

Maritime Piracy: Challenges and the Way Ahead

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The topic of Somali piracy keeps fading in and out of the front pages of newspapers, and attention to this billion dollar problem has waxed and waned. However, piracy is an affront to human security and ignoring it amounts to international recklessness and contempt for the rule of law. There have been many efforts to coordinate naval responses to Somali piracy, but these have focused on only one aspect of intervention – namely, safe passage, and, occasionally recovery and rescue. This article argues that there needs to be a coordinated effort on two other fronts as part of a comprehensive multilateral strategy, viz. legal, as in the development of judicial institutions and procedural recourse/remedies for accused pirates; and socio-economic, as in help for former fishermen, now pirates, to return to livelihoods that may be low yield but are also low risk.

INTRODUCTION

While the present century has been designated ‘the century of the seas,’ there are greater challenges than ever before. Ensuring preservation of the concept of the freedom of the seas (*Mare Liberum*), enshrined by the United Nations Conventions on the Laws of the Sea, is by far one of the biggest tasks. Illegal actions by both Violent Non-State Actors (VNSAs) and pirates have impeded the unfettered freedom enjoyed by law abiding vessels. At present, the number of documented vessels held by pirates is approximately fifty, and there are still over 600 seafarers held as hostages awaiting exchange of ransom. Negotiations, in some instances, have gone on for months, and in other cases years, adding to the woes of seafarers who sustain the global economy, moving vast cargoes to the far corners of the world.

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The acts of piracy, particularly in Somali waters, have grown at alarming proportions, requiring multinational forces to protect Sea Lines of Communication (SLOCs). There are naval forces from Europe (EUNAVFOR), NATO forces (MSCHOA) and the Combined Task Force (CTF151), all operating in tandem to combat the menace. While on one hand, an Internationally Recognized Transit Corridor (IRTC) has been established for safe passage of convoyed ships, each nation has dispatched its war vessels to protect shipping in the vast area of seas between the African and Indian coasts. There is another serious dimension of the pirate-terrorist nexus which has emerged in the wake of the execution of Al Qaeda leader, Osama bin-Laden. The emergence of sea-faring bandits, who might harbour a political agenda beyond monetary inducement, requires serious analysis to formulate tangible preventive measures to stem an escalation of terror on the seas.

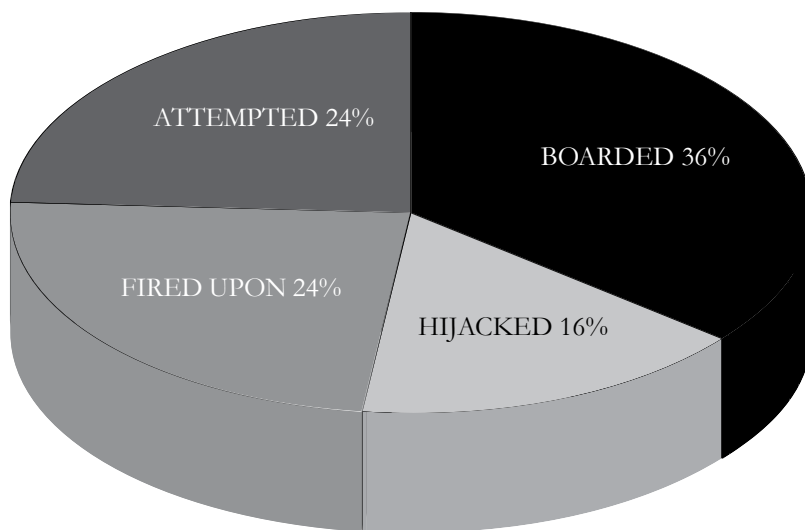
The problem is a complex one, with paradoxical origins in a protracted land dispute. The complexity of the problem is accentuated by legal/jurisdictional, tactical and strategic dimensions. Briefly put, the lack of governance, or more plainly, a functional Somali government, as well as the lack of employment, along with the denuding of rich fishing grounds in Somali waters, brought on by poaching and exacerbated indiscriminate dumping of foreign-born toxic waste was sufficient inducement to piracy. 'Easy money' and a successful business model of relatively low cost have established piracy as the best and only 'employment' option for Somali bandits. As such, they have become an internationally known 'scourge' on the seas. Estimates suggest that the true cost of piracy, which includes loss of property, damage, high seas policing and recovery efforts, is presently over \$21 billion. This problem, with its various dimensions, challenges, and contexts, requires a thorough examination.

SURGE IN PIRACY OFF SOMALIA

What is of greatest concern in the present decade is the increasing number of hijackings at far off distances from the coast, the absence of coordinated action by the international community, and the expanding geographic area of pirates in the Arabian Sea – right up to the areas of Exclusive Economic Zone (EEZ) controlled by India. In June 2010, some drifting pirates were apprehended by the Indian Coast Guard off Gujarat. This anecdote is indicative of the reach and spread of this 21st century menace,

which challenges the freedom of the seas, has enormous economic impact for maritime nations and severe psychological impact on seafarers who have been detained for months while safe-return negotiations continue indefinitely. An analysis of the attacks for a select time period indicates that over 36 per cent of the attacks were successful, and a quarter of the targets were hit, thus potentially endangering the lives of thousands of sea-farers (see Figure 1). These statistics do not instil any sense of confidence in the measures instituted by UN, the International Maritime Organisation (IMO), or individual nations.

2010 Breakdown of Attacks



ICC-IMB Piracy and Armed Robbery Against Ships Report-Jan to Jun 2010

Figure 1: Breakdown of attacks for a six month period in 2010

While attention has been high toward the happenings in Somali waters, the Gulf of Aden and the Horn of Africa, acts of armed robbery and piracy in waters in other regions, including in the South China Sea (see Figure 2), also continue. However, most of these robbery incidents do not result in hijacking of the ships, as the perpetrators in this region are 'small-time' operators who attack ships relieving the crew of their possessions.

Seven Locations Recorded 146 of the Total 196 Attacks from Jan to June 2010

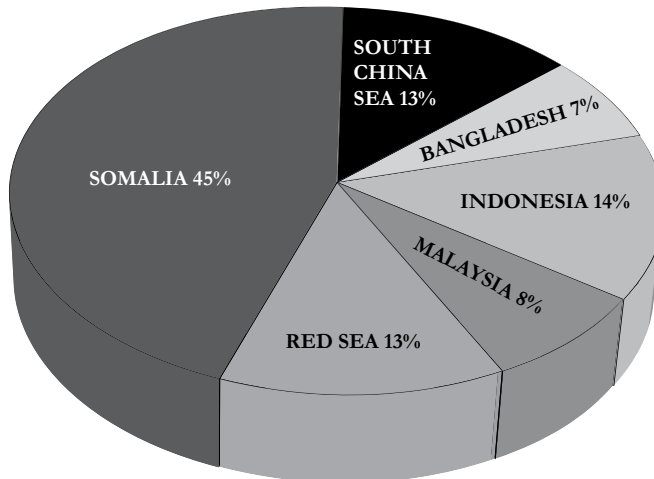


Figure 2: Record of incidents by location

Piracy attacks over a five-year period from 2005 to 2010 indicate an increase and intensification of activity. The number of attempted attacks and successful attacks are both increasing. Meanwhile, the Law Enforcement Agencies (LEA) are finding it difficult to thwart the sustained attacks by pirates due to vastness of East African coastal waters.

THE UNCLOS DEFINITION OF PIRACY

Before proceeding any further, it would be relevant to look at the definition, as provided by UNCLOS, which is unambiguous and gives ample scope for law enforcement agencies to take assertive action against acts of piracy.

“Piracy consists of any of the following acts:

- (a) *Any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:*
 - (i) *On the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;*
 - (ii) *Against a ship, aircraft, persons or property in a place outside the jurisdiction of any state;*

- (b) *Any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;*
- (c) *Any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b)."*

THE JACK LANG REPORT

Concerned with the increase in the acts of piracy and the growing menace to seafarers, UN Secretary General Ban Ki Moon appointed expert Jack Lang for exploring the details of this scourge at sea and wanted a full-fledged report on what the international community can do to ensure that the concept of the freedom of the seas is preserved. The key extract from the report, submitted on 11th April 2011, is as follows:

"There has not been a decline in piracy since its resurgence off the coast of Somalia in 2007. In 2010, the violence escalated, the periods of detention became lengthier, the modus operandi became more sophisticated, and the area of attacks extended farther south, as far as Mozambique, and east in the Indian Ocean."

The pirate economy, which has its epicentre in Puntland, is having a destabilising effect on Somalia and the entire region owing to rising prices, insecurity of energy supplies, and loss of revenue. While the world of seaborne trade appears to be handling the threat better thanks to naval operations, which play a crucial role in providing security, the number of victims is nevertheless rising. In 2008, 1900 persons were taken hostage. In the long term, the entire world economy could be affected.

INDUSTRIALISATION OF THE PHENOMENON: TRENDS AND INFERENCES

According to the transnational government of Somalia, there is an escalation of an ever-growing number of pirates, who hail from the hinterland, totalling at least 1500. The violence of the attacks is also increasing, wherein the first weapons of choice are AK-47 automatic assault rifles and RPG-7 rocket launchers. This has led to increased use of heavy weapons that can damage ships and injure or kill the crew of a ship, especially where a chase precedes the attack. There is a sophistication of the modus operandi, as with the increased use of "mother ships" to backstop attack skiffs, global positioning satellites (GPS), Automatic Identification System (AIS) data,

satellite telephones and counterfeit detectors, and highly organised re-fuelling-at-sea of captured ships for the trip to Somalia. The levels of sophistication are indicative of a high grasp of technology and situational awareness. Doubts have been expressed about the kind of help being given to the pirates by some Western mercenaries who are aware of the loopholes in the security of merchant ships.

Additionally, there is a marked increase in the logistical and organisational capacities of both sea and land hijackings, especially where the negotiations concerning hostages are a source of continuous income. The ‘pirate’ model has been fine-tuned and the hostages are held in places not accessible by intervening forces. The support of the locals who claim a share in the ransom money is a factor that facilitates the creation of logistical support and alternative options for the pirate leadership.

Piracy's Costs

Piracy's costs give an indication of the success of the ‘Somali’ business model, attracting many players not just from Somalia, but also from adjacent countries including some from the hinterland. Overall, some \$7 to \$12 billion is the approximate direct and indirect costs of piracy. The colossal ransom costs can be gauged from samples in Figure 3.

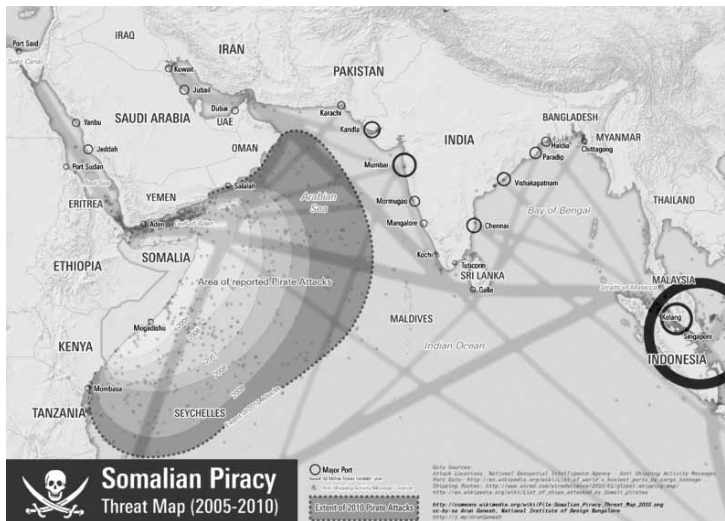


Figure 3: Expanding range of Piracy and indication of ransom paid

The details of who all shared the spoils of ransom money (\$238 million paid in 2010) makes interesting reading and illustrates the deep penetration

made at many layers both in Somalia and outside the country. More importantly, it also explains why some of the tribal leaders who are opposed to piracy which is prohibited by Islam are keeping quiet with the lure of money.

Typical share of Ransom money (in USD)

Reimbursement of supplier, financiers, and/or investors:	30% of the ransom,
Local elders:	5 to 10% of the ransom (anchoring rights)
Class B shares– militiamen, interpreters, etc.	approx. 15,000 each
The remaining sum — the profit — is divided between class-A shareholders	

THE PIRACY-TERRORISM NEXUS

While, so far, there is no evidence to suggest that pirates and terrorists are acting in unison, such a possibility looms large, particularly after the elimination of Osama bin Laden which has angered the Taliban. It has been suggested that the radicalisation of the pirates – many of whom operate in East African waters, are Somali, and are therefore Muslims – could provide a context or opportunity for terrorist groups to induce them to act against the West. The incident of a crudely planned attack last year, on the M Star, a Japanese tanker (Figure 4) has illuminated the possibility of more such attacks. Money is not the only possible inducement. Should

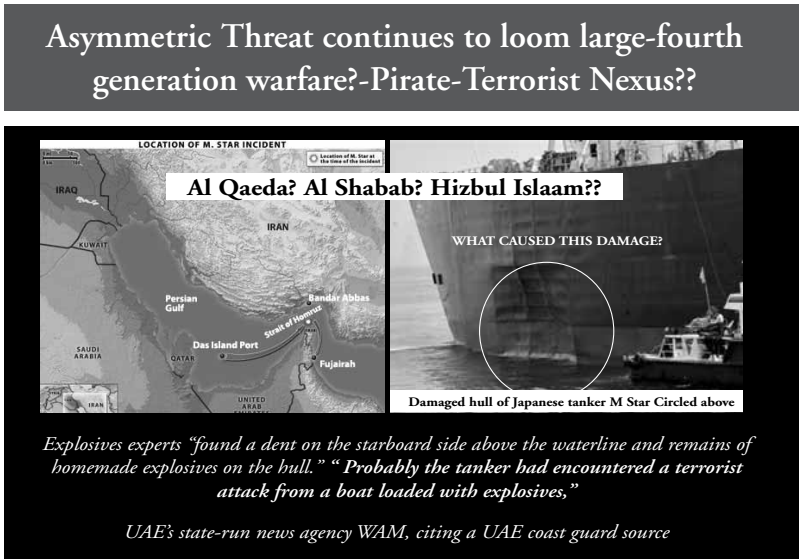


Figure 4: Snapshot of attack location and the M Star after the explosive attack

radicals seek to indoctrinate the young and unwitting in behaviour that mimics high-seas theft, piracy may become the sport of the jihadist.

THE GLOBAL RESPONSE

Before looking at the global response to piracy off the Horn of Africa, it might be worthwhile to examine measures initiated by the international community noting the increased incidences of piracy in the Malacca Straits, until very recently. The menace of piracy was manifold in the Malacca Straits and the shipping community and the security agencies were challenged in their task. The International Maritime Bureau (IMB) established the Piracy Reporting Centre in Kuala Lumpur. The PRC started recording all the incidents of piracy, providing detailed analysis of these incidents in different parts of the world. The littoral states – Malaysia, Singapore, Thailand and Indonesia – were compelled to come together as the transportation and insurance costs through the Malacca Straits kept mounting.

The moment of crisis, a proverbial ‘last straw that broke the camel’s back,’ came in the form of a declaration by the Lloyds War Committee (LWC) of the Malacca Straits as risk prone and the cost of insurance went up, affecting the region. Various measures were implemented by the littoral countries who agreed on combating the menace together. Thus, there were ‘hot-pursuit’ initiatives in each other’s waters, a common pool to undertake aerial surveillance, and better patrolling and pro-active piracy deterrence manoeuvres. The results are there for all to see. The last few years have witnessed the dropping of the attacks to single digit figure, thus demonstrating that if the concerned nations are able to act together it is not so difficult to combat the menace.

Regarding the Somali theatre of war, it is not that there is dearth of naval units engaged in anti-piracy missions. Rather, despite the united efforts of various political and military groups, the overall coordination of effort still leaves a lot to be desired, a factor made evident by the number of successful attacks in the ‘safe corridors.’ Despite a ‘convoy’ method of escorting ships to ‘safe’ passage, through the IRTC, there have been instances where ships are attacked just as they enter or leave the IRTC. Meanwhile, the number of agencies involved in anti-piracy missions includes Maritime Security Centre Horn of Africa (MSCHOA), EUNAVFOR, NATO, CMF with rotational command and many units of individual navies of the world.

This is in addition to the establishment of the ReCAAP in Singapore, which has a dedicated role in monitoring all pirate attacks and interacting with various Data Fusion Centres. Further, since 2008, India and China have sent out their best frigates/destroyers for anti-piracy operations.

While the best of the naval units are engaged in anti-piracy operations, the cost of conducting high-value ships safely is prohibitive, and questions have been raised about deploying war ships against fishermen-pirates. The joint maritime missions have also been compared to killing a fly with a sledge hammer – a comparison that has annoyed naval planners who have no choice but to deploy whatever vessel, no matter how large, that is available.

THE KENYAN DIMENSION

With Kenya sitting on Somalia's southern border, the country has been on the frontline in the fight against piracy. The Kenyan Foreign Minister, Moses Wetangula, says that this fight has made shipping/insurance costs through the port of Mombasa exorbitant. East African tourist ships also shied away from the region. The Kenyan government may have been motivated by these losses, agreeing to prosecute pirates caught by the EU naval task force. A Kenyan government official who represents the ministry reported that:

“For the last two weeks we have declined to accept captured pirates from some of our friendly countries and told them to try it elsewhere ... We discharged our international obligation. Others shied away from doing so. And we cannot bear the burden of the international responsibility.”

While some pirates were captured, and are being kept in custody by various navies, there are questions being raised about due process trial format and jurisdictional issues. Kenya did oblige the international initiative by allowing pirates to be tried. However, it came under pressure from Somalia-based pirate groups, finding itself over-extended in terms of resources as a result of trying the pirates.

The head of the EU delegation in Kenya, Ambassador Eric Van der Linden, said he understood the frustration, but felt that there was still room for discussion. He said it was in Nairobi's interest to contain piracy, but that it should not be its burden alone. So, it is clear that unless there

are templates for trying the pirates, the burden of logistics, jurisdictional issues and legal wrangling will make the process of trying the pirates slow and bringing them to justice will be difficult.

DJIBOUTI CODE OF CONDUCT

In January 2009, nine countries from the region most affected by Somali piracy signed a deal enhancing cooperation in the fight against piracy in the Indian Ocean and Gulf of Aden. A code of conduct, known hereafter as the Djibouti Code of Conduct or DCC, was signed by eight coastal nations, as well as Ethiopia, during a special meeting convened in Djibouti, under the auspices of the International Maritime Organization (IMO). The DCC is the first regional agreement between Arab and African countries against acts of piracy directed toward ships in the Gulf of Aden, the Red Sea and the western Indian Ocean. The DCC document provides for the creation of three information centres in Mombasa, Dar-e-Salaam and Sanaa. Further, the DCC agreed to establish a training centre for anti-piracy units in Djibouti. According to the IMO Spokesperson, the purpose of the DCC was to create an efficient mechanism to fight piracy. The text of the code was accepted by consensus of the nine delegate nations. The IMO offered to help the member states to implement this agreement. The nine signatories are Djibouti, Ethiopia, Kenya, Madagascar, the Maldives, the Seychelles, Somalia, Tanzania and Yemen, all highlighted in Figure 5.



Figure 5: Nations compliant of the Djibouti Code of Conduct

The DCC says coastal states should make the necessary changes in their legislations to facilitate the arrest and prosecution of piracy suspects. The fate of Somali pirates arrested by warships patrolling the area – most of which were dispatched by Western navies – has been a sensitive issue. The meeting failed to reach an agreement on allowing foreign navies to engage in ‘hot pursuit’ of suspected pirate vessels in Somali territorial waters because of sovereignty sensitivities.

NEED FOR A COMPREHENSIVE STRATEGY

As for concerted action by the UN, it is necessary to examine the Jack Lang report of 25th Jan 2011 to understand its implications. Overall, there are about twenty-five proposals which need to be implemented after the due processes of vetting and adoption take place. Proposals from the Jack Lang report and the author’s commentaries in italics follows:

Proposal 1: Establishing international certification for compliance with certain best management practices.

In essence, this proposal establishes that those ships that complied with Best Management Practices were able to thwart the piracy attacks. However, it was observed that only about 20 per cent were actually following the practices stipulated by IMO. Unless there is greater awareness and insistence on adoption of BMP, the task of the pirates will be rendered easy. The insurance companies who are required to shell out a lot of money, as ransom, will doubtlessly include the compliance of BMP as a prerequisite for processing claims.

Proposal 2: Informing the flag state in the event of non-compliance with best management practices (BMP).

The problem with merchant men is also due to factors of economy and convenience. While the vessel may be under the ownership of a particular nation, it could be under the flag state where it is registered. Then there are operators from one country while the crew is multinational. It is this complexity of many nations involved in the business that has created new challenges regarding the equitable interaction of all the stakeholders.

Proposal 3: Intensifying close monitoring of the thirty-three hundred kilometre coastline.

The length of the Somali coast requires a strong intelligence, surveillance and reconnaissance architecture, which only exists on paper today. Therefore, there has to be a mechanism to ensure that the pirates who leave the coast are intercepted before they engage in acts of piracy.

Proposal 4: Increasing cooperation with the Somali regional authorities in Puntland and Somaliland.

Pirates are being released despite the destruction of skiffs and mother ships by many navies. This is another priority area that needs refinement and requires that those concerned are able to reach workable and enforceable agreement

Proposal 5: Encouraging all states to criminalise piracy by domestic law.

For some unexplained reasons, nations have been slow in adopting appropriate legislative and constitutional provisions which ensure that the act of piracy is criminalised and the authority of the LEA is strengthened.

Proposal 6: Encouraging all states to adopt universal jurisdiction over acts of piracy and detention at sea.

As long as there are uniform standards for deterrence, detection and prosecution of pirates, it will be possible to implement such laws.

Proposal 7: Adopting a legal framework for detention at sea, in compliance with international human rights law and compatible with operational constraints.

Invariably, the international agreements on human rights do need correct interpretation, as many pirates are likely to attempt to impersonate as innocent victims 'lost' at sea. There have been cases wherein the pirates, on sighting of a ship, have abandoned all the arms and ammunition as well as their home-made ladders, jumping over board and awaiting rescue by an unsuspecting ship. By this act, they claim they were innocent fishermen stranded in the sea due to wind and weather. They are thus granted the status of a survivor and are rescued.

Proposal 8: Formulating an international model case report on acts of piracy and armed robbery at sea.

It is necessary to involve the Interpol, which has massive records/data bases on apprehended pirates. There needs to be a mechanism to share such information in real time so that the pirates who claim to be survivors can be checked out with the help of the Interpol— much like regular criminals who operate in the international arena.

Proposal 9: Facilitating the prosecution of individuals who intend to commit acts of piracy.

Proposal 10: Raising awareness of the need for victims and their employers to testify; encouraging testimony by video conference (UN Security Council Resolution 1950), giving more people opportunity for providing witness.

In many cases, the Master and the crew of a vessel have not been willing to testify against pirates for fear of retribution.

In some cases, the families of the crew have been threatened, when crew members give evidence that would lead to the prosecution of offenders. So there is a need to work out modalities for testimony while protecting identity to every extent possible.

Proposal 11: Facilitating the transfer of suspects for trial.

Proposal 12: Facilitating the transfer of convicted persons for imprisonment

Proposal 13: Consolidating international assistance for the expansion of prison capacity in the regions suffering from piracy.

Unfortunately, this proposal assumes that a larger number of pirates will be held in prison awaiting trial. The solution lies not in increasing the capacity of the prisons, but in having speedy disposal of piracy cases by establishing fast track courts.

Proposal 14: Encouraging general mobilisation by states to prosecute persons accused of piracy.

It is a sad reflection that even maritime nations which are badly affected by incidences of piracy are not motivated to greater actions. Acknowledging the response to proposal two above, it is clear that the multiple agencies involved in the maritime enterprise often dilute the forceful action required for tackling the piracy menace due to matters of sovereignty, operating costs, insurance premiums etc.

Proposal 15: Give Somaliland and Puntland the means to exploit their resources – i.e. developing fisheries.

Another complaint often heard is that it is the indiscriminate dumping of hazardous waste by Western nations that denuded the fishing grounds and drove the jobless fishermen to acts of piracy. Right or wrong, this issue of rehabilitation of the fisher-pirates needs to be addressed with the help of the local governments and international support.

Proposal 16: Facilitate the declaration of Somali ocean space.

One problem with formally establishing Somali ocean space is the fact that there is no effective government. So, the international effort and funding should aim to help Somalia to manage both its land and sea borders. A declaration of an EEZ would also require the creation of a Somali Coast Guard which would require funding, but would provide training to maintaining law and order at sea and near the coast.

Proposal 17: Establish a committee to investigate illegal fishing and maritime pollution.

This is long overdue and the committee should not only investigate the two interrelated issues but also come out with time bound recommendations to implement preventive

measures. If need be, there should be an effective UN presence at sea to oversee the implementation of various measures suggested by the expert committee.

Proposal 18: Redeploy police units to the lawless areas.

Once Somalia is empowered and is supported, these issues could be handled by the elected government with or without UN support.

Proposal 19: Develop a land-based coastguard support function.

This again should be a time-bound proposal. Many nations who are patrolling the area could offer some of the patrol vessels as a gift to help build a Somali coast guard. The training of the fishermen-turned-pirates for law enforcement duties at sea could be a gradual process, overseen by an independent nominated UN agency.

Proposal 20: Build the investigative capacity of forensic police in the states of the region, under the auspices of INTERPOL.

This point has been covered earlier in the response to a previously mentioned proposal and needs to be institutionalised.

Proposal 21: Ensure the admissibility of evidence against instigators.

It is always hard to establish laws that could be misused to hurt innocents. However checks and balances, most notably international oversight, are required to ensure that the processes are valid and that computer documentation is used to help in evidence gathering as well as corroboration of witness statements.

Proposal 22: Apply individual sanctions against instigators.

The response to proposal 21 applies here as well.

Proposal 23: To adopt the missing legislative provisions needed to make the Somali counter-piracy body of law complete.

This needs to be done in consultation with the prospective stakeholders in the Somali government. It should not be a succinct process and needs to support a robust mechanism that is sensitive to the local enforcement context and conditions.

Proposal 24: In the short term, construction of two prisons in Puntland and Somaliland.

All short term means and methods must be considered carefully and implemented only after fully understanding the longer term implications.

Proposal 25: Strengthen the rule of law in Somalia by establishing a court system comprising a specialised court in Puntland, a specialised court

in Somaliland and an extraterritorial Somali specialised court focusing on counter-piracy efforts to drive comprehensive reform of the Somali judicial system.

It is important to ensure that the tribal leaders and other law makers are taken on board to prevent application of an alien law that may not meet the local culture. A balance needs to be achieved in implementing the right mix of international standards with local flavour.

TAKING THE MENACE HEAD ON?

On 11th April 2011, the UN Security Council adopted the tenth resolution (1976) regarding countering maritime piracy since 2008. Various proposals, including those discussed in this article, should be studied and, where relevant, adopted and implemented. The operational component of counter-piracy, including its patrols and protection for vulnerable ships, is now a topic of international attention, and it needs a lot more fine-tuning to prevent the pirates from taking advantage of uncoordinated action by maritime nations.

When it comes to self-protection, the Best Management Practices (BMP) does stipulate certain minimum requirements on board. There also have been many technological solutions to prevent surprises and deter acts of piracy at sea. There has been plenty of debate on the issues of armed guards and their utility in addition to their jurisdiction. Questions remain on the Rules of Engagement (RoE), as to who would be in charge in the event of an attack. There need to be as many safeguards as possible for ensuring that innocents are not killed by human errors.

INDIA'S PREDICAMENT

India was one of the first countries to send the units of its navy to patrol the piracy-infected areas in the Gulf of Aden. An effective patrol has been maintained since end of 2008 by deploying ships in rotation. The Indian Navy has been effective in neutralising many threats to shipping, but has also sunk some legitimate mother ships. It has over 108 pirates in its custody, each at a different stage of prosecutorial processing. However, the naval action has angered the Somali pirates who are now reportedly targeting Indian crews for harsher treatment. Further, even after the ransom of over \$3.5 million was paid, seven crew members of MV Asphalt Venture were

not released. In this case, the pirates were keen to negotiate the release of their own members held in Indian custody.

The capture of some pirates close to Gujarat and also the L&M Islands has shocked the shipping community as well as the Indian Government. It is time to ensure that India's own EEZ is better monitored and that such suspicious activities are scrutinised more carefully.

THE JOURNEY AHEAD

There is no choice but to tackle this menace in a determined way through the combined and meaningful efforts of the international community. Having followed certain templates, the weaknesses of such well-worn approaches are well known. Along with the acceptance and implementation of the Jack Lang proposals, there is a need to have time-bound plans for institutionalising prosecution that is binding in nature.

The over-lapping areas for prosecution, on land, as well as where jurisdictional and legal issues are concerned, should be clearly understood, ensuring that there are no loopholes in the new architecture. The existing arrangements need to be reviewed at the local, regional, and international level to establish the adequacy of such arrangements. Timely review and resolute action might go a long way in re-establishing confidence among business and recreational seafarers, further reinforcing the concept of "*Mare Liberum*", which is the primary and inescapable interest of maritime trade and the lifeline of the global economy.