the basis of the repealed section. Similarly, the accused persons cannot be rearrested and charged afresh under the Merchant Shipping Act as the offences with which they would subsequently be charged with would be deemed to be *ex post facto* crimes which are prohibited under the Kenyan Constitution.[77] The present quagmire and untidy situation of the law is likely to lead to acquittals as it would be illegal and in utter breach of the Constitution to convict and sentence the suspected pirates in respect of an offence not known to Kenyan law. Perhaps the situation would have been saved by a sunset clause in the Criminal Procedure Code that the repeal of the section in question would not affect the power of the court to convict and sentence the accused persons in respect of the pending piracy cases and offences committed prior to the commencement of the Merchant Shipping Act. Without such a sunset clause to save the jurisdiction of the court to try the pending piracy cases, the accused persons are entitled to outright and unconditional acquittals.

2. The Domestication of the Universal Jurisdiction to Try Piracy

In considering the general objection to jurisdiction raised by the counsel for the appellant in the *Hassam M. Ahmed* case, the appeal judge noted, quite correctly, that in Kenya the offence of piracy can be tried and is punishable under the provisions of the repealed Section 69 of the Penal Code. The judge's finding that any state can try pirates by virtue of the universality principle (universal jurisdiction) is correct and has support from leading scholars (to some of whom he referred) and the English courts including the House of Lords.[78] It should be noted that the repealed Section 69 of the Penal Code did not make any distinction between the offences of piracy committed in territorial waters or in the high seas and that a suspected pirate's *nexus* with Kenya is irrelevant to the exercise of jurisdiction by Kenyan courts. It is, therefore, reasonable to argue that the universal (and, therefore,

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[77] Section 77(4) Kenyan Constitution provides: "No person shall be held to be guilty of a criminal offence on account of an act or omission that did not, at the time it took place, constitute such an offence, and no penalty shall be imposed for such a criminal offence that is severer in degree or prescription than the maximum penalty that might have been imposed for that offence at the time it was committed."

[78] See The Harvard Draft Convention, *supra* note 53, p. 760; *Dubner*, *supra* note 2, pp. 37–65; *Rubin, supra* note 1, p. 360; and the House of Lords decision in the case of *In re Piracy Jure Gentium*, *supra* note 73, p. 586 where the court held that "with regard to the crimes as defined by international law, that law has no means of trying or punishing them. The recognition of them as constituting crimes, and the trial and punishment of criminals are left to the municipal courts of each country." See also the decision of the court in *R v Keyn*, *supra* note 73, p. 203.

extraterritorial) jurisdiction in the Merchant Shipping Act [79] still exists, notwithstanding the repealing of Section 69 of the Penal Code, but that such jurisdiction could only be properly exercised by the High Court of Kenya and not by the subordinate courts.

The Constitution of Kenya is the supreme law of the country and any other law which is inconsistent with it is void.[80] Section 60 of the Kenyan Constitution grants to the High Court "unlimited original jurisdiction in civil and criminal matters" and "such other jurisdiction and powers as may be conferred on it (...) by any other law." Two such other laws which confer admiralty jurisdiction are the Judicature Act (under Section 4) and the old repealed Merchant Shipping Act of 1967.[81] Reading Section 60 of the Constitution together with Section 4 of the Judicature Act and the repealed Section 69 of the Penal Code, it is reasonable to argue that the three sections vest universal jurisdiction in the High Court of Kenya to try piracy cases as a court of admiralty. This view is supported by other scholars who have commented on the nature of the admiralty jurisdiction vested in the High Court of Kenya.[82]

The nature of the universal jurisdiction vested by the repealed Section 69 of the Penal Code is different in some respects to the universal jurisdiction in the Merchant Shipping Act. The Merchant Shipping Act has express provisions on extraterritorial jurisdiction granting Kenyan courts jurisdiction over non-nationals and in respect of acts committed in foreign ships. The Merchant Shipping Act also clearly creates new offences of robbery against ships (in territorial waters) and hijacking and destroying ships which were not covered by the repealed Section 69 of the Penal Code.

B. The Framework of the Memoranda of Understanding

As noted above, Kenya signed Memoranda of Understanding with the United Kingdom, the United States and the European Union between the last quarter of 2008 and early 2009. These agreements were mainly designed to allow for and to

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[79] See Sections 369, 370 and 371 Merchant Shipping Act providing for the universal/extraterritorial jurisdiction.

[80] Section 3 Kenyan Constitution.

[81] The Merchant Shipping Act of 1967 (Chapter 389 Laws of Kenya) was repealed by Section 454 Merchant Shipping Act, which entered into force in 2009.

[82] See *Gathii*, *supra* note 26, p. 8. The author argues that this is the most feasible legal basis for prosecuting non-national pirates for extra piratical conduct in Kenya and that other crimes of an international law character that are triable in domestic courts cannot be directly created by customary international law without an enabling domestic statute.

facilitate the prosecution in Kenyan courts of pirates captured in the high seas by the navies of the other states parties to the Memoranda of Understanding.[83]

The Exchange of Letters between Kenya and the European Union contains an annex with nine provisions regulating the conditions and modalities of transfer of piracy suspects and seized property from the EU-Led Naval Force (EUNAVFOR) to Kenya. The main objectives of the Memorandum of Understanding are to support the Kenyan prosecutors, the police and the judicial service to ensure that the trial of piracy cases are fair, humane, efficient and conducted within the sound framework of the law. Transfers and proceedings based on the Memorandum of Understanding challenge the Kenyan judicial system, already burdened by overstretched capacity, logistical problems, and financial constraints. Kenya's role in implementing the Memorandum of Understanding will involve legislative review (especially of the Evidence Act) to allow for admission of new forms of evidence (e.g. video link evidence instead of direct oral evidence); the need for legal research and materials; the need for specialized training for prosecutors, police officers and magistrates; prisons reform pilot projects at Shimo-la-Tewa and Manyani prisons; and finally the need for Kenya to give support to other regional countries through sharing of experience.

The provisions of the Memoranda of Understanding are vague on the question of financial support and do not contain a firm commitment of financial resources to fully and successfully implement the terms of the Memoranda of Understanding. Although Kenya had prepared and submitted a budget of $5.1 million for the period of 18 months during the first cycle of the Memorandum of Understanding, the United Nations Office on Drugs and Crime (UNODC) has only committed itself to financing $2.3 million leaving a resource gap of $2.8 million. Lack of adequate financing may eventually lead to the collapse of the framework of the Memoranda of Understanding as it would be very difficult (and politically imprudent, too) for Kenya to continue to support the prosecutions with its limited resources.[84]

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[83] See *supra* note 3.

[84] *Ondari, Jacob*, *supra* note 76, pp. 3–8. The author lists the twelve challenges of prosecuting piracy cases as: language/need for interpretation; lack of clarity as to which law to apply when collecting evidence before and after arrest; unwillingness of witnesses to testify due to distance and security concerns; security concerns for both prosecutor and magistrate; the fact that the Kenyan Evidence Act does not permit photographic and video link evidence; overcrowded pretrial and detention facilities; no clarity as to who will carry the burden of indemnity in the event of acquittals; uncoordinated approach by donor agencies and Kenya law enforcement agencies; short notice for transfer of prisoners before being landed; and lack of payment of travel allowance for prosecutors and logistical arrangements relevant to the trials (financial support has been rather *ad hoc* and does not cover capital expenditure).

The Kenya/EU MoU is not intended to be a formal binding agreement, but a mere framework,[85] which facilitates further detailed and specific agreements on the pertinent issues covered by the agreement. One notable feature of the Memorandum of Understanding is the absence of an indemnity clause. It is not clear from the document which party to the agreement would shoulder the burden of paying damages for wrongful arrest and confinement of the suspected pirates where the courts acquit them (on whatever ground). Kenya, as the prosecuting state, would be liable for damages for wrongful confinement/detention and for malicious/wrongful prosecution or improper exercise of adjudicative jurisdiction. Besides, there have been allegations of inhuman treatment and abuse of human rights by the arresting naval officers and should such allegations be proven to the satisfaction of the court, the suspected pirates would be entitled to an award of damages. The burden placed on Kenya to prosecute the pirates and then pay damages to those who may be acquitted and opt to sue for wrongful confinement is onerous and is not matched by sufficient support by the international community. The Memorandum of Understanding further places on Kenya the extra burden of supporting other regional countries in sharing her experience; hence the exasperation of the Kenyan leadership at the failure by other states to fully honor the terms of the Memorandum of Understanding.[86]

C. Evidence and Witness Attendance at the Trials

The procedure governing the production of evidence before courts of law in Kenya is provided for in the Evidence Act.[87] This somewhat old piece of legislation came into force on December 10, 1963 and is based on the colonial Indian Evi-

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[85] Art. 9(a) Kenya/EU MoU entitled "implementing arrangements" provides that: "For the purposes of the application of these provisions, operational, administrative and technical matters may be the subject of implementing arrangements to be approved between competent Kenyan authorities on the one hand and the competent EU authorities, as well as the competent authorities of the sending States, on the other hand."

[86] See *Muyanga, Philip*, Daily Nation, Death Knell Tolls for Prosecutors, Sept. 13, 2009, *available at* www.nation.co.ke/News/-/1056/657622/-/umup3w/-/index.html (last visited April 21, 2010), in which the Attorney General of Kenya expressed concern by Kenya's Partners in the MOUs to honor their part of the bargain. See also *Butty, James*, Kenyan Foreign Minister Shed Light on U.S.-Kenya Piracy Agreement, Jan. 28, 2009, *available at* www.turkishweekly.net/print.asp?type=1&id=63755 (last visited April 21, 2010), where Kenya's Minister for Foreign Affairs is quoted as saying that the Memorandum of Understanding was not "an open door for dumping pirates onto Kenya [sic] soil because it will not be acceptable."

[87] The Evidence Act (Chapter 80 Laws of Kenya) [hereinafter: Evidence Act] came into force on Dec. 10, 1963. It is based on the colonial Indian Evidence Act. It has been amended several times since enactment but still it does not provide a suitable framework for the trial of modern offences like piracy, terrorism and other related crimes of an international character.

dence Act. The Act has a number of shortcomings which encumber the efficient trial of piracy cases. Key among the shortcomings is the requirement of direct oral evidence to prove a fact;[88] another is the restriction in the admission of photographic evidence.[89] Due to the requirements of the Evidence Act that the evidence to prove a fact in court is direct oral evidence, it is mandatory for the arresting naval officers and persons who witnessed the piratical attacks being committed to personally attend court and give testimony. Neither video link nor photographic evidence is admissible to prove a case in Kenyan courts. The provisions of the Evidence Act, therefore, have created logistical challenges to the prosecution since the date for the mention or trial of a criminal case is usually fixed by the court, depending on the convenience of its diary. The prosecution shoulders the burden of producing witnesses to give evidence in court.

Under the Kenyan Constitution it is the duty of the prosecution to prove the guilt of the accused person.[90] In the trial of piracy cases, the burden of the prosecution is made heavier as the witnesses have to be traced miles away due to the nature of their engagements, which requires that they move from place to place. With regard to witnesses who reside within jurisdiction and refuse to attend court to testify, attendance may be compelled by issuance of a police bond or by court (witness) summons to attend trial under the provisions of the Criminal Procedure Code.[91] However, there is no means for the Kenyan courts to compel attendance of witnesses in situations where the witness who is unwilling to testify is outside the jurisdiction of the court.[92] The scenario may be further complicated by situations

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[88] Section 62 Evidence Act provides that: "All facts, except the contents of documents, may be proved by oral evidence." Section 63 Evidence Act reads: "(1) Oral evidence must in all cases be direct evidence. (2) For the purposes of subsection (1), "direct evidence" means – (a) with reference to a fact which could be seen, the evidence of a witness who says he saw it; (b) with reference to a fact which could be heard, the evidence of a witness who says he heard it; (c) with reference to a fact which could be perceived by any other sense or in any other manner, the evidence of a witness who says he perceived it by that sense or in that manner; (...)."

[89] Section 78 Evidence Act provides that photographic evidence may only be tendered in criminal proceedings by an officer appointed by the Attorney General and in the prescribed form and who shall "have prepared a photographic print or a photographic enlargement from exposed film submitted to him." The court may presume that the signature appearing on the certificate by such an officer is genuine.

[90] Section 77(2) Kenyan Constitution provides that: "Every person who is charged with a criminal offence (a) shall be presumed innocent until he is proved or has pleaded guilty."

[91] Sections 144 to 149 Criminal Procedure Code provide for the procedure to be followed in summoning witnesses who fail to voluntarily attend court and give testimony. The court is granted power to issue a warrant of arrest to compel attendance of the witness and may fine a defaulting witness and attach the property for failure to honor a witness summons.

[92] Section 3 Witness Summons (Reciprocal Enforcement) Act (Chapter 78 Laws of Kenya), makes provisions for the issuance of witness summons outside jurisdiction based on a reciprocal arrangement. The procedure for service is very lengthy and only applicable to

where the witnesses' statements may have been recorded on the high seas by arresting naval officers using procedures unknown to Kenyan laws.[93] The format for recording witness statements prior to the trial of a criminal case is provided for under the Police Act.[94]

To expedite the process of tracing witnesses and tracking down property which may have been acquired through criminal activities, the government of Kenya recently published the Mutual Legal Assistance Bill[95] which went through the second reading in Parliament and is expected to be enacted into law early 2010. The Mutual Legal Assistance Bill has a fairly broad framework[96] and makes provision for a number of items for which Kenya could request and upon which it could furnish, mutual legal assistance with other states. These include identifying and locating persons for evidential purposes; examining witnesses; intercepting telecommunications; conducting covert electronic surveillance; and "any other type of legal assistance or evidence gathering that is not contrary to Kenyan law."[97] The Bill also provides for personal attendance of witnesses[98] before a court exercising national jurisdiction, and the transfer of persons in custody for the purpose of identification, providing assistance in obtaining evidence or prosecutions or to appear as a witness before a court exercising jurisdiction in that state.[99]

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countries which have reciprocal arrangements with Kenya. There are no means of compelling witness attendance where such witnesses reside in non-reciprocating countries.

[93] Art. 5(g) of the Annex to the Kenya/EU MoU states that: "For the purposes of ensuring that EUNAVFOR is able to provide timely assistance to Kenya with attendance of witnesses from EUNAVFOR and the provision of relevant evidence, Kenya will notify EUNAVFOR of its intention to initiate criminal trial proceedings against any transferred person and the timetable for provision of evidence, and the hearing of evidence." On the other hand, Kenya is not always notified timely by the EUNAVFOR when its arresting vessels are about to land the suspected pirates.

[94] Section 22(3) Police Act (Chapter 84 Laws of Kenya) provides that: "Any police officer may record any statement made to him by any such person, whether such person is suspected of having committed an offence or not, but, before recording any statement from a person whom such police officer has decided to charge or who has been charged with committing an offence, the police officer shall warn such person that any statement which may be recorded may be used in evidence: Provided that any such statement shall, whenever possible, be recorded in writing and signed by the person making it after it has been read to him in a language which he understands and he has been invited to make any correction he may wish."

[95] The full text of the Mutual Legal Assistance Bill, 2009 is *available at* www.kenyalaw.org/Downloads/Bills/2009/200905.pdf (last visited May 10, 2010) [hereinafter: Mutual Legal Assistance Bill].

[96] Sections 40 and 48 Mutual Legal Assistance Bill.

[97] The Memorandum of Objects and Reasons of the Mutual Legal Assistance Bill provides: "The object of this Bill is to facilitate the widest range of assistance to be given and received by Kenya in investigations, prosecutions and judicial proceedings in relation to criminal matters, including with respect to the freezing, seizing and confiscation of proceeds and instrumentalities of crime."

[98] Section 15 Mutual Legal Assistance Bill.

[99] Section 16 Mutual Legal Assistance Bill.

Although it can be argued that Kenya has made reasonable efforts to reform the legislative framework for summoning witnesses residing outside the national jurisdiction to testify in criminal cases involving the trial of non-nationals, a lot still remains to be done in reforming the law to ensure that such trials proceed with minimum delay. The current legislative framework does not guarantee expeditious disposal of criminal cases in situations where the witnesses have to be summoned from outside the national jurisdiction. Pending the proposed legislative reform, delays will be experienced in the trial of such criminal cases.

D. Witness Protection

Over and above the challenge of summoning witnesses residing outside the Kenyan jurisdiction to attend court, the courts also have to deal with the general reluctance of witnesses to attend court and testify in the pending piracy cases due to perceived feelings of insecurity (having to face those who subjected them to the brutal assault at sea) or their unwillingness to relive the nasty experience in retelling the story of assault at sea to the court. The need to protect the witnesses, the prosecutors and the magistrates in the pending piracy cases cannot be gainsaid given the fact that piracy is a high stakes game which has attracted the interest of organized international criminal groups. Ironically, the Kenya/EU MoU does not provide for witness protection, save the vague provision that EU-Led Naval Force (EUNAVFOR) will assist Kenya to secure timely attendance of witnesses.[100]

The Witness Protection Act in Kenya is of recent origin. Kenya enacted the first ever legislation on witness protection in 2006 following concerted pressure by lobby groups to protect potential witnesses willing to testify against persons involved in mega corruption.[101] Although the Act went through parliament in 2006, it was not until 2008 that it was gazetted to take effect, which explains in part the controversy surrounding the legislation and the fact that it did not enjoy official support. The Witness Protection Act empowers the Attorney General to place under the witness protection program[102] persons who in his sole opinion need to be protected because they have given evidence or are about to give evidence or they have recorded a statement with a police officer.[103] The Attorney General is empowered by the Witness Protection Act to apply to the High Court[104] for a protection order,

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[100] Art. 5(g) of the Annex to the Kenya/EU MoU.

[101] Witness Protection Act (Act No. 16 of 2006), which came into force on Sept. 1, 2006 [hereinafter: Witness Protection Act].

[102] Section 4 Witness Protection Act.

[103] Section 5 Witness Protection Act.

[104] Section 14 Witness Protection Act.

where in his opinion the witness requires a change of identity, which may necessitate change of particulars in the births, deaths or marriage registers.[105]

The general framework of the legislation is sound and the Minister has already made the necessary regulations under the Witness Protection Act.[106] Following the promulgation of the witness protection regulations, the Witness Protection Unit has been set up within the Office of the Director of Public Prosecutions, led by a "unit head" in accordance with regulatory requirements. The Witness Protection Unit is not operational to its full capacity due to acute financial constraints[107] and to date it has not placed any single witness under the protection program. The process of placing witnesses under the program requires substantial financial resources, especially where the witness and the family have to be relocated to another country. Therefore, unless the unit is supported by would-be-donors or other well-wishers it may not succeed in achieving its objectives.

E. Plea Bargaining

Plea bargaining has been used in most criminal jurisdictions to decongest the courts of caseload and has, over the years, gained acceptability despite a consistent criticism that it is unconstitutional.[108] Plea bargaining has been used to get the accused person to either plead guilty to a lesser offence than the one with which he is charged[109] or to negotiate with the accused to plead guilty to the offence – as charged – on the undertaking of the prosecutor that he will receive less than the maximum sentence prescribed by law.[110]

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[105] Section 4 Witness Protection Act.

[106] Section 36 Witness Protection Act requires that the Minister and the Attorney General make regulations to give effect to the provisions of the Act.

[107] In an interview with a senior officer in the Office of Director of Public Prosecutions on Oct. 6, 2009 (the officer's identity will not be disclosed but whose answer to questions presented by the author remain in the file) the officer stated that the unit was allocated a paltry 3 million Kenyan Shillings (equivalent of € 30,000) since it was set up about twelve months ago.

[108] See *Lynch*, *Timothy*, Cato Institute, The Case against Plea Bargaining, *available at* www.cato.org/pubs/regulation/regv26n3/v26n3-7.pdf (last visited, April 21, 2010); and *Prister*, *Benjamin*, The Separation of Powers and the Constitutional Law of Sentencing, *available at* www.law.fsu.edu/faculty/2003-2004workshops/priester.doc (last visited April 21, 2010).

[109] Referred to as "charge bargain;" see *Larson, Aaron*, How Does Plea Bargaining Work? *available at* www.expertlaw.com/library/criminal/plea_bargains.html (last visited April 21, 2010).

[110] *Id.* referred to as "sentence bargain."

Until the 2008 amendment to the Criminal Procedure Code there was no legislative framework for plea bargaining in Kenya.[111] The Kenyan Constitution and the Criminal Procedure Code places duty on the prosecution to prove the offence with which the accused is charged beyond a reasonable doubt, even where the accused person chooses to offer no evidence in defense and remains silent throughout the criminal proceedings.[112] However, despite the lack of a legislative framework, plea bargaining had been used by the Kenyan courts, mostly in cases of murder where accused persons are willing to plead guilty to the lesser offence of manslaughter which does not carry the mandatory death penalty.[113] The benefit goes both ways as the state is able to procure a conviction without going through the lengthy process of proving a case against the accused person, while the accused benefits by securing a lesser sentence upon conviction. In a congested criminal justice system like Kenya's, such a compromise comes with tremendous benefit to the state as it is able to save resources. The amendments to the Criminal Procedure Code on plea bargaining are, therefore, a case of progressive reform of the Kenyan law on criminal procedure, as they formalize a practice which the courts had engaged in for a very long time without clear statutory guidelines.

In high profile criminal cases, the practice is for the prosecution to prefer sentence bargaining over charge bargaining to avoid inviting unnecessary criticism. A sentence bargain would allow the prosecutor to maintain the original charge but secure a conviction through a plea of guilty from the accused, on the understanding that the accused would get less than the maximum sentence provided under the law. In Kenya, the pending piracy cases can be categorized as high profile due to the fact that they involve non-nationals. The office of the Director of Public Prosecution has indicated a willingness to enter into plea bargaining agreements with the accused persons in exchange for information on the sponsors of piracy who are believed to be wealthy and well connected members of organized criminal groups

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[111] Statutory provisions for plea bargaining were introduced by amendment to the Criminal Procedure Code by Miscellaneous Statute Law Amendment (Act No. 11 of 2008) which introduced Sections 137A-O to the Criminal Procedure Code. These amendments allow for the accused person to enter into plea agreements with the prosecutor and give a framework of how plea agreements are to be handled by the courts and how they are to be made part of the court record. The provisions also have detailed safeguards to ensure that neither the accused person nor the prosecutor use the process for improper purposes. The right of the court to reject a plea agreement where it has good reasons to do so is also preserved.

[112] Section 77(2) Kenyan Constitution states the presumption of innocence and Section 210 Criminal Procedure Code states that where the prosecution fails to establish a strong case against the accused, the court is required to acquit the accused person without putting him or her on his or her defense.

[113] For the use of plea bargaining, see, for example, *Republic v Silvester Machika*, High Court Criminal case no. 87 of 2004 eKLR (2005); and *Republic v Kilonzo Munyoki*, High Court Criminal case no. 20 of 2003 eKLR (2006), *available at* www.kenyalaw.org/CaseSearch (last visited April 21, 2010).

residing in Nairobi.[114] Armed with such information, the government will be able to arrest the sponsors of piracy and hopefully destroy the cartels that plan the piratical attacks off the cost of Somalia and in the Gulf of Aden.

F. The Constitutional Guarantees for a Fair Trial

The Constitution of Kenya protects the accused person in a criminal trial by prescribing and guaranteeing certain minimum requirements:[115] the right to a fair trial within a reasonable time and before an independent and impartial tribunal;[116] the right to be presumed innocent until proven guilty;[117] the right to be informed as reasonably as practical in a language that he understands and in detail, of the nature of the offence with which he is charged;[118] the right to be given adequate time and facilities for the preparation of his defense;[119] the right to defend himself before the court in person or by a legal representative of his choice;[120] the right to examine witnesses called by the prosecution;[121] the right to an interpreter where he cannot follow the proceedings in the language of the court;[122] and the right to be present in court during the course of the criminal trial.[123]

The courts in Kenya have recently shown assertiveness in enforcing the constitutional guarantees to a fair trial and have, on occasions, acquitted the accused persons where reasonable cause has not been shown why the accused was not produced in court within the prescribed time.[124] It is this concern for the possible

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[114] Information obtained in an interview with a senior officer in the Office of Director of Public Prosecutions on Oct. 6, 2009; the officer's identity will not be disclosed but his answers to questions presented by the author remain in the author's file.

[115] For a detailed provision on these rights granted to an accused person in a criminal trial see Section 77 Kenyan Constitution.

[116] Section 77(1) Kenyan Constitution.

[117] Section 77(2)(a) Kenyan Constitution.

[118] Section 77(2)(b) Kenyan Constitution.

[119] Section 77(2)(e) Kenyan Constitution.

[120] Section 77(2)(d) Kenyan Constitution.

[121] Section 77(2)(e) Kenyan Constitution.

[122] Section 77(2)(f) Kenyan Constitution.

[123] Section 77(2)(f) Kenyan Constitution.

[124] Section 73(3)(b) Kenyan Constitution requires that persons suspected to have committed criminal offences should be produced in court within 24 hours and those suspected to have committed capital offences (which include murder and robbery with violence) be produced before the court within 14 days from the date of their arrest or commencement of their detention. For the assertiveness of Kenyan courts in enforcing the rights of the accused persons see *Cisse Djibrilla v Republic*, Court of Appeal Criminal Appeal No. 221 of 2006, [2008] eKLR (Tunoi, Githinji and Deverell JJA, March 7, 2008); *Diba Wako Kiyato v Republic* (1982–88) 1KAR 1974; and *ex parte Abaidul Haque and 62 others* Misc Criminal Application No. 43 of 2005 (ruling delivered May 25, 2005 by Mwera J).

intervention by the courts that partly explains the inclusion of the constitutional safeguards for fair trial in the Memoranda of Understanding between Kenya and the United Kingdom, the European Union[125] and the United States.

One peculiar inclusion in the Kenya/EU MoU is the requirement that no transferred person will be liable to suffer the death sentence and that Kenya undertakes to "take steps to ensure that any death sentence is commuted to a sentence of imprisonment."[126] This curious inclusion is not surprising as it confirms the disharmony in the provisions of the Penal Code, the Criminal Procedure Code and the Merchant Shipping Act.[127] This disharmony in the country's laws must have been in the minds of the framers of the Memorandum of Understanding and it is a clear admission that it is possible that the court may find an accused person charged with the offence of piracy guilty of the offence of murder and, therefore, sentence such an accused to death. Otherwise the provision in the Memorandum of Understanding that death penalties shall be commuted to life imprisonment and the definition in the Merchant Shipping Act that acts of violence include murder would be sheer tautology.

One likely outcome of the courts' assertiveness to protect the rights of accused persons is their acquittal, especially where there are allegations of breach of fundamental rights, or where the constitutional guarantees to a fair trial are not observed by the trial court. In the event of such acquittals, the accused persons are

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[125] Art. 3 of the Annex to the Kenya/EU MoU, which repeats all the provisions guaranteeing fair trial provided for under Section 77 of the Kenyan Constitution.

[126] Art. 4 of the Annex to the Kenya/EU MoU.

[127] Under Section 370(7)(a) Merchant Shipping Act 2009 an act of violence is described to include murder. The history of this inveterate practice of including the act of murder under the offence of piracy can be traced to three colonial laws, namely the Admiralty Offences (Colonial) Act, 1849, the Admiralty Offences Colonial Act, 1860, and the Courts (Colonial) Jurisdiction Act, 1874. The three statutes were applied to Kenya by the Reception Clause of Aug. 12, 1897, see Section 3(2) Judicature Act on sources of Kenyan law. The Penal Code under Section 203 as read together with Section 204 describes the offence of murder as causing "the death of another person by an unlawful act or omission" and prescribes the death penalty for the offence. The Merchant Shipping Act prescribes life imprisonment as the maximum sentence for the offence of piracy which under Section 370(7)(a) Merchant Shipping Act includes murder committed in the high seas. The effect is to have two laws prescribing different sentences for the same act of violence committed in different sets of circumstances. In the *Hassan M Ahmed* case, *supra* note 63, the accused were sentenced to serve seven years imprisonment which the High Court found to be a reasonable sentence. Had they also committed an act of murder while engaging in piracy, they would have been sentenced to a jail sentence with a maximum of life imprisonment. Persons charged with the offence of murder cannot be admitted to bail by virtue of the provisions of Section 123 Criminal Procedure Code. However, persons charged with piracy may be admitted to bail as it is not a capital offence and is not excluded under the Criminal Procedure Code. It should, however, be noted that bail is granted at the sole discretion of the court and the courts will usually not grant bail where the nature of the charge is such that the risk of the accused absconding (for example, if the accused is a foreigner facing a serious charge) is very high.

entitled to damages for breach of their fundamental rights and for wrongful confinement. This in turn raises the complex issue of indemnity within the framework of the Memoranda of Understanding discussed earlier in this paper.

IV. The Preventive Statutory Provisions

In this section, the provisions of Kenya's legal framework for the prevention of organized transnational crimes, which may have adverse implications to the economy of the country, will be analyzed. Piracy as an organized transnational crime has to be facilitated by movement of money. Huge sums are paid as ransom, but this money is not received by the suspected pirates who commit the actual piratical attacks. The ransom money is paid through the informal *hawala* system.[128] It then becomes very difficult to track, since it is not remitted through formal channels. It is widely believed that the sponsors of piracy off the coast of Somalia are wealthy and well connected criminals, who are involved in organized crime and live lavishly in Nairobi.[129] If the activities of these sponsors of piracy are monitored carefully and the accounts used to receive ransom money frozen whenever there is the slightest suspicion of engagement in criminal activities, then piracy can become an expensive venture in which to engage.

If piracy off the coast of Somalia has to be controlled, then the strategy must be to target not only the pirates who actually commit the piratical attacks, but also the sponsors who facilitate such attacks hoping to make huge returns from the lucrative business. In the following paragraphs of this section we outline and evaluate the current legal framework which can be used to target the sponsors of piracy.

A. Legislation against Corruption and Economic Crimes

In 2003, the Kenyan parliament enacted legislation providing for the prevention, investigation and punishment of corruption, economic crimes and other related offences.[130] Although the legislation was aimed at public officers who engage in corrupt activities using their positions, the Anti-Corruption and Economic Crimes Act has certain provisions which can be used to target the sponsors of piracy.

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[128] See *Fornari, Fransesco*, A Business Worth 50 Million Dollars, 3 Freedom from Fear 8–13 (2009), *available at* www.freedomfromfearmagazine.org (last visited April 21, 2010).

[129] *Id*. p. 10.

[130] Anti-Corruption and Economic Crimes Act (Chapter 65 Laws of Kenya) [hereinafter: Anti-Corruption and Economic Crimes Act].

The property market in Nairobi has undergone a sudden change involving a very unusual demand, where buyers are willing to pay up to five times the market price. As a result, the property prices have sky rocketed to levels which ordinary Kenyans are unable to afford.[131] Investigations have revealed that the escalated prices of the properties depended largely on availability of ready cash buyers, which in turn was noted to be directly proportional to the number of piratical attacks off the coast of Somalia. The situation alarmed the government into taking measures to bring the situation under control.[132]

The Anti-Corruption and Economic Crimes Act provides that a person who deals with property that he believes or has reason to believe was acquired in the course of or as a result of corrupt conduct (i.e. conduct constituting corruption or economic crime) is guilty of an offence.[133] For any such offence the Anti-Corruption and Economic Crimes Act imposes a fine of one million Kenyan shillings and an additional mandatory fine if the person committing the offence received a quantifiable benefit or any other person suffered a quantifiable loss.[134] The Anti-Corruption and Economic Crimes Act further provides that it shall be no defense that the receiving, soliciting or offering of any benefit is customary in any business, undertaking, office, profession or calling.[135] The Anti-Corruption and Economic Crimes Act also provides that "unexplained assets may be taken by the court as corroboration that a person accused of corruption or economic crime received a benefit."[136]

Though the provisions of the Anti-Corruption and Economic Crimes Act cannot be considered to be watertight by any standard and are definitely not directly applicable to piracy cases, the same can be used to curb remittance of money received as ransom payments to the accounts of the sponsors of piracy off the coast of Somalia. By allowing investment of such money into the Kenyan economy, the sponsors of piracy are able to sanitize it and distort the demand in the property market.

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[131] See *Mugambi, Kaburu*, Daily Nation, Piracy money distorting prices, Nov. 18, 2009, *available at* www.nation.co.ke/business/news/-/1006/687864/-/iekgm7z/-/index.html (last visited April 21, 2010), in which it is alleged that property prices have sky rocketed to 500 % due to availability of ready cash buyers with money traced to piracy which has now replaced the remittances from Kenyans in the diaspora.

[132] In September 2009, the Central Bank of Kenya issued a circular directing that all payments in excess of one million Kenyan Shillings had to be made through the direct credit system and that cheques will not be used for sums below this amount. For further details on the Real Time Gross Settlement System (RTGS), see *infra* note 149 and www.centralbank.go.ke/nps/npsold.aspx (last visited April 21, 2010).

[133] Section 47 Anti-Corruption and Economic Crimes Act.

[134] Section 48 Anti-Corruption and Economic Crimes Act.

[135] Section 49 Anti-Corruption and Economic Crimes Act.

[136] Section 57 Anti-Corruption and Economic Crimes Act.

B. Legislation against Money Laundering

For a long time the Kenyan public and other activist groups have been lobbying the government to enact a law against money laundering. Although it had become common knowledge that certain persons and entities were engaged in money laundering in Kenya, the reason given for their non-prosecution by the authorities was the lack of a legislative framework to deal with the alleged crimes. Due to public pressure, the Attorney General published the Proceeds of Crime and Money Laundering Bill,[137] which has since gone through the first reading in parliament and may be enacted into in 2010.

The Proceeds of Crime and Money Laundering Bill gives a broad legislative framework for combating the crime of money laundering and provides for the identification, tracing, freezing, seizure and confiscation of the proceeds of crime.[138] The broad nature of the provisions in the Proceeds of Crime and Money Laundering Bill can be seen from the definition of money laundering and the broad net it casts by including any person who knowingly enters into a transaction with another with a view to facilitating such other person to conceal the proceeds of crime or money laundering.[139] It should also be noted that it does not matter whether the offence is committed in or outside Kenya or whether or not it was committed before the proposed law came into force.[140]

To attain the objectives of the proposed legislation, the Proceeds of Crime and Money Laundering Bill creates: firstly, the Financial Reporting Centre to disseminate information collected pursuant to the proposed Act and to ensure compliance with international standards in anti-money laundering measures;[141] secondly, the Anti-Money Laundering Advisory Committee to advise the director of the centre on the performance of his functions;[142] and, thirdly, the Assets Recovery Agency.[143] The proposed legislation further provides for obligations of reporting institutions;[144] the procedure for realization of proceeds of crime and for civil recovery and preservation of recovered property;[145] and the procedure for mutual legal assis-

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[137] The full text of the Proceeds of Crime and Money Laundering Bill, 2009 is *available at* www.kenyalaw.org/Bills/ (last visited May 10, 2010) [hereinafter: Proceeds of Crime and Money Laundering Bill].

[138] See Memorandum of Objects in the Proceeds of Crime and Money Laundering Bill.

[139] Clauses 2 and 3 Proceeds of Crime and Money Laundering Bill; also see generally the provisions of Part II (Clauses 3–18) Proceeds of Crime and Money Laundering Bill, which provide for the offence of money laundering and other related offences.

[140] Clause 3 Proceeds of Crime and Money Laundering Bill.

[141] Clauses 19–41 Proceeds of Crime and Money Laundering Bill.

[142] Clauses 46–48 Proceeds of Crime and Money Laundering Bill.

[143] Clauses 49–52 Proceeds of Crime and Money Laundering Bill.

[144] Clauses 42–45 Proceeds of Crime and Money Laundering Bill.

[145] Clauses 53–77 Proceeds of Crime and Money Laundering Bill; Clauses 78–96 Proceeds of Crime and Money Laundering Bill.

tance in cases of money laundering.[146] It also gives power to the police to demand the production of information and documents by persons suspected of any offence under the proposed Bill.[147]

If enacted into law, the Proceeds of Crime and Money Laundering Bill will provide Kenya with a firm legal framework for dealing with sponsors of piracy who may wish to conceal the monies paid as ransom by investing such money in the Kenyan property market. If applied effectively, the provisions of this new law as supplemented by those of the Anti-Corruption and Economic Crimes Act will certainly seal all the existing loopholes that facilitate money laundering, which have been utilized by those engaged in organized transnational crimes to conceal the benefits of their crimes. It should be noted that the proposed new law has some obvious weaknesses and it will need to be revised if it is fully to meet expected international standards.[148] It does, however, provide a starting point in the war against money laundering in Kenya.

C. Regulatory Procedures on Money Laundering

Pending the enactment of a substantive anti-money laundering law, the Central Bank of Kenya – as the lead government agency in the formulation and implementation of fiscal and monetary policies – recently introduced guidelines on the use by commercial banks of the Real Time Gross Settlement System (RTGS).[149] The system aims to reduce fraud and money laundering and, if effectively implemented to supplement the provisions of the Anti-Corruption and Economic Crimes Act, it could

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[146] Clauses 111–116 Proceeds of Crime and Money Laundering Bill.

[147] Clauses 100–104 Proceeds of Crime and Money Laundering Bill.

[148] The proposed Proceeds of Crime and Money Laundering Bill does not specifically target the ransom money paid to sponsors of piracy; it does not specifically target artificial persons who may be beneficiaries of the proceeds of crime; it does not specifically include terrorist financing; and it does not place obligations on the financial institutions to ensure that they fully participate in the war against money laundering. For a discussion on the expected international standards in fighting money laundering see the Council of Europe's Committee of Experts on the Evaluation of Anti-Money Laundering Measures and Financing of Terrorism, Annual Activity Report 2009, cited in Moneyval: Annual Activity Report for 2008, 1–2 Eucrim: The European Criminal Law Associations' Forum 31 (2009).

[149] The Real Time Gross Settlement System (RTGS) is a system in which both the processing and final settlement of funds transfer transactions take place on an item by item (gross) basis continuously throughout a business day. It is an online system that facilitates the transfer of high value and or time critical payments between participants in real time. It aims at enhancing efficiency by reducing inherent risks in the existing payment system. It runs on a credit push basis in which final and irrevocable settlement can only occur if funds are available in the commercial bank's settlement account with the Central Bank of Kenya. The Central Bank of Kenya now requires that all payments of sums in excess of one million Kenya Shillings be made through the RTGS. See further details on the system at www.centralbank.go.ke/nps/npsold.aspx (last visited April 21, 2010).

drastically reduce the incidents of money laundering and thereby prevent the injection of ransom money from piracy off the coast of Somalia into the Kenyan financial system.

V. The After Trial Challenges

Kenya does not only face challenges in dealing with the prosecution of piracy suspects handed over by the arresting vessels of state parties to the various Memoranda of Understanding, but also during the post-trial phase, especially regarding the enforcement of sentences.

A. Prison Service Reform

Various reforms to Kenyan prisons are being undertaken by the Counter Piracy Programme of the United Nations Office on Drugs and Crime.[150] The facilities of Shimo-la-Tewa and Manyani prisons in the Coast Province, for example, are undergoing significant renovation and repair, with a view to alleviating problems of congestion.[151] The suspected pirates are held in these two maximum security facilities awaiting their trials at the Chief Magistrate's Court at Mombasa. Shimo-la-Tewa prison, just like most other Kenyan prisons, was noted to be operating at 300 % of its normal capacity.[152] Although it has been argued that the number of suspected pirates is insignificant compared to these large numbers of inmates,[153] it should be noted that the decision to prosecute non-nationals is a policy decision for which the government of Kenya takes full responsibility. In this regard the gov-

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[150] See United Nations Office on Drugs and Crime, Counter Piracy Report, Nov. 2009, *available at* www.unodc.org/documents/easternafrica//piracy/UNODC_Counter_Piracy_Programme.pdf (last visited April 21, 2010).

[151] *Id*. p. 4.

[152] For details on prison population in Kenya see www.gjlos.go.ke/gjinner.asp?pcat2=agencies&pcat=vphomeaffairs&cat=kenyaprison (last visited Nov. 30, 2009*)*. This website has not been updated as the Governance, Justice, Law and Order program has since stalled. Currently the total holding capacity for Kenyan detention facilities (remand prisons) based on the international standards is 16,000 inmates. However, as at May 28, 2009, the detention facilities held 53,000 inmates. This number ranges between 50,000 and 51,000 inmates at any one time: information obtained verbally from the office of the Commissioner of Prisons by oral interview, Nov. 7, 2009.

[153] One such view is held by Mr. Allan Cole, the Coordinator of the United Nations Office on Drugs and Crime Counter Piracy Program in Nairobi, who in a recent interview with the author in October 2009 (details on file with the author), took the view that the total number of suspected pirates is less than 200 and that this is insignificant compared to the total population of over 50,000 inmates.

ernment of the day in Kenya must show sensitivity to public opinion on the issue,[154] however insignificant the cost of such detentions.

The regional office of the United Nations Office on Drugs and Crime in Nairobi, in line with the obligations contained in the Kenya/EU MoU, has been helping with the review of cases of those held in remand facilities so as to decongest the prisons. One method which the government has used for quite some time is the annual release of petty offenders who have been jailed for minor offences through the exercise of the presidential prerogative of mercy under the Constitution.[155] The second method which the government has used is the release of prisoners on parole by the Commissioner of Prisons, where the remaining portion of a prisoner's term is three months or less.[156] The courts have also utilized the community service program provided for under the Community Service Orders Act[157] to grant non-custodial sentences for minor offences and have also made probation orders under the Probation of Offenders Act,[158] releasing convicted persons on probation as a means of decongesting the prison facilities.

The prison reforms noted above have to be sustained in the long term and the other state parties to the Memoranda of Understanding must be seen to help Kenya achieve the necessary reforms if public support for the prosecution of suspected pirates is to be maintained. At the moment, the *ad hoc* and uncoordinated support by United Nations Office on Drugs and Crime to different agencies involved in the prosecution of suspected pirates is not helping the Kenyan government in consolidating public support for the ongoing prosecutions of non-national piracy suspects.

Kenya faces a significant post-trial challenge in gaining budgetary support. The other state parties to the MOUs have committed themselves to supporting the necessary reforms to the tune of $2.3 million against a budget of $5.1 million, leaving a huge resource gap. This resource gap will have to be met by the government of Kenya despite the severe shortage of financial resources in the country. There is, therefore, a need for continued donor support if the prosecutions under the framework of the Memoranda of Understanding are to succeed.

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[154] *Butty, James*, Kenyan Foreign Minister Shed Light on U.S.-Kenya Piracy Agreement, Jan. 28, 2009, *available at* www.turkishweekly.net/print.asp?type=1&id=63755 (last visited April 21, 2010).

[155] Section 27 Kenyan Constitution. The exercise of the presidential power of clemency is based on the recommendations of the Board of Review appointed by the President under Section 48 Prisons Act (Chapter 90 Laws of Kenya) [hereinafter: Prison Act].

[156] Section 49 Prisons Act.

[157] Community Service Orders Act (Act No. 10 of 1998); its Section 3 empowers the court to order a convicted person serving less than three years to perform approved community service without pay.

[158] Probation of Offenders Act (Chapter 64 Laws of Kenya); its Section 4 empowers courts to release convicted persons on probation in certain circumstances stated in the Section.

B. Long Term Legislative and Institutional Reform

One of the challenges noted with regard to the prosecution of piracy cases is the need to review the legislative framework on the law of evidence and other relevant laws touching on the exercise of jurisdiction by the Kenyan Courts. It was further noted that there is a need to train prosecutors, magistrates and police officers in handling the prosecution of piracy cases, to improve the physical facilities including office accommodation and to set up a viable witness protection program. These are long term challenges, which require proper planning and also call for future financial commitments, as results cannot be achieved within the timeframe of the Memoranda of Understanding. In addition, there is also the need to formulate specific agreements with relevant government agencies to detail the obligations of the parties in respect to each of the areas targeted by the Memoranda of Understanding.

C. Security for the Judicial Officials

One of the challenges noted by the prosecution in the piracy cases is the lack of security for the magistrates and the prosecutors presiding over piracy cases.[159] If there is need to protect witnesses in piracy cases, then there is even a greater need to protect the prosecutors and the magistrates. In the course of the trials, some of the suspected pirates have complained that they do not expect justice in Kenya, as Kenya is friendly to the other states that are party to the Memoranda of Understanding. There has also been agitation in some sections of the Kenyan public that the fight against piracy is an anti-Islamic war, as all the suspected pirates facing trials in Kenya are Somali Muslims.[160]

Should the suspected pirates be convicted, then they or their accomplices or sponsors, may wish to seek revenge for their perceived improper conviction. This is important, as the genesis of the Somali piracy is the alleged illegal fishing in Somalia's territorial waters by foreign vessels and also the alleged dumping of toxic waste in Somalia's waters by other states, thereby destroying fishing grounds and marine life.[161] In a way, therefore, the piratical attacks off the coast of Somalia

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[159] *Ondari, Jacob*, *supra* note 76, pp. 3–8.

[160] *Gekara, Emeka-Mayaka*, Daily Nation, Leaders Question the Trial of Somali Pirates in Kenyan Courts, Dec. 11, 2009, *available at* www.nation.co.ke/News/-/1056/610466/-/uk9mt7/-/index.html (last visited April 21, 2010).

[161] See *Hansen, Hans/von Hoesslin, Karsten*, Intelligence in the Fight against Piracy, 3 Freedom from Fear 18–21 (2009), *available at* www.freedomfromfearmagazine.org (last visited April 21, 2010). See also *Ishaan, Tharoor*, Time, How Somali Fishermen Became Pirates, April 18, 2009, *available at* www.time.com/time/world/article/0,8599,1892376,00.html (last visited April 21, 2010) and *Gilpin, Raymond*, United States Institute of Peace, Counting the Cost of Somali Piracy, *available at* www.ciaonet.org/wps/usip/0017329/f_0017329_14833.pdf (last visited April 21, 2010).

have elements of nationalism and patriotism, and the chances of revenge – should the suspected pirates be convicted – are very high indeed. The situation, therefore, calls for continued extra security for magistrates and the prosecutors trying the piracy cases. This security has to be a long term arrangement as the threat may exist long after the cases are concluded.

D. Political Acceptability

One long term challenge which will continue to haunt the Kenyan political leadership is the vexed question of the continued trial of non-national suspected pirates by Kenyan courts when the country's criminal justice system has almost grounded to a halt due to congestion. Kenya has shown commitment in fighting piracy in the high seas and in Somalia's territorial waters, but such zeal may not find continued support from the Kenyan public, who simply may not understand why navies of other states should arrest suspected pirates in the high seas and then hand them over to Kenyan courts to face trial. The only way the current Memoranda of Understanding framework can continue to enjoy the support of the Kenyan public is to undergo a thorough revision to evenly distribute obligations and responsibilities between the state participants and to include all the regional states.

VI. Conclusions

Kenya has set the pace in the fight against piracy in the high seas and armed robbery against ships in its territorial waters by criminalizing the two offences and expanding the jurisdiction to try suspected pirates, whether the offences are committed in Kenya or elsewhere; whether by Kenyans or non-Kenyans; and whether on a Kenyan ship or on a foreign ship. However, the exercise of this extraterritorial jurisdiction has brought with it short and long term challenges which ought to be addressed if the war against piracy in the Horn of Africa is to be won. The most significant of the challenges to the jurisdiction of the Kenyan courts is the possible nullification of the trials on the ground that the courts cannot convict and sentence the suspected pirates, as Section 69 of the Penal Code under which they were charged, having been repealed, is no longer in existence and, therefore, the courts lack jurisdiction to proceed with the trials or convict or sentence the accused persons. This situation is complicated by the fact that under the Kenyan Constitution, the offences cannot be tried under the Merchant Shipping Act as they amount to *ex post facto* crimes.

The possible acquittals of alleged pirates could expose Kenya to civil liability, as the acquitted persons may choose to sue for their wrongful confinement, pending the trials. The Memoranda of Understanding do not have an indemnity clause under

which Kenya can claim from the other parties to the Memoranda of Understanding, for damages which may be awarded for breach of the fundamental rights of the suspected pirates in the exercise of enforcement jurisdiction by arresting ships and for wrongful confinement, while awaiting trial. There is, therefore, an urgent need to review the framework of the MOUs, to ensure that there is an even distribution of obligations and responsibilities in the exercise of both enforcement and adjudicative jurisdiction over suspected pirates.

The present Memoranda of Understanding framework is lopsided and burdensome on Kenya. Other states party to a Memorandum of Understanding have not met their part of the bargain by adequately supporting the prosecution of the suspected pirates and the reform of the relevant laws, to ensure that the pending cases are completed at an early date. The MOUs are also silent on the burden of hosting the convicted pirates while they serve their jail terms and, therefore, this burden has been left to Kenya. The revised Memoranda of Understanding framework should include a clause with obligations on the other state parties to consent to hosting the convicted pirates as they serve their jail sentences. Alternatively, the regional states should enter into a treaty akin to the European Convention on the Transfer of Sentenced Prisoners[162] to facilitate the transfer of convicted pirates to other regional states to serve their sentences.

The fight against piracy off the Horn of Africa can only succeed if the regional states cooperate with other maritime nations with expeditionary (blue-water) navies. Such a framework of cooperation exists under the Djibouti Code of Conduct. The regional structure which brought forth the Djibouti Code of Conduct should be utilized to negotiate with the western maritime nations for a fresh Memoranda of Understanding framework. There is also an urgent need for the regional states to internally harmonize their policies and laws relevant to the fight against piracy, in order to in turn facilitate harmonization of regional policies and laws. The harmonization process may take long, as it is essentially a political process, but it should be initiated forthwith and the policy makers looped in while the "piracy crisis" lasts.

The fight against piracy should not just target the actual perpetrators of the piratical attacks, but also the sponsors. Nairobi has witnessed an unprecedented increase in property prices due to ransom money being injected into the economy. Kenya presently does not have an effective anti-money laundering legislation, although the Proceeds of Crime and Money Laundering Bill is pending in parliament. This Bill should be urgently enacted into law and pending such enactment the Real Time Gross Settlement System (RTGS) should be strengthened and the existing legislation utilized to control the investment of ransom money into the Kenyan economy.

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[162] Convention on the Transfer of Sentenced Prisoners, C.E.T.S. No. 112, *adopted* March 21, 1983, *available at* http://conventions.coe.int/Treaty/en/Treaties/Html/112.htm (last visited April 21, 2010).

Tanzania's Legal Framework on Sea Piracy: An Obligatory but Inconsistent Model

Raphael Kamuli

Contents

I. Introduction

Contemporary maritime piracy is a complex phenomenon, which requires efficient legislative and judicial systems as well as joint deliverance in eradicating it. Maritime piracy is not an isolated phenomenon; rather it encompasses political, economic and social aspects. Therefore, an all-encompassing approach on land is vital in supplementing law enforcement mechanisms at sea. This work explores Tanzania's criminal justice and law enforcement framework and human rights considerations in combating piracy. In assessing the state, internationally recognized norms and standards in human rights and cooperation will be considered.

II. General Overview of Tanzania

A. Geography

The sovereign state of Tanzania is comprised of two constituent entities namely Tanzania Mainland (formerly known as Tanganyika) and Tanzania Zanzibar (Zanzibar). The latter is located about 37 kilometers east of Tanzania Mainland across the Indian Ocean. Territorial waters of Tanzania cover 59,050 square kilometers. Tanzania's coastline covers 1,424 kilometers and the maritime claims include 12 nautical miles of territorial sea and 200 nautical miles of exclusive economic zone (EEZ).

B. Historical Background

1. Political Background

During the colonial era Tanzania Mainland was under German rule, before being handed over to Britain under the League of Nations mandate following the defeat of Germany in the First World War. It became independent in 1961 and one year later it became a Republic. Zanzibar was a British protectorate under the Arab Sultanate and became independent in 1963. The post-independence minority rule was overthrown in 1964 and the Peoples' Republic of Zanzibar was established. In the same year the Peoples' Republic of Zanzibar and the Republic of Tanganyika united to form the United Republic of Tanzania. Notwithstanding the union, Zanzi-

bar still retains autonomy over issues commonly known as "non-union matters."[1] The caveat is entered that this work concerns itself with the legal framework of Tanzania Mainland, however, where appropriate, reference will also be made to the legal position in Tanzania Zanzibar. With respect to matters of international relations and international instruments, the jurisdiction is exclusively vested in the United Republic of Tanzania. Therefore, it is the United Republic which has the mandate to ratify international instruments.[2]

2. Legal Background

Tanzania's legal system is overwhelmingly based on the English common law. The common law of England, doctrines of equity and statutes of general application were imported into the territory of Tanganyika in 1920 through the Tanganyika Order-in-Council (TOC). It made the common law of England applicable to Tanganyika as of July 22, 1920 and empowered the King to promulgate other Orders and Ordinances for Tanganyika. The Penal Code of Tanganyika, which was modeled on the Indian Penal Code, was imported into Tanganyika in 1930 and prescribed the offence and punishment for piracy occurring within Tanganyika's territorial waters or committed by a citizen of Tanganyika. Moreover, the Penal Code stipulated that it did not affect any criminal liability against the Common Law (of England).

The Tanganyika Order-in-Council also established a High Court for Tanganyika and extended to it English court practices and procedures.[3] The appeals from the High Court of Tanganyika were heard and determined in the Court of Appeal for Eastern Africa. The decisions of the Court of Appeal for Eastern Africa had precedent effect and were binding upon all courts in East Africa. In 1954 the Court of Appeal for Eastern Africa acknowledged that the charge of piracy *jure gentium* was unusual in the East African Territories.[4] However, the Court affirmed that the courts, within the "power, authority or jurisdiction of the Admiralty," had powers

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[1] It should be noted that Tanzania Mainland and Tanzania Zanzibar share only the union matters; see note 7.

[2] *Majamba, Hamudi*, An Assessment of the Framework of Environmental Law of Zanzibar, 1 Law, Environment and Development Journal 20 (2005), *available at* www.lead-journal.org/content/05018.pdf (last visited May 12, 2010).

[3] Aga Khan Development Network, The Third Sector in Tanzania – Learning More About Civil Society Organizations and Non-Profit Organizations, their Capabilities and Challenges: An Updating and Dissemination of Work Started under the John Hopkins University Non-Profit Organization Study, May 2007, pp. 40–41.

[4] *Saad Saeed Bin Ali Mahri v. Reginam* (Criminal Appeal No. 142 of 1954), Court of Appeal for Eastern Africa. The case was reported in the East African Law Reports [1954], 222, *available at* www.lawafrica.com/shop.php?mode=getbook&productID=117# (last visited May 10, 2010).

to try a case of piracy committed on the high seas pursuant to the Admiralty Offences (Colonial) Act of 1849 and the Courts (Colonial) Jurisdiction Act of 1874.[5]

C. Legislative System

Tanzania follows a "dualist" as opposed to a "monist" approach in incorporating international legal instruments into domestic law. Thus an agreement that is ratified by the government does not generally have a binding effect except where the legislature has explicitly incorporated it by way of local enactment.[6] This procedure equally applies to any regional or multilateral agreements. It is equally noteworthy that the nature of Tanzania's government, constitutional setting and legal system impacts the *modus operandi* of the laws stemming from international obligations.

Jurisdictions within the sovereign state of Tanzania are charted out in the Constitution of the United Republic of Tanzania of 1977 (the Union Constitution) as amended. The Union Constitution provides for union matters[7] and non-union matters. Union matters are governed by the Government of the United Republic of Tanzania and non-union matters fall in the exclusive jurisdiction of the Government of Zanzibar. There is no provision for concurrent jurisdiction.[8] A matter is either exclusively for Zanzibar or it is for the Union. It is the Union Government which has the mandate to ratify international treaties.[9]

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[5] It should be noted that the alleged piracy took place upon the high seas to wit in the Gulf of Oman implying that it took place upon waters within the power, authority, or jurisdiction of the Admiralty.

[6] See *Mapunda B.T.*, Treaty Making and Incorporation in Tanzania, 156 Eastern Africa Law Review 28–30 (2003).

[7] Tanzania Mainland and Tanzania Zanzibar share only the union matters. According to the First Schedule of the Constitution of the United Republic of Tanzania of 1977 (as amended) these matters include: the Constitution of Tanzania and the Government of the United Republic, foreign affairs, defense and security, police, emergency powers, citizenship, immigration, external borrowing and trade, service in the Government of the United Republic, income tax payable by individuals and by corporations, customs duty and excise duty on goods manufactured in Tanzania collected by the Customs Department, harbors, matters relating to air transport, posts and telecommunications, all matters concerning coinage and currency for the purposes of legal tender (including notes), banks (including savings banks) and all banking business, foreign exchange and exchange control, industrial licensing and statistics, higher education, mineral oil resources, including crude oil other categories of oil or products and natural gas, the National Examinations Council of Tanzania and all matters connected with the functions of that Council, civil aviation, research, meteorology, statistics, the Court of Appeal of the United Republic and registration of political parties and other matters related to political parties.

[8] *SMZ v. Machano Hamis Alli and Others* (Criminal Application No. 8 of 2000). The case is *available at* www.saflii.org/tz/cases/TZCA/2000/1.html (last visited May 12, 2010).

[9] Art. 63(3) Constitution of the United Republic of Tanzania of 1977 (as amended). The full texts of Tanzanian laws are *available at* www.parliament.go.tz/bunge/act.php (last visited May 10, 2010).

On the basis of that duality and the established fact of exclusive jurisdiction of the Government of Zanzibar over all non-union matters in Zanzibar, it is logical to conclude that sovereignty is divisible within the United Republic of Tanzania. Therefore, in order to determine which of the two governments exercise sovereignty over any given matter, one has to determine whether it is a union or non-union matter. Criminal matters are non-union matters except where they are associated with the union matters. Therefore, each of the two Governments in the United Republic has exclusive jurisdiction in criminal matters in its own sphere. All criminal matters in Tanzania Mainland are defined, triable and punishable in accordance with the Penal Code[10] while those in Zanzibar are regulated by the Penal Decree. It is an obvious outcome that the two entities have different legal frameworks as regards piracy occurring territorially.

D. Magnitude of Piracy in Tanzania's Territorial Waters

In the period between January and September, 2005 to 2009, Tanzania experienced 34 piratical attacks, the third highest toll suffered by an individual country in Africa in the same period.[11] Dar-es-Salaam port is reported to have experienced the second highest piratical attacks among ports and anchorages in the world in the period between January 2008 and September 2009.[12] For the period of January to September, 2005 to 2009, out of the overall ships attacked by pirates worldwide, three were of Tanzanian nationality.[13] Among all the attacks that occurred between January and September 2009, no attacked ship was controlled or managed in Tanzania. While the pirates in Somalia use sophisticated weapons, pirates in Tanzania mostly use knives and attack ships when they are anchored. In most cases piratical acts were reported to the authorities but no actions were taken.

In the year 2006, out of 5,648 unlawful acts of violence reported nationwide, two were piratical acts, while in the year 2007 the number of piratical acts increased to 9 out of 8,306 acts of violence reported nationwide.[14] Tanzania has prosecuted

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[10] Penal Code (Chapter 16 of the Laws of Tanzania) [hereinafter: Penal Code].

[11] Somalia experienced 112 attacks and Nigeria experienced 93 attacks: International Chamber of Commerce – International Maritime Bureau (ICC-IMB), Piracy and Armed Robbery against Ships, Report 1 January – 30 September 2009 [hereinafter: ICC-IMB Report January – September 2009], pp. 6–7. It should be noted that the statistics in this paragraph include actual and attempted attacks, whether the ship was berthed, at anchor or at sea and that they also include acts of armed robbery against ships.

[12] ICC-IMB Report January – September 2009, *supra* note 11, p. 11.

[13] *Id.* pp. 18–19.

[14] Inference drawn from Tanzania's Police Crime Report 2007, *available at* www.policeforce.go.tz/index.php?option=com_content&task=view&id=218&Itemid=74 (last visited May 12, 2010) and ICC-IMB Report January – September 2009, *supra* note 11, p. 7.

cases relating to destruction of vessels and illegal deep sea fishing, but no direct piracy cases.[15] The patterns of piratical acts occurring in territorial waters of Tanzania and those acts against ships of Tanzania's nationality involve both territorial and extraterritorial dimensions. Thus there needs to be both municipal and international mechanisms to tackle the problem, especially with the reported indication that the Somali pirates are extending their attacks off the east and south coast, including off Tanzania, Kenya, Seychelles and Madagascar.[16] However, the fact that most ships attacked are not controlled or managed by countries which are actually located in piracy prone zones may negatively impact upon their willingness to devotedly cooperate in counter piracy mechanisms advocated by countries whose ships are largely affected.[17] This may create tendencies of viewing piracy not as a collective problem but rather one belonging to those countries whose ships are largely victimized. This trend differs from the one regarding terrorism, whereby Kenya and Tanzania quickly embarked in the war against terror by passing legislation, partly because they themselves had experienced fatal terror attacks with the bombing of United States embassies in their respective countries.[18]

III. Provisions for the Criminal Prosecution of Piracy and Armed Robbery at Sea

A. International Customary Law

Piracy is not a new phenomenon and the existing law in the management of piracy has a long genealogy. Piracy, in the customary law perspective, warrants universal jurisdiction since it is a crime to the international community as a whole.[19] In the same light, the perpetrators of piracy are considered *hostis humani generis*, enemies of all mankind, and are thus susceptible to prosecution by any nation. Rec-

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[15] Hanns Seidel Foundation, Regional Strategies to Combat Piracy in Eastern Africa for Law Enforcement Agents: Summary of the Meeting's Deliberations, June 2009, p. 3 [hereinafter: Hanns Seidel Foundation, Regional Strategies].

[16] ICC-IMB Report January – September 2009, *supra* note 11, p. 23.

[17] For example, in the period between January and September 2009, while 50 victim ships were controlled or managed in Germany, 41 in Greece, only one victim ship was managed or controlled in Ethiopia, one in Kenya, one in Nigeria, and no victim ship was managed in Somalia or Tanzania: ICC-IMB Report January – September 2009, *supra* note 11, pp. 21–22.

[18] On August 7, 1998, the United States embassies in Dar-es-Salaam (United Republic of Tanzania) and Nairobi (Kenya) were simultaneously bombed killing at least 212 people and injuring at least 4,000. Most of the causalities were citizens of Kenya and Tanzania. In 2002, Tanzania enacted the Prevention of Terrorism Act (Act No. 21 of 2002) [hereinafter: Prevention of Terrorism Act]; Kenya's Suppression of Terrorism Bill of 2003 was rejected over concerns of human rights violations.

[19] See *Re Piracy Jure Gentium* [1934] Appeal Court (AC) 586 at 689.

ognized as such in customary international law, piracy *jure gentium* would be triable and punishable under the domestic criminal law of any country, irrespective of any domestic statute or judicial precedent. The customary framework with respect to the crime of piracy is thus a definable, universal and obligatory norm.

B. Common Law Approach

Common law jurisdictions have been reluctant to accept automatic assimilation of customary international law into their domestic criminal law.[20] Common law judiciaries, particularly English courts, have handled the assimilation of customary international law with great caution. They argue that inasmuch as the development of customary international law largely remains the consequence of international behaviour of the executive – in which neither the parliament nor the judiciary need to have played any part – it would be odd if the executive could, by means of that kind, amend or modify criminal law. Citing political accountability, regularity and legal certainty, they argue that the power to create crimes should be reserved exclusively to the legislature. Such a strict view of the English courts is likely to be followed by other common law countries like Tanzania which imported English common law, doctrines of equity and statues of general application.[21] Such an approach would limit Tanzania's international obligation to exercise jurisdiction against pirates in the absence, as it stands, of a clear and consistent statutory framework.

However, the doctrine of customary international law on piracy remains, in the absence of domestic statutory framework, vague and powerless. It is impractical to confer jurisdiction over foreigners on high seas without legislation to that effect.[22] Admittedly, therefore, courts in countries like Tanzania, whose domestic laws are not exhaustive and do not accurately state the present international law as regards piracy, may resort to customary international law in so far as customary law may enlarge the definition of piracy. This would allow reference to extraneous sources and techniques of construction not normally incident to the interpretation of a statute.

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[20] See generally: Majority of the Federal Court of Australia in *Nulyarimma v. Thompson* (1999), 120 International Law Reports 353; *O'Keefe, Roger*, Customary International Crimes in English Courts, 72 British Yearbook of International Law 293 (2001).

[21] This system of law was imported by the British during the era of colonialism into the territory of Tanganyika (now Tanzania Mainland) in 1920 through the Tanganyika Order-in-Council.

[22] *R v. Keyn* (1876) 2 Exchequer Division (Ex D), 63 at 203 per Lord Cockburn Chief Justice.

C. Statutory Approach

Piracy *jure gentium* is an offence defined by international law and is distinguishable from municipal law variations on the theme of piracy.[23] According to international law, the criminal jurisdiction of municipal law against piracy is ordinarily restricted where piracy is committed on its *terra firma* or territorial waters or against its own ships and crimes committed by its own nationals wherever they take place. Seemingly, this was the approach adopted in the enactment of Section 66 of the Penal Code of Tanzania which deals with the offence of piracy. Law makers did not seem to cover piracy *jure gentium* in Section 66 of the Penal Code. It has excluded in its scope piracy committed in the high seas by foreign pirates.

Since the offence of piracy in Tanzania is a creation of statute, namely, the Penal Code, one must look to the terms of the statute for a definition of its nature. Per terms of the Penal Code of Tanzania, its effect was limited territorially and so was the nature of the offence of piracy.[24] It has been solidly argued that a distinction should be drawn between the sort of situation where a crime is to be regarded as an offence wherever it is committed and the sort of statutory offence which is created only in relation to a particular place.[25] But pirates are *hostis humani generis*, thus they commit an offence against the moral law, not thought of having territorial limits. It follows, therefore, that the crime of piracy is conceived by common law and, as a result, there is a strong basis from which Tanzania's courts may assume jurisdiction, without being restricted by statutory limits.[26] Admittedly, it is not always an easy venture to disentangle statute and common law.

D. Tanzania's Incorporation of the International Framework on Piracy

1. Incorporation of International Treaties

The current international legal framework to counter piracy is founded on the United Nations Convention on the Law of the Sea (UNCLOS),[27] the Convention on the High Seas of 1958[28] and the largely ignored Convention for the Suppression of

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[23] *Re Piracy Jure Gentium* [1934] Appeals Court (AC) 586 at 594.

[24] Sections 6, 7 and 66 Penal Code.

[25] See generally *Bank voor Handel en Scheepvaart NV v. Slatford* [1953]1 Queens Bench (QB).

[26] Note that the Penal Code does not preclude any liability, trial or punishment for an offence against the common law, see its Section 3(1)(a).

[27] United Nations Convention on the Law of the Sea, *adopted* Dec. 10, 1982, 1883 U.N.T.S. 3 [hereinafter: UNCLOS].

[28] Convention on the High Seas, *adopted* April 29, 1958, 450 U.N.T.S. 11 [hereinafter: Convention on the High Seas].

Unlawful Acts against the Safety of Maritime Navigation of 1988 (SUA).[29] Under Article 101 UNCLOS, piracy consists of any criminal acts of violence, detention, or depredation committed for private ends by the crew or the passengers of a private ship or aircraft that is directed on the high seas against another ship, aircraft, or against persons or property on board such ship or aircraft.[30] Although member states are called to cooperate, the enforcement of such norms is hampered in practice. The predicament is associated with treaty exceptionalism and the soft law effect of the same. Normally treaties are not binding, with the exception of signatory states, and treaty execution is fairly limited in dualist countries.

Tanzania was the 24th state to ratify UNCLOS,[31] the second earliest after Egypt[32] among 17 states from the Western Indian Ocean, Gulf of Aden and Red Sea areas which adopted the Djibouti Code of Conduct in January 2009.[33] However, UNCLOS was shelved for 20 years before its provisions regarding piracy were progressively incorporated into domestic legislation pursuant to the Merchant Shipping Act of 2003.[34] Also, Tanzania has ratified the SUA Convention of 1988[35] and the Convention on the High Seas.[36]

With regard to piracy committed on the high seas, Tanzania has enacted the Merchant Shipping Act in 2003 covering both Tanzania Mainland and Zanzibar.[37] The Merchant Shipping Act progressively incorporates the provisions of the UNCLOS into Tanzania's domestic laws. Since this amounts to direct incorpora-

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[29] Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, *adopted* March 10, 1988, 1678 U.N.T.S. 221 [hereinafter: SUA Convention].

[30] Art. 101 UNCLOS.

[31] Tanzania ratified UNCLOS on September 30, 1985: United Nations Treaty Collection, Status of Treaties, Chapter XXI, Law of the Sea, 6. United Nations Convention on the Law of the Sea, *available at* http://treaties.un.org/Pages/ParticipationStatus.aspx (last visited Feb. 10, 2010).

[32] Egypt ratified UNCLOS on August 26, 1983: *id*.

[33] The meeting was convened by the International Maritime Organization in Djibouti to address the problem of piracy and armed robbery against ships off the coast of Somalia and in the Gulf of Aden and adopted the Code of Conduct Concerning the Repression of Piracy and Armed Robbery against Ships in the Western Indian Ocean and the Gulf of Aden, advance copy *available at* www.fco.gov.uk/resources/en/pdf/pdf9/piracy-djibouti-meeting (last visited Feb. 10, 2010) [hereinafter: Djibouti Code of Conduct].

[34] Merchant Shipping Act (Act No. 21 of 2003) [hereinafter: Merchant Shipping Act].

[35] Status of Multilateral Conventions and Instruments in Respect of which the International Maritime Organization (IMO) or its Secretary-General Performs Depositary or Other Functions as at 31 December 2009, *available at* www.imo.org (follow "legal" hyperlink, then follow "IMO Conventions" hyperlink, then follow "Depositary Information on IMO Conventions" hyperlink).

[36] United Nations Treaty Collection, Status of Treaties, Chapter XXI, Law of the Sea, 2. Convention on the High Seas, *available at* http://treaties.un.org/Pages/Participation Status.aspx (last visited Feb. 10, 2010).

[37] Part XVII Merchant Shipping Act.

tion of the provisions of a treaty ratified by the Government of the United Republic, implementation of the provisions of a treaty has gone from being an executive act to a legislative one. It should be noted that since the provisions of the Merchant Shipping Act merely define piratical offences, the manner in which pirates will be prosecuted and punished remains within the exclusive criminal regulatory framework of the two entities of the Union unless the matter finds its way to the Court of Appeal which is a Union matter.

2. Tanzania's Obligations Pursuant to United Nations Security Council Resolutions and the Djibouti Code of Conduct

a) United Nations Security Council Resolutions

The resurgence of the critical sea piracy phenomenon off Somalia and in the Gulf of Aden has proved that several aspects in the international legal framework need to be expanded. There should be a determined shift from theory to practice and the link between piracy and other criminal phenomena be thoroughly considered. The United Nations Security Council passed three Resolutions in 2008 specifically to tackle the issue.[38] The Security Council authorized states and regional organizations cooperating with the Somali Transitional Federal Government in the fight against piracy to enter into the territory and territorial water of Somalia to counter piracy and to use all necessary means to repress acts of piracy.[39]

Obviously the means employed to repress piracy pursuant to these Resolutions have to conform to international law.[40] Reasonable inference would suggest that the reference to international law encompasses human rights law. However, the matter attracts the debate whether the determination to fully eradicate piracy by all means should supersede human rights considerations. There is not a clear cut answer to this. Some maintain that human rights principles are mainly the creatures of treaties as interpreted by courts. Thus, it may be argued that since the respect and obser-

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[38] S.C. Res. 1816, U.N. Doc. S/RES/1816 (June 2, 2008) [hereinafter: S.C. Res. 1816]; S.C. Res. 1846, U.N. Doc. S/RES/1846 (Dec. 2, 2008) [hereinafter: S.C. Res. 1846]; S.C. Res. 1851, U.N. Doc. S/RES/1851 (Dec. 16, 2008) [hereinafter: S.C. Res. 1851]. Upon their expiry in December 2009, the time limited authorizations of Security Council Resolutions 1846, para. 10, and 1851, para. 6, were prolonged for a period of 12 months until December 2010 by virtue of S.C. Res. 1897, U.N. Doc. S/RES/1897 (Nov. 30, 2009) [hereinafter: S.C. Res. 1897]

[39] *Id*. S.C. Res. 1846 and S.C. Res. 1851.

[40] *Id*. S.C. Res. 1846, para. 9, calls upon States and regional organizations that have the capacity to do so, "to take part actively in the fight against piracy and armed robbery at sea off the coast of Somalia, in particular, *consistent with* this Resolution and *relevant international law* by deploying naval vessels and military aircraft, and through seizure and disposition of boats, vessels, arms and other related equipment used in the commission of piracy and armed robbery off the coast of Somalia, or for which there is reasonable ground for suspecting such use." (emphasis added).

vance of human rights is parallel to the fulfilment of treaty obligations, the call under Chapter VII by the Security Council should prevail over these treaty obligations as per Article 103 of the UN Charter. That, however, would be a fundamental misconception as human rights are meant to be inherent and not mere creatures of treaties. Thus, if Tanzania chooses to cooperate in suppressing piracy off the Somali coast pursuant to the abovementioned Resolutions, it should stick to the internationally recognized human rights principles and standards, because that is what seems to be meant by conforming to relevant international law.

b) Djibouti Code of Conduct

As one of the founding signatories to the Djibouti Code of Conduct, Tanzania recognized the extent of the problem of piracy and armed robbery against ships off the coast of Somalia and in the Gulf of Aden and declared its intention to cooperate to the fullest possible extent in the repression of piracy and armed robbery against ships. Thus, it offered to fully cooperate in the arrest, investigation and prosecution of persons who have committed piracy or are reasonably suspected of having committed piracy. Despite the willingness, the extent of achievement remains to be measured as available resources are known to be scarce in the country. The main investigation machinery – the Police Force – still retains its colonial model and its mandate is not incorporated with human rights ideals.[41]

Although there are progressive laws in place to criminalize piracy and armed robbery against ships, the enabling trend is not adequate and does not, in several aspects, coincide with the standard of international law.[42] The condition of prisons and detention centers, for example, are reported to be harsh and inmates have complained of inadequate food and medical services. Attributable to the unwarranted delays of prosecutions, the overcrowding amounts up to 193 % of normal capacity in Tanzania Mainland.[43] With such shocking statistics it is doubtful whether the means employed by Tanzania to arrest and prosecute pirates as pursuant to the Djibouti Code of Conduct would be consistent with international law.

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[41] *Kamau, Evelyn*, The Police, the People, the Politics: Police Accountability in Tanzania. Nairobi 2006, p. 7, *available at* www.humanrightsinitiative.org/publications/police/tanzania_country_report_2006.pdf (last visited May 12, 2010).

[42] Art. 2(1) Djibouti Code of Conduct requires the means used to suppress piracy and armed robbery against ships to be consistent with international law.

[43] Amnesty International, State of the World's Human Rights, Human Rights in United Republic of Tanzania, Report 2009, *available at* www.amnesty.org/en/region/tanzania/report-2009 (last visited May 12, 2010).

3. Multifaceted Approach

a) Related Laws

Whether within Tanzanian territory or off the Somali Coast, the legal efforts to counter piracy will be fruitless if the means employed isolate the political and economic dimensions of the issue. It is also a correct submission that over the long term the efforts to suppress piracy must be concentrated on land, not solely at sea. Thus, the role of justice should complement that of sailors and snipers. With the lessons learned from the dynamics of piracy off the coast of Somalia with coordinated *modus operandi*, advanced technological strategies and financial variables, the manifest willingness of Tanzania to counter piracy territorially should start before the problem becomes too complex to tackle. Eradication of piracy in Tanzania and the high seas cannot be solely achieved by the Penal Code and the Merchant Shipping Act, rather the web of laws in place, such as the Anti-Money Laundering Act,[44] Economic and Organized Crime Control Act,[45] Extradition Act,[46] Proceeds of Crime Act,[47] Prevention of Terrorism Act,[48] and Mutual Assistance in Criminal Matters Act,[49] must be well coordinated to collectively tackle the socio-economic aspects of piracy.

b) Law and Politics

Law cannot be divorced from politics. The political dimensions of piracy are worth consideration whenever legal efforts are employed. In the absence of a permanent international court to try pirates and the unlikelihood that the world's navies will be patrolling off coasts and high seas eternally, the long term solution should be to maintain peace and help lawless countries to restore order and justice. Also law enforcement mechanisms seeking to maintain justice and order, must meet the internationally recognized human rights standards, otherwise they will

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[44] Anti-Money Laundering Act (Act No. 12 of 2006), the Act applies to Mainland Tanzania as well as Tanzania Zanzibar [hereinafter: Anti-Money Laundering Act].

[45] Economic and Organized Crime Control Act (Act No. 13 of 1984), the Act applies to Mainland Tanzania only [hereinafter: Economic and Organized Crime Control Act].

[46] Extradition Act (Act No. 15 of 1965), the Act applies to Mainland Tanzania as well as Tanzania Zanzibar [hereinafter: Extradition Act].

[47] Proceeds of Crime Act (Act No. 25 of 1991), the Act applies to Mainland Tanzania as well as Tanzania Zanzibar [hereinafter: Proceeds of Crime Act].

[48] Prevention of Terrorism Act, the Act applies to Mainland Tanzania as well as Tanzania Zanzibar.

[49] Mutual Assistance in Criminal Matters Act (Act No. 24 of 1991) [hereinafter: Mutual Assistance in Criminal Matters Act], the facilitation of the provisions of the Act is based on reciprocity; therefore, its provisions are applicable only where the Minister is satisfied that similar provisions have been made by a foreign country: see Section 3(1) Mutual Assistance in Criminal Matters Act.

defeat their purpose. Thus, treating *hostis humani generis* during arrest, investigation, trial or imprisonment in an inhuman manner should not be justified. It is the challenge for Tanzania and all the willing states that the fight against piracy should go further than mere enactment of laws; rather the law enforcement and judicial systems must also be improved to meet the international standards.

E. Tanzania's Legal Framework on Piracy and Armed Robbery against Ships

In the following paragraphs the legislative components which make up Tanzania's legal framework on piracy and armed robbery against ships will be analyzed.

1. Penal Code

a) Territorial Scope

The statutory criminalization of piracy in Tanzania is traceable to 1945.[50] From then until the enactment of the Merchant Shipping Act in 2003, the Penal Code was the sole legislation which defined and criminalized piracy. The criminalization of piracy pursuant to the Penal Code was and still is, however, with considerable territorial limits. According to its provisions, a judge or magistrate in Mainland Tanzania shall try the offence of piracy when, among other circumstances, piracy occurs within the territorial waters.[51] By territorial waters it is reasonable to conclude that it means territorial waters of the United Republic and that would include territorial waters of Zanzibar.[52]

b) Exceptions to Territorial Limits

The territorial limits of the offence of piracy are eroded in certain stipulated circumstances. The Courts of Mainland Tanzania may exercise jurisdiction when an act of piracy is committed against a ship registered in the United Republic of Tan-

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[50] Section 66 Penal Code of 1945 contains similar provisions to Section 66 Penal Code of 1980 (as amended by Act No. 14, 1980), the current Penal Code also contains exactly similar provisions with the substitution of the word Tanganyika with the word(s) United Republic/Tanzania, see Section 66(1)(a) and (b) Penal Code.

[51] Section 6(a) Penal Code reads: "The jurisdiction of the Courts of Mainland Tanzania for the purposes of this Code extends to (a) every place within Mainland Tanzania and within territorial waters."

[52] Section 3 Interpretation of Laws and General Clauses Act (Act No. 30 of 1972) [hereinafter: Interpretation of Laws and General Clauses Act] defines territorial waters as "any territorial or inland waters of the United Republic [of Tanzania]."

zania,[53] or against persons or property on board that vessel.[54] Thus regardless of nationality of the offender or the part of the sea where the act of piracy occurred, the courts in Mainland Tanzania are vested with authority to try the person if it will be established that the ship or vessel concerned was duly registered in Tanzania.

c) Jurisdiction

aa) The Effect of Citizenship

A citizen of Tanzania, either from Mainland Tanzania or Zanzibar, shall be guilty of the offence of piracy if he performs any act of violence against any vessel.[55] Admittedly, Zanzibar is not a sovereign state[56] and thus noone can be a *de jure* citizen of Zanzibar. However, in the event that the person committing piracy is a "citizen" of Tanzania Zanzibar and the act of piracy occurred outside Tanzania Mainland – say on the coast of Zanzibar – it is not clear, whether that person can be tried in the courts of Tanzania Mainland. The difficulty of determining jurisdiction arises – particularly regarding courts of Tanzania Mainland – because the provisions of the Penal Code broadly stipulate that a citizen of Tanzania (from Tanzania Mainland or Zanzibar) can commit piracy as abovementioned, but the provisions of the same legislation which gives jurisdiction to courts of Mainland Tanzania narrowly confines itself to offences committed by a citizen of Mainland Tanzania in any place outside Mainland Tanzania.[57]

bb) Extraterritorial Jurisdiction

It appears that the courts of Mainland Tanzania are also conferred with jurisdiction to try the offence of piracy occurring outside the territorial waters of Tanzania if the act constituting piracy as defined by the Penal Code is committed partly within the territorial waters and partly outside such territorial limits or high seas.[58]

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[53] According to Section 13(1) Merchant Shipping Act, a ship or vessel is eligible for registration in Tanzania if it is wholly owned by either national(s) of Tanzania or individuals or corporations owning ships hired out on bareboat charters to nationals of Tanzania, individuals or corporations in *bona fide* joint venture shipping enterprise relationships with nationals of Tanzania.

[54] Section 66(1)(a) Penal Code.

[55] Section 66(1)(b) Penal Code.

[56] *SMZ v. Machano Hamis Alli and Others* (Criminal Application No. 8 of 2000).

[57] Section 6(b) Penal Code.

[58] Section 7 Penal Code states: "When an act which, if wholly done within the jurisdiction of the court would be an offence against this Code, is done partly within and partly beyond the jurisdiction, every person who within the jurisdiction does or makes any part of such act *may* be tried and punished under this Code in the same manner as if such act had been done wholly within the jurisdiction." (emphasis added).

The person committing piracy in that manner shall be punished on conviction in the same manner as if such piracy had been committed wholly within the territorial waters. It is worth emphasizing that for liability to stand in that case, the act constituting piracy must be directed against a ship or vessel registered in the United Republic of Tanzania or against persons or property thereof, or if the piratical act was committed by a citizen of Tanzania. However, liability under this regime is suggestive rather than mandatory as the founding provision states "such acts *may* be tried and punished."[59]

d) Interpretation of the Penal Code

aa) Judicial Interpretation of the Term "Unlawful Act of Violence"

The definition of piracy in Section 66 of the Penal Code requires an "unlawful act of violence" to have been committed against a ship or vessel or against a person on board that ship or vessel.[60] However, the legislation appears to give discretion to the judges and magistrates to determine what amounts to an "unlawful act of violence" as it refrains from explicitly listing acts that would, if directed against a ship, vessel, persons or property, amount to piracy. In assigning meaning to unlawful act of violence, the presiding magistrate or judge is supposed to be guided by principles of construction of written laws with regard to Tanzanian conditions. In the course of the discretionary endeavour the magistrate should not apply any principle of strict construction relating to penal legislation.[61]

bb) Risk of Double Jeopardy

Refraining from explicitly listing the acts that would amount to piracy may attract double jeopardy and thereby infringe one of the core criminal justice principles – *ne bis in idem*. Inference drawn from the vague expression "unlawful act of violence" suggests that there is an independent act or series of acts such as assault, breaking, murder or arson directed against a person, property or vessel which if done in the prescribed circumstances amount to piracy. Therefore, there is no act in itself called piracy, although there is an offence of piracy. There is a real likelihood, therefore, that a prosecutor would include the charge of piracy with other acts which actually are mere elements of piracy and thereby subject the offender to double jeopardy.

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[59] Section 7 Penal Code.

[60] Section 66(1)(c) Penal Code.

[61] Section 4 Penal Code.

cc) Legislative Uncertainty regarding Punishment

Upon conviction the person found guilty of piracy is liable for life imprisonment.[62] Since the Penal Code does not explicitly specify acts that would constitute piracy, it is not clear what the position would be in cases where the act constituting piracy would, in itself, attract the death penalty. It is likely, for example, that if the offender, by his unlawful act of violence, inflicts grievous bodily injury on a person in a vessel registered in Tanzania and he is later charged for piracy and after nine months[63] in the middle of the trial the victim dies of the wounds,[64] the charges would be amended to include the charge of murder. The question then arises what the position would be upon conviction of the offender on the two charges. It should be noted that murder is punishable by death in Tanzania.[65]

dd) Status of Attempted Piracy

The Penal Code is silent on attempted piracy. But the general inference of the penal law suggests that attempted piracy is punishable in Tanzania.[66] Thus, a person in a ship or vessel registered in Tanzania is guilty of attempted piracy if, for example, with intention to commit piracy, he begins to put his intention into execution by, say, loading the gun, and manifests his intention by some other act like starting to pull the trigger, but does not fulfil his intention of shooting by circumstances independent of his will. Upon conviction the offender of attempted piracy is liable to imprisonment for seven years.[67]

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[62] Section 66(1) Penal Code.

[63] According to Section 205 Penal Code, a person is deemed to have caused the death of another person if the death caused by the direct act or commission occurs within a year and a day from the day which the unlawful act contributing to the cause of death was done.

[64] According to Section 203 Penal Code a person is deemed to have caused death if, *inter alia*, he inflicts bodily injury on another person in consequence of which that other person undergoes surgical or medical treatment which causes death (in this case it is immaterial whether the treatment was proper or mistaken if it was employed in good faith and with common knowledge and skill); if he inflicts bodily injury on another person which would not have caused death if the injured person had submitted to proper surgical or medical treatment or had observed proper precautions as his mode of living; if by any act or commission he hastens the death of a person suffering under any disease or injury which apart from that act or commission would have caused death.

[65] Section 197 Penal Code.

[66] Section 380 Penal Code.

[67] Section 382 Penal Code reads: "Any person who attempts to commit a felony of such a kind that a person convicted of it is liable to the punishment of death or imprisonment for a term of fourteen years or upwards, with or without other punishment, is guilty of a felony and is liable, if no other punishment is provided, to imprisonment for seven years."

e) Powers of the Director of Public Prosecution

Prosecution of the person who commits piracy as defined by the Penal Code cannot be commenced unless the Director of Public Prosecution consents.[68] The power of the Director of Public Prosecution with regard to piracy proceedings was not accidentally conferred. The nature of the crime of piracy puts public interests at stake, as it may involve foreigners and such aspects as payment of ransoms and, therefore, lead – at its critical level – to the involvement of political and diplomatic dynamics. Therefore, criminal proceedings concerning piratical acts are likely to affect Tanzania's relations with foreign states and external tranquillity.[69] In that light there has been a statutorily established procedural requirement that any proceeding for the trial of any foreigner who commits an offence within territorial waters of Tanzania shall not be instituted in court except with the leave of the Director of Public Prosecution and upon his or her certificate that it is expedient that such proceedings should be instituted.[70] In addition, the nature of the crime of piracy involves complex legal issues and processes. Thus the power of the Director of Public Prosecution was put in place to prevent any possible abuse of the ends of justice or legal process and to protect public interests.

It is noteworthy that in all his or her endeavours, the Director of Public Prosecution is required to have regard for public interest, interests of justice and the need to prevent abuse of the legal process.[71] However, in the absence of clear definition of public interest and the broad discretion conferred upon the Director of Public Prosecution, his or her power to commence or terminate piracy proceedings is unreasonably wide. It should be noted that even the Court cannot review the decision of the Director of Public Prosecution not to commence piracy proceedings. It is equally the abuse of the ends of justice for the law to explicitly stipulate that the Director of Public Prosecution is subject to directions and control of the President[72] that allows political aspects to prevail over purely judicial matters.

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[68] Section 66(2) Penal Code.

[69] The title under which the offence of piracy falls in the Penal Code reads "Offences Affecting Relations with Foreign States and External Tranquility."

[70] Section 94(1) Criminal Procedure Act (Act No. 9 of 1985) [hereinafter: Criminal Procedure Act].

[71] Section 90(3) Criminal Procedure Act.

[72] Section 95 Criminal Procedure Act states: "In the exercise of the powers conferred upon him under this section, the Director of Public Prosecutions shall have and exercise his own discretion and shall not be subject to directions or control of any person *except the President*." (emphasis added).

f) Piracy and Armed Robbery under the Penal Code

aa) Piracy under the Penal Code Compared with IMO Definition of Armed Robbery at Sea

In principle the definition of piracy under the Penal Code is identical to the definition of armed robbery against ships adopted by the International Maritime Organization (IMO) in the Code of Practice for the Investigation of Crimes of Piracy and Armed Robbery against Ships.[73] Both instruments cover unlawful acts of violence directed against ships or vessels, persons or property on board such ships within a state's jurisdiction.

bb) Armed Robbery under the Penal Code Compared with IMO Definition of Armed Robbery at Sea

The terms which define armed robbery against ships in the Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery against Ships of the International Maritime Organization (IMO) are also similar to the definition of armed robbery in the Penal Code, except that the latter clearly prescribes that the offender should have stolen and/or assaulted a person before or after the violence and he must have been armed with a dangerous or offensive weapon.[74] The latter proposition, therefore, excludes situations where passengers or crew members of the ship are held hostage solely for demanding ransoms or for expression of grievances. The contexts of violence against ships in Tanzania between 2005 and 2009, as reported by the International Maritime Bureau of the International Chamber of Commerce, suggest that they categorically fall in the ambit of armed robbery pursuant to the Penal Code. In most reported cases the offenders are armed with knives and steal the cargo.[75]

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[73] International Maritime Organization, Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery against Ships, Art. 2(2), IMO Doc. A 22/Res.922 (Jan. 22, 2009), defines "armed robbery against ships" as "any unlawful act of violence or detention or any act of depredation or threat other than an act of piracy directed against a ship or against persons or property on board such ship, within a States jurisdiction over such offences."

[74] Section 285 and 287(2) Penal Code.

[75] For example, on Feb. 14, 2009, five robbers armed with knives boarded *Safmarine Zambezi* at anchor in Dar-es-Salaam. They tied up two duty crew, took their personal belongings and then opened a container and stole the cargo. See the ICC-IMB Report January – September 2009, *supra* note 11, p. 63.

cc) Ambit of Piracy and Armed Robbery Prosecutions under the Penal Code

Prosecuting a "pirate" for armed robbery instead of piracy pursuant to the Penal Code is advantageous because it fills the *lacuna* in cases where the offence of "piracy" cannot stand because the ship concerned is not registered in Tanzania and the person committing the offence is not a citizen of Tanzania. This is evidently reasonable because out of 34 ships attacked in Tanzania between 2005 and 2009 only three had been registered in Tanzania.[76]

dd) Punishment Differs for Piracy and Armed Robbery under the Penal Code

In cases where the ship concerned is registered in Tanzania or the act is committed by a Tanzanian, the choice of which offence to charge a person who commits an act of violence against the ship and person(s) on board has consequences on the severity of the punishment. If the person is found guilty and convicted for piracy he shall be liable to life imprisonment, while if he is found guilty and convicted for armed robbery the liability ranges from fifteen years (with corporal punishment) to life imprisonment.[77]

2. Merchant Shipping Act

a) Definitional Scope

Tanzania substantially incorporated Article 101 of UNCLOS (definition of piracy) through the Merchant Shipping Act of 2003. It is *prima facie* political progress in recognition and fulfilment of international obligation in combating the long outlawed enmity of mankind – piracy. Seemingly, the provisions of the legislation appear to serve as a general policy against piracy rather than alluring judicial enforcement to the problem. The legislation confines itself to the definitional ambit of piracy and does not create the offence nor does it provide for punishment. Except for the overall title preceding the whole part of the legislation which reads "Offences Against the Safety," nothing in the entire provision criminalizes piracy. It should be noted that according to the methods of statute interpretation in Tanzania titles and introductory words do not constitute part of the statute.[78]

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[76] ICC-IMB Report January – September 2009, *supra* note 11, pp. 7 and 18.

[77] Section 66(1) and 287(2) Penal Code.

[78] Section 8 Interpretation of Laws and General Clauses Act reads: "Every section of an Act shall take effect as a substantive enactment *without introductory words*." (emphasis added).

If piracy is to be regarded as an offence in the statute at all, it is by the vague mention in Section 344(2)(a) of the Merchant Shipping Act[79] of "any offence under Section 341 or 342," with Section 341 being the provision which covers piracy. But as a matter of law and practice, charges must point out the provision which is contravened by the offender. For this case it should be Section 341 of the Merchant Shipping Act and relying on any other section would be defective in criminal proceedings. The vagueness of the legislation has exculpatory effect on persons who commit piracy and are prosecuted under the legislation. This is in the light of the canon of construction of penal statutes, which requires interpretation to be in favor of the accused in case of such vagueness. The canon requires the judiciary to adhere to precise prescription of the specific provision instead of the meaning induced from the general purpose or legislative intention of the statute.[80]

b) Implications on Criminal Proceedings

The omission to explicitly criminalize and provide for punishment against piracy is a fundamental setback in engaging judicial mechanisms in suppressing the problem. As it stands, pirates will be acquitted or discharged for judicial technicalities. Courts have long been wedded with the principle of *nullum crimen sine lege* which means that no conduct may be held criminal unless it is precisely prescribed in a penal law. Similar to that is a well established principle that no person may be punished except pursuant to the statute which prescribes a penalty – *nulla poena sine lege.*[81] Even in ancient Roman jurisprudence, which suggested unlimited discretion of the judiciary for extraordinary offences, there was definite insistence on the precise prescription of both offence and penalty.[82] It follows, therefore, that strict adherence to prescription of the statute is of paramount importance in the judicial process in matters which implicate criminal responsibilities.

Hence the Merchant Shipping Act of 2003 does not precisely prescribe the offence and penalty for piracy and the judiciary will most likely construe that the legislature did not intend to attribute criminal responsibility with its provisions on piracy. Pursuant to the principle of legality the judiciary is required to avoid the derivations of wide meanings which express the general policy of a statute and adhere to its explicit prescription.[83] The inference that the legislature did not intend to criminalize piracy per the Merchant Shipping Act is well established because it did

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[79] Section 344 Merchant Shipping Act generally covers a master's power of delivery. The Section confers powers upon the master of a ship to deliver the person who committed an offence aboard a ship to appropriate authorities in Tanzania.

[80] *Hall, Jerome*, General Principles of Criminal Law. 2nd ed. Indianapolis 2005, p. 38.

[81] *Id.* p. 28.

[82] *Id.* p. 29.

[83] *Id.* p. 37.

explicitly criminalize and penalize the offence of hijacking, which falls in the same part as the provision covering piracy in the legislation.[84]

The abstinence is further manifested by the lesser sentence it attracts for not prescribing the punishment for "piracy." The legislation provides that a person who commits an offence against it, for which no specific punishment is provided, shall be liable to a fine of not less than one thousand US dollars or to imprisonment for a term not exceeding six months or both such fine and imprisonment.[85] If it is established that piracy is an offence pursuant to the Merchant Shipping Act, the legislature will be responsible for setting a double standard in regard to penalty. While a person who commits piracy contrary to the Penal Code is subjected to life imprisonment, the person who commits "piracy" contrary to the Merchant Shipping Act is liable to only six months imprisonment or can secure his liberty by paying the prescribed fine. The latter sentence falls far below the severity of penalties given to pirates worldwide and thus manifestly infringes the deterrent effect which those penalties seek.[86] Hence it solidifies the inference that the legislation merely intended to provide a definitional scope of piracy and not to punish piracy by the provisions of the Merchant Shipping Act.

As far as piracy is concerned, the Merchant Shipping Act did not seem to opt for a judicial mechanism in repressing and eradicating the problem. The legislation progressively highlights the ingredients of piracy as recognized by international law as it considerably reproduces the provisions of UNCLOS with regard to piracy. One can reach the conclusion that the legislature placed priority on the solution of the problem in the high seas and in places outside the jurisdiction of any state and not on land, at least not on Tanzanian land. That means the role of warships, snipers and sailors was more appreciated than that of prosecutors, magistrates and judges. The trend does not seem to infringe UNCLOS whose Article 105 is not mandatory but rather suggestive as it provides that "the courts of the State which carried out the seizure *may* decide upon the penalties to be imposed."[87] The trend,

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[84] Section 342(6) Merchant Shipping Act.

[85] Section 401(1) Merchant Shipping Act.

[86] In Kenya, for example, the punishment for piracy is life imprisonment, see The Copenhagen Post Online, Kenya Agrees to Take Captured Pirates, April 26, 2009, *available* at http://www.cphpost.dk/news/international/89-international/45494-kenya-agrees-to-take-captured-pirates.html (last visited May 12, 2010). Equally, the punishment for piracy in the United States is life imprisonment: The Wall Street Journal, Obama's Next Hostage Crisis, April 9, 2009, *available at* http://online.wsj.com/article/SB123923550659203341.html (last visited May 12, 2010).

[87] Art. 105 UNCLOS, in its entirety, reads: "On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure *may* decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith." (emphasis added).

however, infringes Tanzania's obligation towards the Djibouti Code of Conduct, to which it was one of the first nine signatories. Among other obligations the Djibouti Code of Conduct requires signatories to ensure that persons committing or attempting to commit acts of piracy are apprehended and prosecuted.

In the wake of rampant acts of piracy and armed robbery in territorial waters and the high seas off the coast of Somalia, the Security Council adopted Resolution 1846 calling upon states to use all necessary means to repress the acts of piracy and armed robbery at sea in the area. The Security Council Resolution binds Tanzania to implement its obligations under it. To implement its obligation under the Resolution the sole legislation that could possibly be embarked is the Merchant Shipping Act of 2003. While by "all necessary means" one would reasonably include bringing the pirates to justice, the Merchant Shipping Act is not without confines to that effect. The part of the legislation which covers piracy is limited to acts occurring in the high seas and places outside the jurisdiction of any state.[88] Therefore, if piracy is an offence pursuant to the legislation at all, the aspects of "all necessary means" pronounced in the Resolution cannot be implemented if the acts of piracy occurred within the territorial waters of Somalia, except where the act of piracy is committed by a citizen of Tanzania, for which criminal responsibility will be laid pursuant to the Penal Code.[89]

It is manifestly obvious that the Merchant Shipping Act was crafted in the light of UNCLOS and, therefore, refrains to extend jurisdiction beyond the high seas or international waters. It did not anticipate the situation where a state consents to the repression of piracy in its territorial waters like Somalia pursuant to Security Council Resolution 1846. The abstention is justifiable since the Security Council Resolution came into force five years after the enactment of the Merchant Shipping Act. Before the Security Council Resolution, the enforcement jurisdiction by any state could not validly extend to territorial waters of Somalia, even in cases of "hot pursuit" of a pirate vessel.[90] Also prior to the Security Council Resolution, state practice suggested that states were against the extension of enforcement jurisdiction to territorial waters of the state mostly affected by piracy. Indonesia, for example, had previously rejected suggestions of extending other states' enforcement jurisdiction to counter piracy within those parts of the Malacca Straits falling within its territorial waters.[91]

Therefore, the Merchant Shipping Act was a *bona fide* reflection of the well established principle of non-interference in the internal affairs of a sovereign state.

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[88] Section 341(3) Merchant Shipping Act.

[89] Section 66(1)(b) Penal Code.

[90] Art. 111 UNCLOS.

[91] *Guilfoyle, Douglas*, Piracy Off Somalia: UN Security Council Resolution 1816 and IMO Regional Counter Piracy Efforts, 57 International and Comparative Law Quarterly 699 (2008).

Although the Merchant Shipping Act does not fit in the context set by the Security Council Resolutions regarding Somalia, it was created in the light of then widely celebrated reluctance to extend the definition of piracy to acts of violence in the territorial waters of a failed state. Such an extension was firmly opposed and China went further to warn against considering the Security Council Resolutions 1816, 1838, 1846 and 1851 as precedents.[92] It is thereby argued that if the definition of piracy is to be broadened, the task should not be vested in the Security Council, rather it should be incorporated into a new treaty. The proponents of the reluctance point out that the prerogatives vested with the Security Council to determine the use of force do not extend to a legislative role.

However, the Merchant Shipping Act progressively places Tanzania in a position to possibly arresting people who commit acts of piracy in the territorial waters and the high seas off the coast of Somalia. The legislation provides that the master of any ship can hand over a person who has committed, attempted, or taken part in the act of piracy or hijacking to the police officer or immigration authorities in Tanzania.[93] However, the provision seems impractical in the real sense. It is a key ingredient of piracy that the crew or passengers committing piracy are in dominant control of the (pirate) ship.[94] Thus it is impractical that the master of the ship could take the pirates all the way from the high seas off the coast of Somalia to Tanzania without subjecting herself or himself to unlawful acts of violence.

The Merchant Shipping Act refrains from conferring jurisdiction upon Tanzania's courts to try and punish piracy committed on the high seas by foreigners, unless such an offence is committed on board a Tanzanian ship.[95] This defeats the concept of universal jurisdiction which has long been attached to the offence of piracy by law of nations. The legislation opted to assign jurisdiction upon Tanzania's courts only in cases where a citizen of Tanzania commits piracy in the high seas. With the rampancy of piracy in the high seas worldwide, in which only four victim ships were of Tanzanian nationality, the legislation contributes to impunity for pirates who should otherwise be tried universally under the law of nations. This is an indication of Tanzania's partial fulfillment of international counter piracy obligations.

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[92] *Alessandri, Emiliano*, Istituto Affari Internazionali, Report of the Conference: Addressing the Resurgence of Sea Piracy: Legal, Political and Security Aspects, July 2009, p. 4, *available at* www.iai.it/pdf/DocIAI/IAI0916.pdf (last visited May 12, 2010).

[93] Section 344 Merchant Shipping Act.

[94] Art. 103 UNCLOS and Section 341(1)(c) Merchant Shipping Act.

[95] Section 406 Merchant Shipping Act.

3. Tanzania's Legal Framework with Respect to Offences Associated with Piracy

a) Forfeiture and Confiscation of Proceeds of Crime

Pirates often attack ships and rob the property they contain. In some cases a ransom is paid for safe release of crew members or passengers onboard. Proceeds of piracy are used to finance more attacks or are laundered to conceal criminality. Tanzania's legal framework is considerably well tailored to tackle these secondary offences. Thus any property that is derived or realized, directly or indirectly, from the commission of piracy is liable for forfeiture or confiscation upon conviction of the pirate.[96] Tanzania can also execute a forfeiture order issued by a foreign country if the order is duly registered pursuant to the laid down procedure.[97] The law confers powers upon courts to lift the corporate veil in determining issues related to the involved property. Thus, in assessing the proceeds of the piratical act, the court may treat them as property of the "pirate," subject to his effective control whether or not he has right, interest, power or privilege in the property.[98]

b) Anti-Money Laundering

Laundering of proceeds of piracy is statutorily prohibited and punishable in Tanzania.[99] Thus, a person is criminally liable for money laundering if she or he converts, transfers, transports, transmits or acquires property with knowledge that such property is the proceed of piracy for the purpose of concealing or disguising its illicit origin.[100] A person is equally liable if she or he assists a "pirate" to evade the legal consequences related to the proceeds of piracy.[101] The anti-money laundering legal framework represents a crucial step in preventing the cycle of crimes from which piracy flourishes. However, it is effective only in circumstances where the pirates use formal institutions to transfer or acquire property or ransoms. Proceeds of piracy can be easily concealed or laundered if the pirates opt for informal banking arrangements, such as the *hawala* system,[102] which are anonymous and require minimal documentation. It is thus a challenge for Tanzania's law enforcement ma-

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[96] Section 91(1) Proceeds of Crime Act.

[97] Section 18(1) and (2) Proceeds of Crime Act.

[98] Section 23(1)(a) and (b) Proceeds of Crime Act.

[99] Section 12 Anti-Money Laundering Act, which must be read together with Section 3 Anti-Money Laundering Act defining "predicate offence" to include "piracy."

[100] Section 12(b) to (d) Anti-Money Laundering Act.

[101] Section 12(b) Anti-Money Laundering Act.

[102] It is an informal remittance system which allows the transfer of funds both domestically and internationally without using formal financial institutions. The transaction is secured by the trust between the parties with no legal means of reclamation.

chinery to supplement the progressive law to trace undocumented transactions of the proceeds of piracy honored by trust.

c) Prevention of Terrorism

International law suggests a fundamental distinction between piracy and terrorism. In the legal and conceptual context, terrorism, unlike piracy, requires the existence of a political or ideological motive. At the Tanzanian national level, the fundamental legal distinction of the two phenomena is clearly stipulated. Generally, motive to commit an offence is immaterial in Tanzania's criminal justice, unless the motive is expressly declared to be an element of the particular offence.[103] However, the Prevention of Terrorism Act expressly prescribes that an act shall constitute terrorism only if the act is committed with a terrorist intention.[104] Moreover, its provisions are overriding as they have effect notwithstanding any inconsistence with any other law in Tanzania.[105]

However, the distinction must not dismiss the possibility of a *nexus* between piracy and terrorism in the laws of Tanzania. At its highest level, the laundering of proceeds of piracy can seriously destabilize economic or social structures of a country. Therefore, in cases where it is established that such destabilization was intended by the offender in the course of committing the piratical act, the crime would constitute terrorism according to the provisions of the Prevention of Terrorism Act.[106] Tanzania's legislature had contemplated the link between piracy and money laundering as it explicitly prescribed that piracy is a "predicate offence" to money laundering.[107] Similarly, provision or collection of proceeds of piracy to fund terrorist acts is punishable as terrorism. However, it remains the discretion of the courts to determine the prerequisite *mens rea*, where it is alleged that the piratical act constitutes terrorism. The contexts of the piratical acts in Tanzania are far below the terrorist threshold, though the current legal framework is solidly tailored to tackle the issue.

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[103] Section 10(2) and (3) Penal Code.

[104] Section 4(2) Prevention of Terrorism Act.

[105] Section 11 Prevention of Terrorism Act.

[106] Section 4(2)(b)(iii) Prevention of Terrorism Act.

[107] Section 3 Anti-Money Laundering Act.

IV. Criminal Procedure with Respect to Piracy Proceedings

A. Introduction

The Djibouti Code of Conduct, to which Tanzania is a signatory, requires the participating countries to adhere to international law when affording their cooperation in various aspects of counter piracy.[108] Since international law encompasses customary law and treaties which protect and guarantee human rights and fundamental freedoms,[109] it is reasonable to conclude that Tanzania must accord persons who have committed piracy or are reasonably suspected of having committed piracy the right to a fair trial. That is to say, they must be presumed innocent, accorded minimum rights recognized in criminal justice[110] and tried in a public hearing before an independent and impartial court within a reasonable time.[111] This partially observes Tanzania's criminal and justice system to determine its consistency with and, conformity to, international law in the course of repressing piracy.

B. Arrest

1. Competent Authorities

The laws of Tanzania confer powers of arrest to designated public authorities as well as to private persons.[112] In principle, police officers, immigration officers, members of Tanzania's intelligence security services, justices of the peace and even private persons can arrest a person who has committed piracy or is reasonably sus-

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[108] Its participants intend to cooperate in the arrest, investigation and prosecution of persons who have committed piracy or are reasonably suspected of having committed piracy; seize suspect ships and the property on board such ships; and rescue ships, persons and property subject to acts of piracy. These acts would be consistent with international law.

[109] Art. 38(1)(a) and (b) Statute of International Court of Justice, *adopted* June 26, 1945, 33 U.N.T.S. 993.

[110] These include adequate time and facilities to prepare their defense, access to legal representation, the right to examine witnesses against them or have them examined, the right to the free assistance of an interpreter.

[111] On the right to fair trial see Art. 9 International Convention on Civil and Political Rights *adopted* Dec. 16, 1966, 999 U.N.T.S 171, Art. 7 African Charter on Human and Peoples' Rights, *adopted* June 27, 1981, 1520 U.N.T.S 217, Art. 6 Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11, *adopted* Nov. 4, 1950, 213 U.N.T.S. 222.

[112] Section 14, 16 and 17 Criminal Procedure Act, Section 28 Prevention of Terrorism Act and Section 14 National Security Act (Act No. 3 of 1970) [hereinafter: National Security Act].

pected of having committed piracy, subject of course, to some limitations.[113] The matter is well established if the person is suspected to have committed piracy within the territory of Tanzania. In that instance, even the magistrate can arrest the suspect if the act occurred within local limits of his or her jurisdiction.

The Tanzanian legal framework provides for the possibility of competent authorities to arrest pirates outside Tanzania. The Criminal Procedure Act provides that a police officer or a private person may, without warrant, arrest any person whom he reasonably suspects of having been involved in any act of piracy at any place outside of Tanzania.[114] The core qualification is that the offender must be liable to be apprehended and detained in Tanzania and that the act concerned, if committed in Tanzania, would have been punishable as an offence. Regardless whether piracy is punishable under the Merchant Shipping Act, the suspects of piracy are liable to be apprehended and detained in Tanzania pursuant to the abovementioned provision because piracy is punishable under the Penal Code and Tanzania is duty bound internationally to arrest, investigate and prosecute pirates.[115] The circumstance in which a pirate can be arrested by Tanzania's authorities outside Tanzania is where there is, or there will be, reciprocal provision in any contiguous country, which authorizes the police of Tanzania to enter such a country in pursuit of a person who has committed piracy "by the law of nations" in Tanzania.[116] A police officer or immigration officer may also arrest a person reasonably believed to have attempted to commit, participated in, or committed piracy, and is delivered by the master of the ship involved.[117]

The international trend, however, shows that the counter piracy mechanisms pertain to navies. This is likely to generate detrimental consequences in the judicial proceedings because navies are generally not trained to carry out judicial procedures such as collecting evidence and receiving confessions. Tanzania is not an exception to the phenomenon. The only venue which would allow navies to exercise the duties and powers of a police officer is in case of occurrence of a riot or disturbance of peace and the military forces are called out for service in aid of the

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[113] Section 28(2) Prevention of Terrorism Act, also Section 47 Magistrates' Courts Act (Act No. 55 of 1963) [hereinafter: Magistrates' Courts Act].

[114] Section 14(f) Criminal Procedure Act.

[115] Inference drawn from S.C. Res. 1846, para. 10(b) "all necessary means" and the obligations stipulated in Art. 4(3) Djibouti Code of Conduct to cooperate to the fullest possible extent in the arrest, investigation and prosecution of persons who have committed piracy or are reasonably suspected of having committed piracy.

[116] Section 3 Fugitive Offenders (Pursuit) Act (Act No. 1 of 1969) [hereinafter: Fugitive Offenders (Pursuit) Act]. The Section applies only to extradition crimes. According to the Extradition Act piracy by laws of nation is an extradition crime.

[117] Section 344(2) and 344(8) Merchant Shipping Act.

"civil" authority.[118] The prerequisite for the deployment of the military in aid of the civil power is the establishment that the riot or disturbance of the peace is likely to be beyond the powers of the civil authorities to suppress or prevent. In such case, although they assume powers and duties of a police officer, the forces can only act militarily and are individually liable to obey the orders of their superior officers.[119] Considering the contextual elements of piratical acts it is difficult to establish that they would give rise to riots or disturbances of the peace beyond the capability of the police force to prevent or suppress. Moreover, even where the circumstances call for the deployment of the military in such civil duty, it is unlikely to serve the judicial ends because the military force will be under the order and supervision of their superiors who are most likely not trained to perform judicial duties such as collection of evidence and receiving confessions. The power to receive confessions is exclusively vested upon police officers, magistrates and justices of the peace.[120]

2. Illegal Arrests

The legal framework impliedly prohibits the use of force in the course of criminal justice. The law bars the admission of evidence obtained by force.[121] But any confession obtained on ground of threat will be accepted in court unless the court is of the opinion that the threat was likely to cause an untrue admission.[122] The solidly established principle is that conviction on a retracted or repudiated or both retracted and repudiated confession will follow only where the court is satisfied that the confession cannot but be true.[123] However, courts are given absolute discretion to admit evidence which contravenes or fails to comply with the law if it is in the public interest.[124] The standard of determination is that of balance of probability. By setting such a low threshold, the law gives room for arbitrary discretion whereby the rights of persons charged with piracy will be prejudiced when public interest is inappropriately invoked as justification. The usurping of rights of those accused of

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[118] Section 21(1) and 22 National Defence Act (Act No. 24 of 1966) [hereinafter: National Defence Act]. The Act extends and applies in Tanzania Mainland as well as Zanzibar.

[119] Section 22 National Defence Act.

[120] See Section 53 Magistrates' Courts Act. The Act applies exclusively in Tanzania Mainland. See also Sections 27 and 28 Evidence Act (Act No. 6 of 1967) [hereinafter: Evidence Act]. The Act applies exclusively in Tanzania Mainland and is applicable to all judicial proceedings in Tanzania Mainland in or before the High Court and all Magistrates' Courts except Primary Courts.

[121] Section 27 Evidence Act.

[122] Section 29 Evidence Act.

[123] The Courts in Tanzania have been widely citing with approval the decision of the Supreme Court of Uganda in *Matovu Musa Kassim v. Uganda* (Criminal Appeal No. 27 of 2002) which laid down the principle.

[124] Section 169 Evidence Act.

piracy in the name of public interest is likely to measure a low standard due to the fact that Tanzania has not ratified the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment.[125] According to Tanzania's criminal procedural law, a person suspected of committing piracy whose arrest contravenes the well established standards of arrests can institute civil suit against the arresting person or authority.[126] Generally, the arresting office will not be criminally responsible on the ground of illegal arrest, although she or he may be subjected to disciplinary action.[127]

3. Public Interest

The Constitution of Tanzania allows derogation from basic rights of the individual in the public interest.[128] However, the highest court in the land set a principle that any law that allows derogation should not be arbitrary and it should be proportional in the sense that the limitation should not be more than reasonably necessary. It is suggestible, therefore, that the procedure in allowing the derogation should not be arbitrary, unfair or unreasonable. It is true that pirates are enemies of mankind, but acts of piracy cannot always be reasonably construed to endanger the interests of defense, public safety, public order, public health, public morality, development or public benefit. The typical captured piracy suspects are young boys without sophisticated weaponry. It is reported that the masterminds of the crime are not on trial.[129] Therefore, the courts should exercise due diligence in allowing derogation of pirate's human rights and fundamental freedoms on the basis of public interest or national security. The derogation should only stand if the court is satisfied after considering all material points and the surrounding circumstances of the case that the national security or public interest reasonably and manifestly attracts prevalence over a fundamental freedom of a suspect or an accused.

C. Bail

Bail is a qualified right in Tanzania. Under certain circumstances bail is prohibited. Hence, the person will not be admitted to bail if the unlawful act constituting piracy he committed in Tanzania or elsewhere would, if committed in Tanzania, be

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[125] Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, 1465 U.N.T.S. 85.

[126] Section 6(3)(c) Criminal Procedure Act.

[127] Section 6(2) and 6(3)(a) Criminal Procedure Act.

[128] Art. 30(2) Constitution of the United Republic of Tanzania of 1977 (as amended).

[129] Hanns Seidel Foundation, Regional Strategies, *supra* note 15, p. 5.

construed to endanger national safety and interest.[130] Furthermore, the prohibition applies if the person has been charged under the National Security Act. Also, a suspect of piracy will be denied bail if the piratical act he committed constitutes an act of terrorism.[131] It is possible for the piratical act to constitute terrorism in Tanzania because the law broadly defines terrorism to include an act or threat of action which involves serious bodily harm, serious damage to property, or endangers a person's life if the act or threat is done with a terrorist intention.[132] It should be noted that this is only applicable if the terrorist act constituting piracy is committed by a Tanzanian within or outside Tanzania,[133] or where the terrorist act is committed by a non-Tanzanian in what is construed and gazetted as an "act of international terrorism."[134]

The laws on piracy in Tanzania do not prescribe the acts that constitute piracy. However, inference can be drawn from the wording of the provisions that cover the offence of hijacking that "act of violence" (which is a core ingredient in the offence of piracy) means "any act done in [or outside] Tanzania which constitutes the offence of murder."[135] If that is a correct proposition, it means any person who is accused of committing a piratical act which constitutes the offence of murder, cannot, according to Tanzania's laws, be admitted to bail.[136] Equally a person will not be granted bail if the piratical act for which he is charged consists of a serious assault or threat of violence to another person or if the pirate was in possession of a firearm or an explosive.[137]

According to the provisions of the Children and Young Persons Act, a juvenile under the age of sixteen charged for piracy under the Penal Code would not qualify for release on bail because the penalty for such offence(s) exceeds seven years imprisonment.[138] However, the Inspector General of Police is required to ensure that the juvenile is prevented, while in custody, from associating with adult offenders unless such an adult is a relative.[139]

The nature, means and circumstances under which the acts of piracy are committed further complicate the issues related to bail even if the concerned piratical act is

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130 Section 19 National Security Act.

131 Section 148(5) Criminal Procedure Act as amended by Section 149 Prevention of Terrorism Act.

132 Section 4(3)(a), (b) and (c) Prevention of Terrorism Act.

133 Section 2(2) and 4(1) Prevention of Terrorism Act.

134 Section 12(7) Prevention of Terrorism Act.

135 Section 342(7)(a) and (b) Merchant Shipping Act.

136 Section 148(5)(a) Criminal Procedure Act.

137 Section 148(5)(e) Criminal Procedure Act.

138 Section 4 Children and Young Persons Act (Chapter 13 of the Laws of Tanzania) [hereinafter: Children and Young Persons Act].

139 Section 5 Children and Young Persons Act.

bailable. For foreign pirates who are tried in Tanzania it is difficult to be released on bail on their recognizance because their appearance on trial cannot be reasonably guaranteed. By virtue of their status it is difficult to monitor their movement as they are unlikely to be in possession of authentic identification and a permanent residential address. Also releasing the suspects of piracy on bail in a foreign land without a well established arrangement on their welfare and protection would risk them engaging in more crimes and endangering their safety. The issue is further complicated by the fact that it is difficult for a foreign person accused of piracy to execute bond on the property involved in the commission of the offence, for example, the pirate ship, because it is the subject matter and part of the evidence in the material case. Taking property involved in the crime of piracy as bond for bail is likely to deprive the rights of *bona fide* third parties whose ships, aircrafts or properties were used in committing the crime without their knowledge of facts on the crime.[140] Moreover, officials in their respective embassies or consulates would, in principle, not be allowed to be sureties of the persons accused of piracy because the former cannot be held responsible by the virtue of their diplomatic immunities when the accused jumps bail.

D. Juvenile Proceedings

If the dynamics of piracy in the Gulf of Aden represents a phenomenon in the region, it can be concluded that most pirates in action are juveniles.[141] This calls for application of human rights as regards juveniles in criminal proceedings. In Tanzania no criminal responsibility can be attributed to a person under the age of twelve years who commits a piratical act unless it is established that he had the capacity to know that he ought not to commit the crime.[142] Moreover, any criminal proceeding that involves an accused person under the age of sixteen years is supposed to be conducted in juvenile court.[143] In that case, the proceedings will be conducted in a different building or room from that in which the ordinary sittings of the court are held. However, since the nature of piracy often involves joint acts and the Penal Code criminalizes conspiracy, juvenile pirates are likely to be jointly charged with adult pirates, in which case, the former's rights to a separate proceeding will be

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[140] This will contravene Art. 105 UNCLOS which requires the courts to exercise due regard to the rights of third parties acting in good faith when such courts determine actions to be taken with regard to ships, aircrafts or properties involved in the commission of piracy.

[141] *Alessandri, Emiliano*, Istituto Affari Internazionali, Report of the Conference: Addressing the Resurgence of Sea Piracy: Legal, Political and Security Aspects, June 2009, p. 5

[142] Section 15(2) Penal Code.

[143] Section 3(1) Children and Young Persons Act.

derogated.[144] It should be noted that the Merchant Shipping Act is silent on conspiracy to commit piracy.

In cases where a juvenile is convicted for piracy in which no homicide resulted, the court may order his conditional discharge on own recognizance, with or without sureties, to be of good behavior and to appear for sentence when called upon at any time during such period, not exceeding three years.[145] Sentencing imprisonment for a juvenile under the age of sixteen is the matter of last resort. It could only happen if no other legally suitable methods are available.[146] However, alternative punishment seems to apply only where a juvenile is convicted of an offence other than homicide or other than an offence punishable by imprisonment for a term exceeding seven years.[147] The fact that piracy is punishable for life imprisonment under the Penal Code, suggests that a juvenile pirate will be liable for imprisonment regardless of his maturity. In that case, however, he may be committed to custody to an approved school. As far as practically possible, where a juvenile pirate is sentenced to imprisonment he shall not be allowed to associate with adult prisoners, not even those with whom he was jointly charged.[148] As far as the Merchant Shipping Act is concerned, the juvenile pirate would qualify for punishment other than imprisonment if the piratical act did not result in homicide because the penalty it prescribes for piracy is less than seven years.[149] Equally, a juvenile would qualify for punishment other than imprisonment in the case of attempted piracy under the Penal Code because the punishment does not exceed seven years.

The safeguards for the rights of juveniles are not in all cases strictly observed in Tanzania. Although Tanzania has ratified the Convention on the Rights of the Child,[150] it has not enacted domestic legislation to incorporate its standards, measures and safeguards. The Government of Tanzania has acknowledged the severe problem of holding juveniles together with adult prisoners.[151] There are also reports

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[144] Section 3(1) Children and Young Persons Act.

[145] Section 18(1) Children and Young Persons Act.

[146] Section 22(2) Children and Young Persons Act. Alternative methods include discharging the juvenile without making any order; ordering the juvenile to be repatriated; ordering the juvenile to be handed over to the care of a fit person or institution or ordering the juvenile be committed to custody to an approved school.

[147] Section 23 Children and Young Persons Act.

[148] Section 22(3) Children and Young Persons Act.

[149] Since the Act did not prescribe penalty for piracy the offender is liable for six months imprisonment or fine at the tune of 1,000 US$ or both imprisonment and fine, see Section 401(1) Merchant Shipping Act.

[150] Convention on the Rights of the Child, *adopted* Nov. 20, 1989, 1577 U.N.T.S. 3.

[151] United States of America, Department of State (Bureau of Democracy, Human Rights and Labor), 2008 Human Rights Report: Tanzania, Feb. 25, 2009 [hereinafter: US Human Rights Report on Tanzania], *available at* www.state.gov/g/drl/rls/hrrpt/2008/af/119028.htm (last visited May 12, 2010).

of beating and sexual abuses on juveniles both in police custody and prisons.[152] As of December 2008, there was only one facility for convicted juveniles, which was mainly used for male convicts. Male juveniles awaiting trials were held in one of five remand homes.[153] Juveniles are not often accorded legal representation in criminal proceedings and there is a considerable lack of qualified personnel for the welfare of juveniles.[154] Steps have been taken to improve juvenile and adult prison conditions with the establishment of the Department of Public Complaints. The unit is vested with the responsibility of visiting detainees and prisoners with a view to identifying core problems and seeking durable solutions.[155]

E. Investigations

Counter piracy mechanisms in waters have long been overwhelmingly executed by navies. However, with the escalating trend of shifting the solution from sea to land, the role of authorities other than navies has also been appreciated. Increased prosecutions of pirates call for the role of trained investigators in order to ensure that justice is manifestly and effectively served. In Tanzania, general investigative powers are vested with the police force. Pending current reforms, police officers have even been carrying out prosecution roles as public prosecutors. Police officers are conferred with powers to arrest, search, seize offensive weapons, grant bail, collect evidence and to receive confessions.[156] Therefore, the police force would play a vital role in the process of prosecuting pirates.

However, Tanzania's investigative machinery is less likely to cope with the contemporary piracy dimensions unless the personnel and facilities at their disposal are improved, especially with the sophisticated Somali piracy extending south off the Somali coast. With the ratio of one policeman for three thousand people, Tanzania's police force is far below the international standard and does not guarantee

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[152] In Zanzibar police officials fired Officer Pandu Ndame for the rape of a 13-year-old school girl at the police station; there was also a case of rape of a 15-year-old female prisoner and the investigation of the rape of a school girl inside a police station: US Human Rights Report on Tanzania, *supra* note 151.

[153] Out of 81 detention facilities which the Commission for Human Rights and Good Governance visited only four had separate facilities for juveniles: Report of the Commission for Human Rights and Good Governance (CHRAGG), July 2009, *available at* www.chragg.go.tz (follow "documents" hyperlink, then follow "taarifa ya Mwezi Julai 2009" hyperlink) (last visited May 12, 2010) [hereinafter: CHRAGG Report].

[154] *Id.* p. 235.

[155] US Human Rights Report on Tanzania, *supra* note 151.

[156] Sections 14, 24, 27 and 64 Criminal Procedure Act; Sections 27 and 28 Evidence Act.

efficiency in combating crimes.[157] Shortage of personnel is not the sole problem of Tanzania's police. There are also concerns about the level of investigative skills and inefficiency in collecting evidence. Tanzania's police force concedes that in 2007, out of 88,527 reported criminal incidents only 30,946 were taken to court, of which 30 % were successful, while 11 % of the cases were dropped for lack of evidence.[158] Therefore, there is a need for comprehensive improvements in Tanzania's police force to effectively contain escalating piracy in the territorial waters of Tanzania and in the high seas.

The current investigative and judicial burden in carrying out criminal justice in Tanzania implies potential reluctance to receive piracy offenders other than those apprehended and detained by Tanzania's authorities. Delayed investigations and shortage of judicial facilities and personnel lead to lengthy pre-trial detention and overcrowding of detention facilities. According to the Tanzanian Ministry of Home Affairs, the detention facilities in Tanzania currently accommodate 45,000 inmates, while the holding capacity is 22,669 inmates.[159] The overcrowding is extreme and detention conditions remain life threatening and harsh.[160] The average waiting time from apprehension to completion of trial is estimated at five years and there were complaints that some inmates have spent more than ten years in remand awaiting completion of investigations.[161] The Tanzanian justice system is bearing a huge burden and it would overload the system if it sought to receive offenders outside its territorial jurisdiction either for prosecution or serving of sentences.

The possibility of receiving pirates convicted in other countries should not be dismissed merely because it falls outside the scope of the Mutual Assistance in Criminal Matters Act. It should be born in mind that such an Act does not prevent the provision of criminal assistance by Tanzania arranged independently of its scope.[162] Any arrangement that would accord suspected or convicted pirates special treatment over other Tanzanian inmates will likely give rise to massive social unrest. Special treatment in prison accorded to former government officers had in the

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[157] Tanzania's Police Crime Report 2007, *available at* www.policeforce.go.tz/index.php?option=com_content&task=view&id=218&Itemid=74 (last visited May 12, 2010): the international ratio is 1: 400–700 while the ratio in developed countries is 1: 250–350.

[158] *Id*.

[159] See the website of the Ministry of Home Affairs: www.moha.go.tz (last visited May 12, 2010).

[160] CHRAGG Report, *supra* note 153, p. 200.

[161] Legal and Human Rights Centre (LHRC) and Zanzibar Legal Service Centre, Tanzania Human Rights Report 2007, Incorporating Specific Part on Zanzibar, p. 26, *available at* http://alpha.web2-netshine-hosting.co.uk/~lhrc/index2.php?option=com_docman&task=doc_view&gid=13&Itemid=56 (last visited May 12, 2010) [hereinafter: LHRC Human Rights Report on Tanzania]; see also US Human Rights Report on Tanzania, *supra* note 151.

[162] Section 5 Mutual Assistance in Criminal Matters Act.

past sparked nationwide protests with inmates boycotting court sessions and going on hunger strike.[163]

F. Jurisdiction of Courts

In Tanzania the deliverance of justice is wholly and exclusively vested by the Constitution in the judiciary.[164] Jurisdiction to try and punish piracy differs depending on the nature and circumstances under which the acts constituting piracy occurred or the manner which proceeds of piracy were acquired.

For piracy as defined under the Penal Code, the District Courts and Resident Magistrates' Courts have original jurisdiction and the proceedings thereof are limited and regulated by the Criminal Procedure Act.[165] As for piracy occurring in the high seas or international waters or committed in the foreign port or ship by a Tanzanian – and the offender is found within the jurisdiction of court in Tanzania – such courts shall have jurisdiction to try the offence as if such offence was committed on board a Tanzanian ship within the limits of its ordinary jurisdiction.[166] In cases where the offender is not a citizen of Tanzania the proceedings shall not be commenced without the consent of the Director of Public Prosecution.

For a piratical act which constitutes terrorism, the case would be triable and punishable by the High Court.[167] Since the legislation which seeks to prevent terrorism is applicable in Tanzania Mainland and Tanzania Zanzibar, it suggests that, by High Court, it refers to the High Court of Tanzania and, the circumstances determine, the High Court of Zanzibar. In such a situation, no prosecution can be instituted except by or with the consent of the Director of Public Prosecution.

There may be a case in which a person is found in possession of, or, having control over, any property which was acquired during the commission of piracy, or by way of purchase with funds obtained through ransoms paid for piratical acts.[168] The judicial authorities may choose to try the offence as an economic crime, in which case the prosecution and determination of penalty will be held by the High Court sitting as the Economic Crimes Court. No trial in that respect may be commenced unless the Director of Public Prosecution consents.

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[163] LHRC Human Rights Report on Tanzania, *supra* note 161, p. 26.

[164] Art. 107A Constitution of the United Republic of Tanzania of 1977 (as amended).

[165] Section 37(a) Magistrates' Courts Act.

[166] Section 406 (a) and (b) Merchant Shipping Act.

[167] Section 34(1) Prevention of Terrorism Act.

[168] Section 4 First Schedule of the Economic and Organized Crime Control Act.

V. Extradition and Mutual Assistance on Piracy

A. Extradition

Piracy by law of nations is an extradition crime in Tanzania.[169] Thus, where there is bilateral agreement between Tanzania and the country in which piracy, as defined by law of nations, was committed, the suspect, so accused, or convicted, who is in (or is suspected of being in) Tanzania, shall be liable to be arrested, detained and surrendered. The law resolves any contention over issues of jurisdiction as it clearly prescribes that liability to that effect lies – whether there is or is not any concurrent jurisdiction – in a court in Tanzania.[170] The warrant to arrest the "pirate" shall be issued on information and evidence or proceedings which justify the issue of the warrant. However, the law seems to usurp the judicial role in matters of justice and places it on political figures instead. Under the law, the Minister responsible for legal affairs may cancel the warrant of arrest issued by the magistrate against the piracy suspect whose surrender is sought and, thereby, order his discharge.[171] Except where the alleged crime is of political character (piracy is far less likely to fall in this category), there are no well established procedures or guidelines to ensure that the discretion of the Minister is not arbitrary, unfair or unreasonable.

Willingness of states to cooperate in the repression of piracy through extradition does not come without difficulty. The first problem is related to the reciprocity required in the extradition process. For many states extradition remains bilateral treaty based, rather than offence based, and with no specific recognition accorded to piracy. Few such agreements exist among the countries which should be engaged in the frontline in the fight against piracy, due to their proximity to the area largely affected by the crime off the Somali coast.[172] Also some states' laws on extradition are based on an outdated model, relatively limiting the arrangements of extradition agreements.[173] The willingness to fight piracy is further contradicted with the existence of the death penalty in some countries like Tanzania.[174] Therefore, extradition

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[169] See Schedule of the Extradition Act.

[170] Section 4(b) Extradition Act.

[171] Section 6(2) Extradition Act.

[172] Ethiopia, for example, which is a signatory to the Djibouti Code of Conduct has only extradition agreements with Djibouti and Sudan among all signatories of the Djibouti Code of Conduct; a relatively limited range of countries have extradition arrangements with Kenya: *Goredema, Charles*, African Human Security Initiative, African Commitments to Combating Organised Crime and Terrorism: A Review of Eight NEPAD Countries, *available at* www.iss.co.za/pubs/Other/ahsi/Goredema_Botha/pt1chap5.pdf (last visited May 12, 2010).

[173] For example, Kenya's Extradition (Commonwealth Countries) Act (Chapter 77) and the Extradition (Contiguous and Foreign Countries) Act (Chapter 76).

[174] In Tanzania there is a *de facto* ban on death penalty because although death penalty is sanctioned by law, there has not been an execution for more than ten years: Information Please Database, The Death Penalty Worldwide, *available at* www.infoplease.com/ipa/A0777460.html (last visited May 12, 2010).

requests are likely to be denied by the sending state, if the piratical acts under which the extradition is sought attract the death penalty in the receiving state. It is noteworthy that among the 17 states which adopted the Djibouti Code of Conduct, four countries have outlawed the death penalty,[175] four countries officially sanction the death penalty by law but have not practiced it for more than ten years (*de facto* ban)[176] and nine countries permit the death penalty.[177] Tanzania's legal framework on extradition could also be supplemented by other schemes which favorably incorporate a streamlined process for extradition. By virtue of its membership in the Commonwealth, Tanzania could engage other members in the fight against piracy through the London Scheme which binds Commonwealth states.[178]

B. Mutual Assistance in Criminal Matters

Tanzania's legal framework accommodates mutual provision on obtaining assistance in substantial and incidental aspects of piracy. Aspects covered by the framework include evidence, identification of suspects or witnesses, confiscation or forfeiture of property, recovery of pecuniary penalties and provision and service of documents and investigations.[179] However, the required reciprocity associated with the framework is likely to hinder the willingness to repress piracy by judicial enforcement. For example, the willingness of Tanzania to engage in mutual assistance in criminal aspects of piracy with Kenya will be rendered nugatory because there is no mutual assistance legal framework in Kenya.[180]

Lacking such reciprocity, Tanzania should fulfill its obligation to repress piracy through regional arrangements such as the East Africa Police Chiefs Cooperation Organization. The latter provides a broad platform on which police agencies pledge to cooperate in the exchange of crime related information, technical assistance and crime prevention.[181] By virtue of their memberships to the Commonwealth, five among 17 states which adopted the Djibouti Code of Conduct in January 2009 are bound by the well established framework on mutual assistance in criminal matters – the Harare Scheme Relating to Mutual Assistance in Criminal Matters within

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[175] *Id*. The four countries are Djibouti, France, Seychelles and South Africa.

[176] *Id*. The four countries are Kenya, Tanzania, Madagascar and Maldives.

[177] *Id*. The nine countries are Comoros, Egypt, Ethiopia, Jordan, Oman, Saudi Arabia, Somalia, Sudan and Yemen.

[178] Six states which adopted the Djibouti Code of Conduct in January 2009 are members of the Commonwealth. The others are Mozambique, South Africa, Kenya, Maldives and Seychelles.

[179] Section 4(a) to (j) Mutual Assistance in Criminal Matters Act.

[180] See *Goredema, Charles*, *supra* note 172.

[181] *Id*. p. 44.

the Commonwealth.[182] The framework sufficiently accords supplementary assistance in criminal matters among Commonwealth members where other mechanisms are rifled.

C. Hot Pursuit

As an extraditable crime in Tanzania, piracy by law of nations allows any contiguous country to authorize Tanzania's police to enter such country in pursuit of pirates upon satisfaction that there exists or will exist, in such country, reciprocal provision made by or under law.[183] The prescription of piracy by law of nations[184] implies that the authorization of Tanzania's police to pursue may also stem from the commission of piracy in the high seas. Although the law allows exceptions and conditions for the framework, it is *prima facie* evident that it requires reciprocal provision or legitimate promise of enactment by the contiguous country. This infers that the pursuit will be legitimate only in the existence of the reciprocal legislation or an agreement made by or under the legislation and, therefore, excludes Memoranda of Understanding entered between countries which are not derived from a particular legislation. This negates the possibility of Tanzania's police to pursue pirates in territories where there is no legislative machinery to enact reciprocal provisions like Somalia. It remains a challenge, therefore, for the willing states to build the capacity of the Somali Transitional Federal Government to establish stable legislative machinery which accommodate reciprocity in the fight against piracy. Once such legislation is put in place, the capacity of the enabling authorities should also be strengthened, otherwise the whole machinery will be ineffective. To exemplify the need for effective authorities, a pirate who is extradited to Somalia would be discharged if he is not conveyed out of Tanzania within one month after the date of the order of his extradition.[185]

The legal venue that allows pursuit of persons who commit piracy by law of nations by Tanzania's police solely applies in duo basis and does not seem to provide a venue for a third party engagement. Even the exceptions and modifications that may be sought to relax the framework must be founded on such reciprocal provision made by or under the particular legislation in the contiguous country. Therefore, the framework cannot apply in circumstances where the agreement is entered between Tanzania and another state for the benefit of another state(s). The defect is curable under the Chapter VII Security Council Resolutions, like Resolution 1846, which authorizes cooperating states to enter the territorial waters of Somalia for the

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[182] Tanzania, Kenya, South Africa, Maldives and Seychelles.

[183] Section 3 Fugitive Offenders (Pursuit) Act.

[184] See the Schedule of the Extradition Act, which enumerates extradition crimes.

[185] Section 15(1) Extradition Act.

purpose of repressing acts of piracy. However, such Resolutions are only of temporary effect and the dynamics of piracy change with time. It is, therefore, ideal for states whose locations are prone to piracy to enact sustainable reciprocity of legislation, which accommodate bilateral mechanisms to counter piracy. This approach is worth consideration because, as the International Maritime Bureau concedes, the majority of attacks against ships take place within the territorial waters.[186]

D. Tanzania's Police Officers Serving in a Foreign Country

Tanzania's police officers are statutorily allowed to serve in a foreign country.[187] The condition precedent for such service is that the requesting state must prove that there exists or there will exist reciprocal arrangements made by such country in favor of the Government of Tanzania.[188] Such provisions must be made in the law of the requesting country and must confer upon Tanzania's police officers powers and duties of police officers in such country. Moreover, such provisions must enable courts of such country to hear and determine charges and inflict penalties against Tanzania's police officers in their acts which would be offences if they were committed in Tanzania.[189] Like the case of pursuing pirates in the territorial waters of another country, mechanisms under this provision require a stable legislative and judicial system with clear powers to enact laws as well as established courts. This framework cannot be capitalized upon to arrest pirates in failed states like Somalia whose legislature and judiciary do not meet the threshold stipulated in Tanzania's law.

Equally, the framework negates the legality of arrests of pirates by Tanzania's police officers operating on a ship from a country with reciprocal arrangement, if the arrest is made in the territorial waters of a third state which has no reciprocal arrangement with Tanzania. In that case, the act of arrest by Tanzania's police officer(s) will be *ultra vires* because the framework is founded on duo basis. In the event that the arrest of pirate(s) is made in the high seas by Tanzania's police officers onboard a ship from a country with reciprocal arrangement, the prosecution of the pirate(s) involved will depend on the attribution of command of Tanzania's police officer(s). Generally, Tanzania's police officers working outside Tanzania are statutorily required to be under the orders of Tanzania's superior commander

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[186] ICC-IMB Report January – September 2009, *supra* note 11, p. 4.

[187] Section 91(1) and (2) Police Force and Auxiliary Services Act (Chapter 322, Laws of Tanzania) [hereinafter: Police Force and Auxiliary Services Act]. The provisions apply for countries sharing borders with Tanzania; however, the Minister responsible for legal affairs may declare any country to be a neighboring country for the purposes of the Act.

[188] Section 91(1) Police Force and Auxiliary Services Act.

[189] Section 94(a)(c) Police Force and Auxiliary Services Act.

and are subject to the laws of Tanzania as regards policing.[190] In that case the resulting prosecutions and determination of penalty may be held in Tanzania because the effective control of Tanzania's authority over the police officers is well attributable. The prosecution and the determination of penalty will be consistent with the provisions of UNCLOS which confers discretion on courts of the state which carried out the seizure and arrest to decide upon the penalties to be imposed upon arrested pirate(s).[191] However, the law regulating external policing provides the possibility that Tanzania's police officers will be under the control of the superior commander of the country with which Tanzania has entered reciprocal arrangement.[192] Since effective control of these police officers is not attributable to Tanzania in that case, it implies that no consequential prosecution can take place in Tanzania against the arrested pirate(s) in the light of Article 105 of UNCLOS, which in principle requires the state which carried out the seizure or arrest to determine the penalty to be inflicted on such pirate(s).

The laws regulating pursuit of offenders and external policing would apply in the event that the Minister responsible for legal affairs is satisfied that there will be a law in the foreign country which will regulate reciprocal arrangements accordingly.[193] However, both laws do not prescribe the guidelines for such discretionary powers. Therefore, it solely rests on the Minister to determine a matter which is, in its nature, anticipatory. In Tanzania no prosecution is invalidated solely for reason of illegal arrest. However, this might allure constitutional or civil proceedings in cases where the anticipation of the Minister is unreasonable or is exercised arbitrarily. This could happen in cases where there was no reasonable or probable cause to believe that such a reciprocal law would be enacted within a reasonable time and the consequential prosecutions would end in favor of the pirate(s), in which case the whole process would cause serious denial of justice to the arrested pirate(s).

VI. Conclusion

The use of arms on merchant vessels has, in the past, been ruled out as the way of fighting piracy.[194] The use of arms, it was stated, escalates the violence from pirates and increases the risks to crew members.[195] The proposition suggests that

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190 Section 93(1) Police Force and Auxiliary Services Act.

191 Art. 105 UNCLOS.

192 Section 93(1) Police Force and Auxiliary Services Act.

193 See Section 3 Fugitive Offenders (Pursuit) Act and Section 91(1) and (2) Police Force and Auxiliary Services Act.

194 International Association of Independent Tanker Owners (INTERTANKO) statement cited in the ICC-IMB Report January – September 2009, *supra* note 11, p. 41.

195 *Id.*

non-violent measures should prevail in the fight against piracy. Inflicting violence on pirates does not go to the roots of piracy and does not break the chain of incidental crimes from which piracy flourishes. The financiers of piracy and people who launder ransoms obtained from piracy are rarely the ones committing the acts of piracy themselves.[196] Therefore, the fight against piracy should be concentrated on the land and not at sea. Harmonized bodies of laws should be put in place at the national and regional levels which tackle both substantial and incidental aspects of piracy. However, this cannot be achieved if the investigative and judicial systems do not guarantee efficiency and conformity to human rights. As it was observed by then United Nations High Commissioner for Human Rights, Mary Robinson, when law and order has broken down, individuals feel that they can commit atrocious crimes without fear of legal sanction.[197] If the legislative, investigative and judicial machineries permit impunity for principal and accessory piracy, cycles of crime will flourish and create long term socio-economic chaos. Judicial mechanisms in dealing with the dimensions of piracy would remedy the other mechanisms, like payment of ransoms, which are themselves "fuelling the growth of piracy."[198] Full eradication of piracy can be achieved with devotion to increasing the capacity of judicial systems and law enforcement to deter and prevent piratical attacks in light of international law and human rights law. However, political, economic and social stability remains the long term solution to the problem.

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[196] Hanns Seidel Foundation, Regional Strategies, *supra* note 15, p. 3.

[197] *Robinson, Mary*, Genocide, War Crimes, Crimes against Humanity, 23 Fordham International Law Journal 275–278 (1999).

[198] S.C. Res. 1846, para. 2.

Le cadre juridique relatif à la piraterie maritime à Djibouti

Aïd Ahmed Ibrahim

Table de matières

I. La réponse des Nations Unies face au phénomène de la piraterie maritime dans le Golfe d'Aden

A. La situation politique en Somalie: origines de la piraterie maritime

„Qui tient la mer, tient le commerce du monde, tient la richesse du monde: qui tient la richesse du monde tient le monde lui-même."

Sir Walter Raleigh, XVIème siècle[1]

Cette citation montre les enjeux économiques et géostratégiques liés au contrôle de la mer et la nécessité pour les États d'empêcher les pirates qui voudraient usurper leur pouvoir. Elle illustre parfaitement la situation dans la région du Golfe d'Aden où les pirates tentent de tirer profit du commerce maritime.

La Somalie comprend près d'un million de morts depuis 1985, trois millions de déplacés ou de réfugiés à l'intérieur du pays ou dans les pays limitrophes avec un million de personnes immigrées à travers le monde. Cette situation dramatique trouve son origine dans les conflits armés et la situation de famine dans laquelle se trouve ce pays. Les rébellions contre la dictature du Général Mohamed Siad Barré ont débuté en 1985 essentiellement au nord de la Somalie et, se sont accentuées depuis sa chute en 1991. L'exode massif de la population – qualifié de „transhumance d'un peuple nomade reconverti en diaspora mondialisée"[2] – est la conséquence de la volonté de fuir les zones de combat entre les différentes factions ethniques[3] après la chute de Siad Barré du pouvoir. Par ailleurs, selon le coordinateur humanitaire des Nations Unies pour la Somalie, Mark Bowden, environ 45 % de la population somalienne souffre de malnutrition, à cause notamment de la sécheresse et parmi ce pourcentage, on comptabilise également certains enfants vivant dans des „conditions proches de la famine."[4]

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[1] Citation tirée de *Struye de Swielande, Tanguy*, La piraterie maritime: un nouveau rapport de force dans l'Océan indien? Février 2009, *disponible sous:* www.uclouvain.be/cps/ucl/doc/pols/documents/Note-analyse-1-INBEV.pdf (accès le 20 juillet 2010), p. 13.

[2] *Pérouse de Montclos, Marc Antoine*, Interprétations d'un conflit, le cas de la Somalie, Centre d'étude d'Afrique noire, travaux et documents, No. 70, 2009, *disponible sous:* www.cean.sciencespobordeaux.fr/page perso/td70.pdf (accès le 20 juillet 2010), p. 9.

[3] *Id.* p. 14, figure 1, montrant un arbre ethnologique avec les grandes familles claniques des Somalis.

[4] *Besson, Sandra*, La sécheresse aggrave la crise humanitaire en Somalie, 13 mai 2009, *disponible sous:* www.actualites-news-environnement.com/20490-secheressesSomalie.html (accès le 20 juillet 2010).

Nous pouvons alors nous interroger sur les liens qui peuvent exister entre cet état des lieux et la présence de la piraterie maritime dans le Golfe d'Aden et de la Mer Rouge. Le livre remarquable de Laurent Mérer, vice-amiral d'escadre, tente de répondre modestement à cette question dans un roman pour montrer le basculement de la vie de simples pêcheurs vers „le métier lucratif de pirate."[5]

L'absence d'un État central fort en Somalie depuis l'année 1991 a provoqué tous ces déplacements de population et a livré le pays aux chefs de guerre, aux brigandages, aux pillages de toutes sortes et bien-sûr aux activités criminelles liées à la piraterie maritime, qui en est une des conséquences. La Somalie est ainsi qualifié de *failed state*.

En effet, les chefs de guerre pour maintenir leur domination dans leur secteur géographique respectif devaient trouver de la nourriture et à cette occasion commencèrent à se „servir" dans les convois d'aide humanitaire des Nations Unies. Afin d'éviter le détournement de l'aide humanitaire, la France prendra l'initiative d'escorter les navires du Programme Alimentaire Mondial (PAM) jusqu'aux ports de déchargement des aides humanitaires de la Somalie. Cette opération mettra en échec les pirates somaliens. Le Conseil de Sécurité des Nations Unies „emboîtera le pas" à la France, en réaffirmant par la Résolution 1814 du 15 mai 2008, son appui à la contribution par certains États à la protection des convois humanitaires.[6]

Au-delà des attaques des pirates somaliens sur les navires de l'aide alimentaire, il pèse également sur l'économie mondiale une réelle menace aux conséquences néfastes ainsi que sur la sécurité environnementale et la liberté de navigation. Il faut donc étudier ces deux points: quels sont les acteurs de la piraterie maritime et comment fonctionne le système de blanchiment des sommes rançonnées.

B. Les acteurs de la piraterie maritime en Somalie

Le *modus operandi* des pirates est toujours le même, c'est-à-dire l'utilisation de petites embarcations appelées *skiffs*[7] et parfois à partir de „bateaux mères" pour accomplir leurs forfaits criminels. Ces petites embarcations sont également utilisées par les pêcheurs somaliens, au risque parfois d'une confusion entre eux. Pour l'accomplissement de leurs actes criminels, l'utilisation la plus répandue est celle du fusil-mitrailleur *kalachnikov* et d'un lance-roquette. En dépit des embargos sur les armements à destination de la Somalie, se procurer des armes en Somalie, n'est

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[5] *Mérer, Laurent*, Moi, Osmane, Pirate Somalien. Monaco 2009, pp. 28–29 et pp. 46–49. L. Mérer a exercé les plus hautes responsabilités dans la Marine française et a notamment dirigé les opérations navales dans l'Océan Indien pour lutter contre cette criminalité.

[6] Résolution 1814 du Conseil de Sécurité, U.N. Doc. S/RES/1814 (15 mai 2008).

[7] C'est une petite embarcation en bois généralement de trois à cinq mètres de taille légère, dotée d'un moteur hors-bord; ils sont quasiment indétectables par les radars.

pas chose difficile. La mise de départ pour une opération est d'environ 20 000 dollars américains, alors que le revenu (rançon) escompté oscille entre 1,5 et 3 millions d'Euros avec un risque limité.[8]

Il faut avoir à l'esprit que le pirate somalien est contraint d'exercer cette activité criminelle dans certaines situations résultant de l'état d'extrême pauvreté dans laquelle il se trouve, l'appartenance „tribale" – facteur essentiel de la société somalienne – et dont découle une obligation „d'obéissance" dans la mesure où sa vie n'a pas d'importance par rapport au clan pris dans son ensemble.[9]

Ces pirates somaliens peuvent être définis en deux catégories distinctes: les pirates occasionnels et les pirates organisés. Leurs motivations ne sont pas exactement les mêmes. Les pirates occasionnels sont généralement des habitants proches des côtes, totalement démunis et disposant d'un armement léger. Ils s'attaquent aux bateaux de pêche, aux voiliers ou aux yachts de passage au large des côtes somaliennes. L'objectif est de s'emparer des objets de valeur à bord de ces bateaux.

Quant à la deuxième catégorie appartenant à la piraterie organisée,[10] elle utilise le même type d'embarcation que les premiers, mais dispose de matériels perfectionnés et d'armements de guerre. Ils interviennent sur des navires de grandes capacités[11] qu'ils détournent dans leurs zones „de résidence." Très souvent ces opérations de piraterie se déroulent très loin de leurs côtes. L'utilisation de bateaux mère a été démontrée lors de l'arrestation par les forces navales d'*Atalanta* de groupes de pirates présumés.

Les objectifs recherchés, dans cette situation, sont multiples. Dans un premier temps, les pirates ont pour objectif le vol des marchandises du navire et des effets personnels des équipages. Puis très souvent, les équipages deviennent des otages et

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[8] *Gros-Verheyde, Nicolas*, Europolitique, Des pirates très bien organisés, 28 mai 2009, *disponible sous:* www.europolitique.info/dossiers/atalanta/des-pirates-tres-bien-organises-artb237906-74.html (accès le 20 juillet 2010).

[9] *Id.*

[10] La plupart des pirates sont des gens de la mer comme des anciens pêcheurs, voire d'anciens garde-côtes ou d'anciens militaires de l'armée somalienne (certains formés par les programmes internationaux): *Gros-Verheyde, Nicolas*, Europolitique, Des pirates très bien organisés, 28 mai 2009, *disponible sous:* www.europolitique.info/dossiers/atalanta/des-pirates-tres-bien-organises-artb237906-74.html (accès le 20 juillet 2010).

[11] Le 15 novembre 2008, le supertanker saoudien *Sirius Star*, navire long de 330 mètres et d'une valeur de 150 millions de dollars américains dont la cargaison était estimée à 100 millions de dollars américains, a été arraisonné par des pirates somaliens et conduit dans la zone de Harardhere au Puntland (Somalie). Le navire ainsi que son équipage ont été libérés le 9 janvier 2009 contre la remise d'une forte rançon estimée à trois millions de dollars américains: L'Express.fr, Les pirates réclament une rançon pour le Sirius Star, 19 novembre 2008, *disponible sous:* www.lexpress.fr/actualite/monde/afrique/les-pirates-reclament-une-rancon-pour-le-sirius-star_705878.html (accès le 20 juillet 2010) et Libération.fr, Le Sirius Star relâché par les pirates somaliens, 9 janvier 2009, *disponible sous:* www.liberation.fr/monde/0101310730-le-sirius-star-relache-par-les-pirates-somaliens (accès le 20 juillet 2010).

une rançon est demandée aux armateurs des navires contre leur libération et la restitution du navire.

Ces opérations similaires à du grand banditisme nécessitent des complicités, une organisation structurée et des chefs à leurs têtes. Ces chefs ou commanditaires sont les têtes pensantes de la piraterie; ils ne participent pas aux opérations maritimes en mer, mais sont les logisticiens de ces opérations. En général, ils dirigent le réseau local „mafieux“ et livrent les armes aux pirates (souvent contre paiement), qui ont connaissance des zones de navigation des navires convoités, qui procèdent aux négociations avec les armateurs pour la remise des rançons réclamées pour la libération des navires et des équipages retenus en otages et enfin, qui se chargent des opérations de blanchiment des fonds reçus des rançons. Nous sommes alors en présence d'actes appartenant à la criminalité organisée.

C. Le circuit ou l'utilisation des sommes rançonnées payées aux pirates somaliens

Ces activités criminelles très lucratives peuvent rapporter aux pirates, des sommes très importantes. Selon des estimations, seulement durant l'année 2008 entre 18 et 30 millions dollars américains de rançons étaient payée aux pirates somaliens.[12] À chaque intervenant (pirates, commanditaires, intermédiaires pour les négociations, informateurs dans les différents ports internationaux) est attribuée une partie des rançons perçues. Ces sommes entrent dans le circuit financier international (blanchiment d'argent) par l'intermédiaire de différents systèmes plus ou moins légaux et plus ou moins surveillés. Parmi ces systèmes, il existe ceux des *hawalas* et ceux des transferts ou des dépôts de fortes sommes liquides vers les États peu regardant quant à l'origine des fonds.

1. Le système des hawalas

Le *hawala* est un système de transfert de fonds qui existait déjà au 12ème siècle connu sous différentes appellations: le *fei ch'ien* en Chine, le *palada* aux Philippines, le *hundi* en Inde ou au Pakistan, le *hui kuan* à Hongkong et le *phei kwan* en Thaïlande. En comparant le mécanisme de fonctionnement d'une lettre de change, le constat est fait que le système des *hawalas* y apparaît identique. Il est utilisé

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[12] *Middleton, Roger*, Piracy in Somalia, Threatening Global Trade, Feeding Local War, Chatham House, Africa Programme, Briefing Paper, London, octobre 2008, p. 5, *disponible sous:* www.chathamhouse.org.uk/files/12203_1008piracysomalia.pdf (accès 20 juillet 2010). Il est assez difficile de connaître le montant exact des rançons versées. Ne sont généralement recensés que les actes de piraterie commis sur des gros navires. Certains armateurs des navires préférant la discrétion, paient les rançons exigées sans donner d'informations à ce sujet.

principalement dans les pays en développement et n'est pas soumis aux mesures drastiques des institutions financières classiques. Les formalités de création pour un *hawala* sont très réduites.[13]

Les Somaliens utilisent très massivement ce système de transfert de fonds. Les fonds injectés par ce biais sont estimés à 40 % du revenu des ménages somaliens. Il permet aux familles peu aisées, vivant avec moins d'un dollar américain par jour, de recevoir des devises étrangères et, d'acheter la nourriture de base. Sans ces transferts d'argent, la Somalie connaîtrait une crise humanitaire beaucoup plus grave que celle qu'elle connaît aujourd'hui.[14]

En 2006, l'estimation des montants transférés par les *hawalas* était de 65 à 92 millions de dollars américains par mois, par la communauté somalienne présente en Somalie, en Éthiopie et au Kenya. Aujourd'hui, l'augmentation des actes de piraterie, coïncide avec les transferts des fonds, dans le sens d'envoi opposé qui ont aussi explosé à leur tour.[15]

Les capitaux qui transitent par ces canaux font bien sûr l'objet d'une surveillance. La Banque Centrale de Djibouti[16] est chargée de veiller sur les activités des établissements bancaires et financiers – les *hawalas* sont assimilables à des établissements financiers[17] – dans le cadre des dispositions légales en vigueur. Elle dresse une liste desdits établissements autorisés à exercer des activités sur le territoire national.

La Banque Centrale de Djibouti délivre les agréments à l'installation d'un établissement de crédits ou financiers et elle est chargée de contrôler périodiquement leurs états financiers. Ces contrôles peuvent être effectués sur place ou sur pièces, inopinés ou après notification. En cas de survenance d'une faute, sans préjudice des poursuites pénales éventuelles, la Banque Centrale de Djibouti peut retirer l'agrément.

Malgré le contrôle concret que les autorités de Djibouti exercent sur les *hawalas*, ce système de transfert déplaçant de grandes quantités de devises étrangères peut

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[13] *Houssein Ismaïl Mahamoud*, Dossier hawala, L'éveil économique, bimestriel d'information économique de Djibouti, avril/mai 2009, *disponible sous:* www.leveil-economique.com (accès le 20 juillet 2010).

[14] *Id.*

[15] *Id.*

[16] Ces statuts sont fixés par la loi n° 92/AN/00/4ème Loi du 10 juillet 2000. Tous les textes juridiques (Lois, Décrets et Arrêtés) cités en références sont consultables sur le site de la Présidence de la République de Djibouti: www.presidence.dj, rubrique: „Journal Officiel" (accès le 20 juillet 2010).

[17] Art. 8 de la loi n° 93/AN/00/4ème Loi du 10 juillet 2000 dispose: „Sont considérés comme moyens de paiement tous les instruments qui, quel que soit le support ou le procédé technique utilisé, permettent à toute personne de recevoir ou de transférer des fonds". Les *hawalas* entrent dans cette catégorie ainsi définie.

échapper à cette surveillance. En effet, les bureaux des *hawalas* peuvent évoluer très simplement en dehors du cadre légal et être cachés derrières les façades de magasins de détails ou mêmes derrières des institutions religieuses. Leur opacité prive parfois les États en question, de la possibilité de percevoir des impôts et facilite la fuite des capitaux. Mais, contraindre à plus de réglementation les *hawalas* aurait pour effet négatif de les pousser à exister dans la clandestinité pour échapper à l'administration fiscale et, augmenterait à terme, le risque de voir ces fonds financer d'autres activités criminelles.[18] La Banque Centrale de Djibouti a donc opté pour une attitude de prudence à leur égard car elle les surveille sans pour autant leur imposer une réglementation trop contraignante.

2. Les „paradis fiscaux"

De l'avis général, des rançons très importantes sont payées aux pirates somaliens.[19] Aussi, rechercher et poursuivre les circuits financiers des ces fonds perçus par les pirates n'est pas évident. La situation est aggravée si ces fonds sont déposés dans les „paradis fiscaux", comme l'Andorre ou le Liechtenstein.[20]

La Somalie étant qualifiée de *failed state*, il est peu probable que le Gouvernement Somalien Fédéral de Transition puisse passer des accords bilatéraux en vue de l'échange d'information sur les comptes bancaires des ressortissants somaliens dans ces pays. En plus, en raison du secret bancaire, ces „paradis fiscaux" ou plus exactement „paradis judiciaire", ne coopèrent que très peu aux enquêtes des juges étrangers, ce qui favorise l'opacité des circuits financiers utilisés par les sociétés somaliennes qui y sont implantées.

Une plus grande coopération avec l'Office Européen de Lutte Anti-Fraude (OLAF)[21] ainsi qu'avec Interpol[22] et le Groupe d'action financière (GAFI)[23] est

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[18] *Houssein Ismaïl Mahamoud*, Dossier hawala, L'éveil économique, avril/mai 2009, *disponible sous:* www.leveil-economique.com (accès le 20 juillet 2010).

[19] Voir *supra* note 12.

[20] Dans son rapport publié en 2000 l'Organisation de Coopération et de Développement (OCDE) a identifié un certain nombre de juridictions comme paradis fiscaux: OCDE, Liste des paradis fiscaux non coopératifs, *disponible sous:* www.oecd.org/document/57/0,3343,fr_2649_33745_31236089_1_1_1_1,00&&en-USS_01DBC.html (accès le 20 juillet 2010).

[21] Pour plus d'information sur l'Office Européen de Lutte Anti-Fraude (OLAF) voir http://ec.europa.eu/anti_fraud/index_fr.html (accès le 20 juillet 2010).

[22] LeMonde.fr, Interpol favorable au renforcement de l'arsenal législatif contre la piraterie maritime, 29 mai 2009, *disponible sous:* www.lemonde.fr/international/article/2009/05/29/interpol-favorable-au-renforcement-de-l-arsenal-legislatif-contre-la-piraterie-maritime_1199600_3210.html (accès le 20 juillet 2010) citant le secrétaire général d'Interpol, Ronald Noble: „Ces pirates criminels s'organisent de manière à cibler leurs victimes, à les prendre en otages et pratiquent l'extorsion de fonds. Nous devons donc suivre la piste de ces fonds pour frapper les intérêts économiques de ce genre de criminalité organisée."

donc nécessaire. Elle a pour but de rechercher et de poursuivre les circuits financiers des fonds perçus par les pirates somaliens. C'est une synergie de tous les acteurs qui permettra de retrouver le chemin emprunté par l'argent des rançons et d'appréhender les „commanditaires" des actes de piraterie maritime et de vol à main armée au large des côtes somaliennes.

D. Les Résolutions des Nations Unies relatives à la piraterie maritime au large des côtes somaliennes

Face à la recrudescence des actes de piraterie maritime et des vols à main armée commis contre des navires au large des côtes Somaliennes, qui font peser sur l'aide humanitaire pour la Somalie, sur la sécurité des routes maritimes commerciales et sur la navigation internationale, le Conseil de Sécurité saisi, a adopté plusieurs résolutions que l'on peut considérer comme historique.

1. La Résolution 1816 du 2 juin 2008

En juin 2008, le Conseil de Sécurité a adopté en vertu du Chapitre VII[24] de la Charte des Nations Unies la Résolution 1816.[25] Cette Résolution autorise, avec le consentement du Gouvernement Somalien Fédéral de Transition, les États dont les navires de guerre et les aéronefs militaires opèrent en haute mer et au large des côtes somaliennes à entrer dans les eaux territoriales de la Somalie afin de réprimer les actes de piraterie et les vols à main armée en mer et d'utiliser, dans les eaux territoriales de la Somalie, tous moyens nécessaires pour réprimer les actes de piraterie et les vols à main armée. Cette autorisation était limitée à une période de six mois à compter de l'adoption de la Résolution.[26]

Cette Résolution n'est applicable que dans le seul cadre de la Somalie. Le Conseil de Sécurité prend la précaution de préciser „qu'elle ne peut être regardée comme établissant un droit international coutumier."[27] À bien des égards, elle crée

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[23] Le Groupe d'action financière (GAFI) était créé en 1989 lors du sommet du G-7 contre la lutte contre le blanchiment de capitaux et le financement du terrorisme. Cet organisme vise à créer des normes non impératives, qui sont en quelque sorte des lignes de conduite que les gouvernements doivent suivre afin de promouvoir la lutte contre le blanchiment de capitaux. Il s'agit de normes regroupées sous la forme de recommandations. Pour de plus amples informations sur le GAFI voir www.fatf-gafi.org (accès le 20 juillet 2010).

[24] Le Chapitre VII de la Charte des Nations Unies traite des actions en cas de menace contre la paix, de rupture de la paix et d'acte d'agression.

[25] Résolution 1816 du Conseil de Sécurité, U.N. Doc. S/RES/1816 (2 juin 2008).

[26] *Id.* paragraphe 7(a) et (b).

[27] *Id.* paragraphe 9.

une jurisprudence, qui se renouvellera, à ne point douter, dans le futur à d'autres États dans une situation similaire. C'est la „boîte de Pandore" qui est ouverte.

La piraterie est définie selon l'article 101 de la Convention des Nations Unies sur le droit de la mer pour les actes perpétrés en haute mer ainsi que dans la zone économique exclusive. Selon la première phrase de l'article 105 de la Convention des Nations Unies sur le droit de la mer „[t]out Etat peut, en haute mer ou en tout autre lieu relevant de la juridiction d'aucun Etat, saisir un navire ou un aéronef pirate, ou un navire ou aéronef capturé à la suite d'un acte de piraterie et aux mains de pirates, et appréhender les personnes et saisir les biens se trouvant à bord." Il existe donc une compétence universelle de police à l'encontre des actes de piraterie commis en haute mer.

Vis-à-vis des actes perpétrés dans les eaux territoriales, par contre, une telle compétence policière universelle n'existe pas; assurer la sécurité dans cette zone relève plutôt de la compétence de l'État concerné à exercer sa souveraineté territoriale. Or, la Résolution 1816 ainsi que la Résolution 1846[28] dérogent à ce principe en autorisant tous les États à entrer dans les eaux territoriales somaliennes et d'y faire usage de tous les moyens nécessaires (y compris celle de la force) pour réprimer les actes de piraterie et les vols à main armée. Pour atténuer cette „atteinte" à la souveraineté de la Somalie, le Conseil de Sécurité a disposé que le consentement préalable de la Somalie à une telle opération est nécessaire.

2. La Résolution 1846 du 2 décembre 2008

Avec la Résolution 1846 du 2 juin 2008 du Conseil de Sécurité, l'autorisation d'entrer dans les eaux territoriales de la Somalie et de prendre tous moyens nécessaires pour réprimer les actes de piraterie et les vols à main armée était renouvelée pour une période de 12 mois.[29]

Par contraste à la Résolution 1816 faisant référence seulement à la Convention des Nations Unies sur le droit de la mer comme cadre juridique relatif à la lutte contre la piraterie, la Résolution 1846 rappelle l'importance de la Convention de 1988 pour la répression d'actes illicites contre la sécurité de la navigation maritime. Le Conseil de Sécurité demande aux États parties à ladite Convention,[30] „à s'acquitter pleinement des obligations que celle-ci leur impose et à coopérer avec le Secrétaire Général et l'OMI en vue de se donner les moyens judiciaires de poursuivre les personnes soupçonnées d'actes de piraterie et de vol à main armée commis au large des côtes somaliennes".[31]

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[28] Voir *infra* I.D.2.

[29] Résolution 1846 du Conseil de Sécurité, U.N. Doc. S/RES/1846 (2 décembre 2008), paragraphes 10(a) et (b).

[30] La République du Djibouti est partie à cette Convention: voir *supra* note 160.

[31] Résolution 1846 du Conseil de Sécurité, paragraphe 15.

Il faut noter que le Conseil de Sécurité soulignait dans la Résolution 1846, que la paix et la stabilité en Somalie, le renforcement des institutions publiques, le développement économique et social et le respect des droits de l'homme et de l'état de droit sont nécessaires pour créer les conditions d'une éradication totale de la piraterie et des vols à main armée au large des côtes somaliennes.[32]

3. La Résolution 1851 du 16 décembre 2008

Avec la Résolution 1851 du 16 décembre 2008[33] le Conseil de Sécurité a décidé que „pour une période de douze mois à compter de l'adoption de la Résolution 1846 (2008), les États et les organisations régionales qui coopèrent à la lutte contre la piraterie et les vols à main armée au large des côtes somaliennes et concernant lesquels le Gouvernement Somalien Fédéral de Transition aura donné notification au Secrétaire général sont autorisés à prendre toutes mesures nécessaires et appropriées en Somalie aux fins de réprimer ces actes de piraterie et vols à main armée en mer, conformément à la demande du Gouvernement Somalien Fédéral de Transition, étant toutefois entendu que toutes les mesures prises en application du présent paragraphe devront être conformes aux normes applicables du droit international humanitaire et du droit international des droits de l'homme."[34] Dès lors, des mesures anti-pirates par des États tiers sont non seulement autorisées dans les eaux territoriales de la Somalie mais également sur son territoire.

Dans la Résolution 1851, le Conseil de Sécurité des Nations Unies rappelle que le manque de moyens, l'absence de législation interne et les incertitudes au sujet du sort à réserver aux pirates après leur capture, ne peut justifier leur mise en liberté sans les avoir traduits en justice. Le Conseil de Sécurité demande donc aux États parties, de se conformer aux termes de la Convention pour la répression d'actes illicites contre la sécurité de la navigation maritime.[35]

Le Conseil de Sécurité invite aussi tous les États et organisations régionales, à conclure des accords avec les pays disposés à prendre livraison des pirates (comme le Kenya) pour embarquer des agents des services de lutte contre la criminalité de ces pays *(shipriders)*, en particulier au sein de la région, en vue de faciliter la conduite des enquêtes et des poursuites à l'encontre des personnes détenues dans le cadre des opérations anti-pirates.[36] C'est non-seulement la Résolution 1851 du Conseil de Sécurité qui prévoit la possibilité d'embarquer à bord des navires de lutte

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[32] Préambule de la Résolution 1846 du Conseil de Sécurité.

[33] Résolution 1851 du Conseil de Sécurité, U.N. Doc. S/RES/1851 (16 décembre 2008).

[34] *Id.* paragraphe 6.

[35] Préambule de la Résolution 1851 du Conseil de Sécurité.

[36] Résolution 1851 du Conseil de Sécurité, paragraphe 3.

contre la piraterie des officiers des pays de la région, mais aussi le Code de Conduite de Djibouti, dont la République de Djibouti est signataire.[37]

L'État somalien étant défaillant, la communauté internationale se substitue à celui-ci en vue de rétablir la liberté maritime menacée par tous les moyens. Pour répondre aux enjeux majeurs posés par la piraterie, des solutions policières répressives ne constituent qu'un moyen. Une réponse au niveau judiciaire est autant nécessaire que des efforts au niveau de la diplomatie et de la coopération internationale pour une „éradication totale de la piraterie et des vols à main armée au large des côtes somaliennes."[38] Pour une meilleure compréhension du rôle que Djibouti peut y jouer, une connaissance de ses institutions et de son système juridique (II.), de ses structures étatiques chargées du transport maritime et de sa législation en matière de piraterie (III.) ainsi que de ses obligations internationales (IV.) sont nécessaires.

II. Les institutions et le système juridique de la République de Djibouti

A. La Constitution

1. La promulgation de la Constitution

À l'accession à l'indépendance nationale, le 27 juin 1977, le régime juridique de la République de Djibouti était régi par quatre textes de loi et par un acte réglementaire.[39] Djibouti a adopté un régime présidentiel basé sur le système du monopartisme.[40] Le 4 septembre 1992, la République de Djibouti a adopté par voie référendaire une Constitution.[41] Cette loi fondamentale a été promulguée le 15 septembre 1992 pour s'engager dans un processus de démocratisation des institutions et de la

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[37] Art. 7 du Code de Conduite de Djibouti.

[38] Préambule de la Résolution 1846 du Conseil de Sécurité.

[39] La loi n° LR/77-001 du 27 juin 1977 dite loi constitutionnelle n° 1 et loi n° LR/77-002 du 27 juin 1977 dite loi constitutionnelle n° 2, la loi organique n° 1/AN/81 du 10 février 1981 en application des lois constitutionnelles n° 1 et 2, la loi de mobilisation nationale n° 199/AN/81 du 24 octobre 1981 qui consacre officiellement le système de parti unique et l'ordonnance n° 77-008 exécutée comme loi d'État en date du 30 juin 1977 relative à la nécessité d'assurer la continuité du fonctionnement de la République jusqu'à l'instauration de l'ensemble des institutions républicaines.

[40] Le premier Président de la République de Djibouti fut Monsieur Hassan Gouled Aptidon, de 1977 à 1999. Il décéda le 21 novembre 2006 à l'âge officiel de 90 ans.

[41] Avant 1992, c'est la loi organique n° 1/AN/81 du 10 février 1981 qui disposait à l'article 1er que „La Constitution de Djibouti est formée des lois Constitutionnelles n° 77-001 et n° 77-002 du 27 juin 1977 et les lois organiques prises pour leur application". La République de Djibouti s'est dotée d'une véritable Constitution uniquement à la suite du vote référendaire du 4 septembre 1992.

vie politique.[42] Le multipartisme était limité pour une période transitoire de dix années à quatre partis politiques. C'est en 2002 que le multipartisme intégral entrait en vigueur passant ainsi d'un système monopartisme et d'institutions centralisées au pluralisme politique et à la décentralisation des pouvoirs aux régions.

2. Les principes fondamentaux de la Constitution

La nouvelle Constitution est fondée sur les principes de l'État de droit et de la démocratie pluraliste[43] et sa devise est „Unité-Égalité-Paix".[44] L'État de Djibouti est fondée sur le principe fondamental de la séparation des pouvoirs.[45] Les langues officielles de la République sont l'arabe et le français.[46] L'Islam est la religion d'État. En effet, la République de Djibouti proclame en Préambule de sa Constitution, son attachement à la religion musulmane. Pourtant, Djibouti n'est pas une République islamique car la Sharia n'est pas en vigueur mais l'Islam occupe une place prépondérante.[47]

La Constitution assure également les droits et libertés fondamentales de la personne. L'attachement à ces principes intangibles de la personne humaine et de la démocratie, tels qu'ils sont définis par la Déclaration Universelle des Droits de l'Homme et par la Charte Africaine des Droits de l'Homme et des Peuples est d'une part, inscrit en Préambule de la Constitution et d'autre part, la Constitution Djiboutienne consacre les articles 10 à 20 aux droits et aux libertés fondamentales de la personne humaine.

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[42] Ce processus résultait du sommet de La Baule de 1990 des pays africains francophones. Ce sommet conditionnait l'aide au développement de la France vis-à-vis des pays africains à la démocratisation: Sommet Afrique-France, Prime à la démocratisation? 16ème sommet, La Baule, 1990, *disponible sous:* www.diplomatie.gouv.fr/fr/pays-zones-geo_833/afrique_1063/sommets-afrique-france_326/prime-democratisation-16eme-sommet-baule-1990_1578.html (accès le 20 juillet 2010).

[43] Préambule de la Constitution.

[44] Art. 1 de la Constitution.

[45] Art. 7 de la Constitution.

[46] Art. 1 de la Constitution.

[47] Ce propos doit toutefois être nuancé car les dispositions relatives au Code Civil ou au statut personnel et au droit de la famille sont prévues par la loi n° 152/AN/02/4ème Loi du 31 janvier 2002 dite Code de la Famille. Ce Code a été adopté dans le strict respect des préceptes de l'Islam. Le 21 avril 2010, une révision constitutionnelle était promulguée. L'article 1er dispose que „le premier alinéa du Préambule „l'Islam est la Religion de l'État" est déplacé vers l'article premier." Voir loi constitutionnelle n° 92/AN/10/6ème Loi portant révision de la Constitution du 21 avril 2010.

3. La séparation des pouvoirs

a) Le pouvoir exécutif

Le pouvoir exécutif est assuré par le Président de la République qui est également le Chef de l'État et le Chef du Gouvernement.[48] Le Président de la République est élu au suffrage universel direct et au scrutin majoritaire à deux tours pour un mandat de six ans renouvelable une fois.[49] Il détermine et conduit la politique de la nation et dispose du pouvoir réglementaire.[50]

Dans l'exercice de ses fonctions, il est assisté par un Gouvernement, qui est chargé en outre de conseiller le Président de la République. Il leur fixe leurs attributions et met fin à leurs fonctions. Les membres du Gouvernement sont responsables devant le Président de la République.[51]

Le Gouvernement et *a fortiori* le Chef du Gouvernement n'est pas responsable de son programme devant l'Assemblée Nationale, c'est-à-dire que le Gouvernement ne peut-être soumis à un vote de défiance. Inversement, le Président de la République ne dispose pas du pouvoir de dissolution de l'Assemblée Nationale.

b) Le pouvoir législatif

Le Parlement est constitué par une assemblée unique (monocamérale) composé de députés.[52] Les députés sont au nombre de 65. Ils sont élus suffrage universel direct et au scrutin de liste majoritaire à un tour, sans panachage ni vote préférentiel pour un mandat de cinq ans. Ils sont rééligibles sans limitation du nombre de mandats. Sont éligibles tous les citoyens djiboutiens, des deux sexes, jouissant de leurs droits civils et politiques et âgés de vingt trois ans au moins.[53] La loi relative aux élections prévoit comme condition d'éligibilité que l'on ne doit pas disposer d'une

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[48] Art. 21 et 22 de la Constitution.

[49] Art. 23 de la Constitution. Depuis le 21 avril 2010, la loi constitutionnelle n° 92/AN/10/6ème Loi portant révision de la Constitution a modifié en son article 4, les articles 23 et 24 de la Constitution promulguée, le 15 septembre 1992 par: „Tout candidat aux fonctions de Président de la République doit (…) être âgé de quarante ans au moins et de soixante quinze ans au plus (…)" et „Le Président de la République est élu pour cinq ans (…). Il est rééligible dans les conditions fixées à l'article 23."

[50] Art. 30 de la Constitution.

[51] Art. 41 de la Constitution.

[52] Art. 45 de la Constitution. *Idem* notes 47 et 49, la loi constitutionnelle n° 92/AN/10/6ème Loi portant révision de la Constitution a introduit la création d'un Sénat à l'article 15, qui sera institué lorsque toutes les conditions nécessaires à sa création seront réunies. Les dispositions, l'organisation et le fonctionnement du Sénat seront fixés par une loi organique.

[53] Art. 46 de la Constitution.

autre nationalité, mais surtout que le territoire de la République de Djibouti est divisé en circonscriptions électorales.[54]

L'Assemblé Nationale détient le pouvoir législatif.[55] Les matières autres que celles qui sont du domaine de la loi en vertu de la Constitution, ressortissent au pouvoir réglementaire.[56] L'initiative des lois appartient concurremment au Président de la République et aux membres de l'Assemblée Nationale.[57]

c) Le pouvoir judiciaire

Le pouvoir judiciaire est indépendant du pouvoir législatif et du pouvoir exécutif. Il s'exerce par la Cour Suprême et les autres cours et tribunaux.[58]

Le juge n'obéit qu'à la loi et la Constitution consacre l'inamovibilité des magistrats du siège et garantit sa protection contre toute forme de pression de nature à nuire à son libre-arbitre.[59] Le Président de la République est le garant de l'indépendance de la Magistrature. Pour cela, il est assisté par le Conseil Supérieur de la Magistrature qu'il préside.[60]

La Constitution garantit que nul ne peut être arbitrairement détenu.[61] Le pouvoir judiciaire, gardien de la liberté individuelle, assure le respect de ce principe.

B. L'organisation judiciaire en République de Djibouti

1. Les réformes du système judiciaire

Les États Généraux de la Justice, tenus en septembre 2000, avaient posé un sévère diagnostic du système judiciaire de Djibouti. En constatant l'état de dénuement de l'appareil judiciaire, de ses lacunes, de ses difficultés récurrentes, les États Généraux de la Justice avaient émis des recommandations en vue de résoudre tous ces dysfonctionnements recensés qui font obstacle à l'appareil judiciaire et en particulier, à l'État de droit.

Ainsi, une série de réformes ont été réalisées, d'autres sont encore en cours. Elles ont notamment permis de porter des efforts sur le recrutement conséquent de per-

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54 Loi Organique n° 1/AN/92 relative aux élections du 29 octobre 1992.

55 Art. 56 de la Constitution.

56 Art. 58 de la Constitution.

57 Art. 59 de la Constitution.

58 Art. 71 et 72 de la Constitution.

59 Art. 72 de la Constitution.

60 Art. 73 de la Constitution.

61 Art. 74 de la Constitution.

sonnel auprès des juridictions (magistrats et greffiers surtout) entre 2001 et 2009 pour faire face à la constante augmentation des quantums des dossiers dont elles sont saisies. En outre, la loi relative à la Magistrature de février 2001[62] a permis la création d'un véritable statut pour ce corps; auparavant, un chapitre spécifique du Code de la Fonction Publique intégrait le corps des magistrats. Ce statut met en œuvre concrètement les garanties affirmées par la Constitution et, les perspectives de carrière des magistrats indispensables au maintien de leur indépendance. Une autre réforme portait sur le Conseil Supérieur de la Magistrature.[63] La rénovation complète du Palais de Justice avec la création d'une nouvelle salle d'audience pour la Cour d'Appel (portant ainsi le nombre de salle à trois) constitue une autre mesure de réforme. La livraison du nouveau bâtiment a été effective en novembre 2006. Finalement, un statut a était adopté pour les surveillants pénitentiaires.[64] Par ailleurs, d'autres réformes sont en cours et des travaux de réflexions par différentes commissions nationales sont en place dans ce cadre, et devraient aboutir au cours des années 2010 et 2011.

2. Les juridictions

L'organisation du droit et celles des juridictions de la République de Djibouti se subdivisent en quatre sous-ordres juridiques.

a) La justice coutumière formelle

Le droit coutumier traite essentiellement des litiges mineurs en matière civile. Ces juridictions coutumières qui sont implantées dans les chefs lieux des différentes Régions du pays et dans les cinq arrondissements de la capitale sont présidées par les présidents des collectivités territoriales (les Communes). Elles sont compétentes pour connaître des litiges relatifs aux habitations construites en planches et dont la valeur n'excède pas 500 000 Francs Djibouti (environ 2 000 Euros).

Leur importance tend depuis ces dernières années à décroître en raison de plusieurs facteurs, notamment l'aménagement du territoire, la modernisation des infrastructures du pays et l'unification du droit. Cette coutume est alors, de plus en plus mise en œuvre par des personnalités revêtues d'une autorité spirituelle.

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[62] Loi organique n° 9/AN/01/4ème Loi du 18 février 2001 relative à la Magistrature; voir aussi ses décrets d'application: décrets n° 2002-0062/PR/MJAPM et n° 2002-0064/PR/MJAPM respectivement des 2 et 4 mai 2002 concernent les modalités d'échelons et d'avancements de cette catégorie publique ainsi que les avantages et indemnités auxquels ils ont droit.

[63] Loi organique n° 10/AN/01/4ème Loi du 18 février 2001 portant modification de la loi organique n° 3/AN/93/3ème Loi du 7 avril 1993 relative à l'organisation et au fonctionnement du Conseil Supérieur de la Magistrature.

[64] Loi n° 35/AN/09/6ème Loi du 21 février 2009.

b) La justice coutumière informelle

Le règlement des litiges en matière pénale et civile est très souvent encore de nos jours soumis à la décision des *okals*.[65] Ces personnes sont habituellement les chefs de la composante ethnique (clan ou sous clan) à laquelle appartiennent les parties en présence au litige ou il s'agit parfois de chefs de quartiers. Ces „sages" des clans tribaux règlent les litiges en recourant à la conciliation mais ils sont incompétents en matière criminelle.

Cette procédure est non écrite. Toutefois, une plainte devant le Procureur de la République, est toujours possible, et pourra être classée sans suite car il tiendra compte, le plus souvent de la conciliation pastorale intervenue. Ces conseils des sages concourent au maintien de la paix civile et de l'ordre public.

c) La justice de la Sharia

L'application de la loi islamique est la justice de la Sharia. Jadis, cette justice était rendue par les Tribunaux de la Sharia constitués dans chaque arrondissement de la ville de Djibouti et des chefs lieux des Districts.[66] Avec loi du 25 juin 2006,[67] ces Tribunaux de la Sharia ainsi institués étaient supprimés et remplacés par le Tribunal de Statut Personnel de Première Instance avec siège à Djibouti-ville et dont le ressort s'étend à l'ensemble du territoire national. Le Tribunal de la Sharia Central de Djibouti est remplacé par la Chambre d'Appel de Statut Personnel qui est créée au sein de la Cour d'Appel de Djibouti.

Le Tribunal de Statut Personnel de Première Instance est compétent pour statuer sur tous les litiges relatifs au mariage, à la filiation, au divorce, à la garde des enfants, à la pension alimentaire ainsi qu'à toutes les autres affaires relatives au statut personnel. Il est également compétent pour le partage, la liquidation, les dettes et les litiges en droit des successions, ainsi que les litiges portant sur les Mosquées, les biens *wakfs*,[68] les dons, les testaments, les incapacités mentales, les disparus, les internés et la tutelle. Enfin, le Statut de Statut Personnel de Première Instance est compétent pour juger les affaires relatives aux dettes, aux loyers et les affaires civiles et commerciales lorsqu'elles sont relatives aux dites compétences et qu'elles ne dépassent pas le montant de 5 000 000 Francs Djibouti (environ 20 000 Euros).

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[65] Cette appellation d'*okals* est traditionnellement donnée aux sages de la Région sud de Djibouti (Dikhil); les termes de sages ou de *cheick* en arabe sont synonymes.

[66] Les lois portant décentralisation et statuts des Régions n° 174/AN/02/4ème Loi du 7 juillet 2002 et n° 139/AN/06/5ème Loi du 4 février 2006 ainsi que la loi n° 122/AN/05/5ème Loi du 1er novembre 2005 portant sur le statut de la ville de Djibouti ont supprimé et remplacé le découpage des collectivités territoriales communément appelées Districts par le découpage en Région.

[67] Loi n° 8/AN/03/5ème Loi du 25 juin 2006.

[68] Il s'agit des biens religieux dans l'Islam.

La Chambre d'Appel du Statut Personnel statue quant à elle, en formation collégiale de trois magistrats du siège et les décisions sont prises à la majorité. Les arrêts de la Chambre d'Appel du Statut Personnel sont susceptibles de recours devant la Cour Suprême.

Le Ministère Public est représenté près les juridictions de Statut Personnel et il peut agir comme partie principale ou jointe. Les magistrats du Parquet et du Parquet Général prennent toutes réquisitions qu'ils jugent utiles à la promotion du droit et à l'équité. Leur présence est obligatoire en matière d'état des personnes et lorsque l'ordre public est en jeu.

d) La justice „moderne"

Le droit moderne est constitué par l'ensemble des textes législatifs, réglementaires et des instruments internationaux signés et ratifiés par la République de Djibouti. La justice „moderne" a été réorganisée en profondeur. Avant 1994, les instances judiciaires de Djibouti étaient réparties en deux juridictions distinctes: la Cour Judiciaire de Djibouti qui constituait le 1er degré de juridiction et la Cour Suprême. Puis, la loi n° 52/AN/94 du 10 octobre 1994 créait le Tribunal de Première Instance et la Cour d'Appel de Djibouti, scindant ainsi la Cour Judiciaire en deux juridictions distinctes.[69]

La Cour Suprême de Djibouti, qui est constituée d'une seule formation de juge comprenant un président et cinq conseillers, n'a pas été touchée par la réorganisation entreprise. Son organisation et son fonctionnement restent régis par la loi du 10 avril 1979 et les ordonnances qui ont suivi jusqu'en 1984. Cependant, une réforme importante de la Cour Suprême est en cours actuellement. Après la réforme, elle aura seulement un rôle de cassation et ne serait plus juge en droit et en fait. Cette mesure nécessaire résulte d'un manque crucial de magistrats.

Le Tribunal de Première Instance et la Cour d'Appel de Djibouti connaissent exclusivement (sauf exception, à titre d'exemple, des causes relatives au statut personnel) de toutes les affaires civiles, commerciales, pénales et sociales. Pour ce faire, elles sont constituées de chambres spécialisées.

La Cour d'Appel comprend les mêmes chambres spécialisées plus une chambre d'accusation chargée du contrôle des juges d'instruction et des appels relatifs aux ordonnances statuant sur la détention provisoire. La Cour Criminelle, juridiction non permanente de la Cour d'Appel, est compétente pour juger les crimes. Elle est constituée à l'occasion de deux sessions annuelles.

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[69] Le décret n° 95-0027/PR/MJ du 14 février 1995 vient préciser le fonctionnement des nouvelles juridictions. Leurs organisations seront complétées par la loi n° 82/AN/95/3ème Loi du 28 mai 1995.

Le Tribunal de Première Instance statue à juge unique. Les arrêts de la Cour d'Appel sont rendus collégialement par trois magistrats au moins. Le Ministère Public est représenté au Tribunal de Première Instance et à la Cour d'Appel, respectivement par le Procureur de la République et le Procureur Général de la République, le premier étant placé sous l'autorité du dernier.

Enfin, la Cour Suprême est la Cour de Cassation non seulement à l'égard des juridictions „modernes", mais aussi de la juridiction coutumière et sharienne.

3. Le Conseil Constitutionnel

Le Conseil Constitutionnel composé de six membres dont le mandat est non renouvelable[70] est l'organe régulateur du fonctionnement des institutions et de l'activité des pouvoirs publics. Il veille au respect des principes constitutionnels et contrôle la constitutionnalité des lois. Le Conseil Constitutionnel garantit les droits fondamentaux de la personne humaine et les libertés publiques.[71] Ses décisions sont revêtues de l'autorité de la chose jugée. Elles ne sont susceptibles d'aucun recours. Elles s'imposent aux pouvoirs publics, à toute autorité administrative et juridictionnelle ainsi qu'à toute personne physique ou morale.[72]

Les dispositions de la loi concernant les droits fondamentaux reconnus à toute personne par la Constitution peuvent être soumises au Conseil Constitutionnel par voie d'exception à l'occasion d'une instance en cours devant une juridiction. La juridiction saisie doit alors surseoir à statuer et transmettre l'affaire à la Cour Suprême. La Cour Suprême dispose d'un délai d'un mois pour écarter l'exception si celle-ci n'est pas fondée sur un moyen sérieux ou, dans le cas contraire, renvoyer l'affaire devant le Conseil Constitutionnel qui statue dans le délai d'un mois. Une disposition jugée inconstitutionnelle sur le fondement de cet article cesse d'être applicable et ne peut plus être appliquée aux procédures. Le fait que toute personne puisse soulever l'exception d'inconstitutionnalité devant toute juridiction constitue une avancée importante en matière de garantie des droits de l'homme.[73]

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[70] Art. 76 de la Constitution; la disposition règle également comment les membres sont désignés.

[71] Art. 75 de la Constitution.

[72] Art. 81 de la Constitution.

[73] Art. 80 de la Constitution.

C. Droit pénal et procédure pénale

1. Influence de la France et refonte de la législation pénale en 1995

Ancienne colonie française, la législation pénale et l'organisation judiciaire en matière pénale de la République de Djibouti s'inspirent du modèle français. Jusqu'en 1995, c'est l'ancien Code d'Instruction Criminelle français de 1810 qui était appliqué. Malgré de nombreuses modifications, il était devenu très archaïque et devait impérativement être „dépoussiéré" pour tenir compte de la société djiboutienne du 20ème siècle. Au début des années 90, une refonte importante de la législation pénale ainsi que de la procédure pénale a été engagée. Le 16 avril 1995, un nouveau Code Pénal[74] ainsi qu'un nouveau Code de Procédure Pénale[75] sont entrés en vigueur. Face à l'augmentation de la criminalité transnationale, le droit pénal interne doit constamment s'adapter pour en tenir compte et, apporter les réponses répressives adéquates et opportunes.

2. Le Code Pénal

a) Les crimes et les sanctions

Le nouveau Code Pénal de Djibouti définit les crimes et les sanctions respectives. Le Code Pénal est divisé en cinq livres, le premier contenant des dispositions générales, le second concerne les crimes et délits contre la sûreté et l'autorité de l'État, le troisième énonce les crimes et délits contre les personnes, le quatrième est relatif aux crimes et aux délits contre les biens et enfin, le dernier règle les contraventions. Le Code Pénal ne contient pas de dispositions spécifiques sur la piraterie (elles sont essentiellement contenues dans le Code Maritime).[76] Les infractions se retrouvant à l'article 385 et suivants du Code Pénal,[77] traitent de la prise de contrôle par violence d'un navire et peuvent ainsi couvrir les actes commis par les pirates somaliens.

L'avancée la plus importante du nouveau Code Pénal a été la suppression de la peine de mort.[78] Bien que cette condamnation n'ait jamais été prononcée par une juridiction nationale, elle demeurait toutefois inscrite dans notre droit pénal interne issu du Code d'Instruction Criminelle français. Cette volonté de la République de

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[74] Loi n° 59/AN/94 du 5 janvier 1995 dite Code Pénal.

[75] Loi n° 60/AN/94 du 5 janvier 1995 dite Code de Procédure Pénale.

[76] Voir *infra* III.B.1.a.

[77] Voir *infra* III.B.1.b.

[78] La révision constitutionnelle intervenue le 21 avril 2010 sous la référence n° 92/AN/10/6ème Loi portant révision de la Constitution du 21 avril 2010, a renforcé cet attachement en inscrivant à l'article 3 la modification de l'article 10 de la Constitution du 15 septembre 1992, par l'inscription, à l'alinéa 3 que "[n]ul ne peut être condamné à la peine de mort."

Djibouti de modernisation adaptée aux réalités et aux comportements de sa société, se retrouve dans l'échelle et le régime des peines applicables aux personnes physiques, allant de la réclusion criminelle à perpétuité à la réclusion criminelle à temps de cinq ans au moins et, pour les peines correctionnelles, du travail d'intérêt général à la peine d'emprisonnement de dix années au plus.

b) Champ d'application du droit pénal dans l'espace et compétence de juridiction

Au niveau du champ d'application du droit pénal djiboutien dans l'espace et de la compétence des tribunaux pénaux djiboutiens de statuer sur une affaire pénale, il faut distinguer deux situations: les infractions commises ou réputées commises sur le territoire de la République et celles qui sont commises hors du territoire. C'est le Chapitre III du Code Pénal qui consacre les modalités et les conditions d'application de la loi pénale dans ces deux cas de figure, sous réserve des lois particulières et des traités internationaux.

En vertu du principe de territorialité, le territoire djiboutien comprend aussi les espaces maritime et aérien.[79] L'infraction est réputée commise sur le territoire de Djibouti dès lors qu'un acte caractérisant un de ses éléments constitutifs a été accompli sur ce territoire.[80] La compétence des juridictions du pays l'emporte, dès lors qu'une infraction est commise à bord d'un navire battant pavillon de Djibouti ou à l'encontre de tels navires, en quelque lieu qu'ils se trouvent.[81]

Les infractions pénales commises à l'étranger par des Djiboutiens, tant en matière de crime que de délit, emportent la compétence des juridictions nationales.[82] Elle est aussi applicable si l'infraction est réalisée par un étranger à l'étranger, lorsque la victime est djiboutienne.[83] Dans ces deux cas, alors la poursuite ne peut être exercée, qu'à la requête du Ministère Public, précédée d'une plainte des personnes dûment autorisées à cet égard.[84] La loi djiboutienne s'applique à tout crime ou délit qualifié comme atteinte à la sûreté de l'État et à ses intérêts fondamentaux.[85]

Le droit djiboutien ne connait pas la compétence universelle de poursuivre les auteurs de certains crimes, quel que soit le lieu où le crime a été commis, et sans égard à la nationalité des auteurs ou des victimes. Djibouti ne dispose pas des moyens humains, matériels et financiers nécessaires pour connaître des instances

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79 Art. 10 du Code Pénal.
80 Art. 11 du Code Pénal.
81 Art. 12 du Code Pénal.
82 Art. 15 du Code Pénal.
83 Art. 16 du Code Pénal.
84 Art. 17 du Code Pénal.
85 Art. 19 du Code Pénal.

ouvertes sur le fondement de la compétence universelle. Par contre, le droit interne autorise le renvoi des plaintes devant les tribunaux d'un autre pays sur la base de conventions d'extraditions.

Les décisions rendues par les juridictions étrangères, à l'encontre de ressortissants djiboutiens en matière de crime et de délit, ont l'autorité de la chose jugée. L'article 18 du Code Pénal prévoit qu' „aucune poursuite ne peut être exercée contre une personne justifiant qu'elle a été jugée définitivement à l'étranger pour les mêmes faits et, en cas de condamnation, que la peine a été subie ou prescrite."[86]

3. Le Code de Procédure Pénale

La procédure pénale comprend les règles et les formes qui doivent être respectées pour la recherche, la constatation et la poursuite des infractions relevées. Elle détermine par ailleurs, l'autorité et les effets des décisions répressives rendues et les voies de recours susceptibles d'être exercées contre ces décisions. La procédure pénale djiboutienne est consacrée dans le Code de Procédure Pénale de 1995.[87]

La procédure pénale djiboutienne est inquisitoire, secrète et écrite essentiellement, mais intègre quelques particularités de la procédure accusatoire. Ainsi, les parties, autre que le Ministère Public, peuvent introduire une instance devant le juge d'instruction avec constitution de partie civile.[88] L'action publique peut enfin être mise en mouvement par la poursuite d'une personne par voie de citation directe devant le Tribunal Correctionnel ou de simple police.[89] Le procès est aussi contradictoire, les parties, par écrit surtout, soulèvent leurs moyens de défense; *in fine* le juge tranchera. Le secret de l'instruction demeure le fondement juridique du procès pénal, au nom de la présomption d'innocence[90] et de l'efficacité de l'instruction.

La loi pénale djiboutienne étant d'interprétation stricte,[91] l'action publique s'éteint lorsque la personne en cause est acquittée ou relaxée (bien entendu également en cas de décès de la personne poursuivie), c'est-à-dire, qu'elle ne peut être poursuivie à raison des mêmes faits, même sous une qualification différente. Cette règle s'applique tant pour les infractions correctionnelles que criminelles sans distinctions. Il n'existe pas de jurisprudence en la matière, mais l'application du principe *ne bis in idem* semble évidente pour les juridictions djiboutiennes.

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[86] L'art. 19 du Code Pénal prévoit une exception: le principe ne s'applique pas aux infractions commises hors du territoire de la République pour les cas d'atteintes à la sûreté de l'État, même si elles ont déjà été poursuivies et jugées à l'étranger.

[87] Loi n° 60/AN/94 du 5 janvier 1995 dite Code de Procédure Pénale.

[88] Art. 78 du Code de Procédure Pénale.

[89] Art. 83 et 239 du Code de Procédure Pénale.

[90] Art. 10 de la Constitution.

[91] Art. 4 du Code Pénal.

III. Structures étatiques et législation djiboutienne en matière de piraterie maritime

A. Structures étatiques chargées des transports maritimes à Djibouti

1. Au plan ministériel

Jusqu'en octobre 1987, le Premier Ministre était chargé de la tutelle du Port Autonome International de Djibouti (PAID) et des affaires maritimes. En 1987, le Conseil National de la Mer était institué, sous la Présidence du Premier Ministre.[92] Ce Conseil était chargé de définir les orientations gouvernementales dans tous les domaines de l'activité maritime, notamment en matière de mise en valeur des ressources, de développement du transport maritime sous pavillon national, de promotion des métiers liés à la mer, d'aménagement et d'utilisation de l'espace maritime et du littoral, de la sécurité des activités maritimes et de la protection du milieu marin.

De 1987 jusqu'en octobre 2001, la compétence ministérielle des affaires maritimes a été conférée au Ministre du Port et des Affaires Maritimes car le secteur tertiaire de l'activité du port de Djibouti prenait une place prépondérante dans l'économie du pays (depuis l'indépendance nationale, les ressources financières tirées de l'exploitation du port sont les plus importantes pour la jeune République). La Direction des Affaires Maritimes conservait, quant à elle, toutes ses prérogatives, mais était dorénavant placée sous l'autorité du Ministre du Port.

Depuis, le 1er octobre 2001, la loi portant organisation de l'administration du Ministère de l'Agriculture, de l'Élevage et de la Mer, chargé des Ressources Hydrauliques attribue au Ministre de l'Agriculture la compétence du secteur des affaires maritimes.[93] L'autorité Ministérielle du Port Autonome International de Djibouti est exercée alors par le Ministre des Transports et de l'Équipement remplaçant le Ministère du Port et des Affaires Maritimes.

Enfin, en 2003 la loi portant sur l'organisation du Ministère de l'Équipement et des Transports confère à ce ministère l'autorité sur la direction des affaires maritimes ainsi que la tutelle du Port Autonome International de Djibouti.[94]

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[92] Décret n° 87-052/PR/PM du 5 juillet 1987.

[93] Loi n° 142/AN/01/4ème Loi portant organisation de l'administration du Ministère de l'Agriculture, de l'Élevage et de la Mer, chargé des Ressources Hydrauliques du 1er octobre 2001.

[94] Loi n° 5/AN/ 03/5ème Loi portant organisation du Ministère de l'Équipement et des Transports et fixant leurs attributions; l'art. 8 énonce les départements de l'administration centrale de ce ministère dont bien sûr, la Direction des Affaires Maritimes.

2. Au plan de la direction civile

Par décret n° 82-044/PR/PORT du 8 juin 1982 a été crée le Service des Affaires Maritimes en République de Djibouti. Sa compétence s'étend à toutes questions se rapportant à la gestion et au statut de la navigation maritime des navires et des marins. Il participe au contrôle de l'exploitation du domaine public maritime. Les matières relevant de sa compétence sont celles précisées par la loi portant sur le Code Maritime de 1982.[95] Ce service est placé sous la tutelle du Ministère du Port et des Affaires Maritimes.

Puis, le 10 février 1991 par décret n° 91-018/PR/MPAM, il était créé la Direction des Affaires Maritimes au sein du Ministère du Port et des Affaires Maritimes. Cette direction, directement sous l'autorité du Ministre du Port, avait en charge de traiter toutes les questions relatives au droit de la mer dans les eaux nationales et internationales, de la prévention et de la répression de toutes les infractions à la législation nationale et internationale ainsi que de la protection des eaux territoriales et de leurs rivages. Cette Direction des Affaires Maritime est établie en lieu et place du Service des Affaires Maritimes.[96]

Enfin, le décret n° 2006-0202/PR/MET du 10 août 2006, confie à la Direction des Affaires Maritimes, en sus de ses précédentes attributions, la gestion et l'exploitation de tout navire d'État destiné aux transports des passagers et des marchandises dans la limite des eaux territoriales.

3. Au plan de la direction militaire

C'est par décret n° 80-126/PR du 30 octobre 1980 que la République de Djibouti créait la Prévôté Maritime composée de personnels militaires de la Gendarmerie Nationale,[97] constituée d'une brigade du port et d'une brigade maritime. Cet organe a pour compétence, l'exercice de la Police Judiciaire,[98] le contrôle des navires et des boutres étrangers et la surveillance de la zone maritime portuaire.

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[95] Cf. *infra* III.B.1.a. concernant le Code Maritime.

[96] Art. 5 du décret n° 91-018/PR/MPAM du 10 février 1991. Le 2 novembre 1994, le décret n° 94-0146/PR apporte quelques modifications au décret précédent de 1991 pour compléter les compétences de cette Direction des Affaires Maritimes.

[97] La Gendarmerie Nationale a été créée par le décret n° 79-040/PR/DEF du 10 mai 1979. Ce corps a pour mission, entre autres, de correspondre pour les missions de Police Judiciaire, administrative et participe au maintien de l'ordre, directement avec les Ministères de la Justice et de l'Intérieur.

[98] Cf. *infra* III.C.1. et III.C.2. concernant l'exercice de la qualité d'officier de Police Judiciaire et III.C.3.b. concernant la garde-à-vue.

Par la suite, le décret n° 85-009/PRE/DEF du 8 janvier 1985 a transformé la Prévôté Maritime en Gendarmerie Maritime et le décret n° 2009-039/PRE du 19 février 2009, a créé l'unité de Gardes-côtes qui remplace la Gendarmerie Maritime.[99]

Enfin, en vertu de ses obligations édictées à l'article 8 du Code de Conduite de Djibouti,[100] la République de Djibouti a désigné comme *national focal point* le sous-directeur des relations bilatérales du Ministère des Affaires Étrangères et de la Coopération Internationale. Il s'agit d'un interlocuteur privilégié dans la lutte contre la piraterie maritime et les vols à main armée réalisés au large des côtes somaliennes.

B. La législation pénale en matière de piraterie en République de Djibouti

1. Le crime couvrant le phénomène de la piraterie maritime

En matière de répression pénale du phénomène de la piraterie, tant le Code Pénal que le Code Maritime contiennent des dispositions portant sur la piraterie maritime.

a) Dispositions du Code Maritime

L'article 208 du Code Maritime de Djibouti[101] définit les personnes susceptibles d'être poursuivies et jugées comme pirates:

Art. 208 Code Maritime

1 Tout individu faisant partie de l'équipage d'un navire battant pavillon djiboutien, lequel commettrait à main armée des actes de dépravation ou de violence, soit envers des navires djiboutiens ou des navires d'une puissance avec laquelle la République de Djibouti ne serait pas en état de guerre, soit envers les équipages ou chargement de ces navires;

2 Tout individu faisant partie de l'équipage d'un navire étranger lequel hors de l'état de guerre et sans être pourvu de lettre de marque ou de commission régulière, commettrait les actes visés à l'alinéa précédent envers les navires djiboutiens, leurs équipages ou chargements;

3 Tout individu faisant partie de l'équipage d'un navire de la République de Djibouti qui tenterait de s'emparer dudit navire par fraude ou violence envers le capitaine.

L'alinéa premier de cette définition de la piraterie par le Code Maritime concerne les actes perpétrés par des individus faisant partie de l'équipage d'un navire battant pavillon djiboutien. Dans le contexte de la piraterie somalienne, cet alinéa n'est

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[99] Cf. *infra* III.C.1. concernant les Gardes-côtes.

[100] Cf. *infra* IV.B.1. concernant le Code de Conduite de Djibouti.

[101] Loi n° 212/AN/82 du 18 janvier 1982 portant Code des Affaires Maritimes.

donc guère pertinent. Le deuxième alinéa concerne les actes de piraterie commis par des individus faisant partie de l'équipage d'un navire étranger (par exemple un bateau somalien). Alors que l'alinéa premier prévoit comme victime de la piraterie des personnes ou biens de la République de Djibouti et de toute puissance étrangère avec laquelle la République de Djibouti n'est pas en état de guerre, l'alinéa 2 ne vise que les actes commis à l'encontre des navires djiboutiens, leurs équipages ou leurs chargements; et par conséquent un lien de la victime avec Djibouti est nécessaire.

L'article 208 du Code Maritime de Djibouti définit seulement les personnes susceptibles d'être poursuivies et condamnées en tant que pirates. La définition ne couvre pas l'incitation, la planification et le soutien à des actes de piraterie depuis un navire capturé à la suite d'un acte de piraterie et aux mains de pirates (communément appelé „navire mère"). Les actes commis au large des eaux territoriales somaliennes, le sont régulièrement à l'aide du „navire mère". Cette lacune devra être comblée en droit interne.

À la lecture de la définition de la piraterie donnée par l'article 101 de la Convention des Nations Unies sur le droit de la mer, les actes de piraterie reposent tout d'abord sur l'accomplissement d'un acte illicite de violence ou de détention ou de déprédation commis par l'équipage ou des passagers d'un navire privé ou d'un aéronef agissant à des fins privées. De plus, les actes doivent être perpétrés à l'encontre du navire en tant que tel, des personnes physiques ou des biens. Enfin, ces faits doivent se dérouler en haute mer ou dans un espace maritime ne relevant de la juridiction d'aucun État. Pour Djibouti, la piraterie, comme explicitée ci-dessus, est bien un acte de violence et de déprédation commis à main armée envers les équipages ou le chargement des navires objets desdits actes. Seules les notions de „commis par un navire privé agissant à des fins privées" sont absentes de la législation djiboutienne.

Les personnes reconnues coupables du crime de piraterie sont passibles des travaux forcés ou de la réclusion.[102]

b) Dispositions du Code Pénal

Au niveau du Code Pénal, les articles 385 à 387 relatifs au détournement d'aéronef, de navire ou de tout autre moyen de transport couvrent les actes commis par les pirates somaliens, notamment s'ils prennent le contrôle d'un navire par violence ou menace de violence. Les articles 385 à 387 du Code Pénal s'appliquent indépendamment du fait que les actes aient été commis en haute mer ou en mer territoriale.

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[102] Art. 209 du Code Maritime.

Art. 385 Code Pénal

Le fait de s'emparer ou de prendre le contrôle par violence ou menace de violence d'un aéronef, d'un navire ou de tout autre moyen de transport à bord desquels des personnes ont pris place est puni de vingt ans de réclusion criminelle.

Art. 386 Code Pénal

L'infraction définie à l'article 385 emporte la peine de la réclusion criminelle à perpétuité lorsqu'elle est accompagnée de tortures ou d'actes de barbarie ou s'il s'en est résulté la mort d'une ou de plusieurs personnes.

Le *modus operandi* des pirates est de prendre les équipages de navire en otages (au cours de la seule année 2009 plus que 860 personnes étaient prises en otages),[103] et de demander une rançon aux armateurs des navires contre leur libération et la restitution du navire.[104] Les dispositions législatives relatives à l'enlèvement et la séquestration[105] ainsi que celles relatives à l'extorsion et le chantage[106] seront potentiellement applicables aux actes des pirates. De même, les sanctions pénales portant sur le vol pourront couvrir les actes des pirates.[107]

Bien évidemment, la tentative de crime est punissable. Elle est constituée dès lors qu'elle s'est manifestée par un commencement d'exécution et qu'elle n'a été suspendue ou n'a manqué son effet qu'en raison de circonstances indépendantes de la volonté de son auteur.[108]

2. Champ d'application du droit pénal dans l'espace et la compétence pour juger

Comme nous l'avons vu précédemment,[109] la loi pénale de Djibouti est applicable en vertu du principe de territorialité,[110] du principe de pavillon,[111] du principe de la personnalité active[112] et passive,[113] et du principe de compétence réelle.[114] Si un acte de piraterie est, par exemple, commis dans les eaux territoriales de la République de Djibouti ou dans la haute mer contre un navire battant pavillon djiboutien

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[103] International Chamber of Commerce – International Maritime Bureau, Piracy and Armed Robbery against Ships, Annual Report 1 January – 31 December 2009, p. 25.

[104] Voir *supra* I.C.

[105] Art. 381 à 384 du Code Pénal.

[106] Art. 499 à 508 du Code Pénal.

[107] Art. 485 à 498 du Code Pénal.

[108] Art. 24 du Code Pénal.

[109] Voir *supra* II.C.2.b.

[110] Art. 10 et 11 du Code Pénal.

[111] Art. 12 et 13 du Code Pénal.

[112] Art. 15 du Code Pénal.

[113] Art. 16 du Code Pénal.

[114] Art. 19 du Code Pénal.

ou contre un ressortissant djiboutien, le droit pénal de Djibouti serait alors applicable. Sans un tel lien, les tribunaux djiboutiens ne pourraient exercer leur compétence.

En matière de piraterie, le droit maritime international énonce le principe de compétence universelle. Dès lors, tout État a le droit de juger des pirates devant ses juridictions nationales. Pourtant, Djibouti ne fait pas usage de cette „permission" offerte par le droit international coutumier et son droit pénal ne prévoit pas la compétence universelle. Toutefois, le droit interne autorise le renvoi des plaintes devant les tribunaux d'un autre pays sur la base de conventions d'extraditions. Il faut noter que ni la Convention des Nations Unies sur le droit de la mer ni le droit coutumier international ne fait obligation aux États de juger des personnes soupçonnées d'avoir commis des actes de piraterie.

C. La procédure suivie en cas d'infractions à la législation maritime et les autorités compétentes

Le Code Maritime de Djibouti définit la procédure et les autorités compétentes en matière de délits et de crimes maritimes.[115]

Art. 211 Code Maritime

Les crimes et délits prévus et réprimés par les dispositions des sections 1 à 5 du présent chapitre, sont recherchés et constatés soit sur plainte de toute personne intéressée, soit d'office:

1° Par les capitaines des navires à bord desquels ils ont été commis;

2° Par les représentants qualifiés de l'autorité maritime;[116]

3° Par les officiers de Police Judiciaire;

4° Par les officiers et les sous-officiers commandant les navires ou embarcations de la République de Djibouti, les gendarmes, les officiers et maîtres de port, les agents des Douanes et les autres fonctionnaires spécialement habilités à cet effet.[117]

Les articles 212 et 213 du Code Maritime relatifs aux procès-verbaux établis par les autorités dûment habilitées, font foi jusqu'à preuve du contraire. Cependant, l'article 214 du Code Maritime prévoit que „l'autorité maritime (…) complète l'enquête effectuée par le capitaine ou procède dès qu'elle a connaissance de

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[115] Section VI, Chapitre 3, Titre II du Code Maritime.

[116] L'exercice de l'autorité maritime ainsi que l'organisation des affaires maritimes ont connu plusieurs modifications: voir III.A.

[117] Il faut d'une part en exclure les enquêtes et les poursuites en matière judiciaire car seuls les officiers de Police Judiciaire et certains magistrats sont habilités à le faire et d'autre part considérer seulement une autorisation pour les fautes contre la discipline définie aux articles 150 à 168 du Code Maritime.

l'infraction à une enquête préliminaire.[118] Elle saisit ensuite le Procureur de la République[119] sauf si elle estime que les faits ne constituent qu'une faute de discipline."

1. Les Gardes-côtes exerçant la fonction de Police Judiciaire maritime

La Police Judiciaire est chargée de constater les infractions à la loi, d'en rassembler les preuves et d'en rechercher les auteurs tant qu'une information judiciaire n'est pas ouverte.

Tout officier de Police Judiciaire qui est avisé d'un crime ou d'un délit flagrant se transporte sur les lieux après avoir avisé le Procureur de la République.[120] Il veille à la conservation des indices susceptibles de disparaître et de tout ce qui peut servir à la manifestation de la vérité. Il saisit les armes et tout ce qui a servi à commettre le crime ou le délit ou qui était destiné à le commettre, ainsi que tout ce qui paraît en avoir été le produit. Il est interdit à toute personne non habilitée (c'est-à-dire en l'absence d'un officier de Police Judiciaire) de modifier l'état des lieux et d'y effectuer des prélèvements quelconques avant la fin des opérations de l'enquête judiciaire.

Les officiers de Police Judiciaire ont compétence dans les limites territoriales dans lesquelles ils exercent leurs fonctions habituelles. En ce qui concerne les crimes et les délits constatés dans le milieu maritime, notamment la piraterie, ce sont les officiers et agents de Police Judiciaire des Gardes-côtes qui sont compétent.[121] Il s'agit d'une brigade maritime spécialisée dans l'investigation dans le milieu maritime.[122] Les officiers et agents de Police Judiciaire des Gardes-côtes ont compétence judiciaire en ce qui concerne les crimes et délits relevés dans le milieu maritime. Ils sont chargés de rechercher et de constater, y compris à bord des navires qu'ils sont habilités à visiter, les crimes et délits prévus et réprimés conformément aux termes du Code Maritime qui définit la piraterie dans son article 208. En cas de constatation d'une infraction, un procès-verbal qui fait foi jusqu'à preuve du contraire sera établi et transmis au Procureur de la République et à l'Autorité Mari-

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[118] Il faut la distinguer de l'enquête préliminaire définie aux articles 61 à 63 du Code de Procédure Pénale en matière d'infractions pénales.

[119] L'article 37 du Code de Procédure Pénale dispose que „Le Procureur République reçoit les plaintes et les dénonciations et apprécie les suites à leur donner. (…) Toute autorité constituée, tout officier public ou fonctionnaire qui, dans l'exercice de ses fonctions, acquiert la connaissance d'un crime ou d'un délit est tenu de lui en donner avis sans délai et de lui transmettre tous les renseignements, procès-verbaux et actes qui y sont relatifs (…)."

[120] Art. 47 du Code de Procédure Pénale.

[121] Les Gardes-côtes étaient créés par le décret n° 2009-039/PR portant création d'unité des Gardes-côtes du 19 février 2009; selon l'art. 9, l'unité des Gardes-côtes a comme mission principale la prévention et la lutte contre la piraterie.

[122] Art. 3 et 6 du décret n° 2009-039.

time par les officiers et agents de Police Judiciaire des Gardes-côtes.[123] Les Gardes-côtes sont sous la direction du Procureur de la République.[124] Ces agents de l'État sont tenus de se conformer aux dispositions du Code Pénal et du Code de Procédure Pénale.[125]

2. Shipriders prévus par la Résolution 1851 du Conseil de Sécurité

Le Conseil de Sécurité invite dans sa Résolution tous les États à conclure des accords avec les pays disposés à prendre livraison des pirates pour embarquer des agents des services de lutte contre la criminalité de ces pays *(shipriders)*.[126] Le Code de Conduite de Djibouti contient une disposition similaire.[127] Il reste cependant à définir la nature de l'intervention de ces officiers (ou *shipriders*), leurs prérogatives et leurs limites.

Les seuls officiers que la République de Djibouti peut envoyer à bord des navires de guerre en intervention contre la piraterie dans le Golfe d'Aden et la Mer Rouge, ne peuvent être que des officiers de Police Judiciaire. En effet, le Code de Procédure Pénale de Djibouti, confère à la seule Police Judiciaire la compétence pour constater les infractions à la loi, d'en rassembler les preuves et d'en chercher les auteurs tant qu'une information n'est pas ouverte.[128] Lorsqu'une information est ouverte par le juge d'instruction,[129] la Police Judiciaire exécute les délégations des juridictions d'instruction et défère à leurs réquisitions.[130]

La Police Judiciaire comprend les officiers de Police Judiciaire, les agents de Police Judiciaire et les fonctionnaires auxquels la loi attribue certaines fonctions de Police Judiciaire.[131] Avant de pouvoir exercer les fonctions d'officier de Police Judiciaire, certaines conditions d'accès doivent être remplies.[132]

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[123] Art. 10 du décret n° 2009-039.

[124] Art. 6 du décret n° 2009-039.

[125] Art. 6 du décret n° 2009-039.

[126] Résolution 1851 du Conseil de Sécurité, paragraphe 3; voir I.D.3.

[127] Art. 7 du Code de Conduite de Djibouti.

[128] Art. 13 du Code de Procédure Pénale.

[129] Art. 72 et suivants du Code de Procédure Pénale.

[130] Art. 13 du Code de Procédure Pénale.

[131] Art. 17 du Code de Procédure Pénale.

[132] Il s'agit presque des mêmes conditions requises pour les personnels issus des rangs de la Police Nationale ainsi que pour ceux du corps de la Gendarmerie Nationale. Elles sont explicitées par le décret n° 95-/PR/MI du 7 novembre 1995 (ce décret fixe les modalités d'exercice de l'examen d'officier de Police Judiciaire de la Force Nationale de Police et la composition de la commission d'examen) et par l'arrêté n° 2004-0214/PR/DEF du 3 avril 2004 (cet arrêté fixe les modalités de l'examen technique d'officier de Police Judiciaire de la Gendarmerie Nationale).

Les officiers et les agents de la Police Judiciaire sont placés sous l'autorité du Procureur de la République. À cet égard, le Procureur de la République dirige et coordonne leurs actions.[133] Ils sont tous, par ailleurs, placés sous la surveillance et le contrôle du Procureur Général de la République.[134]

En cas de négligence, le Procureur Général de la République peut adresser aux membres de la Police Judiciaire un avertissement. En cas de faute grave, il saisit les autorités administratives compétentes aux fins des poursuites disciplinaires. Dans cette situation, alors il peut prononcer pour une durée n'excédant pas deux ans, la suspension de l'habilitation à exercer les attributions attachées à la qualité d'officier de Police Judiciaire, par décision prise soit d'office soit sur proposition du chef de service.[135]

Ces fonctionnaires et militaires[136] ne peuvent exercer effectivement les attributions attachées à leur qualité ni se prévaloir de cette qualité uniquement dans la mesure où ils sont affectés à un emploi comportant cet exercice et en vertu d'une décision du Procureur Général les y habilitant personnellement.[137] Le rôle du Procureur Général est donc assez important et s'explique principalement par rapport aux lourdes responsabilités confiées aux officiers de Police Judiciaire, en matière de recherche de la vérité lors de la commission d'une infraction criminelle par exemple, dans la sauvegarde des éléments de preuve et surtout dans le respect des droits de la défense.

3. Privation de liberté dans le contexte maritime

a) Article 213 du Code Maritime: base légale insuffisante

La Constitution de la République de Djibouti garantit à la personne humaine qui est sacrée, qu'elle ne peut être poursuivie, arrêtée, inculpée ou condamnée qu'en vertu d'une loi promulguée antérieurement aux faits qui lui sont reprochés.[138] Or, un cadre légal suffisamment clair et précis est absent en ce qui concerne la privation de liberté à bord d'un navire.

Il n'existe aucune base légale autorisant une privation de liberté à bord d'un navire dans le cadre d'une procédure de flagrance[139] à l'exception de l'article 213 du Code Maritime de Djibouti. L'article 213 du Code Maritime dispose „qu'en cas de

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133 Art. 14 du Code de Procédure Pénale.

134 Art. 15 du Code de Procédure Pénale.

135 *Id.*

136 L'institution de la Gendarmerie Nationale est soumise au statut militaire.

137 Art. 19 du Code de Procédure Pénale.

138 Art. 10 de la Constitution.

139 Le délit flagrant est défini aux articles 45 et 46 du Code de Procédure Pénale.

nécessité, le capitaine peut faire arrêter préventivement l'inculpé. L'emprisonnement préventif est subordonné à l'observation des prescriptions de l'article 162. L'imputation de la détention sur la durée de la peine est de droit, sauf décision contraire de la juridiction compétente."

L'article 213 du Code Maritime semble être en conflit avec le Code de Procédure Pénale qui dispose que seul le juge d'instruction a le pouvoir d'inculper une personne ayant pris part, comme auteur, instigateur ou complice, aux faits qui lui sont imputés.[140] De plus, l'article 162 du Code Maritime auquel l'article 213 renvoie, traite des prérogatives du capitaine du navire seulement pour les fautes commises contre la discipline. Ainsi, le capitaine peut détenir une personne pour assurer le maintien de l'ordre, la sécurité du navire, celles des personnes embarquées, en procédant à une privation de liberté des personnes incriminées. Pour ces différentes raisons, on peut conclure que l'article 213 du Code Maritime est en contradiction avec les principes de procédure pénale.

b) Les délais de la garde-à-vue

Les officiers de Police Judiciaire peuvent placer une personne en garde-à-vue pour les nécessités de l'enquête.[141] Cette mesure prend fin quarante-huit heures après. Une prolongation de la garde-à-vue de quarante-huit heures supplémentaires ne peut être effectuée que sur autorisation écrite du magistrat du Ministère Public. Cette autorisation de prolongation ne peut être donnée qu'après vérification qu'elle soit indispensable à la bonne fin de l'enquête et, après s'être assuré personnellement, que la personne retenue n'a été l'objet d'aucun sévices. Un autre délai de vingt-quatre heures est autorisé lorsque l'interpellation n'a pas eu lieu au siège du magistrat.[142] L'obligation qui est faite à la personne interpellée de rester à la disposition de l'autorité judiciaire fixe le point de départ de la garde-à-vue, quel que soit le moment où sera ultérieurement notifiée cette privation de liberté, à l'intéressé.[143]

Ainsi, le délai de garde-à-vue, au maximum après prolongation du Procureur de la République, ne peut dépasser cinq jours soit cent vingt heures. Au terme de cette période de „restriction de liberté" légale, la personne retenue doit être présentée au Parquet. Tout dépassement des délais de garde-à-vue constituerait, une privation arbitraire de liberté et par conséquent, frappée de nullité d'ordre public qui sanctionne les règles essentielles à la validité de la procédure et les principes fondamen-

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[140] Art. 73(3) du Code de Procédure Pénale.

[141] Art. 64 à 66-1 du Code de Procédure Pénale.

[142] Art. 64 du Code de Procédure Pénale. Les magistrats du Parquet sont tous installés au Palais de Justice dans la ville de Djibouti. Lorsque l'arrestation a eu lieu dans les Régions de l'intérieur, le temps d'acheminement des gardés à vue est pris en compte ce qui explique les vingt quatre heures supplémentaires.

[143] Art. 64-1 du Code de Procédure Pénale.

taux du droit. La jurisprudence de la Cour Suprême de Djibouti en la matière est constante. Tous les dépassements des délais de garde-à-vue (même de quelques minutes) ont toujours été sanctionnés par la nullité de la procédure de ladite garde-à-vue et par l'ordre de mise en liberté d'office, des personnes détenues dans le cadre d'une information judiciaire.

La période de „rétention" à bord d'un navire en mer au cours de laquelle est placée la personne suspectée jusqu'à sa présentation au magistrat du Ministère Public, est incompressible de la durée totale de la garde-à-vue autorisée. Même si le délai de rétention à bord du navire peut apparaître justifié du fait du temps nécessaire et des contraintes liées à „l'acheminement" des suspects, il n'existe pas de dispositions dérogeant aux articles 64 à 66-1 du Code de Procédure Pénale de Djibouti. Cette période de rétention n'est ni justifiable en droit interne ni conforme aux droits de l'homme.

Enfin, dernière complexité, la garde-à-vue débute dès la privation de liberté et prend fin au plus tard, après prolongation légale, cent vingt heures après ladite restriction de liberté. Si les opérations d'arrestation ont eu lieu en haute mer, et quel que soit le temps „d'acheminement" du gardé à vue au-delà de la durée légale, le début d'une nouvelle période ne peut être admise, après son arrivée „à quai." Cela serait toujours considéré par la Cour Suprême comme un dépassement sanctionné par la nullité des actes accomplis.

À l'issue de la période de garde-à-vue réglementaire, la personne concernée doit être présentée au magistrat du Ministère Public. Ce dernier peut, surtout si les faits sont criminels, requérir l'ouverture d'une information judiciaire. C'est à ce stade de la procédure que le juge d'instruction doit prendre le relais.

La procédure pénale djiboutienne ne permet pas une appréciation ou une interprétation, selon les cas ou les circonstances en question, entre la période de rétention à bord d'un navire en haute mer et la présentation du suspect à l'autorité judiciaire habilitée. En d'autres termes, l'impossibilité matérielle de présenter les personnes retenues à bord d'un navire dans les délais prescrits par la loi devant le Procureur de la République, du fait de circonstances exceptionnelles de nature à justifier un allongement de la procédure ne peut être évoquée.

Une modification de la législation nationale djiboutienne semble impérative. Les textes existants sont obsolètes et inadaptés à la piraterie maritime. Évoquer les termes de „rétention provisoire" ou de „privation temporaire de liberté" et de „détention provisoire" pour se substituer au „placement en garde-à-vue", n'est pas un remède et transgresse les dispositions législatives et la Constitution elle-même.

c) Le droit de se faire assister par un avocat et à un examen médical

Les droits constitutionnels garantissent à toute personne faisant l'objet d'une mesure de privation de liberté, le droit de se faire assister par un avocat à tous les sta-

des de la procédure y compris durant la période de la garde-à-vue et, celui de se faire examiner par un médecin de son choix.[144] Plusieurs questions découlent de cet article: comment, où et à quel moment, pourront se dérouler l'examen médical ainsi que l'entrevue du gardé à vue avec son avocat, dès lors qu'il en a fait la demande dans le cas d'une détention sur un navire de guerre engagé dans la lutte anti piraterie? La procédure pénale djiboutienne est silencieuse à ce propos.

Les Gardes-côtes en charge des opérations de police de l'État en mer devront concilier le strict respect de la procédure pénale et la lutte contre les actes de piraterie maritime et des vols à main armée commis au large des côtes somaliennes.

4. L'information judiciaire

En matière criminelle, l'instruction préparatoire est obligatoire. En revanche, elle est facultative en matière de délit.[145] L'information judiciaire ne peut être ouverte que sur réquisitoire du Procureur de la République.[146] La procédure est secrète, sans préjudice des droits de la défense, à charge et à décharge.[147]

Le juge d'instruction saisi peut mettre en inculpation le prévenu et rendre une ordonnance de placement en détention provisoire[148] et décerner à son encontre un mandat de dépôt ou rendre une ordonnance de placement sous contrôle judiciaire,[149] selon la gravité des faits.[150] Les décisions du juge d'instruction sont susceptibles de recours devant la Chambre d'Accusation de la Cour d'Appel sans effet suspensif. La Chambre d'Accusation vérifie la régularité des procédures qui lui sont soumises. En cas de découverte d'une cause de nullité, elle en prononce la nullité.

Le juge d'instruction ne peut pas introduire de procédure lui-même, il doit être saisi par réquisitoire introductif du Procureur de la République ou par plainte avec constitution de partie civile,[151] mais il est compétent pour la recherche des preuves.

Les procédures d'information judiciaire représentent moins de 5 % de l'ensemble des procédures pénales ouvertes en République de Djibouti.

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144 Art. 10 de la Constitution; art. 65-2 et 65-3 du Code de Procédure Pénale concernant l'examen médical et art. 65-4 concernant l'assistance par un avocat.

145 Art. 72 du Code de Procédure Pénale.

146 Art. 73 du Code de Procédure Pénale.

147 Art. 74 du Code de Procédure Pénale.

148 La détention provisoire est définie aux articles 133 à 145 du Code de Procédure Pénale.

149 Les conditions de placement sous contrôle judiciaire sont définies aux articles 146 à 154 du Code de Procédure Pénale.

150 Les différents mandats décernés par le juge d'instruction sont encadrés par les articles 117 à 132 du Code de Procédure Pénale.

151 Art. 79 du Code de Procédure Pénale.

D. Révisions nécessaires du droit pénal relatif à la piraterie

Il conviendra en raison de toutes ces observations, que la République de Djibouti procède à une révision de son Code Pénal et du Code de Procédure Pénale.

En ce qui concerne le droit pénal matériel, il semble nécessaire de réviser le Code Maritime de Djibouti, en complétant la définition des actes de piraterie. La définition actuelle est lacunaire et ne couvre pas tous les aspects de la piraterie tels que définis à l'article 101 de la Convention des Nations Unies sur le droit de la mer.

Quant à la compétence de Djibouti pour juger les suspects de la piraterie, il est primordial d'intégrer la compétence juridictionnelle des tribunaux djiboutiens, même si, ni les victimes ni les auteurs et ni les navires ne sont de nationalité djiboutienne, mais parce que les infractions en haute mer ont été constatées par des officiers de Police Judiciaire djiboutiens. Ceci serait notamment nécessaire si des États tiers embarquent des officiers de Police Judiciaire de Djibouti sur leurs navires *(shipriders)* en vue de faciliter la conduite des enquêtes et des poursuites à l'encontre des personnes soupçonnées d'actes de piraterie.[152]

Au niveau procédural et des droits des personnes suspectées de ces actes de piraterie et de vol à main armée arrêtées, il est nécessaire d'encadrer et d'autoriser une période de privation de liberté à bord d'un navire en haute mer. Celle-ci devrait prendre en compte les circonstances exceptionnelles de la durée d'acheminement des prévenus au magistrat du Ministère Public et donc qui autorise l'allongement de la période de garde-à-vue. Il faudrait aussi veiller à adapter le droit du prévenu (ou du gardé à vue) pour lui accorder la possibilité de se faire assister à tous les stades de la procédure par un conseil de son choix et à être examiné par un médecin.

Une modification du droit interne en matière pénale devra inévitablement être mise en œuvre.

IV. L'engagement international de Djibouti dans la lutte anti-pirate

A. Organisations et instruments internationaux ayant trait à la piraterie dont Djibouti fait partie

Depuis l'accession à l'indépendance, la République de Djibouti a cherché à s'inscrire définitivement et irréversiblement dans la culture de la démocratie, de la cohésion sociale, de la croissance et du développement de sa nation, et a décidé

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[152] Résolution 1851 du Conseil de Sécurité, paragraphe 3.

d'adhérer par conséquent à plusieurs organisations internationales, en vue de promouvoir et de bénéficier de ces cultures universelles. En matière de piraterie, son statut de membre des Nations Unies et de l'Organisation Maritime Internationale est à relever.[153] Au plan régional, Djibouti est membre de l'Union Africaine.[154]

Djibouti est partie à plusieurs instruments internationaux multilatéraux, tant au niveau international que régional, ayant une importance dans la lutte contre la piraterie. La République de Djibouti a notamment ratifié la Convention des Nations Unies sur le droit de la mer.[155] Dans le domaine des droits de l'homme, Djibouti a, entre autre, accédé au Pacte international relatif aux droits civils et politiques[156] et à la Convention contre la torture et autres peines ou traitements cruels, inhumains ou dégradants.[157] Au plan régional, elle a ratifié la Charte Africaine des Droits de l'Homme et des Peuples.[158] Djibouti est également partie aux traités pertinents pour la répression pénale de la piraterie, notamment la Convention internationale contre la prise d'otages[159] et la Convention de 1988 pour la répression d'actes illicites contre la sécurité de la navigation maritime.[160] Bien évidemment, les Conventions signées par l'ancienne puissance coloniale – la France – sont de surcroît adoptées à l'indépendance par la République.

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153 Djibouti a adhéré aux Nations Unies le 1er février 1978 par la loi n° 6/AN/78; par la loi n° 224/AN/83 du 25 janvier 1983, elle est devenue membre de l'Organisation Internationale Maritime.

154 Loi n° 109/AN/00/4ème Loi portant ratification de l'Acte Constitutif de l'Union Africaine.

155 Djibouti a ratifié la Convention des Nations Unies sur le droit de la mer le 8 décembre 1991: Nations Unies, Collection des traités, Chapitre XXI, Droit de la mer, 6. Convention des Nations Unies sur le droit de la mer, *disponible sous:* http://treaties.un.org/Pages/Treaties.aspx?id=21&subid=0&lang=fr&clang=_fr (accès le 20 juillet 2010); au niveau interne voir la loi n° 159/AN/85/1ère Loi du 11 juin 1985.

156 Djibouti a accédé au Pacte international relatif aux droits civils et politiques le 5 novembre 2002: Nations Unies, Collection des traités, Chapitre IV, Droit de l'homme, 4. acte international relatif aux droits civils et politiques, *disponible sous:* http://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=fr (accès le 20 juillet 2010); au niveau interne voir loi n° 181/AN/02/4ème Loi ainsi que ses protocoles facultatifs par les lois n° 83/AN/02/4ème Loi et n° 185/AN/02/4ème Loi du 9 septembre 2002.

157 Djibouti a accédé à la Convention contre la torture et autres peines ou traitements cruels, inhumains ou dégradants le 5 novembre 2002: Nations Unies, Collection des traités, Chapitre IV, Droit de l'homme, 9. Convention contre la torture et autres peines ou traitements cruels, inhumains ou dégradants, *disponible sous:* http://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=fr (accès le 20 juillet 2010); au niveau interne voir la loi n° 184/AN/02/4ème Loi du 9 septembre 2002.

158 Loi n° 211/AN/86/1ère Loi du 18 septembre 1986.

159 Djibouti a accédé à la Convention internationale contre la prise d'otages le 1er juin 2004: Nations Unies, Collection des traités, Chapitre XVIII, Questions pénales, 5. Convention internationale contre la prise d'otages, *disponible sous:* http://treaties.un.org/Pages/Treaties.aspx?id=18&subid=A&lang=fr (accès le 20 juillet 2010); au niveau interne voir la loi n° 49/AN/04/5ème Loi du 27 mars 2004.

160 Loi n° 49/AN/04/5ème Loi du 27 mars 2004.

La République de Djibouti est un des neuf pays qui ont signé le Code de Conduite de Djibouti lors de la cérémonie de clôture le 29 janvier 2009.[161]

Par la ratification de ces conventions et traités internationaux, la République marque indéniablement son attachement aux valeurs universelles. Des efforts importants ont été apportés dans le domaine de l'harmonisation en droit interne avec les normes internationales.

B. La coopération internationale de Djibouti dans la lutte anti-piraterie

La République de Djibouti a ratifié la Convention des Nations Unies sur le droit de la mer, la „Constitution pour les océans",[162] le 8 décembre 1991.[163] Djibouti a intégré dans son droit interne, les articles de la Convention qui relèvent de la piraterie, en particulier dans la Section 4 du Code Maritime.[164]

Par ailleurs, la République de Djibouti apporte sa coopération pleine et entière à la lutte contre la piraterie maritime en Mer Rouge et dans l'Océan Indien, comme l'article 100 de la Convention des Nations Unies sur le droit de la mer le requiert. Djibouti participe activement dans la lutte contre la piraterie non seulement au niveau diplomatique mais aussi en contribuant à la répression policière et judiciaire de la piraterie.

1. La conférence de Djibouti: „Code de Conduite de Djibouti" et Centre de Formation

Sous l'égide de l'Organisation Internationale Maritime (OMI), Djibouti a organisé une conférence sur son territoire du 26 au 29 janvier 2009 sur la sécurité maritime, les actes de piraterie et les vols à main armée contre les navires naviguant dans la zone de l'Océan Indien Occidental, le Golfe d'Aden et la Mer Rouge. La conférence regroupant des représentants d'une vingtaine d'États ainsi que des observateurs de différentes agences onusiennes, organisations internationales et organisations non-gouvernementales ont adopté ledit „Code de Conduite de Djibouti".[165]

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[161] Organisation Maritime Internationale (OMI), High-level meeting in Djibouti adopts a Code of Conduct to repress acts of piracy and armed robbery against ships, 30 janvier 2009, *disponible sous:* www.imo.org/home.asp?topic_id=1178 (accès le 20 juillet 2010).

[162] Il s'agit d'une remarque prononcée par Tommy Koh (Singapour), président de la troisième Conférence des Nations Unies sur le droit de la mer, le 10 décembre 1982.

[163] Voir *supra* note 155.

[164] Loi n° 212/AN/82 du 18 janvier 1982; voir *supra* III.B.1.a.i.

[165] Code of Conduct Concerning the Repression of Piracy and Armed Robbery against Ships in the Western Indian Ocean and the Gulf of Aden, document provisoire *disponible*

Cet instrument qui a été signé au terme de la conférence par neuf pays, dont la République de Djibouti, ouvre la voie à une coopération régionale plus étroite.[166]

La conférence a également adopté quatre résolutions dont la troisième porte sur la création d'un centre de formation à vocation régionale à Djibouti pour les agents en charge de la lutte contre la piraterie. Il a pour but de renforcer l'efficacité de la coopération technique en matière de sécurité et de la lutte contre la piraterie et les vols à main armée dans la Mer Rouge, le Golfe d'Aden, la Zone Occidentale et l'Océan Indien. Son financement sera assuré par les partenaires au développement.[167]

Le 19 avril 2009, la République de Djibouti a adopté le décret n° 2009-075/PR/MET ayant comme objet la création de ce centre de formation. C'est au cours de la séance du Conseil des Ministres de Djibouti du 13 octobre 2009, qu'une parcelle de terrain située à Doraleh a été attribuée au Ministère des Transports pour l'édification dudit centre.[168] L'adoption de ce projet s'inscrit dans le cadre de la mise en œuvre des engagements de la République de Djibouti sur la sécurité maritime dans la sous-région.

2. Accords relatifs aux statuts des forces militaires

C'est non seulement au niveau diplomatique et de *capacity building* que Djibouti contribue à la sécurité maritime mais aussi au niveau de la poursuite policière des pirates. Djibouti a notamment conclu différents accords relatifs aux statuts des forces militaires *(Status of Forces Agreements)* réglant les droits et privilèges des troupes étrangères engagées dans la lutte anti pirate et stationnées sur le sol djiboutien.

En janvier 2009, un tel accord était conclu entre l'Union Européenne et la République de Djibouti concernant les forces placées sous la direction de l'Union Européenne dans la République de Djibouti dans le cadre de l'opération militaire de l'Union Européenne *Atalanta*.[169] Un autre accord était signé avec les États-Unis

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sous: www.fco.gov.uk/resources/en/pdf/pdf9/piracy-djibouti-meeting (accès le 20 juillet 2010).

[166] Organisation Maritime Internationale (OMI), High-level meeting in Djibouti adopts a Code of Conduct to repress acts of piracy and armed robbery against ships, 30 janvier 2009, *disponible sous:* www.imo.org/home.asp?topic_id=1178 (accès le 20 juillet 2010).

[167] Code of Conduct Concerning the Repression of Piracy and Armed Robbery against Ships in the Western Indian Ocean and the Gulf of Aden, document provisoire (y comprise la Résolution 3, *disponible sous:* www.fco.gov.uk/resources/en/pdf/pdf9/piracy-djibouti-meeting (accès le 20 juillet 2010).

[168] L'arrêté n° 2009-0775/PR/MEFPCP.

[169] Accord entre l'Union Européenne et la République de Djibouti relatif au statut des forces placées sous la direction de l'Union Européenne dans la République de Djibouti dans le cadre de l'opération militaire de l'Union Européenne Atalanta 2009 J.O. (L 33) 43–48 (UE).

d'Amérique concernant la présence sur le territoire de la République d'un important contingent militaire, contribuant à la *Coalition Task Force 151*. Avec l'Empire du Japon un accord est en train d'être signée; le dispositif militaire japonais est déjà en place sans accord signé au préalable depuis le mois d'avril 2009.

3. Transit des pirates appréhendés

Contrairement à la République du Kenya et à l'Archipel des Seychelles, qui ont signé un accord de transfert de pirates somaliens avec l'Union Européenne dans le cadre de l'opération *Atalanta* en 2009,[170] la République de Djibouti n'est pas signataire d'un tel instrument juridique. Par contre, Djibouti autorise, sans accord officiel, que les personnes soupçonnées d'avoir perpétré des actes de piraterie et ayant été appréhendées par les forces de l'opération *Atalanta* et blessées transitent sur son territoire pour subir des soins médicaux appropriés à l'hôpital militaire français.[171] Il s'agit d'une disposition d'ordre technique, permise pour faciliter le transfert des pirates présumés somaliens vers leur lieu d'incarcération et de jugement.

V. Conclusion

La piraterie maritime au large des côtes somaliennes existe depuis plus d'une décennie. Elle a pris de l'ampleur ou tout du moins a attiré l'attention des pays occidentaux, dans le courant de l'année 2007. Ces actes criminels non seulement portent atteinte à la liberté de navigation mais surtout, ils ont un impact indéniable sur l'économie mondiale. Le Golfe d'Aden est annuellement traversé par plus de 22 000 navires transportant environ 8 % de l'échange commercial mondial.[172] Le

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[170] Échange de lettres entre l'Union Européenne et le gouvernement du Kenya sur les conditions et les modalités régissant le transfert, de la force navale placée sous la direction de l'Union Européenne (EUNAVFOR) au Kenya, des personnes soupçonnées d'avoir commis des actes de piraterie ou des vols à main armée dans les eaux territoriales de la Somalie ou du Kenya qui sont retenues par l'EUNAVFOR et de leurs biens saisis en possession de cette dernière, ainsi que leur traitement après un tel transfert 2009 J.O. (L 79) 49–59 (UE); échange de lettres entre l'Union Européenne et la République des Seychelles sur les conditions et les modalités régissant le transfert, de l'EUNAVFOR à la République des Seychelles, des personnes suspectées d'actes de piraterie ou de vols à main armée, ainsi que leur traitement après un tel transfert 2009 J.O. (L 315) 37–43 (UE).

[171] La France dispose d'un contingent militaire très important présent sur le sol de la République de Djibouti, à la suite de la signature d'accords de coopérations entre les deux pays après l'accession à l'indépendance. Ainsi, la France dispose d'un centre hospitalier militaire dénommé Bouffard.

[172] European Space Agency, Earth from Space: The Gulf of Aden – The Gateway to Persian Oil, 13 avril 2006, *disponible sous:* www.esa.int/esaEO/SEMWOXNFGLE_index_2.html (accès le 20 juillet 2010).

regain d'intérêt des grandes puissances européennes peut alors aisément s'expliquer.

L'intervention militaire ne peut donner, à elle seule, une solution à long terme du „problème somalien." Malgré la présence importante de navires de l'Union Européenne, de l'OTAN et d'autres puissances militaires, les actes de piraterie ne cessent de croître d'année en année. Le Conseil de Sécurité des Nations Unies ainsi que le Conseil de l'Union Européen autorisant l'opération *Atalanta* sont bien conscients que la solution militaire n'est pas suffisante et, que seule l'assise du Gouvernement Somalien Fédéral de Transition pourra endiguer durablement ce phénomène de piraterie maritime.

L'Union Européenne vient de décider, quant à elle, à la fin du mois de novembre 2009, d'emboîter le pas à la France et à la République de Djibouti, de former dans un laps de temps assez court 2 000 soldats somaliens, soit en territoire djiboutien soit en Ouganda. Elle a pris l'engagement d'apporter une aide financière à l'opération militaire de l'Union Africaine en Somalie ainsi qu'au Gouvernement Somalien Fédéral de Transition.[173] Mais ces aides importantes demeurent en dessous des besoins pour rétablir l'État de droit en Somalie. L'ONU doit s'engager plus fermement avec l'aide des pays de la région et, une collaboration „financière" plus accrue avec l'Union Africaine afin de trouver un règlement au conflit somalien.

La répression des activités de pêches illégales dans les eaux territoriales somaliennes par les navires occidentaux qui ponctionnent dans les ressources halieutiques de la Somalie doit parallèlement faire l'objet d'une lutte sans faille. L'aboutissement des enquêtes judiciaires en Europe concernant ces déversements des déchets des industries nucléaires, hospitalières, chimiques ou pharmaceutiques en Somalie par le biais très souvent de la Mafia italienne sera un gage supplémentaire de la volonté de punir toutes les activités illégales, et de s'attaquer aux maux de la Somalie par la communauté internationale.[174] Les côtes somaliennes sont devenues depuis vingt ans, la poubelle de l'hémisphère nord de nombreuses entreprises.

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[173] Agence France Presse, Bruxelles étudie la possibilité de former l'armée somalienne, 18 novembre 2009, *disponible sous:* www.france24.com/fr/20091118-somalie-afrique-formation-soldats-armée-gouvernementale-instructeurs-union-européenne (accès le 20 juillet 2010).

[174] La société suisse *Achair Partners* et l'entreprise italienne *Progresso*, par exemple, ont déposé des conteneurs de déchets dans les eaux somaliennes. À la suite du *tsunami* de 2004, des conteneurs ont été fracassés et se sont répandus sur la côte provoquant de graves troubles de santé à des milliers de personnes. Les enquêtes menées par les Nations Unies concluaient que ces conteneurs ont contenu de l'uranium et d'autres déchets radioactifs ainsi que des métaux lourds comme du plomb, du cadmium, du mercure et des déchets chimiques. Les Nations Unies précisent que ces crimes continuent encore à ce jour: Courrier International, Pirates par désespoir, 16 avril 2009, *disponible sous:* www.courrierinternational.com/article/2009/04/16/pirates-par-desespoir (accès le 20 juillet 2010).

Les causes du symptôme somalien sont multiples et les remèdes à y apporter sont multiples. La piraterie maritime n'est qu'une conséquence parmi d'autres de ce drame humain. Les solutions pour soigner ce „mal du piratage" sont également nombreuses et diverses.

La République de Djibouti a toujours respecté ses engagements internationaux. Elle devra faire évoluer son droit positif, prenant en compte les forfaits de ces „flibustiers des temps modernes", aujourd'hui sous la lumière des projecteurs de l'actualité mondiale car faisant peser sur l'ordre économique mondial, une menace réelle et constante, qui par ailleurs, parallèlement, met en „stand-by" l'obligation commune de lutter, avant tout, contre la déshumanisation de la Somalie.

Regional Cooperation in Combating Piracy and Armed Robbery against Ships: Learning Lessons from ReCAAP

Maximo Mejia

Contents

I. Introduction

Even in the 1980s and the 1990s, when piracy and armed robbery against ships in Southeast Asian waters increased threats to the security of maritime commerce, cooperation among littoral and other affected states was widely recognized as being one of the cornerstones in any comprehensive program to suppress such crimes. In the 2000s, this has taken the form of the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (ReCAAP).[1]

A. ReCAAP Background

ReCAAP is an international treaty instrument that resulted from a series of negotiations and calls for a multilateral approach to combating piracy in Southeast Asian waters. Some of the relevant documents and statements include a joint communiqué adopted at the 30th Association of Southeast Asian Nations (ASEAN) Ministerial Meeting (Subang Jaya, Malaysia, July 24 to 25, 1997), the ASEAN Declaration on Transnational Crime (Manila, Philippines, December 20, 2000) and the statement of former Japanese Prime Minister Keizo Obuchi at the ASEAN+1 Summit Meeting (Manila, November 1999). Additionally, two documents were adopted at the Asia Anti-Piracy Challenge 2000 Conference (Tokyo, April 2000), namely the Tokyo Appeal[2] and the Model Action Plan.[3] In its preambular paragraphs, the Tokyo Appeal makes reference to a set of recommendations developed by the International Maritime Organization (IMO) that contains, among others, a call for "further development of regional co-operation" and "a regional agreement to facilitate co-ordinated response at the tactical as well as the operational level" to "be concluded between the countries concerned".[4]

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[1] This treaty instrument is interchangeably referred to in this paper as "ReCAAP" or "the Agreement".

[2] Japanese Ministry of Land, Infrastructure, Transport, and Tourism, Tokyo Appeal, *available at* www.mlit.go.jp/english/mot_news/mot_news_000330/mot_news_000330_2.html (last visited Feb. 11, 2010).

[3] *Ito, Yoshiaki/Nibre, Jerry*, Enhancing Cooperation, Special Lecture at the World Maritime University, Oct. 29, 2009; see also *Bradford, John*, The Growing Prospects for Maritime Security Cooperation in Southeast Asia, 58 Naval War College Review 63–86 (2005); and *Ho, Joshua*, Combating Piracy and Armed Robbery in Asia: The ReCAAP Information Sharing Centre (ISC), 33 Marine Policy, 432–434 (2008).

[4] International Maritime Organization (hereinafter: IMO), Recommendations to Governments for Preventing and Suppressing Piracy and Armed Robbery against Ships, IMO Doc. MSC/Circ.622/Rev.1 (June 16, 1999).

The text of the ReCAAP[5] was drafted by representatives from the so-called ASEAN+6 countries, i.e., the ten members of ASEAN,[6] plus six other countries from South Asia (Bangladesh, India and Sri Lanka) and East Asia (China, Japan and South Korea). The Agreement was finalized and adopted on November 11, 2004, and entered into force on September 4, 2006. The ReCAAP-Information Sharing Center (ISC) was officially launched on November 29, 2006. As the name of the Agreement implies, ReCAAP covers only the Asian region, although it is open for accession by any state.[7] To date, there are fifteen contracting parties to the Agreement, namely Bangladesh, Brunei, Cambodia, China, India, Japan, Laos, Myanmar, Norway, Philippines, Singapore, South Korea, Sri Lanka, Thailand and Vietnam. It is significant to note that two ASEAN member states – Indonesia and Malaysia – are, as of December 31, 2009, not contracting parties to ReCAAP. The ReCAAP-Information Sharing Center is an international organization with a Governing Council and Secretariat. It operates under a headquarters agreement with the Republic of Singapore, its host country.[8] The Secretariat is presently manned by staff from Singapore together with officers seconded from China, India, Japan, the Philippines and South Korea.[9]

B. Main Features

A number of the Agreement's main features are highlighted in the subsections that follow.

1. General Obligations

Under Art. 3 ReCAAP, parties to the Agreement commit themselves to taking effective measures to prevent and suppress piracy and armed robbery against ships, arrest pirates and armed robbers, seize vessels under the control of pirates and armed robbers, and rescue victims:

Art. 3 ReCAAP – General Obligations

1. Each Contracting Party shall, in accordance with its national laws and regulations and applicable rules of international law, make every effort to take effective measures in respect of the following:

(a) to prevent and suppress piracy and armed robbery against ships;

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[5] The full text of ReCAAP is *available at* www.recaap.org/about/pdf/ReCAAP%20Agreement.pdf (last visited March 10, 2010).

[6] Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand, and Vietnam.

[7] Art. 18 ReCAAP.

[8] Art. 5 ReCAAP.

[9] *Ito, Yoshiaki/Nibre, Jerry*, *supra* note 3.

(b) to arrest pirates or persons who have committed armed robbery against ships;

(c) to seize ships or aircraft used for committing piracy or armed robbery against ships, to seize ships taken by and under the control of pirates or persons who have committed armed robbery against ships, and to seize the property on board such ships; and

(d) to rescue victim ships and victims of piracy or armed robbery against ships.

2. Nothing in this Article shall prevent each Contracting Party from taking additional measures in respect of subparagraphs (a) to (d) above in its land territory.

2. Definitions

The issue of definitions of the terms "piracy" and "armed robbery against ships" has been a perennial bone of contention among bureaucrats, academics and industry practitioners. The different interpretations and permutations of these terms condition the manner in which the crimes have been treated and the gravity with which these are perceived.[10] Art. 1 ReCAAP is significant because it provides clarity among ReCAAP parties as to the nature of the criminal acts referred to in the Agreement:

Art. 1 ReCAAP – Definitions

1. For the purposes of this Agreement, "piracy" means any of the following acts:

(a) any illegal act 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 against persons or property on board such ship;

(ii) against a ship, persons or property in a place outside the jurisdiction of any State;

(b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;

(c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).

2. For the purposes of this Agreement, "armed robbery against ships" means any of the following acts:

(a) any illegal act of violence or detention, or any act of depredation, committed for private ends and directed against a ship, or against persons or property on board such ship, in a place within a Contracting Party's jurisdiction over such offences;

(b) any act of voluntary participation in the operation of a ship with knowledge of facts making it a ship for armed robbery against ships;

(c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).

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[10] *Meija, Maximo*, Maritime Gerrymandering: Dilemmas in Defining Piracy, Terrorism, and other Acts of Maritime Violence, 2 Journal of International Commercial Law, 153–175 (2003).

The text used in Art. 1(1) ReCAAP above is, for all intents and purposes, lifted *verbatim* from Art. 101 "Definition of Piracy" in the United Nations Convention on the Law of the Sea.[11] The text in Art. 1(2) ReCAAP above is an adaptation of the definition of armed robbery against ships found in the Annex to Resolution A.922(22) of the International Maritime Organization Assembly.[12]

3. ReCAAP-Information Sharing Center

The preambular text of the Agreement reinforces a strong belief "that information sharing and capacity building among the contracting parties will significantly contribute towards the prevention and suppression of piracy and armed robbery against ships in Asia".[13] This sentiment is operationalized through the Information Sharing Center, which serves as ReCAAP's platform for information exchange and regional cooperation. The Information Sharing Center consolidates, collates and analyzes statistics related to piracy and armed robbery against ships in the Asian region. The collected and processed information is translated into regular reports that are not only disseminated internally but also made available for public consumption via the ReCAAP website. ReCAAP-Information Sharing Center fosters closer cooperation among member states through a series of capacity building activities and by providing technical training and assistance. Art. 14 ReCAAP is instructive in terms of the scope and intent of this function:

Art. 14 ReCAAP – Capacity Building

1. For the purpose of enhancing the capacity of the Contracting Parties to prevent and suppress piracy and armed robbery against ships, each Contracting Party shall endeavor to cooperate to the fullest possible extent with other Contracting Parties which request cooperation or assistance.

2. The Center shall endeavor to cooperate to the fullest possible extent in providing capacity building assistance.

3. Such capacity building cooperation may include technical assistance such as educational and training programs to share experiences and best practices.

A single entity is identified in each member state to serve as interface vis-à-vis ReCAAP. Art. 9 ReCAAP obliges each contracting party to "designate a focal point responsible for its communication with the Center (i.e., the ISC)". The same article provides that parties shall also "ensure the smooth and effective communication between its designated focal point, and other competent national authorities (…) as well as relevant non-governmental organizations". In other words, informa-

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[11] United Nations Convention on the Law of the Sea, *adopted* Dec. 10, 1982, 1883 U.N.T.S. 3.

[12] IMO, Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery against Ships, IMO Doc. A 22/Res.922 (Jan. 22, 2009).

[13] Preamble of the ReCAAP.

tion sharing, incident reporting, and general communications, both externally[14] and internally,[15] take place in the first instance via the designated focal points.

The Information Sharing Center is governed by a Governing Council made up of one representative per contracting party. The following is extracted from the relevant article:

Art. 4 ReCAAP – Composition

(…)

3. The Center shall be composed of the Governing Council and the Secretariat.

4. The Governing Council shall be composed of one representative from each Contracting Party. The Governing Council shall meet at least once every year in Singapore, unless otherwise decided by the Governing Council.

5. The Governing Council shall make policies concerning all the matters of the Center and shall adopt its own rules of procedure, including the method of selecting its Chairperson.

6. The Governing Council shall take its decisions by consensus.

(…)

It is worth noting that aside from meeting at least once a year to develop policy, the Governing Council is mandated to adopt the ASEAN philosophy of taking decisions by consensus. Policies adopted by the Governing Council serve as the basis for the daily work program of the ReCAAP-Information Sharing Center.

II. ReCAAP in the Context of the Horn of Africa

The importance of regional cooperation and the experience with ReCAAP has become of great relevance now that the attention of the maritime world is focused on the problem of piracy in the Horn of Africa. In early 2009, concrete steps were taken to adapt ReCAAP to the context of piracy in the Horn of Africa.[16] From January 26 to 29, 2009, a sub-regional meeting was held in Djibouti on maritime security, piracy and armed robbery against ships in the Western Indian Ocean, Gulf of Aden and Red Sea. The principal actors were delegations from most of the states in the region (17 out of the 21). Also in attendance were observers from "12 States from outside the region; four United Nations bodies and programmes; nine inter-

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[14] That is, between the Information Sharing Center and a member state or between different member states.

[15] That is, with regard to ReCAAP matters among different maritime or other interested agencies, institutions, or organizations within a member state.

[16] IMO, High-Level Meeting in Djibouti Adopts a Code of Conduct to Repress Acts of Piracy and Armed Robbery against Ships, Jan. 30, 2009, *available at* www.imo.org/newsroom/mainframe.asp?topic_id=1773&doc_id=10933 (last visited March 10, 2010).

governmental; and three non-governmental organizations".[17] The outcome of the meeting was the adoption of the "Code of Conduct Concerning the Repression of Piracy and Armed Robbery against Ships in the Western Indian Ocean and the Gulf of Aden", more commonly referred to as the Djibouti Code of Conduct (DCC).[18]

A. Djibouti Code of Conduct and ReCAAP: a Brief Comparison

The signature requirements and effective date for the Djibouti Code of Conduct are laid out in Art. 16:

Art. 16 DCC – Signature and Effective Date

1. The Code of conduct is open for signature by Participants on 29 January 2009 and at the Headquarters of IMO from 1 February 2009.

2. The Code of conduct will become effective upon the date of signature by two or more Participants and effective for subsequent Participants upon their respective date of deposit of a signature instrument with the Secretary-General.

Of the 21 countries in the region, nine signed the Code of Conduct during the closing ceremony in Djibouti. Having thus exceeded the minimum number of signatures, the Djibouti Code of Conduct became effective as from January 29, 2009.[19]

While the Djibouti Code of Conduct is heavily influenced by ReCAAP, the one is not the exact duplicate of the other. The Djibouti Code of Conduct does not explicitly provide for countries outside the region to accede to it. Art. 15 of the Djibouti Code of Conduct provides that it be open for signature by any of the 21 regional states that were participants in the Djibouti Meeting of January 26 to 29, 2009. In contrast, ReCAAP, having entered into force, is open to accession by states outside the Asian region.[20]

Compared to ReCAAP, the wording in the Djibouti Code of Conduct reveals an instrument that is bolder in its intentions. The Djibouti Code of Conduct's provisions include, *inter alia*, a more explicit statement on seizure of ships,[21] an article

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[17] IMO, Protection of Vital Shipping Lanes: Sub-regional Meeting to Conclude Agreements on Maritime Security, Piracy and Armed Robbery against Ships for States from the Western Indian Ocean, Gulf of Aden and Red Sea Areas, IMO Doc. C 102/14 (April 3, 2009).

[18] An advance copy of the Djibouti Code of Conduct is *available at* www.fco.gov.uk/resources/en/pdf/pdf9/piracy-djibouti-meeting (last visited April 21, 2010).

[19] The nine are Djibouti, Ethiopia, Kenya, Madagascar, Maldives, Seychelles, Somalia, United Republic of Tanzania and Yemen; see *supra* note 17.

[20] Art. 18 ReCAAP.

[21] Art. 4 Djibouti Code of Conduct.

relating to embarked officers or shipriders[22] and "the sharing of information concerning applicable laws and guidance pertaining to the interdiction, apprehension, investigation, prosecution, and disposition of persons involved in piracy and armed robbery against ships".[23]

In spite of the determined tone of the instrument, nothing in the Djibouti Code of Conduct "is intended to (…) create or establish a binding agreement".[24] In other words, the Djibouti Code of Conduct in its present form is a set of statements of intent rather than a treaty opposable to its parties. In contrast, ReCAAP is an international treaty instrument within the scope of the Vienna Convention on the Law of Treaties.[25] Nonetheless, the Djibouti Code of Conduct makes a strong appeal for a binding agreement to be concluded within two years of the date at which the Code took effect.[26]

Another significant difference between Djibouti Code of Conduct and ReCAAP is that the former creates not one, but three, Information Sharing Centers, plus a training center. While ReCAAP has its single Information Sharing Center in Singapore, the Djibouti Code of Conduct designates an Information Sharing Center each in Kenya (Mombassa), Tanzania (Dar-es-Salaam), and Yemen. Additionally, Djibouti has offered to establish the regional training center.[27]

B. Lessons from ReCAAP

Commentators refer to ReCAAP as a "model for other regions that are faced with the scourge of piracy and armed robbery"[28] or as a "template for other similar international agreements".[29] Indeed, some very useful lessons can be learned from the ReCAAP experience. The first of these is that a regional agreement is not a silver bullet. Regional agreements are an important element in any comprehensive approach against criminality at sea, but these are effective only when applied together with a multitude of other measures and arrangements. In fact, ReCAAP did

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22 Art. 7 Djibouti Code of Conduct.

23 Art. 8(7) Djibouti Code of Conduct.

24 Art. 15(a) Djibouti Code of Conduct.

25 Art. 2 Vienna Convention on the Law of Treaties, *adopted* May 22, 1969, 1155 U.N.T.S. 331, defines treaty as "an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation".

26 Art. 13 Djibouti Code of Conduct.

27 Resolution 3 *adopted* at the Djibouti Meeting; see *supra* note 17.

28 *Ho, Joshua*, *supra* note 3, 434.

29 *Menefee, Samuel*, A Recap of ReCAAP, paper presented at the International Symposium on Selected Issues in Maritime Security, World Maritime University, Malmö, Sweden, Nov. 10–12, 2008.

not enter into force until after the magnitude and severity of piracy and armed robbery against ships in East Asia had already peaked.

There are many other lessons to be learned from ReCAAP, both in terms of challenges and opportunities. Using ReCAAP as a model reduces the learning curve and hastens the pace for launching the different Djibouti Code of Conduct-Information Sharing Centers.

1. Opportunities and Potential

The ReCAAP experience in Southeast Asia has shown that regional agreements can and do enhance maritime domain awareness. ReCAAP continues to serve as a forum for cooperation, communication, and sharing of information and best practices. It offers a valuable facility for capacity building of member states.

Aside from institutionalizing existing anti-piracy arrangements and affording a coordinated program for combating threats at sea, regional agreements such as ReCAAP serve as a vehicle for receiving external assistance. Relatedly, the establishment of a region-based and -led organization confers the littoral and affected states with ownership of the solution. While external assistance might be vital in many cases, a regional organization can ensure that control over the use and deployment of such resources is retained by littoral states, helping to shield against sensitivities and criticisms that programs and measures are being implemented by extra-regional forces.

In spite of the strong regional focus, however, ReCAAP encourages the involvement and participation by more states and organizations. ReCAAP's inclusive nature welcomes membership applications from any country, even those outside the Asian region.[30] ReCAAP also engages industry and other non-government actors in its confidence and capacity building programs. The involvement of a broad spectrum of actors not only raises international awareness, it also promotes transparency, in the sense that a collective effort with regular meetings and consultations affords comment and discussion among the different stakeholders as to the adequacy or appropriateness of response, actions, involvement, assistance, or other activities and programs related to combating piracy and armed robbery against ships.

2. Challenges

The establishment of a regional organization such as ReCAAP is not without its challenges. One important lesson to be learned from ReCAAP is the importance of engaging all states concerned and securing their commitment. The fact that two

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[30] *Ho, Joshua*, *supra* note 3, 433.

important players in the region, Indonesia and Malaysia, are not parties to the Agreement is a major challenge for ReCAAP. These two countries sit astride what were once considered the most dangerous and violence-prone waterways in the world – the Straits of Malacca and Singapore – and were highly instrumental, together with Singapore, in arresting the alarming rise in attacks against ships in that region.

Another challenge is the fact that regional agreements require more than just time, commitment, and political will; they require solid, reliable and predictable income or funding streams. With the current global economic crisis, however, the heavy competition for scarce resources from donor states and organs can only increase. At the very least, one would expect states party to the agreement to pitch in their fair share of the finances. This has not been the case in terms of ReCAAP where only less than half of the parties contribute, either financially or in kind, to the organization's budget. Professor Menefee expresses concern that this "cannot be considered a healthy situation in an organization which is supposed to be run by consensus and should be rectified as soon as possible. Otherwise, it is hard to believe that countries 'footing the bill' will not eventually develop an unhealthy, if understandable, sense of entitlement concerning ReCAAP ISC and its operations".[31]

The political dimension in the context of the regions is another challenge that cannot be underestimated. ReCAAP involves relatively stable states in what can be argued as an increasingly stable region. The locomotive power behind ReCAAP is made up of some of the most dynamic economies and governments in Asia. In contrast, Somalia, which in the past five years has been synonymous with piracy and hijacking of ships, is a failed state.[32] Moreover, it is located in a region where there are other failed states or states that are in high risk of being labeled as such.[33]

The designation of three separate Djibouti Code of Conduct Information Sharing Centers makes for a potentially cumbersome arrangement. One might wonder if a single, rather than three Information Sharing Centers, would better serve the interest of streamlined and efficient communications.

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[31] *Menefee, Samuel*, *supra* note 29.

[32] Failed states are those that have lost "control over the means of violence, and cannot create peace or stability for their populations or control their territories. They cannot ensure economic growth or any reasonable distribution of social goods. They are often characterized by massive economic inequities, warlordism, and violent competition for resources:" *Brooks, Rosa*, Failed States, or the State as Failure? 72 The University of Chicago Law Review, 1159–1196 (2005). See also *Helman, Gerald*/*Ratner*, *Steven*, Saving Failed States, 89 Foreign Policy, 3–20 (1992–1993); and *Gros, Jean-Germain*, Towards a Taxonomy of Failed States in the New World Order: Decaying Somalia, Liberia, Rwanda and Haiti, 17 Third World Quarterly, 455–471 (1996).

[33] The Failed States Index, 49 Foreign Policy, 56–65 (2005).

The problem of under-reporting is yet another challenge that Information Sharing Centers will face. Many ships hesitate to report incidents or attacks unless circumstances make reporting unavoidable. The underreporting of attacks is a widely acknowledged phenomenon; many of those that do undertake to file reports are loath to file these with government focal points.[34] There is no reason to believe that the situation has changed. Data analysis is vital in winning a campaign against criminality. The quality and relevance of the analysis is only as good as the comprehensiveness and reliability of the data.

Yet another issue in the ReCAAP formula that could be improved upon when adapted to another region is capacity building in the areas of extradition and mutual legal assistance. References to these areas in terms of the ReCAAP-Information Sharing Centers are expressed in the hortative ("shall endeavor").[35] Additionally, Art. 14 ReCAAP does not expressly cover extradition and mutual legal assistance within capacity building.[36]

III. Conclusion

By the end of 2009, the number of attacks reported against ships off the coast of Somalia rose to record levels. According to the International Maritime Bureau, there were 217 separate incidents involving Somali pirates recorded during 2009, 48 of which resulted in a ship being hijacked.[37] In comparison, only 111 Somali-related attacks were reported in 2008, 42 of which resulted in hijackings.[38] The International Maritime Organization expressed the serious security situation in the waters off Somalia in terms of the "need to protect seafarers, fishermen and passengers; the need to ensure the uninterrupted delivery of humanitarian aid to Somalia effected by ships chartered by the World Food Programme; and the need to preserve the integrity of the Gulf of Aden – a lane of strategic importance and significance to international shipping and trade, both east and west of the Suez Canal, which is used by some 22,000 vessels annually, carrying around 8 % of the world's

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[34] *Abhyankar, Jayant*, Maritime Crime. In: Maximo Meija (ed.), Contemporary Issues in Maritime Security, Malmö 2005, p. 224; *Hyslop, Ian*, Contemporary Piracy. In: Eric Ellen (ed.), Piracy at Sea. Paris 1989, p. 5; *Menefee, Samuel*, Under-Reporting of the Problems of Maritime Piracy and Terrorism: Are we Viewing the Tip of the Iceberg? In: Maximo Mejia (ed.), Contemporary Issues in Maritime Security. Malmö 2005, pp. 245–263.

[35] Arts. 10, 12 and 13 ReCAAP.

[36] *Menefee, Samuel*, *supra* note 29.

[37] International Chamber of Commerce – International Maritime Bureau (ICC-IMB), Piracy and Armed Robbery against Ships, Annual Report 1 January – 31 December 2009.

[38] International Chamber of Commerce – International Maritime Bureau (ICC-IMB), Piracy and Armed Robbery against Ships, Annual Report 1 January – 31 December 2008.

trade, including more than 12 % of the total volume of oil transported by sea, as well as raw materials and finished goods".[39]

The situation has escalated to such an alarming level as to put the global maritime community "at wit's end". Measures ranging from the employment of private security companies to the deployment of an international armada are being attempted. Any piracy meeting or conference will conclude that only a healthy combination of a wide range of short-, medium- and long-term programs will lead to a resolution of the problem of piracy off the Somali coast and that an effective regional agreement is a *sine qua non* in any successful program.

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[39] International Maritime Organization, Piracy in Waters off the Coast of Somalia, *available at* www.imo.org/home.asp?topic_id=1178 (last visited March 10, 2010).

Harmonized Legal Framework for Africa as an Instrument to Combat Sea Piracy

Henri Fouché

Contents

I. Introduction

"In music, sounds may be in unison, or they may be in harmony, but what is undesirable is discord."[1]

In the middle of the first decade of the 21st century a serious threat to maritime transport began to manifest itself off the Horn of Africa, when ships transiting the area increasingly came under attack from pirates. The perpetrators of these attacks were seen to be operating in the area with impunity, due to the lack of a functioning criminal justice system in Somalia. Robust action by states' navies and naval alliances operating in the Gulf of Aden, Red Sea and Western Indian Ocean – in response to United Nations Security Council Resolutions permitting states' navies to enter the territorial waters of Somalia to repress acts of piracy and armed robbery – led to many pirates being captured. More than half of the suspected pirates deprived of their freedom up to December 4, 2009, however, were released without being prosecuted.[2] This led to scrutiny being placed on the effectiveness of international legislation and the national legislations of states to deal with suspected pirates. A subsequent audit by the International Maritime Organization (IMO) of member states' national legislations with regard to piracy revealed many shortcomings in the domestic laws of the member countries, with regard to the capture, arrest, prosecution and extradition of pirates.[3] Clearly, it has become necessary to review national legislations and harmonize legal frameworks to ensure that no opportunity exists for pirates to escape prosecution.

In Africa there have been some successes in harmonizing legal frameworks. These have been at regional level. The performance with regard to the harmonization of laws at continental level, however, has been less successful.[4] This paper will discuss the factors, which led to the necessity for the harmonization of laws in Africa relating to piracy and will examine ways in which international organizations, such as the Comité Maritime International, can assist with the process. Instruments of the African Union, including the regional economic communities on the conti-

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[1] *Mukherjee, Proshanto*, Maritime Legislation. World Maritime University, Malmö 2002, p. 1.

[2] *Gros-Verheyde/Nicolas*, Bilan des opérations anti-piraterie (EUNAVFOR Atlanta, CTF, Otan, Russie), *available at* http://bruxelles2.over-blog.com/pages/Bilan_antipirates_UE_USA_Russie_exclusif-1169128.html (last visited April 28, 2010).

[3] *Mitropoulos, Efthimios*, Presentation on Piracy at the Athena 09 Crisis Management International Conference, Athens, Greece, Sept. 30 – Oct. 3, 2009, *available at* www.imo.org/newsroom/mainframe.asp?topic_id=1774&doc_id=11894 (last visited April 28, 2010).

[4] *Id.* pp. 5–6.

nent, will be discussed and analysed as to their potential to assist states in achieving a harmonized legal framework for combating sea piracy.

II. The Absence of a Harmonized Legal Framework on Piracy and the Need for Its Establishment

A. Insufficient Recognition of the Importance of the Sea

The absence of a harmonized legal framework in Africa to deal with sea piracy comes as no surprise. Africa has for centuries looked to the land and ignored the tremendous potential of the sea for economic growth. Economies and seaward defense in Africa were largely managed by colonial powers that also imported their legal systems to their colonies. The withdrawal of the navies of the colonial powers after independence left many African states with navies, very often, too small to be effective. In a speech to delegates attending a Sea Power for Africa Symposium in August 2005, Vice Admiral Mudimu pointed out that although the Heads of Navies in Africa clearly understand their roles and responsibilities, many of the citizens of Africa do not comprehend and have not seen the sea. Admiral Mudimu emphasized that the mission is to educate such citizens, so that they can become force multipliers to put the naval agenda on the African Union calendar.[5] Since the national interests of a nation are congruent with its maritime interests, it is imperative that mindsets that are dominated by an orientation towards the land are balanced by the proper recognition of the importance and power of the sea.[6]

The often repeated call for the African Union to recognize the importance of the sea to African states was given stature, when on February 23, 2007, under the leadership of the African Union, the ministers of member states responsible for maritime transport in Africa adopted a Plan of Action in Abuja (Nigeria), as a roadmap primarily aimed at outlining the global objectives to be pursued in the bid to improve African maritime transport. The Plan of Action was reviewed and updated in a conference of ministers responsible for transport, held in April 2008, in Algiers (Algeria) and, again, at the second African Union conference of ministers responsible for maritime transport, held in October 2009, in Durban (South Africa). The objectives of the African Union Plan of Action reflect the growing awareness on the continent of the importance of the sea and the potential for economic growth and development in the maritime transport sector by listing objectives such as promotion and acquisition of vessels, promotion of shipbuilding and repair, creation of

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[5] *Mudimu, Johannes*, Welcoming speech by Chief of the South African Navy, Vice Admiral Johannes Mudimu, to delegates attending the Sea Power for Africa Symposium, Aug. 28, 2005, Cape Town, South Africa (on file with author).

[6] *Kohli, Kailash*, Maritime Power in Peace and War: An Indian View, 5 African Security Review (1996).

African ship registries, promoting and fostering mobilization of financial resources for maritime transport and the protection of the marine environment.[7] Although the current and foreseeable worldwide economic climate is not favorable to many of the objectives of the Plan of Action, it indicates the African states' increasing awareness of the potential of the maritime sector and the importance of the sea.

The African Union's Plan of Action to improve African maritime transport tasks regional economic communities with the responsibility to, inter alia, enhance and strengthen national capacities, ratify and implement national convention and ensure the security of ships and ports[8] at the national level, through development of relevant legislation and assistance to states for the implementation of the Djibouti Code of Conduct.[9] The Plan also provides the means to strengthen legal capacities of national maritime authorities by developing, revising and updating national maritime legislations and their enabling texts and to organize the activities of maritime transport auxiliary services, by enacting appropriate and harmonized legislation for African countries.[10]

B. Closing Legal Loopholes and Enhancing Police and Judicial Cooperation

By implementing a harmonized legal framework, legal loopholes through which alleged offenders may escape prosecution and punishment can be closed and police and judicial cooperation can be increased. The fact that such a framework constitutes a means to combat serious crime successfully can be demonstrated by looking at the fight against terrorism.

In the wake of the terrorist attacks against the United States in September 2001, the European Union undertook various harmonization efforts in order to ensure successful arrest, extradition (if necessary) and prosecution of alleged offenders of

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[7] African Union, African Union Plan of Action, AU Doc. AU/MT/MIN/DRAFT/PI.Ac, reviewed at the Second African Union Conference of Ministers Responsible for Maritime Transport, held in Durban, South Africa on Oct. 12–16, 2009 [hereinafter: African Union Plan of Action].

[8] By implementation and compliance with chapters V and XI-2 of the International Convention for the Safety of Life at Sea (SOLAS) 1974, 1184 U.N.T.S. 2, the International Ship and Port Security (ISPS) Code (IMO Doc. SOLAS/CONF.5/34, Annex 1 (Dec. 12, 2002), containing Resolution 2 of the Dec. 2002 conference, which contains in its Annex the ISPS Code), and the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, *adopted* March 10, 1988, 1678 U.N.T.S. 221 [hereinafter: SUA Convention].

[9] Code of Conduct Concerning the Repression of Piracy and Armed Robbery against Ships in the Western Indian Ocean and the Gulf of Aden, advance copy *available at* www.fco.gov.uk/resources/en/pdf/pdf9/piracy-djibouti-meeting (last visited April 28, 2010) [hereinafter: Djibouti Code of Conduct].

[10] African Union Plan of Action, *supra* note 7.

serious and organized crimes. The chairperson of the national council of provinces in South Africa, Mr. Mahlangu, during a conference at the University of Pretoria in 2008, stressed that the measures adopted by the European Union in the fight against terrorism, such as the creation of a European Arrest Warrant, the setting up of joint investigative teams amongst European Union Member States and the possibility of freezing the property of suspected terrorists, would have allowed more effective investigation and prosecution of serious offenses. He pointed out that the underlying assumption of these measures is that harmonizing national legislation is the best way for states to fight terrorism beyond their borders.[11]

Given that piracy is a serious crime, generally involving several states, there is an equal need for enhancing police and judicial cooperation and to close the legal loopholes allowing piracy suspects to evade criminal prosecution. Hence, there is an obvious need for harmonizing the legal frameworks on piracy on the African continent.

III. Situation off the Coast of Somalia

A. Emerging Crisis

In 2005, the situation developing off the coast of Somalia alerted the continent and the world to the danger posed to shipping in the area, as a result of the state of Somalia being unable to protect shipping in its territorial waters and to apprehend and prosecute perpetrators of maritime crime. The International Chamber of Commerce's International Maritime Bureau recorded off the coast of Somalia the second highest number of actual and attempted attacks against ships in the world. What also caused alarm was that ships were being attacked as far as 400 nautical miles off the coast by pirates using mother vessels.[12]

B. Continual Deterioration

In 2006, there was a short reprise, with fewer recorded attacks against ships off the coast of Somalia. This was attributed to the increased patrols by the coalition naval forces and the takeover of certain key areas in Somalia by the Union of

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[11] *Mahlangu, Mniwa Johannes*, Address by the chairperson of the Council of Provinces, Hon. Mninwa Johannes Mahlangu, at the Society of Teachers of Southern Africa Conference, University of Pretoria, Jan. 21, 2008, p. 7, *available at* http://web.up.ac.za/sitefiles/File/47/Chair%20Speech%20STLSA%20Conference%2021%20Jan%2008%20Univ%20Pret.doc (last visited April 28, 2010).

[12] International Chamber of Commerce – International Maritime Bureau [hereinafter: ICC-IMB], Piracy and Armed Robbery against Ships, Annual Report 1 January – 31 December 2005, p. 16.

Islamic Court until December 2006, when they were driven out by Ethiopian forces militarily supporting the interim government of Somalia.[13] The year 2007 saw the highest number of hostages taken (154) in eleven hijackings off Somalia.[14] In 2008, the number of attacks attributed to Somali pirates against ships off Somalia and the Gulf of Aden rocketed to a total of 111, with 815 crew members having been taken hostage, the highest number of attacks and hostages recorded in the world.[15]

C. Latest Trends

By March 2009, more than 230 suspected pirates had been investigated by navies operating off Somalia. Of these suspected pirates approximately half were sent for prosecution and most of them were released. When a navy intervenes to stop a pirate attack, they often do not know whether the pirates they catch can be prosecuted. It became apparent when navies of various states began to release pirates without prosecuting them that there was a lack of coordination between navies and shortcomings in international law and universal jurisdiction in terms of prosecuting the suspected pirates. The situation has precipitated a necessity to harmonize the legal framework for African states relating to sea piracy.[16]

IV. Involvement of International Bodies in the Fight against Piracy

In recent years, various international bodies have been active in the fight against piracy. In this section, a description will be given of their activities and the deepening involvement of the international community in piracy issues. This can be seen as a corollary to the situation developing on the high seas as described in the previous section.

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[13] ICC-IMB, Piracy and Armed Robbery against Ships, Annual Report 1 January – 31 December 2006, p. 17.

[14] ICC-IMB, Piracy and Armed Robbery against Ships, Annual Report 1 January – 31 December 2007, p. 24.

[15] ICC-IMB, Piracy and Armed Robbery against Ships, Annual Report 1 January – 31 December 2008, p. 22.

[16] *Hawkins, Oliver*, BBC News, What to Do with a Captured Pirate, March 10, 2009, *available at* http://news.bbc.co.uk/go/pr/fr/-/2/hi/in_depth/7932205.stm (last visited April 28, 2010).

A. International Maritime Organization Resolution

On November 23, 2005, the International Maritime Organization adopted Resolution A.979(24) on Piracy and Armed Robbery against Ships in Waters off the Coast of Somalia.[17] The Resolution condemned and deplored all acts of piracy and armed robbery against ships and appealed to all parties, which might be able to assist to take action, within the provisions of international law, to ensure that all acts or attempted acts of piracy and armed robbery against ships were terminated forthwith, any plans for committing such acts abandoned and any hijacked ships be immediately and unconditionally released, with no harm caused to seafarers serving in them.

The Resolution authorized the Secretary-General of the International Maritime Organization to submit the Resolution to the Secretary-General of the United Nations for consideration and any further action he might deem appropriate, including bringing the matter to the attention of the United Nations Security Council, taking into account regional coordination efforts.

The Resolution also requested the Secretary-General of the International Maritime Organization to continue monitoring the situation in relation to threats to ships sailing in waters off the coast of Somalia and to report to the Council on developments and any further actions, which might be required. This included taking into account the outcome of the sub-regional seminar on piracy and armed robbery against ships and maritime security held in Sana'a (Yemen) from April 9 to 13, 2005.[18] In January 2006, a follow up to the Sana'a sub-regional workshop on maritime security, piracy and armed robbery against ships was held in Muscat (Oman). In April 2008, a follow up to the Muscat sub-regional meeting on piracy and armed robbery against ships in the Western Indian Ocean, the Gulf of Aden and the Red Sea area was held in Dar-es-Salaam (United Republic of Tanzania).

B. United Nations Security Council Statement

On March 15, 2006, the President of the Security Council of the United Nations issued a presidential statement on the situation in Somalia, in which the Security Council encouraged member states, whose naval vessels and military aircraft operate in international waters and airspace adjacent to the coast of Somalia, to be vigi-

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[17] International Maritime Organization [hereinafter: IMO], Resolution A.979(24), IMO Doc. A.979(24) (Nov. 23, 2005) was subsequently revoked by Resolution A.1002(25), IMO Doc. A.1002(25) (Nov. 29, 2007).

[18] *Adamson, Lee*, Security Council Urges Action over Piracy off the Coast of Somalia in Line with IMO Assembly Resolution, International Maritime Organization Briefing 08, March 17, 2006, p. 1, *available at* www.imo.org/Newsroom/mainframe.asp?topic_id=1320&doc_id=6201 (last visited April 28, 2010).

lant in any incident of piracy therein and to take appropriate action to protect merchant shipping – in particular, the transportation of humanitarian aid – against any such act, in line with relevant international law. The Secretary-General of the International Maritime Organization expressed his satisfaction at this development and said that he hoped the action requested by the Security Council of all United Nations member states would help to bring about a significant reduction in attacks on innocent merchant shipping in the area and, eventually, lead to the eradication of the problem of piracy off the coast of Somalia.[19]

C. United Nations Security Council Resolutions

The attacks necessitated further action by the United Nations Security Council in the form of Resolutions 1816,[20] 1838,[21] 1846[22] and 1851[23] in relation to piracy and armed robbery in waters off the coast of Somalia.

In response to the Security Council Resolutions, naval vessels from, amongst others, the European Union, North Atlantic Treaty Alliance (NATO) and Combined Maritime Forces defense alliances, China, Japan, the Republic of Korea, Canada, the United States of America, Norway, Russia, Sweden, Australia, India and the Islamic Republic of Iran converged in the Gulf of Aden and in the Western Indian ocean area to address the issue of piracy.[24]

D. Adopting the Djibouti Code of Conduct

In January 2009, following up on the regional meeting on piracy and armed robbery against ships held in Dar-es-Salaam in 2008, a meeting was held in Djibouti to adopt the draft text of an instrument concerning the repression of piracy and armed robbery against ships in the Western Indian Ocean, the Gulf of Aden and the Red Sea area, which had been prepared by the Dar-es-Salaam regional meeting on piracy. The Djibouti meeting was attended by delegations from 17 states, as well as representatives from the United Nations and other intergovernmental organizations including Interpol. The meeting adopted the Djibouti Code of Conduct, effective from January 29, 2009, which was signed by nine countries in the region, namely, Djibouti, Ethiopia, Kenya, Madagascar, Maldives, Seychelles, Somalia, Tanzania

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[19] *Id.*

[20] S.C. Res. 1816, U.N. Doc. S/RES/1816 (June 2, 2008).

[21] S.C. Res. 1838, U.N. Doc. S/RES/1838 (Oct. 7, 2008).

[22] S.C. Res. 1846, U.N. Doc. S/RES/1846 (Dec. 2, 2008).

[23] S.C. Res. 1851, U.N. Doc. S/RES/1851 (Dec. 16, 2008).

[24] *Mitropoulos, Efthimios*, *supra* note 3.

and Yemen. The Djibouti Code of Conduct is open for consideration for signature by the remaining countries in the region (Comoros, Egypt, France, Jordan, Oman, Saudi Arabia, South Africa and Sudan).[25]

In order to allow for the prosecution, conviction and punishment of those involved in piracy and armed robbery against ships and to facilitate extradition or handing over when prosecution is not possible, each participant, in Article 11 of the Djibouti Code of Conduct, undertakes to review its national legislation with a view towards 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 investigation and prosecution of alleged offenders.[26]

Following the Djibouti meeting, the International Maritime Organization requested its members to provide copies of their national legislation and other relevant information about their domestic laws with regard to the capture, arrest, prosecution and extradition of pirates, with the aim of reviewing the legislation and arriving at pertinent conclusions and recommendations. The International Maritime Organization reports that in the responses received so far, very few national legislations fully incorporate the definition of piracy as contained in Article 101 of UNCLOS,[27] nor a jurisdictional framework based upon the concept of universal jurisdiction regulated by UNCLOS. The International Maritime Organization found further, that in most cases, piracy is not addressed as an independent, separate offence with its own jurisdictional framework, but is subsumed with crimes such as robbery, kidnapping, abduction and violence against persons, and that in such cases, prosecution and punishment can only take place in accordance with a jurisdictional scope that is inevitably more restricted than the scope of universal jurisdiction regulated in UNCLOS.[28] Clearly, revision is necessary and, at the same time, the harmonization of national legal frameworks.

E. The Role of the Comité Maritime International

One of the international instruments which can be of assistance to states reviewing national legislations pursuant to the request in Article 11 of the Djibouti Code

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[25] IMO, High-level meeting in Djibouti adopts a Code of Conduct to repress acts of piracy and armed robbery against ships, Jan. 30, 2009, *available at* www.imo.org/home.asp?topic_id=1178 (last visited May 10, 2010).

[26] IMO, IMO News: The Magazine of the International Maritime Organization, Issue 1, 2009, p. 7, *available at* www.imo.org/includes/blastDataOnly.asp/data_id%3D28484/IMO_News_No1_09_WEB.pdf (last visited April 28, 2010).

[27] United Nations Convention on the Law of the Sea, *adopted* Dec. 10, 1982, 1883 U.N.T.S. 3 [hereinafter: UNCLOS].

[28] *Mitropoulos, Efthimios*, *supra* note 3.

of Conduct and examining the possibility of harmonization is the draft guidelines for national legislation compiled by the Comité Maritime International (CMI).

The Comité Maritime International was created in 1897. Its aim is to contribute by all appropriate means and activities to the unification of maritime law. The activity of the association, which has affiliated national maritime law associations in over 50 countries, includes the drafting and promotion of international conventions and other harmonizing instruments.[29] In 2007, the legal committee of the Comité Maritime International, proposed draft guidelines for national legislation on maritime criminal acts.[30] The international working group assisted with the draft guidelines for national legislation and was composed of representatives from the Comité Maritime International, the Baltic and International Maritime Council, the International Chamber of Shipping, the International Criminal Police Organization (Interpol), the International Group of Protection and Indemnity Clubs, the International Maritime Bureau of the International Chamber of Commerce, the International Maritime Organization, the International Transport Workers Federation and the International Union of Marine Insurance.[31]

In the light of the Djibouti Code of Conduct, which requires participating states to review their national laws with a view towards ensuring that piracy and armed robbery against ships is criminalized and that adequate guidelines are created for the exercise of jurisdiction, conduct of investigation and prosecution of offenders, the draft guidelines for national legislation provides a point of departure for legislators in national as well as regional context in reviewing national legislations. Assistance towards harmonization can be provided to legislators by the Maritime Law Associations (affiliated to the Comité Maritime International) situated on the African continent. The Comité Maritime International 2009 Yearbook lists four African member associations – the Maritime Law Association of South Africa, the Maritime Law Association of Nigeria, the Moroccan Association of Maritime Law and the Tunisian Association of Maritime Law. Kenya and Zaire are temporary members. The Arab Society for Commercial and Maritime Law is also listed as a member.[32]

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[29] *Griggs, Patrick*, Comité Maritime International – Draft Guidelines for National Legislation, paper presented to Parliamentary Assembly, Political Affairs Committee Hearing on Modern Day Piracy, Brussels, Nov. 17, 2009 (on file with author).

[30] IMO, Legal Committee Leg 93/12/1, 93rd session, Aug. 15, 2007.

[31] *Id*. p. 1.

[32] Comité Maritime International (CMI), CMI 2009 Yearbook, *available at* www.comitemaritime.org/year/yearbooks.html (last visited April 28, 2010).

V. African Union Instruments and the Harmonization of Laws Relating to Piracy

The African Union can assist states toward the harmonization of legal frameworks through the following instruments.

A. African Union Commission on International Law

The African Union Commission on International Law (AUCIL) was established in terms of Article 2 of the Statute of the African Union Commission on International Law, adopted by the Assembly of the Union in Addis Ababa (Ethiopia), in February 2009. The primary objective of the African Union Commission on International Law is to undertake the activities relating to the codification and development of international law in the African continent, with particular attention to the laws of the Union as embodied in its treaties, in the decisions of its policy organs and in the customary international law arising from the practice of member states.[33] Other functions of the African Union Commission on International Law are the codification of international law, the review of treaties, where necessary, and to contribute to other objectives and principles of the African Union.[34]

According to Mazimhaka,[35] the African Union Commission on International Law will strengthen the legal framework of the African Union, serve as a think tank for its member states and play an important role in the legal integration of the continent. He also points out that the review of procedures for the ratification of treaties in member states – with a view to harmonizing them and speeding up the ratification process – is also an attempt at accelerating the legal integration of the continent. The African Union Commission on International Law is an instrument of the African Union, which could assist states working toward the harmonization of laws relating to maritime crime and piracy.

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[33] Art. 4 of the Statute of the African Union Commission on International Law.

[34] International Law Observer, African Union Establishes a New Organ: AUCIL, *available at* http://internationallawobserver.eu/2009/05/19/african-union-establishes-a-new-organ-aucil (last visited April 28, 2010).

[35] *Mazimhaka, Patrick*, Statement by Patrick Mazimhaka on behalf of the chairperson of the commission of the African Union to the meeting of ministers of justice/attorneys general on legal matters, March 20, 2008, p. 4, *available at* www.africa-union.org (last visited April 28, 2010).

B. African Union Convention on the Prevention and Combating of Terrorism

The African Union Convention on the Prevention and Combating of Terrorism,[36] in Article 2(b), urges states party to the convention to consider, as a matter of priority, the signing or ratification of, or accession to, the international instruments listed in the Annexure which they have not yet signed, ratified or acceded to. Two conventions which are very pertinent to piracy and listed in the Annexure are the UNCLOS and the SUA Convention.[37] States desirous of harmonizing legislation relating to piracy and armed robbery against ships would need, as a prerequisite, to be party to the UNCLOS and SUA Conventions.

C. Pan-African Parliament

The Pan-African parliament was established in March 1994 by the constitutive act of the African Union, as one of the nine organs provided for in the treaty establishing the African Economic Community, signed in Abuja (Nigeria) in 1991. Article 11 of the protocol to the treaty establishing the African Economic Community relating to the Pan-African Parliament articulates the function of the parliament to, amongst others, work towards the harmonization or coordination of the laws of member states and promote the coordination and harmonization of policies, measures, programs and activities of the Regional Economic Communities and the parliamentary fora of Africa.[38] The parliament can provide states in the regional economic communities with assistance in reviewing their legislation on piracy and armed robbery against ships, with a view to harmonization of their legal frameworks.

D. African Union Maritime Transport Charter

An additional instrument to assist states with harmonizing legislation is the Maritime Transport Charter of the African Union. In October 2009, member states of the African Union adopted a Maritime Transport Charter which, in Article 21(2), calls on member states to work towards the establishment of a harmonized legisla-

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[36] African Union Convention on the Prevention and Combating of Terrorism, *available at* www.africa-union.org (last visited April 28, 2010).

[37] Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, *adopted* March 10, 1988, 1678 U.N.T.S. 221 [hereinafter: SUA Convention].

[38] For more information on the Pan-African Parliament see www.pan-african-parliament.org (last visited April 28, 2010).

tive and regulatory framework capable of ensuring the promotion and the guarantee of stability of multimodal joint ventures.

In November 2009, in a memorandum to the South African Department of Transport, in response of the South African Maritime Law Association to the draft South African Maritime Transport Policy, the president of the Maritime Law Association, Mr. Andrew Robinson – with reference to Article 21(2) of the Maritime Transport Charter of the African Union – noted that the collation of all the various African states' legislative and regulatory frameworks relating to maritime transport would be a daunting task. Mr. Robinson pointed out that there may be a need to establish, in consultation with other Maritime Law Associations on the continent, an African Maritime Law Association, which, in turn, could mandate its members to provide a summary of their relevant legislative and regulatory regimes relating to maritime transport. The African Maritime Law Association could, in turn, give a formal report on this aspect of the Charter.[39] Such a continental association, dedicated to improving maritime laws, could also provide assistance to member associations in regions beleaguered by piracy, to harmonize national legislations relating to piracy and armed robbery against ships.

E. Regional Economic Communities

Most suited and best positioned to assist states which have commonalities in terms of legal systems and current socio-economic conditions would be the already established regional economic communities. The annexure to the Djibouti Code of Conduct welcomes the significant decrease in the number of attacks by pirates and armed robbers in the Asian region through increased national, bilateral and trilateral initiatives, as well as regional cooperative mechanisms and calls on other states to give immediate attention to adopting, concluding and implementing cooperation agreements on combating piracy and armed robbery against ships at regional level.[40]

In Africa, regional economic communities are well established and geographically positioned to assist states with harmonizing national legislations relating to the criminalization of piracy and the prosecution of offenders. Regional approaches to harmonization are more effective where there are substantial commonalities in terms of legal systems and the prevailing political and socio-economic conditions

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[39] *Robinson, Andrew*, Memorandum to South African Department of Transport: Response of the Maritime Law association to the Draft South African Maritime Transport Policy, Nov. 2009.

[40] IMO, Djibouti Meeting, 2009 (Record of Meeting), *available at* www.fco.gov.uk/resources/en/pdf/pdf9/piracy-djibouti-meeting (last visited April 28, 2010).

among the states in the region.[41] Such commonalities are generally present in the various African regional economic communities. The regional economic communities thus provide an existing regional mechanism, through which increased national, bilateral and trilateral initiatives to combat piracy and armed robbery against ships can be initiated.

In 1958, the Economic and Social Council of the United Nations established the Economic Commission for Africa. It was established as one of the United Nations regional commissions to operate at the regional and sub-regional levels, with the intent of harnessing resources for African priorities. The mandate of the economic commission for Africa is, amongst others, to promote the economic development of its member states, intra-regional integration and international cooperation for Africa's development. The Economic Commission for Africa focuses on promoting regional integration in support of the African Union vision and priorities and, in pursuit of this goal, works with the main regional economic communities. These regional economic communities include the Arab Maghreb Union, the Southern African Development Community, the Common Market for Eastern and Southern Africa, the East African Community, the Inter-Governmental Authority on Development, the Economic Community of West African States, the Central African Economic and Monetary Community, the Economic Community of Central African States and the West African Economic and Monetary Union.[42] The aim of the regional economic communities is to promote cooperation and integration leading to the establishment of an economic union in the sub-region.[43] Where regional alliances have shipping as a subject on their agenda, it is usually as a part of the wider economic interests and particularly the common trading interests of the state concerned.[44]

In order to fully understand a particular coastal state's situation at sea, a thorough understanding of its position on the whole range of functional treaties and agreements, international, regional and bilateral, needs to be taken into account.[45] The potential of the regional economic communities to implement the African Union's objectives in terms of the harmonization of legislation will be examined by analyzing the Southern African Development Community and some of the other regional economic communities in Africa.

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[41] *Mukerjee, Proshanto*, *supra* note 1, p. 144.

[42] Economic Commission for Africa (ECA), Overview of the ECA, pp. 1–3, *available at* www.uneca.org (last visited April 28, 2010).

[43] Economic Commission for Africa (ECA), Consultancy Opportunities, *available at* www.uneca.org/about_eca/consultancy/istd-ict4d.htm (last visited April 28, 2010).

[44] *Muherjee, Proshanto*, *supra* note 1, p. 144.

[45] South African Department of Transport, Consolidated Maritime Issues Document, Comido 1, 2003/4, p. 1.

1. Southern African Development Community

Fourteen states make up the Southern African Development Community. The member states are Angola, Botswana, Democratic Republic of Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe.[46] Article 125 UNCLOS provides for the right of access for the land-locked states to and from the sea and Article 131 UNCLOS provides for the equal treatment of ships flying the flag of land-locked states.

An Interpol Sub-Regional Bureau for Southern Africa covers the member countries of the Southern African Development Community. The Sub-Regional Bureau has a strategic plan with, over and above, the general objectives of Interpol, such as the objective to facilitate cooperation and meetings to resolve legal issues which may inhibit police cooperation and other joint activities in the region and to act as the Secretariat of the Southern African Regional Police Chiefs Cooperation Organization (SARPCCO). Among the activities of SARPCCO are to make relevant recommendations to governments of member countries in relation to harmonization of legislation and accession and ratification of international conventions in matters related to deportation, extraditions, confiscation of proceeds of crime and repatriation of recovered exhibits.[47]

An example of the influence that organizations such as the Secretariat of the SARPCCO can have on creating uniformity in national legislation or the introduction of new legislation is illustrated by its Resolution on "Harmonization of Laws," passed at its 14th annual general meeting, held in September 2009 in South Africa. In this Resolution members are mindful of the need to harmonize legislation in the region and member countries are requested to consider the Botswana Motor Vehicle Theft Act as a model to deal with the problems being experienced with vehicle theft and the repatriation of stolen vehicles. Members are also asked to consider the introduction of legislation to combat and regulate recyclers and dealers in second hand goods, drawing good practices from the South African and/or the Namibian Second Hand Goods Act. The Secretariat of the SARPCCO also directs the legal subcommittee to conduct an audit of laws relating to extradition in the region and to make recommendations on how to overcome impediments being experienced in the extradition of offenders.[48]

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[46] For more information about the South African Development Community see www.sadc.int (last visited April 28, 2010).

[47] For more information about the Southern African Regional Police Chiefs Co-operation Organisation Activities (SARPCCO) see www.interpol.int/Public/Region/Africa/Committees/SARPCCO.asp (last visited April 28, 2010).

[48] Southern African Regional Police Chiefs Co-operation Organisation (SARPCCO), Annual General Meeting held at Emperors Palace, Kempton Park, South Africa, in Sept. 2009; SARPCCO Resolution 14, AGM/09/RES/3: Harmonization of Laws.

The successful legislative efforts that have been made to combat motor vehicle theft and repatriation of stolen vehicles provide a model for possible reforms in the area of piracy. Similar legislation enacted with regard to these good practices, can be implemented in the fight against piracy and promoted within the regional economic communities, through organizations such as the Secretariat of the SARPCCO. This should in turn contribute, not only to alleviating the problem of piracy faced by African nations, but also to the ultimate goal of a harmonized legal framework for Africa.

2. East African Community

The East African Community was inaugurated in 2001. The member states are Kenya, Uganda and Tanzania. The main organs of the East African Community are the Summit of Heads of State and Government, the Council of Ministers, the Coordination Committee, Sectoral Committees, the East African Court of Justice, the East African Legislative Assembly and the Secretariat. The Summit meets at least once a year and may also hold extraordinary meetings as necessary. The East African Court of Justice's appellate, human rights and other jurisdiction has yet to be determined by the Council of Ministers in a protocol. Although the priority of the East African Community is based on economic cooperation, the East African Community believes that it can play a role in enhancing regional stability. The Inter-State Committee of the East African Community has already discussed the issue of counter-terrorism.[49] The two littoral member states of the East African Community have both experienced attacks against ships in their territorial waters, as well as in the high seas adjacent to their territorial waters.

As in the case of the Southern African Development Community, with its Interpol Sub-Regional Bureau, and the SARPCCO, an Interpol Regional Bureau in Nairobi covers the member states of the East African Community and has an Eastern African Regional Police Chiefs Cooperation Organisation (EAPCCO). Among the objectives of the Interpol Regional Bureau in Nairobi are to consider for adoption all the resolutions made by the EAPCCO. The Regional Bureau also has a priority crime desk for maritime piracy off the Somali coast. Model legislation and good practices in other states in the region can be promoted for adoption by legislators through the EAPCCO, which in turn will assist in creating a harmonized legal framework for states on the east African coast.[50]

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[49] East African Community, History and Background, *available at* www.africa-union.org/root/AU/recs/eac.htm (last visited April 28, 2010).

[50] For more information on the Interpol Regional Bureau in Nairobi see www.interpol.int/public/ICPO/SRB/nairobi.asp (last visited April 28, 2010); Interpol, East African Police Chiefs Eye Closer Ties with INTERPOL in Combating Transnational Crime, media release, Sept. 29, 2009, *available at* www.interpol.int/public/ICPO/PressReleases/PR2009/PR200988.asp (last visited April 28, 2010).

3. Inter-Governmental Authority on Development

The member states of the Inter-Governmental Authority on Development are the East African countries Djibouti, Ethiopia, Kenya, Somalia, Sudan, Uganda and Eritrea. The vision of the Inter-Governmental Authority on Development is to be the premier regional organization for achieving peace, prosperity and integration in the region.[51]

A meeting of the Council of ministers of the Inter-Governmental Authority on Development was held on June 29, 2009, at Addis Ababa (Ethiopia). After the meeting, a communiqué was issued, which, in point 12, commits the governments of the member states of the Inter-Governmental Authority on Development, individually and collectively, to support the cause of peace and security in Somalia and to provide all necessary coordinated support in capacity building of the Somali security forces and public sector management.[52] This regional economic community has included in its membership the Transitional Federal Government of Somalia and can be regarded as comprising the front line states in the efforts to stabilize Somalia and to eradicate piracy in the region. In this regard, it is important that the national legislations of these states be harmonized to ensure that there is no opportunity for pirates in the region to avoid being prosecuted.

4. Arab Maghreb Union

The Arab Maghreb Union was established in 1989. The Arab Maghreb Union member states are Algeria, Libya, Mauritania, Morocco and Tunisia. The Arab Maghreb Union is dormant and attempts are underway to revive it. The Arab Maghreb Union treaty provides for the possibility for other Arab and African countries to join the union at a later stage. The main objectives of the Arab Maghreb Union treaty are, amongst others, to strengthen all forms of ties among the member states to ensure regional stability.[53] Member states in the region working towards harmonizing legislation relating to combating sea piracy could be assisted in this regard by the Arab Maghreb Union committee responsible for security.

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[51] For more information on the Intergovernmental Authority for Development (IGAD) see www.africa-union.org/root/au/recs/igad.htm (last visited April 28, 2010).

[52] Intergovernmental Authority on Development, Communiqué of the 33rd Extra-Ordinary Session of the IGAD Council of Ministers on the Security and Political Situation in the Sub-Region in Particular Somalia, Addis Ababa, Ethiopia, July 10, 2009, *available at* www.issafrica.org/uploads/IGADCOM33Jul09.pdf (last visited April 28, 2010).

[53] For more information on the Arab Maghreb Union, see www.maghrebarabe.org (last visited April 28, 2010).

5. Economic Community of West African States

The Economic Community of West African States is a regional organization of 16 West African states. The following countries are members: Benin, Burkina Faso, Cape Verde, Ivory Coast, Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Mauritania, Niger, Nigeria, Senegal, Sierra Leone and Togo. The Economic Community of West African States is designated as one of the five regional pillars of the African Economic Community. In February 1998, it signed the Protocol on Relations between the African Economic Community and regional economic communities, together with the Common Market for Eastern and Southern Africa, the Economic Community of Central African States, the Inter-Governmental Authority on Development and the Southern African Development Community.

To enforce community decisions, the treaty of the Economic Community of West African States provides for a West African Parliament, an Economic and Social Council and an Economic Community of West African States Court of Justice. The Economic Community of West African States has a Technical Commission for Transport, Communications and Tourism.[54] This regional economic community can, through its Technical Commission for Transport, fulfill its obligations to instruments of the African Union, such as the African Union Maritime Transport Charter. This calls for the harmonization of laws relating to maritime security, by assisting with the harmonizing of such laws in West Africa.

6. Common Market for Eastern and Southern Africa

The member countries of the Common Market for Eastern and Southern Africa are Burundi, Comoros, Democratic Republic of Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia and Zimbabwe. The Common Market for Eastern and Southern Africa was established as an organization of free independent sovereign states, which have agreed to cooperate in developing their natural and human resources for the good of all their people and, as such, has a wide-ranging series of objectives, which include the promotion of peace and security in the region.[55]

With many littoral state members and the strategy to create economic prosperity through regional integration, any threat which could disrupt trade, particularly seaborne trade, would necessarily be taken seriously by this regional economic community and approached with a view to its eradication. This, by its nature,

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[54] For more information on the Economic Community of West African States, see www.ecowas.int (last visited April 28, 2010).

[55] For more information on the Common Market of Eastern and Southern Africa, see http://comesa.int (last visited April 28, 2010).

would have to include actions to examine the capacity of national legislations to deal with piracy.

7. Economic Community of Central African States

The member states of the Economic Community of Central African States are Angola, Burundi, Cameroon, Central African Republic, Chad, Congo, Democratic Republic of Congo, Equatorial Guinea, Gabon, Rwanda, Sao Tome and Principe. The ultimate goal of the Economic Community of Central African States is to establish a Central African Common Market. One of the priority fields for the organization is to develop capacities to maintain peace, security and stability, which are recognized as essential prerequisites for economic and social development.[56]

In this regard, any threat which could disrupt seaborne trade would need to receive the attention of the Security Committee of the Economic Community of Central African. If legislation to combat this threat is lacking or in need of harmonization among littoral member states, the Security Committee of the Economic Community of Central African States could provide an additional instrument to assist in this regard.

VI. Findings and Recommendations

Africa, through the African Union and its structures, has sufficient mechanisms by which legal frameworks on the continent can be harmonized. These structures need to be fully utilized by states in this regard.

The international initiatives by the Comité Maritime International and the International Maritime Organization have provided the instruments (draft guidelines for national legislation on maritime criminal acts and the Djibouti Code of Conduct) to harmonize laws relating to the prosecution, conviction and punishment of those involved in piracy and armed robbery against ships and to facilitate extradition or handing over when prosecution is not possible. The best structures to implement these initiatives would be the existing regional economic communities, utilizing the commonalities in their legal system and political and socio-economic conditions.

Law enforcement agencies within the regional economic communities can assist with promoting model legislation or good practices relating to successes in prosecuting pirates, through regional organizations such as the Secretariat of the SARPCCO or their equivalents in the other regional economic communities.

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[56] For more information on the Economic Community of Central African States see www.africa-union.org/root/AU/recs/eccas.htm (last visited April 28, 2010).

The Maritime Law Associations on the continent, dedicated to improving maritime laws, should consider the founding of a continental (African) association to provide assistance to states in implementing maritime legislation relating to the Djibouti Code of Conduct and the African Union Maritime Transport Charter. There is a long road ahead and political and business leaders, academics and ordinary citizens need to champion the cause of African unity. Champions need to take the lead in their communities and regions with initiatives that will assist in the harmonization of the legal frameworks relating to maritime security in order to create a safe environment in which trade can take place between Africa and its partners in the rest of the world. Any disruption to seaborne trade will have dire consequences to food security in the affected region as well as lack of confidence and possible cessation of trade. The situation in Somalia amply illustrates this scenario.

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