Djibouti code of conduct: an instrument to suppress piracy in the Western Indian Ocean and the Gulf of Aden

Dave Muli
World Maritime University

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WORLD MARITIME UNIVERSITY

Malmö, Sweden

DJIBOUTI CODE OF CONDUCT

An instrument to suppress piracy in the Western Indian Ocean and the Gulf of Aden

by

DAVE N. MULI

Kenya

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

MASTER OF SCIENCE

IN

MARITIME AFFAIRS

MARITIME SAFETY AND ENVIRONMENTAL ADMINISTRATION

2011

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DECLARATION

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

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

(Signature)........................................

(Date):........................................

21st October 2011

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I also extend my thanks to my family and my parents for enduring an absent husband, father and son in the course of my studies. Their unrelenting support and understanding was my source of inspiration.
ABSTRACT

Title of Dissertation: Djibouti Code of Conduct, an instrument to suppress piracy in the Western Indian Ocean and the Gulf of Aden

Degree: Master of Science

The Djibouti Code of Conduct concerning the repression of piracy and armed robbery against ships in Western Indian Ocean and the Gulf of Aden signed on the 29th January 2009 provides for Member States to cooperate in their efforts to repress acts of piracy in the region. This followed hijacking of MT Sirius Star laded with Crude oil worth 100 million USD and MV Faina carrying a consignment of military armaments which included 33 battle tanks.

This dissertation examines the Code with emphasis on the concept of the principal articles in the areas of embarkation of law enforcement officers, information sharing mechanism and review of domestic legislations on piracy. An evaluation of existing cooperative mechanisms in the region is included for the purposes of identifying potential partners who could provide synergy and minimize duplication in the course of realization of these objectives.

After analyzing the Code concept through literature review of similar practices and piracy cases prosecuted in the region, the dissertation concludes the Code is sufficient in intention and text save for the political will, which will have to be aroused and maintained through rigorous campaigns, such as IMO 2011 theme “piracy: orchestrating the response” to raise awareness on the negative effects of piracy on shipping and seafarers, who are subjected to these acts.

Key words: Piracy, Embarked officers, Information sharing, National legislation, Incident reporting, Extradition
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<td>AIS</td>
<td>Automatic Identification System</td>
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<tr>
<td>AMISOM</td>
<td>African Union Mission in Somalia</td>
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<td>AOR</td>
<td>Area of Responsibility</td>
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<tr>
<td>ASEAN</td>
<td>Association of South East Asian Nations</td>
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<tr>
<td>BC</td>
<td>Before Christ</td>
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<tr>
<td>CENTCOM</td>
<td>Central Command</td>
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<td>CGPS</td>
<td>Contact Group on Piracy off the Coast of Somalia</td>
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<tr>
<td>CJTF</td>
<td>Combined Joint Task Force</td>
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<td>CMF</td>
<td>Combined Maritime Force</td>
</tr>
<tr>
<td>EASBRIG</td>
<td>East Africa Brigade</td>
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<tr>
<td>ESAF</td>
<td>East Africa Stand by Force</td>
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<tr>
<td>ESA-IO</td>
<td>East and South Africa –Indian Ocean</td>
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<td>EU</td>
<td>European Union</td>
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<td>EUNAVFOR</td>
<td>European Naval Force</td>
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<tr>
<td>GISIS</td>
<td>Global Integrated Shipping Information System</td>
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<tr>
<td>GMDSS</td>
<td>Global Maritime Distress and safety System</td>
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<td>GWOT</td>
<td>Global War on Terror</td>
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<td>ICS</td>
<td>International Chamber of Shipping</td>
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<td>Acronym</td>
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<tr>
<td>ICU</td>
<td>Islamic Courts Union</td>
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<td>IGAD</td>
<td>Inter Governmental Authority on Development</td>
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<td>IMB</td>
<td>International Maritime Bureau</td>
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<tr>
<td>IOMoU</td>
<td>Indian Ocean Memorandum of Understanding</td>
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<td>IRTC</td>
<td>International Recommended Transit Corridor</td>
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<td>LRAD</td>
<td>Long Range Acoustic Device</td>
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<td>LRIT</td>
<td>Long Range Information and Tracking</td>
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<tr>
<td>MDA</td>
<td>Maritime Domain Awareness</td>
</tr>
<tr>
<td>MEND</td>
<td>Movement for Emancipation of Niger Delta</td>
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<tr>
<td>MSC-HOA</td>
<td>Maritime Security Centre-Horn of Africa</td>
</tr>
<tr>
<td>MSSI</td>
<td>Maritime Safety and Information System</td>
</tr>
<tr>
<td>NATO</td>
<td>North Atlantic Treaty Organization</td>
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<td>PCASP</td>
<td>Private Contracted Armed Security Personnel</td>
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<tr>
<td>PLANELM</td>
<td>Planning Element</td>
</tr>
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<td>PRC</td>
<td>Piracy Reporting Centre</td>
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<tr>
<td>ReCAAP</td>
<td>Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia</td>
</tr>
<tr>
<td>RPG</td>
<td>Rocket Propelled Grenade</td>
</tr>
<tr>
<td>SHADE</td>
<td>Shared Awareness and De-confliction</td>
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<tr>
<td>Abbreviation</td>
<td>Full Form</td>
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<tr>
<td>SNM</td>
<td>Somali National Movement</td>
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<td>SOLAS</td>
<td>International Convention for the Safety of Life at Sea</td>
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<td>SSAS</td>
<td>Ships Security Alarm System</td>
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<tr>
<td>SSDF</td>
<td>Somali Salvation Defense Force</td>
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<tr>
<td>SUA</td>
<td>Suppression of Unlawful Acts</td>
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<tr>
<td>SWIFCO</td>
<td>South West Indian Fisheries Commission</td>
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<tr>
<td>TFG</td>
<td>Transitional Federal Government</td>
</tr>
<tr>
<td>TFI</td>
<td>Transitional Federation Institutions</td>
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<tr>
<td>UK</td>
<td>United Kingdom</td>
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<tr>
<td>UKMTO</td>
<td>United Kingdom Maritime Transport Office</td>
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<tr>
<td>UN</td>
<td>United Nations</td>
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<tr>
<td>UNMGSE</td>
<td>United nations Monitoring Group on Somalia and Eritrea</td>
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<td>UNODC</td>
<td>United Nations Office for Drug and Crime</td>
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<tr>
<td>UNSC</td>
<td>United Nations Security Council</td>
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<tr>
<td>USA</td>
<td>United States of America</td>
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<td>USSR</td>
<td>United Soviet Socialist States of Russia</td>
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Chapter 1
Introduction

“The escalating problem of piracy off the coast of Somalia is completely unacceptable and requires an urgent and coordinated response” (Ban Ki Moon UN Secretary General 2011)

1.1 Background
Piracy in the past had been repressed using various state sanctioned means with historical records dating as early as the era of the Roman Empire indicating that General Pompey, (66BC) used military to clear piracy in the Mediterranean Sea in record 89 days.

State sanctioned anti-piracy measures in the Middle Ages by the then powers in Europe of England, Denmark and the Netherlands took form of privateering in suppressing pirates. The challenges facing use of these groups led to the treaty of Paris in 1856 by Britain, France, Prussia Russia, Austria and Turkey which abolished the use of privateers as a means of curbing piracy (Roazen, 2010, P 89).

Different writers have traced different players in the 18th and 19th centuries who used military to repress and end piracy citing Napoleon invasion of Malta in 1798, the American invasion of the North African Barbary States during President James Madison in 1815 and the Lord Exmouth bombardment of Algiers in 1816. These military campaigns and the total mastery of seas strategy adopted by US and Great Britain closed the chapter on piracy and relegated it to movie theatres at least for most of the 20th century (Green, 2010, p 80).

Piracy incidents resurfaced again in the mid-80s in South East Asia following the end of the cold war which had been superseded by the two world wars and birth of independent former colonies in Asia and Africa. The timing of this resurgence found the United States
of America, the only superpower whose policy and strategy had shifted from military and political ideologies to development of commerce, human rights and democracy.

With war risk insurance premium being imposed on shipping in the South East Asia region, the littoral states agreed to tackle the piracy problem through various initiatives adopted within regional forums, such as the Association of South East Asian Nation (ASEAN) and extra regional stakeholders including shipping companies and concerned nations like Japan and the USA. Notable among these initiatives is the Tokyo Appeal of March 2000 which culminated into signing of the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (ReCAAP) in November 2004 (Tamara, 2000, p 163).

This agreement ushered in a new concept of regional solution to a regional problem worth emulating. IMO began mobilizing the Horn of Africa and West Indian Ocean regional countries as early as 2006 in Sana’a Yemen and Tanzania in 2008 to address piracy in the region. These meetings culminated in adoption of the Code of Conduct concerning the Repression of Piracy and Armed Robbery against Ships in the Western Indian Ocean and the Gulf of Aden (Djibouti Code of Conduct) on 29th January 2009 in Djibouti. Nine countries out of the 21 eligible signed the Code on the adoption day with others following in different times making a total of 18 by July 2011.

“In 2011 IMO will focus on promoting further co-operation between and among states, region and organizations in reducing the risk of attacks on ships through a variety of mechanisms including information sharing; coordination of military and civil efforts; development and implementation of regional initiatives such the Djibouti Code of Conduct”. (Efthimios Mitropoulos- IMO Secretary General)
1.2 Objectives
This research aims to evaluate the effectiveness of the Djibouti Code of conduct in addressing piracy in Somalia by analyzing the core concept of the Code based on its main articles. The research will also identify existing arrangements which provide opportunities for synergy and partnership.

1.3. Research questions
The research will seek to answer the following questions to reach a conclusion:

1. How big a problem is Somali piracy and how is it organized and perpetuated?
2. What were the motives and the intentions of the framers of different articles of the Code?
3. How practical is the embarkation of law enforcement officers taking into account regional capability of the Djibouti Code participants and what options exist which could make up for the incapacity?
4. On information sharing what information systems exist in the region and what is available in the market that could inform the choice of the system?
5. On review of domestic legislation what inadequacies exist in the domestic laws of the regional countries and what can be learned from the piracy cases prosecuted in Kenya?
6. What other cooperative arrangements exist in the region which may provide opportunities for partnership and synergy?

1.4 Scope
The scope of this research include an analysis of the main articles of Djibouti Code of Conduct, its concept and implementation options taking into consideration the existing environment in the region in terms of players and known practice elsewhere.
1.5 Research Methods

The research method used in this study is qualitative analysis based on published information on piracy available from literature research and data from various piracy information centers such as the International Maritime Bureau (IMB), European Union Naval Force (EUNAVOR), Maritime Security Centre, Horn of Africa, (MSC-HOA), NATO Shipping Centre (NSC) and ReCAAP.

The research on the Code main features is based on other similar practices such as the ship rider practice in anti-narcotics campaigns, existing information sharing mechanisms and the maritime domain awareness concept and strategies. The research also includes case laws on current prosecution of pirates held in Kenya, theories of cooperation in international relations published and various reports to the United Nations Security Council (UNSC) by different United Nations bodies.

1.6. Organization

The research is organized into eight chapters where chapter one introduces the logical foundation of the research by stating the objectives, research questions and the scope. The second chapter reviews piracy literature in trends and evolvement while chapter three looks at the Code text. Chapter four, five and six will deal with the three principal articles of the Code, which are embarkation of law enforcement officers, information sharing and review of national legislation. Chapter seven will explore the regional cooperative mechanisms which could provide synergy in the realization of the Code objectives. Chapter eight will contain the discussions and conclusions of the research.
Chapter 2
Piracy, origin, evolvement and trends

“If you know the enemy and know yourself, you can win a hundred battles without a single loss”. (Sun Tzu Art of War)

2.1 Background

2.1.1 Piracy in general

Understanding the nature of pirate attacks and their *modus operandi* is essential before informed mitigation measures, such as the cooperative approach advanced by the framers of the Djibouti Code can be effectively put in use. This chapter will look at pirate attacks in the past and the present with particular emphasis on Somali piracy with a view to understanding their organization and operations to enable an in depth evaluation of the Code in its overall effectiveness in repressing piracy. Recorded history during the Roman Empire has it that piracy was a common criminal act in the Mediterranean in the BC and that maritime powers played a role in suppressing these criminal acts from the Roman hegemony to the Spanish and Portuguese. The last century maritime powers of Britain and US are credited for restoring order in the world oceans.

The 20th century witnessed the two world wars followed by the cold war era in the fifties, sixties and the seventies with two superpower blocks of the United States of America and the United Soviet States of Russia dominating the world oceans. The collapse of the USSR left the US as the only super power, whose policies and ideologies led to reduction of its naval force among other major naval powers (Abhyankar, 2005 p 225). Piracy incidents started re-emerging in the 1980s in South East Asia and spread to other parts of the world oceans with high number of attacks in the turn of the millennium recorded in the Gulf of Aden, Horn of Africa and Gulf of Guinea in West Africa.
2.1.2 Response to piracy incidents in South East Asia

The first international response to the increased piracy incidents and other maritime related crimes can be traced to the creation of the International Maritime Bureau (IMB), a specialized division of the International Chamber of Shipping (ICS) in 1981 to act as a focal point in the fight against all types of maritime crime and malpractices. It is however, the creation of the IMB Piracy Reporting Centre (PRC) in 1992 based in Kuala Lumpur in Malaysia which brought the world-wide alerts in its reporting of piracy incidents and compiling statistics of piracy. Among other things the IMB PRC Centre defined piracy as “an act of boarding any vessel with the intent to commit theft or any other crime and with the intent or capability force in the furtherance of that act”. This definition, however, deviates from UNCLOS probably because the practical purpose is to facilitate the collection and analysis of data (Mejia, 2010 p 291).

The piracy incidents in the region evolved from various maritime crimes in the region notably the phantom vessel phenomena in the late 70s and 80s. There were three means of acquiring vessels for this kind of operation namely through purchase in the open market, creating a new ownership on paper for vessels that were already in the possession of the syndicates and hijacking or stealing vessels to order (Abhyankar, 2007 p 97).

2.1.3 Trends and Tactics

The spectrum of these piratical attacks are that at one end, a group of pirates boards a vessel with the intention of stealing whatever they can steal such as crew’s personal values, cash, ship’s equipment and stores within easy reach. On the extreme end, the pirates approach the vessel, fire automatic weapons at the bridge and are extremely aggressive when they board and take over the vessel. The crew are transferred to other pirate craft or set adrift or executed as the pirates take over the ship and cargo (Mukundan, 2010, p 7).
The case of MV Alondra Rainbow is a typical example of these extreme cases where the general cargo ship was hijacked by a group of pirates, who forcefully took over the control and command of the ship in October 22 1999. The pirates transferred the crew members to another pirate vessel where they were later transferred to a raft and set adrift. The crew was rescued after drifting for about ten days at sea by a fishing boat and taken to Phuket in Thailand.

The vessel was intercepted by the Indian Coast Guard after having changed her name to MV Mega Rama. The pirate crew on being intercepted set fire to the documents of MV Alondra Rainbow and further attempted to sink the ship by opening the sea chest valves to fill the engine room with sea water. The pirates were charged in a Mumbai Court with piracy (Venkiteswaran, 2010, p 175).

### 2.1.4 Piracy incidents in the Gulf of Guinea in West Africa

This region includes coastlines of Angola, Cameroun, Benin, Guinea, Ghana, Ivory Coast and Nigeria. The region according to the 2010 IMB PIC reports recorded the third highest reported incidents in the period of 2000 to 2010. These incidents initially involved the low level attacks to ships mostly at anchor, but the situation changed from 2006 particularly in the Niger Delta where more violent attacks have been witnessed.

Incidents of attacks on supply vessel and oil platforms associated with the political armed groups of the Movement for Emancipation of Niger Delta (MEND) became common as the militants kept their pressure on the government of Nigeria. This group has been involved with kidnapping workers in the oil platforms and demanding ransom. This region has recorded high attacks in 2010 and 2011 leading to insurance companies imposing war risk premiums at a similar rate to those of Somalia (Payne, 2010, p120).

### 2.1.5 Somali Piracy

For the purposes of this paper the Somali piracy will be considered as those piracy incidents perpetrated by members of the Somali community off the seas adjacent to the
Somali coast and neighboring areas in the Gulf of Aden and the Somali basin in the Indian Ocean which are covered by the Djibouti Code of Conduct.

The period preceding the fall of the Siad Barre government of Somalia in 1991 is imperative in attempting to understand the genesis of Somali piracy. Incidents of early hijacking involved one of the factions fighting the Mogadishu government the Somali National Movement (SNM), in an attempt to prevent vessels calling at the Somali ports still under the Mogadishu government.

With the fall of the Barre government in January 1991 there were isolated reports of ships coming under attack in the region off Puntland. The attack on *MV Bonsella* in September 1994 by a party of 26 pirates posing as Coast Guards who used the ship as a base to attack other ships in the area is vital in attempting to unravel the genesis of Somali piracy. The pirates said they would use the ships to apprehend fishing vessels operating without licenses. The ship was eventually released after offloading the ship’s cargo of aid supplies alongside ship stores and cash and served as the beginning of reactions to fishing off the coast of Somalia by fishing community backed by militias. Another notable incident involved a Taiwanese trawler, *MV Shen Ko* in 1997, which was captured by the Somali Salvation Democratic Front (SSDF) of the Majarteen Clan, who demanded a fine of $800,000 to release the ship, $40,000 for the captain and $10,000 for each member of the crew (Murphy, 2010, p. 13)

An account by one of the pirates on the early attacks to ships points to a rivalry between the foreign fishing vessels and the local fishermen. He confessed that in 2003 they surrounded a large fishing vessel with 18 crew members, climbed and held the ship for two weeks. Somali and Arab mediators stepped in and paid $50,000 as a compensation for damaged fishing boats and gears of the local fishermen. To him this came as a surprise and inspired the duo to hunting ships (Nigel, 2010, p 148).
Many of these early incidents involving mostly fishing vessels seem to have been unreported to IMB –PIC and hence the reason why there were no statistical data, presumably due to the fact that mostly, it involved fishing vessels near the coast. There however, exists literature which point to the fact that these incidents were common.

The earliest appreciable data by International Maritime Bureau, Piracy Information Centre (IMB-PIC) reports of piracy attacks in Somalia were in 1995 when 14 incidents were recorded in Somalia, while in the Gulf of Aden the first incidents were recorded in 2000 comprising of 14 incidents. Though the region continued recording incidents averaging 10 annually, it did not attract international attention until 2006, when IMB-PIC statistics recorded Somali piracy incidents exceeded those of other areas, in particular Indonesia, which had led the path. The center started issuing warnings on ships not scheduled to call Somalia to avoid the Somali coast by at least 50nm This warning increased the range to more than 200nm in 2007, 250nm in 2008 and by 2009 it increased to 600nm. For ships routeing North South, they were to consider keeping East of 60 E Longitude East of Seychelles (Mejia, 2010 p 298).

The turning point in Somali piracy occurred in 2005 when the highest incidents were recorded at 35. The attack on MV Seabourne Spirit involving a passenger ship caught international attention on piracy primarily due to the number of potential hostages had the pirates succeeded and also due to the fact that the ship used the Long Range Acoustic Device (LRAD) to repel the pirates. This was the first incidence using active devices to repel the pirates The incident caused IMO to organize a meeting in Sana’a, Yemen in April 2005 as a first attempt to go regional on the issue. This was followed by a similar conference in Oman in January 2006.

The year 2006 witnessed a significant decline of attacks off the Coast of Somalia and on ships delivering WFP aid to Mogadishu owing to the control exercised by Islamic Courts Union (ICU) who controlled Mogadishu and southern parts of Somalia. The Transitional
Federal Government (TFG) backed by the Ethiopian forces drove the ICU out of Mogadishu and established some form of control and chose a new town Baidoa, as the seat of the government. This TFG control waned with the withdrawal of Ethiopian troops resulting in an escalation of attacks in 2007 and subsequent years (Murphy, 2010 p 84).

2.1.6 The Somali piracy statistics

Piracy statistics have been compiled first by the IMB PIC with others following suit among them, the IMO and ReCAAP. With recent deployment of naval forces reports are also compiled by European Union (MSC-HOA), and NATO (NSC). These reports have been acknowledged in the past that they are not compressive as most of them are compiled based on the reported cases by ship masters particularly in the beginning of the reporting period (Mejia, 2010). The statistics for the last two years are however more comprehensive owing to the use of LRIT and the presence of the military in the region. This research uses statistics from two sources in order to depict specific information of choice.
Table 1: Number of reported pirate attacks in three regions (2000-2010)

![Graph showing the number of reported pirate attacks in three regions (2000-2010)](image)

**Figure 1**


The figure shows trends in piracy attacks of reported cases from selected areas of South East Asia, Somali region including Gulf of Aden and Gulf of Guinea in West Africa. The piracy incident attacks are based on original data collected by IMB-PIC for the period 2000 to 2010. As can be seen in figure 1 the piracy incidents in South East Asia were the highest from 2000 up to 2007 when Somali pirate attacks shot up to record the highest attacks and remained so till the end of the reporting period of 2010. Piracy incidents in the Gulf of Guinea show a gradual fluctuating trend of between 25 and 35 incidents per year.
In South East Asia there was a decline of piracy incidents attributed to the adoption of ReCAAP information sharing mechanisms and regional joint operations such as “eye in the sky” by Malaysia, Indonesia and Singapore.

Table 2: Number of pirate attacks in Somali Basin and Gulf of Aden (2005-2010).

![Graph showing trends in pirate attacks per Somali Basin and Gulf of Aden](image)

**Figure 2**


The figure shows trends in piracy attacks perpetuated by Somali pirates in the Gulf of Aden and Somali basin. There was a steep increase of piracy attacks in the Gulf of Aden in 2007 and 2008 with the trend changing to a gradual fall in 2009. The attacks in the Somali Basin plummeted in 2008 and rose gradually to overtake the Gulf of Aden in mid-2009. This trend can be attributed to the deployment of naval vessels to protect merchant ships which saw an International Recommended Transit Corridor (IRTC) established in the Gulf of Aden. This led to the pirates adopting use of mother ships to attack ships in mainly Somali Basin.
Table 3: Monthly number of disrupted and pirated attacks (Jan 2009 – December 2010)

![Graph showing monthly number of disrupted and pirated attacks]

**Figure 3:**


The figure shows trend in monthly statistics for the, pirated, disrupted and attacked. The trend illustrate seasonal fluctuations in the number of attacks with highs recorded in October to April and lows recorded in May to September a factor attributed to the seasonal weather pattern of the monsoon period in the Indian Ocean region.

Though the general trend is seasonal, the number of successful attacks shown by the difference between the total attacks and successful pirated ships is widening depicting a higher rate of disruptions from 2010 owing to increased patrolling by the combined maritime force and use of Privately Contracted Armed Security Personnel (PCSG) by ships.
2.1.7 Somali Pirates *modus operandi*

Military strategists have in the past considered an analysis of an enemy essential in drafting their military mission orders. Such a clause will consist of facts, such as enemy composition, disposition, strength, activity locations, units, observed equipment, enemy capabilities, limitation and enemy’s course of action among others. This approach will guide this paragraph in its quest to understanding the Somali pirates.

Various suppositions have been advanced as to the origin and evolvement of Somali piracy with two common hypotheses, namely the pirates evolved from rag tag fishermen to a well organized crime network with financiers and ground security. The second hypothesis has it that it evolved from a holy alliance of three groups, which are the fisher folks who know the sea, the militia men who knows the weapons and use of violence and the financiers who sponsor the operations. Some common names and organizations associated with Somali pirate groups are the Somali Marines led by Abdi Mohamed Afywene referred to as the most organized, the Puntland group. the Marka group led by Yusuf Indha’adde made up of several decentralized groups and the National Volunteer Coast Guard headed by Garaad Mohamed operating around Kismayu in the southern region. What many authors and military intelligence organizations agree is the fact that most of these groups are clan based (Eichstaedt, 2010, p 56; Mejia, 2010, p 294; Geiss & Petrig 2010, p 10).

The Somali piracy tactics have evolved to match the operational readiness of both the ships and the naval protection force. In 2006 and 2007 the pirates would pounce on unsuspecting ships and vulnerable ships plying the Somali coast and the Gulf of Aden. In 2008, 2009 and 2010 with the use of captured fishing vessels as mother ships they would attack even faster ships hundreds of miles away from the coast. The weapons captured and those witnessed by the crew who had been attacked in the past point to an assortment of arms ranging from Rocket Propelled Grenades (RPG) to small arms AK 47.
Table 4 Position of pirated ships in January 2011

Figure 4

Source: NATO (2011), Piracy in the Horn of Africa, IMO Somali piracy updates

2.1.8 Somali piracy business model
Details obtained by the UN monitoring group on Somalia claim that ransom payments are usually managed by a committee comprising of a chair, two principal investors and two commanders, that is sea pirates and the guard force and are assisted by an accountant who is rewarded with a share equal to that of a guard.
The main expenses covered by a ransom payment are the direct operational costs and profits. The profits are normally arrived after deductions from the operational expenses. Sources indicate that the profits are divided between the investors who take 30% guard force 30% and the sea pirates who take 40%. The pirate’s operational costs includes committee members, provisions for pirates and captured crews, logistics, cooks, negotiators and payoff to other local militia groups. A social obligation to share wealth Shahaad is also factored as a cost (Eichtaedt, 2010, p 57).

2.1.9 Ransom Payment
Ransom payment has been sighted as a main contributor to the growth of piracy, as part of this money is reinvested to acquire better equipment for the pirates and better weapons with increased logistics support enabling the pirates to venture far and recruit more pirates (UNSC Resolution 1897 (2009)). The payment takes different methods with aircrafts dropping the ransom money on hijacked ships to payment through transfers such as Hawala system and investments in “khat” drugs. Money paid in ransom in 2008 is estimated by United Nations to be over $150 million with single ransom payment of MT Sirius Star believed to have been $3 million against the $25m demanded and MV Faina $3.2million against an initial demand of $35 million (Payne, 2010; Nigel 2010). This has led to expansion of the Contact Group on Piracy off the coast of Somalia (CGPCS) to include a fifth working group of the CGPCS chaired by Italy to look for ways of tracing the ransom payment.

2.2 Cause and effect
Piracy has affected nearly all maritime users with the shipping industry bearing the brunt of the scourge. In the report The Economic Costs of Piracy published by One Earth Future (OEF) Foundation the international economic cost is estimated to be between $7 to $12 billion per year (Bowden, 2010, p 2.; IMO, 2011).
These costs are in form of direct financial costs of piracy which includes insurance costs, ransoms, cost of rerouting ships via the cape, security arrangements including private security detachments, cost of maintaining navies among other related government expenses. Other indirect costs occur as negative effects on other related areas like trade, fishing, inflation and tourism resulting to decrease in foreign revenue.

Psychological effects such as trauma to the seafarers and their families for those held and also for those working in the piracy affected areas are common. By June 2011 there were 462 seafarers and 22 ships held by Somali pirates for ransom (IMO, 2011). The setting on fire of MV Yasin C in 2010 and MV Pacific Express in 2011 after the crew escaped to citadel is an indication of what seafarers can be exposed to by frustrated pirates. In the fragile Somalia, the pirates net more money than government causing more political instability. It is a case of money equating power and the pirates are exploiting their new found influence and affluence (Payne, 2010, p 34).

2.3 International and regional response to Somali piracy

The IMO Assembly adopted Resolution A. 979 (24) (IMO, 2005) on piracy and armed robbery against ships in waters off the Coast of Somalia in consultation with the Transitional Federal Government (TFG). This marked the beginning of high level engagement of the IMO on Somali piracy. The IMO sought the attention of the president of the United Nations Security Council (UNSC), who issued a presidential statement on the matter in 2006.

IMO revised Resolution A.979(24)(IMO,2005) and in place adopted Resolution A.1002(25)(2007) which urged parties with naval capability to deploy naval ships and further addressed the Flag states on the advice to give to ship crews sailing these areas. In paragraph 7 the Resolution “called upon Governments in the region to conclude, in co-operation with the Organization and implement as soon as possible, a regional agreement to prevent, deter and suppress piracy and armed robbery against ships”. The
IMO held its first regional meeting in Dar es Salaam, Tanzania where a draft text of agreement was drafted in April 2008 setting the scene for the adoption of the Code.

On the International scene, the adoption of UNSC Resolution 1816 (2008) which authorized States cooperating with the TFG to enter the territorial sea off the coast of Somalia for the purpose of repressing acts of piracy and armed robbery at sea is cited as the turning point in the anti-piracy campaign. The wording of the Resolution contained some fundamental principles of International law on sovereignty and was limited for a six month period.

With international backing the IMO mobilized the regional countries of Comoros, Djibouti, Egypt, Eritrea, Ethiopia, France, Jordan, Kenya, Madagascar, Maldives, Mozambique, Oman, Saudi Arabia, Seychelles, Somalia, South Africa, Sudan, the United Arab Emirates, the United Republic of Tanzania and Yemen to adopt the Djibouti Code on 29 January 2009. Nine governments signed the Code on the date of adoption making the Code effective since it only required signatures by two participants. IMO established a multi donor trust fund and a counter piracy Project Implementing Unit (PIU) in 2010 to assist signatory states to implement the Code. The team is composed of a team head, and three project officers. At the time of writing the Fund had received donations from Japan, South Korea, France, Norway, the Kingdom of Saudi Arabia and Panama.

2.4 Conclusion
Piracy criminal acts as seen in the chapter are bound to adopt new tactics and means with chances that they may resurface in different geographical localities provided that the underlying factors exist in that particular geographical area, such as weak states unable to establish rule of law, weak surveillance and law enforcement at sea.

Military means used in the past for suppressing piracy is no longer viable owing to the modern globalized political environment where human rights and sovereignty issues are
considered fundamental. This call for the IMO and the international community to adopt other mechanisms aimed at discouraging would be pirates to engage in criminal acts by increasing the consequences of engaging in the crimes as contained in the articles of the Djibouti Code of Conduct. Former UK Prime Minister Tony Blair put the situation succinctly with the following statement: “Our ultimate weapon against piracy is not our guns but our belief.”
Chapter 3

Anti-piracy regional instruments: Djibouti Code of Conduct and ReCAAP

“The devil is in the details” (Ludwig Van Der Rohe 1886-1969)

3.1 Introduction

The importance and implication of a text in a contract of the nature of a treaty is codified in the Vienna Convention on the Law of Treaties (1969) where in section 3 Article 31 to 33 is dedicated to treaty interpretation. Although the Djibouti Code is not a treaty yet, it should be borne that Article 13 of the Djibouti Code provides that the participants intend to consult with the aim of arriving at a binding agreement.

Article 18 of the Vienna Convention on obligation not to defeat the object and purpose of a treaty prior to its entry into force is a guiding principle when dealing with the Code. This chapter will seek to scrutinize the text of the Djibouti Code with a view to establishing the motive of the framers of various articles and the expectation from the participants in implementing the Code by drawing parallels with the existing ReCAAP, the first such regional cooperation mechanism in modern time and expressly stated as the inspiration of the Code in the preamble.

3.2 Preamble

The significance of preamble in a treaty is entrenched in the Vienna Convention on the Law of Treaties (1969) text on interpretation of treaty where it is stated that “a treaty shall be interpreted in good faith in accordance with ordinary meaning to be given to the terms of the treaty in their context and in light of its objective and purpose”. Article 32 further provides for supplementary means of interpretation, including “the preparatory work” of the treaty and the circumstances of its conclusion.

The Djibouti Code was signed in January 2009, following the astronomical increase in Somali piracy cases in 2008, and against a background where these incidents had attracted a worldwide attention. Notable hijackings included MV Faina with a cargo of
33 T-72 Soviet designed tanks among other assorted military ware and MT *Sirius Star*, a newly built ship worth $150 million, carrying crude oil worth $100 million. These two incidents had attracted worldwide publicity and concern sending all interested parties in a desperate search for a solution to these attacks. This explains the wide acceptance given to the initiative. Nine regional countries signed the Code on adoption.

The signing took place following the UNSC issue of Resolutions 1816 in June, 2008, Resolution 1838 in 2008, 184 in 2008 and 1851 in October, 2008 issued under chapter VII of the UN Charter which applied only to the case in Somalia. The Code notes all these four resolutions in the preamble pointing to the influence of the UNSC in the preparatory work of the Code. The UN Resolution 63/111 of December 2008 on Ocean and the Law of the Sea is also noted in the preamble. This resolution contains a text which recognizes the crucial role of international cooperation at the global, regional, sub-regional and bilateral levels in combating threats to maritime security.

The motive of IMO prior to the signing of the Code is evident in its Resolutions A.922 (22) adopted in November 2001 on the Code of Practice for the Investigation of Crimes of Piracy and Armed Robbery against Ships. This resolution invited governments to develop agreements and procedures to facilitate co-operation in applying efficient and effective measures to prevent acts of piracy. Resolution A.1002 (25) adopted in November 2007 specifically for Somali waters called governments in the region to conclude, *in co-operation with IMO*, and implement a regional agreement to prevent, deter and suppress piracy and armed robbery against ships; pointing to the role that IMO would play in such a regional agreement.

Players recognized in the preamble are international agencies, such as the United Nations Office on Drugs and Crime (UNODC), the United Nations Development Program (UNDP), European Commission and League of Arab States who are touted as potential partners in provision of technical assistance and other forms of capacity
building. This is an indication of the partnership concept which guides the cooperative mechanism of the Code. The Contact Group on Piracy off the Coast of Somalia (CGPCS) established a fortnight before the signing is mentioned possibly due to the expected international role it would play in mobilizing and coordinating contributions of international efforts.

The last paragraph of the preamble notes the need for a comprehensive approach to address the poverty and instability that create conditions conducive to piracy which may include strategies for effective environmental conservation and fisheries management. The need to address the possible environmental consequences of piracy is also included, which could be interpreted as recognizing the interests of Somalia and at the same acknowledging the need for alternative livelihood strategies to be included in the long term.

In ReCAAP the preamble is brief and recognizes UNCLOS concept for ships and crew to exercise the right of navigation and the State duty to cooperate in the prevention and suppression of piracy. This can be construed to be the guiding principle of the Agreement. There exist a clause affirming that each participant should strengthen its measures aimed at preventing and suppressing piracy and armed robbery against ships indicating a State centered approach before moving towards a regional and international cooperation. This approach may not be applicable in Djibouti Code considering that Somalia, which is a major player in the Code, is a failed state.

ReCAAP acknowledged origin is in the Tokyo Appeal of March 2000, the Asia Anti-Piracy Challenge 2000 and Tokyo Model Action Plan of April 2000 (Menefee, 2008, p 187). The ASEAN +3 summit meeting proposed a conference on combating piracy and armed robbery against ships. This meeting was held on October, 2001 and discussed medium and long term visions of a regional cooperation framework. The text of the ReCAAP was drafted by representatives from the ASEAN+6 that is the ten members of
ASEAN plus six other countries, which are Bangladesh, India and Sri Lanka and East Asia China, Japan and South Korea. The key pillars of the agreement which are information sharing and capacity building are expressed in the preamble indicating the concept the framers intended to pursue right from the onset unlike Djibouti where this is contained in the principle articles (Mejia, 2010, p 128).

Both the Agreement and the Code have adopted the piracy definition provided in UNCLOS 101 and further defines armed robbery against ships as defined in the Annex to the Resolution A.922(22) adopted in January 22, 2009. ReCAAP in its introductory part dwells on General Provisions under Article 2 and General Obligations in Article 3. These articles address generic issues of contracting parties, such as sovereignty rights. The Djibouti Code is very specific regarding geographical location where the code applies. The opening clause under purpose and scope states “consistent with the available resources and related priorities” a clause which can be interpreted as a reflection of the non-binding nature of the Code leaving it to participating States to determine what areas of the Code to execute, including prioritization.

3.4 Principal features

3.4.1 Embarked officers

The Djibouti Code introduces a concept of embarked officers in article 7 where a participant may nominate law enforcement or other authorized officials to a patrol ship of another participant. In the preceding paragraphs the drafters attempt to guide the conduct of the embarked officers by laying down some basic legal and policy considerations.

This could be in anticipation of bilateral agreements to be entered and hence lays the background of what could possibly be included in the text agreement. A more elaborate analysis of this article is discussed in the next chapter. This concept is not contained in the ReCAAP model probably due to complex issues of these kinds of agreements such
as reciprocity, suspicion and State interests which have the potential of slowing down any international cooperation (Baylis & Smith, 2004, p 426).

### 3.4.2 Information Sharing Centre

The Code designates three information sharing centers to be situated in the maritime rescue coordination center in Mombasa Kenya and Dar es Salaam in the United Republic of Tanzania and the regional information center in Sana’a Yemen.

ReCAAP has created an information sharing center with its location in Singapore and structures for the Centre comprising a Governing Council and a Secretariat complete with functions for each. Article 6 of ReCAAP also provides for a financing mechanism of the center and states the sources of funding as, host state, voluntary contributions from Contracting Parties, voluntary contributions from international organizations and other entities, in accordance with relevant criteria adopted by the governing council and any other voluntary contributions as may be agreed upon by governing council.

The Djibouti Code lacks such elaborate text on functions of such centers and does not specify the relations among the three and leaves the individual participants to ensure the smooth running of these centers. This could be deliberated and agreed once the Code becomes binding.

### 3.4.3 National Focal Points

The national focal points are deemed in the Code as part of the information sharing mechanism where participants are expected to designate a focal point capable of receiving and responding to alerts and requests for information or assistance at all times. This article could be interpreted as laying down the basic requirements in terms of minimum communication infrastructure and the authority of the point of contact to coordinate and offer assistance through competent national authorities.
The ReCAAP requires the contracting parties to designate a focal point responsible for its communication with the Centre and which should be declared at the time of the signature or deposit of an instrument of notification. The agreement requires the contracting parties to ensure smooth and effective communication between its designated focal point and other competent national authorities including rescue coordinating centers.

The Code further states the intention of the participants to keep each other fully informed concerning their respective applicable laws and guidance, particularly those pertaining to the interdiction, apprehension, investigation, prosecution and disposition of persons involved in piracy and armed robbery.

The inclusion of this clause shows that the emphasis of Djibouti Code is leaning more to prosecution as a means of addressing piracy while at the same time it could be acknowledging the inability of the Somali government institutions to enforce law and order and carry out judicial functions.

### 3.4.4 Assistance among participants

The Code stipulates areas where a participant may request another participant that is persons who have committed, reasonably suspected of committing both piracy and or armed robbery or pirate ships, where there are reasonable grounds to suspect the ships. Information on ships or persons subjected to piracy or armed robberies is also included. Joint exercises and capacity building, which may include technical assistance, such as educational training programs to share experience and best practices, are also included as part of assistance among participants.

ReCAAP dwells heavily on cooperation, dedicating two articles in part 3 and the entire part 4 of the agreement. Areas for request of cooperation include requests to cooperate in detecting pirates, pirate ship or any person who have committed armed robbery against ships. Request for cooperation also include arrest or seizure. It further states the request
may be to take effective measures to rescue a victim ship, and victims of piracy or armed robbery against ships. In article 11 the agreement compels a contracting party to make every effort to take effective and practical measures to implement such requests.

3.4.5 Review of National Legislation
The Code has an article on review of national legislation (article 11) which is aimed at having adequate laws within the region to tackle piracy and armed robbery. The ReCAAP did not consider this kind of approach probably due to the fact that most of the incidents were happening in territorial waters of the littoral states, whose laws were probably deemed adequate in addressing these acts. The Djibouti Code envisions fulfillment of this article through review of participant’s national legislation to allow for prosecution, conviction, punishment and facilitate extradition or handing over when prosecution is not possible.

ReCAAP article 13 obligates contracting parties subject to their national laws and regulations to endeavor to render mutual legal assistance in criminal matters including the submission of evidence related to piracy and armed robbery against ships at the request of another contracting party.

3.4.6 Extradition
The ReCAAP has an article on extradition whereby the parties are obliged, subject to their national laws and regulations, to endeavor to extradite pirates or persons who have committed armed robbery against ships and who are present in its territory to the other contracting party which has jurisdiction over them at the request of that contracting party.

The Code has included this important aspect in its article on review of national legislations whose process should facilitate extradition or handing over when prosecution is not possible.
3.4.7 Dispute settlement and claims
The Code has two separate articles on dispute settlement and claims and states that if responsibility is established the claim should be resolved in accordance with the national law of that participant and adds in a manner consistent with international law including article 106 and Paragraph 3 of article 110 of UNCLOS. The ReCAAP combines settlement of disputes and claims in one article, where it states that such shall be settled amicably by the contracting parties concerned through negotiation with applicable rules of international law.

3.4.8 Consultations
The Code has one salient clause in article 13 on consultation, which states that within 2 years of the effective date (1st Feb 2009) the participant intends to consult with the assistance of IMO with the aim of arriving at a binding agreement. This is further amplified under miscellaneous provisions, which state that nothing in the Code is intended to create or establish a binding agreement except as noted in the article. In ReCAAP the government of Singapore is the depository of the agreement, while in the Code the depository is the IMO headquarters clearly defining the leaders in the two instruments.

3.5 Conclusion
The text of the Djibouti Code is found to be sufficient in rallying the regional countries together to address the piracy incidents in the region albeit for the short and middle term. An in depth analysis of the three main articles will be discussed in the preceding chapters in order to arrive at a fair assessment and expectation of the impacts of the articles in suppressing piracy acts.

The experience from ReCAAP, however, points to regional political commitment by the signatory states, role of regional leadership by Singapore and a hegemonic stability role provided by Japan as key to this successful cooperative mechanism.
Chapter 4

Embarkation of Law enforcement officers

“The new shiprider protocol is clearly a force multiplier, it will significantly assist in the fight against narcotics traffickers in the region, together Jamaica and United States along with our partners will have greater coverage, greater reach, greater ability to detect and seize narcotics shipments” (Sue Cobb, US Ambassador to Jamaica 2004)

4.1 Introduction

The deployment of international navies in the Gulf of Aden and Somali Basin in early 2008 was met with unexpected challenges in apprehension of pirates leading to some navies adopting the catch and release tactics due to lack of clear course on what to do with the captured pirates. Issues related to human rights, ships mandate, missions and rules of engagement further complicated matters for the naval forces.

This challenge was expressed in the UNSC meeting by the UNODC executive director Antonio Costa, who proposed the use of the “shiprider” concept to circumvent the legal impediments being faced. The concept was incorporated in the UNSC Resolution 1851 of 2008, which invited all states and regional organizations fighting piracy in the region to enter into “ship rider” agreements. This chapter will examine this principal article of the Code with a view of identifying the possible implementation avenues and potential key players for its realization.

4.2 Concept background

The inclusion of this article can be traced to the “Shiprider” concept where two states enter into a bilateral agreement to have officials of one State embark on a vessel of another State for the purposes of law enforcement. The purpose of such agreements are to overcome jurisdictional hurdles and broaden law enforcement powers (Geiss & Petrig
This approach has been practiced by the United States of America with Canada and the Caribbean countries on anti-narcotics campaigns.

The UNSC Resolution 1851 of November 2008 contains a paragraph where it invites all states and regional organizations fighting piracy off the Coast of Somalia to conclude special agreements or arrangements with countries willing to take custody of pirates in order to embark law enforcement officials (“shipriders”). The Resolution went further to state that this would facilitate the investigation and prosecution of persons detained as a result of operations conducted preceding the resolution. The resolution contains a clause that the above is subject to advance consent of the TFG for the exercise of third state jurisdiction by “shiprider” and that it should not prejudice the effective implementation of the SUA Convention. This resolution came amid press claims that the navies were releasing captured pirates due to lack of prosecution powers.

The above text was repeated after the signing of the Djibouti Code in November 2009 through UNSCR 1897, which among other things acknowledged the signing of the Djibouti Code in January 2009. At the time of this Resolution, prosecutions problem of pirates still persisted and there were no known agreements which had been concluded to that effect prompting the repeat of the concept in the resolution.

The wording of Article 9 paragraph one of the Code that a participant may nominate law enforcement or other authorized officials to embark in the patrol ships or aircraft of another participant may itself limit the scope of host participants since the Code limits number of states eligible Participants to the Code (21). Of the eligible countries only France has warships in the Combined Maritime Force (CMF) and has to date not signed the Code further restricting the use of the concept to only those states willing to contribute law enforcement officers.

In the wording of UNSC Resolutions 1851 and 1897 the envisioned purpose of the “shiprider” is more a means for enabling the exercise of adjudicative jurisdiction rather
than enlarge enforcement powers since TFG had already given consent for States involved in counter piracy operations to enter Somali territorial waters through the same UNSC resolutions (Geiss & Petrig, 2011, p 87).

A review of “shiprider” agreements points to the fact that these agreements are bilateral and very specific between two countries (the US and Canada, the US and Trinidad and Tobago, the US and Jamaica). The purpose of the “shiprider” is to grant authority on behalf of the host state. In order to realize this concept the regional countries would need to enter into a specific agreement with states operating in the region and would grant permission in case the pirates were to be pursued to the countries’ territorial waters. The article could be expanded to allow the embarked officers to apply and act under their own law to effect seizure and detention of pirate vessels.

4.3 Prospective host participants

4.3.1 The United States

The United States has a presence in the region comprising ships employed under the Task forces 150,151 and 153 which could see bilateral arrangements signed between the United States of America and the regional countries. The areas of responsibility of this Task force include Djibouti, Kenya, Sudan, Eritrea and Seychelles. There are indications that there exists a possibility of including the neighboring areas of Tanzania, Mauritius, Madagascar, Mozambique, Yemen and Comoros who are members of the Djibouti Code of Conduct.

The US has an existing memorandum of understanding with Kenya on prosecution of pirates captured by their naval forces, and through this memorandum pirates were prosecuted and convicted (Omar v Republic 2007). Similar arrangement exists with the Seychelles, where prosecution of pirates handed over by the US is ongoing.
4.3.2 European Union Naval Force Somalia- Operation Atalanta

This force was formed as a result of UN resolutions 1814, 1816 and 1836 and following a joint council action 2008/851/CFSP of 10th November, 2008 on EU military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the coast of Somali. This force comprise of EU members who have contributed assets, personnel and finances. The Headquarters is based in Northwood, the United Kingdom.

The force size at any one time consists of 5 to 10 surface combat ships, 1 to 2 auxiliary ships and 2 to 4 maritime patrol reconnaissance aircraft. It comprises a total of around 2000 military personnel including land-based personnel. Operation Atalanta’s stated mission objectives include the protection of vessels of WFP delivering food aid to displaced persons in Somalia, protection of vulnerable vessels cruising off the Somali coast and deterrence, prevention and repression of acts of piracy and armed robbery against ships off the Somali Coast and contribute to the monitoring of fishing activities off the coast of Somalia. The EU has signed an agreement on transfer of pirates with Kenya and Seychelles and can have this memorandum reviewed to include “shiprider” provision.

4.3.3 Members of Combined Maritime Force (CMF)

The CMF force comprises of Task Forces 150, TF 151 and 152 formed with a principle aim to deter, disrupt and defeat attempts by international terrorist organizations to use the maritime environment as a venue for an attack or as a means to transport personnel weapons and other materials. The contributing members include Australia, Canada, Denmark, France, German, Italy, the Republic of Korea, the Netherlands, New Zealand, Pakistan, Portugal, Singapore, Spain, Turkey, United Kingdom and United States The Task Force 151 established in January 2009 was specifically to conduct counter piracy operations around the Gulf of Aden and Somali Basin. The Task Force 152 operates in the Arabian Gulf conducting Maritime security operations in conjunction with regional
partners to prevent destabilizing activities and promote maritime security. Members of this task force include Kuwait, Bahrain, the UAE, France, New Zealand, Italy, Australia, the UK and the US. The inclusion of regional states in this military forum particularly those of Gulf States come with potential for realization of this concept.

4.3.4 North Atlantic Treaty Organization—“operation ocean shield”

The involvement of NATO in anti-piracy operations has its genesis to the UNSC Resolutions 1814, 1816 and 1836 when the organization launched *Operation Allied Provider* between October and December 2008. The mission of this operation was to escort World Food Program (WFP) vessels and patrol the waters around Somalia. This first mission had three combat Ships from Italy, Greece and the UK.

This mission was followed by *Operation Allied Protector* from March to August 2009 which had its mission and objectives modified to deter, defend against and disrupt pirate activities in the Gulf of Aden and the Horn of Africa in response to increased attacks recorded in this period.

This operation gave rise to the current *Operation Ocean Shield* which commenced in August 2009 after the North Atlantic Council (NAC) approved the mission. This operation introduces a new element to its mission by offering regional states assistance upon request to develop a regional maritime capacity in combating piracy such as law enforcements, which may include Coast Guards operations.

This offer could be easily expanded to include embarkation of these law enforcement officers as part of the assistance to regional training where the “shipriders” could be utilized to carry out law enforcement roles in the course of onboard training.

4.3.5 Peoples Republic of China

The People’s Republic of China has contributed naval assets comprising of two destroyers and one supply vessel since January 2009 and has been participating in the
SHADE monthly meetings. The country has signed a memorandum of understanding with Kenya on transfer of captured pirates an indication of commitment of the country in regional stability in its quest for new investments and markets.

Chinas’ involvement in the region can easily see a “shiprider” agreement concluded as it currently enjoys a close collaboration with the regional countries through its investments policy in the region.

4.4 Challenges to realization of the concept

4.4.1 Contravention of UNCLOS

The rationale behind use of flag is embedded in UNCLOS and its legal certainty in the exercise of enforcement of powers at sea. It has been argued that by embarking law enforcement officers to operate from a host vessel for the purposes of law enforcement subjects the ship to two flags or two legal regimes which could be in contravention of the principle of UNCLOS where a ship only sails under one flag. (Geiss & Petrig, 2011, p 90)

UNCLOS Article 107 on ships and aircraft which are entitled to seize pirate ships states that it may be carried by warships or other ships or aircraft clearly marked and identifiable as being on government service. Whereas this can be easily attained on the host vessel it may complicate matters for law enforcement officers in the high seas and only restrict the use of these “shipriders” to the territorial waters of the embarked officers.

4.4.2 Human Rights consideration

The MoU between Kenya and EU, Denmark and the United States has a clause which stipulates that the transferred pirates will not be given death sentence or have to be commuted to life sentence. This can be seen as a safeguard to the principle of non-refoulment. It is not clear what course such a case would take if it was done primarily
using the domestic law in those jurisdictions where death penalty exist in Yemen, Kenya and Tanzania.

It is not clear how this legal principle can be circumvented in the event that the captured pirates will be tried under the Kenyan Law, which provides for death penalty without explicit provisions like the ones contained in the memorandum of understanding.

4.5 Conclusion

The “ship rider” concept has the potential for increasing law enforcement capacity by utilizing the regional countries’ law enforcement officers and the deployed assets in the region. The “shipriders” policing skills and forensic work background could provide initial and on spot investigation of piracy cases crucial for gathering and collection of evidence for later criminal proceedings.

There are for the time being sufficient resources in terms of naval vessels (32) deployed in the region and available regional law enforcement officers who could be deployed as “shipriders”. The Djibouti Code training center could be used to train regional law enforcement officers who could provide a pool to be embarked onboard willing naval ships for the purposes of attainment of this objective under the Code.

This research has, however established that such agreements are concluded between two states and hence the IMO could consider devising ways of initiating these bilateral arrangements. The existing MoU between western countries and some regional countries, such as Kenya and the Seychelles on prosecution of pirates could be explored for possible inclusion of "shiprider" clauses.
Chapter 5

Incident reporting and Information sharing mechanism

“We will conduct operations with compatible information and communication systems, usable data and flexible operational constructs beyond battlefield application,“ (Robert Gates Defense secretary on US defense strategy 2006).

5.1 Introduction

The push for a common system of communication in the maritime industry first came into the scene with the first treaty of SOLAS in 1914 following the sinking of RMS Titanic in 1912, which introduced requirement for carriage of Radio and continuous Radio watches. Versions of SOLAS have been adopted since then with the latest 2010 edition still containing an entire chapter IV on Radio Communications specifying Radio requirements for both shore facilities and ships in regulations 5 and 6.

The information technology sector has, however, recorded one of the fastest growths with breakthroughs in digital and satellite technologies ushering in a wide range of equipment and systems. This can present a challenge to a consumer in deciding on a particular system in such a large market and hence the need for the user to determine a minimum system requirement to guide his choice. The IMO has relied on performance standards and result based standards when it comes to decisions related to similar systems.

This chapter will review the existing communications and information system with a view of identifying those systems which can be adopted in the implementation and realization of this article of the Code.
5.2 Maritime Safety: Global Maritime Distress and Safety System (GMDSS)

The GMDSS system adopted as an amendment to SOLAS chapter IV introduced a new era in the maritime industry as far as information exchange is concerned. The adoption of this amendment came in the wake of another convention the International Convention on Maritime Search and Rescue (1979) which introduced the Global Search And Rescue (SAR) Plan which seeks to achieve a worldwide SAR coverage by responsible nations.

The designation of the maritime rescue coordination centers as the piracy information center in the Code hints that the GMDSS concept forms the basic equipment requirement in the arrangement. The specifications for this system are contained in SOLAS Chapter IV regulations 5 and 6. The system enables a ship to send distress in any part of the globe. It would mean that the national focal point will consider the GMDSS as the primary communication information sharing system.

The main advantage for this system is the fact that it is subject to IMO regulations with already developed performance standards and the hardware are readily available in the market.

5.2.1 Ship Security Alert System (SSAS)

The SSAS has its roots in the infamous September 11 2001 terrorist attacks in the US by use of civilian aircrafts on both the World Trade Centre and Pentagon. IMO woke up to the realization that ships could also be used to carry out similar attacks on civilian targets. This led to adoption of Resolution A.924(22)(2001) which amended SOLAS Chapter XI-2 and ushered a new role of IMO in maritime security. These amendments brought in a new carriage requirement under regulation 6 which ships and mobile offshore drilling platforms have complied since 1st July 2006. The system has been widely used in disseminating information on piracy attacks.
The concept of the system is that a ship should be able to send a security alert when under attack to the Administration, the company, maritime rescue coordination center or any other security center as specified by the administration of the ship.

This system can be linked to the Djibouti Code PIC that could also monitor the alarm. The information can be further relayed to a particular center focal point which could include the country’s law enforcements and naval detachments capable of responding.

5.2.2 Global Integrated Shipping Information System (GISIS)

This IMO information sharing system has its origins in circular. ES 18/16 (1995) which sought to have an international ship information data base (ISP) with a purpose then to compile and make information available on worldwide basis on maritime safety pollution prevention and on conditions of ships.

The system has been expanded to support other reporting modules including piracy information among other modules such as maritime security, recognized organization, port reception facilities, contact points, marine casualties and incidents, pollution prevention equipment, training simulators and greenhouse gas emissions.

5.3 Piracy Information exchange

5.3.1 IMB Piracy Information Center

The IMB-PIC is a nonprofit organization which established a piracy reporting center in October 1992 in Kuala Lampur in Malaysia. This center has been involved in compiling all reports on piracy and disseminating the same information to ships ever since.

The center sends broadcast to ships via Inmarsat C safety net containing daily status reports on piracy incidents and also posts information and update on attacks in its website www.ics-ccs.org.
The IMB-ICC has a wider coverage as all GMDSS compliant ships receive this broadcast. It may not be cost effective to duplicate this system of broadcast and what could be looked at is linking the regions’ piracy information centers to IMB-PIC as a priority source of information and maintain a single source of broadcast for the time being.

5.3.2 ReCAAP Information Sharing Center (ISC)

The ISC-Focal point concept uses a web based secure network linking the national focal points with the information sharing center based in Singapore. The national focal points are connected to other Focal points via other means of communication as agreed in different countries mostly Telephone and VHF Radio and MF Radio also part of the GMDSS set of equipment.

Member Countries are able to log in and update information on reported incidents which is made available to all other focal points. This system could be linked to the three information centers for a wider global picture of pirate attacks as these centers are permanently manned unlike the naval centers which are deployed for a specified time and are subject to extension on case by case and priority consideration.
Table 5: Flow diagram for reporting Incidents in ReCAAP

Figure 5

Source: ReCAAP-(2010), Measures for combating piracy and armed robbery against ships in Asia, APEC/OPRF Workshop

5.3.3 The Maritime Security Center –Horn of Africa (MSC-HOA)

This center was established by the European Naval Force with close cooperation with the industry in 2009 to provide a 24hr manned monitoring of ships transiting through the Gulf of Aden. This initiative runs an interactive website which gives updated piracy information and enables vessels to register movement.

This website allows a password access where merchant ships transiting the Gulf and Somali Basin are able to log in electronically and also receive the latest warning and information concerning piracy attack.
5.3.4 NATO Shipping Center (NSC)
The NSC established by NATO forces acts as a link between the NATO forces deployed in the region and the merchant shipping community. The center has launched a new piracy information website which gives alerts and enables ships to log and gain information regarding potential piracy risks and actions ( “NATO Launches…piracy information website” 2011, Sep/Oct The Sea,(213), pp2)

5.3.5 The UK Maritime Trade Operations (UKMTO)
This office based in Dubai United Arab Emirates (UAE) has its origin in the aftermath of the US bombing by civilian aircraft on September 11, 2001. The office was launched to act as a point of contact by the maritime industry on security issues in the Gulf region. However the focus has shifted to anti-piracy and maritime security operations where the center acts as the primary point of contact for merchant vessels and liaison with military forces operating in the region.

The center also administers the voluntary reporting scheme where merchant vessels are encouraged to send regular reports regarding the ship position, course and speed which is shared with the naval forces. The center is listed in the Best Management Practices (BMP) a handbook developed by the Industry as the primary point of contact for ships coming under the piracy attacks.

5.4 Maritime Domain Awareness (MDA)

5.4.1 Automatic Identification System (AIS)
The AIS is designed to provide information about a ship to other ships and coastal authorities automatically. The system was adopted through an amendment to SOLAS chapter V which brought in mandatory carriage requirement by ships of 300GT and above with effect from 31st December 2004.
Information provided automatically by a ship fitted with AIS includes ships identity, type, position, speed, navigational situation and other safety related information. A ship fitted with an AIS receiver also receives similar information.

5.4.2 Long Range Information and Tracking System (LRIT)

The LRIT System was brought to the shipping industry through an amendment to Chapter V regulation 19-1 by a MSC Resolution MSC.202 (81) (2005) establishing a carrying requirement for specified ships including mobile offshore drilling unit since 1st January 2009.

The system consists of ship borne LRIT information transmission equipment, communications service provider, application service provider and data LRIT data center. The information transmitted includes the ship’s identity position and the time of transmission.

The above Regulation further allowed access of LRIT information by interested parties, such as the to the flag state on ships entitled to fly its flag to determine their location anytime, Port State on ships which have indicated to enter its port facilities, Coastal state on ships navigating within 1000 and not intending to entre its port facilities and Search and rescue services relating to ships and persons in distress.

The anti-piracy potential for this system was realized through the adoption of an MSC Resolution MSC 298 (87)(IMO 2010) which established a distribution facility for the provision of LRIT information to security forces operating in the Gulf of Aden and the Western Indian Ocean to aide their operations on repression of piracy. This can also be pursued for the Code to have a similar data distribution facility for the organization.
Table 6: Illustration of LRIT System Architecture

![LRIT System Architecture](image)

Figure 6


5.4.3 The Maritime Safety & Security Information System (MSSI)

The MSSI was developed by the Volpe National Transportation System center at the US Department of Transportation Research and Innovative Technology Administration and is a freely shared unclassified near real time data collection and distribution network.
This system is available to nations willing to participate and several regional countries, such as Djibouti, Kenya, Tanzania and the Seychelles are already participating. The system provides participating States access to global shipping information using a password protected Internet based link.

5.4.4 The Ship Security Reporting System (SSRS)

The SSRS is a counter piracy service that enhances the ship security alert system by linking the ship sending the alert to the information sharing centers in the region such as the MSC-HOA, UKMTO and OPS ATALANTA.

The service continuously monitors alerts transmitted by SSAS on board vessels and is able to compare the position of the vessel sending the alert and the position recorded by the MSC-HOA and UKMTO. On confirmation of the alert and attack the information is passed on to all the operating forces with a copy going to the Company Security Officer (CSO) who also get to know which forces have been alerted and hence could get in touch with them for any update.

5.5 Conclusion

The wide range of technologies and information system discussed above are found suitable for the task envisioned in the Code. However there need to be established minimum system requirements which could be guided by some basic principles of a system such as compatibility, reliability, adaptability and affordability.

Those systems which have already been approved by the IMO and have minimum performance standards agreed could be prioritized when it comes to choice of a system. It should also be borne in mind that due to the fast technological changes in the sector considerations should also be made for utilization of emerging technologies. This may require further consideration by the IMO sub-committee on Communications and Search Rescue (COMSAR) the subcommittee of MSC which works with ITU on issues of frequency allocation for similar maritime communication systems.
Chapter 6

Review of National legislation for the regional countries

“There never has been any doubt that every nation may lawfully conduct a war against pirates, even if they have not been attacked by them” (Francis Bacon, English Statesman 1561-1616)

6.1 Introduction

Internationally there exists a sufficient legal regime capable of addressing piracy cases with many legal scholars citing the United Nations Convention on the law of the Sea (UNCLOS 1982) and the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA 1988) as the most important ones having been assented by most of the UN member states. However, it is the municipal law of a given country which determines whether prosecution of pirates succeeds or is defeated in accordance with the provisions and procedures of the particular jurisdiction.

This chapter will examine the provisions of piracy in Kenyan Law having prosecuted the highest number of suspected pirates. The legal regime of Tanzania is also examined owing to its inability to carry out prosecutions. The chapter will seek to identify legal challenges to be addressed in the process of reviewing the legislation in fulfillment of this Article of the Code.

6.2 Background

The jurisdictional dilemma in prosecution of piracy can be traced to the treatise of Cicero, a Roman author of 44 BC where he notes on pirates “The common enemy of all (Communis hostis omnium), cannot be considered a criminal, because he does not belong to the city- state, yet he cannot be counted among the foreign opponents of war” (Daniel, 2009, p16). A similar dilemma faces the current navies deployed in the region on what to do with the pirates once captured.
The framers of the Djibouti Code sought to solve this judicial puzzle by insertion of Article 11 where the participants would review their national legislation with an intention of ensuring that there are national laws in place to criminalize piracy and armed robbery against ships. This article is viewed by many as one of the most progressive provision of the Code (Wambua, 2010, p10). The wording of this article leads one to sum the end state as achievement of prosecution, conviction, punishment, and extradition which guides the content of this chapter.

6.2 Prosecution

Prosecution can be understood as the legal process of bringing an alleged offender to trial. It is therefore prudent to establish what constitutes these legal processes to allow an in depth evaluation of a given nation’s legal framework before an attempt can be made on identification of areas requiring review. One important aspect is to look at the Jurisdictional basis and the related legal framework which creates the jurisdiction to try cases. This legal framework consists of existing legal regime comprising of customary international law, UNCLOS, the ISPS Code, SUA, Regional and Bilateral treaties and National Law (Mbiah, 2010, p 303).

6.2.1 Republic of Kenya-The Penal Code

The Republic of Kenya has a common law legal system whose piracy prosecutorial powers had been derived from the Penal Code (Chapter 63 Laws of Kenya), section 69 prior to enactment of the Merchant Shipping Act (2009), which repealed the section. This section provided that “any person who, in territorial waters or upon high seas, commits any act of piracy jure gentium is guilty of offense of piracy”. It further states that “Any person who is guilty of the offence of piracy is liable to imprisonment for life”.

Kenya prosecuted the first ten suspected pirates under the charge of piracy contrary to section 69(1) as read with Section 69 (3) of the Penal Code .( Chapter 63 Laws of
Kenya. The case was tried in the Magistrates Court at Mombasa (Republic v Hassan M. A 2006) and the accused were sentenced to seven (7) years with Right to Appeal in 14 days.

The case was appealed (Hassan M. A v Republic 2008) where the appellant raised issues among them that the principal magistrate erred in law in her finding that she had jurisdiction to try the case and also in finding out that she could try the offence under the Penal Code even when the offence was committed outside the territorial sea of Kenya.

The appeal was dismissed on the grounds that the offence of piracy can be adjudicated and is punishable in the country and no limitations existed in the section. The judge F. Azangala held that the court with jurisdiction is that of a 1st class magistrate of all ranks save the rank of resident magistrate and hence the principle magistrate clearly had jurisdiction under the Penal Code and the Criminal Procedure Code.

In delivering the ruling, the judge allowed the definition of piracy to apply as defined in UNCLOS Article 101 and held that the Country is a member of the civilized world and hence was bound to apply international norms and instruments. He further held that the country being a member of the United Nations cannot act in contradiction of these international norms particular on matters of universal crimes.

6.2.2 Kenya Merchant Shipping Act (2009)

Kenya enacted the Merchant shipping Act (2009), which incorporates the provisions of UNCLOS and SUA, hence adopting the definitions of piracy and armed robbery against ships and subsequently repealing the Section 69 of the Penal Code. This legislation gives the elements of the offence of piracy and at the same time creates the extraterritorial jurisdiction desired for successful prosecution of pirates.

The newly enacted Merchant Shipping Act (2009) was tested by case (Republic v Abdirahman I. M. and others 2010). The four suspected pirates were charged with the
offence of piracy contrary to Section 369 (1) (a) (ii) as read with section 371 (a) of the Merchant Shipping Act (2009). The defense Counsel argued that the trial court (magistrate court) had no jurisdiction to entertain any matter brought under the Merchant Shipping Act 2009 and only the High Court had such jurisdiction. The Counsel argued that the Judicature Act section 4 provides “(1) The High Court shall be a court of admiralty and shall exercise admiralty jurisdiction in all matters arising on the high seas, or in territorial waters, or upon any lake or other navigable inland waters in Kenya”. The defense invoked section 76 of the Criminal Procedure Code (Cap. 75 Laws of Kenya) as permitting a reference to the high court when a doubt arises on an issue of which court should try an offence.

This matter was referred to the High Court for a decision (Republic and Abdirahaman 2011). The judge J Ojwang held that the High Court preoccupation with admiralty matters was a non-criminal preoccupation essentially of maritime commerce. He further held that the basic jurisdiction for the trial of offence of piracy lies with courts other than the High Court. In Kenya, those courts are the magistrate court. The Merchant Shipping Act, (2009) provides that the word “court” means the High Court “unless the context otherwise requires”. The Judge held that the context otherwise requires in the instant matter-and the proper trial for the offence of piracy is the magistrate court.

Scholars have, however, expressed different opinions on this ruling. Some have pointed to contradictions between section 4 of the judicature Act and Section 4 of the Criminal Act. The former vests exclusive jurisdiction in the high court to exercise jurisdiction in all admiralty matters arising on the high seas, or in territorial waters or upon any lake or navigable waters in Kenya. The later vest jurisdiction in both the high court and the subordinate courts. Another view advanced is that section 3 (2) of the Magistrates Act confers jurisdiction on Magistrates courts “throughout Kenya a fact strongly suggesting that the subordinate jurisdiction is territorial (Gathii, 2009.; Wambua, 2010, p 7).
The lack of clarity as to who is entitled to prosecute non Kenyan nationals who have committed piracy crimes outside the territorial jurisdiction of Kenya was also raised in an IMO consultant mission report on legislation on anti-piracy held in September 2009 by Ashley Roach.

6.3 Republic of Tanzania

The United Republic of Tanzania has a common law system and has not prosecuted piracy cases. The country is a signatory to the main international conventions against piracy including the UN Convention on the Law of the Sea (1982) and the Convention for the Suppression of unlawful Acts against the Safety of Maritime Navigation (SUA 1988). The country has other related domestic legislation which can be used to prosecute pirates including the Penal Code of (1945) (as amended by Act no 14, 1980), the Merchant Shipping Act of 2003, Prevention of Terrorism Act (Act 21 of 2002), Proceeds of Crime Act (Act No 25 of 1991) and anti-money laundering Act (Act 12 of 2006).

6.3.1 Tanzanian Penal Code 1945 (as amended)

The Tanzanian Penal code has been the main legal framework on piracy prior to the incorporation of UNCLOS which defined piracy in the Merchant Shipping Act 2003. This legislation is, however, restricted by the territorial scope and effects on citizenship. The wording is framed to the effect that the courts of mainland Tanzania may exercise jurisdiction when an act of piracy is committed against a ship registered in the United Republic of Tanzania or against persons or property on board that vessel (Kamuli, 2010, p 55).

Further the definition given in section 66 of the Penal Code requires an unlawful act of violence to have been committed against a ship or a vessel or a person onboard that ship or vessel. The Code does not explicitly list the acts that would amount to piracy, and that leaves the presiding magistrate or judge to assign a meaning to the offence. This was evident in Kenya in the (Hassan M.A v Republic 2008) case when the judge used
definitions contained in the Law of the Sea (Churchill & Lowe, 1988, p 209) to assign meaning to piracy. This has been argued that without an explicit description of the acts could infringe the principle of criminal justice.

This lack of clarity can lead to a charge of murder on suspected pirates in the event one of the victims subjected to piracy dies in the process. It should be noted that many of the European countries have abolished death sentence in their jurisdictions and this may dissuade the countries from handing over captured pirates. The Memorandum on transfer of pirates has a specific provision that any death sentence would be commuted to life sentence.

6.3.4 Tanzania Merchant Shipping Act 2003

This is the piece of legislation which incorporates the provisions of UNCLOS Article 101. Critics have pointed out that this legislation confines the definition of piracy and does not create the offence nor does it provide for punishment. What is observed is that the Act mentions offence under 341 and 342 of the Merchant shipping Act (2003) and in this case according to the methods of statute interpretation of Tanzania, introductory words do not constitute part of the statute. The Act however explicitly criminalizes and penalizes the offence of hijacking, which falls in the same part as the provision covering piracy in the legislation and hence it can be summed that the legislature did not intend to criminalize piracy. (Kamuli, 2010, p 59).

There are provisions within the Merchant Shipping Act (2003) which stipulates the fine where there is no specific punishment provided, a fine of “not less than one thousand US dollars or imprisonment not exceeding six months or both”, applies to these offences. This is the punishment one is likely to be given if charged under this section. This punishment to be too light to dissuade would be pirates from engaging in piracy criminal acts and probably the reason Tanzania has been reluctant to initiate such prosecutions.
6.4 Correctional facilities

The regional country’s’ correctional facilities have been quoted to operating in more than double the capacity. The capacity for these facilities is fundamental to achievement of this article as justice includes the post-trial stage of the pirates. The research established that UNODC has been involved in projects aimed at increasing capacity for these facilities both in the region and Somalia.

Measure could be explored at tackling the under capacity of these facilities, which in the past have included positive measures, such as community service programs and presidential prerogative.

6.5 Extradition

The Code envisages participants to review national legislation to facilitate extradition or handing over in those cases where prosecution is possible. However, different opinions exist as to how this process can be strengthened with some quarters citing that extradition remains bilateral treaty based and requires reciprocity and that piracy by law of nations is an extradition crime in Tanzania (Extradition Act 1965). This view is however contradicted by the argument that Article 100 of UNCLOS cannot be read as an obligation to either prosecute or extradite piracy suspects (Geiss & Petrig, 2011 p 187).

This provision if properly implemented can be used to alleviate the burden on the prosecuting country, which has to deal with the after sentence challenges of deportation. The IMO can extend the legal assistance to include drafting of generic extradition instruments to guide the bilateral arrangements for countries wishing to enter into such treaties.
6.6 Challenges facing piracy trials in Kenya and Tanzania

6.6.1 Procedural challenges

The evidence collection and its admissibility are provided for in the Evidence Act of 1963 which did not take into consideration the emergence of electronic imaging and that rules for reception of photographic evidence can only be circumvented by a case law. The requirement also that the evidence to prove a fact in court is direct oral evidence makes it mandatory for the arresting naval officers and persons who witnessed the piratical attacks being committed to personally attend the Court and give a testimony. This has created a serious problem especially with the merchant ships whose owners may not be ready to incur extra expenses in releasing and transporting their crew to give evidence in a lengthy court process. Neither video link nor photographic evidence is admissible to prove a case in Kenya (Wambua, 2010, p 22). The consultancy report on Kenya’s legislation noted that this evidence Act does not reflect the exigencies of detention of criminal suspects far at sea.

There are issues with constitutional guarantees to a fair trial that require persons suspected to have committed criminal offences to be produced in court within 24 hours and those suspected of capital offence to be produced in court within 14 days from their arrest or commencement of their detention (Constitution of Kenya 73 (3) ). This could prove a challenge to piracy cases as most of the incidents take place in distant places making it impractical to present the suspects within the dictates of the constitution. There seems to have been no serious issues raised as far as piracy is concerned though the local courts in some cases have dismissed cases on the grounds of rights of accused persons (Cisse Djibra v Republic 2008)

Witness attendance at trials has been claimed as a challenge by the prosecution team in Kenya where the burden of producing witnesses is left to them. Whereas there have been agreement with the arresting countries to avail witnesses during trials, there still exists a
challenge when it comes to the seafarers’ witnesses whose companies may not be willing to incur the extra cost of flying the witnesses to attend trials which are lengthy.

6.6.2 Criminal Prosecution of non-nationals

In Tanzania the Penal Code Act (1945 as amended) establishes a statutory procedure where any proceedings for the trial of any foreigner who commits an offence within the territorial waters of Tanzania should not be instituted in court except with the leave of the director of public prosecution.

The Code further provides that in the exercise of the powers conferred upon him, the director of prosecution is obliged to exercise his own discretion and shall not be subject to directions or control of any person except the president. This provision restricts prosecution based on arrangements, such as the Djibouti Code, which will require further presidential guidance to institute prosecution on non-citizen.

6.7 Conclusion

The chapter concludes that the provisions of UNCLOS are adequate in defining piracy and the elements of the offence are well covered. In the domestic legislation matters of procedure seem to play a major role in determining cases brought before the domestic courts (Republic v Abdirahaman & others 2010)

This calls for an all-inclusive review of both the main and related subsidiary legislation to avoid inconsistencies, which have been quoted as potential challenges to successful prosecution of piracy cases in the region. This leads to the conclusion that the process of transforming international conventions to domestic law is a crucial step with far reaching consequences if not done comprehensively.
Chapter 7

Existing regional cooperative arrangements: Avenues for Synergy

“In the long history of humankind (and animal kind too) those who learned to collaborate and improvise most effectively have prevailed”. (Charles Darwin 1809-1882)

7.1 Introduction

In the modern era of globalization, the role and rise of transnational actors have come to challenge the traditional approach to international relations dominated by a realist school with emphasis on state actors. The liberal approach advanced by theorists such, as Keohane and Nye seem to have gained popularity in the last decade with complex transnational connections and interdependence increasing while the use of military and power balancing is decreasing, though they remain important.

The drafters of the Code appears to subscribe to this theory given the fact that the Code envisions this transnational and interdependence cooperation even though the emphasis is on the region. This chapter explores the existing regional cooperative arrangements both political and military with a view to identifying potential avenues of synergy at the same time eliminating duplication of efforts in the pursuit of implementing the Code.

7.2 Short term strategy on containment

7.2.1 Shared Awareness and “De-confliction” (SHADE) mechanism

The SHADE mechanism was initiated in December 2008 by those nations and organizations involved in counter piracy in the Gulf of Aden and the Somali Basin with a purpose of conducting informal meetings to share best practices and de-conflict the activities of the players. Initially it was composed of Combined Maritime Force, NATO and EUNAVOR but was later expanded to include most of the Nations contributing naval assets including Japan, China Republic of South Korea and Russia.
The SHADE is credited with the establishment of the International Recommended Transit Corridor (IRTC) endorsed by IMO in July 2009. This corridor has been very effective in conducting escort missions of merchant ships and played a big role in reducing the pirate attacks in the Gulf in recent years.

The IMO short term strategy as articulated by the Secretary General in various forums including the speech for 2011 maritime day remains containment and thwarting of pirate attacks at sea. This can only be accomplished by use of naval vessels deployed at sea making this grouping of now expanded 22 countries the most ideal partner for the time being. It should also be noted that the mechanism holds monthly meetings where issues affecting their operations are discussed. IMO is represented in these monthly meeting hence has the opportunity of articulating the Organization and the Code strategies as far as Djibouti Code is concerned.

7.2.2 Adoption of the Best Management Practice (BMP)

The best management practices were developed by the CGPS working group 3 chaired by the United States and comprising of some member States and the industry. This set of practices was meant to assist ships to avoid or delay attacks while transiting in defined high risk areas. The advice entails advising ships to register with UKMTO and the MSC-HOA security information center to following the (IRTC). Other measures included are ship protection and deterrent measures deemed appropriate in reducing vulnerability of the ship.

The practices cover areas such as pre planning stage, where it recommends a thorough risk assessments based on the piracy activity information from various sources listed in the handbook. The risk analysis should identify among other things measures for prevention, mitigation and recovery. It should also be noted that these guidelines includes advice on use of Private Contracted Armed Security personnel PCASPs despite the fact that the industry has not supported their use on long term. The Djibouti Code
States could adopt recommendatory measures based on these best practices in their role as Flag and Port States.

7.2.3 The Combined Joint Task Force –Horn of Africa (CJTF-HOA)

This US combined Task Force was established in November 2002 operating aboard USS *Mount Whitney* arriving in the Horn of Africa December 2002 and transitioned ashore to Camp Lemonnier in Djibouti in May 2003. The creation of this Task force followed the invasion of the US and UK of Afghanistan and Iraq at the beginning of the Global War on Terrorism (GWOT) to capture Osama Bin Laden and destroy Al Qaeda. Initially under the CENTCOM its mission was to capture terrorists who could flood the Horn of Africa from the Middle East.

The CJTF-HOA Area of Responsibility (AOR) includes the countries of Kenya, Somalia, Ethiopia, Sudan, Eritrea, Djibouti and Seychelles with a further interest being Yemen, Tanzania, Mauritius, Madagascar, Mozambique, Burundi, Rwanda, Comoros, Chad, the Democratic Republic of Congo and Uganda.

This Task Force mission has however evolved to conducting operations in the combined joint operation area to enhance partner nation’s capacity, promote regional security and stability, dissuade conflict and protect US and Coalition interest. The future plans based on a committee report to Congress (2011-2012) indicates a mission with a long term objective in the region making it a preferred partner in the realization of the Code objective.

7.3 Midterm strategy on capacity building

7.3.1 Maritime Safety and Security related cooperative arrangements

The IMO has been involved in maritime security issues with one of its committee the Maritime Safety Committee (MSC) having a permanent agenda on piracy. The adoption of both hard and soft law frameworks on safety of navigation such as the SUA
convention and the ISPS Code in 2002 and numerous recommendations makes the organization a central player in maritime security issues. The ongoing work of the MSC on recommendations on use of Privately Contracted Armed Security Personnel (PCASP) on board ships is an indicator of dynamism and expertise possessed by the Organization. This makes the organizations existing arrangement the preferred choice among other regional arrangements.

The role of Port State Control (PSC) is hailed as one of the major achievements of IMO in ridding the industry of unseaworthy ships. This arrangement is replicated in most regions following the signing of Paris Memorandum of Understanding by mostly European region. The Indian Ocean region is covered by the Indian Ocean Memorandum of understanding on Port State Control (IOMoU) with current membership of 19. Most of these members are signatory to the Code with exceptions of Australia, India, Myanmar, and Sri Lanka. The rest of the 15 members are eligible members of the Djibouti Code. Members of Djibouti Code who are not members of IOMoU are Egypt, Ethiopia, Jordan, Saudi Arabia and United Arab Emirate (UAE).

**Table 7: Venn illustration diagram, Djibouti Code of Conduct and IOMoU**

![Venn diagram]

Figure: 7

Source: Djibouti Code of Conduct; Indian Ocean Memorandum of understanding
In evaluating how this MoU can be incorporated into the anti-piracy roles, a product-market strategy business model developed by Igor Ansoff (1918-2002) is used.

Table 8: Anti-Piracy growth strategy matrix

<table>
<thead>
<tr>
<th></th>
<th>Existing (PSC)</th>
<th>New (Anti-Piracy)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Existing IOMoU Members</td>
<td>Penetration</td>
<td>Development</td>
</tr>
<tr>
<td>New Djibouti Members</td>
<td>Development</td>
<td>Diversification</td>
</tr>
</tbody>
</table>

Figure 8


On applying the market penetration concept, Ansoff considers measures such as increase of market share of current products. In this case, the IOMoU could extend to those countries in the Indian and Gulf region who are not members such as Egypt and other Mediterranean countries granting them observer status. Other means of achieving this penetration strategy would include securing dominance of the existing PSC measures by
aggressive campaigns and increasing the port state control inspections of the member
countries.

The product and market development would include introduction of anti-piracy
measures within the PSC regime and in particular those inspections related to the ISPS
Code. Measures as those developed in the Best Management Practices could be
incorporated in the inspections to ensure these ships operating in the region are
complying with the recommendations and have these copies on board as part of the anti-
piracy kit. This strategy can also see the members adopt a common policy on ships using
PCASP when calling on member ports to avoid possible detentions which could arise
through their presence on board. The fourth strategy of the market diversification cited
as the most risky by market strategist would be to introduce these anti-piracy measures
to other regions such as the neighboring Riyadh MoU.

7.3.2 Security cooperative arrangement: The East Africa Standby Force
The EASF is part of the five regional forces under the African Union Standby Force
with its headquarters in Addis Ababa. This standby force draw its mandate under the
United Nations Charter Chapter VII on maintenance of peace and the African Union
Peace and Security Commission Protocol on Peace and Security adopted in May 2003 in
Addis Ababa. The EASF covers 13 countries in the horn of Africa which includes 10
Djibouti Code participants namely Comoros, Djibouti, Eritrea, Ethiopia, Kenya,
Madagascar, Mauritius, Seychelles, Somalia and Sudan. The three members not part of
the Code are Burundi, Rwanda and Uganda. It should be noted that Uganda and Burundi
have contributed troops in the AU peace keeping mission in Somalia.

The EASF has a standby brigade arrangement, the East Africa Brigade (EASBRIG)
which comprises a full time planning element (PLANELM) based in Nairobi, Kenya
comprising 15 staff members drawn from civilian police and the military and a further
list of brigade staff on call in member states. The brigade has units which are on standby
in the member states and are subject to verification visit by PLANELM to identify standards and shortfalls. This force carried out a joint field training exercise “AMANI CARANA” in Djibouti in November 2009, which tested the application of principles of the peace support operation doctrine in a failed state “CARANA”

EASBRIG enjoys support of the regional countries through the regional economic and political body of Intergovernmental Authority on Development (IGAD) and has already attracted funding from European countries such as the UK under the peace support mission, the Netherlands and Norway who also have funded a consultative work on incorporating a naval component of the force by the year 2015. The IMO and the PIU through the Regional office based in Nairobi could partner with the PLANELM in areas of training of personnel from this organization who has considerable potential as a long term substitute for the current deployed naval forces on the expiry of their mandate.

**Table 9: Venn illustration of Djibouti Code members and EASBRIG**

![Venn Diagram](image)

**Figure 9**

7.3.3 Africa Union Mission in Somalia (AMISOM)

The African Union Mission in Somalia (AMISOM) was established following an African Union Peace and Security Commission decision in 2007 to assist the Transitional Federal Government (TFG) of Somalia to consolidate its position after the withdrawal of Ethiopian troops in the same year. This force which to date total up to 8,000 troops comprises of 9 infantry battalions and support staff. The mandate of AMISOM is to conduct peace and support operations in Somalia, to stabilize the situation and create conditions for the conduct of humanitarian activities by protecting the Transitional Federal Institutions (TFI). The mission has been extended to 31 August 2012 a projected time for handing over to the United Nations in accordance with the force concept of operation.

This is the only unit inside Somalia with the law enforcement capability which IMO could incorporate in the attainment of its midterm strategy of undermining organized criminal elements by denying them access to their operational bases both on land and along the coast where hijacked ships are anchored awaiting ransom negotiations. The force is set to get additional 3,000 troops in December 2011 according to Wafula Wamunyinyi the deputy special representative of the chairperson of the African Union Commission. This will boost the force in consolidating the positions they have been holding in Mogadishu and the outlying areas after driving the Al-Shabaab militias linked to Al Qaeda terrorist group in August. Priority could be given to those areas currently perceived as pirate strongholds of Hardhere, Macca, Eyl and Hobyo in the next phase of expansion of AMISOM to new areas of operation.

7.4 Long term strategy

7.4.1 The East and South Africa-Indian Ocean (ESA-IO) Strategy

The ESA-IO regional strategy action plan for 2010 was adopted by the second regional ministerial meeting on piracy and maritime security held in Mauritius 2010. The regional...
strategy has three pillars with the first pillar being the development and implementation of the Somali action plan by IGAD, encouraging states in the region to carry out prosecution of pirates and strengthening of regional capacity to secure their maritime zones. The secretariat is composed of Inter-Regional Coordination Committee (IRCC) which consists of Common Market for Easter and Southern Africa (COMESA), Indian Ocean Commission (IOC) Southern Africa Development Community (SADC) and EU.

The pillars of this organization are similar to the objectives of the Djibouti Code, hence the need to partner with this group particular on the implementation on the first pillar on the Somali action plan where the focus is on inter Somali dialogue, reconstruction of key Somali institution and dialogue with international community to mobilize resources to revive growth of economic activities which are key to provision of alternative livelihood not fully covered in the Djibouti Code as part of the long term solution.

7.4.2 South West Indian Fisheries Commission (SWIFCO)

SWIFCO was established in 2004 by the Food and Agriculture Organization (FAO), a United Nations body charged with a mandate to promote sustainable utilization of marine resources in the region of South West Indian Ocean. The members of the commission are the Comoros, France, Kenya, Madagascar, Maldives, Mauritius Mozambique, the Seychelles, Somalia, South Africa Tanzania and Yemen who are all participants of the Djibouti Code.

In executing its functions in the region such as assisting fishery managers in the development and implementation of fishery management systems, the commission provides an opportunity to revive the fishing sector in Somalia, which is a key economic lifeline of the Somali fishing community destroyed by successive years of illegal and unregulated fishing. The commission could also assist the fishing community to accessing markets for their catches.
7.5 Conclusion

The chapter has identified a group of players considered central in partnership and providing the necessary synergy in the restoration of sanity in Somalia and the adjacent maritime areas. In a congested field of multiple players, there exist a challenge to this synergy which may result to duplication of efforts leading to waste of scarce resources and hence the need for the movers of Djibouti Code to embrace an approach which focus on partnership in reppression of piracy in the region in all aspects of a short, medium and long term strategy.
Chapter 8
Discussions and Conclusions

8.1 Piracy criminal acts

Piracy criminal acts remain a threat to shipping and freedom of navigation with statistics showing that there were 22 ships held with 462 seafarers awaiting payment of ransom in deplorable conditions in Somalia in July 2011 (IMO, 2011). The economic cost of piracy is estimated to be between $7 to $12 billion to the industry with considerable human cost through death, torture and psychological trauma on captured seafarers and their families (Bowden 2010, ITF 2011).

The piracy business model points to the role played by sea gangs as contributing to 40%, leaving the remaining 60% to the shore based organizers who comprise the sponsors cum investors and shore security. Efforts must be geared to tackling the shore organizers, who are fueling the piracy at sea, through reinvestment of ransom money in recruitment of youths including juveniles and supplying the logistics enabling the pirates to extend their range of operations.

Somali pirates’ mode of operation involves forcefully boarding a ship, commandeer it to Somali coast and then demand ransom to release the captured seafarers. The hostage taking of two tourists in the neighboring Kenya resorts located more than 60nm using speedboats and the hijacking of *MT Fairchem Bogey* after it disembarked the PCASP is a pointer to the changing tactics of the pirates in their attempt to beat the measures adopted by international navies at sea and the industry. As long as the reward for ransom payment exceeds the risks associated, there will be new recruits willing to engage in these criminal acts. Measures should be adopted aimed at increasing probability of detection, capture and conviction to dissuade would-be pirates.

The case of South East Asia shows that the pirate attacks went down after the littoral states carried out joint operations and signed the ReCAAP. The Djibouti Code holds the
potential of bringing down these acts, but requires revival of governance institutions in Somalia to establish a rule of law and deny the pirates and militant groups such as Al Shabaab operating bases on land.

8.2 Regional cooperation mechanism-text analysis.

The setting of the Code text was influenced by UNSC Resolutions 1816 (2008), 1838 (2008) and 1846 (2008) on Somalia, which stand out as the most progressing resolutions in the fight against Somali pirates and credited with mobilizing one of the largest flotilla in modern time on maritime law enforcement with up to 32 ships deployed in the region. The invocation of Chapter VII of the UN Charter by the UNSC is a further indication of the political support given to the problem of piracy in the region.

The concept of the main articles is based on existing practices elsewhere with the information sharing mechanism having contributed to a reduction of piracy incidents in South East Asia. In the region there existing information sharing centers, such as UKMTO, NATO Security Center and EEU MSC-HOA who have been instrumental in coordinating escorts and military interventions. On review of national legislation, successful prosecution have been instituted following the enactment of the Kenya Merchant Shipping Act (2009), an indication that the article once implemented by other participants will enable prosecution to be instituted and concluded.

The Code is still not binding despite the fact that the participants intended to have a binding instrument by January 2011. This has however not impacted on the implementation of the Code. The process to a binding instrument will need careful consideration of some aspects such as regional leadership, hegemonic stability factor and regional state interest cited as key to any international cooperation by the realist school of international relations. The case of Malaysia and Indonesia having not signed to ReCAAP should serve as a lesson as participants move to the next level of a binding agreement.
8.3 Embarkation of Law enforcement officers

The research established that this concept though key to overcoming prosecutorial challenges faced by the navies deployed has not been realized. The reasons point to the fact that these agreements are bilateral and specific and have political considerations such as reciprocity and sovereignty which may be subject to protracted diplomatic negotiations before conclusion.

The countries contributing naval assets in the region are not eligible participants to the Code with an exception of France, which has also not signed the Code despite having contributed to the IMO Trust Fund. This leaves the regional countries with the role of only providing the law enforcement officers to host countries willing to embark them on board which further restricts the realization of the concept.

There are reservations from legal point of view on the use of the “shipriders” in the high seas as this has been cited to contradict the principle of one ship one flag rule in UNCLOS and further conflicts article 107 which requires the arresting government vessel to be clearly marked. This argument restricts the use of the “shipriders” to the territorial seas of the embarked law enforcement officer.

8.4 Information sharing mechanism

The research found that there exist sufficient systems and technologies both in the shipping industry and in the field of maritime domain awareness which could be adopted for use in the attainment of this article of the Code. The system could be based on IMO approved basic communications systems in SOLAS to benefit from the performance standard criteria already established.

The Naval forces operating in the region have established a web based piracy information sharing centers which includes the NATO Security Center and EU MSC-HOA where ships gain access to the latest piracy information and alerts. The website enables ships to register their movements electronically. The implementers could
explore the possibility of complementing these existing systems by linking them with the regional piracy information centers. Considerations should be made to the fact that the forces information centers are tied up to the mission of the task force and are subject to expire in December 2012. These services could be taken over by the regional piracy information centers on the occasion that the mission is discontinued.

8.5 Review of Regional National Legislations
The research established that the international law on repressing piracy and armed robbery as codified in UNCLOS and SUA are sufficient in addressing piracy. The municipal laws of the regional states and the procedures are, however, the ones which determine whether a country has sufficient jurisdiction to prosecute persons accused of committing piracy at high seas or territorial waters of a failed state.

The nexus clause in the execution of universal jurisdiction is found to be retrogressive in the modern shipping business practice. This is complicated by the wider number of stakeholders involved in a single business venture who represent ship owners, seafarers, insurers, Flag states, business managers and others. The concluded pirate cases in Kenya proved that the universal jurisdiction established under UNCLOS is sufficient and adequate in carrying out prosecution of pirates arrested by third parties.

The capacity for correctional facilities in the regional countries carrying out pirate trials is a factor, which if not solved, may see the countries become reluctant in accepting arrested pirates. This could be solved by having prison transfer arrangements in the region which would ease the burden for the prosecuting countries by having the convicted pirates serve their sentences in a third state party. However, this requires elaborate bilateral arrangements on extradition of pirates which has to address some fundamental issues such as reciprocity, human rights, constitutional guarantees and death sentences contained in some jurisdictions.
In June 2011 the Working Group 2 of CGPCS estimated that there are close to 1000 pirates either convicted or going on trial in 20 countries. This means that there exist sufficient case laws which could be used to influence the course of review of the Code Participants’ national legislation.

8.6 Avenues for synergy

There exist players in the region who are currently involved in the activities of repressing piracy in the region both at sea and land. This paper finds the SHADE mechanism the most appropriate partner in the attainment of short term goal of containment of piracy. The industry guidance through the Best Management Practices for Protection against Somalia based Piracy (BMP), now in its 4th edition, has also been established as having an effect in reducing the successful pirate attacks in many cases hence its incorporation in the short term could be considered.

The EASBRIG mechanism of the East Africa Standby Force has the potential of stabilizing the region owing to its wide regional participation and its strategic plan for incorporation of a naval component of the regions Standby force by 2015. This regional military alliance can be an alternative to the Combined Maritime Forces operating in the region once their mandate expires.

The revival of economic institutions alongside the political institutions in Somalia holds a key to provision of alternative livelihood. UNODC has been involved in rebuilding of prison facilities both in Puntland, Somaliland and Somalia. Similar efforts could be instituted to revive the fishing sector in the long term to dissuade the fisher folk community from becoming pirates. The establishment of Somalia maritime zones could be prioritized to provide for territorial jurisdiction and Economic Exploitation Zone to enable the government to manage the fishing industry and earn revenue through licensing regime.
8.7 Conclusions

The following International organizations are core to the realization of the Djibouti Code of Conduct. The United Nations, through the UNSC whose mandate of preservation of peace can be invoked to revive law and order in Somalia and continued deployment of Military assets in the region, the UNDP, who have the capacity to provide alternative livelihood to Somalia through its development role and the UNODC which has been rebuilding incarceration facilities inside Somalia.

Member States have a duty to protect ships flying their flags and their citizen who serve under these Flags. UNCLOS also obligates states to cooperate to the fullest possible extend in repression of piracy on the high seas. This research concludes that the following States have a stake in the fight against piracy, The US through its policy on Global War on Terror and its program on Maritime Domain Awareness, France through its territories in the Indian Ocean, Kenya Ethiopia and Djibouti who are neighboring States to the failed State of Somalia and whose national security is threatened by the lawlessness State of Somalia.

The industry which bears the brunt of piracy should keep pressure on the state actors to attract the political will required to protect the vital industry and guarantee the freedom of navigation in the high seas. The industry could also embrace the best management practices and carry out appropriate risk assessments while operating in these high risk areas.

The IMO roles in the attainment of the overall objective of the Djibouti Code remain core and require concentrated effort and engagement with the international community, Member States and the industry beyond its traditional mandate of safer ships on cleaner oceans. This call for adoption of dynamic and proactive strategies such as 2011 year’s theme, “piracy: orchestrating response”.
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APPENDIX: 1

ANNEX

CODE OF CONDUCT
CONCERNING THE REPRESSSION
OF PIRACY AND ARMED ROBBERY AGAINST SHIPS
IN THE WESTERN INDIAN OCEAN AND THE GULF OF ADEN

The Governments of Comoros, Djibouti, Egypt, Eritrea, Ethiopia, France, Jordan, Kenya, Madagascar, Maldives, Mauritius, Mozambique, Oman, Saudi Arabia, Seychelles, Somalia, South Africa, Sudan, the United Arab Emirates, the United Republic of Tanzania and Yemen (hereinafter referred to as “the Participants”),

DEEPLY CONCERNED about the crimes of piracy and armed robbery against ships in the Western Indian Ocean and the Gulf of Aden and the grave dangers to the safety and security of persons and ships at sea and to the protection of the marine environment arising from such acts;

REAFFIRMING that international law, as reflected in UNCLOS, sets out the legal framework applicable to combating piracy and armed robbery at sea;

NOTING that the Assembly of the International Maritime Organization (hereinafter referred to as “IMO”), at its twenty-fifth regular session, adopted, on 27 November 2007, resolution A.1002(25) on Piracy and armed robbery against ships in waters off the coast of Somalia which, among other things, called upon Governments in the region to conclude, in cooperation with IMO, and implement, as soon as possible, a regional agreement to prevent, deter and suppress piracy and armed robbery against ships;

NOTING ALSO that the General Assembly of the United Nations, at its sixth-third session, adopted, on 5 December 2008, resolution 63/111 on Ocean and the law of the sea which amongst others:

- recognizes the crucial role of international cooperation at the global, regional, sub-regional and bilateral levels in combating, in accordance with international law, threats to maritime security, including piracy, armed robbery at sea, terrorist acts against shipping, offshore installations and other maritime interests, through bilateral and multilateral instruments and mechanisms aimed at monitoring, preventing and responding to such threats, the enhanced sharing of information among States relevant to the detection, prevention and suppression of such threats, the prosecution of offenders with due regard to national legislation and the need for sustained capacity-building to support such objectives;

- emphasizes the importance of prompt reporting of incidents to enable accurate information on the scope of the problem of piracy and armed robbery against ships and, in the case of armed robbery against ships, by affected vessels to the coastal State, underlines the importance of effective information-sharing with States potentially affected by incidents of piracy and armed robbery against ships, and takes note of the important role of the IMO;
- calls upon States to take appropriate steps under their national law to facilitate the apprehension and prosecution of those who are alleged to have committed acts of piracy;

- urges all States, in cooperation with the IMO, to actively combat piracy and armed robbery at sea by adopting measures, including those relating to assistance with capacity-building through training of seafarers, port staff and enforcement personnel in the prevention, reporting and investigation of incidents, bringing the alleged perpetrators to justice, in accordance with international law, and by adopting national legislation, as well as providing enforcement vessels and equipment and guarding against fraudulent ship registration;

- welcomes the significant decrease in the number of attacks by pirates and armed robbers in the Asian region through increased national, bilateral and trilateral initiatives as well as regional cooperative mechanisms, and calls upon other States to give immediate attention to adopting, concluding and implementing cooperation agreements on combating piracy and armed robbery against ships at the regional level;

- expresses serious concern regarding the problem of increased instances of piracy and armed robbery at sea off the coast of Somalia, expresses alarm in particular at the recent hijacking of vessels, supports the recent efforts to address this problem at the global and regional levels, notes the adoption by the Security Council of the United Nations of resolutions 1816 (2008) of 2 June 2008 and 1838 (2008) of 7 October 2008, and also notes that the authorization in resolution 1816 (2008) and the provisions in resolution 1838 (2008) apply only to the situation in Somalia and do not affect the rights, obligations or responsibilities of Member States of the United Nations under international law, including any rights or obligations under the United Nations Convention on the Law of the Sea (hereinafter referred to as “UNCLOS”), with respect to any other situation, and underscores in particular that they are not to be considered as establishing customary international law;

- notes the initiatives of the Secretary-General of the IMO, following up on resolution A.1002(25) to engage the international community in efforts to combat acts of piracy and armed robbery against ships sailing the waters off the coast of Somalia; and

- urges States to ensure the full implementation of resolution A.1002(25) on acts of piracy and armed robbery against ships in waters off the coast of Somalia;

NOTING FURTHER that the Security Council of the United Nations has adopted resolutions 1816 (2008), 1838 (2008), 1846 (2008) and 1851 (2008) in relation to piracy and armed robbery in waters off the coast of Somalia,

RECALLING the Assembly of IMO, at its twenty-second regular session, adopted, on 29 November 2001, resolution A.922(22) on the Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery against Ships which amongst others invited Governments to develop, as appropriate, agreements and procedures to facilitate co-operation in applying efficient and effective measures to prevent acts of piracy and armed robbery against ships;

TAKING INTO ACCOUNT the Special measures to enhance maritime security adopted on 12 December 2002 by the Conference of Contracting Governments to the International
Convention for the Safety of Life at Sea, 1974 as amended, including the International Ship and Port Facility Security Code;

INSPIRED by the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia adopted in Tokyo, Japan on 11 November 2004;

RECOGNIZING the urgent need to devise and adopt effective and practical measures for the suppression of piracy and armed robbery against ships;

RECALLING that the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (hereinafter referred to as “SUA Convention”) provides for parties to create criminal offences, establish jurisdiction, and accept delivery or persons responsible for or suspected of seizing or exercising control over a ship by force or threat thereof or any other form of intimidation;

DESIRING to promote greater regional co-operation between the Participants, and thereby enhance their effectiveness, in the prevention, interdiction, prosecution, and punishment of those persons engaging in piracy and armed robbery against ships on the basis of mutual respect for the sovereignty, sovereign rights, sovereign equality, jurisdiction, and territorial integrity of States;

WELCOMING the initiatives of IMO, the United Nations Office on Drugs and Crime, the United Nations Development Programme, European Commission, League of Arab States, and other relevant international entities to provide training, technical assistance and other forms of capacity building to assist Governments, upon request, to adopt and implement practical measures to apprehend and prosecute those persons engaging in piracy and armed robbery against ships;

WELCOMING the creation in New York on 14 January 2009 of the Contact Group on Piracy off the coast of Somalia which will help mobilise and co-ordinate contributions to international efforts in the fight against piracy and armed robbery against ships in the waters off the coast of Somalia, pursuant to United Nations Security Council resolution 1851(2008);

NOTING FURTHER the need for a comprehensive approach to address the poverty and instability that create conditions conducive to piracy, which includes strategies for effective environmental conservation and fisheries management, and the need to address the possible environmental consequences of piracy;

Have agreed as follows:

**Article 1**

**Definitions**

For the purposes of this Code of conduct, unless the context otherwise requires:

1. “Piracy” consists of any of the following acts:
any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:

(i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;

(ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;

(b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;

(c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).

2. “Armed robbery against ships” consists of any of the following acts:

(a) 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 in subparagraph (a).

3. “Secretary-General” means the Secretary-General of the International Maritime Organization.

Article 2
Purpose and Scope

1. Consistent with their available resources and related priorities, their respective national laws and regulations, and applicable rules of international law, the Participants intend to cooperate to the fullest possible extent in the repression of piracy and armed robbery against ships with a view towards:

(a) sharing and reporting relevant information;

(b) interdicting ships and/or aircraft suspected of engaging in piracy or armed robbery against ships;

(c) ensuring that persons committing or attempting to commit piracy or armed robbery against ships are apprehended and prosecuted; and

(d) facilitating proper care, treatment, and repatriation for seafarers, fishermen, other shipboard personnel and passengers subject to piracy or armed robbery against ships, particularly those who have been subjected to violence.
2. The Participants intend this Code of conduct to be applicable in relation to piracy and armed robbery in the Western Indian Ocean and the Gulf of Aden.

Article 3

Protection Measures for Ships

The Participants intend to encourage States, ship owners, and ship operators, where appropriate, to take protective measures against piracy and armed robbery against ships, taking into account the relevant international standards and practices, and, in particular, recommendations\(^1\) adopted by IMO.

Article 4

Measures to Repress Piracy

1. The provisions of this Article are intended to apply only to piracy.

2. For purposes of this Article and of Article 10, “pirate ship” means a ship intended by the persons in dominant control to be used for the purpose of committing piracy, or if the ship has been used to commit any such act, so long as it remains under the control of those persons.

3. Consistent with Article 2, each Participant to the fullest possible extent intends to cooperate in:

   (a) arresting, investigating, and prosecuting persons who have committed piracy or are reasonably suspected of committing piracy;

   (b) seizing pirate ships and/or aircraft and the property on board such ships and/or aircraft; and

   (c) rescuing ships, persons, and property subject to piracy.

4. Any Participant may seize a pirate ship beyond the outer limit of any State’s territorial sea, and arrest the persons and seize the property on board.

5. Any pursuit of a ship, where there are reasonable grounds to suspect that the ship is engaged in piracy, extending in and over the territorial sea of a Participant is subject to the authority of that Participant. No Participant should pursue such a ship in or over the territory or territorial sea of any coastal State without the permission of that State.

6. Consistent with international law, the courts of the Participant which carries out a seizure pursuant to paragraph 4 may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ship or property, subject to the rights of third parties acting in good faith.

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\(^1\) MSC/Circ.822/Rev.1 on Recommendations to Governments for preventing and suppressing piracy and armed robbery against ships as it may be revised.

\(^2\) MSC/Circ.623/Rev.3 on Guidance to shipowners and ship operators, shipmasters and crews on preventing and suppressing acts of piracy and armed robbery against ships as it may be revised.
7. The Participant which carried out the seizure pursuant to paragraph 4 may, subject to its national laws, and in consultation with other interested entities, waive its primary right to exercise jurisdiction and authorize any other Participant to enforce its laws against the ship and/or persons on board.

8. Unless otherwise arranged by the affected Participants, any seizure made in the territorial sea of a Participant pursuant to paragraph 5 should be subject to the jurisdiction of that Participant.

**Article 5**

**Measures to Repress Armed Robbery against Ships**

1. The provisions of this Article are intended to apply only to armed robbery against ships.

2. The Participants intend for operations to suppress armed robbery against ships in the territorial sea and airspace of a Participant to be subject to the authority of that Participant, including in the case of hot pursuit from that Participant’s territorial sea or archipelagic waters in accordance with Article 111 of UNCLOS.

3. The Participants intend for their respective focal points and Centres (as designated pursuant to Article 8) to communicate expeditiously alerts, reports, and information related to armed robbery against ships to other Participants and interested parties.

**Article 6**

**Measures in All Cases**

1. The Participants intend that any measures taken pursuant to this Code of conduct should be carried out by law enforcement or other authorized officials from warships or military aircraft, or from other ships or aircraft clearly marked and identifiable as being in government service and authorized to that effect.

2. The Participants recognize that multiple States, including the flag State, State of suspected origin of the perpetrators, the State of nationality of persons on board the ship, and the State of ownership of cargo may have legitimate interests in cases arising pursuant to Articles 4 and 5. Therefore, the Participants intend to liaise and co-operate with such States and other stakeholders, and to coordinate such activities with each other to facilitate the rescue, interdiction, investigation, and prosecution.

3. The Participants intend, to the fullest possible extent, to conduct and support the conduct of investigations in cases of piracy and armed robbery against ships taking into account the relevant international standards and practices, and, in particular, recommendations\(^3\) adopted by IMO.

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\(^3\) Resolution A.922(22) on the Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery against Ships as it may be revised.
4. The Participants intend to co-operate to the fullest possible extent in medical and 
decedent affairs arising from operations in furtherance of the repression of piracy and armed 
robbery against ships.

Article 7

Embarked Officers

1. In furtherance of operations contemplated by this Code of conduct, a Participant may 
nominate law enforcement or other authorized officials (hereafter referred to as “the embarked 
oficers”) to embark in the patrol ships or aircraft of another Participant (hereafter referred to as 
“the host Participant”) as may be authorized by the host Participant.

2. The embarked officers may be armed in accordance with their national law and policy 
and the approval of the host Participant.

3. When embarked, the host Participant should facilitate communications between the 
embarked officers and their headquarters, and should provide messing and quarters for the 
embarked officers aboard the patrol ships or aircraft in a manner consistent with host Participant 
personnel of the same rank.

4. Embarked officers may assist the host Participant and conduct operations from the host 
Participant ship or aircraft if expressly requested to do so by the host Participant, and only in the 
manner requested. Such request may only be made, agreed to, and acted upon in a manner that is 
not prohibited by the laws and policies of both Participants.

Article 8

Coordination and Information Sharing

1. Each Participant should designate a national focal point to facilitate coordinated, timely, 
and effective information flow among the Participants consistent with the purpose and scope of 
this Code of conduct. In order to ensure coordinated, smooth, and effective communications 
between their designated focal points, the Participants intend to use the piracy information 
exchange centres Kenya, United Republic of Tanzania and Yemen (hereinafter referred to as “the 
Centres”). The Centres in Kenya and the United Republic of Tanzania will be situated in the 
maritime rescue co-ordination centre in Mombasa and the sub-regional co-ordination centre in 
Dar es Salaam, respectively. The Centre in Yemen will be situated in the regional maritime 
information centre to be established in Yemen based on the outcomes of the sub-regional 
meetings held by IMO in Sana’a in 2005 and Muscat in 2006 and Dar es Salaam. Each Centre 
and designated focal point should be capable of receiving and responding to alerts and requests 
for information or assistance at all times.

2. Each Participant intends to:

(a) declare and communicate to the other Participants its designated focal point at the 
time of signing this Code of conduct or as soon as possible after signing, and 
thereafter update the information as and when changes occur;
(b) provide and communicate to the other Participants the telephone numbers, telefax numbers, and e-mail addresses of its focal point, and, as appropriate, of its Centre and thereafter update the information as and when changes occur; and

(c) communicate to the Secretary-General the information referred to in subparagraphs (a) and (b) and thereafter update the information as and when changes occur.

3. Each Centre and focal point should be responsible for its communication with the other focal points and the Centres. Any focal point which has received or obtained information about an imminent threat of, or an incident of, piracy or armed robbery against ships should promptly disseminate an alert with all relevant information to the Centres. The Centres should disseminate appropriate alerts within their respective areas of responsibility regarding imminent threats or incidents to ships.

4. Each Participant should ensure the smooth and effective communication between its designated focal point, and other competent national authorities including search and rescue coordination centres, as well as relevant non-governmental organizations.

5. Each Participant should make every effort to require ships entitled to fly its flag and the owners and operators of such ships to promptly notify relevant national authorities, including the designated focal points and Centres, the appropriate search and rescue coordination centres and other relevant the contact points, of incidents of piracy or armed robbery against ships.

6. Each Participant intends, upon the request of any other Participant, to respect the confidentiality of information transmitted from a Participant.

7. To facilitate implementation of this Code of conduct, the Participants intend to keep each other fully informed concerning their respective applicable laws and guidance, particularly those pertaining to the interdiction, apprehension, investigation, prosecution, and disposition of persons involved in piracy and armed robbery against ships. The Participants may also undertake and seek assistance to undertake publication of handbooks and convening of seminars and conferences in furtherance of this Code of conduct.

**Article 9**

**Incident Reporting**

1. The Participants intend to undertake development of uniform reporting criteria in order to ensure that an accurate assessment of the threat of piracy and armed robbery in the Western Indian Ocean and the Gulf of Aden is developed taking into account the recommendations adopted by IMO. The Participants intend for the Centres to manage the collection and dissemination of this information in their respective geographic areas of responsibility.

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4 For example the Maritime Liaison Office Bahrain (MARLO), the United Kingdom Maritime Trade Office Dubai (UKMTO).

5 MSC/Circ.622/Rev.1 on Recommendations to Governments for preventing and suppressing piracy and armed robbery against ships as it may be revised.

6 MSC/Circ.623/Rev.3 on Guidance to shipowners and ship operators, shipmasters and crews on preventing and suppressing acts of piracy and armed robbery against ships as it may be revised.
2. Consistent with its laws and policies, a Participant conducting a boarding, investigation, prosecution, or judicial proceeding pursuant to this Code of conduct should promptly notify any affected flag and coastal States and the Secretary-General of the results.

3. The Participants intend for the Centres to:
   (a) collect, collate and analyze the information transmitted by the Participants concerning piracy and armed robbery against ships, including other relevant information relating to individuals and transnational organized criminal groups committing piracy and armed robbery against ships in their respective geographical areas of responsibility; and
   (b) prepare statistics and reports on the basis of the information gathered and analyzed under subparagraph (a), and to disseminate them to the Participants, the shipping community, and the Secretary-General.

Article 10
Assistance among Participants

1. A Participant may request any other Participant, through the Centres or directly, to co-operate in detecting any of the following persons, ships, or aircraft:
   (a) persons who have committed, or are reasonably suspected of committing, piracy;
   (b) persons who have committed, or are reasonably suspected of committing, armed robbery against ships;
   (c) pirate ships, where there are reasonable grounds to suspect that those ships are engaged in piracy; and
   (d) ships or persons who have been subjected to piracy or armed robbery against ships.

2. A Participant may also request any other Participant, through the Centres or directly, to take effective measures in response to reported piracy or armed robbery against ships.

3. Co-operative arrangements such as joint exercises or other forms of co-operation, as appropriate, may be undertaken as determined by the Participants concerned.

4. Capacity building co-operation may include technical assistance such as educational and training programmes to share experiences and best practice.

Article 11
Review of National Legislation

In order to allow for the prosecution, conviction and punishment of those involved in piracy or armed robbery against ships, and to facilitate extradition or handing over when prosecution is not possible, each Participant intends to review its national legislation with a view
towards ensuring that there are national laws in place to criminalize piracy and armed robbery against ships, and adequate guidelines for the exercise of jurisdiction, conduct of investigations, and prosecutions of alleged offenders.

**Article 12**

**Dispute Settlement**

The Participants intend to settle by consultation and peaceful means amongst each other any disputes that arise from the implementation of this Code of conduct.

**Article 13**

**Consultations**

Within two years of the effective date of this Code of conduct, and having designated the national focal points referred to in Article 8, the Participants intend to consult, with the assistance of IMO, with the aim of arriving at a binding agreement.

**Article 14**

**Claims**

Any claim for damages, injury or loss resulting from an operation carried out under this Code of conduct should be examined by the Participant whose authorities conducted the operation. If responsibility is established, the claim should be resolved in accordance with the national law of that Participant, and in a manner consistent with international law, including Article 106 and paragraph 3 of Article 110 of UNCLOS.

**Article 15**

**Miscellaneous Provisions**

Nothing in this Code of conduct is intended to:

(a) create or establish a binding agreement, except as noted in Article 13;

(b) affect in any way the rules of international law pertaining to the competence of States to exercise investigative or enforcement jurisdiction on board ships not flying their flag;

(c) affect the immunities of warships and other government ships operated for non-commercial purposes;

(d) apply to or limit boarding of ships conducted by any Participant in accordance with international law, beyond the outer limit of any State’s territorial sea, including boardings based upon the right of visit, the rendering of assistance to
persons, ships and property in distress or peril, or an authorization from the flag State to take law enforcement or other action;

(e) preclude the Participants from otherwise agreeing on operations or other forms of co-operation to repress piracy and armed robbery against ships;

(f) prevent the Participants from taking additional measures to repress piracy and armed robbery at sea through appropriate actions in their land territory;

(g) supersede any bilateral or multilateral agreement or other co-operative mechanism concluded by the Participants to repress piracy and armed robbery against ships;

(h) alter the rights and privileges due to any individual in any legal proceeding;

(i) create or establish any waiver of any rights that any Participant may have under international law to raise a claim with any other Participant through diplomatic channels;

(j) entitle a Participant to undertake in the territory of another Participant the exercise of jurisdiction and performance of functions which are exclusively reserved for the authorities of that other Participant by its national law;

(k) prejudice in any manner the positions and navigational rights and freedoms of any Participant regarding the international law of the sea;

(l) be deemed a waiver, express or implied, of any of the privileges and immunities of the Participants to this Code of conduct as provided under international or national law; or

(m) preclude or limit any Participant from requesting or granting assistance in accordance with the provisions of any applicable Mutual Legal Assistance Agreement or similar instrument.

Article 16

Signature and Effective Date

1. The Code of conduct is open for signature by Participants on 29 January 2009 and at the Headquarters of IMO from 1 February 2009.

2. The Code of conduct will become effective upon the date of signature by two or more Participants and effective for subsequent Participants upon their respective date of deposit of a signature instrument with the Secretary-General.
Article 17

Languages

This Code of conduct is established in the Arabic, English and French languages, each text being equally authentic.

DONE in Djibouti this twenty-ninth day of January two thousand and nine.

IN WITNESS WHEREOF the undersigned, being duly authorized by their respective Governments for that purpose, have signed this Code of conduct.

S Signed (signatures omitted) in Djibouti on 29 January 2009 by Djibouti, Ethiopia, Kenya, Madagascar, Maldives, Seychelles, Somalia, United Republic of Tanzania and Yemen.