

The background of the slide is a dark blue-grey color with a faint, light-colored map overlay. A compass rose is visible on the left side, and a dollar sign (\$) is located near the bottom left. The map shows various landmasses and lines of latitude/longitude.

# **Universal Jurisdiction & The Suppression of Modern-Day Piracy**

# 1. What is piracy?

*Art. 15 High Seas Conv. 1958 & Art. 101 CLOS'82*

- (a) any illegal acts of violence/detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship:
  - (i) on the high seas, against another ship, or against persons or property on board such ship;
  - (ii) against a ship, persons or property in a place outside the jurisdiction of any State;
- (b) voluntary participation in the operation of a ship + knowledge of facts makes it a pirate ship;
- (c) inciting or intentionally facilitating (a) or (b).

Britain failed in 1958 to have “attempts” included.

## 2. Universal jurisdiction (UJ) over piracy

Cicero (Roman Empire: 106 – 43 B.C.):

*"Pirata est hostis humani generis"*

Moore J. in *The Lotus Case (France v. Turkey)*, Permanent CIJ (1927): “Piracy ... is ... an offence against the law of nations; and as the scene of the pirate's operations is the high seas, which it is not the right or the duty of any nation to police, he is denied the protection of the flag he may carry, and is treated as an outlaw, as the enemy of mankind—*hostis humani generis*—whom any nation may in the interest of all capture and punish.”

***In re Piracy Jure Gentium* [1934] A.C. 586  
(Privy Council): Criminal jurisdiction of  
municipal law extends to**

- crimes committed on State territory or territorial waters or its own ships; or
- by State's own nationals wherever committed;
- piracy committed on the high seas by any national on any ship, as a pirate is beyond the protection of any State. He is no longer a national, but "*hostis humani generis*" and as such he is justiciable by any State anywhere: Grotius (1583-1645) "*De Jure Belli ac Pacis*," vol. 2, cap. 20, § 40."

**Logics: UJ because:**

**(a) the high seas is beyond national jurisdiction of any State;**

**(b) the flag State or the State of nationality of the victims is too far away; &**

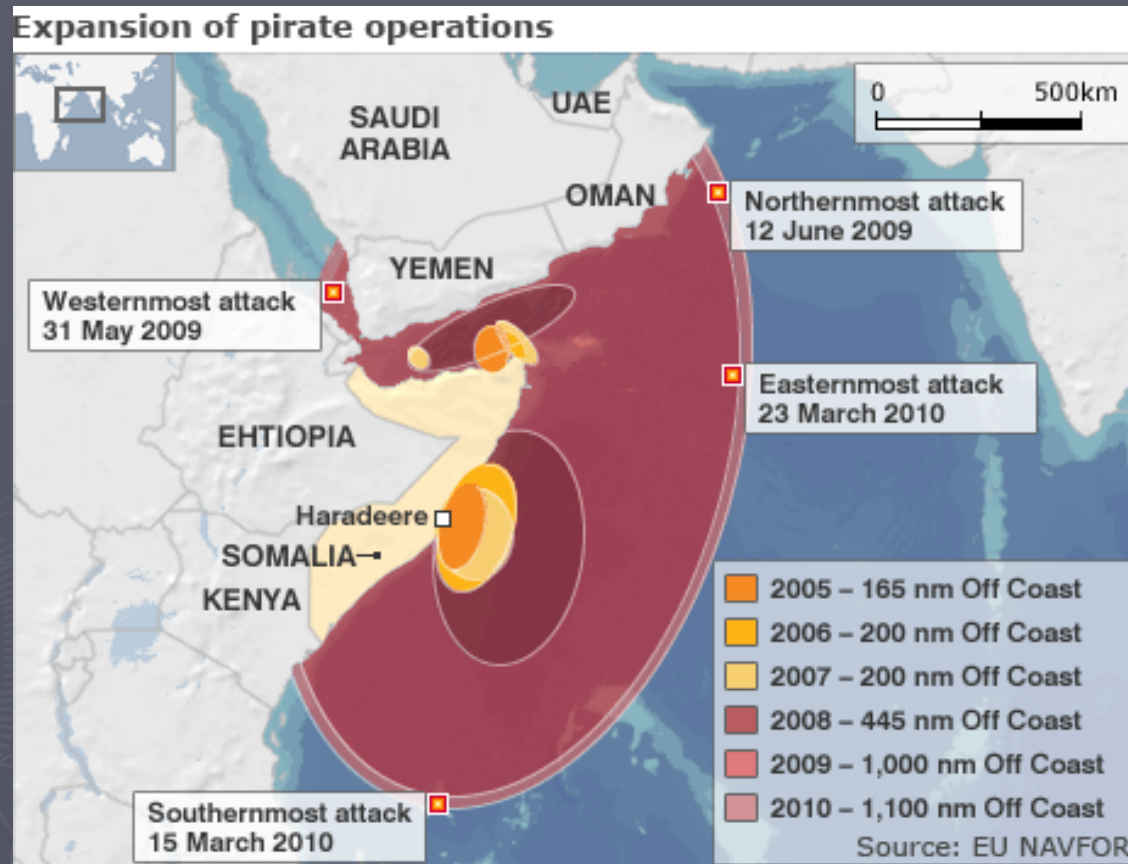
**(c) the nearest coastal State has a weak enforcement capability**

## HS Convention 1958 & UNCLOS 1982:

universal jurisdiction +  
right to board the pirate ship  
& take action against the pirate  
+ prosecution

But no specific obligation to extradite or prosecute pirates, or even criminalization of acts of piracy under their domestic law.

### 3. Modern-day Piracy: Characteristics and *modus operandi*



6.7 m. sq. km. patrolled by 25 nations

- ▶ **hostage taking [31 vessels & 688 hostages held in Feb. 2011] + ransom demand**
- ▶ **[@US\$5.4m. in 2010; @US\$150,000 in 2005]**
- ▶ **captured oil tankers/big fishing vessels used as “motherships” servicing skiffs (assault ships)**
- ▶ **satellite phones & GPS devices monitoring passage and reporting on targeted ships; hence = transnational organized crime (TOC) involved in “intentionally facilitating” acts of piracy**
- ▶ **possible link to terrorists (esp. al Shabaah fighting Somali Govt.)**
- ▶ **Home State is a failed State**

## 4. Responses

### a) Self defence

- **Joint or coordinated patrol operations**
- **Convoy Escort Programme (fleet of 18 armed vessels)**
- **Vessel Protection Detachments (VPD) on board each ship.**

## (b) Legal responses

(i) 1958 & 1982 LOS Conventions

(ii) 1988 Conv. for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA 1988)

- Core elements may overlap with piracy, e.g., “seiz[ing] or exercis[ing] control over a ship by force or threat thereof or any other form of intimidation”, or “perform[ing] an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of that ship”
- No need for “high seas” element
- No need for “attack ≠ another ship” element
- But requiring international elements + presence in a SUA State Party for extradition or prosecution of the offender

No UJ to board/arrest offenders w/o flag State’s consent

### **(iii) 2005 SUA Protocol**

- broadens the list of offences to include, e.g., using a ship as a means to carry out a terrorist attack; carrying an explosive material to cause death/serious injury or damage for a terrorist purpose; transporting by sea any person who has committed an offence under 1988 SUA or another UN counter-terrorism Convention
- a comprehensive set of criminal responsibility for accessory offences, including attempts, participation as an accomplice etc.
- boarding procedures with *ad hoc* or implicit consent of the Flag State of the suspected ship

#### **(iv) 1979 Hostage Taking Convention**

- **Hijacking a ship and holding the ship/crew hostage until ransom is paid = offences under the HT Convention + = acts of terrorism!**
- **Commission/attempt/participating as an accomplice in hostage taking shall be “prosecuted or extradited” by HT Conv. State Party when the alleged offender is present in the territory or territorial sea of that State Party.**

## (v) 1999 Terrorist Financing Convention

– prosecution & asset seizure of offenders

“ ... A person commits an offence if that person by any means, directly or indirectly, unlawfully and wilfully, provides or collects funds with the intention that they should be used or in the knowledge that they will be used, in full or in part, to carry out an offence [under one of the treaties listed in the Annex, including the Hostage Taking Convention].”

**Q: payment of ransom = terrorist financing?**

## **(vi) 2000 UN Conv. on Transnat'l Org. Crime**

**-UNCTOC criminalizes participation in an organized criminal group or laundering of proceeds of crime when these offences are transnational in nature and involve an organized criminal group of 3 or more persons**

**-When piracy, as a “serious crime”, is committed by persons participating in an organized criminal group or when pirates launder the proceeds of their crime, UNTOC States Parties shall extradite/prosecute the offenders and may confiscate and seize proceeds of crime + property, equipment or other instruments used in or destined for use in these offences**

**Australia is party to all the said international conventions except the 2005 SUA Protocol.**

## 5. Policies & Challenges

2 main different situations

(a) Small-scale, “traditional” piracy

(b) Large-scale – Somali piracy & UN Security Council actions under Chap. VII of UN Charter

► Pre-2008, 0.53% of worldwide UJ prosecutions (4 cases)

► 1998-2009: 1.47% of UJ prosecution (= 1:68 of reported attacks), mostly in Kenya

21 Mar.’11: 850 pirates being prosecuted in 16 States, but 90% catch & release by intern’l forces

Source: Kontorovich & Art (2010) *Amer. JIL* 436 at 444-5

## **UJ Prosecution of pirates by:**

**China**

**India (21 Mar.'11: prosecuting 104)**

**Kenya (MOUs with USA, UK, EU etc.)**

**Seychelles**

**Tanzania**

**Yemen**

**Madagascar – 1<sup>st</sup> time on 26 Feb. 2011 (Q:  
charges against foreigners with piracy under  
19<sup>th</sup> Century law, or illegal detention of the  
hijacked mothership's crew, or lacking ID  
papers?)**

## **Reasons why UJ has not worked:**

- (1) Inadequate national legislation – no UJ/incomprehensive criminalization**
- (2) No genuine interests to prosecute or lack of resources**
- (3) States of the flags of convenience are incapable/unwilling to take responsibility**
- (4) Witnesses' safety; evidentiary difficulties; no extradition due to human rights concerns (esp. the death penalty)**
- (5) Where to imprison convicted pirates?  
Where to send the pirates after their acquittal  
or after having served their sentence?**

## Possible Solutions

- (1) Prosecution by directly affected States  
(e.g., USA, Germany, S. Korea, Malaysia, Oman, Spain, Netherlands, France, Belgium)
- (2) Disrupting piracy-related financial transactions and action against TOC and those captured on board motherships
- (3) UNSC/international community to address how best to respond to the plight of hostages – common understanding to deter hostage taking?
- (4) “Root causes” – fisheries, economic development, job creation for Somalis (*per capita* GDP in 2009 = US\$600)

**BUT – use of force inside/against Somalia NOT legally justifiable for feasible. Q: naval blockade?**

**(5) J. Lang's report (UN Security Council/Jan.'11)  
"Somaliazation": US\$25 m. for special courts +  
prison facilities in Puntland & Somaliland/Somalia**

**Cf. Examples of efforts to help Somali as well  
as to combat Somali piracy to date:**

- **Japan: US\$21.5m.**
- **Norway: US\$35m.+**
- **European Union: EUR 142m.**
- **Spain: EUR 9m.**

**[UN in Feb. 2011: cost to global economy from  
pirates' disruption to international commerce =  
US\$7 – 12 billion]**

**Q: nature of the special courts =? Precedent?**

- **ICTY/ICTR model?**
- **Khmer Rouge Tribunal model?**
- **Domestic criminal courts exercising UJ over Somali piracy (with foreign judges and prosecutors on secondment)?**

**Internat'l Trib. LOS Press Release 24 Apr. 2009:**

**“ITLOS is NOT a criminal court & has NO competence to try pirates.”**

## **MEANWHILE:**

**(6) Djibouti Code of Conduct of Jan. 2009**

**(17 signatory States) to arrest and**

**prosecute pirates and armed robbers at sea**

**(7) Appropriate re-integration into society**

**of convicted Somali pirates repatriated**

**back to Somalia**

## Conclusions: Holistic approach

- A short-term solution: *deterrence* through repression and prosecution of pirates and those criminally involved in piracy, using UJ over piracy and criminalization of acts proscribed by the relevant international conventions and protocols
- A medium-term solution: “Somaliazation”
- The long-term, and long-lasting, solution: *security & rule of law* in Somalia + economic *development* for Somalis