

SOMALI PIRACY AND INTERNATIONAL LAW: SOME ASPECTS

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Piracy is a crime under international law and some municipal laws. Although it prominently features as a crime under existing Law of the Sea instruments, the advent of Somali piracy has demonstrated that some aspects of it are not properly addressed. The Security Council, the EU and indeed the major powers are actively engaged in stamping out the phenomenon of piracy by various means such as naval patrols, freezing of pirates' assets, and perhaps imposing sanctions on ransom payers. Prosecution of suspected pirates has come with its own bundle of difficulties which need to be ironed out through various means, such as Memoranda of Understanding (MoU). Above all, a comprehensive rather than incremental approach to the roots of the problem in Somalia is most needed.

1 Introduction

This paper addresses piracy as the major concern off the coast of Somalia and the Gulf of Aden. Having said that, the author recognizes that piracy is still widespread in many other parts of the world such as: coastal areas of West Africa (mainly Nigeria), Tanzania, Peru, Bangladesh, Malaysia, the Philippine Archipelago, Indonesia and the Straits of Malacca.¹

According to International Maritime Bureau (IMB), last year alone there were 214 pirate incidents in the Somali Basin and the Gulf of Aden.² That figure represents half of the piracy-related incidents worldwide during that year. Forty seven vessels were hijacked with 837 of their crew taken hostage. Until recently, the attacks were on the increase along the east coast of Somalia and in the Indian Ocean, sometimes taking place over 1000 nautical miles from the coast. IMB statistics for the first three months of 2010 show that only 17 incidents have been recorded, in contrast with 41 in the same period in 2009.³ The decline is apparently attributable to the continued naval presence in the area and also to the employment of vigorous anti-piracy techniques by merchant shipping.⁴ What is alarming is that, Somali pirates are currently holding more than 10 vessels. Moreover, a conservative estimate of ransoms paid to Somali pirates reaches the astronomical figure of \$50 million; on the other hand, other estimates exceed this figure by far.⁵ This supports the hard reality that, whatever its motivation, piracy off the coast of Somalia remains a profitable activity.

The purpose of this article is to examine some of the main legal issues which have arisen in the context of Somali piracy. Thus, it will commence by addressing the root causes of the Somali piracy. It then proceeds to identify and analyse the definition of piracy as mentioned in existing instruments on the Law of the Sea. The paper will then highlight the major weakness of these instruments when it comes to Somali piracy. The question of whether piracy is synonymous with terrorism will be alluded to. From there, an assessment of the contribution of the Security Council (SC) in combating piracy will be made. Next to be discussed is the important question of the prosecution of suspected pirates, particularly in the courts of third states. A comment on the role of the Memoranda of Understanding (MoU) between Kenya and the EU and other States will be made. The paper will then proceed to examine the viability of freezing ransom money after it has been paid, as well as the possibility of imposing sanctions against entities that pay it. Reference will also be made to the Djibouti Code of Conduct ('Code of Conduct') and the lessons that can be learnt from the South-East Asian experience. Thereafter, combating Somali piracy through naval deployment will be looked at. Finally, an overall conclusion will be offered.

* Reader-in-law, City University London. This article is dedicated to the memory of my mentor, the late Professor Sir Ian Brownlie. I owe a great debt of gratitude to Milica Djordjevic for her excellent and tireless research skills, which made the production of this article possible.

¹ Lauren Ploch et al, *Piracy off the Horn of Africa*, [R40528] Congressional Research Service (28 September 2009), 5 <<http://italy.usembassy.gov/pdf/other/R40528.pdf>> at 10 July 2010; Peter Chalk, *The Maritime Dimension of International Security. Terrorism, Piracy, and Challenges for the United States* (2008) RAND Project Air Force, 8 <http://www.rand.org/pubs/monographs/2008/RAND_MG697.pdf> at 10 July 2010.

² UN Security Council, *Somalia: Piracy*. Update Report No 3. 20 April 2010, 1.

³ Ibid.

⁴ Paul Ames, 'Costly blunder for pirates as figures show decline in attacks', *Europolitics* (online), 22 April 2010 <<http://www.europolitics.info/sectorial-policies/costly-blunder-for-pirates-as-figures-show-decline-in-attacks-art269814-13.html>> at 10 July 2010.

⁵ Above n 2, 4.

2 The Root of the Problem

Though piracy has been, until recently, considered a relic of the past, it has returned in the Horn of Africa almost with impunity. Somalia is now synonymous with the phenomenon of piracy. Powerful naval powers are united in their resolve to fight it all the way. One of the perplexing questions is why this phenomenon has flourished in Somalia.

There are several possible reasons that can be identified for the prevalence of the phenomenon, chief among which is the extreme poverty which existed prior to the inception of piracy.⁶ This poverty is seen as a direct result of the protracted civil war which has engulfed the country for about two decades. That civil war is directly responsible for the total collapse of the economy as well as the entire infrastructure of the country and its institutions.⁷ Thus, it comes as no surprise that piracy has emerged as a natural consequence of the desperation and the relative ease with which ships may be targeted while passing through one of the most important maritime trade routes in the world. In addition to the foregoing, although Somali piracy had humble beginnings with a crude foundation, the attraction of huge lucrative gains has turned it into a sophisticated organised crime. It now has the character of a business and the actors are no longer the insolvent disgruntled local fishermen scantily equipped with simple GPS and some guns. They now possess long-range speed boats that stalk the high seas, advanced weaponry, sophisticated electronic equipment, and support from 'mother ships'.⁸

As may be appreciated, it would be a mammoth task to engage in a detailed discussion of all the root causes of Somali piracy. Suffice it for now to address some of its major contributory aspects such as pollution, depletion of resources, and lack of lasting solutions. As concerns pollution, there are undisputed claims of discharging toxic waste dating back to 1990s.⁹ The waste we are talking about is thought to be extremely hazardous as it includes radioactive uranium waste, lead, cadmium, mercury chemical, hospital and industrial waste. According to one official account:¹⁰

the coastal population has already begun to fall ill. At first, the inhabitants had strange rashes, nausea, and babies were born with malformation. But after the tsunami in late 2004, washing hundreds of these barrels and their contents up onto the beaches, people began to show symptoms of radiation poisoning, and more than 300 people died.

Turning to depletion of resources, Western, Asian and African fleets have engaged in illegal and unregulated harvesting of fish and other seafood in Somali territorial waters, with an estimated annual return of \$94 million.¹¹ This unregulated overfishing by foreign ships deprived local fishermen of their traditional livelihood.¹² The early Somali pirates were motivated by the desire to push away foreign fishing fleets, but to no avail. Thus, when fishing resources became depleted, Somalis turned to piracy. This new 'industry' suddenly flourished and proved to be very lucrative.

As has been alluded to above, the disposal of toxic waste at sea off the coast of Somalia is one of the precipitating factors which triggered off Somali piracy. Member States of the EU and the overwhelming majority of UN members have, in 1989, adopted the *Basel Convention on the Control of*

⁶ Raymond Gilpin, *Counting the Costs of Somali Piracy*, (2009) United States Institute of Peace, s 1 <http://www.usip.org/files/resources/1_0.pdf>.

⁷ Martin Murphy, *Somali piracy: Not just a naval problem* (2009) Center for Strategic and Budgetary Assessments, 10 <http://www.csbaonline.org/4Publications/PubLibrary/B.20090417.Somali_Piracy/B.20090417.Somali_Piracy.pdf>; Roger Middleton, *Piracy in Somalia: Threatening Global Trade, Feeding Local Wars* (2008) Chatham House <http://www.chathamhouse.org.uk/files/12203_1008piracysomalia.pdf> at 10 July 2010.

⁸ Ploch et al, above n 1, 11.

⁹ See Edward G Howard-Clinton, 'The Emerging Concepts of Environmental Issues in Africa' (1984) 8 *Environmental Management* 3, 187; and more recently María Femés, 'The Hidden Side of Somali Piracy', *The Epoch Times* (online), 15 March 2010 <<http://www.theepochtimes.com/n2/content/view/31437/>> at 10 July 2010.

¹⁰ Femés, above n 9.

¹¹ Marine Resources Assessment Group Ltd, *Review of Impacts of Illegal, Unreported and Unregulated Fishing on Developing Countries* (2005) UK Department for International Development, 37 <<http://webarchive.nationalarchives.gov.uk/+http://www.dfid.gov.uk/pubs/files/illegal-fishing-mrag-report.pdf>> 10 July 2010.

¹² See United Nations Environment Programme (UNEP), *The State of the Environment in Somalia: A Desk Study*, UN Doc DEP/0760/GE (December 2005) available from <http://www.unep.org/DEPI/programmes/Somalia_Final.pdf> at 10 July 2010; Leigh Phillips, 'Commission Ready to Investigate European Illegal Fishing Off Somalia', *euobserver.com* (online) 22 April 2009 <<http://euobserver.com/13/27983?print=1>> at 10 July 2010.

Transboundary Movement of Hazardous Wastes and their Disposal (Basel Convention).¹³ This Convention has proved to be a double edged weapon, as compliance with its provisions forced the 'toxic traders' to dump their hazardous waste in the territorial waters of war torn Somalia. This seems to defeat the main purpose of the Convention, namely to forestall that precise type of activity.¹⁴

As concerns the lack of lasting solutions, the international community must accept some of the responsibility for the disastrous situation in Somalia. For some time, the prevailing philosophy among States was that, Somalia was a failed State and whatever came of it would be of no consequence to other nations. As it turned out, such an assumption proved to be erroneous. The world has now recognized that, without lasting solutions the problem of piracy will prevail for an indefinite period.¹⁵ In recognition of this, the EU is now taking a comprehensive approach, which seeks to address in a holistic way political, economic and security aspects of the situation in Somalia. It is evident that without addressing the root causes of the crisis in Somalia, piracy will continue flourishing.¹⁶

There are some factors which do not qualify as root causes of piracy in the strict sense, but they can conveniently be discussed here. One illustration is whether paying ransom to pirates encourages more acts of piracy. The preponderant majority in the maritime commercial industry believe that an occasional ransom payment of US\$5 million in order to secure the release of a ship, its cargo and crew is cost effective. This is based on the arithmetical notion that non-payment of ransom is almost certain to trigger off loss of, for example, a large oil tanker worth over US\$100 million, with its cargo at an estimated value of US\$5 million. This is, of course, without quantifying ensuing loss of life, in the event no ransom demand is met. Even if such losses could be circumvented by re-routing the shipping, the end result would be longer and more costly trips. The result of this would be that, at some point, if the established shipping routes were to permanently change it would become more costly than making ransom payments as necessary. Pertinent to this, a senior US Government official has articulated the stance taken by the administration, namely that 'the continued payments will only encourage more kidnappings. For this reason, the United States actively encourages other states to adopt our no concession policy and refrain from paying ransoms'.¹⁷

The frequency of ship seizures and demands for ransom has prompted some maritime underwriters to cover ships by special marine insurance provisions providing indemnity for ransom payments as necessary. Moreover, ship owners can now (and indeed do) purchase a more comprehensive *war risk* policy. By buying this type of policy the need for obtaining a separate cover for piracy/ransom is obviated.¹⁸

We may conclude by saying that the continuance of ransom payment and of taking these comprehensive insurance covers will reassure the pirates that payment will be extremely likely. It would only be the most naïve ship owners, who would believe that the active pirate community would be unaware of this change in insurance culture and net cost risk analysis on the part of the ship owners.

3 Definition of Piracy

The first major international instrument setting forth a definition of piracy is the *Geneva Convention on the High Seas (Geneva Convention)* of 1958,¹⁹ followed by the *United Nations Convention on the Law*

¹³ *Convention on the Control of Transboundary Movement of Hazardous Wastes and their Disposal* ('Basel Convention'), 1763 UNTS 126 (entered into force 5 May 1992).

¹⁴ It is beyond the scope of the present paper to discuss issues of State responsibility arising from the breach of the Convention.

¹⁵ See generally Middleton, above n 7.

¹⁶ European Union Committee, House of Lords, 12th Report, *Combating Somali Piracy: the EU's Naval Operation Atalanta* (2010) 18 [5][g].

¹⁷ US Assistant Secretary of State for Political-Military Affairs Andrew Shapiro addressing the American University Law Review Symposium 'Counter -Piracy Policy: Delivering Judicial Consequences', 31 March 2010, Washington DC. Cited in Ploch et al, above n 1.

¹⁸ Zack Phillips, 'Marine Insurers Transfer Piracy Risk to War Cover: Surge in Attacks Prompts Move by London Market', *Business Insurance* (online), 30 March 2009 <http://www.businessinsurance.com/article/20090329/ISSUE_01/10027383> at 11 July 2010.

¹⁹ *Convention on the High Seas (Geneva Convention)*, opened for signature 29 April 1958, 450 UNTS 11 (entered into force 30 September 1962) art 15.

of the Sea (*UNCLOS*) in 1982. The latter Convention identically restates the definition established in its predecessor, according to which piracy consists of:²⁰

- a) Any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or 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 an aircraft with knowledge of facts making it a private ship or aircraft;
- c) Any act of inciting or intentionally facilitating an act described in subparagraph (a) or (b).

According to this definition, piracy is a crime that can only be committed on or over international waters. This includes the high seas, and presumably exclusive economic zones, contiguous zones, international airspace and other places beyond the territorial jurisdiction of any state. By necessary implication, therefore, if the very same acts are committed in the territorial waters or the airspace of a given nation, they do not count as piracy.²¹ This clearly excludes the coastal areas of Somalia. The majority of the attacks in that area occur within Somali territorial waters. Under *UNCLOS*, only a State in whose territorial waters the attack occurred would be entitled to prosecute offenders, but it is common knowledge that Somalia is unable to carry out such prosecution as it is a dysfunctional State, lacking in skills and ability to act.

The definition of piracy under Article 101 of *UNCLOS* puts two further restrictions on the crime of piracy, one of which is that it can only be committed by private vessels or private planes. In view of this, acts of piracy cannot be committed by ships or aircrafts owned by other nations. One can imagine, however, that this restriction must be waived in a situation where a state-owned ship or aircraft has been taken over and employed for piratical purposes. The last restriction imposed by Article 101 provides that the maritime offence committed can only amount to piracy if committed for private ends. This excludes crimes motivated by political considerations, or those committed by insurgents, even those not recognized as belligerent. Furthermore, the requirement that the acts be motivated for private ends restricts the definition offered to attacks committed with intention to rob, and also limits the ability of States to claim universal jurisdiction over politically motivated attacks which have commercial aspects.

In the context of Somali piracy, the offenders could claim, as they in fact do, that they are protecting Somali fishing zones from unauthorized intruders. Such argument would not stand up to scrutiny, as it appears that the funds are being used for private enrichment in Somali communities. Pirates have become the drivers of socio-economic activity in tiny Somali coastal towns which have sprung up as a result of the piracy activity. They own luxury dwellings and drive prestigious cars.²²

Shortly after the adoption of *UNCLOS*, it became evident that its elucidation of piracy did not encompass all possible crimes of violence committed on board ships as demonstrated by the *Achille Lauro* incident of October 7 1985,²³ when four armed stowaways onboard the Italian cruise liner *Achille Lauro*, hijacked it and murdered one American passenger. The fact that the attack was clearly politically motivated, took place within Egyptian waters, and originated from the ship itself rather than from another ship, removed it from the ambit of the *UNCLOS* definition of piracy and, presumably, beyond the purview of universal jurisdiction. The United States, and other States that may have had an

²⁰ *United Nations Convention on the Law Of the Sea (UNCLOS)*, opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 14 November 1994) art 101.

²¹ The International Maritime Bureau (IMB) defines piracy as follows: 'an act of boarding (or attempted boarding) with the intent to commit theft or any other crime and with the intent or capability to use force in furtherance of that act'. This definition is all encompassing in comparison with that provided by *UNCLOS*.

²² Jay Bahadur, 'The Pirate King of Somalia', *Globe and Mail* (Canada), 26 April 2009. A copy of this article is available at <http://wardheernews.com/News_09/April/28_pirate_king.html> at 11 July 2010.

²³ See for example: George R Constantinople, 'Towards a New Definition of Piracy: The *Achille Lauro* Incident' (1986) 26 *Virginia Journal of International Law* 723.

interest in prosecuting the attackers, were apparently left without the authority under the international Law of the Sea to do so.

After the *Achille Lauro* attack, the international community, through the UN and the International Maritime Organization (IMO), promulgated the *Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA Convention)*,²⁴ which established a legal basis for prosecuting maritime violence that did not fall within the *UNCLOS* piracy framework. The *SUA Convention* made it unlawful to seize or take control of a ship by force or the threat of force, to perform an act of violence against a person on board a ship if it is likely to endanger safe navigation of that ship, to destroy or damage a ship or its cargo, if it is likely to endanger safe navigation, to place devices or substances on a ship that are likely to destroy that ship, to knowingly communicate false information to a ship that would endanger safe navigation, and to injure or kill any person in connection with any of the above acts.²⁵ The *SUA Convention* authorises and, under certain circumstances, requires State parties to establish jurisdiction over the perpetrators, and to either prosecute or extradite them to another interested signatory State. The State of which the perpetrator is a national, the State in whose territorial waters the act is committed, and the Flag State of the ship against whom the act is committed, are all required to take measures necessary to establish jurisdiction over the alleged offences.²⁶ Furthermore, a State party is permitted to exercise jurisdiction if the victim is a national of the State, if the perpetrator's habitual residence is in the State, or if the act was committed in an attempt to compel the State to do, or abstain from doing, any act.

As hitherto mentioned, The *SUA Convention* was meant to fill the gaps left by the *UNCLOS* definition of piracy. In particular, the *SUA Convention* covers acts occurring in territorial waters and acts motivated for political ends, as well as eliminating the two-vessel requirement. While the *SUA Convention* would empower states to act more decisively in responding to maritime attacks, none of the States in the region affected by the Somali piracy are particularly anxious to act, as they are not especially hard hit by the attacks.

Leaving aside the reluctance of the States in the region to clamp down on Somali piracy, the Convention has shortcomings that prevent it from completely covering all the acts excluded by *UNCLOS*. Although the *SUA Convention's* definition of piracy covers attacks that do not fall within the *UNCLOS* definition, the *SUA Convention's* provisions are only applicable within the jurisdictions of States party to the *SUA Convention*. Arguably, the scope of criminal attacks embraced by the *SUA Convention's* definition of piracy includes acts that are not considered obligations to the international community as a whole, and therefore do not provide for universal jurisdiction. The acts within the *SUA Convention's* definition of piracy are only punishable by the States that are parties to the treaty, and only if the perpetrators or victims are nationals of a State party, and if the offending acts take place in a State party's territorial waters or the offending vessel was scheduled to navigate through such waters. Furthermore, the decision by the parties to enforce the *SUA Convention* is ultimately discretionary. Even though a party may be obligated by the terms of the *SUA Convention* to act in response to an offense, the Convention does not provide for any sanctions against parties who fail to fulfil their treaty obligations. Thus, if a party authorised or obligated by the *SUA Convention* to act declines to do so, the purported attack may go unpunished, and the other State parties may have no recourse against that non-conforming State.

For the sake of completeness, reference should be made to the *2005 SUA Protocol (2005 Protocol)* which entered into force in July 2010.²⁷ This Protocol has to a great extent expanded the ambit of the *SUA Convention*. This is evidenced by the inclusion of politically motivated piracy and acts of maritime terrorism.²⁸ Having said that, it is arguable that the main thrust of the changes introduced by the *2005 Protocol* do not relate to acts of common piracy or robbery at sea²⁹. Furthermore, the Protocol

²⁴ *Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation* ('*SUA Convention*'), opened for signature 10 March 1988, 1678 UNTS 221 (entered into force 1 March 1992).

²⁵ *Ibid* art 3.

²⁶ *Ibid* art 6.

²⁷ *Protocol of 2005 to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation* ('*2005 Protocol*'), opened for signature 14 October 2005, [2005] ATNIF 30 (entered into force 28 July 2010).

²⁸ *Ibid* art 3.

²⁹ *Ibid*.

does not go far enough in addressing jurisdictional gaps with respect to pursuing any criminal suit where non-nationals or non-State ships are implicated.³⁰

To conclude, the limitations of the *SUA Convention* and *UNCLOS* leave a regulatory gap through which certain acts of maritime violence could slip by unpunished.

4 Whether Somali Piracy Amounts to Terrorism

Although it is beyond the scope of the present work to undertake a major comparative study of piracy and terrorism, it is felt necessary to make a brief reference to a possible link between the two phenomena. This is also motivated by the fact that terrorism has found its way into the agendas of many legal forums, and it is feared that piracy might become an instrument of international terrorism.

In spite of cogent argument that piracy can only be committed for private ends and that terrorism can only be committed out of political conviction, some commentators are of the view that there are extensive links between the two. For example, in this respect, Burgess Jr. has noted that 'both crimes involve bands of brigands that divorce themselves from their nation states; both aim at civilians; both involve acts of homicide and destruction [...] for private ends'.³¹ In view of this, Burgess has suggested that the international community should come up with definition that forges a link between terrorism and piracy. With all due respect, there is no merit in this suggestion as, in practical terms, it is not going to make dealing with Somali piracy any easier. The war on terror has produced countless international and domestic rules dealing with the phenomenon of terrorism. Thus, if these numerous rules are allowed to creep up into the area of piracy, the end result would be further legal uncertainty in relation to piracy. Murphy, writing in 2007, is of the firm view that there is not any cooperation between pirates and terrorists, and that the criteria for each are different.³²

Finance is an area worthy of consideration, as it can be the basis for an overlap between piracy and terrorism. In the context of Somali piracy, Bruno Schiemy has remarked that ties between various pirate groups and the Somali al-Shabaab Islamic group are on the increase, and that the latter group is linked to al-Qaida. By way of illustration, he asserts that the former provides military training for the latter, who in turn use pirate groups for smuggling weapons.³³ Schiemy's remarks are somewhat less persuasive due to a lack of material evidence. Or, as put by Middleton, the connections between the two are tenuous.³⁴

It is noteworthy that the United Kingdom state practice in this area of the law clearly shows that, at the present time, Somali pirates are not connected in any systematic way to any known terrorist organisation.³⁵ Likewise, the US state practice affirms that at present no financial ties have been found between al-Shabaab and piracy, but the potential for a link remains.³⁶ Even if it is accepted for the sake of argument that Somali pirates are to some extent responsible for funding organisations such as al-Shabaab, this is indicative of the importance of such organisation within Somalia, rather than ideological alignment with piracy.

5 The Role of the Security Council in Combating Somali Piracy

Over the past two and a half years, the SC has passed seven resolutions relating to Somali piracy, more than on any other subject on its agenda.³⁷ It is noteworthy that all seven resolutions had been passed

³⁰ Ibid art 8.

³¹ Douglas R Burgess Jr, 'Piracy Is Terrorism', *The New York Times* (online), 5 December 2008

<<http://www.nytimes.com/2008/12/05/opinion/05burgess.html>> at 11 July 2010.

³² Martin N Murphy, 'Suppression Of Piracy And Maritime Terrorism: A Suitable Role for a Navy?' (2007) 60 *Naval War College Review* 3.

³³ Bruno Schiemy, 'Piracy's Rising Tide - Somali Piracy Develops and Diversifies' (February 2009) *Jane's Intelligence Review*, 40-43.

³⁴ Middleton, above n 7.

³⁵ Above n 16.

³⁶ See remarks made by the Commander of US Naval Forces to the House Armed Services Committee, 5 March 2009, cited by Ploch et al, above n 1, 18.

³⁷ SC Res 1814, UN SCOR, 5893rd mtg, UN Doc S/Res/1814 (15 May 2008); SC Res 1816, UN SCOR, 5902nd mtg, UN Doc S/Res/1816 (2 June 2008); SC Res 1838, UN SCOR, 5987th mtg, UN Doc S/Res/1838 (7 October 2008); SC Res 1844, UN

under Chapter VII of the *UN Charter*, under which the Council could authorise the use of force against threats to international peace and security. These resolutions have clearly enhanced the authority of the armada far beyond what is permitted by *UNCLOS* and customary international rules pertaining to piracy. It would be recalled that, without further authorisation from the SC, existing international Law of the Sea is very restrictive. Thus, as has been stated previously, *UNCLOS* defines acts as piracy only when committed on the high seas.³⁸ Moreover, the same Convention authorises seizure of pirate ships only on high seas. Somali pirates have figured out that as international shipping must pass through the narrow corridor of the Gulf of Aden, that provides them with the opportunity to launch their attacks in international waters and within no time enter Somali territorial waters. This was a major gap in the Law of the Sea, to which the SC responded by passing Resolution 1816.³⁹ The relevant part of the Resolution reads as follows:

Acting under Chapter VII of the Charter of the United Nations,

...

7. *Decides* that for a period of six months from the date of this resolution, States cooperating with the TFG in the fight against piracy and armed robbery at sea off the coast of Somalia,⁴⁰ for which advance notification has been provided by the TFG to the Secretary General, may:

(a) Enter the territorial waters of Somalia for the purpose of repressing acts of piracy and armed robbery at sea, in a manner consistent with such action permitted on the high seas with respect to piracy under relevant international law; and

(b) Use, within the territorial waters of Somalia, in a manner consistent with action permitted on the high seas with respect to piracy under relevant international law, all necessary means to repress acts of piracy and armed robbery;

9. *Affirms* that the authorization provided in this resolution applies only with respect to the situation in Somalia and shall not affect the rights or obligations or responsibilities of Member States under international law, including any rights or obligations under the Convention, with respect to any other situation, and underscores in particular that it shall not be considered as establishing customary international law, and affirms further that this authorization has been provided only following receipt of the letter from the Permanent Representative of the Somalia Republic to the United Nations to the President of the Security Council dated 27 February 2008 (S/2008/XXX) conveying the consent of the TFG;

What may be gleaned from the above two provisions is that, States have been empowered to take action against pirates even in Somali territorial waters. Secondly, this authorisation has been expressly based on the consent of the Somali government. Thus, notwithstanding the fact that Somalia is a failed State, it continues to retain the right as a sovereign State to preclude foreign ships and aircrafts from entering its territorial zones.

Thirdly, and more significantly, the resolution has been ruled out as laying the foundation for a customary rule of hot pursuit in the territorial waters of other nations. This is certainly a novel way for determining how an evolving norm should or should not crystallise into customary international law.⁴¹

On 16 December 2008, the SC passed Resolution 1851.⁴² This resolution is broader than Resolution 1816. It could be viewed as the main contribution by the Bush Administration towards combating the

SCOR, 6019th mtg, UN Doc S/Res/1844 (20 November 2008); SC Res 1846, UN SCOR, 6026th mtg, UN Doc S/Res/1846 (2 December 2008); SC Res 1851, UN SCOR, 6046th mtg, UN Doc S/Res/1851 (16 December 2008); SC Res 1897, UN SCOR, 6226th mtg, UN Doc S/Res/1897 (30 November 2009); SC Res 1918, UN SCOR, 6301st mtg, UN Doc S/Res/1918 (27 April 2010).

³⁸ *United Nations Convention on the Law Of the Sea (UNCLOS)*, opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 14 November 1994) art 101(3)(1).

³⁹ SC Res 1816, UN SCOR, 5902nd mtg, UN Doc S/RES/1816 (2 June 2008).

⁴⁰ Transitional Federal Government (TFG).

⁴¹ On criteria for customary international law see generally: *Asylum case (Columbia v Peru)* [1950] ICJ Rep 266, 277; *North Sea Continental Shelf Cases (Federal Republic of Germany v Netherlands)* [1969] ICJ Rep 3, 229; *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)* [1986] ICJ Reports 14, 98.

⁴² SC Res 1851, UN SCOR, 6046th mtg, UN Doc S/Res/1851 (16 December 2008).

phenomenon of piracy. This was because the resolution had been drafted and sponsored by that Administration. Of special significance is paragraph 6:⁴³

In response to the letter from the TFG of 9 December 2008 [the SC], encourages Member States to continue to cooperate with the TFG in the fight against piracy and armed robbery at sea, notes the primary role of the TFG in rooting out piracy and armed robbery at sea, and decides that for a period of twelve months from the date of adoption of resolution 1846, States and regional organizations cooperating in the fight against piracy and armed robbery at sea off the coast of Somalia for which advance notification has been provided by the TFG to the Secretary-General may undertake all necessary measures that are appropriate in Somalia, for the purpose of suppressing acts of piracy and armed robbery at sea, pursuant to the request of the TFG, provided, however, that any measures undertaken pursuant to the authority of this paragraph shall be undertaken consistent with applicable international humanitarian and human rights law;

As can be readily seen, this resolution has a life span of one year, i.e. to run for an extra six months more than Resolution 1816. Secondly, it extends the authorisation on the use of force to military incursions right into mainland Somalia. This is a compromise formula, as some members of the Council viewed with suspicion the original proposal by the United States which, in an unprecedented manner, called for authority to launch air strikes on Somali airspace in pursuit of pirates. Indeed, the majority of States which had a history of piracy problems were quite apprehensive about the erosion of their national sovereignty. This fear has been reflected in the statements made by Council members which emphasised that the aforesaid resolutions applied exclusively to the situation in Somalia. And, as has been mentioned, parallel with that, the resolutions have stated expressly that their content do not constitute a precedent in customary international law.

It is noteworthy that the resolution subjects the use of force in Somali territory to further scrutiny in the form of prior approval by the provisional government of that country. Additionally, the resolution requires that the measure to be taken must adhere to international humanitarian law. This latter condition comes with its own difficulties as pirates, by definition, are non-combatant civilians and as such should not be fired at as lawful targets, unless in clear situations of self-defence with all the attending preconditions. Be that as it may, it appears that the forces taking action against pirates are content to confine themselves to the high seas and the territorial waters of Somalia, without chasing the pirates all the way onto dry land.

The SC became increasingly aware of the fact that States have invariably distanced themselves from anything to do with the prosecution of suspected Somali pirates. It has, therefore, become manifestly clear to the SC that the prosecution of pirates is a problem independent of that of capturing them. In fact, it comes with many perplexing and intricate questions, as will be shown in the next section. In order to ensure that States play their roles in combating Somali piracy, the Council also addressed the question of prosecution in Resolution 1897, which may be summarised as follows:⁴⁴

- i) States and regional organizations are invited to conclude agreements with countries willing to take custody of pirates for law enforcement with the aim of facilitating investigation and prosecution of detained pirates; and to enhance cooperation among themselves in determining jurisdiction and in investigating and prosecuting suspected pirates
- ii) States are called upon to help Somalia strengthen its prosecution capacity and urged to fully implement their obligations under the *UNCLOS* and the *1988 SUA Convention* by building judicial capacity for prosecution of suspected pirates.

Inviting States and institutions to conclude transfer and prosecution agreements is a sound idea; however, lessons ought to be heeded from the experience of MoU concluded with Kenya before embarking on new agreements. Moreover, calling upon the contracting States of *UNCLOS* and the *SUA Convention* to carry out their duties under these conventions and to enhance their judicial capabilities to cope with Somali piracy is not going to achieve much result. This is because the interests of the preponderant majority of the contracting States are not affected by it and are therefore not willing to act.

⁴⁴ Security Council Report, above n 2, 1-2.

The most recent Security Council Resolution on Somali Piracy was adopted on 27 April 2010.⁴⁵ Like its predecessor, this resolution has reaffirmed in its preamble that, the authorisation renewed in Resolution 1897 (2009) is to be applied only to the situation in Somalia and that it should not be considered as establishing customary international law. However, as mentioned earlier, the formation of customary international law is dependent on other criteria and not merely at the whimsical wishes of the SC. Be that as it may, the resolution has clearly recognised again the problems caused by the limited capacity of the judicial system of Somalia and other States in the region to effectively prosecute suspected pirates. Accordingly, the SC has gone further by asking the Secretary-General to report to it within three months on ways and means for ending international legal ambiguities that have hampered effective prosecution of suspected Somali pirates. Paragraph 4 of the resolution refers in particular to 'options for creating special domestic chambers possibly with international components, a regional tribunal or an international tribunal and corresponding imprisonment arrangements'.⁴⁶ Although the idea is a sound one, the proposed tribunal will be affected in a negative way by the limitation of judicial institutions in the region, and hence, it is unlikely that due process would be observed in prosecuting suspected pirates. Moreover, the present writer is acutely aware that the setting up of the proposed tribunals can be very complicated and costly.⁴⁷ In addition, it is unlikely that it would deter impoverished Somalis from engaging in acts of piracy.

6 Prosecution of Suspected Pirates

This section will deal with specific issues relating to the prosecution of suspected pirates in the courts of a third State. While it is clear under international law that any state may prosecute pirates under universal jurisdiction, many States have not actively pursued the issue of prosecuting suspected pirates in their domestic courts. This is because their national laws do not outlaw the crime of piracy and/or they do not have the capacity or political will to deal with this matter.

The language of Article 105 of *UNCLOS* is a clear codification of universal jurisdiction as it applies to piracy. Thus, it stipulates that, 'every State may seize a pirate ship' on the high seas, but that the prosecution *may* be by 'the Courts of the State which carried out the seizure'. Applying the rules of interpretation from the *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980), it becomes clear that the use of the word 'may' rather than 'shall' is indicative of the fact that the seizing State does not have exclusive jurisdiction on the putative pirate. This conclusion also finds support under Article 32 of the *Vienna Convention on the Law of Treaties*, which allows recourse to the legislative history of the provision under scrutiny. Thus, we find that Article 105 of *UNCLOS* was lifted verbatim from Article 18 of the *Geneva Convention* drafted by the International Law Commission in 1958.⁴⁸ The piracy provision in the latter has been taken directly from the draft treaty in the Harvard Research publication of 1932.⁴⁹ This recognises the jurisdiction of any State having lawful custody of a pirate to prosecute and punish him. The commentary also recognises that, although the legality of seizure depended primarily on international law, the power to deal with the alleged pirate could be enlarged or restricted by agreement between States. Accordingly Article 105, properly interpreted provides for permissive rather than exclusive jurisdiction of the State of the flag. This means that it does not create an impediment to the transfer of suspected pirates to a third State which is willing to prosecute them.

In the context of Somali piracy, the TFG seems to have very little control over Somalia, and hence it has not involved itself in the prosecution of pirates.⁵⁰ On the other hand, it should be noted that the Government of Somaliland appears to have more effective control over its territory. Thus, it has on

⁴⁵ SC Res 1918, UN SCOR, 6301st mtg, UN Doc S/Res/1918 (27 April 2010).

⁴⁶ Ibid.

⁴⁷ On the Viability and Cost-Effectiveness of Establishing International Tribunals, see generally: Omer Elagab, 'The Special Court for Sierra Leone: Some Constraints' (2004) 8(3) *International Journal of Human Rights* 249, 249-274.

⁴⁸ Alfred Rubin, *The Law of Piracy* (Brill Academic, 2nd ed, 1998) 360.

⁴⁹ International Law Commission, *Articles Concerning the Law of the Sea with Commentaries*, UN GAOR, 11th sess, Supp No 9, UN Doc A/3159 (1956), 282 (Draft Article 38).

⁵⁰ James Thuo Gathii, 'Jurisdiction to Prosecute Non-National Pirates Captured by Third States Under Kenyan and International Law', (2010) 31 *Loyola of Los Angeles International and Comparative Law Review* 363; Working Paper No 39, Albany Law School, 31 March 2010) <<http://ssrn.com/abstract=1360981>> at 12 July 2010.

numerous occasions captured and prosecuted pirates in its own courts,⁵¹ thereby adhering to the text of Article 105 of *UNCLOS*. In a similar vein, Somali pirates have been arrested in the high seas by French Naval forces in April 2008, for holding hostage a French yacht and its occupants. The pirates are still in French custody and they are almost certain to be prosecuted in French courts.⁵² For further illustration, Somali pirates seized the *MV Maersk Alabama*, a US flagged ship, and detained its captain, some 250 nautical miles off the coast of Somalia in April 2009. The US Navy responded by dispatching two warships to the vicinity, with a view to securing the release of the captain. When it became apparent that his life was in imminent danger, a rescue mission was launched. This resulted in the release of the captain, the demise of three pirates and the detention of a fourth pirate. The latter is currently being indicted before a US District Court.⁵³

In contrast to that, there are situations in which the State of the flag which had captured the pirates handed them over to other States to deal with them. The handing over by the UK government of arrested suspected pirates for prosecution in Kenya in the year 2006 comes to mind. More recent examples include first, the handing over at the beginning of January 2009, of Somali pirates by Danish authorities to the Dutch government for prosecution in the Netherlands under Dutch domestic law.⁵⁴ In fact, their trial has already commenced and it is the first European trial of Somali pirates.⁵⁵

Secondly, in April 2009 pirates who had attacked a German supply vessel were arrested by Spanish and German naval forces and handed over for prosecution in Kenya.⁵⁶ A third example relates to the fate of eight suspected Somali pirates who had been captured by the British Royal Navy in the high seas and thereafter handed over to Kenyan authorities for prosecution. More recently, the French Navy handed over twenty two suspected Somali pirates to Puntland's authorities with a view to prosecuting them in local courts.⁵⁷

A thorny question is on what grounds can Kenya assume jurisdiction to prosecute suspected pirates who committed their wrongful act on the high seas? As a general rule, a State may exercise such jurisdiction if either the perpetrator or the victim is one of its nationals. This can be done under the passive personality principle.⁵⁸ Likewise, if the effects of the criminal act in question reach the State, it can extend its jurisdiction over the assailant. Pertinent to this, President Guillaume stated in his separate opinion in the *Arrest Warrant Case* that:⁵⁹

under the law classically formulated, a State normally has jurisdiction over the offence committed abroad only if the offender, or at very least the victim, has the nationality of that State or if the crime threatens its internal or external security'.

Applying these rules to the question of prosecuting Somali pirates in Kenya, it is difficult to see how Kenya can assume jurisdiction under this heading not least because neither victims, nor assailants were Kenyans. Of course, there are other possible grounds for asserting jurisdiction of Kenyan courts over Somali pirates, such as universal jurisdiction. Customary international law certainly supports such a notion, as piracy is the oldest international crime that attracted universal jurisdiction.⁶⁰

In addition to the aforementioned grounds of jurisdiction, it is arguable that Kenyan courts have acquired jurisdictional competence by *agreement*. These agreements which Kenya has entered into

⁵¹ 'Five Somali Pirates Given Each 12 Years Prison Terms by Somaliland Government', *Somaliland Press* (online), 22 December 2008; 'Somaliland Court Charges Pirates', *Somaliland Press* (online), 19 February 2009

<<http://somalilandpress.com/2606/somaliland-berbera-court-charges-pirates>> at 11 July 2010.

⁵² 'French Warship Captures Pirates', *BBC News* (online), 15 April 2009 <<http://news.bbc.co.uk/2/hi/africa/8000447.stm>> at 12 July 2010.

⁵³ *US v Abduwali Abdukhadir Muse*, (SD D NY, 09-MG-1012-US, 21 April 2009).

⁵⁴ Article 381 of the *Penal Code 1886* (Netherlands) outlaws piracy.

⁵⁵ 'First European trial of Somali pirates opens in the Netherlands', *Europe Deutsche Welle* (online), 25 May 2010

<<http://www.dw-world.de/dw/article/0,,5604083,00.html>> at 12 July 2010.

⁵⁶ 'Germany Hands Over Pirates to Kenya', *United Press International* (online), 9 April 2009

<http://www.upi.com/Top_News/Special/2009/04/09/Germany-hands-over-pirates-to-Kenya/UPI-44881239295753/>.

⁵⁷ Above n 50.

⁵⁸ *Ibid*.

⁵⁹ *Arrest Warrant of 11 April 2000 (Congo v. Belgium)* [2002] ICJ Rep 3, 17 (President Guillaume).

⁶⁰ See Rosalyn Higgins, *Problems and Process: International Law and How we Use it* (Oxford University Press, 1994) 56; Leila Sadat, 'Redefining Universal Jurisdiction' (2001) 35 *New England Law Review* 241, 241-246.

with the US, EU, UK and several other countries, are known as MoU.⁶¹ According to these agreements, Kenya is under a legal obligation to prosecute in its national courts suspected pirates captured in the high seas by EU, UK or US Naval forces. This means that the MoU will be used to facilitate the attendance of the pirates who are non-nationals suspected of committing offence on the high seas.⁶² The legal status of the MoU is not contentious under international law as they are nothing more and nothing less than international agreements in accordance with the provisions of the *Vienna Convention on the Law of Treaties*.⁶³ However, MoU do not constitute an open-ended responsibility to prosecute all suspects captured on the high seas. In this context, Kenya's Foreign Minister has declared that, the MOU were not 'an open door for dumping pirates onto Kenyan soil because it will not be acceptable'.⁶⁴ It must be noted, however, that without a domestic statute establishing jurisdiction over piracy on the high seas by non-nationals, Kenyan courts would be hard pressed to prosecute, as their subject matter jurisdiction would be open to challenge. This has been overcome by the passage of a new *Merchant Shipping Act* in Kenya.⁶⁵

As a matter of efficacy, some credit should be given to the MoU as the situation was really chaotic before they came into force. It was indeed a perplexing question what to do with the pirates after they had been captured, due to the immense legal hurdles in the face of their prosecution. For instance, some suspected pirates had been released by some members of the international naval coalition, despite being found with weapons and grappling hooks. Presumably, their release must have been motivated by a desire to prevent repetition of the case in which a suspected pirate was kept on board a US naval ship for several months as it could not be determined during that time where to prosecute him.⁶⁶

It is noteworthy that, the MoU between Kenya and other States have not confined them to jurisdictional arrangements as they have complied with human rights standards. Thus, they have stipulated that suspects should be treated humanely and in accordance with international human rights obligations. Therefore, they should never be subjected to torture, cruel, inhuman or degrading treatment or punishment. Moreover, they should not be subjected to unfair trial or arbitrary punishment. However, serious doubts may be expressed about the propriety of trials taking place in Kenya on the basis of the MoU. It would appear that these trials are tarnished by disparities in the legal standards of the States involved, and lack of credible evidence. In addition, further constraints are produced by language barriers and the unavailability of prosecution witnesses.⁶⁷

Finally, at the time of writing this article, serious doubt had been expressed about the capacity of the Kenyan legal system to cope with these trials, including the financial burden. As events are unfolding, the MoU with Kenya are now under serious threat of becoming defunct.⁶⁸ One can only assume that the financial costs and other legal and practical difficulties in holding these trials outweigh any legal interest Kenya may have on the matter.⁶⁹

⁶¹ European Security and Defence Policy Website, *Agreement With Kenya Signed*, available at <<http://www.consilium.europa.eu/showPage.aspx?id=1518&lang=en>>. Kenya has also signed the MoU with Canada, Denmark and China. The EU has also entered into an agreement with Seychelles to prosecute suspected pirates captured by EUNAFOR. Considerations of space have precluded a discussion of the situation in the Seychelles, but discussion relating to Kenya apply *mutatis mutandis* to the Seychelles.

⁶² See Lori Fisler Damrosch, Louis Henkin and Sean D Murphy, *International Law: Cases And Materials* (West Group, 5th ed, 2009).

⁶³ *The Vienna Convention on the Law of Treaties* (*Vienna Convention*), opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980).

⁶⁴ James Butty, 'Kenyan Foreign Minister Shed Light on U.S.-Kenya Piracy Agreement', *The Journal of Turkish Weekly* (online), 28 January 2009 <<http://www.turkishweekly.net/print.asp?type=1&id=63755>>.

⁶⁵ *The Merchant Shipping Act 2009* (Kenya), available at <<http://faolex.fao.org/docs/pdf/ken94222.pdf>> at 12 July 2010.

⁶⁶ Associated Press, 'Insufficient Evidence Could Force U.S. Navy to Return Suspected Pirates to Somalia', *Fox News* (online), 13 February 2009 <<http://www.foxnews.com/story/0,2933,492784,00.html>> at 12 July 2010.

⁶⁷ The UNODC is making efforts to address some of these concerns. UNODC, *UNODC and Piracy* (2010) UNODC <<http://www.unodc.org/easternafrica/en/piracy/index.html>>.

⁶⁸ Above n 2.

⁶⁹ The government of Kenya has announced that Kenya will keep trying Somali pirates on an individual basis while waiting for the outcome of negotiations underway with the European Union: 'Kenya to continue trying Somali pirates', *EUBusiness* (online), 19 May 2010 <<http://www.eubusiness.com/news-eu/somalia-piracy.4tc>> at 12 July 2010.

7 Djibouti Code of Conduct

On 29 January 2009, nine countries from the region most affected by the Somali piracy signed an agreement, under the auspices of IMO, to enhance cooperation in the fight against piracy in the Indian Ocean and the Gulf of Aden.⁷⁰ The agreement, which is known as the *Djibouti Code of Conduct*, is hailed for being the first of its kind for combating piracy against ships in the Gulf of Aden, the Red Sea and the Western Indian Ocean. The main objectives of the agreement are listed in Article 2 of the annex to that agreement as follows:

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.

At the meetings in Djibouti which led to the adoption of the *Djibouti Code of Conduct*, several dissenting opinions were expressed. Some participants went as far as describing the drive of the UN and other key players legalising the transfer of Somali pirates by foreign navies to Kenyan courts as a rendition scheme with UN approval.⁷¹

The *Djibouti Code of Conduct* has expressly ruled out the engagement in hot pursuit in Somali territorial waters by naval forces of third States. This is clearly inconsistent with provisions of SC Resolution 1846 which authorised anti-piracy action in Somali territorial waters. This is evident from the text of Article 4(5) of the *Djibouti Code of Conduct* which stipulates:

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.

This provision can be seen as an expression of the view of the majority, namely, that national sovereignty should not be undermined and each ship pursuing a pirate boat has to ask for permission of the coastal State before entering its territorial waters. Clearly, therefore, this is a restrictive approach to combating piracy in Somalia. At the same time, however, it is not difficult to see why the participants at the Djibouti meeting could not reach a more binding agreement.

The regional agreement on combating piracy, signed in Djibouti, resembles to a great extent an earlier multinational regional deal struck in 2005 to fight piracy in South-East Asia. Thus, brief reference to the South-East Asian experience will be made to see what lessons may be learnt from it. Piracy was widespread in the Malacca Strait and Indonesian waters prior to 2005. But, with the inception of the multilateral agreement, the threat of piracy in the region has substantially receded. The contracting parties implemented what became known as the 'Eye in the Sky Programme' and the 'Malacca Strait Patrol'. These anti-piracy methods involved coordinated/joint forces from the littoral States.⁷² These forces dominated the Malacca Strait and the Indonesian waters by placing them under constant air and sea surveillance, and also through effective exchange of information. Although the enterprise was

⁷⁰ Djibouti, Ethiopia, Kenya, Madagascar, Maldives, the Seychelles, Somalia, Tanzania and Yemen: <http://www.fco.gov.uk/resources/en/pdf/pdf9/piracy-djibouti-meeting>.

⁷¹ Djibouti Meeting, Resolution I, 'Adoption of the Code of Conduct concerning Repression of Piracy and Armed Robbery Against Ships in the Western Indian Ocean and the Gulf of Aden' (*Djibouti Code of Conduct*) adopted on 29 January 2009. <http://www.fco.gov.uk/resources/en/pdf/pdf9/piracy-djibouti-meeting>.

⁷² Malaysia, Singapore, Indonesia and Thailand.

regional, the contacting parties did not hesitate in inviting big powers outside the region. This invitation was conditional. Thus, the invitees were not permitted to willingly engage in the use of force. What may be gleaned from this brief account is that, the littoral States were keen to enlist assistance from big naval powers while at the same time retaining full sovereignty.⁷³

Finally, it remains to be seen whether any lessons have been learnt from the South-East Asian experience in relation to Somali piracy. For the optimistic, it can be said that the multilateral initiatives taking place in the Somali region are comparable to the vigilantism which had been adopted in South-East Asia. For the less optimistic, the multilateral initiative is seen as a mere stopgap, the objective of which is to fulfil the strategic goals of the big naval powers. Unlike the South-East Asian experience, the vigilante approach does not address the root causes of piracy in Somalia.

8 Combating Somali Piracy through Naval Deployment

As mentioned above, in the year 2008, the European Union and the UN Security Council expressed serious concerns with regard to piracy off the east coast of Africa and around the Gulf of Aden. It is a well known fact that a sizable number of trading vessels pass through these trade routes. Somali pirates took advantage of that, and its most notable victim was the World Food Programme (WFP).⁷⁴ It became a regular pattern for the pirates to launch attacks on ships carrying WFP's vital humanitarian aid to Somalia. Thus, in a cry for help, the WFP appealed to the world community for international protection. The concern about the threat posed by Somali piracy had also been expressed by shipping companies, the safety of whose vessels, cargo and crew had been compromised by the aforesaid piracy.

In response to repeated calls by the UN Security Council to combat piracy, the Council of the EU had, on 26 May 2008, reiterated its concern at the upsurge of Somali piracy and the effect of that on safety of maritime traffic and the humanitarian efforts. Accordingly, the EU Council decided on November 2008 to launch Operation EUNAVFOR Somalia (otherwise known as Operation Atalanta) for one year at an estimated cost of 8.3 million Euros.⁷⁵

The main strength of Operation Atalanta is the clarity of its mandate, namely, offering support to WFP in its efforts to transport humanitarian aid to Somalia, to protect the shipping of the African Union (AU) mission providing supplies to the TFG of Somalia, to protect vulnerable shipping and to liaise with shipping companies as to how to avoid high-risk zones, and to cause deterrence, disruption and breakup of private gangs.

Although Operation Atalanta has been generally praised, its successes have been more apparent in protecting WFP and AU shipping more than in deterring and disrupting piracy. Moreover, the presence of military forces and cooperation by some ship operators seem to have thwarted to a great extent the number of attempted pirate attacks.

There have been, however, some collateral constraints which have reduced by far the efficacy of Operation Atalanta. To begin with, it has to be remembered that Atalanta has been designed to work hand in hand with transiting ships and in cooperation with the Maritime Security Centre Horn of Africa (MSHOA). This liaison, however, has thus far proved to be an impediment in the face of naval protection. This is due to the fact that a significant proportion of transiting ships have not been co-operating as required in the spirit mentioned above. Another reason which militates against successful naval protection is the sheer vastness of the waters to be patrolled, namely, south of the Red Sea, the Gulf of Aden, the Somali Basin and part of the Indian Ocean. In addition to the above, the pirates are continuously expanding their sphere of operation further and further away from Somali and Yemeni coasts, well over 1000 nautical miles into the Indian Ocean and Kenyan Waters. This is all a direct

⁷³ Mark J Valencia and Nazery Khalid, *The Somalia Multilateral Anti-Piracy Approach: Caveats on Vigilantism* (17 February 2009) Japan Focus <http://japanfocus.org/articles/print_article/3052> at 12 July 2010.

⁷⁴ World Food Program, *Coordinated Action Urged: Piracy Threatens UN Lifeline to Somalia*, 7 October 2007 <<http://www.wfp.org/node/328>> at 12 July 2010.

⁷⁵ European Union Common Security and Defence Policy, *EU Naval Operation Against Piracy (EUNAVFOR Somalia - Operation ATALANTA)*, EUNAVFOR/18 (June 2010) <http://www.consilium.europa.eu/uedocs/cms_data/docs/missionPress/files/100607%20Factsheet%20EU%20NAVFOR%20Somalia%20-%20version%2018_EN.pdf> at 12 July 2010.

result of the pirates now using more sophisticated ‘mother ships’ as a base for launching minor skiff attacks.

In addition to the foregoing, notwithstanding the clarity of the mandate with which Atalanta is endowed, many of the naval forces present have not been provided with unequivocal rules of engagement. As a result, there appears to be a total lack of coordination amongst the present naval forces, including the methods of processing alleged captured pirates.

It is axiomatic that the lack of clear rules of engagement should not provide naval forces with the right to commit unnecessary or unlawful killing of alleged pirates. Naval commanders should always remember that Atalanta remains a law-enforcement operation and should not be seen as war as such against pirates. Thus, like any situation in which the use of force is in issue, Atalanta must abide by notions of proportionality and reasonableness, with the inference that naval forces should resort to lethal force against pirates only when they pose a threat to life.

In spite of any impact that Atalanta may have had, piracy in the Gulf of Aden and the Indian Ocean remains a serious and continuous threat not only to EU interests but general maritime trade. Nevertheless, the fact that Operation Atalanta has been launched in a short space of time constitutes a good precedent for how the EU can successfully conduct its foreign and security policy. It may, however, be mentioned in passing that fifteen of the EU member States have as yet to make a permanent operational contribution to Atalanta. On the other hand, there are a number of non-EU Member States that participate in the operation, namely Norway, Croatia, Montenegro and Ukraine. There are also several States that have sent naval forces to protect shipping from Somali piracy, such as China, Japan, Russia, the United States.⁷⁶

9 Freezing of Ransom Money and Sanctions Against Ransom Paying Entities

We now turn to two specific questions: first, freezing of assets owned by pirates; and second, whether sanctions may be imposed under international law on any entity paying ransoms to secure the release of cargo and crew on board ships taken by Somali pirates.

The UN Security Council Resolution 1844 (2008), impelled member States to impose travel bans and to freeze assets of named individuals and entities who, *inter alia*, through their actions, undermine the security and stability of Somalia, and prevent humanitarian aid from reaching those at whom it is targeted in Somalia. An important element of that resolution is that, it authorizes member States to nominate such individuals and entities to the then newly created SC Committee concerning Somalia for inclusion on the list of those subjected to travel ban and freezing of assets.⁷⁷ The latest report of that Committee, dated April 2010, contains a list of eight individuals and one entity. This means that all those named on the list may have their assets immediately frozen. Thus, if any member State takes such action, that could be legally justified on the basis of Resolution 1844.⁷⁸ It is noteworthy that the comprehensive list of names provided by the Committee describes in detail the misdemeanour committed by every individual/entity listed there. What is curious, however, is that the aforementioned list does not name pirates as such and does not refer to involvement in piracy of those listed. Therefore it appears that the list is not even remotely connected with piracy. It is submitted that the consolidated list is not an efficient method for coping with the crisis. The simple fact is that even those who negotiate the ransom payment with the pirates would not have a clue as to the name or identity of the person they are dealing with. By the same token, it is impossible to ascertain whether that person (i.e. the pirate) is a nominated individual on the Committee’s list. According to Steve Askins, ‘a shipowner will have done well if during the course of negotiation he is able to determine which Somali clan or sub-clan he is dealing with, let alone identifying the individual with whom he is dealing’.⁷⁹

⁷⁶ Ibid.

⁷⁷ Security Council Committee pursuant to Resolutions 751 (1992) and 1907 (2009) concerning Somalia and Eritrea <<http://www.un.org/sc/committees/751/index.shtml>>.

⁷⁸ SC Res 1844, UN SCOR, 6019th mtg, UN Doc S/Res/1844 (20 November 2008) [1], [3], [7]..

⁷⁹ Stephen Askins, Ince & Co, *Paying Ransoms - Could The US Make This More Difficult?* (Ince & Co: 2010) <<http://www.incelaw.com/documents/pdf/Strands/Shipping/Article/Paying-ransoms-could-the-US-make-this-more-difficult.pdf>> at 13 July 2010.

In addition to the foregoing, there appears to be a gap in what SC Resolution 1844 requires States to do. Thus, it remains an open question as to whether assets may be frozen before the inclusion of the name of the holder to the Committee's list. It is arguable however, that such assets may nevertheless be frozen on the basis of the spirit and intent of the SC Resolution. At any rate, this is how the situation is perceived in the US, as evidenced by the Executive Order concerning Somalia, dated 13 April 2010.⁸⁰ The preamble of that order cites the deterioration of the security situation and the persistence of violence in Somalia, and acts of piracy and armed robbery at sea off the coast of Somalia, and the various SC Resolutions as providing the impetus for adopting the Executive Order in question. The Order which authorises the freezing of assets of certain designated individuals and entities does not include names of pirates, nor does it for that matter make any express reference to ransom.

Leaving issues of legality aside, in practical terms freezing assets of Somali pirates is difficult to attain as they do not use national or international banking systems. In short, they do not hold bank accounts which can be frozen. In any event, even if such accounts exist, Somalia is a dysfunctional State without proper law enforcement mechanisms. According to media reports, ransom money is channelled through secret routes involving for the most part corrupt *Bureaux de Change* and tribal chiefs.⁸¹ In a nutshell, the freezing of ransom money which is authorised by the SC is unattainable in practical terms.

Turning to the second question, namely the issue of imposing sanctions on those who pay the ransom, there is room for the view that such actions may be justified on the basis of the various SC Resolutions relating to Somalia. It is submitted that this may not stand up to scrutiny, as the *raison d'être* of these resolutions is to suppress piracy and not to victimise the victims further. In our search for the legality of these sanctions, we find no support in general international law for that.⁸²

As there seems to be no international precedent on the matter, our attention now focuses on the State practice of the UK and the US. As far as the UK is concerned, there may be two putative snags with ransom payments. The first one is under UK anti-terrorist legislation and the other is under the *Proceeds of Crime Act 2002 (POCA)*. Therefore, under the former it would be a criminal offence to provide funds knowing or having reasonable cause to suspect that they may be used for the purpose of terrorism.⁸³ The legislation extends the definition of terrorism to acts committed outside the jurisdiction as well as to non-violent acts which have devastating effect on the community. Furthermore, the Act recognises various motives for terrorism, such as religion, politics and ideology. As to the *POCA*, presumably once the ransom is received by the pirates it becomes 'proceeds of a crime', but on proper interpretation of the provisions of *POCA*, it becomes very clear that paying the ransom is not *per se* a punishable act.⁸⁴ This conclusion finds support in the Twelfth Report of the EU Committee to the House of Lords on combating Somali Piracy.⁸⁵ It is also supported by the decision of Justice Steel in *Masefield AG v Amlin Corporate Member Ltd*.⁸⁶ This case concerned a dispute between the parties as to whether the hijacking of a tanker seized by Somali pirates justified a claim under an insurance policy. The claimants argued that the payment of ransom, though not illegal under English law, was contrary to public policy. Mr Justice Steel was inclined to think otherwise, as the shipowners had no other realistic option at their disposal in order to save the crew, the ship and its cargo. He concluded there were no clear and compelling circumstances to justify ransom payment as an activity which is contrary to public policy.

⁸⁰ Office of the Press Secretary of the White House, 'Executive Order Concerning Somalia' (Press Statement, 13 April 2010) <<http://www.whitehouse.gov/the-press-office/executive-order-concerning-somalia>> at 13 July 2010.

⁸¹ ECOTERRA International, 'ECOTERRA Intl No 348 Somali Piracy News', *Australia.to News* (online), 25 March 2010 <http://www.australia.to/2010/index.php?option=com_content&view=article&id=1721:ecoterra-intl-no-348-somali-piracy-news&catid=70:piracy-in-somalia&Itemid=14> at 13 July 2010.

⁸² See volumes 1 and 2 of Robert Jennings and Arthur Watts (eds), *Oppenheim's International Law* (Oxford University Press, 9th ed, 1996); Sir Ian Brownlie, *Principles of Public International Law* (Oxford University Press, 7th ed, 2008).

⁸³ *Terrorism Act 2000* (UK) c11, ss 15-18. See also Stephen Askins, Ince & Co, *Piracy Off Aden and Somalia: An Overview of Legal Issues for the Insurance Industry* (Ince & Co: 2008) <<http://www.incelaw.com/documents/pdf/Legal-Updates/Piracy-off-Aden-and-Somalia-an-overview-of-legal-issues-for-the-insurance-industry>> at 13 July 2010.

⁸⁴ *Proceeds of Crime Act 2002* (UK) c 29, pt 7.

⁸⁵ Above n 16, [82] (Conclusions and Recommendations).

⁸⁶ [2010] EWHC 280 (Comm)(QB) (18 February 2010).

As far as the US is concerned, it was hoped that the aforementioned Executive Order would have clarified once and for all whether sanctions should be imposed against ship owners who pay ransom to pirates, but this was not to be. A strict interpretation of the provisions of the Executive Order exonerates payment of ransoms from sanctions. On the other hand, and in the unlikely event that the Executive Order is seen as authorising such sanctions, one can only speculate what their character can be. Thus, this can take the form of banning from port entry of vessels whose release is secured through payment of ransom to pirates. Secondly, freezing of the assets of the registered owners of the freed vessel, if they have offices registered in the territory of the sanctioning state.

Having said that, criminalisation of pirated ships could produce negative results in relation to ransom insurance companies and the payment of ransom. It would seem that any restriction on the present practice relating to ransom payment could push it deep down to the level of an underground activity. This could result in an enormous dark figure, thereby making it difficult, if not impossible, to ascertain the extent of what is actually going on in relation to piracy. To conclude, the idea of penalising ship owners is deplorable as a means of dealing with the continued burden of piracy and ransom demands.

As a matter of legal efficacy, the type of sanctions discussed here will not perturb Somali pirates significantly as their whole approach to the matter is not necessarily rational, taking into account the degree of risk involved.

10 Conclusion

Piracy is a crime under international law and is conceptualised and defined in several international instruments, chief among which is *UNCLOS*. However, the current influx of piracy off the coast of Somalia has exposed major weakness in the application of the current rules pertaining to that phenomenon all over the world. There is, therefore, an urgent need to fill in the *lacuna* in defining the term piracy and enhancing the enforcement of the relevant rules. With that in mind, confusion between acts of piracy and those of terrorism must be avoided, in spite of the fact that they share some common grounds.

The SC has reacted swiftly to the crisis by passing several resolutions urging the international community to take action to protect vessels transporting humanitarian aid to Somalia; expressing its concern that acts of piracy and armed robbery against vessels pose a threat to the safety of maritime routes; authorising the States cooperating with the TFG to enter the territorial waters of Somalia and to use all necessary means to repress acts of piracy by deploying naval forces; and to seize and detain vessels and individuals involved in piracy.

The presence of a number of serious collateral constraints, such as the lack of cooperation by shipowners, the use of 'mother ships' by pirates and the enlargement of the pirates' sphere of operation has diluted the effectiveness of Operation Atalanta. It seems from the recent surge in piracy attacks that this operation cannot by itself alone stamp out piracy and a more comprehensive approach to the problem is required.

While the act of arresting suspected pirates is relatively not an onerous task, dealing with them thereafter can be quite daunting. This is because many States have not updated their national legislation to support prosecution of suspected pirates. Moreover, States are not actively pursuing such prosecution because they lack either the political will or the technical capacity. Until recently, Kenya and Seychelles were the only countries in the region that had actually accepted to prosecute pirates captured by other States in their courts. However, Kenya has threatened to pull out of this scheme, which could render the MoU more or less dysfunctional. No wonder, therefore, that the SC is considering the possibility of creating international/regional tribunals to assume jurisdiction over Somali piracy. Whether such tribunals would become operational and effective is a matter of speculation at this stage.

The current measures of preventative or retributive nature that are aimed at combating Somali piracy, such as naval patrols, or freezing the assets of the pirates, or imposing sanctions on shipowners who yield to ransom, do not provide a long term solution to the problem. Thus, there is an urgent need for a

comprehensive strategy to tackle the problem at its root causes. In this context, capacity-building initiatives such as the IMO's *Djibouti Code of Conduct* should be encouraged.