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PIRACY:
INTERNATIONAL LAW & POLICIES

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I. INTRODUCTION

Universal jurisdiction over piracy is beyond dispute.¹ Pirates are considered enemies of all mankind (*hostis humani generis*).² As explained by Judge Moore in *The Lotus Case (France v. Turkey)* decided by the Permanent Court of International Justice in 1927:

“Piracy by the law of nations, in its jurisdictional aspects, is *sui generis*. Though statutes may provide for its punishment, it is an offence against the law of nations; and as the scene of the pirate's operations is the high seas, which it is not the right or the duty of any nation to police, he is denied the protection of the flag he may carry, and is treated as an outlaw, as the enemy of mankind—*hostis humani generis*—whom any nation may in the interest of all capture and punish.”³

Simply put, suppression of piracy necessitates universal jurisdiction, together with the concomitant right to board and visit suspected pirate ships on the high seas because the flag State or the State of nationality of the victims are not usually in the position to take enforcement action on the high seas and/or piracy often takes place off the coast of

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The view in this paper is the author's personal view which does not necessarily reflect the official position of the Royal Thai Government.

¹ See, e.g., the debates and positions of Governments at the 6th Committee on the agenda item “The scope and application of the principle of universal jurisdiction” during the 64th and 65th Sessions of the UN General Assembly. See also *The Princeton Principles on Universal Jurisdiction* (2001), Principle 2 – Serious Crimes Under International Law.

President Gilbert Guillaume opined in his Separate Opinion in *Arrest Warrant Case (Democratic Republic of the Congo v Belgium)*, ICJ Report 2002, p. 3 at p. 38 *et seq.*, that customary international law knows of only one true case of universal jurisdiction: piracy, and that other examples of so-called universal jurisdiction involve the exercise of jurisdiction accorded by international conventions binding on their respective States Parties.

² One author contends that Cicero, the Roman philosopher and statesman (106 – 43 B.C.), was the first to describe pirates as such by saying “*Pirata est hostis humani generis*” – a pirate is the common enemy of humankind. See Joseph McMILLAN, “Apocalyptic Terrorism: The Case for Preventive Action”, Strategic Forum, Institute for National Strategic Studies, National Defense University (no. 212) (Nov. 2004), at 2.

³ *The S.S. Lotus Case*, P.C.I.J. Ser. A, No. 10, p. 4 (1927) at p. 70.

nations with weak enforcement capabilities. Universal jurisdiction is permitted so as to fill the gap.⁴

II. INTERNATIONAL LAW

The piracy suppression regime enshrined in Articles 14 – 21 of the Geneva Convention on the High Seas of 1958 is substantially reproduced in Articles 100 – 107 of the 1982 UN Convention on the Law of the Sea (UNCLOS).

Article 101 of UNCLOS defines piracy. Article 100 imposes a duty on all States “to cooperate to the fullest extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State”. Article 105 specifically authorizes every State to seize, on the high seas or in any other place outside the jurisdiction of any State, a pirate ship or aircraft or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. Besides, the courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith.

Article 110 of UNCLOS, corresponding to Article 22 of the 1958 High Seas Convention, describes exceptions to the principle of exclusive jurisdiction of the flag State over its ship on the high seas. It specifically authorizes a warship to board a foreign ship on the high seas where there is reasonable ground to believe that the ship is engaged in piracy.

However, unlike the relevant provisions of other conventions dealing with suppression of crimes, the said provisions of UNCLOS do not go so far as to impose on States Parties to UNCLOS the specific obligation to extradite or prosecute pirates, or even criminalization of acts of piracy under their domestic law.

The UNCLOS regime of piracy suppression is supplemented by the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (1988 SUA). Core elements of some of the crimes under the 1988 SUA can be elements of the crime of piracy as well, for example, “seiz[ing] or exercis[ing] control over a ship by force or threat thereof or any other form of intimidation”, or “perform[ing] an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of that ship”.⁵ The 1988 SUA removes the requirements that the attack on ships occurs on the high seas (including the exclusive economic zone which is the high seas for navigational purposes) and that the attack is directed against another ship. The 1988 SUA 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.⁶ The 1988 SUA, thus, applies so long as the ship does not navigate or is not scheduled to navigate within a single State’s territorial sea. Nonetheless, unlike UNCLOS, the 1988 SUA does not authorize boarding of ships

⁴ Eugene KONTOROVICH and Steven ART, “An Empirical Examination of Universal Jurisdiction for Piracy” (2010) 104 American Journal of International Law 436 at 447.

⁵ Art. 3 (1) (a) and (b) of the 1988 SUA.

⁶ Art. 4 of the 1988 SUA.

on the high seas and seizing offenders without the flag State's consent. The 1988 SUA applies only when the alleged offender is present in the territory or in the territorial sea of a State Party thereto.⁷ Once the alleged offender is so present, the State Party is obligated to either prosecute or extradite the offender to another State Party which has jurisdiction over the alleged offender.⁸

The 2005 Protocol to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (2005 SUA Protocol) broadens the list of offences under the 1988 SUA to include, *inter alia*, acts of maritime terrorism (such as using a ship as a means to carry out a terrorist attack)⁹ and transport by sea any person who has committed an offence under the 1988 SUA or one of the other UN counter-terrorism Conventions.¹⁰ Article 3*bis* (1) (b) (i) criminalizes “transport[ing] on board a ship any explosive or radioactive material, knowing that it is intended to be used to cause, or in a threat to cause, with or without a condition, as is provided for under national law, death or serious injury or damage for the purpose of intimidating a population, or compelling a government or an international organization to do or abstain from doing any act.” Article 3*quater* establishes a comprehensive set of criminal responsibility for accessory offences, including attempts, participation as an accomplice and so forth.

Article 8*bis* of the 2005 SUA Protocol modifies the 1988 SUA's boarding regime by setting additional guidelines for cooperation and procedures to be followed if a State Party wants to board a ship flying the flag of another State Party outside the territorial sea of any State because it has reasonable grounds to suspect that the ship or a person on board that ship is, has been, or is about to be involved in, the commission of an offence under the 2005 SUA Protocol. The State Party which is the flag State of the ship has four hours after being alerted of the intention to board that ship to either deny or expressly consent to the boarding. If no response is received within the four hours, the requesting State is authorized to board and inspect the ship. Besides the consent given *ad hoc* to requests for boarding, any State Party to the 2005 SUA Protocol may give implicit consent to such boarding by notifying the Secretary-General of the International Maritime Organization (IMO) that prior authorization to board is given if no response is received from it as the flag State of the ship in question after four hours of a request, or without any time limit imposed at all.

Other conventions that may be relevant to modern-day pirates are the International Convention Against the Taking of Hostages of 1979 (Hostage Taking Convention), the International Convention for the Suppression of the Financing of Terrorism of 1999 (Terrorist Financing Convention), and the UN Convention on Transnational Organized Crime of 2000 (UNTOC) Convention.

When pirates hijack a ship and hold the crew hostage until ransom is paid, they commit offences under the Hostage Taking Convention. Any person who commits hostage taking, attempts to do so, or participates as an accomplice of any person who

⁷ Arts. 7 – 9 of the 1988 SUA.

⁸ Arts. 6 and 10 of the 1988 SUA.

⁹ Art. 3 of the 2005 SUA Protocol.

¹⁰ Art. 3*ter* of the 2005 SUA Protocol.

commits or attempts to commit an act of hostage taking shall be “prosecuted or extradite” by every State Party to the Hostage Taking Convention when the alleged offender is present in the territory or territorial sea of that State Party.¹¹

By virtue of Article 2 of the Terrorist Financing Convention, a person commits an offence under that Convention if that person by any means, directly or indirectly, unlawfully and wilfully, provides or collects funds with the intention that they should be used or in the knowledge that they will be used, in full or in part, to carry out an offence in one of the treaties listed in the Annex to that Convention, which includes the Hostage Taking Convention. Thus, those involved in the activities just described shall be subjected to criminal prosecution or extradition,¹² and have their funds as well as proceeds derived from piracy seized and forfeited by any State Party to the Terrorist Financing Convention.¹³ This is so unless the State in question: (a) is not party to the Terrorist Financing Convention, or (b) is party thereto but is not yet party to the Hostage Taking Convention and has declared that, in the application of the Terrorist Financing Convention, the Hostage Taking Convention shall be excluded from the Annex of the Terrorist Financing Convention.¹⁴

UNCTOC criminalizes participation in an organized criminal group (Article 5) or laundering of proceeds of crime (Article 6) when these offences are transnational in nature and involve an organized criminal group of three or more persons.¹⁵ When piracy, as a “serious crime”, is committed by persons participating in an organized criminal group or when pirates launder the proceeds of their crime, States Parties to UNCTOC shall prosecute the offenders and may confiscate and seize proceeds of crime as well as property, equipment or other instruments used in or destined for use in these offences.¹⁶ Article 16 (1) of UNCTOC imposes an “extradite or prosecute” obligation on its States Parties.

III. POLICIES & CHALLENGES

There are two main different situations concerning modern-day piracy. On the one hand, as in the Straits of Malacca and Singapore and in the South China Sea, there are incidents of piracy on a relatively small scale. On the other hand, incidents of piracy off the coast of east Africa, the Gulf of Aden and elsewhere the western Indian Ocean are much more extensive in scope and scale, leading to the UN Security Council (UNSC) taking action under Chapter VII of the UN Charter.

In the first type of situation, piracy occurs not far from the coast, the coastal States in the region can exercise effective control over maritime areas off their coasts,

¹¹ Arts. 1, 2, 6, and 8, Hostage Taking Convention.

¹² Arts. 4 and 10, Terrorist Financing Convention.

¹³ Art. 8, Terrorist Financing Convention.

¹⁴ Art. 2 (2) (a), Terrorist Financing Convention.

¹⁵ Art. 3, UNCTOC.

¹⁶ Arts. 11 and 12, UNCTOC.

and the States in the region have capacity to singularly or jointly suppress piracy. In the second type of situation, piracy takes place in the vast expanse of the ocean far from the coast of any State, and there is no effective government in the pirates' home State to apprehend the pirates for the purpose of their prosecution at home or extraditing them to another State which has legitimate interests in their prosecution.

(a) The Straits of Malacca and Singapore and the South China Sea

According to the International Maritime Bureau (IMB), there were only three successful and four attempted attacks by pirates on shipping in the Malacca Strait in 2007. The Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (ReCAAP) Information Sharing Center (ISC) in Singapore reported only one successful attack on a vessel in the Malacca Strait and three attempted attacks in the first half of 2008.¹⁷ A senior risk intelligence analyst reports 19 incidents that included one hijacking, ten armed robberies, and eight failed robberies in the Strait of Singapore in 2009.¹⁸ There were 12 incidents and 10 actual robberies in 2010 in the southern South China Sea, including the Anambas/Natuna corridor.¹⁹

There are several tiers of cooperation among the interested States to suppress piracy in this maritime region.

First of all, the Royal Thai Navy has sent ships to join Indonesia, Malaysia, and Singapore in suppressing acts of piracy in the Strait of Malacca under the Malacca Strait Coordinated Patrols scheme since September 2008, and joined these States' aerial patrols in the Malacca Strait under the Eye in the Sky programme since January 2009.

Secondly, there exists the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (ReCAAP) – the first international agreement in Asia that addresses the incidents of piracy and armed robbery at sea. The ReCAAP initiative aims to enhance multilateral cooperation among its Contracting Parties based on 3 pillars: information sharing, capacity, and cooperative arrangements. It operates on the principles of respect for sovereignty, effectiveness and transparency. The ReCAAP Information Sharing Centre (ISC) was set up in Singapore on 29 November 2009. Each ReCAAP Contracting Party designates a Focal Point responsible for its communications with the ReCAAP ISC. There are currently 16 Contracting Parties to ReCAAP, including all ASEAN Member States except Indonesia and Malaysia. The other Contracting Parties are Bangladesh, China, India, Japan, the Republic of Korea, the Netherlands, Norway, and Sri Lanka.

On top of the aforesaid, there is a new framework of cooperation. On 12 October 2010, the ASEAN Defence Ministers' Meeting (ADMM) agreed with the Defence

¹⁷ Catherine Zara RAYMOND, "Piracy and armed robbery in the Malacca Strait: a problem solved?", *Naval War College Review* (Summer 2009).

¹⁸ Karsten VON HOESSLIN, "International Maritime Crimes in the ASEAN Region: Incidents and Trends" (Paper presented at the Workshop on International Maritime Crimes: Legal Issues and Prospects for Cooperation in ASEAN", organized by the Centre for International Law, National University of Singapore, 17 – 18 Jan. 2011.

¹⁹ *Ibid.*

Ministers from ASEAN's eight Dialogue Partner countries²⁰ to commence practical cooperation in five areas including maritime security, with Malaysia and Australia co-chairing the Experts' Working Group on Maritime Security.

Such cooperation to suppress piracy can only be achieved if the States concerned feel duty-bound, are willing, and have the necessary legal authority as well as physical capacity to take the necessary action.

Thailand, for example, has all of what has just been said.

The Penal Code of Thailand sets out criminal jurisdiction of Thai courts on the bases of internationally recognized principles of the exercise of criminal jurisdiction by domestic courts. Of particular relevance to maritime crimes is Section 7 which provides that whoever commits offences relating to robbery or gang robbery on the high seas and offences related to terrorism outside the Kingdom shall be punished in the Kingdom.

In the case of piracy, Thailand exercises universal jurisdiction pursuant to Section 28 of the Act on the Prevention and Suppression of Acts of Piracy of B.E. 2534 (1991 A.D.) which provides that whoever commits acts of piracy under the Act outside the Kingdom shall be punished in the Kingdom. The definition of piracy in Article 101 of UNCLOS is followed in Section 4 of the Act. Penalties under the Act are heavy, ranging from 6 months' imprisonment to a death penalty, and a fine of 5,000 to 200,000 Baht. Section 25 stipulates that the penalty shall be doubled for any person who commits an act of piracy using a warship, government ship or government aircraft which the perpetrator has taken control of, or any person who commits an act of piracy against a government ship. By virtue of Section 26, any person who facilitates the commission of an offence under this Act shall be liable to the same punishment as the principal perpetrator. Any person who attempts to commit an act of piracy shall be subjected, under Section 27 of the Act, to the same punishment as the perpetrator of a consummated act of piracy.

With regard to terrorism, including hostage taking, Section 135/1-135/4 of the Thai Penal Code is now the main Thai law on acts of terrorism. Whoever commits these offences shall be punished in the Kingdom. Any one preparing or conspiring to commit an act of terrorism shall be punished with imprisonment of 2 to 10 years, and a fine of 40,000 to 200,000 Baht. The wording "preparing to commit" encompasses an attempt to commit an act of hostage taking as stipulated in Article 2 (a) of the 1979 Convention, too. By virtue of Section 135/3, any person who supports the commission of any offence in Section 135/1 shall be liable to the same punishment as a principal offender in such offence.

As for terrorist financing, Section 135/2, paragraph 2, of the Penal Code of Thailand provides in its pertinent part that whoever procures or gathers any asset for the purpose of perpetrating an act of terrorism shall be punished with 2 to 10 years' imprisonment and a fine of 40,000 to 200,000 Baht. That provision of Section 135/2 also covers attempts to commit the offence. Any person financing an act of terrorism under Section 135/2, second paragraph, could, arguably, be cumulatively convicted under Section 135/3 for supporting the commission of any offence in Section 135/1 and, as such, liable to the same punishment as a principal offender in such offence, too.

Section 3 of the Anti-Money Laundering Act of B.E. 2542 (1999 A.D.), as amended in 2005, empowers Thailand's Anti-Money Laundering Office (AMLO) to

²⁰ Australia, China, India, Japan, the Rep. of Korea, New Zealand, Russia, and the USA.

freeze any fund or financial resource of any person or entity suspected of committing or facilitating the commission of an act of terrorism. The Act also requires financial institutions, government agencies under the Department of Land, and persons or entities engaged in business relating to investment or capital mobilization to report suspicious transactions to AMLO. Section 60 of the Act imposes on any natural person who commits the offences under the Act the punishment of imprisonment for a term of 1 to 10 years or a fine of 20,000 to 200,000 or both. In case of a juristic person which commits an offence under the Act, Section 61 imposes a fine of 200,000 to 1,000,000 Baht, but any director, manager or person responsible for the conduct of business of the said juristic person shall be liable to imprisonment for a term of 1 to 10 years or to a fine of 20,000 to 200,000 Baht or both unless that person can prove that he/she has no part in the commission of the offence of that juristic person.

(b) Off the coast of east Africa, the Gulf of Aden and elsewhere the Indian Ocean

The rise of piracy off the coast of east Africa, the Gulf of Aden and elsewhere in the western Indian Ocean has presented the international community with what is, up to now, still insurmountable a challenge.

Ships, large and small, are hijacked for a huge sum of ransom. A study by the Colorado-based One Earth Future Foundation shows the average ransom paid to pirates in this region rose almost 60 per cent from the year 2009 to the year 2010, reaching US\$5.4 million, and much more than the average ransom of US\$150,000 paid to pirates in the same region in the year 2005.²¹

Pirates operate hundreds and sometimes thousands of nautical miles from their bases. Pirates using skiffs and mother ships in combined piracy operations can sustain themselves for weeks while searching for victims, communicate with each other and their accomplices onshore via satellite telephone, and receive information from networks of contacts watching shipping routes and lanes. As such, Somali pirates have become part of transnational organized crime.²² The international community has set up joint or coordinated patrol operations. Yet, the problem continues, to the extent that insurance companies are taking the law into their own hand by hiring private security officers to protect their ships, including the setting up of the Convoy Escort Programme with a fleet of 18 vessels, each with a fixed gun position and an armed crew permitted to engage pirates in battle.²³ Worse still, there are reports about the connection and sharing of piracy ransoms between pirates and al-Shabaab, an insurgent group fighting to overthrow the Somali government. If this is true, insurance companies' paying ransoms to pirates

²¹ One Earth Future Foundation, "The Economic Cost of Maritime Piracy", One Earth Future Working Paper (Dec. 2010) at p. 9.

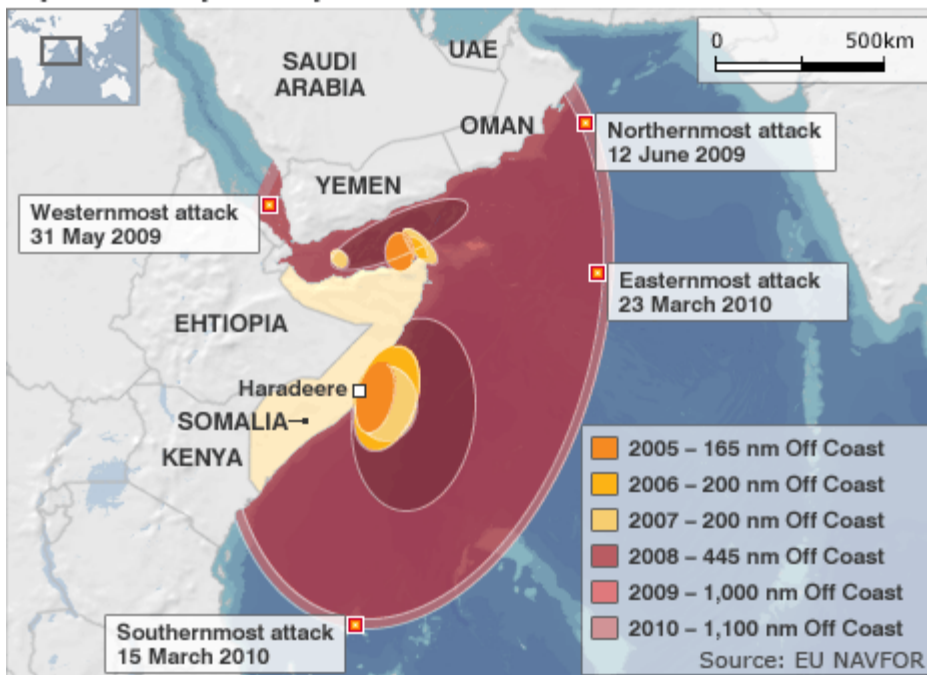
²² "Somali piracy 'part of global crime net'", The Canberra Times, 18 Feb. 2011, p. 13.

According to Donna L. Hopkins, coordinator of counter-piracy and maritime security at the US State Department, of the approximately US\$60 million in ransoms the pirates got in 2010, only 15 per cent went to the pirates themselves, with the rest going to a transnational criminal network, not all of whom were Somalis. ("Somali pirate sentenced to 33 years in US prison", *BBC News*, 16 Feb. 2011.)

²³ "Private fleet to target pirates", The Weekend Australian, 19-20 Feb. 2011, p. 20.

would be illegal under the domestic law of States that treat al-Shabaab as a terrorist organization.²⁴

Expansion of pirate operations



The UN Security Council’s resolutions 1814, 1816, 1838, and 1846 adopted in 2008, call for the use of “all necessary means” to fight piracy and armed robbery at sea off the Somali coast, in accordance with international law. The UNSC also adopted resolutions 1897 in 2009, and 1950 in 2010 to further renew and strengthen the international community’s hands to repress the scourge of piracy in the western Indian Ocean. The UN Secretary General has presented a report (S/2010/394) on options to further the aim of prosecuting and imprisoning persons responsible for acts of piracy and armed robbery at sea, and another report (S/2010/556) on the implementation of UNSC resolution 1897 (2009). The UN’s International Trust Fund to Support Initiatives of States Countering Piracy off the Coast of Somalia has been set up, on 27 January 2010, focusing on support for the prosecution and detention-related activities as well as other priorities (such as public communications initiatives). The Trust Fund is managed by the

²⁴ Anthony LOYD and Patrick HOSKING, “Somali pirates to pay militants”, *The Australian*, 25 Feb. 2011, p. 11.

Those States that consider al-Shabaab as being engaged in terrorist activities include Uganda, and less specifically, the Member States of the Organization of the Islamic Conference (OIC), and Italy [Statements of Uganda, Tajikistan on behalf of the OIC, and Italy at the Open Debate of the UN Security Council on the Situation in Somalia, 10 Mar. 2011]. The Statement by the President of the UNSC issued after the Open Debate condemned “all attacks, including terrorist attacks on the Transitional Federal Government, AMISOM, and the civilian population by armed opposition groups, and foreign fighters, particularly Al Shabaab.”

UN Office on Drugs and Crime (UNODC), and as of 1 November 2010, it received US\$3,662,271 in donations from a total of ten UN Member States.²⁵

On 16 August and 16 November 2010, the Thai Cabinet authorized the Royal Thai Navy (RTN) to dispatch the RTN Counter Piracy Task Group composed of 371 RTN personnel with two naval vessels – HTMS Pattani (an offshore patrol vessel) and HTMS Similan (a logistics and supply vessel) – together with two airlift helicopters, and two RTN Special Operation Units to participate in the Combined Maritime Forces (CMF) patrolling in the Internationally Recommended Transit Corridor (IRTC) in the Gulf of Aden and off the coast of Somalia from 8 September 2010 to 30 September 2011.²⁶

On 23 October 2010, the two Royal Thai Navy vessels patrolling the Gulf of Aden as part of the naval operations under the 25-nation Combined Maritime Forces headquartered in Bahrain apprehended 6 Somali pirates and surrendered them to the Somali authorities for prosecution.²⁷ On 28 October 2010, the two Thai naval vessels intercepted a suspected pirate ship, boarded the ship and searched the 6 persons on board before forcing them back to the Somali coast.²⁸ These are just a few incidents encountered by the Royal Thai Navy in the Indian Ocean.²⁹

Towards the end of February 2011, the EU's anti-piracy naval force said pirates were holding a total of 31 vessels, and 688 hostages.³⁰ Length of duration of detention of hostages increases because there is more money involved, leading to more protracted

²⁵ Source: UNODC.

²⁶ The Cabinet's resolution dated 16 Aug. 2010 and resolution dated 16 Nov. 2010. The Cabinet cited UN Security Council resolutions 1814, 1816, 1838, and 1846 in support of its action.

²⁷ *The Daily News* (Thai language), 24 Oct. 2010. The Royal Thai Navy's Counter Piracy Task Group is based in Salalah, Oman. There are another eight RTN personnel working at the CMF Headquarters in Bahrain.

²⁸ "Thai Navy disrupts Somali pirate attack on Liberian-flagged vessel", *BNO News*, 2 Nov. 2010. There was no prosecution probably because the suspects were arrested too early, with insufficient evidence to charge them.

²⁹ On 22 Dec. 2010, some 570 n.m. from its base in Salalah in Oman, HTMS Similan helped the cargo vessel *MV Thor Nautilus* dispose of explosives and dangerous materials on board the latter vessel after the latter vessel's 29 captain and crew had successfully warded off the attack by Somali pirates on board the *MV Izumi* which had been previously hijacked by the pirates. (*The Thai Rath* (Thai language), 24 Dec. 2010).

On 25 Dec. 2010, approximately 350 n.m. east of Salalah, Somali pirates captured the *Thor Nexus*, a Thai-flagged bulk carrier with 27 crew members all of whom were Thai nationals, on its way from the UAE to Bangladesh. (*The Bangkok Post*, 25 Dec. 2010; *The Daily News* (Thai language), 25 Dec. 2010).

³⁰ *BBC News*, "Somali Pirates 'seize Danish children' in Indian Ocean", 28 Feb. 2011.

According to the IMO, in 2010 there were 286 piracy-related incidents off the coast of Somalia, resulting in 67 hijacked ships, with 1,130 crew on board. A recent study estimated the cost to the global economy from pirates' disruption to international commerce as between US\$7 – 12 billion. ("Somalia: UN launches new anti-piracy plan calling for greater global naval support", UN News Service, 3 Feb. 2011.)

negotiations as each side strives for a better deal.³¹ Worse, pirates have now started to murder their victims in cold blood.³²

Why has not universal jurisdiction worked here? As pointed out during the Open Debate on the Situation in Somalia held at the UN Security Council on 10 March 2011, while 820 pirates are being prosecuted in 16 States,³³ about 90 per cent of the pirates arrested by international forces are released shortly after their detention.³⁴

According to one analysis, “[O]f all clear cases of piracy punishable under universal jurisdiction, international prosecution occurred in no more than 1.47 percent. ... Four non-Western States—China, India, Kenya, and Yemen—are the only ones to have used universal jurisdiction to prosecute piracy.... Moreover, prosecutions have invariably been conducted by States in the region of the crime... The rarity of UJ prosecutions of piracy suggest that the adoption of UJ treaties and the internationalization of UJ norms do not in themselves translate into prosecution. ...”³⁵

This rarity of the exercise of universal jurisdiction over piracy in the western Indian Ocean may be attributed to several factors.

First of all, national legislation of States having interests or expected to play a role in piracy suppression is not uniform – some go beyond international law/obligations, while others are more restrictive than international law/obligations.³⁶ At the UN General Assembly’s meeting in the Plenary on Agenda Item “Oceans and the Law of the Sea”, on 7 December 2010, Ukraine lamented the lack of physical and legal infrastructure to apprehend and prosecute pirates and the lack of coordination between the States concerned, whereas the EU expressed its support for initiatives to enhance efficiency of the system of arrest and prosecution of pirates in domestic courts. Without piracy being criminalized and subjected to universal jurisdiction under the domestic law of all the States concerned, prosecution of pirates in domestic courts cannot be realized. This is a major reason why the UN Security Council adopted UNSC resolution 1918 (2010) on 27 April 2010 to call on all States to criminalize piracy under their domestic law and favourably consider the prosecution of suspected, and imprisonment of convicted, pirates apprehended off the coast of Somalia.

Secondly, States in whose jurisdiction the offender is present may not have genuine interests to prosecute, or may lack resources to do so. Kenya and the Seychelles

³¹ “Growing risk of deaths at the hands of Somali pirates”, *BBC News*, 4 Oct. 2010.

³² The first incident was the killing of four American hostages on a hijacked yacht, the *Quest*, in the Arabian Sea as US forces endeavoured to negotiate the release of the hostages. (“Americans on hijacked yacht killed”, *Al Jazeera*, 23 Feb. 2011.)

³³ Statement of Denmark.

³⁴ Statement of Qatar.

³⁵ KONTOROVICH and ART, (2010) 104 *American J.I.L.* 436 at 436-8, and see also at 441, 444-5, 448, 450.

³⁶ See, J. Ashley ROACH, “Counter Piracy Off Somalia: International Law and International Institutions” (2010) 104 *American Journal of International Law* 397 at 414.

should be highly commended for prosecuting pirates on the basis of universal jurisdiction. But, there could be “prosecution fatigue”. In April 2010, Kenya was reported to have declined to accept more pirate suspects under the Memorandum of Understandings (MOUs) with Western States and China for Kenya to prosecute pirates in its courts because Kenya had become a “dumping ground” for those unwanted for prosecution elsewhere as if this were Kenya’s own problem. It was too costly and too burdensome to prosecute pirates.³⁷ There were reports that Tanzania, Mozambique, Comoros, South Africa, and Maldives have expressed interest in concluding such MOUs to alleviate Kenya’s and the Seychelles’ burden.

Thirdly, prosecution of pirates on the basis of universal jurisdiction can run into problems of the distance the witnesses have to travel to testify and many witnesses have expressed their unwillingness to testify in a domestic court of a foreign State troubled by internal instability for fear for their personal safety.³⁸ There are also evidentiary difficulties to be considered.³⁹ Besides, several States are prohibited by their domestic law and/or international conventions bidding on them from extraditing alleged offenders to States with capital punishment for the offence(s) for which the alleged offenders are being sought for prosecution, and piracy is a heinous crime that carries a death penalty under the domestic law of many States of the world.

IV. POSSIBLE SOLUTIONS

There are multifarious possible options to suppress the modern-day piracy.

Firstly, in lieu of domestic prosecution by States exercising universal jurisdiction but not genuinely affected by the pirates’ act in question, extradition to “directly affected” States, such as the flag State of the attacked vessel or the State of nationality of the attacked crew is an attractive option. Prosecution of Somali pirates has taken place in, for instance, Germany, the USA, the Republic of Korea, and Malaysia on this basis.

In Germany, 10 Somali pirates were put on trial in November 2010, accused of attacking the German-flagged vessel *MV Taipan* in April 2010.⁴⁰

In the USA, it has been noted by a former US State Department law of the sea expert that: “... the US itself may try suspected pirates who attacked US vessels and US nationals off the coast of Somalia, but not others. Indeed, for nearly 200 years before 2008, the US never invoked universal jurisdiction over piracy.”⁴¹ The first conviction in a

³⁷ UNSC resolution 1918 of 27 April 2010 acknowledged the difficulties faced by Kenya in prosecuting suspected pirates and imprisoning those who are convicted, and it called on all States to share Kenya’s burdens.

³⁸ Jeff DAVIS, “Missing witnesses stall piracy cases”, *The Daily Nation* (Kenya), 13 Oct. 2010.

³⁹ James Thuo GATHII, “Kenya’s Piracy Prosecutions” (2010) 104 *American Journal of International Law* 416 at 431-2, 450.

⁴⁰ “Somali pirates on trial in Germany”, *Al Jazeera*, 23 Nov. 2010.

⁴¹ J. Ashley ROACH, “Counter Piracy Off Somalia: International Law and International Institutions” (2010) 104 *American Journal of International Law* 397 at 425-6, and see also at 435.

US court in nearly 200 years took place in November 2010, when a court in Norfolk, Virginia, convicted 5 Somali men of piracy, attacking to plunder a maritime vessel and assault with a dangerous weapon, for their attack on the *USS Nicholas* after mistaking it for a merchant ship.⁴² Their sentencing will take place on 14 March 2011.⁴³

In the case of Malaysia, the Malaysian navy's commandos freed a hijacked oil tanker *MT Bunga Laurel* on 20 January 2011 in the Gulf of Aden, rescuing 23 crew and capturing seven Somali pirates.⁴⁴ The oil tanker was registered in Panama, owned by a Japanese company, manned by a Filipino crew and chartered by a Malaysian company. The seven Somali, including three boys under 15, were charged with firing on Malaysian naval commandos and thereby endangering Malaysia's national security.⁴⁵

Somali pirates' prosecution in the Republic of Korea (ROK) was a result of the ROK navy's action to free the ROK-flagged *Samho Jewelry*, a hijacked chemical freighter in the Indian Ocean, on 21 January 2011, some 1,300 km. off the coast of Somalia, rescuing all 21 crew, eight of whom were Koreans, killing eight pirates and arresting five other pirates.⁴⁶

In addition to prosecution of pirates in domestic courts, the States prosecuting the pirates and other interested States must join forces to disrupt piracy-related financial networks through their respective law to suppress transnational organized crime and/or terrorist financing.⁴⁷

The UN Security Council and the international community should also address how to respond to the plight of those taken hostage by Somali pirates. This matter should not be left solely to the State of nationality of the hostages and their employers to find solutions on their own. A common, collective position of all States as to how to respond to ransom demands might narrow down the expectation of the pirates and their accomplices and deter future hostage taking by the pirates in return for ransom.

Secondly, and even more importantly, the "root causes" of Somali piracy need to be addressed. As UN Secretary-General Ban Ki-moon states, "Although piracy manifests itself at sea, the roots of the problem are to be found ashore. ... In essence, piracy is a criminal offence that is driven by economic hardship, and that flourishes in the absence

⁴² "Somali pirates convicted of attacking US navy ship", *BBC News*, 25 Nov. 2010.

⁴³ On 15 Feb. 2011, the only Somali pirate surviving the battle with US naval officers during the rescue of the *Maersk Alabama* merchant ship off Somalia's coast in April 2009 was sentenced by a federal court in New York to 33 years' imprisonment. ("Somali pirate sentenced to 33 years in US prison", *BBC News*, 16 Feb. 2011.)

⁴⁴ "Malaysian commandos free tanker", *The Bangkok Post*, 22 Jan. 2011.

⁴⁵ "3 teenage boys among 7 Somalis facing death in Malaysia piracy case", *CNN News*, 11 Feb. 2011.

⁴⁶ "Hijacked crew rescued as attack on pirates boosts South Korean leader", *The Financial Times*, Sat. 22 Jan. 2011, p. 1.

⁴⁷ The significance of disrupting, and bringing to justice those involved in, such networks was emphasized by Italy, Spain, and Norway at the Open Debate on the Situation in Somalia at the UN Security Council on 10 March 2011.

of effective law enforcement.” He further reasons that ransom payments add up to hundreds of millions of dollars, creating a “pirate economy” in areas of Somalia that make them more resistant to efforts to develop alternative livelihoods.⁴⁸

Jeffrey Gettleman, East Africa bureau chief for *The New York Times*, went to Somalia to find such “root causes” of piracy and reports as follows.

Somalia has 1,900 miles of coastline bordering the Gulf of Aden. Somali maritime zones are rich in tuna, shark, lobster, deep-water shrimp and whitefish, but Somalis are not seafaring fishermen, leaving their marine fisheries to be freely exploited by foreign fishing vessels. Barrels of toxic waste illegally dumped by foreign companies wash Somali shores and further damage the Somali marine environment and coastal marine resources. In the old days, traditional, artisanal Somali fishermen armed themselves and forcefully boarded foreign trawlers to charge a “fine”, and the fishing fine became increasingly so lucrative that Somali youngsters organized themselves into gangs or “companies” with names like “Central Somali Coast Guard”, “Defenders of Somali Territorial Waters”, “Somali Marines”, and “Ocean Salvation Corps”. These Somalis subsequently transformed themselves into what we call “pirates”, operating farther and farther into the ocean. Anarchy in Somalia has allowed firearms to become easily and cheaply available, while lawlessness in Somalia gives pirates the entire country as safe haven. There even exists a functioning pirate stock exchange where “shares” in 72 individual pirate “companies” are sold.⁴⁹

In November 2010, Under-Secretary-General for Political Affairs B. Lynn Pascoe rightly informed the UN Security Council that the growing problem of piracy off the Somali coast demands more than just military efforts, and he called for simultaneous action on three fronts – deterrence, security and the rule of law, and development – to combat the scourge of piracy. The UN Secretary-General himself recognizes that deterrence efforts must be carried out in concert with the other elements of the strategy on land, including supporting alternative livelihoods and the rehabilitation of coastal fisheries.⁵⁰ Some Somali leaders, including members of Somalia’s transitional

⁴⁸ Speech at the launch of the IMO’s action plan to combat piracy off the Somali coast on 3 Feb. 2011. (UN News Service, “Somalia: UN launches new anti-piracy plan calling for greater global naval support”.)

Admiral Robert Willard, head of the 300,000-troop US Pacific Command, and Donna L. Hopkins, coordinator of counter-piracy and maritime security at the US State Department, contend that piracy in the Indian Ocean region can only be solved only in Somalia – by “fixing” Somalia. (“Private fleet to target pirates”, *The Weekend Australian*, 19-20 Feb. 2011, p. 20.)

The Statement of the President of the UNSC issued after the Open Debate on the Situation in Somalia at the UNSC on 10 March 2011 recognized that “the ongoing instability in Somalia contributes to the problem of piracy and armed robbery at sea and [stressed] the need for a comprehensive response to tackle piracy and its underlying causes.” At that Open Debate, the following States stated the need to tackle the root causes of the Somali piracy: Thailand, the Philippines, Qatar, Sweden, Egypt, Spain, Tanzania, and the European Union.

⁴⁹ Jeffrey GETTLEMAN, “Opportunism rules in pirate waters”, *The Australian Financial Review*, 10 Dec. 2010, p. 6.

⁵⁰ Speech at the launch of the IMO’s action plan to combat piracy off the Somali coast on 3 Feb. 2011 (UN News Service, “Somalia: UN launches new anti-piracy plan calling for greater global naval support”.)

parliament, are reported to believe that illegal fishing trawlers were part of the root causes of the Somali piracy problem.⁵¹ The second preambular paragraph of UNSC resolution 1851 (2008) specifically reaffirms its respect for Somalia's rights with respect to offshore natural resources, including fisheries.

One analyst who has carried out a comparative study between pirates in the 17th – 19th centuries and Somali pirates has come up with a combined set of actions to end Somali piracy. He has proposed: "... changing public attitudes, hiring pirate hunters, rooting out corruption, improving the administration of justice, offering pardons to pirates who voluntarily surrendered, increasing the number of naval ships dedicated to anti-piracy duty, cooperating with other nations, convoying merchant ships, blockading and bombarding pirate ports, chasing pirates both at sea and on land, and, finally, occupying and dismantling pirate lairs."⁵² UNSC resolutions 1816 and 1846 authorize cooperating States to enter and use all necessary measures within Somalia's territorial waters to repress piracy and armed robbery in a manner consistent with such action permitted on the high seas with respect to piracy under relevant international law. UNSC resolution 1851 even goes further by allowing, in operative paragraph 6, such States to "undertake all necessary measures that are appropriate in Somalia".⁵³ Since the second preambular paragraph of UNSC resolution 1851 reaffirms its respect for the sovereignty, territorial integrity, political independence and unity of Somalia, it is doubtful whether any State would consider it legally authorized by the UNSC to actually go on land to assault, occupy and dismantle pirate lairs in Somalia, or seriously risk taking such a drastic action with unforeseen consequences.⁵⁴ A naval blockade of Somalia might prevent more Somali pirates from going out to sea and those already at sea from returning to their mainland bases, though.⁵⁵

Before the root causes are eliminated, the UN Secretary-General's Report to the UNSC dated 26 July 2010 set out seven options, including setting up a special chamber in

⁵¹ "Hijacked crew rescued as attack on pirates boosts South Korean leader", *The Financial Times*, Sat. 22 Jan. 2011, p. 1.

⁵² Max Boot, "Pirates, Then and Now" (July/August 2009) *Foreign Affairs* 94 at 103 – 7.

⁵³ For further discussion, see ROACH, (2010) 104 *American Journal of International Law* 397 at 400 – 1, 412 – 3.

⁵⁴ At the Open Debate on the Situation in Somalia at the UN Security Council on 10 March 2011, Qatar and the UAE emphasized the need to respect the sovereignty, territorial integrity etc. of Somalia. Several States referred to the need to support and continue the African Union Mission in Somalia (AMISOM), and Egypt and Tanzania went further by asking the UNSC to continue to consider the deployment of a UN peace-keeping mission in Somalia. However, as the European Union put it bluntly, "There is no purely military solution to the conflict in Somalia...."

⁵⁵ Tanzania, for example, proposed that the UNSC "support, endorse and authorize the specific requests by the Peace and Security Council of the African Union which include ... imposing a naval blockade and non-fly zone over Somalia;..." (Statement of the Permanent Representative of Tanzania at the UNSC's Open Debate on the Situation in Somalia, held on 10 March 2011.

national jurisdiction without UN involvement, a regional tribunal with UN involvement, and an international tribunal. This idea has received some refinement in Jack Lang's proposed "Somaliaization" of responses to piracy.

In his report to the UNSC on 25 January 2011 after extensive consultations with 50 States, international organizations, private companies and research institutes, Jack Lang, Special Adviser to the UN Secretary-General on Legal Issues related to Piracy off Somalia, called for a US\$25 million budget to set up special courts for suspected pirates in Somalia's semi-autonomous enclaves of Puntland and Somaliland, with two special prisons with capacity of 500 prisoners each to be built in Somaliland and another one in Puntland.⁵⁶ Lang reasons that the US\$25 million budget, which the UN, the African Union, the European Union and other organizations should contribute, is a relatively modest expense compared to the estimated US\$7 billion which is the cost of piracy to the world economy. Under Lang's proposal, the international component of the cost to train judges, prosecutors, lawyers, and prison guards is essential. Lang also proposes strengthening the forensic element of gathering evidence and the imposition of sanctions against the leaders of piracy gangs. Furthermore, Lang proposes the establishment, for a transitional period, of a Somali "extraterritorial jurisdiction court" in the northern Tanzania town of Arusha to deal with piracy cases, if Tanzania agrees.⁵⁷ This proposal has its merits and is worth serious consideration.⁵⁸ The estimated budget is reasonable in view of the financial contributions made or committed by so many States to the suppression of Somali piracy and/or the realization of the lasting peace in Somalia.⁵⁹

In addition, the soft-law approach adopted in the ReCAAP model in East Asia is to be emulated the western Indian Ocean.

⁵⁶ On 7 Feb. 2011, Somali Ambassador to Kenya Mohamed Ali Nur told the press that the Somali Govt. wanted suspected pirates to be prosecuted in Somalia's Puntland and Somaliland. (Brian OTIENO and Maureen MUDI, "Envoy wants piracy suspects tried at home", *The Star* (Kenya). 8 Feb. 2011).

⁵⁷ At the UNSC's Open Debate on the Situation in Somalia on 10 March 2011, Tanzania expressed its readiness to do its part, within its own capabilities, in prosecuting accused pirates, and looked forward to working with the UNODC to assess its capabilities and the support it needed in this regard.

⁵⁸ Those expressing support for Lang's proposal either in part or in its entirety include: Thailand, Italy, Norway ("[Lang's] report contains certain proposals that we hope will be implemented."), the UAE, the Philippines, Spain, and Japan. See the UNSC's Open Debate on the Situation in Somalia, held on 10 March 2011.

⁵⁹ Japan has contributed US\$500,000 to the Trust Fund to Support Initiatives of States Countering Piracy off the Coast of Somalia, and will contribute another US\$1 million for this, in addition to the financing of capacity building and deployment of Somali police force, and US\$10 million to the UN SSI Trust Fund. On top of that, Japan has paid US\$10 million to cover the cost of the salaries of trained police officers and construction of police facilities in Mogadishu. In 2011, Norway will contribute approximately US\$30 million in humanitarian assistance to Somalia and will contribute another US\$5 million to combat Somali piracy. The European Union has, through the African Peace Facility, provided financial support for AMISOM worth EUR 142 million. In 2010, Spain contributed EUR 6 million to AMISOM, plus another EUR 3 million to the Transitional Federal Government of Somalia. The USA and Italy have renewed their financial support for 8,000 additional soldiers. See the statements at the UNSC's Open Debate on the Situation in Somalia, 10 March 2011.

For a start, the Code of Conduct Concerning the Repression of Piracy and Armed Robbery against Ships in the Western Indian Ocean and the Gulf of Aden (or the “Djibouti Code of Conduct”) was adopted at a meeting convened by the International Maritime Organization in Djibouti in January 2009. The 21 States bordering the western Indian Ocean and the Gulf of Aden are entitled to join the Djibouti Code of Conduct, and 17 of them have done so as of February 2011.⁶⁰ Participating States are committed to cooperation in sharing and reporting relevant information; interdicting ships and/or aircraft suspected of engaging in piracy or armed robbery against ships; ensuring that persons committing or suspected of committing such crimes are arrested and prosecuted; and facilitating proper care, treatment, and repatriation for victims of piracy or armed robbery against ships.

Moreover, on 3 February 2011, the IMO launched a new action plan to promote greater levels of support from, and coordination with, navies off Somalia, with priorities including boosting anti-piracy coordination and cooperation among States, regions, organizations and industry, through information-sharing and military and civil efforts; and helping States build capacity in piracy-infested regions so as to deter, interdict and prosecute the pirates. In partnership with the UNODC, the IMO is helping countries in the region develop the legal framework needed to prosecute pirates. The UNODC’s Counter-Piracy Programme, based in Nairobi, Kenya, is assisting efforts to help deal with suspected pirates who have been apprehended in the region, with three main objectives: fair and efficient trials and imprisonment in regional centres; humane and secure imprisonment in Somalia; and fair and efficient trials in Somalia.

V. CONCLUSION

The serious problem caused by the modern-day piracy in the western Indian Ocean demands a holistic approach to its solution by the international community of nations.

A short-term solution is *deterrence* through repression and prosecution of pirates and those criminally involved in piracy, including national and transnational organized criminal groups. Universal jurisdiction over piracy and criminalization of acts proscribed by the conventions and protocols analyzed in this paper are useful tools to achieve this objective.

A medium-term solution may appear in the form of the “Somaliaization” of responses as proposed by Jack Lang.

The long-term, and long-lasting, solution to the Somali piracy problem can only be through the stabilization of the situation in Somalia that restores *security* and *the rule of law* to Somalia, and the economic *development* which allows Somalis to support their livelihoods and enjoy the fruits of their natural resources to the full.

It is hoped that these solutions will be endorsed by the UN and the international community, including those attending the high-level conference to be held in Dubai from 17-19 April 2011 under the title “Global; Threat, Regional Responses: Forging a Common Approach to Maritime Piracy”.

⁶⁰ The signatories to the Code are the Comoros, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Madagascar, the Maldives, Mauritius, Oman, Saudi Arabia, the Seychelles, Somalia, Sudan, Tanzania, and Yemen. The four non-signatory States are France, Mozambique, South Africa, and the UAE.