

**Security Council Debate on the Secretary-General's
report requested in resolution 1918 (2010)**

25 August 2010

**Opening remarks by Ms. Patricia O'Brien
Under-Secretary-General for Legal Affairs
The Legal Counsel**

Thank you Mr. President,

I am delighted that the Secretary-General is here this morning and I am honoured to have this opportunity to present the report on his behalf.

Before introducing the report, I wish to endorse the views expressed here this morning by the Secretary-General. He has painted a very clear and stark picture of the situation off the coast of Somalia and the wider implications of piracy in the region.

As many of us know, the Secretary-General has been consistently advocating for the international community to counter piracy and to respond in the most coherent way possible. The Secretary-General has never shied away from the problem despite the complexity and the challenges which it poses. He has pressed the UN and other international organisations to do more to contribute to a solution. He takes every opportunity he can at internal senior management meetings to maintain momentum. In my own case, he dispatched me on a mission to Kenya as far back as March of last year to discuss the issue with the Kenyan authorities and to engage with the UN offices active on the ground. Additionally, he strongly supported the informal meeting of the General Assembly on Piracy in May this year, and he ensured

that piracy was an important part of the discussion at the UN Istanbul Conference on Somalia in May.

For my Office, the piracy dossier is an active and important one. This is how it should be. The human cost of piracy off the coast of Somalia is incalculable, with killings and widespread hostage-taking of sailors whose daily jobs are already filled with risk. The commercial cost is also very high. The problem clearly demonstrates the increasing interdependence of States and people in a globalised world. The number and diversity of States and organisations with a stake in finding a solution provides strong evidence of this, with human welfare, and commercial and security interests under threat.

Against this background, the Secretary-General's seven options are a very timely and important basis for Security Council consideration. The report has had input from my Office, UNODC, DPA, UNDP and other UN offices. In responding to the Security Council's request in resolution 1918 (2010), we have taken into account UN practice in establishing and assisting criminal tribunals, experience from non-UN tribunals, such as the War Crimes Chamber of Bosnia and Herzegovina, and the work of the Contact Group on piracy off the coast of Somalia.

In introducing the report, I hope the Security Council would find it useful for me briefly to set out the international legal framework applicable to piracy. I believe that this legal context is instructive and that it provides an important backdrop for the options identified in the report, which I will then describe in a little more detail

The international legal framework

The legal framework for the repression of piracy under international law is set out in the 1982 UN Convention on the Law of the Sea (UNCLOS), which also reflects customary international law. Other instruments, such as the

1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (“the SUA Convention”), may also be relevant to combating piracy since some elements of the act of piracy may also constitute offences under such instruments.

In the context of Somalia, the legal regime is complemented by a number of Security Council resolutions. The Djibouti Code of Conduct concerning the repression of piracy and armed robbery against ships in the Western Indian Ocean and the Gulf of Aden is also an important vehicle for cooperation among regional States.

Piracy, as defined in UNCLOS, includes any illegal act of violence detention or depredation committed for private ends by the crew or passengers of a private ship against another ship, or persons or property on board that ship. It is a crime which can only be committed on the high seas or in the Exclusive Economic Zone (EEZ) of a State. In other words, it is committed outside the territorial sea.

UNCLOS and customary international law provide for universal jurisdiction over acts of piracy. That is, all States are entitled to exercise criminal jurisdiction over acts of piracy, no matter where they occur, and no matter what the nationality of the suspect or the victim. No connection between the prosecuting State and the act of piracy is required. It is the broadest possible legal basis for States to exercise jurisdiction under international law. Any State may seize a pirate ship or a ship under the control of pirates, any State may arrest the suspects, and any State may prosecute them.

On the other hand, the crimes of “armed robbery at sea” or “armed robbery against ships” have the same elements as piracy, but are committed within the territorial sea of a State. These crimes are generally within the jurisdiction only of the territorial State, although this regime has been

modified to an extent with respect to piracy occurring within the territorial sea of Somalia by a series of resolutions of this body.

In the repression of piracy, States remain bound by other applicable rules of international law. Clearly, apprehension, detention, prosecution and imprisonment must all take place in accordance with a State's international human rights and other obligations.

The options identified in the Secretary-General's report

The Secretary-General has identified seven options for furthering the aim of prosecuting and imprisoning persons responsible for acts of piracy and armed robbery at sea.

Before describing these options, I should underline some of the important preliminary matters that the Secretary-General identified in his introduction.

First, in the absence of a host State for a potential judicial mechanism, the report analyses the options in a general way, setting out the advantages and disadvantages of each, as well as information related to the time and resources necessary to achieve and sustain substantive results.

To assess the feasibility of any of these options would require dialogue with an identified host State to determine its wishes and needs, and to determine what form UN participation could most effectively take.

Second, given the large number of suspects being detained at sea by naval forces, it is clear that putting in place adequate prison arrangements is equally as important as considering the options for prosecution.

It is only fair to say that the potential size of the piracy-related prison population and the fact that most of the suspects are not nationals of the

prosecuting States, contributes to the difficulties associated with finding a potential host State.

Third, the Council's request emphasises the important goal of achieving and sustaining substantive results. The challenges in achieving this goal would include the large number of suspects, the fact that any judicial mechanism would be addressing a symptom of the situation in Somalia, not its causes, and the lack of any defined completion date for the mechanism's work. It is for these reasons that sufficient political and financial commitment by States would be necessary, not only to establish a new mechanism, but also to sustain it.

Turning to the options set out in the report, the first is one that is already on-going through the work of UNODC, UNDP and others to assist prosecutions and imprisonment in regional States. In the report, we identify a number of actions which the Security Council may wish to consider to enhance the important role that the UN is already playing.

Option 2 draws on the example of the Lockerbie Court. That is, it would involve the establishment of a Somali Court applying Somali law, sitting in the territory of another regional State. This would certainly require assistance from UNODC and others, and would enable Somalia to play a direct part in efforts to counter piracy.

However, as underlined in discussions in the Working Group on Legal Issues in the Contact Group, the Somali judicial system faces a number of challenges, and this option may therefore be one for the future rather than the present.

Options 3 and 4 involve special chambers embedded in a national jurisdiction. The distinction is that Option 3 would be a purely national court, whereas

Option 4 would be a national court with international participation, perhaps in the form of UN selected judges sitting with national judges.

Option 5 would consist of a regional tribunal, and therefore would not be embedded within the national jurisdiction of a State. This would be a new jurisdiction requiring an agreement or statute to establish the crimes. What is not clear, of course, is whether a group of regional States cooperating to establish such a tribunal would want or need UN assistance, or participation by UN selected judges.

Option 6 would be a tribunal on the lines of the Sierra Leone and Lebanon tribunals. That is, it would be an international tribunal with participation by national judges and prosecutors. This Option perhaps demonstrates most clearly why the report says that any of the judicial mechanisms identified would be different to the existing tribunals.

The Sierra Leone and Lebanon tribunals were established by the UN in partnership with the affected States. In other words, these tribunals were established with the States which had been affected by serious international crimes and acts of terrorism, but were unable to prosecute them nationally. We need to bear in mind that a tribunal established under Option 6, or indeed, under any of the options in the report, would not address the situation in Somalia, other than with respect to piracy, and would thus not be analogous to the existing tribunals.

Option 7 would involve the establishment of an international tribunal under Chapter VII of the UN Charter by the Security Council. Important questions under this Option would include whether such tribunal should be established in the region, and whether it should include regional judges to the extent possible.

Finally, a brief word about the process. Any of these options which involves the establishment of a new judicial mechanism with UN participation would require a mandate for the Secretary-General. This mandate has usually been given in the form of a Security Council resolution requesting the Secretary-General to negotiate a suitable agreement with the State concerned. This has been followed by negotiations conducted by the Legal Counsel on behalf of the Secretary-General, and a report to the Security Council setting out the recommended judicial mechanism. In the case of a Chapter VII resolution, the Council would, of course, establish the tribunal directly itself, and request the Secretary-General to take the necessary steps for the tribunal to function.

Thank you Mr. President. I am looking forward to the debate and would be happy to take any questions.