

# Negligent Prosecution

## Why Pirates Are Wreaking Havoc on International Trade and How to Stop It

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### Abstract

*The standard of living throughout the world has been on the rise thanks in large part to perhaps the greatest advance in the last hundred years: international trade performed by maritime traffic. Despite modern advances in shipping practice, the centuries-old problem of piracy has once again threatened advancement of international trade. Although piracy is not limited to a geographical area, the Horn of Africa has received much attention of late owing to a resurgence of pirate attacks. Using the failed state of Somalia as a base, pirates off the Horn of Africa have found piracy to be an extremely lucrative business in a part of the world ravished by famine, poverty and ongoing wars. This article calls for nations the world over to invoke universal jurisdiction and grant to the International Tribunal for the Law of the Sea in Hamburg, Germany, exclusive jurisdiction over claims of piracy. In doing so, the international community will no longer turn a blind eye to a crime that affects all nations equally.*

**Keywords:** piracy, shipping, maritime law, universal jurisdiction, Somalia.

### A. Introduction

The world as we know it today could not exist if not for international trade. In fact, the United States can trace its very beginnings to international trade. Had it not been for Columbus seeking a faster shipping route to the East Indies, the discovery of America could have been prolonged for perhaps hundreds of years. Just as international shipping routes gave rise to America more than 400 years ago, the pursuit of international trade has brought about an increase in the standard of living for citizens all over the world.

In fact, international shipping on the high seas is so vital that for more than 100 years countries have asserted universal jurisdiction over pirates.<sup>1</sup> Because piracy is a threat to us all and not just to a specific nation, vessel, or person, the doctrine of universal jurisdiction has been applied. Henry Kissinger stated that,

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1 See Y.M. Dutton, 'Maritime Piracy and the Impunity Gap: Insufficient National Laws or a Lack of Political Will?', *Tulane Law Review*, Vol. 86, 2012, pp. 1111, 1115.

the doctrine of universal jurisdiction asserts that some crimes are so heinous that their perpetrators should not escape justice by invoking doctrines of sovereign immunity or the sacrosanct nature of national frontiers.<sup>2</sup>

Applying universal jurisdiction to pirates is acceptable because in many instances pirates operate outside the controls of any specific nation. Further, pirates rarely discriminate between which countries' vessels to attack. Often, bands of pirates consist of individuals from numerous countries. These bands of pirates rarely have the continuous and systematic contact with a specific country that would make one jurisdiction more appropriate than another for prosecution. Pirates, by and large, are not an easy bunch to catch. Once captured, whether or not the warship is the best country for the job is of little concern. More important is that some criminals of the high seas, who are a threat to all nations equally, have been caught and should be brought to justice. In short, to make the solution to the problem more efficient, it is best for all countries to exercise jurisdiction over pirates equally; however, it appears as though currently few, if any, countries are exercising sufficient jurisdiction.

Because piracy is a crime subject to universal jurisdiction, whether or not pirates are receiving adequate due process is largely a concern that has gone unnoticed. Some countries that apprehend pirates may seek the death penalty, while others may seek a relatively short prison sentence. Evidentiary rules, access to counsel, and the burden of proof placed on the prosecution differ in each country; therefore, no consistent criminal justice system for pirates exists. Although this has been of little concern to the international community as a whole, largely because there are very few piracy prosecutions occurring, it is something that a court exercising exclusive jurisdiction could easily solve. Giving a single court exclusive jurisdiction over piracy claims would bring legitimacy to a process that has by and large been shoved into a corner and ignored. In issues regarding international security such as piracy and terrorism, it is best when nations speak with one voice. A court exercising exclusive jurisdiction over piracy would do just that.

## B. Modern Piracy

### I. *Damage to World Economy Inflicted by Pirates*

Ninety per cent of the world's goods are moved by sea.<sup>3</sup> This fact, in and of itself, means that not only countries with significant assets and capital investments in shipping but also any country benefitting from imports and exports has an interest in curtailing piracy. Simply put, the world's largest economies, Europe, Asia, the United States and Canada, are the largest victims of piracy.

2 H. Kissinger, 'The Pitfalls of Universal Jurisdiction', *Global Policy Forum*, July/August 2001, available at <[www.globalpolicy.org/component/content/article/163/28174.html](http://www.globalpolicy.org/component/content/article/163/28174.html)>.

3 Y.M. Dutton, 'Gunslingers on the High Seas: A Call for Regulation', *Duke J. Comp. and Int'l L.* 2013 (Draft) at 6, citing to; Foreign Affairs Committee, *Piracy Off the Coast of Somalia*, Report, 2010–12, HC 1318, at para. 26 (UK).

Recently, CNN reported that pirates were costing the world as much as \$18 billion a year.<sup>4</sup> The article, published by CNN, as well as other sources, admits that because of the enormous amount of variables, trying to put a price tag on piracy is almost an exercise in futility, *e.g.* insurance costs, ransom (many times not reported as companies fear this information may lead to a decrease in stock price – thereby making a bad situation even worse), cost of hiring private security firms, route changes due to avoidance of piracy. And those ransoms, at least the ones that are reported, are clearly on the rise. In 2011 ransoms to pirates totalled \$170 million compared with only \$110 million in 2010.<sup>5</sup>

Piracy places a burden on both the public and private sectors alike. In each of the last several years the world has spent more than a billion dollars to support international naval fleets to provide protection to merchant ships transitioning the pirate-infested waters of Somalia.<sup>6</sup> At the time of this writing, the world can heave a sigh of relief as it is finally beginning to see a decrease in piracy around the Horn of Africa.<sup>7</sup> However, this success has come at a very high cost, and, much like any victories won in the war zones of Iraq and Afghanistan, these victories can easily be reversed.<sup>8</sup>

Whatever be the approach to piracy, one thing is clear: it is an activity that is deterring resources and capital from countries the world over. Still recovering from the financial crisis, the United States and other wealthy nations are all looking for ways to trim their budgets, and military spending, at least in the United States, is a ballooning problem. In the past, NATO, the EU, and other nations have devoted military assets to the Horn of Africa.<sup>9</sup> However, given the instability in Syria, the uprising in Egypt and the nuclear threats in North Korea, the international community simply does not have the resources to monitor all threats. Further, as North Korea continues to make nuclear threats, the United States cannot waste having its navy on standby on the Horn of Africa. Nuclear threats simply take precedence over Somalis with rocket launchers in rubber boats.

The purpose of this article is to explore the current problems that exist in international maritime law hindering the international community from prosecuting piracy. Having studied business, I also attempt to look at the problem of piracy from a cost-benefit analysis. Simply put, if the world is spending \$10 billion annually, almost half of the cost reported by CNN, then it seems giving an institution a budget of \$2 billion to decrease piracy to say only \$3 billion per year

4 T. Kermeliotis, 'Somali Pirates Cost Global Economy "\$18 Billion a Year"', 12 April 2013, article available at <<http://edition.cnn.com/2013/04/12/business/piracy-economy-world-bank/index.html?iref=allsearch>>, See also J. Bone, 'Piracy Costs Maritime Industry \$16bn+', *Marine Business News*, 23 August 2008, <[www.marinebusinessnews.com/index.cfm?nid=48105](http://www.marinebusinessnews.com/index.cfm?nid=48105)> (this article, published in 2008, puts that number around \$16 billion annually).

5 Dutton, 2013, at 7.

6 *Id.*, at 1.

7 Article available at <<http://globalpublicsquare.blogs.cnn.com/2013/04/10/is-somali-piracy-over/?iref=allsearch>>.

8 Dutton, 2013, at 9.

9 See J. Kraska & B. Wilson, 'The Pirates of the Gulf of Aden: The Coalition Is the Strategy', 43 *Stan. J. Int'l L.* 2009, pp. 241, 243-244 (this part of the article gives an explanation of the naval resources that are operating in and around the Horn of Africa).

would mean a 250% return on investment. A minimal contribution by countries the world over would render a massive return. Piracy would be curtailed, and international traders would no longer have to concern themselves with the high cost of piracy.

## II. *Somalia: Perfect Breeding Ground for Piracy*

It is telling that as the author of this article, I have never known a time when Somalia was not in turmoil. For more than twenty years Somalia has been, and continues to be, a failed state with constant violence, war and famine. If Mr. Webster needed to define a failed state, a citation to Somalia would certainly do the trick. Although this article focuses on the pirates from Somalia, one simply cannot discuss a real solution to piracy without first understanding why such conditions exist in Somalia allowing pirates to safely operate.

As previously stated, Somalia has, for the better part of twenty years, known nothing but war, famine and wholly ineffective governance. That means that there is an entire generation of young men such as myself to whom the very concept of governance, peace and even limited prosperity is a foreign concept. Somali pirates, many of them in their 20s and 30s, cannot even remember Somalia having a government or a time without war. For this reason, the international community must recognise that the huge problem that exists in Somalia is not a political one, but rather a problem much bigger and perhaps even more difficult to solve: ignorance.

To be fair, piracy in Somalia is not something that happened overnight. In fact, the origins of piracy in Somalia actually seem to have served a legitimate governmental interest. The first Somalia pirates were not really pirates at all but rather rightfully protecting their fishing lands from Asian poachers.<sup>10</sup> Although the Somali countryside may be war torn, unsuitable for farming, and destitute, yet the fishing grounds within Somalia's territorial waters and beyond are quite another story. Asian fishing fleets were continually trespassing into Somali waters and reaping large profits from their illegal bounties. Not only were these Asian fishing fleets taking large amounts of fish from Somali waters, but they were doing so at a rate simply unattainable by Somali fishermen in their make-shift boats. The destruction to the ecosystem by Asian fishing fleets left the waters of Somalia unable to support basic yearly reproduction, much less enough left over for the Somali fishermen.<sup>11</sup> In fact, these Asian fishermen poaching Somali waters were drawing in as much as \$90 to \$300 million in fish catch, causing widespread overfishing and destruction to Somalia's territorial waters. With an annual GDP of approximately \$5.896 billion, that means that Asian poachers were stealing as much as 20% of Somalia's GDP.<sup>12</sup>

10 *Id.*, at 247.

11 J. Kraska, 'Freakonomics of Maritime Piracy', *Brown Journal of World Affairs*, Vol. 16, No. 2, 2010, pp. 109, 116.

12 Somalia GDP from CIA World Factbook, available at <<https://www.cia.gov/library/publications/the-world-factbook/geos/so.html>>.

Soon it became difficult to distinguish between the somewhat legitimate Somalia's 'coastguard' and Somalia's fishermen who were only interested in making some quick money.<sup>13</sup> In the coming years more and more Somalians began patrolling their territorial waters, and what started out as a legitimate policing action turned into full-fledged piracy. It is important to understand that at least some of these claimed 'pirate attacks' might in fact be serving a legitimate governmental interest. Evidence of Asian fishermen poaching Somalia's fishing grounds further strengthens the case for a central court with exclusive jurisdiction where due process exists and suspected pirates are given a chance to plead their case.

The crisis in Somalia is an example of experimentation with anarchy. The Somali government does not exert a monopoly on the use of force; therefore, determining who is and who is not part of the government becomes a daunting task. Clearly, the people of Somalia have a right to the bounties of their territorial waters, just as the United States, Norway and other countries enjoy bounties such as fish and offshore oil. However, because Somalia lacks a central government that can protect its onshore assets, much less offshore, it has been left to the international community to declare what is and what is not an acceptable form of Somali aggression. As the discussion of piracy develops, it is key to keep this notion of Somalia sovereignty and right to bounties of its territory at the forefront. Although by and large piracy is driven by pirates' desire to make a quick dollar, there are at least conceivable instances in which the use of force by Somalia against a foreign ship might be seen as acceptable. Neither the United States, nor any other country with a standing navy for that matter, would permit another country to drill for oil in its territorial waters without prior agreement. Therefore, to better understand the story of piracy in Somalia, one needs to listen to both sides of the story.

### C. Established International Mechanisms to Combat Piracy

Piracy is no new phenomenon. In fact, piracy dates back more than 2,000 years to Ancient Greece. Vikings, with their fast and agile ships, were well known for their acts of piracy as well as the pillage and plunder of seaside villages. Although piracy dates back to almost prehistoric times, it was not until the 1600s that it began to reach its golden age. Although there were certainly several factors that led to the increase in piracy, the growth of international global trade certainly being one of them, it was in fact a governmental act that created the incentive needed to bring piracy into its golden age. Piracy was, and to this day still is, a matter of universal jurisdiction. This means that any state may prosecute piracy on the high seas. However, in the 1600s governments began to issue 'letters of marque'. Letters of marque allowed pirates to attack and pillage ships of enemy nations and then share with their flag state government the riches of the seized ships. These letters

<sup>13</sup> Kraska & Wilson, 2009, at 247.

of marque were important because they prevented the pirates from being tried for piracy, a crime punishable by death.<sup>14</sup>

It was not until 1856 that the majority of maritime nations signed the Declaration of Paris, an agreement by signatory states banning letters of marque.<sup>15</sup> Although the history of piracy and the issuance of letters of marque are lengthy and somewhat complicated, the lessons learned from its existence must be understood before the current problem of piracy can be effectively combated. In 1856 it was effective international governance that led to the sharp decline in piracy. Once again it will take effective international governance to make it decline once more.

The Declaration of Paris effectively removed safe land havens from which the pirates could operate. Every boat, just like every airplane, must at some point return to land. Therefore, a crucial element for piracy is that of a safe land haven friendly towards pirates. Somalia, with its ineffective government and war-torn condition, has provided the perfect breeding ground for piracy. Despite the efforts of the UN and the international community, Somalia continues to be a state in constant battle, with little hope of prosperity in sight.

### I. UNCLOS

The most effective treaty in the arsenal of international law is UNCLOS, United Nations Convention on Law of the Sea. The convention, among other things, provides universal jurisdiction among its signatory states to combat piracy.<sup>16</sup> Although UNCLOS gives universal jurisdiction, it falls short of requiring jurisdiction by any specific state. For this reason, UNCLOS has served as a means of voluntarily pursuing piracy, but has fallen short of requiring any nation or state to pursue pirates legally once they are captured.

Drawing up an effective international convention is no easy task. Although many considerations go into drawing up such proposals, it appears that when UNCLOS was drafted there were two conflicting forces that the authors had to balance: efficiency/effectiveness *v.* sovereignty.

On the one hand, the convention needs to be strong enough to allow a majority of member states to more or less bully a non-conforming member state into doing something that it may not want to do. In many ways, the convention is aimed at efficiency. For example, UNCLOS would be extremely efficient if all member states agreed that the 'high seas' meant any water right up to the shoreline and that universal jurisdiction applied up to the shoreline and, further, any

14 See A.P. Rubin, *The Law of Piracy*, Naval War College Press, Newport, Rhode Island, 1988, at 69. (This book gives an excellent historical explanation of piracy and its development. It explains how the use of letters of marque aided the growth of piracy and acted as a shield protecting pirates on the high sea.)

15 <[www.royalnavalmuseum.org/info\\_sheets\\_piracy.htm](http://www.royalnavalmuseum.org/info_sheets_piracy.htm)>; see also L. Azubuike, 'International Law Regime Against Piracy', 15 *Ann. Surv. Int'l & Comp. L.* 2009, pp. 43, 46 (noting that nearly all the imperial powers signed the Declaration of Paris in 1856 thereby abolishing all forms of piracy, privateering and government sponsorship and was likely the decisive turning point in combating piracy).

16 Dutton, 2012, at 1121.

crime committed on the water would be tried by an international tribunal in a predetermined location, by predetermined courts, with a predetermined criminal code, procedure and sentencing. If only life were so simple!

On the other hand, countries are concerned that a convention that is too strong or too efficient would intrude on a country's sovereignty. By signing an international convention a country is undoubtedly surrendering some of its sovereignty in the name of achieving a common goal. As the saying goes, the path to hell is paved with good intentions. The unintended consequences of good intentions, in my opinion, have actually prolonged a war in Somalia for some twenty years, but more on that later.

UNCLOS defines piracy as a crime of universal jurisdiction subject to universal jurisdiction allowing any state to seize pirate ships, arrest and prosecute pirates, and levy appropriate punishment.<sup>17</sup> Further, Article 100 states that member states are required to cooperate in the repression of piracy and should make some efforts to assist in the arrest and prosecution of pirates. However, UNCLOS allows for universal jurisdiction, but it falls short of *requiring* jurisdiction. In short, states are allowed but not required to take action against piracy.

Assuming a country was willing to take on piracy, UNCLOS, though it allows states to assert jurisdiction, may actually hinder the prosecution owing to simple definitions. As stated earlier, every international convention is a balancing act: efficiency *v.* respect for state sovereignty. In an attempt to strike that balance, UNCLOS states that from the coastline out to 12 nautical miles may be declared as territorial waters of a state. These territorial waters are the waters of the coastal state and that coastal state has exclusive jurisdiction over this area.<sup>18</sup> The Somali government, with all its power, or lack thereof, could not even properly police its capital city, much less its entire country plus an additional 12 nautical miles of ocean extending from its coastline. However, the story does not end there. UNCLOS recognises that states may also exert control over an 'exclusive economic zone'; *i.e.* water that extends up to 200 nautical miles from its coastline. Article 57 of UNCLOS states that the 'exclusive economic zone shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.'<sup>19</sup> To be fair, the most powerful navies in the world would have a difficult time properly patrolling an exclusive economic zone this big, much less a country that does not even have a navy. The mere notion that Somalia even *has* an exclusive economic coastal zone is nothing short of a joke.

Although Somalia cannot possibly properly patrol such a large area, it most certainly has a legitimate interest in protecting these waters from other nation states. Recall that Somali piracy actually began as Somali pirates trying to protect their waters from poaching of Asian fishing fleets. In fact, this exclusive economic zone may very well be the solution to turning Somalia around. These coastal

17 Y. Dutton, 'Pirates and Impunity: Is the Threat of Asylum Claims a Reason to Allow Pirates to Escape Justice?', 34 *Fordham Int'l L. J.* 2011, pp. 236, 248.

18 Dutton, 2012, at 1124.

19 UNCLOS Art. 57.

waters may be able to provide local fishermen with the livelihood to jumpstart some legitimate, legal and sustainable economic activity.

Another potential problem that arises from a definition in UNCLOS is that for an act to constitute piracy, and therefore be subject to universal jurisdiction, it must be for 'private ends'.<sup>20</sup> Some legal scholars have suggested that if the act was politically motivated or an act of terrorism, it would not be an act subject to universal jurisdiction because the act was not committed for 'private ends', *i.e.* purely with the intention of making money. Currently, this is somewhat of a moot point as we are not really prosecuting pirates, so at no time have pirates used this defence. Its relevance, therefore, is more academic than pragmatic. Although this concern is of little practical relevance, it does point out the problem of having to interpret an international convention. This concern further emphasises my suggestion that there be an international court to interpret such a convention and apply it accordingly. As humans we cannot anticipate every potential act. It is for this reason that we read cases in law school. Simply put, people in real life do things that even the most creative academic mind could not conceive. As the saying goes, the difference between reality and fiction is that fiction must be believable. There will certainly be instances in the future that boggle the most brilliant minds, and therefore it is in the interest of all those involved in piracy that a single court be established to provide guidance accordingly.

## II. SUA

One of the major criticisms of UNCLOS is that it is not really anything new. In fact, many scholars suggest that UNCLOS was nothing more than a restatement of customary international law.<sup>21</sup> For the act to constitute piracy under UNCLOS, two vessels are required.<sup>22</sup> The Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation ('SUA') was drafted in response to the Achille Lauro incident when Palestinians essentially hijacked an Italian cruise liner.<sup>23</sup> Approximately 161 states are parties to UNCLOS, and approximately 156 are parties to SUA. SUA in its entirety is a much more aggressive, farther-reaching and perhaps efficient convention than UNCLOS. Under SUA, a prohibited offence is committed by anyone who

- (1) seizes or exercises control over a ship by force or threat thereof or any other form of intimidation, (2) performs an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of the ship, or (3) attempts to do any of the above.<sup>24</sup>

Additionally, SUA applies to offences committed in territorial or archipelagic waters or in ports so long as the ship is intended for international navigation.

20 Dutton, 2012, at 1123.

21 D. Doby, 'Piracy Jure Gentium: The Jurisdictional Conflict of the High Seas and Territorial Waters', *Journal of Maritime Law and Commerce*, Vol. 41, No. 4, 2010, p. 566.

22 UNCLOS Art. 101.

23 Dutton, 2011, at 247.

24 *Id.*, at 249.



According to Professor Dutton, SUA, unlike UNCLOS, does appear to cover pirate attacks that occur in territorial waters.

Jurisdiction pursuant to SUA, however, is not universal. Rather, jurisdiction can be asserted by any member state so long as the offence was either “against a ship flying its flag, (2) occurred in its territory, (3) was committed by a national of the state, or (4) had a national of the state as a victim”.<sup>25</sup> Given the above definition, it appears that if pirates attacked a cruise liner, any nation who had a citizen on board may assert jurisdiction. SUA attempts to put member states’ feet to the fire by requiring that signatory states that find offenders in their territory must either extradite or prosecute them.<sup>26</sup>

Perhaps one of the most frustrating legal aspects of both UNCLOS and SUA is the doctrine of standing. In American law, we are somewhat comfortable with the doctrine that the party bringing a lawsuit should have suffered a significant and definite harm, giving it proper standing to bring the case against the defendant. Pursuant to UNCLOS, all nations are granted standing regardless of their connection to the act. Jurisdiction pursuant to SUA, though short of universal, boils down to simply requiring a state to have some contact with the act.

A simple case demonstrates the nightmare of determining jurisdiction. A merchant ship owned by Norway, piloted by a Danish captain, in Somali waters, with sailors from the United States is attacked by pirates from Somalia and Kenya and rescued by a Japanese warship. Who has proper jurisdiction? Although this question might make for an interesting essay for a law exam, in practice it is a nightmare of a problem. If we all agree that piracy affects every country equally, and in an economy that is ever more intertwined it would be difficult to argue otherwise, then all countries have proper standing. However, given the fact that witnesses, evidence and other aspects of the case may very well come from all corners of the globe, it makes sense to have a central court.

### *III. United Nations Resolutions*

In 2008, the UN Security Council, having recognised the impact piracy was making on the international community, adopted Resolution 1816 authorising coalition navies in cooperation with the Transitional Federal Government for Somalia to enter the territorial waters of Somalia and use all means necessary to repress piracy. The UN Security Council with Resolution 1816 essentially recognised that Somalia had become a nation without rule and that commerce was becoming the victim and bearing the cost. Essentially, Somalia could not point to its wall of sovereignty if it was unable to build a wall. Resolution 1816 was initially only for six months; however, that time was extended for one year under Resolution 1846 signed on 2 December 2008. Some two weeks later the Security Council further strengthened the prior two resolutions by the passage of Resolution 1851 in which the Council authorised land-based operations in Somalia to combat piracy.

<sup>25</sup> *Id.*

<sup>26</sup> Dutton, 2012, at 1138.

Although these resolutions were passed in 2008 and 2009, piracy continued to rise in the following years, finally peaking in 2011.<sup>27</sup> Although piracy continued to rise, it is clear that without the passage of these resolutions Somalia would have operated much like the Wild West outside the control of the international community.

#### D. Private Security Companies

In response to the plethora of pirate attacks, merchant vessels have looked to private security companies (PSCs) to provide them with protection on their passage through the pirate-infested waters of Somalia and around the Horn of Africa. Companies in both the United States and Britain, such as Blackwater, are more than happy to take advantage of such business opportunities.<sup>28</sup> Before a discussion of these firms, how they operate, and the challenges they face, the elephant in the room must be addressed. PSCs have a major conflict of interest. War, conflict, and fear mean more business for private security firms. Giving PSCs a piece of the pie, or even merely a seat at the table is a move in the wrong direction. With that in mind, merchant ships most certainly have an interest in protecting their cargo, personnel and investments. PSCs may very well be part of the entire solution to piracy.

Most of the PSCs in the business are either British or American companies staffed by former Special Forces soldiers that have left the theatre in Iraq or Afghanistan.<sup>29</sup> With such an abundance of soldiers coming back from a decade of war, it is hard to argue that these men are anything but extremely well trained and prepared for combat. A PSC's services providing safe passage range anywhere from \$15,000 to \$100,000, depending on a whole range of factors, including the number and quality of security guards, ship size and vulnerability, and the length of the trip.<sup>30</sup>

America, in comparison with its European allies, appears to be much more comfortable with the use of force against pirates by private security firms. The high seas are no different from other international settings in that there will certainly be some cultural differences in the approach to solving a problem. Americans are, by and large, much more comfortable with the notion of private individuals wielding deadly force. Simply compare a police officer in New York City with a police officer from London. Simply put, one carries at least one gun, likely two, whereas his British counterpart is armed with a radio and a baton. It should then come as no surprise that some countries fear the notion of allowing armed PSCs more than others.

Not only do some countries culturally not accept the notion of privately armed guards but also some countries fear having to essentially compete with a well-armed foreign ship. In the Netherlands shipping companies are not permit-

27 See Kermeliotis, 2013.

28 Kraska & Wilson, 2009, at 245.

29 Dutton, 2013, at 11.

30 *Id.*

ted to employ PSCs because employment of such forces would undercut the Dutch government from maintaining a monopoly on the use of force. Although a well-armed private security company might be welcomed in Boston harbour, it may very well be viewed as nothing short of political negligence in Rotterdam. Further, if the ports of call for a merchant ship are in small island nations, it could easily be the case that the private security firm yields superior firepower to the local police. Certainly, it is well within a state's interest to determine how many and what type of weapons it will allow within its territory – if any at all.

Despite the differences that may exist, it has become somewhat universally accepted that some form of protection, be it private or state provided, has become necessary in the light of the increase of piracy attacks. In what follows we will attempt to compare individual country responses to the necessary evil that is protection by private security firms, and attempt to determine whether there can be some international agreement for use of a treaty.

### *I. America's Response to Private Security Firms*

It appears as though America is leading the pack when it comes to encouraging the employment of PSCs. The reasons for this appear to be a mixture of cultural, political and capital. As previously stated, most of the companies around the world that offer such services are either British or American. Further, America's now more than a decade-long experience of war in the Middle East in Iraq and Afghanistan has left it with a plethora of well-trained military personnel looking for employment in such areas.

But the mere fact that America has the resources to provide such a void in the market is certainly not the only reason that America has taken such a pro-PSC position. Culturally, Americans are by and large completely fine with the notion of self-defence. If a PSC were to kill pirates during an attempted attack, it is unlikely any American would hold out the employees of the PSC to be anything but heroes. To Americans if pirates have been killed during an attempted attack, self-defence was employed, due process was served and an efficient result was achieved. Case closed. There are, however, significant concerns about yielding too much power to PSCs even on the high seas.

The United States strongly favours the use of PCSs to fight maritime piracy. In March of 2012 Andrew Shapiro, Assistant Secretary of the Bureau of Political-Military Affairs, explained that the United States permits commercial ships sailing under its flag to use PSCs. Further, Shapiro suggested that in response to the seriousness of the situation other countries should follow suit. Shapiro did, however, make it clear that the ship's captain, not the leader of the PSC, maintained full command over the PSC as well as any order with respect to the use of force.

With respect to just how much force is appropriate, a 2009 Self-Defense Advisory stated that ship personnel may use deadly force only when an individual has "a reasonable belief that the person or persons to whom the deadly force would be directed poses an imminent danger of death or great bodily harm".<sup>31</sup> Of course, PSCs must also comply with US weapon laws. Specifically, they must comply with

31 *Id.*, at 27.

the International Traffic in Arms Regulations (ITAR), which requires a permit by either individuals or corporations who import or export firearms and ammunition to or from the United States. Under some circumstances an individual may qualify for an exception from ITAR licensing requirements, but then they will only be allowed to carry three non-automatic firearms and up to 1,000 rounds of ammunition,<sup>32</sup> clearly not enough to properly defend a full-on pirate attack.

However, in 2010 the Coast Guard and the Department of Homeland Security addressed the issue of US-flagged ships carrying firearms on board to defend against pirate attacks in a Port Security Advisory entitled International Traffic in Arms Regulations (ITAR).<sup>33</sup> The advisory stated that US vessel operators may apply for a temporary export licence if they chose to bring firearms aboard. The licence is valid for up to four years and may be used for multiple trips. To obtain the licence, the shipper need identify the firearms and ammunition to be carried along with a list of the foreign countries for each port of call the ship will be visiting. The licence permits the personnel to be transferred, but weapons may not be.

## II. *Other Countries' Response to Private Security Firms*

Outside of the United States, Great Britain has been an extremely important player in maritime piracy. In 2012 Dr. McCafferty, Head of the Counter-Terrorism and UK Operational Policy at the Ministry of Defense, worried that the presence of armed guards may lead to an escalation of violence, encouraging pirates to arm themselves even more.<sup>34</sup> Despite this level of concern, on 30 October 2011 the British Prime Minister announced Great Britain would allow its shippers to hire private security forces. Later, in December, a statement was issued stating that guards would be allowed under exceptional circumstances only when the ship is travelling through areas posing the highest risks of pirate attacks.<sup>35</sup> Following Great Britain's lead, Cyprus, Denmark, Greece and Norway have since changed their laws, allowing for the presence of PSCs on board.

Although it appears many nations around the world are moving in the direction of allowing for PSCs, the fact is that the laws controlling PSCs are country specific, and it appears there is little effort by countries to work together to make a more universal framework. The amount of armaments available to the public is a matter that is country specific. What may be appropriate in one country will most certainly not be in another. However, if a country chooses to limit PSCs to small firepower, they may in fact become more attractive targets.

## III. *Creative Solutions to Jurisdictional Problems*

Sometimes it seems as though shipping companies are caught between a rock and a hard place. The destination country may be unwilling to permit the use of PSCs, but along its route of travel the merchant ship certainly needs protection. For

32 *Id.*, at 26-30.

33 *Id.* (citing: US Coast Guard and the Department of Homeland Security, International Traffic in Arms Regulations (ITAR), Port Security Advisory (4-09) (Rev. 4), 3 September 2010).

34 Foreign Affairs Committee, Piracy Off the Coast of Somalia, Report, 2010-12, HC 1318, at para. 26 (UK).

35 Dutton, 2013, at 25.

problems such as these, both private security companies and navies of the world have developed some rather creative solutions.

It appears that Yemen has seized its geographical location as an asset and now rents out its own military personnel to escort ships travelling through the Gulf of Aden. Sri Lanka, on the other hand, has taken the approach of not providing the personnel but providing the weapons. PSCs are permitted to rent government weapons from Sri Lanka and must also agree to allow a retired or off-duty Sri Lankan military officer to monitor the use of weapons on board the ship.<sup>36</sup>

The Coast Guard and Department of Homeland Security has also issued an advisory pertaining to the applicable standards for hiring a private security firm. The 2009 Port Security Advisory entitled *Minimum Guidelines For Contracted Security Services In High Risk Waters* states that the security personnel must be fluent in English, meet certain training requirements that will allow them to properly defend the specific vessel, and should be trained in the use of any weapons they may carry, weapon safety, and what constitutes lawful use of force in self-defence and the defence of others.<sup>37</sup>

#### *IV. Conclusive Remarks about Private Security Firms*

Although it is slowly becoming more accepted for PSCs to accompany ships through pirate-infested waters, both countries and the international communities should be wary of yielding too much power. For starters, it is in the best interests of all nations that the government maintain a monopoly on armaments that pose a significant threat of being used against it. As stated previously, maintaining a monopoly on force means different things in different countries. A small helicopter armed with an automatic rifle poses little if any legitimate threat against the US government; however, this same weapon in a small island nation in the Pacific that lacks an air force is another question entirely.

PSCs do allow for a shift of the cost from governments and taxpayers to the private industry. Of course, the presence of a private company on board will indeed increase the cost of shipping; however, those who benefit from the shipping of certain products through pirate-infested waters will bear the cost, rather than the taxpayer in general. One could imagine a scenario in which the navies of the world lined the Horn of Africa, suppressing piracy at its every turn; however, the cost of performing such an operation would be in billions of dollars annually.<sup>38</sup> Although PSCs do appear to pose a threat to national security, a cost benefit analysis seems to suggest that they have become a necessary evil.

Although private security firms have become somewhat of a necessary evil, one should recall the history of letters of marque. Countries that allow PSCs to accompany merchant ships sailing under their flag are essentially permitting activities conducted by the PSC. Although the flag state may not be the one pull-

<sup>36</sup> *Id.*, at 13-14.

<sup>37</sup> *Id.*

<sup>38</sup> R.S. Jeffrey, 'An Efficient Solution in a Time of Economic Hardship: The Right to Keep and Bear Arms in Self-Defense Against Pirates', *Journal of Maritime Law & Commerce*, Vol. 41, No. 4, 2010, pp. 507-540, 508.

ing the trigger, it is definitely seen as an enabler. If an American merchant ship, protected by a PSC were to fire on an innocent fishing boat, it may well be the American ship that is now guilty of piracy. Becoming too trigger-happy may well turn the hunted into the hunter. It would be nothing short of a fiasco if an American ship were asked by an island nation of fishermen to be detained by a European warship on accusations of committing piracy.

On the high seas PSCs are able to act as judge, jury and executioner, lacking any notion of due process. For this reason, it is in the best interest of the international community to grant jurisdiction over piracy to a central court. Currently, because no such court is in place there is no definition or limit of due process, and universal jurisdiction over piracy guarantees nothing but uncertainty. Such a court through its decisions would be able to better define the rules of engagement and a code of conduct for such security firms.

## **E. Why Pirates Are Not Being Prosecuted**

### *I. Countries Lack Jurisdiction*

In September 2008 a Danish warship captured ten Somali pirates, and even though the pirates possessed assault weapons and notes determining how they would split the paid ransoms with their warlords back on land, the Danish warship released them on a Somali beach.<sup>39</sup>

With respect to the 2008 case involving a Danish warship, it appears the problem resulted from Danish law not recognising jurisdiction over piracy. According to Danish law, Denmark may recognise jurisdiction over an act of piracy only when the ship is sailing under the Danish flag or a Danish citizen is the direct victim of the attack.<sup>40</sup> This line of reasoning is not exclusive to Denmark. In fact, other countries such as Austria and Norway require some sort of jurisdictional nexus or proof that their country would somehow be advantageous as a prosecutorial forum.<sup>41</sup>

Although this line of reasoning may seem to infuriate those who are victims of the attack, one can understand the Danish position. UNCLOS and customary international law allows for jurisdiction but does not require it. Comparing Denmark's laws with the US doctrine of standing, one can start to see a similar resemblance. In the case above, because the attack did not directly affect Denmark it was not the proper country to exercise jurisdiction. Nowhere does it appear that Denmark took the position that no country should exercise jurisdiction; it simply took the position that it was not the proper one to do the work. This philosophy, however, runs completely counter to the philosophy of universal jurisdiction. In American criminal law we see the perpetrator harming not necessarily the victim

39 Dutton, 2011, at 237; *see also*, P. Prada & A. Roth, 'On the Lawless Seas, It's Not Easy Putting Somali Pirates in the Dock', *The Wall Street Journal*, 12 December 2008, at A16; *see also* J. Gettleman, 'Pirates Outmaneuver Warships off Somalia', *The New York Times*, 16 December 2008, at A6 (this article reports Danish and American navies have released suspected pirates).

40 Dutton, 2012, at 1136.

41 *Id.*, at 1150.

but rather society as a whole. If person A assaults person B, then A has caused harm to not only B but to society at large. Therefore, to make himself whole, B may assert a tort against A; however, to protect society as a whole from further acts a prosecutor files a suit against A on behalf of society as a whole.

In much the same way, because piracy affects us all, it is in the interest of the international community to take on the role of the prosecutor even in instances where the victim, and his country, may be too weak or lack the resources to properly prosecute the perpetrator. An international convention that would create a court of exclusive jurisdiction for piracy would solve such a problem and ensure that not only the victim but also the international community as a whole is properly protected and represented regardless of who the victim may be.

## II. *Pirates May Seek Asylum*

A pirate attack occurs, navies from around the world respond, Special Forces soldiers risk their lives to rescue the hostages and make a heroic capture of the pirates. Then, just as in a game of cops and robbers, the pirates are taken back to shore and released. All the while, time, money and a large risk of loss of life have been wasted only to let the perpetrators go free. This is no joke; in fact it has happened and continues to happen to pirates captured by international navies on the high seas. Citizens throughout the world are baffled as to why their countries' navies would let criminals of such a crime of piracy go unpunished. There are many reasons why countries would rather let pirates go than deal with them; they include cost of a trial, problems with extraditing, and finding a convenient forum. But perhaps the greatest concern of countries willing to try pirates as criminals in the countries' home courts is fear of the pirates claiming the magic word that makes politicians cringe: amnesty.

In May 2010 the United States released ten pirates it had been holding for weeks after determining that a search for a nation to prosecute them would be futile.<sup>42</sup> Although this can be extremely frustrating for the international community, it appears that there may be some logic to the madness. A warship has several concerns in dealing with pirates, not the least of which is that pirates at some point may attempt to seek asylum in the warship's home country.<sup>43</sup>

Kenya has become the forum of choice to try Somali pirates. In fact, Kenya has entered into agreements with Canada, China, Denmark, the European Union, the United Kingdom and the United States to try pirates captured by these nations.<sup>44</sup> Other countries such as Mauritius, Seychelles and Tanzania have created similar agreements to try pirates. In consideration for prosecuting these

42 *Id.* See also, C. Whitlock, 'Navy Releases Accused Somali Pirates Held on Warship for Six Weeks', *The Washington Post*, 29 May 2010, at A10; see also M.S. Moore, 'How Do You Prosecute a Pirate?', *Miller-McCune*, 16 December 2009, available at <[www.miller-mccune.com/politics/how-do-you-prosecute-a-pirate-6181](http://www.miller-mccune.com/politics/how-do-you-prosecute-a-pirate-6181)>.

43 G. Gauci, 'Piracy and Its Legal Problems: With Specific Reference to the English Law of Maritime Insurance', *Journal of Maritime Law and Commerce*, Vol. 41, No. 4, 2010, pp. 541-560, 543. Also, See J. Kraska & B. Wilson, 'Piracy Repression, Partnering and the Law', 40 *JLMC* 2009, pp. 43-58, 55-56.

44 Dutton, 2011, at 238.

cases, since 2009 Western states have given as much as \$10 million to these countries to help pay for the transfer of prisoners, witnesses, the training of police and prosecutors as well as upgrades to prisons and courts.<sup>45</sup>

Why would Western countries with some of the most advanced legal systems in the world leave such an important crime as piracy up to African courts with little experience, poor resources and a system wrought with corruption? The answer is quite simple. So long as the pirates remain on African soil, they cannot claim Amnesty in Western countries. Roger Middleton, a researcher for Chatham House, a London-based think tank, claimed that “these countries don’t 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>46</sup> In fact, the British Foreign Office warned the Royal Navy that detaining pirates on the sea may be a violation of their human rights and potentially lead to pirate claims of asylum in Europe.

The only thing worse than letting a pirate go free seems to be having to pay to put him on trial, perhaps pay for both the prosecution and his defence, deal with potential appeals, pay for his incarceration, and then perhaps at the end of the day once his sentence has been served give him asylum in your country. The details of Human Rights Law tend to get a bit messy in this area, and it is beyond the scope of this article. However, a basic overview of the claims of amnesty will be discussed as well as a possible solution to avoid such claims.

Professor Dutton wrote an extremely detailed article on the potential legitimacy of amnesty claims. In her article, Professor Dutton claims that:

although the threat of asylum claims is frequently offered to explain Western nations’ reluctance to prosecute pirates in their territories, what is not addressed is whether this fear has any actual basis in fact or law. Instead, the statement that nations are afraid of asylum claims is followed by little explanation at all – and certainly no legal analysis of the international or domestic laws on which convicted pirates would base their claims.<sup>47</sup>

Central to the threat of asylum is that pirates are, by definition, criminals. It would make little sense to *use* international law to grant asylum to an individual who is basing his claim upon his breaking international law. A pirate is being tried for breaking international law. He cannot break international law simply to get a hearing and then demand its full protection.

A potential argument for amnesty is somehow the pirate could suggest that sending him back to Somalia would be returning him to a war zone. Despite this argument being akin to Brer Rabbit begging not to be thrown back into the briar patch, it becomes difficult to claim you are a refugee when the reason you are in another country to begin with is that you engaged in a war-like action. The pirate may be able to convince someone that he is a prisoner of war, but a refugee seeking asylum he is not.

45 *Id.*, at 239.

46 *Id.*, at 240.

47 *Id.*, at 241.



But even if he were to convince a court that returning him to Somalia would put his life in jeopardy, such as under the theory of refolement, he would not only have to prove that a general threat exists, such as reports showing that pirates are many times subject to gang violence, but he would also have to show that the threat is specifically aimed at him. But even if he had proof that there was a specific threat against him and returning him to his home in Somalia would almost certainly result in his death, even then, asylum may still not be an appropriate response. If, for example, the pirate ran a competing pirate network and since his capture a competing gang had overtaken, killed and threatened to kill any existing members of his clan, he should still not be granted asylum. Although it may well be the case that his hometown would be an unsafe place for him to be returned to, that does not mean that another city some 500 miles away would not be a perfectly good place to be returned to.

Further, most asylum claims point to some sort of institution discrimination. Simply proving that there is someone in your home country who wants to kill you will not carry the day for an asylum claim. Because Somalia is a failed state, and its government is effectually ineffective, the petitioner would have a hard time showing that any institution, government or otherwise, exerted enough control *throughout Somalia* to withstand a claim of asylum.

Despite the claim of asylum being rather far-fetched, it still is something that Western nations are rightfully concerned about. While the cost of piracy may be borne by all nations equally, at least in theory, the cost of prosecuting and imprisoning a pirate is borne by the prosecuting country alone. It appears that on the international stage we have a classic case of Everybody, Somebody, Anybody and Nobody.<sup>48</sup> Everybody could prosecute pirates, Somebody should do it, although not Anybody can, meaning Nobody is getting it done. In such instances a Leviathan is needed. If nations were to agree that piracy is a matter of international concern, subject to universal jurisdiction, to be prosecuted and tried, and punishment rendered in a central location, there would finally be some real action towards eradicating piracy. Admittedly, such a system would remove some sovereignty from nations; however, at the present moment it seems no nation is exercising its authority and all nations are suffering the consequences.

#### **F. Proposal for Exclusive Jurisdiction Given to ITLOS in Hamburg, Germany**

If, as CNN has reported, the world is truly bearing a loss of some \$18 billion per year for pirate-related activities, then it makes sense to invest in a better criminal justice system for pirates. If a court was given a budget of say \$9 billion, and it was able to reduce in half to say \$5 billion, the world would see a net savings of

48 The story goes like this: This is a story about four people named Everybody, Somebody, Anybody and Nobody. There was an important job to be done, and Everybody was sure that Somebody would do it. Anybody could have done it, but Nobody did it. Somebody got angry about that because it was Everybody's job. Everybody thought Anybody could do it, but Nobody realised that Everybody wouldn't do it. It ended up that Everybody blamed Somebody when Nobody did what Anybody could have done.

\$4 billion. However, \$5 billion would be quite the budget for a court; perhaps only a few million would do the trick.

The international community could stand by and do nothing or continue with the status quo; however, to do so would leave a monster lurking in the shadows. What would happen if two bands of pirates seized two large merchant ships carrying oil in or around the same time and held them for an average of 70 days. Oil prices would surely skyrocket, jobs would be lost as refineries would limit their production, and although commerce may not come to a grinding halt, the expenses that businesses the world over, as well as individuals, would have to bear would be almost incalculable. To make the hypothetical situation even worse, imagine for a moment that a botched rescue attempt caused a massive oil leak in the waters of Somalia. Aside from the environmental damage that countries all along the African coast would have to bear, an oil spill in Somalia waters would likely kill any chance of Somalia's regaining economic activity from the sea. In many instances, because of Somalia's instability, its only hope of economic prosperity comes from its territorial waters, the only part of Somalia its incompetent leaders cannot singlehandedly destroy.

For all the reasons stated above, it is in the best interest of not only one single nation but the world as a whole to enter into a binding agreement whereby an international criminal court has exclusive jurisdiction over piracy, provides the court facilities and also provides facilities for detention and imprisonment. Paramount to this convention would be the recognition that pirates may not claim amnesty in the country in which they are tried. Although some may argue that agreements with African nations such as Kenya have already created such a forum, I suggest that Africa is not a proper forum for such a court.

### *I. Why ITLOS*

The ITLOS is the dispute resolution body that is empowered to resolve disputes under UNCLOS and other international treaties that do not conflict with UNCLOS. Although the ITLOS is modelled after the International Court of Justice, it generally hears civil cases involving state parties.<sup>49</sup> The ITLOS court comprises 21 judges, a staff of 37 and an annual budget of just over €20 million.<sup>50</sup> Although the ITLOS court is not a criminal court, its experience in international maritime law and the application of UNCLOS, the agreement most important to pirate proceedings, is unprecedented. Currently, we have the problem that no one is exercising jurisdiction. Rudiger Wolfrum, former President of the Court and current member, told the UN General Assembly that:

it is evident that the Tribunal has not exhausted its potential. There is certainly room for more judicial work. The tribunal has broad competence in

49 C. Thedwall, 'Choosing the Right Yardarm: Establishing an International Court for Piracy', 41 *Geo. J. Int'l L.* 2010, pp. 501, 516.

50 See <[www.itlos.org/index.php?id=8&L=0](http://www.itlos.org/index.php?id=8&L=0)>.

matters relating to the law of the sea and remains ready to settle a variety of disputes concerning the application or interpretation of the Convention.<sup>51</sup>

The city of Hamburg is also an excellent city that could easily attract judges from their home countries. Although UNCLOS permits the court to sit anywhere it may choose, the mere number of cases that may be brought before it may make part-time residency of justices a requirement. The city of Hamburg, with its central location in Europe, is uniquely positioned to allow judges to travel to and from their home countries with ease or perhaps even to find part-time residences in the city. The fact that some of the world's largest shipping companies are headquartered in Hamburg further gives credibility to the city as the epicentre of international maritime trade. With the introduction of a court of exclusive jurisdiction, countries will have an incentive to capture pirates rather than release them allowing them to continue to cause harm to others. With such an influx in cases, one could expect that the ITLOS court will be in session on a continual basis.

## II. *How to Fund the Court*

Currently, the court is funded by contributions by states party to the UNCLOS convention. The amount that an individual state pays is based upon "the scale of assessments of the budget of the United Nations adjusted to take into account participation in the Convention. The European Community pays a fixed contribution set by the Meeting of State Parties".<sup>52</sup> Although this system has seemed to work in the past, with the increased workload on the part of the court, one could certainly expect the budget to balloon. Given that the payment is in some way related to participation in the UNCLOS treaty, that is to say, the more a country engages in international trade, the more it pays, seems to be a fair way of splitting the bill. But one should not forget, much like when dining out with friends, that even if a specific state may pay more than its fair share, it benefits as a whole. Though island nations may pay a larger share of the bill because of their heavy involvement in international trade, they will likely pay nothing towards the enforcement of the Convention, *i.e.* warships of military nations that have the power to capture the pirates.

The funding of the court could certainly be a topic of discussion, as there are countries that would certainly benefit more from the court than others. Given the minimal increase in cost that would be required to grant ITLOS exclusive jurisdiction over piracy claims, it does not appear that the bill would be all that great. The major costs that would come along with the court would not necessarily be the process itself, but rather the transportation of pirates to the court and the imprisonment. Again, if countries share the bill, they can all receive a benefit greater

51 Thedwall, 2010, citing to R. Wolfrum, President of the International Tribunal for the Law of the Sea, Statement to the General Assembly of the United Nations Page 4, available at <[www.itlos.org/fileadmin/itlos/documents/statements\\_of\\_president/wolfrum/sixth\\_committee\\_201006\\_eng.pdf](http://www.itlos.org/fileadmin/itlos/documents/statements_of_president/wolfrum/sixth_committee_201006_eng.pdf)>.

52 See <[www.itlos.org/index.php?id=8&L=true](http://www.itlos.org/index.php?id=8&L=true)>.

than if they were to try to fight piracy on their own. In this proposed system, countries could work together and share resources to receive a more efficient result. Pirates could be captured by an American warship, taken to court by a Danish vessel, tried in Germany, serve their sentence in a Dutch prison, and be returned to Somalia by a French vessel. Prosecution of pirates is no cheap and easy task; however, if countries work together to combat piracy there will be an incentive to bring them to justice. Creating a court of universal jurisdiction means that no one country will have to bear the costs individually.

First, as stated above, African courts are severely underfunded, unreliable and full of corruption.<sup>53</sup> The development of piracy law, one of the very few crimes of universal jurisdiction, should not be left to inexperienced, underfunded, corrupt judges in Kenya or elsewhere. If we are going to write a convention giving exclusive jurisdiction to a court, then we need to make sure that the people sitting on that court and the country in which the court is located are legitimate. Finding judges willing and able to sit on the court should not be very problematic; however, convincing those individuals to reside, at least for part of the year, in a country means that we need to make sure the country is at least somewhat attractive to live in. For this reason, I suggest that the best solution to this problem would be to give the ITLOS in Hamburg, Germany, exclusive jurisdiction over piracy.

### *III. Courts' Experience in International Territorial Waters Claims*

It may well be the case that someday the notion of piracy becomes something of the distant past, a notion that we may have held during the 1990s; however, it is unlikely that disputes at sea will become less. As the world population continues to grow, out of control one might conclude in areas such as Southeast Asia, nations of the world will certainly turn to the sea to look for available resources. Claims of territorial waters will most certainly increase. One area that will likely cause controversy is an Arctic passage that may become navigable due to global warming. Imagine what would occur if a country such as Russia were to declare this to be its 'exclusive economic zone'. The ITLOS court may be put to use today for pirate criminal matters, but in doing so it will gain the desperately needed expertise in international maritime law to deal with future disputes. Therefore, instating an institution that will work towards settlements of international maritime issues appears to be the ounce of prevention needed to solve problems that may otherwise turn out to be very costly. Remember, wars are never cheap.

As ice melts from the Polar caps, deep-sea drilling becomes more advanced and the demand for oil increases, we can undoubtedly expect turmoil in a competition for resources. This court may lay the legal basis for determining how best to deal with the consumption of these resources. The directions in which the court could go are boundless, but one thing is for sure: it is an unlikely case that there would not be enough work.

53 Thedwall, 2010, at 515-517 (noting that African courts, though having received millions in funding for prosecution of trials, are corrupt, inept and have yet to produce significant results).

## G. Conclusion

Just as no man is an island, no country on the high seas is truly independent. The bell of responsibility is ringing, and it is ringing for all nations equally. It is time for the international community to answer the call, pledge the money and support for a court with exclusive jurisdiction and bring an end to maritime piracy. The fundamental reason that piracy continues to occur is that there is no internationally coordinated effort to prosecute pirates. Although piracy is one of the few crimes in which countries *may* exert universal jurisdiction, it seems no country wants to be the one left holding the bag. It would be a large undertaking for any country, even a wealthy country with ample resources such as the United States, to combat piracy on its own. However, because piracy affects all nations, regardless of their location in the world, all countries have an interest in curtailing it. To grant exclusive jurisdiction to the ITLOS over all maritime piracy claims would finally give legitimacy to a crime that is costing the world economy billions a year.

The ITLOS has the experience in international maritime issues to handle such complex cases, and its funding, judges and procedures are adequate to provide all defendants with ample due process. Further, the ITLOS would allow the world to speak with one voice, and a strong one at that, against the crime of piracy and give some clarity to a crime that has, up till now, been an international crime with unforeseeable implications. The cost to any individual nation would be minimal, yet the benefits derived from such a system would be monumental. For these reasons, a convention should be drafted issuing exclusive jurisdiction to the ITLOS and provide funding for its activities consistent with its current funding schedule.

## H. Closing Remarks

I am not, nor have I ever been or will ever be, an expert on Somalia. Although in the course of writing this article, I have indeed gained an insight into a war-torn country. The path to hell is paved with good intentions. In this light, one may start to seriously question the positive effects of foreign aid to Somalia. Although those who argue for the continuance and/or increase of foreign aid certainly appeal to the altruistic side of humanity, it may well be the case that this foreign aid is hindering Somalia's recovery into a governing nation state. However, foreign aid sent to Somalia has given the people in Somalia just enough to get by.

To say that governments throughout the Horn of Africa are corrupt is an understatement. Yet foreign aid rather than helping African nations to emerge into modern democracies has hindered their growth and trapped them in a vicious cycle.

A constant stream of 'free' money is a perfect way to keep an inefficient or simply bad government in power. As aid flows in, there is nothing more for the government to do – it doesn't need to raise taxes, and as long as it pays the army, it doesn't have to take account of its disgruntled citizens. No matter that its citizens are disenfranchised (as with no taxation there can be no

representation). All the government needs to do is to court and cater to its foreign donors to stay in power.<sup>54</sup>

Give a man a fish, he is fed for a meal, teach him to fish and he can feed himself for a lifetime. Dambisa Moyo, in her piece for *The Wall Street Journal*, provided a perfect example as to how foreign aid hurts Africans.

Say there is a mosquito-net maker in small-town Africa. Say he employs 10 people who together manufacture 500 nets a week. Typically, these 10 employees support upward of 15 relatives each. A Western government-inspired program generously supplies the affected region with 100,000 free mosquito nets. This promptly puts the mosquito net manufacturer out of business, and now his 10 employees can no longer support their 150 dependents. In a couple years, most of the donated nets will be torn and useless, but now there is no mosquito net maker to go to. They'll have to get more aid. And African governments once again get to abdicate their responsibilities.<sup>55</sup>

Necessity is the mother of invention, and at least at the current moment, the necessities for much of Africa are being provided through foreign aid. Why would an entrepreneur risk capital to start a business when it will likely be the case that some government enterprise will come along with foreign aid, no overhead, and start a black market that will be able to beat your business every time. Why should a farmer plant his field, pay for irrigation, pay for guards to protect his land, fertilise his crops, and risk capital if another player in the market receives his crops for free? Capitalism does not work when a player in the market does not have Cost of Goods Sold in his accounting equation.

The aid that needs to be given to Africa needs to be procedural rather than substantive. There are some things that can be done to shape society, or to create incentives, without actually doing the work. Authors Steven Levitt in his book *Freakonomics*, Jeffrey Sachs in *The End of Poverty*, and Malcolm Gladwell in *The Tipping Point* have all written about population control and its effect on crime and poverty. Instead of providing mosquito nets to save lives, subsidise birth control to prevent procreation of lives that cannot be sustained on the meagre incomes anyways. The more dependents one has, the more desperate he becomes. His entire income is devoted to attempting to provide for his dependents, and no resources, time, money, or otherwise, exist to invest in other ventures. If the sole economic activity of a Somali household is simply to 'keep afloat', then the country will continue to be in the dark ages.

54 D. Moyo, 'Why Foreign Aid Is Hurting Africa', *The Wall Street Journal*, 21 March 2009, available at <<http://online.wsj.com/news/articles/SB123758895999200083#CX>>.

55 *Id.*