

MUDDYING THE WATERS OF MARITIME PIRACY OR DEVELOPING THE CUSTOMARY LAW OF PIRACY? SOMALI PIRACY AND SEYCHELLES

*Mathilda Twomey**

This article examines the development of the law of piracy, specifically that arising from the threat of Somali pirates and the response of the international community in tackling the crisis it posed, while giving consideration to the legal innovations of a tiny island developing state, Seychelles, as a facilitator for the prosecution of international maritime piracy.

Cet article porte sur les récents développements du droit dans le domaine de la piraterie maritime internationale (en particulier, celle pratiquée depuis les côtes somaliennes) et les réponses pratiques apportées par la communauté internationale pour les contrecarrer. Les développements de l'auteur portent sur la contribution des petits États insulaires dont les Seychelles, au mouvement de lutte contre la piraterie maritime internationale.

I INTRODUCTION

Piracy has existed for as long as the oceans have been plied for commerce. References to the practice exist in Homer's *The Iliad*¹ and *The Odyssey*² where piracy was considered a reputable profession.³ There are historical accounts of piracy across the world through all the centuries: in Scandinavia, where Vikings in the Middle Ages plundered most of Western Europe;⁴ in Russia, where the

* Judge, Court of Appeal of Seychelles, PhD Candidate, Irish Research Council and Hardiman Scholar, National University of Ireland, Galway.

1 A T Wyatt (ed) *Homer, The Iliad* (William Murray tr, Harvard University Press 1924).

2 A T Wyatt (ed) *Homer, The Odyssey* (William Murray tr, Harvard University Press 1924).

3 See Coleman Phillipson *The International Law and Custom of Ancient Greece and Rome* (MacMillan, 1911).

4 Dirk Meier *Seafarers, Merchants and Pirates in the Middle Ages* (Boydell Press, 2006).

ushkuiniks from the Novgorod operated along the Volga;⁵ in India as recorded in the *Vedas*;⁶ in North Africa where Barbary pirates launched attacks as far north as Iceland;⁷ in England in the 16th century where Queen Elizabeth viewed pirates as adjuncts to the Crown's navy in its fight against Spanish trade;⁸ the same was true in the Caribbean, Indian Ocean and North America in the 18th and 19th centuries and in the Straits of Malacca from the 14th century to this day.

The 21st century has seen a recrudescence of piracy in different parts of the world, with attacks most common in the Malacca Straits, the Gulf of Guinea and the Horn of Africa. In 2009, incidents of maritime piracy reached the highest level since the International Maritime Bureau's (IMB) Piracy Reporting Centre began recording piracy incidents in 1992.⁹

Whilst the causes and symptoms of the attacks may differ, the results are invariably the same: economic, social and political repercussions on a global scale. The overall annual cost to trade of the current piracy crisis is estimated to be up to US\$18 billion dollars,¹⁰ interrupting both free trade and movement on the high seas. At its most basic level, piracy poses a threat of death or injury; at a political level uncurbed piratical activities undermine legitimate governance and increase weapon proliferation weakening global political stability.

The international legal architecture for maritime piracy is underpinned by the United Nations Convention on the Law of the Sea (UNCLOS):¹¹ in particular its articles 100 to 107 and 110, but its parameters on definition and jurisdiction are limited. Some of these shortcomings are partly addressed by other treaties and by

5 Sheilagh Ogilvie *Institutions and European Trade: Merchant Guilds, 1000-1800* (Cambridge University Press, 2011).

6 KS Mathew (ed) *Mariners, Merchants, and Oceans: Studies in Maritime History* (Manohar Publications, 1995).

7 Stanley Lane-Poole *The Story of the Barbary Corsairs* (G P Putnam's Sons, 1890).

8 Alfred Thayer Mahan *The Influence of Sea Power Upon History 1660-1783* (Little, Brown and Company, 1928).

9 The International Maritime Bureau is a specialized division of the International Chamber of Commerce. It was established in 1981 to act as a focal point in the fight against all types of maritime crime. Its Commercial Crime Centre has a Piracy Reporting Centre from which statistics can be obtained.

10 The World Bank, "Pirates of Somalia: Ending the Threat, Rebuilding a Nation" <<http://siteresources.worldbank.org/INTAFRICA/Resources/pirates-of-somalia-main-report-web.pdf>> accessed 22 March 2014.

11 United Nations Convention on the Law of the Sea, 1982.

the United Nations in a plethora of Resolutions.¹² While most countries have ratified UNCLOS, few have enacted domestic laws to reflect UNCLOS provisions, resulting in few prosecutions and a non-uniform application of piracy laws.¹³

The explosion of piracy off the coast of Somalia challenged this legal framework and has led to an increase in the domestic enactment of laws of piracy. The tiny island state of Seychelles modernised its law on piracy in 2010 and has led the development of jurisprudence on the issue. This paper analyses the origins of the law of piracy, its modern development and its application in a specific state - Seychelles.

II ORIGINS OF MARITIME PIRACY

A *The Historical Context*

Rubin traces the origins of piracy and the appearance of the term itself in vernacular English during the Renaissance where piracy became defined as any type of interference with property rights.¹⁴ Up to that time, incidents of piracy were referred to by the nationality of the perpetrators themselves, hence accounts of Viking raids. From the 18th century there was a dramatic increase in piratical activity worldwide, an era commonly referred to as the golden age of piracy. This may have been due to developments in ship building allowing for bigger, better and faster vessels and competition between colonial powers to exert their influence, acquire wealth and expand their economic and trade ventures, which, in turn was exploited by pirates.¹⁵

Unlike Barbary corsairs and buccaneers, pirates and privateers had a less defined role or identity. To many, the likes of Sir Francis Drake, Kanhoji Angre of India or Jean Lafitte of France are patriots or national heroes but to others they are viewed simply as pirates.¹⁶ The distinction is ultimately between the private or

12 See for example Resolutions: SC Res 1851, UN Doc S/RES/1851 (16 December 2008); SC Res 1846, UN Doc (2 December 2008); SC Res 1844, UN Doc S/RES/1844 (20 November 2008); SC Res 1838, UN Doc S/RES/1838 (Oct. 7, 2008); SC Res 1816, UN Doc S/RES/1816 (2 June 2008).

13 See Yvonne Dutton "Maritime Piracy and the Impunity Gap: Insufficient National Laws or a Lack of Political Will?" (2011-2012) 86 *Tulane Law Review* 1111.

14 Alfred Rubin *The Law of Piracy* (2nd ed, Transnational Publishers, 1998) 30.

15 Hugh Rankin *The Golden Age of Piracy* (Colonial Williamsburg, 1969).

16 C R Pennell (ed) *Bandits at Sea: Pirates Reader* (New York University Press, 2001).

public aims of the pirates: if they were operating under letters of marque,¹⁷ their objectives were supposedly for the public good of the nation from which they had obtained a licence and their acts therefore were legitimate; but if their exploits were purely for personal gain, then they were pirates and triable as criminals. In practical terms, however, their actions were much the same: pillage, murder and rape, the crime not diminished because of state sanction.

What is clear is that the licensed privateering of many European powers made trade extremely dangerous on the high seas.¹⁸ It was this fact that led Gentili¹⁹ to conclude in the 17th century that "to Pirates and wild beasts no territory offers safety. Pirates are the enemies of all men..."²⁰ and for Daniel Defoe to claim that "Privateering in times of war was a nursery for pirates in times of peace."²¹

The post-19th century marked the demise of piracy or so it seemed. Privateering was abolished by the Declaration of Paris of 1856, and although signed by almost all European imperial powers, it was not supported by the United States, Spain, Mexico, and Venezuela. The Declaration abolished all forms of piracy and pirates were subject to prosecution wherever they were apprehended.

However, the end of piracy in the century was delayed by several factors including the non-cooperation of states and their pursuit of self-interest. The United States Congress, under the Constitution, had the power to issue letters of marque and with the outbreak of civil war where privateering might be called upon, was reluctant to part with that right. Privateering was only expressly renounced by the United States during the Spanish-American War of 1898.²²

17 "A 'Letter of Marque and Reprisal' (both a legal device and an economic contract) specified the legitimacy of the targets, as well as the distribution of the spoils". Martin Parker "Pirates, Merchants and Anarchists: Representations of International Business" (2009) 4(2) *Management & Organizational History* 167, 173.

18 Rubin, above n 14, 26.

19 Frost Abbott (tr) *Gentili, Hispanicae Advocationis Libri Duo, Volume II* (Oxford University Press, 1921).

20 *Ibid*, 17.

21 Daniel Defoe *A General History of the Robberies and Murders of the Most Notorious Pyrates* (Garland Publishing, 1972) Preface A3.

22 Nicholas Parrillo "The De-Privatization of American Warfare: How the U.S. Government Used, Regulated, and Ultimately Abandoned Privateering in the Nineteenth Century" (2007) 19 *Yale Journal of Law and the Humanities* 1.

Similarly, although the grant of letters of marque from France and Britain ended with the Napoleonic wars, former Spanish colonies in South and Central America still issued them. Catching pirates and turning them over to the authorities of littoral states was simply not satisfactory because those states essentially provided them with safe havens even when it deeply affected their own trade interests.²³

It was only when those interests became so compromised that the United States began to act to eliminate piracy. It did so by setting up naval stations in some southern states like New Orleans to combat, vigorously pursue and attack pirates. Havens like those of Lafitte's in Baratavia Bay, Louisiana were attacked and destroyed.²⁴

Finally, when Spain granted independence to its former colonies in South and Central America, pirates lost their justification, and cooperative patrolling between British and American navies finally stamped out piracy in the Caribbean.²⁵ Similarly, the resurgence of the Riff pirates in the 19th century was ultimately eradicated by cooperation between states, namely, Britain, France and Morocco.²⁶

B Customary Principles of the Law relating to Piracy

The legal definition of piracy has been much debated. The Harvard Group²⁷ claimed that there was a "chaos of expert opinion as to what the law of the nations includes, or should include, in piracy. There is no authoritative definition..."²⁸

Whereas Gentili in the 16th century defined piracy as "...any taking of foreign life or property not authorized by a sovereign, synonymous with brigandage or robbery on land..."²⁹ Grotius³⁰ in the 17th century saw it as any interference with property rights, whether licensed or not. The customary definition was summarised

23 Angus Konstam *Piracy: The Complete History* (Osprey Publishing, 2008).

24 William Davis *The Pirates Laffite: The Treacherous World of the Corsairs of the Gulf* (Harcourt, 2006).

25 Ibid.

26 Pennell, above n 17.

27 Harvard University Research Group "Draft Convention on Piracy with Comments" (1932) 26 *American Journal of International Law* 749.

28 Ibid, 769.

29 Rubin, above n 15, 29.

30 AC Campbell (ed and tr) *Grotius, The Rights of War and Peace: including the Law of Nature and of Nations* (Boothroyd, 1814).

by Oppenheim³¹ as: "...any unauthorised act of violence against persons or goods committed on the open sea either by a private vessel against another vessel or by a mutinous crew or passenger against their own vessel."³²

However piracy's status as an international criminal offence (*jure gentium*) has never been clearly established. The divergent positivist and naturalist approaches of Gentili and Grotius respectively, to law and consequently to piracy *jure gentium*, has a huge bearing on the application of the principle of universal jurisdiction deriving from it. Moreover, positing piracy as an international crime is inherently problematic as international law is a practical mechanism guiding the interaction of states,³³ when in most cases piracy are crimes of private persons on the seas. Reydam's states that in international law:³⁴

to constitute an act of piracy *jure gentium* subject to universal jurisdiction, the locus delicti must be on the high seas or a place outside the jurisdiction of any state. Furthermore, only acts of violence committed for private ends by crews or passengers of private craft can constitute piracy *jure gentium*.

The Harvard Group also came to the conclusion that piracy was never an international crime but was merely a basis for extraordinary jurisdiction in every state to prosecute suspected pirates. This, in essence, is the same view taken by Rubin who in tracing the development of piracy as a municipal law concept in England and America in the 19th century³⁵ concluded that "the attempt to spread the concept to make an "international crime" of piracy seems to have been based on attempts by some statesmen to apply their municipal law to the acts of foreigners abroad."³⁶

Hence in *Re Piracy Jure Gentium*³⁷ it was firmly established that:³⁸

31 Lassa Oppenheim *International Law: A Treatise* (3rd ed, Longmans, Green and Co, 1920-1921).

32 *Ibid*, 434.

33 See Ian Brownlie *Principles of Public International Law* (7th ed, Oxford University Press, 2008).

34 Luc Reydam's *Universal Jurisdiction-International and Municipal Legal Perspectives* (Oxford University Press, 2003) 58.

35 Rubin. above n 14, 138-311.

36 *Ibid* 307.

37 *Re Piracy de Jure Gentium* [1934] AC 586.

38 *Ibid* 588.

...with regard to crimes as defined by international law, that law has no means of trying or punishing them. The recognition of them as constituting crimes, and the trial and punishment of criminals are left to the municipal courts of each country... .

In contrast, the doctrine of universal jurisdiction asserts that some crimes (like piracy) are so heinous that whoever commits them cannot escape justice by either invoking sovereign immunity or national jurisdiction.³⁹ It is therefore open to any state to try any of those perpetrators. This is based on the notion that the crime is committed against all. The concept of piracy as a crime subject to universal jurisdiction can be traced back to Cicero's⁴⁰ view of the offence being *hostes humanis generis*.⁴¹

A further aspect of a piratical act is the notion of *animo furandi*⁴² (private ends). *Animo furandi* was also an English municipal law concept, used to distinguish between private motives and political ones, a concept that distinguishes piracy from acts of terrorism proper. This notion of private gain is also problematic as will become evident later in this paper. As was predicted by Dubner, "it may prove totally unrealistic to ignore political motivation and still arrive at a suitable definition of acts of piracy."⁴³

Another customary principle of the crime of piracy is that the *locus delicti* must be the high seas or in any case be outside the jurisdiction of any littoral state.⁴⁴ Yet again this had led to dubious distinctions between what is termed piracy for an offence on the high seas and armed robbery at sea for an offence committed in

39 Robin Churchill and Alan Lowe *The Law of the Sea* (Manchester University Press, 1999) 209; Cassese *International Criminal Law* (Oxford University Press, 2003) 37-38, 284. For an opposing view see Henry Kissinger "The Pitfalls of Universal Jurisdiction" (July/August 2001) *Foreign Affairs*.

40 Walter Miller (tr) *Cicero, De Officiis, Book III* (Harvard University Press, 1913) 107.

41 Campbell (ed and tr), *Grotius, The Rights of War and Peace: Including the Law of Nature and of Nations* (Boothroyd, 1814).

42 See also Johnson "Piracy in Modern International Law" (1957) 43 *Grotius Society Transactions* 63.

43 Barry Dubner *The Law of International Sea Piracy* (Martinus Nijhoff Publishers, 1980) 59.

44 Oppenheim, above n 31.

territorial waters.⁴⁵ Given its jurisdictional peculiarities, piracy may well be an offence sui generis.⁴⁶

III CONTEMPORARY MARITIME PIRACY: LEGAL AND POLITICAL ISSUES

Contemporary maritime piracy persists in the Malacca Straits, the Gulf of Guinea and the Horn of Africa. The objectives and modes of operation by pirates in those distinct seas are quite different: in the Malacca Straits stealing cash, cargo and other valuable goods is the favoured mode of operation, in Nigeria and the Gulf of Guinea "insurgents use piracy as a means to compel the redistribution of the country's oil wealth,"⁴⁷ by attacking oil installations and kidnapping foreign workers, in Somalia and the Indian Ocean ship-jacking, hostage taking and demanding ransoms is the modus operandi. Somali piracy is generally non-violent whereas the attacks in West Africa and the South China Sea are often vicious and entire crews killed or set adrift.⁴⁸ There are also other but less frequent incidents of maritime piracy in disparate reaches of the oceans from the Bay of Bengal to Jamaica and Brazil.⁴⁹ In 2011, the most frequent incidents were off the Horn of Africa with an all-time high of 243 incidents.⁵⁰

A Piracy off the Horn of Africa

Somalia is a large country, roughly the size as France, with a coastline of 3,025 km, bordering the Gulf of Aden and the Indian Ocean. Strategically positioned next to the major shipping route of the Red Sea and the Suez Canal, it is "ideally placed to control and possibly to interdict shipping coming from or going to the Red

45 See for example James Kraska "Developing Piracy Policy for the National Strategy for Maritime Security" in Myron Nordquist, Rüdiger Wolfrum, John Moore and Rónan Long (eds) *Legal Challenges in Maritime Security* (Martinus Nijhoff Publishers, 2008) 337.

46 See *The Lotus Case (France v Turkey)* PCIJ, Ser A, No 10, 1927 [70].

47 James Kraska *Contemporary Maritime Piracy: International Law, Strategy, and Diplomacy at Sea* (Praeger, 2011).

48 See One Earth Future, "The Economic Cost of Maritime Piracy 2010" <www.oceansbeyondpiracy.org/sites/default/files/attachments/View%20Full%20Report_4.pdf> accessed 22 March 2014.

49 See The Central Intelligence Agency's The World Factbook <www.cia.gov/library/publications/the-world-factbook/fields/2008.html> accessed 22 March 2014.

50 One Earth Future, above n 48, xxi. The figures have plunged to 75 incidents in 2012 and only 15 off Somalia in 2013. See International Chamber of Commerce, Commercial Crime Services Report <www.icc-ccs.org/news/904-somali-pirate-clampdown-caused-drop-in-global-piracy-imb-reveals>. accessed 22 March 2014.

Sea."⁵¹ From 2003 it was governed by a Transitional Federal Government but de facto it was operated by a system of clans in three relatively autonomous regions – Somaliland in the northwest, Puntland in the northeast and Central Somalia in the central and southern regions.⁵² In August 2012, the Federal Government of Somalia was inaugurated.⁵³ Islamic insurgent groups permeate the fragile structure and Islamic fundamentalists continue to control the southern two thirds of Somalia from which attacks are periodically launched on the Federal Government, which in turn is falteringly propped up by the African Union Peacekeeping Force (AMISOM).⁵⁴

It is generally assumed that when Somalia's government of Siyaad Barre was overthrown in 1991 a descent into anarchy was triggered, inevitably leading to piratical attacks off the Horn of Africa. This is not true, nor does pirate incident statistics from the IMB support this widely held belief.⁵⁵ In fact it was not until a decade later that the first piracy incidents occurred – 12 attacks in the region in 2006, rising to 61 in 2009 and a peak of 237 in 2011.⁵⁶

That there was a descent into anarchy is not disputed, but much more social research is necessary to discover what triggered Somali fishermen and tribesmen to resort to piracy after enduring years of unbearable living conditions. Dr Georgi Kapchits,⁵⁷ the linguist and anthropologist, states that:⁵⁸

51 Final Report of UN International Expert Group at 15 <www.imcsnet.org/imcs/docs/somalia_piracy_intl_experts_report_consolidated.pdf> accessed 22 March 2014.

52 Peter Lehr and Hendrick Lehmann "Somalia-Pirates' New Paradise" in Peter Lehr (ed) *Violence at Sea: Piracy in the Age of Global Terrorism* (Routledge, 2007) 2.

53 UN News Centre 'Ban welcomes inauguration of Somali Parliament as "watershed moment" <www.un.org/apps/news/story.asp/story.asp?NewsID=42711&Cr=Somalia&Cr1=#.UyrWBBvIY3U> accessed 22 March 2014.

54 The African Union Mission in Somalia (AMISOM) is a regional peacekeeping mission operated by the African Union with the approval of the United Nations <www.amisom-au.org/> accessed 22 March 2014.

55 ICC, Piracy and Armed Robbery Against Ships, Report for the Period 1993-2004 <www.imo.org/> accessed 22 March 2014.

56 ICC Report for the Period 2006-2011 <www.icc-ccs.org/piracy-reporting-centre/request-piracy-report> accessed 22 March 2014.

57 Georgi Kapchits <http://kapchits.narod.ru/main_en.htm> accessed 22 March 2014.

58 Kapchits "Reports on Somalia (Part III)" <http://wardheernews.com/Articles_2010/Jan/Kapchits/20_Kapchits_Reports_Part_III.html> accessed 22 March 2014.

Before 2004 the word "pirate" did not exist in the Somali language... Although the Somali people were primarily pastoralists, farmers and city dwellers, the individualist nature of their culture ... was tempered by the limited tradition of ocean navigation and mitigated against any history of piracy. Cases of assaults against foreign vessels are extremely rare in the annals of modern Somali history.

There is no doubt that traditional means of earning livelihoods were threatened by overfishing from international fishing fleets and the illegal dumping of toxic waste, including the washing of oil tankers in Somali waters.⁵⁹ Further the consequences of the earthquake and tsunami of 2004 cannot be underestimated. Thousands of people were displaced, villages and fishing vessels washed away and significant amounts of waste washed up on Somali shores harming the already compromised health of the local population.⁶⁰

Criminality as a means to both political and economic survival is all pervading in Somalia but there are conflicting views on how this spread from land to the sea. A simplistic and non-empirical view is that of natural progression: that the⁶¹

combination of inter-clan rivalry, corruption, arms proliferation, extremism and pervasive impunity...[that] ha[d] facilitated crime in most parts of Somalia, particularly in Puntland and Central Somalia... eventually moved from land to the sea.

Another is that the first pirate gangs initially emerged in the 1990s to protect Somali fishermen against international trawlers plundering Somali territorial seas, work that hitherto had been performed by the Somali navy who had been trained and advised by Soviet military advisers.⁶²

The tactics and demands of Somali pirates are well known: using sophisticated weaponry including AK 47s and rocket propelled grenade launchers (RPGs) they use skiffs with powerful outboard engines to give chase to slow moving ships and⁶³

59 See Gary Weir "Fish, family and profit: Piracy and the Horn of Africa" (2009) 62 (3) *Naval War College Review* 15. Olmer Elagab "Somali piracy and International Law" (2010) 24 *Australia and New Zealand Maritime Law Journal* 59.

60 Matt Arons "Stopping Somali piracy: addressing the hidden environmental causes" <<http://afpprinceton.com/2010/02/stopping-somali-piracy-addressing-the-hidden-environmental-causes/>> accessed 22 March 2014.

61 *Ibid*, 5.

62 Weir, above n 59.

63 Lauren Ploch "Piracy off the Horn of Africa" <www.fas.org/sgp/crs/row/R40528.pdf> accessed 22 March 2014.

then "grappling hooks and modified ladders to climb aboard and secure the crew... The hijacked vessel is then directed to a pirate anchorage area off the Somali coast... Ships are released when the ransom is delivered and counted."⁶⁴ Initially they operated in the Gulf of Aden, but then they moved to the Indian Ocean, as far south as the Seychelles, nearly 900 miles away, using mother ships, most often taken from previous ship jackings, from which to launch attack skiffs.

B The Response of the International Community

The international community's response has ranged from naval interventions to strategies of coordinated information sharing and other collaborative political and legal initiatives. Pacification of pirates by payment of ransoms and catch and release⁶⁵ practices by individual states are also common responses.

The Somali piracy crisis emerged as the South East Asian piracy crisis was abating.⁶⁶ In 2009 there was only 1 attack off Indonesia and 1 in the Malacca Straits compared to 20 off Somalia and 41 in the Gulf of Aden in the same period.⁶⁷ South East Asian States signed the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (RECAAP)⁶⁸ in 2004. This was the first regional government-to-government agreement to promote and enhance cooperation against piracy and armed robbery in Asia and which saw counter piracy naval forces deployed. RECAAP resulted in a coordinated and structured international approach to tackling piracy. It promoted information sharing, capacity building and co-operative arrangements between different signature states.⁶⁹

Operationally, it established an Information Sharing Centre in Singapore, with different focal points or hubs of contact linked via a web-based and secure

64 US Department of Transportation, Maritime Administration "Somali Piracy Tactics Pamphlet" <www.marad.dot.gov/documents/Somali_Piracy_Trifold_30NOV2010.pdf> accessed 22 March 2014.

65 See Yvonne Dutton "Bringing Pirates to Justice: A Case for including Piracy within the Jurisdiction of the International Criminal Court" 14-15 <www.oneearthfuture.org/siteadmin/images/files/file_52.pdf> accessed 22 March 2014.

66 ICC International Maritime Bureau, Piracy and Armed Robbery Against Ships (n 55) accessed 22 March 2014.

67 Ibid.

68 See <www.recaap.org> accessed 22 March 2014.

69 Joshua Ho "Combating piracy and armed robbery in Asia: The ReCAAP Information Sharing Centre (ISC)" (2009) 33 Marine Policy 432.

network.⁷⁰ The dramatic drop in piracy incidents in the area was testament to the fact that a group coordinated effort does work,⁷¹ so much so that the IMO in November 2007 called upon East African states to adopt a similar agreement.⁷²

In the Somali context, the Djibouti Code of Conduct, modelled on RECAPP, followed.⁷³ The Code sets out best practices to suppress piracy and develop the capacity of regional states to accept and prosecute pirates whilst, binding its signatories to operate under international law. This was followed by the establishment of the Regional Anti-Piracy Prosecutions Intelligence Co-ordination Centre (RAPPICC) based in Seychelles. Its objective is to create a centre "for law enforcement cooperation in partnership with Seychelles, wider Indian Ocean nations, and international partners, to combat the threat from regional piracy and maritime linked transnational crime."⁷⁴

It may be too early to judge the success of RAPPICC but it is evident that the operation together with the coordinated efforts of the maritime security agencies, other information sharing centres and the prosecution of pirates has been instrumental in the dramatic drop of piracy in the area.

1 UN Security Council measures

The tactic by Somali pirates of retreating to territorial waters frustrates the operation of UNCLOS as its piracy provisions are inapplicable to territorial seas. The UN Security Council, acting under Chapter VII responded with Resolution 1816 on June 2, 2008,⁷⁵ which effectively extended the UNCLOS regime to territorial waters, authorising third party governments to conduct anti-piracy

70 Ibid.

71 Catherine Raymond "Malacca Strait, A problem solved" (2010) 62(3) Naval War College Review, 38.

72 IMO Assembly Resolution A 1002(25) 6 December 2007.

73 IMO "Code of Conduct Concerning the Repression of Piracy and Armed Robbery Against Ships in the Western Indian Ocean and the Gulf of Aden, Annex" IMO Council Doc C 102/14 (3 April 2009). See Robin Geiss and Anna Petrig *Piracy and Armed Robbery at Sea* (Oxford University Press, 2011) 49.

74 See Oceans Beyond Piracy <<http://oceansbeyondpiracy.org/matrix/regional-anti-piracy-prosecutions-intelligence-coordination-centre-rapicc>> accessed 22 March 2014.

75 United Nations, Security Council, Resolution 1816, para 7(a), (b) 2 June 2008.

operations in Somali territorial waters, with authorization from the TFG. The scheme has been renewed on three occasions and is still operational.⁷⁶

In 2009, Resolution 1897⁷⁷ broadened the UNCLOS definition of piracy to include certain land-based operations on Somali mainland.⁷⁸ Further, the Security Council in Resolution 1918⁷⁹ called on member states to criminalise piracy under their domestic laws and to favourably consider the prosecution and imprisonment of suspected pirates. The Security Council asked the Contact Group on Piracy off the Coast of Somalia⁸⁰ to consider several options suggested in a report by Jack Lang,⁸¹ who favoured the "Somaliation" of the legal battle against piracy.⁸² He proposed supplementing Somali legislation on piracy and establishing special courts in Somaliland and in Puntland. The two new courts would get foreign funding and training but be staffed by Somalis. A third court, also using Somali law, would be based in Tanzania, which already hosted the International Criminal Tribunal for Rwanda.⁸³

In April 2011, the Security Council adopted Resolution 1976,⁸⁴ deciding to urgently consider the establishment of the specialised courts as proposed in the Lang report. The international community, however, was divided over these courts. France and Russia seemed to favour their creation whilst UK and the US expressed reservations about such an option.⁸⁵ The Security Council adopted Resolution

76 Security Council Resolution 1846, UN Doc S/RES/1846 (2 December 2008), Security Council Resolution 1897, UN Doc S/RES/1897 (30 Nov 2009) 1897, Security Council Resolution 1950, UN Doc S/Res/1950 (23 November 2010) Resolution 2077 (2012).

77 Security Council Resolution 1897, UN Doc S/RES/1897 (30 November 2009).

78 Ibid [7].

79 Security Council Resolution 1918, UN Doc S/RES/1918 (27 April 2010).

80 The Contact Group on Piracy off the Coast of Somalia (CGPCS) was created on 14 January 2009 pursuant to UN Security Council Resolution 1851.

81 Report of the Secretary-General on possible options to further the aim of prosecuting and imprisoning persons responsible for acts of piracy and armed robbery at sea off the coast of Somalia UN Doc S S/2010/394 (26 July 2010).

82 United Nations Document, Security Council S/2011/30, 25 January 2011.

83 Ibid.

84 Security Council Resolution 1976, UN Doc S/RES/1976 (11 April 2011).

85 See Security Council Report <www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/October%202011%20Forecast.pdf> accessed 22 March 2014.

2125⁸⁶ in November 2013 reiterating the UN's decision to establish specialised anti-piracy courts in Somalia. To date none have been set up.

2 *International Naval Interventions*

In naval terms, the first step towards using a coordinated effort in Somalia was Operation Allied Provider ⁸⁷ by NATO, requested by the UN Secretary General to provide escorts for the World Food Programme in Somalia and the transport of critical supplies to AMISOM.

These operations were taken over by the European Union Naval Force Operation Atalanta⁸⁸ in December 2008 in support of UN Security Council Resolutions⁸⁹ to eradicate piracy. Initially, the operations protected vessels of the World Food Programme delivering food aid to displaced persons in Somalia and protected other vulnerable vessels off the Somali coast. The EU Council first extended this mandate until December 2012, which also saw it taking the lead role in the Shared Awareness and Deconfliction (SHADE)⁹⁰ mechanism to promote coordination among international, regional and national naval forces in the area. On 23 March 2012, the Council of the EU extended the mandate of Operation Atalanta until December 2014 and extended the operation to include Somali coastal territory and internal waters.⁹¹

A number of states outside the EU participate in the Operation and the intervention has resulted in the transfer since 2009 of over 300 pirates for prosecution to Kenya and Seychelles.⁹² These have been possible through Status of

86 Security Council Resolution 2125, UN Doc S/RES/ 2125(18 November 2013).

87 NATO, Operation Allied Provider <www.manw.nato.int/page_operation_allied_provider.aspx> accessed 22 March 2014.

88 Council Joint Action 2008/851/CFSP, 10 November 2008 on a European Union Military Operation to Contribute to the Deterrence, Prevention and Repression of Acts of Piracy and Armed Robbery off the Coast of Somalia, 2008 OJ (L301) 31-37 (EU).

89 Resolutions 1814, 1816, 1838, 1846 of 2008 and 1897 of 2009.

90 Shared Awareness and Deconfliction Group is a voluntary international military group established in December 2008 to share best practices and discuss operations.

91 See <<http://eunavfor.eu>> accessed 22 March 2014.

92 UNODC Counter Piracy Programme Support to the Trial and Related Treatment of Piracy Suspects Issue Eleven: March 2013 <www.unodc.org/documents/easternafrika/piracy/UNODC_Brochure_Issue_11_wv.pdf> accessed 22 March 2014.

Forces Agreements (SOFAs)⁹³ signed between the EU and Seychelles and Exchange of Letters between the EU and Kenya.⁹⁴

NATO expanded its role in 2009 with Operation Allied Protector⁹⁵ operating five NATO ships in the area to deter piracy activities in the area and with Operation Ocean Shield⁹⁶ which also offers assistance to states in the region in developing their capacity to counter piracy activities. The United States leads an international naval coalition, the Combined Maritime Forces comprising of Task Forces deployed in the area "to create a lawful maritime order and conduct maritime security operations to help develop security in the maritime environment."⁹⁷

Other nations including China, Japan, India and South Korea have independently deployed naval forces to patrol the area. These remain largely uncoordinated and haphazard, partly displacing piracy which may not bring lasting benefits.⁹⁸

C Legal and Political Considerations to the Problems of Somali Piracy

Under the international legal regime there are limits to the prosecution of the crime of piracy; more so for Somalia because of its failed statehood. This has sharpened the focus on seizing states to prosecute, even as the new and fragile Federal Government of Somalia begins to establish law and order. Article 105 of UNCLOS clearly authorises all states to seize pirate ships but it imposes no duty on them to prosecute. This shortcoming has been raised repeatedly but as yet there seems no willingness by the UN to renegotiate or amend the provision. Others⁹⁹

93 Status of Forces Agreements grant rights and privileges to EU forces whilst in foreign jurisdictions.

94 See Geiss and Petrig, above n 73, 20-21.

95 NATO, Operation Allied Protector <www.nato.int/cps/en/natolive/topics_48815.htm> accessed 22 March 2014.

96 NATO, Operation Ocean Shield <www.mc.nato.int/ops/Pages/OOS.aspx> accessed 22 March 2014.

97 Geiss and Petrig, above n 73, 24.

98 Michelle Nakamura, "Piracy off the Horn of Africa: What is the Most Effective Method of Repression," 2009 <www.dtic.mil/cgi-bin/GetTRDoc?Location=U2&doc=GetTRDoc.pdf&AD=ADA503032> accessed 22 March 2014.

99 See J Ashley Roaches' comment on McDougal and Burke in his article "Countering Piracy off Somalia: International Law and International Institutions" 2010 (104) American Journal of International Law 397, at 404.

have argued that the provision lacks clarity as article 105 could be interpreted as providing the right to seize pirate ships and to have pirates adjudicated by a court of any jurisdiction. In any case the ambiguity has resulted in "catch and release" practices by many states with no economic, legal or political appetite to prosecute and imprison pirates.¹⁰⁰

The reluctance in general to prosecute under universal jurisdiction is further hindered by ship rider agreements¹⁰¹ which clearly encourage prosecutions under national jurisdiction. The first universal jurisdiction prosecution took place in Kenya,¹⁰² in which the Kenyan High Court found that Kenya had jurisdiction to undertake universal jurisdiction prosecutions on the basis of its Penal Code as supplemented by article 101 of UNCLOS.¹⁰³ Seychelles has now overtaken Kenya as the jurisdiction of choice for piracy prosecutions.¹⁰⁴

Even in cases of national jurisdiction the evidentiary burden is no small matter. The logistics of successfully transporting witnesses, interpreters, exhibits and other paraphernalia associated with trials can be overwhelming and greatly dissuade seizing states from proceeding with such actions. In cases where such trials have been successful, prison capacity problems arises.¹⁰⁵

It is also obvious to the international community that legal and naval efforts in their present confines will not solve Somali piracy. The problem of piracy although perpetrated at sea emerges from the Somali mainland. It is there that the problem

100 UN Secretary-General, Report of the Special Adviser to the Secretary-General on Legal Issues Related to Piracy off the Coast of Somalia, 2-3, UN Doc S/2011/30 (25 January 2011) para 43.

101 For a discussion on ship rider agreements see Roger Middleton "Pirates and How to Deal With Them" Available at <www.chathamhouse.org.uk/files/13845_220409pirates_law.pdf> accessed 22 March 2014.

102 *R v Hassan Mohamud Ahmed* (MV Powerful) Crim No 434 of 2006, <[www.unicri.it/topics/piracy/database/Kenya_2010_Crim_No_3486%20\(2008\)%20Judgment.pdf](http://www.unicri.it/topics/piracy/database/Kenya_2010_Crim_No_3486%20(2008)%20Judgment.pdf)> accessed 22 March 2014.

103 See James Gathi "Kenya's Piracy prosecutions" (2010) 104 (3) American Journal of International Law 416.

104 See Samuel Shnider "Universal Jurisdiction Over 'Operation of a Pirate Ship': The Legality of the Evolving Piracy Definition in Regional Prosecutions" (2013) 38 (2) North Carolina Journal of International Law and Commercial Regulation 473.

105 See President James A Michel "Piracy: Orchestrating a Response" Speech delivered at Le Meridien, Barbarons, Mahé, Seychelles, Wednesday 7 September 2011 <[www.saarpsco.com/Opening%20Remarks%20-%20President%20Michel%20\(SEYCHELLES\).pdf](http://www.saarpsco.com/Opening%20Remarks%20-%20President%20Michel%20(SEYCHELLES).pdf)> and "Seychelles Refuse to Take Somali Pirates Held by Danes" Reuters, 17 January 2012 <www.reuters.com/article/2012/01/17/denmark-somalia-pirates-idUSL6E8CH3XH20120117> accessed 22 March 2014.

must be solved.¹⁰⁶ This would mean a redoubling of efforts to manage the security problems and weak institutions the Federal Government of Somalia has inherited from its predecessor the Transitional Federal Government. Clashes with al Shabaab in the south of Somalia are on-going and although AMISOM has regained full control of Mogadishu, reconciliation and reunification with Somaliland and Puntland has only started.¹⁰⁷

IV INTERNATIONAL LAW AND PIRACY

International legal concepts relating to piracy developed over two centuries, beginning perhaps with the Declaration of Paris.¹⁰⁸ Whilst neither the Crimean War nor the Paris Treaty and subsequent Declaration had piracy as their main topic, several principles of international law with implications for piracy were adopted by the Congress in the Declaration of Paris, the most important Resolution being that "privateering is and remains abolished."¹⁰⁹

If the Declaration of Paris marked the beginning of the formulation of rules of war, then the Hague Conferences and its Conventions dealt with all other aspects of the laws of war including those of prize. Its ground-breaking proposals on an International Prize Court and a Permanent Court of International Appeal was the first such court ever proposed and had it been ratified it may well have been the blue print for a contemporary piracy court providing as it did access to individuals, as opposed to states, to the court.¹¹⁰

Problems about jurisdiction on the high seas remained and were insurmountable at the Hague Codification Conference of 1930 but the work of the Harvard Group¹¹¹ was instrumental in bringing the different concepts and strands of customary international law into a Draft. Hence, the first successful modern-day attempt to codify the law of piracy succeeded when Draft articles on piracy were adopted and included in the Convention on the High Seas (HSC).¹¹² The articles reiterate customary principles, repeating the definition of piracy as any illegal act

106 Secretary General, Address to UN General Assembly SG/SM/12891 GA/10941 (14 May 2010).

107 See Human Rights Watch "World Report: Somalia" <www.hrw.org/world-report/2014/country-chapters/somalia> accessed 22 March 2014.

108 Declaration of Paris, 1856.

109 Ibid, Article 1.

110 Henry Brown "The Proposed International Prize Court" (1908) 2 (3) American Society of International Law 476.

111 The Harvard Group, above n 37.

112 Articles 15 -23, Convention on the High Seas, Geneva, 1958, 13 UST 2312.

of depredation or violence for private ends against person or property. The International Law Commission, like the Harvard Group, were anxious to arrive at a common definition for common jurisdiction, but faced the dilemma of the prevailing view that international law existed only between states.¹¹³

The Harvard Group had concluded that piracy was not a crime under international law but that it was the basis for extraordinary jurisdiction for each state to prosecute for piracy and that the provisions of the HSC would "define this extraordinary jurisdiction in general outline."¹¹⁴ The Commission, however, in defining the crime of piracy *jure gentium* in article 18 of the Convention, (confirming the view of Moore, J in the *Lotus Case*¹¹⁵ and the decision in *Re Piracy de Jure Gentium*)¹¹⁶ expressly extends to it the principle of universal jurisdiction:¹¹⁷

On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship taken by piracy and under the control of pirates, and arrest the persons and seize the property on board...

The HSC remains important since some states, notably the United States, whilst not bound by United Nations Convention on the Law of the Sea, are bound by the HSC.

A United Nations Convention on the Law of the Sea, 1982 (UNCLOS)

This Convention imports the piracy provisions of the HSC in its basic framework. It reiterates the HSC's definition of piracy, the wording of which provokes the same difficulties and shortcomings.

Hence, in the Somali context kidnapping for ransom may well be considered "an illegal act of violence, [or] detention...committed on the high seas ... against persons on board such ship,"¹¹⁸ as can ship-hijacking but for these acts to be construed as piracy the limitative conditions of article 101 (a) (i) and (ii) must be satisfied namely:

¹¹³ See Dubner, above n 43.

¹¹⁴ Harvard University Research Group, above n 76, 760.

¹¹⁵ *The Lotus Case* above n 46.

¹¹⁶ *Re Piracy de Jure Gentium* [1934] AC 586

¹¹⁷ Article 18, Convention on the High Seas, 1958.

¹¹⁸ Article 101, United Nations Treaty on the Law of the Sea, 1982.

- The geographic delimitation – the acts of piracy must happen on the high seas or in exclusive economic zones (EEZ).¹¹⁹
- The act must be committed by one ship against another ship.¹²⁰
- The act must only be committed for private ends.¹²¹

It is disputed whether the latter is a restatement of customary international law. In tracing the origins and practices of piracy it is clear that not all acts of piracy were committed for private ends. As is pointed out by Burgess¹²² the aims of the pirates across the ages were not always monetary as "cast out from the fold, these men regarded piracy as a means of exacting personal vengeance on civilisation itself".¹²³

It is contended that any interpretation of the private ends proviso that reduces it simply to the *animus furandi* meaning, limits the definition¹²⁴ and ignores the fact that the distinction might be private/public and not private/political. However, in the context of the Somali pirates, the argument is irrelevant as the acts committed are clearly for private ends.¹²⁵

When all the above ingredients are satisfied, UNCLOS obliges all states to suppress piracy, granting them universal jurisdiction to seize "a pirate ship . . . , or a

119 There are varying opinions on jurisdiction in the EEZ; see Roach above n 99, fn 7. The provisions of Article 86 and the application of Article 58 (2) of UNCLOS in relation to the assimilation of the EEZ into the high seas for jurisdictional purposes is ambiguous. But see Douglas Guilfoyle "Treaty Jurisdiction over Pirates: A Compilation of Legal Texts with Introductory Notes" <<http://ucl.academia.edu/DouglasGuilfoyle/Papers/116803/Treaty-Jurisdiction-over-Pirates-A-Compilation-of-Legal-Texts-with-Introductory-Notes>> accessed 22 March 2014. Guilfoyle states that Article 58(2) makes it plain that the provisions of the high seas regime (including all provisions on piracy) apply to the EEZ.

120 *Klinghoffer v SNC* (Achille Lauro) 937 F.2d 44 (1991).

121 *Ibid.*

122 Douglas R Burgess "Hostis Humani Generi: Piracy, Terrorism and a New International Law" (2005) 13 *United Miami International & Comparative Law Review*, 293.

123 *Ibid* 304, quoting Marcus Rediker "The Seaman as Pirate: Plunder and Social Banditry at Sea" in C R Pennell (ed) *Bandits at Sea: Pirates Reader* (New York University Press, 2001) 142.

124 See Malvina Halberstam "Terrorism on the High Seas" (1988) 82 *American Journal of International Law* 269, at 277.

125 Note however that some some pirates have claimed a political purpose for their actions: to drive away foreign vessels that have intruded on Somali fishing grounds and dumped poisonous waste. See Najad Abdullahi "Toxic Waste Behind Somali Piracy" *AlJazeera.net*, 11 October 2008, <<http://english.aljazeera.net/news/africa/2008/10/2008109174223218644.html>> accessed 22 March 2014.

ship... taken by piracy and under the control of pirates, and arrest the persons and seize the property on board."¹²⁶ UNCLOS does not, however, impose an *aut dedere aut judicare*¹²⁷ obligation and there is no duty therefore on any state to prosecute and punish pirates, a lamentable failing which has resulted in many "capture and release" situations in the Somali context.

Despite what may be perceived as very clear provisions in article 105 of UNCLOS, namely that "every State may seize a pirate ship...", many states remain unclear or perhaps unwilling to deal with situations in which a ship belonging to a third party might come across another ship belonging to a different state being attacked by pirates. It is contended that this stems from the fact the universal jurisdiction proviso authorises rather than obliges a state to try and punish aggressors and has led to states conveniently ignoring their duty under universal jurisdiction generally.¹²⁸

Finally, although UNCLOS makes it clear that the inchoate offence of inciting¹²⁹ is included in the offence of piracy it is silent on the other inchoate offences such as attempted piracy and conspiracy to commit piracy.

B Other Conventions Relevant to Piracy

Somali piracy has a very distinct characteristic – ships are seized in order to capture hostages and demand ransoms. The taking of hostages is covered neither by the HSC nor UNCLOS. This lacuna is partly addressed by the Hostage Taking Convention.¹³⁰ Its provisions make it a crime to seize or detain a person (the hostage), combined with the threat to kill, injure, continue to detain the hostage, in order to compel a third party to do or to abstain from doing any act as an explicit or implicit condition for the release of the hostage.¹³¹ "The typical piracy offences

126 Article 105, United Nations Convention on the Law of the Sea, 1982.

127 The contemporary phrase *aut dedere aut judicare* literally means either surrender or try. However, it is usually described as an obligation to extradite or prosecute.

128 See for example Robert Beckman and Tara Davenport "Enhancing Regional Cooperation on Piracy and Maritime Crimes" <<http://cil.nus.edu.sg/wp/wp-content/uploads/2010/10/Beckman-and-Davenport-Enhancing-Regional-Cooperation-in-Piracy-and-Maritime-Crimes.pdf>> accessed 22 March 2014.

129 Article 101(c) UNCLOS.

130 The International Convention against the Taking of Hostages, 1979.

131 Article 1, The International Convention Against the Taking of Hostages, 1979.

being committed off Somalia involving holding crews for ransom could thus clearly fall within the Convention definition."¹³²

Further the Convention imposes no limitation on jurisdiction and covers any incidents at sea or on land. Advantageously, it also carries an *aut dedere aut judicare* obligation in article 8 (1).

In the Somali context, the Hostages Taking Convention also covers any person who "participates as an accomplice of anyone who commits or attempts to commit an act of hostage taking"¹³³ and hence would cover the associates/superiors of Somali pirates, responsible for the on-shore organisation of kidnapping of crew members for ransom as well as those negotiating or laundering monies on behalf of the pirates.

The provisions are wide-ranging and all-encompassing and may provide an alternative basis of jurisdiction other than UNCLOS or where a state is not a party to the Suppression of Unlawful Acts Convention (SUA) and has no domestic laws suitable for the prosecution of pirates.

Two of the limitations of the HSC and UNCLOS mentioned above, namely the two ship rule and the "private ends" condition are addressed by the SUA. The Convention was inspired by the Achille Lauro incident of 1985¹³⁴ in which a vessel was hijacked by members of the Palestinian Liberation Organisation, a disabled Jewish passenger killed and his body dumped overboard. In that case only one ship had been involved as the aggressors had boarded the ship in Alexandria to later ship-jack it in return for their demands being met. The case would not have been triable as piracy as their demands were political and hence would not have met "the private ends" proviso of article 101 (a) of UNCLOS.

The treaty was also necessary as, although there existed similar agreements in relation to the hijacking of planes,¹³⁵ no provisions existed in relation to ships. Article 3(1) (a) of SUA, states that:

132 See Guilfoyle, above n 119, 4.

133 Article 1 (2) The International Convention against the Taking of Hostages, 1979.

134 *Klinghoffer v SNC*, above n 130.

135 Convention for the Suppression of Unlawful Seizure of Aircraft 1970, 860 UNTS 105; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation 1971, 974 UNTS 177.

any person commits an offence if that person unlawfully and intentionally ... seizes or exercises control over a ship by force or threat thereof or any other form of intimidation.

Article 3 (2) of SUA provides for the crimes of attempting, abetting and threatening such an offence, so, whilst the Convention was not inspired by events like Somali piracy, its provisions clearly cover those perpetrated on the high seas and those of their on-shore abettors.

Similarly, although a failing of SUA is that it is limited in its application to offences in territorial waters, because of its article 4 (1),¹³⁶ most offences by Somali pirates occur on the high seas and would therefore not be caught by this exception.¹³⁷

Finally, SUA confers what can only be termed as "quasi-universal jurisdiction" as it allows the prosecution of offenders, without requiring any nexus to the prosecuting state as long as no other state has jurisdiction or the offender has not been extradited to another state.¹³⁸ It must be noted however, that Somalia has not ratified the SUA.¹³⁹

It is clear from an examination of the practices of Somali pirates that they are organised criminal groups engaged in highly structured operations. Outlawing and criminalising participation in such groups is a step towards the eradication of the crime of piracy or armed robbery at sea. Similarly, enabling the laundering of property obtained from acts of piracy or armed robbery at sea perpetuates such crimes. The United Nations Convention Against Transnational Organized Crime, 2001 (UNTOC) criminalises all such acts¹⁴⁰ and provides a clear framework together with the SUA and Hostage Taking Conventions for the arrest, prosecution and punishment of perpetrators of acts of kidnap for ransom and ship hijacking.¹⁴¹

136 Article 4 (1) SUA "This Convention applies if the ship is navigating or is scheduled to navigate into, through or from waters beyond the outer limit of the territorial sea of a single State, or the lateral limits of its territorial sea with adjacent States"

137 See Guilfoyle, above n 119, at 13.

138 Ibid 15.

139 See IMO 'Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation 1988' <https://imo.amsa.gov.au/public/parties/sua88.html> accessed 22 March 2014.

140 The United Nations Convention Against Transnational Organized Crime, 2001, Arts 3-11.

141 See Beckman and Davenport, above n 128, 25.

Arming criminal groups engaged in piratical acts permits and enables their illegal operations and part of the initiative to remove this threat will have to be based in removing their access to arms and ammunition. No Conventions address the issue of seizing cargoes of registered vessels, which cargoes may be bound for the use by states or individuals to perpetrate crimes. The Proliferation Security Initiative, 2003(PSI) is an effort among, to date, 97 countries who have committed formally to improve cooperation and change legal standards to interdict weapon shipments. The initiative is not grounded in international law and both the United Kingdom and the United States in 2005 began efforts to obtain a UN Security Council Resolution specifically authorising states to interdict the shipment of weapons of mass destruction from specified states. However, the PSI is aimed at weapons of mass destruction and not all armaments; further it is an initiative clearly aimed by the United States to impede the proliferation of weapons in North Korea but it may be a mechanism to be utilised by the UN in preventing shipment of arms to Somalia.

V SEYCHELLES: DEVELOPING THE LAW OF PIRACY

A UNODC report in 2013 stated that 1,200 pirates were being detained in 21 countries around the world.¹⁴² There is presently no uniform national law guiding states in the prosecution of pirates. Most countries have imported the international law concepts discussed above into their domestic legislation either historically or in recent reforms.¹⁴³ However, in general the prosecution of pirates has to meet two main challenges: firstly the adherence of the national state to international law rules and secondly the legal capabilities in term of expertise and court and detention facilities for prosecution whilst respecting human rights and humanitarian norms.

EU states initially practised catch and release measures, albeit admittedly disarming pirates before their release.¹⁴⁴ There was reluctance on their part to engage in the wholesale arrest and prosecution of pirates despite the ratification of UNCLOS by the EU. Member states have by and large been content to individually sign bilateral Memoranda of Understanding with Kenya, Seychelles, Tanzania and Mauritius to arrange for their transfer to those countries for prosecution. The

142 UNODC "Counter Piracy Programme: Support to the Trial and Related Treatment of Piracy Suspects" Issue Eleven: March 2013 <www.unodc.org/documents/easternafrika/piracy/UNODC_Brochure_Issue_11_wv.pdf> accessed 22 March 2014.

143 See for example Chuck Mason "Piracy: A legal definition" (Congressional Research Service) <www.fas.org/sgp/crs/misc/R41455.pdf> accessed 22 March 2014. See also Security Council Resolution 1950 (2010), calling on states to ensure reform of their domestic legislation with the implementation of the relevant provisions of UNCLOS.

144 Roach, above n 99.

details of such Memoranda of Understanding are not publicly available. However the EU itself through Exchange of Letters¹⁴⁵ has completed transfer agreements with Kenya and Seychelles. It is empowered to do so by article 12 of the EU Council Joint Action Operation Atalanta.¹⁴⁶

In general the Letters establish the modalities of transfer of suspected pirates for their criminal prosecution and the assurance that they will be treated humanely. In marked contrast to the agreement with Kenya, the Seychelles initially only agreed to accept transfers of persons captured in its "EEZ, territorial sea, archipelagic waters and internal waters... [and those engaged in attacks against] Seychelles flagged vessels and Seychellois citizens on a non-Seychelles flagged vessel..."¹⁴⁷ Under these Agreements several transfers of pirates by Atalanta took place.

Seychelles, one of the tiniest and least resourced states has to date tried over 130 pirates in 15 cases. It is an archipelagic state as defined by article 46 of UNCLOS and consists of 115 islands, with a population of 86,000.¹⁴⁸ It is over 800 miles from Somalia but effective patrols by international fleets in the Suez Canal and off the Horn of Africa have pushed Somali piratical activities south into its waters. Its naval capability is tiny, and yet it is the only state in the region actively patrolling its waters which including its EEZ extends to nearly 1.4 million kilometres. Its economic mainstays are fishing and tourism including the yachting industry. Many Seychellois are involved in artisanal fishing for their livelihood. Five Seychellois were kidnapped and taken to Somalia by pirates on two different occasions in 2009 and 2011 respectively, while sailing or fishing. In the former case, the three sailors endured seven months of captivity before negotiations led to their release.¹⁴⁹ In the latter case, two elderly fishermen of seventy and sixty-seven years were held in difficult circumstances for over a year and returned from their ordeal extremely

145 Exchange of Letters between the Seychelles and the European Union <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:315:0037:0043:EN:PDF>> Exchange of letters between Kenya and the European Union <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:079:0049:0059:EN:PDF>> accessed 22 March 2014.

146 Council Joint Action 2008/851/CFSP of 10 November 2008 <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:2008E0851:20100730:EN:PDF>>.

147 Exchange of Letters between Seychelles and the EU, above n 145.

148 National Bureau of Statistics, Seychelles, Available at <www.nsb.gov.sc> accessed 22 March 2014.

149 See <www.seychellesweekly.com/September%202013,%202009/p01_hostages_released.html> accessed 22 March 2014.

traumatised.¹⁵⁰ The threat of piracy continues to curtail fishing especially during the North West monsoon when the seas are calm. Inevitably anti-Somali emotions run very high.

Seychelles is a mixed jurisdiction, and in this respect its Constitution does not lend itself either to a classical monist or dualist system in terms of international law. Articles 64 and 48 of the Constitution bear out this ambiguous position. Article 64(4) provides that international treaties, agreements and conventions do not bind the Republic unless they are ratified by an Act or passed by a resolution of a majority of members of the National Assembly. Article 48 of the Seychelles Constitution, on the other hand, instructs the courts to interpret the Seychellois Charter of Fundamental Rights in such a way so as not to be inconsistent with any international obligations of Seychelles relating to human rights and freedoms. It is not clear whether obligations at international law which have not been ratified locally can be implemented in circumstances when the provisions of the treaty in question are inconsistent with Seychellois domestic law. As a former British colony and with a public law regime based on the common law it may well adhere to the English principle that parliament should not intend to act in breach of international law.¹⁵¹

It conducted its first piracy prosecution in 2009 in the case of *Dahir*.¹⁵² The charges brought against the eleven accused were under the then provisions of the Penal Code¹⁵³ and also under the provisions of the Prevention of Terrorism Act 2004.¹⁵⁴ Seychellois criminal law, laws of evidence and procedure are based on English law. *Dahir* related to an incident on the high seas. The eleven suspects were first spotted on a mother ship¹⁵⁵ with two skiffs in tow on 5 December 2009 by a French surveillance plane which relayed the information to the Seychellois

150 See news report <www.oceanuslive.org/main/viewnews.aspx?uid=00000495> and Seychelles State House Press Release <www.statehouse.gov.sc/news.php?news_id=2022> accessed 22 March 2014.

151 *Salomon v Commissioners of Customs* [1966] 2 All ER 340. This principle is known in the United States as the "Charming Betsy" canon (*Murray v The Charming Betsy* 6 US (2 Cranch) 64 (1804)).

152 *R v Mohamed Ahmed Dahir and others* (The Topaz) (unreported) SCA 51 of 2009 <www.seylii.org/sc/judgment/supreme-court/2010/81> accessed 22 March 2009.

153 Section 65 of the Penal Code of Seychelles was later amended adopting the articles 101-117 of the UNCLOS Convention.

154 Prevention of Terrorism Act, 2004 <www.cbs.sc/acro/terrorismAct.pdf> accessed 22 March 2014.

155 Mother ships are usually previous hijacked merchant or fishing vessels used by pirates for operations by its crew.

naval patrol boat, *Topaz*. The *Topaz* intercepted the pirates in the vicinity of an Iranian ship which had broken down and after an exchange of fire with the pirates arrested them. They were charged with piracy and terrorism. Their defence was that they were fishermen, had been fishing at the time of the incident and had only defended themselves on being attacked by the *Topaz*.

Section 65 of the Seychelles Penal Code then provided that:

Any person who is guilty of piracy or any crime connected with or akin to piracy shall be liable to be tried and punished according to the law of England for the time being in force.

The Court relying on definitions of piracy as set out in *Re Piracy Jure Gentium*,¹⁵⁶ on UNCLOS and on evidence adduced, convicted all eleven accused on the counts of piracy. It noted that piracy *jure gentium* is justiciable by the courts of every nation and that universal jurisdiction is provided for in international law and the arresting state is free to prosecute suspected pirates and punish them if found guilty. It rejected the defence of the accused that they were merely fishing lines or hooks, fish nets, bait or any fishing gear or paraphernalia had been recovered from any of the three vessels. All charges in relation to acts of terrorism were dismissed since the "objective of influencing governments or international organizations for political ends"¹⁵⁷ was not proven. The Court found that the intent of the eight defendants on the two skiffs was to commit piracy, and that their manifest intentions and actions constituted the complete crime, regardless of their ultimate lack of success and that their actions had caused fear of imminent death or harm to the crew sufficient to constitute the crime of piracy. It found that the common intention of the eight defendants on the skiff was to execute a pre-arranged plan and in that respect they were all guilty of the offence of piracy. It also found that the three men apprehended on the mother ship were guilty of aiding and abetting this endeavour. Each of the eleven accused were sentenced to ten years' imprisonment.

A second case was also conducted under section 65 of the Penal Code before it was amended. In the case of *Abdi Ali*¹⁵⁸ another eleven Somalis in two skiffs and a mother ship were apprehended after attacking a Spanish fishing vessel, the *Intertuna II*, bearing Seychellois registration. The pirates were twice repelled by the *Intertuna II* and retreated to their mother ship. They were then intercepted by

156 *Re Piracy Jure Gentium*, above n 37.

157 *Dahir*, above n 37, 38-43.

158 *R v Abdi Ali and others* (2010) SLR 341.

the crew of French naval vessel, *FNS Nivose*, who handed them over to the Seychellois authorities for trial. Only piracy charges were proffered against the accused persons. They argued in defence that it was the officers on board the *Intertuna II* who had opened fire and attacked them and that there was no evidence that the crew of *Intertuna II* had been put in fear by their acts. They also argued that they had been charged with piracy and not attempted piracy and that their arrest on the mother ship violated international law. All the arguments were rejected by the court which found, relying on *Re Piracy Jure Gentium*¹⁵⁹ that the law of England applicable to Seychelles established universal jurisdiction and had incorporated articles 15-17 of the 1958 Convention on the High Seas into the definition of piracy. It concluded that "actual robbery is not an essential element in the crime of piracy jure gentium. A frustrated attempt to commit a piratical robbery is equally piracy jure gentium."

In these first two cases, the Seychelles Supreme Court established the definition of piracy and universal jurisdiction over piracy. It also equated attempted robbery at sea with piracy. This finding was in stark contrast to that of the Federal Court in *United States v Said*¹⁶⁰ that attempted robbery at sea did not constitute piracy. In the event all eleven accused in *Abdi Ali* were found guilty of piracy and sentenced to 22 years of imprisonment. No substantial explanation was provided by the Burhan J for departing so significantly from the sentence given in the previous case of *Dahir*, but *Abdi Ali* was to establish sentencing precedent in the piracy cases that followed.

Both *Dahir* and *Abdi Ali* were appealed to the Court of Appeal but the appellants withdrew their cases close to the hearing and were repatriated to Somalia to serve their sentences. Their convictions therefore remained untested in the court of final resort in Seychelles. However, in light of the defences raised at trial, amendments were introduced to the Penal Code in March 2010. The legislative reform was assisted by the UNODC. The new section 65 provides:

- (1) Any person who commits any act of piracy within Seychelles or elsewhere is guilty of an offence and liable to imprisonment for 30 years and a fine of R1 million.
- (2) Notwithstanding the provisions of section 6 and any other written law, the courts of Seychelles shall have jurisdiction to try an offence of piracy whether the offence is committed within the territory of Seychelles or outside the territory of Seychelles.

¹⁵⁹ *Re Piracy Jure Gentium*, above n 37.

¹⁶⁰ *United States v Said* 757 F Supp 2d 554 (ED VA 2010).

- (3) Any person who attempts or conspires to commit, or incites, aids and abets, counsels or procures the commission of, an offence contrary to section 65(1) commits an offence and shall be liable to imprisonment for 30 years and a fine of R1 million.
- (4) For the purposes of this section "piracy" includes-
 - (a) any illegal act of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft and directed-
 - (i) on the high seas, against another ship or aircraft, or against persons or property on board such a ship or aircraft;
 - (ii) against a ship, an aircraft, a person or property in a place outside the jurisdiction of any State;
 - (b) any act of voluntary participation in the operation of a ship or an aircraft with knowledge of facts making it a pirate ship or a pirate aircraft; or
 - (c) any act described in paragraph (a) or (b) which, except for the fact that it was committed within a maritime zone of Seychelles, would have been an act of piracy under either of those paragraphs.
- (5) A ship or aircraft shall be considered a pirate ship or a pirate aircraft if-
 - (a) it has been used to commit any of the acts referred to in subsection (4) and remains under the control of the persons who committed those acts; or
 - (b) it is intended by the person in dominant control of it to be used for the purpose of committing any of the acts referred to in subsection (4).
- (6) A ship or aircraft may retain its nationality although it has become a pirate ship or a pirate aircraft. The retention or loss of nationality shall be determined by the law of the State from which such nationality was derived.
- (7) Members of the Police and Defence Forces of Seychelles shall on the high seas, or may in any other place outside the jurisdiction of any State, seize a pirate ship or a pirate aircraft, or a ship or an aircraft taken by piracy and in the control of pirates, and arrest the persons and seize the property on board. The Seychelles Court shall hear and determine the case against such persons and order the action to be taken as regards the ships, aircraft or property seized, accordingly to the law.

The new section 65 (2) clearly imports the notion of universal jurisdiction into Seychellois law and the amendment replicates the UNCLOS definition of piracy. It also further extends the offence of piracy to its territorial and archipelagic waters,

notwithstanding the fact that the international law of piracy does not apply to archipelagic waters. The amendment ensures that piracy committed on the high seas and outside the jurisdiction of Seychelles even with no direct nexus to Seychelles and even in the absence of extradition treaties can still be tried in its courts on the basis of universal jurisdiction.

However, although the Penal Code (Amendment) Act 2010 greatly improves the previous provisions, it contains some incongruities that have been raised in subsequent trials. The statutory provisions do not address the issue of pirates cruising looking for prey; they do not cover the abetting of piracy by ransom brokers; they do not adopt "equipment provisions"¹⁶¹ which might otherwise lessen the burden of proof on the prosecution. Section 65 (7) also imposes an obligation on Seychelles to seize pirate ships and arrest and detain pirate suspects on the high seas; it obliges Seychelles to hear all such cases even though the international law on piracy imposes no such obligation. It is regrettable that the new provisions did not include threats of force or other forms of intimidation in its definition of piracy as envisaged by the SUA or the much more preferable IMB definition.¹⁶²

As has already been pointed out,¹⁶³ the EU, empowered by article 12 of the EU Council Joint Action Operation Atalanta, completed transfer agreements with Seychelles.¹⁶⁴ An exchange of Letters established the modalities of transfer of suspected pirates for their criminal prosecution and the assurance that they would be treated humanely. Several cases were prosecuted under the new Penal Code provisions in which Seychelles had a clear nexus with the offence committed. These were the cases of - *Sayid (the Galate)*¹⁶⁵ in which a Seychellois fishing vessel was one of the boats seized and Seychellois fishermen kidnapped by the pirates; *Aden (The Faith)*¹⁶⁶ in which the boat and crew seized by the pirates were Seychellois and their interception was by the Seychellois patrol boat *Topaz*; *Ise*

161 "Equipment articles are defined as rules that create a judicial presumption of guilt on piracy charges for the crews of civilian vessels possessing certain specified equipment within a specified area of the high seas plagued by pirate attacks" See Eugene Kontorovich "Equipment Articles for the Prosecution of Maritime Piracy" (2010) <www.oneearthfuture.org/index.php?id=52&page=Publications> accessed 22 March 2014.

162 See International Maritime Bureau "Piracy and Armed Robbery against Ships", above n 55, 3.

163 Exchange of Letters, above n 145.

164 Ibid.

165 *R v Sayid and ors (the Galate)* (unreported) SC Cr S 18/2010 <www.unicri.it/topics/piracy/database/> accessed 22 March 2014.

166 *R v Aden and ors (The Faith)* (2011) SLR 30.

(*The Talenduic*)¹⁶⁷ in which the pirates who had attacked two French vessels were intercepted by the Seychellois warship *Andromache*; and *Ahmed (The Gloria)*¹⁶⁸ in which the vessel and fisherman attacked and detained by the pirates were Seychellois and the intercepting vessels were the Seychellois warships *Andromache* and *La Fleche*.

Sayid, however was successfully appealed to the Court of Appeal by one of the nine convicts on a very specific ground.¹⁶⁹ In its decision of 6 December 2013, the Court of Appeal overturned the appellant's conviction. The sole appellant was a child of 16 years at the time of the offence and his rights under the Constitution and Children Act 1982 had been breached. In particular his right to "special protection in view of [his] immaturity and vulnerability" and given that the fiat of the Attorney-General for his prosecution had not been sought or given as provided for by section 92 of the Children Act. The nine suspects in *Sayid* had attacked three ships including the Seychellois fishing vessel *Galate* and the Seychelles coast guard vessel *Topaz* and the violent exchange of fire had resulted in the sinking of the Iranian vessel, *Al Ahmadi* previously hijacked for fuel by the pirates. There was evidence that the appellant had played an active part in the hi-jack of the *Galate*.

In *Ise (The Talenduic)*, the Seychelles warship *Andromache* had intercepted the pirates long after they had attacked two French vessels (the *Talenduic* and *Cap Ste Marie*) and had been repelled. None of the accused could be identified as having fired the shots at the French vessels. The charges of piracy had, as in previous cases, been drafted to be read in conjunction with section 23 of the Penal Code which provides:¹⁷⁰

When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.

167 *R v Ise and ors (The Talenduic)* (unreported) SC Cr S 75/2010 <www.unicri.it/topics/piracy/database/> accessed 22 March 2014.

168 *R v Ahmed (The Gloria)* (unreported) SC Cr S 21/2011 <www.unicri.it/topics/piracy/database/> accessed 22 March 2014.

169 *Sayid v R* (unreported) SCA 2/2011 <www.seylii.org/sc/judgment/court-appeal/2013/24> accessed 22 March 2014.

170 These provisions are found in the Penal and Criminal Codes of a number of Commonwealth countries where the Griffith Code was introduced. Sir Samuel Griffith (Chief Justice of the High court of Australia) drafted the Code for Queensland in 1899.

A Common intention offence is the Seychellois version of joint enterprise crime. Using the concept, the Court found that sufficient circumstantial evidence existed to tie all the accused men to the frustrated attempts of piracy. It found that it was:¹⁷¹

immaterial if the prosecution does not point out who specifically did what from the PAG [Piracy Action Group], as long as it is proved that an accused was party to the joint accomplishment of this criminal object, and that his will contributed to the wrong doing which in law makes him responsible for the whole crime as though performed by himself alone.

A similar case in terms of pirates being apprehended after an unsuccessful attack and convicted for piracy was that of *R v Osman (The Draco)*.¹⁷² The crew of the *Draco* could not identify the occupants of the skiff which numbered between 6 and 8 persons who had sped towards them with a bazooka visible. They had however not fired and were successfully repelled by gunfire from the *Draco*. The occupants of the skiff had boarded their mother ship when they were apprehended together with three other occupants of the mother ship over three hours later by a Spanish warship, the *Canarias*. No weapons were found on the mother ship although witnesses from the *Canarias* testified to seeing weapons being thrown overboard shortly before the pirates were apprehended. The prosecution had argued that a "failed attempt to seize the vessel to which the skiff had directed its activities would suffice to establish piracy."¹⁷³ The Court disagreed finding that the "acts of violence, depredation or detention", as described in section 65(4) (a) had not been directed at the *Draco*. It therefore dismissed the charge of piracy against the accused but found them guilty of attempt to commit piracy under section 65(3). *Osman* confirms that the law of Seychelles allows for two types of attempted piracy - one under attempted piracy *jure gentium* regardless of success and two under section 65(3) of the Penal Code where there are overt acts with intent to commit piracy but with no violence.¹⁷⁴ It would appear therefore that based on this finding, it is now firmly settled that the inchoate offence of attempted piracy can be successfully prosecuted in universal jurisdiction cases based on customary law.

In 2010, Seychelles agreed to become a regional piracy prosecution centre on the condition that convicted pirates would be deported to Somaliland and

171 *Ise*, above n 167 [37].

172 *R v Osman and ors (The Draco)* (2011) SLR 344.

173 *Ibid* [20].

174 See Shnider, above n 104, 548-549.

Puntland¹⁷⁵ to serve their sentences in the newly completed prisons. Memoranda of Understanding to that effect were signed.¹⁷⁶ The UNODC assisted Seychelles in constructing a secure 60-bed facility for the purpose of accommodating pirates in a high-security environment. With prison sentences of up to 22 years in some cases, the facility is already at capacity but deportations to Somaliland and Puntland are under way and seem to be running efficiently. As a regional piracy prosecution centre, Seychelles has now embarked on piracy prosecutions with which it has no nexus.

The *Draco* was the first case in which Seychelles undertook a prosecution where its nexus with the piratical activity was tenuous. The *Draco* was indeed registered in Seychelles but its crew was Spanish and African and the pirates had been intercepted by a Spanish EUNAVFOR ship, but the Seychelles Supreme Court made it clear that:¹⁷⁷

...we must note that a pirate is treated as an outlaw, as the enemy of all mankind (*hostis humani generis*) and since the crime is committed on the high seas, he places himself beyond the protection of any state and any nation may in the interest of all capture, prosecute and punish. Hence bringing to the fore the principle of universal jurisdiction.

All subsequent cases have been of the purely universal jurisdiction nature in which Seychelles has had no connection with the piratical activity: *R v Jama (The Alankrantxu) SC*,¹⁷⁸ *R v Liban Mohamed Dahir and others (The Happy Bird) SC 6/2012*,¹⁷⁹ *R v Farad Ahmed Jama (MV Sunshine) SCA 16/2012*, *R v Bashir Nur Mohamed and ors (The Tahiri) Cr S 8/12*, *R v Ahmed Abdi Barre and ors (The Suidis) Cr S 28/12*, *R v Abdirahaman Nur Roble and ors (The Burhan Nour) Cr S No 54/12*, *R v Ali Galawe Mowlid (Super Lady) Cr S 31/12*. This has resulted in further development in the law of piracy. It also has implications both for the domestic Seychellois law regime but also in terms of the development of jurisprudence in the application of the definition of piracy under the UNCLOS provisions. As will be seen below, some of these cases have challenged the

175 See UN Security Council Report of the Secretary-General pursuant to Security Council resolution 2020 S/2012/783 <www.securitycouncilreport.org/atf/cf/%7B65BF99B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2012_783.pdf>.

176 See <www.intermanager.org/forums/topic/deal-to-transfer-pirate-to-puntland-and-somaliland> accessed 22 March 2014.

177 *R v Osman and ors (The Draco)*, above n 172.

178 *R v Mohammed Abdi Jama (The Alankrantxu) SC 15/2012* (unreported).

179 *R v Liban Mohamed Dahir and others (The Happy Bird) SC 6/2012* (unreported) copy of judgment with author.

principle that universal jurisdiction should only apply to conduct that matches the definition of piracy under international law.¹⁸⁰ They also illustrate the difficulties of prosecuting piracy offences beyond the definition of piracy either in UNCLOS or customary law.

In *Jama (The Alankrantxu)*,¹⁸¹ where a pirate ship was intercepted on the high seas by the Royal Navy, the seven defendants were charged with a single count of the operation of a pirate ship read in conjunction with section 23 of the Penal Code, the Court noting that this section "obviates the burden of the prosecution proving individual criminal liability where an offence is committed by a group and it is difficult to point out whose hand exactly did what." The Court had to grapple with the fact that the seven defendants had not been engaged in any overt piratical attack when intercepted. It used circumstantial evidence – a previous aborted attack on the British warship, the *Fort Victoria*, a pre-emptive distress call from the Spanish fishing vessel, *The Alankrantxu*, images captured by a Norwegian patrol aircraft of the pirates dumping ladders and other equipment into the sea, the recovery of a single AK 47 bullet in one of the three boats used by the pirates and the lack of fishing equipment to find that although no offence of piracy had been committed, the charge of operating a pirate ship could be sustained.

Although section 101(b) of UNCLOS defines piracy as "any act of voluntary participation in the operation of a ship...with knowledge of facts making it a pirate ship...", it also crucially defines a pirate ship as one in which "it is intended by the persons in dominant control to be used for the purpose of committing one of the acts referred to in article 101." There are two difficulties with this provision - one is in the definition of "knowledge" and the other "dominant control."

Whilst it is clear that cruising with pirate intent was envisaged by the UNCLOS provisions, it is unclear how one draws an inference of requisite knowledge in the absence of a ship flying the Jolly Roger. In *Jama*, Gaswaga J decided that he could use the analogy of equipment articles in offences of slavery to infer a presumption of knowledge and therefore guilt on the part of the defendants. He did not consider whether Seychelles in expanding the UNCLOS of "operating a pirate ship" into its domestic legislation, could apply it extraterritorially. By contrast, in the American case of *United States v Ali*,¹⁸² the United States Court of Appeals for the District of Columbia Circuit in deciding whether to uphold a conviction of conspiracy found

180 *The Lotus case*, above n 46, established the principle that a state had jurisdiction as long as it was not prohibited by an international convention or custom.

181 *Jama*, above n 177.

182 *United States v Ali* 718 F.3d. 929 (DC Cir 2013).

that since UNCLOS is silent on conspiracy to commit piracy there was no basis for a domestic court to expand its provisions.¹⁸³ The court noted that using universal jurisdiction necessitates a basis "in norms firmly grounded in international law."¹⁸⁴ Although the domestic conspiracy statute did encompass "any offense against the United States", the Court required clear congressional intent to apply the statute extraterritorially.¹⁸⁵

It may be that Gaswaga J tried to establish a norm of customary international law by using the slave trade equipment articles analogy. He observed that there were two paths to proving the operation of a pirate ship: an act of voluntary participation in the operation of a ship committed with knowledge that the ship had been used to commit an act of piracy or an act of voluntary participation in the operation of a ship, such act having been committed with knowledge of facts showing that it was a pirate ship and the persons in control of the ship intended to use the ship to commit an act of piracy (or cruising with intent).¹⁸⁶ He pointed out that the first option requires the "two-ship" requirement but not the second, which he observed was harder to prove as one had to find evidence on which to base or draw an inference that the defendant intended to carry out a piratical attack. On this basis, he concluded that the inclusion of "equipment articles" in the legislation would have been useful.

In the subsequent case of *R v Liban Dahir (The Happy Bird)*¹⁸⁷, the fourteen defendants were intercepted by the British naval vessel, the *Fort Victoria* in the EEZ of Oman. They were transferred to and charged in Seychelles with one count of piracy and another of operating a pirate ship. The Court emphasised that the EEZ was subject to the same regime as the high seas as far as piracy was concerned and that the jurisdiction of the coastal state of the EEZ did not apply. It found that although there was a possibility that the ship used by the defendants had been used in pirate attacks in the area, since the surrounding seas were "infested"¹⁸⁸ with similar groups, "the possibility was too remote for any court to base an inference of guilt"¹⁸⁹ and acquitted them on that charge. In terms of the second count, it again used the concept of a Piracy Activity Group to conclude that although it might be

183 Ibid 932.

184 Ibid 942.

185 Ibid.

186 *Jama*, above n 177, [31].

187 *Liban Dahir*, above n 178.

188 Ibid [37].

189 Ibid.

"difficult to prove that a group of individuals intended to use their vessel to launch piratical attacks",¹⁹⁰ circumstantial evidence could be used to show the intent of such a group. Again using the slave trade analogy, it found that where "tools of the trade" such as grappling hooks, ladders and firearms on board the ship these were "incompatible with any explanation other than guilt of operation of a pirate ship."¹⁹¹ Relying on this analysis, the Court concluded "the accused were all voluntary participants in a common scheme, with common intention to use private vessels, over which they maintained dominant control at all material times, to attack peaceful shipping."

It found that there could be no other logical inference to be drawn when they were found in possession of such equipment on the high seas. In this case, however, five members of the group were minors, one was only eleven years old. In the event, the eleven year old was released by virtue of section 15 of the Penal Code which provides that he could not be held criminally responsible. The four remaining minors were convicted; a twelve-year old was conditionally released and deported from Seychelles, the remaining fourteen to seventeen year olds were sentenced to two and a half years of imprisonment.¹⁹²

The case of *Jama* and those that followed it are all cases in which the pirates prosecuted were transferred to Seychelles (a third party) by the "seizing" state. As yet, no one has raised the legality of third party jurisdiction given article 105 of UNCLOS and its wording which may suggest that while every state may seize pirates only the flag state of the vessel that captures may prosecute.¹⁹³

VI CONCLUSION

History has shown that only concerted efforts of the international community both in terms of naval patrols and prosecutions will stem piracy. The fight against Somali pirates is presently clearly being tackled by the international community in terms of information sharing, concerted naval patrols and interventions. The statelessness of Somalia seems to have been resolved and the restoration of the rule of law will undoubtedly assist in eliminating piracy off its coast.

190 Ibid [43].

191 Ibid.

192 Note that in correspondence the law clerk to Gaswaga J admitted that the interpretation of the court was that the offence was complete once the ship had entered the high seas with pirate equipment. See Shnider, above n 104, fn 488.

193 See for example Eugene Kontorovich "A Guantanamo on the Sea: The Difficulties of Prosecuting Pirates and Terrorists" (2010) 98 California Law Review 234, 270.

Whilst UNCLOS and other treaties provide for the basic legal architecture for the prosecution of piracy, the landscape of legal enforcement of anti-piracy provisions is unfortunately characterised by a lack of uniformity and coherence. Different nations have different municipal laws¹⁹⁴ and universal jurisdiction is seldom exercised by first world powers who are most often the "seizing" nations. Their reluctance and lack of regularity to prosecute has led to transfer agreements with third-party states and with the setting up of piracy prosecution centres, aided by UNODC in Indian Ocean states. One of these states, Seychelles, seems to have become an ad hoc international piracy court.

It is a tiny country with both limited legal expertise and capabilities. No doubt, its decisions in piracy trials are providing a rich jurisprudence for the law of piracy. This may be viewed as Seychelles developing customary international law but it could also be viewed as securing convictions at the expense of international law norms. This may well be overlooked by those "seizing" nations intent on forum shopping for jurisdictions that can be depended on to return convictions and impose stiff penalties for piracy consistently.

However, the issues raised by the Seychellois decisions, especially in terms of inchoate piracy offences and "operating a pirate ship," and child and juvenile offenders needs to be urgently addressed by the international community. Clear guidelines need to be set as to the limits of universal jurisdiction especially where international law rules are at variance with municipal laws.

194 See Dutton, above n 13.