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# Corso di Laurea magistrale in Relazioni Internazionali Comparate – International Relations

Tesi di Laurea

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## Piracy off the coast of Somalia: Challenges to law enforcement

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## ABSTRACT

L'idea di scrivere la tesi di laurea magistrale sul tema della pirateria marittima è nata durante gli studi di diritto internazionale e più specificamente di diritto internazionale del mare. Infatti, può suscitare una certa curiosità in uno studente il fatto che la Convenzione delle Nazioni Unite sul Diritto del Mare (Convenzione di Montego Bay – CMB) del 1982, che è stata definita una costituzione per gli oceani, contenga alcuni articoli che riguardano la pirateria marittima nonostante che questa pratica illegale non sia oggi particolarmente diffusa. Durante il novecento, gli episodi di pirateria marittima sono stati piuttosto limitati, anche se mai totalmente assenti, ma nei primi anni del ventunesimo secolo la pirateria si è presentata come una minaccia alla libertà di navigazione e di trasporto delle merci nell'Oceano Indiano, a largo delle coste della Somalia. Dato l'impegno che la comunità internazionale ha riposto nel combattere la pirateria somala, ho deciso di concentrarmi su di essa.

Le prime ricerche sulla pirateria marittima in generale mi hanno portata a pormi una serie di domande, ovvero: quanti episodi di pirateria si sono verificati negli ultimi anni? Il quadro giuridico fornito dalla CMB è sufficiente per reprimere questo fenomeno o vi sono altre convenzioni? In che modo la comunità internazionale si è impegnata a rispettare l'obbligo di cooperazione per combattere la pirateria disciplinato dall'articolo 100 della CMB? Ho cercato di rispondere a queste domande nel primo capitolo. Infatti, dopo aver trattato brevemente di alcune forme di pirateria antica e delle caratteristiche della pirateria moderna, attraverso un'analisi dei rapporti pubblicati dall'Organizzazione Marittima Internazionale, ho potuto constatare come gli episodi di pirateria abbiano raggiunto un numero piuttosto elevato negli anni novanta nel sud-est asiatico e soprattutto nei primi anni del ventunesimo secolo a largo delle coste somale. È stato stimato che il costo economico della sola pirateria somala nel 2012 sia variato tra 5,7 e 6,1 miliardi di dollari. Vi sono varie ragioni che facilitano l'insorgere della pirateria; ad esempio, la debolezza delle istituzioni statali che non sono in grado di governare sul proprio territorio e tantomeno di sorvegliare le proprie acque, la mancanza di leggi nazionali che criminalizzano la

pirateria, la morfologia delle coste che possono offrire ottimi nascondigli, e la possibilità di ottenere elevati riscatti in cambio degli ostaggi o delle navi catturate. Nel caso della Somalia, queste ragioni sono in buona parte presenti.

Per quanto riguarda il quadro giuridico disciplinato dalla CMB, ho analizzato la definizione di pirateria, le azioni previste dalla Convenzione per combatterla e l'obbligo di cooperazione. Secondo l'articolo 101 della CMB vi sono quattro elementi necessari per identificare un atto di pirateria; tale atto deve consistere in un atto illecito di violenza, commesso per fini privati, in alto mare e contro un'altra nave. Dato che questi elementi pongono dei limiti oggi nella repressione del crimine di pirateria, ho evidenziato come sia la Convenzione per la Repressione degli Atti Illeciti contro la Sicurezza della Navigazione Marittima del 1988, sia l'utilizzo della terminologia *atto di rapina a mano armata in mare* insieme al termine pirateria, siano stati di estrema utilità per la comunità internazionale. Inoltre, in riferimento alla cattura di una nave pirata, è possibile affermare che la Convenzione ribadisce che una nave di qualsiasi Stato può catturare una nave sospettata di condurre atti di pirateria e portare i sospettati di fronte ai propri tribunali per sottoporli a processo. I pirati sono stati considerati da sempre degli *hostes humani generis* che conducevano attività illecite indiscriminatamente e per questo sono perseguibili da qualunque Stato. Vi sono ovviamente dei limiti riguardo a quali navi possono lecitamente fermare una nave sospettata di pirateria e delle regole che disciplinano il diritto di inseguimento e il diritto di visita di una nave che ho analizzato in questo capitolo. Per concludere l'argomento sul quadro giuridico definito dalla CMB, ho fornito alcuni esempi di cooperazione internazionale per combattere il crimine della pirateria, ovvero le attività dell'Organizzazione Marittima Internazionale e dell'International Maritime Bureau (Ufficio Marittimo Internazionale), ed ho esaminato il primo accordo stipulato su questo tema in Asia. Ho ritenuto che una spiegazione della pirateria marittima come fenomeno e del quadro giuridico internazionale che la riguarda costituissero i punti di partenza necessari per comprendere meglio il caso della pirateria marittima somala e le difficoltà che ha posto e che continua a porre.

Il secondo capitolo della tesi è stato quindi dedicato alla pirateria somala, alle sue cause e caratteristiche e all'impegno della comunità internazionale per

reprimerla. Ho ritenuto necessario fare un accenno alla recente storia della Somalia, poiché la mancanza di un governo effettivo e la conseguente guerra civile che per molti anni hanno alienato questo Paese e i disordini che continuano ad affliggerlo sono le cause primarie delle attività illecite che vi si sono diffuse, compresa la pirateria. Molti studiosi ritengono infatti che le prime forme di pirateria a largo della Somalia si siano manifestate a seguito della caduta del regime di Siad Barre nel 1991. Tuttavia la pirateria somala è divenuta una vera e propria minaccia per i commerci qualche anno più tardi raggiungendo un picco storico di circa 225 attacchi nel 2011 soltanto. Infatti in pochi anni, tra il 2008 e il 2011, i pirati somali hanno compiuto un ingente numero di attacchi piuttosto violenti in un'area molto ampia dimostrando un'efficiente organizzazione e un buon adattamento di fronte al crescente dispiegamento delle numerose flotte internazionali in operazioni anti-pirateria. La pirateria somala si è inoltre distinta per l'uso di "navi madre" e per la predilezione per attacchi che mirano a prendere in ostaggio la nave e i suoi membri dell'equipaggio al fine di ottenere elevati riscatti.

Dato che la Somalia non era in grado allora, e in parte non lo è ancora oggi, di sorvegliare le proprie acque e di impedire che venissero commessi atti di pirateria, il Consiglio di Sicurezza delle Nazioni Unite dal 2008 ad oggi ha adottato dodici risoluzioni che riguardano la pirateria somala. Il Governo di Transizione Somalo ha richiesto un'assistenza internazionale e queste risoluzioni sono state adottate anche con il suo consenso. Nella parte centrale del secondo capitolo ho quindi spiegato come tali risoluzioni hanno potuto estendere l'area geografica di applicabilità delle azioni anti-pirateria previste dalla CMB al mare territoriale somalo e poi alla terraferma, nel tentativo non solo di ridurre il numero di attacchi in mare, ma anche di minare la pirateria alla radice, trovandone gli organizzatori e i finanziatori. Queste risoluzioni hanno quindi permesso alla comunità internazionale di organizzare operazioni anti-pirateria e l'impegno è stato notevole sia attraverso le tre principali operazioni di cui ho trattato, ovvero l'Operazione Atalanta istituita dall'Unione Europea, le tre operazioni NATO, e la Combined Task Force 151, sia con l'impegno individuale di molti altri Stati, sia con iniziative regionali come il Codice di Condotta di Djibouti del 2009. L'analisi

di questo straordinario impegno internazionale mi ha però portata a scoprire che non sempre, quanto meno inizialmente, un'operazione anti-pirateria che conduce alla cattura di una nave pirata e dei suoi membri dell'equipaggio, si conclude poi con la sottoposizione a processo dei sospettati. Infatti come sottolineato più volte dal Consiglio di Sicurezza, troppo spesso gli Stati hanno optato per il rilascio dei pirati subito dopo averli catturati e questo ha anche influito sulla reale efficacia delle operazioni anti-pirateria. Dato che questo aspetto mi ha particolarmente incuriosito, ho deciso di dedicarvi il terzo e ultimo capitolo.

Quando ho letto che il numero dei pirati rilasciati senza processo a metà 2010 ammontava a nove su dieci mi sono chiesta: quali erano e sono i motivi che conducono gli Stati a preferire la cosiddetta pratica del *catch-and-release* (cattura-e-rilascio)? Inoltre, dato che il numero dei pirati processati nel tempo è poi cresciuto, mi sono chiesta: quali soluzioni sono state individuate? Per quanto riguarda la prima domanda, gli Stati ritengono di trovarsi di fronte a problemi giurisdizionali, politici, finanziari, e logistici. All'inizio del terzo capitolo ho quindi spiegato che, benché la CMB preveda che il crimine della pirateria sia sottoposto a giurisdizione universale, pochi Stati hanno ritenuto di avere giurisdizione quando la nave attaccata e/o catturata non batteva la loro bandiera o quando i membri dell'equipaggio non erano loro cittadini. Molti studiosi ritengono però che gli Stati potrebbero quanto meno ricorrere alla formula *aut dedere aut judicare*, o estradare o giudicare. Tuttavia, mentre per alcuni non è chiaro se questa formula sia prevista dalla CMB, altri ritengono che ci si potrebbe comunque avvalere della disciplina dettagliata prevista al riguardo dalla Convenzione per la Repressione degli Atti Illeciti contro la Sicurezza della Navigazione Marittima del 1988. In ogni caso però anche il ricorso all'extradizione è stato frequentemente scartato. Per quanto riguarda gli altri problemi gli Stati temono che i sospettati condannati, una volta scontata la pena, richiedano asilo politico, inoltre ritengono che i costi e le tempistiche per il trasporto dei sospettati dall'Oceano Indiano siano troppo elevati, ma soprattutto che ci siano innegabili problemi inerenti al reperimento delle prove e delle testimonianze necessarie.

Tuttavia la comunità internazionale ha individuato un'altra soluzione: la stipulazione di accordi di trasferimento degli individui sospettati di pirateria tra lo Stato che si occupa della loro cattura e uno Stato della regione che è disposto ed ha la possibilità di processarli. Questi accordi sono stati stipulati da vari Stati con il Kenya, le Seychelles, Mauritius, e la Tanzania, e di essi, gli unici disponibili pubblicamente sembrano essere quelli dell'Unione Europea e quindi ho scelto di analizzarli nel terzo capitolo. Oltre a questa soluzione alcuni Stati hanno suggerito la possibilità di creare delle corti nazionali specializzate o dei tribunali internazionali per processare i sospettati di pirateria. A tal proposito, il Segretario Generale delle Nazioni Unite ha presentato un rapporto in cui sono identificate sette possibili soluzioni tra cui, incentivare attività di capacity building nella regione, creare corti somale specializzate in Somalia o in altri Stati della regione, oppure creare una corte internazionale con o senza la partecipazione delle Nazioni Unite. Ad oggi, le azioni intraprese sembrano riguardare essenzialmente la costruzione di capacità negli Stati della regione, questo significa che si è cercato di garantire un equo processo e delle adeguate condizioni di prigionia per i condannati. Ciò ha comportato e comporta una continua assistenza da parte di varie agenzie ONU, dell'UE, e di organizzazioni regionali e locali a quei Paesi della regione che conducono i processi, ovvero il Kenya, le Seychelles, Mauritius, e le due regioni somale, Somaliland e Puntland, nelle fasi di accoglienza dei sospettati e di eventuali testimoni, durante il rilevamento delle prove, nella ristrutturazione o costruzione delle strutture necessarie per condurre i processi e per incarcerare i condannati. Si ritiene che questo impegno, oltre a favorire l'aumento del numero dei pirati processati, abbia migliorato i sistemi giuridici e abbia incentivato lo scambio di conoscenze tra gli Stati della regione.

Molti studiosi ritengono che il fatto che le soluzioni individuate abbiano condotto alla riduzione del numero di pirati rilasciati senza essere stati sottoposti a processo stia avendo un effetto positivo, accrescendo inoltre i rischi di chi sceglie di compiere un attacco. Allo stesso tempo però i timori non mancano. Nei vari libri, ricerche e articoli analizzati si rintracciano sempre frasi che ricordano come la pirateria somala sia stata fin dall'inizio una questione di mancanza di applicazione della legge e per questo sono stati spesi molti soldi ad esempio per le

operazioni anti-pirateria in mare e per aumentare il numero di processi. Tuttavia molti temono che, dato che il numero di attacchi nel 2013 è stato molto basso, i fondi devoluti dalla comunità internazionale per migliorare l'applicazione della legge in Somalia e a largo delle sue coste diminuiranno e il disordine che è stato alla base del manifestarsi della pirateria somala, e che ancora è presente, possa rifiorire e riportare la situazione ai livelli passati.

## LIST OF ABBREVIATIONS

AMISOM	African Union Mission in Somalia
ASIL	American Society of International Law
BMP	Best Management Practice
CGPCS	Contact Group on Piracy off the Coasts of Somalia
CPP	Counter-Piracy Programme
CTF	Combined Task Force
CJIL	Chinese Journal of International Law
DCoC	Djibouti Code of Conduct (Code of Conduct concerning the Repression of Piracy and Armed Robbery against ships in the Western Indian Ocean and the Gulf of Aden)
EEZ	Exclusive Economic Zone
EJIL	European Journal of International Law
EU	European Union
EUCAP Nestor	European Union Capacity Nestor
EUNAVFOR	European Union Naval Force
HSC	High Seas Convention
ICU	Islamic Courts Union
IMB	International Maritime Bureau
IMB-PRC	International Maritime Bureau – Piracy Reporting Centre
IMO	International Maritime Organisation
ITLOS	International Tribunal for the Law of the Sea
NATO	North Atlantic Treaty Organisation
PIU	Project Implementation Unit
PSC	Political and Security Committee
ReCAAP	Regional Cooperation Agreement on Combatting Piracy and Armed Robbery against ships in Asia
ReCAAP-ISC	Regional Cooperation Agreement on Combatting Piracy and Armed Robbery against ships in Asia – Information Sharing Centre
SHADE	Shared Awareness and Deconfliction

SUA Convention	Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation
TFG	Transitional Federal Government
UNCLOS	United Nations Convention on the Law of the Sea
UNDP	United Nations Development Programme
UNODC	United Nations Office on Drugs and Crimes
UNSC	United Nations Security Council
UNSG	United Nations Secretary-General
UNOSOM	United Nations Operation in Somalia
UNITAF	Unified Task Force
WFP	World Food Program

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## INTRODUCTION

The idea of writing a Master's thesis on maritime piracy was born out of mere curiosity. At a certain point during international law studies, a student comes across the study of the international law of the sea and discovers that the United Nations Convention on the Law of the Sea (UNCLOS) consecrates a few articles to maritime piracy. Given that this is not a topic that often makes the headlines, its inclusion in a convention labelled "a constitution for the oceans"<sup>(1)</sup> might raise some interest in the issue.

Once you approach this topic your mind might recover smatterings of ancient maritime piracy taught at primary school; yet, soon afterwards, while reading, you discover that acts of maritime piracy almost disappeared in the nineteenth century and reappeared in much recent years, in particular, but not only, in the Indian Ocean off the coast of Somalia. Indeed, Somali piracy has posed a major threat to the freedom of the seas and the security and safety of maritime navigation and transports since the beginning of the twenty-first century. Accordingly we decided to focus on Somali-based maritime piracy.

A first glimpse at modern-day piracy has aroused a number of questions that we will try to address: which has been the amount of piratical attacks occurring in recent years and how much have they impacted on seaborne trade transiting through major international straits, such as the Straits of Singapore and Malacca, the Strait of Hormuz, the Strait of Bab al Mandeb, or the Suez Canal? And then, given that UNCLOS provides a legal framework for piracy, is it a sufficient framework or are there other international conventions dealing with piracy or with acts similar to piracy? And finally, is the international community respecting its duty to cooperate in the suppression of piracy as enshrined in article 100 UNCLOS?

These first issues will be addressed to in Chapter 1. In fact, this Chapter will begin with a brief history of ancient maritime piracy and will arrive at modern-day piracy. It will be recalled that piracy has always been considered a

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<sup>(1)</sup> Remark of T. T. B. KOH of Singapore, President of the Third UN Conference on the Law of the Sea, *A Constitution for the Oceans*, consulted at [http://www.un.org/depts/los/convention\\_agreements/texts/koh\\_english.pdf](http://www.un.org/depts/los/convention_agreements/texts/koh_english.pdf) on 10 October 2010.

*crimen juris gentius*, since it was and is perpetrated indiscriminately, and, therefore, it has always been viewed as punishable by all nations. The impact of piracy on seaborne trade can be underlined by the fact that the most piracy-prone areas are located along the most transited sea lines. Hence, we will provide a figure of the number of piratical attacks that have been occurring since 2008 and of their location, and we will highlight that the estimated economic cost of 2012 Somali piracy alone amounted to between \$5.7 and \$6.1 billion.

Subsequently, we will focus on the legal framework. For each part of Chapter 1, we will take UNCLOS provisions as a basis to address three main issues: the definition of piracy, the actions undertaken to seize a pirate vessel, and the cooperation to suppress piracy. This will help us to understand which are the limitations of the current legal framework and which are the solutions at the international community's disposal.

With respect to the definition of piracy, we will analyse the four elements needed to identify piracy according to UNCLOS. Then we will explain that the limitations of this definition are most commonly overcome through reference to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and to the differences, but even similarities, between piracy and acts of armed robbery against ships. In order to better understand some of these elements, we have deemed it useful to explain which are the various marine spaces according to the international law of the sea and which is the difference between piracy and maritime terrorism.

As far as the seizure of pirate ships is concerned, we will explain that all States enjoy universal jurisdiction over piracy and that UNCLOS provides a legal basis for the exercise of such jurisdiction, as well as some provisions for the seizure of a pirate vessel. In this case, the limitations of UNCLOS with respect to prosecution will be addressed briefly and postponed to Chapter 3.

Lastly, we will deal with the cooperation to suppress piracy. Given that a general duty to cooperate is an obligation under UNCLOS and that a vast majority of States is party to the convention, there are various international organisations engaged in the cooperation to suppress piracy and armed robbery, as well as a number of multilateral agreements adopted to specifically address this issue.

Hence, we will mention the International Maritime Organisation, the International Maritime Bureau, and the Regional Cooperation Agreement on Combatting Piracy and Armed Robbery against ships in Asia.

After having exhausted the analysis of modern-day piracy in general and of the legal framework set by international conventions, we will consecrate Chapter 2 to Somalia. First of all, we will slightly deepen the topic of recent Somali history in order to understand why piracy has become so endemic off the Somali coast. As a consequence, we will highlight that Somali piracy is first of all a direct offspring of the persistent disorder ashore. In fact, Somalia has lacked, and in some areas is still lacking, an effective government for nearly twenty years. The total lack of law enforcement has not only caused a civil war, but also famine, human rights violations, socio-economic deterioration, and, consequently, the rise of illegal criminal activities, including piracy. The activities of the *burcard badeed*, theft or plunderer of the sea, have become increasingly known for the extraordinary number of attacks concentrated in a few years, for the geographical extension of their area of attack, for their violence, and their high level of organisation. Hence, we will deal with all these characteristics.

Moreover, the absence of law enforcement off the Somali coast, together with the damaging effect of the attacks on the shipping industry, has spurred the United Nations and the international community as a whole into action. Since 2008, the United Nations Security Council has adopted twelve resolutions addressing Somali piracy and armed robbery. Consequently, the central part of Chapter 2 will be devoted to an analysis of some aspects of these resolutions which aimed both at defining and, in a sense, extending the legal framework for counter-piracy operations and, in particular, for piracy prosecution, and at enhancing cooperation among States. Hence, in the last part of Chapter 2 we will deal with the three most relevant counter-piracy operations, the European Union Operation Atalanta, the NATO Operation Ocean Shield, and the Combined Task Force 151, and with the most important regional cooperation initiative, the Djibouti Code of Conduct.

The analysis of Somali piracy and of the international community's commitment in its suppression brought us to understand that there have been a

number of challenges in the effective achievement of the ultimate goal, that is put an end to this unlawful activity. We have understood that some of these challenges are still present, while others seem to have been won. Among the still persistent challenges, there are the root causes of piracy, namely the weakness of the Somali government which still lacks even a sufficient anti-piracy law. In the latter group, there is without doubts the effectiveness of counter-piracy operations at sea; hence, the number of attempted or committed attacks attributed to Somali pirates in 2013 has been only 11. Still, we could position another challenge halfway between a still persistent and an overcome difficulty; this is the prosecution of pirates. Hence, we will consecrate our last Chapter to this topic.

Pirates' prosecution has posed a number of challenges that have led States to opt for the so-called *catch-and-release practice*. Apprehending States chose, and choose, to release suspected pirates soon after their capture, instead of bringing them before a judge. The United Nations Security Council has been particularly concerned about this practice and has called on States to find a suitable solution. Hence, we have tried to understand why States have been so reluctant to prosecute, and then imprison, suspected pirates. We will explain that the answer is to be found in the fact that States claim that prosecution poses jurisdictional, political, financial, and logistical hurdles. However, given that an increase in the number of prosecuted pirates has nevertheless been witnessed more recently, we have looked for the solutions chosen by the international community to address the difficulties and eventually partly solve the problem of the *catch-and-release practice*.

In brief, we decided to subdivide the present thesis into three Chapters. Chapter 1 will deal with piracy as an ancient and modern phenomenon and with the legal framework set by the international law, namely the international law of the sea. Chapter 2 will address the characteristics of Somali-based piracy as a direct consequence of the disorder in Somalia. It will follow an analysis of United Nations Security Council resolutions on the issue and of the international community endeavour in counter-piracy operations at sea. Chapter 3 will be devoted to a particular problem posed by Somali piracy, that is the challenges of

pirates' prosecution. Given that States have demonstrated their reluctance in prosecuting pirates, we will analyse which solutions have been envisaged to increase the number of prosecuted pirates.

# CHAPTER 1

## PIRACY: HISTORY AND INTERNATIONAL LAW

CONTENTS: 1.1. Historical and modern-day piracy – 1.1.1. A brief history of maritime piracy. – 1.1.2. Modern-day piracy. – 1.1.3. Reasons for piracy, methods of attack, and objectives. – 1.1.4. Economic and human costs of piracy. – 1.2. Marine spaces and State jurisdiction. – 1.3. Definition of Piracy. – 1.3.1. From the Harvard Draft to UNCLOS. – 1.3.2. Definition of Piracy under UNCLOS. – 1.3.3. Beyond the limitations of the definition of piracy. – 1.3.4. Piracy and armed robbery at sea. – 1.3.5. Piracy and maritime terrorism. – 1.4. Seizure of pirates. – 1.4.1. Pirates and universal jurisdiction. – 1.4.2. Articles 110 and 111 UNCLOS and the use of force. – 1.5. International and regional cooperation to suppress piracy. – 1.5.1. International Maritime Organization. – 1.5.2. International Maritime Bureau - Piracy Reporting Centre. – 1.5.3. Regional Cooperation Agreement on Combatting Piracy and Armed Robbery against ships in Asia. – 1.5.4. The Nairobi Report. – 1.6. Conclusions.

### 1.1. HISTORICAL AND MODERN-DAY PIRACY.

Maritime piracy has a long history that can be traced back to the ancient Greeks and Romans. Some characteristics of ancient piracy are reflected in its modern-day form. Pirates have always been considered *hostes humani generis*, enemy of all mankind, since they attacked ships indiscriminately, irrespective of their nationality. As a consequence, piracy was classified as a *crimen juris gentium*, a crime against the mankind, and any State could, and can, apprehend pirates that, in the past, were most commonly sentenced to death penalty. Hence, we will start with a brief history of ancient piracy and, afterwards, we will address the scourge of modern-day piracy.

#### *1.1.1. A brief history of maritime piracy.*

The word pirate itself draws its origin from a Greek term which means to carry out brave acts. The earliest forms of maritime piracy date back to acts perpetrated in the Mediterranean at the beginning of the second millennium BC. At

the time, pirates from the Aegean and Adriatic coasts used to attack communities along the Asia Minor and Egyptian coasts. The first powers that attempted to curb Mediterranean piracy have been the Greek city-states in the fifth century BC. The Mediterranean remained for a long time an hub for this lucrative practice, because it is a rather small sea and its eastern coasts, in particular those close to Greece, are full of islands which offered excellent hiding spots from where to attack ships. Pirates used to attack villages and take hostages for whose release they used to request ransom payments. At mid-first century BC, the Romans managed to curb violent pirate activities, that were even approaching Rome, and to impose a time of relative security at sea which lasted until the Empire started to fall in the West<sup>(2)</sup>.

Since the birth of Islam in the sixth century, maritime piracy resurrected vigorously from the southern and south-eastern coasts of the Mediterranean. Yet, it was with the Ottoman Empire that piracy acquired a new feature. The Ottomans and their North African principalities, or Barbary States, of Alger, Tunis, and Tripoli, used piracy to conquer vast areas and even to make war against the Christians. This resulted in a fifty-year-long naval war in the Mediterranean which ended in 1751 with the Ottoman defeat of Lepanto. In the meantime, since the end of the sixteenth century, the North African principalities were less and less under the control of the Ottoman Empire and they started to give permission to pirates to use their coasts through the so-called letters of marque. The consent of a government transformed pirates into corsairs (or privateers). The two terms, pirate and corsair/privateer, are not interchangeable, because, whereas a privateer acted with a State's authorisation and even delivered a part of his profits to that State; a pirate acted independently of any State and irrespective of any rule<sup>(3)</sup>. For a period of nearly three hundred years, corsairs from North Africa and, in response, from Europe conducted their activities, which among others consisted in the enslavement of an astonishing number of both Christians and Muslims. This

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<sup>(2)</sup> VERONESI M., *Storia della pirateria (raccolta)*, Livorno, Accademia Navale di Livorno, 1972, pp. 7-8.

<sup>(3)</sup> As we shall see later on, according to some scholars this distinction is in a sense represented by the private ends requirement of the UNCLOS definition of piracy.

corsair war was perceived from both sides as a war against faithless people and lasted until the end of the eighteenth century<sup>(4)</sup>.

Maritime piracy has not been only a Mediterranean scourge. In northern Europe, the Vikings coming from the cold Scandinavian Peninsula, have been particularly violent predators from about 800 to 1300. The Vikings did not constrain their activities to the assault of trade vessels, but rather pillaged villages along the northern European coasts<sup>(5)</sup>. Another venue for past maritime piracy was Asia where the first pirates came from Japan, the *wokou*, and adventured along the Chinese and Korean coasts at the beginning of the thirteenth century. Alike the eastern Mediterranean's, the coasts of South East Asia are full of small islands, ideal hiding spots for pirates. First the Korean and later the Chinese attempted to halt Japanese piracy. During the ruling of the Ming dynasty in China from 1368 to 1644, the Chinese interrupted almost any foreign trade, also in an attempt to limit Japanese piracy, but this let clandestine, Chinese activities to grow and some Chinese started to conduct piratical activities as well. When China eventually opened its ports at the end of the seventeenth century, many poor coastal communities resorted to piracy, an activity that the Chinese emperor was unable to curb and, therefore, it became extremely powerful<sup>(6)</sup>. During the nineteenth century, Chinese pirates threatened the coastal communities of South East Asia to enslave them if they would not pay ransoms. In that period, Europeans trading in the Indian Ocean contributed in the suppression of piracy in that area<sup>(7)</sup>. Nevertheless, piracy and armed robbery has reappeared in the twentieth century and south-eastern Asian States have put much effort into curbing these activities.

The New World was not spared by piracy. Soon after the discovery of America, the two main maritime powers at the time, Spain and Portugal,

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<sup>(4)</sup> BONO S., *Un altro Mediterraneo. Una storia comune tra scontri e integrazioni*, Salerno, Salerno Editore, 2008, pp. 79-81.

<sup>(5)</sup> VERONESI M., *Storia della pirateria (raccolta)*, Livorno, Accademia Navale di Livorno, 1972, pp. 8-9.

<sup>(6)</sup> KRASKA J., *Contemporary maritime piracy: international law, strategy and diplomacy at sea*, Santa Barbara, California, Praeger ABC-CLIO, LLC, 2011, pp. 16-20.

<sup>(7)</sup> VERONESI M., *ibid.*.

challenged themselves in the expansionism over the oceans, both favouring the idea of the dominion/empire of the seas. This common objective led to some disputes between the two powers that were eventually settled by a Papal Bull of 1493. This Bull divided the Atlantic Ocean from pole to pole assigning Spain and Portugal respective spheres of sovereignty over the seas and territories therein. However, the other major European naval powers of the time, were not intentioned to let Spain and Portugal take advantage of their dominion over the seas and their exclusive position in the exportation of valuable resources from the New World. Spanish shipments were soon attacked both by pirates and later by French, English, and other European privateers. France and England used to issue letters of reprisal, in peacetime, and letters of marque, in wartime, to their seafarers who were allowed to engage in the preying of Spanish ships becoming, therefore, privateers. They gave a percentage of their profits to the State who issued the letters and some of them became national heroes who reached even the Caribbean. Indeed, during the sixteenth century when these privateers arrived in central America, they discovered that there was already a group of predators of the sea of French origins who had been deprived of their land upon Spanish arrival and who used to eat smoked meat cooked on a *buccan*, a type of grid. From this term derives their name: buccaneers<sup>(8)</sup>. French, Dutch, and English privateers even supported the buccaneers and these States provide them with letters of marque. However, at the beginning of the seventeenth century, when the Treaty of Utrecht imposed peace in Europe, there was, as a consequence, less interest by European States in practicing privateering in the Caribbean, and therefore they stopped issuing letters of reprisal for central American pirates. Curiously, later on Caribbean pirates adventured until the coast of East Africa to profit of the flourishing trade transiting through the Indian Ocean<sup>(9)</sup>.

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<sup>(8)</sup> VUOSI R., *La pirateria marittima un crimine da debellare*, 25 October 2012, retrieved at <http://riformalavoro.diritto.it/docs/34100-la-pirateria-marittima-un-crimine-da-debellare> on 15 October 2013.

<sup>(9)</sup> VERONESI M., *Storia della pirateria (raccolta)*, Livorno, Accademia Navale di Livorno, 1972, pp. 17-18.

With the advent of more professional armies and steamship navies, the practice of privateering was no more in States' interest and the practice of piracy became too risky and of low profit. In April 1856, the Paris Declaration Respecting Maritime Law was signed by the plenipotentiaries who had signed the Treaty of Paris ending the Crimean War in March. The Declaration abolished privateering. Later on, the Treaty on International Penal Law signed at Montevideo in 1889 at article 13 stated that "acts of piracy, as defined by public international law, shall be subject to the jurisdiction of the State under whose power the offenders may happen to fall"<sup>(10)</sup>, recognising that the repression and prosecution of piracy was the responsibility of all States<sup>(11)</sup>. From the nineteenth century, the major naval powers were able to guarantee the freedom of the seas, as well as a certain level of security at sea. As we shall see, when the Harvard Draft Convention on Piracy was redrafted in 1932, piracy had not been threatening the safety of navigation and security of maritime transport for a long time. As a consequence, the definition of piracy and the legal framework for its suppression enclosed in the Harvard Draft and reiterated almost *verbatim* in the High Seas Convention of 1958 and in the United Nations Convention for the Law of the Sea of 1982, reflects the perception of an ancient threat and has become less suitable for the repression of piracy in the late twentieth century and early twenty-first century.

### 1.1.2. Modern-day piracy.

We shall now move on to address the issue of modern-day piracy as it resurfaced since the 1980s and, more blatantly, in the first decade of the twenty-first century. In order to give a comprehensive understanding of the extent of acts

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<sup>(10)</sup> Article 13, *Treaty on International Penal Law*, 23 January 1889, Montevideo, Uruguay. The Treaty has been revised in 1940 and article 14 states that "International piracy, traffic in narcotics, white slavery, and the destruction or damage of submarine cables, are subject to the jurisdiction and law of the State into whose power the offenders may come, regardless of the place where such crimes were committed; but without prejudice to the preferential right of the State in which the criminal acts were perpetrated, to request the extradition of the offenders", consulted at <http://www.refworld.org/docid/3ae6b3781c.html> on 15 October 2013.

<sup>(11)</sup> KEYUAN Z., *New developments in the international law of piracy*, in *Chinese Journal International Law*, vol. 8, n° 2, Oxford University Press, 2009, pp. 323-325, retrieved at <http://chinesejil.oxfordjournals.org/content/8/2/323.abstract> on 15 October 2013.

of modern-day piracy and armed robbery<sup>(12)</sup>, and of their damaging effect, it is useful to provide first a brief idea of the significance of maritime transportation on the global trade system today. Subsequently, we will address the reasons for modern-day piracy, the types and number of attacks occurring, and finally the human and economic costs of piracy.

Maritime transportation has a long history and today represents the most common way to grant the transportation of enormous amount of goods. Oceans and seas present, however, both natural constraints for transport such as, the shape of coastlines (e.g. the presence of straits), the presence of winds and currents, and varying water depths; and political constraints, for instance the presence of boundaries that may limit free circulation<sup>(13)</sup>. For these reasons, maritime transport is limited to a series of sea lines that connect ports in all continents and most of which pass through the so-called “chokepoints”<sup>(14)</sup>. Chokepoints are narrow passages, i.e. straits, which are places of particular vulnerability for ships mainly due to the low cruising speed making vessels more susceptible to piratical attacks<sup>(15)</sup>. The world’s five major straits are: the Straits of Singapore and Malacca, the Strait of Hormuz, the Suez Canal, the Strait of Gibraltar, and the Panama Channel. To these, it is worth adding here the Straits of Bab al-Mandeb which connects the Gulf of Aden to the Red Sea. Alongside straits, other places that are most susceptible to acts of armed robberies are ports and harbours where ships might stay at anchor for several days for purposes of loading and unloading.

To give an idea of the amount of goods transported by sea we can refer to the recently published review of the United Nations Conference on Trade and

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<sup>(12)</sup> As we shall see in subparagraph 1.3.4. there is a difference between acts of piracy and acts of armed robbery.

<sup>(13)</sup> RODRIGUE J. P., *The Geography of Transport Systems*, Routledge, 2009, consulted at <http://people.hofstra.edu/geotrans/index.html> on 8 November 2012.

<sup>(14)</sup> MURPHY M. N., *Small boats, weak states, dirty money: the challenge of piracy*, New York, Columbia University Press, 2009, pp. 265-266.

<sup>(15)</sup> RODRIGUE J. P., *The Geography of Transport Systems*, Routledge, 2009, consulted at <http://people.hofstra.edu/geotrans/index.html> on 8 November 2012.

Development (UNCTAD)<sup>(16)</sup>. In 2012, seaborne trade was estimated at slightly more than 9.000 millions of tons loaded, of which the highest percentage is constituted by oil and gas transport. In other words, we could say that this figure corresponds to about 80% of global trade<sup>(17)</sup>.

The shipping system is rather complex and therefore vulnerable. With the advent of globalization the amount of transported goods has become enormous. This has led to the creation of larger and larger ships and the majority of maritime trade today moves in containers. The types of ships most used are: bulk carriers, oil tankers, gas carriers, and containers ships. Ship size has an impact on their speed and on the possibilities of manoeuvre in tiny passages or in case of a proximate piratical attack. Of the first ten busiest container ports, nine are Asian ports<sup>(18)</sup>; in fact, the majority of seaborne trade passes in the South China Sea and in the Indian Ocean and consequently through the Straits of Singapore and Malacca, the Strait of Hormuz, and the Straits of Bab al Mandeb up to the Suez Canal.

Interestingly, and probably not by accident, the most piracy prone areas are located close to the busiest sea lines. To count piracy and armed robbery incidents is not simple. We shall point out that statistics of reported incidents may vary depending on whether acts of armed robbery against ships are taken into account or not. Another factor that may blur the picture is a still common tendency not to report attacks due to various reasons such as, fear of the increase of insurance costs, fear of loosing credibility by the shipping company, fear of a worsening in the level of violence used by pirates, and so on. That said, the International Maritime Organisation's (IMO) and the International Maritime Bureau – Piracy Reporting Centre's (IMB-PRC) analyses, which encompass both

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<sup>(16)</sup> United Nations Conference on Trade and Development, *Review of maritime transport 2012*, New York and Geneva, United Nation Publication, 2012, retrieved at [http://unctad.org/en/PublicationsLibrary/rmt2012\\_en.pdf](http://unctad.org/en/PublicationsLibrary/rmt2012_en.pdf) on 10 November 2012.

<sup>(17)</sup> World Bank, *Ports and waterborne transport*, consulted at <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTTRANSPORT/EXTPRAL/0,,menuPK:338600~pagePK:149018~piPK:149093~theSitePK:338594,00.html> on 5 November 2013.

<sup>(18)</sup> United Nations Conference on Trade and Development, *Review of maritime transport 2012*, New York and Geneva, United Nation Publication, p. 83, retrieved at [http://unctad.org/en/PublicationsLibrary/rmt2012\\_en.pdf](http://unctad.org/en/PublicationsLibrary/rmt2012_en.pdf) on 10 November 2012.

piracy and armed robbery, are considered as highly reliable; yet, the IMB estimates, for instance, that the amount of non reported attacks could equal to 50% of the actually occurred attacks<sup>(19)</sup>. The most piracy prone areas are: South East Asia and the Indian Sub Continent, in particular the Straits of Singapore and Malacca, East Africa, due to Somali piracy, and the Gulf of Guinea. It follows a graph published by IMO together with the 2012 annual report.

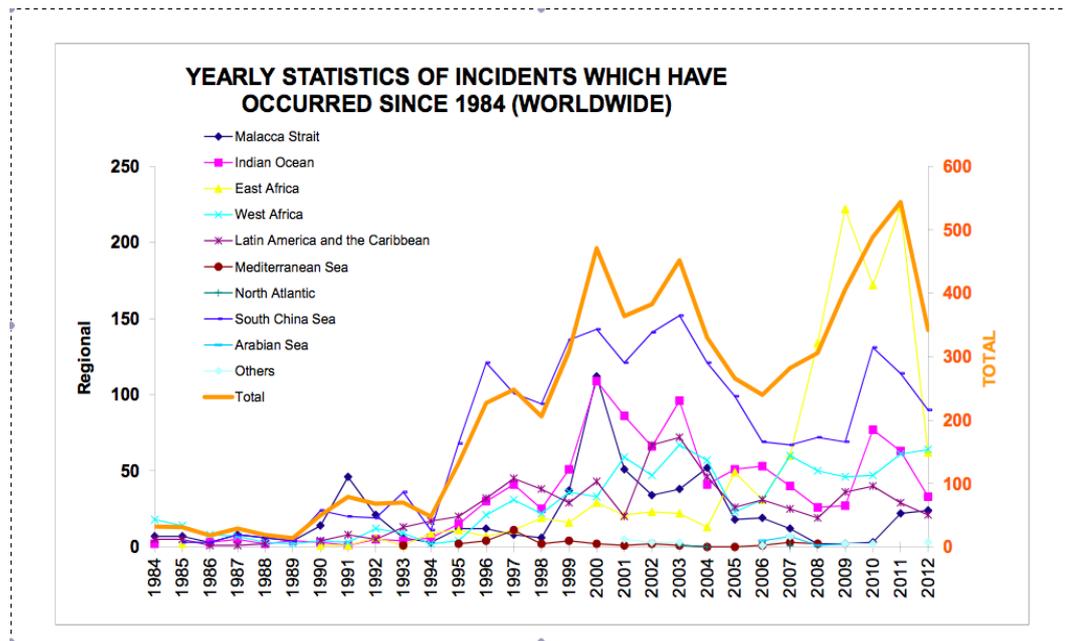


Figure 1.1.: Yearly Statistics of Incidents since 1984<sup>(20)</sup>.

The Figure 1.1. assembles the numbers of incidents signalled in IMO’s reports from 1984 to 2012. As can be noticed, the number of reported attacks has been relatively low until 1994. Between 1994 and 1995, and between 1998 and 2000, there have been two peaks in the number of attacks. A significant drop has been witnessed in the midst of the past decade; yet, since then the attacks augmented and reached an historical peak in modern day piracy in 2011. The first two increases were mainly due to attacks in the Malacca Strait; as a consequence, the first cooperative framework to counter piracy was developed

<sup>(19)</sup> MURPHY M. N., *Small boats, weak states, dirty money: the challenge of piracy*, New York, Columbia University Press, 2009, pp. 59-61.

<sup>(20)</sup> IMO annual report 2012, retrieved at <http://www.imo.org/Pages/home.aspx> on 20 October 2013.

between East Asian countries in 2004 and it seems to have had positive consequences with a drop of attacks in that area since the very same year. Instead, the rise of more recent modern day piracy, from 2006, is to be ascribed to Somali-based piracy.

Pursuant to IMO reports for the period 2008-2012, the number of allegedly committed and attempted acts of piracy and armed robbery against ship is:

	<b>South China Sea</b>	<b>Indian Ocean (Malacca Strait)</b>	<b>East Africa (Arabian Sea / Persian Gulf)</b>	<b>West Africa</b>	<b>Others</b>	<b>Total</b>
<b>2008</b>						
<b>Attempted</b>	10	3 (2)	73 (1/0)	8	3	100
<b>Committed</b>	62	23	61	42	18	206
<b>Total</b>	72	26 (2)	134 (1/0)	50	21	306
<b>2009</b>						
<b>Attempted</b>	14	3	163 (2/0)	12	2	196
<b>Committed</b>	57	24	59	34	36	210
<b>Total</b>	71	27	222 (2/0)	46	38	406
<b>2010</b>						
<b>Attempted</b>	25	38	124 (10/0)	10	6	213
<b>Committed</b>	109	39	48 (6/2)	37	35	276
<b>Total</b>	134	77	172 (16/2)	47	41	489
<b>2011</b>						
<b>Attempted</b>	11	39 (1)	176 (23/0)	17	7	274
<b>Committed</b>	102	24 (21)	47 (5/0)	44	27	270
<b>Total</b>	113	63 (22)	223 (28/0)	61	34	544
<b>2012</b>						
<b>Attempted</b>	5	7 (2)	47 (28/1)	19	6	115
<b>Committed</b>	85	26(22)	14 (10/0)	45	24	226
<b>Total</b>	90	33 (24)	61 (38/1)	64	30	341

Table 1.1.: List of attempted and committed attacks between 2008 and 2012<sup>(21)</sup>.

In Table 1.1., we can more easily notice the high pick reached by piracy in East Africa in 2011. It is worth to highlight here that due to the increased presence of counter piracy operations immediately off the coast of Somalia, piratical

<sup>(21)</sup> Information on the numbers of attacks has been gathered from various reports on IMO website <http://www.imo.org/Pages/home.aspx> on 20 October 2013.

activities of Somali piracy have shifted towards the high seas eastward and southward. Indeed, IMO reports provide information on the location of the acts as well.

Lastly, in the period January-September 2013, the number of attacks lowered significantly with only 5 attempted and 6 successful attacks occurred in East Africa. We shall see later on the reasons that are usually attributed to this decline.

### *1.1.3. Reasons for piracy, methods of attack, and objectives.*

Providing that piratical and armed robbery incidents have never completely stopped throughout the twenty-first century, being an horrific example the atrocities of the attacks on the so-called “boat people” in the South China Sea after the Vietnam War, according to Murphy, there is a specific year that can be mentioned as the starting point for the recognition of the arise of modern-day piracy<sup>(22)</sup>. This year is 1983 when IMO adopted its first resolution concerning “measures to prevent acts of piracy and armed robbery against ships”<sup>(23)</sup>. From that year piratical activities have varied in extent and location.

In his book “*Small boats, weak states, dirty money: the challenge of piracy*” M. N. Murphy provides a comprehensive analysis of the reasons which favour the increase in the number of attacks that we will keep as a main reference in order to discuss this issue.

First of all, a reason for piracy to occur might be a consequence of the limitations of UNLCOS in dealing with piracy since it does not even oblige States to enact national legislations concerning piracy<sup>(24)</sup>. As a consequence, such legislations are still lacking in some States. Moreover, even when such legislations exist, States may have problems in enforcing them. In other words, States may not have the financial capabilities to provide law enforcement and the necessary means of surveillance and security of a vast sea area. On the one hand,

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<sup>(22)</sup> MURPHY M. N., *Small boats, weak states, dirty money: the challenge of piracy*, New York, Columbia University Press, 2009, p. 2.

<sup>(23)</sup> Resolution A.545(13) of 17<sup>th</sup> November 1983, retrieved at <http://www.imo.org/Pages/home.aspx> on 20 October 2013.

<sup>(24)</sup> MURPHY M. N., *Small boats, weak states, dirty money: the challenge of piracy*, New York, Columbia University Press, 2009, p. 29.

some solutions to tackle the lack of law enforcement have been envisaged. For instance, we shall see the establishment of the Cooperative Mechanism in South East Asia. On the other hand, solutions to improve surveillance and security could encompass, for example, arming the personnel on board or using private maritime security personnel on board merchant ships. Moreover, as in the Somali case, a State's lack of enforcement capabilities at sea might be a mere result of the lack of the same capabilities on land.

Another reason for piracy/armed robbery to occur is linked to geography. Straits, narrow seas, archipelagos, fragmented coastlines are the most desirable spots for attacks. The amount of attacks that occur close to the coasts is attributable partly to the availability of safe havens in unpopulated and hidden small bays. This is particularly true for South East Asian piracy and less for Somali piracy.

Moreover, according to Murphy piracy seems to increase when there is an on-going conflict or disorder on land. For instance, he mentions that during the civil war in Lebanon criminal activity was taking place along the coast with a series of "ports" where stolen ships were sold<sup>(25)</sup>. Another example is Somali piracy that reappeared seriously after the fall of the regime of Siad Barre in 1991. It is interesting here to highlight a totally opposed point of view. In a recently published article on the NYTimes, Currun Singh<sup>(26)</sup> reports that piracy cannot flourish either when there is effective rule of law on land, or when there is a too much intensive conflict, because it needs stable conditions to prosper in order to have the land linkages it needs<sup>(27)</sup>.

Lastly, there is a characteristic reason that pushes poor people with some seafarer abilities to opt for piracy: an high reward or ransom. Rewards can derive from cash on board hijacked vessels, the sale of any valuable equipment, or of the hijacked ship itself. However, probably the highest profits come out of ransoms,

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<sup>(25)</sup> MURPHY M. N., *Small boats, weak states, dirty money: the challenge of piracy*, New York, Columbia University Press, 2009, p. 31.

<sup>(26)</sup> Currun Singh has had long protracted contacts with Somali pirates and ransom negotiators. His assumption is based both on its field work and on a study of the King's College of London as stated in the NYTimes article *Al-Shabaab fights the pirates*, consulted at [http://www.nytimes.com/2013/10/23/opinion/international/al-shabab-fights-the-pirates.html?\\_r=1&](http://www.nytimes.com/2013/10/23/opinion/international/al-shabab-fights-the-pirates.html?_r=1&) on 4 November 2013.

<sup>(27)</sup> *Ibid.*.

at least in the case of Somali pirates given that their favourite method of attack seems to be kidnap for ransom. According to an Opinion of the European Economic and Social Committee, since 2007 the number of seafarers held hostage by Somali pirates amounts to 2653<sup>(28)</sup>. As a consequence, ransom payments for the release of such a high number of hostages are quite rewarding. For example, considering 2012 Somali piracy only the amount of ransom payments and recovery has been estimated at \$31.75 million dollars<sup>(29)</sup> and 2012 was not an year in which Somali pirates have been particularly active.

We shall move now to which are the methods of attack and the objectives. On the high seas, pirates might attack with one or more small and fast boats that can easily be exchanged for fishing boats. An other method which has been increasingly used to address ships on the high seas is one that makes use of the so-called “mother ships”. Mother ships, mainly used by Somali pirates, are hijacked vessels that are used as an offshore basis, a starting point to conduct piratical attacks further in the high seas. With the increased number of counter piracy operations in piracy prone areas, the mother ship tactic has evolved into the stepping stone strategy, that is firstly pirates attack a small vessel, then a larger one, and finally they attack a merchant ship<sup>(30)</sup>. Pirates often resort to the use of violence during attacks in particular if they possess weapons.

Objectives of pirates and armed robbers vary. Pirates may merely look for cash or precious items on board the attacked vessels. For example, this might be a reason why attacks have been directed also against yachts. In addition, they might look for cargos or oil tankers. Obviously, to conduct a successful attack against a ship of such huge dimensions and to profit from its load requires greater abilities. Another objective may be the ship itself. For instance, pirates in Asia are used to

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<sup>(28)</sup> Opinion of the European Economic and Social Committee on ‘Maritime piracy: strengthening the EU response’ (own-initiative opinion), C/76/15, of 14 March 2013, retrieved at <http://eur-lex.europa.eu/en/index.htm> on 10 November 2013.

<sup>(29)</sup> BELLISH J. (lead author), *The economic cost of Somali piracy 2012*, One Earth Future Foundation, 2012, p. 3, retrieved at <http://oceansbeyondpiracy.org/publications/economic-cost-piracy-2012> on 10 November 2013.

<sup>(30)</sup> KRASKA J., *Contemporary maritime piracy: international law, strategy and diplomacy at sea*, Santa Barbara, California, Praeger ABC-CLIO, LLC, 2011, p. 54.

attack ships in order to sell them, or the cargo or both. These ships are often renamed and reregistered<sup>(31)</sup>.

#### *1.1.4. Economic and human cost of piracy.*

The cost of piracy is constituted by various elements and therefore it is difficult to estimate it or at least to have similar figures from a source to another. Moreover, as mentioned before, the alleged cost may not correspond to reality given that many incidents are not reported. That said, we can however point out which are the costs that are usually taken into account<sup>(32)</sup>.

First of all we should divide between economic costs and human costs, being the second often recorded with less accuracy. The economic cost of piracy derives from: the loss of ships and their cargoes, increased insurance costs, delays due to the attack, or attempted attack, and to re-routing in order to avoid piracy prone areas, increased investments in security on board ships, and ransom payments. Moreover, there are other costs that are sometimes neglected such as the reputation of a shipping company, that might vanish due to repeated attacks, and the environmental consequences that may result for example from the release of toxic materials in waters during an attack. Another curious side effect of piracy has been highlighted by the World Bank in the 2013 report *The Pirates of Somalia: ending the threat rebuilding a nation*; it is the cost for the tourism and fishing industries. Finally, economic costs include also the costs of the increased number of counter piracy operations in particular off the coast of Somalia and in the wider Indian Ocean<sup>(33)</sup>.

With regard to human costs first of all we should mention the number of lives lost. Furthermore, we should consider the pain suffered by hostages. Hostages are not mere prisoners and they are not in helping hands. Hence, the first

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<sup>(31)</sup> KRASKA J., *Contemporary maritime piracy: international law, strategy and diplomacy at sea*, Santa Barbara, California, Praeger ABC-CLIO, LLC, 2011, p. 40.

<sup>(32)</sup> MURPHY M. N., *Small boats, weak states, dirty money: the challenge of piracy*, New York, Columbia University Press, 2009, pp. 49-54.

<sup>(33)</sup> World Bank *The Pirates of Somalia: Ending the Threat, rebuilding a nation*, retrieved at <http://siteresources.worldbank.org/INTAFRICA/Resources/pirates-of-somalia-main-report-web.pdf> on 15 December 2013.

IMB-PRC quarterly meeting of 2013 on *Piracy and Armed Robbery against ships* presents other human costs such as, psychological and physical suffering<sup>(34)</sup>.

Finally, we can report some figures of the cost of piracy as analysed by the US-non-profit organization One Earth Future Foundation under the project *Oceans Beyond Piracy*. The organization issued its third annual working paper on *The economic cost of Somali Piracy in 2012*. The expenditures considered are: the cost of counter piracy operations, the cost of ransoms and recovery, insurance costs, the cost of military operations, the cost of prosecutions and imprisonment of pirates, labour costs, the costs derived from increased vessel's speed, the cost of security equipment and guards, and the cost of re-routing. The total amounts to between \$5.7 and \$6.1 billion, a decrease of 12.6% compared with 2011 figures<sup>(35)</sup>.

## **1.2. MARINE SPACES AND STATE JURISDICTION.**

The law of the sea is among the oldest instances of international law and one that has been subject to many changes from its appearance until the present day<sup>(36)</sup>. Starting from the imposition of the principle of the freedom of the seas, we shall see how this freedom has been constrained and which are today the marine spaces from a legal perspective. This will be useful in order to better understand the problem posed by Somali piracy.

As we recalled above, the principle of the freedom of the seas can be traced back to the seventeenth century while previously, the most powerful maritime States, namely Spain and Portugal, declared their right to exclusive dominium of the oceans. This claim was questioned by other European States, such as France, Great Britain and The Netherlands. As a result, during the seventeenth century the principle of the freedom of the seas gained momentum, in particular thanks to the work of Hugo Grotius, *Mare Liberum* of 1609.

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<sup>(34)</sup> Details of the IMB-PRC report as discussed in *Aljazeera Inside Story*, consulted at <http://www.aljazeera.com/programmes/insidestory/2013/06/201361992443928350.html> on 8 November 2013.

<sup>(35)</sup> One Earth Future Foundation program Oceans Beyond Piracy working papers, BELLISH J. (lead author), *The economic cost of Somali piracy 2012*, retrieved at <http://oceansbeyondpiracy.org/> on 10 November 2013.

<sup>(36)</sup> TANAKA Y., *The international law of the sea*, Cambridge, Cambridge University Press, 2012, pp. 3-4.

Interestingly though, since the second half of the nineteenth century, a progressive erosion of this principle has been witnessed. First of all, some States started to claim an exclusive jurisdiction over the sea off their coastline and formally declared territorial seas of various breadth. Secondly, in 1945 the US President Truman claimed exclusive jurisdiction of the United States over “the natural resources of the subsoil and sea bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States”<sup>(37)</sup>. Thirdly, starting from the eighties of the twentieth century, the exclusive economic zone has been introduced.

In the meantime, there have been attempts at codifying the international law of the sea. The first codification of the regime for the oceans is represented by the four Geneva Conventions of 1958 on the territorial sea and the contiguous zone, on the continental shelf, on fishing and conservation of the living resources, and on the high seas. Afterwards, the regime of the Geneva Conventions has been partly revised and at the end of the long-protracted Third United Nations Conference on the Law of the Sea a final new agreement was reached. The United Nations Convention for the Law of the Sea (UNCLOS) was opened for signature on 10 December 1982 and entered into force on 16 November 1994. The UNCLOS codifies to a great extent the customary international law of the sea and has been labelled “constitution for the oceans”<sup>(38)</sup>. Article 311(1) UNCLOS states that the Convention prevails over the 1958 Geneva Conventions between States parties.

Under UNCLOS provisions, the oceans are subdivided into various jurisdictional zones, such as internal waters, territorial seas, archipelagic waters, the contiguous zone, the exclusive economic zone (EEZ), the continental shelf, the high seas, and the Area<sup>(39)</sup>. Notwithstanding the fact that, in order to consider an act of violence at sea, a piratical act under UNCLOS, this act must have been

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<sup>(37)</sup> Truman Proclamation in TANAKA Y., *The international law of the sea*, Cambridge, Cambridge University Press, 2012, pp. 132-133.

<sup>(38)</sup> Remark of T. T. B. KOH of Singapore, President of the Third UN Conference on the Law of the Sea, retrieved at [http://www.un.org/depts/los/convention\\_agreements/texts/koh\\_english.pdf](http://www.un.org/depts/los/convention_agreements/texts/koh_english.pdf) on 10 October 2013.

<sup>(39)</sup> TANAKA Y., *The international law of the sea*, Cambridge, Cambridge University Press, 2012, p. 6.

carried out in the high seas, it is useful to highlight here which rules apply in every jurisdictional zone of the sea.

The sovereignty of a coastal State decreases as further as one gets from the coastline and the various jurisdictional zones have to be determined starting from a baseline which separates internal waters from the territorial sea. The determination of a baseline, in particular when bays are at issue, can be troublesome and can, as a consequence, lead to disagreements between States. To deepen this point is beyond the scope of the present thesis, yet it is important not to forget it.

Internal waters are equalized to a State's land territory; therefore, every State has full sovereignty over them.

The territorial sea extends to up to 12 nautical miles from the baseline and the coastal State exercises exclusive sovereignty over it. However, such sovereignty is subject to two restrictions. The first limitation is outlined in article 17 UNCLOS “[...] ships of all States, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea”. The innocent passage has to be continuous and expeditious and must not damage the peace and good order of the coastal State<sup>(40)</sup>. The second limitation is represented by the fact that the coastal State cannot exercise its civil and criminal jurisdiction over foreign warships lawfully transiting in its territorial waters; as well as over foreign private ships lawfully benefiting of the right of innocent passage as long as facts occurring on board the ship do not have consequences on the coast. Jurisdiction over such ships is exercised by their flag State.

Archipelagic waters are waters enclosed by the baselines of an archipelagic State. Such State has sovereignty over archipelagic waters, yet all States enjoy a right of archipelagic sea line passage, as well as of over-flight, in lines commonly used for international navigation<sup>(41)</sup>.

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<sup>(40)</sup> Article 18, UNCLOS, 10 December 1982, retrieved at [http://www.un.org/depts/los/convention\\_agreements/texts/unclos/unclos\\_e.pdf](http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf) on 10 October 2013.

<sup>(41)</sup> FOCARELLI C., *Diritto internazionale. Il sistema degli Stati e i valori comuni dell'umanità*, ed. 2, Padova, CEDAM, pp. 903.

The contiguous zone extends to up to 24 nautical miles from the baseline. Over this area of the sea, under article 33 UNCLOS, “the coastal State may exercise the control necessary to: prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations”. Unlike the territorial sea, the contiguous zone must be claimed by the coastal State.

The continental shelf extends to up to 200 nautical miles from the baseline. Under UNCLOS provisions, it is possible for a coastal State to exploit a continental shelf that in the geological sense extends beyond 200 nautical miles up to a limit of 350 nautical miles. The rights of the coastal State consist in the exploration and exploitation of the natural resources, that is the “mineral and other non-living resources of the sea-bed and subsoil” and the “living organisms belonging to sedentary species”<sup>(42)</sup>. Third States are entitled to navigate the super-adjacent waters, to lay submarine cables and pipelines, and to construct artificial installations.

The exclusive economic zone (EEZ) extends to up to 200 nautical miles and in a sense absorbs the continental shelf; yet, unlike it, the EEZ must be declared by the coastal State. The coastal State is entitled to the exploitation of the living and non-living natural resources not only of the marine soil and subsoil, but also of the super-adjacent waters<sup>(43)</sup>. Furthermore, it authorizes and regulates the construction of artificial installations<sup>(44)</sup>. Third States enjoy the “freedom of navigation and over-flight and the freedom to lay submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms”<sup>(45)</sup>.

Beyond the above mentioned marine zones, there are the high seas. Each State enjoys a series of freedoms in the high seas: “freedom of navigation,

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<sup>(42)</sup> Article 77, UNCLOS, 10 December 1982, retrieved at [http://www.un.org/depts/los/convention\\_agreements/texts/unclos/unclos\\_e.pdf](http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf) on 10 October 2013.

<sup>(43)</sup> Article 56, UNCLOS, 10 December 1982, retrieved at [http://www.un.org/depts/los/convention\\_agreements/texts/unclos/unclos\\_e.pdf](http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf) on 10 October 2013.

<sup>(44)</sup> Article 60, UNCLOS, 10 December 1982, retrieved at [http://www.un.org/depts/los/convention\\_agreements/texts/unclos/unclos\\_e.pdf](http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf) on 10 October 2013.

<sup>(45)</sup> Article 58, UNCLOS, 10 December 1982, retrieved at [http://www.un.org/depts/los/convention\\_agreements/texts/unclos/unclos\\_e.pdf](http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf) on 10 October 2013.

freedom of over-flight, freedom to lay submarine cables and pipelines, freedom to construct artificial islands, freedom of fishing, and freedom of scientific research”<sup>(46)</sup>, which shall be exercised “with due regard for the interests of other States”<sup>(47)</sup>. Moreover, on the high seas, the principle of the exclusive jurisdiction of the flag State is in force. Indeed, every State is free to bestow a ship the right to sail under its flag. However, the principle of freedom of the high seas and the principle of exclusive jurisdiction of the flag State are subject to two exceptions: the right of visit and the right of hot pursuit that are granted to the ship of every State as we will explain more extensively at a later stage. It should be recalled though that warships and ships used only on government non-commercial service enjoy “complete immunity from the jurisdiction of any State other than the flag State”<sup>(48)</sup>.

In short, the oceans are subdivided into various jurisdictional zones and this, as we shall see, influences the actions that can be undertaken both at-large and in the event of an act of piracy.

### **1.3. DEFINITION OF PIRACY.**

When dealing with the definition of piracy, a series of legal instruments<sup>(49)</sup> as well as a number of international entities<sup>(50)</sup> must be taken into account. Starting from the definition of piracy under UNCLOS, this part will highlight how these instruments and institutions have attempted to resolve the hurdles posed by the limits enshrined in UNCLOS’ definition.

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<sup>(46)</sup> Article 87, UNCLOS, 10 December 1982, retrieved at [http://www.un.org/depts/los/convention\\_agreements/texts/unclos/unclos\\_e.pdf](http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf) on 10 October 2013.

<sup>(47)</sup> *Ibid.*

<sup>(48)</sup> Articles 95 and 96, UNCLOS, 10 December 1982, retrieved at [http://www.un.org/depts/los/convention\\_agreements/texts/unclos/unclos\\_e.pdf](http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf) on 10 October 2013.

<sup>(49)</sup> For instance, UNCLOS, the Convention for the Suppression of Unlawful acts against the Safety of Maritime Navigation, the Regional Cooperation Agreement on Combatting Piracy and Armed Robbery against ships in Asia, and the Djibouti Code of Conduct.

<sup>(50)</sup> For instance, the International Maritime Organization and the International Maritime Bureau.

### *1.3.1. From the Harvard Draft to UNCLOS.*

In 1930 the League of Nations charged the Harvard Law School with forming a research group entitled to carry out a research on a number of topics to be discussed at the 1930 Codification Conference of the League of Nations<sup>(51)</sup>. One of the topics was piracy and the result of the research on this matter was the 1932 Harvard Draft Convention on Piracy which consisted of 19 articles<sup>(52)</sup>. The valuable effort of the researchers comprised the collection and restatement of the existing international law on piracy and of any relevant statute, national law, or doctrinal debate<sup>(53)</sup>. It is worth mentioning this Draft since it greatly influenced the 1958 High Seas Convention (HSC) and, consequently, the UNCLOS, which restates with minor changes articles 14-22 HSC into articles 100-107. Given that the majority of the States which compose the international system are parties to at least one of the two Conventions, the provisions delineated can be seen as widely accepted and constitute a codification of customary international law. Many scholars maintain that the reiteration of almost the same wording in the articles which deal with piracy between the two Conventions is mainly due to one reason, that is that in the twentieth century piracy was perceived as an old problem, an almost vanished historical phenomenon<sup>(54)</sup>.

### *1.3.2. Definition of piracy under UNCLOS.*

Article 101 UNCLOS states that:

Piracy consists of any of the following acts:

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

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<sup>(51)</sup> GEISS R., PETRIG A., *Piracy and armed robbery at sea: the legal framework*, Oxford, Oxford University Press, 2011, p. 38.

<sup>(52)</sup> RUBIN A. P., *The law of piracy*, Newport, Rhode Island, Naval War College Press, 1988, p. 308 ss..

<sup>(53)</sup> KRASKA J., *Contemporary maritime piracy: international law, strategy and diplomacy at sea*, Santa Barbara, California, Praeger ABC-CLIO, LLC, 2011, p. 115.

<sup>(54)</sup> MURPHY M., *Piracy and UNCLOS: does international law help regional states combat piracy?*, in LEHR P., *Violence at sea: piracy in the age of global terrorism*, New York, Routledge Taylor and Francis Group, 2007, p. 158.

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

The present definition outlines four elements necessary to identify piracy. Each of these elements has been subject to a lively debate which has highlighted some ambiguities and limitations of the UNCLOS' definition of piracy.

Firstly, piracy consists in *a unlawful act of violence*, which may consist in detention or depredation; the range of acts may encompass assaults, thefts of cash or ships, kidnappings with the purpose to obtain a ransom, or even murder<sup>(55)</sup>.

Secondly, piracy must be committed for *private ends*, which means that neither ships or aircrafts on military or government service nor insurgents can commit a piratical act<sup>(56)</sup>. Furthermore, UNCLOS states in article 102 that a public ship likewise becomes a private ship in case of mutiny or taking of control of the ship by its crew<sup>(57)</sup>. In addition, the private end requirement may also have been kept in order to recall the ancient distinction between piracy and privateering described above<sup>(58)</sup>. Besides, this requirement is useful in order to distinguish

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<sup>(55)</sup> MURPHY M. N., *Small boats, weak states, dirty money: the challenge of piracy*, New York, Columbia University Press, 2009, p. 135. See also, KONTOROVICH E., "A Guantanamo on the Sea": the difficulty of prosecuting pirates and terrorists, in KONTOROVICH E, ART S., *An empirical examination of universal jurisdiction for piracy*, Faculty Working Papers, Chicago, USA, Northwestern University School of Law, 2010, p. 252, retrieved at <http://www.californialawreview.org/assets/pdfs/98-1/Kontorovich.pdf> on 12 October 2013.

<sup>(56)</sup> TANAKA Y., *The international law of the sea*, Cambridge, Cambridge University Press, 2012, pp. p. 355.

<sup>(57)</sup> *Counter piracy under international law*, Academic briefing n. 1, Geneva, Geneva Academy of International Humanitarian Law and Human Rights, Université de Genève, August 2012, p.13, retrieved at <http://www.geneva-academy.ch/docs/academyLecture/Counterpiracy.pdf> on 19 October 2013.

<sup>(58)</sup> MURPHY M., *Piracy and UNCLOS: does international law help regional states combat piracy?*, in LEHR P., *Violence at sea: piracy in the age of global terrorism*, New York, Routledge Taylor and Francis Group, 2007, p. 159.

piracy from maritime terrorism, which is a politically and ideologically motivated act that will be discussed at a later stage.

Thirdly, piratical acts must be committed *on the high seas* or *in a place outside the jurisdiction of any state*. Even though the article does not explicitly refer to the EEZ, many scholars believe that illegal acts of violence that have taken place in the EEZ of a State may likewise be considered piratical acts<sup>(59)</sup>. The legal basis for this assumption is to be found in a cross-reference to article 58(2) UNCLOS, as it states that “articles 88 to 115 and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with this Part”<sup>(60)</sup>. As we shall see later on, illegal acts committed in the internal waters or in the territorial sea of a coastal State are often referred to as armed robberies at sea.

Fourthly, piratical acts must be committed from one ship against another ship, this is the so-called *two ship requirement*. Accordingly, internal hijacking of a ship on the high seas is not regarded as an act of piracy<sup>(61)</sup>. Moreover, we can add here that UNCLOS provides under article 103 a definition of pirate ship or aircraft and under article 104 the conditions under which a pirate ship or aircraft may retain or lose its nationality. A ship becomes a pirate ship when the persons who control it claim that it is so. The loss of nationality by a ship is not a result of the fact that it has become a pirate ship; instead, the retention or loss of nationality depends on the law of the flag State.

### *1.3.3. Beyond the limitations of the definition of piracy.*

In order to overcome the limitations of UNCLOS definition of piracy, we should first of all consider the role of the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (hereinafter SUA Convention). The SUA Convention was concluded under the International

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<sup>(59)</sup> TANAKA Y., *The international law of the sea*, Cambridge, Cambridge University Press, 2012, p. 357.

<sup>(60)</sup> KRASKA J., *Contemporary maritime piracy: international law, strategy and diplomacy at sea*, Santa Barbara, California, Praeger ABC-CLIO, LLC, 2011, p. 130.

<sup>(61)</sup> TANAKA Y., *The international law of the sea*, Cambridge, Cambridge University Press, 2012, p. 356.

Maritime Organization auspices on 10 March 1988 and entered into force on 1 March 1992<sup>(62)</sup>.

The specific circumstance which as induced to the conclusion of the SUA Convention has been the *Achille Lauro* affair that occurred on 7 October 1985. The Achille Lauro was an Italian-flag cruise ship that was seized in the Mediterranean Sea by members of the Palestinian Liberation Front, who had boarded the ship as tourists in Genoa<sup>(63)</sup>. They held all people on board hostage and threatened to kill them unless Israel released fifty Palestinian prisoners<sup>(64)</sup>. One of the hostages, an American Jew, was eventually killed. According to the majority of scholars, this case should not be considered as an act of piracy, but rather as an act of maritime terrorism.

The SUA Convention is endowed with some merits that concern the range of offences addressed, the geographical scope considered, the outlined ship-boarding procedures, and the jurisdictional criteria delineated<sup>(65)</sup>. While the first two peculiarities will be discussed here, the others two will be dealt with in the next Chapters.

The importance of the geographical scope of the SUA Convention lies in the fact that it applies to a ship who is carrying out the alleged offence while it is “navigating or is scheduled to navigate into, through, or from waters beyond the outer limit of the territorial sea of a single State, or the lateral limits of its territorial sea with adjacent States”<sup>(66)</sup>. In other words, the Convention applies to offences committed in the territorial seas, the archipelagic waters, international straits, and EEZs. Moreover, “in cases where the Convention does not apply pursuant to paragraph 1, it nevertheless applies when the offender or the alleged

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<sup>(62)</sup> TANAKA Y., *The international law of the sea*, Cambridge, Cambridge University Press, 2012, p. 361.

<sup>(63)</sup> HALBERSTAM M., *Terrorism on the high seas: the Achille Lauro, piracy and the IMO convention on maritime safety*, in ASIL, 1988, p. 269, retrieved at [http://www.uio.no/studier/emner/jus/humanrights/HUMR5503/h09/undervisningsmateriale/halberstam\\_achille\\_lauro.pdf](http://www.uio.no/studier/emner/jus/humanrights/HUMR5503/h09/undervisningsmateriale/halberstam_achille_lauro.pdf) on 20 October 2013.

<sup>(64)</sup> *ibid.*.

<sup>(65)</sup> TANAKA Y., *ibid.*.

<sup>(66)</sup> Article 4(1), SUA Convention, 10 March 1988, retrieved at <http://www.un.org/en/sc/ctc/docs/conventions/Conv8.pdf> on 15 October 2013.

offender is found in the territory of a State party other than the State referred to in paragraph 1”<sup>(67)</sup>.

As far as the types of offences are concerned, the SUA Convention applies to persons who “unlawfully and intentionally: seize a ship [...], perform an act of violence against a person on board [...], destroy a ship [...], place on a ship a device or substance which is likely to destroy that ship [...], destroy or seriously damage maritime navigational facilities [...], or communicate false information endangering the safe navigation of a ship [...]”<sup>(68)</sup>. The range of offences addressed to by the SUA Convention has been widened by the 2005 Protocol that implemented it and entered into force on 28 July 2010<sup>(69)</sup>. Indeed, the 2005 Protocol could close a gap enshrined in the UNCLOS definition of piracy, since the offences considered are not limited to an act occurring against another ship; that is, there is no two ships requirement<sup>(70)</sup>.

Even though, the SUA Convention and the 2005 Protocol do not explicitly refer to piracy, given the range of offences that they address and the geographical scope, they are considered to be relevant international instruments in order to increase security and safety of maritime navigation. Providing that under UNCLOS an illegal act of violence is an act of piracy only if it is carried out on the high seas, the SUA Convention is particularly important because it allows State parties to take actions against acts that are alike piratical acts but which occur in other areas of the sea.

As of 2 December 2013, 161 States are parties to the SUA Convention and 28 States are parties to the 2005 Protocol. It is to be noted, though, that among the States of the larger Gulf of Aden and Horn of Africa: Kenya, the Seychelles, the United Republic of Tanzania, the United Arab Emirates, Yemen, Djibouti, and Oman are State parties to the SUA Convention; while Somalia and Eritrea are not;

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<sup>(67)</sup> Article 4(2), SUA Convention, 10 March 1988, retrieved at <http://www.un.org/en/sc/ctc/docs/conventions/Conv8.pdf> on 15 October 2013.

<sup>(68)</sup> Article 3, SUA Convention, 10 March 1988, retrieved at <http://www.un.org/en/sc/ctc/docs/conventions/Conv8.pdf> on 15 October 2013.

<sup>(69)</sup> TANAKA Y., *The international law of the sea*, Cambridge, Cambridge University Press, 2012, p. 362.

<sup>(70)</sup> GEISS R., PETRIG A., *Piracy and armed robbery at sea: the legal framework*, Oxford, Oxford University Press, 2011, pp. 42-43.

and that none of these States is part to the 2005 Protocol<sup>(71)</sup>. This consideration is of some relevance when dealing with the issue of Somali piracy, since it is clear that these instruments do not apply in the Somali territorial sea, which in turn is the area in which Somali pirates have been quite active. In order to tackle this problem, the UN Security Council has adopted a series of resolutions, in particular at the end of 2008, aimed at driving down the number of piratical attacks off the coast of Somalia that we shall see in details in Chapter 2.

#### 1.3.4. Piracy and armed robbery at sea.

When dealing with the elements needed to identify piracy under article 101 UNCLOS, we saw that acts of piracy must occur on the high seas; yet, we hint there at another terminology, i.e. *armed robbery at sea*. The International Maritime Organization (IMO), in its Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery against Ships adopted on 2 December 2009, defines armed robbery against ships as:

- (a) any unlawful act of violence or detention or any act of depredation, or threat thereof, other than an act of piracy, committed for private ends and directed against a ship or against persons or property on board such a ship, within a State's internal waters, archipelagic waters and territorial sea;
- (b) any act of inciting or of intentionally facilitating an act described above<sup>(72)</sup>.

What distinguishes piracy and armed robbery is the location in which acts take place. Acts of piracy can occur only on the high seas or within a State's EEZ; while, an act of armed robbery at sea can only occur in maritime spaces that are

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<sup>(71)</sup> *Status of multilateral Conventions and instruments in respect of which the International Maritime Organization or its Secretary-General performs depositary or other functions*, consulted at <http://www.imo.org/Pages/home.aspx> on 2 December 2013.

<sup>(72)</sup> International Maritime Organization, *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), retrieved at <http://www.imo.org/Pages/home.aspx> on 25 October 2013.

under a State's sovereignty<sup>(73)</sup>. It is a State's responsibility to suppress acts of armed robbery at sea by enacting proper legislations<sup>(74)</sup>.

The terminology armed robbery at sea has been used in various UN Security Council resolutions as well as in the text of the Regional Cooperation Agreement on Combatting Piracy and Armed Robbery against ships in Asia (ReCAAP), in the text of the Djibouti Code of Conduct (with exactly the same wording), and it is recognized by the International Maritime Bureau. This common use of the terminology suggests that it is widely accepted as a form of crime at sea similar to piracy.

While, the Security Council has not provided a definition of armed robbery, since its wording is limited to sentences like "international law, [...], sets out the legal framework applicable to combating piracy and armed robbery at sea"<sup>(75)</sup>; a slightly different definition from the one outlined by the IMO's code is contained in the ReCAAP: "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"<sup>(76)</sup>.

As Geiss observes, in all the definitions of armed robbery at sea, the acts have to be directed against "a" ship; consequently, the two ships requirement does not seem necessary to identify acts of armed robbery at sea<sup>(77)</sup>.

To conclude, in order to allow major warranty of safety and security of navigation in every zone of the sea, the issue of piracy is often addressed in

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<sup>(73)</sup> *Counter piracy under international law*, Academic briefing n. 1, Geneva, Geneva Academy of International Humanitarian Law and Human Rights, Université de Genève, August 2012, p. 14, retrieved at <http://www.geneva-academy.ch/docs/academyLecture/Counterpiracy.pdf> on 19 October 2013.

<sup>(74)</sup> MURPHY M., *Piracy and UNCLOS: does international law help regional states combat piracy?*, in LEHR P., *Violence at sea: piracy in the age of global terrorism*, New York, Routledge Taylor and Francis Group, 2007, p. 165.

<sup>(75)</sup> UNSC resolution n° 1816 of 2<sup>nd</sup> June 2008, consulted at <http://www.un.org/en/sc/documents/resolutions/> on 22 October 2013.

<sup>(76)</sup> Article 1(2), ReCAAP, 11 November 2004, retrieved at <http://www.recaap.org/> on 24 October 2013.

<sup>(77)</sup> GEISS R., PETRIG A., *Piracy and armed robbery at sea: the legal framework*, Oxford, Oxford University Press, 2011, p. 75.

conjunction with acts of armed robbery at sea. In contrast, piratical acts and acts of maritime terrorism have to be dealt with separately.

#### *1.3.5. Piracy and maritime terrorism.*

Before highlighting some differences between piracy and maritime terrorism, it is useful to hint to what is in itself terrorism.

The difficulty in drawing a shared legal definition of terrorism can be identified both in the divergent State's interpretations of what is terrorism from their perspective, and in the complexity of distinguishing terrorism from common crimes, such as murder, slaughter, and others. When terrorism becomes international terrorism it is especially difficult to outline a definition since it is hard to perceive the existence of an enemy of all mankind a part from piracy<sup>(78)</sup>. The peculiarity of terrorism, especially in its international form, is that it is a form of violence which aims at instil terror. Terrorism is spectacular, it causes major damages. To put it in M. N. Murphy's words "it is in the mind that the terrorist achieves his effect"<sup>(79)</sup>.

Maritime terrorism is merely terrorism perpetrated at sea. There are a few reasons why episodes of maritime terrorism have occurred quite rarely. On the one hand, it is a matter of deficiencies of a terrorist group interested in carrying out an attack at sea, for instance lack of mariner abilities or of financial resources. To practice terrorism at sea requires both knowledge of the sea environment and of different typology of assault, and availability of resources to buy the essential new equipment and technology. On the other hand, it is a matter of visibility and impact on the global scene. Hence, an act which occurs in the sea may be broadcasted on worldwide screens with delays and less distressing effect<sup>(80)</sup>.

Notwithstanding, we can mention some cases of maritime terrorism that most struck the general public.

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<sup>(78)</sup> FOCARELLI C., *Diritto internazionale. Il sistema degli Stati e i valori comuni dell'umanità*, ed. 2, Padova, CEDAM, pp. 903.

<sup>(79)</sup> MURPHY M. N., *Small boats, weak states, dirty money: the challenge of piracy*, New York, Columbia University Press, 2009, p. 184.

<sup>(80)</sup> CHALK P., *The maritime dimension of international security. Terrorism, Piracy, and Challenges for the United States*, Santa Monica, California, RAND Corporation, 2008, pp. 19-29.

The *Santa Maria* incident. In 1961, the 21,000-ton Portuguese cruise Santa Maria was hijacked by a group of men led by Captain H. Galvao. Galvao declared the seizure “the first step aimed at overthrowing the Dictator Salazar of Portugal”<sup>(81)</sup> posing the basis for a debate on whether the seizure was to be considered an act of a terrorist group or an act of insurgents; the latter being the intent of Captain Galvao. This is considered to be the first modern-day hijack at sea<sup>(82)</sup>.

The *USS Cole* incident. The USS Cole was moored for refuelling in the port of Aden, Yemen, when it was attacked by two suicide bombers on 12 October 2000. The attack was soon afterwards attributed to al-Qaeda and indeed a member of the terrorist group, Abd al-Rahim al-Nashiri, admitted to have been the architect behind the attack. 17 US sailors were killed and many others were injured<sup>(83)</sup>.

The *Superferry 14* incident. The Superferry 14 was a Philippine ship which set on fire due to the explosion of a bomb on 27 February 2004. More than a hundred people lost their lives and, therefore, this is considered to be one of the most horrific maritime attack in history<sup>(84)</sup>.

Even though these episodes might seem different from piratical attacks, for instance for the use of bombs, some scholars have argued that the difference between piracy and maritime terrorism is merely artificial. Conversely, the common view sees these two unlawful acts as different. In fact, as previously mentioned, acts of piracy are carried out for private ends while (maritime) terrorism has political as well as ideological motivations. Piracy aims at profit and financial gain, and appears as linked to a specific region or area; whereas,

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<sup>(81)</sup> GREEN, *The Santa Maria: rebels or pirates*, 37 *British Yearbook of International Law* 496 (1961) in HALBERSTAM M., *Terrorism on the high seas: the Achille Lauro, piracy and the IMO convention on maritime safety*, in *AJIL*, vol. 82, n°2, Washington DC, United States, American Society of International Law, April 1988, p. 286, retrieved at [http://www.uio.no/studier/emner/jus/humanrights/HUMR5503/h09/undervisningsmateriale/halberstam\\_achille\\_lauro.pdf](http://www.uio.no/studier/emner/jus/humanrights/HUMR5503/h09/undervisningsmateriale/halberstam_achille_lauro.pdf) on 20 October 2013.

<sup>(82)</sup> CHALK P., *The maritime dimension of international security. Terrorism, Piracy, and Challenges for the United States*, Santa Monica, California, RAND Corporation, 2008, p. 48.

<sup>(83)</sup> *USS Cole bombing fast facts*, consulted at <http://edition.cnn.com/2013/09/18/world/meast/uss-cole-bombing-fast-facts/> on 6 November 2013.

<sup>(84)</sup> *Bomb caused Philippine ferry fire*, consulted at <http://news.bbc.co.uk/2/hi/asia-pacific/3732356.stm> on 7 November 2013.

maritime terrorism seems to aim at having a negative impact against a particular enemy, i.e. nation, or on global economy<sup>(85)</sup>.

Finally, it is worth spending a few words on the often alleged link between piracy and maritime terrorism. Terrorist groups might be interested in attacks at sea since it is a large place where enforcing regulation poses difficulties especially when weak and poorly equipped coastal State's governments are at stake. Given that terrorist groups have not of necessity seafarers expertise, they might seek some link with pirate groups. Somalia is a case in point. John Steed, the principal military adviser to the UN special envoy to Somalia and head of the envoy counter piracy unit, referred to Reuters in 2011 that the linkages between al-Shabaab, the Somalia-based cell of Al-Qaeda, and pirate groups in Somalia was growing<sup>(86)</sup>. At the time, al-Shabaab was looking for funding and, as a consequence, it was believed that pirates were giving a percentage of their ransoms to the terrorist group<sup>(87)</sup>. Nonetheless, the link between terrorists groups and pirates remain, according too many, hard to prove.

#### **1.4. SEIZURE OF PIRATES.**

Dealing with the issue of the seizure of pirates requires first of all to recall that any State enjoys universal jurisdiction over pirates. This issue is addressed to by article 105 UNCLOS. Instead, articles 110 and 111 UNCLOS outline the framework for the right of visit and the right of hot pursuit respectively and we shall see why they are relevant with respect to piracy.

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<sup>(85)</sup> CHALK P., *The maritime dimension of international security. Terrorism, Piracy, and Challenges for the United States*, Santa Monica, California, RAND Corporation, 2008, p. 19-29. See also KONTOROVICH E., "A Guantanamo on the Sea": the difficulty of prosecuting pirates and terrorists, in KONTOROVICH E, ART S., *An empirical examination of universal jurisdiction for piracy*, Faculty Working Papers, Chicago, USA, Northwestern University School of Law, 2010, p. 247, retrieved at <http://www.californialawreview.org/assets/pdfs/98-1/Kontorovich.pdf> on 12 October 2013.

<sup>(86)</sup> SOUL J., REED C., *Shabaab-Somali pirates link growing: UN adviser*, consulted at <http://www.reuters.com/article/2011/10/20/ozatp-somalia-shabaab-pirates-idAFJOE79J0G620111020> on 7 November 2013.

<sup>(87)</sup> KRASKA J., *Contemporary maritime piracy: international law, strategy and diplomacy at sea*, Santa Barbara, California, Praeger ABC-CLIO, LLC, 2011, p. 50.

#### 1.4.1. Pirates and universal jurisdiction.

At the very beginning of the present thesis we stated that pirates have always been regarded as *hostes humani generis*, or enemies of all mankind, due to the fact that they attacked anyone without any discrimination of nationality and, therefore, constitute a danger to any State's maritime trade. Given the drop in piratical attacks during the nineteenth century, for a period of time this classification has seemed inappropriate. However, according to Treves this has become again a fitting qualification consequently to the huge increase in the number of piratical attacks off the coast of Somalia<sup>(88)</sup>.

The exercise of universal jurisdiction for the seizure and prosecution of pirates derives from the necessity to curb an unlawful activity that constitutes a threat to the entire system and that may remain otherwise unpunished. The principle of universal jurisdiction is most commonly handled in conjunction with core international crimes; yet, the logic behind this reference to universal jurisdiction is different. Indeed, core international crimes are so restrained due to their seriousness, but they do not necessarily constitute a threat for the entire system<sup>(89)</sup>.

The exercise of universal jurisdiction over pirates represents an exception to the principle of exclusive jurisdiction of the flag State on its ships. The universal jurisdiction over pirates is deducible under article 105 UNCLOS which states that:

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,

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<sup>(88)</sup> TREVES T., *Piracy, Law of the Sea, and Use of Force: Developments off the Coast of Somalia*, in the EJIL, vol. 20, n° 2, 2009, pp. 399-400, retrieved at <http://www.ejil.org/pdfs/20/2/1800.pdf> on 12 October 2013.

<sup>(89)</sup> FOCARELLI C., *Diritto internazionale. Il sistema degli Stati e i valori comuni dell'umanità*, ed. 2, Padova, CEDAM, pp. 903.

aircraft or property, subject to the rights of third parties acting in good faith<sup>(90)</sup>.

We shall underline here some features of this article. First of all, it should be noted that the use of “may” suggests that the seizure and prosecution of pirates are not an obligation; rather, they seem optional<sup>(91)</sup>. Still, the powers conferred to a seizing State consist in the arrest of alleged pirates and in the seizure of the property found on board the ship they were in control of. Moreover, the State who proceeded in the apprehension should define both the penalties to be imposed and the actions to be undertaken *vis-à-vis* the pirates and the seized ship. Yet, States reveal themselves often unwilling to take action. In Chapter 3, we will address this issue in much details. Lastly, according to article 106 UNCLOS, the seizure has to be perpetrated with “adequate grounds” on suspicion of piracy. In fact, the seizing State will be liable to the State whose flag the seized ship is entitled to fly, for any damage it might have caused during the seizure if the “adequate grounds” were missing<sup>(92)</sup>.

Secondly, we should address the issue of the location of the seizure. Providing that under UNCLOS piratical acts occur only on the high seas or in places outside State jurisdiction, the seizure may be carried out according to article 105 only in these areas of the sea. With regards to Somali piracy, this geographical limitation has posed serious constraints in counter-piracy activities; yet, we will see how such constraints have been overcome with resolutions adopted by the UN Security Council.

Thirdly, we should consider which are the ships entitled to interdict a vessel under the control of pirates. Article 105 is not specific on the issue; yet,

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<sup>(90)</sup> Article 105, UNCLOS, 10 December 1982, retrieved at [http://www.un.org/depts/los/convention\\_agreements/texts/unclos/unclos\\_e.pdf](http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf) on 10 October 2013.

<sup>(91)</sup> KONTOROVICH E., “*A Guantanamo on the Sea*”: the difficulty of prosecuting pirates and terrorists, in KONTOROVICH E, ART S., *An empirical examination of universal jurisdiction for piracy*, Faculty Working Papers, Chicago, USA, Northwestern University School of Law, 2010, p. 247.

<sup>(92)</sup> *Counter piracy under international law*, Academic briefing n. 1, Geneva, Geneva Academy of International Humanitarian Law and Human Rights, Université de Genève, August 2012, p. 24, retrieved at <http://www.geneva-academy.ch/docs/academyLecture/Counterpiracy.pdf> on 19 October 2013.

article 107 integrates it by stating that “warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government non commercial service”<sup>(93)</sup> are authorised to seize pirate ships.

In conclusion article 105 UNCLOS sets the framework both for seizure and prosecution of pirates. Whereas in the following sub-paragraph we will deal with two UNCLOS’ articles that concern the possible modalities to seize a pirate vessel; the issue of pirate’s prosecution will be further addressed to in Chapter 3.

#### *1.4.2. Articles 110 and 111 UNCLOS and the use of force.*

UNCLOS provides two specific limits to the exercise of exclusive jurisdiction of the flag State that are linked to counter-piracy operations: the right of visit and the right of hot pursuit.

The legal framework for the *right of visit* is codified under article 110 UNCLOS which entitles warships, military aircraft, and authorized ships on government service to board a foreign ship if they have reasonable ground to believe that it might be engaged in the acts listed; piracy is the first of these acts. Article 110(1) states that the entitled ships can derive their power to board a foreign ship also from a treaty. Article 110(2) provides a series of subsequent actions that the entitled ships shall carry out. First of all, the warship shall verify if the suspected vessel is entitled to fly its flag by sending a boat under the command of an officer. Secondly, the officer will check the documents on board the suspected ship and, if suspicion remains, he shall go on with a further examination. Alike article 106, article 110(3) states that if the suspicion is unfounded, the ship boarded must be compensated.

In counter-piracy activities, especially off the Somali coast, it might be hard to identify a vessel which is engaged in piracy, since either piratical attacks are usually carried out using small fishing boats, or fisherman are accustomed to carry light weapons on board even if they are not engaged in piracy. To

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<sup>(93)</sup> Article 107, 10 December 1982, UNCLOS, retrieved at [http://www.un.org/depts/los/convention\\_agreements/texts/unclos/unclos\\_e.pdf](http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf) on 10 October 2013.

complicate matters, Geiss recalls even the use of mother ships that might be exchanged as mere merchant ships and, therefore, might not arouse suspicions<sup>(94)</sup>.

The legal framework for the *right of hot pursuit* is instead codified under article 111 UNCLOS. The *ratio* behind the exercise of this right is to allow the competent authorities of a coastal State to pursue a foreign ship on suspicion of its violation of the coastal State regulations. It is obvious that, the right of hot pursuit constitutes a basis for counter-piracy operations undertaken by the coastal State, if such a State has criminalized piracy under its domestic law. In order to exercise the right of hot pursuit, a series of cumulative requirements must be observed. There must be good reasons to claim that the suspected ship has violated the laws and regulations of the coastal State<sup>(95)</sup> bearing in mind that laws and regulations vary being the foreign ship in internal, archipelagic, or territorial waters, or in the contiguous zone of the coastal State. The pursuit must begin when the foreign ship is located within these waters and it must be preceded by a “visual or auditory signal to stop”<sup>(96)</sup>. According to article 111(2), the right can be exercised as well for violations of the laws in force in the EEZ or on the continental shelf of the coastal State. The pursuit cannot be interrupted; it “must be hot and continuous”<sup>(97)</sup> until the foreign ships enters the territorial waters of its State or of a third State.

With regards to the right of hot pursuit, Tanaka raises two issues: the relevance of the doctrine of the constructive presence and the eventual use of force.

It is common to believe that article 111(4) accepts the doctrine of the constructive presence. According to this doctrine, a ship can be chased while on

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<sup>(94)</sup> GEISS R., PETRIG A., *Piracy and armed robbery at sea: the legal framework*, Oxford, Oxford University Press, 2011, p. 56.

<sup>(95)</sup> Article 111(1), UNCLOS, 10 December 1982, retrieved at [http://www.un.org/depts/los/convention\\_agreements/texts/unclos/unclos\\_e.pdf](http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf) on 10 October 2013.

<sup>(96)</sup> Article 111(4), UNCLOS, 10 December 1982, retrieved at [http://www.un.org/depts/los/convention\\_agreements/texts/unclos/unclos\\_e.pdf](http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf) on 10 October 2013.

<sup>(97)</sup> TANAKA Y., *The international law of the sea*, Cambridge, Cambridge University Press, 2012, p. 164.

the high seas if it is suspected to be linked with offences perpetrated by other ships in the territorial sea or EEZ of the coastal State<sup>(98)</sup>. A case in point is the use of mother ships.

The issue of the use of force while exercising the right of hot pursuit, and more broadly in antipiracy operations, is not explicitly addressed to by UNCLOS; yet, Treves maintains that this use is implicit in articles 105 and 110 when they authorise the seizure and the right of visit of a pirate ship, since otherwise the aim of these articles might not be fulfilled<sup>(99)</sup>. Assuming that the use of force is permitted, this use must be somehow limited; for this reason it is necessary to mention the *M/V Saiga (n°2) case*<sup>(100)</sup>. In this judgement, the Tribunal for the Law of the Sea (ITLOS) had to decide on the use of force during the boarding and arrest of the Saiga. ITLOS explained that international law “requires that the use of force must be avoided as far as possible, and when [it] is unavoidable, it must not go beyond what is *reasonable* and *necessary* in the circumstances”<sup>(101)</sup>. Hence, the use of force must be a last resort, reasonable and necessary. To strengthen the assumption that article 105 UNCLOS implies the possibility to resort to using force, Treves mentions the UN Security Council resolutions of 2008 as well. The wording used in these resolutions is the use of “all necessary means” or “measures”, but “it is well known that in the parlance of the Security Council ‘all necessary means’ means ‘use of force’”<sup>(102)</sup>. It is important to highlight here, though, that these resolutions are expressively limited to the case of Somalia.

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<sup>(98)</sup> FOCARELLI C., *Diritto internazionale. Il sistema degli Stati e i valori comuni dell'umanità*, ed. 2, Padova, CEDAM, pp. 903.

<sup>(99)</sup> TREVES T., *Piracy, Law of the Sea, and Use of Force: Developments off the Coast of Somalia*, in the EJIL, vol. 20, n° 2, 2009, pp. 413, retrieved at <http://www.ejil.org/pdfs/20/2/1800.pdf> on 12 October 2013.

<sup>(100)</sup> International Tribunal for the Law of the Sea, *The M/V Saiga (n°2) Case (Saint Vincent and The Grenadines v. Guinea)*, Judgement, 1 July 1999, consulted at <http://www.itlos.org/index.php?id=10> on 24 October 2013.

<sup>(101)</sup> International Tribunal for the Law of the Sea, *The M/V Saiga (n°2) Case (Saint Vincent and The Grenadines v. Guinea)*, Judgement, 1 July 1999, paragraph 155; emphasis added, consulted at <http://www.itlos.org/index.php?id=10> on 24 October 2013.

<sup>(102)</sup> TREVES T., *Piracy, Law of the Sea, and Use of Force: Developments off the Coast of Somalia*, in the EJIL, vol. 20, n° 2, 2009, p. 412, retrieved at <http://www.ejil.org/pdfs/20/2/1800.pdf> on 12 October 2013; see also, R. GEISS, A. PETRIG, *Piracy and armed robbery at sea: the legal framework*, Oxford, Oxford University Press, 2011, p. 45.

Moreover, in subparagraph 1.3.3. we dealt with the 1988 SUA Convention and with its 2005 Protocol. We analysed there two of the peculiarities of this Convention, its geographical scope and the broad range of offences considered; hence, we will address here a third characteristic: the ship boarding procedures that have been added by the 2005 Protocol under article 8bis. Even if these procedures may be undertaken only between ships flying the flag of States parties to the Convention, they might be relevant when handling the issues of antipiracy operations and the use of force<sup>(103)</sup>. Accordingly, article 8bis states that “the use of force shall be avoided except when necessary to ensure the safety of [...] officials and persons on board”<sup>(104)</sup> as well as when such officials are hindered in their actions. In any case, the use of force must not go beyond what is *necessary* and *reasonable*. It might seem superfluous to note the similarity between these requirements and those of the ITLOS judgement previously mentioned.

#### **1.5. INTERNATIONAL AND REGIONAL COOPERATION TO SUPPRESS PIRACY.**

It is undoubtedly clear that in order to suppress piracy it is essential to have an extensive knowledge of the reasons for piracy to occur, of its environment, its organisation, and its linkages on land. In order to achieve this goal, many believe that regional cooperation is more effective rather than international cooperation. Article 100 UNCLOS places an obligation upon all States parties “to cooperate to the fullest possible extent in the suppression of piracy on the high seas or in any other place outside the jurisdiction of any State”<sup>(105)</sup>. Here again it is to be noted that this obligation is limited to places outside State jurisdiction. This general duty to cooperate has been reiterated in all UN Security Council resolutions addressing Somali piracy.

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<sup>(103)</sup> *Counter piracy under international law*, Academic briefing n. 1, Geneva, Geneva Academy of International Humanitarian Law and Human Rights, Université de Genève, August 2012, p. 27, retrieved at <http://www.geneva-academy.ch/docs/academyLecture/Counterpiracy.pdf> on 19 October 2013.

<sup>(104)</sup> Article 8bis(9), SUA Convention, 2005 Protocol, 1 November 2005, retrieved at [https://www.unodc.org/tldb/pdf/Protocol\\_2005\\_Convention\\_Maritime\\_navigation.pdf](https://www.unodc.org/tldb/pdf/Protocol_2005_Convention_Maritime_navigation.pdf) on 11 October 2013.

<sup>(105)</sup> Article 100, UNCLOS, 10 December 1982, retrieved at [http://www.un.org/depts/los/convention\\_agreements/texts/unclos/unclos\\_e.pdf](http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf) on 10 October 2013.

The following subparagraph will be devoted to international and regional cooperation initiatives, starting with the International Maritime Organization and the International Maritime Bureau-Piracy Reporting Centre, and going on over with the Regional Cooperation Agreement on Combatting Piracy and Armed Robbery against ships in Asia, and the Cooperative Mechanism on Safety of Navigation and Environment Protection in the Straits of Malacca and Singapore. These regional cooperation initiatives represent a major breakthrough in counter-piracy at a regional level and therefore deserve mention as models of best practices.

#### *1.5.1. International Maritime Organization.*

The Inter-Governmental Maritime Consultative Organization (IMCO) is a London-based UN specialized agency created in 1948 which changed its name in 1982 into International Maritime Organization (IMO). As of September 2013, it has 170 member States and 3 associate members.

Its tasks include the development and constant implementation of a regulatory framework granting safety and security for the shipping industry and the marine environment<sup>(106)</sup>. Under IMO's auspices, a series of conventions has been adopted and amended; the first of which was the International Convention for the Safety of Life at Sea (SOLAS), that remains one of the most important treaties for maritime safety. Another example is the amendment of the SUA Convention through the 2005 SUA Protocols.

For the purpose of the present thesis, it is of outmost interest to mention other achievements which aim at preventing acts of piracy, namely of Somali piracy, such as the *Recommendations to Governments for preventing and suppressing piracy and armed robbery against ships*<sup>(107)</sup>, the *Guidance to ship-owners and ship operators, shipmasters and crews on preventing and suppressing acts of piracy and armed robbery against ships*<sup>(108)</sup>, the above mentioned *Code of*

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<sup>(106)</sup> *Structure of IMO*, consulted at <http://www.imo.org/Pages/home.aspx> on 2 November 2013.

<sup>(107)</sup> MSC.1/Circ. 1333 of 26<sup>th</sup> June 2009, consulted at <http://www.imo.org/Pages/home.aspx> on 2 November 2013.

<sup>(108)</sup> MSC.1/Circ.1334 of 23<sup>rd</sup> June 2009, consulted at <http://www.imo.org/Pages/home.aspx> on 2 November 2013.

*Practice for the Investigation of the Crimes of Piracy and Armed Robbery against Ships*<sup>(109)</sup>, and the *Guidelines to assist in the investigation of the crimes of piracy and armed robbery against ships*<sup>(110)</sup>. Moreover, the International Chamber of Shipping has requested to IMO in 2011 to circulate the most recent version of the Best Management Practices (BMP4), which is the fourth edition of a booklet aimed at providing ships with the necessary recommendations and guidance to prevent piratical attacks<sup>(111)</sup>. These are just a few examples of IMO's commitment at a general level; yet, IMO shares the belief that piracy and armed robbery at sea can be best defeated at a regional level. To this end, it aims at enhancing continuous dialogue and information sharing urging States to conclude regional agreements and codes of conduct. An example of this endeavour is, indeed, the Djibouti Code of Conduct.

Finally, it must be recalled that IMO publishes monthly and annually piracy reports, which have been useful in order to present the figure of modern-day piracy at the beginning of this chapter.

#### *1.5.2. International Maritime Bureau – Piracy reporting Centre.*

The International Maritime Bureau (IMB) is one of the specialized bureaux of the ICC Commercial Crime Services, the anti-crime branch of the International Chamber of Commerce. In 1992, the IMB decided to create a free service in order to provide updated information for seafarers about criminal activities occurring at sea; therefore, it established the IMB Piracy Reporting Centre (IMB-PRC) based in Kuala Lumpur, Malaysia<sup>(112)</sup>.

The peculiarity of the IMB-PRC is that it is the only centre that receives and diffuses information on acts of piracy and armed robbery against ships 24 hours a day without any restriction to a specific group of States. The Centre follows the definition of piracy outlined in article 101 UNCLOS and the definition

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<sup>(109)</sup> IMO Doc. A 22/Res.922 of January 2009, consulted at <http://www.imo.org/Pages/home.aspx> on 2 November 2013.

<sup>(110)</sup> MSC.1/Circ. 1404 of 23<sup>rd</sup> May 2011, consulted at <http://www.imo.org/Pages/home.aspx> on 2 November 2013.

<sup>(111)</sup> *Best Management Practices for Protection against Somalia Based Piracy* of August 2011, consulted at <http://www.imo.org/Pages/home.aspx> on 2 November 2013.

<sup>(112)</sup> Information about the international Maritime Bureau – Piracy Reporting Centre, consulted at <http://www.icc-ccs.org/piracy-reporting-centre> on 25 October 2013.

of armed robbery as identified by the IMO<sup>(113)</sup>. The IMB-PRC aims at enhancing the knowledge about piracy prone areas and about ports that are most affected by armed robberies. The IMB-PRC website leaves at ship master's disposal a live piracy map and a live piracy report section with updated details on the location and timing of attacks. It distinguishes between attempted attacks, boarded vessels, ships which have been fired upon, hijacked vessels, and suspicious vessels. Ship masters are urged to report on any situation that in their opinion may lead to an attack.

The IMB-PRC works in conjunction with the IMO and invites ship masters to make use of the advices enshrined in IMO's circulars and of the procedures provided for by the Best Management Practices for Protection against Somalia-Based Piracy (BMP4). Alike to the IMO, the IMB Piracy Reporting Centre publishes quarterly and annual reports.



Figure 1.2.: Live Piracy Map 2012<sup>(114)</sup>.

<sup>(113)</sup> *Ibid.*

<sup>(114)</sup> <http://www.icc-ccs.org/piracy-reporting-centre>.

*1.5.3. Regional Cooperation Agreement on Combatting Piracy and Armed Robbery against ships in Asia and the Cooperative Mechanism.*

Even though the present thesis is mainly consecrated to piracy off the coast of Somalia, the Regional Cooperation Agreement on Combatting Piracy and Armed Robbery against ships in Asia (ReCAAP) and the Cooperative Mechanism deserve mention.

The ReCAAP is an international agreement contracted by 16 Asian countries on 11 November 2004 and entered into force on 4 September 2006. It is the first agreement of this kind and, therefore, has constituted and constitutes a model for others to come. As of September 2013, 19 States are parties to the ReCAAP, 5 of which are non-Asian countries<sup>(115)</sup>.

Among the general obligations for contracting States there are: prevention and suppression of piracy and armed robbery against ships, apprehension of pirates, seizure of ships used to commit acts of piracy or of armed robbery, and rescue of victim ships<sup>(116)</sup>. In order to ease the achievements of these objectives, article 4 ReCAAP established an Information Sharing Centre (ISC) that was launched on 29 November 2006. Unlike the IMB-PRC the ISC is at disposal of contracting States only. Nevertheless, this Centre is of outmost importance not only for information sharing on attacks, but also for capacity building efforts, improvement in incidents response, and promotion of cooperative agreements. The ReCAAP-ISC is recognized as an international organization and it is based in Singapore<sup>(117)</sup>.

Another issue of great interest enshrined in the ReCAAP is related to legal measures concerning prevention and suppression of piracy and armed robbery; these include extradition and legal assistance. Hence, article 12 ReCAAP requires contracting parties to “endeavour to extradite pirates” to “the other Contracting Party which has jurisdiction over them, at the request of the contracting

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<sup>(115)</sup> ReCAAP website is <http://www.recaap.org/> consulted on 7 November 2013.

<sup>(116)</sup> Article 3(1), ReCAAP, 11 November 2004, retrieved at <http://www.recaap.org/> on 24 October 2013.

<sup>(117)</sup> ReCAAP website at <http://www.recaap.org/> on 24 October 2013.

Party”<sup>(118)</sup>. However, it is to be noted that article 2(5) ReCAAP states that contracting parties are not entitled to “undertake in the territory of another Contracting Party the exercise of jurisdiction”<sup>(119)</sup>.

The achievements of the ReCAAP have been recognized by the ASEAN Regional Forum, by the IMO and by the UN General Assembly. Likewise, in its resolution 1851 of 16 December 2008, the UN Security Council boosted for the arrangement of an agreement similar to the ReCAAP between the States of the Gulf of Aden<sup>(120)</sup>.

With regards to the Cooperative Mechanism on Safety of Navigation and Environment Protection in the Straits of Malacca and Singapore, this has been the result of a series of meetings organized by the governments of Indonesia, Malaysia, and Singapore from 2004 to 2007 with the aim of finding new financial sources establishing a cooperation between coastal States and users of the Straits of Singapore and Malacca<sup>(121)</sup>. It is interesting to recall this mechanism because such a type of cooperation is in reality also an obligation under UNCLOS article 43 and the Cooperative Mechanism represents the first initiative ever pursuant to this article. The Mechanism consists of three components: Cooperation Forum, Project Coordination Committee, and Aids to Navigation Fund<sup>(122)</sup>.

#### *1.5.4. The Nairobi Report.*

We will end this Chapter by mentioning here the early initiatives that have been undertaken to curb Somali piracy when it became dangerously active in 2008. Laying aside for the time being the series of UN Security Council

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<sup>(118)</sup> KEYUAN Z., *New developments in the international law of piracy*, in CJIL, vol. 8, n° 2, Oxford University Press, 2009, p. 334, retrieved at <http://chinesejil.oxfordjournals.org/content/8/2/323.abstract> on 15 October 2013.

<sup>(119)</sup> Article 2(5), ReCAAP, 11 November 2004, retrieved at <http://www.recaap.org/> on 24 October 2013.

<sup>(120)</sup> KRASKA J., *Contemporary maritime piracy: international law, strategy and diplomacy at sea*, Santa Barbara, California, Praeger ABC-CLIO, LLC, 2011, p. 155.

<sup>(121)</sup> KRASKA J., *Contemporary maritime piracy: international law, strategy and diplomacy at sea*, Santa Barbara, California, Praeger ABC-CLIO, LLC, 2011, p. 43.

<sup>(122)</sup> Cooperative Mechanism website consulted at <http://www.cooperativemechanism.org.my/index.php> on 13 November 2013.

resolutions of 2008, it is interesting to address here a report that most probably influenced some of those resolutions<sup>(123)</sup>.

At the end of 2008, the Special Representative of the Secretary General of the UN to Somalia, Ambassador Ahmedou Ould-Abdallah, commissioned a workshop on Piracy off the Somali Coast that was held in Nairobi. The final report, the Nairobi Report, provides a comprehensive analysis of the situation in Somalia at the time starting from the assumption that “piracy off the coast of Somalia is rooted on land”<sup>(124)</sup> and, therefore, it cannot be eradicated with sea based counter piracy activities only. The purpose of the report was to present an assessment and outline a number of recommendations of short, medium, and long term impact, to enhance cooperation to combat piracy. The overall viewpoint is that, first of all, law and order on land had to be imposed in order to overcome the economic and political instability of Somalia. Then, since for too many along the Somali coast line piracy had become one of the most profitable way to make a living, it was necessary to improve employment opportunities and create a fishing industry. As regards to sea based activities, surveillance of the coastline was recommended. Moreover, recommendations encompassed matters such as, counter piracy activities of foreign warships, revision of Somali law on piracy, improvement of law enforcement, and transfer of captured pirates to regional States<sup>(125)</sup>.

It has been worth mentioning here the Nairobi Report to give an idea of the awareness of the multifaceted hurdles posed by Somali piracy. Since that time, much has been done to implement recommendations of this kind as we shall see in Chapter 2 and 3.

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<sup>(123)</sup> KRASKA J., *Contemporary maritime piracy: international law, strategy and diplomacy at sea*, Santa Barbara, California, Praeger ABC-CLIO, LLC, 2011, pp. 151-153;

<sup>(124)</sup> Final report of the *Piracy of the Somali Coast workshop commissioned by the Special Representative of the Secretary General of the UN to Somalia Ambassador Ahmedou Ould-Abdallah*, Nairobi 10-21 November 2008, p. 41, retrieved at [http://www.imcsnet.org/imcs/docs/somalia\\_piracy\\_intl\\_experts\\_report\\_consolidated.pdf](http://www.imcsnet.org/imcs/docs/somalia_piracy_intl_experts_report_consolidated.pdf) on 15 November 2013.

<sup>(125)</sup> KRASKA J., *ibid.*;

## **1.6. CONCLUSIONS.**

In this Chapter, we have provided both an idea of the extent of modern-day piracy and an analysis of the legal framework as set out by international law. Modern-day piracy is in some aspects similar to ancient piracy, but in other it is more damaging, since it impinges on maritime trade, which represents a high percentage of nowadays shipments.

With regards to the legal framework, given the decline in piracy in the nineteenth century, we have seen that the definition of piracy of UNCLOS seems not sufficient to address the scourge of modern-day piracy. Hence, we have explained how the SUA Convention and the reference to armed robbery when dealing with piracy issues have helped to overcome the gaps of UNCLOS' definition.

Moreover, since UNCLOS provides also a legal framework for the seizure of pirates and for the cooperation to suppress piracy, we deemed it useful to address these two topics as well, accompanied by a few examples of the international community endeavour to curb piracy and armed robbery at sea.

## **CHAPTER 2**

### **PIRACY OFF THE COAST OF SOMALIA**

CONTENTS: 2.1. Recent history of Somalia. – 2.1.1. From the beginning to the collapse of Siad Barre’s regime. – 2.1.2. After State collapse. – 2.2. Modern-day Somali piracy. – 2.2.1. Characteristics of Somali piracy. – 2.2.2. Somali piracy operations and relevant episodes. – 2.3. UNSC resolutions. – 2.3.1. Resolutions 1816, 1836, and 1846. – 2.3.2. Resolution 1851. – 2.3.3. Resolutions 1897, 1918, and 1950. – 2.3.4. Resolutions 1976, 2015, and 2020. – 2.3.5. Resolutions 2077 and 2125. – 2.4. International and regional cooperation to suppress Somali piracy. – 2.4.1. European Union EUNAVFOR Somalia – Operation Atalanta. – 2.4.2. NATO’s operations. – 2.4.3. Combined Task Force 151. – 2.4.4. The Djibouti Code of Conduct. – 2.5. Conclusions.

#### **2.1. RECENT HISTORY OF SOMALIA.**

Somalia has a long history that can be traced back to the seventeenth century, when Yemenite immigrants probably from the Quraysh tribe founded there an Arab Sultanate<sup>(126)</sup>. The original social structure of Somalia is clan-based and clan identities are a fundamental reference framework that cannot be easily and probably conveniently uprooted. The territory of present day Somalia has been subjected to Western colonization, in particular from Great Britain and Italy that attempted to subvert the social structure by imposing meaningless boundaries from the point of view of the population. Somalia became eventually independent in 1960 as a result of the merging of the State of Somaliland (former British Somaliland) and of the Trust Territory of Somalia (former Italian Somalia), but its future will not be promising.

##### *2.1.1. From the beginning to the collapse of Siad Barre’s regime.*

As early as 1969, Major General Muhammad Siad Barre seized power. Siad Barre imposed an authoritarian rule that was initially supported by armed

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<sup>(126)</sup> LEHR P., *Violence at sea: piracy in the age of global terrorism*, New York, Routledge Taylor and Francis Group, 2007, p. 8.

Somali forces. He did not appreciate its nation nomadic traditions and rural economy to a great extent, therefore, he aimed at urbanizing the country by attracting any possible business toward the capital Mogadishu<sup>(127)</sup>. During its rule, that lasted twenty two years, misunderstandings between different clans and irredentism have revealed themselves in various circumstances. At the beginning of its dictatorship, Siad Barre proposed a form of scientific socialism that was to be compatible with Islam, yet in reality he aimed at diminish the weight of Muslim leaders particularly in politics. In these first phase Siad Barre enjoyed USSR support<sup>(128)</sup>. However, one major war that extended outside Somalia, the 1977 Ogaden Conflict, has been a turning point for the definitively shift of Siad Barre politics from the USSR to the US side in the cold war logic. The Ogaden is a desert in the south-eastern part of Ethiopia whose inhabitants are mainly of Somali origins<sup>(129)</sup>. The war was a failure, incredibly costly, and it augmented the already present discontent of the population as a result of Siad Barre harsh repression of any form of social dissent. From the late seventies and throughout the eighties, various armed groups, based on different clan memberships and mastered by clan leaders, have been organized with the aim to overthrow the dictator. Siad Barre organized various bloody campaigns addressing different groups, but this resulted in the alienation of many clans and in an escalation of warfare<sup>(130)</sup>. In 1991 Siad Barre's regime eventually collapsed, but no effective government replace it. What resulted was a protracted civil war between so-called warlords<sup>(131)</sup>.

Soon after the collapse of Siad Barre's regime, a north-western region of Somalia, Somaliland, declared independence in 1991. It has never been recognized so far by any State as an independent State, but rather as an

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<sup>(127)</sup> BAHADUR J., *The pirates of Somalia inside their hidden world*, New York, Patheon Books, 2011, pp. 30-47.

<sup>(128)</sup> FITZGERALD N. J., *Somalia: Issues, History and Bibliography*, New York, Nova Science Publishers, 2002, pp. 22-23.

<sup>(129)</sup> WESTAD O. A., *The global cold war*, Cambridge, Cambridge University Press, 2007, pp. 273-279.

<sup>(130)</sup> FITZGERALD N. J., *Somalia: Issues, History and Bibliography*, New York, Nova Science Publishers, pp. 23-26.

<sup>(131)</sup> LEHR P., *Violence at sea: piracy in the age of global terrorism*, New York, Routledge Taylor and Francis Group, 2007, pp. 9-10.

autonomous region inside Somalia. Given that it was ruled by one dominant clan, it has been one of the most stable areas of the country. In addition, in 1998 a north-eastern region of Somalia, Puntland, declared its autonomy within the Somali Republic and remains today an autonomous region of Somalia<sup>(132)</sup>.

Since the collapse of Siad Barre, the situation in Somalia has deteriorated, not only due to the protracted factional fighting, but also because of draughts<sup>(133)</sup>. At the time, and for many years, Somalia will be one of the most representative examples of “failed State”<sup>(134)</sup>.

Given the horrific situation of humanitarian disaster, the UN decided to intervene in Somalia with the participation of numerous Western forces. The aim was to protect the delivery of humanitarian aid to the population and monitor the ceasefire. There have been various phases of intervention starting with the 1992 United Nations Operation in Somalia (UNOSOM I), which did not accomplish its objectives and was followed by a US-led attempt, a UN-sanctioned multinational force, the UNITAF from December 1992 to May 1993. These have been followed by UNOSOM II, an operation that ended in March 1995 after the progressive withdrawal of the participating forces<sup>(135)</sup>.

### 2.1.2. *After State collapse.*

After the international interventions, conflicts between warlords never weakened and various attempts to create a national government in Somalia have failed until 2004 when negotiations in Nairobi, Kenya, ended with the establishment of a Somali Transitional Federal Government (TFG). The TFG for the first two years was a government in exile and, in reality, did not gain much

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<sup>(132)</sup> FITZGERALD N. J., *Somalia: Issues, History and Bibliography*, New York, Nova Science Publishers, pp. 23-26.

<sup>(133)</sup> FITZGERALD N. J., *ibid.*.

<sup>(134)</sup> According to international law, three elements identify a State: its territory, its population, and a government which is effective and independent. Focarelli states that Somalia has been a case of “failed State” since its government has been extremely weak, or ineffective, in the period 1991-2001. FOCARELLI C., *Diritto internazionale. Il sistema degli Stati e i valori comuni dell'umanità*, ed. 2, Padova, CEDAM, pp. 903.

<sup>(135)</sup> The main reason seems to have been the Battle of Mogadishu where two US-helicopters were shot down. LEHR P., *Violence at sea: piracy in the age of global terrorism*, New York, Routledge Taylor and Francis Group, 2007, pp. 9-10.

support neither in Somalia nor by the international community<sup>(136)</sup>. The warlords that took part in it saw the TFG with suspicion claiming that it could curb their power and their illegal businesses in the long run<sup>(137)</sup>.

In opposition to the TFG, there was a totally different experience, that of the Islamic Courts that emerged at the beginning of the twenty-first century. These courts had played a major role in the enforcement of the rule of law based on the Sharia soon after the fall of Siad Barre's regime and they became increasingly popular since they provided education and medical assistance<sup>(138)</sup>. These Courts, from the point of view of the population, represented that form of State that was lacking in Somalia. Various unions of courts were formed and, in particular in 2004 a Islamic Court Union (ICU) brought together the ten clans that held the courts in Mogadishu; its chairman was Shaikh Sharif Shaikh Ahmed. In May 2006, the ICU came to power in Mogadishu after defeating a group of warlords assembled in the Alliance for the Restoration of Peace and Counterterrorism (ARPCT). In June of the same year, the ICU became the Supreme Islamic Court of Somalia. Unfortunately, tensions soon arose between the various factions of the ICU, in particular between moderates and radicals. One of the radical groups was Harakaat al-Shabaab al-Mujahiddin, or simply al-Shabaab (Movement of Striving Youth), young men with a very radical view of Islam whose active role has been witnessed recently in the bombing of a mall in Nairobi. Internal tensions were not the only problem weakening the ICU, because, even if almost all Somalis are Muslim, the enforcement of Islamic law could in a sense undermine Somali traditions and clan identities and, therefore, was not well thought of by a part of the population. Furthermore, soon after having asserted

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<sup>(136)</sup> BRUTON B. E., *Somalia, a new approach*, Council Special Report n° 52, Council on Foreign Relations, New York, USA, March 2010, pp. 6-7, retrieved at <http://www.cfr.org/somalia/somalia/p21421> on 14 November 2013.

<sup>(137)</sup> *La Somalia dopo la sconfitta delle corti islamiche*, Centro Studi Internazionali, dossier n° 65, February 2007, pp. 1-35, retrieved at [http://leg16.senato.it/application/xmanager/projects/leg16/attachments/dossier/file\\_internets/000/006/922/65.pdf](http://leg16.senato.it/application/xmanager/projects/leg16/attachments/dossier/file_internets/000/006/922/65.pdf) on 15 November 2013.

<sup>(138)</sup> The supreme Islamic Courts Union, consulted at <http://www.globalsecurity.org/military/world/para/icu.htm>.

control on Mogadishu, the ICU attempted to expand its power both northward and southward challenging the role of the TFG<sup>(139)</sup>.

Negotiations between the ICU and the TFG were attempted, but no agreement seemed foreseeable and in December 2006 Ethiopian troops invaded Somalia with the objective to uphold the TFG against the ICU. Once Mogadishu was freed up from the ICU, the TFG could eventually transfer to the capital. The Ethiopian occupation lasted for two years and, according to many, it was backed by the US. During the occupation the situation in Mogadishu “reduced to a level of human suffering, violence, and disorder unknown since the civil war”<sup>(140)</sup>.

Given the disastrous conditions in which the population verged and the apparent impossibility for the TFG to impose its rule, in 2007 the UNSC adopted resolution 1744 providing a mandate for the African Union to establish the African Union Mission in Somalia (AMISOM)<sup>(141)</sup>. This mandate was initially for six months, but it has been extended several times, lastly with resolution 2093<sup>(142)</sup>, until 28 February 2014. AMISOM troops in a way replaced Ethiopian militias (which definitively withdrew in 2009) in an attempt to provide protection for the TFG.

In the meantime, the path of diplomacy was experienced. It became possible to bring to peace talks the TFG and a Djibouti-based branch of an Islamist Reform Movement called the Alliance for the Ri-Liberation of Somalia led by the above mentioned Shaikh Sharif Shaikh Ahmed. The result was a peace and reconciliation agreement (“the Djibouti Agreement”) of 19 August 2008

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<sup>(139)</sup> RABASA A., *Radical Islam in East Africa*, Santa Monica, California, RAND Corporation, 2009, pp. 53-63, retrieved at [http://www.rand.org/content/dam/rand/pubs/monographs/2009/RAND\\_MG782.pdf](http://www.rand.org/content/dam/rand/pubs/monographs/2009/RAND_MG782.pdf) on 30 December 2013.

<sup>(140)</sup> BRUTON B. E., *Somalia, a new approach*, Council Special Report n° 52, Council on Foreign Relations, New York, USA, March 2010, p. 9, retrieved at <http://www.cfr.org/somalia/somalia/p21421> on 14 November 2013.

<sup>(141)</sup> GEISS R., *Piracy and armed robbery at sea: the legal framework*, Oxford, Oxford University Press, 2011, p. 14.

<sup>(142)</sup> UNSC resolution n° 2093 of 6<sup>th</sup> March 2013, consulted at <http://www.un.org/en/sc/documents/resolutions/> on 22 October 2013.

which will be followed on 26 October 2008 by a joint ceasefire agreement. Shaikh Sharif Shaikh Ahmed will be elected President of the TFG in January 2009<sup>(143)</sup>.

During the Ethiopian occupation, the abovementioned radical group Harakaat al-Shabaab al-Mujahiddin gained popularity as a resistance movement attracting members even from the Somali diaspora. Al-Shabaab acquired greater military capability and managed to control vast territories and cities in southern Somalia to the detriment of TFG's and AMISOM's efforts to bring stability in the country. Hence, if external actors succeeded in destroying the ICU, they also gave strength to its radical branches. In the post-9/11 logic, Somalia was considered to be another venue in the war on terror declared by US president G. W. Bush and this nourished al-Shabaab ranks<sup>(144)</sup>. The problem is that al-Shabaab, with its good times and bad times, has continued to represent a challenge for the TFG. Moreover, in a 2011-report of the Monitoring Group on Somalia and Eritrea concern is expressed on TFG "lack of vision or cohesion, its endemic corruption, and its failure to advance the political process"<sup>(145)</sup>.

One of the most recent documents on Somalia, the report of the Monitoring Group on Somalia and Eritrea of 12 July 2013 does not provide a promising picture. On 20 August 2012, the TFG ended its transitional phase and the Somali Federal Government was constituted with Hassan Shaikh Muhammad as President. The report expresses the necessity of a change in the system of government, of the assertion of control over financial flows, and of the establishment of functioning security institutions. In the meantime, al-Shabaab

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<sup>(143)</sup> BRUTON B. E., *Somalia, a new approach*, Council Special Report n° 52, Council on Foreign Relations, New York, USA, March 2010, p. 10, retrieved at <http://www.cfr.org/somalia/somalia/p21421> on 14 November 2013.

<sup>(144)</sup> MUKOMA WA NGUGI, *How al-Shabaab was born*, consulted at <http://www.theguardian.com/world/2013/oct/04/kenya-westgate-mall-attacks> on 3 December 2013; see also BRANKAMP H., *Not just Islam: how Somalia's Union of Islamic Courts used local customs*, consulted at <http://thinkafricapress.com/somalia/union-islamic-courts-prism-xeer> on 3 December 2013.

<sup>(145)</sup> Report of the Monitoring Group on Somalia and Eritrea pursuant to UNSC resolution 1916(2010), 18 July 2011, retrieved at <http://www.un.org/sc/committees/751/mongroup.shtml> on 3 December 2013.

remains in control of a vast area in southern and central Somalia and “remains the principal threat to peace and security”<sup>(146)</sup>.



Figure 2.1.: Map of Somalia<sup>(147)</sup>.

## 2.2. MODERN-DAY SOMALI PIRACY.

In Somali the word for pirate is *burcard badeed* whose translation is “thief or plunderer of the sea”. Yet Somali pirates prefer the definition *baadinanta badah* which means “saviour of the sea”<sup>(148)</sup>. Piracy, or at least thefts off the

<sup>(146)</sup> Report of the Monitoring Group on Somalia and Eritrea pursuant to resolution 2060(2012): Somalia, 12 July 2013, retrieved at <http://www.un.org/sc/committees/751/mongroup.shtml> on 3 December 2013.

<sup>(147)</sup> <http://www.un.org/Depts/Cartographic/map/profile/somalia.pdf>.

<sup>(148)</sup> VUOSI R., *La pirateria marittima un crimine da debellare*, 25 October 2012, retrieved at <http://riformalavoro.diritto.it/docs/34100-la-pirateria-marittima-un-crimine-da-debellare> on 15 October 2013.

Somali coast, are not an entirely new phenomenon in Somali history, yet piratical attacks that have been carried out since the fall of Siad Barre's dictatorial regime, and in particular since 2008, have no precedents in terms of number, geographical scope, violence, and organization. This part of Chapter 2 will address the causes for the upsurge of modern-day Somali piracy, its characteristics and evolution over time, and, finally, we will provide some examples of piratical attacks that most struck the general public.

### *2.2.1. Causes, characteristics, and evolution of modern-day Somali piracy.*

To determine a precise date for the beginning of modern-day Somali piracy is quite difficult and probably of no avail. During the final years of Siad Barre's regime, the level of unrest in the country was high and the ability to guarantee order and security on land and at sea was declining. The situation deteriorated with the collapse of the regime. As a consequence, many believe that the basis of modern-day Somali piracy were laid down in this period. Indeed, Somali piracy is primarily the offspring of the disorder on land.

At the beginning, it was not the form of piracy *on the high seas* as stated in UNLCOS definition, but rather a form of thefts carried out along the Somali coast by armed or non-armed groups which boarded a ship and stole money or other valuable objects<sup>(149)</sup>. Beside this form, there was another type of activity born in response to the problem of foreign illegal fishing in Somali waters (including the EEZ). In fact, after the fall of the regime, many foreign countries have taken advantage of the lack of the coastal State control on Somali waters and practised illegal fishing. Hence, some armed groups went out to sea with small skiffs, stopped foreign vessels, and demanded for the payment of "fines" since the foreign ships were fishing illegally. Frequently, these were simple groups of fishermen acting in a sort of self-defence in the absence of a functioning government. Some scholars believe that this has been one of the first causes of Somali piracy; while others claim that if it was not a cause, at least it was, and still

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<sup>(149)</sup> BAHADUR J., *The pirates of Somalia: inside their hidden world*, New York, Pantheon Books, 2011, pp. 32-47.

is, one of the most used excuses by pirates after their seizure for claiming that they are not pirates, but fishermen<sup>(150)</sup>.

After this early phase, according to some scholars piracy as a professional activity emerged in the mid nineties when armed and non-armed groups of Somali fishermen have profited of their initial earnings becoming better equipped and more organized. They used the returns of their first plundering to buy, for instance, weapons and larger skiffs with powerful engines. They also started to target larger ships and commercial vessels. In Bahadur<sup>(151)</sup> views, piracy experienced a major change at the beginning of the twenty-first century thanks to a pioneer who understood that piracy in Somalia could become a profitable business. This pioneer was Mohamad Abdi Hassan<sup>(152)</sup>, or Afweyne. In 2003, he formed a group called the “Somali Marines” based in his hometown Harardheere which became a new hub for Somali piracy. The “Somali marines” had even an internal hierarchy, they have been among the first to use the so-called “mother ships”, and to introduce a type of attack which is peculiar to Somali piracy: the hijack and kidnap for ransom. The use of mother ships allowed pirates to enlarge their geographical area of activity. These mother ships were, in fact, hijacked ships whose characteristics of identification, such as the name, had been modified so that they could be used as offshore starting bases for attacks. The mere fact that pirates could hijack a ship and held its crew hostage, even for months, proves how law enforcement by competent authorities was absent both at sea and on land and, moreover, it shows that pirates were probably also somehow tolerated, when not helped, by local communities. In 2005, it has been a “Somali Marine” attack which has triggered increased attention of the international community to the piracy threat, the one carried out against the *Seabourn Spirit*. In the meantime, groups similar to the “Somali marines” have been assembled in other port cities

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<sup>(150)</sup> MURPHY N. M., *Small boats, weak states, dirty money: the challenge of piracy*, New York, Columbia University Press, 2009, p. 102.

<sup>(151)</sup> Bahadur Jay is a Canadian journalist who lives in Nairobi, Kenya. He is known for his reporting on Somali piracy in the New York Times, Financial Post, The Times of London, and others.

<sup>(152)</sup> Mohamad Abdi Hassan has been arrested in Bruxelles on 12 October 2013, *Bruxelles: arrestato capo della pirateria somala*, 14 October 2013, consulted at <http://video.corriere.it/bruxelles-arrestato-dei-capi-pirateria-somala/417a5fe4-3509-11e3-b0aa-c50e06d40e68> consulted on 9 January 2013.

along the Somali coast; an example is the “National Volunteer Coast Guard” based in Kismayo in southern Somalia<sup>(153)</sup>.

In 2006, after the ICU had come to power in Mogadishu, there has been a brief decline in piratical activity. The ICU put a lot of effort into suppressing piracy for two main reasons; firstly, because pirates had links with Somali warlords, and, secondly, because the ICU believed that piracy was against Islamic law<sup>(154)</sup>. However, the ICU experience has been a remarkably short one and piracy resurrected soon afterwards aspiring to large commercial ships transiting the Gulf of Aden and in Chapter 1 we have already mentioned the importance of this area of the sea to the international trade.

Between 2003 and 2008, the Harardheere group had increased its linkages with pirates based in the Puntland city of Eyl and they had developed together a veritable business model. In this period, the “Somali marines” started to attack even vessels of the World Food Program (WFP); for instance, the MV Semlow in 2005. The expertise acquired during these period has allowed these groups to diminish the risks of their piratical activity and to increase their profits after the brief stalemate of 2006<sup>(155)</sup>.

As we stated in Chapter 1, 2008 has been the year in which Somali piracy has most struck the general public, because the number of attacks suddenly skyrocketed. Since that year, the amount of reported incidents has continued to increase up to a pick of 223 attempted or committed attacks in 2011. Since 2008 Somali piracy has presented itself in its three distinctive characteristics: its scale, its geographical scope, and its violence<sup>(156)</sup>. Not surprisingly, 2008 has been the year in which the UNSC adopted its first resolutions related to Somali piracy. As we shall see later on, since that year a number of counter-piracy operations pursuant to these resolutions have been undertaken by international organizations,

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<sup>(153)</sup> BAHADUR J., *ibid.*; and LEHR P., *Violence at sea: piracy in the age of global terrorism*, New York, Routledge Taylor and Francis Group, 2007, pp. 11-18.

<sup>(154)</sup> BAHADUR J., *ibid.*; and MURPHY N. M., *Small boats, weak states, dirty money: the challenge of piracy*, New York, Columbia University Press, 2009, p. 105.

<sup>(155)</sup> BAHADUR J., *ibid.*.

<sup>(156)</sup> World Bank report, *The Pirates of Somalia: Ending the Threat, rebuilding a nation*, 2013, p. 4, retrieved at <http://siteresources.worldbank.org/INTAFRICA/Resources/pirates-of-somalia-main-report-web.pdf> on 15 December 2013.

such as NATO and the EU, as well as by individual States independently or under the Combined Task Force 151.

The following years have seen an ever increasing endeavour in combatting piracy. For instance, the UN established the Contact Group on Piracy off the Coast of Somalia (CGPCS) in 2009 which aims at coordinating the activities of the 60 navies patrolling the Indian Ocean<sup>(157)</sup>. In the same year, under IMO auspices at a final meeting between States of the Gulf of Aden region the Djibouti Code of Conduct was signed. At first, the effect of such an endeavour has been an extension of the geographical area of attack southward and eastward off the coast of Somalia reaching the Seychelles and Mozambique, and getting closer to the Indian coast (see Figure 1.4.: Expansion of pirate operations). The IMB has called navies not scheduled to stop in a Somali port to transit as far as possible from the Somali coast<sup>(158)</sup>. The mere fact that, facing counter-piracy operations, the pirates have been able to adapt, shows how organized and sophisticated they had become. Pirates had external financiers that supply them with fuel, arms, and communication equipment<sup>(159)</sup>. They became more violent, reduced the risks of their activities, and get negotiating capabilities that prized them with higher and higher ransom payments.

To give an idea of the 2013 state of art, we can refer to a recently published report on Somalia of the Monitoring Group on Somalia and Eritrea of 12 July 2013. The report highlighted the decline in the number of incidents and attributed it mainly to the activities of the international counter-piracy operations, but also to the improvement of the BMPs constantly updated by the shipping industry mentioned in Chapter 1, and to the use of private maritime security personnel on board merchant ships<sup>(160)</sup>. As of July, only one merchant vessel and six fishing vessels are under pirate hands, together with about 60 individuals.

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<sup>(157)</sup> World Bank *The Pirates of Somalia: Ending the Threat, rebuilding a nation*, p. 1, retrieved at <http://siteresources.worldbank.org/INTAFRICA/Resources/pirates-of-somalia-main-report-web.pdf> on 15 December 2013.

<sup>(158)</sup> KRASKA J., *Contemporary maritime piracy: international law, strategy and diplomacy at sea*, Santa Barbara, California, Praeger ABC-CLIO, LLC, 2011, p. 55.

<sup>(159)</sup> GEISS R., PETRIG A., *Piracy and armed robbery at sea: the legal framework*, Oxford, Oxford University Press, 2011, p. 9.

<sup>(160)</sup> The use of private maritime security personnel has raised a number of problems, including the ones connected to the use of force. Some scholars are against the use of such personnel.

However, this decline should not be overestimated. The Monitoring Group has recalled that “the organized criminal networks and individuals that proved successful in one context are diversifying their financial business”<sup>(161)</sup> and that these “networks and individuals can easily shift away from or back to piracy”<sup>(162)</sup> in case of a relaxation in the international endeavour to combat piracy. This worrisome consideration has been reached also in the occasion of the International Conference on the Threat of Contemporary Piracy held in Rome on 28 November 2013 where many of the speakers raised the question: what would happen if the international counter-piracy operations were halted?

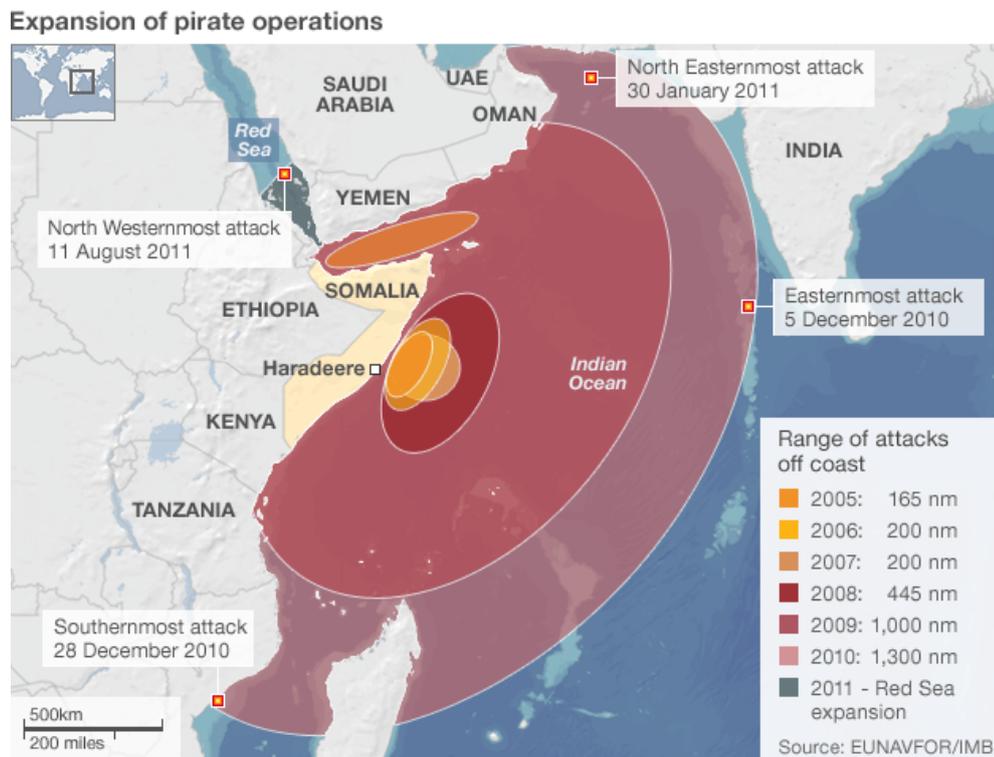


Figure 2.2.: Expansion of pirate operations<sup>(163)</sup>.

### 2.2.2. Somali piracy operations and relevant episodes.

The 2013 report of the World Bank, *The Pirates of Somalia: Ending the Threat, rebuilding a nation*, provides a quite detailed framework of the phases of

<sup>(161)</sup> Report on Somalia of the Monitoring Group on Somalia and Eritrea of 12 July 2013 paragraph 63, retrieved at <http://www.un.org/sc/committees/751/mongroup.shtml> on 3 December 2013.

<sup>(162)</sup> *ibid.*.

<sup>(163)</sup> <http://www.bbc.co.uk/news/world-africa-17487767>.

Somali piracy operations in their most practiced form: the hijack and kidnap for ransom. Hence, we will address this issue before citing some relevant episodes.

According to the findings of the report, pirate hubs are concentrated today on the coasts of Puntland and in the northern part of Central Somalia. Before going out at sea to conduct an attack, a leader collects all the necessary funds from investors – money, fuel, food, and heavy weapons – and chooses a commander, whose duty is to organize a group of pirates and lead the operation. What is interesting is that once a team has been successful in carrying out an attack, it usually “retires”. Attacks today are mostly perpetrated from a mother ship that releases smaller skiffs off shore<sup>(164)</sup>. When Somali pirates hijack a vessel, it can be either subsequently used as a mother ship, or it can be moored in a port waiting for the payment of a ransom. In most cases, part or all members of the crew are taken hostage. Somali pirates tend to be quite violent and they do not push back the temptation to use the arms they possess.

Once the attack has been successfully carried out and the ship has been brought to one of the pirate safe havens, the negotiating phase with the shipping company starts. Opinions vary on the treatment of hostages during this phase. The World Bank reports that both pirates and hostages are supplied with water and food. However, when we dealt with the human cost of piracy we mentioned also the physical and psychological suffering of the hostages; hence, the way they are threatened most probably differs from that reserved to pirates. For conducting negotiations, a committee made of a series of members is gathered and, once the negotiations have been concluded, an accountant is engaged in the division of ransom money among all the stakeholders. According to UNDOC-WB statistics the duration of negotiations between 2005 and 2010 has ranged from an average of 46 days in 2005 to 188 days in 2010; yet, the longest negotiation has been protracted for 1178 days. The average ransom in 2011 appears to have been \$5.04 million<sup>(165)</sup>. Ransom money is usually airdropped. It is a common understanding

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<sup>(164)</sup> World Bank *The Pirates of Somalia: Ending the Threat, rebuilding a nation*, pp. 85-97, retrieved at <http://siteresources.worldbank.org/INTAFRICA/Resources/pirates-of-somalia-main-report-web.pdf> on 15 December 2013.

<sup>(165)</sup> World Bank *The Pirates of Somalia: Ending the Threat, rebuilding a nation*, pp. 107-119, retrieved at <http://siteresources.worldbank.org/INTAFRICA/Resources/pirates-of-somalia-main-report-web.pdf> on 15 December 2013; see also KRASKA J., *Contemporary maritime piracy:*

that of the total payment, only about one fourth goes to the pirates who have carried out the attack. In fact, most of the ransom goes to the enablers of piracy<sup>(166)</sup>. In any case, given the level of poverty of Somali people, even one fourth of a high ransom payment is much more than any income resulting from a legal job<sup>(167)</sup>.

We would like to mention here some episodes that have been relevant for different reasons and we will list them in chronological order.

The *MV Semlow* incident. The Semlow is a cargo ship of the Kenyan-based Mataka Shipping Agency. When the incident occurred, it had been chartered by the World Food Program and had been loaded with 850 tons of rice directed to the victims of the 2004 Boxing Day tsunami which reached also the Somali coast. On 27 June 2005, a number of pirates fired at the ship, boarded it, stole money and any valuables on board, and held the crew hostage. The ship was moored in a port north of Mogadishu and the pirates asked for a ransom. On 3 October 2005, after that a \$135,000 ransom had been paid, the ship was released with no hostage injured<sup>(168)</sup>. The attack was committed by the “Somali Marines” and their leader, Afweyne, fearing accusation of hypocrisy claimed the cargo for the people of Harardheere<sup>(169)</sup>. There have been other attacks perpetrated against ships of the WFP and their prevention has been, and still is, one of the aims of counter-piracy operations.

The *Seabourn Spirit* incident. The Seabourn Spirit is a US-owned cruise ship that has been attacked by two small speedboats on the early morning of 5 November 2005 about 100 nm far from the Somali coast<sup>(170)</sup>. The attack was carried out by the “Somali Marines” who fired with automatic rifles and rocket-

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*international law, strategy and diplomacy at sea*, Santa Barbara, California, Praeger ABC-CLIO, LLC, 2011, p. 51.

<sup>(166)</sup> World Bank, *ibid.*.

<sup>(167)</sup> MURPHY N. M., *Small boats, weak states, dirty money: the challenge of piracy*, New York, Columbia University Press, 2009, pp. 110-111.

<sup>(168)</sup> LEHR P., *Violence at sea: piracy in the age of global terrorism*, New York, Routledge Taylor and Francis Group, 2007, pp. 2-3.

<sup>(169)</sup> BAHADUR B. J., *The pirates of Somalia: inside their hidden world*, New York, Pantheon Books, 2011, pp. 38-39.

<sup>(170)</sup> LEHR P., *Violence at sea: piracy in the age of global terrorism*, New York, Routledge Taylor and Francis Group, 2007, p 1.

propelled grenades, but they have been eventually unsuccessful. However, this attack represented one of the most shocking incidents at an international level, since it gave the idea that any type of ship could be a victim of piracy. The US reacted to the attack by extending the mandate of the Combined Task Force 150 (CTF150) from counter-terrorism operations only to patrolling the Somali coast as well<sup>(171)</sup>.

The *Golden Mori* incident. The Golden Mori is a Japanese chemical tanker that was loaded with highly flammable benzene when it was hijacked in October 2007 in the Gulf of Aden. The peculiarity of this incident lies in the fact that the US-navy was given permission to enter Somali territorial waters in pursuit of the ship. The navy sunk the pirates' boat, but the Golden Mori was brought further south and moored. It remained under US observation until its release to months later<sup>(172)</sup>.

The *Le Ponant* incident. The Le Ponant is a French luxury yacht that was hijacked in the Gulf of Aden on 4 April 2008 and moored in the town of Garacad where it seems that local people were paid for the help they provided to the pirates<sup>(173)</sup>. The 30 members of the crew were held hostage and released after one week when the pirates had received a \$2,15 million ransom. What is interesting in this case is that the pirates have been captured a few days later by French special forces which even recovered part of the ransom money<sup>(174)</sup>. It seems that probably also as a consequence of this French operation on Somali territory, the UN Security Council decided to authorize actions against piracy *in* Somalia as well with resolution 1851, that we will address below.

The *MV Faina* incident. The Faina is an Ukrainian ship that was hijacked on 23 September 2008 when it was carrying grenades launchers and Russian

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<sup>(171)</sup> MURPHY N. M., *Small boats, weak states, dirty money: the challenge of piracy*, New York, Columbia University Press, 2009, p. 102.

<sup>(172)</sup> MURPHY N. M., *Small boats, weak states, dirty money: the challenge of piracy*, New York, Columbia University Press, 2009, pp. 106-7.

<sup>(173)</sup> MURPHY N. M., *Small boats, weak states, dirty money: the challenge of piracy*, New York, Columbia University Press, 2009, p. 109.

<sup>(174)</sup> LeMonde.fr with AFP and Reuters, *Procès du "Ponant" : deux acquittements, quatre peines de prison*, consulted at [http://www.lemonde.fr/societe/article/2012/06/15/procès-du-ponant-deux-acquittements-quatre-peines-de-prison\\_1718951\\_3224.html](http://www.lemonde.fr/societe/article/2012/06/15/procès-du-ponant-deux-acquittements-quatre-peines-de-prison_1718951_3224.html) on 9 December 2013.

armoured tanks to Kenya<sup>(175)</sup>. The attack has been committed by the “Somali Marines” and Eyl pirates jointly<sup>(176)</sup>. During the negotiating phase, the ship has been surrounded by US warships. The Faina has been released after almost five months. It is believed that pirates might have received about \$3.2 million as ransom<sup>(177)</sup>.

The *Maersk Alabama* incident. The Maersk Alabama is a US-flagged container ship which was attacked by Somali pirates on 8 April 2009. It has been the first piratical attack against a US cargo in two hundred years<sup>(178)</sup>. The captain of the Alabama, Richard Phillips, was taken hostage on a lifeboat that left the cargo, but was reached by US-navy and other warships. The negotiations to release the captain were conducted by the pirates using satellite telephones<sup>(179)</sup> and the captain was eventually saved after that three pirates had been killed and one was brought to face prosecution in the US.

### 2.3. UN SECURITY COUNCIL RESOLUTIONS.

We have been mentioning the relevance of the series of UN Security Council resolutions dealing with Somali piracy since the beginning of the present thesis; hence, we will explain here why they have been so important.

The UN Security Council adopted its first resolution concerning Somali piracy on 2 June 2008 and since then it has adopted eleven additional resolutions. There are two overall reasons for this continuous commitment. Firstly, the situation on Somalia’s territory. We mentioned above the level of disorder and the inability of the then TFG to enforce power and create functioning institutions. This situation enabled the creation of any form of organized crime and impeded the assertion of control over Somalia’s waters; hence, the upsurge of armed

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<sup>(175)</sup> KRASKA J., *Contemporary maritime piracy: international law, strategy and diplomacy at sea*, Santa Barbara, California, Praeger ABC-CLIO, LLC, 2011, p. 53.

<sup>(176)</sup> BAHADUR B. J., *The pirates of Somalia: inside their hidden world*, New York, Pantheon Books, 2011, p. 38.

<sup>(177)</sup> JONES S., MCGREAL C., *Somali pirates release Ukrainian arms ship*, The Guardian, consulted at <http://www.theguardian.com/world/2009/feb/05/somali-pirates-free-military-ship> on 9 December 2013.

<sup>(178)</sup> Bahadur B. J., *The pirates of Somalia: inside their hidden world*, New York, Pantheon Books, 2011, p. 42.

<sup>(179)</sup> MAZZETTI M., OTTERMAN S., *US Captain is hostage of pirates; navy ship arrives*, consulted at <http://www.nytimes.com/2009/04/09/world/africa/09pirates.html> on 9 December 2013.

robbery at sea and piracy. Being unable to enforce power, Somalia was equally incapable to combat piracy; as a consequence, the TFG requested international assistance. Secondly, the increased number of piratical attacks and the escalation of 2008 made piracy a major threat to the safety and security of international navigation and maritime trade, including the delivery of humanitarian aid to Somalia. We will analyse here some important features of each resolution.

### 2.3.1. Resolutions 1816, 1836, and 1846.

Resolution 1816 was adopted on 2 June 2008. Being the first resolution, it is also one of the most important and many of its sentences will be repeated verbatim in the following resolutions. One of these sentences states that:

[...] international law, as reflected in the United Nations Convention on the Law of the Sea [...], sets the legal framework applicable to combatting piracy and armed robbery, as well as other ocean activities, [...]<sup>(180)</sup>

With this sentence the Security Council refers in particular to articles 100, 101, and 105 UNCLOS<sup>(181)</sup> requiring States to cooperate in the repression of piracy, to board, search, and seize (suspected) pirate vessels, and to arrest suspected pirates with the aim to prosecute them. It should be noted though that the same framework is said to be applicable also against *armed robbery* and this is not accidental. As we mentioned in Chapter 1, armed robberies are unlawful acts of violence that occur in a State's territorial waters. In fact with resolution 1816, the Security Council has extended the geographical area of intervention for international navies that are authorised to conduct their counter-piracy operations in the territorial waters off the coast of Somalia, "in a manner consistent with such

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<sup>(180)</sup> UNSC resolution n° 1816 of 2<sup>nd</sup> June 2008, retrieved at

<http://www.un.org/en/sc/documents/resolutions/> on 22 October 2013.

<sup>(181)</sup> This is explicitly affirmed in other UNSC resolutions n° 1976 of 11<sup>th</sup> April 2011, and 2015 of 24<sup>th</sup> October 2011, retrieved at <http://www.un.org/en/sc/documents/resolutions/> on 22 October 2013.

action permitted on the high seas with respect to piracy under relevant international law”<sup>(182)</sup>.

Other issues that are reiterated in every resolution concern the TFG. The Security Council’s resolutions are indeed adopted also upon TFG request of international assistance. Moreover, the authorisation to enter Somalia’s territorial waters is a result of TFG’s consent and its notification to the UN Secretary General enlisting the States that aim at cooperating with it. In fact, the Security Council affirms that the authorisation to enter territorial waters does not establish customary international law, yet it is exclusively applicable to the Somali case. The exercise of this authorisation must be carried out with respect to Somalia’s sovereignty and without interfering with the right of innocent passage exercised by any third State’s vessel.

Furthermore, with paragraph 7(b) the Security Council authorises the States cooperating with the TFG to use “all necessary means” in their counter-piracy operations. The authority provided by paragraph 7(a) and (b) is for a period of six months.

In addition, the Security Council refers to piracy and armed robbery against vessels as activities that “exacerbate the situation in Somalia which continues to constitute a threat to international peace and security in the region”<sup>(183)</sup>. As a consequence, the Security Council affirms to act under Chapter VII of the Charter of the United Nations<sup>(184)</sup>. It should be highlighted here that even in the subsequent Security Council’s resolutions it will never be piracy itself to constitute and international threat, but rather the situation in Somalia.

Ultimately, the Security Council invites all States to cooperate in the determination of jurisdiction, as well as in the investigation and prosecution of those responsible for carrying out acts of piracy and armed robbery off the Somali coast. Requests which pertain jurisdiction, investigation, prosecution, preservation

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<sup>(182)</sup> UNSC resolution n° 1816 of 2<sup>nd</sup> June 2008, paragraph. 7(a), retrieved at <http://www.un.org/en/sc/documents/resolutions/> on 22 October 2013.

<sup>(183)</sup> UNSC resolution n° 1816 of 2<sup>nd</sup> June 2008, retrieved at <http://www.un.org/en/sc/documents/resolutions/> on 22 October 2013.

<sup>(184)</sup> Chapter VII of the UN Charter is indeed entitled “Action with respect to threats to the peace, breaches of the peace, and acts of aggression” and sets the framework of the UN Collective Security System.

of evidence, logistical assistance to detained persons or to witnesses, and so on, will be increasingly at the epicentre of the Security Council's concern expressed in its following resolutions.

Resolutions 1836 and 1846 have not brought about significant changes in terms of relevant authorisation for international navies.

Resolution 1836, adopted on 7 October 2008, reiterates to a great extent the concerns and requests of the previous resolution, yet there are two additional matters. Firstly, it highlights that piracy was becoming increasingly violent and organized and the use of mother ships was becoming a common practice for Somali pirates. Secondly, this resolution underlines the conditions essential to create an environment unsuitable for piracy to flourish; that is, Somalia's need of economic and social development, of functioning institutions and rule of law, and respect for human rights<sup>(185)</sup>.

Resolution 1846 was adopted on 2 December 2008 and its chief objective was extending the authorisations of paragraph 7 of resolution 1816 for twelve additional months. Moreover, the Security Council underlines how the escalation on ransom payments for the release of ships and hostages is favouring piratical activities. The Security Council also welcomes the efforts of the IMO, the initiatives of many States and international organizations and in particular the launch of the European Union Operation Atalanta.

Lastly, in resolution 1846 there is an additional, interesting observation. With regards to the importance of determining jurisdiction and bringing pirates to face justice, the Security Council makes reference to the 1988 SUA Convention, because the State parties to this Convention have agreed "to create criminal offences, establish jurisdiction, and accept delivery of persons responsible for or suspected of"<sup>(186)</sup> having carried out a series of offences that we enlisted in Chapter 1 and that can be assimilated to acts of piracy or armed robbery at sea. As

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<sup>(185)</sup> UNSC resolution n° 1836 of 7<sup>th</sup> October 2008, retrieved at <http://www.un.org/en/sc/documents/resolutions/> on 22 October 2013.

<sup>(186)</sup> UNSC resolution n° 1846 of 2<sup>nd</sup> December 2008, par. 15, retrieved at <http://www.un.org/en/sc/documents/resolutions/> on 22 October 2013.

a consequence, the Security Council invites State parties to implement the Convention.

### 2.3.2. Resolution 1851.

Resolution 1851, adopted on 16 December 2008, contains a further extension of the geographical area in which States and international organizations are allowed to act in order to combat piracy and armed robbery at sea. In fact, States and international organizations “may undertake all necessary measures that are appropriate *in Somalia*, [...] pursuant to the request of the TFG”<sup>(187)</sup>. This geographical extension to Somali territory is most probably linked to a growing problem highlighted in this resolution: the need for investigation and prosecution of those who facilitate and organize on Somalia’s territory acts of piracy and armed robbery<sup>(188)</sup>. On this matter, the Security Council invites all the States involved in counter-piracy operations to support the TFG. The apprehension of piracy facilitators is still one of the most difficult problems to be solved.

With this resolution, the Security Council underlines two additional concerns. Firstly, it expresses concern over the *catch-and-release practice* that was causing the release of many pirates soon after their capture. Secondly, the Security Council claims that those who provide pirates’ arms and ammunitions are doing so in violation of the arms embargo<sup>(189)</sup>, which was imposed upon Somalia with resolution 733 of 1992 and, therefore, their illegal traffic must be halted.

In addition the Security Council makes two suggestions. The first one pertains to the conclusion of so called ship-rider agreements that would allow countries that are willing, and have the sufficient legal instruments to do so, to embark law enforcement officials on board ships of States and regional

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<sup>(187)</sup> UNSC resolution n° 1851 of 16<sup>th</sup> December 2008, paragraph 6, emphasis added, retrieved at <http://www.un.org/en/sc/documents/resolutions/> on 22 October 2013.

<sup>(188)</sup> UNSC resolution n° 1851 of 16<sup>th</sup> December 2008, paragraph 7, retrieved at <http://www.un.org/en/sc/documents/resolutions/> on 22 October 2013.

<sup>(189)</sup> UNSC resolution n° 1851 of 16<sup>th</sup> December 2008, retrieved at <http://www.un.org/en/sc/documents/resolutions/> on 22 October 2013.

organizations engaged in counter-piracy operations<sup>(190)</sup>. Yet, ship-riders have not been used often in the region. A second suggestion concerns the necessity to establish an international cooperation mechanism and create a regional centre for the sharing of information.

### *2.3.3. Resolutions 1897, 1918, and 1950.*

Resolution 1897, adopted on 30 November 2009, extended the authority set out in paragraph 7 of resolution 1816 (or paragraph 10 of resolution 1846) and of paragraph 6 of resolution 1851 for one year. With this resolution, the Security Council expresses its appreciation for the endeavours of the European Union Operation Atalanta, of NATO's operations Allied Protector and Ocean Shield, of the Combined Task Force 151, as well as of other individual States. Pursuant to the request of the previous resolution to create a mechanism to facilitate coordination among the various States and organizations involved in counter-piracy activities, in January 2009, the Contact Group on Piracy off the Coast of Somalia has been established. Moreover, at the end of the same month, regional States have adopted the Djibouti Code of Conduct<sup>(191)</sup> through which a number of information sharing centres have been established.

We have mentioned above that in Security Council resolutions the problem of prosecution has been increasingly touched upon. Here again, this aspect is presented, but with a positive development. Hence, the Security Council appreciated the efforts of the Republic of Kenya to prosecute suspected pirates<sup>(192)</sup>. As we shall see in Chapter 3, Kenya has played one of the most active roles in the prosecution of pirates and has concluded a number of transfer agreements.

Resolution 1918, adopted on 27 April 2010, deals almost exclusively with problems related to prosecution; first of all, with the limits of the Somali, as well

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<sup>(190)</sup> These type of agreements have been used in particular to curb the illicit traffic of narcotic drugs in the Caribbean.

<sup>(191)</sup> UNSC resolution n° 1897 of 30<sup>th</sup> November 2009, retrieved at <http://www.un.org/en/sc/documents/resolutions/> on 22 October 2013.

<sup>(192)</sup> UNSC resolution n° 1897 of 30<sup>th</sup> November 2009, retrieved at <http://www.un.org/en/sc/documents/resolutions/> on 22 October 2013.

as of other regional, judicial systems. Together with the efforts of the Republic of Kenya in pirates' prosecution, the Security Council welcomes the Seychelles' engagement<sup>(193)</sup>. Moreover, some regional and non-regional States criminalized piracy under their domestic law facilitating prosecution in their courts, yet too many others have not and this situation, according to the Security Council, is undermining the major achievements obtained in counter-piracy operations. Given the difficulties to find a prompt solution to this issue, the Security Council concluded the resolution with a request to the UN Secretary General to present a report concerning possible solutions; for instance, considering the establishment of a regional or international tribunal, or of special domestic chambers in a regional State<sup>(194)</sup>. This report will be presented by the Secretary-General to the President of the UN Security Council in July 2010.

Resolution 1950, adopted on 23 November 2010, extends for twelve months the authorisations renewed in resolution 1897. The Security Council welcomes the report of the Secretary General concerning possible solutions for piracy prosecutions which proposes seven options that we will analyse in Chapter 3. Moreover, the Security Council stresses again on the lack of domestic laws criminalizing piracy, on the lack of investigation on piracy facilitators and financiers, and also on the necessity to investigate international criminal networks and prevent ransom-money laundering. As far as convicted pirates are concerned, the Security Council affirms that Somalia is putting effort into repatriating the pirates convicted abroad through prisoner transfer agreements<sup>(195)</sup>.

Another issue, that has been merely touched on in previous resolutions and it is considered here much further, concerns the importance of preventing illegal fishing and dumping, even of toxic waste, in Somali waters. The negative impact of such illegal activities is twofold: on the one hand, pirates have at various instances claimed that their activities are carried out in order to prevent illegal

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<sup>(193)</sup> As expressed in subsequent resolutions, also the Republic of Mauritius and the United Republic of Tanzania have been engaged with pirates prosecution.

<sup>(194)</sup> UNSC resolution n° 1918 of 27<sup>th</sup> April 2010, retrieved at <http://www.un.org/en/sc/documents/resolutions/> on 22 October 2013.

<sup>(195)</sup> UNSC resolution n° 1950 of 23<sup>rd</sup> November 2010, retrieved at <http://www.un.org/en/sc/documents/resolutions/> on 22 October 2013.

fishing in Somali waters as mentioned above. On the other hand, illegal fishing and dumping is damaging the Somali marine environment and is impairing Somali fishermen to do their work<sup>(196)</sup>.

#### 2.3.4. Resolutions 1976, 2015, and 2020.

Resolution 1976, adopted on 11 April 2011, reiterates again the need for further endeavour in the prosecution of pirates and in the adoption of laws which criminalize piracy since piracy is “a crime subject to universal jurisdiction”<sup>(197)</sup>. With regards to Somalia, the Security Council underlines the necessity to enhance the counter-piracy law enforcement, for example, through the implementation of anti-money-laundering laws, the establishment of Somali National Forces, the delimitation of Somali maritime spaces, including the declaration of an EEZ, and the development of national fisheries activities<sup>(198)</sup>. With regards to other States, an examination of the laws pertaining the detention of pirates at sea is deemed to be necessary<sup>(199)</sup>. Moreover, the Security Council recalls the relevance of the preservation of evidence of incidents at sea and of the availability of seafarers as witnesses during judicial proceedings<sup>(200)</sup>.

In addition, between the various options proposed by the Secretary General as possible solutions for pirates prosecution, the Security Council considers the establishment of specialized Somali anti-piracy courts, inside or outside Somalia, as most advisable<sup>(201)</sup>.

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<sup>(196)</sup> *Ibid.*

<sup>(197)</sup> UNSC resolution n° 1976 of 11<sup>th</sup> April 2011, paragraph 14, retrieved at <http://www.un.org/en/sc/documents/resolutions/> on 22 October 2013.

<sup>(198)</sup> Various international organizations support Somalia in this process, e.g. UNODC, UNDP, IMO, the Djibouti Code of Conduct Trust Fund.

<sup>(199)</sup> The examination of such laws is deemed necessary, because protracted detention at sea might pose human rights violations such as the breach of the right to liberty or of the right to be promptly brought before a judge. On this point an interesting case is the *Medvedyev and others vs France* which is among others analysed by Piedimonte Bodini S. in *Fighting maritime piracy under the European Convention on Human Rights*, in EJIL, vol. 22, n° 3, 2011, pp. 830-834, retrieved at <http://ejil.oxfordjournals.org/content/22/3/829.abstract> on 25 November 2013.

<sup>(200)</sup> UNSC resolution n° 1976 of 11<sup>th</sup> April 2011, retrieved at <http://www.un.org/en/sc/documents/resolutions/> on 22 October 2013.

<sup>(201)</sup> *Ibid.*

Resolution 2020, adopted on 22 November 2011, extends resolution 1950 for another year, always upon TFG request and consent. After commending the work of the IMO, the CGPCS, and the shipping industry with regards to BMPs<sup>(202)</sup>, the Security Council strongly condemns the practice of kidnappings and hostage-takings which results not only in the brutal treatment of the hostages, but also in the generation of further funding to buy weapons, ammunitions, and any other equipment thanks to ransom money<sup>(203)</sup>.

### *2.3.5. Resolutions 2077 and 2125.*

These are the last two resolutions adopted on Somali piracy so far. Resolution 2077 was adopted on 21 November 2012 and extended the previous resolution for another year until the adoption of resolution 2125 on 18 November 2013 which contains a further one-year extension. Notwithstanding the fact that the period of transition in Somalia ended on 20 August 2012, the Security Council stresses on the persistent need to strengthen Somali institutions and law enforcement capabilities.

Once again, resolution 2077 deals extensively with the hurdles posed by investigation and prosecution of suspected pirates and of piracy facilitators, which remain one of the gravest concern for the Security Council. On this respect, the Council appreciates the initiative to establish a Regional Anti-Piracy Prosecution & Intelligence Coordination Centre located in the Seychelles<sup>(204)</sup>.

Resolution 2125 starts with a positive announcement, that is a decrease in acts of piracy that in 2013 have reached the lowest rate since 2006<sup>(205)</sup>. The merit of this achievement is attributed by many scholars and stakeholders, and by the Security Council itself, to the efforts of international counter-piracy operations and of the private sector. However, it is a common view that this progress will

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<sup>(202)</sup> UNSC resolution n° 2020 of 22<sup>nd</sup> November 2011, retrieved at <http://www.un.org/en/sc/documents/resolutions/> on 22 October 2013.

<sup>(203)</sup> UNSC resolutions n° 1976 of 11<sup>th</sup> April 2011, 2015, 18 November 2013, and 2020, 22 November 2011, retrieved at <http://www.un.org/en/sc/documents/resolutions/> on 22 October 2013.

<sup>(204)</sup> UNSC resolution n° 2077 of 21<sup>st</sup> November 2012, retrieved at <http://www.un.org/en/sc/documents/resolutions/> on 22 October 2013.

<sup>(205)</sup> UNSC resolution n° 2125 of 18<sup>th</sup> November 2013, retrieved at <http://www.un.org/en/sc/documents/resolutions/> on 22 November 2013.

vanish, if these efforts are reduced. Moreover, the Security Council notes an increasing commitment in capacity building in the region through the Djibouti Code of Conduct, the European Union program EUCAP Nestor, UNODC, and others aimed at strengthening the judicial system in Somalia and at developing maritime security capacities<sup>(206)</sup>.

#### **2.4. INTERNATIONAL AND REGIONAL COOPERATION TO SUPPRESS SOMALI PIRACY.**

In Chapter 1, we recalled that article 100 UNCLOS places an obligation upon State parties to cooperate in the suppression of piracy on the high seas. Beside, we have explained that UN Security Council resolutions 1816 and 1851 have extended the geographical area for international counter-piracy operations to encompass Somalia's territorial waters and Somali territory.

In the Somali case, the State disorder and other regional State's limited capabilities, as well as the importance of the international sea lines transiting in the Indian Ocean, have triggered an unprecedented wave of international intervention in accordance with international law, including UNCLOS, and with UN Security Council resolutions. This has been exemplified most blatantly by the European Union, NATO, and by the Combined Task Force 151, but we should not forget individual States efforts. For instance, the initiatives of States such as the Russian Federation, India, China, Turkey, Japan, the Republic of Korea, as well as others<sup>(207)</sup>. These activities aimed not only at curbing piratical attacks, but also at enhancing the institutions and capacity building of Somalia and of other regional States. In fact, they have been considered as law enforcement operations. We will deal here with three international counter-piracy initiatives and with probably the most important initiative undertaken by regional States: the Djibouti Code of Conduct.

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<sup>(206)</sup> *Ibid.*

<sup>(207)</sup> In various UNSC resolution on Somali piracy there is a list of the States endeavouring in counter-piracy operations.

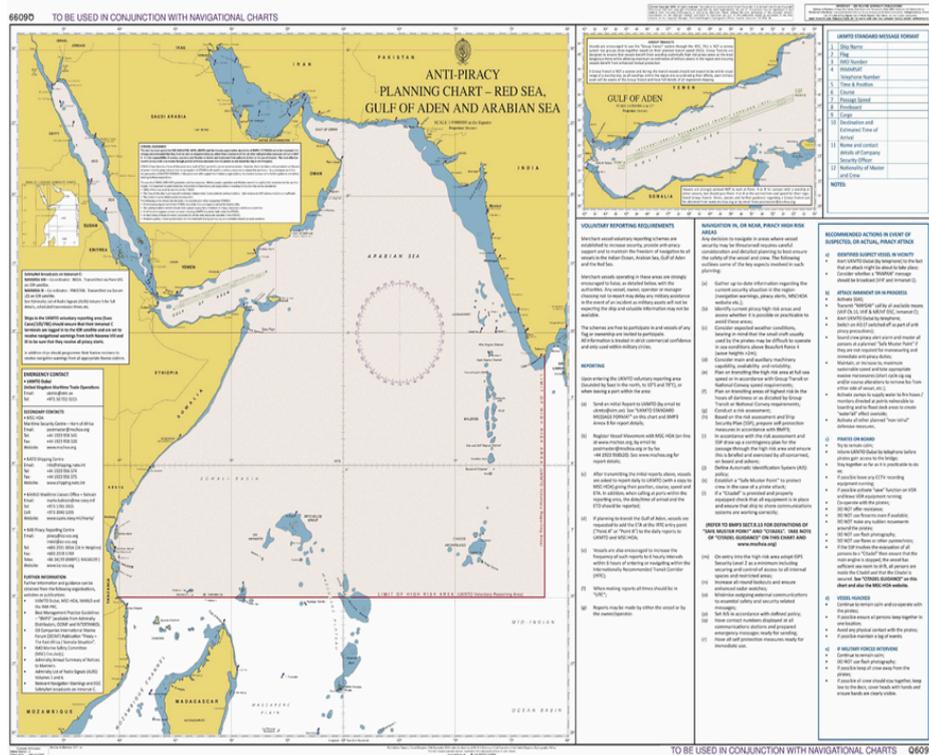


Figure 2.3.: High Risk Area<sup>(208)</sup>.

#### 2.4.1. European Union EUNAVFOR Somalia – Operation Atalanta.

The European Union (EU) endeavour in countering piracy and armed robbery off the Somali coast, and in uprooting the causes for piracy to occur, has been remarkable. Since some EU member States naval assets<sup>(209)</sup> were already present in the Indian Ocean when the number of Somali pirates' attacks skyrocketed in 2008, the Council of the EU adopted a Joint Action as early as 19 September 2008. The objective was to conduct a military coordination action that could support the activities of the various member States for a period of six months through an EU Coordination cell located in Brussels<sup>(210)</sup>. This first engagement has been followed soon afterwards by the first EU naval mission ever

<sup>(208)</sup> <http://eunavfor.eu/about-us/mission/>.

<sup>(209)</sup> The participation to EUNAVFOR is opened also to States that are not members of the EU. Norway, Montenegro, Serbia, and Ukraine have all contributed to the operation. The naval deployment changes constantly and the currently deployed units are from France, Italy, Germany, Spain, and Luxemburg.

<sup>(210)</sup> Council Joint Action 2008/749/CFSP, 19 September 2008 on the European Union military coordination action in support of UN Security Council resolution 1816 (2008) (EU NAVCO), retrieved at <http://eur-lex.europa.eu/en/index.htm> on 25 October 2013.

whose mandate has been stipulated with a Council Joint Action<sup>(211)</sup> on 10 November 2008. The EUNAVOR Somalia – Operation Atalanta (hereinafter Atalanta) has been launched on 8 December 2008 in accordance with UN Security Council resolutions<sup>(212)</sup> and international law, including UNCLOS.

The objectives and mandate of Atalanta are outlined in articles 1 and 2 of the Council Joint Action; as amended four times in the subsequent years, they include:

- the protection of the vessels of the World Food Program (WFP) and of other vulnerable ships transiting through the waters off the Somali coast also through the presence of Atalanta armed units on board such vessels;
- patrolling the areas off the Somali coast, including territorial waters and internal waters<sup>(213)</sup>;
- use of all necessary means, including force, for the deterrence, prevention, and intervention to curb acts of piracy and armed robbery;
- with the aim of prosecution, persons as defined in articles 101 UNCLOS shall be arrested, detained, and transferred, together with the ship they used and goods found on board such a ship<sup>(214)</sup>;
- monitoring of the fishing activities off the Somali coast and help Somalia in maritime capacity-building;
- collect relevant information on the characteristics of those who carried out acts of piracy or armed robbery, for instance, their fingerprints.

The political control and strategic direction of the operation is exercised by the Political and Security Committee which is authorised to take relevant

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<sup>(211)</sup> Council Joint Action 2008/851/CFSP of 10<sup>th</sup> November 2008 on a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast, retrieved at <http://eur-lex.europa.eu/en/index.htm> on 25 October 2013.

<sup>(212)</sup> Beside the UN Security Council resolutions mentioned above, we should add here resolution n° 1814 of 15<sup>th</sup> May 2008 which called on States to protect ships delivering humanitarian aid to Somalia and transiting through piracy-prone areas, in particular World Food Program vessels.

<sup>(213)</sup> The extension of the operational area to Somali internal waters has been added with the amendment of 23 March 2012 to the Council Joint Action 2008/851/CFSP (Council Decision 2012/174), retrieved at <http://eur-lex.europa.eu/en/index.htm> on 25 October 2013.

<sup>(214)</sup> The transfer is subject to provisions under article 12 as amended by Council Decision 2012/174, retrieved at <http://eur-lex.europa.eu/en/index.htm> on 25 October 2013.

decisions under the responsibility of the Council of the EU and of the High Representative of the EU for foreign affairs and security policy<sup>(215)</sup>.

The peculiarity of the European mission is that it aims at a “comprehensive approach” which encompasses the achievement of peace, stability, and sustainable development in Somalia and has been defined in the Council Strategic Framework for the Horn of Africa in November 2011<sup>(216)</sup>. To this end, in April 2010 the Council of the EU had already approved an European training mission for Somali military and security forces based in Uganda and, in July 2012, it agreed on operation EUCAP Nestor aimed at strengthening the maritime capacities of eight countries in the Horn of Africa and the Western Indian Ocean<sup>(217)</sup>. Moreover, still as a part of Atalanta, the *Maritime Security Centre – Horn of Africa* has been established and ships transiting the area can register and receive information from the centre.

Atalanta has been working in coordination with the other deployments in the Indian Ocean and has actively participated in the elaboration of the BMPs published on IMO’s website, in the international Contact Group on Piracy off the Coast of Somalia, in the establishment of the Internationally Recognized Transit Corridor<sup>(218)</sup>, and in the Shared Awareness Deconfliction<sup>(219)</sup> (SHADE) mechanism<sup>(220)</sup>.

In early May 2012, EUNAVFOR stroke its first attack on the Somali coast. Despite of Security Council resolutions’ consent for operations on Somali

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<sup>(215)</sup> Council Decision 2012/174/CFSP of 23<sup>rd</sup> March 2012 amending Joint Action 2008/851/CFSP on a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast, retrieved at <http://eur-lex.europa.eu/en/index.htm> on 25 October 2013.

<sup>(216)</sup> *ibid.*.

<sup>(217)</sup> European Union External Action, *Common Security and Defence Policy, EU Maritime Operation against piracy (EU NAVFOR Somalia - Operation Atalanta)*, updated on 16 October 2012, for further information see: <http://www.eunavfor.eu>.

<sup>(218)</sup> The Internationally Recognized Transit Corridor has been established by the Combined Task Force, the EU, and the United Kingdom Maritime Trade Operations, on 1 February 2009. Thanks to this transit corridor, ships can be escorted, usually in groups, through the Gulf of Aden preventing, therefore, the occurrence of an attack.

<sup>(219)</sup> The Shared Awareness and Deconfliction mechanism is a forum established in an attempt to coordinate the activities of the several forces present in the Indian Ocean.

<sup>(220)</sup> LARIK J., *Europe’s Fight Against Piracy: From the Barbary Coast to Operation Atalanta*, Mai 2013, consulted at <http://www.fondation-pierredubois.ch/en/Papiers-d-actualite/piracy.html> on 15 December 2013.

territory, the EUNAVFOR has been extended to Somali internal waters only in March 2012. The strike was carried out through gun fires shot from an helicopter and addressed to a pirate camp near one of the hotspots, Harardheere. It seems that most likely five speedboats have been destroyed and no-one was injured<sup>(221)</sup>.

In conclusion, many agree on the overall success of Atalanta in reducing the number of attacks, in protecting humanitarian aid for Somalia, and in enhancing multilateral cooperation, even if this has been achieved by bearing high costs. Much remains to be done to uproot the causes of Somali piracy, but the EU seems to have undertaken a really comprehensive approach and Atalanta's mandate has been extended until 12 December 2014.

#### 2.4.2. NATO's operations.

Almost in parallel with EUNAVFOR, NATO's engagement in the Indian Ocean started with *Operation Allied Provider* in the period October – December 2008. Similarly to Atalanta, the objective was to protect WFP vessels, patrol the waters off the Somali coast, and deter acts of piracy and armed robbery at sea. This was a temporary operation undertaken upon request of the UN Secretary General Ban-Ki Moon and was the first NATO-flagged force operating in the Gulf of Aden<sup>(222)</sup>.

A second NATO initiative, *Operation Allied Protector*, was deployed for the period March-August 2009 and evolved into the on-going *Operation Ocean Shield* approved by the North Atlantic Council in August 2009 and recently extended until the end of 2014. The operation main focus is counter-piracy operations at sea, but it has engaged in the escort of AMISOM supply ships as well. Unlike the EU, NATO has devolved less endeavour to regional capacity-building and to address the root causes of piracy. According to a September 2013 research paper released by the NATO Defence College, it is not advisable for

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<sup>(221)</sup> WRIGHT R., MANSON K., *EU raids target Somali pirates onshore*, Financial Times, 15 May 2012, consulted at <http://www.ft.com/intl/cms/s/0/b08d9800-9e7f-11e1-a24e-00144feabdc0.html-axzz2p4acZ4PE> on 15 December 2013; and BAYOUMY Y., *EU helicopters strike Somali pirate base on land*, Reuters, 15 May 2013, consulted at <http://www.reuters.com/article/2012/05/15/us-somalia-piracy-idUSBRE84E0YN20120515> on 15 December 2013.

<sup>(222)</sup> Operation Allied Protector on NATO's website consulted at [http://www.nato.int/cps/it/natolive/topics\\_48815.htm](http://www.nato.int/cps/it/natolive/topics_48815.htm) on 16 December 2013.

NATO to build a regional training centre of its own, but rather to offer its expertise at the disposal of EUCAP Nestor<sup>(223)</sup>.

In brief, NATO's initiatives in coordination with other forces deployed in the Indian Ocean have played a major role in the effective repression of piracy as well.

#### 2.4.3. Combined Task Force 151.

The Combined Task Force 151 (CTF-151) has been created in January 2009 and it is one of the three Task Forces, alongside CTF-150 and CTF-152, operated by the US-led Combined Maritime Forces, a multinational partnership of 29 naval forces which participate voluntarily and without any political or military mandate. CTF-150 aims at enhancing maritime security and at counter-terrorism in support of Operation Enduring Freedom in an area which includes the Red Sea, the Gulf of Aden, the Indian Ocean, and the Gulf of Oman. CTF-151 is, instead, engaged with improving maritime security and cooperation in the Arabian Gulf<sup>(224)</sup>.

The CTF-151 was created with the exclusive purpose of conducting counter-piracy operations in accordance with the UNSC resolutions abovementioned. Providing that participation is voluntary, the resources at disposal of the CTF-151 vary. Its objectives include not only counter-piracy operations in the waters off the Somali coast, but also capacity-building efforts in the domain of maritime security. The CTF-151 contributes, in coordination with the EU and NATO, to the escort of vessels through the Internationally Recognized Transit Corridor and supports the implementation of BMPs<sup>(225)</sup>.

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<sup>(223)</sup> BRIDGER J. M., *Safe seas at what price? The costs, benefits, and future of NATO's Operation Ocean Shield*, research paper, research division of the NATO Defence College of Rome, n° 95, September 2013, retrieved at <http://www.isn.ethz.ch/Digital-Library/Publications/Detail/?lng=en&id=169344> on 5 January 2014.

<sup>(224)</sup> KRASKA J., *Contemporary maritime piracy: international law, strategy and diplomacy at sea*, Santa Barbara, California, Praeger ABC-CLIO, LLC, 2011, pp. 92-94.

<sup>(225)</sup> Combined Task Force 151 website consulted at <http://combinedmaritimeforces.com/about/> on 16 December 2013.

#### 2.4.4. *The Djibouti Code of Conduct.*

Between 2005 and 2008, the IMO invited the regional States surrounding Somalia to meet in order to reach an international agreement to tackle the problem of Somali-based piracy<sup>(226)</sup>. The latest of these meetings took place in Djibouti on 29 January 2009 and on that same date the Code of Conduct concerning the Repression of Piracy and Armed Robbery against ships in the Western Indian Ocean and the Gulf of Aden (hereinafter Djibouti Code of Conduct or DCoC) entered into force. It is to be noted though that it is a non-binding agreement and of the 21 eligible countries to sign the Code, France is the only one which so far has not signed it.

The overall objectives of the DCoC are, alike those of the ReCAAP, to promote regional cooperation, sharing of information, the formulation of more effective national rules concerning prosecution and punishment of pirates and armed robbers, apprehend and prosecute suspected pirates and armed robbers, and facilitating the repatriation of those who have been held hostage by Somali pirates<sup>(227)</sup>. Similarly to the ReCAAP, article 15 of the DCoC states that “nothing in the Code entitles a Participant to exercise jurisdiction in the territory of another Participant, which is exclusively reserved for the authorities of that other Participant”<sup>(228)</sup>. In fact, any Participant is entitled to seize a pirate ship and arrest the persons and property on board beyond the limit of any State’s territorial sea and hot pursuit is not allowed to be extended to the territorial sea of a Participant without its permission. However, a Participant may renounce to the exercise of jurisdiction and authorize another Participant<sup>(229)</sup>. Moreover, under article 7 States agreed that “a Participant may nominate law enforcement or other authorized officials to embark in the patrol ships or aircraft of another Participant”. In

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<sup>(226)</sup> KRASKA J., *Contemporary maritime piracy: international law, strategy and diplomacy at sea*, Santa Barbara, California, Praeger ABC-CLIO, LLC, 2011, p. 161.

<sup>(227)</sup> Articles 2 and 11, DCoC, 29 January 2009, retrieved at <https://www.prc.cm/files/f7/26/ec/8acea8ec3a597473a76bd03c76140019.pdf> on 15 December 2013.

<sup>(228)</sup> Article 15(j), DCoC, 29 January 2009, retrieved at <https://www.prc.cm/files/f7/26/ec/8acea8ec3a597473a76bd03c76140019.pdf> on 15 December 2013.

<sup>(229)</sup> Article 4(4), (5), and (7), DCoC, 29 January 2009, retrieved at <https://www.prc.cm/files/f7/26/ec/8acea8ec3a597473a76bd03c76140019.pdf> on 15 December 2013.

addition, States have agreed upon the conduct of shared operations both between contracting States and with countries outside the region.

Concerning information sharing, the aim of the agreement was to create regional focal points and information centres. To this end, three information sharing centres have been established in Sana'a, Mombasa, and Dar el Salaam which coordinate the sharing of information through a network linking various focal points distributed among the contracting States<sup>(230)</sup>.

Moreover, in April 2010 the IMO Secretariat provided a list of projects, including the establishment of a Project Implementation Unit (PIU). This Unit is mainly financed by the Djibouti Code of Conduct Trust Fund (DCoCTF), a voluntary fund opened to all States or organizations whose first contributor has been Japan, which remains the major sponsor followed with much smaller contributions by the Kingdom of Denmark and the Republic of Korea<sup>(231)</sup>. The PIU set out four pillars: information sharing, regional training, reviewing of national legislations, and capacity building. In order to pursue such objectives, the PIU has organized several workshops and training courses working in cooperation with the EU, NATO, the ReCAAP, UNODC, as well as other international entities<sup>(232)</sup>. As recently as September 2013, a Regional Maritime Training Centre has been opened in Djibouti and it is organizing a number of training courses.

## 2.5. CONCLUSIONS.

The account provided on recent Somali history has been a useful starting point in order to understand why piracy has been so endemic in Somalia. Indeed, the persistent instability of a so-called “failed State” has transformed Somalia’s territory into a fertile ground for the upsurge of piracy. As a result, the international cooperation requested by article 100 UNCLOS has been perceived as the most suitable solution. However, in Chapter 1, we analysed the legal

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<sup>(230)</sup> Information about the *Djibouti Code of Conduct* retrieved at

<http://oceansbeyondpiracy.org/matrix/djibouti-code-conduct> on 16 December 2013.

<sup>(231)</sup> *Djibouti Code of Conduct Project Implementation Unit*, Third Edition September 2012 – March 2013, consulted at

[http://www.imo.org/OurWork/Security/PIU/Documents/PIU\\_Brochure\\_3rd\\_edition.pdf](http://www.imo.org/OurWork/Security/PIU/Documents/PIU_Brochure_3rd_edition.pdf) on 6 November 2013.

<sup>(232)</sup> *ibid.*

framework for the suppression of piracy enshrined in UNCLOS and we stressed on the limitations of such a framework. As a consequence, in Chapter 2, we decided to explain how the UN Security Council has contributed to get rid of some of these limitations in order to allow the international community's engagement to be much more effective.

In accordance with UN Security Council resolutions and with international law, several organizations and individual States have contributed in the fulfilment of their duty: a drastic reduction in Somali piracy attacks. Notwithstanding, too many believe that this achievement should not be overestimated. The root causes of Somali piracy are perceived to be still present, primarily a weak law enforcement capacity of the Somali government. To this end, international efforts have evolved into capacity-building, in particular in the maritime sector, for the Somali as well as for other regional governments. In conclusion, "the global response mounted against Somali piracy has displayed an unparalleled level of international cooperation"<sup>(233)</sup>. Still, one of the problem that have hindered the effectiveness of counter-piracy operations at sea has been the *catch-and-release practise* and the consequent lack of prosecution of an high number of pirates. Hence, this will be the issue addressed to in Chapter 3.

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<sup>(233)</sup> BRIDGER J. M., *Safe seas at what price? The costs, benefits, and future of NATO's Operation Ocean Shield*, research paper, research division of the NATO Defence College of Rome, n° 95, September 2013, retrieved at <http://www.isn.ethz.ch/Digital-Library/Publications/Detail/?lng=en&id=169344> on 5 January 2014.

## **CHAPTER 3**

### **PROSECUTION OF SUSPECTED PIRATES: CHALLENGES AND ATTEMPTED SOLUTIONS**

CONTENTS: 3.1. Determination of State jurisdiction. – 3.1.1. Allocation of State jurisdiction. – 3.1.2. Universal jurisdiction for piracy. – 3.1.3. SUA Convention provisions. – 3.2. Obstacles to the prosecution of suspected pirates. – 3.2.1. Lack of domestic jurisdiction. – 3.2.2. Political, financial, and logistical hurdles. – 3.3. Envisaged and attempted solutions. – 3.3.1. Transfer agreements and handovers. – 3.3.2. Seven possible venues for pirates prosecution. – 3.3.3. Improved regional capacity and infrastructures. – 3.3.4. Increase in the number of prosecuted pirates. – 3.4. Conclusions.

#### **3.1. DETERMINATION OF STATE JURISDICTION.**

State jurisdiction is the ability of a State to formulate and enforce its laws. Jurisdiction is usually exercised by a State inside its territory, yet there are instances of extraterritorial exercise of jurisdiction both in another State's territory and in a place outside any State's jurisdiction, e.g. the high seas. Moreover, no State pretends that its laws should be applicable to everyone and everywhere, but there might be circumstances in which two or more States claim that their laws are applicable. As a result, some criteria have been established through State practice in order to tackle this problem. We will address this issue firstly since it will be useful in the subsequent analysis of universal jurisdiction under UNCLOS and of SUA Convention relevant provisions on the matter<sup>(234)</sup>.

##### *3.1.1. Allocation of State jurisdiction.*

The criteria that allow a State to apply its laws are four: the territoriality principle, the active and passive personality principle, the protective principle, and

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<sup>(234)</sup> FOCARELLI C., *Diritto internazionale. Il sistema degli Stati e i valori comuni dell'umanità*, ed. 2, Padova, CEDAM, pp. 903.

the universality principle. As we shall see, for some of these criteria a debate is still open on whether they constitute customary law or not.

According to the territoriality principle, a State can enforce any law which is consistent with international law upon any person located in its territory, being he or she a citizen of that State or not. A State's territory is the geographical area enclosed by that State's borders, including internal waters, territorial waters, and the airspace above them<sup>(235)</sup>. Moreover, any ship or aircraft registered in a State, and therefore flying that State's flag, is considered to be an integral part of that State. In other words, the flag State is the one who exercises exclusive jurisdiction on board a ship<sup>(236)</sup>.

The personality principle is twofold: it can be either active or passive. According to the active personality principle, a State can enforce its laws upon one of its citizens who has committed an offence abroad. Conversely, the passive personality principle allows a State to enforce its laws upon one of its citizens who has been victim of an offence abroad. Whereas, the active personality principle, alike the territoriality principle, is considered to be a customary practice, the passive personality principle is less applied<sup>(237)</sup>. However, the latter is to be found in some international treaties dealing in particular with international terrorism<sup>(238)</sup>.

According to the protective principle, a State could require the enforcement of its jurisdiction in case of offences committed abroad that might threaten its fundamental national interests<sup>(239)</sup>. There is not much clarity on what may be judged as a fundamental national interest and the chances of a certain

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<sup>(235)</sup> *Ibid.*

<sup>(236)</sup> Article 92(a), UNCLOS states that: "Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas. A ship may not change its flag during a voyage or while in a port of call, save in the case of a real transfer of ownership or change of registry",  
retrieved at [http://www.un.org/depts/los/convention\\_agreements/texts/unclos/unclos\\_e.pdf](http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf) on 10 October 2013.

<sup>(237)</sup> FOCARELLI C., *ibid.*

<sup>(238)</sup> GEISS R., PETRIG A., *Piracy and armed robbery at sea: the legal framework*, Oxford, Oxford University Press, 2011, p. 159.

<sup>(239)</sup> FOCARELLI C., *ibid.*

abuse of this principle do not go missing<sup>(240)</sup>. Focarelli claims that the correspondence of this principle to customary international law is rather doubtful<sup>(241)</sup>.

The peculiarity of the universality principle is that it is based on the assertion that certain crimes are so heinous that any State can punish their perpetrators. In such cases, neither the nexus of territoriality nor that of personality between the State and the offender is required<sup>(242)</sup>. Piracy is considered to be the “paradigmatic universal jurisdiction crime”<sup>(243)</sup>, or “the original universal jurisdiction crime”<sup>(244)</sup> and, in fact, the universality principle has been firstly used in relation to piracy. Moreover, there are today other crimes, such as genocide or torture, whose perpetrators can be likewise punished by any State.

We decided to provide an explanation of these criteria, since States can establish their jurisdiction over an act of piracy by invoking almost any of them. For example, in the Somali case, the territoriality principle would allow Somalia or its neighbouring States to establish their jurisdiction over acts of armed robbery occurring in their territorial waters, providing that such acts are criminalized under their domestic law. In addition, Somalia could likewise punish Somali pirates who commit an offence outside its territory through the active personality principle, yet always providing that the offence is criminalized under Somali domestic law. Lastly, all States, including Somalia, could invoke the universality principle to prosecute suspected pirates caught on the high seas.

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<sup>(240)</sup> GEISS R., PETRIG A., *Piracy and armed robbery at sea: the legal framework*, Oxford, Oxford University Press, 2011, p. 161.

<sup>(241)</sup> FOCARELLI C., *ibid.*.

<sup>(242)</sup> *Counter piracy under international law*, Academic briefing n. 1, Geneva, Geneva Academy of International Humanitarian Law and Human Rights, Université de Genève, August 2012, p. 43, retrieved at <http://www.geneva-academy.ch/docs/academyLecture/Counterpiracy.pdf> on 19 October 2013.

<sup>(243)</sup> GEISS R., PETRIG A., *Piracy and armed robbery at sea: the legal framework*, Oxford, Oxford University Press, 2011, p. 143.

<sup>(244)</sup> INAZUMI M., *Universal jurisdiction in modern international law: expansion of national jurisdiction for prosecuting serious crimes under international law*, School of Human Rights Research series, vol. n° 19, Intersentia, 2005, p. 49-50, in MIDDELBURG A., *Piracy in a legal context: prosecution of pirates operating of the Somali coast*, Nijmegen, The Netherlands, Wolf Legal Publishers, 2011, p. 29, retrieved at <http://arno.uvt.nl/show.cgi?fid=121424> on 25 November 2013.

Despite these possible solutions, the Somali case has presented two major difficulties. First of all, we already mentioned the lack of enforcement capabilities of Somali authorities both on land and at sea. Secondly, Somalia still lacks a comprehensive framework of anti-piracy laws as recalled by the UN Security Council in its resolution of November 2013. These hurdles contribute to explain why international cooperation has been and remains necessary.

Still, as we explained in Chapter 2, the UN Security Council has extended the applicability of UNCLOS provisions to Somali territorial waters. This would mean that all States could prosecute Somali pirates apprehended even in Somali waters by invoking the universality principle that appears to be enclosed in article 105 UNCLOS and that we will examine further hereinafter.

### *3.1.2. Universal jurisdiction for piracy.*

In Chapter 1, we analysed the provisions enshrined in article 105 UNCLOS focusing more on the apprehension of pirates and seizure of their ships rather than on prosecution. Hence, we will address this issue hereinafter. It is a common knowledge that this article sets the framework for universal jurisdiction to seize and prosecute pirates, despite the problems arising from the use of “may”, rather than “shall”, that we presented above. In fact, according to the first sentence of article 105, any State *may* seize a pirate ship and apprehend the suspected pirates found on board. Yet, the second sentence of article 105 has raised some doubts on the universality of the jurisdiction for prosecution. We shall recall that the second sentence of article 105 states that:

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<sup>(245)</sup>.

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<sup>(245)</sup> Article 105, UNCLOS, 10 December 1982, retrieved at [http://www.un.org/depts/los/convention\\_agreements/texts/unclos/unclos\\_e.pdf](http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf) on 10 October 2013.

According to some scholars, the peculiarity of this sentence is that whereas the previous sentence of the article states that *any State* may seize a pirate ship; this one seems to state that, not any State, but rather only the State who apprehended the pirate may prosecute him. In the Somali case, such a restrictive interpretation of this sentence could pose serious problems. In fact, as we shall see, many States who apprehended and apprehend Somali pirates have demonstrated themselves often unwilling to bring them to face justice before their own tribunals. This unwillingness has resulted in the *catch-and-release practice*; that is, pirates are often apprehended, deprived of their arms, and released. In order to avoid this practice, States have been encouraged to conclude transfer agreements with States willing to prosecute suspected pirates. The number of such agreements has increased over time and this conduct probably testifies that States do not interpret the second sentence of article 105 restrictively. On the issue, Kontorovich states “although UNCLOS does not explicitly authorise prosecution by third-party States, it does not expressly prohibit the practice”<sup>(246)</sup>. Similarly Treves affirms that “the rule in Article 105 does not, however, establish the exclusive jurisdiction of the seizing state’s courts”<sup>(247)</sup>.

With respect to universal jurisdiction, we recalled previously that universal jurisdiction is primarily linked today with the prosecution of other crimes, namely international crimes. Historically, according to traditional international law, piracy was considered a *crimen juris gentium*, alongside for example the slave trade. After the second World War, a number of crimes has been identified as international crimes, first among others the crime of genocide; yet, piracy was not, at least not by all scholars, considered to be one of these crimes. The explanation lies most probably in the fact that at the time, piracy was not a crime threatening the international community. Hence, it has not even been enlisted in the Statute of the International Criminal Court of 1998. These omissions lay at the bases of

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<sup>(246)</sup> KONTOROVICH E., “*A Guantanamo on the Sea*”: the difficulty of prosecuting pirates and terrorists, in KONTOROVICH E, ART S., *An empirical examination of universal jurisdiction for piracy*, Faculty Working Papers, Chicago, USA, Northwestern University School of Law, 2010, p. 271, retrieved at <http://www.californialawreview.org/assets/pdfs/98-1/Kontorovich.pdf> on 12 October 2013.

<sup>(247)</sup> TREVES T., *Piracy, Law of the Sea, and Use of Force: Developments off the Coast of Somalia*, in the EJIL, vol. 20, n° 2, 2009, p. 402, retrieved at <http://www.ejil.org/pdfs/20/2/1800.pdf> on 12 October 2013.

certain scholars' assumption that piracy is not an international crime and the debate is rather heated<sup>(248)</sup>. In order to appease it, we could affirm that a crime is considered to be an international crime, because it is so heinous or serious that it damages the international community and the values that it tries to preserve<sup>(249)</sup>. Even though it is difficult to see modern-day piracy, or at least Somali piracy, has an heinous crime, we could at least affirm the it has damaged the international community not only in terms of economic and human costs, but also because it impinged one of the principle of international law, i.e. the freedom of navigation. On this basis, some assert that piracy might be considered an international crime. Yet, being it an international crime or not, this does not hinder to the exercise of universal jurisdiction in order to suppress piracy since it is indeed stated by article 105 UNCLOS. Still, we should add here another consideration.

At the time when international crimes have been introduced, universal jurisdiction has been linked to a fundamental principle which is the *aut dedere aut iudicare* principle. Accordingly, all States are obliged either to prosecute or to extradite a perpetrator of an international crime. This principle is contained in a number of international treaties, but it is not deducible by article 105 UNCLOS. Notwithstanding, some authors reasonably claim that, in order to fulfil the duty of cooperation to suppress piracy stated by article 100 UNCLOS, the principle *aut dedere aut iudicare* should be considered an obligation with respect to piracy as well. While others claim that given that States enjoy universal jurisdiction over piracy, the *aut dedere aut iudicare* principle should likewise be applicable. Ultimately, we could alternatively resort to the 1988 SUA Convention in order to set a basis for the obligation to apply the *aut dedere aut iudicare* principle<sup>(250)</sup>.

### 3.1.3. SUA Convention provisions.

As we mentioned above, the offences considered by article 3 of the SUA Convention encompass also illegal acts committed by pirates, even if the word

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<sup>(248)</sup> DEL CHICCA M., Universal jurisdiction as obligation to prosecute or extradite, article published by World Maritime University Affairs, Malmo, Sweden, 2012, pp. 1-11.

<sup>(249)</sup> FOCARELLI C., *Diritto internazionale. Il sistema degli Stati e i valori comuni dell'umanità*, ed. 2, Padova, CEDAM, pp. 903.

<sup>(250)</sup> DEL CHICCA M., Universal jurisdiction as obligation to prosecute or extradite, article published by World Maritime University Affairs, Malmo, Sweden, 2012, pp. 1-11.

piracy is never mentioned throughout the Convention. That the SUA Convention is of a certain relevance with respect to the suppression of piracy has been also recognized by the UN Security Council in its resolutions<sup>(251)</sup>. In the previous Chapters, we already dealt with some characteristics of this Convention, i.e. its geographical scope, the broad range of offences considered, and the ship-boarding procedures; hence, we will address now the provisions for the exercise of jurisdiction.

The SUA Convention outlines two systems for the establishment of a State jurisdiction: one is compulsory, while the other is optional. Article 6(1) obliges any State party to take the measures needed to establish its jurisdiction when one of the offences considered by the Convention is committed:

- a) against or on board a ship flying the flag of that State at the time the offence is committed; or
- b) in the territory of that State, including its territorial waters; or
- c) by a national of that State<sup>(252)</sup>.

In other words, a State party to the SUA Convention can establish its jurisdiction through the flag State principle, the territoriality principle, or the active personality principle we discussed above.

Moreover, a State party has three further non compulsory options to establish its jurisdiction according to article 6(2), that is when the offence:

- a) [...] is committed by a stateless person whose habitual residence is in that State; or
- b) during its commission a national of that State is seized, threatened, injured or killed; or

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<sup>(251)</sup> For example, in resolution n° 1846 of 2<sup>nd</sup> December 2008, the UN Security Council notes that the SUA Convention “provides for parties to create criminal offences, establish jurisdiction, and accept delivery of persons responsible for or suspected of seizing or exercising control over a ship by force or threat thereof or any other form of intimidation”, retrieved at <http://www.un.org/en/sc/documents/resolutions/> on 22 October 2013.

<sup>(252)</sup> Article 6(1), SUA Convention, 10 March 1988, retrieved at <http://www.un.org/en/sc/ctc/docs/conventions/Conv8.pdf> on 15 October 2013.

c) [...] is committed in an attempt to compel that State to do or abstain from doing any act<sup>(253)</sup>.

The range of criteria outlined is quite broad; yet, the article provides further that such measures have to be taken by a State party “when the alleged offender is present in its territory and it does not extradite him to any of the State Parties which have established their jurisdiction [...]”<sup>(254)</sup>. Hence, article 6(4) already provides the bases for an obligation to either extradite or prosecute (the *aut dedere aut iudicare* principle abovementioned). Notwithstanding, this duty is even further extended through article 10(1):

The State Party in the territory of which the offender is found shall, in cases to which article 6 applies, if it does not extradite him, be obliged, [...], to submit the case without delay to its competent authorities for the purpose of prosecution [...]<sup>(255)</sup>.

Since there are various criteria for the establishment of jurisdiction under article 6, a situation might occur in which more than one State party rightfully establish its jurisdiction and requests for the extradition of an offender located in another State party’s territory. This situation poses a problem of positive conflict of jurisdiction. Yet again, another article of the SUA Convention clarifies the point by stating that in such an event, the State in whose territory the offender is present shall:

[...] in selecting the State to which the offender or alleged offender is to be extradited, pay due regard to the interests and responsibilities of

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<sup>(253)</sup> Article 6(2), SUA Convention, 10 March 1988, retrieved at <http://www.un.org/en/sc/ctc/docs/conventions/Conv8.pdf> on 15 October 2013.

<sup>(254)</sup> Article 6(4), SUA Convention, 10 March 1988, retrieved at <http://www.un.org/en/sc/ctc/docs/conventions/Conv8.pdf> on 15 October 2013.

<sup>(255)</sup> Article 10(1), SUA Convention, 10 March 1988, retrieved at <http://www.un.org/en/sc/ctc/docs/conventions/Conv8.pdf> on 15 October 2013.

the State Party whose flag the ship was flying at the time of the commission of the offence<sup>(256)</sup>.

In any case, State parties are obliged to include the offences addressed to by the SUA Convention in any extradition treaty existing between them. In the event that such a treaty does not exist between the State parties involved, the requesting State “[...] may, at its option, consider this Convention as a legal basis for extradition [...]”<sup>(257)</sup>.

In conclusion, we might recall once again that the SUA Convention was not conceived for the suppression of piracy, but the offences it considers are quite akin to the actions perpetrated, for instance, by Somali pirates. Moreover, the Convention extends the geographical area where the actions for the suppression of such offences can be undertaken and it even encompasses the attempts to commit, not only the commission, of the unlawful offences it aims to curb. Hence, it deserves to be considered as a useful instrument to be implemented by State parties in order to criminalize act perpetrated by pirates and armed robbers under their domestic law, as envisaged by the UN Security Council.

### **3.2. OBSTACLES TO THE PROSECUTION OF SUSPECTED PIRATES.**

UNCLOS provisions assert universal jurisdiction for the apprehension and prosecution of suspected pirates. Moreover, the UN Security Council has extended the area of application of UNCLOS provisions and has invited States to criminalize piracy under their domestic law. Given the high number of State parties to UNCLOS, as well as to the SUA Convention, and the commitment demonstrated by many States in counter-piracy operations off the Somali coast, it could be figured out that a positive conflict of jurisdiction would be at stake. Instead, we witness a rather opposite tendency as reiterated by the UN Security Council in its most recent resolution where it notes with concern:

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<sup>(256)</sup> Article 11(5), SUA Convention, 10 March 1988, retrieved at <http://www.un.org/en/sc/ctc/docs/conventions/Conv8.pdf> on 15 October 2013.

<sup>(257)</sup> Article 11(2), SUA Convention, 10 March 1988, retrieved at <http://www.un.org/en/sc/ctc/docs/conventions/Conv8.pdf> on 15 October 2013.

[...] that the continuing limited capacity and domestic legislation to facilitate the custody and prosecution of suspected pirates after their capture has hindered more robust international action against the pirates off the coast of Somalia, too often has led to pirates being released without facing justice, regardless of whether there is sufficient evidence to support prosecution, [...]<sup>(258)</sup>.

We decided to cite this paragraph because it highlights the problem of the *catch-and-release practice* and recalls some of the obstacles to the prosecution of Somali pirates, that are: limited capacity, in particular that of regional States, and limited domestic legislation. In addition, we shall mention States' unwillingness both to prosecute pirates and to incarcerate them in their prisons after conviction, logistical problems and expenses, and lack of evidence. Hence, we will address these issues in the following subparagraphs.

### 3.2.1. *Lack of domestic legislation.*

UNCLOS' provisions allow any State party to try any case of piracy, even when the prosecuting State has no territoriality or nationality nexus with the suspected pirate. Notwithstanding, it is necessary that the exercise of universal jurisdiction to prosecute pirates is provided for by each State domestic law. Accordingly, the Security Council has invited States to criminalise piracy under their domestic law in order to be able to establish their jurisdiction. The problem is that many States still lack a domestic law that criminalises piracy or, when they have one, it is insufficient. The result is that such States opt for the *catch-and-release* practice justifying their reluctance to bring captured, suspected pirates before their tribunals by arguing that they do not have jurisdiction<sup>(259)</sup>. Hence, we will address first of all the Somali anti-piracy law and then we will provide some

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<sup>(258)</sup> UNSC resolution n° 2125 of 18<sup>th</sup> November 2013, retrieved at <http://www.un.org/en/sc/documents/resolutions/> on 22 November 2013.

<sup>(259)</sup> ADRIANSEN B.S.E., *Combatting piracy off the coast of Somalia. Jurisdiction over interdiction and prosecution*, Oslo, University of Oslo – Faculty of Law, 2010, p. 41.

examples of different ways of defining and criminalizing piracy under national law<sup>(260)</sup>.

As of November 2013, Somalia did not have a sufficient set of laws criminalizing piracy<sup>(261)</sup>. The main reason is attributed to the complexity of its legal system, which is composed of customary law (known as *xeer*), Sharia law, and a more formal legal system which is a result of colonisation. The Somali Penal Code, based on the Italian Penal Code of 1930, entered into force on 2 April 1964, it has not been changed ever since, and it is still applicable; yet, it has no rule criminalizing piracy<sup>(262)</sup>. Given this vacuum, representatives of the three entities, i.e. TFG, Puntland, and Somaliland, met on various occasions in 2010 in order to outline an antipiracy law, under the auspices of United Nations Office on Drugs and Crimes. The resulting law was soon adopted by the Parliament of Puntland, but not by the other two entities. The law uses the wording of UNCLOS' definition of piracy; yet, the version adopted by the Puntland State of Somalia has a definition of piracy which is not consistent with UNCLOS. The legislation provides the competence for the exercise of universal jurisdiction by Puntland Courts, a 5 to 20 years' imprisonment sanction, and substantial fines<sup>(263)</sup>. More recently, in February 2012 the Republic of Somaliland has adopted a law on combatting piracy<sup>(264)</sup> which follows UNCLOS' definition<sup>(265)</sup>. The punishment

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<sup>(260)</sup> On this matter, the United Nations Division for Oceans Affairs and the Law of the Seas (UNDOALOS) website as a section dedicated to *National legislation on Piracy* which can be consulted at [http://www.un.org/Depts/los/piracy/piracy\\_national\\_legislation.htm](http://www.un.org/Depts/los/piracy/piracy_national_legislation.htm) on 23 December 2013.

<sup>(261)</sup> UNSC resolution n° 2125 of 18<sup>th</sup> November 2013: [...] requests the Somali authorities, with assistance from the Secretary-General and relevant United Nations entities, to pass a complete set of anti-piracy laws without further delay, [...], retrieved at <http://www.un.org/en/sc/documents/resolutions/> on 22 November 2013.

<sup>(262)</sup> Report of the special advisor on legal issues related to piracy off the coast of Somalia, Mr Jack Lang, annexed to the letter dated 24 January 2011 from the Secretary-General to the President of the Security Council, retrieved at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N11/206/21/PDF/N1120621.pdf?OpenElement> on 26 December, pp. 34-35.

<sup>(263)</sup> *Ibid.*

<sup>(264)</sup> Somali Law on Combatting Piracy – Law n° 52/2012, retrieved at [http://www.somalilandlaw.com/Somaliland\\_Piracy\\_Law\\_2012\\_Eng180311A.pdf](http://www.somalilandlaw.com/Somaliland_Piracy_Law_2012_Eng180311A.pdf) on 26 December 2013.

<sup>(265)</sup> Article 2 of the Somali Law on Combatting Piracy – Law n° 52/2012, retrieved at [http://www.somalilandlaw.com/Somaliland\\_Piracy\\_Law\\_2012\\_Eng180311A.pdf](http://www.somalilandlaw.com/Somaliland_Piracy_Law_2012_Eng180311A.pdf) on 26 December 2013.

for the crime is 5 to 20 year's imprisonment; yet, in case the pirate has committed murder, he is liable of death penalty<sup>(266)</sup>. Somaliland courts have jurisdiction over acts of piracy, when they are not committed in an other State's territorial waters and when jurisdiction has not been assigned to another State. Moreover, Somaliland courts have jurisdiction when the accused person is detained by Somaliland Costal Forces located in Somaliland territorial sea or in other areas of the sea which do not fall under any other State's jurisdiction<sup>(267)</sup>. In brief, a law uniformly criminalising piracy in Somalia is still lacking, but hopefully the endeavours in particular of UNODC and EU will bear fruit soon.

We will provide hereinafter some examples of national laws criminalizing piracy. We selected certain States in particular, because they have played a major role either in counter-piracy operations or in pirates prosecution. Some of these States, in order to criminalise piracy under their domestic law, refer to the UNCLOS' definition without rephrasing it. For instance, the United Kingdom in its Merchant Shipping and Maritime Security Act of 1997 states that:

[...] for the purposes of any proceedings before a court in the United Kingdom in respect of piracy, the provisions of the United Nations Convention on the Law of the Sea 1982 that are set out in Schedule 5 shall be treated as constituting part of the law of nations<sup>(268)</sup>.

Notwithstanding the active role it plays in counter-piracy operations at sea, based on the information that we could gather, the United Kingdom has not prosecuted any Somali pirate so far.

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<sup>(266)</sup> Article 4 of the Somali Law on Combatting Piracy – Law n° 52/2012, retrieved at [http://www.somalilandlaw.com/Somaliland\\_Piracy\\_Law\\_2012\\_Eng180311A.pdf](http://www.somalilandlaw.com/Somaliland_Piracy_Law_2012_Eng180311A.pdf) on 26 December 2013.

<sup>(267)</sup> Article 5 of the Somali Law on Combatting Piracy – Law n° 52/2012, retrieved at [http://www.somalilandlaw.com/Somaliland\\_Piracy\\_Law\\_2012\\_Eng180311A.pdf](http://www.somalilandlaw.com/Somaliland_Piracy_Law_2012_Eng180311A.pdf) on 26 December 2013. We can understand here the importance of embarking ship-riders, in this case from Somaliland, on ship involved in counter-piracy activities.

(<sup>268</sup>) Merchant Shipping and Maritime Security Act 1997, 26(1), retrieved at <http://www.legislation.gov.uk/ukpga/1997/28/crossheading/maritime-security-etc> on 26 December 2013. Schedule 5 quotes articles 101,102, and 103 UNCLOS.

Other States implemented article 101 UNCLOS. For example, both the Kenyan Merchant Shipping Act of 2009 and the Tanzanian Merchant Shipping Act of 2003 state the same wording of article 101, but omit the geographical limitation to the high seas, while keeping the restriction to a place outside the jurisdiction of any State. Moreover, any person who has attempted or committed an act of piracy or of armed robbery is liable, in both cases, to be convicted to imprisonment for life<sup>(269)</sup>. These acts criminalise also piracy facilitators and the offences considered by the SUA Convention. Moreover, the Tanzanian Penal Code as amended in 2010 makes it lawful to try suspected pirates arrested by foreign navies pending the reaching of an agreement with the capturing State when the pirate ship is not a Tanzanian flagged vessel<sup>(270)</sup>. Kenya has been the first State in the region to exercise universal jurisdiction<sup>(271)</sup>. Furthermore, we could mention the Piracy and Maritime Violence Act enacted in June 2012 by the Republic of Mauritius which reiterates the UNCLOS' definition of piracy and alike the Tanzanian law makes it possible for Mauritius to receive suspected Somali pirates for prosecution. Lastly, the Republic of Seychelles has criminalised the offence of piracy under article 65 of the Penal Code revised in March 2010<sup>(272)</sup>. The Seychelles and Mauritius have exercised universal jurisdiction to prosecute pirates and Tanzania has recently expressed its interest in prosecuting pirates as well.

Other States define piracy as a crime under the law of nations. An example is that of the United States, since in the US Code it is stated that:

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<sup>(269)</sup> Kenyan Merchant Shipping Act 2009, Part XVI – Maritime Security, 370 e 371, retrieved at [https://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/KEN\\_merchant\\_shipping\\_act.pdf](https://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/KEN_merchant_shipping_act.pdf) on 26 December 2013; Tanzanian Merchant Shipping Act 2003, Part XVII – Maritime Security, 341(1) e 342(6), retrieved at <http://faolex.fao.org/docs/pdf/tan61354.pdf> on 26 December 2013.

(<sup>270</sup>) UNSG report n° S/2012/50 of 20<sup>th</sup> January 2012, retrieved at <https://www.un.org/en/sc/documents/sgreports/> on 15 December 2013.

<sup>(271)</sup> Report of the special advisor on legal issues related to piracy off the coast of Somalia, Mr Jack Lang, annexed to the letter dated 24 January 2011 from the Secretary-General to the President of the Security Council, retrieved at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N11/206/21/PDF/N1120621.pdf?OpenElement> on 26 December, p. 22.

(<sup>272</sup>) UNSG report n° S/2012/50 of 20<sup>th</sup> January 2012, retrieved at <https://www.un.org/en/sc/documents/sgreports/> on 15 December 2013.

Whoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life<sup>(273)</sup>.

During the Bush Administration, the United States defined an antipiracy strategy where they reaffirmed the duty to cooperate in order to suppress piracy and recalled that “piracy is a universal crime”<sup>(274)</sup>. Moreover, it could be worth highlighting here that the United States are not an UNCLOS State party, yet they are a State party of the HSC of 1958.

We will consider now how the issue of pirates prosecution is handled in the mandate of the three counter-piracy operations mentioned in Chapter 2, since many States have engaged in counter-piracy activities as part of one of these multinational forces active in the Indian Ocean. With regards to NATO Operation Ocean Shield and CTF 151, given that they are counter-piracy operations at sea and, in part, capacity building operations only, there is no indication on how to handle with issues related to prosecution and it is up to participating States to decide whether they can or will prosecute a suspected pirate. As far as Operation Atalanta is concerned, article 2 of the Council Joint Action of November 2008 states that the operation aims at prosecuting suspected pirates and, to this end, arrest, detention, and transfer of suspects is allowed. This article makes reference to article 12 which has been lastly emended in March 2012. Article 12(1) specifies that, given Somalia’s consent to the exercise of jurisdiction by EU Member States or by third States participating in Operation Atalanta, those suspected pirates that have been arrested in Somalia’s territorial and internal waters or on the high seas shall be transferred to the authorities of the flag State of the vessel who apprehended them. Yet, if that State is not willing to prosecute or cannot do so,

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<sup>(273)</sup> United States Code, Chapter 81 Piracy and Privateering, Part 1 Crimes, Title 18 Crimes and Criminal Procedure, retrieved at <http://www.gpo.gov/fdsys/pkg/USCODE-2011-title18/pdf/USCODE-2011-title18-part1-chap81-sec1651.pdf> on 26 December 2013.

<sup>(274)</sup> Maritime Security (Piracy) Policy, Policy for the Repression of Piracy and Other Criminal Acts of Violence at Sea, Annex B to the National Strategy for Maritime Security, 2007, retrieved at <http://georgewbush-whitehouse.archives.gov/news/releases/2007/06/20070614-3.html> on 26 December 2013.

the suspect shall be transferred to another State taking part in Operation Atalanta. Moreover, when the suspect is apprehended in the territorial or internal waters of another regional State, he shall be transferred to the authorities of that State or, with that State's consent, to the authorities of another Member State or of a third State<sup>(275)</sup>(see 3.3.1). Hence, we could conclude that a suspected pirate is apprehended on behalf of the EU, but the decision whether to prosecute lies to the flag State of the seizing vessel. Once again, we may underline that the criminalisation of piracy under domestic legislation is indeed necessary. Moreover, the EU has concluded a number of transfer agreements with States of the Indian Ocean area with the aim to avoid the *catch-and-release practise* and increase the number of pirates facing justice.

In conclusion, some States have enacted legislations which criminalise piracy under domestic law and some have also prosecuted pirates exercising universal jurisdiction. Still, many States which have the sufficient legal basis to prosecute are either releasing pirates soon after capture or transferring them to another State. Moreover, those non-regional States who have tried some suspected pirates have done so in a majority of cases when one of their nationals was involved or when their interests were at stake, hence without exercising universal jurisdiction. This tendency demonstrates that it is not just a matter of legal constrains.

### 3.2.2. *Political, financial, and logistical hurdles.*

Beside legal issues, States' reluctance to prosecute pirates is also due to a lack of political will, to the burden of costs linked to prosecution, and to logistical difficulties.

As far as the lack of political will is concerned, some States have explained it as a result of the lack of public interest; while others, in particular Western States, have gone even further by arguing that suspected pirates, once

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<sup>(275)</sup> Article 12, of Council Decision 2012/174/CFSP of 23 March 2012 amending Joint Action 2008/851/CFSP on a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast, retrieved at <http://eur-lex.europa.eu/en/index.htm> on 25 October 2013.

they have served their sentences in Western countries, might seek political asylum or refugee status. In fact, given the disorder that persists in some areas of Somalia, many States do not claim that pirates can be brought back to their country of origin, because doing so, in their opinion, would result in the breach of the obligation of non-refoulement on their part. According to the principle of non-refoulement, a State shall not send people to a country where they are liable of abuse. This principle was firstly stated in article 33 of the Geneva Convention Relating to the Status of Refugees<sup>(276)</sup> and it is also deducible by human rights treaties, such as the International Covenant on Civil and Political Rights<sup>(277)</sup>, the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment<sup>(278)</sup>, and the European Convention on Human Rights<sup>(279)</sup>. Since most of the States involved in counter-piracy operations are party to at least one of these conventions, their fear of breaching the non-refoulement obligation seems to be supported by a set of legal instruments. However, there have been also critics on the practice of transfers to Kenya given the uncertainty over the respect of certain human rights obligation and given the conditions of prisons in that

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<sup>(276)</sup> Article 33(1) of the 1951 Geneva Convention Relating to the Status of Refugees states that: “No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion”. This article applies only to refugees as defined in article 1 of the Convention and it is subject to some restrictions, retrieved at <http://www.unhcr.org/pages/49da0e466.html> on 20 December 2013.

<sup>(277)</sup> Article 7 of the 1966 International Covenant on Civil and Political Rights states that: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation”. Through its interpretation of this article, the Human Rights Committee has accepted the principle of non-refoulement, consulted at <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> 20 December 2013.

<sup>(278)</sup> Article 3(1) of the 1984 Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment states that: “No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture”, consulted at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx> on 20 December 2013.

<sup>(279)</sup> Article 3 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms states that: “No one shall be subjected to torture or to inhuman or degrading treatment or punishment”. In the judgement of a number of cases the European Court of Human Rights has recognized the principle of non-refoulement. For further reading on this issue see: DUFFY A., *Expulsion to face torture? Non-refoulement in international law*, article, Oxford, Oxford University Press, 2008, pp. 373-390, retrieved at [http://www.echr.coe.int/Documents/Convention\\_ENG.pdf](http://www.echr.coe.int/Documents/Convention_ENG.pdf) on 20 December 2013.

country<sup>(280)</sup>. To examine further this issue is beyond the scope of the present thesis, yet it could be concluded that human rights violations seem to be at stake in any event, including the no less important human rights of the innocent seafarers attacked by Somali pirates. Hence, States found themselves in a quite complex situation in which, in a sense, they have to choose to what extent they can stand breaching human rights obligations.

Indeed, States also argue that pirates' prosecution is expensive. The costs to be considered are not only the ones deriving from the trial itself, but also the cost of the transfer of the apprehended pirates and of any evidence to the prosecuting country, as well as the costs of imprisonments. In fact, these costs are high, but compared to other costs such as those of counter-piracy operations, ransom payments, or increased insurance costs, they appear to be quite paltry. According to the two reports of the One Earth Future Foundation for 2011 and 2012, the cost of Somali piracy has been estimated at between \$6.6 and \$6.9 billion in 2011 and between \$5.7 and \$6.1 billion in 2012. Of these overall costs, expenses for prosecution and imprisonment have been estimated at \$16.4 million in 2011 and \$14.89 million in 2012. Hence, the expenses for prosecution and imprisonment constitute the lowest cost borne by States cooperating in the curbing of Somali piracy. It might be worth noting that the costs for prosecution and imprisonment are higher in the EU or the US and lower for States in the region which are also supported through external funds<sup>(281)</sup>.

Another obstacle and probably the most undeniable is posed by logistical difficulties. Indeed, States have been concerned in particular with the difficulties in collecting the sufficient evidence of an attack which are an indispensable

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<sup>(280)</sup> See DUTTON Y. M., *Piracy and impunity: is the threat of asylum claims a reason to allow pirates to escape justice?*, New York, Fordham International Law Journal, vol. 34, n°. 2, p. 236, January 2011, p. 250-295, retrieved at <http://oneearthfuture.org/sites/oneearthfuture.org/files/documents/publications/Piracy-and-Asylum-Dutton.pdf> on 27 December 2013.

<sup>(281)</sup> One Earth Future Foundation program Oceans Beyond Piracy working papers, BELLISH J. (lead author), *The economic cost of Somali piracy 2011* and BELLISH J. (lead author), *The economic cost of Somali piracy 2012*, retrieved at <http://oceansbeyondpiracy.org/> on 10 November 2013.

element to prove the alleged offence. In addition, States have also found it hard to bring the witnesses of a piratical attack, namely seafarers of various nationalities, into tribunals<sup>(282)</sup>. These hurdles have indeed pushed many States to avoid prosecution and have been recognized as the main reason for the *catch-and-release practice*<sup>(283)</sup>. During the first apprehensions, there have been even cases in which the captain of the attacked ships ordered to throw all the weapons in the pirates' hands into the ocean for "security reasons"<sup>(284)</sup>. In order to tackle this problem, the IMO has developed in 2011 the *Guidelines to assist in the investigation of the crimes of piracy and armed robbery against ships*<sup>(285)</sup> with detailed recommendations on how to collect evidence and provide incident's reports. With respect to witnesses, given that crews are multinational, it has been often hard to find their members or to hold them throughout the proceeding<sup>(286)</sup>.

In brief, all these difficulties, together with the *catch-and-release practice* and the increasing number of piratical attacks, have brought some States, in the years between 2008 and 2010, to suggest the creation of special domestic tribunals or international courts. To this end, the UN Security Council in April 2010 requested the UN Secretary-General to submit a report on possible solutions to enhance Somali pirates' prosecution. The report, submitted in July, proposed seven options ranging from the establishment of a special domestic Somali court to that of international tribunals and was eventually followed by the report of Mr

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<sup>(282)</sup> KONTOROVICH E., "A Guantanamo on the Sea": the difficulty of prosecuting pirates and terrorists, Faculty Working Papers, Chicago, USA, Northwestern University School of Law, 2010, pp. 265-266, retrieved at <http://www.californialawreview.org/assets/pdfs/98-1/Kontorovich.pdf> on 12 October 2013.

<sup>(283)</sup> *Counter piracy under international law*, Academic briefing n. 1, Geneva, Geneva Academy of International Humanitarian Law and Human Rights, Université de Genève, August 2012, p. 44, retrieved at <http://www.geneva-academy.ch/docs/academyLecture/Counterpiracy.pdf> on 19 October 2013.

<sup>(284)</sup> GEBAUER M., STARK H., *Policing the Gulf of Aden: Somali pirate trial tests limits of EU mission*, Der Spiegel, April 2009, consulted at <http://www.spiegel.de/international/world/policing-the-gulf-of-aden-somali-pirate-trial-tests-limits-of-eu-mission-a-616760.html> on 28 December 2013.

<sup>(285)</sup> IMO MSC.1/Circ. 1404 of 23<sup>rd</sup> May 2011, <http://www.imo.org/Pages/home.aspx> on 12 November 2013.

<sup>(286)</sup> KONTOROVICH E. *ibid.*

Lang, the special advisor of the UN Secretary-General on legal issues related to piracy off the coast of Somalia; yet, we will address this point at a later stage.

### **3.3. ENVISAGED AND ATTEMPTED SOLUTIONS.**

In order to increase the amount of Somali pirates being prosecuted and eventually convicted, the international community has envisaged a number of solutions. Some States and organizations have stipulated transfer agreements with States of the Indian Ocean capable and willing to prosecute pirates. Others have asked for the establishment of special Somali or international courts. Hence, we will address both options and at the end of this part we will see that the number of pirates being brought to face justice has increased.

#### *3.3.1. Transfer agreements and handovers.*

Transfer agreements, the terminology used for instance in the EU Council Joint Actions on Operation Atalanta, and handover agreements, the one used in the DCoC, have been stipulated to serve as a mean to move suspected pirates from one jurisdiction, that of the seizing State, to another jurisdiction, that of the prosecuting State, in order to be tried for the alleged offences they have committed. This is the scope of these agreements, yet the provisions enclosed in each of them vary. The practice to stipulate such agreements has been preferred to extradition and has become the most common way to transfer suspected pirates to face prosecution within States of the region<sup>(287)</sup>. These types of agreements have been contracted by the United Kingdom with the Republic of Kenya, the Republic of Seychelles, the Republic of Mauritius, and the Republic of Tanzania; by the US with Kenya and the Seychelles; by Canada, China, and Denmark with Kenya; as well as by the EU with Kenya, the Seychelles, and Mauritius. Negotiations for a EU-Tanzania transfer agreement are underway. Interestingly though, only the transfer agreements contracted by the EU are publicly available; hence, we will focus on the characteristics of these three agreements only.

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<sup>(287)</sup> GEISS R., PETRIG A., *Piracy and armed robbery at sea: the legal framework*, Oxford, Oxford University Press, 2011, p. 191.

Before dealing with the agreements which actually exist, we will spend a few words on agreements which have not been stipulated so far; that is, agreements with Somalia. The reasons for this gap are to be found in the uncertainty of the fairness of trials which would eventually be conducted in Somalia and in particular the uncertainty in the respect of human rights standards. It is to be noted though that trials have been conducted in Puntland and Somaliland for pirates and armed robbers apprehended by Somali forces and UNODC and UNDP have recently involved in the construction of courts and prisons in Puntland and Somaliland to make it possible to try suspected pirates fairly in their country of origin<sup>(288)</sup>.

EU transfer agreements with regional States are required by article 12(2) of the Council Joint Action 851/2008 where it is stated that:

No persons referred to in paragraphs 1 and 2 may be transferred to a third State unless the conditions for the transfer have been agreed with that third State in a manner consistent with relevant international law, notably international law on human rights, in order to guarantee in particular that no one shall be subjected to the death penalty, to torture or to any cruel, inhuman or degrading treatment.

Beside requiring the existence of an agreement with the receiving State, this article demands that the agreement shall be consistent with international law, namely human rights law and, therefore, in a sense reiterates the non-refoulement obligation.

Given that Kenya has been the first State in the region to try suspected pirates in 2006<sup>(289)</sup> and it has also remained one of the most actively involved in pirates' prosecution, we will address the EU-Kenya agreement first. This

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( 288 ) UNSG report n° S/2012/50 of 20<sup>th</sup> January 2012, retrieved at <https://www.un.org/en/sc/documents/sgreports/> on 15 December 2013.

<sup>(289)</sup> Report of the special advisor on legal issues related to piracy off the coast of Somalia, Mr Jack Lang, annexed to the letter dated 24 January 2011 from the Secretary-General to the President of the Security Council, p. 22, retrieved at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N11/206/21/PDF/N1120621.pdf?OpenElement> on 26 December.

agreement is an *Exchange of Letters between the EU 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 the EUNAVFOR to Kenya and for their treatment after such transfer*<sup>(290)</sup> of February 2009. The agreement endorses the UNCLOS definition of piracy and the persons who can be transferred are those “suspected of intending to commit, committing, or having committed”<sup>(291)</sup> an act of piracy. The EUNAVFOR shall transfer the detained persons “only to competent Kenyan law enforcement authorities”<sup>(292)</sup>. Kenya confirms that the persons transferred will be treated with respect of international human rights, e.g. they will not be subjected to torture or other cruel, inhuman or degrading treatment, they will be promptly brought before a judge or otherwise released, they will be tried fairly, and no persons will be liable to be sentenced to death penalty<sup>(293)</sup>. Kenya shall inform EUNAVFOR, among others, on the transferred persons physical status, on the location of their detention, and on any judicial decisions taken. In return, EUNAVFOR will provide assistance in investigation and prosecution by handing over any record, evidence, and witnesses’ statement<sup>(294)</sup>. In April 2010, the Kenyan government announced that it was no more willing to accept suspected Somali pirates transferred from various States for prosecution to Kenya<sup>(295)</sup>. The main reasons were that, according to Kenyan authorities, Kenya was not receiving adequate

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(<sup>290</sup>) Council Decision 2009/293/CFSP of 26 February 2009, retrieved at [http://psc-psdc.esteri.it/NR/ronlyres/4F88974E-B783-4E0B-9C12-BE7018FC4F8D/14816/Council\\_293\\_09.pdf](http://psc-psdc.esteri.it/NR/ronlyres/4F88974E-B783-4E0B-9C12-BE7018FC4F8D/14816/Council_293_09.pdf) on 29 December 2013.

(<sup>291</sup>) Article 1, EU-Kenya Transfer Agreement, retrieved at [http://psc-psdc.esteri.it/NR/ronlyres/4F88974E-B783-4E0B-9C12-BE7018FC4F8D/14817/Exchange\\_Kenya.pdf](http://psc-psdc.esteri.it/NR/ronlyres/4F88974E-B783-4E0B-9C12-BE7018FC4F8D/14817/Exchange_Kenya.pdf) on 29 December 2013.

(<sup>292</sup>) Article 2(b), EU-Kenya Transfer Agreement, retrieved at [http://psc-psdc.esteri.it/NR/ronlyres/4F88974E-B783-4E0B-9C12-BE7018FC4F8D/14817/Exchange\\_Kenya.pdf](http://psc-psdc.esteri.it/NR/ronlyres/4F88974E-B783-4E0B-9C12-BE7018FC4F8D/14817/Exchange_Kenya.pdf) on 29 December 2013.

(<sup>293</sup>) Article 3, EU-Kenya Transfer Agreement, retrieved at [http://psc-psdc.esteri.it/NR/ronlyres/4F88974E-B783-4E0B-9C12-BE7018FC4F8D/14817/Exchange\\_Kenya.pdf](http://psc-psdc.esteri.it/NR/ronlyres/4F88974E-B783-4E0B-9C12-BE7018FC4F8D/14817/Exchange_Kenya.pdf) on 29 December 2013.

(<sup>294</sup>) Article 5, EU-Kenya Transfer Agreement, retrieved at [http://psc-psdc.esteri.it/NR/ronlyres/4F88974E-B783-4E0B-9C12-BE7018FC4F8D/14817/Exchange\\_Kenya.pdf](http://psc-psdc.esteri.it/NR/ronlyres/4F88974E-B783-4E0B-9C12-BE7018FC4F8D/14817/Exchange_Kenya.pdf) on 29 December 2013.

(<sup>295</sup>) BBC News, *Kenya ends trials for Somali pirates in its courts*, 1 April 2010, consulted at <http://news.bbc.co.uk/2/hi/8599347.stm> on 29 December 2013.

support by the international community for the investigation and prosecution of pirates and that it was not clear how repatriation was to be handled<sup>(296)</sup>. Since then, Kenya accepts suspected pirates on a case-by-case basis. In effect, this reluctance did not last long, yet enough to push further action by the international community and to look for other regional States willing to prosecute pirates. In the meantime, in June 2010, thanks to the funds of international organisations and States, Kenya could open a court for pirates' prosecution. Given that, at the time, Kenya was detaining more than 100 suspected pirates, the establishment of this court was a major achievement<sup>(297)</sup>.

As far as the Seychelles are concerned, the archipelagic State has been at the forefront of Somali pirates' prosecution as well. The EU-Seychelles agreement is likewise the result of an Exchange of Letters approved by the Council of the EU on 23 October 2009<sup>(298)</sup>. As a consequence of the increased counter-piracy operations, piratical attacks were moving at the time southwards reaching also Seychellois waters. Hence, the government of the Republic authorized EUNAVFOR to transfer to the Seychelles those suspected pirates or armed robbers apprehended in the internal, archipelagic, and territorial waters, and in the EEZ of the Seychelles. Additionally, EUNAVFOR shall protect Seychelles flagged vessels and Seychelles citizens beyond the EEZ limit if requested by the Seychelles. This limitation to a certain category of persons is a difference compared to the EU-Kenya agreement. Moreover, the EU recognises the limited financial, logistical, and infrastructural capacities of the Republic and, therefore, will provide assistance which will include the cost of repatriation of the suspected or convicted pirates. Alike Kenya, the Seychelles confirm the respect of human rights law. The acceptance of transferred persons is subordinated to the Seychelles Attorney General decision after an examination of the evidence

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<sup>(296)</sup> LEPOSO L., *Kenya ends agreement with the EU to prosecute suspected Somali pirates*, 4 October 2010, CNN, consulted at <http://edition.cnn.com/2010/WORLD/africa/10/04/kenya.eu.pirates/> on 29 December 2013.

<sup>(297)</sup> AKANDE D., *Anti-piracy court opens in Kenya*, 28 June 2008, EJIL:Talks!, consulted at: <http://www.ejiltalk.org/anti-piracy-court-opens-in-kenya/> on 29 December 2013.

<sup>(298)</sup> Council Decision 2009/877/CSFP, of 23 October 2009, retrieved at [http://pesc-psdc.esteri.it/NR/ronlyres/4F88974E-B783-4E0B-9C12-BE7018FC4F8D/14814/Council\\_877\\_09.pdf](http://pesc-psdc.esteri.it/NR/ronlyres/4F88974E-B783-4E0B-9C12-BE7018FC4F8D/14814/Council_877_09.pdf) on 29 December 2013.

provided<sup>(299)</sup>. Given the limited capacity in a tiny country as the Seychelles, agreements have been stipulated between the Seychelles and the TFG, Somaliland, and Puntland in 2011 for the repatriation of convicted Somali pirates both post-conviction or in order to serve the last part of their prison sentences in their country of origin<sup>(300)</sup>. A number of post-conviction transfers have already took place on a case-by-case basis. Any transfer is subjected to the request by Seychelles and to the consent of both the receiving State and the person to be transferred<sup>(301)</sup>.

On 12 July 2011, the Council of the EU has approved the signing of a transfer agreement with the Republic of Mauritius for the handover of “persons suspected of attempting to commit, committing, or having committed”<sup>(302)</sup> an act of piracy apprehended within the area of operation of EUNAVFOR or, more specifically, beyond the territorial waters of Mauritius, Madagascar, the Comoros Islands, Seychelles, and Réunion Island<sup>(303)</sup>. Yet, Mauritius acceptance is made on a case-by-case basis after the examination of relevant evidence. Alike the Seychelles, Mauritius has limited prison capacity; hence, article 4(8) states that convicted persons may be transferred to another State to serve their sentence or after having served it, but with guarantees of respect of human rights in that other State. As for the other agreements EUNAVFOR shall provide any evidence, witnesses’ statement, or other relevant information; whereas, Mauritius shall keep a record on transferred persons physical status, their movements within the

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<sup>(299)</sup> *Exchange of Letters between the European Union and the Republic of Seychelles on the Conditions and Modalities for the Transfer of Suspected Pirates and Armed Robbers from EUNAVFOR to the Republic of Seychelles and for their Treatment after such Transfer* retrieved at <http://eur-lex.europa.eu/en/index.htm> on 29 December 2013.

<sup>(300)</sup> STERIO M., *A report on the possibility of future Somali piracy prosecutions in Mauritius*, EJIL:Talks!, consulted at <http://www.ejiltalk.org/a-report-on-the-possibility-of-future-somali-piracy-prosecutions-in-mauritius/> on 29 December 2013.

<sup>(301)</sup> UNSG report n° S/2012/50 of 20<sup>th</sup> January 2012, retrieved at <https://www.un.org/en/sc/documents/sgreports/> on 15 December 2013.

<sup>(302)</sup> Article 1(a), of the *Agreement between the European Union and the Republic of Mauritius on the conditions of transfer of suspected pirates and associated seized property from the European Union-led naval force to the Republic of Mauritius and on the conditions of suspected pirates after transfer*, retrieved at <http://eur-lex.europa.eu/en/index.htm> on 29 December 2013.

<sup>(303)</sup> *ibid.*.

country, and on judicial decisions<sup>(304)</sup>. On 25 May 2012, Mauritius has signed an agreement for the transfer of sentenced pirates with representatives of the TFG and of Puntland State of Somalia and the UNODC will pay the cost of repatriation<sup>(305)</sup>. As recently as January 2013, twelve pirate suspects have been transferred to Mauritius by an EUNAVFOR French frigate after an attempted attack on a merchant vessel<sup>(306)</sup>.

To conclude, transfer agreements have been the most effective mean to increase the number of pirates being prosecuted. The fact that the acceptance of apprehended pirates is achieved on a case-by-case basis does not seem to have posed major obstacles so far(nota). Moreover, transfer agreements constitute a necessary element in all the options proposed as possible venues for pirates prosecution by the UN Secretary-General.

### 3.3.2. *Seven possible venues for pirates prosecution.*

Pursuant to UN Security Council resolution 1918 of April 2010, in July of the same year, the UN Secretary-General submitted to the Council a report which considered seven possible options for enhancing piracy prosecution<sup>(307)</sup>. The Secretary-General does not express a preference for one of the options, but it provides a set of advantages and disadvantages for each solution that may let understand which is the most desirable. Before dealing with each option, the report highlights a number of general considerations valid for all of them.

The aim of six out of seven options is that of establishing a national, regional, or international court for piracy prosecution; hence, the first step necessary would be to find an host State. Moreover, any solution would require a

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(<sup>304</sup>) Articles 6 and 7, of EU-Mauritius Transfer Agreement, retrieved at <http://eur-lex.europa.eu/en/index.htm> on 29 December 2013.

(<sup>305</sup>) News on *Mauritius-Somalia: agreement on the transfer of sentenced pirates signed*, 28 May 2012, Republic of Mauritius website consulted at <http://www.gov.mu/English/News/Pages/Mauritius-Somalia-Agreement-on-the-transfer-of-sentenced-pirates-signed.aspx> on 29 December 2013.

(<sup>306</sup>) *Pirate suspects transferred to Mauritius* 25 January 2013, consulted at <http://maritimeaccident.org/2013/01/pirate-suspects-transferred-to-mauritius/> on 29 December 2013.

(<sup>307</sup>) UNSG report n° S/2010/394 of 26<sup>th</sup> July 2010, retrieved at <https://www.un.org/en/sc/documents/sgreports/> on 15 December 2013.

strong, constant political, and financial commitment, and the agreement on a number of arrangements to move suspected and convicted pirates and evidence. In addition, decisions have to be taken with regards to the prosecutable crimes, i.e. not only acts of piracy but also activities which organise and finance piracy should be probably considered, and with regards to possible geographical limitations, i.e. whether acts occurring in Somali territorial waters should be comprised if the court established is not a Somali court. Lastly, it should not be forgotten that to try a pirate most probably leads to its conviction; therefore, any solution considers the necessity of enhancing prison capacity and of transfer of convicted pirates to other States when the capacity of the prosecuting State is not sufficient<sup>(308)</sup>. That said, we will outline which are the seven options.

*Build regional capacity to prosecute and imprison suspected pirates and armed robbers.* This option was the only one already on-going as of July 2010 and it remains the most followed given that it aims at the long-term solution of the problem: enhancing the judicial and infrastructural capacity of Somalia and other regional States. For instance, as we already mentioned, in June 2010, a high security courtroom has been opened in Mombasa, Kenya, thanks to a number of donors which include UNODC, the EU, Australia, and Canada<sup>(309)</sup>. This court does not try suspected pirates only, but also the offenders of other serious crimes. The fact that activities of regional capacity-building were on-going at mid-2010, even through funding programmes for both Kenya and the Seychelles, constitutes an advantage. Moreover, the report highlights that national trials had been quite rapid, with restrained costs, and of an undeniable benefit for the criminal justice system of States such as Kenya and the Seychelles, and as well as for Puntland and Somaliland. It has to be noted though that, as of June 2010, the amount of donations to Kenya and Seychelles was much higher compared to those received by Somalia, because international donors were less confident in Somali judicial capacity<sup>(310)</sup>. Hence, enhanced judicial capacity could spur donations triggering a

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<sup>(308)</sup> *Ibid.*, paragraphs 35-54.

<sup>(309)</sup> *Kenya opens fast-track piracy court in Mombasa*, 24 June 2010, consulted at <http://www.bbc.co.uk/news/10401413> on 31 December 2013.

<sup>(310)</sup> UNSG report n° S/2010/394 of 26<sup>th</sup> July 2010, paragraphs 55-60, retrieved at <https://www.un.org/en/sc/documents/sgreports/> on 15 December 2013.

positive vicious cycle of continuous improvement. This is particularly true for Somalia in terms of judicial and imprisonment capacity.

*Establish an extraterritorial Somali court in a State in the region.* This solution could be achieved either with or without UN participation, that is with the participation of UN judges, prosecutors, or staff. Such a court would be a Somali court with Somali jurisdiction, but based outside Somalia, in a place which is more secure. The fact that sentences would be based on the enforcement of Somali laws poses both an advantage and a disadvantage since, on the one hand, the adequacy of Somali piracy law is doubtful and, therefore, the court could not immediately be operative until substantive laws have been enacted; on the other hand, the aim of establishing such a court could accelerate the restatement of Somali laws<sup>(311)</sup>. States such as France, Portugal, and Russia seem to support this option, alongside the UN special advisor Mr Lang abovementioned<sup>(312)</sup>. It seems though that the costs for the establishment of such an extraterritorial court might be rather high compared to the solution envisaged in the third option<sup>(313)</sup>.

*Establish a special chamber within the national jurisdiction of a State or States in the region, without UN participation.* This is considered to be the least expensive and the most effective solution, even though there might not be enough pirates to be prosecuted, to justify the establishment of a special chamber. In fact, the chamber opened in Mombasa is not for the exclusive prosecution of suspected pirates. Notwithstanding, this option would have the advantage to lead to the creation of a special court within an already established jurisdiction, with its laws and procedures. The host State could be obviously Somalia itself, but this would again raise the problem of the adequacy of Somali anti-piracy law. Conversely, in the event that the special chamber is based outside Somalia, it would be necessary to establish if it has jurisdiction over acts committed in Somali territorial waters and if Somali consent would be needed. With respect to this option, the Secretary-

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<sup>(311)</sup> *Ibid.* paragraphs 62-65.

<sup>(312)</sup> KRASKA J., *Contemporary maritime piracy: international law, strategy and diplomacy at sea*, Santa Barbara, California, Praeger ABC-CLIO, LLC, 2011, p. 173.

<sup>(313)</sup> UNSG report n° S/2010/394 of 26<sup>th</sup> July 2010, paragraphs 55-60, retrieved at <https://www.un.org/en/sc/documents/sgreports/> on 15 December 2013.

General fears that it might lead to the use of huge resources for piracy prosecution to the detriment of prosecution of other crimes in the host State<sup>(314)</sup>.

*Establish a special chamber within the national jurisdiction of a State or States in the region, with UN participation.* This option is considered to be slightly more expensive compared to the previous one and it has more or less the same advantages and disadvantages. Given that it considers UN participation, an agreement between the UN and the host State is needed and its provisions depend to a great extent on the choices of the host State. If the host State is Kenya or Seychelles, it is without doubts that much knowledge sharing will result, since both States have acquired expertise in piracy trials and UN judges and staff (which could also come from the region) would provide a further contribute. The Secretary-General informs on Kenya, Seychelles, Tanzania, and Mauritius availability to establish a special chamber<sup>(315)</sup>.

*Establish a regional tribunal.* The tribunal would be established, with UN participation, through a multilateral agreement between regional States. Alike the other solutions, this tribunal could enhance regional judicial capacity in particular if judges and staff originate from the region, but other advantages are hard to find. The conclusion of a multilateral agreement could help further cooperation and burden sharing, but the time needed to reach the agreement might be lengthy since negotiations would include the definition of the jurisdiction of such tribunal. Moreover, this solution is judged as too expensive<sup>(316)</sup>.

*Establish an international tribunal.* This would be achieved through an agreement between an host State in the region and the UN and would lead to the establishment a UN-assisted tribunal, or hybrid tribunal, similar to the Special Tribunal for Lebanon or the Special Court for Sierra Leone. The most desirable host State would be Somalia. Even in this case, negotiations to define the Statute of such tribunal might last long<sup>(317)</sup>. The members of the CGPCS have suggested that an international tribunal could already exists if States would consider to

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(<sup>314</sup>) UNSG report n° S/2010/394 26<sup>th</sup> July 2010, paragraphs 68-72, retrieved at <https://www.un.org/en/sc/documents/sgreports/> on 15 December 2013.

(<sup>315</sup>) *Ibid.*, paragraphs 73-79.

(<sup>316</sup>) *Ibid.*, paragraphs 80-89.

(<sup>317</sup>) *Ibid.*, paragraphs 90-96.

amend the Statute of the ITLOS. This tribunal was created under UNCLOS to solve disputes in the interpretation of the Convention. Given that it took nearly ten years to negotiate UNCLOS, any amendment was not perceived as feasible and the Secretary-General ruled out CGPCS' suggestion<sup>(318)</sup>.

*Establish an international tribunal through a UN Security Council resolution under Chapter VII of the UN Charter.* The greatest problem in the establishment of this tribunal is to be found in the fact that, according to UN Security Council resolutions, it is not piracy itself, but rather the situation in Somalia which poses a threat to peace. This is a major obstacle, because decisions taken under Chapter VII aim to solve a problem which the Security Council recognises as a threat to peace<sup>(319)</sup>. Supposing that this obstacle could be overcome, the international tribunal would be a subsidiary organ of the UN similar to the International Criminal Tribunal for Former Yugoslavia or the International Criminal Tribunal for Rwanda, with UN judges and staff, of which some might come from the region. As a consequence, this tribunal might have a lot of resources and, therefore, try an high number of suspects, but it would be nevertheless rather expensive if compared to the other options, and even less useful in the perspective of enhancing regional capacity<sup>(320)</sup>. The members of the CGPCS have proposed an amendment of the Statute of the International Criminal Court (ICC) so that piracy could be inscribed in the list of the prosecutable crimes, since, as we already mentioned in this Chapter, piracy was not included in the Statute of the ICC. In brief, this option has been ruled out by the UN Secretary-General.

Of these seven options, as it is in a sense inferable from the report, the most desirable are the ones which would increase regional capacity through funding programmes and the establishment of special national chambers or courts. These solutions could enhance a sharing of information and expertise between

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<sup>(318)</sup> *Ibid.* paragraph 106.

<sup>(319)</sup> Article 39, Chapter VII of the UN Charter, 26 June 1945, retrieved at <https://www.un.org/en/> on 5 October 2013.

(<sup>320</sup>) UNSG report S/2010/394, 26 July 2010, paragraphs 97-104, retrieved at <https://www.un.org/en/sc/documents/sgreports/> on 15 December 2013.

regional States and would imply the enforcement of national laws so that any limitations of such laws could be perceived and their restatement could be considered. In addition, we recalled many times in the present thesis that the scourge of piracy is essentially a result of the persistent disorder in Somalia, a State which needs to improve its law enforcement capabilities, its economy, its life standard, its employment opportunities. As a consequence, any solution which considers regional capacity-building, i.e. Somali capacity-building, becomes the long-term solution to the problem.

After having submitted this report to the Security Council, the UN Secretary-General requested to its special advisor on legal issues related to piracy off the coast of Somalia, Mr Jack Lang, to consider additional steps to enhance piracy prosecution. A report was submitted by the special advisor in January 2011 and the most striking information it delivers is that, in Lang's opinion as of May 2010, nine out of ten apprehended pirates were released soon after capture<sup>(321)</sup>. Mr Lang reiterated a number of necessary measures that we already considered, such as, the criminalisation of piracy at domestic level and adoption of universal jurisdiction, the importance of gathering evidence and witnesses' statements, of the sharing of information, and of continuous support to States in the region<sup>(322)</sup>. Afterwards, the special advisor, following one of the options of the report of the Secretary-General, suggests to establish two special courts, one in Puntland and one in Somaliland, and an extraterritorial Somali court in Arusha, Tanzania. Accompanied by the construction of two prisons, one in Puntland and one in Somaliland<sup>(323)</sup>. According to Lang, an approach that aims at establishing Somali courts would bring large benefits to Somalia and its law enforcement capabilities. This approach is what Lang calls "Somalisation" of the problem and encompasses also economic and security issues<sup>(324)</sup>. Lang's recommendations, alongside the

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<sup>(321)</sup> Report of the special advisor on legal issues related to piracy off the coast of Somalia, Mr Jack Lang, annexed to the letter dated 24 January 2011 from the Secretary-General to the President of the Security Council, paragraph 43, retrieved at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N11/206/21/PDF/N1120621.pdf?OpenElement> on 26 December.

<sup>(322)</sup> *Ibid.* paragraphs 42-76.

<sup>(323)</sup> *Ibid.* paragraphs 116-122.

<sup>(324)</sup> *Ibid.* paragraphs 79-80.

Secretary-General's, have been taken into account by the Security Council in its resolution 1976 of April 2011 when it decided "to urgently consider the establishment of specialised Somali courts both in Somalia and in the region, including an extraterritorial Somali specialised court[...]"<sup>(325)</sup>.

In conclusion, we could state that, as of mid 2011, a good asset of possible options to solve the problem of the catch and release practice and to increase the number of pirates brought before a judge had been contemplated. Hence, we will see in the following subparagraphs which of the envisaged solutions has been achieved or effectively taken into account.

### *3.3.3. Improved regional capacity and infrastructures.*

The first option, regional capacity-building, and the establishment of new courts in Somalia (even if not the special court envisaged in the report) seem to have been the most followed path. Since we decided to dedicate this Chapter to the challenges posed by piracy prosecution, we will focus here on achievements connected to this topic, and we will leave aside other not less relevant regional developments, in particular in Somalia. In fact, various organisations have worked together with Somali authorities to enhance Somali economy, for example, trying to provide job opportunities and education for young Somalis so that they will not opt for piracy. The Somali government alone, and then with UNODC support<sup>(326)</sup>, has started also a campaign to spread among the population the awareness of the negative impact of piracy on Somali culture, tradition, and society in general. We have stated many times that the root causes of piracy are "in" Somalia, where for too many years the population has witnessed only disorder, war, famine, and lack of any alternative livelihood. As a consequence, it has been in the State's interest to try to improve its population's lives and chances also with external support.

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(<sup>325</sup>) UNSC resolution n° 1976 of 11<sup>th</sup> April 2011, paragraph 26, retrieved at <http://www.un.org/en/sc/documents/resolutions/> on 22 October 2013.

(<sup>326</sup>) The UNODC-supported campaign aimed to broadcast messages that defined piracy as against Islam and as a menace to Somali culture and Somalia's reputation. UNODC Counter-Piracy Programme. Support to the trial and related treatment of piracy suspects, Issue Seven, September/October 2011, p. 10, retrieved at: <http://www.unodc.org/unodc/en/piracy/index.html?ref=menuaside> on 15 December 2013.

That said, we will, however, concentrate hereinafter specifically on developments connected to regional judicial capacity.

In October 2010, regional States, at the presence of the European Union High Representative Catherine Ashton, signed at Mauritius a Regional Strategy with the aim to combat piracy and as a basis to ease the political dialogue and cooperation with the various international partners. In fact, there have been a number of international entities engaged in assisting States in the region in matters linked to piracy prosecution, such as the amendment of national legislations, the training of regional judges and prosecutors in particular on the law of the sea, the training of investigators and prisons' staff, and the construction of new courts and prisons<sup>(327)</sup>. We already mentioned for example the IMO, which has assisted the United Nations Office on Drugs and Crimes (UNODC) in the review of national counter-piracy laws, and the implementation of the DCoC that has focused on training, capacity-building, and review of national legislations.

Moreover, we have touched on the establishment, in January 2009, of an international cooperation mechanism, the Contact Group on Piracy of the Coast of Somalia (CGPCS). This mechanism is composed by five Working Groups; Working Group 2 is engaged in all legal matters related to counter-piracy. It has developed a legal toolbox for States who intend to contribute to piracy prosecution and endeavours to enhance prosecution not only of pirates, but also of the facilitators and organisers of the attacks and to implement post-trial transfer agreements. The CGPCS negotiated in 2009 the establishment of the International Trust Fund to Support Initiatives of States Countering Piracy off the Coast of Somalia (hereinafter Trust Fund) which is the main source of funding for any program or activity related to piracy prosecution. As of December 2012, the amount of donations received by the Trust Fund was \$16.50 million. It supports a number of UN agencies (namely UNODC and UNDP) which in turn assist

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<sup>(327)</sup> *Joint Communiqué from the Eastern and Southern Africa – Indian Ocean Ministers and European Union High Representative at the 2nd Regional Ministerial Meeting on Piracy and Maritime Security in the Eastern and Southern Africa and Indian Ocean Region*, of 7<sup>th</sup> October 2010, Grand Bay, Republic of Mauritius, retrieved at [http://eeas.europa.eu/delegations/mauritius/press\\_corner/all\\_news/news/2010/20101007\\_01\\_en.htm](http://eeas.europa.eu/delegations/mauritius/press_corner/all_news/news/2010/20101007_01_en.htm) on 12 December 2013.

regional States and non-governmental organisations<sup>(328)</sup>. The work of the CGPCS and of the Trust Fund have been commended by the UN Security Council in any resolution concerning Somali piracy. In January 2010, as requested by the CGPCS, the TFG, Somaliland, and Puntland representatives established a committee called Somali Contact Group on Counter-Piracy, which is also known as Kampala Process, with the aim to improve internal coordination among Somali regions. In 2013, this committee has developed a Somali Maritime Rescue and Security Strategy, which is engaged with strengthening Somali maritime safety and law enforcement<sup>(329)</sup>.

A part from the essential contributions of these entities, we will focus on the commitment of the United Nations Office on Drugs and Crimes since it has reached laudable achievements in many aspects of piracy prosecution often working in collaboration and/or coordination with the United Nations Development Program (UNDP) and the European Union as well as with other States that have transfer agreements with States in the region. Given the growing concern for piracy impunity since mid-2010, as expressed by the UN Secretary-General and in the report of Mr Lang, UNODC put into action a comprehensive Counter-Piracy Programme (CPP) in May 2011 with two aims: support regional States in the prosecution of pirates and extend prison capacity in the State of the region, mainly in Somalia<sup>(330)</sup>. It is to be highlighted immediately that all the abovementioned, recent amendments and restatements of regional national piracy legislations have been achieved also through UNODC assistance. UNODC has initially concentrated its work in Kenya, Seychelles, and, slightly afterwards, in Mauritius<sup>(331)</sup>, because these have been the first States to agree on the transfer of

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( 328 ) Contact Group on Piracy of the Somali Coast website consulted at <http://www.thecgpcs.org/main.do?action=main> on 10 December 2013.

( 329 ) Information on the Kampala Process, retrieved at <http://oceansbeyondpiracy.org/matrix/kampala-process> on 20 December 2013.

<sup>(330)</sup> UNODC Counter-Piracy Programme. Support to the trial and related treatment of piracy suspects, Issue Seven, September/October 2011, p. 1, retrieved at: <http://www.unodc.org/unodc/en/piracy/index.html?ref=menuseide> on 15 December 2013.

<sup>(331)</sup> More recently UNODC has assisted also Tanzania and Maldives. Conversely, programmes which aim at improving capacity-building and infrastructure in Southern Somalia seem quite rare. However, there are a number of judges in Mogadishu and a training program has been organised

pirates apprehended by the EU and other States. In these States UNODC has work together with the EU. While, later on, the Office has collaborated with UNDP in its work in Somalia.

The aim of UNODC is to reach fair and efficient trials and secure and humane imprisonment<sup>(332)</sup>. To this end, through the CPP, it has organized a number of training courses and learning exchanges in the three countries so that the expertise and knowledge acquired in each of them could be transferred to the others and be even widened through the presence of international experts. To guarantee the fairness of trials, UNODC has provided any useful equipment, assisted investigations, trained judges and prosecutors, paid for their transfer and the transfer of witnesses, and found interpreters. To ensure a secure imprisonment, UNODC has trained prison staff and refurbished or built new prisons. Moreover, it has endeavoured to make prisons a rehabilitating and educational venue in order to enhance prisoners future perspectives<sup>(333)</sup>.

Since the idea of the establishment of extraterritorial Somali courts or of special courts in other States of the region has been put forward by the UN Secretary-General and Security Council, on the one hand, Somali authorities have not favoured the option of an extraterritorial court; and, on the other hand, States such as Seychelles and Kenya have not seen as an advantage the construction of special courts essentially for the fear that they could drain resources from their judicial systems. As a consequence, UNODC has supported, for example, the opening of the abovementioned security courtroom next to a prison in Shimo La Tewa, near Mombasa, which is not a special piracy court. Moreover, instead of establishing new courts, UNODC has assessed the status of the ones already present and refurbished them<sup>(334)</sup>.

As far as imprisonment is concerned, when we dealt with the transfer agreements, we affirmed that small island States such as the Seychelles and

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by the faculty of law, UNSG report n° S/2011/360, annex III, retrieved at <https://www.un.org/en/sc/documents/sgreports/> on 15 December 2013.

<sup>(332)</sup> UNSG report n° S/2010/394 of 26<sup>th</sup> July 2010, paragraph 26, retrieved at <https://www.un.org/en/sc/documents/sgreports/> on 15 December 2013.

<sup>(333)</sup> UNODC Counter-Piracy Programme. Support to the trial and related treatment of piracy suspects, Issue Seven, September/October 2013, pp. 1-16, retrieved at <http://www.unodc.org/unodc/en/piracy/index.html?ref=menuse> on 15 December 2013.

<sup>(334)</sup> *Ibid.*

Mauritius have not enough prison capacity to detain an high number of suspected or convicted pirates. In order to solve this problem, on the one hand prosecuting States have agreed on the transfer of convicted pirates back to Somalia to serve their sentences. On the other hand, UNODC has supported the extension of prison places in the Seychelles and Mauritius and it has created in January 2012 a Piracy Prisoner Transfer Programme to arrange and pay for transfers. The Programme aims at providing a long-term solution to the imprisonment of repatriated Somali pirates. The first transfer took place in March 2012 from the Seychelles to Hargeisa, Somalia<sup>(335)</sup>. In March 2013, piracy prisoners have been transferred to Puntland from the Seychelles and previously others had been transferred to Puntland and Somaliland<sup>(336)</sup>. It is to be noted though that the transfer of convicted pirates back to their country of origin could not have been achieved if prisons in Somalia, namely in Puntland and Somaliland, had remained as they were a few years ago. These prisons did not meet international standards in terms of number of detained persons, sanitation, or rehabilitation. Accordingly, UNODC has worked together with UNDP to built new prisons in the two northern regions of Somalia. As of March 2013, a new prison in Hargeisa has been built, another in Bossaso has been extended, and one in Garowe was under construction. These prisons were deemed necessary for a number of reasons: prisons already present did not match with international standards, there was and is an high number of pirates being prosecuted in Puntland and Somaliland as well and sentences might be long, and other convicted pirates were repatriated to serve sentences in Somalia<sup>(337)</sup>.

With respect to the enhancement of international standards for trials in Somaliland and Puntland, much has been achieved by UNDP and UNODC which have refurbished and constructed a number of courts. Compared to Kenya, the Seychelles, and in particular to Mauritius, the situation of both prisons and courts

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( 335 ) UNSG report n° S/2012/783 of 22<sup>nd</sup> October 2012, paragraph 57, <https://www.un.org/en/sc/documents/sgreports/> on 15 December 2013.

( 336 ) CGPCS: quarterly update, 17 April 2013, pp. 1-4, retrieved at <http://www.thecgpcs.org/main.do?action=main> on 20 December 2013.

(337) UNODC Counter-Piracy Programme. Support to the trial and related treatment of piracy suspects, Issue Seven, September/October 2013, pp. 1-16, retrieved at <http://www.unodc.org/unodc/en/piracy/index.html?ref=menuaside> on 15 December 2013.

in Somalia was far more critical. Proceedings in Somalia were subject to delays, lack of trained judges and prosecutors, and in particular lack of secure and equipped courtrooms. Moreover, we should recall that in Puntland (and in Somaliland until February 2012) the anti-piracy law is not consistent with UNCLOS, this is why there has been a continuous and strenuous incitement to its restatement. UNDP, in collaboration with UNODC, has built courts in Garoowe, Qardho, Bossaaso, and Galkayo in Puntland, and in Hargeisa in Somaliland. Interestingly, even a number of mobile courts has been organised to reach remote areas<sup>(338)</sup>.

Lastly, since it is also extremely necessary to track the facilitators and organisers of Somali piracy and prosecute them as well, it deserves mentioning that, mainly with United Kingdom's financial support, a Regional Anti-Piracy Prosecution and Intelligence Coordination Centre has been opened in the Seychelles in February 2013. This centre will gather together international and regional experts and will focus on piracy financiers<sup>(339)</sup>.

To conclude, UNODC, UNDP, and the EU as well as a number of other States and donors have contributed greatly to regional capacity building and law enforcement capabilities. Of course, these could not have been achieved without the great endeavour of regional States and populations. Through this commitment a chain has been created with a number of phases: the apprehension phase carried out mainly, but not only, by non-regional States; the transfer phase in which suspected pirates are brought within the jurisdiction of a regional State willing to prosecute them; the investigation and prosecution phase conducted by some regional States with the help mainly of UNODC; the prisoner transfer phase when convicted pirates are brought back to Somalia. This chain has been created with the aim to prosecute and imprison pirates, but, additionally, with the aim to bring the respect of human rights in all these phases, since this has always been a major concern of the UN Security Council and of the international community as a whole.

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<sup>(338)</sup> UNSG report n° S/2012/50 of 20<sup>th</sup> January 2012, paragraphs 11-111, retrieved at <https://www.un.org/en/sc/documents/sgreports/> on 15 December 2013.

<sup>(339)</sup> *Anti-piracy centre opens for business*, News Story UK Government website consulted at <https://www.gov.uk/government/news/anti-piracy-centre-open-for-business> on 2 January 2014.

#### 3.3.4. Increase in the number of prosecuted pirates.

In Chapters 1 and 2, we saw that piratical attacks have decreased since 2012 reaching in 2013 their lowest level. There are various reasons to explain this result: ranging from counter-piracy operations at sea, to the implementation of the various IMO guidance and shipping industry's BMPs mentioned in Chapter 1, and to the use of privately contracted armed personnel on board ships. In addition, there is another essential explanation: the number of prosecuted and eventually convicted and imprisoned pirates has increased; hence, impunity is less widespread and this might at least add some risk to the decision to perpetrate an act of piracy<sup>(340)</sup>. One could plausibly argue that the number of attacks has decreased and, therefore, it has become much easier to apprehend and then prosecute a restrained number of pirates. Yet, this consideration might be misleading given that, as we have explained, it is not a matter of course that once a pirate is captured, he is also prosecuted. In brief, the number of prosecuted pirates has augmented, especially because States have understood that prosecution is a huge step on the pathway to the suppression of Somali piracy.

To provide an idea of the amount of pirates acting off the Somali coast, in June 2011, naval forces claimed that the number of pirates amounted to about 2500<sup>(341)</sup>. In March 2013, according to an Opinion of the European Economic and Social Committee, there were about 1500 pirates operating in Somalia<sup>(342)</sup>. Yet, there is also a number of leaders which organise the attacks, a number of negotiators, and individuals guarding ships and hostages while they are held. Taking the two figures as representative of the actual amount of pirates, the difference between the two testifies a relevant decrease. This could most probably

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(<sup>340</sup>) UNSG report n° S/2012/50 of 20<sup>th</sup> January 2012, paragraph 8, retrieved at <https://www.un.org/en/sc/documents/sgreports/> on 15 December 2013.

(<sup>341</sup>) UNSG report n° S/2011/360 of 11<sup>th</sup> June 2011, annex 1; and UNSG report n° S/2012/50 of 20<sup>th</sup> January 2012, paragraphs 8-10, retrieved at <https://www.un.org/en/sc/documents/sgreports/> on 15 December 2013.

(<sup>342</sup>) Opinion of the European Economic and Social Committee on 'Maritime piracy: strengthening the EU response' (own-initiative opinion), C/76/15 of 14<sup>th</sup> March 2013, paragraph 2.1.3, retrieved at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2013:076:0015:0019:EN:PDF> on 10 November 2013.

be ascribed to the international commitment to suppress, prosecute, and discourage the undertaking of piratical activities.

As far as the number of prosecutions are concerned, as of May 2010, there were just 10 States in the world prosecuting pirates and the estimated total number of suspected pirates being prosecuted was only 568, of which only 40 were taking place either in Europe, US, or Asia. At the time, Kenya was bearing the highest number of prosecutions of suspected pirates apprehended by naval forces engaged in counter-piracy operations<sup>(343)</sup>.

	<i>Prosecutions following arrest by patrolling naval States</i>	<i>Prosecutions following arrest by own forces</i>	<i>Total</i>
Kenya	123	0	123
Somalia (Somaliland)	20	80	100
Somalia (Puntland)	60	148	208
Seychelles	11	20	31
Yemen	Not known, but some reported	Not known	60 (estimate)
<b>Total</b>			<b>528</b>

Figure 3.1.: Prosecutions as of May 2010<sup>(344)</sup>.

As of December 2010, the number of detained persons, suspected or found guilty of piracy, amounted to 738 of which a vast majority was detained in Puntland, Somaliland, and Kenya. The number of States detaining pirates was 13. Moreover, as stated by Lang, the catch and release practice augmented at the end of 2010<sup>(345)</sup>.

<sup>(343)</sup> UNSG report n° S/2010/394 of 26<sup>th</sup> July 2010, paragraphs 19-23, retrieved at <https://www.un.org/en/sc/documents/sgreports/> on 15 December 2013.

<sup>(344)</sup> *Ibid.*

<sup>(345)</sup> Report of the special advisor on legal issues related to piracy off the coast of Somalia, Mr Jack Lang, annexed to the letter dated 24 January 2011 from the Secretary-General to the President of the Security Council, paragraph 43, retrieved at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N11/206/21/PDF/N1120621.pdf?OpenElement> on 26 December.

From 2006, the number of prosecutions taking place in 20 different States reached 1011 at mid-2011 and 1063 at the end of the year<sup>(346)</sup>. By September 2012, there were 1186 suspected pirates being prosecuted or awaiting prosecution in 21 States<sup>(347)</sup>. The following Figure 3.2. shows the numbers of individuals suspected or found guilty of piracy as of September 2012. The highest number of prosecutions was taking place in Somalia, mainly Puntland and Somaliland, followed by Kenya, Seychelles, Yemen, and India. Since 2010, the amount of prosecutions taking place outside the region has also augmented. Lastly, the most updated information that we could gather sets the number of imprisoned pirates to 1200 at March 2013<sup>(348)</sup>.

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<sup>(346)</sup> UNSG report n° S/2011/360 of 11<sup>th</sup> June 2011, annex 1; and UNSG report S/2012/50, of 20 January 2012, paragraphs 8-10, retrieved at <https://www.un.org/en/sc/documents/sgreports/> on 15 December 2013.

<sup>(347)</sup> UNSG report n° S/2012/783 of 22<sup>nd</sup> October 2012, paragraphs 44-46, retrieved at <https://www.un.org/en/sc/documents/sgreports/> on 15 December 2013.

<sup>(348)</sup> UNODC Counter-piracy program, Support to the trial and related treatment of piracy suspects, Issue Eleven, March 2013, pp. 1-20, retrieved at: <http://www.unodc.org/unodc/en/piracy/index.html?ref=menuse> on 15 December 2013.

**Individuals suspected or convicted of piracy**

<i>Country</i>	<i>Number currently held</i>	<i>Number released</i>	<i>Total</i>
Belgium	2 (1 convicted)		2
Comoros	6		6
France	18 (3 convicted, 5 convictions under appeal)	3 acquitted, 1 completed sentence	22
Germany	10		10
India	119		119
Italy	20		20
Japan	4		4
Kenya	137 (74 convicted)	17 acquitted, 10 completed sentence	164
Madagascar	12		12
Malaysia	7		7
Maldives	41 (Awaiting deportation since Maldives has no law criminalizing piracy)		41
Netherlands	29 (10 convicted)		29
Oman	32 (25 convicted)		32
Seychelles	105 (83 convicted)	2 repatriated to Puntland	107
Somalia: Puntland	290 (Approximately 240 convicted)		290
"Somaliland"	35 (All convicted) (including 17 transferred from Seychelles)	76 released	111
South-central	18 (Status of trial unclear)		18
Republic of Korea	5 (All convicted)		5
Spain	8 (2 convicted)		8
United Arab Emirates	10		10
United Republic of Tanzania	12		12
United States	28 (17 convicted)		28
Yemen	123 (123 convicted)	6 acquitted	129
<b>Total States: 21</b>	<b>1 071</b>	<b>115</b>	<b>1 186</b>

Figure 3.2.: Individuals suspected or convicted of piracy as of September 2012<sup>(349)</sup>.

Given that piracy trials are conducted by several States, sentences vary depending on national laws and on judicial practices. In fact, neither the HSC nor UNCLOS define exact penalties for piracy and, as we have noticed, article 105 leaves to States the duty to decide the penalties to be imposed. Kontorovich has conducted a study on the variation of penalties among the different prosecuting States and has noted that EU member States appear to be the least severe, while US sentences seems to be the gravest. States in the region, in particular Kenya and the Seychelles, position in the middle between these two extremes. Kontorovich states that the average sentence globally is 16-year imprisonment. Sentences might vary also depending on the age of the defendants and on the level of

<sup>(349)</sup> UNSG report n° S/2012/783 of 22<sup>nd</sup> October 2012, paragraphs 44-46, retrieved at <https://www.un.org/en/sc/documents/sgreports/> on 15 December 2013.

violence used. Moreover, according to some scholars without an international venue for piracy there might be a certain lack of fairness in the sentences depending on where a suspected pirate is tried. In fact, Kontorovich argues that not even when State exercise universal jurisdiction they try to look at other State's sentences in piracy cases in order to facilitate an harmonization of sentences and this might indeed result in different sentences for similar acts<sup>(350)</sup>. This could be a good cause to consider the establishment of an international tribunal.

In brief, the number of both prosecutions and prosecuting States has increased. Obviously opinions vary on whether this is to be considered a major achievement or not. Still, many believe that the necessity to prosecute pirates has at least triggered anti-piracy laws' restatement, regional cooperation and capacity-building, and regional infrastructural enhancement. Even though the international endeavour has been remarkable, it is a common understanding that some root causes are still there; hence, the overall international commitment must not end.

### 3.4. CONCLUSIONS.

These Chapter has been consecrated to challenges posed by piracy prosecution and to some attempted solutions. We explained how a State can assert its jurisdiction on an unlawful act which occurred outside its territory. In particular, we focused on the exercise of universal jurisdiction in the case of a piratical act stretching from article 105 UNCLOS, passing on its limitations, and explaining how the SUA Convention can help to filling UNCLOS' gaps. Moreover, we underlined the various reasons why apprehending States have been reluctant to prosecute pirates and have opted for the so-called *catch-and-release practice*. Given that impunity has become one of the factors who lowers the risk for a young Somali to resort to piracy, the international community has endeavoured to address this problem. Hence, we dealt with the practice of concluding transfer agreements between apprehending and prosecuting States,

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<sup>(350)</sup> KONTOROVICH E., *The Penalties for Piracy: An Empirical Study of National Prosecution of International Crime*, Faculty Working Papers, Northwestern University School of Law, 2012, pp. 1-20, retrieved at <http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1210&context=facultyworkingpapers> on 22 December 2013.

with the possible venues for piracy prosecution as envisaged by the UN Secretary-General, and with the commitment of many States and organisations, in particular UNODC, to enhance regional-capacity building, regional infrastructures, the restatement of anti-piracy laws and their enforcement. Finally, we provided some information on the achieved increase in the number of piracy prosecutions conducted in recent years. As we stated throughout this Chapter, these remarkable results should not bring the international community to divert its attention from piracy in the Indian Ocean, because some of its root causes are still there and the work done can be easily washed away.

## CONCLUSIONS

It is time to summarise the content of the present thesis. In the last subparagraph we have explained that the number of prosecuted pirates has increased, yet which is the positive side of this achievement and what can and should be done in the proximate future? We will first provide a summary of the issues addressed in the three Chapters and then we will highlight which is the answer that is most commonly given to our question.

In Chapter 1, after having dealt with ancient and modern-day piracy, we have outlined which is the legal framework set by UNCLOS with respect to piracy. We started with the definition of piracy and with the elements needed to identify it, namely the occurrence of an unlawful act of violence, the private ends requirement, the commission of the act on the high seas or in a place outside the jurisdiction of any State, and the two-ship requirement. Then we moved on to the seizure of pirates and we analysed the features of the right of visit and the right of hot pursuit of a ship as stated by UNCLOS' articles 110 and 111. Afterwards, we dealt with examples of cooperation to suppress piracy.

Moreover, providing that UNCLOS seems to pose a number of limitations to the suppression of piracy, we have seen that the SUA Convention might come to the international community's rescue. In fact, this Convention addresses acts that are similar to piracy, yet it encompasses a broader range of unlawful acts, it has a larger geographical scope, it sets further provisions for the seizure of pirates, and even relevant jurisdictional criteria for piracy prosecution. Hence, we have seen that the United Nations Security Council calls on States to implement the provisions of the SUA Convention in order to criminalise unlawful acts perpetrated at sea.

As far as Chapter 2 is concerned, we dealt firstly with recent Somali history and with the characteristics of Somali-based piracy. This helped us to understand that the root causes of Somali piracy are to be found in the disorder and lack of law enforcement on land coupled with a long coastline and the proximity to highly transited international shipping lines. We explained that from 2008 to 2012, Somali pirates conducted about 880 attacks and the International

Maritime Bureau claims that this figure represents just half of the attacks which actually occurred. The affected geographical area has extended eastwards close to the Indian coast and southwards in the proximity of the Seychelles and Mozambique. In addition, Somali pirates made an extensive use of the so-called mother ships and of highly dangerous weaponry. Moreover, the most peculiar feature of Somali piracy is its favoured type of attack: the hijack and kidnap for ransom. It seems that since 2007 the number of seafarers held hostage has reached 2653 individuals<sup>(351)</sup>, the vast majority of whom has been released after that pirates had received strikingly high ransom payments.

Given the inability of Somalia to secure the seas off its coast, the United Nations Security Council, through various resolutions, has allowed international navies to conduct counter-piracy operations in the territorial waters of Somalia and then *in* Somalia, that is onshore. The commitment to suppress Somali pirates has come from an extraordinary number of international navies. Some have operated under the European Union Operation Atalanta, the NATO Operation Ocean Shield, and the Combined Task Force 151, while others have acted individually. A part from EU member States and the US, the international navies involved came from Canada, Russia, India, and China, just to mention a few. This has been considered as an unprecedented attempt to curb an internationally shared threat.

We have closed Chapter 2 dealing with a regional cooperation initiative, the Djibouti Code of Conduct, which has drawn lessons from the Regional Cooperation Agreement on Combatting Piracy and Armed Robbery against ships in Asia mentioned in Chapter 1, and endeavours to promote regional cooperation, information sharing, and the restatement of regional domestic laws concerning the criminalisation and prosecution of pirates.

The analysis conducted in Chapter 2 has brought us to understand that the so-called *catch-and-release practice* has constituted one of the major problems hindering the effectiveness of counter-piracy operations at sea. After having

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<sup>(351)</sup> Opinion of the European Economic and Social Committee on ‘Maritime piracy: strengthening the EU response’ (own-initiative opinion), C/76/15 of 14<sup>th</sup> March 2013, retrieved at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2013:076:0015:0019:EN:PDF> on 10 November 2013.

verified the reasons for apprehending States' reluctance to prosecute pirates, we have looked for the envisaged and attempted solutions to solve the problem. Given that States claim to face jurisdictional, political, financial, and logistical challenges, at the beginning of Chapter 3, we have explained how States can establish their jurisdiction over an act occurring outside their territory and how they can establish universal jurisdiction. In the case of piracy the legal basis for the exercise of universal jurisdiction is set by article 105 UNCLOS. Yet, some scholars doubt that this article encompasses also the *aut dedere aut iudicare* principle, so we have highlighted how, once again, the SUA Convention provides a comprehensive legal framework.

Unfortunately, we have also underlined States reluctance both to exercise universal jurisdiction and to resort to extradition. However, an other solution has been envisaged: apprehending States have concluded a number of transfer agreements with regional States willing and able to prosecute suspected pirates. This solution has been quite successful, even if it has required a still on-going endeavour in regional capacity building and in the restatement of regional anti-piracy laws. Interestingly, various international organisations have worked closely with regional States willing to prosecute pirates assisting them in the restatement of their laws and in the enhancement of their judicial capacities to conduct a fair trial and to provide a secure imprisonment. Organisations and entities such as the United Nations Office on Drugs and Crimes, the United Nations Development Programme, the European Union, the Contact Group on Piracy off the Coast of Somalia, and others, have all contributed in regional capacity-building and rehabilitation or opening of courts and prisons namely in Kenya, the Seychelles, Mauritius, Tanzania, and of course Somalia, in particular in the northern regions of Somaliland and Puntland. Lastly, regional prosecuting States have been supported in the adoption of a number of prisoners transfer agreements to allow convicted pirates to serve their sentences in their country of origin, Somalia.

Ultimately, we have explained that this endeavour in regional judicial capacity-building has been envisaged as the truly long-term solution to the problem of Somali piracy. In fact, in a report of the United Nations Secretary-General of July 2010, capacity-building has been considered, alongside other

options, as a solution to the problem of piracy prosecution. The other options encompassed the establishment of special Somali courts in Somalia or in another regional States or of a regional or international tribunal. However, compared to capacity-building initiatives, some of these solutions have been considered as too expensive or requiring too much time for their establishment. Whereas others were not seen as viable, not even by regional governments. In the end, we have stated that through regional capacity-building, the commitment of both international entities and regional States has been rewarded with enhanced regional judicial systems and an increase in the number of prosecuted pirates.

Hence, we can deal now with the answer to the question stated above on whether this increase in the number of prosecuted pirates is a positive achievement. According to Bueger, and others, the attempt to suppress Somali piracy has been to a great extent a matter of enhancing law enforcement not only at sea, but also on land. In fact, among the reasons justifying the dramatic decline in the number of piratical attacks there are the effectiveness of counter-piracy operations at sea, the implementation of a series of Best Management Practices outlined by the shipping industry, the use of armed guards on board merchant ships, the developments of rule of law in Somalia, and the increased number in prosecuted pirates; that is, activities which encompass also law enforcement<sup>(352)</sup>. As stated in a recent NATO research paper, “the fact that those caught are now punished for their crimes is believed by counter-piracy officials to be having a deterring effect”<sup>(353)</sup>, because it has a number of side effects: it reduces the number of pirates that are less and less easily replaced with other young Somalis, it increases the risk of deciding to conduct a piratical attack, it pushed and pushes

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<sup>(352)</sup> BUEGER C., *Learning from piracy: future challenges of maritime security governance*, Paper for presentation at the Third International Conference on Strategic Theory “Good order at sea off Eastern Africa: Beyond piracy”, Dar es Salaam, September 2013, Cardiff, Cardiff University, September 2013, pp. 1-15, retrieved at [http://www0.sun.ac.za/milscience/images/stories/lecturers/sciencetech/Draft\\_papers/bueger\\_2013\\_learning\\_from\\_piracy\\_1st\\_draft.pdf](http://www0.sun.ac.za/milscience/images/stories/lecturers/sciencetech/Draft_papers/bueger_2013_learning_from_piracy_1st_draft.pdf) on 22 December 2013.

<sup>(353)</sup> BRIDGER J.M., *Safe seas at what price? The coasts, benefits, and future of NATO’s Operation Ocean Shield*, research paper, Research Division of the NATO Defence College of Rome, n° 95, September 2013, pp. 1-8, consulted at <http://www.isn.ethz.ch/Digital-Library/Publications/Detail/?lng=en&id=169344> on 22 December 2013.

for the restatement of regional domestic anti-piracy laws, and it helps to improve regional judicial systems in terms of capacities and infrastructure.

Still, the think-tank Ocean Beyond Piracy in its working paper on the Economic Costs of Somali Piracy has affirmed that in spite of the decrease of piracy attacks and of a consequent declining need for counter-piracy operations at sea “over 99% of the cost of piracy is still incurred at sea pursuing short-term mitigation strategies”<sup>(354)</sup> and only the other 1% is spent in long-term solutions such as capacity-building. Hence, given that some results seem to have already been achieved with restrained expenditures, one could plausibly suppose that diverting a great amount of the money spent for counter-piracy operations of international navies into regional (judicial) capacity building would be the easiest solution. This could contribute to the effort of Somali authorities to improve law enforcement also with the support of the already on-going programmes, such as the UNODC Counter-Piracy Programme or the EUCAP Nestor, which are engaged in judicial capacity-building and in the training of Somali military and security forces for onshore and offshore law enforcement activities. However, it should not surprise that many already fear that with a very limited number of Somali piracy attacks occurring nowadays, the international community interest to eradicate the root causes of Somali piracy will weaken and funding will be reduced. After all, in almost all books, research papers, studies, or articles that we examined, we found sentences which convey the idea that “the underlying root causes of piracy still remain, so we must all remain vigilant”<sup>(355)</sup>.

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<sup>(354)</sup>BELLISH J. (lead author), *The economic cost of Somali piracy 2012*, pp. 1-40, retrieved at <http://oceansbeyondpiracy.org/> on 10 November 2013.

<sup>(355)</sup> Comment of the outgoing Ocean Shield Commander Rear Admiral Antonio Natale, in BRIDGER J.M., *Safe seas at what price? The coasts, benefits, and future of NATO's Operation Ocean Shield*, research paper, Research Division of the NATO Defence College of Rome, n° 95, September 2013, pp. 1-8, consulted at <http://www.isn.ethz.ch/Digital-Library/Publications/Detail/?lng=en&id=169344> on 22 December 2013.

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