

## Adding Piracy To The Rome Statute : A Good Idea?



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## Table of Contents

<b>Acknowledgements .....</b>	<b>4</b>
<b>Index.....</b>	<b>5</b>
<b>Introduction:.....</b>	<b>5</b>
<b>Chapter 1. History and definition of piracy.....</b>	<b>10</b>
A. Historical background of piracy .....	10
B. Definition of Piracy & existing International legal framework .....	12
a. UNLCOS Limitations .....	14
i. Acts must be carried out on the high seas.....	14
ii. Between two vessels.....	14
iii. For private ends .....	16
b. Definition of piracy under SUA .....	17
C. Modern Piracy in the coast of Somalia .....	19
a. Alleged cause of Piracy in Somalia.....	20
i. Somalia a failed State.....	21
ii. Illegal, Unreported and Unregulated fishing .....	22
iii. Waste and toxic dumping .....	22
<b>Chapter 2. Current International Response: Ineffective .....</b>	<b>25</b>
A. Naval Petrol on the high Sea.....	25
a. Powers of Navies and their capacity to apprehend and detain.....	26
B. Universal Jurisdiction .....	28
a. UNCLOS flaws: inability to provide a tool for universal jurisdiction and a mechanism for prosecution .....	30
b. SUA Flaws: in respect to the application of Universal jurisdiction .....	34
c. Unwillingness by International Community to Prosecute .....	35
C. Regional Effort .....	39
a. Kenya: dumping ground for pirates from third states .....	40
i. Kenya’s Judicial system: corrupt .....	42
<b>Chapter 3. An International Court Desirable .....</b>	<b>45</b>
A. Justice must be seen to be done.....	45
a. Rome Statute draft 1994 .....	47
b. Piracy a case: for the ICC.....	48
c. The most serious crimes of concern to the international community .....	49

Adding Piracy To The Rome Statute: A Good Idea?

d. Rome Statute amendment procedure.....	51
i. “Low level” pirates should be prosecuted.....	54
e. For Non state parties such as Somalia: Referral .....	55
<b>Conclusion .....</b>	<b>57</b>
<b>Bibliography .....</b>	<b>60</b>

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*“One of the greatest deterrents to crime is not the severity of the punishment but its inevitability” Cesare di Beccaria (1738-1894)*

## Index

<b>CHS 1958</b>	Convention On The High Sea
<b>UNCLOS 1982</b>	United Nations Convention On The Law Of The Sea
<b>GA</b>	General Assembly
<b>UN</b>	United Nations
<b>UNSC</b>	United Nations Security Council
<b>UNSCR</b>	United Nation Security Council Resolution
<b>EU</b>	European Union
<b>AU</b>	African Unions
<b>IMO</b>	International Maritime Organisation
<b>IMB</b>	International Maritime Bureau
<b>NATO</b>	North Atlantic Treaty Organisation
<b>TFG</b>	Transnational Federal Government
<b>SHADE</b>	Shared Awareness and Deconfliction

## Introduction

The word “pirate” derives from the Greek “peirates”, which meant adventure<sup>1</sup>. In novels and films pirates are often romanticised as roamers of the sea, in search for treasure; however, today’s pirates seem to be more than mere adventurers and the impact they have on the international community seems to require a serious global response. The Gulf of Aden, one of the world busiest sea lanes<sup>2</sup>, has begun to experience a marked escalation in piracy attacks launched by Somali pirates. The issue of piracy in Somalia can only be described as unprecedented in the history of piracy<sup>3</sup>. Pirate’s acts in Somalia reveal to be “increasingly blatant, sophisticated, daring, brazen, unrelenting, seemingly intractable, and audacious threats to international law, security at sea and global trade.”<sup>4</sup> Maritime piracy is a threat to lives and property; it has profound implications to international navigation and trade. Piracy is a grave concern to the international community, subsequently, international organisation such as the UNSC<sup>5</sup>, and GA<sup>6</sup>, IMO<sup>7</sup>, NATO<sup>8</sup> and regional organisations such as the AU<sup>9</sup> and the EU<sup>10</sup>, have collectively adopted measures to combat piracy. The UNSC has

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<sup>1</sup> SUNDBERG, J. “Piracy” in Bassiouni, C. (1999) *International Criminal Law, 2<sup>nd</sup> edition. Vol. 1: Crimes* New York, Transnational Publishers, Inc. P.803

<sup>2</sup> INGRID MELLINGEN, “Gulf of Aden piracy: background forecast practical prevention strategies” The Gulf of Aden is “roughly 900 kilometres long and 500 Kilometres wide- is an important waterway for international shipping. The Red sea and Gulf of Aden form an important transport route between Europe and the far East, particularly for the carriage of oil and commodities. Approximately 11% of the world’s seaborne oil is transported through the region.”

<sup>3</sup> ICC International Maritime Bureau “*Piracy and armed robbery against ships*” 1 January -31 March 2011 p.23 “figures for piracy and armed robbery are the highest ever recorded in the first quarters of any past year, since the IMB piracy Reporting Centre started monitoring piracy worldwide in 1991”

<sup>4</sup> JOSEPH M. ISANGA, “Troubled waters: Combating Maritime Piracy with the rule of law” *American University law Review* 2010; 59 *Am. U.L.Rev.* 1267

<sup>5</sup> The Security Council available from: <http://www.un.org/Docs/sc/> accessed 02/08/2011

<sup>6</sup> The General Assembly is the main deliberative, policymaking and representative organ of the United Nations, comprising of 193 Members of the United Nations. Available from: <http://www.un.org/en/ga/> accessed 02/08/2011

<sup>7</sup> The International Maritime Organisation is the United Nations specialized agency with responsibility for the safety and security of shipping and the prevention of maritime pollution by ships. Available from: <http://www.imo.org/About/Pages/Default.aspx> accessed 02/08/2011

<sup>8</sup> The North Atlantic Treaty Organisation is an international alliance of 26 countries of Europe and North America created to ensure the peace and security of the North Atlantic region. Signed April 4, 1949, available from <http://www.nato.int/cps/en/natolive/index.htm> accessed 02/08/2011

<sup>9</sup> The African Union available from <http://www.au.int/en/commission> accessed 02/08/2011

<sup>10</sup> The European Union available from : <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/528&format=HTML&aged=0&language=EN&guiLanguage=en> accessed 03/08/2011

issued a numerous Resolutions<sup>11</sup> in an attempt to combat the alarming and increasing level of pirate attacks both on the coast of Somalia and on the High Seas. The IMB<sup>12</sup> has received 97 incidents of piracy attributed to Somalia only between 1 of January and 31 of March 2011<sup>13</sup>. It is reported that the incidents pose a threat to a large geographical region, which includes the Gulf of Aden, southern Red Sea, off Yemen, off Oman, Arabian Sea of Kenya off Tanzania, off Seychelles, off Madagascar, off Mozambique, Indian Ocean, off Indian west coast, and of Maldives west coast<sup>14</sup>. The safety of seafarers is under constant threats, 299 have been taken hostage, among whom three were injured and seven killed<sup>15</sup>. From 31 of March 2011, Somali pirates held 28 vessels for ransom, with 596 crew members as hostages from different Nationalities<sup>16</sup>. Pirates are becoming more sophisticated and aggressive with time since, "Pirates use hijacked fishing vessels as mother ships, they wage their attacks with means and methods such as M-16 and AK-47 assault rifles and rocket- propelled grenade, they are equipped with speedboats, global positioning systems and satellite phones."<sup>17</sup> This not only causes a threat to the crew but to the ship cargo and the environment<sup>18</sup>.

In recent years, we have witness an increase in pirates attacks by Somali pirates, this is a threat to the international Community as a whole, since pirates do not discriminates between nationalities<sup>19</sup>. The reality of this problem let the international community to adopt measures to effectively combat piracy; these measures are studied from the

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<sup>11</sup> United Nation Security Council Resolution 1816(2008), 1838 (2008), 1844(2008), 1846(2008), 1851(2008), 1897(2009), 1976 (2011)

<sup>12</sup> The International Maritime Bureau, is a non- profit making organisation, established in 1981 to act as a focal point in the fight against all types of maritime crime and malpractice" available from : <http://www.icc-ccs.org/home/imb> accessed 02/08/2011

<sup>13</sup> ICC International Maritime Bureau "*Piracy and armed robbery against ships*" 1 January -31 March 2011

<sup>14</sup> *ibid.*, p 19.

<sup>15</sup> *ibid.*, p 23.

<sup>16</sup> *ibid.*, p23.

<sup>17</sup> VED P. NANDA, "Maritime Piracy: how Can International Law and Policy Address This Growing Global Menace", *Denver Journal of International Law and Policy Spring 2011*, 39 *Denv. J. Int'l L. & Pol'y* 177

<sup>18</sup> *ibid.*, see footnote 14

<sup>19</sup> ICC International Maritime Bureau "*Piracy and armed robbery against ships*" 1 January -31 March 2011

“political, legal, security and operational perspective”<sup>20</sup>. Yet again, the international community failed to seek a comprehensive and long term solution to the situation of pirates in Somalia. The United Nation Security Council Resolution (1851)<sup>21</sup>, enabled the establishment of a Contact Group of the Coast of Somalia, which consist of 50 nations and several international Organisations<sup>22</sup>, it aims to respond to the concerns stipulated by the Resolution. One among the four working groups deals with legal issues<sup>23</sup>, whereby states have agreed to coordinate and cooperate, in attempt to strength their regional capabilities. They have established coordination centres, provided warships, created coastguard and provided guidance for commercial shipping<sup>24</sup>. All these measures adopted by the international community are relevant and practical to an extent; however, these measures will not eradicate the practice of piracy in Somalia.

As from 31 of December 2010, 738 individuals were either suspected or convicted of piracy, and were detained in 13 different countries<sup>25</sup>. 738 detained individuals may seem an achievement and a progress towards combating piracy, unfortunately the 738 is only a very small number over 2,000 of pirates apprehended since 2008. As of May 2010, only 1 out of 10 pirates were prosecuted<sup>26</sup>, this suggests among navies a customary of “catch and release”<sup>27</sup> practice has developed. In essence, the rule has become capture and release, while “judicial prosecution the exception”<sup>28</sup>. This has set a dangerous precedent<sup>29</sup>. The

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<sup>20</sup> M.D. FINK and R.J. GALVIN “Combating pirates off the coast of Somalia: current legal challenges” *Netherlands International Law Review*, LVI:367-395,2009

<sup>21</sup> The United Nations Security Council Resolution 1851(2008) Adopted by the Security Council at its 6046<sup>th</sup> meeting, on 16 December 2008. S/ RES/1851(2008)

<sup>22</sup> YVONNE M. DUTTON, “Bringing pirates to justice: A Case for including piracy within the jurisdiction of the International Criminal Court”, *Chicago Journal of the International law 2010; 11 Chi J. Int’l L.197*: the international organisations include NATO, the African Union, the League of Arab States, INTERPOL, and the EU.

<sup>23</sup> Ibid.,

<sup>24</sup> M.D. FINK and R.J. GALVIN “Combating pirates off the coast of Somalia: current legal challenges” *Netherlands International Law Review*, LVI:367-395,2009

<sup>25</sup> United Nation Security Council 25 January 2011, letter dated 24 January 2011 from the Secretary- General to the President of the Security Council; S/2011/30 page 20 para:42-43

<sup>26</sup> Ibid.,p. 20 para:42-43

<sup>27</sup> Ibid., p. 20 para:42-43

<sup>28</sup> Ibid., p. 21 para:43

<sup>29</sup> YVONNE M. DUTTON, “Bringing pirates to justice: A Case for including piracy within the jurisdiction of the International Criminal Court”, *Chicago Journal of the International law 2010; 11 Chi J. Int’l L.197*

international community can exercise universal jurisdiction, but there is an apparent unwillingness by states to prosecute pirates, due to many obstacles including financial, political and logistical. Currently, pirates “know international law”<sup>30</sup> and are aware that no state wants to prosecute, then it is as if they are immune from prosecution, which only increases the level of piracy and by the same token, establishes a culture of impunity. Piracy cannot be eradicated, with the current international measures, there is clearly a lack of international prosecution, pirates run no risk, in fact, piracy is lucrative business, it is reported a single seizure of a ship can earn each individual pirate up to \$150,000.<sup>31</sup> There is an essential question that remains uncertain: how can alleged pirates be most adequately prosecuted? The conventional response is provided in this thesis, which proposes, to tackle piracy effectively, the crime should be added to the Rome Statute, this will send the message that the international community will not tolerate impunity, and that it takes the crime of piracy seriously.

Chapter one, will set the historical background followed by the definition of piracy, it will be established that there is a lacuna in the definition. In chapter two, the current legal response to piracy will be discussed it will be demonstrated that there is a weak link in the chain of measures adopted by the international community due to the lack of judicial prosecution. The third chapter will propose that the crime of piracy should be added to the Rome Statute, and that piracy should be a crime under the ICC’s jurisdiction.

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<sup>30</sup> THOMAS FEDELI “The Rights and liabilities of private Actors: Pirates, master, and Crew” *One earth Future*, July, 2010

<sup>31</sup> MILENA STERIO. “The Somali Piracy Problem: A Global Puzzle Necessitating A Global Solution”, *American University Law Review* (59) June 2010 : 2

## Chapter 1. History and definition of piracy

### A. Historical background of piracy

In order to understand the current phenomenon of piracy in Somalia, it is crucial to understand the roots of piracy. Talking about the history of piracy has two major disadvantages: firstly, there is no “truth”<sup>32</sup>. Accounts from a long time ago have been told, retold and written down and may therefore be ambiguous. Secondly, addressing the history spread over many centuries, thereby naturally leaving out many issues. However, putting piracy in the historical context is appropriate, since “the law embodies the story of a nation’s development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematic”<sup>33</sup>. In any event, to fairly appreciate the current international piracy problems, that is “to know what it is, we must know what it has been, and what it tends to become”<sup>34</sup>.

If one looks into the history of piracy, it becomes quickly apparent that the practice of piracy has existed since; man has ever navigated on the sea for commerce and was regarded as one of the means of livelihood that the sea offered<sup>35</sup>. Piracy has always been a danger and a troublesome to the ocean, which lead the origin of piracy to be lost in time. Since the ancient Greece and the Roman Empire, piracy has been a constant obstacle to maritime trade, affecting every maritime region in different times. In the year of 78 BC, Julius Ceasar<sup>36</sup> was the victim of piracy, as he was taken hostage by pirates in exchange for a ransom<sup>37</sup>. Under the Roman Empire the concept that pirates are the enemies of all people was born, when Cicero declared pirates to be “*hostis humani generi*”, which, means “enemy of all

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<sup>32</sup> PARKER, M. (2009). “Pirates merchants and the anarchists: Representations of international business” *Management & Organisation History, Vol.4 (2):Pp.167-185*.

<sup>33</sup> Holmes, O. (2009). *The Common Law*, London, Harvard University Press.

<sup>34</sup> Ibid.,

<sup>35</sup> HENRY A. ORMOND, “Piracy in the Ancient World: an Essay in the Meditation History” *Johns Hopkins Paperbacks Edition, 1997*

<sup>36</sup> H.E.JOSE LUIS JESUS, “Protection of Foreign Ships against Piracy and Terrorism at Sea: Legal Aspects” , *The International Journal of Maritime and Coastal Law, Vol. 18, No3 Kluwer Law International, 2003*

<sup>37</sup>ibid.,

mankind”.<sup>38</sup> Alberico Gentili later adopted this notion in 1588 and deposited in “De Lure Belli Liberis Tres”<sup>39</sup>, he was against the idea that the rules of war applied to pirates. His reasoning was based on the notion that acts of pirates could not be attributed to any sovereign states; in fact, any state could chase and capture pirates. The danger with this position is that it allows domestic law to be extended beyond the high seas and to foreign jurisdiction to eradicate pirates. Hugo Grotius, the father of modern international, saw the danger of this position, and advocated the theory that domestic criminal law should only be extended on the high seas, thereby establishing the principle<sup>40</sup> of “freedom of the High Seas”<sup>41</sup>

The offence of piracy has declined from the 17<sup>th</sup> to the 18<sup>th</sup> century<sup>42</sup>. From the 19<sup>th</sup> to the 20<sup>th</sup> century, the offence of piracy was held to have become obsolete, and its existence was merely recorded in the mist of history. In due course, until two decades ago piracy was seen “as an interesting historical problem”<sup>43</sup>, regrettably, what was once regarded as an interesting historical problem has become the present nightmare of the international community. Not only is piracy haunting the international community once again, rather, this time, the new type of piracy is more sophisticated, pirates use a modern means and methods to carry their attacks. Thus, the nature of piracy has evolved with time as correctly articulated by an author, “a new breed of Buccaneers is emerging to threaten the passage of ships across the world oceans”<sup>44</sup>.

The dangerous renaissance of piracy is due to many factors, some of which will be the study of this thesis. One of the major reasons that the crime is getting out of hand is due to the ineffective international legal instrument, and the absence of judicial prosecution. The second reason why the offence of piracy was revived in Somalia is due to the lack of

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<sup>38</sup> H.E.JOSE LUIS JESUS, “Protection of Foreign Ships against Piracy and Terrorism at Sea: Legal Aspects” , *The International Journal of Maritime and Coastal Law*, Vol. 18, No3 Kluwer Law International, 2003

<sup>39</sup> MONICA PATHAK, “ maritime violence: piracy at sea & terrorism today” *Windsor Review of Legal and Social Issues*, November, 2005, 20 *Windsor Rev. Legal & Soc. Issues* 65

<sup>40</sup> *ibid.*, page 2

<sup>41</sup> P.W. BIRNIE “Piracy, past, present and future”, *Maritime Policy Volume 11, Issued 3, July 1987, page 163-183*

<sup>42</sup> *ibid.*, see footnote38

<sup>43</sup> H.E.JOSE LUIS JESUS, “Protection of Foreign Ships against Piracy and Terrorism at Sea: Legal Aspects” , *The International Journal of Maritime and Coastal Law*, Vol. 18, No3 Kluwer Law International, 2003

<sup>44</sup> *ibid.*,

effective central government in Somalia, this in turn made the coast of Somalia vulnerable to international exploitation in the form of illegal fishing and the dumping of toxics. All these elements are factors, which in one way or another contribute to the unprecedented flourishing of piracy.

## **B. Definition of Piracy & existing International legal framework**

Two international legal instruments regulate the crime of piracy under international law. The first is the United Nations Convention on the Law of the Sea (UNCLOS); the second is the Convention for the Suppression of Unlawful Acts of Violence against the Safety of Maritime Navigation (SUA). In the following part, firstly, the definition of piracy under UNCLOS will be examined thoroughly, from this examination it will be born that UNCLOS is the victim of some important limitations, which impede the process of pirate's prosecution. Secondly, the SUA Convention will also be studied to see whether it can be used as a substitute to overcome the limitations imposed in the UNCLOS convention with respect to the prosecution of pirates.

The League of Nations attempted to regulate piracy, unfortunately, the idea was never achieved, it was dismissed by some Delegates on two grounds<sup>45</sup>. Firstly, the crime was neither important nor prevailing enough to be addressed at international level<sup>46</sup> Secondly, the Delegates were of the opinion that it would be impossible to obtain a consensus on

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<sup>45</sup> DONALD P. PARADISO "Come All Ye Faithful: How The International Community Has Addressed The Effects Of Somalia Piracy But Fails To Remedy Its Cause"; *Penn State International Law Review Summer 2010*; 29 *Penn St. Int'l L. Rev.* 187

<sup>46</sup> LAWRENCE AZUBUIKE "International Law Regime against Piracy", *Annual Survey of International & Comparative, Volume 15/Issue 1, Article 4*. A Polish Representative M. Zaleski, approved statement by the Council of the League of Nations 13 June 1927, "it is perhaps doubtful whether the question of piracy is of sufficient real interest in the present state of the world to justify its inclusion in the programme of the (proposed) conference, if the scope of the conference, ought to be cut down. The subject is in any case not one of vital interest for every state, or one the treatment of which can be regarded as in any way urgent, and the replies of certain Government with regard to it indicate that there are difficulties in the way of concluding a universal agreement"

what the law on piracy should contain. Based on these reasons the idea was dismissed and never pursued<sup>47</sup>. Piracy was regulated at international level in 1958<sup>48</sup>, when the Geneva Convention was enacted; this convention has become the basis for UNCLOS adopted in 1982<sup>49</sup>. UNCLOS is binding on all State parties, and equally binding on non States parties, since the convention has become a customary international law<sup>50</sup>. The act of piracy is regulated by UNCLOS in which articles 100 to 107 and 110 provide detailed provisions on aspects of piracy. Piracy is defined under Article 101<sup>51</sup>. This definition is inadequate to eradicate current piracy as it limits the offence of piracy to four specific conditions, rendering the fight against piracy harder. First, an act amounts to piracy, only if the act is committed on the high Sea, this automatically precludes any acts committed under the waters of a state's jurisdiction. This has profound implications in eradicating the act of piracy and bringing pirates accountable under international law. The second condition is that the act of piracy must be carried between two vessels; this condition imposes limitations as it precludes any attacks within one vessel<sup>52</sup>. Thirdly, the act must be carried out by a private ship, and lastly but not least the act must be carried out for private purposes, thereby precluding politically motivated acts<sup>53</sup>. It is currently, evident that acts of piracy can take place without being condemned or regulated under international law. The impeding main three requirements will be separately studied to demonstrate that the convention fails to cover current circumstances of piracy in Somalia which has profound implication in the detention and prosecution of these individuals.

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<sup>47</sup> DONALD P. PARADISO "Come All Ye Faithful: How The International Community Has Addressed The Effects Of Somalia Piracy But Fails To Remedy Its Cause"; *Penn State International Law Review Summer 2010*; 29 *Penn St. Int'l L. Rev.* 187

<sup>48</sup> CONVENTION ON THE HIGH SEAS 1958; Done at Geneva on the 29 April 1958. Entered into Force on 30 September 1962. United Nations, Treaty Series, vol. 450, p. 11, p. 82

<sup>49</sup> United Nation Convention on the Law of the Sea (UNCLOS), 1982

<sup>50</sup> *ibid.*, footnote 45

<sup>51</sup> *ibid.*, footnote 47: Article 101 piracy consists of any of the following acts: (a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or private aircraft, and directed: (i) on the high seas, against another ship or aircraft, or aircraft, or against a person or property on board such ships or aircraft; (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any state; (b) any acts voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft; (c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) (b)

<sup>52</sup> ZOUK KEYUAN "New Development in the International Law of Piracy", *Chinese Journal of International Law*, July, 2009, 8 *Chinese J. Int'l L.* 323

<sup>53</sup> *ibid.*,

## a. UNLCOS Limitations

### i. Acts must be carried out on the high seas

The requirement that the act of piracy must be carried out on the high seas has profound implications in the fight against piracy in Somalia, since these acts cannot be regulated by the international law, nor are they regulated by the government of Somalia which is a failed state since 1991. The idea of confining the act of piracy to acts carried out on the “high seas” derives from the needs of states during the draft of the Convention. There was a presumption that any acts committed on the “high seas” was the concern of the international community, since such acts are obstacles to international trade<sup>54</sup>, while acts committed in the waters of a state’s jurisdiction were held to be matters of domestic jurisdiction. There was a presumption that states were capable of guarding their coastal waters and enforcing laws under their jurisdiction. Due to this, the international community did not feel, it was necessary to consider how to deal with acts of piracy, which takes place outside the “high Sea”.<sup>55</sup> This lack of consideration poses immense problems today, since; failed states such as Somalia are unable to exercise effective control over piratical acts under their jurisdiction. Statistics show that up to 70% of attacks have occurred in territorial waters<sup>56</sup> this means that these acts are not regulated by UNCLOS. This illustrates how ineffective and small the scope of the convention is. Clearly, UNCLOS cannot eradicate piracy, the requirement of the high sea jeopardises the aim of achieving the end of piracy.

### ii. Between two vessels

There is a prerequisite requirement for violence on the high sea to amount to piracy the attack must be carried out between two vessels. The two vessel requirement makes a

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<sup>54</sup> *ibid.*, see footnote 47: Article 87 “The high seas are open to all states, whether coastal or land locked. Freedom of the high seas is exercised under the conditions laid down by this both for coastal and land locked states: (a) freedom of navigation; (b) freedom of over flight; (c) freedom to lay submarines cables and pipelines, subject to VI; (d) freedom to construct artificial islands and other installations permitted under international law, subject to part VI; (e) freedom of fishing, subject to conditions laid down in section 2; (f) freedom of scientific research, subject to part VI and XIII. 2 these freedoms shall be exercised by all states with due regard for the interest of other states in their exercise of the freedom of the high seas, and also with due regard for the rights under this convention with respect to activities in the Area.

<sup>55</sup> LIEUTENANT (NAVY) MIKE MADDEN “*Trading the shield of Sovereignty for the scales of justice: a proposal for reform of international sea piracy law*” *University of San Francisco Maritime Law Journal* 2008-2009; 21.U.S.F. *Mar L.J.* 139

<sup>56</sup> YVONNE M. DUTTON, “*Bringing pirates to justice: A Case for including piracy within the jurisdiction of the International Criminal Court*”, *Chicago Journal of the International law* 2010; 11 *Chi J. Int’l L.* 197

distinction between a hijacking, which takes place on the high sea by its own crew or passengers, and piracy. For the purpose of international law, any criminal acts that occur within one vessel are matters of the vessel flag and must be dealt with by the flag state<sup>57</sup>. This provision derives from the “ICL’s view from 1956 that internal mutiny or seizure<sup>58</sup>” of a vessel cannot fall within the definition of piracy. History shows that pirates in the past operated through their vessels to capture other ships, therefore the definition was not problematic but rather consistent with the norms of pirate attacks in the past. However, pirate norms and skills have evolved with time; evidence shows that contemporary pirates can operate attacks with one vessel, and such attacks are the concern of the international community because hijackers impede the international trade and have far reaching consequences<sup>59</sup>. The requirement of the two vessels was put to test by two different incidents. The first incident, a Cruise-Liner Santa Maria was hijacked in 1962 by a Portuguese man who was acting against the regime, the act was not considered a piratical act, simply because a second vessel was not involved. Similarly, members of the Palestine Liberation Front hijacked the Achillo Lauro, in 1985<sup>60</sup>, the argument that such act amounts to piracy was dismissed, on the basis that the two vessels requirement was not met. The failure of characterising the incidents as piracy seems to have been based on incoherent and rather artificial rationales. One commentator has observed that characterising the ACHILLE LAURO attack, as piracy would be “more in accord with reason,” since “there seems to be no sound basis for distinguishing acts of depredation perpetrated by those who boarded from another ship”.<sup>61</sup> The above two cases show that piracy norms have evolved with time, and that contemporary pirates do not always operate or use their vessels as “attack platforms”<sup>62</sup>. The definition of piracy must evolve with time; the requirement of two vessels should be

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<sup>57</sup> M.D. FINK AND R.J. GALVIN “Combating pirates off the coast of Somalia: current legal challenges” *Netherlands International Law Review*, LVI:367-395, 2009

<sup>58</sup> JAMES KRASKA “Contemporary Maritime Piracy International law, Strategy, and Diplomacy at Sea” *Contemporary Military, Strategic, and Security Issues; Praeger 2011, page 129*

<sup>59</sup> LIEUTENANT (NAVY) MIKE MADDEN “Trading the shield of Sovereignty for the scales of justice: a proposal for reform of international sea piracy law” *University of San Francisco Maritime Law Journal 2008-2009; 21.U.S.F. Mar L.J. 139*

<sup>60</sup> VED P. NANDA, “Maritime Piracy: How can International Law and Policy Address This Growing Global Menace”, *Denver Journal of the International Law Policy Spring 2011, 39 Denv. J. Int’l L. & Pol’y 177*

<sup>61</sup> *Ibid.*, see footnote 57

<sup>62</sup> *Ibid.*,

omitted, in order to address modern piracy and to observe the aims and object of the UNCLOS Convention rather than creating loopholes in the convention.

### iii. For private ends

The definition of piracy further dictates for an act to amount to piracy, the acts to be carried out for private ends. The private ends requirement reflects the historical norms of piracy, pirates in the past would rob for personal gain. This means that the convention precludes acts, which are politically motivated<sup>63</sup>. This creates a loophole in the convention, because captured pirates can simply claim that their primary motives were for political ends. According to Rubin, piracy is closely linked to robbery rather than a “struggle for political power”.<sup>64</sup> Although it may seem unusual to incorporate into the definition of a crime the motives of the perpetrators, the requirement of private ends was not incorporated into the convention randomly or recklessly; rather it was the intention of the drafters to have such requirement for a purpose. The reason behind this rationale was that the offence of piracy had to be distinguished from that of privateering. Privateering was in essence, a State sponsored piracy, the commission of such acts was only authorised if the privateer had received from the monarchy a “letter of marque” this would have the effect of legitimising the seizure of ships on the high sea. On land, the privateer would have to prove before a court of law that during the seizure of the ship all the conditions set forth in the “letter of marque” were indeed met. If the capture of the vessel is deemed legitimate, the ship would be sold and the money shared between the Crown and the privateer<sup>65</sup>. Thus, the only difference between the acts of pirates and that of privateering lies in the “letter of marque” which legitimises the latter. This close similarity between the two offences is initially what triggered the private end requirement. During the eighteenth and nineteenth century, England was furiously fighting against the practice of piracy for failing to comply with the “formalities of licensing”<sup>66</sup> while privateering was legitimate. In light of this

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<sup>63</sup> ZOUK KEYUAN, “New Development in the International Law of Piracy”, *Chinese Journal of International Law*, July, 2009, 8 *Chinese J. Int'l L.* 323

<sup>64</sup> M.D. FINK AND R.J. GALVIN, “Combating pirates off the coast of Somalia: current legal challenges” *Netherlands International Law Review*, LVI:367-395, 2009

<sup>65</sup> LIEUTENANT (NAVY) MIKE MADDEN “Trading the shield of Sovereignty for the scales of justice: a proposal for reform of international sea piracy law” *University of San Francisco Maritime Law Journal* 2008-2009; 21. *U.S.F. Mar L.J.* 139

<sup>66</sup> *ibid.*,

historical background, it was a natural consequence that customary international law saw the requirement of private ends incorporated into the definition of piracy.<sup>67</sup> Subsequently, this element was included in the Harvard Draft Convention of piracy in 1932, followed by the 1958 Geneva Convention on the law of the High Seas and presently in the UNCLOS. The distinction between pirates and privateering based on the private ends motivation was appropriate up until the 19<sup>th</sup> century, What is peculiar is that the private end motivation has survived despite the fact that the practice of privateering was abolished in 1856 in the Paris Peace Conference. One explanation put forward during the Harvard draft Convention, was that the offence of piracy was sporadic and almost obsolete, and the drafters did not feel the need to persist on the matter since the offence was fading away. This is the reason why they contented themselves for the sake of convenience with the old definition of piracy, rather than carrying out a comprehensive research and reforming the definition.<sup>68</sup> It is currently apparent that the crime of piracy is on the rise, this means that the definition must be reformed, since it would be irrational for the present definition of piracy to derive its constitutive element from privateering. The requirement of “private end” is a major obstacle to prosecution of alleged pirates; pirates can challenge the prosecution on the basis that their motivations are politically motivated<sup>69</sup>. Somali pirates argue that they are protecting their coastal water; this means that their motives are political rather than private<sup>70</sup> unfortunately; UNCLOS is unable to deal with such situations. The definition must be re-examined and the private end requirement must be omitted, international law is a living instrument and can only be effective if it evolves with time, the application of out dated definition will not eradicate current piracy in Somalia.

## **b. Definition of piracy under SUA**

The SUA Convention was primarily drafted to regulate acts of maritime terrorisms; in any event, this convention is used as a tool to combat piracy, as it creates a bridge to close the

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<sup>67</sup> *ibid.*,

<sup>68</sup> *ibid.*,

<sup>69</sup> YVONNE M. DUTTON, “Bringing pirates to justice: A Case for including piracy within the jurisdiction of the International Criminal Court”, *Chicago Journal of the International Law* 2010; 11 *Chi J. Int’l L.*197

<sup>70</sup> ZOUK KEYUAN, “New Development in the International Law of Piracy”, *Chinese Journal of International Law*, July, 2009,8 *Chinese J. Int’lL.* 323

gaps and loopholes found in the UNCLOS in attempt to effectively prosecute captured pirates on the high seas. The limitations found in the UNCLOS, such as the high seas<sup>71</sup>, private end and the two vessel requirements were departed from in the definition of piracy under article 3 of the SUA convention.<sup>72</sup> Contrary to UNCLOS, SUA convention seems broader in terms that it “applies to offences committed even in territorial or archipelagic water or in port”<sup>73</sup>, with the only requirement that the ship is scheduled for international navigation<sup>74</sup>. States parties to this Convention have an obligation to incorporate into their domestic law, acts criminalising actions committed by pirates or armed robbers, furthermore, State parties have an obligation under Article 6<sup>75</sup> to adopt measures to establish jurisdiction over acts stipulated under article 3<sup>76</sup>. This convention was adopted after the incident of the Achille Lauro 1985, as stipulated above, a Palestinian Liberation Organisation hijacked the ship, thereby killing an American Citizen<sup>77</sup>. This case was a challenge to the UNCLOS for two reasons. Firstly, the requirement of the two vessel was not met<sup>78</sup>, because the hijackers were on board of the ship which meant that the offence could not have been classified as piracy, and thus outside the scope of UNCLOS. Secondly, the motivation of the hijackers did not meet the threshold required under UNCLOS since, for an act to amount to piracy hijackers must have private end motivations<sup>79</sup>. However, in this case it was apparent that the hijackers’ motivations were for public purposes: the release of

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<sup>71</sup> JOSEPH M. ISANGA “Troubled Waters: Combating Maritime Piracy With The Rule Of Law, Countering Persisting Contemporary Sea Piracy: Expanding Jurisdictional Regimes” *American University Law Review* June 2010; 59 *Am. U.L.Rev.*1267

<sup>72</sup> Convention for the Suppression of Unlawful Acts of Violence Against the Safety of Maritime Navigation (1988) Text 1678 UNTS 201; Article 3 “ Any person commits an offence if that person unlawfully and intentionally: (1) seizes or exercises control over a ship by force or threat thereof or any other form of intimidation; or (2) performs an act of violence against a person on board a ship if that act is likely to endanger the safe navigation on that ship; or ( 3) destroys a ship or causes damage to a ship or to its cargo which is likely to endanger the safe navigation if that ship”

<sup>73</sup> *ibid.*, see footnote 67

<sup>74</sup> *ibid.*, see footnote 70: Article 4 “ 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”

<sup>75</sup> *ibid.*, Article 6 “ Each party shall take measures as may be necessary to establish its jurisdiction over the offences set forth in article 3 when the offence is committed:”

<sup>76</sup> VED P. NANDA, “Maritime Piracy: how Can International Law and Policy Address This Growing Global Menace”, *Denver Journal of International Law and Policy* Spring 2011, 39 *Denv. J. Int’l L. & Pol’y* 177

<sup>77</sup> *ibid.*,

<sup>78</sup> *ibid.*,

<sup>79</sup> *ibid.*, see footnote 47, UNCLOS Article 101; (a) any illegal acts of violence or detention, or any act of depredation, committed for private ends....”

prisoners<sup>80</sup>. Due to the UNCLOS flaws, the incident did not meet the definition of piracy. Subsequently, SUA was adopted in order to fill the gaps. In any event, it is noteworthy, that SUA only binds State parties to the Convention because the Convention has not yet become customary international law. Somalia among other States are not party to this Convention, which limits its application to Signatory state, who have a nexus to the crime thus lacking the universal application offered by UNCLOS.<sup>81</sup>

### C. Modern Piracy in the coast of Somalia

*“We don’t consider ourselves sea bandits. We consider sea bandits [to be] those who illegally fish and dump in our sea”<sup>82</sup>*

Piracy off the Somali coast started in the 1990’s, on a small scale and mostly towards trawlers engaged in illegal fishing in the area<sup>83</sup>. However, the issue has started to attract international attention only since 2007, when attacks escalated and all kind of ships were being attacked and hijacked for ransoms.<sup>84</sup> For instance, major attacks include the ship carrying humanitarian aid provided by the World Food Program, the attack on an American owned cruise liner<sup>85</sup>, and the hijacking of a Saudi oil tanker “The MV Sirius Start”<sup>86</sup>. Evidence

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<sup>80</sup> *ibid.*, see footnote 74

<sup>81</sup> *ibid.*,

<sup>82</sup> HARRIS, J. (05 January 2009). *“You are being lied to about pirates”*. The Independent. Available from: <http://www.independent.co.uk/opinion/commentators/johann-hari/johann-hari-you-are-being-lied-to-about-pirates-1225817.html> Accessed: 06/07/2011

<sup>83</sup> VED P. NANDA, *“Maritime Piracy: how Can International Law and Policy Address This Growing Global Menace”*, *Denver Journal of International Law and Policy Spring 2011*, 39 *Denv. J. Int’l L. & Pol’y* 177

<sup>84</sup> DENISE RUSSELL *“Who rules the waves? Piracy, Overfishing and Mining the Ocean” first edition 2010*, by Pluto press; page 71

<sup>85</sup> READ, S. (30 November 2008). *“Somalia Pirates Attack Cruise Ship”* Sky News. Available from : <http://news.sky.com/skynews/Home/World-News/Somali-Pirates-Attack-Luxury-Cruise-Ship-Nautica-Carrying-British-American-And-Australian-Tourists/Article/200811415167952> Accessed: 08/07/2011

<sup>86</sup> Mohamed Olad Hassan (Sunday, January 11, 2009) *“5 Pirates Drown with Share of \$3 Million Ransom a Day After Freeing Saudi Tanker”* the Washington post. Available from: <http://www.washingtonpost.com/wp-dyn/content/article/2009/01/10/AR2009011002205.html> Accessed: 08/07/2011

shows that 50% of Somalia population is dependent on international humanitarian aid,<sup>87</sup> and 90%<sup>88</sup> of that food arrives through the sea, which meant that action needed to be taken urgently to “stamp out piracy”<sup>89</sup>, as briefly, discussed above the international community has done this in the form of warships and several Security Council resolutions.

### **a. Alleged cause of Piracy in Somalia**

As already established above, the offence of piracy has been on decline for many years, in this part of the thesis, it will be discussed what triggered or rather motivated Somali fisher men to resort to piracy. Many reasons have been put forward which attempt to explain the reasons, piracy has now become an option in Somalia. There seems to be three prevailing cause roots to piracy in Somalia, these are the illegal fishing, illegal toxic dumping, and lack of central government have all contributed to the renaissance of the piracy phenomenon in East Africa. Each of these cause roots will be examined in turn in order to evaluate the impact these causes had in reviving piracy in Somalia.

Current literature relating to piracy in Somalia largely omits an analysis of the reasons for the “piracy threat”. When the reasons are considered, Somalia’s history of being a collapsed state is often presented as the root cause for the materialisation of the piracy threat<sup>90</sup>, however, it seems that this might not be the whole story. Having looked at the power relations, often presented in the development of international law and the subjective identity of the pirate in the past, it seems that one should be hesitant to believe that pirates are just, “ruthless criminals who exploit very vulnerable people at sea”<sup>91</sup>. As held above, most pirates do not consider themselves to be pirates and argue that they are mere “coast

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<sup>87</sup> Mohamed Olad Hassan (Sunday, January 11, 2009) “5 Pirates Drown with Share of \$3 Million Ransom a Day After Freeing Saudi Tanker” the Washington post. Available from: <http://www.washingtonpost.com/wp-dyn/content/article/2009/01/10/AR2009011002205.html> Accessed: 08/07/2011

<sup>88</sup> The world Food programme , available from: <http://www.wfp.org/stories/two-new-piracy-incidents-underline-threat-wfp-shipments> accessed 03/08/2011

<sup>89</sup> See preamble of Security Council Resolution 1816, expressing the grave concern regarding “ the threat that acts of piracy and armed robbery against vessels pose to the prompt, safe and effective delivery of humanitarian aid to Somalia”

<sup>90</sup> KONTOROVICH E. (2009). “Piracy and International law” *Global Law Forum*, Available from: <http://www.globallawforum.org/ViewPublication.aspx?ArticleId=96> Accessed: 06/07/2011

<sup>91</sup> Ahmed, S. (29 April 2008) “High-tech pirates are no romantic figures”. CNN News. Available from: <http://edition.cnn.com/2008/CRIME/04/29/pirates/index.html> Accessed: 06/07/2011

guards”, responding to the illegal, unreported and unregulated (UUI) fishing and hazardous waste dumping that is taking place in their sea.<sup>92</sup> Names such as “National Volunteer coast Guard of Somalia” and Somalia Marines” are just a testimony of the initial motivation of these men; however, their current motivation lies in the large ransom they receive<sup>93</sup>. At this point, it seems fair to assess the merits of these claims. The failed state can definitely be one of the reasons for the emergence of piracy<sup>94</sup>; equally, the failed state has attracted or rather enabled foreign vessels to exploit Somali waters.

**i. Somalia a failed State**

*“[P]iracy is a symptom of the State of anarchy which has persisted in [Somalia] for over 17 years.”*<sup>95</sup> ~ UN Secretary- General Ban Ki moon, December, 2008

The history of Somalia has been horrendous; during the cold war, the horrific regime of Siad Barre was in fact supported by the United States, for Somalia was a regional counterpoint to the communist state of Ethiopia. This in itself was sufficient reason for the United States to shut their eyes to the human rights abuses taking place in the country.<sup>96</sup> At the end of Cold War, foreign aid was virtually stopped, leaving Somalia with tons of weapons and a government on the edge of collapse. The break –out of a civil war was therefore hardly surprising and Somalia is now in its 20<sup>th</sup> year without an effective central government.<sup>97</sup> *“The absence of designated policing authorities has created an ongoing security vacuum [that] has encouraged the clan violence and anarchy that makes Somalia a global poster child for a failed state politically, economically, and socially.”*<sup>98</sup> This lack of central government means that there are no national police and security services, no formal

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<sup>92</sup> Penjabi, R (2010) *“The Pirates of Somalia: Opportunistic Predators or Environmental Prey?”* William & Mary Environment law & policy Review. Vol.34 pp.377-491

<sup>93</sup> VED P. NANDA, “Maritime Piracy: how Can International Law and Policy Address This Growing Global Menace”, *Denver Journal of International Law and Policy Spring 2011*, 39 *Denv. J. Int’l L. & Pol’y* 177

<sup>94</sup> *ibid.*,

<sup>95</sup> MARIO SILVA “Somalia: State Failure, Piracy, and the Challenges to International Law”, *Virginia Journal Of International Law volume 50-Issue 3-,2010: Page 553*

<sup>96</sup> *ibid.*,

<sup>97</sup> MARIO SILVA, “ Somalia: State failure, Piracy, and the Challenge to international law” *the Virginia Journal of International Law Association, (50) 2010*

<sup>98</sup> *ibid.*,

national legal system and most importantly for the purpose of this study, no coastguards to protect Somali territorial waters. The absence of coastguards has facilitated two types of foreign exploitations illegal fishing and toxic dumping.

## **ii. Illegal, Unreported and Unregulated fishing**

The modern practice of piracy in Somalia seems to have been triggered not for private and personal gain as the offence was known in the past, but rather fisher men have initiated the practice of piracy for the protection of the coast of Somalia from illegal fishing and toxic dumping. Somali waters, are one of the richest in the globe in relation to fish stocks, these include tuna, shrimps and lobsters, which have all been plundered by foreign fishing vessels.<sup>99</sup> The foreign exploitation of fish<sup>100</sup> in the Somalia waters is due to the high global demands of fish. This high demand of fish has led some companies to break international law, in order to obtain cheap catch. It has been estimated that \$300 million worth of fish is taken every year from the Somali waters. Methods, which are officially illegal, such as the use of dynamite and the destruction of coral reefs, have allegedly been used in Somalia this is due to the absence of a functioning coastguard<sup>101</sup>. Foreign exploitations in the Somalia coastal water had a profound implication, on the Somalia Coastal Community, whose only income derives from fishing stocks. Moreover, Somalia fisher men were intimidated by large trawlers when fishing in their waters.

## **iii. Waste and toxic dumping**

Somalia has become a land, which can be labelled a “dumping ground” for hazardous wastes. The dumping of toxic waste from developed countries to the developing world can be explained by the “Not In My Backyard” phenomenon: “nations benefiting from modern economic and scientific developments, unwilling to bear the environmental burdens of their economic activities, have often sought to shift those burdens to nations that reap none of

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<sup>99</sup> BAWUMIA, M. & SUMAILA, R. “Fisheries, Ecosystems and Piracy: A Case Study for Somalia” *The University of British Columbia, fisheries Centre Working paper 2010-04*

<sup>100</sup> VED P. NANDA, “Maritime Piracy: how Can International Law and Policy Address This Growing Global Menace”, *Denver Journal of International Law and Policy Spring 2011*, 39 *Denv. J. Int’l L. & Pol’y* 177

<sup>101</sup> PANJABI, R. “the pirates of Somalia: Opportunistic Predators or Environmental Prey?” *William & Mary Environment Law & Policy Review. Vol.4 (2). Pp377-491*

the benefit's<sup>102</sup>. The advantages of developing countries for waste dumping are plain; for instance the disposal of a ton of waste to the United States coast \$ 2500<sup>103</sup> compared to an average of \$3<sup>104</sup> in developing countries; furthermore, there are generally no environmental regulations or risk of litigations.<sup>105</sup> In general, there is secrecy around proposals for the dumping of toxic wastes,<sup>106</sup> however, on occasion such proposal leak. This was the case in 1991, when a controversy regarding a proposal deal arose between Swiss, Italian firms and the Somali Minister of Health, in relation of the dumping of 500,000 metric tons of toxic waste over a period of twenty years in exchange for \$80 million, and perhaps unsurprisingly, a substantial bribe for the Minister of health.<sup>107</sup>

Over the years a numerous complaints have been made by the Somalia leaders. In 1995, leaders of all Somali political fractions drafted a formal complaint to the United Nations, the European Union and the Arab League, in which they have expressed their concerned in relation to the illegal fishing and toxic waste dumping occurring in their waters. In the complaint, the United Nations was asked to set up an organisation, which would have the mandate to protect their waters until an effective government could be formed in Somalia. In addition to this, the Ministers of Fisheries from the Putland region have made an appeal to various nations and international organisations, in assisting them to tackle the illegal activities in their sea. Ahmedou Ould- Abdallah, a UN envoy for Somalia, states that European and Asian Companies are, dumping toxic and nuclear waste off the Somalia Coast. He declares, "What is most alarming here is that nuclear waste is being dumped. Radioactive uranium waste that is potentially killing Somalis and completely the Ocean"<sup>108</sup>

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<sup>102</sup> ANDREW WEBSTER- MAIN "Keeping Africa out of the Global Backyard: A Comparative Study of the Basel and Bamako Conventions" *Environs Environmental Law & Policy Journal*. Vol. 26(1) pp.65-94

<sup>103</sup> *ibid.*,

<sup>104</sup> *ibid.*,

<sup>105</sup> *ibid.*,

<sup>106</sup> BRIAN, B. & MOHAI, P. *Race and the Incident of environment Hazards*, London, Westview Press (1992)

<sup>107</sup> CLAPP, J *Toxic Exports; the Transfer of Hazardous Wastes from Rich to poor Countries*. London, Cornell University Press (1963)

<sup>108</sup> DONALD P. PARADISO, "Come All Ye Faithful: How The International Community Has Addressed The Effects Of Somali Piracy But Fails to Remedy Its Cause" *Penn State International Law Review Summer 2010*

## Adding Piracy To The Rome Statute: A Good Idea?

Unfortunately, the Somalis concerns have not been given much thoughts and attentions; this evidence can be inferred from the fact that among all the Security Council Resolutions that have been passed in relation to Somali piracy over the past years, not a single Resolution has mentioned the problems of UUI fishing and toxic dumping. The lack of action by the International Community in addressing the issues of Somalia in relation to the illegal fishing and dumping of toxics, has allowed pirates to justify their actions, this further allowed piracy to become an accepted industry in Somalia.<sup>109</sup>

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<sup>109</sup> *ibid.*,

## Chapter 2. Current International Response: Ineffective

The crime of piracy has been dramatically increasing in the past few years. This had the effect of threatening the lives and property of the international Community. Due to the commercial and human costs, and the threat to regional and international security at sea<sup>110</sup>, the offence has become on top of the agenda of the international community. The international community have collectively adopted measures to tackle the fast growing activities of piracy in Somalia. In this Chapter the current international measures will be scrutinised, it will be assessed, whether the current measures have achieved their aim and object, which is to eradicate the crime of piracy in Somalia. In this respect, the aim of this chapter is to establish that the current international responses to piracy are ineffective.

### A. Naval Patrol on the high Sea

Due to the obstacle caused by pirates on the high sea, the well established customary principle “ Mare liberum” freedom of the sea as developed by Grotius in 1609<sup>111</sup> has drastically been jeopardised by Somali pirates who threaten international commerce. Navies from the NATO, EU and many other countries including the United State, Russia, China, India, and Japan, have all send their warships in the affected areas, in attempt to protect trade and the global supply and security.<sup>112</sup> In 2008, the UN Secretary General Ban Ki Moon, has requested NATO to protect the safe navigation of the World Food Programme send to Somalia for humanitarian assistance.<sup>113</sup> The role of NATO was further extended to cover

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<sup>110</sup>VED P. NANDA, “Maritime Piracy: how Can International Law and Policy Address This Growing Global Menace”, *Denver Journal of International Law and Policy Spring 2011*, 39 *Denv. J. Int’l L. & Pol’y* 177

<sup>111</sup> JOSHUA MICHAEL GOODWIN “Universal Jurisdiction and the Pirate: Time for an Old Couple to Part”, *Vanderbilt journal of Transnational law, May 2006*, 39 *Vand.j. Transna’lL.*973

<sup>112</sup> *ibid.*, see footnote 110

<sup>113</sup> *ibid.*,

issues of piracy from March 2009, since then NATO has been conducting operation Ocean Shield<sup>114</sup>.

In essence, the European Union's operation EU-NAVFOR, has been conducted in accordance of the UN Security resolutions 1814,1826,1838,1846, and 1897<sup>115</sup>. Pursuant to the EU Council decision of December 8, 2008, the EU for the first time has launched a maritime operation.<sup>116</sup> The operation's mandate was to ensure the protection of: "(1) shipments of the World Food Programme carrying food aid to displaced persons in Somalia and (2) vulnerable cruising vessels off the Somalia coast".<sup>117</sup> The Council of the EU has extended the operation, up until 12 December 2012; this operation has taken the lead role in the SHADE (Shared Awareness and Deconfliction) mechanism.<sup>118</sup>

Since, the deployment of navies, the number of piracy attacks in the Gulf of Aden has diminished. However, activities of piracy continue, attacks have simply intensified in other areas where navies have not yet been deployed.<sup>119</sup> Therefore, it follows from this that the efficiency of deployed navies is only effective in time and space. The high sea is a very large geographical area; this means that it is impossible to deploy navies all over the high seas. Although this measure has diminished the level of piracy attacks in the navies protected areas, it is not a feasible measure to tackle the issue of piracy with warship navies. A more profound measure must be envisaged by the international community, one with a long lasting solution to this ever growing phenomenon of piracy.

### **a. Powers of Navies and their capacity to apprehend and detain**

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<sup>114</sup> VED P. NANDA, "Maritime Piracy: how Can International Law and Policy Address This Growing Global Menace", *Denver Journal of International Law and Policy Spring 2011*, 39 *Denv. J. Int'l L. & Pol'y* 177

<sup>115</sup> *ibid.*,

<sup>116</sup> Council Decision 2008/918/CFSP of 8 December 2008. Available from: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:330:0019:0020:EN:PDF> Accessed : 14/07/2011

"To contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast"

<sup>117</sup> *ibid.*, see footnote 114

<sup>118</sup> *ibid.*,

<sup>119</sup> *ibid.*,

Pirates in Somalia are by nature ruthlessly violent and dangerous, this lead powerful state to conceive or rather overrate the importance of military deterrence<sup>120</sup>. The role of navies is to ensure the safety of international trade in the Gulf of Aden. They have a mandate to suppress and prevent acts of piracy<sup>121</sup>. Ironically, what remains unsolved is the treatment of pirates after capture, according to the U.S. National Security Council “Somali based piracy is flourishing because it is... nearly consequence-free”<sup>122</sup>. Navies are faced with many difficulties after they have captured suspected pirates.

Firstly, there is no appropriate place on board of their vessels to detain pirates<sup>123</sup>. Moreover, they can only detain suspected pirates for a short period before taking them to a court<sup>124</sup>, otherwise the detention will amount to a deprivation of liberty, as held in *Medvedyev and Others v. France*<sup>125</sup>. Secondly, some States do not wish to capture and prosecute pirates, for practical reasons, such as lacking acts criminalising piracy in their domestic court.<sup>126</sup> Thirdly, due to complex issues related to the collection of evidence, some State lack the political will, they will rather release pirates, because they do not wish to overcrowd their judicial, nor are they willing to overcrowd their immigration system. This is due the principle of non refoulement<sup>127</sup>, in case of an acquittals or where pirates are found not guilty, mainly due to lack of evidence, civilised nations have a duty, not to return

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<sup>120</sup> RYAN P. KELLEY “UNCLOS, But No Cigar: Overcoming Obstacles to the prosecution of Maritime piracy” *Minnesota Law Review* June, 2011, 95 *Minn.L.Rev.*2285

<sup>121</sup> EUGENE KONTOROVICH, STEEVN ART, “An Empirical Example Examination of Universal Jurisdiction for piracy”, *American Journal of International Law* July, 2010,104 *Am. J. Int’l.L.* 436

<sup>122</sup> EUGENE KONTOROVICH “A Guantanamo On The Sea: The Difficulty of prosecuting pirates and terrorists” *California Law Review* February 2010, 98 *Cal. L. Rev.* 243

<sup>123</sup> United Nation Security Council 25 January 2011, letter dated 24 January 2011 from the Secretary- General to the President of the Security Council; S/2011/30 page 23 para:53-54

<sup>124</sup> *MEDVEDYEV AND OTHERS v. FRANCE* (Application no. 3394/03) on the 29 March

<sup>125</sup> *ibid.*, “Applicants were Cambodian apprehended by the French Navy, and were brought to france, were they convicted of drug smuggling. It was held by the court that the detention amounted to a deprivation of liberty within the meaning of article 5”

<sup>126</sup> YVONNE M. DUTTON “Bringing pirates to justice: A Case for including piracy within the jurisdiction of the International Criminal Court” *Chicago Journal of the International law* 2010; 11 *Chi J. Int’l L.*197

<sup>127</sup> YVONNE M. DUTTON “Pirates and impunity: is the threat of asylum claims a reason to allow pirates to escape justice?” *Fordham International Law journal* January, 2011, (34*Fordham Int’ L. J.* 236)

individuals in places where they could face persecution or torture<sup>128</sup> such is the case of Somalia due to the violent civil war.<sup>129</sup>

The patrol of warship navies in the Gulf of Aden has diminished the level of piracy attacks however; the crime of piracy has not ceased but rather has intensified in other areas. It is clear that warship navies do not have substantive powers to eradicate the crime of piracy. The navies can only prevent piracy; in general, they apprehend pirates disarm them just to release them. This approach is not effective because most pirates know that “they will literally get away with their illegal conduct”<sup>130</sup>, cases where pirates are apprehended by navies and brought to justice are the exception rather than the rule. The patrol of navies is ineffective, they can do very little to contribute to the eradication of piracy, certainly, the idea that warship navies current measures of capture and release pirates will eradicate piracy is unconceivable. To make the action of warship navies effective the current approach must be departed from, captured pirates should not be tapped on the shoulder and released, rather the rule should be prosecution and the exception release. Until the current approach is not drastically reformed, and the natural consequences of captured pirates is not prosecution, the crime of piracy will only increase and a culture of impunity will reign on the Gulf of Aden and the Coast of Somali. This will drastically affect the international community’s economy, social, as well as international peace and security.

## **B. Universal Jurisdiction**

*“Pirates are common enemies, and they are attacked with impunity by all, because they are without the pale of the law. They are scorers of the law of nations; hence, they can find no*

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<sup>128</sup> *ibid.*, see footnote 127

<sup>129</sup> *ibid.*,

<sup>130</sup> YVONNE M. DUTTON “Bringing pirates to justice: A Case for including piracy within the jurisdiction of the International Criminal Court” *Chicago Journal of the International Law* 2010; 11 *Chi J. Int’l L.*197

*protection in that law. They ought to be crushed by us...and by all men. Thus is warfare by all nations*<sup>131</sup>

The examination of universal jurisdiction is complex, due to the numbers of ways the term is used. In essence, “universal jurisdiction refers to an assertion of jurisdiction over an actor whose conduct occurred in whole or in part outside the prosecuting state’s territorial boundaries”.<sup>132</sup> The crime of piracy is one of the oldest crimes, which enjoys a complete right of universal jurisdiction recognised by international customary law. This is due to the fact that pirates were held to be the enemies of mankind “hostis humani generis”<sup>133</sup>, this principle derives from the fact that pirates considered themselves not to be the subject of any authority. Pirate attacks are indiscriminate since they attack vessels on the high seas regardless the nationality of the vessels, thus no state could be held responsible for the acts of piracy under international law<sup>134</sup>. Piracy from its inception is held to be the classic example of a crime for which universal jurisdiction can be exercised<sup>135</sup>. This notion was confirmed in the *United States v. Brig Malek Adehel* (1844)<sup>136</sup>, in this case the court held that universal jurisdiction applies in cases of piracy because: “pirates commit hostilities upon the subjects and property of any and all nations without regard to right or duty, or any pretence of public authority”. More recently, the principle of universal jurisdiction was confirmed in the *Arrest Warrant* case<sup>137</sup>. In essence, the idea of universal jurisdiction is that any state has the power to try and punish a person who has committed a particular international crime

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<sup>131</sup> TINA GARMON “International law of the Sea: Reconciling the Law of Piracy and Terrorism in the Wake of September 11<sup>th</sup>”, *Tulane Maritime Law Journal* Winter 2002, 27 *Tul. Mar.L.J.* 257

<sup>132</sup> MARK A. SUMMERS “the International Court of Justice’s Decision in *Congo v. Belgium*: How has it affected the development of a principle of universal jurisdiction that would obligate all states to prosecute war criminals” *Boston University International Law Spring 2003*, 21 *B. U. Int’l L. J.* 63

<sup>133</sup> HELMUT TUERK “The Resurgence of Piracy: a phenomenon of modern times”, *University of Miami International and Comparative Law Review* Fall, 2009, 17 *U. Miami Int’l & Comp.L.Rev.* 1

<sup>134</sup> *Ibid.*,

<sup>135</sup> LUIS BENAVIDES “The Universal Jurisdiction Principle: Nature and Scope”, *Anuario Mexicano de Derecho Internacional*, Vol.1, 2001, pp.19-96

<sup>136</sup> YVONNE M. DUTTON “Bringing pirates to justice: A Case for including piracy within the jurisdiction of the International Criminal Court” *Chicago Journal of the International Law* 2010; 11 *Chi J. Int’l L.* 197

<sup>137</sup> *Democratic Republic of Congo v. Belgium*, Judgement ICJ Reports 2002, p 3 Joint Separate Opinion of the Judges Higgins, Kooijmans & Buergenthal, at 61

(delicta juris gentium)<sup>138</sup>. According to Professor Guillaume; the application of universal jurisdiction is limited to the crime of piracy:” [le droit international] n’a longtemps connu et ne connaît encore qu’un seul cas de compétence universelle absolue, celui de la piraterie”<sup>139</sup>. Judge Moore, also retains this position, in the Lotus case<sup>140</sup>, it was stated “piracy by law of the nations, in its jurisdictional aspects is sui generi”<sup>141</sup>. More importantly, the principle of universal Jurisdiction is mirrored, under article 105 of the UNCLOS, which provides that on the high seas or any place outside the jurisdiction of any state “every state has the right to seize the pirate ship, arrest the pirates and seize the property on board”<sup>142</sup>. This provision is an exception to the principle governing jurisdiction on the high seas, which stipulates, “Ships on the high seas are subject to the exclusive jurisdiction of the flag state”<sup>143</sup>.

Currently, two international treaties regulate the crime of piracy and thereby provide jurisdictional bases for states to prosecute such acts in their domestic courts. In the following part of this thesis it will be discussed how these two treaties facilitate or complicate the application of universal jurisdiction of piracy, it will be demonstrated that both UNCLOS and SUA are ineffective in dealing with piracy, because they are both flawed in terms of being an effective legal instrument for the purpose of prosecuting pirates.

#### **a. UNCLOS flaws: inability to provide a tool for universal jurisdiction and a mechanism for prosecution**

The definition of piracy under Article 100 of UNCLOS is based on four core elements, these are: 1) an illegal act involving violence, detention or depredation 2) committed for private

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<sup>138</sup> LUIS BENAVIDES, “The Universal Jurisdiction Principle: Nature and Scope”, *Anuario Mexicano de Derecho Internacional*, Vol.1, 2001, pp.19-96

<sup>139</sup> *ibid.*,

<sup>140</sup> S.S Lotus (Fr. V. Turk), 1927 P.C.I.J (ser. A) No. 10 (Sept.7)

<sup>141</sup> *ibid.*, see footnote 137

<sup>142</sup> UNCLOS Article 105

<sup>143</sup> HELMUT TUERK “The Resurgence of Piracy: a phenomenon of modern times”, *University of Miami International and Comparative Law Review* Fall, 2009, 17 *U. Miami Int’l & Comp.L.Rev.*1

ends 3) on the high sea 4) involving at least two ships<sup>144</sup>. As studied above these requirements impede or rather weaken; the convention as a tool for judicial prosecution and thereby fails to be an instrument which achieves the eradication of piracy. The first requirement is criticised by many scholars<sup>145</sup> since it precludes any attacks carried out without the knowledge of the crew and without the use of violence<sup>146</sup>. The second requirement has been the debate and critics of international lawyers; this requirement precludes any piratical attacks, which have political motivations. It follows from this that any political motivation becomes a legitimate defence according to this definition.<sup>147</sup> The third condition “the two ship” requirement precludes munity as an act of piracy simply because the attack does not involve two ships. And finally, the fourth requirement further limits the possibilities that States could exercise universal jurisdiction, since an act will come under the definition of piracy only if it is carried out on the “high seas”, this weakens the UNCLOS especially in the situation of Somalia where legal enforcement are nonexistent due to the failed state<sup>148</sup>. To deprive the international community from exercising universal jurisdiction based on the notion that the crime took place on the wrong location seems rather an irrational requirement. To demonstrate this irrationality, an act amounts to piracy if it is committed at 12.1 nautical miles, while the same attack carried at 11.9 miles<sup>149</sup>, a little distance further does not amount to piracy for the purpose of international law seems rather maladroit. This requirement limits the scope of UNCLOS as a tool for judicial prosecution, which means most attacks on the Gulf of Aden (narrow area surrounded by states) by Somali pirates do not amount to piracy for the purpose of international law<sup>150</sup>. This restriction was overcome temporarily by Resolution 1846, adopted by the United

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<sup>144</sup> DIANA CHANG “piracy laws and the effective prosecution if pirates” *Boston College International and Comparative Law Review*, Spring 2010, 33 B.C. Int’l & Comp. L. Rev.273

<sup>145</sup> FINK M. AND GALVIN, R (2009). “Combating pirates off the coast of Somalia: current legal Challenges”. *Netherlands International law Review*. Vol. 56.pp.367-396;

<sup>146</sup> *ibid.*, see footnote 143

<sup>147</sup> *ibid.*,

<sup>148</sup> ROBERT S. JEFFREY “An efficient Solution in Time of Economic Hardship: The Right to Keep And Bear Arms in Self- Defence against pirates” *Journal of Maritime Law and Commerce* October, 2010, 41 J. Mar. L & Com. 507. “the United Nations Security described the Situation in Somalia as a crisis, nothing the lack of capacity of the Transnational Federal Security Government to interdict, or upon interdiction to prosecute pirates or petrol and secure the waters off the coast of Somalia, including the international sea-lanes and Somalia’s territorial waters”

<sup>149</sup> MICHAEL BAHAR “Attaining Optimal Deterrence at Sea: A Legal and Strategic Theory for Naval Anti--Piracy Operation”. *Vanderbilt Journal of Transnational Law* January 2007, 40 Vand. J. Transnat’l L.1

<sup>150</sup> EUGENE KONTOROVICH “A Guantanamo on the sea”: the difficulty of prosecuting pirates and terrorists”, *California Law Review* February 2010,(98 Cal. L. Rev. 243)

Nation Security Council (UN SC) acting under the Charter's Chapter VII. This resolution, gave patrolling warships an exceptional right to enter the Somalia Sovereign territory to capture pirate. This Resolution, respectfully stipulates, States and regional organisations that are engaged in cooperation with the Somali Transnational Federal Government (TFG) "may enter Somalia's territorial waters and use all necessary means"<sup>151</sup>. However, facts remain that the Council only allows nations that have entered into an agreement with the TFG, to enter into the territory of Somalia. Under Resolution 1816<sup>152</sup>, the Council still requires an advance notification to the TFG before consented states can enter in the sovereign territory of Somalia, this does not seem to "be a revolutionary in respect to international law."<sup>153</sup> Adopting UN SC Resolutions is not a cure, but rather a temporary relive to the existing epidemic of piracy in Somalia, this objective is even made clear when the Resolution 1851 "recalls that future recommendations on ways to ensure the long term security".<sup>154</sup> Furthermore, resolution 1846 stipulates, "the authorisations only applies to Somalia"<sup>155</sup>, thus, from this statement, it must be born in mind that the resolution's scope is limited to a specific area and further limited to a framework of 12months<sup>156</sup>. Clearly, such isolated and timely limited resolution cannot be a solution to the rooted obstacle of UNCLOS in facilitating the prosecution of pirates. Rather a more radical and long lasting reform must be made to UNCLOS with the aim of rendering the convention a tool that facilitate the prosecution of pirates.

Accordingly, under Article 105 of UNCLOS, States can exercise Universal Jurisdiction for piratical offences, thus in theory any state can capture and prosecute pirates. Moreover, according to article, 100 states have an obligation to "cooperate to the fullest possible

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<sup>151</sup> United Nation Security Council Resolution 1846(2008) adopted by the Security Council at its 6026<sup>th</sup> Meeting, on the 2<sup>nd</sup> of December 2008

<sup>152</sup> United Nations Security Council Resolution 1816 (2008), 2 June 2008, S/RES/1816 (2008)

<sup>153</sup> M.D. FINK AND R.J. GALVIN "Combating pirates off the coast of Somalia: current legal challenges" *Netherlands International Law Review*, LVI:367-395, 2009

<sup>154</sup> United Nations Security Council Resolution 1851 (2008) adopted by the Security Council at its 6064<sup>th</sup> Meeting, on 16 December 2008, S/ RES/1851(2008)

<sup>155</sup> *ibid.*, see footnote 149

<sup>156</sup> *ibid.*,

extent in the repression of piracy”,<sup>157</sup> there is no obligation to prosecute<sup>158</sup>, nor is there an obligation under UNCLOS for states to have an act criminalising piracy in their domestic law<sup>159</sup>. On the surface this Convention seems rather a perfect tool that deals with piracy, however, in practice the convention is flawed and incapable to tackle modern piracy of Somalia. In any event, this article implicitly limits the right of prosecution to the state, which has captured the pirates “the court of the State which carried out the seizure may decide upon the penalties to be imposed”.<sup>160</sup> This clearly suggests that although piracy is a crime under universal jurisdiction, apprehended pirates can only be prosecuted by the captured states and not by a third state<sup>161</sup>. Moreover, UNCLOS does not provide a mechanism for the prosecution and punishment of pirates since it gives the seizing state the right to “decide upon penalties”, thus some states give little prison time, while others impose a life time in prison. Furthermore, UNLCOS lacks an enforcing mechanism, the convention merely, describes the conditions under which universal jurisdiction applies, it disregards or fails to empower an international tribunal which would have the jurisdictional power to adjudicate on cases of piracy.<sup>162</sup> States have a right to exercise universal jurisdiction to prosecute pirates, mark the word; “ a Right” Not “an Obligation”, this means that states do not have an obligation to arrest and prosecute alleged pirates, but they can do so if they so wish to.<sup>163</sup> Furthermore, UNCLOS lacks a supervisory mechanism of enforcement, to ensure that State have incorporated into their domestic law the UNCLOS convention, which would in essence, allow states to prosecute pirates under the universal jurisdiction. This lack of enforcement mechanism on the part of UNCLOS is a key element, which makes states who failed to implement UNCLOS, remain passive in respect to piracy, since they lack the legal mechanism to prosecute.

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<sup>157</sup> The United Convention on the Law of the Sea (1982), Article 100

<sup>158</sup> UNCLOS Article 105, This is indicated by: “*may decide upon the penalties to be imposed*”

<sup>159</sup> DOUGLAS GUILFOYLE “Towards a Robust Legal Framework on Piracy: Law and Politics” *Conference on Global Challenge, Regional Responses: Foreign a Common Approach to Maritime Piracy. April 18-19,2011, Dubai, United Arab Emirates*

<sup>160</sup> The United Convention on the Law of the Sea (1982), Article 105

<sup>161</sup> JAMES THUO GATHII “Jurisdiction to Prosecute Non- National Pirates Captured By Third States Under Kenyan and International law” *Loyola of Los Angeles International and Comparative Law Review Summer 2009, 31 Loy. L.A. Int’l & Comp. L. Rev.363*

<sup>162</sup> DIANA CHANG, “piracy laws and the effective prosecution Of pirates” *Boston College International and Comparative Law Review, Spring 2010, 33 B.C. Int’l & Comp. L. Rev.273*

<sup>163</sup> BARRY HART DUBNER, KAREN GREENE “On The creation Of a New Legal Regime to Try Sea Pirates” *Journal of Maritime Law and Commerce, 41 J. Mar.L. & Com.439*

## **b. SUA Flaws: in respect to the application of Universal jurisdiction**

SUA was initially enacted to address maritime Terrorism, therefore, the convention does not use the term piracy, when referring to the offences it regulates<sup>164</sup>. Although SUA has adopted a wider definition for the purpose of piracy, it is apparent that this convention is not complete on three grounds. Firstly, the requirement under the Convention, that Signatory States should either prosecute or extradite offenders found under their jurisdiction,<sup>165</sup> has the effect of limiting the principle of universal jurisdiction to states that have a nexus to the crime<sup>166</sup>. Furthermore, the statute has not been applied many times, this is due to the fact that there is confusion as to the application of the treaty, it is suggested by some commentators that the treaty is only applicable to prosecute act of terrorists<sup>167</sup>. Secondly, although in theory, the treaty regulates attacks while ships are docked or in territorial waters, this is not without a pre condition, since the attack must meet a certain threshold, which is that the attack must be one which “is likely to endanger the safe navigation of the ship”<sup>168</sup>. Thus, to establish this level of threshold is challenging, since, even, violent attacks while a ship is docked may be difficult.”<sup>169</sup> Thirdly, although the Convention is broad in terms that it covers large range of offences regardless of location, as long as the ships are engaged in international navigation. Thus, SUA fails to establish enforceable jurisdiction regarding territorial maritime piracy, this implies that vessels must be in international transit, when the unlawful act occurs, thus precluding ships navigating

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<sup>164</sup> MICHAEL GARGAIN, “Neglected Waters: Territorial Maritime Piracy and Developing states: Somalia, Nigeria, and Indonesia” *New England Journal of International and Comparative Law*, 2010, 16 *New Eng. J. Int’l & Comp. L.* 169

<sup>165</sup> YVONNE M. DUTTON “Bringing pirates to justice: A case for including piracy within the jurisdiction of the international criminal court”, *Chicago Journal of International Law*, summer 2010. 11 *Chi.J.Int’l L.*197

<sup>166</sup> DIANA CHANG, “ Piracy laws and the effective prosecution of pirates” *Boston College International Comparative Law Spring*, 2010,33 *B.C. Int’l & Comp. L. Rev.* 273

<sup>167</sup> Yvonne M. Dutton “Bringing pirates to justice: A case for including piracy within the jurisdiction of the international criminal court”; *Chicago Journal of International Law*, summer 2010. 11 *Chi.J.Int’l L.*197

<sup>168</sup> SUA; Article 3 (2) “ Performs an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of that ship..”

<sup>169</sup> *ibid.*, see footnote 162

within national waters<sup>170</sup>. In any case, evidence shows that some offences can still go unpunished because the treaty is only valid between signatory States; this means that only signatory States with a nexus to the offence enjoy the right to prosecute. It follows from this that under SUA, Signatory States may prosecute as stipulated under article 6 only when:

*“The offence is committed against or on board a ship flying a flag of that state; the offense occurs within the state’s territory or is committed by one of its nationals or where a state’s national is seized, threatened, injured or killed in connections with the offense”<sup>171</sup>.*

In essence, states that wish to prosecute must satisfy some conditions, such as; the state must be a signatory to the convention and further have a nexus to the offence. Equally, non signatory state to the convention, which nevertheless, has nexus to the offence, cannot prosecute the offence. This limitation has a profound implication, since pirates and maritime terrorists can go unpunished. The scope of SUA is limited since there is no universal jurisdiction, therefore prosecution is only left to a small number of signatory states<sup>172</sup>, who must further satisfy the nexus of the offence to its nationals. Among these states, some might be either unable or unwilling to prosecute. Most importantly, SUA fails to empower an international tribunal to adjudicate on cases of piracy or set a penalty for piracy.<sup>173</sup> In sum, it is unconceivable, to imagine that a treaty which is not universally ratified and which has further strict conditions in relation to prosecution, can be an appropriate international legal instrument to fight the impunity of piracy in Somalia.

### **c. Unwillingness by International Community to Prosecute**

Nations fighting against the insurgence of piracy have been faced against many legal impediments that are obstructing the successful arrest and prosecution of suspected

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<sup>170</sup> MICHAEL GARGAIN, “Neglected Waters: Territorial Maritime Piracy and Developing states: Somalia, Nigeria, and Indonesia” *New England Journal of International and Comparative Law*, 2010, 16 *New Eng. J. Int’l & Comp. L.* 169

<sup>171</sup> SUA; Article 6

<sup>172</sup> CHRISTOPHER TOTTEN, MATTHEW BERNAL “Somali Piracy: Jurisdictional issues, enforcement problems and potential solutions”, *Georgetown Journal of International Law Winter 2010*, 41 *Geo. J.Int’l L.*377 *There are currently 148 signatory states*

<sup>173</sup> DIANA CHANG, “ Piracy laws and the effective prosecution of pirates” *Boston College International Comparative Law Spring, 2010*,33 *B.C. Int’l & Comp. L. Rev.* 273

pirates. “The legal challenges of prosecuting pirates are intertwined with issues that lay outside a strictly legal scope, such as national policy and decision making processes in international organisations”<sup>174</sup>. From a national perspective the question is not only based on the capacity to effectively prosecute, rather the national policy also examine the “the consequences of prosecution with possible side effect, such as the issues that arise from the right of non refoulement”.<sup>175</sup> There is yet not one uniform standard developed among navies for arresting and prosecuting suspected pirates<sup>176</sup>

Un Security Council 1851 noted in its preamble “the lack of capacity, domestic legislation, and clarity about how to dispose of pirates after their capture, has hindered more robust international action against the pirates off the coast of Somalia and in some cases led to pirates being released without facing justice.”<sup>177</sup> During the discussion of the Security Council August 25, 2010 a representative from Norway has said, “It is simply unacceptable that the suspects are released when there is sufficient evidence against them, as this undermines the credibility and effectiveness of the naval presence”. There is evidence that many European navies have adopted the catch and release approach. For instance by ways of illustration, the EU naval forces have released 235 of the 275 pirates that they have captured<sup>178</sup>. The practice of catch and release is not limited to the EU navies, others states have also been practicing this approach. Among navies a custom of catch and release pirates has developed, captured pirate are simply released; this has created a culture of impunity<sup>179</sup>. To illustrate the gravity of the problem, in 2008, a Danish warship captured 10 Somali pirates just to release them. This is despite the fact that the pirates were carrying a note stating how they should divide the proceeds of their piracy, and if that was not

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<sup>174</sup> M.D. FINK AND R.J. GALVIN “Combating pirates off the coast of Somalia: current legal challenges” *Netherlands International Law Review*, LVI:367-395, 2009

<sup>175</sup> *ibid.*, footnote 168

<sup>176</sup> *ibid.*,

<sup>177</sup> VED P. NANDA, “Maritime Piracy: how Can International Law and Policy Address This Growing Global Menace”, *Denver Journal of International Law and Policy Spring 2011*, 39 *Denv. J. Int’l L. & Pol’y* 177

<sup>178</sup> *ibid.*,

<sup>179</sup> YVONNE M. DUTTON “Bringing pirates to justice: A Case for including piracy within the jurisdiction of the International Criminal Court” *Chicago Journal of the International law 2010*; 11 *Chi J. Int’l L.*197

incriminating enough the pirates were equipped with weapons<sup>180</sup>. Pirates were released due to the Danish restricted judicial system, for instance Danish “prosecution policy authorised jurisdiction to prosecute only attacks against Danish subjects or vessels...”<sup>181</sup> Equally, it is reported that Britain Royal Navy have also been releasing captured pirates, who had on board of their vessels hostages. A regional State such as Seychelles has released 23 suspected pirates in 2009. Moreover, Canadian Naval forces have also been practicing the catch and realise approach of pirates, by simply disarming the pirates before releasing them<sup>182</sup> this is due to the fact that the Canadian Government lacks jurisdiction under international law to prosecute pirates.<sup>183</sup> As briefly mentioned above, there is an apparent unwillingness among states to bring captures pirates to justice, this unwillingness is not without justification. There are five justifications put forward by states.

Firstly, some state simply do not have acts criminalising the offence of piracy in their domestic law, thus depriving them from exercising universal jurisdiction. Secondly, there is evidence that states who’s national commit piracy are usually failed States, such as Somalia. This means that such States automatically lack the institutional capacity to enforce law. Rear Admiral Baumgartner made a statement in his Congressional testimony, that “the States surrounding the Gulf of Aden and the horn of Africa generally lack the maritime capabilities to respond to acts of piracy in their waters and that Somalia in particular lacks judicial and law enforcement capacity to address piracy.”<sup>184</sup> Moreover, most piracy attack do occur under the territorial water of Somalia which means UNCLOS cannot regulate such offences, which are matters under national jurisdiction, and since Somalia is a failed State it is unable to tackle such impunities. However, signatory States of the SUA convention can bring such pirates to justice, in any event, evidence shows that states are unwilling to exercise universal jurisdiction.

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<sup>180</sup> *ibid.*,

<sup>181</sup> M.D. FINK and R.J. GALVIN “Combating pirates off the coast of Somalia: current legal challenges” *Netherlands International Law Review*, LVI:367-395, 2009

<sup>182</sup> YVONNE M. DUTTON “Bringing pirates to justice: A Case for including piracy within the jurisdiction of the International Criminal Court” *Chicago Journal of the International law* 2010; 11 *Chi J. Int’l L.*197

<sup>183</sup> *ibid.*,

<sup>184</sup> YVONNE M. DUTTON “Bringing pirates to justice: A Case for including piracy within the jurisdiction of the International Criminal Court” *Chicago Journal of the International law* 2010; 11 *Chi J. Int’l L.*197

Thirdly, even if states possess the legal instrument, which gives them the capacity to bring pirates to justice, there is still an unwillingness from states to prosecute, due to issues such as evidentiary and cost- benefit perspective. This is due to the fact that the prosecuting state has to provide a detention centre and take full responsibilities for the pirates, whether they are, or not convicted.<sup>185</sup> Moreover, interested state will have to collect evidence miles away from their country. This involves transporting witnesses to the trial destination; provide a language translator for the pirates. thus due to these complexities, many states who are the direct victims of piracy attacks and wish to see pirates face justice feel that the advantages are not enough to compel them to go through the burden of international prosecution which are both expensive and time consuming.<sup>186</sup>

Fourthly, to bring a case under the current international law makes trial process a complex matter, this is because the legal framework of piracy varies greatly among states, thereby creating a variety of definitions and penalties, which has the effect of jeopardising the effective prosecution of piracy<sup>187</sup>. The lack of uniformity in the law of piracy has profound implications since the victims of piracy involve many states, who can all equally prosecute under the principle of universal jurisdiction. For instance, “ships may be attacked by a national of one state, registered under the flag of a different state, owned by nationals of another state, insured by a company in yet another state, operated by a crew comprised of nationals from a number of other states and transporting cargo from a number of other nations”.<sup>188</sup> With the current trend, it is unconceivable to eradicate piracy, if the definition of the crime and the penalty varies, depending what country apprehends the pirates and prosecutes them. What is required is a universally applicable definition of piracy, which creates consistent guidelines for the prosecution and punishment of pirates<sup>189</sup>.

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<sup>185</sup> *ibid.*,

<sup>186</sup> *ibid.*, see footnote 178

<sup>187</sup> DIANA CHANG, “ Piracy laws and the effective prosecution of pirates” *Boston College International Comparative Law Spring, 2010,33 B.C. Int’l & Comp. L. Rev. 273*

<sup>188</sup> *ibid.*, see footnote 178

<sup>189</sup> DIANA CHANG, “ Piracy laws and the effective prosecution of pirates” *Boston College International Comparative Law Spring, 2010,33 B.C. Int’l & Comp. L. Rev. 273*

Fifthly, both European and American states avoid prosecuting pirates in their country. This is due to the fact that these states fear pirates may claim political refugee status. Western states have an obligation under international human rights law, not to deport a person in a country where that person will be faced with persecution, the death penalty or even ill treatment<sup>190</sup>. Thus in the case of Somalia the principle of non refoulement<sup>191</sup> applies due to the civil war. According to a researcher Roger Middleton, Western nations do not “want to be bombarded by claims of asylum from the pirates, who would ask not to be deported to Somalia, a country at war”.<sup>192</sup> The unwillingness to prosecute, based on the fear that the pirates will claim asylum, is not without a foundation, for instance there is evidence that two pirates on trail for attacking a Dutch vessel have made known their intention to claim asylum status.<sup>193</sup>

### C. Regional Effort

Four countries in the region are willing to prosecute pirates these are Kenya, Puntland, Somaliland and the Seychelles. Kenya is the most developed state with respect to its judiciary, investigative and logistical abilities<sup>194</sup>. For the purpose of this paper, it would be tiresome and unnecessary to elaborate on all the four countries, rather Kenya; the most advanced among them will be thoroughly examined: With the aim of establishing whether Kenya can end the impunity of piracy.

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<sup>190</sup> YVONNE M. DUTTON “Pirates and impunity: is the threat of asylum claims a reason to allow pirates to escape justice?” *Fordham International Law journal January, 2011, (34Fordham Int’ L. J. 236)*

<sup>191</sup> FIONA DE LONDRAS, SAADIV ITALY: European Court of Human Rights “Reasserts the absolute prohibition on Refoulement in Terrorism Extradition cases”, *May 13,2008 Volume 12, Issue 9, ASIL Insights available from: <http://www.asil.org/insights080513.cfm> accessed 03/08/2011*

<sup>192</sup> YVONNE M. DUTTON “Bringing pirates to justice: A Case for including piracy within the jurisdiction of the International Criminal Court” *Chicago Journal of the International law 2010; 11 Chi J. Int’l L.197*

<sup>193</sup> *ibid.*,

<sup>194</sup> AFRICA PROGRAMME AND INTERNATIONAL LAW CONFERENCE REPORT, “ Piracy and Legal Issues: Reconciling Public and Private” 1<sup>st</sup> October 2009, Chatham House p 9

### **a. Kenya: dumping ground for pirates from third states**

One of the responses envisaged by the international Community was to prosecute pirates within the region. This approach raises practical and legal concerns. Firstly, the practical concern is whether developing countries such as Kenya have the capacity to maintain a long term and sustainable piracy prosecution. Secondly, the legal concern is based on “[t]he legality of transfers from outside capturing states to third states is thrown into doubt by the piracy provisions of the [UNCLOS].”<sup>195</sup> The travaux preparatoire, reveal that the provision precludes transfers to third states.<sup>196</sup> However, the United Nations Security Council, with a desperate attempt to deal with the ever growing threat of piracy in Somalia, has adopted Resolution 1851, urging states “to increase regional capacity with assistance of UNODC to arrange effective “shiprider” agreements or arrangements consistent with UNCLOS and to implement the SUA Convention”<sup>197</sup>. However before the resolution was adopted by the Security Council, which allowed the transfer of pirates by third state to Kenya, it is apparent that Kenya was accepting to prosecute pirates captured by a third states, thereby lacking the jurisdictional basis to do so. In the *Hassan M. Ahmed v. Republic of Kenya*<sup>198</sup>, the alleged pirates have been captured by the U.S Navy for having allegedly attacked an Indian Merchant ship 275 -280 miles off the Somalia Coast in January, 2006<sup>199</sup>. In this case, the Kenyan court has invoked UNCLOS for its jurisdictional basis, stipulating that UNCLOS grants them universal jurisdiction. The defence council for the pirates challenged this, arguing that the Kenyan court had no jurisdiction to adjudicate on the matter, because the alleged pirates were apprehended in Somali territorial sea, thus the legal venue for the prosecuting these men is either in India or Somalia<sup>200</sup>. This claim was based on the notion that Kenya had no real link with the parties involved thus dismissing out personal jurisdiction, in addition to this it was evident that the crime took place miles away from the Kenyan coast,

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<sup>195</sup> JOSEPH M. ISANGA “Troubled Waters: Combating Maritime Piracy with the Rule of Law, Countering Persistent Contemporary Sea Piracy: Expanding Jurisdictional Regimes” *American University Law Review* June 2010, 59 *Am. U.L. Rev.* 1267

<sup>196</sup> *ibid.*,

<sup>197</sup> The United Nations Security Council Resolution 1851(2008), adopted by the Security Council at its 6046<sup>th</sup> meeting, on 16 December 2008

<sup>198</sup> JOSEPH M. ISANGA “Countering persistent Contemporary Sea piracy: Expanding Jurisdictional Regimes” *American University Law Review* volume 59, Issue 5 (June 2010) : 1267- 1319

<sup>199</sup> *ibid.*,

<sup>200</sup> *ibid.*,

thereby equally dismissing territorial jurisdiction. On appeal, the Kenyan court has rejected these arguments, without a legal basis<sup>201</sup>. According to UNCLOS, there is an indication that customary international law does not establish a universal jurisdiction in cases of extradition. Therefore, such jurisdiction is contrary to the terms of the treaty, which articulate that “the court of the state which carried out the seizure may decide upon the penalties to be imposed, and may determine the actions to be taken...”<sup>202</sup> clearly, it rests upon the capturing state to exercise universal jurisdiction and not a third state.<sup>203</sup>

From 2008, Kenya has become a famous destination for the prosecution of pirates. Most captured pirates are prosecuted under the Kenyan judicial system; this is not because Kenyan warship navies are very active in the capture of Somali pirates. Rather this practice was born, following the 1851 UN Security Council Resolution<sup>204</sup>, which urged states to enter into an agreement with regional states for facilitating the process of prosecution. For the first time in December 11, 2008, Kenya has entered into an agreement with the United Kingdom, to prosecute captured pirates by the British navies. This is because United Kingdom retained the notion that trying pirates in Kenya is a substitute to trying them in Somalia, which unfortunately has “no effective central government or legal system”<sup>205</sup>. Following this memorandum, Kenya has signed a second Memorandum of Understanding with the United States on the 16<sup>th</sup> of January 2009.<sup>206</sup> Furthermore, in the same year around March and August, similar agreements were signed between Kenya and the European Union and Denmark, whilst China and Canada are said to be planning such arrangement with Kenya.<sup>207</sup> It follows from these agreements that Kenya is a leading state willing to prosecute alleged pirates. The capacity of Kenya to prosecute on behalf of all the above states is a

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<sup>201</sup> *ibid.*,

<sup>202</sup> UNCLOS Article 105

<sup>203</sup> JOSEPH M. ISANGA “Troubled Waters: Combating Maritime Piracy with the Rule of Law, Countering Persistent Contemporary Sea Piracy: Expanding Jurisdictional Regimes” *American University Law Review* June 2010, 59 *Am. U.L. Rev.* 1267

<sup>204</sup> UN SC Resolution 1851

<sup>205</sup> JAMES THUO GATHII “Jurisdiction to Prosecute Non- National Pirates Captured By Third States Under Kenyan and International law” *Loyola of Los Angeles International and Comparative Law Review* Summer 2009, 31 *Loy. L.A. Int’l & Comp. L. Rev.* 363

<sup>206</sup> *ibid.*,

<sup>207</sup> *ibid.*,

rather overwhelming case load, one that is bound to endanger the achievement of sustainable fair and just trials for the pirates. A notion retained by the Kenyan Prime Minister when he made the statement that “Kenya must not become the dumping ground for pirates”.<sup>208</sup>

**i. Kenya’s Judicial system: corrupt**

“Why hire a lawyer when you can buy a judge”<sup>209</sup>, is the phrase commonly heard in the judicial sphere in Kenya, this is because judges do not enjoy independence, rather they operate under corruption<sup>210</sup>. Clearly, this phrase speaks for itself, but to simply accentuate on the issue, some numbers will be put forward to show how acute the problem of judicial corruption is in Kenya. The International Commission of Jurist reported in 2005, that in Kenya “five out of nine, court of appeal justice, 18 out of 36 High Court justice and 82 out of 254 Magistrates were implicated as corrupt”<sup>211</sup>. With such rooted judicial corruption, it is clear that the rule of law cannot develop neither can it be implemented nor applied in a healthy manner. Kenyan judicial system, a third world country, is according to lawyers of the world in violation of some basic human rights law. Basic human rights such as medical access or basic needs such as soaps are not accessible in the overcrowded prisons of Kenya<sup>212</sup>. Before EU agreed to prosecute pirates in Kenya the “United Nations issued an extraordinary document calling for Kenya’s police chief and attorney General to step down because of their complicity in police murders of hundreds of people”<sup>213</sup>. In addition to this, under the Kenyan system, defendants do not have the right to legal aid, such aid is only

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<sup>208</sup> M.D. FINK AND R.J. GALVIN “Combating pirates off the coast of Somalia: current legal challenges” *Netherlands International Law Review*, LVI:367-395, 2009

<sup>209</sup> JOSEPH M. ISANGA “Troubled Waters: Combating Maritime Piracy with the Rule of Law, Countering Persistent Contemporary Sea Piracy: Expanding Jurisdictional Regimes” *American University Law Review* June 2010, 59 *Am. U.L. Rev.* 1267

<sup>210</sup> EUGENE KONTOROVICH, “ Introductory not to exchange of letters between the European Union and the Government of Kenya on the Conditions and Modalities for the Transfer of Persons Suspected of Having Committed Acts of Piracy” *International Legal Materials*, vol. 48, No.4 (2009), pp. 747-750

<sup>211</sup> JOSEPH M. ISANGA “Countering persistent Contemporary Sea piracy: Expanding Jurisdictional Regimes” *American University Law Review* volume 59, Issue 5 (June 2010) : 1267- 1319

<sup>212</sup> *ibid.*,

<sup>213</sup> EUGENE KONTOROVICH, “ Introductory not to exchange of letters between the European Union and the Government of Kenya on the Conditions and Modalities for the Transfer of Persons Suspected of Having Committed Acts of Piracy” *International Legal Materials*, vol. 48, No.4 (2009), pp. 747-750

given when the crime is one which death penalty can be imposed, thus fair trial for accused pirates are not maintained.<sup>214</sup>

However, beyond the problems relating to the judicial corruption, it is apparent that Kenyan courts lack the capacity to deal with suspected pirates. Statistics show that Kenyan prisons are overcrowded, its national prison capacity is 16,000<sup>215</sup>, while it is estimated that it currently holds 53,000 prisoners<sup>216</sup>. There are currently only three prosecutors in the Mombasa department of public prosecution<sup>217</sup>, while there are over 870,000<sup>218</sup> cases waiting to come before the court. The prosecutors have made their concerns known; they have clearly articulated that they lack the capacity to take on new cases of piracy without the assistance of extra prosecutors. In addition to that, they have further echoed that they are facing legal challenges, which require specialised staff<sup>219</sup>. This is because its judicial system is hindered by outdated rules of evidence, which are in conflict with and renders modern rules of evidence inadmissible, while making other forms of evidence admissible through a procedure, which is time consuming<sup>220</sup>.

While prosecuting pirates under the Kenyan judicial system is ideal for state not wishing to bear such burden, it is clear that the solution of prosecuting pirates in Kenya is only a partial solution to the problem of piracy, one that is an international problem. Thus, it will be more appropriate for an international court to adjudicate such matters. In April Kenya has announced that it would not accept to prosecute any pirates, this is because the International community has failed to financially support the cause<sup>221</sup>.

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<sup>214</sup> YVONNE M. DUTTON "Bringing pirates to justice: A Case for including piracy within the jurisdiction of the International Criminal Court" *Chicago Journal of the International law* 2010; 11 *Chi J. Int'l L.*197

<sup>215</sup> YVONNE M. DUTTON "Bringing pirates to justice: A Case for including piracy within the jurisdiction of the International Criminal Court" *Chicago Journal of the International law* 2010; 11 *Chi J. Int'l L.*197

<sup>216</sup> *ibid.*,

<sup>217</sup> *ibid.*,

<sup>218</sup> *ibid.*,

<sup>219</sup> *ibid.*,

<sup>220</sup> *ibid.*,

<sup>221</sup> SECURITY COUNCIL REPORT update Report "Somalia: Piracy" 20 April 2010 No. 3

It follows from the above observation, that Kenya lacks the legal capacity, expert staff<sup>222</sup>, prison space, court time, legal aid, nor maintains basic human rights; it is in my opinion that the judicial system in Kenya is not fit to tackle the ongoing impunity of piracy, while its own judicial system operates through impunity. Thus, it is the proposition, of this thesis that a complex international crime such as piracy, requires to be before an international court expert in dealing with complex international crimes and staffed by international experts, and thereby, able to guarantee an upmost level of fair and just trial for the accused.

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<sup>222</sup> CRAIG THEDWALL "Choosing the right yardarm: establishing an international court for piracy" *Georgetown Journal of International Law*.

## Chapter 3. An International Court Desirable

*“One of the greatest deterrents to crime is not the severity of the punishment but its inevitability” Cesare di Beccaria (1738-1894)*

### A. Justice must be seen to be done

Attacks from the Somali pirates, are increasing by number, sophistication, logistic, violence, and their impact have a great ramifications to both the world commerce navigation and the international peace and security. With such an impact to the international community as whole, one would think that the international community will be extremely vigilant in the face of such threats to the international peace and security, and adopt draconian measures to fight against draconian ongoing attacks of piracy. The international community was not swift and efficient in its response against the phenomenon of piracy. The Security Council has adopted several resolutions, which have not improved the situation on the ground. the level of concern and desperation can be seen in one of its recent resolutions: *“...expressing concern over a large number of persons suspected of piracy having to be released without facing justice, reaffirming that the failure to prosecute persons responsible for acts of piracy ...undermines anti-piracy efforts of the international community and being determined to create conditions to ensure that pirates are held accountable.”*<sup>223</sup>

Military actions against pirates was also sought to be a solution, clearly as established above, warship navies faced the dilemma of capturing pirates and not knowing what to do with them, because their government do not want to take the burden of prosecuting pirates. Clearly, the philosophy of capture and realise shows that there is an unacceptable weak link in the chain of measures adopted by the international community to effectively

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<sup>223</sup> United Nations Security Council, Resolution 1976(2011), adopted by the Security Council at its 6512<sup>th</sup> meeting, on 11 April 2011, S/RES/1976 (2011)

eradicate the crime of piracy<sup>224</sup> thus, the response of the international community seems rather reckless in my opinion. It is unconceivable, even at national level to eradicate a crime, by capturing criminals just to release them without prosecution, simply because the definition of the crime is outdated or due to an absence of an established judicial system willing to prosecute them. This raises questions: what message is the international community sending to these criminals by releasing them? Moreover, how are warship navies contributing to the eradication of pirates by releasing them without consequences?

It is a well established principle that criminals can only be deterred, if the consequence of their criminal actions is punished. Punishing criminals is not a new phenomenon, but rather a natural consequence of committing a crime. According to Montesquieu “the sovereign’s right to punish crimes is founded; that is, upon the necessity of defending the public liberty, entrusted to his care...”<sup>225</sup> thus pirates must be captured and prosecuted in order to maintain the liberty of navigation.

This thesis proposes that piracy can only be eradicated by way of international prosecution, evidence shows that presently, states are either unable or unwilling to exercise universal jurisdiction to prosecute pirates. Due to this dilemma, this thesis proposes that the crime of piracy should be included in the Rome Statute, since the International Criminal court is a complimentary court, which only prosecutes cases when states are either unable or unwilling to prosecute. The ICC is the most appropriate measure to the problem of piracy on three grounds. First, the ICC is a permanent court established to deal with international crimes, unlike an ad hoc tribunal, which will need to be created from start, thereby involving many issues such as finding a state willing to host the tribunal. Second piracy is a crime, which has existed for centuries, thus only a permanent court such ICC can accommodate such ongoing problem. Third, only the ICC has the logistic and finance to deal with the complexities associated with the crime of piracy.

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<sup>224</sup> United Nation Security Council 25 January 2011, letter dated 24 January 2011 from the Secretary- General Ban Ki –moon to the President of the Security Council; S/2011/30 page 13 para:14

<sup>225</sup> CESARE BONESANA, MARCHESE BECCARIA, “*Crimes and punishments*”, originally published in Italian in 1764. Available from: [http://www.constitution.org/cb/crim\\_pun.txt](http://www.constitution.org/cb/crim_pun.txt), accessed 29/07/2011

The Resolution 1976(2011) was initiated by Russia and urges states to consider the establishment of international tribunal to prosecute pirates. According to the Resolution, the UN Security Council has called on UN Secretary General Ban Ki-moon to provide “concrete measures for the prosecution of pirates”<sup>226</sup>. Unfortunately, adding piracy in the Rome Statute was not among the options considered by the legal adviser Mr. Jan Lang appointed by Secretary General. In any event, following its previous resolution 1918(2010) and 1950(2010) the contact group on piracy on the coast of Somalia have raised the ICC as a feasible option<sup>227</sup> to tackle piracy and that is the only feasible solution in my opinion to the problem of piracy<sup>228</sup>

#### a. Rome Statute draft 1994

The historical background of the Rome statute draft indicates that piracy was among the crimes to be included in the Rome Statute. The United Nation requested the International law commission to make recommendations, in relation to nine treaty based crimes<sup>229</sup> that were considered by the United Nation to be “serious crimes of international concern”<sup>230</sup>. The Rome statute draft 1994, adopted the definition of piracy under Article 3 of the SUA convention. Thus, there is evidence, under article 20(e)<sup>231</sup> that the drafters anticipated the court should have jurisdiction to adjudicate on treaty based crimes, such as piracy, torture,

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<sup>226</sup> UN Security Council adopts Russian anti-piracy resolution-updates “Sea piracy in the modern world”, 27/04/2010. Available from: <http://en.rian.ru/world/20100427/158775508.html?pid=> accessed 29/07/2011

<sup>227</sup> United Nation Security Council 26 July 2010, S/2010/394 “Report of the Secretary –General on possible options to further the aims of prosecuting and imprisoning persons responsible for acts of piracy and armed robbery at sea off the coast of Somalia, including, in particular, options for creating special domestic chambers possible with international components, a regional tribunal or an international tribunal and corresponding imprisonment arrangements, taking into account the work of the contact Group on Piracy off the Coast of Somalia, the existing practice in establishing international and mixed tribunal, and the time and resources necessary to achieve and sustain substantive results”

<sup>228</sup> RIA NOVOSTI “Un Security Council adopts Russian anti-piracy resolution-updates”. Available from: <http://en.rian.ru/world/20100427/158775508.html>, Accessed 24/07/2011

<sup>229</sup> YVONNE M. DUTTON “Bringing pirates to justice: A Case for including piracy within the jurisdiction of the International Criminal Court” *Chicago Journal of the International law* 2010; 11 *Chi J. Int’l L.* 197

<sup>230</sup> *ibid.*,

<sup>231</sup> DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL COURT (1994), adopted by the commission at its forty-sixth, appears in the Year book of the International law Commission, 1994, vol.II (part two)

hostage taking, crimes involving illicit in narcotic drugs and so on<sup>232</sup>. From the historical background, it is apparent that the United Nations and the international law commission perceived the crime of piracy to be a “serious crime of international concern”, and were thus in favour of adding the crime within the court’s jurisdiction. The reason piracy was omitted from the final Rome statute, was based on two grounds. First, to facilitate state to come to a consensus, it was therefore felt necessary to chose core crimes that “shock the conscience of humanity”<sup>233</sup>. Moreover, it was felt annexing treaty based crimes would overwhelm and trivialize the court<sup>234</sup>. Second, piracy was omitted since it is the first crime that enjoyed universal jurisdiction, and was thereby by nature a crime for which the international community could exercise jurisdiction over. It follows from the above passage that piracy was simply omitted from the statute for practical reasons, now that a consensus is obtained and the tribunal established adding the crime of piracy should not pose a problem, clearly, the crime is on the rise, and has thus become “a serious crime of international concern”. Current trend shows, pirates are not brought to justice; this is due to the fact that states are either unable or unwilling to prosecute pirates. This gap of impunity can only be closed if piracy is included in the Rome statute a step correctly but unsuccessfully taken by the drafter of the Rome Statute.

## **b. Piracy a case: for the ICC**

The International criminal court (ICC) is a unique institution both in its character and in nature; it is a treaty –based legal institution, which means that its democratic legitimacy cannot be challenged<sup>235</sup>. The ICC was established when 120 states have adopted the Rome Statute in 1998<sup>236</sup>, and came into force on the 1<sup>st</sup> of July 2002<sup>237</sup> The ICC is a permanent

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<sup>232</sup> *ibid.*,

<sup>233</sup> The Rome Statute of the International Criminal Court (1998); preamble

<sup>234</sup> ELIZABETH ANDERSEN “ *Suppressing Maritime Piracy: exploring the Options in international law*” One Earth Future, 17 October 2009, available from: <http://www.oneearthfuture.org/images/imagefiles/OEF%20-%20PIRACY%20-%20LAW%20WORKSHOP%20BOOKLET%20-%20FINAL%20VERSION.pdf> accessed 03/08/2011

<sup>235</sup> Philipp Kasterner, “*The ICC in Darfur—Savior or Spoilers?*” 14 ILSA J. Int’l & Comp. L. 145

<sup>236</sup> The International Criminal Court, Available from: <http://www.icc-cpi.int/Menus/ICC/About+the+Court/> accessed 29/07/2011

court<sup>238</sup> and has jurisdiction over crimes against humanity<sup>239</sup>, war crimes<sup>240</sup>, genocide<sup>241</sup> and the crime of aggression<sup>242</sup>. In theory, the ICC has jurisdiction over state parties to the Rome Statute, it can also exercise jurisdiction over non states parties, when referred by the Security Council, acting under Chapter VII of the UN Charter<sup>243</sup>, pursuant to article 13<sup>244</sup> of the Rome statute. The tribunal can only exercise its jurisdiction over states parties who are “unable or unwilling” to try cases, which means that the ICC is merely a complementary tribunal<sup>245</sup>.

It is currently, apparent that although the crime of piracy has universal jurisdiction, states are either unable or unwilling to prosecute pirates in their domestic courts. The international criminal court being a complementary court would be the perfect institution to prosecute, since, “as a general rule, the policy of the office of the prosecutor [is] to undertake investigations only where there is a clear case of failure to act by the state or states concerned”<sup>246</sup>. This mechanism seems perfect for the current ongoing crime of piracy in Somalia, as it will close the gap of impunity that currently exist. This means that under the ICC jurisdiction, victim states and any other interested states can still exercise universal jurisdiction over apprehended pirates.

### **c. The most serious crimes of concern to the international community**

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<sup>237</sup> ANGELA HARE “A new forum for the prosecution of terrorists: exploring the possibility of the addition of terrorism to the Rome Statute’s jurisdiction” *Loyal University Chicago International Law Review Fall- winter 2010*, 8 *Loy. U. Chi. Int’l. Rev.*95

<sup>238</sup> The Rome Statute of the International Criminal Court (1998); Article 1

<sup>239</sup> *ibid.*, Article 7

<sup>240</sup> *ibid.*, Article 8

<sup>241</sup> *ibid.*, Article 6

<sup>242</sup> *ibid.*, Article 8 bis

<sup>243</sup> Paper on some policy issues before the Office of the Prosecutor, available from: [http://www.amicc.org/docs/OcampoPolicyPaper9\\_03.pdf](http://www.amicc.org/docs/OcampoPolicyPaper9_03.pdf) accessed 26/07/2011

<sup>244</sup> The Rome Statute of the International Criminal Court (1998); Article 13

<sup>245</sup> The Rome Statute of the International Criminal Court (1998); Article 17 (a) “ the case is being investigated or prosecuted by a state which has jurisdiction over it, unless the state is unwilling or unable genuinely to carry out the investigation or prosecution”

<sup>246</sup> *ibid.*, Article 17

The ICC in accordance with the Rome Statute is empowered to adjudicate only on crimes<sup>247</sup> of concern to the international community. This begs the question of what is the definition of “international crimes” in order to establish, whether piracy comes within this definition. According to the Hostage case:

*“An international crime is such an act universally recognised as criminal, which is considered a grave matter of international concern and for some valid reason cannot be left within the exclusive jurisdiction of the state that would have control over it under normal circumstances”.*<sup>248</sup>

Furthermore, under **Article 38**<sup>249</sup> of the ICJ, which provides the sources of international law, holds if a particular act, in this case, “piracy” is regarded as a criminal offence by the majority of states or by all of them there is a presumption that such act is contrary to the principle of international criminal law recognised by civilised nations<sup>250</sup>. No doubt, the crime of piracy comes under this definition since pirates are held to be the enemies of all mankind, and as an “enemy of all he is liable to be punished by all”.<sup>251</sup> Piracy is the first crime over which states have decided to exercise universal jurisdiction in the strict sense<sup>252</sup>. The nature of the crime of piracy is seen to be “heinousness” this is due to its unique ability of harming the international community as whole, since, attacked vessels are multinationals. For instance a vessel might be owned by state A, insured by state B, composed of crew members of state C,D,E,F,and G, and carrying a cargo owned by state H. consequently, an attack against such multinational vessels equates an attack against the international community. Therefore, piracy has always been seen and is still seen as an international problem, requiring an international condemnation by way of an international prosecution.

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<sup>247</sup> *ibid.*, see Article 5

<sup>248</sup> L. C. GREEN “*International Crimes and the Legal Process*” *The International and Comparative Law Quarterly*, Vol. 29, No. 4 (Oct., 1980), pp 567-584. Available from: <http://www.jstor.org/stable/758831> accessed on 24/07/2011

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<sup>250</sup> *ibid.*, see footnote 248

<sup>251</sup> H.E.JOSE LUIS JESUS “*Protection of Foreign Ships against Piracy and Terrorism at Sea: Legal Aspects*”, *The International Journal of Maritime and Coastal Law*, Vol. 18, No3 *Kluwer Law International*, 2003

<sup>252</sup> YVONNE M. DUTTON “*Bringing pirates to justice: A Case for including piracy within the jurisdiction of the International Criminal Court*” *Chicago Journal of the International law* 2010; 11 *Chi J. Int’l L.*197

Contemporary piracy in the Coast of Somalia has become the concern of the international Community. This is because 90% of world trade passes through sea<sup>253</sup>, disrupting such trade has drastic effect on the international community as a whole. Therefore, piracy is an obstacle to the free movement of trade; and far worse, it is an obstacle to the delivery of humanitarian assistance. Such obstacles have profound implications for the international community on different dimensions, for instance, failure to deliver food to countries in civil war such as Somalia only makes situation on land more desperate, dangerous and chaotic, thus making the activity of piracy an appealing prospect for young hungry Somali boys. Adding the crime of piracy in the Rome Statute is an appealing choice, as it is among the options considered by the Secretary General to prosecute pirates, pursuant to Resolution 1918(2010)<sup>254</sup>. Crimes that are within the jurisdiction of the ICC are the “most serious crimes of the international community... and must not go unpunished...” similarly, piracy is a heinous crime and involves many of the crimes already within the jurisdiction of the ICC such as murder<sup>255</sup>, torture, hostage taking<sup>256</sup>. It follows from the above passage that piracy is equally the concern of the international community as a whole, thus must not go unpunished. Consequently, adding the crime of piracy to the Rome statute will not alter the purpose and object of the treaty, which is to “put an end to impunity...”<sup>257</sup>

#### **d. Rome Statute amendment procedure**

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<sup>253</sup> CRAIG THEDWALL “Choosing the Right Yardarm: Establishing an International court for piracy” *Georgetown Journal of International Law* 2010, 41 *Geo .J. Int’L*. 501

<sup>254</sup> United Nation Security Council 26 July 2010, S/2010/394 “Report of the Secretary –General on possible options to further the aims of prosecuting and imprisoning persons responsible for acts of piracy and armed robbery at sea off the coast of Somalia, including, in particular, options for creating special domestic chambers possible with international components, a regional tribunal or an international tribunal and corresponding imprisonment arrangements, taking into account the work of the contact Group on Piracy off the Coast of Somalia, the exiting practice in establishing international and mixed tribunal, and the time and resources necessary to achieve and sustain substantive results”

<sup>255</sup> ICC International Maritime Bureau “Piracy and armed robbery against ships” 1 January -31 March 2011 “In the first three months of 2011, pirates murdered seven crew and injured 34. Just two injuries reported in the first quarter of 2006”

<sup>256</sup> YVONNE M. DUTTON “Bringing pirates to justice: A Case for including piracy within the jurisdiction of the International Criminal Court” *Chicago Journal of the International law* 2010; 11 *Chi J. Int’l L*.197

<sup>257</sup> The Rome Statute of the International Criminal Court (1998); see preamble “determined to put an end to impunity for the perpetrators of these crimes and thus contribute to the prevention of such crimes.”

Contemporary piracy attacks in the coast of Somalia are sharp, consistent, and organised; statistics of IMB's demonstrate that attacks are carried out in a "widespread and systematic manner"<sup>258</sup>. Thus, the scope, character and gravity of piracy reached the threshold of crimes for which the ICC has jurisdiction these being: "The most serious crimes of concern of the international community"<sup>259</sup>. The preamble further stipulates, "That such grave crimes threaten the peace, security, and well-being of the world"<sup>260</sup>. Clearly, piracy fits well within this description, since the Security Council acting under Chapter VII of the UN Charter, has determined in many resolutions that piracy constitutes a "threat to international peace and security".<sup>261</sup> In essence, pirate's act are more and more violent, in fact some of the acts committed by pirates are included within the definition of crimes that can amount to crimes against humanity<sup>262</sup> if carried out against civilians in a widespread and systematic manner.<sup>263</sup>

The Rome Statute was drafted in a manner that, the statute could evolve with time and thus accommodate upcoming serious crimes of concern to the international community. This thesis proposes that the crime of piracy can be and should added to the Rome Statue by way of an optional protocol.<sup>264</sup> under Article 121<sup>265</sup>, an amendment may only occur upon adoption by two thirds<sup>266</sup> of the State parties, which must then be ratified by seven – eighths<sup>267</sup> of the states parties for the amendment to take effect. However, the advantages of an optional protocol are that the protocol is only binding on states that have ratified it, thus it neither has legal effects nor imposes legal obligations on states that have not

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<sup>258</sup> The Rome Statute of the International Criminal Court (1998); Article 7

<sup>259</sup> *ibid.*, see preamble

<sup>260</sup> *ibid.*, see preamble

<sup>261</sup> United Nations Resolution 1851(2008) , S/RES/1851

<sup>262</sup> The Rome Statute of the International Criminal Court (1998); Article 7

<sup>263</sup> *ibid.*, see Article 7, these are crimes such as murder, rape, torture

<sup>264</sup> YVONNE M. DUTTON "Bringing pirates to justice: A Case for including piracy within the jurisdiction of the International Criminal Court" *Chicago Journal of the International law* 2010; 11 *Chi J. Int'l L.*197

<sup>265</sup> The Rome Statute of the International Criminal Court (1998); Article 121

<sup>266</sup> *ibid.*, see Article 121 (3)

<sup>267</sup> *ibid.*, see Article 121 (6)

adopted;<sup>268</sup> Further, enabling non state parties to the Rome Statute such as Somalia to agree to it<sup>269</sup>.

Adding the crime of piracy in the Rome statute is a feasible project, on two grounds. Firstly, state parties could adopt the current definition of piracy provided by UNCLOS, doing so is practicable, in terms, that UNCLOS is currently customary international law, thus states parties to the Rome statute should use this treaty as a basis to develop and strengthen international law on piracy. Adding piracy to the Rome Statute will be easier than was the case of reaching a definition for the crime of aggression. This is because a current workable customary definition of piracy exists.

Secondly, the Security Council is very active in the search of a solution to combat piracy, it is evident that its permanent members are eager and willing to adopt any measures that will eradicate piracy, thus, it can be inferred from their full participation that its permanent members will adopt the optional protocol. The current practice between Kenya and third states such the European and Americans, to send captured pirates to Kenya for prosecution demonstrates that state are happy to hand over their right to exercise universal jurisdiction<sup>270</sup>, thus it is reasonable to infer from this that no state will object for the ICC to exercise jurisdiction over piracy.

The optional protocol should create a chamber within the ICC to specifically deal with complex matters of piracy. Thus, specialised judges and legal staff will staff this chamber. The importance of having a specialised chamber is that the crime of piracy will be dealt

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<sup>268</sup> YVONNE M. DUTTON "Bringing pirates to justice: A Case for including piracy within the jurisdiction of the International Criminal Court" *Chicago Journal of the International law* 2010; 11 *Chi J. Int'l L.*197

<sup>269</sup> ELIZABETH ANDERSEN " Suppressing Maritime Piracy: exploring the Options in international law" *One Earth Future*, 17 October 2009, available from: <http://www.oneearthfuture.org/images/imagefiles/OEF%20-%20PIRACY%20-%20LAW%20WORKSHOP%20BOOKLET%20-%20FINAL%20VERSION.pdf> accessed 03/08/2011

<sup>270</sup> YVONNE M. DUTTON "Bringing pirates to justice: A Case for including piracy within the jurisdiction of the International Criminal Court" *Chicago Journal of the International law* 2010; 11 *Chi J. Int'l L.*197

separately, thus the court's mission and focus will not be jeopardised by the additional crime of piracy. Additionally, the chamber will have a leading role in the development of international law of piracy. Thus setting precedent and clarifying any obscurity in the law. Under Article 4(1)<sup>271</sup> the ICC has its own international personality, this is an important factor, which will overcome current challenges that are associated with prosecuting pirates, some states either refuse to prosecute for political reasons, while others such as Kenya prosecute with impunity. The international personality enjoyed by the ICC is such that the court is an independent judicial organ free from any political influence and corruption. This guarantees that trials are conducted and completed in a fair and impartial manner while completing them within a reasonable time<sup>272</sup>. Moreover, the rules of procedure and evidence of the ICC contain set of norms, which ensures that the court will take utmost care in adhering to human rights law, thus the ICC can guarantee a fair trial for the accused. Legal aid and translators<sup>273</sup> are among the services provided by the ICC to any accused, unlike Kenya who only provides legal aid to criminals who face the death penalty.

**i. "Low level" pirates should be prosecuted**

Generally, the ICC Chief prosecutor focuses its investigation and "prosecutorial efforts and resources on those who bear the greatest responsibility, such as the leaders of State or organisation allegedly responsible for those crimes."<sup>274</sup> However, in the case of piracy, the prosecutor should depart from such approach, since "those most responsible" operate through impunity from the cost of Somalia a failed state<sup>275</sup> in order to escape prosecution. The ICC should adopt measures similar to the ad hoc tribunals such as the ICTY and the ICTR. the former Chief prosecutor of both tribunals Richard Goldstone, "explains that his prosecutorial strategy necessarily required indicting non-leaders perpetrators, especially

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<sup>271</sup> The Rome Statute of the International Criminal Court (1998), Article 4(1): "the court shall have international legal personality. It shall have such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes"

<sup>272</sup> YVONNE M. DUTTON, "Bringing pirates to justice: A Case for including piracy within the jurisdiction of the International Criminal Court", *Chicago Journal of the International Law* 2010; 11 *Chi J. Int'l L.* 197

<sup>273</sup> Rules of procedure and Evidence, adopted by the Assembly of states Parties first session September 2002, official Records ICC- ASP/1/3 Rule 42 " the Court shall arrange for the translation and interpretation services necessary to ensure the implementation of its obligations under the statute and the rules"

<sup>274</sup> Paper on some policy issues before the Office of the Prosecutor, available from: [http://www.amicc.org/docs/OcampoPolicyPaper9\\_03.pdf](http://www.amicc.org/docs/OcampoPolicyPaper9_03.pdf) accessed 26/07/

<sup>275</sup> MILENA STERIO. The Somali Piracy Problem: A Global Puzzle Necessitating A Global Solution, *American University Law Review* (59) June 2010 : 2

because evidence against leaders was often more difficult to obtain and because indicting those at the lower levels could provide the building blocks necessary to indict those at the top”<sup>276</sup>.

Thus, the first case in the ICTY was Tadic<sup>277</sup>, a rather trivial case in the conflict of the Former Yugoslavia. The idea of starting case load with small criminals is that it will build the court in collecting intelligence in order to capture those most responsible, it is only at later stage of the tribunal process that leaders were prosecuted. Moreover, the ICC should prosecute any captured pirates, because it is these minor actors but important actors in the chain of command that perform the final task of capturing vessels, they are the ones that commit the criminal acts that hold the crew as hostage and torture or even sometimes kill them. Therefore, the prosecution of low level perpetrators is very important and the ICC should prosecute them. Such approach would send the message that the international community stands together and speak with one voice against the fight of piracy and that it will not tolerate impunity.

#### **e. For Non state parties such as Somalia: Referral**

There are three ways of instigating cases in the ICC, first the prosecutor can start investigations in proprio motu<sup>278</sup>, second state parties can refer cases<sup>279</sup>, and third the Security Council can refer a case to the ICC.<sup>280</sup> In the Situation of Somali pirates, the Security Council acting under Chapter VII of the UN Charter has determined that acts of piracy by Somali pirates “constitute a threat to international peace and security.”<sup>281</sup> According to

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<sup>276</sup> YVONNE M. DUTTON, *Bringing pirates to justice: A Case for including piracy within the jurisdiction of the International Criminal Court*, *Chicago Journal of the International law* 2010; 11 *Chi J. Int'l L.*197

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<sup>278</sup> The Rome Statute of the International criminal Court (1998); Article 13(c) “ the prosecutor has initiated an investigation in respect of such crime in accordance with article 15”

<sup>279</sup> *ibid*, 13(a) “ A situation in which one of the one or more of the such crimes appear to have been committed is referred to the prosecutor by a state party in accordance with article 14”

<sup>280</sup> *ibid*, Article 13 (b) “ A situation which one or more of such crimes appears to have been committed is referred to the prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations:”

<sup>281</sup> Charter of the United Nations San Francisco 1945, Article 39 “ The Security Council shall determine the existence of any threat to the peace, breach of the peace or acts of aggression and shall makes

article, 13<sup>282</sup> of the Rome Statute the SC can refer a case if it determines that such a case constitutes a threat to international peace and security. Through this referral mechanism, the fact that Somalia is a non state party to the Rome statute is irrelevant. The SC has exercised its right of referral for the first time, when it referred the situation of Darfur to ICC<sup>283</sup>. From this referral mechanism, we can see that if the crime of piracy is added to the Rome Statute, the referral mechanism will be useful in insuring that the court can still exercise (universal) jurisdiction over non state parties with respect to the crime of piracy.

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recommendations, or decide what measures shall be taken in accordance with Article 41 and 42, to maintain or restore international peace and security.”

<sup>282</sup> The Rome Statute of the International criminal Court (1998) Article 13(b) “A situation in which one or more of such crimes appears to have been committed is referred to the prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations;”

<sup>283</sup>

## Conclusion

This thesis has sought to explore the most adequate mechanism for the prosecution of suspected Somali pirates. Having established the two international treaties, which regulate the crime of piracy are ineffective legal instruments, ipso facto impeding the prosecution of pirates due to their ill defined provisions. While, the principle of universal jurisdiction is applicable in the case of piracy, evidence shows that both UNCLOS and SUA are victims of some important limitations, thus, states are either unable or unwilling to prosecute pirates. This in turn has established a principle of catch and release, while making prosecution of pirates the exception.

Numerous measures have been adopted, to combat piracy, deploying warship navies was sought to be a solution, it quickly became apparent that there was a weak link in the chain of measures adopted, since navies will capture pirates just to release them. SC acting under Chapter VII of the UN Charter has passed many resolutions among which, giving navies an unprecedented right of entry into the Somali Sovereign territory in the pursuit of pirates<sup>284</sup>. Despite these extended rights granted to the navies, it has become evident that these acts will not be effective if pirates are not prosecuted.

Western states recklessly avoiding the burden of prosecuting pirates have entered into agreements with Kenya a corrupted judicial system to prosecute Somali pirates. Kenya a struggling and corrupted judicial system has recently echoed its inability to further prosecute pirates. With Kenya refusing to prosecute and the western states warship navies capturing pirates just to release them, the crime of piracy is at its peak having far reaching consequences. The SC is desperate in finding a solution to deal with the threat of piracy. All the recommendations made have one thing in common, and agree that prosecution is the

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<sup>284</sup> United Nations Security Council Resolution 1816 allows states to capture pirates in Somalia's territorial Sea, and Resolution 1851 extends this to Somaliland.

solution; prosecuting pirates is not disputed, rather what is disputed is what would be the best solution.

To solve the current problem of piracy, the crime must be added to the Rome Statute. This begs the question of why is the ICC the most feasible mechanism, first there is evidence in the Rome statute draft that piracy was among the crimes considered in the draft, but later piracy, among other crimes were omitted, in order to reach a consensus on core crimes which “shock the conscience of humanity”<sup>285</sup>. Second, now that the court is established it would be feasible and cost effective to add the crime, rather than creating a new institution. Third, the ICC prosecutes crimes, which are the concern of the international community, therefore it is clear that pirates are dangerous and thus a threat to international peace and security as stipulated by the SC, thereby, reaching the threshold of crimes, which are the concern of the international community. Under Article 121 a new crime can be added to the Rome statute, we propose that piracy should be added to the statute by way of an optional protocol, which would have the effect of creating a chamber for piracy. The definition provided by UNCLOS should be used as a basis since it is customary norm, thus allowing states to reach a consensus on the definition of piracy; however, it is advised to change and make reforms to UNCLOS in order to reflect modern threats of piracy.

Although the ICC prosecutes “those most responsible” this approach should be departed in cases of piracy, since it has been proven by other tribunals prosecuting “low level” perpetrators has proven to be effective in collecting intelligence to capture those most responsible. The fact that Somalia is a non state party to the Rome statute is irrelevant, since under article 13, the SC acting under Chapter VII, can refer cases to the court. Finally the crime of piracy is getting out of hand thus having far reaching consequences on the international community, piracy is an international crime, it is thus only logical to add the crime within the jurisdiction of the ICC. The international community can no longer afford to be reckless nor passive in the face of such overwhelming and unprecedented attacks of piracy. “This is a constantly changing world in which we live in, a world that requires from

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<sup>285</sup> The Rome Statute of the International criminal Court (1998); Preamble

## Adding Piracy To The Rome Statute: A Good Idea?

the international community a change in the rules of the game if the battle against crime at sea and from the sea is not to be lost”<sup>286</sup>.

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<sup>286</sup> H.E.JOSE LUIS JESUS, “Protection of Foreign Ships against Piracy and Terrorism at Sea: Legal Aspects” , *The International Journal of Maritime and Coastal Law*, Vol. 18, No3 Kluwer Law International, 2003

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