The Legality of Maritime Ransom Payment in the Light of UK and Singapore Jurisdictions

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1 INTRODUCTION TO PIRACY

1.1 Definitions of Terminologies

This paper seeks to examine the issue of legality of ransom payment to pirates in the context of two different jurisdictions – in UK and Singapore. Ransom payment is hereby defined as “a sum of money demanded or paid for the release of a captive”\(^1\) which in a maritime context, may be extended to apply to the release of vessel and cargo as well that are being held by pirates. The legality of payment of ransom refers to whether or not such an act is deemed to be illegal under a nation’s laws and if so, the legal outcome which will follow thereof.

The approach of the paper focuses on the relevant legal framework, so-called black letter law placed in a background comprising other influences such as economic, social and political fields. Therefore, it illustrates the complex nature of piracy problem itself - the symptoms of its rise and subsequent analysis of possible solutions lie not only in the legal arena, but the root causes demonstrate that it is inevitable to concede the origins are often of a non-legal nature.

The UK and Singapore jurisdictions have been selected on the basis that they are major, well-known maritime powers held in high reputation internationally. They contribute heavily to the global shipping activities ranging from ports to the financial sector in maritime transactions and ultimately, in the field of arbitration where the UK and Singapore are reputable centers for dispute resolution. The UK Lloyd’s Market is a world famous specialist insurance market, of whose activities have great impact on the rest of the shipping world. Singapore, once a British colony, also offers an interesting insight into how two countries with similar civil law tradition, can display differences in the way they interpret case law as shown in the latter part of this thesis.

Shipping is considered the most international of all trades. It traverses across nationalities and territories around the globe, with oil being one of the most significant yet buccaneering

commodities to be transported on the oceans. With maritime adventures come along certain risks faced by the different actors in the industry, ranging from governments, insurers, ship owners or operators to the crews members.

1.2 Brief Historical Background

In the ancient world, piracy has long been described in a myriad of literary works and texts from Homer, to Odysseus to Thucydides. There were distinctions made between lawful and unlawful pirates; the former included pirates commissioned by authorities and vested with power to do plunders and exploits. As portrayed by Thucydides in his introduction to the Peloponnesian War that “it is easy to see it today, when some contemporary maritime people honoured themselves to indulge in it and ancient poets let the seafarers be asked by the figures of their poems whether they were pirates. Those who were questioned in such a way do not deny such an activity and those who were asking it do not consider the question as insulting… From this ancient robbery the custom of circulating with arms exists among the inhabitants of the inland”. Similarly, Homer’s poems illustrated the fact that piracy was not condemned unless committed between citizens; it was not only lawful but honourable when perpetrated on foreigners.

Hugo Grotius, an expert of ancient literature, reiterated Thucydides’ and Homer’s points that it was non-offensive to ask foreigners if they were crooks or pirates. In his famed The Law of War and Peace, he wrote of how “Justinian observed that in the time of Tarquinius, the profession of piracy was still attended with a degree of glory”.

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1.3 The Current Situation

1.3.1 Shift in piracy landscape

Piracy is a phenomenon that is wide-spread internationally given its very nature. Hotspots include the coastal waters off the Far East, in particular the Straits of Malacca and Singapore, the South China Sea, East Africa, West Africa, South America, the Caribbean and the Indian Ocean. In the past since 1990s, much attention had been given to maritime piracy and armed robbery at sea in Southeast Asia. Over the past decades, however, certain regions like the Horn of Africa, western Indian Ocean and the Arabian Sea have seen sharp spikes in the rate of piracy, making them notorious areas for ships to transit. There were 69 piracy incidents reported in the South China Sea in 2009 and 27 incidents in the Malacca Strait. In East Africa, the number of piracy increased from 134 attacks in 2008 to 222 attacks in 2009. These statistics give a backdrop of the prevalence of piracy and its evolution across time and space.

1.3.2 Modus Operandi of Pirates

This following section describes the business model of pirates to illustrate the wide extent in which ransom payments is considered as a highly attractive and lucrative source of revenue.

Since 2005, many international organizations and governments have expressed concerns over the drastic increase in Somali piracy. In 2009, there were 217 attacks on vessels in the waters off the Horn of Africa by Somali pirates, a doubling of figure registered in 2008. It was estimated that there were about two to four hundred Somali pirates in 2008 and according to some sources, there are currently “around one thousand to fifteen hundred pirates operating in the Indian Ocean and Gulf of Aden.” In 2010 alone, 4,185 seafarers were subjected to armed attacks off Somalia. 1,432 ships were boarded by pirates of which 1,090 were held hostage.

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and 516 were used additionally as human shields. According to statistics in spring 2012, there were 121 worldwide attacks of which 51 incidents took place off the coast of Somalia; there were 11 hijackings off Somalia out of 13 worldwide and more than 158 hostages were held. At the moment, “12 ships and more than 170 seafarers are being held hostage by Somali pirates for ransom”.

Throughout the years, there has hardly been any change to the methodology employed by Somali pirates when carrying out acts of piracy, with the exception that they have gone much further in their range of attacks, striking at vessels as far as Mozambique, which is 2,500 miles from Somalia. They have shown heightened confidence in the fact that the crew can be held as hostages, along with the vessel and cargo in their demand for ransom payments. Their experiences show that this way of earning revenue has paid off because “in 2006, the average ransom was around US$150,000, but by 2011 it had increased to between $4.5 and $5 million”.

This represents a formidable increment even though their capture and success rate has been drastically reduced in recent years due to counter-piracy efforts through multilateral co-operations, capacity building, law enforcement on the national and international levels and the safeguards taken by shipowners through the Best Practice Management (BMP 4) as endorsed by IMO whereby “Member Governments are invited to consider the Best Management Practices as set out in annex 2, and advise owners, operators and managers of ships entitled to fly their flag, as well as the shipboard personnel employed or engaged on such ships, to act accordingly taking into account the guidance provided in resolution MSC.324(89) and the Organization's current recommendations to Governments and guidance to shipowners and ship operators, shipmasters and crews on preventing and suppressing acts of piracy and armed robbery against ships”. The prevalence of self-defence measures has gone a long way in aid-

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9 IMO MSC.1/Circ.1339, 14 September 2011, “Piracy And Armed Robbery Against Ships In Waters
ing the reduction of possible or successful attacks by Somali pirates. In particular, the use of armed security has proven to be very effective because to date, no vessel that has employed an armed security team has been taken by pirates.\textsuperscript{10} This method, though controversial, has gained traction in the maritime community. In February 2011, the International Chamber of Shipping acknowledged the use of armed guards to deter piracy. The UK Government announced plans in October 2011 to license armed guards for merchant ships in areas prone to piracy.\textsuperscript{11}

A common tactic used by pirates consists of converting captured merchant or fishing vessels as mother ships from which they are able to launch attacks using high-speed skiffs. The mother ships are usually small or medium sized ships like fishing boats and dhows, but also include bigger vessels such as general cargo ships and bulk carriers. Through this usage, pirates can increase their range of action. Furthermore, the captured crews are used to operate the vessel and to serve as human shields in the event of military intervention by governments to recover the vessel. Once they have closed in on a target on their skiff, the pirates would open fire, aimed at the bridge and accommodation area either with AK 47s guns or Rocket Propelled Grenades (RPG) to force the master to stop the vessel. Otherwise, it is not uncommon for the pirates to give chase, sometimes lasting for hours and attempt to board the vessel with aluminium ladder put against the freeboard. The ultimate goal of hijacking is to demand a ransom payment for the safe return of the crew, vessel and cargo.

For instance, in 2010, Somali pirates were able to attack vessels very close to India. Sometimes, those attacks took place more than 1500 nautical miles from Somalia. The Indian navy and coast guard interdicted three Thai fishing vessels – the \textit{Prantlaya 11, 12 and 14} after the vessels along with the Thai crews were hijacked in April 2010 and were used as mother ships in the Indian Ocean.\textsuperscript{12}

\textsuperscript{10} UN Contact Group on Piracy (Legal Committee), http://www.theguardian.com/world/2013/may/03/somali-pirate-hijacking, 3 May 2013.
\textsuperscript{11} Tom Tulloch, “Plague of Pirates – A Primer”, ibid note 5, p. 47.
\textsuperscript{12} Ibid note 4, p. 45.
DEFINITION OF PIRACY

It is the modern day definition of piracy in accordance with United Nations Law of the Sea (UNCLOS) Article 101 that sets the central theme for analysis and will be further expounded in a chapter of its own.

The concept of piracy has evolved in a myriad of ways from historical times up to modern days. For instance, Cicero, the famed orator of his time, reproached governor Verres of Sicily for having given shelter to an “enemy who was fighting desperately and very relentlessly against the Roman people, or rather the common enemy of all races and all people”. Henceforth, the phrase describing a pirate as “an enemy of all mankind”, hostis humani generis emerged and he also related the term to the politically significant communities of the Eastern Mediterranean who pursued a course of behaviour similar to the Vikings about 800 years later. As such, the relevant definition is that which is set against modern day piracy.

Piracy jure gentium is yet another perception which looks upon piracy through the lens of international law. This distinction is explained by Wheaton as follows: “Piracy under the law of nations (jure gentium) may be tried and punished in the courts of justice of any nation, by whomsoever and wheresoever committed. But piracy created by municipal (domestic, state) statute can only be tried by that state within whose territorial jurisdiction, and on board of whose vessels, the offence created was committed. There are certain acts which are considered piracy by the internal laws of a state to which the law of nations (jure gentium) does not attach the same significance”. Therein lies the fine line of distinction in the way piracy is defined. Only piracy in the sense of piracy jure gentium is conferred universal jurisdiction.

Even though not all national laws make piracy a universal crime which can be subject to arrest and prosecution, many countries have implemented UNCLOS definition of piracy

14 Supra note 13.
within their domestic or municipal penal laws. In Europe, countries such as the UK, the Netherlands, France and Belgium have penal codes dealing with piracy. The same goes for the United States through case law; although Germany does not refer to piracy as such, it is able to deal with the issue of piracy under provisions of their penal code. In Asia, countries like Japan, Malaysia and Singapore have such legislations, as well as Kenya, Tanzania and the Seychelles in the African continent. Certain states like Spain have created specific laws against piracy using their own definitions.16

The arrest and prosecution of pirates take place through the domestic law and state practice and this is the reason why Somali pirates are able to be prosecuted in countries like USA and Germany. But it also poses a huge challenge when some states are not equipped with the legal framework necessary to carry out arrests or prosecutions in line with their domestic laws. Belgium and France are two countries that provide examples of successful piracy legislation and trials. On 20 December 2009 Belgium adopted two laws against piracy: Loi relative à la lutte contre la piraterie maritime and Loi relative à la lutte contre la piraterie maritime et modifiant le Code judiciaire. The definition of piracy under Belgian law is identical to that of piracy under Article 101 of UNCLOS.17 Under Article 3(2) of the second law, the Belgian Public Prosecutor can prosecute any person accused of piracy that takes places outside their territory when the acts are committed against a Belgian ship or when the Belgian military has arrested the suspects. In May 2011, Belgium started a trial against a Somali pirate captured by a Belgian ship within the EU Atalanta operation. He was found guilty of taking hostages on the Pompei ship in 2009 and the hijacking of the Petra ship in 2010.18 Similarly, France adopted a law on piracy: Loi n° 2011-13 relative à la lutte contre la piraterie et à l'exercice des pouvoirs de police de l'Etat en mer on 5 January 2011 that brings the French law into conformity with UNCLOS.19 In the Carré d'As case which became the first piracy trial under the new French piracy legislation, the French trial court convicted five Somali men for

16 PILPG, “Piracy Definitions in Domestic and Regional Systems”, Legal Memorandum prepared by the Public International Law & Policy Group, March 2013.
offences under the piracy law and sentenced them to imprisonment for terms of between four and eight years. Subsequently, the French Appeals Court upheld the sentences of four men and acquitted one.

2.1 Significant Role of 1982 UN Convention on the Law of the Sea (UNCLOS)

2.1.1 Historical background on the formation of UNCLOS

The historical roots of how 1982 UNCLOS came about clearly shows the pro-active efforts taken by the international community in setting clear guidelines of oceans governance and taking concrete steps, amongst which the issue of piracy is also tackled through the relevant provisions in their fight against it.

Back in 1932, a group of distinguished West Coast legal scholars attempted to codify the international law on piracy. This resulted in the production of the 1932 Harvard Research Draft Convention on Piracy containing 19 articles. The document defined piracy in the common law as “those acts of robbery and depredation upon the high seas, which, if committed upon land, would have amounted to felony”. Article 3 of the Harvard Draft defined piracy as any act done outside the territorial jurisdiction of a state and constitutes “an act of violence or depredation committed with intent to rob, rape, wound, enslave, imprison or kill a person with intent to steal or destroy property, for private ends”. Article 14 stipulates that any state having custody of suspects may prosecute them at trial for piracy. This Article, however, in practice, is often fraught with difficulties of successful prosecution for various reasons.

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After the World War II, the United States led the international community to adopt the Charter of the United Nations. In 1947, the UN General Assembly adopted a statute to create the International Law Commission (ILC) to see to the work of codifying legal principles. In 1956, the ILC produced a draft treaty in which Articles 38-45 of the draft convention were dedicated to antipiracy. Those Articles were strongly emulated from the 1932 Harvard Draft Convention and formed the basis for the modern international law of maritime piracy. For example, Article 39 in 1956 treaty about the definition of piracy is a clear parallel taken from Articles 3 and 4 of the 1932 Harvard Draft Convention.

The first UN Conference on the Law of the Sea was convened in Geneva in 1958.23 Four treaties were created: the Convention on the Territorial Sea and the Contiguous Zone, the High Seas Convention, the Convention on the Limits of the Continental Shelf, and the Convention on Fishing and Conservation of the Living Resources of the High Seas. They were subsequently replaced by the Third United Nations Conference on the Law of the Sea (UNCLOS III) which took 9 long years to be completed from 1973 to 1982. Besides the UN Charter that ensures a treaty framework facilitating governance of affairs in war and peace among nations, UNCLOS is considered second in importance by upholding norms for the international community in all matters pertaining to world order at sea and in the air.

As of January 2015, 166 countries and the European Union have joined the Convention. These nations represent the overwhelming majority of the 193 member states of the United Nations. 1982 UNCLOS provides the “essential governing framework for a multitude of supporting treaties, codes, guidelines, and practices regulating the international conduct at sea and in the air. UNCLOS prescribes the rules for activity on, over, and under the seas, and many of its provisions amplify principles reflective of customary international law”.24 Terms like coastal state, flag state and port state are also derived from it and UNCLOS is a comprehensive multilateral agreement capable of enabling collaborative approaches to good oceans governance and control.

23 UN Resolution 1105 XII adopted on February 21, 1957.
24 Ibid note 5, p. 122-123.
The important features of the 1932 Harvard Draft Convention are that piracy is an illegal maritime act committed beyond coastal state territorial jurisdiction and as such, becomes an exception to the ordinary rules of jurisdiction under international law. Coastal states exercise exclusive jurisdictional powers over their territorial seas and are responsible for enforcing maritime criminal laws. All flag states also possess jurisdiction on board their ships and aircraft registered in their states. In addition, states often practice the “nationality principle” which means that they may assert jurisdiction over its nationals abroad in order to protect its citizens against threats or harm. This public international law tenet states that “a sovereign can adopt criminal laws which govern the conduct of the sovereign’s nationals while outside of the sovereign’s borders”.  

In the case of piracy, it is perceived as a crime of universal jurisdiction. All states may exert jurisdiction over persons suspected of piracy regardless of nationality, territorial restrictions and flag state responsibility. It is suggested that “the purpose of codifying international law against piracy is not to unify the various national legal frameworks or even to develop uniform standards for punishing pirates, but rather to explore and define the basis of state jurisdiction over offenses committed by foreign nationals against vessels outside of the territory of the prosecuting state. Furthermore, the special jurisdiction is expansive, encompassing judicial, executive, and legislative authority”.

2.1.2 The Provisions in UNCLOS Addressing Piracy

The issue of piracy is embedded in Articles 100 to 110 of the 1982 United Nations Convention on the Law of the Sea (UNCLOS). Piracy is defined in Article 101 as any criminal acts of violence, detention, or depredation committed for private ends by the crew or the passengers of a private ship that is directed on the high seas against another ship, aircraft, or against persons or property on board a ship. Piracy is committed against a ship, aircraft, persons, or property in a place outside the jurisdiction of any State. UNCLOS remains the broadest in terms of jurisdiction, providing for universal jurisdiction over piracy.

25 http://www.kentlaw.edu/faculty/rwarner/classes/carter/tutorials/jurisdiction/Crim_Juris_6_Text.htm
26 Ibid note 6, p. 757 (1932).
27 Ibid note 4, p. 115.
UNCLOS Article 100 stipulates that “all states shall cooperate fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State”. In other words, international law confers special jurisdiction over the crime by any state through the universal principle. It means that “a sovereign can adopt criminal laws that apply to conduct performed by any person anywhere in the world when the conduct is recognized by nations as being of universal concern”. The significance of UNCLOS relevant provisions relating to counter-piracy operations, including Article 100, were more closely examined in a memo titled “Piracy off the coast of Somalia” presented by Dr. Douglas Guilfoyle to the UK Government Foreign Affairs Committee in Session 2010-12.

This provision clearly represents a responsibility under international law that all Member States have towards the problem of piracy. The contrary is also true – the International Law Commission in its commentary on the equivalent provision in the High Seas Convention noted that “any State having an opportunity of taking measures against piracy, and neglecting to do so, would be failing in a duty laid upon it in international law. Obviously, the State must be allowed a certain latitude as to the measures it should take to this end in any individual case…”. It is, however, unclear whether this duty demands that States put in place an adequate national law addressing the issue of piracy. The wording of Article 100 is open to interpretation as to whether all States should have such a law. However, the Security Council has noted the fact remains that historically, and at present, many States still do not have laws adequately criminalising piracy.

There is often wide divergence from the theory of jurisdiction because of several factors. One of them lies in the fact that certain states simply do not have written provisions in their legal system which allow them to arrest or prosecute pirates suspected of piratical acts. Sometimes, even if States have the penal code in place for prosecutions; another major problem is the strong lack of political will in pursuing them due to the costs involved and legal barriers that

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28 Ibid note 25.
arise when a ship is attacked. Confusion arises as to who is responsible for fighting the pirates amidst questions of the country of origin of the vessel, the nationality of the owners of the vessel, and the nationality of the nearby waters leads to stagnant response when ships come under attack. There are also arguments against prosecutions on the ground of human rights. In other cases, flags of convenience act as a hinder to successful prosecution because the phenomenon of “phantom ships” make it difficult for pirates to be caught and brought to justice. This happens when a crew is eliminated and the hijacked vessel is quickly painted and renamed. The cargoes are then unloaded and sold to buyers. They obtained new goods from unsuspecting shippers whose cargoes never made it to where they intended to go. By the time they realised they were conned, the “phantom” ship has been repainted and renamed with fake registration papers.

3 RANSOM PAYMENT IN THE LIGHT OF UK JURISDICTION

In this section, we will take a look at whether payment of ransom is legal from the perspective of criminal law in the UK.

3.1 General Overview of UK’s Standpoint

Politically, the United Kingdom, like the United States of America, has always taken a firm stand against negotiation with foreign threats or enemies which seek to jeopardise their national interests and the lives of its citizens. This includes a strictly non-negotiation policy with terrorists and in the case of maritime interest, with pirates who demand ransom payment in exchange for the release of hostages, vessel and cargo. For many years, the UK Government’s official outward position to the world lies in their practice of this belief in non-intervention and this is distinct from what individuals might do in order to secure the release of their loved ones or property through a ransom payment.

According to UK Counter-Terrorism and Security Bill 2015 that was passed into law on 12 February 2015 after a fast-track enactment, under Part 6 amendments of or relating to the
Terrorism Act 2000, a new clause was added as “section 17A Insurance against payments made in response to terrorist demands”. Pursuant to sections 17A (a) and (b), an insurer is liable of criminal offence if he makes a payment under the contract or purportedly under it, “in respect of any money or other property that has been, or is to be, handed over in response to a demand made wholly or partly for the purposes of terrorism”. The same charge applies under provision (c) if “the insurer or the person authorising the payment on the insurer’s behalf knows or has reasonable cause to suspect that the money or other property has been, or is to be, handed over in response to such a demand”.

Under subsection (2), “if an offence under this section committed by a body corporate is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of— (a) a director, manager, secretary or other similar officer of the body corporate, or (b) any person who was purporting to act in any such capacity, that person, as well as the body corporate, is guilty of the offence and liable to be proceeded against and punished accordingly”.

One of the most controversial aspects of ransom payment to pirates lies in the long-time fears and discussions as to whether the upsurge of piracy off the coast of Somalia is linked to a wider network of organisers and financiers, especially theories that they are supposedly backed by terrorist movements. The ransom revenue would then be used to equip and further advance the cause of those terrorists in achieving the aims they have in mind, be it political, religious or socio-economic. Therein lies UK Government’s geo-strategic position of not giving ransom payment to pirates. In particular, the presence of militant extremist Islamist groups al-Shabaab in Somalia and al-Qaeda in the Arabian Peninsula (AQAP) in Yemen have been considered a destabilising factor and challenge to political powers outside the regions.

Regardless of the extent and nature of the relationship between al-Shabaab and AQAP, “Yemen-based Islamist terrorism will remain an international threat that cannot be ignored, in part because the shipping has to pass through the BAM to access the Red Sea. Islamist groups are far from blind to the opportunity that disrupting shipping may present”.  

http://services.parliament.uk/bills/2014-15/counterterrorismandsecurity.html  
31 Supra note 8, p. 82
strategist al-Suri and other Islamist websites have revealed “more than a passing interest in what the pirates have achieved”.32 Evidences seized from Bin Laden’s compound after his death suggested a “continuing interest in attacking oil and gas supplies, perhaps using the small boat tactics used against the Limburg off Yemen in 2002, and against the M Star in the Strait of Hormuz in 2011”.33 It seemed that he had plans for pirates to demand ransom as a form of terrorism.

Therefore, one can deduce that in spite of a lack of conclusive evidence, there remains a certain likelihood that there might be terrorist links behind some demands of ransom payments. Should that be the case, such ransom payments will be deemed illegal under the UK Counter-Terrorism and Security Bill.

The existence of Kidnap and Ransom Cover as a longstanding and important feature in the insurance market is also a sure sign that ransom payment has traditionally been practised. The UK Government has judged that there is “a small risk that individuals or companies with kidnap and ransom insurance could exploit a lack of clarity in UK legislation around reimbursement of terrorist ransoms. In other words, the expectation that a ransom payment may be reimbursed creates an environment which may facilitate the payment of terrorist ransoms in the first place”.

In the past, due diligence was required of insurance companies before reimbursements of ransom payments were done. Through the new Section 17A amendment to the Terrorism Act, the UK has now explicitly banned the UK insurance and reinsurance firms from reimbursing such payments if there are terrorism elements involved.

Interestingly enough, Section 21ZA, subsection (1) of the Terrorism Act allows arrangements with prior consent in which “a person does not commit an offence under any of sections 15 to

18 by involvement in a transaction or an arrangement relating to money or other property if, before becoming involved, the person discloses to an authorised officer the person's suspicion or belief that the money or other property is terrorist property and the information on which the suspicion or belief is based” and thereafter obtains consent from the authorised office to becoming involved in the transaction or agreement. It opens up a world of questions of how the UK National Crime Agency is likely to react to an application for consent for the payment or reimbursement of a "terrorist ransom" under that section. It also raises other issues of whether a denial of consent is likely to expose the NCA to an application for judicial review and/or leave open a challenge under the Human Rights Act 1998.

3.2 Phenomenon of Somalia Piracy

This chapter takes a closer look at the distinctive problems Somalia faces and how those issues contributed to the rise of Somali piracy.

3.2.1 Brief Historical Perspective

Somalia was once a British colony and broke away from colonialism in 1960 forming a new nation under the reign of Mohamed Siad Barre. However, the government collapsed in 1991 and with it began an onslaught of chaos with fighting. The country was wracked by hybrid warfare comprising of various clan and militia conflicts in the midst of more conventional forces involving the nation’s neighbours. Subsequently, Somalia was fractured into three regional states – the Republic of Somaliland declared independence in 1991 whereas the regions of Bari, Nugaal and northern Mudug formed the semiautonomous state of Puntland.

In the beginning period of piracy during the mid-1990s to early 2000s, it was widely assumed that former Somali fishermen transformed into self-styled volunteer ‘coast guards’, “targeting
fishing vessels accused of fishing illegally in Somali territorial waters”. Those caught doing illegal fishing were held to ransom\(^{35}\) or simply “fined”.\(^{36}\)

Still, the types of vessels taken involved “an equal representation of fishing vessels, commercial traders or private yachts”.\(^{37}\) This indicates that there was little evidence of a clear-cut distinction from ‘coast guard’ to ‘criminal’ forms of piracy. In fact, most pirates were not displaced fishermen but members of “nomadic, land based clans” who “generally have little or no knowledge of the sea”.\(^{38}\) Although fishing has never constituted a large part of the Somali economy,\(^{39}\) the most visible economic damage done to local communities dependent on fishing came in the wake of the destruction caused by the 2004 tsunami. At the same time, illegal fishing also represents a vast potential loss of earnings to Somalia.\(^{40}\) The hosts of problematic issues Somalia faces, such as human trafficking and smuggling and organised crime syndicates having free reins in the failed stated prompted the Minister for Foreign Affairs of the Russian Federation, Mr Sergey Lavrov, to comment that maritime piracy is just the “tip of the iceberg” of the problems facing Somalia.\(^{41}\)

With the adoption of the UN Resolution 1851, the international community is adamant to combat the problem of maritime piracy and ransom payment in a co-ordinated manner which takes into account the fact that the land conquers the sea. All efforts at sea are at best, merely a treatment of the symptoms of the root cause problems originating from land. The key to


\(^{37}\) Supra note 35, p. 18.


\(^{41}\) UN Doc. SC/9541, Security Council Authorizes States to Use Land-Based Operations in Somalia as Part of Fight against Piracy off Coast, Unanimously Adopting Resolution 1851, 6046th Meeting (PM), 16 December 2008.
success against the pirates lies ashore by interdicting their supply chain or through destroying their bases on land.\footnote{Supra note 11, p. 47.}

3.3 Tackling the Symptom of Piracy

The following analysis takes a look at the impacts Somali piracy has on the UK and the role it plays in combating this challenging issue.

3.3.1 Dynamism between UK’s Role and Piracy

Along with many other maritime nations and organisations, the United Kingdom has been deeply affected by the surge of Somali piracy.\footnote{House of Commons Foreign Affairs Committee, “Piracy off the coast of Somalia”, Tenth Report of Session 2010–12, at 17-18.} According to Minister Henry Bellingham in a speech to the Chamber of Shipping, “piracy off the coast of Somalia has escalated over the last four years and is a major concern for the UK. The threat is not primarily to UK ships as very few have been captured. Rather, the threat is to the UK’s economy and security. Piracy affects the UK’s banking, insurance and shipping industries, and threatens the large volume of goods which are transported to the UK by sea. In light of these concerns, and as a state whose strengths and vulnerabilities are distinctly maritime, the UK should play a leading role in the international response to piracy”\footnote{Ibid 43, at 18.}.

The UK is known within the international community to be very active in its response to piracy through various coordination mechanisms. Besides safeguarding its own national interest and security, and the safety of its citizens and British seafarers, the threat of Somali piracy can have far-reaching negative consequences to international peace and security on the whole.\footnote{Supra note 43.} One of the major concerns stem from energy security for the shipping routes off the coast of Somalia. When it is under threat, the resulting consequence can be disruption to

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\footnote{Supra note 11, p. 47.}

Tom Tulloch, “Plague of Pirates – A Primer”, ibid note 5, p. 47.

\footnote{House of Commons Foreign Affairs Committee, “Piracy off the coast of Somalia”, Tenth Report of Session 2010–12, at 17-18.}

\footnote{Ibid 43, at 18.}

\footnote{Supra note 43.}
energy supplies;\textsuperscript{46} the constriction of major trade routes off Somalia, both globally and in the UK, can create devastating effect on its economy since the turnover of the UK shipping industry is worth £10.7 billion per annum of the UK’s GDP. Minister Henry Bellingham noted that the turnover of the British shipping industry is worth £10.7 billion of the UK’s GDP and stated that “the crimes committed on the high seas off the coast of Somalia […] have a direct impact on the UK’s security, prosperity and the lives of British people”.

The UK has not only committed its scarce naval assets on a consistent basis to counter-piracy operations, it is also making an impact on the shipping industry as a whole. The UK has provided two frigates to Middle East maritime security operations on a permanent basis; warships are also deployed to the CMF task force 151 and the operational headquarters for Operation Atalanta is located in military facilities in Northwood, London. Additionally, the UK Maritime Trade Operations (UKMTO) is manned by the UK military and is crucial in assisting merchant vessels transiting through high-risk areas in the Horn of Africa.

3.3.2 Challenges Faced By States and Multinational Organisations

It is recognised that in order to effectively tackle the symptom of piracy, a comprehensive approach is needed to address the root causes on land in Somalia.\textsuperscript{48} The question is what type of challenges are posed to States and multinational organisations in their fight against piracy.

Firstly, one of the biggest problems faced by multinational organisations, ranging from UN (hereunder Security Council and the General Assembly), the European Union, African Union and NATO to the national governments involved is the issue pertaining to prosecution and imprisonment of pirates. Without a universally synchronised legal framework, payments to pirates will continue. The fact remains that there is no international legal system which exists to cater to this aspect; prosecution and trials of pirates usually take place on the national level.

\textsuperscript{46} Statistics show that in 2010, 35\% of the UK’s total gas imports arrived by sea and 79\% of it originated from Qatar. Source: “Royal Navy in the Middle East” (2011).

\textsuperscript{47} Minister Henry Bellingham MP, Parliamentary Under-Secretary of State, speech to the Chamber of Shipping, 12 Oct 2011.

\textsuperscript{48} UN Secretary General, 64\textsuperscript{th} Meeting of the UN General Assembly, 14 May 2010.
by the individual country that captured the pirates. Under international law, any state may prosecute pirates according to the accepted notion of universal jurisdiction.\textsuperscript{49} UNCLOS 1982 Article 105 provides the basis to seize and arrest a pirate ship or aircraft and the persons and property on board. It also states that “the courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third party acting in good faith”.

This option of criminal procedure against pirates is fraught with complex dilemma. Based on several UN Security Council’s Resolutions adopted in cooperation with Somalia’s TFG/FGS, various foreign military and coalition forces have been given powers to carry out law enforcement actions against piracy in the East African region. Some renowned examples are EU’s Operation Atalanta force, the NATO’s Operation Shield and the Combined Maritime Forces (CMF), a US-led international naval coalition of 27 states. These coalition forces are complemented by several UN Member States’ own efforts of sending their naval ships and personnel to aid the fight against piracy. It is strongly based on the adage that ‘the land conquers the sea’ which leads to the belief that the symptom is best cured when the international forces prioritise helping the AMISOM onshore operations whilst ensuring that the FGS is strengthened with authority so as to have the capability to prevent the pirates from using Somali soil as a launching for more attacks offshore.\textsuperscript{50}

An IMO Assembly resolution in November 2007 called upon regional states in East Africa to conclude an international agreement in order to prevent, deter and suppress piracy. The Code of Conduct concerning the Repression of Piracy and Armed Robbery against Ships in the Western Indian Ocean and the Gulf of Aden (the Djibouti Code of Conduct) was created as yet another example of a framework for capacity building in the Gulf of Aden and Western Indian Ocean to combat the threat of piracy. It is a partnership between willing States and is


not a legally binding mechanism. The states continue to work towards its aims as well as attract increasing membership.\textsuperscript{51}

There is no doubt that the multi-coalition naval forces’ efforts and presence at sea have gone a long way in reducing the rate of piracy. In particular, the use of armed security personnel on board ships has also contributed to a drastic reduction in attempted and successful hijacking incidents. However, the deployment of armed security in itself is a topic fraught with legal complexities, including issue of liability and has yet to be regulated under legal regimes of most States.\textsuperscript{52} The coalition forces’ effectiveness is hampered due to the “capture and release” policy of some of the naval forces. In the past, it was confined and practised by only by certain navies. However, according to Jack Lang, the UN Secretary-General’s Special Adviser on legal issue related to piracy in Somalia, this has become the rule rather than the exception. On the contrary, judicial prosecution is few and far between. The naval forces’ reluctance in prosecuting Somali pirates in their national courts could be due to different factors such as the expenses involved in such prosecution, logistical difficulty and the mere lack of political will to ensure that justice is served on the pirates.\textsuperscript{53} It was estimated that by the end of 2010, 90 percent of pirates captured by national navies off the coast of Somalia were released because no one was prepared to prosecute them.\textsuperscript{54}

Secondly, not every country or flag state has a criminal or penal code that deals with prosecution of pirates, especially those that do not directly affect their nationals or national interest. Neither do some countries have the capacity, resources and facilities needed to bring the pirates through a lengthy and expensive prosecution process, which include transfer of prisoners to the courts, attending to their basic human rights’ needs and the subsequent costs of incarceration.

Thirdly, the concern with human rights implications can prove to be a daunting task. In the opinion of Lang, to avoid the ‘catch and release’ practice, “there is a need to streamline the


\textsuperscript{52} Security Association for the Maritime Industry, http://psm.du.edu/media/documents/industry_initiatives/sami_presentation_maritime_security.pdf

\textsuperscript{53} Supra note 49.

transfer of prisoners to the competent judicial authorities”, a viewpoint which is inextricably dependent on the political will of these competent authorities. Indeed, the legal challenge of jurisdiction and piracy prosecutions in foreign countries cannot be underestimated. As many as over 1000 Somali piracy suspects have been jailed in over 20 countries around the world by the end of 2012. In April 2011, the Puntland and Seychelles Governments signed a piracy-transfer agreement on the condition that there are “tangible support for upgraded and new correctional facilities, as well as human resource development in the judiciary sector, such as training programs and incentives for judges, prosecutors and lawyers in the Puntland State”.

The Puntland President echoed the words of the UK Minister for Africa, Henry Bellingham in stressing that piracy-transfer agreements of Somali pirates in foreign countries to prisons in Somalia is the “most sustainable solution”.

3.3.3 Unique Somali Piracy-For-Ransom Business Model

In short, “piracy in Somalia has arisen within this milieu of impoverishment and clan dynamics, with competing religious and ideological groups vying for power. The underlying economic and political challenges include ‘crushing poverty, widespread unemployment, environmental hardship, a reduction of pastoralist and maritime resources due to drought and illegal fishing and a volatile security and political situation.’ The confluence of these factors keeps the country on a downward arc and contributes to the persistence of piracy”.

Research has shown that “globally, when the cost of insurance premiums, prosecutions, deterrent and security equipment and the macroeconomic impact on regional states is taken into account, the annual cost of piracy has been estimated at between $7 and $12 billion”. The profits derived for hijacking a single ship skyrocketed from US$50,000 in the early 2000s

56 Supra note 55.
58 Supra note 4, p. 48
to as much as US$7 million by 2011. The lure of a life changing possibility, albeit through piracy and crime, is attractive in the context of Somalia. It is astounding that the money gained in ransom revenue each year exceeds the total budget of the Puntland government.\footnote{UN Nairobi Report, p. 31.}

One of the most difficult questions gripping Somali piracy is whether the definition of piracy as provided for under Article 101 of UNCLOS 1982 extends to enable prosecution of individuals who do not actually participate in the piratical acts on the high seas. They are the ones who provide financial support as ‘investors’ to the actual pirates, and in some cases, also facilitate as negotiators for ransom payments for the release of captured hostages and vessels. They supply the pirates with the necessary funds needed to obtain equipment and weaponry for attacks. These financial supporters then get profitable returns on their so-called investments. In the words of Dr. Keene, the Director of the Security Economics Programme of the Institute for State Craft, “maritime piracy in Somalia has become a profitable business, attracting not only ‘internal’ investment from the pirate communities, but a variety of international investors through the establishment of a specialist ‘stock exchange’ dedicated to investment in piracy operations in addition to diaspora support from around the world”.\footnote{S. Keene, “Maritime Piracy, Somalia” (The Institute for State Craft, 12 November 2012), http://www.statecraft.org.uk/research/maritime-piracy-somalia.}

The 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA Convention) is useful to prosecute these persons under the condition that the prosecuting state has taken such measures as required by the Convention to establish jurisdiction. Article 3(2)(b) of the SUA Convention states that a person is guilty of an offence if such person “abets the commission of any of the offences set forth in paragraph 1 perpetrated by any person or is otherwise an accomplice of a person who commits such an offence”.

Despite the relative success of naval counter-piracy measures off the Somali coastline, the socio-economic profitability of piracy remains largely unchanged. In the face of a host of onshore, insurmountable problems experienced by the Somali people, recruitment of young men to a piratical life as a source of good income is comparatively easy. This is especially true in the less stabile Puntland region at the tip of the Horn of Africa in contrast to
Somaliland. James Kraska\textsuperscript{62} notes that there is a “ripple effect from the local communities that harbour pirates through to the Somali diaspora abroad as ransom money ‘percolates through the local economy’”.

Thus, the World Bank recognises that the “solution to Somali piracy is first and foremost political. Pirates rely on onshore support to conduct negotiations and to secure safe access to coastal territories. In turn, politically powerful figures capture large portions of the profits associated with piracy. Any solution therefore will involve forging a political contract with local stakeholders – a shift in attention, in other words, from the perpetrators to the enablers of piracy”.\textsuperscript{63} In response to criticisms by certain quarters such as World G18 and Saferworld about UK’s seemingly lack of engagement with Somalis and the Somali diaspora given its funding through international NGOs, the UK commented as follows: “The ongoing problems in Somalia are of such scale that no single state can hope to have a meaningful impact alone. The UK should be very wary of international claims to deliver a solution on land in Somalia. International capacity to rebuild Somalia state is extremely limited. We conclude that the UK should continue to act through the United Nations and European Union programmes to pursue peace and stability in Somalia”.\textsuperscript{64}

3.4 UK’s Role in the Formation of International Piracy Ransoms Task Force

The International Piracy Ransoms Task Force as mooted by the UK, signifies a big step in the right direction in gathering the international community against ransom payments.

In 2012, the UK Prime Minister made an announcement during the London Conference on Somalia that the UK would be establishing an international task force on ransom payments. This is a powerful initiative which seeks to bring together experts from some of the world’s largest flag states and states whose seafarers and nationals are at the forefront of the maritime


\textsuperscript{64} House of Commons, Foreign Affairs (Select) Committee, “Piracy off the Coast of Somalia”, Tenth Report of Session 2010-12, HC 1318 (5 January 2012), p. 65, paragraph 132.
industry, being most vulnerable to the threat of piracy. A final report on the International Task Force on Ransom Payments was released on 11 December 2012 containing recommendations as to how a multilateral approach may be used to tackle the problem at hand across both public and private sectors. Their meetings examined several issues such as “options for preventing the payment of ransoms; options for avoiding the payment of ransoms/alternative strategies to paying ransoms; and options for reducing the size/frequency of ransom payments”.\textsuperscript{65} In all, four recommendations were made; firstly, they will develop a new strategic partnership between Flag States, the private sector and law enforcement agencies that brings together those tackling piracy and those subjected to it in a united effort to break the piracy business model. Secondly, a more co-ordinated approach to information-sharing to provide evidence to pursue and prosecute all involved in piracy will be developed. Thirdly, there will be a strengthening of co-ordination between Flag States, the private sector and military responders to prepare for potential hostage situations. Fourthly, the International Task Force will encourage implementation of anti-piracy measure, including compliance with Best Management Practice.\textsuperscript{66}

Another methodology employed is through the Financial Action Task Force’s efforts in combating poor information sharing, the lack of a formal banking system in Somalia and enhancing the degree of admissibility of evidences in national courts when exercising jurisdiction over suspected pirate leaders and financiers. Those prosecution procedures must at the same time, be supported by domestic laws that deal specifically with money-laundering crime.

\textsuperscript{65} Ibid note 50, p. 222.
3.5 Under the Scope of Case Law

3.5.1 The UK Policy

The UK Government carries a clear line of policy in that it does not “make, facilitate or encourage substantive concessions to hostage-takers, including by payment of ransoms”. The London Conference on Somalia illustrates this position well – one of the keys to conquering piracy lies in controlling the financial flows that enabled it to flourish in the first place. In theory, it is argued by Andrew Murdoch that “ransom payments are the key drivers in pirate business models and thus encourage further piratical activity. If the pirate business model is to be broken, attention must be given to exploring what action can be taken to curtail ransoms and eventually, shut them off”. This leads to the question as to whether it is an appropriate measure to make ransom payments illegal. Proponents of this argument suggest that without the lure and prospect of ransom payments, there would be lesser pirates who would be attracted to this criminal activity. In fact, UK’s Prime Minister champions for an end to ransom payment and desires to see a global ban on it.

On 19 June 2013, UK Prime Minister David Cameron gave a statement on the G8 Summit to the House of Commons and addressed, amongst other things, a pertinent issue about ransom payment. It was specifically targeted at ransoms paid to terrorists. The G8 countries were united on “a tough, patient and intelligent approach. Confronting the terrorist, defeating the poisonous ideology that sustains them and tackling the weak and failing states in which they thrive”. With this declaration, the G8 leaders came to a ground-breaking agreement to “stamp out” ransom payments for kidnap by terrorists which is aimed at reducing terrorist groups’ access to funding. The UK has outlawed such ransom payments but it is traditionally known


that countries like Italy, France, Germany and Spain have continued to accede to ransom demands. Mr Cameron also appealed to private firms to stop paying ransoms to kidnappers. However, this ban on ransom payment does not cover maritime ransom payment to pirates unless and until it is proven that the money is channelled onwards for terrorism purpose.

3.5.2 Case of Masefield AG v Amlin Corporate Member Ltd

The judgment of *Masefield v Amlin* is a crucial case that highlighted important legal principles and settled doubts regarding questions about the legality of ransom payment and whether it is against public policy.

The plaintiff Masefield was the insured in this case who owned a cargo of biofuel that was being transported from Malaysia to Rotterdam on board a MISC Bhd (‘MISC’) vessel *Bunga Melati Dua*. The defendant was Amlin, the insurer of the cargo under an open cover policy which used a modified version of the London Institute Cargo Clauses (A) (‘ICC(A)’) in its wording. Under the agreement, there was no dispute that piracy was an insured peril. Following that, on 19 August 2008, the *Bunga Melati Dua* was unfortunately seized by Somali pirates in the Gulf of Aden and resulted in the death of one crew member. A dialogue between MISC and the pirates ensued within days about the negotiation of a ransom to be paid for the safe release of the vessel, its crew and cargo. Before the courts, there were clear evidences that proved Somali pirates’ practice of negotiating release ransom and of the active negotiation which took place.

The insured served a notice of abandonment on its insurers with respect to the cargo which was rejected by the insurers. The parties were agreeable on the point of the commencement of proceedings which in turn, determines the date on which the question of whether or not there was a constructive total loss is dependent upon.

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71 Facts of the case as per the judgment of Steel J at first instance in Masefield EWHC [2010] 2 All ER 593.
MISC paid the ransom about 10 days later and the vessel, crew and cargo were then released. The vessel continued its journey to Rotterdam and managed to discharge its cargo on 26 October 2008. At that point in time, the vessel had lost 6 weeks in detention which caused the devaluation of its cargo in the market as a result. Masefield commenced proceedings in the High Court despite the fact that the goods had been retrieved. They argued that at the time of notice of abandonment, they had been irretrievable denied of the cargo, which accordingly, represents an actual total loss (ATL) of the Marine Insurance Act 1906 (‘MI Act’) pursuant to Section 57 paragraphs (1) and (2). The insured relied upon the 1854 case of *Dean v Hornby* which concluded that “an ATL occurs as soon as insured goods are captured by pirates who intend to exercise dominion over them, even if the goods are recovered later”. Alternatively, the insured also claimed the cargo was a CTL pursuant to Section 60(1) of the Marine Insurance Act. The notice of abandonment was directly relevant for the CTL claim.

In the first instance, Steel J held that Somali pirates capture vessels with the intention of releasing them upon payment of ransom. Expert evidence was cited that the kidnapping of *Bunga Melati Dua* fit the profile of a typical seizure for ransom demand and not for interest in detaining the cargo when the ship is released. To the question as to whether the ATL claim was a valid one, the insured had to establish that recovery was impossible. *Dean v Hornby* was rejected as ground of argument to assert that piratical seizure was automatically an ATL. It was the test for a CTL which proved to be more problematic. In practice, this is gauged by “whether the subject matter is likely to be returned within a reasonable time, and for this purpose market practice accepts that the relevant period is 12 months from the date of seizure, assessed at the date when the legal proceedings are commenced (ie. when the notice of abandonment is rejected)”. According to Steel J, unless the intention of the captors was to permanently remove the cargo from the owners, then it would constitute ATL. In this case, although the insured had filed the notice of abandonment, it had not actually abandoned the goods in the true sense of abandoning any hope of recovery. In other words, it was

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72 (1854) 3 El & Bl 180; 118 ER 1108.
74 Supra note 63.
indisputable to all parties that they had every intention of recovering their property and were hopeful of doing so.

The insured in turn, raised another argument that the manner in which the recovery of the goods was done, namely through bribery in the form of ransom payment, must render it an improbable case based on two reasons. Firstly, payment of ransom is contrary to public policy and secondly, the insured could not be liable under any duty to pay the ransom, even as a sue and labour expense. The judge held that he was “wholly unpersuaded” that ransom payment was against public policy because there was no such legislation. Notwithstanding the fact that the court acknowledged that payment of ransom could give encouraging impetus to pirates to re-commit acts of piracy, it is “often the only way to get the crew and vessel out of harm’s way”. The supporting basis for his conclusion were derived from the fact the courts allow ransom payments to be recovered as a sue and labour expense. In addition, kidnap and ransom insurance has been a “long-standing” feature of the market insurance, under which the UK is one of the biggest players in the insurance field. The judge further dismissed the other two claims based on the lack of duty to pay a ransom and that there had been theft of the property. The insured lost the entire case and an appeal was heard in October 2010.

On 26 January 2011, the Court of Appeal decided upon the merits of the case. At this juncture, the CTL claim was discarded, leaving only the ATL claim. Once again, the Court asserted their stand that ransom payment was not against public policy and that it was allowable under UK law in order to secure the safe release of the crew with the following reasoning:

“There is something of an unexpressed complicity: between the pirates, who threaten liberty but by and large not the lives of crews and maintain their ransom demands at levels which industry can tolerate; the world of commerce, which has introduced precautions but advocates the freedom to meet the realities of the situation by the use of ransom payments; and the world of government, which stops short of deploring the payment ransom but stands aloof, participates in naval operations but on the whole is unwilling to combat pirates with force …. In these morally muddied waters, there is no clearly identified public policy, no substantially incontestable public interest, which could lead the courts, as matters stand at present, to state that the payment of ransom
should be regarded as a matter which stands beyond the pale, without any legitimate recognition”.76

Prominent practitioners echoed the same sentiment in their conviction that banning ransom payment would outlaw the only method shipowners has to remove their crew from harm’s way and rescue their vessel and cargo.77 Besides being the barrister who represented Paul and Rachel Chandler78 in a high-profile case as the British couple who fell victims to Somali piracy, Mr Neylon personally supports the UK’s government policy of not paying ransoms.79

On 23 October 2009, retired engineer Paul Chandler and his economist wife, Rachel, whilst sailing enroute from the Seychelles to Tanzania, were captured by Somali pirates. The pirates wanted an initial ransom demand of 7 million dollars (£4.3 millions) and Her Majesty Government promptly responded by stating its unequivocal position that it will “not make or facilitate substantive concessions to hostage-takers, including the payment of ransoms”.80 The UK Government’s position was extremely problematic for the Chandler couple because they had no insurance and had used most of their funds to finance their sailing trips. Under the control and permission of the pirates, the increasingly desperate couple made repeated pleas to the Government for help through television interviews and recorded messages. However, the latter was unwavering in spite of long-drawn negotiations between the UK and Somali government officials and local rulers.81 Through the Foreign Office, the Government reiterated that its policy against ransom payment is long-standing and clear. When their

77 Richard Neylon, “Banning Ransom Payments To Somali Pirates Would Outlaw The Only Method A Shipowner Has To Remove His Crew From Harm’s Way And Rescue His Vessel And Cargo”, Holman Fenwick Willan LLP, article first published in Lloyd’s List (1 November 2011).
78 Paul and Rachel Chandler are a married couple who were captured by Somali pirates while on a yacht sailing trip in the Indian Ocean in 2009. They were held captives for over a year before they were released against ransom payment.
80 Sam Jones, Somali pirates demand $7m to release British hostages, GUARDIAN (Oct. 30, 2009), http://www.guardian.co.uk/world/2009/oct/30/somalian-pirates-yachtcouple-hostages
relatives managed to raise a ransom amount of about £62,000, the Chandler couple was finally released after more than a year in captivity.

Mr Neylon highlighted private individuals’ rights to act within the law to resolve a kidnapping and hijacking on commercial terms. As Mr Justice Steel solemnly observed in *Masefield v Amlin*, “this conclusion is fortified by the wider implications of any contrary conclusion”. The Court noted too that with specific regard to the Bribery Act 2010, “the payment of a ransom in response to threats to life or liberty is not prima facie a bribe, done for the purpose of obtaining an improper advantage”.

Given various factors such as the safety of crews’ lives, the substantial values of vessels and cargo and the undesirable consequence of environmental damage, for example, in the event of the loss of a crude oil tanker at sea from a piratical act, Mr Neylon’s conclusion is that “if the international community is to continue to sit by and allow pirates to hijack vessels it would be unconscionable for lawmakers to take away a shipowner’s only prospect of rescuing its personnel and assets and to prevent a potential environmental catastrophe”. This is demonstrated by the well-known case of merchant oil tanker *Sirius Star* oil tanker whose crew members were held as hostages until a ransom was paid.\(^2\) Further consequences include captured seafarers being trapped in Somalia and the possible likelihood of jeopardising other seafarers who would refuse to be engaged in a dangerous occupation, resulting in dire impact for trade and commerce in the long run.

### 3.5.3 Conclusion from the English Courts after *Masefield AG v Amlin* Corporate Member Ltd Case

This judgment provides important answers to the questions about the legality of ransom payment and the issue on public policy. Based on the outcome of the UK Courts’ decisions, it has become settled law that as long as the ransom payment is not given to terrorists, it is not illegal to do so in order to secure the safe release of the crew or hijacked victims and the vessel.

\(^2\) The Telegraph, “Sirius Star Oil Tanker Released After $2m Ransom Paid”, 9 January 2009.
4 RANSOM PAYMENT IN THE LIGHT OF SINGAPORE JURISDICTION

Singapore, a former British colony, has a similar civil law tradition as the UK. It is one of the most active maritime powers in the world, along with a well-developed judicial system, offers interesting insight into the problem of piracy in this part of the world.

4.1 General Overview of Singapore Maritime Industry

Singapore is a modern city-state situated at the southern tip of the Malay Peninsula with a vibrant maritime community as an important lifeline for the country’s economic development. It is one of the world’s major commercial hubs, including being one of the five busiest ports. It is also one of the largest financial centers in the world with well-developed infrastructure and stable political environment which contribute to the country’s growth as a shipping hub. The Maritime and Port Authority of Singapore (MPA) was established on 2 February 1966 by the MPA Act 1966 and acts as the port authority, developer of Singapore as a leading global hub port and as representative of the country in safeguarding Singapore’s maritime interests in the international arena.

4.2 The Legal Landscape

Singapore’s legal system started from the common law tradition inherited from the time of British colonialism. Subsequently, Singapore has adapted the legal system to suit the unique changes and profile of the country after its independence on 9 August 1965. The huge influence of English common law is evident in certain areas of law, such as contract, tort and equity and some of the English statutes are still applicable in Singapore. For instance, the Marine Insurance Act 1906 (UK) regulates the law of marine insurance in Singapore. In February 2002, the first specialist commercial court known as the Admiralty Court was introduced. The purpose of this court is to enhance Singapore’s status as a leading shipping
hub. There is no permanent judge assigned to the Admiralty Court. Rather, former shipping law practitioners and a former academic take on the role of judges on a rotational basis.  

4.3 Piracy and Armed Robbery in Southeast Asia

4.3.1 The Current Situation

Under the regime of UNCLOS, piracy can only be committed against ships on the high seas or in the exclusive economic zones (EEZ) of states. Article 58(2) of UNCLOS provides that piracy provisions apply in the EEZ. There is a correct distinction to be made between piracy and armed robbery which is more often than not, the type of maritime crime that is committed in this region of the world for the purpose of accurate reporting of incidents. In comparison to the geographical make-up of the UK whereby attacks on ships are categorised as piracy, most attacks on ships in Southeast Asia happened in port, in maritime zones such as the territorial sea, in internal waters, in straits used for international navigation (such as the Malacca Strait or Singapore Strait) or in the archipelagic waters of Indonesia.  

When attacks take place in areas under the sovereignty of the coastal state, they are not considered acts of piracy but categorised as ‘armed robbery against ships’. Ships are vulnerable to thefts by pirates whose motive is to steal oil from the vessel along with the crew’s valuables.

The International Maritime Organisation defines it as “any illegal act of violence or detention or any act of depredation, or threat thereof, other than an act of piracy, committed for private ends and directed against a ship or against persons or property on board such ship, within a

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83 Corina Song, “Singapore Law and Practice” in “International Cargo Insurance” (2012),
state’s internal waters, archipelagic waters and territorial sea”. As a matter of fact, “the upper half of the Straits of Malacca and the South China Sea are the only areas in Southeast Asia in which attacks take place outside of territorial waters where the UNCLOS piracy provisions are applicable”.

Since ancient days, ships had been under threat of attacks while passing through Southeast Asian waters. Starting from the 1990s, in particular between 1998 and 2004, attacks on ships in this region has been an acute problem. Some of the world’s most densely populated coastal areas and export-based economies are found in Asia, to name a few like Japan, South Korea, China, Taiwan, Singapore and Malaysia. For example, exports account for 20 percent of Japan’s economy whereas export figure in China is 26 percent. In the case of Singapore, exports account for a phenomenal 221 percent of its Gross Domestic Product, slightly more than Hong Kong which stands at about 212 percent.

There were 120 incidents of piracy and armed robberies at sea reported in Southeast Asia in 2010, of which 87 attacks were successful, including seven hijackings of tugs and fishing vessels. Nowadays, there is once again a focus back on Southeast Asian piracy after piracy on the high seas fell last year to an eight-year low worldwide due to the multinational naval patrol effort launched off East Africa and improved armed security on-board vessels. But the IMB warned that the efforts need to be strengthened again. The Southeast Asian attacks make up the bulk of incidents reported globally. Most of the 141 piracy and armed robbery incidents took place in Indonesian waters in 2014. According to figures in its annual report from the International Maritime Bureau, there were 245 attacks recorded globally in 2014, a

drop from 264 cases the year before. It was slightly over half the level of 445 reported incidents in 2010 when piracy off the coast of Somalia was raging.\textsuperscript{92}

The seas off Southeast Asia, especially the waters between Indonesia, Singapore and Malaysia have steadily emerged as a new hot spot for pirates to attack small coastal tankers. As expressed by IMB director Pottengal Mukundan in a statement following the report, “gangs of armed thieves have attacked small tankers in the region for their cargoes, many looking specifically for marine diesel and gas oil to steal and then sell”.\textsuperscript{93} There was therefore, a warning given by IMB to step up the efforts to strengthen the necessary regional cooperation and capacity building.

4.3.2 Distinct Differences between Piracy in Southeast Asia and Somalia

This section provides a closer comparative analysis of the differences between these two types of piracy in terms of their origin, statistics and modus operandi.

In recent years, international attention on piracy and its impact on global shipping have shifted from Southeast Asian waters to the region of the Horn of Africa and the Gulf of Aden for the simple reason that while piracy incidents in Southeast Asia have shown a steady decline, on the other hand, there were sharp increase and continuing growth in the number of successful pirate attacks in and around the Gulf of Aden. The similarity of Southeast Asian piracy in relation to those in other parts of the world stems from the symptom of economic hardship and other pressures originating from land. Statistics from the International Maritime Bureau showed that in the wake of the 1988 East Asian Financial Crisis, there was a sharp rise in incidents within the region. IMB reported that piracy incidents in Southeast Asia peaked in 2000 at 242 (over half of the 469 reported globally) while incidents off Somalia Coast and the Gulf of Aden only accounted for 22 (less than 5% of the world’s total). By 2009, there was a complete reversal of trend. Southeast Asian waters stood at 11% which were only 45 out of 406 reported incidents while the Gulf of Aden accounted for 217


\textsuperscript{93} Ibid note 92.
incidents (53% of the global total). The 2009 figure was the lowest ever recorded by the IMB since 1994. In 2010, there were at least 219 attacks in the Horn of Africa with 49 successful hijackings. This is in contrast to 120 incidents of piracy and armed robbery reported in Southeast Asia. Later in the first quarter of 2011, pirate attacks hit an all-time high worldwide due to piracy off the coast of Somalia. During those months alone, the International Chamber of Commerce saw 97 attacks by Somali pirates, which meant more than one a day on average. 15 ships were successfully hijacked and 299 crewmen taken captives. This steep upward trajectory continued throughout 2011 and 2012, with 239 actual and attempted hijackings reported in 2011 and a further 69 cases in the first six months of 2012.\(^9^4\) Even though the sharp spike in Somali piracy has warranted more global attention on it, the IMB’s ‘live’ piracy updates covering the most recent incidents suggested that all is still not well in Southeast Asia. The early part of 2013 revealed a significant spike in piracy and armed robbery at sea in Southeast Asian waters.

The geographical make-up of coastal regions in Southeast Asia allows for an optimal environment for piracy and armed robbery to flourish. There are literally thousands of islands interspersed in-between the populations, coupled with “the innumerable small fishing vessels, dhows and coastal cabotage traders mean that Asian pirates easily can hide among legitimate shipping. Nearby shore side retreats are used for planning attacks and rest. The excellent banking and communications infrastructure facilitates the business of organized crime”\(^9^5\) which is in stark comparison to Somalia that is a failed state with a deeply flawed banking system. Besides, Somali pirates are exposed to the possibility of interdiction by the many naval patrols as they operate far away from their shores and in the western Indian Ocean. The modus operandi of the Southeast Asian pirates is that they often target vessels transiting amongst the complex straits and harbours, travelling much smaller distances using smaller ships to launch their attacks. This is turn, makes it easier for them to avoid detection by authorities as they seek to hide in coastal communities along the shores.


Southeast Asian pirates typically attack any type of vessel regardless of nationality and cargo. With the exception of very large vessels, such as the very large crude oil carriers that ply the Malacca and Sunda Straits, small and medium-sized cargo vessels are the much preferred targets. Unlike Somali piracy, the most common type of piracy and armed robbery in Southeast Asia takes the form of on-board theft against ships at anchor in territorial waters.

Another way Southeast Asian piracy is different from Somali piracy is that targeted vessels are usually robbed at night whereas for the latter, attacks are carried out in both broad daylight and night time. The Southeast Asian pirates prefer to use the element of surprise and seek to “steal engine parts, crew effects, cash or other portable high-value items. Incidents involving robbery at berth (when the ship is in port, engaged in loading or unloading cargo operations) are more seldom attempted”.

In comparison, Somali pirates prefer the vast oceans compared to Southeast Asian pirates and robbers who are restricted to operations in littoral waters in addition to the exclusive economic zones (EEZ). Rarely do they venture far out from shores unless there is a specific attractive vessel object that is targeted. Furthermore, a new trend has emerged in recent times where Southeast Asian piracy is concerned. According to Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (ReCAAP), the most serious incidents involved illegal fuel siphoning in the Straits of Malacca and the South China Sea. Ten small tankers were hit between April to September 2014. Since 2011, a total of 19 siphoning attacks have been reported, of which 13 were successful. With the increasing demand in the underground markets, one of the most targeted fuel is that of marine gas oil. As reported by ReCAAP, “syndicates are likely to be involved from a recent arrest made by the Singapore Police Coast Guard in September 2014”.

96 Ibid note 94.
97 Supra note 91.
Another crucial difference between Southeast Asia and Somali piracy lies in the nature of the approach in dealing with the problem. For Somali piracy, it can be said that there was an unprecedented wave of global measures to coordinate initiatives and execute various actions in fighting its rise, for example through the United Nations and other international bodies. Back in 1998 towards the height of Southeast Asian piracy, author Peter Chalk\(^{100}\) after analysing the contemporary dynamics of maritime piracy in this area came to the conclusion that there was much room for improving regional and international actions against piracy, in particular “with regard to creating effective multilateral joint patrol areas; consolidating the work of the Regional Piracy Center; institutionalising the issue of piracy on the future Southeast Asian security agenda; and creating more favourable conditions for the provision of regionally applied international assistance”. In response to his calls for increased and improved structure of piracy prevention and abatement efforts, “new regional initiatives have indeed been undertaken by the littoral states, with support from interested extra-regional powers”\(^{101}\).

4.4 The Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (ReCAAP)

4.4.1 Historical Background of ReCAAP

In 2000, under the leadership of Japan, a group of Asian nations met in Tokyo to begin negotiations on how to share information and curb piracy which was fast becoming a powerful tool being used by well-organised Asian crime syndicates\(^{102}\). Finally, on 11 November 2004, a successful treaty known as the Regional Agreement on Combating Piracy and Armed Robbery was signed by 16 nations. ReCAAP is the “first binding international

Source: ReCAAP, Information Sharing Centre, SR 01/2015, “Incidents of Siphoning of Ship Fuel/Oil at Sea in Asia (Part II).


\(^{101}\) Supra note 98.

legal instrument that recognises the IMO definition of armed robbery at sea, in addition to the UNCLOS definition of piracy”. 103 At the same time, ReCAAP is the first regional government-to-government agreement to promote and enhance cooperation against piracy and armed robbery in Asia. It entered into force on 4 September 2006. Under the Agreement, ReCAAP was officially launched in Singapore on 29 November 2006 and formally recognised as an international organisation on 30 January 2007. 104 To date, there are twenty Contracting Parties to ReCAAP. 105

4.4.2 ReCAAP Information Sharing Center

The ReCAAP Information Sharing Centre (ReCAAP ISC) is a major instrument used by many countries in their international efforts to combat piracy, and thus reduce the overall cases of ransom payments.

The ReCAAP ISC has several roles to play – firstly, it establishes a system of information sharing relating to incidents of piracy and armed robbery among Member States through a common platform with the ReCAAP Focal Points that utilises the web-based Information Network System (IFN). This function enables facilitation of communication among participating governments to improve incident response by member countries. Through this network, the ReCAAP Focal Points are linked to each other as well as the ReCAAP ISC on a 24/7 basis. This gives efficient and appropriate responses to reported incident. The agency receiving the report will manage the incident in accordance to its national policies and response procedures, and provide assistance to the victim ship where possible. Secondly, the ISC facilitate “capacity building efforts that help improve the capability of member countries in combating piracy and armed robbery in the region”. 106 Lastly, ReCAAP ISC is useful in promoting cooperation with organisations and various parties on joint exercises, information

104 Ibid note 103.
106 Ibid note 103.
sharing and capacity building programmes as deemed appropriate among the Contracting Parties.

In February 2015, there were 11 incidents of piracy and armed robbery reported in Asia. Five of those occurred on board ships while underway in the eastbound lane of the Traffic Separation Scheme (TSS) in the Straits of Malacca and Singapore and one while underway in the Malacca Strait.  

4.5 Legality of Ransom Payment in Singapore Context

Taking an example from marine insurance to illustrate the principle of illegality under Singapore law, Section 41 of the Marine Insurance Act (Chapter 387) provides for “an implied warranty that the adventure insured is a lawful one, and that, so far as the assured can control the matter, the adventure shall be carried out in a lawful manner”. The Singapore courts have used a similar approach as the English courts in their application of Section 41, that is, the court will consider the question of illegality pursuant to the law of the court. This is proven by the case of *Everbright Commercial Enterprises Ptd Ltd v. AXA Insurance Singapore Pte Ltd*. In modern times, illegality occurs in marine cargo insurance when the goods are accompanied, for instance, by false invoice to defraud the revenue authorities or if the goods are exported against the customs and excise legislation. This rule appears to be limited only with regard to English law where the case is brought or the law of the court having jurisdiction over it. Thus if the case is under Singapore jurisdiction, illegality under the legislation of another country might not necessarily render the insurance illegal. In the *Everbright Commercial Enterprises Ptd Ltd v. AXA Insurance Singapore Pte Ltd* case, the insurer asserted that even if the contract of insurance existed, it was not enforceable due to illegality because the volume of logs exported had been deliberately under-declared in order

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108 See also parallel provision under English law in Marine Insurance Act 1906.
to circumvent custom duties laws under the Solomon Islands’ laws. The Singapore court had to decide which country’s laws had to be contravened in order for the adventure to be deemed unlawful under Section 41 of the Act. The conclusion reached by the Court was that when a marine insurance contract is governed by the law of Singapore, Section 41 would require legality under Singapore law and lawful performance by the standards of Singapore law. Thus, it was of no consequence even if she accepted that the export of logs was contrary to Solomon Islands’ law, there was still no breach of the warranty implied by Section 41.

When piracy has occurred and a vessel with its cargo are held by pirates, the question arises as to whether a ransom payment for the recovery of the cargo is deemed illegal under general common law principles, or against public policy in a case pertaining to marine insurance.\(^{110}\) This question was tested in *Masefield AG v Amlin Corporate Member Ltd*. Although payment of a ransom is not illegal under English law following the repeal of the Ransom Act of 1782, the Court had to decide if there was any illegality imposed by a foreign law. In the event of illegality, it would render a claim to be reimbursed for the ransom payment illegal and therefore not recoverable under the policy. The Court concluded that it was neither illegal nor contrary to English public policy.

For Singapore context, it is likely that the Singapore courts would not arrive at the same conclusion because payment of ransom remains an offence under Section 5(2) of the Kidnapping Act \(^{111}\) within the confines of Singapore jurisdiction. This provision extends to anyone who “whoever knowingly negotiates or assists in any negotiation to pay or pays or provides funds for the payment of any ransom for the release of any person who has been wrongfully restrained or wrongfully confined shall be guilty of an offence and shall be punished on conviction with imprisonment for a term not exceeding 7 years and shall also be liable to a fine”. Therefore, this criminal provision acts as an effective barrier against ransom payment and has been relied upon by legal practitioners in Singapore.

However, there have been known cases of ransom payment being made for the safe release of crew without criminal penalty being raised against the party who paid the ransom. For example, a Singapore vessel *MV Kota Wajar* operated by the Pacific International Lines was

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\(^{110}\) Refer to *Regazzoni v KC Sethia* (1944) Ltd. [1958] AC 301 (HL).

\(^{111}\) (Cap. 151, 1999 rev. edn.)
hijacked when en route to Mombasa on 15 October 2009. According to local news reports, the pirates received a ransom of $4 million in order to secure the freedom of the 21 crewmembers onboard the ship.\textsuperscript{112} No mention about ransom payment was made by PIL in their public press statement concerning the safe return of the crewmembers.\textsuperscript{113}

Since a cargo policy covers reimbursement of general average, a parallel question of illegality by a foreign law is extended to allow cargo insurers “grounds to refuse to pay a general average contribution where the contribution consists, in whole or in part, of reimbursement of a ransom payment”. In another judgment, \textit{Mitsui & Co Ltd v Beteiligungsgesellschaft & Co Ltd}\textsuperscript{114} involving a chemical carrier \textit{MV Longchamp} with a ransom demand of US$1.85 million paid by the vessel’s owner. During the negotiations, they incurred a certain expenditure including bunkers and crew wages and the sole issue before the Court was whether that sum was allowable in general average under York-Antwerp Rules 1974. Judge Stephen Hofmeyr QC held that the expenses were admissible in general average and as such, it was the first English authority that validated the true operation of Rule F and the principle of substituted expenses.

Under English law, a court will not enforce a contract, which, though not illegal by English law, involves enforcing directly or indirectly, the terms of a contract that is illegal at the place of performance".\textsuperscript{115} However, the Court cited a passage from \textit{Arnould}\textsuperscript{116} that “there appears to be little doubt that where a payment is not itself illegal under any relevant law is made to secure the release of property, this can be recovered even though the persons demanding the payment are not acting lawfully in doing so. Thus, for example, payment to recover from pirates or hijackers must, it is submitted, in general be recoverable”. Reimbursements are usually forthcoming because underwriters accept that “payment of ransom to secure the release of a ship seized by pirates is justified as a general average (GA) expense, although in

\begin{thebibliography}{99}
\item \textsuperscript{112} http://www-seatrade-global-com/news-asia-PILs-Kota-Wajar-containership-released-by-pirates.html
\item \textsuperscript{113} Ibid note 112.
\item \textsuperscript{114} 2014 EWHC 3445 (Comm).
\item \textsuperscript{116} \textit{Arnould}, 17\textsuperscript{th} edition, at paragraph 25-21.
\end{thebibliography}
practice, in most if not all cases, claims have been settled without GA have been formally declared”.  

So, the next pertinent question to ask after this statement is whether there is illegality “by any relevant law” and whether a payment of a ransom in a piracy case is illegal by that law. Justice David Steel concluded in the *Masefield* case that “as already noted, the payment of ransom is not illegal as a matter of English law (nor can I assume as a matter of Somali, Swiss or Malaysian law)” since there was no evidence submitted before the Court of such payment being illegal anywhere in the world. Conversely, it could be argued that if any illegality is found by the law of the place where the ransom payment is made, or the law of the place of the shipowners’ domicile, or the law of the place where the cargo owners are based, it could make a ransom payment illegal. Although it is remains unambiguous, it is unlikely to be the approach of the English Courts. Rix LJ in the Court of Appeal had already indicated that the parties who pay ransom are inherently innocent and under those circumstances the English Court would be reluctant to “state that the payment of ransom should be regarded as a matter which stands beyond the pale, without any legitimate recognition”. 

The background and objective for the introduction of the Kidnapping Act by Singapore Parliament in 1961 was to ensure that it will “create a situation where the payment of ransom money is made so difficult that…it will encourage victims and their families and agents to be more resolute in their co-operation with the Police in tracking down and arresting these evil doers”. Following that, it is unclear whether payment of ransom is still illegal under Singapore law if it is only the vessel’s cargo at stake and there is no “victim” involved. Still, it is argued that if the “underlying objective of the Kidnapping Act is to encourage those victims

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118 Supra note 115.

119 At para 71. It is interesting to note that it is further submitted that there would be need, at least to be evidence of illegality at the place of payment of ransom, e.g. Somalia, if the illegality was to fall within the English rule. Moreover, it could still be argued that the main purpose was not to break Somali law but to obtain the release of the ship, crew and cargo, and where the illegality is incidental it is unclear whether or not the English Court will refuse to enforce the contract, albeit that it may be illegal by the place of performance. Refer to ibid note 99.
involved in such cases to co-operate with the police, as opposed to making the payment under duress, it should not make any difference whether or not there any lives at stake”.

An important distinction has to be made between ransom payment owing to a piratical act as opposed to ransom payment as a result of terrorism. Even though Singapore has no national legislation implementing the piracy provisions under Articles 100 to 110 of UNCLOS, however, there are two provisions in the Singapore Penal Code (Cap 224) which deals directly with acts of piracy. Section 130B states that “a person commits piracy who does any act that, by law of nations, is piracy”. Section 130C defines “piratical acts” as follows:

“Whoever, while in or out of Singapore —
(a) steals a Singapore ship;
(b) steals or without lawful authority throws overboard, damages or destroys anything that is part of the cargo, supplies or fittings in a Singapore ship;
(c) does or attempts to do a mutinous act on a Singapore ship; or
(d) counsels or procures a person to do anything mentioned in paragraph (a), (b) or (c).”

As long as the ransom payment is made in violation of the Penal Code dealing with piracy, the Kidnapping Act kicks in at the same time to provide the necessary legal grounds to outlaw and criminalise such payment.

Should a ransom be paid pursuant to an act of Terrorism, Section 4 in the Terrorism (Suppression of Financing) Act prohibits, inter alia, a person from providing property or finances when “knowing or having reasonable grounds to believe” or “intending” that “in whole or in part, they will be used by or will benefit any terrorist or terrorist entity”. This seems also to include a payment of ransom to secure release of cargo. Section 35 allows for the prosecution of this offence committed by corporate body such as “a company, firm, society or other body of persons, any person who, at the time of the commission of the

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120 Supra note 111.
121 (Chapter 224, 2008 rev. edn.)
122 Penal Code, section 130B.
123 (Chapter 325, 2003 rev. edn.).
offence, was a director, manager, secretary or other similar officer or a partner of the company, firm, society or other body of persons...". Under Section 2-1, a terrorist is defined as “terrorist” means any person who —

(a) commits, or attempts to commit, any terrorist act; or
(b) participates in or facilitates the commission of any terrorist act,
and includes any person set out in the First Schedule; ”

A “terrorist entity” means any entity owned or controlled by any terrorist or group of terrorists and includes an association of such entities, and any entity set out in the First Schedule. The names and date of birth of individuals classified as terrorists are listed out in the First Schedule.

A terrorist act includes any act or omission constituting an offence as set out in Section 3 to Section 6 of the Maritime Offences Act.\textsuperscript{124} Section 3 of this Act criminalises hijacking of ships but it is recognised that hijacking of ships for personal gain should not be categorised as an act of terrorism. The condition to be fulfilled is that the act must be done with an intent to “influence or compel he Government, any other government, or any international organisation to do or refrain from doing any act; to intimidate the public or a section of the public” and as such, an act for personal profit and gain falls outside the ambit of this Act. The conclusion is that if an act is considered to be an act of terrorism, then it is determined under the Singapore law to be illegal to pay any ransom for the release of cargo, even if no human life is at stake. In this regard, the International Convention for the Suppression of Financing of Terrorism 1999 (TFC) which Singapore has ratified is applicable. Having established this, however, this is no evidence to suggest that the current acts of the Somalian pirates are linked to the activities of the terrorists.\textsuperscript{125}

Besides UNCLOS, Singapore adheres to several other conventions. Under the Hostage-Taking Convention of 1979, in Article 8, it shows the obligation to either extradite or prosecute an alleged offender that is found in that State Party’s territory. However, “Singapore would obviously not be able to meet that obligation under its preventive detention

\textsuperscript{124} (Chapter 170B, 2004 rev. edn.)
laws which allow Singapore to arrest and detain individuals without trial in certain defined circumstances” amongst reasons, for example, such as national security. Yet another example is the United Nations Convention against Transnational Organised Crime 2000 (UNTOC) of which Singapore is a State Party. Provisions regulating participation in organised criminal group (Article 5) and money-laundering offences (Article 6) are stated in it. The parallel legislations under Singapore laws are Section 107 of the Penal Code and the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (Chapter 65A) (CDSA).

In Section 15 (1) (f) of Singapore’s Supreme Court of Judicature Act, it provides that the High Court has jurisdiction to try all offences —in any place or by any person if it is provided in any written law that the offence is triable in Singapore. Furthermore, Section 4 of the Hostage-Taking Act provides that “every person, who outside Singapore, commits an act that, if committed in Singapore would constitute a hostage-taking office, is deemed to commit the act in Singapore and may be proceeded against, charged, tried and punished accordingly”. Section 4 is to be read with Section 15 (1) (f) and is the “written law” which provides the legal basis for extraterritorial jurisdiction over hostage-taking offences. The applicability of the Hostage-Taking Act of 2010 to maritime crimes in the kidnapping of crew members of a vessel for ransom was clearly stated by the Minister of Home Affairs during a Parliamentary Debate of the Hostage Taking Bill.

Additionally, Section 15 (1) (e) of the SCJA provides that the High Court shall have jurisdiction to try all offences committed by any person within or outside Singapore where the


127 Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (Chapter 65A) (CDSA).

128 Supreme Court of Judicature Act (Chapter 322), rev. edn. 2007.

129 Hostage-Taking Act 2010 (No. 19 of 2010).

130 See Comments of Minister for Home Affairs, Wong Kan Seng in the Second Reading of the Hostage-Taking Bill, Parliament No. 11, Session No. 2, Volume No. 87, Sitting No. 6, 16 August 2010.

131 Ibid note 130.
offence is punishable under and by virtue of the Maritime Offences Act.\textsuperscript{132} Similar to the Hostage-Taking Act, this is wide enough to cover all the jurisdictional bases provided for in Article 6 of SUA Convention.

A separate question that can be raised is regarding the legality of Kidnap & Ransom insurance in Singapore. It is illegal to buy Kidnap & Ransom insurance in Singapore as it is against the laws laid down in the Kidnapping Act.\textsuperscript{133} In particular, Section 6(1) provides the basis for the Public Prosecutor to take legal action to freeze a bank account, “where he is satisfied that it is likely that the money for the payment of ransom for the release of any person may be paid out of any bank account, by order direct any bank in Singapore not to pay any money out of nor to pay cheques drawn on such account for a specified period not exceeding one month”. This enables the authority to prevent payment of ransom to any party.

\textsuperscript{132} Maritime Offences Act (Cap 170B).
5 Conclusion

5.1 Overcoming the Challenges and Difficulties Against Piracy

In dealing with the challenges and difficulties posed by piracy, it is important to bear in mind that just as the pirates are evolving in their modus operandi in the way they run piracy as a business model, coupled with the enormous task of co-ordinating the different willing parties in fighting against piracy, there exist many intervention options and mechanisms which can be further developed in order to enhance effectivity in controlling this maritime crime.

On the one hand, there are certain flaws which act as hindering factors representing a less than desirable condition. An example is the ‘catch and release’ dilemma many naval patrols are practising even as they are tasked with the duty of guarding the vulnerable areas prone to piracy on the high seas due to issue of legal legitimacy depending on the national laws of that particular State. Although particular attacks might had been prevented before the pirates were eventually released, it is nonetheless a vicious cycle of perpetuation of this maritime crime whereby the same culprits were turned free on the seas again. Pirates utilise a series of camps scattered along the coast of Somalia. From there, they are able to amass their supplies for launching attacks. Moreover, those camps are used as base anchorages during the period when the captured merchant vessels lay “off-hire” in captivity whilst the pirates negotiate for ransom payments. Pirates have been known to take advantage of the restriction caused by Rules of Engagement (ROE) granted by most western governments to their navies. It prohibits their navies from “mounting hostage rescue operations against pirated merchantmen for fear of hostage injury or death; as such, once pirates have taken the crew of a ship hostage they generally find themselves safe from attack by naval forces”\(^{134}\). The hands of the naval personnel are tied under such a restriction. By the endorsement of United Nations Security Council Resolutions, naval forces have the authority to operate within the territorial waters of Somalia, usually extending to 12 nautical miles. In spite of it, the Rules of Engagement also means that all operations onshore are prohibited, otherwise known as “no boots on the

\(^{134}\) Supra note 11, at p. 46.
ground” policy. Pirates have exploited this fact to the fullest as they are well aware of their freedom in using the hostages as leverage. It prevents action to recover any pirated merchant vessels, be it whether they are held at anchor or used as motherships.

At times, a lack of political will on the part of the states is another hindrance in itself that needs to be tackled before the countries can look outward to solving piracy issue on the international level. Countries can be wary of infringement of their state sovereignty with the presence of naval patrols from other countries entering their territories. In other cases, they seek to protect their own national interests above a direct multinational co-operation, opting rather to participate alongside those international efforts according to their agenda. A good illustration is that although Indonesia and Malaysia do attempt to co-operate and bring up to level their maritime security standards and procedures within Southeast Asia, including combating piracy, nonetheless, these countries have chosen not to become Member States in ReCAAP all these years and there is no indication thus far that they might become participating States in the future.

On the other hand, countries and the shipping industry at large can look to self defence measures as a method to ward off piracy or, attempt to resolve the situation if it has already occurred through Best Management Practices. For instance, the usage of a citadel or ‘panic rooms’ has been an effective development. The Maritime Security Center – Horn of Africa (MSCHOA) has published “Guidance relating to the Construction and Use of Citadels in Waters Affected by Somali Piracy”. A citadel is a “designated pre-planned area purpose built into the ship where, in the event of imminent boarding by pirates, all crew will seek protection”. 135 It is estimated that the crew can hide in a citadel for up to about 3 days which is roughly the amount of time for naval help to arrive. By then, the naval forces can launch assaults with reduced fear of harming the crew in the process since they are most likely not yet been taken hostage and for that reason, pirates are trying different counter-measures to reduce the effectiveness of a citadel like using smoke to force the crew to leave the safe room.

Other successful measures include adaptations to the way the vessels are being operated by the companies and crews. For instance, increased watch guards on the bridge, better training for the crew about crisis handling and deploying water hoses from the vessels or installation

135 BMP para 8.13. The Citadel “is designed and constructed to resist a determined pirate trying to gain entry for a fixed period of time”.

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of barb wires around the vessel. The employment of armed security guards on board is a proven successful measure which shown presumably one hundred percent success rate of preventing a piracy attack in the first place.\footnote{Peter Cook, “Armed Guards on Ships – A Controversy”, Security Association for the Maritime Industry, 26 September 2011.}

5.2 The Way Forward

In summary, the ancient problem of piracy and ransom payment has been around for many centuries. This maritime crime has been adapted by pirates to suit the modern world in various ways. A concluding warning given by the MSCHOA regarding the construction of citadels provides an apt analogy of the piracy situation for the international maritime community – “Somali Pirates knowledge and modus operandi continues to evolve over time. As their knowledge on Citadels increase, then their ability and methodology in attempting to defeat a citadel will also change, and therefore more robust protection will be required”.\footnote{MSCHOA “Guidance relating to the Construction and Use of Citadels in Waters Affected by Somali Piracy”, at p. 8.}

This warning extends beyond Somali pirates to all maritime criminals in different regions of the world. They would continue to be relentless in their quest for wealth and power, albeit by illicit means of ransom payments or thefts and robberies. The onus is upon all actors who are affected by piracy, be it regional or global ones, to take their share of responsibility and efforts in stamping out piracy, if it may be possible. Pirates, are after all, the enemies of all mankind.
LITERATURE LIST:

BOOKS:


David Ong “Alternative Approaches to Piracy and Armed Robbery in Southeast Asian Waters and off the Horn of Africa: A Comparative Perspective”, in “The Law and Practice of Piracy At Sea” (2014).


Corina Song, “Singapore Law and Practice” in “International Cargo Insurance” (2012),


LEGISLATIONS AND CASES:

Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (CDSA) (Chapter 65A, 2000 rev. edn. Sing.).

Hostage-Taking Act 2010 (No. 19 of 2010).

Marine Insurance Act 1906.

Maritime Offences Act (Chapter 170B, 2004 rev. edn. Sing.).

(Chapter 151, 1999 rev. edn Sing.).

(Chapter 325, 2003 rev. edn Sing.).

(Chapter 170B, 2004 rev. edn. Sing.).

Penal Code (Chapter 224, 2008 rev. edn. Sing.).

Supreme Court of Judicature Act (Chapter 322, 2007 rev. edn.).


Masefield EWHC [2010] 2 All ER 593.

2014 EWHC 3445 (Comm).
DOCUMENTS AND ONLINE RESOURCES:


http://www.kentlaw.edu/faculty/rwarner/classes/carter/tutorials/jurisdiction/Crim_Juris_6_Text.htm


IMO MSC.1/Circ.1339, 14 September 2011, “Piracy And Armed Robbery Against Ships In Waters Off The Coast Of Somalia - Best Management Practices for Protection against Somalia Based Piracy


Sam Jones, Somali pirates demand $7m to release British hostages, GUARDIAN (Oct. 30, 2009), http://www.guardian.co.uk/world/2009/oct/30/somalian-pirates-yachtcouple-hostages


Marsh, “Piracy – the Insurance Implications”.
MSCHOA “Guidance relating to the Construction and Use of Citadels in Waters Affected by Somali Piracy”, at p. 8

Minister Henry Bellingham MP, Parliamentary Under-Secretary of State, speech to the Chamber of Shipping, 12 Oct 2011.


Richard Neylon, “Banning Ransom Payments To Somali Pirates Would Outlaw The Only Method A Shipowner Has To Remove His Crew From Harm’s Way And Rescue His Vessel And Cargo”, Holman Fenwick Willan LLP, article first published in Lloyd’s List (1 November 2011).


PILPG, “Piracy Definitions in Domestic and Regional Systems”, Legal Memorandum prepared by the Public International Law & Policy Group, March 2013.


http://data.worldbank.org/indicator/NE.EXP.GNFS.ZS.

UN Resolution 1105 XII adopted on February 21, 1957.

UN Contact Group on Piracy (Legal Committee),


UN Doc. SC/9541, Security Council Authorizes States to Use Land-Based Operations in Somalia as Part of Fight against Piracy off Coast, Unanimously Adopting Resolution 1851, 6046th Meeting (PM), 16 December 2008.


UN Nairobi Report.


UK Government Counter-Terrorism and Security Bill, Factsheet – Fact 6 Clause 34 – Kidnap and Ransom,

