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**THE SEAFARER, PIRACY AND THE
LAW**

A HUMAN RIGHTS APPROACH

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A Thesis submitted in partial fulfilment of
the requirements of Doctor of Philosophy
of the University of Greenwich

May 2008



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ACKNOWLEDGEMENTS

With thanks to the following:

Professor A. D. Couper for much helpful “pilotage” advice, keeping this thesis on course.

P. Mukundan of the International Maritime Bureau for answering my questions with good humour and supplying me with the piracy reports.

Brigadier(Retd) B.A.H. Parritt CBE for allowing me to share in small measure his expertise on security.

ABSTRACT

Piracy at sea has existed almost since voyaging began and has been effectively subdued from time to time, principally by the Roman Imperial Navy in the 1st C and the British Navy in the 19th C. Over the past twenty five years piracy has once again been increasing such that it has now become of serious concern to the maritime community, in particular the seafarer, who as always bears the brunt of these attacks.

In parallel with piracy itself the laws of piracy have developed from the Rhodian Laws through Roman Law, post Treaty of Westphalia Law both British and American until today the Law of Piracy is embodied in the United Nations Convention of the Law of the Sea (UNCLOS) of 1982. Under this Law piracy can only be committed on the high seas and with UNCLOS increasing the limit of the territorial sea from 3ml. to 12ml. many of the attacks upon shipping today cannot, legally, be classed as piracy but as armed robbery.

Piracy and armed robbery at sea can consist of one or more of the following crimes upon the person: murder, violence actual or implied, rape, torture and disappearance and are considered a violation of the seafarers' human rights. The incidents and court cases cited in the thesis provide the basic information and evidence for this.

On the high seas the flag state has jurisdiction over the ship flying its flag and all on board whatever their nationality. In the territorial sea the coastal state has jurisdiction over the safe passage of a ship and is responsible for maintaining order. Many of the states in whose territorial sea these attacks take place are considered failing states unable to maintain order at sea due to lack of political will, resources and corruption. These are matters of law, international relations and the structure of a globalised maritime industry.

In effect this thesis argues that the flag or coastal State is failing by omission to uphold the human rights of the seafarer over whom it has jurisdiction. The seafarer may be able in one of the Human Rights Courts to obtain redress from these States but there are many prerequisites which are addressed in detail.

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ACRONYMS AND ABBREVIATIONS

AC	African Charter on Human and Peoples' Rights
AC	Appeal Court
ACHR	American Convention on Human Rights
AIS	Automatic Identification System
AJIL	American Journal of International Law
All ER	All England Law Reports
ATCA	Alien Tort Claims Statute
BASIC	British American Security Information Council
BIMCO	Baltic and International Maritime Council
BCN	Biological Chemical and Nuclear
CAT	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CERD	Convention on the Elimination of all Forms of Racial Discrimination
CGS	Coast Guard Ship
CIA	Central Intelligence Agency
CMI	Comite Maritime International
CRC	Convention on the Rights of the Child
CSO	Company Security Officer
CSR	Continuous Synopsis Record
DMEC	Developed Market Economy Country
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ESCSOC	Economic and Social Council of the United Nations

EEZ	Exclusive Economic Zone
ETS	European Treaty Series
FBI	Federal Bureau of Investigation
FOC	Flag of Convenience
GAM	Movement for an Independent Aceh
HC	House of Commons
HRA	Human Rights Act
HSC	Convention on the High Seas
I-ACHR	Inter American Court for Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICFTU	International Confederation of Free Trade Unions
ILC	International Law Commission
ILO	International Labour Organisation
ILM	International Legal Materials
IMB	International Maritime Bureau
IMB-PRC	International Maritime Bureau- Piracy Reporting Centre
IMO	International Maritime Organisation
INS	Indian Naval Ship
ISF	International Shipping Federation
ISPS	International Ship and Port Facility Security (Code)
ISSC	International Ship Security Certificate
ITCY	International Criminal Tribunal for the Former Yugoslavia

ITF	International Transport Workers' Federation
ITLOS	International Tribunal for the Law of the Sea
LISCR	Liberian Ship and Corporate Registry
LNG	Liquefied Natural Gas
LTTE	Liberation Tigers of Tamil Eclam
MCA	Maritime and Coastguard Agency
MMEA	Malaysian Maritime Enforcement Agency
MOD	Ministry of Defence
MWC	International Convention on the Protection of the Rights of all Migrant Workers and their Families
MRCC	Maritime Rescue Coordination Centre
MSC	Maritime Safety Committee
NGO	Non Governmental Organisation
NUMAST	National Union of Marine, Aviation and Shipping Transport Officers
OAU	Organisation for African Unity
OECD	Organisation for Economic Co-operation and Development
OED	Oxford English Dictionary
PCIJ	Permanent Court of International Justice
P&I	Protection and Indemnity Club
PFSO	Port Facility Security Officer
PSC	Port State Control
PSI	Proliferation Security Initiative
ReCAAP	Regional Co-operation Agreement on Combating Piracy and Armed Robbery in Asia
RIAA	Reports of International Arbitral Awards
RSO	Recognised Security Organisation

SLOC	Sea Lane of Communication
SOLAS	International Convention for the Safety of Life at Sea
SSA	Ship Security Assessment
SSO	Ship Security Officer
SSP	Ship Security Plan
SUA	International Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation
TSI	Transport Security Incident
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UKTS	United Kingdom Treaty Series
UNCLOS	United Nations Convention of the Law of the Sea
UNCTAD	United Nations Conference on Trade and Development
UNESCO	United Nations Educational, Scientific and Cultural Organisation
UNGA	United Nations General Assembly
UNICEF	United Nations Children's Fund
USA	United States of America
UNTS	United Nations Treaty Series
VLCC	Very Large Crude Carrier
X/O	Executive Office
WLR	Weekly Law Reports
WMD	Weapon of Mass Destruction

CHAPTER 1 – INTRODUCTION – A PERSPECTIVE

The primary objective of this thesis is to analyse over time the issues around piracy and the human rights of seafarers. This is more complex than may appear at first sight. Piracy has been a scourge of seagoing since ancient time. It has often been tolerated as a hazard of the sea, even employed by states and owners for their own ends, combated by others and legislated against. In turn owners of ships, cargo interests, insurers, coastal communities and courts of law have adopted diverse attitudes and actions to obviate these violent acts on the high seas. The only constant element in the long history of piracy has been the neglect of the crews of trading ships who have been subject to abandonment, incarceration, injury and death as innocent victims. To a considerable extent this remains so in the modern world.

The study examines why and how seafarers have been so neglected in the face of criminal attacks. It looks at the ways legal measures have been formulated and adopted but which, in effect, have often left the seafarer in legal isolation. To do so a historical perspective is adopted identifying the elements of the past which have influenced thinking and in instances have been incorporated into present legislation. It is necessary also, in order to appreciate the diversity of interests involved, to consider the commercial world of the sea, its political geography, and in particular the present day complexity of international relations, globalised commerce, and forms of violence.

There has been some published work into seafarers' rights generally. Lowe in his *Opinion on International Human Rights Law Aspects of the Death, Personal Injury and Abandonment of Seafarers*(2001) takes a broad view of the problem identifying the

main sources of international rights and duties of those persons and States involved under public international law, that is the law which concerns itself with questions of rights between nation States or between nation States and the citizens or subjects of other nation States.

Couper et al in Voyages of Abuse(1999) chronicles the deplorable conditions that exist in some sectors of the shipping industry and by means of case studies demonstrates the problems some have had in attempting to obtain their pay and repatriation costs under private international law, that is the area of the law that deals with disputes between private persons, natural or juridical, arising out of situations having a significant relationship with more than one nation.

Seafarers' Rights(2005) edited by Fitzpatrick and Anderson examines the whole issue of the rights of seafarers or rather the lack of them under national, private international law and public international law.

However, in focusing on Piracy and Armed Attack at Sea this thesis takes the issue of seafarers' rights one step further and argues that the flag or coastal State have a positive duty to secure the basic human rights of the seafarer against violations carried out or threatened not by the State but by private persons, *ie* the pirate.

The final discussion of pirates and the law examines the alternatives open to seafarers and their representatives in bridging the various barriers to effective fair treatment of these civilian victims of violence at sea. It may be useful at this juncture to begin with a

summary of three of the relevant subjects within which the modern seafarer functions, including piracy, these are:

First. The Global Labour Market. Merchant ships have always employed seafarers of different nationalities, now the diversification in crew, flags and ownership are more nationally complex. A multi national crew may be recruited by international agencies, they are employed under flags which are not those of the States of the shipowners, who may also be anonymous in names and places of residence. The vessels may be mortgaged and insured in other States, managed from yet another, chartered elsewhere, and carry cargoes for a variety of shippers.

Second. The Law. Most ships will be subject to a number of International Conventions as ratified by the flag States, and also codes and recommendations of international and regional bodies, as well as national laws (which lack uniformity). The vessels will come under some elements of coastal State, strait State, and port State jurisdictions at various times during the voyage.

Third. Piracy. Vessels may encounter violent actions by pirates on the High Seas and in Territorial Waters. The pirates can also be multi national in composition, organised by international criminal syndicates and operating from safe havens in parts of nation States. They can hijack ships, steal cargoes, abandon crews, rob, injure and kill seafarers, or take them hostage.

Seafarers are also subject to the possibility of terrorist activities motivated by political aims, under which ships may be taken to raise money, obtain publicity or used as weapons.

Under all these dangerous circumstances the legal position of the isolated seafarer is complex.

The primary aims of the thesis are to analyse the rights of the seafarer to protection and where necessary compensation in relation to violence at sea under Public International Law and Private Law. To contribute to this the history of piracy is traced with emphasis on changing attitudes and regulation over time. In the modern era several case studies are analysed, along with assessments of the efficacy or otherwise of international, regional and national legal regimes to which seafarers may have recourse.

The study focuses primarily on legal instruments in meeting the needs of the global seafarer. It is seafarer centred from the viewpoint of a participant in the industry. It seeks to evaluate the legal provisions at various levels in terms of the practicalities involved in obtaining redress as victims of piracy. In doing this some case studies giving the reality for the seafarer are followed through, new regulations assessed and the compromises and ambiguities which are inherent in law are considered from the seafarers' point of view. Finally, current trends and a possible solution are discussed. Thus, the thesis is policy orientated with its value towards the use of human rights law as a fundamental tool in solving the problems of nationally isolated shipboard communities faced with violence at sea.

The structural content of the thesis is now summarised as follows:

Antiquity of Piracy and the Law

'Piracy as an offence dates back at least to the Code of Hammurabi (1948-1903 BC) where the penalties for the unlawful or forceful seizure of a vessel are given.'

Menefee,S.P.(1989:13) The Roman Laws on piracy were developed from the

Rhodians who included piracy in their maritime laws. The Romans suffered increasingly from piracy, however, it was not until 67 BC when Rome itself was faced with starvation due to the plundering of the grain cargoes that Pompey was ordered by the Senate to subdue the pirates which, according to Cicero he did in 67 days.

The word pirate comes from the Latin '*piratae*' OED(1995) and to the Romans pirates were recognised as belonging to political societies of the Eastern and Central Mediterranean where the seizing of cargoes and taking of hostages was considered legitimate. Thus, the Romans considered themselves to be in a state of undeclared war against these people. In the sense that the word, pirate, is used today, that is one who robs and plunders on the sea, to the Romans they were brigands and robbers (*latines et praedones*) who were common criminals in Roman Law.

A further confusion arises from the word privateer, which is the term applied to a privately owned vessel or Master who had a commission from a Government through a Letter of Marque to operate against the sea borne trade of an enemy in time of war. Thus they were pirates in the Roman sense of the word, but the dividing line between privateers and pirates as we know the terms was a thin one.

In the 16th, 17th, 18th Cs England, France, the Netherlands and Spain all made use of privateers when they were at war with one another, as it was a cost effective means of raising a Navy. But in this confused period privateers and pirates were often one and the same person. The only distinction being who was at war, with whom and when. However, if a date has to be given to the time when piracy shifted its meaning from

raiders coming from recognised States to common criminals then perhaps it could be October 1696 where in the case of *Rex v Dawson* under the judge Sir Charles Hodges part of the judgement read as follows: '*Now piracy is only a sea term for robbery, piracy being a robbery committed within the jurisdiction of the Admiralty*' Rubin(1997:95)

Pirates had long been considered *hostes humani generis* that is enemies of all mankind, the phrase dates back to at least the time of Cicero, where in this phrase, *hostes*, enemies, is taken to mean enemies in time of war, not applying to common criminals, but at the end of the 17th C this phrase as used to justify extending the jurisdiction of municipal courts to anywhere that the pirates could be found and apprehended. Thus the Barbary corsairs operating from the North African coast and the Malay pirates in the South East Asia should be considered pirates in the Roman sense of the word.

By the end of the 19th C States were powerful enough, having State navies, to no longer require the services of the privateer/pirate. Piracy was ruthlessly put down wherever it occurred and privateering was banned at the Congress of Paris in 1856. Up to this time all laws relating to piracy had been municipal law. However, in the aftermath of the First World War the Council of the League of Nations assembled a committee of legal experts to prepare a list of subjects suitable for codification in international law. Piracy was included in the list.

It was against these long traditions and concepts that in 1932 the Harvard Law School organised its own research into the laws of piracy as its contribution to the process of codification. The results of Harvard's research and draft Convention were used by the

International Law Commission (ILC) as the basis of Article 15 of the Geneva Convention of the High Seas (1958). This was the first globally accepted definition of piracy in international law. The Laws of piracy written into the above Convention appeared virtually unchanged in United Nations Convention on the Law of the Sea (UNCLOS) (1982) which is where the international law on the subject stands at the moment. Before considering aspects of the present legal framework a perspective of present day pirate activities is necessary together with the related activities of terrorism.

Modern Piracy

'We must be clear about what piracy involves: kidnapping, theft, assault, rape, wounding, murder. There is nothing remotely "romantic" about the perpetrators of these appalling crimes, or their detestable activity' Transport Select Committee(2006:6) . This has always been so, but it has become of more concern to the international maritime community over the last twenty five years or so. Indeed, as long ago as 1983 the International Maritime Organisation (IMO) adopted a resolution urging all governments to take: *'all measures necessary to prevent and suppress acts of piracy and armed robbery from ships in or adjacent to their waters, including strengthening of their security measures'* Measures to Prevent and Suppress Piracy and Armed Robbery Against Ships(1983).

It was evident from reports that it was the seafarer who still suffers the main consequences of these attacks. Ships, cargoes, equipment and money can all be replaced, human lives cannot. Such attacks took place, with the increasing pace of globalisation against a complex system of international trade with shipping at the very

centre, playing a key role in facilitating trade. The following basic statistics provide some perspective of the scale of international trade and the necessary place of shipping:

'6758 million tons of cargo carried annually' Review of Maritime Transport(2005:50)

'This cargo is carried in 31097 ships engaged in international trade' Review of Maritime Transport(2005:33)

'25.7% of these ships are registered in Developed Market Economy Countries (DMECs) whilst 45.1% are registered in one of the major open-registry countries' Review of Maritime Transport(2005:27)

'Approximately two thirds of these beneficially owned fleets are owned by DMECs' Review of Maritime Transport(2005:26)

'In 2004 the value of this cargo \$9250 billion' World Trade in 2004-Overview(2005:2)

'The freight costs for carrying this cargo was 5.4% of the total value or \$500 billion.' Review of Maritime Transport(2005:71)

'The total number of containers in circulation is 19,310,000' Review of Maritime Transport(2005:88)

'world seaborne trade grew by 4.3% in 2004' Review of Maritime Transport(2005:4)

'1,227,000 officers and men were on these ships, carrying the cargo and facilitating international trade.' BIMCO/SF Manpower Survey(2000)

'The emerging paradigm for global prosperity has been predicted, on near-frictionless transport and trade.' Security in Maritime Transport. Risk Factors and Economic Impact(2003:1)

For this to continue and indeed, for every State engaged in international trade it must be evident that a relatively small number of people, seafarers 1.25million or so worldwide, have a vital role in the whole enterprise. They are truly indispensable, but during the latter part of the 20th C and early 21st C they have increasingly become the victims of piracy and armed robbery.

Modern piracy steadily increased during the 1990s and early 2000s peaking in 2003 with *'445 attacks before falling back and apparently stabilising at 276 attacks in 2005'* IMB Piracy and Armed Robbery Against Ships 2005(2006:10).

The types of attack range from random opportunistic robbery at the lower end of the scale to hijacking of the vessel and cargo and abduction or stranding of the whole or part of the crew at the other end. Despite the apparent stabilisation of the number of attacks worldwide the most disturbing trend, in particular, for the seafarer is the fact that the attacks, of all types, are becoming increasingly violent. *'Pirates armed with guns occurred in 18% of cases in 1994. This had risen to 29% in 2005.'* IMB Piracy and Armed Robbery Against Ships 2005(2006:9).

With the increase in the use of firearms it is inevitable that seafarers are more likely to be killed or injured during an attack as, indeed, the statistics demonstrate:

'In 1994, eleven hostages were taken, in 2005, this figure was 440. In 1994, no seafarer was kidnapped for a ransom, nor were any killed or missing, in 2005, the respective figures were 13 kidnapped, and 12 missing presumed murdered' .IMB Piracy and Armed Robbery Against Ships 2005(2006:10)

These attacks can happen anywhere, indeed, petty theft from ships alongside in port or at anchor has always been a problem in certain parts of the world. In these opportunistic attacks the pirates steal whatever they can quickly and then depart. If disturbed they were easily frightened off by the crew. However, they have become

ever bolder such that they *'are quite prepared to injure or kill the captain and crew if they cannot get what they want'* .Mukundan,P.(2004:9)

It should be noted that in 2004 there were *'330 reported attacks'* IMO Piracy and Armed Robbery Against Ships 2004(2005:1)worldwide, this figure taken together with the ship-day figure of 11,350,405 (365x31097) means that there was only a 0.00003% chance of a ship being attacked. Even in a "piracy hotspot", the Malacca Strait and South China Sea with *'113 incidents'* IMO Piracy and Armed Robbery Against Ships 2004(2005:1) or 34% of the total the likelihood of an attack only increases to 0.002%. Hence, the chance of a ship being attacked is extremely low. On the other hand it should be noted that in 2004, *'30 seafarers were killed, 87 wounded, 140 taken hostage of which 43 are still unaccounted for.'* IMO Piracy and Armed Robbery Against Ships 2004(2005:1)

There were no reported incidents of maritime terrorism in this period, 2004. Indeed, there have not been any since the *Limberg* in 2002. Maritime terrorism *per se* is not as yet a vital issue for the seafarer, although some acts of piracy may be motivated for the funding of national liberation movements which are designated as terrorist by governments.

For the seafarer the most serious actions involve the hijacking of the vessel and her cargo with the crew usually being murdered or abandoned. This was the fate of the *Alondra Rainbow* whose case is discussed in detail in Chapter V, from the planning of the hijack to the eventual conviction in an Indian Court of some of the criminals. This type of crime is carried out by well organised criminals with substantial resources, and are capable of operating the ship without the crew's assistance.

In between the two ends of this spectrum is what the International Maritime Bureau (IMB) calls Medium Level Armed Assault and Robbery. This type of attack is discussed in detail in Chapter IV. Usually the pirates loiter in a sea lane in a small fast craft awaiting a suitable target, preferably slow moving, low freeboard with no obvious security measures such as extra lookouts. This type of attack can be extremely dangerous for the crew as the pirates are usually armed, and are in a hurry to steal whatever valuables they can, including cash from the Master's safe. There have been many instances of ships being fired upon with automatic weapons and rocket propelled grenades in order to force them to stop. In certain cases such attacks have tended to be linked with "terrorism". This complicates to some extent the legal issues and consequently needs clarification at this stage.

Maritime Terrorism

Terrorism has of course many of the characteristics of piracy, but the pirates and terrorists have quite different motives for the acts of violence which they carry out. For the terrorist the act has a political purpose whereas for the pirate the purpose of this act is for financial gain. Moreover, the terrorist actively seeks publicity, the pirate attempts to shun the limelight at all costs. Nevertheless politicians identify a strong correlation between the two crimes. After the attack on the *Dewi Madrim* where the ship was steered for about thirty minutes by the pirates before kidnapping the Captain and Chief Officer, the Deputy Prime Minister of Singapore said '*that it might have been a training run for a future terrorist mission*' Tan,T(2004). The real fear for governments in this situation is:

'if terrorists were to commandeer a ship transporting LNG to undergo a suicide mission in the Straits of Malacca, such an act could devastate Southeast Asia's economies and environment and severely disrupt trade as the Straits could be closed to shipping and fishing' Brandon, J.J(2003).

The illustrative effects of such attacks upon shipping provide examples to any party, as to how easy it is to overwhelm a small crew and take control of a ship at sea:

'Piracy provides a tempting and successful demonstration to terrorists of what can be achieved with relatively straightforward equipment and organisation. Well organised and determined terrorists could take control of a ship and use it to achieve terrible ends. Dangerous cargo could be seized and used as a weapon; the ship itself could be used as a weapon; hostages could be taken'. Transport Select Committee(2006:27).

No mention here of the plight of the seafarer and as in the past there seems to be little account taken of the seafarer in the politician's response to this perceived threat of maritime terrorism.

Where there have been responses internationally is the introduction of the International Ship and Port Facility Security (ISPS) Code and an additional protocol to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA) at the IMO. Neither of these instrumental responses seemed to have produced better security for the seafarer, nor were they intended to. The ISPS code is designed to protect the country the ship will visit. Thus it is the ships and by implication the crews that are perceived to be the threat. This is

particularly so in the US where in spite of protests from many sources including the Secretary General of IMO, seafarers as alien suspects can be denied rights to go ashore:

'Forged ship and crew travel documents can be easily obtained for tankers carrying oil or liquefied gases, facilitating their use by terrorists to undergo suicide missions for their cause.' San Diego Union Tribune(2002)

On the other hand, civilians in the form of one of the ship's officers are expected by legislation to perform with minimal training the role of Ships Security Officer. In addition to his other duties this officer is expected to co-ordinate a defence against terrorist attack. *'Many consider that security duties are an additional burden on already overworked merchant ships complemen'* Transport Select Committee(2006:Ev45).

Whilst acknowledging that the seafarer should take all reasonable precautions to protect his home and the shipowners property the view of the seafarer is that the security forces of either the flag State or port State should be the first line of defence against these extremely dangerous people not unarmed civilians on board the vessel.

In the case of the SUA Convention the protocol is designed to give a legal basis for States to prevent the transport of Weapons of Mass Destruction (WMD) and other terrorist materials by sea. Article 3bis gives a new range of offences for carrying and transporting these materials whilst Article 8bis covers the necessary co-operation and procedures to be followed by a State Party if, they consider there are reasonable

grounds to suspect that the ship itself or a person on board has or is likely to commit an offence under the interpretation under the articles of the Convention.

Article 11 covers extradition and perhaps most importantly Article 11 bis states that none of the offences should be considered as a political offence. Confirming the view of at least western governments that terrorists of whatever persuasion should be considered common criminals. There is apparent legitimacy in linking these activities together with piracy, but as will be appreciated this adds to various legal complications.

The Present Legal Framework

All efforts by governments to suppress piracy and armed robbery must take place within the ambit of international law, in particular UNCLOS. However, *'there continues to exist the "lack of agreed definitions" constituting piracy and it poses as one of the major difficulties faced by government authorities and organisations in dealing with the problem of piracy'* Beckman, R.C.(2001:319).

The definition of piracy as contained in Article 101 of UNCLOS is now considered to be somewhat narrow but furthermore, under Article 3 of the same Convention the breadth of the territorial sea was increased from 3 to 12 miles measured from the baseline. This has had the effect of making as many as 80% of the incidents not subject to the laws of piracy, which are only relevant upon the high seas, but subject to the criminal law of the coastal State. It is for this reason that the IMO have clarified acts within the territorial sea,

'armed robbery against ships as an unlawful act within a State's jurisdiction'

IMO Piracy and Armed Robbery Against Ships(2000:1)

.

Furthermore it is widely acknowledged that many countries do not have adequate municipal laws to deal with piracy or indeed, armed robbery in their territorial sea. To overcome this obstacle to bringing justice, the Comité Maritime International (CMI) have drafted a Model National Law on this subject to be incorporated into national law if a State so wishes. The facts remain:

'Piracy in municipal law may differ from the international law definition ... This has led to persistent confusion in the Courts and in arriving at any common understanding of what a lay person may understand to be the "piracy problem". Thus legislators have over time created an arguably flawed framework – from a practical point of view – in which the nature of the crime is determined by the locus or place of the event. While the rationale in identifying jurisdiction is clear nevertheless this explains why very few piracy cases have resulted in prosecution and why "legal" misunderstanding and confusion regarding "piracy" persist' Transport Select Committee(2006:Ev15).

To this statement might be added the fact that very few pirates are apprehended. Fundamentally some coastal States, and especially third world States, feel that they are under no obligation to squander their scarce resources on what amounts to somebody else's problem. The concern has been expressed that:

'the maritime industry requires a more basic and effective codification of the act of piracy – where there is confusion and uncertainty we can see that pirates will prosper, while innocent seafarers will continue to suffer'

Transport Select Committee(2006:Ev42).

Clarification is of course not straightforward, a new definition may require UNCLOS to be reopened for negotiation which would undoubtedly take a long time as no doubt nation States would wish to renegotiate other matters not concerned with piracy. In any event several coastal States would resist any infringement of their territorial sea jurisdiction. These States particularly in the Far East and SE Asia where their territorial waters adjoin one another or nearly so, are extremely sensitive to any infringement or perceived infringement of their sovereignty, such that when the American, Admiral Fargo, was quoted as suggesting that the US was considering sending US Marines to the Strait of Malacca to conduct unilateral patrols:

'That suggestion angered Malaysian and Indonesian leaders, who said that the United States should respect their sovereign control of the Strait, Malaysia warned that a US military presence in the region could inflame anti US sentiment, and increase the threat of terrorist attack instead of lessening it' Sand,B.(2004:1)

The geopolitics of such situations may be illustrated by Singapore and Indonesia, and Malaysia and Indonesia which have bi-lateral agreements permitting hot pursuit, that is the ability of one State to pursue a suspect into the territorial waters of another State. However, they, the States concerned *'deny cross-boundary "hot pursuit", or fail to*

operationalise it due to their inexperience with complicated nature of this doctrine despite having created such bilateral arrangements' Ong, G.G.(2004:10).

It is pointed out however, by the British House of Commons Transport Select Committee (2006:17) that:

'The piecemeal approach taken to the development of the 'hot pursuit' agreements so far is unlikely to provide the flexibility of response to address the problem of piracy world-wide. The arrangements need a more systematic and international focus with the IMO in the lead.'

Thus, there has been a good deal of discussion on the subject of piracy at the international and bilateral government level with the private sector, such as the IMB and others contributing. But without the total commitment and co-operation of governments the outlook for the seafarer in following his profession with safety and assertion of his rights to do so remains bleak.

The Present Plight of the Seafarer and Human Rights

While the numbers of seafarers killed and injured in the course of these attacks may not be large compared with some of the atrocities being carried out around the world, it is significant that these attacks are regularly being suffered by innocent civilians in their home and place of work on board ship:

'The UK Government and the international community generally, ought to be ashamed that they have failed to put effective measures in place to prevent the present high level of piratical attacks on seamen and women'

Transport Select Committee(2006:19).

Part of the problem is that people, politicians in particular, simply do not recognise that piracy really exists as a modern menace when compared to other threats such as terrorism, where the politicians have moved with commendable speed to put in place mechanisms to counteract the perceived threat. The public perception of piracy is still one of swashbuckling heroes and has been trivialised to the extent of a pirate character appearing as the hero in a children's' television cartoon series.

Seafarers' representatives frequently maintain that politicians should know better but in the eyes of seafarers it seems the sea is the forgotten constituency and the seafarer most definitely the ignored constituent. The seafarer works in a mobile invisible industry where he has little or no legal, social or political identity. This raises the fundamental question of how the seafarer is to obtain justice in the face of this indifference. First, *'Piracy may be regarded as the very first crime against humanity'*

Robertson, G.(2002:224).

Because of, as already noted, the particularly savage way in which the attacks are carried out against an exposed population. Piracy consists of murder, rape, assault and other inhumane acts which have the character of *erga omnes*, that is valid against all the world, they are a violation of the seafarers most basic human rights.

However, it should also be noted that, in the opinion of a leading British human rights lawyer *'these atrocities are no longer formally regarded as crimes against humanity since they have no linkage with governments'* Robertson, G(2002:251).

On the High Seas the seafarer comes under the jurisdiction of the flag state alone. This applies also to the Exclusive Economic Zone (EEZ) where vessels have high seas rights to navigational freedom. In the territorial sea the coastal State has some jurisdiction and is responsible for maintaining the law within that sea. It does not normally intervene in the internal order of a ship unless specially asked to do so by the flag state or the Master. There is still uncertainty for the seafarers of the possibility of intervention in the absence of such requests, although where there is clearly an act of piracy a naval vessel of any State could in practice intervene, but how can this be ascertained with certainty is the question.

What can at least be ascertained is that pirates and indeed terrorists are by their actions depriving seafarers of their fundamental human rights. Furthermore, the State under whose jurisdiction the seafarer falls when the attacks place are failing by omission to ensure these rights. If this proposition can be accepted then two important consequences follow for the seafarer. First, the issue of compensation for those killed or injured in these attacks, the right to an effective remedy is itself a human right, so States are obliged to provide a remedy under national law. Second, in bringing a case against the State in open court with the attendant publicity may well embarrass the State into taking effective action to protect the seafarer.

These are the principal aspects of piracy and the law on which this study focuses. It goes beyond formal legal discussion as a contribution to Maritime Policy studies and

International Relations. It has as the main concern the safety and welfare of the seafarer who in the complex world of globalisation remains in legal isolation in the face of violent acts and has limited opportunities for redress as victims.

CHAPTER II – THE EVOLUTION OF THE LAWS OF PIRACY

Piracy has taken many complex forms over time, as have the legal regimes. In order to determine how the Laws of piracy emerged and how they meet with the definitions and controls in privateering and modern terrorism it is necessary to trace the long processes of evolution in these respects.

Ancient Times

It has been said that *'piracy has always been part of maritime commerce'* Mukundan, P.(2003:2) but it is only from the period *'800-500 BC that the concept of piracy starts to emerge'* de Souza, P(1999:17):. And this is from extant texts where the word is mentioned explicitly. The Ancient Greeks had two words for pirate. First, *'leistos which means armed robbers or plunder'* de Souza, P.(1999:3) and was used in the time Homer, that is, around 700n B.C. and second *'peirates, from peira to attempt or attack'* OED(1995). This word became *'pirata in Latin'* Rubin, A.P.(1997:7) and thus pirate in English.

To the Homeric Age Greeks piracy seems to have been their way of life with:

'small communities' including fighting men capable of participating in wars as they were fought between acknowledged political leaders within the legal order of the time ' . Homer(1968:39).

Indeed, the opening scene of the “Iliad” gives us a succinct description of the leader of one of these communities; his arrogance, his anger, his raw power which enabled him to lead his men. The following quotation giving a vivid account of their deprivations:

‘The wind bearing me from Ilium made me approach the Ciconians in Ismarus, and there I laid waste the city and destroyed them. And taking their wives and many possessions out of the city, we divided them, that no one might go deprived of an equal share’. Homer(1968:42).

These men had no interest in enlarging their political or commercial domain only in spoil, anything of value that could be carried or driven off, in particular men, women and children as slaves. Indeed Aristotle mentions *‘plundering’* Aristotle(1975:1) as one of the five elements of a political economy.

Nor were the pirate leaders above becoming allied with one Greek city state or another in their battles with each other. One of the first dated inscriptions to mention *peirates* (267 BC) is in honour of Herakleitos of Athenonon who protected Salamis when the Spartan King Agis III was attempting to throw off the Macedonian yoke whilst Alexander was in Asia *‘and when the war of Alexander broke out, and pirates were sailing out from Epilimnon’* Potles, D.S.(1984:22).

Some insight into the stature and character of these pirate leaders can be gained from the following. When Alexander the Great had captured a pirate leader and was about to execute him for his crimes the pirate leader said to Alexander *‘I take small ships,*

you take whole countries. Is it just that you should condemn me? Alexander looked at him for a moment and let him go' de Monet, T(2004:2).

From these warring communities of Greek city states Rhodes emerged as one of the most powerful due to its geographical position where it was ideally placed to act as an entrepot for trade with Egypt, the Levant, Black Sea and the communities to the West and the skill of its people both as seaman and traders. The profits from their trading enabled them to finance a substantial navy which was '*designed as an anti-pirate force*' Berthold, R.M.(1984:98).

To provide for good government of their maritime affairs the Rhodians drew up a code of laws, including piracy, the text of which has unfortunately not survived as a whole but was largely incorporated by the Romans into their civil law.

It was the problem of piracy that caused the Romans to establish protectorates eastwards on the Adriatic coast and what is now Greece. During the first Punic War the Illyrian chieftain had expanded his chief industry of piracy to include Roman shipping. As long as it was only Greek shipping that was attacked Rome remained indifferent, indeed, they had a strong motive for not interfering. Agriculture was the basis of the Roman economy and as the Roman aristocracy grew richer they invested their money in large estates worked by slaves, dispossessing the small farmer. Thus, out of a total population '*of about six million, two million were slaves*'Madden,J(1996:34).

Clearly this stock needed constant replenishment, buying slaves from the slave market that was stocked in part by the pirates was one way of doing this. However, by robbing looting and capturing Roman shipping popular indignation forced the Senate to act. A fleet of 200 vessels was dispatched along with an army of 22,000 troops and the Illyrian capitulation quickly followed. Thus, *'Rome had freed the passage between Italy and Greece from the danger of Illyrian pirates'* Sculland, H.H.(1980:191).

As the Romans expanded their hegemony eastwards they appear to have been in more or less constant conflict with the piratical communities referred to above such that they found it necessary to promulgate a law *Lex de provinciis praetoriis* in about 100 BC stating how the problem of piracy was to be dealt with. Fragments of two copies have been found, one at Delphi, the other at Knidos.

The main elements of the law are as follows:

- '(i) Provisions for the safety of navigation for Romans, Latins and Rome's friends and allies.*
- (ii) Limitations are imposed upon the consuls in office concerning troops stationed in Macedonia.*
- (iii) A list of matters which are not affected by the Law.*
- (iv) Next came instructions to the senior consul to write to various persons informing them of the designation of militia as a praetorian province.*
- (v) Further instructions follow, telling the senior consul to note to: ... the King of Cyprus and to the King ruling at Alexandria and in Egypt and*

to the King ruling in Cyrene and to the Kings ruling in Syria who have friendship and alliance with the Roman people to the effect that it is also right for them to see that no pirate use as a base of operations their Kingdom or land or territories and that no officials shall harbour the pirates and to see that, insofar as it shall be possible the Roman people have them as contributors to the safety of all. The section ends with a general proviso that all magistrates see to it that the law is obeyed.

(vi) the consuls are also very clearly instructed to give special senate audience to the Rhodian ambassadors.

(vii) There then follows a series of orders to the governor of Asia. The governor is instructed to see to the publication of the law.

(viii) The governor of Macedonia is given more specific instructions, relating to his territory.

(ix) The law next orders the governors of Asia and Macedonia to swear to do whatever the people order him to do in this statute and not to do anything otherwise with wrongful deceit.

*(x) The final section of the law is a complex *insurandum in legem* intended to see that the law is obeyed, with a detailed set of provisions for the enforcement of fines for non-compliance.*

It is important to emphasise that this law is the earliest clear statement of the position of Rome concerning pirates. They are effectively being declared enemies of the Roman people, and their friends and allies. The prohibitions on assisting pirates in section (i) and (v) are similar to the prohibitions placed upon Roman allies with regard to the enemies of Rome' de Souza, P.(1999:111)

The Romans, more over, attached great importance to the formal declaration of war consisting as it did of religious rites with the priests representing the entire Roman community and the high priest at the frontier of the state giving that declaration. Clearly, this was not possible with loose political societies *'who accepted the legitimacy of selling goods and persons without the religious and formal ceremonies necessary to begin a war'* Cicero(1928:xii).

In other words the Romans considered themselves to be in a state of undeclared war against these communities. Thus when Cicero used the phrase *'hostes humani generis'* Rubin, A. P.(1997:18) that is enemies of all mankind in respect of pirates the word *hostes* is taken to mean enemies in time of war, not applying to *latrones et praedones*, brigands and robbers, who were common criminals in Roman law.

Around 70 BC the Romans were engaged in a series of civil wars so perhaps their thoughts and energies were directed elsewhere, certainly the Law of 100 BC does not seem to have had much effect. Piracy was still endemic, the famous story is told of how Julius Caesar in 75 BC was sailing to Rhodes to study rhetoric where he was captured by pirates near the island of Pharmcusa:

'Because of his purple robes Caesar was not thrown into the sea but ransomed him for 20 talents which Caesar increased to 50. When released after 40 days he sailed for the port of Milatos where he raised a squadron of ships at his own expense, captured the pirates and had them executed' Defoe,D.(1972:18).

By 67 BC, Rome itself was threatened with starvation and Ostia, the port at the mouth of the Tiber was attacked by the Cilician pirates. The Senate was compelled to act:

'The pirates' power was felt in all parts of the Mediterranean, so that it was impossible to sail anywhere and all trade was brought to a halt. It was this which really made the Romans more vigilant. With their markets short of food and a great famine looming, they commissioned Pompey to clear the seas of pirates' Plutarch(1995:28.1).

The grain supply was the one matter that the Senate could not ignore. Many of the Agrarian dispossessed referred to earlier made their way to Rome such that by this time the cities' population was *'approaching one million'* Boetto, G.(2003:1). It has been estimated that Rome *'needed to import 420,000 tonnes of grain a year'* Boetto, G.(2003:2) to feed this population and in turn this required *'1,200 vessels of approximately 350 tonnes'* Boetto, G.(2003:3) to transport the grain from the growing regions of North Africa, Sardinia, Sicily and Corsica. In addition, of course, were ships carrying wine and oil as well as other necessities. Navigation was usually suspended during the winter months, leaving eight months of calmer weather for transport of these cargoes. This, in turn, means that there must on average have been at least five ships a day due in Ostia.

What became of the seafarers manning these ships? Unlike the Roman Navy where ships were manned by freeman, this included the rowers, and although many were from Egypt and other parts of the Eastern Mediterranean they were nevertheless freeman, the Merchant ships were *'largely manned by slaves'* Robol, R.T.(2000:524).

This includes the position of Master, Justinian(529-565) *'makes several references to this in his Digest'*.

These trained men would presumably have had a high value in the slave market, but they were already somebody's property, so whether they were ransomed or sold is not clear.

The Senate appointed Graeus Pompeius Magnus (Pompey the Great), a General, to rid the Mediterranean of pirates. All provinces and allies had to submit to his authority up to 50 miles inland. He was allotted enormous resources, *'120,000 troops, 4,000 cavalry, 270 ships and had 6,000 talents at his disposal'* Wilkezycki, K.(2003:3).

The Senate were not disappointed; he achieved total success astonishingly quickly. A Roman commentator wrote:

'he divided up the coasts and seas into thirteen regions, assigning a number of ships to each one, with a commander. His forces were spread out, threatening the pirate hordes from all sides so that they were swiftly caught and brought to land. The more elusive ones were driven together towards Cilicia, like bees swarming to their hive. Pompey made ready to move against them with sixty of his best ships. He, himself however, set out from Brundisium and in 49 days he had brought Cilicia into the Roman Empire' Plutarch(1995:28.3).

So successful was Pompey that:

'If one seeks a monument for the Imperial Navy, it may be found in the disappearance of piracy from mens' thoughts. From the time of Augustus to that of Septimium Severus there is not one contemporary reference to a Mediterranean pirate. After Labeo a contemporary of Augustus, no jurist is known to have dealt with the provisions of Rhodian sea law on the subject until the third century' Starr, J.(1975:175).

These laws were municipal in the sense that Roman *imperium* extended over the whole of the known seas. Although it is unlikely that piracy was completely eradicated, but with the principal commercial sea routes being left open long distance trade would have been encouraged to expand:

'For more than two centuries, the Roman peace more or less freed the inhabitants of the Roman world from major military disturbances; the Mediterranean was free of pirates ... ; tax burdens were by and large predictable ... But it seems likely that these conditions allowed the accumulation of capital' Hopkins, K(1983:XIX).

The Middle Ages and the Elizabethan Era

With the disintegration of the Roman Empire in the 3rd c A.D. into the Western Roman Empire, and the Eastern Roman Empire with its capital at Constantinople which developed into the Byzantine Empire, *'very little use was made of sea transport preferring to transport goods overland where possible' Stopford, M.(1997:257).*

However, during the Middle Ages the economy began to grow not only in the Mediterranean with the ports of Barcelona, Genoa, Pisa, Naples and Venice prospering but North Europe also, in particular the British Isles had a thriving export trade in wool to Flanders and afar as Florence. Such that wool was said to be *'half the wealth of the whole land and it, contributed nearly all the country's foreign earnings'*. Hope, R.(1990:34).

Wine was the largest import, mainly from Bordeaux, with imports of raw materials for the woollen industry second, followed by luxury items from the Mediterranean and of course the all important spices; pepper, cinnamon, cloves, ginger from the East.

Perhaps because of their close proximity to the Alps the Venetian Republic became the main centre for the import export trade with the East, *'the first organised voyage of Venetian galleys to north-west Europe was in 1314 but there is no record of their prence in England before a voyage to Southampton in 1319'* Hope, R.(1990:38).

In 1453 Byzantium was defeated by the Ottoman Turks, overrunning Constantinople which they renamed Istanbul, thus gaining control of the trade routes to the East. After 1479 Venice paid tribute to the Ottomans to keep their access to these routes, especially the important spice trade. It was partly in response to the threat of losing access to these spices and to find an alternative route to East bypassing the Islamic world that the papal "Bull Aeterni Regis" was issued that decreed that the unknown world was to be divided between the two most powerful (and catholic) countries in Europe. Spain taking all that 100 leagues west of the Cape Verde Islands whilst those to the East of this line were allocated to Portugal. This arrangement was further

ratified by the Treaty of Tordesillas in 1494 where the line was moved 370 leagues west of the Cape Verde Islands.

The merchants living in these ports and trading with each other had to have a set of rules that they could all agree upon to settle disputes, an informal court was presided over by the “Lord of the fair” to adjudicate upon disputes. These laws were not promulgated by Kings or princes but were merely customary laws of the merchant class. Each commercial city had its own laws the most important being the Consulate of the Sea from Barcelona, the Rules of Oleron which England incorporated into the Black Book of the Admiralty, the Laws of the Hanse Towns and the Laws of Wisby. These laws can be traced back to the Rhodian Sea Law referred to earlier. Moreover, they differed very little between countries, which in fact is not surprising considering the nature of international trade. It is likely that these laws were carried from the Mediterranean to the French coast, onto the German coast and into the Baltic by shipping and commerce and may be regarded as an early example of international law. Amongst the many maritime rules given, they all require the shipowner to pay maintenance and cure expenses, that is, the costs of normal medical care and treatment of a seaman while in the service of the ship. This was introduced into these codes *‘primarily to encourage seaman to participate in the defence of their vessels against rovers’* Tetley, W.(1994:13) as pirates were called at this time. Indeed, the Laws of the Hanse Towns go further:

‘The seaman are obliged to defend the ship against rovers, on pain of losing their wages; and if they are wounded, they shall be healed and cured at the general charge of the concerned in a common average. If any

one of them is maimed and disabled, he shall be maintained as long as he lives by a like average' The Laws of the Hanse Towns:Art. 35(2004).

A pension for life, as will be seen in Chapter 3 is a good deal more generous than their modern counterparts receive. And, *'if the mariners, or any of the company refuse to assist on the like occasion, and the ship be taken or lost, they shall be condemned to be whipped as cowards and rascals.'* Laws of the Hanse Towns:Art.36(2004). Moreover, *'if the mariners resolve to defend the ship, and the Master is afraid and against, he shall be turned out of his post with infamy, and declared incapable of ever commanding a ship afterwards.'* Laws of The Hanse Towns: Art. 37(2004).

In this period the state was not very powerful, there was no Navy as such and safeguarding of the sea was left to the merchants and ship owners. *'Piracy led to reprisal'* Tracy, J. N(1991:10). In these rough times the response of the ship owner was first, to arm themselves in self defence and second, attempt to recover the property or seize the equivalent of. In an attempt to prevent these international incidents escalating into war the European Kings and Princes began to issue "letters of marque and reprisal". Both these words are French in origin, *marque* meaning to seize as a pledge and *reprisal* to seize by force the property or persons of subjects of another nation, in retaliation for loss or injury suffered by subjects of that nation. This concept was entirely a product of the age, the practice was unknown to the Romans. The first recorded instance of one being issued in England was in 1295 where the *'English petitioner was granted the legal right to take back from the Portuguese the value of goods seized by them'* Rubin, A. P.(1997:47). Noting that the letter entitled the holder

to seize any Portuguese goods, not necessarily from those of the original offenders. Thus it is easy to envisage how this practice degenerated into piracy.

Initially the King through the Lord Chancellor issued these letters. However, in 1357 the High Court of the Admiralty was founded for jurisdiction of matters that arose on the high seas out of the reach of the common law of England. In addition to issuing letters of marque and reprisal it was also responsible for jurisdiction over piracy and prize. The court had to adjudicate to ensure that the value of the goods and or ship(s) taken did not exceed the loss given in the original letter and that the nationality of these articles was as given. The jurisdiction of the court was founded on the Rules of Oleran and was thus essentially Roman Law, not common law. The justification for separating the law in this way was to make the judgements of the court acceptable aboard, in particular, to title of ownership of the prize(s). Thus, we may think of this special brand of municipal law as another early example of international law. All this was neatly summed up by Sir Julius Caesar, Judge of the High Court of Admiralty in 1592 when he wrote:

'The Civil Lawes Imperiall were best suited for the sea : which for that by long continuance in the most flourishing commonwealth of Rome, they have been many ages since, the most perfect and equal lawes of the world and are generally received throughout all nations about us.' Hill, L.M.(1988:49).

The Lord High Admiral had deputies with their own courts in all the major ports of the time. Thus, a commission of 1374 directed the Deputy Admiral of the Cinque Ports to adjudicate upon criminal matters arising off the southeast coast. Amongst the offences

mentioned are *'robberies, depredations, discords and slayings'* Rubin, A.P.(1997:48). The word piracy is not mentioned. The *'first direct legal use of the word appears to have been in an order of Henry VI of 1443 directing the restitution to Englishmen of goods taken from them by pirata'* Rubin, A. P.(1997:49).

This, referring to property rights not criminal activities. It is recalled that from the Renaissance onwards the vernacular of scholars and learned men was Latin. Thus a John Hopton was required by Henry VIII in 1511 to *'seize and subdue all and singular such praedones, pirata, exiles et bannitos wheresoever they shall be seized'* Rubin, A. P.(1997:49).

The Offences at Sea Act of 1536 gave the Admiralty Courts the authority to adjudicate upon *'Traytors, Pirates, Theives, Robbers, Murderers and Confederates upon the Sea'* Rubin, A. P.(1997:86) and if following a guilty verdict, *'the Judgement of Death was given against the offenders'* Menefee, S.P.(1989:52).

However, it was recognised that these were criminal matters and under this Act the common law of England was to be applied to the offenders. The Admiralty Court was becoming more like a County Assize with the Admiral or one of his deputies as Judge and juries allowed. The jurisdiction of the court to enforce this act was apparently restricted to vessels flying the English flag wherever they were afloat, including foreign ports and the navigable waters of England as far as the first seaward bridge in the rivers when common law became applicable. *'There was considerable doubt as to whether or not it extended to foreign vessels outside England's Common Law jurisdiction even within three miles of the English coast'* Rubin, A.P.(1997:52). Thus

a law was in place to resolve this problem but the political will appears to have been sorely lacking. Piracy was endemic, moreover:

'it was not an activity of marginal outcast communities... on the contrary, it was often an activity of the wealthy and well connected, privately and sometimes publicly backed by the Queen and her ministers' Rodger, N. A. M.(1997:345).

'In 1442 the Earl of Warwick gained some £10,000 by piracy and plundering a fleet of Genoese merchantmen bound for Lubeck' Scammell, G. V.(1961:13).

'Sir George Carey, governor of the Isle of Wight, employed his own ships on pirate cruises and ran a well advertised market for other pirates to bring their spoil for sale' Earle, P.(2003:20)

Leading families in Cornwall, the Courtenays and Trevelyans financed and acted as receivers of goods stolen at sea. Indeed, Sir John Killigrew, vice admiral of Cornwall, *'was head of a commission set up by the Elizabethan government to look into the problem of piracy whilst at the same time piracy was one of his major sources of income'* Earle, P.(2003:20).

However, without the backing of the local gentry the consequences of a pirate could be dire. In 1581 John Piers, *'a verie notorious pirate'* Acts of the Privy Council(1550:228) was convicted and hanged near Studland *'to the terrifying of others, for that the same place hath bene mucche frequented and the inhabitants molested with pirates'*Acts of the Privy Council(1580:227). It should be noted that

pirates of this era were not enemies of all mankind, they did not in general attack their own countrymen.

England, the Netherlands and France never accepted the edict of the Papal Bull and relations between these countries and Spain deteriorated with English pirates attacking the Spanish treasure fleet on its way to Spain and Spanish possessions ashore in the Caribbean and the South American mainland. The concept of a “letter of marque and reprisal” was extended with the introduction of privateers. A privateer is *‘an armed vessel owned and officered by private individuals holding a government commission and authorised for war service; or the commander of such a vessel’* OED(1995).

Indeed, there is evidence that Sir Francis Drake *‘that master thief of the unknown world’* Andrews, K.R.(1970:81) received *‘secret permissions uttered by Elizabeth although an open commission would have incited an unwanted war with Spain’* Rubin, A.P.(1997:86).

It was simply not in the national interest to suppress too hard these activities. At the battle with the Armada in 1588 the English mustered 34 royal ships, these being the personal property of the Queen, and 192 privately owned ships, some coming from as far afield as Newcastle. These ships being manned by *‘approximately 8,000 seaman whose normal work was trading, privateering and piracy’* Lloyd, C.C.(1968:34).

Clearly this battle could not have been fought, let alone won if ships had been impounded and the seamen in jail. War broke out between England and Spain in 1585 and privateering became big business, *‘as significant in Elizabeth I’s economy*

as automobile production in Elizabeth II's' Hope, R.(1990:144), with considerable benefit to the Crown itself. The usual division of the spoils being 10% for the Crown and 90% to the owner:

'There is clear evidence that by 1599 piracy was to become the crime in English municipal law of an English privateer even under valid English License who did not bring his capture in for English adjudication' Rubin, A.P.(1997:86).

The implication is that the Crown is being robbed of its 10%.So began what has been termed the classic or golden age of piracy.

The Golden Age of Piracy

From the late 16th C until the early 19th C was an age of considerable turmoil and instability in Europe. As was noted relations with Spain deteriorated to the point where open war broke out in 1585 and lasted until 1603. The Thirty Years' War began in 1618 and involved all of Europe in one way or another. The English began economic sanctions against the Dutch in the 1650's and the two nations were at war three times in the next two decades. France under Louis XIV began to pursue an aggressive expansionist policy such that she became a more or less permanent enemy until the final defeat of Napoleon in 1812. Internally the English had a civil war from 1642 until 1648 and lost the American colonies in 1776.

It was against this backdrop that what has long been considered the '*golden age of piracy*' Piracy in the Caribbean(2003:1) began and lasted until the early 18th C. The

popularised tales of pirate captains such as Blackbeard, Morgan and Kidd gave piracy, at least in the English speaking world, the aura of swashbuckling heroes engaged in glamorous daring-do and has been trivialised to the extent of a pirate character appearing as the hero in a children's television cartoon series. Whereas the reality, especially for the seafarers, is that piracy has always been characterised by extreme brutality and cruelty from ancient times up to, as will be seen in Chapter 3, the present day.

Furthermore, in challenging Spanish hegemony as decreed in the Papal Bull referred to earlier, England, France and the Dutch United Provinces were all establishing their own colonies in the West Indies. After Barbados, the English expanded into St. Kitts and Nevis, Antigua and Montserrat, evicting the Spanish from Jamaica in 1655. France had Guadeloupe, Hispaniola and Martinique whilst the Dutch established themselves on Curacao and St. Eustatius. These colonies had to fend for themselves, the feuding European states had no spare resources to defend these colonies or enforce their laws. Indeed, at this time England did not have the resources to enforce their own law at home either. In 1612 the Privy Council found it necessary *'to offer a General Pardon to all pirates who surrendered, on very generous terms which allowed them to keep all their loot, 'the entire fruition of whatsoever they were then possessed of'*. Earle, P.(1988:61)

Thus, it could be argued that the Governors of these fledgling colonies had little choice but to issue "letters of marque and reprisal" to anyone who would take up these commissions, whatever their character, good or otherwise, to secure their territorial gains and to take the fight to the Spanish. Henry Morgan is a case in point, a

Welshman who came out to the West Indies in about 1654 as part of Cromwell's '*Western Design, whose object was to carve out for England a protestant empire in the Indies*' Earle, P.(1988:94) and '*whose settlers were expected to annoy the King of Spain in the Indies*' Earle, P.(1988:95).

His commission was signed by the Governor of Jamaica and under this commission he captured and sacked Porto Bello in 1669 followed by Maracaibo the following year. It was not all one sided of course, any seafarers captured by the Spanish were '*treated as pirates, some to be executed, others imprisoned for long periods, or sent to serve on the galleys in Spain*'. Earle, P.(1988:61)

There is some doubt as to whether Morgan's last commission was legal at all as it was issued several months after the signing of the Treaty of Madrid in July 1670. However, this commission was his legal basis for the capturing and sacking of Panama in 1671. Surprisingly, Henry Morgan was knighted for this exploit. Surprise, because the Treaty of Madrid was designed to normalise relations between the two countries in both Europe and the West Indies. In return for Spain's recognition of England's colonies, she agreed to cease hostilities in the Caribbean and to relinquish her old policy of '*No Peace beyond the Line*'. Piracy in the Caribbean(2003:2) Not only did this Treaty mark the end of '*England's reliance on that raffish instrument of foreign policy, the privateer*' Earle, P.(1988:95) but piracy itself would not be condoned and it was the duty of government to provide a safe environment for their merchants. This policy was not the preserve of the English, French colonies ceased to issue commission to privateers from 1684 onwards.

Judicial thinking reflected government policy:

'There are some sorts of felonies and offences which cannot be committed anywhere else but upon the Sea, within the Jurisdiction of the Admiralty ... the chief of this kind is Piracy. You are therefore to enquire of all Pirates and sea-rovers, they are in the Eye of the Law Hostes humani generis, Enemies not of one Nation ... only, but of all Mankind' Rubin, A.P.(1997:97). Moreover, *'This power and Jurisdiction which his Majesty hath at Sea in more remoter Parts of the World, is but in concurrence with all other Sovereign Princes that have Ships and subjects at Sea'*. Rubin, A.P.(1997:97)

However, the Offences at Sea Act of Henry VIII was found to be hopelessly inadequate to deal with offences that occurred many miles beyond English soil. To bring the law up to date and effective parliament passed *'An act for the more effectual suppression of piracy'* Piracy Act(1700), which delegated the necessary authority to locally convened Admiralty courts in the colonies themselves to try cases of piracy. The court to consist of seven officials of standing or naval officers, no jury was required. Furthermore this Act extended the definition of piracy to include persons receiving stolen goods at sea or ashore, or assisting a known pirate in any way would be judged to be an accessory and thus liable to the same penalties as a pirate. That is, death, loss of lands, goods and chattels. This statute defined piracy as a municipal law crime, it did not rest on any assertions of *jus gentium*, that is the law common to all countries.

Nevertheless it was thought necessary to back up this action with the offer of a general pardon in December 1717. The terms being very generous, all those who surrendered

by the 5th September 1718 would be allowed to keep their goods and chattels even if stolen and all offences including murder pardoned. Those who refused would feel the full weight of the law, a bounty of £100 for Captains and £20 for Able Seamen of pirate ships was offered to those who caught them. It has been estimated that *'no fewer than 400, and probably 500-600 pirates were executed between 1716 and 1726'* Rediker, M.(1981:38).

Moreover by an Act of 1721 Masters and seaman would be encouraged to defend their ships against pirates:

'... and the widows of such seamen as are slain, in any piratical engagement, shall be entitled to a bounty, to be divided amongst them, not exceeding one fiftieth part of the value of the cargo on board; and such wounded seamen shall be entitled to the pension of Greenwich Hospital; which no other seamen are, except only such as have served in a ship of war. And if the commander shall behave cowardly, by not defending the ship, if she carries guns or arms, or shall discourage the mariners from fighting, so that the ship falls into the hands of pirates, such commander shall forfeit all his wages, and suffer six months imprisonment' . Piracy Act(1721)

And these laws had far reaching effects, *'it has been shown, that a substantial part of the fall in freight rates on the North Atlantic between the sixteenth and eighteenth centuries reflected the savings made in costs as a result of the suppression of piracy'* Anderson, J. L.(1995:).

With the golden age of piracy more or less over in the West Indies and Americas, some of the few pirates still at large sailed for the Indian Ocean. Now since the days of John Hopton it had been the practice of Kings to issue commissions to seize and subdue all pirates wherever they shall from time to time be found.

There is a thin line between privateering and piracy. A case example may illustrate this, and show also the political and legal hazards involved for the seafarer as one spills over to the other. William Kidd was born in Scotland in 1645 and after 1689 he was sailing out of New York as a legitimate privateer in the West Indies and off the Eastern Seaboard of America. In London in 1695 Kidd received '*two commissions dated 26th January 1695 and 11th December 1695*' Rubin, A.P.(1997:106) . The first to apprehend pirates '*... full power and authority to apprehend, stop, and to take into custody all such pirates, free-booters and sea-rovers ...*' Rubin, A.P.(1997:106), the second, to attack the French:

'... and therewith by force of arms to apprehend, seize and take the ships, vessels and goods belonging to the French King and his subjects, and to bring the same to such port as shall be most convenient in order to have them legally adjudged in our high court of admiralty' Rubin, A.P.(1997:106).

In October 1697 his refusal to attack a Dutch ship off the Malabar coast brought his crew to the edge of mutiny and in restoring discipline killed his gunner, William Moore. In January 1698 he took the *Quedagh Merchant* sailing under a French East

India Company Pass but the English East India Company had acted as broker in chartering the ship. Kidd realised that this connection would cause trouble for him and his crew. *'The taking of this ship will make a great noise in England'* Zactis, R.(2002:150) which indeed it did, leading to questions in Parliament.

He scuttled his own unseaworthy ship and sailed the *Quedagh Merchant* back to the West Indies to learn he had been denounced as a pirate. Leaving this ship in the West Indies (where it subsequently disappeared) he went to New York to protest his innocence. However, he was sent to England to stand trial charged with the murder of his gunner and piracy. On the first day of his trial Kidd was found guilty of murder and on subsequent days guilty of two counts of piracy. The legal issues were first, he could not produce his commission to attack French shipping, in this case the *Quedagh Merchant*, thus he had no legal basis on which to attack this ship. Second, he did not bring his capture in for adjudication by the Admiralty Court as required and this omission was regarded as piracy.

Kidd was hanged at Execution Dock, Wapping, the traditional place to hang pirates as a warning to others on the 23rd May 1701. Interestingly *'his effects valued at £6472 were given by Queen Anne to Greenwich Hospital'* Zactis, R.(2002:375).

This case shows some of the legal pitfalls in maritime law into which an individual could fall. A much more complex situation arose in relation to nation states, but again the result of politics and legal ambiguity. This is the case of North European States and the pirates of North Africa. It ultimately drew in the fledgling United States.

The Mediterranean Sea

After the fall of Constantinople the Ottomans continued to expand their territory along the southern shore of the Mediterranean and across into Spain. This, however, was the limit of Ottoman expansion in this area and in 1492 the Islamic forces were defeated by the Christians and expelled from Spain. These Arabs, known as Moriscos settled on the North African shore mainly in Sallee, what is now Rabat. Spain took five coastal settlements, including Tripoli and Algiers to pre-empt any attempt by the Moriscos to retake Granada. In the early 16th C these coastal settlements were retaken by Islamic forces and the Barbary States of Morocco, Algiers, Tunis and Tripoli came into being. Morocco was ruled by a Sultan, Algiers and Tunis by a Dey and Tripoli by a Pasha. All recognised the sovereignty of the Ottoman Sultan but were largely self governing *'and carried out an independent diplomatic and military existence'* Earle, P.(1988:40). These states extended their jihad to attacking and plundering Christian vessels and coastal settlements. These attackers were designated corsairs meaning *'pirate from the Latin curcus meaning inroad'* OED(1995).

Muslim owned ships were never attacked by them. Legally of course they were privateers, operating with the permissions, indeed encouragement of their rulers. They were very successful ranging over the whole of the western Mediterranean with the Sallee corsairs roving as far afield as the English Channel and the southern coast of Ireland. It has been estimated *'that from 1622 to 1642 over three hundred English ships and around seven thousand English subjects were captured by the corsairs'* Hobb, D.D.(1994:139). Those captured being condemned to slavery in the Barbary States, if they had relatives wealthy enough then they could be ransomed. The outlook

for the ordinary seaman must have been bleak, however, Pope Innocent III had established an order for the Redemption of Captives. *'The Order was organised to collect and distribute funds for the relief and ransom of Christian captives'* and had branches throughout Western Europe. *'The western movement for the abolition of slavery is believed to have grown out of this tradition of Christian charity and ransoming of slaves'* Islam's War Against the West(2004:2).

With such terrible predations taking place the question must be asked why there was no international co-operation sooner to defeat the corsairs. The combined force of the English, French, Dutch and Spanish navies could have easily done so. The answer is first, that these countries if not actually at war with each other were intensively suspicious of each other's motives, *'an expedition against the Barbary corsairs became the stock diplomatic formula for covering some ulterior and sinister design'* Corbett, J. S.(1904:52). Second:

'the Maritime powers, especially England and France, realised that if the corsairs could be persuaded to leave their shipping alone, these predators would then concentrate their attention on the shipping of weaker nations and so reduce the competition in trade' Earle, P.(1988:73),

in modern jargon they obtained a comparative advantage. With this in mind England began to pay an annual tribute in return for the free passage of their ships along the Barbary coast in 1662.

The effect of this policy can be seen in the case of Venice. This city state is a documented case in which piracy contributed to the decline of an established commercial centre. Between 250 and 300 Venetian ships are estimated to have been taken between 1592 and 1609. Moreover, *'from an expected return of 10,000 ducats on a voyage in 1607, 8,500 would have been consumed in expenses for port dues, soldiers, sailors and insurance'* Tenenti, A.(1967:101). Venice as a small state simply couldn't compete with the larger powers and had to turn from the sea.

The United States as an independent country went to war with Tripoli in 1804 over the question of paying tribute to little avail. With the end of the Napoleonic wars the Congress of Vienna of 1815, discussing the abolition of the Slave Trade in general decided to assemble an international naval force to eradicate Christian slavery in the Barbary States and rid the Mediterranean of the corsairs. It was realised (as the Romans had found out) that the only way to truly rid areas of pirates was to destroy their bases. This was done by an Anglo-Dutch force in 1816 and the French in 1820.

The British Government never regarded the corsairs as pirates in the legal sense or the Barbary States as piratical. The government considered them as legitimate states fulfilling Cirero's criteria of a fixed domain, public revenue and form of government. Thus the Moors were pirates in the Roman sense and Britain was in a state of undeclared war against the Barbary States.

At the end of this period, in 1795, the words Terrorism and Terrorist came into being from the French *terroisme* meaning *'Government by intimidation. A policy intended to strike with terror those against whom it is adopted and terrorist used as a political term. Anyone who attempts to further his views by a system of intimidation'* OED(1995).

As we can see from the definition in its original meaning terrorism was used by Government as a policy to consolidate the States' rule by intimidation. In this case the State was France.

The 19th.Century- Early 20th. Century- Pirate and Pax Britannia

At the end of the Napoleonic wars in 1815 Britain was the world's strongest maritime power and her *imperium* extended over all the oceans of the world. Thus, the era of Pax Britannia began.

The golden age of piracy was over, the Barbary States were subdued and what pockets of piracy remained the British Navy had the resources to deal with. To encourage them to do their duty in this respect the Government found it necessary to pass '*An Act for Encouraging the Capture or Destruction of Piratical Ships and Vessels*' Piratical Ship(The Bounty)Act(1825) where a bounty was paid for every piratical person taken or killed during the Attack on their ship. The going rate being £20 with £5 being paid for every person not taken or killed but proved to be on the pirate ship's books. This act did not apply to private vessels, i.e. privateers. With a large Navy, Britain now had no need of their services. Nor did the Act make any distinction as to the nationality of the pirate or ship used by them.

There had been a healthy flow of maritime trade between the Indian Ocean and the South China Sea for centuries. This trade had to pass through the Malacca and Singapore Straits '*where predation on shipping was endemic, an intrinsic part of the*

local communities' economy and way of life, fully supported by their sultans who regarded these activities as 'legitimate naval operations' Tither, G(2005:5).

Moreover, the Moros from the Southern Philippines whom the Spaniards had failed to pacify, attacked shipping in this area and carried out raids ashore in search of slaves. All the peoples of this region lived in established communities and fulfilled the criteria for statehood referred to earlier. As long as British trade was little affected, it was not in the British interest to expend too much effort in subduing these peoples. However, the establishment of the Freeport of Singapore in 1819, the expansion of trade between India and China led to increased attacks on British shipping such that *'predation became so acute that the naval presence was increasingly strengthened'* Anderson, J.L.(1995:16) *'Action under this statute was a major part of British imperial activity from 1825 to 1850 and the British seemed to assume they were legally at war with all who obstructed the expansion of British hegemony'* Rubin, A.P.(1997:223).

Hence the British using their municipal law were treating these people as pirates in the Roman sense of the word. So zealous were the Navy that the provisions of this Act proved too expensive for the Exchequer, *'The bounty paid out in one action alone was over £42,000'* Fox,G.(1949:112), that this Act was repealed in 1850 to be replaced by an Act to pay a reward at the discretion of the Commissioners and further to *'... attack or be engaged with any persons alleged to be Pirates afloat or ashore ...'* Piracy Bounty Act(1850). Thus, it seems that British *imperium* on the High Seas was to be extended to British *dominium* on land.

Ever since the landmark decision by the Judge, Lord Mansfield, in the case of *James Somerset v Charles Stewart* in 1772 that the status of slavery was unknown to the common law of England, thus abolishing slavery in England, the anti-slavery movement had gathered pace such that in the early 19th C. both Britain and the United States wished to use the laws of piracy to tackle the problem of slavery. The United States statute of the 15th May 1820 Section 4 said that if *'any citizen seize any negro or mulatto, and forcibly bring or carry or receive on board any such ship or vessel with intent such citizen shall be adjudged a pirate; and on conviction Suffer death'* . Piracy Extension Act(1820). Similarly in Britain *'An Act for the more effectual Suppression of the African Slave Trade'* Slave Trade Act(1824), was passed where Persons wilfully shipping, embarking, receiving, detaining or confining any person on board a ship for the purpose of being carried into slavery shall be adjudged guilty of piracy and on conviction suffer death. This line of attack failed in both their courts. In America in the case of *US v Antelope* Chief Justice Marshall *'held the slave trade not to be a violation of the law of nations'* 23 V.S.(Wheaton) 66 (1825) and hence not piracy. Similarly, in England in the *Le Louis* case of 1816 the Judge, Sir William Scott, said *'Be the malignity of the practice (slavery) what it may, it is not that of piracy in legal consideration'* Rubin, A.P.(1997:165).

Such has been the moral outrage and publicity that slavery is now prohibited by international law, the latest convention giving this effect dated 1926. It is worth noting here the public's perception of the two offences. Arguably, piracy is of the greater evil consisting as it can do of deliberate murder whereas generally speaking slavery does not. A dead slave is of no economic value to the slaver hence he has every interest in keeping his slaves alive.

Modern Rulings

Thus it can be seen that the laws of piracy, positive in nature, that is man made law, stretched back many centuries as municipal law. The British at least, used their municipal law in two separate ways. First, as a criminal act within the jurisdiction of the Admiralty courts and second, in treating piracy as a label for states seen as being outside the family of European States where raiding and taxing commercial shipping was considered legitimate. The laws of piracy being cynically ignored in the case of the Barbary States and used ruthlessly in the case of Malay States. However, Sir William Blackstone in 1765 appeared to take a naturalist viewpoint. Natural Law assumes that rules of human behaviour derive ultimately from sources outside the will of Mankind, they are God's Will. He wrote in his commentaries in the Laws of England that *'The Law of Nations is a system of rules, deducible by natural reason and established by universal consent ... in the construction of which there is also no judge to resort to, but the law of nature and reason...'* Blackstone, W.(1765:1). One of the principal offences he considered to be piracy. Here he was using the phrase Law of Nations to mean *jus gentium* that is the law common to all countries.

However, nearly a hundred years later the American jurist Judge Kane neatly summed up the position as regards piracy in the case of U.S. v Darraud of 1855 when he said that:

'In a word, no state can make a general law applicable to all on the high seas. Where an act has been denounced as a crime by the universal law of nations, where the evil to be guarded against is one which all mankind

recognise as an evil, where the offence is one that all mentioned concur in punishing, we have an offence against the Law of Nations. Thus pirates may be punished by the first taker' 3 Wallace 143(3rd.Circuit)(1855:160).

Thus, by the mid 19th C the phrases *jus gentium* that is the law common to all nations and *jus inter gentes* the law between nations, that is international law, and the concepts of *hostes humani generis*, common enemies of all mankind and *jus cogans*, the peremptory norms of general international law were well understood. Moreover, in the public mind the phrases '*law of nations and international law had by 1832 become synonymous*' Rubin, A.P.(1998:138). Thus piracy was an offence both in national or municipal law, and international law.

At the conclusion of the Crimean War the various states involved met at the Congress of Paris in early 1856 to settle terms. This war had shown that there were conflicting methods used by states in the treatment of enemy vessels and property at sea on the one hand and neutral vessels and property on the other. The last act of the Congress was to adopt the Declaration of Paris which established four principles of international law, the most important of which was to abolish privateering. Although the Declaration only had seven signatories, the United States and Venezuela declining to sign, virtually all other maritime powers acceded to it over time, and many non-parties acted in accordance with the rules, which acquired the '*status of customary international Law*' Paris Declaration(1856). Hence, this may be regarded as the first attempt to codify International Law as it applied to the sea. This declaration has never been superseded and thus may be regarded as still valid. Indeed, these principles were again reaffirmed at the Hague Convention of 1907 but with what could be regarded as

a retrograde step the use of armed merchant ships was permitted as long as they were commissioned as warships. Nevertheless *'by the late 19th C piracy was only practiced on a small scale in such areas as the Aegean and the coast of China'* Ward,R.T.(1914:178) and that *'the end of piracy, after centuries, was brought about by a public feeling, backed up by the steam engine and telegraph'* Gosse, P.(1946:231).

From the late 19th C onwards the "divine right to rule" by the Monarchs of Europe was increasingly being questioned. This, together with the increasing pace of industrialisation which gave rise to massive social changes led to the spawning of several revolutionary organisations who used terrorism as we know the term today in an attempt to force change.

In Russia there was the Narodnaya Volya or Peoples' Will who succeeded in assassinating Tsar Alexander II in 1881. In Turkey militant Armenian nationalist groups pursued a terrorist strategy against the Ottoman Empire. In the Balkans it was a member of the Mlada Bosna or Young Bosnians who in their fight for freedom from Hapsburg rule sparked off the first World War when Gavrilo Princip assassinated the Archduke Franz Ferdinand in Sarajevo.

However, after the end of the First World War the community of nations both nationally and internationally seemed to lose its way with regard to the laws of piracy. At the Washington Naval Conference of 1922 on the Limitation of Armaments, no doubt mindful of the havoc wrought on merchant ships by the submarine agreed *'that the general international law of war forbade the destruction of a merchant ship unless*

the crew and passengers have first been placed in safety' Treaty Relating to the Use of Submarines(1922:Art.1). It stated further *'that any person, whether or not under the orders of a government superior shall be deemed to have violated the laws of war and shall be liable to trial and punishment as if for an act of piracy'* Treaty Relating to the Use of Submarines(1922:Art.3).

Likewise in the Nyon Agreement of 1937 (the Spanish Civil War) the Preamble says:

'Whereas these attacks are violations of the rules of international Law in Part IV of the Treaty of London of 1930 ... and constitute acts contrary to the most elementary dictates of humanity, which should be justly treated as acts of piracy' Nyon Agreement(1937:Preamble).

Never before has an act of piracy been thought of as a war crime, there was no precedent for this notion. Historically for an act of piracy to have occurred there had to have been an element of *animo furandi*, that is private gain, whether committed by a pirate or a privateer exceeding his commission.

In the inter war years there were two cases tried under municipal law that further confused matters. First, a Chinese vessel attacked another Chinese vessel in the South China Sea, on the high seas. The perpetrators were captured by the British Navy also on the high seas and taken to Hong Kong to be tried and later convicted of piracy. However, this case went through all the superior courts up to the Privy Council on the question of whether or not piracy could occur if there was only an attempt to rob, actual robbery not, having taken place. Their Lordships ruled that *'... that actual*

robbery is not an essential element in the crime of piracy jure gentium' Piracy Jure Gentium [1934] AC 586. This ruling appears to fly in the face of all known precedents. A crime may have been committed but it was not piracy. Second, an American court in the Philippines convicted for piracy certain Moros, who with a long history of piracy and slave taking, boarded a boat flying the Dutch flag in the territorial waters of the Dutch East Indies, raped the women and sank the boat. The judges said: *'the jurisdiction of piracy unlike all other crimes has no territorial limits, it does not matter that the crime was committed within the 3-mile limit of a foreign state'* Rubin, A.P.(1997:332).

This ruling also appears to fly in the face of all known precedents, piracy can only be committed on the high seas or perhaps within the 3-mile limit of the pertinent flag state. Furthermore, not only was there no *animo furandi*, but in any event the crime of rape is surely more serious than that of piracy.

In 1924 the Council of the League of Nations convened a committee of experts to propose a list of topics that would be suitable for codification in International Law. Perhaps mindful of the confusion that the Washington Treaty created, piracy was one of the topics chosen. The committee did indeed produce a paper entitled "Draft Provisions for the Suppression of Piracy" and reflected *'the assumption that there is a single conception of piracy in the international legal order reflecting a stable natural law that did not change over time'* Rubin, A.P.(1997:334).

This as we have seen is completely wrong, in the British case at least, the Law of piracy was always policy driven. Furthermore, in the words of the Polish representative and approved by the league council:

'It is perhaps doubtful whether the question of piracy is of sufficient real interest in the present state of the world to justify its inclusion in the programme. The subject is in any case not one of vital interest for every state, or one that can be regarded as in any way urgent' Rubin, A.P.(1997:334)

Not surprisingly nothing more became of this report.

In the inter war years this Committee of the League of Nations also looked at the problem of terrorism noting that *'the rules of international law concerning the repression of terrorist activity are not at present sufficiently precise to guarantee efficient international co-operation in this matter'* Hoffman,B.(1998:9). An International Convention on this subject was drafted where terrorism was defined as *'All criminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons or a group of persons or the general public'* Terrorism Convention(1937). Perhaps because of the situation in Europe at this time, the late 1930's, this convention was never ratified.

At much the same time the Harvard Law School produced what became known as the Harvard Draft. This draft examined the laws of piracy in depth, both international such as they were and the municipal laws. This resulted in the Harvard Draft

Convention on Piracy which ran to 19 Articles, the underlying logic of these Articles was:

'pirates are not criminals by the laws of nations, since there is no international agency to capture them and no international tribunal to punish them ... it cannot truly be said that piracy is a crime or an offence by the Law of Nations' Rubin, A.P.(1997:334).

Moreover:

'theory of this draft convention, then, is that piracy is not a crime by the law of nations. It is the basis of an extraordinary jurisdiction in every state to seize and to prosecute and punish persons ... for factual offences which are committed outside the territorial jurisdiction of the prosecuting state and which do not invoke attacks on its peculiar interests' Rubin, A.P.(1997:334)

Here we can see a glimmer of the perceived difference between the concept of terrorism and piracy in the phrase "attacks on its peculiar interests". The German jurist Paul Stiel made this concept more explicitly in his definition of piracy: *'Piracy is a non-political professional course of forcible robbery against nearly all countries undertaken at sea'* Stiel, P.(1905:117).

Many of these articles were used by the International Law Commission in preparing a text for the basis for what became the Convention on the High Seas(HSC) of the 29th April 1958. As far as piracy is concerned the Articles within the 1958 Convention

were virtually unchanged in the 1982 United Nations Convention of the Law of the Sea(UNCLOS). Thus it may be seen that the Laws of Piracy as Laws between nations as opposed to the Law of Nations is a recent innovation in international relations. However, as will be seen in subsequent Chapters these laws have had little impact practically in protecting the seafarer outside the State regardless of the flag of the ship.

CHAPTER III – VIOLENCE AT SEA AND LEGAL REGIMES

'Acts of piracy and armed robbery against ships represent a serious threat to the lives of seafarers, the safety of navigation, the marine environment and the security of coastal states' Oceans and the Law of the Sea(2001:11)

The above quotation taken from the UN report on Oceans and the Law of the Sea to the 56th session of the General Assembly neatly encapsulates the problem. Moreover following the attacks on the World Trade Centre in New York on the 11th September 2001 governments in reviewing their security arrangements realised that terrorism poses exactly the same threats to the maritime community as does piracy and armed robbery. Simply put, these threats are making the environment in which ships' crews have to work more unsafe.

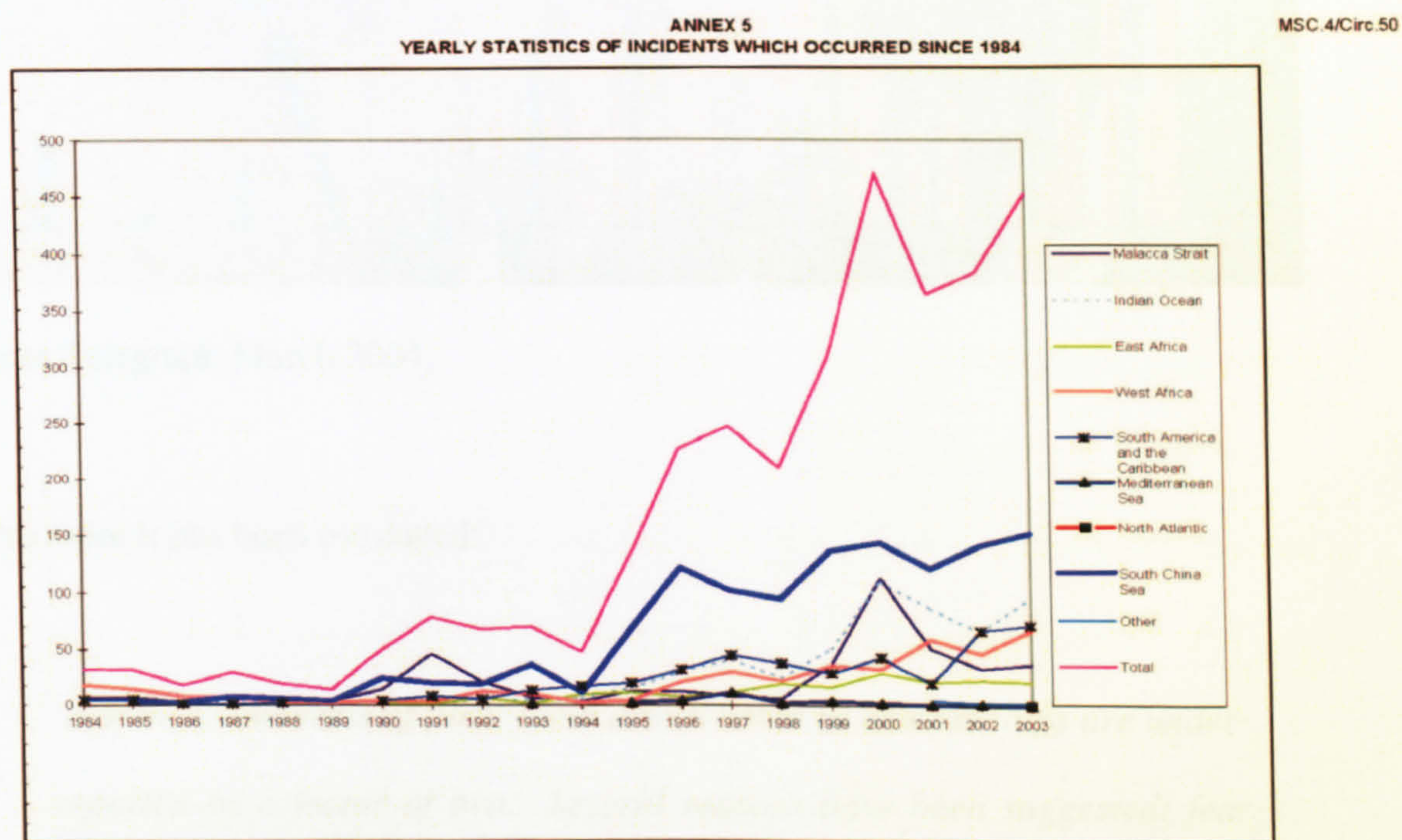
Petty theft from ships alongside in port or at anchor has always been a problem in certain parts of the world but if we have to date modern piracy becoming of serious concern to the international maritime community then perhaps we can cite 1983. This was the year when Sweden brought to the attention of the MSC of IMO the situation off the West Coast of Africa where ships were being attacked at anchor, sometimes many miles offshore, by armed gangs using fast motor launches. These *'piratical attacks had grown to such an extent that the situation had become "alarming"'* IMO Piracy and Armed Robbery at Sea(2000:2)

This resulted in resolution A545 (13) – Measures to prevent acts of piracy and armed robbery against ships where amongst other matters Governments were urged to take,

as a matter of highest priority, all measures necessary to prevent and suppress acts of piracy and armed robbery from ships in or adjacent to their waters.

Since that time, as can be seen from Figure 1, not only has the geographical spread of reported incidents increased but armed attacks on merchant shipping increased almost exponentially since 1992.

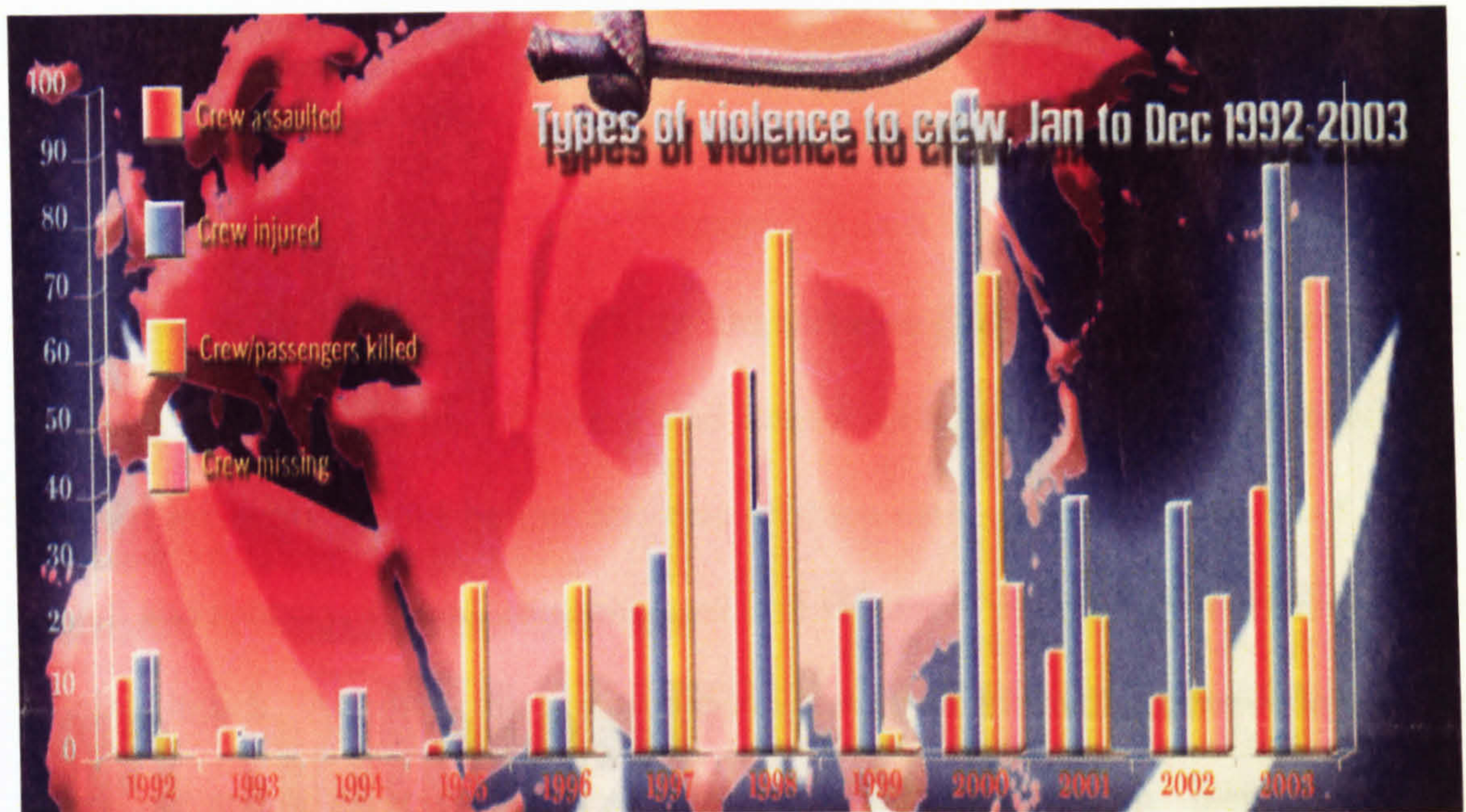
Figure 3.1



Source: IMO, Reports on Acts of Piracy and Armed Robbery Against Ships, Annual Report, 2003.

As can be seen from Figure 2 in tandem with the increased attacks so has the level of violence to the crews increased such that for the year 2003 'there were 445 reported attacks resulting in 21 killed, 88 injured, 71 listed as missing and 359 taken hostage'. IMO Annual Report Piracy and Armed Robbery Against Ships 2003(2004:1)

Figure 3.2



Numast Telegraph March 2004.

Furthermore it has been estimated:

'that these incidents of piracy and armed robbery against ships are under-reported by a factor of two. Several reasons have been suggested: fear that a successful act of piracy will reflect on the master's competence, concern that such a report would embarrass the State in whose territorial waters the act occurred (the coastal state), the belief that an investigation would disrupt the vessel's schedule and the possibility that the shipowners' insurance would increase' Piracy and Armed Robbery at Sea(2000:2).

The majority of reported attacks, '*a total of 3405 from 1984 to March 2004*' IMO 4th. Quarterly Report 2003(2004:1), are opportunistic in the sense that the pirates board to steal whatever of value comes to hand quickly including in many cases cash from the Master's safe. One thing they all have in common however, is the violence, sometimes extreme violence used or threatened against the crews concerned. This was recognised by the International Maritime Organisation (IMO) Working Group of 1992 reporting on the problems of piracy and armed robbery. They recommended that reported incidents should be put into one of three categories; first, low level armed assault and robbery; second, medium level armed assault and robbery and third, major criminal hijack. Although the first two categories result in small economic loss to the shipowner and/or cargo owner the use of the term "armed assault" mentioned in all three categories represents the most serious danger to life for the seafarers concerned.

The problem of violence towards the seafarer today whether from piracy or terrorism has a truly international character. Until the early 1970's shipping and its ancillary services had a decidedly national character. The ships were often built, registered and manned in the home state of the owner. Since that time there has been a rapid growth in the use of offshore flags of registry with the crews coming from developing countries. Such that today the world's fleet is registered as follows: '*Major open register tonnage 47.2%; developed market economy countries 25.7%; developing countries 20.3%; of this 74% is from Asian countries*' Review of Maritime Transport(2005:35).

The largest users of offshore registers are '*Greek owners with 100.1 million dwt; Japanese owners with 88.5 million dwt; Norway with 34.6 million dwt and the United*

States with 32.0 million dwt: the United Kingdom is 11th in this table with 2.8 million dwt Review of Maritime Transport(2005:37). The most popular open registers are *'Panama, Liberia, Bahamas, Malta and Cyprus'* Review of Maritime Transport(2005:38). There is estimated to be:

'approximately 1.25 million seafarers worldwide manning these ships. 27.5% of this workforce are from OECD countries; 56% from the Far East including SE Asia and the Indian subcontinent, half of this number from the Philippines alone; and 16½% from the rest of the world' BIMCO/ISF(2000).

Moreover, it is by no means unusual to have crew members of several different nationalities serving on the same ship. These seafarers are recruited by manning agencies of which there are many, located worldwide, there are over 300 in the Philippines alone.

Every vessel must be registered with a State in order to operate internationally and conversely by Article 90 of UNCLOS every State including land-locked States has the right to sail ships flying its flag on the high seas. However, under Article 92 of UNCLOS ships shall sail under the flag of one State only ... shall be subject to its exclusive jurisdiction on the high seas. Furthermore by Article 91 of UNCLOS there must exist a genuine link between the State and the ship. This requirement has led to considerable controversy. The International Law Commission(ILC) said:

'While leaving States a wide latitude in this respect, the Commission wishes to make it clear that the grant of its flag to a ship cannot be a mere administrative formality, with no accompanying guarantee that the ship possess a real link with its new State'. ILC Yearbook(1956:278)

On the other hand,

'The United States Department of State has adopted a position which involves interpreting the provision in such a way that the requirement of a genuine link is not a condition for recognition of the nationality of the ship but an independent obligation to exercise jurisdiction and control effectively' Brownlie, I.(2003:411).

In 1986 United Nations Conference on Trade and Development (UNCTAD) sponsored a Convention on Conditions for Registration of Ships where amongst other matters:

'States must First, include in its register of shipping information; identifying those owning and managing its ships and hence accountable for them; Second, ensure that its nationals participate to a required degree in either the ownerships or the manning of its ships' Harris, D.J.(1991:400).

Not surprisingly this convention has never come into force requiring as it does the signature of 40 States with 25% of the world's tonnage before doing so. The International Court of Justice had advised in 1960 that: *'the term largest ship-owning nations referred to registered tonnage and not beneficially owned tonnage'* ICJ

Rep.(1960:150). Clearly the countries with the largest fleets, Panama and Liberia for example had nothing to gain and a lot to lose if this Convention had come into force.

The validity or otherwise of a genuine link was again restated by the International Tribunal for the Law of the Sea (ITLOS) in the Saiga case where the judgement read in part:

'There is nothing in Article 94 to permit a State which discovers evidence indicating the absence of proper jurisdiction and control by a flag State over a ship to refuse to recognise the right of the ship to fly the flag of the flag State' M.V. Saiga(No.2) Case(1999:para82).

and

'the conclusion of the Tribunal in that the provisions of the Convention on the need for a genuine link between a ship and its flag state is to secure more effective implementation of the duties of the flag State, and not to establish criteria by reference to which the validity of the registration of ship in a flag State may be challenged by other States' M.V. Saiga(No.2)Case(1999:para83).

Thus we have a situation where in a recent survey:

'of the crews of 1,700 ships under 62 flags there were no nationals among the 898 crew of vessels under the Bahamian flag, no Panamanians among the 1,346 seafarers on Panamanian ships and no

Liberians amongst the 1,004 seafarers on Liberian ships' Lane,
A.D.(2002)

And in terms of percentage share of tonnage owned by nationals of open registers we have:

<i>'Panama</i>	<i>0%</i>
<i>Liberia</i>	<i>0%</i>
<i>Bahamas</i>	<i>0%</i>
<i>Malta</i>	<i>0%</i>
<i>Cyprus</i>	<i>2.6%</i> ' Review of Maritime Transport(2005:37).

Hence we can see that the linkage requirement in Article 91 is in reality a straightforward commercial relationship between the "beneficial" owner and the Flag State. Thus, the oft used term "flag of convenience" applied to these open registers is a literally true statement of the current situation pertaining to this problem.

The beneficial owner maybe defined as the *'ultimate controlling owner who benefits from any profits the ship makes'* Ownership and Control of Ships(2003:7).

He or she may of course be located in any country in the world. Through a Holding company the beneficial owner can set up one ship companies in an open register country. The use of one ship one company enables the owner to protect his other assets from claims against one of his one ship companies. At the same time a Management company is formed to manage these ships on a day to day basis. Again

this company could be located anywhere in the world but is often located in a commercial shipping centre such as London, New York or Hong Kong.

To achieve anonymity the beneficial owner has if he so wishes several devices to hand such as nominee shareholders, nominee directors, intermediaries, International Business Corporations and lastly but by no means least, Bearer shares. *'Bearer shares are perhaps the single most important (and perhaps the most widely used) mechanism to ensure total anonymity for beneficial owners'* Ownership and Control of Ships(2003:7).

Bearer shares confer ownership of the asset to the person who physically possesses the bearer share certificates. These certificates can be sold, traded or simply transferred from person to person without having that transfer registered by any authority anywhere. The advantages of anonymity are that the shipowner is insulated from any authority pursuing a claim of any description against him.

All of the above have two important outcomes for the seafarers which will be discussed in detail later in this paper but briefly they are: First, *'seafarers have difficulty in pursuing their claims in the flag State for various reasons, including against an absent shipowner and absence of local assets'* Leggate,H. and McConville, J.(2002:9)

Second, the anonymity of the beneficial owner of shipping is of serious concern to the security authorities with respect to terrorism, inter alia:

'ships can be used as a means of covertly transporting men, equipment and weapons around the world; as a means of delivering bombs to their destinations, such as in a container set to explode near a city or other target; ships as weapons in their own right, such as oil or gas tankers; as a means of raising money, through legal and/or illegal activities to finance terrorist activities' Ownership and Control of Ships(2003:4).

All of the above could of course be carried out with the seafarer being totally unaware of any of these activities on the ship which he or she is serving.

International Law

UNCLOS already referred to was signed on the 10th December 1982 it came into force on the 16th November 1994 after obtaining the necessary number of ratifications. The Convention is a multilateral treaty that is not limited to an exclusive group of States, UNCLOS is intended to create a framework for a truly global regime. It is open for all to sign and at the time of writing has 164 ratifications. There are of course many bilateral and multilateral treaties concerned with maritime matters but they should all be compatible with the provisions of UNCLOS. The many IMO Conventions are an example of this, these Conventions are very important but the degree of technical detail would be inappropriate in UNCLOS itself, nevertheless they are compatible with it. The laws of the sea are of course but a small part of a much larger body of international law.

As the import of international law is fundamental to the arguments throughout this thesis it is necessary to consider its definitions and variations in context, its applications and practices, as well as consistency. *‘The term “international law” was it seems first used by Jeremy Bentham in 1780 in his Introduction to the Principles of Morals and Legislation and replaced the earlier terms “Law of nations” or “droit de gens”’* Malanozutz, P.(1997:1). It has been defined as follows *‘International Law in the system of law containing principles, customs, standards and rules by which relations between states and other international persons are governed’* Williams, S.A.(1987:1). To this it might be added that international law offers protection of individual human rights against the State(s).

The sources of international law are set out in Article 38(1) of the Statute of the International Court of Justice. They are (a) international conventions, whether general or particular, establishing rules expressly recognised by the contesting States; (b) international custom, as evidence of a general practice accepted as laws; (c) the general principles of law recognised by civilised nations; (d) subject to the provisions of Article 5, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law. The first three are referred to as primary sources whilst the fourth is referred to as a secondary source because they only point to what constitutes the law, not what it actually is. Although not stated to represent a hierarchy *‘the Court may be expected to observe the order in which they appear’* Brownlie, I.(2003:5).

A treaty is an agreement between states which is binding between the signatories in international law, however it is described. In practise, there are many terms for an

international agreement that can be used with no special significance attached to a name. Thus, the terms treaty, convention, protocol, covenant, declaration, charter, pact can all be used interchangeably. Multilateral treaties, laying down general rules of conduct for all states which are parties to that treaty serve much the same function as legislation in municipal law; hence they are sometimes referred to as law making treaties. However, in cases involving non-signatories the treaty may be cited as evidence of customary law as indeed can non-ratified treaties. The Declaration of Paris of 1856 outlawing privateering is an example of such a Treaty. International organisations are not mentioned in Article 38 of the ICJ but some treaties establish international organisations. One such treaty in the Charter of the United Nations. The 1969 Vienna Convention on the Law of Treaties is a very important multilateral treaty as it is the primary source for the law of and the interpretation of treaties.

Customary international law is a very important source of law and is essentially the body of international rules which have their source in the customary practice of States.

These may include the following:

'diplomatic correspondence, policy statements, press releases, officials manuals on legal questions, state legislation, international and national judicial decisions, recitals in treaties and other international instruments, the practice of international organs and resolutions in the General Assembly of the United Nations.' Brownlie, I.(2003:6)

Resolutions of international organisations and the UN in particular are of special importance. By Article 25 of the UN Charter members are bound by resolutions of the

Security Council and thus they become part of the body of international law. Furthermore, by Article 103 of the UN charter members obligations under the Charter take precedence over all other international agreements they, the members have entered into. On the other hand resolutions of the General Assembly are not legally binding upon members but *'acceptance by a majority vote constitutes evidence of the opinions of governments ... providing a basis for the progressive development of the law and the speedy consolidation of customary rules'* Brownlie, I.(2003:6). Thus:

'the Universal Declaration of Human Rights, originally intended as a non binding instrument ... many, if not all of its provisions have become part of customary international law. John Humphrey, one of the Declarations' key drafters noted that 'the Declaration has been invoked so many times both within and without the United Nations that lawyers are now saying that, whatever the intention of its authors may have been, the Declaration is now part of the customary law of nations and therefore binding on all States' The Primacy of Human Rights in International Law(2000:1).

Before a practice amounts to a rule of customary law there must be first, evidence of a general practice, uniform and constant usage practised by countries. A long practice is not required neither is complete uniformity required but substantial uniformity is. In the *Asylum case* the judgement stated:

'The Party which relies on a custom ... must prove that this custom is established in such a manner that it has become binding on the other party ... that the rule involved ... is in accordance with a constant and

uniform usage practised by the States in question ... ' Columbia v Peru(1950:266).

Second, a recognition by countries that this practice is the result of a rule of international law, often referred to as "*Opinio juris et necessitatis*" (*opino juris* for short), the literal translation of which in belief of law or of necessity but in the vernacular is rendered as '*belief in the legal permissivity or obligations of the practice*' Committee on the Formation of Customary International Law(2000:33). In the *North Sea Continental Shelf case* the judgement stated:

'Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule requiring it' Federal Republic of Germany v Denmark, Federal Republic of Germany v The Netherlands(1969:44).

Thus, unlike a treaty where in the act of ratification the State acquiesces to the rules of that Treaty, a State does not have to specially accept a rule of customary international law before being bound by that rule. However, a State may not be bound by a new rule of customary international law if it has continually and expressly continued to object to the practice used to support the existence of the rule.

The general principles of law recognised by civilised nations is essentially a filler clause where treaty provisions and international custom do not provide sufficient guidance to resolve particular issues. This involved looking at the different laws of different nations to see if there are principles which are universal, or early so amongst

states. Judicial decisions and the teachings of the most highly qualified publicists refers to the decisions of the International Court of Justice (ICJ) and other international tribunals. In this respect, the International Tribunal for the Law of the Sea (ITLOS) where States bring their disputes under UNCLOS to be adjudicated upon will undoubtedly add flesh to the bones of UNCLOS. Whilst academic writings maybe important the reports of the International Law Commission assume special significance as they are a UN related body charged with codifying and developing international law.

The particular aspects of international law which are the subject of this study are the laws of piracy and terrorism.

Jurisdictional Aspects of UNCLOS

By virtue of Articles 100 to 107 (see appendix 1) piracy is a crime under international law. Piracy can also be a crime under the municipal law of a nation state, in the United Kingdom for example the provisions of UNCLOS regarding piracy are incorporated into '*municipal law*' Merchant Shipping & Maritime Security Act 1997(c.28). Municipal law being defined as that law: '*which applies within a state and regulates the relations of its citizens with each other and with the executive*' Brownlie, I.(2003:3). Thus, municipal laws can have binding force only in the jurisdiction creating them. However, many countries do not have the municipal legislation necessary to deal with this problem. Indeed this aspect of the problem has been recognised by IMO when it stated:

'Being aware that the fight against piracy and armed robbery against ships is often impeded by the absence of effective legislation in some countries for the investigation of reported cases of piracy and armed robbery against ships and being aware also that, when arrests are made, some Governments are lacking the legislative framework and adequate guidelines for investigations necessary to allow conviction and punishment of those involved in acts of piracy and armed robbery against ships.'

Code of Practice for the Investigation of Crimes of Piracy and Piracy and Armed Robbery Against Ships(2002:8)

Not only is the definition of piracy as written down in Article 101 of UNCLOS considered to be very narrow and ambiguous but in addition, under Article 3 of the same convention the breadth of the territorial seas was increased from 3 to 12 miles measured from the baseline. *'This had the effect of making many of the incidents, 86.5%'* Piracy Against Ships(2000:4) not subject to the laws of piracy, which are only relevant upon the high seas but subject to the municipal laws of the coastal state in question. It is for this reason that IMO has defined *'armed robbery against ships as an unlawful act within a States' jurisdiction'* Piracy and Armed Robbery Against Ships, Definitions(2000:1). Hence this problem is always referred to as "Piracy and armed robbery against ships" in all IMO correspondence. This rule also had the effect, of quadrupling the area of the sea under the coastal states jurisdiction requiring in theory a quadrupling of assets in terms of men, money and equipment to exercise that jurisdiction effectively for as Judge Sir Gerald Fitzmaurice noted in the Fisheries Jurisdiction case *'the territorial sea involves responsibilities as well as rights, which many countries were unable to discharge satisfactorily outside a relatively narrow*

belt, such as for example policing and maintaining order ...' UK v Iceland
ICJ(1973:3).

On the High Sea the jurisdiction of the flag State over the vessel flying its flag is absolute as stated in Article 94(2)(6); every State shall assume jurisdiction under its internal law over each ship flying its flag and its master, officers and crew in respect of administrative, technical and social matters concerning the ship. On the other hand the coastal states' jurisdiction within its internal waters, that is between the baseline and the shore, is absolute. All merchant ships by the act of voluntarily entering internal waters, place themselves with the jurisdiction of the coastal state.

In the territorial sea, however, UNCLOS attempts to strike a balance between flag state freedom and jurisdiction on the one hand and coastal states rights and jurisdictions on the other. By Article 17 of the UNCLOS ships of all States enjoy the right of innocent passage through the territorial sea providing that by Article 19 the passage is not prejudicial to the peace, good order or security of the coastal state. In particular, so far as piracy and terrorism is concerned, a passage is not innocent if the ship poses any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal state, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations. Indeed, the coastal state may take the necessary steps by Article 25 in its territorial sea to prevent passage which is not innocent. However, by Article 27 criminal jurisdiction of the coastal state should not be exercised on board a foreign ship passing through the territorial sea to arrest any person or to conduct any investigation in connection with any crime committed on board the ship during its passage, serve only in the following

cases; (a) if the consequences of the crime extend to the coastal state; (b) if the crime is of a kind to disturb the peace of the country or the good order of the territorial sea; (c) if the assistance of the local authorities has been requested by the master of the ship or by a diplomatic agent or consular officer of the Flag State. Finally, by Article 25 (3) a coastal state may, without any discrimination, suspend the right of innocent passage but only temporarily in specified areas if such suspension is essential for the protection of its security.

Another important consequence of increasing the territorial sea from 3 to 12 miles is that '*over 100 international straits*' Nautical Briefing(1995:8) are now within the territorial sea of a coastal state including the important southern half of the Malacca Strait and Singapore Strait. By Article 38 all ships enjoy the right of transit passage through straits used for international navigation and by Articles 44 and 45 the coastal state(s) may not transfer or suspend transit passage, unlike innocent passage. By Article 39 ships are required to proceed without delay through the strait and observe the rules in Article 19.

In terms of sovereign territory UNCLOS created the designation of archipelagic waters within an archipelagic state. That of an archipelagic state, by Article 46 this means a State constituted wholly by one or more archipelagos. Thus, in addition to the territorial sea extending seawards from the outer periphery the waters enclosed by the baselines connecting the outermost islands of an archipelago are within the jurisdiction of the State, but vessels have the right of passage following designated sea lanes. Indonesia is the world's largest archipelagic State '*with 17,000 islands, and only 6,000 of them inhabited*' Indonesia-World Factbook(2003). As regards the rights and

duties of the ship and State their obligations are similar as transit passage through international straits when following sea lanes in archipelagic waters.

Piracy in International Law

The theory behind the modern international law of piracy, which harkens back to very early issues, was perhaps best summed up by Judge J Moore in the Lotus case when he said:

'Piracy by law of nations, in its jurisdictional aspects, is "sui generis", that is Atypical, not falling within the normal legal categories. Though statutes may provide for its punishment, it is an offence against the law of nations; and as the scene of the pirates' operations is the high seas, which it is not the right or duty of any nation to police, he is denied the protection of the flag which he might carry, and is treated as an outlaw, as the enemy of mankind – "hostis humani generis" – whom any nation may in the interest of all capture and punish' Turkey v France(1927:70).

As was detailed in Chapter 2 historically speaking pirates committed depredation for the purposes of "*animo furandi*", that is private gain, and for a long time it was thought that this was necessary for an act of piracy to have taken place. However, courts both in the United States and Britain and the writings of leading publicists have held that robbery is not an essential element of the crime.

In the United States Justice Story held that:

'A pirate is deemed, and properly deemed, "hostis humani generis". But why is he so deemed? Because he commits hostilities upon the subjects and property of any or all nations, without any regard to right or duty, or any pretence of public authority. If he wilfully sinks or destroys an innocent merchant ship, without any other object than to gratify his lawless appetite for mischief, it is just as much a piratical aggression, in the sense of the law of nations, as if he did it solely and exclusively for the sake of plunder.' US v Brig Naletz Adtel(1844:43).

And, more recently in the Privy Council, Viscount Sankey stated that:

'When it is sought to be contended, as it was in this case, that armed men sailing the seas on board a vessel, without any commission from any state, could attack and kill everybody on board another vessel, sailing under a national flag, without committing the crime of piracy unless they stole, say, an article worth sixpence, their Lordships are almost tempted to say that a little common sense is a valuable quality in the interpretation of international law and concluded that actual robbery is not an essential element of the crime of piracy under international law' re Piracy Jure Gentium [1934 AC 586.

Then again, in Oppenheims International Law, edited by Sir Hersch Lauterpacht, it is said that:

'Piracy, in its original and strict meaning, is every unauthorised act of violence, committed by a private vessel on the open sea against another vessel with intent to plunder (animo furandi). But there are cases possible which are not covered by this narrow definition, and yet they are treated in practice as though they were cases of piracy ... If unauthorised acts of violence, such as murder of persons on board the attacked vessel, or destruction of goods thereon, are committed on the open sea without intent to plunder, such acts are in practice considered to be piratical ... If a definition is desired which really covers all such acts as are in practice treated as piratical, piracy must be defined as every unauthorised act of violence against persons or goods committed on the open sea either by a private vessel against another vessel or by the mutinous crew or passengers against their own vessel' Oppenheim, L(1955:613).

As can be seen, however, for Article 101 this definition has not been accepted by the international community.

If then, robbery or intent to rob is not necessary for an act of piracy to have taken place what is the meaning of "committed for private ends". At what point does "private ends" cease and public or political ends start. The term "for private ends" is not defined in the Geneva Convention on the High Seas, nor in UNCLOS and nor in the Harvard Draft Convention on Piracy.

J.P.A. Francois, the special rapporteur for the International Law Commission, which drafted the Geneva Convention, stated *'that in preparing the articles on piracy, he had*

relied heavily on the Draft Convention on Piracy prepared by the Harvard Research in International Law and the Comment to the Draft by Professor Bingham' Summary Records of the Seventh Session ILC(1955:25).

The Comment stated:

'It may be thought advisable to exclude from the common jurisdiction certain doubtful phases of traditional piracy which can now be left satisfactorily to the ordinary jurisdiction of a state, or of two or three states, stimulated to action on occasion by diplomatic pressure ... Therefore the draft convention excludes from its definition of piracy all cases of wrongful attacks on persons or property for political ends, whether they are made on behalf of states, or of recognised belligerent organisations, or of unrecognised revolutionary bands.' Harvard Research in International Law(1932).

The rapporteur to the International Law Commission stated that:

'he had defined as piracy acts of violence or depredation committed for private ends, thus leaving outside the scope of the definition all wrongful acts perpetrated for a political purpose and, although States at times have claimed the right to treat as pirates unrecognised insurgents against a foreign government who have pretended to exercise belligerent rights on the sea against neutral commerce, or privateers whose commissions violated the announced policy of the captor, and although there is authority for subjecting some cases of these types to the common

jurisdiction of all States, it seems best to confine the common jurisdiction to offenders acting for private ends only.' Summary Records of the Seventh Session ILC(1955:40)

Moreover:

'an act... is hardly deemed political simply because the proprietor so characterises it. Nor is it logical that a person once labelled an "insurgent" should never commit actions "for private ends". What appears to be needed therefore in a balancing test, in which actions are strictly weighted against political objectives. Nor should the fulcrum of the decision be the mind of the terrorist, it should be the mind of the judge weighing the facts' Menefee, S.P. Anti-Piracy Law in the Year of the Ocean : Problems and Opportunity(1999:5)

Nor can a warship or other state owned vessel as long as it is in command of a commissioned officer, ever be a pirate vessel:

'The principle of common jurisdiction, according to which a pirate was treated with universal public enmity, could only exist where the political element was lacking and where the ship concerned was not the public property of a State ... All that was made clear by the words "for private ends"' Harvard Research Draft on Piracy(1932).

Thus the “for private ends” requirement seems to exclude from the laws of piracy not only insurgents who act only against the government they seek to supersede in some manner but also all those with no personal motive. As we have seen:

‘the intent to rob is not required so that the motive may be gratuitous malice, or the purpose maybe to destroy, in private revenge or real or supposed injuries done by persons or classes of persons, or by a particular national authority’ Harvard Research Draft on Piracy(1932).

We may assume that violence or the threat of violence is used in the above.

We now turn to what has been termed *‘the one ship-two ship dilemma’* Menefee, S.P. *Anti-Piracy Law in the Year of the Ocean: Problems and Opportunity*(1999:2), the question is whether or not an act of piracy can be committed by the crew or passengers of a ship or aircraft against the same ship or aircraft. Article 107(a)(i) clearly states that provided the act takes place on the high seas and is against another ship or aircraft then piracy has occurred. It is sometimes thought however that under Article 101(a)(ii) where the crime may take place outside the jurisdiction of any state and because no mention is made of another ship and the high seas is just such a place, therefore the requirement for two vessels is unnecessary. But, as we can see acts occurring on the high seas are already covered in Article 101(a)(i) and furthermore the ILC in its Commentary on the 1958 Convention stated that *‘by place outside the jurisdiction of any State the Commission had chiefly in mind acts committed by a ship or aircraft on an island constituting “terra nullius” or on the shores of unoccupied territory’* ILC Yearbook Vol II(1956:282) and further commented that:

'Acts committed on board a ship by the crew or passengers and directed against the ship itself, or against persons or property on the ship cannot be regarded as acts of piracy. Even where the purpose of the mutineers is to seize the ship, their acts do not constitute acts of piracy' ILC Yearbook Vol II(1956:283).

Thus, if a murder is committed on board a ship, piracy has not been committed because the authority of the state to which it belongs is intact and the due processes of the law of that state can take place. If, however, the mutineers are successful and then use the ship to carry out further acts of violence and depredation then the common jurisdiction of all States would apply being *hostis humani generis*. It seems then that for an act of piracy to have taken place there has to be a usurpation or repudiation of all authority.

Article 101 of UNCLOS has been called *'imprecise because it offers no guidance as to what types of violence constitute piracy'* O'Connell. D.P.(1984:970) and *'Because of its elliptical nature one of the least successful essays in codification of the Law of the Sea.'* O'Connell, D.P.(1984:971). Furthermore, there is precious little case law on the subject to enlighten us. The only persons to be found guilty of piracy in recent times is the well-respected Non Governmental Organisation(NGO) Greenpeace. Greenpeace in an anti-dumping of toxic waste protest boarded, occupied and damaged two Dutch vessels in the southern North Sea. The defence of self proclaimed public ends was not allowed in the Belgian Court of Cassation and they were found guilty of piracy *Jure Gentium* on the grounds that those acts were in *'support of a personal point of view*

concerning a particular problem' ILR(1977:537) and as such had been committed for private ends. The "private ends" requirement was put into the Harvard Draft specially as:

'one method of avoiding "touchy" political questions of immunity (as well as extradition, political asylum, insurgency and belligerency). 'There is no question that acts of terrorism under modern conditions would constitute piracy under traditional and conventional law if the limitation were not present' Dubner, B.H.(1977:63).

In addition to piracy, terrorism is the other form of external violence to which the seafarer has on rare occasions been subjected. Although the outcomes for the seafarer in terms of violence are the same the offences are quite separate in law. So rare are the cases of maritime terrorism that the issue is not of primary concern to the seafarer whilst piracy of which there have been many instances in recent years is. Conversely since the attack on the World Trade Centre, New York, in September 2002 terrorism including maritime terrorism has been of the greatest concern to governments and policymakers worldwide. Consequently it needs to be more clearly defined in the context of violent actions at sea.

Terrorism

Terrorism and terrorist are words frequently found in the media and used by politicians. There is a general idea of what is meant and used in a pejorative sense. They are applied to opponents or enemies, or those with whom there is disagreement subjectively in that if identified with the victims of the violence the act is terrorism, on

the other hand if identified with the perpetrator then the act is not regarded as terrorism. "One man's terrorist is another man's freedom fighter" is a perfectly valid statement, in the context of the conflict in Northern Ireland or in Israel to see that this is so.

Perhaps because of this ambivalent attitude there is not one accepted definition of terrorism. The definitions in dictionaries include:

'Terrorism : A system of terror. A policy intended to strike with terror those against whom it is adopted; the employment of methods of intimidation and Terrorist: As a political term; Anyone who attempts to further his views by a system of coercive intimidation.' OED(1995)

These broad definitions introduce the two fundamental characteristics of terrorism; one, the political concept and two; the systematic use of violence or threat of violence to further the terrorist aims.

There are however *'more than a hundred different definitions of terrorism'* Schmid(1998:3)in existence, the more important of which are as follows:

'Terrorism is the unlawful use of force or violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political objectives.' FBI(2004)

'Terrorism constitutes the illegitimate use of force to achieve a political objective when innocent people are targeted.' Laquer, W.(1977:12)

'The term "terrorism means premeditated politically motivated violence perpetrated against non-combatant targets by sub-national groups or clandestine agents, usually intended to influence an audience. The term "international terrorism" means terrorism involving citizens or the territory of more than one country' . Title 22, United States Code(2004)

'All criminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons or a group of persons or the general public.' Convention Against Terrorism(1937)

'1. Strongly condemns all acts, methods and practices of terrorism as criminal and unjustifiable wherever and by whomsoever committed: 2. Reiterates that criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or other nature that may be invoked to justify them.' UNGA Reasolution(1999)

'Acts of persons acting on behalf of, or in connection with, any organisation which carries out activities directed towards the overthrowing or influencing, by force or violence, of their Majesty's Government in the United Kingdom or any other government de jure or defacto.' Reinsurance(Acts of Terrorism) Act 1993 c.18.

Now all these definitions have a slightly different emphasis but some common characteristics can be discerned. First, political in its aims and motives; second, violent or threatens violence; third, designed to inflict psychological damage in persons far removed from the immediate act; fourth; perpetrated by an identifiable sub national group or non-state entity. Moreover, terrorists differ from those engaged in guerrilla warfare although they are often confused as they often employ the same tactics of assassination, hostage taking, kidnapping and bombing of public places. Although generally speaking neither wear uniform, guerrillas operate as a military unit and seize or attempt to seize territory to exercise some form of control over a defined geographical area and its population. Terrorists, however, do not operate in public view as armed units, do not attempt to seize territory, indeed avoid wherever possible combat with military forces.

Given that '*terrorism is a criminal act*' Report of the Policy Making Group, UN(2002:4) it is necessary to define how piracy differs from terrorism. Whilst both use violence, sometimes extreme violence, to further their aims clearly their motives are very different. The pirate employs violence to obtain money, material goods or to kill or injure out of personal revenge, he is acting out of personal motivation or for private ends. The pirate may terrorise his victim such as waving a gun in the face of a Ship's Master in order to persuade him to open his safe. This terrorism is not intended to have any consequences beyond the act itself, the pirate is not attempting to convey a message to a wider audience. The terrorist uses violence to influence a wide an audience as possible to bring about change, usually political change. Nevertheless both groups use violence, against unarmed, non combatant civilians, in this case the

seafarer. Moreover, *'international terrorism and transnational organised crime are often closely interrelated and connected'* Report of the Policy Making Group, UN(2002:5). As will be seen in Chapter 5 the grosser acts of piracy are indeed a part of transnational organised crime.

There have been two high profile cases in recent times where the issue of terrorism or piracy was of concern to the international community. Each case is considered in turn to see if what is or what is not piracy was resolved and the law taken forward in this respect.

The *Santa Maria* Incident

In 1961 the *Santa Maria*, a Portuguese cruise ship, was seized internally by Captain Galvao, a political opponent of the Portuguese Government and others who either boarded the ship as passengers or were members of the original crew. In the act of seizing the ship the 2nd Officer was killed and eight other crew members wounded.

Over the ship's radio:

'Galvao declared he had captured the ship in the name of the Independent Junta of Liberation led by General Delgado, the legally elected President of the Portuguese Republic who has been fraudulently deprived of his rights by the Salazar Administration' Joyner, N.D.(1974:109).

Portugal requested US, Dutch and British naval vessels in the West Indies to search for and capture the vessel *'in accordance with the well defined terms of international law governing piracy and insurrection on board ship'* Joyner(1974:109). After the

ship was found by the U.S. Navy, it was persuaded to sail to Brazil. Initially Brazil was unwilling to grant political asylum for as the Brazilian Navy Minister said '*Galvao was accused of piracy, murder and theft.*' Zeiger, H.A.(1962:72). Luckily for Galvao and his accomplices there was a change of government in Brazil the following week and the new President granted them political asylum and thus no charges were laid against them. However, all commentators agreed that it was not piracy under international law:

'Since the ship was taken over by certain of its own passengers (apparently for private ends), and not by another ship, as at first reported, it was considered that for this, if for no other reason, Article 15 of the 1958 Convention was inapplicable' Whiteman, M.(1965:666)

And:

'it would not constitute piracy under the Geneva Convention because it did not satisfy the requirement that the illegal act must be directed against another ship and because the treatment of the ship once she had been seized, together with the statements made by Captain Galvao made it perfectly clear that this seizure was not made for private ends' Green(1961:496).

Achillo Lauro

The *Achillo Lauro*, an Italian cruise ship, was seized on the 7th October 1985 whilst sailing from Alexandria to Port Said. The perpetrators were members of the Palestine Liberation Front who had boarded the ship in Genoa as passengers. After seizing the

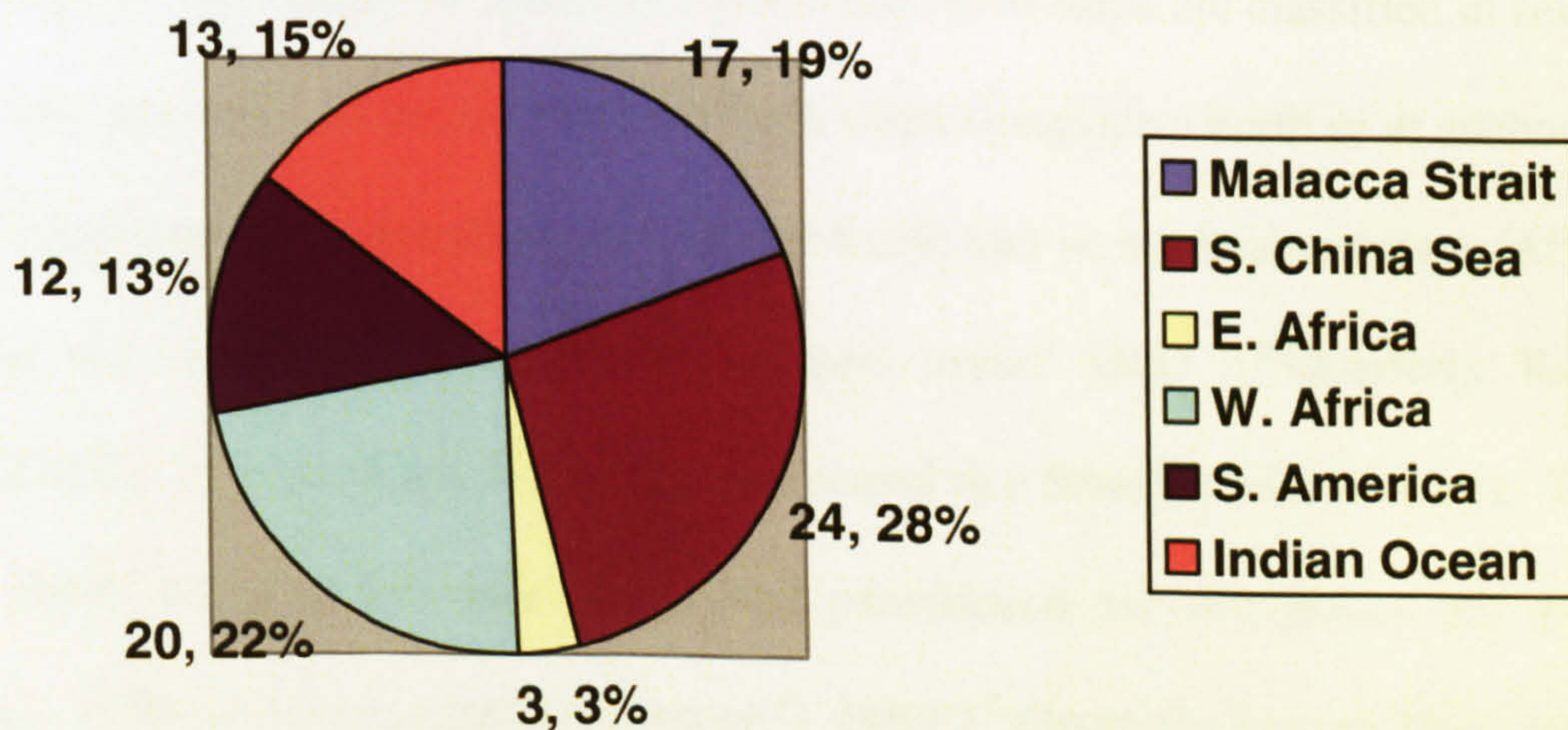
ship they held the crew and passengers captive, threatening to kill the passengers unless Israel released 50 Palestinian prisoners. When their demands were not met by the following afternoon, a US citizen who was also Jewish, Leon Klinghoffer was shot. His partly paralyzed body and wheelchair were then thrown overboard. The United States treated the seizure '*as piracy*' ILM(1986:1515). Although this act took place on board an Italian flag ship in arguably Egyptian territorial waters the Justice Department obtained arrest warrants charging the perpetrators with '*hostage taking, conspiracy and piracy*' ILM(1986:1555). In fact it can be seen that as in the Santa Maria incident the Achille Lauro was not seized for private ends nor was any other vessel involved. Hence it was not piracy. It was this incident that gave rise to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation or SUA Convention for short. This Convention came into force on the 1st March 1992 with 37 ratifications. By August 2004, only 56 states have ratified this treaty. We can deduce from the poor number of ratifications that this Convention has not found favour with the international community.

Following events in New York on September 11th 2001 the IMO have rushed to bring into force the International Ship and Port Facility Security Code (ISPS) as a subset of the SOLAS Convention, where amongst many other provisions every ship has to have an approved ship security plan and officer. This and the problems with the SUA Convention will be discussed in detail in Chapter VI. Anti piracy procedures are incorporated into this plan but piracy is perceived as just part of the overall threat to ships. Nevertheless at a practical level piracy remains the major threat to seafarers today as it has done for centuries.

CHAPTER IV - CONTEMPORANEOUS PIRACY AND TERRORISM - THE REALITY FOR THE SEAFARER

The reality for the seafarer is that these attacks for whatever motive are extremely violent, vicious and shocking. The aim of this chapter is to demonstrate why this so. For these purposes this chapter will use the first quarter, that is January to March inclusive, of 2004 as a case study to demonstrate why this is so. This period is chosen as being both fairly recent and representative of the types of attacks the seafarer has to suffer. In this period a total of 87 incidents were reported to the IMO, '61 attacks were reported as having been committed whilst there were 26 attempted attacks' IMO 1st.Quarterly Report(2004:1). These acts of piracy and armed robbery resulted in '23 crew members and passengers killed, 41 crew members injured and 30 missing' IMO 1st.Quarterly Report(2004:1). The geographical areas where these incidents occurred is shown below.

4.1Fig.



The figure for the South China Sea is slightly misleading in that 15 of the 24 reported incidents occurred in the area of the Anabas and Bintan Islands on the eastern approaches to the Singapore Strait. Thus it is in this area, the 'Malacca Strait' (17), and the 'Singapore Strait with the eastern approaches to the Singapore Strait' (15) that 32 of the 87 reported incidents or 37% of the total have occurred.

Given that it is through this chokepoint on a major Sea Lane of Communication (SLOC), being some 600 miles in length and 9 miles wide at its narrowest point that *'approximately 138 merchant ships a day'* YB Chia Kwang Chye IMB Speech(2004) carrying *'30% of the world's international trade including two thirds of the world's supply of liquefied natural gas (LNG) and about 50% of the world's crude oil'* Lehr, P.(2004:1) pass. It is this statistic, 37%, more than any other that so worries the policy makers of the littoral states of this region and Japan who rely on this SLOC for much of their international trade, being their route to and from the Middle East and Europe.

The incidence of all unlawful activities against merchant ships are classified in several ways under international law. Petty theft from ships alongside a berth or at anchor has always been a problem in certain parts of the world and so it remains today, *'43% of the reported incidents (57) occurred in port areas'* IMO 1st.Quarterly Report 2004(2004:3). Port areas are almost always located in a State's internal waters. Thus, these crimes being within that states total jurisdiction are not piracy but armed robbery. *'17% of the recorded incidents (15)'* IMO 1st.Quarterly Report 2004(2004:3) occurred in the territorial waters of a coastal state. As already noted many of these incidents would have been regarded as piracy prior to extending the territorial waters

from 3 to 12 miles. However, as the law is written down at the moment these acts are also within the Coastal States' jurisdiction and deemed to be armed robbery not piracy. The remaining *'40% of the recorded incidents (35)'* IMO 1st.Quarterly Report 2004(2004:3) occurred on the high seas and thus can be regarded as acts of piracy.

Almost all ship types were victims of these attacks including *'yachts (4), tugs (5), fishing vessels (12), ferries (2), supply ships (3), general cargo ships (16), bulk carriers (14), container ships (9), chemical and gas tankers (9), tankers (11), others (2)'*. IMO Monthly Reports (Jan, Feb, March 2004). These vessels flew many different flags, as expected the majority flew the flag of Liberia or Panama with *'31 ships between them, or 35% of the total'* . IMO Monthly Reports (Jan, Feb, March 2004).

The total numbers of seafarers killed, missing and injured has already been given these horrific figures were the result of violence being used against the crew in *'47%'* IMO 1st.Quarterly Report 2004(2004:3) *of the reported incidents with '1 ship missing and 5 hijacked'* IMO 1st.Quarterly Report 2004(2004:3). This violence was largely inflicted by the attackers usually in gangs of *'1 to 4 persons'* IMO 1st.Quarterly Report 2004(2004:3) although a substantial minority were in gangs of *'5 to 10 persons'* IMO 1st. Quarterly Report 2004(2004:3) using guns in *'20%'* IMB Annual Report 2003(2004:11) of the cases and knives in another *'20%'* IMB Annual Report 2003(2004:11). Guns includes automatic rifles and grenade launchers, the use of which has risen alarmingly with *'18 reported incidents in 1992 to 100 in 2003'* IMB Annual Report 2003(2004:11).

Many of these attacks are opportunistic in nature such that in '33%' IMO 1st. Quarterly Report 2004(2004:3) of cases the Masters and crew accommodation was raided. However, in '52%' IMO 1st. Quarterly Report 2004(2004:3) of the cases the cargo area was raided. The statistics quoted for this quarter are by no means atypical. For example *'in the 4th quarter of 2003 there were 82 reported acts of which 18 were attempted. Resulting in 1 killed and 4 injured. In one case all of the crew of one ship were forced to jump overboard'* 4th. IMO Quarterly Report 2003(2004:2). In the 3rd quarter 2003 there were *'75 reported acts of which 26 were attempted acts. Resulting in 8 injured and in one case the crew were abandoned on an island.* IMO 3rd. Quarterly Report 2003(2003:2). In the 2nd quarter 2003 there were *'92 reported incidents, 29 of which were attempted acts. Resulting in 6 crew injured and in one case the fate of the crew of a ship taken hostage is unknown.'* IMO 2nd. Quarterly Report 2003(2003:1) In the first quarter of 2003 *'there were 92 reported incidents, 21 of which were attempted acts. Resulting in 3 seafarers killed and 8 injured.'* IMO 1st. Quarterly Report 2003(2003:1)

Turning now to individual attacks and the outcome for the seafarer. It has already been noted that most of the attacks are opportunistic in nature and it is these that are considered. *'The "Meridan Nira" is a tanker of 3581 tonnes flying the Malaysian flag and on the 22nd April 2003 was about 50 NM SSE from the Anabas Islands'* IMO February Report(2004:3)) in the South China on passage from Singapore to Kota Kimabalu in Sabah, E. Malaysia. The ship was fully loaded with a cargo of approximately 5500 tonnes of refined oils, the weather was good with calm seas and a slight breeze. As would be normal, the ship was on full sea speed of 10 kts.

From the Master's report to the International Maritime Bureau's Piracy Reporting Centre (IMB-PRC) in Kuala Lumpur (see Appendix 2) at 0245 hours on the above date 9 men armed with guns and knives boarded the ship over the stern from a small craft. They went first to the Engine Room and took 4 hostages from the watch keepers and the off duty crew. The 2nd officer, who was on watch on the bridge, raised the alarm and on hearing this the Master went up to bridge where shots were fired at him by the pirates. Then, the pirates stole valuables from the crew and took the ship's hand held radios. Fortunately in this case no one was injured, but the crew suffering the trauma of the attack.

Two months later (30th June 2003) a similar attack occurred some 150 miles to the SW in the vicinity of Bintan Island. The *Lerong* is a general cargo ship of 15,500 tonnes under Chinese Registry and was on passage from Singapore to Panjang in Southern Sumatra. From the Master's report to the IMB-PRC (see appendix 2) at 0210 hours local time eight pirates armed with guns and knives boarded the ship over the stern. They then went to the bridge where they took the 2nd officer (2/O) who had the watch, hostage. From there they went to the Master's cabin taking the 2/O with them where holding the Master at gunpoint they took the ship's cash, the Master's personal cash and belongings. Next, using the Master as hostage, they went to the 3/O's cabin where they repeated the exercise. The pirates left the ship 0232 hours local time. The attack only lasted 22 minutes but in this time both the Master and 2/O were seriously injured from knife attacks.

This type of attack occurs not only in Far Eastern waters. Two days before the attack on the *Meridian Mira* 'the *Nine Hawk* a general cargo ship of 37,880 tonnes,

registered in Singapore was attacked 55 miles off the North Eastern Tip of the Somali Coast' IMO January Report(2004:4) whilst on passage from Singapore to Immingham, UK via the Suez Canal. From the Master's Report to the IMB-PRC (see appendix 2) at 0230 local time pirates armed with guns and knives on board 3 high speed craft approached the vessel from different sides and directions. After gaining access to the vessel they then went to the crew's quarters and the bridge where the 2/O was seized and tied. All communication equipment and distress transmitting facilities on the bridge and radio room were destroyed. Some of the pirates proceeded directly to the Chief Officer's and Chief Engineer's cabins and both were held at gun/knife point. Two pirates armed with guns/knives entered the Captain's cabin, tied him up and demanded the master key and the key to the ship's cash box. Other crew were threatened by brandishing guns and knives and ordered not to go out of their respective cabins. Some of the armed pirates were in the accommodation alleyways and some outside. At about 0400 hours the engine was stopped and the pirates disembarked after taking all the cash they could find.

The Captain suffered knife wounds to his arms and feet, bad injuries and a stab wound in the stomach. He reported that he was still capable of carrying out his duties and that most of the crew were in a state of trauma after being awoken with a knife in their neck or gun to the forehead. He further stated that "generally they are okay". This is an understatement.

The incidents quoted above are typical of the hit and run, opportunistic type of attack. The pirates appear to be well organised, knowledgeable and ruthless, using terror to quickly overpower any resistance. The pirate "modus operandi" is to board from a

small fast motorboat in the quiet middle watch hours using grappling hooks to board over the stern. As we have seen they are in groups of five to ten men armed with knives and small arms. Even with today's reduced manning levels on merchant ships the crew of an attacked ship will almost always outnumber the pirates. So that from the attacker's point of view brutality and shock tactics are essential if they are to gain control of the ship quickly, once on board. Although some of the incidents take place far off-shore the use of small craft must indicate that they operate from a land base and do not "cruise" looking for targets as did pirates of previous centuries.

As already shown many attacks take place within the internal waters of a state are largely of the petty crime category. Some however are far more serious, one such case in that of the *MCT Almak*. This vessel 'is a chemical tanker of 12358 tonnes, registered in Liberia, and was on passage inward bound to Warri in Nigeria in the Warri river on the 23rd March 2004' IMO March Report(2004:8). From the Master's report to the IMB-PRC (see appendix 2) the ship was boarded at 1013 hours by robbers from six boats and ordered by them into a side creek where she anchored.

The robbers then brought alongside a barge and forced the crew, who were Russian, to discharge the vessel's cargo of gasoline into the barge. The four Nigerian armed security guards on board the vessel, hired by the owners to protect the ship, advised compliance. Whilst this was going on the robbers patrolled the mouth of the creek to keep their activities secure. Once the discharge of cargo commenced the robbers left the ship but remained on the barge and alongside in one of their boats. After obtaining 650 tonnes of cargo in this way the ship was then released and proceeded to Warri. No injuries to the crew were reported, nor was the ship damaged in any way.

What is remarkable about this incident is that the robbers were so sure of themselves, that they would be undisturbed by the authorities, that the master was able to be in communication with his owners, his agents and the IMB (see appendix 2) whilst the robbery was taking place. The robbery commenced at 1013 hours, the Master contacted the Owners at 1037 with details of his plight. He again was able to give them an update 1348 hours where he said that the discharge was expected to take 2 hours more and that the armed guards had advised him that “navy forces” were expected in 2-3 hours. Which implies that they were in communication with some authority. The Master also said in this message that he was uncertain whether the gasoline alone would be sufficient to keep the pirates happy, as they were now talking about wanting lube oil and some pyrotechnics (flares).

Meanwhile the ship management company based in London contacted the Naval Attaché at the Nigerian High Commission at 1419 hours requesting assistance. As can be seen it was all too late and the culprits got clean away with their spoils. Notwithstanding the fact that Warri is the HQ of the Western Naval Command and had *‘two ships stationed there, the NNS Kyanwa and the NNS Ologbo.’* Vanguard, Lagos(2004:1).

That the above attack could take place in broad daylight and the crime remains unsolved is not surprising. The Niger Delta appears to be in the grip of total anarchy:

‘A local paper in the Niger Delta recently published an advertisement – notice of a peace treaty between warring villages. They announced that they had agreed which village had the right to bunker oil from Shell’s

pipeline...some 50,000 barrels a day is siphoned off into barges, transferred into coastal tankers and sold. The obvious solution, monitoring shipping in the sea channels of the Delta, is proving less than easy. "They have had problems with the alignment of naval officers," says Shell's Nigeria Chairman.' Times, London(2004:75)

In October 2003 the ship *African Pride* was found carrying 11,000 tonnes of stolen crude oil. This ship was arrested by the Navy and allegedly handed over to the police. However, the ship disappeared and at that moment *'Three rear-admirals are defending themselves in court-martial proceedings and seven local governors are being investigated.'* Times, London(2004:75) Nor does the rule of law appear to be better applied in Somalia or Indonesia. *'Somalia has been without a central government since 1991, and much of the territory has been subject to serious civil strife'* Background Note Somalia(2004:1) being fought over by various warring factions. Generally, Indonesia has been labelled *'one of the worst countries in the world in terms of corruption by the International Corruption Watch (ICW)'* Asia Times, Hong Kong(2002:1) . In particular *'it is an open secret in regional shipping circles that rogue elements in the Indonesian military and police have a hand in the problem'* Ellis, E.(1999:32) with respect to piracy.

However, Rear Admiral Yusuf Effendi, the commander of Indonesia's western fleet:

'strongly rejected recent press reports accusing Indonesian officials of collusion with pirates, "It is totally untrue that the Indonesian military is

involved and I strongly deny reports that there is co-operation between pirates and radar operators”” Muklis, A.(2004:1),

the last part referring to a report that operators of a surveillance radar unit on Bataan Island were passing information on shipping movements to pirates. Moreover, Admiral Sandakh, C in C of the Indonesian Navy claimed, *‘the piracy and terror threat was overblown as part of an international conspiracy’* Lloyds List(2004:1). He went on to say that he thought the numbers of attacks reported by the IMO were exaggerated. Perhaps he was thinking of the *Yayasan Tujak*. This ship is a general cargo ship of 5106 tonnes, flying the Malaysian flag:

‘On the 17th March 2004 between 0210 and 0400 UTC off Jayapura, Irian Jaya in Indonesian territorial waters whilst on passage she was allegedly intercepted by an Indonesian Navy patrol boat (Kal Youtega, Kal-I-502) and fired at, ordering her to stop. Master and 3/O were ordered on board the patrol boat for cargo document inspection and were assaulted and held hostage. A Naval Officer requesting a ransom of US \$ 5000 in exchange for their release. The Master negotiated down to US \$2500 in addition to provisions. The 3/O was held until the Master handed over the ransom.’ IMO March Report(2004:9).

The Indonesian Naval Headquarters were informed and a response is awaited.

Although it is difficult to see what the master could have done in this case other than to comply, many shipping companies issue standing orders to their Masters’ in regard to precautions to be taken when transmitting known piratical areas. These standing

orders are based on an IMO document: *'Guidance to ship owners and ship operators, shipmasters and crews on preventing and suppressing acts of piracy and armed robbery against ships'*, the latest version of which was circulated in May 2002.

IMO Preventive Measures and Recommended Practices

Whilst many of the measures contained in this document are common sense and could be expected to be followed by any Master transiting a known dangerous area it nevertheless enumerates the various phases of an attack and the measures that can be taken to mitigate them. In general it warns ship owners and masters against carrying large amounts of cash as seizing this cash is the primary motive in many attacks. It also advises Masters against using the radio (VHF) to transit sensitive information, thus helping the pirates to select their targets.

In this respect the maritime community have established conflicting goals. Since 1st July 2002 all ocean going ships have been required to have an Automatic Identification System (AIS) automatically transmitting the vessels position, course and speed amongst other information. This transmitter/receiver gives this information to all within range automatically, also giving the range and bearing from the receiving station. AIS equipment is readily available and could be purchased by anybody in any major port. All the pirates would have to do is have a 24 volt electricity supply and set the transmitting section of the equipment to default and then follow the bearing to the required target.

Recommended procedures include the following. All crew members should be warned against giving the ship's impending voyage or cargo details to strangers whilst ashore.

All ships are urged to have a security plan. This plan should cover the use of extra lighting, surveillance and detection equipment if carried and the need for enhanced surveillance. *'Early detection of a possible attack is the most effective deterrent'* Guidance to Shipowners and Ship Operators, Shipmasters and Crews(2002:3).

A secure area should be established to which the crew can retreat in case of attack, this area should include the bridge, engine room and steering gear compartment. In reality this means that the entire after end of ship should be able to be sealed off with the crew inside.

The crew should be aware of the alarm signals and be trained in the response required by the Master in the event of an attack. The carrying and use of firearms for whatever reason is *'strongly discouraged'* Guidance to Shipowners and Ship Operators, Shipmasters and Crews(2002:9). Not only would be use of firearms by the crew make an already tense situation worse, *'in some jurisdictions, killing a national may have unforeseen consequences even for a person who believes he has acted in self defence'* Guidance to Shipowners and Ship Operators, Shipmasters and Crews(2002:9).

Areas that are known to be prone to attacks should be avoided if at all possible and if not then speed should be adjusted so that the transit is in daylight hours. However, in the case of the Malacca straits for example, not only can the area not be avoided, being some 600 miles in length part of the transit will be at night. In this case maximum

lighting should be used *'consistent with safe navigation'* Guidance to Shipowners and Ship Operators, Shipmasters and Crews(2002:7) during the hours of darkness. When in a known danger area it is paramount that a good watch be kept both visually and by radar. This may involve having extra lookouts in the radar blind spots, for example right astern. *'Small craft which appear to be matching the speed of the ship on a parallel or following course should always be treated with suspicion'* Guidance to Shipowners and Ship Operators, and Crews(2002:5).

Once an attack appears to be imminent the Master should send an Urgency/Pirate Attack message to the nearest Rescue Co-ordination Centre (RCC) requesting assistance and commence sounding the alarm signals and ship's whistle. Not only to alert the crew off duty but *'signs of response can discourage the attackers'* Guidance to Shipowners and Ship Operators, Shipmasters and Crews(2002:8). At this stage the Master should consider taking evasive and defensive measures. Executing fishtail manoeuvres, that is putting the wheel from hard-aport to hard-astarboard and back again creating a large bow wave and wash *'will make boarding a severe hazard and may discourage the best pirate boat captain from coming alongside'* Grey, J. (1999:51).

The use of fire hoses should be considered. High pressure jets would make it difficult for the attackers to climb ropes or ladders or bamboo poles and could well swamp a small boat. *'Water pressures of 80lb per sq. in. and above have deterred and repelled attackers'* Guidance to Shipowners and Ship Operators, Shipmasters and Crews(2002:9). The aldis lamp or other equally bright light could be used to blind the coxswain of the pirate craft, making his task impossible. Using some or all of these

methods does sometimes work even against a very determined attack as the following report demonstrates. *'The Apollo Pacific is a LPG carrier of 3354 tonnes, flying the Singapore flag'* IMO March Report(2004:15) and was on passage from Singapore to Bintulu in Sarawak on the 5th May 2003. From the Master's report sent to the IMB-PRC at 0018 hrs. local time on the 6th May (see Appendix 2). For the last 2.5 hours a big boat with 7 small craft were targeting the vessel. The small craft had speeds of more than 14 knots and kept trying to approach the vessel from many directions. Since the Master suspected their movements he had all the crew out on deck with powerful flashlights shining them on these small craft as directed by the officer of the watch (OOW) who was using the ARPA radar to track them and then direct the crew using a hand held radio.

The potential attackers gave up the pursuit at about 0400 hrs. local time and the vessel continued on its way to Bintulu. The Master must have been a resolute and determined man with the full support of his crew. For, of course, if the attackers had succeeded in boarding his ship their (the attackers) retribution on the Master and his crew could have been extremely severe, their patience sorely tried over a period of 2½ hours by the ship's energetic response.

Again IMO recommends that if the attackers gain access to the ship any crew on deck should retreat to the ship's secure area. If this area is truly secure and all the crew are accounted for then *'the Master may consider undertaking evasive manoeuvres of the type referred to above to encourage the attackers to return to their craft.'* Guidance to Shipowners and Ship Operators, Shipmasters and Crews(2002:10).

However, if the attackers take one of the crew hostage and/or gain access to the secure area and manage to seize control of the ship then the Master:

'should remain calm and, if possible seek to negotiate with the attackers.... There will be many circumstances when compliance with the attackers' demands will be the only safe alternative and when resistance or obstruction of any kind could be both futile and dangerous.' Guidance to Shipowners and Ship Operators, Shipmasters and Crews(2002:11)

As already noted this is exactly what occurred in the first three piracy reports.

Mention has already been made of the need to send an immediate report to the nearest coastal state RCC and the IMB-PRC, follow up reports are also required by the flag state, coastal state and of course the owners.

International Maritime Bureau(IMB)

The IMB has already been identified as important. It is appropriate at this stage to note the role of the IMB in the suppression of piracy. Overall its role is to prevent fraud in international trade and maritime transport, reduce the risk of piracy and assist law enforcement in protecting crews. It is a NGO founded in 1981 as a branch of the International Chamber of Commerce (ICC). In response to the continuing growth in attacks on merchant ships the IMB was created in 1993 and continues to run the Piracy Reporting Centre(PRC) in Kuala Lumpur, Malaysia. The PRC receives its funding from many maritime bodies worldwide, largely P & I Clubs.

The services that the PRC provides free of charge to all shipping upon request are as follows:

'To receive reports of suspicious or unexplained craft movements, boarding and armed robbery from ships and to alert other ships and law enforcement agencies in the area.

To issue status reports of piracy and armed robbery in daily broadcasts on Inmamat-C through its Safety NET Service (see Appendix 2)

To assist owners and crews of ships that have been attacked.

To locate vessels that have been seized by pirates and recover stolen cargoes.

To collate and analyse information received and issue consolidated reports to relevant bodies, including the IMO.' IMB Annual Report(2003:1)

indeed the IMO seems to obtain most if not all its information on piracy from the IMB. The high regard with which it is held can be judged by the fact that it has consultative status at both the IMO and Interpol.

In addition it organises and runs a Tri-annual conference on piracy and maritime security where all interested parties can meet. The last conference was held in June of 2004 and attracted 187 delegates from 34 countries.

Terrorist Acts and Piracy

There have been no terrorist acts per se reported in this case study quarter, however:

'on the 20th March 2003 a Chinese fishing trawler was sunk 16 miles off Chundibulum' in Sri Lanka. She was surrounded by smaller boats and sunk by rocket propelled grenade attack. Nine crew were rescued but 18 were still missing as of the 25th March. The attack was blamed on LTTE rebels who deny any of their boats involved – possibly indicating the attack was in error' IMO January(2004:4).

Certainly the “Sea Tigers”, the naval arm of the “Liberation Tigers of Tamil Eelam” (LTTE) have the capability. *'In 1985, 20 6m long fibreglass boats were purchased in Japan, they have 60 p.p. engines and are capable of speeds of about 45 knots. They have a crew of four and are armed with one machine gun' Singh, K.R.(2003;4).* Some of these boats have been modified and are *'packed with explosives and used to ram naval vessels' Campbell,T & Gunaratna R.(2003:74).* Indeed, it is thought that Al-Qaeda obtained their knowledge of this type of attack from the “Sea Tigers”, using this information in their attacks on the USS Cole in October 2000 and on the French tanker, the Limberg some two years later. Moreover, since the mid 1980's using the FOC structure of vessel ownership they have been able to develop:

'a fleet of 10-12 reasonably well-maintained bulk freighters bearing Panamanian, Honduran or Liberian flags, crewed by Tamils and owned by front companies in Asia. For the majority of the time the vessels operate openly in the world shipping market. However, approx 5% of the cargo carried by these vessels is thought to be the material necessary for LTTE to carry out attacks in Sri Lanka.' Security in Maritime Transport(2003:14).

Turning now to a type of maritime violence that has been described legally as a 'grey area' Jesus, J.L.(2003:363) and 'terrorists acting tactically as pirates' Lehr, P.(November:2004), that is the hijacking of crewmembers for ransom in order to fund their organisation and activities. This type of piracy is occurring at the northern end of the Malacca Straits and is carried out by members of Movement for an Independent Aceh (GAM) who wish for independence of this area, the northern end of Sumatra, from Indonesia. This area has had "Operational Military Status" since 1991 and the central government has some 30 to 40,000 troops in the region to maintain law and order.

In the case of the "Cherry 201" the full details are not known as the document relating to the case cannot be released until the Indonesian police have finished their investigations. What is known, however, is that '*on the 5th January 2004 the Indian registered tanker "Cherry 201" of 640 tons was boarded by armed pirates off Northern Aceh*' IMO February Report(2004:4) whilst on passage to Belawan with a full cargo of crude palm oil, a valuable cargo. Once on board they took the 13 crew members hostage, the Master being later released to convey to the owners the ransom demand for RM 400 million. The owners countered with an offer of RM 70 million. After a month of negotiation the hijackers shot dead 4 crew members, the remaining 8 jumped overboard and escaped.

The above has not been the only case involving the GAM. On the 8th April 2003 in approximately the same area '*the Indonesian general cargo ship Trimangguda of 3876 tons was attacked at 1730 hours, in broad daylight, by several pirates in three fishing*

boats firing on the ship from both sides forcing the Master to stop. IMO April Report(2003:3).

The Master sent a distress message. Once on board, the pirates gathered all the crew on deck. After taking the ship's documents and some equipment they left the ship taking the Master, Chief Engineer and chief officer with them as hostages. Some time later the Indonesian Navy in response to the distress call escorted the ship to Belawan.

'The hostages were subsequently released upon payment of ransom' IMB Annual Report(2003:18).

A similar incident was that of the tanker *Penrider*. This ship:

'a Malaysian registered tanker of 740 tons as on passage from Singapore to Penang on the 10th August 2003 when at 13 30 hours she was attacked by eight pirates armed with automatic machine guns and a grenade launcher and boarded the ship from a fishing boat while underway' IMO September Report(2003:3).

Once on board they took all 10 crew members hostage and ordered the Master to divert the ship into Indonesian waters.

After some 7 hours on board the ship the pirates left the ship taking the Master, Chief Engineer and a crew member with them as hostages. In addition,. They stole the ship's cash, personal cash and belongings, and the ship's documents and certificates. The Chief Officer then took command and sailed the ship to Penang where he reported

the incident. *'The pirates later demanded \$100,000 for the hostages' release. This amount was negotiated down to \$2,000 and the three hostages were released'*. IMO September Report(2003:3) .

Several months later *'on the 1st December 2003 at 1600 hours The Sea Panther a Belize registered supply ship of 1132 tons'* IMO January Report(2004:5) was attacked in the same area. This time:

'four armed pirates in a speedboat chased the ship and ordered her to stop, attempting to board, while underway. The ship ignored their threat and increased speed, they then fired several shots and two bullets hitting the helm killing one crewmember' IMO January Report(2004:5)

Although there have been more than fourteen reported incidents of this type recently, where the senior officers and crewmembers of ships have been kidnapped for ransom *'and it is believed that many other cases may have gone unreported as ship owners prefer to pay the pirates to secure the safe release of their crew.'* IMB January-June Report(2004:22) It is as yet to early to say if this is a "new trend" in terrorism.

Moreover, the attacks by GAM freedom fighters is not confined to passing merchantmen alone:

'On the 2nd February 2004 at 1100 hours off Pinlan Jerajak, Malaysia, twelve pirates approached a Malaysian trawler under the pretext of buying fish. When they came alongside, five of them armed with M16

rifles jumped on board and held hostage the skipper and nine crew members, demanding a ransom of RM500,000. Whilst the skipper was talking to the owner shots were fired into the air (presumably to intimidate the crew). The pirates then took their hostages to Aceh where they were beaten up, in addition they stole ship's equipment, documents and the catch. On the 5th February after negotiation, a ransom RM180,000 was paid and the hostages released.' IMO February Report(2004:4)

Furthermore:

'it is reported that pirates in the Northern Malacca Straits are forcing fishermen to pay protection money or risk being kidnapped. These pirates are said to have provided their bank account numbers in Indonesia for the victims to deposit the sum. Once the money is paid, the pirates provide the fishermen with a letter permitting them to fish. The letterhead bears the name "Aceh Sumatra National Liberation front" and signed by N.A. / Abu Hendon. The Malaysian Authorities have advised the fishermen, not to pay as it would encourage their activities' IMB January-June Report(2004:23).

Considering that GAM appear to only attack during daylight hours and none have so far been caught in either Malaysian waters or Indonesia those fishermen would be brave fellows indeed if they refused to pay.

In none of the cases mentioned so far has the State itself been threatened, economically or otherwise by maritime terrorism. The only case where this has happened since 9/11 was where the *Limberg* was attacked in Yemen and the perpetrators were quickly caught. The *Limberg* was a modern double hulled very large crude Carrier (VLCC) delivered from the Korean shipyard in October 2000. She was French flagged and manned by French officers and Bulgarian ratings. She arrived off the Ash Shipur oil terminal at 1400 hours on the 4th October 2002 coming from Ras Tanura, Saudi Arabia in the Persian Gulf coast where she had part loaded 55,000 tonnes of Arabian Heavy Crude Oil.

On the early morning of the 6th October at 0415 hours she left her drifting position and began her approach to the pilot position. At 0630 she made contact with the Pilot and at 0615 hours speed was reduced to meet the Pilot boat and two tugs who would assist her to berth. To make the tugs fast 12 Bulgarian crew members had gone to the forecastle. At 0700 hours with the ship virtually stopped to pick up the pilot on the port side of the ship an explosion occurred '*exactly dead centre of the only starboard tank containing oil and blew a hole 10m x 8m in her side sparking an enormous fire*' In The Firing Line(2004:12).

The Master went astern on his engines in an attempt to keep the flames away from the accommodation, bridge and engine room. This manoeuvre was successful, however in so doing the 12 crewmembers who had gone for'd were trapped forcing them to jump overboard. One crewmember died as a result, presumed drowned. This was the only casualty. The rest of the crew attempted to fight the fire but to no avail. The decision to abandon ship was taken at 1200 hours.

The fire was finally extinguished by the salvage tug *Ryan* at 2030 hours on the 8th October. After their investigations the Yemeni authorities released the *Limberg* on the 28th October and she proceeded to Fujairah under her own power where she was declared a total constructive loss by the insurers.

At first the Yemeni officials refused to concede that the *Limberg* was the victim of a terrorist attack:

'A number of Yemeni military experts are sceptical of the possibility of terrorism as the cause of the oil tanker Limberg's explosion. In particular, they question if the oil tanker was exposed to an attack by a small fibreglass boat, in a fashion similar to the attack on the USS Cole in 2000 at Aden. They have cited some reasons supporting their scepticism, mainly that the vessel was about 16 km away from the Yemeni coast and that Yemeni port officials control its movement inside territorial waters. The experts question how anyone could have access to the co-ordinates of the vessel at the required speed and time. The experts have considered three possibilities more likely: a technical failure in the ship; the tanker hit a sea mine or that some intelligence bodies having more capabilities for such an act were behind the explosion' Yemen Times(20th.Oct.2002:1).

However, a cadet on board the vessel had watched the terrorist craft approach the starboard side of the ship at speed, *'they interviewed him no fewer than 20 times, attempting to get him to admit he did not see anything.'* In *The Firing Line*(2004:12)

With this evidence and debris of the craft used to launch the strike being found on the deck and the hole in the ship's side clearly being the result of an external implosion rather than an internal explosion the Yemeni authorities had no choice but admit the truth. *'It was a premeditated terrorist act carried out with a boat laden with explosives "the Saba news agency" quoted the interior minister Rashad al-Alimi as saying'* Yemen Times(27th.Oct. 2002:2):

'Al-Qaeda claimed responsibility in these terms. "If a boat that didn't cost US \$1,000 managed to devastate an oil tanker of that magnitude, so imagine the extent of the danger that threatens the West's commercial lifeline, which is petroleum, " said a communiqué issued by Al-Qaeda's political bureau on the 13th October.' Associated Press Report(3rd. Dec 2002).

Once the Yemeni authorities had admitted to the outside world and themselves that this was a terrorist attack they were remarkably quick in arresting the suspected terrorists:

'Authorities have detained a total of 20 people in connection with an attack last month on the French oil tanker Limberg. Those detained included two watchmen from the house rented by the suspected perpetrators and three people who transported a boat used in the attack from the house to the shore' Yemen Times(10th. Nov. 2002:1)

Also arrested in this round-up was:

'Abda Al-Nasheri, Al-Qaeda's former chief of naval operations, who has reportedly admitted playing a key role in organising the attacks on the USS Cole and the Limberg' US Dept. Justice(2003:1)

However, the damage had already been done to the Yemeni economy. The number of ships, particularly container ships, calling at Aden and other ports dropped off dramatically, brought about principally by high insurance costs:

'Marine underwriters tripled war risk premiums for ships calling at Aden and other ports in Yemen to as high as 0.5% of the value of the vessel's hull and machinery, compared to about 0.15% before the attack – an increase amounting to hundreds and thousands of US dollars for larger ships. For a ship carrying around 5,6000 TEU's. This premium came to as much as US \$ 300,000 per port call.' Richardson, M.(2004:52)

Aden as a container transshipment port was devastated. *'From 43,000 TEU's in September 2002 to 3,000 TEU's just two month's later, in November 2002 it then fell further to almost nothing'* Richardson, M.(2004:52). To sum up, the attack on the *Limberg* is losing Yemen *'approximately \$3.8 million U.S. dollars per month.'* International Security(2004:1). This is out of an *'estimated GDP of 15.09 billion'* CIA Fact File(2004:4).

By October 2004, 15 people had been charged, tried and convicted in connection with the bombing of the *Limberg*. *'Hizam Saleh Negalli was sentenced to death and the other fourteen, including Abda Al-Nasheri in absentia, to prison terms ranging between 3 and 10 years'* Yemen Times(8th.Oct. 2004:1). Abda Al-Nasheri is at present helping the Americans with their inquiries at an unknown location.

Hijacking and Piracy

Turning now to a type of piracy where the vessel disappears with sometimes fatal consequences for the crew. There were no merchant ships per se hijacked in this quarter but the Indonesian tug *Sing Sing Mariner* towing the barge *Kapmas 68* was hijacked by armed pirates:

'On the 9th February 2004 at 0001 hours she was in Indonesian territorial waters between Lingga and Bintan Islands (south of Singapore) when armed pirates boarded the barge and kidnapped the five man crew landing them on Nesanak Island' IMO February Report(2004:12) *'Later, the local police managed to arrest the pirates and release the barge crew'* IMB January-June Report(2004:17). *Meanwhile 'the tug continued sailing unaware of the kidnap of the barge crew. Owners were last contacted on the 12th February at 1500 hours.'* IMO February Report(2004:12).

The tug and barge had been hijacked by another gang of pirates:

'The IMB sent out an alert to ports and authorities in the region. On the 13th March 2004, the IMB received information on the location of the tug and barge. Both were subsequently detained by the Royal Thai Marine Police' IMB January-June Report(2004:17)

'The fate of the tug's crew is unknown' IMO February Report(2004:3). In spite of the alert sent out by the IMB this slow moving tug and barge managed to evade the authorities of Indonesia, Singapore and Malaysia and Thailand for more than a month.

Again in Indonesian territorial waters:

'on the 27th October 2003 at 1845 hours a group of masked robbers armed with guns boarded the tug Royal Palma 1 towing the barge Royal Palma 8 from a fishing boat. In the vicinity of Sadat Berhala. They tied up all the tug's crew and seven out of the eight of the barge's crew and locked them up in the lower deck of the tug. The pirates repainted the colour of funnel, removed the tug's name and left the tug to drift, hijacking the barge with its cargo of crude palm oil. The tug has been found but the barge and one crew member are still missing.' IMO November Report(2003:7)

Earlier in the year on the 10th July 2003 the Singapore registered tug *Bintan 1200* towing the barge *Bintan Golden 2301* whilst on passage in ballast from Jambi to Tanjung Pinang was hijacked in the vicinity of Sintep Island, which is just south of Lingga Island which featured in the case of the SingSing Mariner:

'A group of armed pirates in a fast speedboat boarded the tug while underway. All crew members were taken hostage, tied and blindfolded. They were later released and abandoned on a deserted island. On the 12th July they were spotted by a local fisherman and rescued. Tug and barge are still missing' IMO August Report(2003:3) .

Details are sparse but it was reported that *'on the 19th September 2003 the Singapore flagged tug Poet Vanda was missing in Selat Durain'* IMO September Report(2003:4) in the same area as Simtep and Lingga islands:

'Following a tip-off from the IMB-PRC, the police managed to locate and detail the tug near Penang Island, Malaysia. The tug had been repainted and renamed "Akiss". The Police said that they had handed the case to their Indonesian's counterparts for further investigations' IMB January-June Report(2004:23).

It has already been seen how information from the IMB led to the detention of the *Sing Sing Mariner*. How does the IMB come by this information? As has been seen it is often the IMB-PRC who first receive the message or a copy of it that a ship has gone missing, usually hijacked. The director of the IMB-PRC:

'asks the ship's owners and underwriter if they are willing to put up a reward for its recovery. They usually agree to a price of about \$100,000 to \$200,000. If the ship is carrying \$2.5 million in diesel fuel, then a couple of hundred thousand for the return of cargo , ship, and – if not

already dead – the crew, is worth it. Sadly, this is the priority of retrieval – cargo, ship and the crew; if the seafarers aren't Western they are seldom a high priority for the underwriter or ship owners..... The Director calls his informants on their mobile phones in Bangkok, Ho Chi Minh City, Hong Kong, Manila, Singapore, Jakarta. First he gets their attention, says a reward is offered. Then he gives them the name of the ship and its registry, the destination, and the cargo aboard ... Within hours someone usually calls and wants to get together.' Burnett, J.S.(2003:213)

A total of 10 tugs some with barges have been hijacked recently and some security consultants:

'worry that they are for use to tow a hijacked laden super-tanker into a busy international port, such as Singapore, or the Malacca and Singapore Straits and scuttle it to create a major blockage and oil spill, or blow it up to start a massive blaze' Aegis Terrorism Report(2003:5)

However, looking at where two of the tugs have been found, Thailand and Penang, it is far more likely to be the work of an international crime syndicate. Chinese Triad gangs for example who have affiliations throughout South East Asia. These tugs and barges are easy targets being of low freeboard and slow moving with a cargo of crude palm oil at \$300 a tonne on the open market a valuable prize.

Malaysia's Southern Regional Marine Police Commander ACO Abd Azuz Yusof speaking of piracy generally in the Southern Malacca – Singapore Straits area said:

'The pirate groups operating in several areas along the Straits of Malacca have become more sophisticated and organised. The perpetrators are well-equipped and trained, and use high speed craft for their unlawful pursuits. They are well organised. In some cases, the equipment used is more superior than that of enforcement agencies. Information on the pirates also showed that some were members of the armed forces or para-military units. In many instances, they use high speed boats with good communication and visual equipment. Furthermore, in some cases, poor villagers and coastal communities who get a share of the pirate illegal gains consider them as heroes' Aegis Terrorism Report(2003:6)

However, he does not say which country the military or para-military units come from.

But it is more likely Al-Qaeda and the Jemaih Islamiyah would use its own ships or its own operatives to take control, for a major maritime terrorist attack. This would give the organisation better control over any operation. Moreover:

'for pirates, and any criminal syndicate behind them, a serious terrorist attack would be bad for business because it would almost certainly lead to a crackdown that would make future sea robberies more difficult.'

Richardson, M.(2004:28)

Summing up of the Case Examples

From the statistics and examples quoted for this quarter of 2004 it can be seen that whatever their motives, be it common robbery, terrorism, hostage taking for political purposes or as members of an organised crime syndicate the pirates inflict upon the seafarer the most violent attacks leading to serious injury, both mental and physical, and murder. The reports themselves are stark and factual but lack important detail largely because the perpetrators of these crimes are almost always never caught, and for the reasons given coastal states and ship owners in many cases try to ignore these crimes. It seems that only when the State itself is threatened does the full weight of the law come down swiftly on those responsible.

However, there is one recent case where the pirates were apprehended on the high seas in the vessel they had hijacked. They were brought to trial in open court, leading to their conviction for various crimes. Thus, the full facts of the case became public and the modus operandi of the pirates can be examined in detail. This is the case of the *Alondra Rainbow*.

CHAPTER V - ANALYSIS OF THE CASE OF THE *ALONDRA RAINBOW*

The case of the *Alondra Rainbow* is likely to be picked over by many legal experts as so far it is the most comprehensive from start to finish available. It is seldom that there is a sequence of detailed pieces of information of a case of piracy that can be put together and a near complete account arrived at. The information relating to the "Alondra Rainbow" extends from October 1999 until February 2003. A substantial series of documents and evidence has been collected in this respect, and also by sifting the investigatory process at court levels a good sequential picture has been established.

The components of this cover the original crew, the ship and cargo, the pirate attack, the recapture of the ship and the trial ending with the conviction of the pirates. From the point of view of this study, however, this case allows a step-by-step analysis of the dangers to the seafarers, the testing of the measures involved for their protection, and as will be seen from the subsequent chapter, the efficacy of current and proposed international law as applied to the crews of vessels.

This ship of '7783 gross registered tonnes and 8912 tonnes deadweight' Lloyds Register(1999:), was built to a conventional design with 'two holds, tweendecks and two hatches' Lloyds Register(1999). It was owned by 'Imura Kiren Company Limited of Japan' Lloyds Register(1999: and was registered in Panama through a one-ship company 'Alondra Maritime S.A.' India v C. A. Mintodo & Others(2003:74). The vessel's 'hull was dark blue, superstructure white, cranes and derricks beige, and the funnel in blue, white, red and blue stripes' India v C. A. Mintodo & Others(2003:74). The crew, 17 in total, consisted of 'Captain Ko Ikeno of Japan, the Chief Engineer Mr.

Kenzo Ogawa also Japanese, and the rest of the officers and crew being Filipino'
India v C. A. Mintodo & Others(2003:77).

The ship's name, Alondra Rainbow, was embossed and painted white on both sides of the bow and the stern. The port of registry, Panama, was painted on the stern below the name. *'The ship arrived at the port of Kuala Tanjung, Sumatra on the morning of the 17th October 1999'* India v C. A. Mintodo & Others(2003:77) in ballast from Thailand. She spent the next 24 hours at anchor in the outer anchorage of this port. Kuala Tanjung is situated approximately half way down the Malacca Strait on the Sumatran side.

The following morning, the 18th, the ship berthed and commenced loading *'6972 bundles of aluminium ingots. Each bundle weighed 1 tonne and consisted of 44 ingots of weighing 22.73 kilos each'*. India v C.A. Mintodo & Others(2003:76). The dimensions of each ingot *'was 20 cm x 81 cm x 9.5 cm and had the letters I.N.A.L. stamped on them, standing for Indonesian Asahan Aluminium. Each bundle had blue, green and/or yellow straps'* India v C. A. Mintodo(2003:77) to keep the ingots in place. The ship *'completed loading at 1700 hours on the 22nd of October and sailed at 2010 hours the same day.'* India v C. A. Mintodo(2003:77) . This cargo had a value of *'\$10 million'* Ship Carrying ingots missing(1999:1) which incidentally was also the value of the ship, \$10million' Ship carrying ingots missing(1999:1). The ship was bound for *'Niike, Japan'* India v C. A. Mintodo & Others(2003:77) so her course would be through the Malacca and Singapore Straits, South China Sea and so on to Japan. However, she never reached this port.

The Hijacking

From the Master's *'testimony'* *India v C. A. Mintodo & Others*(2003:78-81) given at the trial, the ship had cleared the port by 2200 hours, the course of 113 ° was set on the autopilot and she came up to her full sea speed of 13 knots. Leaving the 3rd officer and a lookout on the bridge the master went below to draft a letter to the charterers and Owners confirming his departure and to take a bath. After 30 minutes he heard abnormal sounds over the public address system and thumping sounds on the deck over head. He rushed out of his cabin and up the stairs to the bridge where he found the bridge door blocked from the inside. When he pushed hard enough to open the door a little he saw a knife and a gun so he gave up pushing the door. Almost simultaneously the door was yanked open and two strangers pushed him against the bulkhead, held a knife to his throat and threatened to kill him if he resisted. One of these strangers fired several shots into the deck head to make his point. His hands were then tied behind his back and he was pushed onto the bridge.

Once on the bridge the Master noted that there were in addition to the 3rd officer and the lookout, whose hands were also tied behind their backs, approximately ten strangers who wore ski masks and who were armed with guns, knives and bolo swords. They then took the master key from the Master along with his wristwatch. Captain Ikeno further stated that he did not say anything to the strangers because he was afraid that they would attack himself, the 3rd Officer or lookout or all three.

He, the Captain, was then forced by the strangers to guide them through the accommodation where they pulled the off duty crew from their bunks, tied their hands behind their backs, blindfolded them and took them to the messroom. The strangers

then forced the Master to take them to the engine control room where the 3rd Engineer, the engineer on watch, was forced to bring down the speed. After binding and blindfolding the 3rd Engineer both he and the Master were taken to the Messroom. Captain Ikeno was then led back to his cabin where the pirates opened the ship's safe with the key they had taken from him earlier where they stole \$2500 and 3,800,000 Japanese Yen, the ship's money and 8,000,000 Japanese Yen which was the Captain's personal cash. In addition, they stole from his cabin a spare wrist watch, passports of the crew and ship's papers. On their way back to the Messroom with the Captain the pirates went into the other cabins and stole personal cash of other crew members. Back in the Messroom the Captain was blindfolded and forced to sit on the floor. The entire crew of seventeen were now in the Messroom and held in this way, they did not talk to each other as there were armed pirates in the messroom with them.

After what Captain Ikeno estimated to be two hours he heard different engine noises and the sound of a pump starting indicating that the ship was slowing down. He then felt a sharp bump. After about half an hour the pirates took the Master and the rest of the crew one by one to the poop deck where the pirates removed their blindfolds. Captain Ikeno then saw that there was one poorly maintained dirty cargo ship alongside the starboard side of his ship with many armed men on the deck.

He and his crew were then ordered by the pirates to transfer to that ship. Thereafter they were blindfolded again and separated into two groups. One group into a central room and the rest of which the Master was amongst their number were put into a room on the port side of the ship. Once there they were ordered to lie down on dirty mattresses, not to speak to each other and not to stand up and look out of the porthole.

The pirates warned the crew of the *Alondra Rainbow* not to make trouble or they would be killed. They were left like this for six days, being fed only twice, given dirty drinking water occasionally and taken to the toilet once a day. The only concession made to their welfare was to change the shackles on their wrists from behind their backs to the front.

After six days at about midnight the vessel stopped and the crew were taken one by one onto the main deck where their blindfolds were removed. Once he could see Captain Ikeno saw that there was an inflated life raft alongside the ship. He and his crew were ordered onto the life raft. After all were on board the pirates cut the rope holding the raft to the ship and the ship sailed away. When he got into the life raft Captain Ikeno found that it was from the *Alondra Rainbow*. The raft was equipped with the standard items: a supply of fresh water in cans, biscuits also in tins, a first aid kit, two sponges, two safety knives, two bailers, two paddles, ten signal flares and some fishing hooks and line.

Captain Ikeno and his crew had, of course, no idea where they were so that even if they had been able to paddle the raft any distance they would not have known in which direction to go, to reach land. They were in fact in the Andaman Sea, north of Sumatra and off the Thai coast. Captain Ikeno would have been aware that although the search for the *Alondra Rainbow* would be under way no one would be looking for a life raft.

During the ten days they were on the life raft several ships passed by and they let off their distress flares, to no avail, no one stopped. On the 8th November at about midday

they saw a small fishing boat slowly heading in their direction. Having used all their flares one of Captain Ikeno's crew tied a white shirt to a paddle and waved it in the air to attract attention. The fishing boat, flying the Thai flag, stopped within hailing distance and asked the Captain and crew to show them their passports. None had their passports of course, recalling that the pirates had taken them. However, one of the crewmembers had his expired passport which was passed over to the fishing boat. Captain Ikeno was then allowed on the boat where he tried to explain himself, writing out his name and that of his ship, the *Alondra Rainbow*. The skipper of the fishing boat then radioed ashore for advice. This advice must have been positive and reassuring to the skipper for all the crew were allowed on board the fishing boat, which then proceeded to the port of Phuket.

This port was reached the following morning and the crew of the *Alondra Rainbow* were taken to the local police station for questioning where they were held for two days. Thereafter they were taken to Bangkok and repatriated to their home countries. So ended their harrowing ordeal which had lasted for almost three weeks.

The Fate of the *Alondra Rainbow*

As already noted the pirates boarded the *Alondra Rainbow* so soon after sailing that the Master was not able to send his departure message to his owners so that it was not until the 27th October that they reported the ship missing. On the 28th October the IMB Reporting Centre broadcast a message to all ships giving the characteristics of the "Alondra Rainbow" and a request to report such sightings with a reward of US \$100,000 on offer to the person giving information leading to the recovery of the ship and cargo. On the 5th November the 'IMB doubled its reward to US \$200,000 and

issued fresh details to block the sale of its cargo of aluminium ingots' Ship carrying ingots missing(1999:1) to ports, coastal and law enforcement agencies in the region.

On the evening of the 13th November the Master of the Kuwaiti registered tanker the *Al-Shuhadan* reported to the IMB-PRC by:

'satellite phone that he had passed a ship matching a description of the "Alondra Rainbow". He said that the suspect ship's name was illegible in the fading light but it appeared to have been freshly painted. He gave the location, 50 miles west of Kerala, in international waters, and the information that this ship was steering 330° at 8 knots' India v C. A. Mintodo & Others(2003:99).

The following day, the 14th November, *'the IMB-PRC passed this information to the Indian Coast Guard along with a photograph and requested assistance' Abhyanker, J.(2001:17).* From the testimony given at the trial by *'Soibam Mahendra Singh, Executive Officer of the Indian Coast Guard Cutter Tarabai,' India v C. A. Mintodo & Others(2003:98-105)* his ship sailed from Cochin at about 1400 hrs the same day to intercept the suspect ship, coming upon her at about 2000 hrs, 40 miles west of Cochin. The *Tarabai* repeatedly asked for identification on VHF Channel 16 (the international short range calling and distress frequency.) There was no reply. On the possibility that the ship's radio had failed or the ship had not seen the *Tarabai*, she flashed her lights and let off two yellow flares, again no response. The coast guard cutter then fired six warning shots across the bow of the *Alondra Rainbow*. The response to this action was for the suspect ship to alter course to 310° and increase

speed. For the rest of the night the *Tarabai* shadowed the suspect ship at a safe distance maintaining a listening watch on VHF Channel 16.

Early the following morning the Coast Guard dispatched a Dornier patrol aircraft for positive identification of the vessel. The aircraft called the suspect ship on Channel 16 and this time a reply was received. The suspect ship identified herself as the *Mega Rama*, flying the Belize flag, carrying a cargo of aluminium ingots, on a voyage from Manila to Fujairah, with a crew of 15 Indonesians. Headquarters, ashore, confirmed through the IMB-PRC that there was no such ship registered in Belize. It appeared the *Alondra Rainbow* had been found. Both the patrol plane and the "Tarabai" ordered the *Mega Rama* to stop for further investigation. However, they refused, saying that they had a schedule to keep, that they were in international waters and could do whatever they wanted. Thereafter they used moderate force to stop the ship. This force consisted of firing into the superstructure and hull (above the waterline) with the *Tarabai's* armament. Still, the *Mega Rama* did not slow down and stop. Prior thereto the accused on board the ship had fired towards the *Tarabai*.

During the night, the 15th/16th, the missile carrying corvette, INS *Pinhar*, arrived on the scene and at daybreak with her much heavier armament fired at the *Mega Rama*. Shortly afterwards the *Mega Rama* slowed and stopped. Smoke was seen coming from the accommodation, she was beginning to settle by the stern and the crew were seen on the forecastle waving white shirts. Also on the scene by this time were the INS *Gomati* and the large coast guard cutter *Veera*.

On boarding the ship the X/O of the *Tarabai* found that the fire came from burning documents in the engine room. Furthermore, the engine room was flooding. The Chief Engineer, Burhan Nanda, volunteered the information that he had opened the sea valves in an attempt to scuttle the ship. A damage control party, including divers, came across from the INS *Gomati*. They put out the fire, shut the sea valves, plugged holes in the hull and pumped out the engine room. In spite of their attempts to destroy the evidence the X/O found enough evidence to positively identify the ship as the *Alondra Rainbow*. The 15 Indonesians found on board were taken into custody and transferred to the *Veera*. On the 17th the *Veera* took the *Alondra Rainbow* in tow and arrived in Mumbai on the evening of the 20th.

During the four day passage to Mumbai the 15 Indonesians were subjected to intensive questioning and much was learnt about how they were recruited and what had happened to the *Alondra Rainbow* and approximately half her cargo, which was missing, in the period between her hijack and capture. It transpired that:

'Burhan Nanda, the chief engineer along with Christinous Nintodo, master, met an employment agent who was called Yan or Yance Makatengkeng at a coffee shop in Bataan, Indonesia on the 4th October 1999' Langewieshe, W.(2004:51).

During this meeting in Bataan Makatengkeng had several conversations on his mobile telephone with a person referred to as the "Boss". *'This man is believed by investigators to be Chinese'* Langewieshe, W.(2004:51). Nintodo and Nanda flew to Jakarta where *'they joined a ship called the Sanho in the anchorage, this is the ship*

referred to as the “dirty ship” by Captain Ikeno as indeed did the Judge in his summing up at the trial’ *India v C.A.Mintodo & Others*(2003:80) .

The Sanho sailed under the command of:

‘Namos Zachawarus for Bataan on the 16th October with a crew of thirty five people that included Indonesians, Chinese, Malaysians, Thai and perhaps other nationalities’ Langewieshe, W.(2004:52)

‘Sanho’s first port of call was Bataan where she took on bunkers, water and provisions, then on the 17th she sailed for Kuala Tanjung where she arrived on the 22nd October’ Abhyanker, J.(2001:17)

the same day as the Alondra Rainbow sailed. When the *Sanho* sighted the *Alondra Rainbow* after clearing Kuala Tanjung *‘about 10 to 12 persons armed with pistols and lethal weapons were transferred to a speed boat’* Abhyanker, J.(2001:17) which came up close astern of the *Alondra Rainbow* and the pirates climbed up ropes put over by a member of the gang who had hidden on board before she sailed. The seizing of the ship and the fate of Captain Ikeno and his crew has been described in detail but once the *Sanho* was alongside the *Alondra Rainbow* she was boarded by Nintodo, Nanda and thirteen other Indonesians.

Once on board, the ship sailed for Miri in East Malaysia, en route *‘the name was changed to “Global Venture” and with black paint supplied at Miri her hull was repainted black.* Abhyanker, J.(2001:18) In addition *‘the funnel’s stripes were painted over black.’* Langewieshe,W.(2004:60)

The *Alondra Rainbow* 'now the "Global Venture" arrived in Miri anchorage on the 26th October and on the 27th October about 3,000 tonnes of the cargo was transhipped to the "Bansoon II"' Abhyanker, J.(2001:18) which came alongside.

The *Bansoon II* sailed for Subic Bay in the Philippines, where apparently it arrived renamed as the "Victoria" and presented satisfactory import documents for the cargo' Langwieshe, W.(2004:60).

Very little of this part of the *Alondra Rainbow*'s cargo has ever been recovered. The Philippines National Bureau of Investigation only managed 'to trace and recover 214 bundles of the aluminium ingots found in Hanson Paper Mills, Passig City,' South China Morning Post(24th. May 2000) which is some 12km SE of Manila.

When this transfer was complete Yance Makatengkeng, the employment agent 'instructed Mintodo to sail towards Karachi in Pakistan' Abhyanker, J.(2001:18). En route, as is now known the name was changed again to *Mega Rama*.

On the 8th December Captain Ikeno was asked by his company to go to Mumbai to formally identify the *Alondra Rainbow*. This he did 'after being offered full time police protection whilst in India' Langewieshe, W.(2004:78). Once there he identified the ship as the *Alondra Rainbow*, this name being embossed on the bow and stern and clearly visible under the name *Mega Rama*. He also identified several items found on the ship including the 'brass bell of the ship' India v C. A. Mintodo & Others(2003:92). Once this had been done the owners of the *Alondra Rainbow*

claimed ownership through their Attorney's in India who made an application for the return of their ship.

The Trial

On arrival in Mumbai on the 20th November 1999 the pirates were given into the custody of the police and India declared its intention to prosecute them. However, at this time, India although a signatory to the UNCLOS Treaty had yet to incorporate its provisions into her national legislation. In particular, Article 105 of UNCLOS (See Appendix 1) would have given her authority under international law to seize any ship under the control of pirates and decide the penalties to be imposed upon the pirates. Nor was she a signatory to the SUA Convention. Nevertheless, piracy "*Jure Gentium*" (law common to all nations) has been defined as: '*acts which international law requires states to punish by their municipal law in all cases within their enforcement jurisdiction*' Rubin, A. P.(1997:375) recalling that pirates have long been held as "*hostes humani generis*" (common enemies of all mankind). Moreover, the Indian Penal Code does not address the offences of piracy or the hijacking of ships. However, '*Article 372 of the Constitution of India provides that all the laws in force in the territory of India immediately before the commencement of the prosecution shall continue to remain in force ...*' India v C. A. Mintodo & Others(2003:59).

Thus the provisions of '*The Admiralty Jurisdiction (India) Act of 1860 and the Admiralty Offences Colonial Act, 1849 still applied*' India v C. A. Mintodo & Others(2003:60) as they had never been repealed. Section 1 of the above Act states:

'If any person within any colony shall be charged with the commission of any treason, piracy, felony, robbery, murder conspiracy or other offence of whatsoever nature or kind committed upon the sea ... or if any person charged with the commission of any such offence upon the sea shall be brought for trial to any colony' India v C. A. Mintodo & Others(2003:60).

The trial opened on the 19th March 2001 in the Sessions Court of Mumbai, similar to the English County Court, under *'Judge R R Vachha with Mr S Venkiteswaran prosecuting and Mr S Deshpande defending'* India v C. A. Mintodo & Others(2003:2).

'India gave up the jury system in 1961, after it was believed to have failed, most cases are now argued before single judges' Langwieshe., W.(2004:77) as this case was.

Thus Nintodo, Nanda and thirteen other Indonesians found on the *Mega Rama* were brought before the court and charged along with in their absence Yan or Yance Makatengkeng, Rager, Narnes Zachawarus, Boss (name not known), Ating or Ting, one Captain of N.V. Bansoon II and 20 other persons of eleven offences under the Indian Penal Code:

'1st Charge : That the accused along with the wanted accused in furtherance of their common intention had done illegal acts to hijack the vessel M.V. "Alondra Rainbow", to commit docoity in respect of cargo loaded in the said vessel and by use of lethal weapons attempted to commit murder of 17 crew members aboard the said vessel by abandoning them and setting them adrift in a raft on the high seas, by preparing false documents and changing name and colour of registered vessel and

committed docoity in respect of U.S. Dollars and Japanese Yen from the Master of the said vessel and disposed of the cargo.

2nd Charge; That the accused along with the wanted accused in furtherance of their common intention after hijacking the said vessel M.V. Alondra Rainbow, had abandoned and set adrift 17 crew members of the said vessel in a raft on the high seas furthermore the accused sailed the hijacked vessel towards Karachi, Pakistan and the same was noticed by the officers of the Coast Guard ship Tarabai near Cochin and when they asked the accused to stop, the accused in furtherance of common intention done an act opened fire on the Coast Guard officers aboard the Tarabai with an intent to deter or prevent them from exercising their duty as coastguards and/or public servants.

3rd Charge: That the accused along with the wanted accused in furtherance of their common intention entered into territorial waters of India without valid documents.

4th Charge: That the accused along with the wanted accused had disobeyed the order promulgated by the coast guards where the accused were directed to abstain from proceeding towards Karachi, Pakistan and to surrender.

5th Charge: That the accused along with the wanted accused had committed mischief by opening sea chest valves of the vessel "Alondra Rainbow" and by scuttling sink the said vessel.

6th Charge: That the accused along with the wanted accused in furtherance of their common intention had committed or attempted to commit mischief by fire, viz, by putting the engine room on fire, thereby causing destruction of said vessel.

7th Charge : That the accused along with the wanted accused in furtherance of their common intention had committed dacoit, and the accused used deadly weapons, fire arms.

8th Charge : That the accused along with the wanted accused in furtherance of their common intention were armed with deadly weapons, fire arms and pistols and used the said firearms at the time of committing the aforesaid offences.

9th Charge : That the accused along with the wanted accused in furtherance of the common intention had forged certain documents and changed the registered name of the ship to "Global Venture" and to "Mega Rama", changed its original colour with intention to claim its title, to cause damage to the owner.

10th Charge : That the accused along with the wanted accused had dishonestly used certain documents and changed the original colour of the vessel.

11th Charge : That the accused along with the wanted accused in furtherance of their common intention had caused certain evident connected with the said offences, viz the forged documents in the name of “Global Venture” and “Mega Rama”, the original documents in the name of “Alondra Rainbow” and other relevant documents, to disappear by setting fire to them in the engine room with the intention to screen you all from legal punishment.’ India v C. A. Mintodo & Others(2003:2)

In addition every charge had the added rider that the offences numerated above ‘*are related to international terrorism contrary to the international law on sea piracy and contrary to the U.N. Convention on the law of the sea as also international terrorism*’ India v C. A. Mintodo & Others(2003:59).

As can be seen whilst the accused were charged under the Indian Penal Code the Judge took full account of the provisions of UNCLOS, in particular Article 105 (see Appendix 1). Thus, in the Judge’s mind at least piracy is very much akin to terrorism. The accused pleaded not guilty to all the charges.

The case for the prosecution can be broken down into five parts; first, the evidence of Captain Ikeno as Master of the *Alondra Rainbow* to prove piracy; second, the officers of the Coast Guard and Navy who actually participated in the operation of the capture of the *Alondra Rainbow*; third, independent witnesses such as the photographer and videographer; fourth, the Deputy Director of the IMB and finally the police officers who investigated the case. The admitted facts of the case were:

'first, the ship was seized by the Indian Coast Guards and Navy in a joint operation; second, fifteen persons were found aboard the ship and have been prosecuted for the offences of piracy and the other offences charged. The ship was towed to Mumbai and anchorage was provided by the Bombay Port Trust; third, the offence was registered by the Yellow Gate Police Station; fourth, the fifteen persons charged in this case are only persons who were found aboard the ship. No other person was found on the ship; fifth, the fact that the ship was apprehended in the Arabian Sea is not disputed' India v C. A. Mintodo & Others(2003:57).

Essentially the case for the defence was that the accused were victims of circumstance. They had been recruited by manning agents in Jakarta and had flown to Manila where they joined the ship, having no idea of the vessels ownership. They ran from the Indian forces fearing that they were pirates and that they had no documents because the Indian coast guard had thrown them overboard. They, the accused, pleaded not guilty to all charges laid against them. Moreover, according to the defence advocate; the owners of the ship *Mega Rama* were Mega Rama Maritime S.A. having their office at Flat A, 10/ Fl Kings Lodge, 135 – 137 Kings Road, North Point, Hong Kong. But as the Judge pointed out nobody from this address had come forward to claim ownership of the ship and cargo worth millions of dollars. The defence did not call any witnesses; in particular, none of the accused were called into the witness box.

The defence advocate attempted to discredit the evidence of Captain Ikeno in several ways. By suggesting that the *Alondra Rainbow* was never hijacked and that Captain Ikeno and his crew were never adrift. The judge found this line of argument in *'total*

contradiction to the defence that the accused were the innocent occupiers of the ship and the victims of circumstance' India v C. A. Mintodo & Others(2003:95).

The defence advocate also argued that Captain Ikeno had not identified the ship correctly and *'that the identification of the articles on the ship are not believable'* India v C. A. Mintodo & Others(2003:95).The Judge dismissed this reasoning out of hand on the grounds that it was on record that Captain Ikeno had been Master of the *Alondra Rainbow* for over a year and that the articles produced in court were from the ship was unchallenged.

The defence advocate's next line of attack was to say that Captain Ikeno had not identified any of the accused as being the pirates. Captain Ikeno did however testify that none of the accused were members of his crew. The Judge's reply to this was:

'once the fact of piracy stands proved and that the accused were the persons aboard the ship without any satisfactory explanation, identification by the witness of the accused before the Court becomes immaterial' India v C. A. Mintodo & Others(2003:97).

The further submission of the defence advocate that Captain Ikeno *'had not stated that the cargo was not discharged at Port Kuala Tanjung by him in fact substantiates the prosecution case that the accused persons unloaded some of the cargo after they pirated the ship'* India v C. A. Mintodo & Others(2003:98). The Judge went on to say that: *'In the light of the evidence of the witness (Captain Ikeno), his demeanour and the manner in which he faced cross-examination the Court fully believes his version*

and is satisfied about the truthfulness of his deposition' India v C. A. Mintodo & Others(2003:90).

Thus the Court came to the conclusion that Captain Ikeno was the Master of the *Alondra Rainbow* and that the said ship was pirated in the manner given in his evidence. Moreover:

'the fact stands proved that the accused are the persons who had participated in the offence of piracy by taking away the ship and/or the disposal of the cargo therein, and who have participated in well hatched conspiracy' India v C. A. Mintodo & Others(2003:98).

How the *Alondra Rainbow* was stopped and the pirates apprehended have already been noted largely through the evidence of the Executive Officer of the *Tarabai*. The allegation that coastguard officers had thrown the identity documents of the accused overboard was quickly dealt with by the Judge who said:

'in the light of the above cross-examination it has to be seen the witness (the Executive Officer of the Tarabai) who was a member of the coast guard had no motive to depose against the accused persons. He has apprehended the accused persons as a part of his official duty. The fact that the staff of C.G.S. Tarabai along with other coastguard ships and INS Prehar were required to chase the pirated vessel, were required to use force to bring them under control and to apprehend them and thereafter to handover them to the police cannot be disbelieved in any manner as to be material to show any probability to raise any doubt in the mind of the Court.' India v C. A. Mintodo & Others(2003:110)

Moreover there was the evidence of other witnesses, coast guard and naval officers, and the video showing the amount of force necessary to stop the ship to corroborate his testimony. The Judge found him to be '*fully credit-worthy and truthful.*' India v C. A. Mintodo & Others(2003:115).

Another witness the Judge considered important was the Deputy Commandant of the Indian Coast Guard, Surendra Singh Dasila, who joined the C.G.S. *Veera* for this operation. Reference has already been made to the intensive interrogation the accused underwent during the four day passage to Mumbai. It was this officer who '*recorded the extra judicial confessions of the accused and obtained the signatures on their respective statements*' India v C. A. Mintodo & Others(2003:133). He confirmed that the accused were the persons found on the *Alondra Rainbow* and that they were the persons who signed the statements.

Inevitably the defence advocate submitted to the Judge that these extra judicial confessions were not admissible to the court on the grounds that '*confessions made before the Police arrive on the scene are not admissible in evidence*' India v C. A. Mintodo & Others(2003:134) according to Section 25 of the Indian Evidence Act. The Judge agreed but went on to say that these confessions were acceptable as corroborative evidence because they were in part confirmed by other witnesses and they were recorded at the first available opportunity after the *Alondra Rainbow* was seized. Moreover:

'there is no material brought on record by the defence that at that particular point of time the accused were under duress or their minds were influenced by the officers of the Coast guard or were obtained by threat, coercion or promise' India v C. A. Mintodo & Others(2003:135).

These confessions were not retracted until just before the trial commenced.

It was at this stage in his summing up that the Judge dealt with the accused's defence that they were victims of circumstance and had been recruited by manning agents who promised them employment. Their defence was not accepted by the Court because no material was brought to the Court's attention to substantiate this claim nor did they put themselves in the witness box to explain their version of events, where of course the prosecution would have had the opportunity to cross examine them and establish the truth. Furthermore:

'had the accused really been innocent persons it would have been proper on their part to stop when the call was given by the Indian coastguard... the further fact that the chase was required to be given and the services of 3 coastguard ships, navy ships and one aircraft were required to bring them under control goes against the innocence of the accused. On the contrary this conduct of the accused and the cogent and clinching evidence of the witnesses who actually participated in the operation proves that the accused were armed with weapons which they may make use of to resist their apprehension and they did not mind to finish the

persons who came in their way.' India v C. A. Mintodo & Others(2003:137)

Various other officers of the Coastguard and Navy who had participated in the operation to retake the *Alondra Rainbow* were called as witnesses who all confirmed the evidence of the principal witnesses. Perhaps the only light relief was in the evidence of the Executive Officer, Prashant Gojare, of the *Veera* who admitted that he had taken the brass bell with the name *Alondra Rainbow* on it as a souvenir and put it on display in the Coastguard headquarters, not realising that it was an important piece of evidence. When asked for it by the police, he knowing this to be a lapse on his part handed it over at once. In a reply to the defence advocate '*he further stated that it was not correct to say that the bell was not found on the Mega Rama and that he had fabricated the bell and handed it over to the police.'* India v C. A. Mintodo & Others(2003:141).

Several police officers were called upon to give evidence of whom Police Inspector Ambre is perhaps the most important. He took charge of the case once the *Alondra Rainbow* reached Mumbai and took over the custody of the accused from the Executive Officer of the *Tarabai*. Four days later in order to confirm the identity of the ship, he visited it himself along with navy personnel, other police officers and Mintodo. Once on board Mintodo led them to the paint locker and showed them the drums of black paint that had been used to change the colour of the hull. Paint samples were taken to confirm this. He also confirmed that it was they, '*the accused, who had changed the name from Alondra Rainbow to Mega Rama.'* India v C. A. Mintodo & Others(2003:190)

A week later on further interrogation Nintodo '*expressed his willingness to point out some documents in respect of change in name of the vessel.*' India v C. A. Mintodo & Others(2003:192). Accordingly Inspector Ambre, Police and Navy personnel with Nintodo went out to the ship where he took them to the Chief Engineer's cabin and he showed them a book with the documents in, that the police then took charge of. The individuals who took photographs and a video recording of the ship and damaged caused were also called as witnesses, merely to confirm that they had done so whilst the *Alondra Rainbow* was at anchor at Mumbai.

Captain Abhyanker of the IMB was also called as a witness. He had gone to Mumbai at the request of the Indian Police to help with their enquiries. It was he who found the shipbuilders plate of the *Alondra Rainbow*, which is normally fixed to the forepart of bridge structure, in the steering flat. He also took tracings of the serial numbers of the main engine and turbo blower, the numbers of which further confirmed the identity of the ship.

And so the trial has reached the stage where it has been proved beyond doubt that the vessel is the *Alondra Rainbow*. Captain Ikeno's evidence establishes that he was deprived of possession of it and the fifteen accused were caught on board on the high seas without a plausible alibi. Recalling that the accused were not identified as taking part in the hijacking nor of course were they identified in the transferring of the aluminium ingots in Miri. The Judge said that although:

'the cardinal principles of jurisprudence are that an accused is to be presumed to be innocent unless the contrary is established, is the bedrock of our system. From this principal no departure is permissible or desirable' India v C. A. Mintodo & Others(2003:62).

Recalling further that the defence called no witnesses, only the prosecution did so and the Judge found Captain Ikeno a very sound witness he, the Judge said *'At the same time the Court thinks it appropriate to note that what is scrutable is either the testimony of the witness radiates confidence or not and the Court can very well base conviction on believing the prosecution version.'* India v C. A. Mintodo & Others(2003:63). Moreover:

'the concepts of probability and the degree of it cannot obviously be expressed in terms of units to be mathematically enumerated as to how many of such units constitute proof beyond reasonable doubt. There is an unmistakable subjective element in the evaluation of the degrees of probability and the quantum of proof. Probability in the last analysis must rest on a robust commonsense and ultimately, on the trained intuitions of the Judge' India v C. A. Mintodo & Others(2003:63).

The Judge concluded that:

'in the present case it has to be seen that the accused before the Court are not the only accused persons who have been charged with the offence. Along with the accused facing trial 6 accused who are wanted in this case

and 20 other unknown persons have been charged for commission of the offence. Once the fact stands admitted that the accused facing trial in this case board the ship at some point of time in which the robbed cargo was loaded and were found on the said ship. A perfect plan stands established to enter the vessel load full with cargo. The entry of the pirates on the ship, after the time interval approach of a dirty vessel, transfer of the crew members on the dirty vessel and after time interval drifting them in the high seas on a hand operated raft with limited food and water, then leaving them to die at their fate at some distance. Unloading the part of the cargo while entering the Arabian Sea, exactly on the opposite side of the places mentioned for unloading cargo, all these facts prove a well hatched conspiracy. The accused before the Court have participated in the said conspiracy.’ India v C. A. Mintodo & Others(2003:216).

Section 120(A) of the Indian Penal Code states that when two or more persons agreed to do so or caused to be done (1) an illegal act or (2) an act which is not illegal by illegal means, such agreement is designated as a criminal conspiracy. Nor is it necessary for all of the accused to be together for the whole duration of the act:

‘Although the common design is the root of the charge, it is not necessary to prove that these two parties came together and actually agreed in terms to have this common design and to pursue it by common means, and so to carry it into execution. This is not necessary because in many cases of the most clearly established conspiracies there are no means, of pursuing any such thing and neither law nor commonsense requires that it should be

proved. If you find that these two persons pursued by their acts the same object, often by the same means, one performing one part of an act, so as to complete it, with a view to the attainment of the object which they are pursuing, you will be at liberty to draw the conclusion that they have been engaged in a conspiracy to effect that object. The question to be asked is, had they this common design and did they pursue it by these common means The design being unlawful.' Regina v Murphy[1993] 173 All ER 508

Clearly in this case this was so.

Due to the vagaries of the Indian Court system the trial dragged on for almost three years, during which time one of the accused Junus Umboh, died of natural causes. It was not until the 25th February 2003 that the Judge handed down his verdict. All of the accused were found guilty of all the charges, except for the 3rd charge, entering India illegally which was dismissed. All were sentenced to seven years hard labour. However, the Judge did not address the issue of monetary compensation for the crew, whether this was because the accused before the court had no visible assets or he thought it not relevant is not known.

Related International Points Arising from the *Alondra Rainbow* Case

This case demonstrates a considerable level of sophistication by the accused in that: First, the ship appears to have been hijacked for its cargo implying that the cargo is identified as suitable for hijacking rather than the ship or put another way the cargoes

are hijacked to order, the pirates being left with a ship, a bonus from their point of view.

Second, suitable arrangements must be made for the reception and disposal of the cargo, no easy task given the large tonnages involved.

Third, for a ship to clear inwards with a hijacked cargo at a port with false papers and discharge its cargo the customs, immigration and port officials must at least be extraordinarily inefficient or at worst completely corrupt.

Fourth, one or more of the hijackers must have some education and nautical knowledge for the ship to be hijacked has to be located at night, the rendezvous with another ship carried out and the hijacked ship sailed to the required port.

Fifth, if it is accepted that his cargo was hijacked to order then there has to be a considerable level of international co-operation between the criminals involved, pointing to an international crime syndicate. *'Usually Chinese Triads, who in the most important Southeast Asian harbours provide the logistical background necessary for organised forms of piracy'* Lehr, P.(2004:2).

As has already been noted India had no direct interest in this ship or its cargo. The crew were of Japanese and Indonesian nationality, the ship was Japanese owned and registered in Panama, the cargo was Japanese owned and the offences took place in Indonesian, Malaysian and international waters. India was merely acting under Article 100 of UNCLOS (appendix 1) in repressing piracy. Clearly the Indian authorities had gone to considerable trouble and expense in this case. Not least because at the end of their sentences India may well be left with fourteen stateless persons on its hands, recalling that the pirates had no valid means of identification.

However this is not necessarily so, in the case of the *Alondra Rainbow* it can be established that *'at least two of the fifteen Indonesians found on board the Alondra Rainbow have been identified as featuring in the hijacking of the Tenyu in September 1998'* Abhyanker, J.(2001:17)

This ship, like the *Alondra Rainbow* Japanese owned, with fifteen crew, went missing after departing the same port with the same cargo, that in Kuala Tanjung and aluminium ingots bound for Inchon, Korea. *'This ship was found three months later in the port of Zhangjiagang, Jiangsu Province, China under the name Sanei 1 with a crew of 14 Indonesians. The original crew are feared murdered by the pirates'* Fairplay(March 2000:18). The cargo was also missing:

'The strangers found aboard the Tenyu were arrested by the Chinese under suspicion of piracy, but because they claimed to have joined the ship legitimately in Myanmar and because they possessed used airline tickets to Rangoon along with valid Myanmar visas issued in Singapore they were released for lack of evidence' Langewieshe, W.(2004:55).

However:

'three South Koreans were arrested by the South Korean Maritime Police and charged with acquiring stolen cargo from the Tenyu. Those arrested admitted buying the ship and aluminium from two Chinese Indonesians and selling them to a Chinese company in Myanmar via another company in Singapore' Burnett, J.S.(2003:322)

'At least two of the 15 Indonesians found on board the Alondra Rainbow had featured in the hijacking of the Tenyu in September 1988' Abhyanker, J.(2001:18). So far as is known no flag, coastal or other state authority has investigated this wider aspect of the *Alondra Rainbow* case. It provides conclusive evidence of an international crime syndicate.

This action did cause such international outrage that the next pirate gang the Chinese authorities apprehended were put on trial, in the Intermediate Peoples' Court of the Southern Port of Shanwei, Guangdong Province, found guilty and executed. In this case the gang were responsible for a particularly brutal and shocking hijacking. The *Cheung Son*, registered in Panama, was on passage from Shanghai to Malaysia with a cargo of furnace slag when she was hijacked on the 16th November 1998:

'The leader of the pirates wanted everyone on his team implicated, so he forced each in his gang to kill one crewman. The pirates tied up the twenty three Chinese crew on deck, hooded their heads with plastic garbage bags, and clubbed them, or shot them or stabbed them to death. The bodies were tossed into the sea. Six of the bloated corpses weighted down with engine parts, were found snagged in fishing nets.' Abhyanker, J.(2002:18)

The condemned men included one Indonesian and twelve mainland Chinese:

'The Court also imposed the death sentence on Huang Daming, Chinese, who lent his ship, previously used for customs border patrols, to become

the mother ship from where the gang was able to launch its attacks. Huang also provided the pirates with custom officer uniforms. The Court ordered the guilty should pay Yuan 2.66 M in compensation to the families of the dead' Abhyanker, J.(2001:25).

At 1 US \$ to 8.2765 Yuan this implies that each family received an average of \$ 14456. At '5888 Yuan or \$736 per capita income for urban workers at 1999 prices' Exchange Rate(20 Nov. 2002). This equates to each family receiving 19.64 years pay.

The three ships mentioned in this chapter, *Alondra Rainbow*, *Tenyu* and *Cheung Son* all became what are known as "phantom ships". This is the term given to ships that have been hijacked, their cargo and crew disposed of; the ship is then reregistered under an assumed name:

'This is possible because of temporary registrations issued indiscriminately by officials of some ship registries. Applications for registration are submitted by so called 'Shipping Bureau', Shipping Assistance' or 'Marine Companies' based in South East Asia. Documents bearing false information are submitted to the officials at the time of registration. As a result, ships particulars and ownership details stated in the 'Certificate of Provisional Registry' or ' Patente Provisional de Navegacion' which is valid for three months is wrong.' Abhyanker, J.(2001:15)

This ship is then offered to the shippers and when loaded diverts to a port other than the one intended for discharge and the cargo stolen. This whole process can be then repeated. Alternately, given the high price of scrap iron due to China's rapid industrialisation the ship could be sold for scrap once anything of value had been removed.

The conclusion of the case of the *Alondra Rainbow* was widely welcomed by the maritime community because in spite of the problems with the law its outcome was a triumph for all who use the sea, particularly the seafarer. This and the other cases all showed up the vulnerability of vessels to attack for whatever motive.

These all gave rise to concerns internationally and pressures for greater security in shipping. This was intensified by the initial response to the Al 'Qaeda attacks on the World Trade Centre in New York which focused on the air transportation system. However, governments generally and the United States in particular quickly intensified their scrutiny to include the maritime sector and as all the foregoing shows with very good reason.

To address the maritime transport systems acknowledged vulnerabilities and weaknesses the Maritime Safety Committee of the IMO after lengthy negotiations introduced the International Ship and Port Safety Code (ISPS) as part of the Convention on the Safety of Life at Sea (SOLAS). At the same time the Legal Committee of the IMO is taking a fresh look at the SUA Convention with a view to bringing it up to date and making it more robust. It is these two measures that are now examined in detail.

CHAPTER VI – NEW MARITIME SECURITY MEASURES

As the preceding chapters have shown violence towards the seafarer whether from piracy, armed attack or terrorism is not a new phenomenon, indeed it is ongoing. Although the IMO have been addressing the problem for a number of years through collecting statistics, regional seminars and issuing guidance notes to governments and ship owners it took the terrorist attack of the 11th September 2001 on the World Trade Centre for the IMO to develop as a matter of urgency a set of mandatory rules relating to the security of ships and of port facilities. This was done through adopting new provisions to the Safety of Life at Sea (SOLAS) Convention of 1974. At the same time, as already noted, the Legal Committee of IMO began to look afresh at the SUA Convention with the USA taking the lead. The intention being to revise the Convention so that it will give states the legal means to deal more effectively with the new perceived threats in the maritime sphere.

The additions and revisions to these Conventions are examined in detail because not only are they important to the seafarer upon whom the main burdens of the provisions fall but after many decades of neglect governments and the shipping industry have been forced to address the issue of security of shipping.

SOLAS and the ISPS Code

The SOLAS Convention was used as the vehicle for introducing the new security measures because this Convention incorporates a “tacit amendment procedure.” Normally an amendment to a Convention requires acceptance by two thirds of the

signatories to that Convention. *'This requirement led to long delays in bringing amendments into force'* Conventions(2005:3).

With the rapidly evolving technology in the shipping industry it was widely accepted that this was unsatisfactory in such an important area as safety of life at sea. Hence, *'the tacit acceptance procedure provides that an amendment shall enter into force at a particular time unless before that date, objections to the amendment are received from a specified number of parties'* Conventions(2005:4). *'In other words, silence would be deemed to be acceptance'* New Measures for Maritime Security Aboard Ships and in Port Facilities(2004:2). *'The tacit acceptance amendment procedure has now been incorporated into the majority of IMO's Conventions'* Conventions(2005:8) but was not incorporated into the SUA Convention.

Thus, the first resolution of the diplomatic conference held by the IMO in December 2002 to consider maritime security issues:

'determined that the amendments shall be deemed to have been accepted on 1 January 2004 (unless, prior to that date, more than one third of the contracting Governments to the Convention or Contracting Governments the combined merchant fleets of which constitute not less than 50% of the gross tonnage of the world's merchant fleet, have notified their objections to the amendments) and that the amendments would then enter force on 1 July 2004.' IMO Adopts Comprehensive Maritime Security Measures(2002:4)

There were no objections, hence the amendments came into being as stated.

Chapter V of SOLAS was modified to contain a new timetable for the fitting of AIS:

'Ships, other than passenger ships and tankers, of 300 gross tonnage and upwards but less than 50,000 gross tonnage, will be required to fit AIS not later than the first safety equipment survey after the 1st July 2004 or by the 31st December, whichever occurs earlier. Ships fitted with AIS shall maintain AIS in operation at all times except where international agreements, rules or standards provide for the protection of navigational information' ISPS Code(2003:108).

However, as already noted the use of AIS has caused concern because the information transmitted is freely available to anyone with an appropriate receiver and could be used by pirates or terrorists for their illegal activities. Because of these very valid concerns the IMO adopted resolution A956 (23) which allows Masters to switch off the AIS in known dangerous areas where an attack by pirates or terrorists could happen at any time. Moreover, AIS information is freely available over the Internet. *'Concern over the security implication of the operation of AIS can only be overcome by tightening the security control measures to be enforced by the coastal security authorities' ISPS Code and Maritime Security(2004:12).* Due to the very public nature of AIS it is difficult to see how these concerns can be addressed without some form of encryption of the information transmitted.

The Chapter of SOLAS relating to measures to enhance maritime security has been renumbered as Chapter X1-1.

Rule XI-1(3) has been modified to require ships' identification numbers to be permanently marked in a visible place either on the ship's hull or superstructure. In practice, the usual place is below the name and port of registry on the stern.

The Rule XI-1(5) requires ships to be issued with a Continuous Synopsis Record (CSR). This important document will provide a history of the ship in terms of the name of the ship and of the state whose flag the ship is entitled to fly, the date on which the ship was registered with that State, the ship's identification number, the port at which the ship is registered and the name of the registered owners with their address. Any changes are to be recorded in the CSR, thus providing as the name implies full history of the ship from, eventually, new build to scrap.

However, the greater part of the amendments have been incorporated into an entirely new chapter numbered XI-2. *'This chapter applies to passenger and cargo ships of 500 gross tonnage and upwards, including high speed craft, mobile offshore drilling units and port facilities servicing such ships engaged on international voyages;'* ISPS and Maritime Security(2004:3)

Rule XI-2(3) of this chapter embodies the ISPS Code. Part A of the Code is mandatory and part B of the Code which is for guidance on how best to comply with Part A *'relates primarily to protection of the ship when it is at a port facility'* ISPS Code(2003:37). It is considered that *'ship and port facility security is a risk management activity'* Hesse, H.(2004:123).

Government law enforcement agencies are responsible for providing a safe environment, free from threat, for their citizens and visitors to their territory but can

never, nor would they claim to, guarantee total success. *'Hence the risk reduction approach to lessen the possibilities to the lowest practicable.'* ISPS Code and Maritime Security(2004:5)

In so far as the maritime world is concerned this is achieved through the ISPS Code providing *'a standardised, consistent framework for evaluating risk, enabling governments to offset changes in threat levels with changes in vulnerability for ships and port facilities.'* IMO Adopts Comprehensive Maritime Security Measures(2002:2)

The amendments to SOLAS and the ISPS Code apply worldwide, all 148 State parties to the SOLAS Convention are required to ensure their ships and port facilities comply. Under Part A (4) of the Code Governments can fulfil their responsibilities by establishing "Designated Authorities" within government to undertake and oversee their security obligations. At the same time they may delegate certain responsibilities to "Recognised Security Organisations" (RSO) outside Government. They may not, however, delegate the following:

1. *setting of the applicable security level.*
2. *approving a port facility security assessment and subsequent amendments to an approved assessment;*
3. *determining the port facilities which will be required to designate a port facility security officer.*
4. *approving a port facility security plan and subsequent amendments to an approved plan;*

5. *exercising control and compliance measures pursuant to regulation XI-2(9) (ship security plans).*
6. *establishing the requirements for a Declaration of Security' ISPS Code(2003:9).*

In fulfilling their obligations as given above under the Code *'Nothing Shall be interpreted or applied in a manner inconsistent with the proper respect of fundamental rights and freedoms as set out in instrumental instruments, particularly those relating to maritime workers'* ISPS Code(2003:5)

Furthermore, the:

'foreign crew members shall be allowed ashore by the public authorities while the ship on which they arrive is in port, provided that the formalities on arrival of the ship have been fulfilled and the public authorities have no reason to refuse permission to come ashore for reasons of public health, public safety or public order. Governments, when approving ship and port facility security plans, should pay due cognisance to the fact that ships' personnel live and work on the vessel and need shore leave and access to shore-based seafarer welfare facilities, including medical care'. ISPS Code(2003:5)

Moreover, at the Diplomatic Conference adopting the amendments to SOLAS a resolution was adopted which stated:

'Recalling the generally accepted principles of international human rights applicable to all workers, including seafarers. Considering that, given the global nature of the shipping industry, seafarers need special protection. And, being aware that seafarers work and live on ships involved in international trade and that access to shore facilities and shore leave are vital elements of seafarers' general well being and, therefore, to the realisation of safer seas and cleaner oceans....' ISPS Code(2003:140)

Clearly the Secretary General of IMO foresaw that certain countries may well ignore this part of the Code and Resolution. At the 31st session of IMO's facilitation Committee be appealed to States to apply the Code with a sense of pragmatism and common sense:

'His pleas was that they should do so not only when they were dealing with ships and cargoes but also when dealing with seafarers serving on ships calling at their ports. It should not be forgotten that it was on the seafarers, initiatives, co-operation and constant vigilance that the industry relied heavily in order to prevent breaches of maritime security If, on security grounds, seafarers face difficulties, such as refusal of shore leave, they might well feel somehow rejected He pointed out how important shore leave was to hard working professional reaching port after days or even weeks of isolation at sea' Hesse, H.(2004:130)

Moreover, *'States must ensure that any measure taken to combat terrorism complies with their obligations under international law, in particular human rights, refugee and*

humanitarian law.....' Protection of Human Rights and Fundamental Freedoms while Countering Terrorism(2002:1). His pleas, however, fell on deaf ears. The United States, in spite of being one of the prime movers in getting the amendments adopted refuses all shore leave to seafarers, irrespective of nationality.

Again in January 2005 the Secretary General of the IMO at a meeting with the US Secretary of Homeland Security raised the issue of shore leave. The US Secretary *'drew attention to the need for authentication and verification of documents relating to individual seafarers and his concerns about fraudulent documentation'* IMO Press Release(2005:1).

As the US Secretary must be aware, following Resolution 8, Enhancement of security in co-operation with the International Labour Organisation, IMO and the ILO in a joint working group are working on the development of an acceptable Seafarers' Identity Document as a matter of urgency. This has led to ILO Convention No. 185, The International Labour Organisation Seafarer's Identity Documents Convention 2003 coming into force in early February 2005 having received the necessary ratifications. The main requirement of the new identity document is that it conforms to the standards for converting two fingerprints into a biometric template, to be stored in an internationally standardised barcode so that it can be read by scanners operated worldwide.

To date only four countries have ratified this convention, namely, France, Hungary, Jordan and Nigeria. As can be seen no major seafarer supply country has ratified this Convention and perhaps more importantly neither has the USA. Indeed, the USA has said:

'that it will not accept the new international seafarers' document one of the principal reasons for requiring individual visas is the need, for security purposes, for a consular officer to personally interview each applicant. The new identity document will not address this need' Federal Register(2005:52)

At a Maritime Safety Committee (MSC) of IMO post 9/11 the USA *'proposed a new seafarer's identity card and a requirement that all seafarers should undergo background criminal record checks'* Prevention and Suppression of Acts of Terrorism Against Shipping(2002:5):

'The issue of background criminal record checks was rejected by an overwhelming majority. The opposition was based on legal and constitutional restrictions in national law and concern about issue of human rights, privacy and data protection.' Seafarers' Comments on Relevant Regulatory and Political Developments(2004:2)

As noted above it is for states to set the applicable security level as they see fit. Port states for port facilities and the Flag State for ships. These are:

'Security Level 1, normal; the level at which the ship or port facility normally operates;

Security Level 2, heightened, the level applying for as long as there is a heightened risk of a security incident;

Security level 3, exceptional; the level applying for the period of time when there is the probable or imminent risk of a security incident.’ ISPS Code(2003:8)

In setting the Security level states, both Port and Flag, will require accurate intelligence. In addition to their usual covert methods, they will need to engage and liaise with the private sector. The shipping industry contains many players, not only shipping companies and seafarers but charterers, shippers and freight forwarders, bunker suppliers, ship chandlers and ships’ agents to name but a few. All these people, many of whom have years of experience, would be of immense help in spotting anything untoward in shipping operations. This will require *‘the maintenance of communication protocols for ships and port facilities’* ISPS Code(2003:7).

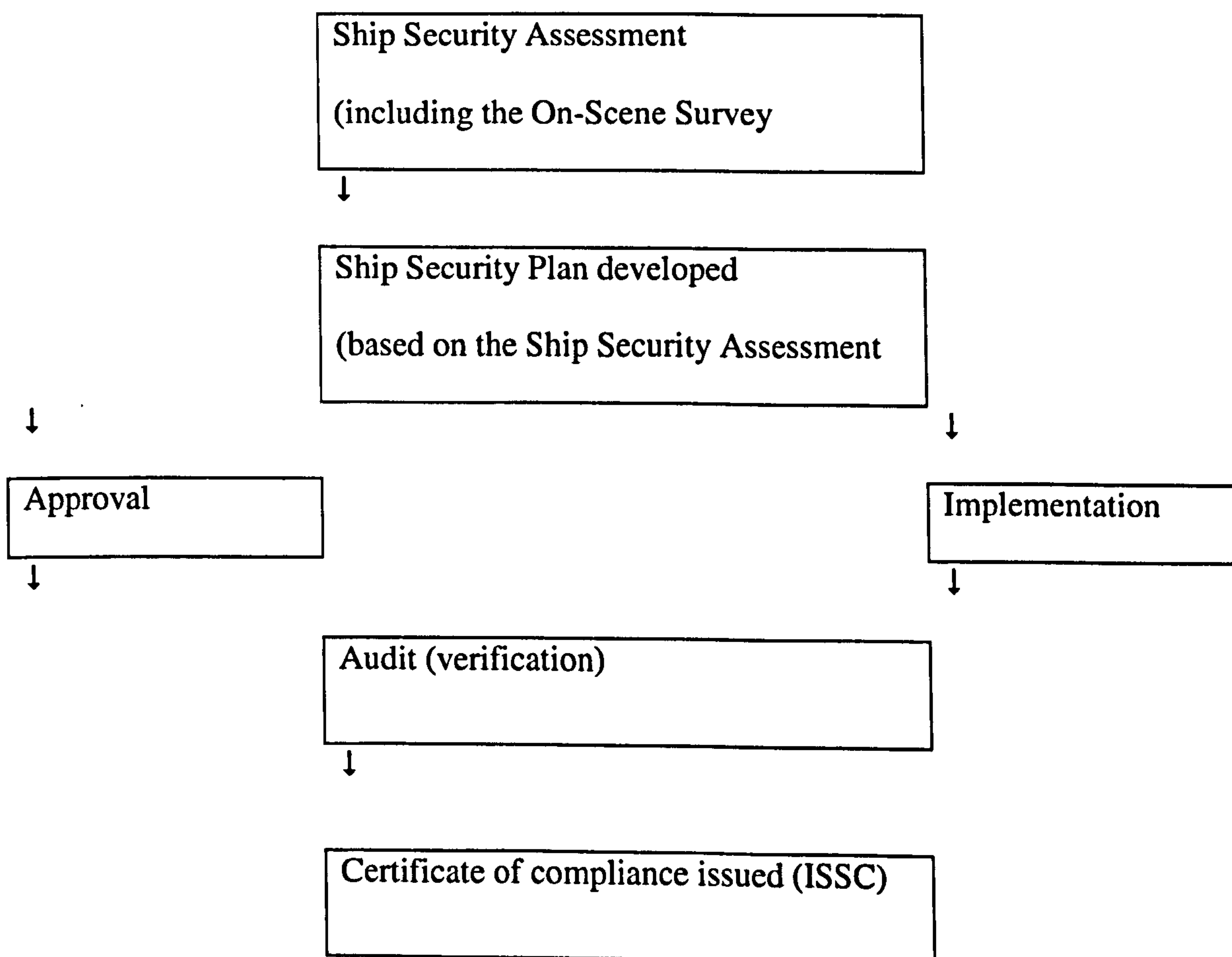
The Code is designed through its Port Facility Security Plan and ship Security Plan to:

‘prevent unauthorised access to ships, port facilities and their restricted areas; preventing the introduction of unauthorised weapons, incendiary devices or explosives to ships or port facilities and providing means for raising the alarm in, reaction to security threats or security incidents;’
ISPS Code(2003:7).

In order to achieve these objectives this will *‘require training, drills and exercises to ensure familiarity with security plans and procedures’* ISPS Code(2003:7).

From the 1st July 2004 for a ship to trade internationally it must have an International Ship Security Certificate (ISSC). The consequences for a ship not having a valid ISSC or indeed not complying with the provisions of the Code would be draconic. A State through Port State Control (PSC) could detain A ship until it got a certificate, refuse entry to a ship or expel a ship from its territory. In other words it simply would not be able to trade.

The procedure for obtaining an ISSC is given in schematic form below:



For all shipping companies, worldwide, a Company Security Officer (CSO) has to be appointed by the Company. It is this officer's task to ensure that the Ship Security Assessment (SSA) is carried out by persons with appropriate skills to evaluate the

security of the vessel. From the SSA the Ship Security Plan (SSP) is developed, verified and submitted for approval to the Flag State. In implementing and maintaining the SSP the CSO should liaise with the ship security officer (SCO) and the port facility security officers (PFSO) as necessary.

It is for the CSO to *'ensure that the SSA is carried out by persons with appropriate skills to evaluate the security of the vessel.'* ISPS Code(2003:12) In practice this means RSO's and it is for Governments *'to ensure that a RSO has the competencies needed to undertake the task.'* ISPS Code(2003;43)

With a company such as International Maritime Security where the Chairman is a former Director, Military Intelligence, U.K. Army it is easy to see that the necessary competency is available. However, with many classification Societies and companies such as Panama Maritime Quality Services Inc. offering their services as RSO's it is difficult to discern their competency in this field. A SSA can be produced in one of two ways; individually for each ship which will include the on-scene survey or generically, where the company may produce an assessment which covers their whole fleet. Nevertheless on on-scene security survey must be carried out on each ship. If an RSO has carried out the SSA then it *'shall be documented that the SSA has been reviewed, accepted and retained by the Company'*. ISPS Code(2003:13)

The SSA is designed to:

*'identify existing security measures, procedures and operations;
identification and evaluation of key ship board operations that it is*

important to protect; identification of possible threats to key shipboard operations; and identification of weaknesses, including human factors, in the infrastructure, policies and procedures. 'RWCSO and SSO should always have regard to the effect that security measures may have on ship's personnel who will remain on the ship for long periods. When developing security measures, particular consideration should be given to the convenience, comfort and personal privacy of the ship's personnel and their ability to maintain their effectiveness over long periods.' ISPS Code(2003:60)

From the SSA the SSP is developed taking into account the guidance given in Part B, Section 9 of the Code. *'The SSP will indicate the minimum operational and physical security measures the ship shall take at all times (security level 1)'*. Hesse, H.(2004:128)

Furthermore, the SSP will detail the intensified, security measures the ship itself can take without delay to move to security level 2 and *'when necessary to security level 3.'* .ISPS Code(2003:61)

As can be seen the security measures to be physically taken are largely straight forward and common sense. They appear to be largely based on:

MSC 443. Measures to prevent unlawful acts against passengers and crews on board ships;

MSC 622 and 623, as revised, Guidelines for ships and governments on combating acts of piracy and armed robbery against ships; (infra p.)

Resolution A 871 (20). Guidelines on the allocation of responsibilities to seek the successful resolution of stowaway cases.

Resolution A 872 (20). Guidelines for the prevention and suppression of the smuggling of drugs, psychotropic substances and precursor chemicals on ships engaged in international maritime traffic.

Thus it can be seen that all the guidelines relating to security have been brought together in one document, the ISPS Code, and made mandatory.

Once the SSP has been made it is then submitted to the Flag State administration for approval. Once approved it is then audited and if found satisfactory an ISSC is issued. This certificate must be kept on board at all times and made available for inspection as required. It is valid for five years and is subject to an intermediate verification. Once again, the approval and auditing of a SSP may be delegated by the Administration to an RSO. If so, then the RSO undertaking the approval and auditing the SSP shall not have been involved in either the SSA or the SSP.

The SSP shall of course be carried on board at all times and is to be protected from unauthorised access or disclosure whether kept in paper or electronic format. And is not subject to inspection by Port State Control unless the PSC officers:

'have clear grounds to believe that the ship is not in compliance with the requirements of Chapter XI-2 or Part A of the Code, and the only means to verify or rectify the non-compliance is to review the relevant requirements

of the SSP, limited access to the specific sections of the plan relating to the non-compliance is exceptionally allowed' ISPS Code(2003:15)

'A ship security officer (SSO) shall be designated on each ship'. ISPS Code(2003:17)

It is the SSO's responsibility to maintain and implement the SSP in liaison with the CVSO and PFSO's'. The SSO may or may not be the Master. Informal questioning of the Masters of over 200 ships carried out between July and December 2004 by the author of this thesis revealed that in the majority of cases the master is the SSO, followed by the Chief Officer, then the 2nd officer and in one case the Chief Engineer. If the Master is not the SSO he is still ultimately responsible for the safety and security of his ship and crew as *'Regulations and Master's discretion for ship safety and security'* ISPS Code(2003:118) makes clear. This is reinforced by the phrase *'accountable to the Master'* ISPS Code(2003:12) in the definition of the SSO.

As has been already noted the IMO acknowledge that it is the seafarer who is in the front line in the terms of maritime security:

'Without their [the seafarers] support and wholehearted commitment to the cause of security, the system the ISPS Code aimed so meticulously to put in place would be severely weakened, to the detriment of the overall effort' IMO 31st. Facilitation Committee(2004:1).

It is they who are responsible for implementing the Code with its wide range of extra tasks and paperwork. This is also acknowledged by the Drafters of the ISPS Code:

'The Administration should also take into account any additional workload which may result from the implementation of the SSP and ensure that the ship is sufficiently and effectively manned. In doing so, the Administration should verify that ships are able to implement the hours of rest and other measures to address fatigue which have been promulgated by national law'. ISPS Code(2003:49)

In the informal questioning quoted above it was observed that no ship had its complement increased to cope with the increased workload.

In some respects it is possible to feel some sympathy for the ship owner in his desire not to increase his costs even further. It has been estimated that *'the initial cost of complying with the new requirements of SOLAS and the ISPS Code to be at least US \$ 1729 million initially and US \$ 730 million per year thereafter'* Security in Maritime Transport(2003:38) worldwide.

It has already been noted that Al-Qaeda considers the economy of the USA and its allies as legitimate targets. If so, then in forcing ship owners to spend this amount of money to counter the perceived threat Al-Qaeda could perhaps be said to have won a battle. However, the costs of doing nothing could be potentially far greater. It has already been noted what the effect an act of maritime terrorism can have on the economy of a country in the case of the Limburg. Using the 10 day shut down of the American west coast ports due to labour dispute problems in October 2002 as a model it has been variously estimated as costing *'US \$ 19.4 billion to as little as US \$ 466.9 million'*. Security in Maritime Transport(2003:18)

A war game played out in the USA in October 2002 with senior figures from government, the law enforcement agencies and industry *'to assess the impact of a terrorist incident happening in ports on both the west and east coast of the USA resulting in a total shutdown put the cost at US \$ 58 billion'*. Security in Maritime Transport(2003:19)

The above widely varying figures do not of course take any account of the scale of human misery likely to be caused.

The requirements for port facilities as laid down in the ISPS Code broadly correspond to those required for vessels. Thus, port facilities serving ships on international voyages are required to:

Carry out, and have approved port facility security assessments;

Develop port facility security plans that detail measures to be taken at each security level and address single-ship security alerts;

Designate a Port Facility Security Officer (PFSO) with skills and training similar to that required of a CSO.

Ensure that the PFSO and other personnel receive sufficient training to carry out their duties and security exercises are held to test the efficiency of those measures.

Ensure that port facilities are sufficiently equipped and staffed in order to operate at the three security levels.

If the system works as it is intended to do and there is a free flow of information between the port state, flag state and indeed the ship then the ship and port should be

at the same level of security. If the ship arrives at a port with a higher level of security than the port then the ship can request a Declaration of Security to be completed to *'address the security requirements that could be shared between a port facility and the ship and shall state the responsibility for each'*. ISPS Code(2003:10)

As can be seen all these measures are largely to address the perceived security threat at the ship/port interface. However, when at sea States *'should provide general guidance on the measures considered appropriate to reduce the security risk to ships flying their flag when at sea'* ISPS Code(2003:47)

Moreover, Regulations XI-2/6 requires all ships to be fitted with a ship security alert system not later than the 1st July 2006. When activated this system shall:

'initiate and transmit a ship-to-shore security alert to a competent authority designated by the Administration, which in these circumstances may include the Company, identifying the ship, its location and indicating that the security of the ship is under threat or has been compromised'.

ISPS Code(2003:116)

To do this the system shall be capable of being activated from the bridge and at least one other location. In addition it shall not send the alert to any other ships nor raise the alarm on board the ship. In practice it is the Marine Rescue Co-ordination Centre (MRCC) of a State that will have to deal with this alert when sent either directly or through a Company. IMO MSC 1073 of June 2003 gives direction on how a MRCC is to deal with this.

Security authorities see the ship as posing a threat in essentially one of two ways. First, the ship itself as a weapon of mass destruction (WMD), perhaps a liquid natural gas carrier (LNG) or a ship carrying a bulk cargo of ammonium nitrate (with additives) could be ignited in or at the approaches to a heavily populated urban port area with catastrophic results or; second, as a means of introducing WMD, perhaps in a container, into a country to be detonated at some date in the future or to smuggle people and/or conventional weapons into a country. The last scenario is recognised in Resolution 9 where the World Customs Organisation is urgently invited to '*consider measures to enhance the security throughout international movements of CTUs*' ISPS Code(2003:137), containers.

All these measures, then, are not designed for the protection of the seafarer per se. Logically however, they must bring about an improvement in overall security situation and hence a reduction in the violence visited upon seafarers.

SUA Convention

Following IMO Resolution A. 924 (22)(2001) calling for '*a review of measures and procedures to prevent acts of terrorism that threaten the security of passengers and crews and the safety of ships*' in November 2001 the Legal Committee of the IMO at its 84th Session in March 2002 began work on revising the SUA Convention with the United States taking the lead.

At this session the USA in document Leg 84/6/1 suggested using the Convention for the Suppression of Terrorist Bombings (STB) Convention as a model. Furthermore

the USA, Turkey in Leg 84/62/2 and the IMO Secretariat in Leg 84/6 stated that they wished to see a revision and expansion of the offences given in the present Article 3. In addition most parties wanted the Articles regarding jurisdiction and extradition to be widened and strengthened with a political exception clause added. Moreover, Turkey wished the title of the SUA Convention changed to more accurately reflect its contents. For though it is entitled the Convention for the Suppression of Unlawful Acts Against The Safety of Maritime navigation, as in other anti terrorist Conventions, its operative provisions largely deal with the apprehension, conviction and punishment of those who commit the offences numerated, in this case given in Article 3. Only one Article addresses the problem of prevention directly. That is Article 13, which remains basically unchanged in the revision. In this Article:

'State parties are required to cooperate in the prevention of offences forth in Article 3, particularly by:

- (a) taking all practicable measures to prevent preparation in their respective territories for the commission of those offences within or outside their territories;*
- (b) exchanging information in accordance with their national law, and co-ordinating administrative and other measures taken as appropriate to prevent the commission of offences set forth in Article 3.'* SUA Convention Draft Protocol(2005:4)

The heart of this Convention '*... is the extradite or prosecute requirement known as the aut dedere aut judicare rule which literally means 'surrender (or deliver) or try or judge'* Halberstam, M.(1988:292).

Article 10(1) of the Convention and the revision which remains unchanged obliges each and every State Party to the Convention in which an offender or alleged offender is found to either extradite the offender to one of the states that has jurisdiction or to submit the case to its authorities for prosecution without delay.

Article 10(2) which deals with the fair treatment of suspects remains largely unchanged in the revision except with the important addendum '*... and applicable provisions of international law, including international human rights law.*' SUA Convention Draft Protocol(2005:14)

The first four paragraphs of Article 11, which remain unchanged in the revision, deal with the conditions under which extradition may take place. In particular:

'... the offences set forth Shall be treated, for the purposes of extradition between State Parties, as if they had been committed not only in the place in which they occurred but also in a place within the jurisdiction of the State Party requesting extradition'. SUA Convention Draft Protocol(2005:14) .

Article 11(5) allows for the case where, if the State holding the offender decides not to prosecute then the Flag State shall have precedence over any other State.

Turning now to the important and far reaching additions to the Convention and the criticisms of States, International Bodies and NGOs' to those additions.

Recalling that this Convention is about terrorist offences and recalling further that there is no one accepted definition of terrorism but all include the political concept a very important paragraph has been added to Article 11 which is worth quoting in full:

'None of the offences set forth in Articles 3, 3bis, 3ter or 3quarter shall be regarded for the purposes of extradition or mutual legal assistance as a political offence or as an offence connected with a political offence or as an offence inspired by political motives. Accordingly, a request for extradition or mutual legal assistance based on such an offence may not be refused on the sole ground that it concerns a political offence or an offence connected with a political offence or an offence inspired by political motives'. SUA Convention Draft Protocol(2005:15).

This paragraph is taken directly from Article 11 of the International Convention for the Suppression of Terrorist Bombings 1997 and the International Convention for the Suppression of the Financing of Terrorism of 1999.

However:

'this article, which aims to prevent any State Party from refusing to extradite on account of the political nature of an offence that is the subject of proceedings (depolitisation clause), is not acceptable to France.' SUA Convention Review(2005:Annex22).

She that is France, gives five reasons why this is so:

- 'i) *The Council of State has identified as a fundamental principle recognised by the laws of the Republic and as having constitutional force, France's right to refuse to extradite a person on the ground that an offence is of a political nature....*
- ii) *France is a party to only two instruments that contain such a provision (the Conventions referred to above), but under no circumstances can they be regarded as valid precedents for the revised SUA Convention. The SUA Convention will no longer define simply acts of terrorism, but also acts of proliferation, which are general law offences.*
- iii) *The reference to the recent revision of the European Council's Convention on the Suppression of Terrorism of 1977 with the protocol to this Convention of 2003. This convention sets out a principle for depolitisation of acts of terrorism (which also includes acts covered by the current SUA Convention) but allows State Parties under Article 13 to make a reservation and to retain the right, under strict conditions, to refuse extradition for offences that it considers to be political.*
- iv) *The current revision of the Convention on Physical Protection of Nuclear Material (CPPNM), one of the United Nations and anti-terrorist Conventions, has not led to the introduction of any such clause into that instrument, which is highly comparable to the SUA Convention. Indeed, France successfully sought and obtained the withdrawal of an identical clause in this Convention.*

- v) *The absence of a depolitisation clause does not amount to a situation of impunity.* SUA Convention Review(2005:Annex22)

Jurisdiction

Before a State can prosecute it has, however, to establish jurisdiction over the offences as set down in Article 3. The circumstances under which a State establishes jurisdiction is stated in Article 6 which again remains largely unchanged in the revision, and takes two forms, obligatory and discretionary.

The obligatory part is given in Article 6(i) where:

'each State Party shall take such measures as may be necessary to establish its jurisdiction ... when the offence committed:

- a) *against or on board a ship flying the flag of the State at the time the offence is committed; or*
- b) *in the territory of that State, including its territorial sea; or*
- c) *by a national of that State'* SUA Convention(1988)

The discretionary part is given in Article 6(2) where:

'State Party may also establish its jurisdiction over any such offence when:

- a) *it is committed by a stateless person whose habitual residence is in that State; or*

- b) *during its commission a national of that state is seized, threatened, injured or killed; or*
- c) *it is committed in an attempt to compel that State to do or abstain from doing any act'* SUA Convention(1988).

There is generally held to be *'five principles for jurisdiction: namely, territorial jurisdiction; active personality (nationality of offender), jurisdiction; passive personality (nationality of the victim) jurisdiction; protective jurisdiction and universal jurisdiction.'* Brownlie, I.(2003:313).

Territorial jurisdiction *'is accepted by all States as an essential aspect of state sovereignty'* Brownlie, I.(2003:313) and is the predominant form of national jurisdiction over crimes committed in its territory which includes ships flying the national flag of that state. Clearly Article 6(1) (a, b & c) and Article 6(2)(a) would be covered by this principle.

Active personality (nationality of offender) jurisdiction is based on the nationality of the offender at the time of the offence where the offender was not a national or resident of the State concerned. Article 6(2)(a) is covered by this Principle.

Passive personality (nationality of the victim) principle allows State jurisdiction over an offence committed outside the territory of that State based upon the nationality of the victim. Many states assert jurisdiction under this rule. Both *'France and the USA'* Law 75-624 of France(1975),Law 98-473 of the USA(1984) for example both have laws to this effect. In this case Articles 6(1)(a) and 6(2)(b) could apply.

Protective jurisdiction allows the national courts of States to prosecute non-nationals for offences against the national interest of that State. Article 6(2)(c) would apply in this case.

Finally, universal jurisdiction is the ability of the court of any State to try persons for crimes committed outside its territory which are not linked to the State by the nationality of the offender or the victims or by harm to the state's own national interest, and is related to but distinct from the extradite or prosecute rule (supra pg). Piracy is one of the oldest offences over which States have exercised universal jurisdiction, at least since the 16th C. As noted the pirate was an enemy of all mankind, *hostes humani generis* when any State could capture and punish in the common interest of all States.

Today in addition to piracy, the anti terrorist conventions, in particular the SUA Convention Article 6(4), provide for universal jurisdiction. For as already noted (supra pg) there is no agreed definition of terrorism the offences given in Article 3 are crimes over which States have long exercised universal jurisdiction:

'It is, therefore, not necessary to search for evidence that there is a rule of customary international law expressly permitting national courts to exercise universal jurisdiction over a crime whose definition remains elusive' Universal Jurisdiction(2003:2).

Thus, the courts of any State can act as an agent for the international community as a whole.

Definitions

The application of the Convention has been broadened considerably. In addition to the definition of a ship which remains unchanged the definitions given in Article 1 have been expanded.

Thus in Article 1(b) “transport” is defined as *‘means to initiate, arrange or exercise effective control, including decision-making authority, over the movement of a person or item’* SUA Convention Draft Protocol(2005:1). This definition was favoured over an alternative proposal that transport should be defined as *‘means to have responsibility for initiating or to have effective control over the delivery of the item or the evasion of persons from criminal prosecution’* SUA Convention Draft Protocol(2005:7)

Certainly Brazil believed that the accepted definition *‘submitted by the International Confederation of Free Trade Unions (ICFTU) addresses the seafarers’ interests more effectively’* SUA Convention Review(2005;Annex6).

Moreover, the working group were initially undecided on whether or not to include the term “arrange” in the definition. In particular, India noted that use of the:

‘term “transport” is intended to cover situations where the goods have been contracted for transport or smuggled on board a ship, while excluding individuals, such as crew members, who do not have

responsibility or control over goods or persons, or who are acting under duress. 'Any definition of "transport" should be unambiguous and should serve the objective of protecting innocent seafarers from prosecution'

SUA Convention Review(2005:Annex7)

To this end India *'wanted "arrange" replaced by "knowing facilitate"'* SUA Convention Review(2005:Annex7).

However, the Committee decided to retain "arrange" on the grounds that actions *'would not be considered criminal unless there was proof of a subjective element (e.g. intent or knowledge) as required by Article 3 bis'*. SUA Convention Review(2005:13).

Article 1(c) defines serious injury or damage as

a) serious bodily injury, murder is not mentioned here but is defined as an offence in Article 3 quarters.

b) extensive destruction of a place of public use, State or government facility, or public transportation system.

c) substantial damage to the environment, including air, soil, water, fauna or flora.

One delegation expressed concern about this definition on the grounds that environmental damage would only be an offence under this Convention if it *'endangered the safety and security of international navigation ...'* SUA Convention Review(2004:9).

Article 1(d) defines in detail a "BCN weapon"; That is biological, chemical, nuclear weapons or devices. In the original draft Article 1(d) was intended to define

'prohibited weapon' SUA Convention Review(2004:9). However, several delegations with India being the most voracious strongly objected to this term, maintaining:

'that defining a "prohibited weapon" in a Convention on the Safety of Maritime Navigation is beyond the mandate of the IMO or its instruments which is not a competent forum to either discuss the issue or legislate on it' SUA Convention Review(2004:9).

Moreover, *'the use of the term might have consequences beyond the SUA treaties'* SUA Convention Review(2004:9). Thus, the committee changed the term to "BCN weapon".

The terms "toxic chemical" in Article 1(e) and "precursor" in Article 1(f) are taken directly from the Chemical Weapons Convention.

Article 2, the saving clause, has been expanded from excluding naval vessels and auxiliaries on State service and commercial vessels laid up to include in Article 2 bis:

- '1. Nothing in this Convention shall affect other rights, obligations and responsibilities of States and individuals under international law, in particular the purposes and principles of the Charter of the United Nations and international human rights, refugee and humanitarian law'* SUA Convention Draft Protocol(2005:2).

Article 2(2) is taken directly from the Convention for the Suppression of Terrorist Bombings and *'has been incorporated in the draft SUA Protocol in order to clarify that rights and obligations of State Parties to other instrumental instruments, specially on international humanitarian law would not be affected'* SUA Convention Review(2004:10).

Article 2 bis3 states that nothing in this Convention shall affect the rights, obligations and responsibilities under the Non-Proliferation of Nuclear Weapons, the Convention on the Prohibition of the Development, Production and Stockpiling of Biological and Toxic Weapons and their Destruction and a similar convention covering chemical weapons, of State Parties to such treaties.

Defining the Offences

Turning now to the main revisions to the SUA Convention that have been negotiated in the Legal Committee meetings at the IMO over the last four years. They are an expansion of the offences given in Article 3 and certainly as far as the seafarer is concerned the main revision is an enlargement of Article 8 giving new boarding provisions on suspect vessels.

Seven new offences are drafted into Article 3(see Appendix 4.1). Four concern activities taking place on the ship or directed towards a ship that involve a terrorist purpose. One is concerned with the presence of substances not usually used on a ship but useful in a weapon of mass destruction and two offences relate to the use of a ship for the transport of substances to be used for mass destruction.

From the outset, at the 85th Session (Sept 2002) of the Legal Committee when the USA introduced in document LEG 85/4 a draft Protocol to the SUA Convention several delegations *'expressed the need to carefully consider the proposal and to consider whether there was an overlap with existing terrorist Conventions'* SUA Convention(2002:2).

Japan in particular, suggested that, in document Leg 85/4/1, the proposals substantially exceeded the scope of the current SUA Convention and questioned why acts at sea needed to be criminalised when they were not on land. However, it was recognised that *'even with an expanded focus, SUA would remain a maritime convention under the competency of IMO'* SUA Convention(2002:2)

Article 3 (1) of the SUA Convention is largely unchanged, however Article 3(2) has been entirely rewritten thus:

'Any person also commits an offence if that person threatens, with or without a condition, as provided for under national law, aimed at compelling a physical or judicial person to do or refrain from doing any act, to commit any of the offences set forth in paragraph 1 (b), (c) and (e), if that threat is likely to endanger the safe navigation of the ship in question.' SUA Convention Draft Protocol(2005:5).

This part of Article 3 appears to have caused little dissension as it is clearly associated with the suppression of unlawful acts against the safety of maritime navigation.

Article 3(2) goes on to say:

'It shall not be an offence with the meaning of this Convention to transport an item or material covered by paragraph 1(b)(iii) or, insofar as it relates to a nuclear weapon or other nuclear explosive device, paragraph 1(b)(iv), if such item or material is transported to or from the territory of, or in otherwise transported under the control of, a State Party to the Treaty on the Non-Proliferation of Nuclear Weapons...'
SUA Convention Draft Protocol(2005:6).

Both India and Brazil wished for the "chapeau" to paragraph 1(b) to include a terrorist motive. *'Where the terrorist motive is when an individual commits an act that causes a terrorist effect'* SUA Convention Review(2005:Annex 7). *'The Committee rejected this proposal'* SUA Convention Review(2004:2) .

Several delegations objected to any reference to safeguards agreements (Article 1(b)(iii):

'Views were expressed that including the safeguard requirement would have the effect of imposing the NPT regime on non NPT States, or would go beyond the NPT regime. It was also noted that it would criminalise the legitimate transport of nuclear materials for peaceful purposes' SUA Convention Review(2004:3).

'The Chairman introduced his proposal for Article 3 bis, para 2 on the grounds that the savings clause is essential to set out clearly the exceptions to the offences in Article 3 bis 1(b)(ii) and (iv). The clause is needed to make it clear that the SUA exempts legitimate trade activities that NPT Parties are permitted to undertake ' SUA Convention Review(2004:3)

'The delegation of India noted that the combination of Article 3(2) and (1)(b)(iii) amounted to a simple rejection of countries not parties to the NPT.' SUA Convention Review(2004:4).

Furthermore, 'other delegations noted that Article 3 bis paragraphs 1(b)(iii) and paragraph 2 entrench the unequal legal regime for nuclear weapons States contrary to their obligations under the NPT ...' SUA Convention Review(2004:4).

'Several delegations stated their formal opposition to the inclusion of this clause and their right to revert to this matter at a later stage, including at the Diplomatic Conference' SUA Convention Review(2004:5) to be held in October 2005.

Article 3 quarter details the further circumstances under which an offence is committed under Articles 3 of which perhaps the most important is in paragraph 1 where a person 'unlawfully and intentionally injures or kills any person in connection with the commission of any of the offences set forth in Article 3 ...' SUA Convention Draft Protocol(2005:7).

Boarding Provisions and Safeguards

Article 8 (see Appendix 4.2) has an entirely new lengthy section dealing with boarding suspect vessels on the high seas and is perhaps the Article most likely to affect the seafarer directly. It covers co-operation and procedures to be followed if a State party wishes to board a ship when there are reasonable grounds for suspecting that the ship or persons on board are committing an offence under the Convention.

Article 8 bis challenges one of the fundamental tenets of the law of the Sea, that is freedom of the seas. As has been noted *'on the high seas a ship is under the exclusive jurisdiction of the state whose flag it flies'* UNCLOS Article 92(1982).

This was confirmed years earlier in 1927 when the Permanent Court of International Justice said:

'vessels on the high seas are subject to no authority except that of the State whose flag they fly. In virtue of the principle of the freedom of seas, that is to day, the absence of any territorial sovereignty upon the high seas, no State may exercise any kind of jurisdiction over foreign vessels upon them.' France v Turkey[1927] PCIJ Ser.A.10,18

It seems clear that countries belonging to the Proliferation Security Initiative (PSI) wish to *'expand the current amendment negotiations of the SUA Convention to enable the boarding of vessels suspected of carrying WMD materials.'* BASIC Report(2004:73).

This was confirmed by the UK Foreign Secretary when he said:

'that the British Government (presumably with the support of other PSI participating states) is working in the IMO to secure amendment to the SUA Convention to make it an 'internationally recognised offence to transport Weapons of Mass Destruction (WMD), their delivery systems and related materials on commercial vessels' Straw, J.(2004:46).

In other words to use the SUA Convention to give the actions, of the PSI States, at sea some legality. *'The PSI is not a treaty but a "collective political commitment"'* Proliferation Security(2003:1) led by the USA and comprising of the following members in addition to the USA; Australia, Britain, France, Germany, Italy, Japan, the Netherlands, Poland, Portugal, Spain, Canada, Denmark, Norway, Singapore and Turkey. The aim of this initiative is to establish a comprehensive enforcement mechanism *'which aims to restrict WMD trafficking in the air, on land and at sea'* BASIC Report(2004:1).

The PSI participants *'claim that their principles are 'consistent with national legal authorities and relevant international law and frameworks, including the UN Security Council'* Proliferation Security Initiative Fact Sheet(2003:1). However *'the principles give the impression that it is the embryo of a new legal regime'* BASIC Report(2004:1).

No significant objections were raised by the State delegations to this section of Article 8 bis. This is hardly surprising as the USA has already concluded bilateral boarding agreements with Liberia in February 2004 and Panama in May of the same year:

'The agreement is mutually applicable and is expected to streamline boarding procedures: each party may refuse a request to board one of their flagged ships, but must do so within two hours from the time they are contacted. Otherwise the other party is automatically authorised to go ahead and board' Giacomo, C.(2004).

Hence:

'the combination of Panama, Liberia and PSI core partner countries means that now almost 50 percent of the total commercial shipping of the world measured in deadweight tonnage is subject to the rapid action consent procedures for boarding, search and seizure.' Bolton, J. R.(2004)

Both the Panamanian and Liberian ship registries were originally set up by US shipowners and still contain significant US owned tonnage. In both these countries ship registration fees contribute a vital amount in foreign currency to their national income. *'In Panama, the fees charged for the registry in 1996 contributed five percent to the national budget'* Morris, J.(1996:15) and in Liberia *'the revenue from the registry accounted for approximately 10 percent of the national budget before the civil war, and in 1998 after the civil war it contributed up to 30 percent'*. Freudmann, A.(1998:2B)

These are of course bilateral agreements but it is difficult to envisage a scenario where a Panamanian or Liberian warship forcibly stopped an American flagged ship.

Moreover these countries, indeed almost all FOC States are third-world or developing countries (as indeed are the major crew supplying countries). Thus they are extremely unlikely to have the same resources in intelligence matters as the USA or other PSI States. Hence, they will not have the means available to evaluate the intelligence given by the State requesting boarding over any period of time let alone four hours. Not that the intelligence agencies of the USA and her close allies are omnipotent in these matters. Witness the failure to find any WMD in Iraq despite the many assurances that they were there and the shooting dead of an innocent Brazilian by the authorities in London in July 2005. The flag State and by extension the seafarer are in a no win situation.

To an impartial observer a glaring omission to this Article and indeed in Article 3 is any reference to the shipowner. Given that Al-Qaeda are suspected of owning ships and it is known that the Tamil Tigers do so anyone would assume that knowing the owner of a ship would be fundamental to combating the transport of WMD. As a US analyst noted *'Now you've got thousands of little no-name ships all over the world and you have no idea who they belong to and what they're carrying.'* Pike, J.(2003:1)

This issue was raised by the International Confederation of Free Trade Unions (ICFTU) in document Leg 87/5/2 but was objected to by delegates of the major ship registries and was not pursued by the USA. No explanation has been given to why this is so and appears to be a taboo subject to everyone apart from the ICFTU, including the shipowners themselves who potentially have a lot to lose from this Article.

Because this Article has such profound implications not only for the shipowners and owners of the cargo but more importantly the seafarer who as always will have to bear the brunt of these new rules several safeguards have been included in this Article. These are given in paragraph 10, including not endangering life at sea and ensuring all persons on board are treated in a manner that preserves their dignity and is in keeping with Human Rights Law.

These safeguards, on paper at least, appear to be comprehensive and attempt to assuage the fears of all interested parties. Several States expressed concern about freedom of navigation under UNCLOS. This is dealt with within paragraph 8(c)(ii), UNCLOS is again referred to in the preamble, thus *'Bearing in the importance of the United nations Convention on the Law of the Sea adopted at Montego Bay, on 10 December 1982, and of the customary international law of the sea'* SUA Convention Draft Convention(2005:1).

Mexico went further and said *'In stipulating an exception to the freedom of navigation the SUA should leave no room for doubt on its application and leave no scope for abuse of authority'* SUA Convention Review(2004;Annex 1).

Redress for any harm, damage or loss is dealt with in 10(b) but it is not stated how recompense is to be obtained or which party would adjudicate upon this.

The protection of the seafarer is dealt with in Article 8 (10)(a)(i), (ii) and (iii). However, out of sight of land and with no oversight or media presence there must be doubt as to whether or not those provisions will be fully implemented during the

boarding and searching in what is bound to be a highly charged and volatile atmosphere. In this context it is relevant to recall that in the preamble it is stated that:

'Recalling further resolution 58/187 of the United Nations General Assembly, which reaffirmed that States must ensure that any measure taken to combat terrorism complies with their obligations under international law, in particular international human rights, refugee and humanitarian law' SUA Convention Draft Protocol(2005:2).

Perhaps because the IMO and the State delegations recalled that the Convention is relating to the Suppression of Unlawful Acts against the safety of navigation the preamble urges:

'States to take appropriate measures to ensure the effective implementation of those instruments, in particular through the adoption of legislation, where appropriate, aimed at ensuring that there is a proper framework for responses to incidents of armed robbery and terrorist acts at sea.' SUA Convention Draft Protocol(2005:2).

It is not known whether or not it was in response to this sentence in the preamble or the urgings of NUMAST over many years that the UK Government published its Strategy for tackling Piracy and Armed robbery at Sea. Much of what is written in this document is not new, however:

'The strategy is based on two distinct strands of work, the first being defensively focussed that looks to provide guidance, support and protective measures to UK seafarers and ships (see Appendix 3) ... The second strand of work consists of a counter-piracy offensive to address the underlying causes of piracy. This will focus on joint working with states that have a significant problem' Strategy for tackling Piracy and Armed Robbery at sea(2005:4).

Thus it can be seen that the ISPS Code with associated resolutions and the revision of the SUA Convention are the IMO's response to the now perceived security threats in the maritime world. Although the ISPS Code should make the seafarer more security conscious these measures are not designed to make the maritime environment safer for the seafarer but to prevent and to give a legal basis to the interdiction of WMD.

The PSI participants could have gone to the Security Council of the UN to obtain the necessary Resolution permitting the boarding of suspect vessels on the high seas. It seems likely that this was not done for two reasons. First, this method would not be in accordance with Article 110 of UNCLOS:

'which only permits interference with another State's vessels when there are reasonable grounds for suspecting that the ship is engaged in piracy or the slave trade, unauthorised broadcasting, is without nationality, or is of the same nationality as the warship despite flying another flag' Harris, D. J.(1998:430).

Second:

'a senior US official has been quoted as saying that the PSI... will be focussed on those activities which require no additional laws, no new international treaties, going to the United Nations Security Council.'

BASIC Report(2004:42).

It would appear that the US regards the IMO as the easy option.

In conclusion it can be said that far from protecting the seafarer these measures, Article 8 of the SUA Convention in particular, have the potential to present the seafarer with grave consequences. *'However, we have serious concerns about the human rights of individuals under Article 8, given the lack of an effective legal regime on the high seas'* Non-proliferation(2005:17).

This from a group of people, the House of Commons Select Committee on Foreign Affairs, who presumably have little or no knowledge of the maritime world.

So concerned are they that:

'We recommend that the Government outline how it will ensure the human rights of those on board any detained vessels, and how it will limit any potentially destabilising interdictions or detentions, particularly if the Government adheres to its position of "deemed consent", giving States four hours to respond to demands to allow boarding' Non-Proliferation(2005:17).

This Committee, indeed the whole maritime community, in particular the seafarer await a reply.

Summary

Before a ship can enter a port it must confirm through it's agent at least 24hrs. before arrival that:

- 1) The ship possesses a valid ISSC.
- 2) The security level at which the ship is operating.
- 3) The security level at which the ship operated at the last ten ports of call.
- 4) If any special or additional security measures were undertaken at any of the last ten ports of call.
- 5) Confirmation that appropriate procedures were maintained during any ship-to-ship activity the last ten ports of call.
- 6) Other practical related security information.

If there are clear grounds for believing a ship is non compliant in respect of the above then the port State can require the ship to rectify the problem or deny entry into the port and require the ship to proceed to a location in the State's internal or territorial waters to await inspection. Whether the ship would be inspected by port State control officers or the security services or a combination of both is not clear. It should be noted that nowhere in the Code are the security services mentioned in any form. Once in port the ship will be subject to port state control inspection where implementation of the Code will be verified.

Thus, it can be seen that the vessel is closely monitored to ensure that it is complying with the Code not only in port but whilst on passage from port to port. It is perhaps worth noting that no ship has been detained in the UK for failures in implementing any aspect of the Code since it's inception.

Turning now to the issue of liability, the opinion of the UK Maritime and Coastguard Agency(MCA) presumably on the advice of Government lawyers is that:

*‘ In our view, compliance with a plan will not only prevent a TSI
(Transport Security Incident) but will allow an owner of a SOLAS vessel
who has complied with the SOLAS and the ISPS Code to limit his liability’*

Maritime Security (2007)

Thus, it can be seen that the UK Government at least recognises that the shipowner cannot be liable for the injuries or deaths suffered by the seafarer in the course of a terrorist attack.

It is the duty of the port State and flag State to set the level of security under the Code needed to provide a secure and safe environment for both the seafarer and the port worker. If they fail in their duty to protect those under their jurisdiction then they should be liable to pay compensation for injuries and deaths that occur.

The introduction of the ISPS Code has affected all within the maritime industry but none more so than the seafarers who have to make the code work on board ship.

The code requires, by law, unarmed and largely untrained civilians, the seafarer, to act as society’s first line of defence against terrorism and associated threats in the maritime sector. Can this be morally right? In no other area of life does government require civilians to act in this way.

Nevertheless the Code has the potential to be of benefit to the seafarer not only in the suppression of terrorism which the Code is primarily aimed at but if implemented properly by the ship and port authorities then it should lessen not only the problem of piracy and armed attack but other hazards to the ship and crew such as stowaways.

Such individuals can be refugees, asylum seekers, or economic migrants in addition to human trafficking and drug smuggling by organised crime.

Not only the Master and the SSO but the whole crew need to be properly trained to appreciate the threats facing the vessel and to feel confident in dealing with such threats if they occur. Are the short courses they have to undertake sufficient to equip civilians for this task?

To make the ship as secure as possible requires not only the rules of the Code to be followed but the spirit of the Code as well. To this end the crew should be constantly vigilant but there are many obstacles to this in modern ship board life. Fatigue is probably the most important and obvious obstacle to vigilance. It has already been noted that in informal questioning of over 200 ships' Masters that not one had had its compliment increased to cope with the demands made by the Code. With today's small crews having many tasks to perform both at sea and in port this extra work load will inevitably lead to greater fatigue and distraction from perhaps more vital tasks. It is of course part of the job of the Master, SSO, and indeed the CSO not only to remain vigilant themselves but to motivate their crews to do likewise but with no recorded case of maritime terrorism since the inception of the Code complacency is almost bound to creep in and affect the operation of the Code in practice.

There is still much to be done, by the port authorities especially, in applying the Code. In the third quarter of 2006 *'two thirds of all reported attacks took place in port areas'* IMO 3rd.Quarter Report(2006).

This should not happen under the new security requirements. Clearly some ports are falling behind others in fully securing their ports as they are required to do under the Code.

The revisions to the SUA Convention do nothing to enhance the legal protection of the seafarer in respect of piracy and armed attack from whatever quarter. In their deliberations the delegates missed a unique opportunity to look afresh at the legal definition of piracy. As a starting point they could for example have taken the IMB's definition of piracy, where *'An act of boarding or attempted to board any ship with the intent to commit theft or any other crime and with the intent or capability to use force in furtherance of the act'* IMB Annual Report(2004:3).

This definition or something similar has several advantages over the present definition in UNCLOS. It covers attacks or attempted attacks wherever the ship is, on the high seas or territorial waters, at anchor or berthed in internal waters. Moreover, this definition does not require the attack to be committed for private ends. Thus it would cover attacks with a political motive, i.e. terrorism.

Instead the revision concentrated on providing a legal basis for the arrest, detention and extradition of those found to be using the ship either to transport WMD or planning to use the ship itself as a weapon.

Bearing in mind that the ships and the seafarers who man them may well be the innocent carriers of WMD or other illicit cargo under false manifests then the innocent seafarer could be in great danger from over zealous officials from a PSI country boarding the ship on the high seas under the provisions of the Convention.

Thus it can be seen that whilst in the wake of the attacks on the World Trade Centre in September 2001 the issue of security of ships and their cargoes has begun to be addressed the security of the seafarer has not. Indeed under the ISPS Code it appears that unarmed civilians are expected to defend themselves against the very serious threats with which they are faced.

In this light the seafarer and his representatives should look to Human Rights Law for protection and compensation from piracy and armed attack. This is addressed in the next two chapters.

CHAPTER VII. INTERNATIONAL HUMAN RIGHTS LAW AND JURISDICTIONAL ASPECTS

As noted in the previous chapter the recent introduction of the ISPS Code and the revisions to the SUA Convention have done little to address the vulnerability of the seafarer. However, the international law of human rights is mentioned more than once. It is an important aspect which needs to be considered more fully. Basically what are these rights and how may they come to the assistance of the seafarer.

This is examined first by discussing the genesis of "Human Rights" concepts, then the application to the seafarer. This is followed by a view of "Humanitarian Law" and its relationship with Human Rights Law on the same basis. Finally, the jurisdictional aspects are explored.

Traditionally international law has emerged as a body of rules and principles of action, which are binding upon civilised states in relationship with one another and is based upon reciprocity and consensus. In this process individuals were regarded as either nationals or aliens. Nationals were considered as being governed solely by the municipal law of the sovereign state and thus did not have any rights under international law. Aliens did, however, have some rights. For example, the dissenting Judge, Judge Moore, in the Lotus case stated that *'an Article in the Turkish Penal Code whereby jurisdiction was asserted over aliens committing offences abroad to the prejudice of Turkish subjects was contrary to international law'*, France v Turkey(1927) and *'if a particular treaty confers rights on individuals either expressly or by implication, then these rights should receive recognition and effect at international law'*. Jurisdiction of the Court of Danzig(1928)

However, the various international declarations and conventions on human rights expressly bestow rights upon the individual. The concept of inherent, inalienable rights (not benefits) is universal in that they have appeared in different eras, cultures and religions. Inherent in the sense that they are the birthright of all human beings and as such, they do not have to be granted or bestowed by a sovereign state for them to be enjoyed. Inalienable in the sense that individuals cannot agree to give them up or have them taken away from them.

The European Court of Human Rights(ECHR) has ruled that:

'having regard to its responsibilities in pursuance of Article 19 of the Convention, the Court would not be relieved of its duty by the sole fact that an individual had stated to his government that he waived rights guaranteed by the Convention'. Neumeister v Austria(1974)

Although human rights concepts are to be found in Hindu and Buddhist texts as well as in the readings of Confucianism it is through the natural law tradition of the West that modern human rights theory comes. There is however another law tradition that is equally ancient and that is positive law. *'The distinction between natural law, which is universal and divine, and positive law, which is local and human is attributed to Hippias by Plato in the Protagoras'* Haines, P(2005:2)

Aristotle, who was a pupil of Plato, made the same distinction in his "Nicomachean Ethics" which is even quoted today in the opposition of natural law to positivism. To Aristotle justice was either natural in that it has the same validity everywhere and

hence universal or local and conventional which is peculiar to each separate community. The Greek stoics expressed similar ideas but emphasised that morality originated in the rational will of God whose authority transcended all local legal codes. These ideas made a great impression on the Romans, in particular Cicero, an influential Roman jurist who wrote:

'True law is right reason in agreement with nature: it is of universal application, unchanging and everlasting, ... And there will not be different laws at Rome and at Athens, or different laws now and in the future, but one eternal and unchangeable law will be valid for all nations and for all times'. D'Entrevés, A.P.(1970:24)

These ideas were codified in the Corpus Iuris Civilia (Justinian Code) in AD 534. The area of private law, that is, law for Individuals was composed of three sections:

'Ius civilis, the law of the state; jus gentium, the Law of Nations, which natural reason appoints for all mankind obtains equally among all nations, because all nations make use of it; jus naturale which corresponds to that which is always good and equitable'. D'Entrevés, A.P.(1970:24)

'Thus principles of natural law or natural justice found their expression in the hands of the judge and the practical administrator rather than in the writings of political philosophers. It was in juristic reasoning that natural law concepts were extensively used, for the authority of the opinions of the

jurists in their responses depended upon the reasonableness of their comments'. Haines, P(2005:3)

How Roman jurists reconciled the law in these different codes is not clear. Slavery would presumably be contrary to the *Ius natural*, since by the law of nature all men are born free and equal. Yet by *Ius gentium* slavery was lawful, indeed as noted it was part of Roman life.

After the fall of the Western Roman Empire, it was inevitable that the church became the authority for legal matters and incidentally much else besides. So that although mediaeval churchmen accepted the Roman division of law into its three parts, the law had to accommodate the Christian view. Mediaeval churchmen identified nature and reason with God and law and rights originated from his will. The rules of natural law being God given would always take precedence over man made laws. Perhaps the greatest philosopher of the Middle Ages, St Thomas Aquinas divided the law into the eternal, that is divine wisdom unknowable and coming from God himself; natural law, the part of eternal law known to man through rational thought by which he is able to distinguish between good and evil for example and human or positive law made by man for the common good. To St Aquinas an unjust law was no law at all and should be disobeyed. Here it can be clearly seen that the ideas of Aristotle being moulded to the Christian viewpoint.

St Aquinas actually wrote:

'This rational guidance of created things on the part of God ...we can call the Eternal Law. But, of all others, rational creatures are subject to divine 'Providence in a very special way; being themselves made participators in Providence itself, is that they control their own actions and the actions of others. So they have a share in the divine reason itself, deriving there from a natural inclination to such actions and ends as are fitting. This participation in the Eternal Law by rational creatures is called Natural Law'. Haines, P.(2005:43)

Not until the late 16th C, early 17th C following the reformation were philosophers able to base their natural law theories on human reason, to a certain extent discarding the religious element. Hugo Grotius famous for his great work, *De Jure Belli ac Paris* (The Law of War and Peace) wrote in this book that:

'Natural Law is a dictate of right reason, showing the moral necessity or moral baseness of any act according to its agreement or disagreement with rational nature, and indicating that such an act is therefore either commanded or forbidden by the author of nature, God.' Grotius, P.(1625:33)

However, at about the same time Thomas Hobbes rejected the idea of natural law, above the laws introduced by the State. In his view natural law demanded that man submit to the commands of the sovereign. Moreover, the sovereign must be strong enough to preserve the laws of nature against the innate foolishness of the population. Hence, the sovereign must be above the civil (positive) laws that he enacts to help him

govern and his subjects have no appeal in civic law if the sovereign violates the law of nature.

In the age of enlightenment the struggles between Parliament and the Monarchy came to a climax in the Glorious Revolution of 1688. The resulting Bill of Rights were largely influenced by John Locke *'arguably the most important natural law theorist of modern times'*. Stainer, H.J.(2000:324) In his book "Two Treatises of Government" of 1688 he argued that individuals possess certain natural rights as human beings because human kind existed in the state of nature before the formation of a civic society. For Locke, *'the protection and promotion of individuals' natural rights was the sole justification for the creation of government.* Human Rights(2005:4)

'These are the bounds which the trust, that is put in them by the society and the law of God and nature, have set to the legislative power of every commonwealth, in all forms of government; 'Chief among them are the rights to life, liberty and property; that, upon entering civil society (pursuant to a social contract) humankind surrendered to the State only the right to enforce these natural rights, not the rights themselves'. Locke, J.(1690:324)

The writings of Locke together with the English Bill of Rights greatly influenced Thomas Jefferson and led to the American Declaration of Independence (1776) where it was said *'... we take these truths to be self-evident, that all men are created equal, and that they are endowed by their Creator with certain unalienable Rights, that among these are life, liberty and the pursuit of happiness'*.

Similarly in France, Rousseau and others were greatly influenced by Locke so that their thoughts found form in the Declaration of the Rights of Man and the Citizen(1789) whose Article 1 states *'all men are born and remain free and equal in their rights'*

and Article 2 where:

'The aim of all political association in the preservation of the natural and imprescriptable rights of man. These rights are liberty, property, security and resistance to oppression.'

In sum, the idea of human rights, called by another name, played a key role in the late 18th C – and early 19th C struggles against political absolutism.

The rights contained in these Declarations only applied to citizens of the respective countries concerned and indeed the rights or lack of them was solely of national concern. This was because of the primacy of the concept of national sovereignty and the notion of equality between States.

The sentiments expressed in these declarations did not go unchallenged. In the early 19th C Burke in his "Reflections on the Revolution in France (1790:5) for example:

'criticised the drafters of the Declaration of the Rights of Man and of the Citizen for proclaiming the "monstrous fiction" of human equality, which

he argued, serves to inspire false ideas and vain expectations in men destined to travel in the obscure walk of laborious life'.

A close friend of Rousseau's was the Scottish philosopher David Hume (1711-1776). Hume was important not only for his own opinions but for his influence on later moral theories. Hume wanted nothing less than a total reform of philosophy. *'We must cultivate true metaphysics with some care, in order to destroy the false and adulterate'* Hume(1748:12). He thought the present state of philosophy was in a poor state which had given rise to *'that common prejudice against metaphysical reasonings of all kinds, everykind of argument which is in any way abstruse, and requires some attention to be comprehended'* Hume(1737:14)

The main thrust of his approach was the anti-metaphysical aim of abandoning the *a priori*, that is working from something known, search for theoretical explanations into the ultimate nature of reality with a empirical inquiry that answered questions about the science of human nature. With this approach he rejected the existence of natural law as contrary to empirical truth. He pointed out the unbridgeable gap between "is" and "ought", propositions which state facts on the one hand and prescribe norms on the other. Moral norms cannot be deduced from statements of fact. He also argued that moral values were a matter of social convention and his moral theories were secular without any reference to God's or divine will.

It was Hume who introduced the term utility into the moral vocabulary but it was Jeremy Bentham (1748-1832) who took these ideas forward in his "Principles of Utilitarianism". By the principle of utility Bentham meant that what is morally obligatory is that which produces the greatest amount of happiness for the greatest number of people, happiness being determined by the reference to the presence of

pleasure and the absence of pain and in respect of the law it was his view that laws should be crafted to produce the best consequences for the greatest number of people. He strongly attacked the whole concept of natural rights. Rights are created by law and law is simply a command of the Sovereign. By Sovereign he meant a ruler or government to whom a whole political community owed allegiance. Reflecting these thoughts Jeremy Bentham(1781:49) wrote that:

'Rights is the child of law, from real law come real rights, but from imaginary laws, from "law of nature", come imaginary rights ... Natural rights is simple nonsense; natural and imprescriptable rights, rhetorical nonsense, nonsense upon stilts'

According to Bentham the term natural right is a perversion of language. The term is ambiguous, figurative and has anarchical consequences.

Ambiguous because it suggests that there are general rights so that a person would have a claim to whatever right he chose. No legal system could function with such a broad conception of rights.

Figurative because there can be no right anterior to government for it is government to make the law and enforce it. Finally the idea of a natural right is anarchical. Such a right would be free from all legal restraint and would lead to anarchy.

Positivists argue, then, that the only rights that can be said to legitimately exist are legal rights, rights that are embodied in a legal system. In their view moral rights

are not rights in a strict legal sense but are moral claims that may or may not be incorporated into law.

Building on this work John Austin (1790-1859) who had been a pupil of Bentham's gave the modern definition of legal positivism where the existence and content of law depends on social facts and not on its merits.

He said *'The existence of law is one thing; its merit and demerit another. Whether it be or be not in one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry'*. Austin, J.(1832:157) In other words there was the realisation that what the law is and what it ought to be are separate.

Unlike earlier legal philosophers who had looked at jurisprudence as merely a branch of moral philosophy Austin studied the law in an analytical way. In his view the nature of law is fundamentally that which the Sovereign commands. The Sovereign being defined as a person (or collection of persons) who receive habitual obedience from the bulk of the population but who do not habitually obey any other earthly person or institution. Such commands are backed by sanctions. Positive laws, meaning they exist by position, are those commands established by the Sovereign, to be contrasted to God's commands which he called divine law.

Those laws not established by men as political superiors he called positive morality. In this category he put international law or as he called it international morality. Because sovereign States are equal there is no sanction that in theory can be enforced other than moral sanctions of other States.

This is the situation that exists today and put in modern language as:

'The word "conventions", as used by constitutional lawyers, refers to rules

of political practice which are regarded as binding by those whom they concern-especially the Sovereign and Statesmen-but which would not be enforced if the matter came before them. The lack of judicial enforcement distinguishes conventions from laws in the strict sense. This is an important formal distinction for the lawyer, though the politician may not be so interested in the distinction.' Hood Philips (1978:649)

Hence any agreement between States whether called convention, treaty or protocol, to have legislative effect has to be incorporated into municipal law of the State(s) concerned. In the U.K. this is done by Act of Parliament whereas in the USA and Germany for example the convention becomes part of municipal law when it is ratified.

Thus human rights can be thought of as moral rights and their legitimacy as legal rights is necessarily dependent upon them being incorporated into the municipal law of the State(s) where they can be enforced in the courts.

The positive view of the law largely predominated until the end of the Second World War. Nevertheless the concept of natural rights was not entirely dead; the pressure of perhaps the world's first NGO began to make its presence felt in the field of human rights. The Anti-Slavery society was founded in the UK in 1839 and campaigned for the abolition of slavery. Their efforts resulted in the General Act of Brussels of 1890 regarding the suppression of slavery and this in turn led to the League of Nations sponsored Slavery Convention of 1926 being adopted. Incidentally the organisation is still in existence and has consultative status at ESCSOC, ILO, UNESCO and UNICEF. Although human rights were not mentioned in the Covenant of the League

of Nations, the organisation did address the issue of the rights of ethnic minorities and the protection of persons inhabiting the colonies of the defeated powers of World War I. However, the International Labour Organisation (ILO) founded in 1919 did what it could to realise one of the League's objectives which was "fair and humane conditions of labour for men, women and children", including seafarers, a task it carries out to this day.

The modern concept of international human rights is the result of the world's reaction to the Holocaust and German and Japanese atrocities during the Second World War. President Roosevelt's four freedoms speech of 1941 (freedom of speech and expression, religion, want and fear) inspired the establishment of the United Nations (UN) in 1945. The UN Charter together with the statutes and judgements of the Nuremberg and Tokyo tribunals laid the foundation stones for the development of a legal framework for the international protection of human rights. A major shift in the thinking of the world community towards human rights was the emphasis on the universal rights of all people.

In the preamble to the UN Charter it stated '*to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small*' UN Charter(1945:Preamble)

Furthermore the United Nations promises to promote among other things '*universal respect for and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.*' UN Charter(1945:Art.55[c]) and '*All members pledge themselves to take joint and separate action in co-operation with the*

Organisation for the achievement of the purposes set forth in Article 55'. UN Charter(1945:Art.56)

The consequences for National States agreeing to and signing the UN Charter is that they have given the UN the legal authority to define and legislate for human rights and Member States recognise that human rights are of legitimate international concern. This means that one nation's treatment of its own citizens is a legitimate concern of other nations.

The significance of the Nuremberg and Tokyo tribunals for international human rights law was that for the first times crimes against humanity were specified and that individuals could be held accountable for their actions. At Nuremberg:

'It was submitted that international law is concerned with the actions of sovereign states, and provides no punishment for individuals and further where the act in question is an act of state, those who carry it out are not personally responsible but are protected by the doctrine of the sovereignty of the state. In the opinion of the tribunal, both these submissions must be rejected. That international law imposes duties and liabilities upon individuals as upon states has long been recognised ...' Brownlie, I.(2003:566)

To further strengthen this important judgement the General Assembly of the UN in a resolution of the 11th December 1946 adopted unanimously *'the principles of*

international law recognised by the charter of the Nuremberg Tribunal and the judgement of the Tribunal'. Brownlie, I.(2003:566)

This was followed by the Universal Declaration of Human Rights (UDHR), a resolution adopted on the 10th December 1948 by the General Assembly of the United Nations. The Universal Declaration is regarded as the basic cornerstone of the international rights system and:

'is now widely acclaimed as a Magna Carta of humankind, to be complied with by all actors in the world arena. What began as more common aspiration is now hailed both as an authoritative interpretation of the human rights provisions of the UN Charter and as customary law, having the attributes of jus cogens and constituting the heart of a global bill of rights'. Hakeen, M.(1989:1)

“Jus Cogens” is a peremptory norm of international law. The concept, Roman in origin, means the law applicable to every person without exception.

Moreover:

'the Universal Declaration of Human Rights, originally intended as a non binding instrument ... many, if not all of its provisions have become part of customary international law. John Humphrey, one of the Declaration's key drafters noted that 'the Declaration has been invoked so many times both within and without the United Nations that lawyers are now saying that, whatever the intention of its authors may have been , the Declaration

is now part of the customary law of nations and is therefore binding on all states'. The Primacy of Human Rights in International Law(2000:1)

The Universal Declaration provided the inspiration for the European Convention on Human Rights of 1950. The International Covenants on Civil and Political Rights (ICCPR) and the International Covenant on Social, Economic and Cultural Rights(ICESCR) of 1976 define in detail the rights set out in the Universal Declaration, and provide some additional rights. As well as the European Convention already mentioned there are two other regional instruments that specially address human rights. They are : the American Convention of Human Rights(ACHR) of 1978 and the African Charter on Human and People's Rights(AC). The principles of the Universal Declaration were reaffirmed in the '*Proclamation of Tehran*' (1968:1); the '*Vienna Declaration and Programme of Action*' 1993:1) and the '*Beijing Declaration and Platform of Action*' (1995:1)

Relevance of Human Rights to the Seafarer

On examining the above Declarations and Conventions the following Articles are relevant to the seafarer in the context of Piracy, armed robbery at sea and terrorism.

In the Universal Declaration of Human Rights(1948):

Article 3: Everyone has the right to life, liberty and security of person.

Article 5: No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Article 7 : All are equal before the law and are entitled without any discrimination to equal protection of the law.

Article 8 : Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

Similarly in the International Covenant on Civil and Political Rights, 1966 which came into force in 1976 it states in:

Article 2; Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

This Article is particularly important to the seafarer because it means that whatever their nationality the seafarer is entitled to the protection of the flag state in respect of human rights.

Article 6: Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

Article 7: No one shall be subjected to torture, or to cruel, inhuman or degrading treatment.....

Article 26: All persons are equal before the law and are entitled without any discrimination to the equal protection of the law...

Again in the European Convention on Human Rights(1950).

Article 2; Everyone's right to life shall be protected by law

Article 3: No one shall be subjected to torture or to inhuman or degrading treatment...

Article 13; Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

Likewise these fundamental rights are again reaffirmed in the American Declaration of the Rights and Duties of Man, 1948 as Articles I, II and XVIII. In the American Convention on Human Rights, 1969 as Articles 4, 5 and 8 and in the African Charter on Human and Peoples' Rights, 1981 as Articles 3 and 7:

'In short, human rights which require protection are the same; they are not the product of a particular judicial system in the hierarchy of the legal order, but the same human rights must be recognised, respected and protected everywhere man goes. The uniformity of national laws on the protection of human rights is not derived, as in the cases of the law of

contracts and commercial and maritime transactions, from considerations of expediency by the legislative organs or from the creative power of the custom of a community, but it already exists in spite of its more or less vague form. This is of nature "jus naturale" in roman law.' South West Africa Cases(1966:17)

Thus these basic rights assume a character of *erga omnes* that is opposable to, valid against, the entire world:

'An essential distinction should be drawn between the obligations of a state towards the international community as a whole, and those arising vis-à-vis another state in the field of diplomatic protection. By their very nature the former are the concern of all states. In view of the importance of the rights involved, all states can be held to have a legal interest in their protection; they are obligations "erga omnes" ... Such obligations derive ... from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person ...' Belgium v Spain(1970:3)

The Commentary to Article 19 of the International Law Commission's Draft Articles on State Responsibility reads:

'This passage (the one above) has been the subject of differing interpretations; but it seems undeniable that the court intended by such affirmations to draw a fundamental distinction between international

obligations and hence between the acts committed in breach of them... In the court's opinion, there are in fact a number, albeit a small one, of international obligations which, by reason of the importance of their subject matter for the international community as a whole, are – unlike others – obligations in, whose fulfilment all states have a legal interest'.

ILC Yearbook(1976:99):

'Some authorities have gone further and concluded that derogation from them is prohibited'. The Primacy of Human Rights in International Law(2000:2)

Indeed, the International Covenant on Civil and Political Rights and the European Convention on Human Rights does provide for in Articles 4 and 15 respectively for the derogation of some provisions under the Treaties in time of war or public emergency threatening the life of the nation. But derogation is not permitted under any circumstances from the right to life, the prohibition to torture or to cruel, inhuman or degrading treatment and everyone shall have the right to recognition everywhere as a person before the law.

Moreover it has been given that in international law:

'a peremptory norm of general international law is a norm accepted and recognised by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character'. Convention on the Law of Treaties(1969:Art.53)

Thus it can be seen that these fundamental human rights are well established in international law in terms of international conventions, customary international law and the general principles of law recognised by nations and they are well supported by judicial decisions and the International Law Commission.

As shown, human rights apply to everyone, they are universal, but some groups of people are considered particularly vulnerable to human rights abuses. One such group are migrant workers, such that:

'Great importance must be given to the promotion and protection of the human rights of persons belonging to groups which have been rendered vulnerable, including migrant workers, the elimination of all forms of discrimination against them, and the strengthening and more effective implementation of existing human rights instruments'. Declaration and Programme of Action(1993:Art.14)

Furthermore *'The World Conference on Human Rights urges all states to guarantee the protection of the human rights of all migrant workers and their families'. Declaration and Programme of Action(1993:53)*

In particular the International Convention on the Protection of the Rights of All Migrant Workers and their Families(MWC), 1990 which came into force in July 2003 MWC *'distils half a century of expert opinion on the problems of migrant workers and takes into account the requirements of a wide range of international and national*

legal instruments' The Rights of Migrant Workers(1990:10) for their protection. In this convention a migrant worker is defined as *'a person who is to be engaged, is engaged or has been engaged in remunerated activity in a State of which he or she is not a national'*. MWC(1990:Art 2[1])

The above sentence exactly describes the circumstances under which the vast majority of today's seafarers live and work. Thus *'The term "seafarer" which includes a fisherman, refers to a migrant worker employed on board a vessel registered in a State of which he or she is not a national'* MWC(1990:Art.2[2])

In addition to the fundamental rights which it is recalled no derogation is permitted Article 16(2) is of note:

'Migrant workers and members of their families shall be entitled to effective protection by the State against violence, physical injury, threats and intimidation, whether by public officials or by private individuals, groups or institutions'. MWC(1990:Art 16[2])

However, it should be noted that the present Convention (MWC) shall not apply to *'Seafarers and workers on an offshore installation who have not been admitted to take up residence and engage in a remunerated activity in the State of employment.'* MWC(1990:Art. 3[f])

'The original intention was to extend the MWC to non-resident seafarers. However, to appease States that pay different wages on the basis of

nationality to their seafarers non resident seafarers were excluded from the scope of the MWC.’ Churchill, R.(2005:142)

Yet Article 3(f) which says: *‘The present Convention shall not apply to: Seafarers and workers on an offshore installation who have not been admitted to take up residence and engage in a remunerated activity in the State of employment’*, can surely be regarded as a “*non-sequitar*”, seafarers are by definition living and working legally in that States territory. The ship is their home as well as their place of work. Moreover the MWC goes on to say:

‘State Parties undertake, in accordance with the international instruments concerning human rights, to respect and to ensure to all migrant workers and members of their families within their territory or subject to their jurisdiction the rights provided for in the present Convention without distinction of any kind such as Nationality ... or other status’.

MWC(1990:Art. 7)

Thus, *‘the MWC can be regarded, as an elaboration of human rights standards’*

Brownlie, I & Goodwin-Gill, G(2002:272) given in the major human rights Conventions.

Also mentioned in the same sentences of the revision to the SUA Convention as human rights is humanitarian law. What is humanitarian law and what is its relationship with human rights.

The Link between Humanitarian Law and Human Rights

Humanitarian law has a much later genesis than the concept of human rights and is an entirely different branch of international law. The purpose of international humanitarian law is to protect individuals who do not take part in an armed conflict or who have been placed hors de combat and to ensure their dignity is respected and they are treated humanely.

Although the concept of the protection of women, children and the aged goes back many centuries, it was not until the mid 19th C with the tremendous casualties that modern, for their time, warfare brought, that the idea of international action to limit the suffering of the sick and wounded as born. After what he had seen at the battle of Solferino in 1859, Henri Dunant, a Swiss national, founded the International Committee for Aid to the Wounded, which soon became the Red Cross. This committee was responsible for the diplomatic conference in Geneva of 1864 where the Convention for the Amelioration of the Condition of the Wounded in Armies in the field was adopted by 16 European countries. *'This Convention formally laid the foundations of international humanitarian law'*. International Humanitarian Law and Human Rights(2000:2)

At about the same time in April 1863, during the American civil war, Francis Lieber prepared the "Instructions for the Government of Armies in the field" which covered much the same ground as the European Convention mentioned above. This Convention and the Lieber Code provided the basis for the development of the Hague

Conventions of 1899 and 1907. Further Conventions followed in between the two world wars but the Spanish civil war and the Second World War showed that with the changing nature of warfare the concepts of international humanitarian law needed to be updated. This resulted in the four Geneva Conventions of 1949, which amongst other matters oblige states to try or extradite individuals responsible for having committed grave breaches of the Geneva Conventions. Whilst these Conventions have stood the test of time new forms of warfare have emerged such as dissident armed groups within a State so that two further Protocols were adopted in 1977, one to deal with the protection of victims of international conflicts and the other to deal with the protection of victims of internal armed conflicts.

Thus, it can be seen that human rights law and humanitarian law have developed along separate lines, indeed the United Nations at its inception held the view that the laws of war might not be discussed lest it shake world confidence in its ability to maintain peace. Hence the Universal Declaration of 1948 does not refer anywhere to respect human rights in armed conflicts, conversely no mention is made of human rights per se in the Geneva Conventions. However, during the signing ceremony of the Geneva Conventions the President of the Conference spoke of the parallelism between the Geneva Conventions and the Universal Declaration:

'Our texts are based on certain fundamental rights proclaimed in it – respect for the human person, protection against torture and against cruel, inhuman or degrading treatments or punishments. The Universal Declaration and Geneva Conventions are derived from one and the same ideal'. Kolb, R.(1998:411)

Indeed Article 3, common to the four Geneva Conventions which specifies certain minimum obligations of treatment in non-international armed conflicts resemble human rights guarantees. *'Such obligations as will ensure, even in internal conflicts, the observance of certain fundamental human rights'*. Gutteridge, J. A. C.(1949:300)

The influence of human rights can be seen in the two additional Protocols of 1977, particularly in Protocol II where in the preamble it states *'Recalling furthermore that international instruments relating to human rights offer a basic protection to the human person'*. Geneva Convention(1978)

It is considered *'that International Humanitarian Law and Human Rights Law together in 1968'* Doswald-Beek(1993:103) where at a United Nations conference in Tehran a human rights resolution was adopted inviting the Secretary General to examine the development of humanitarian law. Thus, for the first time this branch of the law became of concern to the UN. *'It is becoming apparent that legal instruments should be drawn up combining elements of both humanitarian and human rights law in order to provide rules that can be applied in peacetime as well as in wartime'*. Doswald-Beek(1993:103)

With this in mind a group of experts met and drafted the "Declaration of Turku" in December 1990. This Declaration of Minimum Humanitarian Standards brings together in a most profound way the most important elements of human rights and humanitarian law. Hence Article 1:

'affirms minimum humanitarian standards which are applicable in all situations, including internal violence, disturbances, tensions and public emergency, and which cannot be derogated from under any circumstances! This Declaration does not of course have the force of law although it could be quoted as the 'teachings of the most highly qualified publicists of the various nations'. ICJ Statute(1945:Art. 38[d])

Indeed, it has been used in discussion and quoted by the '*UN Commission on Human Rights*'. UNHCR(1995).

Many of the Articles are already part of either human rights law or humanitarian law and having been drafted by experts must reflect the convergence the law is taking in this respect:

'The convergence of international humanitarian law and human rights shows that war and peace, civil wars and international conflicts, international law and internal law, all have increasingly overlapping areas. Thus the Geneva Convention and Human Rights Conventions may often be applied in cumulative fashion'. Schindler, D.(1979)

Application of Human Rights Law to the Seafarer in the Context of Piracy and Armed Attack

Arising from the above discussion the question is how then, may human rights law be of assistance to the seafarer? There are two separate but related issues. One is to

obtain proper compensation which is dealt with in the next Chapter and the other is to have effective jurisdiction to prescribe and adjudicate against piracy and armed attack. Terrorism is, as noted, in the previous Chapter required to be dealt with under the principle of prosecute or extradite.

It is generally considered that *'one basic difficulty in obtaining effective measures of suppression is a lack of uniformity in national laws concerning piracy and acts of maritime violence'*. Report of the Joint International Working Group(2001:1). In particular:

'Many States do not have legislation making piracy on the high seas or in the EEZ an offence under their laws. Flag States are often not interested in pursuing pirates who operate from ships flying their flag. Many States do not assert criminal jurisdiction over criminal acts committed by their nationals outside their territory. Therefore, the State of nationality of the perpetrators is not able to assert and prosecute their nationals if they have been accused of committing acts of piracy or armed robbery in international waters or in the territorial sea of another State. There is often no legal basis for states to extradite their nationals to other States when they are suspected of committing acts of piracy or armed robbery against ships, or for co-operating with States who are investigating such cases'. Beckman, R.(1999:5)

As already noted in Chapter V, concerning the *Alondra Rainbow* case, it was extremely fortunate that somebody in the Attorney General's Department of India

discovered a Piracy Act of the 19th C was still in force otherwise no prosecution would have been possible.

For the reasons given above it can be seen that the law as regards piracy and armed robbery is less than satisfactory both in terms of international and municipal law.

To overcome the acknowledged problems in this area of the law the working group of the Comité Maritime International(CMI) have drafted a Model National Law with three principal aims in mind:

'First, to ensure that no act of piracy or maritime violence falls outside the jurisdiction of affected States to prosecute and punish these crimes or, alternatively, to extradite for prosecution in another State; second, the Model Law has been drafted to ensure that it assists in giving full effect to (a) the provisions relating to piracy contained in the UNCLOS and SUA Conventions; third, the provisions of SUA (and Protocol) will also be uniformly applied as national law in those States enacting the Model Law which are not Parties to either the Convention or Protocol'. Report of the International Working Group(2001:2)

To this end the geographical area where an act of piracy can take place is extended to include the territorial and internal waters of a coastal State. The acknowledged deficiencies of the UNCLOS definition of piracy is addressed by the inclusion of a new offence of maritime violence.

The main elements of the crime of maritime violence are when a person(s) injures or kills any person in connection with piracy or performs an act of violence against a

person(s) on board a ship or causes damage to a ship or ship's cargo. Or seizes control over a ship by force or employs any device which is likely to destroy the ship or cargo. It is also a crime of maritime violence to engage in act constituting an offence under Article 3 of the SUA Convention. There is no "private ends" requirement which is one of the perceived drawbacks of the UNLOS definition.

Jurisdiction over the offences is wide ranging. If the offence is committed on the High Seas then of course the flag State has jurisdiction but in recognition of the international scope of the problem, in addition, the State of the seafarer, the State of the perpetrator of the crime or the State where the perpetrator normally resides if different from the one above also have jurisdiction over the offence.

Similarly, if the offence is committed in the territorial or internal waters of a State then that State would have jurisdiction in addition to the flag State of the ship concerned and the State of the seafarer and the State of the perpetrator of the offence would also have jurisdiction.

If in a case where an offence has been committed on the High Seas the flag State or in the case where the offence has been committed in the territorial or internal waters of a coastal State then if the State concerned declines to prosecute then the State of the nationality of the seafarer or the State of the nationality of the perpetrator of the offence would be able to request extradition. Moreover, in addition to terms of imprisonment for those found guilty of these offences, forfeiture of their assets is allowed for in addition to restitution to the victims of these crimes. Hence, this Model National Law was a genuine attempt to correct the failings of the present legal regime in respect of piracy and maritime violence.

Member National Associations of the CMI will be requested to submit this Model National Law to their respective governments in the hope that they will enact in their

national legislation as much as is required to comply with the three aims mentioned above. A questionnaire was sent to all member countries requesting information on their laws of piracy, if any. Only fourteen replies were received out of a possible total of fifty six. Thus, it can be seen that very few countries are interested in this problem. However, events in America (9/11) seem to have overtaken this project with Nation States excited by terrorism. As already noted in the previous chapter the revisions to the SUA Convention have done little or nothing to protect the seafarer.

As the CMI points out piracy and armed robbery lie in the area of public international law and the problem has a truly international character. The pirates themselves maybe operating on the high seas or in the territorial waters of a third state, indeed, as noted in the case of the *Alondra Rainbow* the gang itself can consist of more than one nationality. The target ship will most probably be FOC with the crew commonly consisting of several nationalities none of which may belong to the flag State, the ship owner, cargo owner and charterer will be of different nationalities and finally, the ship if in territorial waters when attacked will almost certainly not be in flag state waters. Thus, this paper suggests that using human rights law the International Criminal Court (ICC) may be of assistance to the seafarer in obtaining justice.

A Role for the ICC

The ICC was established by the Rome Statute of the 17th July 1998 with the Statute coming into force on the 1st July 2002. To date the Statute has received ninety six ratifications. UN Secretary-General Kofi Annan '*described the 17th July decision by the United Nations diplomatic conference to establish an International Court as a giant step forward towards universal human rights and the rule of law*' Plans for the

ICC gather Momentum(1998:10 and the UN's Under Secretary General for legal affairs called it *'the missing link to prosecute crimes against humanity wherever they may occur when national courts cannot or fail to take action'*. Overview-ICC(1998:1)

It is probably safe to say that the above was spoken or drafted by a lawyer such that the phrase "where they may occur" can be taken to include the high seas.

The need for an International Criminal Court was recognised by the United Nations over 50 years ago when in a Resolution of the General Assembly the International Law Commission was invited *'to study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide'*. International Humanitarian Law and Human Rights(2000:2)

The UN Convention on the Prevention and Punishment of the Crime of Genocide 1948 states in Article 6 that persons charged with genocide shall be tried by a competent tribunal of the State in the territory of which the act committed or by such international penal tribunal as may have jurisdiction. The International Law Commission concluded that an international court to try very serious crimes was possible and indeed desirable. However, it was not possible to take these ideas forward at this time (early 1950s) because the General Assembly could not agree on the definition of aggression. With the ending of the Cold War the political climate changed and the General Assembly again asked the commission to look at the establishment of an ICC and at the behest of Trinidad and Tobago to include jurisdiction over drug trafficking.

The conflicts in the former Yugoslavia and Rwanda with the massive violations of the human rights of innocent people graphically illustrated on the world community's television screens caused the United Nations security council under Chapter VII of the UN Charter amongst to establish ad hoc International Criminal Tribunals to hold individuals accountable for war crimes, crimes against humanity and genocide committed in those countries. These ad hoc Tribunals and the realisation that the crimes mentioned represent a threat to international peace and security gave the final push towards the Rome Statute and the establishment of a permanent International Criminal Court.

At the forty-sixth Session of the International Law Commission in the summer of 1994, the Commission wrote their first draft statute for an ICC. In this document they enumerated the crimes that would come within the jurisdiction of the court. They were:

'(a) genocide; (b) the crime of aggression; (c) serious violations of the law and customs applicable in armed conflict; (d) crimes against humanity; (e) crimes established under or permanent to the treaty provisions listed in the Annex, which, having regard to the conduct alleged, constitute exceptionally serious crimes of international concern.' ICC Draft Statute(1994:Art. 20)

In the Annex only treaties in force of universal scope were included. No bilateral or regional treaties were included. Nor were treaties that merely regulated conduct. Amongst the treaties listed was the SUA Convention.

At the following Diplomatic Conference this broad range of offences was whittled down to just three for inclusion in the Statue. They are (a) genocide (b) war crimes and (c) crimes against humanity:

'To the extent that there is an explanation on the record, it goes something like this. The ICC is a radical, new and untested institution which, regrettably, will have limited resources, at least in its initial stages. The present regime, where States invest resources in the task and have developed substantial expertise, works satisfactorily and it is best to leave well alone'. Clark, R.(2000;5)

Thus the matter to be discussed is can piracy and armed attack be considered a crime against humanity.

Can Piracy and Armed Attack at Sea be Regarded as Crimes Against Humanity

'Piracy may be regarded as the very first "crime against humanity", its peculiarly barbaric quality derived from the taking of lives which were especially vulnerable while outside the protective realm of any nation' Robertson, G.(2003:224)

This is as true today as it has always been. Seafarers are vulnerable because they live and work in small, often multinational isolated populations. The ship's crew of today is typically of not more than twenty and whilst on board have no control over their destiny in so far as they have to go where the ship goes. Particularly vulnerable in the

case of piracy and armed attack because being in such small numbers they are, as has been noted, almost defenceless against such attacks.

Perhaps the best modern precedent for equating piracy with crimes against humanity in the case against Adolf Eichmann in 1962. Both the Israeli District Court and the Appeal Court relied heavily on the piracy to assert jurisdiction. Thus:

'The principal offences against the law of nations, animadverted on as such by the municipal Laws of England, are of three kindsiii) Piracy; and 'Lastly, the crime of piracy, or robbery and depredation upon the high seas, is an offence against the universal law of society; a pirate being, according to Sir Edward Coke, "hostis humani generis"; and, with regard to crimes as defined by international law, that law has no means of trying and punishing them. The recognition of them as constituting crimes, and the trial and punishment of the criminals, are left to the municipal law of each country. But whereas according to international law the criminal jurisdiction of municipal law is ordinarily restricted to crimes by its own national wherever committed, it is also recognised as extending to piracy committed on the high seas by any national or any ship ...' A-G Israel v Eichmann(1962:38).

More recently; a Law Lord stated that:

'In my opinion, crimes prohibited by international law attract universal jurisdiction under customary international law if two criteria are satisfied.

First, they must be contrary to a peremptory norm of international law so as to infringe a “jus cogens”. Second, they must be so serious and on such a scale that they can justly be regarded as an attack on the international legal order. Isolated offences, even if committed by public officials, would not satisfy these criteria ... In my opinion, the systematic use of torture on a large scale and as an instrument of state policy has joined piracy, war crimes and crimes against peace as an international crime of universal jurisdiction well before 1984...’ Regina v ex parte Pinochet(1999:97)

Furthermore at a symposium of international jurists in the USA, serious crimes under international law were defined as *‘For purposes of these Principles serious crimes under international law include: (1) piracy; (2) slavery; (3) war crimes; (4) crimes against peace; (5) crimes against humanity; (6) genocide; and (7) torture’*. Princeton Principles on Universal Jurisdiction(2001:2[1])

It is worth noting that the Chairman of the initial draft of these principles, M Cherif Bassiouni, was also Chairman of the Drafting Committee of the Diplomatic Conference on the establishment of the ICC.

Thus, there seems to be no doubt that piracy is considered as a serious international crime alongside crimes against humanity. But does piracy conform to a crime against humanity as laid down in Article 7 of the Statute of the ICC.

Article 7 of the Rome Statute(1998) recognises that certain inhumane acts constitute crimes against humanity which is defined as *'any of the following acts when committed as part of a wide spread or systematic attack directed at any civilian population with knowledge of the attack'*.

Thus, this definition requires one of two alternatives to be met if a crime against humanity is to occur, first, widespread means:

'massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims.

'The concept of systematic may be defined as thoroughly organised and following a regular pattern on the basis of a common policy involving substantive public or private resources'. Prosecutor v Akagesu(1998:579)

'The thrust of this requirement is to exclude a random act which was not committed as part of a broader plan or policy.' Draft Code of Crimes Against the Peace and Security of Mankind(1996:30)

Of the two alternatives “widespread” is stronger but a good case could be made for many of the attacks to be considered “systematic” in that they are part of a broad plan against seafarers as noted in the *Alondra Rainbow* case:

'Attack directed against a civilian population in the context of these elements is understood to mean a course of conduct involving the multiple commission of acts referred to in Article 7, paragraph 1, of the Statute against any civilian population, pursuant to, or in furtherance of a State or

organisational policy to commit such attack'. ICC Report of the Preparatory Commission(2000:9)

In a judgement at a trial of the ICTY it was stated that:

' ... the article does not rule out the possibility that private individuals with "de facto" power organised in criminal gangs or groups might also commit the kind of systematic or mass violations of human rights covered by crimes against humanity.' Prosecutor v Tadic(1997:49)

The case of the *Alondra Rainbow* must surely be an example for the above statement.

Of the eleven crimes mentioned in Article 7 of the Statute as constituting crimes against humanity, three are of particular interest in the context of piracy and armed attack. First murder, this requires no elaboration, is well understood and is a crime in every State in the world. Second, torture, by which is meant:

'the individual infliction of severe pain or suffering, whether physical or mental, upon a person in the custody, or under the control, of the accused, except that torture shall not include pain or suffering arising only from inherent in or incidental to, lawful sanctions.' ICC Report of the Preparatory Commission(2000:120)

Under the United Nations Convention Prohibiting Torture the offence may only be committed by State officials or their representatives but under the Statute this

restriction does not apply. Third, other inhumane acts of a similar character intentionally, causing great suffering, or serious injury to body, mental or physical health. The commission recognised that it was impossible to establish an exhaustive list of the in humane acts which might constitute crimes against humanity but it should be noted that the notion of “other inhumane acts” is circumscribed by two requirements:

‘first, this category of acts is intended to include only additional acts that are similar in gravity to those listed in the preceding subparagraphs. Second, the act must in fact cause injury to a human being in terms of physical or mental integrity, health or human dignity’. ICC Report of the Preparatory Commission(2000:12)

The casting adrift of the crew of the *Alondra Rainbow* without any apparent means of rescue must surely be thought of by any reasonable person as an inhuman act.

Throughout the list of crimes in the jurisdiction of the Court and in particular with regard to crimes against humanity, for a crime to have occurred *‘The perpetrator has only to commit that crime upon one or more persons’* Draft Code Of Crimes Against the Peace and Security of Mankind(1996:32) so that although piracy as a crime against humanity is not remotely of the same order of magnitude as say Rwanda the crew of the smallest ship could nevertheless be covered by this provision.

Moreover, the perpetrator must have the requisite state of mind or *mens rea* (guilty mind) relating to a crime against humanity. It is the prerequisite for conviction of a

crime involving a moral wrong. Thus the mental element is allowed for in the ICC Statute as:

'1) Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge. 2) For the purposes of this Article, a person has intent where: a) In relation to conduct, that person means to engage in the conduct: b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events. 3) For the purposes of this Article, "knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. "Know" or "knowingly" shall be construed accordingly.' ICC Statute(1998:Art.30)

By intention (*dolus*) is meant where the perpetrator has a clear foresight of the consequences of that action and desires those consequences to occur. Thus:

'I want to kill a civilian. So I shoot him and he dies as a result of my act. I must answer for this crime. Or else, I think he is dead but in fact he has not died. He only dies later of exposure because he is left in the cold. It does not matter that my conduct did not kill him – I am guilty of murder because : 1) I intended him to die (mens rea); and ii) he dies as a result of my acts ...' Cassese. A.(2003:162)

In the context of crimes against humanity, knowledge means that the perpetrator of the crime must be aware that his conduct is part of a widespread or systematic attack on a civilian population:

'It must be proved that the accused knew that his crimes were related to the attack on a civilian population in the sense of forming part of a context of mass crimes or fitting into such a pattern'. Kittichaisaree, K.(2002:91)

It has been noted that two of the pirates involved in the *Alondra Rainbow* case have been identified as taking part in previous attacks. *'Furthermore, when it comes to his criminal liability, the motives of the accused for taking part in the attack are irrelevant, and a crime against humanity may be committed for purely personal reasons'*. Prosecutor v Vasiljevic(2002;112)

'The mens rea for inhuman acts is satisfied where the offender, at the time of the act or omission that forms the basis of the charges, had the intention to inflict serious physical or mental suffering or to commit a serious attack on the human dignity of the victim, or where he knew that his act or omission was likely to cause serious physical or mental suffering or a serious attack upon human dignity and was reckless thereto.' Mettraux, G.(2005:190)

Thus, those who cast the crew of the *Alondra Rainbow* have demonstrated the mental culpability required for an inhumane act.

Turning now to issue of admissibility in Article 7 of the Rome Statute, it is important to recognise that under the principle of complementary the ICC will act only when national courts are unable or unwilling to do so. It has already been noted the problems in this area of the law. In the preamble to the ICC Statute(1998) it *'emphasised that the ICC established under this Statute shall be complementary to national criminal jurisdictions.'*

In Article 17, para 2, the ICC Statute(1998) writes down the circumstances the court should consider in deciding the unwillingness or otherwise of a particular State to prosecute the person(s) concerned. First:

'the preceding were or are being undertaken on the national decision was taken for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in Article 5'.

that is the core crimes; second, *'there has been an unjustified delay in the proceedings which in the circumstances is consistent with an intent to bring the person concerned to justice'* ICC Statute(1998:Art.17.1[6]); third:

'the proceedings were not, or are not being conducted independently or impartially and they are or were being conducted in a manner which, in the circumstances is inconsistent with an intent, to bring the person concerned to justice'. ICC Statute(1998:Art.17.2[b])

Finally:

'in order to determine inability in a particular case, the Court shall consider whether due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence or testimony or otherwise unable to carry out its proceedings'. ICC Statute(1998:Art.17.3)

The last condition may be particularly important in respect of FOC States. Would Antigua, a small country, but with:

'607 ships totalling three and a half million gross tons' Antigua and Barbuda(2003:2) have the means to bring to and conduct a trial of this type or Liberia, a country recovering from a civil war be concerned with this type of crime or Indonesia one of the worst areas affected by piracy and armed attack be interested in bringing to trial persons charged with serious human rights violations, when the Indonesian Government itself 'continues to commit serious human rights abuses'. Indonesia Country Report(1999:1)

On the question of how to initiate or trigger a case involving the ICC this is dealt with in Articles 12, 13, 14 and 15 of the Statute, but first it should be noted that *'a State which becomes a Party to this Statute accepts the jurisdiction of the court with respect to the crimes referred to in Article 5'* ICC Statute(1998:Art.12.1) Thus the Court: *'may exercise its jurisdiction if the 'State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft.'* ICC Statute(1998:Art.12.2[a])

This is particularly important for the seafarer because the drafters of the Statute acknowledge that crimes of this magnitude can occur on board a ship.

The Court may exercise its jurisdiction in three different situations. First:

'a situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party; second 'a situation in which one or more of such crimes appear to have been committed is referred to the Prosecutor by the Security Council of the UN acting under Chapter VII (Action with Respect to threats to the peace, Breaches of the peace, and Acts of Aggression) of the UN charter; third, the Prosecutor has initiated an investigation in respect of such crimes is in accordance with Article 15'. ICC Statute(1998:Art.13[d])

No comment is required from a State when the Security Council refers a situation to the Prosecutor under Chapter VII. This is because, as has already been noted, Security Council resolutions are mandatory, indeed under a Security Council resolution the court could exercise its jurisdiction even when neither the State in whose territory the crimes have been committed nor the State of nationality of the accused is a Party to the Statute.

The Prosecutor who by the Statute is required to *'act independently as a separate organ of the Court' and is elected by secret ballot of State Parties'* ICC Statute(1998:Art.42.1) has the power to *'initiate investigations proprio motu (that is*

on his/her own initiative) on the basis of information on crimes within the jurisdiction of the Court'. ICC Statute(1998:Art.15.1)

There are however checks and balances built into the system and the influence of civil law systems of justice can be discerned. If the Prosecutor decides that there is a reasonable basis for proceeding with an investigation then he or she must submit a request for authorisation to continue to a Pre-Trial Chamber consisting of three judges. Victims may also make representations to this Chamber. If the Pre-Trial Chamber authorises an investigation the Prosecutor has to notify all State Parties concerned. Within one month of receipt of notification a State may inform the prosecutor that it is investigating or prosecuting the case at national level and that the Prosecutor should therefore defer to the State's authority. However, the Prosecutor has the right to review the case after six months and if necessary proceed as before.

At the commencement of the trial the jurisdiction of the court itself and the admissibility of the case can be challenged by the accused, the State which would have jurisdiction over the case or the State from which acceptance of jurisdiction is required. Moreover, there is a separate Appeals Chamber where appeals against verdicts and procedural decisions can be referred. The Judges themselves, are nominated by each State party are elected by *'secret ballot at an Assembly of State Parties'*. ICC Statute(1998:Art.36.6[a])

Aside from the usual qualifications that could be expected of a Judge they should also *'Have established competence in relevant areas of international law such as international humanitarian law and the law of human rights ...'* ICC Statute(1998:Art.36.3[b][ii]).

Thus, it can be seen that the international community has strived to ensure that the Court is free from political interference and reaches the highest standards in terms of impartiality and the guarantee of a fair trial to the accused. However, it should be noted that unlike Anglo-Saxon countries with their common law traditions the Statute does not require the participation of a jury. The precedent for this was set by the Nuremberg Tribunal and more recently by the ad hoc tribunals of Yugoslavia and Rwanda.

By Article 75 of the Rome Statute the ICC has the ability to award reparations to the victims of the crimes within its jurisdiction, these to include restitution, compensation, and rehabilitation. The reparations can be funded in one of two ways: first, under the provision of Article 79 where a Trust Fund has been established by the Assembly of State Parties, this fund has *'EUR 1,518,760 at its disposal as of December 2005'* Victims' Trust Fund(2005:1) for the benefit of victims and their dependants; second, under Article 75(2) the Court may make an order directly against a convicted person specifying appropriate reparations including under Article 77(2) a forfeiture of proceeds, property and assets derived directly or indirectly from that crime. The latter would be particularly appropriate for the person referred to as "the Boss" in the *Alondra Rainbow* case.

Equally important to individual criminal responsibility for the above crimes, any person who *'orders, solicits or induces the commission of such a crime which in fact occurs or is attempted'* ICC Statute(1998:Art.25.3[b]) and who *'facilitates the commission of such a crime, aids, abets or otherwise assists in its commission or attempted commission, including providing the means for its commission'* ICC

Statute(1998:Art.25.3[c]) are liable to the jurisdiction of the court. This directly refers to the person referred to as “the Boss” in the case of the *Alondra Rainbow* for example.

The Court is established at The Hague in the Netherlands but *‘may sit elsewhere, wherever it considers it desirable, as provided in this Statute’*. ICC Statute(1998:Art.3.3)

Thus it could follow the precedent of the regional English Admiralty Tribunals of the 18th C which were set up to try pirates nearest to the scenes of their crimes rather than in England:

‘The attacks of the 11th September 2001 can perhaps be considered the most recent examples of a crime against humanity. These attacks together with the African embassy bombings, the attacks on the USS Cole and the Limberg and other atrocities constitute multiple acts of murder committed as part of a widespread and systematic attack against a civilian population’. Robertson, G.(2002:483)

In this context it is worth noting that with a population of approximately:

‘300 million’ US Census(2001) and with approximately 3000 fatalities at the World Trade Centre in New York on that day 1 in 100,000 of U.S. Residents were murdered or went missing in 2001 in the USA. It is also

worth noting and in no way belittling the scale of that tragedy, in 2001 '64 seafarers were killed or went missing'. IMO Annual Report(2002:1)

With 1.25 million seafarers worldwide this equates to 1 in 20,000. In other words in 2001 the seafarer was five times more likely to be murdered or go missing as a result of piracy than a US resident was to terrorist attack. Given the small populations that seafarers live and work in at sea atrocities on the scale of the 11th September are not possible.

A former President of the International Criminal Tribunal of Former Yugoslavia(ICTY) has written that '*piracy is not a crime against humanity because it is not punished for the sake of protecting a community value*'. Cassesse, A.(2003:24)

However, as this paper has shown it is not piracy per se that is the crime against humanity but rather the murder, torture and other inhumane acts that occur during the attack that is the crime against humanity. Thus, it can be seen that acts of petty theft that take place in port areas would quite rightly not be considered to be a crime against humanity whilst an armed attack on a ship's crew (a civilian population) could be.

As demonstrated, precedent, case law and the writings of scholars does seem to suggest that these crimes could be considered as crimes against humanity within the context of piracy. However it will be up to the three Judges in the Pre-Trial Chamber who would have the final say.

Nevertheless, given the small number of pirates who have been caught and brought to trial of more immediate concern to the seafarer is the question of compensation which is discussed in the next chapter.

CHAPTER VIII – REDRESS FOR THE SEAFARER UNDER HUMAN RIGHTS LAW IN RESPECT OF PIRACY AND ARMED ATTACK

As shown in previous chapters, death and injury, physical and mental, caused by piracy and armed attack are a violation of the seafarers' human rights.

At the present time the seafarers' organisations hold the shipowner liable for compensation payable to the seafarer or dependants for these attacks. Indeed the ITF Model Contracts explicitly state that:

'A seafarer who suffers permanent disability as a result of an accident whilst in the employment of the company regardless of fault ... and whose ability to work as a seafarer is reduced as a result thereof, shall in addition to sick pay, be entitled to compensation according to the provisions of this Agreement'. ITF Collective Agreement(2002:12)

And *'If a seafarer dies through any cause whilst in the employment of the Company ... or as result of marine or other similar peril, the Company shall pay the sums specified ...'* ITF Collective Agreement(2002:13). In the case of loss of life this is *'US\$60,000'* ITF Collective Agreement(2002:24) and *'50-100% disability US\$80,000'*. ITF Collective Agreement(2002:13)

Similar clauses are contained in national agreements, the Standard Terms and Conditions Governing the Employment of Filipino Seafarers On-Board Ocean going ships for example, where the payment for *'loss of life and total disability is US*

\$50,000'. Standard Terms Governing the Employment of Filipino Seafarers(2000:7)
Likewise they appear in Company contracts where typically the amount paid is *'loss of life US \$ 65,000 and total disability US \$85,000'* World-Wide Shipping Agreement(2003:6)

All the contracts mentioned have lengthy appendices itemising various injuries and the degree of disability allowable with the amount of compensation payable in percentage terms after medical examination. This is administered and payable by the P & I Clubs from premiums paid by the ship-owner. The P & I Clubs will not reveal the details of any cases that they have dealt with on behalf of the ship-owner. However, it has been noted that:

'In cases where injury occurs to a seafarer causing employment to be terminated, there is a standard amount of compensation payable under the terms of the seafarer's contract. Some owners, aided and abetted by their P & I Clubs, seek to reduce this amount, using a subterfuge of threats, fear and delaying tactics' Ships, Slaves and Competition(2000:60)

And

'In instances where a seafarer is accidentally killed, the same tactics to minimise compensation payments are used by owners and P & I Clubs to pressure the deceased dependants to accept the lowest compensation possible' Ships, Slaves and Competition(2000:60)

Although the ITF report that they have not dealt with any cases of non or under payment of compensation due to piracy or armed attack they (the ITF) *'has dealt with*

cases totalling US \$1,000 million in unpaid wages or contract payments, and the Manila office cases have covered 1,000 vessels and 2,000 seafarers over the last three years.' Leggate, H. & MacConville, J.(2002:61)

Thus, there is no reason to suppose that these subterfuges are not being used in some cases of piracy or armed attack.

Indeed, the IMO and the ILO have set up a joint working group to study the problems of liability and compensation regarding claims for death, personal injury and abandonment of seafarers.

This joint working group meets regularly and reports to the Legal Committee of the IMO. It has already produced a resolution on the subject which has been adopted by the IMO. The resolution:

'notes a need to recommend minimum international standards for the responsibilities of ship owners in respect of contractual claims in such cases. It expresses the concern that, if ship owners do not have effective insurance cover, or other form of financial security, seafarers are unlikely to obtain full and prompt compensation...' IMO Guidelines on Shipowners Responsibilities(2001:1)

It is worth noting that in response to a questionnaire on the monitoring of this resolution sent out to member governments in 2003 *'only six replies have been received so far'*. IMO/ILO on Liability and Compensation(2003:1)

Recognising the above as a problem for some seafarers and in no sense attempting to exonerate the ship owner of his responsibilities this thesis questions whether this is the right approach in the matter of redress for piracy or armed attack for whatever motive. Clearly the shipowner should be responsible and liable for what might loosely be termed domestic incidents. However, where the loss of life and injury occur due to piracy or armed attack it is the flag State that is primarily obliged to enforce the law, in particular human rights law.

'Violation of international human rights and humanitarian law norms that constitute crimes under international law carry the duty to prosecute persons alleged to have committed these violations, to punish perpetrators adjudged to have committed these violations, and to cooperate with and assist States and appropriate international judicial organs in the investigation and prosecutions of these violations' Cherif Bassiouni, M.(2000:annex 4)

This as has been noted, the Flag and Coastal State have largely failed to do, the *Alondra Rainbow* for example being very much the exception in this respect.

UNCLOS clearly states that:

'Every State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag. In particular, every State shall ... (b) assume jurisdiction under its internal

law over each ship flying its flag and its Master, officers and crew in respect of administrative, technical and social matters concerning the ship.’ UNCLOS(1982:Art.94.1,2[b])

Note the word “shall” in the first sentence; the Flag State is under a legal obligation to exercise its jurisdiction.

The above was affirmed in the first case that the International Tribunal for the Law of the Sea adjudicated upon:

‘Article 94 ..., in particular, set out the obligations of the Flag State which can be discharged only through the exercise of appropriate jurisdiction and control over natural and judicial persons such as the Master and other members of the crew, the owners or operators and other persons involved in the activities of the ship. No distinction is made in these provisions between nationals and non-nationals of a Flag State. The provisions referred to in the preceding paragraph indicate that the Convention considers a ship as a unit, as regards the obligations of the Flag State with respect to the ship and the right of a Flag State to seek reparation for loss or damage caused to the ship by acts of other States ... Thus the ship, everything on it, and every person involved or interested in its operations are treated as an entity linked to the Flag State. The nationalities of these persons are not relevant’. M/V Saiga(No.2) Case(1999:26)

The judgement went on to say in a very perceptive paragraph that:

'The Tribunal must also call attention to an aspect of the matter which is not without significance in this case. This relates to two basic characteristics of modern maritime transport; the transient and multinational composition of ships' crews and the multiplicity of interests that may be involved in the cargo on board a single ship. A container vessel carries a large number of containers, and the persons with interests in them maybe of many different nationalities. This may also be true in relation to cargo on board a break-bulk carrier. Any of these ships could have a crew comprising persons of several nationalities. If each person sustaining damage were obliged to look for protection from the State of which such person is a national, undue hardship would ensue'. M/V Saiga (No.2) Case(1999:26)

The above paragraph clearly demonstrates that the Tribunal are fully aware of the reality of life at sea.

However, it should be noted that the ILC in discussing diplomatic protection stated that:

'In support of the proposal to extend the scope of the draft articles to cover diplomatic protection of crew members and passengers on ships, the example was cited of the "Saiga Case" where the International Tribunal for the Law of the Sea found that the ship's State of nationality was entitled to bring a claim for injury suffered by members of the crew,

irrespective of their individual nationalities; thus, the State of nationality did not possess an exclusive right to diplomatic protection. At the same time, caution was advised regarding the Saiga case, which has been brought before the ITLOS under the special provisions contained in Article 292 [Prompt release of vessels and crews] and not as a general case of diplomatic protection'. ILC Report on Diplomatic Protection(2002:125)

And:

'It was also noted that the evolution of international law was characterised by increasingly strong concern for respect for human rights. Hence, it was suggested that, if crew members could receive protection from the State of nationality of the vessel or aircraft, that merely provided increased protection and should be welcomed.' ILC Report on Diplomatic Protection(2002:125)

On the other hand:

'Others maintained that the Special Rapporteur was correct to propose that the Commission exclude from the scope of the draft articles the right of the State of nationality of ship or aircraft to bring a claim on behalf of the crew or passengers. It was stated that the issue was not how a State should protect its nationals abroad, but rather how to avoid conflicting claims from different States. If the ship flew a flag of convenience, the

State of registration would have no interest in exercising diplomatic protection should the crews' national Governments fail to do so. Such cases would according to this view, in any event be covered by the law of the sea.' ILC Report on Diplomatic Protection(2002:125)

Finally:

'it was also observed that the question of the protection of a ship's crew was covered both by UNCLOS, but also in earlier international agreements. Closer examination of other international instruments was thus called for'. ILC Report on Diplomatic Protection(2002:126)

Thus it can be seen that in the words of the Special Rapporteur:

'The majority of speakers on those subjects [diplomatic protection of members of a ship's crew by the Flag State] were opposed or indifferent to the inclusion of the diplomatic protection of members of a ship's crew by the flag state ...' ILC 5th. Report on Diplomatic Protection(2004:2)

This is, of course, part of the general pattern of ignorance and as said, indifference by the majority of the world's politicians, policymakers, the judiciary and academics to the modern maritime world in general and seafarers in particular.

Nevertheless, the Committee of the ILC charged with the problem of diplomatic protection persevered and drafted Article 27 which states:

'The State of nationality of a ship is entitled to exercise diplomatic protection in respect of the crew of the ship, irrespective of whether they are nationals of the State of nationality of the ship, when they have been injured in the course of an injury to the vessel resulting from an internationally wrongful act'. ILC 5th. Report on Diplomatic Protection(2004:21)

The Special Rapporteur in his commentary on this Article cited State practice to support the above Article. This practice coming mainly from the United States. *'The American view was that once a seaman enlisted on a ship, the only relevant nationality was that of the flag state'. ILC 5th. Report on Diplomatic Protection(2004:21)*

And:

'By ... enlistment he became an American crew on board of an American vessel, and as such entitled to the protection and benefits of all the laws passed by Congress on behalf of American seaman, and subject to all their obligations and liabilities'. ILC 5th. Report on Diplomatic Protection(2004:22)

Similarly in the Queen's Bench Division of United Kingdom's Court it was said that:

'The true principle is that a person who comes on board a British Ship, where English law is reigning, places himself under the protection of the British flag and as a correlative, if he becomes entitled to our law's

protection, he becomes amenable to its jurisdiction ...' ILC 5th. Report on Diplomatic Protection(2004:23)

Again:

'In the "I'm Alone" case which arose from the sinking of a Canadian vessel by a United States Coast Guard ship, the Canadian Government claimed compensation on behalf of three non-national crew members, asserting that where a claim was on behalf of a vessel, members of the crew were to be deemed, for the purposes of the claim, to be of the same nationality as the vessel. The Commission, without examining the issue of nationality, awarded compensation, in respect of all three non-Canadian seamen.' ILC 5th. Report on Diplomatic Protection(2004:24)

'In the "Reparation for Injuries" advisory opinion two judges, in their dissenting opinions, went out of their way to approve the right of a State to exercise diplomatic protection on behalf of alien crew members ... Judge Pasha interpreted the Court's statement in this opinion that there are important exceptions to the traditional nationality of claims rule, to relate to the protection of the flag., in which case protection extends to everyone in the ship ... independent of nationality'. ILC 5th. Report on Diplomatic Protection(2004:24)

The Special Rapporteur made much of the "Saiga" case where he strongly endorsed the findings of the Tribunal especially in relation to the crew. However, this protection does not, in the Special Rapporteur opinion extend to passengers:

'The rationale for extending protection to seaman rests to a substantial degree on the notion that by enlisting in the service of a merchant vessel the seaman temporarily subjects himself to the jurisdiction, laws and allegiance of the flag state. He thus acquires the character of a national and the corresponding right to the flag state's protection ... The same cannot be said of passengers, who have a more limited and transient connection to the ship.' ILC 5th. Report on Diplomatic Protection(2004:29)

Furthermore it has already been noted in Chapter VI much was made of the exclusive jurisdiction of flag states over their vessels.

From the foregoing it seems quite clear that the flag state is required to protect crew members of whatever nationality when serving on their ships. In conclusion:

'Article 27 serves to extend the principles of traditional protection incrementally. It may be described as an exercise in codification rather than progressive development, as there is sufficient state practice to justify such a rule.' ILC 5th. Report on Diplomatic Protection(2004:31)

Moreover,

'diplomatic protection, bilateral investment treaties and human rights treaties are all mechanisms designed to protect persons who have suffered injury as a result of an internationally wrongful act. They are meant to

complement and support each other in the pursuit of this goal.’ ILC 5th.

Report on Diplomatic Protection(2004:21)

Human rights conventions differ from other conventions in that they are not concerned with obligations between States but rather obligations that the State has towards the individual under their jurisdiction. As the Inter-American Court put it:

‘modern human rights treaties in general ... are not multilateral treaties of the traditional type concluded to accomplish the reciprocal exchange of rights for the mutual benefit of the contracting States. Their object and purpose is the protection of the basic rights of individual human beings, irrespective of their nationality, but against the State of their nationality and all other contracting States. In concluding these human rights treaties, the States can be deemed to submit themselves to a legal order within which they, for the common good, assume various obligations, not in relation to other States, but towards all individuals within their jurisdiction’ I-ACHR Advisory Opinion(1982:8)

The European Commission on Human Rights said much the same thing but took a different approach, thus:

‘that the obligations undertaken by the High Contracting Parties in the European Convention are essentially of an objective character, being designed rather to protect the fundamental rights of individual human beings from infringements by any of the High Contracting Parties than to

create subjective and reciprocal rights for the high Contracting Parties themselves.' Austria v Italy(1961:56)

Having established that flag States have jurisdiction, what are their obligations under international human rights law?

Obligations of the Flag State

Article 2 of the Universal Declaration of Human Rights states : Everyone is entitled to all rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 2 of the International Covenant on Civil and Political Rights states: Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind ...

Article 1 of the American Convention on Human Rights states: The States Parties to this Convention undertake to respect the rights and freedoms recognised herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, colour, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

Article 1 - obligation to respect human rights – of the European Convention for the Protection of Human Rights and Fundamental Freedoms states that: The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention.

The repeated reference to “without distinction of any kind” is particularly important with reference to seafarers, being as they are on the very margins of society. Hence, *‘Every State has the obligation to respect, ensure respect for and enforce international human rights law norms that are: (a) Contained in treaties to which it a State party; (b) Found in customary international law ...’* Cherif Bassiouni, M.(2000:6). Furthermore, the States obligations and duties extend:

‘a) Take appropriate legal and administrative measures to prevent violations; b) Investigate violations and, where appropriate, take action against the violator in accordance with domestic and international law; c) Provide victims with equal and effective access to justice irrespective of who may be the ultimate bearer of responsibility for the violation; d) afford appropriate remedies to victims; and e) provide for or facilitate reparation to victims.’ Cherif Bassiouni, M.(2000:7)

Legal Basis of Claims for Injury to Seafarers under Human Rights Law

It has already been noted that the State has an obligation to ensure human rights law contained in treaties to which it is a party especially the non-derogable Articles. Thus, *‘The Law of State responsibility requires a state to make reparations when it*

fails to comply, through an act or omission attributable to it, with an obligation under international law'. Shelton, P.(1999:93)

Article 2 of the ILC's Articles on State Responsibility state that:

'There is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State'. ILC State Responsibility for International Wrongful Acts(2001:Art 2)

And is defined as *'There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character*'. ILC State Responsibility for International Wrongful Acts(2001:12)

Article 1 states that *'Every internationally wrongful act of a State entails the international responsibility of that State*' ILC State Responsibility for International Wrongful Acts(2001:Art 1)

From the wording of Article 1 it can be seen that this Article covers all international obligations of the State and not just those obligations owed to other States. Thus, in the context of the seafarer this article is closely allied to Article 27 of the ILC's draft Articles on Diplomatic Protection.

Moreover, human rights law must be interpreted and applied so as to make the Conventions effective:

'In interpreting the Convention regard must be had to its special character as a treaty for the collective enforcement of human rights and fundamental freedoms ... Thus the object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective' Seering v UK(1989:[102])

In particular, the ECHR regards Articles 2 and 3 of fundamental importance, that is, the right to life and freedom from torture. The ECHR found that in the '*P and A Edwards v UK case*' P. & A. Edwards(2002) of a prisoner held in jail where he was killed by a fellow prisoner the UK Government were responsible under Article 2 for failing adequately to protect the prisoner's life. This case is analogous to the plight of the seafarer, where, especially since the introduction of the ISPS Code, both the prisoner and the seafarer are captive, until in the former case the end of his sentence, the latter until the end of his contract.

However, in another case, the ECHR held that:

'It is common ground that the State's obligation in this respect extends beyond its primary duty to secure the right to life by putting in place effective criminal law provisions to dates the commission of offences against the person backed up by law-enforcement machinery for the

prevention, suppression and sanctioning of breaches of such provisions. It is thus accepted by those appearing before the Court that Article 2 of the Consultation may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventative operational measures to protect an individual whose life is at risk from the criminal acts of another individual ... In the opinion of the Court where there is an allegation that the authorities have violated their positive obligation to protect the right to life in the context of their above mentioned duty to prevent and suppress offences against the person, it must be established to its satisfaction that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk' Osman v UK(1998:[115])

Following the ECHR's reasoning, in the case of piracy or armed attack, it would be unreasonable to expect the State to provide protection in, say, the middle of the Pacific where the risk of attack is virtually nil but not in well advertised areas where the risk is relatively high.

Furthermore, it is implicit under the non-derogatable Articles mentioned above that the State has a positive obligation to conduct an investigation into breaches of these Articles. In the context of piracy and armed attack *'If investigations are to satisfy the*

requirements of Article 2 they must be genuinely rigorous and not made ritualistic charades' Mowbray, A.(2001;67)

This principle has been upheld in both the UK Courts and ECHR.

'... A third is that of plain negligence by servants of the State, leading to a death or allowing it to happen. In the context of any of these classes, there exists the lamentable possibility that the State has concealed or is concealing its responsibility for the death, that possibility gives rise to the paradigm case of the duty to investigate. They duty is in every instance fashioned to support and make good the substantive Article 2 rights'

Amin v Middleton(2002:505)

And:

'Article 2 ECHR imposes two distinct but complementary obligations on the State, the first is the substantive obligation not to take life intentionally, and to take reasonable measures to protect an individual whose life is at risk; the second is a procedural obligation to investigate deaths where there has been an arguable breach of the substantive obligation by the State'. Hurst v HM Coroner(2001:799)

'Where an individual has an arguable claim that he or she has been tortured by agents of the State, the State is under a duty to carry out a thorough and effective investigation capable of leading to the identification and punishment of those responsible.' Aydin v Turkey(1998:[25])

'... the obligation is not confined to cases where it has been established that the killing was caused by an agent of the state. Nor is the issue of

whether members of the deceased's family or others have lodged a formal complaint about the killing with the competent investigatory authorities decisive. In the case under consideration, the mere fact that the authorities were informed of the murder of the applicant's uncle gave rise ipso facto to an obligation under Article 2 to carry out an effective investigation...' Yana v Turkey(1998:[100]).

Victims' (Seafarers') Right to a Remedy

The right to an effective remedy for human rights violations is universally recognised and well established in international law:

'Remedies for violations of international human rights and humanitarian law include the victim's right to; (a) Access justice; (b) Reparation for harm suffered: and (c) Access, to factual information concerning the violations'. Cherif Bassiouni(2000:8)

A victim is defined as:

'A person in "a victim" where, as a result of acts or omissions that constitute a violation of international human rights or humanitarian law norms, that person, individually or collectively, suffered harm, including physical or mental injury, emotional suffering, economic loss, or impairment of that person's fundamental legal rights' Cherif Bassiouni(2000:8)

This definition exactly describes the seafarers' distress as a result of piracy or armed attack. Moreover, this definition extends to the dependants and immediate family of those concerned.

The Universal Declaration of Human Rights in Article 8 states: Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

The ICCPR in Article 2(3) states: Each State Party to the present Covenant undertakes:

- a) To ensure that any person whose rights or freedoms as herein recognised are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity.
- b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
- c) To ensure that the competent authorities shall enforce such remedies when granted.

An almost identical provision is contained in Article 25 of IACHR which states that:

1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognised by the constitution or laws of the State concerned or by

this Convention, even though such violation may have been committed by persons acting in the course of their official duties.

2. The States Parties undertake: a) to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the State;
- b) to develop the possibilities of judicial remedy; and c) to ensure that the competent authorities shall enforce such remedies when granted.

Similarly, Article 13 of ECHR states that: Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity. However, Article 13 has been referred to as '*the most obscure provision in the Convention.*' *Malone v UK*(1984:[13]). This judgement caused '*the Committee of Ministers to reinforce Article 13 with a recommendation adopted in 1984 to all Council of Europe member states to provide remedies for government wrongs.*' Recommendation on Public Liability(1984:No 15)

None of these provisions explicitly distinguish between individuals harmed in the territory and individuals harmed outside the territory of the State concerned. Furthermore:

'the right to an adequate, effective and prompt remedy against a violation of international human rights or humanitarian law includes all available international processes in which an individual may have legal standing

and should be without prejudice to any other domestic remedies'. Cherif Bassiouni(2000:9).

Thus, it can be seen that access to justice for breaches of fundamental human rights law is a core component of the right to an effective remedy. The European Court said that *'the right to a fair hearing included the right of access to justice'*. Golder v UK(1975:[36]). And, in *'another case'* Airey v Ireland(1979:[27]) the ECHR found there had been a breach of Articles 6 and 8 because a female complainant had no practical access to a court to enforce her rights. To sum up, any individual *'must have a bona fide opportunity to have his case tested on its merits and, if appropriate, to obtain redress'*. Leander v Sweden(1987:[77])

Furthermore, it is noted that remedies for human rights violations are required to be effective. The word is used in Article 8 of the UDHR, in Article 2(3) of the ICCPR, Article 13 of the ECHR and Article 25(1) of the ACHR. Moreover, the Inter-American Court on Human Rights has observed that:

'Under the Convention, State Parties have an obligation to provide effective judicial remedies to victims of human rights violations (Art. 25), remedies that must be substantiated in accordance with the rules of due process of law (Art. 8(1)) all in keeping with the general obligation of such States to guarantee the free and full exercise of the rights recognised by the Convention to all persons subject to their jurisdiction (Art. 1)' Velasquez Rodriguez v Honduras(1987:[91]).

Similarly, in the ECHR the principles of effectiveness have been invoked in several cases '*a primary duty to secure the rights by putting in place effective criminal law provisions ...*' Osman v UK(1998:[115]) and:

'The scope of the obligation under Article 13 varies depending on the nature of the applicant's complaint under the Convention. Nevertheless, the remedy required by Article 13 must be effective in practice as well as in law ... Adyin v Turkey(1998:[251])

And:

'Thus the object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective.' Soering v UK(1998:[102])

The Right to Reparation for the Seafarer

As already noted, under international law, any conduct which is attributable to the State and which constitutes a breach of an international obligation of that State is an international wrongful act. The legal consequences of an internationally wrongful act for a State are (a):

'The State responsible for the internationally wrongful act is under an obligation: (a) to cease that act, if it is continuing; (b) to offer appropriate assurances and guarantees of non-repetition, if circumstances so require' ILC Draft Articles on Diplomatic Protection(2004:Art. 30)

And (b):

'1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally act 2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State' ILC Draft Articles on Diplomatic Protection(2004:Art. 31)

In particular, the right of a victim of human rights abuse to reparation derives from a fundamental principle of international law first stated by the PCIJ. Thus:

'The essential principle contained in the actual notion of an illegal act – a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals – is that reparation must, so far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need by, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it – such are the principles which should serve to determine the amount of compensation due for an act contrary to international law'. Factory at Charzow(1928:47)

This maxim was reaffirmed more recently when it was given:

'that it is a principle of international law, which jurisprudence has considered" even a general concept of law"', that every violation of an international obligation which results in harm creates a duty to make adequate reparation. Compensation, on the other hand, in the most usual way of doing so ... Reparation of harm brought about by the violation of an international obligation consists in full restitution (restitution in integrum), which includes the restoration of the prior situation, the reparation of the consequences of the violation, and indemnification for patrimony and non-patrimonial damages, including emotional harm'. Velasquez Rodriguez v Honduras(1989:[25])

Furthermore:

'Adequate, effective and prompt reparation shall be intended to promote justice by redressing violations of international human rights or humanitarian law. Reparation should be proportional to the gravity of the violations and harm suffered. In accordance with its domestic laws and international legal obligations, a State shall provide reparation to victim for its acts or omissions constituting violations of international human rights and humanitarian law norms'. Cherif Bassiouni(2000:9)

As already noted these general principles are firmly embodied in all human rights conventions. In particular, the Universal Declaration of Human Rights (Article 8); the ICCPR (Articles 2(3); the Rome Statue for the ICC (Article 75); ECHR (Articles 13 and 41) and the IACHR (Articles 25, 63 (1), 68) Moreover, the obligation on States to

provide reparation has been further defined in the judgements of many cases. For example:

'The Court considers that in the case of a breach of Articles 2 and 3 of the Convention, which rank as the most fundamental provision of the Convention, compensation for the non-pecuniary damage flowing from the breach should in principle be available as part of the range of possible remedies' Keenan v UK(1998:[123])

And:

'Furthermore, in the case of a breach of Articles 2 and 3 of the Convention, compensation for the non-pecuniary damages flowing from breach should in principle be available as par of the range of redress'.
Edwards v UK(2002:[97])

For clarification in the redress procedures for acts of piracy and armed attack it is appropriate at this point to examine the meaning of the various words that have been used.. The terms, reparation, restitution, satisfaction, compensation, rehabilitation, remedy and redress are all very similar but have different meanings. Reparation refers to the range of measures that may be taken in response to the violation. Reparation may take a number of forms: first, restitution, that in the re-establishment of the situation that existed before the wrongful act was committed; second, compensation, in the payment of money as a recognition of the wrong done and to make good the losses suffered; third, rehabilitation in the restoration of a victim's physical and psychological health; satisfaction, applies to those types of redress that do not aim to make good specific individual harm. The main forms of satisfaction are an apology

with a verification of the facts and disclosure of the truth. Remedy, in this context refers to the procedural means by which a right is enforced or a violation of a right is redressed. Redress is the action by which a wrong is put right or restored to the situation it was before.

Clearly in terms of piracy and armed attack restitution, that is to restore the seafarer to the original situation before the omission of the applicable human rights law occurred is not possible, thus, compensation will be the main avenue of reparation available. Or as the ILC states:

'1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution. 2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.' ILC State Responsibility for International Wrongful Acts(2001;Art 36)

Compensation, then, is a payment of money as recognition of the wrong done and to make good the losses suffered. The classes of compensation are nominal damages, a small sum of money awarded symbolising the vindication of rights and to put the judgement on record; pecuniary damages, to represent the closes possible financial equivalent of the loss or harm suffered and moral damages to compensate for fear, humiliation and mental distress. *'International law does not recognise the concept of punitive or exemplary damages.'* Velasquez Rodriguez v Honduras(1989:[38])

The method by which the amount of compensation is arrived at appears based upon a formula elucidated by the arbitrator in a case as long ago as 1923 when it was stated:

'the amounts (a) which the decedent, had he not been killed, would probably have contributed to the claimant, add thereto (b) the pecuniary value to such claimant of the deceased's personal services in claimant's care, education, or supervision, and also add (c) reasonable compensation for such mental suffering or shock, of any, caused by the violent severing of family ties, as the claimant may actually have sustained by reason of such death. The sum of these estimates reduced to its present cash value, will generally represent the loss sustained by claimant. Other factors were also to be taken into account in making the calculation:

- a) the age, sex, health, condition and station in life, occupation, habits of industry and sobriety, mental and physical capacity, frugality, earning capacity and customary earnings of the deceased and the uses made of such earnings by him:*
- b) the probably duration of the life of deceased but for the fatal injury, in arriving at which standard life-expectancy tables and all other pertinent evidence offered should be considered.*
- c) the reasonable probability that the earning capacity of the deceased, had he or she lived, would either have increased or decreased.*
- d) the age, sex, health, conditions and station in life, and probably life expectancy of each of the claimants;*
- e) the extent to which the deceased, had he or she lived, would have applied income from earnings or otherwise to personal expenditures from*

which claimants would have derived no benefits.' US v Germany(1923:35)

He went on to say:

'that international law provides compensation for mental suffering, injury to feelings, humiliation, shame, degradation, such injuries being very real, and the mere fact that they are difficult to measure or estimate by money standards make them nonetheless real and affords no reason why the injured person should not be compensated...' US v Germany(1923:35)

Several judgements in regional human rights cases *'have explicitly stated that they have drawn on the principles of reparation given under general international law'* Velasquez Rodriguez v Honduras(1989:[29]) in arriving at their decisions.

The elements to be considered in awarding compensation have been restated recently as:

'Compensation should be provided for any economically assessable damage resulting from violations of international human rights and humanitarian law, such as:

- a) *Physical or mental harm, including pain, suffering and emotional distress;*
- b) *Material damages and loss of earnings, including loss of earning potential;*
- c) *Harm to reputation and dignity;*

- d) *Costs required for legal or expert assistance, medicines and medical services, and psychological and social services.*
- e) *Lost opportunities, including education.* Cherif Bassiouni, M.(2000:10)

The last component is a relatively recent innovation and dates from 1998. When the I-ACHR accepted *'the concept of "proyecto de vida". The applicant's reasonable expectations for the future'* Loayza Tamayo v Peru(1998:[144]) as a separate element of damages:

'This concept is akin to the concept of personal fulfilment which in turn is based on the options that an individual may have for leading his life and achieving the goal that he sets for himself ... Those options in themselves have an important existential value. Hence, their elimination or curtailment objectively abridges freedom and constitutes the loss of a valuable asset, a loss the Court cannot disregard'. Loayza Tamayo v Peru(1998:[147])

This is important for seafarers, in particular, the younger members of a ship's company especially the junior officers.

Courts and Tribunals Available to the Seafarer for Civil Remedies

In the first instance an attempt must be made to obtain redress through the relevant domestic courts. Because as a general rule the route to international courts and

tribunals remains closed until all domestic remedies have been exhausted. For example *'The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law; ECHR(1950:Art 35) and 'that the remedies under domestic law have been pursued and exhausted in accordance with the generally recognised principles of international law'. ACHR(1969:Art 46(a)(a))*

This requirement is not applicable when:

'a) the domestic law of the State concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated; b) the party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them; or c) there has been unwarranted delay in rendering a final judgement under the aforementioned remedies'. ACHR(1969:Art:46.

2)

However, it should be noted that as far as seafarers are concerned:

'seafarers employed in the international labour market often have difficulty in pursuing their legal claims in the flag State for various reasons, including against an absent ship owner or in the absence of local assets. Although in a legal sense they work in a specific country and should therefore come under the jurisdiction of that State, they are unable to have their rights enforced. In other words, seafarers working aboard open register vessels have limited access to state institutions or processes

in the flag State that might provide them with protection ... Leggate, H.
& McConville, J.(2002:3)

In view of the above, presumably it would be extremely difficult if not impossible for a seafarer to obtain redress from a flag state for an omission of a human rights obligation in that State's domestic court. Nevertheless *'it is for the State asserting non-exhaustion of domestic remedies to prove that such remedies in fact exist and that they have not been exhausted.'* Exceptions to the Exhaustion of Domestic Remedies(!990):[41]

However, the International Tribunal for the Law of the Sea (ITLOS) does not have a requirement in its Statute for a case to have been heard in any domestic Court before being brought before this Tribunal. ITLOS was established for the purpose of settling disputes between States under UNCLOS. ITLOS is in essence the court of last resort under UNCLOS. By Article 279 all States are obliged to settle their disputes by peaceful means:

'When a dispute arises between State Parties concerning the interpretation or application of this Convention, the parties to the dispute shall proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means.' UNCLOS(1982:Art. 283.1)

If the State Parties fail to reach agreement then one or other of the States, *'may invite the other party or parties to submit the dispute to conciliation...'* UNCLOS(1982:Art.284.1) .

When negotiation and conciliation fail then the compulsory procedures entailing binding decisions as detailed in UNCLOS are invoked by one party to the dispute. Parties have four options before them in choosing to settle a dispute. ITLOS is clearly one, the other three are the International Court of Justice (ICJ), and as given in UNCLOS in Annex VII an arbitral tribunal and in Annex VIII a special arbitral tribunal to deal with: fisheries; environmental protection; marine scientific research and navigation. Signatories to the convention may elect at the time of ratification or later which method they prefer:

'Out of the current 149 States Parties (i.e. 148 States and 1 international organisation, the EC), 36 have filed declarations under Article 287 of the convention and 22 States Parties have chosen the Tribunal as the means for the settlement of the dispute.' Wolfrum, R.(2005:5)

Any State Party that has not indicated in writing the forum of its choice is deemed to have accepted Annex VII arbitral. ITLOS has been in existence for ten years and in that time has dealt with thirteen cases, nine of these have dealt with the "Prompt release of vessels and crews" under Article 292 where the jurisdiction of ITLOS is obligatory. All cases have involved disputes between States.

If, after an attack, in the territorial sea the flag State could be persuaded to take the coastal state to the Tribunal to obtain compensation for the loss and damage caused, including compensation for the seafarers involved, through the coastal States' failure to maintain order as it is required to do under UNCLOS. In the case of armed robbery in the waters of a coastal State the seafarer could appeal to the ITLOS quoting Articles

24 and 25 of UNLOS relating to the rights and duties of a coastal State in addition to the Human Rights Conventions. Although this course of action would require diplomatic pressure from governments, especially the national State(s) of the seafarers concerned and NGO's this Tribunal has the potential in such a case to be of great assistance to the seafarer. The Statute of ITLOS states that *'The tribunal shall be open to entities other than State Parties...in any case submitted to any other agreement conferring jurisdiction on the tribunal...'* ITLOS Statute(1982;Art. 20.2) and in the main body of UNCLOS it states that *'The dispute settlement procedures specified...shall be open to entities other than States Parties only as specifically provided for in this convention.'* UNCLOS(1982:Art. 291.2)

Furthermore, the Statute states that:

'The jurisdiction of the Tribunal comprises all disputes and all applications submitted to it in accordance with this Convention and all matters specially provided for in any other agreement which confers jurisdiction on the Tribunal.' ITLOS Statute(1982:Art. 21.2)

And again in the main body of UNCLOS it states that *'The Tribunal shall also have the jurisdiction over any dispute concerning the interpretation or application of an international agreement related to the purposes of this convention...'* UNCLOS(1982:Art. 288.2)

Moreover, being a Court deriving it's authority from a UN Convention the Tribunal is bound to take note of all the relevant Human Rights Conventions in arriving at a judgement concerning individuals, in this case the seafarer.

All of the foregoing could mean that the Tribunal may be able to exercise jurisdiction over a dispute where one of the parties is a non State actor, a seafarer for example. Thus, in the case of piracy a seafarer could perhaps bring a case against a coastal State or a flag State seeking compensation for the failure of the State to fulfil its duties under Article 94 of UNCLOS including human rights failures. *'there can be little doubt that ITLOS has the capacity to accept and exercise jurisdiction conferred on it by agreements whose subject is clearly within the scope of the Convention on the Law of the Sea'*. Mensah, T. A.(2004:119) However, even if this Tribunal were of a mind to take a case of piracy or armed attack it is extremely unlikely a State would submit to the jurisdiction of ITLOS in this matter.

The International Court of Justice adjudicates between States only. It could be possible for a State, say the State supplying the majority of a ship's company, to lodge a complaint for a violation or omission of human rights against the flag State in this Court.

Under the auspices of the Office of the United Nations High Commissioner for Human Rights, committees have been established to monitor implementation and compliance with the six core human rights treaties, that is the CCPR, CESCR, CERD, CEDAW, CAT and CRC. There is also a Committee that monitors the implementation of the MWC.

These committees are made up of independent experts whose main function is to review mandatory reports made by States that are signatories to these Conventions on a periodic basis. In so far as the seafarer is concerned the most important function of

these Committees is that as long as a State is a signatory to the First Optional Protocol of the CCPR then the Committee will consider complaints from individuals 'under that States jurisdiction or NGOs'. Furthermore, seafarers should be able to make a representation to the Committee monitoring the MWC when 10 State parties have accepted the procedure given in Article 77 of the MWC(1990) which states in part that:

'A State Party to the present Convention may at any time declare under the present article that recognises the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim that their individual rights as established by the present Convention have been violated by that State Party ...'.

However, the information received by these Committees from whatever source is considered in closed session. Their majority decisions are then expressed in "views" which will recommend steps to be taken by the State to remedy the violation if found to have occurred. These "views" are non-binding nor does the Committee have the power to award compensation. The only sanction it seems to possess is one of name and shame. It is perhaps worth noting that Panama is a signatory to the Optional First Protocol of the CCPR whilst Liberia is not.

Noting the above, what the seafarer requires is an international or regional court that will provide access to justice for human rights violations or omissions with the ability to award compensation and ensure its judgements are enforced. One such court in the

European Court of Human Rights. It is the European Convention on Human Rights, this Convention now has 46 ratifications, including that of Cyprus and Malta major FOC States. That gives this Court the jurisdiction to deal with both inter-State cases and individual applications.

As already noted, once all domestic remedies have been exhausted then:

'The Court may receive applications from any person, non-governmental organisation or group of individuals claimant to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. The High Contracting Parties undertake not to hinder, in any way the effective exercise of this right' .

ECHR(1950:Art.34)

In the first instance, a committee of three judges decide whether or not the case is admissible. The criteria to be met by an applicant are:

'2. The Court shall not deal with any applications submitted under Article 34 that a) is anonymous; or b) is substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information. 3. The Court shall declare inadmissible any individual application submitted under Article 34 which it considers incompatible with the provisions of the Convention or the

protocols thereto, manifestly ill-founded, or an abuse of the rights of application'. ECHR(1950:Art. 35)

Furthermore, the application must be submitted to the Court within 6 months of the date on which the final decision under domestic remedies was given and of course, the defendant State must be a signatory to ECHR. An application can be made when it is considered that only partial reparation has been made in the domestic courts:

'If the Court finds that there has been a violation of the Convention ... and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party'. ECHR(1950:Art. 41)

If the Committee considers the case admissible then this Committee will together with representatives of the parties involved attempt to '*securing a friendly settlement*'. ECHR(1950:Art.38) If this is not possible, then the case proceeds to a full judicial hearing where the merits of the case are heard before seven Judges. Where the case '*raises a serious question affecting the interpretation of the Convention or where the resolution of a question before the Chamber might have a result inconsistent with a judgement previously given*' ECHR(1950:Art.30) then the case can be referred upwards to a Grand Chamber consisting of seventeen judges, whose judgement is final. The hearings are in public and the judgements published. In a successful application compensation is invariably awarded as are costs and interest. In the Osman case (supra pg) for example the mother and son were each awarded £10,000 each with £30,000 for costs and expenses. The UK Government were given three

months to pay with 7.5% annual interest payable after the given time interval. In the last resort the execution of the judgements is overseen by the Committee of Ministers at the Council of Europe. This Court and ECHR can be considered a success given the many judgements it has made supporting the citizen against the State. Evidence for this case be deduced from the fact that the average case takes *'over, five years to complete from application to judgement.'* Woolf(2005:1)

Another important regional human rights system to be considered is the Inter-American one. Important for the seafarer because Panama, a major FOC State, falls under its jurisdiction. This system has a dual structure. First is the Inter-American Commission on Human Rights whose authority is drawn from the Organisation of American States *Charter*(1948) an autonomous body and second, the Inter-American Court on Human Rights which was created by the entry into force of the *'American Convention on Human Rights'* (1969)

In the first instance a complaint must be made to the Commission.

'Any person or group of persons, or any nongovernmental entity legally recognised in one or more member states of the Organisation, may lodge petitions with the Commission containing denunciation or complaints of violation of this Convention by a State Party' ACHR(1969:Art. 44)

The admissibility requirements are very similar to those required by the ECHR and are considered by a seven member panel of the Commission. If admissible, the Commission will then hold an investigation and if appropriate *'shall place itself at the disposal of the parties concerned with a view to reaching a friendly settlement of the*

matter on the basis of respect for the human rights recognised in this Convention'

ACHR(1969:Art. 48.1(f))

The conclusions of the Commission are not legally binding on a State neither can it order a State to pay compensation or take specific action to remedy a wrong found to have been committed.

If no friendly settlement is reached then the Commission or the State concerned can refer the case to the IACHR, if the State concerned is a party to the Convention and has expressly recognised the Court's jurisdiction. Seventeen of the twenty five States that have ratified the Convention also accept the jurisdiction of the Court. *'Panama is one of that number'*. I-ACHR Annual Report(1996:48)

Where the Inter-American Court differs significantly from the European Court is that individuals do not have any standing to bring a case before the Court or to appear separately. It is the Commission that appears before the Court as an advocate for the victim. Thus, *'the Commission's role has been likened by the Court to that of a "Ministerio Publico" , akin to a public prosecutor'*. Shelton, D.(1999:171)

The Court has the ability to award compensation to the victim and again unlike the European Court can order a State to take specific action to remedy a breach of the Convention. Moreover, the Court *'may declare that the law is incompatible with the Convention and the State is obliged then to bring the law into conformity with the Convention.'* Shelton, D.(1999:173)

The judgement of the Court is binding on the State concerned and there is no appeal. Despite there being no provision for legal aid in the Inter-American Commission's mandate, with victims relying on NGOs for assistance in this regard, it is only in 1998 that the Court began to award costs and fees following the European model:

'Victims need their own attorneys before international tribunals; indeed, this may be required for due process. Procedures before such bodies have not been created for the sole benefit of the States, but in order to allow for the exercise of important individual rights.' Shelton, D.(1999:319)

This applies as much to the seafarer in terms of piracy and armed attack as anyone else.

There is nothing in the Inter-American system akin to the Committee of Ministers in the European System to oversee the judgements and payment of compensation and costs. However, there is a *'High degree of State compliance with decisions of the Court'*. Anderson, M. & McDowell, A.(2005:118) indeed, the Court does not consider the case closed until arrangements for the payment of compensation, costs and interest have been made to its satisfaction.

Other major FOC States, Antigua and Barbuda, Belize, Bahamas and Bermuda are all either members of the British Commonwealth or are British Dependencies. For these States the English Judicial Committee of the Privy Council is the final Court of Appeal in criminal and as civil cases. This Court is required by the UK's Human Rights Act(Chapter 42. 3(1)) of 1998 to *'So far as it is possible to do so, primary legislation*

and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights' , that is the ECHR. Furthermore:

'A Court or tribunal determining a question which has arisen in connection with a Convention right must take into account any a) judgement, decision, declaration or advisory opinion of the European Court of Human Rights. b) opinion of the Commission given in a report adopted under Article 31 of the Convention, c) decision of the Commission in connection with Article 26 or 27 (2) of the Convention, or d) decision of the Committee of Ministers taken under Article 46 of the Convention, wherever made or given, so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen.'

Human Rights Act(1998: Chapter 42 2.1)

Thus, it can be seen that the provisions of the ECHR are reaching out far beyond the European boundaries.

Liberia alongside Panama is one of the two FOC States and is a signatory to the African Charter on Human and Peoples' Rights (1981) which entered into force in October 1986 and is broadly similar to the ECHR and ACHR in that it obliges State parties to recognise the rights and freedoms of the individual which of course includes the seafarer on board a Liberian flagged ship. The Charter provides for an African Commission on Human and Peoples' Rights whose functions are *'to promote human and peoples' rights and ensure their protection in Africa'* AC(1998:Art.30). *'As far as non-State complaints are concerned, the Commission appears not to have any power*

to take action, or make recommendations to the State concerned.' Anderson, M. & McDowell, A.(2005:118)

In addition, in 1998 the OAU adopted a Protocol to the Charter establishing an African Court on Human and People's Rights which may *'receive from individuals and NGOs', cases that are urgent and those alleging serious systematic or massive violations of human rights'*. AC(1998:Art. 6) The Protocol only came into force in January 2004 and to date Liberia is not a signatory.

Liberia is unique amongst flag States in that the maritime administration is entirely in private hands. The company in question is the Liberian Ship and Corporate Registry (LISCR) based in Virginia, USA and administers the registry:

'under a management agreement concluded with the Liberian government in 2000. The Liberian government's influence over the direction of the programme, and, interference with its operations, are kept to a minimum.'
deGravelles, W. J.(2005:334)

This being so and the fact that due to the recently concluded civil war in Liberia the domestic courts are hardly likely to be functioning properly the answer may lie in the Alien Tort Claim Statute (ATCA) of the USA. The ATCA was enacted by the Founding Father of the USA in the Judiciary Act of 1789 and gave federal courts jurisdiction over suits brought by aliens for a tort committed in violation of a treaty of the USA or the Law of nations:

'The three principal offences against the law of nations at this time were the violation of safe conducts, infringement of the right of ambassadors and the main violation in so far as this act was concerned, ironically, piracy. The original intent of the law was probably to persuade European countries that the new United States would not become a haven for pirates'. Defend the Alien Tort Claims Act(2006:1)

This act lay dormant for almost two hundred years until 1979 when the first modern ATCA case, *Filartiga v Pena-Iraha*, came to the Federal Court of Appeals for the Second Circuit. This court held that acts of torture had been committed under state authority, Paraguay, although not by the State itself and US \$ 10,000,000 in compensation which has never been paid. Since then, ATCA has been used to bring claims of torture, murder and other internationally recognised human rights violations against government officials. However:

'The United States Supreme Court has held that the Foreign Sovereign Immunities Act governs all suits against States, with the result that human rights victims generally may bring actions only against individuals or legal persons who are present within the USA.' Shelton, D.(1999:82)

Since 1979, only twenty given cases against multinational corporation have been brought before the courts. Most of these have failed to be heard for the ATCA only applies in a small number of cases. Both parties must be aliens, the victims must be able to identify and serve process on violators of human rights not protected by sovereign immunity, yet capable of committing a violation of international law and

there must be evidence that the accused party knowingly participate in the violations. *'A successful lawsuit under the ATCA against a multinational corporation would have to prove that it was directly implicated in these types of violations that are clearly defined under international law'*. ATCA(2005:2)

The case that has gone the furthest is that of John Doe 1 v Burma where it is alleged that a multinational company UNOCAL knowingly provided substantial assistance to the Burmese military in the acts of forced labour, murder and rape. The full appeals Court of the Ninth Circuit in the US has allowed, the case to go to the Supreme Court,

However, *'the Bush administration is asking the Court to dismiss the case. It is arguing for a radical re-interpretation of the ATCA, saying that it does not grant victims the right to sue for abuses committed abroad'*. ATCA Case Studies(2005:1)

The LISCR is certainly a multinational company having offices around the world and the seafarer is certainly an alien to the USA. Moreover LISCR at the very least the willing accomplice if not the instigator of any omissions of international human rights law applicable to the seafarer by the very nature of the way their business is conducted. Thus, they may well have a case to answer under the ATCA if it survives in its present form.

As noted above the seafarer has the ability to obtain a civil remedy for omissions of international human rights law through various courts from the traditional maritime States and most of the major FOC States. But is there any hope or expectation for the seafarer who does not have the facility to access any of the above. There has been a

case recently that has worked its way thorough the English legal system and was finally lost in the Grand Chamber of the European Court by the narrowest of margins.

In this case, Sulaiman Al-Adsani v Government of Kuwait, the plaintiff a citizen of dual British and Kuwaiti nationality was claiming damages for injuries suffered as a result of torture at the hands of the Kuwaiti Government. The essence of the plaintiff's submission to the court was that, quoting a US case that *'The right to be free from official torture is fundamental and universal, a right deserving of the highest status under International Law, a norm of "jus cogens"'* Siderman v Rep. of Argentina(1992:699)

It will be recalled that piracy is a breach of the "jus cogens" norm. Consequently:

'Since sovereign immunity itself is a principle of International Law, it is trumped by the "jus cogens". In short, they argue that when a State violates the "jus cogens", the cloak of immunity provided by International Law falls away, leaving the State amenable to suit' Siderman v Argentina(1992:699)

The English Court of Appeal whilst agreeing that the argument was a powerful one nevertheless found that the British State Immunity Act (1978) took precedence and could not be overruled, in spite of the fact that *'The Courts in the United Kingdom are open to all who seek their help, whether they are British citizens or not'*. Sulaiman Al-Adsani v Gov. of Kuwait(1996:2)

As noted, this case went to the Grand Chamber of the European Court where the case was lost by eight votes to seven on the same grounds that the English Courts had found.

At the present time a similar case is going through the English legal system, *Ronald Jones v. the Saudi Ministry of the Interior*, where the plaintiff Ronald Jones is claiming compensation for alleged torture at the hands of the Saudi Government. Presumably this case will also go to the European Court where perhaps with just one extra vote in favour they will win. In the event that they may win it is not clear how the Court would enforce its judgement, Saudi Arabia not being a signatory to ECHR. It is assumed that these countries, Kuwait and Saudi Arabia, have defended themselves in these cases in order to protect their reputation.

From these cases it is clear that human rights NGOs' and others are constantly pushing at the boundaries of human rights law to obtain justice for all. It is within the context of human rights laws, history and ethical behaviour arguments that a solution may be advanced in favour of seafarers' rights and appropriate courts of appeal. This is the subject of the final Chapter.

CHAPTER IX – THE INHERITANCES CURRENT TRENDS AND POSSIBLE SOLUTIONS

As has been documented it is the seafarer who is affected directly by these acts of piracy and armed robbery although occasionally passengers suffer too. It is only the seafarer who is regularly murdered, maimed and traumatised by these attacks. There are also other parties affected to a lesser degree, primarily the ship owner, cargo interests, insurance companies, the P & I Clubs, the flag States and the coastal States. Although there are many rules and Conventions governing the maritime sector such as the SUA Convention it is UNCLOS that *'sets out a general legal framework within which all activities in the oceans and seas must be carried out'*. Proposed Consolidated Maritime Labour Convention(2005:Preamble)

This final chapter is by way of summing up with emphasis on what has been inherited and how the seafarer could obtain more certain legal protection and redress.

The Law of Piracy, Problems and Shortcomings

It is recalled that the modern international rules applicable to piracy were first contained in Articles 14 to 19 of the 1958 HSC and in 1982 UNCLOS which reproduced the same rules as Articles 100 to 107. Those rules are largely based on the Harvard Research Draft Convention of 1932. The Harvard Draft attempted to codify what up to that time had been the inherited municipal laws on piracy. At this time, 1932, there had been no significant cases of piracy brought to court for over a hundred years. Thus these rules contained elements of customary law and were based on a

maritime world in respect of piracy as it was in the 19th C and unfortunately took little account of modern developments.

As detailed in the study piracy was certainly endemic on several maritime trade routes from ancient times until the early 19th C. Contemporaneously, Kingdoms and States found it necessary to have a separate body of law to deal with this problem. But even in the ancient period there were elements of ambivalence arising from interested parties in relation to toleration of pirates.

The Roman elite certainly appear to have had an ambivalent attitude towards the pirates. On the one hand the Romans needed a steady supply of slaves for their "*latifundia*" (large landed estates) and other needs such as the '*estimated 17,000 slaves needed to unload the grain ships*' Johnson, B.(2006:136) upon which Rome depended. The pirates helped to supply this need. Hence, as long as their depredations did not disrupt trade too much they were tolerated.

It is in this period that recognition was given to outlawing piracy which has remained although not without modification when necessary. Cicero, the famous orator and commentator, was the first to use the term "*hostes humani generis*", enemies of all mankind, to describe pirates. He used this term in the sense that the Romans considered themselves in a state of undeclared war against these people. After Graeus Pompeius had defeated the pirates it was said '*This is proof how dangerous it is to Government to be negligent and not take an early care to suppress Sea Banditry before they gather strength*' Defoe, D.(1972:30)

As the western Roman Empire declined the courts of the emerging city states in the West and Central Mediterranean continued to apply this law *'The earliest extant code of medieval maritime law, dated 1063, can be found in the decisions of the Consuls of the Corporation of Navigators of Trani, a port on the Adriatic'*. Mangone, G. J.(1993:2)

Ultimately the common characteristics of international trade made it necessary that Merchants engaged in international trade needed a body of rules that they all understood and were prepared to comply with in order to facilitate trade. Thus, the basic maritime laws were taken up by other city states such as Pisa, Venice, Genoa and Barcelona.

These laws came to north-western Europe by way of the Ile d'Oleron, Aquitaine, in the 13th C. Situated just off the Gironde estuary it is ideally placed to act as a staging post in the trade between England, France, the Lowlands of Europe and Iberia and the Mediterranean. The Maritime law of Oleron, known as the Rules of Oleron, became the basis for a body of maritime rules throughout northwest Europe, for example the Laws of the Hanse League and the Rules of Wisby. *'By the 13th C English maritime courts in London, Bristol, Rochester and the Cinque Ports were applying the Law expounded in the Rules of Oleron.'* Mangone, G. J.(1993:3)

These maritime courts adjudicated over all maritime matters including piracy, spoil, reprisals and shipboard discipline. These courts were presided over by the Lord High Admiral in London or his deputies in the outports. The courts being known as Admiralty Courts, where the law being considered was of course based upon Roman civil law not the common law of England.

As always ambivalence appeared when it came to application of general principles in what was considered international law. In the early Middle Ages, no kingdom was able to exercise any authority beyond its shores, consequently prevention of piracy on the high seas or attacks by own ships on foreign vessels was fraught with wider conflict. To prevent any one of these incidents escalating into a major incident threatening the peace, Kingdoms devised the Letter of Marque or Reprisal. A ship owner or Master could petition the local Admiralty Court for a Letter of Marque or Reprisal to obtain redress from the offending Kingdom to a value equivalent to that taken from him. With this letter he could then put to sea and legitimately seize from any ship of that Kingdom anything to the value stated in the letter. When back in harbour, these seized goods were brought before the Court to be valued. Clearly, this system was open to abuse but appears to have had the desired effect of preventing war breaking out over a piratical attack.

Another problem which was to remain over time was prosecution of pirates who were operating outside recognised national jurisdiction. By the mid 16th C the means by which pirates were tried in England was thought unsatisfactory, largely because of the difficulties of travel and bringing the witnesses to the nearest Admiralty Court. Thus:

'... in such shires and places in the realm, as shall be limited by the King's Commission or commissioners to be directed for the same, in like form and condition, as if any such offence or offences had been committed or done in or upon the land'. Offences at Sea Act(1536:c1.3))

In other words, from now on, pirates were to be tried under the common law of England in the local assize courts before a jury.

At this time, there was no State Navy as such, the ships owned by the monarch being manned by merchant seaman. Because of this lack of resources, to further State policy:

'the letter of marque had become somewhat more sophisticated than it had been a century earlier, now being a commission issued to a private ship owner by a belligerent State authorising him to employ his vessel as a warship. Privateering thus became big business, with considerable commercial possibilities' Hope, R.(1990:87)

The usual division of the spoils being 90% for the ship owner and 10% for the crown. It was in the West Indies and Spanish Pacific Americas that considerable piracy and state privateering took place. As the north European States established their own fledgling colonies and grew stronger economically they moved from fighting Spain ostensibly over religion to fighting each other for supremacy in trade. Many of the seafarers never knew or perhaps cared at what point they were acting legally or illegally. Indeed *'neither the Council of War in Madrid nor the Spanish judiciary had decided whether English corsairs should be treated as mere robbers or prisoners of war'*. Rodriquez-Salgado, M. J.(1998:14)

Nevertheless the English government found it necessary to enact a law in 1698 establishing regional Vice Admiralty Courts in *'his majesty's islands, plantations,*

colonies dominions, forts or factories in order that great trouble and charges in sending them into England to be tried within the realm' Piracy Act(1698c7)

This is can be observed that during this period the distinction between piracy and privateering were somewhat blurred. Moreover, they were both in their own way of essential support to State policy. Put another way, throughout history States have pursued their political and economic interests through forms of piracy.

With the end of the Napoleonic Wars State navies, in particular the British navy, were powerful enough to ensure that there as no hindrance to commerce on the ocean trade routes. Indeed, what piracy remained was an embarrassment to the Navy and ruthlessly put down. Moreover, privateers were no longer required and were outlawed by the '*first piece of international law relating to maritime affairs'* Declaration of Paris(1856).

Modern perspective

Given that the above in the evolution of customary and more formal law was the historical inheritance the Harvard Research Committee had to work on, perhaps it is no small wonder that some of the rules expressed in United Nations Convention On the Law Of the Sea (UNCLOS) were somewhat out of date and there are perceived serious shortcomings regarding piracy in the light of the modern maritime world. In particular:

1. Territorial waters are excluded, with the seaward limit increased under UNCLOS from 3 to 12 miles, most incidents are no longer piracy but armed robbery.

2. Although all States have a duty to co-operate in the repression of piracy, indeed.

'All States shall co-operate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State'

UNCLOS(1982:Art.100). This duty to co-operate ends the moment a pirate moves into a state's territorial waters.

3. Foreign warships are not allowed to operate, other than on innocent passage , in

coastal state's waters even when in pursuit of a pirate ship. *'The right of hot pursuit ceases as soon as the ship pursued enters the territorial sea of its own State*

or if a third State.' UNCLOS(1982:Art.111.3)

4. The penalty for piracy is not prescribed in UNCLOS. Although pirates may be

tried before the courts of any State which seizes them under universal jurisdiction

there is nevertheless an obligation for States to enact domestic legislation for acts

that are considered piracy under international law.

The defects in UNCLOS were not of over concern to the shipping community. For the ship-owner, the commercial risk of an attack is actually relatively small. The ship-owner was also the inheritor of a body of financial safeguards and protection in marine insurance. Piracy was simply one of the many risks involved in a marine adventure.

The extent to which marine insurance also protects the seafarer from the consequences of violence is minimal. However it has been considered as containing possible solutions. The ship-owners have certainly been able to protect themselves by insurance. This is incorporated in the Marine Insurance Act (1906) where a marine adventure is defined as:

- '(1) Subject to the provisions of this Act, every lawful marine adventure may be the subject of a contract of marine insurance.*
- (2) In particular there is a marine adventure where:*
- (a) any ship, goods, or other movables are exposed to maritime perils. Such property is in this Act referred to as insurable property;*
 - (b) the earning or acquisition of any freight, passage money, commission, profit, or other pecuniary benefit, or the security for any advances, loan, or disbursements, in endangered by the exposure of insurable property to maritime perils;*
 - (c) any liability to a third party may be incurred by the owner of, or any other person interested in or responsible for, insurable property, by reason of maritime perils.*

"Maritime perils" means the perils consequent on, or incidental to, the navigation of the sea, that is to say, perils of the seas, fire, war perils, pirates, rovers, thieves, captures, seizures, restraints and detentions, of princes and peoples, jettisons, barratry, and any other perils, either of the like kind or which may be designated by the policy.'

In general the ship owner will have two insurance policies. First, the Hull and Machinery policy which covers the fabric of the ship itself. So that in event of damage to the vessel or even total loss the insured would look to receive compensation through this policy. Second, the P and I Club which provide cover for third party

liabilities which the ship owner may incur. The cover will usually but not necessarily include:

1. *Death and personal injury of seaman*
2. *Liabilities arising from collisions*
3. *Liabilities arising from groundings*
4. *Liabilities arising from pollution*
5. *Liability for cargo damage*

together with legal and other costs associated with these claims' Seward, R.C.(2003:2)

In making any claim the ship owner has to show that he has taken all reasonable precautions to minimise the damage or loss. In terms of armed attack whether from piracy or terrorism he will have not only to be in possession of a valid ISSC but show that the ship's crew are doing what is required under the ISPS Code.

Until very recently piracy was covered under the Hull and Machinery Policy. However, in October 2005, a new set of clauses were drawn up by:

'the London Market's Joint Hull and Joint War Committees allowing for the removal of piracy and some other similar coverage from the hull policy, and their reallocation under the war policy.

The changes will clarify the situation for policy holders and reduce the possibility of disputes between insurance carriers should a claim occur.

They (the changes) were made in response to the evolving nature of modern piracy.

In the past, piracy has not been a substantial economic issue for insurers.

While insurers were aware of the incidents, they have not as yet led to major financial losses.

The method of operation of many of these gangs has been of general concern for some time, but the increasingly sophisticated methods and equipment used by these gangs have heightened fears that one of these incidents may lead to a major loss for underwriters' Piracy and Terrorism to be Covered by a Single Policy(2006:1)

What is relatively new is the decision to link piracy and terrorism together for insurance purposes. This appears to have been taken after a risk assessment by a private defence consultancy, Aegis Defence Services, in 2003 '*which included 21 areas worldwide in jeopardy of "war, strike, terrorism and related perils"*'. Khalid, N.(2006:6) These areas included Iraq, Somalia, Lebanon and the Straits of Malacca with adjacent Indonesian ports.

The inclusion of the Straits of Malacca in this risk assessment appears to be based on the attack against the chemical tanker *Dewi Medrim*:

'This ship was boarded off the coast of Sumatra by ten pirates from a speedboat. They were armed with machine guns and carried VHF radios. They disabled the ship's radio, took the helm and steered the vessel,

altering the speed for about an hour. Then they left with some cash and the captain and first officer, who are still missing....

..... The temporary hijacking of the "Dewi Medrim" was by terrorists learning to drive a ship, and the kidnapping was aimed at acquiring expertise to help the terrorists mount a maritime attack'. Peril on the Sea(2003:1)

'The Aegis report stated that due to the fact that there had been an intensification of the weaponry and techniques used by the pirates in the straits, they are now largely indistinguishable from terrorists'. Khalid, N.(2006:7)

Whilst this may be true especially from the seafarer's point of view there is no evidence linking piracy to maritime terrorism. Indeed, their motives are quite different, the pirate acting mainly for monetary reasons and the terrorists driven by political and ideological goals. The pirate shuns publicity whilst the terrorist seeks it. Moreover they are quite separate offences in international law, although the proceeds of pirate activity could ultimately be used for the purchase of weapons ashore to be used in acts of insurgency or terrorism, the differences are therefore muted.

Whatever the motives the effect of the insurers transferring the risk of an armed attack to a war risk policy has had the effect of raising premiums:

'An increasing number of insurers has begun charging additional war risk premiums for vessels using the Straits since the declaration. The Lloyd's

London underwriting market was reported to be quoting additional premiums, calculated as a percentage of the value a ship's hull and machinery, of 0.05% for base war risk cover and 0.01% for each transit of the Straits. This translates into around US \$12,500 for each passage through the Straits. In the case of a VLCC, this would rise to about US \$ 63,000 for the base premium and US \$12,600 for each transit'. Additional war risk premium imposed(2005:1)

It is to be recalled also that P & I Clubs cover the ship owner against loss due to death or injury to a crew member including medical expenses. It has proved impossible to get any meaningful information on piracy from the P & I Clubs during this study. However:

'Nick Whitear, marketing director, Thomas Miller P & I Club agrees that it is increasingly difficult to distinguish what, in insurance terms, amounts to piracy. Some so called acts of piracy may be more akin to acts of terrorism and, therefore, be excluded from P & I cover, he says, and fall within the scope of war-risks cover.

Generally speaking, protection and indemnity claims arising from piracy attacks are extremely rare, and, at least in the UK P & I Club's case, so rare that it does not have the volume of data to produce meaningful statistics on piracy hot spots, the type of ships most at risk and so on. There have been no major piracy claims from UK Club members this year.' Mullim, R. G.(2005:1)

It has already been observed how hostage taking is an increasingly common feature of attacks upon shipping. P & I Clubs do not normally provide cover for kidnap and ransom. However with:

'Pirate attacks becoming more severe, a situation that has led Lloyd's broker Cooper Gay, and specialist intermediary services to launch a new type of marine cover. Crew SEACODE, underwritten at Lloyd's provides protection for the kidnap and ransom of crews....' Pirate Attacks put Crew in Danger(2006:1)

How many ship owners have taken up this insurance is not known but *'The nature of the cover means information on policy holders is closely guarded, but we've already received a number of enquiries'*. Pirate Attacks put Crew in Danger(2006:1) Clearly this insurance policy as, indeed, are the other insurance policies already mentioned is primarily designed to protect the ship-owner not the seafarer.

The Role of Government

The ship-owners are primarily responsible for the safety of the seafarers on their ships. But the flag State and the coastal State Governments also have responsibilities in law. The basic, indeed essential, role for government is to provide a secure environment for those under its jurisdiction, free from external and internal threat. Secondly it is to safeguard and nurture the States' economic interests. It is for the politicians of the States concerned to secure these outcomes through the policies they pursue.

Presumably they are in part, at least, motivated by the knowledge that if they are found wanting by the populace then they will be voted out of office or overthrown. The primary concern has been confined to commercial interests until the political imperative of the link with terrorist attacks:

'At the present time piracy and armed robbery could, if allowed to increase, eventually have a disruptive effect on maritime trade. In particular, it could threaten the viability of shipping companies (affected by rising insurance premiums and the impact on crew) and therefore ultimately affect global Gross Domestic Products (GDPs)'. UK Government Strategy for Tackling Piracy and Armed Robbery at Sea(2005:3)

It is notable that the above statement is from a Developed Market Economy Country (DMEC), in this instance the UK. From Chapter 1 it was observed that most of the world's shipping is owned by nationals of DMECs.

A group of States with a more direct involvement in piracy and armed attack are those coastal States from which the pirates mount their attacks and use as a safe haven. These States have been called *'Weak and failing States'* by the British House of Commons Select Committee on Transport(2006:15) and described as States where one or more of the following factors are prevalent *'dysfunctional governments, lack of resources, geographical location and shape, high unemployment (especially amongst young people or chronic social problems...'* UK Government Strategy for Tackling Piracy and Armed Robbery at Sea(2005:3)

The main areas of concern or piracy hot spots are in Indonesian waters and the Malacca Straits, Iraq, Somalia and the Gulf of Guinea, in particular the Niger Delta. A solution to the threats to seafarers is considered, as in the early history of piracy, to be in the hands of these States that are under pressure from problems not always of their own making.

Somalia at the moment has a Transitional Federal Government that is not able to exert its authority domestically and in fact appears to be ruled *de facto*, by local warlords. Iraq is, following the fall of Saddam Hussein, suffering from a major breakdown of law and order so presumably the armed robbery of ships in an overspill of this general problem. Again in the Niger Delta all semblance of law and order seems to have broken down such that *'The Nigerian authorities seemed unwilling or unable to take control of the situation'* Transport Select Committee(2006:ev30)

Indonesia and the adjacent Malacca Straits have long accounted for approximately half of all actual and attempted incidents of piracy and armed robbery. Indonesia is the world's largest archipelagic State comprising *'17,508 islands, 6000 of them inhabited situated in three million square kilometres of archipelagic waters'* Indonesia-World Factbook(2006:2)

Clearly any State with this vast area under its sovereignty would need to devote and have to hand vast resources to ensure its territorial integrity is preserved and law and order maintained. Not only does Indonesia lack the resources to effectively patrol its own waters having *'less than one hundred operational vessels'* Dailai, H.(2004:2) to carry out this task, but piracy in particular is of low priority to the Indonesians for two

principal reasons. First, officials of this state at anti-piracy conferences in Tokyo and elsewhere have quoted Article 43 of UNCLOS(1982) where it states that; *'User States and States bordering a strait should by agreement co-operate:b) for the prevention, education and control of pollution from ships'* as the basis for user States providing assistance to Indonesia in this respect. It is worth noting however, that *'the IMB has suggested that only about 1% of shipping transiting the Malacca Straits actually trades with Indonesia.'* Transport Select Committee(2006:28)

Nevertheless co-operation especially with DMECs is perceived as costly to Indonesia's sovereignty such that:

'Intense sensitivity to maritime sovereignty issues has made Indonesia perceive co-operation with foreign forces in its waters as coming at exceptionally high cost. Even co-operative ventures which do not directly undermine sovereignty, are viewed with caution out of fear that such activities might lead to creeping infringement. In fact, so important is the Archipelagic Doctrine that defending complete, unquestioned authority over Indonesian waters is perceived as synonymous with safeguarding the nation's territorial security.' Bradford, J.F.(2004:7)

Second,

'Most Indonesian officials willingly admit that piracy is rampant in their country and that corruption feeds the problem. Policymakers are preoccupied with dozens of more urgent matters ranging from suppressing terrorism and separatism, to alleviating poverty and to sustaining democracy. Fighting piracy is also of low priority because some

politically powerful elements may directly or indirectly profit from the criminal activities' . Bradford, J. F.(2004:8)

Perhaps an example of this in Indonesia is Bataan, an island, with a population of half a million people and one hours ferry journey from Singapore. In the late 1970's, Dr. B.J. Habibie who went on to be President of Indonesia was appointed head of the Bataan autonomous region. Under his tutelage foreign investment was actively encouraged. Such that:

'One of the thriving businesses on the island, home to manufacturing, ship repair and prostitution, has become piracy in the Malacca Strait. The region's authorities have learnt from interviews with seaman, shipping agents, coastguard officers and prostitutes that this modern piracy or crime on the high seas is controlled by a murky alliance between triad-linked figures, the Indonesian Navy, coastal patrol and other marine officials'. Warren, J. F.(2003:13)

It will be recalled that it was on this island that the conspiracy to hijack the *Alondra Rainbow* was conceived.

Indonesia is not the only State sensitive to the issues of maritime sovereignty; all States where piracy is prevalent are sensitive to this issue. Moreover:

'Corruption further encourages piracy in many Southeast Asian States where it is not uncommon for law enforcement agencies to, at the

operational level, ignore acts of piracy or even collaborate with its perpetrators'. Chalk, P.(2000:68)

A further group of States to consider are those who supply the seafarers to man these ships. *'The bulk of the world's seafaring supply is primarily from developing countries'* Couper, A. D.(2005:29) with the Philippines alone supplying approximately twenty per cent of the total. Seafaring for those countries has a dual purpose. First, in their remittances home the seafarer provides much needed hard currency and secondly, seafaring helps to alleviate chronic unemployment, especially amongst young people. Moreover, these States must be in intense competition with each other to provide the necessary personnel. Furthermore:

'Many of today's ships' crews come from politically and economically weak States with undistinguished human rights records and little interest in the protection of their nationals who have lost close contact with their own States while employed on foreign ships and have suffered injuries in the service of foreign ships. It is true that sometimes the flag State will be a State that provides flags of convenience with little interest in the crews of the vessels which fly its flag. On the other hand, such flag states need to protect their reputation as providers of flags of convenience, and this may act as an incentive to protect foreign crew members. Certainly there will be more incentive to protect crew members in the case of such States than there will generally be for the State or nationality of crew members' ILC 5th. Report on Diplomatic Protection(2004:29)

Generally speaking then, modern nation state governments have still little interest in the plight of the seafarer. The DMECs continue to be able to receive their imports and raw materials and export their manufactures with minimal shipping costs whilst the flag states and crew supplying countries show little interest either, presumably as long as the hard currency continues to flow into their treasuries!

There is, however one exception to this general observation. This is Japan, as an island nation not overly endowed with natural resources and, has to import the larger part of its raw materials, crude oil and food by sea. And of course has to export its manufacturers to pay for these imports. A large part of this trade has to come and go by way of the South China Sea and Malacca Straits. So that although Japan appears not to take much notice of piracy and armed robbery in other parts of the world, this area of the world is of vital concern to Japan such that:

'Although the costs of piracy may be considered relatively low, since the mid-1990's a conveyance of factors has driven Japanese policymakers to securitize co-operation with coastal states as a critical policy interest'.

Bradford, J. F.(2004:2)

Not only is this Sea Lane Of Communication (SLOC) of vital economic interest to Japan it will be recalled that the senior officers of the *Alondra Rainbow* were Japanese, as were the officers in other high profile cases such as the *Tenga* and the *Global Mars* so that the plight of the seafarer has been one of the factors in Japan's anti-piracy initiatives:

'Both the humanisation and the "Japanisation" of piracy are important because safety, victimisation, and communal welfare are exceptionally strong triggers in Japanese society. In the case of piracy, the human issues are particularly powerful not only because Japan is seen as being the victim, but because the maritime and violent nature of the attacks are easily associated with other socially disturbing phenomenon such as the abductions conducted by North Korean spy boats, organised crime, and terrorism. Japanese interest groups concerned about piracy have encouraged the Japanese media to report heavily on the phenomenon, highlight the human costs involved, and focus specifically on the victimisation of Japanese citizens'. Bradford, J. F.(2004:3)

However, Japanese initiatives in this respect have met with mixed responses. It has already been noted that Indonesia places a high value on resisting any erosion of sovereignty and perceived decline of State prestige. The same considerations apply to a lesser degree to Singapore and Malaysia. Japan has provided funding for the provision of training progress and equipment for law enforcement authorities in the region. None of these countries will allow Japanese or indeed any other countries' naval forces to operate in their waters or engage in "hot pursuit" of suspects. One Japanese initiative that has the potential to improve security in the region is the Regional Co-operation Agreement on Combating Piracy and Armed Robbery against ships in Asia (ReCAAP) concluded in Tokyo in November 2004 between sixteen Asian countries; Bangladesh, Brunei, Burma, Cambodia, China, Indonesia, India, Japan, Laos, Malaysia, the Philippines, South Korea, Sri Lanka, Thailand and

Vietnam. The agreement will enter into force when at least ten countries have ratified this agreement. Thus far, only Cambodia, Japan, Laos and Singapore have done so:

'A key pillar of the ReCAAP Agreement is the Information Sharing Centre (ISC), which will be an international organisation located in Singapore. The ISC will facilitate communication and information exchanges between member countries... The ReCAAP Agreement also seeks to enhance the capabilities of member countries to combat piracy' Singapore Government Press Release(2005)

Apart from the lack of ratification to date enabling the Agreement to come into force the most obvious *'weakness of the agreement, is that it only obligates governments to share information which they deem pertinent to immediate pirate attacks and that ISC's operation, will depend on voluntary contributions'*. Eklof, S.(2005:4)

Thus it can be seen that Japan is making, within the constraints mentioned, a major effort to combat piracy and armed robbery as much as from a humanitarian point of view as a strategic one. If more DMECs made the same genuine endeavour to combat this menace then the problem could be quickly eradicated.

Recent Changes in State Perceptions and Actions

The single most important event to affect world maritime transport and trade to date were the attacks on the World Trade Centre in New York and the Pentagon in Washington. Up to this time:

'Freely flowing international trade, carried predominantly by a large and heterogeneous fleet of ocean-going vessels, has been the impetus behind

the significant advances in world prosperity experienced in the second-half of the 20th C ... The emerging paradigm for global prosperity has been predicated, on near-frictionless transport and trade.' Security in Maritime Transport(2003:4)

The terrorist attacks gave rise to greater awareness of the vulnerability of the world transport system and more examination of the organisational structure of shipping. To facilitate this freely flowing international trade a maritime transport system has emerged that is characterised by flag states often unwilling or unable to fulfil their responsibilities under safety conventions, opaque ownership of the vessels registered in these states and crewed by a multi-national labour force largely from the third world. Moreover, composition and ownership of the cargoes is also often uncertain. Ownership of bulk cargoes can often change hands several times during a voyage whilst the contents of a container is taken on trust by the shipping agent to keep it moving with the least delay. Post 9/11, therefore, the politicians and policymakers of the DMECs' led by the USA were faced with a dilemma. On the one hand, the very openness of the maritime transportation system that they had encouraged was now considered to be extremely vulnerable to exploitation by terrorist organisations. On the other hand, the question faced by the politicians and policymakers was how to reduce this vulnerability with the least disruption to the free flow of trade and cost:

'but they (the politicians) are extremely motivated by the fear and threat of vessels polluting their waters or of vessels blowing up in the middle of one of their ports. Such devastating outcomes can cost politicians their power base and valuable votes, as such the seriousness with which they are now

viewing maritime security stems from a desire to maintain the safety and security of their nations but also to protect their own power base into the future'. Jones, S.(2006:78)

Thus, ships and by implication the seafarer are now seen as a threat. Whereas, once a ship's arrival was seen as a harbinger of free trade and prosperity it is now viewed upon arrival with, if not hostility, certainly suspicion.

New International Measures

By far the most significant potential measures to protect the seafarer is considered to lie in the more recent international agency activities. In particular the role of the IMO in the fight against piracy and armed robbery:

'The purposes of the Organisation, as summarised by Article 1(a) of the Convention, are "to provide machinery for co-operation among Governments in the field of governmental regulation and practices relating to technical matters of all kinds affecting shipping engaged in international trade ..."' Introduction to IMO(2006:1)

The IMO in itself cannot require governments to take action. The subject of piracy and armed robbery is always on the agenda of the maritime safety committee and regional workshops and seminars on the subject are held by the IMO around the world particularly in the troubled areas. The IMO merely facilitates, it is for governments to take action.

The policymakers answer, then to the politicians' dilemma was twofold. First, the ISPS Code, which came into effect on 1st July 2004 as an extension of the SOLAS Convention. The main elements of the Code are:

- '1. Operators of ships over 500 GRT are required to;*
 - a) Conduct a security assessment and implement a security plan specific to each ship.*
 - b) Appoint a CSO with direct responsibility for implementing the Code.*
 - c) Appoint a SSO to each ship.*
- 2. Operators of port facilities that handle international shipping of over 500 GRT to:*
 - a) Conduct a security assessment and implement a security plan for each facility*
 - b) Appoint and train a PFSO.*
- 3. Contracting are required to:*
 - a) Conduct security assessments of port facilities.*
 - b) Approve the security plans of their ships and port facilities;'* ISPS Code(2004: Part A)

If a ship is found in non-compliance with the Code then it can be barred from its next port, effectively prevented from trading internationally. However, no such stricture applies to ports; the IMO is obliged to accept that Government's word that it is in compliance. *'However, in spite of the apparent compliance, it is generally recognised*

within the maritime industry that the Code has not contributed to the security of seafarers'. Transport Select Committee(2006:Ev 45)

For of course, the Code was not implemented for that reason. It is designed to prevent the ship itself being used as a weapon or to transport terrorists or weapons, particularly WMD. To sum up it can be said that:

'The primary impetus behind the introduction of the Code was the concern that ships are a potential vehicle for weapons and terrorists. In other words, those ships – and their crews – are the threat. This is clearly seen in the US where in many ports seafarers are prevent from leaving their ships. Thus the focus is not on the protection of the seafarer but on the protection of the country to which the ship will visit.' Transport Select Committee(2006:Ev 45)

Second, was the Protocol to the 1988 SUA Convention which was adopted in October 2005. The US took the lead role in negotiating this Protocol whose main purpose is to criminalise any use of a ship for terrorist purposes which includes using the ship itself as weapon or transporting any material for use in a terrorist act such that: *'when the purpose of the act, by its nature or context, is to intimidate a population, as to compel a Government or an international organisation to do or abstain from any act...'* SUA Convention Draft Protocol(2005:Art.3bis)

But the major provision as far as the seafarer is concerned is that Article that allows for State parties to the Convention, in reality the US, to board a vessel suspected of being involved in terrorist activities. However, under the provision of the Protocol 4

hours notice must be given to the flag State or 2 hours in the case of a bilateral agreement.

That this is fraught with danger for the seafarer is recognised by the provision that:

'the use of force is to be avoided except where necessary to ensure the safety of officials and person on board and to ensure that all persons on board are treated in a manner which preserves human dignity and in keeping with human rights law'. SUA Draft Protocol(2005:Art. 8bis)

However, there have been no cases of maritime terrorism since the attack on the *Limburg* in 2002 whilst piracy and armed robbery are an ever present threat for the seafarer as the most recent statistics demonstrate.

According to the IMB the number of reported incidents fell by some 16% in 2005 over 2004 to 276. However, this number appears to have reached a plateau with the same number of incidents being reported in the first half of 2006 as the corresponding period in 2005, 127. In 2005:

'one hundred and fifty two (152) crew members were reportedly injured/assaulted. About six hundred and fifty-two (652) crew members were reportedly taken hostage/kidnapped out of which eleven(11) are still reportedly unaccounted for' IMO Annual Report(2005:1)

'In addition a total of 23 vessels were hijacked, the highest in four years and the number taken hostage were the highest number since the IMB starting compiling statistics in 1992'. IMB Annual Report(2005:16)

Thus it can be that although the total number of attacks is down the incidents are becoming more violent with firearms used in over a third of all cases.

Moreover, a closer examination of the figures reveals that approximately 55% of these attacks took place when the ship was within the port area, either alongside or at anchor. Evidence, that in the first full year of operation the ISPS Code is not in many cases providing protection for the seafarer. But then of course once again it was never intended for that purpose. Further more:

'There has been lack of commitment from IMO Contracting Governments to ensure proper compliance to the ISPS Code by their port facilities. Many countries pay only superficial attention to ISPS compliance in ports. The IMO website indicates that most countries of the world have reported their facilities as compliant with the Code. It is widely recognised amongst seafarers that in very many cases this is not so. Little effort has been made to improve perimeter security, access control, etc.' Transport Select Committee(2006:Ev46)

Under the ISPS Code there is no role, perhaps surprisingly, for the law enforcement agencies of the contracting governments. There is no requirement for them to patrol the anchorages off their ports for example.

As noted only 1% of maritime traffic using the Malacca Straits is bound for Indonesia so perhaps it was national pride that made Indonesia launch operation "Gurita 2005" in July 2005 shortly after the war risk premium was applied to the Malacca Strait, to increase naval and air patrols in the straits. It is this initiative which has led to a dramatic reduction of attacks in this area. On the other side of the Strait Malaysia in with Japanese assistance, formed the Malaysian Maritime Enforcement Agency (MMEA). This organisation will have authority to maintain law and order, including investigation and prosecution, over the whole maritime zone for which Malaysia is responsible.

In September 2005 at the conclusion of a seminar organised by the IMO addressing the issue of piracy the "Jakarta Statement" was agreed to by the three States concerned, Indonesia, Malaysia and Singapore. This Statement outlined the areas of future co-operation to enhance the safety, security and environmental protection of the Straits of Malacca and Singapore. In particular a Joint Co-ordinating Committee has been set up to oversee aerial and sea patrols in the Straits:

'A "hotline" has been set up to provide rapid communications especially when a warship of one nation is in hot pursuit of a pirate vessel toward the waters of another partner nation with the right of hot pursuit up to five miles within each other's territorial waters'. Transport Select Committee(2006:Ev29)

Clearly all these measures are having the desired effect with *'only four reported attacks in the Malacca and Singapore Straits for the first half of 2006. As against this there were thirty three reported attacks within Indonesia'*. IMB Jan.-June Report(2006:6)

Thus, it can be deduced that all the effort is going into patrolling these Straits. This had been acknowledged by Lloyd's Joint War Committee who on the 7th August 2006 removed these straits from their list of war risk premium areas. *'The Committee is now of the opinion that the evidence has shown that not only has the situation, improved, but the measures are long term'*. Insurers drop Malacca Strait as War Risk(2006:1)

For how long these coastal states will be able to keep up this effort without considerable outside assistance is unclear:

'Although Indonesia had signed the [Jakarta] agreement, they have difficulty to fully contribute to the air patrols. Thailand will not join in the regional air patrols in the Malacca Straits in view of the high cost... "It is very far from us. It is not worth sending our ships and planes there because the cost will be extraordinary."' IMB Jan.-June Report(2006:18)

On the other hand:

'Indonesia still cool on security plans. Indonesia has again rebuffed US attempts to play a greater role in security monitoring in the South Asian archipelago. US Defence Secretary Donald Rumsfeld seemed visibly taken aback on his 8th June visit to Jakarta, particularly by a gentle admonition by his Indonesian counterpart. "In the application of security, including

anti-terrorism laws, its best that you leave the responsibility of anti-terrorist measures to the local government in question Suclarsona politely told Rumsfeld”” Fairplay(2006:9)

However, it is undoubtedly Somalia that is causing the greatest angst to policymakers at the moment. In 2004 only two vessels were attacked but in 2005 this number had leapt to thirty five. All of these attacks take place outside Somalia territorial waters, sometimes up to two hundred miles offshore. Thus are in the meaning of the law piratical. *‘The Somali attacks are aimed at seizing the vessel, taking it into Somali waters and then holding the vessel and crew to ransom. Once the ransom is paid the vessel and crew are released.’* Transport Select Committee(2006:Ev1) Many of the attacks on shipping are of this type and *‘there is concern as to where this money eventually ends up after being paid to “militia” groups in Somalia’* IMB Annual Report(2005:30)

However, it is the attack on the high profile cruise ship *Seabourn Spirit* on the 5th November 2005 where six heavily armed pirates in two boats firing machine guns and rocket launchers attempted to stop the ship that prompted the IMO to adopt later the same month a resolution on Piracy and armed robbery against ships in waters off the coast of Somalia(Resolution A. 979(24)) where:

‘The resolution condemns and deplors all acts of piracy and armed robbery against ships and appeals to all parties, which may be able to assist, to take action, within the provisions of international law, to ensure

that all acts or attempted acts of piracy and armed robbery against ships are terminated forthwith...'

The resolution also authorised the Secretary-General of the IMO to submit the resolution to the Secretary-General of the UN to put before the Security Council.

This activity resulted in a Presidential statement from the Security Council on the 15th March 2006 entitled "The Situation in Somalia". At the heart of this statement was the sentence:

'The Council encourages Member States whose naval vessels and military aircraft operate in international waters and airspace adjacent to the coast of Somalia to be vigilant to any incident of piracy therein and to take appropriate action to protect merchant shipping, in particular the transportation of humanitarian aid, against any such act, in line with relevant international law.' The Situation in Somalia(2006:1)

Since this statement was made a coalition naval task group has been patrolling the area. This not unnaturally has led to a decline in the number of attacks with the coalition forces making several arrests. These arrests have, however, appeared to have met with a mixed response by the judicial authorities ashore. In one case, 10 Somali men suspected of being pirates were detailed by the US Navy in January 2006 and landed in Mombasa where the authorities agreed to put them on trial for piracy. These men have not been brought to trial to date. Four months later:

'Ten Somali pirates seized by US Security forces after they attempted to attack to American naval ships off the Somali coast over a month ago were repatriated yesterday, in a Red Cross (ICRC) plane.

According to eye witnesses, a US Navy landing craft with 30 heavily armed officers arrived at the Likoni Ferry crossing (Mombasa) with the pirates dressed in green uniforms.

Sources said that all the Somalis had been screened to establish if they had any terrorist connections'. Piracy. Somali Suspects Sent Home(2006:1)

Both Groups, *'claimed to belong to the "Volunteer National Coast Guard and claimed that they were in fact simply defending the coast of Somalia from illegal fishing'.*

Jones, S.(2006:7) Why one group is languishing in jail and the other repatriated by the Red Cross is not at all clear. Thus in spite of the Security Council statement a confused message is being sent to the Somali pirates, moreover, given the reduced size of today's navies it is by no means certain for how long the present task group can remain on station off Somalia or if they will be replaced.

Thus today, as far as piracy and armed robbery is concerned, a situation exists where:

'if the 1958 formulation in its current version were in fact regarded as codifying acceptable rules regarding piracy it should be apparent that the rules so codified, when read carefully are incomprehensible and therefore codify nothing'. Rubin, A. P.(1998:393)

The ship-owner is covered by insurance so incurs no loss, his crew is short term contract labour from the third world so he feels under no obligation towards them. The insurance companies adjust their premiums so as to incur no loss and the attacks are such that they are not impinging on world trade, thus the DMECs; are not overly concerned with piracy, indeed, they are more concerned with terrorism where shipping and seafarers are seen as a threat.

But if piracy and armed robbery became so bad that it seriously affected the free movement of trade with many seafarers killed and injured then the DMECs either singly or together would have the option of taking countermeasures against a state harbouring the perpetrators of these crimes. The word sanctions is sometimes used in this regard especially where action is authorised by the Security Council of the UN. However, chapter VII of the UN charter uses the word 'measures' not sanctions. The word countermeasures is the term used by the International Law Commission in their Articles on State Responsibility. In terms of human rights *'Every state, by virtue of its membership in the international community, has a legal interest in the protection of certain basic rights and the fulfilment of certain essential obligations.'* Crawford, J.(2002:79)

A court gave us an example *'...the principles and rules concerning the basic rights of the human person.'* Belgium v Spain(1970:[34]). Thus, *'An injured state may only take countermeasures against a state which is responsible for an internationally wrongful act in order to induce that state to comply with its obligations...'* ILC Draft Articles on State Responsibility(2001:Art. 49)

However, *'Countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question.'*

ILC Draft Articles on State Responsibility(2001:Art. 51)

As has already been noted the likelihood of an attack is small and the impact on international trade negligible, thus, in the present circumstances it is extremely unlikely a State or States would or could be induced to take countermeasures against an offending State in this matter. This is despite the compelling argument that the ship is a floating part of the nation State under whose flag it operates, and the State has a related obligation to protect the seafarers.

The flag states, having no nationals crewing these ships are not concerned nor do labour supplying countries always appear to be concerned. The only group that suffers significantly and bears real losses are the seafarers and it is their options to obtain justice and compensation that are now discussed.

The Current Legal Position of the Seafarer

The seafarer will have signed a contract of employment stating his rights and responsibilities before joining the ship most probably in the office of a manning agent, between himself and employer. In the event of making a claim this may prove to be the first of many hurdles, that is in identifying who the shipowner is. His contract may be with the agency itself acting for the owner, it maybe with a ship management company managing the ship on behalf of the owner or charterer. It maybe with the shipowner himself with all the problems that could entail given the nature of ship ownership discussed earlier. In any event given the truly international nature of the

shipping industry today any claim the seafarer may make will almost certainly have a “foreign” element. Hence, any right in the contract that the seafarer or his dependants are making a claim against will involve “private international law” or as it also called “conflict of laws”. The two terms are generally interchangeable.

“Private international law” is the term used in France (*droit international prive*) and other countries using the civil law system and is the predominant system of law in the world, being used in mainland Europe and Francophone countries as well as Spanish and Portuguese speaking countries. Whilst the term “conflict of laws” is used in England, the USA and former colonies and dominions of the UK using the common law system.

The two systems of law are very different and developed separately. Common law was developed by custom from earliest times and continued to be applied after there were written laws. Court decisions are considered law just as are the Statutes of Parliament. Indeed, many Statutes outline the basic principles and it is up to the courts to interpret that law as they see fit, so that through their judgements that particular law is over time continually evolving. Whereas civil law developed out of the Roman law of Justinian’s *Corpus Juris Civilis* (body of civil law) and in France the Napoleonic Code.

In countries applying this civil law legislation is seen as the primary source of the law. Moreover, there are methodological and sociological differences in the way the systems of law work. In courts using the civil law system judges have to base their judgements on the provisions of the Codes and Statutes of that State and precedent whilst not ignored altogether is given less weight. Hence, the judgements given in common law countries will in general be much longer because the judges quote

extensively from previous cases in their reasoning whilst in civil law countries judges will only cite the relevant Statute or Code. In common law countries judges are drawn from practicing lawyers whilst in civil law countries judges are recruited, trained and promoted separately from lawyers. The court procedure is also different, the civil law system being inquisitorial in nature lead by the judge whilst in common law countries the court procedure is adversarial with the lawyers acting as advocates for the parties involved.

In the case where a seafarer or his dependants bring a claim against the shipowner for injury or death due to piracy or armed attack which involves a conflict of laws there are several stages to a successful outcome. First, identify which State is the most appropriate forum to have the case heard, that is the one with a legal system most likely to provide a favourable judgement to the seafarer. The shipowner has the right to challenge this jurisdiction. *'However, generally speaking in both common law and civil law jurisdictions, a challenge will be possible either if it is argued that the court does not have jurisdiction because of a foreign choice of jurisdiction agreement or arbitration agreement'* Fitzpatrick, D & Anderson, M. ed.(2005:204). In common law countries the court itself can decline to exercise jurisdiction on the basis of *forum non conveniens* that is where the court decides that there is a more appropriate forum available to the parties. This concept is not wholly limited to common law jurisdictions however, the Maritime courts of Panama have a similar power and in the case of the *Kyoto I* where the ship was under arrest by a shipyard in Albania (a civil law country) for non payment of repairs. The crew with the help of the ITF tried to obtain their wages through the local courts but *'within five minutes of the beginning of*

proceedings the court had thrown out the appeal on the grounds that Albania had no jurisdiction over wages on a Panamanian flagged vessel. Couper A. D. (1999:111)

Second, the court must characterise the issues involved into its component legal categories. In English law this is called classification and in French law qualification. That is, allocate the factual basis of the case to its relevant legal classes.

Third, the court must then decide which of the competing laws, that is, the laws of different States should be applied to each issue. Here it should be noted that member States of the EU are signatories to the *Convention on the Law Applicable to Contractual Obligations* (1980) which ensures uniformity in applying the rules of private international law. To this end its interpretation is administered by the European Court of Justice rather than by national courts. The court will apply the law of the forum, *lex fori*, to all procedural matters. But faced with a choice of law in substantive matters the court will weigh all the factors that link the legal issues to the law of the potentially relevant States and will apply the laws that have the greatest connection. In so far as personal injury or death to the seafarer whether through piracy or armed attack are concerned claims might be made in contract or tort/delict.

If the claim is made in contract then it is the “proper law” of the contract that will rule on the formation, validity, interpretation and performance of the contract. The principles of “proper law” examine the parties’ intentions as to which law is to govern the contract, if there is no expressed or implied choice of law, it is the law which has the closest and most real connection to the agreement made by the parties. The factors that the court would take into account when coming to a decision could include:

1. The domicile, habitual residence or nationality of the parties. Here it should

noted that domicile is the common law term for where the parties permanently reside whilst habitual residence is the civil law term.

2. The parties main place of business.
3. The language in which the contract is written.
4. The flag of the ship involved.
5. The format of the contract. If that style is found in only one country then this would indicate that the proper law is the law of that State.
6. The country where the contract was signed.

If the claim is made in tort then the choice of law rule is that the “proper law” applies and this is likely to be the law of the place where the tort occurred or other forum if appropriate. In Article 3 of the Rome I *Regulations on the Law Applicable to Non-Contractual Obligations* (2003) there is a presumption that *lex loci delicti*, that is the law of the place where the tort was committed, will in general apply but an exception can be made if there is any common habitual residence between the parties. As far as piracy and armed attack are concerned if the incident took place on the high seas then the law governing the claim would come under the jurisdiction of the flag State whereas if the incident occurred in territorial waters then the laws of the coastal State would apply.

Fourth, once it has been decided which laws to apply then these laws must be proved in the jurisdiction selected and applied to reach a judgement.

Fifth, perhaps most importantly of all the seafarer or his dependants must be able to enforce the judgement. *‘Many employers and shipowners are companies that have been deliberately set up in a structure designed to make it difficult to enforce*

judgements' Fitzpatrick, D. & Anderson, M. ed. (2005:207). However, '*Courts of most jurisdictions, both common law and civil law, now have mechanisms in place by which pre-trial security can be obtained'* Fitzpatrick, D. & Anderson, M. ed. (2005:209).

There are three main alternatives. In common law jurisdictions, the application will generally be for a freezing order or Mareva injunction, that is, an order which prevents the defendant from dissipating his assets so as to frustrate a judgement. It does not, as such, create any rights in or over the assets in question. In civil law jurisdictions, the application will generally be for an *saisie conservatoire*, that is an interim remedy directed at a specific asset which does have the effect of creating rights in that asset.

Finally, it may be possible to attach specific a specific asset. The most obvious asset of the shipowner is the ship, indeed, in one ship companies it may be the only asset. The right to arrest a ship to secure a maritime claim or lien '*is recognised by virtually all maritime States'* Fitzpatrick, D. & Anderson, M. ed.(2005:211). However, keeping a ship under arrest is very expensive and will in all probability be beyond the means of the seafarer without financial backing. '*Many courts require an undertaking to be given to meet the costs of the arrest'* Fitzpatrick, D. & Anderson, M. ed.(2005:212).

Thus, it can be appreciated, that given the global nature of the shipping industry today the seafarer in finding a suitable forum to have his case heard and in enforcing any ensuing damages awarded is facing almost insurmountable odds under private international law. '*It is clear, therefore, that the current legal situation is not able to secure for the seafarer the fundamental human rights recognised by the international community as the entitlement of all workers'* Fitzpatrick, D. & Anderson, M. ed.(2005:540). This is one of the reasons for using Human Rights Law to obtain proper compensation for injuries and death suffered as a result of piracy or armed

attack, the other being that it is the State itself whose jurisdiction the seafarer comes under that is responsible for providing the necessary protection, if it is unwilling or unable to do so then it should pay compensation.

With the speed of new legislation to defeat terrorism and by association piracy, the position of the seafarer in law has paradoxically become evermore confused. Seafarers living and working as they do in small isolated communities are extremely vulnerable to all manner of outside factors beyond their control. The ILO have of course long recognised the seafarer as a unique case in terms of rights within employment conditions, indeed *'Considering that, given the global nature of the shipping industry, seafarers need special protection,'* ILO Proposed Consolidated Maritime Labour Convention(2005:1)

Given the shifts in perceptions and actions it is vital that existing legislation specific to seafarers is reassessed. Since its inception the ILO has introduced many conventions dealing with the seafarer's life and work at sea. Recently the ILO introduced a "super convention" bringing all previous Convention together in a document entitled "Consolidated Maritime Labour Convention".

This Convention covers such matters as conditions of employment; accommodation, recreational facilities, food and catering; health protection, medical care, welfare and social security protection; clearly much of the above is for the ship-owner to comply with but the last chapter deals with flag state, port state and labour-supplying state responsibilities. Given that any reform such as this Convention needs to fulfil two requirements, *'first; on improving the rights which are accorded to seafarers; and secondly, on improving the ability of the seafarer to enforce those rights'* . Mensah, T.

A.(2005:544) In the event of it being ratified, which it has still to be (2006), it remains to be seen whether it will have the desired effect of fulfilling these two essential criteria .

Although as noted, the seafarer is under the jurisdiction of the flag state he is nevertheless isolated from that state, this isolation has two important consequences in his relations or rather, lack of them with that state:

'First, there is a lack of institutional provisions for the protection of seafarers in the countries concerned and second, he is unable to participate in the conventional political processes and thus without political influence within that state'. Leggate, H. & McConville, J.(2002:3)

In other words the seafarer is without a social or political identity in that state. There is no body of maritime law and no recognised court to which the seafarer can find recourse. What is now important in these respects however is the general recognition that:

'There now exists an international consensus that recognises basic human rights and obligations owed by all governments to their citizens... There is no doubt that these rights are often violated; but virtually all governments acknowledge their validity' Country Reports on Human Rights(2002:1)

The Human Rights Laws as a Solution

Thus, where piracy, armed robbery, and human rights are concerned it can be legitimately argued that it is not so much that the seafarer needs special treatment but

that he is able to enjoy the same rights as every other citizen. The international composition of seafaring is now matched with the international representation of seafarers under affiliation to the International Transport Workers Federation and of the ship-owners under the International Shipping Federation. This at least provides the basis for negotiations and agreements to bring forward in the fair treatment of seafarers.

When it comes to more legally based criteria it can be argued that coastal States, port States and flag States are in breach of their obligations under international human rights laws towards the seafarer over whom they have responsibilities and jurisdiction in respect of piracy and armed robbery. It will be recalled that flag states have sole jurisdiction over their ships on the high seas and this jurisdiction includes the crew. As detailed earlier it includes flag States being under an obligation in respect of international human rights law such that:

'it is reasonable to suppose that the concept of "jurisdiction" in those treaties [CERD and the ACHR] should be interpreted in the same way as under the CCPR, the CRC and the ECHR, and thus that State parties should extend the provisions of those treaties to their ships.' Churchill, R.(2005:140)

Although port States have total sovereignty over their internal waters and coastal States are responsible for the good order of their territorial sea they both do not, as noted, interfere in the internal affairs of a ship. This practice extends to the application of human rights law. However:

'One possible exception to the position put forward might be that if the breach of the human rights treaty amounted to a crime that disturbed the peace and good order of a port, the authorities of a port State would not only be entitled to intervene, but would be obliged to do so.' Churchill, R.(2005:156)

This of course is exactly the case in terms of armed robbery within a port area, whether at anchor or alongside a berth.

In effect these States, it is argued from the point of view of the seafarer, are committing an internationally wrongful act by omitting to provide for, under international law, the seafarers fundamental human rights. This being so, then in considering all the problems of identifying specific accountability amongst numerous parties the appeal to human rights law for redress to seafarers may be the most positive advance.

There are many Conventions to support this argument as well as much case law and the writings of publicists. As far as is known no seafarer or his representatives has or has attempted to bring a case against a flag or coastal state in this way. Clearly human rights are universal so ultimately it will be up to the Courts to decide if there is a case to answer in depriving seafarers of their human rights. In all cases domestic remedies must of course be exhausted first bearing in mind that important *'advisory opinion'* The Effect of Reservations on the ACHR(1990:4) which stated that obtaining access to human rights courts the onus is on the State to show that the claimant has had access to domestic courts with legal aid as appropriate.

It will be up to the ICC to decide if murder and the acts of violence associated with piracy constitute a crime against humanity, legal opinion appears to be divided but surely by any test of reasonableness the manner in which the crew of *Alondra Rainbow* were treated must form such an act. Realistically, however, it should be noted that the ICC founded in July 2002 is still in the process of establishing itself on the international stage and at the moment is primarily concerned with widespread atrocities in the Republic of the Congo, Uganda and the Sudan. Hence, it is unlikely to have the resources or inclination to address the plight of the seafarer in relation to piracy in the short to medium term.

Thus, if the seafarer is unable to obtain compensation from the flag state in the relevant domestic court he should be able to obtain access to one of the human rights courts or the Privy Council of the United Kingdom. Although *'The process of seeking reparation should be expeditious, fair, inexpensive and accessible'* The Declaration of Basic Principles of Justice for Victims of Crime(1985:A6) the process of seeking compensation from the coastal State would probably present problems for the seafarer in terms of human rights law. But in general the law does not stand still, except for the law of piracy, it is constantly evolving to meet new circumstances, in particular it is noteworthy that Indonesia acceded to ICCPR on the 23rd February 2006. So hopefully the seafarer could bring a case before the Indonesian Courts under this Convention.

In the final assessment in finding new avenues for the isolated seafarer to obtain redress on board ship in the long history of adversity it can at least be argued that the flag State and or coastal State have committed internationally wrongful acts. These

arise from their omissions to provide protection to ships crews' under their jurisdiction in respect of piracy and armed robbery as required by International Human Rights Laws. In which case it can be further argued the States should compensate the Seafarer with the seafarer appealing to the various human rights courts and related support bodies as necessary. Using this Human Rights route has the advantage in that it does not depend on the largesse or otherwise of the ship-owner or P & I Club to obtain compensation.

How this might be accomplished in England or France under the umbrella of the ECHR is examined in detail. Here it should be noted that the ECHR was the creation of the Council of Europe and has nothing to do with the European Community. Thus, whilst Norway and Russia for example are signatories to the ECHR they are not members of the European Community.

In both cases, that is England and France, the seafarer or his dependants are claiming damages in so far as piracy is concerned that the State itself is omitting under Article 2 of the ECHR the positive duty to protect life.

The provisions of the ECHR are enforceable under the municipal law of England as the Human Rights Act(1998) (HRA) and came into force on the 2nd. October 2000. The HRA gives the right to any individual under the jurisdiction of the English courts to bring a case against any public authority, not an individual, for any infringement of the rights laid down in the HRA. This means for example that a Filipino seafarer serving on an English registered ship could bring a case. In this context the public authority is the government itself not the MCA or the MOD for example, it is the government itself that sets the policy and thus responsible.

If the claim for damages is less than £15000 then the claim is started in a County Court but if for more than £15000 then in the Queens Bench Division of the High Court in London. In the first instance a claim form (see Appendix 5.1) must be completed with particulars of the claim ensuring that the box asking if the claim includes issues under the HRA is ticked within one year of the incident occurring. Assuming the claim is for more than £15000 then this form is lodged with the Issue and Registry section of the Royal Courts of Justice in the Strand, London.

If the case is considered admissible then it goes to trial and depending on the outcome either side can with the Judge's permission lodge an appeal. This appeal would be heard by the Civil Division of the Court of Appeal. Again, whatever the outcome either side could with the Court's permission lodge an appeal with the House of Lords. The House of Lords is the highest court in the UK for civil cases and is the supreme court of appeal. All this would be very expensive but legal aid would be available for the seafarer if necessary whatever his nationality. If at any stage in this court process the seafarer is unsuccessful then he may make an application to the European Court of Human Rights.

As might be expected, France having a different legal system has a very different court also. In France the ECHR is into the Administrative Code of Law and the Administrative Law is an entirely separate area of the law with equal standing to civil and criminal law and as such has its own court system. This court system comprises of thirty seven tribunaux administratifs (court of first instance) where a case against a public authority is heard. Eight regional Cours Administratifs d'Appel (Appeal Courts) with the Conseil d'Etat (Council of State) in Paris acting as the supreme court in this area of the law.

However, in the case where the government itself is the defendant as would be the situation where the seafarer of whatever nationality is bringing a claim against the French government for omission to protect the right to life on board a French flag ship because of piracy then the case would be heard directly by the Conseil d'Etat and their decision is final, there is no higher court in this area of French law.

As in general with a civil law system the procedure is inquisitorial. In the first instance the seafarer or his representative would write a letter to the Conseil d'Etat stating precisely what the circumstances of the case were and how in his opinion the Government acted illegally. The Conseil d'Etat would then begin an inquiry and ask the Government for their reasons why, presumably, in their view they had not acted illegally. The Court may ask for additional information from both sides until it feels it has a clear view of the facts. It is then ready to make a formal judgement on the case. If the case goes against the seafarer then he has the right as in England to take the case to the European Court of Justice.

The detailed workings of this court are given in the previous Chapter. However, in taking a case to the European Court of Human Rights it should be noted that there are two admissibility criteria that must be complied with absolutely. Under Article 35 of the ECHR the Court may only deal with the matter after all domestic remedies have been exhausted and the Court must be informed of the case within six months from the date on which the final decision was taken in the domestic courts. The burden of proof that all domestic remedies have been exhausted rests with the relevant State. Lodging an application with the Court can in the first instance be by letter to the Registrar of the Court summarising the facts of the case or by application form (see Appendix 5.2) directly. It is thought better to submit a letter first as *'this will have the effect of*

stopping the clock for purposes of calculating the six months time limit' Leach, P. (2001:10) and has the effect of allowing more time for the application form with copies of all the relevant documents to be submitted, usually within six weeks of the letter being sent.

Having demonstrated earlier that the flag State does have jurisdiction over all on board whatever their nationality then using Human Rights law to obtain redress from that State using a regional Human Rights Court if the National Court fails the seafarer in respect of piracy or armed attack is perfectly possible.

Human Rights instruments are increasingly argued with legitimacy in cases of discrimination and violence as the most universal laws. Given the complexity and morass of the global maritime industry these emerge as the best recourse of the legally isolated seafarer faced with pirate and terrorist assaults. Moreover, taking the State to court on these grounds may encourage States generally to be more aware and proactive in a matter which has been a hazard for seafarers over centuries with little progress in any other forms of law.

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APPENDICES

APPENDIX 1

Article 100

Duty to cooperate in the repression of piracy

All States shall co-operate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State.

Article 101

Definition of piracy

Piracy consists of any of the following acts:

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

Article 102

Piracy by a warship, government ship or government aircraft whose crew has mutinied

The acts of piracy, as defined in article 101, committed by a warship, government ship or government aircraft whose crew has mutinied and taken control of the ship or aircraft are assimilated to acts committed by a private ship or aircraft.

Article 103

Definition of a pirate ship or aircraft

A ship or aircraft is considered a pirate ship or aircraft if it is intended by the persons in dominant control to be used for the purpose of committing one of the acts referred to in article 101. The same applies if the ship or aircraft has been used to commit any such act, so long as it remains under the control of the persons guilty of that act.

Article 104

Retention or loss of the nationality of a pirate ship or aircraft

A ship or aircraft may retain its nationality although it has become a pirate ship or aircraft. The retention or loss of nationality is determined by the law of the State from which such nationality was derived.

Article 105

Seizure of a pirate ship or aircraft

On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith.

Article 106
Liability for seizure without adequate grounds

Where the seizure of a ship or aircraft on suspicion of piracy has been effected without adequate grounds, the State making the seizure shall be liable to the State the nationality of which is possessed by the ship or aircraft for any loss or damage caused by the seizure.

Article 107
Ships and aircraft which are entitled to seize on account of piracy

A seizure on account of piracy may be carried out only by warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect.

APPENDIX 2.1

IMB Kuala Lumpur

From: MERIDIAN MIRA [9MBT6@globeemail.com]
Sent: 23 April 2003 05:21
To: imbkl@icc-ccs.org.uk
Cc: [REDACTED]
Subject: INITIAL REPORT PIRACY

FM MIRA
RE MIRA/PIRACY/IR
DT 23.04.03

- A. MERIDIAN MIRA, 9MBT6, MALAYSIAN
- B. 22.04.2003 1845 UTC (SMT GMT+0800)
- C. 075*T
- E. 10 KTS
- F. SINGAPORE
- G. KOTA KINABALU, SAPANGAR BAY PETRONAS JETTY
- H. VHF 16/70, AND ALL DISTRESS FREQ.
- I. F-5.9 AFT 7.25
- J. ULG97 1001.750 MT, ADO 4455.687
- K. NOT APPLICABLE- PIRATE ATTACK
- L. NA
- M. CALM SEAS, SLIGHT BREEZE
- N. MR SATISH LUMAR +65 97820218;
DPA- CAPT KUMARA RAJ TEL +60123021500
- O. LOA 93.5, B-17.5, OIL TANKER PRODUCT
- P. PIRATES BOARDED FROM SMALL CRAFT, OUTBOARD MOTOR ABOUT 8 TO
9 PERSONS, ENTERED E/ROOM AND TOOK 4 CREW HOSTAGE.
THEY LEFT AFTER STEALING ALL VALUABLES AND ALL CREW UNHARMED
- Q. NA
- R. VESSEL RESECURED
- Q.17
BRGDS
master

Received: from 9MBT6 at Globe Wireless; Tue, 22 Apr 2003 21:28 UTC
Message-id: 109862420S342

:23/04/2003 10:15:18
:c:\telex\out\A4593.out

===== START OF OUTGOING MSG =====

10.17 GA
00583453305210+
453305210=MIRA X
IMBPCI MA31880

SENTOSA C LES 03-04-23 02:16:05
GA+

TO : MASTER MERIDIAN MIRA
FM : IMB - PIRACY REPORTING CENTRE
DD : 23.4.2003

REF YR EMAIL OF 22.4.03 TKS. YR MSG HAS BEEN RELAYED TO THE RELEVANT
AUTHORITIES CONCERN FOR THEIR PROMPT ACTION.

PLS ENFORCE EFFECTIVE ANTI-PIRACY MEASURES AT ALL TIMES. THERE WAS A
ATTACK ALMOST TO SIMILAR POSN ON 22.04.03 AT 2015 LT.

PLS PROVIDE YR VSL DETAILS, TYPE, FLAG, GRT, IMO NO., OWNERS/MANAGERS
ADDS. ANY OTHER INFO.

WISHING YOU N CREW MEMBERS A SAFE JOURNEY.

TKS N BRGDS
DUTY OFFICER
IMB-PRC

NNNN
VVVV

1 MIN 51 SEC

00:02:27

===== END OF MSG =====

IMB Kuala Lumpur

From: MERIDIAN MIRA [9MBT6@globeemail.com]
Sent: 23 April 2003 03:52
To: imbkl@icc-ccs.org.uk
Cc: [REDACTED]
Subject: pirate attack

FM MIRA
RE MIRA/PIRACY/23042003

AT 1845UTC VESSEL IN POSITION LAT 01 51.8N LONG 106 09.00E
VESSEL WAS BOARDED BY ABOUT 9 MEN ARMED WITH GUNS AND KNIEVES
FROM THE STERN.
THEY WENT FIRST TO ENGINE ROOM AND TOOK 4 HOSTAGES FROM THE
WATCH KEEPERS AND OFF DUTY CREW.
THE ALARM HAD BEEN RAISED BY THE 2/O AND I WAS INFORMED TO
STAY IN MY CABIN AS PIRATES ALREADY ON BOARD.
HOWEVER ON HEARING THIS I WENT UP TO THE BRIDGE AND WAS FIRED
UPON.
THEY TOOK VALUABLES FROM CREW AND LEFT THE VESSEK
PRESENTLY PROCEEDING ON COURSE TO KOTA KINABALU
ETA 25TH 1600 HRS.
PLS ADV ALL SHIPS AS THEY HV TAKEN ALL PHONES/WALKY TALKIES
MASTER

Received: from 9MBT6 at Globe Wireless; Tue, 22 Apr 2003 20:14 UTC
Message-id: 109857644S177

APPENDIX 2.2

:01/07/2003 16:49:12
:c:\telex\in\A2169.in

===== START OF INCOMING MSG =====

IMBPCI MA31880

441206612=LERG X
CI

NL BURUM LES 441206612=LERG X 1-JUL-2003 08:50:40 388962

008431880
TO: IMBPCI
FM: MASTER OF MV.LERONG
DD: 2003-07-01
RE: PIRATES ARMED REPORT

MY VSL LERONG CALLSIGN/BOQI FLAG/P.R.CHINA
UNDERWAY FROM SINGAPORE TO PANJANG AT 0210LT
ON 30TH JUNE 2003 IN POSITION 0041.0N/10512.5E
VICINITY OF BINTAN ISLAND INDONESIA EIGHT PIRATES
ARMED WITH GUNS AND LONG KNIVES BOARD MY VSL
TOOK HOSTAGE 2ND OFF AND TOOK THEM TO MASTER'S CABIN
THEY HELD MASTER AT GUN POINT AND STOLE SHIP'S
AND PERSONAL CASH AND BELONGINGS THEN THEY TOOK
HOSTAGE MASTER TO 3RD OFF CABIN STOLE CASH AND
PERSONAL BELONGINGS AT 0232LT PIRATES ARMED
LEFT.
MASTER AND 2ND OFF WERE SERIOUSLY INJURED
PIRATES ESCAPED IN A SPEEDBOAT

B.RGDS
IMBPCI MA31880

441206612=LERG X
00:02:27

===== END OF MSG =====

:01/07/2003 17:12:55
:c:\telex\out\A4785.out

===== START OF OUTGOING MSG =====

17.16 GA
00583441206612+
441206612=LERG X
IMBPCI MA31880

SENTOSA C LES 03-07-01 09:15:26
GA+
REF0856
TO MASTER LERONG
FM IMB-PIRACY REPORTING CENTRE

RYT TKS. ALL RELEVANT AUTH. INFORMED. RECENT TIMES MANY ATTACKS
TOOK PLACE AROUND THIS LOCATION.

PLS BE CAUTIOUS N ENFORCE EFFECTIVE ANTI-PIRACY SYSTEMS.

KINDLY RECONFIRM THE INCIDENT TOOK PLACE ON 30 JUN /0210 LT OR 01
JUL 0210 LT. ALSO PLS PROVIDE YR VSL DETAILS.
WHAT IS THE CONDITION OF THE MASTER N 2N O/F. DO U REQUIRE ANY
ASSISTANCE. PLS REVERT WITH STATUS.

BRGDS
IMB-PRC

NNNN
VVVV

1 MIN 43 SEC

00:02:23

===== END OF MSG =====

APPENDIX 2.3

21 APR 2003 06:21 From Xantic Inm-C LES 12

To 0060320785769

P1

From :456307850=HAWK X
Ref.No.:117746
Region :IOR
Help :phone +61 754980000

To: IMB Piracy Reporting Center
Frm: M/V Nine Hawk

This is to report to you that the above vs1, a gen cargo, was attacked by pirates at abt 0230Hrs Lt 20th Apr 2003 at pos lat 13-03N Long 051-17E abt 55 nm North of somalian coast. Pirates with guns/knives on board 3 high speed craft approached vs1 in different directions and have gained access and control of d vs1. communication and distress transmitting facilities were destroyed. ship's cash taken. Master suffered knife n stab wounds and head injuries, officers n crew were tied/seized in the bridge and cabins. Pirates left vs1 abt 0400Hrs Lt and headed towards somalian coast.
rgds/master

Last Page : Total Page(s) 1

Violent attack in Gulf of Aden

BIMCO has received a copy of a Master's report that describes a violent attack against a merchant ship navigating in the Gulf of Aden on 20 April 2003. The attack is very similar to an earlier incident that appeared in the BIMCO News on 14 March 2003 involving a 37,880 deadweight tonne bulk carrier that narrowly escaped being hijacked by pirates on 13 March 2003 as she navigated off Socotra Island in a position 12 00 North Lat., 051 30 East Long.

The Master described the attack of 20 April 2003 as follows:

Herewith, the undersigned Master of M/V NINE HAWK, under Singapore Flag, is declaring the following facts regarding the piracy attack to M/V NINE HAWK;

Today, the 20th of April 2003 at about 0230 Hrs LT, in position Lat 13-03N Long 051-17E, while the above-mentioned vessel was underway from Singapore to Immingham, UK via Suez Canal, pirates armed with guns and knives on board 3 high speed crafts approached the sides of the vessel from different directions.

Pirates gained access to the vessel, thence to the bridge and crew quarters. The officer in-charge of the navigational watch was seized and tied on the bridge, the Duty look-out was also tied in his cabin. By then the pirates had taken over the control of the navigating bridge of the vessel. Some of the pirates proceeded directly to Chief Officer's and Chief Engineer's cabin and both were held in custody under guns/knives point. Two pirates armed with guns/knives entered the captain's office/cabin, tied the captain and demanded the master key and the key to the ship's cash box. Other crew were threatened by brandishing guns and knives and ordered not to go out of their respective cabins. Some of the armed pirates on stand-by at the alleyways and some outside the accommodation.

At about 0400Hrs LT in position Lat 13-03.0N Long 051-04.0E, the engine was stopped. Pirates then started to disembark from the vessel.

Injuries Suffered by the Vessel's Crew;

- 1. Captain – suffered knife wounds to arms, feet, head blow, and stab wound in the stomach. No immediate hospitalisation needed, proper medication to the injuries can be appropriately addressed on board as far as present indication/assessment is concerned. Captain still able and capable of carrying his duties and responsibilities.*
- 2. Most of the crew suffer being in a state of trauma after being awoken with a knife in their neck or gun in the forehead. Generally, they are okay.*

Losses /Damages to the Vessel;

- 1. All ship's cash were taken away by the pirates*
- 2. All communication equipments and distress transmitting facilities in the bridge and radio room were destroyed (VHF, MF, Sat-C, Mini-M). Handsets and keyboards were cut and taken away by pirates, these are however recovered by the ship's crew from the pirates together with some of crew's personal property during the last minute effort. Restoration and repair of communication equipt is in progress.*

3. One Line Throwing Apparatus fired to the pirates by master.

*Vessel has been slowed down/ stopped for almost 2 hours due to the incident.
NINE HAWK in normal operational condition, her cargo intact, now pursuing with her intended voyage.*

BIMCO has been informed that the attack was reported to the Maritime Port Authority in Singapore, being the ship's maritime administration.

In view of these recent incidents ships navigating in the area should be advised to keep a piracy watch and take appropriate preventive measures against attack.

Members whose vessels encounter similar incidents are encouraged to duly inform the BIMCO Secretariat.

25APR03

APPENDIX 2.4

IMB Kuala Lumpur

From: Jayant Abhyankar [J.Abhyankar@icc-ccs.org.uk]
Sent: 23 March 2004 23:25
To: imbkl
Subject: Fwd: FW: MCT ALMAK - registered in Liberia - attacked by Pirates -WARRI, Nigeria.



ATT00002.msg
(3.30 KB)



ATT00003.msg
(2.22 KB)



ATT00004.msg
(1.85 KB)



ATT00005.msg
(31.0 KB)



ATT00006.msg
(2.94 KB)



ATT00007.msg
(41.3 KB)

Pl include

this in our database and prepare a sitrep. At this stage no need for any action from our side.

Regards

Jayant Abhyankar
Deputy Director
ICC International Maritime Bureau

-----Original Message-----

From: "ICC International Maritime Bureau" <imb@icc-ccs.org.uk>
To: "Jayant Abhyankar" <j.abhyankar@icc-ccs.org.uk>
Date: Tue, 23 Mar 2004 15:14:09 -0000
Subject: FW: MCT ALMAK - registered in Liberia - attacked by Pirates - WARRI, Nigeria.

-----Original Message-----

From: Safety Department (SAFETY) [mailto: [REDACTED]]
Sent: 23 March 2004 15:11
To: 'imb@icc-ccs.org.uk'
Cc: [REDACTED]

Subject: MCT ALMAK - registered in Liberia - attacked by Pirates - WARRI, Nigeria.

Sirs,

The subject vessel has been menaced by Pirates/armed robbers in the River to Warri.

No injuries reported - to date.

Nigerian Navy have 'despatched a patrol boat'.

Pirates have ordered vessel to anchor.

Pirates have ordered vessel to pump cargo [gasoline] into a barge they have brought alongside.

The four [Nigerian] security guards on board advised compliance with the pirates' demands.

This is still ongoing.

More details in email below.

Please advise if you need further details.

Best Regards,
Safety Department
(as agents only)

IMB Kuala Lumpur

From: Safety Department ([REDACTED])
Sent: 23 March 2004 22:26
To: [REDACTED] <[REDACTED]@nigeriahighcommissionuk.com>;
[REDACTED]
Cc: [REDACTED]
Subject: RE: MCT ALMAK - AT Warri

Have just spoken again with Captain Ibitoye at the Nigerian High Commission, who informed me that a patrol vessel has been dispatched to 'escort the Almak into harbour'.
captain Ibitoye also requested that I fax him details of the ship's plight as their email appears to be giving problems.
This will be faxed in the next few minutes.

Best Regards,
Safety Department [REDACTED]
(as agents only)

[REDACTED]

> -----Original Message-----
> From: Safety Department (SAFETY)
> Sent: 23 March 2004 14:19
> To: 'chancery@nigeriahighcommissionuk.com';
> 'defence@nigeriahighcommissionuk.com'; [REDACTED]
> [REDACTED]
> Subject: FW: MCT ALMAK - AT Warri
> ;
> Details of telcon with ship.
>
>
> Best Regards,
> Safety Department [REDACTED]
> (as agents only)
> [REDACTED]
> [REDACTED]
> [REDACTED]
> [REDACTED]
> [REDACTED]

> -----Original Message-----
> From: [REDACTED]
> Sent: 23 March 2004 13:48
> To: MANAGERS
> Cc: [REDACTED]
> Subject: MCT ALMAK
>
> Ref: SJ2303041342
>
> I have just spoken with the C/O, situation is as follows:
>
> He is preparing a sitrep fax right now.
> Vessel continues to discharge to barges, 400 mt already gone. Total barge
> capacity between 800 - 1000 mt.
> Discharge expected to continue for 2 hours more.
> Police on board advised 40 mins ago that 'navy forces' are due in 2-3

> hours. It is uncertain whether the gasoline alone will be sufficient to
> keep the pirates happy, as they are now talking about wanting lube oil and
> some pyrotechnics. C/O stated that he hops that the Navy forces will be
> able to settle this.

> About 6 pirate boats are patrolling the creek, controlling access to same
> and appearing from time to time around the vessel. There are 2 boats with
> 5 armed pirates permanently stationed alongside vessel.

> There are no pirates on board.

>

> C/O was again requested to send hourly updates to keep us in the picture.

>

> Best Regards

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IMB Kuala Lumpur

From: Safety Department [REDACTED]
Sent: 23 March 2004 22:16
To: chancery@nigeriahighcommissionuk.com; defence@nigeriahighcommissionuk.com;
Cc: [REDACTED]
Subject: FW: REMARK - want more



13856000.tif

This in in the last half hour or so.
Pirates demanding pyrotechnics etc.

Best Regards,
[REDACTED]

(a [REDACTED])

Please reply ONLY to one of the following:

Fax [REDACTED]
Telex [REDACTED]
NNN

-----Original Message-----

From: Faxination
Sent: 23 March 2004 13:58
[REDACTED]

Incoming Fax:
Description:

Explanation:
Sent to: '00' CSID:363616020 (0)

Items received: 1
Duration: 47 seconds Transmission speed: 9600 baud
Gateway ID: 0 Job Reference: 13857

8-20-23-01 Emergency fax report (Revised 17-Dec-02)			URGENT PAGE 1	
TO:		FAX No.		
COPY TO: MERT [REDACTED]		FAX No. [REDACTED]		
INCIDENT TYPE: VESSEL STOPPED & ATTACKED BY ARMED PIRATES ON THE WAY				
(AA) NAME: MCT ALMAK		CALL SIGN: ELWF4	IMO No: 973109	(BB) DATE: 23.03.2004
		FLAG: LIBERIA	TIME of Incident: UTC 10.13LIT	
IMARSAT NUMBERS: 2636010 (TEL) 30366020 (FAX)		30366040 (TEL)		
(CC) POSITION: LAT: 08° 33' N NIS		OR (DD) BEARING: TRUE, DIST: MILES		
AT ANCHOR LONG: 005° 04' E EW		FROM: .		
VABET RIVER (EE) PRESENT COURSE: T		(FF) SPEED: KNTS	(LL) INTENDED TRACK:	
(MM) RADIO STATION AND FREQUENCIES:			(NN) NEXT REPORT: Date/Time (UTC)	
(OO) DRAFT: FWD 6.4 metres AFT 6.4 metres (F.W)				
(PP) CARGO: (Type): AIOGAS		BUNKERS: HFO MT		
(Quantity) 9855 MT		MDO MT		
(Stowage) 1P, 1S, 2P, 2S, 3P, 3S, 4P, 4S, 5P, 5S, 6P, 6S, 7P, 7S, 8P, 8S		FW MT		
(QQ) DEFECTS/ DAMAGE/ DEFICIENCIES:				
VESSEL HAD TO DROP ANCHOR AT THE RIVER. PIRATES BROUGHT THE BARGE ALONGSIDE TO GET THE GASOLINE QUANTITY UNKNOWN. CONFIRM BARGE CONNECTION				
NO INJURED				
(RR) POLLUTION: NO				
(Actual pollution/ Action taken/ Quantity Lost)				
(SS) WEATHER: WIND DIR: T		SEA DIR: T	SWELL DIR: T	TEMP. AIR: °C
(Beaufort) FORCE:		HEIGHT: metres	HEIGHT: metres	TEMP. SEA: °C
TIDE AND CURRENT DATA:				
(TT) SHIP OPERATOR: Novoship (UK) Ltd, Watergate House, 13-15 York Buildings, London WC2N 6JU, UK				
24HR EMERGENCY TEL: +44 20 7839 2534 FAX: +44 20 7747 9000 Tlx: 914932 NOVUK MERT				
(UU) SHIP PARTICULARS: LENGTH: 149 metres		BREADTH: 23.7 metres	FREEBOARD: 4.15 metres	
VESSEL TYPE: CHEMICAL & OIL TANKER		SUMMER DWT: 17561 MT		
(VV) NUMBER OF CREW: 20		NATIONALITY: RUSSIAN		
(XX) ADDITIONAL INFORMATION:				
(e.g.) Assistance required, action taken, injuries, P & I Club, persons notified, etc)				

EMERGENCY FAX REPORT		URGENT PAGE 2 of 2
TO: [REDACTED]	FAX No. [REDACTED]	
INCIDENT TYPE: PIRACY ATTACK		
(AA) NAME: MCT ALMAK	CALL SIGN: ELWF4	(BB) DATE:
IMO NUMBER: 9173109	FLAG: LIBERIA	(gmt) TIME:
INMARSAT NUMBERS: 363616010(TLF) 363616020(FAX) 363616040(TLX)		
(OO) DEFECTS/ DAMAGE/ DEFICIENCIES:		
No damage to THE VESSEL. VESSEL IS DISCHARGING		
MOGAS TO BARGES BROUGHT ALONGSIDE BY PIRATES		
BARGES CAPACITY NEARLY 800-1000 CUB M TOTALLY		
NAVY FORCES INFORMED VIA THE AGENT. PIRATES MAKES		
ADDITIONAL REQUIREMENTS; LUB OILS, PUMP TECHNICIANS		
NO VHF CONTACT IS POSSIBLE DUE TO RADIO MONITORING		
BY PIRATES.		
(Detail of Defects/ Damage/ Deficiencies/ Limitations)		
(RR) POLLUTION: NO		
(Actual Pollution/ Action Taken/ Quantity Lost)		
(SS) WEATHER: FAIR		
(XX) ADDITIONAL INFORMATION:		
INTENDED ACTION: FOLLOW PIRATES REQUIREMENTS		
AWAITING MORE ASSISTANCE		
PERSONS NOTIFIED: NIGERIAN NAVY FORCES		
ASSISTANCE REQUIRED:		
FURTHER COMMUNICATION:		
PROTESTS ISSUED/ RECEIVED		

IMB Kuala Lumpur

From: Safety Department [REDACTED]
Sent: 23 March 2004 22:02
To: [REDACTED] chancery@nigeriahighcommissionuk.com;
[REDACTED] defence@nigeriahighcommissionuk.com
Cc: [REDACTED]
Subject: RE: MCT ALMAK - WARRI - pirates/armed robbers

At 1359z, a copy of this email was faxed successfully to + 44 20 7925 1475, for Captain [Nigerian Navy] Ibitoye, Deputy Defence Adviser at the Nigerian High Commission in London, following his telephones request.

Best Regards,
Safety Department [REDACTED]

Please reply ONLY to one of the following:
[REDACTED]

-----Original Message-----

From: Safety Department (SAFETY)
Sent: 23 March 2004 12:27
To: 'chancery@nigeriahighcommissionuk.com';
'defence@nigeriahighcommissionuk.com'; [REDACTED];
'info@liscr.co.uk'
Cc: MERT (Management Emergency Response Team) [REDACTED]
Subject: MCT ALMAK - Warri - pirates/armed robbers

Sirs,

Further to the telephone conversation I have just completed at about 1215z with your Consular Officer Abiotun, we confirm that our vessel MCT ALMAK, Liberian flag, was menaced by armed men in '5 or 6' boats. Our ship was obliged to stop and anchor. The 4 [Nigerian] armed security guards on board our vessel advised compliance, apparently fearing provoking the [more numerous] armed men in the boats.

The Master was required to discharge cargo [gasoline] into a barge that the pirates/robbers moored alongside the MCT Almak. This he is now doing under duress, taking what precautions he safely can to ensure the safety of this operation.

We seek the immediate intervention of Nigerian authorities - Navy, Coastguard, or Police - to apprehend the malefactors and to recover the cargo stolen under duress from our vessel MCT Almak.

1227z Consular Abiotun informs me he has passed my telephone message to the defence section of the Nigerian High Commission, who were emailed at 1042z this morning.

Please advise what steps are being taken to resolve this situation.

Best Regards,
Safety Department [REDACTED]

Please reply ONLY to one of the following:

IMB Kuala Lumpur

From: Jayant Abhyankar [J.Abhyankar@icc-ccs.org.uk]
Sent: 24 March 2004 00:05
To: imbkl
Subject: Fwd: FW: MCT ALMAK - registered in Liberia - attacked by Pirates -WAR RI, Nige

Regards

Jayant Abhyankar
Deputy Director
ICC International Maritime Bureau

-----Original Message-----

From: "ICC International Maritime Bureau" <imb@icc-ccs.org.uk>
To: "Jayant Abhyankar" <j.abhyankar@icc-ccs.org.uk>
Date: Tue, 23 Mar 2004 15:58:57 -0000
Subject: FW: MCT ALMAK - registered in Liberia - attacked by Pirates - WAR RI, Nigeria.

-----Original Message-----

From: Safety Department (SAFETY) [REDACTED]
Sent: 23 March 2004 15:57
To: Safety Department (SAFETY): 'imb@icc-ccs.org.uk'
Cc: [REDACTED]
'derence@nigeriahighcommissionuk.com', [REDACTED]
Subject: RE: MCT ALMAK - registered in Liberia - attacked by Pirates - WAR RI, Nigeria.

Vessel has now been released by Pirates/Armed Robbers.
No reports of injuries.
No known shooting.
Pirates/Robbers took about 650 tonnes of cargo - gasoline - in two [2] barges.
The vessel has been escorted back to the main river, and is resuming passage to - we believe - Warri.

A fuller report will follow when we receive full details from the ship.

Best Regards,
Safety Department [REDACTED]
(as agents only)

[REDACTED]

Novoship (UK) Limited, Registered office: Watergate House,
13-15 York Buildings, London WC2N 6JU United Kingdom.
Registered No 2682464 VAT No GB608075741

This email and any files transmitted with it are confidential and intended solely for the use of the individual or entity to whom

APPENDIX 2.5

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~~XXXXXXXXXXXXXXXXXXXX~~

162 2003

IMB Kuala Lumpur

From: M.V.Apollo Pacific
Sent: 06 May 2003 00:18
To: PRC-Kuala Lumpur
Subject: SUSPICIOUS ACT REPORT

TO. OFFICERS IN-CHARGE
FM. MASTER APOLLO PACIFIC

PIRACY ALERT /

1. MT APOLLO PACIFIC / S6QS4 / IMO.8814225
2. PIRACY ALERT
3. 03-37.34N 111-04.81E
4. 5-MAY-2003 / 14:00 UTC UPTO NOW
5. FOR THE LAST 2.5 HOURS A BIG LITTENED BOAT WITH 7 SMALL CRAFT WERE TARGETTING VESSEL IN VARIOUS PATERN OF MANOUVERING. SMALL CRAFTS SPEED ARE MORETHAN 14 KTS AND TRYING TO APPROACH THE VESSEL FROM ANY DIRECTN. THEY KEEP SURROUNDING THE VESSEL. THE BIG TARGET WITH BRIGHT LIGHT IS KEEPING IN DISTANT SUSPICIOUSLY ASSUMED AS MASTER STATION. PRESENTLY TWO CRAFTS ARE PURSUEING VSL FROM STERN SIDE 180 DEGREES AND MAINTAINED THEIR SPEED AND COURSE WHICH LIES IN LINE WITH VSL IN DISTANCE AS CLOSE AS 5.5 CABLES . SINCE WE SUSPECT THEIR SUSPICIOUS MOVEMENT WE KEEP THEM TRAINED UNDER THE SEARCHLIGHT AND ALL CREW WERE OUT WITH POWERFUL FLASHLIGHTS CRISS-CROSSING TO THE POINTS AS DIRECTED BY THE OOW ON THE ARPA THRU WALKIE TALKIES.
- 6 THE SITUATION REMAIN
- 7 NONE, DEPEND ON SITUATION
- 8 VHF, INM-B TEL. 356 300 510, FAX 356 300 520 (872 / POR)
INM-C TLX. 456 300 210
- 9 05-MAY-2003 / 16:20 UTC

BRGDS
MASTER

IMO number:	8814225	Name of ship:	APOLLO PACIFIC
Call Sign:	S6QS4	Gross tonnage:	3354
Type of ship:	Gas carrier	Year of build:	1988
Flag:	Singapore	Status of ship:	In Service
Registered owner:	[REDACTED]	Address:	[REDACTED]
Ship manager:	[REDACTED]	Address:	[REDACTED]
Last update:	[REDACTED]		

Classification

IMB Kuala Lumpur

From: M.V.Apollo Pacific [REDACTED]
Sent: Tuesday, May 06, 2005 8:42 AM
To: IMB Kuala Lumpur
Subject: Re: SUSPICIOUS ACT REPORT

TO DUTY OFFICER

GOOD MORNING

LATEST SITUATION AS PER OUR MSG SENT FEW MOMENT AGO.
06-MAY/00:15 UTC PROCEEDING BINTULU CARGO ANCHORAGE SAFELY

PLS FIND DETAILS ASF:

MT APOLLO PACIFIC
LPG CARRIER
SINGAPORE FLAG
GRT 3354.00

[REDACTED]

THANK YOU AND APPRECIATE FOR YOUR PROMPT ACTION.

BRGDS
MASTER

----- Original Message -----

From: "IMB Kuala Lumpur" <imbkl@icc-ccc.org.uk>
To: "M.V.Apollo Pacific" [REDACTED]
Sent: Monday, May 05, 2005 11:51 PM
Subject: SUSPICIOUS ACT REPORT

MASTER APOLLO PACIFIC
IMB PIRACY REPORTING CENTRE

REF. YR E-MAIL TKS. YR MSG HAS BEEN RELAYED TO THE RELEVANT AUTHORITIES
CONCERN FOR THEIR PROMPT ACTION.

PSE UPDATE US THE LATEST SITUATION OF THE REPORT

PSE PROVIDE US YR VSL DETAILS; TYPE, FLAG, GRT, OWNERS/MANAGERS ADDS FOR OUR RECORDS.

WISHING YOU AND CREW A SAFE JOURNEY

TKS N BRGDS

DUTY OFFICER
IMB PRC

IMB Kuala Lumpur

From: M.V.Apollo Pacific [REDACTED]
Sent: 06 May 2003 08:24
To: PRC-Kuala Lumpur
Subject: SUSPICIOUS ACT REPORT - CLOSING REPORT

**TO. OFFICERS IN-CHARGE
FM. MASTER APOLLO PACIFIC**

/ PIRACY ALERT- CLOSING REPORT

**1 MT APOLLO PACIFIC / S6QS4 / IMO.8814225
2 PIRACY ALERT CLOSING REPORT
9 06-MAY-2003 / 00:15 UTC**

**SUSPICIOUS CRAFTS ABORTED PURSUIT AT ABOUT
21:00 UTC/ 05 MAY AT POSN ABOUT 03-30.8N 112-11.1E**

PRESENTLY VSL PROCEEDING SAFELY TO BINTULU CARGO ANCHORAGE

WE THANK YOU AND APPRECIATE.

**BRGDS
MASTER**

IMB Kuala Lumpur

From: M.V.Apollo Pacific [REDACTED]
Sent: 06 May 2003 08:42
To: IMB Kuala Lumpur
Subject: Re: SUSPICIOUS ACT REPORT

TO DUTY OFFICER

GOOD MORNING,

**LATEST SITUATION AS PER OUR MSG SENT FEW MOMENT AGO.
06-MAY/00:15 UTC PROCEEDING BINTULU CARGO ANCHORAGE SAFELY**

PLS FIND DETAILS ASF:-

**MT APOLLO PACIFIC
LPG CARRIER
SINGAPORE FLAG
GRT 3354.00
OWNERS/MANAGERS:-
ODYSSEY MARITIME PTE.LTD.
200 CANTONMENT RD # 15-00
SOUTHPOINT SINGAPORE 089763
SHIP MNGMT DEPT. TEL. : (65) 225 8300
FAX: (65) 224-3275 TLX: RS25070 NMARIN
E-MAIL: smdept@odyssey.com.sg**

**THANK YOU AND APPRECIATE FOR YOUR PROMPT
ACTION.**

**BRGDS
MASTER**

----- Original Message -----

From: "IMB Kuala Lumpur" <imbkl@icc-ccs.org.uk>
To: "M.V.Apollo Pacific" <[REDACTED]>
Sent: Monday, May 05, 2003 8:51 PM
Subject: SUSPICIOUS ACT REPORT

**TO : MASTER APOLLO PACIFIC
FM : IMB PIRACY REPORTING CENTRE**

**REF. YR E-MAIL TKS. YR MSG HAS BEEN RELAYED TO THE RELEVANT AUTHORITIES
CONCERN FOR THEIR PROMPT ACTION.**

PSE UPDATE US THE LATEST SITUATION OF THE REPORT

**PSE PROVIDE US YR VSL DETAILS; TYPE, FLAG, GRT, OWNERS/MANAGERS ADDS FOR OUR
RECORDS.**

WISHING YOU AND CREW A SAFE JOURNEY

TKS N BRGDS

**DUTY OFFICER
IMB PRC**

The information contained in this communication is confidential, may be privileged and is intended for the exclusive use of the above named addressee(s). If you are not the intended recipient(s), you are expressly prohibited from copying, distributing, disseminating, or in any other way

APPENDIX 3

04-08-10 10:38 (UTC)
Successful Receiving message.

Receive Message

Message No. : R0040810.002
Message Ref. No. : 00930209
LES : 021
Priority : Normal
Message Size : 2931 characters
Receive Date & Time : 04-08-10 10:38(UTC)

To: Masters as addressed
Fm: SSPL
Sub: WEEKLY PIRACY REPORT (03 TO 09 AUGUST) - REF:
SS10080404/SAK

Good day

Following is the Weekly Piracy Report from 03 to 09 August 2004

08.08.2004 at 0240 LT at Pertigalete Ve. Anchorage, La Cruz Port, =
Venezuela.

Two robbers boarded a bulk carrier. Crew raised alarm and robbers =
escaped in a boat.

07.08.2004 at 1310 LT in posn 05:05.5N - 098:20.7E, Malacca Straits.
Pirates in two high speed boats attempted to board a product tanker =
underway from her stern. Crew mustered, activated fire hoses, fired =
signal flares, directed searchlights and master increased speed.
Pirates =
aborted attempt after 30 mins and fled.

07.08.2004 at 0100 UTC at oil jetty no.4, Kandla, India.
Five robbers boarded a chemical tanker during cargo operations. They
=
tried to break into paint locker. Alert crew raised alarm and
robbers =
jumped overboard and escaped empty handed.

06.08.2004 at 0200 LT at berth no.3, Bangkok port, Thailand.
Robbers boarded a bulk carrier during cargo operations. They stole =
ship's property and escaped.

02.08.2004 at 0420 LT at Freetown anchorage, Sierra Leone.
Ten robbers armed with guns approached a general cargo ship and =
commenced firing at her. They boarded using hooks, smashed all cabin
=
doors, held the crew at gunpoint and stole their belongings. Robbers
=
left at 0500 LT. Master managed to contact port control whilst
robbers =
were on board. Port officials boarded after 0700 LT. Four injured
crew =
members were hospitalised.

Piracy prone areas and warnings

S E Asia and the Indian Sub Continent

Bangladesh: Chittagong at berth and anchorage.=20

India: Chennai

Indonesia: Anambas/Natuna Island , Balikpapan , Belawan, Dumai, =
Gaspar/Bar/Lepria Str, Jakarta (Tg.Prick), Vicinity of Bintan
Island=20

Malacca straits: avoid anchoring along the Indonesian coast of the
straits. Coast near Aceh is particularly risky for hijackings.

Malaysia : Sandakan=20

Singapore Straits

Africa and Red Sea

Gulf of Aden=20

Somalian Waters - eastern and northeastern coasts have been
high-risk =

areas for hijackings. Whilst there have been no recent incidents,
ships =

not making scheduled calls to ports in these areas should stay away
from =

the coast.

West Africa: Abidjan, Conakry, Dakar, Douala, Lagos, Luanda, Onne,
Tema, =

Warri

South and Central America and the Caribbean waters

Brazil - Belem

Colombia - Mamonal=20

Haiti - Port Au Prince

Venezuela - Guanta,

Reporting of incidents=20

Ships are advised to maintain anti-piracy watches and report all =
piratical attacks and suspicious movements of craft to the IMB

Piracy =

Reporting Centre, Kuala Lumpur, Malaysia.=20

Tel ++ 60 3 2078 5763

Fax ++ 60 3 2078 5769=20

Telex MA 31880 INBPCI=20

24 Hours Anti Piracy HELPLINE Tel: ++ 60 3 2031 0014=20

E-mail imbkl@icc-ccs.org.uk

Best Regards

Kadir

=20

APPENDIX 4.1

'Any person commits an offence within the meaning of this Convention if that person unlawfully and intentionally:(a) when the purpose of the act, by its nature or context, is to intimidate a population, or to compel a Government or an international organisation to do or to abstain from doing any act:

- i) uses against or on a ship or discharges from a ship any explosive, radioactive material or BCN weapon in a manner that causes or is likely to cause death or serious injury or damage; or*
- ii) discharges, from a ship, oil, liquefied natural gas, or other hazardous or noxious substance, which is not covered by clause (i), in such quantity or concentration that causes or is likely to cause death or serious injury or damage; or*
- iii) uses a ship in a manner that causes death or serious injury or damage; or*
- iv) threatens, with or without a condition, as is provided for under national law, to commit an offence set forth in clause (i), (ii) or (iii).'*

SUA Convention Draft Protocol(2005:5)

'(b) transports on board a ship:

- i) any explosive or radioactive material, knowing that it is intended to be used to cause or in a threat to cause, with or without a condition, as is provided for under national law, death or serious injury or damage for the purpose of intimidating a population, or compelling a Government or an international organisation to do or to abstain from doing any act; or*

- ii) *any BCN weapon, knowing it to be a BCN weapon as defined in article 1; or*
- iii) *any source material, special fissionable material, or equipment or material especially designed or prepared for the processing, use or production of special fissionable material, knowing that it is intended to be used in a nuclear explosive activity or in any other nuclear activity not under safeguards pursuant to a comprehensive safeguards agreement' or*
- iv) *any equipment, materials or software or related technology that significantly contributes to the design, manufacture or delivery of a BCN weapon, with the intention that it will be used for such purpose.'* SUA Convention Draft Protocol(2005:6)

APPENDIX 4.2

'Article 8 bis (3). State Parties shall take into account the dangers and difficulties involved in boarding a ship at sea and searching its cargo, and give consideration to whether other appropriate measures agreed between the States concerned could be more safely taken in the next port of call or elsewhere.

Article 8 bis (5). Whenever law enforcement or other authorised officials of a State Party ("the requesting Party") encounter a ship flying the flag or displaying marks of registry of the first Party ("the first Party"), located seaward of any States' territorial sea, and the requesting Party has reasonable grounds to suspect that the ship or a person on board the ship is, has been or is about to be involved in, the commission of an offence under Articles 3, 3 bis, 3 ter or 3 quater, and the requesting Party denies to board,

- a) it shall request, in accordance with paragraphs 1 and 2, that the first Party confirm the claim of nationality, and*
- b) if the nationality is confirmed, the requesting Party shall ask the first Party (hereinafter, the "flag State") for authorisation to board and to take appropriate measures with regard to that ship which may include stopping, boarding and searching the ship, its cargo and persons on board, and questioning the persons on board in order to determine if an offence under Articles 3, 3 bis, 3 ter or 3 quater has been, or is about to be, committed: and*
- c) the flag state shall either:*

- (i) *authorise the requesting Party to board and to take appropriate measures set out in subparagraph (b) of this paragraph, subject to any conditions it may impose in accordance with paragraph 7; or*
 - (ii) *conduct the boarding and search with its own law enforcement or other officials; or*
 - (iii) *conduct the boarding and search together with the requesting party, subject to any conditions it may impose in accordance with paragraph 7; or*
 - (iv) *decline to authorise a boarding and search. The requesting Party shall not board the ship or take measures set out in subparagraph (b) of this paragraph without the express authorisation from the flag state.*
 - (e) *On or after it deposits its instrument of ratification, acceptance, approval or accession, a State Party may notify the Secretary-General that, with respect to ships flying its flag or displaying its mark of registry, the requesting Party is granted authorisation to board and search the ship, its cargo and persons on board, and to question the persons on board in order to locate and examine documentation of its nationality and determine if an offence under Articles 3, 3bis, 3ter or 3 quarter has been, or is about to be, committed, if there is no response from the first Party within four hours of acknowledgement of receipt of a request to confirm nationality.*
6. *When evidence of conduct described in Articles 3, 3bis, 3ter or 3 quarter is found as a result of any boarding conducted pursuant to*

this Article, the flag State may authorise the requesting Party to detain the ship, cargo and persons on board pending receipt of disposition instruction from the flag State ... The requesting Party shall also inform promptly the flag State of the discovery of evidence of illegal conduct that is not subject to this Convention.

- 7. No additional measures may be taken without the express authorisation of the flag State, except when recovery to relieve imminent danger to the lives of persons or those that derive from relevant bilateral or multi-lateral agreements.*
- 8. For all boardings pursuant to this Article, the flag State has the right to exercise jurisdiction over a detained ship, cargo or other items and persons on board (including seizure, forfeiture, arrest and prosecution); however, the flag State may, subject to its Constitution and laws, consent to the exercise of jurisdiction by another State having jurisdiction under Article 6.*
- 9. When carrying out the authorised actions under this Article, the use of force shall be avoided except when necessary to ensure the safety of its officials and persons on board, or where the officials are obstructed in the execution of the authorised actions. Any use of force pursuant to this article shall not exceed the minimum degree of force which is necessary and reasonable in the circumstances.’ SUA Convention Draft Protocol(2005:9)*

‘10(a) Where a State Party takes measures against a ship in accordance with this article, it shall;

- (i) take due account of the need not to endanger the safety of life at sea;*
 - (ii) ensure that all persons on board are treated in a manner which preserves their basic human dignity, and in compliance with the applicable provisions of international law, including international law of human rights;*
 - (iii) ensure that a boarding and search pursuant to this article shall be conducted in accordance with applicable international law;*
 - (iv) take due account of the safety and security of the ship and its cargo;*
 - (v) take due account of the need not to prejudice the commercial or legal interests of the flag State;*
 - (vi) ensure, within available means, that any measure taken with regard to the ship or its cargo is environmentally sound under the circumstances;*
 - (vii) ensure that persons on board against whom proceedings may be commenced in connection with any of the offences set forth in Articles 3, 3bis, 3ter or 3 quarter are afforded the protection of Article 10(2), regardless of location;*
 - (ix) take reasonable efforts to avoid a ship being unduly detained or delayed.*
- b) Provided that authorisation to board by a flag State shall not per se give rise to its liability, State Parties shall be liable for any damage, harm or loss attributable to them arising from measures taken pursuant to this Article when:*

- i) *the grounds for such measures provide to be unfounded, provided that the ship has not committed any act justifying the measures taken; or*
- ii) *the authority of the flag State to exercise jurisdiction and control in administrative, technical and social matters involving the ship.'*

SUA Convention Draft Protocol(2005:1).

APPENDIX 5.1



Claim Form

In the	
--------	--

	<i>for court use only</i>
Claim No.	
Issue date	

Claimant



Defendant(s)

Brief details of claim

Value

Defendant's name and address

--

	£
Amount claimed	
Court fee	
Solicitor's costs	
Total amount	

The court office at

is open between 10 am and 4 pm Monday to Friday. When corresponding with the court, please address forms or letters to the Court Manager and quote the claim number.
 N1 Claim form (CPR Part 7) (01.02)

Printed on behalf of The Court Service

Claim No. _____

Does, or will, your claim include any issues under the Human Rights Act 1998? Yes No

Particulars of Claim (attached)(to follow)

Statement of Truth

*(I believe)(The Claimant believes) that the facts stated in these particulars of claim are true.

* I am duly authorised by the claimant to sign this statement

Full name _____

Name of claimant's solicitor's firm _____

signed _____ position or office held _____

*(Claimant)(Litigation friend)(Claimant's solicitor) (if signing on behalf of firm or company)

**delete as appropriate*

Claimant's or claimant's solicitor's address to which documents or payments should be sent if different from overleaf including (if appropriate) details of DX, fax or e-mail.

APPENDIX 5.2

Voir Note explicative Numéro de dossier
See Explanatory Note File-number

COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

Conseil de l'Europe – *Council of Europe*
Strasbourg, France

REQUÊTE
APPLICATION

présentée en application de l'article 34 de la Convention européenne des Droits de l'Homme,
ainsi que des articles 45 et 47 du règlement de la Cour

*under Article 34 of the European Convention on Human Rights
and Rules 45 and 47 of the Rules of Court*

IMPORTANT: La présente requête est un document juridique et peut affecter vos droits et obligations.
This application is a formal legal document and may affect your rights and obligations.

**I. LES PARTIES
THE PARTIES**

**A. LE REQUÉRANT/LA REQUÉRANTE
THE APPLICANT**

(Renseignements à fournir concernant le/la requérant(e) et son/sa représentant(e) éventuel(le))
(Fill in the following details of the applicant and the representative, if any)

1. Nom de famille 2. Prénom(s)
Surname First name(s)

Sexe : masculin / féminin *Sex: male / female*

3. Nationalité 4. Profession
Nationality Occupation

5. Date et lieu de naissance
Date and place of birth

6. Domicile
Permanent address

7. Tel. N°

8. Adresse actuelle (si différente de 6.)
Present address (if different from 6.)

9. Nom et prénom du/de la représentant(e),
*Name of representative**

10. Profession du/de la représentant(e)
Occupation of representative

11. Adresse du/de la représentant(e)
Address of representative

12. Tel. N° Fax N°

**B. LA HAUTE PARTIE CONTRACTANTE
THE HIGH CONTRACTING PARTY**

(Indiquer ci-après le nom de l'Etat/des Etats contre le(s)quel(s) la requête est dirigée)
(Fill in the name of the State(s) against which the application is directed)

13.
1

Si le/la requérant(e) est représenté(e), joindre une procuration signée par le/la requérant(e) et son/sa représentant(e).
If the applicant appoints a representative, attach a form of authority signed by the applicant and his or her representative.

II. EXPOSÉ DES FAITS
STATEMENT OF THE FACTS

(Voir chapitre II de la note explicative)
(See Part II of the Explanatory Note)

14.

Si nécessaire, continuer sur une feuille séparée
Continue on a separate sheet if necessary

**III. EXPOSÉ DE LA OU DES VIOLATION(S) DE LA CONVENTION ET/OU
DES
PROTOCOLES ALLÉGUÉE(S), AINSI QUE DES ARGUMENTS À L'APPUI
STATEMENT OF ALLEGED VIOLATION(S) OF THE CONVENTION
AND/OR
PROTOCOLS AND OF RELEVANT ARGUMENTS**

(Voir chapitre III de la note explicative)
(See Part III of the Explanatory Note)

15.

**IV. EXPOSÉ RELATIF AUX PRESCRIPTIONS DE L'ARTICLE 35 § 1 DE LA
CONVENTION
STATEMENT RELATIVE TO ARTICLE 35 § 1 OF THE CONVENTION**

(Voir chapitre IV de la note explicative. Donner pour chaque grief, et au besoin sur une feuille séparée, les renseignements demandés sous les points 16 à 18 ci-après)

(See Part IV of the Explanatory Note. If necessary, give the details mentioned below under points 16 to 18 on a separate sheet for each separate complaint)

16. Décision interne définitive (date et nature de la décision, organe – judiciaire ou autre – l'ayant rendue)

Final decision (date, court or authority and nature of decision)

17. Autres décisions (énumérées dans l'ordre chronologique en indiquant, pour chaque décision, sa date, sa nature et l'organe – judiciaire ou autre – l'ayant rendue)

Other decisions (list in chronological order, giving date, court or authority and nature of decision for each of them)

18. Dispos(i)ez-vous d'un recours que vous n'avez pas exercé? Si oui, lequel et pour quel motif n'a-t-il pas été exercé?

Is there or was there any other appeal or other remedy available to you which you have not used? If so, explain why you have not used it.

Si nécessaire, continuer sur une feuille séparée
Continue on a separate sheet if necessary

**V. EXPOSÉ DE L'OBJET DE LA REQUÊTE
STATEMENT OF THE OBJECT OF THE APPLICATION**

(Voir chapitre V de la note explicative)
(See Part V of the Explanatory Note)

19.

**VI. AUTRES INSTANCES INTERNATIONALES TRAITANT OU AYANT
TRAITÉ
L'AFFAIRE
STATEMENT CONCERNING OTHER INTERNATIONAL PROCEEDINGS**

(Voir chapitre VI de la note explicative)
(See Part VI of the Explanatory Note)

20. Avez-vous soumis à une autre instance internationale d'enquête ou de règlement les griefs énoncés dans la présente requête? Si oui, fournir des indications détaillées à ce sujet.
Have you submitted the above complaints to any other procedure of international investigation or settlement? If so, give full details.

**VII. PIÈCES ANNEXÉES (PAS D'ORIGINAUX,
UNIQUEMENT DES COPIES ;
PRIÈRE DE N'UTILISER NI AGRAFE,
NI ADHÉSIF, NI LIEN D'AUCUNE SORTE)
LIST OF DOCUMENTS (NO ORIGINAL DOCUMENTS,
ONLY PHOTOCOPIES,
DO NOT STAPLE, TAPE OR BIND DOCUMENTS)**

(Voir chapitre VII de la note explicative. Joindre copie de toutes les décisions mentionnées sous ch. IV et VI ci-dessus. Se procurer, au besoin, les copies nécessaires, et, en cas d'impossibilité, expliquer pourquoi celles-ci ne peuvent pas être obtenues. Ces documents ne vous seront pas retournés.)

(See Part VII of the Explanatory Note. Include copies of all decisions referred to in Parts IV and VI above. If you do not have copies, you should obtain them. If you cannot obtain them, explain why not. No documents will be returned to you.)

21. a)

b)

c)

VIII. DÉCLARATION ET SIGNATURE DECLARATION AND SIGNATURE

(Voir chapitre VIII de la note explicative)
(See Part VIII of the Explanatory Note)

Je déclare en toute conscience et loyauté que les renseignements qui figurent sur la présente formule de requête sont exacts.

I hereby declare that, to the best of my knowledge and belief, the information I have given in the present application form is correct.

Lieu/Place

Date/Date

**(Signature du/de la requérant(e) ou du/de la représentant(e))
(Signature of the applicant or of the representative)**

1

MARINE GUIDANCE NOTE

MGN 298 (M)

**Measures to Counter Piracy, Armed Robbery
and
other Acts of Violence against Merchant
Shipping**

Note to all ship-owners and operators (companies), Masters etc.

This Marine Guidance Note supersedes Marine Guidance Note 241 (M) issued in November 2002.

SUMMARY

This Marine Guidance Note aims to assist all ship owners and operators (companies), Masters and seafarers in understanding the risk of piracy, armed robbery and other acts of violence against ships, and reminds them of the importance of taking action to deter such acts and advises on how to deal with them if they occur.

Key points:

- Be vigilant
- Reduce opportunities for theft
- Secure Restricted Areas at all times and establish safe secure area(s)
- Maintain, exercise and regularly review your Ship Counter-piracy Plan
- Report all incidents to the coastal and Flag State authorities (for UK flagged ships this is

TRANSEC within the Department for Transport).

An index of this MGN, to assist readers find information on specific issues, is provided on page 28.

1. INTRODUCTION

1.1 This Marine Guidance Note (MGN) brings to the attention of ship owners and operators (referred to as companies in this document), Masters and crews, the risk of acts of piracy on the high seas or armed robbery against ships within the territorial sea of a State. It outlines steps that should be taken to **reduce the risk** of such attacks, possible responses to them and the need to report attacks, both successful and unsuccessful, to the authorities of the relevant Coastal State(s), to the IMB reporting centre and to the ship's own maritime administration. This MGN has been amended to take account of the International Ship and Port Facility Security Code Regulations, which were implemented on 1st July 2004 and their impact on the security requirements of UK ships and also on reporting procedures for incidents. The guidance has also

been updated where the implementation of the Ship Security Alert System (SSAS) and Automatic Identification System (AIS) has had an impact on procedures.

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1.2 In the United Kingdom, the Secretary of State for Transport is responsible for both maritime security and counter-piracy policy with regard to UK flagged ships. The Secretary of State's powers and responsibilities are designated to the Transport Security and Contingencies Directorate (TRANSEC) within the Department for Transport.

1.3 This Marine Guidance Note, which has been developed and written by TRANSEC, is principally aimed at UK seafarers on board UK flagged ships and refers in the first instance to UK maritime security/counter-piracy policy and procedures. However, TRANSEC acknowledges that the majority of readers will be UK nationals serving on board foreign owned/controlled and/or flagged ships. The text therefore makes it clear that the reader should also be aware of their own Flag State's maritime security/counter-piracy policies and procedures.

2. TRENDS IN PIRACY

2.1 The continuing high number and geographical spread of attacks clearly demonstrates that the issue of piracy and armed robbery at sea has not gone away since this Marine Guidance Note was last updated in 2002. However, there was a 27% reduction in piracy attacks between 2003 and 2004, bringing the total number of attacks down to 325 and the figures for the first 6 months of 2005 show that the overall number of attacks is on course to reduce again this year from 182 to 127, a 30% reduction. Although this reduction appears to be positive, in reality the devastating tsunami that occurred at the end of 2004 had a significant, albeit temporary, impact on the piracy figures for that area and this natural disaster is likely to account for a significant percentage of the reduction in attacks this year. Additionally, piracy attacks have seriously escalated this year in Somali and Iraqi waters, which reflects the general state of security in both of those countries. The current main hot spot areas where piracy attacks are prevalent are the Horn of Africa, including Somali waters and the Gulf of Aden; South East Asia including Indonesian waters, the Malacca Straits and the South China Sea; the Bay of Bengal; the Niger Delta in West Africa and also Iraqi/Persian Gulf waters. APPENDIX 1 provides more detail on the trends, figures and locations for piracy attacks.

2.2 While the overall reduction in piracy attacks since 2002 is welcome, there are still a number of locations around the world where increasingly violent attacks are taking place by

well-organised groups. Masters and crew need to exercise extreme caution when transiting these areas. The updating and re-issue of this Guidance Note serves as an important reminder to seafarers about the measures that can be put in place to deter and deal with piracy and armed attacks. Details of such attacks are regularly reported in Lloyd's List and up to date information can be obtained from the Piracy Reporting Centre in Kuala Lumpur (see paragraph 11.1) and from the IMO in their monthly Maritime Security Committee Circulars (MSC.4/Circ.xx series). TRANSEC also issues advice to UK seafarers regarding specific countries or sea areas of concern as the need arises.

3. THE INTERNATIONAL SHIP AND PORT FACILITY SECURITY (ISPS) CODE

3.1 The ISPS Code is an internationally agreed protective security regime for the maritime sector and was adopted in a resolution on 12 December 2002 by a Diplomatic Conference of Contracting Governments to the International Convention for the Safety of Life at Sea (SOLAS) 1974. Another resolution was adopted which made necessary amendments to SOLAS Chapter V and the new Chapter XI-2 (the original chapter XI was amended and split into XI-1 and XI-2) of SOLAS by which compliance with the ISPS Code became mandatory on 1 July 2004. It contains measures aimed at improving the security of ships and port facilities by placing obligations on governments and the maritime industry, including the appointment of security officers, the preparation of security assessments, the implementation of security plans, the issue of mutually recognised security certificates and the setting of security levels. The changes that the amendments to SOLAS and the ISPS Code have brought and their impact on counterpiracy policy and procedures is explained in more detail in APPENDIX 2.

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4. LOCATIONS AND METHODS OF ATTACK

4.1 Theft or Robbery from a Ship

4.1.1 The most common form of piracy and armed attack consists of boarding a ship, stealing cargo or ship's equipment and withdrawing (over 90% of successful attacks in 2003 fell into this category). Last year just over half of these robberies occurred when the ship was in port or at anchor with the remainder occurring when the ship was underway (both within territorial and international waters). The majority of incidents in port are opportunistic and a ship in port is particularly vulnerable since it is in a fixed position, will normally have a skeleton crew and the attacker has both more and easier escape routes than when the ship is at sea.

4.1.2 Most thefts of ships stores and equipment are carried out on an opportunity basis, particularly when crews appear to be complacent in their surroundings and less alert. More professional criminal gangs, including those in South East Asian waters, will target high value goods such as cash and valuables in the ship's safe, crew possessions and any portable ship's equipment. Such gangs have also stolen less valuable items in the past, including paint and mooring lines. Where there is evidence of tampering with containers it has been suggested that the raiders may initially have gained access when the ship was berthed in port and then gone over the side, with what they could carry or when the ship was underway to be picked up by their accomplices. In recent cases, when this was suggested, it had been found that compartments may not have been fully searched or secured before the ship left port.

4.2 Attacks at Anchor (Within Port Limits or at Anchorage)

4.2.1 A ship at anchor is usually boarded from a small boat under the cover of darkness. Most attacks occur between 2200 and 0600 hrs and the attackers primarily board the ship from the stern using grappling hooks attached to the ship's rail or by climbing the anchor chain. Often the raiders will try not to alert the crew, although they may take a crewmember hostage and threaten them either to gain information or to intimidate and gain control over the Master or other crewmembers, or to gain access to the crews' quarters. Communication equipment may be destroyed to prevent or delay the alarm being raised; crews' quarters may be raided for portable personal possessions; the Master's safe may be opened and any cash stolen and there may either alternatively or simultaneously be some opening of containers or holds. There is some evidence of selective opening of containers or holds with high value cargoes implying prior knowledge of the cargo manifest. The attackers may also steal any movable ship's stores. Having removed what they can carry, the raiders depart. There is some evidence that members of boarding parties have been recognised as previously having had access to the ship as employees of shore based cleaning or other contractors.

4.3 Attacks When Tied Alongside

4.3.1 A ship tied alongside either the quay wall or another ship is usually boarded by walking up an unmanned boarding ramp (gangway) between ship and shore/ship to ship, or by climbing mooring ropes and anchor chains or using grappling hooks to get on deck. Given the opportunistic nature of attacks when a ship is moored in port or at anchor, an attacker is

statistically less likely to resort to violence and they may seek to escape empty-handed if challenged by crew. An exception to this is in the Caribbean where currently the favoured method of attack is for the attackers to rush on board a ship, brandishing knives to force the crew into handing over valuables.

4.4 Attacks When Underway

4.4.1 Attacks on ships whilst underway can often be more threatening and dangerous for a ship's crew than an attack taking place in port, as the attack is likely to be planned and the attackers will almost certainly be armed.

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The majority of these attacks have taken place against ships in South East Asian waters and more recently around the Horn of Africa (refer to APPENDIX 1 for more detailed information on attacks). Recent evidence indicates that you should assume that they are carrying and prepared to use firearms (in 2003, the figure was 80% of attackers) and in a limited number of cases more powerful devices such as rocket-propelled grenades have been brandished or employed.

Such incidents often involve the use of the tactics described in the following paragraphs.

4.4.2 Under cover of darkness, again most often between dusk and dawn, one or more high speed, low profile craft come alongside the intended target often utilising any blind spots such as approaching from the stern, but also the sides if the ship has a low freeboard. It should be noted that ships travelling at slow speeds, especially if this is combined with a low freeboard, are more vulnerable to attack. Access to the ship will often be by climbing up poles or by utilising grappling irons hooked on to the ship's rail. Attackers have shown considerable skill and daring and have boarded ships travelling in excess of 17 knots and with high freeboards. They have demonstrated knowledge of ship's procedures, often seeking to board when bridge and engine room personnel are fully engaged in navigating through congested or restricted waters, and knowledge of the general layout of the ships they have attacked. The small craft used by the attackers may come from adjacent coastlines (hiding behind headlands and islands until the ship is close enough to engage) or be launched from "mother" ships and there have been occasions where larger ships running without lights have been reported in the vicinity of ships which have been attacked.

4.4.3 Attackers have also been known to try to blend in with local fishing boats or to disguise

themselves as Coast Guard or Naval personnel, or Pilots in order to board the ship. In the North Persian Gulf and particularly along the Iranian coast and waterways of Iraq, criminal gangs are operating from small high-speed craft and tend to conceal themselves among fishing fleets. When a target ship nears, the attackers' boats will break cover, approach the ship to allow the attackers to board the ship, stealing any valuables, particularly cash, or alternatively they may demand protection money. Another method is the stringing of fishing nets across the waterways to force the ships to slow and damage the nets. The ship is then boarded by the 'fishing crew' who demand compensation for the nets.

4.4.4 Attackers have boarded ships, made their way to the Master's cabin and intimidated crewmembers by threats or assault, into opening the safe. They have then departed taking what they can with them without alerting any other members of the crew. There have also been incidents of crewmembers being seized and threatened to secure the crew's compliance. In a number of hijack incidents the entire crew has been seized and locked up. This poses a serious threat to the safety of shipping because although the typical attack lasts for between 15 minutes and an hour, ships can be under the control of attackers for a much longer period with few, if any, qualified mariners manning the bridge. The ship could therefore be controlled by the attackers throughout this period and they themselves are likely to be under great stress. This can lead to a significant risk of collision or grounding with accompanying loss of life and if the ship is an oil tanker or chemical carrier, it can additionally result in major pollution.

4.4.5 Although the vast majority of attacks are to secure cash and steal crew possessions or portable equipment there are still cases of ships and their cargoes being seized and the entire cargo, and occasionally the ship, being disposed of by the attackers.

4.5 Hijacking of Ships

4.5.1 Such operations tend to be complex and require considerable expertise and resources, which usually puts them beyond the means of small opportunist groups. For example, in the late 1990's most hijacking incidents took place in the South China Sea and these were run by large organised crime syndicates until China launched a successful crackdown. Despite their complexity there has been an increase in the number of hijackings of ships to steal the cargo (usually transferring it to another ship) over the last decade.

A number of violent and well organised hijacking operations have taken place in the Malacca Straits this year following the initial lull in activity as a result of the tsunami. There have been a number of well documented cases such as the Alondra Rainbow or the recent case of the Natris/Paulijng where the ships have been physically altered and re-registered, in essence becoming 'phantom' ships. Similarly there is also a trend now towards the targeting of smaller tugs, barges and yachts which requires far less planning and resources. The ship's crew, particularly the most senior members are also now more likely to be taken captive and held to ransom, rather than have cargo or valuables stolen, particularly at the northern end of the Malacca Straits, in the Niger Delta and off the coast of Somalia. Several ransom demands have been met which may contribute to an increase in attacks of this type. Therefore, it is important that Masters and crew should be aware of the increased possibility of this type of attack when sailing in areas where ransom demands have previously been paid. If a ship is hijacked, crewmembers should adopt an acquiescent attitude and comply with the hijacker's demands and seek to avoid any actions that may antagonise further, what are likely to be already agitated attackers. Failure to do so is likely to endanger the lives of crewmembers.

5. FACTORS ENCOURAGING OR FAVOURING ATTACKERS

5.1 Cash in the Ship's Safe

5.1.1 The belief that large sums of cash are carried in the Master's safe attracts attackers.

On several occasions this belief has been justified and substantial sums have been stolen.

While carrying cash may sometimes be necessary to meet operational needs and crew requirements and to overcome exchange control restrictions in some States, it entices attackers, who in turn are likely to intimidate the Master or other crewmembers to open the safe.

Even if the cash is dispersed throughout the ship the attackers may intimidate crewmembers

until the locations have been revealed. Companies should consider ways of eliminating the

need to carry large sums of cash on board ship. When this need arises because of exchange

control restrictions imposed by States the matter should be referred to the ship's maritime

administration to consider if representations should be made to encourage a more flexible

approach as part of the international response to eliminate attacks by pirates and armed

robbers. If large sums of money must be carried it is advisable to secrete safes in less obvious

locations, i.e. not in the Master's cabin, or to have a number of safes each with a smaller amount of money. In either case it may be advantageous to limit the number of people with knowledge of the safes location(s) to the minimum required for operational purposes. Consideration could also be given to alarming the safes to indicate tampering.

5.1.2 Although the incidence of cruise ships being targeted is extremely low, these ships are attractive to those groups set on unlawful activity due to the money and valuables carried by their passengers. By virtue of their size (deck height) and the size of their crews, these ships are currently less susceptible to attack whilst underway than most other ships. As the attackers develop more sophisticated tactics and employ increasingly sophisticated equipment, so the threat of an attack on a cruise ship increases. Therefore, extra vigilance should be maintained when these ships are in port, and in particular when they are tied alongside.

5.2 Smaller Crews

5.2.1 The smaller crew numbers found on board most ships also favour the attacker. A small crew engaged in ensuring the safe navigation of their ship through congested or confined waters may also have the additional task of maintaining high levels of security surveillance and preparedness for prolonged periods. Companies should ensure that security watches are enhanced if their ship is in waters or ports, where attacks are known to occur. Companies should also consider providing appropriate, i.e. designed for the marine environment, surveillance systems (e.g. portable or fixed CCTV) and intruder detection equipment (security systems incorporating robust sensors and alarms) to aid their crews and protect their ships.

6

The provision of piracy alarm systems on bridge wings and other vulnerable/ lookout positions should be seriously considered. Companies should also consider the need for additional security personnel to be carried (above the normal crewing level) in areas of high risk. If such a decision is taken, companies should seek to verify the bona fides of any security personnel they may engage locally.

6. RECOMMENDED PRACTICES

6.1 Recommended Practices Overview

6.1.1 The recommended practices outlined below are based on reports of incidents, advice published by commercial interests and organisations and measures developed to enhance ship security. The extent to which the recommendations are followed or applied are matters solely for the Company/Ship Security Officers or Masters of ships operating in areas where attacks

may occur. The recommendations are not designed to replace or supersede the security measures recorded in the Ship Security Plan, but they may be operated in addition to the security measures required by the plan at each Security Level.

6.1.2 If possible appropriate risk assessments should be conducted by the Company/ Ship Security Officers or Master, prior to a ship entering areas with a high incidence of piracy. The aim of the assessment is to determine whether additional security personnel and/or measures are required over and above the mandatory security measures specified in the Ship Security Plan for the given Security Level.

6.2 The Counter-piracy Plan

6.2.1 All UK flagged ships operating in waters where piracy incidents occur should hold or develop a counter-piracy plan. This plan should be prepared having regard to the risks that may be faced, the crew numbers available, their capability and training, the ability to establish secure areas on board the ship (for crew to lock themselves into in the event that attackers are successful in boarding the ship) and should also cover the surveillance and detection equipment that has been provided. The plan should, among other things, cover:

- the need for enhanced watch keeping, and the use of lighting and surveillance, detection or perimeter protection equipment;
- crew responses if a potential attack is detected or an attack is underway;
- the radio and alarm procedures to be followed;
- the reports that should be made after an attack, or an attempted attack;
- training to ensure crew react consistently to an incident.

6.2.2 Counter-piracy Plans should ensure that Masters and crews are made fully aware of the risks involved during attacks by pirates or armed robbers. In particular it should address the dangers that may arise if a crew adopts an aggressive response to an attack. Early detection of a possible attack is the most effective deterrent. Aggressive responses once an attack is underway, and in particular once the attackers have boarded the ship, could significantly increase the risk to the ship and those on board. The counter-piracy plan can exist as a standalone document or be incorporated into the Ship Security Plan (see APPENDIX 2) for ease of reference for relevant members of the ship's crew. The important point is that the Counterpiracy Plan should supplement the Ship Security Plan but that the latter document must take precedence as a Government approved official document.

6.3 Routing and Delaying Anchoring

6.3.1 If at all possible ships should, at the Master's discretion, be routed away from areas where attacks are known to take place and in particular seek to avoid bottle necks.

If ships are approaching ports where attacks have taken place on ships at anchor, rather than on ships underway, and it is known that the ship will have to anchor off port for some time, consideration should be given to delaying anchoring by slow steaming or longer routing to remain well off shore thereby reducing the period during which the ship will be at risk.

Charter

party agreements should contain up to date War Clauses, which include piracy provisions and

recognise that ships may need to delay arrival at ports where attacks occur, either when no

berth is available for the ship, or off shore loading or unloading will be delayed for a protracted period.

6.4 Prior to Entering Areas where Attacks Occur

6.4.1 Prior to the ship entering an area where attacks have occurred the ship's crew should

have practised and perfected the procedures set down in the Ship's Security Plan and/or

counter piracy plan. Communication systems, alarm signals and procedures should have been

thoroughly practised. If instructions are to be given over the ship's address systems or personal

radios they must be clearly understood by those who may not have fully mastered the language

in which the instructions will be given. To this end, code words could be employed to simplify

the issuing of instructions, and the initiation of pre-rehearsed responses.

6.4.2 Access points to the ship and any secure restricted or controlled areas must be controlled through monitoring and patrolling in port and at anchor, and as far as practicable

when the ship is underway (see paragraph 6.16.6 and APPENDIX 3 for further information).

Crews should be trained in the use of any additional surveillance or detection equipment

installed on the ship. Planning and training must be on the basis that an attack will take place

and not in the belief that with some luck it will not happen. Indications to attackers that the ship

has an alert and trained crew implementing an effective Counter-piracy Plan could help deter

them from attacking the ship.

6.5 At Anchor or In Port

6.5.1 The ISPS Code and UK Government requires as a minimum that access to all UK

flagged ships is controlled in order to prevent unauthorised access (measures to be put in place

at each access point must be listed in the Ship Security Plan) and that an identification system

(for example an ID Pass system incorporating a photograph of the pass holder) must be in

place for visitors. The specific measures put in place will vary according to the Flag State and

the ship itself. However extra precautions should be taken over certain groups of people who require access to the ship such as Stevedores. It would also be beneficial to site CCTV equipment and other electronic monitoring devices in such a way as to ensure coverage of areas vulnerable to infiltration e.g. the stern, low freeboards, the hawse pipe/ hole and the chain locker (see paragraph 6.10). It would also be wise to consider greasing or installing razor wire woven through and around the anchor chain (extending up to 2 metres down the hawse pipe) while the ship is at anchor to prevent climbing. Hawse pipe covers should be securely locked in place (attackers have been known to reach through covers and undo the traditional wing nut arrangement). A final and temporary measure while the ship is at anchor could be to activate the ship's fitted anchor cable wash-down system, or to aim a fire hose through the hawse pipe turned on at full pressure.

6.5.2 In high-risk areas, it is recommended that the Master organises a system of regular deck patrols and that they be conducted by a sufficient number of crew to ensure personal safety. The crewmembers conducting the patrol should be suitably equipped with two-way radios to ensure instant communication with the bridge, concentrating on vulnerable areas of the ship. The patrols and search patterns should be staggered at unpredictable and irregular intervals to prevent a potential attacker from establishing a routine which can then be exploited.

6.5.3 Given that attackers may use knowledge of cargo manifests to select their targets every effort should be made to limit the circulation of documents which give information on the cargoes on board or their location on the ship.

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6.5.4 While it is acknowledged that there are considerable time pressures associated with the requirement for fast turnarounds in port, the security of the ship should not be compromised by poor procedures. Prior to leaving port/anchorage the ship should be thoroughly searched and all external doors or access points secured or controlled, with priority given to the bridge. Internally priority should be given to the engine room, steering space and other vulnerable areas. Doors and access points should be regularly checked thereafter. The means of controlling doors or access points which would need to be used in the event of an on board emergency will need careful consideration. Crew safety should not be compromised.

6.6 Watch-keeping and Vigilance

6.6.1 Maintaining vigilance is essential. All too often the first indication of an attack has been when the attackers appear on the bridge or in the Master's cabin. Advance warning of a possible attack will give the opportunity to sound alarms, alert other ships and the coastal authorities, illuminate the suspect craft, undertake evasive manoeuvring or initiate other response procedures. Signs that the ship is aware it is being approached can deter attackers.

6.6.2 When ships are in, or approaching, areas where attacks are known to have taken place, bridge watches and look outs should be significantly strengthened, manpower resources allowing. Additional watches on the stern or covering radar "blind spots" should also be considered if manpower allows. Companies should consider investing in low light binoculars for bridge staff and lookouts. Radar stations should be frequently manned, even though it may be difficult to detect low profile fast moving craft on a ship's radars. A Yacht or I-band radar mounted on the stern may provide additional monitoring capability to detect small craft approaching from astern. Use of an appropriately positioned radar system when the ship is at anchor may also provide warning of the close approach of small craft.

6.6.3 It is particularly important to maintain a radar and visual watch for craft which may be trailing the ship when underway, but which could close with the ship quickly when mounting an attack. Small craft, which appear to be matching the speed of the ship on a parallel or following course, should always be treated with suspicion. When a suspect craft has been noticed it is important that an effective all round watch is maintained in case the 'obvious' craft is a decoy. A decoy could be used to divert the attention of the ships' crew away from a second craft on the other side of the ship, which could then be used to board the ship unobtrusively.

6.6.4 Companies with ships that frequently visit areas where attacks have occurred should consider the purchase and use of more sophisticated visual and electronic devices in order to augment both radar and visual watch capability against attackers' craft at night, thereby improving the prospects of obtaining an early warning of a possible attack. Additional advice on more sophisticated equipment appropriate for use on British ships will be provided on request from the Department for Transport (see section 14 for Transec contact details).

6.7 Ship Communications

6.7.1 Radio Procedures and Watch-keeping. There is detailed guidance on radio procedures,

radio watch keeping advice and standard message formats contained in APPENDIX 3.

6.7.2 Ship Security Alert System. The amendments to SOLAS (Chapter X1-2) has required the installation of a new Ship Security Alert System (SSAS) on ships which are subject to the SOLAS Convention. The purpose of SSAS is to provide a covert means of alerting the ship's Flag State and company to the fact that a serious security incident is occurring on board the ship. (refer to APPENDIX 2 for more details).

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6.7.3 Automatic Identification System (AIS) is required under Chapter V of SOLAS. AIS is a shipboard broadcast system that allows a ship's location and movements to be monitored within a certain range, both on shore and by other suitably equipped ships (see APPENDIX 2 for more details).

6.8 Lighting (When Underway)

6.8.1 Ships should use the maximum lighting available consistent with safe navigation, having regard in particular to the provisions of Rule 20(b) of the 1972 Collision Regulations. Bow, and overside lights should be left on if possible. Ships must not keep on deck lights when underway as it may lead other ships to assume the ship is at anchor. Wide beam floods could illuminate the area astern of the ship. Signal projector lights can be used systematically to probe for suspect craft illuminating radar contacts if possible. So far as is practicable crewmembers on duty outside the ship's secure areas when in port, or at anchor, should avail themselves of shadow and avoid being silhouetted by deck lights as this may make them targets for seizure by approaching attackers.

6.8.2 It has been suggested that ships underway should be blacked out except for mandatory navigation lights. This may prevent attackers establishing points of reference when approaching a ship. In addition turning on the ship's lights as attackers approach could alert them that they have been seen, dazzle them, and encourage them to desist. The fitting of passive infrared (PIR) activated floodlights to the periphery of the ship could be considered to ensure that the lights do come on, even if attackers are not observed in advance. It is difficult, however, to maintain full blackout on a merchant ship. The effectiveness of this approach will ultimately depend in part on the level of moonlight, but primarily on the vigilance and light discipline (the control of emitted light) of the ship's crew. While suddenly turning on the ship's lights may alarm

or dazzle attackers it could also place the crew at a disadvantage at a crucial point through temporary loss of their night vision. To this end it is recommended that crews be instructed on how to preserve and enhance their night vision. Crewmembers can maximise their visual acuity by the simple expedient of not looking directly at the intended point. By focussing a few degrees (any direction) off the target, peripheral vision is utilised, and this is better suited to both motion detection and night sight. Ensuring that crews are adequately briefed and trained is essential and thought should be given on how to warn crewmembers that light is about to be employed, without forewarning the attackers.

6.9 Lighting (At Anchor)

6.9.1 The above lighting requirements under the Collision Regulations are not applicable when ships are at anchor or in port, and crews are at liberty to light their ships as they see fit (as long as they do not dazzle other mariners). However, many ships are not adequately fitted with deck lights and are thus poorly lit even when all of them are switched on. To reduce the number of areas vulnerable to night infiltration, it is recommended that the existing number, or at least the placement, of deck lights is reconsidered. Lighting of vulnerable areas could be linked to an alarm system or detection/surveillance equipment.

6.10 CCTV

6.10.1 As an additional deterrent, deck lighting directed on vulnerable areas of the ships superstructure, e.g. the stern, freeboards, the hawse pipe/hole and the chain locker could be augmented by effective CCTV coverage.

6.10.1 Companies should seek to provide closed-circuit television (CCTV) coverage, and recording of, the main access points to the ships secure areas (see paragraph 6.11), the corridors approaching the entrances to key areas and the bridge. If possible the recording equipment should be housed in a secure environment or at least in an unobtrusive place, so that there is an increased chance of it surviving any attack on the ship.

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The ISPS Code requires that proper procedures are in place for the maintenance of CCTV systems including the documentation and reporting and fixing of defects.

6.11 Secure Areas

6.11.1 In accordance with the ship's Counter-piracy Plan, the Master and crew should ensure that they have a secure area(s) on the ship where they can safely retreat to in the event of attackers successfully boarding and hijacking the ship. This definition of a secure area should

not be confused with the term Restricted Area as required by the ISPS Code, which requires access control measures to sensitive parts of a ship (refer to APPENDIX 2 for further details). However, it would make sense to place the secure area(s) of the ship within the ship's Restricted Areas because robust access control measures will already be in place.

6.11.2 All doors to a designated secure area(s) should be secured and/or controlled at all times and should be regularly inspected and monitored, for example by using CCTV. Consideration should be given to the installation of special access control systems to these areas. Ports, scuttles and windows, which could provide access should also be securely closed and have laminated glass installed if possible. Deadlights should be shut and clipped tightly. The internal doors within secure areas which give immediate access to key areas such as the bridge, radio office, engine room and Master's cabin should be strengthened and have special access control systems and automatic alarms. Certainly basic measures such as a spy-hole or an electronic door viewer should be considered for fitting to both the Master's cabin door and the internal Bridge door in order to establish who is on the other side before opening. Access control measures, surveillance and patrolling should all be stepped up in accordance with the Security Level that the ship is operating at.

6.11.3 Securing doors providing access to, and egress from, secure areas may give rise to concern over safety in the event of an accident. In any situation where there is a conflict between safety and security, the safety requirements should be paramount. Nevertheless, attempts should be made to incorporate appropriate safety provisions to ensure ease of egress and to permit access by rescue /emergency parties while allowing entries and exits to be secured or controlled.

6.11.4 To prevent the seizure of individual crewmembers by attackers (seizure and threatening a crewmember is one of the more common means of attackers gaining control over a ship), all crewmembers not engaged on essential outside duties should remain within a secure area during the hours of darkness. Those whose duties necessarily involve working outside such areas at night should remain in constant communication with the bridge and should have practised using alternative routes to return to a secure area in the event of an attack. Crewmembers who fear they may not be able to return to a secure area during an attack should select places in advance in which they can take temporary refuge. There should also be

designated muster areas within the ship's secure areas where the crew can muster during an attack and communicate their location and numbers to the bridge.

6.12 Alarms

6.12.1 Alarm signals, including the ship's whistle, should be sounded on the approach of attackers. Alarms and signs of response can discourage attackers. Alarm signals or announcements which provide an indication at the point at which the attackers may board, or have boarded, may help crewmembers in exposed locations select the most appropriate route to return to a secure area.

6.13 Evasive Manoeuvring and Use of Hoses

6.13.1 Provided that navigational safety allows, Masters should consider "riding off" attackers craft by heavy wheel movements as they approach. The effect of the bow wave and wash may deter 'would be' attackers and make it difficult for them to attach poles or grappling irons to the ship.

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Manoeuvres of this kind should not be used in confined or congested waters or close inshore or by ships constrained by their draught in the confined deep water routes found, for example in the Malacca and Singapore Straits.

6.13.2 The use of water hoses should also be considered, though the use of such equipment may be inappropriate and counter-productive in regions that have a high incidence of attackers employing firearms since the use of a water hose may antagonise the attackers causing them to start shooting at the ship and crew. It is at the Master's discretion as to whether such a defensive measure should be employed, and careful consideration must pre-empt any such order to crewmembers. Hoses may also be difficult to train on an approaching ship if evasive manoeuvring is taking place. However, water pressures of more than 550 kilopascals/ Kpa (80 lb psi) and above have deterred and repulsed attackers. Not only does the attacker have to fight against the jet of water, but the flow may swamp their boat and damage engines and electrical systems. Special fittings for training hoses could be considered which would also provide protection for the hose operator. A number of spare fire hoses could be rigged and tied down at vulnerable areas of the ship e.g. the stern whilst underway and anchor points/gangways whilst at anchor. These hoses could then be pressurised at short notice if a potential attack is detected.

6.13.3 Employing evasive manoeuvres and hoses must rest on a determination to successfully

deter attackers or to delay their boarding long enough to allow all crewmembers to gain the sanctuary of secure areas. Continued heavy wheel movements with attackers on board may lessen their confidence that they will be able to return safely to their craft and may persuade them to disembark quickly. However, responses of this kind could lead to reprisals by the attackers if they seize crewmembers, and should not be undertaken unless the Master is confident that they can be used to advantage and without risk to those on board. They should not be used if the attackers have already seized crewmembers.

6.14 Use of Distress Flares

6.14.1 The only flares authorised for carriage on board ship are intended for use if the ship is in distress and is in need of immediate assistance. As with the unwarranted use of the Distress signal on the radio (see APPENDIX 3) use of distress flares simply to alert shipping rather than to indicate that the ship is in grave and imminent danger may reduce their effect in the situations in which they are intended to be used and responded to. Radio transmissions should be used to alert shipping of the risk of attacks rather than distress flares. Distress flares should only be used when the Master considers that the attacker's actions are putting the ship in grave and/or imminent danger.

6.15 Firearms

6.15.1 The carrying and use of firearms for personal protection or protection of a ship is strongly discouraged and will not be authorised by the British Government. Carriage of arms on board ship may escalate an already dangerous situation, and any firearms on board may themselves become an attractive target for an attacker. The use of firearms requires special training and aptitudes and the risk of accidents with firearms carried on board ship is great. In some jurisdictions killing a national may have unforeseen consequences even for a person who believes that they have acted in self-defence.

6.16 If Attackers Board

6.16.1 Early detection of potential attacks must be the first line of defence and action to prevent the attackers actually boarding the second, but there will be incidents when attackers succeed in boarding a ship. The majority of pirates and armed robbers are opportunists seeking an easy target and time may not be on their side, particularly if the crew are aware they are aboard and are raising the alarm. However, the attackers may seek to compensate for the pressure of time they face by escalating their threats or the violence they employ.

6.16.2 Once attackers have boarded, the actions of the Master and crew should be aimed at:

- securing the greatest level of safety for those on board the ship;
- seeking to ensure that the crew remain in control of the navigation of the ship;
- securing the earliest possible departure of the attackers from the ship.

6.16.3 If the crew is able to maintain control of the ship it is advisable, when navigating in confined waters, to reduce speed and/or head for open waters if possible. This recourse may reduce the risk of grounding or collision if the attackers were to gain control of the ship in the future.

6.16.4 The options available to the Master and crew will depend on the extent to which the attackers have secured control of the ship. If attackers gain access to the bridge or engine room, or seize crewmembers who they can threaten, the Master or crew may be coerced into complying with their wishes. However, even if the crew are all safely within secure areas, the Master will always have to consider the overall risk to the ship, and the damage the attackers could cause outside those secure areas, e.g. by using firebombs to start fires on a tanker or chemical carrier.

6.16.5 If the Master is certain that all crewmembers are within secure areas and that the attackers cannot gain access, or by their actions outside the secure areas place the entire ship at imminent risk, then consideration may be given to undertaking evasive manoeuvres of the type referred to in section 6.13, to encourage the attackers to return to their craft. The possibility of a sortie by a well organised crew has, in the past, successfully persuaded attackers to leave a ship but the use of this tactic is only appropriate if it can be undertaken at no risk to the crew.

6.16.6 For an action like this to be attempted the Master must have clear knowledge of where the attackers are on the ship, that they are not carrying firearms or other potentially lethal weapons and that the number of crew involved significantly outnumber the attackers they will face. If a sortie party can use water hoses they stand an increased chance of success. The intention should be to encourage the attackers back to their craft. Crewmembers should not seek to come between the attackers and their craft nor should they seek to capture attackers as to do so may increase the resistance the attackers offer, which will in turn increase the risk faced by members of the sortie party. Once outside the secure area the sortie party should

always stay together. Pursuit of an individual attacker by a lone crewmember should not be undertaken, as it may result in the crewmember being isolated and seized by the attackers giving them leverage over the rest of the crew. Crewmembers should operate together and remain in constant communication with the bridge and should be recalled if their line of withdrawal to a secure area is threatened.

6.16.7 All apprehended attackers should be placed in secure confinement and well cared for.

Arrangements should be made to transfer the attacker to the custody of law enforcement

officers or naval authorities of a port or Coastal State (depending on whether the attack

occurred in territorial or international waters) at the earliest possible opportunity. Any evidence

relating to the attacker's activities should also be handed over to the authorities taking custody.

6.17 If Attackers Gain Control

6.17.1 If the attackers have gained control of the engine room or bridge, have seized crewmembers or pose an imminent threat to the safety of the ship, the Master or officer in

charge should remain calm and, if possible, seek to negotiate with the attackers with the

intention of maintaining the crew's control over the navigation of the ship, the safe return of any

hostages they may hold and the early departure of the attackers from the ship. There will be

many circumstances when compliance with the attackers' demands will be the only safe

alternative and when resistance or obstruction of any kind could be both futile and dangerous.

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6.17.2 In the event of attackers gaining temporary control of the ship, crewmembers should, if it

is safe and practicable, leave CCTV recorders running.

6.17.3 As there have been occasions when entire crews have been locked up consideration

should be given to secreting equipment within areas in which the crew could be detained to

facilitate their early escape.

6.17.4 If ordered not to make any form of transmission informing shore authorities of the attack,

any such order should be complied with as the attackers may carry equipment capable of

detecting all radio signals, including satellite communication. All ships that fall within the scope

of the ISPS Code are, or will be fitted (by end June 2007) with a Ship Security Alert System

(see paragraph 6.7.2 and APPENDIX 2), which can be covertly and silently activated without

attracting the attention of the attackers who may have overrun the ship. This will alert the ship's

Company Security Officer and Flag State competent authority which in the case of the UK is

MRCC Falmouth who will alert relevant UK authorities.

6.18 Action to Take After an Attack and Reporting Incidents

6.18.1 An immediate post attack report should be made to the relevant Rescue and Coordination

Centre (RCC) and through them to the law enforcement agencies or naval authorities of the port or Coastal State. As well as information on the identity and location of the ship, any

injuries to crewmembers or damage to the ship should be reported as should the direction in

which the attackers departed together with brief details of their numbers and, if possible, a

description of their craft. If the crew have apprehended an attacker, that should also be reported

in this signal. (See APPENDIX 1 for more guidance).

6.18.2 If an attack has resulted in the death of, or serious injury to, any person on board the

ship or serious damage to the ship itself, an immediate signal in line with statutory requirements

should also be sent to the ship's maritime administration. A report of an attack is vital if follow up

action is to be taken by the ship's maritime administration.

6.18.3 Any CCTV or other recordings of the incident should be secured. If practicable, areas

that have been damaged or rifled should be secured and remain untouched by crewmembers

pending possible forensic examination by the law enforcement agencies of a port or Coastal

State. Crewmembers who came into contact with the attackers should be asked to prepare an

individual report on their experience noting in particular any distinguishing features, which could

help subsequent identification of the attackers. A full inventory, including a description of any

personal possessions or equipment taken, with serial numbers when known, should also be

prepared.

6.18.4 As soon as possible after the incident a fuller report should be transmitted to the

authorities of the State in whose waters the attack occurred, or if on the high seas to the

authorities of the nearest Coastal State. Due and serious consideration should be given to

complying with any request made by the competent authorities of the Coastal State to allow law

enforcement officers to board the ship, take statements from crewmembers and undertake

forensic and other investigations. Copies of any CCTV recordings, photographs, etc should be

provided if they are available.

6.18.5 Any report transmitted to a Coastal State should also be transmitted to the ship's

maritime administration at the earliest opportunity. A complete report of the incident, including

details of any follow up action that was taken or difficulties that may have been experienced,

should eventually be submitted to the ship's maritime administration.

6.18.6 The reports received by maritime administrations may be used in any diplomatic

approaches made by Her Majesty's Government of the United Kingdom to the Government of

the port or Coastal State regarding the incident and will also provide the basis for the United

Kingdom's report (through the Department for Transport in London) to the IMO, required under

the relevant IMO Assembly Resolutions on piracy and armed robbery at sea.

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The format required for reports to the IMO is attached at APPENDIX 4. Indeed, historically the

lack of adequate and accurate reporting of attacks (although there has been a recent improvement) has directly affected the ability to secure governmental and international action.

Reports may also contribute to future refining and updating of the advice in this Marine

Guidance Note.

6.18.7 Reports to the RCC, port or Coastal State and the ship's maritime administration should

also be made if an attack has been unsuccessful.

6.18.8 It is hoped that using RCCs as recommended by the IMO in MSC Circular 597 (contact

details provided by Addendum 1 (May 1993) to the above Circular) will eliminate communication

difficulties. However, if a British ship experiences difficulties in establishing, or has been unable

to establish, contact with the authorities of the relevant port or Coastal State, then a signal, an

email or fax should be sent to the Department for Transport outlining the difficulties experienced. (see TRANSEC contact details in section 14).

7 SECURITY MEASURES

7.1 It is the responsibility of companies to ascertain the risk to the ship, its crew and its cargo

and to then mitigate the risks by the introduction of appropriate security measures.

7.2 As well as the possibility of engaging additional crew to carry out specific security related

duties mentioned in paragraph 5.2, companies could also consider equipping their ships with

specialised passive security equipment, e.g. thermal imagers (cooled and uncooled types)

which detect radiated thermal energy from a scene and can work in conditions from daylight to

complete darkness and/or night vision devices which work in low light levels. This equipment

should be both commensurate with the size and type of ship and the perceived level of risk.

8 SUMMARY OF GENERAL PRECAUTIONS

8.1 For ease of reference a summary of the general precautions that may be taken are given

in APPENDIX 3.

9 JURISDICTION AND INTERVENTION

9.1 Criminal Jurisdiction

9.1.1 Piracy is an offence committed on the high seas, or in a place outside the jurisdiction (territorial sea) of any State. A pirate who has been apprehended on the high seas for committing an act of piracy against merchant shipping should therefore be dealt with under the laws of the Flag State of his/her captors by mutual agreement with any other substantially interested States. (See MSC Circular 622/Rev 1 for definitions and additional information/guidance).

9.1.2 Within territorial waters, jurisdiction over armed robbers rests solely with the Coastal State.

9.2 Naval Intervention

9.2.1 International law requires any warship or other government ship to repress piracy on the high seas. Such ships would be expected to take action if they encountered pirates, or come to the aid of any ship under attack by pirates, on the high seas. A naval ship of any State can pursue pirates on the high seas, but not into the territorial waters of another State without that State's prior consent.

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9.2.2 Foreign naval ships on innocent passage within the territorial waters of another State cannot exercise any enforcement powers or pursue attackers without prior authorisation from the Coastal State. However, they may render humanitarian assistance to a ship in danger or distress.

9.2.3 Royal Navy ships will take all appropriate measures to respond to incidents of piracy on the high seas, and to provide humanitarian assistance to ships attacked in territorial waters, whenever they are on hand to do so. However, the likelihood of a Royal Navy ship being nearby when an incident occurs, particularly in distant waters, will not be great. British ships will therefore, need to rely on their own vigilance and resources to prevent attacks and on the capability of Coastal States to suppress piracy or armed robbery.

9.3 Role of the Port and Coastal State

9.3.1 The Government of the United Kingdom calls upon Coastal and Port States to ensure the safety and freedom from attack of ships exercising their rights of innocent passage in the territorial sea of a Coastal State and in their ports. The Government also requests and requires Coastal States to pursue, prosecute and punish pirates or armed robbers who may operate, reside or have their base of operations in their territory. The activities of pirates and armed robbers now pose a real threat not only to those on board ship, but also to the territory and

interests of Coastal States through the threat of a major pollution incident following an attack.

The Government urges Companies, Masters and crews to co-operate to the greatest possible

extent with the authorities of Coastal States in their efforts to pursue and prosecute attackers.

10 CONCLUSION

10.1 Attacks by pirates and armed robbers are still occurring frequently. They pose a threat

not only to those on board ships but also to the interests of Coastal States. Coastal States in

whose waters armed robberies occur or in whose territory pirates are based are taking action.

However, it is essential that the companies, Masters and crews of ships operating in waters

where attacks occur also take appropriate measures themselves, such as those outlined in this

Marine Guidance Note, to guard against attack, to minimise the risks if an attack takes place, to

report attacks and to co-operate in criminal investigations if requested to do so.

10.2 Ships entering such areas must be aware of the risk of attack and should take appropriate measures to increase the level of surveillance and security on board and to devise

means of responding to attacks if the opportunity arises. Adhering to the ISPS Code's Ship

Security Plan, following a clearly drafted Counter-piracy Plan and training crews in security

measures and response techniques are essential. Without clearly defined and rigorously

practised procedures the risk of an uncoordinated response during the inevitable confusion of

an attack increases the danger faced by those on board the ship. While a Counter-piracy Plan

and crew training may not ultimately prevent an attack, they should help reduce the risks,

variables and confusion when an attack is taking place by addressing vulnerabilities and

preparing contingency arrangements.

10.3 By their nature, attacks by pirates or armed robbers can pose an immediate threat to the

safety of a ship or to individual crewmembers. When preparing to respond, or when responding

to attacks, Masters and crews should seek to minimise the risk to those on board and seek to

maintain effective control over the safe navigation of the ship. In any balance that has to be

struck between resistance and safety, actions which secure the greatest level of safety must

take priority.

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11 PIRACY REPORTING CENTRE

11.1 The latest information on piracy attacks and the regions of greatest risk may be obtained

free of charge from the ICC International Maritime Bureau's Piracy reporting Centre at Kuala

Lumpur. The centre operates 24 hours a day and can be contacted as follows:

24hr Anti-piracy Helpline ++ 60 3 2031 0014

Office hrs Tel ++ 60 3 2078 5763

Fax ++ 60 3 2078 5769

Telex MA34199 IMBPCI

E-mail: IMBKL@icc-ccs.org

11.2 The Centre issues status reports and warning messages on the SafetyNET service of

Inmarsat C at 0001 UTC each day.

11.3 The Centre also posts a weekly update of attacks on the Internet at www.icc-ccs.org.

This update posted every Tuesday is compiled from the Centre's daily status bulletins to ship at sea.

12 TRAVEL ADVICE NOTICES

12.1 Information on personal safety is available through the Foreign and Commonwealth

Office (FCO) and can be obtained by contacting the FCO or British Embassies, High Commissions and Consulates in the area concerned.

12.2 The full range of notices are available on the FCO's World Wide Web server on the

internet (<http://www.fco.gov.uk>). The email address is consular.fco@gtnet.gov.uk. The Travel

Advice Unit can also be contacted direct on 0870 6060290. Alternatively it can be faxed on 020

7008 0155.

13 AMENDMENTS

13.1 An Addendum to this Marine Guidance Note will be issued, as required, advising of

significant changes in the locations and/ or patterns or methods of attack. The text of this

Marine Guidance Note may be amended to reflect experience based on the reports submitted to

maritime administrations and also on reports submitted to the IMO by other flag or Coastal

States.

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14 FURTHER INFORMATION

Please use the following contact details for Transec if you require clarification or wish to raise an issue on

any of the points made in this document:

Maritime Security Branch

Transport Security and Contingencies Directorate (TRANSEC)

Department for Transport

Zone 5/5 Southside

105 Victoria Street

London

SW1E 6DT

Maritime Helpdesk Telephone (Office Hours): +44 (0) 20 7944 2844

DfT Duty Officer (Out of office hours): +44 (0) 20 7944 5999

Fax (Office Hours): +44 (0) 23 8032 9251

Fax (24 Hours): +44 (0) 23 8032 9251

e-mail: maritimesecurity@dft.dsi.gov.uk

This document is available to view and download on the Department for Transport website under

Transport Security/ Maritime/ Piracy at: www.dft.gov.uk, File Ref: TRSEC 35/ 6/ 1

General Inquiries: 24 Hour Infoline
infoline@mcga.gov.uk
0870 600 6505
MCA Website Address: www.mcga.gov.uk
File Ref: TRSEC 35/6/1
Published: October 2005
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APPENDIX 1

RECENT TRENDS IN PIRACY AND ARMED ROBBERY ATTACKS

A1.1. Since the last issue of this Guidance Note in November 2002 there was an initial surge

in the number of recorded incidents from the previous 2 years, with a total of 445 attacks in the

whole of 2003 according to both the International Maritime Organisation and the International

Maritime Bureau's Piracy Reporting Centre. This figure decreased considerably (a 27%

reduction) in 2004 to 325 attacks and so far in 2005, the number of attacks in the first half of this

year is the lowest since 2000. While this sounds encouraging, the tsunami that occurred on the

26th December 2004 and devastated many of the coastal regions of the countries within and

bordering the Indian Ocean, undoubtedly impacted on piratical capability in the region. Many

groups involved in piracy and armed robbery are likely to have been victims of the tsunami

and/or had their equipment destroyed which in turn led to a two month lull in incidents.

However, since March 2005 incidents of piracy and armed robbery have been on the increase

again.

A1.2. The trend since the early 1990's when the IMB began recording incidents, has risen from

an average of around 100 attacks per year to 300 plus since 1999 although much of this

increase is probably attributable to an improvement in the reporting of incidents which was

chronically low in the early 1990's. It is estimated that even today only about 80% of attacks are

recorded (**all UK flagged ships are urged to report incidents to TRANSEC at the contact**

details in section 14). Taking the difference between actual and recorded attacks into account,

the rise in overall attacks over the last 14 years is not as dramatic as media reporting suggests,

although the trend is clearly upwards. However within the overall figure, there are various

hotspots in the world where piracy and armed robbery is a prevalent and entrenched problem

and attacks are rising, posing a serious problem to merchant shipping. The majority of recorded

attacks now appear to be taking place within territorial waters and usually occur while a ship is in port or at anchor. Such acts are classed internationally as Maritime Armed Robbery and not true Piracy (on the high seas) which constitutes a smaller percentage of attacks.

A1.3. While the total number of attacks has dropped since 2002, there has been an overall 22% increase in the number of serious incidents with many acts of unprovoked and severe violence taking place. The majority of attacks continue to involve the use of knives and/or firearms resulting, in some cases, in death and injury to crewmembers. The majority of these violent attacks in recent years can be largely attributed to local gangs targeting indigenous ships and crews. The types of internationally trading ships that are most often attacked are bulk carrier and general cargo ships due to their low freeboard, followed by container ships and crude oil tankers.

A1.4. Piracy attacks against ships underway are particularly prevalent in South East Asian waters and a large proportion of attacks in this area have occurred in Indonesian territorial waters and particularly in the Malacca Straits (see A.1.5.) and adjoining channels such as the Selat Phillip (Phillip Channel) used by ships making passage via the Malacca Straits. Other attacks have taken place in the South China Sea and in waters adjacent to the Philippines. The Horn of East Africa has recently seen a dramatic increase in attacks on ships, especially off the coast of Somalia, in the Gulf of Aden and in the Red Sea. Until recently all attacks off the Somali coast were deemed to have been launched from the shore and advice up to now has been to stay at least 50 Nautical Miles from the shore. A recent hijacking of a number of ships beyond 100 NM from the eastern Somali coastline indicates that a mother ship was probably used and that the range of the attackers in this region has greatly increased. It is therefore in the interests of all ships transiting the Horn of Africa to be at a high state of alert and readiness for an attack. Attacks can take place in either international waters as piracy or, more commonly, as armed robbery in territorial waters of a Coastal State.

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A1.5. The stretch of water where armed robbery has been most prevalent over the last decade is the Malacca Straits, which in the last four years has accounted for a fifth of all recorded attacks. The straits traverse the territorial waters of three sovereign nations, Malaysia, Indonesia and Singapore. All of the attack profiles previously listed, for example such as attacks

while in port/harbour areas, especially on the Indonesian side, while in anchorages or against ships transiting through have been reported in this area. Due to the straits forming part of the territorial waters of three sovereign states, any solution or efforts to combat piracy here remains diplomatically complex. However, a number of initiatives have been launched in the last year which includes increased co-ordinated maritime patrols and a recent agreement to begin air patrols of the straits by the three states, a new intelligence centre in Singapore and a recent IMO sponsored conference in Jakarta focussing on the security and safety of the straits. In addition Singapore has started deploying new Accompanying Sea Security Teams (ASSET) Teams which will board and escort high-risk shipping within its waters. Malaysia set up a new Maritime Enforcement Agency to patrol its coastline from June this year, taking crew and support from the Navy, and is also deploying armed police on tugs and barges to enhance security. These measures are welcomed additions to the security of ships from piracy and armed robbery but crews should not become complacent and reduce the precautionary measures taken on board their ships.

A1.6. There has been a particular problem in the Niger Delta involving local rebel militia, who are fighting government forces and have been employing pirate style tactics, targeting and attacking ships for their valuables and cargo with oil tankers being the most popular. There have also been reports of hijackings and crew being kidnapped; therefore Masters and crew should be prepared for attacks as this area remains very dangerous. Although the number of recorded incidents in the first quarter of 2005 would appear to suggest a complete cessation of activity, it is likely that such incidents are simply not being recorded and heightened vigilance and preparedness is advisable.

A1.7. Attacks by pirates or armed robbers continue to take place outside of the geographical hotspot areas mentioned above and based on attacks in recent years, in areas of the Caribbean such as Jamaica and Haiti and along parts of the South American coastline, particularly Brazil, Venezuela and Guyana along the northern coast and Peru, Colombia and Ecuador along the western Pacific coast. Whilst the number of reported incidents are significantly lower than in the hotspot areas, Masters and crew should continue to err on the side of caution when transiting these areas.

APPENDIX 2**THE INTERNATIONAL SHIP AND PORT FACILITY SECURITY (ISPS) CODE & SOLAS****AMENDMENTS 2002**

A2.1. The ISPS Code covers all internationally trading passenger ships carrying 12 or more passengers; cargo ships of 500 gross tonnes and above (as measured by the International Convention on Tonnage Measurement of ships, 1969); mobile offshore drilling units and all port facilities (ship/port interfaces) serving these ships. With specific regard to UK ships, ISPS has required the preparation and subsequent agreement with TRANSEC or MCA of a Ship Security Plan (following the completion of a ship security assessment). The Ship Security Plan covers both the protective security measures required on the ship and the appropriate response to a security incident. Once the Ship Security Plan has been approved and a verification inspection has been conducted ships meeting UK requirements are issued with an International Ship Security Certificate. The Code also requires the appointment and training of a Ship Security Officer for each ship and a Company Security Officer for the shipping company who together are responsible for delivering against the Plan's security requirements. ISPS has also brought in a new 3 tier security level system, where Level 1 is the normal operating level, Level 2 is for a heightened alert and Level 3 is for a critical situation where there is an imminent and specific threat. While the security level is primarily based on counter-terrorism considerations, TRANSEC who sets the security level for all UK flagged ships, determines the appropriate security level that UK flagged ships must adopt when operating in a specific country or sea area taking into account other considerations such as the threat from piracy and armed robbery.

However not all Flag States will set security levels for their ships in the same way.

A2.2. There is also now a much greater emphasis on Restricted Areas of a ship, the requirement for access control and pass systems, monitoring capabilities, visitor searching and in the UK, for Government approved training courses. The concept of a Declaration of Security (DoS) has been implemented which requires an agreement to be reached between two ships or between a ship and a port facility when they interface. It details the different security measures each will undertake and can be requested for example when a ship is at a higher security level than a port facility. The requirement to fit two new technological based systems, the Ship

Security Alert System and the Automatic Identification System (see A2.6 for more details) were

also agreed as part of the amendments to SOLAS and under the ISPS Code.

The Ship Security Plan

A2.3. It is now a requirement that all ships that fall within the scope of the ISPS Code must

undergo a Ship Security Assessment, leading to a Ship Security Plan. This plan must be agreed

with the relevant Flag State competent authority in order to receive an International Ship

Security Certificate and thereby comply with the Code. The content of the plan will vary

depending on the ship that it covers but must include details such as the organisational

structure of security for the ship, the ship's communication systems and the security measures

that will be in place at each of the three security levels. The plan is a living document and will

need to be reviewed and updated as circumstances change.

Restricted Areas

A2.4. The Ship Security Assessment also requires the identification and establishment of

Restricted Areas (RAs) onboard the ship, although certain Flag States such as the UK,

determine the minimum baseline requirements which must then feature in the Ship Security

Plan. The plan should specify the extent of the RA, the times of application, the security

measures to be taken to control access to them and to control activity within them.

The purpose

of the RA is to demarcate certain areas of a ship to prevent unauthorised access; protect

passengers and crew; protect sensitive security areas on the ship as appropriate and to protect

the ship's cargo and stores from interference.

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On UK flagged ships all RAs must be clearly marked to show that access is restricted and that

unauthorised presence within the area constitutes a breach of security.

Ship Security Alert System

A2.5. The amendments to SOLAS under Chapter X1-2, Regulation 6 has required the installation of a new ship security alert system (SSAS) on board ships to which

SOLAS applies

(the roll-out is phased depending on the classification of the ship but will be completed during

2006). The purpose of the SSAS is to alert the ship's Flag State competent authority and also

the Company Security Officer of the relevant shipping line to the fact that the security of the ship

is under threat or has been compromised by terrorists. There are a minimum of two activation

points for the SSAS which initiate the transmission of the alert and it is for the Master to decide

on which crewmembers need to be aware of the location of the activation points.

Once

activated, a covert alert will be made to the relevant competent authority and each Flag State must have procedures in place to ensure quick and effective receipt and handling of the alert (the UK's own response procedure has been separately communicated to UK flagged shipping companies). The alert will continue until it is deactivated or reset. While the SSAS is primarily intended for counter-terrorism purposes, in the event of a pirate attack where the ship has been boarded or is very likely to be and when all other radio procedures have either failed or there is not enough time to use them, then the SSAS may be used as a last resort to alert the Flag State. Periodic testing (once a year as a minimum) of the SSAS to test the communication process is advisable although it is important to contact those who will be involved in the test in advance to ensure that no unnecessary response activity is implemented. For information, the UK's competent authority is the Maritime and Coastguard Agency and Ship Security Alerts are received at the MCA's Maritime Rescue and Co-ordination Centre in Falmouth.

Automatic Identification System (AIS)

A2.6. AIS is a shipboard broadcast system that acts like a transponder and operates on the VHF maritime band enabling the ship to communicate both with the shore and with other ships. Operation of AIS is a requirement under Chapter V of the amendments to SOLAS 2002. The system allows a ship's location and movements to be monitored on shore and by another suitably equipped ship up to a notional range of 35 miles. A ship with AIS installed is able to display information such as the size, speed and heading of similarly equipped ships within VHF range.

A2.7. Clearly the risk of having AIS turned on while a ship is transiting through an area known to have a high level of piracy attacks, is that the ship can easily be targeted and located. This is especially the case if 'would be' attackers in the vicinity have been able to obtain their own receiver. Additionally, the advent of open source on-line AIS information has also increased the 'visibility' of ships using AIS. While it is not recommended under ISPS Regulations to turn AIS off as this may affect the safety of the ship, if a situation arises where the Master of the Ship feels under threat by keeping AIS turned on, then UK flagged ships should conduct a risk assessment. If the assessment determines that the threat to the security of the ship is greater than the threat to safety, then the Master should turn AIS off while the threat remains present.

This however may not be the position of other Flag States and Masters and crew of ships should establish their own policy on AIS use in such scenarios.

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APPENDIX 3 SHIP COMMUNICATIONS

Radio Procedures

A3.1. The Navigational Officer on Watch (OOW) should be on duty at all times and should be

extra vigilant when ships are in, or approaching, maritime transit chokepoints, potential ambush

sites and areas where piracy is prevalent. The Master should not normally perform this duty,

though on occasions, this may be unavoidable. Since the mandatory introduction of GMDSS in

February 1999, the OOW now normally performs the radio watch, replacing the dedicated Radio

Operator (RO) who used to carry out this function. To ensure that a ship's bridge is adequately

manned when transiting potentially hazardous waters, it is advisable that a duly qualified,

dedicated crewmember perform Radio Watch duty. This contingency allows the OOW and the

Master to concentrate on navigational duties and maintaining the extra vigilance that is required

when operating in high-risk areas.

A3.2. Prior to entering areas where attacks have occurred, OOWs should practice and perfect

all appropriate radio operational procedures and ensure all transmitters, including satellite ship

earth stations are fully operational and available for immediate use on distress and safety

frequencies. Where a GMDSS installation is provided and "ship's position" data is not automatically updated from an associated electronic navigation aid, OOWs are strongly

recommended to enter the ship's position at regular intervals into the appropriate communications equipment manually. Where an INMARSAT ship earth station is provided it

may prove useful to draft and store "standard messages" (see paragraph A3.10) for ready use

in an emergency in either the equipment's memory or on a computer disk. A special code for

'piracy/armed robbery attack' is now available for use on Digital Selective Calling (DSC)

equipment. Where practicable and appropriate, DSC equipment should be modified to incorporate this facility. Masters should ensure that all procedures to generate a distress alert

on any communications equipment are clearly marked on, or near, the equipment (with the

exception of the Ship Security Alert System as this is a covert system and the obvious positioning of such procedures is likely to reduce the benefits of carrying the equipment).

Masters should also ensure that all appropriate crewmembers are briefed on the operation of such equipment.

A3.3. Masters should bear in mind the possibility that attackers are monitoring both ship to ship and ship to shore communications and using intercepted information to select their targets. Caution should, therefore, be exercised when transmitting information on intended transit tracks and cargo or valuables on board by radio in areas where attacks occur. The implementation of the AIS broadcast system and the availability of online AIS information means that the location of ships, when they are sailing within close proximity of the shore (under 35 miles) is now more accessible to the public and Masters need to be aware of this when transiting high-risk areas.

Radio Watch-keeping and Responses

A3.4. A constant radio watch should be maintained with the appropriate shore or naval authorities when in areas where attacks have occurred. Continuous watch should also be maintained on all distress and safety frequencies, particularly VHF Channel 16 and 2182 kHz.

Ships should also ensure all maritime safety information broadcasts for the area are monitored.

As it is anticipated that INMARSAT's enhanced group calling system (EGC) will normally be used for such broadcasts using the SafetyNET(SM) service, companies should ensure a suitably configured EGC receiver is continuously available when in, or approaching, areas where there is a risk of attack. Companies should also consider fitting a dedicated receiver for this purpose, i.e. one that is not incorporated into a ship earth station used for commercial purposes, to ensure no urgent broadcasts are missed.

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(Masters should note that as detailed in section 11 of this Marine Guidance Note, the IMB Piracy Reporting Centre broadcasts daily status reports to ships in Indian, Atlantic and Pacific Ocean Regions on the SafetyNET service of Inmarsat C at 0001 UTC each day).

A3.5. The International Maritime Organisation (IMO) recommends in MSC Circular 597, issued August 1992 and supplemented by an Addendum issued in May 1993, that reports concerning attacks by pirates or armed robbers should be made to the relevant Rescue Co-ordination Centre (RCC) for the area. Information on RCCs may be found in the Search and Rescue Section of volume 5 of the Admiralty List of Radio Signals. MSC Circular 597 also recommends that governments should arrange for the RCCs to be able to pass reports of attacks to the appropriate law enforcement agencies or naval authorities. The IMO subsequently published

MSC Circular 622/Rev 1 in June 1999. This circular gives detailed recommendations to Governments to assist in the prevention and suppression of piracy and armed robbery against ships. In May 2002 the IMO published MSC Circular 623/Rev 3 as an equivalent guide to companies. Reports of attacks against UK flagged ships should also be made to the CSO and TRANSEC via MRCC Falmouth. Other Flag States will have their own reporting requirements which seafarers should make themselves aware of.

A3.6. In the event Masters are unable to contact the relevant RCC, it is recommended that they report the incident to the IMB Piracy Reporting Centre, which in turn, will pass the message to appropriate authorities (see section 11).

A3.7. If suspicious movements are identified which may result in an imminent attack, the ship is advised to contact the relevant RCC. Where the Master believes these movements could constitute a direct danger to navigation, consideration should be given to broadcasting an "All Stations" (CQ) "Danger Message" as a warning to other ships in the vicinity as well as advising the appropriate RCC. A danger message should be transmitted in plain language on a VHF working frequency following an announcement on VHF Channel 16, and/or transmission of a DSC call on VHF Channel 70 using the "safety" priority. All such messages shall be preceded by the safety signal (Securite). When, in his opinion, there is conclusive evidence that the safety of his ship is threatened, the Master should immediately contact the relevant RCC and, if considered appropriate, authorise broadcast of an "All Stations" "Urgency Message" on VHF Channel 16, 2182 kHz, or any other radio communications service considered to be appropriate; e.g. 500 kHz, INMARSAT, etc. All such messages shall be preceded by the appropriate Urgency Signal (PAN PAN) and/or a DSC call on VHF Channel 70 and/or 2187.5 kHz using the "All Ships Urgency" category. If the Urgency signal has been used and an attack does not, in fact develop, the ship should cancel the message as soon as it knows that action is no longer necessary. This message of cancellation should likewise be addressed to "All Stations".

A3.8. Should an attack occur and, in the opinion of the Master, the ship or crew are in grave and imminent danger requiring immediate assistance, the Master should immediately authorise the broadcast of a Distress message, preceded by the appropriate distress alerts (MAYDAY,

SOS, DSC, etc), using the radio communication systems most appropriate for the area taking into account its GMDSS designation; i.e. A1, A2, A3 or A4. The appropriate RCC should acknowledge receipt and attempt to establish communications. To minimise delay, if using a ship earth station, ships should ensure the coast earth station associated with the RCC is used.

A3.9. Masters should bear in mind that the distress signal is provided for use only in cases where the ship and/or its crew are in grave or immediate danger and its use for less urgent purposes might result in insufficient attention being paid to calls from ships really in need of immediate assistance. Care and discretion must be employed in its use, to prevent its devaluation in the future. Where the transmission of the Distress signal is not fully justified, use should be made of the Urgency signal. The Urgency signal has priority over all communications other than Distress signals.

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Standard Message Formats

A3.10. The following standard formats were agreed by the IMO Sub-Committee on Radio Communications in January 1993 and updated by MSC Circular 622/Rev 1 published in June

1999, are set out below:

- initial messages - piracy attack alert, and
- piracy attack/sighting/suspicious act reports

A3.11 In addition, guidance for the use of radio signals by ships under attack or threat of attack

from pirates or armed robbers is available in Maritime Safety Committee (MSC) Circular 805

published in June 1997. This circular recommends that a "Piracy/ Armed Robbery Attack

Message" should be sent through INMARSAT-C or on an available DSC or other distress and

safety frequency. Given that some pirates or armed robbers may carry equipment capable of

detecting all radio signals, including satellite communications, this circular also recommends

that communication should not be attempted if a ship has been boarded and its crew specifically

ordered to maintain radio silence.

Secreted VHF Transceiver

A3.12. As a result of communications equipment being damaged in the past by attackers to

prevent an early alarm being raised, particularly when attacks have taken place off port,

companies and Masters are recommended to secrete a VHF transceiver on the ship to allow

contact to be established with the shore authorities if the main communications equipment is put

out of action. Consideration could also be given to the installation of handheld Iridium

telephones. These sets have a longer range than the traditional VHF transceiver, and would allow the ships' Master to inform, and converse with, more distant authorities as well as the authorities in the region of the attack.

INITIAL MESSAGE-PIRACY/ ARMED ROBBERY ATTACK ALERT

Ship's name and call sign/INMARSAT ID (plus ocean region code) IMO number and MMSI.

MAYDAY/DISTRESS ALERT (see Note below).

URGENCY SIGNAL

PIRACY/ARMED ROBBERY ATTACK.

Ship's position (and time of position UTC) – including Course Speed
Nature of Event.

Note:

It is expected that this message will be a 'Distress Message' because the crew and/or ship will be in grave or imminent danger when under attack. Where this is not the case,

the word MAYDAY/DISTRESS ALERT is to be omitted.

Use of distress priority (3) in the INMARSAT system will not require MAYDAY/DISTRESS ALERT to be included.

If the Master and Crew do not have time to follow the above procedure in the event of an

attack, then the covert Ship Security Alert should be activated to inform the Company Security Officer and the relevant Flag State's competent authority.

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PIRACY/ARMED ROBBERY ATTACK/SIGHTING/SUSPICIOUS ACT REPORT

Ship's name call sign and IMO number.

Reference initial PIRACY/ARMED ROBBERY ALERT.

Position of incident.

Date/time of incident (UTC).

Details of incident, e.g.

Method of attack.

Description of suspect craft.

Number and brief description of attackers, including weapons carried and/or language spoken.

Injuries to crew.

Damage to ship.

Brief details of stolen property/cargo.

Last observed movements of suspect ships, e.g.

Date/time/course/position/speed.

Assistance required.

Preferred communications with reporting ship, e.g.

Appropriate Coast Radio Station. HF/MF/VHF. INMARSAT ID (plus ocean region code), MMSI.

Date/time of report (UTC)

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APPENDIX 4

ACTS OF PIRACY AND ARMED ROBBERY ALLEGEDLY COMMITTED AGAINST SHIPS

REPORTED BY MEMBER STATES OR INTERNATIONAL ORGANISATIONS IN CONSULTATIVE STATUS

IMO No.

Name/Type of ship/Flag/Gross Tonnage

Date/Time

Position of the incident*

Details of the incident

Consequences for crew, ship, cargo

Action taken by the Master and the crew

Was the incident reported to the Coastal Authority? If so, to whom?

Reporting State or international organisation

Action taken by the Coastal State

*The position given should be as accurate as possible including latitude and longitude co-ordinates or as bearing and distance from a conspicuous landmark.

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APPENDIX 5

SUMMARY OF GENERAL PRECAUTIONS

Be vigilant - the majority of attacks will be deterred if the robbers are aware that they have been

observed and that the crew has been alerted and is prepared to resist attempts to board.

Ensure that

crewmembers are seen to be constantly moving around the ship, making random rather than predictable

patrols.

Maintain a 24 visual and security watch - including short range radar surveillance of the waters around

the ship. The use of a small marine radar, fitted in such a way to ensure complete coverage of the stern,

un-obscured by the radar shadow of the ship itself, should be considered. Keep a special look-out for

small boats and fishing boats that attackers often use because they are difficult to observe on radar. In

piracy "hotspots", discourage the crew from trading with locals using small craft which may approach the ship.

Strengthen night watches - especially around the rear of the ship and anchor chains/mooring ropes

particularly between the hours of 0100 and 0600 when most attacks occur, with continuous patrols linked

by "walkie-talkie" to the bridge. A drill should be established for regular two-way communication between

the watch and the bridge. If possible, an additional officer should assist the normal bridge watch keepers

at night, in order to provide a dedicated radar and visual watch for small craft that might attempt to

manoeuvre alongside, and allow the watch keepers to concentrate on normal navigational duties. Night

patrols of the ship should be staggered to avoid patterns forming which pirates could observe.

Seal off means of access to the ship - fit the hawse pipe plates, lock doors and hatches etc. While

taking due account of the need for escape in the event of fire or other emergency, so far as possible all

means of access to the accommodation should be sealed off and windows and doors of crewmembers'

quarters should be kept locked at all times. Blocking access between the aft deck and the crewmembers'

quarters is particularly important.

Establish radio contact - and agree emergency signals specifically for attacks with crew, shore

authorities etc.

Provide adequate lighting - deck and over-side lights, particularly at the bow and stern, should be

provided to illuminate the deck and the waters beyond and to dazzle potential boarders. Searchlights

should be available on the bridge wings, and torches should be carried by the security patrols to identify suspicious craft. Such additional lighting should not however be so bright as to obscure navigation lights or interfere with the safe navigation of other ships.

Water hose and other equipment - which may be used to repel potential boarders, should be readily available. Keep a constant supply of water provided to the hoses. In danger areas keep the deck wash pump in operation at all times - spray water over the rear deck where it is easiest for the attackers to board. Consider fitting or equipping the ship with passive security/detection equipment e.g. Perimeter Intruder Detection Systems, CCTV, Night Vision equipment and ensure that where possible, they are linked to an alarm system.

Reduce opportunities for theft - remove all portable equipment from the deck, so far as is possible stow containers containing valuables door-to-door and in tiers and seal off access to the accommodation.

Establish a secure area(s) - if large numbers of armed robbers succeed in boarding the ship, it may be essential for crewmembers to retreat to a secure area(s). Depending upon the construction of the accommodation and the extent to which areas can be effectively sealed off, the secure area may be established in the accommodation as a whole or in the Restricted Areas, for example, around the bridge and inside the engine room. Provision should be made, however, for escape during a fire or other emergency.

A secure area in this sense is intended purely for the safety of the crew and should not be confused with a Restricted Area, which is a mandatory SOLAS ISPS Code requirement for the security of the ship.

Inform crewmembers of the Counter-piracy Plan - hold training exercises and ensure that they are fully briefed on the actions that they need to take in the event of an attack.

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