Sovereignty Denied & Sovereignty Yielded

Through the Looking Glass on 21st Century Piracy in the Seychelles

by

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Abstract

Using the case study of 21st century Piracy as it affects the small islands archipelagic state of the Seychelles, this paper sets the stage for a broader discussion on the “sovereignty of small island states in international law”. Sovereignty can be viewed through different lenses; “sovereignty denied” considers the many challenges faced by small island states and their claim to the traditional concept of sovereignty, as promoted during the decolonisation era and projected by the right of self determination. On the other hand “sovereignty” can also be “yielded” by small island states, where the “jurisdiction” of the state becomes a resource. This is demonstrated through the degree of international assistance afforded to the Seychelles in dealing with pirates and more generally, through the development of offshore companies in small island states. Consequently, this paper suggests that international law is both the problem and solution to the sovereignty of small island states.
Acknowledgments

I would like to thank Dr. Karen Knop of the University of Toronto’s Faculty of Law for her inspiration and guidance in finding a voice for this paper; and

My ever-loving and ever-supportive parents “Anthony & Ramya” and my sister, “Christmarine”, who have given me all the reasons to follow and trust in my own voice...

‘Oh si pa mon Sesel dir mon lekel…’

‘If it’s not my Seychelles, then tell me what else it could be…’
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Chapter 1
Introduction

1 Introduction

In 1883, Robert Louise Stevenson wrote of a “Treasure Island”¹ - a cast away, idyllic island that set the stage for blood thirsty pirates and their lawless behaviour; where the only law that prevailed was that of the harsh and unkempt terrain of the island. Our childhood imaginations were captured...²

However pirates and islands are not merely a fantasy play of children’s books nor is piracy a situation so far removed from modern day reality. Recent years have witnessed a return of piracy to the seas, which poses a growing dilemma for small island states. Nevertheless in this case, these small islands are no longer simply lawless and uninhabited terrain but rather sovereign states with legal rights and the act of piracy has been deemed a universal crime with universal consequences.

The small islands archipelagic state³ of the Seychelles is a prevalent example of such islands plagued by the scourge of 21st century piracy in its waters; and it is this case study that this paper

² As Michael Davey explains “Captain’s Blackbeard and Kidd, and even Hook and Sparrow, are the primary concept of piracy for many people” See Michael Davey, “A Pirate looks at the Twenty First Century: the Legal Status of Pirates in an Age of Sovereign Seas and Human Rights” (2010) 85 Notre Dame L. Rev 1197 at 1197.
will use to elucidate its discussion as to the nature of the sovereignty of small island states in international law. It is the thesis of this paper to consider sovereignty in different lenses as it applies to small island states in public international law.

1.1 Defining a “small island state”

However before going any further it is important to establish what this paper takes to mean by “small island states”. There is no universally accepted or legally acknowledged definition of small island states in the text of international law, even though small islands have often been recognised as a special category of states onto itself.

In a strict geographical definition, an island is understood to be “a naturally formed area of land, surrounded by water, which is above water at high tide”. Nevertheless what constitutes as a “small island state” requires further elaboration, and it is here that we run into definitional dilemmas.

To start with there is no agreement as to what constitutes as “smallness” in the categorization of “small states” in public international law. In the past, definitions of state size have been based on measures such as population, territory size, GNP per capita or power or a combination of these-leading to conceptual confusion. This paper chooses to adopt the categorisation of small states by the Commonwealth Secretariat as those states with a population of under 1.5 million. Of the

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4 There are a number of inter-governmental, international organisations that focus on small island state issues such as; the Small Island Developing States (SIDS) Network of the United Nations, the Alliance of Small Island States (AOSIS) and other regional organisations which include the Caribbean Community (CARICOM), the Pacific Islands Forum (PIF) and the Indian Ocean Commission (IOC).

5 UNCLOS, supra note 3 at Article122.

6 International relations theorists tend to define “small” in terms of “power relative to other states”.

7 Arguably population of size is the more commonly used as a determinant of “smallness” in the categorization of small states in international law.
general classification of small states by the Commonwealth Secretariat, small island states form the majority of this category. Of the 31 small states listed by the Commonwealth Secretariat’s ‘Report on the Vulnerability of Small States’, 8 24 of these states are considered small “island states”. 9 In this report, small island states were considered as a separate category in acknowledgment of the very specific challenges they faced as small island states; the consequences of their “smallness”, aggravated as a result of their “physical features and the geopolitical consequences of their location”.

Using population then as the determinative criteria of a small island state, it is to be noted that the population of the Seychelles is estimated at 89,188 inhabitants 11 as of July 2011. Therefore the Seychelles archipelago is an example of a small island(s) state.


“While there is clearly more than one criterion for defining a small state, we have taken population as the basis for determining which Commonwealth countries should be encompassed within our study. By doing so we are following what seems to have become general international practice”

See also Jacques Rapaport, Ernest Muteba & Jospeh J Therattil, Small States & Territories Status and Problems, (New York: Arno Press for the United Nations Institute for Training and Research 1971). This UNITAR study uses “population” as the criteria with which to determine “small states”.

8 Ibid.
9 Commonwealth Secretariat, supra note 7 at 11.
10 Ibid.
1.2 Hostis Human Generi

Not letting our imaginations run wild with images of pirates with one eye patches, hooks and ships with black sails, it is also important to establish what this paper takes to mean by piracy in the 21st century. Pirates have been a common set of criminals since the days of ancient civilizations. It was Cicero, as far back in time as Ancient Rome, who “famously declared pirates to be *hostis human generi*, meaning “the enemy of all mankind”12; a “concept of enduring relevance especially with respect to universality jurisdiction”13. As explained by Michael Davey, it is Blackstone who perhaps most eloquently explains the universal jurisdiction of the crime of piracy when he suggests that,

“a pirate”[h]as renounced all the benefits of society and ... by declaring war against all mankind, all mankind must declare war against him: so that every community hath a right, by the rule of self-defence, to inflict that punishment upon him . . .”14

This paper adopts the definition of Piracy as set out by article 101 of the United Nations Convention on the Law of the Sea 198215, in which it is determined, that:

“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;

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14 4 William Blackstone, Commentaries * 71, cited in Davey, supra note 2 at 1201.
15 *UNCLOS*, supra note 3 at article 101.
(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)"

As observed by the Max Planck Encyclopaedia of Public International Law, since the heyday of sea faring criminals in the 17<sup>th</sup> and 18<sup>th</sup> century, “the present era has unfortunately seen a return to lawlessness at sea. The phenomenon of sea piracy has taken on a new lease of life, particularly off the coasts of States with weak governments and little maritime surveillance capability”. In this case, this paper will focus particularly on Somali pirates and consequently it is such that,

Modern Somali piracy was born of poor coastal fishermen. After the collapse of the Somali government in 1991 and the subsequent collapse of the Somali Navy, the fisheries off the Somali coast could no longer be protected from foreign exploitation...As their country fell to pieces, the Somali fishermen had only themselves to look to for protection. They armed themselves and confronted foreign vessels demanding taxes...From there they got greedy and started attacking everyone. Today, Somali piracy is predominantly a ransom-driven business.

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<sup>16</sup> The Golden Age of Piracy is considered by many to be from 1692-1725. See Davey, supra note 2 at 1197

<sup>17</sup> Shearer, supra note 13 at 29

<sup>18</sup> Davey, supra note 2 at 1207.
1.3 21st century Piracy in the Seychelles

The Seychelles is located to the East Coast of Somalia and its territorial waters and exclusive economic zone have been plagued by attacks from Somali pirates who are growing menace in the Indian Ocean region.

However to grasp the full extent of this specific case study, to understand the full implications of piracy in the Seychelles; one must first engage in some understanding of the geographical, political and historical foundations of the island. In other words; what happened to the Seychelles - once very much like the islands written of, by Robert Louise Stevenson - which transformed them from previously uninhabited islands into sovereign, legally recognised and independent entities in the law of nations. Entities that have now become a rallying point in the universal battle against piracy.

Part I of this paper will therefore start off with a brief account of the Seychelles islands geography, its historical formation, its entry into international law and provide a framework for its political makeup and some of its foreign policy choices - all of which contribute to the an appreciation of its sovereignty. Having provided the context, this paper will then situate its account of modern day piracy in the Seychelles, considering the extreme challenges faced and the massive threat posed to the wellbeing of the islands.

Part II of this paper will proceed to provide an explanation of the legal principles that will be used to explore this case study, namely the foundational legal principle of sovereignty and the principle (sometimes perceived, a right) of self determination.

Considering sovereignty through its different lenses, the paper will start with an appreciation of the traditional notion of sovereignty as derived from its original Westphalian introduction into
the framework of international law. This traditional concept is critiqued with reference to the historical rush of the decolonisation era, projected by the right of self determination, that saw many small island states including the Seychelles attain sovereign status though unprepared to be truly sovereign states.

The paper will then present the bolder part of its argument that of “sovereignty yielded”. Returning to the very specific geopolitical and historical consequences of the Seychelles, the paper will address some of the reasons for the readily available international assistance to the islands, in dealing with the situation of pirates. With due consideration to the strategic position of the Seychelles and the resourcefulness of jurisdiction, the paper will try to articulate the Seychelles piracy example as one of sovereignty yielded.

The paper concludes with the affirmation that the consequences of international law can deny sovereignty in part but also provide a solution to the material inequality of small island states.
Chapter 2
Understanding the Seychelles

2 The Seychelles

To conceptualise this case study, one must start with an appreciation of the Seychelles islands and the parallels that can be drawn with other island state nations, keeping in mind the Seychelles has a unique colonial past, geographical, legal situation that in so many ways also distinguishes it from other island states. Understanding the geography, history and politics of these islands is then an inference into understanding the nature of its sovereignty and its place in the international community of states.

2.1 Controlling extensive maritime boundaries

The Seychelles are an archipelago, comprised of 42 granitic islands and 73 coralline islands at 4°37′S and 55°27′E\(^\text{19}\) in the Indian Ocean. Between themselves, these 115 islands cover 455 square kilometers of land and an extensive maritime area of 1,340,000 square kilometers\(^\text{20}\). This sheer disproportion of land and maritime territory affects the nature of feasible control that the state has over its maritime boundaries. Apart from its territorial seas, the Seychelles is also considered to have one of the largest Exclusive Economic Zone’s\(^\text{21}\) in the world. While the rights over the EEZ are primarily economic, it remains very much in the interest of the

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\(^{20}\) See *Maritime Zones* (Act. 2 of 1999), Gaz S.I 89.

\(^{21}\) See *UNCLOS, supra* note 3 at Articles 56,58,59 - Part V, Exclusive Economic Zone


“*The EEZ can briefly be defined as a maritime zone beyond and adjacent to the territorial sea extending up to 200 nautical miles (‘nm’) from the baseline of a coastal State where the coastal State has sovereign rights over the living and non-living resources of the superjacent waters and its seabed and subsoil—rights of an essentially economic nature—whereas in that zone other States enjoy the freedoms of navigation and overflight*.”
Seychelles to maintain control and ensure the safety of these waters. These economic interests are to an extent dependant on political considerations, which greatly influence decisions which are made as to which multinational corporations and countries are to benefit from the resources available within the EEZ. Therefore this paper takes into consideration the entire maritime area inclusive of its EEZ, as the total area of square nautical miles over which the Seychelles has one or another sovereign claim.

2.2 The Vulnerability of Small Population

The Seychelles population of a mere 89,000 people also has a significant impact, not only in relation to the economic development of a country which is invariably constrained by this dearth of human resources, but also as a result of the challenges it poses to feasible sovereign control of the islands. Consider the disproportionate small population of 89,000 people and the expansive maritime territory (1,340,000 square kilometres) that needs to be controlled and patrolled by this small population. James Crawford alludes to this as a common problem of many small island states in that they are often “small and have small population; and extensive maritime zones, often of disproportionate size to their land area.... often unaccompanied by a sufficient capacity to harvest or protect the resources of those zones”24. The Seychelles struggles to protect its EEZ from illegal fishing and the scourge of pirates.

As evident then from the Seychelles example, the human and physical geography of small island states, place these islands in a particularly acute category of vulnerable states and that in itself already presents a number of challenges in relation to the sovereign control by these states.

2.3 Historical Influences

However it is necessary to consider the historical consequences of the Seychelles islands to appreciate the uniqueness of the sovereignty of these particular islands. These uninhabited islands were probably first discovered by Arab sea farers in the 7th Century. During the 17th century, these islands were discovered and used as safe havens by pirates. Interestingly, in the 21st century, this paper returns to the issue of pirates and their impact on the Seychelles.

2.3.1 Colonial Control of the Islands

In 1756, the French annexed the islands, which were then subjected to French colonial rule until 1811. A permanent settlement was established by 1778. After 55 years of French Rule, the islands were ceded to the British by the “Treaty of Paris”; and were left under British control for 165 years. Britain administered Seychelles as a dependency of Mauritius, during which time, the Seychelles islands were left largely to their own and political development was slow. In 1814, the islands became a crown colony and started to gain increasing administrative autonomy from Mauritius, until 1903 when they became a separate colony. As a colony, the islands were mostly left to their own, with little development of infrastructure or settlement. On the 19th of June 1976, the Seychelles finally gained independence.

This historical control of the islands by the French and the British sets the stage for the discussion later on in the paper, of past colonisers and their continuing and perhaps competing influences within the country and specifically in dealing with the situation of modern day piracy.

32 It is rumoured that the islands were operated by the notorious pirate, Olivier Le Vasseur (nicknamed La Buse) and is to this day a location for bounty hunters searching for the hidden treasures of the past. 33 Library of Congress Federal Research Division, Country Studies: Seychelles, (1994) online: Library of Congress <http://simplelink.library.utoronto.ca/url.cfm/154828>. 
It is also important to appreciate that the legal system of the Seychelles has been accordingly influenced by its colonial past and is one of few states in the world with a mixed civil and common law jurisdiction.

The French law, introduced by the first settlers in the early 19th century, was codified in 1976 as the new Civil Code and the new Commercial Code... (while)... the Criminal law of Seychelles, is mainly based on English common law principles, and is contained in the Penal Code of Seychelles and various other laws enacted by the National Assembly containing penal provisions. The procedural law both in respect of civil and criminal cases is governed respectively by the respective procedure codes based on English law. The law of evidence contained in the Evidence Act is also based on the principles of English Common law. The 1993 Constitution of the Seychelles contains a Charter of Fundamental Human Rights and Freedoms.

This has had an influence on the laws and jurisprudence in relation to the offence of Piracy under Seychelles jurisdiction. In relation to piracy, until recently Section 65 on the act of Piracy, of the Penal Code of the Republic of Seychelles read as follows:

“There is any person who is guilty of piracy or any crime connected with or akin to piracy shall be liable to be tried and punished according to the law of England for the time being in force.”

The phrase “time being in force” according to established principles and case law was considered as referring to the common law prevailing in England as on the 29th of June 1976, when Seychelles attained independence from Britain. This interpretation was followed by Justice Gaswaga in the case of Republic v Mohamed Ahmed Dahir & [Ten] Others. Therefore at some

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36 The Seychelles Penal Code, Section 65 has now been accordingly amended to afford universal jurisdiction to the act of Piracy.

37 Penal Code, SC 1955,c65

38 R v Dahir & Others 2009 SCS 51 at para 48, Gaswaga J [Dahir].
point in time, the Seychelles islands and the offence of piracy committed in those islands was governed by the law of its colonial past.

The legal tradition of the islands is also a particularly relevant factor in the determination of whether the Seychelles are in position to prosecute pirates in its own domestic courts. It has been observed of Kenya (the other country in the Indian Ocean region to prosecute Pirates) that “Kenya has had a strong tradition of a solid Commonwealth legal system ...There is a capacity and certainly they do have an ability to try pirates.” This observation is also applicable to the Seychelles. Under the purview of the international community, it is important that cases of piracy, a matter of universal jurisdiction are dealt with in the appropriate manner with the guarantees of fair trial and due process. The UNODC Counter-Piracy Program recently concluded “assessments of the laws of Kenya, Seychelles, Tanzania and Mauritius” which focused ... “on the piracy related provisions” and a guarantee by the UNODC “to assist these countries (where necessary) with amending their laws to allow for fair and effective prosecutions”.

2.4 Government, Policy and Politics

In 1964, two parties were founded in the country - the Seychelles Democratic Party (SDP), led by James Mancham, and the Seychelles People's United Party (SPUP), led by France Albert René. After independence in 1976, James Mancham became President and France Albert Rene, the Prime Minister. From the very beginning, the two parties had ideologically different policies towards the international community. It was apparent that the SDP favoured retaining close


relations with the United Kingdom, France and the US\textsuperscript{41} while the SPUP favoured a policy of non alignment and the development of a self reliant economy. \textsuperscript{42}

2.4.1 Cold War Politics

In 1977, France Albert Rene successfully launched a military coup and took control of the country, leading to heightened tensions amongst the international community. In particular the coup caused “...considerable fears in the West that the political shift in the Seychelles would enable Soviet warships to counter the American build up in the Indian Ocean and threaten the sea-lanes that carried Persian Gulf oil to Europe and Japan.”\textsuperscript{43} The Seychelles islands thus found themselves invariably caught up in the tide of Cold War politics.

The Seychelles, despite being small islands were located strategically in the Indian Ocean. Therefore,

“France, the United States (U.S.) and the United Kingdom (U.K.) saw this shift of government in the Seychelles as a crisis. Despite its tiny size, the Seychelles is located in strategically important neighbourhood. The U.S. and U.K. had removed the inhabitants of nearby island of Diego Garcia in the late 1960s, in order to build a substantial naval base. Decades later, it would be from this base that the U.S. and U.K. most famously launched strikes against Iraq during the Gulf War.”\textsuperscript{44}
However despite considerable Western “concerns of a Soviet build up in the Seychelles, this never came to be. Instead the US continued to maintain its tracking station that had been set up during the days of James Mancham”\textsuperscript{45}. All the same, the Seychelles “remained a tributary prize for the two superpowers for the duration of the Cold War”\textsuperscript{46}.

There is an interesting discussion of the foreign policy relations of the Seychelles during the Cold War, in the Country Watch 2010 report on the Seychelles with reference to the work of George W Shepherd in \textit{Tributary States and Self-Reliance in the Indian Ocean Zone of Peace}:

“Writing about U.S. and Soviet strategic interests in the region, scholar George W. Shepherd\textsuperscript{47} quoted a Kiswahili proverb, "When two bull elephants fight, the grass gets trampled." Shepherd makes a convincing argument that the Seychelles was akin to the proverbial trampled grass during this period. In order to alleviate this crush, the Seychelles worked at maintaining good relations with the West, while strengthening its ties with the former Soviet Bloc and with Libya, Iraq, Algeria and North Korea\textsuperscript{48}.

It appears then that the Seychelles were engaged in some sort of play between the World’s dominant capitalist and communist powers. The foreign relations of the Seychelles during this era have contributed greatly to the development and nature of its current international relations. As discussed later on in this paper, it becomes evident how these policy choices and foreign relations have come to govern the manner of international assistance the Seychelles has received in dealing with the situation of piracy in the islands.

\textsuperscript{45} \textit{Ibid} at 10.

\textsuperscript{46} \textit{Ibid}.

\textsuperscript{47} George W. Shepherd, Jr. \textit{The Trampled Grass: Tributary States and Self-Reliance in the Indian Ocean Zone of Peace} (New York: Praeger, 1987).

\textsuperscript{48} \textit{Country Watch, supra} note 42 at 10.
In 1991, the Seychelles became a multi-party government system. It is thought that several political factors contributed to this shift away from a single party rule including:

“Political changes in the former Soviet Union and Eastern Europe, and a movement toward multiparty systems in Africa, left Seychelles conspicuously out of step with trends in the rest of the world. Britain and France trimmed their foreign aid programs, tying future aid to progress on the political front.”

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On the 18th of June 1993, the 3rd Republican Constitution was approved.

2.4.2 Modern Face in the International Community

In maintaining its place as a sovereign state, the Seychelles is accordingly a member of the United Nations (UN); the Commonwealth; the Organization of African Unity (OAU). During the Cold War era, the Seychelles presented itself as a member of the Non-aligned Movement of the Indian Ocean. In 1984 Seychelles along with Mauritius and Madagascar formed the Indian Ocean Commission (IOC); later joined by Comoros and France on behalf of Reunion.50 These international and regional memberships are essential in maintaining a sovereign presence in the international community. Furthermore the Seychelles has links with other organisations as the EU, NATO51 - and has increasingly looked to those relationships, so as to gain international assistance in dealing with its situation of Piracy.

49 Library of Congress, supra note 33 at Section 1 - Government and Politics.
50 Ibid.
51 The Seychelles has an agreement with the EU/UNDOC to prosecute pirates in exchange for military and financial assistance. See UNODC Counter Piracy Programme, supra note 40
Chapter 3
A Seychelles Response to Somali Pirates

3 The Seychelles & Somali Pirates

As remarked earlier, the Seychelles islands which are sprawled out for several kilometres over the Indian Ocean were once perfect havens for the pirates of the 17th century. The current situation of piracy is again related to the location of these islands in the Indian Ocean. In this case, the pirates of Indian Ocean are mainly Somali pirates, fishermen turned criminals, from the failed state of Somalia. Consequently the Seychelles islands which are located to the east coast of Somalia have fallen easy prey to pirate attacks launched from its coast. Milena Sterio provides an account of this threat of Somali Pirates at sea:

Over the past few years, piracy has exploded off the coast of Somalia. Somali pirates congregate on a "mother ship" and then divide into smaller groups that sail out on tiny skiffs. Using potent weapons such as AK-47s and hand-propelled grenades, Somali pirates attack civilian ships.... Once they have overtaken the victim vessel, the pirates typically hijack the vessel's cargo and kidnap the crewmembers. The cargo is often resold to willing buyers or held for ransom.' The crew are kept hostage in Somalia until either the hostages' home country or the ship owners pay, at times, multi-million dollar ransoms.55

The first Seychelles flagged vessels were attacked in February and March 2009. Since then56 there have been about 6 major attacks57 and about 24 hostages taken. One of the more well

56 Information correct as of January 2011.
57 Consider:
reported pirate attacks was the "Topaz" incident when the pirates attacked the Seychelles coast guard vessel Topaz with automatic weapons, "the aiders and abettors were found in a mother skiff not very far from the attack". The pirates were captured by the coast guard, and were among the first of the Pirates to be judged by the Seychelles courts. The ruling by the Supreme Court in Victoria was “a first of its kind for the Indian Ocean” and was referred to as a “historical milestone” in the media. Since then Seychelles, along with Kenya have come to be regarded in the Indian Ocean region, as world criminal courts for the prosecution of pirates with agreements between these countries and the EU/UNODC to prosecute pirates within their domestic courts, in exchange for financial and military assistance. The nature of these agreements will be discussed in more detail later on this paper.

1. **Serenity** - On February 27th 2009, Seychelles experienced its first piracy attack when the Seychelles flagged Catamaran ‘Serenity’ with 3 Seychellois on board was hijacked by Somali pirates on its way to Madagascar from Mahe.

2. **Indian Ocean Explorer** - On April 2nd 2009 Seychelles experienced its second piracy attack with the capture of another Seychellois vessel ‘Indian Ocean Explorer’ with 7 Seychellois crew on its way from Assumption to Mahe.

3. **Alakrana** - On October 2009, an attack occurred very close to the EEZ whereby a Spanish fishing vessel ‘Alakrana’ was hijacked by Somali pirates in the Indian Ocean about 600km off the Somali Coast. The Spanish fishing vessel had a total of a crew of 36 members who were taken as hostages. Most of them were Spanish and there was also one Seychellois among them. All have now been released.

4. **Topaz** - On 6th December 2009, Seychelles patrol ship ‘Topaz’ with its crew were attacked by 11 suspected pirates who used firearms and explosives. Their assault failed and all the suspected pirates were captured and transferred to Seychelles for trial. They all appeared before the Supreme Court on 6th January 2010 and faced varying charges including terrorism and piracy. They have faced trial and negotiations are being made with Somali representatives to repatriate them and serve their sentence in Somali.

5. **Galate** - On Sunday 28th March 2010, six Seychellois crew of the Galata fishing boat were attacked and hijacked by nine Somali Pirates at 2.a.m. 90 miles south-east of Mahe.

6. **Faith** - On 19th November 2010, 7 local fishermen of the Faith fishing boat were attacked and taken hostage by 11 Somali pirates. Military intervention by Topaz allowed liberation of the crew. One Somali pirate was killed in the operation. The remainder were charged and prosecuted.”

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60 “Somali Pirates sentenced to 10 Years in the Seychelles” *BBC News* (26 July 2010), online: BBC News <http://www.bbc.co.uk>.

61 However, Kenya recently rescinded their agreement with the EU/UNODC to prosecute pirates in their domestic courts. See “Kenya ends co-operation in hosting piracy trials” *BBC News* (1 October 2010) online: BBC News <http://www.bbc.co.uk>. 
3.1 Impact on the Seychelles Economy

The Seychelles economy is predominantly based on tourism and fishing, similar to that of many other small island states and unfortunately it is these two industries that are at greatest risk from the activities of pirates. Pirates in the past have attacked yachts, taking tourists and crew members as hostages\(^\text{62}\), causing concerned tourists to divert away from the Seychelles waters. A number of fishing boats have also been attacked. Furthermore there is an increase in the “cost of imports due to insurance for cargo bound for Seychelles increasing”\(^\text{63}\). Africa Online News, quoting the Vice President - Danny Faure has suggested millions of dollars in lost revenues from fishing and tourism\(^\text{64}\).

To give a further idea of the economic costs of Piracy, consider the report by One Earth Foundation which estimates that “Somali pirates extorted some $177 million in ransom in 2009 and $238 million the following year. Including the costs of higher insurance premiums, re-routing ships, anti-piracy security and the impact on regional economies, the total annual costs may range between $7 billion and $12 billion\(^\text{65}\)”. Consequently there has never been a more pressing need to safeguard the country and protect its maritime boundaries.

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\(^{62}\) “Pirates capture luxury boat near Seychelles” *The Telegraph* (April 09, 2009), online: The Telegraph Group <http://www.telegraph.co.uk>.

\(^{63}\) Interview with Danny Faure, Vice President of the Seychelles [nd] in “Piracy costs Seychelles millions” Africa Online News (December 8, 2010) online: AFROL <http://www.afrol.com/articles/37024>.

\(^{64}\) *Ibid.*

3.2 An International Response to Piracy

In the face of what has been described by Ban Ki-Moon, UN secretary general - as a “global menace”, it is interesting to consider what steps the international community as a whole have taken in dealing with the threat of piracy. An international response is of course essential given the globalised nature of international shipping these days. As alluded to by Andrew J. Shapiro, the US assistant secretary for political and military affairs,

“the realities of international shipping and global commerce are such that in any given piracy case you could have suspected Somali pirates intercepted and apprehended by a British naval vessel after trying to attack a Liberian-flagged ship, owned by a Canadian company, crewed by Ukrainians, Indians, and Filipinos, with a Russian captain and carrying cargo owned by a Turkish company, en route for delivery to a company in Dubai. ...the logistical and diplomatic challenges presented by such a scenario are immense.”

However despite the universal nature of the crime of Piracy, only a few countries of the world have yet taken on the task of prosecuting Pirates in their courts. It has been a regional focused response to Piracy in the Indian Ocean with Kenya and the Seychelles being the only two countries in the region, so far, to undertake prosecutions of pirates in their domestic courts. The international community has agreed to support these operations through the provision of financial and military assistance, as will be discussed later. However this international response has been considered weak, in the face of what Jean Paul Adams, Minister of Foreign Affairs in the Seychelles, would describe is a threat almost as significant to world relations as the war on Afghanistan. He claims,

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67 Nigerians Abroad, supra note 39.  
68 UNCLOS, supra note 3 at Article 105  
“Up until now, piracy has been secondary in importance to what has been going on in Afghanistan and other places,” he says. “That has affected the resources, the efforts that have been put into it. Consequently we’re no closer to solving the problem.”

The nature of this International response will be discussed in detail in the following chapters, taking into consideration both the limitations of the responses, the nature of international pressure on the Seychelles but also the underlying reasons as to why, if any, the Seychelles has been afforded international assistance in dealing with pirates. The international response to piracy, particularly piracy as it affects the Seychelles is a prevalent consideration in understanding the sovereign status and authority of the Seychelles on the international platform.

3.3 A Country response to Piracy

It appears that thus far, “Kenya has borne the brunt of the pressure” from the International community to prosecute pirates. Kenya had agreed to take on piracy prosecutions in exchange for a $3million investment into the country’s judiciary from the European Union. 71 (The Seychelles has a similar agreement with the EU and United Nations Office on Drugs and Crime.) According to an article by the Economist, in February 2011 72, 18 Somalis were serving long term prison sentences in Kenya with more than 100 awaiting Trial. It appears that Kenya being a larger country with greater capacity to hold pirates, than the Seychelles, was increasingly pressurised to take on an augmenting number of piracy prosecutions. Consequently in September 2010, Kenya rescinded their agreement with the EU accusing the “outside world of failing to keep its side of the bargain... Kenya’s justice system could not cope with the influx of pirate captives”. 73

70 Wright, supra note 66.
72 The Economist, supra note 55.
73 BBC News, supra note 61
The implications of this rescission are particularly relevant to the Seychelles, which is the only other country in the region, up till now, to have hosted piracy trials and raises a number of questions of the past and the future of piracy prosecutions in the region. Namely, was there an abuse of the Kenyan prosecution system over and above that of the Seychelles, because of a differentiation between the sovereign status of Kenya as a larger state and the Seychelles as a smaller state? How far does size and capacity of a state influence international standards and pressures? How will the international response defer towards the Seychelles? That is, will the Seychelles find themselves in a similar position to Kenya in the future, with a sense of abandonment from the international community and more easily pressured into taking on an increasing number of piracy prosecutions or will the international community be more guarded? Some of these questions as to size and capacity will be considered in greater detail further on this paper; however there is much that still cannot be answered. The future of piracy prosecutions in the Indian Ocean region are to be closely followed.

74 Mauritius has most recently agreed to prosecute pirates in their courts as well. See State House - The Office of the President of Seychelles, Media Release, “Seychelles welcomes move from Mauritius to accept and prosecute pirates” (July 2011) online: State House <http://www.statehouse.gov.sc>.
3.4 An Island Response to Piracy

Reacting then to these continuous attacks of piracy in its water and the international pressure to deal with pirates in the region, the Seychelles has responded through a number of different routes:

- from the signing of multilateral conventions; amending its domestic law provisions to adopt a universal offence of piracy; piracy prosecutions in its domestic courts; other national efforts and policies in monitoring its waters;
- to signing bilateral agreements; memorandums of understandings [MOUs] and status of forces agreements [SOFAs] with international, regional organisations - such as the EU and NATO; its past colonisers and other interested parties including the United States of America, China, India.

This brings us to the substantive analysis of this paper, which will consider each of these responses in turn and suggest how these responses contribute to the broader framework concerned with the nature of sovereignty of the Seychelles.
4 Sovereignty in Lenses

However firstly; it is important to establish the international legal principles that will be used in the analysis of the Piracy case study- namely the doctrinal principle of sovereignty. As suggested by Ian Brownlie, “the sovereignty and equality of states represents the basic constitutional doctrine of the law of nations”\(^75\). However the notion of sovereignty in itself is a contentious doctrine, for while there is a “mass of support -doctrinal, jurisprudential and scholarly -for at least some variant of the principle”\(^76\), there is no universal or formal agreement as to its exact significance. Therefore this paper takes up the argument that given the differentiated understandings of the principle of sovereignty, it is possible to view the concept of sovereignty through different lenses.

4.1 Sovereignty 1: denied

4.1.1 The Traditional Concept of Sovereignty

Historically “it is at Westphalia that the concept was first introduced into the international system, when equality, anarchy, sovereignty and independence were fused in the European system”\(^77\). This concept of sovereignty was articulated such that:

“States were sovereign in the sense that they were at liberty to do as they wished (providing this sovereignty did not interfere with the sovereignty of others) but they were equal,


\(^{77}\) *Ibid* at 30.
too, in the sense that the interior political order of each sovereign was to be accorded respect and immunity from interference”.\textsuperscript{78} It has been suggested that “no principle of general law is more universally acknowledged than this perfect equality of nations”.\textsuperscript{79} It is this status of equality and independence that we will return to again in this paper to assess how, if at all, it is manifested in the Seychelles responses to piracy.

The traditional principle of sovereignty equality finds force in the philosophical projects of naturalism and positivism. Emerich de Vattel provided one of the most relevant articulations of this principle when he wrote:

“Since men are by nature equal, and their individual rights and obligations the same, as coming equally from nature, Nations, which are composed of men and may be regarded as so many free persons living together in a state of nature, are by nature equal and hold from nature the same obligations and the same rights. . . . A dwarf is as much a man as a giant is; \textit{a small republic is no less sovereign than the most powerful Kingdom}.\textsuperscript{80}

His notion of sovereign equality between the small republic and the most powerful kingdom is particularly relevant to the thesis of this paper. The same idea is found in International Court of Justice President Basdevant’s statement that “before this Court, there are no great or small states”.\textsuperscript{81} It suggests that small island states such as the Seychelles are equal, and must be regarded on the same footing as more powerful players on the world stage, such as the United States, France or the United Kingdom. Benedict Kingsbury writes that this desire to enforce a universalised system of formally equally sovereign states,

\textsuperscript{78} \textit{Ibid.}
\textsuperscript{79} \textit{The Antelope} 23 U.S 10 Wheat 66 (1825) at 122.
\textsuperscript{80} E de Vattel, \textit{Le Droit des Gens}, (1758).
\textsuperscript{81} \textit{Prosecutor v Tadic} (1950) 105 ILR at para 479.
“... has been a remarkable feature of the international legal order of the past century.... the quest to fulfil these universalist aspirations, to establish more substantive equality among states in their capacities to influence legal development and to pursue agendas that are not simply those of the powerful, but has been a leitmotif for generations of anti colonial tiers-mondiste international lawyers.”82

The pertinent question to then be asked is how has this traditional concept of sovereign equality manifested in the Seychelles dealings with the situation of modern day piracy?

4.1.2 On Formal Equality and Material Inequality

However at this stage is relevant to introduce a very necessary distinction in the equality status - that being the distinction between formal equality - as manifested through a politically recognisable sovereignty with the accompanying legal jurisdiction - and material inequality manifested through the real power relations between states. To explain this distinction further, we turn to the Seychelles response to Piracy.

4.1.2.1 Multilateral Conventions

As a sovereign state, the Seychelles can be a signatory to multilateral conventions. With regards to piracy, the Seychelles has signed and ratified a number of such conventions including:


Nairobi Declaration on Promoting the Rule of Law and Human Security in Eastern Africa (2009)\textsuperscript{83}.

\textbf{4.1.2.2 Domestic Law and Court Cases}

Following the dualist tradition that international law must be implemented by domestic law gives further credence to the sovereign powers of the state. The state as a subject of international law makes the political decision to ratify multilateral conventions and then uses its domestic legal mechanism to enforce these conventions domestically. Article 64 (4) of the Constitution of Seychelles\textsuperscript{84} states:

“A treaty, agreement or convention in respect of international relations which is to be or is exercised by or under the authority of the President shall not bind the Republic unless it is ratified by-

(a) an Act; or

(b) a resolution passed by the votes of a majority of the members of the National Assembly”

In that regard, the Seychelles have gone on to implement the UNCLOS clauses on Piracy into its domestic legislation, most recently through the Penal Code (Amendment Act) 2010, Section 65\textsuperscript{85}; the wording of which closely follows the definition of the act of piracy as set out in UNCLOS, Article 101.

\textsuperscript{83} The dates in brackets refer to the dates when Seychelles ratified these conventions.

\textsuperscript{84} Constitution of the Republic of Seychelles, 1993, c 64.

\textsuperscript{85} Section 65 of the Penal Code as amended by Act 2 of 2010 makes the following provisions:

65(1)“ Any person who commits any act of piracy within Seychelles or elsewhere is guilty of an offence and liable to imprisonment for 30 years and a fine of R1 million.”

65(4)“For the purposes of this section “piracy” includes-

a) Any illegal act of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or aircraft and directed-

(i) on the high seas, against another ship or aircraft, or against persons or property on board such a ship or aircraft;
Other domestic laws enacted through the Seychelles Legislature that can be used to counter piracy include: the Firearms and Ammunition Act 1973, the transfer of Prisoners Act as well as reference to a number of protocols on the transfer of suspected pirates, control of firearms and ammunition for foreign vessels. As a sovereign state, the Seychelles has its own legal system, with the Court of Appeal of the Seychelles considered as the highest appellate court in the land. With the 2010 amendments to the Penal Code in relation to the act of piracy, to accommodate for the universal jurisdiction Seychelles has gone on to prosecute pirates caught in and outside its waters. A recent case in the Supreme Court of Seychelles was that of ‘Republic v Mohamed Aweys Sayid, Ine Mire Muse, Ali Mohamed Ali, Abdi Ali Said, Bashir Hassan Ali, Abdi Kadir Hashi Awale, Dahir Abdullah Warsame, Abdu Halil Hassan and Salad Mohamed Diriye’; where the decision of December 15 2010 saw 9 accused on three counts of piracy on an Iranian Vessel, “Galate” and “Topaz”. The Supreme Court of Seychelles convicted the “pirates” on all counts. In May 2010, the UN Office on Drugs and Crimes had announced that that Seychelles would work towards the

(ii) against a ship or an aircraft or a person or property in a place, outside the jurisdiction of any State;

b) Any act of voluntary participation in the operation of a ship or an aircraft with knowledge of facts making it pirate ship or a pirate aircraft; or

c) Any act described in paragraph (a) or (b) which, except for the fact that it was committed within a maritime zone of Seychelles, would have been an act of piracy under either of those paragraphs.”

86 It is to be noted that not all countries have an offence of piracy in their jurisdictions, but rather depend other enactments of law, to deal with the crime of piracy.

87 And final (Seychelles are no longer bound by decisions of the Privy Council).

88 Dahir, supra note 38.

89 Galate, supra note 56. See also “Seychelles fishing boat seized by pirates” and “Coastguards rescue six Seychellois Fisherman from Pirates”, online: Virtual Seychelles <http://www.virtualseychelles.sc>.

90 Topaz, supra note 58.

91 The Pirates were convicted on all counts; 11 years for the first two counts to run consecutive and 10 years for the last count to run concurrent.
creation of a UN-backed centre for the prosecution of pirates, the second regional centre after Kenya for the prosecution of pirates.

4.1.2.3 MOUs and SOFAs

Furthermore as a sovereign state, the Seychelles is in a position to sign Memorandums of Understandings (MOUs) and Status of Forces Agreements (SOFAs) with any state, regional and international organisation it so chooses. These include agreements with NATO, the EU, and a range of countries including its past colonisers - the United Kingdom and France; powerful and power hungry players on the world stage, including the United States, China, and India. Seychelles has also entered into diplomatic relations with countries such as Belgium, the UAE, and Spain and is in the process of negotiating MOUS with Canada, the Maldives, Denmark and Turkey.

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92 Kenya has recently backed away from the agreement. *BBC News, supra* note 61.


95 Memorandum of Understanding on the Transfer of Suspected Pirates, Seychelles and United Kingdom, 27 July 2009.

96 Status of Forces Agreement, Seychelles and France, October 2009.

97 Status of Forces Agreement, Seychelles and United States of America, August 2009.

98 Seychelles is currently negotiating a Memorandum of Understanding with China.

99 Agreement on the Control of Piracy, Seychelles and India, June 2010.

100 Memorandum of Understanding, Seychelles and Indian, 6 January 2011.

101 Memorandum of Understanding on Defence Cooperation, Seychelles and Belgium, November 2009.

102 Memorandum of Understanding on Military Cooperation, Seychelles and United Arab Emirates, 21 December 2009.

103 Memorandum of Understanding on Defence Cooperation, Seychelles and Spain, 14 September 2010.

Decleration of Intentions on Cooperation in the fight against Piracy, Seychelles and Spain, 14 September 2010.
However while this demonstrates that Seychelles as a small island state has the necessary legal tools to implement international conventions, prosecute pirates and the competence to sign agreements with any country or organisation it chooses, the pertinent question is: why must the Seychelles look to these countries for assistance?

As suggested earlier on, the Seychelles as a small island state with a small population and disproportionate land to sea territory is a particularly vulnerable state. Its special needs demonstrate the material inequality of the state and its inability to deal with the situation of piracy on its own. On the chapter on the ‘Vagaries of Vulnerability’, the Commonwealth Secretariat’s Report on Vulnerability of Small States in the Global Society, acknowledges that “…at the most obvious practical level of military or paramilitary needs, the combined lack of human and financial resources means that most small states are unable to muster the requisite forces adequately equipped and trained to guard their border or their air and maritime space effectively”\(^\text{103}\). Compelled to look for international assistance in patrolling its waters and dealing with pirates, the Seychelles have little choice but to enter into MOUs and SOFAs. The Seychelles have agreed to become a centre for the prosecution of pirates in exchange for the guarantee of financial, military assistance and international backing from the EU and UNODC Counter-Piracy programs.\(^\text{104}\) This does raise the question as to why other states, larger states have been reluctant to take on the prosecutions themselves. It would seemingly be easier for larger states with greater capacity, to hold these prosecutions, instead of having to develop the capacity of the Seychelles jurisdiction. This is then evident of a general reluctance on the part of the international community to handle piracy prosecutions themselves.

The issue with being dependant on international assistance stems from concerns as to unequal powers at the negotiating table. The concern is that “.....Small colonies and peoples, ...have scant opportunity to arrive at decisions of their own and are likely to be subject to the determinations

\(^{103}\) Commonwealth Secretariat, supra note 7.

\(^{104}\) The Economist, supra note 55.
of the metropolitan Power to which they attach.”\textsuperscript{105} Country Watch 2010 notes that despite the Seychelles’ official policy of non alignment, which included its “most notable foreign policy issue was that any naval vessels wishing to dock in Seychelles ports could not be carrying any nuclear weapons... the United States (U.S.) and the United Kingdom (U.K.) did not ascribe to that policy and were not allowed to use the ports of Seychelles. As of today that agreement has been renegotiated and United States Navy vessels are allowed to make port in Seychelles\textsuperscript{106}, bearing in mind, that the United States has also provided spy drones to assist with patrolling the Seychelles waters for activities of piracy.

As such there are those who would then argue that it is misleading to consider the equality of these states or even regard them as sovereign. If these states are inherently dependant on foreign aid and military assistance, then the formal equality of their sovereign status is almost made redundant. This was deliberated in length by Benedict Kingsbury, in his article on Sovereignty and Inequality\textsuperscript{107}. Kingsbury is of the opinion that the “reluctance formally to control inequality... has been made possible - and encouraged - by the centrality of sovereignty as a normative foundation of international law”\textsuperscript{108}. James Crawford expresses similar concerns in that: “The risk that small States, possessing the various formal incidia of sovereignty and the equal rights that sovereignty entails will be led to act as if their formal equality was necessarily accompanied by an actual or relative equality or parity in power, influences or resources”\textsuperscript{109}.

Consequently the equality of sovereign states lies only at a formal level, with concerns that material inequality of these states chips away at the value of their sovereign equality. Is this then, an example of sovereignty denied?

\textsuperscript{106} Country Watch, supra note 42 at 51.
\textsuperscript{107} Kingsbury, supra note 82.
\textsuperscript{108} Ibid at 1.
\textsuperscript{109} Crawford, supra note 24 at 286.
4.2 Historicizing the problem

This brings us to the next consideration in this paper. Given the inherent vulnerabilities of small island states, how is it that they came to be recognised and legitimated as sovereign states in international law, in the first place?

4.2.1 Self determination

Sovereign rule was considered the end goal of the self determination principle, and this was promoted with particular enthusiasm during the decolonisation era. The United Nations Declaration on Friendly Relations espouses that the establishment of a sovereign and independent State, constitutes the modes of implementing the right of self determination by that people.110

4.2.1.1 Sources

Self Determination as a principle in itself is well established in international law. Article 1 (2) of the United Nations Charter 1945 states that the primary purpose of the United Nations is to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace. The United Nations General Assembly Declaration on the Granting of Independence to Colonial Countries and Peoples of 1960111 emphasises in its “...that all peoples have the right to self-determination, but that this necessarily includes the right freely to determine their political status and freely to pursue their economic, social and cultural development (art. 2) and that the subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of

fundamental human rights (art 1). It is also protected as a human right in the International Covenant on Civil and Political Rights. Of course the significance of self determination as a concept has changed with the times; but for the purpose of this paper - we will focus on the principle and or right of self determination as it was promoted during the decolonisation era which led to the creation of a number of new small island state nations within the international community.

4.2.1.2 During Decolonisation

During the decolonisation era, the principle of self determination had a relatively strong hold on the politics of international relations and was promoted over and above any other material consideration. The General Assembly in 1976 reaffirmed its “conviction that the questions of the territorial size, geographical isolation and limited resources should in no way delay the implementation of the Declaration on the Granting of the Independence to Colonial Countries and Peoples with respect to the Territories concerned.

Gros Espiell found no legal basis to deny the right of self determination on the “grounds that the population of which a people is composed, or the territory which it inhabits, is small”, even though, he did stress issues of independence. The precedent was that smallness was not necessarily a barrier in providing a state with the political recognition of its sovereign status and had already been well established by the membership in the League of Nations of the Central American and Caribbean Republics.

112 International Covenant on Civil and Political Rights, 19 December 1966, 999 UNTS 171, art 1.1:
All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.


Similarly Rupert Emerson is of the opinion that

“small peoples are as much entitled to self-determination as large ones, but it is also evident that at some level a point of absurdity is reached as when islands such as Nauru and Anguilla\textsuperscript{116} with a population of a few thousand each, are envisaged as taking a full place in the international society as sovereign states.” \textsuperscript{117} His concerns are well founded, when Nauru is considered as the first failed state of the Pacific\textsuperscript{118}. Of course this distinction takes us into the category of micro states but is nevertheless is a caution to be established against most small island states.

4.2.1.3 Political and Economic Self Determination

The decolonisation project primarily validated the formal legal independence of small island states, but failed to provide for any adequate setup for economic independence which would ensure that states were truly free from external interferences and thereby truly independent.

The Seychelles islands were;

decolonized as part of the redeployment of western strategic military power in the Indian Ocean. Britain had hesitated over the Seychelles as economic considerations led to several revisions of military plans in the process of handing over her role to the USA. Consequently the decolonization of the Seychelles was badly prepared and the archipelago was launched into independence with a Presidential regime resting on an unlikely coalition of left and right parties

\textsuperscript{116} Both of which are small island states.
\textsuperscript{117} Emerson, supra note 105.
hastily put together by the British who, once the Americans were well entrenched in Diego Garcia, were anxious to cast the islands off.\(^{119}\)

Caught up in the rush of the decolonisation era, this is a truth that can be told of many of the small island states that gained independence - they were simply not prepared to be sovereign entities in the true and traditional sense of the world. To that extent the self determination project of the decolonisation largely failed.

### 4.2.2 Lingering Colonial Influences

Consequently what became of this hurried decolonisation project of many of the small island states? Once provided with political and legal independence, were these small island states truly left with to be sovereign entities of their own volition? Third World scholars have criticized this, suggesting that the reality of self determination was in fact rushed but also strategic in ensuring that the colonial powers would continue to maintain influence over these states.

In an interesting account of the continuing presence of France in the Indian Ocean, which is applicable to the Seychelles, Jean Houbert claims that,

“…as a policy, decolonization was the complement of 'containment'. It was a form of appeasement of nationalism intended to retain the ex-colonies within the western world. The colonial powers groomed indigenous state-bourgeoisies to whom they transferred sovereignty”\(^{120}\). This then relates back to argument of sovereignty denied presented earlier on this paper. That is to say, by ensuring that these states would remain dependant on assistance from its past colonial masters, meant that these states were not in a position to be truly sovereign.

\(^{119}\) *Country Watch, supra* note 42 at 159.

\(^{120}\) Jean Houbert, “Decolonising without Disengaging” (1986) *The Round Table*, 75: 298 at 147.
Also very important to note and specifically related to the decolonisation policy towards small island states was that:

“Decolonization never meant relinquishing western power at sea. On the contrary, the withdrawal of direct control from the rimland of Asia increased the importance of sea power for the West. With hegemony at sea the West could provide security to the state-bourgeoisies in power in the newly decolonized countries on the shores of the ocean... and well located in relation to the sea routes, the islands regained considerable strategic significance with the geopolitical shift of power to the Ocean”121.

In fact, it can be argued that Western powers were well aware of the lack of real self determination of small island states. It was recognised that

“Small and scattered over a wide area of the Indian Ocean, the islands were very vulnerable to sea and air power where the superior technology of the West was really telling. Dependent on external economic exchanges (our emphasis) the islands could also be starved into submission by western sea power.”122 It thus follows that decolonisation almost stood as an empty promise, a false security through mere political recognition of the self determination status.

While this is not what exactly happened in the Seychelles, as will be discussed later on by reference to the Indian Ocean Islands political stand of non alignment, the argument is made that past colonisers continue to exercise some degree of influence over the islands. Indeed the Seychelles has turned to the United Kingdom and France for assistance in dealing with the pirates in the region, and as stated earlier has signed a MOU on the transfer of suspect pirates

121 Ibid.
122 Ibid.
with the United Kingdom and a SOFA with France. Not only that, both countries continue to provide financial assistance to the Seychelles. In particular, France - keen to maintain its position in the Indian Ocean has “cultivated the new radical regime by providing aid with the construction of a long distance tuna fishing fleet, the financing and staffing of a hotel school and the setting up of model farms. French co-operants help in the schools, with planning economic and social developments, and with the press and the radio...”\textsuperscript{123} The Seychelles has also turned increasingly to France for arms and for experts to train the local forces. France also helps with policing the extensive exclusive economic zone of Seychelles.”\textsuperscript{124} By assisting the Seychelles, and other small island states in the Indian Ocean, France seeks to “strengthen her vindication of a special role in wider international politics”\textsuperscript{125}.

The apparent conclusion to then draw out from understanding the historical project of self determination would be to suggest that small island states were never prepared to be sovereign states. To be even bolder, one could claim that this was part of the policy of decolonisation in that the lack of real self determination would ensure that colonisers and other powerful world players maintained a stronghold over the apparently sovereign states. Consequently the Seychelles have turned to its past colonisers for assistance with the crisis of piracy in their waters, looking to the colonisers for their continued naval support. This then returns us to the dilemma of the first lens through which we consider sovereignty, distinguishing between formal equality and actual, material inequality - thereby suggesting an example of sovereignty denied.

\textsuperscript{123} Ibid at 159.
\textsuperscript{124} Ibid.
\textsuperscript{125} Ibid at 160.
4.3 Sovereignty 2 Yielded:

However as suggested at the start of this paper, sovereignty can be seen through different lenses. It is to a different lens that we turn to argue that despite concerns about the autonomy of small island states; perhaps not all small island states were not quite at a loss as to how to handle their new found sovereignty. Essentially some small island have found a use for the political and legal recognition of their sovereignty by being able to use their jurisdiction, namely, the laws, rights and privileges that come with the sovereign rights of an island, to their benefit. This is demonstrated through the Seychelles piracy example but on a broader scale, can be reflected in the development of offshore industries in a number of small island states.

Therefore to explain this further, we first start with a consideration of the foreign policy choices of the Seychelles as well as due consideration to its strategic location in the Indian Ocean, in an attempt to demonstrate how the Seychelles specifically was and has continued to maintain a strong position at the negotiating table with the international community and in dealing with the global threat of piracy.

4.3.1 The non aligned movement

Returning to a historical narrative of the decolonisation era, the political response to a rushed decolonisation project was the non aligned movement that came out of the Indian Ocean. “Unlike 'containment' and decolonization the doctrine of non-alignment was not elaborated in the West but was an authentic contribution of the Indian Ocean region to international politics....pursued... in the teeth of opposition from West and East alike.”\textsuperscript{126} Indeed this was an individual and conscious effort on the part of newly decolonised states of the Indian Ocean, including the Seychelles to stay out of Cold War Politics. However arguably it was also strategic decision also made to yield their sovereignty to their benefit. By formally pursuing a policy of non alignment, the Seychelles was leaving open opportunities to be wooed by all sides. The

\textsuperscript{126} \textit{Ibid} at 152.
islands while practising a policy of non alignment have had partnerships with more “radical” members. As noted by Country Watch 2010:

“... despite claims of being a non aligned member, it appears that in the Past the Seychelles government has often sided with more “radical members” including having developed relationships with the former Soviet Bloc, Libya, Cuba, Iraq, and North Korea”\textsuperscript{127}.

Under this lens, it is not so much as the islands were dependant on military and financial assistance but that the international community too had an ulterior interest in providing such assistance so as to maintain some degree of access to the islands and the rights of passage through their waters. It is then one reason to suggest why the international community has been willing to assist Seychelles in patrolling their waters for pirates.

4.3.2 Location....Location

Focussing then on Seychelles example, we acknowledge the strategic location of the islands which made the islands very important strongholds to any power who wanted to control the Indian Ocean. As suggested at the start of this paper, “France, the United States (U.S.) and the United Kingdom (U.K.) saw this shift of government in the Seychelles as a crisis (because) despite its tiny size, the Seychelles is located in strategically important neighbourhood.”\textsuperscript{128}

4.3.2.1 The Indian Ocean

It is relevant at this stage to dwell on the historical and continuing importance of this neighbourhood of the Indian Ocean. As discussed in the report by Country Watch 2010, starting in the 16\textsuperscript{th} century with the emergence of the European maritime powers of the British, Dutch, Portuguese and French,

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{127} Country Watch, supra note 42 at 10
\item \textsuperscript{128} Country Watch, supra note 44.
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..these activities signalled the beginning of the use of the Indian Ocean as a theatre where European maritime nations competed with one another for power and influence in the area. This rivalry spawned many extra-regional wars and alliances, many of which caused instability in the region's island..... From the seventeenth century until the opening of the Suez Canal in 1869, European and North American shipping relied on the western Indian Ocean and its islands for the transport of eastern goods and spices. During this time the “islands of Madagascar, Mauritius, Comoros, Seychelles, and, to a lesser extent, Maldives became important way stations for international shipping”

The Indian Ocean continued to be a closely watched neighbourhood during the Cold War, and as discussed in some detail earlier in the paper, decolonisation may have in some ways been a policy of containment to ensure that there would be no communist uprisings in regions of the Indian Ocean.

During more recent times, the rise of India and China as global powers has once again give credence to the Indian Ocean neighbourhood. Robert D. Kaplan writes with fervour of the Indian Ocean as being “more than just a geographic feature, the Indian Ocean is also an idea. It combines the centrality of Islam with the global energy politics and the rise of India and China to reveal a multilayered, multi polar world”. It is this idea that makes the Indian Ocean, a lucrative region and the Seychelles a strategically important state in the region.

129 Library of Congress, supra note 33 at Seychelles, Historical Interest.

130 Ibid.

4.3.3 India and China

To focus then on this growing competition between India and China:

“India has expanded its naval presence from as far west as the Mozambique Channel to as far east as the South China Sea. It has been establishing naval staging posts and listening-stations on the island nations of Madagascar, Mauritius and the Seychelles as well as military relationships with them, precisely in order to counter China’s own very active military cooperation with these states.” 132

Therefore as suggested, this power struggle between these two growing hegemonies is apparent in their competing influences on the Seychelles, with both India and China seeking to provide military and financial assistance within the country but also to deal with piracy. The Chinese recently provided the Seychelles with two Chinese Navy Frigates133 and two Y-2 aircrafts to patrol the Seychelles EEZ134; and to be used in counter-piracy missions. The Seychelles has also signed two such memorandums of agreements with India, secured Indian aircrafts for anti-piracy operations and a commitment for $5million dollars of assistance. As reported by the Times of India this “constitutes part of India's efforts to provide military aid to Indian Ocean Region (IOR) countries to counter China's inroads into the region”135.

132 Ibid at 14.
134“China donating two Y-12 aircraft to Seychelles” (23 May 2011), online: Defence Web <http://www.defenceweb.co.za/>.
135“Seychelles to get Indian aircraft for anti-piracy patrols” The Times of India (16 February 2011) online: The Times of Indian <http://articles.timesofindia.indiatimes.com/>.
4.3.4 United States – through Diego Garcia

The United States also continues to maintain a significant military presence in the Indian Ocean from when they first moved into replace the British as the stabilizing force in the area. They hold a significant American naval base on the on the island of Diego Garcia in the Chagos Archipelago.

During the Cold War, the United States and the Soviet Union,

“… competed with one another for strategic superiority in the Indian Ocean. After the Soviet invasion of Afghanistan in December 1979, President Jimmy Carter announced his intention to use military force to prevent any foreign power (i.e., the Soviet Union) from gaining control of the Persian Gulf region. To buttress this policy, the United States increased its military presence in the Indian Ocean to enhance its ability to respond quickly to any military contingency.”\(^{136}\)

“The United States increased its presence on Diego Garcia by building new airfield facilities and an air force satellite detection and tracking station, initiating Strategic Air Command (SAC) operations, improving navigational aids, and increasing anchorages and moorings for pre-positioned warehouse ships stationed permanently at the island.”\(^{137}\)

The Chagos Archipelago and the Seychelles Archipelago are in the same neighbourhood. In so far as the United States, maintains its naval base in Diergo Garcia, then the Seychelles remains strategically important, especially to ensure that their naval ships can cross the Seychelles maritime territories. Despite the Seychelles claim of non alignment, the United States in agreeing to help patrol the Seychelles waters has used this as an opportunity to develop stronger

\(^{136}\) Library of Congress, supra note 33 at S 2, Historical Interest.

\(^{137}\) Ibid.
diplomatic ties with the country. It is interesting to note that “restrictions on British and United States ships carrying nuclear weapons had not been enforced since 1983, in the Seychelles.”

The United States assistance to the Seychelles was particularly high during the time the Americans maintained a tracking station on the island of Mahe, in the Seychelles. “United States assistance, which earlier amounted to US$3.3 million annually, was US$1.3 million in fiscal year 1993. The preeminent feature of United States-Seychelles relations over the preceding thirty years was the United States Air Force satellite tracking station situated on Mahe on land leased from Seychelles at US$4.5 million annually as of 1993. The Seychelles economy benefits by a further US$5 to US$6 million annually in local spending linked to the station.” More recently, the United States has also stepped in to provide military assistance to counter-piracy, and have a number of agreements with the Seychelles authorities to patrol the Seychelles EEZ and have supplied drones to be used in counter-piracy missions.

4.3.5 Another lens

Could one therefore argue that this range of international assistance willingly provided to the Seychelles, demonstrates another lens of sovereignty? That is to suggest that the Seychelles have been astute in their political choices to recognise their strategic relevance and in doing so, balance out the interests of different Powers and perhaps use it to their advantage. Perhaps then, it is not merely that the islands are merely so vulnerable that they are dependent on international assistance but that they are as sovereign states with certain control over seas which they can then yielded to their advantage. In a bid to control the Indian Ocean, it is increasingly acknowledged that:

“...the Ocean and its littoral and island states do indeed constitute an emerging geostrategic region in global politics that both indigenous and external actors - especially the

\[138\] *Ibid* at S 3, Foreign Relations.

\[139\] *Ibid.*
superpowers - are increasingly making policy on the basis of such a perception and the political and strategic analysts are therefore well advised to take such an emerging reality into account\textsuperscript{140}.

4.3.6 The Resourcefulness of Jurisdiction

Furthermore the Seychelles have used their jurisdiction and their laws as a resource with which to barter for financial assistance. The Seychelles have agreed to become a centre for the prosecution for pirates in return for international assistance: “The Seychelles has signed pacts with the European Union (EU) and the US to try suspected Somali pirates captured elsewhere in return for financial and security assistance”. Consequently by putting themselves forward as a jurisdiction capable and willing to take on piracy prosecutions for the benefit of the international community, the Seychelles are using their jurisdiction and legal rights, which is a manifestation of their formal sovereignty, so as to encourage investment and assistance into the country. In the cyclical manner of international obligations, it is an offer of help to the international community in return for much needed international assistance in patrolling their vast EEZ and capturing pirates that continue to greatly affect the Seychelles.

Bill Maurer\textsuperscript{141} in ‘Writing Law, Making a Nation: History, Modernity, Paradoxes of Self Rule in the British Virgin Islands\textsuperscript{142}, discusses the “role of law in modern narrative of national uniqueness”\textsuperscript{143}. He suggests that islands have used the law to reconstruct their own national identities and to encourage capitalist integration. His paper explores, the International Business Companies Ordinance of 1984, a "local" law invoked by BVI leaders as evidence for their


\textsuperscript{141} Bill Maurer is a cultural anthropologist who conducts research on law, property, money and finance, particularly new and experimental financial and currency forms and their legal implications.

\textsuperscript{142} The British Virgin Islands in the Caribbean are considered one of the world’s leading centres for offshore incorporation and home to around million companies.

unique character that brought large-scale investment to the territory by setting up tax haven facilities there”\textsuperscript{144}. Law is then a product for sale, and this law is arguably only made available to a state by virtue of its sovereign status.

The idea of resourcefulness of jurisdiction perhaps can be reiterated with consideration of the development of offshore industries and tax havens in a number of small island states. Departing from the primacy example of piracy in the Seychelles, this paper considers the article by Saltwater Frontiers on “jurisdiction as a resources for small islands”\textsuperscript{145}, which is of the opinion that small island states by virtue of their sovereign status, can make use of their jurisdiction as a valuable resource with which to encourage investment into their countries -

“Today there are some thirty very small island states in the international system that are islands with populations of less than one million, which enjoy the full panoply of jurisdictional prerogatives that sovereignty allows”.

These small island states have used their jurisdictions so as to be,

“able to present themselves to foreign governments, international corporations and multilateral organizations directly and on their own terms. Their status is a green card, if you like, for entry into the world’s boardrooms and there to exploit the phenomenon of globalisation in the pursuit of niche strategies”\textsuperscript{146}

Small Island States have therefore demonstrated their ability to find resourcefulness in their sovereign status by making use of the legal claims that come with the political recognition of

\textsuperscript{144} Ibid at 260.
\textsuperscript{146} Ibid.
their sovereign status. Their extensive maritime boundaries are resourceful negotiating tools against other world powers who desire control of the seas. They have turned into offshore paradises through the development of tax havens to be used by foreign corporations. The Seychelles islands have also focussed on the development of their offshore industry. A 1997 study by the Group of Eight concluded that the Seychelles was one of 40 offshore paradises. The Seychelles government wished to promote the islands as “a destination for investment funds, the Seychelles had become an important member of the borderless economy and ... a leader in the transformation of the once border-bound economy.”

Alongside the Seychelles response to piracy, the development of offshore industries is just another example to suggest how the law is being bartered in an exchange for international assistance and investment within small island states.

147 Country Watch, supra note 42 at 11.
Chapter 5
Conclusion

5 Conclusion

It therefore follows in line with Benedict Kingsbury’s article on Sovereignty and Inequality that the traditional normative concept of sovereignty neglects inequality, specifically material inequality, within and between societies. However Kingsbury is of the opinion that in the absence of better means, sovereignty as a concept remains preferable to any alternatives. This paper takes this argument a step further to suggest that this traditional concept of formal sovereignty which suggests the equality of all states and affords certain inherent legal rights to states, can be yielded to encourage international assistance and investment in a state. As such international law, manifested through the concept of sovereignty, is then both a problem and in itself a solution to inequalities that may exist between states.

The Seychelles case study is an elucidation of these possible dimensions to the principle of sovereignty in international law. An archipelago of a 115 islands, the Seychelles has a lot in common with other small island states including challenges to its ability to secure its territories. As suggested by James Crawford, “when the islands are small and have small population; and extensive maritime zones, often of disproportionate size to their land area” they are “often unaccompanied by a sufficient capacity to harvest or protect the resources of those zones”,155. The inability to protect its maritime zones is clearly demonstrated by considering the challenges faced by the Seychelles in relation to modern day piracy off the coast of Somalia.

Having attained sovereign status during the decolonisation era, part of the self determination project - the Seychelles and other small island states were formally recognised as sovereign

155 Crawford, supra note 24
states but internally unprepared to deal with their sovereign status. Sovereignty as masqueraded
in its traditional formulation in international law with its recognition of equality; is a notion of
sovereignty denied in that the material inequality of small island states makes them inherently
dependant on international assistance. As demonstrated, the Seychelles is heavily dependent on
the international community for financial assistance and security in dealing with the scourge of
piracy in its waters.

Nevertheless the Seychelles has also been innovative in the ways in which they have chosen to
respond to the material inequality in their sovereign status. The Seychelles adopted a policy of
non alignment during the Cold War era; which on closer observance of the politics of the Indian
Ocean region, would suggest that Seychelles had yielded its strategic location in the
neighbourhood so as to balance out competing foreign interests in the country. With one of the
largest economic exclusive zones in the world, the Seychelles has an extensive sovereign control
over its maritime zones and foreign powers are subjected to this jurisdiction. To gain rights of
access, to gain control of the seas - past colonisers such as France and the United Kingdom, naval powers of the United States and the growing hegemonies of India and China are eager to
develop relations with the Seychelles; and eager to provide assistance to the Seychelles in
dealing with piracy in the region. This resourcefulness of jurisdiction by small island states is
then evident not only in the case study of piracy in the Seychelles but also the development of
“offshore paradises” in a number of small island state jurisdictions.

As such, it is argued that International law can provide both a concept of sovereignty denied and
of sovereignty yielded.
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