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**THE MENACE OF PIRACY AND ITS EFFECTS ON THE MARINE  
INSURANCE INDUSTRY**

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Research dissertation presented for the approval of Senate in fulfilment of part of the requirements for the Masters Degree in Law (LLM) in approved courses and a minor dissertation. The other part of the requirement for this qualification was the completion of a programme of courses.

I hereby declare that I have read and understood the regulations governing submission of the Master of Laws dissertations including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

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**OLUWOLE AKINYEYE**

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## **DEDICATION**

This dissertation is dedicated to my father for being a constant inspiration in my life and his never ending belief and trust in me.

## LIST OF ABBREVIATIONS

AMISOM	African Union Mission in Somalia
AICC	American Institute Cargo Clauses
AIHWRS	American Institute Hull War Risks and Strikes Clauses
AIMU	American Institute of Marine Underwriters
FC&S	Free of Capture and Seizure Clause
FPAEC	Free of Particular Average – English Conditions
GAM	<i>Gerakan Aceh Merdeka</i>
HACGA	Heads of Asian Coast Guard Agencies
ICC	Institute Cargo Clauses
ITCH	Institute Time Clauses Hulls
IVCH	Institute Voyage Clauses Hulls
IWSCH	Institute War and Strikes Clauses Hulls
IMB	International Maritime Bureau
IMO	International Maritime Organisation
IHC	International Hull Clauses
ISPS Code	International Ship and Port Facility Security Code
IUA	International Underwriting Association
ICU	Islamic Courts Union
JWC	Joint War Committee
K & R Insurance	Kidnap and Ransom insurance
MIA	Marine Insurance Act
MRCCS	Maritime Rescue Co-Ordination Centres
MEND	Movement for the Emancipation of the Niger Delta
NIMASA	Nigerian Maritime Administration and Safety Agency

NEP&I	North of England Protecting and Indemnity Association Limited
P&I	Protection and Indemnity Insurance
RECAAP	Regional Cooperation Agreement on Combating Piracy and Armed Robbery Against Ships in Asia
TFG	Transitional Federal Government
UNCLOS	United Nations Convention on Law of the Sea

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# 1 INTRODUCTION

## 1.1 BACKGROUND

For many, the word *piracy* brings to the mind the amazing adventures and activities of Johnny Depp as Jack Sparrow, the villain in the movie ‘The Pirates of the Caribbean’ which eulogised and romanticised the pariah that today’s pirate has undoubtedly become. The reality is that the scourge that piracy is has gripped the shipping industry by its jugular. It has led to colossal loss in all sectors of the shipping industry, and is particularly felt in the marine insurance sector. The menace of piracy did not however, spring up overnight, and has constituted a problem right from the days of yore when man first started to conquer the oceans in his quest for riches, fame, adventure and discovery of new lands.

Piracy has been known to be in existence as far back as the 13<sup>th</sup> century B.C and particularly flourished during the 1600’s and 1700’s which was known as the golden age of piracy.<sup>1</sup> Pirates are aptly described as daredevil sea predators who attack and plunder ships and rob them of valuables, cargoes, money and at times even steal the ship in whole for conversion to further their nefarious activities and purposes. Pirates were fearless (and still remain so) without respect for persons or country and thus it happened that the great Julius Caesar of the Roman Empire was once kidnapped by pirates and held captive until his ransom was paid. In retaliation, he assembled a fleet after his release, chased after the pirates, succeeded in capturing them and thereafter executed them.<sup>2</sup> This disregard of national authority is very much the same situation regarding present day piracy as pirates will attempt to capture any vessel regardless of whether or not such a vessel flies the flag of a world superpower.

Piracy and the activities of pirates were never restricted to any particular part of the world and appeared to have surfaced in every part of the world’s waterways which ships plied as commercial routes for the purposes of transportation of goods and people. Pirates were known and classed in reference to the areas of the world’s oceans and seas in which they operated and also in relation to where the pirates originated from. Therefore, there were pirates who were known as the “Pirates in the

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<sup>1</sup> ‘A brief history of piracy: royal naval museum library’. Available at [www.royalnavalmuseum.org/info\\_sheets\\_piracy.htm](http://www.royalnavalmuseum.org/info_sheets_piracy.htm) [Accessed 6 June 2011].

<sup>2</sup> ‘History of piracy’. Available at [www.pirateshipwrecks.com](http://www.pirateshipwrecks.com) [Accessed 6 June 2011].



Orient” who operated in the waters close to Japan and India;<sup>3</sup> “Mediterranean pirates” who sailed and operated in the Mediterranean sea; “Pirates of the Caribbean” who operated in the Caribbean sea. There were a host of others.

The trademark of pirates and which still remains the present day position was the violent takeover, plunder and robbery of ships. Though pirates did not necessarily engage in needless taking of lives as long as their victims did not put up much resistance, this did not remove the fact that countless numbers of lives were lost as a result of the activities of pirates. However, it is pertinent to note that the acts of piracy have sometimes been linked with the acts of privateers and acts of terrorism, while there seems to be a thin line dividing these different acts of violence, there is indeed a distinction to be made between them which becomes pertinent in relation to marine insurance policies and the possibility of an assured losing its ability to be indemnified. A distinction will be made in Chapter Two between piracy and these other concepts.

## **1.2 Structure of Thesis**

Chapter One entails an introduction to the concept of piracy and its journey to modern status and position of piracy. The chapter gives a general view of the thesis and sets out the significance and objectives of the thesis.

Chapter Two analyses the distinction between piracy and other related concepts. The chapter takes a look at the definition of piracy and how it is viewed from different jurisdictions. It examines how piracy is viewed in the marine insurance industry and how this perspective differs from that held by the shipping industry and the United Nations. The chapter examines the shortcomings of the various definitions of piracy and how these shortcomings have created lapses in the fight against piracy and most especially how definitions affect the insurance contract between the insurer and the assured.

Chapter Three examines the causes of piracy and the reasons why it appears piracy has come to stay, at least for the time being on the high seas. Special emphasis will be placed on the Gulf of Aden, Gulf of Guinea and the South China Sea with case studies and the reasons for their being seen as a core factor in the fight against piracy.

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<sup>3</sup> [www.library.thinkquest.org/JO110360/history.htm](http://www.library.thinkquest.org/JO110360/history.htm) [Accessed 6 June 2011].

Chapter Four examines the various insurance policies and how present day piracy has affected the cover given by these policies in relation to acts of piracy vis a vis the insurer- assured relationship. An analysis will also be made of how the marine insurance industry, most especially, in the London market, has responded to the increased and frustrating level of acts of piracy in recent years. The various pirate-endemic areas analysed in Chapter Three are considered in appraising how the piratical activities in these areas have affected the present position taken by the insurer in its continued effort to insure piracy as a peril. The vital issue of ransom payment is examined in detail, most especially in relation to the view taken by the judiciary and various jurisdictions with regard to the legality of the payment of ransom.

Chapter Five examines the measures taken by the international community to combat piracy. It examines the counter measures taken by the shipowners to deter piracy. It also analyses the success of these measures and takes a look at upcoming developments to curb this scourge.

Chapter six is the conclusion in which the author suggests certain workable remedies to combat piracy.

### **1.3 Objective of Thesis**

This thesis has the aim of analysing the metamorphosis of piracy into its present day status as a menace and how it has impacted most especially on the marine insurance industry. The marine insurance industry is basically comprised of the relationship between the assured (shipowner/cargo owner) and the insurer, and the nexus which creates the relationship between these parties lies in the marine insurance policy which is taken out by the assured and underwritten by the insurer. There is no doubt that the peril of piracy is one of the perils the assured would want to insure against in any marine adventure most especially in view of the surge of pirate attacks in recent times. This thesis therefore provides an examination of the response of the marine insurance industry to confront the various challenges and effects brought about by piracy. In analysing the role of piracy in relation to the marine industry, emphasis will be placed on the Gulf of Aden, the Gulf of Guinea and the region of South Sea Asia. The reason for this focus is because of the strategic role they play in the shipping industry, especially in view of the fact that they represent vital shipping

lanes for most of the world's ocean plying vessels and also in view of the fact that the greatest number of attack by pirates have been recorded in these regions more than any other part of the world. Emphasis will also be placed on English law, in view of the fact that many of the insurance policies taken out in the marine insurance sector are subject to English law.

## 2 PIRACY AND RELATED CONCEPTS DISTINGUISHED

Piracy has been confused with certain related concepts which have certain characteristics in common with the concept of piracy. For the purpose of this thesis, the need to establish the difference between piracy and these related concepts becomes pertinent in view of the fact that an assured who has been insured against the risk of piracy under a marine insurance policy, could suddenly become exposed in a situation where the insured peril of piracy becomes beclouded by the elements of these related concepts which have similar characteristics with piracy.

### 2.1 Piracy and Privateers distinguished

There seems to be a thin line between piracy and privateering. Both are characterised by the use of violence and force in their operation. However, a number of scholars present the argument that there is a clear distinction between pirates and privateers. Privateering came about in 1243 when the first Letter of Reprisal was issued by King Henry III of England.<sup>4</sup> The letter gave a license to privateers to attack ships of enemy states without the fear of sanctions.

A privateer is essentially an armed ship issued with a document from a government known as a “Letter of Marque and Reprisal”<sup>5</sup> and the men who controlled a privateer were also referred to as privateers.<sup>6</sup> These letters of marque and reprisal constituted government authority granting a commission to private shipowners to attack, plunder and seize ships<sup>7</sup> of a hostile state. Privateering was in reality piracy which was recognised and given legitimacy by a state and by international law.<sup>8</sup> Virtually all states recognised the rights of other nations to issue a decree of privateering.<sup>9</sup> A ship captured by a privateer was taken to the court of admiralty of the commissioning state which was known as the prize court, to be determined whether or not that ship was a lawful prize,<sup>10</sup> in other words to confirm if that ship had been taken within the ambits of the letter of marque and reprisal issued to the privateer. Where the taking

<sup>4</sup> Pirate Encyclopaedia ‘English privateers.’ Available at [www.ageofpirates.com/article.php?Englishprivateers](http://www.ageofpirates.com/article.php?Englishprivateers) [Accessed 8 June 2011].

<sup>5</sup> Pirates of the Caribbean ‘What be a pirate?’ Available at [www.blindkat.hegewisch.net/pirates/diff.html](http://www.blindkat.hegewisch.net/pirates/diff.html) [Accessed 8 June 2011].

<sup>6</sup> Ibid.

<sup>7</sup> CK Marshall ‘Putting privateers in their place: the applicability of the marque and reprisal clause to undeclared wars’ (1997) 64 *U. Chi. L. Rev* 953 at 954.

<sup>8</sup> E Kontorovich ‘The piracy analogy: modern universal jurisdiction's hollow foundation’ (2004) 45 *Harv.Int'l L.J* 183 at 211.

<sup>9</sup> Ibid.

<sup>10</sup> Ibid at 213.

of the vessel was proved to be lawful, the vessel was condemned as prize, sold and the proceeds were split between the government and the privateer. The person who bought the prize possessed a superior title against even the owner regardless of the fact that it had been acquired by force.<sup>11</sup>

The important and vital role which privateering played could be seen in its utilization during the American Revolution, when the American colonies declared independence from Great Britain.<sup>12</sup> The American naval forces could not go into a headlong confrontation with the British navy which at that time was the world's most powerful.<sup>13</sup> The panacea to the situation was the resort of the Americans to privateering which they utilized by enacting laws for letters of marquee and reprisal<sup>14</sup> which made lawful the seizure of British ships and cargo with the motive of disrupting British commerce. Privateering indeed posted military victories for the Americans in the War of Independence and the War of 1812.<sup>15</sup> Privateering was eventually abolished by the Declaration of Paris in 1856, but many states including the United States and Spain refrained from joining the treaty.<sup>16</sup> However, the issuing of the letter of marquee was stopped by the United States after the war of 1812, though the power to do so has never been repudiated.<sup>17</sup>

The brotherhood of piracy and privateering was reflected in the nature of the execution of their operations which involved the attack, plunder and seizure of ships and at times the killing of those on board the ships in cases where stiff resistance was put up. The consanguinity was delineated only by the issuing of the letter of marquee which rendered the privateer immune to charges of piracy<sup>18</sup> without which he would be branded a pirate and would be condemned to the gallows if caught. However, it is important to note that a privateer was regarded for all purposes and at all times as a pirate by a hostile and belligerent state if caught by that state.

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<sup>11</sup> Kontorovich (note 8) at 213-214.

<sup>12</sup> J Frayler 'Privateers in the American revolution.' Available at [www.nes.gov/revwar/about\\_the\\_revolution/privateers.html](http://www.nes.gov/revwar/about_the_revolution/privateers.html) [Accessed 10 June 2011].

<sup>13</sup> Ibid.

<sup>14</sup> Marshall (note 7) at 961.

<sup>15</sup> Kontorovich (note 8) at 221.

<sup>16</sup> Ibid.

<sup>17</sup> Ibid.

<sup>18</sup> Ibid at 214.

## 2.2 Piracy and Maritime Terrorism distinguished

There are several divergent views concerning the nexus between piracy and terrorism, while some exponents argue that piracy and terrorism are so interwoven as to constitute one and the same crime, there are others who hold the contrary view that there is a fine line of distinction between the two. The words ‘terrorism’ and terrorist were first made use of during the French Revolution and the use of the word “terrorism” originated in 1795 in reference to the Revolutionary government’s reign of terror.<sup>19</sup> Terrorism stems from an ideological basis<sup>20</sup> and employs violence as its primary weapon of projection against a perceived opposition. The essential characteristic of terrorism is its political motivation fuelled by religious fundamentalism, ethno-nationalist demands, and ideology<sup>21</sup> in contrast to an economic one. There is no contest that terrorism and especially maritime terrorism bears a semblance to piracy as both crimes indulge in the use of violence at sea, nevertheless the two crimes are not one and the same.

The basic distinction between the two crimes stem from the “private versus political nature of the violence”.<sup>22</sup> Unlike the thin line of distinction which exists between piracy and privateers, there appears to be a quite a gulf of distinction which exists between piracy and terrorism. Piracy unlike terrorism has no political undertone, the motivation for piracy is exclusively an economic one, the fact that in recent times terrorists have now engaged pirate-like tactics in the shipping industry in perpetrating their evil acts does not detract from the fact that violent acts in order to be considered acts of piracy must have certain elements which include the use of violence, that the act must be committed by one vessel against the other<sup>23</sup> and the intention must be to rob and plunder.<sup>24</sup>

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<sup>19</sup> ‘Early history of terrorism’. Available at [www.terrorism-research.com/history/early.php](http://www.terrorism-research.com/history/early.php) [Accessed 12 June 2011].

<sup>20</sup> International law ‘From piracy to terrorism’. Available at [www.law-teaching.group.shef.ac.uk/law3018/index.php/chapter\\_6\\_-\\_international\\_law:\\_from\\_piracy](http://www.law-teaching.group.shef.ac.uk/law3018/index.php/chapter_6_-_international_law:_from_piracy) [Accessed 4 July 2011].

<sup>21</sup> C Vallar ‘Pirates & privateers; The history of maritime piracy-piracy versus terrorism’. Available at [www.cindyvallar.com/terrorism.html](http://www.cindyvallar.com/terrorism.html). [Accessed 10 July 2011].

<sup>22</sup> T Garmon ‘Reconciling the law of piracy and terrorism in the wake of September 11<sup>th</sup>’ (2002) 27 *Tul. Mar. L. J* 257.

<sup>23</sup> *Ibid.*

<sup>24</sup> *Ibid.*

Another major distinction between piracy and terrorism lies in the fact that “piracy on the high seas is a universal crime and can be repressed by any nation, while repression of terrorism on the high seas is legally confined to particular nations and circumstances”.<sup>25</sup> Furthermore terrorists, apart from their political ideologies, also carry out their activities with the additional motivation of attracting as much attention as possible to their cause and plight and also aim to wreak as much disaster and havoc as possible, while pirates on the contrary seek to avoid attention as much as possible “and will inflict only as much harm and damage as is necessary to accomplish their mission”.<sup>26</sup> In relation to target, “victims of piracy have to be ‘materially satisfying’ to the criminals”.<sup>27</sup> Pirates have no code as regards the nationality, race or religion of their targets as long as there is gain to be had. Terrorists on the contrary identify and choose their targets with specific motives in mind. However, there is no doubt that piracy and terrorism continue to become more entwined by the day as terrorists have now resorted to attacking ships not only as a mark of expressing their political objectives, anger, resentment and beliefs, but also as a tactic in generating funds to further their evil motives.

The case of the *Achille Lauro* presents a classic example of the interwoven nature of piracy and terrorism. The *Achille Lauro* was a cruise ship carrying about 400 passengers at the time it was hijacked by Palestinian terrorists who demanded the release of 50 Palestinian prisoners held by Israel. They killed a disabled 69 year old American tourist and threw his body and wheelchair overboard. The hijackers eventually surrendered after two days in exchange for safe passage. The *Achille Lauro* incident shows how terrorists have now employed the use of piratical acts in trying to achieve their evil motives. It will be noted that the United States deemed the incident as an act of piracy, though the general view is that the incident was one purely of maritime terrorism.

There is no contest that while piracy is an evil phenomenon which has plagued mankind from the days of old,<sup>28</sup> maritime terrorism has only recently manifested itself with the hijacking of the *Achille Lauro* “serving as a wake-up call”.<sup>29</sup>

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<sup>25</sup> GG Ony-Webb *Piracy, Maritime Terrorism and Securing The Malacca Straits* (2006) at 86.

<sup>26</sup> *Ibid* at 88.

<sup>27</sup> J Xu ‘Piracy as a maritime offence: some public policy considerations’ (2007) *J.B.L.* Sep, 639 at 646.

<sup>28</sup> H Tuerk ‘Combating terrorism at sea: the suppression of unlawful acts against the safety of maritime navigation’ (2008) 15 *U. Miami Int'l & Comp. L. Rev* 337 at 365.

## 2.3 Definition of Piracy

There is a deluge of definitions of piracy arising from various sources, notably international law, customary law, case law and even municipal law. In spite of this wealth of definitions on piracy, a common factor which characterises these various definitions is that they are fraught with shortcomings in providing an all encompassing definition of piracy. Let us examine these definitions arising from various quarters and their significance.

### 2.3.1 Definition under Customary International Law

Despite the fact that piracy is one of the oldest crimes known to man, no authoritative definition of piracy was known to exist under customary international law.<sup>30</sup> Disputes whether piracy encompasses an intent to rob; whether acts of insurgency aimed at overthrowing a government should be given piratical recognition; whether the piratical act must be compulsorily committed by one ship against another or could occur on the same ship; all contributed to a deadlock in arriving at a universal definition of piracy.<sup>31</sup>

### 2.3.2 Definition under 1958 Geneva Convention and 1982 Law of the Sea Convention

In contrast to customary international law, article 101 of the 1982 United Nations Convention on Law of the Sea (UNCLOS) defines piracy as follows:

*“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)”<sup>32</sup>*

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<sup>29</sup> Tuerk (note 28) at 365.

<sup>30</sup> M Halberstam ‘Terrorism on the high seas: the Achille Lauro, piracy and the IMO convention on maritime safety’ (1988) 82 *A.J.I.L.* 269 at 272.

<sup>31</sup> *Ibid* at 272-273.

<sup>32</sup> United Nations Convention on Law of the Sea 1982, Art 101.



This provision is a verbatim reproduction of Article 15 of the 1958 Geneva Convention on the High Seas.<sup>33</sup> Certain problematic issues arise from the provisions of this convention which are examined below.

### I The High Seas Prerequisite

The provisions of article 101 limit the crime of piracy to the 'high seas' which means that the crime "can only take place within clearly prescribed locations, those being the high seas or a place outside the jurisdiction of any State".<sup>34</sup> The basis for restricting the definition of piracy to attacks on the 'high seas' probably evolved from the belief that the crime "interfered with international shipping on the high seas. If this interference occurred in territorial waters, the coastal state could resolve this situation by enacting its own municipal legislation".<sup>35</sup> Therefore, piratical acts committed in a country's territorial waters are not deemed as piracy under the Convention<sup>36</sup> which has certain worrisome effects. Piracy is considered as the original foundation for universal jurisdiction which bestows upon "every state the jurisdiction to pursue, arrest, and prosecute pirates on the high seas"<sup>37</sup> and this jurisdiction is provided for under the UNCLOS.<sup>38</sup>

The UNCLOS prerequisite of an attack to occur on the high seas for it to be deemed an act of piracy, constrains the ability of states to harness the concept of universal jurisdiction in employing their warships to investigate, arrest or capture pirates which venture into the territorial waters of a host state.<sup>39</sup> This position creates some problems; firstly, pirates may enjoy some form of immunity from a warship in hot pursuit once they get into the territorial waters of a third state;<sup>40</sup> secondly, offenders who are caught may escape prosecution unless the coastal state has a municipal law which defines and prescribes sanctions for acts of piracy;<sup>41</sup> thirdly, pirates will be

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<sup>33</sup> Garmon (note 22).

<sup>34</sup> D Doby 'Piracy Jure Gentium: the jurisdictional conflict of the high seas and territorial waters' (2010) 41 *J. Mar. L. & Com* 561 at 567.

<sup>35</sup> BH Dubner 'Human rights and environmental disaster - two problems that defy the "norms" of the international law of sea piracy' (1997) 23 *Syracuse J. Int'l L. & Com.* 1 at 17.

<sup>36</sup> Doby (note 34) at 567.

<sup>37</sup> *Ibid* at 568.

<sup>38</sup> See Articles 100, 105 & 111 of UNCLOS.

<sup>39</sup> Doby (note 34) at 569.

<sup>40</sup> Article 111 (3) provides that "The right of hot pursuit ceases as soon as the ship pursued enters the territorial sea of its own State or of a third State".

<sup>41</sup> Garmon (note 22).

able to attack commercial ships in states which lack the wherewithal, resources and capability to police their own waters.<sup>42</sup>

Therefore, Somalia's territorial waters, lacking a national military presence and the authority of a functional government would be out of bounds. This would constitute a barrier to foreign warships attempting to apprehend pirates as those warships must retreat in their pursuit of pirates as soon as those pirates cross over into Somalia's territorial waters.<sup>43</sup> It has therefore been suggested that states should seek an amendment of the provisions of UNCLOS to erase the high sea requirement.<sup>44</sup> The writer is in agreement with this suggestion and is of the opinion that the right of innocent passage<sup>45</sup> which constitutes an exception to the non entry of ships of war into a coastal state's territorial sea should be extended to cover the pursuit of pirates by foreign warships into foreign territorial waters since pirates are regarded as *hostis humanis generis*<sup>46</sup> i.e "the common enemy of mankind".<sup>47</sup>

## II The Private End Prerequisite

As stated earlier, there is a thin line of distinction between piracy and privateering which was basically the 'Letter of Marque' issued by a commissioning government which gave legal recognition to the piratical acts of the privateers. In other words privateering was no more than "state sponsored piracy"<sup>48</sup> by which a percentage of the proceeds garnered by the privateers was remitted to the state on a profit sharing formula basis. It could be said that the gradual emergence of a definition of piracy in international law<sup>49</sup> brought about the need to distinguish between privateering which was commissioned by governments and which was nothing more than 'glorified piracy' and those acts of piracy which had failed "to comply with the formalities of licensing"<sup>50</sup> and thereby lacked legal backing and which were deemed to be for private purpose.

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<sup>42</sup> EC Stiles 'Reforming current international law to combat modern sea piracy' (2004) 27 *Suffolk Transnat'l L. Rev* 299 at 323-324.

<sup>43</sup> Doby (note 34) at 570-571.

<sup>44</sup> Stiles (note 42) at 323-324.

<sup>45</sup> Articles 17 & 45 of UNCLOS grants the right of innocent passage to ships passing through a state's territorial sea.

<sup>46</sup> AP Rubin *The law of Piracy*, 92-94,97 (2<sup>nd</sup> Edition).

<sup>47</sup> Doby (note 34) at 565-566.

<sup>48</sup> M Madden 'Trading the shield of sovereignty for the scales of justice: a proposal for reform of international sea piracy laws' (2009) 21 *U.S.F Mar.L.J* 139 at 143.

<sup>49</sup> Madden (note 48) at 144.

<sup>50</sup> Kontorovich (note 8) at 211.

In view of these historical circumstances, it was hardly surprising that the ‘private end’ prerequisite was incorporated into the definition of piracy<sup>51</sup> in the 1932 Harvard Draft Convention on Piracy (Harvard Draft),<sup>52</sup> the 1958 Geneva Convention on the High Seas,<sup>53</sup> and UNCLOS.<sup>54</sup>

However, it is perplexing that the ‘private ends’ prerequisite continues to remain in the present day definition of piracy. It may be said that while there was a need for the ‘private ends’ prerequisite up till and around the 19<sup>th</sup> Century in order to distinguish between state recognised privateering and acts of piracy not sanctioned by the state,<sup>55</sup> there appears to be no clarity regarding the reason for the persistence of the private ends prerequisite in the definition of piracy long after privateering had ceased to exist.<sup>56</sup> Madden is of the opinion that the reason could be that piracy was not considered a pervasive problem by the comity of nations when the Harvard Draft Convention was been compiled and that the researchers had for reasons of simple expediency adopted an archaic definition of piracy which had originated from the era of privateering.<sup>57</sup> The reality is that piracy has now evolved to be a monster that has become a pervasive problem and coupled with the ‘death of privateering’, the private end prerequisite is no longer tenable and is now outdated.

### III The Two Ships Prerequisite

In accordance with the provisions of article 101 of UNCLOS, an attack must be carried out by one ship or aircraft against another ship or aircraft for it to be deemed to be an act of piracy. The reasoning behind the ‘two ships’ prerequisite stems from the belief “that acts committed onboard a single ship were deemed to be of concern to only the vessel's flag state, and were not properly the subject of international law”.<sup>58</sup> Therefore, it would mean that those instances where the crew of a ship seized the ship or where possession of such a ship was taken over by the passengers or where the passengers or the crew engaged in appropriation of the cargo on board the ship,<sup>59</sup> would not legalise the intervention of a foreign warship seeking to apprehend

<sup>51</sup> Madden (note 48) at 144.

<sup>52</sup> See Draft convention on Piracy Art.3,26 *AM.J.INT'L L.* 743 (Supp.1 932).

<sup>53</sup> United Nations Convention on the High Seas Art.15, Apr. 29, 1959,450 U.N.T.S. 82.

<sup>54</sup> United Nations Convention on Law of the Sea Art.101(a).

<sup>55</sup> Madden (note 48) at 144.

<sup>56</sup> *Ibid.*

<sup>57</sup> *Ibid* at 145.

<sup>58</sup> *Ibid* at 147.

<sup>59</sup> HE Jesus ‘Protection of foreign ships against piracy and terrorism at sea: legal aspect’ (2003) Vol 18, No 3 *The International Journal Of Marine And Coastal Law*, 363at 376.

the culprits on the grounds of piracy.<sup>60</sup> The reality of the present day situation is that pirates do not necessarily have to commit their crimes from another ship, but could well do so from within a ship on which they are on board. Thus in relation to this development, Malvina Halberstam had this to say “In the past, pirates used one ship to attack another and the motive was material gain. Today, terrorists such as the hijackers of the *Achille Lauro* seize a ship, threaten its passengers and kill them without regard to the flag it flies or the nationality of the victims. That they do so by boarding the ship disguised as crew or passengers, rather than by attacking it from another ship...”.<sup>61</sup>

The hijacking of the *Achille Lauro* shows that pirates can employ the same tactics used by the hijackers to carry out their activities from within a ship. The ‘two ships’ prerequisite has now become obsolete and there is no contesting the fact that the definition of piracy is in dire need of overhauling and piratical attacks such as hijacking and suicide bombing ought to be reined into a modernised definition of piracy regardless of the fact that these acts occur on board a single ship.

### 2.3.3 The International Maritime Bureau (IMB) definition

The International Maritime Bureau (IMB) is a specialised division of the International Chamber of Commerce and was established to combat maritime crime and malpractices.<sup>62</sup> Piracy is defined by the IMB as:

*“An act of boarding or attempting to board any ship with the apparent intent to commit theft or any other crime and with the apparent intent or capability to use force in the furtherance of that act”*<sup>63</sup>

The definition of piracy by the IMB is broad and incorporates any attack on a ship regardless of its being anchored, berthed or at sea.<sup>64</sup> However, the IMB’s definition appears not to have been given any recognition in international law or by domestic law.<sup>65</sup>

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<sup>60</sup> Jesus (note 59).

<sup>61</sup> Halberstam (note 30) at 298.

<sup>62</sup> International Chamber of Commerce-International Maritime Bureau ‘Piracy and armed robbery against ships, annual report 1January – 30 December 2007’ at 1. Available at <http://www.cargosecurityinternational.com/dataimages/IMBannual.pdf> [Accessed 14 July 2011]

<sup>63</sup> International Chamber of Commerce-International Maritime Bureau (note 62) at 3.

<sup>64</sup> DR Dillon ‘Maritime piracy: defining the problem’ SAIS Review, Volume 25, Number 1, 2005 at 155. Available at <http://muse.jhu.edu/journals/sais/summary/v025/25.1dillon.html> [Accessed 2 August 2011].

<sup>65</sup> Z Keyuan ‘New developments in the international law of piracy’ (2009) 8 *Chinese J. Int’l L* 323 at 327.

### 2.3.4 Definition of Piracy in relation to Marine Insurance Contracts

In view of the realisation that the various definitions of piracy inadequately provide an all encompassing definition for the modern day phenomenon of piracy, it therefore becomes pertinent to have a definition of piracy relied on by the marine insurance sector. A look will be taken at the judicial perspective of what encompasses piracy in relation to a marine insurance contract.

The Marine Insurance Act (MIA) 1906 codifies insurance law and in Rule 8 of the Rules for Construction defines pirates as including “passengers who mutiny and rioters who attack the ship from the shore”.<sup>66</sup> However, this definition is not exhaustive and reference must be made to case law for further clarity on the concept of piracy.<sup>67</sup> The case of *Nesbitt v Lushington*<sup>68</sup> appears to be the earliest reported case on the subject. Here the vessel *Industry*, while she was at Elly harbor was boarded by rioters and the captain was compelled to sell the cargo of corn at three quarters of the actual value to the rioters. The cargo-owners insurance claim, submitted to the insurers was however, refused on the grounds that the loss was not covered under the policy. The court though holding that the cargo-owner could not recover under the policy, nevertheless declared that the loss occurred as an act of piracy and held that “Whatever would be robbery at land is piracy at sea. Obliging the owners of corn by force to sell it on shore for a particular price imposed by the buyers themselves, would certainly be robbery”.<sup>69</sup> The court further held that “...I think that this loss falls within a capture by pirates: and if a particular average could have been recovered upon this policy, the plaintiffs might have recovered upon the count, stating the loss to have happened by piracy...”.<sup>70</sup> In *Palmer v Naylor*,<sup>71</sup> the Chinese emigrants on board a ship killed the captain along with some of the crew members and gained possession of the ship with the aim of sailing to the nearest place they could effect an escape after which they now returned the ship to the remainder of the crew. The insurers rejected a claim submitted to it by the plaintiff and upon an action brought by the plaintiff, the court in holding that the emigrant’s actions amounted to piracy held *inter alia* that “The admitted seizure of the vessel by them, the taking her out of the possession and control of the master and crew....were either direct acts of

<sup>66</sup> Rule 8 of Rules of Construction; Marine Insurance Act 1906.

<sup>67</sup> S Hodges *Law of marine insurance* (1996) at 212.

<sup>68</sup> *Nesbitt v Lushington* (1792) 4 TR 783.

<sup>69</sup> *Nesbitt v Lushington* (note 68) at 785.

<sup>70</sup> *Nesbitt v Lushington* (note 68) at 787.

<sup>71</sup> *Palmer v Naylor* (1854) 10 Ex 382.

piracy or acts so entirely *ejusdem generis* ....they are clearly included within the general words at the end of the peril clause”.<sup>72</sup>

The case of *Republic of Bolivia v Indemnity Mutual Assurance Co ltd*<sup>73</sup> is the *locus classicus* on this subject,<sup>74</sup> in which case the Court of Appeal gave a detailed interpretation of piracy. Here the plaintiff, the Republic of Bolivia, insured goods which were to be transported on board *The Labrea* under a policy which covered loss by piracy. The vessel was seized during the voyage by insurgents and the goods were subsequently lost, upon which the Bolivian government claimed on the insurance policy, but which claim was rejected by the insurers, upon which the plaintiff therefore sued. The judgment of the trial judge was upheld by the Court of Appeal which affirmed that the loss was not caused by an act of piracy and defined what constituted an act of piracy as:

“...a man who is plundering indiscriminately for his own ends, and not a man who is simply operating against the property of a particular state for a public end, the end of establishing a government, although that act may be illegal and even criminal, and although he may not be acting on behalf of a society.....Such an act may be piracy by international law, but it is not, I think, piracy within the meaning of a policy of insurance; because as I have already said, I think you have to attach to ‘piracy’ a popular or business meaning, and I do not think, therefore, that this was a loss by piracy...”<sup>75</sup>

(The underlining is mine for emphasis)

The definition of piracy was given further clarity by the case of *Athens Maritime Enterprises Corporation v Hellenic Mutual War Risks Association (Bermuda) Ltd. (The Andreas Lemos)*.<sup>76</sup> The issues of ascertaining if piracy was constituted by a vital element of force or the threat of force,<sup>77</sup> and also whether the concept of piracy was confined to the territorial sea<sup>78</sup> came to the fore in this case. As regards the first issue, the court held *inter alia* that “... theft without force or a threat of force is not a piracy under a policy of marine insurance”.<sup>79</sup> The court further held that:

<sup>72</sup> *Palmer v Naylor* (note 71) at 389.

<sup>73</sup> *Republic of Bolivia v Indemnity Mutual Assurance Co ltd* [1909] I KB 785, CA.

<sup>74</sup> Hodges (note 67) at 212.

<sup>75</sup> *Republic of Bolivia v Indemnity Mutual Assurance Co ltd* (note 73) at 796-797.

<sup>76</sup> *The Andreas Lemos* [1983] Q.B. 647.

<sup>77</sup> Hodges (note 67) at 213.

<sup>78</sup> *Ibid* at 213.

<sup>79</sup> *The Andreas Lemos* (note 76) at 660.

*“The association, by the word “piracy” insures the loss caused to shipowners because their employees are overpowered by force, or terrified into submission. It does not insure the loss caused to shipowners when their night-watchmen is asleep... ..and thieves steal clandestinely. The very notion of piracy is inconsistent with clandestine theft”<sup>80</sup>*

Concerning the second issue, the court was of the opinion that no rationale existed for confining piracy to attacks beyond the territorial sea. The court held that

*“In the context of an insurance policy, if a ship is in the ordinary meaning of the phrase “at sea”.....or if the attack upon her could be described as “a maritime offence” .....then for the business purposes of a policy of insurance she is.....in a place where piracy can be committed”.<sup>81</sup>*

(The underlining is mine for emphasis)

This case therefore lays down the principle that in the context of marine insurance, the definition of piracy is not confined to the high seas, but extends to the territorial waters which is in contrast with the definition of piracy laid by UNCLOS 1982 which confines piracy to attacks on the high seas alone. On the other hand, the case is in *ad idem* with the UNCLOS 1982 in that piracy is for private gains and not for a political motive.

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<sup>80</sup> *The Andreas Lemos* (note 76) at 661.

<sup>81</sup> *The Andreas Lemos* (note 76) at 658.

### 3 MODERN MARITIME PIRACY

For the purposes of this thesis, it is pertinent to examine the concept of piracy in the face of present day realities and this examination will be conducted with emphasis on the piracy endemic areas. This analysis becomes crucial in view of the fact that the intrigues of modern day piracy plays a vital role in influencing the events in the marine insurance industry, most especially as regards the position taken by insurers in relation to the cover of piracy as a peril in a marine insurance policy.

There was a downward trend in the activities of piracy in the 19<sup>th</sup>C and 20<sup>th</sup>C for a number of reasons which include:

- An upsurge in the size and speed of merchant vessels due to advanced technology which left pursuing pirates at a disadvantage.
- Increased naval patrols of most of the world's waterways.
- Universal recognition of piracy as a crime under the concept of universal jurisdiction.<sup>82</sup>

In view of the above factors, it was thought at one time that piracy was a nightmare of the past. However, the truth of the matter is that piracy had always been around. The factors outlined above which led to a decline in piracy have now reversed themselves to aid the progression and growth of piracy.<sup>83</sup> The same technology which offered protection to modern vessels as a result of increased size and speed and which led to the manufacture of more advanced vessels which requires fewer crew has also aided the pirates in improving their weapons of speed, shock, surprise, fire power and rapid escape.<sup>84</sup> Most countries in the world now have reduced navies which have drastically reduced the number of ships capable of patrolling vast areas of the oceans thereby exposing vessels to the mercy of pirates.<sup>85</sup>

The unhappy reality is that piracy is now back with full force and with a meaner and ever unrepentant side to it. Gone are the days when pirates operated with cudgels, cutlasses, pistols and crude weapons. The 21<sup>st</sup> C pirate now operates with rapid fire weapons, rocket propelled grenade launchers and emboldened by the huge ransoms

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<sup>82</sup> M McDaniel 'Modern high seas piracy'. Available at [http://www.cargolaw.com/presentations\\_pirates.html](http://www.cargolaw.com/presentations_pirates.html) . [Accessed 14th August 2011].

<sup>83</sup> Ibid at 82.

<sup>84</sup> Ibid.

<sup>85</sup> Ibid.



paid for the release of hijacked vessels, they now have enormous resources which they can fall back on. A tab has been kept on the activities of pirates by the International Maritime Bureau (IMB) as far back as 1995 and the escalating increase in the attacks of pirates over the years is indeed frightening. The IMB reported that 445 attacks were carried out against ships by pirates in 2003; 329 attacks were reported in 2004; 276 attacks were reported in 2005; 239 attacks were reported in 2006; 263 attacks were reported in 2007.<sup>86</sup> In 2011, the IMB reported that there were 409 attacks with Somalia accounting for more than half of the reported attacks.<sup>87</sup>

### 3.1 Types of Piracy

There are basically three kinds of pirates. There is the “Minor Armed Robbery”<sup>88</sup> which refers to those opportunistic attacks which occur in the vicinity of the coast and in the ports.<sup>89</sup> These are pirates who engage in petty robbery and opportunity theft by gaining entry to the ship while she is in the port or at anchor and steal anything<sup>90</sup> they can lay their hands on such as money, crewmen’s personal effects, ropes and even paint.

The second kind is the “Armed Robbery and Aggression of Intermediate Degree”<sup>91</sup> which refers to violent actions which involves the theft of boats in territorial waters or the high seas and which are executed by well organised and fully armed gangs.<sup>92</sup>

The third kind is the “Serious Criminal Hijacking”<sup>93</sup> which involves the hijacking of ships by large armed gangs of well trained men.<sup>94</sup> These pirates hijack the ship and convert it for their evil purposes by renaming the ship and utilise it for illegal trafficking.<sup>95</sup>

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<sup>86</sup> Piracy and Armed Robbery against Ships, Annual Report, International Chamber of Commerce, Jan 1- Dec 31, 2007.

<sup>87</sup> ICC Commercial Crime Services ‘Piracy news and figures’ (2011). Available at <http://www.icc-cs.org/piracy-reporting-centre/piracynewsfigures>. [Accessed 20th August 2011].

<sup>88</sup> WV Bush and T Rettig ‘Covering maritime piracy in South East Asia’. Available at [www.kas.de/wf/doc/kas\\_10478-1522-2-30.pdf?090414112801](http://www.kas.de/wf/doc/kas_10478-1522-2-30.pdf?090414112801). at 19 [Accessed 20th August 2011].

<sup>89</sup> Bush and Rettig (note 88).

<sup>90</sup> K Petretto ‘Weak states offshore-piracy in modern times’ at 8 Available at [http://www.humansecuritygateway.com/documents/HSF\\_PiracyInModernTimes\\_WeakStaesOff-Shore.pdf](http://www.humansecuritygateway.com/documents/HSF_PiracyInModernTimes_WeakStaesOff-Shore.pdf). [Accessed 24th August 2011].

<sup>91</sup> Bush and Rettig (note 88) at 19.

<sup>92</sup> Ibid.

<sup>93</sup> Ibid.

<sup>94</sup> Ibid at 20.

<sup>95</sup> Ibid.

### 3.2 Regional Variations of Piracy

Piracy has been referred to as a movable crime and as a result there is the constant factor of new trouble spots popping up from time to time.<sup>96</sup> However, certain regions have acquired the unenviable reputation of being notorious as constant hotbeds of piracy. The frightening level of piracy in these regions have also affected in no small measure the position taken by the marine insurance industry as regards the insurance policies and the reasons for their notoriety will be analysed below.

#### 3.2.1 Southeast Asia- Malacca Straits, South China Sea, Indonesia.

The region of South Sea Asia “extends to the South China Sea in the north, and Indonesia in the south”.<sup>97</sup> The region occupies a very important position in the world, this is because more than half of the world’s sea bound traffic passes through the region<sup>98</sup> and the reason for this is not farfetched. “Some of the most densely populated countries of the world”<sup>99</sup> abound in the area of the South Sea Asia including Japan, Singapore and Taiwan, all boasting strong economies which are reliant upon imports and exports.<sup>100</sup> Furthermore a number of countries in the region also produce agricultural products and minerals which are in great demand both within and outside the region and the marketing of these resources depend upon a lot of export and import.<sup>101</sup> These factors contribute to make South Sea Asia the busiest shipping region in the world, which also contains the Malacca Straits – “the most heavily trafficked sea lane in the world”.<sup>102</sup> However, the strategic position occupied by South Sea Asia has also brought upon it a curse- the scourge of pirates. The heavy commercial activities makes the region a lucrative hotbed for the activities of pirates and the geographical set up of the region constitutes the ultimate ally for the pirates. The region contains a very high number of islands which the pirates use as bases to carry out their nefarious activities<sup>103</sup> and the dense vegetation present on these islands affords the pirates the perfect hiding place.<sup>104</sup>

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<sup>96</sup> McDaniel (note 82).

<sup>97</sup> R Collins and D Hassan ‘Applications and shortcomings of the law of the sea in combating piracy’ (2009) 40 *J. Mar. L. & Com* 89 at 90.

<sup>98</sup> G Teitler ‘Piracy in Southeast Asia: a historical comparison.’ Available at <http://www.marecentre.nl/mast/documents/GerTeitler.pdf>. [Accessed 4 September 2011].

<sup>99</sup> Ibid.

<sup>100</sup> Ibid.

<sup>101</sup> Ibid.

<sup>102</sup> Collins and Hassan (note 97) at 90.

<sup>103</sup> Teitler (note 98) at 72.

<sup>104</sup> Ibid.

The activities of pirates in South East Asia was so bad between 2000 and 2006, that out of the 2,463 pirate attacks in the world, about 1,125 occurred in South East Asia of which Indonesia accounted for two-thirds of the reported pirate attacks in the region.<sup>105</sup> So bad did the situation become that the Lloyd's Market Association's Joint War Committee (JWC) classified the Malacca Straits as 'highly prone to piracy, war strikes, terrorism and related perils for ocean shipping' which resulted in an increase of insurance premiums for vessels which were transiting through the straits.<sup>106</sup> However, as a result of the recent decrease in the attacks of pirates in the Malacca Straits, the JWC in 2006 removed the straits from its list.<sup>107</sup>

This decrease in the spate of pirate attacks in South Sea Asia is the result of various regional security initiatives to counter piracy such as the Regional Cooperation Agreement on Combating Piracy and Armed Robbery Against Ships in Asia (RECAAP), the annual meeting of the Heads of Asian Coast Guard Agencies (HACGA), the Cooperative Mechanism for Maritime Safety and Environment Protection in the Malacca and Singapore Straits and the MALSINDO patrols formed by Malaysia, Singapore and Indonesia to combat piracy in the Malacca Strait.<sup>108</sup>

### 3.2.2 Gulf of Aden- the Somalia Piracy War

The Gulf of Aden lies between Yemen and Somalia and over 21,000 ships transit this area annually, with about 11% of the world's petroleum passing through the gulf on its way to the Suez Canal.<sup>109</sup> The Gulf of Aden is well known not only for its ecological richness and strategic importance as a vital shipping route, but also for its notorious level of piracy which is orchestrated mostly by pirates operating from Somalia. Piracy has experienced an explosion of frightening magnitude off the coast of Somalia in recent years<sup>110</sup> such that urgent and various initiatives are been taken to checkmate the menace posed by this problem. However, piracy did not spring up

<sup>105</sup> JJ Brandon 'Reducing piracy in Southeast Asia' (2009); Available at <http://asiafoundation.org/in-asia/2009/08/05/reducing-piracy-in-southeast-asia/> [Accessed 13<sup>th</sup> September 2011].

<sup>106</sup> Brandon (note 105).

<sup>107</sup> Ibid.

<sup>108</sup> RC Banlaoi 'Maritime piracy in Southeast Asia: current situation, countermeasures, achievements and recurring challenges'. Available at [http://counterpiracy.ae/briefing\\_papers/Banlaoi%20Maritime%20Piracy%20in%20Southeast%20Asia.pdf](http://counterpiracy.ae/briefing_papers/Banlaoi%20Maritime%20Piracy%20in%20Southeast%20Asia.pdf) [Accessed 19<sup>th</sup> September 2011].

<sup>109</sup> Gulf of Aden- 'What's going on?' (2010) Available at <http://www.weird.com/ufo-aliens/gulf-of-aden-whats-going-on.html> [Accessed 21 September 2011].

<sup>110</sup> M Sterio 'Troubled waters: combating maritime piracy with the rule of law' (2010) 59 *Am. U. L. Rev* 1449 at 1450.

overnight in the Gulf of Aden and is actually the result of a series of chain reactions in Somalia which has now produced the cataclysmic effect of what has now become the ‘hydra headed monster’ of the Gulf of Aden.

The genesis of Somalia’s piracy can be traced to the fall of the Gen. Siyad Barre regime in 1992 and the disintegration of the Somali Navy and Police Coastguard services.<sup>111</sup> A large number of fishing communities had evolved along the Somali coastline as a result of severe draughts in 1974 and 1986 and had found succor and refuge by engaging in fishing as a predominant means of livelihood.<sup>112</sup> Following the fall of the Siyad Barre regime, a civil war erupted which led to a vacuum in power with no government to administer affairs, illegal fishing vessels from Europe soon took advantage of the situation and began to heavily poach Somalia’s enormous fishing resources thereby competing with the locals and depriving them of a means of livelihood.<sup>113</sup> The Somali local fishermen “whose industry was always small-scale, lacked the advanced boats and technologies of their interloping competitors, and also complained of being shot at by foreign fishermen with water cannons and firearms”.<sup>114</sup> Illegal vessels and trawlers came from as far as Japan, Spain and North Korea and helped themselves without licenses to Somalia’s vast rich fish resources.<sup>115</sup>

This situation led to confrontations between the illegal vessels and the local fishermen who fought for the preservation and protection of their fishing turf,<sup>116</sup> the extent of the activities of these illegal vessels could be seen in the comments of one of the fishermen- Jeylani Shaykh Abdi, when he said “They are not only taking and robbing us of our fish, but they are also trying to stop us from fishing”.<sup>117</sup> Another problem which came about was the dumping of nuclear and toxic waste in Somali waters which also angered the locals, this evil dumping of harmful waste led to the

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<sup>111</sup> MA Waldo ‘The two piracies in Somalia: why the world ignores the other?’ Available at [http://wardheernews.com/Articles\\_09/Jan/Waldo/08\\_The\\_two\\_piracies\\_in\\_Somalia.html](http://wardheernews.com/Articles_09/Jan/Waldo/08_The_two_piracies_in_Somalia.html) [Accessed 22 September 2011].

<sup>112</sup> Ibid.

<sup>113</sup> Ibid.

<sup>114</sup> ITharoor ‘How Somalia’s fishermen became pirates.’ Available at <http://www.time.com/time/world/article/0,8599,1892376,00.html> [Accessed 25 September 2011].

<sup>115</sup> Ibid.

<sup>116</sup> Waldo (note 111).

<sup>117</sup> Ibid. (Another fisherman- Mohamed Hussein was also quoted as saying that the international community was "talking only about the piracy problem in Somalia, but not about the destruction of our coast and our lives by these foreign ships." See MA. Waldo ‘The two piracies in Somalia: why the world ignores the other?’

outbreak of all sorts of respiratory ailments and skin diseases amongst the villagers living along the coast.<sup>118</sup>

The culmination of these factors led to the local fishermen arming themselves and thus began the Somali piracy war. The piracy saga first started with the Somali pirates seizing the illegal trawlers which operated without licenses who quickly made the ransom payments since the owners of these vessels didn't want any attention drawn to their violation of international maritime law. This emboldened the pirates and only served to whet their appetites for more money.<sup>119</sup> These pirates constituted themselves into 'self appointed coast guards' charged with the aim of protecting Somalia's fishing resources.<sup>120</sup> "It soon became impossible to distinguish between vessels that were seized for illegally fishing and vessels that were simply seized".<sup>121</sup> The *Playa de Biako* was a Spanish fishing ship which was hijacked in April 2008 by Somali pirates and its crew taken hostage<sup>122</sup>, the ship was eventually released after a ransom payment of \$1.2 million.<sup>123</sup> It was suggested by critics that the ship was fishing very close to Somalia's territorial waters, but the ship's log recorded it had been 247 nautical miles off Somalia's shore when the pirates struck.<sup>124</sup>

The Somali pirates are presently responsible for the greater percentage of the pirate incidents worldwide. In the first quarter of 2011, there were about 142 reported attacks worldwide and this sharp rise was attributed to pirate attacks off the coast of Somalia which accounted for 97 of the attacks reported worldwide.<sup>125</sup> Out of the 18 ships hijacked worldwide within the first three months of 2011, 15 of them were hijacked off the coast of Somalia<sup>126</sup> and as at the last count on 31<sup>st</sup> March, figures released by the IMB also showed that about "596 crew members on 28 ships" were held captive by Somali pirates.<sup>127</sup> Captain Pottengal Mukundan the Director of the IMB observed the frightening increase in the activities of the Somali pirates and

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<sup>118</sup> Tharoor (note 114).

<sup>119</sup> Ibid.

<sup>120</sup> J Kraska and B Wilson 'The pirates of the Gulf of Aden: the coalition is the strategy' (2009) 45 *Stan.J.Int'l L* 243 at 249.

<sup>121</sup> Ibid.

<sup>122</sup> The Economist 'The most dangerous seas in the world'. Available at <http://www.economist.com/node/11751360> [Accessed 29 September 2011].

<sup>123</sup> Ibid.

<sup>124</sup> Ibid.

<sup>125</sup> ICC Commercial Crime Services report 'Attacks off the Somali coast drive piracy to record high'. Available at <http://www.icc-ccs.org/news/441-attacks-off-the-somali-coast-drive-piracy-to-record-high-reports-imb>. [Accessed 2nd October 2011].

<sup>126</sup> ICC Commercial Crime Services report (note 125).

<sup>127</sup> ICC Commercial Crime Services report (note 125).

said “We’re seeing a dramatic increase in the violence and techniques used by pirates in the seas off Somalia”.<sup>128</sup>

### 3.2.3 Gulf of Guinea- Piracy in West Africa with emphasis on Nigeria

It would appear that most of the world’s pirate attacks occur in the Gulf of Aden and South Sea Asia and as such one might be tempted to think that ships sailing in other regions of the world are far from harm and have less to fear, however, this is not the case. One region which appears to be fast acquiring an infamous reputation for pirate attacks is the Gulf of Guinea and most especially the country of Nigeria. The Gulf of Guinea has been reported to be second to Somalia in terms of pirate attacks<sup>129</sup> and the deluge of pirate attacks in recent times in the region has given the international community cause for concern.<sup>130</sup>

Piracy is not a new phenomenon in West Africa.<sup>131</sup> Until recently, Nigeria accounted for more reported cases of pirate attacks in its waters than those of Somalia.<sup>132</sup> “Between 1982 and 1986, West Africa - particularly Nigeria - had the highest reported number of cases of piracy and armed robbery”.<sup>133</sup> The Somali pirates appeared to have taken the forefront in the number of attacks launched by pirates, such that not much attention was given to the West-Africa region, but it seems that the spate of attacks recorded in Nigerian waters in recent years have attained alarming proportions to put it on the world radar. In view of this worrisome situation, the IMB Director Pottengal Mukundan commented that “Whilst Somalia is, rightly, getting a lot of media attention for its piracy problems, a worrying trend is emerging off the coast of Nigeria. We have noted a higher level of violence in attacks off Nigeria than any other region in the world”.<sup>134</sup>

<sup>128</sup> ICC Commercial Crime Services report (note 125).

<sup>129</sup> S Baldauf ‘Pirates take new territory: West African Gulf of Guinea’. Available At <http://www.Csmonitor.Com/World/Africa/2010/0115/pirates-take-new-territory-west-african-gulf-of-guinea> [Accessed 5th October 2011].

<sup>130</sup> Ibid.

<sup>131</sup> Dubai School of Government ‘Global challenge, regional responses: forging a common approach to maritime piracy’. Available at [http://counterpiracy.ae/briefing\\_papers/Forging%20a%20Common%20Approach%20to%20Maritime%20Piracy.pdf](http://counterpiracy.ae/briefing_papers/Forging%20a%20Common%20Approach%20to%20Maritime%20Piracy.pdf) [Accessed 5<sup>th</sup> October 2011].

<sup>132</sup> Ibid.

<sup>133</sup> EG Agbakoba ‘Modern day piracy’. Available at [www.home.wanado.nl/m.bruyneel/archive/modern/index.htm](http://www.home.wanado.nl/m.bruyneel/archive/modern/index.htm). [Accessed 8th August 2011].

<sup>134</sup> ICC Commercial Crime Services report ‘Surge in violent attacks on vessels off Nigeria’. Available at <http://www.icc-ccs.org/news/383-imb-reports-surge-in-violent-attacks-on-vessels-off-nigeria>. [Accessed 7th October 2011].

In October 2009, a product tanker was the subject of an attack by pirates off Lagos in Nigeria who opened fire on the ship and eventually gained entry into the vessel.<sup>135</sup> The pirates took all the crewmen hostage, assaulted them and thereafter made away with valuables, cash, and personal belongings.<sup>136</sup> There were 25 reported pirate attacks in Nigerian waters in 2009, most of which were cases of robbery in contrast to hostage taking.<sup>137</sup> The present spate of pirate attacks which has made Nigeria to become second to Somalia in pirate attacks incidents has a political origin which stems from the grievances held by the indigenes of the Niger-Delta region who were aggrieved by the fact that their communities had been neglected and marginalised by the Federal Government of Nigeria over the years despite the fact that their region produced the oil wealth of Nigeria. They also decried the destruction and the pollution of their marine environment by the multinational oil companies which engage in the oil exploration in the Niger-Delta and their seemingly nonchalant attitude in cleaning up the mess caused by their oil exploration activities.

The culmination of these factors and the tough stance taken by the government in dealing with the perceived rebellious nature of the people of the Niger-Delta which was at first non-violent resulted into catastrophic effects. Various militant groups emerged with the prominent one being the Movement for the Emancipation of the Niger Delta (MEND). These militant groups held the oil industry by the jugular by coordinating various attacks against oil installations in the country which led to a sharp drop in Nigeria's oil production. It soon ballooned into kidnapping of expatriate oil workers and hijacking of vessels. Despite the fact that the Nigerian government granted an amnesty to the militants in 2009 which has seen most of the militant groups laying down their arms and calling a truce with the government, there are still widespread cases of piracy taking place within and off Nigeria's Coastal waters. Criminal gangs in the name of fighting for justice for the neglect of the Niger-Delta have executed a high number of pirate attacks on vessels including fishing trawlers. The Fishing Zone of the Nigerian Merchant Navy Officers and Water Transport Senior Staff Association in 2010 raised concerns over renewed attacks by pirates on fishing trawlers.<sup>138</sup> The group's Administrative Secretary

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<sup>135</sup> ICC Commercial Crime Services report (note 134).

<sup>136</sup> Ibid.

<sup>137</sup> Ibid.

<sup>138</sup> G Oritse 'Merchant navy raises alarm over renewed pirate attacks'. Available at <http://www.vanguardngr.com/2010/07/merchant-navy-raises-alarm-over-renewed-pirate-attacks/> [Accessed 12<sup>th</sup> October 2011].

observed that despite the militants having been granted amnesty by the government, the attack on fishing trawlers has not abated.<sup>139</sup>

However, it is interesting to note that the Nigerian government appears to have contrary views as to the nature of the attacks carried out on vessels off the Nigerian Coast. The Nigerian government is opposed to the IMB's verdict "which rated Nigeria as the second most pirate-prone country in the world".<sup>140</sup> This view was expressed when the Director General of the Nigerian Maritime Administration and Safety Agency (NIMASA) who represents the Nigerian governments position was reported as saying that the attacks in Nigeria are not pirate attacks, but attacks by 'armed robbers' and that most of these attacks were instigated by foreign fishing trawlers who were interfering with Nigerians in the fish trawling business.<sup>141</sup> He further stated that most of the attacks reported by the IMB are false alarms and that what was been experienced were 'little arms attacks' and that there was nothing like piracy in Nigeria<sup>142</sup>. This view taken by the Nigerian government would perhaps suggest the reason why it appears that enough has not been done to counter the activities of pirates in the region. As long as the Nigerian government continues to maintain this stand that there is little or no piracy off the coast of Nigeria, then it means ships transiting the Gulf of Guinea will continue to be at the mercy of pirates.

### **3.3 Root Causes of Contemporary Piracy**

Piracy is attributable to certain root causes irrespective of which region the atrocity is being perpetrated in. Each root cause manifests itself under different circumstances in each part of the world which then leads to the ultimate end result- piracy. Let us examine these root causes and under which situations and circumstances they have germinated and metamorphosed into the menace of piracy using the various piracy endemic regions as cases studies.

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<sup>139</sup> Oritse (note 138).

<sup>140</sup> Ibid.

<sup>141</sup> Ibid.

<sup>142</sup> Ibid.



### 3.3.1 State Weakness<sup>143</sup>

State weakness constitutes a core factor in the cause of piracy. This weakness stems from various factors confronting the state and it is consequently reflected by the inability of the government of a state to effectively exercise control over its territorial waters and the adjacent waters in which pirates carry out their operations.<sup>144</sup> The factors include amongst other things political upheaval, massive corruption, social unrest and internal strife. These major flaws results in the reality that proper mechanisms and institutions are either not in place or are inadequate to project any deterrent measures against piracy and they will be considered below.

#### I. Gulf of Aden

In the Gulf of Aden which lies between Yemen and Somalia, the weak state institutions provide a safe haven and conducive environment for pirates to operate with no fear of being apprehended.<sup>145</sup> The Failed State Index 2011 saw Somalia ranking “as number one for the fourth consecutive year citing widespread lawlessness, ineffective government, terrorism, insurgency, crime, and well-publicised pirate attacks against foreign vessels”<sup>146</sup> as the basis for arriving at this ranking. There has been no effective government in charge of administering the country’s affairs ever since the regime of Gen Siyad Barre was toppled in 1992, the Transitional Federal Government which represents the authority which the international community recognises as the representation of Somalia is under consistent attack by the Islamist militias<sup>147</sup> and is only in control of parts of Mogadishu with the crucial assistance of the African Union Mission in Somalia (AMISOM).<sup>148</sup>

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<sup>143</sup> A Graf ‘Countering piracy and maritime terrorism in South East Asia and off the horn of Africa’ Available at [http://www.maritimesecurity.eu/fileadmin/content/news\\_events/workingpaper/PiraT\\_Arbeitspapier\\_Nr4\\_2011\\_Graf.pdf](http://www.maritimesecurity.eu/fileadmin/content/news_events/workingpaper/PiraT_Arbeitspapier_Nr4_2011_Graf.pdf).

<sup>144</sup> Ibid at 28.

<sup>145</sup> Ibid at 29.

<sup>146</sup> The Fund for Peace ‘The failed states index 2011’. Available at <http://www.fundforpeace.org/global/library/cr-11-14-fs-failedstatesindex2011-1106p.pdf>. [Accessed 25th October 2011].

<sup>147</sup> Graf (note 143) at 29.

<sup>148</sup> Ibid at 29.

The Islamic Courts Union (ICU) headed by Sheikh Sharif Sheikh Ahmed took control of Mogadishu in June 2006<sup>149</sup> and was in control for a period of six months before it was ousted by Ethiopian troops backed by the United States in December 2006. However, during the brief period of authority held by the ICU, it is important to note that piracy virtually vanished, this was due to the fear the pirates had for the backlash of the sharia law which was imposed by the ICU. Donna Nincic of the ABS School Maritime Policy and Management at the California Maritime Academy commented thus “As the ICU exerted its control, they declared piracy a crime and imposed strict penalties (including cutting off both hands); as a result, piracy dropped to only ten attacks in 2006. After the ICU was ousted and the Transitional Federal Government (TFG) returned to nominal power, Somalia soon became one of the world’s major piracy ‘hot spots’ and came to be considered a safe haven for al-Qaeda”.<sup>150</sup> This development during the reign of the ICU shows just how important it is to have an effective and operational government.

The situation with the government in Yemen constitutes a tricky situation which appears on the face value to be fair when compared to that in Somalia. The government in Yemen is trying to project itself as a part of the solution to the problem of piracy in the Gulf of Aden, but some observers say that Yemen which is a failed state might be part of the problem.<sup>151</sup> There is a sympathy in Yemen for the Somali pirates which is shared by both civilians and officials alike<sup>152</sup> and which runs so deep that it is suggested by some Yemeni officials that “the extensive international attention to piracy is just a pretext for big powers like the U.S. to gain control of the Gulf of Aden, a waterway through which millions of barrels of oil pass every day”.<sup>153</sup> Ahmed al-Asbahi, a member of the Yemeni parliament was recently reported as saying that “What the international community should do is help bring a real and lasting peace to Somalia. If they do this, then there won't be any piracy. They can do this without bringing their military forces to our waters”.<sup>154</sup>

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<sup>149</sup> F Nzwili ‘Leadership profile: Somalia's islamic courts union’. Available at [http://www.jamestown.org/single/?no\\_cache=1&tx\\_ttnews\[tt\\_news\]=803](http://www.jamestown.org/single/?no_cache=1&tx_ttnews[tt_news]=803) [Accessed 29<sup>th</sup> October 2011].

<sup>150</sup> D Nincic ‘Maritime piracy in Africa: the humanitarian dimension’ (2009); Available at <http://www.iss.co.za/uploads/18NO3NINCIC.PDF>. [Accessed 5 November 2011].

<sup>151</sup> K Mcevers ‘In anti-piracy fight, Yemen may be part of problem’ (2011) Available at <http://www.npr.org/templates/story/story.php?storyid=103904390> [Accessed 5 November 2011].

<sup>152</sup> Ibid.

<sup>153</sup> Ibid.

<sup>154</sup> Ibid.

Various factors handicap the Yemeni government and makes it weak in combating piracy in the Gulf of Aden: the government faces regional opposition by the Southern movement in the Southern provinces which since 2007 have been seeking secession;<sup>155</sup> the Huthi rebels operating from the North-Western province of Sa'dah constitute a growing problem for the government;<sup>156</sup> a stronghold has been established by Al Qaeda in Yemen most especially in the provinces east of the capital Sana'a.<sup>157</sup> The Failed State Index 2011 ranked Yemen as number thirteen in the world<sup>158</sup> putting all these factors into consideration. These factors coupled with dwindling oil resources which are fast running out and which has forced the government to cut its budget in half for 2011<sup>159</sup> pose a myriad of problems which has made the Yemen government weak in its resolve to combat piracy in the Gulf of Aden.

## II. Gulf of Guinea-West Africa

The West African countries of Gabon, Nigeria, Ghana, Cameroon, Cote d'Ivoire, Guinea, Benin, and Sao Tome and Principe constitute the coastline states of the Gulf of Guinea. This region is well known for its vast pool of oil resources, second only to the Persian Gulf.<sup>160</sup> However, the region has also been besieged with a surge in piracy which is second only to that of the Gulf of Aden. The ability of most of the countries in this region to prevent and combat piracy is weakened by political violence, corruption, ethnic segregation and insurgency which have affected the ability of these countries in putting the right mechanisms and facilities in place. Nigeria, which is regarded as a 'powerhouse' in the region and which should be taking the front-lead in combating piracy in the region is currently bedeviled with issues of massive corruption, government recklessness, ethnic strife and religious conflicts which have all contributed in no small terms to the weakness of the Nigerian government in preventing piracy in the region.

Nigeria's ability to combat piracy is crucial to eradicating piracy in the Gulf of Guinea because the criminal gangs and militants which operate from the Niger Delta

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<sup>155</sup> Graf (note 143) at 30.

<sup>156</sup> Ibid.

<sup>157</sup> Ibid.

<sup>158</sup> The Fund for Peace (note 146).

<sup>159</sup> Mcevers (note 151).

<sup>160</sup> R Rozoff 'Militarization of energy policy: U.S. Africa command and Gulf of Guinea (2011).

Available at <http://guineaoye.wordpress.com/2011/01/08/us-africa-command-and-gulf-of-guinea-militarization-of-energy-policy/> [Accessed 6<sup>th</sup> November 2011].

region of Nigeria are largely responsible for the pirate attacks in the Gulf of Guinea, and the helplessness of the Nigerian government to rein in the militants is a classic example of how state weakness can cause piracy. The decay of corruption which has eaten deep into the fabric of the Nigerian government has seen resources which would have been used to provide facilities and mechanisms in combating piracy diverted to private pockets in government in a mad rush for personal enrichment.

The Nigerian navy has been starved of funds due to the high level of corruption so much so that even the few ships it has are of “uncertain operational readiness”<sup>161</sup> and as a result its efficiency in mounting an effective campaign to thwart or prevent the wave of pirate attacks in the region is greatly handicapped.

### III. South East Asia-Malacca Straits

The Malacca Straits is mostly located within the territorial seas of Singapore, Indonesia and Malaysia,<sup>162</sup> and the safety of the straits is the primary responsibility of these coastal states.<sup>163</sup> In spite of the numerous efforts by these three states to improve safety, the level of piracy still remains high in the straits.<sup>164</sup> Recent efforts by these coastal states under the trilateral effort code named MALSINDO,<sup>165</sup> to curb piracy are bedeviled by inadequate patrol arrangements and the lack of sufficient resources, and of which Indonesia warrants particular concern.<sup>166</sup> The Failed States Index 2011 rates Singapore and Malaysia as number 157 and 111<sup>167</sup> respectively which suggests that the situation in these countries are fair and stable. Indonesia on the other hand is rated as number 64 in the Failed States Index 2011, a position which is not enviable in any way when compared to that held by Singapore and Malaysia. Most of the pirate attacks take place in Indonesia’s waters due to its lack of necessary resources to undertake effective patrol of its waters.<sup>168</sup> This issue of

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<sup>161</sup> J Raidt and KE Smith ‘Advancing U.S, African and global interests: stability and security in the West African maritime domain’. Available at <http://www.isn.ethz.ch/isn/Digital-Library/Publications/Detail/?ots591=0c54e3b3-1e9c-be1e-2c24-a6a8c7060233&lng=en&id=124903>. [Accessed 6<sup>th</sup> November 2011].

<sup>162</sup> TM Sittnick ‘State responsibility and maritime terrorism in the Strait of Malacca: persuading Indonesia and Malaysia to take additional steps to secure the Strait’ (2005) 14 *Pac. Rim L. & Pol’y J* 743.

<sup>163</sup> Ibid.

<sup>164</sup> Ibid

<sup>165</sup> Ibid.

<sup>166</sup> Ibid.

<sup>167</sup> The Fund for Peace (note 146).

<sup>168</sup> Sittnick (note 162).

inadequate resources has consequently resulted in the underfunding of the Indonesian navy and the maritime police, thereby making the country weak in countering piracy.

A core political factor which has also weakened Indonesia's governance capabilities to fight piracy has been the activities of the separatist movement known as *Gerakan Aceh Merdeka* (GAM) which had campaigned for the independence of Aceh since the mid 1970's,<sup>169</sup> and had embarked upon insurgent attacks upon the Indonesian government which met the acts of insurgency with cruel suppression tactics. A peace deal was however, brokered between the two sides in 2005 via a memorandum of understanding signed in Helsinki, Finland which has largely reduced the likelihood of another outbreak of conflict between the two parties.

All these problems bedeviling Indonesia has made it "the locus of the problem in Southeast Asia".<sup>170</sup> It is interesting to note that in the face of all these setbacks, Indonesia has "rejected the possibility of extra-regional patrols of the Strait"<sup>171</sup> which was suggested by the United States, citing the threat to its national sovereignty as the ground for the rejection.

### 3.3.2 Economic Disillusion

This factor is a wide umbrella which encompasses the issues of poverty and corruption. These twin issues have contributed in no small measure to the present level which piracy has attained. There is no doubt that these issues act as a stimulant to spur people who feel they have no economic hope thereby seeing piracy as a way of making ends meet. We shall be taking a look at how these factors have acted as a catalyst in promoting piracy to its present status once again using the piracy endemic areas as case studies.

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<sup>169</sup> I Storey 'Securing South East Asia's sea lanes: a work in progress'. Available at [www.nbr.org/publications/asia\\_policy/Free/AP6/AP6\\_E\\_Storey.pdf](http://www.nbr.org/publications/asia_policy/Free/AP6/AP6_E_Storey.pdf) at 108. [Accessed 7<sup>th</sup> November 2011].

<sup>170</sup> Storey (note 169) at 107.

<sup>171</sup> Sittnick (note 162).

## I. Gulf of Aden

There is no gainsaying that there is a nexus between piracy and poverty.<sup>172</sup> “Poverty is the driving force behind the increase in piracy, not just off the coast of Africa, but in the Caribbean, South America, India, Bangladesh, and Southeast Asia”.<sup>173</sup> Somalia as it is now has not always been the epitome of violence, poverty, misrule and all negative attributes which permeate present foreign perceptions of that country. However, years of warfare fuelled by the greed and endless power tussle between tribal warlords have brought the country to its present predicament. For many in Somalia, piracy is about the only way to earn a ‘good living’. In a country which has been ravaged by war, famine and internal strife and the average person’s survival is hinged upon a sum of less than two dollars a day,<sup>174</sup> piracy becomes an irresistible allure to beat back adversity. It is the assertion of most of the fishermen who have turned to piracy that the brazen depletion of their country’s fishing resources by illegal foreign trawlers and the evil dumping of nuclear waste on their shores have made it extremely difficult for them to eke out a living and as such they see piracy as a convenient way out. The quick and easy money pirates earn from the ransoms paid to them is an invigorating tonic for more and more Somalis to become recruited into the piracy web regardless of the dangers associated with it. The seductive pull of the huge ransoms garnered yearly from the acts of piracy has led many Somalis to believe that piracy dividends offer hope for a better tomorrow. This belief is well reflected by Helen Kennedy’s comments that “Modern-day piracy is growing quickly into big business - just take a look at the booming Somali pirate port of Eyl. Big villas and hotels are sprouting, former subsistence fishermen are driving Mercedes-Benzes and gold-digging women are showing up. So are accountants”.<sup>175</sup>

There is no doubt that piracy is illegal, atrocious and its effects quite devastating, but the reality of the situation is that the average Somali will continue to regard piracy and its huge ransom reward as the ‘ultimate get out plan’ to confront poverty as long as the present economic, social and political upheaval continues to prevail in Somalia. Peter Chalk, a senior political scientist at The RAND Corporation, rightly

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<sup>172</sup> RKL Panjabi ‘The pirates of Somalia: opportunistic predators or environmental prey?’ (2010) 34 *Wm. & Mary Envtl. L & Pol’y Rev* 377 at 446.

<sup>173</sup> *Ibid.*.

<sup>174</sup> P Chalk ‘Piracy off the horn of Africa: scope, dimensions, causes and responses’. Available at [http://www.relooney.info/0\\_New\\_7595.pdf](http://www.relooney.info/0_New_7595.pdf) [Accessed 7th November 2011].

<sup>175</sup> H Kennedy ‘Piracy big boon to Somalia economy; hotels, restaurants sprout in port of Eyl In pirates’ presence’. Available at [http://www.nydailynews.com/news/national/2009/04/10/2009-04-10\\_piracy\\_boon\\_to\\_somalia\\_economy.html](http://www.nydailynews.com/news/national/2009/04/10/2009-04-10_piracy_boon_to_somalia_economy.html) [Accessed 7th November 2011].

observed that “For the coastal communities, the pirates are the major economic influx to their livelihood. Piracy is stimulating local economies in many of these areas...”<sup>176</sup>

## II. Gulf of Guinea

The poverty factor plays a big role in bringing about piracy in this region. Nigeria is a classic example of how poverty could lead to a deluge of piracy acts. It is granted that piracy has always existed in the region, but it was unimaginable a few years ago that the piracy in this region could attain its present alarming level. The current situation in Nigeria’s Niger-Delta area which has led to armed gangs orchestrating pirate attacks off the coast of Nigeria (and who are largely responsible for most of the attacks in the Gulf of Guinea) originated from the oil exploration activities and the injustice meted out to those in that area by the government. The people of this area had the natural belief that the oil discovered and explored in their area would benefit their communities,<sup>177</sup> the foreign multinational companies rather than train the locals with a view to employing them brought in expatriates and modern luxurious facilities and also surrounded themselves with armed guards to deter local trouble makers<sup>178</sup> while the indigenes who were living in poverty could do nothing, but helplessly look on.

This development, working in concert with the brazen corruption which has characterised the ruling elite in Nigeria, the oil pollution resulting from the oil exploration activities which damaged the marine life from which the locals made a living and the fact that the people of the Niger-Delta were left to live in squalor, became the ultimate brew for chaos. “The contract between riches and abject poverty is as it has always been – a recipe for disaster”.<sup>179</sup> The indigenes of the Niger-Delta area after decades of neglect and been denied of the joy and rewards of oil been explored in their ‘backyards’ took to arms with their cause been championed by various armed militias and gangs and the resulting chaos is as we have it now. The present situation of piracy as we have it in the Gulf of Guinea and off the Nigerian

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<sup>176</sup>VOA News Report ‘Lack of effective Somali government root of piracy problem, experts say’. Available at <http://www.voanews.com/english/news/a-13-2009-04-16-voa47-68733422.html> [Accessed 9th November 2011].

<sup>177</sup>CR Amaechi ‘Fundamental causes of maritime insecurity’. Available at <http://www.legaloil.com/NewsItem.asp?DocumentIDX=1212396758&Category=news> [Accessed 10<sup>th</sup> November 2011].

<sup>178</sup> Ibid.

<sup>179</sup> Ibid.

coast will not abate until these core issues of poverty and neglect of the inhabitants of the Niger-Delta in Nigeria are addressed since most of the piracy carried out in this axis are executed by the self proclaimed freedom fighters turned pirates emanating from this region.

### III. Southeast Asia

The economic factors leading to a resort to piracy in Southeast Asia include “overfishing, pollution and the ensuing poverty of fishers and their families”.<sup>180</sup> The development of new and sophisticated technologies brought about the construction of more advanced fishing vessels which led to increased catches and the capturing of stocks that had previously been beyond reach.<sup>181</sup> However, this soon led to a decline in fishstocks in the region and especially affected were those fishers who didn’t have vessels with the capability of going long distances to newer and more promising fishing grounds.<sup>182</sup> Those of the fishermen who became desperate sought refuge in piracy as a source of income.<sup>183</sup> Furthermore, these desperate fishermen became ready hands to be recruited by pirate gangs to carry out pirate attacks on merchant vessels.<sup>184</sup>

#### 3.3.3 Ransom Payment

The demand and payment of ransom is now a characteristic of modern day piracy and which is now a trademark of pirates operating in most areas of the world in which piracy is endemic. The pirates see it as the fastest and easiest way of reaping dividends once a hijacking becomes successful. There is no contesting the fact that the payment of ransoms is a consistent factor which fuels modern day piracy and is one of the core factors that emboldens and inspires pirates to carry out attacks. The demand and payment of ransom has now given the menace of piracy a business-like face. The U.S. Chief of Naval Operations Admiral Gary Roughead commented that “the ransoms fuel the business; the business invests in more capability -- either in a bigger boat, more weapons, better electronic-detection means to determine where the

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<sup>180</sup> C Liss ‘The roots of piracy in Southeast Asia’. Available At <http://www.nautilus.org/publications/essays/apsnet/policy-forum/2007/the-roots-of-piracy-in-southeast-asia>. [Accessed 10th November 2011].

<sup>181</sup> Ibid.

<sup>182</sup> Ibid.

<sup>183</sup> Ibid.

<sup>184</sup> Ibid.



ships are, ... So it's a business".<sup>185</sup> The extent to which ransom payment has fueled and continued to support piracy is better appreciated when one considers the fact that these ransom payments have become a core source of revenue in recent times<sup>186</sup> and accordingly forms "part of Puntland's socioeconomic structure".<sup>187</sup> It is reported by the UN Monitoring Group in Somalia that money garnered from piracy and kidnapping have been received from core members of Puntland's government inclusive of the president, the minister for interior and the minister for internal security.<sup>188</sup>

In Southeast Asia, from a historical perspective, piracy "was thought to be an acceptable part of the local culture, a normal but illegal means of making money".<sup>189</sup> Piracy and ransom demand were seen in some areas as the only means of survival as agriculture and economic conditions were insufficient to sustain them.<sup>190</sup> Thus the financial gains of ransom demands accruing from hijacking a ship are so great that any economic improvement is seen as insignificant in comparison to the massive gains of piracy.<sup>191</sup> It would therefore be difficult to stop ransom demands or to abolish what has been regarded as a core aspect of local culture and a crucial sector of the<sup>192</sup> "local economy of coastal communities in the littoral states in Southeast Asia"<sup>193</sup> Ransom demands have skyrocketed from hundreds of thousands of dollars to demand for millions in recent times.<sup>194</sup>

This situation is a confirmation that steps to stop payments of ransoms will definitely be met by resistance and reluctance in many quarters as it has now come to form a core part in the livelihoods of so many people in the piracy endemic areas in the world. The willingness of ship owners to make the ransom payment in order to guarantee the release and safety of their crew, vessel and cargo does nothing, but

<sup>185</sup> V Gienger 'Piracy syndicates feed off ransom payments'. Available at <http://www.businessweek.com/news/2011-04-22/piracy-syndicates-feed-off-ransom-payments-u-s-navy-chief-says.html> [Accessed 13th November 2011].

<sup>186</sup> 'Combating piracy at sea: advisory council on international affairs'. Available at [http://www.aiv-advies.nl/contentsuite/upload/aiv/doc/webversie\\_AIV\\_72\\_ENG\(2\).pdf](http://www.aiv-advies.nl/contentsuite/upload/aiv/doc/webversie_AIV_72_ENG(2).pdf) at 19 [Accessed 14<sup>th</sup> November 2011].

<sup>187</sup> Ibid.

<sup>188</sup> Ibid.

<sup>189</sup> SW Smead 'A thesis on modern piracy'. Available at <http://www.angelfire.com/ga3/tropicalguy/piracy-modernday.html> [Accessed 14th November 2011].

<sup>190</sup> Ibid.

<sup>191</sup> Ibid.

<sup>192</sup> RC Banlaoi (note 108).

<sup>193</sup> Ibid at 2.

<sup>194</sup> Chalk (note 174) at 93.

exacerbate the piracy situation.<sup>195</sup> However, can anyone really blame them? Most of the companies are disposed to making the ransom in order to secure the release of the crew, cargo and vessel and also to minimise the time spent by the ship idling away in the hands of the pirates.<sup>196</sup>

There is no doubt that ransom payments will continue to fuel the scourge of piracy and only if it is curbed will piracy lose most its present appeal to pirates who see it as a money spinner in enriching themselves. A close look at the intrigues and legalities surrounding ransom demand and payments will be analysed in the subsequent chapter.

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<sup>195</sup> Chalk (note 174) at 94-95.

<sup>196</sup> Ibid at 95.

#### 4. EFFECTS OF PIRACY ON THE MARINE INSURANCE INDUSTRY

The previous chapters have attempted a definition of piracy, as well as analysis of the causes of piracy and where the menace is prevalent. An analysis of how the definition of piracy can affect the insurer-assured relationship in relation to the cover of piracy as a peril in the various marine insurance policies will be undertaken in this chapter. The analysis will also examine how the piracy endemic areas earlier examined have influenced events in the marine insurance industry.

##### 4.1 Historical Purview of Marine Insurance

Marine insurance law has been described as the “mother of all insurance”.<sup>197</sup> Around the twelfth and thirteenth centuries, the practice evolved in northern Italy whereby certain merchants were willing to insure the risk of other merchants upon the payment of a premium<sup>198</sup> and to indemnify “those who suffered loss as a consequence of specified perils”.<sup>199</sup> Merchants were able to insure their business upon this arrangement. The collective premiums from all the merchants who paid premiums to insure their goods supplied the fund from which indemnities could be paid by the insurers<sup>200</sup> and the premiums paid by the merchants was reflected in the price of goods sold to their customers. This insurance business soon extended its tentacles to Europe and became entrenched in England in what was referred to as Lombard Street, by virtue of a Royal Warrant of Henry IV.<sup>201</sup> This insurance ‘wildfire’ later extended itself to the American and English colonies.<sup>202</sup> Most of the business was conducted in coffee houses and the most famous of which is now Lloyd’s of London.<sup>203</sup> It is pertinent to note that most of the practices initiated by Lloyd’s of London have laid the foundation for most of the prevailing practices pervading the marine insurance industry today.

##### 4.2 Types of Marine Insurance Policies

For the purposes of this essay, it is important to decipher the various categories of insurance policies available in present day marine insurance as this will be the core

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<sup>197</sup> JE Hare *Shipping law and admiralty jurisdiction in South Africa*, 2<sup>nd</sup> ed (2009) at 822.

<sup>198</sup> FD Rose *Marine insurance law and practice* (2004) at 1.

<sup>199</sup> Ibid.

<sup>200</sup> Ibid.

<sup>201</sup> Hare (note 197) at 824.

<sup>202</sup> Ibid.

<sup>203</sup> Rose (note 198) at 1.

areas which this chapter will revolve around in order to determine the extent to which the menace of piracy has affected the operational mechanisms of policies and coverage offered by the marine insurance industry.

At the early stages of the 19<sup>th</sup> Century, it was possible to delineate marine insurance policies into four categories which were cargo, freight, hull and builders risk.<sup>204</sup> The mid 19<sup>th</sup> Century saw the evolution of marine insurance into three major parts: freight, hull and cargo, while protection and indemnity insurance (P&I) was more or less a footnote to hull insurance.<sup>205</sup> However, the present day position is that P&I insurance is a core part of the marine insurance industry and as such the modern branches of marine insurance can be categorised into Cargo, Hull and P&I clubs.<sup>206</sup> Let us now take a brief look at these categories of marine insurance covers.

### **I Hull & Machinery Insurance**

The H & M insurance basically insures the shipowner against damage or loss to the ship caused by perils specified in the policy.<sup>207</sup> The H & M policy also indemnifies the shipowner for all expenses he incurs in repairing or replacing the ship as a result of damage or destruction suffered by the ship caused by one of the perils specifically covered in the policy.<sup>208</sup> It can be said that most marine insurance covers “are underwritten on standard insurance policies prepared by the marine insurance industries of the major underwriting nations”.<sup>209</sup> The United States uses the American Institute clauses 1977, but amended in 2009. In England, the International Underwriting Association’s (IUA) ‘Institute Clauses’ or ‘IUA clauses’ are used. It must be noted that while the Institute clauses are often entrenched into policies issued at Lloyds of London, the IUA operates quite separately from Lloyds of London.<sup>210</sup> The perils covered by the institute clauses and International Hull clauses are basically categorised into the perils which do not require a want of due diligence

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<sup>204</sup> RP Hayden and SE Balick ‘Marine insurance: varieties, combinations, and coverages’ (1991) 66 *Tul. L. Rev* 311 at 314.

<sup>205</sup> Hayden and Balick (note 204) at 314.

<sup>206</sup> *Ibid.*

<sup>207</sup> RT Lemon II ‘Allocation of marine risks: an overview of the marine insurance package’ (2007) 81 *Tul. L. Rev* 1467 at 1468.

<sup>208</sup> *Ibid.*

<sup>209</sup> Hare (note 197) at 920.

<sup>210</sup> *Ibid.*

by the assured-shipowner<sup>211</sup> and the *Inchmaree*' cover which are perils insured only if the assured is not guilty of any want of due diligence.<sup>212</sup>

## II Cargo Insurance

Marine insurance cover is not only for the benefit of the shipowner and one party in a shipping contract who derives huge benefits from marine insurance is the cargo owner. Marine cargo insurance is basically concerned with the "physical loss or damage to the cargo, not financial losses or expenses."<sup>213</sup> Marine cargo insurance not only covers physical loss and damage to the goods, but also acts as a cover for loss of the entire adventure when underwritten in the context of a voyage basis which is more often than not the usual case.<sup>214</sup> This is because though the goods may still be undamaged, and in control and possession of the assured-cargo owner, but are unable to arrive at their destination because of loss of the adventure.<sup>215</sup> A basic cargo policy encompasses a "three dimensional process"<sup>216</sup> which includes the policy clauses defining the limitations of the coverage afforded to the assured, the duration of the adventure for which cover is given, and the extent of financial recovery.<sup>217</sup>

## III Protection and Indemnity Insurance (P&I Clubs)

The Protection and indemnity insurance evolved in order to afford protection to shipowners for the liabilities not covered by the Hull insurance. The P&I insurance covers specifically third party liabilities of the shipowner. The necessity of the P&I clubs can be traced to the case of *De Vaux v. Salvador*<sup>218</sup> which held that the Hull insurers who had traditionally been liable for the liability incurred by the shipowner in collision matters would no longer be liable to cover such liabilities. This was based on the court's opinion that the shipowners liability for collision damage towards a third party was not to be regarded a peril of the sea to be given cover by hull insurance.<sup>219</sup> The fallout from this decision was that specific cover had to be procured by the shipowners and even then the hull insurers were only liable for three fourths of the collision liability while the shipowner was liable for the remaining one

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<sup>211</sup> Hare (note 197) at 921.

<sup>212</sup> Ibid.

<sup>213</sup> J Dunt *Marine cargo insurance* (2009) at 6.

<sup>214</sup> Dunt (note 213) at 7.

<sup>215</sup> Ibid.

<sup>216</sup> Hayden and Balick (note 204) at 320.

<sup>217</sup> Ibid.

<sup>218</sup> *De Vaux v. Salvador* [1836] 111 ER 845.

<sup>219</sup> Hare (note 197) at 945.

fourth. Hare is of the opinion that the motive for the shipowner being liable for the remainder of one fourth is to ensure that a keen watch and lookout is maintained by the shipowners and their masters.<sup>220</sup> This situation therefore led to the forming of the P&I clubs to provide adequate cover for the shipowners. However, it is important to note that there are divergent opinions as regards the influence of this decision. Mark Tiley asserts that the opinion that this decision influenced the development of Protection and indemnity insurance is incorrect in view of the research undertaken by the Insurance Institute of London.<sup>221</sup> The institute reported that cover for liability for collision damages through shipowner's mutual underwriting associations had existed prior to the landmark decision.<sup>222</sup> Be that as it may, the structure of present day P&I clubs demand that they be registered as corporate personalities for administrative and legal convenience.<sup>223</sup> The importance of P&I clubs can be assessed by the consideration that over 90% of the world's merchant vessels are registered with one P&I club or the other.<sup>224</sup> It is pertinent to bear in mind that P&I insurance is basically mutual and non profit and the P&I clubs are funded by the contributions made by each member shipowner referred to as 'calls' which are assessed by the club's managers.<sup>225</sup>

### 4.3 Piracy and Marine Insurance

Historically, the situation in England was that piracy has pendulated between being regarded as a marine risk and a war risk<sup>226</sup>. It was included in the old Lloyd's SG policy as an insured peril, but was later expunged by the "Free of Capture and Seizure Clause (FC&S)".<sup>227</sup> Thus it was imperative to get the Institute War and Strike cover if an assured sought to be insured for piracy. It could be said that the FC&S clause was a mechanism used by the insurers to restrict the perils to be insured, including piracy from the marine insurance policy in order to compel the shippers to pay more premiums in order to obtain war risk insurance.<sup>228</sup> Another

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<sup>220</sup> Hare (note 197) at 945.

<sup>221</sup> M Tiley 'The origin and development of the mutual shipowners Protection & Idemnity associations' (1986) 17 *J.Mar.L&Com* 261.

<sup>222</sup> Tiley (note 221).

<sup>223</sup> Hare (note 197) at 946.

<sup>224</sup> Tiley (note 221) at 261.

<sup>225</sup> Hare (note 197) at 949.

<sup>226</sup> Rose (note 198) at 279.

<sup>227</sup> Hodges (note 67) at 212.

<sup>228</sup> CM Douse 'Combating risk on the high sea: an analysis of the effects of modern piratical acts on the marine insurance industry' (2010) 35 *Tul.Mar.L.J* 267 at 279.

advantage derived by the exclusion of piracy by the FC&S clause was that the insurer was relieved from paying the expenses under the ‘Sue and Labour’ clause which were incurred by the assured by paying ransom to the pirates in order to avoid the loss of the vessel.<sup>229</sup> However, piracy has now swung back to be included as an insured peril in the standard clauses for Institute Hulls and Freight policies which stipulate expressly that it is not a subject of exclusion by the war exclusion clause.<sup>230</sup> Nevertheless, it is important to note that since 2005, there is now the availability of alternative wording to transfer piracy as marine peril to the war risk policy in the context of the 2003 International Hull Clauses.<sup>231</sup>

As regards cargo insurance, piracy was initially treated as a “marine or, subsequently, all risks perils”.<sup>232</sup> This was the situation until the Institute Clauses were reviewed in 1937 as a result of the Spanish War which had the effect of transforming piracy into a war risk peril.<sup>233</sup> Piracy swung back again in 1982 to become an all risk peril. Therefore, it is excluded from the war exclusion clause of the Institute Cargo Clauses A, but neither the Institute Cargo Clauses (B) and (C) declares it to be an insured peril nor as a peril excluded by the war exclusion clause. It therefore means that piracy must be specifically insured in cases where the Institute Cargo Clauses (B) and (C) are utilized.<sup>234</sup>

#### **4.4 Piracy and its Impact on Marine Insurance Policies**

We have seen the various definitions of piracy and their shortcomings. There is no doubt that piracy, its definition, and how it is seen by the marine insurance industry affects the policies covering the marine adventures of the assured (shipowner and cargo owner). The relationship of the insurer and the assured is based upon the policy issued by the marine insurers and it therefore becomes pertinent to see how piracy is covered by the various policies and how the relationship of the insurer and the assured is affected by the intrigues of the concept of piracy and its coverage under these policies.

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<sup>229</sup> Douse (note 228) at 279-280.

<sup>230</sup> Rose (note 198) at 279.

<sup>231</sup> G Gauci ‘Piracy and its legal problems: with specific reference to the English law of marine insurance’ (2010) 41 *J.Mar.L.&Com* 541 at 544 .

<sup>232</sup> Dunt (note 213) at 189.

<sup>233</sup> Ibid.

<sup>234</sup> Rose (note 198) at 279.

#### 4.4.1 Piracy and its effects on Hull & Machinery Insurance

In England, the principal marine insurance clauses under the Institute Clauses are the Institute Voyage Clauses Hulls (IVCH) 83 & 95, Institute Time Clauses Hulls (ITCH) 83 & 95, and the International Hull Clauses (IHC), 2003. It appears that the 1983 clauses are still the more commonly preferred. It has been stated earlier that piracy is a covered risk under the Institute Hull Clauses. It is covered as a marine peril under IVCH 83 & 95, cl.4.1.5; ITCH 83 & 95, cl.6.1.5; IHC 03, cl.2.1.5. Now, the inquiry is this, what is the effect of the concept of piracy and its intrigues on Hull and Machinery Insurance? But first, a reflection on how the definition of piracy has affected the marine insurance contract between the insurer and the assured.

It is imperative from the onset to bear in mind that none of the clauses referred to above provide a definition of what piracy is. Therefore, this automatically means that the previous definitions of piracy with specific regard to the case law definition relied upon in the marine insurance sector analysed earlier is what will guide the parties in a marine insurance contract. The fact that any definition of piracy is flawed with so many shortcomings poses a great problem to the shipowner. The case of *Republic of Bolivia v Indemnity Mutual Assurance Co Ltd*<sup>235</sup> has established that an attack on a ship would not amount to piracy if it was not carried out for private ends. The fallout from this decision is that a piratical attack upon the ship of the assured which is termed as an attack by insurgents or politically motivated criminals would not amount to an act of piracy. Thus any attack on a ship under these circumstances would be excluded by IVCH 83, cl.21.2; ITCH 83, cl.24.2; IVCH 95, cl.22.2; ITCH 95, cl.25.2 and IHC, cl.30.2, all of which contain 'strike exclusion clauses' excluding liability for any loss, expenses or damage arising from acts of persons with political motivation. The implication is that the assured suddenly becomes uninsured as he would not be within the ambit of the definition of piracy as laid down by this case and the insurer becomes freed from the liability of indemnifying the assured.

It is also believed that an act of piracy could be both encompassed and beclouded by the excluded peril of 'riots' if the required elements are satisfied.<sup>236</sup> Riot is excluded by ITCH 83, cl.24.1; IVCH 83, cl.21.1; ITCH 95, cl.25.1; IVCH 95, cl.22.1 and

<sup>235</sup> *Republic of Bolivia v Indemnity Mutual Assurance Co Ltd* (note 73).

<sup>236</sup> Gauci (note 231) at 551.



ICH.cl.29.4. It is also defined by S1(1) of the English Public Order Act 1986 as follows:

*“Where 12 or more persons who are present together use or threaten unlawful violence for a common purpose and the conduct of them (taken together) is such as would cause a person of reasonable firmness present at the scene to fear for his personal safety, each of the persons using unlawful violence for the common purpose is guilty of riot.”*

Another problem could arise in circumstances where pirates maliciously decide to damage or destroy a ship in cases where their demands have not been met. Pirates do not have the primary intention of destroying any ship, which they have hijacked as such a vessel is a prized asset, which they would normally protect in order to achieve their objective of obtaining a ransom payment.<sup>237</sup> However, they might not hesitate to do so where their demands have been refused and in doing so may care less if such act causes colossal damage. Gotthard Gauchi is of the opinion that such an incident would take the hijacking of the ship out of its piratical nature and could be regarded as “use of any weapon or the detonation of an explosive by any person acting maliciously”<sup>238</sup> which is excluded under IVCH 83,cl.22; ITCH 83,cl.26; IVCH 95,cl.23; ITCH 95,cl.23 and IHC,cl.30.3. The consequential effect of this is that the assured-shipowner is unable to be indemnified by the insurer, as he would have lost his cover for piracy.

#### **4.4.1.1 Ransom Payments and its effects on Hull insurance**

The concept of piracy and ransom payments which go hand in hand have a number of effects on hull insurance. The hijacking of ships in present day piracy is for the primary aim of ransom demand as can be seen in the patterns displayed by the pirates of Somalia which presents a faster and quicker way of making money rather than the arduous and lengthy stress of trying to sell the ship. The effects of ransom payment on hull insurance will be considered in light of the consequential issues which flows from the payment of ransom which will be appraised by considering the decision in *The Bunga Maleti Dua*<sup>239</sup> in relation to the legality of ransom payments, the possibility of recovering such ransom payments by the assured from the insurer and the consequences of the assured’s refusal to pay ransom to seek release of the ship. These issues will be discussed below.

<sup>237</sup> Gauci (note 231) at 551.

<sup>238</sup> Ibid.

<sup>239</sup> *The Bunga Maleti Dua* [2011] 1 C.L.C. 97 CA.

## I The *Bunga Melati Dua* and the legality of ransom payments.

The marine insurance industry and shipowners have faced continued harsh criticism for indulging in the payments of ransoms, despite the fact that the payments of these ransom demands presently appear to be the only guaranteed way of ensuring that lives are not lost and that the ship and cargo are preserved from destruction. These criticisms largely stem from a moral angle and are reinforced by the fact that the ransom payments have fuelled the endless appetite of the pirates for more money. However, whatever moral justification that has been adduced against the payments of ransom appears to have been displaced by the recent decision of the Court of Appeal in the landmark case of *The Bunga Melati Dua*.<sup>240</sup> One of the crucial issues determined in the case bordered on whether ransom payment contravened public policy.

*The Bunga Melati Dua* was a ship which had been laden with a cargo of biodiesel and was heading for Rotterdam, when it was unfortunately hijacked by Somali pirates and taken into Somali coastal waters. The owners of the cargo immediately commenced negotiations for the ransom payment in order to secure the release of the ship and while this was ongoing, the cargo owners served a notice of abandonment on its insurers declaring the cargo to be an actual total loss. This was rejected by the insurers on the ground that the cargo was not irretrievably lost and could be recovered by the payment of the ransom demand which they contended was neither illegal nor against public policy. The argument of the insurers was upheld in the court *a quo*, and on appeal, the Court of Appeal held that “it is to be observed that there is no legislation against payment of ransom, which is therefore not illegal”<sup>241</sup> and that the repeal of the Ransom Act 1782 in 1864 served to emphasise this position.<sup>242</sup> The court further held that “the fact that there may be no duty to make a ransom payment does not mean that there is any obligation not to make such a payment”.<sup>243</sup> The effect of this decision is that presently, the payment of ransom is not illegal as far as English law is concerned. Therefore, the assured can engage in negotiations over the payment of any ransom demand without the fear of any legal sanctions. And as far as marine insurance is concerned, many marine policies are contractually subjected to English law.

<sup>240</sup> *The Bunga Maleti Dua* (note 239).

<sup>241</sup> *The Bunga Maleti Dua* (note 239) at 119.

<sup>242</sup> *The Bunga Maleti Dua* (note 239) at 119.

<sup>243</sup> *The Bunga Maleti Dua* (note 239) at 123.

However, the ransom payment becomes illegal “if the pirates are not such within a strict definition of that term but rather terrorists”<sup>244</sup> in view of Section 15(3) of the English Terrorism Act 2000 which provides that an offence is committed by anyone who provides money or property for the purposes of terrorism with reasonable cause to believe that it may be used for such cause.

Nevertheless, it is imperative to note that the position as to the legality of ransom payments differs from one jurisdiction to the other. Thus in the United States an Executive Order issued on 13<sup>th</sup> April 2010 by President Obama recently made ransom paid in certain circumstances to pirates illegal and an offence. S1(i) of the Executive Order provides that “the making of any contribution or provision of funds, goods, or services by, to, or for the benefit of any person whose property and interests in property are blocked pursuant to this order”. This Order makes it an offence to make payments to pirates which would subsequently get into the hands of certain designated persons and groups referred to that in that Order as particular threats to the security of the US. It is reported that this Order was issued because of American Intelligence “linking the Somali insurgence group Al-Shabaab to the terrorist group Al Qaeda, and the concern that any payments made to this entity, or the individuals identified in connection with the Executive Order, would contribute to the growing threat of terrorist activity in Somalia and elsewhere. Presently, there are eleven individuals as well as the terrorist group- Al-Shabaab who are identified in the annex to the Executive Order as being blocked and two of these individuals regarded as self identified pirates.<sup>245</sup> The effect of this order is that ransom payment is prohibited and becomes illegal if made to a person who has been recognised and regarded as being blocked.<sup>246</sup> Therefore, it could be said that ransom payments under the law of the US would not be illegal as long as it is not made to persons identified in the Annex to the Executive Order.

It is not certain that the outlawing of ransom payment will bring any meaningful end to the relentless piratical attacks on ships. In view of the absence of any “overall strategic resolution, military or otherwise”<sup>247</sup> to counter the menace of piracy, the only way out for the helpless shipowner will continue to be the payment of ransom.

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<sup>244</sup> Gauci (note 231) at 558.

<sup>245</sup> L Rutkowski *et al* ‘Mugged twice? payment of ransom on the high seas’ (2010) 59 *Am.U.L.Rev* 1425 at 1436.

<sup>246</sup> *Ibid.*

<sup>247</sup> Rutkowski (note 245) at 1429.

The outlawing of ransom payment without resolving the problem of piracy will do nothing more than leave the shipowner in an untenable position.<sup>248</sup>

## II Ransom payment recovery under sue and labour and general average

The second issue is whether the assured can recover a ransom payment from its insurers. In view of the fact that ransom payment is not illegal in England, it would imply that the assured would be able to recover expenses for ransom payment from its insurer. The ransom payment may be recoverable as expenses under general average or expenses under sue and labour.<sup>249</sup> Let us now look at the possibility of the assured–shipowner recovering these expenses.

In respect of the recovery under the sue and labour clause, it must be noted that the assured has an obligation to avert or reduce loss even where the insurance policy fails to contain a sue and labour clause.<sup>250</sup> This obligation is provided for under s78 (4) of MIA 1906 which provides that “it is the duty of the assured and his agents, in all cases, to take such measures as may be reasonable for the purpose of averting or minimizing a loss”. Therefore the refusal of the assured to make the ransom payment may amount to a breach of the obligation to mitigate the loss referred to in s78 (4) of MIA 1906.<sup>251</sup> The assured’s recovery of the expenses undertaken by him or her is provided for under s78 (1) of MIA 1906 which provides that “Where the policy contains a suing and labouring clause, the engagement thereby entered into is deemed to be supplementary to the contract of insurance, and the assured may recover from the insurer any expenses properly incurred pursuant to the clause....”.<sup>252</sup> The issue of the recovery of ransom payment under the sue and labour clause was considered in the case of *Royal Boskalis v. Mountain*<sup>253</sup> where the court stated that “unless the payment of ransom is illegal, it is recoverable from underwriters and, although the precise basis for the recovery is not altogether clear, it does seem to be accepted that it can be under sue and labour clause”.<sup>254</sup> In buttressing this point, the court made further reference to an excerpt from Arnould’s Law of Marine Insurance and Average at p.791 at para.913A where it was stated that:

<sup>248</sup> Rutkowski (note 245) at 1429.

<sup>249</sup> Gauci (note 231) at 552.

<sup>250</sup> Ibid at 553.

<sup>251</sup> Ibid.

<sup>252</sup> S78(1) of Marine Insurance Act 1906.

<sup>253</sup> *Royal Boskalis v Mountain* [1997] C.L.C 816.

<sup>254</sup> *Royal Boskalis v Mountain* (note 253) at 824.

*“Where the assured is forcibly deprived of possession or control of the insured property, it generally makes no difference whether those who deprive him of it are acting lawfully or unlawfully, as the perils covered by the standard policies are in most cases not subject to any limitation in this respect. Problems may, however, arise over the suing and labouring clause, where the steps the assured has taken (or which it is said he ought to have taken) are of an illicit nature. No difficulty arises where the payment of ransom or similar demands is illegal under the proper law of the policy, or the law of the forum where the claim is brought. In such cases, it is plain that the assured cannot recover under the suing and labouring clause . . . . There appears to be little doubt that where a payment which is not itself illegal under any relevant law is made to secure the release of property, this can be recovered even though the persons demanding the payment are not acting lawfully in so doing. Thus, for example, payment to recover property from pirates or hijackers must, if submitted, in general be recoverable.”*<sup>255</sup>

The recovery of ransom payment via the sue and labour clause was also considered in the recent case of *The Bunga Maleti Dua*<sup>256</sup> where the court stated that the payment of a ransom could be recovered as sue and labour expenses.<sup>257</sup> It can therefore be said that the assured’s recovery of its ransom payments from the insurer will be possible as long as the payment of ransom is not illegal under the law applicable to the policy, which in most cases is English law.

In respect of recovery of ransom payments as expenses under General Average, there is no doubt that the shipowner and the cargo owner both have enormous stakes in the safety of the marine adventure. In spite of the fact that it is the shipowner that makes the ransom payment, the shipowner can recover part of the payment from the cargo owner by way of general average. The assured is indemnified by the hull insurance against general losses and salvage charges which arise from any of the perils covered.<sup>258</sup> It is important to note that from a historical view, ransom payment in general average has been admissible from a long time ago, dating back to Roman times.<sup>259</sup> In respect of case law, it would appear that the courts have long recognised that ransom payment can be recovered by way of general contribution as far back as the 16<sup>th</sup> century. Thus in the case of *Hicks v. Palington*<sup>260</sup> it was decided that cargo

<sup>255</sup> *Royal Boskalis v Mountain* (note 253).

<sup>256</sup> *The Bunga Maleti Dua* (note 239).

<sup>257</sup> *The Bunga Maleti Dua* (note 239) at 119.

<sup>258</sup> *Lemon II* (note 207) at 1468.

<sup>259</sup> *Gauci* (note 231) at 555.

<sup>260</sup> *Hicks v Palington* [1590] Moore's QB R 297.

which had been given to pirates as ransom amounted to a sacrifice which was subject to general average contribution.<sup>261</sup>

This principle is embedded in s66(4) of MIA 1906 which provides that the shipowner as regards general average expenses can "...recover from the insurer in respect of the proportion of the loss which falls upon him; and, in the case of a general average sacrifice, he may recover from the insurer in respect of the whole loss without having enforced his right of contribution from the other parties liable to contribute". Therefore, this means that the insurer after indemnifying the assured for general average expenses can then move by way of subrogation against those liable to make contribution such as the cargo owner.

The York-Antwerp Rules 2004 provides the criteria to be met in order to determine if an expenditure such as a ransom payment can be considered to be an act which falls under general average. In defining General Average the Rules state that "there is a general average act when, and only when, any extraordinary sacrifice or expenditure is intentionally and reasonably made or incurred for the common safety for the purpose of preserving from peril the property involved in a common maritime adventure".<sup>262</sup> A similar provision is also to be found in s66(2) of MIA 1906 which provides that "there is a general average act where any extraordinary sacrifice or expenditure is voluntarily and reasonably made or incurred in time of peril for the purpose of preserving the property imperiled in the common adventure".<sup>263</sup> It is pertinent to note that Rule A of the York Antwerp Rules is closely modeled on the MIA definition<sup>264</sup> and a logical conclusion to be arrived at from the two definitions is that there are five essential features to be satisfied<sup>265</sup> for an expenditure to be considered a general average act which are that the act must be a peril; reasonably made; an extraordinary expenditure; for common benefit (common maritime adventure) and voluntary (intentional).

In satisfying these key features, the following can be seen. Firstly, there is no doubt that the attack by pirates which constitutes the act of piracy is a peril covered by the

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<sup>261</sup> Lowndes and Rudolf *The law of general average and the York Antwerp rules*, 13<sup>th</sup> ed, (2008) at 111.

<sup>262</sup> Rule A of the York Antwerp Rules 2004.

<sup>263</sup> S66(2) of MIA 1906.

<sup>264</sup> Lowndes and Rudolf (note 261) at 81.

<sup>265</sup> *Ibid* at 82.

hull insurance. Secondly, the ransom payments made by the assured cannot be said to be reasonably contemplated by the assured in the course of the marine adventure<sup>266</sup> and as such will be considered extraordinary. Thirdly, the ransom payment is voluntary as there is no statutory obligation or pre-existing contractual duty to make such payment.<sup>267</sup> Fourthly, the ransom payment is for common benefit as it guarantees the release of the hijacked vessel in order to achieve completion of the marine adventure.<sup>268</sup> Lastly, the payment of ransom which presently appears to be the only avenue to guarantee the safety of the ship, crew and the cargo can be said to be payment reasonably made. The conclusion could therefore be safely reached that ransom payment could be recovered by way of general average if these five features are present.

However, it is pertinent to note that the recovery of ransom payments may not be possible under general average in some circumstances. Thus it might not be possible to enforce contribution towards general average where ransom payment is illegal in the jurisdiction of the parties to the maritime adventure.<sup>269</sup> Similarly, difficulty to recover the ransom payments as a general average act may also arise where the pirates are termed as terrorists under the instances earlier referred to.

### III Effects of failure to pay ransom

In the event that the assured fails to make the ransom payment either because he refuses to pay the ransom or because the ransom negotiations break down, then the question becomes relevant as to whether the assured will be able to recover any indemnification from the hull insurer in the event of the ship being destroyed or damaged by the pirates by way of retaliation. It has been stated earlier that s78(4) of MIA 1906 provides that “it is the duty of the assured and his agents, in all cases, to take such measures as may be reasonable for the purpose of averting or minimising a loss”. In the light of this provision, it would appear that the assured if it fails to mitigate the loss by paying the ransom would be violating the provisions of the MIA.

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<sup>266</sup> J Spencer ‘Hull insurance and general average--some current issues’ (2009) 83 *Tul. L. Rev.* 1227 at 1262.

<sup>267</sup> *Ibid* at 1262.

<sup>268</sup> *Ibid*.

<sup>269</sup> Lowndes and Rudolf (note 261) at 112.

However, this suggestion was rejected in the case of *The Netherlands v Youell and Hayward*<sup>270</sup>. Here the Dutch royal navy had entered into a contract with a Dutch shipyard for the building of two submarines which had been insured with Lloyd's underwriters and with the shipyard also party to the insurance contract as a co-assured. The submarines suffered damage to their paintwork and following the failure of the shipyard to make the necessary repairs, the repairs were paid for by the navy which were sought to be recovered from the insurers by way of indemnification. In a claim brought by the State of the Netherlands, the insurers denied liability on the grounds of s55(2)(a) and s78(4) of the MIA. The insurers contended that the refusal of the shipyard as a co-assured to make the repairs amounted to a failure to sue and labour which was a breach of S78(4) of the MIA and as such the refusal to indemnify the navy was justified. However, the court rejected this argument and held that there was no reason "...why cover which protects an assured against the errors and defaults of others, including servants, agents and other co-assureds, should be excluded by any principle that lies behind the statutory duty to avert or minimise loss".<sup>271</sup> In view of this decision, it could therefore be said that loss incurred by the assured-shipowner as a result of damage or destruction of the ship and arising from the failure to pay the ransom demand would not deny him of the right to be indemnified by the insurer.

#### 4.4.2 Piracy and its effects on Cargo Insurance

In England, marine cargo insurance is basically covered by the Institute cargo clauses which are the Institute Cargo Clauses (ICC) A, Institute Cargo Clauses (ICC) B, Institute Cargo Clauses (ICC) C. Let us now see the effect of piracy on these policies and how piracy has affected the ability of the assured to insure himself under the policies.

The ICC(A) is projected as an 'All risks' policy which in its literal meaning would perhaps be understood to mean that the policy covers all kinds and manners of marine perils that could be encountered by the cargo during a marine adventure. However, this is far from the true position as the ICC (A) does not cover every peril that may be the lot of the cargo during the marine adventure and is as a result subject to quite a number of implied limitations which restricts the cover to certain losses

<sup>270</sup> *The Netherlands v Youell and Hayward* [1997] C.L.C 938.

<sup>271</sup> *The Netherlands v Youell and Hayward* (note 270) at 968.



arising from an accident.<sup>272</sup> The 1982 and 2009 ICC (A) both cover all perils which may befall the cargo during the marine adventure except those excluded by Clauses 4, 5, 6, and 7.<sup>273</sup> The peril of ‘war risk’ is excluded by both 1982 ICC (A) and the 2009 ICC (A) in Clause 6, but piracy is specifically excepted by the two types of ICC (A) from the war risk clause by Clause 6.2 which states that “capture seizure arrest restraint or detainment (*piracy excepted*), and the consequences thereof or any attempt thereat”.<sup>274</sup>

The implication of this is that piracy is indeed covered as a marine peril and the cargo owner who takes out the ICC (A) will be covered in a case where the peril of piracy befalls the cargo covered by the policy. However, in a situation quite similar to the one analysed in the hull insurance, the fact that piracy is covered under the ICC (A) does not necessarily mean that the assured-cargo owner is ultimately covered. This is because where the pirates have been termed as ‘terrorists’, this will take the piratical act out of the definition of piracy (earlier analysed) which then automatically implies that the assured becomes exposed because Clause 7.3 of the two types of ICC (A) exclude acts of terrorists or any act of terrorism from coverage under the two policies. Secondly, in the event that the pirates are termed as persons acting with political or religious motive, the cover will similarly be ousted by the definition of piracy and the assured will consequently become uninsured as Clause 7.3 of the 1982 ICC (A) and Clause 7.4 of the 2009 ICC (A) exclude such acts.

The situation is quite different under the ICC (B) and (C). The ICC (B) and (C) only cover named perils and is therefore a narrower form of cover.<sup>275</sup> The peril of piracy is not covered under these two cargo clauses and so the effect of this on the insurer who takes the ICC (B) and (C) is that he or she would be exposed in the event that the cargo becomes captured by pirates.

In the United States, the American Institute Cargo Clauses (AICC) are the principal policies which are widely used. The various categories of the current AICC are the American Institute Cargo Clauses 2004 Free of Particular Average – American Conditions (FPAAC) and American Institute Cargo Clauses 2004 Free of Particular

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<sup>272</sup> Dunt (note 213) at 135.

<sup>273</sup> Institute Cargo Clauses (ICC) (A) 1982 & 2009, Clause 1.

<sup>274</sup> Institute Cargo Clauses (ICC) (A) 1982 & 2009, Clause 6.

<sup>275</sup> Dunt (note 213) at 171.

Average – English Conditions (FPAEC). A common feature in these policies is the FC&S Warranty clause which excludes war risks as well as the peril of piracy from coverage under the policies. This position is very much different from the situation in England whereby piracy is a covered peril under the ICC (A). Therefore, the way out for the assured in the United States who wishes to be insured against the risk of piracy is to procure war risk insurance coverage under the American Institute of Marine Underwriters (AIMU) War Risks Open Policy (Cargo) 1981 and 1993, both of which cover the risk of piracy.

#### **4.4.2.1 Piracy, General Average and Cargo Insurance**

In the event that ransom payment is to be made in order to secure the release of the ship and the cargo, then the cargo owner may be required to contribute to the payment by way of general average. It has been earlier stated that the shipowner and the cargo owner both have a joint interest in the safety and the release of the ship and cargo. The ICC (A) (B) and (C) all cover general average in Clause 2 of the three categories of Cargo Clauses. There is no contest as far as the ICC (A) is concerned, the risk of piracy is covered under the ‘all risks’ policy and as such any ransom payment will be contributed to by the cargo owner and which will be indemnified by the cargo insurer by way of general average. This is covered by s66(4) of the MIA 1906 which had earlier been referred to. However, in the case of the ICC (B) and (C), it would appear that the recovery of any contribution made by the cargo owner towards the ransom payment from the insurer would be unlikely in consideration of the fact that the peril or piracy is not covered under these clauses.

#### **4.4.2.2 Effects of the Cargo Piracy Notice of Cancellation**

As a result of the deluge of piracy claims due to the upsurge of pirate attacks in the Gulf of Aden and other piracy endemic areas, a ‘Cargo Piracy Notice of Cancellation’ has been introduced by London insurers to be used with the ICC which provides that:

*“Where this insurance covers piracy and/or general average, salvage and sue and labour charges arising from piracy, such cover may be cancelled by insurers giving 7 days notice in writing, cancellation to take effect on the expiry of 7 days (10 days in respect of reinsurance) from midnight of the day on which the notice is issued by insurers. Insurers agree to reinstate this coverage subject to agreement between insurers and the insured prior to the cancellation taking effect as to any new rate of premium and/or conditions and/or warranties. Such cancellation shall not affect any insurance, which has attached before the cancellation takes effect. If the cancellation is in relation to specific geographical areas, such areas will be clearly defined by insurers in the notice of cancellation”.*

The main aim of the clause is to give the insurers the power to issue a notice of cancellation as regards the piracy risk during the tenure of the policy with the view of renegotiating a premium which is commensurate with the risk.<sup>276</sup> Dunt is of the view that the necessity of the cancellation clause arises from the fact that piracy cover is a marine, or all risks, cover which has no provision for the cancellation of the policy unlike the general position in the war risks cover.<sup>277</sup> The implication of this is that the assured might suddenly become exposed in the event that the cover is cancelled while the ship is in transit and the subject matter of the cargo insurance policy thereafter becomes hijacked by the pirates before the assured and the insurer can enter into a new agreement to renegotiate new premiums.

#### **4.4.3 Piracy and its effects on Protection and Indemnity Insurance (P&I)**

The formality of the operations of P&I clubs though in a way similar to other mutual insurers actually differs in certain ways.<sup>278</sup> Policies are not usually issued by the clubs and the coverage offered to the members(assured) of the club are therefore detailed in the Rules of the associations.<sup>279</sup> Each P&I club uses its own Rules to set the ambits of its cover.<sup>280</sup> The Rules of most of the P&I clubs have similar provisions and the Rules of the North of England Protecting and Indemnity Association Limited (NEP&I) and Rules of the American Club Mutual P&I Association will be considered in relation to the effects of piracy on P&I insurance.

It has been stated earlier that P&I insurance only covers third party liabilities of the shipowner, thus it is important from the onset to state that the P&I clubs do not cover

<sup>276</sup> Dunt (note 213) at 189.

<sup>277</sup> Ibid at 189-190.

<sup>278</sup> Hayden and Balick (note 204) at 326.

<sup>279</sup> Ibid.

<sup>280</sup> Hare (note 197) at 947.

piracy as a named risk, but will only “cover liabilities which are set out in a ‘risk covered’ rule”.<sup>281</sup> In view of this, it is imperative to inquire if the possible liabilities ensuing from piracy as a peril are covered by protection and indemnity insurance. Rule 24(1) of the Rules of NE P&I club states that the club will not indemnify the shipowner from liabilities arising from war risks, but piracy and barratry are excepted. Similarly Rule 3, section 1 of the Rules of the American Club also makes analogous provisions which exclude liabilities arising from war risks, but also excepting piracy and barratry. Therefore, it means that third party liabilities which flow from an act of piracy are covered by the P&I clubs.

In order to analyse the effects which piracy has on this important branch of the marine insurance industry, it is imperative to know which specific third party liabilities piracy may give rise to and how P&I insurance covers such liabilities. The third party liabilities which would flow from a piratical attack would arise in relation to the crew and the vessel itself. In respect of crewmen, there is the high possibility of the pirates bringing harm upon the crew in their bid to hijack the ship. The P&I insurance in this case would have to take care of the liabilities arising from the possible death, illness, injury, hospitalisation and repatriation of the crew members in any event (whether or not the crewmen put up a resistance to thwart the hijack of the ship). In view of this possible eventuality, cover is provided by Rule 19(1) of the Rules of NE P&I club for the liabilities relating to the death, injuries, illness or hospitalization of the seamen, while the same liabilities are similarly covered in Rule 2 section 1 of the Rules of the American Club Mutual P&I Association.

As regards cargo, in the possible though unlikely scenario that the pirates have their demands turned down which might instigate them into damaging or destroying the vessel which might be laden with oil or chemicals and thereby leading to the loss of the cargo, the P&I insurance would have to deal with the cargo claims from the cargo insurer who would have indemnified the cargo owner. Such cargo claim is covered by Rule 19(17) of the Rules of NE P&I club, while similar coverage is offered under Rule 2 section 8 of the Rules of the American Club Mutual P&I Association. In view of the pollution which would definitely arise from the destruction and spilling of the oil cargo, the inevitable pollution claims which would arise from such occurrence are

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<sup>281</sup> N Carden ‘Piracy and armed robbery at sea – how best to protect seafarers; piracy and P&I insurance presentation’. Available at [http://ec.europa.eu/transport/maritime/events/doc/2010\\_03\\_03\\_piracy/2010\\_03\\_03\\_igp-i.pdf](http://ec.europa.eu/transport/maritime/events/doc/2010_03_03_piracy/2010_03_03_igp-i.pdf) [Accessed 28th November 2011].

covered by Rule 19(13) of the Rules of NE P&I club and are similarly covered in Rule 2 section 13 of the Rules of the American Club Mutual P&I Association.

#### **4.4.3.1 Piracy, General Average and Protection and Indemnity Insurance**

It has been stated that P&I insurance will cover the shipowner only where it has incurred a legal liability. Therefore where there is want of legal liability, the P&I clubs have clearly maintained the position that they shall not cover ransom payment.<sup>282</sup> This position stems from the understanding that, though there might be a moral obligation for the shipowner to pay ransom in order to seek the release of the crew and the ship, there might not exist any legal obligation to do so.<sup>283</sup> However, there have been arguments that there should be a contribution via general average from Protection and Indemnity Insurance in relation to ransom payments.<sup>284</sup> The crew of the ship and the ship itself are two of the beneficiaries of the ransom payment and since by the provisions of S66(2) of the MIA 1906 and the criteria laid down by the York Antwerp Rules 2004 both of which have been analysed earlier, ransom payment would qualify for general average contribution from both the cargo insurer and hull insurer, it would be arguable that the P&I clubs which cover the shipowners liabilities as regards crew injuries and pollution damage may be exposed to claims from the shipowners, cargo owners and other interests<sup>285</sup> in view of the fact that the crew could have come to serious harm and that the ship may have been destroyed. However, the P&I clubs have argued that general average is apportioned to property interests and involves the threat to life and threat to the safety of the ship.<sup>286</sup> It has further been argued that ransom payment should be seen as an expense and not as liability, therefore not requiring contribution from the P&I clubs.

#### **4.4.4 Piracy and its effects on War Risks Insurance**

It has been stated earlier that in England, piracy wavered between been covered as a peril under marine risk to war risk and is presently been covered as a peril in hull insurance under the ITCH 83 & 95, ITVH83 & 95 and IHC 2003. In relation to

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<sup>282</sup> Marsh 'Piracy - the insurance implications' Available at [www.igpandi.org/downloadables/piracy/news/Marsh\\_Piracy\\_implications.pdf](http://www.igpandi.org/downloadables/piracy/news/Marsh_Piracy_implications.pdf) [Accessed 26<sup>th</sup> November 2011].

<sup>283</sup> Ibid.

<sup>284</sup> Gauci (note 231) at 554.

<sup>285</sup> Ibid.

<sup>286</sup> Carden (note 281).

cargo, it is covered as a peril under the ICC (A), but not under the ICC (B) & (C). In 2005, optional clauses were introduced by the Joint Hull Committee (after consultation with the Joint War committee) which excluded piracy from coverage under hull policies with the intent of transferring it back to the war risk cover, but most underwriters chose not to adopt the additional clause and instead left it to remain under the hull policies.<sup>287</sup>

However, the murderous upsurge in the attacks by Somali pirates in the Gulf of Aden and other endemic areas has now seen marine insurance underwriters in London begin a "large-scale transition from covering piracy under hull policies to covering the peril under war risk policies".<sup>288</sup> It has been suggested that "in London now in about 80% of cases, (piracy is) being transferred from the hull to the war policy".<sup>289</sup> The insurance underwriters in London have now begun to incorporate the Violent Theft, Piracy and Barratry Exclusion Clause into the various categories of hull insurance (ITCH 83 & 95, IVCH 83 & 95, and the ICH 2003) which has the effect of expressly excluding the perils of violent theft by persons from outside the vessel; piracy; and barratry from all categories of hull insurances. The implication of this is that shipowners who require cover for piracy have to seek such cover under the Institute War and Strikes Clauses Hulls (IWSCH) which had previously lacked cover for piracy, barratry nor violent theft, but has now been amended by the Violent Theft, Piracy and Barratry Extension Clause since 2005.

The IWSCH has now seen the incorporation of three new clauses after clause 1.6 which are clause 1.7(violent theft by persons from outside the Vessel); clause 1.8(piracy); clause 1.9(barratry of Master Officers or Crew). This recent development of incorporating piracy into the IWSCH would therefore appear to have provided a panacea to the ambiguities regarding the issue of definition of acts of piracy being clouded by other perils such as 'riots' and 'malicious damage' which are not covered under hulls insurance, but are adequately covered under the IWSCH.

It is interesting to note that the assured may not be totally covered against the peril of piracy under the IWSCH as the assured may be faced with the hurdle presented by

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<sup>287</sup> Z Phillips 'Marine insurers transfer piracy risks to war cover'. Available at <http://www.businessinsurance.com/apps/pbcs.dll/article?AID=/20090329/ISSUE01/100027383> [Accessed 28th November 2011].

<sup>288</sup> Ibid.

<sup>289</sup> Ibid.

the Navigation Limitations for Hull War, Strikes, Terrorism and Related Perils Endorsement which provides that the insured vessel shall not sail or enter into the territorial waters of any of the countries or places whose names are published periodically by the Joint War Committee in the current List of Areas of Perceived Enhanced Risk (Listed Areas).<sup>290</sup> The waters of the Indian Ocean, Arabian Gulf, Gulf of Aden, Gulf of Oman, Southern Red Sea and the African countries of Nigeria, Somalia and Libya as well as some countries in the Middle East perceived as 'high risk' have all featured prominently in the List of Areas which were published in 2011. The implication of this is that any insured ship which ventures into any of these listed zones will become uninsured and will not be indemnified by the insurer unless due notice about the breach is brought to the insurer's attention as soon as it is possible and amended terms of the cover and additional premiums required by the insurers are agreed upon.<sup>291</sup>

In relation to cargo insurance, it has been stated earlier that piracy is only covered under ICC (A), and it therefore becomes imperative for the assured who wishes to insure his cargo against piracy to procure the ICC (A) as against procuring the ICC (B) or (C) which will not insure him against the risk of piracy since the peril is not covered in these categories of cargo insurance.

In the United States, it is important to note that piracy has always been an excluded peril under the American Institute Hull Clauses (AIHC) 1977 and still remains excluded in the amended AHIC 2009. Thus the implication of this is that an assured who wishes to be insured for piracy must seek coverage under war risk insurance which is a covered peril under the American Institute Hull War Risks and Strikes Clauses (AIHWRSC) 1977 and is also covered as a peril under the amended AIHWRSC 2009.

#### **4.4.5 Piracy and its effects on Kidnap and Ransom Insurance.**

The fact that ransom payments may be recoverable under the sue and labour clause and general average has been analysed earlier. However, it is a reality that the recovery of the ransom payment made by the assured could be a subject of dispute

<sup>290</sup> Navigation Limitations For Hull War, Strikes, Terrorism, and Related Perils Endorsement, Clause 1.

<sup>291</sup> Navigation Limitations For Hull War, Strikes, Terrorism, and Related Perils Endorsement, Clause 2(b) & 2(a).

and in order to avoid such murky waters, there has been a resort to Kidnap and Ransom insurance (K & R Insurance) which provides a guarantee that the ransom payment will be taken care of by the insurer based upon the payment of adequate premium for that cause. The intrigues associated with the payment of ransom by the shipowner are more often than not time consuming, energy sapping and require considerable financial muscle to meet the ransom demands of the pirates. The shipowner might be confronted with issues of how to approach the pirates; how to initiate and conduct the negotiation process; how to raise the required capital to meet the ransom payment and the rather complex process of delivering the ransom. K & R insurance is specifically designed to assist the shipowner in dealing with these cumbersome issues.<sup>292</sup> It ensures that priority treatment is given to the shipowner by kidnap negotiators.<sup>293</sup> Lloyd's of London was the first insurer to offer K&R insurance, but today, there are quite a number of insurers who offer this type of insurance.<sup>294</sup> What is covered under the K&R insurance is reliant upon the wordings used in the policy.<sup>295</sup> Thus the coverage offered by K&R insurers actually differs from one policy to the other which is usually worded in order to accommodate the needs of the assured.

The persons covered under the K&R insurance policy would include the ships crew ships agents, supernumeraries, and persons legally on board the vessel during the occurrence of the piracy incident.<sup>296</sup> The benefits derived from a marine K&R insurance would include having immediate access to professional ransom negotiators and skilled security experts to provide guidance for the insured throughout the kidnap and ransom situation<sup>297</sup> and ensuring that the kidnap and ransom costs are met subject to the limitations on the policy.<sup>298</sup> The policy would also cover the indemnification of the assured in situations whereby the ransom becomes the subject of theft or loss during its transit to the pirates.

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<sup>292</sup> 'Confusion remains over marine kidnap and ransom insurance'. Available at <http://www.fp-marine.com/news/articles/confusion-remains-over-marine-kidnap-and-ransom-insurance> [Accessed 29th November 2011].

<sup>293</sup> Ibid.

<sup>294</sup> Gauci (note 231) at 559.

<sup>295</sup> S Kenney 'Regional shortcomings and global solutions: kidnap, ransom and insurance in Latin America' (2008) 14 *Conn Ins L.J* 557 at 561.

<sup>296</sup> T Brown 'Marine K&R insurance; frequently asked questions'. Available at [http://www.espadaservices.com/news\\_pr/Seacurus\\_Issue\\_02\\_V5.pdf](http://www.espadaservices.com/news_pr/Seacurus_Issue_02_V5.pdf) [Accessed 2nd December 2011].

<sup>297</sup> Ibid.

<sup>298</sup> Ibid.



## 5. PREVENTIVE AND COUNTERMEASURES TO COMBAT PIRACY

We have seen the various challenges and effects which piracy poses to the shipping industry and most especially the assured (shipowner and cargo owner) and the insurer who represent the core players in the marine insurance industry. We have also seen how the definition of piracy could suddenly render the assured to become uninsured if a piratical attack does not fall within the ambit of the definitional constraints of piracy alongside the recent stance been taken by the marine insurance underwriters in reaction to the upsurge in the level of piratical attacks. Therefore, it behoves the shipowner to try as much as possible to deter the occurrence of a piratical attack on his ship as this would save him the consequential effects which flows from a successful pirate attack regardless of the fact that he may be insured. Prevention they say, is much better than cure. Various preventive innovations to deter and prevent the success of a pirate attack have now been developed and we shall take a look at some of these measures in countering piracy.

### 5.1 Secure Ship

The Secure Ship represents the most current and effective innovative countermeasure to prevent piracy<sup>299</sup> and is designed to guard the ship against pirate attacks, stowaways and illegal entry into the ship. The innovation consists of a collapsible electrified fence which is made to surround the ship and which can be easily collapsed when the ship is entering harbour or when a boat has need to come alongside the ship.<sup>300</sup> The electric fence is divided into starboard and port zones thereby making it possible to have one side of the ship activated while the other is deactivated which becomes quite useful when the vessel is moored alongside in the harbor.<sup>301</sup> The secure ship has a sophisticated control system which can detect any attempt to enter the vessel and such attempts are transmitted to a number of output devices such as lights, sirens and alarms.<sup>302</sup> A “very loud noise generating system and strong flood lights ensure that any boarding attempts are quickly aborted”<sup>303</sup> while a high voltage which is non lethal makes the vessel almost impregnable

<sup>299</sup> M Mcdaniel ‘An essay on piracy’. Available at <http://www.stowmasters.com/pirates.htm> [Accessed 3rd December 2011].

<sup>300</sup> Secure Marine ‘The maritime security consultant’. Available at [http://www.secure-marine.com/presentation/BROCHURE\\_Ship.PDF](http://www.secure-marine.com/presentation/BROCHURE_Ship.PDF) [Accessed 4th December 2011].

<sup>301</sup> Ibid.

<sup>302</sup> Ibid.

<sup>303</sup> Ibid.

thereby guaranteeing the crew and ship's protection.<sup>304</sup> It must be noted that even in the event of power failure attempts to board the vessel will still be detected. The electrified wire system produces a voltage level of a maximum of 9000 volts which results into a shock upon the slightest contact, but which has no lethal effect.<sup>305</sup>

## 5.2 Ship Security Alert Systems (SSAS)

The International Maritime Organisation (IMO) in December 2002 adopted certain changes to the Safety of Life at Sea (SOLAS) Convention at the SOLAS Conference which resulted in certain amendments to the convention in order to prevent unlawful attacks against ships.<sup>306</sup> The amendments saw the incorporation of the International Ship and Port Facility Security Code (ISPS Code) into a new chapter XI of the convention and the Ship Security Alert systems was provided for in Regulation 6.<sup>307</sup> This Regulation demanded that a Ship Security Alert system must be provided for in all categories of ships, which are specified in the said regulation. The Ship Security Alert system has the effect of transmitting a "ship-to-shore security alert to a competent authority designated by the Administration"<sup>308</sup> which shall pinpoint the ship's location and indicate that the ship's security has been compromised or is under threat.<sup>309</sup> The SSAS shall also not raise any alarm on board the ship nor send the security alert to other ships and the alert shall continue until it has been deactivated.<sup>310</sup> The IMO in addition to the amendments also produced guidance on the effective implementation of the SSAS<sup>311</sup> as well as guidance for directing the Maritime Rescue Co-Ordination Centres (MRCCS) on how to deal with the alerts from the SSAS.<sup>312</sup>

The ShipLoc is one of the Ship Security Alert Systems that can be found in the market. It is an inexpensive satellite tracking system which enables shipping

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<sup>304</sup> Secure Marine (note 300).

<sup>305</sup> Ibid.

<sup>306</sup> IMO; Consideration and adoption of amendments to the International Convention for the Safety of Life at Sea, 1974; Conference resolution 1 and related amendments to the 1974 SOLAS Convention. IMO DOC SOLAS/CONF.5/32.

<sup>307</sup> Ibid.

<sup>308</sup> Ibid.

<sup>309</sup> Ibid.

<sup>310</sup> Ibid.

<sup>311</sup> IMO; Guidance on provision of ship security alert systems; IMO DOC MSC/Circ.1072, (26 June 2003).

<sup>312</sup> IMO; Measures to enhance security; directives for maritime rescue co-ordination centers (MRCCS) On Acts of Violence Against Ships; IMO Doc MSC/Circ.1073.

companies to pinpoint the precise location of their ships via a computer which has internet access.<sup>313</sup> The shipowners are able to permanently track their ships around 6 to 24 times a day.<sup>314</sup> Information regarding the ship such as its speed, heading, location as well as meteorological indicators such as air pressure, wind and waves are all visible on the ShipLoc website.<sup>315</sup> In a crisis situation, an alert which is activated by pressing the panic button in the ship is sent from the ship to the shore which is not receivable by other ships around and the reports are immediately received by the shipowner, the IMB and the competent authority such as the flag state authority.<sup>316</sup> The result is that a response such as a coast guard intervention force is scrambled to counter the imminent risk and attack. The shiploc is endorsed by the IMB and is compliant with the IMO regulation SOLAS XI-2/6.<sup>317</sup>

### 5.3 Long Range Acoustic Device

In October 2000, an American warship-the USS Cole was attacked and a forty foot hole was blown into the side of the ship by suspected suicide bombers. As a result of this incident, the Long Range Acoustic Device was developed by the American Technology Corporation.<sup>318</sup> The device can operate at a frequency of 120dB to serve as a warning to any approaching vessel or craft to alter its course and can be jerked up to 151dB which has the potential of emitting a very painful and loud noise in order to deter pirates.<sup>319</sup> The technology of the acoustic device has now been drafted into another military device called the ‘Phraselator’ which is designed to issue particular warnings and orders in different languages<sup>320</sup> and if such orders are not obeyed, then a painful and loud warring sound follows.<sup>321</sup> Its use has been employed by the police and US military to serve as warnings from as far as 300m away, but its use in quelling civil disturbances and uprisings have been condemned by human rights activists who argue that sound emissions which are higher than 90dB are

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<sup>313</sup> M Mcdaniel (note 299).

<sup>314</sup> Shiploc ‘How it works’. Available at [http://www.shiploc.com/html/how\\_it\\_works.html](http://www.shiploc.com/html/how_it_works.html). [Accessed 7<sup>th</sup> December 2011].

<sup>315</sup> Ibid.

<sup>316</sup> <http://www.gizmag.com/lrad-long-range-acoustic-device/11433/>

<sup>317</sup> Mcdaniel (note 299).

<sup>318</sup> Ibid.

<sup>319</sup> D Greig ‘The long range acoustic device: pirate deterrent, crowd controller or soft drink seller?’. Available at <http://www.gizmag.com/lrad-long-range-acoustic-device/11433/> [Accessed 7<sup>th</sup> December 2011].

<sup>320</sup> Ibid.

<sup>321</sup> Ibid.

potentially harmful to hearing.<sup>322</sup> Carl Gruenler, a (former) vice president of military and government operations for American Technology Corporation was reported as conceding that the device is capable of causing permanent hear damage and that it is only meant to be employed for a few seconds each time it is used<sup>323</sup>. The success of the device in deterring pirates has also come under criticism and it failed to prevent the attack of pirates on a Liberian flagged vessel in November 2008.<sup>324</sup> There have also been concerns regarding its effectiveness as arguments have been raised that the device becomes harmless and defeated by the use of hearing protection such as earplugs.

#### **5.4 The Sea Laser (lasersec)**

The "SeaLase" laser was developed quite similarly to the one employed by the US military for crowd control in Afghanistan and Iraq and it has a range of four kilometers and the closer one gets to the laser makes it harder to look at<sup>325</sup>. According to the company which developed the device for commercial use- Lasersec Systems, attackers who come within one kilometer of the device have been reported to develop nausea and loss of sight.<sup>326</sup> However, the loss of sight inflicted by the laser is only temporary and no permanent damage is reported. The use of the SeaLase has now become quite popular with superyacht owners who wish to protect their million dollar properties.<sup>327</sup> As a result of the fact that the carriage of guns on board a ship even if it be for protection is not condoned in so many countries in the world, the use of the SeaLase which is a non-lethal weapon is highly favored by many yacht crews and vessel owners alike<sup>328</sup>. The Russian Billionaire-Roman Abramovich, has been reported to have installed such a device on his yacht.<sup>329</sup>

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<sup>322</sup> Greig (note 319).

<sup>323</sup> Mcdaniel (note 299).

<sup>324</sup> Greig (note 319).

<sup>325</sup> Mcdaniel (note 299).

<sup>326</sup> Ibid.

<sup>327</sup> Ibid.

<sup>328</sup> Ibid.

<sup>329</sup> Ibid.

## 6. CONCLUSION AND RECOMMENDATIONS

This dissertation has taken a look at the definitional shortcomings of piracy which pose serious challenges to the fight and efforts in curtailing and curbing the hydra headed monster which it has become. We have also seen the root causes of piracy and how certain core factors aid in its germination and growth as well as the importance which the readiness, ability and willingness of the state plays in combating the menace of piracy. A look has also been taken at how piracy has posed various challenges to the marine insurance industry and how it has come to impact on the relationship between the assured and the insurer in respect of the various marine insurance policies forming the basis of the contractual relationship between the two parties. In view of the issues analysed in this essay, certain realities come to light which if not tackled will result into the fact that pirates will continue to have the upper hand in the efforts to combat the menace called piracy and which will continue to have ricocheting effects on the marine insurance industry. Let us now examine these variables.

Firstly, there is a huge challenge posed by the lack of an international all encompassing definition to piracy. The stark reality of the situation is that as long as the shortcomings confronting the various definitions of piracy analysed in this essay continue to remain at large without the required steps taken to redress these loopholes, the various international efforts to combat piracy will continue to be remain shortsighted and will be akin to taking a 'fire brigade' approach. There is an urgent need for the International community to redress the current ambiguities confronting the definition of piracy. The UNCLOS definition should be amended in order to provide an all embracing definition which would take into consideration not only the new intrigues posed by modern day piracy, but also the antics and modus operandi employed by present day pirates. This amended international definition should also be made applicable in every state by way of each state adopting and integrating this international definition into its municipal laws. By this way, any pirate apprehended by any state will not be able to escape prosecution by the default of an absence of a piracy law in such state. This much needed amendment to the present definition as we have it should also give a wide latitude to the various navies of the world to apprehend pirates in the territorial waters of third states so as to apprehend pirates who seek to escape by making use of this present loophole. Until this vital step is taken, present efforts undertaken by the navies of the world to patrol

the waterways will remain futile as pirates who are not able to escape been apprehended by seeking refuge in the territorial waters of weak states which are incapable of patrolling their waters, will find succor in the ambiguities currently beclouding the present definition of piracy as we have it.

In relation to the marine insurance sector, in view of the fact that most marine insurance policies are always governed by English law, it becomes paramount that there should be a revision of the MIA 1906 in order to provide a modern definition of piracy for the purposes of the marine insurance industry. In view of the shortcomings and deficiencies posed by a lack of modernised definition to piracy, efforts should be undertaken by the marine insurers to incorporate a definition of piracy into the various categories of marine insurance policies issued by them which will have a binding effect on the parties. While this suggestion might seem a little farfetched, it becomes justified considering the fact that the peril of piracy now seems to have occupied top spot in the rankings when considering the likelihood of the occurrence of any of the various perils insured in a marine insurance policy.

Secondly, while the world is busy grappling with countermeasures on how to confront and combat piracy, especially as posed by the activities of pirates in Somalia. It seems to be ignoring the fact that the menace of piracy posed by these pirates is caused by lack of a working and effective government in Somalia as a result of the strife and war happening in that country. The only way to curtail the activities of pirates in the Gulf of Aden is to help Somalia ensure that peace returns once more to that country and ensuring that there is a stable and functioning government in place. A look has already been seen at how pirate attacks in the Gulf of Aden almost vanished during the brief reign of the Islamic Courts Union before they were sent packing by the foreign backed Transitional Federal Government (TFG), this only goes on to show the dividends which can be reaped from effecting stability in that country as well as in the other piracy endemic regions in which the governments have crucial internal issues which have destabilising effects on those governments to combat piracy.

Thirdly, there is the need to put in place a much needed punishment regime for pirates. The author is not unmindful of the fact that past experiences have shown that the existence of punitive measures does not constitute the ultimate antidote to crime.

Nevertheless, the awareness that certain punishment awaits a pirate will do well to act as a deterrent and to curb the incessant increase in the levels of pirate attacks and perhaps also help to dissuade would be pirates from becoming recruited into the dangerous 'do or die' business of piracy. However, the present situation is that many countries are not willing to take on the prosecution of pirates because of the absence of municipal laws in such countries to prosecute apprehended pirates, the cost of prosecuting such captured pirates and the fact that such pirates if prosecuted and convicted might want to seek asylum in those countries after completing their terms. Many of the apprehended pirates are presently been taken to Kenya to be prosecuted, but current feedback suggests that there is a growing reluctance to continue to prosecute these pirates as it puts a strain on the justice system in that country. Therefore there is a need to have an International Court of Justice which shall have the primary role of prosecuting pirates.

Finally, it is imperative that the above recommendations should be enforced in unison if there is indeed to be a conclusive end to piracy. The enforcement of these recommendations in a piecemeal fashion will only result in the fact that piracy will continue to resurface and perhaps metamorphose into a more dangerous hydra headed monster as pirates will continue to look for new avenues which would only assist in getting them miles ahead of efforts to curb the menace. As it is said, 'if one has to kill a hydra headed monster, then it is better to get all the heads'.

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