SOMALI PIRACY-UNDERLYING CAUSES AND NEW CHALLENGES TO INTERNATIONAL LAW AND WORLD ORDER

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SOMALI PIRACY- UNDERLYING CAUSES AND NEW CHALLENGES TO INTERNATIONAL LAW AND WORLD ORDER: A PANORAMIC VIEW\textsuperscript{1}\textsuperscript{+}

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I. INTRODUCTION

In the last 4-5 years over 450 merchant shipping vessels with over 150 crew men and an estimated US$ 1billion worth of cargo have been hijacked through acts of piracy and armed robbery off the Somali
Since the International Maritime Organisation (IMO) started keeping records on piracy in 1984, and sometimes from as far as 600-800 nautical miles out to sea. More than 100 attacks were reported this year (2009) alone, and pirates have seized 50 vessels and more than 800 seafarers have been kidnapped and held for ransom. As of December 2009 over 30 ships and an estimated 400 seafarers from 25 countries are being held hostage in Somalia. About 20 seafarers and 15 pirates have died. In the process, the pirates have netted over US$ 300m in ransom money from ship owners, cargo owners or operators this year. From mid 2009 all the world’s most powerful navies and governments have been paralysed and unable to deal with the phenomenon caused by a rag-tag army of Somali youths, some barely in their teens, sailing in rusty mother-ships and using skiffs (speed-boats) and armed with AK47 and shoulder-held rocket propelled grenades (rpg). These are the Somali pirates who do not fit the classical image and definition of the term; they are modern pirates with new dimensions and posing challenges to international law and world order.

As will be apparent in the following pages, the traditional definition of, and international law rules on, the subject do not shade any light towards our understanding the subject. Classical international customary and treaty law treat piracy under four main categories. 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.

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2 Although generically referred to as Somali Piracy, the incidents occurs 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 and the Somali and the south west and south east Indian Ocean as far south as the Seychelles. It originated from the Gulf 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, it is done predominantly by Somalis. See also Lehr, P & Lehmann H, Somalia: Pirates new paradise, Lehr, P (Ed) Violence at Sea : Piracy in the Age of Global Terrorism. Abington(Oxon) Routledge, 2007, pp.1-22

3 These figures vary depending on releases and further captures

4 Ibid

5 Ibid;

6 US, EU, Russia, China, India, Japan, Netherlands, Denmark, Spain, Turkey

7 Somali pirates relatively small vessels as mother ships 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 misguided as trawlers and several times when approached, they claim to be fishermen until the boat is searched and its lethal cargo revealed. The mother ships carry provisions and sophisticated communication equipment to liaison with land-based command centres and sometimes-foreign based agents.

8 The preferred and most effective weapon of the pirates are the AK47 assault rifle and the shoulder-held rocket propelled grenades, all of which are available very cheaply in Somalia and the region thanks to insurgency, terrorism. Al Qaeda and several years of the cold war and the civil wars.
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\(^9\). 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\(^10\). Thirdly, it includes a frustrated or failed attempt to commit a piratical act as piracy. So when caught in the act, or have failed to capture a vessel, the pirates could still be prosecuted. Failure is neither defence nor excuse or mitigating factor. This too would cover most aspects of Somali piracy\(^11\). 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\(^12\). 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. First, is what to do with captured Somali pirates. The legal position under international treaty and customary law is that ships reasonably suspected of piracy may, regardless of their nationality, be approached, boarded and searched. In addition, if the suspicion proves justified, persons and property on board may be seized\(^13\). The state of seizure may try the boarded pirate without being limited by any rules restricting the jurisdiction of domestic courts in criminal matters\(^14\). This is where the allied navies derive their authority. This state may also determine the action to be with regard to the ship, aircraft, or property, subject to the rights of third party\(^15\). However, this seems to cause problems as the "allied navies" and their national courts are far away from the area of action and earlier on did not know what to do.

In addition to handing, those to over to the port of Mombasa for trial in Kenya under Kenyan law, the US, Germany and France are notably also trying them on home soil\(^16\). This is also in line with international law, which permits courts of the state, whose ship carried out the seizure in good faith to try

\(^9\) The use of aircrafts in piracy was added later on although is almost obsolete except for highjacking. For the moment Somali pirates depend on mother ships rather than aircrafts although situations could develop into that later on

\(^10\) Voluntary participation is an essential criterion, as any indication of duress on the part of persons or government will exonerate the pirate.

\(^11\) It is no defence, when caught, that the operation did not succeed. It is equivalent to an attempted criminal offence. Thus Somali pirates apprehended in the process of in a failed highjacking of a vessel have been handed over for prosecution

\(^12\) Following on the voluntary requirement, it follows that actions by mutinied crew (as in Christian Fletcher's Mutiny on the Bounty) constitutes piracy. In the current case, it is only hypothetical, as it has not happened.

\(^13\) UNCLOS I

\(^14\) Ibid

\(^15\) Ibid

\(^16\) As will be apparent this raises one of the issues of authority and jurisdiction over captured Somali pirates, main problem facing the allied navies over Somali Piracy
the pirates and return the stolen (pirated property)\textsuperscript{17}. However, this right does not extend to third States like Kenya with no connections with the pirates or offences but where most of the pirates are currently tried according to Kenyan law. This means that ships and goods must be restored to their rightful owners in accordance with the rule that \textit{pirata non mutal dominium}, i.e., a pirate does not change ownership or a pirate cannot acquire legal ownership of his booty\textsuperscript{18}.

If international rules on piracy are so clear, why is it hard for the international community to deal with the current Somali piracy? Besides the uncertainties above, there are three other complications. First, under the rules the piratical ship does not lose its nationality unless otherwise provided by the law of the flag state\textsuperscript{19}. Secondly, among other issues bothering the “allied navies” is, if the seizure of the alleged pirate ship was effected without any adequate justification, the state making the seizure is liable for any damage to the state of the ship’s (or aircraft’s) nationality. Thirdly, once again, this would not be a problem had Somali not been a failed state without effective jurisdiction on its territory and maritime boundaries and the allies claim that they have no partners in Somalia to deal with.

Secondly, Somali piracy has been catapulted to one of the major international crises. Thus, other than recession (the Credit Crunch) and international terrorism, the other current pressing issue to the international community is Somali piracy. This is further compounded by the fact, as constantly emphasized in this article, that it is difficult to define the kind of piracy under known rules of both customary and treaty international law. This is a challenge to international law and world order as the characteristics of the Somali piracy is both new and unique. Until now, international law had been accustomed to a pirate as a \textit{buccaneer}\textsuperscript{20} and \textit{privateers}\textsuperscript{21}, one-eyed fellow (with patch on the other eye), sword-wielding and rum-drinking outlaw, out to plunder for selfish and private motives. What we have in Somalia, however, is a modern hybrid piracy problem with roots in a political and economic collapse of a nation and its consequent neglect by the international community.\textsuperscript{22} Furthermore, the international community and the allied navies of the traditional maritime nations were at a loss as to how to handle the problem from both international law and international criminal law perspectives. It will be

\textsuperscript{17} The return of property is inapplicable to Somali piracy who are interested purely on ransom rather than the captured ship or its cargo
\textsuperscript{18} Ibid. This issue does not arise in this case, as the Somali pirates are not interested in either the ships or their cargo; their interests are limited to ransom from capture of the ship.
\textsuperscript{19} This does not pose any concern as the vessels in question are not worth anything and might not even carry Somali flag and nationality
\textsuperscript{20} Buccaneers were pirates who attacked Spanish and French ships in the Caribbean in the 17th Century. The world is now synonymous with pirates, see http://en.wikipedia/wiki/Buccaneers retrieved 27 October 2009
\textsuperscript{21} Originally a ship and its crew authorised by its government to attack and loot the ships of certain other nations. The practice was common in the sixteenth and seventeenth centuries in the Caribbean during the European scramble for American colonies; See generally, Joseph J Someone, “The Trial of the Private Pirate-Captain William Kidd: The Wizard of the Seas”, Wittier Law Review, Vol. 28 (2007), pp.1167-1232, a Maritime History treatment of the trial in 1701 of a Scottish born New York merchant turned privateer and pirate
\textsuperscript{22} Hence the subject of this article- Challenge to International Law and World Order
remembered that unique Somali factors such as the collapsed state, plundering of Somali fisheries, the dumping of toxic and hazardous wastes in 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, further compound the treatment of the subject.

This 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 areas including, the Mediterranean, the South China Sea, the Malacca Straits, the Bay of Guinea (West Africa) and the Caribbean. However, the two hot spots are the Malacca Straits/ South China Sea, Gulf of Aden and the Somali basin. Apart from occasional references to piracy in those other geographical areas, this article is confined to discussions of Somali Piracy. However, it is reiterated that the Somali piracy differs in nature and veracity from both past piracy and those currently occurring in other parts of the globe.

With specific regard to Somali piracy, this article analyses its causes, effects on international trade, and challenges to international law and world order, against the backgrounds of collapsed state and economy under both customary and treaty international law. The article puts Somali piracy into global context and asks whether there is any credence to the claims linking piracy to illegal fishing in Somali waters on the one hand and the dumping of toxic and hazardous wastes in Somali coasts on the other. In doing so, the article further questions whether customary and international treaty law is equipped to deal with this kind of modern piracy. Finally, the article provides some solutions and conclusion by suggesting the way ahead. The article is restricted to maritime piracy and armed robberies at sea.

The article divided as indicated in the synopsis above.

I. PIRACY: ANCIENT AND MODERN-TOWARDS A DEFINITION

(a) Definitional Problems

(i) Piracy
The problems of Somali Piracy are that it does not conform to classical concept of piracy. Furthermore, the definition of piracy has been a source of contention among both academics and policy makers. Piracy has been used loosely to refer to and include attacks on ships, use of unauthorised radio broadcasting ships and unlawful reproduction, distribution and sale of music and works of art contrary to intellectual property laws. There is no single acceptable definition of the subject. Gentili, a 16th Italian

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23 Discussed in paragraph 3(b) of this article (post) under Origin and Causes of Somali Piracy
24 Somali piracy is actually a misnomer used to describe piracy in 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 900 nautical miles from the Somali/East African coast.
jurist wrote, “Pirates are common enemies, and they are attacked with impunity by all, because they are without the pale of the law. They are scorners of the law of nation; hence, they find no protection in that law. They ought to be crushed by us and by all men. This is warfare shared by all nations.”

Hence expressions, “Pirata est hostis humani generis” (A Pirate is an enemy of the human race). Brownlie, on the other hand, points out that, “By way of caution, it may be pointed out that definitions by municipal courts are often out of date, and involve an amalgam of municipal rules and international law, or the narrow issue of the meaning of ‘piracy’ in an insurance policy.

However, it is generally agreed that the definition of maritime piracy contained in Article 15 of the *Geneva Convention* on the High Seas, 1958, represents a wider customary international law view. Article 15 provides that:

“Piracy consists of any of the following acts:

1. Any illegal acts of violence, detention or any act of depredation, committed for private ends by the crew or the passengers of a private ship or private aircraft, and directed:
   a. On the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
   b. Against a ship, or aircraft, persons, or property in a place outside the jurisdiction of any State;
2. Any act of voluntary participation in the operation of a ship or of an aircraft with the knowledge of facts making it a pirate ship or aircraft;
3. Any act of inciting or of intentionally facilitating an act described in the sub-paragraph (1) or sub-paragraph (2) of this article

Provision of Article 15 warrants a few comments. First, the definition was a codification of customary international law by the *Geneva Convention on the High Seas*, reproduced verbatim by the UNCLOS 1982 with the only exception of use or reference to aircraft. Secondly, to constitute piracy, the act must be committed for private not political ends. The Somali Piracy fits into this jacket, since it primarily benefits individual pirates rather than a cause or some national grievances. Thirdly, and accordingly, piracy cannot be committed by warships or other government ships, or government aircraft, save where the crew has mutinied and taken control of the ship or aircraft” such as by *Fletcher Christian in the*...
Mutiny on the Bounty. That aspect is inapplicable to the Somali pirates, as they use neither warships nor government ships for their operations. It is not even clear whether the mother vessels they use are registered (and consequently which state is responsible) although they qualify as ships.

Thus, acts committed on board a ship by the crew and directed against the ship itself, or against persons or property on the on the ship are not piracy within the definition and convention. Piracy can be committed by a ship or aircraft. So long as it is for private gains, the actual motives are irrelevant. This is important, as it has been suggested that, Somali pirates are reacting against the dumping of toxic wastes other borders, which has damaged their fish stocks and economic wellbeing. Fourthly, the illegal and over fishing by foreign trawlers has depleted their fishing and economic activities as has the dumping of toxic wastes in Somali shores. Fifthly, piracy should be differentiated from other illegal acts committed by or onboard a vessel that do not constitute piracy. Whatever the problems of definition, what is happening in Somalia is piracy but of a different nature. Sixth, and finally, there is a correlation between piracies on the one hand and armed robberies, illegal acts, insurgency and acts committed by or with the authority of lawful governments.

(ii) Armed robberies at sea.

An aspect revived in modern definition is of piracy being armed robbery at sea. This is a revival of early definitions referring to it as, “Those acts of robbery and depredation upon the high seas which, if committed on land, would have amounted to a felony.” Using piracy and armed robberies at sea in the same context is misleading. It confuses the fact piracy is an offence committed only in the high seas and outside the jurisdiction of any state whereas armed robbery at sea is committed only in the territorial sea and the contiguous zone. Piracy is sometimes defined as “Brigandage committed on the high seas.” Accordingly, “Whoever, on the high seas, commits the crime of piracy as defined by the law of nations, and afterwards brought into or found in the United States, shall be imprisoned for life.” With its increasing theft element, the UN and its Specialised Agencies increasingly see piracy as a theft or robbery at sea. If anything, this does not seem to fit the characteristics of Somali actions, which involve hijacking not with a view to theft or robbery of the vessels or its contents but with the intent to hold for ransom, or the traditional definitions.

29 Fletcher Christian was a naval officer, a master’s mate on the board the Royal Naval Vessel, The Bounty during Captain William Bligh’s fateful voyage to Tahiti for breadfruit plants. He persuaded the crew to seize command of The HMS Bounty in 1789: , for further details see: http://laruae.org/bounty.htm
31 Ibid; also contained in the earlier edition of, 18 U.S.C.A para 1651
32 Ibid
Pirates operating in the South China Sea and the Straits of Malacca seem to fit this bill; unlike the Somali pirates, they are not hijackers and not interested in detaining the vessel. On the contrary, they are interested in cash from the petty cash from the ships’ purser or from passengers and crew and any ships’ precious cargo. The only difference between the two is the consequences of the actions. In the Somali cases, the ships and their cargo are not normally plundered nor their crew harmed\(^{34}\), but rather used only used for ransom. This is in clear distinction to piracy in the Malacca Straits and the South China Sea, where the pirates are not interested in ransoms but cash from the petty cash box and valuable cargoes on board. Thus, although clearly outlaws, Somali pirates are technically not robbers at sea. Then not all modern pirates fit all the various categories of the definition.

There is need a wider and more modern definition of piracy such as that of the International Maritime Bureau (IMB), which defines piracy, including attempts, as “--- an act of boarding or attempting to board any ship with the intent to commit theft or any other crime and with the attempt of capability to use force in furtherance of that act”\(^{35}\). However, robbery at sea is a 17th century concept, attributed to Justice Hedges in *R v Dawson*\(^ {36}\) who opined that; “Now piracy is only a term for sea –robbery, piracy being committed within the jurisdiction of the Admiralty. If any man shall be assaulted within the jurisdiction, and his ship or goods violently taken away without the legal authority, this robbery and piracy. If the mariners of any ship shall violently dispossess the master, and afterwards carry away the ship itself or any of the goods, or tackle, apparel or furniture, in any place where the Lord Admiral hath, or pretends to have jurisdiction, this is also robbery and piracy”\(^ {37}\). Whatever its colour Somali piracy is, *inter alia*, robbery at sea. It is not apparent at what point it became a crime committed predominantly in the high seas beyond national jurisdiction nor when hijacking for ransom crept in. Otherwise, only the Malacca Straits and South China Seas piracy qualifies as robbery in the high seas. It is not clear at what point it developed from robberies at sea into a crime committed predominantly in the high seas beyond national jurisdiction nor when hijacking for ransom crept in.

(iii) **Hijacking (Seajacking) Vessels for Ransom.**

Methods employed by Somali pirates are in marked contrast to any earlier definitions, descriptions or practices of piracy. This hijacking of vessels and holding them and their crew for ransom comes from an aviation offence, i.e., the unlawful seizure by force or threats of any kind the control of an aircraft in

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\(^34\) The exception was at the beginning when the attackers of the Achili Lauro looted jewellery and cash from the passengers and crew and killed an elderly and infirm passenger. For some reasons they completely abandoned this practice in favour of ransom for the vessel and recently for the crew as well

\(^35\) The London-based International Maritime Bureau (IMB) is an affiliate of the Paris-based International Chamber of Commerce (ICC), a non-governmental organisation not to be mistaken for the Hague-based International Criminal Court, an intergovernmental organisation with same abbreviation (ICC)

\(^36\) Sir Charles Hedges, of the High Court of England, *in R v Dawson* (1696) 13 St.Tr.451

\(^37\) Ibid at 454
flight\textsuperscript{38}. Until recently, this offence was limited to aircrafts but now include ships\textsuperscript{39}. Back to Somali piracy, the process involves identifying, shadowing and attacking a ship, boarding it and towing it away to Hardhere, a safe place on the Somali coast. This is followed by a demand for ransom from the owners, operators or agents of the ship. There then ensures sophisticated negotiations as to where, when, how much and how the ransom is to be delivered. This negotiation is not between the pirates and parties representing the vessel but between agents of pirates who may themselves be thousands of miles away in some comfortable office. The ransom is not deposited in any account but is rather withdrawn, packed in plastic bundles and dropped by helicopter either at some agreed rendezvous or at sea. In the later case, the pirates then take their shares and make their separate ways by speedboats. Occasionally, they have drowned when the speedboats capsized in attempts to outrun the allied navies. Apart from practical difficulties, once the boarding by pirates is complete, there is nothing that the patrolling navies can do for fear of vessel and crew safety.

The vessel is not normally released until the pirates have made their safe gate away. It is like any other normal kidnapping and ransom cases on land, save that it is at sea. This is where conspiracy theory may be important (although difficult to prove) to catch those who may not be physically be involved in the operation. It would need the might of the CIA and other intelligence agencies with sophisticated listening devices. Although the methods employed by Somali pirates are covered under illegal acts below, nevertheless, there is need to consider it as a separate heading to the definition and/or description of piracy. Perhaps to this should be added attempted piracy and conspiracy to commit piracy. This is a new phenomenon facing international law and world order. It is not something that the world has been used to. It is complete contrast to the classical method where pirates seized and confiscated a whole vessel and its cargo or the Malacca Strait/South China Sea\textsuperscript{40} practices where pirates do not highjack the vessel but only aim for its expensive cargo and the cash in the ship's purse. It, therefore, calls for novel and bold measures to deal with. Accordingly, any future international conventions should include hijacking, kidnapping, abduction and demanding and holding for ransom in the definition of piracy.

(v) **Kidnapping and Abduction of Sailors for Ransom**

\textsuperscript{38} See The UK Aviation Security Act 1982 s.1(1); perhaps it should be known as “seajacking”

\textsuperscript{39} See UK Aviation and Maritime Security Act 1990 ss.9 and 10. Section 8(1) of the Act provides that “A Person who unlawfully, by the use of force or threats of any kind, seizes a ship or exercises control of it, commits the offence of hijacking a ship, whatever his nationality and whether the ship is in the United Kingdom or elsewhere”. A ship is defined widely to mean any vessel including hovercraft, submersible craft and other floating craft—S7(1)

\textsuperscript{40} For Malacca/South China Sea see generally, Erika Barros, Note, “Casting a Wider Net: Addressing the Maritime Piracy Problem in South East Asia”, Boston College International and Comparative Law Review, (2005) pp.149-63 where she discusses the serious threat posed by piracy and the shortcomings of SUA and UNCLOS III in trying to deal with the problem.
A new method adopted by Somali pirates is kidnapping and abduction sailors for ransom. This has occurred to mainly fishermen on trawlers and sailors on yachts, the most recent being the capture of an Egyptian, French a British registered yacht, the *Lynn Rival* in November 2009. This is a new tactic and follows their failure to hold on to two French yachts, which were recovered by French commandos at a cost of many pirate lives. Another cause for change of tactics was their failure twice to hold on to the *Maersk Alabama*, US registered vessel, which led to loss of 4 pirate lives. There are many other types of kidnappings (child, woman, and simple) on dry land, but we are here more concerned with one done at sea and for ransom. Kidnapping is a criminal offence under Anglo-American and other common law jurisdictions. Under English Common Law, it is the forcible and illegal abduction or taking away of persons from their home or property or country without their consent. Under US law, anyone who detains another for the purposes of extorting money from him or from another person as a price for his release is guilty of a felony of kidnapping for ransom. The purposes of pirate kidnapping (a) to hold for ransom or reward or shield or, (b) to facilitate a commission of a felony or flight thereafter, (c) to inflict bodily injury or to terrorise the victim or another, or (d) to interfere with the performance of any governmental or political function, would make them liable under US law. Abduction is also the leading away of any person. Unlike kidnapping, abduction can, however, be both a criminal and a civil offence. Transposed to the sea, the boarding of a vessel and taking away of the sailors is an international criminal offence committed in the high seas beyond national jurisdiction. Like most other actions by Somali pirates, abduction and kidnapping are a new type of piratical offence that needs new approaches.

(v) *Illegal Acts.*

Piracy is clearly an illegal act committed in the high seas. It is illegal in the sense that it is unlawful and unauthorised, interferes with normal enjoyment of the freedom of navigation and of the freedoms of the high seas; it is an unlawful detention, a hijacking and an interference with normal commerce. As outlined in paragraph 1 above, it is a detention and use of violence against the ship and or crew therein in order to achieve those aims. They would still constitute illegal acts even if violence were not involved. When apprehended Somali pirates can therefore be charged with commission of illegal acts in the high seas. This closer to the IMB definition of piracy above. Other distinguishing factors of the Somali piracy are its links to current insurgency in the country. Actions of Somali pirates are illegal under both municipal and international law. In this context, it is not new or different from previous definitions.

41 See R v Garwood (1989) 11 Cr. App R(S) 141
42 See 18 USCA para. 1201
43 See Hall, International Law, (8th Ed) 314
(vi) **Insurgency**

Somali piracy is further complicated by insurgency currently taking place in the country. It has been suggested that involvements in insurgency per se does not qualify its participants as pirates for that reason. However, this is a wrong interpretation of the law. To exempt themselves from that definition, Somali insurgents, in the technical sense of that word, would have to demonstrate they neither control the Somalis pirates nor operate from ships. Although there may be a tenuous link between them but Somali pirates’ *mother ships* are not controlled primarily by insurgents. They probably pay some “tax” or protection fee to the insurgents. Some may even sympathise with or been ex-combatants themselves, however, there is no evidence that they are themselves insurgents. If it were proved then international law governing the treatment of insurgency, armed conflicts, and probably belligerency would kick in. This is because; under international law, ships controlled by insurgents may not be confiscated without recognition of belligerency. That notwithstanding, insurgency is a broader branch of international law, quite independent of piracy, although in this context there are connections between them for reasons outlined above.

Otherwise, with limited exceptions, international law prohibits third states from interference with or exercising belligerent rights against the shipping of other states. Forcible interference of this kind is unauthorised by law and may be resisted by all available means. However, it is very doubtful if it is correct to characterise such acts as piracy, and this proposition is reinforced by the terms of the Convention on the High Seas. Brownlie opines that “However, it may be that it is lawful to punish acts constituting *mala prohibita*—murders, robberies, etc.,—carried out *ultra vires* by insurgents”46. His position that,” Opinions, which favour the treatment of insurgents as “pirates”, are surely incorrect”47 is therefore persuasive. Although eluded to in the past, insurgency was never part of piracy. There is need to review position in the light of Somali piracy. That said the whole analysis is academic as insurgency is an action against government ships and there is neither lawful authority nor government ships in Somalia.

(vii) **Acts committed by/with authority of lawful governments**

Once upon a time, legitimate governments used pirates, privateers and buccaneers to raid enemy vessels on their behalf. The method was also employed during wars and hostilities against enemy

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45 In international law, insurgency is a revolt against an established government not reaching the proportions of a full-scale revolution. Under international law, it’s a rebellion not recognised as belligerency or a civil war. Unless it escalates, the international community regards it purely as a domestic matter.

46 Brownlie, p.238, where he also cites the Convention on the Rights and Duties of States in the event of Civil Strife, 1928 and Hudson’s International Legislation Vol. 4 p.195 for his authority

merchant vessels such as during the European colonial scramble for the Americas, American War of independence and American civil wars. It has been suggested that piracy in the Malacca Straights and, may be even Somalia piracy, constitute unlawful acts committed with the authority of lawful governments. A scenario highly unlikely since there is no legitimate government and such use by warlords would not constitute lawful authority or governments. The TFG is however vehemently opposed to pirates. Warlords, insurgents, militias and other organised armed groups sponsor and encourage some or all elements of Somali pirates; however, they are neither lawful authority nor governments. What is important is that the lawful TFG is against the piracy.

But if were, it would constitute piracy, for under international law illegal attacks on or seizure of innocent merchant ships by warships or government ships result in the delictual responsibility of the aggressor’s flag state, but the offending ships do not become pirate ships. Again, a privateer, authorised by a belligerent to act in her service is not a pirate, even if acts of violence are committed by neutral ships. In the latter case, the belligerent is responsible as a principal. The more likely scenario in Somalia piracy is not that of politically motivated operations by organised groups. To qualify they would have to be using warships provide by lawful governments, exactly the opposite of what is happening. The remaining argument needing dismantling is whether Somali piracy constitutes politically motivated operation by organised groups.

**(viii) Politically -motivated operations by organised groups**

Harassing operations by organised groups deploying forces on the high seas may have politically motivate objectives, and yet may be neither connected with insurgency against a particular government nor performed by agents of a lawful government. Ships threatened with such activities may be protected, and yet the aggressor may not be regarded as pirates. Thus, the taking over by Captain Galvano of the Portuguese vessel *The Santa Maria* in 1961 to dramatize his opposition to the Portuguese dictator Antonio Salazar did not constitute piracy since the seizure was not carried out for private motives (apart from the fact that only one ship was involved-whereas piracy needs at least two-the aggressor and victim ships) which alone excluded the act in question from the scope of piracy under international law.

Somali pirates might consist of organised groups even with valid grievances against dumping, illegal fishing, jihadism and purported neglect by international community, but they would benefit from *The Santa Maria*.

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48 Between the British, Portuguese, French and Spanish when they all resorted to using pirates to attack and weaken the other’s navies and merchant vessels
50 See Adam Young, “Roots of Maritime Piracy in South East Asia” in Derek Johnson & Mark Valencia (eds), Piracy in South East Asia, Issues, and Responses(Singapore: ISEAS Publications, 2005), pp1-33 at p.5
51 Ibid p 238
52 *The Santa Maria*
Maria ruling that actions by such groups do not constitute piracy. The ruling in that case related to purely politically motives without any private commercial gains. Nevertheless, the Somali experience merits a review of this customary law position. The Somali organised groups are not the type foreseen under international law. A tiny minority of the Somali pirates might be politically motivated but the bulk, if not all, are opportunists, terrorists if not outright criminals acting from purely private motives. There may be sympathy for Somalia for reasons outlined above but two wrongs do not make a right. What is undisputed is Somali piracy has its roots partly in terrorism

(ix) Terrorism and General Maritime Security

We all saw it coming. Just prior to the emergence of Somali piracy, there had been protracted activities in terrorism in Somalia and off the coast of Somalia. There is a general lawlessness, which has infiltrated legitimate maritime activities. At first, it was regarded as terrorist threats to maritime transport and therefore general threat to maritime security. Under the guidance of the United Nations and championed by the US, efforts were concentrated at both the UN and IMO maritime security. The main cause of this was the 9/11 bombing of the twin towers and general hijackings in that country. All this meant that we were oblivious to what the terrorism was to crystallise into, Somali terrorism. Piracy should now be considered as part of the general maritime security. In fact, in the UK the definition of piracy is that of UNCLOS 1982. This in fact emanates from Aviation security hence the borrowing of the term highjack from therein. When the hijacking of aircrafts became harder and out of fashion, attention switched to merchant shipping, equally high profile but a softer target with a larger and a more difficult environment for the owners to police.

(b) Under Customary International Law

Piracy has been a crime for centuries under customary law of nations, and a pirate has always been considered an outlaw and hostis humani generic, an "enemy of mankind". Piracy is the first "international crime", which means that a piratical act is a crime directly under international law and any state may bring a pirate to justice. Customary international rules developed in the interest of maritime states to protect their international trade. The dissenting opinion of Judge Moore in The Lotus Case provides a useful starting point in customary international law, which should be helpful in current dilemmas. He said, "in the

53 See, The Terrorism Act, 2000 (UK)
54 See UK Merchant Shipping and Maritime Security Act 1997(Cap 28) s26
56 See also The Aviation Security Act 1982 (Cap 36) extended to UK colonies and dependant territories by s.39 thereof; see also the Aviation Security Piracy (Overseas Territories) Order 2000 (SI2000/3059
57 France v Turkey (The Lotus Case) PCIJ Reports, Series A, No. 10 (1927)
case of what is known as piracy by law of nations, there has been conceded a universal jurisdiction, under which the person charged with the offence may be tried and punished by any nation into whose jurisdiction he may come. I say 'piracy by law of nations', because the municipal laws of many States denominate and punish and punish as 'piracy', numerous acts which do not constitute piracy by law of nations, and which therefore are not universal cognizance, so as to be punishable by all nations".

Piracy by law of nations, in its jurisdictional aspects, is sui generis. Though statutes may also provide for its punishment, it is an offence against the law of nations; and as the scene of the pirate's operations is the high seas, which it is not the right or duty of any nation to police, he is denied the protection of the flag which he may carry, and is treated as an outlaw, as the enemy of all mankind – hostis humani generis – whom any nation may in the interest of all capture and punish.\(^{58}\) However, some of the nature and characteristics of Somali pirates do not exactly fit the classical definition under international customary law although it does under international treaty law. This is because the piracy is more of a business than a normal piratical operation, which neither customary nor treaty international law envisaged.

(b) Under International Treaty Law

(i) Geneva Convention 1958 [UNCLOS I]

International customary law was codified and developed under the Geneva Convention on the High Seas 1958\(^ {59}\), sometimes referred to as UNCLOS I, which after defining piracy, provides that all states shall co-operate to the fullest extent in repression of piracy on the high seas or in any other place outside the jurisdiction of any state.\(^ {60}\) Under the Convention, just as under customary international law it codified, the act of piracy committed by a warship, government ship or government aircraft whose crew have mutinied and taken control of the ship or aircraft are assimilated to acts committed by a private ship.\(^ {61}\) Piracy under the Convention includes pirate broadcasting; thus, a ship or aircraft is considered a pirate ship or aircraft if it is intended by the persons in dominant control to be used for committing the acts referred in the definition\(^ {62}\) article.\(^ {63}\) The same applies if the ship or aircraft has been used to commit any such act; so long as it remains under the control of the persons guilty of that act.\(^ {64}\)

\(^{58}\) PCIJ, Ser. A no.10 (1972) p.70

\(^{59}\) An international conference under the auspices of the United Nations convened to codify and develop the law of the sea based on the drafts prepared by the International Law Commission. The First United Nations Conference on the Law of the Sea (sometimes referred to as UNCLOS I) brought together eighty six states which adopted four conventions on (1) The Territorial Sea and the Contiguous Zone; (2) the High Seas; (3) the Continental Shelf; and (4) Fishing and Conservation of the Living Resources of High Seas. An Optional Protocol on the Compulsory Settlement of Disputes was also signed. Of the four conventions the most relevant for the purposes of this article is the second one, the High Seas Convention.

\(^{60}\) Art. 15

\(^{61}\) Art. 14

\(^{62}\) Art. 16

\(^{63}\) Art. 15
A ship or aircraft may retain its nationality although it has become a pirate ship or the law of the State from which such nationality was derived determines aircraft. The retention or loss of nationality gives every state to arrest a pirate ship in the high seas outside the jurisdiction of the flag or any state and to prosecute the captured pirates with the proviso of a possible liability where the seizing state has not acted with adequate grounds. A seizure on account of piracy may only be carried out by warships or other ships or aircraft on government service authorized to that effect. Piracy is given as one of the four exceptions to the enjoyment of the high seas, the other 3 being slavery and a flag of convenient ship. It will be apparent that UNCLOS III (post) retained UNCLOS I provisions on piracy with a few modifications. Thus, UNCLOS I set the basic text that has governed piracy ever since. Not even UNCLOS II changed it.

(ii) The Geneva Convention 1960 [UNCLOS II]
This was an unsuccessful international conference convened by the United Nations to deal specifically with the issues of the breadth of the territorial sea and the fishing rights of states in areas of the high seas adjacent to their territorial sea. The 1960 Geneva Conference [sometimes referred to as UNCLOS II] gathered eighty seven states (one more than UNCLOS I) but failed to achieve its objectives. The sticking point being the breadth of the territorial sea. A joint US-Canadian compromise formula for a six-mile territorial sea plus a six-mile fisheries jurisdiction zone failed by one vote needed for the necessary two-thirds majority. In retrospect, it is clear that even if the compromise had been adopted, it would have been short-lived because of the trend among many, especially third world, countries to claim territorial seas wider than six miles and fishery zones extending beyond the limits proposed by the conference. The significance of UNCLOS II is that it left UNCLOS I provisions intact, especially the second (High Seas) convention which contained piracy provisions.

(ii) UNCLOS 1982 [UNCLOS III]
A United Nations sponsored multilateral convention that comprehensively codifies and develops the contemporary law of the sea in peacetime, has been widely regarded as the greatest codification in international law and the major milestone in the history of the law of the sea. Adopted in 1982 after 8

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64 Art. 17
65 Ibid
66 Art. 18
67 Art. 19
68 Art. 20
69 Art. 21
70 Art. 22(1)
71 The UK law now treats UNCLOS III as part of the law of nations and adopts the piracy definition contained in Article 15 thereof as (Merchant Shipping Maritime Security Act 1997 s 26, Tokyo Convention Act 1967 and Aviation Security Act s.39
years of drafting and 10 years of negotiations by the Third United Nations Conference on the Law of the Sea 1973-1982 (hence also known as UNCLOS III), it continued with the codification of international customary law started by UNCLOS I and II.

More significant, the UNCLOS I provisions, on piracy, were reproduced almost verbatim by the UNCLOS III. These are now contained in Articles 100-107 of the Convention dealing with the duty to co-operate in the repression of piracy; definition of piracy; incidents of piracy by a warship, government ship or government aircraft whose crew has mutinied; definition of a pirate ship or aircraft; retention or loss of the nationality of a private ship or aircraft; seizure of a pirate ship or aircraft; liability for seizure without adequate grounds; ships and aircraft which are entitled to seize on account of piracy; pirate broadcasting from the high seas; and piracy being an exception to freedom of the high seas provided for elsewhere in the Convention. So in terms of piracy, apart from the UNSC/IMO initiatives (see pp.20-21 post) we have not moved far from customary law as codified by UNCLOS I.

(iii) Other UN Convention and Security Council Resolutions

The earliest Security Council involvement into Somali Piracy was Security Council Resolution 751 (1992) which set up a Security Council Committee concerning. Ever since, Reports of the Committee and the Monitoring Group and the Panel of Experts on Somalia have been submitted through the Security Council Committee established pursuant to Resolution 751 concerning Somalia. However, the actual substance began with Resolution 1269(1999) in connection with the responsibility of the Security Council in the maintenance of international peace and security; and Resolution 1772(2007) adopted by the Security Council at its 5732nd Meeting on 20 August 2007.

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73 For the text of the Convention see
74 Art.100 (Geneva)
75 Art.101
76 Art.102
77 Art 103
78 Art.104
79 Art 105
80 Art 106
81 Art.107
82 Art.109
83 Art. 110(a)
84 Art.87
85 See http://un.org/sc/committees/751/mongroup.shtml
86 S/RES1269(1999), 19 October 2000, in connection with the responsibility of the Security Council in the maintenance of international and security peace
87 S/RES/1772(2007), adopted by the Security Council at its 5732nd meeting on 20 August 2007
However, Resolution 1814 requests nations with military capacity in the area to “actively fight piracy on the high seas off Somalia and seeks repressive action in a manner consistent with UNCLOS III. The United Nations Security Council 1816 (SC9344, 5902nd Meeting) condemns acts of piracy and armed robbery off the Somali coast, authorises for six months, “all necessary means” to repress such acts. Adopted unanimously with Somali Transitional Federal Government support, it was passed on the understanding that the measures do not affect states obligations under UNCLOS III.

Adopted on 20 November, 2008, it that was proposed by the UK to introduce tougher sanctions against Somalia over the country’s failure to prevent a surge in sea piracy. The US circulated the draft resolution that called upon countries having naval capacities to deploy vessels and aircrafts to active fight against piracy in the region. The resolution also welcomed the initiative of the EU, NATO and other countries to counter piracy off the coast of Somalia. The US Alternative Representative for Security Council Affairs, Rosemary DiCarlo said that the draft resolution “calls on the Secretary General to look at the long term solution to escorting the safe passage of World Food Programme ships”.

Even the Somali’s Islamist militants stormed the Somali port of Harardheere in the hunt for pirates behind the seizure of a Saudi super tanker, The Sirus Star. A clan elder affiliated with the Islamists is quoted to have said, “The Islamists arrived searching for the pirates and the whereabouts of the Saudi ship. I saw four cars full of Islamists driving in the town from corner to corner. The Islamists say they will attack the pirates for high jacking a Muslim ship”. Security Council Resolution 1838. Security Council Resolution 1846 (following Security Council Resolution 1838), allows states and regional organisations to use all necessary means and to fight terrorists off Somali coats for a 12 months period. Authorisation provided after consent from TFG. On December 17, 2008, the UN Security Council unanimously adopted a tougher resolution (Security Council Resolution 1851), allowing for the first time international land and sea occupations in the pursuit of pirates. Resolution 1851 takes current anti-piracy measures a step further. In addition, authorises states to use land-based operations in Somalia as part of the fight against piracy off the Somali coast. It was particularly focussed on the deteriorating humanitarian situation due to piracy intersection of WFP aid shipments.

(iv) IMO Conventions and Instruments.
**Convention on the Suppression of Unlawful Acts Against Ships (SUA)**

Current Somali piracy was preceded by the IMO *Convention on the Suppression of Unlawful Acts Against Ships*\(^95\). Although aimed at maritime terrorism rather than to piracy, SUA and the amended SUA is now one of the weaponry against it. The convention was ineffective as it was intended against terrorism, general unlawful acts at sea rather than aimed primarily at piracy\(^96\). As to Post Somali piracy, as expected, the IMO- the UN premier agency on maritime safety has issued a number of directives on the subject listed and discussed below. *Recommendations to Governments for Preventing and Suppressing Piracy and Armed Robbery Against Ships*\(^97\) Suggests possible counter measures that could be employed by Rescue Co-ordination Centres and security forces and now includes Draft Regional Agreement on Co-operation in preventing and suppressing acts of piracy and armed robbery against ships\(^98\) *Guidance to Shipowners and Ship Operators, Shipmasters and Crews on preventing and suppressing acts of piracy and armed robbery Against Ships*\(^99\)Contains comprehensive advice on measures that should be taken on board to prevent attacks or, when they occur, to minimise the danger to the crew and ship *Directives for Maritime Rescue Co-ordination Centres (MRCCs) on Acts of Violence against Ships*\(^100\). *Code of Conduct for the Investigation of the Crimes of Piracy and Armed Robbery Against Ships*\(^101\). Adopted by the IMO General Assembly in November 2001. *Measures to prevent the Registration of Phantom Ships*\(^102\). Piracy and armed robbery against ships is dealt with by the Maritime Safety Committee (MSC) and the Facilitation Committee (FAL) as well as the Legal Committee (LEG). Furthermore, the IMO has issued the following additional guidance on ship security alert systems: *Guidance on the Provision of Ship Security Alert Systems*\(^103\), *False Security Alerts and Distress Security Double Alerts*\(^104\), *Guidance on the Message Priority and the Testing of Ship Security Alert Systems*\(^105\), and *Piracy in Waters off the Coast of Somalia*\(^106\).

\(^97\)IMO Revised MSC/Circ.622/Rev 1
\(^98\) For a detailed analysis of the Recommendation see Piracy and armed robbery at sea in Focus on IMO, http://www.imo.org/includes/blast_bindo.asp?_id=433&format=PDF at pp.5-6
\(^99\) Revised MSC/Circ.623/Rev.3; For a detailed analysis thereof see FOCUS ON THE IMO, op cit at pp.6-7
\(^100\) See IMO Docs: MSC/Circ.1073
\(^101\) IMO General Assembly Resolutions: Resolution A.922(22) November 2001
\(^102\) IMO Docs: Resolution A.923(22); see also International Maritime Bureau: Third International Meeting in Piracy and Phantom Ships, Kuala Lumpur, (Malaysia), 1-2 June 1998
\(^103\) MSC/Circ.1072 available from the IMO
\(^104\) MSC/Circ.1109/Rev1
\(^105\) MSC/Circ.1155. In addition IMO provides Information Resources on piracy and armed robbery, Information Resources on Maritime Security, and Reports on Piracy and Armed Robbery (for details on this see http://www.imo.org/Circulars/index.asp?topic_id=334
\(^106\) For text and details see http://www.imo.org/dynamic/mainframe.asp?tpoiic_id=1178
(v) **UNCTAD**

The United Nations Conference on Trade and Development (UNCTAD) has also played a significant role, and highlighting problems of, in suppressing piracy at sea\(^\text{107}\). In 1982, its Committee on Shipping (Committee 4 of the Board) adopted Resolution 49(X)\(^\text{108}\), whereby it was decided to establish an ad hoc intergovernmental group to consider means of combating all aspects of maritime fraud, including piracy\(^\text{109}\). Although primarily aimed at Somali piracy, the Resolution comes in handy in the fights against general piracy.

(vi) **International Maritime Bureau (IMB)**

Although only a private commercial, rather than an intergovernmental, organisation the work of the Paris-based International Chamber of Commerce deserves mention in international efforts to combat piracy. Its London-based subsidiary body, the IMB, is one of the most active bodies. The IMB advises shipowners and shippers, produces guidelines, provides a reporting centre and publishes annual reports\(^\text{110}\) on piracy. Thus, the fight against piracy is not limited to the few but is, rather extends to all stakeholders.

(c) **Indian Ocean Regional Anti-Piracy Efforts**

(i) **ReCAAP –ISC**

The Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (ReCAAP) was the first government- to- government agreement that addressed the incidence of piracy and armed robbery in south Asia and the eastern Indian Ocean following the piracy incidents in the Malacca Straits and the South China Sea. The ReCAAP initiative aims to enhance multilateral cooperation among 16 regional states. It was finalised on 11 November 2004 and came into force on 4 September 2004.

(ii) **The Arab League Summit**

Following the seizure by Somali pirates of an Egyptian ship and the *Sirus Star*, huge oil super tanker worth US$100m of oil, the Arab League, after meeting in Cairo, called for an urgent summit for countries

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\(^{109}\) Ibid., p.4

overlooking the Red Sea, including Egypt, Saudi Arabia, Sudan, Somalia, Jordan Djibouti and Yemen.
The summit came up with several solutions for the piracy problem, in addition to suggesting different routes and looking for a more secure passageway for ships.

(iii) The Djibouti Code of Conduct
As part of its fight against Somali piracy, the IMO facilitated the adoption, by 17 states gathered in Djibouti, of the a Code of Conduct concerning the Repression of Piracy and Armed Robbery against Ships in Western Indian Ocean and Gulf of Aden\[sup]\[111\]\ (the Djibouti Code of Conduct)\[112\]. The Code recognises the extent of the problem in the area, calls for co-operation by the member states\[113\]. Participants undertake to fully co-operate in the arrest, investigation and prosecution of persons who have committed piracy or are reasonably suspected of having committed piracy; seize suspect ships and the property on board such ships; and rescue ships, persons, and property subject to acts of piracy. These objectives are to be achieved through shared operations\[114\], setting up of national focal points\[115\] and establishment of a regional training centre\[116\]. The Code is modelled on RECAP ICS above. The operations of the NATO naval forces have temporarily rendered the Code or Arab Summit surplus.

II. SOMALIA: HOME OF MODERN INTERNATIONAL PIRACY!

(a) Somalia

(i) The Country

Somalia is an East African country on the Horn of Africa with a population of about 10m people (predominantly Muslim) and a landmass of 637,540 sq km\[117\]. It poses a number of problems a number of major problems. First, because of the extensive coastline of 2,105 nautical miles (nm) (3,898 km- the longest of any African country) in total of which 659nm or 1,204 km are in the Gulf of Aden, there is a need for as many naval vessels and military aircrafts for patrol tasks to be carried out effectively\[118\].

\[112\] Adopted on 6 January 2009 and came into force on 29 January 2009
\[113\] For further details see the IMO Briefing http://www.omo.org/About/mainframe.asp?topic_id=1773&doc_id=10933
\[114\] E.g. the Establishment of Piracy Information Exchange Centres
\[115\] Ibid.; These include (a) Regional Maritime Rescue Coordination Centre (Mombasa/Kenya), Sub-regional Coordination Centre (Dar es Salaam/Tanzania? And Regional maritime information Centre (Sana/Yemen)
\[116\] In Djibouti
\[117\] For background details of the country see http://www.cia.gov/library/publications/the-world-factbook/geos/so.html, retrieved 26 October 2009
\[118\] For these reasons the US has succumbed to desperate measures by deploying the dread and deadly drones in the fight against the pirates, see “US drones protecting ships from Somali Pirates”, http://news.yahoo.com/s/ap/piracy, retrieved on 25 October 2009
Secondly, it has a very long coastline stretching, from the border with Djibouti on the Horn of Africa to Kisimayu on the Kenyan border just north of Mombasa (see Map 1). Thirdly, it is a hostile coastline and difficult one to police. It is currently probably the most lawless coastline on earth. Somalia has neither effective government nor police force, army or navy. The coastline, just like the country, is free for all, with warlords having the upper hand. Fourth, it is one of the poorest of the least developed countries in the world with a per capita income of US$50 per annum and a very low life expectancy. It was once rich in fish and other marine resources and skilled seamen although without any significant national fleets.

(ii) Strategic Position
In terms of international security, it occupies a strategic position on the Horn of Africa. The country has a unique shape with connections to the Red Sea, Gulf of Aden and the Persian Gulf and the West Indian Ocean. This covers sea-lanes between the Cape of Good Hope and the important port of Mombasa with the mouth of the Red Sea and entrance to the Indian Ocean. Also in this region is the strategic mouth and entry to the Persian Gulf. The region is also host to the Red Sea and the Suez Canal and the Gulf of Aden, the shortest and economic sea route for 80% of international trade between the Wests on the one hand and the Persian Gulf, Asia and Japan on the other (see Map 3). The pirates are no doubt aware of this factor, which they are putting to maximum use of access to the Somali basin

(iii) Proximity to World Energy source
This region is not only the largest (about 80%) source of the world’s energy buts also one of the most volatile regions of the world and where super tankers traverse all the time with the West’s oil from Iran, Iraq, Saudi Arabia, the Emirates and other oil producing Gulf States(see Map 3). Thus, there is a need to preserve the integrity of the Gulf of Aden – a lane of strategic importance and significance to international shipping and trade, both east and west of the Suez Canal, which is used by some 22,000 vessels annually, carrying around 80% of the world’s trade, including more than 12% of the total volume of oil transport by sea, as well as raw, materials carried by bulk carriers and finished goods transported by containers.

(iv) Vastness of the Somali Coast and the West Indian Ocean
Finally, the vastness of the India Ocean makes it very difficult to patrol against small vessels used by the pirates, let alone determined pirates. The pirates further complicate matters for their pursuers by risking their own safety by going out in un-seaworthy vessels to hijack larger vessels from as far away

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119 The area covered by the pirates in the Somali basin is twice the size of Western Europe which makes it very difficult for the allied navies to police
as 600-900 nautical miles in the Indian Ocean east of the Seychelles\textsuperscript{120}. Searching for pirates in over a million square miles of the western Indian Ocean is like looking for a needle in a giant haystack. Efforts and risks taken by some vessels going as far out as possible to avoid highjack have come to no fruition. The \textit{Sirus Star} and \textit{The Maran Centaurus} were both captured 300 miles east of the Seychelles Islands. The NATO forces have now advised that this area is beyond their capability to patrol. The strategic position, proximity to energy sources and vastness of their area of operation gives the pirates great advantage to have a strangle hold on merchant shipping, international commerce and the all important oil trade.

\textbf{(b) History and development of Somali Piracy}

There are many theories regarding the underlying causes of the piracy but the plausible root cause of Somali piracy lies in the civil war, collapse of the Somali State with the fall of Siad Barre in 1991, illegal fishing and dumping of toxic and hazardous wastes. The Somali coast once thrived in abundance of fish, which provided employment, and source of income to many Somali fishermen and economy. Under strongman, Siad Barre, Somalia received western assistance to develop lucrative fishing co-operatives. The co-operatives had fixed prices for their catch, which was often exported to the West for hard currency due to the low demand for seafood in the country. Then Aid money improved ships, especially trawlers, and supported the navy and the construction and maintenance of facilities\textsuperscript{121}.

However, after the fall of the Siad Barre regime, the shipping industry collapsed and the income from fishing plummeted and eventually ended due to the civil war. This was, however, depleted by illegal fishing by foreign trawlers using dragnets. Overnight Somali ended up with barren fishing grounds and unemployment fishermen and industry that were supported by the fishing industry. This had knock-on effects on Somali sailors from dwindling merchant fleet as well as Somali who had served on foreign vessels. The natural alternative for such trained fishermen and sailors was therefore piracy as a way of alternative employment and revenge on the international community for loss of fishing and abandonment.

Furthermore, there was no coastguard or navy to protect against foreign trawlers illegally fishing in Somali waters. This in turn led to the erosion of fish stocks. Consequently, local fishermen started to band together to protect the resources. Soon they discovered that piracy was an easier way of money. Due to the clan-based organisation of Somali society, the lack of central government, and the country’s strategic location at the Horn of Africa, conditions were ripe for growth of a unique and modern Somali

\textsuperscript{120} The \textit{Sirus Star} was for instance captured at about that distance nearer Seychelles than the Somali or East African Coast. Even risking going that far out with the consequential oil consumption was no guarantee against the pirates.

\textsuperscript{121} “Somali Fishery Industry has potential for Growth”, Marine Fisheries Review, 1982, 44(12)
piracy, as we know today in 1990s. A swath of unemployed gunmen joined this group and other youths who have known nothing else in their lives but guns and fighting. After seeing the profitability of piracy, since large ransoms are usually paid dollars, warlords began to facilitate pirate activities, splitting the profits with the pirates.122

(c) Profile of a Somali Pirate.
The profile of a typical Somali pirate is in complete contrast to that of the Jolly Roger123. In addition to differences noted above, among other ways by which Somali pirates differ from ancient and traditional pirates are their lower average age and poor background. A typical Somali pirate is between 14-35 years old and come from Puntland, a region in the northeastern Somalia. One of the problems in Mombasa is whether to try and lock up the 14 year olds who are technically juveniles. Most pirates serve for 1-2 years at most, retiring once they have built house (es), bought cars for personal use and vehicles for business, established business and invested overseas. Most pirates are have never had any education, educational facilities having stopped 20 years ago before most were born.

The East African Seafarers’ Association124 estimates that there at least five pirate gangs and 1,000 men125. According to a BBC report, the pirates are can be divided into three main categories: local Somali fishermen, considered the brains of the pirates’ operations due to their skill and knowledge of the sea; ex-militia men who used to fight for the local clan warlords, used as the muscle; and, technical experts who operate equipment such as the GPS devices126. Another unique characteristic of the Somali pirates is non-violence so far to and excellent treatment of the captive sailors. In most of the hijackings, the pirates have not harmed their prisoners, although this could soon change if they got desperate127. They generally treat their hostages well in anticipation of a big payday to the point of hiring caterers on the shores of Somalia to cook spaghetti, grilled fish and roasted meat that appeal to four-star Western tests. They also keep a steady supply of cigarettes, games and drinks from shops on shore128.

It is generally accepted that there are four main groups operating off the Somali coast. First, is the “National Volunteer Coast Guard” (NVGG), commanded by a Garaad Mohamed, is said to specialise in

123 For details on the Jolly Roger, see http://cosmosmith.com/jolly_rogger.htm
124 The Mombasa (Kenya) based East African Seafarers Association has done more to assist and highlight the plight of innocent seafarers caught up in thus saga. However, it has also got involved in ransom negotiations. Samuel L Jackson is to play Andrew Mwangura, the Coordinator of the EASFA in a proposed film.
125 Global Security.org, article on the Military.
interception of small boats and fishing vessels around Kisimayu on the southern Somali coast, near the
Kenyan border. Although originally set up to protect the fisheries from illegal fishing by foreign trawlers
(hence their name), this is the least effective group being limited by resources and network, when they
can be picked. Secondly, not necessarily in order of their importance, is the “Marka Group”, under the
command of one Sheikh Yusuf Said (also known as Yusuf Indha’adde), is made up of several scattered
and less organised groups operating under the town of Marka in central Somalia. Not much is known of
this group. The third significant pirate group is composed of traditional Somali fishermen operating
around Puntland and referred to as the “Puntland Group” on the Horn of Africa. No information is
available as their organisation or leadership. This is the second most effective group after the Somali
Marines below.

The fourth, and last known group is are the “Somali Marines”, once the legitimate marine force for
Somalia, and reputed to be the most powerful and sophisticated of the pirates groups with a military
structure, a fleet admiral, admiral, vice-admiral and a head of financial services\textsuperscript{129}. Nothing is known of
their reputed leader, but are thought to be the most effective and ruthless group. Outside Somalia, the
pirates are regarded as bandits but to most at home, they are heroes who have taken on illegal fishing,
dumpers of toxic waste and bring in foreign currency, employment and support to their families in a
country that has been at war and food aid recipient for nearly 20 years. There is reason to believe the
NVGG and the “Marines” are the remnants of the failed state marines.

Thus, contrary to popular belief, Somali pirates are not a monolithic group. Rather, there is territorial
rivalry and even violent clashes between the northern, central and southern pirates. The more
fundamentalist ones believe that Muslim ships should be exempt from high jacks hence their reaction
(above) following the capture of the Saudi owned Sirus Star. Furthermore, the pirates also do not enjoy
total support for instance from the \textit{Transitional Federal Government (TFG)} and other mainstream
Somalis who believe it is un-Islamic to highjack vessels of any kind. Although a vocal minority of
Somalis regard them as heroes, a substantial silent majority of Somalis think they are a disgrace to
Somalia and the country’s regional and international image.

\section*{III. DEVELOPMENT AND UNDERLYING CAUSES OF SOMALI PIRACY}

(a) Legacy of the Cold War

A number underlying causes gave rise to Somali pirates as we know today. Somalia does not only
occupy this strategic position at the Horn of Africa, but is also just coming out of the catastrophic effect
of the Cold War between the former Soviet Union and the West in the 1970s and 1980s. Between her

\textsuperscript{129} Global Security.org, under Military/Pirates
and Ethiopian, the country has changed sides between the “warring” Eastern and Western blocs. When the Soviets were in favour in Somalia in the 1970s, Ethiopia became an American ally to counter the Soviets. This role was reversed in the 1980s when the super powers changed their allegiance in the region. Locally, it created a bitter rivalry between Ethiopia and Somalia, which led eventually to two border wars over the disputed Ogaden, a civil war and the current insurgency in Somalia. That certainly further weakened the political, economic and social fabric of both nations, although of the two nations Somalia probably came off worst being less well endowed than her relatively richer Ethiopian neighbour. It also sowed the seeds for future conflicts. The damage started by Somali being caught between the West and East caused further disintegration of the Somali nation and was later to lead to other consequences listed below and eventually to piracy.

(b) Civil Wars and Regional Conflicts

That damaging legacy of the cold war was followed by two other destabilising events in Somalia’s history. First, was border war between Somalia and Ethiopia in the early 1990s over the disputed Ogaden region, part of Ethiopia but populated by ethnic Somalis who wanted to seceded and join the greater Somalia. In that war, once again, Somalia not only lost but also was also nearly crippled as a nation and an economy. Secondly, and not surprisingly, that defeat led to the disintegration of Somalia as a unitary state and into four smaller “states” creating a political and military vacuum, which was occupied by warlords, gunmen and Al Qaeda supporters of Al Shaba. The effect of these wars and conflicts has meant that the new generation of Somalis have lived and known nothing else but violence and the use of force: all elements needed in the pursuit of piracy.

That political instability led further to the civil war within Somalia, which followed President Siad Barre’s overthrow and death and lasted for another decade in the latter 1990s and early 2000s. The militias, once allied to the US were defeated but staged successful come- back by humiliating the US force, and establishing an “Islamic Union Court” system of government in 2003-2005. The Ethiopians, with US tacit support, returned briefly and drove out the militias in the early 2005-2007. The country’s TFG of President Sheikh Ahmed is currently propped and policed by a UN Peacekeeping Force for Somalia (UNSLA) of 4000 Ugandan and Burundian troops, only half of the 8000 contingent recommended by the UN Security Council. The TFG is only nominally in control of Mogadishu and the central belt with a defacto two other governments and/or states in the North (Puntaland) and the South based at Kisimayu on the Kenyan border. Somalia has not had peace or a stable government for nearly 20 years.

(b) Adverse Climatic Conditions
By geographical accident Somalia happens to be an arid country, a large percentage of which is desert, prone to drought. With only the river valleys fertile enough to support agriculture, most of the population lives along the coastal strip. Before the collapse (see below), the main economic activity was fishing and little agriculture. Apart from marine resources, the country produced nothing else for exports. The bulk of the population were nomads eking a living in hostile environment. The long drought put paid to their livestock and nomadic life style. This sparked large migration to urban areas along the coasts, which means most people are crowded in the coastal waters without means of sustenance. The government, however, provided work in the civil service, commerce and the particularly large armed forces. The long civil wars and all other factors (above and below) coupled with illegal over fishing by foreign trawlers and the dumping of toxic wastes destroyed all the fisheries. That left the population destitute. It is not surprising that piracy came in timely to fill the gap, provide work, adventures and income. This scenario has been made worse by the great famine of the 1980s in Ethiopia and Somali as well as current drought in Eastern Africa, which has led to another famine and gross loss of livestock (the mainstay of the Somalis). The only choice for most Somali youths has therefore been insurgency, terrorism and piracy.

(c) Insurgency and “Terrorism”.

The Islamists and jihadists involvements have further compounded the problem. The Islamic Union Court system and the AL Qaeda allied Al-Shaba Militias have continued the insurgency vowing to overthrow the TFG, which they accuse of being un-Islamic western puppet. Their desire is still to replace it with an Islamic state on the Iranian model. It is against this background of political, economic and social breakdown, hopelessness, lawlessness, unemployment, millions of internally displaced population living on food aid, endless supplies of arms, warlords and gunmen that the current Somali piracy was born and developed.

With the failed state and collapsed economy, the second natural successor to the government is international terrorism by Somali Islamists some home grown (e.g., Al Shaba) and others allied to Al Qaeda. They are not only well armed but are also organised and provide the badly needed “law and order” and some form of social order, judicial and social services. To this group the visible western symbols such as ships, oil trade from the Gulf and international trade via the Red Sea and Suez Canal is a temptation they could not resist. These factors, coupled with the lucrative success of many hijacking operations, have drawn a number of especially young men towards a gang of pirates, whose wealth and strength often make them part of the local social and economic elite. “They have money,
they have power and they are getting stronger by the day .. they wed the most beautiful girls, they are building big houses, they have new cars, new guns”\textsuperscript{130}

Apart from the sometimes-tenuous link between Somali piracy and internal insurgency and terrorism, it has been suggested that piracy is terrorism in itself. Asked if he sees a distinction between the two, Pham opined that, “I would argue …that piracy actually is…the original terrorism, the original crime against humanity because it is a crime ultimately against civilization. For centuries, international law actually describes pirates as …enemies of the human race because they, in essence, rebelled against international system and peaceful commerce. And certainly in the age in which we live today, the disruptive effect of even the small number of successful pirate hijacking is staggering”\textsuperscript{131}

(d) Failed State and failed political order

Probably the main cause of Somali piracy is the failed state leading to so many civil wars, coups and split of the country into three semi-autonomous regions: the North (Puntland), Central (around Mogadishu) and the South (around Kismayu nearer the Kenyan border) between warlords and lawlessness. To the extent that there is no recognisable effective state authority to enforce law and order, provide employment and run the economy, warlords and fundamental Islamists, especially the Al-Shaba, filled the vacuum. However, things are not smooth between the warring pirate groups. There are constant clashes between the Islamists on the one hand and the TFG supported by UNSLA on the other. These in turn have led to gunmen roaming the streets and the coastline and armed unemployed youths looking for alternative sources of income and employment. The transitional government is very weak, without central power and was propped up first by Ethiopians and later by UNSLA force. With a failed state, there is no one that reigns in the pirates and the international community cannot deal with. This, and not illegal fishing in Somali coast and waters by foreign trawlers and the dumping of toxic wastes (post) the tramp card of the pirates, is the principal cause of the Somali piracy.

(e) Collapsed Economy and failed Social Order.

For above reasons, in current Somali there is no social order, respect or oversight from elders. Somali society is clan-based with responsibility to the clan 30%, family 20%, individual 30% & individual 20%. With a failed state, there follows a collapsed economy and therefore loss of employment and hope. With no significant domestic economic activities or international trade and a recognised authorised government, Somalia has had no means of raising domestic taxes and earning foreign currency to meet its economic duties to its people or discharge its international obligations. Piracy then became the

\textsuperscript{130} Hunter, Robyn, supra
\textsuperscript{131} J.P.Pharn, op cit.
obvious means of gaining free and easy foreign currency at very little or no costs to the earners. Overnight piracy has earned Somalia over US$300m in a few years since 2005. Somali is also one of the poorest countries in the world with lowest life expectancy, a position made worse by large number of internally displaced population with others in Kenyan, Ethiopian and Djibouti refugee camps, surviving predominantly on food aid. It is estimated that 50% of Somalis are displaced and 60-80% of Somalis survive only on foreign food aid.

(f) Illegal Fishing by foreign trawlers
Against the background of a collapsed state and economy, western observers often cite two other factors as the cause for Somali piracy: illegal fishing in Somali waters by foreign trawlers mainly from Europe and Asia and the dumping of toxic wastes in Somali. Thus, at the same time, that dumping was taking place; illegal trawlers began fishing Somalia’s seas with an estimated US$ 300m of tuna, shrimp and lobsters being taken each year depleting stocks previously available to local fishermen. Through interception with speedboats, Somali fishermen tried to either dissuade the dumpers and trawlers or levy a tax on them as compensation. In the interview with Sugule Ali, one of the pirate leaders explained, “We do not consider ourselves bandits. We consider sea bandits (to be) those who illegally fish and dump in our seas. Peter Lehr132, says, “It is almost like a resource swap, Somalis collect up to US$100m a year from pirate ransoms off their coast s and the Europeans and Asians poach around US$300m a year in fish from Somali waters”133

According to Middleton, the problem of over illegal and over-fishing and illegal fishing in Somali waters, is a very serious one, and does affect the livelihoods of people inside Somalia […] the dumping of toxic wastes on Somalia’s shores is a very serious issue, which will continue to affect people in Somalia long after the war has ended, and piracy is resolved”134. To lure fish to their traps, foreign trawlers reportedly also use fishing equipment under prohibition such as nets with very small mesh sizes and sophisticated underwater lighting systems135. This is clearly in contravention of Article 56(1) (b) (iii) of UNCLOS, 1982, which provides that “in the exclusive economic zone, the coastal State has jurisdiction as provided for in the relevant provisions of the Convention with regard to the protection and preservation of marine environment”. Furthermore, Article 57 of the Convention, in turn, outlines the limits of the jurisdiction thus:” The exclusive economic zone shall not extend to beyond the 200 nautical miles from

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132 A Somali piracy expert at St Andrews University in Scotland
133 “You are being lied to about pirates”, The Independent, January 5, 2009, Retrieved 2009-04-25; “Off the lawless coast of Somalia, a question of who is pirating who” Chicago Tribune, October 10, 2008
134 http://rfi.fr/actuen/articles/112/article_3481.asp[Chatham House]
135 ABC News: UN Envoy decries waste dumping off Somalia.
the baseline from which the breadth of the territorial sea is measured”\textsuperscript{136}. Except that there is no functional State.

It can be argued that the origin of Somali piracy has nothing to do with illegal fishing by foreign trawlers. Just as in the case of the dumping, of toxic and hazardous wastes, depletion of fish stocks by illegal foreign fishermen is a contributing factor rather than the main cause of piracy. Combined with the collapse of law and order and the economy, it could be a catalyst but not a cause by itself. There is no sufficient statistical evidence of fishermen employed before the collapse of the Somali state and the rise of piracy. It can be equally argued that there is no evidence of the pirates attacking or hijacking most of the illegal foreign trawlers, still operating in Somali fishing grounds, as one would have expected. The small ration of captured trawlers compared to captured yachts and cargo vessels speaks for itself. Surely, that would have removed one of the reasons for their grievances. Instead, they have concentrated on merchant ships simply because they are soft targets; represent the wealth of the Western economies that are blamed for the country’s ills. Worse, neither is there evidence of the foreign navies doing anything about the continued illegal fishing trawlers or the dumping of toxic and hazardous wastes in Somali waters. Much as illegal fishing and the dumping of toxic wastes (post) might have contributed, the world community is paying for the neglect of Somalia.

(g) The Robin Hood Effect - “Transfer of Resources” or “Resource Swap” effect.

For the above reasons, most Somalis see piracy as an efficient way of transferring resources from the developed west to the poor third world country such as Somalia. The youths have tried to justify piracy as a way of taxing the world community for illegal fishing, degradation caused by the dumping of toxic wastes and general neglect. A sizable proportion of people in Africa and the developing countries see Somali pirates as modern day Robin Hoods standing up for the poor against the imperialist might of the West. Even some intellectuals in these regions applaud the pirates as champions of the poor, resisting illegal fishing by foreign trawlers, repaying for the sins of dumping of toxic and hazardous wastes and as “David v s Goliath” example of the pirates taking on the might of the best of the world’s navies.

However, the estimated US$200-300m earned from piracy so far is nowhere near what the country would have legitimately got from the international community through fees on fishing and fish exports estimated at US$300m annually, grants, loans and foreign aid. However, so far it is “the only action in town”. Whatever the arguments, it is an interesting way of justifying piracy and resource transfer between the rich north and the poor south. Merchant ships have nothing to do with either illegal fishing or the dumping of toxic wastes (below). They are only picked for being soft targets and are probably

\textsuperscript{136} United Nations Convention on the Law of the Sea
guilty by association, as the dumpers and to a certain extent the illegal fishermen are predominantly from the West.

(h) The Dumping of Toxic and Hazardous Wastes.

International trade in wastes is not new to Somali and or other developing countries. It has consisted of However; this had led to the dumping of wastes such as computers, fridges, mobile phones, household rubbish, factory and nuclear wastes and second hand cars. Notable among the dumping is the dumping of toxic wastes. He highlight was the dumping of such wastes by the Probo Koala\textsuperscript{137} in Abidjan, Cote d’Ivoire\textsuperscript{138}. Somali fits the bill because it has a long coastline and without a legitimate government. The political and security instability left a vacuum to war lords who used the chance to raise foreign currency for arms purchases by reaching bogus agreements with Western companies (UK, Italian, French, Swiss, etc) trading in and dumping toxic and hazardous wastes.

Following the massive, tsunami in the Indian Ocean, of December 2004, there have emerged allegations that after the outbreak of the Somali civil war in the late 1980s, Somalia’s long, remote shoreline was used as a dumpsite for the disposal of toxic wastes. The huge waves, which battered northern Somalia after the tsunami, are believed to have stirred up tonnes of nuclear and toxic wastes that were illegally dumped in Somali waters by several firms. Green Peace (Europe) followed up these revelations by presenting before the press and the European Parliament in Strasbourg copies of contracts signed by two European companies -the Italian Swiss firm, Archair Partners, and an Italian waste broker, Progresso—and representatives of the warlords then in power, to accept 10 million tonnes of toxic wastes in exchange for US$80m (then about £60m).

According to a report by the joint UNEP assessment mission, there are far higher than normal cases of respiratory infections, mouth ulcers, and bleeding, abdominal haemorrhage and unusual skin infections among the many inhabitants of the areas around the north-eastern towns of Hobbiyo, and Benadir on the Indian Ocean coast—disease consistent with radiation sickness. The UNEP reiterates that the current situation along the Somali coastline poses a very serious environmental hazard not only in Somalia but also in the Eastern African region\textsuperscript{139}. Under Article 9(1)(d) of the Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and their Disposal\textsuperscript{140}, it is illegal for “any transboundary movement of hazardous wastes or other wastes: that results in the deliberate disposal

\textsuperscript{137} The Probo Koala was a ship chartered by Trafirgura, an English oil trader, which ended up dumping its 400 tons cargo of toxic wastes
\textsuperscript{138} The dumping of toxic wastes by the Probo Koala in and around Abidjan, Cote D’Ivoire has come to symbolise the worst effect of the practice.
\textsuperscript{139} “Somali’s secret dumps of toxic waste washed ashore by tsunami” Timesonline.co.uk Retrieved 2009-02-25.
\textsuperscript{140} For a Text of the Convention see
(e.g., dumping) of hazardous wastes or other wastes in contravention of this Convention and of the
general provisions of international law". According to Nick Nuttal of UNEP, “Somalia has been used
as a dumping ground for hazardous waste starting in the early 1990s, and continuing through the civil
war there”, and, “European companies found it to be very cheap to get rid of the waste, costing as little
as US$2.50 a tonne, where waste disposal costs in Europe are something like US$1000 a tonne”.

There is an equally plausible counter argument to this. Although it is agreed that there has been
dumping in the Somali coast, however, it could be argued that the causal link between that and piracy is
rather tenuous. According to this argument, deplorable as dumping is, there is no evidence of a direct
causal link with piracy. It may be an indirect but not a direct link to piracy. It has been argued that the
main reason for the development of piracy is the collapse of the country and economy. Protagonists of
this line of thought have argued that piracy is used as an excuse. For that, reason piracy would have
taken place anyway with or without the dumping of toxic wastes along the Somali coasts.

However, unlike illegal fishing, piracy seems to have largely scared away the dumpers of toxic and
hazardous wastes from Somali coast and waters. Among the few reported exceptions being the T/B
_Buccaneer_ and its two large barges arrested while dumping and released in mid August 2008 from 4
months’ detention after payment of US$3.5-4.25m ransom, a fact disputed by Italian authorities. It is still
unconfirmed whether the vessel was “arrested” by Somali “authorities” or hijacked by the pirates. That is
without action on the pirates’ part. Hijacking such vessels would have strengthened pirate’s hands and
handed them a coup and international publicity following environmental degradation.

IV. FUTURE PROSPECTS AND CHALLENGES TO INTERNATIONAL LAW AND WORLD ORDER

(a) To International Seaborne Trade

(i) Economic and Social Consequences

The piracy has already skyrocketed freight and charter rates and insurance premiums. Somali piracy
has contributed to an increase in shipping costs and impeded the delivery of food aid shipments.

Unless they are involved in shipping the main effect on people outside Somalia is higher freight rates,
insurance premium and consumer prices. Shipping companies pass on the increased costs-security,
higher insurance premiums, ransoms and extra fuel for longer routes-in their fees and so it eventually

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143. The Buccaneer was Italian vessels chartered to transport and discharge toxic wastes from Italy to the Somali coats.
144. See generally, Bondar G, Piracy and its Effects on International Shipping, Australia Chamber of Shipping, 1995
finds its way on to the high street\textsuperscript{145}. Piracy is estimated to have cost the world an estimated US$60-70m in 2008 alone.\textsuperscript{146} Ninety five percent of the World Food Programme’s shipments arrive by sea, and ships have required a military escort\textsuperscript{147}. Ironically, one of the unintended consequences is that piracy is stopping the world food aid to the very Somali refugees and other internally displaced people who need it (see below). There is loss to neighbouring countries, ports and Somalia itself with no ships calling in Mogadishu and other Somali ports. Furthermore, with drought in EA and dependency on food imports, piracy is causing food shortages in Somalia, Kenya, Uganda, Ruanda, Burundi, the DR Congo and Southern Sudan following hijacking of vessels carrying wheat destined for these countries.

\textbf{(ii) Threats to the United Nations Humanitarian [Relief] Aid}

As indicated above a large proportion of Somali population live as internally displaced (IDs) within the country or as refugees in the neighbouring Ethiopia, Kenya and Djibouti. These rely on emergency food aid principally from the World Food Programme, Food and Agricultural Organisation, 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 by Somali coasts to either Djibouti (for Ethiopia) or Mombasa (for Kenya). The irony is that this badly needed emergency relief for the very Somali is neither exempt from nor immune from attacks by Somali pirates. This is real threat to international aid agencies and the starving Somalis. The pirate excuse is that they cannot distinguish between aid bearing and other cargo vessels. The Maersk Alabama, attacked twice, is involved in food running.

\textbf{(iii) Threats to Strategic Energy Sources and Sea Lanes}

It is affecting a particularly strategic sealanes for trade between the Middle East and the West, East and West used by 16,000 vessels per annum. The area is not only strategic sealanes but also strategic energy sources that drive the western industrial engines. The actual cost of the piracy in the ransoms, longer trips via the alternative Cape of Good Hope route, are additional insurance, demurrage costs, higher freight rates and costs of the many navies. With more than 12\% 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 doubles the length and costs of a typical voyage from the Gulf to Europe (or triple the voyage


\textsuperscript{146} \url{http://news.bbc.co.uk/1/hi/world/africa/7734985.stm} Retrieved on 2009-07-28

\textsuperscript{147} Wadhams, Nick, “Pirates in Standoff Threaten Food Aid, Global Shipping”, National Geographic News, Retrieved 2008-10-11
from the Far East to the West Coast of North America via the Panama Canal), thereby increasing fuel consumption, emissions and transport coasts, which is passed on eventually on to consumers elsewhere.

(iv) Challenges to international law and world order

Generally
It is generally agreed that together with international terrorism, drug and human trafficking, Somali piracy not only challenges entrenched positions in international law but also poses real security threat to established world order. It is arguable that as much effort and resources are currently channelled to fight the piracy as is done to other equally deserving factors. The danger is that it diverts global attention from fights against more deserving global issues such as poverty and disease, global warming and climatic change, and global recession. Nichols Dahlvag ably charts these in his masterpiece. The World Order as we know is built on established legal order and institutions, which are now being shattered by this piracy. As the Nigeria playwright, Chinua Achebe, put it when “Things Fall Apart, the Centre can longer hold”

From, and the legality of, the Allied Navies Operation
The current operation by several multinational navies, under the leadership of the EU Navies nicknamed Operation Atalanta has raised two issues. First, it has only served to shift the problem from further south to the north. The Sirius Star was attacked 600 nautical miles nearer the Seychelles, a long way, south east of the Somali coast (see Map 2). The targeted area now encompasses over a quarter of the Indian Ocean which is almost impossible to police. A view shared by many thus,” 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 , as a result 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

149 See generally, EU NAFO-Maritime Security Centre-http://mschoa.eu
hundred miles away”\textsuperscript{150}. There was a lull in the monsoon period but have resumed this time 400 miles east of the Seychelles and 1000 from Somali coast.

The IMB is advising ship-owners to adopt a measure 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 are often too late before 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. The only exceptions are the US, the Dutch and the French. Until the passage of the \textit{UN Security Council Resolution 1816} warships outside Somali territorial waters watched helplessly as they were not empowered to intervene for fear of breaching international law=the UK couple taken under the noses of a Royal Naval Auxiliary vessel. It is unfortunate that of all the countries in the region only Kenya is willing and able to assist the anti-piracy allied effort.

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. As mentioned (post), there is broad provision in Article 15 of UNCLOS for apprehension, arresting and trying pirates, but that would only be applicable if Somalia was a functional state of the international community able and willing to exercise its authority and accept its international obligations. It is therefore doubtful whether there needs to specific mandate.

It is for these reasons that the navies have no clue with captured pirates, as they fear violating international humanitarian law and other jurisdictional issues. Piracy has also led to the questioning hitherto international maritime law doctrines that had been taken for granted for centuries. These are listed and discussed below.

\textbf{The right of approach in time of peace}

Under this maritime right, a warship may approach a merchant ship in time of peace if there is reasonable suspicion. Depending on whether the mother ships employed by the Somali pirates qualify as merchant ships, any warship may approach it without violating its rights. The rights of approach in time of peace; visit, search and capture in time of peace and the right of self defence, discussed in this paragraph, existing in UNCLOS III rights have all been given a recent boost by the various United Nations Security Council Resolutions\textsuperscript{151}

\textbf{The right visit, search, and capture in time of peace}


\textsuperscript{151} See United Nations Security Council Resolutions 1751, 1816, 1838, 1846 and 1851 discussed in Part II (b) above.
The above rule applies in this case for a wide variety of offences. Article 105 of the Convention gives green light to that effect subject to Article 106 namely that “Where 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 that there has not been any dispute arising out of the operation by the allied navies over this right. A further limitation 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 authorized to that effect. So far, no issue has arisen; however, the introduction of the drone by the US might cause problems on two fronts. First, as predominantly spy planes, they are unmarked. Secondly, their mission may not necessarily be to apprehend but to fire missiles to destroy the pirate ship and kill or injure its occupants. These planes have no facilities to shout or give the required warnings.

**The right of self-defence**

It has been suggested that if fired upon by the pirate ships, as they have done a number of times foreign warships could open fire back (which has also happened several times). That would be permitted by extension of the international law doctrine of both individual and collective self-defence. This action has nothing to with the general right of collective self-defence contained in Article 51 of the United Nations Charter. It is limited to international maritime law. Under this rule, any of the navies operating against the pirates can open fight back if fired upon by pirates, something that the pirates have tried to avoid except for the French yacht when they themselves came under fire. Even within the wider context of maritime disputes or conflicts, the ICJ limited the exercise of that right in the *Corfu Channel Case* where the court rejected the British plea of self-protection in justification of the British minesweeping operations in the Albanian waters. However, the issue does not arise because the pirates rarely attack or seek to engage the naval operations of EU, NATO, Russia, Germany, France and Turkey, China, India, Japan

**Blockade and contraband**

There are speculations that the allied navies could employ this right in their fight against Somali pirates. Under international law, warships can mount a blockade in the case of smuggling or to enforce a UN

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152 Arts.179, A4/13(3)(a) and (b),105-107 and 110
153 UK v Albania (The Corfu Channel Case) ICJ1948 p18
Security Council sanction or embargo\textsuperscript{155}. Could they use the empowerment accorded by the many Security Council Resolutions on Somali pirates? The answer seems to be in the negative. This is because the pirates do not normally carry goods of contraband. Besides, it is difficult to see how this could be effected unless they are stopped from sailing in and out of Somali ports when the Somali TFG has fully co-operated with the Security Council.

**The right of hot pursuit**

In the absence of any other authority, it had been suggested that the allied navies could invoke the right of hot pursuit. This 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.\textsuperscript{156} From its wording and context, that remedy would only be available to Somalia warships against foreign vessels or the neighbouring (e.g., Kenya, Djibouti, Yemen, Seychelles, etc) state vessels against pirates vessels but not to members of the allied navies. The offence has to have been committed in the territorial sea or contiguous zone of a coastal state. The right of hot pursuit is restricted and is not available to the allied navies in this case.

**Cases of [pirate] ships without flags**

Suspicion that a ship is sailing without flying a flag or is a pirate ship is one of the justifications or exceptional cases in which a warship is justified in exercising the right of visit of a foreign merchant vessel on the high seas\textsuperscript{157}. Under customary and treaty international law, stateless vessels and vessels without flags may be boarded and checked by a warship that has reason suspicion to verify nationality or reason for none flying of flag\textsuperscript{158}. They are treated as pirate ships. It is not clear, however, whether these mother ships used by the Somali pirates are registered at all and if so where, since Somalia is currently a dysfunctional state without either a registry or maritime administration. This is interesting since the allied navies have come across these. Besides, the mother ships used by the pirates are either not registered as Somali ships, as there is no functional registry, or are registered in Yemen and other Gulf States.

**Militarization of the Indian Ocean.**

With all the Western/NATO, Eastern (China, Russian, Japan and India) navies now prowling the Indian Ocean there is a danger of the militarization of this hitherto peaceful Ocean. For this reason, it has been

\textsuperscript{155} Art 108  
\textsuperscript{156} Art 111 UNCLOS  
\textsuperscript{157} Art.110(1)(a)  
\textsuperscript{158} Art.27(1), (2) and (5);28(1),73(1), 110(1) -(3).
suggested that especially the Western powers are using piracy as an excuse to position themselves and keep an eye on trouble spots and difficult countries like Iran in an area they would have found difficult to occupy. This would be contrary to the wishes of the Indian Ocean countries that have all desired to keep these waters from nuclear and other weapons of mass destruction (WMD). This is yet another security challenge that the international community would rather avoid. The excuse, blame it on pirates.

(v) Rekindled arguments for the Arming of Merchant vessels
Somali piracy has led to questioning the hitherto custom of not 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 safety to the crew, vessels and navigation. Although there are logics in that argument, the current satiation is tempting. The reason it has been easy to hijack the vessels is primarily that they are unarmed and unprotected. The Somali piracy has rekindled the debate in international shipping whether merchant vessels should now either be armed or allowed to have armed guards. Until now, the crew have themselves been fighting back using high-pitched horns and water hoses to deter pirates. However, already some ships are employing unarmed consultants and guards as well as training their crews to use defensive measures such as using water hoses. The debate is continuing in the shipping circles whether or not to have armed guards on board ships. It is suspected that some vessels are secretly employing armed guards. Instead, the IMO’s advice on the Arming of Merchant Ships\textsuperscript{159}, 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. There was a reported incidence where merchant vessels are now armed.

(vi) Money Laundering
It is generally agreed that large ransom and its transfer has given rise to money laundering\textsuperscript{160} within Somali, the region and worldwide. A consequence of the piracy money is the creation of economic boom, through money laundering, in Somalia, Kenya\textsuperscript{161}, Tanzania and Uganda with further effects in the neighbouring countries of Ethiopia, Rwanda, Burundi, Eritrea, Djibouti and the Sudan. The most notable effect is in Kenya\textsuperscript{1} where there are Kenyan ethnic Somalis investing in real estate without obvious evidence of their source of income. Nomad carriers, sophisticated carriers and the \textit{hawalah} system enable the transfer money in cash across the porous Kenya Somali border. The ransom is paid in cash.

\textsuperscript{159} MSC 86\textsuperscript{th} Session 27 May-5 June 2009: for a text of the document see http://imo.org/facilitation/mainframe.asp?topic_id=1833
\textsuperscript{160} Money laundering is
\textsuperscript{161} Kenya is just now introducing a Money Laundering Bill, Nations Newspaper, 14 November 2009 p.10
in US dollars and 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 their dollars. The money is broken down and distributed to many individuals 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. It is then laundered and invested in real estate and other legitimate business such as long haul transport conveniently dominated in the region by Somalis. This is most notable in Nairobi and Mombasa where old property is bought, pulled down and replaced by glass high-rise office structures and modern housing estates. Neither Kenya nor any of the neighbouring countries have anti-money laundering legislation.

What is tragic is that the world community seems to be aiding and abetting piracy by allowing insurers to cover hijackings, negotiators with pirates to continue uninterrupted and international banks to be funding piracy 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 or try to at some stage. Money laundering bill is bogged down in the Kenyan legislature. Abundant corruption in the region does not help. It is feared that the financial sector is itself benefiting from money laundering in defiance of the UN Convention Against Terrorist Financing\textsuperscript{162} and Narcotics Convention\textsuperscript{163}.

**Illicit Traffic in contraband band, arms and humans and organised crimes**

There seems to be a direct link between Somali piracy and the increase in illicit traffic in contraband and human beings from the region. Illegal sources of funds leads to money laundering needed to launder it. Other than money laundering, one of the consequences of the piracy and money generated therefrom is the increase in illicit trafficking in drugs, arms, narcotics and people including illegal migration especially young women for asylum seeking and prostitution in the West. It is also fuelling renewed violence with Somalia. Pirate money has enabled the purchase of air tickets to popular asylum destinations such as the UK, Canada and the US. Increasingly, children are sent unaccompanied by air mainly via Eastern Europe or Western Europe or directly to London and North America. The rapid expansion in the number of Somali nationals in the Diaspora, following the collapse of their country has created a large network of willing participants in illicit traffic in human traffic, general asylum seekers and money-laundering. This is further compounded by the fact that ethnic Somalis are also natives of Ethiopia, Kenya and Djibouti with porous borders and therefore easy access to citizenships and passports of

\textsuperscript{162} For the text of the Convention see \textit{http://incb.org/pdf/e/convention_1961en_pdf} \\
\textsuperscript{163} For the text of the Convention see \textit{http://incb.org/pdf/e/convention_1961en_pdf}
those neighbouring countries. This is clearly against the United Nations Convention Against Transnational Organised Crime 2000\textsuperscript{164}.

(b) International Jurisdictional Challenges

(i) Flag State Jurisdiction

A major problem facing the international community is the jurisdictional limbo on the right of approaches the mother ships, whether pirates can be arrested, what to do with them when arrested and where to try them. This is because the only country that would have flag state and coastal jurisdiction\textsuperscript{165} in those matters would be Somali. However, Somalia is a failed state with no functional government or court system. Next would be the legal status of the allied navies. The initial reservation by these third states was that if the seizure of the alleged pirate ships was effected without any adequate justification, the state making the seizure is liable for any damage to the state of the ships’ nationality\textsuperscript{166}-even if in this case that state (Somali) is all but defunct\textsuperscript{167}.

It was for this reasons that at the initial stage the Dutch Navy, for instance, released the pirates they had captured-only for them to resume their pirates’ actions. Woodruff argues this point in relation to sovereignty and the avoidance of conflicts over jurisdiction\textsuperscript{168}. In effect, the naval states and Kenya have assumed flag state functions for Somalia. To complicate matters even further, piracy is not restricted to only the Somalis but spread to include Omanis, Yemenis, Qatars and other residents of the Gulf countries. The area of operation also seems to moved first further north from the Somali coast to the Gulf of Eden and the mouth of the Persian Gulf and recently south to the Somali basin (i.e. south West Indian Ocean)

(ii) Third State Jurisdiction- Kenya

One of the challenges of Somali piracy is that for the first time pirates are being tried in a third country; a country where the offence neither was not committed nor flag vessel is involved. Three immediate problems are under which laws they are prosecuted. First, is it Kenya Penal Code, or international customary law or the received common criminal law, which Kenya inherited? The Penal Code has no international or extraterritorial application, even if accepted that piracy is an international crime against

\textsuperscript{164} For a text of the Convention see http://untreaty.un.org/English/notpub/18-12e.htm
\textsuperscript{165} Flag state duties are now contained in Articles 94,108(2),109(3)(a) and 113 of UNCLOS 1982
\textsuperscript{166} See Article 106 of UNCLOS 1982, which codified customary international law.
\textsuperscript{167} In which requirements of notification by or to such a state may be impractical under Article 27(3), 73(4) and 226(2) (c) of UNCLOS 1982.
humankind triable by any state. Secondly, other problems include factors such as shortage of time, courtrooms, qualified prosecutors, jail space and other judicial resources in Kenya. There is also the competence of the Courts to try international crimes. Furthermore, the presiding judges are only chief magistrates rather than full judges. A recent ship captured pirates but was unable to verify their denials that they were fishermen or their nationality. The trials take place predominantly in Mombasa with fewer facilities than Nairobi, an hour’s flight away. Thirdly, some of the pirates are under age and come under Convention for the Protection of Children. All that Mombasa had before it are few magistrates’ courts without the expertise or international jurisdiction. This is in addition to the fact that Kenyan laws are inadequate to deal with issues raised by piracy and international law. It is doubtful whether pirates are charged under the Kenya Penal Code or the general penal laws. The Kenya Merchant Shipping Act 2009 has some provisions on piracy but it is equally doubtful whether they would apply to a purely international offence. The crimes are not committed in Kenyan waters or Kenya warships neither are the suspects Kenyans. Fourth, there is also the issue of witnesses and admissibility of video conference and teleconference evidence. What is the effect of the MOUs-No copy available-other countries? Supposed Kenya is sued on release. Fifth, and finally, is the issue of fair hearing, justice and fairness where illiterate non-represented foreign suspects are involved.

Otherwise, under international law, ships reasonably suspected of piracy may, regardless of their nationality, be boarded and, if the suspicion proves justified, persons and property on board may be seized. This is the so-called “right of visit”, “visit and search” or “right of approach”, as an exception to the exclusive flag state jurisdiction. The courts of the 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 but Kenyans do not arrest. This state may also determine the action to be taken with regard to the ships. It is under these rules that the allied navies hand over either to the Kenyans on in the case of the French, Germans and Americans they try some good ones at home. Guy Mandruk, however, thinks that it is high time a new rule is promulgated to replace the outmoded doctrine.

(iv) International Criminal Jurisdiction

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169 Convention for the Protection of the Child
170 Now contained in Article 217, 220(4) and 222 of UNCLOS
171 See Article 110 of UNCLOS 1982.
172 This is now implicit in Article 105 of UNCLOS 1982
The main problem facing the international community is that apprehension of pirate and pirate ships 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 1958 and UNCLOS III affirm the customary law principle enunciated by the Permanent Court 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”\(^{174}\). 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”\(^{175}\). These exceptions are slavery and piracy.

The exceptions in the Conventions, dealt with earlier, are piracy, the slave trade\(^{176}\), hot pursuit\(^{177}\), and the right of approach by warships where reasonable grounds exist for suspecting that a ship is of the same nationality as the warship\(^{178}\). Perhaps the case of a collapsed non-functional flag state should be added to the exception. Furthermore the Conventions are quite explicit that “In the event of collision or of any other incident of navigation\(^{179}\) 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 or\(^{180}\) of the State of which such person is a national “\(^{181}\)". 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\(^{182}\).

For these reasons, Somali piracy represents a challenge to international law and world order. First, international law was not prepared for the type of piracy and did not therefore make provisions to deal with it. Secondly, and as a consequence thereof, the international community is at a loss on whether to approach and apprehend these pirates. Thirdly, and when they eventually decided to apprehend the pirates some had no idea whether, how and where to bring them to justice. Like the inmates of Guantanamo Bay, it is not clear whether captured pirates should be treated as enemy combatants or prisoners of war; or just as ordinary criminals. Michael Passman captures this dilemma with regard to

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\(^{174}\) (1927) PCIJ Ser.A.no10 p25  
\(^{175}\) Article 6(1) Geneva Convention 1958, reproduced in Article 92(1) of UNCLOS 1982  
\(^{176}\) Art.99 and 101(1)(b) UNCLOS 1982  
\(^{177}\) Art 111 UNCLOS  
\(^{178}\) Article 22(1)  
\(^{179}\) e.g., damage to submarine telegraph, telephone, or high voltage cable or pipeline  
\(^{180}\) 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”-Art.97(2) UNCLOS  
\(^{181}\) Art.97(1) UNCLOS  
\(^{182}\) Ibid, Art 97(3)
US, the Geneva Convention, UNCLOS and the United Nations Convention Against Torture\textsuperscript{183}. The early confusion did in fact lead to pirates being released by the Dutch Navy for fear of violating international law. The current international law is not geared for it. Interesting pirates preferred to be tried in France, Germany or US courts instead of Mombasa Kenya because they would have access to representation and justice-asylum, good lawyers, human right organizations. Above, all they could apply for political asylum after serving their sentences. There is also no international legal system for people accused of piracy, although some have been put on trial in Kenya, while French forces captured one group and taken for justice in France. Some argue an international court is needed, backed by the UN, with perhaps even an international prison for those convicted. Alternatively, the Statutes of the International Criminal Court could be amended to accommodate. The two UN Conventions on the Law of the Sea are almost useless so long as Somalia continues to exist without an effective government; many believe lawlessness within the country and off its lengthy coast will only grow.

With all the problems listed above the only link between the suspects and Kenya and the number of Memoranda of Understanding (MOUs) between the Allies and Kenya. However, the legality of these MOUs in conferring jurisdiction to Kenya is doubtful. What might be needed is the Rwanda or Yugoslav style Genocide Courts in Arusha and The Hague respectively.

\textbf{(c) To international financial-economic and political order: sophistication of the nerve centre.}

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, the international community has been at first fooled into dismissing the operation as an amateurish operation by a rag-tag army. Nothing can be far from the truth as this assumption. There is evidence to suggest that the operation is very sophisticated indeed and involving international network of co-ordinated global contacts in Africa, the Middle East and the West. Secondly, the nerve centre of the operation is not actually in Somalia but London and other international maritime centres probably utilising the Lloyds of London, the London-based International Maritime Satellite Organisation, and the Baltic Exchange facilities to mention but a few. It is possible other maritime and finance centres are also utilised. This reasoning is based on the fact the pirates seem to shadow and have knowledge of the exact position of their victims. \textsuperscript{184} 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.\textsuperscript{185} They are also heavily armed with rocket – propelled grenades (rpgs) and AK -47s. The pirates are known to have support of Somalis in the

\textsuperscript{184} Suspect of knowledge
\textsuperscript{185} http://news.bbc.co.uk/1/hi/world/africa/7734985.stm Retrieved on 2009-07-28

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Diaspora especially UK, USA and Canada and to receive tip-offs from those contacts as well as from ports in the Gulf of Aden. They use speedboats with very powerful outboard motors to approach their targets. Sometimes the speedboats are launched from much larger “mother ships” on the high seas. 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 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\(^\text{186}\).

V. CONCLUDING REMARKS

(a) Recommendations.

Somali Piracy is a product of the Somali tragedy and several socio-economic and geo-political factors pertaining in that country and discussed above. The whole episode has demonstrated that the world is but one village and that what happens in even the remotest part or corner of the world ultimately affects the rest. In short, in the crisis of Somali piracy, the world is paying for having neglected Somalia and that neglect has come to haunt it through ransoms, interruption of international trade, dislocation of the oil transport and world food programme and the endless costs of maintaining large navies in the Indian Ocean.

For these reasons, it is recommended as follows.

(i) Short term measures

*Naval Escorts and Convoys*

Other short-term measures should include permanent naval escorts and probably vessels travelling in convoys as were the case in the WW II times. The latter might lead to temporary delays as vessels wait for escorts, but it is cheaper than millions being paid in ransoms and the money saved could be used to offset demurrage charges caused therefrom. Equally, implementing this recommendation might slow down international trade in the interim but will be cheaper over all until a permanent solution is worked out.

*Introduction of the US Drones*

It was thought the recent introduction of the drone into the equation would help matters in covering large tracks of water and scaring away other potential pirates. It has been suggested that the addition of the drones to the allied navies could be used to go against pirate’s sources and land hideouts. Thus, “any military strikes against Somali pirates can be very selective, such as destroying the pirate mother ships that launch speedboats or destroying the mansions build by the pirates leaders”\textsuperscript{187} warning the occupants and other innocent people to leave. However, it has not made much difference so far although we should wait and see since it is still at infancy.

**Temporary powers to the ICC**

Fourthly, the world community should empower the International Criminal Court to try the remaining and any future pirates wherever the source. This will avoid the confusions and hesitation by states of the allied navies as to what to do with captured pirates. It will also end the temporary trials in the make shift courts established in Mombasa. In the long run it will also end the confusion caused by the proliferation of many international juridical bodies such the ICJ, the PCIT, the ITLOS and the Seabed Tribunal, to mention but a few. In the long run durable measures need to be sought.

(ii) Long term measures

**Support for an effective Somalia Government**

In the end, the Somali piracy calls for a holistic solution. First, the world community should reconsider supporting the Somali TFG to establish itself in order to balance or eventually neutralise the insurgents and terrorists, restore law and order, recreate the civil service and provide jobs and hope to millions of Somalis who feel abandoned and let down by the inter national community. One way forward would by the international community refocusing on Somalia, strengthening the TFG, enticing and employment of the dissatisfied pirates to inform on and take on the others. With this sorted out, the international community can return to more important global issues such as global warning, poverty and starvation; it would also avoid what is diverting their attention. It involves investing in the Somali economy.

**Investment in Somalia People**

\textsuperscript{187} J.P.Pham, op cit
Secondly, the international community should invest in Somalia on a **Mini Marshall Plan** type programme to regenerate and revive the economy that should provide employment for the unemployed masses attracted to piracy, insurgency and terrorism. Supporting the TFG and giving “Marshall Plan” type aid to reconstruct the Somali nation will give its predominant young population gainful employment, recognition and hope. Decent and peace loving Somalis should be weaned off from piracy and ensuing insurgency and terrorism.

*Reconstruction of Somalia Economy*

Thirdly, the international community should set about reconstructing Somalia to avoid creating a snowball effect by rebuilding schools, roads, hospitals, housing and related infrastructure. No amount of international Conventions, Security Council Resolutions, naval operations and related efforts will alone change the course of Somali piracy. Somalis need to be reintegrated into the community of nations. This includes reintroduction of a ship registration, a maritime administration, a navy and a coastguard for accountability. Otherwise, Somali piracy will be around for a long time to come. They have shown ability to adapt and change against any piecemeal solutions aimed at them.

*New Convention and International Court*

Existing conventions and institutions would be adequate were it not for unique practical challenges of the Somali piracy. The lessons of Somali piracy is that UNCLOS III and other judicial, economic and political structures have been inadequate to deal with the new and modern challenges caused by piracy. It is therefore necessary to create an entirely new international convention on piracy. The new convention should widen and modernise the definition and concept of piracy. In this respect, it should include hijacking, holding for ransom, robbery, maritime terrorism and other illegal aspects of piracy.

Possible candidates are *Piracy and Maritime Offences Act* and *International Maritime Security*. To support the convention, a specialist international piracy court should be established giving specific rights, measures and procedures to deal with piracy. Failing that, the responsibility should be given to the International Criminal Court in The Hague.

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188 Named after the then Secretary of State General G.C. Marshall, the Marshall Plan was a programme of massive injection of financial assistance by the USA and Canada to Europe to help the reconstruction and rebuilding the continent following the massive destruction of WWII; see [http://www.spartacus.schoolnet.co.uk/USAmrshallP.htm](http://www.spartacus.schoolnet.co.uk/USAmrshallP.htm): a similar mini plan should be done for Somalia.


190 See also Comite Maritime Internationale (CMI)-Model Law on acts of piracy and maritime violence Singapore II 11-17 February 2001(http://www.comitemaritime.org)

Reform of International Finance Institutions

In addition, international banking and finance should be proactive in tackling the piracy by marking the ransom money and thereby helping Interpol in tracing the dealings and apprehending all those involved in this crime chain. Surely, these people should be known through their agents. Furthermore, anti-money laundering laws and institutions need to be strengthened as the fight against related illicit trade and related vices. It cannot be acceptable this day and age that money should be paid to bandits who just disappear. There are surely vested financial interests making a decent living in and encouraging piracy. This means reforming the system to avoid money laundering and other illicit transfer of cash. Efforts should be doubled to go after the godfathers, freeze their assets.

Strengthening the IMO and other International Institutions

The role of the United Nations and its specialised agencies, especially the IMO and UNCTAD should be commended. They should, however, be strengthened and encouraged. Equally, the role of non-governmental institutions such as the IMB, ICC and CMI should be recognised and encouraged. Finally, the shipping industry itself should be encouraged to do so. In particular the insurance industry should be discouraged from paying out easily, an action which is thought to have fanned the crisis. It is anticipated that the above named measures will eventually and further lead to addressing the following major causes of piracy.

End to Illegal and Over-Fishing

In addition to assisting the TFG and Somalia people to re-establishing civil, political and social institutions, law and order; they should also be supported to establish sustainable economy and the reconstruction of a defence force to maintain law and order, and a coastguard and navy to patrol its waters, keep away pirates and protect and conserve fisheries and other marine resources. This will deter western and other foreign trawlers from illegal fishing in and depleting Somali fisheries and other marine resources. Link with the dumping of toxic and hazardous wastes should not be forgotten.

End to the Dumping of Toxic and Hazardous Wastes
It will be remembered that together with illegal fishing, the dumping of toxic and hazardous wastes by western companies in Somali has been the other main grudge and cause of piracy. A stable government will help tackle this. It should reoccupy the vacuum, which led to the exploitation. It should will also end or weaken the power of the warlords responsible for exploiting dumping and illegal fishing for their own ends. Apart from being empowered to end the dumping, they should also be helped to clean the environment caused by the dumping.

(b) The Ten Point Conclusion

(1) Although Somali piracy fits in some aspects of the definition and characteristic of piracy under customary and treaty international law, it differs in many significant ways from the known principles. It is an organised business crime linked to terrorism, insurgency, money laundering, illicit trade in drugs, contraband and human trafficking. In that, respect the piracy represents both a departure from and a challenge to the current world order. The fight against piracy should therefore be considered as part of the international general fight against terrorism and organised crime. The action and content of terrorism is piracy.

(2) It is a sophisticated business, using the latest sophisticated communication equipment, based on hijacking vessels, kidnapping sailors and detaining both for ransom. First, it does not have some of the hitherto known characteristics such as the confiscation of the vessel and its cargo, pillaging, murder of its crew, flying the Jolly Roger before attacking, and wearing patch on one eye, wielding swords, holding a bottle of rum/whisky, etc. On the contrary, it is a disciplined venture calling for an equally well thought efforts to fight it.

(3) Its causes are also quite different from those hitherto known ones to piracy and include the result of failed state, the illegal dumping of toxic and hazardous wastes, the plundering of Somali fisheries by foreign trawlers, civil wars, the cold war, hostile climatic environment, international terrorism heightened by Islamic fundamentalism, and possibly AL QAEDA and other involvements. A holistic solution is to therefore remove those causes and excuses, rather dealing with each in isolation or piecemeal.

(4) Although the number of pirate attacks is probably higher elsewhere in the world put together, the Somali piracy has taken world centre stage and gained notoriety because of its intensity, number of vessels and ransom value involved and occurring at a strategic sealane and main world energy source. It is also at probably the world’s only collapsed and non-functional state.

(5) In Somali Piracy, the international community is paying for the neglect of the state of Somalia, and ripping the consequences and resultant lawlessness of a failed state. At the beginning of its problems, 192 The Jolly Roger, opct
Somalia was regarded as an inconsequential entity. However, there is no such a thing as a small or inconsequential state. It is as important as Iraq, Pakistan and Afghanistan crises and should be accorded same importance.

(6) The Somali episode has demonstrated that the world is but a single stage where factors and actors from even a remote area or corner can affect the whole arena. It cannot, therefore, be true that the international community was taken by surprise. We all saw it coming and we are all sowing the fruits of neglecting “our neighbour”.

(7) The causes of Somali piracy are very different from those of the traditional ones, which arose from mutinies, privateering, buccaneering, civil wars, and sometimes state sponsored piracy. This Somali piracy is a real modern challenge to international law and world order, especially in relation to jurisdiction, terrorism, insurgency, financial dealings and interruption of international trade.

(8) The solution to Somali piracy deserves a holistic rather than piecemeal approach by the international community. Deploying navies extensive and expensive as it may be, capturing and handing pirates over to third parties for trial, are only temporary measures rather than a permanent cure for the piracy. The world will, therefore, have to give full and whole attention to Somalia as a permanent solution.

(9) Recent action by the US Secretary State (Hillary Clinton) during the summer of 2009 tour of Africa, actions by the Obama Administration, introduction of the navies and especially the drone, and the EU in providing financial and diplomatic support is a step in the right direction. It shows the international community has at last realised its mistakes. That, notwithstanding the magnitude and extent of Somalia’s needs would require a Mini Marshall Plan.

(10) Without this course of action, Somali pirates will hold the world ransom for a long time yet. However, the International community can avoid this by acting decisively and with immediate effect. Inaction is not a choice as its costs will be insurmountable. Somali piracy is not just a problem for the shipping industry and the few countries caught in it; it is a global problem needing a universal response.

Notes.

(1) Halsbury’ Laws of England, Vol.18 (2) 4th Ed, pares. 723-738; 775-& 779
(2) Halsbury’s Laws, Vol.93 5th Ed, paras. 16; 35-36; 1249; 1210
(3) Halsbury’s Laws 4th Ed Vol.36 (1)