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WORLD MARITIME UNIVERSITY

Malmö, Sweden

**ARMED SEAFARERS ON BOARD SHIPS: AN
ANALYSIS FROM AN INTERNATIONAL
PERSPECTIVE**

By

ITRISHA NUNES

Jamaica

A dissertation submitted to the World Maritime University in partial
fulfilment of the requirements for the award of the degree of

MASTER OF SCIENCE

IN

MARITIME AFFAIRS

(MARITIME LAW AND POLICY)

2013

DECLARATION

I certify that all the material in this dissertation that is not my own work has been identified, and that no material is included for which a degree has previously been conferred on me.

The contents of this dissertation reflect my own personal views, and are not necessarily endorsed by the University.

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“Keep your dreams alive. Understand that to achieve anything requires faith and belief in yourself, vision, hard work, determination, and dedication”Gail Devers.

ABSTRACT

Title of Dissertation: **Armed Seafarers on Board Ships: An Analysis from an International Perspective**

Degree: **M.Sc.**

The dissertation is a study on the possibility of arming seafarers. The objective of the study is to examine the methods and instruments that have been employed to date and to observe the effectiveness and limitations of these tools in the fight against piracy and maritime terrorism.

The issue of piracy does not seem to be receding as anticipated by the global community. In the mind's eye of the researcher, there seems to be much controversy surrounding the very instruments that were adopted to control this issue. It is possible that the surrounding controversy could be sparked from lack of active actions, will or legal restraints. The dissertation reverts to the times when merchant ships carried arms to fend off attackers; an analysis is done on the arming of ship's personnel, as well as, the associated risks and restrictions of such practice.

Consequently the paper looks at the legal aspects of arming a ship's personnel. Since shipping is regulated by international soft laws, and since there are no international enforcement for international maritime crimes, legal issues fall under the purview of the jurisdiction of the flag states, or the states in which the acts have been committed. Therefore, there may be legal implications associated with arming of seafarers.

The author is of the opinion that the seafarers indeed face victimization from many angles. Different proponents of maritime security have re-iterated the ill fate of these noble artisans. It would seem that the most reliable defence would

be self-defence. However, notwithstanding the hard truth, the author is of the opinion that civilian seafarers should not be armed. The writer believes that the negative consequences far outweigh the positives that could emanate from this practice.

KEYWORDS: Armed Seafarers, Maritime Security, Piracy.

TABLE OF CONTENTS

Declaration	I
Acknowledgement	II
Abstract	III
Table of Contents	IV
List of Abbreviations	V
 CHAPTER I. INTRODUCTION	
1.1. BACKGROUND	9
1.2. PURPOSE	10
1.3. STRUCTURE.....	11
 CHAPTER II. HISTORICAL BACKGROUND ON MARITIME TERRORISM AND PIRACY	
2.1. General Overview on Maritime Terrorism.....	13
2.2. Historical Overview on Piracy.....	16
2.3. Current Situation on Piracy.....	21
2.4. The Cost of Piracy	27
2.5. Instruments Used In the Suppression of Piracy and Other Unlawful Acts....	31
2.6. Best Management Practices and its Effectiveness	39
2.7. Combating Piracy by Having Guns On Board Ships.....	44
 CHAPTER III. ARMING OF CIVILIAN SEAFARERS	
3.1. Historical Overview of Arming of Merchant Ships in the Past.....	48
3.2. Determining Whom Should Be Armed	51
3.3. Rationale for Arming of Civilian Seafarers.....	55
3.4. Flag states that are Employing Armed Guards/Non-Military Personnel/Military/Armed Civilians.....	63
3.5 Legal Justification of Arming Civilian Seafarers.....	64
 CHAPTER IV. CONSEQUENCES OF ARMING OF CIVILIAN SEAFARERS	
.....	73
 CHAPTER V. CONCLUSION AND RECOMMENDATION.....	79
 REFERENCES.....	85

List of Figures

- Figure 1. Conditions of Maritime Piracy and Terrorism
- Figure 2. Map of Traditional Pirate Infested Areas
- Figure 3. Pirate Incidents from 1990-2010
- Figure 4. A Map Illustrating Pirate Infested Areas in the Horn of Africa.
- Figure 5. Economic Indicators of Somali Piracy
- Figure 6. The Human Costs of Piracy
- Figure 7. Seafarers Attacked in 2010 and 2011
- Figure 8. Comparative Cost of Piracy between Government and Industry Players
- Figure 9. Costs of Piracy
- Figure 10. Financial Hardships Experienced by Seafarers After a Piracy Incident

List of Abbreviations

- BIMCO** – Baltic and International Maritime Council
- BMPs** – Best Management Practices
- FOC** – Flag of Convenience
- ICS** - the International Chamber of Shipping
- IMB** – International Maritime Bureau
- IMBPRC** - International Maritime Bureau Piracy Reporting Centre
- IMO** – International Maritime Organization
- ISPS**- International Ship and Port Facility Security
- MLC** – Maritime Labour Convention, 2006
- MSC** – Marine Safety Committee
- UNCLOS** –United Nations Convention of the Law of the Sea, 1982
- UN** – United Nations
- SOLAS** – Convention on the Safety of Life at Sea, 1974
- SUA CONVENTION** – Convention on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation 1988
- STCW** - Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW) 1978 as amended

CHAPTER I

INTRODUCTION

1.1. Background

The hijacking of ships and seizure of their crew is one of the most common means of gaining control over a vessel. Piracy has had devastating impacts on stakeholders in the maritime arena for centuries. Ship owners have experienced a myriad of losses resulting from ships being delayed, detained or destroyed, expending monies for high ransoms for crew held hostages, rapid increase of insurance premiums and in even more unfortunate cases, with the losses of lives. Piracy can be dated as far back as the 800-146BC¹. It consequently gained global attention following the hijacking of the cruise vessel “Achille Lauro” in 1985. In response to this incident, the International Maritime Organization (IMO) implemented the 1988 Convention on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (hereafter SUA), among other resolutions, protocols and treaties to prevent unlawful acts which pose threats to the safety of ships and security of crew members and passengers alike.²

For the past four decades industry players coupled with the International Maritime Organization in a bid to find a practical solution to this menace. To date many are still dissatisfied with the end results. The pertinent question, would be what of the safety of the lives of the men and women who toil the uncharted seas to provide the world with the necessities and luxuries it desires?

It must be appreciated that to reach a satisfactory solution, the root cause must first be identified as eradication of a problem is more likely to be successful if the root cause is terminated. However, the cause of on sea robbery is a compound

¹Bradford, A. S. (2007). *Flying the Black Flag: A Brief History of Piracy*. Greenwood Publishing Group.

² Pinto, C. A., Rabadi, G., & Talley, W. K. (2008). *US port security. Maritime Safety Security and Piracy*”, Informa: London at Pg. 73

issue. The issues for example range from cultural, political, economic and technical disparities; these causes may be manifested in different places and in varying periods of time.³ Thus, one approach may not be the answer to remedying this problem and all the varying causes must be duly eliminated.

One blatant cause of this on sea violence is the insufficiencies of the international laws governing maritime security. The 1982 United Nations Convention of the Law of the Sea (hereafter UNCLOS) and SUA Convention have perceptible pitfalls which prevent their effectiveness in combating maritime terrorism and piracy. In many instances the instruments are unable to expansively capture the range of the crime, as well as, the jurisdiction to enforce the conventions internationally.⁴ In light of the inadequacies of the tools being employed in the fight against maritime terrorism and piracy, seafarers are left vulnerable to attacks of all kinds. The pros and cons of arming a merchant ship will be analyzed.

1.2. Purpose

The principal purpose of this paper is to examine the different measures employed in the fight against piracy including the shortcomings of these methods, as well as, the pros and cons of having armed seafarers on board ships. Furthermore, the arming of seafarers will be justified under the existing international laws on maritime security.

The qualitative research method is principally used in collating this dissertation. The method was selected based on the type of information that will be collected for this paper. It should be mentioned that this topic is quite contemporary and as such the literature is somewhat limited on the direct arming of seafarers, thus the hypothesis of this research was taken from a wide

³ Logina, A (2009), *The International Law Related to Maritime security: An Analysis of its Effectiveness in Combating Piracy and Armed Robbery Against Ships*. WMU Publication

⁴ *ibid*

standpoint. Additionally, the researcher has interpreted findings and provided analyses and recommendations. The qualitative method focuses on gathering information that is later analyzed in an interpretative, subjective, impressionistic, or even diagnostic manner; hence, this proves to be the more suitable method to adopt. Interviews were also carried out further to the qualitative research work.

1.3. Structure

The preparatory chapter will be followed by a historical overview of piracy in which the background and root cause of piracy will be observed succinctly. The paper will then briefly delve into specific tenets of SUA and UNCLOS, namely the articles related to this topic, for example articles 101-107 and 110 of UNCLOS as they directly speak about piracy and article 3 of SUA in relation to unlawful acts. This is important as it will give rise to the main idea of the thesis, as to why the option of directly arming seafarers could be explored.

The third chapter will provide a brief synopsis relating to arming of merchant vessels in past times. The chapter will seek to identify who is deemed as a seafarer under the principles of MLC 2006. This is imperative as it seeks to determine whether the armed guards that are currently being used on board are in fact considered as seafarers or whether there is a different definition for those individuals. Additionally, the rationale behind this initiative of arming seafarers will be looked at in context from the practical and legal context.

The fourth chapter looks at the underlying consequences associated with arming the ship's crew.

The final chapter will provide a brief summary, concluding remarks, as well as, the author's final view on the topic.

While examples range from different States, in some instances, such as in chapter III, cases are taken from the commonwealth countries such as Britain and the United States. During the 1700 and 1750, the era of trade provided captivating reasons for studying seamen. During this period Britain was one such country that was actively involved in arming seafarers. In addition, this period witnessed the evolution of the British Shipping industry, as well as, the astonishing expansion of the American merchant marine.⁵

⁵ Rediker, M. (1989). *Between the Devil and the Deep Blue Sea: Merchant Seamen, Pirates and the Anglo-American maritime world, 1700-1750*. Cambridge University Press. Citing Karl Marx, "The German Ideology" in Marx and Frederick Engels, *Selected Works* (Moscow, 1969), vol. I, 59-60; Edgar Gold, *Maritime Transport: The Evolution of International Marine Policy and Shipping Law* (Lexington, Mass., 1981), 51, 61, 62

CHAPTER II

HISTORIAL BACKGROUND AND THE CURRENT STATUS ON MARITIME TERROISM AND PIRACY

The challenges found in maritime security are the underlying reasons for the various forms of protection now being introduced. These forms of protection range from regional and international cooperations, as well as, the Best Management Practices (BMPs) to name a few. Thus to understand the level and types of protection needed for seafarers it must be justified what warrants the necessary actions. For the past two decades, maritime security has gained increasing consideration. Concerns for safety of vessels have always been on the IMO's agenda since the 1980's but was later crystalized following the 1985 Achille Lauro incident and later the horrendous events of September 11, 2001 on the United States.⁶ The most predominant threat facing ships and their crews today is piracy and armed robbery⁷. The threat of maritime terrorism remains largely a prospective problem.⁸ However since maritime terrorism still poses a potential threat to the safety of crews and commercial shipping, it will be briefly examined but here after the focus will be on piracy and armed robbery.

2.1. General Overview on Maritime Terrorism

On October 12, 2000, U.S Navy destroyer, USS Cole was attacked while refuelling in the harbour of Aden, Yemen. The attack left 17 members of the crew

⁶ Mejia, M. (2003), Maritime Gerrymandering: Dilemmas in Defining Piracy, Terrorism and Other Acts of Maritime Violence. *Journal of International Commercial Law*, 2(2), 153-175.

⁷ Schröder, J. U., Mejia Jr, M. Q., Mukherjee, P. K., Manolis, F. M., & Dreeßen, S. (2006). Potential consequences of imprecise security assessments. *IAMU Journal*, 4(2), 31-38.

⁸ *ibid*

dead, 39 suffering from wounds and extensive damage to their vessel.⁹ Subsequently, on September 11, 2001, terrorists hijacked and took control of 4 civilian aircrafts. These aircrafts were later used to destroy the World Trade Centre, resulting in numerous casualties, fatalities and wreaking mayhem.¹⁰

One may question the link of on-land terrorists attack to that of on-sea violence. Furthermore, the similarities and differences as well as, the links of piracy and maritime terrorism may be questioned. The horrific events of September 11 ignited the search for instances where terrorists could attack and the possible objects that could be used as weapons. This led back to the sea and the vast business of commercial shipping, as well as, the vulnerability of ships to terrorists' attacks. For example in 2002, the attack on oil tanker M/V Limburgh is testimony to the vulnerability of commercial shipping to maritime terrorism¹¹. This could be an advanced step from the Achille Lauro incident in 1985. Similarly, in 2004, the attack on Superferry 14 in the Philippines also concretized the veracity of this threat. The connection is that maritime terrorism maybe disguised as piratical attacks. Murphy states that, there have been speculations about the realness of terrorist attacks on the world seaborne trade, specifically in areas of raw materials and energy. Murphy wrote that these speculations can be aligned with acts of piracy. An example can be drawn from the Dewi Madrim incident. In October 2003, terrorists hijacked and took control of the chemical tanker by emulating pirate techniques and attempted to navigate the vessel for an hour. Murphy wrote that the attempts to navigate the ship resembled methods used by terrorists who hijacked and flew the airplanes used in U.S 2011 attack.¹² Thus it has been evidenced that terrorist operations on land has amplified at sea. In

⁹ The Navy Department Library, 2011, Terrorist Attack on USS *Cole*: Background and Issues for Congress accessed from http://www.history.navy.mil/library/online/usscole_crsreport.htm

¹⁰ Murphy, M. N. (2013). Contemporary Piracy and Maritime Terrorism: The Threat to International Security. Routledge. accessed from http://www.google.se/books?hl=en&lr=&id=4USdYmCA_hQC&oi=fnd&pg=PP2&dq=maritime+terroism&ots=bV5wiUdYn1&sig=gArurN5a-JpiqAVOa2Bwmu2Bv2Y&redir_esc=y#v=onepage&q=maritime%20terroism&f=false

¹¹ ibid

¹² ibid

logical reasoning, crimes in a general sense over time progresses and improve to meet criminals' objectives. Therefore, in reality if terrorists can achieved their goals through varied means such as by use of a ship, then realistically this would be done. In furtherance, these criminal masterminds may also emulate the patterns of pirates to gain access to a ship. This in turn poses additional risks to seafarers.

Maritime Terrorism and Piracy

Piracy	Maritime Terrorism
for personal gains	for political gains or insurgency
Legal and jurisdictional weakness	Legal and jurisdictional weakness
Favourable geography	Geographical necessity
Conflict and disorder	
Under-funded law enforcement	Inadequate security
	Secure base areas
Cultural acceptability	Maritime tradition
	Charismatic and effective leadership
Permissive political environment	State support
Potential for reward	Potential for reward

Figure 1. Conditions of Maritime Piracy and Terrorism (adopted: Martin Murphy, 2007)

Concluding Remarks

The prime differentiating factor between piracy and maritime terrorism is that terrorism has a political objective while piracy has a financial motive, that is the intention to plunder (*animo furandi*) or for the sake of gain (*lucri causa*)¹³. Figure 1 provides a synopsis of the conditions needed for maritime piracy or terrorism to thrive. Both have a common ground in potential rewards, as well as,

¹³ Mejia, M. (2003), Maritime Gerrymandering: Dilemmas in Defining Piracy, Terrorism and Other Acts of Maritime Violence. *Journal of International Commercial Law*, 2(2), 153-175.

jurisdictional and legal weaknesses. Murphy states, that wherever piracy or maritime terrorism exist, one or more of these characteristics will be present¹⁴. These characteristics can be used to compare or contrast the type of on-sea violence that is emerging in a specific area. Hence, the correct preventative measures such as employing BMPs or use of guards or navy can be implemented to counteract the crime, protect seafarers and ship owners' interests. In furtherance, it can be concluded, based on the foregoing that maritime terrorism can be confused with piracy and justifies the need to provide active measures of combating the crimes.

2.2. Background and Historical Overview on Piracy

Background

In order to determine an action it is important to decipher the root of the problem. It must be respected that if a root cause did not exist there would be no need for preventative measures. Hence, the need to implement an active or passive measure would be irrelevant. Piracy is the means to an end for some people. It has been noted that piracy is built on the shoulders of economic depression or rather it has been noted that regions lacking in economic growth and sustainability are the areas that are more susceptible to such "on sea robbery".¹⁵ The longstanding history of lawlessness, poverty, unregulated and unstable economy may be the root cause of maritime crime in the littoral states and specifically in Somali waters. Somalia economic stability obliterated after its

¹⁴ Murphy, M. N. (2013). *Contemporary Piracy and Maritime Terrorism: The Threat to International Security*. Routledge. accessed from http://www.google.se/books?hl=en&lr=&id=4USdYmCA_hQC&oi=fnd&pg=PP2&dq=maritime+terrorism&ots=bV5wiUdYn1&sig=gArurN5a-JpiqAVOa2Bwmu2Bv2Y&redir_esc=y#v=onepage&q=maritime%20terrorism&f=false

¹⁵ Kraska, J., & Wilson, B. (2009). Somali piracy: A Nasty Problem, A Web of Responses. *Current History*, 108(718), 227-231., accessed on 8 April 2013 from <http://search.proquest.com/docview/200722244/13D5678A36B6BE8700E/11?accountid=43722>

government collapsed in the early 1990s.¹⁶ Employment became scarce and other developed nations pillaged off their livelihood. To survive, natives have turned to the sea to commit unlawful acts. It is believed that the total eradication of piracy has to be a consolidated effort at the national, regional and international levels, taking into consideration the root cause of the problem.

Historical Overview

Skull painted black flags, wooden legs, patched eyes, hooked arms, long beards and swords, were all mental images associated with ancient day pirates. In the modern world, swords have been replaced with AK-47 automatic assault rifles as the face of piracy changed. Piracy has been the “bête noire” of shipping since the beginning of seaborne trade. Over the past three decades, piracy has modelled many shapes and forms; different locations were affected in different eras. For example there were pirate attacks against the boat people of Vietnam in the 1970s, subsequently in the 1980s and 1990s there were the South China Sea piratical attacks and finally in current times, Somalia and West Africa pirate attacks.¹⁷ Piratical activities can be grouped in the following eras.¹⁸

- The Greeks (800-146 BC)
- The Romans (753 BC - AD 476)
- The Vikings (AD 793-1066)
- The Buccaneers (1605 -1701)

¹⁶ Kontorovich, E. (2010). Guantanamo on the Sea: The Difficulty of Prosecuting Pirates and Terrorists, A. *Cal. L. Rev.*, 98, 243. Accessed on 18 August, 2013, from: <http://scholarship.law.berkeley.edu/californialawreview/vol98/iss1/6>

¹⁷ Max Q Mejia Jr, *Maritime Piracy: A Multi-dimensional Issue*, 2012. Pg. 8

¹⁸ Bradford, A. S. (2007). *Flying the black flag: A brief history of Piracy*. Greenwood Publishing Group.

- The Barbary Pirates (1320-1785)
- The Tanka (Chinese) pirates (1709-1820)
- America and the Barbary Pirates (1785-1815)

A story of early piratical activity was the apprehension of young Julius Caesar. He was captured by Cilician pirates while voyaging across the Aegean Sea. The pirates required 20 talents for his release but the young Caesar felt belittled and demanded that the value of his release be increased to 50 talents.¹⁹

The act of piracy was not restricted to western countries. In fact, records can be found in support that the phenomenon existed in China as far back as the Han Dynasty (106 BC - AD 220) and is believed to have existed prior to this time. This phenomenon stretched to the 16th century and was driven by the revolutionary milieus of the Ming and Qing empires. On the contrary, prior to the colonial period it would seem as though piracy in West Africa never existed. Perhaps at this time the state did not possess such disposition or maybe this time in West African history was not properly documented. Early pirate ventures were predominantly focused on affluence, but at the same time it had the intentions of territorial acquisition as well.²⁰

Two forms of piracy developed in the age of discovery with the race to colonize the world. One form of piracy was solely for the purpose of plundering while the other was for political gain. During the period of plundering, pirates

¹⁹ Bradford, A. S. (2007). *Flying the black flag: A brief history of Piracy*. Greenwood Publishing Group pg 43

²⁰ Antony, R. (2005). Piracy in Early Modern China. *IIAS Newsletter*, 36(7). accessed from http://www.iias.nl/nl/36/IIAS_NL36_07.pdf/ Elleman, B. A., Forbes, A., & Rosenberg, D. (2010). *Piracy and maritime crime: Historical and Modern Case Studies*. NAVAL WAR COLL NEWPORT RI. Pg. 37 accessed from <http://www.virginia.edu/colp/pdf/Piracy-and-Maritime-Crime-NWC-2010.pdf>

rested in remote islands before and after conducting their raids. Libertalia was one such pirate state located in Madagascar for more than twenty years²¹. The infamous Blackbeard (Edward Teach) was party to this form of piracy. He dominated the Caribbean waters in the mid-1700s. The other form of piracy was sanctioned by States. This was the period when Europeans fought against each other to eliminate their competition and dominate a specific area. These pirates were known as “corsairs” (French) and “privateers” (English).²² The difference between the forms of piracy is that one was for personal gain while the privateers or corsairs were pirates appointed by the State to practice piratical acts. Sir Francis Drake and Sir Henry Morgan were two such pirates that were later knighted and appointed Governor of Jamaica in 1674 by King Charles II²³.

Weapons Used in Early Day Piracy versus Weapons Being Used Today

During the days of the sails, pirates utilized bladed paraphernalia such as cutlasses, knives, daggers and malinspikes^{24/25} as weapons against their enemies. These weapons were initially used as tools for sailing, for example, sharp knives were used to cut ropes while malinspikes were used to separate knotted ropes. Towards the end of the 18th century axes and tomahawks were introduced in combats. The flintlock pistols were common during the Golden age of piracy

²¹ Birnie, P. W. (1987). Piracy: past, present and future. *Marine policy*, 11(3), 163-183. accessed from <http://www.sciencedirect.com/science/article/pii/0308597X87900546>

²² Risso, P. (2001). Cross-cultural Perceptions of Piracy: Maritime Violence in the Western Indian Ocean and Persian Gulf Region During a long Eighteenth Century. *Journal of World History*, 12(2), 293-319.

²³ Birnie, P. W. (1987). Piracy: past, present and future. *Marine policy*, 11(3), 163-183. accessed from <http://www.sciencedirect.com/science/article/pii/0308597X87900546>

²⁴ Malinspikes, where similar to an ice pick

²⁵ Hamilton, J. (2010). *Pirate Ships and Weapons*. ABDO.

(1660-1740)²⁶. Compared to the golden age, modern day pirates are armed with AK-47, semi-automatic rifles and grenade rocket launchers.²⁷

Concluding Remarks

From the above text, it can be concluded that there have been changes globally that have translated into modern day piracy. West Africa, a once docile country is now one of the leading countries in this phenomenon. An underlying reason for the piratical activities in this region today is due to the political and economical instability of these littoral States. Kontorovich citing Jamal Osama wrote “We are hungry. There is no Government. No economy. It is a good way to earn money”²⁸. It is important to note that the agenda of early days’ pirates is different from modern day pirates, thus the will fuelling piratical acts is correspondingly different. In the Anglo–American period (early 1700s), pirates stemming from American and English crews for example were once sailors who later became mutineers.²⁹ Many of these men were sea and land military strategists, some were privateers, knighted and sanctioned by their States to seize countries in their names, but over time these servants became pirates as in the case of William Kidd.³⁰ The fundamental difference between pirates of 1700 milieu and pirates of the 21st century is that early days’ pirates mostly hailed from powerful and wealthy nations. In that line, the choice to become a pirate may not have emerged from desperation or on the basis of survival. In regions such as

²⁶ *ibid*

²⁷ *Supra* 14 at pp. 18

²⁸ Kontorovich, E. (2010). Guantanamo on the Sea: The Difficulty of Prosecuting Pirates and Terrorists, A. *Cal. L. Rev.*, 98, 243.citing Jamal Osma. Accessed on 18 August, 2013, from: <http://scholarship.law.berkeley.edu/californialawreview/vol98/iss1/6>

²⁹ Rediker, M. (1989). *Between the Devil and the Deep Blue Sea: merchant seamen, pirates and the Anglo-American maritime world, 1700-1750*. Cambridge University Press.

³⁰ Nutting, P. B. (1978). Madagascar Connection: Parliament and Piracy, 1690-1701, *The. Am. J. Legal Hist.*, 22, 202.

Somalia, criminal syndicates were formed with the purpose to create opportunities in order to survive; hunger, lack of political and economic support is the driving power behind their actions.

In summary, the evolution of pirates and weaponries over time call for more stringent measures in suppressing the crime. Modern day pirates are armed with a different objective, as well as, equally powerful artilleries. Today, piracy, “hostes humani generis” (the enemy of mankind) is acknowledged as a ferocious crime that has the potential to disturb local communities, economies and the world trade. The evolution of piracy has elicited concerns surpassing that required in earlier times.

2.3. Current State of Piracy

In the 20th century, the known hotspots for piratical activities were South East Asia (the Malacca Straits and South China Seas). In recent times the hottest piracy spot in Africa was the Gulf of Guinea, specifically the waters off the Niger Delta in Nigeria but since of late, the Horn of Africa has become the fore runner. (figure 2 shows a high concentration of attempted attacks and hijackings in the traditional pirate infested areas; figure 3 is illustrating international trends from 1990 to 2010 of the affected areas;³¹ while figure 4 is showing the extended pirate infested areas in the Horn of Africa from 2005-2011).

³¹ GEOPOLITY, *The economics of piracy: Pirate ransoms and livelihoods of the coast of Somalia*, May 2011. Accessed from http://www.geopolicity.com/upload/content/pub_1305229189_regular.pdf

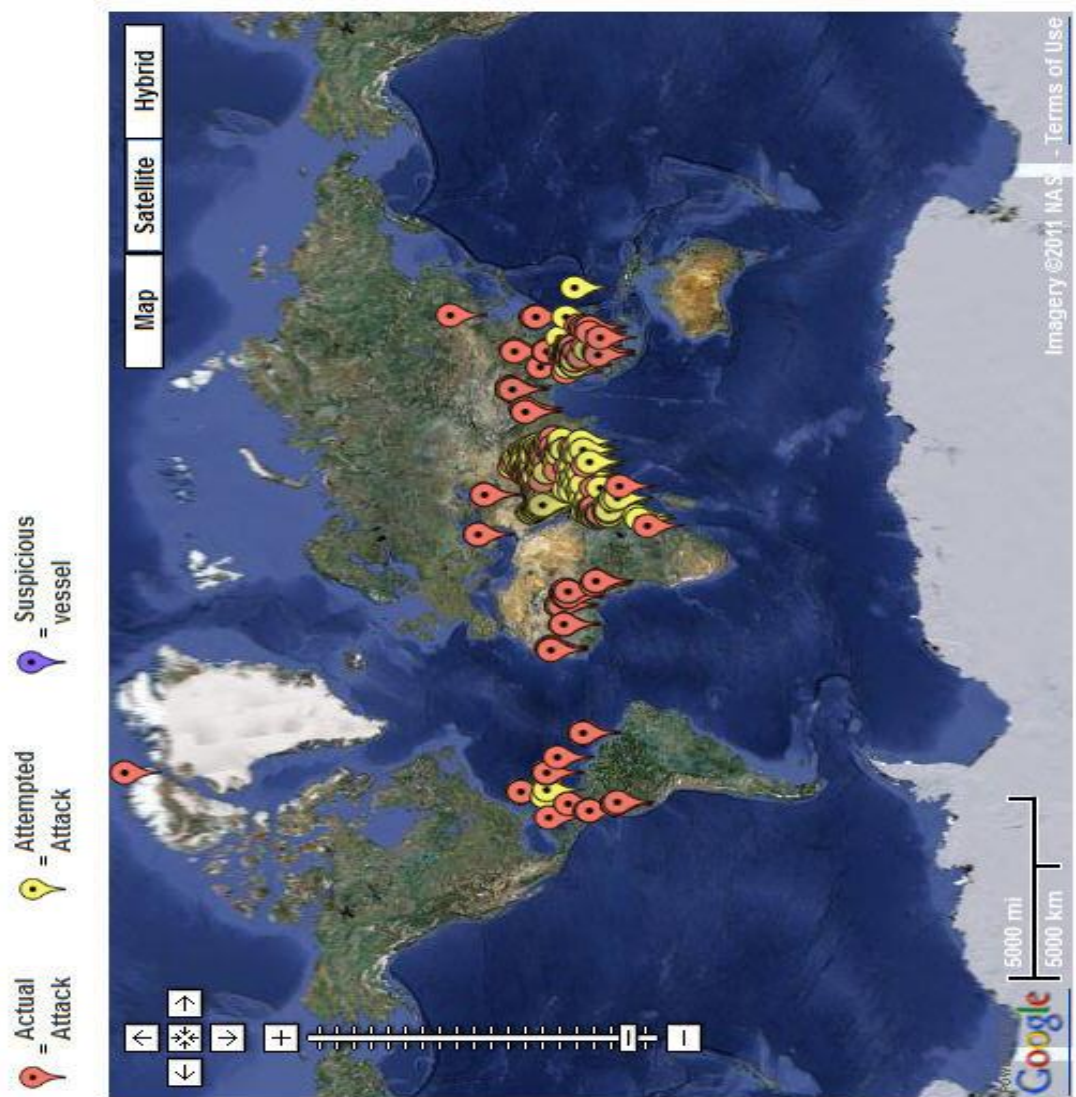


Figure 2. Map of Traditional Pirate Infested Areas.³²

³² Accessed on 18 September 2013 from <http://energeopolitics.com/2011/08/15/the-worlds-most-pirate-infested-waters-navy-india/>

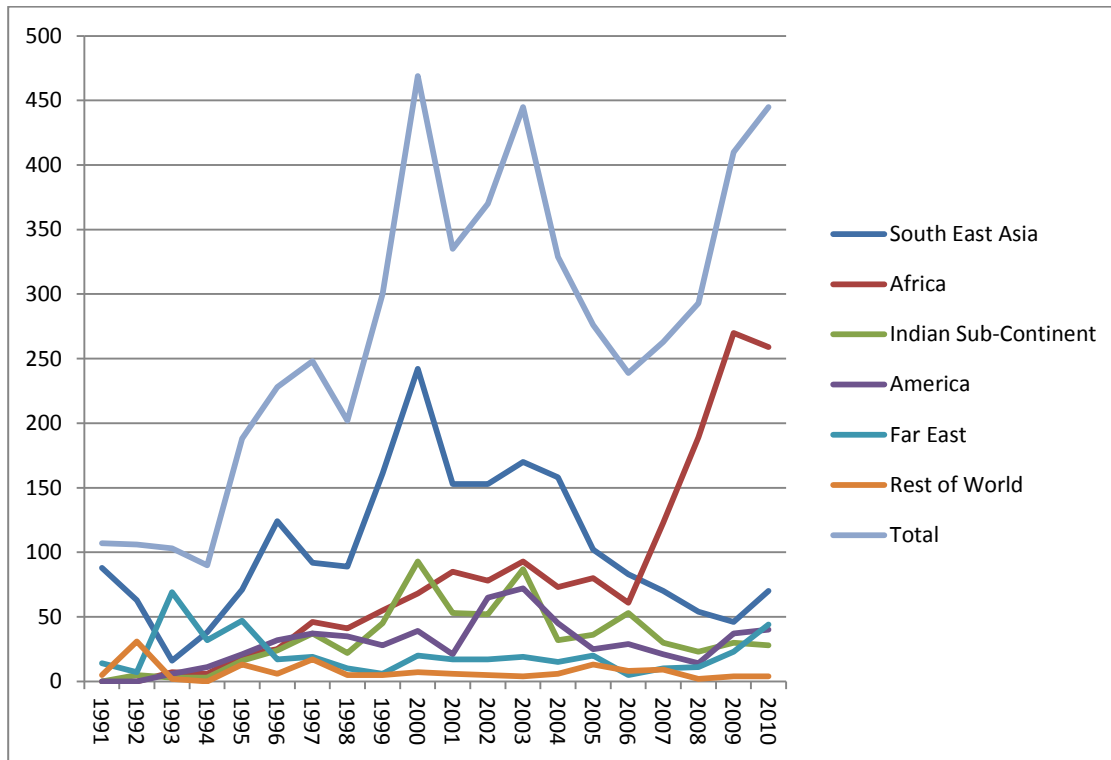


Figure3. Pirate Incidents from 1990-2010 (Adopted from Geopolity, 2011) ³³

The highly traversed Malacca Straits, South China Sea and Somali waters were known for their high volume of pirate attacks annually,³⁴ however, in 2011, there were noticeable reductions in the frequency of these attacks especially in the Somali regions. Pirate attacks fell from 163 in the first six months in 2011, to 69 in 2012; while vessel hijackings fell from 21 to 13.³⁵ Whereas Somali waters have seen a reduction in piratical activities, there has been a vast upsurge in places such

³³ GEOPOLITY, *The economics of piracy: Pirate ransoms and livelihoods of the coast of Somalia*, May 2011. Accessed from

http://www.geopolcity.com/upload/content/pub_1305229189_regular.pdf

³⁴ Talley, W. K. (Ed.). (2008). *Maritime Safety: Security and Piracy*: Informa Publishing. Pg. 91-92

³⁵ <http://www.icc-ccs.org/news/747-six-month-drop-in-world-piracy-imbreport-shows>, accessed 8 April, 2013

as the Gulf of Guinea, where 32 incidents were reported in 2012 in comparison to 25 reported cases in 2011.³⁶ (see figure 3 and 4).

Geographical Expansion of Pirate Attacks: 2005-2011

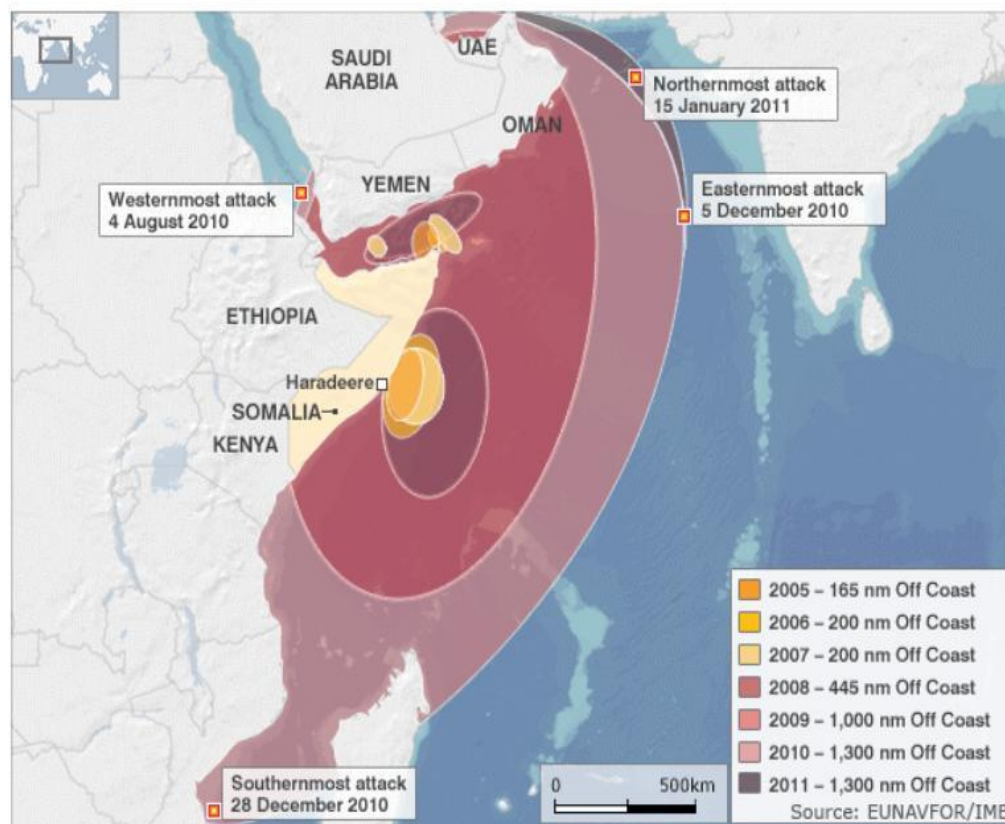


Figure 4. A Map Illustrating Pirate Infested Areas in the Horn of Africa.³⁷

The IMB declared the current number of attacks on ships in 2012 as 297 in comparison with 439 in 2011. The organization reported that though there was a

³⁶ <http://www.icc-ccs.org/news/747-six-month-drop-in-world-piracy-imb-report-shows>, accessed 8 April, 2013

³⁷ Accessed from <http://www.europeaninstitute.org/EA-June-2011/led-by-the-eu-and-nato-international-efforts-to-stem-maritime-piracy-begin-to-pay-off.html>

significant reduction in the numbers for the Somali region, there were obvious increases in the attacks in the East and West Africa regions.³⁸ The IMB documented that on the worldwide scale, 174 ships were boarded in 2012, 28 were commandeered while 28 were fired upon.³⁹

An important question would be how accurate are the claims that piracy has indeed taken a plunge?⁴⁰ The accuracy of information has a ripple effect. If it is that piracy is indeed receding, then the need for aggressive response such as arming of the crew whether directly or through the use of naval support or private armed security guards would become unnecessary and would thereby justify the use of the BMPs instead. Another element to observe is that while the crime has seemed to dissipate in one area, it has manifested in another; thus the plague is still embedded within the maritime arena and calls for active measures to eradicate it. As mentioned earlier, the root cause must be eliminated in order to successfully rid the international community of the plague; is it that the economic situation in Somalia has now been resolved? People must be economically viable, given that the situation in these trouble areas remain the same, could it be possible that the issue of piracy is not reduced but in a dormant period? Could it be that the international community is also aware of this and could this be the rationale for employing guidelines for the use of force and the use of armed security guards? Support for this assertion can be found in Geopolity's May 2011 report:

“the increase in piracy is likely to continue: the comparative economic benefits have guaranteed a virtually unlimited supply of willing labour. Somali piracy is unlikely to be eliminated solely through an increased foreign naval presence; only a restoration of domestic stability and effective local governance can provide viable alternatives in the long term. Since piracy remains by far the most lucrative option available to many

³⁸ Piracy falls in 2012, but seas off East and West Africa remain dangerous, says IMB, 16 January, 2013 accessed on August 17, 2013 from <http://www.icc-ccs.org/news/836-piracy-falls-in-2012-but-seas-off-east-and-west-africa-remain-dangerous-says-imb>

³⁹ *ibid*

⁴⁰ Piracy is a lucrative business model. Is it likely that this model will be dispel of easily?

Somalis—offering minimum earnings 67 times higher than the national average, according to the most conservative estimates—it is unlikely to go away any time soon. While the multilateral military presence has reduced the success rate of such hijackings, they do not provide a sufficient disincentive to potential pirates”⁴¹

Indicator	Amount in USD
Low/high pirate income (2010): Using 1,500 pirates	US\$33,000 –US \$79,000 per year
Potential lifetime earnings (2010): Using 1,500 pirates	US\$168,000 – US\$394,000
Next best alternative	US\$500 per year
Pirate incomes compared to average income	67 – 157 times higher
Number of pirates could double by	2016
Total cost of piracy 2010	US\$4.9 – 8.3 billion
Projected increase by 2014	US\$13 – 15 billion
Major stakeholders	Financiers, sponsors, officials, pirates, maritime insurers, security companies, navies, merchant marine.

Figure 5. Economic Indicators of Somali Piracy (Adopted from Geopolity)⁴²

Concluding Remarks

Based on the documented information presented in figure 5, it would seem as though the incentives to continue this on sea violence outweighs the consequences. For example an annual earning for a native engaged in piratical activity ranges from US\$ 33,000 – US\$ 79, 000, this translates to 67 to 157 times more than the next best financial alternative would generate. If it is that piracy is not anticipated to fully recede soon, or if it is anticipated that the incentives will attract perspective pirates then this is another justification for arming seafarers.

⁴¹ <http://www.europeaninstitute.org/EA-June-2011/led-by-the-eu-and-nato-international-efforts-to-stem-maritime-piracy-begin-to-pay-off.html> citing Geopolity Report, “The Economics of Piracy: Pirates Ransoms & Livelihoods off the Coast of Somalia (May 2011)

⁴² The Economics of Piracy: Pirates Ransoms & Livelihoods off the Coast of Somalia (May 2011) Accessed from http://www.geopolicity.com/upload/content/pub_1305229189_regular.pdf

2.4. The Cost of Piracy

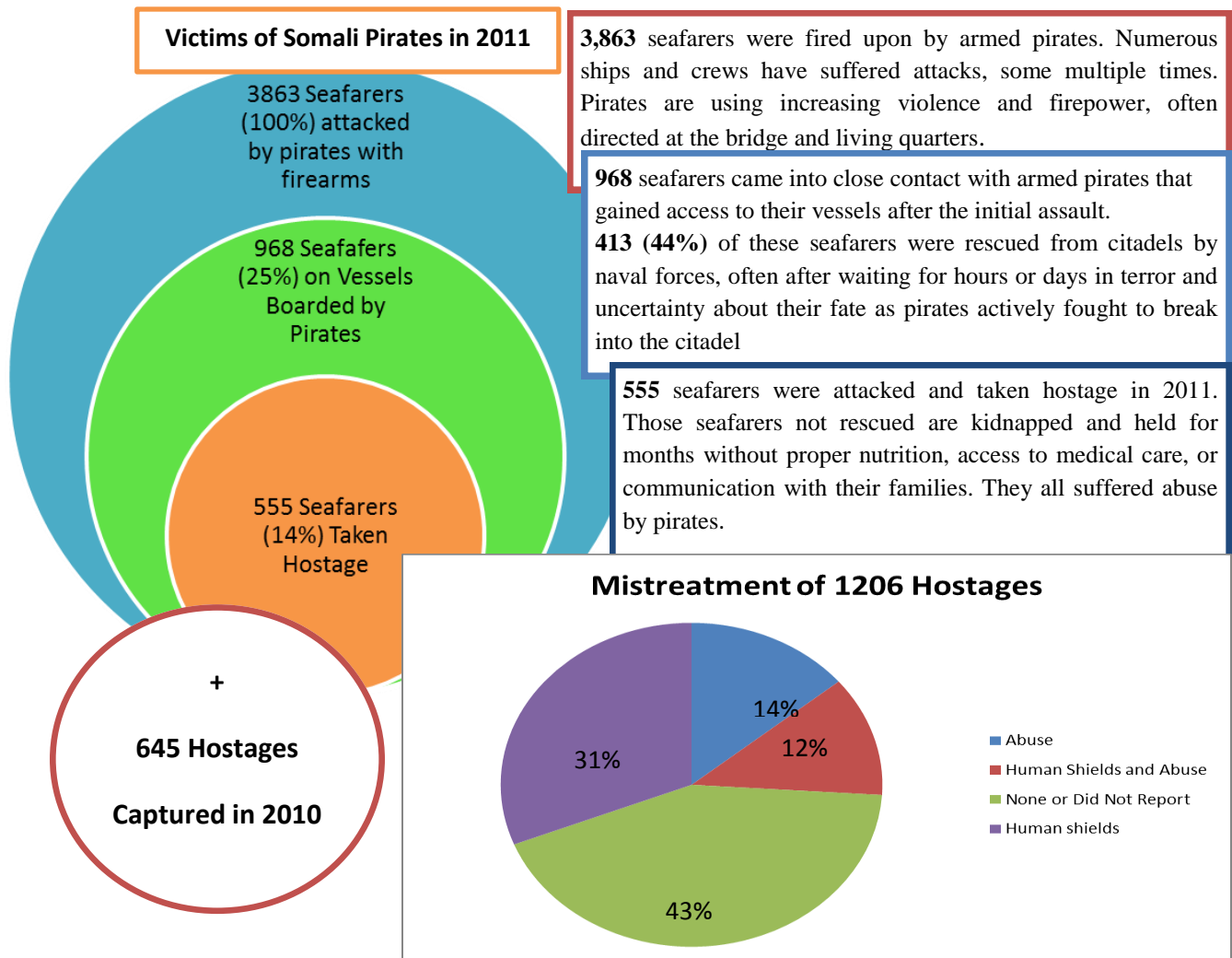


Figure 6. The Human Costs of Piracy. (Adopted from Oceans Beyond Piracy)⁴³

Human Cost of Piracy

⁴³ http://oceansbeyondpiracy.org/sites/default/files/hcop_2011_2_pgr.pdf

Of all the associated costs of piracy, the greatest of them all is the human costs. Reports revealed that in the year 2010, 4185 seafarers were attacked by pirates with firearms while in 2011, 3862 seafarers were attacked. In 2011, 968 vessels were boarded by pirates compared to 1432 vessels boarded in the previous year. Seafarers taken hostages totalled 555 in 2011 while in 2010, 1090 seafarers were taken hostage (see figure 6 and 7). Furthermore it was reported that 1206 seafarers taken hostage were mistreated and in some instances extremely abused.⁴⁴ During 2011, 35 seafarers died after being held hostages died while 8 were killed by pirates after being taken captive, a further 8 died from disease and malnourishment while being held captive; and 19 died while being used as human shields during hostage rescue efforts.⁴⁵

Nature	2010	2011
Seafarers attacked by pirates with firearm	4185	3862
Seafarers on vessel boarded by pirates	1432	968
Seafarers taken hostage	1090	555

Figure 7. Seafarers Attacked in 2010 and 2011. (Adopted from Oceans Beyond Piracy)⁴⁶

It is worthy to note that even in the absence of physical suffering or loss of lives, the trauma endured by a seafarer who has fallen victim to the grips of piracy

⁴⁴ ICC (2012) The Human Cost Of Somali Piracy Updated Report Released. Accessed from <http://www.icc-ccs.org/news/745-human-cost-of-somali-piracy-updated-report-released>

⁴⁵
⁴⁶ http://oceansbeyondpiracy.org/sites/default/files/hcop_2011_2_pgr.pdf

is immeasurable. The trauma is not contained to the seafarer but extends also to his or her family.

Total Estimated Cost of Piracy

The total estimated costs for piracy in 2012 totalled \$5-6 billion dollars for industry players and \$1.09 billion dollars for government. The cost to provide armed security guard services amounted to 1.5 billion versus military operations of \$1.09 (see figures 8 and 9 for a breakdown of the costs)

The military costs of \$1.09 billion included, the fee for scouting aircrafts and unmanned vehicles, vessel protection detachment, naval operations, administrative naval budget charge, as well as, costs for Shared Awareness and De-confliction (SHADE) meetings.

In 2013, the Danish Government reported the safe release of the crew of M/V Leopard but refused to reveal the pay-out amount in fear that it would become a bench-mark figure in possible future hostage situations.⁴⁷ In 2012, \$31.75 million dollars were expended in ransom pay-outs to Somali pirates.

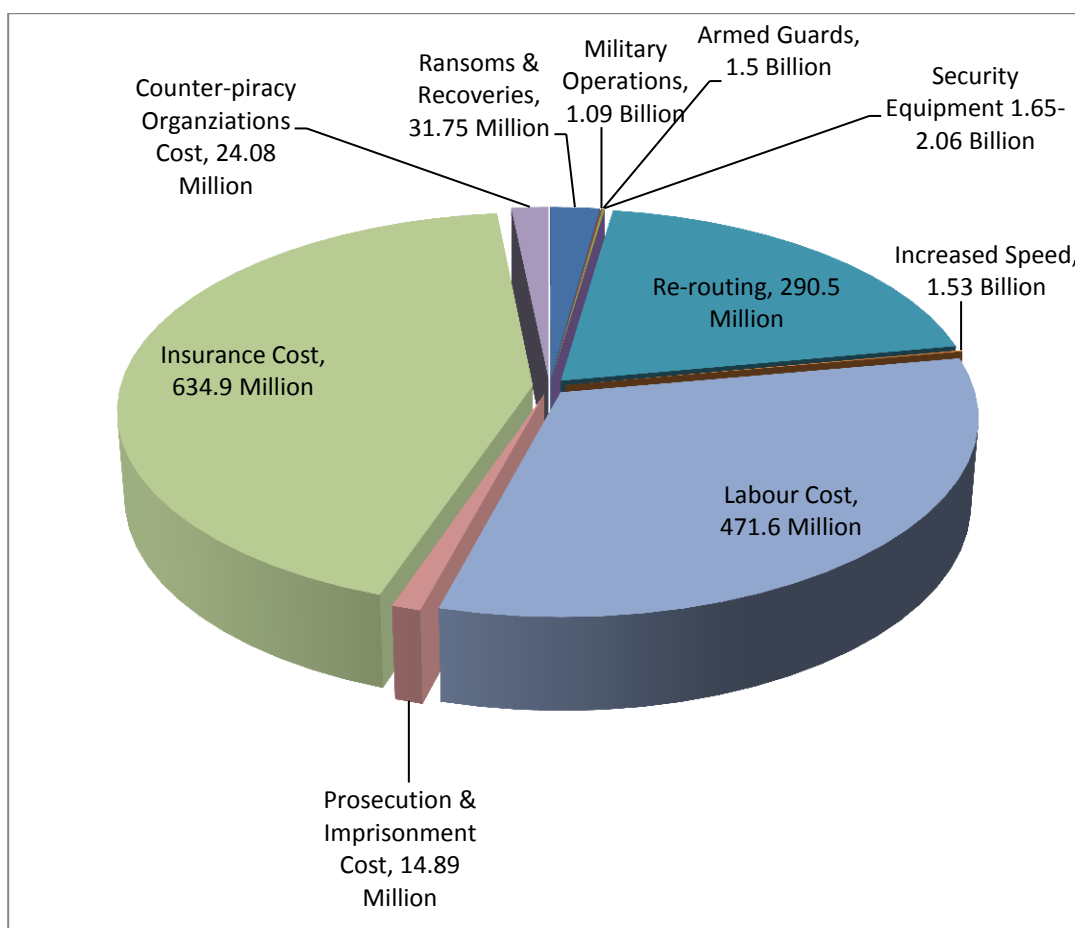
Other costs to industry players included the cost for security equipment, totalling \$1.65-\$2.06 billion; re-routing costs amounting to \$290.5 million; increase speed cost totalling \$1.53 billion; prosecution and imprisonment fee equalling \$14.89 million, armed security guards totalling 1.5 billion, while

⁴⁷ Lloyd's List, Leopard Crew Freed after 28-month Hostage Ordeal Attacks (2013, May 02) Lloyd's List accessed from lloydslist.com

insurance and counter piracy organization costs amounted to \$634.9 million and \$24.08 million respectively.⁴⁸

Industry Players	Government
\$5-6 Billion Yearly	\$1.09 Billion Yearly for military operations
\$13.6 -16.4 Mil per day	\$2.9 Mil per day

Figure 8. Comparative Cost of Piracy between Government and Industry Players⁴⁹



⁵⁰Figure 9. Costs of Piracy (Adopted from Oceans Beyond Piracy, 2012)

⁴⁸ Information was taken from Oceans Beyond Piracy 2012 Report on the Economic Cost of Somalia Piracy accessed from http://oceansbeyondpiracy.org/sites/default/files/ecop2012final_2.pdf

⁴⁹ ibid

Concluding Remarks

The inhumane treatment of seafarers, coupled with the rising costs of piracy, justifies yet another reason why directly arming seafarers could possibly prevent being captured in the first instance much more being subjected to such hostilities and abuse while being held captives.

2.5 Instruments Used In the Suppression of Piracy and Other Unlawful Acts

The IMO in addition to its 1988 SUA Convention and 1982 UNCLOS, in 2004, finalized the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against ships in Asia (RECAAP), with sixteen (16) countries being party to the agreement. Also in July 2004, the IMO amended the 1974 Convention on the Safety of Lives at Sea (SOLAS) to supplement as the International Ship and Port Security (ISPS) Code. Under SOLAS, piracy is threatened as acts of terror with minor differences.⁵¹ January 2009, saw the regulatory body initiating high-level meetings to discuss the Djibouti Code of Conduct. The instrument spoke to the suppression of armed robbery against ships in the West Indian Ocean and the Gulf of Aden. Similarly to RECAAP, the instrument seeks to establish regional cooperation between various countries by sharing information on piratical activities.⁵² Other cooperations include the United States Coordinated Combined Task Force 151 (CTF-151), NATO's Operation Ocean Shield and the European Union Naval Force (EU NAVFOR

⁵⁰ Accessed on 19 September, 2013 from <http://feraljundi.com/4241/maritime-security-the-security-costs-of-piracy-for-2011/>

⁵¹ Mejia M (Jr.) (2006). Coastal Zone Piracy and Other Unlawful Acts at Sea, pg. 111-114

⁵² Piracy and Armed Robbery Against Ships, International Maritime Organization, Retrieved 17 April, 2013 from www.imo.org

Operation Atalanta which are the three foremost multinational task forces operating for the suppression of piracy.⁵³

This section will briefly observed the two main instruments UNCLOS and SUA for the reason that all other legal framework used in combating or suppressing piracy and armed robbery has UNCLOS at its core. According the Kraska and Wilson, the legal framework in the fight against maritime piracy is formed amidst the organized responses of maritime law with UNCLOS at its centre.⁵⁴ Furthermore since the focus of this dissertation is not on the anti-piratical tools, the main provisions directly giving rise to this topic will be examined.

1982 UNCLOS

The United Nations Convention on the Law of the Sea (UNCLOS) opened for signature on the 10th of December 1982 in Montego Bay, Jamaica and entered into force in 1994. The Convention sought to codify rules in a bid to subdue acts of piracy.⁵⁵ To date over 166 countries have ratified⁵⁶ UNCLOS. Thus the efforts to create uniformed rules globally in the suppression of piracy had a wide level of acceptance. The principal limitation with UNCLOS however, is the ancient definition of the term piracy. As mentioned before, piracy has long changed its face. The evolution of piracy, the modus operandi of pirates and the nature of the

⁵³ Yücel, A. (2012). The Impact of Somali Piracy on Seafarers' Rights: A Cross-Disciplinary Assessment. Unpublished Master's Thesis, Lund University, Lund, Sweden citing Pham (n 60) 77. See also P. van Huizen, 'Netherlands State Practice for the Parliamentary Year 2008-2009' in I. F. Dekker and E. Hey (eds) Netherlands Yearbook of International Law Volume 41, 2010: Necessity Across International Law (Springer 2011)

⁵⁴ Kraska, J., & Pedrozo, R. (2013). International Maritime Security Law. Martinus Nijhoff Publishers

⁵⁵ United Nations Convention on the Law of the Sea [UNCLOS 1982]

⁵⁶ Chronological lists of ratifications of, accessions and successions to the Convention and the related Agreements as at 09 August 2013 accessed from http://www.un.org/depts/los/reference_files/chronological_lists_of_ratifications.htm

crime has become sophisticated. As such the instrument's archaic definition of piracy does not capture the contemporary image of the crime. Piracy as defined under article 101 is:

- a) "any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or private aircraft, and directed
 - a. on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
 - b. against a ship, aircraft, persons or property in a place outside the jurisdiction of any state;
- b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of the facts making it a pirate ship or aircraft;
- c) any act of inciting or intentionally facilitating an act described in subparagraph (a) or (b)"⁵⁷

The geographical location of piracy has relocated from the high seas to coastal areas. With this current repositioning, the definition of piracy under UNCLOS has lost its ability to capture the modern nature of the crime, since the act must be committed on the high seas to be recognized under international law as piracy.⁵⁸ For example, pirate attacks have taken place as close as 11.55 nautical miles away from shore however, under the current definition this would not be considered as piracy.⁵⁹

⁵⁷ UNCLOS [1982]

⁵⁸ Mukherjee, P. K., & Brownrigg, M. (2013). The Sectors of Shipping. In *Farthing on International Shipping* (pp. 19-26). Springer Berlin Heidelberg.

⁵⁹ Wu, S., & Zou, K. (Eds.). (2009). *Maritime Security in the South China Sea* [electronic resource]: Regional Implications and international Cooperation. Ashgate Publishing.

Another notable detractor is that attempted attacks are not classified as acts of piracy. Acts of piracy under article 101 of UNCLOS consists of “any illegal acts of violence, detention or depredation...”⁶⁰ Depredation according to the Oxford online dictionary means “an act of attacking or plundering”. The provision was not specific in including attempted attacks. Thus under article 101 of UNCLOS, if attackers attempted to board a vessel but were deterred by actions of the crew, then the definition of piracy under article 101 of UNCLOS does not specifically include this act of attempt.⁶¹

Further limitation with the definition of piracy is the “two ship rule”. UNCLOS refers to piracy as an act committed by the crew or passengers of a private ship against another ship, or against persons or property on board such ship. Experts such as Murphy and Menefee have argued that the lines of this article are unclear. Menefee puts forward an argument counteracting this limitation; one argument resulted from the interpretation of UNCLOS 101 (a).⁶² Menefee contends that both parts of article 101(a) of UNCLOS are conscripted differently⁶³. Menefee states that the second part of the article 101 (a) of UNCLOS does not speak of the “two-ship rule” while the first part of article 101 (a) of UNCLOS⁶⁴ stated that “piracy is an act directed against a ship, persons or

⁶⁰ UNCLOS [1982]

⁶¹ Collin R; Hassan D (2009) Applications and Shortcomings of the Law of the Sea in Combating Piracy: A South East Asian Perspective, *Journal of Maritime Law and Commerce*. Accessed 17 April 2013 from <http://search.proquest.com.proxy.wmu.se/docview/197292579/13D800E7D979034F1D/1?accountid=43722>

⁶² Logina, A (2009), *The International Law Related to Maritime security: An Analysis of its Effectiveness in Combating Piracy and Armed Robbery Against Ships*. WMU Publication citing Samuel Pyeatt Menefee, “Piracy, Terrorism, and the Insurgent Passenger: A Historical and Legal Perspective”, in Natalino Ronzitti (ed.), *maritime Terrorism and International Law*, Dordrecht, Boston, London: Martinus Nijhoff Publishers, 1990 at p. 60

⁶³ *ibid*

⁶⁴ *ibid*

property in a place outside the jurisdiction of any state”⁶⁵ Logina wrote “under such construction it turns out that in places outside the jurisdiction of any state takeover of a ship from within is piracy, but on the high seas it is not piracy”⁶⁶ In furtherance, Logina went on to explain that the difference in approach to the high seas and the places outside the jurisdiction of any state seems not to have any foundation. Logina concluded that an assumption could be drawn that the intent of the drafters was to “apply the “two ship rule” for both territories, or not apply the “two ship rule” for both territories”. Furthermore, Logina stated that either this was the intention of the drafters or perhaps the scribes had made an error in constructing these lines of article 101 (a).

Further to this interpretation of the “two ship rule” it is presumed that if the ship was accessed by stowaways who subsequently gained control over the vessel, then this would not be considered as piracy.⁶⁷ An example of this nature is the case of Achille Lauro. On October 10, 1985, four Palestines boarded a ship as normal passengers. Upon being discovered that they were transporting heavy armament they took control of the ship as she was Sailing form Alexandria to Port Said. The Palestines killed American passenger Leon Klinghoffer and threw his body over board after their requests to dock at Tartus was refused.⁶⁸ The Achille Lauro incident did not include two ships, hence under the provision this act would

⁶⁵ United Nations Convention on the Law of the Sea, 10 December 1982, United Nations, Treaty Series, vol. 1833 p.3 here after UNCLOS [1982]

⁶⁶ Logina, A (2009), The International Law Related to Maritime security: An Analysis of its Effectiveness in Combating Piracy and Armed Robbery Against Ships. WMU Publication

⁶⁷ Collin R; Hassan D (2009) Applications and Shortcomings of the Law of the Sea in Combating Piracy: A South East Asian Perspective, Journal of Maritime Law and Commerce. Accessed 17 April 2013 from <http://search.proquest.com.proxy.wmu.se/docview/197292579/13D800E7D979034F1D/1?accountid=43722>

⁶⁸ Gooding, G. V. (1987). Fighting Terrorism in the 1980's: The Interception of the Achille Lauro Hijackers. *Yale J. Int'l L.*, 12, 158.

have not been considered as piracy. This incident however gave rise to the SUA Convention.

Coming back to present day, pirates often times use skiffs to go alongside ships while attempting to board the vessel. Hypothetically, if these pirates board this ship and took control of the vessel and crew, would this not be considered as acts of piracy? Or would the skiff be considered as a ship, thereby conforming to the “two ship rule.”

1988 SUA Convention

The 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA Convention) was entered into force on the 1st of March 1992⁶⁹. The principal purpose of the SUA Convention was to ensure that suitable actions were taken against persons who committed unlawful acts against ships. Since this dissertation is an analysis on arming of seafarers, two prominent issues is the fact that the SUA Convention did not speak of armed robbery or piracy, nor did it defined or justified what were deemed unlawful acts or spoke of unlawful acts in the text. Lastly, the SUA Convention does not deem the murdering of persons on board as an impediment to the safe navigation of the ship.

Logina noted that the SUA Convention did not speak of armed robbery or piracy; rather it addressed offences as unlawful acts.⁷⁰ However, the wording used in the document did not speak of unlawful acts but rather of offences as so

⁶⁹ Suppression of Unlawful Acts Against the Safety of Maritime Navigation 1988, United Nations, Treaty hereafter SUA [1988]

⁷⁰ Logina, A (2009), The International Law Related to Maritime security: An Analysis of its Effectiveness in Combating Piracy and Armed Robbery Against Ships. WMU Publication

listed under article 3 of the Convention. Therefore, the deduced conclusion is that the unlawful acts to which the preamble and title spoke of, are the offences listed in article 3 of SUA.⁷¹ Since the SUA Convention did not define the term “unlawful act”, but instead provided a disclosed list (tenets of article 3) which falls under this notion, the phrase is subjected to interpretation. For example what may be considered as lawful in one State, may be unlawful in another. Therefore this would create a loophole and may prove hard to indict persons on these grounds of committing an “unlawful act”.

Kraska and Pedrozo wrote that since the SUA Convention was intended to subdue acts against the safety of maritime navigation, under article 3 paragraph 1 (g), it would suggest that “injuring or killing of a passenger on a seized vessel that did not endanger the ship’s navigation should not be included in the treaty, whereas injury or killing that does endanger the ship’s navigation is already covered under paragraph 1(b) (an act of violence likely to endanger the ship’s navigation).”⁷² Kraska et al cited Halberstam, stating that the intentional injury or homicide of a person on board the ship was a different and distinctive offence, not simply an aggravating situation of seizing the ship.⁷³ In furtherance, Kraska and Pedrozo explained that failure to include “injury or murder as a separate criminal offence”, as opposed to an aggravating circumstance of another crime, might

⁷¹ Ibid at pp. 50

⁷² Kraska, J., & Pedrozo, R. (2013). *International Maritime Security Law*. Martinus Nijhoff Publishers citing IMO Doc. PCUA 1/4 , Ad Hoc Preparatory Committee on the Suppression of Unlawful Acts against the Safety of Maritime Navigation, Report of the First Session, Mar. 16, 1987, para 30.

⁷³ Kraska, J., & Pedrozo, R. (2013). *International Maritime Security Law*. Martinus Nijhoff Publishers citing Halbertsam, *Terrorism on the High Seas* at pp. 294

exclude using it as the basis for extradition under the Convention, weakening the entire structure of “extradite and prosecute”.⁷⁴

In concluding Kraska et al explained that while murdering a passenger does not necessarily jeopardise the safety of the ship, the main reason for defending the vessel is to secure the persons on board.⁷⁵

The justification for briefly examining these two Conventions, SUA and UNCLOS, is that these Treaties were drafted to suppress unlawful and violent acts at sea. If the Conventions did not have the noticeable pitfalls, then perhaps they would have successfully achieved their mandate. However, since the Conventions are lacking in pertinent areas needed to ensure the protection of seafarers and passengers alike then it also gives rise to the arming of seafarers.

It should be noted that both SUA and UNCLOS lack consistency for trial and penalty processes. Thus the process for trial and penalty is determined by municipal laws which differ across countries. In order to ensure that offenders are punished, there needs to be standardization in handling of criminals as this would allow states to be confident with their resources for apprehending pirates and ensuring that efforts are not futile.⁷⁶ In countless instances pirates are captured, but released after a few days. The reason being that international laws are soft laws and is not enforceable; the only enforcement comes when these laws are included in the national laws of States. For example, Canada is one such State

⁷⁴ *ibid*

⁷⁵ Kraska, J., & Pedrozo, R. (2013). *International Maritime Security Law*. Martinus Nijhoff Publishers at pp. 808

⁷⁶ Collin R; Hassan D (2009) Applications and Shortcomings of the Law of the Sea in Combating Piracy: A South East Asian Perspective, *Journal of Maritime Law and Commerce*. Accessed 17 April 2013 from <http://search.proquest.com.proxy.wmu.se/docview/197292579/13D800E7D979034F1D/1?accountid=43722>

that has recognized the loopholes with the SUA Convention. To fill the gaps, the government of Canada has enshrined criteria in their municipal laws.⁷⁷

2.6. Best Management Practices & its Effectiveness

In May 2011, the Maritime Safety Committee, at its eighty-ninth session adopted the resolution MSC.324 (89) on the Implementation of Best Management Practice Guidance.⁷⁸ The Best Management Practices (BMPs) is a list of guidelines to assist in evading, daunting or suspending pirate attacks in high risk areas⁷⁹, for example in the Arabian Gulf. Furthermore, the BMPs include measures such as evasive manoeuvring to ensure ship safety. Other recommendations given to deter pirates ranged from physical barriers such as razor wires, electrified barriers, water spray and foam monitors, security alarm systems, use of closed circuit televisions, safe muster points and safe lock citadels.⁸⁰

The best management practices were established to work in conjunction with the assistance of naval support. The idea being that hijacked ships could rely on the naval vessels to rescue and secure the crew against being held as hostages.⁸¹ In some instances, the best management practice approach achieved its mandate as in the case of MV Magellan Star. On 8th of September, 2010, the MV Magellan Star, a German Container Ship, flagged by Antigua and Barbuda, was sailing in

⁷⁷ Interview with P.K Mukherjee on August 29, 2013

⁷⁸ <http://www.imo.org/MediaCentre/HotTopics/piracy/Documents/1339.pdf>

⁷⁹ The BMP booklet describes the High Risk Areas as regions that pirate attacks have taken place. The guidelines of the BMP concluded that high risk areas are constricted by Suez and the Strait of Hormuz to the North, 10⁰ S and 78⁰E.. According to the BMP guidelines, these areas include the Arabian Gulf and Mozambique Channel.

⁸⁰ Best Management Practices for Protection Against Somalia Based Piracy. Witherby Publishing Group Ltd.

⁸¹ Monje, S. C. (2011). Citadels: Passive Defence Against Pirate Attacks. *Australian Journal of Maritime and Ocean Affairs*, 3(2), 43, accessed 8 April 2013 from <http://search.proquest.com/docview/893179132/13D562C229C44801EE0/8?accountid=43722>

the Gulf of Aden. It is important to note that the ship was being escorted by United States Naval Forces; however, they became separated during the course of voyage; during this time, the vessel was hijacked by pirates. Luckily, all members of the crew were able to secure themselves in the safe haven until naval support came, disarmed the pirates and safely handed back the ship to its Captain.⁸²

Some important questions to answer are:

- Why is the best management practices used?
- Can weapons be deterred by a paper bound document?
- Who is in charge of protecting the vessel, whether flag state or ship owner

In the author's opinion, the BMPs serve as an interim solution, since the eradication of on-sea violence needs to be corrected from a political, technical and economic standpoint. In a meeting with Martin Conroy,⁸³ he stated that the BMPs are low cost methods that allow companies to appear to meet their responsibilities without expending monies. Conroy stated that for the BMPs to be effective there has to be a continuum that is determining when the passive methods will work and knowing when to apply lethal force. Conroy explained using an example that the BMPs by itself would not be sufficient security measures for a ship going through Kuwait. A follow-up question would be whether the BMPs are a communication campaign. Since ships are still being attacked and seafarers taken hostage, this provides an indirect answer that a paper bound document (BMPs) cannot deter the armed attacks of pirates. Support for is in the case of MT Samho Jewelry.

“MT Samho Jewelry, a 19,609-ton product tanker carrying chemicals, was Maltese flagged, Norwegian owned, and operated by South Korea's Samho Shipping. It had a crew of 21, including Burmese, Indonesians, and Koreans. On

⁸² Monje, S. C. (2011). Citadels: Passive Defence Against Pirate Attacks. *Australian Journal of Maritime and Ocean Affairs*, 3(2), 43., accessed 8 April 2013 from <http://search.proquest.com/docview/893179132/13D562C229C44801EE0/8?accountid=43722>

⁸³ Martin Conroy is a USA native and Master currently serving on USA merchant ships. This interview was conducted on August 29, 2013

the morning of 15 January 2011, the ship was situated in the Arabian Sea, en route from the United Arab Emirates to Sri Lanka when the ship was seized by Somali pirates. The crew activated the ship's security alert system and withdrew to the citadel but within three hours the pirates had destroyed the hatch and had taken the crew hostage. Some of the hostages were beaten, and one reported that he lost several teeth."⁸⁴

As mentioned before, the BMPs were intended to work along with the support of the naval forces, since a coalition of naval support may not always be reliable. The question of proximity comes into play. How can the crew be assured that help will be rendered in times of distress? The issues of jurisdiction will also be tested. Even though numerous warships have been deployed in these high risk areas, they may choose to operate independently due to sovereignty issues and as such some naval forces are organized to protect their countries' shipping interests. States such as Netherlands, Russia, India and Japan have done this in the past.⁸⁵ Support for this assertion is given citing Martin⁸⁶, he stated that military protection is not reliable as the State does not work for ship owners. Martin continued saying "if the military has communicated that they will meet a vessel at the Suez Canal and for unforeseen reasons the ship has been delayed, then the navy may not wait on the ship" seen as the military work on their own time and schedule and works under the jurisdiction of their sovereign states.

In this same vein lies another challenge for the effectiveness of BMPs, which is the scarcity of warships. Approximately 50,000 vessels traverse the

⁸⁴ Monje, S. C. (2011). Citadels: Passive Defence Against Pirate Attacks. *Australian Journal of Maritime and Ocean Affairs*, 3(2), 43., accessed 8 April 2013 from <http://search.proquest.com/docview/893179132/13D562C229C44801EE0/8?accountid=43722>

⁸⁵ Monje, S. C. (2011). Citadels: Passive Defence Against Pirate Attacks. *Australian Journal of Maritime and Ocean Affairs*, 3(2), 43., accessed 8 April 2013 from <http://search.proquest.com/docview/893179132/13D562C229C44801EE0/8?accountid=43722>

⁸⁶ Martin Conroy is a USA native and Master currently serving on USA merchant ships. This interview was conducted on August 29, 2013

Malacca Straits yearly carrying an estimated one third of the world's trade,⁸⁷ while 20,000-30,000 ships ply through the Gulf of Aden annually; it becomes almost impossible to provide the corresponding number of warships needed to escort these vessels through these high-risked areas.⁸⁸

Concluding Remarks

It would seem as though the total effectiveness of the BMPs is hampered by the inability to provide equally matching number of warships in the high risk areas. As was mentioned earlier in the chapter, the cost to maintained naval support runs the government an annual budget of approximately 2 billion United States dollars. In addition it costs the industry over 5 to 6 billion annually to maintain security presence for their ships. Furthermore some nations have a stronger military presence in the high risk areas but may prefer to only protect ships under their flag. The cost of military presence on the seas is high as seen in chapter 2.4, what if the government should decide to pass this cost on to industry players, coupled with their existing budget? The cost of piracy may become extravagantly high for ship owners and operators who may shy away from providing vessel protection. If this should happen, the question of who will pay or ensure that seafarers are protected is very important. Article 94 of UNCLOS reads⁸⁹.

“every State shall take such measures for ships flying its flag as are necessary to ensure safety at sea with regard, inter alia, to:

(a) the construction, equipment and seaworthiness of ships;

⁸⁷ Kraska, J., & Wilson, B. (2009). Somali piracy: a nasty problem, a web of responses. *Current History*, 108(718), 227-231. accessed on 8 April 2013 from <http://search.proquest.com/docview/200722244/13D5678A36B6BE8700E/11?accountid=43722>

⁸⁸ Monje, S. C. (2011). Citadels: Passive Defence Against Pirate Attacks. *Australian Journal of Maritime and Ocean Affairs*, 3(2), 43., accessed 8 April 2013 from <http://search.proquest.com/docview/893179132/13D562C229C44801EE0/8?accountid=43722>,

⁸⁹ UNCLOS [1982]

- (b) the manning of ships, labour conditions and the training of crews, taking into account the applicable international instruments;
- (c) the use of signals, the maintenance of communications and the prevention of collisions”⁹⁰

On this basis it can be assumed that flag states is responsibility for ensuring that ships that fly their flags are protected. Furthermore according to article III of the MLC 2006, “every seafarer has a right to a safe and secure workplace that complies with safety standards”⁹¹ In addition, Regulation 5 of the MLC 2006 states that it is each Member’s responsibility to enforce and implement the articles and rights set forth in the text of the document. Therefore seen as the seafarer is entitled to a safe and secure working environment, and seen as the flag state is deemed responsible for ensuring all rights are reinforced, it can be assumed that it is the flag state’s duty to ensure that ship-owners provide a safe and secure working environment. Since the term “safe and secure” was used in a general sense in both the MLC 2006 and UNCLOS, it can be interpreted that this means safety and security in every general sense. However, under the tenets of article 94 of UNCLOS, the flag state still has a responsibility to also provide protection.

This comes back to the question of “ability to protect” and the use of “Flags of Convenience”. If it is that flag states are expected to provide safety and security what of the small flag states such as Antigua and Barbuda, Panama, to name a few that lack the capability to protect the ships they have flagged? This would go back to point zero and the seafarers would be left again without added protection and once more would justify the possibility to arm seafarers.

⁹⁰ UNCLOS [1982]

⁹¹ Maritime Labour Convention 2006, International Labour Organization Treaty hereafter MLC [2006]

2.7. Combating Piracy by Having Guns On board Ships

There are no explicit laws forbidding the arming of merchant vessels, whether arming by means of contracted armed security personnel, the direct arming of seafarers, or security through the use of military forces. In 2009, the IMO and the international arena strongly opposed this option supposedly due to the plethora of legal and other underlying liabilities. Subsequently, BIMCO moved to create GUARDCON. GUARDCON supports a more active response to piracy by providing contract security services to ship owners. This strategy, however, gives overall responsibility to the Master. This active approach was not readily embraced as it refutes article 34.1 under SOLAS, which states that the Master⁹² should not be restricted to resolve incidents which relate to safety of life and the protection of the environment.⁹³ Though the IMO initially expressed that they did not endorse seafarers carrying firearms nor did they encouraged the use of privately armed security personnel; the IMO however, follows the trend of the industry, thus in⁹⁴ in May, 2011, at its eighty-ninth Maritime Safety Committee Session, the Committee approved an interim guidance to ship owners, ship operators and shipmasters on the use of privately contracted armed security personnel on board ships in the High Risk Area⁹⁵.

United Kingdom's Prime Minister, David Cameron declared and openly demonstrated Britain's support for the use of armed security personnel. He stated that "pirates are succeeding at holding the world at ransom". In this vein he challenged the maritime fraternity to respond with much vigour. It would seem

⁹² Article 34.1 of SOLAS as well as, the ISPC Code gives overall responsible to the Master when the security services provided is through private means and not the navy or military. The military takes orders from its member state or flag state

⁹³ *Giakoumelos A (2013) Armed Guards on Board, A controversial policy of marine industry: The current status and the regulative perspective.* Accessed 13 February 2013 from <http://www.allaboutshipping.co.uk/2013/02/05/armed-guards-on-board-a-controversial-policy-of-marine-industry-the-current-status-and-the-regulative-perspective/>

⁹⁴ IMO, Piracy and Armed Robbery Against Ships, retrieved 08 April 2013 from <http://www.imo.org/MediaCentre/hottopics/piracy/Pages/default.aspx>

⁹⁵ International Maritime Organization's Website, retrieved 10 March, 2013)

that many countries, contrary to what they professed, welcomed this new change as they began to authorize their merchant vessels to carry weapons or hire armed guards under the umbrella of self-defence. Italy, Sweden, the United Kingdom and the United States of America are some countries that took the lead in this initiative, while others such as Germany, Malta, Cyprus and India are undergoing policy changes in this regard.⁹⁶

In the researcher's point of view these actions would have seemed to recognize the limitations of the instruments used in suppressing piracy and armed robbery. In furtherance, it seemingly demonstrates the acknowledgment that the BMPs are not forceful enough to repel these unlawful acts. Or could it be that the call for more "vigour" from David Cameron and other influential countries sparked this response? Nordquist; Wolfrum; Moore and Long wrote:

"It should be common place that security at sea is to say the least challenged by numerous threats. If not countered appropriately, these threats will inevitably limit our economic sustainability, as well as our capabilities to continue using the world's oceans for security operations. Especially in Europe, some political leaders neither recognize the importance of the sea, nor are they willing to take decisions necessary for an effective and efficient preservation of maritime security. All too often they are seconded by legal experts who claim that maritime security operations, while certainly necessary are contrary to international law. Thus, the law is being abused as a cheap excuse for passivity while, in reality, it is a lack of political will and courage that prevents the necessary steps from being taken." ⁹⁷

⁹⁶ Marmon W (2011, November). Merchant Ships Starting to Carry Armed Guards Against Somali Pirates. The European Institute. Accessed on 9 April 2013 from <http://www.europeaninstitute.org/November-2011/merchant-ships-start-to-carry-armed-guards-against-somali-pirates-1122.html>

⁹⁷ Fleet, G., Frankfurt, V., Treves, T., Baumgartner, R. W., General, U. J. A., & Guard, U. C. (2008). *Legal Challenges in Maritime Security*. Martinus Nijhoff Publishers. pg. 115-116

Industry players believed that passive approaches were best in the fight against piracy as they do not aggravate an already escalated situation⁹⁸. For example, it was mentioned that if seafarers attempted to defend themselves and fail, this could lead to them feeling the “wrath” of the pirates. In the researcher’s point of view, the passive methods could also elicit this wrath and can be equally dangerous. Seafarers using the cannons or hoses to spray water in an attempt to deter pirates from coming aboard are opened to being injured by pirates while employing this technique. It is believed that pirates would become agitated by any means of deterrents and will react accordingly. The case of M/V Theresa is a classic example, where a North Korean Captain was fatally shot after firing a flare gun in wake of an impending pirate attack.⁹⁹ In other cases, victims have cooperated fully and still were taken hostages; as in the case of the owners of the Lynne Rival.¹⁰⁰

As seen in the previous cases, the sanctuary of citadels has failed in the past and seafarers have been beaten and taken hostage. It is also noted that it is becoming a trend for pirates to set fire to ships when they cannot locate the crew.¹⁰¹ It is believed that this method also poses a great danger to seafarers who are locked away in a dark, stifling narrow citadel. In addition, it was mentioned that some vessels carry combustible products making the fear of arming even higher in wake of possible fireballs in a gun battle. Again if pirates set fire to the vessel, the effect will be just the same.

⁹⁸ Monje, S. C. (2011). Citadels: Passive Defence Against Pirate Attacks. *Australian Journal of Maritime and Ocean Affairs*, 3(2), 43., accessed 8 April 2013 from <http://search.proquest.com/docview/893179132/13D562C229C44801EE0/8?accountid=43722>

⁹⁹ Martin, J. S. (2009). Fighting Piracy with Private Security Measures: When Contract Law Should Tell Parties to Walk the Plank. *Am. UL Rev.*, 59, 1363. accessed on 17 September, 2013 from http://heinonline.org/HOL/Page?handle=hein.journals/aulr59&div=39&g_sent=1&collection=journals

¹⁰⁰ Ibid at pp. 1370

¹⁰¹ Monje, S. C. (2011). Citadels: Passive Defence Against Pirate Attacks. *Australian Journal of Maritime and Ocean Affairs*, 3(2), 43., accessed 8 April 2013 from <http://search.proquest.com/docview/893179132/13D562C229C44801EE0/8?accountid=43722>

It is believed that active defence should be left to the militaries but as aforementioned, the ratio of warship to merchant ships is not equal. Once again these vessels will be left susceptible to piratical hijackings. All of the aforesaid may be reasons justifying the arming of seafarers.

CHAPTER III

ARMING OF SEAFARERS

3.1. Historical Overview of Arming of Merchant Ships in the Past

It was common place for merchant ships to be armed in the 1700s.¹⁰² One reason for arming was for the protection of trade and commerce.¹⁰³ In the 19th Century Britain was one such country that used arms on board their merchant ships for protecting its cargo. McCurdy wrote the following:

“The right of a merchant ship to defend itself against capture by the enemy in time of war was never doubted. The carrying of guns for defensive purposes was a common practice in the British merchant service during the Napoleonic wars. As late as 1855, the ships engaged in the opium trade were armed for the protection of their valuable cargo against pirates and others.”¹⁰⁴

The renewal of this policy on the part of British Admiralty was announced by Sir Winston Churchill on the 17th of March 1914 in the House of Commons. Sir Churchill explained the grounds on which merchant ships could be armed:

“They are armed solely for defensive purposes. The guns are mounted in the stern and can only fire on a pursuer. These vessels are not privateers or commerce destroyers in any sense. They are, however, thoroughly capable of self-defence against an enemy's armed merchantman. The fact of their being so

¹⁰² Supra 19/23 at pp.19 and 20 respectively. Privateers were knighted by their states to claim regions in the name of their Kings. These privateers were duly equipped with armament. In addition the Huge Empires armed their merchant ships to protect their commerce and trade

¹⁰³ Walton, O , The Royal Navy and the German Threat 1901–1914: Admiralty plans to protect British trade in a war against Germany , The Mariner's Mirror, Volume 99, Issue 1 (2013) accessed on 18 August, 2013 from <http://www.tandfonline.com/doi/full/10.1080/00253359.2013.767565#.UhGGk5KTSP8>

¹⁰⁴ McCurdy, C.A. The Arming of Merchantmen, 40 *Law Mag. & Rev. Quart Rev. Juris 5th ser.* 46 (1914-1915), [6 pages, 46 to 51] accessed on 20 July, 2013 from http://heinonline.org/HOL/Page?handle=hein.journals/lmagd40&div=8&g_sent=1&collection=journals

armed will probably prove an effective deterrent alone on the depredations of armed merchantmen and an effective protection for these ships and for the vital supplies that they carry.”¹⁰⁵

Though this practice started solely to protect Britain’s interest at the time, it was also explicitly stated that it aimed to protect against acts of piracy and others. Thus it is evidenced that arming merchant ships against acts of piracy was a method used in the past. Notwithstanding, the perceptions on arming merchant ships have almost always attracted the same response. Subsequent to Britain’s admiralty, major shipping companies, though they refused to comment, readily expressed their patriotism to the United Kingdom by agreeing to this policy. Some ship owners and jurists from neutral states were not in favour of this proposition. It was their belief that the proposal was divergent to the Declaration of Paris¹⁰⁶, as well as, the expanded burdens and operations such decision would have had on naval welfare. Evidence of such opposition came in form of letters from neutral countries such as Belgium, Holland, Norway and Sweden.¹⁰⁷

German Jurists denied the rights of merchant ships to bear arms on the basis of self-defence. Following a meeting at the Institute of International Law at Oxford in 1913, article 12 of the *Manuel des Lois de la Guerre Maritime*¹⁰⁸ was adopted. Article 12 (translated by the writer. See original format in footnote 102) read:

¹⁰⁵ Ibid at pp. 47-48

¹⁰⁶ The Paris Declaration of 1856 was a treaty regarding the rules of maritime warfare, issued at the Congress of Paris. The Paris Declaration was the first major attempt to codify the law of the sea. Under the tenets of the Paris Declaration, privateering was no longer thought of as legal.

¹⁰⁷ Ibid at pp. 49-50

¹⁰⁸ “La course est interdite.....les navires publics et les navires privés, ainsi que leur personnel ne peuvent pas se livrer á des actes d'hostilité contre l'ennemi. Il est toutefois permis aux uns et aux autres d'employer la force pour se défendre contre l'attaque d'un navire ennemi.”

“the race is prohibited..... public ships and private vessels, and their staff cannot deliver acts of hostility against the enemy. Permission is granted to each other to use force to defend themselves against the attack of an enemy ship.”¹⁰⁹

The position of arming vessels in the nineteenth and twentieth centuries traces back to present day and to the topic of this dissertation. It can be concluded that arming of merchant ships was a practice of the past. The pertinent questions would be why this practice was ceased and whether it is time to revert to the once practiced method.

The Disarming of Merchant Ships

Based on the foregoing, it was mentioned that Britain’s reason for arming their merchant ships was for protecting trade against attacks from other merchant ships and against pirates. Britain maintained that their vessels were not equipped with armament to partake in any acts of war. As such neutral countries like the United States, Belgium, Norway, Denmark and Sweden admitted armed British merchant ships in their ports. In 1914 however, Mr. Winston Churchill further informed that in addition to the existing 1000 armed merchant ships, they would be adding 2000 more armed vessels, some of which were equipped with guns used by naval crews. This revelation surfaced questions of whether the ships’ arms would be viewed as defensive arming or offensive arming and whether they would be mistaken for belligerent ships and as be attacked and sunken by submarines. On January 18, 1916, Mr. Lansing of the United States wrote to the British Government proposing the disarming of U.K’s merchant ships. The

¹⁰⁹ Ibid at pp. 49-50, see also Manuel des Lois de La Guerre Maritime, Oxford, 9 août 1913 accessed 12 September, 2013 from <http://olivier.hammam.free.fr/imports/conv-guerre/1913.htm>

communique proposed that since pirates and privateers were no longer traversing the main commerce channels there were no longer need for arming. In the 1950s British merchant ships were duly disarmed.¹¹⁰

Concluding Remarks

The disarming of merchant ships was attributed to the decline in privateering and piratical activities. Seen as the crime of piracy among others have resurface perhaps it is time to revert to the old practice of arming merchant ships and sailors once more.

3.2. Determining Who Should Be Armed

Determining Who Should be Armed Based on the MLC

It is of paramount importance that it is established who should be armed. Seen as there is strong resistance against the direct arming of seafarers, it needs to be ascertained whether the armed security forces are considered as seafarers. The definition of a seafarer as so stated under article 2 subparagraph 1(f) of the Maritime Labour Convention 2006, defines a seafarer as “all persons who are employed or are engaged or work in any capacity on board a ship to which the Convention applies”.¹¹¹ The new definition of a seafarer under the MLC was extended to include persons who worked on board ship for example hairdressers and doctors. However, article 2 paragraph 3 of the MLC states that in the event of doubt in determining who is a seafarer, the competent authority in each Member state, after consulting with the ship owners’ and seafarers’ organization can make

¹¹⁰ Borchard, E. (1940). Armed Merchantmen. *The American Journal of International Law*, 34(1), 107-112. Accessed from <http://www.jstor.org/stable/pdfplus/2192972.pdf?acceptTC=true&acceptTC=true&jpdConfirm=true>

¹¹¹ MLC [2006] pp. 3

a decision to deem a person as a seafarer.¹¹² It should be noted that a government by itself cannot decide who is deemed a seafarer.

Determining Who Should be Armed Based on ILO Resolution No. 185

The ILO Resolution No. 185 adopted at its 94th Maritime session on February 22, 2006, in Geneva states that “there are persons who principally work onshore, but occasionally spend a short period on working on a ship. These may not be seafarers; there are persons who regularly spend a short time period on a ship. These may be seafarers.”¹¹³ The 2006 ILO Resolution provides these criteria to resolve the doubts when deciding who should be considered as a seafarer:

- The duration of the stay on board of the persons concerned
- The frequency of periods of work spent on board
- The location of the person’s principal place of work
- The purpose of the person’s work on board
- The protection that would normally be available to the persons concerned with regard to their labour and social conditions to ensure they are comparable to that provided for under the Convention¹¹⁴

The MLC 2006 definition seemingly creates a grey area as to whether or not armed security forces personnel can be considered as seafarers. Liz

¹¹² MLC [2006]

¹¹³ ILO Resolution adopted on 22 February 2007

¹¹⁴ *ibid*

McMahon's article, published on Lloyd's on May, 2013, voiced concerns with the MLC 2006 definition of a seafarer:

"Ship owners and private maritime security companies have voiced concern over moves by the Maritime Labour Convention to class armed guards as seafarers, questioning how this will work in practice. When the MLC comes into force in August, security personnel deployed on ships could be classed as seafarers if they meet the definition outlined in Article II.1 of the convention.

If the matter is unclear, it may be left to the individual flag administration to decide whether it considers the guards to be seafarers. Industry watchers have urged flag administrations making that call to consider factors such as duration of the guards' stay on board, frequency of work on board, the location of his or her principal place of work, the purpose of that work and protection cover for labour and social conditions though a final decision has not been made on whether armed guards would be classified as seafarers, early indicators suggest that this will be the case."¹¹⁵

If armed security guards are indeed considered as seafarers based on the definition given by the MLC 2006, then armed seafarers would have already been on board ships. Hence, the other distinction that must be made for the purposes of this paper is who to arm; whether be it a military seafarer, privately armed security guards or civilian seafarers. The following sentences define a seafarer in the author's view.

Oxford online dictionary defines "military" as "armed forces of a country"¹¹⁶ Therefore, the writer's definition of a military seafarer, is a seafarer who has undergone military training and who has been placed on board ships by their States for protecting civilian seafarers and ensure the safety of the vessel.

¹¹⁵ Owners and Security Firms Slam Bid to Class Armed Guards as Seafarers (02 May, 2013), Lloyd's List accessed on 19 August, 2013 from lloydslist.com

¹¹⁶ <http://oxforddictionaries.com/definition/english/military?q=military+>

Privately armed security guards are persons who have undergone artillery training and are so certified to carry and use arms if necessary. It should be noted that private security guards can also be unarmed. These persons are normally joined to a security company and provides on board security services similar to the services of shore-based security guards.

Civilian as defined by Oxford online dictionary is a person who is not a part of the armed forces or police force.¹¹⁷ Therefore civilian seafarers are those individuals who have complied with the STWC requirements and have been deemed and certified as able bodied seamen and officers. In this research, the writer intends to evaluate the arming of civilian seafarers. It is important to justify hereafter, whether these civilian seafarers have a right to bear arms to protect themselves.

Difference between Military, Private Armed Security Guards

The distinguishing difference between military personnel and privately armed security personnel is that militaries are commissioned by the flag states. A military personnel providing security assurance on board takes orders from the states and not from the captain as per regulation 34.1 of SOLAS. Seen as the Captain does not have overall responsibility of security and does not give directions to the military personnel, he is exempted from liabilities. For example, as in the case of *Enrica Lexie* where the navy was providing security for the vessel, this meant that the navies acted under the directions of the state, thus the Captain of the ship was not held liability along with the navy personnel.

¹¹⁷ <http://oxforddictionaries.com/definition/english/military?q=military+>

Privately armed security personnel have a contractual relationship with the ship owner for a specified period of time. During this period of time on board, the Master has the overall responsibility as per article 34.1 of SOLAS. For example given that the security personnel has fatally injured a pirate, then the Master may also be subjected to legal implications.

Concluding Remarks

From the above definitions, it is clarified that the writer intends to explore the possibility of arming civilian seafarers.

3.3. Rationale for Arming of Civilian Seafarers

Fundamental Rights to Safety

The Magna Carta was developed in the 13th century and represented the first fundamental human rights instrument. The 1689 English Bill of Rights, the Declaration of the Rights of Man and of the Citizen, 1789, followed by the French Revolution and the American Declaration of Independence of 1776, were among other examples of early human rights tools.^{118/119} On December 10, 1948, the General Assembly of the United Nations (UN) adopted and declared the Universal Declaration of Human Rights.¹²⁰ The UN Declaration of Human Rights speaks to the equality, respect, peace, freedom and justice of all members of the

¹¹⁸ Yücel, A. (2012). The Impact of Somali Piracy on Seafarers' Rights: A Cross-Disciplinary Assessment. Unpublished Master's Thesis, Lund University, Lund, Sweden

¹¹⁹ Yücel, A. (2012). The Impact of Somali Piracy on Seafarers' Rights: A Cross-Disciplinary Assessment. Unpublished Master's Thesis, Lund University, Lund, Sweden citing Magdalena Sepúlveda and others, Human Rights Reference Handbook (3rd edn, University for Peace 2004) 3-5.

¹²⁰ <http://www.un.org/rights/50/decla.htm>

human family. Article 3 in particular states that everyone has the right to life, liberty and the security of person.¹²¹

As a part of the human race, a seafarer has the right to life; freedom from torture, cruel, inhumane or degrading treatment; freedom from coerced labour; freedom from discrimination, and a right to legal remedy and access to justice. As an employee, the seafarers under article IV of the MLC, has a right to a safe and healthy working conditions among other things.¹²² In the preparatory texts, it has been evidenced that the existing methods intended for the suppression of piracy, armed robbery and maritime terrorism have drawbacks which prevents their effectiveness. Thus seen as the seafarer is entitled to this right of safety and at present this is not being done, perhaps the seafarers should be allowed to protect themselves. Currently there are no applicable laws that forbade arming of seafarers. In fact, merchant ships are vindicated to protect themselves at sea against an illegal impending attack within the limits of necessity and proportionality. Protection of a seafarer's fundamental rights may be one justifiable reason to arm the crew.¹²³

Fulfilling the Basic Need for Security

Often time seafarers feel defenceless in the face of imminent danger. This could have negative implications on the seafarer. For example, a seafarer knowing that the next planned route will see the vessel traversing some of the high risk areas such as the Horn of Africa, may become anxious of the possible threats to his wellbeing. This may in turn affect the productivity of the seafarer. In April

¹²¹ <http://www.un.org/rights/50/decla.htm>

¹²² Yücel, A. (2012). The Impact of Somali Piracy on Seafarers' Rights: A Cross-Disciplinary Assessment. Unpublished Master's Thesis, Lund University, Lund, Sweden

¹²³ Mejia M (2010). Maritime Security and Crime, pg. 163

2009, an American Captain, Richard Phillips was rescued from Somali pirates. During the rescue operation three (3) Somali pirates were killed. This led to threats of vengeance on the next American seafarer captured. This situation resurrected the long standing debates on whether a crew member should be armed. Barker Parker, a shipping consultant in New York and former ship broker, envisaged that internal agreements would be drafted to permit captains to keep firearms and distribute them in times of potential danger from pirates.¹²⁴ Captain Phillips, albeit his acknowledgment that using arms on board is a sensitive issue, supports that senior members of the crew should have access to weapons that can be used in dire straits. This statement could have been fuelled by his previous misfortune or it could be the need to feel secured.¹²⁵

Extended Hostage Situations

In January 2011, the M/V Leopard was hijacked by pirates who took the crew consisting of two Danes and four Filipinos. Twenty eight months after the crew was still being held captive. In 2010, the M/V Albedo was hijacked and the crew held for over one year; in 2011 an article was released giving hope that the hostages would have soon seen freedom¹²⁶, however, after two (2) years and nine (9) months, the seafarers are still left at the mercies of their hijackers¹²⁷. The ship sunk in July, 2013 subsequent to which four (4) persons of the fifteen (15) crew members went missing. The latest reports on this incident informed that the

¹²⁴ Bradsher K. (2009, April 13). Captain's Rescue Revives Debate Over Arming Crews. *The New York Times*. Retrieved on 8 April 2013, from <http://www.nytimes.com>

¹²⁵ U.S. weighs arming ships against pirates.(2009, August 14). *CBS News*. Retrieved on 17th April 2013 from <http://cbsnews.com/stories/2009/08/14/world/main 5241 388.shtml>

¹²⁶ Albedo Crew Close to Release after 13 months Attacks (2011, December 06). Lloyd's List accessed from lloydslist.com

¹²⁷ No Ransom, No Release For Hostages of Somali Pirates (2013, august 21) accessed on 19 September, 2013 from <http://www.krmagazine.com/2013/08/21/no-ransom-no-release-for-hostages-of-somali-pirates/>

Iranian owner has fled. Seven Pakistani sailors were rescued as a result of a generous endowment from their fellow countrymen; the remaining crew members from Sri Lanka, Bangladesh, Iran and India have had no such benefactor. At present, the European Union naval forces have been patrolling the waters neighbouring the M/V Albedo's sunken hull.¹²⁸ Though their presence has deterred pirate attacks, their mandate does not extend to rescue operations. The question is what will become of these remaining seafarers? Who will now step in and ensure their safe return home? The foregoing situation is a tell-tale sign that duties and responsibilities are not always fulfilled. As mentioned in chapter 2, the flag state is responsible to ensure that seafarers remain safe. In the above case, these sailors are subject to whatever ill-fated future their captors have in mind for them. If protection is not being given as ought to, then perhaps this justifies yet another reason why sailors should be given the opportunity to protect themselves.

Inhumane Treatment

A bitter association with being held hostage is the inhumane treatment that sometimes occurred. Ocean Beyond Piracy reported that in 2011, 1206 seafarers taken hostage were mistreated and in some instances extremely abused.¹²⁹ The report revealed that 35 seafarers died after being held hostages; while 8 were killed by pirates after being taken captive, a further 8 died from disease and malnourishment while being held captive; and 19 died while being used as human shields during hostage rescue efforts¹³⁰ (see Chapter 2, Human Costs of Piracy). A tale of a seafarer, Rathore read:

¹²⁸ *ibid*

¹²⁹ ICC (2012) The Human Cost Of Somali Piracy Updated Report Released. Accessed from <http://www.icc-ccs.org/news/745-human-cost-of-somali-piracy-updated-report-released>

¹³⁰

“They kept us in a state of terror – we were beaten constantly with metal poles. I managed to avoid the worst violence, but I saw my crewmates being thrashed with sticks and having electric probes attached to their genitals, and one man was suspended by ropes from the ship’s mast for several hours. Even when I could not see the torturing, I could hear the screams. I can still hear the screams to this day.”¹³¹

It is believed that if seafarers attempt to defend themselves and fail, this could lead to them feeling the “wrath” of the pirates.¹³² At present it would seem as though the sailors are feeling the wrath of pirates in any given situation. To add to an already horrendous situation, seafarers in some instances are further victimized by the very companies they work for. Liz McMahon wrote about the incongruences between survivors of piratical attacks and the treatment received from employers. The report reveals that seafarers are often refused reimbursement for personal belongings lost during hijackings, loss of pay and coerced resignations as such 31% of sailors who have been captured does not plan to return to sea (see figure 10).¹³³

Limited Protection under Flags of Conveniences

Another notable detractor is aligned with the use of flag of conveniences or open registries. Flags of conveniences are used because of their attractive incentive packages such as tax breaks; however, in many cases these registries lack the ability and resources to effectively protect the crew under their flags. It

¹³¹ Yücel, A. (2012). The Impact of Somali Piracy on Seafarers’ Rights: A Cross-Disciplinary Assessment. Unpublished Master’s Thesis, Lund University, Lund, Sweden citing Dipendra Rathore, ‘Experience: I was kidnapped by Somali pirates’ The Guardian (London, 11 June 2011)

¹³² Monje, Scott C.(2011) Citadels: Passive Defence Against Pirate Attacks, Australian Journal of Maritime and Ocean Affairs, accessed 8 April 2013 from <http://search.proquest.com/docview/893179132/13D562C229C44801EE0/8?accountid=43722>

¹³³ Liz McMahon (June 2013) Seafarer, Victims of Pirate Attacks Left Facing Hardship (2013, June 25) Lloyd’s List accessed from lloydslist.com

should be noted that it is the flag state's responsibility to protect the crew under its flags.



Figure 10. Financial Hardships Experienced by Seafarers After a Piracy Incident

For example Antigua and Barbuda does not have the required resources to protect the ships bearing its flag.

Concluding Remarks

There are a plethora of shortcomings in the minefield of maritime security leads the author back to its position of why the protection of those at risk maybe better left up to the seafarer themselves. One maxim said “when the flag states and coastal states have failed in their mandate to protect against acts of on sea

¹³⁴ Accessed on 19 September 2013 from http://oceansbeyondpiracy.org/sites/default/files/human_cost_of_somali_piracy.pdf

violence, then the last resort is self-defence by merchant ships”¹³⁵. Direct arming of the crews would provide reliable and timely defence mechanisms; reduce the associated cost of anti-piracy strategies and most of all give seafarers more secured feeling. As seen earlier in the case of MV Magellan Star, the ship was being escorted by a naval vessel, prior to losing contact at sea. This made the vessel vulnerable to the impending hijacking. This evidenced that direct arming of the crew would be more readily reliable than expected naval enforcement support.

Moreover as mentioned before, 50,000 vessels traverse the Malacca Straits annually carrying an estimated one third of the world’s trade;¹³⁶ additionally 20,000-30,000 ships ply through the Gulf of Aden yearly; it becomes almost impossible to provide the corresponding number of warships needed to escort these vessels through these high-risked areas.¹³⁷ Thus, the ratio of warship to merchant ships is disparate. Furthermore, it is quite costly to use naval forces as escorts with military protection equalling approximately 2.9 million per day (see breakdown in figure 8 and 9). It is anticipated that soon many states will not be able to render this assistance. Given the high associated costs and the limited numbers of vessels, it is only natural that despite international agreements, countries may only be able to protect their commercial vessels.¹³⁸

Being without protection leaves seafarers susceptible to pirate attacks and fosters the vulnerability leaving them open to hijackings and the possibility of

¹³⁵ Haywood, R. and Spivak, R (2012) *Maritime Piracy*. New York, N. Y; Routledge pg 153

¹³⁶ Kraska, J., & Wilson, B. (2009). Somali piracy: a nasty problem, a web of responses. *Current History*, 108(718), 227-231. accessed on 8 April 2013 from <http://search.proquest.com/docview/200722244/13D5678A36B6BE8700E/11?accountid=43722>

¹³⁷ Monje, S. C. (2011). Citadels: Passive Defence Against Pirate Attacks. *Australian Journal of Maritime and Ocean Affairs*, 3(2), 43., accessed 8 April 2013 from <http://search.proquest.com/docview/893179132/13D562C229C44801EE0/8?accountid=43722>,

¹³⁸ *ibid*

being taken hostages. As seen in the above text, 31% of seafarers have decided not to return to the sea. Perhaps these are valid reasons for allowing civilian seafarers to try protecting themselves or perhaps these are deterrents to the profession at seafaring.

3.4. Flag States that are Employing Armed Guards/Non-Military Personnel/Military/Armed Civilian Seafarers

This section will look at flag states that allow arming vessels. UNCLOS is the regulatory body for all activities on the high sea. However article 94(1) of UNCLOS states that each flag must exercise jurisdiction over the ships that fly its flag.¹³⁹ Therefore, the guidelines governing the carriage of artillery are that of the flag state; however, upon reaching the coastal waters of another state, the jurisdiction of that state will so apply. On this basis, a state may forbid the entrance of arms of any kind, even though it is allowed under the flag state.¹⁴⁰

Some countries should as France and Spain require a licence for arms. A declaration of security as per the tenets of ISPS 5.1 is needed to state that the ship is carrying guns in several countries such as Kenya and Brazil to name a few. The United Kingdom has provided specific guidelines for the use of armed guards on board Britain flagged ships. Similarly, island states such as St. Vincent and the Grenadines has permitted the use of armed guards on board their ships. Australia along with South African countries require that all firearms must be registered, which in reality means that overseas vessels cannot bring weapons into the

¹³⁹ UNCLOS 1982

¹⁴⁰ The Use of Armed Guards, Legal and Practical Issues Accessed on 20 September 2013 from <http://www.idaratmaritime.com/wordpress/?p=386>

country. In 2011 two masters were arrested and charged for breaching the South African Firearm Control Act.¹⁴¹

Following the Maersk Alabama incident, the United States issued an advisory informing that vessels flagged under their state, may use deadly force to defend themselves in the eye of impending danger. However, this recourse should be action under the direction of the master. The advisory further states that seafarers are not legally required to retreat, or use warning shots prior to using deadly force.¹⁴²

Concluding Remarks

It should be noted that the above mentioned countries have taken the initiative to arm its crew through the use of military protection or privately armed security guards. However, the International Ship and Port Facility Security (ISPS) Code necessitates that all vessels that have been flagged in a state that is party to SOLAS 1974 must put in place a safety plan specific to each vessel. These procedures are not rigid, thus the carriage and or use of firearms for self-defence is not forbidden.¹⁴³ In that said vein, Israel is one country that is believed to have taken the initiative to directly arm its crew.¹⁴⁴

¹⁴¹ The Use of Armed Guards, Legal and Practical Issues Accessed on 20 September 2013 from <http://www.idaratmaritime.com/wordpress/?p=386>

¹⁴² Jeffrey R (2010), An Efficient Solution in a Time of Economic Hardship: The Right to Keep and Bear Arms in Self-Defence Against Pirates, Journal of Maritime Law and Commerce, accessed on 11 April, 2013 from <http://search.proquest.com/docview/847561242/13D616A507C42BE0569/1?accountid=43722>
<http://search.proquest.com/docview/847561242/13D616A507C42BE0569/1?accountid=43722>

¹⁴³ *ibid*

¹⁴⁴ U.S. weighs arming ships against pirates.(2009, August 14). *CBS News*. Retrieved on 17th April 2013 from <http://cbsnews.com/stories/2009/08/14/world/main 5241 388.shtml>

3.5. Legal Justification of Arming Civilian Seafarers

Despite the existing international laws such as UNCLOS, SUA, SOLAS, ISPS and the numerous IMO Resolutions addressing maritime security, the unlawful acts still thrive because of the inadequacies within the legal systems.¹⁴⁵ The international legal system of interference rights and counter measures is still riddled with gaps and thus is part of the problem.¹⁴⁶ At present, there are no specific laws relating to armed seafarers, thus the aim of this section is to provide the legal implications of having armed seafarers on board and to ascertain whether under the existing laws arming of seafarers is justifiable.

The Arming Seafarers and International Instruments

UNCLOS

As mentioned earlier, maritime piracy is one of the major threats to maritime security and the most prevailing crimes in the present time. The crime of piracy is dealt with by the United Nations Convention on the Law of the Sea (UNCLOS) particularly articles 100 to 107 and 110. However there are some provisions that can be interpreted and hence forth apply and justify the arming of seafarers while others cannot. One such provision which cannot justify the position of arming is article 105 of UNCLOS. Article 105 of UNCLOS provides that a State may seize a pirate ship, or a ship taken by piracy under the control of pirates, and arrest the persons and seize the property on board. As it can be deduced from the aforesaid provision, the power to seize ships in the event of piracy belongs only to the State and not to civilians. Therefore, the said provision

¹⁴⁵ Uwe Jenisch, International Legal Instruments in the fight against maritime violence-an inadequate regime (as compiled and edited by Maximo Mejia, Jr. , Maritime Security Crime, p. 160, WMU Publications, 2010

¹⁴⁶ *ibid*

cannot be used as a basis for arming seafarers or deploying armed security. Thus this provision though, it governs piracy, will not be examined.

Reservation of peaceful purposes on the high seas under UNCLOS

Although article 105 cannot be used to justify the arming of seafarers, reference can be made to articles 88 of UNCLOS in relation to articles 98 and 100¹⁴⁷ thereof.

Article 88 of UNCLOS provides that the “high seas shall be reserved for peaceful purposes”, article 98 particularly paragraph 1(b) thereof requires the master of a ship to render assistance and rescue persons in distress and finally article 100 requires the cooperation of all State in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State.¹⁴⁸

In order to reserve the high seas for peaceful purposes, article 100 of UNCLOS can be used to complement article 88 thereof. The State is required to cooperate under article 100 in order to repress piracy and this cooperation can be manifested when there is a noticeable effort to accomplish the purpose. Thus, in order to accomplish article 88 and comply with article 100 of UNCLOS, a State may domestically legislate laws that will address piracy and other maritime related offences and provide for the preventive measures that can be used to combat piracy or maritime terrorism; these preventive measures may include the arming of seafarers.¹⁴⁹

¹⁴⁷ UNCLOS

¹⁴⁸ *ibid*

¹⁴⁹ *ibid*

Moreover, article 98 allows the master of a ship to rescue persons in distress. The manner of how to rescue the person in distress was not specifically provided therein, therefore rescue may include employing the use of force if and when necessary. The possible implication is that, the use of force may entail criminal liability and sanctions. Considering the foregoing premises, articles 88, 98 and 100 warrant the arming of seafarers, and this premise can be further buttressed by article 91 of UNCLOS.¹⁵⁰

Nationality of Ships under UNCLOS

Article 91 of UNCLOS reads “every State shall fix the conditions for the grant of its nationality to ships....” The nationality of ships is governed by UNCLOS, and under article 91 thereof, the State is given the power to prescribe the grounds on which it will attach its nationality to a ship. Therefore a State may prescribe the terms and conditions for arming seafarers to its Flag State ships. Nonetheless, it bears emphasis that arming seafarers is not as easy as it may seem as the ship moves from place to place. For example a ship moves from the high seas to the territorial jurisdiction of another State, this may therefore result in complexities in the application of legal rules. It is so as, even if the State allows its Flag State ship to arm seafarers, in other jurisdictions where the ship operates, the carriage of firearms may be prohibited and therefore may become illegal. Furthermore the ship will be subjected to that State’s law and jurisdiction as it can only sail under the flag of one State as provided by Article 92 of UNCLOS which states that:

¹⁵⁰ *ibid*

*“Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be **subject to its exclusive jurisdiction on the high seas**. A ship may not change its flag during a voyage or while in a port of call, save in the case of a real transfer of ownership or change of registry.”*

As earlier mentioned, in some jurisdiction the carriage of firearms is prohibited and therefore is considered illegal. In this regard, there could be a number of possible insurance liability issues to consider in which the ship owners must concern themselves with. Section 41 of the English Marine Insurance Act (MIA)¹⁵¹ of 1906 provides that every voyage is lawful and that voyage will be carried out in a lawful manner. This article refers to implied warranty. Thus, an implied warranty is breached when the carriage of firearms become unlawful, and when there is breach of implied warranty the insurer is therefore discharged from any insurance liability.

SUA Convention and ISPS Code

As can be observed from the above-mentioned discussion, UNCLOS,¹⁵² particularly articles 100-107 and 110 only covers the crime of piracy. Thus subsequent to the Achille Lauro incident, there were no existing laws that covered the crime of hijacking, as such the Convention on the Suppression of Unlawful

¹⁵¹ English Marine Insurance Act [1906]

¹⁵² UNCLOS

Acts against the Safety of Maritime Navigation 1988 (SUA Convention)¹⁵³ was enacted to cover all forms of maritime violence, which also includes the crime of piracy.

While SUA defines other maritime crimes, however it can be gleaned therefrom that SUA is more focus on establishing jurisdiction on how to prosecute perpetrators. Nevertheless, article 13 paragraph 1(a) states that:

“States Parties shall co-operate in the prevention of the offenses as set forth in articles 3 by taking all practicable measures to prevent preparations in their respective territories for the commission of those offenses within or outside their jurisdiction.”

Article 13 paragraph 1 (a) of SUA Convention must be read in relation to the International Ship and Port Facility Security (ISPS) Code, as the former Convention provides that a State Party shall take all practicable measures to prevent the commission of maritime offenses. The ISPS Code provides for the number of preventive measures to combat maritime offenses. The ISPS Code is a consolidated guidance on the implementation of the security-related amendments to the International Convention on the Safety of Life at Sea, 1974 SOLAS Convention.¹⁵⁴

The ISPS Code prescribes a “special measures to be used to enhance maritime security” which is referred to as Maritime Security Measures (MSM).¹⁵⁵ Accordingly, MSM was developed in response to perceived terrorist threats, and are also applicable to countering other forms of security threats, notably piracy

¹⁵³ SUA

¹⁵⁴ Section 1.1.1 of ISPS Code

¹⁵⁵ Section 1.8, ISPS Code

and armed robbery in international and territorial waters.¹⁵⁶ Thus, *the principal purpose of the ISPS Code can be considered to reduce the vulnerability of the maritime industry to security threats, regardless of their measures*¹⁵⁷.

Section 9.1 Part A provides that “each ship shall carry on board a Ship Security Plan (SSP) approved by the Administration. The plan shall make provision for the three security levels as defined in the said Code. SSP as defined in Paragraph 4, Section 2.1, Part A of ISPS Code is a plan developed to ensure the application of measures on board the ship designed to protect persons on board, cargo transport units and ship’s stores or the ship from the risks of a security incident.

As it can be inferred therefrom, the ship company may use various kinds of security measures, including the carriage of firearms as the enumerations given under Section 9 and sub-sections 9.1 to 9.8 are neither exclusive nor prescriptive. Furthermore, under ISPS Code, a State may enact full implementation of the MSM and may provide for regulations on the carriage of firearms on-board as a form of security measure. Thus, SUA Convention and ISPS Code empower the State to provide preventive measures, thus, the arming seafarers can be considered as preventive measure and may likewise be considered as anticipatory self-defence.

Another security measure that the State may prescribe is with regard to the training of seafarers. Section 2.9.8 of ISPS Code provides that “the STCW Code recognizes that shipboard personnel are not security experts, thus they should

¹⁵⁶ Section 1.5.6, ISPS Code

¹⁵⁷ Ibid

receive adequate training so as to acquire the required competencies to perform their assigned duties and collectively contribute to the enhancement of maritime security.” Accordingly, STCW Convention and STCW Code establish a mandatory minimum requirement for security-related training and instruction for all SSOs and shipboard personnel serving on SOLAS ships.¹⁵⁸ Thus the same training may likewise be provided with seafarers who intend to be armed and hold security duties. Further, the State may legislate additional training to make the seafarers competent to use and carry firearms.

IMO Resolutions

The Private Security Contractors (PSCs) like armed seafarers are civilians in nature. The frequent attacks of Somali pirates led many private shipping companies to hire PSCs. At present it can be said that PSCs is internationally accepted as a matter of practice, however the armed seafarers are yet to be recognized by the international law. In most countries, however, weapons are banned; they are confiscated or secured in a holding area before a ship can enter a port.

The IMO recognizing that the existence of PSCs and the need to regulate the same has issued MSC.1 Circ. 1405 on 25 May 2012. The said Resolution provides for a revised interim guidance to ship owners, ship operators and shipmaster on the use of Privately Contracted Armed Security Personnel (PCASP) on board ships in the high risk area. According to Paragraph 1.3, the purpose of the said guidance is to assist ship owners, ship operators and shipmasters on the use of PCASP in order to provide protection against piracy. Further the IMO,

¹⁵⁸ Article 2.9.3, ISPS Code

under paragraph 1.1 of the said Circular recognized the increasing threat to commercial shipping by Somalia-based pirates and the difficulty to identify reliable professional private providers of armed security, hence the issuance of the subject Circular.

As can be inferred therefrom, IMO has recognized the need for the deployment of PCASP as this is one of the effective measures being employed by most shipping companies to combat piracy. As deployment of PCS is considered as one of the preventive measures to combat maritime offenses, thus in the same vein, arming of seafarers can likewise be considered as preventive measure, hence the author is of the view that IMO may in the future enact resolutions that will regulate the arming of seafarers as some countries like Israel is starting to arm their seafarers.

Resolution 2020 and 2015 provides for a twelve (12) month extension of authorization given under Resolution 1846 (2008) and 1851 (2008) to States and regional organizations cooperating with the Somali Transitional Federal Government to enter Somalia's territorial waters and use "all necessary means" to fight piracy. Necessary means may include the use of force, and use of force may include the use of firearms, and when it includes the use of firearms consequently it can arm seafarers. However reading from the wording of the said Resolutions, it can be inferred therefrom that these Resolutions are only applicable to Somali pirates and not to other pirates.

Concluding Remarks

Though the laws are not specific to seafarers, the natures of the provisions governing maritime security are open for interpretations. In justifying the position to arm, the writer has sought to find the loopholes through which arming of civilian seafarers could be permitted. Hence based on the forgoing, it can be concluded that arming of seafarers is justifiable under the international instruments.

CHAPTER IV

CONSEQUENCES OF ARMING SEAFARERS

Training Requirements under STCW/ISPS

The ability to fully evaluate a situation before reacting may come with some level of training. This would be important if one should consider the arming of civilian seafarers. How much training would these persons need to safely operate, what level of training would be needed; how often would the need to re-train or obtain re-certification to use a gun be, what are the associated cost of training and who would undertake the bills for training. Even so what amount of training would be needed to equip civilian seafarers with the necessary skills to coherently appraise a situation before acting; bearing in mind that some actions could lead to law suits against the company and possible criminal charges for the seafarer. The 2008, International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW) Manila amendments incorporated new requirements for security training with the primary purpose of integrating Ship Security Officer (SSO) on board. This training is as a result of the ISPS Code implementation, which aims to dissuade and thwart threats and to mitigate the effects of security incidents.¹⁵⁹ Notwithstanding, these security tasks and training are surety to the primary functions of a seafarer as a navigator or engineers. Hence, it is believed that the training does not provide the aptitude similar to that of security professionals who are so trained to detect, divert, suspend and counteract targets.¹⁶⁰ Not to be confused as this basis was also used

¹⁵⁹ STCW Manila Amendments.

¹⁶⁰ Mejia Jr. M. Potential Consequences of Imprecise Security. World Maritime University, Malmö, Sweden accessed from <http://solomonchen.name/download/7ms/1-012-s2-shroeder.pdf>

as a justifiable means of arming, however, given that the STCW, did not explicitly provide guidelines on the qualifications and training for armed seafarers, but seafarers in general, this could also be translated to mean that seafarers though being trained as Ship Security Officers (SSO) are not being trained in combat or weapons training¹⁶¹ similarly it could be interpreted otherwise.

One other disadvantage of being untrained for combat is that expertise maybe lacking to efficiently and successfully be engaged in gun exchange. Stakeholders worry that the crew could be killed instead of held for ransom if they have engaged in unsuccessful battles with pirates.¹⁶² In addition, specifically with regard to Somalia, there is a widespread concern that the use of force will lead to an escalation of violence in a region where pirates have, for the most part, avoided inflicting injury on their victims. Additionally there are fears that arming of seafarers who are also inadequately trained may cause injury to members of the crew, as well as, themselves.¹⁶³

Liability and Criminal Sanctions

Criminal liabilities may arise out of what may be perceived as justifiable actions as in the case of the *Enrica Lexie*, where two Italian Marines have been charged with murder after acting against what they perceived as a potential threat¹⁶⁴. In 2012, two Italian marines who were apart of the Italian anti-piracy coalition allegedly killed two Indian fishermen mistaking them for pirates. There have been other incidents in which there were no impending prosecutions such as

¹⁶¹ *ibid*

¹⁶² Bradsher K. (2009, April 13). Captain's Rescue Revives Debate Over Arming Crews. *The New York Times*. Retrieved on 8 April 2013, from <http://www.nytimes.com>

¹⁶³ *ibid*

¹⁶⁴ Palmer, A (2012) The Use of Armed Guards, Legal and Practical Issues accessed from <http://www.idaratmaritime.com/wordpress/?p=386>

the Suez Canal shooting in 2008, where three boats were approaching a cargo vessel, the Global Patriot; following three warning shots two of the three vessels retreated except one which coincidentally had a cigarette vendor on board. The security team mistaking the vendor for a potential threat shot and killed the 28 year old Egyptian seller.¹⁶⁵

Prohibited From Entering Ports

Weaponries pose legal complications as they are forbidden on some merchant ships, as well as, in some ports around the world. In 2010, the Suez Canal became one such entity that forbade this practice.¹⁶⁶ As mentioned earlier in the preceding texts, because the ship is a floating device and navigates numerous ports around the world, upon reaching ports that under their jurisdiction carriage of firearm is prohibited, the ship will not be granted access unless under 5.1 of the ISPS code a Declaration of Security (DOS) was prior sent communicating that the ship is so armed.

Attracting Criminal Intent and Elements

As a matter of safety, it is questioned whether ships carrying weapons may attract potential criminals aiming to stealing these artilleries.¹⁶⁷ In the same vein it could also harbour thoughts of criminal intents, such as in the case of M/V *Myre Seadiver* where 15 Russian seafarers were detained and charged in Nigeria with

¹⁶⁵ *ibid*

¹⁶⁶ Marmon W. (2011, November). Merchant ships starting to carry armed guards against Somali pirates. *The European Institute*. Retrieved on 9 April, 2013, from <http://www.europeaninstitute.org>

¹⁶⁷ Bradsher K. (2009, April 13). Captain's Rescue Revives Debate Over Arming Crews. *The New York Times*. Retrieved on 8 April 2013, from <http://www.nytimes.com>

illegal importation of arms, ammunition and for not declaring the contents of the ship. A bail bond of \$500,000.00 was also placed on the vessel.¹⁶⁸ Why would this be? If permission is given to place arms on board merchant ships for protection of the ship, it makes the ship vulnerable to illegal activities; some seafarers may get the idea of smuggling illegal guns and ammunition amongst the legitimate lot. This could lead to the practice of gun trafficking as well.

The Ability of Seafarers to Bear Arms

Finally, aside from the criminal and civil liability that self-defence attracts, one pertinent question would be, are civilian seafarers capable of killing someone? If given the force to protect themselves, would they be ready to fight for their lives and be able to live with the aftermath? Martin¹⁶⁹ relays the story where a crew member was evidently disturbed by actions of the military coalition securing their ship. In the same experience Martin explained that the cook on the other hand appeared to be untroubled by the events. While this experience is not one in the same as the crew actually inflicting the injuries, the results of the ability to cope with such experiences are the similar.

¹⁶⁸ Adesomoju, ADE (2013) Illegal arms importation: 15 detained Russians get bail (26 February, 2013)

¹⁶⁹ Martin Conroy is a USA native and Master currently serving on USA merchant ships. This interview was conducted on August 29, 2013

Rest Hours and Manning Levels are Limited

Regulation 2.3 of the Maritime Labour Convention 2006¹⁷⁰ speaks about the hours of rest and work periods that must be respected. In that regards it is noted that seafarers are already too busy with their schedules to effectively undertake the responsibility of protecting themselves and the ship through the use of arms. Therefore the consequences of arming would add additional stress to their already busy lives. Mejia wrote:

“prevailing manning levels and the demanding nature of shipboard life are also factors that limit the options available to ship crews in dealing with security threats. Crews have simply become too small and too busy to offer any sort of realistic protection against a human intelligence actively seeking to subvert the ship to its wicked purpose”¹⁷¹

Concluding Remarks

From the aforesaid texts, it can be deduced that though arming of the crew may be justified in wake of the current situation surrounding these noble artisans. The above text has provided some instances in which arming of seafarers may have direct consequences such as being held criminally liable for injuries inflicted or the killing of persons at sea (be it pirates or fishermen or other users of the sea) . Additionally carrying arms proves to impede security measures as such ships may not be admitted in ports. Furthermore, seafarers are already too busy to be

¹⁷⁰ MLC 2006

¹⁷¹ Mejia Jr. M. Potential Consequences of Imprecise Security. World Maritime University, Malmö, Sweden accessed from <http://solomonchen.name/download/7ms/1-012-s2-shroeder.pdf>

burdened with the responsibility of bearing arms to protect themselves and their ships.

CHAPTER V

CONCLUSION AND RECOMMENDATION

Concluding Remarks on Piracy and the Responses to Suppress the Crime

The international laws governing maritime security have noticeable pitfalls which impede their ability to combat illegal acts at sea including maritime terrorism, armed robbery and piracy. Earlier in this dissertation, the evolution of piracy was examined for the purposes of illustrating that the archaic definition of piracy could no longer matched the contemporary practice of pirates today. UNCLOS definition of piracy under article 101 does not provide the legal basis for crimes that have taken place as close as 11.55 NM from shore. It should be reiterated that in order for piracy to be considered under the international regime, it must be conducted on the high seas. Furthermore, pirates are captured but not prosecuted and thereafter release. For example because of the loopholes embedded within the treaties, prosecutors may have a difficult task to indict pirates. Additionally the issue of gathering evidence for prosecution proves to be a long task and pirates just as any other human being has the right to fair treatment and judicial process. Hence they cannot be detained for a long period of time without being charged. These loopholes also help to foster the crime of piracy. As seen earlier in the paper, the earnings generated from piratical activities compensate 67-157 times more than the best earning option in Somalia. This firstly provides the encouragement for partaking in the crime and secondly seen as in most cases pirates are not prosecuted, this also offers an incentive to continue with the crime. Moreover if this trend is continued, under the existing suppression methods, this may never deter perspective pirates.

As a result, the crime is amplifying in different regions. As seen earlier in this dissertation, the crime was believed to have started with the Greeks and has

over decades spread to the once docile West Africa and at present it has manifested in the Horn of Africa.

The maritime community believes that the passive approaches are best in the fight against piracy as they do not aggravate an already escalated situation. The Best Management Practices are believed to be the safer options for securing the crew and ensuring safety to vessels traversing the high risk areas. Some persons are of the impression that the BMP is merely a communication campaign, others believe that it is an inexpensive method of providing security without taking into consideration the effectiveness of said security methods. In furtherance, it is believed that active defence should be left up to the naval forces, but as repeatedly mentioned, there are not enough warships to match the number of merchant ships traversing the trade channels.

Concluding Remarks on Arming of Seafarers

In iteration, there are no legally binding laws preventing the direct arming of seafarers. As was mentioned, it is not unlawful to carry firearms, as the right to arm a vessel is vested in the flag states. Seen as the ship is governed under the jurisdiction of the flag state, it has the power to determine whether its vessel should be armed on the high seas. The problem arises because the ship is a floating device. Hence as it moves from different ports across the globe, it enters into the jurisdiction of different countries which may prohibit the carriage of firearms on board.

Admittedly arming of the crew may present a more pragmatic solution due to the inability of the current relevant treaties and other practical solutions being used to repel the acts of piracy and other illegal acts at sea. With reference to the preceding texts, the inhumane treatment of seafarers signifies a desperate call for

more consistently active measures to be employed in combating piracy and other on-sea violence.

Notwithstanding the facts, the writer believes that the protection of any civilian ought to be left up to the relevant competent authorities. Hence seafarers should not be armed. For the reason that there are no clear guidelines determining how a civilian seafarer will be treated given that in the course of protecting his or herself have in the process injured or fatally wounded a pirate. If this action should be justified, it may be on the premise of self defence. Even so self defence is a complicated issue for the mere fact that what may constitute self defence in a particular country may differ in another state. Hence seafarers may be subjected to criminal implications. For example in the *Enrica Lexie* case, the two Italian militaries, though they acted out of perceived defence of the ship, they were subjected to criminal charges under the Indian Law.¹⁷² Though the afore mentioned case included navies, the essence remains the same, the laws governing another country is different from those of the flag states. Therefore if a civilian seafarer or armed security forces or naval force killed or injured a person then the criminal laws of that country may apply and the civilian seafarers could be faced with murder charges under the penal system of foreign laws.¹⁷³ Palmer wrote:

“The International Tribunal for the Law of the Sea, in its *M/V Saiga No 2* judgment, which related to naval personnel, said that ‘international law ... requires that the use of force must be avoided as far as possible and, where force is inevitable, it must not go beyond what is reasonable and necessary in the circumstances. Considerations of humanity must apply in the law of the sea, as

¹⁷² Palmer, A (2012) The Use of Armed Guards, Legal and Practical Issues accessed from <http://www.idaratmaritime.com/wordpress/?p=386>

¹⁷³ *ibid*

they do in other areas of international law.’ The judgment further suggests that practices which are normally followed before resorting to force must be used. These include both visual and auditory signals such as firing shots across the bows, and a variety of other measures.’¹⁷⁴

Consequently ships’ Captains may not approve of arms on the ship they are masters of as criminal and civil consequences extend to not only the perpetrator but the Captains and ship owners as well. This is so as under SOLAS 34.1, the Captain has the overall responsibility, hence equally he would be held responsible for any criminal liability.

Furthermore, the author has had the privilege to discuss this issue at length with seafarers at various levels in their professional career ranging from a current serving ship’s captain, second and third officers, cadets, navigation and engineering officer, industry players from prominent companies, and the conclusion at all levels and diaspora remained in line with that of the author’s. Civilian seafarers should not be armed. The common perception amongst these persons is that armed civilian seafarers are likely to turn on each other in times of conflicts and disagreements. Many went on to explain that a ship though a huge vessel, becomes quite a small space to share with people of diverse, cultures, backgrounds and practices. They believe that misunderstandings and rivalries are inevitable at some point, and that arms on board would be a foreseeable time bomb. Some persons were of the impression that select members of the team, mainly the Master could carry this weapon. It is the view that this would not be of much effectiveness in light of the heavy artilleries being carried by pirates. However, it is the writer’s believe that these sailors would have more to lose than to gain by being armed.

¹⁷⁴ *ibid*

Recommendations

It is recognized that amending the legal documents such as UNCLOS may not be a readily solution. Looking at the original adoption of the document, it took 12 years for the instrument to be implemented. Hence to amend and accept a more contemporize version may take another 12 years. Hence the recommendations are as follows:

- find ways of remedying the definition inefficiencies in UNCLOS and SUA Conventions. This may be done by means of a supplementary documents or chapters. In this way pirates can be duly prosecuted for the crimes they are committing on the world's oceans.
- Establish a national insurance fund for seafarers. This would also ensure that seafarers are not held hostages in hostile environments for longer than necessary. For example, by doing this seafarers would no longer have to wait on ship owners or operators to post their ransoms, as a scheme would readily be available for that purpose. The scheme would be reimbursed by the ship owners and or operators accordingly.

In chapter one of the overview, it was mentioned that in order for a crime to be eradicated, the root cause must first be eliminated. If this is done, then the need for active measures such as arming of seafarers or use of militaries and private security guards may become null and void. Some companies have taken a step in this direction. Oceans Beyond Piracy reported that since early 2013, members of the shipping fraternity including K Line, Maersk Line, Stena, NYK Line, Mitsui OSK Line, Shell and BP have contributed \$1 million dollars in support of job creation and capacity building projects in Somalia. The group has pledged a further \$1.5 million to fund those same efforts. ¹⁷⁵

¹⁷⁵ <http://oceansbeyondpiracy.org/sites/default/files/ecop2012final.pdf>

Perhaps this is the first step in remedying the problems in Somalia and other trouble areas.

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