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Re-assessment of Acts of Piracy Under Contemporary International Law With Particular Reference to Activities of Somali Pirates

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*Re-assessment of Acts of Piracy Under
Contemporary International Law
with
Particular Reference to Activities of Somali Pirates*

A Dissertation Submitted
To
The Committee of International Legal Studies
In
Candidacy for the Degree
Of
Scientiae Juridicae Doctor

Department of International Legal Studies

GOLDEN GATE UNIVERSITY

By

Nutcha Sukhawattanakun

San Francisco, California

November 30, 2017

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Nutcha Sukhawattanakun

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Golden Gate University

The Dissertation Committee for Ms. Nutchawattanakun

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Re-assessment of Acts of Piracy Under

Contemporary International Law

With

Particular Reference to Activities of Somali Pirates

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Abstract

In 2008, Somali pirates began increasing their attacks off the East African coast, thereby, forcing ship owners and charterers to seek ways to reduce risk of capture and plunder, and consequently avoiding the rapidly increasing “exception” insurance premiums for routes like the Gulf of Aden and expanding piracy zone in the Indian Ocean. To date, no ship with armed security has been successfully hijacked. In 2015, pirates claimed over \$170 million in ransom money for hijacked vessels and their crews.

That figure represents an increase since 2010 when, according to a report by United Nation Office of Drugs and crime (UNODC), ransoms paid amounted to over \$110 million. Ransom money is increasingly flowing into the legal financial system, while laundering the proceeds of piracy is causing consumer prices to rise steeply in the Horn of Africa and surrounding areas. According to a review conducted by UNODC, in twenty countries, 1,116 Somali men are currently facing criminal proceedings for piracy, while 688 are being handled within the region. This research reveals there is no authority in the international system that enforces the law in international waters, nor is there a true legislative organ. All rights and responsibilities of the States and the rules regarding sea piracy that are stipulated in the International Law of the sea is based on the consent and readiness of States. Therefore, identifying issues and formulating law is a time-consuming process. Moreover, this study identifies the legal issues that might prevent a ship owner from recovering its losses to Somali pirates.

As a result, international organizations such as the United Nations, the International Maritime Organization, have submitted many drafts concerning the codification of the development of International Law regarding piracy acts committed in territorial waters, and the actions under the command of the UN general assembly or naval forces. Furthermore, International Law does not permit extension of those waters beyond 12

nautical miles, as discussed in the second chapter. The major maritime powers and the coastal States have found a need for a new legal framework concerning the jurisdiction of chase and arrest duty at sea. The maritime powers, for instance, desire a new law that would deal with the use of force on the high seas, while not infringing upon a state's sovereignty.

The study establishes reasonable regulations on suppressing piracy and closing legal loopholes through which pirates have managed to elude the law. The cornerstone of regulations to address maritime security is placed in many conventions and agreements; for instance, the International Convention, UNCLOS and IMO, which are regulations mandated to make trade and travel by sea as safe as possible, extends to maritime security. Organizations such as the United Nations, or international maritime organization, should respond to threats in two ways; by developing appropriate regulations and guidance through its Maritime Safety Committee, and through capacity-building work.

These organizations have been addressing maritime piracy for some time and a series of measures, developed in cooperation with member States and the shipping industry, have helped significantly reduce piracy in the troubled spots of the world. Since 2005, regional co-operation has addressed piracy off the coast of Somalia, in the Gulf of Aden and the Indian Ocean, and is currently implementing a strategy for enhancing maritime security in West and Central Africa.

In 2009, the IMO propagated the Djibouti Code of Conduct, and the IMO's SUA treaties were adopted in 1988, and underwent a comprehensive revision in 2005. These treaties provide an international legal framework to ensure that appropriate action is taken against persons committing unlawful acts against ships. These unlawful acts listed in the treaties include the seizure of ships by force, acts of violence against

persons on board ships, and placing devices on board a ship that could destroy or damage it.

This research suggests that the member States of UNCLOS should have agreed to review their national legislation to ensure the existence of laws that criminalize piracy and armed robbery against ships. In the case that prosecution is not possible, the code would dictate that States should extradite or hand over the pirates. Furthermore, State parties must agree to cooperate in a manner consistent with the International Law, in the investigation, prosecution and arresting pirates, and with respect to the interdiction and seizure of suspected pirate ships. The international community should promote the implementation of the resolutions adopted by the UN Security Council regarding the repression of Somali piracy.

Seizure of piracy funding must be available to commit resources to this field, which will undoubtedly lead to successful prosecution and the seizure of funds in jurisdictions outside Somalia as an interim measure while its legal system is strengthened. Piracy-related business currently represents the main income source for much of the coastal communities, without which the communities may become destitute. Efforts must be made to develop an alternative viable economy within Somalia, in addition to interdicting the illegitimate economic system as stated in the final chapter of this work.

The heads of state and government in West Africa stressed the importance of political leadership and the coordinating role of regions in combating the increasing threat posed by piracy and other forms of organized maritime crime in the Gulf of Aden. On the other hand, to make efforts more effective, maritime nations need broader international support. The commission was tasked to develop a holistic strategic maritime policy framework to guide future actions and cooperation and strengthen collaboration. Addressing the growing problem of piracy off the coast of Somalia, and im-

proving the regional capacity to counter-piracy, should be done by developing and enhancing regional cooperation and coordination, all of which are based on the four pillars of Legislation, Training, Capacity Building, and Information Sharing.

In this work, I present a range of guidance aimed at addressing maritime security which concerns Somali piracy and armed robbery against ships; this includes guidance to governments, ship owners and ship operators, shipmasters and crews on preventing and suppressing piracy and armed robbery against ships; investigation of offences and the use of armed personnel should be granted and enacted into law which are binding on all state parties internationally and regionally. These recommendations should promote the development of the international shipping industry, and bring peace to the Gulf of Aden.

* * *

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Finally, and coming full circle, without the assistance of many other individuals, I am not sure this academic would have been so readily accomplished. I wholeheartedly could never thank them enough for my success.

* * *

TITLE

*Re-assessment of Acts of Piracy Under
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Dedication

This work I dedicate to my family, especially my father, Mr. Prasertsiri Sukhawat-
tanakun who first brought to my attention the Somali Piracy issue. I appreciate his use-
ful critiques that helped shape this work. I also dedicate this work to my beloved moth-
er, Mrs. Apivan Thongarya, who not only allowed me my first breath, but who has al-
ways showers me with unconditional love, never ending support and full encourage-
ment, for whatever endeavor I have undertaken.

* * *

Abbreviations

AIS	Automatic Identification System
AMISOM	African Union Mission in Somalia
BBC	British Broadcasting Corporation
CMF	Combined Maritime Force
CGPCS	Contact Group on Piracy off the Coast of Somalia
CTF151	Combined Task Force 151
EEZ	Exclusive Economic Zones
EU	European Union
EUNAVFOR	European Union Naval Force Somalia
EUCAP	Maritime Capacity Building Mission in Horn of Africa
EUROPOL	European Law Enforcement Organization
FATF	Financial Action Task Force
FBI	Federal Bureau of Investigation
GPS	Global Positioning System
HHPN	Hobyo-Harradherre Piracy Network
ICC	International Chamber of Commerce
ICJ	International Court of Justice
ICU	Islamic Courts Union
IDP	Internally Displaced Person
IMB	International Maritime Bureau
IMO	International Maritime Organization
IMU	International Maritime United
INTERPOL	International Criminal Police Organization
IRTC	Internationally Recommended Transit Corridor

IUUF	Illegal Unregulated Unreported Fishing
MANPADS	Man- Portable Air- Defense System
MARSIC	Maritime Security and Safety
MOU	Memorandum of Understanding
MSC-HOA	Maritime Security Centre – Horn of Africa
NATO	North Atlantic Treaty Organization
NGO	Non-Governmental Organization
PPN	Puntland Piracy Network
ROLS	Rule of Law and Security program
SEMG	Somalia and Eritrea Monitoring Group
SHADE	Shared Awareness and De-confliction
SNM	Somali National Movement
SSDF	Somali Salvation Democratic Front
TFG	Transitional Federal Government of Somalia
UAE	United Arab Emirates
UN	United Nations
UNDP	United Nations Development Program
UNITAF	Unified Task Force
UNCLOS	United Nations Convention on the Law of Sea
UNODC	United Nations Office on Drugs and Crime
UNOSOM	United Nations Operation in Somalia
UNOSOM 2	United Nations Operation in Somalia 2
USD	US Dollars
USSR	Union of Soviet Socialist Republics
WFP	World Food Program

Map of Somalia and its Coastline



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Chapter 1

The Scope of Piracy

In honest work, the food is bad, the wages are low and the work is hard. In piracy, there is plenty of loot, it's fun and easy and we are free and powerful. Who, when presented with this choice, would not choose piracy? The worst that can happen is you can be hanged. No, a merry life and a short one shall be my motto.

Black Bart ¹

1.0 - Introduction

The words above can be viewed as those of practical man, a mad man, an idealist, or even an entrepreneur of a devious sort. Black Bart, however, lived out his days as a man one would call an enemy of all mankind, a pirate. Thanks to Hollywood and the comic books, the very term, "pirate" brings to mind an image of a swarthy, surly and belligerent man, dressed perhaps in garish clothing,² and armed with a sword and a sin-

¹ Bartholomew "Black Bart" Roberts. "Roberts (1682-1722) was a Welsh pirate. He was the most successful pirate of the so-called "Golden Age of Piracy," capturing and looting more ships than pirates like Blackbeard, Edward Low, Jack Rackham, and Francis Spriggs put together. At the height of his power, he had a fleet of four ships and hundreds of pirates. His success was due to his organization, charisma and daring. He was killed in action by pirate hunters off the coast of Africa in 1722.<https://www.thoughtco.com/real-pirate-quotes-2136215> (Assessed 11/25/17).

² Black Bart was a flamboyant and good-looking man, who was daring, bold and care-free. Consider the following: Bartholomew Roberts was described as a tall, an attractive man, who loved the expensive clothes and jewelry. He was often seen dressed in a gorgeous crimson waistcoat with an expensive hat which had a unique red feather. Even in battles he was well-

gle shot pistol. To complete the picture, we might even note the eye patch, and on his broad shoulders, a gaily colored parrot. This man would be at the helm of one of the common warships of the day, perhaps a “Sloop,” or a “Brigantine,” sleek in design and fitted with great canvas sails that bore markings of red and black.³ This notion while romantic, is more appropriate for the annals of a crime journal because unto much of the world, pirates have been in in many instances, the most loathsome form of humanity; opportunistic creatures who for centuries, have dared to pursue their nefarious exploits upon the high seas. Although the current sentiment may be that the above scenario ceased to exist at some time in the past, recent reports over the last couple of years confirm that pirates are not relics of bygone eras; but are yet very much active, and with the aid of various technologies, their activities appear to be on the increase.

The continued existence of piracy may seem like a paradox existing alongside today’s modern technology and more enlightened societies. Yet, as will be described later in this work, the ancient scourge of piracy has availed itself of the many tools of modern technology,⁴ which has provided both benefits and detriments to the modern

dressed. On his chest, was a heavy gold chain with a diamond cross hanging to it. <http://www.thewayofthepirates.com/famous-pirates/bartholomew-roberts/>. (Assessed 11/26/17).

³ A “Sloop” was a common pirate ship. Sloops were fast ships, designed to easily traverse the Atlantic and carry goods and cargo and an increased rate. This also made them ideal for pirates using them to capture a larger, slower ship. A “Brigantine” was a two-masted sailboat and the second most popular ship of the time. These ships . . . could withstand the waves of the Atlantic and with two major sails they would not have to sacrifice speed . . . Brigantines [carried] a larger crew, and [had] more room for weapons such as cannons, mortars and storage space . . . A Brigantine was a perfect ship for pirates because it allowed a pirate to mount at least a dozen cannons and hold a larger crew. . . Types of Pirate Ship-
<http://www.goldenageofpiracy.org/pirate-ships/types-of-pirate-ships.php>.

⁴ Brown, N. (2014, May 1). Taking the Fight to the Pirates. Jane’s Navy International. Jane’s Information Group. Edit.2014, Vol.12

world. In fact, it is technology that has enabled piracy to flourish on an even grander scale than ever before.

Piracy has never been eliminated or eradicated from the world; it has merely been suppressed in one area only to sprout up vigorously in another, while following a predictable and constant pattern. Let us consider a group of individuals who pursue this dishonorable activity, which begins with erratic attacks on soft targets, and gradually becomes more organized and frequent, and then targets “harder” or more valuable targets. The intensity and frequency of the attacks may escalate to the degree that it cripples maritime commerce.⁵ The States whose maritime commerce is affected must then collaborate and mobilize their navies to counter these acts.⁶

Through the collective efforts of navies, the activities of the pirates may be brought to a standstill, or more often, mitigated to the extent that piratic endeavors are severely hampered, meaning the havens and hideouts of pirates are destroyed, and their leaders and operators captured, prosecuted in courts of law, or in some cases summarily executed.⁷ These collaborative efforts may result in the high seas being declared safer and more secure for maritime commerce. However, because ineffective anti-piracy measures, pirates are still laying siege to and invading many maritime routes with the result being that in recent years, throughout many parts of the world, piracy has emerged as a major threat to sea transportation. Many estimates conclude that pirate

⁵ JOHN E. NOYES. Essay on piracy. An introduction to the International Law of piracy, Hein online 21 cal. W. Int, 1 L.J. 105 2014-2015

⁶ P.W. Brine, Piracy, past, present and future, Vol.1 (marine piracy July 2016, Butterworth & Co (publishers) ltd.

⁷ International Maritime Organisation, International shipping facts and figures- Information resources on trade, safety, security, environment, London: Maritime Knowledge Centre, 2016, at p.7

attacks have increased by an enormous 75% in the last decade alone.⁸ As per International Maritime Organization data, there were 489 reports of piracy and armed robbery against ships in 2015 reflecting a 20% increase over the previous year, 2014.⁹ The International Maritime Bureau (IMB) publishes monthly,¹⁰ quarterly, and annual piracy reports, which provide names of ships attacked, position and time of attacks, consequences to the crew, ship or cargo, and actions taken by the crew and coastal authorities.

Because of its continued international impact, piracy is noteworthy in International Law because it is commonly held to represent the earliest invocation of the concept of universal jurisdiction. It is considered, moreover, a breach of *jus cogens*,¹¹ a conventional peremptory international norm that all States must uphold. Those committing theft on the high seas, inhibiting trade, and endangering maritime communication are considered by sovereign States to be *hostis humani generis* (enemies of humanity).¹² Thus, because of its nature and long history, and based on Customary Law definitions among the nations of the world, piracy has long been considered an international crime.

⁸ International Law conference report- Piracy and legal issue: reconciling public and private interests, Vol.2 p.21-01-10-2014 www.chathamhouse.org.uk

⁹ Report of the Monitoring Group pursuant to Security Council resolution 1811 (2015), United Nations, 10 December 2015.

¹⁰ International Maritime Bureau. (2014). Weekly Piracy Report." List of ship attacked " Vol.2, Edit.2014: www.icc-ccs.org/imb.

¹¹ That body of peremptory principles or norms from which no derogation is permitted; those norms recognized by the international community as a whole as being fundamental to the maintenance of an international legal order. *Jus Cogens*. (n.d.) West's Encyclopedia of American Law, edition 2. (2008). Retrieved January 23 2017 from <http://legal-dictionary.thefreedictionary.com/Jus+Cogens>.

¹² Kissinger, Henry (July–August 2016). "The Pitfalls of Universal Jurisdiction". Department of Foreign Affairs. Document No. 1307 p.148-188.

As the world further globalized after World War II,¹³ in addition to the law of nations and certain treaties, there was a need for more regulations and codifications.¹⁴ In the 2000s seaborne piracy against transport vessels remains a significant issue (with estimated worldwide losses of US\$16 billion per year in 2015),¹⁵ particularly in the waters between the Red Sea and Indian Ocean, off the Somali coast, and in the Strait of Malacca and Singapore.¹⁶

Preventing piracy is difficult; for example, modern pirates favor using small boats and taking advantage of the limited number of crew members on modern cargo vessels and transport ships. On the other hand, they also use large vessels to supply the smaller attack/boarding vessels.¹⁷ In addition, because these attacks often occur in international waters, the international community faces difficult challenges in bringing modern pirates to justice.¹⁸ This academic research takes its perspective on marine piracy from within an operating international legal system, namely, the way that International Law of the Sea regulations have become state action through law. The purpose

¹³ Brown, N. (2016, May 1). Taking the Fight to the Pirates. Jane's Navy International. Jane's Information Group. p.256-380

¹⁴ For example, the obvious definition of piracy, Absolute Right to pursuit the pirate ship, and the strict universal jurisdiction over acts of piracy.

¹⁵ Michel-Rolph Trouillot "Foreign Affairs – Terrorism Goes to Sea" Boston: Beacon Press, Retrieved December 8, 2015 see also in Robert Ritchie "Piracy in Asia: A Growing Barrier to Maritime Trade" Cambridge: Harvard University Press, Vol.67. Retrieved December 8, 2015.

¹⁶ Ocean development & International Law, 33:343-358, 2012 copyright 2012 Taylor & Francis, 0090-8320/12, Vol.5 edit. 2012

¹⁷ "Recent Piracy." Journal of public and international affairs: Mohadi You, Volume 14/spring 2013.

¹⁸ D. Archibugi, M. Chiarugi, "Piracy challenges global governance" (April 9, 2015). IMO Journal, Vol.2A p.284-401

of this dissertation, as part of transnational dialogue, and for the effective eradication of Somali piracy, is to locate the principle of The Law of the Sea within the framework of International Law, and to highlight the essential features of other related-regulations. It also discusses the many complex issues regarding piracy, and is thus divided into five chapters.

Chapter I introduces the concept and historical background of piracy. In addition, it discusses the political and social context of piracy and suggests why it has flourished practically unfettered. The research begins with an overview of maritime piracy. The term “pirate” will also be analyzed in the second section of this chapter. In addition, the historical background of piracy is presented in the latter part. The conclusion provides a summary of piracy activities. Chapter II discusses the rules of International Law governing combating piracy. This chapter discusses how International Law is applicable to acts of piracy, and focuses on related international conventions corresponding to those acts.

Chapter III describes the characteristics by which Somali pirates are identified. The first section explains the necessity of companies around the world to use the Gulf of Aden sea route. Furthermore, this chapter explores the underlying reasons that we must eliminate Somali pirates rather than change the maritime route. Additionally, this chapter shows the Somali pirates growing in numbers, explains how they endanger the peace of the sea, and discusses their history of plunder. This chapter further categorizes the acts of Somali pirates, and delicately discusses the impact of their actions. The collapse of the Somali government, which expanded to the failure of administration in Somali, is also discussed.

Chapter IV, which lists the legal issues pertaining to Somali pirates and evaluates the effectiveness of rules of law on the acts of Somali pirates, is divided into two

main parts. The first gathers the incidents related to acts of Somali pirates from recent years to the present. In evaluating the law of dealing with acts of Somali pirates, it shows that the other rules and regulations are essential. This section gathers the extract from each rule that was used as a source of analysis. Finally, this section combines all the regulations from Somali Law which relate to the Somali piracy issues, and analyzes the underlying meaning and purpose of each rule of law.

In Chapter V, the first section illustrates and analyzes new, and hopefully effective, anti-piracy measures. It further reveals the legal issues that should be improved, carefully discusses the solution to the boundary invasion problem, and presents an effective way by which to solve the limitation of right to chase, arrest and repel the Somali pirates in each area of the sea. The chapter proposes a reassessment of a counter-piracy approach that proposes to allow Somalis themselves to be at the forefront of tackling and eradicating piracy.

Besides prevention and protection measures for Somali pirate problems, long-term developments shall be suggested as the requirement to support the solutions to this problem. Furthermore, compensation to which the loser in this circumstance is entitled, will be discussed.

1.1 Piracy and International Law

Piracy, as previously noted, long known to world and to International Law, was the first internationally recognized crime. According to International Law, piracy is any robbery or other violent action for private ends. Piracy takes place outside the normal jurisdiction of a state, occurs without state authority, and is private, not political. Acts of unlawful warfare, acts of insurgents, revolutionaries, mutiny, and slave trading

have been defined as piracy by national laws of various countries or by special treaties.¹⁹

As contemporary international trade routes developed throughout the Seventeenth Century, slow moving and undefended ships were easy targets against which pirates plied their looting, pillaging and plundering.²⁰ Throughout the Nineteenth Century, a legal regime developed in response to the threat of piracy, and customary International Law evolved which, in effect, made piracy the first universal crime over which all States had the capacity to arrest and prosecute.

International Law is a legal system directed toward the defeat or suppression of a category of violators known as “enemies of mankind,” or *hosti humanis generis*.²¹ Occasionally, these enemies have been war criminals, or sometimes terrorists or even slave traders. To those most familiar with crimes, it is indeed not an unbearable stretch of the imagination, to say that the original enemy of mankind was the “pirate.” Thus, as if by default, piracy gives rise to a highly specialized form of international jurisdiction known as universal jurisdiction.²²

¹⁹ *Piracy: Out of Sight, Out of Mind?* Goorangai, RANR Occasional Papers, August (2013) Royal Australian Navy

²⁰ *Contemporary Maritime Piracy*. By: Chalk, Peter. Studies in Conflict & Terrorism, January–March 2014, Vol. 21 Issue 1, p. 87, 26p, 1 chart; (AN 286864).

²¹ *I Sailed with Chinese Pirates* by Aleko Lilius, Oxford University Press, US, October 17, 2014, ISBN 0-19-585297-4.

²¹ Goodman, Timothy H. 'Leaving the Corsair's name to other times:' How to enforce the law of sea piracy in the 21st century through regional international agreements / Timothy H. Goodman In: *Case Western Reserve Journal of International Law*, Vol. 31 (Winter 2016) nr.1, pp. 139–168.

²² *Dangerous Waters, Modern Piracy and Terror on the High Seas*, by John S. Burnett. Dutton, 2013, Plume, 2013–2014, New York. (ISBN 0-452-28413-9)

These developments in custom found their way into the modern law of the sea as it developed throughout the Twentieth Century.²³ The 1958 Geneva Convention on the High Seas, and later, the 1982 United Nations Convention on the Law of the Sea (UNCLOS), both outlined an international regime for the repression of piracy and effectively recognized universal jurisdiction on the part of all States to suppress pirate acts.²⁴ The UNCLOS 1982 Convention, which now has 157 State parties, is generally considered to be reflective of customary International Law.²⁵

1.2 Definition of Piracy

Uniformity in Maritime Piracy Definition

Given the diverging definitions of piracy in international and municipal legal systems, some authors argue that greater uniformity in the law is required in order to strengthen anti-piracy legal instruments.²⁶

A definition of piracy is both fundamental and necessary to my overall thesis. The definition offered here, however, is not intended to provide an exhaustive examination of the concept of piracy, as this has been amply discussed elsewhere. Rather, its purpose is to briefly state the assumptions on which later arguments are based, and to generally examine certain issues that are central to the discussion that follows. More specifically, this section addresses the questions caused by the definitional interpretation of piracy.

²³ *Maritime Piracy*. By: Herrmann, Wilfried. Naval Forces, 2014, Vol. 25 Issue 2, pp. 18–25, 6p; (AN 13193917).

²⁴ *Id.*

²⁵ *Modern Piracy*. Naval Forces, 2015, Vol. 26 Issue 5, pp. 20–31, 7p; (AN 18506590)

²⁶ Bento, Lucas, 'Toward An International Law of Piracy Sui Generis: How the Dual Nature of Maritime Piracy Law Enables Piracy to Flourish' *Berkeley Journal of International Law* Vol.29:2 (2015)"

Definition is used here in the sense of delimiting the boundaries of a scientific subject. It includes the methods, basic assumptions, and categorizations, as well as the basic principles of piracy elements. In this sense, definition is designed to provide the blue print concept of piracy as conduct in perspective that is wide enough to consider both old and new social communities. In an ever-globalizing world with a plethora of different actors, one might wonder what the exact definition of piracy is and whether the concept of piracy has remained the same.²⁷

1.2(a) General Definition

The word “piracy” was first recorded in the English language in 1419.²⁸ However, under Roman law, piracy, or *piracy jure gentium* (piracy by the law of nations) as it is known was part of *jus gentium* (law of nations).²⁹ Piracy, as a term, originates from the Greek “peirateia,”³⁰ thus suggesting that piracy has been a problem for millennia.

As noted, piracy is a crime under International Law and municipal law. Under International Law, piracy *jure gentium* is different from piracy under municipal law.³¹ Offences that fall under the definition of municipal law do not necessarily fall within the definition of piracy under International Law and, subsequently, are not susceptible

²⁷ Pennell, C. R. "TEDx Talk: What is Piracy?" Harvard Press, Vol.51: Retrieved October 23, 2014.

²⁸ Wolfram Alpha, "Origin of piracy," <http://www.wolframalpha.com/input/?i=piracy> , (09-20-2016).

²⁹ Philip de Souza, "Piracy in the Graeco-Roman World", (2014). ISBN.2010-3784-6501 p.131-167

³⁰ *Miriam Webster*, "Definition Piracy," <http://www.merriam-webster.com/dictionary/piracy> , (09-20-2015).

³¹ (Towards a new definition of piracy). The Achille Lauro Incident, Virginia Journal of International Law vol. 26:3 2015-2016.

to universal jurisdiction.³²This general definition of piracy is consistent with the common expression that a pirate is *hostis humani generis*: an enemy of all mankind.³³

In his 1897 Bouvier's Law Dictionary, American jurist John Bouvier defined *piracy* as a robbery or forcible depredation on the high seas, without lawful authority, "*done animus furandi*," in the spirit and intention of universal hostility.³⁴

It is not necessary that the motive be plunder or that the depredations be directed against the vessels of all nations indiscriminately. As in robbery upon land, it is only necessary that the spoliation or intended spoliation be felonious. That is with intention to injure and without legal authority or lawful excuse.³⁵

Since the development of this definition, there have been two significant expansions to the definition of piracy, the being established by *In re Piracy Jure Gentium*. The distinction between *piracy* and *piracy jure gentium* lies in the manner in which the act is punished, and was described by Wheaton as follows:³⁶

Piracy under the law of nations (*jure gentium*)³⁷ may be tried and punished in the courts of justice of any nations, by whomever and

³² Malcolm N. Shaw, *International Law* 1265 (6th ed. 2015).

³³ Ward, ed, Graham (Excerpt published 2016-02-21). Submission to the HMAS Sydney II Commission of Inquiry, ed. *Under The Brave Black Flag: Pirates and Mutineers*, Australia: Ministry of Defense. pp. 6th pg.

³⁴ 1897 Bouvier's Law Dictionary, John Bouvier, "*done animus furandi*" Coovardi press

³⁵ Wallace, R. and A. Holliday, *International Law*, 1st Ed. (London: Sweet & Maxwell, 2014), pp. 91-92.

³⁶ Keith, A. B., *Wheaton's Elements of International Law*, 6th Ed. (London: Stevens and Sons, 2016), page 277.

³⁷ Duhaime, Lloyd, "The Piracy," *General Definition of Piracy Jure Gentium*, Vol.7 19th Ed., 2014.

wherever committed. On the other hand, piracy created by municipal (domestic, state) statute can only be tried by that state within whose territorial jurisdiction, and on board of whose vessels, where the offence was committed.

The second significant development was the ancient restriction that piracy occurred on the high seas, which is to say, upon one of the great oceans or many seas of the world,³⁸ and was achieved by employing a seafaring vessel. Having been in place for thousands of years, this definition did not foresee. This exclusion was resolved by the advent of UNCLOS, as set out above.³⁹

1.2(b) Legal Definitions

1) Definition of Piracy under Articles 101 to 103 of United Nations Convention on the Law of the Sea 1982

In the international arena, the definition of the crime of piracy is contained in Articles 101 through 103 of the 1982 United Nations Convention on the Law of the Sea (UNCLOS),⁴⁰ which provides as follows:

Piracy consists of any of the following acts:

³⁸ International Maritime Organization, MSC.4/Circ.180, Reports on acts of piracy and armed robbery against ships, annual report-2015, March 1, 2016, p. 3.

³⁹ "In re Piracy Jure Gentium, 1934 A.C. 586 ", Keith, A. B., *Wheaton's Elements of International Law*, 6th Ed. (London: Stevens and Sons, 2016), p. 277.

⁴⁰ *Id.* Art. 101.

(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:

(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)."

ARTICLE 102

Piracy by a warship, government ship or government aircraft whose crew has mutinied.

The acts of piracy, as defined in article 101, committed by a warship, government ship or government aircraft whose crew has mutinied and taken control of the ship or aircraft are assimilated to acts committed by a private ship or aircraft.

ARTICLE 103

Definition of a pirate ship or aircraft

A ship or aircraft is considered a pirate ship or aircraft if it is intended by the persons in dominant control to be used for the purpose of committing one of the acts referred to in article 101. The same applies if the ship or aircraft has been

used to commit any such act, so long as it remains under the control of the persons guilty of that act.⁴¹

This definition was formerly contained in articles 15 to 17 of the Convention on the High Seas signed at Geneva on April 29, 1958.⁴² It was drafted by the International Law Commission.

The definition above is in line with that of Customary Law. However, the actus reus of this offense does not depend on factors such as gravity or an intention to act openly.⁴³

The old common law definition had focused on robbery; yet in this case there had been no robbery. The offense had been stopped just before it occurred, though there had been violence.⁴⁴ Justice Sankley for the House of Lords rendered the decision. While it skirted around and ultimately declined to define piracy, the court nonetheless made two points which shaped International Law.⁴⁵

The first, "Actual robbery is not an essential element in the crime of piracy jure gentium. A frustrated attempt to commit a piratical robbery is equally piracy jure gentium."⁴⁶ Secondly, Justice Sankley states that a robbery committed on a sea liner by one

⁴¹ *Id. Art.103*

⁴² "Archbold Criminal Pleading, Evidence and Practice." 2015. Paragraph 25–39 at page 76 refers to the Schedule to the Tokyo Convention Act 1967. That schedule, and section 4 of that Act, refer to the said articles of Convention on the High Seas.

⁴³ Elias Bantekas & Susan Nash, "Private actus reus" International criminal law (2nd ed. 2013).

⁴⁴ *Terror on the High Seas*. By: Koknar, Ali. Security Management, June 2014, Vol. 48 Issue 6, pp. 75–81, 6p; (AN 13443749).

⁴⁵ *Piracy: Out of Sight, Out of Mind?*, Goorangai, RANR Occasional Papers, August (2016) Royal Australian Navy.

⁴⁶ *Id.*

passenger upon another is not piracy.⁴⁷ A key factor in the definition of piracy is that, regardless of its success or failure, piracy must be performed by operators commanding a private ship or aircraft, and such an act is carried out for private ends. This means that attempts are also categorized as piracy.⁴⁸ In addition, it should be performed without authorization by public authority, committed on the seas or in the air outside the normal jurisdiction of any State.

Under the UNCLOS 1982, an act of piracy can only occur beyond the limits of the territorial sea, which in most cases extends twelve nautical miles from the coastline of which a State claims jurisdiction.⁴⁹ One consequence of these developments is that the modern law on piracy has been significantly constrained so as to effectively fall into two categories.⁵⁰ One is piracy on the high seas beyond the twelve nautical mile limit of coastal state jurisdiction and sovereignty, and pirate-type acts that occur within territorial waters, including the water of archipelagic States such as Indonesia.⁵¹

A crucial element of the UNCLOS 1982 definition of piracy is that piracy is an act which occurs on the high seas, which also includes the adjoining exclusive economic zone which extends from the edge of the territorial sea to 200 nautical miles.⁵² When

⁴⁷ *Ibid.*

⁴⁸ *Lucie-Smith, Edward (2015). Outcasts of the Sea: Pirates and Piracy. Paddington Press. ISBN 9780448226170.*

⁴⁹ *Maritime Piracy in Southeast Asia.* By: Liss, Carolin. Southeast Asian Affairs, 2013, p. 52, 17p; (AN 10637324).

⁵⁰ *Id.*

⁵¹ Earle, Peter (2013) *The Pirate Wars* Methuen, London. ISBN 0-413-75880-X.

⁵² *Id.*

piracy was first subject to regulation under the Law of the Sea, nearly all the world's oceans were considered high seas.⁵³

This is essentially the same definition as Article 15 of the 1958 *Geneva Convention on the High Seas*.⁵⁴ Piracy is a criminal offense, but it is also a component of transportation law because pirate ships were subject to seizure and transfer of ownership to the jurisdiction of the seizing ship. Historically, piracy was a crime that was committed upon the ocean only. If a person committed otherwise unlawful acts against property or persons of a country on the high seas, that person was not automatically an enemy of mankind, but merely of that one specific country. While this more encompassing definition allows the IMB to produce a more comprehensive picture of maritime crime, this definition is not recognized by International Law.⁵⁵ Some would prefer to cut to the chase and declare that piracy is an act of robbery or criminal violence at sea, and that those who engage in acts of piracy should be considered pirates.

Meanwhile, the term can be included acts committed in the air, on land (especially across national borders or in connection with taking over and robbing a car or train), or in other major bodies of water or on a shore. However, this regulation above focuses on maritime piracy,⁵⁶ which does not normally include crimes committed against people traveling on the same vessel as the perpetrator (e.g., one passenger steal-

⁵³ *Id.*

⁵⁴ *Heller-Roazen, Daniel (2014). The Enemy of All: Piracy and the Law of Nations. Zone Books. ISBN 978-1890951948.*

⁵⁵ *Id.*

⁵⁶ Abhyankar J., (2014), "Piracy and Maritime Violence: A Continuing Threat to Maritime Industry" <http://itopf.com/_assets/documents/Abhyankar.pdf.

ing from others on the same vessel). Piracy or pirating is the name of a specific crime under Customary International Law, and the name of many crimes under the municipal law of many States.⁵⁷

2) Definition of piracy and armed robbery against ships under Resolutions adopted by The United Nations Security Council 1946.

The Resolution on Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery against Ships determined that armed robbery against ships consists of any of the following acts:⁵⁸

(a) Any illegal act of violence or detention or any act of depredation, or threat thereof, other than an act of piracy, committed for private ends and directed against a ship or against persons or property on board such a ship, within a State's internal waters, archipelagic waters and territorial sea.

(b) Any act of inciting or of intentionally facilitating an act described above.

It is also important to distinguish the crime of piracy from armed robbery against ships, which can occur within the internal waters and territorial sea of a coastal State.⁵⁹ In accordance with Part II of UNCLOS 1982: Territorial Sea and Contiguous Zone, in cases of armed robbery against ships, the primary responsibility for enforcement normally

⁵⁷ Ananthakrishnan A., Dombrowski K., Marcus A., (2015), Editorial: The Enemies of All Mankind'', Vol.74 Edit 2015.

⁵⁸ David P. Forsythe (2016). "Encyclopedia of Piracy, Volume 1". Oxford University Press. p. 464. ISBN 0195334027.

⁵⁹ Resolution A.1025(26) (Annex, paragraph 2.2) on Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery Against Ships, 1946.

falls on the coastal state. Armed robbery against ships also constitutes an offense under the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation⁶⁰ and, in some cases, the 2000 United Nations Convention against Transnational Organized Crime.⁶¹

The UNCLOS 1982 definition of piracy developed into International Law and the International Maritime Organization (IMO) has recognized and accepted this definition.⁶² Thus, according to International Law, any illegal acts of violence and detention, which are committed within a State's territorial waters, are not defined as piracy.⁶³ However, according to the International Maritime Bureau (IMB),⁶⁴ nearly all illegal acts in Southeast Asia occur within territorial waters and would not fall under the definition of piracy.

Technically, if an attack occurs within the territorial jurisdiction of a State, the event is only classified as piracy if that nation's penal code criminalizes it as such. Moreover, the IMO defines any unlawful act of violence or detention or any act of depredation at anchor off ports, or when underway through a coastal State's territorial wa-

⁶⁰ Niclas Dahlvang, Thieves robbers & terrorists: piracy in the 21st century-Heinonline – 4 Regent J. Intl-L. 19 2016.

⁶¹ *Id.* part 3 Art.3 (a).

⁶² Hugo Grotius, On the Law of War and Peace, <http://www.constitution.org/gro/djbp.htm> , (Last visited, 09-20-2016).

⁶³ Samuel Pyeatt Menefee, "The new discipline, problems with piracy, maritime terrorism and the 1982 convention on the law of the sea." —6 conn. J. int, I L.127 (2014-2015.)

⁶⁴ A. Leroy Bennett & James K. Oliver, "International Organizations; Principles and Issues" (7th ed. 2015).

ters as armed robbery against ships.⁶⁵ To overcome the distinctions between high seas and territorial waters, the IMB defines piracy as:

“an act of boarding (or attempted boarding) with the intent to commit theft or any other crime and with the intent or capability to use force in furtherance of that act.”⁶⁶

However, according to the International Maritime Bureau (IMB), nearly all illegal acts in Southeast Asia occur within territorial waters and would not fall under the definition of piracy.

Technically, if an attack occurs within the territorial jurisdiction of a State, the event is only classified as piracy if that nation’s penal code criminalizes it as such. Moreover, the IMO defines any unlawful act of violence or detention or any act of depredation at anchor, off ports or when underway through a coastal State’s territorial waters as armed robbery against ships. To overcome the distinctions between high seas and territorial waters, the IMB defines piracy as: “an act of boarding (or attempted boarding) with the intent to commit theft or any other crime and with the intent or capability to use force in furtherance of that act.”

⁶⁵ LAWRENCE J. KAHN, "pirates, rovers and thieves: new problems with an old enemy." 20 Tul. Mar. L.J. 293 2015-2016.

⁶⁶ Dillon, D. R. (2013). "Piracy in Asia: A Growing Barrier to Maritime Trade." Heritage Foundation Backgrounder #1379. Vol.8 Edit.7th 2013, www.heritage.org.

3) Definition of Marine Terrorism under The Suppression of Unlawful Acts against the Safety of Maritime Navigation Convention 1988

The Council for Security Cooperation Working Group under The Suppression of Unlawful Acts against the Safety of Maritime Navigation Convention 1988 has offered an extensive definition for maritime terrorism:

[t]he undertaking of terrorist acts and activities within the maritime environment, using or against vessels or fixed platforms at sea or in port, or against any one of their passengers or personnel, against coastal facilities or settlements, including tourist resorts, port areas and port towns or cities.⁶⁷

This definition, however, does not define “terrorism,” nor does it clarify whether it only includes maritime attacks against civilian (merchant) vessels or also attacks against military craft. It defines maritime terrorism, therefore, as the use or threat of violence against a ship (civilian as well as military), its passengers or sailors, cargo, a port facility, or if the purpose is solely a platform for political ends.⁶⁸

The definition can be expanded to include the use of the maritime transportation system to smuggle terrorists or terrorist materials into the targeted country. Maritime terrorism is motivated by political goals beyond the immediate act of attacking a maritime target.⁶⁹ On the other hand, the contemporary law of piracy, embodied in the Unit-

⁶⁷ D.Archibugi, M.Chiarugi (April 9, 2016). "Piracy challenges global governance" open Democracy", Sea Journal (p.4, Vol.3A).

⁶⁸ David J. Bederman, Emory, International Law Review, "Suppression of Maritime Terrorism", CSCAP (09-20-2016).

⁶⁹ International Commercial Crime Services, International Maritime Bureau, "Terrorism at sea", http://www.icc-ccs.org/index.php?option=com_content&view=article&id=27&Itemid=16 , (09-20-2015).

ed Nations Convention on the Law of the Sea 1982, has defined piracy as an “act of violence or depredation committed on the high seas by a private actor acting for private ends.”⁷⁰

This distinguishes piracy from naval warfare or recognized belligerency on the high seas, but it has complicated efforts to apply the law of piracy to terrorists (who, after all, act for political ends, and most commonly in the territory of sovereign States).⁷¹ It has meant that acts of piracy committed in the territorial waters of States are not subject to the International Law of piracy (and the expansive forms of jurisdiction that accompany it).⁷² Therefore, attempts to incorporate terrorism into piracy have fallen afoul of the technical rules governing traditional piracy. Likewise, these same rules have frustrated initial efforts to confront the growing problem of traditional piracy carried out in places other than the high seas. For instance, the “international terrorist” and the Somali pirate pose different problems for International Law.

1.2(c) Definitional Problems of Piracy Articulated by UN Organizations

Article 101 of the Convention defines an act of ship-based piracy as “consisting of acts of violence or detention, or an act of depredation, committed for private ends by the crew of a private ship directed against another ship on the high seas, or outside the jurisdiction of any State.”⁷³ As such, a century ago nearly all violent acts at sea committed for private ends would have been characterized as piracy.

However, under the new law of the sea, as reflected in the UNCLOS 1982, vast tracts of the world’s oceans have now fallen under the sovereignty and jurisdiction of

⁷⁰ Declaration of Joint Action to Counter Terrorism, (2015), Association of Nations, retrieved on 14.03.2016.

⁷¹ *Id. Art.101.*

⁷² *Kimball, Steve (2016). The Pyrates Way Magazine. The Pyrates Way, LLC. p. 64.*

⁷³ *Rediker, Marcus (1987). Between the Devil and the Deep Blue Sea: Merchant Seamen, Pirates and the Maritime World, 2015. Cambridge University Press. ISBN 0-521-37983-0.*

coastal States.⁷⁴ Piracy also extends to the operation of a pirate ship, which is a ship used for the purposes of committing pirate acts. However, by limiting the definition to acts committed for ‘private ends’ any actions taken for political motives are excluded.⁷⁵

To that end, the International Law on piracy does not apply to incidents occurring within a coastal State’s adjacent waters. The effect of this is that it has been left to those countries that have been faced with offshore pirate-type attacks and incidents of sea robbery within their jurisdiction to utilize their own criminal justice systems to police, patrol their waters and ultimately enforce their criminal laws through prosecution.⁷⁶

A limitation of article 101 above is that it confines piracy to the High Seas. As the majority of piratical acts occur within territorial waters, some pirates are able to go free as certain jurisdictions lack the resources to monitor their borders adequately.⁷⁷

Thus, a somewhat uneven legal regime has developed that depends upon the capability of and consistency in the fulfillment of these functions by directly affected States.⁷⁸

⁷⁴ *Id.*

⁷⁵ Langewiesche, William (2014). *The Outlaw Sea: A World of Freedom, Chaos, and Crime*. North Point Press. ISBN 0-86547-581-4.

⁷⁶ Girard, Geoffrey (2016). *Tales of the Pirates*. Middle Atlantic Press. ISBN 0-9754419-5-7

⁷⁷ *Id.*

⁷⁸ Security Council speaks out against piracy, armed robbery off coast. (2008, 2 June). UN News Centre. www.un.org.

1.3- History of Piracy

1.3(a): Ancient to Modern Traditions

Unfortunately, pirates have plagued seafarers for millennia. For instance, noted historians, Homer and Cicero wrote of incidents involving ancient Greek and Roman mariners, and several hundred years later, Western Europeans weathered Viking onslaughts during the Middle Ages.⁷⁹ The first recorded incidence of piracy dates to as early as the 14th century BC when sea peoples threatened Aegean and Mediterranean voyages. In classical antiquity (starting in 8th century BC),⁸⁰ the Illyrians, Tyrrhenians, Greeks, Romans, as well as the Phoenicians had been involved in piracy as pirates. In the 3rd century BC, Illyrian pirates were constantly raiding the Adriatic Sea, and thus conflicting with the mighty Roman Republic. Their activities were finally crushed after Rome conquered Illyria in 168 BC.⁸¹ In certain cases, piracy spiraled out of control.

With the Illyrians piratical attacks in 233 BC, the Roman Empire had to protect Italian and Greek traders from common enemies after pirates consistently attacked shipping routes. It took three intricate military campaigns to defeat the threat at sea. Yet thereafter, piracy didn't disappear from history,⁸² but continued to persist in various

⁷⁹ Cordingly, David (2015). *Under the Black Flag: The Romance and the Reality of Life Among the Pirates*. Harvest Books. ISBN 0-15-600549-2.

⁸⁰ Ivan R. Dee., "From ancient high seas pirates to 'road agents' and a host of other bush and mountain pass brigands, bandits have been with us for ages." p. 242. ISBN 9781566639088. Retrieved 2015-03-05.

⁸¹ Fukuyama F., (2014), "The End of History, The National Interest", Summer Edit 2009, p.4.

⁸² Huntington P. Samuel, (202015), The Clash of Civilizations? In Foreign Affairs, Summer2015, Vol. 72, No. 3, p.22, retrieved on 14.10. 2015 from Harvard University.

locations worldwide. England, as a sea faring nation, has historically had much jurisprudential experience related to piracy throughout its history; examples are the Offences at Sea Act 1536 (UK).⁸³

During the 1st century BC, pirates set up a large nation in Cilicia (Turkey) along the Anatolian Coast, threatening the trade of the Roman Empire in the Mediterranean. The great Roman emperor Julius Caesar was said to have been captured by Cilician pirates on a voyage across the Aegean Sea in 75 BC. He was released only after the payment of a huge ransom in the amount of fifty-talents of gold. It was said that after his release, he raised a fleet, captured the pirates and put them to death.⁸⁴

During the period of 258-264 AD, the Gothic pirates looted the towns along the Black Sea Coast and Aegean Coast and reached Cyprus and Crete. In 286 AD, Rome appointed a military commander to eliminate the Frankish and Saxon pirates. The Irish pirates were captured and enslaved by the famous Irish saint, St. Patrick, around 450 AD.⁸⁵

1.3(a)-1: The Middle Ages to the 19th Century

Pirates have been the subject of countless books, movies, plays, and have been stock features in animated cartoons since the advent of television in the 1950s. Howev-

⁸³ Peirates, Henry George Liddell, Robert Scott, "A Greek-English Lexicon", at Perseus (2014) p.189 ISBN 2381-96542-1100.

⁸⁴ Young J. Adam, (2017), *Contemporary Maritime Piracy: History, Causes and Remedies*; Institute of Studies: Singapore, p. 2 Vol.8 Edit 2017.

⁸⁵ Plutarch (*Caesar* 1.8-2) says this happened earlier, on his return from Nicomedes's court. Velleius Paterculus (*Roman History* 2:41.3-42 .), 2016.

er, do fictional pirates bear any resemblance to the real pirates of the Golden Age? This section explores the history of piracy and discussed famous pirates from centuries ago. Around the 8th century, Vikings⁸⁶ from Denmark and Norway sailed their vessels along Europe's coast attacking, raiding and burning other ships and stealing their valuables.⁸⁷ Considered as very brave and vicious pirates, Vikings were active in a wide area from Western Europe to Eastern Europe and to the coasts of North Africa. Centuries later, many Viking pirates attacked ships sailing to and from the New World.⁸⁸

Moorish pirates were also active in this period along the Mediterranean Coast. The Novgorodian pirates looted the cities on the Volga and Kama Rivers in the 14th century AD.⁸⁹ Pirates have occupied the Pacific and Indian Oceans and the Seven Seas for thousands of years. Other famous pirates during the Middle Ages were the Arabian pirates, Privateers, and the Barbary Corsairs. The Barbary pirates from North Africa were famous for their solidarity and successful attacks on merchant ships. Some of the first pirates stole from trade ships sailing in the Mediterranean and Aegean Seas.⁹⁰ They later sailed to West India and became members of the Buccaneer pirates who looted ships along the Caribbean Sea.

⁸⁶ Satkauskas R., (2014), Piracy at Sea and the Limits of International Law, *Aegean Review of the Law of the Sea and Maritime Law* (2014) 1: 217-235.

⁸⁷ Vikings, which translates to sea raiders, were the most popular pirates during the Medieval Age. They were mainly active during 8th to 12th century AD.

⁸⁸ Menkhaus, John, John Prendergast, and Colin Thomas-Jensen. 2015. "Beyond piracy next steps to stabilize piracy." *The Enough Project*. vol.53 Edit 2015.

⁸⁹ Mahan, Alfred, Thayer, Captain USN. 2015. "The influence of sea power upon history", 1660-1783. New York, NY: Hill and Wang Press, ISBN 2567-9567-01123 p.267-290.

⁹⁰ Stavridis, James G. ADM USN. 2015. "Sailing across the bridge." *Proceedings* (October): 17-20.

Buccaneers were considered the most powerful pirates who flourished during the Golden Period of piracy between 1620 and 1720.⁹¹ In the early 19th century, Chinese pirates emerged on the scene. They were active in the waters of Strait of Malacca, the Philippines, Singapore and Malaysia. Some of their threats were eliminated by the joint forces of the US Navy and the Royal Navy during 1860-70 AD.⁹²

1.3(a)-2: History of the Privateer

The earliest documented instances of piracy were in the 14th century BC,⁹³ when the sea peoples, a group of ocean raiders, attacked the ships of the Aegean and Mediterranean civilizations. Narrow channels which funnel shipping into predictable routes have long created opportunities for piracy, as well as for privateering and commerce raiding. From Captains Blackbeard and Morgan in the Caribbean, to the pirates of Barbary Coast in Africa and the famous “Pirate Queen” Cheng I Sao in Asia, the history of the sea is repeated with the often-romanticized accounts of the exploits of these iconic figures and their crews.⁹⁴

A vessel that pirates commonly used was the Privateer, a privately owned and armed ship commissioned by a government to make reprisals, gain reparation for speci-

⁹¹ Chisholm, Hugh, ed. (2014). "Barbary Pirates". *Encyclopedia Britannica* (11th ed.). Cambridge University Press.

⁹² Lucie-Smith, Edward (2015). "Outcasts of the Sea: Pirates and Piracy." *Paddington Press*. ISBN 9780448226170 .

⁹³ Shie, Tamara, Renee, 2016. Maritime piracy in Southeast Asia: The evolution and progress of intra-ASEAN cooperation. In *Piracy, maritime terrorism and securing the Malacca Strait*. Edited by Graham Gerard Ong-Webb, Ch 9, 163-189. Pasir Panjang, Singapore: ISEAS Publishing.

⁹⁴ Young, Adam J., and Mark J Valencia. 2013. "Conflation of piracy and terrorism: rectitude and utility." *Contemporary*. 1 August. ISBN 3890-1950-2204 p.109. Lampe, Christine (2015). *The Book of Pirates*. Gibbs Smith. p. 14. ISBN 4520-0918-5683.

fied offenses in time of peace, or prey upon an enemy in time of war. After a war, the temptation was great to continue this profitable business without authorization. During the wars between England and Spain in the late 16th century, treasure-laden Spanish galleons sailing from Mexico to the Caribbean were a tempting target for Privateers, and the distinction between privateering and piracy became difficult to draw. The Privateer ship's officers and crew were granted a share of the plunder taken from captured vessels.⁹⁵

Privateers had a Letter of Marque⁹⁶ which gave them permission to raid enemy ships. Similar to the role of a bounty hunter, a Privateer commander could turn the ship's crew over to his country. Those who had been captured faced charges and eventual punishment. Sometimes privateers became pirates after they saw all of the riches that had been acquired by the other pirates that had they encountered at sea.⁹⁷ Therefore, the Court made privateering a legitimate form of war-like activity by non-state actors (For a land-based parallel, compare to the association of bandits and brigands with mountain passes).⁹⁸

A Buccaneer was a 17th century pirate who attacked Spanish ships on the Caribbean Sea. These men sailed from England, Holland, and France. Although there is speculation of the origins of the word "Buccaneer," most likely the term comes from

⁹⁵ Lampe, Christine (2015). *The Book of Pirates*. Gibbs Smith. p. 14. ISBN 4520-0918-5683.

⁹⁶ Beal, Clifford (2015). *Quelch's Gold: Piracy, Greed, and Betrayal in Colonial New England*. Praeger. p. 243. ISBN 0-275-99407-4.

⁹⁷ Tortuga – "Pirate History – The Way Of The Pirates". Retrieved October 23,2014. ISBN 7690-1103-4527 p. 137.

⁹⁸ Geoffrey Parker, ed. (2016), *The World: An Illustrated History*, Times Books Ltd., p. 317.

the French, “Boucanier,”⁹⁹ Corsairs were French privateers who occupied the southern Mediterranean Sea. Working for the King of France in the Middle Ages, Corsairs attacked the ships of their country’s enemies. They very likely did this to get compensated for the economic hardships they encountered during times of war.¹⁰⁰ Historic illustrations include the waters of Gibraltar, the Strait of Malacca, Madagascar, the Gulf of Aden, and the English Channel, whose geographic configurations facilitated pirate attacks.¹⁰¹ In the 16th and 17th centuries, monarchs frustrated by Spain's dominance of the Caribbean, commissioned privateers to harass the Spanish fleet, thus helping to usher in piracy's Golden Age, an era when swashbuckling marauders like Edward (Blackbeard) Teach roamed the sun-splashed islands plundering gold and silver.¹⁰²

Despite the romantic overtones of “Golden Age,” and whatever treasure and fame involved, any man who became a pirate was considered an outlaw, and subject to being thrown into prison for a lengthy period, or being led to the executioner’s station. Captain William Kidd was put on trial for piracy, found guilty and executed in 1701. Blackbeard, whose real name was Edward Teach, was killed while trying to rob a navy

⁹⁹ Boot, Max (2016). "Pirates, Then and Now". *Foreign Affairs* Vol.88 (4): 94–107.

¹⁰⁰ Nigel Cawthorne (2015), *"Pirates: An Illustrated History"*, Arturus Publishing Ltd., 2015, p. 65.

¹⁰¹ Mark Kurlansky, *"A Biography of the Pirate That Changed the World"*. Penguin", 2015. ISBN 5982-1850-3829 p. 485.

¹⁰² Wombwell, A. James (202015). *"The Long War Against Piracy: Historical Trends."* Fort Leavenworth, Kansas: Combat Studies Institute Press. p. 204. ISBN 978-0-9823283-6-1.

ship. His head was severed from his body and hung from the navy vessel as a warning to others of his treacherous ilk.¹⁰³

Pirates apparently had their own system of professional “ethics.” For example, one cardinal rule was that a pirate should not steal from another crew member. Another was that women were not allowed to board ships. If pirates didn’t adhere to the rules, they were punished. Some pirate commanders sent offenders to deserted islands and left them there stranded. Others were tied to the mast of the ship and whipped mercilessly, while others were hanged, and their lifeless corpse thrown overboard.¹⁰⁴

1.3(a)-3: Modern Pirates

The issue of piracy has had such a profound impact throughout the ages that by the 16th century, jurists such as Grotius developed the concept that nationals who committed piracy on "terra nullius" (the high seas) had placed themselves beyond the protection of any state and were deemed "hostes humani generis" (enemies of the human race). Consequently, such offenders were to be tried by the courts of any state for the crime of piracy.¹⁰⁵

However, what has been until very recently neglected is that piracy did not end during the Spanish Reign, but continues to exist and thrive in the modern period with an estimated 5.9 merchant ships attacked for every 1,000 voyages. In 2014, there was

¹⁰³ *William III, 1698–99: An Act for the more effectual suppression of Piracy.* [Chapter VII. Rot. Parl. 11 Gul. III. p. 2. n. 5.], Statutes of the Realm: volume 7: 1695–1701 (2015), pp. 590–94. URL: <http://www.british-history.ac.uk/report.asp?compid=46966>. Date accessed: 16 February 2017.

¹⁰⁴ *Id.*

¹⁰⁵ Grotius, *De Jure Belli ac Pacis*, Volume II, chapter 20, §40.

approximately one pirate attack reported every thirty-one hours.¹⁰⁶ This was reaffirmed in "Re Piracy Jure Gentium" [1934] AC 586. Piracy Jure Gentium was defined later in article 15 of the High Seas Convention in 1958.¹⁰⁷ Even later, it was again reaffirmed in article 101 of the United Nation Convention on the Law of the Sea 1982.

By the 19th century, the Golden Age of piracy was over. Although there were still pirates around, the majority of them had vanished. However, piracy still exists in the world today. The most recent account was in 1996 when pirates attacked a fishing boat crew in the Philippines Islands.

1.3(b): Reasons People Become Pirates

The sudden increase of piracy can be attributed to several factors. Technology has made it possible to build bigger and more complex ships. One of the factors involved in this is the need for small crews manning these large advanced vessels. By doing this, these vessels are making themselves vulnerable to small groups of pirates wishing to board and take control over the ship, its cargo and crew.¹⁰⁸ Further, many men become pirates because they want to experience the freedom and benefits of a life of piracy. Pirates often recruit crew members from the ships they have captured; how-

¹⁰⁶ Pike, Luke Owen (2014). *A History of Crime in England: From the accession of Henry VII to the present time*. Smith, Elder & Company. p. 266.

¹⁰⁷ Kraska, J. (2015). "Coalition strategy and pirates." *Comparative strategy*, 28:3, pp.197-216, High Seas Convention in 1958.

¹⁰⁸ Leeson, Peter T. (April 13, 2015). "Want to Prevent Piracy? Privatize the Ocean". *National Review*, Vol.8 Edit 2015.

ever, on merchant or cargo ships, many crew members work under harsh conditions. Thus, some might say that being a pirate is better than joining a merchant's crew.¹⁰⁹

The lack of adequate diplomatic representation in areas where vessels fly flags of convenience, and poor countries with large coastlines that cannot afford and maintain adequate patrol of their territorial waters or adjacent high seas, are other grounds for acts of piracy.¹¹⁰ Another contributing factor is geography. In some cases, such as the Suez Canal, vessels must pass through a narrow straight between the Horn of Africa and the Arabian Peninsula. This, combined with forenamed factors, increases the risk of passing vessels being boarded by pirates which operate from Somali waters.¹¹¹ The distance for pirates to reach a ship is marginal, but poses a problem for those who wish to combat pirates, as there are different rules for the high seas and the territorial waters of a state, as in Somalia.¹¹²

Today's pirates occasionally have political reasons as a hidden agenda. They continue to intimidate their victims as they did during the Golden Age.¹¹³ As is the same for many other worldwide dilemmas, the international community is striving to find a common solution for certain piracy problems. It has been through Customary

¹⁰⁹ Stossel, John and Kirell, Andrew (May 8, 2014). "Could Profit Motive Put an End to Piracy?". ABC News.

¹¹⁰ A. Leroy Bennett & James K. Oliver, *International Organizations; Principles and Issues* (7th ed. 2016).

¹¹¹ Africa program and international law conference report- Piracy and legal issue: reconciling public and private interests-01-10-2015, Vol.38 p. 23-26.

¹¹² Consortium of International Organizations (August 2015). *Best Management Practices for Protection against Somalia Based Piracy* ISBN 978-1-85609-505-1. p.138-150.

¹¹³ Hickox, Rex (2017). "All You Wanted to Know about 18th Century Royal Navy". *Lu-lu.com*. ISBN 1-4116-3057-2. p. 16.

Law or special treaties to combat specific scenarios that have not yet appeared before.¹¹⁴

1.3(c): Resurgence of Violence

1.3(c)-1: Piracy off the Coast

The problem of piracy didn't end with the demise of the Golden age of Piracy, but remained extant in one form or another somewhere around the world. It grew rapidly during the last decade of the 20th century, and became a major problem for international commerce in the first decade of the 21st century. Today, there are several hot spots for modern piracy including the Gulf of Aden, off the Somali and Nigerian coasts, the Strait of Malacca, and the Indian Ocean.¹¹⁵

The hot spots of piracy today are the Indian Ocean, East Africa, and the Far East including the South China Sea, South America, and the Caribbean. In recent times, pirates have been very active in the waters between the Red Sea (particularly in the Gulf of Aden) and Indian Ocean, off the Somali coast, and in the Strait of Malacca.¹¹⁶

Since 2011, there have also been reports of pirate attacks on the Serbian and Romanian stretches of the international Danube River. According to records, worldwide losses due to piracy can be as high as 13 to 16 billion US dollars per year.¹¹⁷ In

¹¹⁴ "CNN's Zain Verjee reports on modern day piracy," 22 February 2014". *Edition.cnn.com*. 16 July 2014. Retrieved 27 March 2014.

¹¹⁵ Bandits at Sea: A Pirates Reader. NYU Press. p. 56. ISBN 9780814766781.(2014).

¹¹⁶ Towards a news of piracy: The Achille Lauro Incident, Heinonline—26 va. J. Int, 1 L .723, 2014.

¹¹⁷ Krane, Jim (March 19, 2015). "U.S. Navy warships exchange gunfire with suspected pirates off Somali coast". *The Seattle Times*. Retrieved January 18,2016.

recent times, there have been several incidences of brutal hijacking of ships off the Somali coast by Somali pirates that grabbed the global media headlines.

As a result, the US has started a multi-national effort to patrol the waters near the Horn of Africa to prevent future attacks on ships.¹¹⁸ The Strait of Malacca remains another hot spot for piracy today. In recent years, this area has seen a dramatic downturn in piracy due to coordinated patrolling by Indonesian, Malaysian, and Singaporean navy forces. There has also been an increased level of onboard security on ships. Other majority of piracy prone areas are the Caribbean Sea and Bay of Bengal in the Indian Ocean. Per reports, acts of piracy in the Indian Ocean are becoming more lucrative and violent, despite an anti-piracy EU naval force patrolling the area.¹¹⁹

1.3(c)-2: Recent Statistics Regarding Piracy

Although piracy is an international crime and has been believed by many to have disappeared from modern times,¹²⁰ however, according to current statistics, activities of pirates have still been found in many areas of the sea. Established by the International Chamber of Commerce (ICC) in 1981, the International Maritime Bureau (IMB) came into existence with the backing of the IMO, the world's foremost agency for exchanging and collecting information on maritime crime.

¹¹⁸ "Piracy is still troubling the shipping industry: report; Industry fears revival of attacks though current situation has improved," *The Business Times Singapore*. August 14, 2015.

¹¹⁹ Sánchez, Pablo Antonio Fernandez. *International Legal Dimension of Terrorism*. BRILL, 2013. p. 231.

¹²⁰ Thomas Buergenthal & Sean D. Murphy, *Public International Law in a Nutshell*, p. 211, West Group (3d ed. 2016).

However, per the IMO, it is estimated that piracy incidents are likely under-reported by a factor of two (meaning, they assume that for each attack that was announced, there were two additional attacks that were not announced).¹²¹ Moreover, it is likely that the statistics are subject to distortion as many smaller attacks went unreported. This mainly stems from two factors:

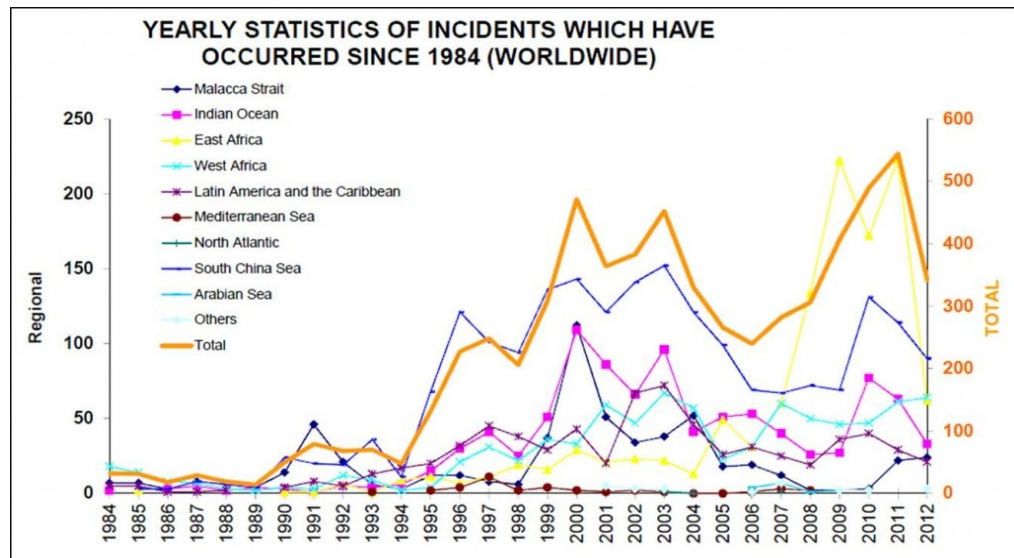
1. The increase in insurance premiums often outweigh the value of the claim for smaller attacks; and
2. Reporting a piracy attack is often time-consuming can lead to a delay of several days. Running sunk costs of an idle ship (up to \$25,000 per day), in many, especially smaller cases, it is cheaper not to report the incident.¹²²

Shown on the following graph, the International Maritime Organization's statistics on piracy show 1.751 incidents from 1984 to December 2012. The incidents in 2011 alone were the most significant increase of this international crime in nearly two hundred years.¹²³

¹²¹ Heller-Roazen, Daniel (2014). *The Enemy of All: Piracy and the Law of Nations*. Zone Books. ISBN 978-1890951948.

¹²² *William III, 1698–99: An Act for the more effectual suppression of Piracy*. [Chapter VII. Rot. Parl. 11 Gul. III. p. 2. n. 5.], Statutes of the Realm: volume 7: 1695–1701 (2014), pp. 590–94. URL: <http://www.british-history.ac.uk/report.asp?compid=46966>. Date accessed: 16 February 2015.

¹²³ BBC, France charges Somali 'pirates', Vol.15 Edit.2013 <http://news.bbc.co.uk/2/hi/europe/7355598.stm>, (Last visited, 09-20-2013).

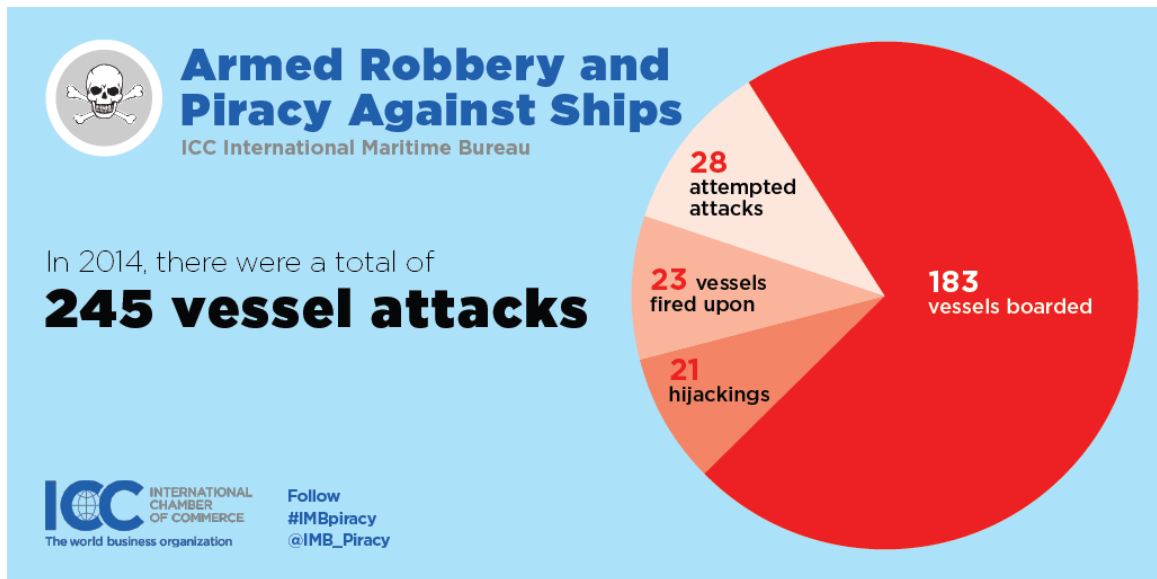


By the early 1990s, the number of attacks was becoming so problematic that in 1996 the International Maritime Organization of the United Nations (IMO) was charged with maintaining details of reported attacks and issuing official reports on a monthly, quarterly, and annual basis. The IMO began to produce annual reports in 1998 and monthly reports in mid-2000.¹²⁴

Since then, over 3,500 attacks have been documented through September 2014. Note: September is the latest month for which detailed attack data is available from the IMO. This is about the same period of the dramatic increases in attacks in Somalia with 111 attacks being reported in the media since then.¹²⁵

¹²⁴ Hill, J.R. (15. *The Oxford Illustrated History of the Royal Navy*. Oxford University Press. ISBN 0-19-860527-7. p. 157.

¹²⁵ Nelson and His Navy –“Prize Money,” *Historical Maritime Society*, Vol.7 part 1, 2014.



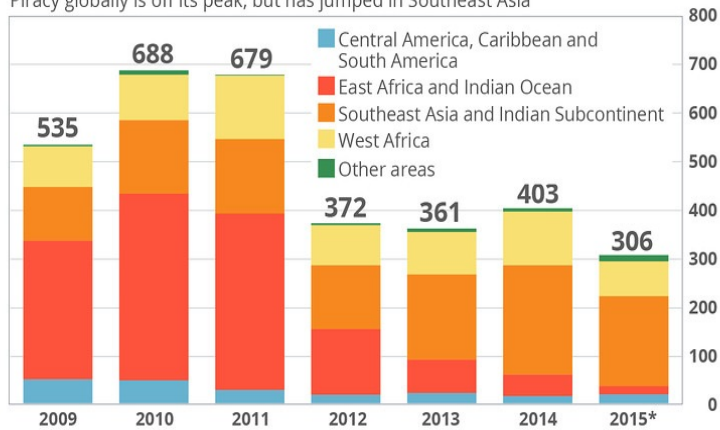
During 2009 through 2015, there were thousands of incidents involving piracy of which 42.5% took place in the Gulf of Aden. This includes actual and attempted attacks. Piracy seems to be focused in the following areas: South East Asia and the Indian Sub-Continent, Africa and Gulf of Aden, and South through Central America.¹²⁶ Piracy, however, is not confined to one specific region or regions. As on December 20th of 2014, four armed robbers boarded an anchored yacht and pillaged valuables and personal property of crew and passengers at Golfe de Porto Novo, Corsica.¹²⁷

¹²⁶ Bueger, C. & Saran, M.S. (2015). Finding a Regional Solution to Piracy: Is the Djibouti Process the Answer? Piracy Studies, Academic Research on Maritime Piracy, 18 August 2015.

¹²⁷ World Bank, 2015: "The Pirates of the world: Ending the Threat, Rebuilding a Nation", Washington: The World Bank, 2015.

Piracy attacks 2009-2015

Piracy globally is off its peak, but has jumped in Southeast Asia



*As of Sept. 11, 2015

Source: Bergen Risk Solutions

1.3(c)-3: *The Prosperity of Pirate Expansion*

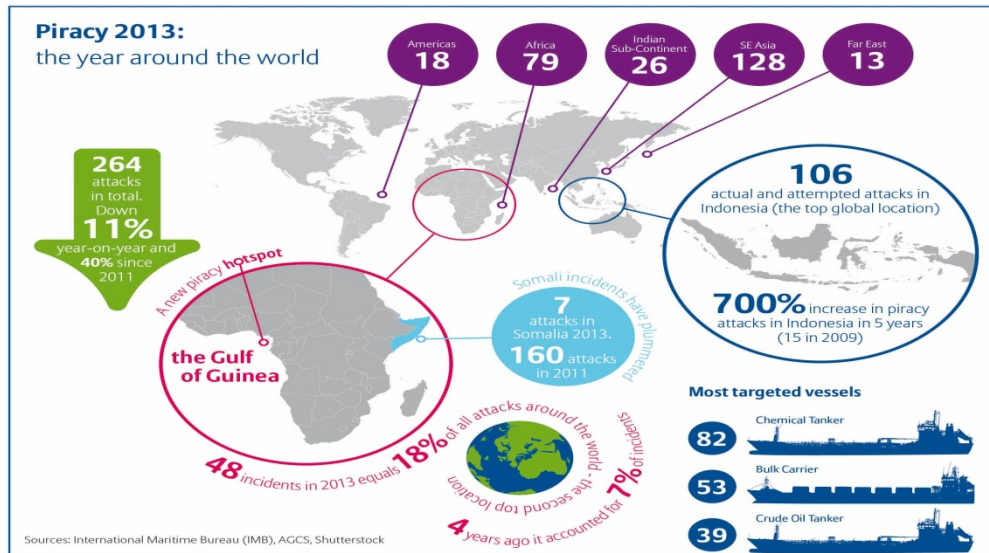
Near present-day Malaysia and Sumatra, an island that is one part of Indonesia lies near a narrow waterway called the Strait of Malacca. From at least the 1400s to the modern day, the Strait of Malacca has been a prime location for pirates to capture vessels. Nations like China occasionally had a naval force that confronted the pirates, but it was not strong enough to drive them out permanently.¹²⁸

By the mid-19th century, after years of increasing contact and trade in East Asia, three European powers, England, Denmark, and Norway, could control local pirate bands. The instances of piracy remained low through the 19th and well into the 20th century.¹²⁹ By the end of the 20th century and the beginning of the 21st, however, piracy was on the upswing again with sea robbers emerging from war-torn and economically depressed nations such as Somalia in Africa.¹³⁰

¹²⁸ "Shippers back private armed guards to beat pirates". Af.reuters.com. 15 February 2011. Retrieved 27 March 2014.

¹²⁹ Beloff, Jonathan R., 2015: "Piracy is Affecting Danger Development in the world," pp. 47-54, in: *Journal of Strategic Security*, Vol. 6, no. 1.

¹³⁰ John W. Miller (January 6, 2015). "Loaded: Freighters Ready to Shoot Across Pirate Bow" Vol.39 Edit 2015



1.4-Conclusion

This chapter started with the study of an overall scope of the concept of piracy. In addition to explaining the importance of pirate culture and trends, the chapter testified to the fact that the international community has never completely conquered worldwide piracy. It may seem that the study of history is intended to relive past losses, and therefore be a guide to resolving certain problems that seem interminable at the moment.

"Piracy jure gentium" is a crime under International Law and the law of nations. It is far from gone. International Law provides for means to define and conceptualize this particular crime in Article 101 of the Convention on the Law of the Sea 1982. There is still a lot of ground to cover. Despite this, the international community has, with an overwhelming majority, managed to anticipate new developments of piracy. This even led to the unanimous adoption of United Nations Resolution 1851 (2008).¹³¹

¹³¹ Marukaya Yu, "SeaLase Offers Shipping Companies Effective Counter to Pirates". Handy Shipping Guide. Retrieved 19 January 2015. Vol.3A Edit 2010

Yet, despite Customary Law, International Law and municipal law, the underlying problems have again appeared. Not only is it required that the international community acts against crimes like piracy, but also a more pro-active approach is deemed necessary such as cooperation among States. Regionalism despite globalization offers a myriad of possibilities to combat and prevent piracy but has not yet been fully exhausted. Since globalization is not a homogenous process, certain countries are not in the position to properly anticipate and combat piracy alone. The acceptance of aid by other States reiterates again that piracy is indeed part of "jus gentium." Despite the complexity of the problem, it also offers the international community new ways to cooperate closer on a common problem.¹³²

The above discussion has been aimed at gaining definition framework and a historical perspective of the current problems that occur in the hot spot maritime zone of piracy. This foundation of understanding should help the international community constitute solutions to problems that continue to lead to the conflict. Further discussion of the arguments will be reserved for the ensuing chapters.

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¹³² Phillips, Roger L. (25 November 2014). "Private Security Liability under the Alien Tort Statute". piracy-law.com. Retrieved 22 December 2014.

Chapter 2

Sources of Piracy Under International Law

2.0-Introduction

In many sectors of the high seas, pirate attacks have increased significantly, thus creating sometimes formidable challenges to ensuring safe passage for maritime traffic.

Maritime piracy affects major shipping lanes, jeopardizes the flow of commerce and puts at risk the lives of seafarers and merchant seamen from all over the world, of whom hundreds are taken captive each year, and number maimed or outright slaughtered.¹

In addition, we must consider the financial losses to ship owners, increased insurance premiums and security costs, which are funneled on to consumers, increased costs of products, and damage to the marine environment. Pirate attacks have other

¹ International Maritime Organization, International shipping facts and figures- Information resources on trade, safety, security, environment, London: Maritime Knowledge Centre, 2014, at p.7

widespread ramifications, which include preventing humanitarian assistance.² In a partial response, by the early 1980s the international community had reacted by codifying its position on maritime piracy in the United Nations Convention on the Law of the Sea (UNCLOS, 1982), in which UN members agreed on a formal definition of piracy and detailed the conditions under which States and vessels could and should respond.³

Piracy as a crime under International Law is an exception to the general rule of what on the global level constitutes a crime. Piracy's inclusion under International Criminal Law derives from the fact that emphasis is put on the principle of State sovereignty⁴ and the control it has over its territory. This could also be a contributing factor to defining piracy as a crime, which is as it should be. The result of the classification is that all international parties gain without conceding any rights.⁵ However, partly because of principles of State sovereignty, transnational organized crime is difficult to suppress, which often frustrates combatting transnational crime due to formalistic rules of jurisdiction that vary among States.

Another factor that plays a pivotal rule is the rule of law. Although most nations provide a penal code addressing piracy in domestic law, enforcing such laws can be an onerous matter. Despite the universality principle, the law of nations, Customary Law

² International Maritime Bureau. (2015). Piracy and Armed Robbery Against Ships: Annual Report 2015. www.icc-ccs.org/imb.

³ Gosse, Philip (2014). *The Pirates' Who's Who*. BiblioBazaar, LLC. ISBN 1-4346-3302-0. p. 251.

⁴ The concept of State Sovereignty is fundamental. States are physical entities that comprise a territory, a citizen population, a legal system, and security and economic institutions. This definition leads to the inference that Sovereignty relates to the State's capacity to govern itself and set its own rules by which it is to be governed.

⁵ Bailet, F.N., Crickard, F.W., & Herbert, G.J, *Integrated Maritime Enforcement: A handbook*, Halifax: Dalhousie University, 2014, at p.6

and UNCLOS 1982, there are still many areas that are not properly addressed.⁶ Despite ever-increasing globalization, International Law that addresses piracy has not developed to the point that it can handle piracy through universal enforcement.⁷ On the contrary, globalization has become one of the factors that work both for and against combating piracy. As the use of technology has enable States to organize their functions more effectively, so have pirates found different methods by which to setup transnational criminal networks.⁸

This second chapter, which consists of two sections, discusses in the first part, the histories of the maritime piracy codification and private entities. The following part describes how universal International Law may be applied to piracy. The rest of this chapter focuses primarily on the related international conventions that address piracy.

2.1 History of Piracy Codification and ‘Private Ends’

(International Regimes to Govern Maritime Piracy)

Ideas relating to best to regulate or eliminate piracy are nearly as old as piracy itself. Heinze traces the origins and evolution of the earliest legal principles pertaining to piracy. He presents conventional accounts from the Roman Republic, quoting Cicero who defined pirates as *hostis humani generi*, enemies of all mankind.⁹ Cicero viewed

⁶ Hirsi, A., Somali Sea-Piracy: Business model or resource conflict?, *Wardheer News*, 2013, at p.22.

⁷ Ayto J., *Word origins: the hidden histories of English words from A to Z*, London: A&C Black Publishers , Ltd, 2015, at p.379.

⁸ Vallar, C., Notorious pirate havens part 3: UN., 2014, at <http://www.cindyvallar.com/havens3.html>.

⁹ Leeson, P.T., *The invisible hook: the hidden economics of pirates*, New Jersey: Princeton University Press, 2013, at p.8.

piracy “not simply as an act committed against individuals, but as an offense against the community or nation as a whole.”¹⁰ Cicero’s sweeping perspective might be grounded in the notion that in as much as the high seas serve as arteries connecting far-flung areas of the globe, over which sea faring vessels deliver commodities and transport passengers and merchants among nations, the evils of piracy inevitably affects each and every nation.

It has been constantly contested, however, whether Cicero was really the first to paint the treacherous phenomenon of piracy with such a broad brush. Nevertheless, such an encompassing perspective leads to the understanding that pirates, as enemies of humanity, were subject to prosecution the domestic law of any nation.¹¹ Therefore, arises the notion under the principle of universal jurisdiction, any state has the right to prosecute piracy on the high seas under its domestic laws regardless of the exact location of the crime or the accused person’s nationality.¹²

The first law specifically governing the issue of piracy on the national level was the 1698 English Act on Piracy.¹³ When piracy became more an issue of transnational commerce and transportation, it moved from the domestic legal domain to the international level. The first document in International Law that governed piracy

¹⁰ The International Maritime Bureau definition is broader: ‘The act of boarding any vessel with intent to commit theft or any other crime... and with the intent or capacity to use force in furtherance of that act.’

¹¹ Keucheyan, R., Spectralité Pirate, at <http://www.scribd.com/doc/27065741/6881-Pirate-Spectrality>

¹² Hiris, A. (2014). Somali Sea-Piracy: Business model or resource conflict? *Wardheer News*. (Retrieved July 26, 2015 from http://www.wardheernews.com/Articles_2014/Sept/15_Ahmed_Hirsi_Somali_Piracy.pdf).

¹³ Oceans beyond Piracy, The economic costs of piracy 2015, One Earth Foundation, p.1

was the *1856 Treaty of Paris*.¹⁴ Numerous international agreements followed: The *1889 Montevideo Convention* accepted the principle that the suppression of piracy was the responsibility of mankind. The *Nyon Agreement of 1937* defined the unidentified attacks in the Mediterranean as ‘acts of piracy.’¹⁵ However, the most important treaty to codify the International Law of piracy was the *1958 Geneva Convention on the High Seas*. This Convention contains eight provisions concerning the suppression of piracy on the high seas.¹⁶ Additional international conventions and mechanisms have emerged over the course of the last sixty years. The following section details four broad international regimes or institutional bodies, public and private, that currently seek to govern the phenomenon of maritime piracy, and explores the areas in which they overlap or compete.¹⁷

2.1.1 League of Nations Committee of Experts on International Law Draft Provisions

The *Draft Provisions for the Suppression of Piracy* were submitted by Matsuda¹⁸ in 1926 as part of the League of Nations’ attempts to progressively codify International Law, and is certainly far removed from the adoption of the *Harvard School Draft Con-*

¹⁴ Lang, J., Report of the Special Adviser to the Secretary-General on Legal Issues related to Piracy off the Coast, January 18, 2016, at 13.

¹⁵ Homan, K. & Kamerling, S., Operational challenges to counterpiracy operations, in Ginkel, B. & Putten, F.P. (Eds), *The International Response to Somali Piracy, Challenges and Opportunities*, 2014, The Netherlands: Martinus Nijhoff Publishers, p. 89.

¹⁶ Ministers Responsible for Emergency Management, *An emergency management framework*, January 2013: Public Safety, at p. 4, (Zou 2013: 324).

¹⁷ Bailet, F.N., Crikard, F.W., & Herbert, G.J., *Integrated Maritime Enforcement Handbook*, 2014, Halifax: Dalhousie University, p. 11.

¹⁸ Committee of Experts on International Law Draft Provisions.

vention 1932 (HSC) and eventually *The United Nations Convention on Law of the Sea 1982* (UNCLOS).¹⁹

Indeed, not many States responded to the Matsuda Draft, and the few comments received “did not evidence either interest or enthusiasm for the topic and were disparate.”²⁰ The project was eventually dropped due to difficulties in reaching agreement and a perceived unimportance in piracy codification.²¹ However, the draft does represent the first stage within the codification process, and importantly the origin of the term ‘private ends’ within the process, which has persisted to this day through each attempt at codification. As will be seen in the discussion on the HSC and the International Law Commission Draft, and The UN Conferences on the Law of the Sea (ILC Draft) Articles, a spectrum of meanings can be attributed to ‘private ends.’²²

Thus if ‘private ends’ is used in the same context, for the same purposes, then the origins of that term should help determine whether the requirement of an undertaking for private ends excludes political activity from the international piracy framework.

However, if during the development of the customary definition of piracy (culminating in UNCLOS Article 101), the development departed from the original meaning applied in the Matsuda Draft, then clearly it would be of limited use. Such a depart-

¹⁹ United Nations Office on Drugs and Crime, Principles and framework for an international classification of crimes for statistical purposes, Report of the UNODC/UNECE task force on crime classification to the conference of European statisticians, June 2015, at 7

²⁰ *Id.*

²¹ IMO, LEG 98/8/3, Piracy: elements of national legislation pursuant to the United Nations Conventions on the Law of the Sea, 1982, 18 February 2014, paragraph 5

²² In the International Law Commission (ILC) commentary on the draft article, the meaning of “A place outside the jurisdiction of any State” is an island of *terra nullis* or the shores of unoccupied territory.

ture is not evident in the continued use of ‘private ends.’²³ Although the ILC Draft Articles commentary only refers to the HSC, the Matsuda Draft was used as an authority on politically motivated violence during the ILC discussions on ‘private ends.’²⁴

The Matsuda Draft adopts a clearly private-political distinction and not one that turns on public power or state sanctioning. This distinction is the test underlying Matsuda’s use of ‘private ends.’ Article 1 of the Draft Provisions for the Suppression of Piracy provides:

1. Piracy occurs only on the high seas and consists in the commission for private ends of depredation upon property or acts of violence against persons. It is not involved in the notion of piracy that the above-mentioned acts should be committed for the purpose of gain, but acts committed with a purely political object will not be regarded as constituting piracy.

Politically motivated violence did not qualify as piracy in Matsuda’s Draft; it was the realization of the “important consequences which follow upon the commission of that crime. In summary, it was considered that such criminals should be subject to the ordinary rules of jurisdiction because they would not be classified as “enemies of the community of civilized States.”²⁵ Political-motivated violence would not indiscriminately target vessels or be a threat to all States and the security of commerce, to which piracy

²³ See LOSC, article 101.

²⁴ United Nations, Yearbook of the International Law Commission 1956, Volume II, Documents of the 8th Session including the report of the Commission to the General Assembly, 1957, New York: United Nations, article 39 commentary, para 1(v) at p.282.

²⁵ Act n°94-589 of 15 July 1994 concerning modalities for the exercise of national police powers at sea, as amended, Article 1. I, Act n° 2013-14 of January 2014 concerning measures against piracy and the exercise of national police powers, Article 1.

is a crime against all nations. Therefore, it was not a crime against mankind, which could be subject to the jurisdiction and punishment of mankind.²⁶

The criteria that would constitute purely political objectives were not elaborated, nor was any examples provided. We may first conclude that the exception did not rest on whether the violence was State sanctioned, and secondly that the exception was very narrow.²⁷ It is better, in laying down a general principle, to be content with the external character of the facts without entering too deeply into the delicate question of motives. This was the reason offered for rejecting a personal acquired criterion, but it would be equally applicable to establishing political motives. Thus, it would need to be clear that the action was solely political, the absence of which would point to violence for private ends.²⁸

2.1.2 The 1932 Harvard Law School Draft Convention (HSC)

The HSC, despite its status as an academic endeavor, was prompted by the League of Nations' work and had a major impact on piracy regulations development throughout the 20th Century.²⁹ Since the HSC was the basis of the ILC's work,³⁰ the draft, includ-

²⁶ Act n°94-589 of 15 July 1994 concerning modalities for the exercise of national police at sea, as amended, Article 1. II (1), Criminal Code, as amended, articles 224-6, 224-7 and 224-8.

²⁷ Defence Code Act, article L1521-2, Act n°94-589 of 15 July 1994 concerning modalities for the exercise of State policing powers at sea, as amended, Article 2, Act n° 2013-14 of January 2014 concerning measures against piracy and the exercise of national police powers, article 1. The hierarchical superiors are either the Maritime Prefect, or the Government official in charge of State action at sea when overseas, or nominated civilian or military command in an international context.

²⁸ United Nations, Report of the Secretary-General on specialized anti-piracy and other States in the region, United Nations Security Council S/2014/50, 20 January 2014, paragraph 87.

²⁹ Ministers Responsible for Emergency Management, An emergency management framework, January 2013, Ottawa: Public Safety Canada, at p. 4. The definition of prepared-

ing the ‘private ends’ requirement was adopted by the ILC. The ILC Draft Articles formed the basis of the HSC and the following UNCLOS’s definition of Piracy.³¹ The ILC Draft Articles commentary noted that:

In its work on the articles concerning piracy, the Commission was convention of nineteen articles with commentary, drafted in 1932 under the direction of Professor Joseph Bingham. In general, the Commission was able to endorse the findings of that research.³²

Even though the definition of piracy is the most complicated article to draft and the chaos of expertise opinion at the time, the draft is the result of analysis and extensive research. The HSC draft reflects the most common views on piracy as observed from the state practice perspective over the centuries.³³

The collection of piracy laws and doctrinal debate at that time enabled the HSC drafters to carry out the most extensive discussion and evaluation of the term ‘private ends’ seen to date, the findings of which were generally endorsed by the ILC and car-

ness, prevention and mitigation, response and recovery in the emergency management context can be adapted to the context of maritime piracy and armed robbery against ships.

³⁰ The International Law Commission Draft and UN Conferences on the Law of the Sea.

³¹ Presently 8 States and the Holy See are parties to the HSC but not to UNCLOS (Afghanistan, Cambodia, the Holy See, Iran (Islamic Republic of), Israel, Malawi, Thailand, United States of America, Venezuela). A further 23 States are parties to neither (Andorra, Azerbaijan, Bhutan, Burundi, Democratic People’s Republic of Korea, Ecuador, El Salvador, Eritrea, Ethiopia, Kazakhstan, Kyrgyzstan, Libyan Arab Jamahiriya, Liechtenstein, Niger, Peru, Rwanda, San Marino, Syrian Arab Republic, Tajikistan, Timor-Leste, Turkey, Turkmenistan, United Arab Emirates, Uzbekistan).

³² Raymond, C.Z., Piracy and armed robbery in the Malacca strait: A problem Solved, *Naval War College Review*, Summer 2013, Vol.62, No.3, at 33-34.

³³ Hogan, J.P. & Chapman, L., International Ship and Port Facility Security (ISPS) Code –What does it mean for fishing vessel security? SPC Fisheries Newsletter #113 – April/June 2015, at p.24.

ried out through the HSC. The ILC and UNCLOS drafters could have commented or demonstrated a different view on ‘private ends,’ but this does not appear to have been the case.³⁴

Those who argued for an expansive view of piracy, based on the lack of state sanctioning, look to the particular purpose and historical context of the Harvard Draft. The term of private ends was included for the sole purpose of excluding civil-war insurgents;³⁵ this means the “acts by unrecognized insurgents who limited their attacks to the state from which they were seeking independence.” The HSC similarly included ‘private ends’ for such a purpose. This is because the insurgents who attack the ships of their state were the one measure to gain independence.³⁶

This would be a public end, which obviously threatens the state to which independence is sought, and not the community of nations at large. This historical exception which the HSC drafters tried to include is based on the objective test of the ships targeted by the insurgents, not the subjective intentions of the actor.³⁷

The HSC commentary focuses on the issues of insurgency, and the exception to Article 3 appeared to apply to all cases of wrongful attacks on person or property for

³⁴ A VPD is a team of military personnel of a State that accompanies a merchant ship to protect it against piracy attacks. Generally, a VPD embark on board a merchant ship that flies the flag of their nation of origin.

³⁵ The Atlantic Council, *Managing the Global Response to Maritime Piracy*, Report of the Atlantic Council Counter-Piracy Task Force, 2014, at p.6.

³⁶ Bailet, F.N, Crickard & Herbert, G.J, *Integrated Maritime Enforcement*, A handbook, Center for Foreign Policy Studies, Dalhousie University at p.11. These authors defined the notion of surveillance, monitoring and control as follows: (1) Surveillance consists of detecting and notifying a State of conditions, activities, or events of interest within its area of jurisdiction; (2) monitoring is the systematic observation of specific conditions, activities, or events of interest within a State’s maritime jurisdiction; (3) control is the execution and rendering effective of international and national rules and regulations.

³⁷ *Oceans Beyond Piracy*, The economic cost of piracy, 2014, p.14

political ends, whether they are made on behalf of States, on behest of recognized belligerent organizations, or by the agency of unrecognized revolutionary bands.³⁸ Thus the private ends qualification was formulated to deal with only insurgency attacks on state vessels. This is the only form of ‘political end’ that falls outside the definition of piracy, to be dealt with in customary International Law.³⁹ Kevin Heller points out, however, in his comment on Article 16 of the HSC, which deals with cases falling beyond the scope of piracy, that the Draft did not adopt a limited list approach.⁴⁰ Although designed primarily for such cases, it covers all non-piratical yet unjustifiable attacks for public or private ends on persons or property under the protection of a state on the high seas.

Article 16 covers “inter alia” the issue of illegal forcible acts for political ends against foreign commerce, committed on the high seas by unrecognized organizations. Article 16 goes over the illustration provided in Article 3, but there is no indication that the article is limited to these cases. This suggests that political violence by unrecognized organizations, and not just insurgents, could fall within Article 16, which covers the cases that do not qualify as piracy under Article 3.⁴¹

The conclusion that such an exclusion is more about the class of vessel as a legitimate target for insurgents, rather than their motives, seems not strong enough. The

³⁸ Brown, J., *Pirates and Privateers: Managing The Ocean’s Private Security Boom*, Lowy Institute For International Policy Analysis, 12 September 2013, p.3, 5 & 8.

³⁹ *Oceans Beyond Piracy*, Human cost of piracy 2013, June 2014, p. 12.

⁴⁰ Chalk, P., *Private Maritime Security Companies (PMSCs) and Counter-Piracy*, Paper presented at the second United Arab Emirates Counter Piracy Conference, Dubai, June 2015, p.2.

⁴¹ *Id. Art. 16*

academic writings referenced by the HSC drafters restrict the exception to insurgents attacking the vessels of the state of which they desire to be independent, and this is presumably the better view they offered to support the presumption.⁴² However, the HSC neither distinguish between acts against an innocent state vessel, and acts against a particular flagged vessel as a legitimate target; nor between groups targeting a single government and affecting multiple States.⁴³ The rationale for exclusion is rather that,

- (a) there is no reasonable justification for extending universal jurisdiction,
- (b) such acts would not fall indisputably under the common jurisdiction by traditional piracy law, and
- (c) such cases often involve serious political considerations that could direct the action of the offended state.⁴⁴

Theoretically, therefore, if the list of contentious cases is not exhaustive, and comparable cases of purely politically motivated violence fulfilled the rationale above, it would not be under 'private ends.' Insurgency is the principal issue set out to consider and address, but other violence for non-private ends that is not state sanctioned could exist.⁴⁵

⁴² 9 Rider, D., Military Protection Journal 'Put together at Speed' is no solution to piracy', 3rg Excellence in Security, Vol.124, 10 October 2013.

⁴³ Oceans Beyond Piracy, Introduction to Private Maritime Security Companies (PMSCs), One Earth Foundation, 2014, at p.8 available at http://oceansbeyondpiracy.org/sites/default/files/pmsc_map_final_6.pdf. The 11 flag States authorizing the use of PCASP are Cyprus, Finland, Germany, Greece, Hong Kong, India.

⁴⁴ Homan, K. & Kamerling, S., Operational challenges to counter piracy operations, in Ginkel, B. & Putten, F.P.(Eds), *The International Response to Somali Piracy, Challenges and Opportunities*, 2014, The Netherlands: Martinus Nijhoff Publishers, p.74.

⁴⁵ Wizardias, India, Japan and China entered into a Pact called Shade, Current Affairs, January 2013, at p.12 available at <http://wizardias.com/Download/January%202013.pdf>.

In summary, the HSC restricts piracy to those acts carried out for private ends. Like the Matsuda Draft, it considers political ends not equivalent to private ends. They are on the opposite side; one is excluded public ends, which all the offended state to prosecute under the ordinary jurisdictional rules of International Law.⁴⁶ The cases of acts committed for political or other public ends are covered by Article 16, according to which, whilst state sanctioned violence would not be piracy, there is no indication that this is the only conduct that would not qualify. Insurgents were the focus of discussion and the origin of the private ends element, but the commentary contemplates other unrecognized organizations using force for political ends that would not be piracy in nature.⁴⁷

Although environmental activists were certainly never considered, the reason of excluding insurgents could equally apply. Piracy is a special common basis of jurisdiction, and we shall consider in the discussion below whether reasonable justification exists for the application of universal jurisdiction.⁴⁸ The state practice discussion would suggest such cases do not fall undisputedly under common notions of jurisdiction. Finally, the discussion highlights the serious political considerations that may have influenced the offended state.⁴⁹

⁴⁶ *Id.* Article 16.

⁴⁷ *Id.*

⁴⁸ Bueger, C. & Saran, M.S., Finding a Regional Solution to Piracy: Is the Process the Answer? Piracy Studies, Academic Research on Maritime Piracy, 18 August 2013.

⁴⁹ Leeson, P.T. (2014). *The Invisible Hook: The Hidden Economics of Pirates*. New Jersey: Princeton University Press.

2.1.3 The International Law Commission Draft and the UN Conferences on the Law of the Sea

The *International Law Commission Articles Concerning the Law of the Sea with Commentaries* is an indispensable measure in interpreting the HSC. The UNCLOS piracy provisions were adopted from that convention.⁵⁰ The Commission stated as follows:

The reports of Special Rapporteurs and the related research projects directed to States are indispensable for the following reasons: (i) they are a critical component of the process of consulting States and obtaining their views; (ii) they assist individual States in the understanding and interpretation of the rules embodied in codification conventions; (iii) they are part of the preparatory works of such conventions, and are frequently referred to the diplomatic correspondence of States, in argument before the International Court of Justice and by the Court itself in its judgments;⁵¹

The ILC Draft Articles generally adopted the research conducted by the Harvard Draft. This is specifically mentioned in the Piracy Section. However, whether general agreement includes the HSC interpretation on private ends, and whether ‘private ends’ *does not* include political motivation is still unclear.⁵² The Matsuda Draft was discussed during the sessions approvingly and detail used in the commentary is acquired from that

⁵⁰ Rider, D. (2015). Military Protection ‘*Put together at Speed*’ is no solution to piracy. 3rg Excellence in Security. Retrieved October 20, 2015.

⁵¹ *Id.*

⁵² United Nations. (1957). Yearbook of the International Law Commission 1956, Volume II, - Documents of the 8th Session including the report of the Commission to the General Assembly. New York: United Nations. Retrieved August 15, 2013 from [http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes\(e\)/ILC_1956_v2_e.pdf](http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes(e)/ILC_1956_v2_e.pdf).

draft.⁵³ However, the political exception in the Matsuda Draft that went into the description is not featured in the commentary.

This omission has led some authors to suggest that such an exception was not accepted.⁵⁴

- i) on the possibility of piracy driven by hatred or revenge is immediately followed by
- ii) the acts must be committed for private ends purpose.⁵⁵ This does not appear to be a very convincing argument.

Thus, it appears that commentary is making two distinct points. Firstly, an intention of robbery (*Animus Furandi*) is not required,⁵⁶ and secondly, the act must be committed for private ends. If private ends were non-political, the fact that commentary does not mention a political exception cannot be taken as rejecting the previous codification attempts.⁵⁷ On the contrary, in view of the lack of convincing evidence, one must consider that the ILC approval and references to previous codification efforts extend to the

⁵³ Vallar, C. (2014). Notorious pirate havens part 3: Matsuda. Retrieved July 29, 2014 from <http://www.cindyvallar.com/havens3.html>.

⁵⁴ Angus Konstam (2015) *Piracy: The Complete History* p. 313. Osprey Publishing. Retrieved October 11, 2015.

⁵⁵ As many States have not had historically, and still do not have laws adequately criminalizing piracy. See: Joseph W. Bingham (reporter), 'Harvard Research in International Law: Draft Convention on Piracy', *AJIL Sup* 26 (1932), 755–756, 760. This work remains relevant as it influenced the International Law Commission's drafting of relevant treaty provisions, which largely endorsed the Harvard findings: [1956] II YbILC, 282. On the modern position see Laurent Lucchini and Michel Voelckel, *Droit de la mer*, Tome 2, vol. 2 (Pedone, 1996), 158-9).

⁵⁶ Menefee, S. (1996). *Trends in Maritime Violence*. Jane's Information Group. ISBN 0-7106-403-9.

⁵⁷ Langewiesche, William (2014). *The Outlaw Sea: A World of Freedom, Chaos, and Crime*. North Point Press. ISBN 0-86547-581-4.

discussions on political violence.⁵⁸ Indeed, this is the position taken by Czechoslovakia, which criticized the International Law Commission for failing to include piracy committed for political ends when the draft being discussed at the negotiations.⁵⁹

The Czech proposal was part of many criticisms that pointed to a broad interpretation of piracy that has never been found in International Law. Other States rejected the Czech interpretation of International Law. The only majority change brought by the ILC Draft Articles is the addition of “any illegal acts” to the HSC definition. The addition is understood to broaden the conduct that would fall under the definition of piracy, yet the term ‘illegal’ is unclear and open to interpretation.⁶⁰ It has been suggested that the term “emphasize[s] that the act must be dissociated from a lawful authority” in supporting of the public-private theory of private ends. However, the link between the two phrases is not explained. It seems difficult to determine whether the term “illegal” requires that piracy not include privateers sanctioned by Governments.⁶¹

The political exception theory does not suggest that the action would be legal. It is reasonable for the action to be illegal (non-state sanctioned) but still not satisfy the private ends requirement due to its political nature. Finally, the difference between the UNCLOS definition and that of the HSC merely confirms the customary definition.⁶²

⁵⁸ Heller-Roazen, Daniel (2013). *The Enemy of All: Piracy and the Law of Nations*. Zone Books. ISBN 978-1890951948.

⁵⁹ Lucie-Smith, Edward (1978). *Outcasts of the Sea: Pirates and Piracy*. Paddington Press. ISBN 9780448226170.

⁶⁰ *Dangerous Waters, Modern Piracy and Terror on the High Seas*, by John S. Burnett. Dutton, 2013, Plume, 2013–2014, New York. (ISBN 0-452-28413-9).

⁶¹ *Maritime Piracy and Anti-Piracy Measures*. By: Herrmann, Wilfried. Naval Forces, 2014, Vol. 25 Issue 2, pp. 18–25, 6p; (AN 13193917).

⁶² *Patriot Pirates: The Privateer War for Freedom and Fortune in the American Revolution* by Robert H. Patton. New York: Pantheon Books, c2015. ISBN 9780375422843.

One might consider that reenacting rules of law without debate rarely provides any degree of enlightenment about the elements of the private ends. However, the private ends requirement was maintained despite academic references to broaden the definition by deleting ‘private ends.’ States were not willing to enlarge the scope of the piracy definition.⁶³ Furthermore, for similar reasons, the inaction is due to the failure of States to define terrorism under International Law. At the time of the HSC, there was a disagreement among experts as to what constituted piracy, yet the drafters with a minimum consensus on the Matsuda Draft that solely relied on political ends fell beyond the scope of piracy, to be dealt with by the general jurisdictional rules.⁶⁴

The limitation of this were never expanded or established beyond insurgent attacks for political ends. By the time of the UNCLOS drafting, the problems of political activity at sea and the doctrinal debate would become apparent, yet the drafters still did not address the issue. Absent a workable definition of terrorism, the grey area of politically motivated violence at sea encountered similar insecurity with States unwilling to delineate the point at which the suspects should be under the jurisdiction of any nation.⁶⁵

The exact act of politically motivated violence by private individual organizations is unclear. However, the fact remains that solely political acts perpetrated against

⁶³ Piracy: Out of Sight, Out of Mind? Goorangai, RANR Occasional Papers, August (2016) Royal Australian Navy.

⁶⁴ Terror on the High Seas. By: Koknar, Ali. Security Management, June 2014, Vol. 48 Issue 6, pp. 75–81, 6p; (AN 13443749).

⁶⁵ Rogue Wave: Modern Maritime Piracy and International Law, Article published on the electronic magazine The Culture & Conflict Review of the United States Naval Postgraduate School, Monterey, California by Commander Osvaldo Peçanha Caninas Article in NPS site

a state(s) are not within the definition of piracy, although the exact scope of this is still unclear.

2.2 The Universality Principles Dealing with Piracy

Several United Nations instruments address piracy, the most important of which are the following:

*Convention on the High Seas, the Convention on the Law of the Sea 1982 (LOS Convention or UNCLOS) and the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation 1988 (SUA Convention) with its Protocol 2005.*⁶⁶

In recent years, several regional cooperation regulations have been established to combat piracy from a regional perspective. The *Regional Cooperation Agreement on Prevention and Suppression of Piracy and Armed Robbery against Ships in Asia (ReCAAP)* has been adopted by sixteen Southeast Asian States. Under this agreement, an anti-piracy center was established in Singapore. The center gathers information on pirate activities and shares it with other State parties.⁶⁷

Furthermore, several regional institutions and authorities, such as the Comité Maritime International (CMI), the Baltic and International Maritime Council (BIMCO), the International Chamber of Shipping (ICS), Interpol, the International Group of P&I Clubs (IGP&I), the ICC International Maritime Bureau (IMB), the International Maritime Organization (IMO) and the United Nations (Office of Legal Af-

⁶⁶ Maritime Piracy and Anti-Piracy Measures. By: Herrmann, Wilfried. Naval Forces, 2014, Vol. 25 Issue 2, pp. 18–25, 6p; (AN 13193917).

⁶⁷ Pirates, Fishermen and Peacebuilding – Options for Counter-Piracy in Somalia. By: Bueger, Christian, Stockbruegger, Jan and Werthes, Sascha. Contemporary Security Policy, 2016, Vol. 32, No. 2.

fairs/Division for Ocean Affairs and the Law of the Sea) have begun establishing their own anti-piracy regulations.⁶⁸

Whereby these regulations are soft-law regulations and non-binding, their establishment can influence existing hard law conventions and provide guidance for further legal developments. However, along with these various international conventions, and soft law treaties that have been recently propagated, the question is whether these regulations are addressing all legal problems attendant to combatting modern-piracy and terrorism at sea.⁶⁹

The aim of two Conventions, the UNCLOS and SUA requires States to create offenses under their law and provide a seamless international criminal law framework that reduces the number of safe havens for those who commit acts covered by these two Conventions. This goal is expressed in the obligation of States to either extradite or prosecute those accused of piracy (*Aut Dedere Aut Judicare*).⁷⁰ The treaties can be useful tools against piracy in many circumstances, but they do not classify piracy as ‘terrorism.’

There are counter-terrorism treaties what are broad enough to include acts of piracy. For example, the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation 1988 (the SUA Convention), which was adopted in response to the attack in 1985 on the "Achille Lauro," does not cover piracy in so many words, but many acts of piracy will be offenses within its terms. The Convention oblig-

⁶⁸ Modern Piracy. Naval Forces, 2015, Vol. 26 Issue 5, pp. 20–31, 7p; (AN 18506590).

⁶⁹ *Id.* at 67.

⁷⁰ Maritime Piracy in Southeast Asia. By: Liss, Carolin. Southeast Asian Affairs, 2013, p. 52, 17p; (AN 10637324).

es States to criminalize, "Inter alia," 'armed robbery at sea'; in other words, an act which might be considered piracy if committed in the circumstances outlined by UNCLOS.⁷¹ The International Convention against the Taking of Hostages 1979 is another example. The offence of hostage-taking covered by this treaty clearly covers holding crews for ransom in the typical acts of piracy being committed off the coast.⁷²

2.2.1 Existing Legal Regulations from an International Perspective

(a) The United Nations Convention on Law of the Sea: UNCLOS 1982

1) Broadening the scope of International Law on acts of Piracy

The Convention of the High Seas was propagated in 1958. However, as time passed, this convention was not effective to counter piracy.⁷³ Thus, in 1982, the United Nations Convention on the Law of the Sea (UNCLOS) was created. Pursuant to this agreement, each state has certain duties and rights regarding the seas and the maritime belts, which are also known as baselines.⁷⁴

⁷¹ Breach of its duty under International Law. This interpretation is supported by the Commentary of the International Law Commission on the provision of the 1958 High Seas Convention on which the UNCLOS provision was based.

⁷² Anti-Piracy Initiatives in Southeast Asia. By: Bradford, John. Contemporary Southeast Asia, December 2014, Vol. 26 Issue 3, pp. 480–505, 26pp; (AN 15709264).

⁷³ This interpretation is supported by the Commentary of the International Law Commission on the provision of the 1958 High Seas Convention on which the UNCLOS provision was based.

⁷⁴ "...the signatories declare their intention to cooperate to the fullest possible extent, and in a manner consistent with International Law, in the repression of piracy and armed robbery against ships, with a view towards sharing and reporting relevant information through a system of national focal points and information centres; interdicting ships suspected of engaging in acts of piracy or armed robbery against ships; ensuring that persons committing or attempting to commit acts of piracy or armed robbery against ships are apprehended and prosecuted; and facilitating proper care, treatment, and repatriation for seafarers, fishermen, other shipboard personnel and passengers subject to acts of piracy or armed robbery against ships, particularly those who have been subjected to violence.

UNCLOS provides the framework for the repression of piracy under International Law, in particular under Articles 100 through 107 and 110.⁷⁵ The Security Council has repeatedly reaffirmed “that International Law, as reflected in the UNCLOS sets out the legal framework applicable to combating piracy and armed robbery at sea, as well as other ocean activities” (Security Council resolution 1897 (2009), adopted on 30 November 2009).⁷⁶

UNCLOS is a broad regime that upholds the goal of freedom of navigation on the seas while guaranteeing States the rights to regulate their territorial waters.⁷⁷ Under this principle of Freedom of the High Seas, ships navigating in international waters are subject to the exclusive jurisdiction of their flag state.⁷⁸ UNCLOS incorporates the anti-piracy provisions of the 1958 Geneva Convention in Articles 100 to 107. It urges States to cooperate to suppress piracy (Article 100),⁷⁹ and gives States that seize a pirate ship on the high seas the right to prosecute the pirates in accordance with their respective national law (Article 105).⁸⁰

Article 100 of UNCLOS provides that “all States shall cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside

⁷⁵ Articles 14 to 23 of the CHS which are reproduced almost verbatim in the articles 100 to 107, 110 and 111 of the LOSC contain the provisions on maritime piracy.

⁷⁶ United Nations. (1982). United Nations Convention on the Law of the Sea. www.un.org;art.101, See also Security Council resolution 1897 (2009), adopted on 30 November 2009.

⁷⁷ Homan,K. & Kamerling, S., Operational challenges to counterpiracy operations, in Ginkel, B. & Putten, F.P.(Eds), The International Response to Somali Piracy, Challenges and Opportunities, 2014, The Netherlands: Martinus Nijhoff Publishers, at p. 89.

⁷⁸ See LOSC, article 2.

⁷⁹ *Id.*

⁸⁰ *Id.*

the jurisdiction of any State.⁸¹ The General Assembly has also repeatedly encouraged States to cooperate to address piracy and armed robbery at sea in its resolutions on oceans and the Law of the Sea. For example, in its resolution 64/71 of 4 December 2009, the General Assembly recognized “the crucial role of international cooperation at the global, regional, sub-regional and bilateral levels in combating, in accordance with International Law, threats to maritime security, including piracy.”⁸²

2) “Private Ends” elements for acts of piracy under UNCLOS 1982

As existing international regulations for piracy have been mainly influenced, established and developed by the HSC, we must examine the HSC closely because it is a source of Article 101. We may also therein ascertain its history as well as attempt to glean the intention of the drafters.⁸³ Article 3 is relevant for piracy definition and reads as follows:

Piracy consists of any of the following acts, committed in a place not within the territorial jurisdiction of any state:

1. Any act of violence or of depredation committed with intent to rob, rape, wound, enslave, imprison or kill a person or with intent to steal or destroy property, for private ends without bonafide⁸⁴ purpose of asserting a claim or right, provided that the act is connected with an attack on

⁸¹ *Id.* Article 100. Duty to cooperate in the repression of piracy:

All States shall cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State.

⁸² Nincic, D. J. (2015, forthcoming). Maritime Security as Energy Security: Current Threats and Challenges. In Luft, G., and Konin, A., eds. Energy Security: Challenges for the 21-Century. Washington DC: Greenwood Publishing in collaboration with the Institute for the Analysis of Global Security (IAGS).

⁸³ *Id.*

⁸⁴ Made in good faith without fraud or deceit.

or from the sea or in or from the air. If the act is connected with an attack which starts from on board ship, either that ship or another ship which is involved must be a pirate ship or a ship without national character.

2. Any act of voluntary participation in the operation of a ship with knowledge of facts which make it a pirate ship.

3. An act of instigation or of intentional facilitation of an act described in paragraph 1 or paragraph 2 of this Article.⁸⁵

Hence, four elements define an act of piracy: (1) It must involve violence, (2) at least two vessels have to be included, (3) it must be committed on the high seas, and (3) it must be committed for private gain. The convention has been ratified by 165 States and the European Union. Fifteen UN member States, among these Israel, Peru, Turkey, and the United States, have not signed UNCLOS.⁸⁶

However, like UNCLOS, the HSC provides a definition that explains, “private act,” and States what a “private ends” means. Within this statement, the drafters have seemingly adopted the private ends requirement and excluded from the definition of piracy all piracy acts committed for political or other public ends. This intention is based on the previous mentioned history of piracy, as acts of political groups or acts of insurgency and States should be excluded.⁸⁷

⁸⁵ *Id.*

⁸⁶ Mejia, M. (2013). Maritime Gerrymandering: Dilemmas in Defining Piracy, Terrorism and other Acts of Maritime Violence. *Journal of International Commercial Law* 2(2), 153-175.

⁸⁷ LOSC, article 102 provides the definition of piracy by a warship, government ship or government aircraft whose crafts has mutinied whereas article 103 defines a pirate ship or aircraft.

3) Legal Framework for the Repression of Piracy under UNCLOS 1982

Piracy may be committed anywhere seaward of the territorial sea of a state.⁸⁸ Equally, the jurisdiction and powers granted to States to suppress piracy apply on all seas outside any state's territorial waters. Within the Exclusive Economic Zone (EEZ), the coastal state enjoys sovereign rights for exploring and exploiting, conserving and managing natural resources, and enjoys jurisdiction over certain other subject matter (Article 56, UNCLOS).⁸⁹ Nothing in Article 56 is incompatible with the UNCLOS provisions on piracy. Therefore, under Article 58(2) the general law of piracy applies to all pirate attacks outside territorial waters. If acting in another States' EEZ a government vessel engaged in suppressing piracy is obviously obliged to have due regard for the coastal state's rights in matters of natural resources, and marine pollution, for example.⁹⁰

UNCLOS provides two baselines that are important factors in determining the twelve-nautical mile range for territorial waters.⁹¹ States retain sovereignty in both internal and territorial waters; yet they have an obligation to grant the right of innocent passage, if this does not impede the state's security.⁹² However, it is important to note that the freedoms of the high seas are not absolute. They must be exercised consistently

⁸⁸ This is consistent with the position adopted in Article 4(4) of the Djibouti Code of Conduct

⁸⁹ *Id. Art. 56, UNCLOS.*

⁹⁰ *Id. Art 58(2), UNCLOS.*

⁹¹ *Id. Article 89 :*

Invalidity of claims of sovereignty over the high seas
No State may validly purport to subject any part of the high seas to its sovereignty.

⁹² Brown, J. (2015). *Pirates and Privateers: Managing The Ocean's Private Security Boom*, Lowy Institute For International Policy Analysis, 12 September 2015. Retrieved October 20, 2015.

with International Law, and regarding the interest of other States as they endeavor to exercise their freedom of the high seas. This suggests in certain situations the exercise of the authorized researchers' freedom of navigation could be balanced against the general right of others to exercise their right of freedom.⁹³

Yet if political ends are pursued by an organization, it is difficult to see what interest the flag-state could have that would legitimize any action that might constitute a necessary restriction on the freedom to move about the high seas. The definition of piracy requires an act of violence, detention or depredation, which would take any such [pirate] ship outside the realm of exercising the freedom of navigation.⁹⁴

This is because the high seas are reserved for peaceful purposes, and precludes any effort to restrict any interest of the flag-state to only unobstructed peaceful naviga-

⁹³ *Id. Article90*

Right of navigation:

Every State, whether coastal or land-locked, has the right to sail ships flying its flag on the high seas.

⁹⁴ *Id. Article87*

Freedom of the high seas:

1. The high seas are open to all States, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of International Law. It comprises, *inter alia*, both for coastal and land-locked States:

- (a) freedom of navigation;
- (b) freedom of over flight;
- (c) freedom to lay submarine cables and pipelines, subject to Part VI;
- (d) freedom to construct artificial islands and other installations permitted under International Law, subject to Part VI;
- (e) freedom of fishing, subject to the conditions laid down in section 2;
- (f) freedom of scientific research, subject to Parts VI and XIII.

2. These freedoms shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas, and also with due regard for the rights under this Convention with respect to activities in the Area.

tion of its subjects. A similar rationale could be applied to any suggestion that such political parties are upholding the common interest of States in marine environmental protection.⁹⁵

The extent of powers granted to suppress piracy, means a warship or military aircraft, or other ship or aircraft, clearly marked and identifiable as being on government service and authorized to that effect (Article 107, UNCLOS)⁹⁶ on the high seas has the power:

to visit any vessel that it has a reasonable ground for suspecting of being engaged in piracy and, if suspicions are not resolved by an inspection of its papers, proceed to search it (Article 110, UNCLOS);⁹⁷ and to seize any pirate vessel and arrest any suspected pirates (Article 105, UNCLOS); subject to a duty to compensate a vessel for any loss or injury suffered as a consequence of inspection or arrest where suspicions of piracy prove unfounded and the vessel “has not committed any act justifying them” (Articles 106 and 110(3), UNCLOS).⁹⁸

⁹⁵ *Id. Article 88 :*

Reservation of the high seas for peaceful purposes
The high seas shall be reserved for peaceful purposes.

⁹⁶ IMO, LEG 98/8/3, Piracy: elements of national legislation pursuant to the United Nations Conventions on the Law of the Sea, 1982, 18 February 2014.

⁹⁷ See LOSC, article 106, article 110, para. 2 & 3.

⁹⁸ *Article 106 :*

Liability for seizure without adequate grounds

Where the seizure of a ship or aircraft on suspicion of piracy has been effected without adequate grounds, the State making the seizure shall be liable to the State the nationality of which is possessed by the ship or aircraft for any loss or damage caused by the seizure.

Piracy includes “any act of voluntary participation in the operation of a ship with knowledge of facts making it a pirate ship” (Article 101(b), UNCLOS). A pirate ship is one “intended by the persons in dominant control to be used” in a pirate attack or which has been used in such an attack and is still under the same control (Article 103, UNCLOS).⁹⁹ Therefore, a warship has a clear right of visit and inspection where it suspects a vessel is under the control of persons intending to use it for a future pirate attack.¹⁰⁰ Indeed, a warship may arrest persons on the basis that those persons “intended” a future pirate attack. By definition, the powers of visit, seizure and arrest are granted on the high seas (or in the exclusive economic zone of a State as discussed above) and do not extend to pursuing pirates into foreign territorial waters without the coastal State’s consent.¹⁰¹

4) Jurisdiction over acts of Piracy under the Division for Ocean Affairs regulations and Law of the Sea

The Division for Ocean Affairs and the Law of the Sea, as the secretariat of UNCLOS, is mandated to provide information and advice on the uniform and consistent application of the provisions of UNCLOS,¹⁰² including those relevant to the repression of piracy. It also has a mandate to provide information, in the annual reports of the Secretary-

⁹⁹ See LOSC, article 103.

¹⁰⁰ This results from applying the definition in Article 103 to the powers granted in Article 105 and 110, UNCLOS.

¹⁰¹ While there has been some scholarly support for such a right, it has not found acceptance in State practice: Lucchini and Voelckel, *Droit de la mer*, Tome 2, vol. 2, 165; O’Connell, *International Law of the Sea*, vol. 2, 978. UNSCRs 1816 (operative paragraph 7), 1846 (operative paragraph 10) and 1851 (operative paragraph 6) obviously provide a mechanism for ‘co-operating States’ to enter the territorial waters and land territory, based both on the consent and the authority of Chapter VII.

¹⁰² Security Council speaks out against piracy, armed robbery off the coast. (2015, 2 June). UN News Centre. www.un.org.

General on oceans and the law of the sea, on relevant developments in oceans and the law of the sea to the General Assembly, as well as to the Meeting of States Parties to UNCLOS.¹⁰³

Monitoring, containing, or more hopefully discouraging, Piracy requires a universal approach. As pirates make no discrimination among vessels subject to attack, it is a problem that should concern all nations. Since the times of Grotius¹⁰⁴ and others, pirates have been considered "hostis humanis generis."¹⁰⁵ The best basis on which to address problems of a universal nature is through cooperation, or the Universality Principle. Piracy has, as already stated above, been a problem throughout the ages, and with the expansion of shipping routes, it has eventually become a problem affecting all nations. By the sixteenth century, the concept of piracy and exclusive jurisdictions were already developed, yet by no means did this legislative clarity indicate that the piracy problem had suffered a lasting demise.¹⁰⁶

Because of the nature of piracy, any state may seize a pirate ship or aircraft on the high sea (terra nullius). The persons on board the vessel may be arrested, and the property seized. The courts of the state that has executed the seizure have jurisdiction to impose trial and penalties against the alleged pirates, and that state may further decide

¹⁰³ United Nations, Report of the Secretary-General on modalities for the establishment of specialized anti-piracy courts, United Nations Security Council S/2014/360, 15 June 2014, paragraph 63.

¹⁰⁴ *Id.*

¹⁰⁵ The preambles to UNSCR 1848 and 1851 (2008) reaffirm 'that International Law, as reflected in [UNCLOS], sets out the legal framework applicable to combating piracy and armed robbery at sea, as well as other ocean activities'; see also operative paragraph 3, UNSCR 1838 (2008).

¹⁰⁶ United Nations, Report of the Secretary-General on modalities for the establishment of specialized anti-piracy courts, United Nations Security Council S/2014/360, 15 June 2014, paragraph 64.

what action to take regarding the ship or aircraft and property, subject of course, to the rights of third parties such as insurance companies that have acted in good faith.¹⁰⁷

Since pirates were a threat to the global order (particularly global sea trade), and committing particularly heinous acts, and since their acts were committed in a place beyond the territorial jurisdiction or sovereignty of any state (different reasons have been adduced at different times), they were subject to the jurisdiction of any state that happened to identify them, engage with, and capture them. Thus, a pirate could be prosecuted in every state's courts.¹⁰⁸

5) Exercising Jurisdiction over Pirates

UNCLOS Article 105 refers only to the power of a seizing state to try a seized pirate. However, as a matter of customary International Law, every state has jurisdiction to prosecute a pirate subsequently present within their territory irrespective of any connection between pirates, their victims or the vessel attacked and the prosecuting state (universal jurisdiction).¹⁰⁹

In addition to the existence of universal jurisdiction at public International Law, States may also have jurisdiction over suspected pirates on other bases as a matter of national law. Following ordinary principles of criminal jurisdiction, the State of the

¹⁰⁷ Chalk, P., Private Maritime Security Companies (PMSCs) and Counter-Piracy, Paper presented at the second United Arab Emirates Counter Piracy Conference, Dubai, June 2014, at p.2.

¹⁰⁸ Roger, L. P. , Mauritius officially on board to prosecute as other options dwindle, *Communis Hostis*.

¹⁰⁹ Arrest Warrant of 11 April 2013 (Democratic Republic of the Congo v Belgium), Judgment, ICJ. Reports 2013, p.3, President Guillaume (Separate Opinion), para. 5 and Judges Higgins, Kooijmans and Buergenthal (Joint Separate Opinion), para. 61; Ian Brownlie, *Principles of Public International Law*, 7th ed (Oxford University Press, 2014), 229; Bingham, 'Harvard Research' (n.4 above), 852-6; Lucchini and Voelckel, *Droit de la mer*, Tome 2, vol. 2, 182.

suspected pirate's nationality, the state of nationality of the suspected pirate's victim and the flag state of any involved vessels may all also have valid claims of jurisdiction over a suspected pirate. An act of piracy, like any number of other offenses, may provide many States with equally valid claims to exercise jurisdiction over an offense.¹¹⁰

Any state may seize a pirate ship or aircraft or a ship or aircraft taken by pirates and arrest the persons and seize the property on board.¹¹¹ In turn, the courts of the state which carried out the seizure may subsequently decide upon the penalties to be imposed, and may determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties (Article 105, UNCLOS).¹¹² Any warship or military aircraft, or other clearly marked government vessel may seize pirates (Article 107).¹¹³

Customary International Law provides basic principles governing the appropriate amount of force to be used whenever it is lawful to stop and arrest a ship at sea.¹¹⁴ Piracy is an ordinary crime and navies are undertaking law enforcement duties, not en-

¹¹⁰ A pirate vessel does not necessarily lose its nationality (Article 104, UNCLOS), and may still be subject to its flag State's jurisdiction in addition to the jurisdiction of the State of the seizing warship.

¹¹¹ Brown, J., *Pirates and Privateers: Managing The Indian Ocean's Private Security Boom*, Lowy Institute For International Policy Analysis, 12 September 2014, at p.3.

¹¹² *Id. Art.105.*

¹¹³ *Article10.7 :*

Ships and aircraft which are entitled to seize on account of piracy A seizure on account of piracy may be carried out only by warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect.

¹¹⁴ The principles were considered in another context by the International Tribunal for the Law of the Sea in the case of *Saiga 2* (http://www.itlos.org/start2_en.html). See also the case of *S.S. 'I'm alone'* (Canada/United States, 1935), U.N.R.I.A.A., Vol. III, p. 1609 and *The Red Crusader* case (Commission of Enquiry, Denmark–United Kingdom, 1962), I.L.R., Vol. 35, p. 485.

gaging in conflict. Navies have the right to use reasonable force in pursuit of their law-enforcement mission. The amount of force use must not exceed what is reasonably required in the circumstance.

In the event of death or serious injury, human rights and the requirement of humane treatment necessitate the holding of an enquiry.¹¹⁵ As described in the previous section, apart from these international regulations, customary International Law authorizes any state to prosecute piracy activities occurring within its territory based on its national criminal code. Due to the location of the piracy crime itself, and the fact that most States do not have the resources, or are unwilling to respond effectively to a pirate attack, it is the coastal state that is the most appropriate entity to combat piracy.¹¹⁶

In the territorial sea, States other than the coastal state do not have any jurisdiction for enforcement measures against piracy. For centuries, as noted several times already, nations have deemed pirates to be “hostis generis” (enemies of all mankind), so that a state may use its own domestic laws to punish piracy, regardless of the pirates’ nationality or where the piratical acts took place.¹¹⁷

As an enemy of mankind, it is recognized in customary International Law, that States could exercise universal jurisdiction because the pirate commits hostilities upon

¹¹⁵ The principles were considered in another context by the International Tribunal for the Law of the Sea in the case of *Saiga 2* (http://www.itlos.org/start2_en.html). See also the case of *S.S. ‘I’m Alone’* (Canada/United States, 1935), U.N.R.I.A.A., Vol. III, p. 1609 and *The Red Crusader* case (Commission of Enquiry, Denmark–United Kingdom, 1962), I.L.R., Vol. 35, p. 485.

¹¹⁶ Report of the UN Secretary-General pursuant to UNSCR 1846(2014), 13 November, 2015/590.

¹¹⁷ Joint Communiqué from the Eastern and Southern Africa – Indian Ocean Ministers and European Union High Representative, at the 2nd Ministerial Meeting on Piracy and Maritime Security in the Eastern and Southern Africa and Indian Ocean Region, 7th October 2014, Preamble, paragraph 7.

the subjects and property of any and all nations, regardless to right or duty, or any pretense of public authority.¹¹⁸ The following chapter examines whether national regulations are comprehensive enough and whether States use their own existing internal jurisdiction and criminal law codes to combat against modern-day piracy and maritime terrorism within their own maritime zone.

6) Justification for the Universal Jurisdiction of International Law

The piracy provisions are part of the high seas regime and should not be applied in isolation.¹¹⁹ The legal regime of piracy should be considered in the context of the general principles of International Law governing jurisdiction. The high seas regime is founded on the freedom of the high seas, as evidenced by its prominence in Article 87 of UNCLOS.¹²⁰

¹¹⁸ Hirsi, A. (2013). Somali Sea-Piracy: Business model or resource conflict? Wardheer News. Retrieved July 26, 2013 from http://www.wardheernews.com/Articles_2013/Sept/15_Ahmed_Hirsi_Somali_Piracy.pdf.

¹¹⁹ Satay, N., Nadan, C.B.E & Rosenne, S. (Eds.), United Nations Convention on the Law of the Sea 1982: A commentary, Volume III, Articles 86 to 132 and documentary Annexes, 1995, The Hague: Martinus Nijhoff Publishers, p. 201.

¹²⁰ *Id. Article 87:*

Freedom of the high seas:

1. The high seas are open to all States, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of International Law. It comprises, *inter alia*, both for coastal and land-locked States:

- (a) freedom of navigation;
- (b) freedom of overflight;
- (c) freedom to lay submarine cables and pipelines, subject to Part VI;
- (d) freedom to construct artificial islands and other installations permitted under International Law, subject to Part VI;
- (e) freedom of fishing, subject to the conditions laid down in section 2;
- (f) freedom of scientific research, subject to Parts VI and XIII.

2. These freedoms shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas, and also with due regard for the rights under this Convention with respect to activities in the Area.

This freedom, coupled with the denial of any sovereign claims, means the general principle of jurisdiction on the high seas is that of flag state exclusivity. Any claim to jurisdiction over other vessels, unless provided for under International Law, would be tantamount to a claim of a sovereign right within the high seas to the detriment of the other state involved. The exclusive flag state jurisdiction provision is found in Article 92 of UNCLOS, which restates the international Customary Law.¹²¹

The universal jurisdiction over pirates is one such exception to the general principle of flag state exclusivity, and is repeated in Article 105 of UNCLOS.¹²² As an exception should be interpreted restrictively, we should be cautious to extend the reach of such a principle. A restrictive approach can be seen in the subsequent acts of States, which have not followed the age-old crime of piracy and granted universal jurisdiction over other threats to their interests in the high seas, such as illegal fishing or passenger

¹²¹ *Id. Article 92 :*

Status of ships:

Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas. A ship may not change its flag during a voyage or while in a port of call, save in the case of a real transfer of ownership or change of registry. A ship which sails under the flags of two or more States, using them according to convenience, may not claim any of the nationalities in question with respect to any other State, and may be assimilated to a ship without nationality.

¹²² *Article 105 :*

Seizure of a pirate ship or aircraft

On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith.

hijacking.¹²³ Indeed encroachments onto flag state exclusivity are permitted to the minimum extent possible. Thus, we must question whether the justifications for providing universal jurisdiction under the International Law of piracy extend to politically motivated violence.

7) Policy and Rationale Behind the Piracy Exception to Exclusive Flag State Jurisdiction

Many different theories have been advanced to explain why piracy is a crime subject to universal jurisdiction. The very first and most popular theories argued that once one becomes involved in piracy, that one becomes denationalized and opens oneself to the jurisdiction of all States.¹²⁴ This is, of course, based on the ancient presumption that pirates are enemies of all mankind. By such actions, the pirates have rejected the authority of that to which they are properly subjected. Therefore, no state should be held accountable for those actions. If the flag state cannot be held to account, but such action threatens the interest of all States, then the right should be granted to all States to exercise jurisdiction.¹²⁵

Their self-imposed denationalization would, as quoted by the HSCers,¹²⁶ take them out of the protection of all laws and privileges. Without the nationality and flag state protection of their registry, pirates can be subjected to the ancient and well-

¹²³ This should not be taken as meaning a flag vessel is territory; a flag vessel is, however, subject to the exclusive jurisdiction of its flag State on the high seas: Article 92(1), UNCLOS.

¹²⁴ Walker, P., *Mystery of the Sea: Ship Feared Seized by Pirates in European Waters*: *The Guardian*, August 11, 2014, at <http://www.guardian.co.uk/world/2014/aug/11/arctic-sea-missing-ship-pirates>.

¹²⁵ ICC-International Maritime Bureau Piracy and Armed Robbery Against Ships, Report for the period 1 January – 31 December 2015. London: ICC International Maritime Bureau.

¹²⁶ *Id.*

established universal jurisdiction that has been extant since the 17th century.¹²⁷ However, this theory has been broadly rejected. UNCLOS' position is that denationalization is not an automatic or necessary step, but is left to the national law of the flag state under Article 104.¹²⁸ International Law is indifferent to the nationality of the ship under the piracy provisions and whether nationality is kept or lost. Such rationale, as indicated by the academic scholar,¹²⁹ can also be found and confirmed in States' attempts to construct an effective international regime in response to the variety of situations and the difficulties of enforcing International Law that are presented by the coastal state, which lacks capacity in maritime law enforcement.

Both elements of the 'common interest' rationality are found in the Security Council resolutions constituting this unique regime. Resolutions adopted by Security Council 1846 provide temporary authorization to 'cooperating' States to use all necessary means within their territorial waters to repress piracy. Such authorization was based on the first element of the 'common interest' rationality, the threat posed to the common interest in international navigation and commerce.¹³⁰

¹²⁷ RAPIDBI. (2015). SWOT analysis (TOWS matrix) Made Simple. Retrieved November 15, 2016 from <http://rapidbi.com/swotanalysis/#Background>.

¹²⁸ *Article 104 :*

Retention or loss of the nationality of a pirate ship or aircraft:

A ship or aircraft may retain its nationality although it has become a pirate ship or aircraft. The retention or loss of nationality is determined by the law of the State from which such nationality was derived.

¹²⁹ Zibell, R., McCarthy, D. & Barnwell, J.R. et al. (2012). Piracy: An ancient risk with modern faces, an insurer's perspective from Allianz Global Corporate & Specialty. Retrieved October 15, 2014.

¹³⁰ Participants intend to fully co-operate in the arrest, investigation and prosecution of persons who have committed piracy or are reasonably suspected of having committed piracy;

"The Locus Delicti"¹³¹ is a different circumstance in that it concerns the location of the crime; i.e., in territorial waters, yet the same issue lacks effective state jurisdiction, and the threat of serious crimes going unpunished prevails. Modern efforts are guided by the rationality of 'common interest' as much as was the original justification for universal jurisdiction.¹³² Piracy does not affect exclusive flag state jurisdiction over navigation rules, safety regulations, or rules of nationality. In addition, piracy does not affect the exclusive flag-state prescriptive, executive, or judicial jurisdiction in relation to any other issue; it only represents a limited waiver in relation to piracy law enforcement.¹³³

We conclude that the universal jurisdiction over piracy results from balancing competing navigational interests. In upholding the freedom of the high seas, the principal starting point is exclusive flag-state jurisdiction. However, once an activity presents a threat to the common interest of States in the freedom of the seas, the rationality points to an exception to exclusive flag-state jurisdiction to ensure the activity being punished and the freedom is restored for all other users of the high seas.

seize suspect ships and the property on board such ships; and rescue ships, persons, and property subject to acts of piracy. These acts would be consistent with International Law.

¹³¹ *Locus delicti* is a Latin term which means the 'scene of the crime.' It is the place where tort, offence, or injury was committed or the place where the last event necessary to make the actor liable occurred. *Locus delicti* gives the court exclusive jurisdiction over the dispute or crime. Under common law, crimes are local and it is recognizable and punishable exclusively in the country where it is committed.

¹³² On the use of ship-riders see: Kathy-Ann Brown, *The Shiprider Model*, Contemporary Caribbean Legal Issues No. 1 (Faculty of Law, University of the West Indies, 1997); Guilfoyle, *Shipping Interdiction*, 89-94, 119-20, 145-146, 196-7, 209-11; Bill Gilmore, "Counter-Drug Operations at Sea: Developments and Prospects" (1999) 25 *Commonwealth Law Bulletin* 609, 612-613.

¹³³ Participants intend to fully co-operate in the arrest, investigation and prosecution of persons who have committed piracy or are reasonably suspected of having committed piracy; seize suspect ships and the property on board such ships; and rescue ships, persons, and property subject to acts of piracy. These acts would be consistent with International Law.

8) Piracy and Use of Force under UNCLOS 1982

The international community retains its rights of regulation and enforcement of ‘traditional’ acts of piracy on the high seas, as may be given the developments in the law of the sea and maritime crimes.¹³⁴ Most global pirate attacks have taken place within enclosed waters within the territorial sea of coastal States, and therefore, within the responsibility of the coastal State in whose vicinity the crime took place. However, not all States have an equal capacity to ensure maritime security within their waters and this is emphasized by current events involving piracy.¹³⁵

UNCLOS provides that all States are obligated to cooperate to the fullest possible extent in the repression of piracy (art. 100) and that all States have universal jurisdiction on the high seas that authorize them to seize pirate ships and aircraft, or a ship or aircraft taken by piracy and under the control of pirates. Moreover, a State may arrest the persons and seize the property on board (art. 105).¹³⁶

Article 110,¹³⁷ *inter alia*, also allows States to exercise a right of visit vis-à-vis suspected ships which appear to have been engaging in piracy.¹³⁸ These provisions

¹³⁴ For example, paragraph 14 of 1846(2008) calls upon States to co-operate in investigating and prosecuting persons suspected of piracy and armed robbery consistent with International Law.

¹³⁵ However, the obligation in UNCLOS to cooperate in the repression of piracy can be interpreted as meaning that any state having an opportunity of taking measures against piracy and failing to do so is in breach of its duty under International Law.

¹³⁶ United Nations, Oceans and Law of the Sea, <http://www.un.org/Depts/los/index.htm>, (09-20-2014).

¹³⁷ *Article 110* :

Right of visit:

1. Except where acts of interference derive from powers conferred by treaty, a warship which encounters on the high seas a foreign ship, other than a ship entitled to complete

should be considered together with article 58(2) of UNCLOS, which makes it clear that the above-mentioned articles and other pertinent rules of International Law applied to the exclusive economic zone in so far as they are not incompatible with the provision of UNCLOS relating to the exclusive economic zone.¹³⁹ Thus, UNCLOS makes it clear that high seas piracy is illegal and that all States have a right to seize and prosecute those responsible for piracy on the high seas.¹⁴⁰ The sudden influx of piracy cases during the last couple of years has sparked public interest. The Maritime Safety Committee

immunity in accordance with articles 95 and 96, is not justified in boarding it unless there is reasonable ground for suspecting that:

- (a) the ship is engaged in piracy;
- (b) the ship is engaged in the slave trade;
- (c) the ship is engaged in unauthorized broadcasting and the flag State of the warship has jurisdiction under article 109;
- (d) the ship is without nationality; or
- (e) though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship.

2. In the cases provided for in paragraph 1, the warship may proceed to verify the ship's right to fly its flag. To this end, it may send a boat under the command of an officer to the suspected ship. If suspicion remains after the documents have been checked, it may proceed to a further examination on board the ship, which must be carried out with all possible consideration.

3. If the suspicions prove to be unfounded, and provided that the ship boarded has not committed any act justifying them, it shall be compensated for any loss or damage that may have been sustained.

4. These provisions apply *mutatis mutandis* to military aircraft.

5. These provisions also apply to any other duly authorized ships or aircraft clearly marked and identifiable as being on government service.

¹³⁸ United Nations Security Council, Security Council authorizes States to use land-based operations, <http://www.un.org/News/Press/docs/2008/sc9541.doc.htm> , (Last visited, 09-20-2014).

¹³⁹ Burnett, J. S. (2014). *Dangerous Waters: Piracy and Terror on the High Seas*. New York: Dutton.

¹⁴⁰ This interpretation is supported by the Commentary of the International Law Commission on the provision of the 1958 High Seas Convention on which the UNCLOS provision was based.

has given recommendations and the International Chamber of Commerce has even started a live piracy reporting service that lists ships that have been victims of piracy, and it also indicates where the event occurred.¹⁴¹

The international community has reacted swiftly to the piracy problem by creating an unprecedented international naval cooperation. In this initiative, the navies of the United States, Great Britain, France and India have played significant roles. This coalition, for the first time in history, includes the first ever European Union naval force and represents the first time that China has deployed its naval force outside of the South Chinese Sea region.¹⁴² Through this effort, the coalition managed to fence off pirate attacks. They did not, however, pursue and apprehend them. In addition, the costs of this operation made it an expensive undertaking. The international community has realized that a proper approach involves not only defending vessels, but also apprehending the criminals.¹⁴³

The United Nations Security Council has passed five resolutions in 2008 that deal with piracy. These were passed pursuant to Chapter VII of the UN Charter, allowing the use of military force against threats to international security.¹⁴⁴ On the 16th of

¹⁴¹ The principles were considered in another context by the International Tribunal for the Law of the Sea in the case of *Saiga 2* (http://www.itlos.org/start2_en.html). See also the case of *S.S. 'I'm Alone'* (Canada/United States, 1935), U.N.R.I.A.A., Vol. III, p. 1609 and *The Red Crusader* case (Commission of Enquiry, Denmark–United Kingdom, 1962), I.L.R., Vol. 35, p. 485.

¹⁴² See: Article 6(2), European Convention on Extradition 1957; Article 16(10), United Nations Convention against Transnational Organized Crime 2000.

¹⁴³ Ship-riders need not be law-enforcement personnel. The present author understands that EUNAVFOR has used ship-riding translators, for example.

¹⁴⁴ U.S. persons for example need to meet the requirements outlined under Title 18 of the US Code Article.

December 2008, the United Nations Security Council passed a broader resolution, extending the authorization of military force to land-based operations.¹⁴⁵

Seeing that piracy has been regarded as an offense against the law of nations, the public vessels of any state have been permitted to seize a pirate ship, to bring it into port, to try the crew (regardless of their nationality or domicile), and, if they are found guilty, to punish them as well as to confiscate the ship.¹⁴⁶

2.3 Principles from Related International Conventions Dealing with Piracy

(a) International Maritime Organization Regulations: IMO

The International Maritime Organization (IMO) and the International Maritime Bureau (IMB) constitute two institutional bodies involved in the governance of maritime piracy. Established in 1959, the IMO is a specialized agency of the UN and its purpose is to set global standards for the safety, security, and environmental performance of international shipping.¹⁴⁷

The IMO currently has 171 member States. The organization facilitates discussions between industry, member States, security forces, and UN agencies that are concerned with piracy. Since 1998, the organization has been working on an anti-piracy program, which aims at fostering the development of regional agreements that imple-

¹⁴⁵ Security Council 6046th Meeting (PM), 2014, [1956] II YbILC, 282.

¹⁴⁶ Report of the Monitoring Group pursuant to Security Council resolution 1811 (2008), United Nations, 10 December 2015, available at: <http://daccessdds.un.org/doc/UNDOC/GEN/N08/604/73/PDF/N0860473.pdf?OpenElement>.

¹⁴⁷ International Maritime Organization, MSC.4/Circ.180, Reports on acts of piracy and armed robbery against ships, annual report-2013, March 1, 2014, at annex 4.

ment counter piracy measures.¹⁴⁸ Its activities were essential in developing the 2009 Djibouti Code of Conduct, in which the Arabian Peninsula and East African littoral States agreed to cooperate in the repression of piracy and armed robbery against ships in the West Indian Ocean and the Gulf of Aden.¹⁴⁹

The IMB, which is a division of the International Chamber of Commerce, has become an increasingly important part of the antipiracy regime. It suggested a definition of piracy as “an act of boarding any vessel with the intent to commit theft or any other crime and with the intent or capability to use force in the furtherance of that act.”¹⁵⁰ While this definition seems to be accepted by the shipping industry, it has not been recognized in international or domestic law. In 1992, the IMB established the Piracy Reporting Centre (PRC) in Kuala Lumpur, Malaysia. The PRC functions as the single point of contact for ship masters anywhere in the world who are under piratical or armed robbery attack.¹⁵¹ If an attacked vessel contacts the PRC, the information is immediately passed on to local law enforcement agencies and shared with all ships in the region.

(b) IMO Support for New Piracy Framework

At a ministerial meeting in Cotonou, Benin, the International Maritime Organization (IMO) pledged to support the implementation of a new code of conduct on piracy and

¹⁴⁸ International Maritime Organization, MSC.4/Circ.180, Reports on acts of piracy and armed robbery against ships, annual report-2013, March 1, 2014, at p.3.

¹⁴⁹ Principally, resolutions 1816(2008), 1838(2008), 1846(2008), and 1851(2008).

¹⁵⁰ For instance, Recommendations To Governments For Preventing And Suppressing Piracy And Armed Robbery Against Ships MSC/Circ.622/Rev.2.

¹⁵¹ The International Maritime Bureau definition is wider: ‘The act of boarding any vessel with intent to commit theft or any other crime... and with the intent or capacity to use force in furtherance of that act.’

other illicit maritime activities.¹⁵² The Gulf of Guinea Code of Conduct, drafted by the Economic Community of Central African States and the Economic Community of West African States, in partnership with the IMO, contains provisions for interdicting sea-and land-based vehicles engaged in illegal activities at sea, prosecuting suspected criminals, and sharing information among state parties. The code builds on several existing frameworks to create a sub-regional coast guard.¹⁵³

Furthermore, the IMO is reacting to the piracy threat, but the results should be critically observed. The IMO's initiatives have resulted in the establishment of several regional and sub-regional arrangements aimed at preventing, deterring, and repressing piracy and armed robbery against ships.¹⁵⁴ In January 2009, the IMO held a meeting to draft four resolutions: The most critical of which is the *Djibouti Code of Conduct* (also, "Code of Conduct") which requires cooperation in a manner consistent with International Law in the investigation, arrest, and prosecution of those reasonably suspected of having committed piracy, the interdiction and seizure of suspect ships, the rescue and care of ships, persons, and property subject to piracy, and a shared patrol.¹⁵⁵

In addition, in 2009 the IMO implemented two important sets of guidelines for a more effective suppression against piracy. One was an update of the IMO's guidance

¹⁵² Report of the Monitoring Group on Somalia pursuant to Security Council resolution 1811 (2008), United Nations, 10 December 2008, available at: <http://daccessdds.un.org/doc/UNDOC/GEN/N08/604/73/PDF/N0860473.pdf?OpenElement>.

¹⁵³ Principally, resolutions 1816(2008), 1838(2008), 1846(2008), and 1851(2008).

¹⁵⁴ Participants intend to fully co-operate in the arrest, investigation and prosecution of persons who have committed piracy or are reasonably suspected of having committed piracy; seize suspect ships and the property on board such ships; and rescue ships, persons, and property subject to acts of piracy. These acts would be consistent with International Law.

¹⁵⁵ The Code of Conduct also covers the possibilities of shared operations, such as nominating law enforcement or other authorized officials to embark in the patrol ships or aircraft of another signatory.

on combating piracy and armed robbery against ships, and it adopted a set of best management practices to deter such attacks. These guidelines include several recommendations related to certain shipping routes, and more technical advice regarding preferred modes of communication and reporting, evasive maneuvering tactics, and other defensive measures.¹⁵⁶ The second set of guidelines was a guidance document in the form of a Code of Practice for the Investigation of Crimes of Piracy and Armed Robbery against Ships. The Code of Practice aimed to foster international cooperation and to coordinate governments' actions.¹⁵⁷

1) International Cooperation

That much-quoted provision, Article 100 of UNCLOS, requires States to cooperate fully in the repression of piracy.¹⁵⁸

2) Regional Cooperation

UN Security Council resolutions have been adopted to facilitate international cooperation in deterring and dealing with piracy. The original impetus was the need to prevent attacks on ships carrying World Food Program aid. The resolutions give cooperating

¹⁵⁶ The Code of Conduct further calls for the setting up of national focal points for piracy and armed robbery against ships and the sharing of information relating to incidents reported. The signatories intend to use piracy information exchange center in Kenya, United Republic of Tanzania and Yemen, to be located, respectively, in the regional Maritime Rescue Coordination Centre in Mombasa, the Sub-Regional Coordination Centre in Dar es Salaam, and a regional maritime information center, which is being established in Sana'a." http://www.imo.org/about/mainframe.asp?topic_id=1773&doc_id=10933

¹⁵⁷ See, for example, Lucchini and Voelckel, *Droit de la mer*, Tome 2, vol. 2, 165.

¹⁵⁸ Articles 14 to 23 of the CHS which are reproduced almost verbatim in the articles 100 to 107, 110 and 111 of the LOSC contain the provisions on maritime piracy.

States the right to pursue and capture pirates in territorial waters and, in the case of resolution 1851, on land.¹⁵⁹

Many UN bodies dealing with piracy have promoted international cooperation. The International Maritime Organization (IMO) primarily deals with the prevention of piracy, and works closely with UNODC (United Nations Organization on Drugs and Crime), which has primacy on transnational organized crime and legislative approaches, as well as procedures to assist naval vessels in investigations.¹⁶⁰

Regional cooperation among States has an important role in solving the problem of piracy and armed robbery against ships, as evidenced by the success of the regional anti-piracy and armed robbery agreement and related operations in the Straits of Malacca and Singapore, to which IMO assists throughout the development and implementation processes.¹⁶¹

The Regional Cooperation Agreement on Combating Piracy and Armed Robbery against ships in Asia (RECAAP), concluded in November 2004 by sixteen countries in Asia, entered into force in September 2006 and encompasses the RECAAP Information Sharing Centre (ISC) for facilitating the sharing of piracy and armed robbery related information, is a good model of a cohesive and successful regional cooperation structure, which IMO seeks to replicate elsewhere around the World.¹⁶²

¹⁵⁹ Lucchini and Voelckel, *Droit de la mer*, Tome 2, vol. 2, 176.

¹⁶⁰ IMO Doc. PCUA 1/3 (3 February 1987), Annexe, paragraph 2.

¹⁶¹ International Maritime Organization, MSC.4/Circ.180, Reports on acts of piracy and armed robbery against ships, annual report-2014, March 1, 2015, at annex 4.

¹⁶² United Nations Office on Drugs and Crime, Principles and framework for an international classification of crimes for statistical purposes, Report of the UNODC/UNECE task force on crime classification to the conference of European statisticians, June 2015, p.7

In recent years, particular focus has been placed on piracy and armed robbery at sea in the Gulf of Aden and the wider Western Indian Ocean, as well as on the Gulf of Guinea in West Africa. While progress has been made recently in those regions to eradicate piracy, armed robbery and other illicit maritime activities, ships are urged to remain vigilant when navigating through those regions, since the threat of piracy is not eliminated, noting the increasingly fragile situation ashore in Somalia.¹⁶³

On the 16th of January 2009, the United States and Kenya signed a Memorandum of Understanding (MOU). Kenya signed a similar memorandum with the European Union. The U.S. and E.U. had provided Kenya with the necessary assistance.¹⁶⁴ In this memorandum Kenya agreed to try suspected pirates captured by the U.S. One of the reasons for this is that other countries are reluctant to put pirates on trial because they are usually foreign nationals with no mailing addresses. Another reason is that it may be difficult finding a translator.¹⁶⁵

Subsequently, the international community is stepping up its efforts in combating piracy by assisting through donations that will help to improve the security on its coastal lines and seas.¹⁶⁶ As soon as there is another motive, e.g., a political one, then it

¹⁶³ Report of the Monitoring Group on Somalia pursuant to Security Council resolution 1811 (2008), United Nations, 10 December 2008, available at: <http://daccessdds.un.org/doc/UNDOC/GEN/N08/604/73/PDF/N0860473.pdf?OpenElement>.

¹⁶⁴ For instance, Recommendations to Governments for Preventing and Suppressing Piracy and Armed Robbery against Ships MSC/Circ.622/Rev.2.

¹⁶⁵ IMO Doc. PCUA 1/3 (3 February 1987), Annexe, paragraph 2.

¹⁶⁶ See, e.g.; Lucchini and Voelckel, *Droit de la Mer*, Tome 2, vol. 2, 165.

no longer constitutes “piracy jure gentium.”¹⁶⁷ This, by itself does not automatically mean that the existence of a political motive justifies any acts of insurgency.

(c) Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation 1988

Rather than attempting to forge a rigid distinction between acts of terrorism and piracy, the ‘four circles’ model may be useful, which views terrorism, piracy, insurgency and organized crime as sometimes overlapping activities.¹⁶⁸ The Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA Convention) was inspired by the Achille Lauro incident in which a vessel was internally hijacked and hostages aboard were killed.¹⁶⁹ The sponsoring governments that first introduced a draft text for the Convention (Austria, Egypt and Italy), cited as part of their reason for doing so were the restrictions inherent within the definition of piracy. It is necessary to include an act for private end and in requiring that one vessel attack another. This could not cover the internal seizure of a vessel.¹⁷⁰

The principal reasons that the SUA Convention was necessary were first, as noted above, the law of piracy did not cover internal hijacking of vessels and second, while there existed treaties concerning the hijacking and sabotage of airplanes no simi-

¹⁶⁷ Privy Council, In re piracy jure gentium, <http://www.uniset.ca/other/cs5/1934AC586.html> , (09-20-2015).

¹⁶⁸ A small boat used by Somali pirates in attacks off the coast of Somalia and the Gulf of Aden.

¹⁶⁹ See SUA Convention, article 1.

¹⁷⁰ IMO Doc. PCUA 1/3 (3 February 1987), Annexe, paragraph 2.

lar conventions yet existed for the shipping industry.¹⁷¹ It is unsurprising, then, that the SUA Convention is closely modelled on the conventions concerning offenses aboard or against aircraft. The sponsors' explicit aim was to devise a comprehensive convention that would cover all forms of violence against shipping.¹⁷²

1) New form of Sea Terrorism and the Updating of the 1988 SUA Convention and Protocol

The 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA Convention) was developed as a reaction to the hijacking of the *Achille Lauro* by politically motivated militants. In 1985, the Palestine Liberation Organization (PLO) hijacked the Italian cruise liner, held its passengers hostage, and killed a Jewish-American passenger.¹⁷³

This incident brought the relationship between piracy and maritime terrorism to light.¹⁷⁴ Under UNCLOS, the hijacking of the *Achille Lauro* does not qualify as piracy, since the attack was not committed for private gain. The SUA Convention was developed to ensure that politically motivated attacks against ships could also be prosecuted, and is, thus, widely considered an anti-terrorism convention.¹⁷⁵

¹⁷¹ Convention for the Suppression of Unlawful Seizure of Aircraft 1970, 860 UNTS 105; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation 1971, 974 UNTS 177.

¹⁷² Mejia, M., Maritime Gerrymandering: Dilemmas in Defining Piracy, Terrorism and other Acts of Maritime Violence, *Journal of International Commercial Law* 2(2), 153-175, 2014, p.161.

¹⁷³ See SUA Convention, article 2, para (1)

¹⁷⁴ *Supra* note 33, article 39 commentary, para 1(i), p. 282.

¹⁷⁵ *Id.*, para 1(vi) p.282.

The SUA Convention was adopted on the 10th March 1988 and entered enforcement on the 1st March 1992. There are 156 Contracting Parties representing 94.62% of the world's tonnage.¹⁷⁶ Various protocols have been adopted, with those of 2005 entering into force in 2010. The significant state adoption, particularly by those 'whose interests are specifically affected' suggests a convention to prevent, punish and prosecute all forms of violence against shipping was needed.¹⁷⁷ Although the crimes under SUA Convention 1988 and piracy are not exclusive crimes, some authors have taken the adoption of the SUA Convention as evidence for the rules on piracy which did not cover terrorist's acts and other politically motivated actors. This is supported by the fact that the convention was adopted in direct response to the "Achille Lauro incident."¹⁷⁸

The sponsoring States that introduced the draft convention such as Austria, Egypt and Italy, cited the two-ship restriction and the private ends requirement as the reason why a new convention on terrorism was needed. Both Special Representative of the UN Secretary General for the Law of the Sea and the Italian Minister of Justice stated at the conference that the private end criterion would not be met by maritime ter-

¹⁷⁶ As at 1 October 2015, 164 countries are party to the convention representing 83,67% of the countries in the world.

¹⁷⁷ Mejia, M., Maritime Gerrymandering: Dilemmas in Defining Piracy, Terrorism and other Acts of Maritime Violence, *Journal of International Commercial Law* 2(2), 153-175, 2014, at p.161.

¹⁷⁸ On October 7, 1985, four men representing the Palestine Liberation Front (PLF) hijacked the Italian MS *Achille Lauro* liner off the coast of Egypt, as she was sailing from Alexandria to Ashdod, Israel. The hijacking was organized by Muhammad Zaidan, leader of the PLF. One 69-year-old Jewish American man in a wheelchair, Leon Klinghoffer, was murdered by the hijackers and thrown overboard.

rorism, thereby making piracy inapplicable.¹⁷⁹ The SUA Convention does appear to adopt the broader interpretation, covering the activity in Article 3 that lacks state sanctioning.¹⁸⁰ If piracy covered all violence on the high seas that lacked state sanctioning, the SUA Convention would be obsolete in that respect. All States would be able to exercise universal jurisdiction against such actors (put aside the two-ship requirement).¹⁸¹

The SUA Convention provides that “Unlawfully and intentionally seiz[ing] or exercise[ing] control over a ship by force or the threat thereof or any other form of intimidation; or perform[ing] an act of violence against a person on board a ship if that

¹⁷⁹ Mukherjee, P.K. & Mejia, M. Jr. (2016). The SUA Convention 2005: acritical evaluation of its effectiveness in suppressing maritime criminal acts, 2016, 12 JIML, at p.173.

¹⁸⁰ See SUA Convention, article 3 para. 1(a), 1(b), 1(c), 1(g).

¹⁸¹ According to Article 3 para 1 of SUA 1988.

1. Any person commits an offence if that person unlawfully and intentionally:

(a) seizes or exercises control over a ship by force or threat thereof or any other form of intimidation; or

(b) performs an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of that ship; or

(c) destroys a ship or causes damage to a ship or to its cargo which is likely to endanger the safe navigation of that ship; or

(d) places or causes to be placed on a ship, by any means whatsoever, a device or substance which is likely to destroy that ship, or cause damage to that ship or its cargo which endangers or is likely to endanger the safe navigation of that ship; or

(e) destroys or seriously damages maritime navigational facilities or seriously interferes with their operation, if any such act is likely to endanger the safe navigation of a ship; or

(f) communicates information which he knows to be false, thereby endangering the safe navigation of a ship; or

(g) injures or kills any person, in connection with the commission or the attempted commission of any of the offenses set forth in subparagraphs (a) to (f).⁶⁴”

act is likely to endanger the safe navigation of that ship”¹⁸² is an act of piracy under the term from this convention. The SUA Convention also applies to offenses that are committed in the territorial waters of States. While UNCLOS is based on universal jurisdiction, only signatory States that are affected by the offense can prosecute under the SUA Convention. This can, for instance, be the flag state of an attacked ship or the state in whose territorial waters the attack took place.¹⁸³ The SUA Convention has 164 state parties. Among its non-signatories are, however, Somalia, Indonesia, and Malaysia, three States that are significantly affected by maritime piracy.¹⁸⁴

Article 3 of the SUA Convention creates many offenses. Most relevant for present purposes is Article 3(1) (a), stating that “[a]ny person commits an offence if that person unlawfully and intentionally seizes or exercises control over a ship by force or threat thereof or any other form of intimidation.” There is no requirement that the seizure must be internal or be politically motivated. Thus, any pirate seizure of a vessel will clearly fall within this definition. Attempting, abetting and threatening such an offence are equally crimes under the Convention Article 3(2).¹⁸⁵ The only case in which the Convention would not apply is where the offence was committed solely within a single state’s territorial sea and the vessel was not scheduled to navigate beyond that

¹⁸² (SUA Convention 1988, Article 3.1.1-2).

¹⁸³ Which prompted the drafting of the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation 1988, as discussed below.

¹⁸⁴ See SUA Convention, article 3 para. 1(a), 1(b), 1(c), 1(g).

¹⁸⁵ See SUA Convention, article 3 para. 2.

territorial sea and the suspected offender was subsequently found within that coastal state's territory.¹⁸⁶

This follows from Article 4, which States that the SUA Convention applies either “if the ship is navigating or is scheduled to navigate into, through or from waters beyond the outer limit of the territorial sea of a single state, or the lateral limits of its territorial sea with adjacent States” or “when the offender or the alleged offender is found in the territory of another state party.”¹⁸⁷

Yet the SUA Convention was introduced for covering politically motivated violence, which lacked state sanctioning and was considered by those States which are not covered by piracy as defined in the HSC.¹⁸⁸ Guilfoyle however commented on the SUA Convention within its historical context and concluded that treaty represents state practice condoning the idea that political motives could exclude criminal responsibility. Later, terrorism suppression treaties exclude a ‘political offenses exception’ from applying to extradition requests.¹⁸⁹

Although the exception is not expressly excluded in the SUA Convention, this is due to the debate at the time, within the UN General Assembly, whether acts in furtherance of self-determination were legitimated acts of politically motivated violence,

¹⁸⁶ This prompted the drafting of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation 1988, as discussed below.

¹⁸⁷ *Id.*, article 4.

¹⁸⁸ *Supra* note 34, p.244.

¹⁸⁹ Guilfoyle, D., The legal Challenges in Fighting Piracy, in Van Ginkel, B. & Van der Putten, F.P. (Eds), *The International Response to Somali Piracy: Challenges and opportunities*, The Netherlands: Martinus Nijhoff Publishers, 2015, at p. 132. The SUA Convention provision regarding delivery of suspected offender is recognized by UNSCR S/RES/1851 preamble at p.2, UNSCR S/RES/1846, paragraph 15.

or whether they were terrorist attacks.¹⁹⁰ Since the 1994 Declaration on Measures to Eliminate International Terrorism the position has been settled, no such considerations can be considered, all such violent attacks being unjustifiable. The 2005 SUA protocol adopts this position, expressly excluding any ‘political offence’ ground to refuse extradition.¹⁹¹

It is reasonable to consider the other reasons for introducing the SUA Convention, which could explain the vast state practice beyond the three States that introduced the draft. The SUA Convention aims to suppress a broader number of acts equally disruptive to navigation, it provides a working regime applicable to a larger geographical area than piracy, and most importantly, it provides a duty to prosecute or extradite.¹⁹² Such interpretations demonstrate the fundamentally different original point which each theory adopts. Academics set out to demonstrate solely on politically motivated violence is another form of public end. The ‘private ends’ requirement has not been fulfilled and universal criminal jurisdiction should not be extended to their actions.¹⁹³

The piracy regime is in the interest of the freedom of high seas stated one of the exceptional cases which individuals are directly the objects of International Law. The freedom of navigation is upheld by the exclusive flag state jurisdiction, which prevents

¹⁹⁰ See SUA Convention, article 2, para (1).

¹⁹¹ Supra n. 33, article 39 commentary, para (3), at p.282.

¹⁹² The minimum guarantees include (a) prompt information and in detail in a language that the accused understands, (b) time and facilities for the preparation of defense and communication with own chosen counsel (c) trial without undue delay; (d) trial in the presence of the accused, self-defense or through legal assistance, be informed of rights, free legal assistance if no sufficient means to have on his own (e) right to examine the witnesses (f) free assistance of an interpreter, (g) no compelling to testify against oneself.

¹⁹³ See SUA, article 13 (1b), article 14, OCC, article 28.

unnecessary restrictions or impediments to navigation on the high seas.¹⁹⁴ It cannot be taken for granted the remedies that States can take against the more traditional instances of maritime violence. These are also available in the case of maritime terrorism.¹⁹⁵ Therefore States turned to the SUA Convention to regulate violence that is not for private ends or involving two ships, but necessarily required a further exception to flag state jurisdiction.

The broad interpretation of piracy, however, is premised on the general rule that the freedom of navigation means ships should not be subjected to violence on high seas. Only States and belligerents or insurgents targeting state's vessels are those who can legitimately use violence. The lack of state responsibility for the actions of private political organizations means States must turn to the criminal law to hold those responsible offenses.¹⁹⁶

Thus, we turn to piracy law, as the general rule excludes all violence that occurs without state sanctioning (and responsibility). The private ends term is a limited exception applying to the facts of insurgency, and the argument holds that only political violence does not fall within this limited exception.¹⁹⁷ Those who see only political violence as a public end are asking whether political violence falls within the exception of piracy universal jurisdiction, while the broader opinion question is whether it falls

¹⁹⁴ See LOSC, article 111.

¹⁹⁵ *Supra* n. 34, p.250.

¹⁹⁶ The reference to "a place outside the jurisdiction of any State" in Article 101(a)(ii), UNCLOS is intended to cover events on islands which are terra nullius and not part of any State's territory. See: [1956] II YbILC, 282.

¹⁹⁷ *Castle John v. NV Mabeco*, (Belgium, Court of Cassation, 1986) 77, *International Law Reports* 537.

within the exception of non-private ends to the exercise of universal jurisdiction over violence at sea. Such perspective obviously affects how the SUA Convention is interpreted.¹⁹⁸

2) Jurisdiction Under the SUA Convention

Unlike the law of piracy, the SUA Convention creates an express obligation upon parties to create appropriate domestic offenses. Under Article 6, State parties must make the offenses in Article 3 a crime under national law when committed:¹⁹⁹

- (a) Against or on board their flag vessels;
- (b) Within their territory, including their territorial sea; or
- (c) By one of their nationals.

In addition, State parties may establish criminal jurisdiction where a relevant offence is committed, inter alia, against one of their nationals or to compel their government to do or abstain from doing any given act. The most important jurisdictional provisions are those dealing with the obligation to either extradite or submit the case for consideration by prosecutorial authorities (commonly, if misleadingly, called an obligation to extradite or prosecute).²⁰⁰ Where a state subsequently finds a suspect or offender within its territory (the territorial state) and another state party or parties have jurisdiction under Article 6, then the territorial state shall, if it does not extradite him, be obliged to submit the case without delay to its competent authorities for the purpose of

¹⁹⁸ Historically there was a debate about the status of insurgents in a civil war and whether they could be classed as pirates if they: (1) attacked the vessels of the government they were attempting to overthrow; or (2) enforced a blockade on government ports against 'neutral' shipping. There is no suggestion pirates are insurgents engaged in either activity.

¹⁹⁹ See SUA Convention, article 6(1) & (2), OCC, article 15 (1) & (2), HC, article 5 (1).

²⁰⁰ See SUA Convention, article 6(3), OCC, article 15 (3) & (4), HC, article 5(2).

prosecution, through proceedings in accordance with the laws of that state.²⁰¹To this end, each party must establish jurisdiction over the offenses set forth in Article 3 in cases where the alleged offender is present in its territory and it does not extradite him to any of the state parties which have established their jurisdiction in accordance with the obligations.²⁰²

Article 7 provides that a state finding a suspect on its territory is required to commence a preliminary investigation and, if it considers the circumstances so warrant, take the suspect into custody while a decision is made about extradition or prosecution. That investigating state is required to communicate with States having jurisdiction under Article 6, but that state is not required to defer to their jurisdiction.

Instead Article 7(5) provides that an investigating state party “shall promptly report its findings to those States and shall indicate whether it intends to exercise jurisdiction.”²⁰³These last words appear consistent with the view that a state has the free choice whether to extradite or prosecute. Article 7, therefore, supports the view that, absent an extradition request, a state could validly prosecute a person suspected of SUA Convention offence found within its territory.²⁰⁴

²⁰¹ Convention for the Suppression of Unlawful Seizure of Aircraft 1970, 860 UNTS 105; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation 1971, 974 UNTS 177.

²⁰² Article 6(4), SUA Convention.

²⁰³ See SUA Convention, article 7.

²⁰⁴ *Id.*, article 7.

3) Delivering Suspects Pursuant to the SUA convention

Article 8(1) of the SUA Convention provides that: “The master of a ship of a state party (the “flag state”) may deliver to the authorities of any other state party (the “receiving state”) any person whom he has reasonable grounds to believe has committed one of the offenses set forth in article 3. Nothing in this provision expressly requires that it be the master of the attacked ship that delivers a suspect to a receiving State under Article 8.”²⁰⁵

Indeed, the Security Council appears to have presumed that Article 8 would cover such delivery from a seizing warship to a receiving state.²⁰⁶ While Article 2 of the SUA Convention States that the Convention does not apply to a warship this provision was intended to prevent the Convention covering offenses against military discipline. Neither the actual language used nor the intent behind it prevents this provision being applied by a warship.²⁰⁷

A receiving state is under a primary obligation to accept delivery of a suspect. A receiving state may only refuse to accept delivery of a suspect under Article 8(3) of the SUA Convention where it has grounds to consider that the Convention is not applicable to the acts giving rise to the delivery. In such a case, it must give a statement of

²⁰⁵ See SUA Convention, article 8.

²⁰⁶ UNSCR 1846; preamble, UNSCR 1851. To the extent that Article 2(1)

(a) may suggest otherwise, the present report assumes that the Security Council has provided an authoritative interpretation.

²⁰⁷ See SUA Convention, article 2, para (1).

the reasons for refusal. Once a delivered suspect is received within its territory, the obligations under Articles 7 and 10 described above apply.²⁰⁸

Under Article 8(5), a receiving state may request that the flag state accept delivery of the suspect. Common sense would suggest the former is intended, but the wording of Article 8(1) suggests the latter. In such cases, the relevant flag state shall consider such a request, but has no primary obligation to accept delivery. If it declines to accept delivery, it must provide a statement of its reasons for doing so.²⁰⁹ Jurists also referred to the SUA Convention, which provides extradition and jurisdiction possibilities, as evidence that maritime terrorists will be punished. Even the UN Secretary-General described the SUA Convention and its protocols as the more effective measures for prosecution than the nineteenth century piracy statutes.

In the following case of politically motivated violence on the high seas, there seems to be a rare need to apply the piracy regime despite the threat posed to the common interest. Sufficient jurisdictional bases exist. However, the SUA Convention has not entered into Customary Law and still depends on flag-States signatories.²¹⁰ Treaty law only requires contracting parties, including the SUA Convention obligations, to make such activities punishable under Customary Law, and subject to a ‘prosecutorial or extradition’ obligation.

²⁰⁸ Article 10(1), SUA Convention.

²⁰⁹ See *supra* n. 135 and CRC, article 8(5)

²¹⁰ While there has been some scholarly support for such a right, it has not found acceptance in State practice: Lucchini and Voelckel, *Droit de la mer*, Tome 2, vol. 2, 165; O’Connell, *International Law of the Sea*, vol. 2, 978. UNSCRs 1816 (operative paragraph 7), 1846 (operative paragraph 10) and 1851 (operative paragraph 6) obviously provide a mechanism for ‘co-operating States’ to enter the territorial waters and land territory of Somalia, based both on the consent of Somalia and, authority of Chapter VII.

Furthermore, the SUA Convention only deals with adjudicative jurisdiction. It does not affect the rules of International Law pertaining to the competence of States to exercise investigative or enforcement jurisdiction on board ships which do not fly their flag. Thus, no jurisdiction to cease, search, arrest or seize is added by the SUA Convention for such offenses.²¹¹ Upon this request, the IMO adopted in 1988 the Convention for the Suppression of Unlawful acts against the Safety of Maritime Navigation²¹² whereby the IMO clearly endeavored to establish a legal basis for prosecuting maritime violence that did not fall within the UNCLOS's piracy framework. It became apparent that legal measures are necessary to prevent all modern-day piracy acts and to ensure that perpetrators of such acts are made duly accountable. There was an urgent need for piracy rules relating to the arrest, prosecution and subsequent detention of those responsible for acts of maritime terrorism.

The SUA Convention applies to ships navigating or scheduled to navigate “into, through or from waters beyond the outer limit of the territorial sea of a single state, or the lateral limits of its territorial sea with adjacent States or when the alleged offender is found in the territory of a state party.”²¹³ The principal purpose of the SUA Convention was to enforce retribution and punishment for maritime crimes and to ensure that appropriate judicial actions are taken against persons committing unlawful acts against

²¹¹ Which fact prompted the drafting of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation 1988.

²¹² (See also “Rome Convention”) The Convention on the Law Applicable to Contractual Obligations 1980, or the "Rome Convention", is a measure in private International Law or conflict of laws which creates a common choice of law system in contracts within the European Union. The convention determines which law should be used, but does not harmonize the substance (the actual law). It was signed in Rome, Italy on 19 June 1980 and entered into force in 1991.

²¹³ See SUA Convention, article 8.

ships, which includes the seizure of ships by force, acts of violence against persons on board ships, and the placing of devices on board a ship that are likely to destroy or damage it.

Rather, Article 9 of the SUA Convention provides that “nothing in this Convention shall affect in any way the rules of International Law pertaining to the competence of States to exercise investigative or enforcement jurisdiction on board ships not flying their flag.”²¹⁴ Thus, the SUA Convention is applicable to ships on an international voyage operating or scheduled to operate seaward of any state’s territorial sea. It expands thereby the definition of UNCLOS on piracy as it applies to any ship navigating to, or from territorial seas. Unlike UNCLOS, the SUA Convention encompasses criminal actions committed during international transit, in ports, coastal zones or territorial waters.²¹⁵

There are also legal issues dealing with the SUA Convention. An issue that arises out of the SUA Convention is its extradite or prosecute provision, which requires that the countries that apprehend the offenders are restricted to perform either extradition or prosecution. Malvina Halberstam States that most legal writers consider this requirement the core of the SUA Convention.²¹⁶ The extradition or prosecute requirement is regulated in Article 10 part 1 of the SUA Convention and narrated below:²¹⁷

²¹⁴ *Id.*

²¹⁵ See SUA Convention, OCC, article 16, HC, article 9 &10.

²¹⁶ Article 10(1), SUA Convention.

²¹⁷ *Id.*

1. Each State Party shall take measures as may be necessary to establish its jurisdiction over the offenses set forth in article 3 when the offence is committed: (a) Against or on board a ship fly-

1. The state party in the territory of which the offender or the alleged offender is found shall, in cases to which Article 6 applies, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case without delay to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that state. Those authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of the state.²¹⁸

According to the use of “shall” within this statement, the decision to prosecute and thereby enforce the SUA Convention is discretionary for the States. There is no absolute obligation to extradite. It seems like the possibility of non-extradition for political offenses as well as the right to grant asylum are maintained. With regards to the question whether the SUA Convention covers all acts of modern-day piracy, it must be considered, as well, as Article 6 of the SUA Convention.²¹⁹

4) Protocol of 2005 to the SUA Convention

In the wake of the terrorist attacks of September 11, 2001, it became obvious that the 1988 SUA Convention required revision and updating because the SUA Convention was focusing more on reactions to a terrorist attack rather than preventing it. The IMO

ing the flag of the State at the time the offence is committed; or (b) in the territory of that State, including its territorial sea; or (c) by a national of that State.

2. A State Party may also establish its jurisdiction over any such offence when: (a) it is committed by a stateless person whose habitual residence is in that State; or (b) during its commission a national of that State is seized, threatened, injured or killed; or (c) it is committed in an attempt to compel that State to do or abstain from doing any act.

decided in November 2001 to update the SUA Convention. So, the original 1988 SUA Convention and Protocol, were amended respectively by two of 2005 SUA Protocols.²²⁰

The legal framework of that Protocol is set by the relevant international legal instruments against terrorism as well as UNCLOS and the customary International Law of the sea. With this wording and the reference to Customary Law, the drafters wanted to enlarge the scope of the SUA Convention so that the regulations are applicable as well to States that have not yet signed or ratified the SUA Convention.²²¹

The critical regulation of the 2005 Protocol to the 1988 SUA Convention is Article 3 (1a) which is narrated as following:

1. Any person commits an offence within the meaning of this Convention if that person unlawfully and intentionally: (a) when the purpose of the act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act:

(i) uses against or on a ship or discharging from a ship any explosive, radioactive material or BCN weapon and other nuclear explosive devices in a manner that causes or is likely to cause death or serious injury or damage;

(ii) discharges, from a ship, oil, liquefied natural gas, or other hazardous or noxious substance, in such quantity or concentration that causes or is likely to cause death or serious injury or damage;

(iii) uses a ship in a manner that causes death or serious injury or damage; or

(iv) threatens to commit any of these offenses.”²²²

²²⁰ Bailet, F.N., Crickard, F.W, & Herbert, G.J, Integrated maritime enforcement : A handbook, Halifax: Dalhousie University, 2014, p.6 .

²²¹ Hirsi, A., Sea-Piracy: Business model or resource conflict?, Wardheer News, 2014, p.22

²²² *Id.*

This protocol has raised awareness within the shipping industry, including the shipmaster, ship-owner, insurance companies, traders, etc., of the areas of high risk associated with piratical attacks or specific ports and anchorages associated with armed robberies on board ships.”²²³ This information sharing via this protocol aims at understanding the nature of piracy and reducing its effects on crew and cargo through self-regulation by the shipping industry.²²⁴

Warships that have reasonable grounds for suspecting that a ship (other than another warship) is engaging in piracy, have a right to board the suspected ship if it is on the high seas. A similar right of boarding exists against the so-called pirate broadcasters, which undertake unauthorized broadcasting based from positions on the high seas. This broadcasting, which is not *piracy per se*, is of a class of prohibited activities akin to piracy.²²⁵ These and other treaties which may, dependent on the circumstances, be relevant to piracy (treaties on hostage-taking and transnational organized crime) are discussed in this last section.

²²³ Vallar, C., Notorious pirate havens part 3: Madagascar, 2014, at <http://www.cindyvallar.com/havens3.html>.

²²⁴ Mejia, M., Maritime Gerrymandering: Dilemmas in Defining Piracy, Terrorism and other Acts of Maritime Violence, *Journal of International Commercial Law* 2(2), 153-175, 2013, at p.161

²²⁵ Gosse, Philip (2014). *The Pirates' Who's Who*. BiblioBazaar, LLC. ISBN 1-4346-3302-0. p. 251.

UNCLOS 1982

Article 91

Nationality of ships

1. Every State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship.
2. Every State shall issue to ships to which it has granted the right to fly its flag documents to that effect.²²⁶

Article 94

Duties of the flag State

1. Every State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.
2. In particular every State shall:
 - (a) maintain a register of ships containing the names and particulars of ships flying its flag, except those which are excluded from generally accepted international regulations on account of their small size; and
 - (b) assume jurisdiction under its internal law over each ship flying its flag and its master, officers and crew in respect of administrative, technical and social matters concerning the ship.
3. Every State shall take such measures for ships flying its flag as are necessary to ensure safety at sea with regard, *inter alia*, to:
 - (a) the construction, equipment and seaworthiness of ships;

²²⁶

Id. Art. 91

- (b) the manning of ships, labour conditions and the training of crews, taking into account the applicable international instruments;
- (c) the use of signals, the maintenance of communications and the prevention of collisions.

4. Such measures shall include those necessary to ensure:

- (a) that each ship, before registration and thereafter at appropriate intervals, is surveyed by a qualified surveyor of ships, and has on board such charts, nautical publications and navigational equipment and instruments as are appropriate for the safe navigation of the ship;
- (b) that each ship is in the charge of a master and officers who possess appropriate qualifications, in particular in seamanship, navigation, communications and marine engineering, and that the crew is appropriate in qualification and numbers for the type, size, machinery and equipment of the ship;
- (c) that the master, officers and, to the extent appropriate, the crew are fully conversant with and required to observe the applicable international regulations concerning the safety of life at sea, the prevention of collisions, the prevention, reduction and control of marine pollution, and the maintenance of communications by radio.

5. In taking the measures called for in paragraphs 3 and 4 each State is required to conform to generally accepted international regulations, procedures and practices and to take any steps which may be necessary to secure their observance.

6. A State which has clear grounds to believe that proper jurisdiction and control with respect to a ship have not been exercised may report the facts to the flag State. Upon receiving such a report, the flag State shall investigate the matter and, if appropriate, take any action necessary to remedy the situation.

7. Each State shall cause an inquiry to be held by or before a suitably qualified person or persons into every marine casualty or incident of navigation

on the high seas involving a ship flying its flag and causing loss of life or serious injury to nationals of another State or serious damage to ships or installations of another State or to the marine environment. The flag State and the other State shall cooperate in the conduct of any inquiry held by that other State into any such marine casualty or incident of navigation.²²⁷

Article 111

Right of hot pursuit

1. The hot pursuit of a foreign ship may be undertaken when the competent authorities of the coastal State have good reason to believe that the ship has violated the laws and regulations of that State. Such pursuit must be commenced when the foreign ship or one of its boats is within the internal waters, the archipelagic waters, the territorial sea or the contiguous zone of the pursuing State, and may only be continued outside the territorial sea or the contiguous zone if the pursuit has not been interrupted. It is not necessary that, at the time when the foreign ship within the territorial sea or the contiguous zone receives the order to stop, the ship giving the order should likewise be within the territorial sea or the contiguous zone. If the foreign ship is within a contiguous zone, as defined in article 33, the pursuit may only be undertaken if there has been a violation of the rights for the protection of which the zone was established.
2. The right of hot pursuit shall apply *mutatis mutandis* to violations in the exclusive economic zone or on the continental shelf, including safety zones around continental shelf installations, of the laws and regulations of the coastal State applicable in accordance with this Convention to the exclusive economic zone or the continental shelf, including such safety zones.
3. The right of hot pursuit ceases as soon as the ship pursued enters the territorial sea of its own State or of a third State.
4. Hot pursuit is not deemed to have begun unless the pursuing ship has satisfied itself by such practicable means as may be available that the ship

²²⁷ *Id.* Art. 94

pursued or one of its boats or other craft working as a team and using the ship pursued as a mother ship is within the limits of the territorial sea, or within the contiguous zone or the exclusive economic zone or above the continental shelf. The pursuit may only be commenced after a visual or auditory signal to stop has been given at a distance which enables it to be seen or heard by the foreign ship.

5. The right of hot pursuit may be exercised only by warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect.

6. Where hot pursuit is effected by an aircraft:

(a) the provisions of paragraphs 1 to 4 shall apply *mutatis mutandis*;

(b) the aircraft giving the order to stop must itself actively pursue the ship until a ship or another aircraft of the coastal State, summoned by the aircraft, arrives to take over the pursuit, unless the aircraft is itself able to arrest the ship. It does not suffice to justify an arrest outside the territorial sea that the ship was merely sighted by the aircraft as an offender or suspected offender, if it was not both ordered to stop and pursued by the aircraft itself or other aircraft or ships which continue the pursuit without interruption.

7. The release of a ship arrested within the jurisdiction of a State and escorted to a port of that State for the purposes of an inquiry before the competent authorities may not be claimed solely on the ground that the ship, in the course of its voyage, was escorted across a portion of the exclusive economic zone or the high seas, if the circumstances rendered this necessary.

8. Where a ship has been stopped or arrested outside the territorial sea in circumstances which do not justify the exercise of the right of hot pursuit, it

shall be compensated for any loss or damage that may have been thereby sustained.²²⁸

(d) International Convention against the Taking of Hostages 1979

Article 1 of the Hostage Taking Convention States that:

Any person who seizes or detains and threatens to kill, to injure or to continue to detain another person (the 'hostage') in order to compel a third party including a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for release of the hostage. . . commits the offence of hostage-taking.

This definition is clearly met where a hostage is detained, threatened with continued detention, and a condition of his or her release is that a private person or company pay a ransom. The typical piracy offenses being committed off the coast involving holding crews for ransom could thus clearly fall within the Convention definition.

The Convention contains no express territorial limitations,²²⁹ a point made clear by Article 5 under which each party is obliged to establish jurisdiction over the offence defined in Article 1 where committed, inter alia:²³⁰

- (a) In its territory or on board a ship or aircraft registered in that State;
- (b) By any of its nationals; [or]

²²⁸ *Id.* Art. 111.

²²⁹ The Convention does place an additional obligation upon a territorial state within which Hostage-Taking has been committed to "take all measures it considers appropriate to ease the situation of hostage, in particular, to secure his release article5(1).

²³⁰ *Id.*

(d) With respect to a hostage who is a national of that State, if that State considers it appropriate. The Convention is thus clearly capable of applying to events occurring at sea.

(e) UN Convention against Transnational Organized Crime 2000 ('UNTOC')
The UNTOC is in force for many States which are active in efforts to suppress piracy. Under Article 3, paragraph 1, UNTOC covers a number of crimes including serious crimes punishable by at least four years' deprivation of liberty or more serious penalties,²³¹ thus potentially encompassing many acts of piracy. To fall within Article 3(1) a crime must be transnational in nature and committed by an organized criminal group.

Under Article 3, paragraph 2, a crime is "transnational in nature" when it is:

- (a) "committed in more than one State";
- (b) "committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State"; and
- (d) "committed in one State but has substantial effects in another State."

Can these provisions extend to crimes committed on the high seas? Under Article 15(b) States must criminalize conduct prohibited by UNTOC "committed on board a vessel that is flying the flag of that State Party".²³² Thus a pirate raid planned in and carried out aboard a foreign flag vessel would appear, for the purposes of the Convention, to involve one or more serious crimes prepared in one State and committed in another state (in the sense of being committed in the flag state's jurisdiction) and carried out by

²³¹ Articles 2(b) and 3(1)(b), UNTOC.

²³² Article 2(a), UNTOC. See also *Id Art. 15(b)*, UNTOC.

an organized criminal group.²³³ It is no obstacle to the application of these principles that some States are not a party to the Convention.

UNTOC may thus provide a common framework for facilitating mutual legal assistance in relation to the prosecution of pirates, although that is already happening under more specific instruments such as the Exchange of Letters between the European Union and Kenya.²³⁴ UNTOC also provides for criminalizing and taking action to suppress money laundering (Articles 6 and 7); measures to confiscate money, property or other benefits deriving from a crime covered by the Convention (Articles 12 and 14) and international co-operation to that end (Article 13);²³⁵ and measures for assistance to and protection of both witnesses and victims (Articles 24 and 25).²³⁶

(f) Conduct Concerning Repression of Piracy and Armed Robbery against Ships in the Western Indian Ocean and Gulf of Aden 2009

The Djibouti Code of Conduct is not a legally binding instrument and applies only as between the participants (Djibouti, Ethiopia, Kenya, Madagascar, Maldives, Seychelles, Somalia, United Republic of Tanzania and Yemen).²³⁷ The Code of Conduct spells out how the participants intend to give effect to their existing duty of cooperation

²³³ This should not be taken as meaning a flag vessel is territory; a flag vessel is, however, subject to the exclusive jurisdiction of its flag State on the high seas: Article 92(1), UNCLOS.

²³⁴ Ship-riders need not be law-enforcement personnel. The present author understands that EUNAVFOR has used ship-riding translators, for example.

²³⁵ *Id.*

²³⁶ This is the interpretation put forward in the UNODC's Legislative Guide for the Implementation of the United Nations Convention against Transnational Organized Crime, paragraph 416(b). While practical, this interpretation is not necessarily obvious on the face of the text, see e.g. David McClean, *Transnational Organized Crime: A Commentary on the United Nations Convention and its Protocols* (Oxford University Press, 2015), p.177, or from the travaux préparatoires. However, the UNODC approach is strengthened by Article 34(2), UNTOC which expressly excludes the "transnational nature" from being an element of national offenses.

²³⁷ Article 4(6), Djibouti Code of Conduct. See also Article 105, UNCLOS.

to suppress piracy, consistently with applicable rules of International Law and available resources, by inter alia (under Article 2(1)).²³⁸

E-1. Enhancing national legislation

The signatory States to the Code undertook to review their national legislation with a view to ensuring that there are laws in place to criminalize piracy and armed robbery against ships and to make adequate provision for the exercise of jurisdiction, conduct of investigations and prosecution of alleged offenders.²³⁹

IMO is working closely with the United Nations Office on Drugs and Crime (UNODC) as well as other international organizations and development partners to assess and assist with upgrading national legislation, focusing on empowering States' law-enforcement forces to conduct arrests and criminal investigations.²⁴⁰

E-2. Information sharing and Maritime Domain Awareness

The Code provides for sharing of piracy-related information, through its information sharing network established in 2011. The network is centered on the three Information Sharing Center: The Regional Maritime Rescue Coordination Centre (RMRCC) in Mombasa, Kenya, Maritime Rescue Coordination Centre (MRCC) in Dar es Salaam, United Republic of Tanzania and the Regional Maritime Information Sharing Centre (ReMISC) in Sana'a, Yemen. It is used to exchange information on pi-

²³⁸ *Id. Art. 2(1)*

²³⁹ *Id.*

²⁴⁰ See supra n. 155 at 32.

racY incidents across the region and other relevant information to help shipping and signatory States to act to mitigate piracy threats.²⁴¹

Since its establishment, the information sharing network has played a significant role in countering piracy. The IMO will continue to support the capacity of the regional network to counter piracy as well as other illicit activities at sea. The IMO is also working to develop signatory States' maritime domain awareness. Projects to increase the use of terrestrial automatic identification systems (AIS), long-range identification and tracking of ships (LRIT), coastal radar and other sensors and systems have been undertaken and continue to be implemented.²⁴²

E-3. Building Counter Piracy Capacity

The IMO has been working with partners to boost the capacity of States in the Western Indian Ocean and Gulf of Aden region to suppress piracy by supporting development of maritime infrastructure, law enforcement and implementation of the Djibouti Code of Conduct. In its endeavor to strengthen capacity in the region, IMO has signed five strategic partnerships with UN agencies and the EU. These joint agreements to combat piracy, reaffirms the mutual commitments to improving coordination at all levels and across all relevant programs and activities, with a view to strengthening the capacity of States in the region to deal with piracy, as well as to help develop viable and sustainable alternatives to piracy.²⁴³

²⁴¹ *Id.*

²⁴² See *supra* n.155 regarding the Djibuti Code Article and accompanying text.

²⁴³ *Id.*

E-4. Evolution of the Djibouti Code of Conduct

Since it was signed in 2009, the Code has evolved to become the major focus for facilitating transnational communication, coordination and cooperation within the region, creating a basis for technical cooperation between the signatory States, IMO and international partners that is trusted, effective and popular. The IMO continues to support Member States to implement the Djibouti Code of Conduct through its Integrated Technical Cooperation Program (ITCP) and activities funded by the Djibouti Code Trust Fund. It also maintains a presence in the region, focused on the Code, with two staff members based in Nairobi, Kenya, whose primary role is training.²⁴⁴

2.4 - Conclusion

Piracy continues to be a threat to international prosperity and security. Vessels all over the world navigate the ocean daily. International Law of the sea is in many ways an evolution of ideas and norms regarding the sea as a common heritage of mankind.

More importantly, the International Law of the sea is the result of a century's long negotiating process. It took States centuries to reach a consensus and create a document that would provide a legal framework and establish rights of States regarding the sea. It took States centuries to create the International Law of the sea mainly because of two reasons.

²⁴⁴ *Id.*

Firstly, International Law differs from national law in a fundamental way. International Law sometimes cannot be enforced through the state's law. It is based on treaties and conventions and on state consensus. There is no real authority in the international system that could enforce the law in the same way that there is no real law-making organ. Thus, all rights and responsibilities of the States and the rules regarding the sea which are stipulated in the International Law of the sea had to be based on the consent of States. It comes to no surprise that reaching such consent was a process that needed time. However, the main problem in the establishment of the International Law of the sea was the controversial debate on the dominion of the sea.

States were divided over two main principles. One group of States has defended the principle of territorial integrity and sovereignty over the sea. The other group of States had advocated the importance of the principle of free navigation. The International Law of the sea had to find a balance between these two principles.

The significance of piracy as a research topic is that it adds to the sanctity of their sovereignty. The case of piracy provides a challenge to this legal order. It is the debate on the International Law of the sea that provides for regulations regarding piracy. At the same time, it establishes the rights of coastal States regarding the integrity of their territoriality a case where International Law of the sea fails to work, but most importantly is that it is a case where the presumed sanctity of territoriality and sovereignty over the sea can be questioned.

* * *

Chapter 3

The Emergence of Somali Piracy

I think the guys . . . in Somali piracy are not unlike low-level drug dealers in urban areas in America, who see it as, . . . not having many other options. I think it comes down to money and needing to survive.¹

3.0 Introduction

International Law, it might be argued, is a legal system directed toward to assist the defeat or suppression of a category of violators known as “enemies of mankind,” or *hosti humanis generis*.² Sometimes these are war criminals, sometimes they are terrorists or slave traders. As had been aptly said, “The original enemy of all mankind was the pirate.”

Since the early 1990s, rampant piracy off the coast of Somalia has become a major issue for global trade and security, prompting strong responses from the international community. In 2014 alone, the collective cost of ransom money, military protection and cargo insurance because of piracy is estimated to have been between seven and

¹ Hodierna, Cutter. Read more at: https://www.brainyquote.com/authors/cutter_hodierna (Assessed, 11/25/17 0).

² Sanayo. "Piracy in Somali Waters: Rising attacks impede delivery of humanitarian assistance". UN Chronicle Journal. United Nations Department of Public Information, Outreach, Division, vol.3 ed. 15, 2015.

twelve billion dollars.³ This number doesn't include the collective loss of trade revenue from nearby countries such as Egypt, Kenya, Yemen and Nigeria, estimated to be at least \$1.25 billion annually.⁴

Bands of pirates on small speedboats patrol the waters in the Gulf of Aden and the Suez Canal targeting any ship that enter their "hunting grounds."⁵ These pirates seize the ship, most of the crew and demand a ransom from the shipping company.⁶ Piracy of this nature has become a lucrative business for Somali pirates, despite the numerous patrol ships sent in from the United States of America, China and other western countries, and the breathtaking rescues carried out by the crews on board these patrol vessels.⁷ These events have had spill-over effects into other businesses. Shipping insurance premiums have skyrocketed for ships travelling through the dangerous waters; private military contractors have begun hiring out security teams to accompany ships and their cargos as they travel through the Gulf of Aden.⁸

Pirate attacks have occurred from as close as the Somali coast line to the Arabian Sea, which lies close to the coast line of India. When the Somali Democratic Republic collapsed in 1991, during the outbreak of a civil war, Somalia's navy fell into disre-

³ Megalommatitis, Muhammad (29 March 2016). "Ecoterra Press Release, p.257 – The Somalia Chronicle June – December 2016, no. 70" *buzzle.com*.

⁴ Dagne, Ted (2014), *Somalia: Conditions and Prospects for Lasting Peace*, American press, p.107-109.

⁵ *Id.*

⁶ "The Advantage of Piracy". 15th ed. *German-foreign-policy.com* Review. Retrieved 17 December 2015.

⁷ Anna, Bowden. "The Economic Cost of Somali Piracy 2015". *Oceans beyond Piracy*, p.1145-1149.

⁸ Axe, David (2015), *Somalia Redux: a more hands-off approach*, p.675, 2015. ISBN 1-0000295684.

pair and was disbanded. This left Somalia's coast line unprotected, and fishing vessels from other countries started to poach fish in the region.⁹ Somali piracy began when Somalis were unable to find a remedy from the international community; local Somali fishermen took up arms and attempted to protect their waters from the illegal fishing (IUU) and illegal dumping of toxic waste. They were compelled to arm themselves because the country lacked political stability and a central government, resulting in no security agency in the form of navy or coast guard to patrol the waters and prevent these illegal activities. Some pirates consider themselves the coast guard of Somalia. The lack of a government created a perfect environment for piracy to thrive.

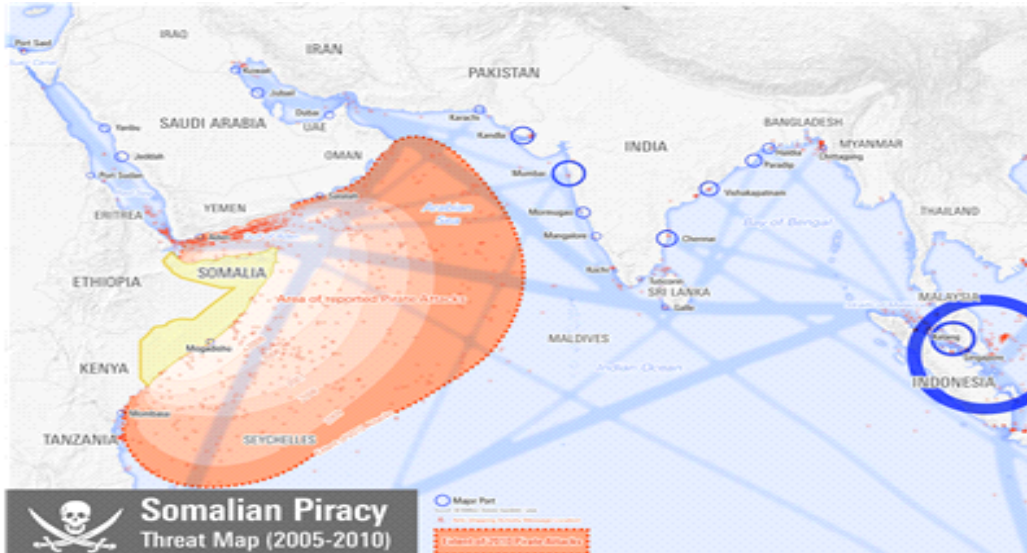
The initial segment of this chapter narrates how important it is for companies all over the world to use the Gulf of Aden marine route, specifically within each mentioned area. What are the reasons for eliminating Somali pirates instead of changing maritime routes? Further, this chapter shows the process of the Somali pirate growth, how it endangers the peace of the sea, and its history. Furthermore, this chapter categorizes the acts of Somali pirates by aspect and deed, and discusses the impacts of their actions. The collapse of the Somali government, which contributed to the failure of administration in Somali, is the pivotal event to be analyzed under this chapter.

⁹ Waldo, Mohamed (8 January 2016). "The Two Piracies in Somalia: Why the World Ignores the Other". WardheerNews.com. Retrieved 22 January 2017.

⁹ "Analysis: Somalia Piracy Began in Response to Illegal Fishing and Toxic Dumping by Western Ships off Somali Coast". *Democracy Now! Vol.55 ed.16*. Retrieved 20 May 2016.

¹⁰ "Toxic Waste Behind Somali Pirates." *Top 25th ed. of 2014. Project Censored. 2014*. Retrieved 22 January 2015.

3.1 History and Evolution of Somali Piracy



The map immediately above depicts the Horn of Africa, Somalia and its extensive coastline, and the region of the Indian Ocean that is subject to Somali piracy.

For thousands of years, the climate and currents of the Indian Ocean have transported watercraft from Africa to Arabia, Arabia into the Persian Gulf, then off to the west coast of India, and back again. Trade with the Mediterranean world sailed south on the Red Sea, through the Bab el Mandeb, into the Indian Ocean and beyond.¹⁰

The travel guide, *Periplus of the Erythrean Sea*,¹¹ which was written in Greek in the first century AD by an anonymous merchant, noted the richness of the maritime trade. He also warned that along the coast of Azania (which is now Somalia) "live men

¹⁰ "Somali piracy becoming criminal enterprise". *Reuters Journal*. Vol.25 ed.14, 16 February 2014.

¹¹ Wilfred H. Schoff, trans, *The Periplus of the Erythraean Sea: Travel and Trade in the Indian Ocean by a Merchant of the First Century* (New Delhi, 1974).

of piratical habit." Claudius Ptolemy, in *Geographia*, first published in 150 AD, identified the Horn region south of Cape Guardafui as "the Gulf of Barbaria." "Men of the greatest stature, who are pirates, inhabit the whole coast and at place have set up chiefs."¹² One thousand years later, in 1854, when the great British explorer, Richard Burton, embarked on a Royal Geographic Society trip to the port of Berbera, the British officials in Aden were concerned for his safety¹³ because attacks on ships in the Gulf of Aden were common. In fact, Major Gordon Laing was murdered when leaving Harar in 1826.¹⁴

As Burton himself noted, in *First Footsteps in East Africa*,¹⁵ "the more adventurous Abyssinian travelers not to mention diverse Roman Catholic Missioners attempted Harar, but attempted it in vain." With a well-armed retinue and dressed as an Arab trader, Burton and his caravan succeeded in getting to Harar and back. In April of 1855, however, as they prepared to leave Berbera, their party was attacked by a group of "Bedouin brigands." Lieutenant Stoyan was killed and John Speke and Richard Burton suffered severe injuries.¹⁶

¹² "How Somalia's Fishermen Became Pirates". *TIME.com.*, p.14-15, 18 April 2015. Retrieved 20 May 2016.

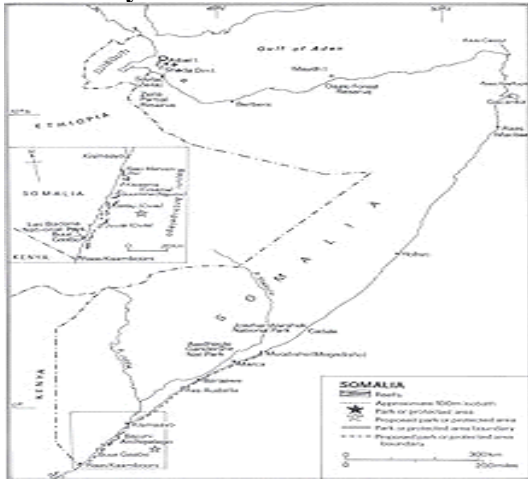
¹³ "Hijackings cut aid access to south Somalia, lives at risk". Vol.31, World Food Programme Journal, 2016.

¹⁴ Ioan Lewis, *Understanding Somalia and Somaliland* (New York: Columbia University Press, 2015) ISBN 1-0000568923.

¹⁵ Kenneth J. Menkhaus, "The Somali Catastrophe, Bigger than the Horn—and Not Over Yet," *Current History Law Reviews* (March 2016 ed.).

¹⁶ ICC Commercial Crime Services Journal, Piracy figures for 20th centuries surpass those for ancient years (Vol.42, 23 September 2016).

3.2 Piracy off the Coast of Somalia



As of 2005, the pirate threat region mostly included the area closest to the Somali coast line. This area, as the map above depicts, was adjacent to Yemen and Oman, which borders Saudi Arabia. It also involved the Gulf of Aden,¹⁷ where over 30,000 commercial ships pass. These include oil tankers as well as other forms of commercial shipping.¹⁸

One out of every ten gallons of oil shipped in tankers, passes through this region. Over the years, however, pirate attacks have spread far beyond the Somali coast line, toward the Maldives islands and the Indian Ocean as of 2013.¹⁹ After the collapse of the central government during the ensuing civil war, the Somali navy disbanded.²⁰ With Somali territorial waters undefended, foreign fishing trawlers began illegally fish-

¹⁷ Jeffrey Gettleman, "Somalia's Pirates Flourish in a Lawless Nation," *The New York Times Journal*, vol.41, October 31, 2015.

¹⁸ Dagne, Ted (2014), *Somalia: Conditions and Prospects for Lasting Peace*, p.144, Yankie Press.

¹⁹ *Washington Times*, (11 April 2015). "Somali pirates a far cry from buccaneers of old". *WashingtonTimes.com*. Vol. 32 16th ed., Retrieved 17 December 2016.

²⁰ Jeffrey Gettleman, "Pirates Tell Their Side," *The New York Times Journal*, Vol.76, October 1, 2014.

ing on the Somali seaboard and ships from big companies started dumping waste off the coast of Somalia. This led to the erosion of the fish stock.²¹

Local fishermen subsequently started banding together to protect their resources.²² After seeing the profitability of ransom payments, some financiers and former militiamen later began to fund pirate activities,²³ splitting the profits evenly with the pirates. In most of the hijackings, the pirates have not harmed their prisoners.²⁴

A United Nations report and several news sources have suggested that the piracy off the coast of Somalia was caused in part by illegal fishing, but also by foreign boats taking advantage of the war, which resulted in lost fishing income to local communities. According to the German Institute for Economic Research and the US House Armed Services Committee,²⁵ the dumping of toxic waste in Somali waters by foreign vessels also severely constrained the ability of local fishermen to earn a living.²⁶

In response, the fishermen began forming armed groups to stop the foreign ships. They eventually turned to hijacking commercial vessels for ransom as an alterna-

²¹ "Marine Fisheries Review, Somali fishery industry has potential for growth, December 1982, p. 44 (12th ed.)" . Retrieved 27 March 2014.

²² *The Washington Times*, (11 April 2014). "Somali pirates a far cry from buccaneers of old". *WashingtonTimes.com*. Vol. 57 14th ed. (Retrieved 17 December 2014).

²³ Westcott, Kathryn (23 April 2015). "Somalia's pirates face battles at sea". *BBC News*. Retrieved 2 May 2016.

²⁴ "Somali Pirates Seize Two Ships" Vol.45 16th ed. P.11, *Sky News Journal*, 15 August 2015.

²⁵ Niall Ferguson, "The Axis of Upheaval," *Foreign Policy Journal*, Vol. 21 14th ed. (March/April 2014).

²⁶ "The Advantage of Piracy." *German-foreign-policy.com*. Vol. 34 15th ed., Retrieved 17 December 2015.

tive source of income. In 2012,²⁷ a survey by *Wardheer News* found that approximately 70 percent of the local coastal communities at the time strongly support piracy as a form of national defense of the country's territorial waters.²⁸

The pirates also believed that they were protecting their fishing grounds, justice and compensation for the stolen marine resources.²⁹ In the absence of an effective national coast guard following by the outbreak of the civil war and the subsequent disintegration of the Armed Forces, local fishermen formed organized groups in order to protect their waters. Their belief is reflected in the names adopted by some of the pirate networks, such as the *National Volunteer Coast Guard*, which are testimony to the pirates' initial motivations. However, as piracy became substantially more lucrative, other reports have speculated that financial gained became the primary motivation for the pirates.³⁰

3.2.1 Weapons and Methodology

The first organized pirate attack carried out by Somali pirates started shortly after the start of the second phase of the Somali Civil War in 2005.³¹ As time went by, more pirates started attacking shipping lanes from the Suez to India, and vice versa. This in-

²⁷ Jeffrey Gettleman and Mohammed Ibrahim, "Somali Pirates Get Ransom and Leave Arms Freighter," *The New York Times Journal*, Vol. 84, February 6, 2015.

²⁸ Najad Abdullahi (11 October 2015). "Toxic waste' behind Somali piracy", October 2015". English.aljazeera.net. Retrieved 27 March 2016.

²⁹ "Piracy ransom cash ends up with Somali militants." *Reuters Journal*. Vol. 8 15th ed. p.18, 6 July 2015.

³⁰ Robin Hunter, "Somali pirates living the high life," 15th ed. BBC News Review, retrieved February 23 at <http://news.bbc.co.uk/2/hi/africa/7650415.stm>.

³¹ ICC Commercial Crime Services, "IMB reports unprecedented rise in maritime hijackings," January 6, 2015, retrieved February 23, 2016 at <http://icc-ccs.org/news/344-imb-reports-unprecedented-rise-in-maritime-hijackings>.

creased activity suggested that Somali piracy was supported by large segments of the Somali population.

According to 2015 reports, Somali pirates were attacking ships with Russian made 82mm mortars that can target a ship as far as five kilometers from shore. Modern pirates are part of organized crime groups that target big and small cargo vessels, and even cruise ships and private yachts.³² As international warships became more present, Somalia pirates started using more advanced techniques (as of now, they use naval mother ships that allow them to organize large scale attacks on distant targets on open sea).

Typically, Somali pirate attacks involve attacking commercial ships, taking hostages, and demanding high ransoms, often in the millions of dollars.³³ The attacks involve fishing trawlers that launch small attack boats, known as skiffs, to seize larger cargo ships. Somali pirates are often armed with rocket-propelled grenade launchers and assault rifles.³⁴ When confronted with a modern naval force,³⁵ the pirates will throw their weapons overboard to destroy evidence. This has made it difficult to prosecute them in international courts of law. Pirates receive funding from various sources, including from within Somali itself, but also from Yemen and other countries. Pirate operations have been so successful that they have been receiving funding from local

³² Leeson, Peter T. "The Law of Pirate Organization." *Journal of Political Economy* 115, no. 6 (2015): 1049–1094. pg. 1066 University of Chicago.

³³ Charbonneau, Louis (18 March 2015). "UN cites reports of gov. links to Somalia pirates". *Vol.14 15th ed. Reuters*.

³⁴ "Pirate on US wanted list arrested in Somalia." *P.10, Vol.90, Abcnews.go.com. Journal* 20 May 2016.

³⁵ Neil MacFarquhar, "U.N. Council Shows Support for U.S. Plan against Piracy," *The New York Times Journal*, Vol.62, December 17, 2014.

stock exchanges, where investors would trade shares in pirate groups.³⁶ In a curious twist of fate, therefore, Somali piracy has metastasized into the country's only boom industry. Most pirates, observers have noted, are not former fishermen, but just poor folk seeking their fortune. Recently, pirates held 18 cargo ships and 300 sailors hostage because of the work of a sophisticated and well-funded operation.³⁷

Small groups of armed former fishermen and militia men use small speedboats to capture a fishing ship. They use these ships as mother ships, which can withstand extreme weather conditions, to sail farther out to sea in search of cargo ships,³⁸ and these large are also used to carry men, fuel, equipment and the speedboats that enable the pirates to operate within a large area.³⁹ These conditions have resulted in the proliferation of armed militia groups and warlords, a motley group that engages in piracy, and provide intelligence for pirates.⁴⁰ The circulation of weapons has made it easier for Somali youth to obtain firearms. Finally, the lack of a Somali national government has resulted in the emergence of a criminal economy that has extended out to the sea.⁴¹ Let us now consider tactics that pirates use to further their nefarious trade.

³⁶ "Marine Fisheries Review, Somali fishery industry has potential for growth, Vol.52 15th ed., December 2015, 44 (p.15)."

³⁷ *Westcott, Kathryn (23 April 2016). "Somalia's pirates face battles at sea". P. 13, 16th ed. BBC News Reviews.*

³⁸ Stig Jarle Hansen, "Piracy in the greater Gulf of Aden: Myths, Misconception and Remedies," Norwegian Institute for Urban and Regional Research, p. 115-118, October 2015.

³⁹ Donna Nincic, "Maritime Piracy in Africa: The humanitarian dimension," Institute for Security studies (2015), p. 87-105 (accessed January 24, 2016). ISBN 5000061943.

⁴⁰ Lauren Ploch, "Piracy off the Horn of Africa," Vol.67 14th ed. Congressional Research Service Journal, April 19, 2014.

⁴¹ Ian Storey, "Calming the Waters in Maritime East Africa," Vol.38 14th ed. *Asia Pacific Bulletin*, February 18, 2015.

After seizing and taking control of the ship, they usually sail it to the north-eastern coast. From there, negotiators take over and start negotiating for ransom.⁴² What is interesting is that these negotiators are often members of the coastal communities or literate citizens of the pirates' safe havens. Technically, they do not operate as pirates in the sense that they do not go out to sea and attack ships.⁴³ They are, however part of a complex system that has made it nearly impossible to pinpoint the pirates, and prevent their attacks on ocean commerce.⁴⁴

Most attacks, however, do not result in physically harming hostages. However, Somali pirates are suspected in the killing of four Americans on board a yacht in 2012,⁴⁵ and they allegedly killed a Chinese sailor in 2013 when their ransom demands were not met. There have also been reported incidents of torture, and the use of hostages as shields against defensive fire.⁴⁶

The main goal of pirates has remained the same throughout all these years. In 2010, over 1100 hostages were captured by Somali pirates, and by the fall of 2011 they had captured 300 more. Pirates also collected various amounts of ransom for captured

⁴² "Countering Piracy off the Horn of Africa: Partnership and Action Plan", U.S. National Security Council, December 2015.

⁴³ Nincic, "Maritime Piracy in Africa: The humanitarian dimension Journal." Vol. 109 15th ed, February 28, 2015.

⁴⁴ Recent IMB reports show acts of piracy and armed robbery within the territorial seas of these countries.

⁴⁵ Hassan, Abdiqani (23 April 2015). "Crew said lucky to be alive after Somali hijack". Vol.40 15th ed. Reuters Africa Journal. Retrieved 25 April 2016.

⁴⁶ M iriri, Duncan (14 November 2014). "Somali pirates killed Chinese sailor-official". Vol.41 14th ed. Reuters Review. Retrieved 12 April 2015.

ships⁴⁷ ranging from 500,000 to 2,000,000 dollars. Even though pirates try to keep their captives alive in the hope of receiving ransom, over 60 seafarers have died in pirate prisons.

The intertwining of the pirate activities with those of ‘citizens’ could be made clear based on the estimates of piracy revenues. The International Maritime Organization estimated that ransom payments to recover the retained ships brought in 40 million dollars in 2008 alone.⁴⁸ This was a significant sum of revenue for Somalia which earns 100 million dollars from its exports and livestock yearly.⁴⁹ This also equals the same amount that Somaliland earns in a year. This has attracted the attention of many religious and clan leaders, many of whom receive a cut of the ransom money. It is difficult to discover where the money has gone since it passes through so many hands in central and northeastern Somalia. The fear has been recently that a large part of Puntland is becoming a pirate version of a narco-state.⁵⁰ This is further complicated by the Somali coast guard. In fact, the groups who conducted the first attacks in the mid-nineties called themselves the ‘coast guard,’ because they were patrolling their territorial waters.⁵¹

⁴⁷ "Piracy ransom cash ends up with Somali militants". P. 18-19, Vol.43 14th ed. Reuters Review. 6 July 2014.

⁴⁸ Harnit Kaur Kang, "Gulf of Aden: Piracy and Counter-piracy efforts," Institute of Peace and Conflict Studies Journal, Vol.3 15th ed. December 2015.

⁴⁹ James Kraska, "The Report on the U.S. Naval War College Workshop on Somali Piracy: Fresh Thinking for an Old Threat," Vol.954 14th ed. April 28, 2014.

⁵⁰ Andrew Mwangura, "Workshop on Fishing Communities and sustainable Developments in Southern and Eastern Africa: A small-scale fisheries perspective," Seafarers' Assistance Program Journal Vol.37 16th ed., March 2016.

⁵¹ Ken Menkhaus, "Somalia: Too Big a Problem to Fail?" Foreign Policy Reviews 15th ed., August 6, 2015.

Effectively, this meant that they were funding and speculating on the success of future pirate attacks. The profits from pirate attacks rose to an estimated \$200 million as of 2013.⁵² The benefits of piracy to local Somali communities have manifested in the form of business from pirates spending their money at local businesses. In addition, pirate attacks have succeeded in fending off illegal foreign fishing in some places, resulting in improved fishing harvests for local fishermen.⁵³

3.2.2 Structural Causes of Somali Piracy

What began as an angry reaction of the fishermen became an enterprise led by militia leaders who demanded cash from the foreign vessels as a form of ‘taxes,’ if those vessels wished to fish in waters the pirates controlled. If crew refused to pay, they risked kidnapping. The militia leaders did not concern themselves with the coastal communities and the loss of Somalia’s fisheries.⁵⁴

The root causes of maritime piracy in the Horn of Africa are not yet fully understood. Greed and grievance are two explanatory variables that are often examined in relation to piracy. While proponents of the greed hypothesis believe that piracy is an act of personal enrichment, advocates of the grievance hypothesis see piracy as a desperate, yet legitimate response to injustice. In this regard, critics consider the presence of illegal fishing vessels and the dumping of toxic materials in Somali waters as damaging

⁵² "Somalia: Puntland forces arrest wanted pirates in Garawa." *Vol.98, Garoweonline.com Journal*. 18 May 2014. Archived from the original on 21 May 2015.

⁵³ "Navy regularly releases Somali pirates, even when caught in the act". *Vol.87, The Telegraph Journal*. 29 November 2016.

⁵⁴ Brice, A. (2015, October 1). "Somali Piracy Threatens Trade, Boosts Terrorists, Analysts say." *Vol.54, Cable News Network (CNN) Journal*. Retrieved on 30th November 2016.

livelihoods and prompting “local fishermen to ‘police’ the coast and extract ‘taxes’ from foreign vessels.”⁵⁵

The fall of Said Barre’s dictatorship in 1991, which led to the complete breakdown of Somali coercive authority and territorial jurisdiction, provided one enabling condition for the emergence of increased pirate attacks.⁵⁶ In the absence of any policing or judicial institutions, pirates operated with impunity. Percy and Shortland saw five obstacles standing in the way of effectively controlling Somali piracy, where were the lack of alternate employment, local corruption, the nature of the victims of piracy (i.e. outsiders to the community), the practices of some shipping companies and insurers (e.g. poor safety practices), and the fact that enforcement efforts push pirates to innovate, the latter phenomenon makes the problem even more difficult.⁵⁷

The growth of piracy attacks off the coast of Somalia has been a culmination of various factors; for instance, the failure of the international community and domestic effort to create a central and functional government in Somalia; the historical background of the country that included a civil war and was filled with violence, the severe poverty of the country, and the geographical location of Somalia.⁵⁸ Creating a consensus on power sharing has been an enormous difficulty in the state-building process in

⁵⁵ British Broadcasting Cooperation Journal, (2014) Vol.56 “Country Profile-Somalia”, 2016. Retrieved on 16th May 2016.

⁵⁶ Hunter, R. (2015, October 28). Somali pirates living the high life, Vol.91, BBC News Law Journal. Retrieved on 20th April 2016.

⁵⁷ Kreskas, J. & Wilson, B. (2014/2015, Winter). Fighting pirates: The pen and the sword. World Policy Journal, Vol. 25, (4), p.41-52.

⁵⁸ Lehr, P. Somali piracy: The next iteration. Perspectives on Piracy, Vol. III, (4), ed. 2016.

Somalia partly because the country is divided along lines of close-knit groups and clans.⁵⁹

Though the Somali people belong to one ethnic group and have the same religion, might lead one to suppose that state building in Somalia should have been manageable. This might have been a correct assessment were it not for the fact that the Somali people are divided along clans and tribes.⁶⁰ Seventy five percent of the citizens belong to the six largest clans: the Darod, the Digil, the Dir, the Hawiye, the Isaaq and the Rahanwein.⁶¹

These clans are based on lineage and kinships all of which forms the basis of identity formation in Somalia.⁶² While Somalia may seem to be anarchic at first sight, the opposite is true. There are well-developed and functional legal norms. Fights between the clans are mostly caused by scarce resources. These fights have traditionally resolved by clan elders. The elders have enjoyed a representative role. Over the years, they would gather in meetings and negotiate until a consensus was reached.⁶³ It was the Cold War, however, that undermined this system of rule. Colonialism sabotaged the system of self-rule and the authority of the ‘uneducated’ elders.

⁵⁹ Lennox, P. (2015, December). Contemporary piracy off the Horn of Africa, p.107-121. ISBN 5-000007621.

⁶⁰ O'Malley, Z. (2015, March 4). World's most dangerous countries. Vol.38 15th ed. Forbes Magazine Journal. Retrieved on 15th May 2016.

⁶¹ Sauvageot, E. (2016, January). Piracy off Somalia and its challenges to maritime 22 security: Problems and solutions. Research Unit on International Security and Cooperation (UNISCI) Journal. Vol. 8, p.1-18.

⁶² Waldo, Vol.87 14th ed. M.A. (2014, January 8). The Two Piracies in Somalia: Why the world ignores the other? Retrieved on 18 May 2015.

⁶³ Andrew Mwangura, “Workshop on Fishing Communities and sustainable Developments in Southern and Eastern Africa: A small-scale fisheries perspective,” Vol.98, 16th ed. Seafarers’ Assistance Program Review, March 2016.

Being a client of the Soviet Union and switching to the side of the United States later during the Cold War resulted in weapon proliferation in Somalia. General Siad Barre came into power after a coup in 1969.⁶⁴ He created a centralized and authoritarian government. Corruption, the disastrous economy, the collapse of institutions and the height of clannism paved the way to the collapse of the regime.⁶⁵ The current crisis in Somalia started in 1992 with the fall of the Siad Barre regime.⁶⁶

The Somali clans are nowadays divided over three major territories: the South, where most combat occurs, Somaliland and Puntland. The latter two are state-like entities in the north, though they are not recognized internationally.⁶⁷ South and Central Somalia have no economy and their people live in severe conditions. The north is better off economically, but suffers from a high rate of criminality and lack of law enforcement; additionally, tensions between Somaliland and Puntland are militarized and often lead to violent confrontations.⁶⁸

In 2009, an initiative taken by the regional African countries and sponsored by the European Union had to ensure the training of 500 sailors to build a Somali Coast Guard. This initiative was developed in the hope that the guard would be a valued asset

⁶⁴ There was a strong Soviet influence in the politics and economy of Somalia, especially in the early years prior to and after independence. I. M. Lewis, *A Modern History of the Somali* (Athens, Ohio: Ohio University Press, 2014).

⁶⁵ James Jay Carafano, Richard Weitz and Martin Edwin Andersen, "Maritime Security: Fighting Piracy in the Gulf of Aden and Beyond," Vol.34, *Heritage Special Report*, June 24, 2015.

⁶⁶ For a detailed account of the political tensions with in Somalia that led to Siad Barre's overthrow, see Lewis, *A Modern History of the Somali*, Vol. 231–63, 2016.

⁶⁷ "There are Two Piracies in Somalia," Vol. 67, *African Loft Journal*, April 13, 2014, <http://www.africanloft.com> (accessed February 27, 2015).

⁶⁸ Steve Tomkins, "Fishermen seeking a bigger catch," 15th ed. *Church Times Law Reviews*, July 3, 2015.

in combating piracy.⁶⁹ However, the sophistication of the pirate attacks indicated that pirates were receiving intelligence from the coast guard. Furthermore, many of them leave the coast guard and become pirates.⁷⁰ Thus, answering the question of who are the Somali pirates becomes much more complicated.

The lack of strong government, poverty and pervasive crime created conditions in which pirates, under the guise of serving as coast guards, started working for local crime lords. Successful pirates live much better than the remainder of the country. This apparent, though relative affluence, fuels the constant arrival of new pirates hungry for glory and wealth. According to some polls, over 70 percent of the local Somali population supports their pirate fleet as one of the main protectors of the nation fishing grounds.⁷¹

Because globalization is not a homogenous process throughout, it is easier to explain why certain regions are more susceptible to developing piracy than others. In the case of Somalia, there is not a central government that has the resources, or even the will to combat the pirates, yet the pirates do have the technological advancements at their disposal to pose a threat.

The autonomous state of Puntland⁷² is located at the very tip of the Horn of Africa, between Somalia to the south and the Somaliland Republic (formerly British So-

⁶⁹ Mohamed Olad Hassan, "It's a pirate's life for me," Vol. 32, *British Broadcasting Corporation Journal*, April 22, 2014.

⁷⁰ Shani Ross and Joshua Ben-David, "Somali Piracy: An Escalating Security Dilemma," Vol.41, *International Institute for Counter-Terrorism Journal*, August 20, 2014.

⁷¹ Jeffrey Gettleman, "Hijacked Arms Ship Limpers into Port," Vol.51, *The New York Times Journal*, February 13, 2016.

⁷² Rankin, Nick (11 March 2015). "No vessel is safe from modern pirates". Vol.443, *BBC News Review*. Retrieved 26 March 2016.

maliland) to the west. Unlike Somaliland, which has for years, been seeking international recognition as an independent state, Puntland envisions itself as a federal but self-governing division of Somalia.⁷³

Monitoring and combating any of these misdeeds is next to impossible. Somalia's current government can barely find its own feet in the wake of the 2016 U.S.-backed Ethiopian invasion. Furthermore, many Somali citizens, along with outside observers, suspect local officials in Mogadishu, and in ports in semi-autonomous Puntland further north, of accepting bribes from foreign fishermen as well as from pirate elders.⁷⁴ U.N. monitors in 2015 and 2016 suggested an embargo on fish taken from Somali waters, but their proposals were shot down by members of the Security Council.⁷⁵

In contrast, and in keeping with the Southwest Monsoon period in the Horn of Africa, the high wind speeds and waves more than five meters per-hour in the Indian Ocean / Arabian Sea and Gulf of Aden has precluded Somali piracy operations. However, the monsoon conditions have not affected the Southern Red Sea and the Gulf of Aden with sixteen reported approaches, none of which has been categorized as piracy.⁷⁶

With calm seas and light winds forecast over the next few months, conditions will be more favorable for pirate operations. However, a lack of funding, equipment

⁷³ Metzler, John (Feb 2015). "Piracy surges despite defense measures". vol.331, *Korea Times Reviews*.

⁷⁴ Axe, David (2015), Somalia Redux: a more hands-off approach, Vol.32, *ABC News Journal*.

⁷⁵ Dagne, Ted (2016), Somalia: Conditions and Prospects for Lasting Peace, Vol.87, *Douglas Reports*, 16th ed.

⁷⁶ Somalia's Vol.67, NISA and CIA Journal: An Effective Partnership Against al Qaeda, 2015.

and man power is likely to limit the number of Pirate Action Groups at sea. There is potential for pirate operations to commit in the southern regions of Somalia, where the advantage of relatively easy access to the southern Somali Basin and areas off Mombasa and Dar es Salaam and the distance from concentrations of naval forces in the Gulf of Aden,⁷⁷ make this a more likely hunting ground.

3.2.3 Invasion of Somali Piracy

The One Earth Future Foundation estimated that in 2011 Somali piracy cost between \$6.6 and \$6.9 billion, of which the shipping industry bore more than 80 percent.⁷⁸ Between 2005 and 2016, Somalia-based pirates took a total of 3,923 seafarers hostage. Starting in 2004, piracy attacks in the Gulf of Aden increased yearly, reaching the highest point in 2009 with 158 reported incidents.⁷⁹ After 152 attacks in 2011, the numbers had fallen to 58 in the year of 2012 and only 13 in 2013.⁸⁰ This sharp decrease of attacks can, *inter alia*, be attributed to the multilateral naval missions organized by the UN, NATO, and the EU that have been dispatched to the Gulf of Aden.

In 2003, fishing ships became targets of pirate attacks on the Coast of Somalia and the Gulf of Aden. The frequency of these attacks increased gradually over time.⁸¹

⁷⁷ Bill Roggio, January 8, 2017 (January 8, 2017). "U.S. Gunship fires on al Qaeda Leader and Operative in Somalia". Vol.98, *The Long War Journal*.

⁷⁸ Brett Schaeffer, "Piracy: A Symptom of Somalia's Deeper Problems," Vol.58, *The Heritage Foundation Journal*, April 17, 2016.

⁷⁹ "Report on Acts of Piracy and Armed Robbery against Ships; MSC Circular 785," 16th ed. International Maritime Organization Report, March 17, 2016.

⁸⁰ Mark Bowden, "Black Hawk Down," Vol.76, *The Philadelphia Enquirer Journal*, November 16, 2015, <http://inquirer.philly.com/packages/somalia/nov16/rang16.asp>.

⁸¹ "Pirates and Profiteers: How Pirate Fishing Fleets are Robbing People and Oceans," Vol.87, *Environmental Justice Foundation Law Reviews*, 2015, 7

These attacks have been a concern for the international community ever since the pirates began targeting commercial ships in the beginning of 2005. Data from the International Maritime Organization showed that twenty-two attacks occurred in the year 2000.⁸² In 2008, this number increased to 108 attacks. In the first half of 2009 alone this number rose again to 143 attacks.⁸³

Because of the power and reach of the United States Navy and other naval forces of the world, attacks on ships and international shipping lanes by pirates, also known as sea bandits, are rare.⁸⁴ However, one major exception are the waters near Somalia, where pirates have been attacking and hijacking ships since the turn of the 21st century. Pirate attacks have occurred from as close as the Somali coast line to the Arabian Sea, close to the coastline of India. Somali piracy has cost the world between \$6 and \$12 billion per year.⁸⁵

Today's pirates pursue their prey with outboard motors instead of oars and tote rocket-propelled grenades instead of cutlasses. With upgraded equipment and loftier stakes, they demanded \$20 million in ransom for the ships' return, a figure that reportedly plunged to \$5 million on Oct. 1 — these 21st century buccaneers, like their peg-

⁸² Kulmiye, "Militia vs Trawlers: Who is the Villain?" 16th ed. *The East African Magazine*, 2016.

⁸³ Gerry Simpson, Law, "War and Crime" (Polity Press, 2017) p.159.

⁸⁴ "Private firm flouts UN embargo in Somalia". *Vol.87, IOL Journal*. Retrieved 20 May 2016.

⁸⁵ Robert F. Worth, "Pirates Seize Saudi Tanker Off Kenya, Vol.76, *The New York Times Journal*, November 18, 2014.

legged predecessors, are economic opportunists exploiting the largely unpatrolled waterways through which 90% of global trade flows.⁸⁶

By the first half of 2010, these increased policing efforts by Somali government authorities on land and international naval vessels at sea reportedly contributed to a drop in pirate attacks in the Gulf of Aden from eighty-six a year prior, to thirty-three, forcing pirates to shift attention to other areas such as the Somali Basin and the wider Indian Ocean.^{87 88} By the end of 2011, pirates had seized only four ships off the coast of Somalia, twenty-two fewer than the twenty-six they had captured in each of the two previous years. They also attempted unsuccessful attacks on fifty-two other vessels, sixteen fewer than the year prior.⁸⁹ As of 27 February 2015, the pirates were holding no major vessels for ransom, although there were twenty-six hostages remaining in their custody from a previous merchant hijacking.⁹⁰

Over the years, pirate attacks skyrocketed, reaching a peak of 151 known attacks in the beginning of 2010. International naval interception efforts have led to a drop in pirate activities. The lack of success has also dried up the various sources of

⁸⁶ "Prince of Mercenaries' who wreaked havoc in Iraq turns up in Somalia". *Vol.36, The Independent Law Review*. 22 January 2015.

⁸⁷ Ng, Eileen (15 July 2015). "World pirate attacks drop 18%." 15th ed. News.smh.com.au. Retrieved 27 March 2016.

⁸⁸ "Somalia: Puntland forces arrest wanted pirates in Garowe." Garoweonline.com. 18 May 2014. Retrieved 27 March 2015.

⁸⁹ Somali pirates struggle against international crackdown, *Vol.87, The Guardian Journal*. Retrieved 2016.

⁹⁰ European Union Naval Force Somalia. "Key Facts and Figures" Journal. Vol.14 15th ed. August, 2015.

funding that pirates have been able to secure for their operations.⁹¹ Overall, Somali piracy has experienced a pattern of rapid decline since 2012. By February 2012, 1,000 pirates had been captured and were going through legal processes in twenty-two countries.⁹² According to the International Maritime Bureau, pirate attacks in the Indian Ocean, had by October 2012, dropped to a six-year low.⁹³ Attempted hijackings fell from 237 in 2011 to 75 the following year, with successful attacks plummeting from twenty-eight in 2011 to fourteen in 2012. Additionally, only one ship was attacked in the third quarter of 2012 compared to 36 during the same period in 2011.⁹⁴

By September 2015, the heyday of piracy in the Indian Ocean was reportedly dwindling to a close. Backers were now reportedly reluctant to finance pirate expeditions due to the low rate of success, and pirates were no longer able to reimburse their creditors.⁹⁵ According to the International Maritime Bureau reports, pirate attacks, had by October 2015, dropped with only one ship attacked in the third quarter compared to

⁹¹ Ng, Eileen (15 July 2014). "World pirate attacks drop 18%". *14th ed.* news.smh.com.au.

⁹² Somali piracy in numbers, Peter Earle, *The Pirate Wars* (Methuen, 2014) p.12. ISBN 126500093.

⁹³ "Combined Task Force 150 Maintains Presence Off East Coast of Africa". *United States Navy Reviews*. Vol. 76, 5 January 2017. Retrieved 11 January 2017

⁹⁴ Unattributed. "<http://www.thecgps.org>". Vol.78, *Oceans Beyond Piracy Journal*. Retrieved 26 April 2015.

⁹⁵ "Somalia: Puntland to start construction of new Navy base." Vol.76, *Horseedmedia.net Reviews*. Retrieved 27 March 2016.

thirty-six during the same period in 2009.⁹⁶ However, according to the IMO's data, the pirate groups in the Gulf of Aden are still active in the year of 2015.⁹⁷

3.2.4 The Impact of Somali Piracy

Although piracy has existed nearly as long as people have used the oceans for traveling and transport, in the modern era, the phenomenon has, however, not held high importance on the international agenda. A sharp increase in the number of attacks on ships, especially on those crossing the Gulf of Aden, has brought to the attention of the world, the impact of piracy on commerce, food aid, and seafarer welfare.

The total damage of Somali piracy for international trade is given by a sum of connected elements. There is not just the cost of ransom to take into account, but a lot of different additional costs, such as those of long and expensive ransom negotiations, higher risk premiums on insurance, defensive measures (security equipment and guards, modification of ships to make them less likely to be hijacked), increased fuel consumption as a consequence of increased travel speed and/or re-routing, increased labor force costs (wages and benefits to pay crews as a result of risk to be taken hostage or killed) and running counter-piracy organizations and military operations.

According to the German Institute for Economic Research (DIW), a veritable industry of profiteers also arose around the piracy. Insurance companies significantly increased their profits from the pirate attacks, as the firms hiked rate premiums in re-

⁹⁶ Abdi Guled, Jason Straziuso (25 September 2016). "AP IMPACT: Party seems over for Somali pirates". Vol.277, AP Journal. (Retrieved 3 October 2016).

⁹⁷ Nick Hopkins. "Somali pirates struggle against international crackdown". Vol.98, *The Guardian Review*. Retrieved 20 May 2016.

sponse.⁹⁸ International Implications of the maritime piracy attacks that transpire off the Horn of Africa are severely disrupting international trade. The Far East-Europe route is one of the world's most active transcontinental maritime routes, as it receives nearly 20 percent of all global trading activities and more than 80 percent of trade moves through the Gulf of Aden.⁹⁹

More specifically, more than 20,000 ships carrying most of the world's affordable clothing, crude oil, and dry commodities pass through this route annually. However, on this route, there is an important barrier by the Puntland area in northeast Somalia. As self-ruling clans and warlords govern that unstable region, the adjacent Gulf of Aden harbors many Somali pirates.¹⁰⁰ Consequently, this route adequately reflects the significant impact of maritime piracy on global shipping and world development, for instance, the financial implications of maritime piracy are widespread. With a lack of central government, Somali pirates exploit their surrounding waters, leaving the cargo frequently transported between Europe and Asia endangered.¹⁰¹

One major implication is that the attacks have forced major shipping companies to adjust their routes from the Far East to Europe. Many companies have altered their courses from the Gulf of Aden to the Cape of Good Hope or the Suez Canal to decrease

⁹⁸ *Abdi Guled, Jason Straziuso (25 September 2015). "AP IMPACT: Party seems over for Somali pirates". Vol.89, AP Law Journal. Retrieved 3 October 2015.*

⁹⁹ For an overview of piracy and maritime activity during the Bronze Age see: Philip de Souza, *Piracy in the Graeco-Roman World* (Cambridge University Press, 2014) p.15. ISBN 50000098123.

¹⁰⁰ *Id.*

¹⁰¹ Times Online Journal, Shipping insurance cost soars with piracy surge off Somalia (Vol.90, 11 September 2014). <<http://www.timesonline.co.uk/tol/news/world/article4727372.ece>> accessed; Lloyd's List, Piracy risk must be put where it best fits – in war policies, urges Allianz (23 June 2015).

the likelihood of pirate attacks. Such changes add significant additional costs. It is estimated that if one-third of the Far-East European cargo routes were diverted via the Cape of Good Hope, it would trigger \$7.5 billion extra in expenses worldwide.¹⁰²

The main consequence of higher costs of insurance, armed guards and defense measures connected to piracy might be the substitution of trade routes transiting via the Gulf of Aden with others contemplating the circumnavigation of Africa. From an economical point of view, this could lead to an increase in travel prices, and therefore to more expensive goods for consumers. The reorientation of maritime traffic from Suez could favor seaports, to the detriment of economies.¹⁰³

It is also true that there is no evidence of a close connection between the rise of Somali piracy and the decrease in trade flow over the high seas. In the period of 2008-2009, maritime transport has shown alarming signs of vulnerability, but it could have been due to the financial crisis.¹⁰⁴ The costs of circumnavigating Africa depend on dynamic factors, such as the variations in fuel price; thus, trade routes via Suez would be more suitable when the fuel price is high, despite the cost of piracy.¹⁰⁵

¹⁰² Roger Middleton, Piracy in Somalia: threatening global trade, feeding local wars (Vol.144, Chatham House, October 2015) AFP Law Review, BP 15/02, p. 9.

¹⁰³ In October 2016, naval escorts for ships contracted by the World Food Program began: Peter Goosens in Harvard Humanitarian Law and Policy Forum, Somalia: Responding to the Legal Challenges of Offshore Piracy (Vol.87, Live seminar Law Journal, 16 April 2016) < accessed 25/06/16.

¹⁰⁴ Brian Wilson, An enduring legacy of Somali piracy could be new navies on the high seas (13 January 2017) 16th ed. *Yale Global Law Reviews*.

¹⁰⁵ *Stanford Law Review* 1201; Tanushree Sangal, Piracy in the media and entertainment industry in India: stemming the menace" (2015) Vol.20, *Entertainment Law Review* p. 82.

However, should the circumnavigation of Africa become a more practicable option, such a change would specifically damage several countries' economies, due to around 80% of international trade passing through the Gulf of Aden having a variation country as its destination.¹⁰⁶ The timeliness of shipments and delayed delivery of transported cargo is another consequence that stems from pirate attacks and the necessity of rerouting vessels.

Unfortunately, the uncertainty of receiving scheduled cargo creates often deters companies, thus significantly decreasing trade opportunities. While it is difficult to study the effects of insecurity, many studies have been demonstrated that more transparency about the measures being used to combat piracy will result in higher volumes of trade. Ultimately, piracy can significantly affect the gross domestic product of countries whose trade it disrupts.¹⁰⁷

The impact of Somali piracy on the international level, can also affect maritime industry, such as ports and terminals, cargo owners, seafarers, and environment, to list a few. Also shipping companies considered facing one of the great impacts as it is responsible for international trade between countries in the world. Ship owners with ships transiting the Gulf of Aden are exposed to direct and indirect impact, which add additional costs to shipping companies, such as operational costs, and insurance costs.¹⁰⁸

¹⁰⁶ Ivan Shearer, Piracy (2017) Max Planck Encyclopedia of Public International Law <http://www.mpepil.com/subscriber_article?id=/epil/entries/law-9780199231690-e1206> accessed 15/07/17, [p.15].

¹⁰⁷ *New York Times Journal*, French Troops Seize Somali Pirates After Hostages are Freed (Vol.177, 11 April 2016).

¹⁰⁸ Xan Rice, US launches anti-piracy naval force to combat hijackings off Somalia (9 January 2017) Vol. 601, Guardian.co.uk Law Reviews.

To avoid the pirate attacks, an increasing number of ship owners are altering their fleets from the traditional trading routes, Gulf of Aden and Suez Canal to the Cape of Good Hope. Therefore, as more vessels begin to avoid the area, an imminent impact on cargo delivery times can be expected to take place, which have a direct impact on the cargo owners as well as the consumers, and may place the market out of balance and cause the freight rates to be increased.¹⁰⁹

There are other direct impacts on shipping companies, such as, delays due to escape maneuvers, damage to the ship and cargo, loss of money, loss of cargo, loss of hire, loss of operation during the attack, investigation procedures, loss of the whole ship as a cause of hijacking, cost of ransom, negotiating and delivering the money for ship and seafarers' release, investigation costs, and contractual penalties due to delayed or damaged delivery.¹¹⁰ Indirect impacts on shipping companies are, for instance, security costs incurred in the fight against piracy, insurance costs due to the Gulf of Aden considered being a high risk area, and change in Trade Routes.¹¹¹

3.3 Contemporary Anti-Somali Piracy Efforts and the UN's Response

Somalia has been an ongoing concern for the Security Council since the early 1990s. The UN has been working with the Transitional Federal Government (TFG) in the failed State to bring about a restoration of law and order not only within Somalia itself but also in relation to its territorial waters.

¹⁰⁹ Gerry Simpson, *Law, War and Crime* (Polity Press, 2017) p. 159. ISBN 50000914789.

¹¹⁰ Central Intelligence Agency Journal, *Somalia* (26 June 2016) *The World Factbook* Vol. 675, 16th ed.

¹¹¹ International Maritime Organization Journal, *Piracy in Waters off the Coast of Somalia*, Vol.63 <http://www.imo.org/home.asp?topic_id=1178> accessed 27/09/16.

Mindful of the growing incidence of pirate attacks in waters off the coast of Somalia since 2005, in June 2008, the Security Council adopted Resolution 1816 which directly sought to address the threat posed by Somali piracy.¹¹² Recognizing the incapacity of the TFG to interdict pirates and secure offshore shipping lanes, and that pirate attacks were a threat to international peace and security in the region, the Security Council authorized States acting in cooperation with the TFG to enter the territorial waters of Somalia to undertake enforcement actions against piracy and armed robbery.¹¹³

In addition to the human toll, pervasive piracy can have significant economic ramifications. According to a report by the World Bank, the global economy is losing 18 billion dollars per year due to the increased costs of trade caused by Somali piracy. Sustained international coordination and cooperation is essential to preventing and prosecuting piracy.¹¹⁴ Recognizing this imperative, countries around the world have shown unprecedented cooperation in combating piracy, particularly near the Gulf of Aden. In August 2009, the North Atlantic Treaty Organization (NATO) commenced Operation Ocean Shield in the horn of Africa, where piracy increased close to 200 per-

¹¹⁵ "Official: US sea captain faced imminent danger." *Associated Press*. 12 April 2014. Archived from the original on 14 April 2015. ISBN 50000196584.

¹¹² "Navy regularly releases Somali pirates, even when caught in the act". Vol.248, *The Telegraph law review*. 29 November 2016.

¹¹³ James Kraska and Brian Wilson, "Piracy Repression, Partnering and the Law" (2015) 40 *J. Mar. L & Com.* 43, p. 43.

¹¹⁴ It is estimated that the "Somali Pirates Group" alone earned US\$18b in ransom payments from international shipping companies in 2016: United Nations Security Council Law Reviews, above 16th ed, [p.5].

cent between 2007 and 2009.¹¹⁵ This effort built upon Operation Allied Protector and consisted of two standing maritime groups with contributions from allied nations.

In taking this unprecedented action, the Security Council was recognizing the reality of Somalia's inability to provide maritime security within its own waters and the need for the international community to effectively undertake 'national-type' policing and enforcement operations within Somali waters. Resolution 1816 was effectively renewed on 2 December 2008 with the adoption of Resolution 1846 which extended the international community's mandate for an additional twelve months.¹¹⁶

This seems to be recognized by the international community. There are three multinational naval operations trying to suppress piracy acts along the coast of Somalia.¹¹⁷ The first multinational operation was the European Union operation launched in November 2008 and is called Operation Atlanta. The operation's main aim is to ensure the safety of ships in the region and to make sure that the UN World Food Program (WFP) ships can provide aid to Somalia.¹¹⁸

On 5 October 2008, the United Nations Security Council adopted resolution 1838¹¹⁹ calling on nations with vessels in the area to apply military force to repress the

¹¹⁵ Mikkelsen, Randall (12 April 2014). "US acted after pirates aimed at ship captain". Vol.598, Reuters Journal. Archived on 14 April 2015.

¹¹⁶ Douglas Guilfoyle, "Piracy off Somalia: UN Security Council Resolution 1816 and IMO Regional Counter-Piracy Efforts" (2016) Vol.57, ICLQ Journal 690, 691.

¹¹⁷ Brian Wilson, An enduring legacy of Somali piracy could be new navies on the high seas (13 January 2015) Vol.401, Yale Global Law Reviews.

¹¹⁸ In October 2016, naval escorts for ships contracted by the World Food Program began: Peter Goosens in Harvard Humanitarian Law and Policy Forum, Somalia: Responding to the Legal Challenges of Offshore Piracy (Live seminar law reviews, 16 April 2016).

¹¹⁹ "India calls for UN force to deter pirates off Somalia". The Times of India Journal, Vol.105, 13 November 2015. Retrieved 27 March 2016.

acts of piracy.¹²⁰ At the 101st council of the International Maritime Organization, India called for a United Nations peacekeeping force under unified command to tackle piracy off Somalia.¹²¹ (There has been a general and complete arms embargo against Somalia since 1992).

The second operation was an NATO operation started in October 2008.¹²² This operation acted under the same mandate as the EU's. Its primary goal was to protect the WFP. The operation was replaced by Operation Allied Provider in March 2009 and its mandate had been extended to include counter-piracy measures.¹²³ In response to these developments, the EU launched Operation Atlanta in December 2008 to combat piracy off the coast of Somalia, with NATO handing over its UN-requested counter-piracy operation named 'Allied Provider' to the EU on 14 December 2008. Other States offering support include Russia, Malaysia, India, Iran, China, Turkey, South Korea, and Singapore.¹²⁴

According to the European Union Naval Force (EU NAVFOR), intensified naval operations had by February 2012 led to a further drop in successful pirate attacks in the Indian Ocean, with the pirates' movements in the region at large also significantly

¹²⁰ "Chinese fishing boat reported hijacked off Somali" *International Herald Tribune*, Associated Press. 14 November 2015. ISBN 500012479.

¹²¹ Making funds available to people who commit, facilitate or participate in terrorist acts is prohibited pursuant to United Nations Security Council Resolution 1838 (2015), UN Doc. S/Res/1838 (28 September 2015).

¹²² Raphael Lemkin, *Piracy as a Crime Under International Law* (2014) Vol.41, *American Journal of International Law*, p.145.

¹²³ In re *Piracy Jure Gentium*, above n 21, referring at 592 to Wheaton in John Bassett Moore, *A Digest of International Law*, vol 2 (AMS Press, 2015 ed) p.953.

¹²⁴ Mohamed Ahmed (18 April 2014). "NATO frees pirate hostages, Belgian ship seized". Vol.45, *Reuters Law Reviews*. (Retrieved 21 April 2015).

constrained.¹²⁵ About 25 military vessels from EU and NATO countries, China, Russia, India and Japan patrolled approximately 8.3 million km² (3.2 million square miles) of ocean, an area about a quarter the size of Africa. On 16 July 2012, the EU launched a new operation, EUCAP Nestor.¹²⁶

The Indian Navy responded to these concerns by deploying warships in the region on October 2012. In September 2012, Russia announced that it too would join international efforts to combat piracy.¹²⁷ Some reports have also accused certain government officials in Somalia of complicity with the pirates,¹²⁸ with authorities from the Galmudug administration in the north-central Hobyo district reportedly attempting to use pirate groups as a bulwark¹²⁹ against Islamist insurgents from the nation's southern conflict zones.¹³⁰ An analysis by the Brussels-based Global Governance Institute urged the EU to commit onshore to prevent piracy over this area.¹³¹

¹²⁵ "Inside The EU's Anti-Piracy Nerve Centre". 16th ed. Sky News Law Reviews. 23 February 2016.

¹²⁶ Regional Cooperation Agreement on Combating Piracy and Armed Robbery Against Ships in Africa (28 April 2015) 44 ILM 829 [hereinafter ReCAAP], see Appendix 4; Zou Keyuan, New Developments in the International Law of Piracy (2016) Vol.8 Chinese J. Int'l L. 323, [p. 9].

¹²⁷ "Russia to fight piracy off Somalia coast". Vol.94, RIA Novosti Journal. 23 September 2014.

¹²⁸ Charbonneau, Louis (18 March 2015). "UN cites reports of gov. links to Somalia pirates". Vol.32, Reuters Law Journal.

¹²⁹ A defensive wall.

¹³⁰ Gettleman, Jeffrey (1 September 2015). "In Somali Civil War, Both Sides Embrace Pirates". Vol.3, *New York Times* Journal.

¹³¹ "GGI Analysis: The Somali crisis and the EU". GGI Express Journal, Vol.91, 24 July 2015.

By December 2013, the US Office of Naval Intelligence reported that pirates had attacked only two vessels during the year, with zero successful hijackings.¹³² Control Risks attributed this 90% decline in pirate activities from the corresponding period in 2012 to the adoption of best management practices by vessel owners and crews, armed private security onboard ships, a significant naval presence, and the development of onshore security forces.¹³³ The decline in pirate activity has allowed foreign fishing corporations to renew their extraction from Somali fisheries.¹³⁴

Another significant step was taken by the UN Security Council with the adoption of Resolution 1851 on 16 December 2008 that authorizes ‘ship rider’ agreements to facilitate more effective law enforcement capability.¹³⁵ The Resolution also permits the international community to operate not only within Somali waters, but also within the land territory of Somalia, which is used to plan, facilitate or undertake acts of piracy and armed robbery at sea.

Following Resolution 1851, then US Secretary of State announced that the US was creating a ‘Contact Group on Somali piracy’ so as to establish a mechanism for sharing intelligence, coordination of activities, and co-operation with partners in the

¹³² Alaric Nightingale, Michelle Wiese Bockmann (22 October 2014). "Somalia Piracy Falls to Six-Year Low as Guards Defend Ships". Vol.87, *Bloomberg News Journal*.

¹³³ Yanofsky, David (27 December 2015). "Somali piracy was reduced this year". 15th ed. *Quartz Law Review*.

¹³⁴ "Somali piracy is down 90 per cent from last year". Vol.45, *The Journal*. 15 December 2016. Retrieved 14 January 2017.

¹³⁵ "Donors pledge over \$250 million for Somalia." 16th ed. *USA Today Review*. 23 April 2016.

shipping and insurance industries.¹³⁶ These initiatives reflect the growing body of opinion that piracy is intrinsically linked to the economic and political crisis in Somalia. Albeit limited to the situation in Somalia, these measures also represent some of the most extensive maritime security powers conferred upon States to deal with piracy in the modern law of the sea era.

Although the efforts concentrate on protecting ships passing through the Gulf of Aden, they also renewed focus on helping countries, specifically Somalia, prevent piracy and secure their ports. Meanwhile, the United States helped establish Combined Task Force 151 to coordinate the various maritime patrols in East Africa. Other countries including Russia, India, China, Saudi Arabia, Malaysia, and South Korea, have also sent naval vessels to this region.¹³⁷

The last operation, Combined Task Force 151, started in 2009 and aimed to deter, disrupt and prosecute pirates. The operation's contributors were Britain, France, Germany, the United States, Turkey, the Netherlands and Australia. Combined Task Force conducted patrols on the Gulf of Aden, the Gulf of Oman, the Red Sea and other strategically important waterways. The operations mentioned above are backed up by the authority of the UN Security Council.¹³⁸ Combined Task Force 150, a multinational coalition task force, took on the role of fighting piracy off the coast of Somalia by es-

¹³⁶ Starr, Barbara (29 October 2015). "U.S. destroyer pursuing hijacked ship in Somali waters, military says". Vol. 80, CNN Journal.

¹³⁷ Eugene Kontorovich, International Legal Responses to Piracy off the Coast of Somalia" (2014) Vol.13, *ASIL Insights Law Journal*, (accessed 20/09/15).

¹³⁸ United Nations Security Council Resolution 1846 (2015), UN Doc. S/RES/1846 (2 December 2015) [p. 15].

establishing a Maritime Security Patrol Area (MSPA) within the Gulf of Aden.¹³⁹ The increasing threat posed by piracy has also caused concern in India since most of its shipping trade routes pass through the Gulf of Aden.

The international community has struggled to deal with the piracy problem, but has made appreciable progress. The United States, Russia and India,¹⁴⁰ among other nations, have fielded warships and Navy special forces teams to deal directly with pirates and pirate ships. Various government entities in Somalia have also worked to stop piracy by attacking their bases on land.¹⁴¹ However, according to UN Secretary-General, both the former and current administrations of the autonomous Puntland region in northeastern Somalia appear to be more actively involved in combating piracy. The latter measures include on-land raids on pirate hideouts,¹⁴² and the construction of a new naval base in conjunction with Saracen International, the UK-based South African private military contractor described by the UN Security Council as the "most egregious threat" to peace and security in Somalia.¹⁴³

To address this, in June 2008, following a letter from the Somalian Transitional Federal Government (TFG) to the President of the UN Security Council requesting as-

¹³⁹ Commander, Combined Maritime Forces Public Affairs (29 September 2016). "Combined Task Force 150 Thwarts Criminal Activities". 16th ed. *US Africa Command Law Review*. Retrieved 17 November 2016

¹⁴⁰ "India: Pirate 'mother ship' left in flames". Vol.32, CNN Journal. Retrieved 19 November 2016.

¹⁴¹ Commander, Combined Maritime Forces Public Affairs (29 September 2014). "Combined Task Force 150 Thwarts Criminal Activities". Vol.76, *US Africa Command Journal*.

¹⁴² "Pirate on US wanted list arrested in Somalia". Abcnews.go.com. 20 May 2015. Retrieved 27 March 2016.

¹⁴³ "Somalia: Puntland to start construction of new Navy base". Horseedmedia.net. Retrieved 27 March 2015.

sistance for the TFG's efforts to tackle acts of piracy off the coast of Somalia, the UN Security Council unanimously passed a declaration authorizing nations that have the consent of the Transitional Federal Government to enter Somali territorial waters to deal with pirates.¹⁴⁴ On the advice of lawyers, the Royal Navy and other international naval forces have often released suspected pirates they have captured because, although the men are frequently armed, they have not been caught engaging in acts of piracy and have not committed a crime.¹⁴⁵

3.4 Scrutinizing Somali Piracy Incidents

While piracy off the Horn of Africa has recently gained significant press, it is not a new phenomenon. From the beginning of the Common Era, travelers have consistently warned of the dangers of pirates in this region. Recent political unrest and a demographic¹⁴⁶ explosion in Somalia have breathed new life into this long history of maritime piracy.

Somali pirates have attacked hundreds of vessels in the Arabian Sea and Indian Ocean region, though most attacks do not result in a successful hijacking.¹⁴⁷ In 2008, there were 111 attacks which included 42 successful hijackings. However, this was on-

¹⁴⁴ "Suspected Pirates Captured Off Somali Coast" (*Press release*). Headquarters, United States Central Command. 22 January 2016. P.178. ISBN 5000007193.

¹⁴⁵ See *supra* n. 148 at p. 107-110.

¹⁴⁶ Recently this aspect was mentioned at the Security by South Africa on 16 Dec. 2016 (S/PV.6046 at p.15).

¹⁴⁷ "Pirates Hijack Two Tankers within 24 Hours off Somali Shore". 14th ed. FoxNews.com Reviews. 26 March 2014.

ly a fraction of the up to 30,000 merchant vessels that pass through that area.¹⁴⁸ The rate of attacks in January and February 2009 was about 10 times higher than during the same period in 2008 and there have been almost daily attacks in March, with 79 attacks,¹⁴⁹ with 21 being successful, by mid-April in the same year.

Most of these attacks occurred in the Gulf of Aden, but subsequently the pirates increased their range and started attacking ships as far south as off the coast of Kenya in the Indian Ocean.¹⁵⁰ Below are some notable pirate incidents that have garnered significant media coverage since 2007.¹⁵¹

On 28 May 2007, a Chinese sailor was killed by the pirates because the ship's owners failed to meet their ransom demand.¹⁵² On 19 November 2008, the Indian Navy warship INS Tabar sank a suspected pirate mothership.¹⁵³ Later, it was claimed to be a Thai trawler being hijacked by pirates.¹⁵⁴ The Indian Navy later defended its actions by stating that they were fired upon first.¹⁵⁵ On 21 November 2008, BBC News reported that the Indian Navy had received United Nations approval to enter Somali waters to

¹⁴⁸ "Factbox: Pirates stalk shipping lanes", Vol.56, Reuters Journal, 9 February 2015.

¹⁴⁹ "Somali Attacks" Pr-canada.net publisher Vol.45 . Retrieved 27 March 2016.

¹⁵⁰ "Seized tanker anchors off Somalia", 16th ed. BBC News Reviews, 18 November 2016

¹⁵¹ United Nations Security Council Resolution 1838.(2008) S/RES/1838 (2008) 7 October 2015.

¹⁵² "New Somalia piracy resolution adopted at UN". Google News. Agence France-Presse. 8 October 2015. P.8

¹⁵³ "India 'Indian navy 'sank Thai trawler". Vol.38, BBC News Journal. 25 November 2016.

¹⁵⁴ "India navy defends piracy sinking". Vol.45, BBC News Journal. 25 December 2016.

¹⁵⁵ Pandey, Geeta (21 November 2015). "Indian navy to go after pirates". 15th ed. *BBC Law Reviews*.

combat piracy.¹⁵⁶By 2008, after decades in which the Straits of Malacca, the Caribbean, and the Nigerian coast consistently witnessed the most incidents of maritime piracy—a full 111 out of the total 293 pirate attacks worldwide happened off the coast of Somalia alone.¹⁵⁷ By the end of 2008, Somali pirates had collected more than \$150 million in ransom, and had even hijacked two unlikely targets: a Ukrainian vessel carrying 30 tanks,¹⁵⁸ and a Saudi supertanker filled with about two million barrels of oil.

Perhaps the most spectacular attack came on November 15, 2008, when 833 kilometers off the coast of Kenya, pirates attacked the Saudi Arabia owned *Sirius Star*,¹⁵⁹ a 330-meter tanker carrying over \$100 million of oil.¹⁶⁰ The pirates used a mother ship, disguised as a fishing trawler, to launch small boats that overtook the *Sirius Star*. Cyrus Mody of the International Maritime Bureau characterized the incident as historic: "It was the first attack of its kind in which such a big vessel had been hijacked so far away from the coast. It shows that the pirates now have the capability and capacity to sustain themselves in deep sea until the vessel comes by."¹⁶¹ Under the pirates' command, the *Sirius Star* sailed to a mooring off the coast of an area known as the Puntland region where it joined a dozen other hijacked ships.

¹⁵⁶ Sanders, Edmund; Barnes, Julian E. (9 April 2015). "Somalia pirates hold U.S. captain". Vol.67, BBC Journal.

¹⁵⁷ Waldo, Mohamed (Vol.43, 8 January 2014). "The Two Piracies in Somalia: Why the World Ignores the Other". WardheerNews.com publisher.

¹⁵⁸ Kurson, Robert. *Pirate Hunters*. New York: Random House.2017, p. 105. ISBN 978-1-4000-6336-9.

¹⁵⁹ Sebastian Berger, "Navies consider their response to hijacking of Sirius Star off Somalia," *Telegraph.co.uk*, Vol.54, online Journal, November 19, 2015

¹⁶⁰ "How Somalia's Fishermen Became Pirates", 15th ed, *Reuters Law Reviews*. 16 February 2015.

¹⁶¹ *Id.*

In the case of the *Sirius Star*, ransom negotiations took about two months—the original \$25 million demand fell to \$3 million.¹⁶² The negotiations for the Ukrainian ship *Faina*, which was transporting 33 T-72 tanks, 150 grenade launchers, 6 antiaircraft guns, and ammunition to Kenya and Southern Sudan, took five months.

The crews survived their ordeal, the exception being the captain of the *Faina*, who died of a stroke soon after his capture.¹⁶³ On 8 April 2009, four Somali pirates seized the *Maersk Alabama* 240 nautical miles southeast of the Somalia port city of Eyl.¹⁶⁴ The ship was carrying 17,000 metric tons of cargo, of which 5,000 metric tons were relief supplies bound for Somalia, Uganda, and Kenya.¹⁶⁵

On 12 April 2009, United States Navy SEAL snipers killed the three pirates that were holding Captain Richard Phillips hostage aboard a lifeboat from the *Maersk Alabama* after determining that Captain Phillips' life was in immediate danger.¹⁶⁶ A fourth

¹⁶² ICC Commercial Crime Services Publisher, "Piracy figures for 2015 surpass those for previous year" (Vol.87, 23 September 2015)

¹⁶³ ICC International Maritime Bureau, Piracy and Armed Robbery Against Ships - Annual Report 2016 (ICC International Maritime Bureau, January 2017) p.5.

¹⁶⁴ "Somali pirates hijack Danish ship". Vol.23, BBC news Journal. 8 April 2014.

¹⁶⁵ "Ship carrying 20 Americans believed hijacked off Somalia". 15th ed, CNN Reviews. 9 April 2015. See also, "Official: US sea captain faced imminent danger". Associated Press. Vol.84, 12 April.

¹⁶⁶ ICC International Maritime Bureau, above n 53, 23. Archived from the original on 14 April 2014. See also, Mikkelsen, Randall (12 April 2014). "US acted after pirates aimed at ship captain". Vol.23, Reuters Journal. "US captain rescued from pirates". Vol.45, BBC News Journal. 13 April 2015.

pirate, Abdul Wali Muse, surrendered and was taken into custody.¹⁶⁷ On 18 May, a federal grand jury in New York returned a ten-count indictment against him.¹⁶⁸

On 20 April 2009, United States Secretary of State, Hillary Clinton commented on the capture and release of 7 Somali pirates by Dutch Naval forces who were on a NATO mission.¹⁶⁹ After an attack on the *Handytankers Magic*, a petroleum tanker, the Dutch frigate *De Zeven Provinciën* tracked the pirates back to a pirate "mother ship" and captured them.¹⁷⁰

Dutch Naval forces confiscated the pirates' weapons and freed 20 Yemeni fishermen whom the pirates had kidnapped and who had been forced to sail the pirate "mother ship." Since the Dutch Naval Forces were part of a NATO exercise, but not on an EU mission, they lacked legal jurisdiction to keep the pirates, so they released them. Clinton stated that this action sent the wrong signal and that additional coordination was needed among nations.¹⁷¹

On 2 May 2009, Somali pirates captured the MV *Ariana* with its 24-man Ukrainian crew.¹⁷² The ship was released on 10 December 2009 after a ransom of al-

¹⁶⁷ Verjee, Zain; Starr, Barbara (12 April 2015). "Captain jumps overboard, SEALs shoot pirates, official says". 15th ed. CNN Reviews.

¹⁶⁸ "Indictment (U.S. v. Abduwali Abdukhadir Muse)". FindLaw. 19 May 2014.

¹⁶⁹ Elise Labott (20 April 2015). "Clinton says releasing pirates sends 'wrong signal'". 16th ed, *CNN Law Review*. Retrieved 21 April 2016

¹⁷⁰ Mohamed Ahmed (18 April 2014). "NATO frees pirate hostages, Belgian ship seized". Vol.80, *Reuters Journal*.

¹⁷¹ New York Times Journal, "Dutch Troops Seize Somali Pirates after Hostages are Freed" (Vol.89, 11 April 2015) accessed 21/09/16.

¹⁷² "Somali pirates free Greek ship with Ukrainian crew". 14th ed. BBC News Online Law Review. 10 December 2014.

most US\$3,000,000 was paid.¹⁷³ After the MV *Ariana* was taken, the vessel's crew members opened fire on U.S. Navy ships and the ship's crew members returned fire. One suspected pirate was killed and 12 were taken into custody.

On 8 November 2009, Somali pirates threatened that a kidnapped British couple, the Chandlers, would be "punished" if a German warship did not release seven pirates.¹⁷⁴ Omer, one of the pirates holding the British couple, claimed the seven men were fishermen, but a European Union Naval Force spokesman stated they were captured as they fired AK-47 assault rifles at a French fishing vessel. The Chandlers were released on 14 November 2010 after 388 days of captivity.¹⁷⁵ At least two ransom payments, reportedly over GBP 500 000, had been made.

In early May 2010, Russian special forces retook a Russian oil tanker that had been hijacked by 11 pirates. One died in the assault, and a week later, Russian military officials reported that the remainder were freed due to weaknesses in International Law but died before reaching the Somali coast. Russian President Dmitry Medvedev had announced the day the ship was retaken that "We'll have to do what our forefathers did when they met the pirates" until a suitable way of prosecuting them was available.¹⁷⁶

¹⁷³ "Pirates Step up threats against British Couple, Threaten to 'Punish' Them". 15th ed. Fox News Law Review. 8 November 2015.

¹⁷⁴ "Somali pirate gang who held Chandlers have families in Britain and one kidnapper's wife is an asylum seeker". 14th ed. Mail Online Review. 26 November 2014.

¹⁷⁵ "BBC News: Somali pirates free UK couple Paul and Rachel Chandler". 14th ed. Bbc.co.uk Review. 14 November 2014.

¹⁷⁶ Mansur Mirovalev (11 May 2014). "Russia says freed pirates didn't reach land". Vol.45, BusinessWeek Journal.

On 11 May 2010, Somali pirates seized a Bulgarian-flagged ship in the Gulf of Aden. The *Panega*, with 15 Bulgarian crew members aboard, was enroute from the Red Sea to India or Pakistan.¹⁷⁷ This was the first such hijacking of a Bulgarian-flagged ship.

On 12 May 2010, Athens announced that Somali pirates had seized a Greek vessel in the Gulf of Aden with at least 24 people on board, including two Greek citizens and some Filipinos. The vessel, sailing under the Liberian flag, was transporting iron from Ukraine to China.¹⁷⁸

On 14 January 2011, while speaking to reporters, Commodore Michiel Hijmans of the Royal Netherlands Navy stated that the use of hijacked vessels in more recent hijackings had led to the increase range of piratical activities, as well as difficulty to actively thwart future events due to the use of kidnapped sailors as human shields.¹⁷⁹

On 15 January 2011, thirteen Somali pirates seized the *Samho Jewelry*, a Maltese-flagged chemical carrier operated by Samho Shipping, 650 km southeast of Muscat. The Republic of Korea Navy destroyer *Choi Young* shadowed the *Samho Jewelry* for several days. In the early morning of 21 January 2011, 25 ROK Navy SEALs on small boats launched from the *Choi Young* boarded the *Samho Jewelry* while the *Choi Youngs* Westland Super Lynx provided covering fire. Eight pirates were killed and five

¹⁷⁷ The European Union entered into a bilateral agreement with African Region, 6 March 2015: CONSILIUM Publisher, EU Prosecution Agreement with African Region Signed (Vol.63, 6 March 2016)

¹⁷⁸ Jeffrey Gettleman, The West Turns to Somalia as Piracy Criminal Court (23 April 2015), Vol.51, New York Times Journal.

¹⁷⁹ Michael Richards (14 January 2015). "Smarter Somali pirates thwarting navies, NATO admits". Vol.89, AFP Journal. Retrieved 23 January 2016.

captured in the operation; the crew of 21 was freed with the Captain suffering a gunshot wound to the stomach.¹⁸⁰

On 28 January 2011, an Indian Coast Guard aircraft while responding to a distress call from the CMA, CGM *Verdi*, located two skiffs attempting a piracy attack near Lakshadweep. Seeing the aircraft, the skiffs immediately aborted their piracy attempt and dashed towards the mother vessel, MV *Prantalay 14* – a hijacked Thai trawler, which hurriedly hoisted the two skiffs on board and moved westward.¹⁸¹

The Indian Navy deployed the INS Cankarso which located and engaged the mother-ship 100 nautical miles north of the Minicoy Island. Ten pirates were killed while fifteen were apprehended and twenty Thai and Burmese fishermen were held aboard the ship as hostages were rescued.¹⁸²

Within a week of its previous success, the Indian Navy captured another hijacked Thai trawler, MV *Prantalay 11* and captured twenty-eight pirates aboard in an operation undertaken by the INS Tir¹⁸³ pursuant to receiving information that a Greek merchant ship had been attacked by pirates on board high-speed boats, although it had

¹⁸⁰ "Navy storms hijacked ship, rescues all 21 sailors". 14th ed. *Korea Joong Ang Daily Review*. 21 January 2014.

¹⁸¹ Marie Woolf, Pirates can claim Thailand asylum (13 April 2014) Vol.57, *The Sunday Times Journal*.

¹⁸² "Various News Reports, collected on Google News". 16th ed. Google News Review. Retrieved 4 January 2016.

¹⁸³ INS *Tir* (A86) is the first dedicated Cadet's Training Ship to be built by Mazagon Dock Limited and commissioned as such by the Indian Navy. She is the senior ship of the *1st Training Squadron* of the Southern Naval Command.

managed to avoid capture. When INS *Tir* ordered the pirate ship to stop and be boarded for inspection, it was fired upon.¹⁸⁴

The INS *Tir* returned fire in which three pirates were injured and caused the pirates to raise a white flag indicating their surrender. The INS *Tir* subsequently was joined by CGS *Samar* of the Indian Coast Guard. Officials from the Indian Navy reported that a total of fifty-two men were apprehended, but that twenty-four were believed to be Thai fishermen who were hostages of the twenty-eight African pirates.¹⁸⁵

In late February 2011, pirates targeting smaller yachts and collecting ransom made headlines when four Americans were killed aboard their vessel, the *Quest*, by their captors, while a military ship shadowed them.¹⁸⁶ A federal court in Norfolk, Virginia, sentenced three members of the group that seized the yacht to life imprisonment.¹⁸⁷ On 24 February 2011, a Danish family on a yacht was captured by pirates.¹⁸⁸ In March 2011, the Indian Navy intercepted a pirate mother vessel 600 nautical miles west of the Indian coast in the Arabian Sea and rescued thirteen hostages. Sixty-one pirates have also been caught in the operation carried out by Navy's

¹⁸⁴ Prof Philip Alston, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions – mission to Somalia (26 May 2009) UN Doc. A/HRC/11/2/Add.6.

¹⁸⁵ *BBC News Journal*: "Indian navy seizes pirates' Indian Ocean Mothership". Vol.76, Retrieved 4 January 2015.

¹⁸⁶ The CNN Wire Staff Review (22 February 2016). "Americans slain by captors on hijacked yacht; pirates killed, arrested". www.cnn.com. 17th ed. 22 February 2017.

¹⁸⁷ "Somali pirate gets life in jail". *BBC Journal*. Vol.91, 3 October 2015. Retrieved 3 October 2016.

¹⁸⁸ "Pirater truer med at dræbe gidsler – dr.dk/Nyheder/Udland". 15th ed. Dr.dk. Review, 27 March 2015.

INS *Kalpeni*.¹⁸⁹ In late March 2011, the Indian Navy seized 16 suspected pirates after a three-hour-long battle in the Arabian seas. The navy also rescued 16 crew members of a hijacked Iranian ship west of the Lakshadweep Islands. The crew included 12 Iranians and four Pakistanis.¹⁹⁰ On 5 January 2012, an SH-60S Seahawk from the guided-missile destroyer USS Kidd, part of the USS John C Stennis Carrier Strike Group, detected a suspected pirate skiff alongside the Iranian-flagged fishing boat, *Al Molai*. The master of the *Al Molai* sent a distress call about the same time reporting pirates were holding him captive.¹⁹¹

A visit, board, search and seizure team from the *Kidd* boarded the dhow, a traditional Arabian sailing vessel, and detained fifteen suspected pirates who had been holding a 13-member Iranian crew hostage for several weeks. The *Al Molai* had been hijacked and used as a "mother ship" for pirate operations throughout the Persian Gulf, members of the Iranian vessel's crew reported.¹⁹²

With the increase in illegal fishing off Somalia after the 2013 decline in piracy, fishing vessels became targets in a few incidents in 2015. In March 2015, two Iranian vessels and a Thai vessel were attacked.¹⁹³ The collapse of the government left Somalia's coastlines unguarded, creating a perfect opportunity for piracy.

¹⁸⁹ "Navy intercepts pirate ship, rescues 13 sailors". Vol.74, *ABC News Journal*, Retrieved 14 March 2014.

¹⁹⁰ "Indian navy captures 16 Somali pirates on Iranian ship". 15th ed. *BBC News Review*. 28 March 2015.

¹⁹¹ Sir Nigel Rodley, Report of the Special Rapporteur on Torture, Sir Nigel Rodley – visit to Somalia (9 March 2015) UN Doc. E/CN.4/2015/9/Add.4.

¹⁹² "Pirate Capture Shows U.S. Commitment to Free Seas, Leaders Say". American Forces Press Service. 7 January 2017.

¹⁹³ Kriel R, Duggan B (November 24, 2015). "Somali pirates seize Iranian, Thai ships". Vol.23, *CNN Journal*. Retrieved January 11, 2016.

3.5 Somali Domestic Law

The federal and regional parliament did not adopt any international anti-piracy law.

Puntland's legislation is not compatible with the definition of piracy of UNCLOS 1982.

However, the federal parliament is expected to adopt an anti-piracy legislation which would allow prosecuting and imprisoning convicted pirates.¹⁹⁴

Somaliland's New Anti-Piracy Law

Somaliland has recently adopted a new law on piracy. The Law for Combating Piracy (or the Piracy Law) - Law No. 52/2012—has been passed by both Houses of Parliament and signed, on 21 March 2012, into law by the President of the Republic. The semi-autonomous region of Somaliland has become an increasingly important ally to shipping States in resolving the present quagmire in piracy prosecutions in the Gulf of Aden.¹⁹⁵

In the buildup to the recent London Conference on Somalia, Somaliland passed legislation criminalizing piracy within its judicial system. The legislation is based to a large degree on the UN Convention on the Law of the Sea definition of piracy with some important differences.¹⁹⁶ The Anti-Piracy Law, together with legislation contemplating the transfer to Somaliland from other States of convicted offenders, was signed

¹⁹⁴ Paulo Prada and Alex Roth, On the Lawless Seas, It's Not Easy Putting Somali Pirates in the Dock (12 December 2015) Vol.90, The Wall Street Journal accessed 10/09/16.

¹⁹⁵ Somalia, Parliamentary Debates Review, House of Parliament, 4 December 2013, p.223-224 (Jack Straw, Lord Chancellor and Secretary of State for Justice) accessed 02/09/14.

¹⁹⁶ Capt. Patrick Neher in Harvard Humanitarian Law and Policy Forum, Somalia: Responding to the Legal Challenges of Offshore Piracy (Vol.24, Live seminar Journal, 16 April 2014)

into law by Somaliland's President last couple of years.¹⁹⁷

While not directly referring to piracy repression measures, the Prisoners Transfer Law already facilitated the transfer of several convicted Somali pirates from other countries in the Gulf of Aden region currently carrying out piracy prosecutions, particularly the Somalia. The passing of both laws signals Somaliland's commitment to combat maritime piracy off its coast and elsewhere in the region in its growing engagement with the international community in a quest for international recognition.¹⁹⁸

More importantly, the laws fill a lacuna in Somalia's out-of-date and politically-motivated legal framework, as applicable to Somaliland pursuant to Article 130(5) of its 2001 Constitution. The new law is a case study in the potential hazards in partial implementation of UNCLOS 1982 legal terms.¹⁹⁹

3.5.1 Somaliland Territorial Jurisdiction

Further, concerning the abandonment of the customary term of "armed robbery at sea," and pursuant to Article 5 of this law, Somaliland Courts will have jurisdiction over any offence of piracy committed within Somaliland sea or in an area outside the territorial waters of any other country.²⁰⁰ In this regard, pursuant to Article 8, the Somaliland Coast Guard has the power to seize ships and to arrest and investigate suspected pi-

¹⁹⁷ Paola Gaeta, International Criminalization of Prohibited Conduct" in Antonio Cassese (15th ed) The Oxford Companion to International Justice (Oxford University Press, 2015) Vol.63, p. 64.

¹⁹⁸ William A. Schabas, An Introduction to the Prisoner Transfer Law, 3rd ed (Cambridge University Press, 2017), p.88-89.

¹⁹⁹ *Id.*

²⁰⁰ Radio Nederland Wereldomroep, "High time for piracy tribunal, experts said" (20 May 2014) accessed 02/09/15.

rates.²⁰¹

3.5.2 Confiscation of Pirate Property

Article 11 of this law, provides for the confiscation of property seized from pirates.²⁰²

The main goal of this provision, also contemplated by the UNCLOS 1982, is to drain off the resources of pirates' cartels by removing their main revenues, including equipment and paid ransoms.²⁰³ However, further consideration has to be given to the full extent of application of this rule, particularly with regard to ships seized by pirates and subsequently used in connection with pirate attacks, for instance, as mother ships.²⁰⁴

The strict application of this norm risks further depriving, even if just temporarily, the legitimate ship owners of costly assets, as well as of their cargo, upon it and its crews have been freed from captivity.²⁰⁵ Crucial in this regard will be the interpretation of Articles 6(2) and 7 of this law which, respectively refers to the status and the ownership of a pirated ship.²⁰⁶

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ Statute of the International Tribunal for the Law of the Sea** in Annex VI to UNCLOS, above n 3.

²⁰⁴ See the opposition of Somalia to the limited temporal jurisdiction of the International Criminal Tribunal for Somalia: United Nations Security Council, Security Council Report of the 3453rd meeting (8 November 2014) UN Doc. S/PV.3453, 14.

²⁰⁵ ICC International Maritime Bureau, above n 53, 3.

²⁰⁶ *Id.*

3.6 Conclusion

Somali piracy continues to seriously threaten international security. Chokepoints such as the Gulf of Aden are one of the busiest chokepoints in the world, and Somali pirates are a threat to these vessels, their crew and tourists. The failure of the international community and domestic effort to create a central, functional and internally recognized government, the severe poverty that the Somali people live in, the geographical location of the country and the history filled with violence, which include civil wars, all contribute to creating an environment and opportunity where piracy prospers.

The situation in Somalia makes it difficult for the central government to combat piracy. The fact that the country is divided among different clans complicates matters. Furthermore, the central government has trouble enforcing anti-piracy measures because the country is divided over quasi separate provinces. Both Somaliland and Puntland have claimed sovereignty and while this sovereignty is not recognized, both territories enjoy a degree of self-rule. Tensions between Somaliland and Puntland have caused many violent confrontations. Militarization led to the proliferation of arms and to the growing power of militia groups and warlords. These militia groups and warlords are for a large part a significant factor behind the piracy attacks. Piracy in Somalia is becoming so intertwined with the Somali society that we can speak of a "Somali criminal economy." Warlords and chieftains continue to finance the attacks to receive part of the ransom money. Ex-fisherman, militias and ex-coast guardsmen continue to execute the attacks.

Teachers and bureaucrats continue to operate as negotiators and everybody is protected by the Somali communities. The lack of Somali effective government had made it impossible to solve all these dynamics. Thus, the economic, political and humanitarian situation in Somalia is the root cause of the piracy while the same situation

makes it impossible to create national approach to solve the problem.

While the Djibouti code provides rules of conduct when a country encounters pirates, it is only signed by a minority of countries. The largest obstacle to an African approach to the Somali piracy however, is the lack of resources of many African countries. This is illustrated by the Kenya's incapability to prosecute all the captured Somali pirates. This leaves the international approach as the only possible option.

Finally, the international community has an interest in resolving the Somali piracy problem because costs of Somali piracy affect the whole community in the form of lost revenue, ransom payments, high insurance and threats to their citizens. This is something that the international community acknowledges along with the fact that it is the international community that must come up with a solution. The following chapter discusses the discourse analysis and evaluation of the International Law applicable to Somali piracy.

* * * *

Chapter 4

Law of the Sea Convention 1982, and Other International Conventions Relevant to Contemporary Somali Acts of Piracy

4.0 -Introduction

Although there are many international legal regimes and institutional bodies designed to deal with maritime piracy, the framework is complex and fragmented, which leads to deficiencies in monitoring, as well as an uncoordinated global response to piracy. Until recently, Somali pirates have been successful in exploiting these inadequacies.¹

A significant decrease of piracy attacks in the Horn of Africa after 2014 indicates,² however, that the time in which pirates can act unaffectedly and with impunity, will end no time in the foreseeable future. By establishing a cooperative forum, the international community has increased information sharing among its participants, and has created new models of cooperative and soft law, which provide a framework for improved prosecution of Somali pirates.

¹ Brown, N. (2014, May 1). Taking the Fight to the Pirates. Jane's Navy International. Jane's Information Group. Edit.2014, Vol.12

² P.W. Brine, Piracy, past, present and future, Vol.1 (marine piracy July 2016, Butterworth &Co (publishers) ltd.

While the above commentary shows that International Law has long recognized maritime piracy as a crime and has provided tools for its universal suppression, it yet persists. Struett, *et al.* (2013) argue that the institutional structure of the different regimes affected, impedes effective cooperation. This is because each regime provides diverging definitions of the targets, pushes different actors to different behaviors, thereby, creating conflicting norms that make it difficult to effectively address maritime piracy as an issue of global governance.³

Many scholars agree that the confusion about the appropriate legal response to piracy has impeded anti-piracy cooperation and has resulted in a governance gap leading to low prosecution rates.⁴ When looking at the various anti-piracy regimes, there are three potential tensions: the definition of the target and the *locus delicti*, the tension between the right and the duty of a state to suppress piracy, and the tension among public and private governance institutions.⁵

The main body of this chapter consists of two central sections. Firstly, it will assess the various international regime complexes and institutional bodies that attempt to govern maritime piracy to examine the overlaps and legal gaps among these mechanisms of governance. The second central section is a brief overview of the domestic legal regimes will, afterwards, explore the mechanisms through which it is closing the

³ International Maritime Organisation, International shipping facts and figures- Information resources on trade, safety, security, environment, London: Maritime Knowledge Centre, 2016, at p.7

⁴ JHONE E. NOYES. Essay on piracy. An introduction to the International Law of piracy, Hein online - - 21 cal. W. Int, 1 L.J. 105 2014-2015.

⁵ "Recent Piracy," *Journal of Public and International Affairs*: Mohadi You, Volume 14/Spring 2013.

legal gaps of the international anti-piracy regimes. The last section looks at the transferability of this model to other affected world regions.

This chapter also examines the discrepancy in the offense of piracy under international and national laws and how this offense is prosecuted and punished under domestic laws of coastal States. Furthermore, essential existing legal regulations with regards to piracy will be examined and the possible gaps within these regulations will be discussed. According to these concerns, it is questionable whether there is international piracy law in place that can properly contend with the current level of modern-day piracy and terror on sea. The following section will examine the important international anti-piracy regulations such as the SUA Convention with its supplemented Protocol and will clarify whether they encompass modern-day piracy and terror on sea or whether there are legal gaps in these regulations.

4.1 International Law Regarding Somali Piracy

The UN Security Council has issued ten resolutions dealing specifically with piracy off the coast of Somalia.⁶ There has since been a growing concern among international, regional and maritime actors about the potential threats posed by Somali piracy and the lawlessness that cultivates it. Academics and international maritime actors have analyzed the several dimensions of the threat to the global economy and global security that piracy off the Horn of Africa constitutes.

However, there is a considerable gap in analyzing the implications of piracy within Somalia and the broader local consequences. Many Scholars address this gap

⁶ International Law conference report- Piracy and legal issue: reconciling public and private interests, Vol.2 p.21-01-10-2014 www.chathamhouse.org.uk

and offers a Somali perspective on the dynamic challenges of piracy.⁷ Such analysis will elucidate the issues and sharpen the debate on prospects for long-term eradication of Somali piracy and propose pragmatic local solutions to confront the piracy problem within Somalia.

Piracy gave rise to a highly specialized form of international jurisdiction known as universal jurisdiction. Because pirates were a threat to the global order (particularly global sea trade), or because they committed particularly heinous acts, or because their acts were committed in a place beyond the territorial jurisdiction or sovereignty of any state, they were subject to the jurisdiction of any state that happened to identify them, engage them, and capture them.⁸

4.1.1 International Rules of Law

(a) UN Convention on the Law of the Sea 1982 (UNCLOS): Analysis of Substantive Provisions

While the preceding discussion seems abstract and theoretical, the past has shown that the existence of various conventions and institutional bodies, which complement each other, but, overlap in certain aspects, has generated confusion regarding the powers and jurisdictions of the States.⁹ The problem is, for example, that International Law defines

⁷ Report of the Monitoring Group pursuant to Security Council resolution 1811 (2015), United Nations, 10 December 2015.

⁸ Kissinger, Henry (July–August 2016). "The Pitfalls of Universal Jurisdiction". Department of Foreign Affairs. Document No. 1307 p.148-188.

⁹That body of peremptory principles or norms from which no derogation is permitted; norms recognized by the international community as a whole as being fundamental to the maintenance of an international legal order. Jus Cogens, (n.d.) *West's Encyclopedia of American Law, edition 2.* (2008). Retrieved January 23, 2017 from <http://legal-dictionary.thefreedictionary.com/Jus+Cogens>

piracy as an international crime, which is subject to universal jurisdiction, but that the practical trial and conviction of pirates is tied to domestic courts.¹⁰ The execution of prosecution of Somali pirates was, therefore, quite challenging and not always politically wanted:

“For a variety of reasons (primarily the high cost of trials and incarceration, and the unwelcome specter of asylum-seekers among the ranks of the convicted), many nations were loath to bring large numbers of suspects home for trial.”¹¹

(a) Definition of Piracy

The first problem that arises when we discuss Somali pirates is defining what we consider to be piracy. Definition of piracy is important because it creates a link to the politics behind the law of the sea.¹² As has been acknowledged throughout this work, piracy is an ancient phenomenon. According to the writer Benton, piracy has been historically not only a challenge to the established order, but furthermore, a link to questions of legitimate sponsorship and sovereignty.¹³ The term piracy was applied to an array of actions that varied from mutiny, shipboard felonies and various kinds of raiding. This resulted in a blurry distinction between pirates and privateers, even though privateers

¹⁰ Ocean development & International Law, 33:343-358, 2012 copyright 2012 Taylor & Francis, 0090-8320/12, Vol.5 edit. 2012.

¹¹ International Maritime Bureau. (2014). Weekly Piracy Report." List of ship attacked " Vol.2, Edit.2014:www.icc-ccs.org/imb.

¹² D. Archibugi, M. Chiarugi "Piracy challenges global governance" (April 9, 2015). IMO Journal, Vol.2A p.284-401.

¹³ Goodman, Timothy H. 'Leaving the Corsair's name to other times:' How to enforce the law of sea piracy in the 21st century through regional international agreements /Timothy H. Goodman In: *Case Western Reserve Journal of International Law*, Vol. 31 (Winter 2016) nr.1, pp. 139–168.

were state authorized as these sovereigns went about the business of accomplishing some stated mission.¹⁴

Highly reputable scholars and jurists stand on different sides of this debate, due in large part to a lack of context surrounding UNCLOS Art. 101, which provides the definition of piracy. Professor Douglas Guilfoyle takes the more expansive view that facilitation can take place within the jurisdiction of a state because UNCLOS Art. 101(c), the section concerning facilitation, does not contain an explicit high seas limitation, as does Art. 101(a) (1), which deals with the direct commission of piracy.¹⁵ This distinguishes piracy from naval warfare or recognized belligerency on the high seas, but it has complicated efforts to apply the law of piracy to terrorists (who, after all, act for political ends, and most commonly in the territory of sovereign States) and it has meant that acts of piracy committed in the territorial waters of States are not subject to the International Law of piracy.

Article 31 of the Vienna Convention on the Law of Treaties (Vienna Convention) provides general rules for the interpretation of treaties like UNCLOS. Thereby Article 31 paragraph 1 of the Vienna Convention States that “a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in the context and in the light of its object and purpose.”¹⁶

To examine the “object and purpose” of Article 101, it must be considered from the point of its creation. The requirement of “private ends” in Article 101 has historical roots. As mentioned in “Chapter One” of this work, in the past, pirates were not always

¹⁴ *Modern Piracy. Naval Forces*, 2015, Vol. 26 Issue 5, pp. 20–31, 7p; (AN 18506590).

¹⁵ *Id.*

¹⁶ *Id.*

frowned upon. To illustrate, States used pirates to protect themselves against enemies, such as other States.¹⁷ Due to this historical prospect of pirates, some scholars argue that, it is the very nature of piracy, that pirates must not be acting for any recognized state, therefore, any incident with political intention is excluded even if pirates are not acting for a state directly, but for their own political goals. It was, however, never expressly suggested by anyone in the past, that the "private ends" requirement would exempt terrorist acts or the kind of modern day piracy occurring today.¹⁸

Article 31 para 2 of the Vienna Convention requires an interpretation of treaties with regards to

a) any instrument relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.¹⁹

The complexities of modern day shipping broaden the possible States to be threatened. Such a theory fits much better with the territorial waters distinction whereby activity, within twelve nautical miles, is not under International Law classified as piracy. Thus, subsequent state practice confirms that political motivation cannot excuse the criminal

¹⁷ *Id.*

¹⁸ Dangerous Waters, Modern Piracy and Terror on the High Seas, by John S. Burnett. Dutton, 2013, Plume

¹⁹ *Id.*

acts.²⁰ The private ends requirement of piracy should not, therefore, be interpreted as excluding action because of its being politically motivated.

Furthermore, although the States introducing the SUA Convention believed that politically motivated attacks were excluded from the definition of piracy, their belief is mere opinion. It should be borne in mind as state practice and *opinion juris* to the effect political ends are excluded, but this is hardly a uniform practice shared by all States. It seems that the writers of the Harvard Draft failed to include a definition of piracy that would meet the political and social needs of the late twentieth century—because they were not aware of these problems because the worldwide community had not dealt with them when the Harvard Draft was created.

Therefore, I agree with the legal writer George Constantinople who States that the drafters of the Harvard Draft gave no attention to acts of violence committed on the high seas for public ends, and thus they ignored the possibility that organized insurgents, national liberation organizations and their splinter groups, informal groups and isolated individuals would attack and seize ships on the high seas.²¹ According to the intention and the purpose of that wording in the Harvard Draft, it would be erroneous to conclude that the drafters, being politically motivated, deliberately excluded piracy acts. We might agree with Douglas Guilfoyle’s opinion that, if the wording of “private ends” is construed so that a political motive could exclude an act from the definition of

²⁰ *Contemporary Maritime Piracy*. By: Chalk, Peter. *Studies in Conflict & Terrorism*, January–March 2014, Vol. 21 Issue 1, p. 87, 26p, 1 chart; (AN 286864).

²¹ *Dangerous Waters, Modern Piracy and Terror on the High Seas*, by John S. Burnett. Dutton, 2013, Plume, 2013–2014, New York. (ISBN 0-452-28413-9).

piracy, it would be a mistake to distinguish the applicable concept of “public” and “private” acts.²²

As well, when looking at the later definitions of piracy which came up during the SUA Convention and the IMB definition, at present, the traditional definition of piracy and interpretation of private ends in UNCLOS is too narrow to meet the prevailing political and social needs with regards to the international fight against piracy. UNCLOS and the SUA Convention differ in their definition of piracy and the location of the crime. In this regard, various scholars have criticized UNCLOS as being insufficient.²³ It clearly limits piracy to international waters and excludes piratical acts in the territorial waters of a state, leaving said acts to national jurisdiction without creating any obligations on how States must regulate piracy in their own waters.

This provision is especially problematic when the coast state is considered a weak or a failed state that is unwilling or unable to address piratical activities. Moreover, including the requirement of “private ends” disregards politically motivated crimes, and the “two vessels” requirement excludes the option that crewmembers of the boat revolt and, subsequently, use the cargo for private gain.²⁴ The SUA Convention,

²² Pennell, C. R. *"TEDx Talk: What is Piracy?"* Harvard Press, Vol.51: Retrieved October 23, 2014.

²³ "Bento, Lucas, 'Toward An International Law of Piracy Sui Generis: How the Dual Nature of Maritime Piracy Law Enables Piracy to Flourish' Berkeley Journal of International Law Vol.29:2 (2015)."

²⁴ The Achille Lauro Incident, Virginia Journal of International Law vol. 26:3 2015-2016.

on the other hand, has a much broader definition of unlawful acts at sea and “creates an obligation for States to regulate piracy in their territorial waters.”²⁵

Because of the absence of historical insight into the bounds of universal jurisdiction over facilitators of piracy, most commentary to date has tended towards policy-heavy speculation based primarily on the text of UNCLOS itself. It appears, however, that the Harvard’s 1932 Draft Convention on Piracy has provided a much-needed context for the debate. According to the Harvard Draft Convention on Piracy, all individuals—perpetrators and facilitators alike—must be physically present on the high seas during the commission of the *actus reus* to be guilty of piracy *jure gentium*. The definition of piracy contained in the Geneva Conventions, including its provision on facilitators, was later copied verbatim into UNCLOS where it remains untouched. If the genealogy connecting the 1932 Harvard Draft Convention to UNCLOS is relatively straightforward, the Harvard Convention’s mandates on piracy facilitation are even more explicit. The explanatory note on Art. 3 makes a high seas requirement for facilitators even more clear.²⁶

To be clear, it may be the case that the UNCLOS drafters did not consider the issue of a high seas requirement for facilitators when copying the 1958 definition of piracy into UNCLOS, almost twenty-five years later. There is even the possibility that the Harvard Draft Convention’s pronouncements on facilitators was an area where the members of the ILC departed from Harvard’s conclusions, though such a departure would likely have merited mention in the ILC’s commentary.

²⁵ Ward, ed, Graham (Excerpt published 2016-02-21). Submission to the HMASSydney II Commission of Inquiry, ed. *Under The Brave Black Flag: Pirates and Mutineers*, Australia: Ministry of Defense. pp. 6th pg.

²⁶ *Id.*

Nonetheless, the Harvard Draft Convention's unequivocal statement that facilitators must be physically present on the high seas to commit piracy under the law of nations should color the contemporary debate over pirate negotiators, and its historical connection to UNCLOS merits further investigation. Reasonable minds may disagree as to whether the conception of facilitation for piracy should be extended to acts occurring within a nation's territory, but if the Harvard Draft Convention is to be a guide, common jurisdiction over facilitators stops at the edge of a state's territorial waters.²⁷

The drafters thereby ignored the fact that there can be differences in the degree of state involvement, and political groups and their acts. While being drafted, the Harvard Draft, the exclusion of political activities made sense. Piracy was only a concern because it interfered with commercial shipping and transportation. However, they did not want to limit piracy to acts motivated by the intent to commit robbery. It may be agreed that the threat of international peace and stability could be significant, if a state whose interests has not been directly infringed, sought to punish a state that authorized an act of piracy. Therefore, it is reasonable to opt for the rule that state acts will not be within the definition of piracy, however, this should not mean that all acts with political goals should be excluded.

The wording of "private ends" must be understood and interpreted as "private acts" or "private interests," so that all acts of violence that lack state sanction are acts undertaken "for private ends."²⁸ Based upon this inclusion of political motive for private gains of pirates, the private ends requirement of Article 101 UNCLOS should be

²⁷ Wallace, R. and Holliday, A., *International Law*, 1st Ed. (London: Sweet & Maxwell, 2014), page 91-92

²⁸ *Id.*

interpreted with an extension to acts of terrorism on the sea. This view of interpretation seems to be right.

(a) Sovereignty and Jurisdiction over Somali Piracy

In the two years since the United States Justice Department began prosecuting Somalis for their alleged roles as pirate hostage negotiators, a debate has emerged about whether UNCLOS requires facilitators of piracy to be physically present on the high seas to have committed piracy *jure gentium*, and thus be subject to universal jurisdiction.²⁹ Therefore, a pirate could be prosecuted in every state's courts. The contemporary law of piracy, embodied in the United Nations Convention on the Law of the Sea, has defined piracy as an act of violence or depredation committed on the high seas by a private actor acting for private ends.³⁰ Although it is a well-known principle of sovereignty that each state has universal jurisdiction to prosecute pirates, the above mentioned preponderance of attacks near States, which lack resources to effectively prosecute pirates, creates a gap within the international cooperation framework. Piracy is a crime under both the municipal law of individual States and is crime under International Law.

(1) Ship Registration and Nationality of the Ship

While maritime piracy long seemed to be a problem of the past, it is now recognized as a major challenge for international security. When a group of pirates captures a vessel, holds its crew hostage for ransom, or sells its cargo, a significant number of actors are

²⁹ Keith, A. B., *Wheaton's Elements of International Law*, 6th Ed. (London: Stevens and Sons, 2016), page 277.

³⁰ *Id.*

affected, making modern day piracy a global issue: “It is not uncommon for a ship to be owned by a national of one country, crewed by nationals of a second, registered to a third state, and carrying cargo owned by nationals of a fourth”.³¹

If one adds the pirates themselves and the navies from a capturing state, the list easily extends to six States that are involved, which makes the practical prosecution of maritime piracy highly challenging. But it is not only States’ interests that are affected, other stakeholders such as private shipping companies, insurance companies, prospective recipients of food aid, or the individual seafarer suffer from piracy attacks. Given this broad number of actors—both public and private—have an interest in suppressing and governing the negative consequences of piracy.

One may argue the same position exists under Customary Law, with universal jurisdiction controlling, regardless of the position or the nationality of the ship. Denationalization clearly cannot be the rationale. Rather the correct rationale for universal jurisdiction over piracy seems to be the ‘common interest of all States. This involves two elements. Firstly, pirate attacks, particularly when looked at, threaten the common interest of all States in the freedom of the high seas, most notable the freedom of navigation. Secondly, despite the threat of piracy to the common interests of all States, the *locus delicti* of piracy (the high seas) leads to a lack of state jurisdiction and the possibility of the crime going unpunished. Because piracy can target any state, and every state benefits from maritime commerce, “every state has an interest in its own safety, but none has jurisdiction.”³²

³¹ “*In re Piracy Jure Gentium*, 1934 A.C. 586”, Keith, A. B., *Wheaton's Elements of International Law*, 6th Ed. (London: Stevens and Sons, 2016), page 277.

³² Duhaime, Lloyd, “The Piracy”, *General Definition of Piracy Jure Gentium*, Vol.7 19th Ed., 2014.

(2) Power of Flag States and Coastal States

“Flags of convenience” present a problem in that large merchant fleets are reliant on States with little power, whether military or in political weight. “Assuming that negotiations fail in such cases, the acts of violence might go un-redressed” In addition to this interpretation, some States have indicated that under their domestic law, they cannot prosecute without a request for extradition. Halberstam States that the result of this opinion is that if jurisdiction is limited to the state of nationality and to the flag state, and these States do not request extradition, the offender may escape punishment, even if found in a state that would like to see him brought to justice.³³

Despite significant, unprecedented moves by the international community to address the growing threat posed by maritime piracy, considerable legal challenges remain. The current legal regime is not comprehensive with respect to the enforcement of either International Law or domestic criminal law against those responsible for pirate attacks. The jurisdiction of a state over acts of piracy is based upon nationality or territoriality. That is, there must be a genuine link between the State and the ship, or between the State and the waters on which the offences take place. Unless Somali courts are willing and able to conduct prosecutions, the responsibility for enforcement will predominantly fall upon those members of the international community whose ships are currently patrolling off the coast of Somalia.

The ability of a State, with a ship in Somali waters to apply and enforce its own laws with respect to piracy and sea robbery, will depend on whether the pirate ship or the pirates are nationals of that State, or it may rely on the degree to which the national

³³ International Maritime Organization, MSC.4/Circ.180, Reports on acts of piracy and armed robbery against ships, annual report-2015, March 1, 2016, at p.3.

law of the enforcing State makes piracy a universal crime that is subject prosecution anywhere in the world.³⁴ This creates confusion on the matter of responsibility. For instance, it is confusing whether the commander of the warship who captured the pirates should make the decision for detainment, or whether it should be the national authorities of the capturing ship who make that decision.³⁵ These problems have opened a debate about the possibility of the creation of an international court or tribunal that to manage the detention and prosecution of pirates.³⁶

Of course, the creation of such a tribunal brings a lot of difficulties. There is a debate concerning which treaty the tribunal should be based upon. Creating a new treaty takes a long time because ratifications go through many complex procedures. In addition, there is an uncertainty as to whether the tribunal should prosecute Somali pirates only, or other pirates as well.³⁷ These challenges have resulted in many navy commanders releasing pirates after arresting them.

(3) Right of hot pursuit: Search and Seizure

Despite these efforts, State response to Somali piracy is inefficient because of the legal framework that covers the prosecution of piracy on the sea. The legal framework that deals with piracy in International Law is based on the United Nations Convention on

³⁴ Najad Abdullahi (11 October 2008). Behind Somali piracy," October 2014". *English.aljazeera.net*. Retrieved 27 March 2015.

³⁵ Keith, A. B., *Wheaton's Elements of International Law*, 6th Ed. (London: Stevens and Sons, 2016), page 277.

³⁶ " Archbold Criminal Pleading, Evidence and Practice." 2016. Paragraph 25–39 at page 76.

³⁷ Lucie-Smith, Edward (2015). *Outcasts of the Sea: Pirates and Piracy*. Paddington Press. ISBN 9780448226170.

the Law of the Sea (UNCLOS).³⁸ Articles 100 to 107 and Article 107 of the UNCLOS deal with aspects of piracy. Furthermore, The UNCLOS regulates the seizure of pirates on the high sea or in any other place outside the jurisdiction of a state.

The problem with the UNCLOS is that it considers piracy as violent acts on the high seas and encourages States to pursue pirates on those waters. By doing so, the UNCLOS excludes piratical acts on territorial waters. Article 58 of the UNCLOS emphasizes the sovereign rights and jurisdiction of a coastal state that must be respected by States engaged in counter piracy.³⁹ Article 56 underlines the enforcement rights of a coastal state in suppressing piracy in its economic water zone.

Thus, International Law of piracy does not apply to the sovereign waters of a state. This led to the adoption of Resolution 1816 by the Security Council in June 2008.⁴⁰ This Resolution authorizes States to take the same action against piracy in the territorial waters of Somalia as the law of sea normally permits on the high seas. This Resolution was, however, passed under a major objection. Indonesia for example insisted that this will not be the basis for new customary International Law.⁴¹

That means that States will act according to the interest of their national security. Sovereignty over their territories is directly linked to control over the national security.⁴² The same principle is true for territorial waters. States will recognize that their

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Heller-Roazen, Daniel (2014). *The Enemy of All: Piracy and the Law of Nations*. Zone Books. ISBN 978-1890951948.

sovereignty over their territorial waters must stay undisputed. Moreover, territorial waters provide important economical recourses that benefit States. Territoriality and sovereignty are thus crucial elements in power relations.⁴³

The international community will not accept a modification of the UNCLOS that would permit States to pursue pirates in territorial waters. Two security strategies will clash in this case. On the one hand, there is the need to combat a non-state security threat such as piracy. The international community would realize that interstate action is necessary to deal with this threat in an effective way. They would recognize that a national approach to the Somali piracy to do this is not sufficient. Therefore, action to change the definition of piracy and to permit States to enter territorial waters without permission is necessary. On the other hand, they are bound by their need to ensure their sovereignty over their territories.

I argue that the second need will overcome the first one. Changing the UNCLOS in a way that defines piracy as acts of robbery on the high seas, as well as on the territorial waters, and permitting States to pursue them on these waters, would create a possibility where they could lose authority and sovereignty in their territory in the future. This is something States can never accept according to the realist theories. Therefore, I expect that the international community will block any attempt to change the International Law of the sea to permit States to pursue pirates in territorial waters without the permission of the coastal States.

⁴³ David P. Forsythe (2016). "Encyclopedia of Piracy, Volume 1". Oxford University Press. p. 464. ISBN 0195334027

(3) Handing over and transferring Somali Pirate Prisoners

Further complications are caused by the legal aftermath.⁴⁴ Many States do not know what to do with the pirates when they capture them. The navy commanders have three options when they capture pirates. They could arrest them and deliver them to their country to prosecute them. They could transport them to another country to be prosecuted or they could release them.⁴⁵

Taking them to Somalia to be prosecuted is not feasible. First, Somalia does not have the resources to conduct a fair trial, and secondly International Law dictates that prisoners cannot be transported to a country where their human rights would be endangered, which would be the case if the pirates were returned to Somalia.⁴⁶ Regional States such as Kenya have made it known that they are prepared to prosecute captured Somali pirates. This does, however, burden, their national legal system, because Kenya, like many States in the region, lack the recourses to prosecute the Somali pirates. The international community recognized that countries such as Kenya could not become a “dumping ground” for prosecuting pirates.⁴⁷ Moreover, it does not mean that other countries do not have responsibility to prosecute, even if the matter of prosecution is solved. The country that captures the offenders must provide evidence, and witnesses

⁴⁴ Abhyankar J., (2014), "Piracy and Maritime Violence: A Continuing Threat to Maritime Industry" <http://itopf.com/_assets/documents/Abhyankar.pdf>

⁴⁵ *Id.*

⁴⁶ Ananthakrishnan A., Dombrowski K., Marcus A., (2015), Editorial: The Enemies of All Mankind”, Vol.74 Edit 2015.

⁴⁷ Niclas Dahlvang, Thieves robbers & terrorists: piracy in the 21st century-Heinonline – 4 Regent J. Intl-L. 19 2016.

for the procedures.⁴⁸

In addition, Western countries feel that they have the responsibility to ensure that the human rights of the pirates are not violated. To this day, NATO has no detention policy regarding the Somali pirates. NATO States that countries that are engaged in counter piracy operations must refer to their national procedures.⁴⁹

Consequently, States were especially disinterested in intervening against criminal ships of a different nationality. This unwillingness to prosecute pirates led to the infamous “catch and release” practice; apprehended pirates were simply returned to the shore and released without charge. They could, hence, act free from prosecution and with impunity. In their empirical study of the universal jurisdiction for piracy between 1998 and 2016, Kontorovich and Art find that international prosecution occurred in only 1.47 percent.⁵⁰

(b) Identifying Gaps in the SUA Convention

The same attempt was followed by the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA) which entered into force 1992. The SUA avoids the word “piracy” itself to broaden the entire definition of it as well as for maritime terrorism.⁵¹ According to the SUA “definition,” piracy is not limited to criminal actions on the high seas, but also focuses on criminal actions during international transits, in ports, coastal zones or territorial waters. Also, SUA does not

⁴⁸ *Id.*

⁴⁹ D.Archibugi, M. Chiarugi (April 9, 2016). "Piracy challenges global governance" open Democracy”, Sea Journal (p.4, Vol.3A)

⁵⁰ LAWRENCE J. KAHN, "pirates, rovers and thieves: new problems with an old enemy." 20 Tul. Mar. L.J. 293 2015-2016.

⁵¹ *Id.*

make any distinction between private, commercial or political motivations. Whether this regulation is enough to encompass all occurring piracy and maritime terrorist acts of today is questionable.⁵²

Interestingly, the SUA Convention does not use the word “piracy,” but has a broader definition of illegal acts at sea than UNCLOS. Still, some of the listed criminal offenses are particularly relevant to maritime piracy. “Private ends” is a requirement for the exercise of universal jurisdiction, or it is an exception to the exercise of universal jurisdiction if the other elements of piracy exist.⁵³ The answer turns on how the definition of piracy operates in terms of policy, and the justification for the exercise of universal jurisdiction. This question is dealt with in the Policy Section below, the answer that determines how the SUA Convention should be interpreted.

Furthermore, it is questionable whether the definition of piracy in the SUA Convention and from the IMB implies that the definition of Article 101 of UNCLOS must be interpreted differently in the light of legal development. UNCLOS does not define what is meant under “private ends,” nor does the Convention on the High Seas. As there is no definition existing, the wording, respectively the objective, of the “private ends” requirement in Article 101 must be interpreted according to International Law.⁵⁴

Thus far, there are 156 countries that have subscribed to SUA, but in fact this mandatory extradites or prosecute requirement deters many Southeast Asian States

⁵² Samuel Pyeatt Menefee, "The new discipline, problems with piracy, maritime terrorism and the 1982 convention on the law of the sea." —6 *conn. J. int, I L*.127 (2014-2015.)

⁵³ A. Leroy Bennett & James K. Oliver, "International Organizations; Principles and Issues" (7th ed. 2015).

⁵⁴ *Id.*

from ratifying it. Apart of – for instance the Southeast Asian countries – there is also a general lack of willingness by many other countries to sign the SUA Convention. For example, general “piracy-countries” like Malaysia, Indonesia and the Philippines did not ratify the Convention.⁵⁵ Therefore, in case pirates will stay out of the range of these countries which are not a party to the SUA Convention, they can avoid any prosecution or extradition for those offenses committed.

Furthermore, according to the legal writer Eugene Kontorovich and his research, even the States that signed the SUA Convention, do not apply it. The SUA Convention has apparently only been used in one incident since its existence. Another problem with the interpretation and application of the treaty, stated by Malvina Halberstam, is that some States interpret Article 10 of the SUA Convention so, that the state, in which the offender is found, has an obligation to prosecute only if a request for extradition is received.⁵⁶ Another problem with the interpretation and application of the treaty stated by Malvina Halberstam is that some States interpret Article 10 of the SUA Convention so, the state, in which the offender is found, has an obligation to prosecute only if a request for extradition is received.⁵⁷ In addition, some States have indicated that under their domestic law they cannot prosecute without a request for extradition.

Halberstam States that the result of this opinion is that if jurisdiction is limited to the state of nationality and to the flag state, and these States do not request extradition, the offender may escape punishment, even if found in a state that would like to see

⁵⁵ Dillon, D. R. (2013). "Piracy in Asia: A Growing Barrier to Maritime Trade." Heritage Foundation Backgrounder #1379. Vol.8 Edit.7th 2013, www.heritage.org.

⁵⁶ *Id.*

⁵⁷ Kimball, Steve (2016). *The Pyrates Way Magazine*. The Pyrates Way, LLC. p. 64

him brought to justice.⁵⁸ According to the intention of the SUA Convention, which is expressly mentioned in its preamble, this cannot be the case. Halberstam's view is correct as it is very certain that this interpretation is not consistent with the legislative history of the SUA Convention. During the negotiation process of the Convention, there has been made proposals with regards to such a requirement, but it was rejected. So, the legislative history does not leave any doubt that the obligation to submit the offender to competent authorities is not dependent on a request for extradition.

Even when this interpretation is wrong, it does not help if States are not willing to become a party of the SUA Convention and ratify it, or if the affected state refuses to start any action. This, in my opinion is very unsatisfactory. I agree with Halberstam that a multilateral convention that is designed to deter and punish pirates and terrorists, should provide the jurisdictional bases necessary to ensure that a state whose fundamental interests are threatened by a maritime terrorist or piracy act, has the right to prosecute the perpetrators and that those who commit such acts do not escape punishment for lack of jurisdiction by an interested state.

From my perspective, the wording of Article 10 of the SUA Convention does not impose an absolute duty to punish because the state in whose territory the offender is found is only required "to submit the case without delay to its competent authorities for the purpose of prosecution," which "shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that state."

So, the punishment and enforcement of such piracy incidents is left with the States as described by the legal writer Carlo Tiribelli: "States make the law, States

⁵⁸ *Id.*

break the law, States enforce the law.⁵⁹ But the law of nations can only be as strong as the States themselves want it to be. Article 3 of the SUA Convention deals with offenses committed by natural persons. It does not deal with offenses that might be committed by Governments or States-sponsored terrorism.⁶⁰ This is another lack in the regulations of the SUA Convention as it should pursue all kind of piracy activities.

Furthermore, it should eliminate the three above-mentioned issues of Article 101 of UNCLOS. The preamble of the Convention thereby expresses a deep concern about the world-wide escalation of acts of terrorism in all its forms, which endanger or take innocent human lives, jeopardize fundamental freedoms and seriously impair the dignity of human beings and the SUA Convention is therefore considered seen “genuine” anti-terrorism Convention.⁶¹ It addressed terrorism at sea for the first time.

To fulfill the gaps of UNCLOS, as mentioned, Article 3 of the SUA Convention⁶² contains a definition of piracy as an offense where a person unlawfully and intentionally seizes or exercises control over a ship, performs an act of violence against a person on board a ship, destroys a ship or causes damage to a ship or to its cargo, also including destruction or damage to navigational facilities, or threatens to do so. Noticeably, Article 3 does not contain any provision for jurisdictional limitation for special maritime zones. In addition, the motive requirement that UNCLOS contains in its “pri-

⁵⁹ International Commercial Crime Services, International Maritime Bureau, "Terrorism at sea", http://www.icc-ccs.org/index.php?option=com_content&view=article&id=27&Itemid=16, (09-20-2015).

⁶⁰ Declaration of Joint Action to Counter Terrorism, (2015), Association of Nations, retrieved on 14.03.2016

⁶¹ Rediker, Marcus (1987). *Between the Devil and the Deep Blue Sea: Merchant Seamen, Pirates and the Maritime World*, 2015. Cambridge University Press. ISBN 0-521-37983-0.

⁶² *Id.*

vate end” element is left out. It can be agreed with other legal writers that the wording in the SUA Convention makes no distinction between commercial or political motives. With regards to the question whether the SUA Convention covers all acts of modern-day piracy, it must be considered as well as Article 6 of the SUA Convention, which provides the following:

1. Each State Party shall take measures as may be necessary to establish its jurisdiction over the offences set forth in article 3 when the offence is committed:
 - (a) against or on board a ship flying the flag of the State at the time the offence is committed; or
 - (b) in the territory of that State, including its territorial sea; or (c) by a national of that State.
2. A State Party may also establish its jurisdiction over any such offence when:
 - (a) it is committed by a stateless person whose habitual residence is in that State; or
 - (b) during its commission, a national of that State is seized, threatened, injured or killed; or
 - (c) it is committed in an attempt to compel that State to do or abstain from doing any act.”⁶³

According to this statement, all these offences mentioned in Article 6 are limited to activities that are directed against the ship per se (including its cargo), the safe navigation of that ship, persons on board and maritime navigational facilities. But this list does not include activities on the high seas which are simply supportive of terrorist

⁶³ *Id.*

acts. Hence, it does not affect terrorist activities which are not sufficiently precise to be considered as piracy.

The problem is that there is not yet an internationally uniform definition of piracy which could be included in the wording of Article 6 of the SUA Convention. The core regulation of the 2005 Protocol to the 1988 SUA Convention is Article 3 which reads as following:

1. Any person commits an offence within the meaning of this Convention if that person unlawfully and intentionally:

(a) when the purpose of the act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act:

(i) uses against or on a ship or discharging from a ship any explosive, radioactive material or BCN167 weapon and other nuclear explosive devices – in a manner that causes or is likely to cause death or serious injury or damage;

(ii) discharges, from a ship, oil, liquefied natural gas, or other hazardous or noxious substance, in such quantity or concentration that causes or is likely to cause death or serious injury or damage;

(iii) uses a ship in a manner that causes death or serious injury or damage; or

(iv) threatens to commit any of these offences.”⁶⁴

Another problem of this core regulation is that its wording just attempts to define some aspects of international terrorism on sea “to intimidate a population, or to compel a

⁶⁴ *Id.*

government or an international organization to do or to abstain from doing any act”, but there is still no comprehensive definition of maritime terrorism or modern-day piracy.

Also, the wording “unlawfully and intentionally” is not defined. Again, this is leading to interpretation problems and legal issues. For example, the question is, “what is meant by ‘intentionally’” when it comes to seizure of ships by force, acts of violence against persons on board ships, and the placing of devices on board a ship which is likely to destroy or damage it. The same happens with the wording “unlawfully.”

It is not clear whether “unlawfully” refers to unlawful acts under international or national laws. Like the SUA Convention, also the 2005 Protocol to the 1988 SUA Convention is only binding to state parties who signed it. The maritime States that are most affected by piracy are non-signatories to either the SUA Convention or its protocols, or none of the instruments at all.⁶⁵

Therefore, like the SUA Convention, according to my opinion, the amendments with the 2005 Protocol are so long ineffective as it does not bind the entire international community. So, its impact to the international suppression against piracy is very little and - apart from that, the SUA Convention and its 2005 Protocol remain still more a reactive rather than a preventative nature with regards to piracy and maritime terrorism.

(b) Identifying Gaps in National Law

Since piratical activities occur generally within regional boundaries, a logical counter would be to establish regional international agreements to combat piracy. However, the ability of States to suppress piracy is limited by International Law, which promotes on-

⁶⁵ Langewiesche, William (2014). *The Outlaw Sea: A World of Freedom, Chaos, and Crime*. North Point Press. ISBN 0-86547-581-4.

ly individual state actions against pirates and makes no provision to encourage, much less coordinate, effective anti-piracy enforcement.

Although UNCLOS requires that “all States shall cooperate to the fullest possible extent in the repression of piracy on the high seas,”⁶⁶ no such an international authority has been named or established to ascertain whether a state meets its obligation. As mentioned above, from a national perspective, due to the location of the piracy act, national criminal codes of each state could apply as far as there are regulations included regarding piracy.

On the territorial seas, States other than the coastal States, do not have any jurisdiction for enforcement measures against piracy. One legal problem is that many criminal codes do not themselves define “piracy” or the “piracy act,” but merely provide for jurisdictions over those committing piracy “as defined by the law of the nations.” For example, China has no special anti-piracy laws, but prosecutes piracy under its general criminal code.⁶⁷

Australia has—contrary to China—incorporated all UNCLOS’s piracy provisions into Part IV of its Crimes Act of 1914¹⁸² same did the United States. They have enacted most of the provisions of SUA in their 18 U.S.C. § 2280¹⁸³.⁶⁸ But when the national criminal code does not define the act of piracy or does not provide a separate single regulation for piracy acts, other existing criminal code regulations must be interpreted by States.

⁶⁶ *Id.*

⁶⁷ Girard, Geoffrey (2016). *Tales of the Pirates*. Middle Atlantic Press. ISBN 0-9754419-5-7

⁶⁸ Menefee, Samuel (2016). *Trends in Maritime Violence*. Jane's Information Group. ISBN 0-7106-1403-9

These gaps in national criminal laws put the burden of interpretation and definition of piracy upon national judges respectively the municipal legal systems. As customary International Law provides no agreed-upon definition for what acts constitute the international crime of piracy, the affected States must decide and interpret the internationally orientated definition of the offence and they do it differently.

Furthermore, national courts may not have sufficient legal capacity or expertise to adjudicate serious crimes of international concern. Another legal problem is occurring in regions that involve a multitude of coastal States, pirates may escape a patrol boat of one coastal state simply by entering the territorial seas of another coastal state which is maybe unwilling to respond to a pirate attack and would then object to any enforcement measure by other States. Therefore, even States which have the necessary resources and procedures to prosecute piracy, political reasons may prevent a pirates' prosecution. For example, the States bordering the Malacca Strait are very reluctant to let other States undertake patrols in their territorial sea (especially patrols of the US navy and coast guard).⁶⁹

In Somalia, an area where currently most of pirate attacks occur, no governmental patrol boats are controlling its coastal waters although piracy represents a considerable international problem in its waters. As Christopher Joyner States correctly in his legal article, with no operating official maritime policy presence at all – i.e., no coast guard, naval presence, patrol boats, defensive armaments, or staff training – the level of lawlessness in Somali waters is bound to grow.⁷⁰

⁶⁹ Cordingly, David (2015). *Under the Black Flag: The Romance and the Reality of Life Among the Pirates*. Harvest Books. ISBN 0-15-600549-2.

⁷⁰ Huntington P. Samuel, (202015), *The Clash of Civilizations?* In *Foreign Affairs*, Summer2015, Vol. 72, No. 3, p.22, retrieved on 14.10. 2015 from Harvard University.

Besides, it can be reported that even in such States like the United Kingdom, pirates of certain nationalities will not be prosecuted, as the United Kingdom asylum laws might allow the offender to remain in the country indefinitely after trial. The British Foreign Office in London has stated in a legal opinion that Somalian pirates who would be subject to harsh treatment in Somalia cannot be deported as this would be against the British Human Rights Act.⁷¹

The same rules applied to Portugal. The Portuguese government only arrests pirates when Portuguese nationals or ships are involved.⁷² Thus, instead of bringing pirates to justice, a tradition of impunity reigns, with captured pirates being released and permitted to continue their illegal activities, has been performed. Particularly Western States are avoiding their duty to prosecute pirates because of fears that, if convicted, those pirates will then seek political asylum for themselves and their families. Though, no country would be eager to have to import pirate clans. Due to these facts and situation, it is obvious that, besides the international regulations on piracy, neither the national systems do work and are not prepared to combat the new developments of modern-day piracy.

4.2 Future Prospects of Development of International Regulations against Modern-Day Piracy

⁷¹ *Id.*

⁷² Peirates, Henry George Liddell, Robert Scott, "A Greek-English Lexicon", at Perseus (2014) p.189 ISBN 2381-96542-1100

4.2.1 States that allow Prosecution of Somali Piracy as a Crime Under Universal Jurisdiction

As examined in the previous section, many States do not have law that permits them to prosecute piracy offenses, either because they have not incorporated the provisions of UNCLOS or the SUA Convention, or because they do not have domestic laws that criminalize piracy. In both documents – UNCLOS and the SUA Convention, the United Nations have limited its member nations’ ability to respond to pirate attacks by preventing foreign incursions into the sovereign waters of another nation and thereby effectively crippling any opportunity to wage a fight against piracy.⁷³

Another reason is that they are unwilling to prosecute piracy. Besides, the current international regulations with regards to piracy have failed to evolve to reflect the times and places limitations on those who can best combat the pirate crisis, the pirate’ victims and private entrepreneurs.

Milena Sterio states in her legal article, that the reasons for this vary, but often there is only domestic criminal prosecution of pirates in place, the cost factors are too high for many States or States just simply want to avoid the hassle associated with prosecuting pirates because of fear that piracy trials will be difficult, lengthy, and burdensome on that nation’s judiciary.⁷⁴ It is usual behavior of nations not to be interested to play the role of the global policeman on piracy and to takeover sole responsibility.

Therefore, in recent years, several ad hoc tribunals have been established and some nations transferred captured pirates to regional partners like Kenya. But the acceptance of ad hoc tribunals for piracy prosecution is still questionable. With regards to

⁷³ *Id.*

⁷⁴ Huntington P. Samuel, (202015), The Clash of Civilizations? In Foreign Affairs, Summer2015, Vol. 72, No. 3, p.22, retrieved on 14.10. 2015 from Harvard University

transfer of captured pirates to regional partnerships for their prosecution, the legality of such transfers to third parties is not given under International Law as it is not provided for in Article 105 of UNCLOS.⁷⁵ The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be take.

While the SUA Convention allows such transfers of pirates to third-party States, there is again the problem that many countries are not members of the SUA Convention.⁷⁶ Besides, I see the problem that it could be, that the capturing nation is bound by various human rights conventions and therefore may not transfer pirates to third States if there is a risk that pirates will be tortured in such third-party States, or that they will not receive a fair trial.

The UN Security Council (UNSC) passed several resolutions in 2007 and 2008 regarding piracy in Somalia. Resolution 1772 of 2007 stresses the importance of cooperation between the opposing factions in Somalia and reiterates the need for comprehensive and lasting cessation of hostilities.⁷⁷ However, the most significant resolution of the UNSC was resolution 1816 that authorizes any, and all countries combating piracy off the Somali coast to engage pirates on land or sea provided that there is advance consent by the Somali Transitional Federal Government (hereby it has to be mentioned that the Somali TGF is nearly non-functional, therefore it is very questionable whether

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ Fukuyama F., (2014), "The End of History, The National Interest," Summer Edit 2009, p.4.

this condition of advance consent is sensible, it seems to be more a political diplomatically action).⁷⁸

According to these facts, it seems like most States are shunning their judicial responsibility to prosecute the pirates who commit crimes in their territory or against their ships and crews. The reasons for this refusal are, as mentioned above, many: inadequate or non-existent national laws criminalizing the acts committed, concerns about the safety and impartiality of local judges, the difficulties of obtaining and preserving evidence, and fears that if convicted, the pirates would remain in the country where they are prosecuted.

In addition to the need of a revision of international regulations on piracy, it is considered in the International Law community to establish a coinciding international crimes court just for piracy acts, an international court of justice for piracy. Article 105 of UNCLOS provides thereby the following provision: “On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board.”⁷⁹

The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith.” and authorizes with it for any state to seize a pirate ship or aircraft and its property on

⁷⁸ Satkauskas R., (2014), Piracy at Sea and the Limits of International Law, *Aegean Review of the Law of the Sea and Maritime Law* (2014) 1: 217-235

⁷⁹ *Id.*

board, arrest the crew, and prosecute them through its own courts, as long as the seizure is on the high seas or on waters outside the jurisdiction of any state.

Therefore, with this resolution, the UNSC made a legal exception by authorizing cooperating States to take the same steps with respect to piracy in the Somali territorial sea as the law of piracy permits on the high seas. Furthermore, the UNSC has endorsed actions by Canada, Denmark, France, India, the Netherlands, Russia, Spain, the United Kingdom, the United States, and other NATO forces to send warships to the Gulf of Aden region to combat pirates.⁸⁰

As well in Resolution 1846, the UNSC noted that the SUA Convention “provides for parties to create criminal offenses, establish jurisdiction, and accept the delivery of persons responsible for or suspected of seizing or exercising control over a ship by force or threat [of force] or any other form of intimidation” and thus urged state parties to the SUA Convention to fully implement their obligations under the Convention, including cooperating with the IMO to “build judicial capacity for the successful prosecution of persons suspected of piracy and armed robbery at sea off the coast of Somalia.”⁸¹ With regards to these recent and ongoing resolutions of the UNSC, the UNSC has been successful in identifying the scope of Somali piracy and encouraging a coordinated international response, but its “real” effectiveness is still unobvious. While the UNSC resolutions have been helpful in combating piracy in some respects, they have not been provided adequate legal guideposts to foreign navies.

⁸⁰ Young, J. Adam, (2017), *Contemporary Maritime Piracy: History, Causes and Remedies*; Institute of Studies: Singapore, p. 2 Vol.8 Edit 2017

⁸¹ *Id.*

Accordingly, there is still the legal issue whether Western navies can act over the International Law and the permissible extent of the use of their force. The UNSC resolutions treat the enforcement jurisdiction exercised by foreign navies over pirates in Somali territorial seas as an exception to international Customary Law and not status quo.

In addition, these naval operations tend to be ad hoc and defensive in nature, but they fail to focus on remedying the political instability that allows piracy in these most affected regions. Whether States which are parties to the SUA Convention are cooperative enough to establish a regional tribunal court based on multilateral agreements and with the UN participation is as well more than unambiguous.

Problematic in this regard is also that, “the mere existence of universal jurisdiction does not mean in *national law* a court may prosecute: that court will usually need a national law implementing the jurisdiction permitted by International Law.” Yet, only few signatory States have incorporated relevant UNCLOS provisions in their respective national laws.⁸² In case of the SUA Convention, however, States must establish the various acts, which the convention identifies as crimes in their domestic legal systems. The SUA Convention, moreover, places a clear duty on the capturing States to prosecute or turn in the accused.

Struett *et al.* (2013) also observe a tension between public and private governance. Both UNCLOS and the SUA Convention clearly try to regulate States’ behavior when interacting with pirates, while the IMO promotes standards for both public and private actors. The IMB, on the other hand, “effectively has reconstructed the counter

⁸² Mahan, Alfred, Thayer, Captain USN. 2015. "The influence of sea power upon history", 1660-1783. New York, NY: Hill and Wang Press, ISBN 2567-9567-01123 p.267-290.

piracy regime complex into a more neoliberal model in which the role of state actors is minimized.”⁸³

However, such cooperative efforts face several legal challenges. The United States has not ratified the UN Convention on the Law of the Sea, which governs crimes, including piracy, in international waters. More broadly, the international legal regime continues to rely on individual countries to prosecute pirates, and governments have been reluctant to take on this burden. Accordingly, many pirates are apprehended, only to be quickly released. In addition, many large commercial vessels rely on private armed guards to prevent pirate attacks, but the legal foundations governing such a force are shaky at best.

4.2.2 Armed Guards on Board

As was mentioned above, there are various military multinational operations conducted in the Gulf of Aden. Many countries have sent warships to patrol this area and other important checkpoints. Not only do government vessels conduct these patrols, but private military companies have been acting as security escorts of commercial vessels. These escorts include the presence of helicopters and armed security personnel who can operate from small inflatable boats.⁸⁴ Private military companies are one of the many private military companies in the world that could take over this task. Still, these efforts have limited success. For instance, in November 2014 Russia, Britain and India managed to stop multiple piracy attacks separately. In the same year the US’s

⁸³ Stavridis, James G. ADM USN. 2015. “Sailing across the bridge.” Proceedings (October): 17-20.

⁸⁴ Lucie-Smith, Edward (2015). *Outcasts of the Sea: Pirates and Piracy.* Paddington Press. ISBN 9780448226170

fleet stopped 24 attacks.⁸⁵ In spite of these successes, there are many pirate attacks that go undeterred.

In fact, pirates seem to be growing bolder. Once they seize a ship, they take the crew hostage and threaten to sink the ship. This limits the possible action of the warships.⁸⁶ The warships do face complications other than the threat of sinking the ships. For instance, if the navy boards the hostage ship, do they fire and use military force and risk harming the crew or should they take all security risk reducing steps to avoid unnecessary harm? Although Article 100 of UNCLOS imposes one duty alone on States regarding piracy: “Cooperation,” this, does not provide any detail on the nature of such cooperation. Without any guidance of cooperation by an international body, States will have difficulties organizing global cooperation to combat piracy.

Therefore, there are discussions to amend the provisions of UNCLOS, and allow crews on vessels to arm themselves, and allow them to use similar weapons like those the pirates use. This view is supported by the IMB as they believe that ships and crews must be armed in proportion to the seriousness of the piracy threat the waters pose.⁸⁷ They propose to include to UNCLOS the following provision, “A State shall have the right to arm any ship flying its flag with sufficient arms to protect its ships in any territory governed by this Convention.” Apart of this, if such a provision would be included in UNCLOS regulations upon piracy, it needs also to provide limitation and

⁸⁵ Young, Adam J., and Mark J Valencia. 2013. “Conflation of piracy and terrorism: rec-
titude and utility.” *Contemporary*. 1 August. ISBN 3890-1950-2204 p.109.

⁸⁶ Lampe, Christine (2015). *The Book of Pirates*. Gibbs Smith. p. 14. ISBN 4520-0918-
5683.

⁸⁷ Beal, Clifford (2015). *Quelch's Gold: Piracy, Greed, and Betrayal in Colonial New
England*. Praeger. p. 243. ISBN 0-275-99407-4.

guidance on this privilege to bear arms on vessels which are not warships or naval vessels.

Ethan C. Stiles States that by allowing an arming of crews, there should be a legal requirement to file an inventory, to send inspectors to board and inspect the ship's weapon inventories, and some further control actions need to be implemented to prevent misuse of arms and weapons on board and in ports as well as any damage to third parties.⁸⁸ The danger that such kind of weapons could be misused and usually violation will be answered with violation.

It could be that arming ship crews could cause an escalation of violence in piracy incidents. Therefore, I have doubts whether such measures would help limit the increase in the piracy threat. A General Assessment of Past and Future Legal Developments and Regulations After all, the international community appears to understand the severity of the problem of modern piracy and that it will not disappear unless the international community takes aggressive action to combat it.

As stated above, at present, no treaty expressly requires States to criminalize piracy, no agreement has been reached on what such laws should contain, and no international court has overall jurisdiction to try pirates.⁸⁹ The existing International Law of piracy imposes no specific duties to prosecute or enact domestic law criminalizing piracy, though it does provide States with various kinds of authority to assist in the repression of piracy.

⁸⁸ Tortuga –" Pirate History – The Way of The Pirates". Retrieved October 23,2014. ISBN 7690-1103-4527 p. 137.

⁸⁹ *Id.*

The IMB stated that its Piracy Reporting Centre is increasingly seen as among the primary authorities in the world of counter-piracy. The IMB acknowledges and promotes the increasing role for private security firms on board, supplanting the traditional approach to the state as the sole provider of security. It focuses the actors' attention on immediate questions such as how to protect cargo rather than on a long-term political or legal approach to maritime piracy.⁹⁰

4.2.3 Response to Somali Piracy

The Contact Group on Piracy off the Coast of Somalia

Not only has the confusion about the appropriate (legal) response to maritime piracy resulted in an ineffective prosecution of pirates, the global response to piracy prior to 2009 was also poorly coordinated.⁹¹ Witnessing the deteriorating circumstances for shipping off the coast of Somalia in the mid-2000s, the international community attempted to address the shortcomings in the governance of maritime piracy.

The most significant step towards global coordination was the establishment of the Contact Group on Piracy Off the Coast of Somalia (CGPCS), which originated from UN Security Council Resolution 1851 (2008). This resolution acknowledged the need for collective problem solving and encouraged:

...all States and regional organizations fighting piracy and armed robbery at sea off the coast of Somalia to establish an international cooperation mechanism to act as a common point of contact between and among States, regional and international organizations on

⁹⁰ *Id.*

⁹¹ Brown, J. (2016). *Pirates and Privateers: Managing the Indian Ocean's Private Security Boom*, Lowy Institute for International Policy Analysis, 12 September 2016, Vol.5 Edit 2016

all aspects of combating piracy and armed robbery at sea off Somalia's coast."⁹²

While the UN called for the establishment of a cooperative forum, the CGPCS is not formally a UN Contact group, which allows it to act independently and to be more flexible in terms of bureaucracy and procedure.⁹³

The Actors in the CGPCS are intentionally described as “participants,” not as “members,” in order “to sidestep thorny diplomatic issues, such as clashes between traditional rivals over the inclusion of a contested territory”.⁹⁴ The inclusion of new participants is very flexible, States or organizations can simply apply to be the chairman of the Contact Group.

The CGPCS must be understood as a coordinating body, it is not a formal institution. Hence, it does not possess a secretary, bureaucracy, or budget. It works in three types of formats: a plenary, five working groups, and various ad-hoc sub-groups and ad-hoc meetings.⁹⁵ The communiqué of the second plenary details that the decisions of the Contact Group are “taken by consensus” and that working groups “do not take decisions, but only make recommendations through Chairmen’s summaries for considera-

⁹² Mark Kurlansky, *A Biography of the Pirate That Changed the World*. Penguin, 2015. ISBN 5982-1850-3829 p. 485

⁹³ David J. Bederman, Emory, *International Law Review*, "Suppression of Maritime Terrorism", CGPCS (09-20-2016).

⁹⁴ *Id.*

⁹⁵ *Dangerous Waters, Modern Piracy and Terror on the High Seas*, by John S. Burnett. Dutton, 2015, Plume, 2015–2016, New York. (ISBN 0-452-28413-9).

tion by the CGPCS".⁹⁶ The chairmanship of the plenary and the working groups is voluntary and rotates; the European Union chairs the CGPCS in 2014. The five CGPCS Working Groups work on narrowly defined topics with clearly separated areas.

4.3 Somali Domestic Law

4.3.1 Inadequacy of old Criminal Laws in Tackling Piracy (2012)

Prosecutions for acts of piracy have so far been conducted unsatisfactorily under the outdated Somali Republic laws. The 1959 Somalia Maritime Code (which with slight modifications still applies to Somaliland since 1967) deals with piracy and mutiny by masters or crews of ships under Article 205 and 206 as follows:

Article 205 – Piracy: The master or officer of Somaliland or foreign vessels who commits acts of depredation to the damage of a Somaliland or foreign vessel or its cargo, or for this purpose commit violence against persons on board Somaliland or foreign vessels, are punished by imprisonment from 10 to 20 years.

Article 206 - Taking Possession of the Vessel: Crew members of a vessel who take possession of the same are punished: -

1. by imprisonment from 10 to 20 years if the fact is committed with violence or threat against the master the other officers.
2. by imprisonment from 3 to 10 years if the fact is committed clandestinely or by fraudulent means.

For promoters and heads, the punishment is increased up to one third.

⁹⁶ Wombwell, A. James (202015). *"The Long War Against Piracy: Historical Trends."* Fort Leavenworth, Kansas: Combat Studies Institute Press. p. 204. ISBN 978-0-9823283-6-1.

If the fact is committed by a person extraneous to the crew the punishment is reduced by one third.”⁹⁷

It is not possible, however, for Article 205 of this Code to be used to prosecute the use of skiffs and other small or large ships by pirates as we have witnessed in the Gulf of Aden and the coasts off Somalia, because the Articles apply only to masters of ships or boats and their crew whose employment status is regulated under the Code. The appointment and duties of ship masters, the recruitment and contracts and duties of the crew and the supervisory role of the Maritime Authority over all these matters are all set out in Articles 92 to 110 of this Code.

The 1962 Penal Code has been used in the piracy cases that have been prosecuted so far, but the Code which does not include piracy as a crime has considerable under limitations. Article 486 of the Code States that, the detention of a person with the object of obtaining a wrongful releasing him (Kidnapping) shall incur punishment of 8 to 15 years or 12 to 18 years if the crime is successful.

Article 486 is relevant to situations where persons are held as hostages until payments by them or by third parties are made but does not apply to the holding of ships or other vessels. In contrast Article 485 covers the more general crime of extortion - compelling someone to do or refrain from doing an act so that a wrongful gain may be obtained, and carries punishment of 3 to 10 years imprisonment, which can be increased by one third or a half where there are aggravating circumstances.⁹⁸

⁹⁷ *Id.*

⁹⁸ *Id.*

Article 485 is more applicable to the threat of or violence being directed at any person who is then made to do the act that the offender wanted to do (and not necessarily to someone who is detained).⁹⁹ The threat or the violence can relate to persons or to any kind of property, including a ship. It differs from the general offence of robbery (in Article 484) in that, the latter specifically applies the taking of any movable property from a person by means of, or by threat of, violence, which is more immediate.

In short, taking away the personal belongings and a yacht from its owners by means of force in the territorial seas (although there are of course problems with Somalia's 1972 Law which defines the territorial sea as 200 nautical miles, a distance that, for various reasons, is not applicable to Somaliland) could amount to robbery under Article 484; compelling them (or others) to pay more money by means of violence or threats can amount to extortion under Article 485 and holding them until they or anyone else makes a payment would bring Article 486 into the role of the law applicable. In the more common cases, involving ship crews who are detained by force, the more relevant provision is likely to be Article 486.¹⁰⁰

It is worth noting that one of the many draconian criminal laws enacted during the Somalian military dictatorship (between 1969 to 1990) was the 1975 Kidnapping Law (Law No. 36 of 30 April 1975) which repealed Article 486 of the Penal Code and replaced it with a narrow and specific offence of kidnapping and/or hijacking. The Law covered all such acts committed in the territory of the Somali Democratic Republic or "abroad" but, unlike Article 7 of the Penal Code,¹⁰¹ did not specify that the act should

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

have been committed in the territory of another country.

Article 1 of this Law States that,

1. Any person who kidnaps a person, [or hijacks] an aircraft or any other type of transport with the intention of securing payment of money or property or of gaining political benefit which is contrary to the public interest of the state of Somalia, its peace and the Somali Revolutionary policies shall be punished by death.

2. Any other persons involved in the organization of this offence shall also incur the same punishment referred to in clause 1 of this Article.”¹⁰²

The law also adds that any person who was aware of such offences and did not inform the security forces would incur imprisonment of 20 to 30 years (Article 5). All the offences in this Law were tried at the special National Security Court (Article 6) from which there was no appeal against its decisions, (and not at the ordinary courts), and the Supreme Revolutionary Council had the power (under Article 2) to decide the fate of the offenders if the offences were not “against the public interest, independence, unity or the general policies of the Revolution.”¹⁰³ Understandably, this Code (and other similar security related laws passed by the military dictatorship between 1969 to 1990) is considered in Somaliland as not compatible with Article 130(5) of the Constitution which allows the continued use and implementation of the pre-1991 laws unless they conflict with fundamental rights and freedoms or with the provisions of the Constitu-

¹⁰² *Id.*

¹⁰³ Africa program and International Law conference report- Piracy and legal issue: reconciling public and private interests-01-10-2015, Vol.38 p. 23-26

tion.¹⁰⁴

Indeed the 1993 Somaliland National Charter which preceded the Constitution that was initially adopted in 1997 (prior to its adoption after a national referendum) only authorized the use of pre-1969 laws which predated the military regime, but the Article 130(5) formula was adopted in 1997 to avoid too many gaps in the legislation until new laws are promulgated. The 1975 Kidnapping Law is therefore considered as having been no longer applied and is no longer in use in Somaliland.¹⁰⁵ It is unlikely that this law will be used in areas of Somalia (such as Puntland) where the Penal Code is currently used.

The Penal Code, pursuant to its civil law tradition, addresses attempt and instigation, but does not deal with other inchoate crimes adequately in the same manner as is normally dealt with in the common law countries. Attempts are defined in Article 17 of this Code as acts “unequivocally directed towards causing the event which has not be entirely completed or where the event has not resulted” and the reduced punishments are set out in Article 125.¹⁰⁶

Although the joint participation in an offence that is committed or attempted is covered by Articles 71 and 73, agreements (conspiracy, in common law countries) to commit an offence which has not been committed are not punishable with imprisonment, unless they are “political conspiracies” to commit offences against the state (Article 232). Instead Article 76 (which is identical to Article 115 of the pre-1962 Italian

¹⁰⁴ A. Leroy Bennett & James K. Oliver, *International Organizations; Principles and Issues* (7th ed. 2016).

¹⁰⁵ Id.

¹⁰⁶ Leeson, Peter T. (April 13, 2015). "Want to Prevent Piracy? Privatize the Ocean". *National Review*, Vol.8 Edit 2015.

Penal Code) States that, except as otherwise provided by law, where two or more persons agree to commit an offence which is not committed, they shall not be punished for making the agreement, but the Court may apply security measures (police surveillance) to them. The same applies to situations where in cases of instigation (or incitement) to commit an offence but the offence was not committed (Article 76(2)).¹⁰⁷

As part of the public order offences, however, if the instigation or incitement was done publicly in an open place, it is a public order offence under Article 320 punishable with imprisonment from one to five years. Another public order offence of association under Article 322 may be used to prosecute any group associating to commit more than one crime and if they roam about carrying arms, they may incur punishment from five to fifteen years.¹⁰⁸

There is no offence in the Penal Code comparable to “going equipped” to commit acts of theft or robbery, and, unless the matter can be dealt with as an attempt, preparatory acts of mere possession of skiffs or boats for piracy may be difficult to prosecute adequately under the Penal Code.¹⁰⁹ There is also no general offence of conspiracy to commit a crime separate from the actual commission as a part of group which is adequately covered and can increase the individual sentences incurred (as set out in Articles 71, 73 and 74 of the Code).

Because of these shortcomings of the Penal Code, it has been reported that other less relevant articles of the Penal Code may have been used. The provisions mentioned

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ Stossel, John and Kirell, Andrew (May 8, 2014). "Could Profit Motive Put an End to Piracy?". ABC News.

were Article 230 (instigation to commit crimes against the personality of the state), Article 234 (participation in armed groups to commit crimes referred to in Article 230), Articles 222 (Devastation, Pillage and Slaughter whilst trying against the state); and 324 (Devastation and Pillage).¹¹⁰ This simply underlined the inadequacy of the Penal Code in addressing acts of piracy and the crimes arising from them.

There is also the issue of territoriality. There are only a few crimes listed in Article 7 (and 8) of the Penal Code, such as crimes against the state, which can be tried in Somaliland/Somalia even though they were committed “abroad” (i.e. outside the territory of the state).¹¹¹ Any offences in respect of (the) Somali penal Code are made applicable by international conventions (Article 7).

The reference to a foreign territory means, however, that crimes committed on the high seas cannot be brought within the purview of Article 7 even though the acts may be covered by an international convention, such as UN Convention of the Law of the Sea (UNCLOS) which was ratified by the pre-1991 Somali Democratic Republic in 1989. Incidentally the 1975 Kidnapping Law applied simply to the crimes committed “abroad” and did not confine them to those committed in foreign countries.¹¹²

Under the previous applicable legislation, particularly Somalia’s 1962 Penal Code, acts of piracy and armed robbery at sea were arguably punishable as armed robbery (Article 484), extortion (Article 485) and kidnapping (Article 486). Additional issues arose regarding the applicable forms of participation to these crimes as well as

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² Consortium of International Organizations (August 2015). *Best Management Practices for Protection against Somalia Based Piracy* ISBN 978-1-85609-505-1. p.138-150

the punishment of inchoate crimes.¹¹³ Recourse to the 1975 Kidnapping Law, adopted during the military dictatorship, was particularly problematic due to the possible unconstitutionally breach of fundamental human rights by its provisions, which also included the jurisdiction over this crime by a special national security court.

Finally, Articles 205-206 of the 1959 Somalia Maritime Code criminalize piracy and mutiny carried out by ship masters and crews.¹¹⁴ However, these articles do not provide sufficient legal basis to contrast the current pirate modus operandi in the Gulf of Aden, where pirates often operate off small and unregistered skiffs and without a formalized chain of command.

It must be noted how the Anti-Piracy Law eliminates within its judicial system the Customary Law distinction between piracy and armed robbery at sea, defining any attack within Somaliland territorial waters as “piracy” (Article 2(1)(c)). The new law also repeals Articles 205-206 of the 1959 Maritime Code (Article 13, see also Article 9) and affirms the applicability of the 1962 Penal Code for matters not specifically dealt with within the law (Article 14), for instance regarding forms of participation in the commission of the crime.¹¹⁵

More importantly, the law introduces a term of imprisonment of 5 to 20 years (Article 4) without the possibility of conversion of a sentence into a fine (Article 10). In the case of murder, the provisions of Article 434 of the Penal Code, which provides for

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ "CNN's Zain Verjee reports on modern day piracy," 22 February 2014". *Edition.cnn.com*. 16 July 2014. Retrieved 27 March 2014.

the death penalty, will apply.¹¹⁶ In addition, the law has expanded the definition of piracy set forth in UNCLOS by adding two forms of participation: ‘willful participation’ and ‘aiding’ piracy.

4.4-Conclusion

With a significant increase of attacks in the mid-2000s, piracy off the Somali coast became a relevant issue on the international agenda. While there are various international regimes and institutional bodies attempting to govern piracy, they do not constitute a cohesive framework.¹¹⁷ UNCLOS, the SUA Convention, IMO, and IMB offer diverging norms and expose many tensions regarding the definition of the target and the location of the crime, the duty of collaboration, and the responsibility for governance. These inter-regime tensions and the lack of cooperation between the affected actors gave Somali pirates the opportunity to operate with impunity.

The rights of coastal States over their territorial waters are the result of a long-fought battle. The debate on the freedom of navigation and the sovereignty of States over their waters ended in the establishment of certain zones where States enjoyed exclusive jurisdiction. This was a necessary development since States felt there was a need to protect their coastal communities. Moreover, States began to link sovereignty over their territorial waters with the protection of their national security.

The road to the UNCLOS was a long road filled with many complications and disagreements. Changing the UNCLOS in a way that makes States able to pursue pirates in the territorial waters of other States would mean a violation of rights the inter-

¹¹⁶ *Id.*

¹¹⁷ *Id.*

national community has fought for. Defining piracy as an act that can occur in territorial waters and urging all States to use all necessary means to stop piracy acts would mean that it would be perfectly normal for States to enter each other's territorial waters under the guise of pursuing pirates. This can be ultimately perceived as threat to a state's national security.

Many nations, such as Somalia, that are in "piracy territories" are ill-equipped to prosecute piracy cases even if they had sufficient domestic laws. Further, they do not have the political stability, institutions, or personnel to allow them to investigate and fairly adjudicate such matters. The problem of defining piracy is significant for the case of the Somali pirates because it implicates that it is a matter of degree and not of characterization what differentiates the activities of pirates.¹¹⁸

For instance, Somali piracy can be considered a consequence of the lack of law enforcement, political disorder and severe impoverishment in the country. Political and economic instability with the proliferation of weapons led to an environment that encourages and nourishes piracy. As a result, it became difficult to pinpoint the Somali pirates.¹¹⁹

However, the main problem in the establishment of the International Law of the sea was the controversial debate on the dominion of the sea. States were divided over two main principles. One group of States defended the principle of territorial integrity and sovereignty over the sea. The other group of States advocated the importance of the principle of free navigation. The International Law of the sea had to ascertain a balance

¹¹⁸ *Id.*

¹¹⁹ *Id.*

between these two principles.

The significance of Somali piracy as a research topic is that it adds to the debate on the International Law of the sea. The law provides for regulations regarding piracy. At the same time, it establishes the rights of coastal States regarding the integrity of their territoriality and the sanctity of their sovereignty. The case of Somali piracy provides a challenge to this legal order. It is a case where International Law of the sea fails to work, but most importantly is it is a case where the presumed sanctity of territoriality and sovereignty over the sea can be put under question.

* * * *

Chapter 5

Conclusions

&

Recommendations

5.0 Introduction

The international community is facing the danger of sea piracy on an unprecedented scale. The vessels of all States, their crews and the economies of all sea-faring States, are at great risk because of the pervasiveness of modern piracy, which is employing advanced technology and even loopholes in the law, to carry out its nefarious objectives. A deep study illustrates that the waters around the Somali coast, and other parts of Africa, are in great danger because of piracy. That is the reason the United Nations Security Council has declared piracy a threat to the international maritime security and peace.

As noted throughout this work, sea piracy has enjoyed a long history. Major global powers such as Great Britain, the United States, France, and Holland have put great efforts into eliminating piracy and maintain control over the shipping lanes of the

oceans. After fifteen years of Cold War, however, and the desolation of the former Soviet Union, we must accept the fact that sea piracy has been increasing since 1980.¹

Since 1982, there has been a trend towards globalization and liberalization, also it had stipulated the sea trade throughout the world in the other hand provide an opportunity for pirates to extend their nefarious activities on the high seas. In the early day, ship owners ordered their crews not to report pirate attacks, because the legal action could be tedious and cumbersome. Instead, they restricted their ships from areas subject to piracy. As piracy has become a main concern for seafarers, depriving them of at 1% of their total income, all the major shipping companies have put the piracy issue on the international agenda.²

Nevertheless, the need for regional cooperation with respect to greater efforts toward coordinated anti-piracy patrols is one universally agreed upon goal. After all, the question is whether an international “criminal code” for piracy needs to be established. Besides, to successfully combat piracy and maritime terrorism, international cooperation is also required. Current legal development and discussions from a global perspective is desired.

After a long discussion, the conclusion of all piracy situation would be placed in this last chapter. According to previous chapters, from the history to the recent situations also the law enforcement which have governed Somali acts of Pirates, many problems and legal loop hole were illustrated. There are several comments and recommendations provided to solve the imperfect structure, yet Somali acts of piracy are still ac-

¹ *Id.*

² *Id.*

tive and not completely eradicated. The last part of this chapter presents the best solutions to effectively close the legal and cultural gap of Somali piracy.

5.1 Conclusion

In the nineteenth century, piracy was not much of a concern for maritime security. This was because of the Declaration Respecting Maritime Law that was signed in Paris in 1856. This declaration outlawed state-sponsored piracy, which meant that privateering became illegal. However, the resurgence of piracy in the late twentieth century and especially in the last decade in South-East Africa has made a sophisticated international legal framework for piracy necessary.³

As discussed in the first chapter, “Piracy: the world’s oldest crime against the law of nations,” does not have a universal definition, which in my opinion is one of the core problems. As described in the second chapter of this thesis, international treaty and Customary Law provide a narrow basis under which pirates can be apprehended on the high seas or elsewhere. As discussed in Chapter Two, whether a pirate can be prosecuted depends on where he is captured, his nationality, the nationality of the ship that arrests him and the circumstances under which he is arrested. Therefore, the international community has discussed whether an international new treaty regarding piracy is required and whether it could solve these problems.

As described before, lacking national and regional enforcement capability, patrol navies are necessary to quell the rise of piracy. The United Nations Security Council, as well as the IMO oversees organizing and implementing naval control and en-

³ *Id.*

enforcement measures, especially for certain piracy affected regions and they should also use this capacity more effectively. The lawlessness of the sea made this possible.⁴ An ad hoc piracy tribunal requires an appropriate housing and detention facility, a well-trained judiciary, prosecution and defense counsel, and a uniform piracy law which would be applicable to all captured pirates.

5.1.1 Overview of Piracy and International Law

Piracy was first codified in the 1958 Geneva Convention. According to the 1958 Convention, piracy contained various acts including robbery and acts of terrorism.⁵ As mentioned in Chapter Two, in 1932 the Harvard Research Group (HRG) drafted a convention that examined the many definitions of piracy, as well as the views of various legal jurists and municipal laws that addressed the question whether piracy could be considered an offense against all nations.

The HRG sought to develop a definition that would be acceptable to all States of the international community.⁶ They did this in reaction to the report of the subcommittee of the League of Nations Committee of Experts for the Progressive Codification of International Law, which States that “it would be preferable for the Committee to adopt a clear definition of piracy applicable to all States in virtue of International Law in general.”⁷

⁴ *Id.* (Benton, 2005: 707-709)

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

The HRG first concluded that because the definitional characteristics of piracy varied in municipal law, convictions and punishment could likewise vary depending on the state that enforced the law. The HRG stated that within the international community there was no authority that could coordinate piracy enforcement.⁸ Thus, while the possibility of criminal acts occurring in international zones exist, the only available legal tools to address these acts were municipal, and lacked an international authority to coordinate them.⁹

The problems defining piracy started when the international community tried to use municipal law to create a definition for piracy acts that could apply to international zones, such as the High Seas. A universal definition was difficult to achieve because of the different views States had on the scope of acts of piracy and the geographical reach of these acts.¹⁰ Still, pirates were considered, as discussed in Chapter One, *hostis humani generis*, enemies of the human race. This conceptualization of a crime against mankind was the reason there was a common agreement that nations had the responsibility to act against pirates. This meant that pirates were subjected to the municipal law of the nation if they were captured.¹¹ Therefore, any nation could prosecute a “common enemy,” using its domestic legal tools that varied, however, in form and character according to that nation.¹²

⁸ *Id.* [You must have no more than five ids in a row. After the 5th *Id.*, spell out the source; then do another id, up to five.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

Acts of piracy are considered special offenses because they are punishable where encountered. Yet, even if nations could agree on universal piracy law and even with the presence of an international authority or tribunal that prosecuted pirates, private persons are not legal persons under International Law.¹³ When the HRGroup combined these views, they concluded that there was no such offence as piracy under national law.¹⁴

Based on these findings, the ICL published a report that became the basis of the 1958 Geneva Convention. Articles 14 and 22 of the Geneva Convention addressed the piracy issue by stating the regulations applied to all ships, especially innocent passage issues which were almost literally repeated in articles 100, 107 and 110 of the UNCLOS. The UNCLOS however, provided a more extensive definition of piracy.¹⁵ Furthermore, the ICL argued that piracy does not necessarily have to be related to motives such as robbery, yet the ICL drafted the definition for the UNCLOS, as stated in Chapter 2, that pirate acts could also be driven by motives such as hatred.¹⁶ Moreover, they asserted that piracy could only be committed by private ships, and not by warships or other government ships, yet they excluded cases of mutiny.¹⁷

The definition of piracy and the related state response provided a limitation because of the High Seas component. The territorial sea, internal waters and archipelagic waters are excluded. Furthermore, the reference to the High Seas made the Economical

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

Exclusive Zone (EEZ) an interesting subject because it failed to clarify how States should act when they encounter pirates in this zone. During the Third United Nations Conference on the Law of the Sea, a proposition to include the EEZ in the definition of piracy was rejected.¹⁸ However, the UNCLOS did provide methods to combat piracy in this area. Article 58(2) States that Articles 88 to 115 of the International Law apply to the EEZ so far as they are not incompatible with this part.¹⁹ Moreover, the EEZ included the contiguous zone as was defined in Article 55. This meant that piracy acts outside the territorial waters were treated as if they were committed on the High Sea.

Under the pressure of maritime powers, the UN Security Council has passed a series of resolutions to repress piracy on the coast of Somalia and the Gulf of Aden. One of the most interesting resolutions is resolution 1816, which addresses a shortcoming of the definition of piracy which describes piracy as acts conducted only on the high seas.²⁰ Because of this description, States are not able to do anything about the attacks conducted in the territorial waters of Somalia. They are also not able to respond efficiently when ships attacked on the High Sea are brought to Somali ports as described in Chapter 4.²¹

“The authorization has been provided only following receipt of the letter from the Permanent Representative of the Somalia Republic to the United Nations to the President of the Security Council dated 27 February 2008 conveying the consent of the

¹⁸ *Id.*

¹⁹ *Id.* (UNCLOS, 1982: Art. 44)

²⁰ *Id.*

²¹ *Id.*

TFG.”²² Naval ships can find themselves in the position where they must transfer arrested pirates for prosecution. This provision however is based on the principle that the Somali government agrees with the exercise of the jurisdiction by member States of the EU.²³ Thus, the EU did not base the mission’s authorization on the UN Resolution. An interesting notification in Resolution 1816 regarding the consent of the coastal state is the reference to the States responding to piracy attacks. The United Nations Convention on the Law of the Sea encourages ‘all States’ to cooperate and repress piracy and armed robbery as mentioned in Chapter 2.²⁴ In contrast, Resolution 1816 limits the authorization only to

States cooperating with the TFG in fighting 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.²⁵

This seems to emphasize, as analyzed in Chapter 4, the importance of Somalia in allowing authorization to act within its territorial waters only to States that Somalia is already cooperating with. Thus, Somalia maintains control over its territory.²⁶ By stressing the importance of the consent of the coastal States under charter VII, the UN Security Council achieves three goals. The first goal is to show the importance of the sovereignty of States and illustrate the Security Council’s respect of this principle. This

²² *Id.* (UNSC, 2008b)

²³ *Id.*

²⁴ *Id.* (UNCLOS,1982: Article 100)

²⁵ *Id.* (UNSC, 2008b)

²⁶ *Id.*

ensures that the concerns about a change of the International Law of the sea are soothed.²⁷

The second goal is to make the position of Somalia in the United Nation stronger and to especially strengthen the position of the TFG because Somalia lacks the resources to combat piracy off its coast. This measure gives Somalia a sense of power and instruments to fight the pirates.²⁸ Furthermore, by adding this clause to the Resolution and referring to ‘States in cooperation with the TFG’ the Security Council succeeds in limiting the presence of the naval fleets on the coast of Somali to the fleets of States that are already involved in combating Somali piracy and to States that are willing to cooperate.²⁹ On the other hand, these acts have denied the naval forces efficient protection against acts of piracy off the Somali Coast.

Finally, requesting and receiving the permission of the TFG to operate on the Somali territorial waters ends the debate about the legal width of the territorial waters of Somalia. However, since the permission of Somalia to enter its territorial waters means that warships can be everywhere no matter the width of these territorial waters, a discussion about the limits of these waters was avoided.³⁰

According to the procedure after piracy arresting, the first transfer agreement was made between the Seychelles and the Somali Transitional Federal Government (TFG) in February 2011. This served as a legal model, which was soon extended to other agreements as stated in chapter 4. The Post Trial Transfer agreements were estab-

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

lished in close collaboration with UNODC's Counter-Piracy Program, which is devoted to constructing and modernizing prisons and courtrooms in Kenya, Seychelles, Mauritius, and Somalia.³¹

Therewith, facilitated the establishment of an effective mechanism that reached from apprehension to prosecution and sentencing. Although it does not lead to a high rate of prosecution, the system is a first step towards fighting impunity. Liisberg, an academic scholar on the law of piracy, explains that this system has contributed to an increased number of prosecuted pirates and a change in public perception regarding the efficiency of fighting piracy. National governments have redoubled efforts to bring pirates to justice as well. In 2010, the United States held its first piracy trial since its civil war, soon followed by Germany's first trial in over four hundred years. Other agreements have been established to try pirates in nearby countries like Kenya, such as the UNODC Trust Fund to Support the Initiatives of States to Counter Piracy of the Coast of Somalia, established in January 2010 as stated in Chapter 2.

The IMO assists Member Countries in revising national legislation to criminalize piracy, attacks against ships, and other illicit maritime activities; coordinating structures and procedures; and having in place well-trained operational, technical and logistical personnel. A Code of Conduct concerning the repression of piracy, armed robbery against ships, and illicit maritime activity in west and central Africa was adopted formally in Yaoundé in June 2013 by Heads of State or their representatives from twenty-five West and Central African countries. IMO's strategy and initiatives for enhancing maritime security and supporting development of a vibrant, sustainable maritime sector

³¹ *Id.* (Zach et al. 2013: 24)

in West and Central Africa, aims to ensure successful implementation of the Code of Conduct.³²

5.1.2 Problems Preventing and Combating Piracy

The legal definition of piracy has provided for the necessary problems in the modern time as well. Joseph M. Isanga, federalist expert, States that fundamental to the discussion of establishing a new international legal treaty with regards to piracy, is an agreed-upon definition of what is piracy, who are the offenders, and who may prosecute them. If coastal States have no obligation to enact domestic laws aimed at combating acts considered to be piracy under International Law, the piracy threat will remain and increase.³³

The lack of uniformity in the definition of piracy throughout the world, in conjunction with the complete absence of any definition of piracy in some countries, will continue to impede efforts to reduce incidents of piracy. Therefore, I agree with Isanga that there is a need for an overall accepted definition of piracy which applies to all possible form of this crime, and that the improvement of domestic laws, especially those pertaining to jurisdiction over piracy, is vital to ensure an effective enforcement regime problem as described in Chapter 4.

On the other hand, UNCLOS does not provide a comprehensive definition what “piracy” means and Article 105 is only limited to actions on the “high seas.” Furthermore, the “may-wording” of Article 105 does not make it obligatory for the States to take jurisdictional action. Besides, this option has not been exercised much by States in

³² *Id.*

³³ *Id.*

the past few years. Modifications of UNCLOS can be done according to Article 311 of UNCLOS as mentioned in Chapter 2 which provides that two or more state parties may conclude agreements modifying or suspending the operation of provisions of this Convention, applicably solely between them.³⁴ I agree that it would be easier to expand the existing regime of piracy in the UNCLOS provisions than establishing a totally new international code on piracy crime.

The presence of international navies may sometimes deter pirates, but navies are for fighting wars; they are neither pirate chasers nor can they be everywhere all the time to suppress every piratical act. When asked about the presence of foreign military within Somalia's territorial waters, a Somali pirate replied, "We are not scared of the U.S. troops or any other troops stationed off our waters. Why should we be scared? They have weapons, but so do we. And we are the ones with the human shields."³⁵

I believe that the problem should be met where it starts. Hence, once it is established why people engage in piracy and maritime terrorism as stated in Chapter 3, it is then possible to develop a comprehensive strategy for resolving the problem. This is how an anonymous Somali pirate highlighted the interconnectivity of violence, piracy and a lack of governmental reaction: "I am Somali; the gun is our government."

It shows that the African region lacks a harmonized legal framework to deal with piracy. African States concentrated on the land and ignored the potential of the sea as an instrument for economic growth.³⁶ Since 2007, there was a call for the African Union to recognize the importance of the sea and to develop a regional legal frame-

³⁴ *Id.*

³⁵ Fouché, 2010: 142-145

³⁶ *Id.*

work. The attacks on the Somali coast and the Gulf of Aden only strengthened this as mentioned in Chapter 3.³⁷ There are examples of successful response to piracy. Piracy in South-East Asia has been known to reach high proportions, especially during the eighties and nineties of the previous centuries. Piracy attacks in this region diminished during the last decade.³⁸ Piracy attacks on the Somali Coast and the Gulf of Aden has its limitations, and there is a lesson to be learned.³⁹

Limitations of the comparison exist in the sense that piracy in this region is not the same as the Somali piracy, because the type of lawlessness and the lack of community support for pirates in Somalia do not exist in South East Asia. The Asian case does, however, show that a regional approach to piracy can be effective in reducing the attacks. States around the Strait of Malacca such as Indonesia, Malaysia and Singapore signed various multilateral agreements in favor of a good cooperation and coordination in pursuing pirates.⁴⁰

In June 2013, Memorandum of Understanding between ECCAS, ECOWAS and GGC,⁴¹ the parties agreed to (1) hold annual meetings to provide guidance, monitoring and evaluation of regional cooperation and (2) create an Inter-regional Coordination Centre (ICC) for the implementation of the regional strategy for maritime safety and security. Yet, all these MOU are only soft law which recently not binding any actor of

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ ECCAS: Economic Community of Central African States ECOWAS: The Economic Community of West African States.

the piratical acts. Meaning that, all the agreements don't have any legal effect.

The first draft of what would be known later as Resolution 1816 was sponsored by the US, France, the UK and Panama and was sent to the other members of the Security Council in 28 April 2008. This draft was based on the request of IMO to the Security Council to encourage States to act against piracy and to permit ships to enter the territorial waters of Somalia when they suspect piracy activities or armed robberies as stated above.⁴² Until this moment, the UN Security Council did discourage action of other States taken near the coast of Somalia to protect their commercial ships because of International Law limitations on sovereignty issue.

In addition, the Security Council was bounded by its earlier statements and resolutions regarding this aspect.⁴³ For instance, the Security Council's presidential statement of March 2006 declared the Security Council's respect "for the sovereignty, territorial integrity, political independence and unity of Somalia, consistent with the purposes and principles of the Charter of the United Nations."⁴⁴

The legal gaps between the various international regimes and institutional bodies attempting to govern maritime piracy have, hence, not been eliminated, but are now governed more successfully through multi-stakeholder collaboration. While increased international cooperation existed on the military level, it was clear that a merely repressive approach to piracy could not be sufficient.⁴⁵ The participants were convinced that a meaningful governance of piracy off the coast of Somalia had to find a viable system

⁴² *Id.* (United Nations, 2008)

⁴³ *Id.*

⁴⁴ *Id.* (The United Nations Security Council, 2006)

⁴⁵ *Id.*

for prosecution, giving States an incentive to end the “catch and release” tactic and, therewith, closing the impunity gap. Two issues were of primary importance: Finding a regulation for where pirates would be prosecuted and determining where to incarcerate those convicted are necessary.

“A total of 1,200 individuals have been convicted of piracy or awaited trial in twenty-one States world-wide – a very clear sign that there is no such thing as impunity for pirates.”⁴⁶The international community has continued to serve as a forum to share information on the latest developments on prosecution, pending piracy court trials, and prison capacities. Affected by the proliferation of piracy and interested in its suppression, both public and private actors established a forum to jointly govern piracy off the coast of Somalia in 2009.⁴⁷ While it did not create new law to govern maritime piracy, it only clarified the existing legal framework and facilitated the establishment of new models of cooperation.

Coming up with a clear agreed upon standard for the provision of armed security with no clear regulation on armed security will not be easy. Currently many major maritime entities insist on armed escorts which keep armed men off their corporate vessels as well as the liability. Nevertheless, placing armed men on commercial ships is still not embraced to the international security regulations; consider the following passage for example:

The carriage of firearms on board merchant ships is a complex legal issue with Member States taking diverse positions. The UN Security Committee has determined that the carriage of armed personnel is

⁴⁶ *Id.*

⁴⁷ Bateman and Ho, 2008: 2

a matter for flag States to authorize, however it has also accepted that their carriage has legal implications for coastal and port States, particularly with respect to the carriage, embarkation and disembarkation of firearms and security equipment in areas under the jurisdiction of such port or coastal States.⁴⁸

Although the provision and use of weapons at sea for self-defense is legal, all have been faced with media scrutiny, controversy and varying degrees of helpful and unhelpful legislation. Although the provision of lethal force by private services rather than government services neither new nor even unexpected on land it seems to be more complicated on the ocean and in international waters. But the potential for missteps, such as the murder of fishermen, is high and the ability to adjudicate or gather evidence in the event of a violent event gone wrong, is lower than land-based operations.

Briefing the Security Council on the situation in Somalia, UNODC Executive Director Yury Fedotov said, "Piracy money is also being reinvested into criminal activities that are not limited to piracy. Drugs, weapons and alcohol smuggling, as well as human trafficking, also benefit from the proceeds of piracy."⁴⁹ After all discussions, the inability of States to police their own waters, the depressed economic conditions that give rise to crime, and the geographical and jurisdictional difficulties of policing States' waters combine to encourage piracy. Therefore, it is essential that States cooperate more effectively in the repression of piracy under Article 100 of UNCLOS.

⁴⁸ Campanelli 2012: 81

⁴⁹ Liisberg 2014: 37

5.1.3 Recommendations

The latter period of the Twentieth century saw the international crime of piracy overshadowed by the growing attention accorded by the international community to the problem of impunity in relation to genocide and crimes against humanity. Through a combination of circumstances, especially arising because of the collapse of effective governance and policing mechanisms within some coastal States, piracy has been allowed to thrive in certain situations, as stated in Chapter 3.

As the world's navies realize that piracy cannot be effectively stemmed by ships designed to fight naval battles, regional and private solutions will come into play.

- 1) Develop the Regional and domestic MOU and guidance to binding law
- 2) Establish the state capacity to patrol, protect and prevent the sea territorial from acts of piracy

Because Somalia is a failed state, all these solutions will be foreign-sponsored, land-based and robust like the Puntland Marine Police Force, some will be domestically sponsored and under resourced like the Somaliland Coast Guard and some will be imaginary like the Somali Navy. Future efforts to combat piracy should continue to focus on the following:

- 1) enhancing regional cooperation and agreements,
- 2) strengthening the international and domestic legal instruments necessary to prosecute pirates, and addressing the root causes of piracy.
- 3) ratifying and abide by the international regulations on suppression of piracy.

The best long-term solution against the crime of piracy may be the developed world's commitment to re-establishing functioning order in Somalia, and other developing and failed States. Somalia's capability to prosecute pirates has been very limited

due to its lack of internal coercive authority and incarceration capacity as mentioned in Chapter 3. Therefore, the global community must engage in discussions about how to best establish a complementary judicial mechanism to ensure that Somali pirates are held accountable for their crimes is needed.

5.2.1 Definition and Codification

Recent situations have made it clear that piracy and threats to maritime security can no longer be ignored. To date, the response of the international community to this threat has been rather haphazard. The development of a robust and universally applicable legal regime to deal with the problem ought to form an essential part of any effective response. A more coordinated approach is warranted, with a view to the resolution of the legal issues identified herein. To this end, the International community may see fit to revisit the definition of piracy. However, there are other options provided to both individual States and the international community.

This problem could be solved by establishing an international code on piracy applicable to all States to harmonize several important legal structures on an international level. From my point of view, that it is questionable whether to establish a new international code, or whether better to expand the existing definitions and provisions in UNCLOS. Many commentators have suggested extending the regime of piracy to territorial waters in UNCLOS but in such a way that a coastal state's sovereignty would continue to be respected. Further, States which have not yet criminalized acts of piracy in their domestic legislation or provided the necessary authorization under the pertinent international conventions and customary International Law to prosecute and punish suspected pirates must do so as a matter of priority, to develop a comprehensive strategy as to the

- (1) development of domestic laws and regulations criminalizing piracy
 - (2) development of a regional framework to counter piracy, and
 - (3) development and strengthening of relevant domestic laws and regulations,
- all these agreements must be enacted as the bind able hard-law.

Secondly, the international community should have an effective roster for naval ships that escort the ships or vessels that would enable them to safely deliver good and humanitarian aid to the people. In addition to the IMO regulations, commercial ships could also be escorted by the skillful naval ships not an unreliable private armed-guard on board."

Because of the insecurity and lack of a sovereign authority over the seas, merchants formed associations among themselves to provide protection.⁵⁰ These associations grew and became powerful over time. They became a significant actor in the enforcement of security of navigation.⁵¹ Principles and rulers made use of the armed flees of these associations. Not before long they became the policing entity on the seas. They enforced maritime regulations and customs which they developed themselves. This was regarded as one step farther from the assertion of exclusive dominion over the sea.⁵²

In a perfect world there would be no threat. Or if there were, the government under whose flag the vessel sailed would provide the required security. In the real world of flags of convenience and aggressive pirates, the industry has simply dealt with the unknowns under the rubric of "No ship with armed guards has been taken by pirates." Additionally, there is a growing public, government and industry concern that

⁵⁰ (Fulton, 1911: 5)

⁵¹ *Id.*

⁵² *Id.*

the provision of this force may be yet another armed group that needs to be regulated. All elements of the maritime industry want a code of conduct for the use of force and a clear legal structure for the provision of security. Currently the industry is “self-regulating” which at its best interpretation means that the management sets standards or that competitive force will create a Darwinian rise to the top.

Maintaining the safety of waterways and strategic chokepoints is beyond the capacity of one state.⁵³ That is the reason that cooperation between States and national navies is needed, especially in the world where non-state actors such as pirates can have access to arms, intelligence and high-tech equipment. However, States in this region do not have well trained navies and other resources to deal with piracy.⁵⁴ The Counter-Piracy Program should be provided support to all East African countries not only the country willing to prosecute piracy, through training program for police, prosecutors, judges and prison personnel in Kenya, Seychelles, Mauritius and, where security conditions allow, Somalia. The areas of cooperation identified include: (1) technical cooperation (2) training and capacity building (3) information management and data collection (4) mobilization of resources (5) coordination of joint activities (6) management of sea borders.

Currently, the IMO is exploring ways to work in partnership with the UN Office on Drugs and Crime (UNODC), the International Labor Organization (ILO), the Office of the High Commissioner for Human Rights (OHCHR), UNHCR, International Organization for Migration (IOM), INTERPOL and others, to address this significant

⁵³ *Id.*

⁵⁴ *Id.*

humanitarian problem which also places burdens on coastal States. IMO has issued standards and recommended practices for addressing the problem, associated guidance and is working with many countries to help address the problem. IMO strongly encourages Member States to fully implement the special measures to enhance maritime security contained in SOLAS chapter XI2 and the ISPS Code, which also contain clear specifications on access control and security measures for port facilities and ships. Unfortunately, these cooperation and agreements are still soft law and do not bind the state parties or members to strictly follow and authorize. The suggestion to this problem is to enact and legislate those rule to the official regulations which all parties must follow mandatorily.

5.2.2 Prosecution

This dissertation suggests four broad options for a more efficient prosecution of pirates: (1) the establishment of a new ad hoc international court; (2) the establishment of a “hybrid” national/international court within a national legal system, but with UN support; (3) the establishment of a regional court based on a treaty among affected States; and (4) prosecution before a variety of national courts based on agreements governing the transfer of the suspects.

The international community soon reached consensus that the focus should lie on supporting the existing mechanisms of prosecution through regional capacity building. By early 2010,⁵⁵ concluded that the most feasible option would be: “a specialized or dedicated piracy chamber – with or without international elements – established within the existing domestic criminal justice system of one or more States and located

⁵⁵ CGPCS 2010

in the one which willing and able to undertake prosecution, including Somalia when this idea becomes possible".⁵⁶

As shown in the previous chapter, some commentators propose that pirates should be prosecuted at the place in the region where the piracy act was committed because of cultural, familial and linguistic considerations and the proximity to where the acts took place. In my opinion, this might lead to uncontrolled enforcement acts and jurisdictional differences between countries which are unlikely to combat piracy on a comprehensive approach.

Apart of that, it is unlikely that a national court would be located close to the offense and the evidences necessary to prosecute it. Pirate attacks usually involve perpetrators, victims and witnesses of many nationalities. International court would be able to provide justice that is fairer and more impartial than justice in national courts, provided that the judges will not be related to the state where the crime was committed or the defendants that committed that crime.

Besides, Piracy cases ought to be tried in courts that are sufficiently equipped to handle piracy cases. Therefore, it is proposed to establish a permanent International Piracy Tribunal, modeled after the International Criminal court (ICC) with special piracy jurisdiction. Some other legal writers, such as Yvonne M. Dutton, propose this possibility to expand the jurisdiction of the ICC instead of contributing new tribunal.⁵⁷ For this expansion, the Statute of the ICC would have to be amended to include the specific crime of piracy.

⁵⁶ *Id.*

⁵⁷ *Ibid.*

The establishment of a special international criminal court for piracy may cause the criticize because if the international community leaves the crime of piracy under the domain of traditional universal jurisdiction, any state was permitted to prosecute suspected pirates regardless of their nationality. The expansion of the ICC's jurisdiction on piracy would be less costly than the establishment of an entirely new international tribunal to adjudicate piracy cases. Bringing pirates to justice is essential for its deterrent effect. Prosecutions must be done in compliance with widely recognized principles of due process and applicable international human rights norms.

Furthermore, an international court on piracy can apply international rules and laws thereby ensure as well the uniformity in the application of laws and the sentencing of offenders. Piracy affects not just only one nation but also the international community. It is the kind of crime which an international criminal court could properly pass judgment on behalf of the world community. In any case, whether a new international crime court will be implemented or the existing International Chamber of Commerce (ICC)'s or The International Tribunal of Law of the sea (ITLOS)' authority should be expanded on piracy, there is a certain need for such a tribunal to govern specifically on sea piracy. Piracy-combating countries may need to undertake additional efforts to rebuild such States and regions cooperation to ensure that such lawlessness does not occur in other regions in the world.

Indeed, it would be more practicable to create a separate chamber at the ICC to ensure that piracy cases could be investigated, prosecuted and adjudicated by those with the expertise. In the contrary, Helmut Tuerk (vice president of the International Tribunal for the Law of the Sea (ITLOS)) stated that the ICC has been established to

prosecute individuals for crimes more complicated than piracy, for instance, genocide, crimes against humanity, war crimes and the crime of aggression.⁵⁸

Tuerk, therefore, believes that the ICC would not be suitable for dealing with criminals like pirates seeing that national tribunals are unwilling or unable to prosecute them. In addition, he reminds that the amendment of the statutes of the ICC would undoubtedly require several years. In any case, I would not agree with these opinions of Tuerk, but I would agree that if there would be a special chamber for pirates at the ICC, this would require time as the judges might need to develop their expertise in maritime laws.

Another discussion is whether the ITLOS should prosecute pirates. ITLOS is a functional tribunal and the judges are already trained on maritime laws. Thus, no additional training would be needed, and no additional personnel costs incurred by any nation. In that case, ITLOS statute would need to be amended to encounter the crimes of piracy as well. Many scholars believe that, this process would be less complicated than that needed to amend the ICC statute. In my point of view, this would be the best solution to create an effective international tribunal on piracy crimes.

According to a review conducted by UNODC, 1,116 young Somali men faced criminal proceedings for piracy in 20 countries around the world, while 688 were dealt with in the region. "To make our efforts more effective, we need broader international support beyond this region. This is the most efficient way to sever the arteries that sustain piracy," said Mr. Fedotov, adding that the issue of piracy required a strong inter-agency approach that struck a careful balance between law enforcement and the judici-

⁵⁸ *Id.*

ary, on the one hand, and the rights of persons accused and convicted of piracy on the other.

5.2.3 Post-Trial Transfer System

We acknowledged that this model of prosecuting suspected pirates in the region could impose a significant political and practical burden on the cooperating States when convicted pirates would serve long sentences in their prisons.⁵⁹ In the 2011 report, the UN Special Advisor on Legal Issues related to Piracy off the Coast of Somalia, Jack Lang, emphasized the importance of finding solutions to imprison convicted pirates in Somalia, enabling them to serve their sentences close to their families.⁶⁰

Consequently, affected regional States, the UN Office on Drugs and Crime (UNODC), developed the Post Trial Transfer System, which allows moving pirates that were prosecuted in one territorial jurisdiction to another. Post-Trial Transfers were established between prosecuting countries lacking the capacity to incarcerate convicted pirates and Somalia, as well as other regional countries willing to incarcerate them.

The assistance provided is strengthening the criminal justice systems of those countries and helping them to become fair, efficient and consistent with human rights standards. In Kenya and Seychelles, UNODC has refurbished prisons and built courtrooms, while also ensuring that witnesses appear at court hearings. However, the existence of child pirates within the criminal justice system represents a complex issue. In Garowe, Puntland, construction of a prison academy has begun; a court, a farm and a

⁵⁹ (Letter from the Secretary-General to the President of the Security Council 2011)

⁶⁰ *Id.*

prison with capacity to accommodate 500 prisoners is to follow soon. A piracy prisoner transfer program supports the transfer of convicted pirates back to Somalia to serve their sentences, while ensuring that prison conditions meet international standards.

The legal gaps in the various anti-piracy regimes were, hence, not totally eliminated but governed through the collaboration of many public and private stakeholders. By establishing new approaches to prosecution, the Post Trial Transfer Mechanism, as well as the legal toolbox and the trust fund, they would help to create a practical framework that regulates the process from the apprehension of suspected pirates to their prosecution and incarceration. As a result, the number of prosecuted pirates has decreased. By focusing on capacity building and cooperation between the regional actors, this process is, moreover, a sustainable solution with strong local ownership of prosecution.

While it is essential to emphasize that the international community mostly concentrates on governing the situations randomly, and not necessarily the root causes of piracy. Furthermore, there is need to restore a central government in Somalia. An effective central government in charge of the country will help restore stability and political security in the country. If this domestic problem could be solved, it will play an important role in decreasing the number of piracy attacks in the Horn of Africa. The Asian countries can be considered a successful example of global governance and a role model, whose practical tools can be transferred to other world regions. The lessons learned from their collaborative, informal, experimental, and multi-stakeholder approach are also valuable for other policy areas.

Besides, Counter Piracy Implementation Task Force, through country assessment visits, capacity building coordination, and exchange of policy developments with other UN and partner entities involved in Border Management and Law Enforcement

are desired. Guidelines on maritime cyber risk management, aimed at enabling stakeholders to take the necessary steps to safeguard shipping from current and emerging threats and vulnerabilities related to digitization, integration and automation of processes and systems in shipping need improvement.

Further, under the mandate of the international encountering on Piracy off the Coast of Somalia, the fund aims to defray the financial capital required from countries like Kenya, Seychelles, and Somalia to prosecute pirates, as well as to increase awareness within Somali society of the risk associated with piracy and criminal activity. However, illegality, unseaworthiness and exemption clauses in a marine policy are identified as being legal issues that may prevent a ship owner from recovering the ransom payment. Some of these problems may be overcome if those clauses are carefully drafted to specifically cater for modern day piracy in a marine insurance policy. Several inconsistencies may also be resolved by transferring the piracy peril to war risks cover. The ship owner's duty is to respond to the changing circumstances, by ensuring that his vessel is sufficiently equipped, and the crew is properly trained to resist a hijacking.

Finally, there is the piracy money-laundering protection. Counter Piracy Finance, as a key driver for maritime piracy is financial, and it is essential that counter measures must incorporate an in-depth understanding of finances and economics relating to piracy, which can be used as effective weaponry to achieve long term goals in mitigating the problem. Financial Intelligence – Efforts to collect and develop finance intelligence must be enhanced, especially in relation to global financial flows involving pirate finances, both in terms of pre-attack financing and the laundering of ransom monies.

I suggest, therefore, that a financial law enforcement approach would be a valu-

able additional tool in countering piracy. To date, however, two obstacles have limited the wider acceptance of those tools. First, until very recently, no ‘norm entrepreneur’ has stepped forward to make financial investigative tactics a central tool in counter-piracy efforts. Secondly, while ‘following the money’ has much potential as a means of fighting piracy, we still know too little about the on-shore side of piracy to put those tools to use.

Considering the many issues international community included merchants, shipping companies, international organizations and victims from acts of piracy have encounter, more revision on piracy law need to be synthesized and presented to national and international parties. According to Somali law on piracy, Somalia not only has to worry about the development of infrastructure and the stability of the government but also their own country’s law regarding convicted pirate-transferring, anti-money laundering and especially prosecution and post-trial regulations. Consequently, there is a need for more consideration on the driving factor of the anti-piracy policies, push and pull the ability to chase and arrest the pirates together with the protection of the coastal state sovereignty. Further, how to bring more smoothly universal jurisdiction to cope with marine piracy is desired.

*More than ever before in human history, we share a common destiny. We can master it only if we face it together. And that, my friends, is why we have the United Nations.*⁶¹

Even though, there are many difficulties to face, the vessels and shipping business still must rely on this maritime route. One nation cannot fight or solve this

⁶¹ Kofi Annan

problem, thus, solid cooperation among nations would be ideal. Lastly, the hope to eradicate sea piracy is still alive and seems more attainable from Somalia and the African region if they are willing to put themselves in the position to obtain the international regulations on piracy also international community must legislate soft-law anti-piracy guideline to codification. This study has illustrated that while it is a difficult and complicated process, peace in the Gulf of Aden is well worth the struggle and sacrifice.

* * *

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