

# SOMALI PIRACY – EFFECTS ON OCEANBORNE COMMERCE AND REGIONAL SECURITY AND CHALLENGES TO INTERNATIONAL LAW AND WORLD ORDER

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*The article analyses the nature, history and causes of Somali piracy in social-economic, geo-political and panoramic context. It also examines its commercial, economic and security threats and challenges to oceanborne trade and traditional doctrines of international law. The article focuses on eight major areas: examination of the threats to maritime commerce, strategic sealanes and vital energy sources; threats to maritime, regional and global security; challenges to international law and existing world order; threats to international financial order; threats to international economic order; outline of future prospects for the piracy and proposed international solution; and concluding remarks.*

## 1 Introduction – Somali piracy

### 1.1 Nature and extent

For nearly a decade now, Somalia has been synonymous with piracy and lawlessness. Yet Somali piracy accounts for only 15 per cent of reported global piracy and robbery at sea incidents for 2005 – 2010.<sup>1</sup> The remaining 85 per cent being accounted for by the Far East (23 per cent), South East Asia (19 per cent), Rest of Africa (17 per cent), Southern Asia (9 per cent), South America (8 per cent) and the Rest of the World (2 per cent).<sup>2</sup> Even within the Continent, piracy in the rest of Africa accounted for only 25 per cent of global incidents: 2 per cent more than Somalia.<sup>3</sup> So why has Somali piracy monopolised global attention? The answer lies in the country's strategic position and the magnitude of the damage to merchant shipping and world trade caused, compared to the mere numerical comparisons of reported piracy incidents. For instance, over the same period, over 250 merchant shipping vessels with over 500 crew men and an estimated US\$1.5 billion worth of cargo have been hijacked through acts of piracy and robbery at sea off the Somali coast alone.<sup>4</sup> Since the International Maritime Organisation (IMO) started keeping records on piracy in 1984, attacks have continued sometimes from as far as 600 – 1500 nautical miles out to sea. More than 100 attacks were reported last year (2010) alone, and pirates have seized over 50 vessels, with more than 800 seafarers and sailors having been kidnapped and held for ransom during that period.<sup>5</sup> As of December 2010, over 30 ships and an estimated 150 seafarers from 25 countries were being held hostage in Somalia.<sup>6</sup> Over 25 seafarers and at least 20 pirates have died so far. In the process, the pirates have netted over US\$500 million in ransom money from ship owners, cargo owners or operators this year.<sup>7</sup> That is more than the total loss during the Malacca Straits and South China Sea piracy attacks in the last decade, preceding Somali piracy. In view of the notoriety and monetary values involved, Somali piracy has dwarfed and replaced Asian piracies, which accounted for 28 per cent of global incidents (nearly twice the Somali record). From mid 2009, almost all of the world's most

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<sup>1</sup> One Earth World, 'Maritime Piracy Around the World' (Fact Sheet No 5, Oceans Beyond Piracy Project Report, 2010).

<sup>2</sup> Ibid.

<sup>3</sup> Ibid.

<sup>4</sup> Although generically referred to as Somali piracy, the incidents occur in the whole region which includes the north-western Indian Ocean, i.e. the Gulf of Aden, the Persian Gulf, the entrance to the Red Sea, the Somali and the south west and south east Indian Ocean as far south as the Seychelles. It originated from the Gulf of Aden and spread south following concerted intervention from the allied navies that drove them away from the North West. Although other nationalities are involved in the piracy, Somalis do it predominantly. See also P Lehr and H Lehmann, 'Somalia: Pirates new Paradise' in P Lehr (ed), *Violence at Sea: Piracy in the Age of Global Terrorism* (Routledge, 2007) 1-22.

<sup>5</sup> The practice is to hold vessels and crew then negotiate ransom of up to \$30 million although only 10 per cent payment is normally received. \$1 million was paid for the British couple, half of that by Somalis who felt ashamed by their compatriots' actions. However, the highest payment has been \$9 million for a South Korean tanker.

<sup>6</sup> These are held in pirate ports especially Haradeera, in the autonomous Puntland beyond the jurisdiction of the TFG but the crew is normally held in the hinterland to avoid daring rescue missions.

<sup>7</sup> A new breed of professionals has developed, especially in London and the Middle East, specialising in contacting and negotiating with pirates on behalf of owners and insurers.

powerful navies and governments<sup>8</sup> have been pinned down and unable to contain the phenomenon caused by a rag-tag army of Somali youths, some barely in their teens, sailing in sometimes rusty ‘motherships’<sup>9</sup> and using skiffs and speedboats and armed with AK47s, hand and shoulder held rocket propelled grenades;<sup>10</sup> the favourite pirate weapons. Where did it all come from and what caused it?

## 1.2 Developments and causes

A number of factors have contributed to the development and facilitation of the piracy. In the first instance Somalia is one of the world’s poorest countries, an under resourced, predominantly barren country with a hostile environment, prone to drought and famine and therefore unable to support her 10 million inhabitants. Secondly, the country’s unique position in the Gulf of Aden, its long coastlines, the vastness of the Western Indian Ocean and its strategic geographical location vis-à-vis vital sealanes and access routes to the West’s energy sources, make anti-piracy patrols around it almost impossible.

Against that general background, the mediate causes of the piracy have been the cold war rivalry between the US (the West) and the former Soviet Union (the East) in the 1970s and 1980s which pitched Somalia and Ethiopia against each other, often switching sides at least twice each. This, in turn, led to two border wars between the two countries; Somalia apparently over the disputed Ogaden, a region administratively part of Ethiopia but inhabited by ethnic Somalis who wished to join Siad Barre’s Greater Somalia Vision. Somalia came off worse in that rivalry. Ravaged and unable to survive, the Central Government collapsed in 1991 leaving nearly three million formerly state employees unemployed and destitute. With that collapse went the administrative, political, economic, social and judicial institutions. Consequently, the country degenerated into lawlessness with the vacuum filled by warlords and clan heads. That eventually led to Somalia’s disintegration into three separate semi-autonomous regions and the emergence of insurgency and Al Qaeda affiliated terrorism first by the Islamic Courts Union and later by the Al Shabab militias.

Thus in a span of about 10 years, the seeds of Somali Piracy were sown. Consequent upon, and building on that, the immediate causes of the piracy can reasonably be attributed to: the large scale internally displaced population (IDP) victims of famine following long drought coinciding with the government collapse and the ongoing civil wars; availability of abundant easy arms supply; support from and funding by the insurgency; ascendancy and influence of warlords and clan heads; the depletion of formerly rich Somali fisheries and other marine resources by large scale and often illegal over-fishing by foreign trawlers; the dumping of toxic and hazardous wastes in Somali waters and coastline by Western multinational corporations; consequent environmental damage and degradation from such dumping; large-scale unemployment of former fishermen and armed forces (navy, army, marine, police, prison and other paramilitaries); the perceived feeling of abandonment of Somalia by the international community; the envy and acute frustration of desperate and destitute Somalis seeing Western owned vessels carrying cargoes and ‘unlawfully’ fishing through Somali waters and coastline.<sup>11</sup> This is putting it simply as matters are probably more complex than this. In addition these are not to excuse piracy, but rather mitigating factors. However, even these do not explain why the piracy is very different from anything else known before.

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<sup>8</sup> That is more than the total loss during the Malacca Straits and South China Sea piracy attacks in the last decade, preceding Somali piracy. In view of the notoriety and monetary values involved, Somali piracy has dwarfed and replaced Asian piracies, which accounted for 28 per cent of global incidents (nearly twice the Somali record). From mid 2009, almost all of the world’s most powerful navies have been involved in the anti-piracy patrols in the Indian Ocean.

<sup>9</sup> Somali pirates use relatively small vessels as ‘motherships’ from where the speedboats are launched to attack and board larger merchant vessels. No information is available regarding registry, safety, equipment and origin of these vessels but they are effective. They are often disguised as trawlers and several times when approached, they have claimed to be fishermen until the boat is searched and its lethal cargo revealed. The ‘motherships’ carry provisions and sophisticated communication equipment to liaise with land-based command centres and sometimes foreign based agents.

<sup>10</sup> The preferred and most effective weapon of the pirates, all of which are available very cheaply in Somalia and the region, a result of the collapse of the estimated 300 000 strong Somali armed forces, several border wars with Ethiopia and ongoing civil wars and insurgency. See also Katherine Houreld, ‘Somali Pirates carrying AK-47s, RPGS storm ship, seizing 21 Filipinos aboard; 326 crew now held’, *Associated Press*, 21 April 2010.

<sup>11</sup> See Ademun-Odeke, ‘Somali Piracy - History and Developments’, forthcoming in the *African Journal of International and Comparative Law*; ‘Somali Piracy, Jurisdictional over Pirates in Third Countries for Offences committed in the High Seas’ forthcoming in the *Journal of International Maritime Law* and ‘Somali Piracy-Agreements to Prosecute in Third Countries’ forthcoming in the *International and Comparative Law Quarterly*.

### 1.3 Novelty of a modern hybrid piracy

Matters are further compounded by the novelty of the Somali piracy, indefinable under known rules of both customary and treaty international law due to its unique characteristics. It includes armed robbery at sea, kidnapping, hostage taking, general security, links to terrorism, money laundering and international organised crimes. Unlike old pirates, these started as amateurs, sometimes under age and operating from a country with no islands, creeks or coves and instead hunting in the open sea, dressed in modern attires. Until then, international law had been accustomed to a pirate as a buccaneer<sup>12</sup> and privateer,<sup>13</sup> a one-eyed fellow (with patch on the other eye and a parrot on his shoulder), a sword wielding and rum drinking outlaw, unshaven and bizarrely dressed and plundering for selfish and private motives. What we have in Somalia, however, is a modern hybrid piracy problem with roots in the history, and a political, social and economic collapse of a nation and its consequent (apparent) neglect by the international community.<sup>14</sup> Furthermore, when things eventually exploded, the international community and the patrolling Allied Navies had no idea how to deal with arrested pirate suspects from both international and criminal jurisdictional perspectives. Thus other unique Somali factors further compound the treatment of the subject.<sup>15</sup> Never before had a collapsed government provided a haven and environment in which piracy germinated and thrived. Again, never before have maritime transport and oceanborne trade been victim of such socio-economic and geo-political factors beyond their control, and never before have all these factors conspired to occur at once and in a single confined place. Somali piracy is and remains enigmatic, at least in its use of existing international institutions. The business capital of the world's maritime industry, London, is home to many of the lawyers, negotiators and security teams who help reunite ship owners with their seized vessels. Legal advisors and maritime risk consultants help haggle over ransom fees while hired muscle ensures the cash reaches the raiders.<sup>16</sup> In that context it is akin to a combination of piracy, a sophisticated international business and international organised crimes.

### 1.4 Sophisticated international business

These are the Somali pirates. They do not fit the classical image and definition of the term; they are modern pirates with new dimensions that pose new threats to oceanborne trade, economic fabric, challenges to international law and existing world order. There are other factors which mark out Somali piracy. Customary and international treaty laws define and classify piracy under four main categories.<sup>17</sup> However, Somali piracy has raised numerous and hitherto unfamiliar issues. First, is the unique nature of the piracy; unlike anything known before and which has taken the international community by surprise. Second, are the unique underlying causes, outlined above.<sup>18</sup> Thirdly, its detrimental consequences to international trade, maritime transport, maritime security and world peace. Finally, its bold challenges to established international law and existing world order calls for a review of the international

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<sup>12</sup> Buccaneers were pirates who attacked Spanish and French ships in the Caribbean in the 17<sup>th</sup> Century. Common usage of the word is now synonymous with pirates. For details on pirates, privateers and buccaneers, see Adam J Young, 'Roots of Maritime Piracy in Southeast Asia' in Derek Johnson & Mark Valencia (eds), *Piracy in Southeast Asia: Status, Issues, and Responses* (ISEAS Publications, 2005) 1-33, 5. See also Jack A Gottschalk and Brian P Flanagan, *Jolly Roger with an UZI: The Rise and Threat of Modern Piracy* (Naval Institute Press, 2000) 3-4, 7.

<sup>13</sup> See generally, Joseph J Someone, 'The Trial of the Private Pirate-Captain William Kidd - "The Wizard of the Seas"' (2007) 28 *Wittier Law Review* 1167, 1167-1232. A maritime history treatment of the trial in 1701 of a Scottish born New York merchant turned privateer and pirate.

<sup>14</sup> Hence the subject title of this article – Threats to Regional Security and World Peace and Challenge to International Law and World Order. The apparent neglect refers to withdrawal of the US forces following its military humiliation when bodies of dead marines were dragged through the streets of Mogadishu, the inability of the AU and UN to abandon Somalia after 1991.

<sup>15</sup> Such as the collapsed state, plundering of Somali fisheries, the dumping of toxic and hazardous wastes in and around Somalia by Western companies, international terrorism and need for 'resource transfer' argument from rich to poor nations, cited as the causes and justifications for the resurgent piracy, discussed below at 3.2.

<sup>16</sup> BBC News, 'Who do pirates call to get their cash?' *BBC News* (online) 29 January 2009 <<http://news.bbc.co.uk/1/hi/magazine/7847351.stm>>.

<sup>17</sup> First, as any illegal acts of violence or detention of, 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: (a) on the high seas (or the exclusive economic zone (EEZ) beyond the territorial sea) against another ship or aircraft, or against persons or property on board such ships or aircrafts; or (b) against a ship or aircraft, persons or property in a place outside the jurisdiction of any state. This definition generally covers activities of the Somali pirates, with the exception that they (the Somali pirates) neither use nor attack aircrafts during or in the course of their operations. Secondly, as a voluntary action participation in the operation of a piratical ship or aircraft, inciting and facilitating piratical acts as piracy. This treatment too covers Somali pirates, whose actions are purely voluntary and business-like as there are no indications of duress involved. Thirdly, it includes a frustrated or failed attempt to commit a piratical act as piracy. So when they are caught in the act, or have failed to capture a vessel, the pirates could still be prosecuted. Failure is neither a defence, excuse, nor mitigating factor. This too would cover most aspects of Somali piracy. A number of these have been handed over for trial in Mombasa. Fourth, and finally, it assimilates to acts of piracy actions by a warship or a governmental ship or aircraft, whose ship has mutinied and taken control of the ship or aircraft. Somali pirates do not seem to fall under this category as they use neither warships nor government ships or aircrafts so far. This traditional or outdated treatment of the subject leaves two further areas of contention or uncertainty.

<sup>18</sup> See above, 1.2.

position. Owing to the strategic location of its occurrence, Somali piracy has been catapulted to one of the major international crises of this decade, after the 2007 – 2009 global recession (the Credit Crunch) and international terrorism. Briefly, Somali piracy is not piracy in the ordinary sense of the word at all. It is a sophisticated internationally orchestrated business, employing equally organised international criminality.<sup>19</sup> The shortcoming of those waging war against this mutant piracy is to employ methods designed against ordinary classical piracy of 300 – 400 years ago. Even this analysis is probably rather simplistic for such a complex problem. Although intended to provide a scenario of the piracy as understandable and mitigating reaction by some Somalis to events giving rise to the piracy, it might be misinterpreted as justifying the piracy. In the meantime something had to be done despite the continuing debate.

## 1.5 International response

International response to Somali piracy has predictably taken the following main categories:

- (i) Efforts by the International Maritime Organisation (IMO),<sup>20</sup> United Nations Office for Drugs and Crimes (UNODC),<sup>21</sup> other UN Specialised Agencies and Non-governmental organisations;<sup>22</sup>
- (ii) United Nations General Assembly<sup>23</sup> and Security Council Resolutions<sup>24</sup> on the piracy, especially Resolutions 1838,<sup>25</sup> 1846<sup>26</sup> and 1851,<sup>27</sup>

<sup>19</sup> See below, 2.5.

<sup>20</sup> As the premier specialised agency in the regulation of maritime safety, the IMO has been at the forefront in the global efforts to combat Somali piracy. For the full extent of the organisation's work on piracy see IMO, 'Focus on Piracy' <[http://www5.imo.org/SharePoint/blastDataHelper.asp/data\\_id%3D29898/Piracy21October2010.pdf](http://www5.imo.org/SharePoint/blastDataHelper.asp/data_id%3D29898/Piracy21October2010.pdf)>.

<sup>21</sup> Although a crime agency rather than a strictly maritime agency, the UNODC has done a lot to develop national anti-piracy legislation. It has particularly supported the implementation of the bilateral and multilateral agreements between the EU/US and Kenya and the Seychelles to prosecute pirate suspects, see UNDOC, 'UNDOC and Piracy' (February 2011)

<<http://www.unodc.org/easternfranca/en/piracy/index.html?ref=menuaside>>; <<http://www.unodc.org/unodc/en/frontpage/2010/May/update-on-unodc-anti-piracy-work-with-seychelles.html>>

<sup>22</sup> Such as the International Maritime Bureau (IMB) of the International Chamber of Commerce <<http://www.iccwbo.org>>.

<sup>23</sup> United Nations General Assembly Resolutions on Somalia are available at [www.un.org](http://www.un.org)

<sup>24</sup> Especially Security Resolutions 733, 751, 1250, 1356, 1425, 1725, 1744, 1814, 1816, 1838, 1946, 1851, 1897 and 1918.

<sup>25</sup> Resolution 1938, pursuant to Chapter VII of the *United Nations Charter* provides especially in arts 2 and 3 thus:

Art 2. Calls upon States interested in the security of maritime activities to take part actively in the fight against piracy on the high seas off the coast of Somalia, in particular by deploying naval vessels and military aircraft, in accordance with international law, as reflected in the Convention;

Art 3. Calls upon States whose naval vessels and military aircraft operate on the high seas and airspace off the coast of Somalia to use on the high seas and airspace off the coast of Somalia the necessary means, in conformity with international law, as reflected in the Convention, for the repression of acts of piracy.

<sup>26</sup> Resolution 1846, pursuant to Chapter VII of the *United Nations Charter*, provides in especially paras 6, 9, 10, 14 and 15 thus:

Para 6. Welcomes initiatives by Canada, Denmark, France, India, the Netherlands, the Russian Federation, Spain, the United Kingdom, the United States of America to counter piracy off the Somalia coast, including by escorting vessels of the WFP, and in particular the EU Operation Atalanta.

Para 9. Calls upon States and regional organizations that have the capacity to do so, to take part actively in the fight against piracy and armed robbery at sea off the coast of Somalia, in particular, consistent with this resolution and relevant international law, by deploying naval vessels and military aircraft, and through seizure and disposition of boats, vessels, arms and other related equipment used in the commission of piracy and armed robbery off the coast of Somalia, or for which there is reasonable ground for suspecting such use.

Para 10. Decides that for a period of 12 months from the date of this resolution States and regional organisations cooperating with the TFG 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:

(a) Enter into 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 such action permitted on the high seas with respect to piracy under relevant international law;

Para 14. Calls upon *all States, and in particular flag, port and coastal States, States of the nationality of victims and perpetrators of piracy and armed robbery, and other States with relevant jurisdiction under international law and national legislation, to cooperate in determining jurisdiction, and in the investigation and prosecution of persons responsible for acts of piracy and armed robbery off the coast of Somalia, consistent with applicable international law including international human rights law, and to render assistance by, among other actions, providing disposition and logistics assistance with respect to persons under their jurisdiction and control, such victims and witnesses and persons detained as a result of operations conducted under this resolution* [emphasis is added to show repetition in most other Resolutions prior to and subsequent to this].

Para 15. Notes that the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA Convention) provides for parties to create criminal offences, establish jurisdiction, and accept delivery of persons responsible for or suspected of seizing or exercising control over a ship by force or threat thereof or any other form of intimidation; urges States parties to the SUA Convention to fully implement their obligations under said Convention and cooperate with the Secretary-General and the IMO to build judicial capacity for the S/RES/1846 (2008) 08-63029 successful prosecution of persons suspected of piracy and armed robbery at sea off the coast of Somalia.

<sup>27</sup> Resolution 1851, pursuant to Chapter VII of the *United Nations Charter*, provides in especially resolutions 2-5 thus:

- (iii) Deployment of relevant International Conventions;<sup>28</sup>
- (iv) Establishment of the Contact Group on Piracy off the Coast of Somalia (CGPCS)<sup>29</sup> together with the International Trust Fund<sup>30</sup> thereto;
- (v) Establishment of the United Nations Operation in Somalia (UNOSOM)<sup>31</sup> and the African Union Mission (AMISOM)<sup>32</sup> Peacekeeping Forces in Somalia;
- (vi) Support for the Somali Transitional Federal Government (TFG)<sup>33</sup>
- (vii) Institution of naval patrols of the Somali Coast, Western Indian Ocean and the Gulf of Aden by the US Task Force 151 and 152,<sup>34</sup> the EU NAVFOR<sup>35</sup> and other Allied Powers;<sup>36</sup>
- (viii) Naval Escort of UN Emergency Shipment Convoys;<sup>37</sup>

RES 2. Calls upon States, regional and international organisations that have the capacity to do so, to take part actively in the fight against piracy and armed robbery at sea off the coast of Somalia, in particular, consistent with this resolution, resolution 1846 (2008), and international law, by deploying naval vessels and military aircraft and through seizure and disposition of boats, vessels, arms and other related equipment used in the commission of piracy and armed robbery at sea off the coast of Somalia, or for which there are reasonable grounds for suspecting such use;

RES 3. Invites all States and regional organisations 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’ from the latter countries, in particular countries in the region, to facilitate the investigation and prosecution of persons detained as a result of operations conducted under this resolution for acts of piracy and armed robbery at sea off the coast of Somalia, provided that the advance consent of the TFG is obtained for the S/RES/1851 (2008) 08-65501 3 exercise of third state jurisdiction by ‘shipriders’ in Somali territorial waters and that such agreements or arrangements do not prejudice the effective implementation of the SUA Convention;

RES 4. Encourages all States and regional organisations fighting piracy and armed robbery at sea off the coast of Somalia to establish an international cooperation mechanism to act as a common point of contact between and among states, regional and international organisations on all aspects of combating piracy and armed robbery at sea off Somalia’s coast; and recalls that future recommendations on ways to ensure the long term security of international navigation off the coast of Somalia, including the long term security of WFP maritime deliveries to Somalia and a possible coordination and leadership role for the United Nations in this regard to rally Member States and regional organisations to counter piracy and armed robbery at sea off the coast of Somalia are to be detailed in a report by the Secretary-General no later than three months after the adoption of resolution 1846;

RES 5. Further encourages all states and regional organisations fighting piracy and armed robbery at sea off the coast of Somalia to consider creating a centre in the region to coordinate information relevant to piracy and armed robbery at sea off the coast of Somalia, to increase regional capacity with assistance of UNODC to arrange effective ‘shiprider’ agreements or arrangements consistent with UNCLOS and to implement the *SUA Convention*, the *United Nations Convention against Transnational Organized Crime* and other relevant instruments to which States in the region are party, in order to effectively investigate and prosecute piracy and armed robbery at sea offences; for the purpose of repressing acts of piracy and armed robbery at sea, and (b) use, within the territorial waters, all necessary means to repress acts of piracy and armed robbery at sea.

<sup>28</sup> Such as the *Convention on the Suppression of the Financing of Terrorism* <<http://www.hrweb.org/legal/cpr.html>> and <<http://www.un.org/law/cod/finterr.htm>> aimed at Al Qaeda and its affiliate Al-Shaba; the *Convention of Civil and Political Rights* <<http://treaties.un.org/doc/db/Terrorism/english-18-11.pdf>> intended to safeguard the rights of pirate suspects during their detentions and trials; *Convention of Organised Crimes* <[http://www.uncjin.org/Documents/Conventions/dcatoc/final\\_documents\\_2/convention\\_eng.pdf](http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_eng.pdf)> aimed at traffickers; *Convention on the Suppression of Unlawful Acts against Ships* <[http://www.nti.org/e\\_research/official\\_docs/inventory/pdfs/civair.pdf](http://www.nti.org/e_research/official_docs/inventory/pdfs/civair.pdf)> aimed at piracy and robbery at sea itself; *Convention Against Torture and other Inhumane and Degrading Treatments* <<http://www.hrweb.org/legal/cat.html>> also aimed at safeguarding suspected pirates during their interrogations and the *Convention Against the Taking of Hostages* <<http://treaties.un.org/doc/db/Terrorism/english-18-5.pdf>> also aimed at current practice of pirate hostage taking of sailors and seafarers.

<sup>29</sup> See ‘Contact Group on Piracy off the Coast of Somalia’, *News Blaze* (online)

<<http://newsblaze.com/story/20090911162343stat.nb/topstory.html>>; Contact Group on Piracy off the Coast of Somalia, ‘Contact Group on Piracy off the Coast of Somalia – Report of Working Group 3’ (Working Group 3 Report, CGPCS WG3/1/WP.1, 26 February 2009) <[http://www.marad.dot.gov/documents/Contact\\_Working\\_Group\\_3\\_final\\_report.pdf](http://www.marad.dot.gov/documents/Contact_Working_Group_3_final_report.pdf)>.

<sup>30</sup> *Ibid.*

<sup>31</sup> UNSOM, ‘United Nations Operations in Somalia I’ <<http://www.un.org/en/peacekeeping/missions/past/unosomi.htm>>.

<sup>32</sup> AMISOM was created by Council Resolution 1744 <<http://www.un.org/News/Press/docs/2007/sc8960.doc.htm>> building Security Council Resolutions 733 (1992), 1356 (2001), 1425(2002) and 1725 (2006). Pursuant to Chapter VII of the *United Nations Charter*, the Resolution provides, especially in paras 3,4 and 8 thus:

Para 3. Requests the Secretary-General to assist the Transitional Federal Institutions with the national reconciliation congress, and, more widely, promoting an ongoing all-inclusive political process, working together with the African Union, the League of Arab States and the Intergovernmental Authority on Development, requests the Secretary-General to report back to the Security Council within 60 days of adoption of this resolution on progress made by the Transitional Federal Institutions in pursuing an all-inclusive political process and reconciliation, and reiterates its intention to consider taking measures against those who seek to prevent or block a peaceful political process, threaten the Transitional Federal Institutions by force, or take action that undermines stability in Somalia or the region;

Para 4. Decides to authorise member States of the African Union to establish for a period of six months a mission in Somalia, which shall be authorised to take all necessary measures as appropriate to carry out the following mandate:

Para 8. Urges Member States to provide personnel, equipment and services if required, for the successful deployment of AMISOM, and encourages Member States to provide financial resources for AMISOM.

<sup>33</sup> For support for the TFG see <<http://www.un.org/News/Press/docs/2005/sc8449.doc.htm>>.

<sup>34</sup> Combined Maritime Forces, ‘Combined Task Force 151’ <<http://www.cusnc.navy.mil/cm/151/index.html>>.

<sup>35</sup> For the EU anti-piracy Naval Force operations in Somalia see EU NAVFOR Somalia <<http://www.eunavfor.eu/press/news/>>.

<sup>36</sup> The other major Allied Powers are China, India, Korea, Japan and the Russian Federation.

<sup>37</sup> Pursuant to para 6 of Security Council Resolution which ‘Welcomes initiatives by Canada, Denmark, France, India, the Netherlands, the Russian Federation, Spain, the United Kingdom, the United States of America, and by regional and international organisations to counter piracy

- (ix) Establishment of Bilateral and Multilateral Agreements between the Allied Powers and Kenya<sup>38</sup> and the Seychelles;<sup>39</sup>
- (x) Establishment of the Djibouti Code,<sup>40</sup> regional multilateral organisation to deal with the piracy; and
- (xi) Finally, the recent call by the AU for UN Security Council naval and air blockade of Somalia.<sup>41</sup>

The fact that the Security Council Resolutions were passed under Chapter VII of the United Nations Charter, reflects the perception that the piracy was regarded as a threat to world peace. Notably, the Resolutions impose what amount to the rights of hot pursuit, economic blockade and disregard of Somali sovereignty through the backdoor.<sup>42</sup> This is despite undertakings in the Resolutions themselves of respect for Somali's territorial sovereignty and regard to international law, especially UNCLOS.

## 1.6 Aims and Objectives

This article provides an overview of the nature, development, causes and global effects of Somali piracy. The article in no way suggests that Somalia is the only place on the globe where piracy currently occurs. It acknowledges that piracy occurs in other regions of the world including the Mediterranean, the South China Sea, the Malacca Straits, the Bay of Guinea (West Africa) and the Caribbean. However, of those, the current two hot spots are the Malacca Straits/South China Sea, Gulf of Aden and the Somali basin ('Somali piracy').<sup>43</sup> Apart from occasional references to piracy in those other geographical areas, this article is confined to discussions of Somali piracy. It reiterates that Somali piracy differs in nature and veracity from both past piracy and those currently occurring elsewhere in the globe. The article is premised, against the backgrounds of a collapsed State, a non-functional economy, under both customary and international norms and suggested international solutions.

## 2 Threats to oceanborne trade and regional security

### 2.1 To international seaborne trade

#### 2.1.1 Economic and social consequences

As the debate as to its causes rages on, piracy has meanwhile wreaked havoc to the current world trade order.<sup>44</sup> It has already skyrocketed freight, charter rates and insurance premiums. Furthermore, it has contributed to an increase

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off the coast of Somalia pursuant to resolutions 1814 (2008), 1816 (2008) and 1838 (2008), the decision by the North Atlantic Treaty Organisation (NATO) to counter piracy off the Somalia coast, including by escorting vessels of the WFP, and in particular the decision by the EU on 10 November 2008 to launch, for a period of 12 months from December 2008, a naval operation to protect WFP maritime convoys bringing humanitarian assistance to Somalia and other vulnerable ships, and to repress acts of piracy and armed robbery at sea off the coast of Somalia'.

<sup>38</sup> *The Memorandum of Understanding between the Republic of Kenya and the United Kingdom of Great Britain and Northern Ireland on the Conditions of Transfer of Suspected Pirates and Armed Robbers and Seized of Property to the Republic of Kenya* signed in Nairobi on 11 December 2008 (unpublished); similar agreements were reached with the EU, the US on 2 February 2009 and the Kingdom of Denmark on 4 June 2009.

<sup>39</sup> *Exchange of Letters Between the European Union and the Republic of the Seychelles on the Conditions and Modalities for the Transfer of Suspected Pirates and Armed Robbers From EUNAVFOR to the Republic of the Seychelles and for their Treatment after such Transfer* signed in Brussels on 19 October 2009 (unpublished); similar arrangement was reached with the US.

<sup>40</sup> See IMO 'High-level meeting in Djibouti adopts a Code of Conduct to repress acts of piracy and armed robbery against ships' (30 January 2009) <[http://www5.imo.org/SharePoint/mainframe.asp?topic\\_id=1773&doc\\_id=10933](http://www5.imo.org/SharePoint/mainframe.asp?topic_id=1773&doc_id=10933)>.

<sup>41</sup> See Mc Parry, 'African Union calls for air, naval blockade of Somalia' (21 October 2010) <<http://www.armybase.us/2010/10/african-union-calls-for-air-naval-blockade-of-somalia/>>.

<sup>42</sup> See Security Council Resolutions, above n 24-27.

<sup>43</sup> Somali piracy is actually a misnomer used to describe piracy in the whole of the Gulf of Aden, north-west Indian Ocean, mouth of the Persian Gulf, entrance to the Red Sea and the Somali basin which now includes areas of the south west Indian Ocean up to 300 nautical miles east of the Seychelles and 1200 nautical miles from the Somali/East African coast.

<sup>44</sup> According to Ocean Beyond Piracy, the cost is as follows:

- **Ransoms:** Over the past five years, Somali pirates' ransom demands have increased from an average of \$150 000 in 2005 to \$5.4 million in 2010. The largest known ransom payment was for the South Korean oil tanker, *Samho Dream*, for which a record \$9.5 million was paid in November 2010. Somali pirates' income for the whole year 2010 was around \$238 million.
- **Naval forces:** The cost of naval operations off the coast of Somalia is around \$2 billion a year.
- **Prosecutions:** More than 750 Somali piracy suspects either have been tried or await trial in more than 11 countries. Working on an average cost of prosecution, OBP estimates that the cost of piracy trials and imprisonment in 2010 was around \$31 million.

in shipping costs and impeded the delivery of food aid shipments,<sup>45</sup> ironically to Somalia itself. Unless they are involved in shipping, the main effect to those outside of Somalia and the industry is higher freight rates, exorbitant insurance premiums and consumer prices. Shipping companies will no doubt pass on the increased operational and additional security costs, higher insurance premiums, ransoms, extra fuel for the twice-longer Cape routes in their fees. However, these effects will eventually find their way on to the high street. The disruption of trade and consequent economic loss to neighbouring countries' ports as well as Somalia itself is incalculable.<sup>46</sup> The Seychelles and the Maldives, for example, whose economies are predominantly reliant on tourism and fishing, have probably suffered most with those key industries most affected. The pirates' excuse being that most foreign trawlers 'illegally' over-fishing in their waters and coasts are either registered or based in Victoria, Seychelles. Kenya is ranked equally first or second on the scale of losses with disruptions in cruise tourism and cargo vessels calling at its port. However, the pirate disruptions know no boundaries.

## 2.1.2 International oceanborne trade and transport

In view of the strategic position of the Gulf with the Suez Canal as the main shipping route close to sources of world energy, piracy has undoubtedly affected international maritime transport and international trade.<sup>47</sup> As indicated, shipping companies pass on the increased security costs – higher insurance premiums, ransoms and extra fuel for the doubly longer Cape routes – in their fees and so these increased costs eventually find their way onto the high street.<sup>48</sup> Excluding the naval costs of patrolling the area by 30 naval vessels from over 20 countries, Somali piracy is estimated to have cost the world an estimated US\$30-70 million in 2008 alone.<sup>49</sup> The full extent of the damage may never be known or not for some time.<sup>50</sup> The incidence of Somali piracy came at a particularly bad time when the world was undergoing a global recession caused by the Credit Crunch in the latter half of the past decade<sup>51</sup> and the major maritime nations were pinned down in Iraq and Afghanistan. However, from the other end of the spectrum it has created a boom in the markets for lawyers, negotiators, financiers, middlemen, maritime security companies and other trades involving in processing and transferring the ransom. Add to that the hike in insurance premiums. The counter argument is that, ironically Kenya and the neighbouring countries have benefited in property boom and commercial expansion as the pirates launder and invest their ransom money. So, according to this persuasion, it has not all been doom and gloom.

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- **Anti-piracy organisations:** A number of intergovernmental organisations dedicated to working towards a solution for maritime piracy have a total budget of around \$24.5 million.
  - **Re-routing ships:** 'Low and slow' vessels, which are prime targets for pirates, are often re-routed to avoid risk zones. The excess cost of re-routing these ships is estimated to be between \$2.4 billion and \$3 billion per year.
  - **Protection:** Deterrent and security equipment costs ship owners between \$363 million and \$2.5 billion per year.

Total direct costs of piracy in 2010 are thus estimated to be between \$7 billion and \$12 billion

<<http://www.evefortransport.com/content/maritime-piracy-costs-global-community-12-billion-year>> also 'Somali Piracy - Causes and Consequences', *Voice of America* (online), 10 April 2010 <<http://www.voanews.com/english/news/a-13-2009-04-10-voa36-68814227.html>>.

<sup>45</sup> See generally, G Bondar, 'Piracy and its Effects on International Shipping' *Australia Chamber of Shipping* (1995) and Security Council Resolution 1816 and 1846 'Economic Impact of Piracy in the Gulf of Aden on Global Trade'

<[http://www.marad.dot.gov/documents/HOA\\_Economic%20Impact%20of%20Piracy.pdf](http://www.marad.dot.gov/documents/HOA_Economic%20Impact%20of%20Piracy.pdf)>. For a more academic and far reaching analysis of the effects of the piracy on see John Knott, 'New Strategies and Idea of Countering Piracy off Somalia; Piracy Prosecutions; Human Rights Issues', *Idarat Maritime* (22 July 2010) <<http://www.idaratmaritime.com/wordpress/?=261>>, where, inter alia, he discusses statistical figures, the danger area for Somalia, cost of defence, cost of attack, redistribution of resources, arrests and prosecution of pirates, trials in Kenya, trials elsewhere, human rights issues in relation to prosecutions, grounds for concern, other rescues, other initiatives, impact of the piracy on other countries and peoples and future prospects.

<sup>46</sup> Known as indirect costs, which are: piracy costs Egypt about \$642 million a year in lost revenue from Suez Canal fees, as ships are re-routed to avoid the Gulf of Aden; the trade impact of piracy costs Kenya and Yemen around \$414 million and \$150 million a year respectively; and losses to its fishing and tourism industries cost the Seychelles around \$6 million a year, id; Total secondary costs to regional economies: \$1.25 billion a year, id; See, also generally, Roger Middleton, 'Piracy in Somalia. Threatening Global Trade, Feeding Local Wars' (Briefing Paper, Chatham House, October 2008) <[http://www.chathamhouse.org.uk/files/12203\\_1008piracysomalia.pdf](http://www.chathamhouse.org.uk/files/12203_1008piracysomalia.pdf)>.

<sup>47</sup> Ibid.

<sup>48</sup> Ibid.

<sup>49</sup> BBC News, 'Somalia piracy "costs up to \$30m"', *BBC News* (online), 2 October 2008 <<http://news.bbc.co.uk/1/hi/7647631.stm>>.

<sup>50</sup> For a spirited attempt, see Martine Murphy, *Small Boats, Weak States, Dirty Money: Piracy and Terrorism in the Modern World* (Hurst and Company, 2009) 49-54.

<sup>51</sup> See para 6 of Security Council Resolution 1846, above n 26; See also, generally, Bondar, above n 45.

### 2.1.3 Effect on law on marine insurance, demurrage and damages for detention of ships

The piracy has led to a call for revision of War Insurance, Institute Cargo Clauses and especially section 57 of the *UK Marine Insurance Act 1906*, legislation forming the basis of Anglo-American and Common Law jurisdictions and of worldwide relevance due to the domination of the British market in matters of insurance. As already discussed, one of the first casualties of the piracy is the hike in insurance premiums for cargo and vessels.<sup>52</sup> Although in the short run, it has created a boom in insurance market, it is disastrous in the end when the cost is eventually passed to consumers and freight rates and fuel costs rises and other goods in the market. Certain insurance companies have benefited from the hike but the moral of the story is that unless the situation is resolved soon they too will be eventual losers. Added to this is the incalculable potential loss caused to business by additional charges for demurrage and damages for detention of vessels due to the piracy which could potentially reduce or wipe out their profit margins altogether. Litigation on these between cargo and shipowners and charterers is only beginning to surface and will increase for the next five to 10 years, or even longer after the containment of the piracy, if ever. The shipping and international community will be paying for the piracy for years to come. Already insurance claims related to piracy have started appearing before courts in the UK.<sup>53</sup> No doubt, demurrage and damage for detention cases will soon follow suit.

### 2.1.4 Effects on seafarer's and sailors' welfare

The forgotten pawn in this game of maritime chess seems to be the seafarers and sailors. They are also the most poorly paid in the industry and easily abandoned (especially by open-registry flags) immediately problems arise.<sup>54</sup> All attention seems to be currently focussed on the pirates and the plights of cargo and ship-owners, financiers, insurers and other commercial interests but not the frontline seafarers who live through the attack, hijack and as captivity. It is probably for those reasons that the IMO dedicated 2010 as 'The Year of Seafarers'. What is not taken into consideration is:

- The loss of life of many seafarers and the repercussions to their families and dependents;
- The psychological after effect of attacks on and the indefinite detention of the seafarers;
- The social consequence of frequent abandonment of many of the seafarer hostages and the ship by the ship-owners;
- The neglecting of the affected seafarers by some flag operators and flag states in terms of wages and benefits;
- The lack of repatriations of the seafarers by the operators, charterers and ship-owners; and  
The suffering and loss of life by the ordinary British, Danish, French and American and other pleasure craft sailors (yachtsmen) caught up in the process.<sup>55</sup>

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<sup>52</sup> Insurance cover includes war risk, kidnap and ransom (K&R), cargo and hull. The most significant increase in premiums has been in war risk and K&R. With the Gulf of Aden classified as a war risk area by Lloyds Market Association (LMA) Joint War Committee in May 2008, it is therefore subject to these specific insurance premiums. OBP estimates that the total excess costs of insurance due to Somali piracy are between \$460 million and \$3.2 billion per year. This is even before attempting to quantify demurrage – loss of use and loss of person-hours while ships and their crew are held hostage, often for a few months, while ship-owners and pirates negotiate a price for their release. The One Earth Future Foundation opines that the scourge of piracy will continue to increase because there is no effective international system to deal with the problem. See Eye For Transport, 'Maritime piracy costs global community up to \$12 billion a year' (20 January 2011)

<<http://www.evefortransport.com/content/maritime-piracy-costs-global-community-12-billion-year>>. For detailed cover of the piracy on the insurance industry see John Knott, 'Somali Piracy: The Effect of Ship Hijacking on Marine Insurance Policies' *Idarat Maritime* (25 February 2010) <<http://www.idaratmaritime.com/wordpress/?p=246>>.

<sup>53</sup> See for instance *Masefield Ag v Amlin Corporate Member Ltd* [2010] EWHC 280 (Comm) 51, in which the court rejected the insured cargo owners' claim for abandonment under s 57 of the *Marine Insurance Act 1906* (UK); see also *Lloyd's Maritime Law Newsletter* 2010 No.791, 2-3 in which the decision is analysed. On piracy and off-hire clauses, see *Cosco Bulk Carrier Co Ltd v Team-Up Owning Co Ltd 'The Saldanha'* [2010] EWHC 134.

<sup>54</sup> See *Year of the Seafarer 2010* (IMO Video, 13 October 2010).

<sup>55</sup> See News Core 'Somali Pirates Accused of Murder Could Face US Trial', *Fox News* (online), 23 February 2011

<[http://www.myfoxdfv.com/dpps/news/somali-pirates-accused-of-murder-could-face-us-trial-dpgonc-20110223-gc\\_12021681#](http://www.myfoxdfv.com/dpps/news/somali-pirates-accused-of-murder-could-face-us-trial-dpgonc-20110223-gc_12021681#)>. See also Ole Wikborg, 'The world's forgotten mariners' (2011) 25(1) *Maritime Risk International* 8, 8-9.

Besides seafarers' direct plight, it has affected their families back home who rely on their remittance and contributions in the foreign income earnings of maritime labour supplying countries like the Philippines and Bangladesh whose estimated annual earnings from the trade range from \$500 million to \$1 billion.

### 2.1.5 Threats to strategic sea lanes and energy sources

The piracy is affecting particularly strategic sealanes for trade between the Middle East and the West, East and West. It is estimated that 16 000 vessels use this space a year. The area is comprised not only of strategic sealanes but also strategic energy sources that drive Western industry. The additional costs of the piracy are, besides the ransoms, longer trips via the alternative Cape of Good Hope route, additional insurance, demurrage costs, higher freight rates, the maintenance of patrolling naval forces. With more than 12 per cent of the volume of oil transported by sea using this route (the Gulf of Aden and Suez Canal), not to mention commodities carried by bulk carriers and finished goods transported by containerships, widespread diversions around the Cape of Good Hope, to avoid the trouble spot, would bring about a series of negative repercussions. Such diversions would almost double the length of a typical voyage from the Gulf to Europe (or triple the voyage from the Far East to the West Coast of North America via the Panama Canal), thereby increasing fuel consumption, emissions and transport costs, which would have to be passed eventually on to consumers elsewhere. This excludes the costs of the 30 warships and several naval aircrafts constantly in operation to keep the sealanes open and environmental damage. It has regional and international security repercussions too, emerging concurrently with heightened international terrorism.

## 2.2 Threats to regional and international security

### 2.2.1 Regional and international maritime security

Somali piracy has impacted on local and regional security too. Within Somalia, it has exacerbated the already poor security situation by fuelling internal insurgency within the country. It is generally believed that some, if not most, of the money earned from the piracy is channelled to the militias fighting the TFG.<sup>56</sup> Furthermore, the piracy has become a threat to the neighbouring countries of Kenya and Ethiopia where the militias have threatened to attack Kenya for their participation in the pirate trials and 'interference in Somali affairs' respectively. They have also threatened the security, fishing industry and tourism of the once peaceful tropical paradises of Mauritius and the Seychelles,<sup>57</sup> and other Indian Ocean islands. In addition, recent events like the bomb attacks in Uganda,<sup>58</sup> allegedly for that country's participation in AMISOM have highlighted the regional threats caused by the piracy and terrorism on those bases. The same fate awaits Burundi, the co-participant in AMISOM. The pirates and their backers have also threatened Tanzania, Mozambique and South Africa if they decide to support Western anti-piracy efforts, to which they are leaning. This is when and where memories of the terrorist bombings in Kenya and Tanzania are still fresh. The Somali insurgents are thought to be linked to Al Qaeda in the Arab Peninsula from Yemen just across the Gulf of Aden in association with the Al Shabab, their Somali affiliates. Left unchecked they might threaten the whole region thereby further endangering the Western energy sources by their strong presence in the strategic sealanes. In the midst of all this, international humanitarian aid to starving Somalia has been jeopardised.

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<sup>56</sup>See, Jonathan Clayton, 'Somali pirates plunder is used to fund terrorism, experts fear' *The Times*, 17 September 2008. See also 'Pirates reached an agreement with Al-Shabaab' *SeaNews Turkey* (online), 1 March 2011 <<http://www.seanews.com.tr/article/PIRACY/54748/Somali-Pirates-Al-Shabaab/>>, according to which Somali pirates are reported to have reached a multi-million-dollar deal with Islamic militants, allowing them a cut of future ransom payouts in return for anchorage at Harardhere, a port controlled by Al-Shabaab fighters.

<sup>57</sup> See Daniel Howden, 'How the Seychelles became a pirates' paradise', *The UK Independent*, 28 February 2010, 24-25 and Ruwantissa Abeyratne, 'New and emerging threats to maritime security' (2010) 18(2) *Asia Pacific Law Review* 171, 171-176, which discusses in details the threats posed to maritime safety by piracy, bioterrorism and the carriage of dangerous goods, the smuggling of illegal immigrants and cyber terrorism. Considers aspects of legal and political preparedness in this area, including: (1) the analogy that can be drawn between the security issues relevant to air and maritime transport; (2) legal definitions of terrorism and terrorists; and (3) the tactics that might be used to counter the particular security threats against the background of the Protocol to the 1988 *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation 2005* (IMO) art 3; *Geneva Convention on the High Seas 1958* art 5; *Convention Against Transnational Organised Crime 2000*; (UN) Protocol Against the Smuggling of Migrants by Land, Sea and Air supplementing the *Convention Against Transnational Organised Crime 2000* (UN).

<sup>58</sup> On the night of the World Cup finals in Johannesburg, suicide bombs were detonated in the Ugandan capital Kampala killing 74 and maiming many more. Al Shabab claimed responsibility for the attack. Targets attacked included an Ethiopian Village Restaurant at Kabalagala – no doubt chosen for its entertainment popularity, proximity to the US Embassy and Ethiopian ownership.

## 2.2.2 Threats to the United Nations humanitarian aid

The piracy has additionally had a detrimental effect on the delivery of world food aid to the IDPs and other starving Somalis. Ninety five per cent of the World Food Programme's (WFP) shipments to Somalia arrive by sea, and ships have required a military escort<sup>59</sup> following indiscriminate attacks from the pirates. Ironically, one of the unintended consequences is that piracy is stopping the world food aid to the very Somali refugees and other IDPs who need it most, a large proportion of the Somali population live as IDPs within the country or as refugees in neighbouring Djibouti, Ethiopia, Eritrea and Kenya. These rely solely on emergency food aid principally from the WFP, the Food and Agricultural Organisation (FAO), UNHCR and the Red Crescent. However, due to the insurgency, terrorism and non-availability of functional ports and infrastructure within Somalia, this aid comes by ships via Somali coasts to either Djibouti (for Ethiopia) or Mombasa (for Kenya) and are then transhipped to Mogadishu. Indeed most of Security Council Resolutions on Somalia and piracy<sup>60</sup> were in response to the acute threat to humanitarian cargo. The irony that this badly needed emergency relief is for the very Somalis has escaped the pirates, with shipments being neither exempted from nor immune to attacks by their very compatriots, the Somali pirates. Thus, to protect the food convoys, the international community has had to resort to the passage of Security Resolutions.<sup>61</sup> The pirates' excuse is that they cannot distinguish between aid bearing and vessels delivering peacekeepers and arms to their opponents the TFG. Nevertheless the cost of protecting the food cargo convoys only adds to the cost of the UN emergency food aid. We should not lose sight of the ensuing inadvertent militarisation of the Indian Ocean.

## 2.2.3 Militarisation of the Indian Ocean

With all the Western/NATO, Eastern (China, Russian, Japan and India) navies now prowling the Western Indian Ocean there is a danger of the militarisation of this previously peaceful ocean. For this reason, it has been suggested that the Western powers especially are using piracy as an excuse to position themselves in this volatile region of the world, keeping an eye on trouble spots and on perceived hostile regimes such as Iran in an area they would have found difficult to move into. For instance, the international environmental organisation ECOTERRA also alleged that newly-leaked information revealed that the anti-piracy activities in the Gulf of Aden serve as a cover-up for the live testing of recently developed less-lethal and sub-lethal weapons systems. The latter allegedly include Human Electro-Muscular Incapacitation (HEMI) Bioeffects devices that emit electrical waveforms for which it is not yet scientifically understood what the long-term effects on a human body are.<sup>62</sup> Furthermore, it has also been argued that the Western countries are using piracy as an excuse to legitimise their presence and exercise their navies in the Indian Ocean.<sup>63</sup> These critics cite the sighting of the US drones and the use of Seychellois ports and airspace, the presence of the French and US naval bases in Djibouti and the de facto use of the port of Mombasa as a supply base. This, it is argued, would be contrary to the wishes of the Indian Ocean countries that have all along desired to keep these waters free from nuclear and other weapons of mass destruction.<sup>64</sup> Most of these countries had been very independent and would, under normal circumstances be fearful of and hostile to interference from and by Western countries. This is yet another security challenge that the international community would rather avoid. The excuse: to blame it on pirates.

## 2.3 Reignited debate for the arming of merchant vessels

Above all, the piracy has unravelled the long kept tradition of not arming merchant shipping vessels. Except during WWI and WWII, when merchant vessels were armed to deter enemy capture, peacetime practice has been to keep them free of arms. However, Somali piracy has also led to the reopening of this previously adhered to custom of not

<sup>59</sup> Nick Wadhams, 'Pirates in Standoff Threaten Food Aid, Global Shipping', *National Geographic News* (online), 10 October 2008 <<http://news.nationalgeographic.com/news/2008/10/081010-somalia-pirates.html>>; See also Security Council Resolutions 1816 and 1846.

<sup>60</sup> Especially Resolutions 1836 and 1846, see above n 24-27.

<sup>61</sup> Ibid.

<sup>62</sup> See, ECOTERRA, 'SMCM Somali Marine & Coastal Monitor: Ecoterra International – Updates & Statements, Review & Clearing-House' (ECOTERRA Intl, No. 339 Somali Piracy News, 8 March 2010) <[http://www.australia.to/2010/index.php?option=com\\_content&view=article&id=1388:ecoterra-intl-no-339-somali-piracy-news&catid=70:piracy-in-somalia&Itemid=142](http://www.australia.to/2010/index.php?option=com_content&view=article&id=1388:ecoterra-intl-no-339-somali-piracy-news&catid=70:piracy-in-somalia&Itemid=142)>.

<sup>63</sup> See generally, Robert D Kaplan, *Monsoon: The Indian Ocean and the Future of American Power* (Random House, 2010).

<sup>64</sup> See generally, M Sornarajah, 'Indian Ocean as a Peace Zone-Possible Legal Framework' (1972) 12 *Indian Journal of International Law* 543, 543-563 where the author outlines three ways in which the Indian Ocean might be given the status of a peace zone in the light of international law. Also see above n 63, where in a comment at 621-625 S Balapuri suggests that a number of matters therein require further elucidation.

arming merchant vessels. For long, there has been a standing reluctance to arm merchant ships. Rationale for this is clear – to stop a shoot-out in the high seas and the consequential threats to the crew, vessels and safety of navigation. Seafarers are civilians, not trained in use of arms. Arming them might also encourage mutiny and piracy by disgruntled crew considering some are grossly ill-treated and underpaid, or not paid at all, sometimes for months.<sup>65</sup> While this is true, the current situation requires serious response. The reason it has been easy to hijack the vessels is primarily that they are unarmed and unprotected. Otherwise, it would be hard to imagine that a handful of armed pirates in small speed rubber dinghies can overpower and hijack a super tanker 1000 times its size. Until now, the crew has been fighting back using only high-pitched horns and water hoses to deter pirates. But this is changing very fast.

Already some shipping companies and ships are employing maritime security consultants and clandestinely deploying armed guards (sea marshals) equivalent of air-marshals, as well as training their crews to use defensive measures such as using water hoses and speeding. Most of the security agencies marketing their services have little or no experience, preying instead on the shipowners' fears. Some of the major maritime nations are also secretly using members of their armed forces to protect their national flag vessels – contrary to international norms. The debate is continuing in the shipping circles whether or not to officially have armed guards on board. The legal implications to international law will not be apparent until there is a full scale shoot-out incident with pirates leading to an unacceptable loss of life and/or destruction of the vessel through explosion. Hence the long standing opposition, the IMO's advice on the Arming of Merchant Ships,<sup>66</sup> which includes mechanisms on self-protection, non-arming of seafarers, use of unarmed security personnel, use of privately contracted armed security personnel, military teams or law enforcement officers duly authorised by Government and firearms, is becoming irrelevant. Thanks to Somali piracy, the whole policy of arming merchant vessels may need re-examining.<sup>67</sup> It is currently observed only in breach. Accordingly, it is arguable that international law precedent is being set and practices changed clandestinely without recourse to international law-making institutions. We will see below that the international financial order has not remained untouched by the issue of piracy.

## 2.4 Threats to international financial order

### 2.4.1 Money laundering and illicit traffic

There seems no doubt that large ransom and its transfer has given rise to money laundering<sup>68</sup> as its principle means of disbursement within Somalia, the region and worldwide. The estimated US\$500 – 600 million ransom money so far earned by the pirates must surely be finding its way in and entering the legal financial and commercial system somewhere. A consequence of the piracy money is the creation of economic boom especially in real estate through money laundering in Somalia itself, Kenya,<sup>69</sup> Tanzania and Uganda with further effects in the neighbouring countries of Ethiopia, Rwanda, Burundi, Eritrea, Djibouti, Sudan and the Gulf States. The most notable effect is in Kenya<sup>70</sup> where ethnic Somali Kenyans are all of a sudden investing large sums principally in real estate without visible means of income and at a time of world recession. The transfer seems to be effected by the sophisticated *hawala*<sup>71</sup> system and international carriers, predominantly nomadic Somalis, carrying cash across the porous borders of Somalia with Djibouti, Ethiopia and Kenya and across the Red Sea to the Arab Peninsula and the UAE where it is believed to be used for arms or placed in bank deposits. The ransom is paid in cash in US dollars and sometimes exchanged openly in the market in these countries where exchange regulations have been either relaxed or removed altogether, so one does not have to explain the source of the cash. At destination, the money is broken down into

<sup>65</sup> See *Year of the Seafarer 2010* (IMO Video, 13 October 2010).

<sup>66</sup> IMO Maritime Safety Committee 86<sup>th</sup> Session, 27 May – 5 June 2009.

<sup>67</sup> See Keith Bradsher, 'Captain's Rescue Revives Debate Over Arming Crews' *The New York Times*, 12 April 2009. However, see where a ship was fined by the South Africa maritime authorities for illegally having weapons on board.

<sup>68</sup> Money laundering is the process of introducing funds illegally obtained into the main stream economy; See also House of Lords, *European Union Committee – Twelfth Report Combating Somali Piracy: the EU's Naval Operation Atalanta*, House of Lords Paper, Session 2009-10 (2010) <<http://www.publications.parliament.uk/pa/ld200910/ldselect/ldcom/103/10302.htm>>. See also, below n 70 and 71.

<sup>69</sup> Unlike the neighbouring countries in the region Kenya is just now introducing a Money Laundering Bill for this purpose (*Nations Newspaper* (Nairobi, Kenya), 14 November 2009, 10).

<sup>70</sup> *Ibid.*

<sup>71</sup> *Hawala* is an alternative method of transferring funds across the globe using human chains that cannot be easily traced through international banking systems. It is mainly associated with Moslem practice. See, generally Patrick M Jost and Harjit Singh Sandhu, 'The Hawala Alternative Remittance System and its Role in Money Laundering' Interpol General Secretariat, Lyon, France <<http://www.interpol.int/public?financialcrime/moneylaundering/hawala.ep>>.

smaller units and distributed to many individual carriers to avoid suspicions of one person exchanging large sums of cash. Where that is not possible, the system is oiled by outright bribery and corruption. The money is then laundered and invested in real estate and other legitimate business such as retail and long haul transport long dominated by Somalis in East Africa. This is most notable in Nairobi and Mombasa where even listed old colonial properties are bought, pulled down and replaced by high-rise glass office structures and modern housing estates overnight.<sup>72</sup> Neither Kenya nor any of the neighbouring countries have anti-money laundering legislation in place.

The tragedy is that, with the exception of noises from the Obama administration,<sup>73</sup> the international community seems to be aiding and abetting the piracy by allowing insurers to cover hijackings, negotiations with pirates to continue uninterrupted and international banks to be funding piracy through withdrawals and deposits without any action on their part. Surely, if the ransom money was marked, which is possible, those handling the money along the chain could be apprehended when they deposit it at some stage. A large part of the cash has also found itself into international banking with London and other leading financial maritime centres, the main beneficiaries. Although the recent UK House of Lords Report believed, despite the Government's failure to find evidence of link between piracy and money laundering, that 'they would find one if they looked for it, making the same effort as they have, with other States, in naval operations'.<sup>74</sup> This is because 'today any study of terrorist financing has to take account of the proceeds of piracy'.<sup>75</sup> Money laundering has strong links with illicit trade and international organised crimes.

#### 2.4.2 Illicit traffic in arms, contraband, drugs and humans

Judging from the excessive number of Somali arrivals seeking asylum in the West since the piracy, there are strong suspicions of direct links between Somali piracy and the increase in illicit traffic in contraband and human beings from and within the region. Additional sources of funding for arms, goods and money laundering seem to be illicit drugs and arms trade, smuggling and other criminal activities. If proven, there is a duty under UNCLOS for all states to cooperate in the suppression of illicit traffic in narcotic drugs or psychotic substances<sup>76</sup> and of the flag state to request cooperation of other states to suppress it.<sup>77</sup> This is also clearly in contravention of the *United Nations Convention against Transnational Organized Crime 2000*.<sup>78</sup> Illegal sources of funds lead to money laundering. Thus, other than money laundering, one of the consequences of the piracy and money generated there from is the increase in illicit trafficking in drugs, arms and people, including illegal migration especially of young women for asylum seeking and prostitution in the West. It is also linked with fuelling renewed violence within Somalia between the rival pirate groups and militias on the one hand and between the insurgents and the Somali TFG on the other. Piracy money has enabled the purchase of air tickets to popular asylum destinations such as the UK, Canada and the US. Consequently, increasingly, children are being sent unaccompanied by air via Eastern Europe to Western Europe or directly to London, Ottawa and New York. The rapid expansion in the number of Somali nationals in the diaspora, following the collapse of their government 20 years ago, has no doubt swelled large networks of willing participants in the illicit traffic in contraband and human beings, general asylum seekers, *hawala* foot soldiers and money-laundering. This was historically facilitated by the colonial arbitrary creation of nation states and the drawing up of artificial boundaries which left ethnic Somalis also in Eritrea, Ethiopia, Kenya and Djibouti with porous borders between them and therefore easy access to citizenships and passports of those neighbouring countries. Hence, the strong suspected linkage between the piracy and contraband, arms, drug and human trafficking.

There are also indications that the piracy ransom is being used to fund drugs and arms trafficking from within the region and the Gulf States and as further fund raising efforts for the insurgents. Somalia was already awash with

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<sup>72</sup> See above n 66-68, supplemented by information gathered by the author from personal interviews during three field research trips to the region between 2007-2010, during which he attended a trial session at the Magistrate's Court in Mombasa. The author also happens to be a native of the region. See also Mary Harper, 'Chasing the Somali piracy money trail', *BBC News* (online), 24 May 2009 <<http://news.bbc.co.uk/2/hi/africa/8061535.stm>>.

<sup>73</sup> Which has passed a freezing order against assets of piracy and money laundering, see 'President Obama Issues Executive Order Regarding Maritime Policy' <<http://www.maintenanceandcure.com/Obama-Executive-Order-Maritime-Piracy-Somalia.html>>.

<sup>74</sup> See House of Lords, *European Union Committee Nineteenth Report on Money laundering and the financing of terrorism*, House of Lords Paper, Session 2008-09 (2009) <<http://www.publications.parliament.uk/pa/ld200809/ldselect/ldcom/132/13203.htm>>.

<sup>75</sup> *Ibid.*

<sup>76</sup> Art 108(1).

<sup>77</sup> Art 108(2).

<sup>78</sup> See UNODC, *UN Convention on Transnational Organized Crime and its Protocols* <<http://www.unodc.org/unodc/en/treaties/CTOC/index.html>>.

arms from the collapse of its 300 000<sup>79</sup> strong armed forces, cattle rustling, the many civil wars and the cold war conflicts. Furthermore, the country is at the cross roads of arms supplies trade routes with the volatile Middle East. Consequently, the AK47 is probably the most common furniture or male ‘walking stick’ in Somalia and the region. The cumulative effect of the above is the overall threat to the very fabric of international and political order.

## 2.5 To international economic and political order

The worrying aspect of Somali piracy is the sophisticated level of its operation and the widespread network of its nerve centre. In the first instance, it would seem that the international community has been fooled into dismissing the operation as an amateurish operation by a rag-tag army. Nothing can be as far from the truth as this assumption. On the contrary and as already inferred,<sup>80</sup> there is circumstantial evidence to suggest that the operation is very sophisticated indeed and involves an international network of coordinated global contacts in Africa, the Middle East and the West. Secondly, the nerve centre of the operation is probably not actually in Somalia, but rather in London and other international financial and maritime centres utilising the Lloyds of London, the London-based International Maritime Satellite Organisation and the Baltic Exchange facilities to mention but a few.<sup>81</sup> They make good use of the London Maritime, Financial and Insurance Centre. It is possible other world maritime and finance centres are also utilised. This reasoning is based on the fact the pirates seem to follow and have knowledge of the exact position of their victims.<sup>82</sup> This is the only logical inference from the unprecedented sophistication, successes and efficiency of the piracy operations. The operation is not based on chance. The pirates are good at what they do. They run sophisticated operations using the latest hi-tech equipment such as satellite phones and GPS.<sup>83</sup> They are also heavily armed with rocket propelled grenades (RPGs) and AK47s. The pirates are known to have support of diasporic Somalis, especially in the UK, USA and Canada and are also known to receive tip-offs from those contacts as well as from ports in the Gulf of Aden. They use a combination of hijacked sophisticated modern vessels as well as rusty vessels and dhows as ‘motherships’ and speedboats with very powerful outboard motors to approach their targets. Sometimes the speedboats are launched from much larger ‘motherships’ on the high seas. This is because the leaders are former navy, army, air force and other security officers, fisheries officers and fishermen with a great deal of local knowledge. Very daring, with no regard to their safety, they take great risks in sailing as far a 1000 nautical miles sometimes in dhows and rusty ‘motherships’ loaded with skiffs, speedboats, fuel and provisions. They make a mockery of the IMO’s life at sea and safety conditions. They are also supported by sophisticated financial systems and agents. It is suggested they might even have moles at the Suez Canal Authority, Lloyds of London, the London Baltic Exchange and other shipping exchanges and the International Maritime Satellite Organisation. London is now regarded as the hub of Somali informants plotting attacks from where several recent hijackings have been orchestrated.<sup>84</sup> Where does this leave international law?

## 3 Challenges to international law

### 3.1 Challenges to established international legal norms

#### 3.1.1 Generally

As hinted above, it is generally believed that together with international terrorism, drug and human trafficking, Somali piracy poses challenges not only to the entrenched positions in international law but also a real security threat to the existing world order based on free and uninterrupted oceanborne trade. It is arguable that as much effort and resources are currently spent on fighting the piracy as is spent on terrorism, hunger, disease, epidemics, floods, earthquakes and other natural disasters. The danger is that it diverts attention from fights against more deserving global issues including global warming, climatic change and global recession. Nichols Dahlvag ably deals with these diversionary effects, consequences and challenges of piracy to the current world order in his treatise on the topic.<sup>85</sup>

<sup>79</sup> The estimated number of men under arms in the Siad Barre’s army, navy, airforce, police, marines, prisons and other security apparatuses.

<sup>80</sup> See 1.4 above.

<sup>81</sup> BBC News, above n 49, also Giles Tremlett, ‘This is London – the Capital of Somali pirates’ secret intelligence operation’ *Guardian* (online), 11 May 2009 <<http://www.guardian.co.uk/world/2009/may/11/somalia-pirates-network>>.

<sup>82</sup> See House of Lords Report, above n 68 and 74.

<sup>83</sup> BBC News, above n 49 and 72.

<sup>84</sup> Tremlett, above n 81.

<sup>85</sup> See Nicols Dahlvag, ‘Thieves, Robbers and Terrorists: Piracy in the 21<sup>st</sup> Century’ (2006) 4 *Regent Journal of International Law* 17, 17-45, where the author discusses all pertinent issues on piracy with particular emphasis to threats to world order.

The world order as we knew, built on established legal order and institutions, ‘civilised’ norms, law of nations and customary international law, has been shattered. In the Somali piracy one sees the reincarnation of ‘Things have fallen apart as the Centre can no longer hold’, to borrow from Chinua Achebe, the Nigerian Nobel Laureate. In view of its catastrophic affect on world commerce<sup>86</sup> and potential threats to global security, Somali piracy probably now ranks equal to international terrorism as a principal destabilising influence on world peace and order. Some anti-piracy measures such as ‘Operation Atalanta’ have themselves in turn raised further problems. Coming at a time where international policemen (the EU, NATO and the US) are pinned down in Iraq and Afghanistan and amidst current political turmoil in North Africa and the Middle East, matters are bound to get worse before they get better.

### 3.1.2 Form and legality of the Allied naval operation

The current operation by several multinational navies, under the leadership of the EU Navies nicknamed ‘Operation Atalanta’ has raised two issues.<sup>87</sup> First, it has only served to shift the problem from further south to the north. The Saudi super tanker, the *Sirus Star*, was attacked 600 nautical miles southeast of the Somali coast nearer the Seychelles. Recent attacks have taken place 1500 nautical miles, deep in the ocean east of the Seychelles. The targeted area now encompasses over a quarter of the Indian Ocean which is almost impossible to police. A view shared by many is:

although the military response has focussed attention on piracy issue, perversely; it has made the problem more complicated. The military escorts have certainly ameliorated the piracy challenge in the Gulf of Aden ... On the other hand, because of that; the pirates have adapted and now switched their operations to the Somali basin in the western part of the Indian Ocean. In addition, unfortunately, there you have a far larger area and it is impossible with the military and the naval resources on hand to patrol that area. That’s why when the *Marersk Alabama* was taken the nearest vessel, the *USS Bainbridge*, was several hundred nautical miles away.<sup>88</sup>

Both the IMO and the IMB are advising ship-owners to adopt measures such as having lookouts or travelling at speeds, which would allow them to outrun the pirates. However, the pirates are adept, travel extremely quickly (and often at night) and it is often too late by the time the crew has realised what has happened. Once the pirates have taken control of a ship, military intervention is complicated because of the hostages on board. Only the US, the Dutch and the French have intervened prior to or during the seizure. Until the passage of the *Security Council Resolution 1816*, warships outside Somali territorial waters watched helplessly as they were not empowered to intervene for fear of breaching international law. Secondly, the operation by the US, EU and other navies raises the issue of their legality in the absence of any international mandate or international convention.<sup>89</sup> Although there is broad provision in Article 105 of UNCLOS<sup>90</sup> for apprehension, arresting and trying of pirates, that would only be applicable if Somalia was a functional state and a member of the international community able and willing to exercise its authority and accept its international obligations. It is therefore doubtful whether such naval intervention needs to be specifically mandated. It is for these reasons that the Allied Navies were at first hesitant to act not knowing what to do with captured pirates, as they feared violating international humanitarian law and other jurisdictional issues. Following some improvements, we have now gone full circle where patrolling navies are once more forced to release captured pirates due to logistical difficulties and legal impediments. Piracy has also led to the questioning of hitherto international maritime law doctrines that had been taken for granted for centuries, namely the right of approach, visit, search and seizure.

### 3.1.3 The right of approach in time of peace

One of the justifications for the operation of the Allied Navies is to enforce the right of approach in times of peace. Under this maritime right, a warship may approach a merchant ship in time of peace only if there is reasonable suspicion. However, that depends on whether the ‘motherships’ employed by the Somali pirates are ‘ships’ within the Convention. Otherwise, any warship may approach the ‘mothership’ without violating its rights. These rights

<sup>86</sup> See One Earth World, above n 1 and n 44.

<sup>87</sup> See generally, EU NAFOR, Maritime Security Centre <<http://mschoa.org>>.

<sup>88</sup> J P Pham, Director of the Nelson Institute for International and Public Affairs at James Madison University, quoted by Joe DeCapua, *African Voice of America News*, Washington DC, 10 April 2009, ‘Somali Piracy – Causes and Consequences’ <<http://www.voanews.com/english/news/a-13-2009-04-10-voa36-68814227.html?CFOKEN=80532048&CFID=260321164&jsessionid=6630581962416c0286a16aa1b93664627374>>.

<sup>89</sup> See House of Lords Report, above n 68 and 74.

<sup>90</sup> Art 105 provides for the seizure of a pirate ship or aircraft in the high seas in the event of piracy.

have all been given a recent boost by Security Council Resolutions.<sup>91</sup> The right of approach, visit and search, however, further depend on whether the visit confirms the suspicion. To get around subsequent legal claims, the consent of the flag state, or even of the master of the vessel in some circumstances, is advisable. This is, however, not practically possible when dealing with pirates and sometimes chaotic environments. The practical problem remains: suspected pirates operating in their own skiffs cannot be held simply based on suspicion. On the other hand, warships have to be a bit cautious in dealing with pirates already in control of the captured vessel or hostages, or both, for fear of endangering their safety. Otherwise, pirates attacking another ship on the high seas or resisting a warship's legal right of approach, visit and search are fair game – all of which carry big risks. The problem is whether to pre-empt the attack or risk pirates' standard excuses when caught that they were fishermen out of provision and approaching the supposed victim in need of help. Already many have been released or acquitted for lack of sufficient evidence.<sup>92</sup>

### 3.1.4 The right of visit, search, capture and seizure in time of peace

The 'right of approach in time of peace' in UNCLOS tends to supplement and follow the 'right of visit, search and capture in time of peace'. The above rule applies in this case for a wide variety of offences.<sup>93</sup> Article 105 of the Convention gives green light to that effect subject to Article 106 namely that:

[w]here the seizure of the ship or aircraft on suspicion of piracy has been effected without adequate grounds, the State making the seizure shall be liable to the State the nationality of which is possessed by the ship or aircraft for any loss of damage caused by the seizure'.

So far, there has not been any major incident arising out of the operations by the Allied Navies. A further requirement is that the seizure on account of piracy may be carried out only by warships or military aircraft, or other ships or aircrafts clearly marked and identifiable as being on a government service and authorised to that effect.<sup>94</sup> So far, no issue has arisen; however, the introduction of the use of drones by the US might cause problems in two respects. First, as predominantly spy planes, they are unmarked. Secondly, their mission may not necessarily be limited to conducting reconnaissance and apprehending but to include firing missiles to destroy the pirate ship and kill or injure its occupants. These planes have no facilities to shout or give the required warning signals, as would warships or ordinary aircraft under normal rules of engagement.

### 3.1.5 The right of hot pursuit

In the absence of any other authority and faced with threats of continuing piracy, it has been suggested that the Allied Navies could invoke the maritime right of hot pursuit.<sup>95</sup> That was indeed the implicit idea behind most of the Security Council Resolutions on Somalia and Somali piracy,<sup>96</sup> which allowed for pursuing pirates to their hideouts in Somali territory. This would include pursuing pirates to Somali ports, confiscating their inland assets and arsenal in disregard of Somali territorial sovereignty. However, there might be additional problems limiting these rights. First, it is the right of the states' warships or military aircraft, or other public ships or aircraft, to pursue and arrest a foreign private vessel on the high seas that has violated *that* state's laws and regulations while within *that* state's internal waters or territorial sea.<sup>97</sup>

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<sup>91</sup> See United Nations Security Council Resolutions 1751, 1816, 1838, 1846 and 1851 discussed above at 1.5.

<sup>92</sup> See 'Kenya acquits 17 suspected Somali pirates', *AFP News* (online), 5 November 2010 <[http://www.google.com/hostednews/afp/article/ALeqM5g5c\\_6Wft6cw4zajy1QbBNXBx2mXQ?docId=CNG.89c96e59c479e63644d023208c721a83.b21](http://www.google.com/hostednews/afp/article/ALeqM5g5c_6Wft6cw4zajy1QbBNXBx2mXQ?docId=CNG.89c96e59c479e63644d023208c721a83.b21)>, which reports acquittals for lack of evidence in the case of *Republic v Hassan (Hassan Jamal) & Others* Criminal Miscellaneous Application 105 of 2010 in the High Court of Kenya at Mombasa <[http://www.kenyalaw.org/CaseSearch/view\\_preview1.php?link=11096317177499300714756&words=>](http://www.kenyalaw.org/CaseSearch/view_preview1.php?link=11096317177499300714756&words=>)>.

<sup>93</sup> UNCLOS arts 179, A4/13(3)(a) and (b), 105, 106, 107 and 110.

<sup>94</sup> *Ibid* art 107; on modern perspectives on the two rights – 'The right of visit, search, capture and seizure in time of peace' and 'The right of approach in time of peace', see Eftymios Papastavridis, 'The right of visit on the high seas in a theoretical perspective: mare liberum versus mare clausum revisited' (2011) 24(1) *Leiden Journal of International Law* 45, 45-69 in which the author examines the theoretical and historical boundaries of the right of visit on the high seas, including the controversy between the arguments of mare clausum and mare liberum.

<sup>95</sup> For a full, detailed and comprehensive examination of the doctrine and the Right of Hot Pursuit, see generally, N M Poulantzas, *The Right of Hot Pursuit in International Law* (Leyden, 1969).

<sup>96</sup> Murphy, above n 50.

<sup>97</sup> UNCLOS, art 111.

That state refers in this case to Somalia and excludes any other states. Secondly, under international law, hot pursuit must begin within the jurisdiction of the offended state, in this case Somalia. Thirdly, only public vessels or aircraft of the territorial sovereign state – in this case, Somalia – can engage in hot pursuit. Fourth, it must be continuous until the pursued vessel is arrested. Finally, failing that, it must be broken off when the vessel has passed into the territorial waters of another state.<sup>98</sup> From its wording and context, that remedy would only be available to Somalia against foreign vessels or at best to the neighbouring (e.g. Kenya, Djibouti, Yemen, Seychelles etc) state vessels against pirates vessels but not to warships of members of the international community. The doctrine is justified in international law as necessary only to the efficient exercise of territorial jurisdiction.<sup>99</sup> It was not designed to deal with issues posed by Somali piracy. The position of the said Council Resolutions on this therefore remains either confusing or at best ambiguous. That they are based on Chapter VII of the UN Charter implies the severity of the problem. On the other hand, they were to be applied in accordance with the Convention and international law taking into consideration prior consent of and respect for the territorial sovereignty of Somalia. In a dangerous precedent, under Resolutions 1816 and 1846,<sup>100</sup> the Security Council has created conditions for third-party governments to conduct anti-piracy operations in Somali territorial waters, as well as engaging in onshore operations. Although prior authorisation from the Somali TFG is required, as is accordance with international law and especially humanitarian law, this has been impractical in practice.

### 3.1.6 The pirates right to fly a flag

The issue whether Somali pirates have the right to fly and/or retain a flag is a challenge, which remains unanswered. Suspicion that a ship is sailing without flying a flag is a pirate ship is one of the justifications or exceptional cases for exercising the right of visit on a merchant vessel on the high seas.<sup>101</sup> Under customary and treaty international law, stateless vessels and vessels without flags may be boarded and checked by a warship that has reasonable suspicion to verify nationality or reason for not flying of a flag.<sup>102</sup> They are treated as pirate ships. It is not clear, however, whether these ‘motherships’ used by the Somali pirates are registered at all, and if so where they are registered, since Somalia is currently a dysfunctional state without either a registry or maritime administration. Pirates use a range of vessels from captured containerships, dhows, trawlers, yachts and tugs as pirate ‘motherships’. They could be registered anywhere in Yemen and other Gulf States or other parts of the world. These may also still be registered in the home countries, or not at all, or the registrations might have lapsed, which causes further challenges to international law and world order. The status of those flags are therefore doubtful under Articles 91 (nationality of ships) and 92 (status of ships) of UNCLOS. In those circumstances, it would be in the interests of the pirates not to fly any flag at all. Regardless, sailing non-registered or wrongly registered ships is sufficient grounds for the exercise of the right of approach, visit, search and seizure by the patrolling warships.

However, pirate suspects captured on these grounds have to be set free. They may be contravening international law but are not committing act of piracy, such as those caught *in pare delicto*. Furthermore, under Article 104 of the Convention, a ship can retain its nationality even if it has become a pirate ship. The reason given for this anomaly is that under international law the law of the state from which such nationality was derived determines the retention or loss of nationality. However, that does not account for a flag state, like Somalia, that subsequently becomes dysfunctional. The unlawful use of a stolen vessel for an unlawful purpose is not an eventuality foreseen by either the Convention or international law. The practice on the ground is that pirate ‘motherships’ are either sunk or destroyed in the event of violent confrontations with the suspects or are confiscated and returned to their rightful owners pursuant to Article 105 (third party rights) of the Convention but do not lose their nationality.

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<sup>98</sup> For this and other details see S Maudments, ‘Historical Aspects of the Doctrine of Hot Pursuits’ (1972-73) 46 *British Year Book International Law* 365, 365-381, where the author argues that the doctrine of hot pursuit originated in British and American practice at the beginning of the 19<sup>th</sup> Century. Though its emergence as a recognised doctrine was a long process, the current trend towards extended coastal jurisdiction and the status of a failed state may lend it a new significance.

<sup>99</sup> Poulantzas, above n 95; see also the author’s earlier publication ‘The Right of Hot Pursuit especially under the Geneva Convention on the High Seas’ (1961) 14 *Revue Hellenique de Droit International* 198, 198-224.

<sup>100</sup> Para 2 which ‘Calls upon States, regional and international organisations that have the capacity to do so, to take part actively in the fight against piracy and armed robbery at sea off the coast of Somalia, in particular, consistent with this resolution, resolution 1846 (2008), and international law, by deploying naval vessels and military aircraft and through seizure and disposition of boats, vessels, arms and other related equipment used in the commission of piracy and armed robbery at sea off the coast of Somalia, or for which there are reasonable grounds for suspecting such use’.

<sup>101</sup> Art 110(1)(a).

<sup>102</sup> Arts 27(1), (2) and (5); art 28(1), art 73(1) and arts 110(1)-(3).

### 3.1.7 The right of self defence

The resort to the rights of approach and of visit in trying to enforce, search and capture in times of peace can invite retaliation. This has materialised where the pirates have fired back and the Allied Navies have retaliated sometimes destroying the skiffs and pirate ‘motherships’ and at times killing or injuring pirate suspects in the process. It has been suggested that if fired upon by the pirate ships, as has been done a number of times, foreign warships could open fire back (which has also happened several times). That would be permitted by the rules of engagement but not as an extension of the public international law doctrine of both individual and collective self-defence as claimed by the Allied Navies and purportedly, the Security Resolutions. This action against pirate suspects has nothing to do with the general right of self-defence in international law or the right of collective self-defence contained in Article 51 of the *United Nations Charter*. It is limited to international maritime law. Under this maritime rule, any of the navies operating against the pirates can openly fight back if fired upon by pirates, something that the pirates have tried to avoid except when they foolishly or mistakenly attacked French and US warships.

Even within the wider context of maritime disputes or conflicts, the International Court of Justice (ICJ) limited the exercise of that right in the *Corfu Channel Case*<sup>103</sup> where the court rejected the British plea of self-protection in justification of the British minesweeping operations in the Albanian waters. Otherwise, in the current instance it does not arise because the pirates rarely attack or seek to engage the naval forces of the Allied Forces. They do not need to, they only need to play hide and seek with and overstretch them. Furthermore, in air and naval blockades, such actions can only be sanctioned by the Security Council. Otherwise interference with foreign shipping on the high seas on grounds of self-defence, such as that asserted by France during the Algerian War, is highly controversial as was also the Cuban ‘quarantine’ action of 1962 when, on the basis of the Organisation of American States (OAS) Resolution, warships of the US, Argentina, Venezuela, and the Dominican Republic interfered with foreign shipping to interdict transportation of offensive military equipment bound for Cuba. That said the Allied Navies owe a duty to protect and save life at sea including those of pirate suspects. They should therefore use reasonable force and aim to disable rather than killing.

### 3.1.8 Blockade and contraband

It has been suggested by the said Security Council Resolutions and the African Union’s (AU) recent call for sea and air blockade of Somalia<sup>104</sup> that the anti-piracy navies patrolling the Indian Ocean should blockade the Somali coast and ports, attack the pirate strongholds and go after their assets. The pretext for this is that under international law, warships can mount a blockade during wars and hostilities, to counter smuggling<sup>105</sup> or to enforce a UN Security Council sanction or embargo.<sup>106</sup> There are other general Security Council Resolutions on Somalia in place and it is feasible that they might be applied if current measures against piracy fail. The matter is also indirectly covered by Articles 27(1)(d) and 108 of UNCLOS with regard to illicit traffic. However, this is a general doctrine of international law, which should be used only exceptionally in peacetime maritime operations. Otherwise, apart from an internal state of civil war and insurgency, there is no state of war or hostilities in the legal sense of that term within Somalia or between Somalia and other states.

Consequently, there is no indication of, or cause for, international blockade but there is strong suspicion and always a possibility that the pirates are also engaged in smuggling and other contraband trades. Unfortunately, the international community cannot act based on mere suspicions without concrete evidence. In any case, the TFG has protested that such action, including hot pursuits, violates its territorial sovereignty. Furthermore, the Resolutions are subject to the Convention, international law, respect for Somali sovereignty and prior consent. Besides, smuggling is handled by a different Convention.<sup>107</sup> Furthermore, it is possible that it might galvanise the insurgents and any Al Qaeda associates in the country to retaliate. Memories of US military humiliation in Somalia in the early nineties are still fresh. Actions against vessels can only be authorised specifically by the Security Council as was the case during the Rhodesian Crisis, when in 1966, such authorisation was given to the UK in order to stop ships on their way to the blockaded port of Beira in the then Portuguese-ruled Mozambique. More urgent, however, are the

<sup>103</sup> *Corfu Channel (UK v Albania) (Merits)* [1949] ICJ Rep 4, 18 (*The Corfu Channel Case*).

<sup>104</sup> See John Heilprin, ‘UN Asked for air and naval blockade of Somalia’, AFP News, 21 October 2010.

<sup>105</sup> See generally, Frank Shanty and Patit Paban Mishra, *Organized crime: from trafficking to terrorism*, (2008) vol 1.

<sup>106</sup> Art 108.

<sup>107</sup> See also 2.4.2 above; and UNCLOS art 108.

threats to international and regional stability caused by actions of the pirates and their associates. All the above maritime rights, principles and norms may need reappraisal in the light of Somali piracy.

### 3.2 International jurisdictional challenges

#### 3.2.1 Flag state jurisdiction

Another major problem facing the international community with regard to Somali piracy is the jurisdictional uncertainty of how to approach the suspected pirate ships, whether pirate suspects can be arrested, what to do with them once arrested and where and how to try them. This is because the only country that has flag<sup>108</sup> and coastal state jurisdiction<sup>109</sup> is Somalia. However, Somalia is a failed state with no functional government, navy, registry or court system. The next alternative is invoking the jurisdiction of states of the patrolling navies, whether or not their merchant vessels are victims of the piracy. These states were however at first reluctant. That initial reservation by these third states was that if the seizure of the alleged pirate ships was affected without any adequate justification, the state making the seizure is liable for any damage to the state of the ships' nationality<sup>110</sup> – even if in this case that state (Somalia) is dysfunctional.<sup>111</sup> There were three or four other reasons for the apparent reluctance.

First, the piracy laws of these countries are rather outdated. For instance, with the exception of the Anglo-American countries, most still forbid domestic jurisdiction over foreign pirates unless the alleged piracy involved an attack on their flag vessel. It was for this reason that at the initial stage the Dutch Navy, for instance, released the pirates they had captured – with the high possibility of releasing them to resume their pirate's activities later on.<sup>112</sup> Secondly are the logistical problems. These navies operate so far away from home, and away for several months and the advice from their defence, foreign and justice ministries back home is to normally do nothing: confiscate their weapons but not their boats or communications equipment, give them food and water and set them free. Woodruff argues this point in relation to sovereignty and the avoidance of conflicts over jurisdiction.<sup>113</sup> Thirdly, are the prohibitive costs in such large areas of operation, which complicate matters even further. 'Somali piracy' is not only restricted to the Somalis but also is spread to include Yemenis, Qataris and other residents of the Gulf countries. The area of operation also seems to have moved further north from the Somali coast to the Gulf of Aden and the mouth of the Persian Gulf, making it difficult for any flag state (let alone a dysfunctional one) to exercise jurisdiction effectively. Even if they wanted to, they are far away from home for several months and have no facilities or budget to accommodate, secure and feed the detainees before transporting them home for further investigations and prosecution. Fourth and finally, is the fear of asylum seeking by the pirates prior to trials, or after serving sentences or following convictions in national jurisdictions.<sup>114</sup>

#### 3.2.2 Port state control

The corollary of the flag state jurisdiction is the port state jurisdiction or control. If Somalia was a functional state, it would have no problem exercising these rights over pirates based in or calling at its ports. Although not yet a member, it is still bound by the spirit of the *Memorandum of Understanding for the Indian Ocean Port State Control (IOMOU)*<sup>115</sup> as a party to UNCLOS. However, and precisely because Somalia is a dysfunctional state, it is unable to exercise either port state jurisdiction or control. The international community cannot assume or exercise those Somali rights on Somalia's behalf. Accordingly, there is a vacuum in Somalia and consequently the pirates have found a safe haven and safe pirate ports from where to operate. This is markedly different from the ancient pirates who had no such safe haven. No other pirates have had the protection of a safe home, in the form of a failed state, as the Somali ones do.

<sup>108</sup> Flag State Jurisdiction is covered in UNCLOS arts 92(1), 94(1), 94(2)(b), 94(6), 95, 96, 109(4), 110(1)(c) and 113.

<sup>109</sup> Flag State duties are now contained in UNCLOS arts 94, 108(2), 109(3)(a) and 113.

<sup>110</sup> See UNCLOS art 106 which codified customary international law.

<sup>111</sup> In which requirements of notification by or to such a state may be impractical under UNCLOS arts 27(3), 73(4) and 226(2)(c).

<sup>112</sup> See Associated Press, 'Dutch navy under fire for releasing pirates', *Associated Press* (online), 21 April 2009

<[http://www.msnbc.msn.com/id/30329846/ns/world\\_news-europe/](http://www.msnbc.msn.com/id/30329846/ns/world_news-europe/)>.

<sup>113</sup> See generally, James J Woodruff, 'Merchants, Traders and Pirates: The Birth of the Admiralty Clause' (2002) 26 *Tulane Maritime Law Journal* 563, 577 and 578 respectively.

<sup>114</sup> See 'The Families Of Somali Pirates Are Requesting Political Asylum In England' *Daily News*, 27 November 2010.

<sup>115</sup> For the Indian Ocean Memorandum of Understanding, see <<http://www.iomou.org/secmain.htm>>.

For this and jurisdictional purposes, that leaves Kenya, the Seychelles and any other neighbouring states as the final destination of the pirate suspects. Handed back to Somalia, they would just melt in and disappear as the TFG has no judicial or detention facilities. However, it remains doubtful that merely because pirates are in ports of neighbouring countries involuntarily would give those states the rights of port state jurisdiction over the pirates in question. It is also uncertain whether being recipients of pirate suspects brings those countries within the mandate of enforcements or instituting of proceedings by port states within Articles 218 and 220 of the Convention. Even if that were the case, those provisions deal only with pollution and environmental issues and not piracy vis-à-vis Port State Control.

### 3.2.3 Third flag state jurisdiction

A further challenge to international law posed by Somali piracy is that for the first time pirate suspects are being tried in third countries of Kenya and the Seychelles; countries where the offence was not committed. Three immediate problems arise as to the laws under which laws they are prosecuted. First, is it under Kenyan or Seychellois Penal Codes, or international customary law or the common criminal law received by these former colonies from the UK. Secondly, other problems include factors such as shortage of time, courtrooms, qualified prosecutors, jail space and other judicial resources in these countries. Hence, following arrests, their warships were often unable to verify the pirate suspects' denials that they were fishermen short of provisions and in distress or their nationality before handing over to Kenya or the Seychelles. Even then, the trials take place predominantly in Mombasa with fewer facilities than Nairobi, an hour's flight away or Victoria in the Seychelles, a very small capital in a country where until recently there were only three prosecutors and little detention facilities and capacity. Furthermore, some of the pirates are under age and should come under the auspices of the Conventions for the Protection of the Rights of the Child.<sup>116</sup> All that Mombasa and Victoria have before them are few magistrates' courts without expertise or international jurisdiction. This is in addition to the fact that Kenyan and Seychellois laws are inadequate to deal with issues raised by piracy and international law.<sup>117</sup>

It is arguable whether international law is in fact that restrictive. Although under international law, which includes flag state jurisdiction, ships reasonably suspected of piracy may, regardless of their nationality, be boarded by warships of the flag or coastal state and, if the suspicion proves justified, persons and property on board may be seized.<sup>118</sup> This is the extension of the 'right of visit', 'visit and search' or 'right of approach',<sup>119</sup> as exceptions to the exclusive flag state jurisdiction. Furthermore, there is a loophole or exception in that the courts of the flag state whose ship carried out the seizure may try the pirate(s) without being limited by any rules restricting the jurisdiction of the domestic courts in criminal matters.<sup>120</sup> The flag state of seizure may also determine the action to be taken with regard to the ships. It is arguable that for those reasons it is immaterial that neither Kenya nor the Seychelles participate in the arrest of the pirate suspects. It is also under these rules that the Allied Navies hand over either to Kenya or the Seychelles, or in the case of the Dutch, French, Germans and Americans, they try them at home. There is clearly still a problem here. Guy Mandruk,<sup>121</sup> however, thinks that it is high time a new rule is promulgated to replace the outmoded doctrine. Other than that, with the exception of attacks on Kenyan and Seychellois registered foreign trawlers, the vessels attacked and taken by the pirates are neither Kenyan nor Seychellois. Neither are these crimes committed in the waters of those countries or the pirates captured by those countries' navies. However, the jurisdictional problems are not only domestic: they are international.<sup>122</sup>

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<sup>116</sup> There are several conventions: (1) UNICEF: <<http://www.unicef.org/crc/>>; (2) the UN: <<http://www2.onchr.org/english/law/crc.htm>>; and (3) the Council of Europe <<http://conventions.coe.int/Treaty/EN/treaties/html/201.htm>>; however, they have not prevented the prosecutions and convictions of child pirates in Germany, Kenya, Netherlands, the Seychelles and the US.

<sup>117</sup> See above n 73. The author was also responsible for the early drafts of the Kenyan, Seychellois and other maritime legislations in the region.

<sup>118</sup> Now contained in UNCLOS arts 217, 220(4) and 222.

<sup>119</sup> See UNCLOS art 110.

<sup>120</sup> This is now implicit in UNCLOS art 105.

<sup>121</sup> See generally, Guy Mandruk, 'The Law of the Flag and Maritime Criminal Jurisdiction: A New Rule to replace the outdated inconvenient doctrine' (2007) 32 *Tulane Maritime Law Journal* 221, 221-248 where he makes the point after surveying recent application and practice of the rule.

<sup>122</sup> See also, generally, Diana Chang, 'Piracy laws and the effective prosecution of pirates' (2010) 33 *Boston College International and Comparative Law Review* 273; Douglas Guilfoyle, 'Counter-piracy law enforcement and human rights' (2010) 59 *International and Comparative Law Quarterly* 141; and Douglas Guilfoyle, 'The laws of war and the fight against Somali piracy: combatants or criminals?' (2010) 11 *Melbourne Journal of International Law* 141.

### 3.2.4 International jurisdiction

#### *Principles of Jurisdiction*

Jurisdiction is the capacity of a state to prescribe and enforce the rule of law; a state's authority or power over persons, property, or events within its purview to prescribe, adjudicate and enforce norms, principles or grounds for jurisdiction, which connects the accused and the crime to the jurisdiction. The issue in this case is which state, other than Somalia, has jurisdiction over Somali pirates in accordance with internationally accepted norms.<sup>123</sup> Accordingly, the known principles of jurisdiction under international law do not provide comfort to third flag states. First, the 'nationality principle' would tend to restrict jurisdiction to Somalia as the only state of the pirate suspects' nationality.<sup>124</sup> Secondly, and on the same principle, the 'territorial principle' would also favour Somalia especially where the offence is committed in territorial waters<sup>125</sup> thereof, subject to the dysfunctionality of that state. Stretched, the 'passive personality'<sup>126</sup> and the 'protective or security'<sup>127</sup> principles would tend to favour the states of the arresting warships and third flag states especially where the piracy affects their nationals or national security. On the basis that piracy is a universal crime or a crime under international law, the only principles that would accommodate the arresting and third flag states are the 'universality principle'<sup>128</sup> and/or 'crimes under international law'.<sup>129</sup>

For these reasons, Somali piracy represents a challenge to international law and world order. First, international law was not designed or prepared for the type of piracy and therefore had not made provisions to deal with it. Secondly, and as a consequence, the international criminal jurisdiction does not provide assistance as to whether to approach and apprehend these pirates. Thirdly, and when they eventually decided to apprehend pirates, there are challenges as to whether they should accorded status of prisoners of war and whether, how and where to bring them to justice.<sup>130</sup> Michael Passman captures this dilemma clearly with regard to US, the *Geneva Convention Relative to the Treatment of Prisoners of War*,<sup>131</sup> UNCLOS and the *United Nations Convention against Torture* thus:

[c]aptured pirates generally must receive a hearing to determine whether they are entitled to prisoner of war status. Despite the fact that the above discussion has considerably narrowed the possibility that captured pirates qualify as prisoners of war, Article 5 of the Third Geneva Convention requires the detaining power to take an additional step to determine the status of the person they capture.<sup>132</sup>

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<sup>123</sup> Namely:

- (i) Nationality principle (Nationality of Offenders' Principle – based on the link with nationality);
- (ii) Territorial principle (based on the power of the State over its territory);
- (iii) Protective or Security principle (based on offender's nationality and the power of the State to protect itself – jurisdictions over alien actions abroad which affect the security of State);
- (iv) Passive personality principle (Nationality of Victim principle – based on the victim's nationality);
- (v) Universality principle (based upon select acts of universal prescription which empowers every State to exercise jurisdiction for piracy and other international crimes); and
- (vi) Crimes under international law – normally contrary to international law except for crimes against international law (*delicta juris gentium*) – and synonymous with universality, which includes slave trade, piracy, war crimes, genocide and other crimes against humanity; however, some authors and jurists treat it as a separate international jurisdiction principle (Genocide, War Crimes, Slavery, etc) as a separate principle from the universal principle.

Only headings (i), (ii), (v) and (vi) are directly relevant here, however, States whose security, commerce and nationals are harmed by the piracy may also have grounds to sue under headings (iii) and (iv).

<sup>124</sup> *The Notebhom Case* (1955) ICJ Rep 4; *The Woodpulp Cases* ILR96 148, 169; see also Constitution of the of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organisation (1960) ICJ Reports 23 and K R Simmonds 'The Constitution of the Maritime Safety Committee of IMCO' (1963) 12 *International and Comparative Law Quarterly* 56 and Ademun-Odeke 'From the "Constitution of the Maritime Safety Committee" to the "Constitution of the Council" Will the IMCO Experience Repeat Itself at the IMO Nearly 50 Years On? The Juridical Politics of an International Organization' (2007) 43 *Texas Journal of International Law* 55, 55-113.

<sup>125</sup> *The Lotus Case* (1927) PCIJ Ser ANo.10, 23.

<sup>126</sup> *The Cutting Case*: US For.Rel (1887) 751-867.

<sup>127</sup> *DPP v Joyce* [1946] AC 347.

<sup>128</sup> Which includes piracy, hijacking (unlawful seizure of aircrafts and ships), slavery and offences related to traffic in narcotics.

<sup>129</sup> Which include war crimes, genocide and crimes against humanity under the *Hague Conventions 1907* and the *Geneva Convention 1949*.

<sup>130</sup> See Ademun-Odeke, 'Issues in International and Universal Jurisdiction over and the Treatment of Pirate Suspects in International Humanitarian Law', forthcoming in the *Journal of International Maritime Law*.

<sup>131</sup> 75 UNTS 135 (entered into force 21 October 1950).

<sup>132</sup> See Michael H Passman, 'Protection Afforded to Captured Pirates Under the Law of War and International Law' (2008) 33 *Tulane Maritime Law Journal* 1, 16 where he quotes from art 5 of the Third Geneva Convention thus: 'Should any doubt arise as to whether persons, having

The early confusion among allied naval operations did in fact lead to pirates being released by the Dutch Navy for fear of violating international law. The current international criminal law is not geared for it. Interestingly, pirate suspects prefer to be tried in France, UK, Germany or US courts instead of Mombasa (Kenya) or Victoria (Seychelles) because they believe they would have access to representation and justice free under legal aids. Above all, they could apply for political asylum after serving their sentences or even use their ransom to employ the best lawyers available. Furthermore, in the West, anti-piracy laws have become antiquated. In continental Europe, the crime of piracy had almost been confined to the history books.<sup>133</sup> In Germany, there have been no piracy trials for over 400 years<sup>134</sup> and in the US<sup>135</sup> not since the War of Independence and the Civil War 200 years ago.

### Legal barrier or mere reluctance?

There are legal barriers to prosecuting individuals captured in international waters. The problem is not restricted to Kenya and the Seychelles. Most countries (including EU ones) are struggling to apply existing maritime law, international law, and their own laws, which limit them to having jurisdiction over their own citizens.<sup>136</sup> The few remaining options to the anti-piracy project participants are to deter and disrupt pirate activity through multinational patrols of the Gulf of Aden, Somali Basin and the Indian Ocean. Consequently, the majority of the pirates are often detained, interrogated, disarmed, and then released. With millions of dollars at stake, pirates and other beneficiaries have little incentive to stop. Prosecutions are rare for several reasons. Prosecutors in the impoverished Kenya and the Seychelles have a hard time assembling witnesses and finding translators, and most countries in the region and worldwide are reluctant to admit, prosecute and imprison pirates because they would be saddled with them upon their release.<sup>137</sup>

Judging from lack of evidence of prosecutions in these countries and/or prosecution agreements with countries in the region, the Russian Federation, China, other major non-Western and Gulf patrolling States appear to shy away from anything to do with prosecuting pirates in their jurisdiction. For the same reasons, the UK, a major player seems to prefer arresting and delivering suspects to Kenya and the Seychelles to using its elaborate piracy and maritime security laws to try pirates at home. On the other hand, Germany,<sup>138</sup> France,<sup>139</sup> the Netherlands,<sup>140</sup> Spain<sup>141</sup> and the US<sup>142</sup> seem to have been forced to prosecute following protests due to problems faced by Kenya and the Seychelles; the alternative being the release of the pirate suspects. The lack of any such activities suggests that Belgium, Denmark, Italy, Japan and the remaining EU states seem to have followed the non-Western patrolling states' stance. The medium-power Asian patrolling states of India,<sup>143</sup> Malaysia<sup>144</sup> and South Korea<sup>145</sup> too have reluctantly agreed

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committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such times as their status has been determined'.

<sup>133</sup> These offences are still confined to national ships and jurisdictions and often forbid extraditions; e.g. ss 46, and 63-65 of the Austrian Criminal Code, Law No.66.380/9/1010 which is fairly representative of continental European anti-piracy legislations <[http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/AUT\\_criminal\\_code.pdf](http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/AUT_criminal_code.pdf)>.

<sup>134</sup> See Derek Scally, 'Piracy trial under way in Hamburg, first in 400 years', *The Irish Times*, 23 November 2010.

<sup>135</sup> For instance in the US, the *Uniform Code's* definition of piracy comes from the law of nations, although earlier cases under the 1790 *Criminal Code*, before the 1819 amendment, struggled to distinguish piracy *jure gentium* from piracy under municipal law.

<sup>136</sup> Scally, above n 134.

<sup>137</sup> See 'Missing witnesses stall piracy cases' *Daily Nation*, (Nairobi), 31 March 2011. This explains the absence of any prosecutions in Djibouti, Eritrea, Ethiopia, Mauritius, Mozambique, South Africa, Tanzania and the Arab States and the corresponding unwillingness of those countries to conclude similar jurisdiction agreements with States of the anti-piracy patrolling navies.

<sup>138</sup> See Karin Matussek 'Somalis Face First German Piracy Trial in 4 Centuries' *Bloomberg Business Week*, 22 November 22, 2010.

<sup>139</sup> See 'French Parliament Passes Sweeping Anti-piracy law', *France 24* (online), 22 December 2010 <<http://www.france24.com/en/20101222-france-parliament-passes-sweeping-anti-piracy-law-pirates>>.

<sup>141</sup> See Adam Gabbatt and agencies, 'Piracy trial starts in the Netherlands', *The Guardian* (online), 25 May 2010 <<http://www.guardian.co.uk/world/2010/may/25/somalis-piracy-trial-netherlands>>.

<sup>141</sup> To be tried under the amended anti-piracy laws: *Organic Act No. 1 of 2009* (Spain), supplementary to the Act that reforms the Criminal Procedure Legislation.

<sup>142</sup> See Larry O'Dell, 'US Piracy trial of 5 Somalis begins in Virginia', *Associated Press* (online), 10 November 2010 <[http://license.icopyright.net/rights/tag\\_act?tag=3.5721%3fix\\_id=D9JDJCOG1](http://license.icopyright.net/rights/tag_act?tag=3.5721%3fix_id=D9JDJCOG1)>.

<sup>143</sup> See 'Captured pirates being tried in Mumbai Court', *MarineBuz.com* (online) 13 February 2011

<<http://www.marinebuzz.com/2011/02/13/india-captured-somali-pirates-being-tried-by-mumbai-court/>>.

<sup>144</sup> See 'Malaysia puts 7 Somali pirates on trial', *Shanghai Daily* (online), 12 February 2011 <<http://www.shanghaidaily.com/>>.

<sup>145</sup> See 'South Korea charges alleged Somali pirates', *UPI News* (online), 28 February 2011

<[http://www.upi.com/Top\\_News/Special/2011/02/28/South-Korea-charges-alleged-Somali-pirates/UPI-37441298892600/](http://www.upi.com/Top_News/Special/2011/02/28/South-Korea-charges-alleged-Somali-pirates/UPI-37441298892600/)>.

to prosecute. This impasse has led to desperate measures and proposals. Leeson, for instance, has suggested that the international community should appropriate Somali territorial waters and sell them, together with the international portion of the Gulf of Aden, to a private company, which would then provide security from piracy in exchange for charging tolls to world shipping through the Gulf.<sup>146</sup>

### Problems in Somalia

Under normal circumstances, and where it is functional, suspects should be handed to Somalia based on nationality (*Nottebhom Cas e*)<sup>147</sup> and territoriality (*Lotus Cas e*)<sup>148</sup> including flag<sup>149</sup> and coastal<sup>150</sup> state jurisdictions. A functional Somalia would have criminal and civil jurisdictions on board its vessels in and off its coasts including over the pirate ‘motherships’ and skiffs. However, that is not practical in a state currently without a functional government, law enforcement, court system or shipping registry. This remains the case despite reported prosecutions of some pirates in Somalia<sup>151</sup> and Puntland.<sup>152</sup>

The absence of a registry in both the federal and opposing regional governments makes the determination of the nationality of both suspects and their vessels difficult. A functional Somalia’s jurisdiction would still be limited to its territorial waters,<sup>153</sup> the only exceptions being where the consequences of the crime extends to the coastal state,<sup>154</sup> the crime is of a kind to disturb the country’s peace or the good order of its territorial sea,<sup>155</sup> assistance of the local authorities has been requested by the master of the ship or by a diplomatic agent or consular officer of the flag state,<sup>156</sup> or such measures are necessary for the suppression of illicit traffic in narcotic drugs or psychotropic substances.<sup>157</sup> None of these scenarios apply to Somali piracy and jurisdiction, so the issue remains academic.<sup>158</sup> Furthermore, these exceptions do not apply if the vessel is exercising passage without entering internal waters<sup>158</sup>

<sup>146</sup> Peter T Leeson, ‘Want to Prevent Piracy? Privatize the Ocean’ *National Review* (online), 13 April 2009

<<http://corner.nationalreview.com/post/?q=Y2YyYwQ0ZTQwYjQzZTFiZGVhMGUzZTZlOWY5ZDgxMTg=>> and John Stossel and Andrew Kirell, ‘Could Profit Motive Put an End to Piracy?’ *ABC News*, 8 May 2009.

<sup>147</sup> See above n 124: emphasising the bond between the State and its national; based on the principle that ships have the nationality of the State whose flag they are entitled to fly and that there must exist a genuine link between the State and the ship embedded in UNCLOS, art 91; see also Ademun-Odeke, above n 124.

<sup>148</sup> The *Lotus Case*, above n 125, emphasising the territoriality as the principle basis of a State’s claim to jurisdiction.

<sup>149</sup> UNCLOS arts 94(1), 94(2)(b) and 97(1) (Flag State Jurisdiction and Control).

<sup>150</sup> UNCLOS arts 27(1), 28(1), 34(1), 34(2), 55, 56(1)(b), 59, and 111(7) (Coastal jurisdictions in various maritime zones).

<sup>151</sup> According to the Report of the Secretary-General on possible options to further the aim of prosecuting and imprisoning persons responsible for acts of piracy and armed robbery at sea off the coast of Somalia, including, in particular, options for creating special domestic chambers possibly with international components, a regional tribunal or an international tribunal and corresponding imprisonment arrangements, taking into account the work of the Contact Group on Piracy off the Coast of Somalia, the existing practice in establishing international and mixed tribunals and the time and resources necessary to achieve and sustain substantive results: S/2010/394, 26 July 2010

<<http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Somalia%20S2010%20394.pdf>> (UN Report), 14 as of 20 July 2010, 528 pirate suspects had either been prosecuted or were undergoing prosecution in 10 states. Of these, 100 (20 arrested by patrolling States and 80 by own forces) were in Somalia (Somaliland). This is more than the 123 in Kenya and 31 in the Seychelles. Neither the arrangements by which the patrolling States handed over the 20 suspects to Somaliland nor the law under which the prosecution was conducted are unknown.

<sup>152</sup> *Ibid.* Of these, 208 in (60 were arrested by patrolling States and 148 by own forces) in Somalia (Puntland); once more both the arrangements under which the patrolling naval States handed over the 60 suspects and the law applicable are unknown; it is however possible that they are using the old Somali Federal Penal Code. Between 2009 and 2010, the government of the autonomous Puntland region in north-eastern Somalia enacted a number of reforms and pre-emptive measures as a part of its officially declared anti-piracy campaign. The latter include the arrest, trial and conviction of pirate gangs, as well as raids on suspected pirate hideouts and confiscation of weapons and equipment; ensuring the adequate coverage of the regional authority’s anti-piracy efforts by both local and international media; sponsoring a social campaign led by Islamic scholars and community activists aimed at discrediting piracy and highlighting its negative effects; and partnering with the NATO alliance to combat pirates at sea. In May 2010, construction also began on a new naval base in the town of Bandar Siyada, located 25 kilometres west of Bosaso and the commercial capital of Puntland. The facility is funded by Puntland’s regional government in conjunction with Saracen International, a UK-based security company, and is intended to assist in more effectively combating piracy. The base will include a centre for training recruits, and a command post for the naval force. These numerous security measures appear to have borne fruit, as many pirates were apprehended in 2010, including a prominent leader. Puntland’s security forces also reportedly managed to force out the pirate gangs from their traditional safe havens such as Eyl and Gar’ad, with the pirates now operating from only one main town, Harardhere.

<sup>153</sup> UNCLOS art 27.

<sup>154</sup> *Ibid* art 27(a); this is inapplicable to current proceedings.

<sup>155</sup> *Ibid* art 27(b); this is applicable as the piracy is clearly destabilising threat not only Kenyan trade and security but to the whole region. Recent bombings in Uganda (2010) claimed by Al Shabab for that country’s participation in the African Union Mission to Somalia (AMISOM) being case in point; Mark Landler, ‘After Attacks in Uganda, Worry Grows Over Group’, *The New York Times* (online), 12 July 2010

<<http://www.nytimes.com/2010/07/13/world/africa/13policy.html>>.

<sup>156</sup> *Ibid* 27(c).

<sup>157</sup> *Ibid* 27(d); this is clearly inapplicable.

<sup>158</sup> *Ibid* 27(5).

except as to violations concerning the protection of the environment,<sup>159</sup> or with respect to violations of laws and regulations made for the protection of the EEZ.<sup>160</sup> Again, none of these apply to Somali pirates, operating mainly on the high seas. Thus, on strict nationality and territoriality interpretations, Somalia would have jurisdiction only on board its vessels, whether bona fide or pirate. It is for those reasons that the arresting states have bypassed Somalia in favour of the Kenyan and Seychellois options.

### Further problems in arresting states

Unlike Kenya and the Seychelles (non-arresting states), patrolling states, as arresting states, have jurisdiction because piracy is a universal crime and their warships, in apprehending the pirates, are brought within the ambits of international law,<sup>161</sup> permitting any state to punish the crime. However, they were handicapped for legal reasons already given.<sup>162</sup> Accordingly, they could not prosecute even if their warships had effected the arrest or if their national merchant vessels were pirated. Consequently, their patrolling warships were receiving contradicting legal and diplomatic advice from their defence, foreign affairs and judicial authorities back home. Second were the logistical, cost and security (threats of prisoner mutiny aboard the warships) problems of accommodating and feeding suspects in cramped warship environments including the costs of transporting, investigating, prosecuting and imprisoning pirates at home. Some patrolling states believe that by providing expensive<sup>163</sup> and resource intensive warships, they are already contributing sufficiently to international counter-piracy efforts. Third, were legal uncertainties,<sup>164</sup> especially fear of liabilities for seizure without adequate grounds.<sup>165</sup> Other legal considerations included lack of evidence sufficient to support prosecution – although this issue would arise irrespective of whether prosecutions are conducted in arresting state's courts or elsewhere; and lack of more transfer arrangements due to unwillingness of other states in either the region or elsewhere to accept and try suspects. Fourth, were potential dangers and delays caused by suspects' potential asylum claims before, during and after serving their sentence, leading to residency and possible citizenships if brought into patrolling states jurisdictions.<sup>166</sup> Pirate suspects saw this as an easy way of shortcutting the immigration process since these powers have, in normal asylum processes, preferred keeping them at bay. Finally, are concerns regarding human rights implications of lengthy detention at sea, and the challenges involved in ensuring prompt access to legal advice and judicial scrutiny while at sea. For those reasons, suspects prefer to be tried in the Western patrolling states, instead of Kenya and the Seychelles. The perception is that it would provide access to representation and justice, good lawyers, better human rights and protection of international human rights' organisations. They believe that these jurisdictions have established fairer legal systems. This is understandable, as the agreements establishing mandates for jurisdiction especially in Kenya<sup>167</sup> (the Kenyan Agreements) do not provide for of acquittals or eventualities after convicted pirates have served their sentences there. The fear of repatriation back to Somalia after serving 20 years in a foreign jail is enough to concentrate anybody's mind.

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<sup>159</sup> Ibid pt XII.

<sup>160</sup> Ibid pt V.

<sup>161</sup> Both customary laws, the *Geneva Convention* and UNCLOS.

<sup>162</sup> See above at 3.2.4.

<sup>163</sup> See Oceans Beyond Borders, *The Economic Cost of Piracy* (2011), whose calculations are that around \$2 billion is spent each year on naval operations off the coast of Somalia as follows: (1) The cost of each contributing naval vessel – the cost of deploying a ship per steaming day, and multiply this number by the number of vessels deployed each year (currently around 43); and (2) The administrative and staffing budgets of the 'big three' naval operations: Operation Atalanta, Operation Ocean Shield, and Combined Task Force 151 <[www.oceansbeyonddpiracy.org](http://www.oceansbeyonddpiracy.org)>; See also, Jonathan Wood, 'Going long' (2010) 24(1) *Maritime Risk International* 20, 20-21.

<sup>164</sup> E.g. UNCLOS art 110(1); Bernie Weinstein, 'No easy answers' (2009) 23(4) *Maritime Risk International* 18, 18-19, examines the problem of high seas piracy, focusing on incidents in the Indian Ocean off the Somali coast and in the Gulf of Aden; comments on issues arising in connection with the legal definition of piracy, the use of lethal force in defending vessels and the legality of ransom payments; discusses the response of the international community to the piracy boom in Somali waters and the impact of the subsequent escalation of hostilities; and considers possible medium and long term solutions to the piracy problem; while Richard Meade 'Pirate hunters could break UN embargo' (2005) *Fairplay* 355, 6-7, suggesting that Reports on the contract between the US security company Topcat Marine Security and the Transitional Federal Government of Somalia (TFG) to supply boats and training to combat piracy off the coast of Somalia despite concerns that the contract may be in breach of the UN arms embargo for Somalia; and questions whether the Transitional Federal Charter of the Somali Republic permits the TFG to approve such a contract.

<sup>165</sup> Under UNCLOS arts 106, 110(3) and 111(8).

<sup>166</sup> For such a case in the UK, see *AM (Somalia) v Secretary of State for the Home Department* [2008] UKAIT 91 (AIT).

<sup>167</sup> *The Memorandum of Understanding between the Republic of Kenya and the United Kingdom of Great Britain and Northern Ireland on the Conditions of Transfer of Suspected Pirates and Armed Robbers and Seized of Property to the Republic of Kenya* signed in Nairobi on 11 December 2008 (unpublished); similar agreements were reached with the EU, the US on 2 February 2009 and the Kingdom of Denmark on 4 June 2009.

### 3.2.5 Universal criminal jurisdiction

As already discussed, piracy confers universal jurisdiction upon other states. However, the main problem facing the international community is that apprehension of pirate suspects and pirate ships for piracy and other illegal acts committed by ships on the high seas can only be justified as an exception to the principle of the freedom of the high seas. Both the *Geneva Convention* and UNCLOS affirm the customary law principle enunciated by the Permanent Court of Justice (PCIJ) in the *Lotus Case* that:

vessels on the high seas are subject to no authority except that of the State whose flag they fly. In virtue of the principle of the freedom of the high seas, that is to say, the absence of any territorial sovereignty upon the high seas, no State may exercise any kind of jurisdiction over foreign vessels upon them.<sup>168</sup>

For that reason both conventions provide that ‘ships shall sail under the flag one State only and, save in exceptional cases expressly provided for in international treaties or in these articles, shall be subject to its exclusive jurisdiction on the high seas’.<sup>169</sup> The exceptions in the conventions, dealt with earlier, are piracy, the slave trade,<sup>170</sup> hot pursuit<sup>171</sup> and the right of approach by warships where reasonable grounds exist for suspecting that a ship is of the same nationality as the warship.<sup>172</sup> Perhaps the case of a collapsed and dysfunctional flag state unable to fulfil its obligations under international law should be added to the exception. Furthermore UNCLOS is quite explicit that:

In the event of collision or of any other incident of navigation<sup>173</sup> concerning a ship on the high seas, involving the penal or disciplinary responsibility of the master or of any other person in the service of the ship, no penal or disciplinary proceedings may be instituted against such persons except before the judicial or administrative authorities either of the flag State<sup>174</sup> or of the State of which such person is a national.<sup>175</sup>

It further states that:

No arrest or detention of the ship, even as a measure of investigation, shall be ordered by any authorities other than those of the flag State.<sup>176</sup>

## 4 Proposed international solutions

Prior to the agreements, a jurisdictional *lacuna* had led to uncertainties and unsatisfactory situations where suspects were simply released. The Kenyan Agreements were intended to rectify that anomaly. They represented the best options. It was also the first time in international law that such attempts at alternative jurisdiction linkage had been made between states. However, the experiment is failing. The non-arresting states (Kenya and Seychelles) in this case are limited by inadequate domestic anti-piracy legislation, resources to investigate and prosecute pirates and the ability to uphold international humanitarian laws. Until now, no other states in the region were prepared to assist. Kenya is currently not taking in any more suspects, having denounced most of the agreements while Seychelles has embarked on repatriation of captured pirates.<sup>177</sup> Willingness by the Western arresting and other affected states (Yemen, Maldives, South Korea, Malaysia and India) to assume jurisdiction has not eased the burden enough. Non-Western, patrolling states have not reached similar agreements with states in the region and are still unwilling to take in and prosecute suspects in their own jurisdictions.

Suggestions for temporary use of neutral regional centres such as the International Criminal Tribunal for Rwanda (ICTR) in Tanzania seem to have little support. Consequently, matters are back to ‘square one’ (pre 2005/2006 position) where more suspects are once more being released. New and urgent solutions are therefore necessary. The

<sup>168</sup> (1927) PCIJ Ser.A.no10, 25.

<sup>169</sup> *Geneva Convention 1958* art 6(1), reproduced in UNCLOS art 92(1).

<sup>170</sup> UNCLOS arts 99 and 101(1)(b).

<sup>171</sup> UNCLOS art 111.

<sup>172</sup> Art 22(1).

<sup>173</sup> E.g. damage to submarine telegraph, telephone, or high voltage cable or pipeline.

<sup>174</sup> Thus states issuing certificates of competence and the like may wish to consider the conduct of the holders swerving on board foreign vessels: hence the reference also to ‘disciplinary proceedings’ – UNCLOS art 97(2).

<sup>175</sup> UNCLOS art 97(1).

<sup>176</sup> UNCLOS art 97(3).

<sup>177</sup> Malkhadir M Muhamed, ‘Seychelles to send captured Somali pirates home’ *The Associated Press* (online), 10 February 2011, <<http://www.businessweek.com/ap/financialnews/D9L9V87G2.htm>>.

UN Report,<sup>178</sup> identifying seven options for Security Council consideration<sup>179</sup> might be a good start. However, elaborate as the suggestions appear, they are probably too little, too late. They also overlook other alternatives such as persuading and assisting more Indian Ocean countries to share the burden, creation of a regional tribunal to solve a regional problem, proposals to amendments the ICTR, the International Tribunal for the Law Of the Sea (ITLOS), the International Criminal Court (ICC) and ICJ Statutes to assume pirate trails, or revision of UNCLOS<sup>180</sup> to create a new piracy convention with a dedicated international court. However, not only would the proposals be arduous and expensive, there is no current international consensus. Even then, it would only be a temporary solution. Council Resolutions have been no more than expressions of intentions and several on the subject have so far made no difference. The short term solution lies in the reconstruction of Somalia and its judicial and other institutions while the long term durable answer might involve creating a new international convention together with a specialist international piracy court. The latter will, in addition, take matters out of national to international jurisdiction.

However, until then, the international community should take responsibility. With 12 and three prosecutors each respectively, implementing the agreements has strained Kenyan and Seychellois court capabilities, and both have signalled intentions<sup>181</sup> to stop prosecuting pirates captured by foreign navies unless their cash-strapped judicial systems receive significant assistance. Whereas pirates can realise millions from the ransom of a single vessel, international aid has been meagre in comparison: the UNODC, launched in May 2009, allocated just \$2.3 million for 18 months of piracy prosecutions.

In the Kenyan case of *Mohamud Moham ed Dashi*,<sup>182</sup> the Mombassa High Court adopted a narrow reading of relevant provisions in the Merchant Shipping Act (Kenya, 2009) and the Penal Code (Kenya) and ruled that it did not have jurisdiction to hear the prosecution of suspected pirates. The ruling's legal foundation is probably suspect: classification of pirates as '*hostis hum ani generis*' – 'enemies' of all humankind – means they are subject to prosecution and punishment by any nation for offences committed on the high seas. In other words, Kenya's courts may well have jurisdiction over piracy regardless of whatever Kenyan statutory law the ruling relied upon. Yet the

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<sup>178</sup> Report of the Secretary-General on possible options to further the aim of prosecuting and imprisoning persons responsible for acts of piracy and armed robbery at sea off the coast of Somalia, including, in particular, options for creating special domestic chambers possibly with international components, a regional tribunal or an international tribunal and corresponding imprisonment arrangements, taking into account the work of the Contact Group on Piracy off the Coast of Somalia, the existing practice in establishing international and mixed tribunals, and the time and resources necessary to achieve and sustain substantive results: S/2010/394, 26 July 2010  
<<http://www.securitycouncilreport.org/atf/cf/%7B65BFCE9B6D274E9C8CD3CF6E4FF96FF9%7D/Somalia%20S2010%20394.pdf>> (UN Report) 14, as of 20 July 2010. According to the report 528 pirate suspects, either had been prosecuted or were undergoing prosecution in 10 States. Of these, 100 (20 arrested by patrolling States and 80 by own forces) were in Somalia (Somaliland). This is more than the 123 in Kenya and 31 in the Seychelles. Neither the arrangements by which the patrolling States handed over the 20 suspects to Somaliland nor the law under which the prosecution was conducted are unknown. For more recommendations, see Robert I Rotberg, *Combating Piracy: A Policy Brief with Recommendations for Action* <[http://www.worldpeacefoundation.org/WPF\\_Piracy\\_PolicyBrief\\_11.pdf](http://www.worldpeacefoundation.org/WPF_Piracy_PolicyBrief_11.pdf)> and John Helmer, 'Moscow pushes for global piracy court' (2009) *Fairplay* 366, 10. As this article goes to press, the Security Council has passed a resolution proposing the setting up of a Special Somali Piracy Court either in Somalia or Arusha, Tanzania (where the Rwandan Tribunal (ICTR) is based) with a view to eventual repatriation back to Somalia, see SC Res 1976, UN SCOR, 6512<sup>th</sup> mtg, UN Doc S/RES/1976 (11 April 2011).

<sup>179</sup> UN Report, above n 151; these are: (1) enhancement of the United Nations assistance to build a capacity of regional States to prosecute and imprison persons responsible for acts of piracy and armed robbery at sea off the coast of Somalia; (2) establishment of a Somali court sitting in the territory of a third State in the region, whether with or without United Nations participation; (3) establishment of a special chamber within the national jurisdiction of a State or States in the region, without United Nations participation; (4) establishment of a special chamber within the national jurisdiction of a State or States in the region, with United Nations participation; (5) establishment of a regional tribunal on the basis of a multilateral agreement among regional States, with United Nations participation; (6) establishment of an international tribunal on the basis of an agreement between a State in the region and the United Nations; and (7) establishment of an international tribunal by Security Council Resolution under Chapter VII of the Charter of the United Nations.

Support for the proposals were reiterated by Council Resolution 1950(2010) in para 14: Reaffirms its interest in the continued consideration of all seven options for prosecuting suspected pirates described in the Secretary-General's report (S/2010/394) which provide for different levels of international participation, taking into account further new information and observations from the Secretary-General based on the consultations being conducted by his Special Adviser on Legal Issues Related to Piracy off the Coast of Somalia, with a view to taking further steps to ensure that pirates are held accountable, emphasising the need for strengthened cooperation of States, regional, and international organisations in achieving this goal, and encourages the CGPCS to continue its discussions in this regard.

<sup>180</sup> To re-define piracy and include armed robbery against ships. UNCLOS envisaged jurisdiction by only individual arresting states and in own jurisdictions rather than by arrangements between states away from the arresting states; see also generally, Guy Mandruk, 'The Law of the Flag and Maritime Criminal Jurisdiction: A New Rule to replace the outdated inconvenient doctrine' (2007) 32(1) *Tulane Maritime Law Journal* 221, 221-248 where he makes the point after surveying recent application and practice of the rule.

<sup>181</sup> See 'Kenya acquits 17 suspected Somali pirate' *AFP* (online), 5 November 2010  
<[http://www.google.com/hostednews/afp/article/ALeqM5g5c\\_6Wf6cw4zajy1QbBNXBx2mXQ?docId=CNG.89c96e59c479e63644d023208c721a83.b21](http://www.google.com/hostednews/afp/article/ALeqM5g5c_6Wf6cw4zajy1QbBNXBx2mXQ?docId=CNG.89c96e59c479e63644d023208c721a83.b21)>

<sup>182</sup> *In Re Mohamud Mohamed Dashi & 8 Others* [2010] *eKLR*, Miscellaneous Application 434 Judgment (Justice Ibrahim) 9 November 2009.

real issue is not the actions of relatively poor East African and Indian Ocean countries but the international community's faint-hearted approach to piracy. This short article has demonstrated that the practice of dumping pirates on poorly resourced jurisdictions reflects wealthier governments' extreme reluctance to try pirates in their own courts.

This is not justified by the costs or fear of asylum seeking by the pirates as the alternative costs of continued patrols and costs to international commerce, shipping and insurance are far greater. Governments in the developed world balk at the high costs of trial and imprisonment, and the risk that defendants may be able to claim asylum in light of Somalia's endemic violence and humanitarian crisis. The same governments that deploy warships to 'combat' piracy in the Indian Ocean end up treating the pirates they capture with kid's gloves. Hundreds have been disarmed and released to continue their depredations with automatic weapons and grenades. The costs of deploying warships to conduct such mock deterrence are inestimable. The global economy relies on the movement of goods by sea. However, a regime of effective impunity for pirates inevitably encourages instability and violence in one of the world's worst neighbourhoods. Short of dealing with pirates extra-judicially (as the Russian navy reportedly did in at least one incident; pirates – now presumed dead – were said to have been 'released' in mid-ocean without navigational equipment), the convenient solution has been trial in Kenya. Clearly, the prosecution of 'enemies' of all humankind must be placed on a more solid framework: wealthier nations and international institutions must step up.

## 5 Concluding remarks

Somali piracy is clearly an international maritime crime, which enables all states to take action within the Convention. Nevertheless, it is also a hybrid form (an international business operation) for which international law was unprepared. In addition, its causes and developments are rooted in the history and unique position (geographical accident) and a rare and unique occurrence of a dysfunctional state. It is a threat to maritime transport and international oceanborne trade. It has doubled the transport costs of shipping and raised marine, cargo and vessel insurance premiums. At the other extreme, it is a threat to international financial order as the vast ransom money obtained is injected into legitimate economies. This is particularly so within the Eastern African and Gulf regions where no money laundering rules exist. Left unchecked, these financial challenges might lead to economic dislocations. Its unusual linkage to insurgency, terrorism and illicit trade and organised crime makes it a threat to regional security and, unless dealt with, to international peace. International response thereto has been patchy, hasty and confused with the Security Council Resolutions advocating hot pursuits and threat to Somali sovereignty. The reason for this state of affairs is that the phenomenon is not piracy in the ordinary sense but an international organised business and crime syndicate. It is a challenge to international law in its uniqueness and this calls for a re-examination of certain established doctrines as outlined above. The naval patrols against piracy are only temporary measures that do not address the root of the problem. The bilateral and multilateral agreements and jurisdictional makeshift solutions that have been introduced are inadequate and seem to unravel with Kenya denouncing the agreements.<sup>183</sup> The bombshell is the recent decision which put paid to the programme by saying Kenya had no jurisdiction over the pirates.<sup>184</sup> Even if that were not the case, such measures amount to short cuts, which are dangerous and characteristic of ill-conceived reactions.

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<sup>183</sup> Above n 181.

<sup>184</sup> *In Re Mohamud Mohamed Dashi & 8 Others* [2010] eKLR, Miscellaneous Application 434 Judgment (Justice Ibrahim) 9 November 2009. The facts of the case are that applicants were charged with the offence of Piracy on High Seas under s 5 of the Penal Code. The case therefore concerned whether (a) Kenya and Kenyan courts had jurisdiction over piracy on High Seas, (b) the jurisdiction of the Courts of Kenya extending to every place within Kenya, including territorial waters, (c) the laws under which the applicants were charged did not provide for an express definition of what constituted 'the High Seas', (d) High Seas was within the territorial waters of Kenya, (e) Kenyan Courts had jurisdiction to try the charges against the applicants in the case and (f) the High Seas were outside the territorial jurisdiction of the Kenyan Courts-Penal Code (Cap 63), ss 5, 69(1) and 69(3). Justice Ibrahim had no problem deciding that Kenya and Kenyan courts shared jurisdiction over offences committed in the high seas beyond its jurisdiction. He in fact declared that it is the obligation of the Kenya Government under the Constitution and all International Conventions on Human Rights to ensure the safe passage and delivery of the applicants to their country of origin as they may disclose. Accordingly, he order that the Attorney General do advise the Ministry of Immigration, Ministry of Foreign Affairs, the Police and all other Law Enforcement Agencies of the provisions of the Constitution of Kenya as 'enacted' by the People of Kenya. The Government of Kenya and in particular the Ministry of Immigration and Registration of Persons is hereby ordered to forthwith make arrangements upon consultation with the Applicants and procure their safe passage and delivery to their respective countries of origin. In default, this court hereby requests the U.N.H.C.R. to take custody and care of the Applicants and consider them as displaced persons who require their protection and to assist them relocate and are repatriated to their country or countries of origin as they may disclose.

These jurisdictional difficulties have led to the UN contemplating setting up a specialist international piracy criminal court.<sup>185</sup> The EU has realised this problem and is now encouraging the neighbouring African countries to share the burden. The alternative is a continued release of captured suspects, which is counterproductive.<sup>186</sup> However, with the pirates now operating near its borders and affecting its lucrative tourist and fishing industry, the Seychelles has now indicated it is willing to assist save that, it has only three prosecutors. Maybe Mozambique, the Comoros, Mauritius, and South Africa will feel threatened enough to join as required by their obligations under international law and especially the *Djibouti Code*.<sup>187</sup> That might take pressure off the overworked and limited number of Kenyan prosecutors and underfunded courts. Meanwhile the neighbouring Arab countries, (e.g. Saudi Arabia, Yemen, Iraq, Iran, Oman, Qatar, the UAE, Bahrain etc) despite being the affected oil producers whose trade is interrupted, have not shown any willingness to assist the process.

There is no international legal system to prosecute those accused of piracy. Some have been put on trial in Kenya and the Seychelles. Allied forces have taken some for justice back home. For those reasons, it has been argued that an international court is needed, backed by the UN, with perhaps even an international prison for those convicted. Alternatively, the statutes of the ICC,<sup>188</sup> or ITLOS,<sup>189</sup> or the ICTR<sup>190</sup> could be amended to temporarily accommodate these trials. The UN Conventions are almost useless so long as Somalia continues to exist without an effective government. It is generally believed that lawlessness within the country and off its lengthy coast will only grow.<sup>191</sup> What is needed is well thought out international engagements with short term and long term solutions. An international conference and donor conference should be convened, the principal aim of which should be the international master plan to reconstruct and rebuild Somalia. The final solution should be a holistic approach involving some kind of a mini-Marshall Plan<sup>192</sup> based on similar plan that was used by the US to reconstruct Europe following ravages of WWII.

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<sup>185</sup> Ibid.

<sup>186</sup> Mike Corder, 'EU to push for piracy prosecutions in Africa', *Associated Press* (online), 27 April 2010 <[http://license.icopyright.net/3.5721?icx\\_id=D9FAOL181](http://license.icopyright.net/3.5721?icx_id=D9FAOL181)>.

<sup>187</sup> For the Djibouti Code, see James Kraska and Brian Wilson 'Combating Pirates Off the Gulf of Aden: The Djibouti Code and the Somali Coast Guard' (2009) *Ocean & Coastal Management*, <<http://asil.org/files/KraskaWilson-OceanCoastalmanagement.pdf>>.

<sup>188</sup> See International Criminal Court website <<http://www.icc-cpi.int/menus/icc.com>>.

<sup>189</sup> See International Tribunal for the Law of the Sea website <<http://itlos.org/>>.

<sup>190</sup> See International Criminal Tribunal for Rwanda website <<http://www.liveinict.rwandaaltamsolution.com>>.

<sup>191</sup> See, e.g., 'Piracy at Sea: Piracy off the coast of Somalia is getting worse. Time to act', *The Economist*, 3 February 2011; for comments see, <<http://www.economist.com/node/18070160/comments#comments>>.

<sup>192</sup> For the Marshall Plan see <<http://eh.net/encyclopedia/article/Ritschl.Marshall.Plan>>.