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Punishment of international crimes in failed states

The Somali piracy imbroglio

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The legal impediments encountered in the global anti-piracy campaign off the coast of Somalia have awakened the international community to the realisation that there are still gaps in the international criminal justice system. One such gap relates to the non-existence of a readily available international criminal justice institution to address international crimes not covered by the Rome Statute of the International Criminal Court. The other gap is the lack of a legal mechanism to respond to international crimes arising from failed or collapsed states. This paper argues that international criminality from failed and collapsed states cannot be addressed by the mere prosecution of offenders in foreign courts; as long as the security vacuum exists in such states, it would be virtually impossible to combat international crimes originating from states in crisis. The actions taken by important international actors and organisations have been aimed at protecting the economic interests of the major powers of the North. These actions are essentially reactive, fragmented and not sufficiently holistic and are thus unlikely to succeed in providing a multifaceted approach needed in the fight against piracy.

Keywords piracy, failed state, criminal justice, Somalia, international law, UN Security Council

Introduction

Contemporary insights into the global anti-piracy campaign suggest that the best approach needed to combat piracy is the deployment of multinational naval warships that would restore safety and security at sea, capturing the pirates before prosecuting them in domestic courts. The most vocal advocates of this approach are the United Nations Security Council, the

European Union, the United States and the majority of developed countries in the northern hemisphere whose economies are significantly supported by maritime-based commerce. The call by these international actors in support of the multinational vigilante navy has consequently dwarfed the merits of alternative anti-piracy approaches. The African Union, for instance, has advocated for the re-establishment of a fully functional government, and thus effective statehood in Somalia with functional social, political and economic institutions.

Between 2006 and 2010, the efforts at combating piracy off the coast of Somalia produced little cause for celebration.¹ For instance, as of 28 December 2010, there were still 25 ships and 587 crew hostages in the hands of pirates.² By the end of 2010, Somali piracy had accounted for 1 016 hostages, 31 vessels and 713 crew members of various nationalities.³

The restoration of absolute safety and security at sea clearly proved an elusive target to achieve. On one hand, the multinational anti-piracy naval forces continued to be stretched, making slow progress in eradicating pirates across ever-expanding piracy hotspots and elongated international sea lanes. On the other hand, AU state-building initiatives are still some distance from achieving their objectives. Somalia has continued to be politically unstable and anarchic and state institutions being established have not found their feet just as yet.⁴ Apart from this, there has been great controversy and uncertainty pertaining to punishment of captured pirates.⁵ With no permanent international or regional criminal tribunal in place, states have encountered embarrassing problems in dealing with captured pirates, particularly those originating from the failed and politically unstable state of Somalia.⁶ In general terms, therefore, it would seem that global anti-piracy initiatives against piracy have not borne a lot of fruit.

This contribution seeks to argue the case for an African criminal justice institution to prosecute international crimes such as piracy from both an international criminal justice and a state-centric perspective. The establishment of such an institution should not stop ongoing efforts by multinational naval forces to restore security and safety at sea. Neither should it halt efforts by regional organisations aimed at establishment of fully functional and effective state institutions. The criminal justice institution may be established by the creation of a permanent regional criminal tribunal to prosecute such crimes and the extension of the operational capacity of regional police systems such as naval paramilitary. Provision should also be made for special penitentiary arrangements. The creation of such a mechanism should run concurrently with efforts designed to recreate fully functional state and its social, political, economic and domestic security structures.

Clearly, therefore, this contribution admits that there is no substitute for a state as the most important actor in international law in terms of guaranteeing the safety and security of its citizens and their property and also the security of other nationals and their property within its territory. These points will be examined with reference to piracy along Somalia's coastline, the international response to the crime, the sustainability of such actions in international law, and the idea of an African regional criminal court for international crimes outside the jurisdiction of the International Criminal Court (ICC).

Structurally, this paper is divided into four parts. The first part provides a background to the nature of the problem of piracy in Somalia and its implications for international criminal justice, international peace and security as well as global economic development. The second part examines the political context within Somalia that encourages piracy off the Somali coast. This part also examines general political and social challenges that feed off the political crisis in Somalia, encouraging general criminality. The third part explores the international response to Somali piracy as led by the Security Council and the forces from the developed

North. The sustainability in international law of the responses will also be canvassed in this section. Part four analyses the idea of an African regional criminal court to prosecute international crimes such as piracy. In this part the basis for such an avenue will be discussed as well as the merits and challenges likely to come with such a course of action.

General background

Domestic criminal justice systems across Africa have achieved significant success in the maintenance of a penalty regime that protects both the state and the individual from different kinds of crime. In a direct way, therefore, these penal systems have guaranteed the safety and security of persons and their property whilst simultaneously protecting other fundamental rights and freedoms. Although the quality of criminal justice in individual states⁷ has varied from country to country and from time to time, it is clear that the punishment of domestic crimes has not proved to be an insurmountable task in various fully functional African states.

In addition to domestic systems, regional blocs have adopted protocols establishing important institutions that enhance regional cooperation, improve and expedite regional responses to trans-border criminal activities, and ensure that such criminal activities do not threaten the friendly relations among states on the continent.⁸ While some of these domestic criminal justice mechanisms may not have performed to the required standards, it cannot be doubted that with time the collective mechanisms could prove the greatest guarantors of the peace and security of Africa's future generations. The saddening fact is however that the commitment and dedication witnessed in establishing domestic institutions necessary in fighting domestic criminality has not been extended towards creation of regional criminal justice mechanisms to respond to international crimes.

Prior to the establishment of the International Criminal Court in 2002, there appears to be no recorded history of tangible efforts by African states to establish a permanent regional criminal court to prosecute international crimes. This does not mean that African states were cold to the idea of international criminal tribunals to prosecute international crimes, however. The request by African states for establishment of post-conflict international criminal tribunals in Rwanda and Sierra Leone⁹ is testimony of Africa's willingness to respond to the problem of international crimes. Further, the active participation of African states in the establishment of the ICC itself demonstrates Africa's commitment to confront serious crimes for the benefit of African victims.¹⁰ The current misgivings over the ICC advanced by a few African states¹¹ raises questions as to their commitment, but this is clearly not enough to put the attitude of African states to international criminal justice in a bad light.

The establishment of the ICC appeared to bridge the huge gap that domestic criminal justice systems in Africa had struggled to address for decades. The failure of African states to find common ground was disheartening, particularly in view of the numerous instances where international crimes were committed on the continent. It is therefore not surprising that, since its creation, the ICC has almost exclusively focused on Africa, with most of the investigations initiated arising from situations of armed conflict in African countries.¹² In so doing, the ICC appeared to be targeting the major international crimes that have been committed during armed conflict or other forms of internal violence, unfortunately losing its African support in the process. However, the popularity that greeted the creation of the ICC, the clouds of dust it has subsequently raised, and the problematic issues it has had to confront in the rather short period of its existence unfortunately conceals the fact that the crimes that

fall under the jurisdiction of the ICC are not the only instances of international crime in the world today. For example, one major international crime, piracy, is not covered by the Rome Statute and the ICC has no jurisdiction to prosecute it.

The resurgence of the crime of piracy in the Horn of Africa awakened the global community to this reality and to the fact that confronting international crimes is not yet a completed task. In view of Africa's misgivings about the ICC, it is doubtful whether the continent will accept another criminal justice mechanism suggested by the Western countries to prosecute piracy. An African criminal tribunal might actually be seen by the AU as a progressive alternative from a theoretical point of view. In practical terms, however, the ICC's experience in investigating and prosecuting international crimes under its jurisdiction suggests that Africa has a long distance to go before a regional criminal tribunal that can also prosecute other international crimes materializes.

The rise of piracy off the Horn of Africa has been attributed to various factors, but undoubtedly the partial demise of the state of Somalia and the resultant collapse of domestic security, policing and human safety institutions are among the major causes. As one author pointed out:

Piracy is both a symptom of Somalia's collapse and a consequence of that breakdown. While there can be no doubt that the world has to be extremely concerned about this situation and the way it imperils our march to a globalized future, until Somalia acquires some national consciousness and acts to create and sustain a viable government, it will remain a rogue state, a failed state, and an anarchy that will be both opportunistic predator and prey, environmentally, economically, and socially.¹³

As a direct consequence of Somali political instability, the emergent piracy crisis has sent shockwaves into Africa's security and economic systems as well as the globe's maritime-based commerce. Piracy has struck at the root of global trade and as long as it continues unabated, will continue to choke maritime-based commerce beneficial to Africa.

The international community, led by the United Nations Security Council and the International Maritime Organisation, has moved swiftly to adopt a line of action that protects the commercial interests of states whose economies stand to lose most.¹⁴ This includes deployment of naval patrols in the affected sea lanes and provision of naval security to international vessels, including those delivering humanitarian aid to Somalia. Africa supports this approach, and its contribution to the Somali piracy strategy is to prioritise political initiatives aimed at bringing peace and stability to Somalia as the major step towards successfully staving off the scourge of piracy.¹⁵ Africa's view is that legal and maritime security strategies must be complemented by state-building political strategies designed to make Somalia stand on its own feet. In essence, the African Union's stance is that to effectively combat Somali piracy, there is a need for a broader approach that respects the rights of Somalis to a politically stable and secure state of Somalia which, in turn, would exercise territorial integrity and sovereignty.¹⁶ It is only when such a state has been created and is fully functional that the problem of piracy along the Somali coastline can be effectively confronted.

The reasoning of the AU can be defended from two perspectives.

First, from a state-centric perspective, only a stable state would secure the rights of Somalis, including their right to land and marine resources and their right of devising ways to secure, defend, utilise and exploit such resources in accordance with their own laws and policies.¹⁷ This approach is reflected in the arguments of one school of thought that posits Somali

piracy as a natural response to maritime environmental pollution and degradation by foreign and international actors.¹⁸

From the perspective of international law, a fully functional state has certain fundamental responsibilities and obligations attached to the manner in which it applies its resources and gives its citizens and foreigners access to them. Once such rights are recognised and respected, other states would be duty bound to ensure that they enter that state's geographical and resource space in accordance with international law and that their activities do not damage its environment, usurp its territorial integrity or violate its permanent sovereignty over its natural resources.¹⁹ Elaborating on this view, establishing a peaceful and functional state that ensures the enjoyment of civil and political rights as well as social and economic rights whilst guaranteeing human security could offer the best hope for combating crimes that feed on the anarchy characterising failed or collapsed states such as Somalia today.

Second, from a security perspective, only a fully functional and stable state can guarantee the security and safety of domestic and foreign economic activities in its territory. According to Tsvetkova, Somali piracy is both a national and regional security problem in that it exacerbates and challenges the existing (Transitional Federal Government, TFG) structures of government in Somalia.²⁰ There is little doubt that effective political governance and security structures can address the security void that is fuelling piracy. Once a measure of security is restored, the state would be able to protect not only the economic activities of its citizens from international criminal activities, but also the security of terrestrial and marine economic resources from foreign funded criminality.

The AU's approach however fails to prioritise the need for an economic approach to suppressing piracy off the coast of Somalia. The United Nations has acknowledged the importance of this economic perspective, stating that another way of combating the piracy economy is to develop economic activities that do not 'thrive in an environment of piracy'.²¹

Be that as it may, it would seem that there cannot be one approach to suppressing piracy off the coast of Somalia; there has to be a multidimensional approach that encompasses security, economic, social and political perspectives. To demonstrate why such a multifaceted approach should be chosen, the origins of piracy in Somalia should be investigated.

Piracy in Somali waters

Piracy along Somalia's coastline has not always existed in the savage terms it does at present. Yet, as a coastal state, Somalia would have been aware of the threats that came with ownership of territorial waters and eventual proximity to busy international sea lanes. Further, Somalia would have been aware of the international ramifications of sea-based criminality eventuating from access and proximity to the seas. Such threats evolved into the reality of piracy, coinciding with a situation of continuous internal armed conflict among warring factions in Somalia following the toppling of the dictator General Muhammad Siad Barre in 1991.²² Effective government ceased to exist from this time with various warlords exercising semi-autonomous political control over several provinces, towns and cities in Somalia. Clan leaders controlled vital services such as airports, customs, and ports, as well as administrative functions such as issuance of licences, collection of taxes and levies, and granting or withdrawal of various other rights.

In 2004 an inherently weak government in exile, the Transitional Federal Government, was formed in Kenya and started operating from this country. This 'government' has no form

of political or administrative control over any substantial part of Somalia. To demonstrate this, in 2006, the Union of Islamic Courts (UIC) seized power from various warlords and structures of the TFG and for six months attempted to exercise governmental functions and powers. However, after US-backed Ethiopian forces removed the UIC from power Somalia returned to the chaos of warring factions and warlords, clan leaders, and Islamic courts exercising partial control over different parts the country where they have taken over government functions. The TFG still exists but as an extremely weak political alternative to the current political chaos characterising Somalia. Since 1991, the incidence of piracy has gradually increased to alarming levels along Somalia's coastline. Of Africa's thirty nine coastal states, nowhere else has the ugly head of piracy wreaked more havoc than along the coast of Somalia. The International Maritime Bureau recorded 239 worldwide piracy cases in 2006, 263 in 2007, 293 in 2008, and an alarming 406 in 2009.²³ Since 2008, the Somali coastline has accounted for close to 40 per cent of piracy activities recorded globally. For instance, 217 of the 406 piracy cases recorded in 2009 were from Somalia, a figure more than half the global total. Forty four per cent of piracy cases recorded in the first six months of 2010 was from Somalia and the attacks had spread to as far as the Red Sea.²⁴

Not surprisingly, most of the direct financial damage wrought by Somali piracy has not involved Somali or African commerce. European, Asian and American ships were the hardest hit, with little if any direct damage on African vessels being recorded. For instance, while acknowledging that there is no 'quantitative research available on the global cost of piracy', the US Council on Foreign Relations estimates that the costs of piracy range from US\$1 billion to as much as US\$16 billion per annum.²⁵ These costs relate to expenses such as ransom, insurance premiums, freight rates and the cost of rerouting. Although these costs affect shipping companies, the African market eventually shoulders these costs especially since Africa is usually the consumer or beneficiary of shipped products and commodities.

Piracy has been known as a 15th-century crime and only became an international crime during the 1800s when the world moved to tackle it and slavery.²⁶ The crime of piracy was then noted as a crime against humanity and a customary international crime.²⁷ Since the 1800s individual states were therefore able to take unilateral action against pirates on the high seas. However, since international criminal law was probably not yet born or sufficiently developed, states found it difficult to exercise international jurisdiction for the crime. Consequently, those states able and willing to prosecute – albeit not having encountered pirates on the high seas or in their territorial waters – were reluctant to do so.²⁸ The trend has continued even to date, with most states having simply failed to modify their legal systems to sanction the prosecution of pirates caught on the high seas by ships belonging to a foreign power.²⁹ The current situation is that states – particularly African states – are precluded by their domestic legal systems from prosecuting pirates apprehended on the high seas unless it can be proved that the pirates were attacking their ships or were engaging in piracy in their territorial waters.³⁰

Major developed powers such as United States and Germany signed agreements with some African coastal states neighbouring Somalia urging them to prosecute pirates captured by European or American naval forces operating off the Somali coast.³¹ Most of these African states however needed to establish the necessary legal framework in order to exercise international criminal jurisdiction over pirates captured on the high seas, or in the territorial waters of other states that lack the capacity to prosecute.³² Other states found themselves unable to prosecute despite having signed agreements with EU powers. Clearly, the legal prerequisites to combating piracy had not been prioritised on the African continent before the resurgence of piracy in Somalia.

Advanced technology and sophisticated weaponry are currently used to fight pirates, but early approaches to piracy followed the conventional route: assault pirate hideouts and capture or kill pirates while the world was attempting to establish a foolproof legal formula to prosecute captured pirates.³³

As the damage wrought by Somali piracy escalated, pressure increased on the International Maritime Organisation and the United Nations Security Council to act and prescribe effective measures. The Security Council passed a number of anti-piracy resolutions³⁴ and the European Union also acted deploying the first EU naval operation, the EU naval force (EU NAVFOR Somalia – Operation Atalanta) to patrol piracy hotspots.

Although a number of Security Council resolutions and reports³⁵ have acknowledged the need for a secure Somalia with an effective government and functional social and political institutions,³⁶ no concrete roadmap has been drafted by the UN to achieve this. Various writers concur that Somalia is no more than a failed state, and an investigation of whether this is in fact the case can shed light on the nature and implications of Security Council perspectives on confronting an international crime in a politically troubled state.

Somalia and statehood

There is widespread belief that Somali is a ‘failed state’³⁷ that poses complex challenges to international peace and security not only in Somalia, but also in Africa and the world at large. However, despite it being a failed state, Somalia retains the basic attributes of a state in terms of international law.

The 1933 Montevideo Convention on the Rights and Duties of States requires a state to satisfy strict criteria before it can be recognised as a state. These fundamental legal requirements include a permanent population, a defined territory, a government, and capacity to enter into relations with other states.³⁸ However, political existence of the state is independent of recognition by other states.³⁹ A US court affirmed this, declaring that in order to satisfy the criteria for a state, a state should control a defined territory, control populations within its power, and enter into agreements with other governments. It should also have a president, a legislature and a currency.⁴⁰

Clearly this definition is too strict and as a result, some modern states may have failed the test during their long march to political hegemony and effective statehood.⁴¹ States that fail to satisfy this strict definition have come to be called by many names, one of which being ‘failed state’. Somalia has by and large come to be identified as a failed state owing to its lack of a government that can exercise and maintain effective control over its territory. However, it does meet some of the requirements of the Montevideo Convention, having a permanent population and clearly defined and relatively undisputed borders.⁴² The status of Somalia’s statehood is thus complicated, although the international community still rates Somalia as if it were a fully functional state.⁴³ The critical element alleged to be lacking in Somalia is effective government⁴⁴ that can claim and exercise political legitimacy and sovereignty. However, Somalia is regarded as a failed state because of the lack of political sovereignty and the failure to exercise it.

The classical definition of ‘sovereignty’ is that it concerns the political competence of a state to assert exclusive control over its territory and resources, mirrored by the state’s supreme power within the internal political hierarchy.⁴⁵ The exercising by that state of authority over its land and territory is thus the most fundamental illustration of its sovereign power.⁴⁶ From

a strictly legal perspective, the concept of sovereignty has come to be known as encompassing all matters in which a state is permitted by international law to decide and act without intrusion from other sovereign states.⁴⁷ Examples of these are the choice of political, economic, social, and cultural systems and the formulation of foreign policy by the state in question. One writer observed that ‘the power of all states is territorially related, for the state expresses itself mainly in possession of its sovereignty in relation to other states. If sovereignty concerns the way in which exclusive jurisdiction is exercised over respective territories of an empire or a nation-state, then the power of a sovereign state ... hinges on territorial integrity.’⁴⁸

There is a need for alternative approaches to statehood and nation-building in Somalia in view of the failure of existing political structures to claim and exercise Somalia’s sovereign power.⁴⁹ The TFG, according to Tsvetkova, lacks the monopoly of the use of legitimate force in Mogadishu and elsewhere in Somalia and thus cannot claim to be a government at all.⁵⁰ Various Somali political entities have claimed to exercise national governance responsibilities, yet even these local political structures have not succeeded to lay claim to Somalia’s sovereign power. Their failure to establish universally acceptable and functional social, political and economic institutions, and to create and maintain a national army, police force and judicial systems that make, enforce and apply laws, means that they cannot be regarded as the effective government of Somalia. Owing to fundamental religious and political differences these disparate political entities have failed to demonstrate a collective will that can credibly be treated as the will of a state.⁵¹ The actions of these semi-legitimate local-level political entities – in contrast to those of the TFG – have not been interpreted by the international community as representing the acts of a state of Somalia and thus have not been bound by the general rules of international law.

Since the state is the basic constituent of the international community and thus indispensable for the effectiveness of international law, Somalia has engendered critical problems to international peace and security. Its security challenges spill over to neighbouring states and affect their security and safety as well. Such challenges may not be effectively addressed by merely strengthening the security apparatus of the neighbouring states.

The resurgence of piracy has not coincided with regional weaknesses in maritime or coastal vigilance, but with each step Somalia has made into political instability, state collapse and internecine warfare. Alternative political solutions to Somalia’s state failure-induced piracy should therefore focus on creating a political establishment that is strong enough to cooperate with both local forces and the international community in combating piracy.

Piracy has also been encouraged by the illegal arms and light weapons trade across Central Africa.⁵² There is no doubt that gun-running flourishes in collapsed states with non-existent security apparatus.⁵³ The ‘merchants of death’ link up with various other transnational criminal networks such as illegitimate functionaries of neighbouring governments, multinational companies, and money launderers to further complicate the resolution of crises in politically troubled states. The huge ransoms paid to pirates facilitate their acquisition of even the most sophisticated weaponry. To further complicate matters, international shipping companies, considering the huge financial resources at stake, may have begun to contract private security companies to provide security escorts for their vessels on the high seas.⁵⁴ Africa has already decided against these private ‘guns for hire’⁵⁵ as they are bound to pose more problems than they would solve. In view of these disturbing facts, the need for a stable state of Somalia and for the establishment of a continental criminal justice mechanism to counteract piracy and other related international crimes in failed states cannot be over-emphasised. The United Nations has not waited for the day when both mechanisms are in place and, through the

Security Council, has moved swiftly to address the problem of piracy. As will be illustrated below, the actions of the United Nations acknowledge not only the seriousness of piracy as an international crime but also the challenges that failed states pose for the UN system and international law in general.

The Security Council response to Somali piracy

Somali piracy has significantly united the Security Council permanent members in passing various resolutions⁵⁶ and calling for concerted action. All these resolutions have been passed in terms of Chapter VII of the UN Charter, which authorises the Security Council to ‘determine the existence of any threat to the peace, breach of the peace, or act of aggression’ before deciding on any measures ‘to restore international peace and security’.⁵⁷ The main thrust of these resolutions is to permit states with naval power to fight pirates originating from Somalia on Somali land and in Somali territorial waters and to ensure the safety of ships at sea. In doing this, the resolutions encourage cooperation of naval forces with Somalia’s TFG authority, which is taken as the nearest form of legitimate governmental authority in Somalia. The resolutions do not question Somalia’s sovereignty, with Resolution 1816 for instance reaffirming ‘respect for the sovereignty, territorial integrity, political independence and unity of Somalia’ and also acknowledging Somalia’s right to its territorial waters. The Security Council further accepts the actions of the TFG in its communications with the Security Council as representing the conduct of the state of Somalia⁵⁸ and directs other nations fighting piracy off the Horn to entreat, negotiate, cooperate and enter into agreements with the TFG.⁵⁹

In order to reinforce the grounds for Security Council intervention, the resolutions condemn the targeting of World Food Programme (WFP) ships destined for humanitarian activities in Somalia.⁶⁰ The resolutions also seek to ensure the security of WFP vessels, while encouraging naval warship escorts to achieve this objective.

The resolutions mainly revolve around Somalia’s political sovereignty and the international legal competence of the TFG. For instance, Article 7 of Resolution 1816 (2008) is telling:

The Security Council, acting under Chapter VII of the UN Charter,

7. *Decides* that for a period of six months from the date of this resolution, States cooperating with the TFG in the fight against piracy and armed robbery at sea off the coast of Somalia, for which advance notification has been provided by the TFG to the Secretary-General, may:
 - (a) Enter the territorial waters of Somalia for the purpose of repressing acts of piracy and armed robbery at sea, in a manner consistent with such action permitted on the high seas with respect to piracy under relevant international law; and
 - (b) Use, within the territorial waters of Somalia, in a manner consistent with action permitted on the high seas with respect to piracy under relevant international law, all necessary means to repress acts of piracy and armed robbery ...⁶¹

In Resolution 1851, the states fighting piracy were given explicit authority to use ‘all necessary measures that are appropriate in Somalia for the purpose of suppressing acts of piracy and armed robbery at sea’.⁶² Under the banner of combating piracy states are therefore free to disregard Somalia’s ‘exclusive sovereign power’ over its land and resources, enter Somalian territorial waters and capture pirates.⁶³

It is clear that the Security Council refuses to admit that Somalia may lack legitimate structures and institutions capable of consenting and representing it in international law.⁶⁴ The route taken by the Security Council has been to tacitly grant Somalia the status of a state whilst admitting that it is in a deep political crisis and under a weak transitional government, the TFG. The Security Council has thus sold the idea that Somalia is in fact an effective state with a functional government albeit lacking the ability to exercise exclusive political control over the whole of Somalia. This pretext permits the Security Council to entreat with the TFG as the legitimate authority representing the state of Somalia and also permits other states to enter into agreements with the TFG.⁶⁵ The reason why the Security Council chooses this route is not difficult to understand: it seems to have no other alternative to dealing with an international crime in a failed state but finding a partner to work with in achieving its anti-piracy objectives.

The anti-piracy intervention is not the first time Somalia has featured on the Security Council agenda. For example, the 1993 US-led nation-building and humanitarian efforts of the Unified Task Force (UNTAF) failed dismally and the task force was withdrawn in 1995. The United Nations Operations in Somalia I and II (UNOSOM I and II) were deployed in 1992 and 1993, but the two missions also failed to deliver before they were terminated in 1993 and 1995 respectively.

Currently the only glimmer of hope left for a stable state of Somalia is being spearheaded by the AU through the Intergovernmental Authority for Development (IGAD), which is driving a process aimed at building the state of Somalia and establishing a fully functional government. This process started in 2004, with one of its landmarks being the establishment of the TFG. Contrary to UN efforts in the 1990s, AU initiatives have seen a measure of success in establishing lasting, albeit weak state institutions. The rather negative experience of the UN in Somali may explain the organisation's current readiness to cooperate more with AU structures and adopting a rather cautious approach in its handling of the Somali political problem.⁶⁶

The actions of the UN may appear indefensible but from a political perspective they probably remain the best approach to dealing with crisis situations arising from politically unstable or extremely weak states. However, UN approaches will likely remain deficient if they are not pursued concurrently with efforts aimed at establishing strong political, security and economic institutions. Efforts to shore up functional state structures, and to capacitate national state institutions and social, economic and security systems, are likely to address the nucleus of the problem in Somalia today. The UN seems to be leaving this to the AU (and IGAD in particular) and waiting to utilise the institutional structures created by IGAD on the ground in confronting Somali piracy. In so doing the UN refuses to be bogged down by the legal niceties of international law, particularly the principle of sovereignty and the sovereign equality of nations upon which it is founded.⁶⁷

The Security Council thus succeeded in killing two birds with one stone: it confronted the twin problems of a failed state and the international crime of piracy in such state by the single act of assuming that the state of Somalia existed, albeit under a weak government. Although the assumption that Somalia was not a failed state may have been morally and legally unacceptable, the Security Council apparently did not violate any explicit rule or norm of international law in its anti-piracy stance.

Most importantly, however, the Somali anti-piracy case serves to show that the Security Council is prepared to recognise fiercely contested forms of rudimentary political order such as the TFG and entreat with these as if they represented the effective government of an

otherwise politically unstable and extremely weak state. For Africa, this approach may be a welcome option for addressing the anarchy-based problem of piracy.

Way forward for Africa

African solution to an African problem?

As discussed above, African politicians have recently become less enamoured of the ICC, although Africa participated extensively in its creation.⁶⁸ Criticisms against the court are mounting and include its exclusive focus on Africa, its prioritisation of justice over peace in Africa, and, most importantly, the indictment of the Sudanese sitting head of state, Omar Hassan al-Bashir.⁶⁹

During the twelfth and thirteenth ordinary session of the Assembly of the African Union held in Ethiopia and Libya in 2009, the idea of the establishment of an African criminal court was discussed. At both sessions, the AU passed a decision to request the AU Commission 'in consultation with the African Commission on Human and People's Rights and the African Court on Human and People's Rights to examine the implications of the Court being empowered to try serious crimes of international concern such as genocide, crimes against humanity and war crimes, which would be complementary to national jurisdiction and processes for fighting impunity'.⁷⁰ The same meeting expressed concern at the indictment of a sitting head of state, the President of Sudan, Omar Hassan al-Bashir, and the unfortunate consequences of the indictment to the achievement of peace in Sudan. Earlier on the AU had castigated the abuse of the principle of universal jurisdiction, 'particularly by some non-African states', expressing deep concern that 'indictments have continued to be issued in some European states against African leaders and personalities'.⁷¹

It is clear from this that African international policymakers envisage an African criminal court as a possible substitute for the ICC. Such a court would have jurisdiction over crimes against humanity, genocide, war crimes, and possibly other international crimes. It would no doubt serve an important function on the continent and possibly entertain international crimes that are currently outside the Rome Statute such as piracy, international drug and human trafficking, illegal arms trading and slavery. Further, African approaches in addressing conflict and post-conflict situations have always favoured peace over justice and this explains the AU position that the restoration of political stability and the establishment of a fully functional state of Somalia is the solution to addressing the problem of piracy off the coast of Somalia.

As if to encourage the debate for an African criminal court, the Security Council tentatively suggested setting up an international criminal tribunal to prosecute pirates captured from Somalia. Security Council Resolution 1918 (2010) tasked the UN Secretary-General with the responsibility of coming up with options 'for creating special domestic chambers possibly with international components, a regional tribunal or an international tribunal and corresponding imprisonment arrangements' to prosecute captured pirates.⁷² The resolution further called on the Secretary-General to 'take account of ... existing practice in establishing international and mixed tribunals, and the time and the resources necessary to achieve and sustain substantive results'.⁷³

To fulfill the terms of this resolution, the Secretary-General produced a report on options for the effective prosecution and imprisonment of captured pirates in Somalia.⁷⁴ The report

deals in detail with options ranging from capacitating regional states to prosecute Somali pirates to establishing a piracy court in a chosen state in the region, establishing a special piracy chamber in a chosen state in the region with or without UN participation, creating a regional criminal tribunal with UN participation, establishing an international tribunal based on an agreement between the UN and a third state in the region, and the establishment of an international tribunal by the Security Council in terms of its Chapter VII powers.⁷⁵ The Secretary-General subsequently appointed a Special Adviser to the Secretary-General who produced a special report on legal issues related to piracy off the coast of Somalia with twenty five proposals on tackling piracy.⁷⁶

The report explores the Somali piracy problems in detail, highlighting the social, political and economic impacts of piracy and possible ways of combating it. It also explores economic, security and legal ways of suppressing piracy in Somalia. Most importantly, the report identifies legal/jurisdictional challenges to prosecuting captured pirates and suggests ways in which to overcome them and generally improve the legal system designed to combat piracy. The major problems identified in the report include lack of universal jurisdiction over piracy in coastal states, inadequate substantive and procedural provisions in the criminal law relating to piracy, lack of international assistance and cooperation in prosecuting piracy off the coast of Somalia, and difficulties in collecting, gathering and transferring evidence.

Apart from identifying the major legal challenges, the report explores in detail the possible solutions to effective prosecution of captured pirates that were highlighted in the earlier report of the Secretary-General on Somali piracy. The first suggestion was that an international criminal tribunal or a regional criminal tribunal specifically designed to prosecute captured pirates be established.⁷⁷ However, this idea was quickly shot down because 'the excessively long procedures would take time and entail high costs', in addition to difficulties in canvassing international support for a multilateral instrument that would lead to the creation of such a tribunal.⁷⁸ Consequently, the favoured legal approach was the capacitation of Somalia's criminal justice system to combat piracy and choosing another state in the region to host an extraterritorial piracy court. Establishing a Somali piracy court would entail making provision for the crime of piracy in Somali's criminal law⁷⁹ and capacitating Somalia's correctional and penitentiary systems for imprisonment and detention of convicted pirates.⁸⁰ In essence, the report suggests the 'establishment, within eight months, of a court system comprising a specialized court in Puntland, a specialized court in Somaliland and a specialized extraterritorial Somali court that could be located in Arusha, United Republic of Tanzania'.⁸¹ The choice of Arusha was expedient because the court would be using the facilities of the International Criminal Tribunal for Rwanda in Arusha, thereby ensuring its expeditious set-up and operationalisation. Such a court would further act as the 'focal point' for international assistance. With time, however, the extraterritorial court would be moved to Mogadishu.⁸²

The greatest oversight in the suggested options is that the solution appears to be transitory. Once the piracy problem disappears, the tribunal will be wound up for good as its life span will coincide with that of the criminality it will be set up to address. The major problem with transitory tribunals in Africa is that as soon as they are wound up, other forms of international criminality emerge, albeit in other parts of the continent.

It is in light of this saddening reality that the call is made for the establishment of a permanent regional criminal justice system. The greatest challenges to be expected are setting up the legal framework and operationalising the tribunal.⁸³ Other problems that are likely to be encountered include the costs involved in setting up a special tribunal, the appointment of judicial staff (judges, prosecutors, clerks and a registrar) and administrative support staff,

and providing physical and logistical infrastructure. In addition, there are costs involved in investigations, evidence-gathering, detention, and provision of defence counsel.

In drafting the way forward, policymakers should be aware of the fact that African regional judicial and semi-judicial systems have generally underperformed their mandates. This can be ascribed to infrastructural impediments and the lack of adequate funding as well as to greater logistical challenges than those experienced by similar institutions in other parts of the globe.⁸⁴ However, it is hoped that the AU suggestion of capacitating the African Court of Human and People's Rights might expedite the establishment of the regional criminal tribunal and advance its operationalisation.⁸⁵

Conclusion

There is no doubt that the pessimism on the success of African criminal justice initiatives derives from the general ineffectiveness of African institutions to carry out their mandates. Africa has never experimented with a regional criminal justice mechanism that targets ordinary international crimes with trans-border implications but – unlike crimes covered by the Rome Statute – without political underpinnings. Crimes such as piracy, human trafficking, drug trafficking, slavery, arms trading and money laundering can be addressed by such a mechanism. The African experience with such crimes has taught us that they usually occur in countries in crisis that lack effective and fully functional social, economic, security and political institutions.

While the establishment of an effective statehood and fully functional institutions are necessary steps in suppressing crime in failed or collapsed societies, such efforts should run concurrently with efforts to deal with the criminality in question. Such criminality definitely acts as a drawback to state-building efforts. The need for the creation of a permanent regional mechanism that would seek the punishment of international crimes emanating from ineffectual, politically unstable states has to be seen in this light. While such a criminal justice mechanism may cover other international crimes as well, it has been argued that it will serve an important purpose in war-torn Africa. The time for an African criminal tribunal to deal with such crimes may have arrived and there is no doubt that such a mechanism will be compatible with the objectives of the UN and the African Charter as well as in accordance with the commitment of the international community to reject impunity.

Notes

- 1 See, for instance, Can Somali pirates be defeated? BBC, <http://news.bbc.co.uk/2/hi/africa/8371139.stm> (accessed 20 December 2010).
- 2 Somali pirates free German chemical tanker, BBC, <http://www.bbc.co.uk/news/world-south-asia-12086627> (accessed 29 December 2010).
- 3 See: Pirates seize a record of 1,181 hostages in 2010, GAOPS, http://gaops.com/index.php?option=com_content&view=article&id=481:19-jan-2011-pirates-seize-a-record-of-1181-hostages-in-2010&catid=3:news&Itemid=13 (accessed 20 January 2011).
- 4 See UN Security Council, *Report of the Secretary-General on Somalia*, 30 December 2011, S/2010/675, <http://www.unhcr.org/refworld/docid/4e2ebcf42.html> (accessed 27 July 2011). The report details the fragile political situation in Somalia in 2010 and further paints a gloomy picture on the security, humanitarian and human rights situation in Somalia.
- 5 These challenges are highlighted in detail in UN Doc S/2010/30, discussed in later parts of this paper.

- 6 The Security Council has shied from calling Somalia a failed state. However, it acknowledges 'the crisis situation in Somalia and the lack of capacity of its [TFG] government to address piracy in Somali waters'. See preamble to Security Resolution 1816 (2010).
- 7 The major African criminal justice systems are a legacy of colonialism and include common law, civil law, Islamic law and traditionalist (customary) systems. Common law systems led by US and UK are predominantly adversarial based whilst civil law systems such as in Germany, Sweden and France are mainly inquisitorial based. See Mathieu Defflem and Amanda J Swygart, Comparative criminal justice, in M A DuPont-Morales, Michael K Hooper and Judy H Schmidt (eds), *Handbook of criminal justice administration*, New York; Marcel Dekker, 2001, 53, <http://www.cas.sc.edu/socy/faculty/deflem/zcompj.pdf> (accessed 20 July 2011)
- 8 A good example is the SADC Protocol creating a regional police agency through the Southern African Regional Police Chiefs Organisation (SARPPCO). SARPPCO is a member of Interpol, but it retains a large measure of independence. One of its objectives is to promote, strengthen and perpetuate cooperation and foster joint strategies for the management of all forms of cross border and related crimes with regional implications. See <http://www.interpol.int/public/Region/Africa/Committees/SARPPCO.asp> (accessed 28 November 2010).
- 9 These are the International Criminal Tribunal for Rwanda and the Special Court for Sierra Leone, which were established after brutal conflicts in these states.
- 10 Max du Plessis, *The International Criminal Court that Africa wants*, Monograph 172, Pretoria: Institute for Security Studies, 2010, 6, http://www.operationspaix.net/IMG/pdf/ISS_The_international_criminal_court_that_africa_wants_2010_.pdf (accessed 20 July 2011).
- 11 Prominent political personalities in Zimbabwe, Kenya and Sudan have fiercely criticised the ICC and its work in Africa. It is not clear whether the citizens in these countries share the views of these politicians, however. There was for instance an outcry in Kenya when Parliament passed a motion to 'unsign' the Rome Statute following indictments of prominent persons in Kenya by the ICC Prosecutor for instigating vicious post-electoral violence. See for instance: Parliament pulls Kenya out of ICC, *Daily Nation*, 24 December 2010.
- 12 This has raised complaints from African countries that claim that the ICC is either targeting Africa only or discriminating against it. The AU Commission chairperson once complained of the ICC's exclusive focus on Africa as being experimental, lamenting that Africa 'has become a laboratory to try the new international law'. See: Vow to pursue Sudan over 'crimes', BBC News, 27 September 2008, <http://news.bbc.co.uk/2/hi/africa/7639046.stm> (accessed 30 December 2010).
- 13 Rancee Kooshie Lal Panjabi, The pirates of Somalia: opportunistic predators or environmental prey? *William and Mary Environmental Law Review* 34(2) (2010) 377-491, 416, <http://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1011&context=wmelpr> (accessed 20 July 2011).
- 14 See, for instance, Bilyana Tsvetkova, Securitizing piracy off the coast of Somalia, *Central European Journal of International and Security Studies* 3(1), 2009, 44-63, http://www.cejiss.org/sites/default/files/Tsvetkova-Piracy_in_Somalia.pdf (accessed 18 May 2011). Tsvetkova argues (at p 45) that 'Somali piracy has gained the status of an international security issue because of its damaging impact on oil supplies to Western states and not because of its relationship with state failure in Somalia, the region, breeding ground for terrorism or human security'.
- 15 The United Nations Secretary-General, Ban Ki-Moon, acknowledged that anarchy is at the root of piracy in Somalia, stating in 2008 that 'piracy is a symptom of the state of anarchy which has persisted in [Somalia] for over 17 years' (UN News Centre, 16 December 2008).
- 16 See for instance the Communiqué of the Sixteenth Meeting of the AU's Peace and Security Council, 17 September 2004, Addis Ababa, 2, <http://www.un.int/wcm/webdav/site/somalia/shared/documents/statements/1121651654.pdf> (accessed 20 July 2011). For instance, paragraph 4 of the communiqué relating to Somalia 'Invites all Somali Parties to contribute effectively to the restoration of their nation-State through the creation of a conducive environment for the installation and functioning of their newly created governance institutions'.
- 17 See Shani Ross and Joshua Ben-David, Somali piracy: an escalating security dilemma, *Harvard African Policy Journal* (2009), 55-57, <http://www.ict.org.il/Articles/tabid/66/Articlsid/745/currentpage/4/Default.aspx> (accessed 20 July 2011).
- 18 See for instance Clive Schofield, The other 'pirates' of the Horn of Africa, RSIS Commentaries 2 (2009), 1, <http://www.isn.ethz.ch/isn/Digital-Library/Publications/Detail/?ots591=0c54e3b3-1e9c-be1e-2c24-a6a8c7060233&lng=en&id=95087> (accessed 20 July 2011). See also **Lal Panjabi**, The pirates of Somalia, who argues (at 382) that 'Somalia provides an important case study of the nexus between environmental devastation and consequent criminal actions against international targets. Although the piracy is entirely criminal and totally unjustifiable, it is understandable, given the political and economic background. Somalia also provides a case study of brazen violations of international law, both by the Somalis and by foreigners, who have taken advantage of the absence of effective government, to wreak environmental havoc on the weakened nation. Although the Somali pirates can be termed "predators", it must be appreciated that their country has suffered at the hands of predators from many nations who have polluted their waters with toxic and even nuclear waste and looted their oceans of fish.'

- 19 International customary law has generally recognised the right of states to exercise permanent sovereignty over their own natural resources. This right is expressed as a principle of international law in General Assembly Resolution 1803 (XVII) of 14 December 1962 and further elaborated in the Declaration on the Establishment of a New International Economic Order (General Assembly Resolution 3201 (S.VI) of 1 May 1974) and the Charter of Economic Rights and Duties of States (General Assembly Resolution 3281 (XXIX) of 12 December 1974).
- 20 Tsvetkova, *Securitizing piracy off the coast of Somalia*, 49–50.
- 21 UN Doc S/2011/30, paragraphs 82–83.
- 22 Alison K Eggers, When is a state a state: the case for recognition of Somaliland, *Boston College International and Comparative Law Review* 30(1) (2007), 211–222, <http://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=1095&context=iclr&sei-redir=1#search=%22K%20Eggers%2C%20When%20state%20state%3A%20case%20recognition%20Somaliland%22> (accessed 20 July 2011). See also Mario Silva, Somalia: state failure, piracy and the challenge to international law, *Virginia Journal of International Law* 50(3) (2010), 554–576, 553, <http://www.vjil.org/assets/pdfs/vol50/issue3/VJIL-50.3-Silva-Essay.pdf> (accessed 20 July 2011).
- 23 See: 2009 Worldwide piracy figures surpass 400, ICC Commercial Crime Services, <http://www.icc-ccs.org/news/385-2009-worldwide-piracy-figures-surpass-400> (accessed 12 December 2010).
- 24 See for instance: Pirates intensify attacks in new areas with first Somali hijacking reported in Red Sea, ICC Commercial Crime Services, <http://www.icc-ccs.org/news/424-pirates-intensify-attacks-in-new-areas-with-first-somali-hijacking-reported-in-red-sea> (accessed 12 December 2010).
- 25 See Stephanie Hanson, Combating maritime piracy, Council on Foreign Relations, http://webcache.googleusercontent.com/search?q=cache:http://www.cfr.org/publication/18376/combating_maritime_piracy.html (accessed 14 July 2011).
- 26 M Cherif Bassiouni, *Crimes against humanity in international criminal law*, 2nd Revised Edition, The Hague: Kluwer Law, 1999, 515. The author observes that as early as 1511, King Henry VII had ordered a certain commissioner to ‘seize and subdue all pirates, from time to time to be found’.
- 27 Bassiouni, *Crimes against humanity*, 515.
- 28 Benjamin N Schiff, *Building the International Criminal Court*, Cambridge: Cambridge University Press, 2008, 21.
- 29 This was acknowledged in Security Council Resolution 1918 (2010), which noted in the preamble ‘that the domestic law of a number of States lacks provisions criminalizing piracy and/or procedural provisions for effective criminal prosecution of suspected pirates’.
- 30 Recently, a Kenyan court prosecuting pirates ruled that Kenyan courts had no jurisdiction to prosecute piracy in the High Seas; in *In Re Mohamud Mohamed Dashi & 8 Others* [2010] eKLR, http://kenyalaw.org/Downloads_FreeCases/78571.pdf (accessed 30 November 2010).
- 31 For Instance, Kenya and Seychelles assigned a pact with Germany and the United States for the transfer of captured pirates into their own countries for prosecution. Tanzania has also shown a willingness to follow Kenya’s footsteps and sign similar agreements with interested major powers.
- 32 African states will always want incentives before they can actively discharge the obligations they have voluntarily assumed to prosecute captured pirates. Kenya for instance had to backtrack on its promises owing to various legal and logistical impediments. In April 2010, Kenya announced that it would no longer be prepared to accept any more seized Somali pirates: Kenya ends trials of Somali pirates in its courts, BBC News, <http://news.bbc.co.uk/2/hi/africa/8599347.stm> (accessed 12 October 2010).
- 33 The Report of the Legal Adviser (S/2011/30) noted that of the 2 000 pirates captured between 2008 and 2010, only 738 had been detained for future prosecution and that by mid-2010, nine out of ten captured pirates have not been prosecuted. See S/2011/30, paragraphs 42–43.
- 34 For instance, UN Security Council Resolution 1814 (2008), Resolution 1816 (2008), Resolution 1838 (2008), Resolution 1910 (2010), etc. See also IMO Resolutions A1002(25) and A1026(26) of 2009.
- 35 See for instance: Piracy off the Somali coast, Workshop commissioned by the Special Representative of the Secretary-General of the UN to Somalia, Ambassador Ahmedou Ould-Abdallah, *Final report: assessment and recommendations*, Nairobi (10–21 November 2008).
- 36 Security Council Resolution 1838 (2008) emphasises in the preamble ‘that peace and stability, the strengthening of State institutions, economic and social development and respect for human rights and the rule of law are necessary to create the conditions for a full eradication of piracy and armed robbery at sea off the coast of Somalia’.
- 37 See for instance Silva, Somalia: state failure, piracy and the challenge to international law, 550.
- 38 Article 1 of the 1933 Montevideo Convention on the Rights and Duties of States. The convention entered into force in December 1934.
- 39 Article 3 of the convention.

- 40 *Kadic v Karadzic* 70 F.3d 232, 236–237 (2nd Cir 1995).
- 41 States such as the Democratic Republic of Congo and Haiti may have constantly failed to meet the requirements of this strict definition when they were undergoing episodes of political change. See Silva, Somalia: state failure, piracy and the challenge to international law, 554.
- 42 Eggers, When is a state a state, 218.
- 43 For this view, see James R Crawford, *The creation of states in international law*, 2nd ed, Oxford: Oxford University Press, 2006, for the view that while statehood is difficult to acquire, once acquired, however, it is consequently difficult to lose.
- 44 The TFG has a cabinet, but it exists more on paper than in reality; see Eggers, When is a state a state, 218.
- 45 John Hilla, The literary effect of sovereignty in international law, *Widener Law Review* 14(1) (2008), 77–147, <http://widenerlawreview.org/files/2008/10/03-hilla-final.pdf> (accessed 3 August 2011).
- 46 John Doyle, New models of sovereignty for contested states: some empirical evidence of non-Westphalian approaches, in Howard Hensel (ed), *Sovereignty and the global community: the quest for order in the international system*, New York: Ashgate, 2004.
- 47 See for instance the general discussion of the concept on http://www.idrc.ca/en/ev-28492-201-1-DO_TOPIC.html (accessed 17 December 2010).
- 48 Jieli Li, State fragmentation: toward a theoretical understanding of the territorial power of the state, *Sociological Theory* 20(2) (2002), 139–156, 141.
- 49 Virtually all the UN Security Council resolutions have acknowledged Somalia's lack of capability to police its territorial waters and international sea lanes off its coast.
- 50 Tsvetkova, Securitizing piracy off the coast of Somalia, 47.
- 51 Other scholars argue that the collective will of warring factions such as those found in Somalia can be treated as the will of a state. See for instance David Wippman, Treaty-based intervention: Who can say no?, *University of Chicago Law Review* 62 (1995), 607.
- 52 See for instance the findings of the International Commission for Rwanda S/1998/1096 on the arms trade in Central Africa.
- 53 Tsvetkova, Securitizing piracy off the coast of Somalia, 50. The author points out that Somalia has become the world's largest duty free shop due to its well established illicit network of sea ports, overland trucking companies and porous borders that facilitate arms flow and arms trade.
- 54 See for instance a BBC news article: 'Pirate' death puts spotlight on 'guns for hire', <http://news.bbc.co.uk/2/hi/africa/8585967.stm> (accessed 21 September 2010).
- 55 See the 1977 OAU/AU Convention for the Elimination of Mercenarism in Africa. For a critique of the regime of mercenarism, see, for instance, Sabelo Gumede (ed), *Elimination of mercenarism in Africa: a need for a new continental approach*, Monograph 147, Pretoria: Institute for Security Studies, 2008, <http://www.iss.co.za/uploads/MONO147FULL.PDF> (accessed 20 July 2011).
- 56 Other resolutions include 1816 (2008), 1836 (2008), 1844 (2008), 1846 (2008) and 1858 (2008).
- 57 Article 40 of the UN Charter, <http://www.un.org/en/documents/charter/chapter7.shtml> (accessed 20 December 2010). The prologue to the resolutions starts with an 'Acting under Chapter VII of the UN Charter' caption.
- 58 See for instance the preambles of most Security Council anti-piracy resolutions.
- 59 See for instance article 2 of Security Council Resolution 1816 (2008) and article 4 of Security Council Resolution 1838 (2008).
- 60 See paragraph 3 of the preamble to Security Council Resolution 1816 (2010).
- 61 Article 7 of Security Council Resolution 1816 (2008), http://www.marad.dot.gov/documents/UNSCR_1816-_SIT_IN_SOMALIA.pdf (accessed 26 July 2011).
- 62 Security Council Resolution 1851 (2008), <http://www.consilium.europa.eu/uedocs/cmsUpload/N0865501.pdf> (accessed 26 July 2011).
- 63 Since the pirates are armed, the methods used would definitely entail military force.
- 64 Silva, Somalia: state failure, piracy and the challenge to international law, 556.
- 65 Virtually all resolutions state that the Security Council has obtained the consent of the TFG government before, for instance, authorising invasion of Somali territorial waters. See for instance paragraphs 11, 12 and 13 of the preamble to Security Council Resolution 1816 (2010).
- 66 See for instance UN Doc S/2010/675, Report of the Secretary-General on Somalia.
- 67 Article 2 of the UN Charter.

- 68 See for instance Du Plessis, *The International Criminal Court that Africa wants*, 7.
- 69 See for instance Sirte Declaration, Decision on the meeting of African States Parties to the Rome Statute of the ICC, Doc Assembly/AU/13 (XIII), paragraphs 2 and 3.
- 70 See Decision on the Implementation of the Assembly Decision on the Abuse of the Principle of Universal Jurisdiction, Doc Assembly/AU/3(XII), paragraphs 9, and Decision on the meeting of African State Parties to the Rome Statute of the ICC, Doc Assembly/AU/13/XII, paragraph 5.
- 71 Decision on the Abuse of the Principle of Universal Jurisdiction, Doc Assembly/AU/11 (XIII), paragraph 4.
- 72 Article 4 of Security Council Resolution 1918 (2010), <http://www.unhcr.org/refworld/country,,UNSC,,SOM,,4bea70cc2,0.html> (accessed 26 July 2011).
- 73 Ibid.
- 74 UN Security Council, *Report of the Secretary-General on possible options to further the aim of prosecuting and imprisoning persons responsible for acts of piracy and armed robbery at sea off the coast of Somalia, including, in particular, options for creating special domestic chambers possibly with international components, a regional tribunal or an international tribunal and corresponding imprisonment arrangements, taking into account the work of the Contact Group on Piracy off the Coast of Somalia, the existing practice in establishing international and mixed tribunals, and the time and resources necessary to achieve and sustain substantive results*, 26 July 2010, S/2010/394, available at: <http://www.unhcr.org/refworld/docid/4c74d3a02.html> (accessed 26 July 2011).
- 75 See Summary, UN Doc S/2010/394.
- 76 UN Security Council, *Report of the Special Adviser to the Secretary-General on Legal Issues Related to Piracy off the Coast of Somalia*, S/2011/30, http://www.un.org/ga/search/view_doc.asp?symbol=S/2011/30&referer=/english/&Lang=E (accessed 26 July 2011).
- 77 Options 5, 6 and 7. See also paragraph 78 of the report (Solutions on which there is no consensus).
- 78 UN Doc S/2011/30, paragraph 78. See also the views of the Contact Group on Piracy off the Coast of Somalia: Chairman's Conclusions, 4th Meeting of Working Group 2 on Legal Issues, 26–29 November 2009, http://www.marad.dot.gov/documents/WG2-4th_Meeting_chair-conclusions-November_26-27-2009-mtg.pdf (accessed 20 May 2011).
- 79 UN Doc S/2011/30, paragraphs 104–107.
- 80 Ibid, paragraph 109.
- 81 UN Doc S/2011/20, 3.
- 82 Ibid, paragraph 119.
- 83 This is acknowledged in Security Council Resolution 1918 (2010), which stressed in the preamble the need to address the problem of piracy in light of the 'limited capacity of the judicial system of Somalia and other states in the region to effectively prosecute suspected pirates'.
- 84 See generally Max du Plessis and Lee Stone, A court not found: the African Court on Human and Peoples' Rights, *African Journal of Human Rights* 7(2) (2007).
- 85 See however the objections by the Coalition for an Effective African Court on Human and Peoples' Rights (CEAC) et al entitled 'An opinion on the implications of the African Court on Human and People's Rights being empowered to try international crimes such as genocide, crimes against humanity and war crimes', http://www.soros.org/initiatives/justice/focus/international_justice/news/africa_20091217/africa_20091217.pdf. Accessed 25 May 2011